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CASE LAW UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 434S.W.3d and Supreme Court opinions released through November 14, 2014.

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.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

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PART I
MORTGAGES AND FORECLOSURES

Saravia* v. *Benson, 433 S.W.3d 658 (Tex.App.-Houston [14th Dist.] 2014, no pet.). This case is also discussed under Deeds and Conveyances. Benson sold some property to Halco Waste Container, taking back a note and deed of trust. The deed of trust had a due-on-sale clause. It also contained a clause permitting assumption of the debt with Benson's consent.

Halco leased part of the property to Saravia, then defaulted on the loan. Benson began the foreclosure process. A few months later, Halco sold the property to Gandy, who assumed the debt. Six days later, Gandy filed bankruptcy. While Gandy's bankruptcy case was pending, Benson foreclosed and acquired the property at the foreclosure sale.

Benson and Saravia then entered into an earnest money contract for Saravia to purchase the property. About a month later, Gandy sued Benson for wrongful foreclosure and filed a lis pendens. Notwithstanding that, Benson and Saravia closed. Saravia didn't know about the lawsuit.

When Saravia tried to get a loan, he discovered the lawsuit. He then intervened in the Gandy/Benson lawsuit. The trial court in that suit found that both of Benson's foreclosures were wrongful, the first because it occurred during the bankruptcy automatic stay and the second because of irregularities in the foreclosure notice. In addition, the trial court found that Gandy had tendered payment of the debt.

The court of appeals reviewed the trial court's setting aside of the foreclosure sale "with a presumption that all prerequisites to the sale have been performed." The presumption is not conclusive and may be rebutted.

Tender of the sum owed on a mortgage debt is a condition precedent to the mortgagor's recovery of title from a mortgagee who is in possession and claims title under a void foreclosure sale. A tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt or obligation. A valid and legal tender of money consists of the actual production of the funds. A debtor must relinquish possession of the funds for a sufficient time and under such circumstances as to enable a creditor, without special effort on his part, to acquire possession. The party asserting valid tender bears the burden of proving it.

Gandy proffered no evidence that he made a valid tender before Benson foreclosed on the lien. Gandy instead contended that Benson refused to provide a payoff amount prior to this suit. A refusal to provide a payoff amount is not evidence of Benson's unwillingness to accept actual tender of the amount owed on the note. Because Gandy did not show that he had tendered payment to Benson, the trial court erred in finding that Gandy had defeated the presumption of regularity of the foreclosure and sale.

Gandy also contended, and the trial court found, that the foreclosures were wrongful because Benson did not comport with required notices of foreclosure, and because any foreclosure proceeding was automatically stayed pending his bankruptcy. Saravia first responds that the property was never part of Gandy's bankruptcy estate, in light of the deed of trust's due--on--sale clause, and thus the bankruptcy was no impediment to foreclosure. Due--on--sale clauses are valid and enforceable in Texas. A due--on--sale clause, however, does not impede the transfer of title; rather, it provides that a sale of the property accelerates the debt, so that any outstanding amount is due and owing at the time of the sale.

Under the federal bankruptcy code, an automatic stay bars a creditor from foreclosing on a debtor's property while the debtor's bankruptcy proceeding is pending. A creditor, however, may ask the bankruptcy court to lift the automatic stay by demonstrating that cause exists. While a due--on--sale clause provides a basis for foreclosing a lien when the property is transferred to a bankrupt debtor without tender and a basis for lifting a bankruptcy stay, nothing in this record shows that Benson sought to lift the automatic stay to allow the foreclosure to proceed. Because the bankruptcy court had not lifted the automatic stay, some evidence supports the trial court's finding that Benson's first attempted foreclosure was invalid.

Gandy's objections to the second foreclosure and sale, however, lack merit.

Gandy first disputed the place of sale. Property Code § 51.002(a) provides that the commissioners court shall designate the area at the courthouse where foreclosure sales are to take place and shall record the designation in the real property records of the county. The foreclosure sale must occur in the designated area. The Harris County Commissioners Court has designated the Family Law Center as the area for foreclosure sales. The evidence showed that the foreclosure sale was conducted there.

Second, Gandy disputed that he received proper notice of the second sale. A creditor must give notice of foreclosure by mailing each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt. To establish a violation of the statute, a debtor must show that the mortgage servicer held in its records the most recent address of the debtor and failed to mail a notice by certified mail to that address. The court held that Benson had sent notice to the address of the property, Halco’s last known address.

Gandy argues that he was entitled to notice in his individual capacity because he had assumed from Halco the debt that the lien secured. The loan documents here provided that the loan could be assumed only with Benson’s consent, which was not sought or obtained. Gandy was not entitled to notice in his individual capacity because Benson did not consent to his assumption of the debt.

Third, the trial court found that no evidence indicated that the sale occurred within three hours after the earliest time stated in the notice. Property Code § 51.002(c) provides that the sale must begin at the time stated in the notice of sale or not later than three hours after that time. Here, the notice provided that the sale would take place between 10 a.m. and 4 p.m. It actually occurred at 10 a.m., so Benson did satisfy the timing requirement of the Property Code.

Kimzey Wash, LLC* v. *LG Auto Laundry, LP, 418 S.W.3d 291 (Tex.App.-Dallas 2013, no pet.). LG sold some land to Shammy Man Auto Wash. Shammy Man purchased the premises in part with a loan from the Bank that was secured by a deed of trust. On the same day, LG and Shammy Man also signed a ground lease granting LG possession of a .0625-acre portion of the tract containing a cellular tower and acknowledging the cellular tower as LG's property for the term of the lease. The ground lease further provided it would be subject and subordinate to any of Shammy Man's mortgages and deeds of trust encumbering the premises but also subject to any subordination, non-disturbance and attornment agreement executed by a mortgage holder “which will state, among other things, if any deed of trust or mortgage is foreclosed, ... this lease shall not terminate or be terminable by the purchaser at foreclosure ... and TENANT shall attorn to the purchaser at such foreclosure sale." LG and the Bank signed an SNDA providing, among other things, that in the event proceedings to foreclose the deed of trust were instituted, LG's possession of the leased premises would not be disturbed. The SNDA had an effective date of February 8, 2007 which was the date stated for LG's execution, but the Bank's execution was dated April 11, 2007 and the SNDA was not recorded in the Collin County real property records.

Shammy Man defaulted on its loan with the Bank, and the property was posted for a foreclosure sale pursuant to the Bank's deed of trust. Before the foreclosure sale occurred, however, the FDIC took over the Bank and transferred its assets, including Shammy Man's loan and deed of trust, to State Bank of Texas. State Bank held the posted foreclosure sale and ultimately acquired title to the property by substitute trustee's deed. Kimzey purchased the property from State Bank by warranty deed about four months later. Kimzey filed this lawsuit asserting, among other things, State Bank's foreclosure of the deed of trust extinguished the LG's ground lease. The trial court ruled in favor of LG.

The general rule is that a valid foreclosure of a lien terminates any leases entered into subject to that lien. Here, the ground lease specifically states that it was subordinate to the deed of trust. Consequently, foreclosure of the deed of trust necessarily extinguished LG's ground lease by the express terms in the ground lease itself. The question for the court is whether the SNDA may be used to support LG's position that the ground lease survived the foreclosure of the deed of trust. The SNDA, while acknowledging the superiority of deed of trust, provides that the ground lease will survive, and LG's possession of the lease tract would not be disturbed, by the foreclosure of the deed of trust. Kimzey claimed it was a bona fide purchaser and that the SNDA was unenforceable against it pursuant to the D'Oench, Dhume doctrine and 12 U.S.C. § 1823(e).

Generally, the D'Oench, Duhme doctrine and its federal codification provide that no agreement which tends to diminish or defeat the interest of the FDIC in any asset acquired as security for a loan, or by purchase, or as a receiver of any insured bank, shall be valid against the FDIC and its assigns unless it is in writing, executed by the bank contemporaneously with the bank's acquisition of the asset, approved by the bank's board of directors or loan committee which approval shall be reflected in the minutes of the board or committee, and has been from its execution an official record of the bank. The essence of the doctrine is that the FDIC is entitled to rely on, to the exclusion of extraneous matters, the official bank records setting forth the rights and obligations of the bank and those to whom the bank lends money.

LG argued that the D'Oench, Duhme doctrine does not prevent its enforcement because LG was neither a borrower nor guarantor of a debt and this matter does not involve a claim by or against the FDIC. The court disagreed. LG also argued that D'Oench, Duhme and its subsequent codification do not apply here because the SNDA did not diminish the FDIC's interest in the Bank's mortgage or deed of trust. It contends the SNDA is merely a contract intended to protect LG's right to occupy the strip of land containing the cellular tower and does not alter the relationship between the original lender and borrower. Again, the court was unpersuaded. On its face, the SNDA in part relinquishes the Bank's lien priority to the extent it provided that any foreclosure of the deed of trust would not disturb LG's possession of the lease tract. Absent the SDNA, any foreclosure of the deed of trust would have necessarily extinguished LG's ground lease. Because enforcement of the SNDA tends to diminish the FDICs interest in the assets at issue, the court concluded that the D'Oench, Duhme doctrine applies here as a matter of law.

PART II
HOME EQUITY LENDING

Sims* v. *Carrington Mortgage Services, L.L.C., No. 13-0638 (Tex. May 16, 2014). The Simses borrowed a home equity loan. The original loan documents required them to pay principal, interest, and late charges, as well as taxes, assessments, and insurance premiums. The documents gave the lender the right to "do and pay for whatever is reasonable or appropriate" to protect its interest in the property and its rights under the agreement and provided that any amount the lender disbursed to that end "shall become additional debt of Borrower secured by this Security Instrument."

The Simses later got behind on their home equity mortgage payments. They entered into a loan modification agreement with CMS. Pursuant to the agreement, past-due interest was capitalized as well as other charges, including fees, unpaid taxes and insurance premiums. The interest rate was lowered, along with the monthly payment amount.

Two years later, the Simses were again behind, and this time CMS sought foreclosure. The Simses resisted, asserting that the 2009 restructuring violated constitutional requirements for home equity loans. A second loan modification was entered into, again reducing interest rate and payments. Neither of the modification agreements otherwise affected the borrowers' basic obligations or the lenders basic rights mentioned above.

Two months after the second modification, the Simses brought this case as a class action against CMS in the United States District Court. That court certified four questions to the Texas Supreme Court.

1. After an initial extension of credit, if a home equity lender enters into a new agreement with the borrower that capitalizes past-due interest, fees, property taxes, or insurance premiums into the principal of the loan but neither satisfies nor replaces the original note, is the transaction a modification or a refinance for purposes of Section 50 of Article XVI of the Texas Constitution?

If the transaction is a modification rather than a refinance, the following questions also arise:

2. Does the capitalization of past-due interest, fees, property taxes, or insurance premiums constitute an impermissible "advance of additional funds" under Section 153.14(2)(B) of the Texas Administrative Code?

3. Must such a modification comply with the requirements of Section 50(a)(6), including subsection (B), which mandates that a home equity loan have a maximum loan-to-value ratio of 80%?

4. Do repeated modifications like those in this case convert a home equity loan into an open-end account that must comply with Section 50(t)?

The certified questions assume a distinction between a loan modification and a refinancing that, if understood in financial circles,12 is not clear in the text of Section 50. While both words are used several times, neither concept is defined in Section 50. The court essentially said that the question posed by the District Court (i.e., whether this was a modification or refinance) was not the correct question. The real question for purposes of the home equity statutes is whether this was a "new extension of credit." And, while the statutes, again, don't provide a definition of "extension of credit," the court said the meaning was clear. "Credit is simply the ability to assume a debt repayable over time, and an extension of credit affords the right to do so in a particular situation."

The Simses argued that any increase in the principal amount of a loan is a new extension of credit. The court disagreed. Section 50(a)(6)(E) refers to principal as a component of an extension of credit. The Simses argue that in restructuring a loan to capitalize past-due amounts, the lender is actually advancing additional funds to itself (past-due interest) or others (past-due taxes and insurance) to pay those amounts for the borrower, and that this constitutes a new extension of credit. But the borrower's obligation for such amounts, and the lender's right to pay them to protect its security, were all terms of the original extension of credit.

CMS argues that restructuring a loan does not involve a new extension of credit so long as the borrower's note is not satisfied or replaced and no new money is extended. The court agreed that these two conditions are necessary, but could not say with assurance that they are sufficient. For example, a restructuring to make the homestead lien security for another indebtedness, such as the borrower's consumer or credit card debt, would certainly be a new extension of credit. The test should be whether the secured obligations are those incurred under the terms of the original loan. The Simses object that this test provides no effective limit on the size or frequency of additions to principal. But, said the court, the terms of the original loan supply the limit.

The Simses argued that it didn't matter that the restructuring here lowered their interest rate and payments. They argued that lenders have only two options for loans in default: foreclose or forbear. The court thought this was at odds with the fundamental purpose of the home equity statutes, which is to protect homesteads.

So, after having re-written the first of the certified questions, the court answered that the restructuring of a home equity loan that involves capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50.

That answer dictated the answers to the other three questions. (1) Capitalization of past-due interest, taxes, insurance premiums, and fees is not and advance of additional funds if those amounts were among the obligations assumed by the borrower under the terms of the original loan. (2) A restructuring like the Simses' need not comply with Section 50(a)(6) because it does not involve a new extension of credit. And (3) repeated restructuring of a home equity loan does not convert the loan into an open-end account subject to Section 50(t). Section 50(t) describes an open end account as one that may be debited from time to time, under which credit may be extended from time to time and under which the borrower requests advances, repays money, and reborrows money. "This description does not remotely resemble a loan with a stated principal that is to be repaid as scheduled from the outset but must be restructured to avoid foreclosure."

Finance Commission of Texas* v. *Norwood, 418 S.W.3d 566 (Tex. 2013). Most of this case is devoted to constitutional issues of separation of powers. The court concludes that the Finance Commission's interpretations of Section 50 of the Texas Constitution dealing with home equity lending are subject to judicial review. It also determined that the homeowners challenging the Commission's interpretations had standing to sue. It then turned to the substantive issues regarding those interpretations.

First, Section 50(a)(6)(E) provides that a home equity borrower may not be required to pay, "in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit." The Commission used the Finance Code definition of interest, i.e., compensation for the use, forbearance, or detention of money. That definition is used in the Finance Code in the context of determining whether a loan is usurious. However, said the court, the functions of "interest" in applying the constitutional fee cap for home equity loans and in prohibiting usury are inversely related. If the word is given the same meaning in both contexts, then including lender-charged fees in "interest" strengthens usury laws and weakens the fee cap, though both are designed to protect consumers. That this was the intent of the framers and ratifiers of Section 50(a)(6)(E) is simply implausible. “Interest” for purposes of Section 50(a)(6)(E) means the amount determined by multiplying the loan principal by the interest rate.

Second, Section 50(a)(6)(N) provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company.” This provision was intended to prohibit the coercive closing of an equity loan at the home of the owner. Nevertheless, the Commissions' interpretations allow a borrower to mail the required signed consent under Section 50(a)(6)(A) to the lender and to close through an attorney-in-fact. Both these interpretations permit coercion in obtaining the required consent and a power of attorney at the borrower's home, allowing the final closing to occur later at one of the prescribed locations, thereby defeating the purpose of the provision. Closing a loan is a process. It would clearly be unreasonable to interpret Section 50(a)(6)(N) to allow all the loan papers to be signed at the borrower's house and then taken to the lender's office, where funding was finally authorized. Closing is not merely the final action, and in this context, to afford the intended protection, it must include the initial action. Executing the required consent or a power of attorney are part of the closing process and must occur only at one of the locations allowed by the constitutional provision. The court held that the Commission’s interpretations were invalid because they contradict the purpose and text of the provision.

Finally, Section 50(g) requires that a loan not be closed before the 12th day after the lender provides the borrower the prescribed notice. The Commission determined there is a rebuttable presumption that notice is received three days after it is mailed. The homeowners in the case argued that the lenders had to establish actual receipt of notice in each case. The Court held that the Commissions' interpretation does not impair the constitutional requirement; it merely relieves a lender of proving receipt unless receipt is challenged. It agreed with the court of appeals that the interpretation is but a reasonable procedure for establishing compliance with Section 50(g).

In a supplemental opinion, the court clarified a few things. Section 50(a)(6)(E) of the Texas Constitution caps "fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service" a home equity loan, not including "any interest,” at 3% of principal. For purposes of Section 50(a)(6)(E), “interest” does not mean compensation for the use, forbearance, or detention of money, as in the usury context, but “the amount determined by multiplying the loan principal by the interest rate.” This narrower definition of interest does not limit the amount a lender can charge for a loan; it limits only what part of the total charge can be paid in front-end fees rather than interest paid over time.

The court also held that Section 50(a)(6)(N), which provides that a loan may be "closed only at the office of the lender, an attorney at law, or a title company", precludes a borrower from closing the loan through an attorney-in-fact under a power of attorney not itself executed at one of the three prescribed locations. Executing a power of attorney is part of the closing process, and that not to restrict the use of a power of attorney would impair the undisputed purpose of the provision, which is 'to prohibit the coercive closing of an equity loan at the home of the owner.

Several amici objected that closing is an event, not a process, and that to consider closing as beginning with the execution of a power of attorney leads to absurd results and problems in applying deadlines prescribed by the constitutional provisions. By "process", the court said, it did not intend something temporally protracted, though it agreed that confusion is understandable. It agreed that the closing is the occurrence that consummates the transaction. But a power of attorney must be part of the closing to show the attorney-in-fact's authority to act. Section 50(a)(6)(N) does not suggest that the timing of the power of attorney is important, or that it cannot be used to close a home equity loan if executed before the borrower applied for the loan. But the court believed that the provision requires a formality to the closing that prevents coercive practices.

