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Real Property

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THIS Article covers cases from 232 S.W.3d through 257 S.W.3d which the authors believed were noteworthy for adding to the jurisprudence on the applicable subject.

I. MORTGAGES, LIENS, AND FORECLOSURES

Mackey v. Great Lakes Investments, Inc.[1] addresses the interplay between competing claims under a deed of trust lien, an abstract of judgment, and a direct assignment of rights under an oil and gas lease, coupled with a bankruptcy plan of reorganization. While the facts are complex, it is best explained by analyzing the three separate chains of title. Under the first chain of title, the original property owner, Martinez, executed a deed of trust to First Federal in January 1989.[2] On Febru-

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1. 255 S.W.3d 243 (Tex. App.—San Antonio 2008, pet. denied).
2. *Id.* at 246.

ary 11, 1994, Martinez filed bankruptcy.[3] The original First Federal deed of trust lien, acquired by MCM Investments in June 1995, was recognized in the bankruptcy plan of reorganization. Pursuant thereto, MCM obtained two notes and deeds of trust. MCM ultimately foreclosed on those deeds of trust in August 1999, and Great Lakes Investments was the purchaser at the foreclosure sale.[4] The property covered by the First Federal deed of trust included four interests: (1) fee title to a designated tract of land; (2) a security interest in the Martinez rights to royalty payments under a pooling unit; (3) a residential tract; and (4) "all leases now existing or hereafter made" and "all rents and revenues of the Property including those now due or to become due by virtue of any lease or other agreement for the occupancy or use of all or any portion of [the] Property."[5] However, on the MCM deeds of trust, the property and description included the first three interests, but the fourth interest was described as "all present and future rent and other income and receipts from the property."[6]

The second chain emanated from a November 1992 oil and gas lease executed by Martinez to Chevron. The rights to royalty payments made under the oil and gas lease were assigned from Martinez to Mackey in May 1999, as payment for services rendered by Mackey, the attorney representing Martinez in the bankruptcy proceeding. The debt to Mackey for such representation was confirmed in the plan of reorganization approved in March 1997.[7] The third chain related to indebtedness of Martinez to First National Bank of South Texas, for which there was an agreed judgment in June 1993. First National Bank of South Texas recorded an abstract of judgment in February 1994, three days after the bankruptcy filing by Martinez. Ultimately, Madrid and Laredo's Trading Company, Ltd. acquired the abstract of judgment from First National Bank of South Texas on August 6, 1999, two days after the MCM foreclosure of its deeds of trust. Madrid proceeded with execution on its abstract of judgment pursuant to a sheriff's sale which was held in October 1999.[8]

When Mackey acquired the direct assignment of all the royalty interests under the Chevron lease, he notified Chevron which began making payments to him. Chevron stopped making payments after Great Lakes demanded payments be made directly to it, as the property owner, pursuant to the August 1999 deed of trust foreclosure sale. When Chevron ceased making payments, this lawsuit was initiated. A summary judgment was granted in favor of Great Lakes against Madrid, declaring that Great Lakes' interest was superior to Madrid's lien claim because the Madrid lien claim accrued by reason of an abstract of judgment obtained three days after the bankruptcy filing in violation of the automatic bank-

3. *Id.* at 247.
4. *Id.* at 248.
5. *Id.* at 246-47.
6. *Id.* at 247-48.
7. *Id.* at 247.
8. *Id.* at 249.

ruptcy stay.[9] The court followed a well-settled rule that when "the owner of real estate executes a valid deed of trust, and then conveys an interest in the mortgaged property to a third party, the rights of the mortgagor's grantee are subject to the rights held by the beneficiary of the deed of trust."[10] However, this case is noteworthy for a number of reasons. First, it underscores the importance of certainty in the description of the mortgaged property. Mackey had asserted that the language contained in the MCM deeds of trust did not cover the assignment of royalty payments under the Chevron oil and gas lease; however, the court concluded that the language "all present and future rent and other income and receipts from the [Chevron lease] property" covered the royalty interest on the Chevron lease.[11] Second, this case recognizes the importance of the effect of the automatic stay in bankruptcy—which, in this case, caused the filing of an abstract of judgment three days after the automatic stay went into effect, without bankruptcy court approval lifting the stay as to such remedial action—to invalidate the lien purported to be created by the abstract of judgment.

