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

Canfield* v. *Countrywide Home Loans, Inc., 187 S.W.3d 258 (Tex.App.—Beaumont 2006, no pet.). Brian and Barbara Boyd bought a house and got a loan from Countrywide's predecessor. Brian died and Barbara defaulted on the mortgage.

Canfield ran a foreclosure listing service business and when he found the foreclosure posting for the Boyd's house, he entered into a transaction with Barbara whereby she conveyed the house to Canfield's relatives subject to the existing debt.

The Boyd's loan was an HUD loan that restricted sales to investors or other non-HUD approved owners. In order to keep the lender from knowing what was going on, Canfield had Barbara send some "form" letters that told the lender she was going to be out of town for a while and to send any notices and payment coupons to another address. She also requested that, on payoff of the loan, all of the existing escrow accounts be delivered to Canfield's designee.

After the loan payoff, Canfield asked Countrywide to send him the escrow balance. Countrywide declined to do so, and Canfield sued. Canfield argued that he was the "successor and assign" of the Boyds and was thus entitled to the escrow balances. Canfield's argument was that his legal entitlement to the escrow account funds derived from paragraph twelve in the deed of trust and from the notation in the warranty deed from Barbara Boyd that "all escrows pass to grantee." The pertinent language he pointed to was that the covenants and agreements of the deed of trust "shall bind and benefit the successors and assigns of Lender and Borrower."

The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract. A third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit. Therefore, the intentions of the contracting parties are controlling. A court will not create a third-party beneficiary contract by implication. The intention to contract or confer a direct benefit to a third party must be clearly and fully spelled out or enforcement by the third party must be denied. Consequently, a presumption exists that parties contracted for themselves unless it clearly appears that they intended a third party to benefit from the contract.

In this case, the court found nothing in the terms of any of the documents executed by the Boyds and North American intending to confer a direct benefit on Canfield. Furthermore, because Canfield explicitly and openly refused to formally assume the Boyds' financial obligation, Countrywide was under no duty to recognize any putative "successor" or "assign" of the Boyds that was not first determined to be a "creditworthy owner-occupant" in compliance with the provisions contained in the "notice to homeowner" document.

Lavigne* v. *Holder, 186 S.W.3d 625 (Tex.App.—Ft.Worth 2006, no pet.). Lavigne bought some property from Holder and the purchase price was paid, in part, by a note secured by a deed of trust. The deed of trust contained a provision that prohibited creating encumbrances against the property other than one that was subordinate to the deed of trust.

When Lavigne granted an easement, Holder accelerated the indebtedness and attempted to foreclose. Lavigne sued Holder to enjoin the foreclosure sale, seeking both a temporary and a permanent injunction. Both parties moved for summary judgment on the issue underlying Lavigne's request for injunctive relief, namely, whether the easement triggered the acceleration clause. The trial court granted Holder's motion, denied Lavigne's, and denied Lavigne's request for a temporary injunction.

In his first issue, Lavigne argues that the trial court erred by granting Holder's motion for summary judgment. Lavigne contends that an easement is an encumbrance subordinate to the deed of trust and thus falls within exclusion (a) of the acceleration clause. It is undisputed that Lavigne transferred the easement to a third party without Holder's prior written consent. Thus, the court addressed three questions to resolve this issue: (1) Is the easement an "interest" in the underlying property, (2) is the easement an "encumbrance," and (3) is the easement subordinate to the deed of trust? The answer to all three questions was "yes."

First, as the parties concede, an easement is an interest in land. Second, Texas courts have long held that the term "encumbrance" includes easements. Third, an easement is subordinate to a prior deed of trust. When the owner of real estate executes a valid deed of trust, and then conveys an interest in the mortgaged property to a third party, the rights of the mortgagor's vendee are subject to the rights held by the beneficiary of the deed of trust. The court held that the easement granted by Lavigne was an encumbrance subordinate to the deed of trust and therefore fell within exclusion (a) of the acceleration clause. Thus, as a matter of law, the easement did not trigger the acceleration clause and did not give Holder the right to accelerate the note and foreclose on the property, and the trial court erred by granting Holder's motion for summary judgment.

Next, the court went on to determine whether the trial court erred by failing to issue a temporary injunction as requested by Lavigne in his motion for summary judgment. An applicant for a temporary injunction must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) probable injury in the interim. When the only relief sought on final trial is injunctive, the applicant must show a probable right on final hearing to a permanent injunction. A probable injury is one that is imminent, irreparable, and has no adequate remedy at law. Disruption to a business can be irreparable harm. Moreover, every piece of real estate is unique, and foreclosure can be an irreparable injury for which there is no adequate remedy at law.

In this case, the summary judgment evidence satisfies each element of the temporary injunction test. First, Lavigne's original petition stated a claim for a permanent injunction. Second, the court already determined that the easement did not trigger the acceleration clause; thus, Lavigne showed a probable right on final hearing to a permanent injunction. Third, Lavigne established an imminent threat of irreparable injury. The threat is imminent because Holder has actually posted the property for foreclosure on at least two different dates. Lavigne filed an affidavit with the trial court averring that he earns his livelihood by operating an auto body shop on the property and has done so since 1983. Holder proffered no summary judgment evidence to controvert Lavigne's affidavit. Thus, foreclosure would cause irreparable injury to Lavigne for which there is no adequate remedy at law because it would disrupt his business and because the property, like all real estate, is unique.

US Bank National Association* v. *Safeguard Insurance Company, 422 F.Supp.2d 698 (N.D. Tex. 2006). Triad executed a promissory note payable to Bankers and a deed of trust, security agreement, and assignment of leases and rents, fixture filing, and financing statement in Bankers' favor. The deed of trust covered four properties in or near Dallas, Texas, and there was no separate value assigned to each individual property. A provision of the deed of trust required Triad to maintain property insurance on the mortgaged property. It also required that the insurance policy contain a mortgagee clause or loss payee endorsement for the benefit of Bankers (U.S. Bank's predecessor), the mortgagee. Safeguard provided insurance coverage for Triad's properties.

The policy relevant to this litigation was for the period November 1, 2002 to November 1, 2003 and insured the Triad properties as a single unit compromised of the four individual properties. The policy listed Triad as the named insured. Contrary to the deed of trust provision that required that insurance policies contain a mortgagee clause or loss payee endorsement, and despite the fact that Bankers itself had paid the premium for the 2002-03 policy, the policy neither identified Bankers as an additional insured nor contained a mortgagee clause.

Hailstorms damaged skylights and air conditioner coils at Atrium and damaged the roof and air conditioner units at one of the properties. Soon thereafter, Triad defaulted and U.S. Bank foreclosed on three of the four properties.. In the substitute deed of trust and bill of sale, the parties agreed that the lien and security interest of the deed of trust remained in full force and effect as to the fourth secured property, which was not part of the foreclosure proceedings. The original deed of trust provided that, in the event of a partial sale of the mortgaged property where the proceeds amounted to less than the aggregate secured indebtedness, the deed of trust and lien remained in full force and effect as to the unsold portions of the four Triad properties, as if no sale had been made.

Later the property manager for the damaged submitted a property loss notice to the insurance agent concerning the hailstorm. She separately mailed to Safeguard's counsel a copy of the substitute trustee's deed and bill of sale and notice of substitute trustee's sale. Her cover letter noted that she had enclosed documents pertaining to the ownership and foreclosure of Courtyard. Also the manager of one of the other foreclosed properties filed a property loss notice for damage sustained in the hailstorm. She faxed the notice to the insurance agent and included on the coversheet a note that advised that any claim checks representing proceeds for repairs due to hail damage should be made payable to Triad and U.S. Bank. Safeguard refused to pay insurance proceeds to U.S. Bank, contending that U.S. Bank was not a party to the insurance policy and was not an insured party under the policy. U.S. Bank responded by filing the instant lawsuit against Safeguard.

U.S. Bank contended that the Texas equitable lien doctrine compels Safeguard to treat U.S. Bank as if it were listed as an additional named insured and loss payee on the policy and that the policy provides coverage to U.S. Bank as if it were. Safeguard argued that the equitable lien doctrine is inapplicable because there was no deficiency remaining on the loan as to the two damaged properties.

The equitable lien doctrine provides that, where a mortgagor is charged with the duty of obtaining insurance on a property with loss payable to the mortgagee, but the policy does not contain such a provision, equity will treat the policy as having contained the loss payable provision and entitle the mortgagee to recover under the policy.

The equitable lien doctrine, however, does not treat the mortgagee and mortgagor as indistinctive entities. Rather, it operates to the extent necessary to preserve the mortgagee's interest. The purpose of the mortgagee clause in an insurance policy is to protect the lender who has lent money for the purchase of property. Accordingly, when a mortgagee reduces the indebtedness by purchasing property at a foreclosure sale, the amount of the mortgagee's interest is limited to the amount of the deficiency remaining on the note after the sale. Safeguard does not contest that Triad agreed to obtain insurance for Bankers' benefit or that Safeguard had notice of the agreement. Instead, Safeguard maintains that the equitable lien doctrine is inapplicable because there is no deficiency remaining on the loan as to the damaged properties.

U.S. Bank claimed that the foreclosure on the three Triad properties did not satisfy the mortgage obligation. It points to the state court judgment as evidence that Triad owes U.S. Bank approximately $22 million under the original deed of trust and promissory note. Safeguard countered that no deficiency remains concerning the three properties foreclosed on because U.S. Bank elected to attach its security interest and any remaining debt thereunder solely against the remaining unsold property. The substitute deed of trust provides that the lien and security interest of the original deed of trust remain in full force and effect as to remaining real and personal property. The deed of trust similarly provides that, upon partial sale, the deed of trust and lien remain in full force and effect as to the unsold portions of the properties, "just as though no sale had been made." Relying on these deed of trust provisions Safeguard maintained that, because Triad and U.S. Bank agreed that any deficiency that remained on the original mortgage loan was no longer secured by the three foreclosed-on properties, no deficiency exists as to these properties.

The facts of this case complicate somewhat the otherwise basic determination of the existence of a loan deficiency. Nevertheless, the narrow question the court must decide is whether Triad still owes money on the loan, that is, whether a deficiency remains. The court concluded that the summary judgment evidence established "beyond peradventure" that there was a deficiency on the loan.

Brown* v. *Zimmerman, 160 S.W.3d 695; 2005 (Tex.App.—Dallas 2005, no pet.). Brown and Zimmerman were married. Zimmerman was also the founder and president of Interfederal Capital. Prior to their marriage, Brown borrowed a loan of $88,000 from Flagstar Bank, secured by a lien on a house in Dallas. She also borrowed the down $55,000 down payment for the house from Interfederal, securing it with a second lien on the house.

A year after they were married, Brown decided she wanted a divorce and moved to Minnesota. In an effort to reconcile with her, Zimmerman agreed to have Interfederal buy the Flagstar Note and to have both the first lien and second lien refinanced in a way that did not require Brown to make payments for some time. They signed an agreement (essentially a modification of their pre-nuptial agreement) which stipulated that the loan would be repaid from the proceeds of life insurance policies on Brown and Zimmerman.

The reconciliation didn't last, though, and Brown sued for divorce. The divorce decree awarded Brown the house, voided the pre-nuptial agreement and all amendments to it (including the one dealing with the refinanced loan), and forgave the $55,000 indebtedness incurred for the down payment of the house. The decree did not address the $88,000 portion of the debt originally incurred to Flagstar Bank.

After the decree, Brown tried to sell the house but discovered that Interfederal had filed a lien on it. She filed an action to quiet title. Interfederal claimed subrogation to the original Flagstar Lien. Brown argued that Interfederal's subrogation claim was barred by limitations.

The doctrine of equitable subrogation allows a person, not acting voluntarily, who pays the debt owed by another to seek repayment of that debt by the person who in equity and good conscience should have paid it. There is no specific statute of limitations for subrogation actions. Instead, these actions generally are subject to the same statute which would apply had the action been brought by the subrogee.

Brown argued that Interfederal's claim was governed by the two-year statute of limitations for actions for the detention of personal property because the claim was that she retained the benefit of Interfederal's purchase of the Flagstar note. She also argued that the claim is barred because Interfederal failed to file its counterclaim within two years of purchasing the note from Flagstar Bank.

The court disagreed. Interfederal was the equitable owner of the Flagstar note for $88,000, the beneficiary of the deed of trust securing the note, and, as such, it had all rights as the holder and owner of the Flagstar note, and as the beneficiary of the deed of trust. Because Interfederal's action was based on the claim the prior note and lien holder would have had, Interfederal's equitable subrogation claim is an action on a debt, not a claim for detention of personal property.

The Civil Practice and Remedies Code § 16.004(a)(3) establishes a four-year limitations period for actions on a debt and has been construed to apply to debts whether or not in writing. To the extent it is a suit for the recovery of real property under a real property lien, it is governed by the four-year statute of limitations in Civil Practice and Remedies Code § 16.035(a).

Langston* v. *GMAC Mortgage Corporation, 183 S.W.3d 479 (Tex.App.—Eastland 2005, no pet.). Daniel and Wendy Langston obtained a home equity loan from Citizens. In the divorce action that this case is part of the home, subject to the mortgage, was awarded to Wendy. During the pendency of the divorce, Wendy refinanced the Citizens loan with a new home equity loan from GMAC. The decision to award the home to Wendy was appealed and the court of appeals remanded. GMAC intervened in the remand, claiming that it was subrogated to the Citizens loan and seeking a declaratory judgment that its lien was enforceable, even though Daniel had not executed the loan documents.

Under the doctrine of equitable subrogation, a third party who pays a debt at the request of the debtor may under certain circumstances be subrogated to the creditor's security interest for the debt which has been discharged. The purpose of the doctrine is to prevent the unjust enrichment of the debtor who owed the debt that is paid. The doctrine of equitable subrogation "is not applied for the mere stranger or volunteer who has paid the debt of another, without any assignment or agreement for subrogation, without being under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property of his own."

Daniel's sole appellate issue is directed toward the "volunteer" exception to the equitable subrogation doctrine. He argues that a fact issue exists with regard to whether GMAC voluntarily paid the debt owed to Citizens. Daniel contends that GMAC was not obligated to provide funds for extinguishing the debt owed to Citizens "as far as [he] is concerned."

The trial court's previous judgment awarded the tract at issue to Wendy. Accordingly, she was entitled to exercise ownership rights with respect to the property during the pendency of the appeal. During this period, Wendy extinguished the debt she and Daniel owed to Citizens with the proceeds of the loan she obtained from GMAC. GMAC did not voluntarily pay the debt owed to Citizens; it did so at the request of one of Citizens' debtors. Furthermore, GMAC made the advance with the express agreement that it would have a first lien on the property. While Daniel did not participate in obtaining the loan from GMAC, he benefited from the loan because it extinguished the prior lien on the property.

National Enterprise, Inc.* v. *E.N.E. Properties, 167 S.W.3d 39 (Tex.App.—Waco 2005, no pet.). ENE signed and delivered to the Resolution Trust Corporation a real estate lien note and a deed of trust encumbering several parcels of real estate in McLennan County. Subsequently, the RTC assigned its interest in the note and deed of trust to National Enterprise. Because ENE defaulted on the note, National Enterprise foreclosed on the properties securing the note, but the amount realized was insufficient to satisfy the outstanding obligation. Four and a half years later, National Enterprise filed suit against ENE to collect the deficiency. ENE filed a motion for summary judgment claiming that the suit was barred by the statute of limitations.

National Enterprise argued that under federal law, the RTC is subject to the FIRREA six-year statute of limitations in regards to any action brought by the RTC. Therefore as an assignee of the RTC, National Enterprise argued that it is entitled to assert the six-year limitations period. ENE agreed that assignees of the RTC may assert a six-year limitations period, but only if the cause of action accrues before the assignment, when the RTC was still the holder of the note.

It is well settled that an assignee of the FDIC may assert the six-year statute of limitations as a successor of the FDIC. However, the Texas Supreme Court has held that whether an assignee of the FDIC can invoke the six-year limitations period depends upon when the underlying cause of action accrues. ***Holy Cross Church of God in Christ* v. *Wolf***, 44 S.W.3d 562, 44 Tex. Sup. Ct. J. 604 (Tex. 2001). In deciding ***Wolf***, the Court relied upon two federal circuit cases denying successors of the FDIC the right to claim the six-year statute of limitations when default on the note occurred after the FDIC assigned it. Because the RTC has "the same powers and rights to carry out is duties as the FDIC has, the question is when did National Enterprise's cause of action accrue?

National Enterprise argued that the note was in default while it was still in the possession of the RTC. ENE argues that the note was in default after assignment because in National Enterprise's pleadings it listed the transaction between itself and the RTC, and then stated that ENE "subsequently defaulted on the note." However, according to the court, the issue is not when the note was in default, but when the cause of action for the deficiency accrued.

National Enterprise's cause of action is a claim of deficiency after a foreclosure sale. Section 51.003 of the Texas Property Codes states:

> "(a) If the price at which real property is sold at a foreclosure sale under Section 51.002 is less than the unpaid balance of the indebtedness secured by the real property, resulting in a deficiency, any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by this section."

National Enterprise's cause of action for a deficiency after the foreclosure accrued at the time of the foreclosure sale, indisputably occurring while National Enterprise was in possession of the note. Therefore, National Enterprise is not entitled to assert the six-year statute of limitations, and the two-year limitations period applies.

PART II
HOME EQUITY LOANS

Marketic* v. *U.S. Bank National Assoc., 436 F.Supp.2d 842 (N.D. Tex. 2006). Marketic borrowed a home equity loan secured by 10 acres of land. After Marketic defaulted, the Bank began foreclosure proceedings. Marketic brought this action to enjoin the foreclosure. Marketic complained that the Bank did not comply with several of the requirements for a valid homestead lien and also alleged that, as a matter of state constitutional law, the Bank cannot foreclose upon her property because it is designated for agricultural use under the relevant property tax statutes.

In 1997, the Texas Constitution was amended to permitt home equity lending against homestead property. In order for a home equity lien to be valid, the home equity loan must comply with the numerous requirements set forth in subsections (A)- (Q) of section 50(a)(6). Marketic challenged the validity of U.S. Bank's lien on her home under two of those provisions--subsections (E) and (I) of § 50(a)(6).

Section 50(a)(6)(E) prohibits foreclosure on property to pay a debt that arises from a line of credit that required the owner to pay fees to necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed three percent of the original principal amount of the extension of credit. Marketic claimed that the home equity loan that she received violated this 3% cap on fees and, therefore, cannot be subject to forced sale.

U.S. Bank showed that the HUD-1 Settlement Statement, which Plaintiff signed, states that she paid only $5,391.90 in total fees. Notably absent from U.S. Bank's calculation is a loan discount fee of $3,900 that Marketic paid in connection with obtaining the loan. When added to the amounts previously mentioned, the aggregate amount paid exceeds the 3% constitutional limit.

The Court disagreed with Marketic. The

3% percent cap on fees was not exceeded because the $3,900 that Marketic paid for discount points qualifies as "interest" under § 50(a)(6)(E). In Texas, "discount points" that are charged to originate a home-equity loan are not "fees" related to the origination of the loan for purposes of § 50(a)(6)(E), as long as the points are charged at the beginning of the loan term and were paid in consideration for a lower interest rate on the outstanding debt.

Next US Bank argued against that Marketic's claim that her property cannot be foreclosed upon because it was (and is) designated for agricultural use under the relevant property tax laws. Subsection (I) of § 50(a)(6) protects property "designated for agricultural use as provided by statutes governing property tax" from foreclosure to satisfy outstanding debt on a home equity loan.

The court dealt with conflicting interpretations of § 50(a)(6)(I). On the one hand, Marketic claimed that the home equity lien was invalid because her home equity lender knew that her property was designated for agricultural use but insisted that she change the designation in order to obtain the loan, which she claims she did. She also alleged that the US Bank was now unable to foreclose on the loan because she subsequently re-designated her land for agricultural use. In this regard, Marketic is asserting that the relevant agricultural "designation" under § 50(a)(6)(I) is either the designation before the loan is extended--if known by the lender before extending the loan--or the designation at the time of foreclosure. By contrast, US Bank argued that the only relevant designation under the amendment is the designation in effect at closing, when the lien was created.

The text of § 50(a)(6)(I) is ambiguous because there is no temporal context for the verb phrases "not secured by" and "property designated for agricultural use." Therefore, both parties have reasonably construed § 50(a)(6)(I). The only difference between their interpretations is that they presuppose different times at which the property's designation will affect the validity of the lien.

The only court to have interpreted § 50(a)(6)(I) has interpreted the phrase "property designated for agricultural use as provided by the statutes governing property tax" as referring to land assessed under both subchapter C of the Tax Code, entitled "Land Designated for Agricultural Use," and subchapter D of the Tax Code entitled "Appraisal of Agricultural Land." Under both of those statutory schemes, a property's designation may vary from year-to-year. The legislature must have known this when drafting § 50(a)(6)(I), and, therefore, the must have contemplated that this situation might arise in the future. Had the legislature intended for the property tax designation to be relevant only at the time that "debt" underlying the foreclosure action was incurred, it would have written such a condition into the constitutional text.

Box v. First State Bank, 340 B.R. 782 (S.D. Tex. 2005). Box was a customer of the bank for over 15 years. The bank made several loans to Box's business. In 2003, Box liquidated his business to pay off creditors. After this liquidation was complete, the bank was owed an unsecured debt of approximately $107,000. Due in part to the unavailability of assets to satisfy the probable deficiency, and dissatisfied with the possibility of having to write-off or write-down the loan, the bank approached Box about obtaining a home equity loan to secure the debt. While Box initially was hesitant to borrow against his homestead, he eventually agreed to take out a home equity loan.

Box testified that he was not forced to take out the home-equity loan. Rather, he did so to maintain a good relationship with the Bank, hoping to obtain future loans. Although Box testified that he felt "pressure," citing the small town in which he lived and the fact that he did not come up with the home-equity loan idea, the record amply supports the bankruptcy court's finding that the Boxes voluntarily agreed to the home-equity loan, giving the Bank a lien against their homestead to collateralize the prior unsecured debt. This finding did not rest on statements to that effect in the credit application and loan documents the Boxes signed, but rather on the testimony Box gave about why he agreed to take out the home-equity loan on the terms offered.

The credit application the Boxes signed contained a statement that the purpose of the loan was for "debt," referring to the unsecured debt he owed to the Bank. The parties agree that in this application, the Boxes agreed that the home-equity loan proceeds would go directly to the Bank, to be applied against the preexisting debt they owed to the same lender. The closing statement shows that the Boxes did not receive any of the proceeds. Rather, the Bank applied the proceeds to the Boxes' preexisting unsecured debt. The Boxes voluntarily agreed to this term. Mr. and Mrs. Box executed a series of documents for the home equity loan. These documents contain recitals and affirmations which state that they were not required to use the proceeds of the loan to repay another debt to the same lender.

When the Boxes filed bankruptcy, the bank moved to lift the automatic stay to permit it to foreclose on the homestead loan. The Boxes claimed the lien was invalid. The bankruptcy court found that the Bank "required" the Boxes to use the proceeds to pay the prior debt, making the loan invalid. The bankruptcy court based this legal conclusion on the finding that the Bank would not have made the home-equity loan to the Boxes unless they agreed to apply the proceeds to the preexisting debt owed to the Bank. The court concluded that the Bank therefore "required" the Boxes to apply the loan proceeds to the prior debt as a condition of extending the loan, in violation of Article XVI, § 50(a)(6)(Q)(i) of the Texas Constitution.

In this appeal, the Bank agreed that both it and the Boxes "understood that the purpose of the loan ... was to pay the Bank on its existing debt." The Bank agreed that it would not have made the loan unless it received the proceeds. The Bank argued it did not require the Boxes to use the proceeds to repay the prior debt because the Boxes voluntarily agreed to this term. The issue was whether section 50(a)(6)(Q)(i) allows a borrower voluntarily to agree to use home-equity loan proceeds to repay a prior unsecured debt to the same lender if the loan would not have been made unless the borrower agreed to this restricted use.

The bankruptcy court concluded that if the lender would not have made the home-equity loan unless the borrower agreed to use the proceeds to repay an unsecured debt owed to the same lender, the lien is invalid because the lender is "requiring" the borrower to use the proceeds for repayment. The bankruptcy court found that despite the borrower's voluntary agreement to the loan on these terms, the lien was invalid because the unrestricted use of the proceeds was a condition for making the loan in the first place. The Bank urges that this interpretation is inconsistent with the constitutional language and its interpretation by regulatory agencies authorized to do so.

The Texas Supreme Court has repeatedly instructed that, in interpreting the Texas Constitution, courts must "rely heavily on its literal text and must give effect to its plain language" to assure that constitutional provisions are given "the effect their makers and adopters intended." ***Doody* v. *Ameriquest Mortgage Co.***, 49 S.W.3d 342, 344 (Tex.2001. The bankruptcy court properly noted that section 50(a)(6)(a) and section 50(a)(6)(Q)(i) had to be read together. The first section states that a home-equity loan must be a "voluntary lien." The debtor must voluntarily agree to use the homestead to secure the loan. The bankruptcy court reasoned that the "not required" in section 50(a)(6)(Q)(i) had to mean something other than the voluntary agreement referred to in section (a), or the two sections would be redundant. The bankruptcy court concluded that section (a) referred to the debtor's agreement and section (Q)(i) referred to the lender's requirement. As a result, even if the debtor voluntarily agrees to use the loan proceeds to pay a preexisting debt to the lender, the lien is invalid if the lender would not otherwise have made the loan.

Section (a) does focus on the debtor, but it focuses on whether the debtor voluntarily agrees to use his homestead as the security for the loan. Section (Q)(i) does focus on the lender, but it refers to the loan terms that can validly be made when the homestead provides the security. Reading the section (Q)(i) language--that a home equity lender cannot require a debtor to use the proceeds to repay a preexisting debt--to allow a debtor voluntarily to agree to use the proceeds to pay a preexisting debt does not make section (a) redundant. Taken together, they require that the debtor must voluntarily agree to use his homestead as collateral; and to use the proceeds to repay the prior loan. This interpretation gives both sections meaning, but does not answer the question whether the borrower's voluntary decision to using his homestead as collateral and voluntary agreement to using the proceeds to repay a prior debt owed to the same lender means that the Bank did not "require" the borrower to use the proceeds in this restricted fashion when the Bank only made the loan because the borrower agreed to the restriction.

The interpretations given to section (Q)(i) by the regulatory agencies are instructive. The Texas legislature revised Chapter 11 of the Texas Finance Code to allow the Texas Finance Commission to interpret the home-equity loan constitutional provisions. Although these interpretations did not become effective until January 8, 2004, too late to apply to the Boxes' loan, which closed on November 16, 2003, they are nonetheless instructive. The Texas and federal courts recognize that the Regulatory Commentary on Equity Lending Procedures, an interpretive document drafted by several Texas agencies, has persuasive value in interpreting provisions setting out the substantive rights and obligations of home-equity lenders and borrowers. The Finance Commission has issued the following interpretation of section 50(a)(6)(Q)(i):

"§ 153.18. Limitation on Application of Proceeds: Section 50(a)(6)(Q)(i). An equity loan must be made on the condition that the owner of the homestead is not required to apply the proceeds of the extension of credit to repay another debt except debt secured by the homestead or debt to another lender.

"(1) An owner may use the proceeds of an equity loan for any purpose. An owner is not precluded from voluntarily paying off a debt that is owed to the same lender.

"(2) The lender may not require an owner to repay a debt owed to the lender, unless it is a debt secured by the homestead. The lender may require debt secured by the homestead or debt to another lender or creditor be paid out of the proceeds of an equity loan. The lender may not otherwise specify or restrict the use of the proceeds.

"(3) When an owner applies for a debt consolidation loan, it is the owner, not the lender, that is requiring that proceeds be applied to another debt. If the proceeds of a home equity loan are used in conformity with owner's credit application, the limitations of this section do not apply." 7 Texas Administrative Code § 153.18(1)--(3) (2004).

The provision repeats section 50(a)(6)(Q)(i): a home-equity loan must be made "on the condition" that the debtor is "not required" to apply the proceeds to repay a preexisting debt owed to the same lender. In this case, the loan documents included recitations to that effect. As the bankruptcy judge pointed out, such recitals, by themselves, are inadequate to make the lien valid if other evidence in the record shows that the lender did require the borrower to use the home-equity loan proceeds to repay a prior unsecured debt owed to the same lender. In this case, the lender concedes that despite the statements in the loan documents that the loan was not conditioned on requiring the debtor to apply the proceeds to the preexisting debt, this term was a condition of making the loan. The Bank concedes that "[t]here would have been no loan had the proceeds not been paid to the Bank."

The interpretation continues to explain the circumstances under which a borrower may use the home-equity loan proceeds to repay a debt owed to the same lender without invalidating the lien. Paragraph (1) recognizes that an owner may use loan proceeds for any purpose and is "not precluded from voluntarily paying off a debt that is owed to the same lender." This paragraph does not state that it is permissible for the lender to condition the loan on the borrower's agreement to use the proceeds to repay unsecured debt owed to the same lender. Paragraph (2) makes this distinction clear: "The lender may not require an owner to repay a debt owed to the lender, unless it is a debt secured by the homestead. The lender may require debt secured by the homestead or debt to another lender or creditor be paid out of the proceeds of an equity loan. The lender may not otherwise specify or restrict the use of the proceeds." The undisputed evidence in this case showed that the lender restricted the borrower's use of the home-equity loan proceeds--to repay the existing unsecured debt owed to the same lender--when it agreed to make the loan only if the borrower specified this use.

