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Real Property

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THIS article covers state cases from 314 S.W.3d through 374 S.W.3d and federal cases during the same time period that the authors believe are noteworthy for adding to the jurisprudence on the applicable subject.

I. INTRODUCTION

There were a few "landmark" cases in real property law during the current Survey period, and there were a number of otherwise significant cases. Unfortunately, the more significant cases create confusion and consternation rather than resolution of legal doctrines. In particular, the decisions concerning constructive notice are among the most important and imperative. The Texas Supreme Court extended a strict reading of waiver and "as is" clauses. The Texas Supreme Court also wrestled with difficult title issues along waterways and the ocean. Finally, the Texas Supreme Court confirmed and applied the rule of capture to groundwater.

II. MORTGAGES, LIENS, AND FORECLOSURES

A. CONSTRUCTIVE NOTICE

In a case of first impression, *Noble Mortgage & Investments, LLC v. D & M Vision Investments, LLC*[1] addresses whether noting a foreclosure sale on an execution document pursuant to Rule 656 of the Texas Rules of Civil Procedure constitutes constructive notice for purposes of the Texas Recording Act.[2] In *Noble*, the Houston Court of Appeals looked at two competing chains of title and analyzed the constructive notice provisions of the Texas Recording Act.[3] The subject property was owned by Kenneth Banks (Banks) on March 23, 2006. Banks conveyed the property to Houston Kaco, Inc., which obtained a refinancing loan from Noble on October 9, 2007, and the Noble deed of trust was recorded on November 2, 2007. After two payments, the Noble deed of trust went into default and was foreclosed in January 2008. The second chain of title derived from a judgment obtained by Financial Holdings, Inc. against

1. Noble Mortg. & Invs., LLC v. D & M Vision Invs., LLC, 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
2. *See* TEX. PROP. CODE ANN. § 13.002 (West 2013); TEX. R. CIV. P. 656.
3. *See Noble*, 340 S.W.3d at 71–76.

Banks on October 30, 2006.[4] The date of this judgment was during the time that Banks owned the property sandwiched between ownerships by Houston Kaco, Inc. Financial Holdings did not file an abstract of judgment in the real property records; however, it did obtain an execution and order of sale on July 5, 2007, which resulted in a constable's sale on September 4, 2007. The successful bidder was the predecessor to D & M Vision Investments (D & M). The return of execution was filed in the litigation records of the court on September 11, 2007. Over two months later, on November 14, 2007, the constable delivered a deed on such sale, which contained defects in the grantee's name. On December 31, 2007, the corrected deed was filed in the real property records, after the Noble deed of trust was recorded.

When the two parties discovered the competing claims of title, suit was initiated, and the trial court awarded title to D & M.[5] On appeal of that judgment, Noble argued it was a good faith purchaser without notice.[6] The appellate court ruling addressed whether Noble had constructive notice of the intervening constable's sale.[7] First, D & M argued that Noble did not acquire title in good faith because Noble did not check the court records for the constable's sale. Specifically, D & M asserted that the recording of a sale on the execution document in compliance with Rule 656 of the Texas Rules of Civil Procedure is a recording for purposes of constructive notice under the Texas Recording Act.[8] The parties and the appellate court acknowledged this to be a matter of first impression and addressed various aspects of the interpretation of the Texas Recording Act's notice provisions.[9] In concluding that a recording under Rule 656 is not a recording for purposes of importing constructive knowledge as to a real property claim, the court of appeals took notice of numerous prior cases where litigation records did not constitute constructive notice as to real property interests, referencing judgments recorded only in court minutes, court judgments partitioning real property recorded only in the court's minutes, divorce decrees transferring real property, and court orders of partition.[10] Any other such interpretation, the court of appeals reasoned, would contradict 150 years of Texas statutory law, case law, and title practice.[11] Further, the court of appeals noted that it was a "'well-established rule that a deed or instrument lying outside of [the] chain of title imports no notice.'"[12] Additionally, the court of appeals relied upon Texas Property Code, Chapter 52, concerning abstract of money judgments, which provides the statutory framework

4. *Id.* at 68.
5. *Id.* at 71–72.
6. *Id.* at 74.
7. *Id.* at 77–78.
8. *Id.* at 77.
9. *Id.* at 77–78.
10. *Id.* at 78–82.
11. *Id.* at 79.
12. *Id.* at 81 (quoting Nguyen v. Chapa, 305 S.W.3d 316, 324 (Tex. App.—Houston [14th Dist.] 2009, pet. denied).

in which notice of judgment liens can constitute constructive notice, and confirmed that: (1) no lien is created by the mere rendition of a judgment, and (2) the judgment creditor's first step in creating a judicial lien is to obtain an abstract of the judgment.[13]

In *Noble*, the losing claimant made a number of fatal mistakes that should be noted by practitioners. First, no abstract of judgment was obtained and filed on the October 30, 2006, judgment lien by Financial Holdings.[14] Secondly, when the erroneous constable deed was obtained, it was not recorded even with the error in the grantee name.[15] Prudent practice would have suggested the recording of the deed immediately with a correction deed to be recorded when available. Even the inaccuracies in the grantee's name would have put third parties on constructive notice of a competing claim. This failure allowed the existing Noble deed of trust to be recorded between the successful bid at the constable's sale and the ultimate recording of the corrected constable's deed. Third, in dicta, the court of appeals noted that possession of the disputed property can operate as constructive notice of a competing party's claim.[16] While D & M did post a no trespass sign, it did not take action to obtain possession immediately and did not properly perfect a possession claim at the trial court. While the possession strategy could be overlooked, the other two defects are mistakes a skilled real estate practitioner would not make.[17]

To the opposite effect as to court records not being constructive notice is the per curiam opinion in *Wind Mountain Ranch, LLC v. City of Temple*.[18] A deed of trust was executed by Robert K. Utley (Utley) with a 1993 maturity date.[19] The property was acquired by Centex prior to the maturity date and Centex filed bankruptcy proceedings in 1992.[20] The bankruptcy court confirmed a Chapter 11 reorganization plan, which extended the maturity date to 1999, and issued an order to that effect.[21] Neither the reorganization plan nor the confirmation order were filed in the real property records.[22] Due to municipal code violations, the City of Temple (the City) obtained a judgment against Centex and recorded an abstract of judgment in 2003.[23] Subsequently, the note and deed of trust were assigned to Wind Mountain Ranch, which conducted a nonjudicial

13. *Id.* (citing Wilson v. Dvorak, 228 S.W.3d 228, 233 (Tex. App.—San Antonio 2007, pet. denied) and TEX. PROP. CODE ANN. § 52.002 (West 2007)).

14. *Id.* at 77.

15. *Id.* at 72.

16. *Id.* at 82.

17. How the trial court could overlook the long history of constructive notice cases under Texas law in reaching its judgment is concerning to this author; *but see Wind Mountain Ranch, LLC v. City of Temple*, 333 S.W.3 580 (Tex. 2010).

18. Wind Mountain Ranch, LLC v. City of Temple, 333 S.W.3d 580 (Tex. 2010).

19. *Id.* at 581.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

foreclosure sale.[24] The foreclosure sale occurred after the note's four-year statute of limitations had lapsed.[25] The City brought a declaratory action, claiming that the maturity date was never filed of record and therefore the nonjudicial foreclosure was void.[26] The trial court rendered judgment in favor of the City, and the Amarillo Court of Appeals affirmed.[27]

Under Texas Civil Practice & Remedies Code § 16.035(a), a party must bring suit for recovery of real property within four years after the date the cause of action accrues.[28] But the statute of limitation period may be suspended by an extension agreement that is signed and acknowledged by the parties and filed for record in the county clerk's office.[29] Furthermore, bona fide purchaser status is provided to any purchaser who takes the real property without actual notice of the extension agreement and before the extension agreement is signed, acknowledged, filed, and recorded.[30] The Texas Supreme Court, purporting to rely on the plain language of the Code, concluded that the plain language imposes no requirement for recordation of an extension agreement on a bankruptcy court order.[31] This position of the supreme court is ludicrous. Such a position flies in the face of 150 years of Texas law on constructive notice and is directly contrary to the position taken by the Houston First District Court of Appeals in *Noble*, as reported above.[32] First, the plain language of Texas Civil Practice & Remedies Code § 16.037 provides that an extension agreement is void as to lienholders without actual notice of the extension agreement.[33] Second, Texas Civil Practice & Remedies Code § 16.036(a) clearly requires that a party to a debt secured by a real property lien must follow the provisions of that section to extend the limitation period, including the recordation of the extension agreement.[34] Texas courts have historically held that judgments and orders in civil litigation proceedings do not constitute constructive notice under the Texas Recording Act.[35] This decision, if not overturned, will create a new burden on parties in real estate transactions. Under existing precedent, the county litigation files would not need to be searched to determine competing real property interests; however, bankruptcy matters throughout the entire United States would have to be searched. Recall that in this case, the bankruptcy proceeding affecting the Bell County property took

24. *Id.*
25. *Id.*
26. *Id.*
27. Wind Mountain Ranch, LLC v. City of Temple, 333 S.W.3d 602 (Tex. App.—Amarillo 2008), *rev'd* 333 S.W.3d 580 (Tex. 2010).
28. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(a) (West 2013).
29. *Id.* § 16.036(b).
30. *Id.* § 16.037.
31. *Wind Mountain Ranch,* 333 S.W.3d at 582.
32. *See* Noble Mortg. & Invs., LLC v. D & M Vision Invs., LLC., 340 S.W.3d 65 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
33. TEX. CIV. PRAC. & REM. CODE ANN. § 16.037.
34. *Id.* § 16.036(a).
35. *See* material cited in n.12 of this article for a discussion of prior case law.

place in the Central District of California.[36] Consequently, until this case is clarified or overturned, the only safe practice for real estate practitioners (including title companies) is to obtain searches of all bankruptcy filings with respect to the applicable owner of a real property interest.

B. Tax Liens

Genesis Tax Loan Services, Inc. v. Kothmann addressed certain details and requirements of the transfer of a tax lien.[37] The principal issue was whether a verified photocopy of the lien transfer could be recorded in lieu of the original tax lien transfer.[38] The appellate court determined that a verified photocopy was invalid,[39] as the authors discussed in the 2010 Survey.[40] Here, the Texas Supreme Court overruled such holding,[41] as predicted in the 2010 Survey. Genesis had paid the outstanding ad valorem taxes and received the statutory required authorization from the owner and certification payment from the taxing authority. Since the original document had been lost, Genesis recorded a photocopy attached to an affidavit signed by Genesis's president. The supreme court confirmed such practice, relying on Texas Rules of Evidence Rule 1003, which allows a duplicate document to be admitted unless questions of authenticity are raised.[42] The supreme court further noted that the tax lien statute did not contain any basis for not accepting a verified duplicate, and common sense would dictate the same.[43]

In other ancillary issues, the supreme court determined that because the county clerk did not have an official seal of office at the time of the tax lien transfer, the use of an acknowledgment before a notary, whose seal was affixed, was sufficient to satisfy the statutory seal requirement.[44] The supreme court did not specifically address the question of whether a notary seal was sufficient if the county clerk actually possessed an official seal of office; but the clear implication is that the alternative use of an acknowledgment notary seal would not be acceptable if the tax collector has an official seal.[45] This should serve as a caution to all practitioners to verify that the tax collector's seal is affixed without concurrent proof (preferably by affidavit) that an official seal does not exist at the time of the certification.

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36. *Wind Mountain Ranch*, 333 S.W.3d at 581.

37. Genesis Tax Loan Servs., Inc. v. Kothmann, 339 S.W.3d 104 (Tex. 2011).

38. *Id.* at 106.

39. *Id.*

40. J. Richard White & G. Roland Love, *Real Property*, 63 SMU L. Rev. 757, 760–62 (2010).

41. *Genesis Tax Loan Servs.*, 339 S.W.3d at 111.

42. *Id.* at 109 (citing Tex. R. Evid. 1003).

43. *Id.*

44. *Id.* at 110.

