CASE UPDATE

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20TH ANNUAL ROBERT C. SNEED
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SAN ANTONIO, TEXAS

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CASE UPDATE

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The case selection for this episode of the Case 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 319 S.W.3d 973 and Supreme Court opinions released through November 12, 2010.

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.

This and past Case Law Updates are available at our website cwrwlaw.com.

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PART I
MORTGAGES AND FORECLOSURES

Myrad Properties, Inc.* v. *LaSalle Bank National Association, 300 S.W.3d 746, 2009 WL 4877733, 53 Tex. Sup. Ct. J. 208 (Tex. 2009). Myrad Properties, Inc. financed two separate properties in Killeen. Myrad executed a promissory note, which was secured by a deed of trust that covered both properties. After Myrad defaulted, LaSalle proceeded to foreclose.

The substitute trustees posted notice of sale. In various parts, the notice referred both to the note and the recorded deed of trust, including a statement that "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." However, the notice's property description referred to Exhibit A, the only exhibit, which in turn described only one of the two properties. La Salle was the only bidder at the foreclosure sale. It bid its entire debt.

After the foreclosure sale, the substitute trustees issued a substitute trustees deed to LaSalle, which LaSalle immediately recorded. The substitute trustee's deed conveyed the "Property" to LaSalle. "Property" was defined in the deed as the real property described in Exhibit A to the deed, which, again, described only one of the two tracts.

Myrad took the position that the sale covered only the one tract and, because LaSalle had bid its entire debt for the one tract, Myrad then owned the other tract free and clear. It sued LaSalle to enjoin it from filing a correction deed, but the trial court dissolved its initial restraining order and LaSalle filed a correction deed which described both tracts. Mryad then sought to quiet title and sought a declaration that LaSalle owns only the one tract described in the initial deed. LaSalle in turn sought a declaration that it now holds title to both properties, or in the alternative, LaSalle and the substitute trustees sought rescission of the conveyance from the substitute trustees to LaSalle.

Rather than requiring that erroneous deeds be reformed or rescinded by judicial proceedings, the courts have long allowed agreeable parties to use correction deeds in limited circumstances. For instance, a correction deed may be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. Similarly, a correction deed may be used to correct a defective description of a grantor's capacity.

However, using a correction deed to convey an additional, separate parcel of land is beyond the appropriate scope of a correction deed. Preserving the narrow circumstances for acceptable use of a correction deed is important because a proper correction deed may relate back to the date of the deed it corrects. To allow correction deeds to convey additional, separate properties not described in the original deed would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice. Thus, the Supreme Court held that LaSalle's correction deed purporting to convey both properties was void as a matter of law.

Having not succeeded in confirming the correction deed, LaSalle then sought to rescind the conveyance from the substitute trustees because of mistake in the original deed. When mistake is alleged, the court may consider extrinsic evidence of intent in determining whether to enforce a deed. Rescission is an available equitable remedy if mutual mistake is shown.

The lower courts did not reach the rescission claim. However, the trial court granted, and the court of appeals affirmed, LaSalle's claim that the correction deed vested title to both parcels. The use of a correction deed to reform a mistaken deed necessarily implies a mutual mistake in the underlying instrument running contrary to the grantor's and grantee's intent. Thus, a fact-finding supporting a decision to enforce a correction deed would be identical to the finding required for equitable rescission. The correction deed at issue made a single change: the description of two properties instead of one. Thus, in entering and affirming judgment enforcing the correction deed, the trial court and court of appeals necessarily found that a mistake existed in the substitute trustees' deed, the intent of LaSalle and the substitute trustees being to convey both properties covered by the deed of trust. Because of the trial court's implied finding of mutual mistake, supported by all of the evidence, equitable rescission is an available remedy.

The court noted that it was "not blind" to the equities of the situation. LaSalle was entitled to be made whole as holder of the note from Myrad, and in trying to acquire two properties LaSalle received only one by mistake. Although the court cannot enforce the correction deed, it recognized that enforcement of the original substitute trustees' deed would result in one of two things happening. Should LaSalle remain able to foreclose on the omitted property under the note after accounting for its payment, requiring someone to pay a second time for that property will entitle Myrad to a windfall from any surplus beyond what Myrad owes on the note. Likewise, if the terms of the note are satisfied, Myrad will stand as owner of the omitted property free from encumbrance despite its default. Myrad has never disputed this, and indeed argues for just such a result. The court concluded that Myrad will be unjustly enriched if the mistaken deed to LaSalle is enforced.

The court did not need not reach the question of whether notice was adequate or chilled potential bidding, because rescission of the deed is proper regardless. And, a fresh foreclosure sale would address Myrad's concerns about adequate notice to the public.

Chase Home Finance, L.L.C.* v. *Cal Western Reconveyance Corporation, 309 S.W.3d 619 (Tex.App.-Houston [14th Dist.] 2010, no pet. history to date). Dickerson bought a lot on Galveston. It was initially financed by AHL, with Dickerson giving AHL a first lien and second lien on the lot. The AHL liens were later assigned to Wells Fargo.

Shortly after buying the lot, Dickerson conveyed the lot to Gooch, subject to the AHL liens. Gooch filed for bankruptcy right after that and later she sold the lot to Landin. Landin borrowed from People's Choice to buy the lot and gave People's Choice a first and second lien on the lot. The People's Choice first lien deed of trust contained a provision stating that People's Choice would be subrogated to any liens paid off with the proceeds of the loan. The People's Choice loan paid off the AHL first lien, which was released, but the AHL second lien was not paid off or released. HSBC bought the People's Choice notes and liens. Its servicer was Chase.

HSBC foreclosed on the People's Choice first lien. After the foreclosure, the AHL second lien was assigned to RTR, which then sought to foreclose on the lot. Chase then filed suit to prevent RTR from foreclosing on the second lien it had acquired from AHL. Chase claimed that, because the proceeds from the People's Choice first lien had been used to pay off the AHL first lien, the holder of the People's Choice first lien (i.e., HSBC) was subrogated to the rights of the AHL first lien and that the HSBC foreclosure extinguished the AHL second lien.

The trial court concluded that RTR was entitled to retain the AHL second lien. Further, on the principle that a lienholder should not be granted subrogation if the superior or equal equities of others with recorded interests would be prejudiced thereby, it denied subrogation to Chase and held that the AHL second lien was prior to Chase's lien.

The trial court found that material prejudice to RTR would result based on the following factors: (1) if equitable subrogation were applied in this case, then rather than RTR being subordinate to the original AHL fixed rate loan, RTR would be subject to a more risky variable rate loan; (2) when the People's Choice (now Chase) loan was made, the new borrower was not properly qualified, was not a suitable borrower for the loan transaction, and made very few payments against the new mortgage before going into default; (3) the People's Choice loan was $41,000 greater than the note it repaid; (4) the borrower of the People's Choice loan was a bad credit risk; (5) permitting subrogation would cause accrued interest under the AHL first lien to be converted to principal under the People's Choice first lien, prejudicing the second lien holder with a greater interest burden in front of it; and (6) a reasonable second lienholder would not voluntarily subordinate its position because of the material prejudices created by any such subordination.

The trial court also found that People's Choice and its successors, including Chase, had a duty to pay off the AHL second lien, and that they knew and acknowledged that they had a duty to pay the amount necessary to extinguish this lien. In addition, the trial court found that People's Choice assumed the responsibility to pay off the AHL second lien. There is no written agreement in the record reflecting such a duty or assumption of responsibility. None of closing documents impose on People's Choice the duty to pay off the AHL second lien. In its closing instructions, People's Choice states that the title policy should not have an exception for a lien like the AHL second lien, and the title policy complied with this instruction.

In ***Texas Commerce Bank National Association*** **v.** ***Liberty Bank***, 540 S.W.2d 554 (Tex.Civ.App.-Houston [14th Dist.] 1976, no writ), this court held that a bank lender was entitled to subrogation as a matter of law. The facts in ***TCB*** are substantially the same. The court in ***TCB*** held that Liberty Bank, who had repaid an existing first lien, was expressly subrogated to the rights of the holders of the prior liens it had repaid and that, as a matter of law, there was no prejudice to TCB. Both before the pay-off of the senior liens by Liberty Bank and after this pay-off and subrogation of Liberty Bank to the senior position, TCB was entitled to the amount remaining after the amounts of these liens were subtracted from the proceeds of the foreclosure sale in a foreclosure of the two senior liens.

The trial court in this case appears to have evaluated prejudice based on the presumption that, if subrogation were granted, it would have to be as to all amounts owed under the People's Choice first lien note. Therefore, the trial court considered the fact that, although the initial interest rate of the People's Choice first lien note was lower than the AHL first lien note, after two years, the People's Choice first lien note changed to a high, variable interest rate. However, if subrogation were granted, priority would be given only to the $348,482.63 paid by People's Choice plus six-percent interest thereon from the date of payment. Therefore, the difference in interest rates is not material to the analysis.

The trial court also emphasized that Landin was a borrower with a high likelihood of default. First of all, this testimony was based on speculation by the corporate representative of RTR, premised on the terms of the Landin purchase rather than on a credit report or other direct information regarding Landin's creditworthiness. Even presuming a high risk that Landin would default, there is no evidence that this risk of default was higher than the risk associated with Dickerson. Although the record also lacks direct information regarding Dickerson's creditworthiness, it reflects that, less than a month after purchasing the property with no down-payment, Dickerson conveyed title to Gooch and warranted to her that the property was free from all encumbrances. In fact, the Property was encumbered with two liens from the recent closing. After making at most a few payments against his indebtedness to Aames, Dickerson stopped paying, and his loan went into default. There is no evidence in the record that Gooch assumed Dickerson's indebtedness, and at the time of the sale to Landin, Gooch had filed for bankruptcy protection. Even if it were appropriate to consider prejudice arising from the substitution of Landin in place of Dickerson as the debtor, the record evidence is legally insufficient to support a finding that this change was prejudicial.

The parties in this case argue over whether this case involves purely contractual subrogation or purely equitable subrogation. In cases like the one at hand, there is no contract between the two lenders who are disputing whether the subsequent lender is entitled to subrogation; however, there is an express deed-of-trust provision between the debtor and subsequent lender stating that, if proceeds are used to pay off a prior debt, the lender will be subrogated to all rights of the prior lienholder. Under precedent from the Supreme Court of Texas, such cases fall into a third, hybrid category. In these cases, the right of subrogation is not wholly dependent on the application of a contract, and it is not wholly dependent on equitable principles. In such cases, though the analysis does involve equitable considerations, each case is not controlled by its own facts, and the subsequent lender can be entitled to subrogation as a matter of law. In these cases, the subsequent lender's actual or constructive knowledge of the lien previously filed by the other lender does not defeat the subsequent lender's right to subrogation. Likewise, in such cases, the subsequent lender's alleged negligence is not relevant to the subrogation analysis.

Long Beach Mortgage Company* v. *Evans, 284 S.W.3d 406 (Tex.App.-Dallas 2009, pet. denied). 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 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, the court had 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.

Statewide Bank* v. *Keith, 301 S.W.3d 776 (Tex.App.-Beaumont 2009, pet. pending). Keith’s deed of trust required her to keep the property in good repair and to maintain insurance. Among the lender’s rights under the deed of trust, it had the right to receive any insurance proceeds paid to the borrower that resulted from damage to Keith's home. That provision, which is at issue, states: “[Mortgagee] may apply any proceeds received under the insurance policy either to reduce the note or to repair or replace damaged or destroyed improvements covered by the policy.”

Hurricane Rita severely damaged Keith's home. Keith filed a claim under her homeowners' insurance policy. Keith received an insurance draft for the damages the hurricane had caused to her home. The carrier made the draft payable to Keith, her attorney, and the lender.

After receiving the draft from the insurance company, Keith's attorney forwarded the draft to Statewide with instructions requesting that the lender endorse the check and return it so as to pay expenses and begin repairs. Instead, the funds were deposited into the account of the lender’s servicing agent. Although Keith sent the proceeds to the address the lender had instructed its mortgagors to send mortgage payments, the lender explained that payments received at that address were actually received by another bank with whom it had a relationship. Its deposit relationship with the other bank required that funds sent to the designated address be deposited into the servicer’s account for the lender. When the lender finally received a copy of the attorneys’ letter, it moved the funds to a suspense account, but did not try to contact Keith or her attorney regarding the funds.

When the endorsed check had not been returned, Keith's attorney called and spoke to a lender representative. Keith's attorney demanded that the lender return the draft. When the draft was not returned, Keith's attorney filed suit against the lender and servicer, alleging claims based on several theories, including breach of contract, theft, and breach of fiduciary duty.

Shortly after the suit was filed, the lender sent a letter saying it was prepared to disburse the proceeds to Keith and her contractor upon presentation of invoices. Keith rejected the lender’s requests.

Other than requesting that Keith provide the lender with contracts and invoices, and directing its servicer to make payments for invoices Keith had paid, the record does not contain any additional evidence that the lender or its agents did anything more to fulfill the lender's obligation under the deed of trust to either repair Keith's home or apply the proceeds to the loan's balance. At trial, the jury found that the lender had breached the deed of trust and rejected its claim that Keith breached the deed of trust.

The lender challenges the legal and factual sufficiency of the evidence to support the jury's finding that it breached the deed of trust. The lender argues that it acted reasonably in requiring Keith to provide it with invoices and contracts to protect its interest in making sure that the insurance proceeds were spent on the repair of Keith's home. It further asserts that none of the evidence indicates it acted unreasonably. However, the lender's brief fails to address one of the questions implicitly resolved by the jury's verdict-whether the lender made a timely election of its option to either repair Keith's home or apply the proceeds to the principal of the mortgage. The lender argues that it still maintains a right under the deed of trust to elect to apply the insurance proceeds to the mortgage balance.

In contrast, Keith contends that the deed of trust did not require her to provide the lender with invoices or contracts for the repair of her home. While Keith recognizes that the lender could place some conditions on the release of the funds it held, she complains that instead of doing so, the lender chose to do nothing until Keith filed suit.

In analyzing whether the lender made a timely election, courts first consider the time period within which the lender was required to elect its option. The deed of trust provides no specific time. Nevertheless, where contracts do not specify the time within which a party must elect an option, the law presumes that the contracting parties intended the option be exercised within a reasonable period of time. Courts also consider the purpose of the option at issue when determining whether it was exercised in a timely manner.

An obvious purpose of a lender's option to repair is to allow it some control over how the insurance funds are used to protect the lender's damaged collateral. But, the lender's interest is not the only consideration, as the borrower also has an interest in making financial decisions that will impact the borrower's interests in the property. With respect to the length of time a lender may take in making its election, the question arises whether the lender could withhold its decision for such a length of time that the mortgagor could be forced to make a decision to repair the property without knowing if the lender had elected to repair the property. Or, stated another way, can the lender decide, after the borrower repaired the property, to apply the insurance proceeds to the mortgage balance instead of to the property's repair? With respect to that question, the answer is no.

Because both have an interest in knowing which option the lender has chosen, the interests of both the borrower and lender are protected by requiring the mortgagee, under an agreement that fails to specify otherwise, to exercise its option within a reasonable time. In this case, in light of the amount of Keith's outstanding mortgage compared to the insurance proceeds received, the court believed that the lender, acting in a reasonably prudent manner, was on notice that Keith's home had fairly extensive damage. Thus, aware of significant damage to Keith's home, the lender needed to inform Keith of its election within a fairly short period after receiving the proceeds in order to allow Keith to then decide what to do about repairing her home.

Black* v. *Washington Mutual Bank, 318 S.W.3d 414 (Tex.App.-Houston [1st Dist.] 2010, pet. pending). Lundy owned a house and got a $1 million loan on it from WaMu. Less than a month after obtaining the loan, Lundy conveyed the house by quitclaim to Black, who paid $100,000 down and made monthly payments of $8,500. About a year after entering into the agreement to purchase the property, Black received a phone call from Lundy telling her that he needed to do something with the lender or bank and he needed her to go and release the property but he would give it back to her. Black signed the deed giving the property back to Lundy. Lundy did not transfer the property back to Black, and Black never heard from Lundy again.

WaMu foreclosed on the loan. Black was given notice of the sale. After the foreclosure, WaMu gave Black a notice to vacate and then filed this forcible detainer action. Black claimed that the justice court and county court lacked subject matter jurisdiction over the case because it involved the determination of title to the property. A justice court in the precinct in which real property is located has jurisdiction over a forcible detainer suit. The sole issue to be determined in a forcible detainer action is the entitlement to actual and immediate possession, and the merits of the title shall not be adjudicated.

Black argues that the granting of a quitclaim deed from Lundy granted her "equitable title" and a greater right of possession than WaMu. However, a quitclaim deed, by its very nature, only transfers the grantor's right in that property, if any, without warranting or professing that the title is valid. Thus, Black took the property subject to the terms of the deed of trust, which allow foreclosure. Further, Black admitted at trial that she did not have title at the time of sale because she conveyed her interest back to Lundy. Black fails to include in her analysis how her conveyance of the property back to Lundy affected her claimed "equitable title." While Black may seek recourse against Lundy independent of the forcible detainer suit, her argument has no bearing on the determination of immediate right of possession.

See also ***Williams* v. *Band of New York, Mellon***, 315 S.W.3d 925 (Tex.App.-Dallas 2010, no pet.). Defects in the foreclosure process may not be considered in a forcible detainer action to evict the foreclosed homeowner.

And see also ***Shutter* v. *Wells Fargo Bank***, N.A., 318 S.W.3d 467 (Tex.App.-Dallas 2010, pet. pending). The lender proved its right to possession of the property by presenting in evidence the substitute trustee's deed, the deed of trust, and notices to the borrower and the other residents of the property to vacate. The substitute trustee's deed showed the lender purchased the property in a public auction following appellant's default on the deed of trust. The deed of trust showed the borrower was a tenant at sufferance when she did not vacate the property after thje lender purchased it. The notice to vacate informed the borrower of her tenant-at-sufferance position and the lender's requirement that she vacate the property. This evidence was sufficient to establish the lender's right to immediate possession of the property.

PART II
HOME EQUITY LENDING

Texas Banks Association* v. *Association of Community Organizations for Reform Now (ACORN), 303 S.W.3d 404 (Tex.App.-Austin 2010, pet. pending). ACORN sued the Finance Commission and Credit Union Commission seeking to invalidate certain regulations adopted by the Commissions relating to home equity lending. This case discusses the ACORN objections in detail.

PART III
ASSIGNMENTS OF RENTS

In re *Amaravathi Limited Partnership*, 416 B.R. 618 (Bankr. S.D. Tex. 2009). The properties involved are high-end apartments that generate a lot of rents that are the primary source of the debtors' income.

Acquisition of the properties were financed by the lender and secured by deeds of trust, assignments of rents and leases, and cash management agreements typical in securitized loan transactions. After borrowing the loan, the debtors collected the rents and deposited them into a lockbox pursuant to the cash management agreement. The lender would deduct the debt service and make the remainder available to the debtor. When the properties stopped generating enough cash to pay the operating expenses and debt service, the debtor stopped making deposits into the lockbox, which was a default under the various loan agreements.

The debtor filed this Chapter 11 bankruptcy and promptly moved to use the rents as cash collateral. The lender opposed the motion. The single issue litigated by the parties was whether the assignment of rents removed the post-petition rents from the property of the estate.

The lender argued that, since the assignment of rents was "absolute" under Texas law, the debtors had no further interest in the rents. Without an interest in the rents, the rents could not become property of the estate under Bankruptcy Code § 541(a)(1). The debtors argued, on the other hand, that the assignment was merely a "collateral" assignment and that the future rents remained property of the estate under § 541(a)(1).

The United States Supreme Court has held that bankruptcy courts should generally look to state law to determine property rights in the assets of a bankruptcy estate. There are two exceptions to this general rule. First, there is an exception if Congress modifies state law through legislation enacted under Congress's authority to establish uniform laws on the subject of bankruptcies throughout the United States. Second, state property law must relent if some federal interest requires a different result.

In an extensive discussion of bankruptcy law, the court concluded that under the unambiguous language of Bankruptcy Code § 541(a)(6), the rents that come from property of the estate are themselves property of the estate.

The court went further to say that the lender's state law arguments also fail. The lender claims that the parties agreed to an "absolute" assignment of rents that automatically transferred full title in the rents to the lender. Alternatively, the lender argues that, if the court finds the assignment was "collateral" and not "absolute," complete title to the rents transferred when the receiver took possession of the Properties. Regardless of whether the assignment was "absolute" from its initiation or "activated" by the appointment of a receiver, the thrust of the lender's argument is that debtors lack any interest in rents sufficient to bring the rents into the estate under Texas law.

Assignments of rents are interests in real property and are created and defined according to the law of the state where the property is located. The two leading cases involving assignments of rent in Texas are ***Taylor* v. *Brennan***, 621 S.W.2d 592 (Tex.1981) and ***FDIC* v. *International Property Management, Inc.***, 929 F.2d 1033 (5th Cir.1991). Neither case directly addresses bankruptcy law or the issue presently before this court; nevertheless, their holdings and dicta provide the legal framework for resolving this case.

In ***Taylor***, the Texas Supreme Court discussed "absolute" and "collateral" assignments of rents. A "collateral" assignment of rents occurs when the debtor pledges the property's rents to the mortgage lender as additional security for a loan. In the event of default, the lender may assert rights not only to the property subject to the mortgage but also to the rents generated by the mortgage property. An important caveat with "collateral" assignments is that the lender must take some affirmative action to "activate" its rights to the rents. In dicta, the Texas Supreme Court explained how an "absolute" assignment of rents differs from a "collateral" assignment. The key difference is that "an absolute assignment operates to transfer the right to rentals automatically upon the happening of a specified condition, such as default.". Thus, unlike a "collateral" assignment-which forces the mortgagee to take additional steps to "activate" its "right" to collect rents-the "absolute" assignment permits the mortgagee to assert "rights" to all the rents immediately once a specified condition (usually default) occurs.

The law governing "absolute" assignments was later explained in greater detail by the Fifth Circuit-when interpreting and clarifying the dicta from ***Taylor***. In ***International Property***, the Fifth Circuit found that the mortgage documents demonstrated the parties' intent to create an "absolute" assignment and, therefore, the FDIC had the right to collect the rents immediately upon default. In ***International Property***, the Fifth Circuit recognized that, given the nature of these arrangements, the term "absolute" assignment is, essentially, a misnomer:

> "The concept of a present transfer of title to rents contingent upon default, as opposed to a security interest in the rents, is essentially a legal fiction.... Whatever terminology the court uses, ... mortgagees employ such assignments to secure the debt, and all such assignments would be considered security interests under the Uniform Commercial Code, which treats all transfers intended to secure a debt as security interests despite their form."

The bankruptcy court also quoted **In re *Foundry of Barrington Partnership***, 129 B.R. 550, 557 (Bankr.N.D.Ill.1991) ("[The lender] can call this arrangement an 'absolute assignment' or, more appropriately, 'Mickey Mouse.' It's still a lien ..."). The Fifth Circuit solidified this point by referring to "absolute" assignments as "contingent present assignments" on four different occasions in its opinion. The phrase "contingent present assignment" more accurately reflects the true substance of "absolute" assignments.

The finding that there is nothing "absolute" about "absolute" assignments directly influenced the Fifth Circuit's clarification of ***Taylor's*** statement, in dicta, that an "absolute" assignment "passes title to the rents" to the lender. Furthermore, any doubt concerning ***International Properties'*** legal conclusion that "absolute" assignments do not grant full title to the mortgagee is put to rest upon review of the general characteristics of an "absolute" assignment of rents transaction. Several characteristics of these transactions, which are also present in this case, indicate that complete title simply cannot transfer to the lender. The most obvious interest that a debtor retains following an "absolute" assignment is the debtor's ability to insist that the rents be properly applied to the debtor's obligation to the lender. The second characteristic demonstrating that equitable title remains with the debtor is that, although the borrower may be required to apply rents to pay for operation and maintenance of the property and to pay debt service, the borrower's use of excess rents is not restricted. Third, generally an absolute assignment of rents is given in connection with (and only because of) the related mortgage loan.