The Bank argues that because the borrower voluntarily agreed to use the loan proceeds to pay off the preexisting debt, and so specified in the loan application, the lien is consistent with, and permitted by, Paragraph (3). However, paragraph (3), by its terms, applies only "when an owner applies for a debt consolidation loan." A "debt consolidation loan" is the replacement of multiple loans with a single loan, often with a lower monthly payment and a longer repayment period. Because such a loan combines existing debt and arranges for its repayment, it necessarily requires using the new loan proceeds to repay existing debt. The lender does not require this use of the loan proceeds as a condition for its willingness to make a particular loan; rather, it is an inherent feature of any debt-consolidation loan. The exception recognized in Paragraph (3) is that if the loan is a debt consolidation loan, and in the credit application the borrower specifies that the proceeds are to repay the existing debt, this limit does not apply and the borrower's voluntary agreement to the requirement results in a valid lien. The Boxes' loan does not fall into the exception. The Bank did not contend that it was a debt consolidation loan. And the Bank admitted that it would not have made the loan unless the Boxes had agreed to use the proceeds to repay the Bank's prior unsecured loan. The fact that the borrower--the Boxes--voluntarily agreed to accept the loan on these terms does not erase the fact that the Bank required their agreement as a condition of making the loan.

The court concluded by once again noting the shortcomings in the draftsmanship of the home equity loan provisions of the constitution: "Courts have previously noted problems with the drafting of article XVI, section 50 of the Texas Constitution. In ***Stringer***, the Texas Supreme Court ruled that the Home Equity Amendment to the Texas State Constitution permits lenders to require that borrowers pay third-party creditors with the proceeds of a home-equity loan, even if those debts are not secured by the borrower's homestead. . . . The case arose because the substantive provisions of the amendment permit a lender to require that a borrower pay loan proceeds to another debt secured by the homestead or to a debt to a third-party lender. The notice that the amendment requires lenders to provide to borrowers, however, states that a lender may not require a borrower to pay the proceeds of a home-equity loan to a debt that is not secured by the homestead. In short, there was a conflict between the substantive provisions of the amendment and the notice to borrowers that the amendment required.

"The Texas Supreme Court has repeatedly instructed that, in interpreting the Texas Constitution, courts must "rely heavily on its literal text and must give effect to its plain language." . . . The result reached in this case is based on the literal text and plain language of the constitutional provision at issue. The Bank's policy arguments are best addressed by revising the text and language, which cannot be done by federal bankruptcy or district courts.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

First National Acceptance Company* v. *Bishop, 187 S.W.3d 710 (Tex.App.—Corpus Christi-Edinburgh 2006, no pet.). Bishop held a note and deed of trust. She read a newspaper ad run by ANI that offered to buy promissory notes and contacted ANI. ANI's principal lender was FNAC, a Michigan corporation involved in lending money to businesses to facilitate the purchase of secured promissory notes, which FNAC itself would then repurchase and service. FNAC would also use ANI to conduct in-house closings of ANI's purchase of secured promissory notes with FNAC-funds. ANI would typically contact FNAC regarding potential promissory notes available for purchase. If FNAC approved the purchase of the note, it would release the funds to ANI with instructions regarding how to disburse the funds. ANI would then purchase the note from the individual holder and transfer its interest in the note to FNAC. FNAC would begin to service the note and collect payments directly from the individual debtors, although ANI would be notified if the note went into default. ANI was obligated to follow FNAC's instructions regarding the purchase of notes exactly. Neither ANI nor FNAC would disclose their relationship to individual note holders seeking to sell their notes to ANI.

When Bishop responded to ANI's newspaper advertisement, ANI allegedly sent FNAC information about the note and the property, including a broker worksheet and appraisal. After receiving approval, ANI sent FNAC the original note, the deed of trust, and note endorsement. FNAC responded with a "funding memo," by which ANI was instructed to conduct the closing for the Bishop property and then, once all FNAC's requirements were met, to disburse the sale funds to Bishop.

ANI failed to disburse any funds to Bishop. Bishop attempted to cancel her agreement and demanded the return of her documents. ANI failed to return the note, deed of trust, and note endorsement to Bishop, having already transferred these to FNAC. ANI then ceased doing business. FNAC also failed to disburse any funds to Bishop and refused to return the note, deed of trust, and note endorsement.

Shortly thereafter, FNAC notified the makers of the note that FNAC had purchased their note and deed of trust and was therefore entitled to collect in full upon the Note, even if Bishop was not paid by ANI for her assignment based on the assignment executed by Bishop. Bishop and the makers of the note sued for a declaratory judgment declaring that (1) Bishop is the lawful owner of the note secured by the deed of trust, (2) neither ANI nor FNAC have an interest in the note due to a failure of consideration, and (3) the transfer of the lien from Bishop is null and void.

FNAC argues that because ANI and FNAC enjoyed independent contractual relationships, the court could not impute that an agency relationship existed between them sufficient to defeat FNAC's holder-in-due-course status for the Bishop note. The trial court held as a conclusion of law that ANI was the agent of FNAC for the closing of the Bishop Sales Agreement, and therefore all knowledge of ANI regarding the closing of the Bishop Sales Agreement, as agent for FNAC is imputed to FNAC including notice of the failure of ANI to pay the consideration to Bishop.

The question of whether a principal-agent relationship exists under established facts is a question of law for the court. An agent is one who consents to the control of another, the principal, where the principal manifests consent that the agent shall act for the principal. A principal-agent relationship is not presumed, and the party asserting the relationship has the burden of proving it. The party claiming agency must prove the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task. The principal's extent of control over the details of accomplishing the assigned task primarily distinguishes the status of agent from that of independent contractor. The right of control is "the supreme test" in establishing an agency relationship.

An agent need not disclose his or her principal's identity in order to act on behalf of that principal. An agent may make a contract for an undisclosed principal in his own name, and the latter may sue or be sued on the contract.

The court agreed with Bishop that the trial court was presented with sufficient evidence to conclude that ANI acted as an agent for its principal, FNAC, for the closing of the

Bishop sale. Bishop met her burden of proof to establish that ANI, over an extended period of time, repeatedly closed sale agreements funded by FNAC, as an "inside" closing under strict written instructions from FNAC. For these "inside" closings, ANI prepared the transaction documents and conducted the closing as the sole representative of FNAC. This "inside" closing of sales agreements by ANI for FNAC was outside of and apart from the specific and limited requirements and duties imposed by the ANI-FNAC loan agreement. FNAC accepted the benefit of the ANI-conducted "inside" closings, repeatedly referred to ANI as its "broker," and took possession of the note before funding the transaction. This demonstrates that FNAC had both the right to assign ANI's task and the right to control the means and details by which ANI accomplished the task of acquiring and purchasing promissory notes.

The protections bestowed on those who qualify for holder-in-due-course status are intended to safeguard innocent holders who acquire a note without prior knowledge of any problems or defenses. Thus, because FNAC knew that Bishop, once she was not paid, had cancelled the sale of her note and demanded its return from ANI, and because ANI was acting as an agent of FNAC in this sale, FNAC cannot be considered a holder in due course and thus exempt from Bishop's claims.

Shankles* v. *Shankles, 195 S.W.3d 884 (Tex.App.—Dallas 2006, no pet.). On May 14, 1986, appellees executed a "Real Estate Lien Note" listing their father, Douglas L. Shankles, as payee, secured by a deed of trust executed the same day. The note provided it was payable on demand. In July 2004, appellants, as executors of Shankles' estate, made demand upon appellees to pay the note. Appellants argue the trial court erred in concluding as a matter of law that the 1986 note and deed of trust were barred by the statute of limitations.

A four-year statute of limitations applies to a suit on a promissory note. The statute of limitations begins to run on a demand note on the date of making. The only item listed on the 1986 note under "Terms of Payment" is "ON DEMAND." The court concluded that the note at issue was therefore an "on demand" note, and the four-year statute of limitations applies. Thus, appellants' demand upon appellees to pay the note nearly eighteen years after origination was barred by limitations.

EMC Mortgage Corporation* v. *Davis, 167 S.W.3d 406 (Tex.App.—Austin 2005, pet. denied). The Davises bought a foreclosed home in Austin from ICA Mortgage Corporation. The Davises applied for and obtained a loan from Imperial Savings for $390,500. The loan was transferred from Imperial Savings to several subsequent holders, and eventually the loan was transferred to EMC. Under the terms of the note, the Davises agreed to pay $390,500 at an interest rate of 10% per year and agreed to make monthly payments of $3,426.92 starting on July 1, 1989. Also, under the terms of the note, the Davises could pay the loan back early without any penalty. The note further states that if the Davises still owed money on June 1, 2019, referred to as the "maturity date," then they would have to pay any outstanding amount owed on that date. At the top of the note, in capital letters centered in the document, is the following language: "THE TERMS OF THIS NOTE CONTAIN PROVISIONS FOR A BALLOON PAYMENT AT MATURITY."

In addition to the note, the Davises signed the following items at the same time the note was executed: (1) a deed of trust; (2) a balloon payment disclosure, stating that the Davises had received notice of the balloon payment obligation; and (3) a regulation Z disclosure, a federally required truth-in-lending disclosure.

Both the balloon payment disclosure and the regulation Z disclosure state that the loan requires 179 payments of $3,426.92 and a final payment of $140,296.42, which would be due in June 2004. In addition, the regulation Z disclosure states that the total amount that will have been paid after all payments were made would be $753,715.10. When the sum of 179 payments of $3426.92 is added to the final payment of $140,296.42, the total is $753,715.10.

During the years of the agreement, the Davises had received mortgage statements indicating that they owed a principal amount on the loan that was well over $300,000. Over the years, the note was transferred several times to different lenders. However, prior to EMC acquiring the note, none of the lenders sought to alter the terms of the agreement as understood by the Davises or took the position that the agreement was not subject to a balloon payment of $140,296.42 due in June 2004. Wanting confirmation of the interest rate and the balloon payment provision of the agreement, the Davises wrote to EMC's predecessor, Bank of America Mortgage. In response to the Davises' request, Bank of America Mortgage sent a letter to the Davises confirming that the interest rate for the loan was 10% and that there was a balloon payment obligation of $140,296.42 that would be due on June 1, 2004. When EMC became the holder of the note, EMC refused to allow the Davises to pay off the note by making monthly payments until June 2004 and then paying $140,296.42 as a balloon payment. Rather, EMC took the position that in June 2004 the Davises would still owe $318,899.09.

In July 2002, Mr. Davis contacted EMC asking for a final, early payoff amount because the Davises wanted to refinance their home with another lender. EMC informed Mr. Davis that the final payoff amount would be $337,828.85. The Davises paid the balance due based upon the amount specified by EMC and refinanced their loan.

The Davises then sued EMC claiming that EMC had breached the contract, that EMC's conduct constituted statutory fraud, and that refusing to release the lien for the amount listed in the disclosure was an anticipatory repudiation of the loan by EMC. Further, the Davises sought a declaratory judgment stating that the contract required a balloon payment of $140,296.42 that was due in June 2004.

Both parties moved for summary judgment; the Davises claimed that the note was ambiguous, but EMC argued that the note was not ambiguous. The district court denied EMC's motion for summary judgment and granted the Davises' motion in part, finding that the contract was ambiguous. The case proceeded to trial on the Davises' allegation that EMC had repudiated the loan agreement. At trial, both parties introduced expert testimony. The Davises' expert's essentially repeated the arithmetic set out on the disclosure statements, although on cross examination he admitted that, application of the payments actually made based on a thirty-year amortization of the note would leave a balance due after 15 years of approximately what EMC had demanded. EMC's expert testified that the original balance of the loan would not be reduced a whole lot after fifteen years since, in a thirty-year amortization scenario, most of the payments for many years are applied to interest and very little reduces principal.

The jury found for the Davises and awarded them almost $190,000 in damages plus another $90,000 in attorneys' fees.

On appeal, EMC argued that the note was not ambiguous. EMC asserted that, because the note can be given a definite legal meaning and is not reasonably susceptible to more than one meaning, the note is unambiguous as a matter of law. Further, EMC contended that the material terms that generally appear in a loan contract--the amount to be loaned, the maturity date of the loan, the interest rate of the loan, and the repayment terms of the loan are all present within the four corners of the note, and, therefore, the payment obligation is clear. The court disagreed. EMC's contention that the contract is unambiguous would require a conclusion that there is only one reasonable interpretation of the agreement between EMC and the Davises--EMC's interpretation. However, the note itself is open to more than one reasonable interpretation. The note specifies that the maturity date for the loan was thirty years from the time the loan was issued. Further, the note specifies that the Davises agreed to make monthly payments of $3,426.92 every month until the loan is paid off. However, in capital letters at the top of the note, the note also states that the terms of the agreement include provisions for a balloon payment. An agreement that has a balloon payment requirement generally calls for regular, equal payments consisting of minor amounts of principal and interest and a large final payment at the end of the loan that fully satisfies the monetary obligations under the loan. Because the note states that there is a balloon payment obligation but does not specify the terms and the payment terms in the note do not include a balloon payment, the note is ambiguous about whether a balloon payment is required. An agreement cannot both require a balloon-payment requirement and require equal monthly payments of principal and interest.

Because the note is ambiguous, extrinsic evidence may be considered to determine the intention of the par-ties. Both the original counterproposal to the earnest money contract and the residential loan applications filled out by the Davises describe the loan as containing a thirty-year amortization period and a fifteen-year term. The counterproposal further specifies that all principal and accrued interest are due at the end of the fifteen year term. Further, the instructions used by the closing agent state that a balloon-payment disclosure must be given to the Davises in order for the loan to be closed. Both the balloon-payment disclosure and the federally required regulation-Z disclosure specify that monthly payments of $3,426.92 were to be paid by the Davises for fifteen years and a final or balloon payment of $140,296.92 must be paid by the Davises in June 2004. These documents both support the Davises' interpretation of the loan agreement that a balloon payment was required and specify precisely what the Davises' repayment obligations were. Further, the Davises' interpretation of the repayment terms was confirmed by EMC's predecessor in interest.

Nelson* v. *Regions Mortgage, Inc., 170 S.W.3d 858 (Tex.App.—Dallas, no pet.) Nelson's son William was experiencing marital and financial difficulties. When William and his wife Karen defaulted on their mortgage, Regions retained Barrett Burke to enforce the deed of trust securing payment of the note. Through Barrett Burke, Regions accelerated the maturity of the note and posted the property for foreclosure. Nelson sought to purchase the note from Regions to avoid the foreclosure and, because Karen had filed for divorce, to deprive her of any community property interest in the house. William hand-delivered Nelson's payment to Barrett Burke in order to effectuate the purchase of the note from Regions. Over time, Nelson received an assignment of the mortgage and copies of the note and deed of trust. However, the original note and deed of trust were never delivered to Nelson.

William and Karen reconciled. They continued to live in the home, but they made no payments to Nelson after he purchased the note. Nelson never attempted to enforce the note against the couple. According to Nelson, his reason for foreclosing "disappeared" when Karen moved back into the house.

More than four years after the maturity of the note was originally accelerated, Nelson filed suit against Regions and Barrett Burke seeking to rescind the agreement to purchase the note. Specifically, Nelson sought to recover the purchase price of the note, plus interest, and to return ownership of the note to Regions. In addition, he sought damages for misrepresentation, fraudulent concealment, violations of the Texas Deceptive Trade Practice/Consumer Protection Act, and breach of contract. Finally, Nelson sought a declaratory judgment that Regions and Barrett Burke were obligated to deliver the original note and deed of trust or to refund his payments plus interest and attorney's fees.

Regions and Burke attacked what they called the "premise" of Nelson's claims for relief: because Nelson did not receive the original note and deed of trust, he did not receive the benefit of his bargain. Their summary judgment motion attempted to establish that Nelson's damages, if any, were not caused by the failure to deliver the original documents. Instead, they were caused by Nelson's own failure to take any action to enforce the note against his son and daughter-in-law. In support of their joint motion, Regions and Burke offered deposition testimony of both Nelson and William establishing that Nelson did not ever attempt to enforce the note.

After reviewing Nelson's summary judgment evidence, the court concluded that Nelson failed to present more than a scintilla of evidence to raise a genuine issue of material fact with respect to damages he incurred because he did not receive the note and deed of trust. Nelson offered no evidence that he made a demand on William to pay what he owed and that William refused. On the contrary, Nelson's evidence establishes that he initially thought he would have to carry the note or foreclose because William had no ability to refinance the transaction. Nelson offered no evidence that he attempted to foreclose. Instead, the evidence suggests Nelson chose to carry the note rather than attempt to enforce it. His evidence does not raise a genuine issue of material fact concerning any injury he suffered that was caused by a failure to deliver the original instruments.

Nelson also sought rescission of the sale of the note based on failure of consideration, i.e., the failure to deliver the original documents. Rescission is an equitable remedy that is available in some circumstances to a claimant that has been injured by such violations as breach of contract or fraud. Again, the court found no evidence in support of Nelson's claim. Furthermore, the court was not persuaded to extend an equitable remedy in this case. Nelson clearly accepted one benefit of his bargain: his purchase of the accelerated note saved William's home from foreclosure and relieved William of four years of obligation on the note. Then Nelson delayed in asserting his claim for rescission until Regions' claim against William on the note had been extinguished by limitations. Equitable relief is not appropriate in this case.

PART IV
GUARANTIES

First Commerce Bank* v. *J.V.3, Inc., 165 S.W.3d 366 (Tex.App.—Corpus Christi 2004, pet. granted). In 1983, the Bank made a loan to JV3. The loan was secured by a deed of trust and guarantied by various individuals. In 1988, after accelerating the note, JV3 executed a renewal note which, according to the Bank's president "refunded" the original loan. Several months after the 1988 renewal note was signed, the Palmers executed guaranties of the renewal note. They had not agreed to be guarantors of the renewal note before it was signed, although they had guaranties the original note. They were no longer partners in the ownership of the land securing the debt and were not informed at the time the 1988 renewal was executed.

When the Bank sued JV3 and the Palmers, the Palmers argued that their guaranties were not supported by consideration and were unenforceable.

A promise to become a surety or guarantor on the debt of another is sufficient consideration for the debt, if the promise is made at, or before, the time the debt is created. However, if the promise is made after the indebtedness of the debtor to the creditor has been created, the agreement must normally be supported by new consideration. If the note was not made at the request of the guarantor, any consideration for the note arose at the time of the giving thereof.

The Bank argued that the Palmers bore the burden of proving that there was no consideration for the guaranties, or that the consideration had failed. According to the Bank, the Palmers attempted to sustain that burden with evidence that the guaranties were signed after the promissory note and evidence that the collateral for the note had been impaired. The Bank contended that this evidence was legally and factually insufficient to support the court's ruling that there was a lack of consideration for the guaranties signed by the Palmers. In short, the Bank claimed the evidence that the note was signed on March 30, 1988, and the guaranties were signed in August, 1988, was legally and factually insufficient to prove the guaranty contracts were signed after the promissory note.
Viewing the evidence in a light most favorable to the Palmers, and considering reasonable inferences, the guaranty agreements were signed on August 9 and 10, 1988, which was more than four months subsequent to the date the promissory note was signed on March 30, 1988. Prior to the signing of the promissory note, there

was no agreement contemplating that the Palmers would sign the August 1988 guaranty agreements. The Palmers were not contacted prior to signing the note, and the trial court could have inferred they had no knowledge of the note prior to it being signed. The note was well secured without the Palmers' guaranty agreements. At that time, the Palmers were not partners of the farm partnership and were not customers of the Bank or in debt to the Bank. The Bank's only reason for having the Palmers sign the 1983 guaranty agreements was because they were partners of the farm partnership at that time. Based on the record evidence, the trial court could have inferred from the deterioration of the relationship of the parties and the financial condition of the farm, that none of the parties involved, except the Bank, contemplated that the Palmers would sign the guaranty agreements. The trial court may further have concluded that since JV3 was already liable to the Bank on the March 30, 1988 note, with the consideration having been exchanged between those parties over four months before the Palmers signed the guarantor agreement, the transaction was complete. No new benefit, therefore, could later flow to JV3 or the Palmers under the terms of the indemnity agreements sued upon. These guarantor agreements were not part of the inducement to the creation of the 1988 renewal note. The Palmers were not asked to sign the August 1988 guaranty agreements until well after the renewal note was signed.

Mid-South Telecommunications Company* v. *Best, 184 S.W.3d 386 (Tex.App.—Austin 2006, no pet.). On January 27, 1999, VidiMedix executed a "Convertible Promissory Note" in favor of Mid-South for $ 250,000. The Note was payable on or before December 31, 1999. Paragraph 3 of the Note provided that VidiMedix "will be deemed in default under this Note if [it] fails to meet its payment obligations hereunder." On the same date, in consideration for the loan and Note, four guarantors, including Faris and Best, executed a guaranty under which they jointly and severally guarantied "the prompt and complete payment of all amounts" owed by VidiMedix on the Note to the extent of their respective ownership shares in the company. Paragraph 6 of the guaranty provided: "One or more of the following shall constitute an Event of Default under the Guaranty[:] if Guarantor purports to revoke or otherwise avoid any obligation under this Guaranty; or if a Guarantor dies, becomes insolvent, commences or has commenced against him an action under the United States Bankruptcy Code, becomes subject to any criminal prosecution, suffers a judgment or judgments for the payment of money individually or in the aggregate in excess of $ 100,000, or suffers any portion of his assets to be attached, seized or levied upon; or any circumstances arising causing [Mid-South] in good faith, to become insecure as to the satisfaction of any of Guarantors' obligations under this Guaranty."

VidiMedix defaulted on the Note at maturity. There was a lot of correspondence with the guarantors after initial demands were made for payment pursuant to their guaranties, but they did not make payment. On May 17, 2004, Mid-South sued Faris and Best. Faris and Best answered with a general denial and the affirmative defense that the four-year statute of limitations barred Mid-South's claims. According to Faris and Best, Mid-South's cause of action accrued on December 31, 1999, the date VidiMedix defaulted on the Note. Mid-South argued, however, that Paragraph 6 of the guaranty established the accrual date which, according to Mid-South's calculations, was the date Faris and Best first sent a letter that caused it to feel insecure.

There is no dispute that this case is governed by the four-year statute of limitations for suits on debts or that this required Mid-South to bring its breach-of-contract action no later than four years after the day its cause of action accrued.

Under the guaranty, Best and Faris "unconditionally and irrevocably" guaranteed "the prompt and complete payment" of VidiMedix's obligations under the Note "in strict accordance with its terms." This type of language tends to denote an absolute guaranty, or one made contingent solely upon the default of the principal obligor. Under an absolute guaranty, a guarantor is primarily liable on the underlying obligation; thus, "the terms of the note must be examined to ascertain the guarantor's obligations under his unconditional guarantee, for by that guaranty he agrees to pay the instrument according to its terms if it is not paid when due." Each guarantor also explicitly waived "all presentments, demands for performance, notices of performance, protest, notices of protest, notices of dishonor, and notices of acceptance of the Guaranty and its existence, creation, or incurring of new or additional indebtedness" and any right to require Mid-South to proceed against VidiMedix, to exhaust any security interest held by VidiMedix, or to seek any other remedy.

Construing paragraph 6 in the context of the guaranty as a whole, the court found that it operates to identify acts and omissions that constitute a failure to perform under the guaranty, but it does not limit the central promise that Best and Faris made concerning "the prompt and complete payment of all amounts that Borrower owes [Mid-South] under the Note, in strict accordance of its terms." In other words, Best and Faris made themselves bound, when guaranteeing the loan, to the payment obligations of the Note. Paragraph 6, then, adds events that could constitute an event of default on the part of a guarantor that do not arise from the terms of the Note itself. In the end, the guarantors had a payment obligation immediately upon VidiMedix's default and, from that point forward, were in breach of that obligation as long as they failed to perform. Thus, the cause of action accrued upon VidiMedix's default and had run by the time this suit was filed.

International Interests, L.P.* v. *Hardy, 448 F.3d 303 (5th Cir. 2006). Hardy, an Oklahoma resident, was the guarantor of a loan made by Key Bank, an Ohio bank, to his company. The loan was secured by a deed of trust covering property in Houston. All of the loan documents, including the guaranty, were executed in Texas. The guaranty contained a choice of Ohio law while the deed of trust was governed by Texas law.

After foreclosure of the deed of trust, there was a deficiency and International Interests, who had acquired the Key Bank loan, sued Hardy. In that lawsuit, Hardy sought to have the deficiency offset pursuant to Texas Property Code § 51.003, alleging that the bid amount was less than the fair market value of the property.

International Interests pointed to the Ohio choice of law provision and claimed that the Texas Property Code offset provision was inapplicable. Hardy responded that because the foreclosure was governed by Texas law under the deed of trust, Texas law also governed the resulting deficiency action. The district court held in favor of International Interests.

Noting some major issues relating to both Texas choice of law rules and Texas foreclosure and deficiency actions, the Fifth Circuit declined to decide the case at this time and certified two questions to the Texas Supreme Court:

1. In an action to recover the deficiency owing on a note guaranteed by the defendant where the guaranty agreement between the original parties is governed by Ohio law and the deed of trust to the property that secured the note is governed by Texas law and the property itself is in Texas, does the law of the guaranty or the law of the deed of trust govern the calculation of any deficiency?

2. If the law of the guaranty governs the calculation of the deficiency, should an Ohio choice of law clause in that guaranty be given effect under section 187 of the Restatement (Second) of Conflict of Laws where (1) no party is from Ohio, the property that secured the note is in Texas, the note, deed of trust, and guaranty were all executed and delivered in Texas, and Texas's foreclosure law, not Ohio's, was used to foreclose the underlying property and (2) applying Ohio law would prevent application of section 51.003 of the Texas Property Code, which provides for a deficiency offset?

PART V
USURY

Anglo-Dutch Petroleum International, Inc.* v. *Haskell, 193 S.W.3d 87 (Tex.App.—Houston [1st Dist.] 2006, pet. denied). Anglo-Dutch sued Halliburton for a $650 million for appropriation of trade secrets and other alleged derelictions. Due to the expense associated with prosecuting the Halliburton lawsuit, and in order to operate its business, to retain its employees, and to avoid bankruptcy until it could recover a judgment, Anglo-Dutch needed to raise money. Anglo-Dutch initially, but unsuccessfully, sought to borrow money from commercial banks, using the Halliburton lawsuit as collateral. Anglo-Dutch then contacted multiple parties and solicited investments in the Halliburton lawsuit. Haskell and others agreed to invest monies, at least in part, to fund the Halliburton lawsuit. Pursuant to the terms of multiple Claims Investment Agreements, investors invested a total of approximately $560,000. These agreements defined the terms of the parties' relationships and set forth the formulas for calculating any returns the investors would be entitled to receive in the event that Anglo-Dutch obtained a cash recovery in the Halliburton lawsuit.

After the Halliburton lawsuit was tried to a jury, the trial court entered a judgment in the amount of approximately $81 million, including approximately $10 million in attorneys' fees, against the Halliburton defendants. Anglo-Dutch and Halliburton subsequently entered into a settlement agreement. Following Anglo-Dutch's and Halliburton's settlement, Anglo-Dutch sent each investor a letter in which it disputed the validity of the litigation funding agreements and asserted that the agreements were contrary to Texas public policy and unenforceable under Texas law. Consequently, Anglo-Dutch requested that the investors accept a reduced payment contrary to the terms of the agreements.

The investors refused Anglo-Dutch's offer of reduced payments and filed suit against Anglo-Dutch, asserting claims for breach of contract, fraud, breach of fiduciary duty, conspiracy, and conversion. One of Anglo-Dutch's defenses was usury.

Anglo-Dutch urged the court to look beyond the language of the agreements to determine the parties' intent. Anglo-Dutch asserted that the summary judgment evidence showed that the alleged contingency was not a real contingency and, therefore, the parties intended their agreements to be loans, which Anglo-Dutch had an absolute obligation to repay. Anglo-Dutch further asserted that parol evidence was admissible to establish that the parties intended their transactions to be loans and that such extrinsic evidence, contradicting the terms of an agreement, may be considered in determining if an agreement is usurious. Anglo-Dutch noted that, despite the terms of the agreements, the investors understood the agreements to be loans, that Anglo-Dutch believed it had an absolute obligation to repay the principal on the loans, and that the investors understood that their agreements were not speculative and involved no risk. Alternatively, Anglo-Dutch argued that even if there was a "real contingency" in the agreements, the agreements were still usurious because, once Anglo-Dutch settled with Halliburton, it had an absolute obligation to repay the investors.

The investors contended that, based on the "specific and unambiguous terms" of the agreements, repayment of their investments was based on an absolute contingency, the transactions were not loans, and usury laws do not apply. They also noted that the agreements did not describe the investments as loans, did not use the word interest, did not state an interest rate, and did not provide a specific repayment date for a sum certain.

The essential elements of a usurious transaction are (1) a loan of money, (2) an absolute obligation to repay the principal, and (3) the exaction of a greater compensation than allowed by law for the use of the money by the borrower. A factor that courts consider when determining usury is whether repayment was based on a contingency. This factor is important because it helps a court in determining whether a transaction was a loan or a business investment. If a transaction is missing any of the above identified three elements, it cannot be usurious. Thus, if the agreements did not constitute a loan, if the agreements did not create an absolute obligation to repay, or if the agreements did not charge "usurious interest," Anglo-Dutch's usury defense fails as a matter of law.

Under the plain terms of the agreements, the investors' right to recover their principal and any return on their investment was contingent upon Anglo-Dutch's cash recovery, if any, in the Halliburton lawsuit. Per the unambiguous terms of the agreements, Anglo-Dutch did not have an absolute obligation to repay the principal amounts that the investors invested. In its arguments, Anglo-Dutch confuses the terms "contingency" and "risk." The investors' belief that they were exposed to little or no risk does not negate the contingency in the agreements. Here, it is indisputable that, if Anglo-Dutch recovered nothing or an insufficient amount of damages, then according to the plain terms of the agreements, Anglo-Dutch had no obligation to reimburse the investors for the principal amounts invested, much less pay them any return on their investments. Thus, as a matter of law, the agreements cannot be usurious.

As Anglo-Dutch emphasizes, however, the court must examine the form of the transaction and its substance in determining the existence or non-existence of usury. Thus, the court recognized that whether an amount of money being charged constitutes interest depends not on what the parties call it, but on the substance of the transaction. However, the "extrinsic evidence" offered by Anglo-Dutch was not sufficient to create a fact issue concerning Anglo-Dutch's absolute obligation to repay the investors. Anglo-Dutch's "extrinsic evidence" consisted almost entirely of the affidavit of one investor, in which he testifies that both he and Anglo-Dutch considered the agreements to be loans. But, even as Anglo-Dutch recognizes, any particular "label placed upon the transaction by the parties should not control the determination of whether that transaction is a loan."