The issue of res judicata in connection with a hearing on a motion to lift the automatic stay in bankruptcy was presented in *Mitchell v. Fort Davis State Bank*.[12] The Mitchells owned property, four acres of which was used as a homestead and four acres of which was used for business purpose. Financing for the business property was obtained from Fort Davis State Bank. Thereafter, the Mitchells filed for bankruptcy protection, and the bank ultimately sought relief from the automatic stay to allow for foreclosure of its lien against the business property.[13] The bankruptcy court lifted the stay and the bank foreclosed, which was challenged based upon the validity of the lien.[14] The Mitchells contended that the entire eight acres was homestead property despite a homestead designation and an affidavit of non-homestead executed in connection with the four acre business property. The court dismissed such claim determining that the validity of the lien on the business property was adjudicated in the lift stay hearing and constituted res judicata. Since the validity of the lien was an issue raised in bankruptcy court, federal law of res judicata was deemed to control.[15] Under either a contested matter or an adversary proceeding, the validity of the deed of trust lien was a matter that should have been addressed in the automatic stay proceeding, and therefore, the mortgagor's claims were precluded by res judicata. In supporting this conclusion, the court analyzed the requirements for granting relief from the automatic stay in bankruptcy:[16] the mortgagee must prove that it

9. *Id.*
10. *Id.* at 253.
11. *Id.*
12. 243 S.W.3d 117 (Tex. App.—El Paso 2007, no pet.).
13. *Id.* at 121.
14. *Id.*
15. *Id.* at 122 (citing Geary v. Tex. Commerce Bank, 967 S.W.2d 836, 837 (Tex. 1998)).
16. *Id.* at 125. Relief from automatic stay is governed by 11 U.S.C. § 362(d)(1)–(2).

holds a claim, the claim is a valid perfected lien upon the subject property, and a decline in the value of the collateral is occurring or threatened against which the creditor is precluded from protecting its interest.[17] Therefore, the court concluded that the bank "was required to make a *prima facie* showing that it held a valid and perfected lien."[18] The Mitchells did not object to the lift stay motion, and the court concluded that they were not entitled to collaterally attack the validity of the bank's lien in a subsequent civil proceeding because the challenge to the validity of the lien could or should have been raised before the bankruptcy court. The doctrine of res judicata precludes raising such issue in a subsequent proceeding.[19]

In reaching this conclusion, the court distinguished the facts from an existing case relied on by the Mitchells, *Pemelton v. Russell Trusts Partnership*.[20] There were three reasons the court distinguished *Pemelton*. First, in *Pemelton*, the creditor's suit for judicial foreclosure was filed during the pendency of the bankruptcy, and not after the foreclosure as occurred in the subject case.[21] Second, the court distinguished between a direct and indirect defense of the debtor, concluding that indirect defenses, such as lender liability, did not need to be raised with respect to a motion to lift stay, and they would not constitute res judicata.[22] Third, the court concluded that the *Pemelton* court had subsequently taken a different position and applied the principles enunciated in *D-1 Enterprises, Inc. v. Commercial State Bank*.[23]

When is a notice of acceleration of the debt not a prerequisite for foreclosure? The court approved the filing of an expedited application for foreclosure without any notice of acceleration in *Burney v. Citigroup Global Markets Realty Corp.*[24] Burney obtained a home equity loan from Long Beach Mortgage Company. Long Beach assigned the note to Norwest Bank, and Burney failed to make any monthly payments under the home equity loan.[25] Norwest Bank sent a notice of intent to accelerate letter. The default was not cured, and Norwest Bank filed an application for expedited foreclosure proceeding.[26] However, the application was subsequently dismissed for want of prosecution. The home equity loan was ultimately transferred to Citigroup, which sent a notice of acceleration of the loan and filed a home equity foreclosure application. Burney filed a lawsuit alleging that the statute of limitations on the debt

17. *Id.* (citing *In re* Self, 239 B.R. 877, 881 (Bankr. E.D. Tex. 1999) and *In re* Kowalsky, 235 B.R. 590, 594 (Bankr. E.D. Tex. 1999)).
18. *Id.*
19. *Id.* at 125-26.
20. *Id.* at 122-24 (discussing Pemelton v. Russell Trusts P'ship, 913 S.W.2d 710 (Tex. App.—Corpus Christi 1995, no pet.)).
21. *Id.* at 123.
22. *Id.*
23. *Id.* at 123-24 (citing D-1 Enterprises, Inc. v. Commercial State Bank, 864 F.2d 36, 39 (5th Cir. 1989)).
24. 244 S.W.3d 900 (Tex. App.—Dallas 2008, no pet.).
25. *Id.* at 901.
26. *Id.* at 902.