The bankruptcy court also noted that, as mentioned in ***Taylor***, a pro tanto payment must be made to create a "true" assignment. A pro tanto payment is a credit to the debt of the present value of the future rental stream. Thus, if the future rental stream was worth $10,000,000 at the time the loan documents were executed, the lender was required to reduce the debt by $10,000,000 in order to effect a "true" assignment of title. No pro tanto payment occurred in this case. The lender's failure to credit the present value of the rents is an indication that the parties did not treat the assignment as one of both a legal and an equitable interest.

Finally, the "absolute" assignment of rents does not transfer complete title because such assignments "terminate upon payment in full of the debt.

PART IV
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Financial Freedom Senior Funding Corporation* v. *Horrocks, 294 S.W.3d 749 (Tex.App.-Houston [14th Dist.] 2009, no pet.). Mullane borrowed a reverse mortgage a few months before she died. The notes evidencing the mortgage provided that borrower was required to pay the balance upon receipt of a notice from lender requiring payment in full as provided in paragraph 7 of the notes. Paragraph 7 provided that the lender could require immediate payment in full upon the borrower's death or a disposition of the property.

Mullane died in March, 2003. In July, 2007, the lender sent a notice of loan maturity. The administrator of Mullane's estate claimed that the statute of limitations had run on the lender's right to foreclose.

The lender claimed that the notes were not demand notes and that the statute did not commence until it sent its notice of acceleration. Citing section 3.108(a)(2) of the Business & Commerce Code, the administrator argued that since the Notes state they are due upon receipt of a notice from appellant requiring payment in full and do not otherwise include a specific time for payment, they are demand notes and limitations began to run on the date they were signed. The court did not accept either interpretation of the notes.

While the notes do not list a specific maturity date, they do contain conditions which create a readily ascertainable time for payment – the borrower's death or the disposition of the property. It thus held that the notes are payable at a definite time.

And while the court agreed that the notes were not demand notes, it did not agree that the cause of action accrued only when notice of acceleration was sent. The Notes at issue here do not provide for repayment through periodic installment payments with provision for acceleration of any outstanding payments in the event of default. Instead, the notes themselves provide that payment shall be made in full upon demand by appellant once specified conditions occurred. Because the entire debt would always be due upon demand, there was never any requirement that appellant accelerate the debt first. Because the notes are payable at a definite time, appellant's cause of action to enforce the liens accrued when one or more of the conditions listed in Paragraph 7 occurred.

Athey* v. *Mortgage Electronic Registration Systems, Inc., 314 S.W.3d 161 (Tex.App.-Eastland 2010, pet. denied). The Atheys executed a promissory note payable to Decision One and secured by their property. The note contained a legend at the top in bold and all caps that said "THIS NOTE CONTAINS PROVISIONS ALLOWING FOR CHANGES IN MY INTEREST RATE AND MY MONTHLY PAYMENT." The body of the note contained a provision that said the interest rate would change on September 1, 2007 and every six months after that.

In contrast to this language, the Atheys contended that an unnamed representative of Decision One told them at closing that the note had a fixed interest rate.

Decision One raised the interest rate from 7.79% to 10.79%. The Atheys defaulted and the lender accelerated. The Atheys contended that they were defrauded when the Decision One representative misrepresented that the interest rate was fixed. The lender moved for summary judgment on this claim, arguing that the note fully disclosed that the interest rate was variable. The Atheys do not dispute that the note unambiguously provided for an adjustable interest rate but contend that, absent proof of their actual knowledge that the rate was variable (knowledge which cannot be inferred merely from what they would have learned had they read the note), testimony that the representative said the interest rate was fixed is sufficient to preclude summary judgment.

While the court agreed that the Atheys were not required to independently investigate the Decision One representative's statement before relying upon it, does this mean that they could rely upon an oral statement clearly inconsistent with conspicuous provisions of the note? The Athey's argued that they could, reasoning that, because the Decision One representative's statement induced them to sign the note, they could rely upon it even if it was contradicted by a conspi-cuous note provision. A party to a contract may not successfully claim that he believed the provisions of the contract were different from those plainly set out in the agreement or that he did not understand the meaning of the language used. To vitiate a contract, a fraud must be something more than merely oral representations that conflict with the terms of the written contract.

Even if bright-line rules for determining whether reliance is justified are sometimes wanting, Texas courts have been more stringent in their analysis of fraudulent inducement claims when the contract is a promissory note. The policy behind this heightened proof requirement is to avoid uncertainty and confusion in the law of promissory notes.

The Atheys' evidence does not establish the trickery, artifice, or device necessary to void a promissory note. The oral representation upon which they rely is directly, clearly, and conspicuously contradicted by the note's heading and introductory paragraph. The court did not hold that a fraudulent inducement cause of action can never lie merely because the operative oral representation is contradicted by a provision within the contract. But in this instance, the Atheys could not reasonably rely upon an oral representation that was so plainly contradicted.

Stephens* v. *LPP Mortgage, Ltd., 316 S.W.3d 742 (Tex.App.-Austin 2010, pet. denied). LPP acquired Stephens's note from the SBA. The note was secured by a deed of trust. LPP initially sued to collect on the note. In that original suit, LPP did not pursue foreclosure of the lien or otherwise place the deed of trust at issue. LPP prevailed and obtained a judgment and attempted collection, but the writ of execution was returned Nulla Bona. LPP then filed suit for judicial foreclosure of its lien.

Stephens contends that after suing on the promissory note and reducing that claim to judgment, LPP Mortgage was barred by res judicata from pursuing the remedy of foreclosure of the deed of trust lien securing repayment of the note. For res judicata to apply, there must be (1) a prior final judgment on the merits by a court of competent jurisdiction, (2) identity of parties or those in privity with them, and (3) a second action based on the same claims that were raised or could have been raised in the first action. The doctrine of res judicata seeks to bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. Under the doctrine, if a plaintiff prevails in a lawsuit, his cause of action merges into the judgment and the cause of action dissolves. The question, here, is whether LPP Mortgage was required to litigate its claim for judicial foreclosure of its lien as part of its prior suit on the promissory note.

It has long been the rule in Texas that suit may be maintained on a note secured by lien without enforcement of the lien, and after judgment another suit can be brought to foreclose the lien. Stephens argued, however, that this longstanding rule was overruled by the Texas Supreme Court's decision in ***Barr* v. *Resolution Trust Corp.***, 837 S.W.2d 627 (Tex.1992), where the court "reaffirmed" the transactional approach to res judicata, which relates to what claims could have been litigated in a prior lawsuit. Under the transactional approach, res judicata may apply if the subsequent suit arises out of the same subject matter as a previous suit and, through the exercise of diligence, could have been litigated in the previous suit. A determination of what constitutes the subject matter of a suit requires an examination of the factual basis of the claims without regard to the form of action.

Stephens claimed that, in order to ascertain the entire agreement between contracting parties, separate documents executed at the same time, for the same purpose, and in the course of the same transaction are to be construed together. So, if the note and deed of trust should be construed together based on this principle, it follows that under the transactional approach to res judicata-as set out in Barr-a final judgment on the note will bar a subsequent suit to foreclose the lien.

The court disagreed. The fact that two documents should be viewed together for purposes of construing those documents' terms is not, by itself, sufficient to require all claims under either document to be brought together, particularly given that, here, the two documents create two separate and severable rights held by LPP. When a debt is memorialized by a note that is secured by a lien, the note and lien constitute separate obligations. Such separate obligations may be litigated in separate lawsuits. Therefore, the holder of a note and security interest may bring suit and obtain judgment on the note, and-if, as is the case here, the holder did not request foreclosure in that suit, the judgment on the note in the holder's favor is not satisfied, and no provisions of the note or deed of trust contractually alter the parties' remedies-the lien-creditor may later bring suit for judicial foreclosure of the lien. Until the underlying debt is actually satisfied, the recovery of a judgment on the note secured by a deed of trust lien, where foreclosure of the lien has not been sought in that suit, does not merge the deed of trust in the judgment and does not preclude foreclosure on the lien in a subsequent suit instituted for that purpose.

PART V
DEEDS AND CONVEYANCE DOCUMENTS

Gaut* v. *Daniel, 293 S.W.3d 764 (Tex.App-San Antonio 2009, pet. denied). To be sufficient, a writing conveying title must provide within itself, or by reference to some other existing writing in existence at the time of the deed, the means or information by which the land being conveyed can be identified with reasonable certainty. This has been termed the "nucleus of description" theory. Under this theory, if the deed contains a "nucleus of description," parol evidence may be introduced to explain the descriptive words in order to locate the land.

Extrinsic evidence may be used only for the purpose of identifying the property with reasonable certainty from the data contained in the contract, not for the purpose of supplying the location or description of the property.

The deed in question first generally references the Duval County surveys out of which the 28 acres can be found. None of these surveys are part of the record. The deed also notes the 28 acres as being out of a called 399.5 acre tract designated as Share No. 6, as set aside to Alice L. Garcia. It then references several surveys of the partitioned land from which the 399.5 acre tract was taken. Following that was a metes and bounds description which, among other things, failed to identify the specific tract that was its point of commencement, contained no means within the deed to locate the tract, and included no reference within the deed to any existing extrinsic writing which might assist in determining the location. A surveyor was able to plot the boundaries, but only in reliance upon external evidence that was not part of the record. The court thus held that the property description was insufficient.

Nguyen* v. *Yovan, 317 S.W.3d 261 (Tex.App.-Houston [1st Dist.] 2009, pet. denied). For a land sales contract to meet the requirements of the statute of frauds, it must furnish within itself or by reference to another existing writing the means or data to identify the particular land with reasonable certainty. Here, the contract for deed described the property as "15817 Hwy. 6, Santa Fe, Tx. The property description is as follows: ABST 613 PAGE 6 LOTS 5 thru 7 HIGHWAY 6 UNRECORDED SUB SANTA FE, TEXAS 0.384 ACRES PARCEL # 4005-0000-0005-000." The property description was clearly taken from appraisal district records.

Here, the contract contains a complete street address. Courts have held that a street address or a commonly-known name for property may be sufficient property description if there is no confusion. Neither party argues that there has been any confusion about the exact property that was conveyed by any of the deeds. In addition, the contract refers to another existing writing which has the means to identify the land with particular certainty. The seller's expert surveyor said that he could use tax records to identify the property. Although he said that the description of the property would not be exact, a contract for deed need only have the "means or data by which the land to be conveyed may be identified with reasonable certainty." The law does not require a metes and bounds description or a plat in a recorded subdivision in order for land to be conveyed by a contract for deed.

Here, the contract for deed provides the size of the property, an address, a lot number in an unrecorded subdivision, an abstract number referencing a railroad survey map of the unrecorded subdivision locating it in the county, and a tax identification number for the parcel conveyed coordinated with the map. The parties were able to drive to the house and lot and there was no confusion as to the property conveyed by the contract for deed. The court held that the evidence presented meets the standard of reasonable certainty and the contract satisfies the statute of frauds as a matter of law.

Wiggins* v. *Cade, 313 S.W.3d 468 (Tex.App.-Tyler 2010, pet. denied). The royalty deeds in question each contained the same legal description, beginning with a reference to the property being the northwest corner of a 45 acre tract formerly owned by Mrs. Kate Crook. The descriptions did not show either the name of the survey or the abstract number in which the property was situated.

An instrument conveying land must contain a sufficient legal description or the instrument is void under the statute of frauds. A property description is sufficient if the writing furnishes within itself or by reference to some other writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. A recital of ownership in a deed may be used as an element of description and may serve as a means, together with some other element, of identifying the land with reasonable certainty. Where the deed contains some data susceptible of being connected, by parol testimony, with some definite land, the description is in law sufficient. A deed is not void for uncertainty unless on its face the description cannot, by extrinsic evidence, be made to apply to any definite land. If enough information appears in the description so that a party familiar with the locality can identify the premises with reasonable certainty, it will be sufficient.

An affidavit in support of the validity of the deed was given by Tonroy. He stated that by using the description in the two royalty deeds and by examining the public records of the county clerk of Rusk County, Texas, he determined that the forty-five acres formerly owned by Mrs. Kate Crook was located in the M.V. Peña Survey, A-27, of Rusk County, Texas. He stated that he was able to determine this information from a search for Kate Crook in the grantor/grantee indices of the Rusk County clerk's office. He stated that this was the only forty-five acre tract that Kate Crook ever owned in Rusk County and that therefore he was able to locate the land described in the two royalty deeds with reasonable certainty.

The court agreed. Parol evidence can be used to connect data described in the instrument, such as the name of a land owner, to establish the sufficiency of a legal description. This is just what the affidavit explained.

Poag *v.* Flores, 317 S.W.3d 820 (Tex.App.-Fort Worth 2010, pet. denied). An equitable suit to quiet title is not subject to limitations if a deed is void. If a deed is voidable, however, then the four-year statute of limitations controls. The question of whether a deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. A void deed is without vitality or legal effect. A voidable deed on the other hand operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared.

Here, Poag alleged that the language in the administrator's deed, "surface estate only," was not the intent of the document and was a fraud on the creditors of the Estate. He further alleged that the failure of the administrator's deed to evidence the true intent of the parties was due to a mutual mistake or a unilateral mistake by one party together with the fraud or other inequitable conduct by the other. Because deeds obtained by fraud or mutual mistake are voidable rather than void, and because unilateral mistake does not apply to the facts of this case, the administrator's deed at issue here is voidable. Therefore, the four-year statute of limitations applies.

The four-year statute of limitations also governs a suit for reformation. The two-year statute of limitations governs a claim for slander of title. In general, a cause of action accrues and limitations begin running when a wrongful act causes a legal injury. Here, Poag claims that the wrongful act occurred in June 1996 when the administrator's deed, which conveyed four parcels of land from Flories to Anson, was recorded in the Tarrant County deed records as a conveyance of "surface estate only." Thus, Poag's slander of title, reformation, and suit to quiet title causes of actions filed in 2006 are clearly barred by the applicable two- and four-year statutes of limitations. Poag, however, argues that the discovery rule applies to his claims. The court disagreed.

The discovery rule defers the accrual of a cause of action until the plaintiff knows, or by exercising reasonable diligence, should know of the facts giving rise to the claim. For the discovery rule to apply, the injury must be inherently undiscoverable and objectively verifiable. An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence. Here, the conveyance Poag attacks occurred in 1996 between Flories and Anson. The conveyancing document (the administrator's deed) was recorded in the Tarrant County deed records on June 11, 1996, and conveyed the "surface estate only" in four parcels of land from Flories to Anson. On June 21, 1996, Anson conveyed two of those four parcels of land to Poag.

The recording of the administrator's deed on June 11, 1996, charged Poag with notice that Anson only possessed the surface estate, thereby commencing Poag's two- and four-year period of limitations to file an action to set the administrator's deed aside.

Bright* v. *Johnson, 302 S.W.3d 483 (Tex.App.-Eastland 2009, no pet.). The Johnsons filed this suit against Clarence O. Bright to reform a deed dated May 2, 2002, by which they conveyed thirty-three acres to Clarence O. Bright. They alleged that the sales contract between the parties called for all minerals to be reserved or retained by the Johnsons; but, through a scrivener's error, the warranty deed failed to reserve or retain the minerals. Clarence O. Bright acknowledged that he had agreed that the Johnsons would keep all the minerals and that, even at closing, he still believed they had.

Clarence O. Bright's son, Clarence Dwaine Bright, intervened in the suit. He testified that he purchased one-half of what his father had purchased from the Johnsons. Clarence Bright had paid $59,400 to the Johnsons for the thirty-three acres, and Dwaine Bright paid $30,000 for the undivided one-half interest. Clarence Bright and Dwaine Bright executed a document, which was not recorded, but which was dated June 13, 2003, to reflect Dwaine Bright's acquisition from Clarence. After the Johnsons filed this suit and a notice of lis pendens, Clarence Bright executed and caused to be recorded two "corrected" deeds without warranty conveying to Dwaine Bright one-half of Clarence Bright's interest in the thirty-three acres.

The Johnsons argued that in their Contract, the parties agreed that the Johnsons would reserve all of the minerals. Therefore, a mutual mistake occurred when the person preparing the deed to Clarence Bright did not reserve or retain the minerals on behalf of the Johnsons. Thus, a scrivener's error occurred and the deed should be reformed.

The Sales Contract contains the following language: "The Property will be conveyed subject to the following exceptions, reservations, conditions and restrictions (if none, insert "none")." That language is followed by these terms: "A. Minerals, Royalties, and Timber interests: (1) Presently outstanding in third parties." The parties inserted the word "None." That language is then followed immediately by "(2) To be additionally retained by Seller" (emphasis added). The parties wrote the words "All of Record" (emphasis added). As to mineral leases and surface leases, the parties wrote in "None." This agreement might not be a model of clarity, but the court believed that it reflects the intent of the parties that, as to minerals, there are no outstanding interests in third parties but that the Johnsons are retaining all of record. The careful title examiner or scrivener should know that the Johnsons were retaining all of the minerals of record and that the conveyance as to other matters was to be made subject to those other matters.

Oftentimes the terms "reservation" and "exception" are used interchangeably. But, that depends on the context in which the terms are used. Here, the contract goes further and contains not only the language "reserved," it also contains the words "additionally retained " in reference to the minerals. The Brights have confused "exceptions" and "reservations." The parties, listed "All of Record" that would have excepted the two interests owned by third parties. However, the interests owned by third parties would not have been "retained" by the Johnsons as the seller. They would have been an exception to the property conveyed. It is clear from the record and the briefing that the parties were not using the words "reservation" and "exception" interchangeably; they used the words "reserved" and "retained" in such a manner that no minerals were to be conveyed to the Brights. Here, the Johnsons "retained" or "reserved" the minerals (that they owned of record) to themselves.

Enerlex, Inc. v. Amerada Hess, Inc., 302 S.W.3d 351 (Tex.App.-Eastland 2009, no pet.). A warranty deed to land conveys property. A quitclaim deed conveys the grantor's right in that property, if any. Enerlex's deed is labeled "MINERAL DEED." It conveyed to Enerlex "[A]ll right, title and interest in and to all of the Oil, Gas, and any other classification of valuable substance, including any mineral leasehold and royalty interests, including any future or reversionary in-terest, in and under and that may be produced from the following described lands situated in Gaines County, State of Texas, to wit: WTTR Survey, Block G, Sections 160-230 inclusive." The deed also said that it was the grantor's intent to convey all interest of the grantor in the county, even if not specifically described. The deed also contained a general warranty.

Enerlex argues that the deed is not a quitclaim deed because it was not restricted to any interest that Grace may have had and, therefore, the deed conveyed an interest in property. Enerlex notes that Grace conveyed "all right, title and interest" in the seventy-one sections rather than "my right, title, and interest" or "all right, title, and interest that I may own."

Enerlex is correct that the deed does not contain this type of qualifying language, but it reads too much into this distinction. It is more significant that at no point in the deed did Grace warrant or represent that she actually owned any mineral interest. The court also recognized that the deed contains a general warranty and that it is absent any "as is" or "without warranty" language, but because the deed contains no specific representation concerning Grace's title, that language does not preclude it from being considered a quitclaim deed. The Fifth Circuit has noted that "what is important and controlling is not whether grantor actually owned the title to the land it conveyed, but whether, in the deed, it asserted that it did, and undertook to convey it." ***Am. Republics Corp.* v. *Houston Oil Co. of Texas***, 173 F.2d 728, 734 (5th Cir.1949). Here, the grantor made no such assertion.

The mineral deed, when viewed in its entirety, is a quitclaim deed. It does not purport to convey any specific interest but instead broadly conveys all of the grantor's interest – not just in the seventy-one sections but in all of Gaines County. Because the mineral deed is a quitclaim deed, Enerlex cannot be a bona fide purchaser.

PART VI
LEASES

Merry Homes, Inc.* v. *Chi Hung Luu, 312 S.W.3d 938 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Luu's lease provides that Luu may use the premises only for the purpose of operating a nightclub or bar and for no other purpose. The lease also prohibits Luu from using the premises for any activity that violates any applicable law, regulation, zoning ordinance, restrictive covenant, or governmental order or for any activity that violates any applicable federal, state, or local law. An additional provision requires Luu to "satisfy himself that the leased premises may be used as Luu intends by independently investigating all matters related to the use of the leased premises or Property.

Luu submitted his liquor license application to the City of Houston. Approximately one month later, the city faxed a letter to Luu, informing him that the city denied his application since the premises is located less than 300 feet from a public school and less than 300 feet from a public hospital. The city mailed a follow-up letter, again informing Luu that it denied his application, but also suggesting that he attempt to qualify for the restaurant exception, which would allow Luu to operate a restaurant that serves alcohol at the premises. Luu testified that immediately after he received the first denial from the City of Houston, he contacted his landlord, Merry Homes, and requested a meeting to determine how to proceed under the lease.

Luu ultimately determined that opening a restaurant instead of a bar would not be financially feasible. Merry Homes refused to refund Luu's deposit or cancel the lease. Luu sought a declaratory judgment that the lease was void since it could not be performed legally, and also asserted claims of common law and statutory fraud, negligent misrepresentation and statutory fraud, negligent misrepresentation, and violations of the Deceptive Trade Practices Act.

The trial court declared the lease void on two grounds: (1) the provisions of the lease that restricted the use of the premises to that of a nightclub or bar, fatally conflicted with the provisions that prohibited any use of the premises that violates an applicable law or regulation; and (2) Luu could not perform his contractual obligations legally, since he could not obtain a liquor license for the premises due to its proximity to a public school.

The Texas Supreme Court previously has held that a contract to fulfill an obligation which cannot be performed without violating the law contravenes public policy and is void. The purpose behind this principle is to benefit and protect the public, not to punish or protect a party to the contract. If the illegality does not appear on the contract's face, a court will not find it void unless facts showing the illegality are before the court. If the parties could perform the contract in a legal manner, the contract is not void merely because the parties may have performed the contract in an illegal manner or committed illegal acts in carrying out the contract.

Whether a contract violates a statute is determined by looking at the specific facts of the case and deciding the intention of the parties in executing the contract. Here, the Texas Alcoholic Beverages Code authorizes counties and cities to adopt regulations prohibiting the sale of alcohol within 300 feet of a public school. The City of Houston has adopted such a regulation.

Although the lease, on its face, does not require violation of the law, the only permissible use of the premises under the lease's terms is impossible and illegal, given the location of the premises relative to a school. As Luu cannot obtain a liquor license and therefore cannot perform under the lease without violating the statute and ordinance, the trial court properly determined that this lease is void for illegality.

Kahn* v. *Imperial Airport, L.P., 308 S.W.3d 432 (Tex.App.-Dallas 2010, no pet.). Imperial owned the leased premises. Its manager negotiated a lease with Kahn. The leased premises was to be occupied by a store under the name “Condom Sense.” Kahn operated four stores under the same name in Dallas.