45. *See id.*

C. CMBS Servicer

Another case of first impression is *ECF North Ridge v. Orix Capital Markets*, which addressed whether a commercial mortgage-backed security (CMBS) loan servicer had standing to sue a mortgagor for breach of contract.[46] A loan was made to TCI on a medical building in Los Angeles, California, that was pooled with other loans in a typical CMBS-style transaction.[47] The loan was owned by a securitization trust and serviced by Orix Capital Markets (Orix) pursuant to a Pooling and Servicing Agreement (the Agreement), a typical and fairly standardized document in the CMBS industry.[48] The loan, originated in 1999, required "all-risk" insurance.[49] After the terrorist attacks on September 11, 2001, many insurance companies excluded terrorism coverage from all-risk policies.[50] In 2002, Orix demanded that TCI obtain certified terrorism insurance, as authorized under the relevant loan documents.[51] When TCI failed to obtain the requisite insurance, Orix declared a default and sued for breach of contract.[52] In defense, TCI alleged that Orix, as a mortgage servicer but not a holder of the note, had no standing to sue.[53]

The Dallas Court of Appeals noted that no Texas cases had directly addressed such standing issue, although there was a supporting Texas case and a recent federal circuit court case directly on point,[54] and relied heavily on *CWCapital*.[55] "Standing is a component of subject matter jurisdiction," which focuses on whether the party to the lawsuit has a justiciable interest in the outcome.[56] In essence, the court of appeals adopted the reasoning and conclusions from *CWCapital*,[57] which reviewed the contractual obligations between a servicer and trustee (the owner) of the CMBS loan pool.[58] In *CWCapital*, the Seventh Circuit concluded that the servicer, although not an assignee, had a personal stake in the outcome of the lawsuit because it received a percentage of the proceeds of a defaulted loan that it serviced.[59] In the subject case, the court of appeals never addressed whether the servicer received benefits from the proceeds of the defaulted loan; rather, it focused on the duties and responsibilities

46. ECF N. Ridge Assocs., L.P. v. ORIX Capital Mkts., L.L.C., 336 S.W.3d 400 (Tex. App.—Dallas 2011, pet. denied).
47. *Id.* at 402.
48. *Id.* at 403.
49. *Id.*
50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.* at 404.
54. *Id.* at 405 (referencing Orix Capital Mkts., LLC v. La Villita Motor Inns, J.V., 329 S.W.3d 30 (Tex. App.—San Antonio 2010, pet. denied) and CWCapital Asset Mgmt., LLC v. Chicago Props., LLC, 610 F.3d 497 (7th Cir. 2010)).
55. *Id.* at 405–07.
56. *Id.* at 405.
57. *Id.* at 407.
58. *CWCapital Asset Mgmt., LLC*, 610 F.3d at 499–500.
59. *ECF N. Ridge*, 336 S.W.3d at 406 (citing *CWCapital Asset Mgmt., LLC*, 610 F.3d at 501).

delegated by a trust to the servicer under the pooling and servicing agreement.[60] In both cases, the trust delegated the duty and responsibility to the servicer to file suit against a borrower and to take other servicing and administrative actions the servicer deemed necessary and desirable, as well as the duty of the trust to provide support to the servicer in the servicer's exercise of such duties.[61] The *CWCapital* court characterized the securitization trust as holding bare legal title with the pooling and servicing agreement, specifically delegating effective equitable ownership of claims to the servicer.[62] Based on these contractual provisions, the court concluded that the CMBS servicer had standing to bring a lawsuit against a defaulting borrower.[63] In a footnote, the court rebuffed TCI's argument that standing required a showing of either third-party beneficiary status or privity, concluding that the cited cases did not control in circumstances where a pooling and servicing agreement specifically delegate to the servicer the rights and responsibilities to institute suit.[64]

D. Substitute Trustee as Party to a Suit

In another case of first impression, *Marsh v. Wells Fargo Bank*,[65] the federal circuit court addressed the basis for dismissal of a substitute trustee from a lawsuit involving a foreclosure pursuant to Texas Property Code § 51.007.[66] In *Marsh*, the plaintiff obtained a loan against his home from Wells Fargo. Based on an alleged default, Wells Fargo accelerated the note and posted the property for foreclosure. The plaintiff added as additional defendants to the suit the law firm representing Wells Fargo and the four substitute trustees named in the foreclosure documents. Wells Fargo filed a motion to dismiss the law firm and the substitute trustees from the lawsuit pursuant to Texas Property Code § 51.007, which provides that a trustee may plead and answer that it is not a necessary party based on its belief that the trustee was named solely in its capacity as a trustee under a deed of trust.[67] In addressing the dismissal of the law firm, the court concluded that the law firm was not subject to dismissal since the law firm was not itself named as a substitute trustee.[68] However, the court concluded that the individuals named as substitute trustees were governed by that statute and proceeded to analyze the requirements for dismissal of the substitute trustees.[69] The plaintiff alleged that the substitute trustees stated in their verified denial that they had a reasonable belief that they were named solely in their capacity as trustees; however, they did not state the basis for that belief, which was the issue

60. *See id.* at 406–07.
61. *Id.* at 405–07.
62. *CWCapital Asset Mgmt., LLC*, 610 F.3d at 501–02.
63. *ECF N. Ridge*, 336 S.W.3d at 407.
64. *Id.* at 407 n.2.
65. Marsh v. Wells Fargo Bank, N.A., 760 F. Supp. 2d 701 (N.D. Tex. 2011).
66. Tex. Prop. Code Ann. § 51.007 (West 2007).
67. *Marsh*, 760 F. Supp. 2d at 705–06 (citing Tex. Prop. Code Ann. § 51.007).
68. *Id.* at 707.
69. *Id.* at 707–08.

addressed by the court.[70] Looking at the plain language of the statute,[71] the court concluded that the unambiguous provisions of the statute required the statement of a basis and not merely a recitation of the trustee's belief, specifying that the statute "requires a trustee to state the reason or justification for the trustee's reasonable belief, rather than swear to the mere fact of that belief."[72] The court did not provide any further details as to the scope of the basis, the content thereof, or any other applicable factors.[73] However, it appears that virtually any reason or justification for the "reasonable belief" would be sufficient to satisfy the statutory requirements. Therefore, practitioners should be careful to include such statements of reason or justification in any such pleading.

E. Foreclosure Prerequisites

In another case of first impression, *Knapik v. BAC Home Loans Servicing, LP*, a federal court addressed whether an apartment characterized as a "weekend home" qualified as a debtor's residence.[74] Knapik obtained financing for a multiple-apartment building of which he used one apartment as a "weekend home" while renting the other apartments to tenants. Upon a default and foreclosure action, Knapik brought suit alleging that the lender did not comply with the requirements under Texas foreclosure law to provide a notice and twenty-day cure period for property which is the debtor's residence.[75] The district court determined that no Texas court had addressed this particular issue and analyzed unrecorded published opinions to reach the conclusion that Texas Property Code § 51.002(d) does not apply to an apartment building in which the debtor allegedly uses one of the units as a "weekend home."[76] The court concluded that the Texas Legislature intended the statute to apply to only one residence and that it should be the current primary residence of the debtor.[77] Further, the court reasoned that a mortgagee would not know that a debtor was using an apartment unit as his residence.[78]

III. DEBTOR/CREDITOR

A. Commitment Breach, Parties, and Damages

The Texas Supreme Court, in *Basic Capital Management, Inc. v. Dynex Commercial Inc.*, considered who was a third-party beneficiary of a loan

70. *Id.*
71. The applicable provisions of Tex. Prop. Code Ann. § 51.007 provide: "The trustee . . . may plead in the answer that [it] is not a necessary party by a verified denial *stating the basis* for the trustee's reasonable belief that [it] was named . . . solely in the capacity as a trustee . . . ." *Marsh*, 760 F. Supp. 2d at 707 (emphasis and alterations in original).
72. *Id.*
73. *See id.* at 707–08.
74. Knapik v. BAC Home Loans Servicing, LP, 825 F. Supp. 2d 869 (S.D. Tex. 2011).
75. *Id.* at 870 (citing Tex. Prop. Code Ann. § 51.002(d) (West 2007)).
76. *Id.* at 871.
77. *Id.*
78. *Id.*

commitment that was breached and whether consequential damages were reasonably foreseeable.[79] American Realty Trust (ART) and Transcontinental Realty Investors (TCI) were publically traded real estate investment trusts that owned commercial properties managed by Basic Capital Management (Basic).[80] Dynex entered into an agreement (the New Orleans Agreement) with TCI for loans on three commercial buildings in New Orleans, with each building to be owned by a single asset bankruptcy remote entity (SABRE) created by TCI.[81] Additionally, Dynex provided a loan commitment (Commitment) to Basic, who agreed to form other single asset bankruptcy remote entities to borrow $160,000,000 over a two-year period with respect to commercial projects not yet known. The New Orleans Agreement was with TCI and the Commitment was with Basic.[82] Dynex made the loan for the three New Orleans buildings to the single asset bankruptcy remote entities formed by TCI and funded $6,000,000 to Basic under the Commitment.[83] Soon thereafter, market conditions deteriorated causing interest rate increases, which made the terms of the Commitment unfavorable to Dynex, and Dynex later refused to provide further funding under both the New Orleans Agreement and Commitment.[84]

ART and TCI sued Dynex for breach of the Commitment, alleging lost profits and increased financing costs.[85] The appellate court concluded that ART and TCI were not third-party beneficiaries and not entitled to bring suit.[86] The Texas Supreme Court granted petition for review and focused on whether ART and TCI were third-party beneficiaries entitled to sue for breach of the Commitment and request lost profits as consequential damages.[87] The supreme court noted that third-party beneficiary law is well settled, stating "[a] third party may recover on a contract made between other parties only if the parties intended to secure some benefit to that third party, and only if the contracting parties entered into the contract directly for the third party's benefit."[88] Therefore, intent of the parties is the controlling interest, and so the supreme court addressed whether the facts and circumstances supported such intent of the parties.[89] First, the Commitment's purpose was specified to be for the future financing of commercial properties for ART and TCI, which Basic would manage and in which ART and TCI would have an ownership interest.[90]

79. Basic Capital Mgmt., Inc. v. Dynex Commercial Inc., 348 S.W.3d 894, 896 (Tex. 2011).
80. *Id.*
81. *Id.* at 896–97.
82. *Id.*
83. *Id.* at 897.
84. *Id.*
85. *Id.*
86. Basic Capital Mgmt. v. Dynex Commercial, Inc., 254 S.W.3d 508 (Tex. App.—Dallas 2008), *rev'd*, 348 S.W.3d 894 (Tex. 2011).
87. *Dynex Commercial*, 348 S.W.3d at 898.
88. *Id.* at 900.
89. *Id.*
90. *Id.*

Basic's business was the management of properties owned by those investment trusts, a fact known by Dynex.[91] The single asset bankruptcy remote entities were to be formed by ART and TCI who would hold an ownership interest therein, further noting that the reason for the formation of the single asset bankruptcy remote entities was for the exclusive benefit of Dynex.[92] Second, the supreme court noted that any such single asset bankruptcy remote entities would not be created until an actual investment opportunity presented itself, and it would be unreasonable to expect their creation for the sole purpose of bringing suit for breach of the Commitment.[93] The supreme court distinguished the subject entity structure from that of a corporate parent; even though a corporate parent is generally not a third-party beneficiary of its subsidiaries, the explicit nature of the subject transaction and structure was to ensure the benefit of ART and TCI as owners of such single asset bankruptcy remote entities.[94] The role of ART and TCI was vital to, and clearly delineated in, the transaction between Dynex and Basic as evidenced by the Commitment.[95] As to the New Orleans Agreement, TCI was determined to be a third-party beneficiary where it was actually the party to the New Orleans Agreement, even though the loans pursuant thereto were made to three separate single asset bankruptcy remote entities.[96]

With respect to consequential damages for breach, the supreme court recognized foreseeability as a fundamental prerequisite to recovery of consequential damages.[97] The lender argued in the lower court and before the supreme court that it was unaware of what specific investments Basic would propose or what alternative financings would be available.[98] This argument was brushed aside because no authority was presented for the proposition that a lender's breach of a loan commitment could not have reasonably foreseeable consequences unless the lender knew the nature of the intended use of funds and the specific venture in which it would be utilized.[99] Under these circumstances, the supreme court concluded that liability for consequential damages was warranted for a commitment breach if the lender knew at the time of commitment "the nature of the borrower's intended use of the loan proceeds but not the details of the intended venture."[100] Dynex clearly knew how funds from the Commitment would be used and that if market conditions deteriorated and interest rates rose, it would have a negative effect on Basic, all of which reflected the foreseeability of consequences.[101]

91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 901.
96. *Id.*
97. *Id.*
98. *Id.* at 902.
99. *Id.*
100. *Id.* at 903.
101. *Id.*

The problems presented in this case could have been avoided by simply restructuring the Commitment. First, the Commitment could have been addressed to and signed by the principal parties as "agents for" the "to be formed" special asset bankruptcy remote entities. Secondly, to evidence the intention of the parties as to who are third-party beneficiaries, simply including a statement that the principal parties are third-party beneficiaries also would have avoided that issue. These are good reminders to the practitioner on the details for drafting.

B. PREPAYMENT PROVISIONS

In *Young v. Gumfory*, a prepayment provision was interpreted by the Dallas Court of Appeals.[102] Gumfory purchased land from Young who financed the purchase with a note and deed of trust.[103] The note contained a prepayment provision providing that the debtor "may prepay this note in any amount at any time before the Maturity Date without penalty or premium."[104] After a few years, Gumfory decided to payoff the note early and requested confirmation of the prepayment amount.[105] Young provided an amount that exceeded Gumfory's expected amount by approximately twenty-five percent.[106] After further consideration of the amount, Gumfory twice tendered the smaller amount on condition that it was full payment and the deed of trust lien should be released.[107] Ultimately, Gumfory made a third tender without any conditions, stating that the tender was "payment of unpaid principal and accrued interest . . . and . . . is a prepayment of principal as allowed by the [Note]."[108] The appellate court rendered summary judgment in favor of Gumfory, noting that whether the tendered amount was in full satisfaction of the debt was irrelevant because the note allowed for prepayment in any amount.[109] This case demonstrates the need for a practitioner to draft and review prepayment provisions with care to assure that the intended result is accomplished.

IV. GUARANTY/INDEMNITIES

A. JURY WAIVERS

In re Go Colorado 2007 Revocable Trust addressed the enforceability of a jury waiver provision under certain unique circumstances.[110] Center Capital Corporation made a loan that was guaranteed by Obert and

102. Young v. Gumfory, 322 S.W.3d 731, 733 (Tex. App.—Dallas 2010, no pet.).
103. *Id.*
104. *Id.* at 734.
105. *Id.*
106. *Id.*
107. *Id.*
108. *Id.* at 735.
109. *Id.* at 742.
110. *In re* Go Colo. 2007 Revocable Trust, 319 S.W.3d 880, 881 (Tex. App.—Fort Worth 2010, no pet.).

others.[111] The guaranty contained a waiver of a jury trial, and that provision is the subject of this case.[112] A default on the loan occurred and the lender sued the guarantors.[113] The lender added the Go Colorado 2007 Revocable Trust (Trust) as a party defendant in the guaranty suit;[114] however, there is no mention in the opinion as to how and why the Trust was added as a defendant, a peculiarity this author believes is critical to fully understanding the case. The trial court enforced the contractual jury waiver against the Trust, and the Trust appealed seeking mandamus against the trial court for abuse of discretion.[115] Preliminarily, the Fort Worth Court of Appeals addressed mandamus, stating that it is available where parties have no adequate remedy by appeal, and it concluded that the enforcement or nonenforcement of a contractual jury waiver provision was such a case.[116] The enforceability of a jury trial waiver requires that the waiver be made knowingly, voluntarily, and intelligently.[117] However, when the subject guaranty was executed, the Trust had not yet been created; therefore, the court of appeals concluded that it was legally impossible for the Trust to have made a knowing, voluntary, and intelligent waiver when it did not exist.[118] Reaching this conclusion, the court of appeals ignored the lender's argument that Obert, as a trustee of the Trust, had a close nexus with the Trust and his individual waiver should be imputed to the Trust, as well as case law regarding arbitration agreement provisions enforced against nonsignatory parties and other equities asserted by the lender.[119]

By way of dicta, the opinion provides that if evidence that the Trust was an assignee of a guarantor had been established, a different result may have occurred.[120] In fact, the guaranty contained a provision that made it binding on successors and assigns.[121] What is puzzling about this decision is the total lack of information on how a lender could sue the Trust, which was not a party to the original guaranty. The only feasible explanation is that the Trust was either an assignee or had assumed or ratified the obligations of the guaranty by some subsequent document. The fact that this is not discussed in the case seems to indicate a failure on the part of the lender to provide appropriate evidence of why the Trust was named as a guarantor party defendant.