evidenced by the home equity loan had expired making the attempted foreclosure invalid.[27] The specific issue before the court was whether the filing by Norwest Bank of the expedited application for foreclosure in April 2000 constituted an effective notice of acceleration, which would have started the running of the four year statute of limitations for recovery under a real property lien foreclosure.[28] In what appears to be a case of first impression, the court considered other relevant cases for guidance. Acceleration occurred by means other than a specific letter advising the debtor of the acceleration of the debt in *Joy Corp. v. Nob Hill Properties, Ltd.*[29] Nob Hill missed an installment payment and received a letter stating the note was in default. Nob Hill attempted to cure the default, but Joy Corp. refused to inform the debtor of the amount needed to cure the default and subsequently posted the property for foreclosure sale. The *Joy* court held acceleration never occurred because Joy Corp. did not give the required opportunity to cure the default.[30] This court also reviewed the holding in *Holy Cross Church of God in Christ v. Wolf*,[31] where the lender provided both a notice of intent to accelerate and notice of acceleration. However, the debtor took the position that acceleration required taking steps toward foreclosure on the property. The *Wolf* court noted the disagreement of the Texas Supreme Court in requiring affirmative action toward foreclosure as a step, in addition to notice of intent to accelerate and notice of acceleration, in order to trigger an actual acceleration of the note.[32]

The court finally looked at cases construing the notice of a trustee sale as equivalent to a notice of acceleration. In *McLemore v. Pacific Southwest Bank*, the lender sent a notice of intent to accelerate but not a notice of acceleration.[33] When the debt remained unpaid, the lender sent a notice of trustee's sale, and the property was sold at the foreclosure sale. That court held that it could be reasonably inferred that a notice of intent to accelerate followed by a notice of trustee's sale constitutes a notice of acceleration.[34] In *Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. Partnership*, a notice of intent to accelerate and a subsequent notice of foreclosure sale was given by the lender.[35] Relying on *McLemore*, the Fort Worth Court of Appeals held that such action amounted to a notice of acceleration.[36]

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27. *Id.*

28. *Id.*; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(a) (Vernon 2002).

29. *Burney*, 244 S.W.3d at 903 (citing Joy Corp. v. Nob Hill Props., Ltd., 543 S.W.2d 691 (Tex. Civ. App.—Tyler 1976, no writ)).

30. *Id.*

31. *Id.* (citing Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562, 569 (Tex. 2001)).

32. *Id.* at 903-04.

33. *Id.* at 904 (citing McLemore v. Pac. Sw. Bank, 872 S.W.2d 286, 292 (Tex. App.—Texarkana 1994, writ dism'd by agr.)).

34. *Id.*

35. *Id.* (citing Meadowbrook Gardens, Ltd. v. WMFMT Real Estate Ltd. P'ship, 980 S.W.2d 916 (Tex. App.—Fort Worth 1998, pet. denied)).

36. *Id.*

During this Survey period, the Texas Supreme Court entered its decision, per curium, in *LaSalle Bank National Ass'n v. White*.[37] White obtained a home equity loan for the purpose of refinancing an existing purchase money mortgage and paying some ad valorem taxes, with the balance being paid directly to White. The loan was secured by homestead property designated for agricultural use which is in violation of the applicable provisions of the Texas Constitution.[38] On appeal, the parties acknowledged the invalidity of the lien for all purposes except for equitable subrogation with respect to payments of valid prior liens on homestead property.[39] The Texas Supreme Court held that equitable subrogation was not addressed and was therefore not eliminated under the constitutional provision.[40] The Texas Supreme Court reviewed prior authority upholding equitable subrogation in the homestead context in reaching its conclusion. Such authority included equitable subrogation against homestead property, even when the refinancing was unconstitutional, where the loan was used to pay off valid federal tax liens based on the Supremacy Clause of the United States Constitution, and where equitable subrogation was deemed valid to the extent of payment of prior purchase money liens, although the home equity loan was invalid with respect to subrogation resulting from judicial sales which included irregularities in the process sufficient to fail to convey title.[41] Consequently, the court concluded that Texas Constitution, article XVI, section 50(e) does not abrogate the longstanding common law principle allowing equitable subrogation to constitutionally permitted purchase money and property tax liens on homestead properties.[42]

Perhaps the most significant case during the Survey period—due to the damage it did to the jurisprudence on foreclosure—is *Myrad Properties vs. LaSalle Bank National Ass'n*.[43] In *Myrad*, the Austin Court of Appeals considered the effectiveness of a notice of trustee sale to sell two separate pieces of property when the notice contained a description of only one of the two tracts of property. Myrad executed a single note and single deed of trust which covered two tracts of property, the La Casa Apartments and the Grande Casa Apartments.[44] After a default on the note, LaSalle instructed the trustee to commence foreclosure proceedings, and the trustee prepared a notice of default, demand for immediate cure, and notice of intention to accelerate the indebtedness.[45] The note was accelerated, and such letter of acceleration correctly referenced both properties. The notice of substitute trustee's sale (Notice), which is re-

37. 246 S.W.3d 616 (Tex. 2007).
38. *Id.* at 617-18 (citing TEX. CONST. art. XVI, § 50(a)(6)(I)).
39. *Id.* at 618.
40. *Id.* at 618-19.
41. *Id.* at 619.
42. *Id.*
43. 252 S.W.3d 605 (Tex. App.—Austin 2008, pet. granted).
44. *Id.* at 608.
45. *Id.* at 609.