At trial, two different versions of the lease were introduced. Kahn’s version’ signature line was as follows:

LESSEE:

Condom Sense

By: Steve Kahn It's president

STEVE KAHN (President)

(Type Name and Title)

By: DBA Condom Sense

____

On Imperial’s version of the lease, the signature line was similar, but not identical:

LESSEE:

Condom Sense

By: It's president

Steve Kahn

(Type Name and Title)

By: STEVEN KAHN

____

(Type Name and Title)

Kahn applied for the store's certificate of occupancy himself. He did not disclose the nature of the business in his application. In December 2005, Kahn oversaw creation of M. Stack, a limited liability corporation that Kahn claims was to be the actual lessee. During this time period, Imperial finished out the premises to Kahn's specifications at a cost of $27,000. Rent was paid for the initial months of the Lease term by an entity named SB TAZ, LLC.

The Irving Condom Sense store opened on February 9, 2006. The next day, the store was raided by the Irving police, who seized some, but not all, of the store's inventory. The City of Irving did not close the store down. Kahn, his mother Marcia Kahn, and M. Stack (collectively designated the Applicants by the City) entered into an Agreed Order with the City. The terms of that order required the store to cease sale of "items used in conjunction with sexual activity" and to change its name. In return, the Applicants would avoid prosecution. But despite the order, the store did not re-open, and after April 2006 no more rent payments were made.

Imperial sued Steven Kahn, CSI, and M. Stack for breach of the Lease. The trial court concluded Kahn breached the Lease and is individually liable as the lessee.

Kahn challenges the trial court's findings that he entered into the Lease in his individual capacity and should be liable in that capacity. Kahn testified he signed the Lease on July 21, 2005 as Condom Sense's president. He testified he was not president of CSI on that date, but he did not know what entities he was president of on that date. Kahn claimed at trial that M. Stack was really the lessee under the Lease, although he acknowledged that "M. Stack" did not appear anywhere in the Lease. He agreed that M. Stack did not exist when the Lease was signed, or when the Certificate of Occupancy was signed, and that he had no authority to sign the Lease for M. Stack. Kahn testified it was his practice to have a DBA Condom Sense enter into a lease on behalf of an entity to be formed after "everything [is] resolved." If the landlord wanted the lease signed before forma-tion, he testified, there would be an addendum to the lease. But Kahn testified no addendum was drafted in this case, and he had never notified anyone at Brad-ford that M. Stack was to be the lessee for the Irving store.

Kahn's arguments have no basis in law. Initially, an individual cannot sign for and bind a DBA entity. A DBA is no more than an assumed or trade name. And it is well-settled that a trade name has no legal existence. Thus, to the extent Kahn purported to sign the Lease on behalf of Condom Sense as a DBA, he bound only himself. Likewise, one cannot sign for and bind a legal entity that does not yet exist. Kahn argues he signed the Lease as a promoter for the later-created M. Stack. But when a promoter signs a contract on behalf of an unformed entity, he is personally liable on the contract unless there is an agreement with the contracting party that the promoter is not liable. The record contains no evidence Imperial agreed not to hold Kahn liable. Moreover, the Lease was not made in the name of the unformed entity; there was conflicting testimony concerning whether the landlord knew Kahn was purporting to sign for an unformed entity; and no evidence was presented indicating M. Stack adopted the Lease after its formation. The court thus conclude that, under the facts of this case, Kahn is personally liable on the Lease.

Kahn went on to argue that his failure to make rent payments and comply with the terms of the Lease should be excused because the Lease was terminated by the City's actions. The trial court's findings support Kahn on this issue. The court found a substantial part of the Leased Premises was taken by the City of Irving for quasi-public use under a governmental law, ordinance or regulation and that this taking materially interfered with the intended use of the leased premises. Accordingly, according to the trial court, no rent or other obligations of the lessee were owed after the date of the raid.

A taking may be either physical or regulatory. A physical taking occurs when the government authorizes an unwarranted physical occupation or appropriation of an individual's property. A compensable regulatory taking occurs if governmental regulations deprive a property owner of all economically viable use of his property or if those regulations totally destroy the property's value.

Kahn argues the Irving Condom Sense store could not be operated for its intended use under the terms of the Agreed Order and under the City's interpretation of its ordinance. However neither of these restrictions on the use of the leased premises qualifies as a governmental taking. The Agreed Order represents the joint decision of the Applicants-including Kahn-and the City; it was not a unilateral act or regulation by the City. Kahn could have chosen to litigate the City's interpretation of the ordinance. Indeed, he testified at trial that at least one court had held Condom Sense was not a sexually oriented business under an identical ordinance. But Kahn voluntarily agreed not to litigate and to accept the restrictions in the Agreed Order. And as to the restrictions posed by the ordinance itself, it is uncontroverted that the Irving ordinance pre-dated Kahn's negotiation of the Lease and that Kahn himself was familiar with the ordinance. When existing law regulates the use of property, an owner's reasonable expectations must take those regulations into account. Kahn did not prove he had a reasonable expectation of operating the store he intended at the leased premises. Accordingly, the court concluded he did not prove a regulatory taking in this case.

Wood Care Centers, Inc.* v. *Evangel Temple Assembly of God of Wichita Falls, Texas, 307 S.W.3d 816 (Tex.App.-Fort Worth 2010, pet. denied). After Hurricane Katrina hit New Orleans, Evangel Temple contacted Wood Care to lease the property to assist evacuees. Several drafts of a lease were circulated. The final version contained a "ten-percent termination clause" that provided Evangel Temple could terminate the lease by giving notice to Wood and paying 10% of the rental payments then owed. The lease also contained a provision that allowed Evangel Temple to terminate if the premises was denied a tax exemption for the property. The tax exemption was granted, but with a proviso that the exemption would be lost if the use of the premises changed.

After the last of the evacuees moved out of the facility, Evangel Temple sent a termination letter to Wood. It's not clear from the case, but it appears that Evangel Temple lost its tax exemption at the time it sent the notice. Wood sent a letter demanding 10% of the remaining lease payments. Evangel Temple claimed not to owe the 10% because of the tax exemption termination clause. The trial court rendered a take-nothing judgment against Wood. The appeal deals primarily with the conflict between the ten-percent termination clause which required a payment for termination and the tax exemption clause which required none.

The essential question is whether Evangel Temple breached the provision of the Agreement that states: "Both parties agree to cooperate with each other to achieve any available property tax exemption." Wood Care argues the evidence conclusively established Evangel Temple's breach of this provision because it admittedly could have come up with another tax exempt use.

Although Evangel Temple "could have" submitted another exemption application for the facility after the evacuees left, there was considerable testimony about Evangel Temple's many efforts to find another use and its resulting inability to finalize an agreement with any of the potential organizations for any of the potential tax-exempt uses. Evangel Temple's efforts to find other tax-exempt uses for the facility included meeting with CPS about an interim facility for children, speaking with the county's veteran's office about a veteran's home, communicating with Dallas representatives about a Sudanese refugee facility, speaking with a representative about an annex for women, consulting with a director of the Dallas Dream Center about a place for at-risk teenagers, and providing a tour of the building for a prison-aftercare expert. Concerning Evangel Temple's cooperation with Wood Care to achieve an exemption, Wood Care suggested a youth bible study group be placed at the vacant building. Wood Care did not suggest any other uses and did not make any further attempt to cooperate after the evacuees left the facility. Bateman stated that he did not personally have any conversations with Wood Care about a continued use of the property. The evidence at trial supported the trial court's findings of fact that Evangel Temple did not breach the Agreement and that it "made reasonable and good faith efforts" to find another use for the facility.

Moosavideen* v. *Garrett, 300 S.W.3d 791 (Tex.App.-Houston [1st Dist.] 2008, pet. denied). A 1928 ground lease was freely assignable. One provision of the lease gave the Tenant the right to purchase the leased premises for $50,000, payable over a five year period. The option provision also stated that, when the Tenant exercised the option, the Landlord was bound to convey the property.

Moosavideen acquired the Tenant's interest under the lease. He sent notice to the four heirs of the original Landlord that he knew about, exercising the option. There were other heirs, as he later determined. He received no response to his initial notice, so he contacted them again, along with some additional heirs, this time sending a form of deed for the property. A few months later, with still no response, Moosavideen filed suit, seeking a declaratory judgment that he had validly exercised the option contained in the lease and was entitled to a deed transferring the lease property to him, and for specific performance of the option. During the course of discovery, Moosavideen determined the names of more heirs and provided notice to them of his intent to exercise the option.

Almost a year after Moosavideen gave notice of his exercise of the option, the heirs notified him that he was in default under the terms of the lease. The property had been used as a gas station and there was an environmental contamination that the heirs claimed violated the lawful use clause. The trial court found for the heirs and awarded them damages for breach of the lease and found that, because of the breach, Moosavideen was not entitled to exercise the option.

Moosavideen contended that he had validly exercised the option when he first contacted the heirs. The lease stated that, if a notice address is to be changed, it is the duty of the party making the change to notify the other parties. The trial court had held that this provision didn't apply to the heirs, because they hadn't changed their addresses. This court disagreed. It is irrelevant that the heirs had not changed the addresses at which they resided. At issue is the lessors' duty in the event he or she wished to change the address for receiving notices under the lease from the address set out in the 1928 lease to some other address.

The undisputed evidence shows that, Moosavideen gave notice to all the heirs for whom he had an address, and that the remaining heirs had never changed their addresses for receiving notice as required by the lease. Because Moosavideen's failure to provide notice to the remaining heirs was brought about by the conduct of those heirs through their failure to comply with the lease, Moosavideen's failure to give notice to them separately is excused. Because some heirs did not comply with the notice change provisions of the lease, Moosavideen's notice of intent to exercise the purchase option was complete when he gave his first notice to the only four heirs for whom he had either received notice or had actual knowledge of their addresses. Thus, Moosavideen validly exercised the option to purchase almost one year before he was given notice of his default under the lease.

Even if the court were to hold that Moosavideen had not validly exercised the option before he was given notice of default, it nonetheless concluded that he was entitled to exercise the option any time before the contract was terminated because his compliance with the other terms of the lease was not a condition precedent to his right to exercise the lease purchase option.

Moosavideen claims that his right to exercise the purchase option was not conditioned on his compliance with the other clauses of the lease. He further argues that because the contract had not been terminated by the time he first attempted to exercise the option, the heirs should be required to specifically perform the option contract by transferring the property to him. The heirs respond that Moosavideen's right to exercise the option was conditioned on his compliance with the other terms of the lease, and that once they notified him that they intended to terminate the lease after a 180-day cure period, he no longer had the right to exercise the option to purchase.

The option clause in this lease agreement is not conditioned on the lessee's performance of the terms of the lease. The option provides that "[i]n consideration of the amount of the rental payments hereunder, paid and to be paid, and of the other valuable considerations inuring to the benefit of the LESSOR hereunder, the LESSOR hereby gives and grants to the LESSEE, and LESSEE shall have an optional right at any time within a period of the term of this lease, to purchase the interest of Lessor in and to the demised premises ..." While the option provision recites the rental payments as consideration, it does not condition the right to exercise the option on compliance with any of the other terms of the lease. Instead, the language clearly states that the option can be exercised "at any time within a period of the term of this lease." It is undisputed that, at the time Moosavideen was able to finally give notice to all of the heirs, rental payments were current, the lease had not yet terminated, and could not be terminated until the "cure" period expired. Had the parties wished to create a condition precedent to the lessee's right to exercise the option agreement conditioned on the lessee's compliance with the terms of the lease, they could have done so.

Taylor* v. *Carbajal, 304 S.W.3d 585 (Tex.App.-Beaumont 2010, pet denied). The lease provided for a term of five years,. The lease required payments of $800 per month, and provided that "amount paid on lease will go to purchase of property $125,000." The badly drafted option to purchase contained in the commercial lease read as follows:

> Option to Purchase. Provided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term. All of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____. The option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term. If notice is not given in the manner provided herein within the time specified, this option shall expire.

The Tenants remained in possession of the property beyond the end of the initial term. The Landlord began demanding more money and refusing to agree to apply rents to the purchase price.

The Tenants gave written notice of their intent to exercise the option to purchase the property. The Landlord rejected the next rent payment and on a few weeks later, gave written notice to vacate the premises. The Tenants filed a petition for declaratory judgment and deposited with the trial court he balance due on the purchase price of the property.

The Landlord claimed the option to purchase expired at the end of the initial lease term. The Tenants contended that the option to purchase remained in effect while they remained as tenants of the property paying rent and not otherwise in default.

The first question was whether the lease expired at the end of its stated term or remained in effect on the date the Tenants gave notice of exercise of the option. The general common law rule provides that a tenant who remains in possession of the premises after termination of the lease occupies 'wrongfully' and is said to have a tenancy at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser or as a tenant holding under the terms of the original lease. The court looked to the terms of the lease to determine whether the terms of the lease continue in the event of a holdover tenancy.

It is apparent that the Landlord converted a form lease renewal clause into an option clause, retaining some of the renewal language and leaving several terms blank. The option paragraph provides that "[a]ll of the terms and conditions of the lease shall apply during the renewal term except that the monthly rent shall be the sum of $ _____." It is undisputed that the Tenants continued to pay monthly rent in the amount of $800, and that the Landlord accepted each payment until after the Tenants gave written notice of the option to purchase. It follows that the parties did not understand this clause to mean that no rent was due. Thus, it appears the "monthly rent" exception did not apply, and all of the terms and conditions of the lease applied during the "renewal term."

"Renewal term" is not defined in the lease, but the previous sentence states that "[p]rovided that Lessee is not in default in the performance of this lease, Lessee shall have the option to purchase for an additional term of _____ months commencing at the expiration of the initial lease term." The second half of this sentence is somewhat ambiguous: do the Tenants have an unspecified number of months to exercise the option to purchase mentioned earlier in the sentence, or is the phrase merely an acknowledgment that the lease might be renewed for an unspecified period of time? The agreement of the parties did not provide the Tenants with the right to renew the lease; instead, they could exercise an option to purchase the property. However, by accepting the lease payments after the end of the initial term, the Landlord elected to treat the Tenants as holding under the terms of the original lease.

Under either possible construction of the clause, the express terms of the contract provided that all of the terms and conditions of the lease continued during the "renewal term." The contract does not provide for the length of the renewal term; however, at the very least, it would include the period during which the Tenants continued in possession of the property and the Landlord accepted monthly lease payments without giving notice of termination.

The next question was whether the option period expired. The contract provided that "[t]he option shall be exercised by written notice given to Lessor not less than _____ days prior to the expiration of the initial lease term." The Landlord construe the contract to require written notice "prior to the expiration of the lease term." Thus, they argue, the Tenants failed to meet the final sentence of the option paragraph, which required written notice to be given "within the time specified" by the option paragraph.

The Tenants argue that when the time for performance is omitted, the contract may be performed within a reasonable time.

Time is of the essence in an option contract because it is unilateral. In this case, however, the unilateral option was part of a bilateral contract. The Tenants had the exclusive right to exercise the option to purchase, but the Landlord had the exclusive right to renew the lease under the same terms and conditions as the original lease. Thus, under this contract both parties could control what occurred after the five-year lease term ended. The Tenants could purchase the property, or the Landlord could renew the lease. The option provision was not excluded from the renewal language. Because the provision was left blank, the contract failed to specify that the notice had to be given before the expiration of the initial lease term.

The contract in this case is distinguishable from a case in which the extension of the lease is contingent upon the exercise of the option. Here, a renewal clause is contained within the option paragraph, but it is not expressly contingent on the exercise of the option. That renewal clause expressly provides that all of the terms and conditions of the contract will continue during a renewal. The only potentially contrary provision appears in a clause that was left blank. Under these circumstances, a reason-able time for the exercise of the option includes the period of time during which the parties continued to perform the lease. The Tenants gave written notice before the Landlord gave notice of termination. Accordingly, the trial court did not err in declaring that the Tenants have a right to purchase the property for the amount agreed to in the lease.

Cottman Transmission Systems, L.L.C.* v. *FVLR Enterprises, L.L.C., 295 S.W.3d 372 (Tex.App.-Dallas 2009, pet. denied). FVLR and LBR entered into a lease. LBR was a franchisee of Cottman and operated a transmission repair shop at the premises. The lease contained a rider that provided that Cottman had the option to assume the lease upon its termination or expiration. To exercise the option, Cottman was required to assume the lease and replace LBR as tenant.

LBR abandoned and moved out of the premises two years after execution. Cottman terminated its franchise with LBR and sent its manager to manage the repair shop at the premises. Cottman paid one month's rent. Cottman didn't pay any further rent and moved out in a few months. The landlord sued. At trial, the landlord was awarded damages for loss of rent, triple-net charges, and costs of finding a new tenant. Cottman complained that the evidence is legally and factually insufficient to support the jury's findings that Cottman was bound by the LBR lease agreement and the lease rider.

The lease agreement and lease rider are subject to the statute of frauds because they concern the lease of commercial real estate for a period greater than one year. Cottman did not sign the LBR lease agreement or the lease rider. At trial, FVLR relied upon the doctrine of partial performance to avoid the statute of frauds. Under the partial performance exception, an agreement that does not satisfy the traditional statute of frauds but that has been partially performed may be enforced if denying enforcement would itself amount to a fraud.

Cottman argues the evidence is insufficient to support the finding that it bound itself to the lease rider because it was not a party to it. However, Cottman's president testified that Cottman was a beneficiary of the lease rider. He readily acknowledged that the lease rider gave Cottman the option to assume the lease.

Cottman also contends the evidence is insufficient to support the finding that it assumed the lease. Cottman makes the following two arguments: (1) the lease rider required it to provide written notice to FVLR of its intent to assume the lease and it never provided such written notice; and (2) its actions did not constitute partial performance under the lease rider.

The court construed the wording of the option. The rider provided that the tenant conditionally assigned its interest in the lease to Cottman, effective upon the occurrence of two conditions: (1) the termination of the franchise with Cottman and (2) exercise by Cottman of the option to assume the obligations of and replace the tenant as provided in the franchise agreement. The court held that the rider did not explicitly state that Cottman had to provide written notice of its exercise of the option to assume.

Cottman also argued that the evidence was insufficient to show that it had partially performed under the lease rider. The court noted that Cottman had paid rent within the 30 day period it had to assume the lease. Payment of the rent was a good indication that Cottman was assuming the lease. But Cottman did a number of other things as well. It entered into a management agreement for the premises. It met with the landlord's property manager and told him that Cottman was taking over the operations at the premises. It secured utilities in its own name, purchased equipment, and entered into service contracts with vendors. Thus, the court concluded that an assumption had occurred and that Cottman was bound by the terms of the lease.

C.W. 100 Louis Henna, Ltd.* v. *El Chico Restaurants Of Texas, L.P., 295 S.W.3d 748 Tex.App.-Austin 2009, no pet.). The lease provided that, on termination, the improvements constructed by the tenant belonged to the landlord but that the tenant owned the trade fixtures. Just before the lease expired, the HVAC units on top of the restaurant were vandalized by copper thieves and damaged by hail. A dispute ensued as to whether the tenant was obligated to repair or replace the units.

The lease defined the Premises as the land and improvements. It also provided that the tenant has the right to install trade fixture and stated that trade fixtures and other personal property remained the property of the tenant. The lease did not define "trade fixtures;" however that term has a well-established, commonly understood meaning in Texas. It is now well settled that, as between a landlord and his tenant, the term "trade fixtures" means such articles as may be annexed to the realty by the tenant to enable him properly or efficiently to carry on the trade, profession, or enterprise contemplated by the tenancy contract or in which he is engaged while occupying the premises, and which can be removed without material or permanent injury to the freehold.

The court held that the tenant conclusively established that the HVAC units met the commonly understood definition of trade fixtures. The tenant presented uncontroverted summary-judgment evidence that the HVAC units were not attached to the building, but were designed to be and were placed on curbs on the roof so they could be removed and replaced without injury to the building, and that such units needed to be replaced periodically as they reached the end of their useful life cycles. The tenant likewise presented undisputed evidence that the HVAC units here were approaching the end of their useful lives, and that the units ultimately were replaced without injury to the building. Further, the tenant presented uncontroverted summary-judgment evidence that the 45 tons of air-conditioning capacity provided by the HVAC units facilitated the building's use as a restaurant, but was many times greater than that needed if the building were to be used for other retail or office use. Several Texas courts, addressing similar facts, have held that air-conditioning units are trade fixtures as a matter of law. There is no rule or presumption in Texas law that air-conditioning units are always trade fixtures. The issue, rather, turns on the parties' intent, which is ascertained from the ground lease.

Harrell **v.** ***Citizens Bank & Trust Company of Vivian, Louisiana***, 296 S.W.3d 321 (Tex.App.-Texarkana 2009, pet. dism’d w.o.j.). Harrell defaulted on his note, and the property was sold to the Bank at a nonjudicial foreclosure sale. The Bank demanded Harrell vacate the premises. When Harrell refused, the Bank filed a forcible detainer action in the justice court; the justice court granted the Bank a writ of possession.

Harrell contends that Charles A. Harrell, Jr., owned an undivided one-fourth interest in the real property described in plaintiff's sworn complaint for forcible detainer and that Harrell remains on the property with the consent of Harrell, Jr. Harrell contends that at the time he executed the deed of trust in favor of the Bank, Harrell, Jr. was a minor. Harrell testified that he was appointed guardian of Harrell, Jr. and that he failed to gain the approval of the county court in which Harrell, Jr.'s guardianship was pending before signing the deed of trust as guardian for his son.FN2 As a result of this omission, Harrell contends the trial court lacked subject-matter jurisdiction because these ownership issues are beyond the jurisdiction of the court sitting in a forcible detainer hearing.

Here, the issue of possession involves Harrell and the Bank; Harrell's only allegation is that the title issue involves Harrell, Jr. and the Bank. Harrell is not claiming any title in his own right. In fact, his attorney conceded as much at the hearing. Harrell's claimed right of possession is merely made through one he claims to have title to the property-Harrell, Jr. Harrell does not claim that his ownership interest in the property did not validly pass to the Bank via the deed of trust and substitute trustee's deed. As between Harrell and the Bank, there is no title dispute; the allegation involves a dispute in title between nonparties and the Bank. Harrell's claim of a title dispute based on the alleged property interests of nonparties with no supporting documentation is far too tenuous to permit us to conclude that the issue of possession cannot be determined. Specific evidence of a title dispute is required to raise an issue of jurisdiction.

Cammack the Cook, L.L.C. **v.** ***Eastburn***, 296 S.W.3d 884 (Tex.App.-Texarkana 2009, pet. denied). The lease provided that, at the expiration of the lease, upon obtaining the Landlord’s written consent, the Tenant would remove any alterations and improvements it made. It also provided that Tenant was required to fix up the premises after termination. When the lease was terminated by the Landlord, the Tenant left everything in place and didn’t clean up or repair the premises, so the Landlord sued. When read as a whole, the court found the language in the lease to be unambiguous and that the Tenant had breached its obligations to remove alterations, trade fixtures, and improvements, and to clean up the premises.

PART VII
VENDOR AND PURCHASER

TC Dallas #1, LP **v.** ***Republic Underwriters Insurance Company***, 316 S.W.3d 832 (Tex.App.-Dallas 2010, no pet. history to date). TC Dallas and Republic entered into a contract for purchase and sale of an office building in which the Dallas National Bank had been a tenant since 1996. TC Dallas intended to re-develop the property, but it could not do so until all the tenants, including the Bank, vacated the building. The purchase price was $20 million, but Republic agreed to share TC Dallas's expenses for terminating the leases of the remaining tenants and the costs of managing and operating the property until the last tenant vacated.

The contract provided that, after closing, TC Dallas had the sole and exclusive right to negotiate the termination of the tenants' leases and provided for the sharing of "O&T Expenses," defined as lease termination expenses as adjusted for operating expenses incurred and rents collected for the period in question.