PART VI
LENDER LIABILITY

1001 McKinney Ltd.* v. *Credit Suisse First Boston Mortgage Capital, 192 S.W.3d 20 (Tex.App.—Houston [14th Dist.] 2006, pet. denied). McKinney borrowed a loan from Credit Suisse to renovate a building in Dallas. After borrowing $39 million and beginning the renovation, McKinney discovered that it needed an extra $7.5 million to build extra office and retail space on the lower floors of the building. McKinney's principals met with Credit Suisse in Las Vegas to discuss the additional funds and were told that the bank would have no problem in making the additional loan. According to McKinney, it was assured by the bank that an additional loan of $6.75 would be made. Instead, around the time that McKinney was expecting the loan, Credit Suisse told it that the additional loan would not be made.

McKinney sued, alleging causes of action for statutory and common law fraud, civil conspiracy, negligent misrepresentation, breach of oral contract, and promissory estoppel. Credit Suisse moved for summary judgment, arguing that McKinney's causes of action were barred by the statute of frauds contained in sections 26.01 and 26.02 of the Texas Business and Commerce Code. Section 26.02(b) states: "A loan agreement in which the amount involved in the loan agreement exceeds $50,000 in value is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative." Loan agreement is defined as: one or more promises, promissory notes, agreements, undertakings, security agreements, deeds of trust or other documents, or commitments, or any combination of those actions or documents, pursuant to which a financial institution loans or delays repayment of or agrees to loan or delay repayment of money, goods, or another thing of value or to otherwise extend credit or make a financial accommodation. Because the alleged oral promise to lend $6.75 million constitutes a loan agreement that exceeds $50,000, the trial court found the agreement unenforceable.

McKinney contended that Credit Suisse was estopped from claiming the statute of frauds as a defense to their breach of contract claim because its officers promised to prepare and sign written agreements to document the new loan. For promissory estoppel to create an exception to the statute of frauds, there must have been a promise to sign a written agreement that had been prepared and that would satisfy the requirements of the statute of frauds. It is the promise to sign a written agreement or enter into a written agreement that is determinative. A mere promise to prepare a written contract is not sufficient. Here, the testimony was that Credit Suisse promised to make the additional loan under the same terms as the original loan and promised to prepare and sign written agreements to document the new loan. No documents were prepared. Further, the parties never agreed on the wording of the loan document. McKinney presented no evidence that a written agreement had been prepared or that the parties had agreed on the wording of the agreement. Therefore, McKinney failed to raise the essential elements of its claim of estoppel.

PART VII
DEEDS AND CONVEYANCE DOCUMENTS

Glover* v. *Union Pacific Railway Company, 187 S.W.3d 201 (Tex.App.—Texarkana 2006, pet. denied). Before he became governor of Texas in 1907, T.M. Campbell owned a particular parcel of Gregg County real property which straddled a railroad right-of-way and included the minerals beneath that right-of-way. In 1904, Mr. Campbell executed a deed conveying to G.B. Turner the 165 acres of that land lying south of the south boundary line of the railroad right-of-way, which 165-acre tract is herein called the "Nettleton Tract." Though the deed to Turner did not describe Campbell's six acres lying within the railroad right-of-way and south of the track centerline--the six acres herein called the "Campbell Tract"--central to this case is whether that deed to Turner conveyed not only the Nettleton Tract, but also the Campbell Tract's minerals.

In 1940, the Texas Supreme Court ruled that the minerals in Campbell's railroad right-of-way, but north of the track centerline, passed to the grantee of Campbell's acreage lying north of the right-of-way. The Glovers succeeded to a fractional interest in the Nettleton Tract and Union Pacific succeeded to a fractional interest in the Campbell Tract.

The Glovers claim ownership in the right-of-way through the conveyance of a 165-acre tract of land immediately south of the right-of-way. Union Pacific contends that T.M. Campbell retained the Campbell Tract when he deeded the land to Turner. The court disagreed. Under the strips and gores doctrine, because T.M. Campbell did not expressly reserve the Campbell Tract mineral interests, they passed to Turner with the Nettleton Tract. In ***Rio Bravo Oil Co.* v. *Weed***, 121 Tex. 427, 50 S.W.2d 1080 (1932), the Texas Supreme Court held there was a presumption that a deed conveys land to the center of the right-of-way even when the deed describes the abutting land as extending only to the edge of the right-of-way. The court was bound by Texas Supreme Court precedent to hold that the Campbell to Turner deed conveyed the property interests Campbell held to the center of the right-of-way.

Union Pacific argued that the strips and gores doctrine does not apply because the property is of significant value. The strips and gores doctrine requires the strip (1) to be small in comparison to the land conveyed, (2) to be adjacent to or surrounded by the land conveyed, (3) to belong to the grantor at the time of conveyance, and (4) to be of insignificant or little practical value. While the tract may be valuable now--and certainly the mineral production proceeds from the Campbell Tract over at least seventy years is quite valuable--the land underneath a railroad right-of-way was of little perceived value in 1904 before oil was discovered in the area. In comparison to the adjacent tract explicitly conveyed to Turner, the Campbell Tract was small and had little practical value at the time conveyed. Under the strips and gores doctrine, T.M. Campbell did not retain any interest in the Campbell Tract.

Centerpoint Energy Houston Electric, L.L.P.* v. *The Old TJC Company, 177 S.W.3d 425 (Tex.App.—Houston [1st Dist.]). The Old TJC executed a Special Warranty Deed ("Original Deed") in which it "GRANTED, SOLD, and CONVEYED" 60.724 acres of land to Fort Bend County. The deed contained a restriction limiting the property's use to a public park. The restriction contained a reverter. Later, The Old TJC and Fort Bend County executed a correction deed which referred to the original deed but did not reference the use restriction contained in the Original Deed. HL&P sued Fort Bend County and the Old TJC in an attempt to seek "declaration of the property interests" owned by the County and the Old TJC resulting from the original deed and the correction deed. HL&P acquired the County's interest in the property. The trial court held that The Old TJC owned a reversionary interest in the property and that the reverter was triggered when HL&P acquired the County's interest in the property.

On appeal, the primary issue was whether the correction deed, which did not contain the restriction or the reverter, included them or not. To construe the rights of the Old TJC and Fort Bend County under the correction deed, the court first read it together with the original deed to which it specifically references.

It is well established under Texas law that a party cannot convey to another a greater interest in a property than it possesses. Pursuant to the plain language of the original deed, the Old TJC granted all of its "rights, title, and interest" in the subject property to Fort Bend County and only retained a reversionary interest in the property. The Old TJC's subsequent grant of all of its "rights, title, and interest" to the property in the correction deed could only pertain to its reversionary interest, nothing more. Accordingly, held the court, following the execution of the correction deed, the Old TJC retained no interest in the subject property.

In its Cross-Motion for Summary Judgment, the Old TJC attempted to introduce extrinsic evidence that would prove otherwise and argued that "any latent ambiguity in the 1990 Correction Deed allows for the introduction of extrinsic evidence of the grantor's intent to retain a reverter interest in the property." The Old TJC asserted that there was a latent ambiguity in the deeds because the correction deed "incorrectly states that the 1986 Special Warranty Deed conveyed 'all of Grantor's rights, title, and interest in and to' the Property, while, on the face of the 1986 Deed, it stated that the grantor retained a reverter interest."

However, the court's review of a latent-ambiguity argument does not hinge on whether the deed "incorrectly states" a conveyance. Rather, the court must determine whether the deed, as it appears, can be carried out without further clarification.

Here, the correction deed can be performed as written and does not require further clarification. When both deeds are read together, the correction deed's recital language cannot be logically interpreted as implying that the Original Deed did not contain a use restriction. Accordingly, the court held that there is no latent ambiguity in the correction deed and, because the Old TJC did not plead fraud, accident, or mistake, the trial court should not have considered extrinsic evidence in its contrary determination below. Based on the unambiguous language of the deeds, following the execution of the correction deed, the Old TJC retained no interest in the subject property.

The Old TJC asserted that the recitals in the correction deed clearly indicate that its sole intent was to do nothing other than that which its title suggests--to correct the property description--and not to convey a greater interest in the property. However, the court noted that the correction deed does more than merely correct the metes and bounds description of the property. Following this statement is essentially a rewording of the entire deed. There is not simply a correct statement of the metes and bounds description of the property. In fact, immediately after the revised metes and bounds description of the property, the correction deed included a new habendum clause, which was substantially different from the habendum clause in the original deed, primarily in that it did not contain the restriction and the reverter

Freeman* v. *Stephens Production Company, 171 S.W.3d 651 (Tex.App.-Corpus Christi 2005, pet. denied). The court held that this description of the property conveyed and reserved in a deed was ambiguous: "All of Lot 1, Block 15; Lot 2, Block 15; The West 17.51 acres of Lot 3, Block 15; All of Lot 10, Block 15; All of Lot 9, Block 15; All of Lot 11, Block 15; All of Lot 12, Block 15; out of the Closner Subdivision of Porciones 71 and 72, also known as the San Juan Tract, Hidalgo County, Texas; EXCEPT such minerals as Grantor does not own; AND ALL of Lot No. 288 of the Kelly-Pharr Subdivision of Porciones 69 and 70, Hidalgo County, Texas; EXCEPT that there is reserved in Grantor an undivided one-half participating interest in and to all of the oil, gas or other minerals in or under said tract of land . ."

No single reasonable meaning clearly emerges from the language of the instrument. The court was equally uncertain and doubtful of the opposite interpretations advanced by the parties. The reservation speaks of its subject as a "tract." Use of this singular noun indicates that the reservation applies only to Lot 288 and not to the other lots. Nevertheless, the first clause of the grant also speaks of a "lot, tract or piece or parcel of land," even though the deed conveys eight different lots. Thus, the reservation's use of the singular noun "tract" to describe its subject is consistent with the deed's use of the singular noun "tract" to describe multiple lots and, in fact, the entire conveyance. This indicates that the reservation applies to all lots. Still, the deed refers to the Closner Lots collectively as the "San Juan Tract" and then proceeds to list Lot 288 separately, indicating that the Closner Lots and Lot 288 are treated as two different tracts. The reservation would then apply only to the second tract, Lot 288.

Further complicating matters is the reservation's location in a clause rather than a separate sentence. It thus appears to modify only the noun immediately preceding it, Lot 288. Given the foregoing considerations, the court could only speculate as to the effect of reservation.

PART VIII
LEASES

Gym-N-I Playgrounds, Inc* v. *Snider, 158 S.W.3d 78 (Tex.App.—Austin 2005, pet. granted). The Landlord and Tenant entered into a lease that contained an as-is provision that read as follows: Tenant [Gym-N-I] accepts the Premises "as is." Landlord [Snider] has not made and does not make any representations as to the commercial suitability, physical condition, layout, footage, expenses, operation or any other matter affecting or relating to the premises and this agreement, except as herein specifically set forth or referred to and Tenant hereby expressly acknowledges that no such representations have been made. Landlord makes no other warranties, express or implied, of merchantability, marketability, fitness or suitability for a [document not legible]. Any implied warranties are expressly disclaimed and excluded." The lease term was extended, but finally the term expired, although the Tenant continued to occupy the premises and to pay rent.

Other than the unexercised renewal option, the sole written instrument in the record contemplating a continuation of the original lease was a holdover clause.

A fire completely destroyed the building and its contents. Gym-N-I sued Snider, claiming that Snider's failure to install a sprinkler system as required by the City constituted gross negligence and negligence per se and that leasing the premises in such a condition violated the DTPA and breached the implied warranty of suitability.

Snider filed motion for summary judgment asserting that all of Gym-N-I's claims were barred by the "as is" clause and by a valid waiver-of-subrogation clause. Snider further argued that the lease contained other valid waivers of express and implied warranties that barred certain claims and that Gym-N-I had admitted that no misrepresentations had been made by Snider.

In its first issue, Gym-N-I asserts that the "as is" clause in the original lease did not survive during the month-to-month tenancy under which it was leasing the property at the time of the fire. Gym-N-I asserts that the holdover provision failed to incorporate the "as is" clause and that only a formal, written, lease extension or renewal could carry that pro-vision beyond the term of the original lease. The court disagreed. The lease's holdover provision states that "any holding over . . . shall constitute a lease from month-to-month, under the terms and conditions of this lease to the extent applicable to a tenancy from month-to-month . . . ." The court gave this provision its plain, ordinary, and generally accepted meaning and held that the "as is" clause from the original lease was incorporated into the holdover lease and was applicable at the time of the fire. To do otherwise would be to give the phrase "under the terms and conditions of this lease" no meaning or effect.

In its second issue, Gym-N-I argues that the "as is" clause is unenforceable as against some or all of its claims. By agreeing to purchase commercial property "as is," a buyer agrees to make its own appraisal of the bargain and accepts the risks of the agreement. In ***Prudential Insurance Co. of America* v. *Jefferson Associates***, 896 S.W.2d 156 (Tex.1995), the Supreme Court approved the enforcement of "as is" clauses under certain circumstances. As long as the buyer is not induced by fraud into accepting the "as is" provision, the legal effect of the provision is to negate the causation element essential to recovery on claims associated with the physical condition of the property. As the Supreme Court explained, contractual disavowal of reliance upon any representation is an important element of an arm's-length transaction and is binding unless set aside. Finally, an "as is" agreement negates the causation element essential to recovery on DTPA theories, fraud (excluding, of course, fraud in the inducement of the "as is" agreement), negligence, and breach of the duty of good faith and fair dealing.

Gym-N-I does not allege that it was fraudulently induced to enter into the lease. In fact, Finn and Caddell both testified that they were not fraudulently induced. Instead, Gym-N-I first argues that ***Prudential*** applies only to the sale of property, not a lease, and should thus be distinguished on that basis. However, although most Texas case law concerns "as is" clauses in the con-text of commercial property sales, "as is" clauses can also apply to leases of commercial property. The court could see no meaningful distinction between sales contracts and leases for purposes of determining the enforceability of "as is" clauses.

Next, Gym-N-I attempts to distinguish its claim for breach of the implied warranty of suitability on the basis that, as a matter of law, only an express agreement that the tenant will repair certain defects can waive that warranty. See ***Davidow* v. *Inwood North Professional Group-Phase I***, 747 S.W.2d 373, 377, 31 Tex. Sup. Ct. J. 247 (Tex. 1988). The Supreme Court first adopted the implied warranty of suitability in ***Davidow***. The implied warranty of suitability is an extension to commercial leases of the implied warranty of habitability, which only applies to residential property. The Supreme Court held that, unless the warranty is waived, a landlord in a commercial lease impliedly warrants that facilities vital to the use of the premises for their intended commercial purpose are free from latent defects and will remain in suitable condition.

Assuming that Gym-N-I's breach-of-warranty claim contains a causation element, under ***Prudential***, the "as is" clause would foreclose that claim. In addition, under ***Davidow***, the "as is" clause negates the implied warranty of suitability itself. ***Davidow*** predates ***Prudential***, and the court saw nothing in either case that would limit the effect of the "as is" clause in the manner Gym-N-I suggests. While the Supreme Court in ***Davidow*** approved one means of waiving the implied warranty of suitability--if "the parties to a lease expressly agree that the tenant will repair certain defects, then the provisions of the lease will control"--it did not state that this is the only method by which the implied warranty of suitability can be waived. Rather, the Supreme Court explicitly stated that determination of whether there has been an actionable breach of the implied warranty of suitability depends on the particular circumstances of the case. One of the factors to be considered in that analysis is "whether the tenant waived the defects." Among other factors a court may consider are: (1) the nature of the defect; (2) its effect on the tenant's use of the premises; (3) the length of time the defect persisted; (4) the age of the structure; (5) the amount of the rent; (6) the area in which the premises are located; and (7) whether the defect resulted from any unusual or abnormal use by the tenant. In short, ***Davidow*** indicates that there is more than one way to override or waive the implied warranty of suitability.

McGraw* v. *Brown Realty Company, 195 S.W.3d 271 (Tex.App.—Dallas 2006, no pet.). McGraw leased a building from Brown. Article 7 of the lease addresses the condition, maintenance, repairs, and alterations of the premises. Pursuant to Article 7.01 Brown represented that on the Commencement Date and for a period of thirty (30) days thereafter the building fixtures and equipment, plumbing and plumbing fixtures, electrical and lighting system, any fire protection sprinkler system, ventilating equipment, heating system, air conditioning equipment, roof, skylights, doors, walk-in cooler and refrigerator, and the interior of the premises in general were in good operating condition. It also gave McGraw a period of thirty (30) days following the Commencement Date in which to inspect the premises and to notify Brown of any defects and maintenance, repairs or replacements required to the above named equipment, fixtures, systems and interior. Within a reasonable period of time after the timely receipt of any such written notice from McGraw, Brown was required to correct the defects and perform the maintenance, repairs and replacements. In Article 7.03A(2) of the lease McGraw waived the benefit of any present or future law that might give him the right to repair the remises at Brown's expense or to terminate the lease because of the condition.

Pursuant to the terms of the lease, McGraw sent Brown a letter advising him of equipment in need of repair or replacement. McGraw also sent Brown a second letter complaining that the roof of the building leaked. The record does not show whether Brown ever responded to these letters. McGraw made timely rent payments from March through October of 2004. However, McGraw's November 2004 rent payment was returned for insufficient funds. Further, McGraw abandoned the premises in early December 2004.

Brown sued McGraw for breach of contract seeking to collect the outstanding and unpaid rent, assess late charges at a rate of five percent for the past due amounts, and accelerate the remaining base rent. The trial court entered summary judgment in favor of Brown Realty on its breach of contract claim.

On appeal, McGraw argued that Brown breached the implied warranty of suitability and the lease fails due to a failure of consideration. Brown responded that McGraw was raising the issue of implied warranty of suitability for the first time on appeal so the claim is not preserved for appeal and McGraw's affirmative defense of failure of consideration was misguided.

Any matter constituting an affirmative defense or avoidance must be "set forth affirmatively." Breach of the implied warranty of suitability may be pleaded as a cause of action, counter-claim, or as an affirmative defense.

McGraw specifically pleaded the affirmative defense of failure of consideration. The affirmative defense portion of McGraw's original answer also stated that the lease agreement required certain actions by both parties and that Brown failed in part to deliver and fulfill its obligations to McGraw upon execution of the lease and also stated that the lease allowed McGraw thirty (30) days to inspect the premises and notify Brown in writing of any defects and maintenance, repairs, etc and within a reasonable period, Brown Realty was to correct the defects and perform the repairs and maintenance at its expenses. Although McGraw did not specifically assert breach of the implied warranty of suitability as an affirmative defense, it was evident to the court that part of the basis of his defense to the suit was Brown's failure to repair latent defects in the leased premises. Brown did not file special exceptions asking for a clearer statement of McGraw's affirmative defenses. In the absence of any special exceptions, the court liberally construed McGraw's pleadings to include the affirmative defense of breach of the implied warranty of suitability.

A tenant's obligation to pay rent and a landlord's implied warranty of suitability are mutually dependent. Breach of the implied warranty of suitability is a complete defense to nonpayment of rent. The implied warranty of suitability covers latent defects in the nature of a physical or structural defect which the landlord has the duty to repair. The evidence must indicate that: (1) latent defects existed in the leased premises at the inception of the lease and (2) such defects were vital to the use of the premises for their intended commercial purpose. Because the implied warranty of suitability may be contractually waived, a court may consider whether the tenant waived the defects.

A complete failure of consideration constitutes a defense to an action on a written agreement. Generally, a failure of consideration occurs when, because of some supervening cause after an agreement is reached, the promised performance fails.

McGraw asserted he had a complete defense to his nonpayment of rent under either the breach of the implied warranty of suitability or the failure of consideration defenses because Brown failed to repair or replace certain items. As evidence, he produced the two letters he had sent to Brown.

The court held that lease explicitly states that McGraw waived his right to terminate the lease because of the condition of the premises. Consequently, McGraw contractually waived his remedy or defenses to the nonpayment of rent. Accordingly, McGraw failed to raise an issue of material fact precluding summary judgment on Brown's breach of contract claim or establish his affirmative defenses as a matter of law.

Marshall* v. *Housing Authority of the City of San Antonio, 198 S.W.3d 782, 49 Tex. Sup. Ct. J. 399 (Tex. 2006). Marshall leased an apartment from a non-profit public facility corporation managed by the Housing Authority of the City of San Antonio for a term beginning on February 1, 2002, and ending on January 31, 2003. Her rent was subsidized by a federal housing assistance program. Following a shooting at her apartment, the Housing Authority gave Marshall notice that it was terminating her right to occupy the apartment, then filed a forcible detainer action seeking possession of the apartment. The trial court entered judgment awarding the Housing Authority possession of the apartment, court costs, and post-judgment interest. Marshall filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. In the motion she specified that she intended to appeal. Following a hearing on November 7, 2002, a supersedeas bond amount was set pursuant to Texas Property Code Section 24.007, but Marshall did not post bond. On November 8, 2002, she filed notice of appeal.

The parties agree that a writ of possession was never executed. Marshall does not contest the Housing Authority's assertion that she vacated the apartment.

After her lease term had expired, Marshall filed her brief in the court of appeals praying that the court reverse the trial court's judgment and award her possession of the apartment. She did not claim in her brief or in her later reply brief any contractual or other right to possession.

The court of appeals determined that Marshall's appeal was moot and dismissed the appeal for want of jurisdiction, although it did not vacate the trial court's judgment. The court of appeals reasoned that because Marshall had relinquished possession of the apartment, the court could no longer grant effectual relief.

The only issue in a forcible detainer action is the right to actual possession of the premises. Some courts of appeals have held that if a tenant fails to post a supersedeas bond pursuant to Texas Property Code Section 24.007, the appellate court lacks jurisdiction. Other courts of appeals have concluded that if a tenant vacates the premises, (1) the tenant's appeal is moot because the court can no longer grant effectual relief, or (2) the issue of possession is moot, but the court can still consider issues unrelated to possession. At least one court of appeals has concluded that a tenant's appeal is not moot even though the tenant vacated the premises.

Marshall argued that her failure to post a supersedeas bond pursuant to Texas Property Code Section 24.007 did not prevent her from appealing the trial court's judgment. The Texas Property Code provides that judgment in a forcible detainer action may not be stayed pending appeal unless the appellant timely files a supersedeas bond in the amount set by the trial court. Thus, if a proper supersedeas bond is not filed, the judgment may be enforced, including issuance of a writ of possession evicting the tenant from the premises. However, there is no language in the statute which purports to either impair the appellate rights of a tenant or require a bond be posted to perfect an appeal. Marshall's failure to supersede the judgment did not divest her of her right to appeal.

Marshall argued that because she timely indicated her intent to appeal the trial court's judgment and because she vacated involuntarily to avoid execution of a writ of possession, her relinquishing possession of the apartment should not moot her appeal. The Housing Authority, however, urges that because the record does not include evidence supporting Marshall's assertion that she vacated the apartment involuntarily, her appeal was rendered moot when she vacated. Again, the court agreed with Marshall.

Usually, when a judgment debtor voluntarily satisfies the judgment, the case becomes moot and the debtor waives any right to appeal. The rule is intended to prevent a party who voluntarily satisfies a judgment from later changing his or her mind and appealing. The court has held, however, that payment of a judgment will not moot an appeal from that judgment if the judgment debtor timely and clearly expresses an intent to exercise the right of appeal and if appellate relief is not futile. Marshall timely filed a motion seeking suspension of enforcement of the judgment or, in the alternative, setting of a supersedeas bond. Her motion set out her intent to appeal. She timely filed notice of appeal before she vacated her apartment. In light of her timely and clear expression of intent to appeal, Marshall's action in giving up possession did not moot her appeal so long as appellate relief was not futile; that is, so long as she held and asserted a potentially meritorious claim of right to current, actual possession of the apartment. But, her lease expired on January 31, 2003, and she presented no basis for claiming a right to possession after that date. Thus, there was no live controversy between the parties as to the right of current possession after January 31, 2003, and the issue of possession was moot as of that date.

Persevering, and recognizing the possibility that the possession issue might be moot, Marshall asserted that even if the possession issue is moot, there are three reasons why the merits of her appeal should be determined.

Marshall argues that her case is not moot because if successful on the merits she would be able to recover, in this action, the fair market value of her leasehold interest for the time between the date she vacated the apartment and the date her lease expired. The court disagreed. Marshall, nevertheless, argued that recovery of the fair market value of her lost leasehold interest in this forcible detainer action is authorized by section 34.022 of the Texas Civil Practice and Remedies Code and by Texas Rule of Civil Procedure 752. Neither of these provisions, however, authorize the type of damages that Marshall seeks. Her property was not sold at execution, and the damages she seeks did not arise until after her county court appeal was complete. Thus, even if her appeal were to be heard and found to have merit, Marshall would not be authorized to recover damages in the forcible detainer suit on the bases she references. Consequently, the damage claims do not present a controversy preventing dismissal of the forcible detainer case as moot.

The court next considered Marshall's position that even if a live controversy does not exist, her appeal falls within the "collateral consequences" exception to the requirement that cases without live controversies are to be dismissed as moot. She argued that a favorable appellate ruling reversing the trial court's judgment would ameliorate collateral consequences to her resulting from the judgment. Marshall noted that the judgment for eviction caused loss of her federal rent subsidy and that loss of the subsidy might last for up to five years. She also asserted that the judgment has adverse practical collateral consequences, including the possibility that landlords may be dissuaded from renting an apartment to her. One purpose of vacating the underlying judgment if a case becomes moot during appeal is to prevent prejudice to the rights of parties when appellate review of a judgment on its merits is precluded. Once the judgment is vacated and the case dismissed, the collateral consequences of the judgment are ordinarily negated to the same extent as if the judgment were reversed on the basis of any other procedural error. The collateral consequences exception to the mootness doctrine is invoked only under narrow circumstances when vacating the underlying judgment will not cure the adverse consequences suffered by the party seeking to appeal that judgment. In order to invoke the collateral consequences exception, then, Marshall must show both that a concrete disadvantage resulted from the judgment and that the disadvantage will persist even if the judgment is vacated and the case dismissed as moot. She did not do so.

Mitchell* v. *Citifinancial Mortgage Company, 192 S.W.3d 882 (Tex.App.—Dallas 2006, no pet.). Mitchell contended that Citifinancial's complaint for forcible entry and detainer did not sufficiently describe the land or premises for which it sought possession.

Under rule 741 of the Texas Rules of Civil Procedure, a complaint for forcible entry and detainer "shall describe the lands, tenements, or premises, the possession of which is claimed, with sufficient certainty to identify the same...." A street address is sufficiently certain to identify the premises made the subject of a detainer action. Citifinancial's complaint described the premises by the following legal description: "Being Lot 35, in Block B of Creek Tree Estates, Phase III-B, an addition to the City of DeSoto, Dallas County, Texas according to the map thereof recorded in Volume 85196, Page 3920 of the map records of Dallas County, Texas." The complaint also identified the "Property" as "more commonly referred to as 909 Hideaway Place, DeSoto Texas 75115." Further, the complaint identified the "Property" as the same location where appellants could be served with process.

Mitchell did not contend that she was misled or confused by the complaint's identifying information. In fact, she offered no argument to support her contention that the identifying information was lacking in some way. The court concluded that both the address and the legal description set forth in the complaint sufficiently identified the premises at issue.

Murphy v. Countrywide Home Loans, Inc., 199 S.W.3d 441 (Tex.App.—Houston [1st Dist.] 2006, no pet.). Murphy borrowed a home loan from Countrywide. After he defaulted, Countrywide posted for foreclosure. Murphy sued to enjoin the foreclosure, but the temporary injunction was denied, so Countrywide foreclosed. It then brought a forcible detainer action to evict Murphy.

Forcible detainer occurs when a person refuses to surrender possession of real property upon a statutorily sufficient demand for possession if that person is: (1) a tenant or subtenant willfully and without force holding over after his right of possession ends, (2) a tenant at will or by sufferance, or (3) a tenant of someone who acquired possession by forcible entry. Generally, an occupant of the property holding over after execution of a deed is considered a permissive tenant whose right to possession is inferior to that of the party holding title. To establish forcible detainer and prevail on its motion for summary judgment, Countrywide had to establish the following as a matter of law: (1) Countrywide was the owner, (2) Murphy was an occupant at the time of foreclosure, (3) the foreclosure was of a lien superior to Murphy's right to possession, (4) Countrywide made a statutorily sufficient written demand for possession, and (5) Murphy refused to leave.

Countrywide alleged that Murphy defaulted on his mortgage payments and failed to make payment even after notices of acceleration and demand notices were served on him. A substitute trustee's sale was held and Countrywide purchased the property and received a substitute trustee's deed. This deed, which transferred title to Countrywide, and an affidavit of mortgage were filed in the Galveston County real property records. Countrywide then gave Murphy written notice to vacate the property. Murphy refused to vacate and unlawfully remained in possession of the property.

As summary judgment evidence for the element of ownership, Countrywide attached its substitute trustee's deed and an affidavit of mortgage. To establish that Murphy was the occupant at the time of foreclosure, Countrywide attached a certified copy of the deed of trust. To establish that it had a lien that was superior to Murphy's right to possession, Countrywide relied on the deed of trust and the substitute trustee's deed. And to establish that it made a demand for possession, Countrywide relied on the notice to vacate. The fact that Murphy refused to surrender possession is uncontested.

Murphy argued that Countrywide's evidence is insufficient because the substitute trustee's deed shows the owner of the property to be Freddie Mac and not Countrywide. Countrywide attached the business records affidavit of Freddy Mac's attorney, to authenticate the notice to vacate. The notice to vacate affirmatively names Countrywide as the authorized servicing agent for Freddy Mac. Murphy offered no evidence to contradict this statement. Murphy did, however, attach exhibits to his response motion. The attachments consisted of a copy of the original promissory note, a cover letter purporting to transfer the original note to First Chicago National Processing Corporation, and Murphy's personal affidavit attesting to the validity of the attached documents. These exhibits do not constitute evidence rebutting the issue of possession.