111. *Id.* at 881–82.
112. *Id.* at 882.
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.*
117. *Id.* at 883.
118. *Id.*
119. *Id.*
120. *Id.* at 884.
121. *Id.* at 884 n.4.

B. Declaratory Judgment

In *Transcontinental Realty Investors, Inc. v. Orix Capital Markets, LLC*, the creditor filed a declaratory judgment action against a guarantor in order to shorten its collection timeframe.[122] Though the trial court awarded relief under the declaratory judgment action, the Dallas Court of Appeals determined that the trial court lacked jurisdiction because the controversy was not ripe for review.[123] Transcontinental executed a guaranty covering payment of legal fees incurred by Orix in a suit against TCI, a subsidiary of Transcontinental.[124] The guaranty would be triggered upon the award of legal fees in another litigation action between Orix and TCI.[125] In its declaratory action, the lender requested a determination that Transcontinental was liable for the attorneys's fees ultimately awarded in the other case and that all affirmative defenses to the guaranty be extinguished.[126] Subject matter jurisdiction exists only where a dispute is ripe, and the court of appeals stated that a case is not ripe if its resolution depends on contingent facts or upon events that have yet to come to pass.[127] Since the underlying case for determining legal fees had not yet been decided, and affirmative defenses depended upon facts in addition to those existing at the time of the contract formation, it was premature to determine any extinguishment of the affirmative defenses.[128] This case represents a good lesson to practitioners to avoid "short circuiting" the appropriate breach of contract suit on a guaranty by filing a declaratory judgment action.

V. PURCHASER/SELLER

A. Prevailing Party and Legal Fees

A typical boilerplate provision awarding attorney's fees to the "prevailing party" was discussed in *Epps v. Fowler*.[129] Fowler purchased a house from Epps and brought suit after discovering foundation issues. During the course of the litigation, Fowler filed a notice of nonsuit without prejudice.[130] An issue developed as to whether Epps was entitled to attorney's fees under the standard Texas Real Estate Commission form contract, which provided that attorney's fees would be awarded to the "prevailing party in any legal proceeding related to the contract."[131] The Texas Supreme Court acknowledged existing judicial decisions awarding

122. Transcon. Realty Investors, Inc. v. Orix Capital Mkts., LLC, 353 S.W.3d 241, 242–43 (Tex. App.—Dallas 2011, pet. denied).
123. *Id.* at 245–46.
124. *Id.* at 242.
125. *Id.* at 243; *see* n.46 of this article discussing other litigation regarding a dispute as to whether the debtor should purchase terrorism insurance.
126. *Transcon. Realty Investors, Inc.*, 353 S.W.3d at 243.
127. *Id.* at 244.
128. *Id.* at 245.
129. Epps v. Fowler, 351 S.W.3d 862 (Tex. 2011).
130. *Id.* at 865.
131. *Id.*

attorney's fees when claims were dismissed "with prejudice"; however, the issue in connection with a nonsuit without prejudice had not yet been addressed.[132] The supreme court held that when a plaintiff takes a nonsuit without prejudice, the defendant may be the prevailing party "if the trial court determines, on the defendant's motion, that the nonsuit was taken to avoid an unfavorable ruling on the merits."[133]

However, a compelling dissenting opinion reasoned that the majority relied too heavily on judicial policy rationale and federal cases interpreting statutory schemes, and instead it should have relied on the plain language and meaning of "prevailing party," which the dissent takes from a dictionary.[134] So, momentarily there is an answer to this issue, but the dissenting opinion points out the main lesson for the practitioner: "[T]he Court forces parties who desire a broader fee-shifting agreement . . . to use clearer words than 'prevailing party' . . . [, and] [t]o be safe, parties will have to spell out their intentions in more detail."[135]

Fitzgerald v. Schroeder Ventures II, LLC is also a case discussing the prevailing party for attorney's fees.[136] Schroeder bought land from Pratt and Panzarella, as trustees, who were represented by Fitzgerald, the real estate broker.[137] After the closing, Schroeder sued the sellers and the broker for not disclosing the existence of a sink hole adjacent to the property.[138] The jury found in favor of the sellers and brokers, who had asserted rights to attorney's fees as the prevailing party.[139] The trial court refused to award attorney's fees based on the decision in *KB Homes*.[140] In the subject decision, the San Antonio Court of Appeals reversed and rendered attorney's fees in favor of the seller and broker.[141] The decision in *KB Homes* was inapplicable to the subject case because *KB Homes* involved a request by the plaintiff for affirmative relief, and while the plaintiff received judgment, it received a no-damage award; therefore, KB Homes was not a prevailing party and could not recover attorney's fees.[142] In *Fitzgerald*, the court of appeals distinguished the requirements for a defendant to be a prevailing party from the requirements for a plaintiff party as in *KB Homes*.[143] The language of the contract[144] was

132. *Id.* at 864, 865–68.
133. *Id.* at 870.
134. *Id.* at 873 (Hecht, J., dissenting).
135. *Id.* at 875 (Hecht, J., dissenting).
136. Fitzgerald v. Schroeder Ventures II, LLC, 345 S.W.3d 624, 626 (Tex. App.—San Antonio 2011, no pet.).
137. *Id.*
138. *Id.*
139. *Id.*
140. *See* Intercontinental Group P'ship v. KB Home Loan Star L.P., 295 S.W.3d 650 (Tex. 2009).
141. *Id.* at 652.
142. *Fitzgerald*, 345 S.W.3d at 627–29.
143. *Id.*
144. The subject contract was a standard contract form promulgated by the Texas Association of Realtors, with Section 16 providing: "If Buyer, Seller, any broker, or escrow agent is a *prevailing party* in any legal proceeding brought under or with relation to this contract or this transaction, such party is entitled to recover from the non-prevailing par-

held to be determinative, and the court of appeals looked to the dictionary definition of "prevailing party" as indicative of the plain, ordinary, and generally accepted meaning of such term. In particular, *Black's Law Dictionary* defines a prevailing party "as '[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded . . . [a]lso termed *successful party*."[145] Therefore, in the subject case, the seller and broker had judgment rendered in their favor and were entitled to recover costs and attorney's fees from the non-prevailing party.[146]

Lesieur[147] further addresses the issue of attorney's fees for a prevailing party in regards to a real estate broker's claim that it was a prevailing party and entitled to recover attorney's fees. The applicable attorney's fees provision read: "The prevailing party in any legal proceeding relating to this contract is entitled to recover reasonable attorney's fees." In addressing the right of the broker, the San Antonio Court of Appeals noted that the broker must be either a party to the contract or a third-party beneficiary to raise such issue.[148] First, the court of appeals looked at the contract and found only one provision describing the parties (the preamble), which did not include the broker. The broker signed the contract but only for the purpose of agreeing to provisions regarding the broker's fee and payment of the cooperating broker's fee.[149] Accordingly, the court of appeals held that the broker was neither a party nor a third-party beneficiary to the contract and could not rely on or enforce the attorney's fee provision.[150]

B. Impracticability of Performance

Chevron Phillips Chemical Co. v. Kingwood Crossroads, L.P.,[151] involves a determination of impracticability of performance under a sales contract, but the case really demonstrates the problems caused by sloppy closing practices and loose talk not documented as amendments to a sales contract.[152] In this case, Chevron Phillips Chemical Company LP (Chevron) contracted to sell to Kingwood Crosssroads, L.P. (Kingwood), approximately seventy acres of land for $3,258,000. During its due diligence period, Kingwood objected to a declaration of covenants, conditions, and restrictions (CCRs) placed upon the property by the original developer,

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ties all costs of such proceeding and reasonable attorney's fees." *Id.* at 626 (emphasis in original).

145. *Id.* at 630 (quoting Black's Law Dictionary 1154 (8th ed. 2004)) (emphasis in original).

146. *Id.*

147. Lesieur v. Fryar, 325 S.W.3d 242 (Tex. App.—San Antonio 2010, pet. denied) (discussed in more detail at n.176).

148. *Id.* at 251.

149. *Id.* at 252.

150. *Id.* at 253.

151. Chevron Phillips Chem. Co. v. Kingwood Crossroads, L.P., 346 S.W.3d 37, 50–61 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).

152. The purchase price of the property and the subject contract was $3.258 million, but legal fees incurred in connection with this suit exceeded $5 million. *Id.* at 43, 48–49.

Exxon Land Development, Inc. (Exxon).[153] Chevron assured Kingwood that it would resolve the issue, and the parties formally extended the due diligence period of the contract; however, no formal amendments were made as to the removal of the CCRs. After nearly two years of effort by Chevron to have the CCRs removed or modified by Exxon to the satisfaction of Kingwood, Chevron gave up. The factual context is significantly more complicated due to the existence of an annexation document that failed to include a legal description of the subject property and the existence of a contract between Chevron's predecessor and Exxon that required the annexation of the subject property under the CCRs. Although the title company was willing to remove the annexation exception based on the invalid annexation document, Chevron, on the eve of closing, wrote to the title company describing the existence of the previously undisclosed contract requiring annexation to the CCRs.[154] Based on this new information, the title company refused to issue a title policy without exception to the CCRs and suit followed.

Although many issues were raised and discussed, the issue of impracticability of performance was the main attraction. Chevron alleged impracticability as a defense to Kingwood's specific performance claim, and the Houston Fourteenth District Court of Appeals analyzed the underlying facts as to whether performance was impracticable. Kingwood argued that the impracticability defense was invalid because (1) Chevron assumed the risk that performance might become impracticable, (2) the performance became impracticable because of Chevron's own fault, and (3) Chevron failed to use reasonable efforts to overcome the performance obstacle.[155] In addressing the assumption of the risk argument, the court of appeals looked to the initial contract provisions concerning the objection and cure to title exceptions.[156] It is important to note that the court of appeals analyzed the original contract provisions because there were no subsequent amendments to the contract that could have addressed what the parties would do with respect to the CCRs.[157] The court of appeals concluded that Chevron did not fail to comply with the contract because a situation arose that prevented Chevron's compliance (the title company's reinsertion of the annexation title exception), which was contrary to the title resolution scheme set forth in the contract.[158] As to Kingwood's allegation that the letter sent on the eve of closing by Chevron to the title company created an impracticability of performance, the court of appeals looked to the truthfulness of the matters in the letter and whether Chevron had a duty to make such disclosure.[159] Based on facts presented at trial, the court of appeals concluded that the evidence was

153. *Id.* at 43.
154. *Id.* at 56.
155. *Id.* at 52.
156. *Id.* at 53–56.
157. *Id.* at 54.
158. *Id.* at 56.
159. *Id.* at 58–60.

sufficient to determine that the letter was truthful and Chevron had a valid reason (other than avoiding performance under the contract) to send the letter to the title company.[160] Therefore, Chevron's letter was not the cause of impracticability of performance.[161] As to the "reasonable efforts" of Chevron, the court of appeals concluded that there was sufficient evidence as to Chevron's efforts to comply with the reasonable efforts requirement, suggesting that litigation with Exxon and indemnification of the title company were not necessary actions due to expense and uncertainty of result.[162] Also, the court of appeals concluded that any attempted monetary settlement was unnecessary because evidence suggested that Exxon would want the property annexed not only for fees and assessments, but also to assure uniform development of all properties under the CCRs.[163]

As suggested above, this case is more significant from a practical standpoint than a legal analysis. First, Exxon, as the developer, failed to record a legally enforceable annexation document because no legal description was attached. Secondly, Kingwood and Chevron took actions based on various verbal statements.[164] The impracticability issue could have been readily resolved by an express amendment to the contract specifying the actions to be assumed by Chevron. Such an amendment would have clearly met the "assumption of risk" principle established by the court of appeals. These actions run counter to the best practices of most real estate attorneys and resulted in a reasonably foreseeable result.

C. "As Is" and Disclaimer of Reliance Clauses

In *Williams v. Dardenne*, the Houston First District Court of Appeals addressed whether fraud in the inducement prevailed over an "as is" clause.[165] Roger and Michelle Williams (Williams) sold a house to Richard and Marilyn Dardenne (Dardenne) pursuant to a standard Texas Real Estate Commission (TREC) residential sales contract that contained an "as is" clause.[166] The court of appeals noted that the "Acceptance of Property Condition" provision in the standard TREC contract had been held by numerous Texas courts to be a valid "as is" provision.[167] The sales contract listed two prior inspection reports, both of which addressed the home's foundation, but did not include a third inspection re-

160. *Id.*

161. *Id.* at 60–61.

162. *Id.*

163. *Id.* at 60.

164. In fact, Kingwood expended over $350,000 in due diligence, development, and marketing plans for the property prior to closing and resolution of the restrictions contained in the CCRs. *Id.* at 47.

165. Williams v. Dardenne, 345 S.W.3d 118, 119 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).

166. *Id.* at 120.