TC Dallas did not develop the property. Instead, it entered into a second contract to sell the property to SCA. This second contract stated that the $16 million sales price reflected a $6 million reduction from the "intended" sales price. The $6 million was a "Bank Credit," which was defined as the amount by which the intended purchase price was reduced to compensate SCA for the risk involved in taking title subject to the Bank's lease, the cost of terminating the Banks' lease, and the intervening operating costs and rent collections. The second contract mentioned the first contract and said that TC Dallas retained all of the rights under that contract, including the rights related to sharing the O&T Expenses.

SCA and the Bank negotiated an amendment of the Bank's lease which initially extended the term, but cancelled all renewal rights. As part of the agreement, SCA was to pay the Bank $2 million. The $2 million was sent by SCA to TC Dallas and from TC Dallas to the Bank.

TC Dallas then sued Republic seeking reimbursement of O&T Expenses. TC Dallas argued that the plain language of the first contract made the $2 million payment was a lease termination cost, clearly made part of O&T Expenses. Republic argued that it had no obligation to reimburse TC Dallas for any part of the "Bank Credit."

Under the first PSA, Republic agreed to pay forty percent of the O & T Expenses, defined as "all Lease Termination Costs incurred by Purchaser [TC Dallas] ... increased by Operating Expenses incurred...." For payments to be "Lease Termination Costs," they had to be "buy-out fees, termination fees and other consideration paid or given to tenants to terminate the leases." For the payments to be "Operating Expenses" they had to be "expenses and disbursements that Purchaser [TC Dallas] incurs in connection with the ownership, operation, management and maintenance of the Property."

TC Dallas argues that some portion of the $6 million Bank Credit should be considered Operating Expenses under the first PSA because the discount constituted an "expense" or "disbursement" incurred by TC Dallas "in connection with the ownership, operation, management and maintenance of the property." The court disagreed.

First, according to the second contract, the Bank Credit was a discount in the sales price of the property made by TC Dallas to Turtle Creek Partnership, not an expense or disbursement. This conclusion is not affected by the fact that its existence arose out of the respective desires of the contracting parties to allocate costs (or risks of costs) that might be incurred in the future. Second, the $6 million Bank Credit (i.e., the discount) was not incurred by TC Dallas "in connection with the ownership, operation, management and maintenance of the property." Rather, it was incurred by TC Dallas in connection with TC Dallas's sale of the property to SCA. And these conclusions are unaffected by the fact that the definition of "Bank Credit" makes clear that its purpose was to compensate SCA for the expenses it (not TC Dallas) may incur in owning, managing, and operating the property while it was occupied. Accordingly, the $6 million Bank Credit, as such, does not constitute Lease Termination Costs or Operating Expenses as defined in the first PSA, and thus does not constitute "O & T" Expenses under that agreement.

TC Dallas also argues that the $2 million of the Bank Credit paid by SCA to the Bank-albeit via TC Dallas-should be considered Lease Termination Costs because the definition of "Bank Credit" in the second PSA stated it was for "anticipated costs of terminating the Bank Lease." However, the definition of "Bank Credit" makes clear the credit was compensation to the Purchaser, Turtle Creek Partnership, for the expenses that Turtle Creek Partnership, not TC Dallas, would incur in terminating the Bank's lease.

TC Dallas also argues that the $2 million of the Bank Credit paid by SCA to the Bank-albeit via TC Dallas-should be considered Lease Termination Costs as defined in the first PSA because it paid the Bank $2 million for the Bank's agreement not to renew its lease after 2010, and it incurred this expense because the source of the $2 million paid to the Bank was the Bank Credit. TC Dallas "paid" the Bank by sending the Bank the money TC Dallas received from SCA. However, the court held that TC Dallas's payment in that manner does not mean that TC Dallas "incurred" a Lease Termination Cost. "Incur" means "become liable or subject to. Thus, assuming without deciding that the $2 million "Bank Lease Modification Costs" paid to the Bank was in connection with terminating the lease, unless TC Dallas was liable to the Bank for that payment it did not "incur" Lease Termination Costs under the first PSA. The agreement with the Bank, though, said that SCA was liable for the payment, not TC Dallas.

That TC Dallas was not liable to the Bank for (and thus did not "incur") the Bank lease modification costs amount, was established by section 12.18 of the second PSA, which eliminated the existence of any third-party beneficiaries to the second PSA. Because the Bank could not enforce the second PSA as third-party beneficiary, TC Dallas could not be liable to the Bank for payment of the $2 million.

Barry* v. *Jackson, 309 S.W.3d 135 (Tex.App.-Austin 2010, no pet.). Barry entered a contract with the Jacksons to buy their home. The Jacksons entered into a contract to buy a replacement house. After their option to terminate the replacement house contract expired, Barry informed the Jacksons that he was backing out of his deal to buy their house. The Jacksons lost the earnest money deposit on the replacement house contract. They re-listed their house and ultimately sold it for less than Barry had agreed to pay. The Jacksons sued Barry for breach of contract.

On appeal, Barry contends that (1) the Jacksons elected a contractual remedy that bars them from receiving damages, and (2) there was insufficient evidence of the property's market value to support the trial court's damages award.

Barry's first contention was that the Jackson's had asked the trial court to order the release of Barry's earnest money to them. The court held that the Jacksons had not elected to receive the earnest money as liquidated damages. Although the Jacksons filed a motion for summary judgment seeking the release of Barry's earnest money, that was sought and granted by the trial court in partial satisfaction of the breach-of-contract damages they sought. Shortly after Barry announced his intention to breach his contract, the Jacksons refused to sign a form that would have given them the earnest money and released Barry from further liability. In their amended petition, the Barrys were very clear in seeking damages for breach of contract, which their contract with Barry allowed. There is sufficient evidence to show that the Jacksons did not elect to receive liquidated damages, relinquish their right to sue, or engage in conduct inconsistent with that right.

The court next turned to Barry's complaint related to the evidence supporting the trial court's damages award. Barry argues that the Jacksons did not present sufficient evidence to show the property's market value at the time of his breach. The Jacksons claimed that the market value of the house at the time of the breach was the price Barry had agreed to pay for the house and that their damages were the price they got in the later sale plus the added expenses they incurred.

The general rule in a breach-of-contract case is that damages should put the plaintiff in the same economic position he would have been in had the contract been performed. When the breached contract is for real estate, the measure of damages is the difference between the contract price and the property's market value at the time of the breach. The market value of the property may be determined by a fair resale, after notice to the party within a reasonable time after the breach.

The Jacksons sold their house more than a year after Barry breached the contract. Although the court recognized that what is a reasonable time is a question of fact, varied by the circumstances of each case, the Jacksons provided no evidence related to whether thirteen months was a reasonable time, especially considering that they took the house off the market for a number of months and had the property listed for sale by owner, rather than through a realtor who could list it in the MLS system, for a time. For example, they did not present testimony by an appraiser or realtor as to whether the real estate market had undergone significant fluctuations during that year, that the eventual sales price would have been a fair market value for the property at the time of the breach, or whether market conditions in October 2003 were similar to those in August 2002. Recent events in the nationwide real estate market show without a doubt that one year can make an enormous difference in the value of real estate, and Texas courts have recognized this fact. As plaintiffs, it was the Jacksons' burden to establish the property's market value as of August 2002, not October 2003, and thus it was their burden to establish that the later sale was within a reasonable amount of time. Because the Jacksons did not present any evidence that would support reasonable inferences either that the October 2003 sale occurred within a "reasonable time" or that the October 2003 sales price reflected the property's value at the time of Barry's breach more than a year earlier, the trial court erred in awarding them the difference between the two contract prices.

Franco* v. *Lopez, 307 S.W.3d 551 (Tex.App.-Dallas 2010, no pet.). Franco entered into a contract to sell three parcels of land to Lopez and Valdespino. The contract was not dated, but according to the contract, it was effective when received by the title company, which was February 2, 2007. The closing was to be on January 19, 2007 (which was, in case you missed it, before the effective contract date) or within 7 days after title objections were cured, and time was of the essence. The closing didn't occur on January 19. In the following months, Lopez and Vadespino deposited additional earnest money and tried to close after receiving a survey of the property, but Franco refused. Lopez and Valdespino sued for specific performance. Franco argued that the buyers had filed to deposit earnest money, obtain a survey, and appear for the January 19 closing, and that such failures were defaults that excused his performance.

The court found that earnest money had been timely deposited. Moreover, the survey provision in the contract didn't specify when the survey was supposed to be obtained. Furthermore, because closing wasn't to be until 7 days after title objections and the title commitment was not due until well after January 19, the failure to close on January 19 could not be a default.

Franco also argued that specific performance was not available because the buyers had failed to close by the required closing date. Generally, where a contract provides that time is of the essence, a party must tender performance within the specified time to be entitled to specific performance. The court had already considered and rejected Franco's complaints based on the buyers' failure to perform by January 19. To the extent Franco argues that the buyers are barred from seeking specific performance because, after January 19, 2007, they never tendered the full amount of the purchase price, the court noted that Franco never presented this complaint to the trial court. By failing to present this theory to the trial court, Franco has waived error on appeal with respect to this issue.

Absent waiver, however, the court would still conclude that Franco's argument lacks merit. Texas cases have long recognized that where a party openly refuses to perform his part of the contract a plaintiff need not tender performance before bringing suit. Where tender of performance is excused, a party must plead and prove he is ready, willing, and able to perform. In this case, there is ample evidence from which the trial court could have found that Franco openly refused to perform his part of the contract and that the buyers were ready, willing, and able to perform their obligations under the contract. Accordingly, the trial court did not err in awarding the buyers specific performance of the contract.

Thedford Crossing, L.P.* v. *Tyler Rose Nursery, Inc., 306 S.W.3d 860 (Tex.App.-Tyler 2010, pet. pending). Tew agreed to sell Thedford approximately 361 acres near Tyler for $6 million. The contract was extended by its terms when Thedford paid an extension fee. During the extension period, the contract was amended to provide two alternate means of purchasing the property, either by cash for the original purchase price of $6 million or for seller financing that raised the price to $10 million and provided for an initial deposit and some partial releases of the land to Thedford free of the seller financing lien. Thedford elected the seller financed method and made the initial deposit. Then the parties started negotiating the location of the partial release portions of the land.

When the closing date was approaching, the parties had not agreed on which acreage was to be released. Ultimately, because they couldn't agree, the sale was not closed. Thedford filed suit, alleging breach of contract and fraud.

Tew contends that the parties' agreement concerning the release tract was a condition precedent to closing that had not been satisfied. Tew also argued that the contract omitted material terms rendering it indefinite and uncertain as to the parties' obligations. Theford disagreed.

A contract must be sufficiently definite in its terms so that a court can understand what the promissor undertook. If an alleged agreement is so indefinite as to make it impossible for a court to fix the legal obligations and liabilities of the parties, it cannot constitute an enforceable contract. Similarly, a contract providing for an agreement to be negotiated in the future is void. The parties, however, may agree on some terms sufficient to create a contract, leaving other provisions for later negotiation so long as those terms are not material or essential. However, those terms left for future negotiation are not part of the enforceable portion of the contract.

Here, the essence of the parties' agreement is the sale of real estate. The parties agreed that Tew would sell and Thedford would buy approximately 361 acres of land. The contract identified the location of the 361 acres to be conveyed, set forth the price Thedford would pay Tew, and stated the date on which the sale must close. Based on the court's reading of the contract, there is no uncertainty concerning these terms, and, thus, there exists a valid contract for the sale of 361 acres of real estate.

The terms concerning the location of land to be released to Thedford free of lien, though undoubtedly of concern to the parties, is not an essential term to the contract for sale of real estate. Thus, the parties' expression of this term as one to be agreed upon in the future does not serve to nullify the contract as a whole.

Likewise, the manner of release and extent of Tew's conveyance of the property between the closing of the option and the final closing date is not an essential term to the contract for sale of real estate. Thus, the parties' failure to specify such details is not fatal to their contract. Further still, the terms and provisions applicable to the payment of the balance of the pur-chase price are not essential terms to the overall sale of the property. Thus, the court concluded that while each of these details may be important to the parties and may have proven to be valuable additions to their agreement given the benefit of hindsight, the absence of such terms does not serve to render unenforceable the contract for sale.

With regard to the question of whether the agreement as to the release portion was a condition precedent to Tew's obligations, the court looked to the intention of the parties as expressed in the contract. Conditions precedent to an obligation to perform under a contract are those acts or events occurring subsequent to the making of a contract that must occur before there is a right to immediate performance and before there is a breach of a contractual duty. In construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible, when the intent of the parties is doubtful, or when a condition would impose an impossible or absurd result.

Thedford argues that the contract contains no language that would indicate the existence of a condition precedent. The court agreed that the contract contains no such language. However, while certain terms such as "if," "provided that," "on condition that," or some other phrase ordinarily connote the parties' intent that there be a condition precedent, no particular words are necessary for the existence of such a condition.

Conditions precedent are acts or events occurring subsequent to the making of a contract that must occur before there is a right to immediate performance. Here, the contract sets forth that the parties agreed to close by one of two methods and that the seller finance method required some future agreements by the parties. It is apparent that the contract required the parties to mutually agree that, among other things, Tew would release fifty contiguous acres, the location of which would be agreed upon, to Thedford. However, the contract does not set forth any date by which the release of such property or the determination of its location must occur. Rather, the contract required only that the parties agree that (1) Tew will release the land and (2) the parties would mutually agree upon the location of the land.

Tew contends that treating the provision as a covenant would lead to an absurd result. The court disagreed. Tew's argument rests upon his assertion that the parties imposed upon themselves a deadline of the closing date to agree upon the location of the fifty acre tract. However, as set forth above, a close reading of the contract reveals that no such deadline was expressed in the agreement. There is no indication from the plain language of the contract that the parties intended to compel the release of the fifty acre tract at the time of closing. Therefore, based on the plain meaning of the language of the contract, the court held that the parties' mutual agreement concerning the location of the fifty contiguous acres to be released by Tew was a covenant rather than a condition.

Cate* v. *Woods, 299 S.W.3d 149 (Tex.App.-Texarkana 2009, no pet.). Tom and Patsy Cates signed a contract to sell their farm to Woods. The contract had a financing contingency that said the contract would terminate if Woods failed to obtain financing. Woods did not obtain financing for one of the two tracts comprising the farm. Nevertheless, the Cates provided partial seller financing and allowed Woods to purchase half of the farm. In order to do that, they entered into a separate contract for the one tract. Although they talked about it, no written contract was ever signed regarding the other half of the farm.

At one point, without letting Patsy know about it, Tom allowed Woods onto the other half of the farm. Woods moved cattle from the part he owned to this half, planted hay, and built some improvements. No money was ever paid for the tract.

When Patsy found out that Tom had let Woods onto the other half of the farm, she "had a heated discussion" with Tom. Tom and Woods continued to talk about Woods buying the property, but no contract was ever entered into. Patsy then wanted Woods off the land. After several attempts to remove Woods from the property, Tom moved Woods's cattle back to the other half of the farm, plowed up the grass, and put locks on the gates. Woods then sued for specific performance based on the original contract of sale. The trial court granted specific performance to Woods, requiring him to pay the purchase price. It also awarded him damages for the Cates trespassing on the property.

Specific performance is an equitable remedy that can be awarded upon showing a breach of contract. In pursuing an action for specific performance, the first question is whether there is an enforceable contract to be performed. To be enforceable and comply with the statute of frauds, a contract for the sale of real property must be in writing and signed by the person to be charged with the agreement. Before a court can order specific performance of a contract for the sale of land, there must be a written agreement expressing the essential terms of the contract with reasonable certainty.

In ordering specific performance, the trial court relied on the original contract for sale, which was clearly contingent upon Woods obtaining third-party financing for the value of both properties. Since financing was not obtained by the closing date, the contract terminated by its own terms. This termination and abandonment of the original contract was further evidenced by the parties' execution of a separate written contract for sale of the one half of the property at a later date.

Woods then tried to argue that he had an oral contract, but no evidence of an oral contract was presented at trial, so this argument was not available on appeal.

The court also found that there was no basis for Woods's fraud claim. When fraud claims arise out of an alleged contract which is unenforceable under the statute of frauds, the statute of frauds bars the fraud claims as well as the contract claims.

Elijah Ragira/VIP Lodging Group, Inc.* v. *VIP Lodging Group, Inc., 301 S.W.3d 747 (Tex.App.-El Paso 2009, pet. denied). VIP owned five tracts of land secured by a senior note held by PMC a subordinate note held by Sunburst. Having trouble paying off the matured notes on the property, which totaled approximately $2.7 million, VIP entered into negotiations with Ragira for the purchase of the property. The parties agreed to a purchase price of $3.5 million and executed three separate contracts.

The first contract provided for the purchase of tracts four and five at a price of $1 million and named the closing date as May 31, 2004. The second contract was for the purchase of tract one at a price of $1.5 million with a closing date of November 30, 2004. The third contract was for the purchase of tracts two and three at a price of $1 million and a closing date of February 28, 2005. Each contract required Ragira to deposit earnest money and a "$100 review fee." If Ragira failed to do so, the contracts were rendered null and void. Ragira deposited the earnest money for each contract, but didn't pay the "review fee."

The contracts were modified in various ways, but the earnest money and review fee provisions were not changed.

The contracts required VIP to provide surveys and phase one environmental reports. There was a dispute as to whether the surveys were to be new ones or existing ones and as to which party was responsible for getting the phase ones.

The first contract did not close on the extended closing date. Ragira blamed that on not having the survey or phase one; VIP claimed Ragira didn't have its financing. When Ragira tried to have VIP close later on, VIP refused.

Ragira found out that the property was part of the new Cowboy's stadium in Arlington and redoubled its efforts to close the properties. VIP, in the meantime, was negotiating with another buyer and the City of Arlington. VIP and the other parties were prevented from moving forward with the City because Ragira had filed memoranda of the contracts.

Ragira filed suit for specific performance. VIP filed counterclaims for removal of the memoranda as clouds on title. Ragira was denied specific performance because there was no evidence that it was ready, willing, and able to close on the contracts.

The equitable remedy of specific performance may be awarded upon a showing of breach of contract. However, to be entitled to specific enforcement of a contract, a party must show that the contract in question is valid and enforceable.

In this case, the express terms of the contracts provided that Ragira's failure to pay the review-period fees rendered the contracts "null and void." Further, Ragira admitted that he failed to pay those fees for any of the contracts. Accordingly, the three contracts were null and void, and Ragira was not entitled to specific performance. Ragira, citing ***1464-Eight, Ltd.* v. *Joppich***, 154 S.W.3d 101 (Tex.2004), argues that the nonpayment of the review-period fees did not preclude the enforcement of the contracts. However, unlike ***Joppich***, the parties did not include a false recital of nominal consideration, that is, that the review-period fees had been paid. Rather, the contract required the payment of the review-period fees and expressly provided that Ragira's failure to do so rendered the contracts null and void. Because Ragira failed to satisfy the express requirements of the contract by failing to pay the review-period fees, the contracts were unenforceable as a matter of law, and therefore, Ragira was not entitled to specific performance on any of the contracts.

Even assuming the contracts were enforceable, Ragira was still required to show his readiness, willingness, and ability to perform at relevant times to be entitled to specific performance.

Ragira contends that he proved his ability to tender performance on all the contracts by relying on the evidence showing that he contacted a third-party investor, who had been pre-approved for a loan, to aid in the purchase of the property. When a party alleges he is ready, willing, and able to perform under the terms of a contract, but is relying on third-party financing, the party must show that he had a firm commitment for financing, or he will not be entitled to specific performance.

The lender's commitment letter agreement falls short of the required firm commitment for financing. The letter agreement did not exist as of the original closing date of the first contract, and by the time Ishii's proposal was accepted by Ragira, Ragira already terminated the first contract. Moreover, funding for the purchase of all the properties was conditional on the formation of a LLC, which was never formed, and title insurance was to be obtained, which was never proven to have occurred. Additionally, although

Ragira claims that VIP was responsible for obtaining the environmental reports under the terms of the contracts, the letter agreement placed that burden on Ragira, and Ragira did not obtain the environmental report until after the closing date passed on the first contract.

Having determined that Ragira did not have a firm commitment for financing from a third-party investor, the court agreed with the trial court that Ragira was not ready, willing, and able to perform under the contracts, and therefore, Ragira was not entitled to specific performance on any of his contracts.

Nguyen* v. *Chapa, 305 S.W.3d 316 (Tex.App.-Houston [14th Dist.] 2009, pet. denied). Ruiz sold the 3-acre tract to Chapa. Chapa did not file the deed from Ruiz. Thirteen months later, Ruiz sold the same 3 acres to Nguyen. Nguyen immediately filed a general warranty deed with the county reflecting his interest in the property. After learning of the Ruiz-Nguyen sale, Chapa sought to establish his title by filing suit. Challenging Chapa's unrecorded interest, Nguyen claimed he was a bona fide purchaser. The bank that financed Nguyen's loan on the property intervened and asserted status as a bona fide mortgagee. A jury found in favor of Chapa on his contract claims against Ruiz and found against Nguyen's and the bank's claims of bona fide purchaser and mortgagee, respectively.

Under Texas law, an unrecorded conveyance of an interest in real property is void as to a subsequent purchaser who purchases the property for valuable consideration and without notice. However, the unrecorded instrument is binding on a subsequent purchaser who does not pay a valuable consideration or who has notice of the instrument. Thus, to receive the bona fide purchaser protection, a party must acquire the property in good faith, for value, and without notice of any third-party claim or interest. A bona fide mortgagee takes a lien in good faith, for valuable consideration, and without notice of outstanding claims.

Notice of a third-party's claim or interest can be either actual or constructive, which has been broadly defined as information concerning a fact actually communicated to a person, derived by him from a proper source, or presumed by law to have been acquired. Generally, the question of whether a party has notice is a question of fact; it becomes a question of law only when there is no room for ordinary minds to differ as to the proper conclusion to be drawn from the evidence.

A subsequent purchaser has actual notice if he has personal information or express knowledge of an adverse right. The only evidence of actual knowledge at trial was Chapa's testimony that once he and Nguyen realized Ruiz had sold each of them the same property, Nguyen asked Chapa if he had filed his interest with Harris County. Chapa answered no, and Nguyen replied “bad luck for you.” Chapa contends that Nguyen's inquiry and response shows that he knew of Chapa's interest and knew Chapa did not file the interest with the county. Contrary to Chapa's argument, Nguyen's query is not evidence that he had personal or express knowledge that Chapa had a competing interest in the same property. Rather, Nguyen's statements merely reflect his knowledge of a party's duty to record interests in real estate. Nguyen's question and reply are not evidence of actual knowledge; at best, this evidence provides nothing more than basis for surmise, guess, or conjecture as to Nguyen's knowledge of Chapa's interest.

Constructive notice is notice the law imputes to a person not having personal information or knowledge. One form of constructive knowledge imputes notice where a subsequent purchaser has a duty to ascertain the rights of a party in possession. The duty to ascertain arises only if the possession is visible, open, exclusive, and unequivocal. This case, however, is not a constructive-knowledge-by-possession case.

Nevertheless, a subsequent purchaser is also charged with notice of the terms in deeds which form an essential link in his chain of ownership. Although a deed outside the chain of title does not impute constructive knowledge, a person may be charged with the duty to make a reasonable diligent inquiry using the facts at hand in the recorded deed. Thus, every purchaser of land is charged with knowledge of all facts appearing in the chain of title through which he claims that would place a reasonably prudent person on inquiry as to the rights of other parties in the property conveyed. Accordingly, if Nguyen or his bank had knowledge of any fact or circumstance sufficient to put a prudent man upon inquiry which, if prosecuted with ordinary diligence, would lead to actual notice of Chapa's claim to the 3 acres, Nguyen and the bank are charged with such knowledge. The court reviewed the evidence and found nothing that would have put Nguyen or the bank on inquiry.