Finally, Murphy contends that the documents used by Countrywide as summary judgment evidence are "products of a void illegal defective fraudulent procedure" because Countrywide failed to prove it had authority to foreclose. However, rule 746 of the Texas Rules of Civil Procedure does not require Countrywide to prove title. To prevail in a forcible detainer action, Countrywide need only show sufficient evidence of ownership to demonstrate a superior right to immediate possession. Murphy's allegations concerning the propriety of the foreclosure or challenges to Countrywide's deed or title to the property cannot be considered in this action.

Hardy* v. *11702 Memorial, Ltd., 176 S.W.3d 26 (Tex.App.—Houston [1st Dist.] 2004, no pet.). Hardy signed a lease for a swank apartment in Houston. Because her credit wasn't as swank as the apartment, the Landlord required a large security deposit, so she provided a security deposit of $20,250. After signing the lease and delivering the security deposit, however, Hardy did not move in and she never paid rent. On September 29, Hardy wrote a letter to the Landlord thanking it for letting her out of her lease. The Landlord promptly wrote back saying that they had done no such thing. Her lease was supposed to start on October 2. The Landlord leased the property to another tenant on October 3. Hardy's lawyer wrote to request the return of the security deposit on October 9. On November 8, the Landlord wrote Hardy a letter itemizing a number of deductions from the security deposit and telling her she owed an additional $14,000.

The Landlord's deductions and charges included lost rents for several months, the first month's rent, the broker's commission, an NSF charge, make ready, and the cost of reletting the apartment.

Section 92.104 of the Texas Property

Code governs the return of residential tenants' security deposits. It provides that, before returning a security deposit, a landlord "may deduct from the deposit damages and charges for which the tenant is legally liable under the lease or as a result of breaching the lease." If the landlord retains all or part of the deposit, it must give the tenant any balance due, together with a written description and itemized list of all deductions. Section 92.109(a) of the Property Code governs a residential landlord's bad faith. It provides that, in a suit to recover a security deposit, a landlord who retains a de-posit in bad faith is liable to the tenant for $100, plus three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorneys' fees. An additional result of a landlord's retention of a security deposit in bad faith is the forfeiture of the right to retain any portion of the security deposit. Moreover, a landlord who fails either to return a security deposit or to provide a written description and itemization of deductions on or before the 30th day after the tenant surrenders possession of the property is presumed to have acted in bad faith.

Bad faith implies an intention to deprive the tenant of a lawfully due refund. To defeat the presumption, the landlord must prove his good faith, i.e., "honesty in fact in the conduct or transaction concerned." Absent rebutting evidence, the presumption that the landlord acted in bad faith by failing to return the deposit or provide a written description and itemization of deductions within 30 days after surrender compels a finding of bad faith.

Tenant's lease was to commence on October 2, 2000. Hardy repudiated the lease on September 29, and never occupied the premises. Landlord acknowledged its duty to mitigate damages and found a new tenant, whose lease commenced on October 3, 2000. On October 9, 2000, tenant's attorney gave landlord formal notice of "surrender" of the property and a written statement of tenant's forwarding address for the purpose of refunding the security deposit, which triggered Landlord's obligation to return the deposit or give her a written description of the damages and charges for which she was liable within 30 days, i.e., by November 8, 2000.

According Hardy's attorney's testimony, the Landlord kept the deposit and sent tenant a letter which was dated November 8, listing "deductions and offsets," by facsimile on November 26, -- six days after tenant sent landlord a draft petition in anticipation of this suit and well outside the 30 day limit for landlord's compliance with section 92.103. The Landlord's deposition testimony was that the letter was created on November 8, but the Landlord didn't remember when it was sent. The court held that the evidence was uncontradicted that the Landlord didn't send it's itemization in a timely manner. So the Landlord was presumed to have acted in bad faith in retaining the deposit. It was then up to the Landlord to rebut the presumption by showing that the deductions it made were in good faith.

In determining the Landlords good faith or lack thereof, the court looked at each of the deductions made by the Landlord. It found most of those deductions to be unwarranted. Under the plain language of section 92.104 of the Property Code, a landlord is entitled to deduct from a tenant's security deposit only those "damages and charges for which the tenant is legally liable." Among other things, the court found that the deduction for the real estate commission was not authorized. The Landlord had an agreement to pay the broker, but that agreement was not imposed on Hardy. The court found the charge for "make ready" to be unauthorized as well, since the lease called for the premises to be accepted "as is." The "re-letting" charge was unauthorized because the Landlord arbitrarily charged $6,500, with no evidence that the costs of re-letting were the reasonable and actual costs, as required by the lease. All in all, the Landlord's deductions were found to be nothing more than attempts to charge Hardy for items that she was not obligated for under the terms of the lease. Thus, the presumption of the Landlord's bad faith stood.

PART IX
VENDOR AND PURCHASER

Ratsavong v. Menevilay, 176 S.W.3d

661 (Tex.App.—El Paso 2005, pet. denied). Ratsavong and Menevilay were Laotian immigrants who had known each other a long time. Menevilay lived in California and came to visit Ratsavong and during the visit decided he wanted to move to Texas. Ratsavong said there was a house next to his and that if Menevilay was interested in buying, Ratsavong would allow him to use his credit to do so. At the time, Menevilay did not have the necessary credit to purchase a house, but it is customary in the Laotian culture for friends to lend each other their credit for the purchase of homes and vehicles; it was customary to not sign written contracts for such agreements. Ratsavong indicated to Menevilay that the house was being sold for $ 14,500 and that Menevilay would need to give him $ 2,000 down payment and that he would take care of everything else. According to Menevilay, Ratsavong entered into a contract for the purchase of the home, but the understanding was that Menevilay would make the payments and that the house was really his.

Menevilay testified that the house was not in good condition and that it needed many repairs. When he bought the house, he indicated the bathroom was not in a usable condition. Menevilay testified that he repaired the bathroom, painted the exterior and interior of the house, he constructed a garage, improved the sidewalk and added a concrete driveway to the garage, he replaced a door and windows, and he added a utility room for the washer and dryer. He paid for all the repairs and completed most of the work himself with the help of his wife. After a repair was completed, Ratsavong would often come over to see the improvement and stay for dinner to celebrate the accomplishment. Menevilay testified that he would talk to Ratsavong about some of the repairs because they were friends and that he did not get a building permit for any of the improvements.

In addition to making these repairs, he testified that he made the mortgage payments, paid the insurance on the home, and the property taxes for the entire time he was living at the house, up to the point where litigation over the title was considered. Once he finished paying the mortgage on the house, Ratsavong refused to transfer the deed to the Menevilay. Rather, Menevilay received a Notice to Vacate and Notice of Termination of Tenancy at Will from Ratsavong's attorney.

Among other arguments made by Ratsavong, he claimed any alleged contract with Menevilay was void because it did not comply with the statute of frauds. The Statute of Frauds exists to prevent fraud and perjury in certain kinds of transactions by requiring agreements to be set out in a writing signed by the parties.

The Texas Supreme Court held that "to relieve a parol sale of land from the operation of the statute of frauds, three things were necessary: (1) Payment of the consideration, whether it be in money or services; (2) Possession by the vendee; and (3) The making by the vendee of valuable and permanent improvements upon the land with the consent of the vendor; or, without such improvements, the presence of such facts as would make the transaction a fraud upon the purchaser if it were not enforced." Each of these three elements is indispensable, and they must all exist. The court reviewed the facts and determined that all three elements were satisfied.

Ratsavong also argued that Menevilay's claims were barred by the four-year statute of limitations. According to the Ratsavong, the oral contract was entered into in 1994, but the lawsuit was not filed until October of 2002, not within the four-year statute of limitations for a breach of contract in Texas. Texas Civil Practice & Remedies Code § 16.051. A party asserting a breach of contract claim must sue not later than four years after the day the claim accrues. It is well-settled law that a breach of contract claim accrues when the contract is breached or when the claimant has notice of facts sufficient to place him on notice of the breach.

Here, the earliest date on which Menevilay could have breached the promise to transfer the deed was in 2001, the date when the mortgage was paid in full and the earliest that Ratsavong refused to transfer the deed. Menevilay filed suit in October of 2002, less than four years after this occurred. Applying the general four-year statute of limitations to the claims, the court held that Menevilay had timely filed suit.

Ski River Development, Inc.* v. *McCalla, 167 S.W.3d 121 (Tex.App.—Waco 2005, pet. denied). A sublease between the Glazier and McCalla contained the following "right of first refusal:"

"That, in the event Lessees [Bakers] shall purchase or otherwise obtain legal ownership of said Property from Lessor [Glazier] and later elect to sell, Lessees [Bakers] hereby grant Sub-Lessees [McCallas] the First Option to Purchase all, or a portion of said Property from Lessees [Bakers] at market value."

Baker obtained title to the property after Glazier's death. Soon after that, she began marketing the property. The listing broker sent McCalla a notice stating that the property was for sale at $2,500 per acre and giving him 72 hours to decide whether to exercise his right of first refusal. McCalla expressed an interest in buying the property, but objected that the 72 hour period to decide was far too short, claiming that more time was needed to determine the fair market value of the property. He later obtained an appraisal at $1,200 per acre. After a period of time, Baker ultimately ground leased the property to Davis, who later assigned it to Ski River. McCalla then decided he wanted to buy the property and when he found out it had been leased to Ski River, he threatened to sue and ultimately did file suit.

Among the issues on appeal was whether Ski River was entitled to a declaratory judgment that the "right of first refusal" was void and unenforceable because it was too indefinite and violated the rule against perpetuities.

The rules regarding indefiniteness of material terms of a contract are based on the concept that a party cannot accept an offer to form a contract unless the terms of that contract are reasonably certain. Thus, the actions of the parties may conclusively establish their intention to enter a binding agreement even if some terms are left for future agreement. To that end, Texas courts prefer to validate transactions rather than void them. A court may not create a con-tract where none exists and they generally may not interpolate or eliminate material terms. However, parties may agree on some terms sufficient to create a contract, leaving other provisions for later negotiation. In certain situations, a court may uphold an agreement by supplying missing terms, such as implying a reasonable price.

The Restatement asserts that contract terms are reasonably certain "if they provide a basis for determining the existence of a breach and for giving an appropriate remedy." Restatement (Second) of Contracts § 33(2). This conforms to the policy that parties, and not the courts, should make contracts. Where the parties intended to make an agreement and there is a certain basis for granting a remedy, courts should find the contract terms definite enough to provide a remedy. Uncertainty of terms can, however, preclude one remedy without affecting others. For example, less certainty is necessary in a suit for damages than one for specific performance.

When essential terms are missing, courts often find no more than an agreement to agree. Courts have, however, implied terms when the surrounding circumstances left little doubt as to the parties' intentions.

Here, the contract clause sets out with certainty the term that the Bakers must obtain legal ownership as a prerequisite to validity of any obligation. However, the contract clause leaves many terms for future negotiation and agreement. These include:

(1) What is the definition of "said Property" (the entire 380-acre tract or the two acres being subleased by the McCallas);

(2) What is the definition of a "portion" of said Property;

(3) Whether listing property on the

market (i.e., solicitation for offers) is an election to sell;

(4) Whether a listing agreement is an election to sell;

(5) Whether a bona fide offer from a third party purchaser was required before the option could be exercised;

(6) Whether an election to sell a portion of the property was sufficient for McCalla to exercise the option;

(7) When market value is to be determined;

(8) What is the method to determine market value;

(9) How long does McCalla have to exercise his option after notification of Baker's election to sell;

(10) Whether the McCallas can ever compel a sale of all or a portion of the Property;

(11) Whether Baker can change her mind after an election to sell the property if she is dissatisfied with an offer from McCalla in comparison with either a bona fide purchaser offer or retaining the property; and

(12) For how long is the option valid?

These provisions requiring future negotiation suggest that the parties are only agreeing to make a future contract. An agreement leaving material terms to be agreed upon later is not definite and specific as to material and essential terms and is, therefore, unenforceable.

Cardenas* v. *Varner, 182 S.W.3d 380 (Tex.App.—Amarillo 2005, pet. pending). Varner sued Cardenas to recover upon a promissory note and foreclose upon a vendor's lien securing payment of the note. Cardenas executed the note as partial payment for ranch land bought from Varner. When Cardenas discovered, after closing of the sale, that the acreage was less than that represented by Varner, they refused to pay the outstanding note balance. This precipitated the suit. In response, Cardenas counterclaimed for breach of the sales contract and warranties, asserting that he was sold less land than promised. Upon trial before the court, the trial judge reformed the purchase price of the land, subtracted the difference from the outstanding balance due on the note, awarded Varner the remaining sum due, and permitted them to foreclose upon their lien.

Among the issued addressed on appeal was the trial court's reformation of the purchase price. Cardenas argued that it did not reduce the price enough while Varner asserted that it had no basis to reduce it at all.

No one disputes that the trial court attempted to re-form the agreement struck by the parties. Furthermore, Cardenas believed that the trial court was authorized to do so because the parties were mistaken about the actual amount of land encompassed in the sale. Thus, equity purportedly entitled the trial court to make the changes to reflect the actual property conveyed. Yet, in suing for redress, Cardenas only pled causes of action sounding in breached contract and warranties. And, as for relief, he sought only damages plus court costs, attorney's fees, and interest. His live pleading said nothing about mistake (either mutual or otherwise) or reforming the terms of the agreement. This is fatal since one must seek reformation in his live pleading to acquire it.

City of Brownsville* v. *Golden Spread Electric Cooperative, Inc., 192 S.W.3d 876 (Tex.App.—Dallas 2006, pet. pending). The electrical generating facility was owned in common by several participants, including the City, TCC, and OMPA. Under the terms of a participation agreement, a co-owner intending to sell its interest in the facility must serve on all other co-owners written notice of its intent to sell at least seven months before consummation of the intended transfer. The notice must include a copy of the written offer from the proposed buyer setting forth the consideration and other terms of the offer. The co-owners then have the option to acquire all or any undivided interest in the ownership interest to be transferred. The participation agreement states that the right of first refusal "shall be exercised by the [co-owners] serving written notice of intention to exercise their option upon the Participant desiring to transfer and on the remaining [co-owners] within three (3) months after service of the written notice of intention to transfer given...."

TCC entered into a contract to sell its interest in the facility to Golden Spread. The agreement stated that TCC's obligation to consummate the transaction was subject to the fulfillment of various conditions, including there being no effective exercise of the right of first refusal held by the facility's co-owners. TCC sent the required notice of intention to transfer to the co-owners. Within the three-month exercise period, the City sent notice to TCC and the other co-owners of its intent to exercise its option to purchase. OMPA also sent a notice of intent to exercise its option, but it is disputed whether a proper notice was sent by OMPA within the three-month exercise period.

The City and TCC executed a contract under which the City agreed to purchase TCC's ownership interest on essentially identical terms to those set forth in TCC's contract with Golden Spread. Golden Spread then filed this suit against TCC, the City, and OMPA claiming that neither the City nor OMPA had validly exercised its right of first refusal. Golden Spread sought a declaratory judgment that its purchase agreement with TCC was valid and enforceable and sought damages for alleged tortious interference with its contract. The trial court granted Golden Spread's motions and held that Golden Spread was entitled to specific performance of its agreement with TCC.

Generally, a right of first refusal or preemptive right to purchase requires the owner of the subject property to offer the property first to the holder of the right on the same terms and conditions offered by a third party. When the property owner gives notice of his intent to sell, the right of first refusal matures or "ripens" into to an enforceable option. The terms of the option are formed by the provisions granting the preferential right to purchase and the terms and conditions of the third-party offer presented to the rightholder. Once the property owner has given the rightholder notice of his intent to sell on the terms contained in the third-party offer, the terms of the option cannot be changed for as long as the option is binding on the property owner.

The rightholder's exercise of the option to purchase must be positive, unconditional, and unequivocal. The rightholder must accept all the terms of the offer or the offer will be considered rejected. In the absence of an agreement otherwise, unequivocal acceptance of the terms of the offer is considered an exercise of the right to purchase. When the rightholder gives notice of his intent to accept the offer and exercise his option, a contract between the rightholder and the property owner is created.

In this case, it is undisputed that the City unequivocally accepted all the terms and conditions set forth in Golden Spread's offer to purchase TCC's interest in the facility. Golden Spread argued, however, that the City was prohibited by the Texas Constitution from accepting the indemnity provisions of the contract and that any purported acceptance of those provisions rendered the contract between TCC and the City void. If the contract were void, Golden Spread contended the City's exercise of its right of first refusal was not effective. Both the City and TCC strongly disputed that the City's acceptance of the indemnity provisions at issue violates the Texas Constitution. The City argued that if the provisions are violative, the severability clause of the purchase agreement operates to sever out those provisions while preserving the remainder of the contract. Severability provisions may serve to preserve contracts so long as the invalidated portions of the contract do not constitute the main or essential purpose of the agreement.

The indemnity provisions of the purchase contract are clearly tangential to the main purpose of the agreement, which is the transfer of the ownership interest. The inclusion of the severability provision in the agreement indicates the parties were willing to sever out such tangential matters to preserve the main agreement. Therefore, the possible invalidity of the indemnity provisions does not render the entire agreement between TCC and the City void.

Golden Spread further argued that, even if the entire agreement is not void, the invalidity of the indemnity provision alone renders the City's exercise of its right of first refusal ineffective because its inability to perform the indemnity provision necessarily makes the City's acceptance of the offer qualified rather than unconditional. This logic would deprive the City of the benefits of the severability provision, however, and would alter the terms and conditions of the contract as applied to the City. Under the severability provision, TCC and Golden Spread agreed the purchase contract would continue to be valid and enforceable even if some provisions of the agreement were later held to be invalid. Accordingly, both parties took the risk that some provisions in the contract would be unenforceable. Once the terms and conditions of the agreement, including the severability provision, were conveyed to the City, neither TCC nor Golden Spread could change the terms of the offer. To conclude that the City's exercise of its right of first refusal was ineffective because one of the tangential provisions of the contract may be invalid or unenforceable against the city would be tantamount to removing the severability clause from the agreement offered to the City. This is not permissible.

Golden Spread's argument was essentially that, to effectively exercise its right of first refusal, the City must not only accept all the terms and conditions of Golden Spread's offer to purchase TCC's interest, but TCC's ability to enforce the contract against the City must be identical to its ability to enforce the contract against Golden Spread. The law does not require equivalent enforceability, however. The law requires only unequivocal acceptance of the terms and conditions of the third-party offer for there to be a sufficient exercise of a right of first refusal.

Probus Properties* v. *Kirby, 200 S.W.3d 258 (Tex.App.—Dallas 2006, pet. pending). Kirby leased commercial real property from Probus under a three-year lease. The lease granted Kirby, for a fee, a one-year option to purchase the property for $200,000 under the terms specified in the lease. The lease also permitted Kirby to extend the option for the years 2002 and 2003, by paying an additional annual Option Fee. If Kirby was not in default and the Option Fees were timely paid, Kirby could exercise the option at any time during the option period. If Kirby failed to make any annual payment of Option Fees, he would forfeit any Option Fees previously made. Kirby made the original Option Fee and the first annual Option Fee payments. The next annual option fee was due on or before January 1, 2003. On January 1, Kirby wrote a personal check for $10,000.00 on his account at North Dallas Bank and put the check in the mail slot on Probus's door. Probus deposited the check at its bank on January 2, 2003. On January 6, 2003, Kirby's bank returned the check unpaid with the notation "Drawn Against Uncollected Funds." A few days later, Probus sent Kirby a notice that the option had expired due to non-payment of the option extension fee.

Kirby explained that he had two checking accounts at the time. The day after he delivered the check, January 2, 2003, he became confused as to which bank the check had been drawn on, and mistakenly made his deposits at the wrong bank. Later that day, Kirby looked at his checkbook and realized he had written the check on his North Dallas Bank account, which did not have sufficient funds to pay the check. He drove to North Dallas Bank to make a deposit, but had car trouble and was unable to reach the bank before it closed. The next afternoon, Friday January 3, 2003, Kirby deposited a $10,000 check drawn on his other bank in the North Dallas Bank account. However, because of inactivity in the account and the size of the deposit, North Dallas Bank placed a two-business day hold on the deposit. Kirby testified he was unaware that the bank would put a hold on the deposit. He also testified he did not contact his bank officer about the deposit. The next business day, January 6, 2003, North Dallas Bank returned the check unpaid.

Kirby sued Probus for breach of contract, specific performance of the purchase option, and for a declaratory judgment. Kirby alleged he performed the conditions precedent to extend the option, or, in the alternative, that equity would relieve him of the obligation to satisfy the conditions precedent. The jury found that Kirby had performed the condition precedent in the lease to extend the option for calendar year 2003. It also found in favor of Kirby on his equitable arguments for relief from compliance with the conditions precedent.

Probus argued, among other things, that there was no evidence to support the jury's finding that Kirby performed the condition precedent to extend the option, that equity does not apply to the option.

In a typical option to purchase property, the optionor offers to sell the property on stated terms for a specific period of time and the optionee, for a consideration, is granted the right or option of accepting or not the terms of the offer during the specified time period. In general, options to purchase property must be exercised in strict compliance with the terms of the option agreement. By its very nature, an option is time-sensitive. It has long been held that time is of the essence in an option because it is unilateral and for the benefit of the optionee. Even where the agreement does not expressly state that time is of the essence, time is essential to the option and the holder of the option must comply with the terms of the option within the specified time period. Thus, any failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection.

The lease required Kirby to pay an additional option fee of $10,000 on or before January 1 to extend the option for 2003. The option to purchase could be exercised only if the option fees were "timely paid." Although the lease does not contain an express statement that "time is of the essence," the nature of the option and the language requiring timely payment of the option fees makes time essential to the extension and exercise of the option.

Kirby argues his act of delivering the check on January 1 and depositing funds sufficient to pay the check before it was presented for payment constituted performance of the terms of the option. However, unless otherwise agreed, an uncertified check is merely a conditional payment for an obligation and payment is made absolute when the check is presented and honored. If the check is dishonored, the original obligation remains. The check suspends the obligation until dishonor of the check or until it is paid or certified. Kirby's personal check was merely conditional payment and the condition--payment of the check on presentment--was never fulfilled.

Kirby argues equity will excuse non-performance of the condition precedent. Relying on language in ***Jones* v. *Gibbs***, 133 Tex. 627, 130 S.W.2d 265 (1939), Kirby asserts that equity will excuse non-performance of an option where the failure was the result of an honest and justifiable mistake, any delay was slight, any loss to the optionor was slight, and cancelling the option would result in unconscionable hardship to the optionee. This equitable rule is sometimes referred to as the doctrine of disproportionate forfeiture. Thus, Kirby argues the jury's findings in questions two through ten support the application of equity to relieve him from performance of the condition precedent to extending the option. Probus argues the doctrine of disproportionate forfeiture does not apply to this option.

The court held that ***Jones*** was a different situation. In ***Jones***, the optionee had paid all of the consideration for timber and was required to make relatively small annual payments in order to remove it. At the direction of the optionor in one year, Jones made a payment in a manner different than the option required. He did so again the following year, but the optionor objected to that manner of payment a substantial time after it was made. It really appeared that Jones had performed in accordance with the optionor's instructions, though not technically in accordance with the option agreement, so equity relieved him. This case is completely different. None of the consideration for the property had been paid. The court held that the doctrine of disproportionate forfeiture did not apply.

Krayem* v. *USRP (PAC), L.P., 194 S.W.3d 91 (Tex.App.—Dallas 2006, pet. denied). Krayem leased a gas station from USRP. The lease included a purchase option which Krayem could exercise by delivering "written irrevocable notice." USRP sold the property to MacArthur. MacArthur sent Krayem a letter notifying him of the change in ownership and requesting new insurance certificates listing MacArthur as the certificate holder. Krayem then sent MacArthur a letter dated July 16, 2003 stating he was exercising his option to purchase the premises and scheduling a closing on or before October 31, 2003. Krayem did not sign the July 16 letter. Krayem sued USRP and MacArthur alleging that, although he properly exercised his option, appellees refused to sell him the property.

Krayem argues his June 16 letter to MacArthur conclusively establishes that he effectively exercised his option to purchase the premises. MacArthur, on the other hand, contends that because the June 16 letter was unsigned, it was not an effective exercise of the purchase option as required by section 2.5 of the lease.

The term "written irrevocable notice," however, is not defined in the lease. MacArthur contends the Texas statute of frauds and case law support its position that "written irrevocable notice" necessarily means a written instrument signed or executed by the party to be charged. The court first noted that MacArthur's argument fails because Krayem is not the party against whom enforcement is sought for statute of fraud purposes. Moreover, none of the cases cited by MacArthur support its position that "written irrevocable notice" required Krayem to sign his letter. Absent any lease provision or legal authority requiring Krayem to sign the written notice, Krayem's unsigned June 16 letter conclusively established that he gave proper "written irrevocable notice" of his intent to exercise his purchase option.

To succeed on his claims, however, Krayem was required to do more than just properly exercise his purchase option. He was also required to perform all conditions precedent necessary to close the purchase. Krayem attacks the trial court's findings and conclusions that he failed to perform all conditions precedent to effectively close the option. In particular, Krayem asserts he was not required to tender consideration of the purchase price of the property or demand a deed from appellees to close the purchase because the record established that MacArthur refused to attend the scheduled closing or agree to a new closing date. Alternatively, he argues that his appearance for a closing on October 3, 2003 and attempts to reschedule the closing were sufficient tender of consideration.

One of the elements Krayem had to prove to support his breach of contract claim was that he performed or tendered performance under the contract. In situations where the parties have mutually concurrent contract obligations, such that a deed is required to be delivered upon tender of the purchase price, tender serves two purposes: it invokes the seller's obligation to convey, and it establishes that the buyer is ready, willing, and able to perform all material acts which the contract requires of him. Tender is not a prerequisite, however, when its performance was prevented by the other party or where defendant repudiates the contract.

Krayem testified that he executed a written contract to sell the premises to a third party, Fahd Enterprises, Inc. Krayem and Jamal Aly, a principal in Fahd Enterprises, then presented the transaction to a title company in an attempt to close their transaction simultaneously with the closing of Krayem's purchase option. Krayem further testified the title company prepared and he signed documents in connection with the closing. The transaction, however, did not close because they were unable to get MacArthur to attend the closing. Aly testified that he took a copy of the sales contract and bank loan commitments to the title company. He expected MacArthur to transfer the property to Krayem and then he would purchase the property as stated in the contract. Aly also indicated that, although he had a cashier's check for the downpayment and the loan commitment, he never tendered any money to the title company. Krayem never received any money from Fahd Enterprises. Thus, there was no evidence that Krayem could have completed the purchase transaction with MacArthur without first receiving funding from Fahd Enterprises.

Based on the evidence before the trial court, the court could not conclude that Krayem tendered performance under the contract or that his tender was excused. Krayem's ability to close the purchase option was completely dependent upon an unrelated third-party transaction. That transaction, however, could not be completed until MacArthur transferred the property to Krayem. There is no indication that Krayem could tender the consideration needed to close the purchase until the third-party transaction closed. Likewise, there is nothing in the record to indicate that MacArthur prevented Krayem from performing or that it openly refused to perform its obligations under the contract. The evidence supports the trial court's determination that Krayem did not tender the consideration required to close the purchase. .

Huntley v. Enon Limited Partnership, 197 S.W.3d 844 (Tex.App.—Ft. Worth 2006, no pet.). Huntley entered into a Commercial Contract of Sale with Enon for the purchase of a strip shopping center owned by Enon in Arlington. The contract provided that, if the contract were properly terminated by Huntley, he was entitled to the return of the earnest money deposit. The contract provided for the assumption of the existing loan and further provided that, if the assumption was not approved by the lender, Huntley had the right to terminate. An amendment to the assumption provision extended the time for obtaining approval. A second amendment provided that the lender's approval had to be free of any obligation on Huntley's part for environmental matters and further extended the time for lender approval.

Just before the date for lender approval to be obtained, the lender sent a letter stating that approval had been given. The letter didn't indicate the terms of the assumption and several days later (after the expiration of the assumption approval period), when the commitment letter arrived, it included a requirement that Huntley execute an environmental indemnity. Enon signed the commitment letter, but Huntley did not. A month later, Huntley sent a letter terminating the contract and requesting the return of the earnest money deposit. Two days after the termination letter was received, the lender sent a new commitment letter deleting the environmental indemnity requirement. Again, Enon accepted and signed the document; Huntley did not.

Huntley argues that he had a right to terminate the Contract when Midland required an environmental guaranty. Enon argues that Huntley did not have a right to terminate the Contract and that Huntley's subsequent termination of the Contract constituted a breach of the Contract because Midland approved Huntley's assumption of the loan. Enon's argument, however, is unpersuasive because it ignores the Second Amendment's requirement that Huntley assume the loan without any liability for environmental issues. Enon must base its approval argument on either the initial approval notice dated September 28, 2001, the October 3, 2001, approval notice, or the approval notice dated November 8, 2001. Although the September 28 approval notice indicates that Midland had approved the loan assumption, it does not indicate any of the terms or conditions upon which the loan assumption had been approved. Conversely, the letter faxed by Midland on October 3 set forth the conditions upon which the loan assumption had been approved, including that Huntley assume liability for environmental issues. The November 8 approval notice waived Huntley's environmental liability guarantee. Because the October 3 letter required Huntley to assume environmental liability and because the November 8 letter expressly waived environmental liability, it is clear that the September 28 letter did not serve as Midland's approval of the loan assumption absent a requirement that Huntley assume liability for environmental issues as required by the Second Amendment, but was, indeed, directly contrary to the express requirement of the Second Amendment that the loan assumption be free of any such assumption of environmental liability. Midland withdrew its requirement that Huntley assume environmental liability in the November 8 letter, but this was more than a month after the September 30 deadline set by the Second Amendment requiring that Midland approve Huntley's assumption of Enon's loan without any environmental liability and two days after Huntley had provided written notice terminating the Contract on November 6, 2001.