The amici argued that requiring a power of attorney, like other closing documents, to be executed "at the office of the lender, an attorney at law, or a title company" works a hardship on borrowers for whom such locations are not readily accessible, such as military persons stationed overseas, others employed in other countries, the elderly, and the infirm. For the military, the Judge Advocate General Corps provides lawyers here and abroad. While JAG lawyers may not be as accessible to military personnel as civilian lawyers are to most people owning homes in Texas, soldiers and sailors in harm's way are no less susceptible to being pressured to borrow money and jeopardizing their homes than people in more secure circumstances.

Patton* v. *Porterfield, 411 S.W.3d 147 (Tex.App.-Dallas 2013, pet. denied). Porterfield bought a house in University Park, borrowing a purchase money loan. A few years later, he borrowed a home equity loan, which was a second lien on the house. After Porterfield defaulted on the purchase money loan, the lender foreclosed. The foreclosure sale generated a significant amount of excess proceeds. The foreclosing trustee distributed excess proceeds to the home equity lender and satisfied that debt. Porterfield sued, claiming that the excess proceeds should not have been distributed to the home equity lender because the constitution requires a court order to foreclose the home equity lien (which was not obtained) and because the home equity lien is only against the homestead property and not against excess cash proceeds.

After a lengthy discussion, the court of appeals saw no reason to abrogate or displace the common law governing foreclosure sales and the disposition of excess foreclosure proceeds. Nothing in the statute provided for doing that.

As to the claim that the home equity lender was not entitled to proceeds because it had not foreclosed following the constitutional requirements, the court refused to buy the argument. The home equity foreclosure rules apply only to a foreclosure by a home equity lender. They do not require a court order for collection or payment and the court would not impose such a requirement.

The court also disposed of the argument that the non-recourse nature of a home equity loan precluded application of common law rules as to application of excess foreclosure proceeds. Again, there was nothing in the constitutional provisions that precluded such application. As well, the court would not buy Porterfield's argument that the constitutional requirement that a home equity loan be secured only by the homestead meant that the proceeds, which were not literally the homestead, could not secure payment of the loan. In Texas, proceeds from the sale of exempt property are a substitute for that exempt property. Accordingly, payment of the home equity loan from excess foreclosure proceeds does not violate the constitution.

Williams* v. *Wachovia Mortgage Corp., 407 S.W.3d 391 (Tex.App.-Dallas 2013, pet. denied). Kroupa and Williams were in a common relationship that was later determined to be a common law marriage. While in that relationship in 2002, Williams obtained a home equity loan covering their homestead. Kroupa didn't know about the loan until after it was made, but probably in 2002 as well. In 2004, the couple divorced. The family court awarded the house to Kroupa. In 2008, she filed suit against Wachovia to remove the home equity lien as a cloud on title. She claimed the loan was void because she did not sign the loan documents. Wachovia pled limitations.

The constitutional home equity lending provisions do not include a separate statute of limitations, so the residual limitations period in Civil Practice & Remedies Code § 16.051 applies. Wachovia argued that the lawsuit was filed more than four years after the cause of action accrued.

Since ***Doody* v. *Ameriquest Mortgage*** Co., 49 S.W.3d 342 (Tex. 2001), Texas courts have recognized that, because the home equity laws contain cure provisions, liens that are contrary to the constitutional requirements are voidable rather than void. The court here stated that ***Doody*** offers support for the applicability of limitations. The court then noted other decisions that have applied the four-year statute. It thus concluded that a limitations period applied to constitutional infirmities. Holding that the claim accrued at least by the time Kroupa learned of the loan's existence, some six years before the lawsuit was filed, the court held that her claims were barred by limitations.

Salas* v. *LNV Corporation, 409 S.W.3d 209 (Tex.App.-Houston [14th Dist.] 2013, no pet.). LNV sought to foreclose on Salases' home equity loan. The Salases sued. Among other issues in the litigation was the Salases' argument that the note and deed of trust were still shown in the county records as being in the name of the original lender. Having received no notice of any assignment of the note and the deed of trust, the Salases believed that the original lender was still the owner of the note and the deed of trust and that LNV is a stranger to the property.

In response, LNV contended that the Salases do not have standing to question the identity of the note holder and have not alleged any facts or offered any summary-judgment evidence to set forth any justiciable controversy. According to LNV, matters such as the identity of the note holder and the amount owed on the note call for nothing more than findings of fact that are not the subject of any genuine dispute. LNV further asserted that it had conclusively established with uncontroverted summary-judgment evidence the chain of indorsements and assignments by which it has become the owner and holder of the note and the deed of trust and that it is entitled to foreclose as provided in the deed of trust.

Standing is a constitutional prerequisite to maintaining suit. Under Texas law, a party has standing to bring suit if (1) it has suffered a distinct injury, and (2) there exists a real controversy that will be determined by the judicial determination sought. This second component of standing refers to presentation of a justiciable issue. A declaratory judgment is appropriate only if a justiciable controversy exists concerning the rights and status of the parties and the controversy will be resolved by the declaration sought. The court held that the Salases have standing to assert their requests for declaratory and injunctive relief because a real controversy exists between the Salases and LNV as to whether LNV is entitled to collect on the promissory note by foreclosing on the property.

In re *One West Bank, FSB*, 430 S.W.3d 573 (Tex.App.-Corpus Christi 2014, pet. denied). Under article XVI, section 50(a)(6)(D) of the Texas Constitution, the homestead of a family or of a single adult person is protected from forced sale for the payment of all debts except, for instance, when an extension of credit is secured by a lien that may be foreclosed upon only by a court order. Under Texas Rule of Civil Procedure 735.1, a party seeking to foreclose a lien for a home equity loan, reverse mortgage, or home equity line of credit may file an application for an expedited order allowing the foreclosure of a lien under Rule 736.

Rule 736, as referenced in Rule 735, sets forth the procedures and requirements for seeking an expedited foreclosure. A party may seek a court order permitting the foreclosure of a lien by filing a verified application in the district court in any county where all or any part of the real property encumbered by the lien is located or in a probate court with jurisdiction over proceedings involving the property. The only issue to be determined in a Rule 736 proceeding is the right of the applicant to obtain an order to proceed with foreclosure under the applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. A respondent may file a response to the application, but the response may not raise any independent claims for relief, and no discovery is permitted. The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure; otherwise, the court must deny the application. An order issued pursuant to Rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding.

Here, the trial court denied the bank's application with prejudice. The court of appeals held that the trial court abused its discretion in denying the bank's application.

PART III PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Village Place, Ltd.* v. *VP Shopping, LLC, 404 S.W.3d 115 (Tex.App.-Houston [1st Dist.] 2013 no pet.). Village Place bought the shopping center with a typical non-recourse loan from VP. When Village Place defaulted, FP foreclosed. After applying the foreclosure proceeds to the debt, the remaining unpaid principal and interest on the loan was about $380,000. VP did not sue for that deficiency because the loan was non-recourse; however, it sought and obtained a judgment against Village Place for failure to comply with two of the bad-boy provisions – its out-of-pocket expenses and about half a million dollars for the reduction in value of the collateral because of Village Place's failure to maintain the property.

Village Place argued on appeal that the trial court erroneously awarded a windfall of about $300,000 over the unpaid loan balance. It claimed that the indebtedness that was converted from non-recourse to recourse was limited or capped at the amount of the loan balance and that it was entitled to an offset for the fair market value of the property, per Property Code § 51.003.

The court held that the non-recourse claim for out-of-pockets was not capped. The loan documents obligate the borrower to pay expenses and those are separate and apart from the obligation to pay principal and interest.

The court did hold that the claim for personal liability for reduction in value of the collateral was limited to the unpaid loan balance. First, the loan documents tie the carve-out liability to a loss or damage "suffered or incurred" by VP, and VP did not suffer an additional loss from the reduction in the shopping center's value over the unpaid loan balance. VP did not pay for the repairs and did not incur any liability as a result of Village Place's failure to repair the property or enroll in the program. VP might have sustained a loss due to Village Place's breach of these obligations, insofar as the property's impaired condition reduced the amount of foreclosure proceeds available to pay off the loan balance. But if the property had sold at foreclosure for more than the loan balance, VP would have been required to pay the excess to Village Place; it was not VP's to keep. Here the pledged property sold for less than the loan balance, but VP's loss is not the reduction in value of the property, which it did not own before the foreclosure. Its loss is the damages it suffered as a result of Village Place's breach: the unpaid loan balance and its other out-of-pocket expenses covered by the carve-out-liabilities provisions. In other words, the carve-out-liabilities provisions do not eliminate the necessity that VP suffer damages for Village Place's breach of its contractual obligations, and the damages suffered by VP function as a cap on Village Place's liability. To the extent that the pledged property's reduction in value from inadequate maintenance exceeds the amount of the unpaid loan and covered expenses, VP was not damaged. In other words, the loss VP "suffered or incurred" is the unpaid loan balance plus its other covered expenses less the property's fair market value, and to that extent, and only to that extent, Village Place's liability is reinstated.

The court also held that Village Place was entitled to the § 51.003 offset. Section 51.003 allows the offset against a "deficiency." VP argued that its non-recourse carve-out claims were not a "deficiency" but were breach of contract claims. The court disagreed. The nature of VP's claims was for a deficiency. As noted by the court, the carve-out-liabilities provisions do not impose additional liability for Village Place. Rather, they conditionally restore personal liability on Village Place for breach of the obligations created by the loan documents – such as the obligations to pay principal and interest, taxes and insurance. Village Place would have no personal liability for these obligations but for the carve-out-liabilities provisions. Village Place's restored liability is limited by the unpaid loan balance and VP's other covered expenses.

Karam* v. *Brown, 407 S.W.3d 464 (Tex.App.-El Paso 2013, no pet.). To lawfully exercise an option to accelerate upon default provided by a note or deed of trust, the lender must give the borrower both notice of intent to accelerate and notice of acceleration, and in the proper sequence. Both notices must be clear and unequivocal. The lender must give the notice of intent to accelerate first. This notice must afford the borrower an opportunity to cure the default and apprise him or her that failure to cure will result in acceleration of the note and foreclosure under the power of sale. If the default has not been cured by the deadline established in the notice, the lender must then give notice of acceleration. Ordinarily, a lender gives notice of acceleration by expressly declaring the entire debt due. However, a lender may give notice of acceleration by taking some other unequivocal action indicating the debt is accelerated. So long as it is preceded by the required notice of intent to accelerate, notice of a trustee's sale constitutes unequivocal action indicating the debt is accelerated.

Graves* v. *Logan, 404 S.W.3d 582 (Tex.App.-Houston [1st Dist.] 2010, no pet.). Logan sued Graves, asking for a declaration specifying the total amount of principal and accrued interest due on the promissory note. Logan also sought damages under a breach of contract theory, contending that, under the lien, Graves, as the note holder, had an implied duty to cooperate with Logan in determining the amount of unpaid principal and accrued interest on a given installment date. Logan claimed that Graves's breach of that implied term caused Logan incur damages from a planned sale of the property she lost as a result of her inability to convey clear title before the expiration of the earnest money contract.

The essential elements in a suit for breach of contract are: (1) the existence of a valid contract; (2) the plaintiff performed or tendered performance; (3) the defendant breached the contract; and (4) the plaintiff was damaged as a result of the breach. Neither party contests the validity of the promissory note and deed of trust, which do not contain an express provision that requires Graves to provide the payoff figure. At issue in this case is whether Graves had an obligation, implied by Texas law, to provide Logan with a payoff figure within a "reasonable" amount of time after Logan's request, and if so, the existence and amount of damages incurred by Logan as a result of the breach of that obligation. The trial court ruled in favor of Logan based primarily on Logan's argument that the recognized and established, though unwritten, procedure in the State of Texas to consummate a sale of real property against which there is a deed of trust lien is for the title insurance company which will be issuing an owner's policy of title insurance to the purchaser of the property to (i) request from the lender or lien holder a statement of the outstanding principal balance and unpaid accrued interest owning on the promissory note as of the closing date and (ii) obtain from such lender or lien holder the pay-off. Logan argued that the foregoing procedure is so well established in the State of Texas that its inclusion in the documents between the lender and the borrower (i.e. the promissory note and the deed of trust) is not necessary.

Graves contended that the trial court erred in finding a duty to provide a pay-off because the loan documents did not require her to do so. Graves thought her only duty was to release the lien after full performance and payment.

The court said that Logan was correct in asserting that there is a duty to cooperate implied in every contract in which cooperation is necessary for performance of the contract. If applicable, this implied duty requires that a party to a contract may not hinder, prevent, or interfere with another party's ability to perform its duties under the contract. Graves did not, however, interfere with Logan's ability to perform Logan's duties under the deed of trust and promissory note. At most, Graves arguably interfered with Logan's pursuit of benefits incidental to the full execution of her obligations under the promissory note.

The dissent thought the majority's ruling was based on too narrow grounds. Justice Sharp said that, whenever a contract recites that a party has a right to an early payoff, there is an implied contractual duty to provide a payoff statement because failure to do so (and do so in a timely fashion) nullifies (breaches) that provision of the contract.

Alphaville Ventures, Inc.* v. *First Bank, 429 S.W.3d 150 (Tex.App.-Houston [14th Dist.] 2014, no pet.). Under the promissory note at issue, SBLS was the original lender, and 5M Corp dba Arby's was the original borrower. Via an "Allonge to Promissory Note," 5M Corp dba Arby's assigned all its liabilities and obligations under the note to Alphaville. In conjunction with that assignment, Bizman, the president of Alphaville, signed a guarantee of Alphaville's obligations under the note, and Alphaville granted SBLS a security interest in certain equipment. Alphaville subsequently defaulted on the Note. First Bank filed suit, alleging the note and guarantee had been assigned from SBLS to First Bank and seeking the amount due.

First Bank claimed to have acquired the Note pursuant to a Loan Purchase and Sale Agreement. The summary judgment documentary evidence included only the PSA. The relevant portion of the PSA provided that SBLS would assign the loans it covered (including the Note) by executing endorsements of the Note and a Bill of Sale. The Note had not been endorsed, although a Bill of Sale was introduced into evidence. The Bill of Sale purported to assign SBLS's interest in the "personal property" listed on its Schedule B, which is entitled "Assets Conveyed to First Bank;" however, it was not clear to the court what "personal property" was actually covered by the Bill of Sale. The court said that the PSA did not contemplate that a Bill of Sale would be utilized to transfer all instruments governing the loans subject to the PSA, including appellants' note and guarantee. The Bill of Sale used a broader term by referring to the sale and delivery of "Assets" listed on Schedule B, but "Assets" is not defined in the Bill of Sale.

The court agreed that the documentary

evidence does not establish First Bank is owner and holder of the note and guarantee. There is no documentary proof of the endorsements required to transfer the note and guarantee.

PART IV
GUARANTIES

Interstate 35/Chisam Road, L.P.* v. *Moayedi, No. 12-0937 (Tex. June 13, 2014). Villages borrowed a loan secured by real property in Denton County. Moayedi executed a guaranty. The guaranty included two provisions dealt with in this case. First, in paragraph 7 of the guaranty, it provided that the guaranty would not be discharged, impaired, or affected by any defense that the guarantor might have, Second, in paragraph 13 of the guaranty, it provided that the guarantor waived and relinquished "all rights and remedies of surety."

The borrower defaulted and the lender foreclosed. At the time of foreclosure, the fair market value of the property was $840,000, but the lender bid only $487,200 at the sale. The lender sued the guarantor. He answered, claiming that Property Code § 51.003 provided an offset to the deficiency. The lender argued that the waiver of "all rights and remedies" and the waiver of defenses meant that § 51.003 did not apply.

Section 51.003 provides for a determination of the fair market value of the property sold at foreclosure. Then, if the fact-finder determines the fair market value is greater than the foreclosure sale price, the person obligated on the indebtedness is entitled to offset the deficiency amount by the difference between the fair market value and the sale price.

The trial court held in favor of the guarantor. The court of appeals reversed, holding that the guarantor had waived his right to apply § 51.003. The court of appeals held that the offset is an affirmative defense. It concluded that the use of "any," "each," and "every" in the agreement encompassed all possible defenses and conveyed an intent that the guaranty would not be subject to any defense other than payment. It further concluded that at least three other provisions in the agreement indicated the same intent, including the guarantor's agreement that I-35 could enforce the guaranty without first resorting to or exhausting any security or collateral. According to the court of appeals, then, because the guarantor waived all defenses, he waived the right to avail himself of section 51.003's offset provision.

The Supreme Court affirmed the court of appeals.

Texans have long embraced the principle of freedom of contract. And the Supreme Court's decisions respect the strong public policy of respecting parties' freedom to design agreements according to their wishes.

The first thing the court did was to address whether § 51.003 can be waived. This had not been argued by the parties, but the court had never ruled on this question. It held that § 51.003 can be waived.

The next thing was to address whether the guarantor had waived § 51.003. Here, the court agreed with the court of appeals that the general waiver provision waives the application of § 51.003.

To be effective, a waiver must be clear and specific. Until now, this court has not addressed the level of specificity required to waive § 51.003. Most cases in which courts have concluded § 51.003 was waived involved language with more specificity than the language at issue here. The guarantor argued that ***Shumway* v. *Horizon Credit Corp.***, 801 S.W.2d 890 (Tex. 1991) should apply. In that case, the court held that a borrower's waiver of the requirement that a lender provide clear and unequivocal notice that it intends to accelerate a debt and that it has accelerated must also be clear and unequivocal. In that case, the court required specific enumeration of the matters being waived. The supreme court said, essentially, that ***Shumway*** didn't really apply here.

