CASE UPDATE

Presented by

DAVID A. WEATHERBIE
Cramer Weatherbie Richardson Walker LLP
Dallas, Texas
cwrwlaw.com

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DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP

EDUCATION:

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

PROFESSIONAL ACTIVITIES:

Licensed to practice in the State of Texas
Partner - Cramer Weatherbie Richardson Walker LLP, Dallas, Texas

ACADEMIC APPOINTMENTS, PROFESSIONAL ACTIVITIES, AND HONORS

Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995
Former Council Member, Real Estate, Probate & Trust Section, State Bar of Texas
Treasurer, Real Estate, Probate & Trust Section, State Bar of Texas 2008-2009
Vice Chair, Real Estate, Probate & Trust Section, State Bar of Texas 2009-2010
Fellow, American College of Real Estate Lawyers
Listed as 2003, 2004, 2005, 2006, 2007, 2008, and 2009 *Texas Monthly* "Super Lawyer"
Listed in *Best Lawyers in America* and *Who's Who Legal*
Namesake of the Weatherbie Work Horse Award given annually by the State Bar Advanced Real Estate Law Course
Recipient of the Standing Ovation Award for 2008 given by TexasBarCLE for extraordinary commitment to State Bar continuing legal education programs.

LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Author *Weatherbie's Texas Real Estate Law Digest* (James Publishing, 1999)
Course Director for the State Bar of Texas, Advanced Real Estate Law Course – 1995
Course Director for the University of Texas at Austin - Mortgage Lending Institute – 2002 and 2007
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
Author/Speaker for Texas Land Title Institute - 1992 to present
Author/Speaker for Southern Methodist University - Leases in Depth - 1992 to 2000
Author/Speaker for Southern Methodist University - Transactions in Depth - 1992 to 2000
Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Author/Speaker for the State Bar of Texas, Residential Real Estate Construction Law Course
Panel Member for State Bar of Texas, Advanced Real Estate Transactions Course B 1997
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course B 2007
Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999)

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DAVID A. WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP
DALLAS, TEXAS

The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 292 S.W.3d 173.

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.

Past Case Law Updates are available at our website cwrwlaw.com.

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CASE UPDATE

DAVID WEATHERBIE
CRAMER WEATHERBIE RICHARDSON WALKER LLP
DALLAS, TEXAS

PART I
MORTGAGES AND FORECLOSURES

A notice of a foreclosure sale must provide a description or other identification of the property to be sold. How good does that description have to be? On March 28 in ***Myrad Properties Inc.* v. *LaSalle Bank National Association***, 252 S.W.3d 605 (Tex.App.—Austin 2008, pet. granted), Austin's 3rd Court of Appeals was generous to a trustee whose foreclosure notice property description was less than ideal. In challenging economic times, this opinion is important for Texas lawyers whose clients will be involved in a rising number of foreclosure actions.

The court's opinion laid out the facts: Two tracts of land secured LaSalle's loan to Myrad. When Myrad defaulted, the substitute trustee filed, posted and sent notices of foreclosure that referenced the correct recording information for the deed of trust but referenced the property to be foreclosed as that shown on Exhibit A to the notice. Unfortunately, Exhibit A described only one of the two tracts. The foreclosure notice also contained a sentence that said, "Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust in accordance with the Holder's rights and remedies under the Deed of Trust and Section 9.604 of the Texas Business and Commerce Code."

The foreclosure sale was held, where the substitute trustee read only the one property description. LaSalle bid its entire debt, and a trustee's deed was executed that, again, described only the one tract.

The borrower claimed that the sale covered only the one parcel, the bid extinguished the entire debt, and it continued to own the other parcel free and clear.

According to the court, the statement in the foreclosure notice that the lender was electing to sell the real and personal property covered by the deed of trust "unequivocally" gave notice that LaSalle would sell all of the property described in the deed of trust. The property described in the deed of trust included both tracts of land. Other portions of the foreclosure notice provided detailed information regarding the deed of trust, including where it was recorded. The court found that all of these components of the foreclosure notice were sufficient under the deed of trust and Property Code §51.002 to inform the reader that both tracts would be sold.

The court also rejected the borrower's argument that the failure to identify both tracts in the foreclosure notice would "chill" the bidding at the foreclosure. At least one court has held that under Texas law a similar under-inclusion of property in a notice of foreclosure sale could be actionable under such a theory. However, to prevail on this theory, the borrower would have to show that the price or consideration received in the sale was grossly inadequate and that such inadequacy was caused by the complained-of irregularity. It did not do so.

Has this case relaxed the standards for trustees in foreclosure notices? Since attorneys in Texas and around the nation are going to be seeing a lot of foreclosures in the near future, this case provides some comfort that simple mistakes may not necessarily result in terrible consequences. We'll see. The Texas Supreme Court has decided to hear this case on appeal.

EMC Mortgage Corporation* v. *Window Box Association, Inc., 264 S.W.3d 331

(Tex.App.—Waco 2008, no pet.). The Condo Owner died and no further payments were made on his mortgage. The Lender sent a notice of default and intent to accelerate in December 2001. That same month, the Condo Association filed a notice of lien based on unpaid dues. In January 2002, the Lender sent a letter to the Condo Owner's estate stating that the mortgage was in default and had been placed with an attorney "for the purpose of initiating a foreclosure action." The Condo Association posted a notice of trustee's sale in May 2002 and foreclosed in June 2002, purchasing the property for $6,059. The Lender hired a debt collection agency, which sent a notice of representation for collection in August 2002. At some point, EMC acquired the note and deed of trust from the Lender.

In February 2003, EMC filed suit seeking judicial foreclosure, but dismissed its claims without prejudice in November 2005. In June, August, and November 2006, EMC sent notices to the Condo Owner's estate. EMC posted a notice of trustee's sale in November 2006. The Condo Association subsequently filed suit.

The Condo Association argued that the statute of limitations barred EMC's right to foreclosure. The trial court granted the Condo Association motion and dismissed the suit.

On appeal, EMC contends that the Condo Association lacks standing to assert a statute of limitations defense.

Standing is a necessary component of subject matter jurisdiction and involves the court's power to hear a case. A question of subject matter jurisdiction is fundamental and may be raised at any time. To establish standing, an individual must demonstrate a particularized interest in a conflict distinct from that sustained by the public at large.

EMC asserts that, as junior lienholder, the Condo Association lacks standing to assert a statute of limitations defense because: (1) its lien is subordinate to EMC's lien; (2) it has an equitable right to surplus funds; (3) the Condo Owner's statute of limitations defense does not run with the land; and (4) its ownership status provides no additional rights because it acquired the property before the maturity date. The Condo Association responds that it is no longer merely a junior lienholder, but is the owner of the property and is entitled to rely on the statute of limitations.

As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagor's deed of trust. However, when the third party has a property interest, whether legal or equitable, that will be affected by such a sale, the third party has standing to challenge such a sale to the extent that its rights will be affected by the sale. The Condo Association possessed an interest in the property that would be affected by a foreclosure sale. If an affected third party has standing to challenge a foreclosure sale, it follows that the party may also assert any applicable defenses in challenging the sale. The court could not say that the Condo Association lacks standing to assert a statute of limitations defense.

If a series of notes or obligations or a note or obligation payable in installments is secured by a real property lien, the four-year limitations period does not begin to run until the maturity date of the last note, obligation, or installment. Civil Practice & Remedies Code § 16.035(e). Although the note and deed of trust in this case specify a maturity date of January 1, 2017, the Condo Association argues that accrual was accelerated. Accrual may be accelerated where: (1) a note or deed of trust secured by real property contains an optional acceleration clause"; and (2) the holder actually exercises its option to accelerate" by sending both a notice of intent to accelerate and a notice of acceleration. Both notices must be clear and unequivocal. Absent evidence of abandonment or a contrary agreement between the parties, a clear and unequivocal notice of intent to accelerate and a notice of acceleration is enough to conclusively establish acceleration and therefore accrual. While accrual is a legal question, whether a holder has accelerated a note is a fact question.

The parties agree that the deed of trust contains an option to accelerate, but dispute whether EMC exercised that option. The Condo Association argues that the option was exercised because: (1) the December 2001 letter constitutes notice of intent to accelerate and the August 2002 debt collection letter constitutes notice of acceleration; and (2) the August 2002 letter combined with events that occurred both before and after the letter was sent illustrates acceleration.

EMC does not dispute that the December 2001 letter constitutes a notice of intent to accelerate, but contends that the August 2002 letter was sent pursuant to section 1692g of the Fair Debt Collection Practices Act and does not constitute notice of acceleration.

The court held that the collection letter merely advised owner of its right to verify the debt did not constitute notice of acceleration of the debt. Advising the debtor of these rights is not tantamount to advising the debtor that the entire debt is immediately due and payable. Otherwise, there would be no need to warn creditors against including language in the notice that contradicts or overshadows the debtor's validation rights. At most, the August 2002 letter could be construed as a notice of intent to accelerate. It does not clearly and unequivocally advise the debtor that the debt is immediately due and payable.

Morrison* v. *Christie, 266 S.W.3d 89 (Tex.App.—Ft. Worth 2008, no pet.). When the Morrisons defaulted on their mortgage loan from Christie, they executed a "conveyance in lieu of (or in addition to) foreclosure" to Christie, basically a deed in lieu of foreclosure. The deed states that the conveyance was in consideration of Christie applying the net proceeds from the property's sale to the unpaid balance of the note and of the Morrisons agreeing to be liable for any deficiency after the sale. Christie sold the property to a third party, with the net proceeds applied to the note. He then sued the Morrisons for the deficiency.

The Morrisons argued that a conveyance of real property with the promise of the grantee to sell the property and satisfy an existing debt with the proceeds is generally held to be a transaction in the nature of a mortgage and, since Christie had failed to comply with Property Code §§ 51.002 and 51.003 in acquiring the property, he had failed to prove all of the elements needed to establish a deficiency on the note.

A deed-in-lieu of foreclosure is not a specific type of deed, such as a special warranty deed or a quitclaim deed; there is no such deed as a deed-in-lieu of foreclosure. But a deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt. No specific statutory scheme governs the format of this type of transaction, although the Texas Legislature provides some protections against undisclosed liens or encumbrances on the property to a holder of a debt secured by a deed of trust who accepts such a conveyance as payment.

The plain language of the deed evidenced an agreement that the borrower would convey the property to the lender in exchange for the lender agreeing to not move forward with foreclosure of the property and to apply to the debt the net proceeds from the sale of the property. The evidence establishes that the property served as security for a debt before the deed-in-lieu conveyance and that the deed-in-lieu conveyance was intended as payment on that debt and not to secure it.

The borrowers argued that under Property Code section 51.003, they have a right to contest the amount of deficiency and a right to a credit of the full fair market value of the property. That section applies to a deficiency judgment action brought after property is sold at a foreclosure sale under section 51.002; section 51.002 by its own terms applies to the "sale of real property under a power of sale conferred by a deed of trust or other contract lien." Because the sale of the real property in this case was not a sale under a power of sale in a deed of trust or other contract lien and was therefore not a foreclosure sale under section 51.002, this section does not apply.

Casstevens* v. *Smith, 269 S.W.3d 222 (Tex.App.—Texarkana 2008, no pet.). Ann Casstevens and her husband were defrauded by their neighbors when they bought the neighbors' house. Even though the Casstevenses paid the neighbors cash and executed a note for the balance and received a warranty deed, they were not informed that the neighbors still owed two debts on the house. The Casstevenses made payments for years but the neighbors did not pay off the existing debts on the house. To make matters worse, when the Casstevenses learned of the existing note, the neighbors prevailed on them to prepay $64,000 cash purportedly to allow the neighbors to pay off their obligation. But the neighbor did not pay off either their first or second lien on the house. Ultimately, one note was foreclosed and the Smiths bought the property at the foreclosure sale.

Casstevens argues that her monthly payments to the neighbors, which the neightbors in turn paid to the bank on the first lien mortgage, created an equitable right of subrogation. It is clear that the neighbors never completely paid off the first mortgage. Casstevens asserts that this alleged equitable subrogation right was in existence when the Smiths acquired title by buying the bank's lien on the property; therefore, they argued, the Smiths' title is subject to this alleged equitable subrogation right.

The right of equitable subrogation arises when one pays the debt of another for which the other is primarily liable. Equitable subrogation is a legal fiction whereby an obligation that is extinguished by a third party is treated as still existing to allow the creditor to seek recovery from the party primarily liable. The purpose is to prevent the unjust enrichment of the debtor who was primarily liable. 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.

Here, the court noted, Casstevens is not attempting to assert a subrogation right against the neighbor, but asserts that this right defeats or dilutes the ownership acquired by the foreclosure purchasers when they acquired the bank's lien. The court did not believe this is the purpose of the equitable subrogation doctrine-instead, the doctrine allows the payor to assert rights owned by a creditor against the party primarily liable-in this case, the fraudulent neighbors. Here, any right of subrogation owned by Casstevens could be asserted only against the neighbors (the parties primarily liable), not against the bank or the Smiths.

Further, the Smiths purchased the property at a foreclosure sale and received a trustee's deed subject only to the first lien. A sale regularly exercised under a power is equivalent to strict foreclosure by a court of equity properly pursued. When a regular sale is made under a power contained in the instrument, not only the mortgagor, but all persons claiming any interest in the equity of redemption by a privity of estate with him are considered as parties to the proceeding, and are precluded by it as fully as if they had been made parties defendant by regular subpoena in an ordinary foreclosure suit.

Terra XXI, Ltd.* v. *Harmon, 279 S.W.3d 781 (Tex.App.-Amarillo 2007, pet. denied). A trustee must conduct a foreclosure sale fairly and not discourage bidding by acts or statements made before or during the sale. However, the trustee has no duty to take affirmative actions beyond that required by statute or the deed of trust to ensure a fair sale. A trustee's duties are fulfilled by complying with the deed of trust. A foreclosure sale may be rendered void if there exists an irregularity, though slight, that caused or contributed to a sale for a grossly inadequate price.

The borrowers contend that the trustee, Harmon, inaccurately described the auctioned property and, thereby, affected the bidding process. Even if Harmon inaccurately described the property, no evidence was presented to demonstrate that an irregularity in the property description caused or contributed to lower bids, fewer bids, or a grossly inadequate price. Evidence must exist that the irregularity caused

or contributed to the sale of property for a grossly inadequate price.

The Borrower's contention that the sales price was grossly inadequate is not supported by evidence considering that, in addition to the sales price of $20,000, the property was sold encumbered by superior liens of more than $3 million while the property had a fair market value of $5.7 million.

Long Beach Mortgage Company* v. *Evans, 284 S.W.3d 406 (Tex.App.-Dallas 2009, pet. pending). Evans was appointed receiver in a California suit brought by the SEC against TLC America. After his appointment in California, Evans brought suit in Texas federal court against various related defendants, included the Prices. During the course of that litigation, Evans discovered that the Prices had diverted funds to buy a house. Evans filed a notice of lis pendens describing the house on July 23 and the notice was recorded on July 24.

Also on July 24, 2002, the Prices borrowed $400,000 from Long Beach through a home equity loan. A deed of trust on the Marquette Property secured this loan. On August 2, 2002, Long Beach filed its deed of trust in Dallas County, Texas, creating a lien on the Marquette Property. The Prices ultimately defaulted on their loan with Long Beach.

After the California court found the Prices liable to Evans, it imposed a constructive trust on the house. Evans then asked for permission to sell the house free and clear of liens. Long Beach did not file a claim in that litigation. Evans registered the California judgment with the federal court in Texas, and that court divested the Prices of title to the house and vested title in Evans.

Evans filed this suit in state court to resolve the competing claims between the lis pendens and the deed of trust lien. The trial court held that the lis pendens was superior to the deed of trust.

Among many other arguments, Long Beach next contends the record does not reflect that the lis pendens was recorded prior to the effective date of Long Beach's lien. Thus, Long Beach argues the lis pendens did not provide the necessary constructive notice prior to the effective date of Long Beach's lien on the Marquette Property.

Although the record reflects the lis pendens was recorded on July 24, the same date Long Beach's deed of trust was executed, the record also reflects the lis pendens was filed on July 23. "An instrument filed with a county clerk for recording is considered recorded from the time that the instrument is filed." Property Code § 191.003. Also, a notice of lis pendens is effective from the time it is filed or, in this case, July 23. Thus, Evans's lis pendens was filed and deemed recorded prior to the date Long Beach executed its deed of trust on July 24 or filed the deed of trust on August 2. Thus, the record establishes that Evans's lis pendens was recorded prior to the effective date of Long Beach's security instrument. Long Beach's lien claim is, therefore, subordinate to Evans's lis pendens as a matter of law.

Still, Long Beach argues lis pendens provides constructive notice only upon recording and proper indexing. Long Beach asserts that "obviously, it was indexed sometime after it was recorded", so there was no constructive notice given prior to the time of execution of Long Beach's deed of trust. However, we have already concluded that the filing of the lis pendens was sufficient to place Long Beach on notice of Evans's interest in the property. There is no provision in Property Code § 13.004 which requires the index to be made as a condition precedent to the validity of the notice.

PART II
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

U.S. Bank, National Association* v. *American Realty Trust, Inc., 275 S.W.3d 647 (Tex.App.—Dallas 2009, no pet.). The note and guaranty were generally non-recourse except for certain exceptions or "carve-outs" under which

Borrower and Guarantor could be personally liable. One of the carve-outs in the guaranty made the Guarantor personally liable for and guarantees payment to lender for "Waste committed on the Property" and "fraud or material misrepresentation."

The Property was a 196-unit, full-service Holiday Inn located near the Kansas City International Airport. The Holiday Inn franchise was set to expire. To relicense the hotel, Borrower was required by Holiday Inn to complete an application and obtain a Property Improvement Plan inspection, which would include all the necessary improvements to the property before a new franchise license could be issued. The PIP was and the estimated costs of improvements was approximately $1.8 million. Although there was some dispute as to who decided not to pursue the relicensing, ultimately the Borrower did not renew with Holiday Inn and, instead, entered into a new franchise with Clarion.