cited in its entirety in the text of the opinion,[46] contained a legal description of only the Grande Casa parcel, and not the La Casa property. Prior to foreclosure, Myrad's bankruptcy counsel sent to LaSalle's counsel a letter stating "[w]ith your foreclosure on the above-referenced real estate set next Tuesday."[47] At the foreclosure sale, the substitute trustee read the legal description attached to the Notice which described only the Grande Casa property. The substitute trustee entered a credit bit for LaSalle and sold the property to LaSalle. Later the same day, the substitute trustee executed a substitute trustee's deed, which contained a description of only the Grande Casa property, and it was recorded. After an initial temporary restraining order obtained by Myrad had lapsed, the substitute trustee filed a correction deed to add a legal description covering both properties.[48] The court concluded that the Notice was sufficient to cover both tracts of property by implication. Although the court noted that the trustee's power to sell the property is derived from the deed of trust and foreclosure statute, and that strict compliance with these requirements is a prerequisite to the trustee's right to make a sale, the court concluded that the notice was sufficient based on a number of rationales,[49] none of which are convincing to this author.

First, the court looked into the mind of the mortgagee and concluded that its intent was to foreclose on both tracts of property based on testimony from the mortgagor and related parties. Further, the court misconstrued the meaning of a provision in the Notice, which provides that the mortgagee elects to proceed against "both *the real property* and any personal property *described in the Deed of Trust.*"[50] Myrad correctly pointed out that this provision should be understood by all knowledgeable practitioners as relating to the election of the right under the Uniform Commercial Code, Section 9.604, allowing personal property to be sold together with the real property.[51] However, the majority disagreed with such rationale and concluded that such language must be deemed to refer to both tracts of real property. The dissent discussed the interpretation by the majority and correctly concluded that the language in the Notice was consistent with a UCC reference to both real property and personal property, as opposed to a reference to both tracts of real property.[52] Next, the court rejected another cogent argument related to a specific provision in the deed of trust, which allowed the mortgagee to sell the entire property "*or any part thereof* . . . at one or more sales, *as an entity or in parcels.*"[53] The court rationalized its holding by quoting from *Mercer v. Bludworth*, where the notice of trustee sale identified the deed of

46. *Id.*
47. *Id.* at 611.
48. *Id.* at 611-12.
49. *Id.* at 615.
50. *Id.* at 616.
51. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 9.604 (Vernon 2002)).
52. *Id.* at 627.
53. *Id.* at 616.

trust with an incorrect date and incorrect recording reference, but included a correct metes and bounds description of the property to be sold and name of the trustee.[54] The *Mercer* court held that the error and inconsistency in describing the deed of trust did not render the sale invalid since the property to be sold was properly described, and a bidding party could have contacted the trustee to clear up any confusion.[55] The *Myrad* court concluded that it was facing the converse and that the inaccurate metes and bounds description of the properties to be sold were corrected by a proper reference to the deed of trust recording information, identifying the substitute trustee and providing contact information.[56] This seems illogical because it conflicts with the strict requirement procedure previously quoted by the court.[57] Note that the court, in addressing another issue on the effects of chilling the biding, acknowledged that the inconsistent property descriptions were "the sort of irregularity in the foreclosure process that could potentially have some propensity to confuse or deter potential bidders interested in purchasing both the Grande Casa and La Casa Apartments."[58] The court acknowledged, but apparently dismissed, the holding in *Resolution Trust Corp. v. Summers & Miller Gleneagles Joint Venture*,[59] which held that a foreclosure based on erroneously transposed legal descriptions of two tracts resulting in excess land in one tract and less land in the other tract, was clearly sufficient to question the irregularity in the foreclosure process.

With respect to a chilling of the bidding irregularity, the court concluded that there were other potential bidders at the foreclosure sale, none of whom made any bids, and therefore, in the court's mind, there could be no proof of a grossly inadequate bid price by reason of such legal description confusion.[60] This appears to be a naïve and incorrect conclusion by the majority. If bidders believed they were bidding on only one property, it is common sense that the bid price would be less than if such bidders believed that two properties were being sold. It is inconceivable that the court could come to the conclusion that the property description confusion would not have chilled the bidding. The dissent challenged the majority's inconsistency in holding that the Notice could be "internally inconsistent regarding what property would be sold" in the face of the statutory requirement of strict compliance as well as the provisions of the deed of trust and the Notice.[61] The dissent also called into question the majority's reliance on the concept that both mortgagor and mortgagee knew which properties were intended to be foreclosed and