FWT, Inc.* v. *Haskin Wallace Mason Property Management, L.L.P., 301 S.W.3d 787 (Tex.App.-Fort Worth 2009, pet. denied). Haskin, Wallace, and Mason are the owners of Haskin Wallace. In 1990, they formed Texas Galvanizing, Inc. Texas Galvanizing is located in Hurst and operates a "hot-dip" galvanizing plant. In 1997, FWT sold to Haskin Wallace approximately six acres of undeveloped real property located in Kennedale and adjacent to FWT's plant. The deed from FWT to Haskin Wallace contained a right of first refusal in favor of FWT that gave FWT the right to purchase the property on the same terms and conditions as Haskin Wallace intended to sell to a third party.

Haskin, Wallace, and Mason then formed U.S. Galvanization to operate a galvanizing business on the property. Haskin, Wallace, and Mason eventually decided to sell the two galvanizing businesses, Texas Galvanizing and U.S. Galvanization. They entered into a contract with Valmont Industries for the sale of the businesses and a lease or purchase of the property. Pursuant to the right of first refusal in the deed, they sent notice to FWT. FWT responded by exercising its right of first refusal. Thereafter, confusion broke out among the parties. Haskin, Wallace, and Mason believed the right of first refusal required FWT to buy the businesses and the property on the Valmont terms; FWT took the position that the right of first refusal required only that FWT buy the property. No closing ever occurred, however.

A preferential right, also known as a right of first refusal or preemptive right, is a right granted to a party giving him or her the first opportunity to purchase property if the owner decides to sell it. A preferential right has been described as a dormant option. Once the property owner conveys the terms of the offer to the rightholder, the rightholder then has the power to accept or reject the offer. Thus, when the property owner gives notice of his intent to sell, the preferential right matures or "ripens" into an enforceable option. The terms of the option are formed by both the provisions granting the preferential right and the terms and conditions of the third-party offer presented to the rightholder. Once the property owner has given the rightholder notice of his intent to sell on the terms contained in the third-party offer, the terms of the option cannot be changed for as long as the option is binding on the property owner.

The rightholder's exercise of the option to purchase must be positive, unconditional, and unequivocal. With regard to an option, generally, a purported acceptance containing a new demand, proposal, condition, or modification of the terms of the offer is not an acceptance but a rejection.

As a general rule, the holder of a preferential right cannot be compelled to purchase assets beyond the scope of the agreement subject to the preferential right in order to exercise that right. An exception to this rule exists, however, when the preferential right is expressly made subject to the same terms and conditions offered by a prospective, bona fide, third-party purchaser, as is the case here. In such a case, the question of whether the holder of a preferential right must purchase the additional assets turns on whether the condition that requires the purchase of additional assets is commercially reasonable, imposed in good faith, and not specifically designed to defeat the preferential right. While this exception has been applied to cases involving the conveyance of a single asset, there doesn't appear to be any reason why it should not apply equally to cases involving multiple assets.

In this case, FWT elected to exercise its preferential right contained in the deed. The deed's preferential right provision clearly and unambiguously requires that FWT meet the same price and the "same terms and conditions offered by the prospective purchaser," Valmont. Valmont expressly conditioned its purchase or lease of the Property on its acquisition of the assets of the galvanizing businesses. Thus, FWT was required to meet the terms and conditions of Valmont's offer, including the conditions requiring acquisition of the business assets, unless those conditions were not commercially reasonable, were imposed in bad faith, or were specifically designed to defeat FWT's preferential right, which the court found them not to be.

Hicks* v. *Castille, 313 S.W.3d 874 (Tex.App.-Amarillo 2010, pet pending). Castille bought 96 acres (out of a 100-acre tract) from Hicks. The other 4 acres included a quarter-acre parcel subject to a tower lease. Castille was given a right of first refusal to buy the 4-acre tract. Hicks sent Castille a notice of intent to sell the quarter-acre tract on which the tower lease was located and which was included in the four-acre tract on which Castille held a right of first refusal. According to Hicks, Castille then had sixty days to exercise his then-matured option to purchase the .28 tract on the same terms to which American Tower and Hicks had agreed: $50,000.00. Castille did not exercise his option to purchase the .28 acre. Instead, on June 18, 2008, he filed suit for declaratory relief.

Castille reads the ROFR agreement as allowing Hicks to sell the 4-acre tract only as one entire parcel. In other words, he reads the agreement as one which would prohibit Hicks from selling a portion, rather than the entirety, of the 4-acre tract. Hicks, on the other hand, reads the Agreement without such restriction and maintains that the Agreement permits such a sale of a portion of the 4-acre tract so long as he notifies Castille in accordance with the terms of the Agreement.

The court began its analysis by observing that alienability is a legal incident of property, and restraints against it are generally contrary to public policy. The right of alienation is an inherent and inseparable quality of an estate in fee simple. A restriction not forbidding alienation to particular persons or for particular purposes only, but against any and all alienation whatever during a limited time, of an estate in fee, is likewise void, as repugnant to the estate devised to the first taker, by depriving him during that time of the inherent power of alienation.

The court said that to adopt Castille's construction of the Agreement would be enforcing what appears to be an unreasonable restraint on alienation: an outright prohibition of indeterminate duration from selling any portion of the land in question less than four acres. Castille has not directed this Court to a case which would support the position that a landowner may not partition or sell portions of the property described in an agreement conferring a right of first refusal. Adhering to the relevant rules of construction, the court then examined the Agreement from a utilitarian perspective, bearing in mind the purposes and restrictions associated with a right of first refusal, and have construed the Agreement in such a way as to not invalidate it.

Having done so, the court concluded that the agreement permits the sale of a portion of the four acres so long as Hicks gives proper notice in accordance with the agreement. To hold otherwise would cause the right of first refusal to represent an unreasonable restraint on alienation by prohibiting Hicks from selling any portion of the tract less than four acres. The converse application would also be unreasonable, permitting the right of refusal to do something it must not do; to hold that Castille has a right to buy all four remaining acres intact would run afoul of the well-established rule that a holder of a right of first refusal cannot compel the owner to sell the property at issue. That is, to read the agreement to mean that Hicks can only sell the entire four-acre tract of land could have the practical effect of forcing him to sell land that he does not wish to sell. The court will not construe the agreement to create a right of first refusal that is inconsistent with the principles concerning such rights

Chambers* v. *Equity Bank, SSB, 319 S.W.3d 892 (Tex.App.-Texarkana 2010, no pet.). The case begins like a bad novel. "Unknown to Charles M. Chambers, when he passed by the Lighthouse Resort on Lake Fork on a weekend fishing trip in early 2004 and noticed the "for sale" sign, was the fact that lurking beneath the resort's surface was a damaged or defective septic system."

Chambers entered into a contract to buy the house from the Bank. While he did not know about the bad septic tanks, the Bank did. A "pre-closing" of the Lighthouse property took place June 28, 2004, at which time various, but not all, closing documents were signed; none were filed for record at that time. At that time, Chambers signed a promissory note for $650,000.00, the Bank gave Chambers the keys to the Lighthouse property along with $15,000.00 for operating expenses, and Cham-bers began cleaning up the property. Chambers did not pay any part of the sales price on June 28 and admits that the property was not purchased on that date. On June 29, 2004, Chambers was advised by the Sabine River Authority of the problem with the septic system. As a result, Chambers and the Bank entered into an amended contract July 20, 2004, which provided that the Bank was to repair the septic system for an allowance not to exceed $32,000.00.

Before the septic-system repairs could be made, Chambers filed for bankruptcy and stopped making payments on the note to the Bank. The Bank foreclosed on the property and sued Chambers for the remaining deficiency on the loan. Chambers thereafter filed suit against the Bank for fraud and real estate fraud. The two cases were consolidated.

The fraud in question concerns the Bank's failure to inform Chambers about the condition of the septic system. The question here is whether there is sufficient evidence that Chambers ratified that fraud.

Ratification occurs when the parties' obligations are adjusted after the defrauded party learns of the fraud. An agreement is also ratified if a party, by word or conduct, affirms the agreement after becoming aware of any fraud that would otherwise impair the agreement. That is, ratification occurs whenever the parties act in a way that recognizes, in spite of the revealed fraud, the existence of a binding contract.

In this case, the evidence shows that, after Chambers learned of the fraud, the purchase of the property was completed, including the signing of an amended contract of sale expressly addressing the matter at the heart of the fraud allegation-repair of the septic system-at a cost to the Bank of $32,000.00. The court held that ratification had occurred.

PART VIII
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Ramsey* v. *Grizzle, 313 S.W.3d 498 (Tex.App.-Texarkana 2010, pet. denied). This case involves a confusing set of circumstances relating to an oil and gas lease. The confusion led to a declaratory judgment action being filed by Grizzle. Ramsey argued that the case, which involved title to the mineral estate, should have been brought as a trespass to try title case rather than a declaratory judgment action and that Grizzle had failed to prove a title interest in the mineral lease in question.

The Texas Supreme Court has explained that oil and gas leases are unique: In Texas it has long been recognized that an oil and gas lease is not a "lease" in the traditional sense of a lease of the surface of real property. In a typical oil or gas lease, the lessor is a grantor and grants a fee simple determinable interest to the lessee, who is actually a grantee. Consequently, the lessee/grantee acquires ownership of all the minerals in place that the lessor/grantor owned and purported to lease, subject to the possibility of reverter in the lessor/grantor. The lessee's/grantee's interest is "determinable" because it may terminate and revert entirely to the lessor/grantor upon the occurrence of events that the lease specifies will cause termination of the estate. In this case, the lessors retained only a royalty interest. When an oil and gas lease reserves only a royalty interest, the lessee acquires title to all of the oil and gas in place, and the lessor owns only a possibility of reverter and has the right to receive royalties. A royalty interest, as distinguished from a mineral interest, is a nonpossessory interest.

With an exception not applicable here, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property. When the suit does not involve the construction or validity of deeds or other documents of title, the suit is not one for declaratory judgment. Since title to real property was at issue in the instant case, a declaratory judgment action is not a proper vehicle to resolve the matter. Had this been a boundary dispute, a declaratory judgment action is permissible. Had it been a case in which interpretation of the lease was at issue, the matter may have been properly resolved through a declaratory action. As the instant case stands, however, title was at issue here, meaning the proper vehicle was a trespass to try title action.

Trespass to try title is a purely statutory creation and embraces all character of litigation that affects the title to real estate. The action is governed by special pleading and proof requirements established by the Texas Rules of Civil Procedure. A plaintiff who has no interest at all in the land lacks standing to assert a trespass to try title action. To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered. A plaintiff's right to recover depends on the strength of his or her own title, not the weaknesses of the title of his or her adversary. A defendant is not required to show title in himself or herself, nor may the plaintiff rely on the defendant's failure to do so. Ordinarily, a plaintiff may recover (1) by proving a regular chain of conveyances from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned.

Another trespass to try title case decided this year is ***Kennedy Con., Inc.* v. *Forman***, 316 S.W.3d 129 (Tex.App.-Houston [14th Dist.] 2010, no pet.), which dwells, for the most part, on the evidence required to establish title.

PART IX
EASEMENTS

Severance* v. *Patterson, --- S.W.3d ----, 2010 WL 4371438 (Tex. 2010). This case answers certified questions from the United States Court of Appeals for the Fifth Circuit.

1. Does Texas recognize a "rolling" public beach-front access easement, i.e., an easement in favor of the public that allows access to and use of the beaches on the Gulf of Mexico, the boundary of which easement migrates solely according to naturally caused changes in the location of the vegetation line, without proof of prescription, dedication or customary rights in the property so occupied?

2. If Texas recognizes such an easement, is it derived from common law doctrines or from a construction of the Open Beaches Act?

3. To what extent, if any, would a landowner be entitled to receive compensation (other than the amount already offered for removal of the houses) under Texas's law or Constitution for the limitations on use of her property effected by the landward migration of a rolling easement onto property on which no public easement has been found by dedication, prescription, or custom?

The central issue is whether private beachfront properties on Galveston Island's West Beach are impressed with a right of public use under Texas law without proof of an easement.

In April 2005, Severance purchased three properties on Galveston Island's West Beach. "West Beach" extends from the western edge of Galveston's seawall along the beachfront to the western tip of the island. One of the properties, the Kennedy Drive property, is at issue in this case. A rental home occupies the property. A public easement for use of a privately owned parcel seaward of Severance's Kennedy Drive property pre-existed her purchase.

Five months after Severance's purchase, Hurricane Rita devastated the property subject to the easement and moved the line of vegetation landward. The entirety of the house on Severance's property is now seaward of the vegetation line. The State claimed a portion of her property was located on a public beachfront easement and a portion of her house interfered with the public's use of the dry beach. When the State sought to enforce an easement on her private property pursuant to the OBA, Severance sued several State officials in federal district court. She argued that the State, in attempting to enforce a public easement, without proving its existence, on property not previously encumbered by an easement, infringed her federal constitutional rights and constituted (1) an unreasonable seizure under the Fourth Amendment, (2) an unconstitutional taking under the Fifth and Fourteenth Amendments, and (3) a violation of her substantive due process rights under the Fourteenth Amendment.

Texas has a history of public use of Texas beaches, including on Galveston Island's West Beach. These rights of use were proven in courtrooms with evidence of public enjoyment of the beaches dating to the nineteenth century Republic of Texas. But that history does not extend to use of West Beach properties, recently moved landward of the vegetation line by a dramatic event, that before and after the event have been owned by private property owners and were not impressed with pre-existing public easements. On one hand, the public has an important interest in the enjoyment of Texas's public beaches. But on the other hand, the right to exclude others from privately owned realty is among the most valuable and fundamental of rights possessed by private property owners.

The Open Beaches Act states the policy of the State of Texas for enjoyment of public beaches along the Gulf of Mexico. The OBA declares the State's public policy to be "free and unrestricted right of ingress and egress" to State-owned beaches and to private beach property to which the public "has acquired" an easement or other right of use to that property. Privately owned beaches may be included in the definition of public beaches. The Legislature defined public beach by two criteria: physical location and right of use. A public beach under the OBA must border on the Gulf of Mexico. Along the Gulf, public beaches are located on the ocean shore from the line of mean low tide to the line of vegetation, subject to the second statutory requirement that the public must have a right to use the beach. This right may be "acquired" through a "right of use or easement" or it may be "retained" in the public by virtue of continuous "right in the public since time immemorial."

The area from mean low tide to mean high tide is called the "wet beach," because it is under the tidal waters some time during each day. The area from mean high tide to the vegetation line is known as the "dry beach." The wet beaches are all owned by the State of Texas. However, the dry beach often is privately owned and the right to use it is not presumed under the OBA. The Legislature recognized that the existence of a public right to an easement in privately owned dry beach area of West Beach is "dependant" [sic] on the government's establishing an easement in the dry beach or the public's right to use of the beach. Accordingly, where the dry beach is privately owned, it is part of the "public beach" if a right to public use has been established on it. The question is did the easement on the property seaward of Severance's property "roll" onto Severance's property?

The court reviewed the history of land ownership along the beaches of Galveston since the days of the Republic and eventually held that the State had divested its entire property interest in the dry beaches. It thus held that a public beachfront easement in West Beach, although dynamic, does not roll. The public loses that interest in privately owned dry beach when the land to which it is attached becomes submerged underwater. While these boundaries are somewhat dynamic to accommodate the beach's everyday movement and imperceptible erosion and accretion, the State cannot declare a public right so expansive as to always adhere to the dry beach even when the land the easement originally attached to is eroded. This could divest private owners of significant rights without compensation because the right to exclude is one of the most valuable and fundamental rights possessed by property owners. Texas does not recognize a "rolling" easement on Galveston's West Beach. Easements for public use of private dry beach property do change along with gradual and imperceptible changes to the coastal landscape. But, avulsive events such as storms and hurricanes that drastically alter pre-existing littoral boundaries do not have the effect of allowing a public use easement to migrate onto previously unencumbered property. This holding shall not be applied to use the avulsion doctrine to upset the long-standing boundary between public and private ownership at the mean high tide line. That result would be unworkable, leaving ownership boundaries to mere guesswork. The division between public and private ownership remains at the mean high tide line in the wake of naturally occurring changes, even when boundaries seem to change suddenly.

Land patents from the Republic of Texas in 1840, affirmed by legislation in the new State, conveyed the State's title in West Galveston Island to private parties and reserved no ownership interests or rights to public use in Galveston's West Beach. Accordingly, there are no inherent limitations on title or continuous rights in the public since time immemorial that serve as a basis for engrafting public easements for use of private West Beach property. Although existing public easements in the dry beach of Galveston's West Beach are dynamic, as natural forces cause the vegetation and the mean high tide lines to move gradually and imperceptibly, these easements does not migrate or roll landward to encumber other parts of the parcel or new parcels as a result of avulsive events. New public easements on the adjoining private properties may be established if proven pursuant to the Open Beach Act or the common law.

Van Dam* v. *Lewis, 307 S.W.3d 336 (Tex.App.-San Antonio 2009, no pet.). The Lewises claim an easement exists across a portion of land owned by the Van Dams, which provides the Lewises and other individuals access to Lake Corpus Christi. The trial court granted a declaratory judgment, in favor of the Lewises, confirming an easement by implied dedication "for the benefit of the public. . ."

The subdivision includes numbered lots and undivided areas designated as "Undivided Q" on the subdivision plat. Over the years, portions of the Q areas were sold to individuals holding lots adjacent to the Q areas including one of the Van Dams' predecessors in title. The disputed easement in question takes the form of a path or overgrown road over that portion of the Van Dams' property formerly designated as Undivided Q-2. The Lewises' property is also adjacent and contiguous to the portion of the Van Dams' Q-2 property in question. Critically, the Q-2 property completely separates the Lewis property from the water. The Lewises argue there is an easement across the Van Dams' property granting them access to the lake.

From August of 2005 through early 2006, the Lewises accessed the lake through their back gate, crossing the Q-2 property, to enjoy the lake. In the spring of 2006, Daniel Van Dam notified Patrick Lewis that the Q-2 property was private property and the Lewises' use of Q-2 was trespassing. The Van Dams subsequently installed a metal chain across their property with a sign that said "Private property, no trespassing." Additionally, the Van Dams began constructing a retaining wall and a boat ramp on the Q-2 property.

The trial court's judgment specifically declares that an easement by implied dedication burdens the Van Dams' Q-2 property. Dedication is the appropriation of land, or an easement therein, by the owner, for the use of the public. Once dedicated, a landowner reserves no rights that are incompatible with the full enjoyment of the public. In Texas, the elements of an implied dedication are well established: (1) the landowner induced the belief that the landowner intended to dedicate the property to public use;n (2) the landowner was competent to do so; (3) the public relied on the landowner's actions and will be served by the dedication; and (4) there was an offer and acceptance.

Determining that a dedication was intended requires more than simply failing to act or acquiescence in the use of land, although direct evidence of an overt act or a declaration is not required. Consequently, in the present case, mere acquiescence and use by the neighbors, without some additional factor from which the donative intent can be inferred, does not establish an easement by implied dedication. Even if the evidence establishes some intent that neighbors could traverse the Q-2 property, the use of the Q-2 property by a limited class of persons is not sufficient to constitute an implied dedication of the Q-2 property for public use. There was no testimony that the public at large used the Q-2 property to access Lake Corpus Christi. Based on the record, the court concluded that there is legally insufficient evidence of donative intent by the original owners and developers the subdivision to burden the Q-2 property with an easement.

Ferrara* v. *Moore, 318 S.W.3d 487 (Tex.App.-Texarkana 2010, pet. pending). Brian Hays owned an eleven-acre tract of land abutting a county road, which he subdivided into five lots. Each deed contained an easement for a "non-exclusive right-of-way for purposes of ingress and egress between a public road and the tract conveyed." Each of the deeds referenced an attachment in which the particular easement was specifically described by metes and bounds. In 2005, Ferrara purchased tract # 2 by warranty deed in which he also was granted such an easement and the tract was subject to all valid easements which allowed northern property owners, including owners of otherwise landlocked tract # 5, access to their property from a county road. Ferrara installed a fence and a gate around the easement in February 2006 and began to block the road. He justified this action by claiming he "researched it and that piece of property north of me did not have legal access to use that [easement]. It was a privilege."

Hays was notified by Roy Gay, another owner of property north of tract # 2, that he was "allowed to enter the gate for a couple of times and then Mr. Ferrara would not let them enter any longer." To no avail, Hays spoke with Ferrara "several times about the easement" and clarified that Ferrara was not allowed to block it. Thereafter, "Ferrara came out and ... cut trees [and laid them] all across the easement where it wasn't passable," despite being directed to open the gate. Finally, to avoid conflict, Hays used a bulldozer to create a road on someone else's property to allow the other tracts to access the county road.

In May 2009, the Moores purchased tract # 5 and discovered that Ferrara was blocking access and use of their easement. The Moores asked Ferrara "once again could we settle this amicably ... and [Ferrara] said no, that [he'd] have to be taken to court." So, the Moores filed suit. They asked the court to order Ferrara to remove the gates to the easement, issue an injunction enjoining him from "erecting any other impediment to the free and unrestricted use of the easement," and sought damages and attorney's fees. Ferrara's pro se answer alleged that the "[f]ence and gate" had been in place for three and one-half years and the easement had not been used for that time and was therefore abandoned.

After a bench trial, which Ferrara attended pro se and called no witnesses other than himself, the trial court issued judgment declaring that the Moores had an express easement for means of ingress and egress onto their property. It permanently enjoined Ferrara from "erecting or placing gates, fences, posts, barriers, wires, chains, locks, logs, rocks, or any other impediment or obstacle" that would "interfer[e] in any manner with [the Moores'] free and unrestricted use and enjoyment of the Easement." The existing gates were to be removed, and Ferrara was ordered to pay damages and $4,500.00 in attorney's fees. After judgment was entered, Ferrara retained counsel.

On appeal, Ferrara argues that the court misinterpreted the easement terms and erred in ordering him to remove gates and other obstacles on the easement. Interpretation of contracts granting easements are reviewed de novo.

A servient estate cannot interfere with the right of the dominant estate to use an easement for the purpose for which it was granted or sought. Likewise, the easement owner must make reasonable use of the right and not unreasonably interfere with property rights of the owner of the servient estate. Any use by others that interferes with the exercise of superior easement rights must yield. The Moores' easement originated from an express grant with a specific description. Their rights are paramount to the extent of the grant.

The court first looked to the grant and its purpose. In this case, all five tracts were borne from a single acquisition of 111 acres. Because all tracts north of tract # 2 did not have access to a public roadway, they were granted "a non-exclusive right-of-way for purposes of ingress and egress between a public road and the tract conveyed and described herein." Additionally, the easement provided that the grantor and his assigns "shall have the non-exclusive right to use any portion of this easement that lies within the tract conveyed herein." Because the gates and fences were built on specifically described easement property, grantees were improperly barred from using these portions of the easement. Ferrara's actions in building a barbed wire fence on one end of the easement, a gate on another end of the easement which remained locked, in felling logs across the easement to make it impassable, and in denying access to grantees of the easement for a period of three years, could certainly be considered as contrary to the purpose of the easement as expressed within the grant. At trial, Ferrara appeared to believe the Moores had no right to an easement and only International Paper Company had legal access on deed for that easement. Ferrara did not attempt to show that the Moores' use of the easement would impair or interfere with his use of the property.

When the easement was granted, no gates, fences, or other obstacles were placed across the roadway. It was openly used for ingress and egress from 1985 until Ferrara's obstacles were built in 2006. There is nothing in the record to suggest that there are uses for the easement property other than to provide access to landlocked property owners. Where, as here, an easement is granted to provide abutting landowners access to a roadway, and no gates existed prior to the grant of the easement, it is evident access to the roadway was to be unobstructed.