Following the switch to Clarion, the occupancy and revenues declined. Borrower could not service the debt and eventually defaulted on the note, and the property was foreclosed. The Lender later learned Holiday Inn was in fact still interested in relicensing the hotel, and it was Borrower who decided not to reapply for a license. In their lawsuit, they argued the change from the Holiday Inn flag to Clarion was a breach of the note and guaranty under the "waste" and "fraud or material misrepresentation" carve-out provisions, which resulted in damages.

The Lender argued that the failure to relicense with Holiday Inn was waste, as contemplated by the carve-out guaranty. Specifically, the Lender contends waste, although not specifically defined by the guaranty, does not require actual, physical damage to the hotel because the terms of the guaranty, as intended by the parties, clearly encompass damage to intangible assets such as the franchise license.

The Guarantor responds that Lender failed to establish waste as a matter of law because waste has a specific common law meaning and requires actual, physical damage, which did not occur under these facts.

Although waste is not defined in the guaranty, the mortgage and security agreement, executed on the same date as part of the same transaction, expressly defined "property" to include physical assets such as land and improvements, and it also included certain contracts and intangibles. Construing these provisions together, the Lender asserts that Borrower was clearly required to keep the hotel operating as a Holiday Inn or as a comparable or better franchise, but failed to fulfill its obligations. By allowing the Holiday Inn franchise license to expire and failing to reapply, appellants claim Borrower committed waste on the property because the value of the franchise diminished when it became a Clarion.

After reviewing the relevant loan documents, the court first notes nothing within any of the documents specifically required Borrower to reapply for a franchise license with Holiday Inn. One of the covenants of the mortgagor simply states it agrees to "conduct and operate its business as presently conducted and operated," which means Borrower must continue to use the property as a hotel, but not necessarily as a Holiday Inn. Although the documents contemplate all future franchise agreements entered into would become "property," they do not include any potential franchise agreements, such as here, that never came into existence. As defined by the carve-out provision, for waste to have occurred, it must have been committed "on the property." The court refuses to interpret the loan documents to mean waste can occur on potential, future property, in this case a potential franchise license, that was never entered into.

The distinction is between breaching an existing contract and renewing or reapplying for a new contract. Had Borrower terminated its franchise license with Holiday Inn prior to September 24, 2002 and then changed to a Clarion, this could possibly be waste to the existing property. However, by failing to reapply for a Holiday Inn franchise license and instead

re-flag as a Clarion after the Holiday Inn franchise license expired, Borrower did not commit any "waste" on the "property."

The Lender then claimed damages for fraud or material misrepresentation. The trial court found Borrower claimed Holiday Inn had decided not to relicense when the franchise license expired. This representation was false because Borrower, not Holiday Inn, had decided to let the license expire. The trial court further found the change from a Holiday Inn to a Clarion resulted in significant diminution in value of the hotel. However, despite recognizing the loss in value because of the flag change, the trial court found these damages were not caused by Borrower's material misrepresentations.

The court of appeals agreed. As previously noted, the Lender had no property interest in any future franchise licensing agreements and did not specifically contract for the hotel to remain a Holiday Inn. Thus, regardless of any misrepresentations Borrower made regarding who decided not to reapply for a license, the misrepresentations could not have caused damages for something Borrower was not required to do, specifically, relicense as a Holiday Inn.

New Wave Technologies, Inc.* v. *Legacy Bank of Texas, 281 S.W.3d 99, 66 UCC Rep.Serv.2d 113 (Tex.App.-El Paso 2008, pet. denied). Checks were made payable to "Maxim Solutions Group/New Wave Techn" for $134,656.16 and $52,558.73 respectively. The back of each check stated "Each Payee Must Endorse Exactly As Drawn." The checks were received by Brett Autrey, president of Maxim, after Maxim had gone out of business, and were subsequently deposited in Maxim's bank account. The checks were accepted for deposit by a teller for Legacy, using a pre-printed deposit slip of Maxim's. The bank teller checked with her supervisor about whether or not to place a hold on the funds due to the size of the deposit. There was no hold placed on the funds. Each check had only Maxim's account number as an endorsement written on the back. The check was not endorsed by the other payee, "New Wave Techn."

New Wave contends that Legacy converted the checks, under Section 3.420 of the Texas Business and Commerce Code, by taking them by transfer from one payee, Maxim, without any endorsement by the other payee, New Wave. The bank argues that the checks were not made payable alternatively, as a matter of law, but rather were made payable jointly. The initial determination of whom an instrument is payable to is determined by the intent of the issuer of the instrument. UCC § 3.110(a). When there are multiple payees listed, the Code provides:

> "If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more person not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively."

The checks in this case were made payable to "Maxim Solutions Group/New Wave Techn." The checks also had "Each Payee Must Endorse Exactly As Drawn" printed on the back. New Wave argues that the wording on the back of the check shows the maker's intent to make the checks jointly payable. However, the front of the check has the payees separated by a virgule, "/". While no Texas court has addressed the use of virgule in between payees on negotiable instruments, courts around the nation have been uniform in their holdings. The courts have used the common meaning of a virgule, looking at previously decided cases in other jurisdictions and dictionary definitions, and have held unanimously that it means "or," allowing for payment in the alternative. The court held that a virgule's common usage means "or" in alignment with the previous decisions of the courts of the many states. This does not resolve

the issue, however, since the checks presented to Legacy include other language as well.

The statement on the back of the checks "Each Payee Must Endorse Exactly As Drawn" unequivocally states that each payee should endorse the check. New Wave argues that this shows that the checks are payable jointly. Obviously, the front and back of the checks are conflicting in their instructions. The use of the virgule indicates either payee can endorse while the backs of the checks require all payees to endorse. The printed instructions on the back of the check only increase the ambiguity of how the check is payable. The court found that the check, on its face, is ambiguous as to whether it is payable to persons alternatively or jointly, and as such, the instruments are payable alternatively. In the case of ambiguity, persons dealing with the instrument should be able to rely on the endorsement of a single payee. No endorsement by New Wave was required for Legacy to deposit the checks since the checks were properly payable to either payee individually.

Bank of Texas, N.A.* v. *Gaubert, 286 S.W.3d 546 (Tex.App.-Dallas 2009, pet. pending). Gaubert and Chami signed as co-borrowers on a loan from the Bank. The loan matured by its terms in January 2008 and contained no provisions for renewal. The note was secured by a deed of trust. The loan documents include a Notice of Final Agreement reciting Texas Business and Commerce Code § 26.02: "The written loan agreement represents the final agreement between the parties and may not be contradicted by evidence of prior, contemporaneous, or subsequent oral agreements of the parties. There are no unwritten oral agreements between the parties."

The parties anticipated that Gaubert would obtain permanent financing a repay the Bank when the loan matured. Gaubert said that he was told by the Bank officer there would be no problem in extending the loan when it matured. When it did mature, no permanent financing had been obtained. Gaubert said that the Bank told him several times by telephone, e-mail and letters that the loan was being extended. There were several letters from the Bank confirming that the loan was in the process of being extended. In late April, the Bank told Gaubert that it no longer intended to extend the loan. The Bank posted the property for foreclosure.

Gaubert sued and obtained a TRO. The Bank filed an answer raising the statute of frauds as a defense to Gaubert's claim that the bank had agreed to extend the loan. The trial court granted a temporary injunction finding that Gaubert had demonstrated a probably right to relief on one or more of his causes of action and had shown a probable, irreparable, and imminent injury in the interim. The temporary injunction enjoined foreclosures until final trial on the merits.

A temporary injunction is an extraordinary remedy and does not issue as a matter of right. Its purpose is to preserve the status quo of the subject matter of the litigation until trial on the merits. To obtain a temporary injunction, the applicant must plead and prove (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.

The traditional statute of frauds in Texas provides that certain types of agreements, such as a promise to answer for the debt, default, or miscarriage of another, a contract for the sale of real estate, or an agreement which is not to be performed within one year of its making, are not enforceable unless the agreement, or a memorandum of it, is in writing and signed by the person to be charged or his authorized representative. However, equity will act to avoid the statute of frauds in circumstances where enforcing the statute would itself amount to a fraud.

In 1989, the legislature enacted section 26.02, a specific statute of frauds for loan agreements involving loans exceeding $50,000. Under this statute, a loan agreement is not enforceable unless the agreement is in writing and signed by the party to be bound or by that party's authorized representative. Unlike the traditional statute of frauds (section 26.01), section 26.02 requires the loan agreement itself

to be in writing; a memorandum of the agreement does not satisfy section 26.02.

No case has expressly held that the equitable exceptions to the traditional statute of frauds also apply to section 26.02. Cases discussing promissory estoppel in the context of section 26.02 concluded that, assuming the exception applied, the evidence did not raise an issue of fact as to the existence of one or more of its elements. The court assumed that the same equitable exceptions apply.

Based on the record, it is undisputed that the loan involved in this case-as well as any relevant loan agreements-fall within the scope of section 26.02. Thus, if any such agreement is to be enforced, it must either be in writing and signed by the Bank, or an exception to the statute of frauds must apply. Viewing the record, including Gaubert's testimony that he was still discussing the extension with the Bank in early April, in the light most favorable to the trial court's ruling, the record does not contain evidence giving rise to the promissory estoppel exception. There is no evidence the Bank promised to sign an existing writing satisfying the statute of frauds. Gaubert never testified the Bank promised it would sign an existing writing extending the loan for four months; rather, his testimony was there was an oral agreement to extend the loan for four months from the time when new documents were signed.

Gaubert also argues his negligent misrepresentation claim alone is enough to support the temporary in-junction. The court disagreed. While equity will avoid the statute of frauds where application of the statute would itself work a fraud, there is no authority for avoiding the statute of frauds based on mere negligence. A negligent misrepresentation claim may not fall within the statute if the premise of the claim is that, although an agreement was never made, the defendant negligently misrepresented that an agreement had been made and the plaintiff reasonably relied on that misrepresentation to its detriment. But recovery under this theory is also limited to the pecuniary loss suffered in reasonable reliance on the misrepresentation; lost profits or the benefit of the bargain are not recoverable.

Here, based in part on his negligent misrepresentation claim and in addition to his out-of-pocket damages, Gaubert sought the relief of a temporary injunction. That relief has the effect of enforcing the alleged unwritten promise to extend the loan, giving Gaubert the benefit of his alleged oral agreement in violation of the statute of frauds. Regardless of any other remedies Gaubert may have for negligent misrepresentation, the relief at issue in this appeal-the temporary injunction-if countenanced, allows Gaubert to do indirectly what he cannot do directly, i.e. enforce an oral agreement within the ambit of section 26.02.

The court concluded that the statute of frauds serves a vital and important function and allegations of mere negligence are not sufficient to avoid its effect. If in the face of the Statute of Frauds it permitted Gaubert's negligent misrepresentation claim to the extent he seeks to recover the benefit of the unenforceable bargain (i.e., a four-month extension of the loan), it would deprive the Statute of any effect.

Burns* v. *Stanton, 286 S.W.3d 657 (Tex.App.-Texarkana 2009, pet. pending). ISC executed a note payable to Stanton, which Burns guaranteed. The note was secured by a security agreement that included a provision making a change in the borrower’s entity type a default. At one point, ISC and Burns decided they would save on taxes if ISC was converted from a corporation to a limited partnership, so, without getting permission from the lender, a conversion was done. This was, as confirmed by the court, an event of default under the terms of the loan documents.

Stanton accelerated the debt. Burns and ISC claimed Stanton had failed to adequately give notice of his intention to accelerate the indebtedness, and that, therefore, acceleration was improper. Even with an event of default, an acceleration of maturity is improper unless there was either a proper notice of intent to accelerate maturity or a waiver of such a notice.

A negotiable instrument that is payable at a definite time may provide for the right of acceleration of the debt on default. Because acceleration of a debt is viewed as a harsh remedy, however, any such clause will be strictly construed. Texas law requires clear notice of intent to exercise acceleration rights, followed (if the debtor continues in default) by notice of actual acceleration.

On December 7, 2006, Stanton's attorneys sent a letter to ISC and Burns advising that default had occurred and that "Stanton will take all applicable enforcement action" against ISC and Burns.

To encourage the Bank to finance ISC's operations, Stanton had entered into a Subordination Agreement with the Bank, and that Agreement had been acknowledged by ISC and Burns. That Agreement specifically contained a definition of "Enforcement Action" as meaning "to initiate or to participate with others in any suit, action or proceeding against Borrower or any Guarantor to enforce payment or to collect all or any part of the Subordinated Indebtedness ... or the Senior Indebtedness ... or to accelerate the Subordinated Indebtedness (in the case of Creditor) or the Senior Indebtedness (in the case of the Bank)." Therefore, when Stanton gave notice of default and that he intended to take "all applicable enforcement actions," that notice necessarily included the required notice of intent to accelerate the maturity of the ISC and Burns obligations to Stanton.

Milton M. Cooke Co.* v. *First Bank and Trust, 290 S.W.3d 297 (Tex.App.-Houston [1st Dist.] 2009, no pet.). This lawsuit derives from two competing claims. First Bank's dispute derives from appellants' failure to pay obligations due to First Bank on two promissory notes for an equipment loan and a boat loan. Cooke's dispute derives from First Bank's having honored checks that Cooke's bookkeeper issued to herself from accounts with First Bank. The bookkeeper had been withdrawing funds to support a gambling habit for about 18 months when Cooke discovered the unauthorized checks. Estimates of the funds lost from her conduct ranged from $235,000 to $336,000. The bookkeeper was still working for Company, although with restricted responsibilities when this case went to trial.

The Bank refused to reimburse Cooke for the unauthorized checks, claiming the late notice violated the terms of its deposit agreement that required Cooke to notify the Bank within 60 days after the checks were issued. After a series of written communications ensued concerning whether First Bank would reimburse Cooke for the unauthorized checks, Cooke devised a plan to offset the losses related to the unauthorized checks through the indebtedness to First Bank under the notes that secured the equipment and boat loans. Cooke warned First Bank then, both verbally, in speaking with a bank officer, and in writing, that he was considering withholding all payments on all notes currently held by First Bank as offsets to the money owed for the unauthorized checks unless First Bank deposited $235,000 in the Company account. An attorney for First Bank explained to Cooke in writing the legal reasons why it would not accept the offset, and First Bank continued to refuse Company's requests to deposit the $235,000 in appellants' accounts.

In keeping with his warnings and objections to First Bank's failure to reimburse for Riley's unauthorized withdrawals, Cooke then issued two checks to First Bank. Each check was in the customary amount of the monthly payments on its notes. The amounts of the checks were $3,471.38, against an unpaid balance of $122,218.53 for the equipment loan, and $2,888.91, against an unpaid balance of $193,156.51 for the boat loan. Cooke added "payment in full" notations to those checks. Cooke testified that he added the notation to indicate that the respective, monthly payment amounts would fully satisfy all further obligations under the notes. An additional purpose was to "offset" the losses from the unauthorized checks. Cooke instructed the teller to whom he gave the "full payment" checks to give the checks directly to the bank officer whom Cooke had warned that he would proffer this "offset."

Cooke described this strategy as "trying to have the bank enter into an accord and satisfaction" to compensate for losses arising from the unauthorized checks. After Cooke's proffer, it took the position that it had no further obligation to First Bank on the notes and did not make any additional installment payments on the notes. This prompted First Bank to declare both notes in default and to accelerate them, in accordance with their terms, and to file this lawsuit. The trial court's judgment awarded First Bank damages in accordance with Cooke's outstanding obligations under the notes, accrued interest, and attorney's fees, and denied appellants relief on their counterclaims.

Cooke contends it established the affirmative defense of accord and satisfaction as a matter of law, and they challenge the trial court's contrary conclusion.

Common-law principles define the defense of accord and satisfaction as premised on a contract, express or implied, in which the parties agree to discharge an existing obligation by means of a lesser payment that is tendered and accepted. To prevail under the common law on the affirmative defense that an accord and satisfaction barred First Bank's claims for the accelerated balances due on the loans, Cooke had to produce (1) evidence establishing a dispute between it and First Bank and (2) evidence establishing that it and First Bank specifically and intentionally agreed to discharge appellants' obligations.

UCC § 3.311 contains a detailed provision regarding accord and satisfaction. Pursuant to section 3.311(a)-(b), a claim is discharged if the "person against whom the claim is asserted proves that the instrument or an accompanying written communication contained a conspicuous statement to the effect that the instrument was tendered in full satisfaction of the claim and (1) that person in good faith tendered an instrument to the claimant as full satisfaction of the claim; (2) the amount of the claim was unliquidated or subject to a bona fide dispute; and (3) the claimant obtained payment of the instrument.

Cooke argued that the trial court disregarded UCC § 3.311 and erred by relying instead on common-law principles in rejecting Cooke's contentions. In other words, Cooke claimed that the UCC and the common law are inconsistent. But, held the court, § 3.311 does not conflict with the common-law doctrine of accord and satisfaction, rather, the statute is consistent with the doctrine as interpreted by Texas courts. As noted in the comments to the UCC, §3.311 is based on a belief that the common law rule produces a fair result and that informal dispute resolution by full satisfaction checks should be encouraged.

Furthermore, both the common law and the UCC recognize freedom of contract and allow the parties to vary the common law and the UCC rules regarding accord and satisfaction. Here, the loan agreements provided that Cooke agreed not to deliver full satisfaction checks to the Bank except in a specified manner that Cooke did not follow.

PART III
GUARANTIES

James Clark, Inc.* v. *Vitro America, Inc., 269 S.W.3d 681 (Tex.App.—Beaumont 2008, no pet.). Both the credit agreement and the individual personal guaranty appear on a one-page pre-printed form. The top half of the page contains the terms of the agreement to extend credit to Clarks' Glass & Mirror for purchases from VVP America, Inc. The bottom half of the page contains an individual personal guaranty signed by Becky Clark. Mistakenly, the blank that was supposed to show the name of the primary obligor instead showed the name of the party extending credit. When she was sued on the guaranty, Becky argued that the guaranty does not state that Becky guaranteed the payment of an obligation owed by Clark Inc., but said she guarantied obligations owed by the party extending credit.