167. *Id.* at 123.

port.[168] After the purchase, Dardenne experienced significant foundation problems, engaged a foundation engineer, and discovered it was the same firm that had issued the third inspection report not disclosed in the sales contract. Consequently, Dardenne brought suit for fraudulent inducement. Williams, the seller, claimed that the valid "as is" clause negated the elements of causation and reliance for fraud claims;[169] however, Dardeene argued that the "as is" provision was unenforceable because it was procured by fraudulent inducement.[170] At issue was whether Dardenne presented any evidence of reliance to support the claim for fraudulent inducement. Dardenne testified that she would not have bought the house if she knew at the time of closing what she knew at the time of trial. However, the court of appeals found that this testimony was no evidence that Dardenne would not have purchased the property if the undisclosed foundation report had been listed in the contract.[171] In support of this position, the court of appeals noted first that there was extensive evidence that the house had suffered significant foundation related damages.[172] Secondly, the undisclosed report contained no additional information not disclosed to Dardenne in the disclosed reports.[173] Finally, there was no evidence that Dardenne even would have read the undisclosed report, since there was evidence in the record that while one listed report was read, the other listed report was not read by Dardenne.[174] Based on the lack of evidence as to actual fraudulent inducement, the court of appeals concluded that the "as is" clause precluded the establishment of the elements of causation and reliance with respect to the various fraud claims.[175]

Lesieur v. Fryar is another case involving an "as is" clause.[176] Prior to acquiring a house, Timothy and Sandra Fryar (Fryar) obtained an inspection report (the Adams Report) that indicated that the house had foundation problems. Three years later, Fryar sold the house to George Lesieur (Lesieur) who also obtained an inspection report (the NPI Report). After closing, Lesieur discovered significant foundation problems and that Fryar did not disclose the Adams Report in the purchase and sale contract. Lesieur sued Fryar and the real estate agents. On appeal, the San Antonio Court of Appeals analyzed whether the causation and reliance elements of Lesieur's fraudulent concealment claim were negated by the NPI Report. Upon analysis of both reports, the court of appeals concluded that although language differences existed in the reports, the un-

168. The third inspection report was not engaged by Williams but rather Williams's former real estate agent, John Sellner, who was not working under Williams's authority. *Id.* at 121.
169. *Id.* at 124.
170. *Id.*
171. *Id.* at 127.
172. *Id.*
173. *Id.*
174. *Id.*
175. *Id.* at 128–29.
176. Lesieur v. Fryar, 325 S.W.3d 242, 246 (Tex. App.—San Antonio 2010, pet. denied).

derlying foundation issues were sufficiently and equivalently described such that the Adams Report would not have disclosed anything Lesieur did not know from the NPI Report.[177] Consequently, the court of appeals held that the NPI Report presented the same substantive information as the non-disclosed Adams Report and therefore negated the elements of causation and reliance as a matter of law.[178] Further, the court of appeals addressed the Dallas Court of Appeals's more stringent requirements to negate causation and reliance, as contained in *Dubow v. Dragon*.[179] In that case, the Dallas Court of Appeals required the following evidence to negate causation and reliance as a matter of law: "(1) the buyer relied *solely* on a pre-purchase inspection, which revealed the defect . . . [,]" and (2) there is a renegotiation of the sales contract based on the defect . . . .[180] The San Antonio Court of Appeals announced its disagreement with the Dallas Court of Appeals's standard for negating causation and reliance.[181] This should be a red flag warning for practitioners.

In *Matlock Place Apartments, L.P. v. Druce*, the Fort Worth Court of Appeals addressed the enforceability of a disclaimer of reliance clause.[182] The facts indicated that the seller delivered significantly false information to the purchaser, including information with respect to occupancy rate, maintenance, and criminal activities. However, the contract contained a detailed and specific disclaimer of reliance clause.[183] The court of appeals reviewed previous Texas Supreme Court decisions on the enforceability of disclaimer reliance clauses, focusing on *Forest Oil Corp. v. McAllen*.[184] *Forest Oil Corp.* listed five factors to be considered in determining the enforceability of such a clause: (1) that the contract was negotiated and not mere boilerplate, including negotiations regarding the issue which is in dispute; (2) representation by counsel of the reliance party; "(3) the parties dealt with each other in an arm's length transaction; (4) the parties were knowledgeable in business matters; and (5) the release language was clear."[185] Here, the court of appeals held that the detailed disclaimer of reliance language in the subject contract clearly and unequivocably disclaimed the purchaser's reliance on the false information provided.[186] The complete disclaimer of reliance provision is attached as Appendix A, and the authors recommend that practitioners consider the use of the provision in appropriate circumstances. In addition, the practitioner

177. *Id.* at 249.

178. *Id.* at 246, 249.

179. *Id.* at 249–50 (citing Dubow v. Dragon, 746 S.W.2d 857 (Tex. App.—Dallas 1988, no writ)).

180. *Id.* at 249 (emphasis added).

181. *Id.* at 250.

182. Matlock Place Apartments, L.P. v. Druce, 369 S.W.3d 355, 369 (Tex. App.—Fort Worth 2012, pet. denied).

183. *Id.* at 370–71.

184. Id. at 369 (citing Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex. 2008)).

185. *Id.* (citing *Forest Oil Corp.*, 268 S.W.3d at 60).

186. *Id.* at 372.

should also consider the opinion in *Italian Cowboy Partners*, discussed in Section VI.A. below.

VI. LEASES AND LANDLORD/TENANT

There were a significant number of cases reported dealing with landlord/tenant issues. Four of them were identified as addressing novel questions. In particular, *Italian Cowboy Partners, Ltd. v. Prudential Insurance Company of America*[187] is a significant case in the continuing development of "as is" and waiver clauses. The other three cases noted below address some interesting drafting and enforcement issues.

A. Proposed Lease Language to Avoid a Fraudulent Inducement Claim

The *Italian Cowboy* dispute arose when the owners/operators of the Dallas restaurant "Italian Cowboy" terminated the restaurant's lease due to the presence of a strong and persistent sewer gas odor in the building. As is discussed in more detail below, the Texas Supreme Court held that the standard merger clause, without more, was insufficient to constitute a valid disclaimer of reliance on fraudulent misrepresentations or omissions.[188]

Restaurant owners and operators Jane and Francesco Secchi (the Secchis) identified a vacant restaurant building in Keystone Park, a Dallas shopping center owned by Prudential Insurance Company of America (Prudential) and managed by Prizm Partners (Prizm), as a possible location to open their new restaurant, Italian Cowboy.[189] The Secchis began the process of negotiating a lease for the building with Prizm's property management director, Fran Powell (Powell), and negotiations continued for approximately five months. During this time at least seven different drafts of the lease were circulated, and the Secchis visited the building on several occasions. Also during this time, Powell made various statements to the Secchis regarding the building and its condition, including statements such as "the building [is] practically new and ha[s] no problems[;]" "the building [is] in perfect condition, never a problem whatsoever[;]" and "there ha[s] been nothing wrong with the place at all."[190]

The executed lease contained the following relevant provisions:

> **14.18** ***Representations.*** Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this Lease except as expressly set forth herein.
>
> **14.21** ***Entire Agreement.*** This lease constitutes the entire agreement between the parties hereto with respect to the subject matter

187. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323 (Tex. 2011).
188. *Id.* at 336.
189. *Id.* at 328.
190. *Id.*

> hereof, and no subsequent amendment or agreement shall be binding upon either party unless it is signed by each party . . . .[191]

It was not until the Secchis began remodeling the building that they first heard about the severe odor that had plagued the previous restaurant tenant, Hudson's Grill. Upon receiving such information, Francesco Secchi contacted Powell and specifically asked her whether Hudson's Grill had experienced an odor problem. "According to [Francesco] Secchi, Powell answered that she had been working with the building 'all the time,' and that '[n]ever before' had there been a problem—this was the 'first time' she heard something was wrong."[192] A week before the restaurant's scheduled "soft opening," a clean-up crew removed a layer of hardened grease that had been blocking the inlet pipe to the grease trap and a constant foul sewer gas odor became evident immediately. Francesco Secchi contacted Powell, who acknowledged that she smelled the odor but never admitted that the same problem had occurred with Hudson's Grill. Extensive attempts to remedy the persistent odor began immediately and continued for months. Unfortunately, none were successful, and the foul odor persisted. Once open, the smell prevented the restaurant from drawing customers. One customer even complained to the health department, causing the City of Dallas to shut down the restaurant for a period of time. Francesco complained to Powell again, telling her that a restaurant could not operate with an odor like that. Later on, Francesco Secchi contacted Powell to tell her that the odor was so terrible that the restaurant could not carry on.

During all of this, Powell continued to deny knowledge of previous odor problems. However, the Secchis soon learned from a former manager of Hudson's Grill not only that the odor was present during Hudson's tenancy and that attempts to remedy it at that time were also unsuccessful, but also that Powell was aware of the odor at that time and had visited Hudson's Grill a number of times while the odor was present. Upon receiving this information, the Secchis immediately ceased paying rent and closed the restaurant. The Secchis, on behalf of the restaurant, then sued Prudential and Prizm, asserting the following claims: (1) fraud in the inducement of the lease, (2) fraud based on later misrepresentations, (3) negligent misrepresentation, (4) breach of the implied warranty of suitability, and (5) constructive eviction.[193] They also sought rescission of the lease.

At trial, the former regional manager of Hudson's Grill directly contradicted Powell's continued denials by testifying that "Powell 'knew of the smell,' that 'she talked to [him] about it and other people about it as well,' and that she described it as 'almost unbearable' and 'ungodly.'"[194] Powell, however, persisted in her denial of having any knowledge of, or

191. *Id.*
192. *Id.* at 329.
193. *Id.* at 330.
194. *Id.*

experience with, the odor during the Hudson's Grill tenancy. The trial court found for the restaurant on all claims, and the restaurant elected to rescind the lease and recover damages for the rescission.[195] The court of appeals, however, reversed and rendered a take-nothing judgment for the restaurant, and entered judgment in favor of the landlord on its counterclaim for breach of contract.[196] The Texas Supreme Court granted the restaurant's petition for review.

The principal issue addressed by the supreme court was whether the disclaimer-of-representations language in the Italian Cowboy lease simply acted as a standard merger clause, or whether it also disclaimed reliance on representations, thus negating a necessary element in the tenant's establishment of a claim for fraudulent inducement.[197] Upon analysis of the issue, the supreme court ultimately held that the language (i.e., the specific provisions quoted above) did not suffice to disclaim reliance or bar a claim based on fraudulent inducement.[198] The supreme court's decision was based on the following two conclusions: (1) a plain reading of the actual lease language indicated that the parties merely intended to include the substance of a standard merger clause, which (as discussed below) does not disclaim reliance; and (2) even if the parties had intended to disclaim reliance, the actual language contained in the lease did not do so clearly and unequivocally.[199]

The supreme court began by setting forth the well-established rules that a merger clause does not waive the right to sue for fraud should a party later discover that the representations it relied upon before signing the contract were fraudulent "'and that the parol evidence rule does not stand in the way of proof of such fraud.'"[200] In *Dallas Farm Machinery v. Reaves*, the supreme court quoted the public policy argument made by the *Bates* court in support of its decision regarding merger clauses:

> The same public policy that in general sanctions the avoidance of a promise obtained by deceit strikes down all attempts to circumvent that policy by means of contractual devices. In the realm of fact it is entirely possible for a party knowingly to agree that no representations have been made to him, while at the same time believing and relying upon representations which in fact have been made and in fact are false but for which he would not have made the agreement. To deny this possibility is to ignore the frequent instances in everyday experience where parties accept, often without critical examination, and act upon agreements containing somewhere within their four corners exculpatory clauses in one form or another, but where they do so, nevertheless, in reliance upon the honesty of supposed friends, the plausible and disarming statements of salesmen, or the

195. *Id.* at 330–31.
196. *Id.* at 331.
197. *Id.*
198. *Id.*
199. *Id.*
200. *Id.* at 331–32 (quoting Dallas Farm Mach. Co. v. Reaves, 307 S.W.2d 233, 239 (Tex. 1957) (citing Bates v. Southgate, 31 N.E.2d 551, 558 (Mass. 1941)).

> customary course of business. To refuse relief would result in opening the door to a multitude of frauds and in thwarting the general policy of the law.[201]

The supreme court then discussed the exception to the rule that it developed in *Schlumberger Technology Corp. v. Swanson*[202] and applied in *Forest Oil Corp. v. McAllen*.[203] In *Schlumberger*, the Texas Supreme Court held that when sophisticated parties who are represented by counsel disclaim reliance on representations about a specific matter, such a disclaimer may be binding and may conclusively negate the element of reliance in a suit for fraudulent inducement.[204] The supreme court reasoned that although there is a clear desire to protect parties from unintentionally waiving a claim for fraud, there is also a desire to provide the parties with the ability to fully and finally resolve disputes between them by bargaining for and executing a release barring all further disputes.[205] The supreme court went on to clarify, however, that in order for a disclaimer of reliance on representations to effectively negate a claim for fraudulent inducement, the parties' intent must be "clear and specific."[206] In *Schlumberger*, the parties had been involved in a long-lasting dispute that they were attempting to put to bed once and for all. Given the circumstances surrounding the settlement agreement's formation, the supreme court determined that the disclaimer-of-reliance clause contained therein had "the requisite clear and unequivocal expression of intent necessary to disclaim reliance on . . . specific representations by Schlumberger," and thus, the clause effectively precluded a claim for fraudulent inducement.[207] The language evaluated by the supreme court in *Schlumberger* is set forth below:

> [E]ach of us . . . expressly warrants and represents . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that **none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment** . . . .[208]

In *Forest Oil*, the Texas Supreme Court applied its *Schlumberger* holding to a settlement agreement that was intended to resolve both future and past claims, and it held that "a freely negotiated agreement to settle present disputes and arbitrate future ones" was enforceable.[209] The language evaluated by the supreme court in *Forest Oil* is set forth below:

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201. *Dallas Farm Mach. Co.*, 307 S.W.2d at 239 (quoting *Bates*, 31 N.E.2d at 558).
202. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex. 1997).
203. Forest Oil Corp. v. McAllen, 268 S.W.3d 51 (Tex. 2008).
204. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 332 (citing *Schlumberger Tech. Corp.*, 959 S.W.2d at 179).
205. *Id.* (citing *Schlumberger Tech. Corp.*, 959 S.W.2d at 179).
206. Id. (quoting *Schlumberger Tech. Corp.*, 959 S.W.2d at 179).
207. *Schlumberger Tech Corp.*, 959 S.W.2d at 179–80.
208. *Id.* at 180 (emphasis in original).
209. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 58, 62 (Tex. 2008).