The court's decision really rested on this question: What did the guarantor think he was waiving when he waived "any," "each," and "every" defense? As the court of appeals concluded, the plain meaning of "any," "each," and "every" used in paragraph 7 results in a broad waiver of all possible defenses. Just because the waiver is all encompassing does not mean that it is unclear or vague. To waive all possible defenses seems to very clearly indicate what defenses are included: all of them.

The same waiver issue was dealt with the same way in ***Compass Bank* v. *Goodman***, 416 S.W.3d 715 (Tex.App.-Dallas 2013, pet. pending). See also ***Grace Interests, LLC* v. *Wallis State Bank***, 431 S.W.3d 110 (Tex.App.-Houston [14th Dist. 2013 pet. pending).

Also, take a look at ***U.S. Bank* v. *Kobernick***, 402 S.W.3d 748 (Tex.App.-Houston [1st Dist.] 2012, pet. dism'd), which deals with various procedural issues under Property Code § 51.005.

Sowell* v. *International Interests, L.P., 416 S.W.3d 593 (Tex.App.-Houston [14th Dist.] 2013 no pet.). The Guarantor claimed that the Lender's claim on the guaranty is barred by the four-year statute of limitations and because the Lender breached its duty to mitigate its damages by delaying foreclosure, that is, if there had been a prompt foreclosure, there would have been no deficiency.

The loan matured in November 2004. The Lender foreclosed on February 6, 2007. Almost two years later, on February 4, 2009, the Lender sued the Guarantor for a deficiency.

The Lender claimed that Property Code § 51.003 gave it an independent claim against the Guarantor that accrued on the date of foreclosure. Section 51.003(a) provides that any action brought to recover the deficiency must be brought within two years of the foreclosure sale and is governed by that section. Based on the unambiguous language of section 51.003, the Legislature did not create a claim or other basis upon which a person may be liable for a deficiency. Any such liability arises from a different source, for example, a person's liability under a promissory note or a guaranty agreement. In section 51.003, the Legislature addressed the statute of limitations for such an action and a potential offset and credit; the Legislature did not address the source of the liability itself. Thus, the court held that § 51.003 does not create a right to sue for a deficiency, but merely regulates a right that arises from a different source.

The Guarantor then argued that the Lender couldn't recover the deficiency because the claim was barred by the four year statute in Civil Practice & Remedies Code § 16.004. The Guarantor argued that the claim on his guaranty accrued when the note matured and was not paid, back in 2004. In the guaranty, the Guarantor waived any requirement that the creditor make demand for payment on him. Under this type of guaranty, the Lender's claim against the Guarantor accrues if the debt reaches maturity and the Borrower defaults by not paying it. The court agreed that, under the typical rule for determining accrual of a cause of action, facts had come into existence as of 2004 that authorized the creditor to seek a judicial remedy against the Guarantor.

Still, what statute applies? No courts have dealt with this before.

The court noted that, if a creditor sues a guarantor under a guaranty agreement and obtains a judgment before the creditor conducts a nonjudicial foreclosure sale, then there is no conflict and the suit on the guaranty is governed by the four-year statute of limitations under § 16.004. Likewise, if a creditor sues a guarantor under a guaranty agreement and the suit is still pending when the creditor conducts a nonjudicial foreclosure sale, then there is no conflict and the suit on the guaranty is governed by the four-year statute of limitations under section 16.004.

But, in the fact pattern in this case there is an irreconcilable conflict between section 51.003(a) and the limitations period in section 16.004. Under the unambiguous language of section 51.003(a), this statute applies, and the Lender's suit is timely because it filed it within two years of the foreclosure sale. Under the unambiguous language of § 16.004, this statute applies and the Lender's suit is time-barred because the Lender filed it more than four years after the day the claim accrued.

Applying Government Code § 311.026, the court held that § 51,003 prevails as an exception to the general provision of § 16.004. In this situation, if a deficiency remains after a nonjudicial foreclosure sale under section 51.002 conducted before the creditor files suit against a guarantor, then the effect of section 51.003 is to extend the limitations period under section 16.004 so that it ends two years after the date of the foreclosure sale.

The Guarantor's argument that the Lender's claims were barred because it had failed to mitigate its damages by delaying foreclosure. If there had been a prompt foreclosure, there wouldn't have been any damages, claimed the Guarantor. The court noted provisions in the guaranty that waived the right to assert this kind of defense. Also, the Guarantor's public policy arguments were not supported by case law.

Burchfield* v. *Prosperity Bank, 408 S.W.3d 542 (Tex.App.-Houston [1st Dist.] 2013). A loan from the Bank was jointly and severally guarantied by four guarantors. After the borrower defaulted and the property securing the loan was foreclosed, the Bank made a demand on the four guarantors. It sued two of the guarantors, Woodall and Burchfield. Woodall failed to answer the lawsuit and a default judgment was obtained by the Bank. It settled with the other two guarantors.

Burchfield claimed that once the Bank obtained a default judgment against Woodall for the entire deficiency, it was precluded from then seeking judgment against Burchfield because any judgment against Burchfield would make the Bank more than whole. What the Bank should have done, according to Burchfield, is sue each guarantor in the same suit to make the guarantors joint-and-severally liable for the deficiency amount, but no more. The trial court ruled in favor of the Bank.

Burchfield argued that res judicata bars all claims which have been previously litigated, including all claims which could have been litigated in the prior suit. Under the transactional approach followed in Texas, a subsequent suit is barred if it arises out of the same subject matter as the prior suit, and that subject matter could have been litigated in the prior suit. The doctrine seeks to bring an end to litigation, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery.

The Bank argued that res judicata does not apply. Specifically, it argues that (1) Burchfield was not a party to the Woodall case and is not in privity with anyone from that lawsuit, and (2) the Bank's claims against Burchfield in this lawsuit were not based on the same claims as were raised or could have been raised in the first action. The court agreed with the Bank that Burchfield cannot establish that res judicata bars litigation of his obligation on the guarantee in the underlying case. Burchfield would have to show that he was in privity with a party to the prior suit, and the court also held that he was not in privity with Woodall. While Burchfield cites cases explaining the general policies behind res judicata, it cites no authority for holding co-guarantors situated as Woodall and Burchfield in privity for purposes of res judicata based only on their having signed personal guarantee agreements on the same note.

Wells Fargo Bank, N.A.* v. *Smuck, 407 S.W.3d 830 (Tex.App.-Houston [14th Dist.] 2013, no pet.). The borrower got a typical non-recourse CMBS loan, in conjunction with which Smuck executed a document entitled Non-recourse Indemnification Agreement which said, in all caps and bold: "Indemnitor [Smuck] hereby assumes liability for and agrees to pay, protect, indemnify, defend and hold harmless lender (and any assignee or purchaser of all or any interest in the note and the security instrument) from and against any and all liabilities, obligations, losses, damages, costs and expenses (including attorneys' fees), causes of action, suits, claims, demands and judgments which at any time may be imposed upon, incurred by or awarded against lender and for which borrower at any time may be personally liable pursuant to the nonrecourse exceptions (as defined in paragraph 12 of the note)." The borrower defaulted and the lender sued, seeking, among other things, damages because of waste and unpermitted liens on the property that violated the non-recourse carve-outs. After obtaining judgment against the borrower, the lender sued Smuck on his Indemnification Agreement.

Smuck argued that its agreement to indemnify the lender applied only when the borrower is liable to the lender for third-party claims under the carve-outs, not when the borrower itself is liable. In other words, Smuck thought that the lender was incorrectly characterizing the Indemnification Agreement as a guaranty. Smuck contended that the terms "indemnify" and "indemnity" refer to an agreement to hold the Indemnitee harmless against claims by third parties.

The court would not buy that argument. The express wording of the document clearly encompasses any of the lender's own losses in connection with the non-recourse carve-outs. So, contrary to Smuck's argument, the court held, the agreement was, in essence, a guaranty.

PART V
LEASES

Coinmach Corp.* v. *Aspenwood Apartment Corp., 417 S.W.3d 909 (Tex. 2013). Anyone who has dealt with apartment complexes knows Coinmach. It installs laundry rooms and operates its machines in those rooms.

In 1980, Coinmach entered into a lease at Aspenwood Apartments. Its lease was expressly made subordinate to any mortgage or deed of trust on the premises. The term was ultimately extended to 1999. In 1994, a lender foreclosed on the project. Ultimately, Aspenwood acquired the property.

Aspenwood gave notice to Coinmach to vacate the laundry rooms, claiming that the foreclosure terminated the lease. Coinmach refused to vacate. A long back-and-forth legal battle ensued. Aspenwood would file an FED; Coinmach would somehow get a writ of reentry. Even after the expiration date of the lease, Coinmach stayed at the property and refused to leave.

This suit was filed in 1998, shortly after Aspenwood filed its second FED action. The trial court ruled, as a matter of law, that the 1994 foreclosure sale had terminated Coinmach's lease. The jury found in favor of Aspenwood and awarded $1.5 million in damages, consisting of actual damages, DTPA treble damages, exemplary damages, attorneys' fees, and prejudgment interest. In the spring of 2000, after judgment was entered, Coinmach vacated the property.

Coinmach moved for a new trial. In 2007, the trial court again ruled that the foreclosure sale terminated the lease and that Coinmach became a tenant at sufferance. The trial court also struck all of Aspenwood's breach of contract claims. Ultimately, the trial court ruled that Aspenwood was not a consumer under the DTPA, that Coinmach had a possessory interest in the property from the time of foreclosure until it vacated the premises in 2000, and concluding that the effect of its legal rulings was to preclude Aspenwood's remaining claims as a matter of law. The court thus entered judgment that Aspenwood take nothing on its claims.

The court of appeals affirmed the dismissal of Aspenwood's breach of contract claims, holding that, because Aspenwood never consented to Coinmach's remaining on the premises, no actual or implied contractual relationship existed between the parties. But the court reversed and remanded Aspenwood's claims for trespass, trespass to try title, tortious interference, and declaratory judgment, concluding that Coinmach, as a tenant at sufferance, had no possessory interest in the property. The court of appeals also agreed with the trial court that Aspenwood was not a consumer for DTPA purposes.

Generally, a valid foreclosure of an owner's interest in property terminates any agreement through which the owner has leased the property to another. This is particularly true when, as here, the lease agreement is expressly subordinate to a mortgage or deed of trust affecting the leased premises.

Upon termination of the lease, Coinmach became a "tenant at sufferance." The parties agreed about that, but not about the effect of being a tenant at sufferance. A tenant who continues to occupy leased premises after expiration or termination of its lease is a "holdover tenant." The status and rights of a holdover tenant, however, differ depending on whether the tenant becomes a "tenant at will" or a "tenant at sufferance."

A tenant at will is a holdover tenant who "holds possession with the landlord's consent but without fixed terms (as to duration or rent)." Because tenants at will remain in possession with their landlords' consent, their possession is lawful, but it is for no fixed term, and the landlords can put them out of possession at any time. By contrast, a tenant at sufferance is a tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired. The defining characteristic of a tenancy at sufferance is the lack of the landlord's consent to the tenant's continued possession of the premises. With the owner's consent, the holdover tenant becomes a tenant at will; without it, a tenant at sufferance.

A lease agreement may provide that its terms continue to apply to a holdover tenant. But if, as here, the lease does not address the issue, and if the parties do not enter into a new lease agreement, the parties' conduct will determine whether the holdover tenant becomes a tenant at will or a tenant at sufferance. Under the common law holdover rule, a landlord may elect to treat a tenant holding over as either a trespasser – that is, a tenant at sufferance – or as a tenant at will. Thus, an implied agreement to create a new lease using the terms of the prior lease may arise if both parties engage in conduct that manifests such intent. If the tenant remains in possession and continues to pay rent, and the landlord, having knowledge of the tenant's possession, continues to accept the rent without objection to the continued possession, the tenant is a tenant at will, and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary. The mere fact that the tenant remains in possession, however, is not sufficient to create a tenancy at will; unless the parties' conduct demonstrates the landlord's consent to the continued possession, the tenant is a tenant at sufferance.

The court held that Aspenwood's conduct demonstrated that it never consented to Coinmach's continued possession of the property. Immediately after purchasing the complex, Aspenwood gave Coinmach written notice to vacate the laundry rooms and it continued to pursue eviction. It never cashed any checks from Coinmach.

So, Aspenwood claimed that, as a tenant at sufferance, Coinmach was liable both for breach of contract and for tortious conduct. Coinmach claimed it wasn't liable for either.

As to the breach of contract claims, the court held that the parties reached no agreements after the lease terminated. Aspenwood did not enter into a lease agreement with Coinmach and did not expressly or by its conduct consent to Coinmach's continued presence. Coinmach thus became a tenant at sufferance, and there existed no express or implied contract or agreement between the parties. Coinmach cannot be liable for breaching a contract that did not exist.

As to the trespass claims, Coinmach contends that, even though it was a tenant at sufferance, it was not a "trespasser" and cannot be liable on any tort-based theories. Coinmach contends that the Texas Legislature has relieved a tenant at sufferance of any trespasser status by providing a "grace period" during which the tenant is permitted to remain in possession pending statutory eviction proceedings. According to Coinmach, a tenant at sufferance does not become a trespasser unless and until the tenant refuses to leave after the landlord has finally prevailed in the statutory eviction process.

The Court ultimately held that Coinmach could be liable for trespass damages. Under the common law a tenant at sufferance has no legal title or right to possession, and is thus a "trespasser" who possesses the property "wrongfully." The question that Coinmach raises is whether the Legislature has altered the common law through the statute governing FED actions. The Legislature has itself answered that question, expressly providing in section 24.008 that a suit for eviction under the FED statute "does not bar a suit for trespass, damages, waste, rent, or mesne profits." The court has long held that the remedies against a holdover tenant include a forcible detainer action for possession and an action for recovery of damages, including trespass damages.

Chapter 24's procedural protections do not grant to tenants at sufferance any legal interests in or possessory rights to the property at issue; rather, the statute provides procedural protections that apply once the tenant has lost, or allegedly lost, all legal interests and possessory rights. Although the landlord must comply with the statute's procedural requirements to evict the tenant at sufferance, eviction is allowed only if the tenant has no remaining legal or possessory interest, which makes the tenant a tenant at sufferance.

AAA Free Move Ministorage, LLC,* v. *OIS Investments, Inc., 419 S.W.3d 522 (Tex.App.-San Antonio 2013, pet. denied). AAA bought the property where OIS was the ground lessee. AAA gave OIS a notice of termination, believing it had the right to do so under the terms of the lease. OIS filed this suit for a declaratory judgment that AAA had no right to terminate the lease. While this suit was pending, AAA filed a forcible detainer suit in the justice court. OIS prevailed in the forcible detainer and was awarded attorneys' fees and expenses. It then moved for summary judgment in this declaratory judgment case on the ground that the final judgment in the detainer case was res judicata of the claims made in this cause because the same issue--validity of AAA's termination of the lease--was decided in the county court. OIS argued that the county court ruled in its favor because it necessarily found AAA could not terminate the lease. OIS argued the finding has "res judicata" effect in this litigation, bars a declaratory judgment action to construe the lease, and precludes AAA from arguing OIS breached the lease or tortiously interfered with its business relations by remaining on the premises.

AAA contends the trial court erred in granting OIS summary judgment on res judicata grounds because the detainer action adjudicated only the issue of immediate possession of the premises. AAA argues the court in the detainer action did not adjudicate the ultimate rights of the parties under the lease and that AAA could not have asserted its affirmative claims for relief in that action. OIS argues that res judicata bars all the claims in this suit because the county court specifically determined that AAA could not terminate the lease and that issue was finally determined for all purposes.

Texas courts have uniformly recognized that, because a judgment of possession in a forcible detainer action is a determination only of the right to immediate possession, it does not determine the ultimate rights of the parties to any other issue in controversy relating to the realty in question. Because of the limited matter adjudicated in a forcible detainer action, a subsequent suit in district court may adjudicate matters relating to the property that could result in a different determination of possession from that rendered in the forcible detainer suit.

Centerplace Properties, Ltd.,* v. *Columbia Medical Center of Lewisville Subsidiary, L.P., 406 S.W.3d 674 (Tex.App.-Fort Worth 2013, no pet.). Landlord, and Tenant entered into a lease for an ambulatory surgery center. The lease provided for certain improvements to be constructed by the Tenant after submitted plans for approval by the Landlord. The Tenant submitted a space plan but did not start finishing out the space. The Tenant discovered that there was not enough interest in an ambulatory surgery center and want to move forward with plans for a diagnostic imaging center. The Landlord didn't like that idea because it competed with another tenant's use. However, the parties amended the lease to broaden the scope of uses. The amendment gave the Tenant the right to terminate the lease if improvements were not completed by a certain time. The Tenant did not even start on the improvements before the completion deadline.

The Landlord sent a default notice, giving it 30 days to cure. Correspondence went back and forth. Eventually, the Landlord declared the Tenant to be in default and told the Tenant it had no right to possess the premises. The Tenant took the position that when the Landlord told it that the Tenant had no right to occupy the premises, that was a violation of Property Code § 93.002, which prohibits a commercial landlord from intentionally preventing a tenant from entering the leased premises. In fact, the Landlord never did anything physically to prevent the Tenant from entering the premises. Here, the Tenant never requested access to the premises after it got the Landlord's letter. The question, then, is whether § 93.002(c) requires that the landlord take some action beyond making written demands – such as changing the locks or refusing access upon request by the tenant – before it can be found to have intentionally prevented the tenant from entering the premises, or whether a landlord may violate the statute by wrongfully accusing the tenant of breaching the lease and demanding that the tenant vacate the premises.