54. *Id.* at 617 (citing Mercer v. Bludworth, 715 S.W.2d 693 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.)).
55. *Id.*
56. *Id.*
57. *Id.* at 615.
58. *Id.* at 618.
59. *Id.* (citing Resolution Trust Corp. v. Summers & Miller Gleneagles Joint Venture, 791 F. Supp. 653, 654-55 (N.D. Tex. 1992) (applying Texas law)).
60. *Id.*
61. *Id.* at 625.

pointed out that the Notice also ran in favor of the public, and that any understanding between mortgagor and mortgagee would not have any bearing on the public's reading of the actual Notice.[62] The dissent succinctly states the problem with the majority opinion: "The majority's interpretation renders the Property description actually contained in the Notice meaningless."[63] From a practitioner's viewpoint, we can only hope that subsequent courts will see the error in logic and refuse to follow any of the holdings contained in the majority's opinion relating to the sufficiency of the legal description.

II. DEBTOR/CREDITOR; NOTES AND LOANS

In *Fix v. Flagstar Bank, FSB*[64] the court addressed the retroactivity of the provisions of Texas Constitution article XVI, section 50(a)(6)(Q)(x) and, more importantly, the length of the constitutionally mandated cure period for a home equity loan. Mr. and Mrs. Fix obtained a home equity loan in March 2002 and refinanced that loan with a conventional loan in January 2003.[65] Since the refinancing occurred less than one year after the home equity loan was obtained, it was in violation of the Texas Constitution.[66] Under the current version of the constitution, the lender has sixty days to cure the violation after being notified by the borrower.[67] At the time of the refinancing, the constitution required cure within a "reasonable time."[68] Therefore, the court had to determine if this amendment applied retroactively. The court considered prior cases dealing with retroactivity of constitutional amendments. Although the Texas Supreme Court had found retroactivity in the case of a constitutional amendment relating to premarital agreements,[69] the court noted that the Bankruptcy Court for the Northern District of Texas specifically refused retroactive application of the amendment.[70] The court found that retroactive application occurs when the drafters and adopters of the constitutional amendments intended such retroactivity[71] and where public policy is so clear and broadly stated as to make retroactivity unmistakable.[72] First, the court looked at the literal language of the amendment, which did not indicate any intention for retroactive application.[73] Next, the court looked at the legislative history and found that the drafters intended the subject amendment as a mere clarification of the cure process.[74] After finding

62. *Id.* at 627.
63. *Id.* at 628.
64. 242 S.W.3d 147 (Tex. App.—Fort Worth 2007, pet. denied).
65. *Id.* at 152.
66. *Id.* (citing TEX. CONST. art. XVI, § 50(a)(6)(M)(iii)).
67. TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).
68. *Id.* (amended 2003).
69. *Id.*
70. *Fix*, 242 S.W.3d at 156 (discussing Adams v. Ameriquest Mortgage Co., 307 B.R. 549, 559 (Bankr. N.D. Tex. 2004)).
71. *Id.* at 155.
72. *Id.*
73. *Id.*
74. *Id.*

that there was no overriding social policy in favor of its retroactive application, the court concluded that retroactive application was unwarranted in this constitutional amendment.[75]

The court also considered the issue of the lender's attempted cure. After the refinancing occurred, the borrower contacted the lender and discussed the legality of the refinancing loan in a phone conversation.[76] The lender responded the next day with a letter confirming the conversation and advising the borrower that the title company had been notified of the conversation.[77] The title company also responded to the Fixes with a letter, which denied the validity of the loan. In response to the title company's letter, Mr. Fix sent a letter detailing the two constitutional grounds for dispute of the second loan.[78] Within twenty-one days after receiving such letter, the lender offered to cure the home equity loan violation by refinancing at an equal or better rate at no cost to the borrower and the payment to the borrower of $1,000; a concurrent letter from the title company offered to reclose the loan for free. The Fixes refused such cure and demanded forfeiture of the entire amount of principal and interest on such refinanced loan pursuant to Texas Constitution article XVI, section 50(a)(6)(Q)(x).[79] The applicable version of this statute contained no specific cure period.[80] The Texas Supreme Court answered certified questions from the United States Fifth Circuit Court of Appeals in *Doody v. Ameriquest Mortgage Co.*, regarding a home equity loan, and concluded that the subject constitutional provision allowed the lender a reasonable opportunity to cure not only the particular defect of issue but also to validate the entire lien.[81] The *Fix* court concluded that the three month period of discussions between the bank, the title company, and the Fixes occurred within the time period approved by the Texas Supreme Court in *Doody*, and the cure was within a reasonable period of time, as required by the constitution.[82]

III. GUARANTIES/INDEMNITIES

Ayres Welding Co. v. Conoco, Inc.[83] involves a contractual indemnity dispute and illustrates the need for careful draftsmanship in preparing indemnity provisions. The indemnity in question arises from a welding