> [We] expressly represent and warrant . . . that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not relying upon any statement or representation of any of the parties being released hereby. [We] . . . are relying upon [our] own judgment . . . .[210]

Although the supreme court acknowledged that "[a]n all-embracing disclaimer of any and all representations, as [contained in the *Forest Oil* agreement], shows the parties' clear intent" to disclaim reliance, it was careful to clarify that "[its] holding should not be construed to mean that a mere disclaimer standing alone will forgive intentional lies regardless of context" and that it was declining "to adopt a *per se* rule that a disclaimer automatically precludes a fraudulent-inducement claim."[211] Rather, the supreme court was simply holding that in this specific factual context, the *Forest Oil* disclaimer of reliance precluded a claim for fraudulent inducement by refuting the required element of reliance.[212] Accordingly, in addition to analyzing the *Forest Oil* disclaimer language under the *Schlumberger* clear, specific, and unequivocal test, the supreme court announced the following four-part test for determining the validity of a disclaimer of reliance provision:

(1) Were the terms of the contract negotiated, rather then boilerplate;
(2) Was the complaining party represented by counsel;
(3) Did the parties deal with each other at arm's length; and
(4) Were the parties knowledgeable in business matters?[213]

In the *Italian Cowboy* case, the landlord and tenant were in disagreement over whether a disclaimer of reliance existed, or whether the lease provisions simply amounted to a standard merger clause, which (as stated above) does not suffice to disclaim reliance. The supreme court stated that the question of whether an adequate disclaimer of reliance exists is a matter of law.[214] Prudential argued that the restaurant's fraud claim was barred by its agreement (as set forth in § 14.18 of the lease) that Prudential did not make any representations outside the agreement. In other words, Prudential attempted to convince the supreme court that the restaurant impliedly agreed not to rely on any external representations when it agreed that no external representations were made. However, the supreme court after applying the typical rules of contract construction regarding interpretation, held that the language set forth in the Italian Cowboy lease can only reasonably be interpreted to demonstrate that the parties intended to include nothing more than a standard merger clause in the lease (i.e., they intended to ensure that the contract invalidated or superseded any previous agreements and negated the apparent authority

210. *Id.* at 54 n.4.
211. *Id.* at 58, 61.
212. *Id.* at 61.
213. *Id.* at 60.
214. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am., 341 S.W.3d 323, 333 (Tex. 2011).

of an agent to later modify the contract's terms).[215] Accordingly, they did not intend to include a disclaimer of reliance on representations made by Prudential, Prizm, or any of their respective agents.[216] Therefore, the supreme court determined that it was not necessary to consider any extraneous evidence to determine the parties' intent or the true meaning of the document.[217]

The supreme court distinguished the language in the Italian Cowboy lease from the language analyzed in the *Schlumberger* and *Forest Oil* cases by focusing on the presence (or lack thereof) of evidence of the intent to disclaim reliance on other's representations and to rely on one's own judgment.[218] While it had decided that evidence of such intent was present in both *Schlumberger* and *Forest Oil*, it held that no such intent was evident in the Italian Cowboy lease.[219] In fact, it drew attention to the fact that the term "rely" does not appear in any form in the Italian Cowboy language.[220] The supreme court stated that "[t]here is a significant difference between a party disclaiming its *reliance* on certain representations, and therefore potentially relinquishing the right to pursue any claim for which reliance is an element, and disclaiming the *fact* that no other representations were made."[221] The *Schlumberger*, *Forest Oil* and *Italian Cowboy* provisions are compared below:

Schlumberger:

> [E]ach of us . . . expressly warrants and represents . . . that no promise or agreement which is not herein expressed has been made to him or her in executing this release, and that none of us is relying upon any statement or representation of any agent of the parties being released hereby. Each of us is relying on his or her own judgment . . . .[222]

Forest Oil:

> [We] expressly represent and warrant . . . that no promise or agreement which is not herein expressed has been made to them in executing the releases contained in this Agreement, and that they are not relying upon any statement or representation of any of the parties being released hereby. [We] are relying upon [our] own judgment . . . .[223]

Italian Cowboy: "Tenant acknowledges that neither Landlord nor Landlord's agents, employees or contractors have made any representations or promises with respect to the Site, the Shopping Center or this

215. *Id.* at 334.
216. *Id.*
217. *Id.*
218. *Id.* at 336.
219. *Id.*
220. *Id.*
221. *Id.* at 335 (emphasis in original).
222. Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 180 (Tex. 1997).
223. Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 54 (Tex. 2008).

Lease except as expressly set forth herein."[224]

In a footnote, the supreme court stated that if the Italian Cowboy lease had contained a clear and unequivocal disclaimer-of-reliance clause, the analysis would have then proceeded to the circumstances surrounding the lease's negotiation, drafting, and execution (i.e., pursuant to the four-part test established in *Forest Oil*) in order to determine whether such a clause would be binding on the parties.[225]

A number of cases have addressed *Schlumberger*, *Forest Oil*, and *Italian Cowboy*.

In *Allen v. Devon Energy Holdings, L.L.C.*, a stock redemption case, the Houston First District Court of Appeals applied *Schlumberger*, *Forest Oil*, and *Italian Cowboy* to language contained in a redemption agreement and held that a sophisticated party represented by counsel had not effectively disclaimed reliance on pre-closing representations.[226] The contractual provisions reviewed by that court of appeals are summarized as follows:

"Independent Investigation" Clause—The clause provides that (1) Allen based his decision to sell on his independent due diligence, expertise, and the advice of his own engineering and economic consultants; (2) the Phalon appraisal and the Haas reserve analysis were estimates and other professionals might provide different estimates; (3) events subsequent to the reports might have a positive or negative impact on the value of Chief; (4) Allen was given the opportunity to discuss the reports and obtain any additional information from Chief's employees as well as Phalon and Haas; and (5) the redemption price was based on the Phalon and Haas reports regardless of whether those reports reflected the actual value and regardless of any subsequent change in value since the reports.[227]

The "Independent Investigation" clause also included mutual releases "from any claims that might arise as a result of any determination that the value of [Chief] . . . was more or less than" the agreed redemption price at the time of closing.[228]

In its opinion, the *Allen* court focused on and drew attention to the following items relating to the drafting of the subject disclaimer-of-reliance provisions:

The court of appeals noted the critical importance of the absence of the words "*only*," "*exclusively*," or "*solely*" in describing Allen's reliance on his own judgment and independent investigation.[229]

The court of appeals noted that the words "disclaimer of reliance" are not necessary to preclude a fraudulent inducement claim. Yet, the court

224. *Italian Cowboy Partners, Ltd.*, 341 S.W.3d at 348.
225. *Id.* at 337 n.8.
226. Allen v. Devon Energy Holdings, L.L.C., 367 S.W.3d 355, 368 (Tex. App.—Houston [1st Dist.] 2012, pet. granted, judgm't vacated w.r.m.).
227. *Id.* at 377 n.18.
228. *Id.*
229. *Id.* at 379 (emphasis added).

of appeals stated that it would be necessary to include: (1) a clear and unequivocal disclaimer of reliance (however, it did not expand on what would be considered clear and unequivocal); (2) an express waiver specific to fraudulent inducement claims; and (3) an all-embracing disclaimer of any and all representations and any duty to make any disclosures.[230]

The court of appeals found that the *Allen* language did not do any of the following but indicated that if it had there might have been a different result.[231] The *Allen* language did not: (1) state that the only representations that had been made were those set forth in the agreement; (2) contain a broad disclaimer that any extra-contractual representation had been made and that no duty existed to make any disclosures; (3) provide that Allen had not relied on any representations or omissions by Chief; nor (4) include a specific "no liability" clause stating that the party providing certain information will not be liable for any other person's use of the information.[232]

Though admittedly unnecessary, the *Allen* court also addressed (in dicta) the four-part test announced in *Forest Oil.* After noting that it was unsettled among the courts how many of the *Forest Oil* factors must be satisfied for a disclaimer of reliance to be effective, the *Allen* court concluded that two factors are absolutely necessary—the complaining party must be a sophisticated party and represented by counsel in the negotiation.[233] Then, according to the *Allen* court, the sophisticated party represented by counsel must also show "that the party who agree[d] to the disclaimer either (1) did in fact negotiate the contract terms or (2) had the ability to negotiate terms because the parties dealt with each other at arm's length."[234] Some proposed language to address these issues is attached as Appendix B.

B. Drafting a Lease Term

During the Survey period, the courts reaffirmed "tenancy at will" as a default position in construing the term of a lease. In *Providence Land Services, LLC v. Jones*, the issue involved lakefront property and leases for the property between the purchased lots and the water.[235] When the leases were completed to specify a ninety-nine year term, those leases were enforced accordingly. However, in many of the leases the concluding term of the lease was identified as "indefinite" or "no-end term." The Eastland Court of Appeals stated that an indefinite and uncertain length of time is an "estate at will," and "indefinite" was not found to constitute the same as "perpetual," "forever," or "infinity," but rather was uncer-

230. *Id.* at 380.
231. *Id.*
232. *Id.*
233. *Id.* at 384–86.
234. *Id.* at 385.
235. Providence Land Servs., LLC v. Jones, 353 S.W.3d 538, 540 (Tex. App.—Eastland 2011, no pet.).

tain.[236] Accordingly, the leases were tenancies at will.[237]

Likewise, in *Effel v. Rosberg*, a lease "for a term equal to the remainder of the Lessee's life, or until such time that she voluntarily vacates the premises" did not satisfy the certainty requirement.[238] The lease was considered a tenancy at will.[239] The uncertainty of the date of the lessee's death rendered the lease terminable at will by either party.[240]

C. Eviction

In *Moncada v. Navar*, the El Paso Court of Appeals interpreted Rule 749b of the Texas Rules of Civil Procedures and also recently passed legislation, Texas Property Code §§ 24.0053 and 24.0054, relating to payment of rent pending appeal in nonpayment of rent cases.[241] *Moncada* is a forcible detainer suit, resulting from a foreclosure purchaser's attempt to evict the current occupants. The Moncadas were the current occupants of the foreclosed home and refused to vacate the premises after Bert Navar purchased the home at a foreclosure sale, even though there was no rental agreement. Thus, Rule 749b and Texas Property Code §§ 24.0053 and 24.0054 were not applicable to an appeal by the Moncadas.[242] The Moncadas also filed a pauper's affidavit, which was uncontested. "Rule 749b simply provides a procedure by which an indigent appellant may remain on the premises during the appeal: an appellant who appeals by filing a pauper's affidavit 'shall be entitled to stay in possession of the premises during the pendency of the appeal' by complying with the procedures set forth in the rule."[243] Thus, Rule 749c dealt with perfecting an appeal while Rule 749b dealt with continued possession.

VII. CONSTRUCTION MATTERS

Two cases were noteworthy in the area of construction law. The first, *Gray v. Entis Mechanical Services LLC*, highlights the current difficulty in applying the fraudulent-lien statute.[244] This statute was originally passed to deal with the problem of lien filings intentionally intended to cloud title. It has been extended to apply to any lien that might satisfy the elements of the statute, somewhat loosely written. In particular, it has found its way into the area of affidavits claiming a mechanic's lien. In the *Gray* case, the Houston Fourteenth District Court of Appeals set out the elements of the fraudulent-lien statute: (1) knowledge; (2) intent that the

236. *Id.* at 542.
237. *Id.*
238. Effel v. Rosberg, 360 S.W.3d 626, 628, 630–31 (Tex. App.—Dallas 2012, no pet.).
239. *Id.* at 630–31.
240. *Id.* at 631.
241. Moncada v. Navar, 334 S.W.3d 339, 341–42 (Tex. App.—El Paso 2011, no pet.); Tex. R. Civ. P. 749b; Tex. Prop. Code Ann. §§ 24.0053–.0054 (West 2012).
242. *Moncada*, 334 S.W.3d at 341–42.
243. *Id.* at 342 (quoting Tex. R. Civ. P. 749b).
244. Gray v. Entis Mech. Servs., L.L.C., 343 S.W.3d 527, 529–31 (Tex. App.—Houston [14th Dist.] 2011, no pet.); Tex. Civ. Prac. & Rem. Code Ann. § 12.002 (West Supp. 2009).

document be given legal effect; and (3) intent to cause financial injury.[245] The lower court was reversed with directions that the intent to cause financial injury was an issue of fact that could not be decided on summary judgment.[246] The reported details indicated that a payment was made, marked paid in full, and the subcontractor refused to release the lien associated with a disputed amount. A concurring opinion turned on an inadequacy—a double negative—in an affidavit used to support the motion for summary judgment.[247] The Texas Legislature reviewed legislation in connection with modifications to the fraudulent-lien statute to help address the difficulty of an unintended breath of scope in applying this statute, but did not pass any bills.[248]

Similarly pointing out the complexity of Texas Property Code Chapter 53, the *Morrell Masonry Supply, Inc. v. Loeb*[249] case out of the Houston Fourteenth District Court of Appeals highlights the difficulty some subcontractors incur in complying with the fund trapping provisions and the calculation of the time requirements for filing an affidavit claiming a lien. In particular, in this case, the court of appeals found that each month's delivery was supported by a separate invoice, which began accrual of the time to file or to submit notices of the lien claims.[250] In addition, the property was a homestead and the subcontractor failed to give the complete notice, omitting the required last sentence of the notice that goes to the homeowners. The subcontractor was understandably disturbed because the owner proceeded to pay the general contractor despite evidence of actual notice of the fund trapping and affidavit claiming a lien. Once again, whether one agrees or not with the statutory regime set out in Chapter 53 of the Texas Property Code, this case demonstrates the difficulty in meeting strict compliance with the statute.