Michael Moore testified that he cannot travel down the easement to his property without running over Ferrara's gate, jumping over stumps, and finally breaking through a six-foot barbed wire fence wired to a post. The trial court did not err as a matter of law in its interpretation of the deed and the parties' intent. Contrary to the motion for new trial alleging the court was without legal authority to do so, the trial court could enjoin Ferrara from "erecting or placing gates, fences, posts, barriers, wires, chains, locks, logs, or any other impediments or obstacles ... on the Easement.

PART X
CONDOMINIUMS AND OWNERS ASSOCIATIONS

Holly Park Condominium Homeowners' Association, Inc.* v. *Lowery, 310 S.W.3d 144 (Tex.App.-Dallas 2010, pet. denied). Lowery quit paying her monthly assessments, so the Association gave her notice of default and conducted a non-judicial foreclosure of her unit, then sold the property. Lowery sued for wrongful foreclosure and sought a declaratory judgment finding the non-judicial foreclosure void. Lowery contended that only a judicial foreclosure was permitted under her declaration. She contended further that the Texas statutes governing condominium regimes did not abrogate this specific contractual right.

Because the Holly Park condominium regime was created before January 1, 1994, it is governed primarily by the Condominium Act (the "Old Act"), codified at chapter 81 of the Texas Property Code. However, the condominium regime is also governed by the Uniform Condominium Act (the "Uniform Act"), codified at chapter 82 of that code, to the extent provided by section 82.002. Section 82.002, in turn, sets forth a list of specific provisions in the Uniform Act that apply to pre-1994 condominium regimes. Those listed provisions apply only to events and circumstances occurring after January 1, 1994, and they do not invalidate existing provisions of the declaration, bylaws, or plats or plans of a condominium for which the declaration was recorded before January 1, 1994.

Among the listed provisions of the Uniform Act that conditionally apply to the Holly Park condominium regime is section 82.113, which addresses assessments levied by an association against a unit owner. The Old Act does not provide an association with any method of enforcing its owners' obligation to pay assessments, with the single exception of an association's claim for unpaid assessments against sales proceeds when an owner sells her unit. But section 82.113 of the Uniform Act, titled “Association's Lien for Assessments,” provides that an assessment levied by an association is a personal obligation of the owner, secured by a continuing lien on the condominium unit.

Holly Park’s bylaws, which are incorporated into the declaration, state that enforcement of the assessment lien shall be by judicial foreclosure. Lowery maintains that judicial foreclosure represents the outer limit of the Association's right to enforce its assessment lien.

The Uniform Act provides that foreclosure can be either judicial or non-judicial, and the Association relied on it in conduction the non-judicial foreclosure; however, the provision is states that these foreclosure rights exist except as provided in the declaration.

The declaration in this case balanced the interests of the parties on the issue of unpaid assessments. It specifically provided the Association with an assessment lien and a method of enforcing that lien, although the Old Act did not provide either of those mechanisms. At the same time, the declaration assured Lowery that she would have her day in court before her property could be sold for unpaid assessments. This was the parties' agreement; it is laid out in an existing provision of the bylaws, incorporated into the declaration. Any application of section the Uniform Act that allowed nonjudicial foreclosure without Lowery's approval would upset the balance for which the parties contracted. It would invalidate an existing provision of the declaration or bylaws and, thus, would violate the property code.

Duarte* v. *Disanti, 292 S.W.3d 733 (Tex.App.-Dallas 2009, no pet.). Duarte owned a condominium in the Skillman Bend Condominiums. The condominiums were created in 1980. Duarte failed to pay certain assessments, and the condominium association foreclosed on its lien, conducted a foreclosure sale, and sold the property to Disanti, a third party. Duarte attempted to “redeem” the property pursuant to the provisions of Section 209.011 of the Texas Residential Property Owners Protection Act. Disanti refused to allow Duarte to redeem the property, and Duarte filed suit. The sole basis for Duarte's claimed right of redemption is chapter 209 of the Texas Property Code. Disanti filed a motion for summary judgment asserting chapter 209 does not apply to condominiums.

Chapter 209 of the Texas Property Code, known as the Texas Residential Property Owners Protection Act, became effective in 2002. The Property Owners Protection Act contains various provisions concerning when a property owners' association of a “residential subdivision” may foreclose upon a lien. The Act also gives property owners certain rights of redemption when a property owners' association forecloses on such a lien. Section 209.003(d) makes clear that the Act does not apply to condominium developments governed by Chapter 82 of the Property Code.

Chapter 82, which applies only to condominiums, contains its own provisions that concern redemption after foreclosure by a property owners' association. Chapter 82 became effective in 1994. Condominiums created after that date are governed “exclusively” by chapter 82. Certain provisions of chapter 82, however, apply to all condominiums, regardless of when they were created. In particular, section 82.113 applies to all condominiums in the State of Texas. This section contains the provisions that permit a condominium's property owners' association to take a lien on a condominium, allow for nonjudicial foreclosure of such liens, and give a property owner a right of redemption when a unit is foreclosed on and purchased by the association.

The court concluded under the plain terms of the Property Owners Protection Act, that the Act does not apply to Duarte's condominium. This construction is in harmony with the legislature's clear intent to have different redemption rights for residential subdivisions than for condominiums.

Ritter* v. *Las Colonitas Condominium Association, 319 S.W.3d 884 (Tex.App.-Dallas 2010, no pet.). The Las Colonitas Condominium is a condominium association, comprised of 243 units. It was built approximately thirty years ago and many of its common elements are in need of repairs. The bylaws of the Association provide that any special assessment for additions, alterations, or improvements in excess of $25,000 must be approved by fifty-one percent of the owners. However, if the special assessment is for the "replacement, repair, maintenance or restoration of any Common Elements," approval of the owners is not necessary.

The board of directors for the Association passed a $200,000 special assessment. Owners did not vote on the assessment. The Association gave owners six months to pay the special assessment. Ritter has not paid the special assessment. Sometime after the assessment, Ritter distributed post cards to units alleging the special assessment was "illegal," and scheduled a meeting to discuss the issue. Before filing this lawsuit, the Association asked Ritter to retract the information. When Ritter failed to do so, the Association filed suit, seeking a declaratory judgment that the special assessment was valid. Ritter filed a counterclaim against the Association and alleged that the special assessment violated the bylaws.

A new board of directors was elected and the new board passed a resolution to clarify the purpose of the special assessment. The resolution provided that the special assessment was to fund replacement, repair, maintenance, and restoration work on the common elements, and would not be used for any additions, improvements, or alterations.

On appeal, Ritter argued that the board of directors did not authorize a special assessment and that the special assessment was for additions, alterations or improvements to the common areas, and therefore, it was invalid without a vote of the majority of the owners. The bylaws, submitted by both parties as summary judgment evidence, established that a special assessment for replacement, repair, maintenance, and restoration of the common areas, did not require a vote of the owners. However, a special assessment for additions, alterations or improvements to the common areas in excess of $25,000, required the vote of fifty-one percent of the owners. It is undisputed that the owners did not vote to approve the special assessment. The court held that the summary judgment evidence submitted by the Association showed that the assessment had been authorized by the board and that it was for repairs, not new construction, and was therefore valid.

PART XI
HOMESTEAD

Fairfield Financial Group, Inc. v. Synnott, 300 S.W.3d 316 (Tex.App.-Austin 2009, no pet.). Glenn and Connie Synnott purchased the house in Travis County in 1984. Fairfield obtained a judgment against Glenn and filed an abstract of that judgment in 1992. The judgment debt is owed solely by Glenn. In the fall of 1997, Glenn moved out of the house to Hays County and filed for divorce. In January 1998, Glenn and Connie executed an Agreement Incident to Divorce, the court signed the decree, and then Glenn signed a special warranty deed conveying his interest in the property to Connie. By special warranty deed dated September 15, 1999, Connie conveyed the house to the Connie L. Synnott Revocable Trust. She lives in the house and claims it as her homestead.

Connie filed this suit seeking a declaration that Fairfield has no interest in the property through a lien or otherwise. The trial court held that the house was Connie's homestead and not subject to the judgment lien. Fairfield appealed.

The core of Fairfield's appeal is its assertion that the summary judgment is erroneous because there is a genuine issue of material fact regarding whether Glenn abandoned the homestead, thereby allowing Fairfield's judgment lien to attach to his share of the community ownership of the house.

Under Texas law, judgment liens that have been properly abstracted cannot attach to a homestead while that property remains a homestead. The court noted that this statement differs from one of its earlier interpretations. In ***Exocet Inc.* v. *Cordes***, 815 S.W.2d 350 (Tex.App.-Austin 1991, no writ), the Austin court held that a properly recorded and indexed abstract of judgment attached to the homestead but that the homestead remained exempt from the foreclosure while the homestead exemption existed.

On reviewing relevant statutory and case law, the Austin court changed its position. Constitutional homestead rights protect citizens from losing their homes, and statutes relating to homestead rights are liberally construed to protect the homestead. The property code states that a homestead is exempt from seizure for the claims of creditors except for encumbrances properly fixed on homestead property, and lists the limited ways a lien can be fixed. The implication is that types of encumbrances not listed may not be "properly fixed" on homestead property. This interpretation is consistent with the holdings of other courts of appeals regarding the effect of the homestead exemption on most liens and provides greater protection to the homestead. So Austin joined other Courts of Appeals in holding that judgment liens cannot attach to a homestead while that property remains a homestead.

A judgment lien may attach to the judgment debtor's interest, however, if he abandons the property as his homestead while he owns it and while there is a properly abstracted judgment lien against him. Fairfield contends that Glenn abandoned his homestead interest and that Fairfield's lien attached to his ownership interest in the home before he transferred his ownership interest to Connie. The court concluded, however, that the timing and effect of Glenn's actions are irrelevant because the property remained at all relevant times protected by Connie's undivided homestead interest in the property. Fairfield argues, correctly, that one spouse may abandon his homestead interest while his spouse retains her homestead interest. However, although a lien attaches to property when it loses its homestead character, Texas courts have held that the property is wholly exempt from the attachment of liens (other than those listed in property code section 41.001(b)) so long as the remaining spouse retains her homestead interest.

PART XII
CONSTRUCTION AND MECHANICS' LIENS

Ready Cable, Inc.* v. *RJP Southern Comfort Homes, Inc., 295 S.W.3d 763 (Tex.App.-Austin 2009, no pet.). Ready Cable sent its lien affidavit to the Williamson County Clerk for filing. Attached to the affidavit was a document entitled "EXHIBIT 'A' to Condominium Declaration: FIELD NOTES," which contained a legal description of the property sought to be charged with the lien. The phrase "Unofficial Document" appears across the face of the document.

A week later, Ready Cable got a written notice for the Williamson County Clerk stating that it could not accept an unofficial document as an attachment. A few weeks later, Ready Cable filed a modified affidavit.

RJP filed suit against Ready Cable seeking removal of the lien, claiming it was not timely filed. The district court granted a summary judgment and removed the lien.

To perfect its lien, Ready Cable was required to sign an affidavit with specified contents (Property Code § 53.054), timely file the affidavit with the county clerk (Property Code § 53.052(a)), and provide notice of the filed affidavit to the property owner and the original contractor (Property Code § 53.055). Also, Ready Cable was required to have provided prior notice of the unpaid balance to the property owner and the original contractor(Property Code § 53.056). It is well settled that the mechanic's and materialman's lien statutes are to be liberally construed for the purpose of protecting laborers and materialmen. Generally, for purposes of perfecting the lien, only substantial compliance is required in order to fulfill the statutory requirements.

The single issue in this appeal is whether Ready Cable's affidavit delivered to the Williamson County Clerk should be deemed timely filed. The question, then, is whether the August 15 affidavit fails to comply with the timing requirements of property code section 53.052(a) when the only reason for such failure is the county clerk's rejecting its filing.

The court held that, in this case, it does not. The county clerk was required to record the affidavit. RJP does not direct us to-and the court couldn’t find-any authority that would authorize the county clerk to refuse to file or record an affidavit of a materialman's lien based on an attachment bearing the property description also bearing the notation “unofficial document.” There is no evidence that the property was incorrectly described, that the attachment failed to provide proper notice of which property was at issue, or that RJP would have been misled to its prejudice if the county clerk had accepted the affidavit with the attachment for filing. Thus, the county clerk's basis for rejecting Ready Cable's August 15 filing was not a defect that would cause the lien affidavit to fail to satisfy the substantial compliance requirement of Property Code § 53.054. The county clerk was not authorized to impose additional requirements for filing or recording a legal paper such as the removal of irrelevant notations. Filing the affidavit was a ministerial act, and the county clerk's refusal to accept the lien affidavit was improper.

Having found no authority for the county clerk's rejection of Ready Cable's filing, the court concluded that the clerk's failure to accept for filing Ready Cable's lien affidavit when it was timely delivered for filing did not result in invalidation of the lien claim for lack of timeliness. Property Code § 53.052(c) says “Failure of the county clerk to properly record or index a filed affidavit does not invalidate the lien.” Moreover, RJP does not dispute its having received actual notice of the August 15 filing of the lien affidavit, or allege that it was otherwise misled to its prejudice.

Private Mini Storage Realty, L.P.* v. *Larry F. Smith, Inc., 304 S.W.3d 854 (Tex.App.-Dallas 2010, no pet.). Raus was the general contractor for a storage facility. It hired Smith as the concrete subcontractor. Smith submitted invoices for close to $600,000. Pursuant to its contract with Smith, Raus withheld retainage. Raus also did not pay any part of an $18,000 invoice. Smith sent a funds-trapping notice to the owner for payment of the retainage and the unpaid work. A month later, Smith notified the owner that it had filed a mechanics’ lien affidavit for the unpaid work. The owner had retained 10% of Raus’s contract amount, by never paid any of it to Smith. Smith filed suit.

Subchapter E of the property code requires an owner to retain ten percent of the funds to be paid to a general contractor to secure payment to "artisans and mechanics" who were not paid by the general contractor. When the time expires for filing a claim on these retained funds, the owner pays the retainage to the general contractor. Subchapter D permits an owner to retain additional amounts due to the contractor upon the request of a subcontractor when the contractor fails to pay the subcontractor as required during the performance of the contract. Under section 53.084, the owner will be personally liable for any amounts paid to the contractor after receiving the proper notice under the statute if the subcontractor's lien has been secured and its claim reduced to judgment.

Section 53.083 permits a subcontractor to demand payment from an owner who was authorized to retain funds under subchapter D. The subcontractor must send a copy of the demand to the general contractor, who then has thirty days to notify the owner of the general contractor's intent to dispute the subcontractor's claim. If the general contractor does not give timely notice of intent to dispute the claim, he is considered to have assented to the demand and the owner must pay the claim. Smith claims the owner was required to pay it because Raus failed to notify the owner within the thirty day period. He was granted summary judgment.

The court held that many of the owner's arguments against granting summary judgment were not timely. The court also held that there was sufficient evidence supporting summary judgment.

In re *Classic Openings, Inc.*, 318 S.W.3d 428 (Tex.App.-Dallas 2010, no pet.). This mandamus proceeding involves a suit brought by Gary Sayre against Classic Openings, Inc. for breach of contract, deceptive trade practices, and breach of express and implied warranties after Classic Openings replaced windows and doors in Sayre's residence. Classic Openings claims the trial court abused its discretion by failing to abate the case under the Residential Construction Liability Act, Property Code § 27.004(d). The Dallas Court of Appeals conditionally grant the writ.

Sayre contends the RCLA does not apply to his claims because he is not seeking damages under that act, However, Property Code § 27.002(a)(1) provides that the RCLA applies to "any action to recover damages or other relief arising from a construction defect, except a claim for personal injury, survival, or wrongful death or for damage to goods." A "construction defect" includes "an alteration of or repair or addition to an existing residence ... on which a person has a complaint against a contractor." Property Code § 27.001(4).

Sayre alleged Classic Openings overcharged for improper windows and the incorrect configuration of three doors. These allegations are a complaint against a contractor regarding the alteration or repair of an existing residence. Thus, Sayre's allegations fall within the RCLA. Consequently, Sayre was required to give Classic Openings written notice of the defect sixty days before filing suit. While Sayre did give the required notice under the DTPA, that notice does not suffice to provide Classic Openings with the specific notice required under the RCLA.

J.P. Morgan Chase Bank, N.A.* v. *Texas Contract Carpet, Inc., 302 S.W.3d 515 (Tex.App.-Austin 2009, no pet.). The Bank was the lender, Agape was the owner, AMHC was the contractor, and there were several subcontractors. The Bank agreed to lend money for construction of a low-income apartment complex. The funds became available as a result of a loan agreement between Agape and Capital Area Housing Finance Corporation, a public, non-profit housing finance corporation authorized under the Housing Finance Corporations Act to issue tax-exempt bonds for the purpose of loaning the proceeds of the bonds to other entities for the development of low-income housing projects. In the loan agreement between Capital Area and Agape, Capital Area agreed to loan the proceeds of the sale of certain bonds to Agape in order to finance costs of the acquisition, construction, and equipping of the project. Capital Area assigned its rights under the loan agreement to the Bank, who became trustee of the funds pursuant to a trust indenture between Capital Area and the Bank. Also, in the construction contract between the Bank and Agape, the Bank agreed to issue a letter of credit in favor of the owner of the bonds.

The Bank initially funded a large portion of the loan into an account from which it would draw funds to pay Agape for construction costs. Funds were released when Agape satisfied certain conditions. The Bank could refuse to fund a draw request if any mechanics' liens were threatened or filed, unless Agape bonded around the liens. The Bank also kept the retainage and was directed to disburse it 31 days after completion and the satisfaction of certain additional conditions.

Agape hired AMHC as the contractor. AMHC entered into a contract with American Multi to act as prime contractor, and American Multi entered into the subcontracts. American Multi and AMHC were related entities.

Construction began in early 2001 and was completed in January or February 2002. During that time, Agape submitted twelve draw requests to the Bank, each of which was approved. Each of the draw requests was submitted to multiple entities before submission to the Bank, and by the time each request reached the Bank, it included various representations made by AMHC and Agape. Those representations included statements that all bills were paid and there were no liens.

After funding the twelfth draw, the Bank became aware that several of the subcontractors had not been paid for their work and had filed affidavits claiming liens on the property. At that point, Agape's construction consultant advised the Bank and Agape that they should not release any further funds until they received proof that the subcontractors had been paid and had released their liens. In February 2002, AMHC submitted a thirteenth draw request, this time bypassing intermediaries and submitting it directly to the Bank. Thus, the draw request did not contain the usual representations from Agape. The Bank did not release funds and notified Agape that it was in default under the loan agreement. The Bank also told Agape that the remaining funds in the construction account were insufficient to pay project costs and demanded that Agape promptly pay all of the remaining costs of the project, including all amounts necessary to remove the subcontractors' liens on the property.

The bondholder also demanded that the Bank draw on the letter of credit to pay interest on the bonds. The Bank paid the letter of credit and took possession of the bonds.

Everybody sued everybody else and many of the claims were settled. On appeal, the only issues were whether the Bank (i) was Agape's agent and, as such, breached its fiduciary duty by failing to withhold retainage in the construction account, (ii) misapplied trust funds under the Texas Trust Fund Act; (3) was negligent and grossly negligent in failing to withhold retainage in the construction account; (4) violated a fiduciary duty to the subcontractors; and (5) converted the subcontractors' funds.

The Bank contends that the trial court erred in determining that the Bank acted as Agape's agent with regard to the statutory duty to retain ten percent of the contract price of the project. Property Code § 53.101 imposes a duty to retain funds on owner of project or owner's agent, trustee, or receiver. The Bank argues that section 53.101 imposes the duty to retain funds on Agape as the owner of the project and that there is no evidence that Agape delegated the duty to the Bank as an agent or that the Bank accepted any such delegation.

To be an agent, a person must (1) act for and on behalf of another person and (2) be subject to that person's control. Both elements are required. The absence of one will prevent the conclusion that an agency relationship exists. The party claiming agency must prove that the principal has both the right to assign the agent's task and the right to control the means and details by which the agent will accomplish the task.

The subcontractors concede that Agape, as the owner of the project, would ordinarily be responsible for retaining funds in the construction account pursuant to the statute. However, the subcontractors argue that the construction agreement created an agency relationship between Agape and the Bank. As support for their position, the subcontractors point to the construction agreement that allegedly demonstrate the Bank's acceptance of Agape's statutory duty to withhold retainage. The agreement states that the Bank "shall make all decisions in connection with the day-to-day administration of the Construction Matters." Construction Matters is defined to include approval of construction draws, inspection of the project, and holding and disbursing retainage. There was also testimony from a loan officer who said it was her job to make sure the Bank complied with Texas laws regarding retainage.

The court did not find there was an agency, despite these provisions. Although there is evidence of the first requirement of an agency relationship, that the Bank agreed to act on behalf of Agape in withholding retainage, there is no evidence of the second requirement, that the Bank was subject to Agape's control in accomplishing the task. To the contrary, considerable evidence supports a conclusion that it was the Bank, not Agape, that maintained sole control of the funds in the construction account and sole control over whether to release retainage from the account. Given that there is no evidence of the vital fact that the Bank was subject to Agape's control, the court concluded that the evidence is legally insufficient to support the trial court's finding that the Bank served as Agape's agent with regard to the duty to withhold retainage.

The Bank also asserted that the trial court erred in applying the Texas Construction Trust Fund Act (Property Code § 162.001) to it. The Bank argues that (1) whether the funds were "trust funds" under the Act is irrelevant because the Bank is exempt from the Act's requirements, and (2) even if the Bank were not exempt, the funds in the construction account were undisbursed bond proceeds held for the benefit of the bondholder and thus could not be considered "trust funds" under the Act.

The Act states that it does not apply to a bank, savings and loan, or other lender. The Bank, of course, is a bank, and was the entity lending money. Thus, the plain wording of the Act exempts the Bank from its application.

The subcontractors argue that the court should not follow the plain language of the provision because doing so would lead to an absurd result. According to the subcontractors, a plain-language interpretation of the provision would lead to the allegedly absurd result of allowing a bank to take on the attributes of an owner in a construction project while also permitting the bank to avoid all the responsibilities imposed upon an owner under the Act. The court disagreed. Although the specific circumstances of this case may have led to an undesirable result for the subcontractors, the circumstances do not create an absurd result out of the plain-language of the statute. At most, they demonstrate a gap or oversight in the statute that, if true, must be corrected by the legislature, not the courts. Further, although the subcontractors may consider the statute unfair under the circumstances of this case, whether a statute is fair or makes the most sense are questions for the legislature to consider, not the courts.

In its third issue, the Bank contends that the trial court erred in issuing a finding of fact that the Bank was negligent in failing to exercise reasonable care in disbursing retainage funds from the construction loan account, prior to completion of the project. To prove negligence, a party must establish: (1) the existence of a legal duty; (2) a breach of that duty; and (3) damages proximately caused by the breach. Duty is the threshold inquiry in a negligence case. In the absence of a duty, there can be no negligence. A duty can be assumed by contract or imposed by law.

The subcontractors allege the duty was established in the loan agreement. Because the subcontractors were not parties to the contract, they bring their claim as third parties. A third party may recover on a contract made between other parties only if the contracting parties: (1) intended to secure a benefit to the third party, and (2) entered into the contract directly for the third party's benefit. An agreement must clearly and fully express an intent to confer a direct benefit on the third party. The Bank contends that the subcontractors cannot be third-party beneficiaries of the construction agreement because the plain language of the agreement specifically disavows the existence of third-party beneficiaries. The court agreed, saying that the express disavowal of third-party benefits defeats the subcontractors' claims.