The court reviewed several cases and concluded that Texas law requires a landlord to do something more than post a notice to vacate or send a letter advising the tenant that it no longer has a right to possession before the landlord can be said to have violated property code section 93.002(c). The statute requires that a landlord intentionally take some action to prevent entry, beyond giving a tenant a notice to vacate, before the landlord incurs liability under section 93.002(c). If a notice of default or to vacate were all that the statute required, section 93.002(c) would arguably create landlord liability in each instance in which a landlord even mistakenly believes a tenant has violated the lease and intentionally gives notice to vacate.

Curtis* v. *AGF Spring Creek/Coit II, Ltd., 410 S.W.3d 511 (Tex.App.-Dallas 2013, no pet.). The Landlord entered into a lease with Atrium Executive Business Centers Richardson LLC as Tenant. Curtis signed as president of Atrium. The lease was modified three times. Turns out, though, that Atrium was never formed. Curtis did form an entity named AEBC that operated out of the premises, but all of the correspondence and all of the lease modifications were in the name of Atrium.

Curtis sent Landlord an email stating that business wasn't working out. She returned the keys and left. No rent was paid after she moved out.

The Landlord sued Curtis individually for breach of the lease, alleging that Atrium never existed and Curtis was individually liable. The trial court held in favor of the Landlord and awarded over $200,000 in damages.

Curtis claimed on appeal that the trial court should have found there was a lease by conduct with AEBC and that she should not have been held liable.

A lease may be created by words or other conduct expressing consent to the lessee's possession. The conduct expressing consent may consist merely in a failure to object to the presence of one who has entered without the lessor's consent but not adversely to him. Curtis points to evidence developed at trial that reimbursement of the tenant's move-in expenses, as well as the tenant's rent payments, fax transmissions, insurance policy, sales and use tax permit, and service agreements with its clients were all made in the name of AEBC rather than Atrium, and that Landlord was aware of these documents. But, said the court, the object of the lease, i.e., to provide commercial space to the tenant, could be accomplished without applying the lease by conduct doctrine to substitute AEBC. The lease expressly identified the tenant as Atrium. The lease also provided that it "shall not be altered, waived, amended or extended, except by a written agreement signed by the parties hereto...." The parties signed three subsequent modifications to the lease identifying Atrium as the tenant. Instead of conforming the terms of the lease to the parties' original intent, application of the lease by conduct doctrine would alter a material term of the contract, the identity of one of the contracting parties.

Curtis also argued that an entity unformed at the time a lease is made can adopt the lease after the entity is formed. But here, the entity was never formed, and thus could not "subsequently adopt" the lease. Curtis argues that the only difference between the unformed entity and the corporation she did form was the name. If Landlord had sought to recover for breach of the lease against AEBC, however, AEBC could defend the suit on the ground that it was not a party to the lease, and could not become a party without the written modification required by the lease.

Murray* v. *U.S. Bank National Association, 411 S.W.3d 926 (Tex.App.-El Paso 2013, no pet.). The Murrays defaulted on their mortgage and the Bank foreclosed. After foreclosure, the Bank sought to evict the Murrays. It sent them a notice to vacate, then went to the justice court, then to the county court, where it ultimately got a writ of possession. The Murrays complained that the eviction order should be vacated because the Bank did not affirmatively establish that the substitute trustee who executed the trustee's deed at the foreclosure sale was duly appointed and acting within the scope of her authority. As such, the Murrays claim the Bank's title is defective, no tenancy at sufferance came into being under the terms of the deed of trust, and the grant of eviction based on that nonexistent landlord-tenant relationship is void.

The Bank argued that the resolution of the possession issue in this case does not hinge on resolution of title because the Murrays did not present an actual dispute as to title. The Murrays didn't complain that the Trustee's Deed is in fact defective, nor did they provide any evidence that the trustee actually acted outside the scope of her authority in executing the deed. Instead, they argue that the Bank has the burden of proving step-by-step that the Trustee's Deed is valid. Not only does this argument subvert the Legislature's intent in expediting possession determinations and preventing protracted title litigation in the justice courts, it misapprehends the burden of proof on appeal. Because the Murrays brought a no-evidence challenge to the county court's judgment for a writ of possession, the court was required to uphold the county court's judgment upon a showing of any evidence of probative force in the record. Under this standard, bare allegations will not suffice to defeat the Bank's presumptively valid evidence of a Trustee's Deed.

Because the Bank provided an executed and presumptively valid trustee's deed, the deed of trust, and the notice to vacate, and because the Murrays did not adduce any evidence of an actual title dispute that would deprive the justice court and the county court of jurisdiction, the county court properly granted the writ of possession.

Wells Fargo Bank, N.A.* v. *Ezell, 410 S.W.3d 919 (Tex.App.-El Paso 2013, no pet.). Wells Fargo established its entitlement to possession of the premises as a matter of law. Wells Fargo did so primarily via three documents admitted into evidence without objection: (1) a certified copy of the deed of trust; (2) a certified copy of the substitute trustee's deed; and (3) a business record affidavit containing a copy of the notice to vacate sent to the Ezells. Section 22 of the deed of trust contains language establishing a landlord-tenant relationship between the Ezells and the purchaser of the property at a foreclosure sale. The substitute trustee's deed establishes that Wells Fargo purchased the property at the foreclosure sale and is entitled to possession of the property. The notice to vacate provides proof of proper notice to the Ezells that they were required to vacate the premises in three days. Finally, Mr. Ezell's testimony provided evidence of his possession of the property and his refusal to vacate. Collectively, this evidence is sufficient to establish Wells Fargo's superior right to immediate possession of the premises.

Philadelphia Indemnity Insurance Company* v. *White, 421 S.W.3d 252 (Tex.App.-San Antonio 2013, pet. pending). White's clothes dryer in her apartment caught fire and destroyed her apartment and belongings as well as several adjacent apartments. She had signed the TAA lease which said the tenant was obligated to pay for any damage for any cause not due to the landlord's negligence or fault. Despite a jury finding that White was not negligent, the landlord took the position that she was still contractually liable pursuant to the TAA lease provision. White argued that the provision violated public policy because it makes a tenant liable for damage to the entire apartment project for accidental losses, acts of God, criminal acts of another or something unassociated with the tenant or the apartment complex. The court agreed.

The court paid homage to the strong public policy in favor of freedom of contract, but then focused on certain provisions of Chapter 92 the Property Code. Chapter 92 permits the parties to contract over who will pay for repairs when the tenant causes damage. Under section 92.052, "[u]nless the condition was caused by normal wear and tear, the landlord does not have a duty . . . to repair or remedy a condition caused by: (1) the tenant; (2) a lawful occupant in the tenant's dwelling; (3) a member of the tenant's family; or (4) a guest or invitee of the tenant."

The Property Code also specifically authorizes the parties to shift by contract costs of repairs for "certain damages" from the landlord to the tenant irrespective of whether the damage was caused by the tenant. But, these "certain damages" are limited. Under section 92.006(f), a landlord and tenant "may agree that, except for those conditions caused by the negligence of the landlord, the tenant has the duty to pay for repair of the following conditions that may occur during the lease term or a renewal or extension: (1) damage from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant's dwelling; (2) damage to doors, windows, or screens; and (3) damage from windows or doors left open." By adding subsection (f), the Legislature permitted landlords and tenants to bargain over who would bear the cost of repairing these three specific conditions, typically tenant-caused, without requiring landlords to show that they were tenant-caused.

The court said that the public policy of Texas, as expressed in the Property Code, is that tenants may be held responsible for damages they, their cotenants, or their guests cause, and a landlord and tenant have the freedom to contractually agree a tenant will pay for specific kinds of repair without a showing that the tenant caused the damage. Absent from this legislatively-expressed public policy is the imposition of contractual liability on a tenant for any and all damages to the apartment complex whenever the damages are not caused by the landlord. In this case, all that is required to impose liability on a tenant is that the damage not be caused by the landlord. Here, the jury determined White's negligence did not proximately cause damages to the landord. However, under the TAA lease provision, White is required to pay for any damages to the apartment complex as long as the apartment complex was not at fault. The court concludes that the broad imposition of liability on a tenant for damage not caused by the landlord is void because it violates public policy as expressed in the Property Code.

PART VI
DEEDS AND CONVEYANCES

Cade* v. *Cosgrove, 430 S.W.3d 488 (Tex.App.-Fort Worth 2014, pet. pending). In 2006, the Cades and Cosgrove executed a contract for the sale of the Cades' property. The property was subject to an oil, gas, and mineral lease between the Cades and Dale Resources. The sales contract stated that the Cades were to retain all mineral rights. The warranty deed, however, failed to include the mineral reservation. Nevertheless, mineral lessee kept sending royalties to the Cades. In 2010, Cosgrove woke up to the fact that they weren't getting the royalty checks. In 2011, the Cades filed a declaratory judgment action and sought reformation of the deed to include the mineral reservation.

Among other defenses, Cosgrove raised limitations and the trial court granted summary judgment in favor of Cosgrove.

The four-year statute applies, but the statute starts running on the accrual of the cause of action. Generally, a cause of action accrues, and therefore the limitation period begins to run, when a wrongful act causes a legal injury. But when determining how long a grantor has to bring an action to reform a deed, a court must take into consideration the presumption of the grantor's immediate knowledge (the presumption). A grantor is presumed to know the contents of the deed immediately upon executing it. Application of the presumption means that the limitation period on a claim to reform an incorrect deed begins to run as soon as the deed is executed because, as soon as the deed is executed, the grantor has actual knowledge that the deed is incorrect. This rule has not been strictly applied in the past, however, and courts have noted numerous exceptions over the years.

The rule can be rebutted in several ways. Among those exceptions is subsequent conduct of the parties as though the deed had not contained the error." Thus, when the actions of both parties after execution of the deed show that the parties believed and behaved as though there was no error in the deed, the limitation period begins when the mistake was or should have been discovered.

Having held that the presumption may be rebutted, a court must start with the proposition that execution of the deed is not enough to irrefutably establish a grantor's knowledge as a matter of law so that a grantor will always be prohibited from introducing evidence of when the grantor actually learned of the deed's true contents. Nor can execution of the deed absolutely establish when the grantor should have known of the deed's contents such that the trial court would be prohibited from considering evidence of when the grantor should have known.

Cosgrove argues that Property Code §13.002 dictates that the Cades had notice of the existence of the instrument because the deed was recorded in the public records of the property county. The recording of an instrument does not work to create notice as a matter of law in every circumstance. The Cades are not third parties to the deed and are not a person interested in an estate admitted to probate--persons charged with knowledge as a matter of law with instruments filed in the public records. The Cades were perfectly aware of the deed's existence, and they had no reason after conveying the property to search the public records to examine the deed, absent some circumstance to put them on notice of a problem.

The evidence recited by the court was also sufficient to raise a fact issue about when the Cades should have known of the deed's contents. No evidence suggested that Cosgrove disputed the Cades' ownership of the mineral rights until she received forms from Chesapeake or that she did anything to create a question about who owned the minerals. Chesapeake continued to treat the Cades as the mineral owners for years after execution of the deed, and no evidence shows that any circumstance that occurred before December 2010 should have put the Cades on inquiry about whether they had retained the mineral rights. The court held that the trial court should not have granted summary judgment for Cosgrove on the reformation claim based on limitation.

Tipton* v. *Brock, 431 S.W.3d 673 (Tex.App.-El Paso 2014, pet. pending). In 1999, the Tiptons entered into a contract to buy some property. The contract provided that the seller, Brock, would retain the minerals. The title company prepared the deed and sent it around for review. It did not contain the mineral reservation in favor of the seller, but instead contained an exception for minerals previously reserved. Nobody complained and it was executed and recorded. In 2000, a "correction deed" was filed that included the mineral reservation in favor of Brock. The Tiptons claimed the correction deed was forged. In 2006, Brock sued the Tiptons for reformation of the deed based on mutual mistake. The Tiptons argued, among other things, that the lawsuit was barred by limitations.

A suit for reformation is subject to the four-year statute of limitations. In general, the statute of limitations begins to run when a particular cause of action accrues.

Ordinarily, a grantor is charged with knowledge of all defects in a deed, although the presumption of immediate knowledge is rebuttable under certain circumstances. The statute of limitations with regard to a reformation claim begins to run on the date the deed is executed. However, the Supreme Court of Texas recognizes two exceptions, the discovery rule and the doctrine of fraudulent concealment, which may extend the statute of limitations.

The discovery rule is a limited exception to the general principle that a statute of limitations begins to run when an injury occurs, regardless of when the plaintiff learns of the injury. The discovery rule defers accrual of a cause of action until the claimant knows or, by exercising reasonable due diligence, should know of the facts giving rise to the claim. The discovery rule applies when the injury is both 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. The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where 'it is difficult for the injured party to learn of the negligent act or omission. The court decides whether the nature of a plaintiff's injury is inherently undiscoverable, on a categorical basis rather than a case-specific basis.

The Tiptons argue that Brock failed to meet the two requirements of the discovery rule. They assert that the sales contract clearly states that the seller is to retain all mineral rights, that it is equally apparent that the 1999 deed does not contain any language reserving mineral rights, that Brock's testimony is that none of them read the 1999 deed before they executed the deed, and that whoever prepared the 2000 correction deed understood that the 1999 deed language did not reserve any of Brock's mineral rights. As such, the Tiptons contend that the 1999 deed is not ambiguous on its face and that Brock's failure to reserve any minerals was not inherently undiscoverable as a matter of law.

Trahan* v. *Mettlen, 428 S.W.3d 905 (Tex.App.-Texarkana 2014, no pet.). The Mettlens and the Trahans entered into a written contract memorializing the terms of their agreement regarding the sale and purchase of the Property. There is no mention of a reservation of mineral rights in that contract. The warranty deed transferring title to the Property from the Mettlens to the Trahans, however, is a different story. That deed recorded in Nacogdoches County, Texas on April 21, 2006, includes a clear reservation of mineral rights by the Mettlen.

Mr. Trahan testified that he was not given a copy of the deed when he purchased the property and that he first obtained a copy of the deed in September 2010. He acknowledged being present at the closing where the deed was executed but testified that he did not read the deed and that it was not physically delivered to him at that time. The Trahans contend that they were unaware of the reservation of mineral interests contained in the warranty deed until 2010, when they discovered oil and gas company vehicles on their property. They argue that the statute of limitations did not begin to run until that time.

In an effort to establish tolling of the applicable four-year limitations period, the Trahans rely heavily on the written contract, which states that the Trahans are purchasing the Property "with all rights, privileges and appurtenances pertaining thereto, including but not limited to: water rights, claims, permits, strips and gores, easements, and cooperative or association memberships . . . ." The Trahans contend that the omission of even a reference to a reservation of mineral rights by the Mettlens in the written sales contract, which is a memorialization of the parties' intentions, establishes that such a term was not a part of the bargained-for exchange. Consequently, the Trahans argue that, under the terms of the written agreement, they were entitled to a conveyance of the entirety of the ownership interest held by the Mettlens at the time the agreement was executed, including any mineral rights.

The Trahans testified via deposition that they believed they were purchasing both the surface and mineral interests in the Property and that they believed all such rights had been transferred to them through this transaction; however, they also admitted that the parties did not discuss ownership of mineral interests prior to executing the contract, including whether the Mettlens even owned any mineral interest that could be conveyed. Finally, the Trahans claim that the reservation of mineral rights was included in the warranty deed as the result of a mutual mistake and that, consequently, they are entitled to reformation of the deed to reflect the parties' original agreement.

A mutual mistake occurs when contracting parties have a common intention, but, due to a mutually-held mistake regarding a material fact, the written contract does not accurately reflect that intention. The elements of mutual mistake are thus (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-upon exchange. The facts of this case do not establish the elements of mutual mistake in the traditional sense. However, the Supreme Court has held that unilateral mistake by one party and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Here, the evidence is undisputed that the original contract to purchase the Property contained no reservation of mineral rights. Mrs. Mettlen testified that she called someone at the title company office and instructed them to include a reservation of mineral rights in the deed. The Trahans' testimony is that they did not know about Mrs. Mettlen's telephone call, that they were not aware of the reservation in the deed until 2010, and that the Mettlens never disclosed the reservation to them. Under these circumstances, the court will assume that this evidence is sufficient to establish the equivalent of a mutual mistake, that is, that the Trahans entered into the written real estate contract operating under a unilateral mistake regarding a material term of the agreement and that the Mettlens were aware of that mistake. Based on this assumption, reformation of the contract is a potentially appropriate remedy. However, whether that remedy has been invoked in a timely manner is actually the dispositive issue in this case.

There is no dispute that, under the applicable statute of limitations, the Trahans had four years from the date their cause of action accrued to file suit. Likewise, there is no dispute that this suit was filed more than four years after the deed was executed. The Trahans contend, however, that the statute of limitations was tolled under the facts of this case because they did not discover the facts giving rise to their cause of action until 2010, almost four years after the real estate transaction at issue was completed.

The first step in analyzing this issue is determining when the Trahans' cause of action accrued. Generally, purchasers of real property are immediately charged with knowledge of all defects in the deed conveying title to the purchased property, though this presumption of immediate knowledge is rebuttable.