Nonsense, said the court. In this case, there was certainly a mistake made in reducing the parties' agreement to writing. Of the two possible constructions of the contract, however, only one is reasonable. The single-page

document reveals that the merchant agreed to sell merchandise to Becky's company on credit and that Becky agreed to guarantee payment. Read literally and without reference to its context, the payment Becky agreed to guarantee was a payment by one merchant entity to another. From the face of the document such a result is nonsensical.

The document shows that one party-the merchant (itself and through related entities)-was extending credit to one party only-Clark Inc. (itself or through an assumed name)-and one party-Becky-personally guaranteed payment of any debts that arose pursuant to the transactions under the credit agreement. Because the party mistakenly shown in the blank is a party extending credit, not a party receiving credit under the agreement, there is no reasonable interpretation of the contract under which ACI Distribution would be making a payment for Becky to guarantee. Because the only reasonable interpretation of the contract is that Becky guaranteed payment of debts incurred by Clark Inc. under the agreement, the trial court did not err in so construing the contract as a matter of law.

PART IV
USURY

***C & K Investments* v. *Fiesta Group, Inc.*,** 248 S.W.3d 234 (Tex.App.—Houston [1st Dist.] 2007, no pet.). As a condition to making two loans (each of which bore interest at 18% per annum), the lender required the borrower to pay a "fee," "commission" or "equity" of 10% of the amount of each loan contemporaneously with funding. After the loans went into default, and the lender foreclosed on the property securing the loans, the borrower sued for usury. The trial court awarded separate statutory usury penalties for contracting for, charging, and receiving usurious amounts.

The lender argued that, since the trial court had found that the notes were not usurious on their face and contained a savings clause, there was not a violation of the "contracting for" element of the usury claim. The court disagreed. Although the notes in this case were non-usurious on their face, the borrower presented evidence that the loans were conditioned on the immediate payment of a fee of approximately 10% of the face amount of both loans, thus effectively reducing the true principal of the loans and increasing the effective interest rate above the maximum lawful rate of 18%, and resulting in a contract for usurious interest.

Also, in regard to the lender's argument that the savings clauses in the notes preclude the award of damages against Ken for "contracting for" usurious interest, the court first noted that Texas courts have acknowledged the validity of usury savings clauses and, in appropriate circumstances, enforced such clauses to defeat a violation of the usury laws. However, the mere presence of a usury savings clause will not rescue a transaction that is necessarily usurious by its explicit terms. This rule prevents a creditor from freely contracting for usurious interest knowing that for the few debtors who complain, the creditor will escape penalty by mere reference to a savings clause and refund of the usurious amounts. Furthermore, the effect of a usury savings clause is largely a question of construing the terms of the clause as a whole and in light of the circumstances surrounding the transaction.

Based on these guidelines, the court concluded that the savings clauses in the notes do not preclude judgment against the lender. First, although the notes are not usurious on their face, the borrower presented evidence that its payment of fees to the lender was contemporaneous with the parties' execution of the notes, and the jury found that the lender conditioned the loans on the payment of these fees. The borrower also presented evidence that the checks were signed on the date of the closings and were negotiated or presented by the lender shortly thereafter. Additionally, there is no evidence that the lender ever attempted to effectuate the savings clauses, and they cannot now seek the clauses' protection in this appeal.

Finally, the lender argues that the amount of interest contracted for was wrongly "spread over the entire term of the loan" instead of spread

through the date of the foreclosure sale. Section 302.101 of the Finance Code provides that the determination of whether a real estate loan is usurious is made by amortizing or spreading all of the interest during the entire stated term of the loan. In this case, involving “contracting for” usurious interest, the borrower presented evidence properly spreading the interest under the stated term of the loans, as those terms existed at the time the lender engaged in the penalized conduct, i.e., at the time he contracted for the loans.

Kennon* v. *McGraw, 281 S.W.3d 648 (Tex.App.-Eastland 2009, no pet. history to date). McGraw and her husband bought a house with a mortgage from the seller. Until they were divorced, all went well, but after the divorce, McGraw fell behind in payments. The seller’s lawyer sent McGraw a demand letter and received one in return from McGraw’s lawyer stating that McGraw was not in default and claiming that the amounts were miscalculated. The seller sent another demand letter and McGraw’s lawyer again responded with a denial of any default, this time asserting that McGraw was being charged usurious interest.

The seller sent a notice of trustee’s sale. McGraw’s lawyer faxed a response to it on the day before the sale, again contending that there were usurious charges being made. The seller foreclosed and, when it tried to evict McGraw, she filed suit. The trial court found that she had been charged about $3,000 in usurious interest and awarded damages of around $9,000. The seller argued that the trial court erroneously failed to spread the interest over the entire term of the note and also erred by not giving effect to the savings clause contained in the note.

The trial court found that from March 1995 through December 1999 the seller charged McGraw interest of $17,845.29 and that this was usurious because the maximum amount of allowable interest was only $13,920. The December date may have been a typographical error because it appears that the court intended to use the time period running through the Trust's acceleration of the note, but the note was accelerated by letter dated March 10, 2000. Regardless, the seller argues that, because of the Spreading Doctrine, it was error to use any period of time shorter than the fifteen-year term of the note and that the trial court should have determined whether $17,845.29 could be legally charged over fifteen years. McGraw answers that the Spreading Doctrine only applies when analyzing a note to determine if it charges usurious interest and that it does not apply here because Kennon did not follow the note's terms when she charged past-due interest.

The Spreading Doctrine is codified in Texas Finance Code § 302.101: “To determine whether a loan secured in any part by an interest in real property, including a lien, mortgage, or security interest, is usurious, the interest rate is computed by amortizing or spreading, using the actuarial method during the stated term of the loan, all interest at any time contracted for, charged, or received in connection with the loan.” Because of the statute's mandatory language and its broad reference to all interest contracted for, charged, or received, the court disagreed with McGraw that it only applies to the construction of a written agreement. The doctrine is applicable to this case as well.

The next question is what time period should be utilized. The trial court did not use the entire fifteen-year term because the note was accelerated; however, the Supreme Court has held that this is immaterial. In ***Tanner Dev. Co.* v. *Ferguson***, 561 S.W.2d 777, 779 (Tex.1977), the court considered a five-year note that required prepayment of interest at the beginning of the note and then provided for a subsequent period of principal-only payments. The debtor defaulted while still making prepaid interest payments, and the creditor accelerated the note. The court held that, even though the note was accelerated, usury should be determined by using the five-year term. Because the trial court did not utilize the entire term of the note when it performed its interest calculation, the court ruled in favor of the seller on the spreading issue. It did not agree with the seller as to the calculation of allowable interest, however.

The seller argued that the trial court erred as a matter of law by not giving effect to the note's

savings clause. They contend that, unless a note is usurious on its face, a savings clause precludes a usury claim. The trial court found that, because the note was accelerated and the property foreclosed, McGraw's future payments could not be adjusted to compensate for overcharges and, thus, that the savings clause did not preclude a usury claim.

Savings clauses are favored by the law and will be given effect if reasonably possible. The effect of a savings clause hinges on the construction of the terms of the whole transaction in light of the surrounding circumstances. Usury is a matter of intention, and a savings clause is evidence of an intent not to charge usurious interest. A party may not, however, escape penalty by disclaiming the intention to do what was clearly done.

The seller's daily late interest charge was the amount of interest accruing each day on the total note. The seller testified that she calculated late interest charges using an amortization schedule the title company provided at closing. That schedule included an equivalent daily interest rate. She multiplied this rate by the number of days a payment was late. This initially resulted in a $7.872 daily late payment charge. As the note balance decreased, she recalculated the daily interest rate. The seller was, therefore, doubling the interest McGraw was charged each day her payment was late. One court has described this method as "patently erroneous." McGraw's lawyer had twice pointed this out to the seller. The court held that this meant the trial court had not erred in find that the savings clause did not preclude McGraw's usury claim issue.

At this point, the court had to determine how much, if any, usurious interest was being charged. Because McGraw's payments were late, the seller was entitled to late charges and to interest on unpaid charges. Finance Code § 302.001 allows the seller to charge the greater of 5% of the payment of $7.50 for any payment that is 10 days late. The seller was entitled to charge $16.23 for each late payment. The note also provided for interest on past due principal and interest at the maximum rate. Finance Code § 302.001(b) sets the maximum rate of interest at 10% a year. The seller was thus allowed to charge 8.8921 cents per day on all late payments. The court held that, while there was legally sufficient evidence to support the trial court's determination of the amount of interest charged, it was factually insufficient, so the case was remanded for a determination of how much interest had been charged and how usurious it was.

PART V
DEEDS AND CONVEYANCE DOCUMENTS

Givens* v. *Ward, 272 S.W.3d 63 (Tex.App.—Waco 2008, no pet.). Ward purchased a 115-acre tract of land from Givens. The sales contract said the seller would reserve the minerals. The contract also contained a "further assurances" provision that said the parties would fully cooperate, adjust, and correct any errors or omissions and to execute any and all documents needed or necessary to comply with all provisions of the contract. The warranty deed contains no reservation of mineral interests. About six months after closing, the title company contacted Givens and Ward, explaining that the deed erroneously omitted the mineral reservation and asking the parties to sign a correction deed with the mineral reservation. Ward refused to sign.

Ward filed a declaratory judgment action against Givens seeking a judicial declaration that he owns the disputed mineral interests. Givens filed a general denial, asserted the affirmative defense of mistake, and counterclaimed for reformation of the deed due to mistake.

The underlying objective of reformation is to correct a mutual mistake made in preparing a written instrument, so that the instrument truly reflects the original agreement of the parties. For reformation of a written instrument, a party must prove two elements: (1) an original agreement and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing.

Givens contends that the requisite mutual mistake consists of the unilateral mistake in signing a deed which did not conform to the parties' agreement and Ward's knowledge that the deed did not conform. Unilateral mistake by one party, and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Ward argued that when a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. However, the merger doctrine applies to deeds only in the absence of fraud, accident, or mistake. The court rejected Ward's claim that the merger doctrine barred reformation.

Watson v. Tipton, 274 S.W.3d 791 (Tex.App.—Fort Worth 2008, pet. denied). Tipton filed declaratory judgment actions against the Watsons and the Kennedys, asking the court to construe the validity of a warranty deed and to declare that Tipton held good and marketable title to the property described by the deed. He alleged that the Watsons and the Kennedys had each executed a deed to him of the houses they lived in, that Tipton had allowed them each to remain in their respective houses in exchange for an agreement to pay taxes and insurance on the property, that they had failed to do so, and that, when he tried to evict them, each raised the issue of validity of the deeds in question in order to oust the jurisdiction of the justice court.

The Kennedys and the Watsons, acting pro se, claimed that Tipton's attorney Alex Tandy, either alone or in complicity with Tipton, fraudulently obtained the signatures of the Watsons and Weldon and fraudulently appended them to the deeds at issue. Tipton alleged that the Watsons and the Kennedys had no evidence to support their contentions that they did not execute the deed, that the endorsements on the deed were not genuine, or that Tipton's suit was barred by the doctrine of release. He argued that because the deed was recorded in the public records, the presumption that the deed is valid applies and that an acknowledgment on a deed is conclusive evidence of the facts stated in the instrument.

The trial court granted summary judgment for Tipton. The court's order states that the Kennedy and Watson deeds passed good and marketable title to Tipton and also awards Tipton attorneys' fees.

When a grantor transfers property, title to the property vests in the grantee upon execution and delivery of the deed conveying the property. Whether the grantor intended to deliver the deed and convey the property in accordance with the deed is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument. Proof that the deed was recorded creates a presumption of and establishes a prima facie case of delivery and intent by the grantor to convey the land. This presumption may be rebutted by showing (1) that the deed was delivered or recorded for a different purpose, (2) that fraud, accident or mistake accompanied the delivery or recording, or (3) that the grantor had no intention of divesting himself of title.

Tipton produced copies of the deeds at issue and proof that the deeds had been filed in the records of Parker County. The notarized deeds named him as grantee and Watsons and Kennedys as the grantors. By providing the deeds and proving that the deeds were recorded, Tipton established a prima facie case that the parties delivered the deeds and intended to convey the property described. A showing that the deeds were executed and delivered with an intent to convey the property is sufficient to establish that the deeds vested title to the properties in Tipton.

The Kennedys and Watsons argue that the deeds are not entitled to the presumption because the file stamp numbers suggest that the documents were somehow altered and pages interchanged. Specifically, they point out that the Watson deed has a file stamp and page number that is quite a bit lower than the file stamp and page number of the Kennedy deed, indicating that the Watson deed was filed much

earlier than the Kennedy deed, which they argue is contrary to what one would expect if the deeds had been signed one day apart. A showing that fraud accompanied the recording of the deeds would rebut the presumption that Appellants intended to convey the property to Tipton.

The Watson deed was filed in October 2001 and that the Kennedy deed was filed in January 2003; the Watson deed has a lower record number because it was filed over a year before the filing of the Kennedy deed. There was no evidence explaining why the Kennedy deed was not filed until 2003, but the Kennedy's and Watsons make no argument as to how the delay in filing raises a fact issue on whether fraud accompanied the delivery or recording.

The Watsons and Kennedys contend that Tipton presented no summary judgment evidence that he paid consideration for the conveyances. Thus, they argue, Tipton did not carry his burden of proof. The Watsons and Kennedys do not cite any authority supporting their argument that Tipton had to prove consideration to prevail. And Tipton did not have to prove consideration because mere lack of consideration would not have prevented the deeds from conveying title.

Furthermore, the acknowledgments on the deeds constitute prima facie evidence that the deeds were executed for the consideration stated therein. Both deeds were acknowledged and notarized by Lana Trimble, a notary public of the State of Texas. The acknowledgment on the Watson deed states that Larry and Sheridan Watson personally appeared before Trimble and acknowledged that they executed the deed for the purpose and consideration expressed in it. The acknowledgment on the Kennedy deed states that Weldon Kennedy appeared before her and made an identical acknowledgment. An acknowledgment on a deed is prima facie evidence that the grantor executed the deed for the consideration expressed in the deed. Tipton therefore made a prima facie case as to the genuineness of the signatures and as to the execution of the deeds

PART VI
LEASES

Prudential Insurance Company of America* v. *Italian Cowboy Partners, Ltd., 270 S.W.3d 192 (Tex.App.—Dallas 2008, pet. pending). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The first claims dealt with by the Court of Appeals were Italian Cowboys' common-law fraud claim, the statutory fraud claim, and the negligent misrepresentation claim. The trial court found that the property manager made the following statements to Italian Cowboy during lease negotiations: (a) The tenant was lucky to be able to lease the premises because the building on the premises was practically new

and was problem-free; (b) No problems had been experienced with the Premises by the prior tenant; (c) The building on the Premises was a perfect restaurant site and that the tenant could get into the building as a restaurant site for next to nothing; and (d) given the property manager's superior and special knowledge, these matters were represented as facts, not opinions.

The trial court also found that the statements were false; that the property manager and Prudential knew that they were false; and that they intended for the tenant to rely upon them. Further, the trial court found that the Tenant relied on the statements and would not have entered the lease and executed the guaranty if the representations had not been made.

Prudential and the property manager argue that common-law fraud, statutory fraud, and negligent misrepresentation all have the common element of reliance and that the tenant disclaimed any reliance on representations not contained in the lease. The lease contained a statement that there were no representations not set out in the lease and also contained a merger clause.

Relying on ***Schlumberger Tech. Corp. v. Swanson***, 959 S.W.2d 171 (Tex.1997), the court noted that the following elements will foreclose a claim of fraudulent inducement: (1) the parties were attempting to end a situation in which they had become embroiled in a dispute over the value and feasibility of the subject project, (2) highly competent and able legal counsel were involved in negotiating the release, (3) the parties were negotiating at arm's length, and (4) the parties were knowledgeable and sophisticated in business. Here, the parties were represented by counsel as well as real estate brokers both before and during the negotiations leading up to the signing of the lease and guaranty. The record also reveals that the parties to this arm's length transaction were sophisticated in dealings involving the leasing and the operation of restaurant properties, that several drafts of the lease were circulated, and that various changes were negotiated and made to both the lease and the guaranty.

When sophisticated business parties who have fully negotiated a contract and who have been represented by attorneys or other professionals in the field are dealing at arm's length, they should be able to enter a contract in which they effectively disclaim reliance, or in which they agree that there are no representations outside of the written contract, or in which they otherwise provide for merger. Such a rule will result in agreements with predictable results and liability limitations that are well-defined. In this negotiated, redrafted lease agreement the disclaimer and merger clauses must be considered to be a part of that negotiated agreement and not simply boilerplate as found by the trial court. Under such circumstances, sophisticated parties who are represented by counsel and other professionals certainly can bargain to have the details of any representations upon which they are relying inserted into the contract, rather than agreeing that there are none.

The court next dealt with Italian Cowboy's claim of breach of the implied warranty of suitability. Here, there is no express waiver of the implied warranty of suitability. Rather, the parties rely upon the placement of repair responsibilities in support of their respective positions. Prudential and the property manager argue that the cause of the sewer odor problem was related to plumbing, ventilating, air conditioning, or some other mechanical installation. Prudential argues that, in accordance with the terms of the lease, the Tenant was required to make all repairs "foreseen or unforeseen" to the plumbing, ventilating, air conditioning, and "any other mechanical installations or equipment serving the Premises or located therein." In its arguments, the tenant contends that Prudential and the property manager ignore findings of fact regarding problems with a grease trap that contributed to the sewer gas odor problem. They also argue that, because the grease trap was located in the "Common Area," Prudential was obligated to repair it.

The court held as a matter of law that the lease placed the burden upon the Tenant to make any needed repairs, foreseen or unforeseen, to

plumbing, heating, ventilating, air conditioning, and mechanical installations or equipment serving the premises. It went on to note that the subsequent tenant managed the odor problem by altering some of the ventilation pipes. The court also noted that, even if the grease trap, located in the common area, was implicated in the problem, the implied warranty of suitability applies only to the premises, and does not apply to the common area.