VIII. TITLE MATTERS

A. PARTITION

In the world of conveyances and title issues, four cases were noted as dealing with some important, though often obscure, provisions. In the first case, *Barham v. McGraw*, the Amarillo Court of Appeals addressed an alleged partition agreement and a family conflict over what "mother" must have intended.[251] Chief Justice Quinn begins his opinion with a pithy reference to the evils of greed and the complications of family.[252]

245. *Gray*, 343 S.W.3d at 529–30 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 12.002).
246. *Id.* at 530–31.
247. *Id.* at 531–32 (Frost, J., concurring).
248. *See* H.B. 3474, 83d Leg., R.S. (2013); H.B. 2567, 83d Leg., R.S. (2013); S.B. 693, 83d Leg., R.S. (2013).
249. Morrell Masonry Supply, Inc. v. Loeb, 349 S.W.3d 664 (Tex. App.—Houston [14th Dist.] 2011, no pet.).
250. *Id.* at 667–68.
251. Barham v. McGraw, 342 S.W.3d 716, 717–18 (Tex. App.—Amarillo 2011, pet. denied).
252. *Id.* at 717 (stating "*Blood may be thicker than water, but money beats everything*" and "*He that is greedy of gain troubleth his own house*").

By letter agreement, the family members attempted to reach a partition at one point, attaching to a letter agreement an aerial view of the property. The letter agreement was inadequate in many aspects, including an adequate legal description. The aerial photo was not enough. Moreover, the court of appeals noted that partition was a matter of dividing property owned by co-tenants and concerned possession, not title.[253] In this case, possession continued to reside in the trustee, their mother. The court of appeals affirmed the dismissal of the partition agreement but reversed on the issue regarding sanctions and time requirements under Texas Civil Practice and Remedies Code § 9.012(c), which requires a ninety day waiting period after a violation before imposition of a sanction.[254]

In addressing yet another obscure provision in the partition context, the El Paso Court of Appeals, in *Gardner v. Estate of Trader*, addressed Texas Property Code §§ 29.001–.004 and the forced sale of an owner's interest in real property as reimbursement for property taxes paid by a co-owner on that owner's behalf.[255] First, the court of appeals noted that Chapter 29 only applies to real property that is not exempt from forced sale under the Constitution, such as homestead property, and must be property received by a person as a result of the death of another person by inheritance, under a will, by a joint tenancy with a right of survivorship, or by any other survivorship agreement passing title other than an agreement between spouses for community property with a survivorship.[256] Of course, this is fairly limiting, but in such an event, the payor may file a petition in district court for an order to require another owner of an undivided interest in that property to sell the other owner's interest in the property to the payor.[257] The payor must have paid the ad valorem taxes for three years in a five year period, and the other owner must not have been reimbursed "for more than half of the total amount paid by the person for the taxes on the owner's behalf."[258] In this case, the defendant undertook to reimburse the petitioner/payor but did so after the suit was filed. The court of appeals found that to be sufficient, and it also held that a forced sale could not be ordered under such circumstances.[259]

B. Muniment of Title

The Amarillo Court of Appeals addressed the use of a muniment of title more than four years after the death of the testator in *In re Estate of Campbell*.[260] The standard for filing a muniment of title after four years

253. *Id.* at 719.
254. *Id.* at 719–20; Tex. Civ. Prac. & Rem. Code Ann. § 9.012(c) (West 2012).
255. Gardner v. Estate of Trader, 333 S.W.3d 331, 334, 336–37 (Tex. App.—El Paso 2010, no pet.); Tex. Prop. Code Ann. §§ 29.001–.004 (West 2012).
256. *Gardner*, 333 S.W.3d at 336.
257. *Id.*; Tex. Prop. Code Ann. § 29.002(a).
258. Tex. Prop. Code Ann. § 29.002(a)(2).
259. *Gardner*, 333 S.W.3d at 337.
260. *In re* Estate of Campbell, 343 S.W.3d 899, 901 (Tex. App.—Amarillo 2011, no pet).

requires that the party applying for probate was not in default in failing to present the same for probate within four years.[261] The court of appeals noted that the focus of the default inquiry—that is, the absence of reasonable diligence—is to be on the part of the party offering the instrument.[262] Generally, a party applying for probate would not be considered personally in default if he or she did not know of the existence of the will, provided such proponent was not negligent in failing to discover whether there was a will.[263] In summary, the default of another did not preclude a non-defaulting applicant from filing the will.

C. Strips and Gores

In yet another unique case, *Escondido Services, LLC v. VKM Holdings, LP*, the Eastland Court of Appeals addressed both the appurtenance doctrine and the strips and gore doctrine.[264] This was a trespass to try title action involving mineral rights underneath a strip of land that had been conveyed to the State for a highway. An earlier conveyance had expressly reserved "oil, gas, and sulphur."[265] A subsequent conveyance by the landowner described the property up to the boundary of the roadway and did not reserve minerals. The question, of course, was ownership of the minerals under the highway strip. Relying on the appurtenance and strip and gore doctrines, the court of appeals restated the general rule set out by the Texas Supreme Court in *Mitchell v. Bass* as follows:

> The established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road . . . . Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant. The owners of the land on each side go to the center of the road, and they have the exclusive right to the soil, subject to the right of passage in the public.[266]

In this case, the appellant asserted that the strip and gore doctrine did not apply to a mineral interest lying underneath a separately conveyed fee estate to the State. The court of appeals found that the conveyance to the State as a result of a deed rather than an easement was of no practical consequence.[267] The strip and gore doctrine was applicable to a mineral interest underneath a highway reserved in a deed to the State.[268] It additionally was not relevant that the highway had not yet been constructed.[269]

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261. Tex. Prob. Code Ann. § 73(a) (West 2012).
262. *In re Estate of Campbell*, 343 S.W.3d at 902–04.
263. *Id.* at 903.
264. Escondido Servs., LLC v. VKM Holdings, LP, 321 S.W.3d 102 (Tex. App.—Eastland 2010, no pet.).
265. *Id.* at 109.
266. *Id.* at 106 (quoting Mitchell v. Bass, 26 Tex. 372, 380 (1862)).
267. *Id.* at 107.
268. *Id.* at 106–07.
269. *Id.* at 108.

D. Easement by Estoppel

In *Martin v. Cockrell*,[270] the Amarillo Court of Appeals addressed a somewhat popular theory of easement by estoppel. More and more courts have tended to find easements by estoppel under appropriate circumstances, including when someone detrimentally relies on another's "representations."[271] In this case, the court of appeals found that silence did not give rise to an easement by estoppel.[272] Moreover, the court of appeals noted that where two methods of access exist, but a second roadway is a matter of convenience, that simple impassability does not create an easement right against another's property.[273]

E. Restrictions

In an interesting case dealing with condominium regimes, which ostensibly would transfer the same logic to covenants, conditions, and restrictions, the Dallas Court of Appeals, in *Riner v. Neumann*, held that a home equity security instrument was a deed of trust for purposes of determining priority of liens.[274] Thus, the condominium documents subordinate to a deed of trust included a home equity loan.[275] Such language stated that "[a]ll liens securing sums due or to become due under any prior recorded purchase money mortgage, vendor's lien or deed of trust."[276] This decision, based on the context of the wording, is highly questionable and was probably driven by the result. One should note that this case involved a condominium declaration before adoption of the Texas Uniform Condominium Act. The court of appeals also found that the lien for unpaid assessments arose on the date of the failure of payment of the assessment.[277] In this case, this placed the home equity loan ahead of the assessment lien in terms of time.

In another case, interesting for its facts but also because of the clash of legal rights held by the developer, a fiduciary duty won out over good intentions. In *Lesley v. Veterans Land Board of the State of Texas*, a subdivision developer held the executive mineral rights for land which he also sought to develop for residential property.[278] As part of the development of the residential property, the subdivision developer filed restrictive covenants limiting future leasing of minerals. Problematic, however, was the estimated $610 million worth of minerals underneath the surface that apparently could not be reached from outside the subdivision. The Texas Supreme Court found that this violated the fiduciary duty of the

270. Martin v. Cockrell, 335 S.W.3d 229 (Tex. App.—Amarillo 2010, no pet.).
271. *Id.* at 236–37.
272. *Id.* at 238.
273. *Id.* at 238–40.
274. Riner v. Neumann, 353 S.W.3d 312, 320 (Tex. App.—Dallas 2011, no pet.).
275. *Id.*
276. *Id.* at 316.
277. *Id.* at 317.
278. Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 481 (Tex. 2011).

executive right holder to the mineral interests held by others.[279] The holder of the executive right had a duty to develop the minerals.[280] Also interesting, the remedy the supreme court selected was to cancel the restrictive covenants.[281] The supreme court felt that the common law accommodation doctrine was adequate to protect the landowners.[282]

F. Home Equity

Two other cases addressing home equity loans were reported during the Survey period. Both were federal court cases, and in the first, *Smith v. JPMorgan Chase Bank*,[283] the district court addressed the issues of limitations and defects in the home equity loans. This district court followed a previous opinion of Judge Barbara Lynn in which a four-year limitations applied in connection with claims for damages, but not in connection with the challenge to the lien.[284] The theory is that a lien on a homestead that does not comply with constitutional requirements is completely invalid—that is, void—and cannot be made valid later.[285] This case involved a second prohibited home equity loan. In its analysis, the district court also indicated that the sixty day cure period was the constitutional provision to balance the equities between the borrower and the lender.[286] An application of the statute of limitations, which by its language does not include actions to recover real property, would upset the checks and balances provided by the Texas Constitution.[287]

Texas intermediate appellate courts and the majority of federal courts have applied the residual four-year statute of limitation, set forth in Texas Civil Practice and Remedies Code § 16.051, to constitutional claims under the home equity provisions, with an accrual date being the date the loan is closed.[288] The Eastern District of Texas has recently produced two cases holding that the residual four-year statute of limitation is applicable to constitutional claims under the home equity provisions.[289]

However, there is federal authority to the contrary in the Southern and Northern Districts of Texas. In *Smith v. JPMorgan Chase Bank*, the dis-

279. *Id.* at 491.
280. *Id.* at 491–92.
281. *Id.* at 491.
282. *Id.* at 492.
283. Smith v. JPMorgan Chase Bank, Nat'l Ass'n, 825 F. Supp. 2d 859 (S.D. Tex. 2011), *adhered to on reconsideration*, CIV. A. C-11-260, 2012 WL 43627 (S.D. Tex. Jan. 9, 2012).
284. Santos v. CitiMortgage, Inc., No. 3:11–CV–2592–M–BK, 2012 WL 1065464 (N.D. Tex. Mar. 29, 2012).
285. *Smith*, 825 F. Supp. at 861–62.
286. *Id.* at 863 (citing Tex. Const. art. XVI, § 506(a)(6)(Q)(x)).
287. *Id.* at 868.
288. *See* Rivera v. Countrywide Home Loans, Inc., 262 S.W.3d 834 (Tex. App.—Dallas 2008, no pet.); Kennedy v. Argent Mortg. Co., No. H-12-1137, 2012 U.S. Dist. LEXIS 106663 (S.D. Tex. July 22, 2012); Belanger v. BAC Home Loans Servicing, L.P., 839 F. Supp. 2d 873 (W.D. Tex. 2011).
289. *See* Blodgett v. BAC Home Loans Servicing, LP, No. 4:11-CV-00051, 2012 WL 32950 (E.D. Tex. Jan. 6, 2012); Priester v. Long Beach Mortg. Co., No. 4:10-CV-641, 2011 U.S. Dist. LEXIS 142031, *adopt. mem.*, No. 4:10-cv-00641, 2011 U.S. Dist. LEXIS 141415 (E.D. Tex. Dec. 8, 2011).

trict court concluded that, despite the Texas and federal decisions holding to the contrary, there is no time limit for cure of home equity loan violations, and there is no limitations period applicable to the claim based on the violation.[290] Subsequently, the Fifth Circuit in *Boutari v. JP Morgan Chase*, a per curiam decision, affirmed a district court's order adopting a magistrate's recommendation that found claims for home equity loan violations time barred after four years.[291] JPMorgan Chase filed a motion for reconsideration based on the *Boutari* per curiam decision.[292] The district court ignored *Boutari* and denied the motion to reconsider.[293] It stated that it was unclear whether the court of appeals affirmed on the basis of limitations.[294]

Also, in *Santos v. CitiMortgage*, the magistrate judge recommended that a motion to dismiss claims for home equity loan violations based on limitations should be denied.[295] Judge Lynn adopted the recommendation in part and rejected it in part.[296] She followed the *Smith* case and held that the lien claim was not subject to limitations.[297] However, she also concluded that the claim for forfeiture of all principal and interest due four years before the suit was brought was barred by the residual four-year statute of limitation.[298]

However, since these cases were reported, the Fifth Circuit, in *Priester v. JP Morgan Chase Bank, N.A.*, found four-year statute of limitations uniformly applicable to home equity loan claims.[299] The *Priester* case involved contentions that (1) the closing of the loan occurred in the borrower's home, rather than at the office of an attorney, lender, or title company, and (2) they did not receive notice of their rights twelve days before closing. Both of these items are required by the Texas Constitution.[300] The Priesters sent their cure demand more than four years after the closing. The Fifth Circuit noted that the Texas Supreme Court has not addressed the issue, but two Texas courts of appeals have, both finding that the residual four-year statute of limitation applies.[301] After some analysis, the Fifth Circuit concluded "that a limitations period applies to constitutional infirmities under § 50(a)(6)."[302] The decision did not limit itself to the two infirmities under discussion. Moreover, the Fifth Circuit

290. *Smith*, 825 F. Supp. 2d at 867.
291. Boutari v. JP Morgan Chase Bank N.A., 429 F. App'x 407 (5th Cir. 2011) (per curiam).
292. Smith v. JPMorgan Chase Bank Nat'l Ass'n, No. C-11-260, 2012 WL 43627 (S.D. Tex. Jan. 9, 2012).
293. *Id.* at *1–2.
294. *Id.* at *2.
295. Santos v. CitiMortgage, Inc., No. 3:11-CV-2592-M-BK, 2012 WL 1065464, at *1 (N.D. Tex. Mar. 29, 2012).
296. *Id.*
297. *Id.*
298. *Id.*
299. Priester v. JP Morgan Chase Bank, N.A., 708 F.3d 667, 674 (5th Cir. 2013).
300. *Id.* at 671.
301. *Id.* at 673.
302. *Id.* 674; TEX. CONST. art. XVI, § 50(a)(6).

found that "[t]he injury occurred when the Priesters created the lien, and there was nothing that made the injury undiscoverable."[303] Accordingly, limitations began at the time of closing. "A lack of knowledge that that was a violation of the law is insufficient to toll limitations."[304] Again, the Texas Supreme Court has not written on this issue.