If the mistake is plainly evident or clearly disclosed on the face of the deed, such as when the parties unquestionably agreed to a reservation of mineral interests by the seller but that reservation was omitted from the deed, all parties are chargeable with knowledge of the contents of the deed. The statute of limitations begins to run from either the date the deed was executed by the grantor or the date it was delivered to the grantee. On the other hand, if the mutual mistake is not plainly evident on the face of the deed, but, instead, relates to the legal effect of a material term of the parties' agreement, the statute of limitations begins to run when the mistake was, or in the exercise of diligence should have been, discovered.

Finally, the subsequent conduct of the parties may rebut the presumption that all parties are charged with immediate knowledge of the mistake. In that event, the discovery rule delays the accrual date or tolls the running of the statute of limitations until the mistake is, or in the exercise of reasonable diligence should have been, discovered.

The court assumed that the evidence establishes a unilateral mistake on the part of the Trahans coupled with inequitable conduct--the failure to disclose the reservation of mineral rights prior to or even at the closing--by the Mettlens. This is the equivalent of a mutual mistake and allows the court to consider reformation. However, the statute of limitations must be complied with as well. The difficulty with the Trahans' position is that the deed unequivocally discloses the Mettlens' reservation of oil, gas and other minerals. The reservation is set out immediately after the property description and is clear and obvious. It does not require interpretation as to its legal effect. There is no evidence that, after the execution of the deed, the Mettlens misled the Trahans or lulled them into a false sense of security that the mineral rights were conveyed in the deed or that the Mettlens attempted to hinder the Trahans from reading the plain provisions of the deed. There was no claim that the reservation was ambiguous or could be interpreted in different ways--it is an express written reservation of all mineral rights. The alleged mistaken term is clearly evident and disclosed in the deed; the parties are charged with the knowledge of the terms. Consequently, the statute of limitations begins to run from the date of execution of the deed by the grantor and the date of delivery to the grantee. The discovery rule is inapplicable.

The Trahans further allege that the Mettlens fraudulently concealed from them the fact that their reservation of mineral rights was included in the deed. They further allege they had no knowledge of the reservation until mineral exploration began on their property. They contend that the Mettlens' fraudulent concealment invoked the discovery rule, which, in turn, tolled the running of the statute of limitations until they actually discovered the reservation. But the warranty deed conveying title to the Trahans contains a clear and unambiguous reservation of mineral rights. The discovery rule for fraudulent concealment tolls the running of the statute of limitations only until the plaintiff discovers the fraud or could have discovered the fraud through the exercise of reasonable diligence. There is no evidence to suggest that, following their execution of the deed, the Mettlens engaged in any conduct designed to mislead the Trahans or prevent them from reviewing the warranty deed. More importantly, however, even assuming that the evidence showed fraudulent concealment by the Mettlens, the Trahans could have immediately discovered such fraudulent conduct by the exercise of reasonable diligence (reading their deed). However, the record reflects that the Trahans, who were present when the warranty deed was executed, failed to discover this mineral reservation even though it is clearly disclosed in the deed. Consequently, whether the discovery rule applied under the theory of fraudulent concealment or not, it did not operate to toll the running of the statute of limitations on the Trahans' cause of action.

Saravia* v. *Benson, 433 S.W.3d 658 (Tex.App.-Houston [14th Dist.] 2014, no pet.). This case is also discussed under Mortgages and Foreclosures. Benson sold some property to Halco Waste Container, taking back a note and deed of trust. The deed of trust had a due-on-sale clause. It also contained a clause permitting assumption of the debt with Benson’s consent.

Halco leased part of the property to Saravia, then defaulted on the loan. Benson began the foreclosure process. A few months later, Halco sold the property to Gandy, who assumed the debt. Six days later, Gandy filed bankruptcy. While Gandy’s bankruptcy case was pending, Benson foreclosed and acquired the property at the foreclosure sale.

Benson and Saravia then entered into an earnest money contract for Saravia to purchase the property. About a month later, Gandy sued Benson for wrongful foreclosure and filed a lis pendens.

Notwithstanding that, Benson and Saravia closed. Saravia didn't know about the lawsuit. The trial court set aside both of the two foreclosures and also held that Saravia was not a bona fide purchaser.

The court of appeals held that the second foreclosure was proper. Because the foreclosure of the lien and sale of the property to Benson were proper, Benson's subsequent sale to Saravia was also proper. Gandy contends that Saravia lacks standing to challenge the trial court's determination of title, because Saravia purchased the property with constructive notice of Gandy's lis pendens and Saravia is not the holder of Halco's underlying debt. The court agreed with Gandy that Saravia took title to the property subject to Gandy's lis pendens, but disagreed that Saravia lacks standing to assert his claim to good title.

Status as a bona fide purchaser is an affirmative defense to a title dispute. A bona fide purchaser acquires real property in good faith, for value, and without notice of any third--party claim or interest. A properly filed lis pendens operates as constructive notice to the world of its contents. Gandy filed a lis pendens two days before Benson and Saravia closed the sale of the property. Saravia purchased the property at closing. Saravia thus is properly charged with constructive notice of the previously filed lis pendens. Because Saravia had constructive notice, Saravia is not a bona fide purchaser.

Saravia, however, has standing to establish proper title, even though he was not the holder of the note. To establish standing, a plaintiff must show that he is personally aggrieved and that his alleged injury is concrete and particularized, actual or imminent, not hypothetical. When a third party has a property interest, whether legal or equitable, that will be affected by a foreclosure sale, the third party has standing to challenge the sale to the extent that its rights will be affected by the sale. Concomitantly, a property owner whose title is challenged based on a faulty foreclosure has standing to defend his title.

Saravia further contends that Benson is liable for breach of the general warranty deed. A warranty of title is a contract on the part of the grantor to pay damages in the event of failure of title. The purpose of a general warranty deed is to indemnify the purchaser against the loss or injury he may sustain by a failure or defect in the vendor's title. The grantor warrants that he will restore the purchase price to the grantee if the land is entirely lost.

Benson conveyed the property to Saravia by a general warranty deed. Benson warranted that the property was not subject to any debts or liens. In consideration for the property, Saravia paid $60,000 plus $13,421.72 in delinquent property taxes. Saravia also has undertaken the expense of defending his title. Because it concluded that Saravia has title to the property pursuant to a general warranty deed, the court remanded to the trial court his claims against Benson for breach of that deed.

Teal Trading And Development, LP* v. *Champee Springs Ranches Property Owners Association, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. pending). This case is also discussed in Land Use Planning and Restrictions.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made "subject to" the CCRs.

At one point, Teal Trading's predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

The doctrine of estoppel by deed precludes parties to a deed from denying the truth of any material fact asserted in the deed. Estoppel by deed is founded upon the theory that the parties have contracted upon the basis of the recited facts. Thus, although estoppel by deed figuratively closes the mouths of the parties to a deed and their privies from challenging the truth of the recited facts in a deed, itdoes not validate something that is otherwise invalid and cannot bind or benefit strangers to the deed.

The court held that, because the CCRs were neither a conveyance or a lease, it could not be an effective or enforceable reservation. In addition, each subsequent deed's recitation that the conveyance is subject to the Declaration is not a clear intention to reserve or except an interest from the conveyance" of that deed. Champee Springs takes the position that, when a grantee takes property "subject to" certain deed restrictions of record, the grantee has acknowledged the validity and enforceability of the restrictions, and thus is estopped by deed from denying their validity and enforceability. The court disagreed. Those words mean "subordinate to," "subservient to," or "limited by." They are words of qualification and not of contract. They are notice to and an acknowledgment that such restrictions are of record, but they are not in fact an acknowledgment of the validity of the restrictions.

In fact, a “subject to" clause may simply protect a grantor on its warranty. When property is conveyed by warranty deeds, it is in the interest of the grantors that the conveyance be made subject to every restriction or encumbrance which not only does apply to such property but also may apply. The inclusion of restrictions in the "subject to" clause may thus express a wise precaution on the part of the grantor. It would indeed be foolhardy for a grantor who is delivering a warranty deed to fail to refer to a restriction which may at some time in the future be held to apply to his property, merely to avoid the criticism of excess wordiness. Thus, it is not unusual for conveyances to be made subject to all recorded covenants, easements and restrictions, without specific enumeration, and it would be inappropriate, to say the least, to infer restrictions because it may subsequently turn out that none then applied to the property.

Having recognized that the meaning of a "subject to" clause is somewhat contextual, the court examined the "subject to" clauses contained in Teal Trading's chain of title. The clauses in some of the deeds in the chain stated they were subject to exceptions listed on an attached exhibit, to the extent they were valid and existing and affect the property.

Because none of the deeds within the chain of title from Cop to Teal Trading acknowledge the validity and enforceability of the non-access restriction, Champee Springs did not show as a matter of law that Teal Trading is estopped by deed from challenging the non-access restriction's validity and enforceability. The trial court erred by granting Champee Springs's motion for summary judgment.

PART VII
VENDOR AND PURCHASER

HMC Hotel Properties II Limited Partnership* v. *Keystone-Texas Property Holding Corporation, No. 12-0289 (Tex., June 13, 2014). The Rivercenter Mall and the ground underneath the Marriott Riverwalk hotel in San Antonio were both owned by Keystone–Texas. Keystone leased the hotel land to Host who owns and operates the Marriott Riverwalk. The lease contained a sort of modified ROFR they called a "right of first negotiation" that allowed Host to negotiate a deal to purchase the property should Keystone ever propose selling it to a third party.

Keystone wanted to sell to a third party and notified Host, asking it to make an offer pursuant to the lease provision. Host indicated that it might be interested, but didn't actually make an offer. Host was suspicious that Keystone was monkeying with the sales price allocations in a way that would discourage it from making an offer. Host sent a letter accusing Keystone of failing to comply with the lease by already having its deal lined up with the third party. In the letter, Host demanded an extended negotiation period that would focus on establishing the fair market value of the property not based on Keystone's previously negotiated deal with a third party. The letter made its way to proposed title insurers. The title insurers required a waiver from Host in order to issue clean policies to the third party. Although Keystone asked Host for such a waiver, Host did not provide one, and it is undisputed that the lease did not obligate Host to do so

By the time Host sent its letter, the deal with the third party had been split into two parts, one for the hotel and one for the mall. The mall deal closed, but the hotel did not. Host sued Keystone for breach of the lease. Keystone counterclaimed for slander of title and tortious interference with contract, arguing that the letter, which had made its way to the title companies, scuttled the sale. The trial court held in favor of Keystone and awarded $39 million in actual damages. The court of appeals upheld the award and also awarded $7.5 in punitive damages.

Host argues that because the title insurers required a waiver both before and after Host sent its April 18 letter, the letter could not have caused the deal's collapse. At most, it simply communicated that a waiver was not forthcoming. The outcome would have been the same regardless of how Host communicated its position to Keystone, or if it had said nothing at all.

The Supreme Court noted that the court of appeals summarized testimony of several witnesses, many who blamed Host's letter for killing the deal, and concluded the evidence was sufficient to support the jury's findings that Host's letter proximately caused the deal's demise. The court of appeals did not, however, point to any evidence showing how the ultimate outcome would have been different had Host not sent the letter.

Goldman* v. *Olmstead, 414 S.W.3d 346 (Tex.App.-Dallas 2013). This case is also discussed under Brokers. The Goldmans requested that Hewett assist them with the purchase of a new home. They decided to make an offer to the Olmsteads to buy their house. The Goldmans obtained a prequalification letter from Bank of America to submit with their offer. The Goldmans and the Olmsteads entered into a contract for the purchase and sale of the house. The Olmsteads' broker was Sally Smith, who was Mrs. Olmstead's mother.

After the contract was entered into, the Goldmans had difficulty obtaining financing. After having been turned down twice, Mr. Goldman applied for a loan from Bank of America. In connection with that application, he supplied false information regarding his employer and income. Bank of America turned the Goldmans down because they couldn't verify income. Ultimately, after making some other efforts to obtain a loan, the Goldmans were unable to close. They sent a letter to the Olmsteads terminating the contract based on their inability to obtain financing.

The Olmsteads sued and the Goldmans answered, also filing third party petitions against Hewett and her company. The claims against the broker were for negligence, breach of fiduciary duty, violations of the DTPA, fraud in a real estate transaction, common law fraud, and negligent misrepresentation. Hewett asserted a counterclaim against the Goldmans for fraud, alleging Mark Goldman provided false information to Bank of America in order to obtain the prequalification letter.

The trial court ruled in favor of the Olmsteads on the breach of contract issues, awarding over $50,000 in damages and a whole lot of attorneys' fees. The trial court also ruled against the Goldmans on their claims against Hewett and awarded her a whole lot of attorneys' fees.

On appeal, the Goldmans claimed that the contract was indefinite because it was illegible. It was a standard TREC form. The copy of the original contract was difficult to read, but the parties had executed a clean copy at the request of Bank of America as part of its loan application process. Accordingly, the court held that the contract was not indefinite because of illegibility.

The Goldmans next argued that the contract was indefinite because the sellers' names were not inserted on the first page of the contract. The court noted that the sellers' names were all over the contract otherwise and that each page was initialed and the signature page signed by the Olmsteads. That was sufficient.

The Goldmans then argued that because the contract was illegible and indefinite for failure to identify the sellers, it failed to comply with the statute of frauds. To comply with the statute, the writing must contain the essential terms of the contract, expressed with such certainty that they may be understood without resorting to oral testimony. The contract for the sale of the Stanford house was in writing, contained the essential terms of the agreement, and was signed by both the Olmsteads and the Goldmans. It, therefore, complied with the statute of frauds.

The Goldmans finally complained about the damages that were awarded. The trial court awarded damages based on the carrying costs of the house after the breach of contract. The Goldmans asserted the proper measure of damages for breach of a residential real estate contract is the difference between the contract price and the market value of the property on the date of the breach and that the carrying costs recovered by the Olmsteads, while perhaps recoverable as part of an equitable accounting in a suit for specific performance of the contract, are not recoverable in a suit for damages.

Generally, the measure of actual damages in a breach of contract case is the loss of the benefit of the bargain, which would put the plaintiff in the same economic position he would have been in had the contract actually been performed. In this case, the Goldmans agreed to purchase the Stanford house for $810,000, and the Olmsteads admitted the market value of the house on the date of the breach was $810,000. Under Texas law damages are measured by the difference between the contract price and the market value of the house on the date the Goldmans breached the contract. The evidence established there was no difference in the contract price and the market value on the date the Goldmans breached the contract. The court held that the trial court had used an improper measure of damages and concluded that the

Olmsteads failed to prove they suffered any damages under the correct legal measure of damages.

G.D. Holdings, Inc.* v. *H.D.H. Land & Timber, L.P., 407 S.W.3d 856 (Tex.App.-Tyler 2013, no pet.). GD and HDH were negotiating a contract for HDH to sell some land to GD. HDH signed a contract form that included a provision requiring GD to pay for dozer work and cleanup if the sale didn't close. GD struck that provision when the contract got to it. When HDH found out about that it refused to agree. GD had put up $30,000 earnest money, but eventually failed to obtain financing and did not purchase the property. GD sued to get its earnest money back. HDH claimed that GD had breached a valid written contract and that HDH was entitled to the earnest money. The trial court found in favor of HDH.

GD contends that the trial court erred in awarding damages because there was no contract. The elements of an enforceable contract are (1) an offer; (2) an acceptance in strict compliance with the terms of the offer; (3) a meeting of the minds; (4) a communication that each party consented to the terms of the contract; (5) execution and delivery of the contract with an intent that it become mutual and binding on both parties; and (6) consideration. For a contract to be formed, the minds of the parties must meet with respect to the subject matter of the agreement and all its essential terms.

The material terms of the contract must be agreed upon before a court can enforce the contract. An acceptance must not change the terms of an offer; if it does, the offer is rejected. Acceptance must be identical to the offer in order to make a binding contract. A material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party. A contractual provision dealing with payment is always an essential element or a material term.

Here, there is no dispute between the parties that they had not agreed in writing about what would happen to the earnest money if the sale did not close. Thus, the parties did not have a meeting of the minds on an essential term of the contract. Further, when GD struck out the term describing its responsibility to pay for clearing the nine acres, HDH's offer was rejected. Because GD's change regarded the earnest money, a material or essential term of the contract, HDH must have accepted the change for a contract to be formed.

Magill* v. *Watson, 409 S.W.3d 673 (Tex.App.-Houston [1st Dist.] 2013, no pet.). The earnest money contract provided that a party who wrongfully fails or refuses to sign a release of the earnest money would be liable for liquidated damages in an amount equal to the sum of (i) three times the amount of the earnest money; (ii) the earnest money; (iii) reasonable attorney's fees; and (iv) all costs of suit.

A court will enforce a liquidated damages clause if (1) the harm caused by the breach is incapable or difficult of estimation, and (2) the amount of liquidated damages is a reasonable forecast of just compensation. An assertion that a liquidated damages provision constitutes an unenforceable penalty is an affirmative defense, and the party asserting penalty bears the burden of proof. Generally, that party must prove the amount of actual damages, if any, to demonstrate that the actual loss was not an approximation of the stipulated sum. If the amount stipulated in the liquidated damages clause is shown to be disproportionate to actual damages, a court should declare that the clause is a penalty and limit recovery to actual damages. Whether a liquidated damages clause is an unenforceable penalty is a question of law for the court, but sometimes factual issues must be resolved before the court can decide the legal question.

Here, the court held that the liquidated damages provision was void on its face. The liquidated damage provision makes no attempt to quantify the actual damages that would be caused by a failure to release the earnest money. Instead, the provision merely assumes that the earnest money, which the parties have agreed will constitute actual damages for breach of the agreement in general, should be trebled and added to the earnest money in the event that the obligation to release the earnest money is breached.