75. *Id.* at 156-57.
76. *Id.* at 152.
77. *Id.*
78. *Id.*
79. *Id.* at 153.
80. *Id.* at 154-55. Such constitutional provision read, in applicable part, as follows: "the lender . . . shall forfeit all principal and interest of the . . . credit if the lender . . . fails to comply with the lender's . . . obligations under the extension of credit within a reasonable time after the lender . . . is notified . . . of the lender's failure to comply." TEX. CONST. art. XVI, § 50(a)(6)(Q)(x).
81. *Fix*, 242 S.W.3d at 157 (citing Doody v. Ameriquest Mortgage Co., 49 S.W.3d 342 (Tex. 2002)).
82. *Id.* at 158.
83. 243 S.W.3d 177 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

and maintenance contract between Ayres, the contractor, and Conoco. The contract contained a number of separate contractual provisions dealing with indemnity obligations.[84] The injury in question occurred to Day, an Ayres employee injured in an automobile driven by a Conoco employee after hours and off the job site. Ayres's first argument was that the automobile accident was not incidental to the work and should not be the subject of the indemnification.[85] The court pointed to the provisions in the employee injury indemnification paragraph that plainly stated it applied "[n]otwithstanding anything to the contrary in this Contract," and therefore, the question of whether the accident occurred in connection with the subject work was not relevant.[86] Further, because the liability limitation provision was contained in a paragraph separate from the employee injury indemnification provision, the $1,000,000 limitation did not protect Ayres from Conoco's $1,700,000 claim for the damages awarded to Day.[87]

This case is illustrative for purposes of drafting indemnification provisions. The primary focus of all these indemnification provisions may have been intended to relate only to the "work" as defined in the contract; however, it was not clearly expressed in the contractual provisions. Therefore, care should be taken in drafting complex indemnification provisions to be specific as to the subject matter of each indemnification. Furthermore, use of the standard drafting term "notwithstanding anything to the contrary" should be carefully considered in the context of each separate provision.

The drafting of indemnity provisions is also addressed in *MEMC Electronic Materials v. Albemarle Corp.*[88] This dispute involved an asset purchase agreement whereby Albemarle sold a manufacturing plant to MEMC.[89] The agreement contained a number of assumption provisions listing the various contracts assumed. However, a preexisting indemnity contract between Ethyl and Albemarle (dealing with indemnification of injuries to employees on the work site) was not disclosed in the asset purchase agreement. The asset purchase agreement did contain a separate indemnity provision which was broadly worded whereby MEMC agreed to indemnify Albemarle from all damages arising from the operation of the plant after the closing date.[90] In construing this separate indemnity provision, the court concluded that the indemnification

84. *Id.* at 180. Section 14.1 of the contract was an overriding application of the indemnity provisions (beginning with "except as otherwise provided in this contract") and specifying that the indemnity would apply regardless of the negligence of the indemnified party. A separate paragraph provided that Ayres indemnified Conoco for personal injuries arising from the specified work, with a $1,000,000 per occurrence limitation. A third paragraph provided Ayres indemnified Conoco for any losses relating to injuries to Ayres' employees, notwithstanding anything to the contrary in the contract.

85. *Id.*

86. *Id.*

87. *Id.* at 179, 181-83.

88. 241 S.W.3d 67 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

89. *Id.* at 69.

90. *Id.* at 70.

provisions of the asset purchase agreement did not arise from the operations of the plant, but arose out of a prior contractual relationship.[91] This again shows the need for careful drafting with respect to indemnity provisions.

IV. USURY

In *Allen v. American General Finance, Inc.*,[92] the court addressed whether a usury charge could occur in a letter never received. The home equity lender sent a demand letter to Allen which contained a charge in excess of the 18% statutory limit. The property which was the subject of the home equity loan was located on Nashville Drive in San Antonio, and it was deeded to Allen and his father. The deed listed Allen's mailing address at a Cypress Garden Drive in San Antonio, although Allen actually lived in Oregon.[93] Allen's father lived at the Cypress Garden Drive address, and one of Allen's brothers lived at the Nashville Drive address. American General defended against the usury claim brought by Allen by arguing that interest was never charged on the home equity loan since Allen did not receive the demand letter.[94] American General relied upon two cases, *George A. Fuller Co. v. Carpet Service, Inc.*[95] and *Hoxie Implement Co. v. Baker*,[96] which the San Antonio Court of Appeals distinguished. In *Fuller*, the court was construing a charge for interest contained in pleadings and determined that it was not a charge for purposes of the usury statutes since it was not communicated to the debtor.[97] Similarly, in *Hoxie*, the usury claim was based on the charging of interest on an internal computer system on an account receivable, but the debtor had never been sent an invoice which included such charge.[98] The *Hoxie* court concluded there was no charge because there was no express and positive demand for usurious interest.[99] The court determined that neither of these cases expressly addressed the issue of whether a debtor actually received and read a charge and that, therefore, they could not support that proposition. Rather, the holdings were limited to circumstances where the usury charge was not communicated outside the organization making the charge. Consequently, the court concluded that for purposes of the usury statute, a demand for usurious interest contained in a letter addressed and sent to the debtor was a charge within the meaning of the statute without requiring proof that the intended recipient actually received and read the letter.[100]