In another Fifth Circuit case, *Cerda v. 2004-EQR1 L.L.C.*,[305] the court of appeals dealt with the issue of substantially equal payments. In particular, the court of appeals addressed the potential conflict between permissible variable interest rates and the constitutional requirement that scheduled payments be substantially equal.[306] The court of appeals found that balloon payments are prohibited, and in order to fully amortize a loan over its remaining term, each time an interest rate was adjusted it would permissibly result in substantially equal, but different, amortized payments over the balance of the loan term.[307]

IX. NUISANCE TRESPASS

A. LIMITATIONS

The courts addressed nuisance in a number of cases. This continues to be an active area in jurisprudence. In *ACCI Forwarding, Inc. v. Gonzalez Warehouse Partnership*, ACCI Forwarding, Inc. (ACCI) placed oil field chemicals in Gonzalez Warehouse Partnership's (GWP) warehouse and failed to remove them.[308] After the short term agreement, GWP found itself with a difficult disposal issue. This occurred in October of 2000, and in 2003, GWP found a purchaser for its property, but a requirement of the contract was that the chemicals be removed. In the fall of 2003, GWP paid to have the chemicals properly removed. The suit was filed in February of 2005 and trial finally reached in May of 2009.[309] The San Antonio Court of Appeals noted that "[t]he determination of the accrual date for damage to real property depends on the characterization of the injury as permanent or temporary."[310] A permanent trespass or nuisance claim accrues upon discovery of the injury, while a temporary trespass or nuisance claim accrues anew upon each injury.[311] Accordingly, "a cause of action for permanent injury to land must be brought within two years, [while] damages for temporary injury to land may be recovered for the two years prior to filing suit."[312] In this case, because the tortious conduct could have been terminated, the court of appeals found it to be a tempo-

303. *Priester*, 708 F.3d at 676.
304. *Id.*
305. Cerda v. 2004-EQR1 L.L.C., 612 F.3d 781 (5th Cir. 2010).
306. *Id.* at 789.
307. *Id.* at 789–92.
308. ACCI Forwarding, Inc. v. Gonzalez Warehouse P'ship, 341 S.W.3d 58, 61 (Tex. App.—San Antonio 2011, no pet.).
309. *Id.*
310. *Id.* at 63.
311. *Id.*
312. *Id.* at 64.

rary injury to land.[313] In addition, the damage could be cured and was not permanent in nature.[314] "Because the injury here was temporary, GWP could recover damages for the two years prior to filing suit," including the cost of properly removing and disposing of the chemicals.[315] Also of interest in this case, ACCI's corporate privileges were forfeited under the Texas Tax Code.[316] Accordingly, each officer or director of the corporation became liable for the debt of the corporation.[317] The court of appeals found that tort liability, not just contract liability, constituted debt of the corporation.[318] There were some stipulations and unique items in the jury charge that may limit the holding of this case, but again, a careful note for the practitioner, especially in that a corporate liability became a personal liability.

In contrast, *Yalamanchili v. Mousa* held that limitations began for a nuisance cause of action at the time when a homeowner first became aware of damage to his plants and trees due to post-rain runoff water from an adjacent shopping center.[319] In this case, the rain runoff, which occurred "with every rain of any magnitude," was a permanent nuisance and limitations began upon discovery of the first damage.[320] The plaintiff also alleged damages to his foundation, which he discovered at a later date, but the Houston Court of Appeals found that the plaintiff knew that plants and trees were dying, and he knew he had moisture retention problems.[321] However, the court of appeals did leave open a question as to whether the limitations would apply to a request for permanent injunction.

Also of importance is *Sullivan v. Brokers Logistics, Ltd.* where the El Paso Court of Appeals reversed a summary judgment based on limitations requiring a jury determination as to whether a 100 year flood in El Paso, and the resulting silt build-up on down flood property, was a temporary or permanent injury.[322] Moreover, in *Markwardt v. Texas Industries, Inc.*, the Houston Fourteenth District Court of Appeals found that the continuing-tort doctrine did not apply to a cause of action for permanent nuisance, so as to extend the statute of limitations.[323]

A statute of repose was also applied to a nuisance claim in *Ehler v.*

313. *Id.* at 64–65.

314. *Id.* at 65.

315. *Id.*

316. *Id.* at 62 (citing TEX. TAX CODE ANN. § 171.252 (West 2008)).

317. TEX. TAX CODE ANN. § 171.252(2).

318. *ACCI Forwarding, Inc.*, 341 S.W.3d at 67.

319. Yalamanchili v. Mousa, 316 S.W.3d 33, 38–39 (Tex. App.—Houston [14th Dist.] 2010, pet. denied).

320. *Id.*

321. *Id.* at 40–41.

322. Sullivan v. Brokers Logistics, Ltd., 357 S.W.3d 833, 834–38 (Tex. App.—El Paso 2012, pet. denied).

323. Markwardt v. Tex. Indus., Inc., 325 S.W.3d 876, 893–94 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

LVDVD, L.C.[324] The statute of repose was for a one year period and statutorily created for lawful agricultural operations.[325] Thus, the landowners were precluded from bringing an action against a neighboring dairy farm that was conducting lawful agricultural activities.[326]

B. "ACTIONABLE" NUISANCE

The Austin Court of Appeals addressed the seminal question of what constitutes an "actionable" nuisance as opposed to a "mere" nuisance.[327] In *Hanson Aggregates West, Inc. v. Ford*, a long utilized rock quarry and a nearby community had expanded over time to become closer in distance to one another. Allegedly, the quarry's operations, including occasional blasting operations and dust, constituted a nuisance to homeowners in the area. The trial court found for the homeowners, but on appeal, the court of appeals noted that an actionable nuisance required some showing that the conduct was wrongful, caused by intentional or negligent conduct, or abnormal and out of place in its surroundings.[328] The court of appeals rejected a theory of absolute liability for nuisance.[329]

C. TRESPASS

The Texas Supreme Court also addressed trespass in *Barnes v. Mathis*, a case that dealt with road construction and a neighboring wetlands area.[330] In this case, the road across a creek, which was upstream from the wetlands area, included culverts, or drainage pipes, but allegedly caused flooding. There was significant disagreement as to whether the new road caused a nuisance, or whether the flooding was caused by rain, animal activity, and the like. Basically this case has a good discussion of nuisance and trespass, but the supreme court reversed and remanded the case for determination of a fact question as to whether there had been either a nuisance or trespass.[331]

D. PERMITTING

In another trespass case, the Texas Supreme Court addressed permitting and, in particular, the Injection Well Act, located in Chapter 27 of the Texas Water Code.[332] The supreme court reversed the trial court, which essentially had found that a permitted deep subsurface injection

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324. Ehler v. LVDVD, L.C., 319 S.W.3d 817, 820–22 (Tex. App.—El Paso 2010, no pet.).
325. Id. at 820–21; TEX. AGRIC. CODE ANN. §§ 251.003, 251.004(a) (West 2012).
326. *Ehler*, 319 S.W.3d at 821–22.
327. Hanson Aggregates W., Inc. v. Ford, 338 S.W.3d 39, 46–48 (Tex. App.—Austin 2011, pet. denied).
328. *Id.* at 46.
329. *Id.*
330. Barnes v. Mathis, 353 S.W.3d 760, 762 (Tex. 2011).
331. *Id.* at 766.
332. FPL Farming Ltd. v. Envtl. Processing Sys., L.C., 351 S.W.3d 306 (Tex. 2011); TEX. WATER CODE ANN. §§ 27.001–.105 (West 2012).

could not arise to a trespass when the fluids that were injected at deep levels later migrated into the deep subsurface of nearby tracts.[333] The supreme court noted that a permit only removes a government imposed barrier to a particular activity and does not relieve the party of tort liability.[334] "[A] permit is a 'negative pronouncement' that 'grants no affirmative rights to the permitee.'"[335] This decision was made somewhat easier because the Texas Administrative Code, which governs Texas Commission on Environmental Quality (TCEQ) permits, also states that "[t]he issuance of a permit does not authorize any injury to persons or property or an invasion of other property rights, or any infringement of state or local law or regulations."[336] Thus, operators utilizing deep injection wells will need to conduct an analysis that extends beyond the permit process.

E. STANDING/DAMAGES

The courts additionally addressed damages to land and improvements on numerous occasions. While most of the cases will be in the context of nuisance or trespass, the Texas Supreme Court dealt with the Natural Resources Code in *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*[337] In this case, a current mineral lessee sought to bring an action against a prior lessee for failure to properly plug a well. The supreme court found that the Natural Resources Code created a private cause of action resulting from statutory violations,[338] but the current mineral lessee lacked standing to bring those claims.[339] The supreme court fell back on the common law principle that a subsequent purchaser of real property does not have the right to recover for an entry to the land committed before his purchase, unless there is an express assignment of the cause of action.[340] The right to sue for the damage to the property belonged to the person who owned the property at the time of the injury.[341] Many times grantees under a warranty deed assert a right to bring a claim for damages, but a warranty deed will not support an assignment of that claim. In this case, the supreme court noted that if the legislature had intended to change the common law principle it could have done so in the statute, and it did not.[342]

333. *FPL Farming Ltd.*, 351 S.W.3d at 314–15.
334. *Id.* at 310–11.
335. *Id.* at 310 (quoting Magnolia Petroleum Co. v. R.R. Comm'n, 170 S.W.2d 189, 191 (Tex. 1943)).
336. 30 TEX. ADMIN. CODE § 305.122(d) (2013).
337. Exxon Corp. v. Emerald Oil & Gas Co., L.C., 331 S.W.3d 419 (Tex. 2010).
338. *Id.* at 422 (citing TEX. NAT. RES. CODE ANN. § 85.321 (West 2012)).
339. *Id.* at 424–25.
340. *Id.* at 424.
341. *Id.*
342. *Id.* at 425.

X. PREMISES LIABILITY

The Dallas Court of Appeals, in *Jensen v. Southwest Rodeo, L.P.*, refused to extend responsibility for a defect in a leased premises to the lessor where multiple tenants used the space in question.[343] In this case, the premises were an arena and events center located in Mesquite, Texas, which were leased to various entities for events. The injured plaintiff fell on arena stairs, alleged a defect, and brought a claim against the owner of the arena.[344] The plaintiff attended an event for which the premises had been leased. The court of appeals distinguished *City of Irving v. Seppy* largely because of the nature of the lease agreement.[345] Accordingly, this case presents a good drafting lesson for counsel to identify and specifically allocate control and responsibility for maintenance and safety.

In *Hyde v. Hoerauf*, the Texarkana Court of Appeals dealt with the more recent phenomenon of "pasture parties."[346] A pasture party is an event where party-goers lack permission to be on certain property but use it nonetheless because the property is "out in the middle of nowhere."[347] In this case, one of the participants driving home from the pasture party was tragically killed in an automobile accident. The trial court granted summary judgment, dismissing the wrongful death action, and the matter was brought on appeal.[348] On appeal, the plaintiffs raised for the first time the issue that the trespassing motorist was a licensee, based on the landowner's failure to prevent the multiple pasture parties.[349] This case highlights the need for a landowner to be vigilant about repeated trespassing to avoid such a claim. In this particular case, the court of appeals declined to hear the licensee allegation because it had not been raised in the trial court.[350] The court of appeals also suggested in its discussion that the landowner may have owed some duty under premises liability to the intoxicated participant had there been an accident on the property.[351]

XI. REALTORS AND BROKERS

There were a number of cases dealing with listing agreements, all of which applied stringent requirements for the real estate agent. In the first case, *Clouse v. Levin*, Mark Levin (Levin) was a real-estate agent and independent contractor.[352] Levin had an agreement with the Clouses, who were interested in purchasing a house, on behalf of Coldwell Banker, the real-estate broker. He was not individually a party to the agreement.

343. Jensen v. Sw. Rodeo, L.P., 350 S.W.3d 755, 756 (Tex. App.—Dallas 2011, no pet.).
344. *Id.*
345. *Id.* at 757–59 (citing City of Irving v. Seppy, 301 S.W.3d 435 (Tex. App.—Dallas 2009, no pet.)).
346. Hyde v. Hoerauf, 337 S.W.3d 431, 433 (Tex. App.—Texarkana 2011, no pet.).
347. *Id.*
348. *Id.*
349. *Id.* at 435 n.9.
350. *Id.*
351. *Id.* at 436–37, 439 n.13.
352. Clouse v. Levin, 339 S.W.3d 766, 768 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

After Levin left Coldwell Banker, Coldwell Banker assigned its rights to commissions provided for in the agreement dated August 11, 2007, to Levin.[353] However, the original agreement was signed on November 11, 2007. Levin testified that this was a typographical error and that the intended date of the Buyer Representation Agreement was November 11, 2007.[354] The Houston Fourteenth District Court of Appeals found that Levin was not a party to a written agreement with the Clouses and that the assignment was ineffective.[355] Similarly, in *Neary v. Mikob Properties, Inc.*, the Dallas Court of Appeals held that a term sheet and other communications, including emails, did not constitute a written agreement to pay a commission on the sale of apartment complexes.[356] These communications did not satisfy the requirements of § 1101.806(c) of the Real Estate Licensing Act (RELA).[357] In addition, the parties' communication did have some of the standard language indicating that it was the parties' mutual intent that the agreement was not binding upon them, which also may have lent to this result.[358] Finally, in *Barton v. Sclafani Investments, Inc.*, the Dallas Court of Appeals investigated the element of consideration, finding that prior services before an agreement did not constitute sufficient consideration.[359] Note that this case applies Tennessee law, but it is likely that the same result would be reached under Texas law.