The court concluded that because the contract provision simply takes the value of the earnest money, which the parties have agreed represents the actual damages caused by the breach of the agreement, and multiplies it times three if there is an additional breach of the obligation to turn over the earnest money, the provision is an unlawful penalty and does not attempt to forecast actual damages. "We are not holding, however, that a contract can never provide liquidated damages for the failure to release earnest money. We hold only that the clause in this case, on its face, did not attempt to reasonably forecast a just compensation for a breach of the agreement to release the earnest money."

PART VIII
EASEMENTS

Hamrick* v. *Ward, No. 12-0348 (Tex. August 29, 2014). "This case presents the Court with an opportunity to provide clarity in an area of property law that has lacked clarity for some time: implied easements."

In 1936, O. J. Bourgeois deeded 41.1 acres of his property in Harris County, Texas to his grandson, Paul Bourgeois. During Paul's ownership, a dirt road was constructed on the eastern edge of the 41.1 acre tract, providing access from the remainder of the land to a public thoroughfare, Richardson Road. In 1953, Paul deeded two landlocked acres of the tract to Alvin and Cora Bourgeois, severing the 41.1 acres into two separate parcels. Alvin and Cora used the dirt road to access their two acres. The two acre tract was subsequently transferred to Henry and Bettie Bush in 1956, who sold the land to Henry Gomez in 1957. In 1967, Henry Gomez and his wife, Anna Bell, built a house on the two acre tract with a listed address of 6630 Richardson Road. Anna Bell became the sole owner of the two acre tract when Henry died in 1990.

In the late 1990s, developer William Cook began construction of the Barrington Woods subdivision on the remaining acreage of Paul Bourgeois' property. Cook planned to close the dirt road Anna Bell used to access her two acres and to construct a paved driveway for her to directly access her property from a newly added paved street. But Anna Bell's land was not platted, and Harris County required a one foot reserve and barricade between her property and the new street, which rendered the dirt road her only means of access.

In February 2000, Cook unilaterally filed a special restriction amendment to the subdivision's deed restrictions. The special restriction purported to create a "Prescriptive (Rear Access) Easement" along the southeast property line of Lots 3 and 4. It further stated, "[t]his Prescriptive Easement will also be used by Annabelle [sic] Gomez," and allowed Anna Bell a fifteen foot wide easement along the dirt road for herself, her family, social guests, and service vehicles under 6,200 pounds. Anna Bell was not a party to the special restriction, never discussed its contents with Cook, and did not learn of the existence of the document until September 2005.

The Hamricks and others purchased lots on Barrington Woods. The developer told them that, when Anna Bell sold her home, the property would be platted, her access to the main road would open and the Hamricks would recover full use of the dirt road.

Before the Hamricks closed on their home, Anna Bell sold her property to the Wards. After buying her property, the Wards continued to use the dirt road. They reinforced the dirt road with gravel and made use of the road to build a new home on the land.

In 2006, the Hamricks got a temporary injunction preventing the Wards from using the easement to construct their home. Ward responded by platting the property. Access was made available to the paved road that allowed them to complete construction. Even with access to the paved road in place, the Wards continued to press a counterclaim that they had an implied, prior use easement to use the dirt road. The trial court granted the Ward's motion for summary judgment.

Both sides appealed. The court of appeals held that the evidence established beneficial use of the road prior to severance as well as the necessity of the road, affirming the trial court. It held that the Wards had to prove only necessity at the time of severance, not continuing necessity. But, the court of appeals determined that a fact issue remained with respect to the bona fide purchaser defense.

At the Supreme Court, the parties raise three distinct issues: (1) whether the Wards have an implied easement over the Hamricks' land despite a lack of continued necessity; (2) whether the Hamricks qualify as bona fide purchasers so as to take the land free of any easement the Wards may have; and (3) the propriety of the trial court's award of attorney's fees. The court disposed of the first issue in a way that precluded reaching the other two.

Under Texas law, implied easements fall within two broad categories: necessity easements and prior use easements. But the unqualified use of the general term "implied easement" has sown considerable confusion because both a necessity easement and a prior use easement are implied and both arise from the severance of a previously unified parcel of land. Further contributing to this confusion, courts have used a variety of terms to describe both necessity easements and prior use easements. Despite imprecise semantics, the Supreme Court said that it has maintained separate and distinct doctrines for these two implied easements for well over a century. In this case, said the court "we clarify that a party claiming a roadway easement to a landlocked, previously unified parcel must pursue a necessity easement theory."

The Supreme court recognized in 1867 that a necessity easement results when a grantor, in conveying or retaining a parcel of land, fails to expressly provide for a means of accessing the land. To successfully assert a necessity easement, the party claiming the easement must demonstrate: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the claimed access is a necessity and not a mere convenience; and (3) the necessity existed at the time the two estates were severed. As this analysis makes clear, a party seeking a necessity easement must prove both a historical necessity (that the way was necessary at the time of severance) and a continuing, present necessity for the way in question. Once an easement by necessity arises, it continues until "the necessity terminates."

Two decades after it established the necessity easement doctrine for roadways, the Supreme Court found that framework to be ill suited for other improvements that nonetheless are properly construed as implied easement. It held that, if an improvement constructed on one parcel of land for the convenient use and enjoyment of another contiguous parcel by the owner of both is open and usable and permanent in its character, the use of such improvement will pass as an easement, although it may not be absolutely necessary to the enjoyment of the estate conveyed. Unlike necessity easements, which are implied out of the desire to avoid the proliferation of landlocked—and therefore, unproductive—parcels of land, the rationale underlying the implication of an easement based on prior use is not sheer necessity. The basis of the doctrine of prior use easements is that the law reads into the instrument that which the circumstances show both grantor and grantee must have intended, had they given the obvious facts of the transaction proper consideration."

The requirements for establishing are: (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended that its use pass by grant; and (4) the use must be necessary to the use of the dominant estate. The element of proof of necessity is higher for a prior use easement, and the requirement differs depending on whether the easement is implied by grant or by reservation. If implied by reservation, strict necessity must be proved; if by grant, usually only reasonable necessity is required, although there is some ambiguity as to the latter (which the court did not address).

The court noted that the factual circumstances where a prior use easement has been found are somewhat limited: use of a common stairwell, grazing cattle, recreational use of adjoining property, a party wall, utility easements and the like.

The court then held that the prior use doctrine was inappropriate for easements such as that claimed by the Wards. It held that courts adjudicating implied easements for roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine. The court said that it had developed the two types of easements for discrete circumstances. The less forgiving proof requirements for necessity easements (strict and continuing necessity) simply serve as acknowledgment that roadways typically are more significant intrusions on servient estates. By contrast, improvements at issue in prior use easements (e.g., water lines, sewer lines, power lines) tend to involve more modest impositions on servient estates. Accordingly, for such improvements, the court has not mandated continued strict necessity but instead carefully examine the circumstances existing at the time of the severance to assess whether the parties intended for continued use of the improvement. The court then remanded to allow the Wards to pursue a necessity claim.

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

Frazier* v. *Donovan, 420 S.W.3d 463 (Tex.App.-Tyler 2014, no pet. history to date). In late 1934 or early 1935, the home of Mary Frazier and her husband, Harrison, was destroyed by a fire. After the fire, in 1935, Mary's parents conveyed to her the land on which the home once stood (call it the "Frazier tract"). Mary and Harrison built a new home for themselves and their thirteen children across the road from their previous home site.

In 1936, Mary's parents conveyed another tract of their land to Mary's sister, Eddie Barnett, and her husband, Eugene (call it the "Barnett tract"). Eddie and Eugene had five sons.

Both couples died intestate. After Mary died in 1981, her daughter Dessor moved into Mary's house. Her nephew Neal lived in the house with her and raised cattle on the surrounding land. In 1997, Dessor moved out of the house. Neal continued to live there and use the property until 2011.

In 2011, Donovan bought both the Frazier and Barnett tracts. A survey told him that the Frazier house, where Neal lived, was located on the Barnett tract. Donovan closed anyway, then filed an eviction suit against Neal. Neal then filed this suit to establish title to the Barnett tract by adverse possession. Donovan argued, among other things, that Neal did not exercise exclusive dominion over the property and appropriate it for his own use and benefit because there was no evidence he had attempted to oust any cotenants from the Barnett tract. He also argued that Neal could not have claimed the property by adverse possession because he did not realize the Frazier homestead had been built on the Barnett tract until the property was surveyed in 2011. The trial court granted summary judgment in favor of Donovan.

A tenancy in common is a tenancy by two or more persons, in equal or unequal undivided shares, where each person has an equal right to possess the whole property, but with no right of survivorship.

Because cotenants in an undivided estate have an equal right to enter upon the common estate and a corollary right to possession, a cotenant seeking to establish title by adverse possession must prove, in addition to the usual adverse possession requirements, an ouster of the cotenant not in possession or repudiation of the cotenancy relationship.

The problem for Donovan, according to the court of appeals, was that there is no indication that Neal and any other person were ever cotenants in the property. The summary judgment record reflects that none of Mary's heirs owned any interest in the Barnett tract. The summary judgment evidence further indicates that Neal never inherited any portion of the Barnett tract. Rather, the evidence indicates that tract passed by intestacy to either the five sons of Eugene and Eddie Barnett or their heirs.

As to Neal's mistaken belief of ownership, the court held that a claimant's lack of knowledge of any deficiency in his record title or that there could be other claimants for the land would not defeat a claim of right coupled with actual, visible possession and use of the real property.

PART X
HOMESTEAD

Thomas* v. *Graham Mortgage Corporation, 408 S.W.3d 581 (Tex.App.-Austin 2013, no pet.). Thomas borrowed a loan from the Lender secured by a ranch. A few weeks before the loan, the title company identified a 200 acre portion of the ranch as homestead, based on a homestead designation filed by Thomas a few years earlier. Thomas argued that it wasn't homestead – that he had moved off the land some time ago. At the closing, Thomas signed a Non-Homestead Affidavit.

Thomas defaulted and the bank posted for foreclosure. Thomas sued. In that suit, Thomas maintained that the 200 acres was his homestead and that the bank's lien violated the homestead laws. The Lender foreclosed and the trial court ultimately granted it summary judgment in favor of the Lender.

One of the grounds upon which the Lender moved for summary judgment was abandonment. Specifically, the Lender argued that, to the extent the property was ever Thomas's homestead property, the undisputed evidence conclusively established that Thomas had abandoned the Property as a homestead at the time the loan agreement was executed and the deed of trust lien was acquired.

A property owner does not necessarily abandon homestead property by changing residence. Even the temporary renting of the homestead does not change the homestead character of the property, when no other homestead has been established. Rather, evidence establishing abandonment of a homestead must be undeniably clear and show beyond almost the shadow, at least of all reasonable ground of dispute, that there has been a total abandonment with an intention not to return and claim the exemption. That is, it must be clear that there has been a discontinuance of the use of the property coupled with an intention not to use it as a homestead again.

Though a change of residence does not necessarily equate to abandonment, a change in residence coupled with a disclaimer of the homestead may form the basis of a claim of abandonment by estoppel. Estoppel is a doctrine recognized and applied in a variety of contexts, but generally prevents a party from asserting rights, claims, and matters of fact that are inconsistent with those previously asserted by the party. Applying estoppel principles in the context of homestead disclaimers, Texas courts have sought to balance the importance of constitutional homestead protection with policy considerations which abhor the perpetration of fraud on creditors.

As a result, it is well established that when physical facts open to observation lead to a conclusion that the property is not the homestead of the mortgagor, and its use is not inconsistent with the declarations made that the property is disclaimed as a homestead, and these declarations were intended to be and were actually relied upon by the lender, then the owner is estopped from asserting a homestead claim. On the other hand, if the circumstances are such that a lender should have known or suspected that a homestead disclaimer was false – such as when a property owner is in actual possession of a piece of property, occupying and using the property –then courts will not enforce the disclaimer against the debtor.

In support of its motion for summary judgment, the Lender attached the affidavit of Castelhano, vice president of the Bank and loan officer for the Thomas loan. Castelhano stated that during their initial conversation, Thomas informed Castelhano that he was a doctor in Van Horn, that the Property was currently for sale, and that he wanted to borrow against the Property so that he could buy a ranch in New Mexico. Further, Castelhano explained in his affidavit that he had conducted a visual inspection of the Property with Thomas's real estate agent in the month before the closing. Castlehano stated that during this inspection, he did not observe any dwellings or living structures on the subject property except a cabin and that the real estate agent told Castelhano that employees who worked on the Property lived there and, for that reason, he could not inspect it." The agent also informed Castelhano that Thomas had not lived on the Propperty. Thomas did not dispute these facts. Under these circumstances, the Bank was justified in relying on Thomas's representation that he was disclaiming any constitutional homestead rights in the Property.

PART XI
BROKERS

Goldman* v. *Olmstead, 414 S.W.3d 346 (Tex.App.-Dallas 2013, pet. denied). This case is also discussed under Vendor and Purchaser. The Goldmans requested that Hewett assist them with the purchase of a new home. They decided to make an offer to the Olmsteads to buy their house. The Goldmans obtained a prequalification letter from Band of America to submit with their offer. The Goldmans and the Olmsteads entered into a contract for the purchase and sale of the house. The Olmsteads' broker was Sally Smith, who was Mrs. Olmstead's mother.

The Goldmans contended that the contract was void or voidable as against public policy because the Olmstead's broker, Smith, failed to disclose that she was Mrs. Olmstead's mother. Section 1101.652(a)(3) of the Occupations Code provides that TREC may suspend or revoke a broker's license or take disciplinary action if a broker engages in misrepresentation, dishonesty, or fraud when selling real property in the name of a person related to the license holder within the first degree by consanguinity. The regulations under that statute require disclosure to be made in the contract or in writing before the contract is entered into. The Goldmans argue that the statute and the Occupations Code set out the public policy in Texas and where disclosure is required but not provided, public policy makes the contract void or voidable.

The court disagreed. Section 1101.652 of the Occupations Code relates solely to the suspension or revocation of a license. Neither section 1101.652 of the Occupations Code nor any applicable version of section 535.144 of the administrative code provides that the non-compliance of the license holder causes any related contract for the sale of real estate to be void.

Shanklin* v. *Bassoe Offshore (USA) Inc., 415 S.W.3d 311 (Tex.App.-Houston [1st Dist.] 2013, no pet.). Under the Real Estate License Act, Occupations Code § 1101.754, there is a private cause of action for certain violations by a broker:"A person who receives a commission or other consideration as a result of acting as a broker or salesperson without holding a license or certificate of registration under this chapter is liable to an aggrieved person for a penalty of not less than the amount of money received or more than three times the amount of money received." The statute does not define "aggrieved person." Courts have held, as did this one, that an aggrieved person under this statute must have paid all or part of the fee or profit to the unlicensed broker.

PART XII TITLE INSURANCE AND ESCROW AGENTS

Lawyers Title Insurance Corporation* v. *Doubletree Partners, L.P., 739 F.3d 848 (5th Cir. 2014). Doubletree bought 36 acres close to Lake Lewisville in Highland Village. In connection with the acquisition, Doubletree got a survey and an owner's title policy with the "survey exception" modified to read "shortages in area."

The survey showed a flowage easement, referring to its "approximate" location. In preparing the survey, the surveyor relied on flood insurance rate maps, but did not measure elevations and did not consult a publicly available contour map from the City of Highland Village. Based on the survey, Lawyers Title issued title insurance policy and provided the policy to Doubletree. Due to a software printing error, the original policy failed to include many of the encumbrances listed as exceptions, including the flowage easement. The original policy also failed to include the agreed-upon survey coverage. Several months later, in October 2006, Doubletree submitted a lost policy request. In response, Lawyers Title sent a copy of the policy that was identical to the original policy in all respects, including in its omission of the flowage easement exception and the survey coverage.

Turns out that the survey substantially underrepresented the area of the property that was subject to the flowage easement. The significantly larger no-building zone covered by the flowage easement meant Doubletree would be unable to proceed with its plan to build several of the residential structures it intended to build on the lakeside portion of the property.

Doubletree filed a title insurance claim with Lawyers Title. Doubletree alleged the existence of the flowage easement on the property caused $850,025 in damage from the diminution of the property's value for its intended purpose. The claim did not rely on the error in the survey but instead relied on the original policy, which did not contain an exception for the flowage easement and did not include a provision for survey coverage. In response, Lawyers Title denied the claim, explaining that, based on the title commitments, the flowage easement was meant to come within an exclusion to coverage under the policy.

Doubletree resubmitted the claim to Lawyers Title, again relying on the fact that the title policy contained no exception relating to the flowage easement, and insisting that the title commitment containing that exception was no longer in force. Lawyers Title again denied the claim, but this time it provided a corrected policy with the denial. The corrected policy included the flowage easement exception as reflected in the final title commitment, as well as the standard survey exception as amended to reflect the purchase of survey coverage. By the time Lawyers Title sent its second letter denying Doubletree's claim, Doubletree had been unable to go forward with its development as planned and was eventually unable to meet its loan obligations on the property. The property was subjected to foreclosure proceedings and sold at a public auction to the Trust for Public Land, a conservation organization.