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91. *Id.* at 75.
92. 251 S.W.3d 676 (Tex. App.—San Antonio 2007, pet. granted).
93. *Id.* at 682.
94. *Id.* at 689.
95. *Id.* (citing George A. Fuller Co. v. Carpet Serv., Inc., 823 S.W.2d 603 (Tex. 1992)).
96. *Id.* (citing Hoxie Implement Co. v. Baker, 65 S.W.3d 140 (Tex. App.—Amarillo 2001, pet. denied)).
97. *Id.*
98. *Id.* at 690.
99. *Id.*
100. *Id.*

V. PURCHASER/SELLER

When can a title company affect the validity of a contract? In *Petras v. Criswell*, the contract contained an opening paragraph reciting that the contract would not be effective until the title company also signed the contract acknowledging receipt of the earnest money.[101] The purchaser failed to submit summary judgment evidence showing that the title company signed the contract, and the court concluded that the purchaser could not successfully maintain a breach of contract claim because it did not show the existence of a valid contract.[102] While otherwise unremarkable, this case represents a lesson for practitioners in drafting provisions requiring the title company to sign as a condition precedent to the effectiveness of the contract of sale.

Hawkins v. Walker[103] is one of numerous cases during the Survey period dealing with fraud in connection with a purchase and sale agreement. The Walkers bought a lot from Rischon Development Corp., of which Hawkins is the president.[104] The sales brochures for the subdivision depicted a high-end subdivision, and the Walkers built a 5,000 square foot house initially valued at $896,000 (but later reduced by change orders during construction to a value of $732,000). The subdivision contained restrictive covenants applicable to the high-end subdivision contemplated. However, after purchase of the lots, the covenants were revoked by Rischon.[105] During the lot purchase negotiations, Hawkins made numerous presentations to the Walkers concerning the quality of the subdivision, which were relied upon by the Walkers. However, after construction of Walkers' house commenced, and the remainder of the lots were sold by Rischon to Pulte Homes, reflecting a lower quality subdivision, the Walkers reduced the quality of their home. Some of the cost savings were made pursuant to oral agreements with Hawkins allowing the deviation from the covenants; however, many of the deviations in the covenants were not approved or discussed with Hawkins.[106]

On appeal, Hawkins took issue with damages awarded to the Walkers pursuant to the Texas Property Code.[107] Hawkins contends that there was neither a homeowners' association nor a representative designated by an owner of real property. In reviewing the statute and its legislative intent, the court concluded that the legislative intent evidenced that only the property owners association or the designated representative of a property owner may sue for damages under the statute.[108] The court

101. 248 S.W.3d 471, 474 (Tex. App.—Dallas 2008, no pet.).
102. *Id.* at 477.
103. 233 S.W.3d 380 (Tex. App.—Fort Worth 2007, pet. denied).
104. *Id.* at 386.
105. *Id.* at 387.
106. *Id.* at 386-87.
107. TEX. PROP. CODE ANN. § 202.004(b) (Vernon 2007). In relevant part, this statute dealing with enforcement of restrictive covenants provides that enforcement of such covenants is available to a "property owners' association or other representative designed by an owner of real property."
108. 233 S.W.3d at 389.

noted that the statute does not specify individual property owners as having authority to bring suit under the statute. The court reasoned that the Walkers were obviously not a property owner association and that they were not "designated representatives of the property owners."[109] The court interpreted the representative requirement as being one requiring designation by either all or multiple property owners, since it uses the plural term "property owners."[110] In support of this interpretation, the court cited *Anderson v. New Property Owners Ass'n. of Newport*,[111] which holds that an association designated by a single subdivision owner as that owner's representative could sue under such statute. Note that in this case, there was only a single owner, but the court ignores this fact. The court further cites *Musgrave v. Brookhaven Lake Property Owners Ass'n.*[112] as support, which held that a voluntary homeowners association, open to any property owner, could be appointed as the designated representative of such property owners. This author does not believe that any of the cited cases stand for the proposition that a single owner could not designate a representative to bring suit. However, relying on such authority, the court held, contrary to the rulings in the authorities it cited, that a single property owner is not authorized to bring suit under this statute. This court further failed to address both the exact statutory language that allowed suit by a representative designated by "an owner of real property" and why the legislature used the singular term "owner" if it intended to require something more.