XII. WATER AND TITLE

As a matter of first impression, the Texas Supreme Court held in *Severance v. Patterson* that an avulsive event that moves the high tide line and vegetation line suddenly, causing former dry beach to become part of State-owned wet beach, does not automatically deprive private property owners, through the rolling easement doctrine and Texas Open Beaches Act, of their right to exclude the public from the new dry beach.[360] In this case, Hurricane Rita devastated a landowner's beach-front property that was subject to a public easement and suddenly moved the vegetation line substantially landward. The State claimed an easement on the new dry beach. The supreme court held that easements for public use of private dry beach property may change according to gradual and imperceptible changes to the coastal landscape.[361] However, avulsive events, such as storms and hurricanes, that drastically alter pre-existing littoral boundaries do not automatically have the effect of allowing a public use ease-

353. *Id.*
354. *Id.*
355. *Id.* at 770–71.
356. Neary v. Mikob Props., Inc., 340 S.W.3d 578, 587 (Tex. App.—Dallas 2011, no pet.).
357. *Id.* at 584; *see* TEX. OCC. CODE ANN. § 1101.806(c) (West 2004).
358. *See Neary*, 340 S.W.3d at 584.
359. Barton v. Sclafani Invs., Inc., 320 S.W.3d 453, 454 (Tex. App.—Dallas 2010, pet. denied).
360. Severance v. Patterson, 370 S.W.3d 705, 723–27 (Tex. 2012).
361. *Id.* at 723.

ment to migrate onto previously unencumbered property.[362] In such a case, if the public has an easement in newly created dry beach, as with any other property, the State must prove it.[363]

Severance included a dissenting opinion, which lamented that the decision jeopardized the public's right to free and open beaches and would lead to restricted access along the coast.[364] The government was not "taking" private property but merely enforcing changing boundaries caused by nature, and therefore no compensation was appropriate.[365] One immediate result was the cancellation of a $40 million beach replacement project for Galveston.[366] Query: What happens when the oceans rise and/or land sinks due to human activities?[367]

In *Texas General Land Office v. Porretto*, the Houston First District Court of Appeals held that a conveyance of beachfront land "to the meanders" is a grant to the shoreline and does not include submerged land.[368] In such a case, the State holds title to the submerged land and cannot "divest itself of title to any submerged land by facilitating the replenishment of the beaches on that land."[369]

In *Edwards Aquifer Authority v. Day*, a landowner was denied a permit by the Edwards Aquifer Authority to pump water from the Edwards Aquifer under his land.[370] The Texas Supreme Court held as a matter of first impression that each landowner owns separately, distinctly, and exclusively all groundwater under his land.[371] This interest in groundwater is compensable under the takings clause of the Texas Constitution.[372] The supreme court applied the *Penn Central* takings analysis to determine that there was a fact issue regarding whether the Edwards Aquifer Authority's regulation was too restrictive of the landowner's rights to the groundwater without justification in the overall regulatory scheme.[373]

XIII. CONCLUSION

During the Survey period, there were a number of significant cases, some of which are instructive and some of which may cause consternation to the practitioner. Further, a number of the cases have been criticized herein and may be subject to further analysis and possible change in the

362. *Id.* at 723–24.
363. *Id.* at 724.
364. *Id.* at 733–34 (Medina, J., dissenting).
365. *Id.* at 741.
366. *Id.* at 754–55 & n.4 (Lehrmann, J., dissenting).
367. *See* Tex. Nat. Res. Code Ann. §§ 61.001, 61.016, 61.0171, 61.0185 (West 2011 & Supp. 2013) (directing how to deal with a "meterological event").
368. Tex. Gen. Land Office v. Porretto, 369 S.W.3d 276, 285 (Tex. App.—Houston [1st Dist.] 2011, pet. granted).
369. *Id.* at 286.
370. Edwards Aquifer Auth. v. Day, 369 S.W.3d 814, 818–21 (Tex. 2012).
371. *Id.* at 832.
372. *Id.* at 838.
373. *Id.* at 838–43 (referring to Penn Cent. Transp. Co. v. N. Y. City, 438 U.S. 104 (1978)).

future. In summary, the following legal developments and practical advice are offered from the foregoing cases and analysis:

Constructive notice of a foreclosure was not effective by court record filings only; however, the Texas Supreme Court, in contradiction of 150 years of Texas law, held a bankruptcy court record represented valid constructive notice. Practitioners need to be very cautious of bankruptcy filings until the constructive notice issue is fully resolved.

A CMBS servicer, with appropriate contractual authority from the owner of the note and mortgage, has appropriate standing to sue the debtor under the note and deed of trust.

Drafting precision also came into play in numerous cases, including dismissal of substitute trustees from a lawsuit challenging a foreclosure sale,[374] as to which parties are third-party beneficiaries of a contract or commitment,[375] and as to prepayment provisions.[376] In the lease context, lack of a specific term led to unintended tenancies-at-will.[377] Subcontractors were required to give complete notices,[378] and realtors need very precise and accurate commission agreements to collect.

The award of attorney's fees to the prevailing party has been both clarified and confused. The Texas Supreme Court in *Epps* found that a defendant could be a prevailing party when the plaintiff nonsuits the case only if the defendant can prove the nonsuit was taken to avoid an unfavorable ruling. Other cases, *Fitzgerald* and *Lesieur*, looked to the actual language of the contract to determine the contract parties' intention for the meaning of "prevailing party." The authors believe that we are likely to see further clarification and a meshing of these decisions in further cases, since there is clearly no uniform standard.

Unfortunately, there is still confusion on the issue of whether the "as is" clause trumps a fraudulent concealment claim and if so under what circumstances. An announced split of opinion between the Dallas and San Antonio Courts of Appeals puts the practitioner on warning. The Texas Supreme Court also examined the issue in a leasing context, together with merger and waiver provisions. The current best practice is extremely diligent drafting of these provisions and the listing of all known defects.

Home equity loan disputes continued to move toward a four-year statute of limitations, although the Texas Supreme Court has not addressed this issue.

The courts continued to wrestle with the characterization of nuisance and trespass as permanent or temporary, often with seemingly inconsis-

374. *See* Marsh v. Wells Fargo Bank, N.A., 760 F. Supp. 2d 701 (N.D. Tex. 2011).
375. *See* Basic Capital Mgmt., Inc. v. Dynex Commercial, Inc., 348 S.W.3d 894 (Tex. 2011).
376. *See* Young v. Gumfory, 322 S.W.3d 731 (Tex. App.—Dallas 2010, no pet.).
377. *See* Providence Land Servs., LLC v. Jones, 353 S.W.3d 538 (Tex. App.—Eastland 2011, no pet.); Effel v. Rosberg, 360 S.W.3d 626 (Tex. App.—Dallas 2012, no pet.).
378. *See* Morrell Masonry Supply, Inc. v. Loeb, 349 S.W.3d 664 (Tex. App.—Houston [14th Dist.] 2011, no pet.).

tent results. One thing learned, however, is that permits are just a beginning and not a bar, while contests to lawful agricultural operations must be brought within a year.

Finally, the Texas Supreme Court issued two very important cases dealing with water. First, an avulsive event like a hurricane could not create a new public easement on the beach. Second, the Texas Supreme Court applied the rule of capture to groundwater.

Again, there were many cases during the Survey period worthy of reading, analysis, and comment, but space limitation did not permit all to be addressed. The cases noted herein were significant decisions, some landmark pronouncements, and others reflections of the continuing struggles in some areas, such as "as is," home equity, and nuisance. Others offered very important drafting lessons or traps for the unwary.

APPENDIX A

MATLOCK PLACE APARTMENTS, L.P. V. DRUCE

DISCLAIMER OF RELIANCE

9. LIMITATIONS OF SELLER'S REPRESENTATIONS AND WARRANTIES EXCEPT AS OTHERWISE SPECIFICALLY STATED IN THIS CONTRACT, SELLER HEREBY SPECIFICALLY DISCLAIMS ANY WARRANTY, GUARANTY OR REPRESENTATION, ORAL OR WRITTEN, PAST, PRESENT OR FUTURE, OF, AS TO, OR CONCERNING (I) THE NATURE AND CONDITION OF THE PROPERTY, INCLUDING WITHOUT LIMITATION, THE WATER, SOIL AND GEOLOGY, AND THE SUITABILITY THEREOF AND OF THE PROPERTY FOR ANY AND ALL ACTIVITIES AND USES WHICH BUYER MAY ELECT TO CONDUCT THEREON, AND THE EXISTENCE OF ANY ENVIRONMENTAL HAZARDS OR CONDITIONS THEREON (INCLUDING THE PRESENCE OF ASBESTOS) OR COMPLIANCE WITH ALL APPLICABLE LAWS, RULES OR REGULATIONS; (II) EXCEPT FOR ANY WARRANTIES CONTAINED IN THE DEED TO BE DELIVERED BY SELLER AT THE CLOSING, THE NATURE AND EXTENT OF ANY RIGHT-OF-WAY, LEASE, POSSESSION, LIEN, ENCUMBRANCE, LICENSE, RESERVATION, CONDITION OR OTHERWISE; AND (III) THE COMPLIANCE OF THE PROPERTY OR ITS OPERATION WITH ANY LAWS, ORDINANCES OR REGULATIONS OF ANY GOVERNMENT OR OTHER BODY. BUYER ACKNOWLEDGES THAT IT WILL INSPECT THE PROPERTY AND BUYER WILL RELY SOLELY ON ITS OWN INVESTIGATION OF THE PROPERTY AND NOT ON ANY INFORMATION PROVIDED OR TO BE PROVIDED BY SELLER. BUYER FURTHER ACKNOWLEDGES THAT THE INFORMATION PROVIDED WITH RESPECT TO THE PROPERTY WAS OBTAINED FROM A VARIETY OF SOURCES AND SELLER (I) HAS NOT MADE ANY INDEPENDENT INVESTIGATION OR VERIFICATION OF SUCH INFORMATION; AND (II) DOES NOT MAKE ANY REPRESENTATIONS AS TO THE ACCURACY OR COMPLETENESS OF SUCH INFORMATION. THE SALE OF THE PROPERTY AS PROVIDED FOR HEREIN IS MADE ON AN "AS IS" BASIS, AND BUYER EXPRESSLY ACKNOWLEDGES THAT, IN CONSIDERTAION OF THE AGREEMENTS OF SELLER HEREIN, EXCEPT AS OTHERWISE SPECIFIED HEREIN, SELLER MAKES NO WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED, OR ARISING BY OPERATION OF LAW, INCLUDING, BUT NOT LIMITED TO, ANY WARRANTY OF CONDITION, HABITABILITY, MERCHANTABILITY OR FITNESS FOR A PARTICULAR PURPOSE, IN RESPECT OF THE PROPERTY.

APPENDIX B

SAMPLE LANGUAGE

This Lease, and the attachments, riders and exhibits thereto, constitute the entire agreement between the parties hereto with respect to the subject matter of this Lease. In that regard, all written or oral understandings and agreements heretofore had or made between the parties are merged in this Lease and in any other written agreement(s) made between the parties hereto concurrently herewith and which expressly refer to this Lease (*"Ancillary Agreement(s)"*), which Lease and Ancillary Agreement(s) alone fully and completely express the agreement of the parties with respect to the subject matter hereof and thereof and are entered into by the parties after full investigation and consideration. In that regard, in executing this Lease, each party hereto unequivocally represents, acknowledges and states that such party was represented by counsel in the negotiation and formation of this Lease, and that the negotiation was conducted by the parties at arm's length.

EACH PARTY HERETO UNEQUIVICALLY REPRESENTS, ACKNOWLEDGES AND STATES THAT THE OTHER PARTY AND THE OTHER PARTY'S AGENTS, EMPLOYEES AND/OR CONTRACTORS (A) HAVE NOT MADE AND ARE NOT MAKING ANY WARRANTIES, REPRESENTATIONS, PROMISES OR STATEMENTS, EITHER EXPRESS OR IMPLIED, TO INDUCE SUCH PARTY TO ENTER INTO THIS LEASE EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS LEASE OR IN ANY OTHER ANCILLARY AGREEMENT, AND (B) HAD NO AND HAVE NO DUTY TO MAKE ANY DISCLOSURES EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS LEASE OR IN ANY OTHER ANCILLARY AGREEMENT. EACH PARTY HERETO FURTHER UNEQUIVICALLY REPRESENTS, ACKNOWLEDGES AND STATES THAT IN ENTERING INTO THIS TRANSACTION AND EXECUTING AND DELIVERING THIS LEASE TO THE OTHER PARTY, SUCH PARTY IS (I) NOT RELYING UPON ANY WARRANTIES, REPRESENTATIONS, PROMISES OR STATEMENTS, WHETHER EXPRESS OR IMPLIED, MADE BY THE OTHER PARTY, OR THE OTHER PARTY'S AGENTS, EMPLOYEES OR CONTRACTORS, EXCEPT TO THE EXTENT THAT THE SAME ARE EXPRESSLY SET FORTH IN THIS LEASE OR IN ANY OTHER ANCILLARY AGREEMENT(S), AND (II) EXCEPT TO THE EXTENT OTHERWISE EXPRESSLY AND SPECIFICALLY SET FORTH IN THIS LEASE AND/OR THE ANCILLARY AGREEMENT(S), RELYING SOLELY ON ITS OWN INSPECTION, INVESTIGATION AND JUDGMENT.

EACH PARTY HERETO UNEQUIVICALLY WAIVES, RELEASES, AND DISCLAIMS ANY RIGHT OR ABILITY TO SEEK TO REVOKE, RESCIND, VACATE, OR OTHERWISE AVOID THE OPERATION AND EFFECT OF THIS LEASE ON THE BASIS OF ANY ALLEGED FRAUDULENT INDUCEMENT, MISREPRESENTATION, OR MATERIAL OMISSION BY THE OTHER PARTY OR THE OTHER PARTY'S AGENTS, EMPLOYEES AND/OR CONTRACTORS, OR ON THE BASIS OF MUTUAL OR UNILATERAL MISTAKE OF FACT OR LAW, OR NEWLY DISCOVERED INFORMATION.