The third claim made by the tenant was that the odor problem constituted a constructive eviction and breach of the covenant of quiet enjoyment. The court held that, for an act to constitute a breach of the covenant of quiet enjoyment, it must occur during the lease term. Here, the misrepresentations were all made before the lease began, so they could not be the basis of a constructive eviction claim.

Garza* v. *CTX Mortgage Company, LLC, 285 S.W.3d 919 (Tex.App.-Dallas 2009, no pet.). In a lawsuit related to a mortgage loan transaction, the Garzas alleged claims for breach of oral and written contract, fraud, fraud in the inducement, fraud in a real estate transaction, breach of fiduciary duty, conversion, negligence, gross negligence, nine separate violations of the Texas DTPA, negligent misrepresentation, misapplication of trust funds, breach of a trust relationship, and breach of the common law duty of care.

CTX argued that it had no liability to Garza for misrepresentation claims because those claims were precluded by the terms of the contract and, CTX claimed, the entire relationship of the parties was established by the contract. The contract provision said: “Complete Agreement; Amendment. No party has made any promise or representation to any other that is not in the Loan Documents. The Loan Documents contain the complete agreement of the parties. This Loan Agreement may not be amended and no provision of it may be waived except by a writing signed by Lender.” CTX Mortgage contended that this clause “precludes and eliminates any prior or contemporaneous agreements which are inconsistent with the integrated agreement.”

The court agreed that a party's disclaimer of reliance on representations, if the intent is clear and specific, can defeat claims for fraud, fraudulent inducement, and negligent misrepresentation, because reliance is a necessary element of each of those claims. However, the Texas Supreme Court in ***Forest Oil Corp.* v. *McAllen***, 268 S.W.3d 51, 56 (Tex.2008) and ***Schlumberger*** expressly declined to adopt a per se rule that a disclaimer of reliance automatically precludes a fraudulent-inducement claim. The court enunciated factors which it considered important in making that determination: whether the contract was negotiated or boilerplate, whether the complaining party was represented by counsel, whether the parties dealt with each other at arms length, whether the parties were knowledgeable in business matters, and whether the release language was clear.

Based on this record, the court could not conclude that the Garzas disclaimed reliance on CTX's alleged representations as a matter of law. Consequently, it concluded that summary judgment in favor of CTX Mortgage on the Garzas' claims for fraud, fraudulent inducement, and negligent misrepresentation was improper.

Luccia v. Ross, 274 S.W.3d 140 (Tex.App.—Houston [1st Dist.] 2008, pet. denied). Luccia leased an office building from Ross. The lease included an option to purchase at a set price “Anytime with credit on rents prorated.”

Luccia excercised the option and the parties entered into a purchase contract; however, Luccia defaulted and failed to purchase the property. Ross kept the earnest money and Luccia continued as tenant of the property, paying rent.

Sometime later, Luccia again sought to purchase the property pursuant to the terms of the option. Ross declined to sell the property to Luccia, contending that a “new contract with new terms” would be necessary. Luccia responded to Ross's refusal to sell by filing this suit for breach of contract, seeking the remedy

of specific performance or, alternatively, damages. Ross counterclaimed seeking a declaration that Luccia had no right to exercise the option and also seeking damages for Luccia's breach of contract for failing to meet the terms of the original Lease Agreement.

The parties dispute whether the option to purchase in the lease allowed Luccia more than one attempt to close the sale. In other words, the parties disagree whether the first Purchase Contract was the only time that the option to purchase could be exercised, or whether Luccia could again exercise the option to purchase during the period of time after the failed closing and the end of the lease.

Luccia contends that because the lease does not specify an exact time for the exercise of the option, it may be exercised at any time during the lease term, even though he defaulted on the first purchase contract. The court agreed because the plain terms of the agreement do not limit the number of times that Luccia can exercise the option to purchase the property, other than to require that the options be exercised during the term of the lease. The plain language of the lease agreement does not provide that the option offers a one-time-only chance to Luccia. The option expressly states "Anytime with credit on rents prorated." The reference to the rents indicates the option was tied to the lease term. Unless the option contains provisions to the contrary, all that is required of the optionee is that he notify the optionor, prior to the expiration of the option, of his decision to exercise the option. The Optionee thereafter has a reasonable time within which to complete the deal.

In re *Wild Oats Markets, Inc.*, 286 S.W.3d 499 (Tex.App.-Beaumont 2009, mandamus dism'd). The lease between Wild Oats as the tenant and its landlord contained a waiver of jury trial in any court action. The landlord sued Wild Oats for breach of the lease and sued Whole Foods for tortious interference with the lease agreement. The trial court struck the Landlord's jury demand as to the suit with the tenant, Wild Oats, but set the claims regarding Whole Foods for a jury trial.

The landlord argued that Whole Foods could not enforce the jury waiver because it was not a party to the lease.

The issue here is whether the waiver language in the lease necessarily includes the landlord's claims against Whole Foods. The provision covers any court action, any claim of injury, and any provisional remedy. While the contract places no express limitation on the parties affected by the provision, it does expressly refer only to the landlord and the tenant. Although the damages the landlord seeks in its petition for both its breach-of-contract claim and its tortious interference claim are both identical, a tortious interference claim against an unrelated third party is not a claim encompassed by the waiver-of-jury-trial clause contained in the lease.

Although direct benefits estoppel does not apply here, arguably the doctrine of concerted-misconduct equitable estoppel would apply if the doctrine were accepted in Texas. However, the Texas Supreme Court has declined to adopt concerted-misconduct equitable estoppel.

Merit Management Partners I, L.P.* v. *Noelke, 266 S.W.3d 637 (Tex.App.—Austin 2008, no pet.). The County Court has no jurisdiction to hear a case involving the effect of a consent to assignment of lease because the existence and extent of the tenant's leasehold rights are so involved in the case as to make the landlord's claims a suit for the determination of the existence and extent of the tenant's leasehold and, thus, a determination of title to real property.

PART VII
VENDOR AND PURCHASER

In re *Bank of America, N.A.*, 278 S.W.3d 342, 52 Tex. Sup. Ct. J. 400 (Tex. 2009). Bank of America and Mikey's Houses executed a real estate contract and a two-page Bank of America Mortgage Addendum, which contains a jury-waiver provision. The addendum comprises twenty numbered and separately-spaced

paragraphs, five of which contain bolded introductory phrases that appear to be hand-underlined. Both parties signed the contract and afterwards separately executed the addendum. Mikey's Houses sued Bank of America for breach of contract.

When Mikey's Houses made a jury demand, Bank of America moved to enforce the jury waiver. The trial court agreed that the waiver should be enforced and issued an enforcement order. Mikey's Houses then filed an interlocutory appeal seeking to reverse the trial court's enforcement order. The court of appeals reversed, holding that Bank of America did not meet its burden of producing prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to a jury trial. 232 S.W.3d at 147.

The court of appeals imposed this burden on Bank of America by inferring a presumption against contractual jury waiver from **In re *Prudential***, 148 S.W.3d 124 (Tex.2004) where the Supreme Court cited to ***Brady* v. *United States***, 397 U.S. 742, 748, 90 S.Ct. 1463, 25 L.Ed.2d 747 (1970), to recognize that the right to a trial by jury is a constitutional right. The Supreme Court said the court of appeals was wrong for two reasons: First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on Bank of America, which is contrary to the rule that a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though the Supreme Court has previously said the rule should be the same for all similar dispute resolution agreements.

In holding that the waiver in this case was conspicuous, the court noted that the addendum which contained the waiver is only two pages long, and each of its twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in ***Prudentia***l, and the "Waiver of Trial By Jury" caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word "waiver" and the words "trial by jury" within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers the court has previously upheld in both and therefore serves as prima facie evidence that the representatives of Mikey's Houses knowingly and voluntarily waived their constitutional right to trial by jury.

DiGiuseppe* v. *Lawler, 269 S.W.3d 588, 52 Tex. Sup. Ct. J. 29 (Tex. 2008). The purchase contract limited the remedies available to the parties in the event of a breach. In the event DiGiuseppe failed to close, Lawler's "sole and exclusive" remedy was to retain the earnest money as liquidated damages, and he expressly waived any right to claim any other damages or specific performance from DiGiuseppe. In the event Lawler defaulted in performing his obligations under the contract for any reason other than DiGiuseppe's default or a proper termination of the contract under its provisions, DiGiuseppe could choose between two remedies: (1) terminate the contract and receive a full and immediate refund of the earnest money, or (2) "seek to enforce" specific performance of the contract. DiGiuseppe also expressly waived any right to claim damages.

The case was ultimately tried to a jury and the parties' breach of contract claims were submitted on broadform questions inquiring as to whether either party failed to comply with the contract. The jury answered favorably to DiGiuseppe that Lawler had failed to comply with the contract and that DiGiuseppe had not failed to comply. Although disputed at trial, no question was requested by either party or submitted to the jury with respect to specific performance or whether DiGiuseppe was ready, willing, and able to perform under the contract at the time he alleged the transaction should have closed. The trial court rendered a takenothing judgment against Lawler and granted DiGiuseppe specific performance of the purchase contract.

The court of appeals reversed the trial court's order granting specific performance, holding that DiGiuseppe had failed to conclusively establish, or to request and obtain a finding of fact on, an essential element of his claim for specific performancethat he was ready, willing, and able to perform under the terms of the purchase contract.

DiGiuseppe claimed that the purchase contract provided for the remedy of specific performance in the event of a breach by Lawler regardless of whether DiGiuseppe obtained a finding of fact that he was ready, willing, and able to perform. The court held that the remedy provision at issue here does not entitle DiGiuseppe to obtain specific performance merely upon a showing of a breach or default by Lawler. The provision at issue limits the available remedies to either (1) terminating the contract and receiving a refund of earnest money, or (2) seeking to enforce specific performance. It does not in any way alter the requirements for obtaining specific performance in the event DiGiuseppe decides to seek such a remedy.

An essential element in obtaining the equitable remedy of specific performance is that the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract. It is also a general rule of equity jurisprudence in Texas that a party must show that he has complied with his obligations under the contract to be entitled to specific performance.

A corollary to this rule is that when a defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering his or her performance to the repudiating party before filing suit for specific performance. In such a circumstance, a plaintiff seeking specific performance is excused from tendering performance presuit and may simply plead that performance would have been tendered but for the defendant's breach or repudiation. This exception to the general rule - that actual tender of performance is a prerequisite to obtaining specific performance - is grounded in the notion that actual presuit tender of performance should be excused when it would be a useless act, an idle ceremony, or wholly nugatory. However, even when presuit tender of performance is excused, a plaintiff is still obligated to plead and prove his readiness, willingness, and ability to perform at relevant times before specific performance may be awarded.

As an alternative basis for relief, DiGiuseppe argued that the omitted jury finding as to his readiness, willingness, and ability to perform may be deemed found in his favor pursuant to Texas Rule of Civil Procedure 279. His theory was that specific performance was at least partially submitted to the jury in the form of a question regarding his compliance with the contract, and Lawler failed to object to the omission of a "ready, willing, and able" question. The court disagreed and held that a deemed finding under Rule 279 is not available here.

McCarty* v. *Montgomery, 290 S.W.3d 525 (Tex.App.-Eastland 2009, pet. denied). McCarty agreed to sell an undivided interest in some land to Montgomery. Their contract was on a TREC form. The contract required McCarty to provide a title policy with certain enumerated exceptions. McCarty was also required to furnish a commitment for title insurance, legible copies of restrictive covenants, and documents evidencing exceptions in the commitment. While preparing a commitment, Palo Pinto County Abstract discovered that a federal tax lien burdened the property. The lien arose because McCarty's estranged husband failed to pay income taxes after their separation in 1995. McCarty knew that the IRS had filed tax liens on their Brownwood home, but she did not know that it had filed a lien on her Palo Pinto County property.

McCarty's broker informed Montgomery about the lien and asked for some time to clear up the lien. Montgomery responded by filing an affidavit with a copy of the contract and stating his intention to seek specific performance. McCarty was firm in her belief that she didn't

owe the taxes and said she wouldn't pay off the lien even if she got a million dollars for the property. Her broker then sent Montgomery a copy of a letter from McCarty saying that she would have to terminate the contract because of the situation with the lien. Montgomery kept insisting on buying the land free of the lien.

In the meantime, McCarty executed an oil and gas lease on part of the property, which Montgomery characterized as criminal misconduct.

Suit was filed and the trial court ordered specific performance, providing for payment of the tax lien out of the sales proceeds.

On appeal, McCarty argued that specific performance was not available because the contract terminated by its own terms. According to her, the contract provided that after Montgomery had objected to the lien, she had 15 days to cure. Because she didn't sure, Montgomery could then either close with the lien in place or terminate the contract.

However, the court pointed and Montgomery pointed out, the cure provision was in effect only after the purchaser received a commitment with exception documents. Montgomery never got a commitment. Furthermore, Montgomery was never put to an election. The court pointed out that the contract said that Schedule C requirements of the title commitment were not waived, so with or without any action by Montgomery, the commitment would have confirmed McCarty's obligation to clear the lien from title.

McCarty also argued that the provision of the contract dealing with representations limited Montgomery's rights to the termination of the contract. That provision said that if any of the seller's representations were untrue on the closing date, the buyer could terminate. However, the representation paragraph's language does not indicate that the parties intended termination to be Montgomery's exclusive remedy if McCarty failed to deliver clear title. For example, it does not contain language such as "exclusive" or "sole" remedy. Instead, termination is described permissively, "Buyer may terminate this contract."

Besteman* v. *Pitcock, 272 S.W.3d 777 (Tex.App.—Texarkana 2008, no pet.). Besteman and the Pitcocks entered into a lease for two years with an option for the Pitcocks to purchase at the termination of the lease agreement. A condition precedent in the leases agreement to the Pitcocks' right to purchase was stated as follows: "90 days before the 24 month lease period expires, Lessee will notify Lessor of Lessee's intent to purchase said property." The agreement also contained a provision that required all notices to be in writing, and stating when notices given by different means would be deemed received. The final sentence says that notices "delivered otherwise" than by certified mail effective upon actual receipt.

The Pitcocks went into possession of the tract of land under the lease agreement and made timely payments of the lease installments. However, they failed to provide any written notice of their intention to exercise the option to purchase until some forty-nine days after the time specified in the contract. When the Pitcocks did send written notice by certified mail, it was not retrieved by the Bestemans and the notice was returned, undelivered.

Almost immediately after the notice was returned to them, the Pitcocks filed suit for specific performance, declaratory judgment, and breach of contract. In their petition, the Pitcocks alleged that they had provided unequivocal notice of their intention to exercise the option to purchase well before the required time and that they had, in reliance upon the option to purchase, invested substantial sums in improving the property. The Bestemans responded with a request for an award of reasonable rentals from the time of the termination of the two-year lease until the time of recovery of the property from the Pitcocks.

The Pitcocks maintain that although the contract states that all notices required under the agreement be in writing and delivered by certified mail, the paragraph concerning notices ends with the statement that "Notices delivered

otherwise will be effective upon receipt." The Pitcocks insist that since the contract permits notices to be delivered "otherwise," that means that the notice could be delivered orally rather than in writing; in other words, the Pitcocks say that they effected notice by oral communication and that this was sufficient notice to invoke the option to purchase.

The Pitcocks also rely upon the equitable doctrine of disproportionate forfeiture (defined later) as a defense against the claims that they failed to conform to the ninety-day notice requirement.

It is a well-settled principle that strict compliance with the provisions of an option contract is required. Except in rare cases of equity, acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. An option is unilateral. It imposes no liability on the optionee unless and until he exercises the option according to its terms. Acceptance of an option, unless excused on equitable grounds, must be unqualified, unambiguous, and strictly in accordance with its terms. Any failure to exercise an option according to its terms, including an untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. Consequently, an acceptance that does not comply with the option's terms, unless it is accepted by the optionor, binds neither the optionee nor the optionor.

The Bestemans maintain that written notice of the intent to exercise the option was required by the agreement. The Pitcocks seize on the final sentence of paragraph 18 and the use of the words "delivered otherwise" as permitting oral notice of the intent to exercise the option in lieu of a written notice. This interpretation would completely negate the first sentence of the paragraph, which plainly states that all notices "must be in writing." Therefore, to give those words the meaning urged by the Pitcocks would violate one of the principal tenets of contract construction. It is plain that the "delivered otherwise" wording of the contract pertains to the manner of delivery of the notice which (as is stated in another part of the contract) "must be in writing." To find otherwise, the writing requirement would mean nothing. Impliedly, the trial court determined that the contract was ambiguous; it is not.

Shin-Con Development Corporation* v, *I.P. Investments, Ltd., 270 S.W.3d 759 (Tex.App.—Dallas 2008, pet. denied). The parties own adjacent commercial property tracts, each of which contains a shopping center and parking lot. The parties discussed exchanging easements to facilitate the traffic between the two properties. Shin-Con's tract, however, was encumbered by a lien, and the lienholders would not readily consent to the granting of an easement. The parties signed a 30-month license agreement permitting vehicular and pedestrian access between their tracts along a shared boundary. The license agreement granted each party the right to drive vehicles across, walk across, and traverse across the parking and driveway areas of each other's tract. Additionally, IP agreed to pay Shin-Con $50,000 to remove a fence that was obstructing access between the shopping centers and to construct a driveway connecting the tracts.

Attached to the license agreement as "Exhibit C" was a document indicating that the license agreement was entered into in contemplation of the Mutual Easement Agreement and listing items forming the basic contents of the Mutual Agreement to be effective in the future. Among other things, "Exhibit C" provided that IP would pay appellants a total of $300,000 for the mutual easement agreement. It also confirmed that the $50,000 IP paid appellants under the license agreement was the down payment for the Mutual Agreement and that another $100,000 would be paid to Shin-Con once they obtained the lienholders' consent and after the Permanent Agreement was entered into by the parties. It further provided that sixty days after the $100,000 payment, an additional $150,000 would be paid at ten percent per annum for ten years.