Roberts* v. *Clark, 188 S.W.3d 204 (Tex.App.—Tyler 2002, pet. denied). The Sellers agreed to sell 360 acres to the Buyers. The Buyers arranged a loan from the lender. The Buyers and the lender went to the title company for the closing and the Buyers signed all their closing documents. The lender did not fund the loan because it wanted the Sellers to sign and deposit the deed with the title company before funding. The Sellers refused to sign the deed until they were actually paid.

The Sellers filed suit for breach of contract, asking the court to declare the contract terminated because the Buyers did not tender payment on or before May 1, 2000 as required by the contract. The Buyers counterclaimed for specific performance. The Sellers moved for summary judgment, asserting that the Buyers failed to tender the purchase price and, inasmuch as the contract required payment of the purchase price before the Sellers' duty to sign the deed arose, the Sellers were excused from performing under the contract and the Buyers are not entitled to specific performance. The trial judge agreed.

In their first issue, the Buyers assert that the trial court erred in holding as a matter of law that the Buyers breached the contract, the contract terminated, and the Sellers' performance is excused. Among other arguments, they contend there are fact questions regarding whether the contract requires the Buyers to make payment before the Sellers execute the deed and whether tender of a wire transfer satisfied the contract.

Sellers assert the contract clearly requires the Buyers to tender payment on or before May 1, 2000 before the Sellers' duty to execute the deed even arises. In other words, Sellers contend that tender of payment is a condition precedent. Buyers disagree, asserting that it is a covenant.

A condition precedent is an event that must happen or be performed before a right can accrue to enforce a contract. While no particular words are necessary for the existence of a condition, such terms as "if," "provided that," "on condition that," or some other phrase that conditions performance, usually connote an intent for a condition rather than a promise. The contract specifically states in paragraph two that Buyers agree to pay $1.6 million on or before May 1, 2000. Paragraph three states, in pertinent part, that if the Buyers make the payment required in paragraph two, the Sellers shall make, execute, and deliver the deed. Giving this language its plain, grammatical meaning, the parties use of the word "if" in paragraph three indicates their intent to require the Buyers to tender payment before the Sellers' duty to execute the deed would arise. Consequently, tender of payment by the Buyers is a condition precedent to execution of the deed by Sellers and, once payment has been tendered, the Sellers will have a duty to sign the deed. Accordingly, the court must next determine if the Buyers' acts constitute tender of payment on or before May 1, 2000.

A tender is an unconditional offer by a debtor or obligor to pay another a sum not less in amount than that due on a specified debt or obligation. A valid and legal tender of money consists of the actual production of the funds and offer to pay the debt involved. The tenderer must relinquish possession of it for a sufficient time and under such circumstances as to enable the person to whom it is tendered, without special effort on his part, to acquire its possession. Since the lender did not relinquish the funds, no tender was made. As the Sellers have conclusively proven that the Buyers did not comply with the condition in the contract that they make payment on or before May 1, 2000, the Sellers have shown that the Buyers breached the contract. It might be argued that the application of this rule produces a harsh result since the lender was merely attempting to do business as usual and its requested procedure was not unreasonable. However, the Sellers are entitled, reasonably or unreasonably, to rely upon their legal rights under the terms of the contract signed by the parties.

The evidence shows the Sellers were ready, willing and able to comply with the terms of the contract but had a valid excuse for nonperformance under the terms of the contract. When a promise is subject to a condition precedent, there is no liability or obligation on the promissor and there can be no breach of the contract by him until and unless such condition or contingency is performed or occurs.

Martin* v. *Birenbaum, 193 S.W.3d 677 (Tex.App.—Dallas 2006, pet. denied). Birenbaum agreed to buy Martin's house for $3.6 million. A contract was signed and earnest money deposited with the title company. While the contract was pending, Birenbaum decided to buy another house, so he sent a letter to the title company and to Martin telling them he was terminating the contract and asking for the return of his earnest money. Martin orally instructed the title company not to return the earnest money, even though the contract required notices to be in writing. The title company did not return the earnest money but continued to hold it.

At first, Martin filed suit for specific performance and breach of contract, but later sold the house to a third party and dropped the specific performance demand. In connection with the sale of the house to the third party, Martin signed an affidavit stating there were no other pending contracts for the property.

Birenbaum's defense was that Martin had waived his claims for damages by preventing the return of the earnest money. Although Martin admitted he acted to prevent the return of the earnest money to Birenbaum because Birenbaum did not perform the contract and did not deserve it, he also testified that he did not want the earnest money, that the earnest money was insufficient, and that he had no choice but to sue Birenbaum because Birenbaum had not performed the contract. In fact, the record shows Martin notified Birenbaum in writing of his intent to pursue specific performance of the contract and, if necessary, a lawsuit for breach of contract. In contrast, nothing shows Martin provided any similar express notice, either oral or written, of an intent to accept the earnest money as liquidated damages. Moreover, after Birenbaum failed to specifically perform the contract as demanded, Martin filed a lawsuit seeking specific performance and damages for breach of contract. The court concluded that there was evidence supporting the jury's determination that Martin had not waived his right to sue for damages.

Having concluded that that there was no waiver, the court also rejected Birenbaum's contention that Martin had contractual elected to accept liquidated damages. Birenbaum claimed that Martin terminated the contract by selling the property to a third party. Although Martin did not physically receive the earnest money, Birenbaum contended he constructively received it by exercising "dominion and control" over it in a manner analogous to a conversion. The court disagreed.

Martin's sale of the property to a third party did not conclusively establish that he terminated the contract. By not closing the transaction, Birenbaum materially breached the contract. Birenbaum's breach excused Martin's further performance. Thus, Martin was free to sell the property to a third party and assure the purchaser that there were no competing contracts on the property. After selling the property, Martin amended his pleadings to drop his request for specific performance, but he continued to pursue damages for breach of contract. Thus, the court could not conclude as a matter of law that Martin terminated the contract within the meaning of paragraph 15.

Likewise, the evidence did not

conclusively establish that Martin "received" the earnest money. The contract does not contemplate constructive receipt of the earnest money. Nor does the contract mandate an interpretation that objecting to a demand for the earnest money made outside the normal closing process constitutes an election under paragraph 15. Furthermore, because Martin did not object in writing, the contract authorized the title company to release the earnest money to Birenbaum at any time after thirty days from the issuance of Birenbaum's written demand. The court concluded that the evidence did not conclusively establish Birenbaum's election defense.

In two responsive issues, Birenbaum questions (1) whether the "election-of-remedies clause" of the contract permits an aggrieved seller to sue for damages while also preventing the buyer from retrieving his earnest money and (2) whether such actions waive the seller's right to sue. Because the contract at issue is a standardized Texas Real Estate Commission form, Birenbaum further contends that resolving this case in Martin's favor would adversely impact public policy because aggrieved sellers will henceforth always choose both to withhold the earnest money and to sue for damages.

All three contentions presuppose that Martin withheld the earnest money from him and thus, effectively chose both remedies for default. The record, however, contains more than a mere scintilla of evidence showing that the title company, rather than Martin, chose not to release the earnest money to Birenbaum.

Coldwell Banker Whiteside Associates* v. *Ryan Equity Partners, Ltd., 181 S.W.3d 879 (Tex.App.—Dallas 2006, no pet.). The Parkmont apartment project was built in 1964 when zoning allowed multi-family uses. The sellers bought the property in 1972. In 1978, the property was re-zoned to single family, but allowed multi-family to continue as legal non-conforming. In 1988, the area was rezoned again, making multifamily housing nonconforming. This zoning change went unrecognized until 1994, when residents petitioned the City to shut down various multifamily housing uses. The Dallas City Council then passed an ordinance creating a Planned Development District that included the property. Under the PD, multifamily housing uses larger than six units were prohibited unless they obtained a Special Use Permit. If a property larger than six units failed to obtain a Special Use Permit, then its nonconforming use would be abated by the City's Board of Adjustment on the application of any citizen. "Abatement" of the nonconforming use meant that the nonconforming property would have to become a single-family residence or cease to operate. In 1995, the sellers applied for a Special Use Permit from the City, but their application was denied. However, they continued to operate the Property as a thirty-one-unit apartment complex, and no one applied to abate the nonconforming use while they owned the Property.

In 1998 Ryan Equity started looking for properties in East Dallas to buy and renovate. It contacted Coldwell Banker as a broker, who recommended the Parkmont as a suitable investment. One of the partners in Ryan Equity asked Whiteside about the zoning, and Whiteside said it was a legal nonconforming use but was grandfathered. Ryan Equity made no independent investigation of the zoning, nor did it seek confirmation of Coldwell Banker's representation of the extent to which the property was grandfathered. Ryan Equity did not ask sellers about the zoning, nor did it tell them the intended use of the property. After looking at the property and deciding it could be rehabilitated according to the plan, Ryan Equity offered to purchase the property. The contract for the sale of the property stated that the sellers, were "not aware of ... any material defects to the Property." The sale closed on November 24, 1998. Coldwell Banker received a commission of three percent.

Ryan Equity planned to renovate the property after renovating one of the other properties, but it planned to use the rental income from the Property to maintain it until the renovations could begin. Ryan Equity, however, was soon cited for the property's multiple building code violations, and it hired an attorney to represent it before the City. The attorney discovered the PD ordinance and determined that unless Ryan Equity obtained a Special Use Permit, the property would be forced to cease operation as multifamily housing on the application of any citizen to the Board of Adjustment. Ryan and the attorney held meetings with the neighborhood association to win the neighborhood's support for a Special Use Permit, but the neighborhood refused to support the plan for the property. An application for abatement of the nonconforming multifamily use of the property was filed with the Board of Adjustment. Because the property did not have a legal right to exist as a multifamily-housing use, Ryan Equity was unable to obtain the building permits and financing necessary to repair the major problems with the property. Ryan Equity incurred fines of over $167,000 for building code violations. The City of Dallas brought two suits, one seeking demolition of the buildings on the property for building code violations and the other seeking abatement of the nonconforming use of the Property. In June 2001, Ryan Equity settled the suits with the City by agreeing to tear down the apartments in exchange for the City waiving the fines. Ryan Equity demolished the buildings in August 2001.

Ryan Equity sued the sellers and Coldwell Banker for breach of the duty of good faith and fair dealing, common-law and statutory fraud, and breach of contract. Ryan Equity also sued Coldwell Banker for breach of fiduciary duty. The trial court found the sellers were not liable and found Coldwell Banker liable only for breach of contract.

Ryan Equity challenged the trial court's finding and conclusion that the sellers did not breach the purchase contract. Ryan Equity argued that the sellers breached two provisions in the purchase contract by failing to disclose the status of the zoning, that the operation of the apartment complex was subject to being shut down on the application of any citizen to the Board of Adjustment, and the denial of the sellers' application for a Special Use Permit. Ryan Equity contended that the nondisclosure of the status of the zoning and the denial of the Special Use Permit were nondisclosures of material defects with the property. The trial court concluded, "The status of the Property's zoning does not constitute a 'material defect' under the terms of the Contract."

Whether nonconformance to zoning ordinances constitutes a "material defect" requiring disclosure under a real estate contract is an issue of first impression in Texas. The term "material defect" is not defined in the purchase contract. Nor is it defined in the statutes governing the sale of real property. According to the dictionary, a "defect" is "an irregularity in a surface or a structure that spoils the appearance or causes weakness or failure." Thus, a "defect to the Property" would be some irregularity in "a surface or a structure" of the Property that mars its appearance or causes some aspect of the Property to weaken or fail. The definition addresses tangible aspects of the Property, whether its physical appearance or its physical structure. This definition is in line with the plain understanding and usage of the term: when we call something defective, we mean it is blemished, broken, deficient, or imperfect in some physical sense.

Given this plain understanding of the language at issue, the court concluded that the zoning status of the property was not a material defect to the property within the meaning of the purchase contract. Zoning laws neither cause nor result from physical imperfections or deficiencies in real property itself. The zoning law at issue does not relate to the exact physical condition of the property. Instead, the zoning law regulates the use of the property, giving it a discernible legal status. The denial of sellers' application for a Special Use Permit was a determination of the property's legal status pursuant to the zoning ordinance, not a material defect to the Property.

Finally, having concluded the zoning information related to legal status and not to any defective condition on the Property, the court addressed whether that legal status nonetheless had to be disclosed by the sellers. Ryan Equity contends the sellers had the duty to inform it of the zoning laws and to interpret the effect of those laws for it. Ryan Equity cited no authority for the proposition that a seller of commercial real estate has a duty to identify the applicable zoning laws or explain their effect to a sophisticated, experienced real estate investor who makes no inquiry to the seller of the zoning status and receives no express representation from the seller of the zoning status. Courts presume the parties to a contract knew and took into consideration the laws affecting matters about which they contracted, unless the contrary clearly appears in the terms of the contract.

In its second issue, Ryan Equity contended the trial court erred in concluding the sellers did not commit fraud against it. For common-law fraud, the plaintiff must prove (1) a material misrepresentation; (2) that was false when made; (3) that was known by the speaker to be false when it was made or that was made recklessly as a positive assertion without knowledge of its truth; (4) the speaker made it with the intent that it should be acted upon; (5) the party justifiably relied on the representation; and (6) the party was injured as a result.

To prove statutory fraud in a real estate transaction, a plaintiff must show: (1) a false representation of a past or existing material fact, when the false representation is (A) made to a person for the purpose of inducing the person to enter into a contract and (B) relied on by that person in entering into that contract; or (2) a false promise to do an act, when the false promise is (A) material, (B) made with the intention of not fulfilling it, (C) made to a person for the purpose of inducing that person to enter into a contract, and (D) relied on by that person in entering into that contract. Tex. Bus. & Com.Code Ann. § 27.01(a).

A misrepresentation may consist of the concealment or nondisclosure of a material fact when there is a duty to disclose. The duty to disclose arises when one party knows that the other party is ignorant of the true facts and does not have an equal opportunity to discover the truth.

It is undisputed that the sellers did not discuss the zoning or Special Use Permits with Ryan Equity's principals and made no affirmative representations regarding the zoning. Thus, their liability for fraud depends on their having a duty to disclose those facts. A seller of real estate is under a duty to disclose any material fact that would be not be discoverable by the purchaser's exercise of ordinary care and diligence or which a reasonable investigation would not uncover. Ryan Equity does not explain why the zoning status and denial of the application for the Special Use Permit were not discoverable through the exercise of ordinary care, reasonable diligence, or a reasonable investigation. Ryan Equity's lawyer testified that he discovered the zoning status and the denial of the application for the Special Use Permit through examining the publicly available zoning records at City Hall. No witness testified that these records were not discoverable through a reasonable investigation. The lawyer's testimony did not indicate his investigation that discovered the facts was unreasonable or went beyond the exercise of ordinary care and reasonable diligence. Because the sellers had no duty to disclose the facts, their failure to do so was not fraud.

Warehouse Associates Corporate Center II, Inc.* v. *Celotex Corporation, 192 S.W.3d 225 (Tex.App.—Houston [14th Dist.] 2006, pet. pending). Celotex Corporation operated an asphalt shingle manufacturing plant on the Property for a number of years until 1998, when Celotex permanently closed the plant. Celotex decided to sell the Property and retained Cushman & Wakefield as its real-estate broker. While Cushman & Wakefield was entertaining bids for the Property, Warehouse Associates asked Cushman & Wakefield for any documents that Celotex had regarding the Property. In response, Celotex forwarded part of a 1996 environmental report prepared for Celotex. The part of this report Celotex produced indicates that there had been asbestos issues relating to the buildings on the Property but indicates nothing about asbestos contamination in the soil or use of asbestos in the manufacturing process on the Property, as opposed to asbestos in building materials in the structures on the Property. Celotex did not give Warehouse Associates the part of the report stating that asbestos previously had been used in the manufacturing process at the plant on the Property.

Celotex entered into a written contract with appellant Warehouse Associates Development, Inc. for the sale of the Property. Under the Contract, Warehouse Associates was allowed to inspect the Property within sixty days from the date Celotex gave notice that it had completed this demolition work. During this sixty-day inspection period, Warehouse Associates had the right to terminate the Contract by written notice if its inspections revealed conditions unsatisfactory to it in its sole discretion. In the Contract, the parties agreed that, other than the warranties of title contained in the deed, Celotex did not make and was specifically disclaiming any representations, warranties, promises, covenants, or guaranties of any kind. The Contract imposed no obligation on Celotex to provide documents or records relating to the Property's condition. Warehouse Associates, however, was entitled to conduct inspections, tests, and investigations as it deemed necessary to determine the suitability of the Property for its intended use.

On the day that the inspection period began, Celotex's contractor was excavating soil on the Property and found what appeared to the contractor to be raw, friable asbestos buried in the ground. The contractor contacted appellee Lecil M. Colburn, Celotex's Director of Environmental Affairs and chairman of a Celotex committee formed to sell various Celotex properties. The contractor asked Colburn what to do and Colburn instructed the contractor to leave that area of the Property alone and to backfill the excavated area, indicating the matter would be addressed at a later date. The contractor had one employee, wearing a respirator, backfill the excavation as quickly as possible.

During the relevant period, HBC Engineering inspected the Property and conducted a Phase I Environmental Site Assessment of the Property. HBC had discussions about the Property with supervisors for Celotex. HBC did not specifically ask them about asbestos, and they said nothing to HBC about asbestos or the recent discovery of suspected asbestos-containing material buried in the ground on the Property. Celotex listed the major raw materials Celotex had used in its shingle-manufacturing process without mentioning asbestos. At the end of his interview with the supervisor, an HBC representative asked if he was aware of any other environmental concerns, and the supervisor said nothing about the suspected asbestos-containing material recently discovered on the Property or about the possibility of asbestos being buried in the soil on the Property. HBC also conducted an environmental site investigation that included analysis of soil and groundwater samples taken from the Property. HBC did not test the soil for the presence of asbestos. In its reports to the buyer, HBC did not mention anything about any contamination of the soil on the Property due to asbestos.

Warehouse Associates did not exercise its right to terminate the Contract during the inspection period and the sale closed. The special warranty deed that contains the same waiver-of-reliance and as-is language as the Contract. A few months later, a contractor demolishing the concrete slabs discovered asbestos-containing material in the soil on the Property. An expert analyzed soil borings and detected more than one percent asbestos in forty-four of seventy soil borings from sites across the Property. This expert concluded that the Property has extensive, widespread asbestos-containing material in the soil to a depth of at least thirteen feet below the ground surface.

Warehouse Associates sued, alleging damage claims for common law fraud, negligent misrepresentation, and statutory fraud under section 27.01 of the Texas Business and Commerce Code. Warehouse Associates also sought the equitable remedy of rescission of the transaction, as well as punitive damages and attorney's fees.

In ***Prudential***, the Texas Supreme Court limited the enforceability of as-is and waiver-of-reliance language to exclude situations in which (1) the buyer was induced to enter into the contract containing that language by a fraudulent representation or concealment of information by the seller or (2) the seller engaged in conduct that impaired, obstructed, or interfered with the buyer's inspection of the property being sold. In ***Schlumberger Tech. Corp.* v. *Swanson***, 959 S.W.2d 171 (Tex.1997), the Supreme Court held that the fraudulent-inducement exception from Prudential does not apply to waiver-of-reliance language (1) that clearly and unequivocally disclaims reliance on the specific representations that are the basis of the claims in question, (2) in a contract whose purpose is to definitively end a dispute in which the contracting parties have been embroiled, (3) in an arm's length transaction between sophisticated parties represented by counsel. This court of appeals held that, because the Contract's purpose was not to definitively end a dispute in which Celotex and Warehouse Associates had been embroiled, this case does not fall within the scope of Schlumberger, and therefore, the two Prudential exceptions provide the legal standard. So the court turned to the two exceptions to Prudential's general rule: fraudulent inducement and interference with inspection.

Looking over the facts, the court concluded that there was a material fact issue relating to fraudulent inducement.

As to the issue of interference with inspection, the court began by examining the language used by the ***Prudential*** court to describe this exception: "[A] buyer is not bound by an "as is" agreement if he is entitled to inspect the condition of what is being sold but is impaired by the seller's conduct. A seller cannot obstruct an inspection for defects in his property and still insist that the buyer take it "as is". The only case that actually analyzes the proper application of this exception is Prudential itself. In Prudential, the buyer asserted the seller had "interfered with his investigation" by withholding plans and specifications the buyer had requested. See id. The Prudential court stated that withholding such plans and specifications could not have interfered with the buyer's inspection. It noted that the withheld plans and specifications did not mention if an asbestos-containing material was used in the construction of the building and that the only way to determine whether the building contained asbestos was to "inspect the premises." According to the Prudential court, the buyer did not claim that the seller had interfered with his inspection in any way. By this statement, the Prudential court recognized a distinction between an inspection of the property and an investigation of that property. The Prudential court noted that the buyer was asserting that the seller had interfered with its investigation of the property by withholding information about the property but that this assertion was not equivalent to an assertion that the seller had interfered with the buyer's inspection of the property. This distinction is consistent with the plain meaning of these words; "inspect" focuses on a careful physical examination, whereas "investigation" includes a physical examination as well as a gathering of information through research and study. In the absence of further guidance from the Texas Supreme Court, the court concluded that the ***Prudential*** court intended the second ***Prudential*** exception to apply to a seller's conduct that impairs, obstructs, or interferes with a buyer's inspection of the property being sold but not to conduct that impairs, obstructs, or interferes with a buyer's investigation of that property. Therefore, to trigger the impairment-of-inspection exception, the seller, by its conduct, must impair, obstruct, or interfere with the buyer's exercise of its contractual right to carefully view, observe, and physically examine the property. Conduct by the seller that impairs, obstructs, or interferes with the buyer's ability to obtain information regarding the property does not trigger this exception.

Almost all of the evidence cited by Warehouse Associates shows alleged fraudulent misrepresentations or nondisclosures of information by Celotex concerning the condition or prior use of the Property. As discussed above, even presuming the truth of all such evidence, this proof does not raise a fact issue as to Celotex's alleged impairment of Warehouse Associates's inspection of the Property. Warehouse Associates does not assert on appeal that Celotex impaired, obstructed, or interfered with its ability to carefully view, observe, and physically examine the Property. The summary-judgment evidence shows that Warehouse Associates and HBC had access to the Property and were free to take whatever soil and water samples they wanted to take for testing

Henderson* v. *Love, 181 S.W.3d 810 (Tex.App.—Texarkana 2005, no pet.). In 1999, Henderson agreed to purchase from a house in Avinger from Love under an executory contract of sale, also known as a contract for deed. At the time of the contract, neither the contract nor any law required an annual accounting statement by Love. In 2001, changes to Section 5.077 of the Texas Property Code became effective which required Love, beginning in January 2002, to provide Henderson with an annual report, briefing her on certain financial details of the contract and imposing "liquidated damages" of $250.00 per day after January 31 for each year such report was not provided. Apparently, Love failed to provide such a report. In 2004, Henderson sued Love and his co-owner, Sylvia Allison, alleging they were "jointly and severely [sic]" liable for the daily "liquidated damages" because of that failure. The trial court determined that, as applied in this case, the section was unconstitutional. The court of appeals reversed the summary judgment and remand this case for further proceedings holding that Section 5.077 of the Texas Property Code is not unconstitutional as properly applied, given that Chapter 41 of the Texas Civil Practice and Remedies Code also applies, conditioning and limiting the potential recovery under Section 5.077.

Marker* v. *Garcia, 185 S.W.3d 21 (Tex.App.—San Antonio 2005, no pet.). Marker sold the Garcias a 3 acre lot under a contract for deed. Section 5.077 of the Texas Property Code requires the seller under a contract for deed to provide the purchaser with an annual accounting statement containing: (1) the amount paid; (2) the amount owed; (3) the number of payments remaining; (4) the amount paid to taxing authorities on the purchaser's behalf if collected by the seller; (5) the amounts paid to insure the property on the purchaser's behalf if collected by the seller; (6) if the property has been damaged and the seller has received insurance proceeds, an accounting of the proceeds applied to the property; and (7) if the seller has changed insurance coverage, a legible copy of the current policy or binder. Under the terms of the Contract for Deed, the Garcias were responsible for taxes and insurance, so the only information Marker would have been required to provide was the amount paid, amount owed, and number of payments remaining. A seller who fails to provide the annual statement is liable to the purchaser for "liquidated damages in the amount of $250 a day for each day after January 31 that the seller fails to provide the purchaser with the statement" and "reasonable attorneys' fees." In their motion for summary judgment, the Garcias calculated the amount of the liquidated damages to the date of their motion as totaling $584,000.00. The purchase price under the contract for deed was just over $20,000.

Section 5.077 applies to a transaction involving an executory contract for conveyance of real property only if the property is "used or to be used" as the purchaser's residence or as the residence of a person related to the purchaser within the second degree of consanguinity or affinity. Marker asserts that the Garcias were not entitled to recover the liquidated damages because the Property was not used or to be used as the Garcias' residence.

In this case, the Garcias didn't use the land for their residence, but they claimed an intent to use the property as their residence within three years. Although no evidence was presented of any actions taken to further this intent other than the construction of a fence, the Garcias had finished paying for the land only four months before the hearing on the motions for summary judgment.

The statutory phrase "used or to be used" is broad language. By its express terms, the language of the statute encompasses real property which is presently being used as the purchaser's residence as well as real property which will be so used in the future. Thus, the language clearly encompasses executory contracts for the sale of real property which the purchaser may use as a residence in the future.

Reviewing the legislative intent, the court was convinced that this case does not present the type of situation that the Legislature intended to remedy in adopting the statutory provisions relating to executory contracts for deed, including the strict liquidated damages provision contained in section 5.077. Furthermore, given the circumstances presented, the court acknowledged that the Garcias' simple statements of intent may be too weak to convince a jury that they intended to use the property as a residence even under the forward-looking "to be used" standard adopted by the Legislature. In the summary judgment context, however, the court is required to consider the evidence in the light most favorable to the non-movant, so the court held that a genuine issue of material fact has been raised about whether the property was "to be used" as the Garcias' residence.

PART X
BROKERS

BBQ Blues Texas, Ltd.* v. *Affiliated Business Brokers, Inc., 183 S.W.3d 543 (Tex.App.—Dallas 2006, pet. denied). The parties orally agreed that, if Affiliated found a buyer for BBQ Blues's business in Round Rock, BBQ Blues would pay it a commission equal to ten percent of the sales price. Affiliated introduced BBQ Blues to a group that ultimately purchased the business in for $335,000. As a part of the final purchase and sale agreement, the purchasers assumed the lease on the property where the restaurant was located. BBQ Blues refused to pay the ten percent commission and commenced a declaratory judgment action in Dallas County. BBQ Blues did not contest the fact that there had been an oral commission agreement but rather filed answers and counterclaims alleging that Affiliated's claims were barred by the statute of frauds provision of § 1101.806(c) of the Texas Occupations Code. Specifically, they asserted that the oral commission agreement between the parties included the sale or purchase of real estate.

Affiliated argued that the evidence presented at trial established that the oral commission agreement did not contemplate the transfer of real estate. Affiliated claimed that BBQ Blues and the purchaser of the restaurant worked out a transfer of the lease agreement between themselves and Affiliated had no control over the ultimate structure of that transaction. Affiliated claimed that the oral commission agreement was a finder's fee for bringing a willing buyer together with a willing seller and also observed that the business could have been sold without the transfer of the lease. Finally, they point out that this issue was clearly presented to the jury in Question 2, "Did a part of the agreement you have found include the transfer of the real estate lease for the restaurant in Round Rock, Texas?" To which the jury answered "No."

The court held that there were two separate and distinct contracts in this case: (1) the oral commission agreement between Affiliated and BBQ Blues which called for a ten percent commission to be paid to Affiliated if they found a buyer for the restaurant and (2) the sales contract between the buyer and the seller of the restaurant. Regardless of the terms of the final contract between the buyer and seller of the restaurant, the jury found that BBQ Blues breached the oral commission agreement and that the oral commission agreement did not involve the transfer of the real estate lease in Round Rock, Texas. There is more than a scintilla of evidence to support this finding.

PART XI
TITLE INSURANCE
AND ESCROW AGENTS

Holder-McDonald* v. *Chicago Title Insurance Company, 188 S.W.3d 244 (Tex.App.—Dallas 2006, pet. denied). When Barbara and Michael bought their house, Chicago Title acted as escrow agent and as title insurer. Chicago Title prepared a title commitment, including a legal description of the metes and bounds of the property being purchased. The title examiner identified three different tracts as part of the property. Tract 1 was a fee simple tract on which the house and a barn were located. Tracts 2 and 3 were described as easement estates.

Tract 2 was identified as an easement running from the northwest side of tract 1 to a public roadway known as Wimbledon Court. The address of the house was listed as 4 Wimbledon Court, and the tract 2 easement was the only part of the property described in the title commitment that connected the house to Wimbledon Court. There was no driveway or other form of access on the easement, however. Instead, the house was accessed from Wimbledon Court by use of a neighbor's driveway. The McDonalds knew at the time they purchased the property that use of the neighbor's driveway was an at-will courtesy and their purchase of the property did not include any rights to the neighbor's driveway.

Tract 3 was described as an easement running from the southeast side of the property to another neighbor's driveway. This second driveway ran to a different public roadway and was accessible from tract 1 only by crossing a creek or using a narrow footbridge across the creek.

Barbara and Michael refinanced the house three times, each time using the same closer and escrow agent at Chicago Title. Eventually, they ran into financial problems and their lender foreclosed.

Approximately two weeks before the foreclosure, the McDonalds learned there was a problem with the tract 2 easement. It was discovered that the easement had expired by its own terms many years before the McDonalds purchased the property. Because the easement no longer existed, the McDonalds' property did not include a legal right of access to and from Wimbledon Court. The property was sold at the foreclosure sale as scheduled. No deficiency was taken against the McDonalds as a result of the foreclosure. The McDonalds conceded they never discussed the expiration of the easement with Chicago Title before the foreclosure.