The subcontractors final attempt was to ask the court to impose a new common law on the Bank in its administration of construction loan agreements. In deciding whether to impose a new common-law duty, courts must first consider the risk, foreseeability, and likelihood of injury, and then weigh those factors against the social utility of the actor's conduct, the magnitude of the burden of guarding against the in-jury, and the consequences of placing the burden on the defendant. The most important factor to consider is the foreseeability of the risk. The test for foreseeability is what a party should, under the circumstances, reasonably anticipate as a consequence of its conduct.

In addition to the balancing test, courts must also consider (1) whether one party had superior knowledge of the risk; (2) whether one party had a right to control the actor who caused the harm; (3) whether societal changes require recognition of new duties; (4) whether the creation of a new duty would be in conflict with existing statutory law; and (5) whether there are countervailing concerns that would support or hinder the recognition of a new duty.

The court first addressed the initial considerations: the risk, foreseeability, and likelihood of injury. Here, the subcontractors' injury was that they were not paid for some of their work on the project. Although the Bank could have anticipated this injury, it could have done so only in the same way that every party to every construction contract could foresee the possibility that a contractor, for whatever reason, may not pay subcontractors for their work. In fact, the danger of subcontractors remaining unpaid in construction projects is so well known that the Texas legislature recognized and responded to it by enacting the Trust Fund Act, which was previously discussed in this opinion.

The court then looked the second set of considerations: the social utility of the Bank's conduct, the magnitude of the burden of guarding against the injury, and the consequences of placing the burden on the Bank. The court found significant social utility in the Bank's general conduct of lending money to a non-profit organization for the construction of a low-income apartment complex. Regarding the second and third considerations, the court found the magnitude of the burden of protecting subcontractors and the consequences of placing that burden on lenders to be significant. Lenders currently do not carry such a burden unless they explicitly agree to do so. Thus, they are currently able to assess their liability at the time of entering into the contract. The more they can limit their liability, the more freely they can lend money for projects such as the one here. If courts were to impose a duty on them to withhold retainage and ensure that subcontractors were paid, they would be exposing them to a considerable number of costly lawsuits brought by parties that they may not even be able to identify at the time of entering into the contract. Also, placing the burden on lenders would interfere with their freedom to contract as they see fit, which is a strongly favored public policy in Texas.

The court addressed the final set of considerations: whether one party had superior knowledge of the risk; whether one party had a right to control the actor who caused the harm; whether societal changes require recognition of new duties; whether the creation of a new duty would be in conflict with existing statutory law; and whether there are countervailing concerns that would support or hinder the recognition of a new duty. Regarding the first consideration, whether the Bank had superior knowledge of the risk, the court first noted that the risk of harm in this case was allegedly created by the fact that the Bank was in control of the construction account but was not under a statutory obligation to withhold retainage in the account. Because the subcontractors did not know that the Bank had control over the construction account, it did have superior knowledge of the risk associated with the arrangement between the Bank and Agape. With respect to the second consideration, whether the subcontractors had a right to control the Bank, there is no evidence in the record that the subcontractors had a right to exert control over the Bank.

Although the first two considerations weigh against the Bank, the remaining three do not. For instance, there are no societal changes implicated in this case that would require our recognition of a new duty. In addition, the creation of a new duty would be in conflict with existing statutory law.

The court concluded that the factors weighing against the imposition of a new duty outweigh those in favor.

PART XIII
CONDEMNATION

State of Texas* v. *Brownlow, 319 S.W.3d 649, 53 Tex. Sup. Ct. J. 1100 (Tex. 2010). The State sought to condemn Brownlow's 12.146 acres of land for the opening, construction and maintenance of a floodplain mitigation pond. The parties eventually settled the condemnation suit with an Agreed Judgment for an easement on the property "for the purpose of opening, constructing, and maintaining a detention/mitigation facility in, over, and across the tract of land for the purpose of making additions to, improvements on, and repairs to said detention facility or an part thereof." A recital in the judgment noted that the State sought the property "for highway purposes."

The State then began to remove a whole lot of dirt and use it in another section of the Highway 35 widening project. The Brownlows protested that the excavated soil was not part of the Agreed Judgment. They contend that as the fee simple owners of the land the soil belongs to them. They claimed that the State unconstitutionally took the excavated dirt, entitling them to compensation. The State filed a plea to the jurisdiction. It argued that the Agreed Judgment gave it the right to use the dirt for highway construction purposes, it was within its rights to remove and use the dirt, and that it was immune from suit on the basis of sovereign immunity. The Court of Appeals held that the dirt belonged to the Brownlows and that they could maintain their takings suit.

When the State acquires fee simple title to land through a condemnation proceeding, it acquires the land as well as appurtenances to and buildings on the land. However, where only an easement is acquired, the owner retains title to the land and all that is ordinarily considered part of the land. If only an easement is acquired, it is the State's burden to assure that the document granting the easement expressly addresses any special arrangements or provisions in the easement taking. The State's burden flows from the principle that an easement's express terms, interpreted according to their generally accepted meaning delineate the purposes for which the easement holder may use the property. An easement, unlike a possessory interest in land, is a nonpossessory interest that authorizes its holder to use the property for only particular purposes. An easement does not transfer rights by implication except what is reasonably necessary to fairly enjoy the rights expressly granted. If the rule were otherwise, easements would effectively become possessory, rather than nonpossessory, land interests. The emphasis placed on an easement's express terms serves the important public policy of promoting certainty in land transactions.

The State argued that the Brownlows failed to state a takings claim because the Agreed Judgment gave the State the right to use the dirt for highway construction purposes and the Brownlows did not have a compensable interest in the dirt the State removed. To recover under the constitutional takings clause, one must first demonstrate an ownership interest in the property taken. The heart of the State's argument is that the Agreed Judgment expressly or implicitly gives it the right to remove the dirt excavated from the Brownlows' land and use it in highway construction, or that, in any event, use of the dirt is reasonably necessary for the State to fully enjoy the easement rights it was expressly granted. The Agreed Judgment, however, sets out the purposes of the easement as "opening, constructing, and maintaining" a mitigation pond; it does not grant the State rights to use the Brownlows' property for other purposes. Using the dirt at a site remote from the Brownlows' property to construct a highway does not constitute a use related to either (1) opening, (2) constructing, or (3) maintaining a mitigation pond on the Brownlows' property. The purpose of a mitigation pond is to hold water.

Nor does a recital in the Agreed Judgment that the State first sought the Brownlows' property for "highway purposes" expressly or implicitly grant the State a right to use the dirt from the easement for highway construction. It was incumbent on the State to be sure the property rights it needed were acquired and encompassed within the language of the Agreed Judgment.

The Agreed Judgment mentions "highway purposes" a single time, and that is in the recitals. In contrast, at five different points—twice in the granting clauses and three times in the recitals—the Agreed Judgement announces that the State is acquiring the easement for the purpose of "opening, constructing, and maintaining" a detention facility. Express decretal language in a judgment controls over recitals. Therefore, a single statement in the recitals that the State "sought and prayed for the acquisition, for highway purposes" is not clear enough to carry the State's burden. It does not unambiguously indicate that the State has the right to use the Brownlows' property for purposes unrelated to "opening, constructing, or maintaining" the mitigation pond generally, or more specifically, as highway construction material.

The State argues that under longstanding precedent, it has the right to use all materials located in the easement for the purpose of constructing, repairing, or improving roadways. It argues this right tacitly inures to every condemned easement. But, while courts have held that the cities could use materials removed from the streets during the grading process to construct and grade other roads, they were not considering materials removed from easements other than easements for city streets. In contrast, the soil removed from the Brownlows' property was not removed as part of the grading process nor was the property in the highway right of way. The materials could be removed only for the specific purpose of opening, constructing, and maintaining the mitigation pond.

The State also argues that it was entitled to use the dirt to construct a highway embankment because doing so was necessary to fully enjoy its easement. The court agreed that an unlimited easement carries with it all rights as are reasonably necessary for enjoyment consistent with its intended use. But the rights reasonably necessary for full enjoyment of an easement are limited. They do not encompass rights foreign to the purpose for which the easement is granted. The servient estate holder retains these rights.

Alewine* v. *City of Houston, 309 S.W.3d 771 (Tex.App.-Houston [14th Dist.] 2010, pet. pending). Homeowners in a subdivision close to Bush Intercontinental Airport sued the City because construction of a new runway resulted in increased airplane flights over a corner of their neighborhood. The City successfully moved for summary judgment, arguing the homeowners were not entitled to compensation for inverse condemnation or intentional nuisance because they had not shown their property was "taken" by the government. The City argued that (1) the homeowners' complaints do not rise to the level of a constitutional "taking" because their homes remain habitable; (2) no "taking" occurred because the average noise level in the neighborhood does not exceed that approved by the federal government for residential use; and (3) the "community damages rule" bars recovery because all plaintiffs claimed similar injuries. The trial court granted summary judgment without specifying the basis for its ruling.

A government is vested with certain inherent powers commensurate with its status as a sovereign, including the right of "eminent domain" in which private property is taken-in exchange for compensation-and converted for public use. Some "takings" are more conspicuous than others. This case would more appropriately be described as an "inverse condemnation" action, in which an owner claims his property has already been taken-outside of proper condemnation proceedings-without compensation.

To recover compensation for inverse condemnation under Texas Constitution Article I, Section 17, a claimant must plead and prove (1) an intentional governmental act; (2) resulted in a "taking" of his property; (3) for public use. Here, the parties' dispute focuses only on the second prong of this test, that is, the proof necessary to establish a "taking" of property by airplane overflights. To establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land's use and enjoyment. However, the City contends the homeowners must also show the overflights have rendered their homes uninhabitable-that is, unusable for their intended purpose-to prove a constitutional "taking" of property.

In ***City of Austin* v. *Travis County Landfill Co.***, 73 S.W.3d 234 (Tex.2002), the Texas Supreme Court held that, to establish a taking by aircraft overflights, a landowner must show that the flights directly, immediately, and substantially interfere with the land's use and enjoyment. To meet this standard, the landowner must show that the overflight effects directly and immediately impact the land so that the property is no longer usable for its intended purpose. In this case, then, the court held that, to demonstrate a compensable taking-by-overflight under current Texas law, the homeowners were required to prove the overflights directly, immediately, and substantially impacted the land so as to render their property unusable for its intended purpose as a residence.

City of Houston* v. *Mack, 312 S.W.3d 855 (Tex.App.-Houston [1st Dist.] 2009, no pet.). The Macks filed suit against the City on September 30, 2008, alleging that after FEMA approved the new Flood Insurance Rate Maps, its property was within a newly delineated floodway. The Macks contend that, in light of that designation, the City's 2006 amendments to section 19-43(a) of the Code prohibited the issuance of building permits to them for "new construction, additions to existing structures or substantial improvement of any structure" on their property. In addition, the Macks contend that the Code, as it applied until September 1, 2008, prohibited the City Engineer from issuing any building permits for such construction. The Macks allege that during that period of time, the City's ordinance deprived them of the use, benefit, and enjoyment of their property, amounting to a taking without just compensation.

The City's alleged that the Macks failed to exhaust the administrative remedies allowed by the Code. The City further alleged that, because the Macks had not filed an application for a permit, nor had they yet appealed such a denial as allowed by the Code, their claims were not ripe and the trial court lacked jurisdiction to consider their petition. The Macks did not dispute the fact that they did not apply to the City for building or development permits before they filed suit. However, the Macks claimed that, under the plain language of the 2006 ordinance, their intended use for the property was expressly forbidden and the Code allowed no discretion or variances under such circumstances. Therefore, the Macks argued, their application for a permit would have been futile.

Ripeness is an element of subject matter jurisdiction and, as such, is subject to de novo review. A regulatory-takings claim may challenge a land-use restriction on its face or as applied to particular property. A facial challenge is ripe when the restriction is imposed, but an as-applied claim is not ripe until the regulatory authority has made a final decision regarding the application of the regulation to the property.

Ripeness concerns whether, at the time a lawsuit is brought, the facts have developed sufficiently such that an injury has occurred or is likely to occur, rather than being contingent or remote. To establish that a claim is ripe based on an injury that is likely to occur, the plaintiff must demonstrate that the injury is imminent, direct, and immediate, and not merely remote, conjectural, or hypothetical. By focusing on the concreteness of injury, the ripeness doctrine allows a court to avoid premature adjudication and issuance of advisory opinions.

The City contends that the Macks have not alleged that they suffered a "concrete injury." However, in their petition, the Macks allege they have been deprived of the "use benefit and enjoyment of the Property" and that the property's value has been drastically reduced because "after the date of the amendment, Plaintiffs could neither construct any improvement in or upon the Property nor sell the Property to anyone who desired to construct any improvements in or upon the Property." Moreover, the Macks allege that they had entered into a listing agreement with a local real estate broker in furtherance of their intention of selling the property for development.

The court held that record does not support the City's contention. In addition to viewing the Macks' allegations in their favor, the court must take as true all evidence favorable to the Macks and indulge every reasonable inference and resolve any doubts in their favor. The Macks alleged that their property was in a Houston floodway. They also alleged that the 2006 amendments to the City Code deprived them of the "use, benefit, and enjoyment" of the property because they could not sell it to anyone who desired "to construct any improvements in or upon the property." Considering these allegations, the court concluded that the Macks have alleged a "concrete injury."

City of San Antonio* v. *De Miguel, 311 S.W.3d 22, (Tex.App.- San Antonio 2009, no pet.). The De Miguels' lawsuit alleged in their inverse condemnation and nuisance lawsuit that the City constructed a drainage facility near their residence that diverted surface water onto their property during rainfall.

Nuisance liability arises only when governmental immunity is clearly and unambiguously waived. In some cases, a city may be held liable for a non-negligent nuisance-that is, one that rises to the level of a constitutional taking. In others, the Texas Tort Claims Act may waive immunity from nuisance claims (Civil Practice & Remedies Code § 101.021). Here, the plaintiffs do not assert there exists any statutory waiver of immunity and the court found none; therefore, it concluded there is no statutory waiver. Consequently, the City can only be liable for a non-negligent nuisance rising to the level of a constitutional taking.

To properly assert a non-negligent nuisance claim against a governmental entity, a party must plead and show the following elements: (1) the governmental entity intentionally performed an act in the exercise of its lawful authority; (2) that resulted in the taking, damaging, or destruction of the party's property; (3) for public use. Here, the City's plea to the jurisdiction challenged only the first element; therefore, the court limited its analysis to whether a fact issue exists on the question of whether the City intentionally performed an act that rises to the level of a taking.

The City argues the plaintiffs did not plead or show the City knew a specific act was causing identifiable harm or knew that specific property damage was substantially certain to result from an authorized government action. A person's property may be taken, damaged or destroyed if an injury results from either the construction of public works or their subsequent maintenance and operation. However, a city has no duty to provide drainage or facilities adequate for all floods that may occur or reasonably be anticipated as long as the city does nothing to increase the flow of surface water across the land in question. The existence of such liability would tend to deter the city from providing even partial relief from flooding. In determining the extent of the protection to be provided, a city must weigh the needs of the entire community and allocate available resources so as best to serve the interests of all its citizens. Here, the De Miguels point to no new action taken by the City after the conclusion of the 1989 lawsuit that resulted in an increased flow of surface water across their property.

State of Texas* v. *Bristol, 293 S.W.3d 170, 52 Tex. Sup. Ct. J. 751 (Tex. 2009). When a taking occurs, all damages associated with the taking are not necessarily compensable, and diminished value is compensable only when it derives from a constitutionally cognizable injury. Remainder property damages are generally calculated by the difference between the market value of the remainder property immediately before and after the condemnation, considering the nature of any improvements and the use of the land taken. While various methods can be used to determine the market value of a remainder property, the income approach is especially appropriate when, as with the hotel here, property would be valued on the open market according to the amount of income it already generates. The income approach consists of estimating the net operating income stream of a property and applying a capitalization rate to determine the property's present value.

Lost profits or injury to a business are not compensable over and above the value of the land taken and the diminution in the value of the remainder tract. Further, to the extent that the taking affects access to the remainder property, a partial, temporary disruption of access is not sufficiently material and substantial to constitute a compensable taking. In addition, disruption of use due to construction activities of the condemning authority during a roadway expansion project are not compensable.

PART XIV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Webb* v. *Voga, 316 S.W.3d 809 (Tex.App.-Dallas 2010, no pet.). Kathy Webb filed suit against the POA and other property owners seeking a declaratory judgment that the POA and owners had abandoned and waived the restrictive covenants. The evidence showed that Webb did not own a lot in the restricted subdivision. Record title to the lot was in her husband's name.

Subject matter jurisdiction is an issue that may be raised for the first time on appeal and may not be waived by the parties. Standing is a component of subject matter jurisdiction; therefore, standing cannot be waived and may be raised for the first time on appeal. Standing deals with whether a litigant is the proper person to bring a lawsuit. To establish standing, one must show a justiciable interest by alleging an actual or imminent threat of injury peculiar to one's circumstances and not suffered by the public generally. As to each of Webb's causes of action against the Association and her cause of action against the Lot Owners, Webb's ownership of property in the subdivision was critical to her standing to maintain her claims.

Although Webb claimed ownership, the evidence showed that the property had been deeded to her husband and her name did not appear in record title. Webb's contention that she had standing in a representative capacity for the record title owner is unfounded. Webb's suits as consolidated were brought in her individual capacity and not as a representative or fiduciary of the record title owner, and there is no pleading or evidence in the record to support a contention that Webb brought claims other than on her own behalf. Further, Webb acknowledges Robert Webb as the record owner of the property at all relevant times.

The evidence shows Webb was not a property owner. The court concluded that Webb lacked standing for her causes of action against the Association and the lot owners and, therefore, the trial court lacked subject matter jurisdiction over those causes of action.

Tellez* v. *City of Socorro, 296 S.W.3d 645 (Tex.App.-El Paso 2009, pet. denied). Under the common law, a non-conforming use of land or buildings is a use that existed legally when the zoning restriction became effective and has continued to exist. When determining whether there is a legal non-conforming use in a particular case, the proper focus is on the legislative enactments of the regulation body.

The City of Socorro's interpretation of non-conforming use is consistent with the common law. Its ordinance provides that non-conforming use means the use of land or a building, or a portion thereof, which does not conform with the current land use regulations of the zoning district in which it is located. A legal non-conforming use which existed prior to the enactment of a regulation is permitted to continue but cannot be expanded or enlarged. Further, the non-conforming use be continuous. The ordinance provides that if the non-conforming use ceases for any reason for more than thirty days or six consecutive months or eighteen months during a three year period (depending on the value of the structure), any subsequent use must conform to the existing regulations for the property.

Even if the evidence conclusively established that the Tellez property was being used as a salvage yard when the zoning ordinance was enacted, there is conflicting evidence whether the property was continuously used as a junkyard after that time as required to maintain the non-conforming use status. The court below specifically found that the 1991 post-enactment aerial photograph admitted into evidence showed the property was vacant. Consistent with this evidence, the property was listed on the appraisal district's records as vacant residential. Because there is no evidence of the replacement cost of the small cinder-block structure located on the property, it is unclear which vacancy time period would apply. However, there is evidence from which the Board of Adjustment could have found that the property was vacant for more than six months, and therefore, it could have concluded that the non-conforming use status had been lost under either subsection.

Milestone Potranco Development, Ltd.* v. *City of San Antonio, 298 S.W.3d 242 (Tex.App.-San Antonio 2009). The City adopted a Tree Ordinance pursuant to the Local Government Code platting provisions. By its terms, the Tree Ordinance applied to the City's extra-territorial jurisdiction. Milestone argues the Tree Ordinance cannot be enforced in the City's ETJ because: (1) the Tree Ordinance is not a "rule governing plats and subdivisions of land" and, therefore, cannot be an ordinance adopted under Local Government Code § 212.002; (2) the Tree Ordinance is overly broad in its application; or (3) the Tree Ordinance regulates the use of property which the City is prohibited from regulating in the City's ETJ by Local Government Code § 212.003(a)(1).

Milestone asserts the Tree Ordinance cannot be categorized as a rule governing plats and subdivisions because tree preservation is not one of the purposes for requiring municipal approval of plats and subdivisions. Milestone contends platting and subdivision ordinances are limited to those ordinances that regulate "basic infrastructure." Based on its belief that the Tree Ordinance is a purely aesthetic regulatory scheme that does not regulate basic infrastructure, Milestone argues that the Tree Ordinance is not a rule governing plats and subdivisions of land.

The court disagreed. A municipality is authorized to adopt as rules that "promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality." Moreover, the purpose of platting and subdivision regulations is to ensure that subdivisions are safely constructed and to promote the orderly development of the community. Platting ensures that adequate provisions have been made for streets, alleys, parks and other facilities indispensable to the particular community affected. In this case, the Tree Ordinance contains a statement of purpose explaining the objectives or purposes the ordinance is intended to accomplish. The court found that the listed purposes offer more than simply an aesthetic regulation. Instead, the Tree Ordinance was intended to, and does, regulate tree preservation to promote the health of the municipality and the orderly and healthful development of the community. Therefore, it concluded that the Tree Ordinance is a rule "governing plats and subdivisions of land" that the City was authorized to adopt under Local Government Code § 212.002.

In the alternative, Milestone claims that even if the Tree Ordinance is a rule "governing plats and subdivisions of land," the Tree Ordinance is overly broad because it contains provisions unrelated to the activities of platting and subdividing land. Milestone asserts the Tree Ordinance applies not only to those wishing to plat and subdivide property but also to every person who simply wants to reduce the number of trees on his or her property. To support this contention, Milestone quotes language from the Tree Ordinance that states the Tree Ordinance "regulates all activities that result or may result in the removal of protected or heritage trees." The court disagreed and found that the Tree Ordinance does not extend as broadly as Milestone contends.

The Tree Ordinance itself also contains exceptions demonstrating the City's intent that the ordinance's application is limited to subdivisions or similar land development. For example, the Tree Ordinance does not apply to "[t]rees located on property on which construction of single-family, two-family or three-family residential dwelling units has been completed." Therefore, the Tree Ordinance does not purport to regulate property on which the construction of a home is complete.

When the City amended its development code to include the Tree Ordinance, the caption of the amendment referred to the Tree Ordinance as a "subdivision regulation." The memorandum arranging the public hearing on the Tree Ordinance also described the ordinance as a regulation for the preservation of trees in conjunction with commercial and residential development activities.

Because the Tree Ordinance was properly adopted pursuant to Local Government Code §212.002, the City may extend the Tree Ordinance to the City's ETJ under Local Government Code § 212.003 of the Code unless one of its exceptions apply. Milestone argues the Tree Ordinance should be treated as a prohibited "land use" regulation under subsection 212.003(a)(1), which contains an exception that prohibits a municipality from regulating, "the use of any building or property for business, industrial, residential, or other purpose."

The court held that the distinctions made in the case law between zoning or use ordinances and platting or subdivision regulations reveals that the Tree Ordinance does not regulate the "use" of property as that term is used in section 212.003 of the Code. Zoning contemplates the prohibition of certain physical uses of land and allows a municipality to create districts where land uses are limited or restricted to specific enumerated purposes. Planning or platting, on the other hand, contemplates adequate provision for orderly growth and development. In this case, the Tree Ordinance does not regulate the physical use of the land or the specific purpose for which it is used but regulates the manner in which trees must be preserved in developing the land for any use or purpose.