Lawyers Title sued Doubletree asking for a declaratory judgment and reformation of the original policy. Doubletree counterclaimed. The magistrate judge at the district court held in favor of Lawyers Title. The magistrate judge's opinion reformed the title insurance policy to reflect the corrected policy issued by Lawyers Title. The magistrate judge further held that exclusion 3(a), which appeared in both the corrected policy and original policy issued by Lawyers Title, barred Doubletree's claim. According to the court, under exclusion 3(a), Doubletree "suffered, assumed or agreed to" the flowage easement as an encumbrance on title by accepting the final title commitment, the vesting deed, and the leaseback agreement, each of which referenced the easement. In addition, the magistrate judge held that, even under the corrected policy, the survey coverage purchased by Doubletree did not cover the survey error in identifying the easement; the type of title insurance Doubletree suggested it purchased is not available in Texas; and the exception for the flowage easement excluded the entire flowage easement from coverage in any event. For all of these reasons, the magistrate judge held that Doubletree could not recover on its breach of contract claim based on the title insurance policies.

The Fifth Circuit first held that the magistrate judge correctly reformed the policy. The final title commitment before closing reflects agreement on the terms of the title insurance policy. That agreement included both an exception for the flowage easement and the survey coverage purchased by Doubletree. Further, the summary judgment evidence shows that Doubletree paid an additional premium to amend the survey clause to obtain survey coverage. Based on this evidence, the first part of the contract reformation test is satisfied. And, even though the mistake in issuing the policy without the exceptions or the survey deletion was the unilateral mistake of Lawyers Title, Doubletree clearly had knowledge of this mistake since it paid a premium for survey coverage and received the final title commitment reflecting the coverage, but later received a policy from Lawyers Title that differed materially from the agreed-upon terms in the final title commitment. Indeed, the two title insurance claims Doubletree submitted to Lawyers Title were based on the original, flawed policy, and those claims noted that the policy it received lacked the flowage easement exception. Therefore, there is no question that Doubletree knew of the unilateral mistake by Lawyers Title in reducing the agreement to writing. Because a unilateral mistake by one party and knowledge of that mistake by the other party is equivalent to mutual mistake, the second part of the contract reformation test is also satisfied.

As to whether the reformed policy covered survey errors in identifying the location of the flowage easement, the court held that it did.

As to survey coverage, the magistrate judge erred in concluding that it is not permitted under Texas law. Texas law requires title insurers to use policy provisions approved by the Texas Department of Insurance. The standard title insurance form contains the standard survey exclusion identical to the one set forth in the original policy. However, the Texas Department of Insurance explicitly allows title insurance companies to provide survey coverage by amending the standard survey exclusion. In that event, the Texas Department of Insurance requires the standard survey clause to be modified to exclude only "shortages in area."

Also, when a disputed provision in the title insurance policy is an exclusion, the insurer has the burden of establishing that the exclusion applies. If an exclusion is ambiguous, the court must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not itself unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties' intent. As to whether the survey coverage clause in the corrected policy provides coverage for the survey error in locating the flowage easement, the court held that both parties' interpretations of the clause are reasonable. As a result, it adopted Doubletree's interpretation.

Lawyers Title argued that survey coverage doesn't cover all alleged defects in the survey, but only errors in identifying boundaries. Doubletree argued that the survey coverage it purchased covers all errors in the survey, including the error in describing the location of the flowage easement.

Lawyers Title then argued that the flowage easement exception precludes coverage for the survey error in this case. The exception for the flowage easement identified the easement and added "and shown" on the survey. Lawyers Title argued that the "and shown" wording was merely a notation to indicate that the surveyor had identified the easement as affecting the property and doesn't affect the substance of the exception. Alternatively, Lawyers Title argued, as held by the magistrate judge, that the "and shown" wording actually expands the scope of the exception, precluding coverage for the flowage easement as it exists in the real property records and as it is described in any other documents, like the survey.

Doubletree argued that the addition of the "and shown on survey" language to the flowage easement exception limits the exception to cover the easement only to the extent the easement is shown in the real property records and on the survey. Thus, any error in identifying the location of the easement in the survey would not be excepted from coverage.

The court held that Lawyers Title's first argument and Doubletree's argument were reasonable, so it was required to pick Doubletree's.

Finally, the court held that the Acts of the Insured exclusion from the policy did not bar Doubletree's claim. Exclusion 3(a) to the policy excludes coverages for matters "created, suffered, assumed or agreed to by the insured claimant." Lawyers Title argued that the district court was correct in concluding that Doubletree "suffered, assumed, or agreed" to the flowage easement as a defect in title under exclusion 3(a). Lawyers Title contends that Doubletree did so by virtue of three documents. First, in the sales contract, Doubletree agreed to purchase the property with the easement listed as a title defect. Second, Doubletree accepted a deed stating that title was being conveyed "subject to" the flowage easement. Third, in the final title commitment, the flowage easement was specifically identified as an exception.

Doubletree argued that it could not have suffered, assumed, or agreed to the flowage easement as a title defect because it did not know the actual location and size of the recorded easement. Doubletree also maintained that the language of the deed—that it took the property "subject to" to the easement—does not establish that it suffered, assumed, or agreed to the flowage easement as a defect in title. Finally, Doubletree noted that the deed and other closing documents referred to the flowage easement as it was shown in the real property records and on the survey. Thus, even if it did assume the flowage easement as a defect in title, it only assumed it to the extent it was shown in the real property records and the survey.

The court said "suffered" means "permit" and implies the power to prohibit or prevent the lien which has not been exercised. The term "assume" requires knowledge of the specific title defect. Courts have held that an insured does not assume something affecting title merely by taking the property subject to it. "Agreed to" connotes "contracted for," requiring full knowledge by the insured of the extent and amount of the claim. All of these require some degree of intent to acquire the property with defects in title. The court said that, under exclusion 3(a), the insurer can escape liability only if it is established that the defect, lien or encumbrance resulted from some intentional misconduct or inequitable dealings by the insured or the insured either expressly or impliedly assumed or agreed to the defects or encumbrances in the course of purchasing the property involved. The courts have not permitted the insurer to avoid liability if the insured was innocent of any conduct causing the loss or was simply negligent in bringing about the loss.

Based on these standards, Doubletree did not suffer, assume, or agree to the undisclosed magnitude of the flowage easement for three main reasons. First, all four documents at issue include the "and shown on survey" language that the corrected policy contains. Because the survey failed to disclose the full extent of the easement, Doubletree did not suffer, assume, or agree to the full extent of the easement as a defect in title. Second, Doubletree did not suffer, assume, or agree to the undisclosed magnitude of the flowage easement because it did not have the requisite intent to do so. There is simply no summary judgment evidence to prove Doubletree had any intent to acquire the property with the full scope of the flowage easement as a title defect. Third an insured does not suffer, assume, or agree to an encumbrance under this exclusion when it lacks knowledge of the true scope of the encumbrance. Most importantly, exclusion 3(a) would completely nullify the survey coverage if interpreted as Lawyers Title suggests. The magistrate judge was incorrect in concluding that the exclusion barred Doubletree's claim here.

McGonagle* v. *Stewart Title Guaranty Company, 432 S.W.3d 535 (Tex.App.-Dallas 2014, pet. pending). The McGonagles' purchased of a piece of property in downtown Granbury. The property was subject to a dedication instrument requiring the property owner to move a bungalow currently on-site to a location within the Historic Overlay and requiring the owner to obtain all necessary approvals through the City of Granbury prior to beginning any new construction. The dedication instrument said that it ran with the land.

Mr. McGonagle testified that he was aware of the dedication instrument before purchasing the property and that he tried to have it removed before closing on the purchase. McGonagle also stated he told the seller that he would not close on the purchase unless the dedication instrument was removed. According to McGonagle, the seller told him that he would "take care of" the dedication instrument and, shortly before the closing, the seller stated that the instrument had been "taken care of."

Despite these alleged representations by the seller, the sales contract signed by the McGonagles specifically stated that the Granbury Historical Society Agreement" was included in the purchase and would belong to the buyer. A copy of the dedication instrument was attached to the sales contract.

At the closing, the McGonagles also purchased a title insurance policy issued by Stewart Title. The policy contained several exclusions from coverage including defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured. Also excluded was the refusal of any person to purchase, lease or lend money on the estate or interest because of Unmarketable Title." Schedule B Item 1, Restrictions, was deleted. McGonagle, he interpreted the deletion of the first exception from coverage in Schedule B to mean that the dedication instrument had been removed and no longer applied to the property. McGonagle stated that he believed the deleted provision confirmed the seller's statement to him that the instrument had been "taken care of."

Sometime after purchasing the property, the McGonagles attempted to resell it. They allege they were unable to do so because the property was still subject to the dedication instrument. The McGonagles brought suit against the seller for misrepresentation. They then brought this separate suit against Stewart for breach of contract, negligence, gross negligence, and violations of the Texas Insurance Code and DTPA. Stewart filed motions for traditional summary judgment contending the McGonagles' claims failed as a matter of law because there was no coverage under the title policy for losses allegedly caused by the dedication instrument and neither company made any misrepresentations about the property or the title policy.

A title insurance policy is a contract of indemnity that imposes a duty on the insurance company to indemnify the insured against losses caused by defects in title. The alleged defect must involve a flaw in the ownership rights of the property to trigger coverage. An irregularity that merely affects the value of the land, but not the ownership rights, is not a defect in title.

The McGonagles contend the dedication instrument falls within the scope of coverage because it is a covenant, creating an encumbrance, which affects title. The court disagreed. An encumbrance is a tax, assessment, or lien on real property. The dedication instrument neither involves nor creates a tax, assessment, or lien. Although a few cases have noted that it is possible for a covenant to cloud title, the covenant must pertain to the ownership interest. The McGonagles failed to show how any of the requirements set forth in the dedication instrument impact their fee simple ownership interest in the property.

The McGonagles argue at length that the dedication instrument affects their ability to sell the property and, therefore, amounts to a defect in title. The court again disagreed. The concept of title speaks to ownership of rights in property, not the condition or value of the property. The term "marketable title" goes to whether the property interest can be sold at all, not whether it will fetch a lesser price because of some condition limiting its use. In this case, although the dedication instrument imposes certain burdens on the land owners that may lessen the market value of the property, it does not vest any ownership interests in the property in any other party that would affect the McGonagles' title. Accordingly, the dedication instrument does not fall within the title policy's covered risks.

Even if the dedication instrument could be considered a defect in title, it is a defect that the McGonagles assumed when they signed the purchase contract and is, therefore, excluded from coverage under the terms of the title policy. The purchase contract specifically stated that the dedication instrument was included in the The title policy excludes all defects or other matters assumed or agreed to by the insured.

The McGonagles contend that the deletion of the first exception to coverage under Schedule B constituted a misrepresentation of both the state of the title to the property and the extent of coverage provided by the policy. The McGonagles rely heavily on the Texas Supreme Court opinion of First Title Co. of Waco v. Garrett, 860 S.W.2d 74 (Tex. 1993). In Garrett, the Supreme Court held that a title company made an actionable, affirmative representation to its insured when it inserted the phrase "none of record" in the space provided for itemizing restrictive covenants of record rather than deleting the provision. The court concluded that the phrase "none of record" was clearly a representation " that there were no restrictive covenants in the county deed records." The McGonagles attempt to equate the word "deleted" used in their policy with the phrase "none of record" used in the Garrett policy. The word "deleted," however, refers solely to the fact that the exception was deleted pursuant to the instructions in the standard form document and cannot be construed to mean anything else. It conveys no information about the existence or non-existence of restrictive covenants. Although the McGonagles may have assumed the provision was deleted because the dedication instrument had been removed, they point to no statements by Stewart that the exception was deleted for this reason. The deletion represents only that restrictive covenants of record affecting the title, if any, were not excepted from coverage.

The McGonagles next argue that the removal of the exception for restrictive covenants constituted an affirmative representation that the dedication instrument would be a covered risk. But the deleted provision makes no reference to any specific covenant and the exception only impacts restrictive covenants that otherwise fall within the scope of coverage. As discussed above, the dedication instrument at issue does not fall within the scope of coverage because it does not affect the McGonagle's fee simple interest or, alternatively, because the " defect" was assumed. The removal of the exception cannot create coverage that is not otherwise provided by the policy. Neither can the removal of an exception from coverage mislead the insured that coverage exists when the remainder of the policy indicates otherwise.

The McGonagles suggest that Stewart was required to inform them that the dedication instrument was still attached to the property. The only duty of a title insurer is to indemnify the insured against losses caused by a defect in title. Although an insurer cannot misrepresent the state of the title or mislead the insured, it has no duty to point out any outstanding encumbrances.

PART XIII
CONSTRUCTION
AND MECHANICS' LIENS

Lyda Swinerton Builders, Inc.* v. *Cathay Bank, 409 S.W.3d 221 (Tex.App.-Houston [14th Dist.] 2013, no pet.). This case is also discussed under Taxation. The Builder agreed to improve the Developer's property, but the project never progressed very much. The property consisted of Parcels A and B. The Builder began work in February 2007, completing dirt and utility work. After the Builder began work, the Bank made two loans to the Developer, one for $800,000 secured by a deed of trust on Parcel B only and one for $500,000 secured by a deed of trust covering both parcels. In October 2007, work stopped due to "payment issues" and was never resumed. That month the Builder filed a lien affidavit as to parcel A for about $3.2 million. The court noted that, generally, mechanic's liens like this one relate back to the start of work for priority purposes, regardless of when the mechanic files its lien affidavit. Thus, although the Builder filed its affidavit after the Bank had obtained its deed of trust liens, the Builder's lien nonetheless had priority because it related back to the start of work in February 2007.

Later on that October, the Bank made another loan of about $1.9 million to the Developer, secured by a deed of trust covering both parcels. The Builder was paid $1.5 million and filed a release of lien which recited the amount received and purported to release the entire $3.2 million lien.

On the same day as the Builder's

release, the Bank used a portion of the loan to satisfy outstanding tax liens on the property. It did not comply with the tax lien transfer statutes in doing so.

In November, the Builder filed an amended lien affidavit reciting a debt of approximately $2.9 million. This sum included both the unpaid portion of the Developer's pre-release debt (approximately $1.7 million) and amounts for post-release expenses that the Builder had since incurred. Like the first lien affidavit, this covered only Parcel A. Although the Builder stated in its lien affidavit that it had incurred post-release expenses, no post-release work had occurred on the property. The Builder contends that even though it had stopped working, it remained on the site at the Developer's request. The post-release expenses reflected in the affidavit were administrative and equipment rental costs related to maintaining the site at an estimated $200,000 per month. Over the ensuing months, the Developer made at least one partial payment, but none of the Developer's payments kept up with the Builder's accruing expenses. The Builder sent demand letters and threatened to leave the site, but never did. Eventually, the Builder filed this suit, in which the Bank intervened, claiming a superior interest in the property. The trial court severed the lien priority suit from the Builder's action against the Developer.

While the suit was pending, the Builder filed another lien affidavit in January 2009, over a year after the last work on the project, six months after its termination letter, and three months after filing the lawsuit.

The Builder finally left the property in March 2010. The Bank foreclosed on its deed of trust The Bank purchased the property and contends that it was foreclosing on the senior tax lien and that that foreclosure wiped out all junior liens, including the Builder's.

The trial court held in favor of the Bank and the Builder appealed.

First, the court of appeals dealt with the Builder's release of lien. Boiled down, the release simply said that, in consideration of $1.5 million, the Builder "does hereby release and discharge the property from this lien." The parties present multiple alternative interpretations of the simple release. The Builder argued that, that notwithstanding the release, it could "re-file" a lien for the unpaid portion of the same debt against the same parcel of land. The court disagreed because allowing the Builder to do so would render the release meaningless. The release extinguished the Builder's initial lien and prevented it from reasserting the same lien against Parcel A for the unpaid portion of the pre-release debt.

The Bank argued that the release did other things, but the document in front of us does not mention them. For example, the Bank argued that the release not only released the lien, but also forgave the unpaid portion of the initial debt. The release doesn't say that. The Bank also argued that the release prevented the Builder from filing liens for subsequent expenses. The release does not say that either. Finally, the Bank contended that the release prevented the Builder from securing the unpaid portion of its initial debt with a lien on Parcel B. The release also does not say that – in only mentions Parcel A. The court discussed these conclusions at length.

The court then turned to whether the Builder's post-release lien affidavits were for "materials" as defined in the statutes. The Bank claimed that, even if the Builder's release did not preclude it from filing subsequent affidavits, those affidavits were nonetheless ineffective because (1) they were not timely and (2) the expenses referred to in them were not for materials furnished for construction, as required by the mechanic's lien statute.

The court discussed the timeliness issue at length, ultimately concluding that fact questions remained, so summary judgment on the issue was not appropriate. It sent that issue back to the trial court.

As to whether the post-release expenses were for "material furnished for construction" the court did basically the same thing. Mechanic's liens secure payment for, among other things, the labor done or material furnished for the construction or repair. There was no contention that the Builder did any labor, so the entire question was whether its services after construction ceased were "material furnished." The court said it couldn't determine from the summary judgment evidence the extent to which the Builder's expenses were for equipment or services delivered to prosecute the work. Standing alone, the fact that no work ultimately occurred does not answer the question. Moreover, to obtain a mechanic's lien for rental expenses, the equipment must be not only "delivered for use," but also "reasonably required" for use in the direct prosecution of the work. In this case, the Builder continued to incur rental expenses for several months after work had ceased even though the Developer already owed over $1.7 million and the project had no apparent prospect of adequate financing. At some point, continuing to incur these expenses may have become unreasonable, regardless of the parties' intent. Whether and at exactly what point these expenses stopped being "reasonably required" are questions of fact that cannot be answered conclusively on this record. Back to the trial court.