After the foreclosure, the lender made a claim against Chicago Title under its mortgagee's title insurance policy based on Chicago Title's mistaken representation that the property included an easement to Wimbledon Court. Chicago Title resolved the lender's claim by purchasing an easement across the neighbor's driveway to Wimbledon Court. Although the McDonalds no longer owned the property, they filed suit against various parties, including Chicago Title, alleging various claims. These included negligent misrepresentation, breach of fiduciary duty, breach of contract, and violations of the Texas Deceptive Trade Practices Act. All of the McDonalds' claims were based on the company's representation that the subject property included an easement to Wimbledon Court. According to the McDonalds, but for that representation, they would not have purchased the property.

The trial court granted a directed verdict to Chicago Title on the claims of breach of fiduciary duty. On the remaining claims, the jury found that Chicago Title had made a negligent misrepresentation but that it had not breached its contract with the McDonalds nor violated the DTPA. The jury awarded the McDonalds $4,658.83 in damages resulting from the misrepresentation. The jury further found, however, that Chicago Title did not act with malice and the misrepresentation did not cause any difference in the value of the property to the McDonalds compared to the price the McDonalds paid for it.

The McDonalds contended the trial court erred in granting a directed verdict on their claim for breach of fiduciary duty. Any fiduciary duties Chicago Title owed to the McDonalds were not owed in its capacity as title insurer. Rather, the fiduciary duties owed by Chicago Title arose solely out of its employee's role as escrow agent and closer for the purchase of the property. An escrow agent owes fiduciary duties to both the buyers and the sellers of the property, including the duty of loyalty, the duty to make full disclosure, and the duty to exercise a high degree of care to conserve the money placed in escrow and pay it only to those persons entitled to receive it. But these duties are strictly limited to the agent's role as escrow agent.

The McDonalds asserted that Chicago Title breached its fiduciary duties to them when it attached an incorrect legal description of the property to the closing documents. The McDonalds argued that attaching an incorrect legal description constituted a breach of fiduciary duty because it violated the mortgage loan closing instructions that defined Chicago Titles' obligations as escrow agent. The McDonalds relied heavily on one portion of the loan closing instructions which required the escrow agent to attach the correct legal description, as ascertained by the title company, to the documents. The court held that the escrow agent's sole responsibility under the subsection is to obtain the correct legal description, as determined by the title company, and attach a legible copy to all the legal documents referencing the description. To conclude otherwise would convert the contractual obligation of the title company to indemnify its insured into a fiduciary duty of the escrow agent. The escrow agent would, in essence, become a second title insurer with unlimited liability.

The McDonalds further contended Chicago Title breached its fiduciary duty as escrow agent by preparing and presenting them with an affidavit signed by the sellers stating that they did not know of any other person claiming any part of the property under any color of title. Attached to the affidavit was a legal description of the property that set out the metes and bounds of the three tracts. Missing from the legal description was the portion stating that only tract 1 was owned in fee simple. The evidence shows the affidavit was prepared by Chicago Title as part of its issuance of the title insurance policy, not as part of its duties as escrow agent at the closing. Accordingly, Chicago Title could not have breached a fiduciary duty to the McDonalds through its preparation of the affidavit.

The remaining claims against Chicago Title were negligent misrepresentation, violations of the DTPA, and breach of contract. Unlike the claim for breach of fiduciary duty, these claims were not directed at Chicago Title's actions as escrow agent. The sole claim upon which the jury found Chicago Title liable to the McDonalds was their claim for negligent misrepresentation. In their second issue on appeal, the McDonalds challenge the jury's award of damages arising from the misrepresentation. The jury instructions gave the jury two measures of damages: the difference, if any, between the value of the property received in the transaction and the purchase price given, and the pecuniary loss, if any, otherwise suffered as a consequence of the McDonalds' reliance on the misrepresentation. In response to the query about the difference in value, the jury answered there was no difference between the value of the property to the McDonalds and the purchase price they paid. The jury further found, however, that the McDonalds suffered $4,658.83 in pecuniary loss as a result of the misrepresentation. The McDonalds moved for a new trial arguing that the jury's findings on misrepresentation damages were insufficient and against the overwhelming weight of the evidence.

At trial, the McDonalds presented the testimony of an appraiser who opined the value of the property without the easement to Wimbledon Court was $200,000 less than what the McDonalds paid for it. Weighing against this evidence, however, was the McDonalds' admission that they never attempted to use the easement during the time they lived on the property. Furthermore, the McDonalds were completely unaware the property did not include the easement until immediately before they lost the property to foreclosure. The absence of the easement did not contribute to either the McDonalds' failure to make their mortgage payments or their inability to sell the property. At the foreclosure, no deficiency resulted from the fact that there was no easement to Wimbledon Court. Because the absence of the easement never impacted the value of the property to the McDonalds, the court concluded the jury's finding of no damages arising from a difference in value is not against the great weight of the evidence.

Finally, the McDonalds complained that there is an irreconcilable conflict between the jury's finding that Chicago Title made a negligent misrepresentation and its failure to find that Chicago Title violated the DTPA. The material fact the McDonalds allege is central to both their negligent misrepresentation claim and their claim for violations of the DTPA is Chicago Title's erroneous statement that the property they purchased included an easement to Wimbledon Court. The jury instruction on negligent representation generally states that a negligent misrepresentation occurs when a party in the course of business supplies false information for the guidance of others and the party did not exercise reasonable care or competence in obtaining or communicating the information. Based on that definition, the jury concluded Chicago Title had made a negligent misrepresentation. The jury question on the DTPA claim asks if Chicago Title engaged in any unfair, false, misleading, or deceptive act or practice.

The agreement between the McDonalds and Chicago Title was the title insurance policy. The services Chicago Title was to render the McDonalds under the policy were title defense and indemnification. Given these instructions, the jury could reasonably conclude that the sole transaction relevant to this question was the McDonalds' purchase of the title insurance policy, not their purchase of the underlying property. There is no evidence in the record that Chicago Title made any misrepresentations about its insurance policy or the services to be provided thereunder. To the extent the erroneous title description formed a part of the insuring agreement, the policy specifically states that the agreement is not intended to be an opinion or report on the title being covered, but is merely a contract of indemnity entitling the insured to payment or other action for a loss resulting from a covered risk. The McDonalds never made a claim under the policy, and when a claim was made by the lender, Chicago Title resolved its obligations under the policy by purchasing an easement from the property to Wimbledon Court.

Home Loan Company* v. *Texas American Title Company, 191 S.W.3d 728 (Tex.App.—Houston [14th Dist.] 2006, no pet.). TATCO acted as settlement agent for the closing of a residential mortgage loan funded by Home Loan. After Home Loan sold the loan in the secondary market, no payments were made on it, and Home Loan was obligated to repurchase it. Home Loan filed suit against TATCO alleging that TATCO breached fiduciary duties it owed Home Loan by failing to inform Home Loan that the seller had requested over half of the seller's proceeds to be paid to the mortgage loan broker, by failing to inform Home Loan that the seller had requested that those proceeds be paid to the principal of the mortgage loan broker and that TATCO would comply with this request; and by failing to accurately disclose on the HUD-1 settlement statement how the proceeds would be or had been disbursed.

TATCO's asserted that its duties to Home Loan were limited to carrying out the terms of the real estate contract and escrow agreement and disclosing any actual knowledge of a scheme to defraud Home Loan. TATCO contends that it therefore had no duty to disclose the seller's funding requests to Home Loan because TATCO was required to remain strictly impartial and not favor the interest of any party to a closing over that of another; because an escrow agent has no obligation to police the affairs of the participants or report suspicious circumstances unless it has actual knowledge of a scheme to defraud; and because the request that payment be sent to Texas State Mortgage Brokers, Inc. and the actual disbursement of the escrow funds to Kruichak occurred after the loan was funded by Home Loan, and, thus, there is no evidence that TATCO's actions caused Home Loan any damage.

Even where, as in this case, no formal escrow agreement has been entered into, a title company that accepts funds for disbursement in a closing transaction for a fee owes the party remitting those funds a duty of loyalty, a duty to make full disclosure, and a duty to exercise a high degree of care to conserve the money and pay it only to those persons who are entitled to receive it.

Ordinarily, a fiduciary duty of full disclosure requires disclosure of all material facts known to the fiduciary that might affect the rights of the person to whom the duty is owed. However, there is variation among the states regarding the extent to which any such disclosure duty applies to escrow agents. Under the Restatement (Second) of Agency § 14 and in at least one state, an escrow holder's duties are limited to the safekeeping of the escrow property and its delivery or return to the appropriate party, as the case may be, in accordance with the agreement; and, thus, entail no duty of disclosure whatever unless specified by the agreement. In at least two other states, an escrow agent has no duty to disclose unless it has actual knowledge of clear evidence of fraud. A further variation followed in at least two other states is that, although not required to investigate, an escrow agent has a duty to disclose facts that a reasonable escrow agent would perceive as evidence of fraud. Finally, at least two other jurisdictions prescribe that an escrow agent owes a duty to disclose all matters coming to the agent's notice or knowledge concerning the subject of the agency that are material for the principal to know for his protection or guidance.

In seeking to establish that Texas law limits its duty of disclosure to facts involving known fraud, TATCO first relied on ***City of Forth Worth* v. *Pippen***, 439 S.W.2d 660 (Tex.1969), in which a settlement agent was found to have breached its fiduciary duties for failing to disclose a fraudulent misapplication of funds. However, because ***Pippen*** involved only a fraudulent misapplication of funds, it gives no express guidance concerning a duty of disclosure in any other context.

TATCO argued that ***Pippen*** must nevertheless be read as limiting the duty of disclosure because it also recognizes a duty of loyalty to each party in the escrow transaction, which, in turn, requires the escrow agent to remain neutral and thereby precludes it from disclosing to one party any information obtained from another if the disclosure could work to the detriment of the party from whom it was obtained. However, the duty of loyalty is mentioned in ***Pippen*** only once without any elaboration, and the opinion contains no indication whatever of any duty of neutrality, loyalty, or otherwise to any party other than the one remitting the settlement funds and paying the settlement agent's fee, much less that the agent's duty of disclosure was in any way affected by any such duties to others.

Neither ***Pippin*** or TATCO's other authorities nor any other Texas decision has directly addressed any limitation on the scope of an escrow or other settlement agent's fiduciary duty of disclosure. Nor would there be any rationale for limiting such an agent's fiduciary duties to only those set forth in a written contract because fiduciary duties arise as a matter of law, not contract, they exist in special relationships in which a high degree of trust warrants that the fiduciary's conduct be measured by higher standards than ordinary contractual dealings between parties and that those standards not be whittled down by exceptions, and contracts between fiduciaries and those to whom they owe a fiduciary duty carry a presumption of unfairness.

Lastly, TATCO urged that subjecting escrow agents to the same duty of disclosure as other fiduciaries would allow participants in failed real estate transactions to shift their losses to title companies for not disclosing information concerning the merits of the underlying transaction (such as market factors affecting the value of property, terms at which financing could have been obtained, and the like) that could have alerted a party to abandon the transaction in time to avoid the loss. However, this contention failed to recognize that a fiduciary's duties do not extend beyond the scope of the fiduciary relationship. To the extent an escrow agent is employed only to close a transaction in accordance with a contract that has already been entered into by the parties, it is not apparent how the agent's duty of disclosure could extend beyond matters affecting the parties' rights in the closing process to those concerning the merits of the underlying transaction.

In summary, contrary to TATCO's position, no Texas court (and particularly not the Texas Supreme Court) has even directly addressed, let alone affirmatively adopted, a limitation on the fiduciary duty of disclosure applicable to an escrow agent. Although courts that have addressed this issue in other states have varied in their approach, none of those decisions is binding on this court, and, regardless which of their reasoning this court might find persuasive, and it is not within this court's province as an intermediate appellate court to select the law our State will follow. Accordingly, because TATCO's motion for summary judgment did not establish that its asserted limitation on an escrow agent's (or other settlement agent's) fiduciary duty of disclosure has been adopted under Texas law, the court sustained Home Loan's challenge to that portion of the summary judgment.

Turning to Home Loan's motion for summary judgment on the fiduciary duty of disclosure, the evidence necessary to support that motion would, at a minimum, have to prove conclusively that a disclosure of the seller's request for payment to the mortgage broker was material to Home Loan's rights in the closing phase of the transaction.

Home Loan contended that, had TATCO advised it of the seller's requests to divert the loan proceeds to the mortgage broker or its principal, Home Loan could have withheld or withdrawn approval and/or funding of the loan and thereby avoided the loss it incurred on the loan's default. TATCO's motion for summary judgment asserted that Home Loan suffered no loss from the disbursement because Home Loan had already funded the loan before TATCO received or complied with the request to disburse the proceeds to Kruichak.

In a formal escrow arrangement, the deposit of funds by Home Loan would have been irrevocable, pending satisfaction of the conditions for disbursement. The parties' summary judgment materials did not address whether an escrow or other settlement agent's payment, at a seller's request, to a third party for the benefit of the seller is the legal equivalent of a payment to the seller, and thus a person entitled to receive payment, such that the payment would have complied with the conditions for disbursement. If such a payment did so comply, and if Home Loan's deposit of the loan funds, and their disbursement, was irrevocable, then Home Loan would have had no recourse to prevent the disbursement. Under those circumstances, it is not apparent how Home Loan's loss would have been caused by TATCO's disbursement of the funds according to the terms Home Loan had agreed to and could not alter after it deposited the funds. Moreover, because the underlying loan transaction was a sham, Home Loan would have suffered the resulting loss on it even if TATCO had disbursed the funds to the seller expressly named in the HUD-1.

However, because the summary judgment materials did not establish any of the foregoing legal or factual considerations, summary judgment could not properly be granted with regard to TATCO's contention of lack of damage. Therefore, the court sustained Home Loan's challenge to that aspect of the summary judgment.

PART XII
ADVERSE POSSESSION

Bernal* v. *Chavez, 198 S.W.3d 15 (Tex.App.—El Paso 2006, no pet.). In 1983, Esther and her husband Ricardo moved a mobile home onto a parcel of land in Pecos County. The land was a gift from Ricardo's parents, but no deed was ever executed. Esther and Ricardo established electric service in 1983. In addition to making improvements to the mobile home, they also made improvements to the real property, including fencing and landscaping. When Esther and Ricardo divorced in 1996, Esther was awarded the mobile home and this property that it was situated on. Esther paid the property taxes until 1996 when the statements stopped coming to her. With the exception of a six month period when she lived in Del Rio, Esther and her children lived continuously on the property. Even during that period of time, Esther returned to the property on weekends.

Manuela lived in a nearby house. She had known Esther since 1992 and was aware that she lived on the property. In 1996, Esther's former in-laws, conveyed the property in question to their daughter Adel as a gift. On January 13, 1998, Adel deeded the property to Manuela and Manuela began paying the property taxes.

Esther lived on the property without objection until 2000, when an attorney sent her a "notice of eviction" letter informing her that Manuela owned the property. The letter demanded that she remove the mobile home and vacate the property within three days. Esther ignored the letter and continued to live on the property. No further action was taken to evict Esther until 2004.

In 2002, Manuela sold the property to the Bernals and entered into a contract for deed. When Maria told Esther sometime in 2002 that she was buying the property, Esther responded that she owned the land. In 2004, Esther filed a trespass to try title suit alleging that she had acquired the property by adverse possession. The court concluded that Esther had lawful title to and possession of the property and that she had met her burden of proof under Texas Civil Practice and Remedies Code § 16.026. Consequently, the court entered judgment awarding Esther title and possession of the property and attorney's fees.

The Bernals contended that the evidence was legally and factually insufficient to establish hostility because Esther's initial entry was permissive and she did not give the record owner notice of the claim until 2000 when she ignored the eviction notice. Adverse possession is "an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." Texas Civil Practice and Remedies Code § 16.021(1). The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property.

The Bernals relied on the rule providing that use of another individual's land with the acquiescence of the landowner does not ripen into adverse possession unless the evidence shows that the landowner was given notice of the adverse possession claim. In other words, possession of land by adverse claimants who began their entry upon the disputed land with the acquiescence of the record owner cannot establish adverse possession unless or until they give notice of the hostile nature of their possession.

Esther testified repeatedly that her former father-in-law made a parol gift of the land and she expressly denied that she merely had permissive use of the property. The court found that this was supported by the evidence and upheld the award of title to Esther.

In another issue, the Bernals argued that the trial court erred in awarding attorney's fees to Esther. Attorney's fees are allowed in adverse possession cases "if the prevailing party recovers possession of the property from a person unlawfully in actual possession." To recover attorney's fees, the person seeking possession must give a written demand for that person to vacate the premises at least ten days before filing the claim for recovery of possession. The court held that Section 16.034 was inapplicable here.

Cullins* v. *Foster, 171 S.W.3d 521 (Tex.App.-Houston [14th Dist.] 2005, pet. denied). In 1995, the Cullinses purchased an acre of land from Billie Foster, Foster's stepmother. According to the legal description attached to the deed, the property has boundaries of approximately 186 feet on the north and south, and approximately 233 feet on the east and west. At the time of the sale, Billie Foster owned the property immediately to the east. A chain link fence ran parallel and to the east of the property the Cullinses purchased, cutting across the Cullinses' property at the southeast corner. The fence apparently connected with fences to the north and south of the purchased property. The Cullinses claim that, at the time of sale, they believed they were purchasing all of the property contained within the fences.

A month after acquiring the land, Ross Cullins was digging postholes to straighten the fence line at the southeast corner. After Foster informed Cullins that Cullins did not own the property, he ceased digging. Later, the Cullinses asked Billie Foster to execute a corrected deed, which would have extended the Cullinses' eastern boundary to the fence line. She declined to do so.

The land between the Cullinses' eastern boundary and the fence (i.e., the "disputed property") contained a grove of pine trees, cultivated by Foster's father. From 1995 until 2002, the Cullinses used the area and placed a barbecue and trailer for their lawn mower there. In 2002, the Cullinses began removing the pine trees, a process which continued from about April 21 until May 16. On May 16, 2002, Foster destroyed part of the fence; and on May 24, 2002, allegedly staked out a new line. This lawsuit followed shortly after that. The Cullinses asserted multiple causes of action, including a claim to the property by adverse possession, mistake, and trespass. They sought unspecified actual and consequential damages and declaratory and injunctive relief. Foster counterclaimed, alleging trespass to try title, trespass, conversion, and a claim for wrongful harvesting of timber under Natural Resources Code § 151.051,and sought judgment for title to, and possession of, the disputed area, monetary damages, attorney's fees, and injunctive relief

Shortly after the lawsuit was filed, Billie Foster executed a warranty deed granting Foster the tract of land immediately east of the Cullinses' property. The deed had an "effective" date of April 29, 1996. Billie Foster testified she sold Foster the property in November 1995 for $6,000. Billie Foster also recalled that the payments were due on a monthly basis, but did not recall how much Foster paid or how many months he paid. She recalled the purchase price had been paid in full around April 1996. She did not have a written agreement with Foster to sell the property until the first part of 2002. Foster testified he paid "around $250.00 a month" for the property until it was paid off. He could not recall the purchase price or how many payments he made. He testified he made payments until he "got it paid off. I'm not sure how the math works out on that." In his affidavit, Foster attested, "On or about April 29, 1996, Mrs. Billie Foster sold the eastern tract to me. Since that time, I have been the owner in fee simple of that portion of the property."

Foster moved for summary judgment on his counterclaims and against the Cullinses on their claims. Regarding the Cullinses' adverse possession claim, he argued the Cullinses had not paid property taxes and did not obtain the property under a duly registered deed. Regarding the claim of mistake, he argued the cause of action did not apply to unilateral mistake and was barred by limitations. Regarding trespass and declaratory judgment, he argued he conclusively proved the Cullinses had no right to the disputed area via deed or adverse possession. In relation to his counterclaims, Foster complained about the Cullinses' use of the land and their cutting the trees. He also asserted his ownership of the property by virtue of the June 5, 2002 deed. In support of his motion, Foster provided the following documents: (1) the November 6, 1995 warranty deed from Billie Foster to the Cullinses with the attached legal description; (2) a November 2, 1995 survey showing the fence line in relation to the area described by metes and bounds in the November 6, 1995 warranty deed; (3) a letter reflecting the Cullinses' 1996 request that Billie Foster execute a correction deed which would have included the property extending to the fence; (4) a letter indicating Billie Foster declined to execute a correction deed without additional consideration; (5) the June 5, 2002 deed; and (6) deposition testimony and affidavits relating to the sale and transfer of the property described in the June 5, 2002 deed.

The Cullinses responded to Foster's summary judgment motion and also moved for partial summary judgment against Foster on his counterclaims. They alleged that the June 5, 2002, deed was ineffective to vest ownership in Foster at the time of their injurious actions on the property. Foster responded, in part, that he had obtained equitable title to the disputed property when he completed all payments to Billie Foster.

The trial court granted summary judgment in favor of Foster "on all defensive issues" against the Cullinses and on Foster's counterclaims of trespass, trespass to try title, conversion, and violation of Texas Natural Resources Code.

On appeal, the Cullinses first complained that summary judgment was not proper because Foster failed to move for summary judgment on their claim under the 10-year adverse possession statute. They lost this argument because they had failed to plead a claim under the 10-year statute – all they pled was the 5-year statute.

Next, they claimed that summary judgment was improper on their claim under the 5-year statute of limitations. To establish a claim of adverse possession under the five-year statute, a party must claim the property under a duly registered deed. It is also necessary for the land described in the deed to coincide with the land held in possession. The evidence was pretty conclusive that the property described in the Cullinses' deed did not coincide with or include the property they were claiming under the 5-year statute.

The Cullinses lost on their claims of mistake as well. They sought reformation of their deed based on mistake; however, they brought their claim after the four-year statute of limitations for bringing such an action. Furthermore, reformation is available only for mutual mistakes, not for unilateral mistakes such as this one.

Finally, Cullinses argued that the trial court erred in granting Foster's motion for summary judgment on Foster's counterclaims for trespass to try title, trespass, conversion and violation of Natural Resources Code. To establish each of his counterclaims, Foster was required to establish title to, ownership of, or right of possession in, the disputed property. The Cullinses argue, in part, that the summary judgment proof established Foster did not obtain a valid interest in the property or a valid conveyance until the grantor executed and delivered the deed in June of 2002, after this lawsuit was filed.

A plaintiff in a trespass to try title suit may rely on a title acquired after the institution of suit, if he asserts such title by an amended pleading. By the time Foster filed his amended counterclaim on August 30, 2002, he had legal title to the property described in the June 5, 2002 deed.

By the June 5, 2002 deed, Billie Foster conveyed to Foster--with the exception of two tracts--a piece of land described by metes and bounds. The two excepted tracts were (1) the tract she had conveyed to the Cullinses, and (2) a tract Foster's father had previously bequeathed to Foster. Foster's summary judgment proof conclusively establishes Billie Foster did not convey the disputed property to the Cullinses. The disputed property is therefore included in the description of the property conveyed to Foster by the June 5, 2002 deed. The court thus held that Foster conclusively proved ownership of the disputed property as of June 5, 2002. Therefore, in his action for trespass to try title, he was entitled to title to, and possession of, the disputed area, as prayed for in his amended counterclaim.

PART XIII
EASEMENTS

Murphy* v. *Long, 170 S.W.3d 621 (Tex.App.—El Paso 2005, pet. denied). The Murphys and the Longs were friends. They contemplated buying property together and included a third couple, Rocky Beavers and Whit Watkins, in their plans. In 1997, the three couples purchased adjoining properties located outside of Fort Davis from The Nature Conservancy of Texas. TNC required them to agree to a "Conservation Easement" to ensure that the property would be retained predominantly in its natural and scenic condition. The easement required that roads were to be constructed in such a manner as to cause the least disturbance to the scenic beauty. The three couples also entered into a Reciprocal Easement Agreement for the right to use the road which ran from the highway across all three tracts of land to a common pen area. Initially, they operated the properties jointly and had access to some pens in a common area.

The Longs discussed with the Murphys

their need for a road easement from the common pens across the Murphy land to the Longs' future homesite. The Murphys agreed to grant a written easement similar to the Reciprocal Easement Agreement. The couples discussed several potential routes and eventually agreed upon one. They also agreed to share in the cost of building the road and continued maintenance based upon the pro rata use of the road. Based upon the site chosen by the Murphys for their home, their pro rata use of the road would have been 12 percent. The Longs had the 1.03 mile road constructed using native caliche, the same material used to build the Reciprocal Easement road. The Murphys paid 12 percent of the $10,000 it cost to construct the road based on the planned site of their home. When the Murphys later changed the location of their home site, they utilized a greater percentage of the road but did not pay the Longs any additional money. The Longs specifically relied upon the Murphys' promises to grant them a written easement and to pay their pro rata share of the road costs.

After the road was built, the Longs received written notification from TNC that the road violated the Conservation Easement. TNC's primary objection was the color of the road. Mr. Long notified Mr. Murphy of the objection. A few weeks later, the Longs submitted a written proposal to TNC to resolve the problem by reseeding the roadsides with native grasses and vegetation, and perhaps by coloring the road. The Longs subsequently built up the edges of the road and reseeded the berm edge of the roadway but did not change the color due to the substantial expense. TNC sent a letter to the Longs reflecting that it no longer had any objections to the road given the changes made. Nevertheless, the Murphys sent a letter to the Longs contending that they had agreed to the road easement based on the Longs' promise to obtain TNC approval of the road and that prior approval apparently had not been obtained. Their letter also referenced a dispute between the parties about how costs to maintain the road would be shared.

The disputes could not be resolved and the Longs ultimately filed suit alleging various tort and contract causes of action based on alleged agreements regarding the use of their properties.

The trial court awarded judgment to the Longs. It further declared that the Longs and their heirs, successors, and assigns were entitled to a road easement across the Murphy's land from the reciprocal easement to the Longs' home site.

In Issue One, the Murphys challenge the legal and factual sufficiency of the evidence to support the award of the road easement. The easement by estoppel is based on the jury's finding that the Longs substantially relied on the Murphy's promise to provide a written road easement and that their reliance was reasonably foreseeable.

The Murphys do not complain that the evidence does not support them. Instead, they focus on the absence of two findings which they claim are necessary to support the award, namely, that a written but unsigned easement existed at the time they promised to give the Longs an easement and that a vendor-vendee relationship existed between the parties.

Section 26.01 of the Texas Business and Commerce Code provides that a promise or agreement 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. Likewise, the Statute of Conveyances found in Section 5.021 of the Texas Property Code provides:

A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor's agent authorized in writing. The easement which the Murphys promised to grant is one which attaches to the land itself and passes with it, and thus, is an easement appurtenant to the land. As such, it is an interest in land which requires a writing to create or transfer. The Longs, however, rely on the doctrine of easement by estoppel, or estoppel in pais as it is sometimes called, to avoid the statutes of frauds and conveyances.

More than 125 years ago, the Supreme Court first articulated the rationale for the doctrine of easement by estoppel. ***Harrison & Co.* v. *Boring***, 44 Tex. 255, 267-68, 1875 WL 7685 (1875). The doctrine essentially holds that the owner of the alleged servient estate may be estopped to deny the existence of an easement by making representations that have been acted upon by the owner of the alleged dominant estate. It is grounded on the notion that justice forbids one to gainsay his own acts or assertions. Estoppel arises when one is not permitted to disavow his conduct which induced another to act detrimentally in reliance upon it.

Three elements are necessary to the creation of an easement by estoppel: (1) a representation, communicated, either by word or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication to his detriment.

Citing ***"Moore" Burger, Inc.* v. *Phillips Petroleum Co.***, 492 S.W.2d 934 (Tex.1972), the Murphys maintain that the jury's findings do not support the award of an easement by estoppel because the jury was not asked to--and did not--find that a written easement agreement existed at the time of the promise. Consequently, they argue that the Longs have failed to establish this exception to the statute of frauds. In ***"Moore" Burger*** the Supreme Court held for the plaintiff in finding that a promise to sign an instrument which complied with the statute of frauds allowed recovery under the promissory estoppel doctrine. The Supreme Court followed ***"Moore" Burger*** in ***Nagle* v. *Nagle***, 633 S.W.2d 796 (Tex.1982), holding that the failure to obtain a jury finding that the defendant promised to sign an instrument which complied with the statute of frauds precluded the plaintiff's recovery under the promissory estoppel doctrine. The rule developed in ***"Moore" Burger*** and Nagle has been applied in various contexts, but it has not been applied to a case involving easement by estoppel.

In ***"Moore" Burger***, the agreement at issue had numerous essential elements. In the absence of a written agreement, one or more of those elements would have to be established by parol evidence. Thus, ***"Moore" Burger*** imposed the requirement that the written agreement containing all of these elements be in existence at the time of the promise to sign. An agreement to provide a road easement is distinguishable from the agreements in the cases relied on by the Murphys. If a party agrees to provide another with an easement for a particular purpose, there are no other required elements which would have to be supplied by parol evidence. The Murphys complain that the agreement is incomplete because the parties did not reach an agreement with respect to the width of the easement, but that is not an element which would have to be supplied by parol evidence. It is a well settled rule that where the grant does not state the width of the right-of-way created, the grantee is entitled to a suitable and convenient way sufficient to afford ingress and egress to the owner of the dominant estate. What is suitable depends on the purpose of the easement. If the grant states merely the object for which the easement is granted, dimensions which are reasonably sufficient for that purpose must be inferred.

The Murphys also allege that the Longs were required to prove the existence of a vendor-vendee relationship in order to establish an easement by estoppel. The Austin Court of Appeals has held that a vendor-vendee relationship is required to establish an easement by estoppel. Although the case relied upon by the Austin Court acknowledges that applying the doctrine of easement by estoppel outside of the vendor-vendee relationship is "rare and nebulous," the Austin Court of Appeals is the only court to hold that the doctrine never applies outside of the vendor-vendee relationship. This court refused to follow the Austin rule.