The license agreement was extended. In connection with the extension, IP gave Shin-Con

$30,000, and Shin-Con executed a promissory note providing, among other things, that in the event of a default, the parties' license agreement would be extended an additional forty months. Later, IP gave Shin-Con another $105,000, and the parties executed an addendum to the license agreement. The addendum provided that if Shin-Con failed to obtain title to their property and execute a "permanent easement agreement" to IP by January 31, 2003, Shin-Con would forfeit the $185,000 they had received from IP and pay eighteen percent annual interest on the unpaid balance from the date the addendum was signed.

Shin-Con received a release of vendor's lien from their lienholders in 1998. Shin-Con did not, however, execute a "permanent easement agreement" by the January 31, 2003 deadline. Nor did they return to IP the $185,000 plus interest. In the lawsuit that ensued, IP argued that Shin-Con owed it $185,000 plus interest because Shin-Con failed to execute a permanent easement for IP's benefit by January 31, 2003. Shin-Con, on the other hand, contended that because the addendum merely set a deadline for the parties to reach and finalize a future mutual permanent easement agreement, it was merely an agreement to agree and IP was entitled to nothing on its claims.

Whether an alleged agreement constitutes an enforceable contract is generally a question of law. To be legally enforceable, an agreement must be sufficiently definite to allow a court to understand what the promisor undertook. The rules requiring definiteness in a contract's material terms are based on the concept that a party cannot accept an offer unless the terms of that offer are reasonably certain. If the agreement is so indefinite as to make it impossible for the court to determine the legal obligations of the parties, it is not an enforceable contract.

Shin-Con argues that because the parties never reached a mutual permanent easement agreement, the addendum is unenforceable. That argument is misdirected. There is nothing in the addendum or the other documents in the record requiring Shin-Con to execute either a mutual permanent easement agreement or a permanent easement to IP. The addendum merely required Shin-Con to return to IP $185,000 plus interest in the event Shin-Con failed to execute "a permanent easement agreement." Shin-Con's argument assumes the addendum required the parties to reach an easement agreement before appellants had a duty to execute anything. Nothing in the record supports this assumption, however. Even if essential terms were missing from the parties' future permanent easement agreement, such omissions would not render unenforceable the requirement to return monies advanced should they fail to reach an agreement within the designated time frame.

For the same reasons, the court rejected appellants' contention that the parties' agreement violated the statute of frauds because their agreement lacked the essential terms of the easement and an adequate description of the easement. As noted above, IP is not trying to enforce a promise to execute an easement or easement agreement but rather to enforce Shin-Con's obligation to repay monies upon their failure to execute an easement or easement agreement by the stated deadline.

Shin-Con also asserted that the liquidated damages clause in the addendum was an illegal penalty or forfeiture. Whether a contract term is a liquidated damages clause is a question of law for the court. Liquidated damages clauses fix in advance the compensation to a party accruing from the failure to perform a specified contractual obligation. The provision in the addendum, however, is different from a liquidated damages clause. Here, the specific contractual obligation Shin-Con failed to perform and for which IP sought recovery was the return of the money paid plus interest. Thus, IP's actual damages under the addendum were the amount Shin-Con agreed to repay if it they failed to execute an easement agreement.

Zuniga* v. *Velasquez, 274 S.W.3d 770 (Tex.App.—San Antonio 2008, no pet.). The Zunigas entered into a contract for deed with Velasquez to purchase a house. The contract for deed provided for immediate possession by the Zunigas, but Velasquez was to retain title until

the Zunigas paid the full purchase price, at which time Velasquez would convey the property to the Zunigas by general warranty deed. Under the contract for deed, the Zunigas could either pay a cash price of $37,000 or a deferred payment price of $57,228.49, less a cash down payment of $3,200. The deferred payment price called for 143 payments of $375.20, plus a final payment of $374.89 due on June 1, 2008. Payments more than 15 days late were to be assessed a 5% late fee. Additionally, the contract for deed provided that if the Zunigas did not pay the property taxes directly, the Zunigas would reimburse Velasquez for property tax payments she made, subject to an 8.5% interest charge.

The Zunigas gave Velasquez two cashier's checks totaling $14,517.93, asserting that they constituted the final payment under the contract for deed. The Zunigas asked Velasquez to transfer title to the property, but Velasquez refused, claiming the Zunigas owed her $1,694.49 for the 2004 property taxes. The Zunigas paid Velasquez $1,649.49 and renewed their demand that she convey the property to them; Velasquez again refused to transfer the title because she had a mortgage on the property and the Zunigas's early payoff amount was insufficient to pay off her mortgage. In October of 2005, the Zunigas filed suit, claiming Velasquez violated section 5.079(a) of the Texas Property Code by failing to convey title within 30 days after final payment was made, and seeking attorney's fees and statutory liquidated damages in the amount of $182,000 through October 1, 2005. Property Code § 5.079 provides that a seller of property covered by an executory contract who fails to convey legal title to the purchaser more than 30 days after the final payment is made is liable to the purchaser for liquidated damages in the amount of $250 per day from the 31st day to the 90th day after final payment is made, and $500 per day for each day after the 90th day after final payment is made.

Velasquest argued that because a balance was still due and owing on the property, no final payment had ever been made, and therefore she had no duty to transfer the title to the Zunigas. In support, Velasquez alleged that a balance remained due on the property because the Zunigas: (1) only paid her $375 each month, not $375.20 as required under the contract for deed; (2) failed to make timely monthly installment payments and therefore owed late fees; (3) owed interest on property tax payments that were made late; and (4) owed $45 on the 2004 property taxes because the Zunigas paid her $1,649.49-not $1,694.49 as required-due to a transposition error.

In order to recover damages under section 5.079 of the Texas Property Code, the Zunigas were required to prove they fulfilled the terms of the contract for deed, and Velasquez failed to convey title within 30 days after receiving the final payment. Although the Zunigas believed the final payoff amount to be correct at the time it was paid, they now concede they owe Velasquez for amounts that were not paid under the contract for deed. In fact, the evidence at trial conclusively established that the Zunigas failed to pay off the contract for deed. Most of the monthly installment payments made by the Zunigas were short by twenty cents. The Zunigas also concede that they did not pay the late fee for the October 2004 installment payment. Third, the evidence was uncontroverted that the Zunigas still owed $45 for the 2004 property taxes due to a transposition error. Finally, Velasquez testified that from 1997 to 2001, the Zunigas did not reimburse her for the taxes by the specified deadline, and that the Zunigas further did not pay any of the late fees incurred by the late payments. In response, the Zunigas did not present any evidence to prove they paid the tax reimbursements on time, nor did they refute Velasquez's claim that they failed to pay the interest due on late property tax reimbursement payments.

Despite conceding these shortfalls, the Zunigas contend any deficiency was more than satisfied by excessive late fees they paid to Velasquez. Specifically, they argue Velasquez routinely demanded a $25 late fee instead of the 5% late fee-equating to $18.75-provided for in the contract for deed. Thus, the Zunigas maintain they overpaid Velasquez $200.00,

which should offset any amount Velasquez claims was not paid under the contract for deed.

The court disagreed that such an offset, if even owed, triggered a duty to transfer title. The right of offset is an affirmative defense which must be pleaded and proved by the party asserting it. Generally, an affirmative defense must be pled in a responsive pleading, or the defense is waived. Here, the Zunigas did not plead the right of offset. Assuming, without deciding, that the Zunigas would be entitled to an offset, their complaint that their failure to make all required payments should be excused by excessive late fees paid to Velasquez was not asserted at the time they demanded title.

Transcontinental Realty Investors, Inc.* v. *John T. Lupton Trust, 286 S.W.3d 635 (Tex.App.-Dallas 2009, no pet.). The original closing date under the contract between the Trust as seller and TCI as buyer was June 30, 2002. It was extended by written agreement several times. There was also an oral agreement to extend the closing date for two weeks. After the oral agreement to extend, the parties signed another written amendment to the contract, reinstating it and extending the closing yet again. This amendment required additional earnest money and if the additional earnest money was not deposited, the fourth amendment would be null and void. The earnest money got to the title company after the deadline and was rejected. The Trust sold the property to another buyer.

TCI claimed that, since the amendment was rendered void by its terms, the oral agreement was still in existence and should have allowed TCI to extend the closing date. The court disagreed. The oral agreement was the result of negotiations preceding the execution of the amendment and negotiations preceding a written contract should not displace the terms of the written contract. The parties' execution of a written agreement, i.e., the amendment in this case, presumes that all prior negotiations and agreements related to the transaction have been merged into it. The written agreement will not be added to, varied, or contradicted by parol evidence. Therefore, the oral extension agreement merged into the written amendment.

Lovett* v. *Lovett, 283 S.W.3d 391 (Tex.App.-Waco 2008, pet. denied). Louis and his wife moved to Navarro County from Arizona in 1993. Before moving to Texas, Louis and Peter reached an oral agreement concerning the property in dispute. Louis paid Peter $4,200 for the down payment, $500 for the appraisal, and began making monthly payments of $210 to Peter in March 1993. Louis and his wife moved into the house in June. They made these monthly payments through November 2001 and "paid taxes on the entire property for a period of at least three years." Louis states in his affidavit that the "total amount I have paid pursuant to our agreement for the shared purchase and for maintenance and repair costs and taxes exceeds $25,000.00."

According to Peter, his wife Cheryl and he purchased the property at issue (the "first farm") in February 1993. Louis and he negotiated regarding the formation of a joint venture to purchase "another farm" but "never reached a formal agreement" and never purchased "the second farm." Peter allowed Louis to move into the house and pay "a portion of the note on the property and closing expenses" in lieu of rent.

Peter filed a forcible detainer action in July 2004, seeking to evict Louis from the property, but that proceeding was dismissed. Louis filed this suit in October 2004. Peter contends in his summary judgment motion that Louis's suit is barred by the statute of frauds. Louis responded that the oral agreement is enforceable under the partial performance exception to the statute of frauds.

To establish partial performance, a party must show: (1) payment of consideration; (2) possession of the property by the buyer; and (3) permanent and valuable improvements by the buyer with the consent of the seller or other facts demonstrating that the buyer would be defrauded if the agreement were not enforced. Peter does not dispute that Louis established the first two elements of partial performance. Therefore, the only issue to be determined is

whether Louis presented some evidence that he made permanent and valuable improvements with Peter's consent or that he would be defrauded if the oral agreement is not enforced.

The court reviewed the case law and determined that the third required element of a claim of partial performance may be satisfied with evidence that the buyer made "a serious change of position in reliance upon the oral contract," which requires something more than the mere payment of consideration such that the buyer "will suffer an additional and substantial out-of-pocket loss" if the seller is permitted to avoid the contract. The court noted that the evidence showed that Louis did something more than the mere payment of consideration in reliance on the parties' oral contract. In particular, Louis presented summary-judgment evidence that his wife and he moved from Arizona to Texas in reliance on the agreement and that he paid ad valorem taxes for "at least three years" in reliance on the agreement.

Chief Justice Gray dissented, stating that "This proceeding involves the emasculation of the statute of frauds." He noted that the court's opinion allowed Louis to count payments he made to satisfy the first element to also satisfy the third element. The evidence the court now relies upon is nothing more than the evidence of the second element repeated. Everyone concedes money changed hands and that the alleged buyer moved onto the property. That is the evidence which satisfies the first and second elements of the test. The dissent did not believe more of that same evidence, payment of money and a move to the property from farther away, satisfies the third element.

PART VIII
TITLE INSURANCE

GCI GP, LLC* v. *Stewart Title Guaranty Co., 290 S.W.3d 287 (Tex.App.-Houston [1st Dist.] 2009, no pet.). Frame bought a house and hired Aspen to do renovations on the home. Aspen worked on the house from 1997 to August 2003, when it stopped due to non-payment.

While the renovations were still ongoing, Frame executed a promissory note to the Bank FN2, secured by a deed of trust to the land "TOGETHER WITH all the improvements now or hereafter erected on the property, all easements, appurtenances, and fixtures now or hereafter a part of the property." The Bank purchased a mortgagee policy of title insurance from Stewart Title with a coverage amount equaling the original principal amount of the "promissory" [sic] note.

Aspen filed a lien affidavit claiming a statutory lien on the land, improvements, and removable, and a constitutional mechanic's and materialman's lien against the land and improvements.

Frame defaulted on the note and the Bank noticed the property for foreclosure sale. Aspen began negotiating with the Bank about their relative lien priorities and then filed suit against Frame and the Bank. The Bank sold its note and lien to Gulf Coast, who proceeded to foreclose. Aspen amended its lawsuit to include Gulf Coast.

Gulf Coast notified Stewart Title about the Aspen lawsuit and demanded that Stewart Title provide indemnification against Aspen's claims and a defense to the lawsuit.

Stewart Title claimed that losses or damage from Aspen's claims were not covered by the title policy because the claims involved items that could be removed without material damage to the land and improvements, i.e., "removables," and the that policy covered only claims against the land, not claims regarding personal property. Implicit is the argument that the policy only insures the priority of the lien of the insured mortgage against other liens that attach to the land that is subject to the mortgage lien. Stewart Title asserts that "removables" are personal property, not part of the land as that term is defined in the policy; therefore, Aspen's claims were not covered by the title policy and Stewart Title had no duty to indemnify Gulf Coast as to Aspen's claims.

The court disagreed with Stewart Title that the insuring clause limits coverage of loss or damage to risks and claims against the land only. Such a narrow interpretation is unsupported by the plain language of the policy. Neither the conditions and stipulations nor the insuring clause limits coverage exclusively to loss or damage by reason of risk and claims against the land that is insured. Rather, the paragraphs of the insuring clause provide eight specific circumstances against which Stewart Title would indemnify loss or damage. These involve claims against the title ("the land that is insured"), but also situations related to the exercise of various rights under the title or lien and disputes related to the priority of the lien of the insured mortgage over other liens or encumbrances. The salient question as to this last area of coverage is whether the other lien has priority over the lien of the insured mortgage. If the other lien has priority, the policy clearly provides indemnity for any losses or damages arising from it.

Paragraph 5 of the policy deals generally with claims made by holders of any liens, mechanic's or other types, which are superior to the lien of the insured mortgage, such as those that pre-date the recording of the mortgage lien. Paragraph 6, however, specifically addresses superior mechanic's liens that have an inception date on or prior to the date of the policy, not the date of the mortgage lien. This is significant because it provides for coverage for mechanic's liens whose inception date is subsequent to the date of the mortgage lien, but prior to the date of the policy.

In general, mechanic's liens whose inception is subsequent to the date of a deed of trust lien will be subordinate to the deed of trust lien. However, Texas statutes and case law provide that mechanic's liens whose inception date is subsequent to the recording of a deed of trust lien will, nevertheless, have priority over the prior recorded deed-of-trust lien in one narrow instance – that of removables.

A statutory mechanic's lien may only attach to land and items that have become annexed to land, such as improvements (including fixtures), not to chattel. However, chattels that have been incorporated into the realty become "fixtures" and are subject to a statutory mechanic's lien. A statutory mechanic's lien may therefore attach to items that have become fixtures and such lien will be superior to a prior deed-of-trust lien when the fixtures can be removed without material injury to the land and pre-existing improvements or to the fixtures themselves.

Paragraph 6 of the insuring clause covers loss or damage arising from "a statutory or constitutional mechanic's, contractor's, or materialman's lien for labor or material" having its inception (statutorily defined in Property Code § 53.124(a)) on or before the date of the policy, when such lien has priority over the lien of the insured mortgage (as provided for by the language of Property Code § 53.123 and its interpretation by Texas courts). Such a "mechanic's lien" will have priority over any prior lien, including a "lien of the insured mortgage," when the "mechanic's lien" is on improvements (including fixtures) that can be removed without material injury to the land and pre-existing improvements or to the improvements themselves, i.e., "removable improvements." Thus, paragraph 6 is specifically meant to provide indemnity for loss or damage arising from a "mechanic's lien" on "removable improvements" that had its inception on or before the date of the policy.

To interpret the insuring clause of the policy so as to exclude coverage when an asserted mechanic's lien is on removable improvements would render paragraph 6 superfluous and meaningless. The only circumstance under which a prior-in-time lien of the insured mortgage would lack priority over any mechanic's lien having its inception on or before the date of the title policy is when the mechanic's lien is on removable improvements.

PART IX
BROKERS

ERA Realty Group, Inc.* v. *Advocates for Children and Families, Inc., 267 S.W.3d 114 (Tex.App.—Corpus Christi-Edinburg 2008, pet. denied). ERA's brokerage agreement with

Advocates contained the following provision: "The parties agree that [ERA] will receive a commission calculated as follows: (1) 6.00% of the gross sales price if [Advocates] agrees to purchase property in the market area, and (2) if [Advocates] agrees to lease property in the market a fee equal to (check only one box) [] ___% of one month's rent or [] 6 % of all rents to be paid over the term of the lease." As to the lease provisions, neither box was checked but the number "6" was typed into the final blank space.

Advocates entered into a twelve year lease with College Church of Christ in Victoria County on July 8, 2005, without ERA's participation. ERA subsequently learned of Advocates' lease and filed a breach of contract suit seeking its purported commission and attorney's fees. Advocates moved for traditional summary judgment on the grounds that the agreement between the parties did not create a duty for Advocates to pay ERA a commission when Advocates leased property. The rationale for Advocates' argument was that the terms of the agreement did not obligate Advocates to pay a commission to ERA on a lease because an appropriate box was not checked. ERA responded to Advocates' summary judgment motion by arguing that the contract evidenced an intent to pay ERA commission on a lease because the number "6" was typed into an appropriate blank, even though no box was checked.

The primary goal in interpreting a contract is to give effect to the written expression of the parties' intent. To determine the parties' intent, courts must consider the entire writing in an effort to harmonize all the provisions of the instrument. Parol evidence is not admissible to render a contract ambiguous; however, the contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists.