Letkeman* v. *Reyes, 299 S.W.3d 482 (Tex.App.-Amarillo 2009, no pet.). This case involves restrictive covenants as they relate to a house being moved into the subdivision. The house was originally built some years ago and subsequently acquired by the Letkemans. They had the house cut in half, moved into the subdivision, on a lot that they intended to buy. Before completing the process, they were told by one or more home owners in the development that their efforts violated several restrictive covenants. Despite hearing these complaints, they continued their efforts. The homeowners sued and the trial court enjoined the Letkemans from allowing the structure to remain on the lot and gave them 60 days to remove it.

The Letkemans appealed. Their first issue was whether the house was "pre-fabricated" and therefore prohibited by the restrictions. To the Letkemans, the word encompassed only structures built in a factory and then moved in sections or by wall panels onto a site where it was then constructed or assembled into a house.

As written in the covenants, the word in question contains the root "fabricated" and prefix "pre." he definitions assigned to the latter include "earlier than," "prior to," "before," "in advance," and "beforehand" to name a few of the most common. In turn, "fabricate" includes such meanings as to "invent," "create," "construct," "manufacture," "to construct from diverse and usually standardized parts," or to "make by art or skill and labor," and "make by assembling parts or sections." Combining this root and prefix, therefore, gives us a word meaning "to fabricate or construct beforehand," "to manufacture in standardized parts or sections ready for quick assembly and erection ...," or to "fabricate the parts of [as a house] at a factory so that construction consists mainly of assembling and uniting standardized parts." While those definitions do not mirror each other, they have one aspect in common. Each connotes something that is already or previously made (whether made as a whole or in parts for later assembly) as opposed to something that is erected from scratch.

In their next issue, the Letkemans claimed the trial court abused its discretion by enjoining them to move the house from the subdivision. This was purportedly so because their opponents failed to prove a substantial violation of the restrictive covenants and the equities did not favor such relief.

Whether to grant a permanent injunction lies within the trial court's discretion. Generally, that discretion is abused and subject to reversal when the court acted without reference to guiding rules or principles or misapplied the law to the established facts. Next, injunctive relief ordinarily may issue when the applicant proves the occurrence of a wrongful act giving rise to imminent and irreparable harm for which there is no adequate remedy at law.

These elements change somewhat when the dispute concerns the enforcement of restrictive covenants. There, one need not establish the presence of imminent and irreparable injury. Nor must he prove the presence of actual damages arising from the breach. It is enough simply to prove a distinct or substantial breach.

As concluded in the first issue, the Letkemans breached that restrictive covenant prohibiting them from moving a pre-fabricated structure into the sub-division. Furthermore, the record illustrates that they knew of the restriction and objections raised by their prospective neighbors before completing the project. So too did their efforts continue despite having this knowledge. And though some evidence appears of record indicating that the finished structure could actually enhance neighboring property values, it does not matter that the home owners may suffer no actual damages.

Hourani* v. *Katzen, 305 S.W.3d 239 (Tex.App.-Houston [1st Dist.] 2010, pet. denied). Katzen owned Lot 7 in the subdivision. Lot 7 is surrounded, on the sides and rear, by property owned by others. The lake extends almost completely across the front of Lot 7. Hence, a narrow path of approximately 15 feet, situated between the eastern edge of the lake and the eastern boundary line of the property, provides the only street access to the dry portion of the lot behind the lake. There is also a 15-foot setback line along the eastern boundary line, which comes near to or touches the edge of the lake. Katzen sought to either build a bridge over the edge of the lake or to obtain a variance to pour a driveway. Katzen was granted a special variance from the City of Piney Point Village to build "a driveway/bridge" within 15 feet of the edge of the lake and within the setback zone.

The subdivision's restrictive covenants required the homeowners association's approval for improvements of the type in question. Because the association had forfeited its existence, Katzen submitted his plans to the other owners in the subdivision. Several owners told Katzen they disapproved. Katzen filed suit against the other owners, alleging the restrictions were preventing him from accessing his property.

Hourani, one of the objecting owners, contended that the trial court disregarded the pre-construction approval process mandated by the restrictions. Katzen contended that he was not required to obtain that approval because the homeowners association had forfeited its charter and there was no board in existence to grant or withhold the approval of his plans.

The record shows that the Association "forfeited existence" in 1989 and was not reinstated April 4, 2006. Hence, in 2004, when Katzen sought to begin construction of his driveway, he could not have complied with Section 2.2, which required the written approval of an entity that had forfeited its existence. The court recognized that, notwithstanding the status of the Board, any person entitled to benefit under a restrictive covenant is entitled to enforce it. Hence, here, any one or more of the property owners could have compelled Katzen to seek pre-approval of the Board, had it existed. Nothing in the Restrictions, however, requires Katzen to submit certain plans to, or obtain written approval from, each of the individual property owners in the subdivision, in the absence of a board.

Nash* v. *Peters, 303 S.W.3d 359 (Tex.App.-El Paso 2009, no pet.). Contending Peters violated certain deed restrictions by maintaining junked cars on his property and engaging in improper trash burning, Nash filed suit in the Justice Court. Peters denied the allegations, but a jury determined otherwise and found for Nash, awarding him $3,500 in punitive damages for breach of the restrictive covenant and $1,500 in attorneys' fees. Peters appealed the jury's verdict to the County Court. There, Nash also sought injunctive relief barring Peters' further violation of the deed restrictions. Claiming that the County Court lacked jurisdiction to consider Nash's contentions since Nash was seeking injunctive relief and could not prove any monetary damages from Peters' alleged breach of the deed restrictions, Peters moved for summary judgment on traditional and no-evidence grounds. In addition to responding to Peters' summary-judgment motion, Nash filed a motion to sever all causes of action that were not pled in the Justice Court. He also sought to sever the injunctive actions as the injunctive relief arose from the same core set of facts pled in the Justice Court. The court granted a partial summary judgment to Peters and denied Nash's action for injunctive relief.

Nash's suit for breach of deed restrictions was tried to a jury in the County Court. The jury found that Peters violated the restrictive covenant in question and awarded $20,262.50 in attorneys' fees. In response, Peters moved for judgment in his favor. The court agreed with Peters and rendered judgment that Nash take nothing, since he was not a prevailing party, and ordered Nash to pay the costs of the suit. After Nash's motion for rehearing was denied, he appealed.

Nash contends that the County Court abused its discretion by finding the Justice Court lacked jurisdiction to grant him relief in the deed-enforcement suit, and second, that the County Court erred in failing to grant him attorneys' fees.

The applicable statutes at issue are Section 27.034 of the Government Code, which provides that a justice court has concurrent jurisdiction with district courts in suits to enforce residential subdivisions' deed restrictions, and Section 5.006 of the Property Code, which provides that "[i]n an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees in addition to the party's costs and claim."

Peters argues that only courts of record can enter a declaratory judgment and grant injunctive relief, and since justice courts are not courts of record, the Justice Court lacked jurisdiction to enter a declaratory judgment, and as such, could not have granted Nash the requisite injunctive relief, thus failing to make Nash the prevailing party.

Peters is correct that a justice court is not a court of record. However, a justice court does not lack the ability to enter a declaratory judgment when faced with a suit to determine whether restrictive covenants have been violated. Although the general rule is that only courts of a record may render a declaratory judgment, Section 27.034, a much more specific statute, inherently grants the justice court the ability to enter a declaratory judgment in suits relating to the enforcement of a deed restriction. By specifically granting the justice court jurisdiction in deed-enforcement suits, the justice court, in essence, must declare the parties' rights and status with respect to the enforcement of the deed restrictions. Section 27.034(j) states that a justice court may not grant injunctive relief to a party; however, that does not mean that a justice court could not grant a declaratory judgment.

Further, even if the court were to conclude that the Justice Court lacked the authority to enter a declaratory judgment in this matter, that does not mean that the court lacked jurisdiction to hear the case, much less that Nash, having failed to obtain injunctive relief, was not the prevailing party in his suit to enforce the deed violations. Nor is there any requirement in such suits that the plaintiff must plead monetary damages to be labeled the prevailing party on a finding that a defendant violated a deed restriction. Rather, the plaintiff simply must prove that the defendant intended to do an act which would breach the deed restriction or that the defendant violated the deed restriction.

Here, the Justice Court, by statute, had jurisdiction to hear Nash's suit against Peters for violating the deed restrictions. Having received a verdict that Peters breached the restrictive covenants in question, Nash was the prevailing party in his suit and entitled to recover attorney's fees.

Uptegraph* v. *Sandalwood Civic Club, 312 S.W.3d 918 (Tex.App.-Houston [1st Dist.] 2010, no pet.). The subdivision's deed restrictions are restrictive covenants concerning real property. Restrictive covenants are subject to the general rules of contract construction. As when interpreting any contract, the court's primary duty in construing a restrictive covenant is to ascertain the drafter's intent from the instrument's language. In ascertaining the drafter's intent, the court must examine the covenant as a whole in light of the circumstances present when the covenant was made.

Whether restrictive covenants are ambiguous is a matter of law for the court to decide. A covenant is unambiguous if, after appropriate rules of construction have been applied, the covenant can be given a definite or certain legal meaning. In contrast, if, after appropriate rules of construction have been applied, a covenant is susceptible of more than one reasonable interpretation, the covenant is ambiguous. Mere disagreement over a restrictive covenant's interpretation does not necessarily render the covenant ambiguous.

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

In 1987, the Legislature amended the Texas Property Code to provide that all restrictive covenants contained in instruments governing certain residential developments, regardless of the date on which the covenants were created, must be liberally construed to give effect to their purposes and intent. Property Code §§ 202.002(a) and .003(a).

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

In contrast, other courts of appeals, including the Houston 1st District, have concluded that there is no discernable conflict between the common law and section 202.003(a). Even among the courts that believe that the common law and section 202.003(a) can be reconciled, there exists a split in how to apply section 202.003(a). Some of these courts have simply continued to apply the common-law rule without a precise explanation of how to reconcile it with section 202.003(a). Other courts of appeals have held that the common-law rule applies only when there is an ambiguity concerning the drafter's intent, but to determine if such an ambiguity exists, these courts first apply section 202.003(a)'s liberal-construction mandate.

Some courts of appeals since 1987 have simply continued applying the common-law strict-construction rule without referring to section 202.003(a) at all. Others have applied section 202.003(a)'s liberal-construction standard without referring to the common-law construction principles at all. The Texas Supreme Court has noted, but not yet resolved, the potential conflict between the common law and section 202.003(a).

PART XV
AD VALOREM TAXATION

Woodway Drive LLC* v. *Harris County Appraisal District, 311 S.W.3d 649 (Tex.App.-Houston [14th Dist.] 2010, no pet.). In December 2006, First Reliance sold the parcel to Woodway. Despite the year-end conveyance, First Reliance filed a notice of protest with HCAD protesting the 2007 tax assessment. The protest was denied. First Reliance filed a suit challenging the review board's determination. The following February First Reliance amended its petition to add Woodway as a plaintiff. HCAD filed a plea to the court's jurisdiction, arguing that the trial court lacked jurisdiction because First Reliance was not the owner of the property on January 1, 2007, that only the property owner on that date, Woodway, had the right to protest and appeal, and that Woodway had failed to make a timely protest or appeal. The trial court agreed and dismissed the case.

As a general rule, only a property owner may protest tax liability before an appraisal-review board and seek judicial review in court. Section 42.21(a) of the Property Tax Code requires a party who appeals as provided by Chapter 42 of the Property Tax Code to timely file a petition for review with the district court. Failure to timely file a petition bars any appeal under the chapter. A property owner may designate a lessee or an agent to act on the property owner's behalf for any purpose under the Property Tax Code, including filing a tax protest.

Therefore, to qualify as a "party who appeals" by seeking judicial review of an appraisal-review board's tax determination under section 42.21(a), First Reliance had to be an owner of the property, a designated agent of the owner, or the authorized lessee of the property under the circumstances stated in section 41.413. A party who does not meet one of the above criteria would lack standing under the Property Tax Code. If the litigant lacks standing, the trial court is deprived of subject-matter jurisdiction to consider a suit for judicial review based on an ad valorem tax protest. Here, First Reliance did not own the property as of January 1, 2007. It did not claim rights to protest under the Property Tax Code as either a lessee or an agent. Therefore, First Reliance lacked standing to pursue judicial review as a "party who appeals" under section 42.21(a).

PART XVI

MISCELLANEOUS

State of Texas* v. *$281,420.00 in United States Currency, 2010 WL 1933023 53 Tex. Sup. Ct. J. 741 (Tex. 2010). Johnny Mercado approached Gregorio Huerta, the owner of Greg's Towing, at a race track in Edinburg, Texas, and asked Huerta to tow a disabled Freightliner truck-tractor from Alvin to Mercedes for approximately $2,800. Huerta agreed, drove to Alvin that night to retrieve the truck, and returned to his office in Edinburg. Huerta contacted Mercado to request payment, and they planned for Huerta to follow Mercado with the truck to the final destination in Mercedes. When Mercado did not show up, Huerta became worried that the truck might be stolen and contacted Department of Public Safety Trooper Cesar Torres. Torres agreed to stop by Huerta's office to inspect the truck, but before he got there Mercado arrived and paid for the tow. Huerta informed Torres that it would no longer be necessary for him to come by, but Torres still had concerns about the truck and insisted on inspecting it. Together they devised a plan whereby Huerta would intentionally exceed the speed limit so that Torres would have probable cause to pull him over. When Torres stopped Huerta for speeding in San Juan, Mercado circled the area several times and then drove away.

Huerta gave Torres verbal and written permission to perform a road-side search of the truck cab. Unable to find anything during the field search, Torres asked Huerta to move the truck to the United States Customs point of entry at the International Bridge in Hidalgo for further inspection. There law enforcement officers examined the truck, x-rayed it, and searched it with drug sniffing dogs, but nothing was discovered. At some point, officers examined the center axle of the truck and, with Huerta's assistance, removed the housing around one of the axles. Inside the housing were a number of tightly-wrapped bundles containing $281,420 in United States currency. Torres told Huerta that if no one came forward to claim the money Huerta should get some sort of reward. When no one came forward, Huerta contacted Torres about a reward but was told he would have to speak to Torres's superiors. Huerta did not receive a reward for his role in the seizure.

The Hidalgo County District Attorney's Office commenced separate forfeiture proceedings against the truck and the currency. Approximately one month after the State initiated the proceedings, Huerta filed a petition seeking to intervene as the last person in possession of the currency at the time it was seized. According to Huerta, the currency was not contraband, Mercado and Pulido had abandoned any claims they held to the currency by failing to answer or appear, and Huerta's interest in the currency was superior to that of the State.

The trial court agreed, found the currency to be contraband, and ordered its forfeiture to the Hidalgo County Criminal District Attorney and DPS. A divided court of appeals reversed the trial court's judgment, holding that the currency had not been shown to be contraband and that Huerta was entitled to the entire $281,420.

Huerta first asserts that, as bailee of the Freightliner, he is entitled to the currency because it was abandoned by Mercado while in Huerta's possession. This argument, however, presumes that Huerta established a bailment as to the currency, something Huerta did not do. To create a bailment, there must be (1) delivery of personal property from one person, the bailor, to another, the bailee, for a specific purpose; (2) acceptance of delivery by the bailee; (3) an express or implied contract between the parties that the specific purpose will be realized; and (4) an agreement between the parties that the property will be either returned to the bailor or dealt with according to the bailor's direction.

That a bailment may have existed concerning the Freightliner does not mean that a bailment existed as to the currency. The bailee must, at a minimum, "knowingly [take the] property into possession or control" for there to be a bailment. Huerta admitted at trial that he did not enter into an agreement with Mercado to transport the currency and that he was not aware of the currency before it was discovered in the axle. A bailee's duty of care extends to undisclosed items in a vehicle that are in plain view. But if the undisclosed items are not in plain view, then the bailee's duty of care extends to items that are "reasonably anticipated to be found in the car based on the surrounding circumstances." If undisclosed items are not in plain view and the bailee could not have reasonably anticipated that they would be in the vehicle, the bailment contract does not extend to those items.

Huerta appears to believe that, with or without a bailment, he may claim the cash because it was abandoned while in his possession. However, even if such a claim were viable, one who seeks to acquire abandoned property must take possession of the property with an intent to acquire title. Huerta contends he had possession of the currency before it was seized by law enforcement officers because he was the first to remove it from the axle and the first to discover that the bundles contained currency. The court disagreed. Huerta removed the hub housing while assisting law enforcement and customs officials. By the time the currency was discovered, Huerta had already turned the vehicle over to law enforcement, and it had been subjected to a roadside search, an x-ray, and a sniff search by dogs. The fact that Huerta was the first to remove the currency bundles from the axle does not establish that he was in legal possession of them. Huerta's theory of legal entitlement based upon simple abandonment is unavailing.

Huerta also claims a right to possession of the currency under a common law "treasure trove" or "finders keepers" doctrine. The treasure-trove doctrine applies to valuables found hidden in the ground or other private place, the owner of which is unknown. However, the court has previously declined to recognize the treasure-trove doctrine as part of Texas law. Instead, the court applies the common law distinctions of "lost" and "mislaid" property. Mislaid property includes property which the owner intentionally places where he can again resort to it, and then forgets. It is presumed that the owner or occupier of the premises on which the mislaid property is found has custody of the property. In this case, it is undisputed that Huerta did not own the "premises"-the Freightliner-on which the currency was found. Accordingly, Huerta cannot establish possession to the currency by characterizing it as mislaid property.

Neither can Huerta establish a right to possess the currency as lost property. In contrast to mislaid property, "lost" property includes that which the owner has involuntarily parted with through neglect, carelessness or inadvertence. Unlike mislaid property, the owner or occupier of the premises on which lost property is found does not acquire title to the property. Instead, the finder of lost property retains possession as against the owner of the premises on which the property is found, but not against the lost property's true owner. Where the owner does not part with property as a result of carelessness or neglect, but instead demonstrates a deliberate, conscious and voluntary desire to hide his property in a place where he thought it was safe and secure, and with the intention of returning to claim it at some future date, it is mislaid property. The property in this case was clearly deliberately hidden. The manner in which the money was placed in the axle forecloses any argument that it was lost rather than mislaid.

Del Lago Partners, Inc.* v. *Smith, 307 S.W.3d 762, 53 Tex. Sup. Ct. J. 514 (Tex. 2010). This appeal concerns a bar owner's liability for injuries caused when one patron assaulted another during a closing-time melee involving twenty to forty "very intoxicated" customers. The brawl erupted after ninety minutes of recurrent threats, cursing, and shoving by two rival groups of patrons. The jury heard nine days of conflicting evidence from twenty-one witnesses and found the owner fifty-one percent liable. The court of appeals affirmed the roughly $1.48 million award: "A reasonable person who knew or should have known of the one-and-a-half hours of ongoing 'heated' verbal altercations and shoving matches between intoxicated bar patrons would reasonably foresee the potential for assaultive conduct to occur and take action to make the condition of the premises reasonably safe."

Bradley Smith was injured when a fight broke out among customers at the Grandstand Bar, part of the Del Lago resort on the shores of Lake Conroe. Smith attended a Sigma Chi fraternity reunion at Del Lago from Friday to Sunday, June 8-10, 2001. On Saturday, fraternity members and guests attended a reception and dinner at the conference center. Del Lago provided a cash bar. Around 9:00 p.m., Smith and other fraternity members proceeded to the Grandstand Bar, which was very busy. Later that evening, a group of ten to fifteen mostly male members of a wedding party entered the bar. Fraternity member Toby Morgan testified that soon after the wedding party arrived, there was tension in the air, tension that grew as the night went on. Forsythe testified that within ten to fifteen minutes of the wedding party's arrival, verbal confrontations between the wedding party and some of the forty remaining fraternity members began. These heated confrontations involved cursing, name-calling, and hand gestures.

The animosity between the two groups arose when one of the fraternity members made an offensive comment to the date of one of the wedding-party members. The comment led to men squaring up to each other, with "veins popping out of people's foreheads." Del Lago waitress Elizabeth Sweet observed the exchanges, describing them as "talking ugly" and consisting of cursing, threats, and heated words. Sweet testified that the participants appeared drunk and that these confrontations recurred throughout a ninety-minute period. Morgan observed that the bar patrons were "very intoxicated" that night.

The verbal confrontations led to physical altercations. Witnesses described more than one "pushing" match that evening. At least three witnesses described a particularly heated and intense shoving match that took place a few minutes before the ultimate fracas. Tensions finally came to a head when the bar staff attempted to close the bar. After the crowd refused to leave, the staff went table to table and formed a loose line to funnel the customers toward a single exit and into the conference center lobby. Smith testified that the staff was literally pushing the hostile parties out of the bar through the exit, prompting a free-for-all. He recalled that "it was just a madhouse," with punches, bottles, glasses, and chairs being thrown, and bodies "just surging." In Forsythe's words, "all heck broke loose" with pushing, shoving, kicking, and punching.

Smith was standing against a wall observing the fight when he saw his friend Forsythe shoved to the floor. Smith knew Forsythe had a heart condition and waded into the scrum to remove him. By this time, the fight had moved into the lobby. Before Smith could extri-cate himself, an unknown person grabbed him and placed him in a headlock. Momentum carried Smith and his attacker into a wall, where Smith's face hit a stud. Smith suffered severe injuries including a skull fracture and brain damage. Smith brought a premises-liability claim against Del Lago. After a nine-day trial involving twenty-one witnesses, the jury sifted through the conflicting evidence and found Del Lago and Smith both negligent, allocating fault at 51-49 percent in favor of Smith.

In a premises-liability case, the plaintiff must establish a duty owed to the plaintiff, breach of the duty, and damages proximately caused by the breach. Whether a duty exists is a question of law for the court and turns on a legal analysis balancing a number of factors, including the risk, foreseeability, and likelihood of injury, and the consequences of placing the burden on the defendant. Here, Smith was an invitee, and generally, a property owner owes invitees a duty to use ordinary care to reduce or eliminate an unreasonable risk of harm created by a premises condition about which the property owner knew or should have known.

Generally, a premises owner has no duty to protect invitees from criminal acts by third parties. There is an exception when the owner knows or has reason to know of a risk of harm to invitees that is unreasonable and foreseeable. The nature and character of the premises can be a factor that makes criminal activity more foreseeable. In this case, the fight occurred in a bar at closing time following ninety minutes of heated altercations among intoxicated patrons.

More generally, criminal misconduct is sometimes foreseeable because of immediately preceding conduct. In this case, Del Lago observed-but did nothing to reduce-an hour and a half of verbal and physical hostility in the bar. From the moment the wedding party entered, there was palpable and escalating tension. Del Lago continued to serve drunk rivals who were engaged in repeated and aggressive confrontations. That a fight broke out was no surprise, according to the testimony of three fraternity members. According to Forsythe, everyone could tell serious trouble was brewing. Another fraternity member agreed that the fight was not unexpected but merely "a matter of time." A third characterized the situation as "very, very obvious"; if you did not see it you were "blind or deaf or [didn't] care."

The court held that Del Lago had a duty to protect Smith because Del Lago had actual and direct knowledge that a violent brawl was imminent between drunk, belligerent patrons and had ample time and means to defuse the situation. Del Lago's duty arose not because of prior similar criminal conduct but because it was aware of an unreasonable risk of harm at the bar that very night. When a landowner "has actual or constructive knowledge of any condition on the premises that poses an unreasonable risk of harm to invitees, he has a duty to take whatever action is reasonably prudent" to reduce or eliminate that risk.

The court said that it did not announce a general rule today. It held only, on these facts, that during the ninety minutes of recurrent hostilities at the bar, a duty arose on Del Lago's part to use reasonable care to protect the invitees from imminent assaultive conduct. The duty arose because the likelihood and magnitude of the risk to patrons reached the level of an unreasonable risk of harm, the risk was apparent to the property owner, and the risk arose in circumstances where the property owner had readily available opportunities to reduce it