Betts* v. *Reed, 165 S.W.3d 862 (Tex.App.—Texarkana 2005, no pet.). Several witnesses testified the narrow gravel Tyson Road had been used by the public since at least the 1920s. At one time, several families used Tyson Road to access their homes. Permission was never sought from anyone, and there were no restrictions on who could use the road.

In 1964, Reed purchased 105 acres along Tyson Road, which is most of the property now accessible by that road. Initially, Reed paid taxes on only 103 acres because the county estimated that Tyson Road occupied the remainder of the acreage. However, the county's taxing authority started collecting taxes for the entire 105 acres eight to ten years ago. Reed uses his property primarily to graze cattle and to lease for deer hunting. Reed testified he has used Tyson Road continuously since 1964. He never asked permission to use the road. At some time, not shown by the record, a gate was erected across the road at some location, again not shown by the record, but apparently before reaching Reed's property.

Betts acquired her property along Tyson Road in 1990. She testified that she wanted to build a new house on the site of the road and that she had offered Reed an alternative route, which he refused to accept. Betts further testified she was aware before the acquisition of her property that Reed used Tyson Road.

Approximately one year before trial, Reed began to experience problems using the road. Although he had an alternative route through a neighbor's property to access his property, the alternative route was more difficult and much longer. Despite a temporary restraining order against Betts, the gate across the road was locked and debris was left on the road to inhibit its use.

Following a bench trial, the court found Tyson Road had been a public road that was abandoned for twenty years or more. The court further found that Reed had perfected a prescriptive easement. The court awarded Reed damages and attorney's fees in the amount of $6,250.00 to Reed and permanently enjoined Betts from interfering with Reed's use of the road and barred her from entry onto the road.

Legally and factually sufficient evidence supported the trial court's finding that Tyson Road had become a public road through implied dedication. Since the origin of the road is "shrouded in obscurity," the long and continuous use of the road by the public creates a presumption of dedication. No evidence was introduced to rebut this presumption.

The trial court found Tyson Road had been abandoned more than twenty years ago. If Tyson Road is a public road, Betts contends the road remains a public road because it is still being used for the same purpose for which it has been used in the past. The court agreed. A landowner cannot revoke the dedication or use the property contrary to the original purpose of the dedication once a dedication is accepted. Neither statutory abandonment nor common-law abandonment has been shown. Section 251.057 of the Transportation Code provides that a county road is abandoned when its use has become so infrequent that one or more adjoining property owners have enclosed the road with a fence continuously for at least 20 years. There was no evidence that the road had been enclosed for 20 years.

The evidence at trial does not support a finding of common-law abandonment, either. To show common-law abandonment, one must show intent to abandon and acts of relinquishment. Common-law abandonment occurs when the use for which property is dedicated becomes impossible, or so highly improbable as to be practically impossible, or where the object of the use for which the property is dedicated wholly fails. There was no evidence that the purpose of Tyson Road had become practically impossible or that the object of the use for which the property was dedicated has wholly failed. The purpose of a public road, particularly one of local character, is to provide access to property abutting upon it, as well as a thoroughfare between distant points. The court noted that the county ceased maintaining Tyson Road years ago. However, the county's failure to maintain a road does not establish common-law abandonment.

Gleason v. Taub, 180 S.W.3d 711 (Tex.App.—Ft. Worth 2005, pet. denied). The Gleasons claimed that Taub, trespassed on their property with a bulldozer, destroyed vegetation, and removed 16,000 cubic feet of dirt for use on another property where he was the construction manager. The affected part of the property is subject to a public drainage easement. They sued Taub for trespass claiming that Taub's actions damaged them by adversely affecting their visual enjoyment of the property and have shortened the life of their trees.

Taub argued that the Gleasons did not have standing to sue for trespass. He also filed a motion for summary judgment, arguing that he did not owe the Gleasons a duty to refrain from entering the property and removing dirt because the property was subject to a public easement. Taub also argued that, as a matter of law, he had a right to enter the easement and remove dirt and vegetation because his action improved the flow of water through the easement. The trial court granted both Taub's plea and motion.

A cause of action for injury to real property is a personal right that belongs solely to the owner of the property at the time the alleged injuries occurred. The granting of a public utility easement to the use and benefit of the public on a plat by the owner of a subdivision creates an easement in favor of the city, for the benefit of the public, with fee remaining in the owners and their successors in title. When an easement is dedicated to the public, possession and control of the surface are surrendered to the public, but ownership is not surrendered.

Taub argued that the Gleasons did not have standing to assert a claim for trespass or for damages to property within the public easement because the Gleasons are not the entity whose primary legal right has been breached. The land on which the trespass allegedly occurred is entirely within a public floodway, drainage, and utility easement. Taub contended that because a public easement is superior to the right of the individual who owns the fee, only the public--in this case, the City of Arlington--can bring a suit for trespass on the public easement.

The court said that it found no Texas cases holding that a fee owner lacks standing to sue a private party for trespass on private property that is subject to a public easement. Indeed, said the court, many cases resolve just such disputes with no discussion or even mention of standing.

Taub relied on ***Pak-Mor Manufacturing Co.* v. *Brown***, 364 S.W.2d 89 (Tex. App.--San Antonio 1962, writ ref'd n.r.e.), for the proposition that only the dominant tenant--in this case, the City of Arlington--has standing to sue for trespass to a public easement. In that case, Pak-Mor built a dike and a fence across a public drainage and roadway easement on its own property. The dike caused flooding on neighboring property. The neighboring landowners sued Pak-Mor for nuisance. The appellate court upheld the judgment of the trial court requiring Pak-Mor to remove the dike because it caused damage to the neighboring property. But the appellate court also held that the neighboring landowners lacked standing to complain about the fence. While Pak-Mor built the fence in the easement, it was entirely on Pak-Mor's property and did not cause damage to the adjacent land. At most, the fence interfered with the disused roadway--something only the city or State could complain about. From this holding, Taub jumped to the conclusion that only the city or State may ever sue for trespass on a public easement.

The court said that this case is distinguishable from ***Pak-Mor***. The key distinction is that ***Pak-Mor*** built its fence on its own property; Taub, on the other hand, entered on and removed dirt from the Gleason's property. Pak-Mor neither trespassed on nor damaged its neighbors' land; therefore, the neighbors had no standing to complain about the fence. But in this case Taub allegedly trespassed on and damaged the Gleason's property. The Gleasons, unlike Pak-Mor's neighbors, were directly affected by Taub's activity in the easement because they own the servient estate. Thus, ***Pak-Mor*** does not support Taub's standing argument. In this case the Gleasons are the owners of the underlying fee to the property that has directly been injured. Taub entered the Gleasons' property and removed dirt, allegedly damaging their property. The Gleasons have standing to sue because they own the property and their property rights have been aggrieved by the alleged wrong.

In his motion for summary judgment Taub claims that, as a matter of law (1) he owed the Gleasons no duty to refrain from entering the drainage and utility easement or removing dirt from the easement, and (2) he had a right to go into the area to improve the flow of water by moving dirt and removing vegetation because such actions are within the scope of the easement. The court did not agree.

In support of his claim that he owed no duty to the Gleasons, Taub cited ***Langston* v. *State***, 812 S.W.2d 406, 408 (Tex. App.--Houston [14th Dist.] 1991), aff'd 855 S.W.2d 718 (Tex. Crim. App. 1993), for the proposition that a person who is in a public easement does not commit a trespass against a private landowner adjoining the easement. The court in ***Langston*** did hold that protestors in the roadway easement outside of an abortion clinic were not guilty of criminal trespass, but it conditioned its holding by stating that it so held because the State had failed to prove that the clinic owned the servient estate where the easement was located. Id.

To succeed under ***Langston***, Taub needed to show conclusively that the Gleasons did not own the property where the alleged trespass took place. Taub's summary judgment evidence proves just the opposite: The Gleasons did own the property where the alleged trespass took place, subject to the City of Arlington's drainage and utilities easement. Because Taub has not conclusively disproved the Gleasons' ownership of the property, he has failed to show as a matter of law that he owed no duty to them.

Taub also claimed that as a matter of law he had a right to enter the easement and conduct activities within the scope of the easement, specifically, to improve drainage. In support of his motion for summary judgment, Taub presented the uncontroverted affidavit of a professional engineer and registered public surveyor, who stated that, in his opinion, the movement of dirt and vegetation improved the flow of water and drainage in the easement and that those actions did not exceed the "typical usages" that are made of floodway, drainage, and utility easements.

Taub relied on ***Peterson* v. *Barron***, 401 S.W.2d 680, 686 (Tex. Civ. App.--Dallas 1966, no writ), and ***City Public Service Board of San Antonio* v. *Karp***, 585 S.W.2d 838, 841-42 (Tex. Civ. App.--San Antonio 1979, no writ), for the proposition that a public drainage and utility easement may be altered in any way consistent with the scope and intent of the use of the public easement. Taub failed, however to consider important aspects of these two holdings. ***Peterson*** holds that the city has a right to alter and use a public drainage and utility easement in any method consistent with the easement's purpose. ***Karp*** holds that the easement may be used by the dominant tenant in a manner that is not inconsistent with the purpose for which it was created. In this case, Taub is neither the city nor the dominant tenant. The city or dominant tenant has an absolute right to alter the easement in a manner consistent with its purpose. Nothing in the law suggests Taub was exalted above the status of a rank trespasser merely because his activities on the Gleasons' property happened to be consistent with the public's easement.

PART XIV
RESTRICTIVE COVENANTS SUBDIVISIONS AND CONDOMINIUMS

Sloan* v. *Owners Association of Westfield, Inc., 167 S.W.3d 401 (Tex.App.—San Antonio 2005, no pet.). The Declaration provided that a lien is established to secure payment of assessed maintenance charges "together with all reasonable expenses, costs, and attorney's fees which may be incurred in connection with the collection thereof." The Sloans contended that because the Association had a contingent fee agreement with its counsel, the Association had not "incurred" any legal expenses for which the Sloans could be held accountable. However, in Texas, an attorney who provides legal services to a client under a contingent fee agreement has a contractual or quantum meruit claim against that client in the event of breach. Because the Association is liable to its counsel for services provided, even if provided on a contingent fee basis, and because the Association would be required to pay its counsel out of any proceeds received as a result of this litigation, the court concluded that the Association has "incurred" the legal fees that are secured by the lien in this case.

PART XV
HOMESTEAD

In re *Norris*, 413 F.3d 526 (5th Cir. 2005). In their bankruptcy, the Norrises claimed a 68-foot boat as their homestead. The boat includes four bedrooms, three bathrooms, a galley, and an upper and lower salon. In the bankruptcy, they listed a San Antonio street address, a business postal center, in the bankruptcy petition because they receive their mail there, rather than at the marina in Corpus Christi where his boat is moored. After selling his home in Lake McQueeney, Texas in 2000, Mr. Norris had taken up permanent residence on his boat.

The bankruptcy court denied the Norrises' claim for exemption, holding that the Texas homestead exemption, even broadly construed, does not include boats. The district court agreed that language in the Texas statutes addressing homesteads indicates that the legislature intended homesteads to include only estates in land and improvements affixed to land. The court concluded that structures unattached to land, such as a boat, even if used as a debtor's primary residence, are moveable chattels and do not fall within the definition of homestead under Texas law.

When a debtor selects state exemptions on filing a bankruptcy petition, the bankruptcy court must determine exemption rights according to state law. Article 16, §§ 50 and 51 of the Texas Constitution provides for a homestead exemption but does not define the term other than to limit a rural homestead to not more than two hundred acres of land with the improvements thereon and urban homesteads to not more than 10 acres together with improvements. Chapter 41 of the Texas Property Code expands on these definitions, somewhat, but they are essentially the same as the Constitution.

The Texas Tax Code, § 11.13, however, defines a homestead as a structure used as an individual's or family's residence, together with the land, if the structure and land have identical ownership.

In Texas, homesteads are "favorites of the law," so the court must give a liberal construction to the constitutional and statutory provisions that protect homestead exemptions. They must uphold and enforce the Texas homestead laws "even though in so doing we might unwittingly assist a dishonest debtor in wrongfully defeating his creditor." Historically, however, the purpose of the Texas homestead exemptions, both urban and rural, has been to protect not only the home, but also the property that enables the head of the household to support the family.

In ***Cullers* v. *James***, 66 Tex. 494, 1 S.W. 314 (Tex. 1886), the Texas Supreme Court stated that a house standing on land not owned or leased by a family is a chattel but may qualify as a homestead under the Texas constitution. Although this statement appears to endorse the debtors' argument that the homestead exemption includes personal property used as a home without regard to whether it is attached to or situated on land, such an argument was rejected by a Texas appellate court in ***Gann* v. *Montgomery***, 210 S.W.2d 255, 259 (Tex. Civ. App. -- Fort Worth 1948, writ ref'd n.r.e.), when it determined that mobile homes do not qualify for the homestead exemption without an accompanying interest in the real property to which they are affixed. The ***Gann*** court expressed doubt whether in Cullers the Supreme Court of Texas intended to expand the homestead exemption to include personal property not affixed to land and noted that ***Cullers*** only considered the homestead status of structures that were "without doubt a house, or a building of the kind and character which would uniformly have been declared to be a permanent fixture attached to the realty."

Several bankruptcy courts sitting in

other jurisdictions and applying the laws of other states have found in favor of debtors claiming homestead exemptions in boats on which they resided. Some of those courts have done so by relying on statutes that expressly allow for an exemption in personal property or mobile homes or similar dwellings. Others have relied on liberal construction of homestead exemption statutes, reasoning that, for example, boat dock slips are real estate to which debtors have a title, therefore entitling their houseboats to exemptions; that the primary question is not whether a home is affixed to land but whether, on the petition date, the debtor was using a boat as his only residence; or, in the case of the cab of a semi-tractor truck, a debtor's intent to use such a structure as his residence. In contrast, other courts have construed state statutes narrowly, as the bankruptcy and district courts did in this case, noting that the statute at issue did not include exemptions for personal property, waterborne vessels, or "mobile homes or similar dwellings."

Given this tension between, on the one hand, the above-quoted language in the Texas Constitution and Property Code and in other Texas Supreme Court opinions referring to the homestead estate as an estate in land, and, on the other hand, our duty to construe the Texas homestead exemption broadly and the novelty of the question presented, the Fifth Circuit was reluctant to be the first court to decide this public policy-bound state law issue. It asked Texas Supreme Court address and answer the following certified question:

> "Does a motorized waterborne vessel, used as a primary residence and otherwise fulfilling all of the requirements of a homestead except attachment to land, qualify for the homestead exemption under Article 16, §§ 50 and 51 of the Texas Constitution?"

In re *Jay*, 432 F.3d 323 (5th Cir. 2005). The Jays acquired title to an .85 acre tract sometime in 1984 and have since used the land to operate a service station and convenience store. The Jays also acquired title to a neighboring 1.04 acre plot, which was used only intermittently for business. The Jays have never resided on either parcel of land. In November 1999 the Jays entered into negotiations with Nesco to finance improvements on the .85 acre property. Nesco told the Jays that it would provide financing only if the Jays agreed to convey the property to Nesco. The Jays testified before the bankruptcy court that Nesco agreed to build a new facility that it would then lease back to them. The resulting Retail Store Lease ("Lease") was signed by the parties on December 15, 1999. The Lease provided, inter alia, that the term would begin on April 1, 2000, and run twenty years. The Lease also gave the Jays, as tenants, an option to repurchase both tracts at any time during the lease or upon its termination. The existing facilities were demolished in early January 2000, and on the 13th of that month, the Jays conveyed to Nesco title to the property by warranty deed. The new facilities were eventually completed, and the Jays opened the new service station. The Jays, however, never made any lease payments to Nesco as required under the terms of the lease. Nesco filed a forcible entry and detainer suit in state court to eject the Jays from the property. The Jays sought bankruptcy protection and removed the case to bankruptcy court.

The bankruptcy court held that the Jays owned a business homestead as defined under the Texas Constitution on the .85 acre tract. The court further held that the sale/leaseback arrangement was a "pretended sale" in violation of the Texas Constitution; that the deed to Nesco was void; that Nesco's mortgage lien on the property was void; and that Nesco possessed an unsecured claim for money Nesco had paid the Jays as an investment in inventory and working capital, which the court considered to be a simple loan.

Nesco raises three issues on appeal. First, Nesco contends that the bankruptcy and district courts erred in applying the business homestead requirements provided in the Texas Constitution prior to the 1999 amendment. Second, Nesco argues that the courts wrongly concluded that this was a "pretended sale" prohibited by the Texas Constitution. Finally, Nesco contests the courts' determination that Linc was not an innocent lienholder with rights to enforce the lien against the property.

Prior to November 1999, a property owner could establish a business homestead under the Texas Constitution if the property in question was used "as a place to exercise the calling of business." Property designated a homestead is granted certain protections, including exemption from forced sale for the payments of debts. This protection also voids all "pretended sales" of the homestead to avoid these constitutional restrictions. In November 1999, an amendment to the Constitution, approved by Texas voters, provided homestead protection only if the property "shall be used for the purposes of a home, or as both an urban home and a place to exercise a calling or business." On January 1, 2000, a provision of the Texas Property Code went into effect that expressly applied the newly amended definition to "all homesteads in this state whenever created."

Because the business dealings between the Jays and Nesco cross the operative dates for the amendment and the statute, the relevant question for purposes of this appeal is which homestead definition applies. The district court determined that the amendment to the Texas Constitution was passed after the creation of the Jays' homestead and thus did not affect their rights. Furthermore, under the district court's reasoning, the retroactivity of the amendment triggered by the Texas Property Code on January 1, 2000 did not matter in this case because the rights had vested on December 15, when the parties signed the lease agreement. Nesco offers several reasons that the amended definition of a business homestead should apply, thus stripping the .85 acre tract of its homestead protection. Nesco argues that the amendment is expressly retroactive, that the relevant transaction took place after the amendment to the Constitution, and that it was improper for the bankruptcy court to find that the execution of the warranty deed in mid-January related back to the lease date in December.

There is no need to consider the retroactivity of the constitutional amendment or the application of the statute because it was improper for the district court to "relate back" the execution of the warranty deed in January 2000, to the signing of the lease agreement in December 1999. It is a well-settled principle of Texas law that a deed takes effect from the date of its delivery. Those cases concerning deeds which allow relation back, however, refer only to a contract of sale between the parties. A lease does not constitute a contract of sale. The Lease between the Jays and Nesco did not trigger any duties for either party until April 1, 2000. The demolition of the buildings on the .85 acre tract did not begin until January 2000, and was not undertaken pursuant to any language in the Lease. The Jays deeded the land to Nesco on January 13, 2000, and it is improper to relate the date of the vesting of the rights back to December 1999. To expand the relation-back doctrine to include not only a contract for sale, but also all written instruments that allude to or reference a future transfer of property, would expand the principle so far as to undermine the clear rule regarding the execution of deeds.

Because the deed was executed in January of 2000, the amended definition of a business homestead is controlling. Since the Jays have never lived on the .85 acre tract, the land does not meet the requirement of a business homestead and is thus not due the special protection granted homesteads by the Texas Constitution.

PART XVI
CONSTRUCTION AND MECHANICS' LIENS

McKee* v. *Wilson, 174 S.W.3d 842 (Tex.App.—Waco 2005, no pet.). Since at least January, 2001, the McKees have lived in their home on Main Street in Waxahachie, Texas. In July, 2001, the McKees orally agreed to have Wilson help design and to build the entire shell of a Victorian-style home based in part on the television show "The Munsters." In October, 2001, a "New Home Contract" and a "Mechanic's Lien Contract" were signed by the McKees and Wilson. Construction of the Munster Home began in November, 2001.

During construction, problems arose between the McKees and Wilson regarding the work being done and alleged unauthorized bank draws. It is disputed whether Wilson walked off the project or whether the McKees told Wilson not to return to the project. Wilson ceased working on the Munster Home in February or March, 2002, at which time the shell was almost done except for the roofing and front door, which the McKees completed later. In July, 2002, the McKees sold their Main Street property and began living in the Munster Home. In October, 2002, Wilson filed a mechanic's lien against the McKee's Munster Home property asserting that the McKees owed him money. The trial court found this lien valid and ordered foreclosure to satisfy part of the judgment.

The McKees claimed that the lien on the Munster Home was invalid because it was their homestead.

A family is not entitled to two homesteads at the same time. A homestead once established is presumed to continue until there is proof it has been abandoned. To establish abandonment of a prior homestead, there must be evidence of an intent not to return to the previous homestead and an intent not to claim a homestead exemption on such property. Intention alone is not sufficient to constitute abandonment; overt acts of preparation consistent with such intention are required.

Where no homestead dedicated by actual occupancy exists, effect may be given to ownership, intention and preparation to use for a home; however, if a homestead already exists, it cannot be abandoned while actually being used as the home of a family and at the same time, acquire another homestead by intention at sometime in the future to use this other property as a homestead, even if there is preparation for such use.

To fix a lien on a homestead, a written contract is required between the owner and the builder. Here, the trial court found a valid statutory mechanic's lien. The McKee's only argument is that the mechanic's lien is invalid due to non-compliance with section 53.254 because they did not enter into a written agreement with Wilson. They argue that the court should look at the status of the property on the date the lien was filed, at which time the Munster Home property was the McKee's homestead. Wilson argues that the court should look at the date of the construction agreement to determine the status of the property. He argues that when they made an oral agreement for him to help design and build the shell of the Munster Home, the McKees were occupying their Main Street property as their homestead.

There was no evidence that the Munster Home property was the McKee's homestead prior to July, 2002, or that the McKees abandoned their Main Street property prior to July, 2002. There was also no evidence that the McKees actually occupied the Main Street property prior to July, 2002. A court must look at the time of the construction agreements to determine the homestead status of the Munster Home property. Here, the oral agreement was in July, 2001, and the written agreement was in October, 2001. At these times, the McKees had not abandoned their Main Street property and had not established the Munster Home property as their homestead. Thus, it is irrelevant whether Wilson complied with section 53.254 for purposes of the statutory mechanic's lien found in the judgment against the Munster Home property.

MG Building Materials, Ltd.* v. *Moses Lopez Custom Homes, Inc., 179 S.W.3d 51 (Tex.App.—San Antonio 2005, pet. denied). Mr. and Mrs. Gonzalez entered into a contract with Lopez to build a new house. The Gonzalezes then obtained interim financing from MG. In connection with the financing, they executed the typical set of residential construction loan documents, including a mechanics' lien contract with Lopez which was assigned by Lopez to MG. The operative wording of the assignment of the mechanics' lien contract was: "[Lopez] . . . has sold and conveyed, and does by these presents sell and convey to [MG] that certain Mechanic's Lien Contract . . . and the liens and security interests against the following described real property . . . together with all materials, supplies, equipment and fixtures incorporated and to be incorporated thereon whether located on the aforesaid real property or elsewhere, to secure the payment of all indebtedness owed under that certain Mechanic's Lien Note of even date herewith . . . and [Lopez] does hereby TRANSFER AND ASSIGN unto [MG] all of [Lopez's] rights, privileges and equities under and by virtue of the indebtedness, lien and the Mechanic's Lien Contract."

The construction loan was fully funded, although a portion relating to the last draw was placed in escrow with the title company. Unfortunately, because of their pending divorce, Mr. and Mrs. Gonzalez were unable to obtain a permanent loan, so they defaulted on the MG loan.

MG posted the house for foreclosure. In addition, Lopez filed an "Original Contractor Affidavit of Claim for Mechanic's Lien" in the amount of its final draw request. Lopez then filed suit and obtained a judgment foreclosing his claimed mechanics' lien. MG appealed from that final judgment claiming the trial court erred in foreclosing Lopez's mechanic's lien because the lien had been assigned to MG.

Lopez claimed that all he had assigned was the contractual lien set out in the Mechanic's Lien Contract. Lopez asserted that its foreclosure suit was based on a separate "statutory lien" that arose by operation of law and that was never assigned to MG.

The court noted that the plain language of the assignment conveys to MG: (1) the mechanic's lien contract between Lopez and Gonzales; (2) "liens and security interests" against the Gonzales home and "all materials, supplies, equipment and fixtures incorporated and to be incorporated thereon." The assignment further transfers and assigns to MG all of Lopez's "rights, privileges and equities under and by virtue of the indebtedness, lien and the Mechanic's Lien Contract." The words used in the assignment are broad in scope, encompassing "all materials, supplies and fixtures," "incorporated and to be incorporated," and "all of Contractor's rights, privileges and equities." Accordingly, the court held that the intent of the parties as expressed in the written assignment was to transfer and assign to MG all lien rights that Lopez possessed by virtue of its status as an original contractor for the Gonzales home.

The court further held that Lopez can not avoid the effect of this broad assignment by arguing that it only assigned the lien created by the mechanic's lien contract, and did not assign its right to assert a statutory lien under the pre-existing new home contract. In order to establish a statutory lien, Lopez had to prove it provided labor or materials under a contract with the owner. It is undisputed that both contracts at issue in this suit, the new home contract and the mechanic's lien contract, employed Lopez to construct the Gonzales residence. Both contracts involved the same new home construction, the same real property, the same contract price, and the same lien and indebtedness. When dealing with two documents comprising a single agreement, a court should read and construe them together. It is further undisputed that at the time Lopez executed the assignment of lien in favor of MG, no work had begun on the Gonzales construction. Therefore, the court concluded that when Lopez assigned to MG "all of Contractor's rights, privileges and equities under and by virtue of the indebtedness, lien and the Mechanic's Lien Contract," it intended to assign to MG whatever right it might have to assert a future lien claim associated with the construction of the Gonzales home, whether by virtue of the new home contract or the mechanic's lien contract. Accordingly, once it executed the assignment in favor of MG, Lopez no longer had the right to enforce a mechanic's or materialman's lien for its own benefit.

In re *Hall*, 2005 Tex. App. LEXIS 10438 (Tex.App.—Beaumont 2004, no pet.). The parties executed a "Residential Purchase Agreement" in February 2002 for the construction and purchase of a house. While the house was being built, the Bravenecs informed Hall of construction defects. In December 2002, the house was completed, closing occurred, and the Bravenecs began occupying the house. The Bravenecs then brought other construction defects to Hall's attention. The Bravenecs testified they discovered and told Hall about all the complaints prior to September 1, 2003. The Bravenecs also testified they made written complaints to Hall in October, November, and December 2003. Hall worked to correct some of the problems. The Bravenecs filed suit on July 26, 2004.

Effective September 1, 2003, the Texas Residential Construction Commission Act, Texas Property Code §§ 401.001-438.001, created a state commission to oversee the registration of homes, homebuilders, and remodelers, to administer a state-sponsored inspection and dispute resolution process, and to create limited statutory warranties and building and performance standards. The Act provides that before suit may be filed on any action for damages or other relief arising from a "construction defect," the homeowner or builder must comply with Subtitle D of the Act, which includes a state-sponsored inspection and dispute resolution process. Hall says the Bravenecs did not comply with the requirements of the Act's state-sponsored inspection and dispute resolution process. Hall argues the suit must therefore be dismissed.

The Bravenecs say the defects they complain of were discovered before September 1, 2003, and their suit does not fall under the Act. Pursuant to its rule-making authority, the Commission adopted the following rule, relating to the state-sponsored inspection and dispute resolution process:

> § 313.1. Purpose.
>
> (a) The state-sponsored inspection and dispute resolution process (SIRP) described in this chapter applies to a dispute that:
>
> (1) is between a homeowner and a builder;
>
> (2) arises from a transaction governed by the Act;
>
> (3) is a result of alleged construction defect(s) that were discovered on or after September 1, 2003[.]

The record contained uncontroverted testimony that the Bravenecs discovered the alleged defects and informed Hall of their existence prior to September 1, 2003. The SIRP process therefore does not apply to the claims asserted in this suit. The petition for writ of mandamus is denied.

Fondren Construction Co., Inc.* v. *Briarcliff Housing Development Associates, Inc., 196 S.W.3d 210 (Tex.App.—Houston [1st Dist.] 2006, no pet.). In January 1999, Westbrook Construction contracted with BHDA to perform services at the Briarcliff Apartments. John Deere, acting as surety, filed a payment bond covering the work to be performed under the contract. Around the same time, Lubkeman contracted with Westbrook, subject to Westbrook's contract with BHDA, to perform supervisory work in an individual capacity and to perform contracting work in his capacity as owner of Fondren Construction Company. Westbrook paid Fondren initially. At some point, Westbrook stopped work, and another contractor completed the work at Briarcliff. At the time, Westbrook owed additional amounts to Fondren. After Westbrook stopped work, Fondren alleges BHDA and DPMC promised full payment of the amounts due under the contracts with Westbrook. Fondren further contends this promise encouraged it to continue work on the property for BHDA and DPMC.

In February 2000, Lubkeman filed liens against the Briarcliff property on behalf of himself and Fondren. Lubkeman testified that none of the work he performed for which he demands payment occurred after he filed the liens. In October 2000, Lubkeman sued BHDA and Westbrook. In August 2003, he amended the petition, removing Westbrook as a party to the suit, adding DPMC and John Deere as parties, and adding a cause of action on the payment bond.

Fondren contends that the payment bond is not a valid defense to either John Deere's motion for summary judgment or DPMC and

BHDA's motion for judgment because the bond fails to comply with the requirements of the Property Code.

First, Fondren argues John Deere's bond does not prominently display contact information as Texas Property Code section 53.202(6) requires. John Deere issued the bond in this case in January 1999. The Legislature added subsection 6 to the statute in May 2001, and it did not take effect until September 1, 2001. The statutory contact information requirements did not exist when John Deere filed the bond; thus, no fact issue exists regarding John Deere's compliance with subsection 6.

Second, Fondren relies on section 53.202(1) of the Property Code, which requires that the penal sum of the bond be at least equal to the original contract amount. Because the penal sum sets the financial limits of the surety's obligations, it is the most material aspect of a payment bond. Here, Fondren sued John Deere on a payment bond it executed on January 11, 1999. The bond covers the contract entered into between Westbrook and Briarcliff on January 12, 1999. The original amount of the contract between Westbrook and Briarcliff is $4,224,485.00, and the amount of the payment bond issued by John Deere is $4,224,485.00--exactly equal to the amount of the contract. The contract and the bond are evidence that the bond is in a penal sum equal to the total of the original contract, and Fondren did not offer any controverting evidence. Thus, no fact issue exists regarding compliance with subsection 1 of the statute. The payment bond complied with the Property Code's requirement with respect to section 53.202(1).