Plains Builders* v. *Steel Source, Inc., 408 S.W.3d 596 (Tex.App.-Amarillo 2013, no pet.). Plains Builders' checks made jointly payable to Steel Source and Construction Services totaled $1,223,275.71. Steel Source deposited these checks to its bank account. But it ultimately received only $806,410 because it remitted the remaining amount totaling $417,165.71 to Construction Services via cashier's checks. The maximum claim of Steel Source under its subcontract with Construction Services was $943,410. The fact it issued joint checks in amounts substantially more than Steel Source's maximum claim, Plains Builders argues, supports its affirmative defense of payment.

What Plains Builders is asserting here is application of the "joint check rule," which has expressly been adopted by several states. As restated by the California Supreme Court, the rule is that,when a subcontractor and his materialman are joint payees, and no agreement exists with the owner or general contractor as to allocation of proceeds, the materialman by endorsing the check will be deemed to have received the money due him.

However, noted the court of appeals, the cases in which the joint check rule has been applied are cases enforcing materialmen's liens or bonds securing payment or performance of the construction contract. In this case, the joint check agreement the parties here signed does not address the subject of allocation of a check's proceeds between Construction Services and Steel Source. The court agreed with Steel Source that Plains Builders' argument in effect asks the court to read into the joint check agreement a provision it does not contain. In the absence of contract language warranting the inference Steel Source had an obligation to retain funds necessary to keep its account current from each joint check as issued, the court refused to apply the joint check rule to support Plains Builders' payment defense.

Trinity Drywall Systems, LLC* v. *TOKA General Contractors, Ltd., 416 S.W.3d 201 (Tex.App.-El Paso 2013, no pet.). It is well-settled that a constitutional lien requires a person to be in privity of contract with the property owner and, therefore, that lien does not apply to derivative claimants such as subcontractors. Property Code § 53.026 provides a way to elevate a subcontractor or materialman to an original contractor where the original contractor acquired the status by virtue of a sham relationship with the owner.

Here, the owner argued that Texas case law is clear that § 53.026 was never meant to be applied to a constitutional lien, but was only meant to apply in the statutory lien context.

The court disagreed with the owner. The mechanic's and materialmen's lien statutes of Texas are to be liberally construed for the purpose of protecting laborers, materialmen, and owners. The argument raised by Vineyard is contrary to this rule. The Legislature codified Chapter 53 of the Property Code for the speedy and efficient enforcement of mechanic's liens as mandated by Article 16, section 37 of the Texas Constitution. While the Legislature has no power to affix conditions of forfeiture of lien created by the constitutional provision, it may provide means for enforcement of such lien and, in doing so, prescribe necessary things for the protection of owners or purchasers of such property. Although the owner here asserts that the subcontractor is attempting to use the statutory scheme to alter a constitutional right, the court noted that Article 16, section 37 itself does not limit liens to "original contractors" rather, it states "[m]echanics, artisans and material men, of every class, shall have a lien ...." and then directs the Legislature to provide for the enforcement of such liens.

Section 53.026 specifically provides that where a sham contract exists, the legal fiction is to be ignored and the subcontractor is deemed to be an original contractor. Accordingly, under the sham contracts provision, a subcontractor is placed in direct privity with the property owner for purposes of the mechanic's and materialman's lien statutes. As a result, by changing a subcontractor's position in the construction contract chain, the statutory provisions allow a subcontractor hired under a sham contract to assert and enforce a constitutional lien because he is deemed to have a direct contractual relationship with the owner.

Sanchez* v. *Shroeck, 406 S.W.3d 307 (Tex.App.-San Antonio 2013, no pet.). Cope borrowed a construction loan from Stock Loan. The loan agreement stated that no construction or delivery of materials was allowed to occur before the deed of trust was recorded. Cope signed an affidavit stating that construction had not begun and no materials had been delivered before the date of the loan agreement. Sanchez filed a mechanics' lien affidavit about six months after the loan agreement was signed. Cope later defaulted on the construction loan and the lender foreclosed. It acquired the property at the foreclosure and later sold it to Shroeck.

Sanchez sued Shroeck and the trial court held that Sanchez had a valid lien and ordered foreclosure. That order was set aside, however, and the trial court later held that the mechanics' lien was extinguished by the foreclosure of the construction deed of trust.

A valid foreclosure on a senior lien (sometimes referred to as a "superior" lien) extinguishes a junior lien (sometimes referred to as "inferior" or "subordinate") if there are not sufficient excess proceeds from the foreclosure sale to satisfy the junior lien. For the purpose of determining whether a mechanic's lien is superior, as a general rule, a properly perfected mechanic's lien relates back to a time referred to as the inception of the lien for the purpose of determining lien priorities. In general, mechanic's liens whose inception is subsequent to the date of a deed-of-trust lien will be subordinate to the deed-of-trust lien.

However, if there is a general contract regarding the construction of improvements to the property, courts apply the relation-back doctrine to determine the time of a mechanic's lien's inception. Under this doctrine, the inception date of subsequently perfected mechanic's liens will relate back to the date of a general contract for a building or other improvement between the owner of the land and a contractor for the construction of which the mechanic contributed.

Sanchez argued that, although her work was done after the deed of trust was recorded, the inception of her lien relates back to a construction contract in existence before the deed of trust was recorded. The court agreed that this argument raised a material fact question precluding summary judgment in favor of Shroeck.

PART XIV
CONDEMNATION

City of Lorena* v. *BMTP Holdings, L.P., 409 S.W.3d 634 (Tex. 2013). Here, the municipality approved a subdivision plat and subsequently enforced a moratorium against the property, citing the municipality's additional sewage system capacity requirements. The landowner sued for a declaratory judgment that the moratorium did not apply against its approved development and for damages arising from a regulatory taking under an inverse condemnation claim. The trial court granted summary judgment in favor of the municipality on the declaratory judgment and inverse condemnation claims and awarded attorney's fees to the municipality. The court of appeals reversed, holding that the moratorium could not apply to the property in question because it had been approved for development before the moratorium took effect. The court remanded the inverse condemnation and attorney's fees claims. The Supreme Court held that the moratorium cannot apply to the property because the municipality approved the property for subdivision before it enacted the moratorium, and the owner is therefore entitled to prevail on its declaratory judgment claim.

State of Texas* v. *Moore Outdoor Properties, L.P., 416 S.W.3d 237 (Tex.App.-El Paso 2013, no pet.). The billboard structure in this case was held to be a fixture, so the State is obligated to compensate for it in a condemnation action. However, the sign permit, being a license or privilege, is not a compensable property right in the context of a condemnation proceeding.

PART XV
LAND USE PLANNING, ZONING, AND RESTRICTIONS

In re *Hai Quang La*, 415 S.W.3d 561 (Tex.App.-Fort Worth 2013, pet. denied). La and Nguyen, homeowners in the subdivision filed a motion under Government Code § 51.903 seeking a determination that restrictive covenants filed in the Tarrant County records were a fraudulent lien or claim and should not be accorded any status. They alleged that the restrictive covenants were not signed by the true owner of the property and because the document laced a notary’s signature, the document was fraudulent.

The Government Code provides an expedited proceeding for challenging a fraudulent lien or claim against real or personal property, the foundation of which is found in section 51.903. That section, which is largely a suggested form motion and order, allows a purported debtor or obligor or a person who owns an interest in real or personal property to ask for a judicial determination of the legitimacy of a filed or recorded document or instrument purporting to create a lien or interest in real or personal property.

For purposes of a § 51.903 action, a document or instrument is presumed to be fraudulent if it purports to create a lien or assert a claim against real or personal property and if it meets a few other criteria. Based on the plain language of the statute, a proceeding under § 51.903 must first involve a document or instrument that purports to create a lien or assert a claim against real or personal property or an interest in real or personal property. The court said that restrictive covenants are not liens or claims against real property, and therefore, are not subject to a § 51.903 proceeding. A lien is a legal right or interest that a creditor has in another's property, lasting usually until a debt or duty that it secures is satisfied. A restrictive covenant, on the other hand, is defined in the Property Code as any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive or administrative. Although restrictive covenants restrict or otherwise limit permissible uses of the land, they do not create or purport to create a "lien or a claim" on the owner's property within the meaning of § 51.903.

Wasson Interests, Ltd.* v. *Adams, 405 S.W.3d 971 (Tex.App.-Tyler 2013, no pet.). Wasson is the owner of a 3.014 acre tract burdened by restriction limiting its use to "residential development only." In 1983, the City conveyed the 3.014 acre subject tract to M.G. Moore by a general warranty deed that contained the "residential development only" covenant. Wasson became the successor in interest to the subject tract on April 21, 2010.

The area where the subject tract is located is rural in character. In the past, the property contained a pecan orchard and a peach orchard. There is no evidence of a residence on the property until January 2009 when Wasson moved a mobile home there. Wasson removed the mobile home when he received complaints that it violated the restrictions on the property. Thereafter, Wasson began putting hogs, goats, and other livestock on the property. He also placed an inoperable 1957 Chevrolet and an old dump truck near the road. At one point Wasson kept sixteen pigs, seven goats, three sheep, two horses, thirty chickens, five guinea fowl, and two peacocks on the 3 .014 acres. The result of this concentration was not only unsightly but evil smelling.

The Adamses sued to enforce the “residential development only” restriction. Wasson contends that the Adams lack standing to enforce the restriction burdening the 3.014 acres.

In order for a party to enforce a covenant burdening land against a successor to the party with whom he covenanted, the covenant must run with the land. For a covenant to run with the land, the covenant must be made between parties who are in privity of estate at the time the covenant was made, and must be contained in a grant of land or in a grant of some property interest in the land. Privity of estate between covenanting parties means a mutual or successive relationship exists to the same rights in property. A restrictive covenant is ordinarily enforceable only by the contracting parties and those in direct privity of estate with the contracting parties.

When the City (the covenantee) granted the subject 3.014 acres to M.G. Moore (the covenantor), there was a mutual relationship to the same rights in the property described in the grant. Hence they were in privity of estate as to the 3.014 acres. As successor covenantor to the interest of M.G. Moore, Wasson succeeded to the burden imposed by the covenant and is in privity of estate with the City.

The Adams' predecessor, who held the leasehold in 1983, was not a party to the grant to M.G. Moore or the covenant therein created. When the covenant was made in 1983 burdening the 3.014 acres, there was no mutuality of interest in the tract between the then current lessee of the Adams' subdivision lot and M.G. Moore. Therefore, the Adams have not succeeded to the interest of the City as covenantee in the estate created in 1983 grant containing the restrictive covenant.

The Adams argue that since they and Wasson both derive title from the City, they are in privity of estate. But privity of estate requires more than a common source of title. As successors to Bill Canino, the covenantor in the covenants created in 1962 in the original grant by the City of their subdivision lot, they are successor as covenantors to the burdens he assumed in the 1962 covenant. Hence, they are in privity of estate with the City under the 1962 covenant. But they are not successor covenantees to the rights of the City, the original covenantee, in the covenant created in the City's 1983 grant to M.G. Moore. Therefore, there is no privity of estate between the Adams and Wasson. The Adams lack standing to enforce the covenants restricting the use of Wasson's 3.014 acre tract.

Teal Trading And Development, LP* v. *Champee Springs Ranches Property Owners Association, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. pending). This case is also discussed in Deeds and Conveyances.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made "subject to" the CCRs.

At one point, Teal Trading's predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

Teal Trading argues the non-access restriction is not a valid easement in fact or law because an easement is the right to use a servient estate by a dominant estate, and because Cop only purported to retain the right to prohibit use, there is no valid easement. That argument overlooks the well-established nature of negative reciprocal easements, restrictive covenants, or equitable servitudes restricting the use of property. A restrictive covenant is a negative covenant that limits permissible uses of land. A negative easement is a restrictive covenant. Teal Trading did not meet its summary judgment burden to show the restriction was not a valid easement.

Teal Trading then argues that, because Cop already owned the entire tract when he purported to create an easement, any purported easement would therefore merge into the fee simple estate. If any valid and enforceable negative reciprocal easement or restrictive covenant arose from the non-access restriction, it happened when Cop sold the first tract of the burdened property, not when he filed the Declaration. Termination by merger could only happen thereafter if all the burdened and benefitted properties came back into the ownership of a single entity. There is no evidence that such an event occurred in this case.

Teal Trading did not meet its summary judgment burden to show the restriction, if it was a valid easement, was terminated by merger.

Teal Trading then argues the non-access restriction is void because it is against public policy. Texas law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal. Teal Trading contends that the subdivision regulations of Kerr County and Kendall County are a source of public policy and that the non-access restriction violates them. The court assumed that a property restriction created in violation of a county's subdivision regulations may be void as against public policy. But the court held that there was no violation of the subdivision regulations. Again, Teal Trading did not meet its summary judgment burden.

Teal Trading then argues the non-access restriction is void as an unreasonable restraint against alienation. The Texas Supreme Court has used the definitions from the First Restatement of Property to identify whether an instrument contains a restraint on alienation. Under the First Restatement, a restraint on alienatio is an attempt by an otherwise effective conveyance to cause a later conveyance: (i) to be void (a disabling restraint); (ii) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey (a promissory restraint); or (iii) to terminate or subject to termination all or a part of the property interest conveyed (a forfeiture restraint).

Although Teal Trading identifies the three categories of restraints against alienation accepted by the Texas Supreme Court, it does not argue that the restriction falls within any of the categories. It simply states that the restriction entirely prohibits Teal Trading from selling a parcel of its property that straddles the imaginary line. The restriction does not purport to prohibit Teal from selling any part of the Privilege Creek Tract, and the court held that the restriction does not, on its face, fall within any of the recognized categories of restraints on alienation.

To the extent that the non-access restriction may operate as a restraint on alienation, it does so as an indirect restraint. Texas law does not favor declaring indirect restraints on alienation as unreasonable and against public policy. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on alienation.

Finally, Teal Trading argues that the non-access restriction is an unreasonable restraint on its use of the Privilege Creek tract. Restrictions that amount to a prohibition of the use of property are void. Of course, public policy also recognizes that parties may contract with regard to their property as they see fit. The restriction, if valid and enforceable, does not prohibit Teal Trading's use of the Privilege Creek tract, but only limits how it may use it. Teal Trading did not present evidence showing that the restriction so severely limited its use of the property that the property was rendered valueless. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on use.

PART XVI
AD VALOREM TAXATION

Lyda Swinerton Builders, Inc.* v. *Cathay Bank, 409 S.W.3d 221 (Tex.App.-Houston [14th Dist.] 2013, no pet.). This case is also discussed under Construction Issues. The Builder agreed to improve the Developer’s property, but the project never progressed very much. The property consisted of Parcels A and B. The Builder began work in February 2007, completing dirt and utility work. After the Builder began work, the Bank made two loans to the Developer, one for $800,000 secured by a deed of trust on Parcel B only and one for $500,000 secured by a deed of trust covering both parcels. In October 2007, work stopped due to “payment issues” and was never resumed. That month the Builder filed a lien affidavit as to parcel A for about $3.2 million. The court noted that, generally, mechanic's liens like this one relate back to the start of work for priority purposes, regardless of when the mechanic files its lien affidavit. Thus, although the Builder filed its affidavit after the Bank had obtained its deed of trust liens, the Builder's lien nonetheless had priority because it related back to the start of work in February 2007.

Later on that October, the Bank made another loan of about $1.9 million to the Developer, secured by a deed of trust covering both parcels. The Builder was paid $1.5 million and filed a release of lien which recited the amount received and purported to release the entire $3.2 million lien.

On the same day as the Builder's release, the Bank used a portion of the loan to satisfy outstanding tax liens on the property. It did not comply with the tax lien transfer statutes in doing so. The project was ultimately stopped, the Builder sued, the Bank intervened, and the Developer filed Bankruptcy. There is more discussion of these facts in Construction Issues.

The principal issue in the dispute of the effect of the Bank's foreclosure is whether the Bank became subrogated to a senior tax lien that it satisfied with part of its loan proceeds. With a few exceptions that are not relevant here, tax liens are senior to other liens. Thus, if the Bank became subrogated to tax liens, these liens would be senior to the Builder's mechanic's liens. As a result, foreclosure of the subrogated tax liens would have extinguished the Builder's mechanic's lien because the foreclosure sale proceeds were insufficient to satisfy both.

Subrogation is liberally applied and is broad enough to include every instance where one person, not acting voluntarily, pays another's debt. The Bank's subrogation arguments focus on a clause in its deed of trust signed by the Developer, so it contends this provision entitles it to subrogation under a contractual subrogation theory. However, the Bank's right to subrogation also depends upon equitable considerations.

The Builder first argues that the Bank is not subrogated to the tax lien because it failed to comply with sections 32.06 and 32.065 of the Tax Code. After a lengthy discussion, the court concluded that these statutes supplement common law subrogation doctrines for tax liens. Still, the court declined to uphold summary judgment for the Bank on the subrogation issue. A balancing of equities is required, even as to contractual subrogation. Here, said the court, subrogation would prejudice the Builder because it would alter the foreclosure requirements that otherwise apply to tax liens. The requirements for foreclosing on a tax lien protect intervening lien holders and permitting the Bank to merely foreclose on its deed of trust would eliminate them.

In sum, before subrogation, the tax lien could only be foreclosed through a judicial proceeding requiring the Builder as a party, but after subrogation, the Bank could foreclose (thereby extinguishing the Builder's lien) without even notifying the Builder. Indeed, the Builder has offered evidence that it had no knowledge that any tax lien existed or that the Bank was asserting the taxing authority's priority position in its foreclosure. So, because so many fact issues remained, the court remanded the subrogation issue to the trial court.