Not every difference in the interpretation of a contract creates an ambiguity. The mere disagreement over the meaning of a particular provision in a contract does not make it ambiguous. In order for an ambiguity to exist when the parties advance conflicting interpretations, both interpretations must be reasonable. If a contract is found ambiguous, it must be construed strictly against the author and in a manner so as to reach a reasonable result that is consistent with the intent of the parties.

The agreement, therefore, can be read in one of two ways: (1) as providing for a lease commission because the number "6" is typed, or (2) as making no provision for a lease commission because no box is checked. ERA argues that the number "6" is a specific provision that conflicts with the "general provision" reading "check only one box." The court disagreed. What ERA considers a "general provision" is in fact an instruction that ERA did not follow. The omission of a check and the number "6" in the lease provision, are properly characterized as scrivener errors rather than what ERA terms "specific provisions." Because an ambiguity exists and ERA completed the form, we strictly construe the agreement against ERA.

Duncan* v. *F-Star Management, L.L.C., 281 S.W.3d 474 (Tex.App.-El Paso 2008, pet. denied). The broker's letters identified the property in question only as "Operation Campus View, Socorro, Texas." To comply with the Real Estate License Act's requirements, a written commission agreement must provide a description of the real estate that would satisfy the statute of frauds. In other words, the agreement must furnish, either within itself or by reference to some other existing document, the means or data by which the real estate may be identified. A commission agreement does not have to contain a metes-and-bounds property description to be enforceable, but it must furnish the data to identify the property with reasonable certainty.

Parol evidence may be used to clarify or explain the agreement, but not to supply the agreement's essential terms. For example, a contract for the sale of "my ranch of 2200 acres" satisfied the statute of frauds where extrinsic evidence showed that the grantor owned one ranch, which contained 2200 acres. However, a commission agreement for the sale or lease of an

unidentified portion of a larger, identifiable tract is not sufficient.

The court held that the broker's letter was not an enforceable commission agreement because it doesn't sufficiently identify the property and doesn't refer to another writing that does. The broker claimed that the description in the lease which resulted from the commission letter was sufficient, but the court noted that letter does not specifically refer to the lease.

The court also held that the description of property as Operation Campus View was not used to refer to a single tract of land; rather it was used to refer to a project of consolidating warehouse facilities. By itself, the term could not connote a specific tract of land with specific acreage.

Sellers* v. *Gomez, 281 S.W.3d 108 (Tex.App.-El Paso 2008, pet. denied). Sellers and Harvey Development Co., both licensed real estate brokers, demanded compensation from Gomez for their services in the sale of a theater in El Paso. Gomez refused because there was no signed commission agreement. Sellers and Harvey sued Gomez and his attorney for theft of services, fraud, breach of fiduciary duty, and conspiracy.

The Real Estate License Act provides:
"A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document." Texas Occupations Code § 1101.806(c).

In ***Trammell Crow Co. No. 60* v. *Harkinson***, 944 S.W.2d 631, 635 (Tex.1997), the Texas Supreme Court held that this section of the Real Estate License Act precluded a real estate broker's action for tortious interference to recover a commission. In this case, the brokers argue that the holding in ***Trammell Crow*** applies only to common law causes of action, rather than statutory causes of action. The court wouldn't buy the argument, holding that nowhere in the ***Trammell Crow*** opinion does the Supreme Court distinguish between statutory and common law causes of action. What is clear from that opinion, however, is that "a broker may not recover a commission unless the commission agreement is in writing and signed by the party to be charged."

The $120,000 that the brokers seek is nearly equal to the $114,000 it would have received if the property had been sold at $1,900,000 and Harvey Development had received a six-percent commission. When asked the basis for the amount of their claim, the brokers noted that the amount approximates what the brokerage commission would have been.

The purpose underlying the Real Estate License Act's requirement of a signed commission agreement is "to prevent fraud arising from parol testimony as to the terms and conditions of such contracts. In this case, the brokers rely strictly on the alleged statements of the principals indicating that the brokers would be compensated for their services. Allowing them to proceed would essentially allow them to construct an enforceable commission agreement out of an alleged oral agreement, directly contrary to the purpose underlying the requirement of a signed commission agreement.

Lathem* v. *Kruse, 290 S.W.3d 922 (Tex.App.-Dallas 2009, no pet.). Lathem was a broker who put a deal together for Kruse. Lathem told Kruse at the time the land was purchased that his broker fee was $50,000. Kruse asked Lathem if he wanted the cash or if he wanted to leave the fee "in the deal." Lathem left the money "in the deal;" however, there was no written agreement with Kruse or the acquiring partnership documenting the $50,000 commission or leaving the amount in the deal. Nor was there such a written agreement including Lathem as a partner in the joint venture.

When the project was sold, Lathem asked for his share of the profits. Kruse declined to pay, so Lathem sued asserting breach of contract and fiduciary duty.

Kruse denied liability, claiming that the amount Lathem was asking for was a real estate commission and that Lathem's claimed was barred by the Real Estate License Act, Occupations Code § 1101.806(c), which requires commission agreements to be in writing.

Lathem argues that the statute of frauds does not apply here because he is not suing for the $50,000 commission, but for an accounting, resulting trust, and damages as a participant in the joint venture. Lathem argues that this suit concerns a joint venture, not an oral listing agreement. He argues that the commission was paid when Kruse acknowledged his $50,000 commission in 2001 and agreed to Lathem's investing in the joint venture.

But, said the court, the test is whether Lathem is seeking recovery of compensation due for rendition of services governed by the Real Estate License Act, regardless of the form that compensation took. The court considers the substance, not the form, of the contract at issue.

Lathem entered into an oral agreement to be paid a commission measured as a percentage of the proceeds of the ultimate sale of property for which he provided broker services. It is undisputed Lathem did not provide any part of the purchase price of the original tract, and he does not claim to own an interest in the land.

The initial oral agreement for a $50,000 commission was modified when Lathem and Kruse orally agreed Lathem's compensation due for rendition of broker services was a profits partnership interest in the joint venture. Thus, although Lathem is not seeking $50,000, the basis of his share of the profits of the joint venture is a commission arising from the sale of real property. Thus, Lathem's claim for breach of the oral joint venture agreement is "wholly derivative" of his unenforceable oral commission agreement and "translates only" into the loss of the expectancy of a commission agreed to as an interest in the profits of project's sale. The court held that Lathem was not entitled to this commission.

PART X
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Kazmir* v. *Benavides, 288 S.W.3d 557 (Tex.App.-Houston [14th Dist.] 2009, no pet.). The area of disputed ownership was a 4 foot strip between Lot 12 and Lot 13. Originally, the owner of Lot 13 built a chain link fence around his lot. It was 4 feet inside his property line on the Lot 14 side, reportedly to give the Lot 14 owner room to mow his yard between the houses. At the same time, the Lot 13 owner built the fence on the Lot 12 side 4 feet across the Lot 12 boundary.

Kazmir bought Lot 12, after having been shown that the fence encroached 4 feet into the lot. Over time, the Lot 13 owners built a concrete patio up to the fence. Kazmir knew the patio and the fence both encroached, but did nothing to compel the Lot 13 owners to remove them.

Lot 13 was sold to Benevides in 1973 under a contract for deed and he was given a deed to the property in 1997. Benevides began renting the property out in 1978. The entire time, the disputed area was used by the owners and tenants of Lot 13. During that time, Kazmir never told the Lot 13 owners or tenants that he owned the disputed area and never demanded they remove the fence or patio.

In 2004, Benevides tried to sell his lot to a developer, but the sale fell through when the developer had the lot surveyed and determined that the 4-foot strip was on Lot 12. Kazmir then ripped out the fence and removed the patio. Benevides then filed this lawsuit alleging ownership by adverse possession.

Kazmir claimed that possession before Benevides acquired Lot 13 was not adverse because it was consentual. And becauses Benevides acquired the lot by contract for deed, he was no more than a tenant of the property, did not have exclusive possession of the property, and therefore did not acquire an interest in Lot 13 sufficient to begin the ten-year statute of

limitations running for their own adverse possession of the adjacent. Kazmir argued that the earliest Benevides's adverse possession could begin was when he received a deed in 1997, so the 10-year statute had not run.

The court disagreed. There is a difference between a lease and a contract for deed. While a tenant under a lease occupies for the benefit of the landlord, the same is not true for a purchaser under a contract for deed. The court held the contract for deed passed sufficient interest in Lot 13 for Benevides to have exclusive possession of Lot 13 and the disputed area and commence adverse possession of the Disputed Area for his own benefit. Because Benevides obtained exclusive possession of Lot 13 through the 1973 contract for deed, the court concluded he did not need to rely on any alleged adverse possession by the the prior owner to meet the ten-year statute of limitations. Instead, Benevides's adverse possession commenced in 1973 when he occupied Lot 13 and the disputed area and his claim under the ten-year statute of limitations matured in 1983.

PART XI EASEMENTS

Centerpoint Energy Houston Electric LLC* v. *Bluebonnet Drive, LTD., 264 S.W.3d 381 (Tex.App.—Houston [1st Dist.] 2008, pet. pending). The express easement conveyed to CenterPoint, as HL&P's successor, grants a right-of-way not only for "electric transmission and distributing lines consisting of variable numbers of wires," but also for "all necessary and desirable appurtenances." The easement then specifies that "necessary and desirable appurtenances" includes "towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys." The plain meaning of these terms conveys the right to install "appurtenances" as "additions" or "attachments" when "necessary and desirable." The plain meaning of these terms further specifies that "telephone and telegraph wires" are among the appurtenances that may be installed when necessary and desirable.

No rights pass to the easement holder by implication except those that are "reasonably necessary" to enjoy the rights that the easement grants expressly. Accordingly, if the grant expressed in the easement cannot be construed to apply to a particular purpose, a use for that purpose is not allowed. The common law permits some flexibility in determining an easement holder's rights because the manner, frequency, and intensity of use of an easement may change over time to accommodate technological development. Changes must, however, fall within the purposes for which the easement was created, as determined by the grant's terms. Accordingly, an express easement encompasses only those technological developments for which the easement was granted.

The court held that the express terms of the CenterPoint easement encompassed installation and use of cellular transmission within the easement.

Gutierrez* v. *People's Management of Texas I, Ltd., 277 S.W.3d 72 (Tex.App.—El Paso 2009, pet. pending). Two tracts of land were involved in this adverse possession case. When the issue was submitted to the jury, the trial court submitted only one question to the jury on adverse possession of all of the Property. Gutierrez claimed that the trial court should have issued separate questions on each of the two tracts.

The court of appeals agreed. It is a reasonable inference that, when a party pleads adverse possession to a unit of land containing constituent parts, with separate legal descriptions, the claim will run to those constituent parts or elements individually.

In this case, the two tracts of land, each having its own legal description and unified under a single deed, were both touched jointly and severally by pleading adverse possession unspecifically. The pleading requirement of Rule 278 of the Rules of Civil Procedure was satisfied by Gutierrez's answer, in which he defended by asserting adverse possession under the 3-, 5-, and 10-year periods of limitations.

There was also sufficient evidence at trial to show that the two tracts of land were distinct enough to warrant the submission of separate questions for the two constituent tracts. Because there is more than a scintilla of evidence to support the submission of separate questions, Gutierrez is entitled to the submission of two separate questions.

Allen* v. *Allen, 280 S.W.3d 366 (Tex.App.-Amarillo 2008, pet. denied). Barbara and Andrew acquired their interests in the Barker Hill Pasture in 1970 and have regularly used the Barker Hill Pasture Road to reach their property. There was also some evidence that their predecessor in title, Barbara's mother, used the Barker Hill Pasture Road. Barbara and Andrew never requested permission to use the road nor was their use expressly barred. Barbara never saw Tommy or his parents on the road. Andrew testified he did not know if Tommy used Barker Hill Pasture Road but could not contradict Tommy if he testified that he used the road. Tommy testified no one tried to exclude him from the Barker Hill Pasture Road, which he said was the only access to the east side of his pasture. He used the road when coming from the south and his deer hunt lessees used it to reach the east side of his property. Barker Hill Pasture Road also provided access to a communications tower. When asked about his exclusive use of the road Andrew agreed that he did not attempt to fence the road and that it was available for use by anyone on Tommy's property. Andrew could name no measures he undertook to prevent others from using the road.

Andrew claimed a right to use Barker Hill Pasture Road beginning when he was approximately age eight in the early 1950s because his father and grandfather used the road and they cut limbs along the way. Andrew did not notify anyone of this claim until his 1990 conversation with Tommy at the 1987 gate. At that time, Barbara and Andrew complained of the locked gate, apparently precipitating Tommy's statement, “your way to go is down by [Millie Ward's].” It was then Andrew told Tommy he and Barbara had an easement over the Barker Hill Pasture Road.

Thereafter, on their trips from Austin to the Barker Hill Pasture during the 1990s, Barbara and Andrew continued using the Barker Hill Pasture Road. And problems with the locked gate persisted. At times, Barbara and Andrew found obstructions such as logs on the Barker Hill Pasture Road, which they removed. For a time, Tommy left the gate key in a mailbox but at other times the key could not be located. It was then necessary for Barbara and Andrew to call Tommy to come unlock the gate. At times, Tommy did not engage the lock but left it on the gate. On two such occasions, Andrew removed the lock and had a lock-smith make a duplicate key. According to Andrew, in 2002 he and Tommy had another conversation at the gate. This time Tommy said he might have to sell his property and if this occurred Barbara and Andrew could no longer use the Barker Hill Pasture Road. This led Barbara and Andrew to file suit.

As distinguished from establishment of a road by express or implied dedication, where the focus is on the intent or actions of the alleged easement's grantor, an easement by prescription rests on the claimant's adverse actions under color of right. An easement by prescription is established by the open, notorious, hostile, adverse, uninterrupted, exclusive and continuous use of the servient estate for a period of more than ten years, and the absence of any of these elements is fatal to the prescriptive claim. Use of property with the owner's express or implied permission or license will never ripen into a prescriptive easement no matter how long the use continues.

The use of the property must be exclusive, in that the claimant excluded or attempted to exclude all other persons, especially the property owner, from using the same land for the same purpose. It has long been the law in Texas that when a landowner and the claimant of an easement both use the same way, the use by the claimant is not exclusive of the owner's use and therefore will not be considered adverse. Moreover, the owner of the servient estate must have actual or constructive notice that there was

an adverse and hostile claim against the property.

Barbara and Andrew contend the ten-year prescriptive limitation period began in 1990 when Andrew told Tommy he and Barbara possessed an easement. They argue this was a sufficient independent act establishing hostility and adversity and removing the case from the long-standing Texas rule that joint use of a way with the property owner is fatal to the claim of a prescriptive easement because it is consistent with permissive use in a non-adverse manner.

Assuming, without deciding, that Andrew's statement to Tommy on one occasion that he claimed an easement is the type of "distinct and positive assertion" required to establish adversity of use under the case law, here, after Andrew told Tommy he claimed an easement, it is undisputed Tommy kept the gate leading into the Allen property locked. Initially Tommy used a combination lock and provided Barbara the combination. But after the lock disappeared it was replaced with a keyed lock. At times Tommy provided keys to the lock for Andrew and Barbara, at other times it was necessary for them to call Tommy to unlock the gate, and on two or three occasions Andrew made a key without Tommy's knowledge. Even the broadest reading of the case law will not support the creation of a prescriptive easement in favor of Andrew and Barbara by virtue of their entry onto the Allen property through Tommy's locked gate. The evidence was legally insufficient to sustain the jury's finding of prescriptive easement.

Having failed to prove a prescriptive easement existed, Andrew and Barbara claimed an easement by estoppel. The statute of frauds generally requires a writing to establish an easement, but the doctrine of equitable estoppel provides an exception to prevent injustice and protect innocent parties from fraud. The essence of the doctrine of easement by estoppel is the owner of a servient estate may be estopped to deny the existence of an easement by making representations that are acted on by the owner of the dominant estate. Easement by estoppel requires proof of three elements: (1) a representation of the easement communicated, either by words or action, to the promisee; (2) the communication was believed; and (3) the promisee relied on the communication. An easement by estoppel is binding on the successors in title to the servient estate if reliance on the existing easement continues.

The gravity of a judicial means of acquiring an interest in the land of another solely by parol requires equitable estoppel be strictly applied. Thus, an estoppel should be certain, precise and clear. Authority for application of the doctrine is "rare and nebulous" outside a narrow band of cases consisting of those that concern: (1) the dedication of a street, alley, or square; (2) an owner selling land with reference to a map or plat; and (3) a seller of land who allows its purchaser to expend money on an alleged servient estate.

In 1970, Andrew and his now-deceased father constructed a cabin in the Barker Hill Pasture. They hauled the materials over CR-216A and the Barker Hill Pasture Road. After construction began, Tom Allen asked Andrew and his father if they needed help "cutting some limbs over there on your road." Following the death of Tom Allen, Iva Allen telephoned Andrew on one or more occasions, asking that when he went to town he not "go out your way" but instead come to her house and pick up mail for delivery to the post office. Barbara and Andrew assert these two statements were representations of their ownership of an easement across the Barker Hill Pasture Road and in reliance on the statements they expended additional sums improving the cabin and out buildings on the Barker Hill Pasture.

Barbara and Andrew further argue Tommy is estopped to deny an easement because his predecessors in title silently watched Barbara and other members of her family use the Barker Hill Pasture Road since 1929 and make valuable improvements to the Barker Hill Pasture. Andrew and Barbara contend the silent acquiescence by Tommy and his family to their family's use of the Barker Hill Pasture Road combined with the "your road" and "your way" statements of Tom and Iva Allen provide

factually sufficient evidence supporting the existence of an easement by estoppel. The court disagreed, finding the "your road" and "your way" statements insufficient as representations that an easement existed. Having considered and weighed all of the evidence, it found the evidence supporting the existence of an easement by estoppel, under the trial court's charge, to be so weak as to make the jury's finding clearly wrong and unjust.