As its sole ground for summary judgment, John Deere contends that Fondren cannot recover on the valid payment bond because Fondren failed to bring suit within the one year allowed by the Property Code.

An original contractor who has a written contract with the owner may furnish a bond for the benefit of claimants, such as subcontractors who are not paid for their work. The bond protects anyone with a claim perfected in a manner prescribed for fixing a lien under subchapter C of the Code. Section 53.052 allows a claimant to perfect a claim by filing an affidavit with the county clerk no later than the fifteenth day of the fourth month after the day on which the indebtedness accrues. Indebtedness to a subcontractor accrues on the last day of the last month in which the labor was performed or material furnished. A claimant may sue the surety on a bond "if his claim remains unpaid for 60 days after the claimant perfects the claim." If the bond is recorded at the time the lien is filed, the claimant must sue on the bond within one year following perfection of his claim.

Here, Fondren failed to sue on the bond within the statutorily allowed period. Fondren alleges that the work performed at Briarcliff ended in December 1999, and thus the indebtedness accrued on December 31, 1999. Fondren perfected its claim by filing affidavits with the county clerk on February 24, 2000, within the time allowed for perfection under the statute. John Deere recorded its bond on January 13, 1999; thus, Fondren had one year from February 24, 2000 to file suit on the bond. Fondren did not sue on the bond, or add John Deere as a party to the suit, until August 18, 2003, well after the time limit. Fondren argues that appellees conspired to withhold the existence of the bond despite his repeated request that they produce it. However, the bond was on file in the county records beginning January 13, 1999, before Fondren filed its liens. An instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument.

TA Operating Corporation* v. *Solar Applications Engineering, Inc., 191 S.W.3d 173 (Tex.App.—San Antonio 2006, pet. pending). Solar was the contractor building a multi-use truck stop for TA Operating. When everyone agreed that the project was substantially complete, TA sent Solar a punch list of items to be corrected or completed. Solar disputed several items on the list and delivered a response to TA listing the items Solar would correct, and listing the subcontractor responsible for each item. Solar began work on the punch list items and filed a lien affidavit against the project. TA understood the lien affidavit to be a request for final payment.

Shortly thereafter, TA sent notice to Solar that Solar was in default for not completing the punch list items, and for failing to keep the project free of liens. TA stated in the letter that Solar was not entitled to final payment until it completed the remainder of the punch list items and provided documentation that liens filed against the project had been paid. TA ultimately sent Solar a letter of termination citing Solar's failure to complete the punch list items as grounds for termination. In its reply letter, Solar disputed that the termination was for cause. Solar acknowledged at least two items on the punch list had not been completed, and submitted a final application for payment in the amount of the unpaid retainage. TA refused to make final payment, however, contending that Solar had not complied with section 14.07 of the contract, which expressly made submission of an all-bills-paid affidavit a condition precedent to final payment.

Although Solar did not comply with this condition precedent to final payment, Solar sued TA for breach of contract under the theory of substantial performance. Solar did not dispute that the liens existed, nor did it dispute that it was contractually obligated to submit an all-bills-paid affidavit as a condition precedent to final payment.

The first issue on appeal was whether the doctrine of substantial performance excuses the breach of an express condition precedent to final payment that is unrelated to completion of the building. TA acknowledged that Solar substantially performed its work on the project, but contends its duty to pay was not triggered until Solar pleaded or proved it provided TA with documentation of complete and legally effective releases or waivers of all liens filed against the project. TA argued that Solar's failure to plead or prove that it fulfilled this condition precedent to final payment barred its right to recover final payment. TA contended that when the parties have expressly conditioned final payment on submission of an all-bills-paid affidavit, the owner's duty to pay is not triggered until the contractor pleads or proves it complied with the condition precedent.

The issue of whether the doctrine of substantial performance applies in construction contracts when the submission of an all-bills-paid affidavit is an express condition precedent to final payment has not yet been decided by a Texas court.

While the common law did at one time require strict compliance with the terms of a contract, this rule has been modified for building or construction contracts by the doctrine of substantial performance. The rule of substantial performance is an equitable doctrine adopted to allow a contractor who has substantially completed a construction contract to sue on the contract rather than being relegated to a cause of action for quantum meruit.

The doctrine of substantial performance recognizes that the contractor has not completed construction, and therefore is in breach of the contract. Under the doctrine, however, the owner cannot use the contractor's failure to complete the work as an excuse for non-payment. Substantial performance is regarded as a condition precedent to a contractor's right to bring a lawsuit on the contract.

Solar argued that by agreeing substantial performance occurred, TA acknowledged that Solar was in "full compliance" with the contract and any express conditions to final payment did not have to be met. Solar argued that TA may not expressly provide for substantial performance in its contract and also insist on strict compliance with the conditions precedent to final payment.

The court disagreed. While the substantial performance doctrine permits contractors to sue under the contract, it does not ordinarily excuse the non-occurrence of an express condition precedent. The substantial performance doctrine ordinarily applies to constructive conditions precedent and not to express conditions precedent--substantial performance by the builder is a "constructive condition" of the owner's duty to pay.

TA, seeking protection from double liability and title problems, expressly conditioned final payment on Solar's submission of an all-bills-paid affidavit. Solar did not dispute that it was contractually obligated to submit the affidavit as a condition precedent to final payment, and it was undisputed at trial that liens had been filed against the project. Though the doctrine of substantial performance permitted Solar to sue under the contract, Solar did not plead or prove that it complied with the express condition precedent to final payment. Had Solar done so, it would have been proper to award Solar the contract balance minus the cost of remediable defects. While harsh results occasioned from Solar's failure to perform this express condition precedent, the court recognized that parties are free to contract as they choose and may protect themselves from liability by requesting literal performance of their conditions for final payment. The parties agreed to the conditions for final payment, and Solar did not plead or prove it performed the condition precedent of submitting an all-bills-paid affidavit.

PART XVII
AD VALOREM TAXATION

UMLIC VP LLC* v. *T&M Sales And Environmental Systems, Inc., 176 S.W.3d 595 (Tex.App.-Corpus Christi 2005, pet. denied). T&M obtained a loan from the SBA. The loan was secured by a deed of trust, a security agreement, and a guaranty executed by the Lozanos and Ezell in their personal capacities.

The loan matured by its own terms on July 19, 1999. The last payment T&M made on the note was on November 19, 1998. After the loan matured, it was acquired by UMLIC. After T&M offered to resume payments on an extended term, UMLIC rejected the request and decided to foreclose. However, as UMLIC began to prepare for foreclosure, it discovered that the property securing the loan had been sold in a tax foreclosure for $10,000. UMLIC contacted the purchaser and redeemed the property, paying the statutory redemption penalty of 25% of the tax foreclosure amount. The foreclosure purchaser gave UMLIC a special warranty deed covering the property.

After the redemption, UMLIC offered to let T&M redeem the property by paying the amount UMLIC had paid for the redemption plus the unpaid balance of the loan. T&M would offer only the redemption price. UMLIC had T&M evicted from the property and subsequently sold the property to a third party, without applying any part of the sales price to the T&M debt. It then sued T&M and the guarantors for the debt. T&M and the guarantors promptly counterclaimed for wrongful foreclosure, negligence, breach of the deed of trust, fraud, and malice. They won on all counterclaims at the trial court.

Among other issues on appeal was whether UMLIC's redemption of the property gave them fee simple title. T&M argued that the only interest redeemed by UMLIC was its lien position and that, in order to obtain fee simple title, UMLIC would have to foreclose. UMLIC argued that it was not required to foreclose and apply foreclosure proceeds to the debt because the redemption gave it fee simple title. The court agreed with T&M.

When property is sold at a tax sale, the deed purchased vests "good and perfect title in the purchaser or the purchaser's assigns," including the right to the use and possession of the property, subject only to the former owner's right to redemption. Under the right to redemption, an owner may redeem the property by paying the purchaser the amount bid for the property, the deed recording fee, and any taxes, penalties, interest, or costs on the property, plus a premium of twenty-five percent. Tax Code § 34.21(e), (e)(2). UMLIC argued that because Gonzalez became vested with good and perfect title to the property at the tax sale, when Gonzalez assigned a special warranty deed to UMLIC, UMLIC purchased and received all of the same rights in the property that Gonzalez had acquired.

UMLIC claimed rights as a "purchaser." However, at the time of the transaction, UMLIC did not attempt to "purchase" the property from Gonzalez. In its letter to Gonzalez, UMLIC clearly stated it was exercising its statutory right to redeem the property and en-closed a cashier's check for $12,500, the statutorily-determined amount. In a sale, Gonzalez would have had the ability to negotiate price and decide whether he wanted to sell or not sell. In a redemption, Gonzalez had no choice but to transfer the property to the redeemer for the statutorily-determined price.

When an owner of real property tenders an appropriate payment before the end of the redemption period, he effectually extinguishes the rights of the purchaser at the tax sale. Because UMLIC made no actual attempt to purchase the property, the court concluded that the status of UMLIC's title did not depend on whether a mortgagee would be eligible to purchase fee simple title to property at or subsequent to a tax sale, but on what title a mortgagee holds after it redeems property under the redemption statute. Redemption does not operate in the same manner as a purchase. Unlike the purchase of real property, redemption does not establish new title; it restores the parties to the position they were in before the lien.

Woodside Assurance, Inc. **v.** ***N.K. Resources, Inc.***, 175 S.W.3d 421 (Tex.App.—Houston [1st Dist.] 2005, no pet.). Just before the tax foreclosure, Gibbs sold the property to NKR. At the tax foreclosure, NKR's owner bought the property. The tax foreclosure, held in 2003, generated excess funds, which were held in the court registry. NKR filed a petition to withdraw the funds, based on its status as a former owner of the property.

Woodside also filed a petition to withdraw the funds. To support its entitlement to the excess proceeds, Woodside relied on a deed of trust that it had acquired from J-Hawk Corporation (J-Hawk). J-Hawk had previously received a promissory note from Gibbs that was secured by a deed of trust on the subject property. The promissory note had a final maturity date of March 1, 1995. On October 19, 1994, J-Hawk transferred its interest in the note and deed of trust to Woodside. The trial court awarded the funds to NKR. Woodside argued that the funds should have been paid to it because it had a higher priority than NKR.

Chapter 34 of the Property Tax Code contains the procedures for tax sales and redemptions. Proceeds of a tax sale are applied first to costs, fees and commissions associated with the tax suit and the tax sale, then to taxes, penalties, and interest and other expenses and amounts awarded under the judgment. Excess proceeds are paid to the clerk of the court issuing the warrant or order of sale. The clerk must keep the proceeds for two years. A person may file a petition setting forth a claim to the excess proceeds. The petition must be filed before the second anniversary of the date of the sale of the property. If no claimant establishes entitlement to the proceeds within the period provided by section 34.03(a), that is, two years from the date of the sale, the clerk must distribute the excess proceeds to the taxing units that participated in the sale.

Section 34.04 provides that the trial court must order that the excess proceeds be paid according to the following priorities to each party that establishes its claim to the proceeds:

(1) to the tax sale purchaser if the tax sale has been adjudged to be void and the purchaser has prevailed in an action against the taxing units under Section 34.07(d) by judgment;

(2) to a taxing unit for any taxes, penalties, or interest that have become due or delinquent on the subject property subsequent to the date of the judgment or that were omitted from the judgment by accident or mistake;

(3) to any other lienholder, consensual or otherwise, for the amount due under a lien, in accordance with the priorities established by applicable law;

(4) to a taxing unit for any unpaid taxes, penalties, interest, or other amounts adjudged due under the judgment that were not satisfied from the proceeds from the tax sale; and

(5) to each former owner of the property, as the interest of each may appear.

NKR argued at the trial court and argues on appeal that Woodside's lien, on which it relied to recover the excess proceeds, is void pursuant to section 16.035(d) of the Texas Civil Practice and Remedies Code which states that a person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues. When there is no recorded renewal or extension, the maturity date stated in the original instrument is conclusive evidence of the maturity date of the debt. Four years from that date, it is conclusively presumed that the lien debt is paid. The effect of such a conclusive presumption of payment, like the effect of actual payment, is to terminate the superior title retained by the vendor and, consequently, to terminate all remedies for the enforcement of such superior title. A bona fide third person is entitled to the statutory presumption that the debt was paid and that the lien became void and ceased to exist.

The deed of trust, on which Woodside relied for its entitlement to the excess proceeds, matured on March 1, 1995. Thus, pursuant to section 16.035(d), the lien on the deed of trust became void on March 1, 1999. Woodside could recover on its real property lien no later than four years after the cause of action accrued. Accordingly, Woodside's lien became void on March 1, 1999. Without a valid lien to support its motion to withdraw, Woodside had no entitlement to the excess proceeds.

Woodside responds that NKR cannot rely on the statute of limitations because NKR was not in privity with the debtor, Gibbs. Woodside reasons that Bhagia bought the property and that only he should have been allowed to collect the excess proceeds according to the Code's priority schemes. The court agreed.

First, NKR was in privity with Gibbs. NKR bought the property from Gibbs prior to the tax foreclosure sale. Second, the tax foreclosure purchaser did not qualify to recover any of the excess proceeds pursuant to the priority rules in the Property Tax Code. Rather, under the present facts, only the former owners of the property--NKR or Gibbs--had the potential right to recover the excess proceeds.

Woodside next argues that the debt is not destroyed; only an action to recover the debt is barred by limitations. Although the debt may not be destroyed, for the creditor to receive payment, the debtor would have to make a new promise. This principle is also known as a moral obligation. Whether NKR may have a moral obligation to repay Woodside, however, is irrelevant to the issue before this Court because the Property Tax Code sets out the procedure for entitlement to excess proceeds. Because Woodside does not have a valid lien, the trial court properly awarded the entirety of the excess proceeds to NKR.

ABN AMBRO Mortgage Group v. TCB Farm and Ranch Land Investments, 200 S.W.3d 774 (Tex.App.—Ft. Worth 2006, no pet.). The owners refinanced their house with ABN. By mistake, the ABN deed of trust was not recorded for more than a year after closing. During that year, the owners fell behind in their tax payments. In order to come up with the funds to pay the taxes, the owners borrowed from Genesis Tax Loan Services and, in connection with that loan, executed a deed of trust and an affidavit authorizing transfer of tax lien. The deed of trust was recorded shortly before the ABN deed of trust. The owners defaulted on the tax loan, so Genesis foreclosed on its transferred tax lien. TCB purchased at the foreclosure sale. After the foreclosure sale, ABN sent notice to TCB that it was exercising its right to redeem under Section 32.06 of the Texas Tax Code. TCB and Genesis refused the redemption offer, so ABN sued.

ABN sought to rescind the foreclosure sale deed to TCB and to confirm ABN's right as secured lienholder to redeem the property from TCB pursuant to Section 32.06(i) of the tax code or, alternatively, to declare that ABN holds an equitable and to order sale to foreclose on that lien. TCB asserted a counterclaim to quiet title to the property and to declare it the owner free and clear of ABN's lien.

On January 1 of each year, a tax lien attaches to property to secure the payment of all taxes, penalties, and interest ultimately imposed for the year on the property. An owner of real property may authorize another person (the "transferee") to pay taxes imposed by the taxing unit. When the transferee pays the taxes, the tax collector certifies that the taxes have been paid by the transferee and that the tax lien has been transferred to the transferee. To be enforceable, the transferred tax lien must be recorded. The transferee or any successor in interest is entitled to foreclose on the lien. However, the statute provides the owner and the holder of a first lien with the right to redeem the property from the purchaser at the tax sale.

In its first issue, ABN argues that under a liberal interpretation favoring rights of redemption, as required by Texas law, its lien is the "first lien" under Section 32.06(i) of the tax code even though its lien was not filed of record when the tax lien was transferred to Genesis, and that it thus had the right to redeem the property upon foreclosure. Under TCB's interpretation of the statute, which was accepted by the trial court, the term "first lien" under the statute means first recorded lien so that, when the Genesis's lien was recorded first, it took priority over ABN's lien, making its lien the senior or "first lien," and ABN's lien was relegated to junior lien status with no right of redemption under Section 32.06(i).

Section 32.06(i) does not define the term "first lien." However, when a statute is clear and unambiguous, a court "should give the statute its common meaning." When language in a statute is unambiguous, a court will seek the intent of the legislature as found in the plain and common meaning of the words and terms used.

The court disagreed that ABN's prior lien was required to be recorded first in order to be a "first lien" entitling ABN to exercise the right of redemption under § 32.06(i). Holding that the term "first lien" as used in the statute refers only to a lien recorded prior to filing of the transfer tax lien would obviously require us to insert the word "recorded" not contained in the statute. Moreover, TCB does not explain how the statutory intent would be effectuated by restricting the right of redemption based upon timing of recordation as between the transferee of the tax lien (Genesis, in this instance) and the existing lienholder. TCB next argues that priority is nevertheless determinative because, under established Texas law, ABN's lien became a junior lien once Genesis's lien was recorded first. Under this theory, ABN's lien was extinguished when Genesis foreclosed, thereby still precluding ABN from asserting the rights of a first lienholder to redemption under Section 32.06(i). TCB relies upon the well-established law that, when a senior lienholder forecloses on property subject to its lien, all junior lienholders are divested of title to the property and their liens extinguished, so that the purchaser at the sale takes free of any junior lienholder claims. But those cases and that principle do not address rights of redemption. Priority of liens as between claimants does not affect the applicability of a right of redemption as between an existing lienholder and a purchaser at a tax sale.

Additionally, the principle of lien priority based upon time of filing does not apply to a tax lien. A lien for ad valorem taxes imposed by state, county, or city taxing units in Texas is perfected upon attachment on January 1 of each year without further action by the taxing authority. Therefore, a tax lien for the 2002 ad valorem taxes attached and was perfected on the Fleckensteins' property as of January 1, 2002. Such a tax lien is always senior to and has priority over other liens. This is so regardless of whether it is timely filed by the taxing authorities.

Finally, TCB argues that, because ABN had not recorded its deed of trust when the tax lien was transferred to Genesis, ABN's lien was void as to Genesis because nothing in the record indicates Genesis had notice of ABN's prior lien at that time. TCB relies on Section 13.001(a) of the property code providing an unrecorded deed is "void" as to a subsequent creditor who extends its loan and acquires its lien without notice of the earlier lien. But the record affirmatively establishes the contrary, that Genesis had full knowledge by virtue of the statute and as expressly stated in Genesis's deed of trust that the interest it was acquiring from the Denton County tax authority, in return for its agreement to pay the delinquent taxes, was merely a transfer of the tax lien and was subject to the statutory rights of redemption of the owner and first lienholder. Nor was TCB a bona fide purchaser. ABN had recorded its deed of trust before the foreclosure and sale to TCB, and the notice of sale listed ABN as lienholder. Additionally, a purchaser at a tax sale buys with full knowledge that his title may be defeated by redemption.

Harris County Appraisal District* v. *Pasadena Property LP, 197 S.W.3d 402 (Tex.App.—Eastland 2006, pet. denied). To stay within environmental laws while producing ethylene oxide and ethylene glycol, Pasadena Property installed pollution control equipment at its plant. Prior to tax year 2004, Pasadena Property had a statutory exemption under Section 11.31 of the Tax Code for that property. Tex. Tax Code Ann. § 11.43(c) (Vernon Supp.2005) provides that, once the Section 11.31 exemption is granted, the taxpayer need not claim the exemption in subsequent years; the exemption applies to the property until the ownership of the property changes or the taxpayer's "qualification for the exemption changes."

HCAD's chief appraiser determined that Pasadena Property's qualification for the exemption changed for the year 2004 and canceled the exemption. However, the chief appraiser failed to deliver written notice of the cancellation as required by Section 11.43(h) of the Tax Code. Pasadena Property did receive a tax bill which provided notice that the exemption had been canceled and that HCAD appraised the property at $185,130. Pasadena Property timely filed a notice of protest with the appraisal review board. In its hearing affidavit, Pasadena Property asserted only that the "value for this property is exempt." Pasadena Property was granted a hearing before the appraisal review board on July 20, 2004. The appraisal review board denied the Section 11.31 exemption but lowered the appraised value to $180,000. Pasadena Property timely filed an appeal to the district court.

Under the facts of this case, HCAD had jurisdiction for the chief appraiser to cancel the pollution exemption. The question is the effect of the chief appraiser's failure to send notice of his cancellation to Pasadena Property. Viewing the issue as one of due process, HCAD's argument implicitly assumes that it had jurisdiction to cancel the exemption. HCAD argues that Pasadena Property waived its claim of lack of notice under Section 11.43(h) by filing its Section 41.41(9) protest and voluntarily appearing before the appraisal review board. According to HCAD, Pasadena Property was afforded due process when it contested the removal of the exemption before the appraisal review board in a hearing where it obtained a ruling. HCAD concedes that Pasadena Property exhausted its administrative remedy with the appraisal review board and that the district court had subject matter jurisdiction of its appeal.

A chief appraiser's failure to provide the notice to a taxpayer required by Section 11.43(h) makes his cancellation of the Section 11.31 ad valorem exemption voidable, not void, because a taxpayer must be afforded an opportunity to protest the cancellation. The collection of a tax constitutes a deprivation of property; therefore, a taxing unit must afford a taxpayer due process by giving notice to the taxpayer and a fair opportunity to be heard before that deprivation occurs. The lack of notice did not make the chief appraiser's cancellation a void act. Notice is a procedural requirement that does not affect the appraisal district's jurisdiction. If the cancellation were a void act, then judgments in tax proceedings would be subject to collateral attack years later. Pasadena Property waived its claim of lack of notice under Section 11.43(h) by filing its protest of the loss of the exemption pursuant to Section 41.41(9) and voluntarily appearing before the appraisal review board. Likewise, the notice requirement of Section 11.43(h) of the Tax Code is mandatory, but failure to satisfy it does not deprive courts of subject matter jurisdiction. The key issue is whether a taxpayer is afforded due process so that the taxpayer has an opportunity to protest a cancellation of its ad valorem exemption. If a taxpayer is given an opportunity to be heard before an appraisal board at some state of the proceedings, then the requirements of due process are satisfied.

PART XVIII
CONDEMNATION

State of Texas* v. *Delaney, 197 S.W.3d 297, 49 Tex. Sup. Ct. J. 557 (Tex. 2006). In this inverse condemnation case, the owner of raw land recovered a judgment for 90 percent of the property's value based on alleged impairment of access. A few months after the court of appeals affirmed, the Supreme Court held in ***County of Bexar* v. *Santikos*** that when a tract has "no businesses, homes, driveways, or other improvements of any kind," an impairment claim cannot be sustained on the basis that "someday a developer might want to build a driveway at the single most difficult and expensive location on the entire property." 144 S.W.3d 455, 460-61 (Tex.2004). Based on that reasoning, the Supreme Court reversed the portion of the court of appeals' judgment that affirmed the impairment claim here.

The Delaneys' land abutted a tract of land known as Parcel 9 that was previously acquired by the State for the purpose of serving I-45 in a number of ways. The landl was undeveloped. Skirting the edge of Parcel 9 was a road, called the Connector Road, which connected to I-45. In 1998, the State demolished the Connector Road for safety reasons. The Delaneys sued the State for inverse condemnation, arguing the removal of the Connector Road resulted in substantial and material impairment of access to their property, a compensable taking under the Texas Constitution.

Texas has long recognized that property abutting a public road has an appurtenant easement of access guaranteeing ingress to and egress from the property. Under the Texas Constitution, a compensable taking has occurred if the State materially and substantially impairs access to such property.

The Delanys first argue their property, abutting the Connector Road, had such an easement guaranteeing access to that specific road. The court disagreed. In Texas, easements of access do not guarantee access to any specific road absent a specific grant. The Delanys next argue the 1965 Petition for Condemnation granted them access to a specific road. Petitions for condemnation can preserve easements of access for the remaining property of those owners whose land has been condemned. The Court held that the condmentation petition did not grant access to a specific road, but that the Delaneys had a general access easement to their land.

Having determined that, the Delaneys would have a compensable claim if the destruction of the Connector Road substantially and materially impaired access to their property. The trial court found the proposed driveways left "the property with an unsuitable means of access to serve its intended purpose or highest and best use." The intended purpose, the trial court found, was unspecified "commercial." But while condemned property may be appraised at its highest and best use, remaining property on which there are no improvements and to which reasonable access remains, is not damaged simply because hypothetical development plans may have to be modified. The Delanys are entitled only to reasonable access, not the most expansive or expensive access their planners might design.

Wells Fargo Bank Minnesota, N.A.* v. *North Central Plaza I, L.L.P., 194 S.W.3d 723 (Tex.App.—Dallas 2006, no pet.). NCPI owned some land and a building on Central Expressway in Dallas. Wells Fargo held the mortgage on the property. Before NCPI bought the property, a condemnation was commenced for a taking of a part of the property to build the High Five interchange at LBJ and Central in North Dallas. NCPI was joined in the condemnation and filed an objection to the jurisdiction and to the amount of the award.

NCPI defaulted on its loan. Wells Fargo foreclosed and ended up with the property and a sizeable deficiency. It then intervened in the condemnation case to protect its rights to the award. Both NCPI and Wells Fargo claimed the right to the award. The trial court held that NCPI was entitled to the award.

Wells Fargo contends the trial court erred in its determination that NCPI was entitled to the condemnation proceeds. Specifically, Wells Fargo contends that the proceeds were trust property that it acquired through the foreclosure sale. Neither NCPI nor Wells Fargo contend that the deed of trust is ambiguous. The parties disagree over the interpretation of certain provisions contained in the deed of trust.

Pursuant to the definition of the "Trust Property" (i.e., the property covered by the Deed of Trust), if the High Five condemnation of does not result in a decrease in the property's value, then, NCPI retains the award. On the other hand, if the High Five Condemnation results in a decrease in the property's value, then the award is part of the trust property. Upon default under the non-recourse deed of trust note, the lender may sell the property through foreclosure. Pursuant to the terms of the deed of trust, a foreclosure sale operates to "divest all the estate, right, title, interest, claim and demand whatsoever, whether at law or in equity, of Trustor in and to the properties and rights so sold, and shall be a perpetual bar both at law and in equity against Trustor and against any and all persons claiming or who may claim the same, or any part thereof from, through or under Trustor."

NCPI claimed that the condemnation provision in the deed of trust, which provided that condemnation awards would be paid to the borrower, controlled over this definition, but the court noted that the definition applied to the specific High Five condemnation and the condemnation provision applied to other condemnation actions arising after the date of the deed of trust.

NCPI then argued that the court's holding rendered the definitional provision meaningless, since a condemnation would always result in a decrease in the value of the property. The court disagreed. A condemnation does not necessarily result in a decrease in the value of the property. Where a property's value actually increases after a portion of the property has been condemned, the owner is still entitled to an award equal to the market value of the property taken. When only a portion of property is taken, the constitution requires adequate compensation both for the part taken and severance damages, if any, to the remaining property. Because the undisputed evidence showed that the property's value did, in fact, decrease, the trial court erred in its determination that NCPI was entitled to the Condemnation proceeds.

PART XIX
MISCELLANEOUS

Shaw* v. *Palmer, 197 S.W.3d 854 (Tex.App.—Dallas 2006, no pet.). Shaw began working as a legal assistant/paralegal for Palmer, an attorney. Shaw stopped working for Palmer. Shaw claimed she was fired and has filed two claims with the Texas Workforce Commission, both of which were denied, and one of which she appealed to the county court. Thereafter, Shaw filed this suit alleging breach of contract, misrepresentation, perjury and harassment, intentional infliction of emotional distress, and defamation. In her petition, Shaw alleged that Palmer defamed her by making statements to the effect that Shaw was incompetent, crazy, and was attempting to ruin his business. The only statement in question on this appeal was that Palmer had told a former employee that Shaw was "crazy." Following a bench trial, the trial court found that while the term "crazy" is sometimes used in a "benign or joking connotation," its common and ordinary meaning is that a person is mentally unbalanced. After considering the circumstances surrounding the complained-of statement, the trial court found that it was "substantially untrue and injurious" to Shaw's reputation.

Slander is a defamatory statement that is orally communicated or published to a third person without legal excuse. A statement is defamatory if the words tend to injure a person's reputation, exposing the person to public hatred, contempt, ridicule, or financial injury. An essential element of defamation is that the alleged defamatory statement be a statement of fact rather than opinion. Expressions of opinion may be derogatory and disparaging. Nevertheless they are protected by the First Amendment of the United States Constitution and by article I, section 8 of the Texas Constitution. The question of whether a statement is an assertion of fact or opinion is a question of law.

The use of the term “crazy” does not, in its common usage, convey a verifiable fact, but is by its nature indefinite and ambiguous. Rather, it is a loose and figurative term employed as a metaphor or hyperbole. As such, it is an expression of opinion absolutely protected by the First Amendment and article 8, section I.

The court pointed to a line of authority on this matter. See ***Lieberman* v. *Fieger***, 338 F.3d 1076, 1081 (9th Cir.2003) (attorney’s comments that psychiatrist was “Looney Tunes,” “crazy,” “nuts,” and “unbalanced” protected under First Amendment as statements of opinion); ***Weyrich* v. *The New Republic, Inc.***, 235 F.3d 617, 624 (D.C.Cir.2001) (statement that plaintiff “suffered from bouts of pessimism and paranoia” was protected opinion because it was employed in its popular, not clinical sense); ***Estate of Martineau* v. *ARCO Chem. Co.***, 203 F.3d 904, 914 (5th Cir.2000) (statement that former employee was “insane, delusional, and irrational” not actionable slander). Because Palmer’s statement that Shaw was “crazy” did not imply an assertion of fact, but rather was used in its popular sense, the statement was an expression of opinion, not a statement of fact, and therefore the trial court erred by concluding it was actionable slander.