Kothmann* v. *Rothwell, 280 S.W.3d 877 (Tex.App.-Amarillo 2009, no pet.). Rothwell owned undeveloped land where he wanted to develop a subdivision. The City required he obtain, in the City's name, drainage easements on adjacent property owned by Philpott before development. Philpott executed an instrument entitled "Drainage Easement" granting the City five drainage easements, each measuring fifty feet by two hundred feet. Kothmann subsequently acquired the property of Philpott.

At the time Kothmann acquired the property, the easements were not opened and a "fence-line berm" separated his land from that of Rothwell. After the easements were opened, Kothmann filed suit alleging damages from water flowing from the easements onto his land. He also sought a declaratory judgment that the instrument did not permit the flow of water off the easements onto the remainder of his property. Rothwell filed a counterclaim for declaratory relief seeking a declaration that water flowing through the easements could continue past the boundaries of the easements.

According to the easement document, the purpose of the grant from Philpott to the City was creation of a "perpetual and permanent drainage easement." For drainage, the instrument grants the City "liberty of passage ... over ... and across" each of the easements described by the instrument. As used here, "passage" means "to go past or across." The instrument expresses the parties' intention that water drain freely without restraint over and across the easements.

Kothmann argues the language of the instrument permits the City and Rothwell to drain only so much water as will naturally dissipate within the dimensions of the five easements. But this reading requires wringing from the text of the instrument a limitation that the City may do no more than impound water within each easement. This interpretation creates something other than a drainage easement and is not consistent with other language used in the instrument.

Kothmann further argues the trial court's ruling renders the stated boundaries of the easements meaningless, contrary to standards of contract construction. The court disagreed. Under the instrument language, the City's maintenance access and activities are limited to the described boundaries, as are its right to set and determine drainage grade and direction of water flow. Further, the restrictions on the erection of buildings or like structures exist only within the boundaries of the easements. But, consistent with the stated purpose and other terms of the easement, the court would not agree the flow of water is limited in the way Kothmann sees it. The trial court did not err in declaring that surface water could flow beyond the boundaries of the five easements.

PART XII
CONDOMINIUMS AND OWNERS ASSOCIATIONS

S***tanford Development Corporation* v. *Stanford Condominium Owners Association***, 285 S.W.3d 45 (Tex.App-Houston [1st Dist.] 2009, no pet.). The Owners Association sued the developer, Stanford, for construction defects. Stanford moved to compel arbitration based on arbitration clauses contained in all of the deeds from the developer to the individual condo purchasers. The trial court held that the Owners Association was not subject to the arbitration provisions in the individual deeds, and refused to compel arbitration.

It is undisputed that there is an arbitration agreement between Stanford and 27 of the individual homeowners. The issue is whether the arbitration agreements can be enforced against the Association, a nonsignatory to the

agreements. Courts have recognized six theories that may bind nonsignatories to arbitration agreements: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.

Stanford argues that the fifth theory for binding non-signatories-equitable estoppel-applies in this case. Specifically, Stanford argues that because the Association has filed suit based, in part, on the contractual terms found in the homeowners' earnest money contracts, it is estopped from denying the applicability of the arbitration provision in the same contract. The court agreed.

A litigant who sues based on a contract subjects him or herself to the contract's terms. When the nonsignatory asserts claims identical to the signatories' contract claims, all must be arbitrated. Additionally, claims must be brought on the contract and arbitrated if liability arises solely from the contract or must be determined by reference to it. If a nonsignatory pursues a claim based on the contract of another, and the contract contains an arbitration clause, then the nonsignatory must pursue all claims-tort and contract-in arbitration.

In this case, the Association alleged in its petition that Stanford failed to comply with the express and implied contractual duties which they owed to owners. The only contracts giving rise to any express or implied contractual duties in this case are the earnest money contracts between Stanford and the individual homeowners. The Association also alleged that Stanford breached express and/or implied warranties. The only express warranties are contained in the individual homeowners' earnest money contracts. Because the Association has filed suit seeking the benefits of the earnest money contracts, it cannot deny the applicability of the arbitration agreements in the same contracts.

In addition to the claims based directly "on the contracts" of the individual homeowners, the Association also included DTPA claims, fraud, and intentional or negligent misrepresentation claims, and negligent design, construction, and supervision claims. However, because the Association chose to allege contract claims that are subject to arbitration clauses, and because the arbitration clauses in this case are broad enough to cover both contract and tort claims, the Association must also arbitrate the intertwined tort claims.

Schindler* v. *Baumann, 272 S.W.3d 793 (Tex.App.—Dallas 2009, no pet.). Baumann owned the condominium unit above the one owned by the Schindlers. The Schindlers sued Baumann for damages to their condominium after water allegedly leaked into their unit from Baumann's condominium. Among other claims was an action for breach of contract and one for negligence.

Among the elements necessary to succeed on their breach of contract claim, the Schindlers needed to present evidence of a valid contract existing between them and Baumann.

The Schindlers contend the amended and restated condominium declaration and annexation declaration for their condominium project, filed with the county clerk by the project developers, satisfy this element. Nothing in these declarations, however, purports to create a contract between the Schindlers and Baumann or vests the Schindlers with the right to sue to enforce the declarations. Although the Schindlers cite cases for the proposition that such declarations are treated as contracts, those cases are inapposite here as they did not involve claims between two owners but rather claims between condominium or homeowners' associations and owners. Absent any evidence of a valid contract between the Schindlers and Baumann, the trial court did not err in granting summary judgment against appellants on their breach of contract claim.

The Schindlers also assert they are entitled to recover damages caused by the water leak under section 82.117 of the Texas Uniform Condominium Act, which requires Baumann to pay for damage caused by negligence or wilful misconduct. The Schindlers presented no argument or authority to support their position

that a private cause of action exists under this section of the Act, and the fact that a person has suffered harm from an alleged violation of statute does not automatically give rise to a private cause of action. Moreover, even if a private cause of action exists under the statute, the Schindlers would still be required to present evidence of Baumann's negligence or wilful misconduct in order to recover damages. The court held that the Schindlers did not present sufficient evidence of that misconduct.

PART XIII HOMESTEAD

Denmon* v. *Atlas Leasing, L.L.C., 285 S.W.3d 591 (Tex.App.-Dallas 2009, no pet. history to date). Sarah and Carnell Denmon sold their home on Forest Green Drive in Dallas. After the sale of the home, Carnell gave his half of the sale proceeds to Sarah to put down on the Shennandoah property in Desoto, which is the property subject to this suit. Sarah bought the Shennandoah property in her name in July of 2003. She stated she was hoping to retire in the home, have a place for her son to live when he came home from college, and have a place for any future grandchildren. Although both spouses stated Carnell visited the Shennandoah property on several occasions, he bought a trailer home in his sole name in Giddings, Texas in July 2003. He did not, however, file a homestead exemption for his property until after he and Sarah divorced in 2004.

In November 2003, Sarah inquired into receiving a $10,000 loan for some home repair projects and to help her son with college. Atlas Mortgage Company worked out the details of the loan with Sarah, which included A-Advantage Company performing certain home repairs. On November 23, 2003 Sarah executed the documents, which included a mechanic's lien, a promissory note, and a deed of trust for the Shennandoah property.

Despite testimony that Sarah and Carnell had been separated since 2001, the undisputed evidence shows they were married until late 2004. Thus, when Sarah signed the loan documents, she and Carnell were still married.

Sarah testified she told Atlas prior to signing the loan documents that she was in fact married. The owner of Atlas, who testified at trial, stated he was never informed she was married. When Atlas conducted a property search on the Shennandoah property, it was listed only in Sarah's name and no homestead exemption was on file. Further, Carnell's name never appeared in the chain of title.

Sarah defaulted on the loan and Atlas eventually foreclosed and eventually evicted her. Sarah sued, arguing fraud and wrongful foreclosure. The trial court ruled against her.

Sarah relied on Texas Property Code § 53.254 which requires the signature of both spouses when fixing a lien on a homestead. Despite evidence of the two being separated since 2001, there is no evidence in the record to contradict their marriage or these findings as a matter of law.

The language of section 53.254 is clear. To fix a lien on a homestead, the person who is to furnish material or perform labor and the owner must execute a written contract setting forth the terms of the agreement. Because it is undisputed they were married, section 53.254 applies if the Shennandoah property was in fact their family homestead.

The State of Texas famously recognizes one of the broadest homestead exemptions in the United States. Homestead rights have traditionally enjoyed great protection, and statutes that affect such rights are liberally construed to protect the homestead. The burden of proving homestead is on the party claiming such a homestead. To sustain a homestead claim, there must be proof of overt acts of homestead usage and intent on the part of the owner to claim the land as homestead. Nevertheless, exceptions to the homestead exemption do exist. Among them, the Texas Constitution provides that a marital homestead is "protected from forced sale for the payment of all debts except for ... work and material used in

constructing new improvements thereon if ... the work and material are contracted for in writing, with the consent of both spouses."

Texas law recognizes that homestead protection can dissolve if the owners deliberately misrepresent their marital status in order to defeat the rights of an innocent third party who, in good faith, without notice, for valuable consideration, has acquired valid liens. However, Atlas never affirmatively asserted that Sarah misrepresented herself in order to defeat its rights. In fact, Sarah claimed at trial she told Atlas she was married; however, Atlas's owner stated at trial that information, if true, was never relayed to him. Rather, Atlas simply relied on its document review showing Sarah owned the Shennandoah property solely in her name, Carnell's name never appeared anywhere in the chain of title, and she did not file a homestead exemption on her property.

However, it is not necessary for a spouse to be listed on real property documents in order for homestead status to attach. Texas law is clear that possession of a homestead interest is not dependent upon ownership; a person is permitted to hold homestead rights in his or her spouse's separate property. Likewise, it has been held that no specific writing is needed to claim a homestead; therefore, the fact that Sarah did not file a homestead exemption is not proof that she did not intend it as such. To assert that the homestead protection of the Texas Constitution could be voided by mere failure to designate the property as a homestead for tax purposes would render the constitutional protection meaningless.

Also, once a property has been dedicated as a homestead, it can only lose such designation by abandonment, alienation, or death. Here, it is undisputed the Shennandoah property was Sarah's homestead, despite her failure to file an exemption. She specifically testified of her homestead intentions when buying the home and further stated she thought she had filed an exemption.

By reaching the conclusions that Sarah had the ability to place a valid lien on the home and the lien was not in violation of the homestead protections of the Texas Constitution, the trial court essentially determined that either (1) the property was her single person homestead, or (2) despite being married, the property was not Carnell's homestead. The court noted that either of these conclusions was incorrect.

First, it is undisputed Sarah was married at the time she entered into the transaction. As such, she could not qualify for a homestead exemption as a single person. Here, the community money from the sale of Sarah and Carnell's homestead on June 30, 2003 was applied for a down payment on the Shennandoah property, which became the family homestead.

The court acknowledged the trial court's finding that he purchased a trailer home in Giddings, Texas shortly after the sale of the first homestead and another woman, not his wife, sometimes stayed there. However, the trailer home could not be his single adult or family homestead. Carnell was not single and therefore could not claim his trailer as a single adult homestead. Further, the claim of a family homestead is not maintainable by a man and woman living together in an unmarried state.

Thus, under these facts, the court concluded because Sarah and Carnell were married at the time she purchased the Shennandoah property, she intended it to be the family homestead, and Atlas never pleaded and proved abandonment, the Shennandoah property was also Carnell's family homestead. Therefore, the trial court erred in concluding the lien did not violate the homestead protection of the Texas Constitution.

Atlas finally argued that Sarah does not have standing to challenge that the lien violated provisions of the homestead act because the purpose of requiring both parties to sign the legal documents creating a lien is to protect the non-signing spouse from possible loss of existing homestead rights without his consent. Thus, it contends that any homestead violation is Carnell's right to assert and not Sarah's right. The court disagreed. A void instrument has no effect, even as to persons not parties to it, and a contention that a document is void under

homestead law may be asserted by anyone whose rights are affected by the instrument.

Siller* v. *LPP Mortgage, Ltd., 264 S.W.3d 324 (Tex.App.—San Antonio 2008, no pet.). In 1967, Abel M. Siller, Mario M. Siller, Santiago Siller, and Jose Siller, Jr. purchased 520 acres of land in La Salle County, and the property was deeded to the four brothers individually. However, after purchasing the property, the brothers formed a partnership and began doing business together growing vegetables and raising cattle on the property. The property is mainly farming and grazing land, but there are also two houses and some barns on the property. Abel and his wife have lived continually in the main house on the property, while the other brothers and their wives have lived on and off the property over the years. According to the Sillers and their wives, they all claim a homestead interest in the property.

In the late 1970's and early 1980's, after suffering through a series of natural disasters, Mario, Abel, and Santiago sought a loan from the SBA The SBA promissory note was signed by the three brothers and their wives. The brothers also signed a deed of trust pledging the property as collateral for the loan. In the late 1990's, the Sillers began having trouble paying on the loan. To prevent foreclosure on the property, the partnership filed for bankruptcy. At some point, the SBA notified the Sillers that the note had been sold to LPP. LPP in turn notified the Sillers that full payment was due on the note. Although the Sillers maintain they have always claimed a homestead exemption on the property, the Sillers had represented on various documents that the property was partnership property. For instance, partnership financial statements list the property as partnership property. When the partnership filed for bankruptcy, it listed the property as partnership property. The Sillers paid taxes on the property to various taxing authorities from the partnership account. The partnership claimed an agricultural exemption for the property. The partnership filed income tax returns listing the property as partnership property. The individual brothers and their wives, on the other hand, did not list the property on their individual income tax returns. When the Sillers applied for the SBA loan, they represented that the partnership owned the property and that there were no homestead rights on the property. Santiago admitted he wrote a letter during the course of the litigation stating the property had always been partnership property, but during his trial testimony he claimed he was mistaken.

LPP went forward with foreclosure, with September 4, 2001 set as the date for the foreclosure sale. The trustee conducted the sale, although there were no bidders. A bid was submitted by the trustee on behalf of LLP in the amount of $125,000, as a credit on the note. The trustee filed the trustee's deed (which admittedly had some typographical errors in it).

The Sillers brought suit for wrongful foreclosure on the grounds that the property was homestead.

For a homestead right to attach, there must be an existing bona fide intention to dedicate the property as a homestead, and the intent must be accompanied by such acts of preparation and such prompt subsequent occupation as will amount to notice of the dedication. However, if the property was, in fact, partnership property, it could not be considered property of the individual partners. Partnership property is not property of the partners. A partner or a partner's spouse does not have an interest in partnership property.

Grant* v. *Clouser, 287 S.W.3d 914 (Tex.App.-Houston [14th Dist.] 2009, no pet.). Earnest and Gwendolyn were married and bought a house together. Gwendolyn died intestate and her children, Shawna and Mark, inherited Gwendolyn's 50% community property interest in the house. Earnest and Shawna both lived in the house for a while, but later, Earnest remarried and moved out. Shawna remained in the house.

Grant obtained a judgment against Earnest and filed an abstract of judgment in Harris County. The constable executed on the judgment and grant bought Earnests' interest in

the house at the execution sale. Grant then filed an application for partition of the house by sale.

Shawna answered the partition suit asserting that Grant did not acquire an interest in the property because it was her homestead. The trial court denied the partition by sale.

Grant contends that the trial court erred when it refused to compel partition of the property by sale because (1) the right to partition is absolute, and homestead laws do not preclude partition by sale of real property where a homestead-claiming cotenant asserts homestead as a defense to a non-homestead-claiming cotenant's attempt to partition the property by sale; (2) Texas homestead laws are intended to prevent forced sales of a homestead only when a creditor seeks a forced sale of a debtor's homestead; (3) Shawna is not Grant's judgment debtor; and, therefore, (4) article XVI, section 50(a) of the Texas Constitution and Texas Property Code section 41.001 do not preclude Grant's right to partition.

Shawna argued that her homestead interest and article XVI, section 50 of the Texas Constitution preclude partition by sale because Grant obtained his interest as Ernest's judgment creditor. Shawna also asserted that at the time actually where the judgment took place, she had a homestead interest in the property. That homestead interest could not be trumped by any lien that attaches thereafter.

Homestead rights historically have enjoyed strong protection in Texas. Because constitutional homestead rights protect citizens from losing their homes, statutes relating to homestead rights are liberally construed to protect the homestead.

Partition rights also are well established. Texas Property Code § 23.001 provides that "[a] joint owner or claimant of real property or an interest in real property ... may compel a partition of the interest or the property among the joint owners or claimants under this chapter and the Texas Rules of Civil Procedure." The right to partition has been characterized as absolute. If the property cannot be partitioned in kind, there must be a partition by sale.

A homestead right must accommodate the right to partition in some circumstances. For example, upon divorce, the trial court has broad power to order a "just and right" division of a divorcing couple's estate, including the power to order the sale of the homestead and partition of the proceeds. Under these circumstances, the homestead right attaches to the proceeds of the partition sale; a spouse generally enjoys continued homestead protection for the proceeds of the partition sale against creditors.

Section 52 of article XVI of the Texas Constitution also provides that heirs have a right to partition real property after the surviving spouse's death; accordingly, an heir may not defeat partition sought by another heir even if the property is the heir's homestead.

Since the court was not dealing with either the partition in a divorce or in an heirship situation, resolution of the case depends on principles governing rights of cotenants in circumstances other than those involving divorce or conflicts among heirs.

Homestead rights can attach to property interests held by tenancy in common; however, such homestead rights may not prejudice the rights of a cotenant. The general rule is that homestead rights attaching to property interests held by a cotenant are subordinate to another cotenant's right to partition. The court held that Shawna's homestead right is subordinate to Grant's right to compel partition.

PART XIV CONSTRUCTION AND MECHANICS' LIENS

Arias* v. *Brookstone, L.P., 265 S.W.3d 459 (Tex.App.—Houston [1st Dist.] 2007, pet. denied). Property Code section 53.055(a) states: A person who files an affidavit must send a copy of the affidavit by registered or certified mail to the owner or reputed owner at the owner's last known business or residence address not later

than the fifth day after the date the affidavit is filed with the county clerk. Section 53.055 does not require that a mechanic's, contractor's, and materialman's lien affidavit be filed with the county clerk before the required notice is given.

Truss World, Inc.* v. *ERJS, Inc., 284 S.W.3d 393 (Tex.App.-Beaumont 2009, pet. pending). Property Code § 53.058 entitled "Derivative Claimant: Notice for Specially Fabricated Items," states that, for a lien to be valid for non-delivered specially fabricated items, a claimant who specially fabricates material must give the owner notice not later than the 15th day of the second month after the month in which the claimant receives and accepts the order for the material.

For the purposes of mechanic or materialman liens, an "original contractor" is "a person contracting with an owner either directly or through the owner's agent." A subcontractor is "a person who has furnished labor or materials to fulfill an obligation to an original contractor or to a subcontractor to perform all or part of the work required by an original contract." A subcontractor is a derivative claimant; an original contractor is not.

Truss World contracted directly with AGH and was an original contractor, not a subcontractor or derivative claimant. As an original contractor, Truss World was not required to serve additional notices required of a subcontractor or derivative claimant to perfect a lien claim.

PART XV
CONDEMNATION

State of Texas* v. *Central Expressway Sign Associates, --- S.W.3d ----, 2009 WL 1817305, 52 Tex. Sup. Ct. J. 978 (Tex. 2009). The Texas Constitution provides that "[n]o person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person." Adequate compensation does not include profits generated by a business located on condemned land. In this case, the State condemned an easement that was leased to an advertising company for the purpose of erecting a billboard and selling advertising space.

The State filed a petition to condemn a 3,950-square-foot parcel of land in Dallas that was needed to improve a highway interchange. Central Expressway Sign Associates (CESA) held an easement for the construction and operation of a billboard on an 1,801-square-foot parcel, most of which was contained in the parcel to be condemned. The easement was leased to Viacom Outdoor, Inc., for the greater of $11,000 per year or twenty-five percent of billboard advertising revenues after paying limited agency commissions, with the base rent rising to $11,500 after one year and $12,000 after two. Viacom sold advertising space on a billboard that had been constructed on the property. At the time of condemnation, the billboard generated $168,000 per year in advertising revenue. After court-appointed special commissioners determined that the fair market value of the property to all of the interest holders was $2,012,300, the State objected and demanded a jury trial. The State reached a settlement agreement with the underlying fee owner and another leaseholder, and the State acquired title to the fee interest. The State also settled its condemnation suit against Viacom by agreeing to pay relocation benefits, and Viacom relocated its billboard to a new location. Thus, this case does not involve the acquisition of a billboard structure and Viacom was able to place its billboard elsewhere. Viacom remained a party to the State's suit against CESA, however, because of a dispute arising out of the settlement agreement over interest and attorneys' fees, which dispute proceeded separately from the trial on the merits between the State and CESA. As a result, the trial court's final judgment included acquisition of both CESA's and Viacom's interests in the property.

Before trial, the State challenged CESA's appraisal expert, claiming that he had improperly included in his appraisal business profits that Viacom's billboard generated and had mischaracterized the billboard structure as realty rather than personalty. The trial court also

granted CESA's challenge to the State's expert appraiser, Grant Wall. Wall used the income approach to valuing property, which estimates future rental income generated by the property and applies a capitalization rate to arrive at a present value. Wall capitalized the income Viacom paid CESA in rent for the easement, and estimated the fair market value to be $359,817. Because Viacom was paying a market rent, Wall assigned no value to the leasehold interest. The trial court excluded Wall's testimony as unreliable because he did not include billboard advertising revenues in his appraisal.

The State argues that it is entitled to a new trial because the trial court erred in excluding expert appraiser Grant Wall's testimony. The trial court found that Wall's testimony was unreliable because he did not include billboard advertising revenues in his estimate of the easement's value. Texas recognizes three approaches to determining the market value of condemned property: the comparable sales method, the cost method, and the income method. The comparable sales method is the favored approach, but when comparable sales figures are not available, courts will accept testimony based on the other two methods. The income approach is appropriate when the property would be priced according to the rental income it generates. All three methods are designed to approximate the amount a willing buyer would pay a willing seller for the property.

Texas law allows income from a business operated on the property to be considered in a condemnation proceeding in two situations: (1) when the taking, damaging, or destruction of property causes a material and substantial interference with access to one's property and (2) when only a part of the land has been taken, so that lost profits may demonstrate the effect on the market value of the remaining land and improvements. Absent one of these two situations, income from a business operated on the property is not recoverable and should not be included in a condemnation award. Courts have applied this rule for two reasons: first, because profits from a business are speculative and often depend more upon the capital invested, general market conditions, and the business skill of the person conducting it than it does on the business's location; and second, because only the real estate and not the business has been taken and the owner can presumably continue to operate the business at another location.

Texas courts have refused to consider business income in making condemnation awards even when there is evidence that the business's location is crucial to its success.

CESA and Viacom argue that billboard advertising revenue is derived from the intrinsic value of the land, and therefore that revenue should be treated like rental income for purposes of an income-method appraisal. But Texas courts have not recognized the exception for business profits derived from the intrinsic nature of the real estate. Profits from an existing farming business have been excluded as unreliable evidence of a property's value because they depend on weather, labor, market conditions, and other factors that may vary from year to year. Texas courts have also excluded evidence of profits from mining businesses operated on condemned land.

The Supreme Court said it was not inclined to create an exception for land on which a billboard is placed. Although CESA and Viacom consider billboards unique, there is nothing to indicate that a billboard's location is any more significant to their business than it would be to a retail establishment whose profitability depends upon visibility and easy access. Moreover, profits from a billboard advertising business depend upon more than just the land itself. The business involves securing permits for the operation of billboards, constructing, lighting, and maintaining the billboards, and employing personnel to sell advertising space and to place and remove the advertisements. If there were no business effort or skill involved in operating a billboard business beyond “renting” the space to advertisers, one would expect the rental rate of the easement to more closely ap-proximate the advertising income Viacom received.

PART XVI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Ski Masters of Texas, LLC* v. *Heinemeier, 269 S.W.3d 662 (Tex.App.—San Antonio 2008, no pet.). In 1956, Carlson platted and subdivided a 6.76 acre property into ten tracts of land of varying acreages. The plat was not recorded. Between 1957 and 1972, Carlson sold the ten tracts of land to various people.

The first lot Carlson sold had a residential only restriction and contained the following provision: Grantor also, by this instrument subjects the remainder of the 6.76 acres of land with these same restrictions, conditions and options, whether embodied in future instruments of conveyance or not. The deeds by which Carlson conveyed seven of the remaining nine original tracts reference and incorporate the restrictions contained in the Fleming Deed. Although the incorporating language is not identical, each of the seven deeds reference the volume and page number of the Fleming Deed and contain language similar to the following: "It is expressly understood that this conveyance is subject to the same restrictions, conditions, options and exceptions set out and recorded in Volume 311, Page 208 of the Guadalupe County deed records [i.e., the Fleming Deed]." Carlson did not include such language in the deeds conveying tracts 2 and 4.

In June 2004, Ski Masters purchased property including portions of tracts 4 and 5, as well as a very small amount of adjacent land that was not included in the original 6.76 acre tract. The deed by which Ski Masters purchased this property states that the conveyance is subject to the restrictive covenants set out in the Fleming Deed. Moreover, Ski Master and its realtor were aware of the deed restrictions at the time of purchase.

Ski Master wanted to operate a ski school on the property. The other residents sued to enforce the restrictions and Ski Master sought a declaration that the property was not subject to any valid restrictions enforceable by the residents.

Ski Masters asserts that the residents do not have standing because there was no overall development plan for the 6.76 acre tract, and even if there was such a plan, it was abandoned. The residents respond that evidence supports the trial court's findings that Carlson intended a "general plan or scheme" that the 6.76 acre tract be a residential subdivision and that this general plan or scheme has not been abandoned or waived.

A restrictive covenant is a contractual agreement between the seller and the purchaser of real property. In ordinary circumstances, a restrictive covenant is enforceable only by the contracting parties and those in direct privity of estate with the contracting parties. Circumstances do exist, however, in which a restrictive covenant may be enforced by someone other than the grantor or grantee. For example, a property owner may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designed to further the owner's general plan or scheme of development. Under these circumstances, each purchaser within the subdivision is assumed to benefit from the restrictions and each has the right to enforce the restrictions.

The standing of a property owner within a subdivision to enforce a restrictive covenant against another similarly situated property owner does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction. If the deed of the property owner against whom enforcement of the restriction is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers within the subdivision.

If, on the other hand, the deed does not contain the restriction, standing is based on application of the doctrine of implied negative reciprocal easement. The doctrine of implied reciprocal negative easement applies when a developer sells a substantial number of lots within a subdivision by deeds containing the restrictive covenant, and the party against whom the restriction is sought to be enforced had

notice of the restriction but the deed did not actually contain the restriction. The court held that the residents had standing.

Ski Masters argues that, as a matter of law, there was no scheme or plan, noting that (1) Carlson conveyed tracts 2 and 4 without the residential-only restriction, (2) the plat referenced in the restriction was never recorded, and (3) the ten original tracts have been re-subdivided in significant ways.

The argument that the existence of a general plan or scheme was negated by the conveyance of two tracts without the restriction at issue was raised and rejected in ***Hooper* v. *Lottman***, 171 S.W. 270 (Tex.Civ.App.-El Paso 1914, no writ). The Hooper court noted that uniformity of restrictions and deviation from that uniformity are evidentiary matters only, and that "there may be departures from the usual restrictions in individual cases without destroying the integrity of the scheme of development as a whole.

Likewise, Carlson's failure to record the plat is not dispositive of the existence of a general scheme or plan. The parties seeking to enforce the restrictive covenant in that case, like the Residents here, did not rely exclusively on unrecorded plat, but presented other evidence to establish the existence of general plan or scheme.

Finally, Ski Master failed to provide any case-law support for his proposition that the re-subdivision of the property somehow affected the residential scheme.

Meehl* v. *Wise, 285 S.W.3d 561 (Tex.App.-Houston [14th Dist.] 2009, no pet.). The parties own property in the Carleton Acres Subdivision in Brazoria County, Texas. With the exception of two lots that are not at issue in this case, the deeds to the properties in the subdivision incorporate a Declaration of Restrictions executed in 1965 and renewed in ten-year increments thereafter. The Declaration of Restrictions provides that no tract, lot, parcel or building site in said subdivision shall be used for any purpose other than that of a single family residence.

The Meehls purchased two adjoining lots in the subdivision conveyed by warranty deed expressly subject to the Declaration of Restrictions. The Meehls immediately began constructing a 3800-square-foot structure. According to a newspaper article published in The Facts on January 21, 2006, the Meehls planned to operate the facility as a "retreat, resource and educational center" for persons with bipolar disorder, and would be operated "in a bed-and-breakfast style with four luxury guest suites...." All the neighbors opposed the operation of the facility in the subdivision and sought an injunction to prevent its further construction. At trial, the neighbors won and the Meehls were enjoined from constructing or operating the facility.

Texas Property Code § 202.002, which pertains to enforcement of restrictive covenants, provides as follows:

> (a) This chapter applies to all restrictive covenants regardless of the date on which they were created.
>
> (b) This chapter does not affect the requirements of the Community Homes for Disabled Persons Location Act (Article 1011n,Vernon's Texas Civil Statutes).

Section 202.2003(b) further provides: "In this subsection, "family home" is a residential home that meets the definition of and requirements applicable to a family home under the Community Homes for Disabled Persons Location Act (Article 1011n, Vernon's Texas Civil Statutes). A dedicatory instrument or restrictive covenant may not be construed to prevent the use of property as a family home. However, any restrictive covenant that applies to property used as a family home shall be liberally construed to give effect to its purposes and intent except to the extent that the construction would restrict the use as a family home."

The Community Homes Act (now Texas Human Resources Code § 123.003) provides in relevant part:

> (a) The use and operation of a community home that meets the qualifications imposed under this chapter is a use by right that is authorized in any district zoned as residential.
>
> (b) A restriction, reservation, exception, or other pro-vision in an instrument created or amended on or after September 1, 1985, that relates to the transfer, sale, lease, or use of property may not prohibit the use of the property as a community home.

The court had to determine which statute controls the enforcement of these restrictive covenants: the Property Code provision providing for universal coverage or the Human Resources Code provision that controls only those covenants created or amended on or after September 1, 1985. Chapter 202 of the Texas Property Code generally controls the enforcement of restrictive covenants. However, chapter 202 yields to the Community Homes Act. Section 123.003(b) limits the enforceability of private covenants. Looking forward at the time of its effective date, section 123.003(b) provides that as of September 1, 1985, private covenants restricting the use of property as a community home are not enforceable. The instant restrictive covenant, adopted in 1965, would appear to avoid the restrictions of section 123.003(b) absent contrary controlling authority such as section 202.003(b) of the Texas Property Code.

The tension between section 202.003(b) of the Texas Property Code and section 123.003(b) of the Human Resources Code is readily apparent with respect to enforceability of a restrictive covenant depending on the date in which the covenant was created. The Human Resources Code bars enforcement of a covenant restricting the use of property as a community home created after September 1, 1985, while the Property Code bars enforcement of the same covenant regardless of the date in which the instrument was created. Because section 202.003(b) is the later statute, enacted in 1987, its general prohibition controls the less restrictive section of 123.003(b) passed in 1985. The court concludes that the universal applicability of the Property Code's section 202.003(b) controls if the use of property comports with definition of a community home articulated in the Human Resources Code. Applying section 202.003(b), the court further concludes that the disputed restrictive covenant is enforceable to the extent that the Meehls have met the qualifications further articulated under the Human Resources Code. After a lengthy discussion the court concluded that the Meehls satisfied the Human Resource Code requirements and dissolved the injunction.

PART XVII
MISCELLANEOUS

Intercontinental Group Partnership* v. *KP Home Loan Star, L.P., --- S.W.3d ----, 2009 WL 2667854 (Tex. 2009). A provision in the contract for attorneys' fees read as follows: "If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court." "Prevailing party" was not defined.

KB sued Intercontinental for breach of contract, seeking damages, specific performance, injunctive relief, and attorneys' fees. It did not sue for declaratory judgment. At trial, KP sought only lost profits damages for Intercontinental's breach. The jury found that Intercontinental had breached the contract, but found $0 damages. Both parties then sought attorneys' fees as the "prevailing party."

Under the so-called American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties. Chapter 38 of the Texas Civil Practice and Remedies Code provides for attorneys' fees in wording that is similar to the contract provision in this case. "A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for ... an oral or written contract."

The Supreme Court has previously held that, before a party is entitled to fees under Chapter 38, the party must prevail on a cause of action for which attorneys' fees are recoverable and must recover damages. If that rule is applied in this case, KB could not recover damages. However, the court said the rule and Chapter 38 are not controlling here. Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38's, and they have done so here. As KB points out, Chapter 38 permits recovery of attorney's fees "in addition to the amount of a valid claim," while nothing in the contract expressly requires that a party receive any "amount" of damages. The triggering event under the contract is that a party prevail in an action "to enforce the terms of this Contract or to declare rights hereunder...." The question remains, however: what does "prevailing party" mean under the contract?

It seems beyond serious dispute that KB achieved no genuine success on its contract claim. Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB got nothing except a jury finding that Intercontinental violated the contract. It recovered no damages; it secured no declaratory or injunctive relief; it obtained no consent decree or settlement in its favor; it received nothing of value of any kind, certainly none of the relief sought in its petition. No misconduct was punished or deterred, no lessons taught. KB sought over $1 million in damages, but instead left the courthouse empty-handed: "That is not the stuff of which legal victories are made." Nor did the outcome materially alter the legal relationship between KB Home and Intercontinental.

A zero on damages necessarily zeroes out "prevailing party" status for KB.

KB argues that it should nonetheless recover attorney's fees because it sued to "declare rights" under the contract and prevailed by obtaining a jury verdict that Intercontinental breached the contract. The court disagreed. Neither law nor logic favors a rule that bestows "prevailing party" status upon a plaintiff who requests $1 million for actual injury but pockets nothing except a jury finding of non-injurious breach; to prevail in a suit that seeks only actual damages-compensation for provable economic harm-there must be a showing that the plaintiff was actually harmed, not merely wronged.

If KB had brought its breach-of-contract case and obtained favorable answers on the same "failure to comply" questions, but the jury also found that an affirmative defense barred KB's claim, a take-nothing judgment in favor of Intercontinental would have been rendered. There would be no dispute that KB had not prevailed, despite jury findings that Intercontinental breached. No rational distinction exists between that scenario and the one before the court. In both, the end result is a take-nothing judgment with no meaningful judicial relief for KB. Its only "relief" in either case is the gratification that comes with persuading a jury that Intercontinental behaved badly. But vindication is not always victory. However satisfying as a matter of principle, "purely technical or de minimis" success affords no actual relief on the merits that would materially alter KB's relationship with Intercontinental. Accordingly, KB, while perhaps a "nominal winner" in convincing the jury that it was "wronged," cannot be deemed a "prevailing party" in any non-Pyrrhic sense.

If KB "lost" by receiving no damages does that mean Intercontinental "won" by remitting no damages? The court could not reach this question if it was not properly presented, and it was not. Intercontinental neither preserved the issue nor presented any evidence (either before, during, or after trial) regarding its attorney's fees for defending KB's breach-of-contract claim. This failure waives any right to recovery.

The dissent accused the majority of ignoring the contract's language in order to reach an easy-to-apply answer.

"Nothing could be further from the truth," said the majority in response. Since the contract leaves "prevailing party" undefined, the court must do its best to effectuate the parties' intent.

The most sensible interpretation is that a plaintiff prevails by receiving tangible relief on the merits.

Despite what the dissent contends, the court is not saying a plaintiff must recover a money judgment in every breach-of-contract action. Quite the opposite. The dissent cites a variety of situations where we agree the plaintiff would “prevail”: when the plaintiff obtains rescission of the contract, specific performance, an injunction, or a declaratory judgment. Today's decision is not grounded on the fact that KB received no money damages, but rather on the fact that KB received nothing at all.