VI. LEASES; LANDLORD/TENANT

The court addressed the difference between a mailed and a received notice in *Meadows v. Midland Super Block Joint Venture*.[113] In this case, the tenant, Midland Super Block Joint Venture, had a lease with Meadows which contained a renewal option exercisable "only by Lessee's delivery to Lessor in person or by United States Mail on or before the first (1st) day of each month."[114] The lease provision further provided that receipt of the check for the $1,000 rent payment would be sufficient notice of the renewal option election. Evidence at trial reflected that Midland's employee deposited the monthly rental check into the United States Mail on September 30, 2005, it was postmarked October 3, 2005 and was not received by Meadows until October 5, 2005. The issue was whether the language of the lease required the notice to be sent or received by the specified date, with the conclusion that the plain language of the lease provision required the receipt of the notice on or before the

109. *Id.*
110. *Id.*
111. 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).
112. 990 S.W.2d 386 (Tex. App.—Texarkana 1999, pet. denied).
113. 255 S.W.3d 739 (Tex. App.—Eastland 2008, no pet.) (quoting S. Disposal, Inc. v. City of Blossom, 165 S.W.3d 887, 896 (Tex. App.—Texarkana 2005, no pet.)).
114. *Id.* at 741.

first day of the month.[115] The court looked at other cases and found support in *Southern Disposal, Inc. v. City of Blossom*,[116] a case where the contract language clearly intended the notices to be effective when properly mailed. The court adopted language from the *Southern Disposal* court interpreting *Brown v. Swift-Eckrich, Inc.*,[117] which noted that "'when a contract requires only that one party "notify" the other, and the matter is not defined in the contract, notice occurs at the time a notice is mailed,'" and held the lease language required the tenant to have delivered, and not merely mailed, the notice to renew before the specified date.[118] In light of this case, best drafting practices will focus on using more descriptive terminology—don't use "delivery" if the date of mailing is the critical date.

Motiva Enterprises, LLC v. McCrabb[119] involves an analysis of a lease provision dealing with condemnation and the definition of "special damages" and "leasehold advantage." Motiva had a lease from McCrabb and operated a gas station and convenience store. The lease provided that the lease would terminate upon condemnation, but it reserved to the tenant the right to such condemnation proceeds for amounts relating to "special damages." Upon condemnation of a portion of the tract, Motiva determined that the remaining property was unsuitable for its use and chose to terminate the lease, but claimed it was entitled to the $1,705,000 condemnation award as special damages for its "leasehold advantage" under the condemnation provision.[120] The court looked at the term "special damages" and concluded that it was a term of art used in condemnation proceedings, distinguishing it from damages which were "community" in nature. In other words, community damages are those where the injury or benefit is one that the property owner experiences in common with the general community.[121] Nevertheless, the court concluded that the retention of special damages to the tenant in a condemnation proceeding was a non-compensable interest where the lease terminated upon such condemnation, thereby preventing a tenant from recovering for loss of future "leasehold advantage" after the lease is terminated.[122]

7979 Airport Garage v. Dollar Rent A Car involves the lease of a parking garage.[123] The lease was between 7979 Airport Garage (7979), as landlord, and Dollar Rent A Car, as tenant, and contained provisions dealing with the various repair obligations of each party.[124] The relevant

115. *Id.* at 743.
116. S. Disposal, 165 S.W.3d 887.
117. 787 S.W.2d 599 (Tex. App.—El Paso 1990, writ denied).
118. 255 S.W.3d at 744.
119. 248 S.W.3d 211 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
120. *Id.* at 213. Footnote 1 defines "leasehold advantage" as being the difference between the lease rate required under the lease and the market value of the lease. *Id.* at 213 n.1.
121. *Id.* at 216.
122. *Id.*
123. 245 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).
124. *Id.* at 493-94 (quoting the entire applicable lease provision).

provision required that "Lessor shall keep the foundation, the exterior walls . . . and roof . . . in good repair."[125] Issues arose when the expansion joints in the garage deteriorated. The landlord's predecessor made temporary repair to the expansion joints in 1999 and 2000. However, a structural repair report dated December 2000, reflected significant deterioration of the expansion joints and concluded that repairs were warranted within one year. Since the deteriorated expansion joints were on the second and third floor of the garage, the landlord alleged that the lease provisions made the tenant responsible for the repairs since the expansion joints did not relate to foundation, exterior walls, or roof. The court concluded that a reading of the lease as a whole would not support the landlord's position, noting that an interpretation ignoring the second and third floor construction was not a consistent interpretation.[126] The court further noted that the insurance requirements in the lease required the landlord to insure the full replacement value of the garage, which was also inconsistent with the landlord's interpretation.[127]

Interestingly, at the time 7979 took control of the property, the tenant executed an estoppel certificate in favor of the predecessor owner, Parking Company of America.[128] The exact language of the estoppel certificate indicated that there were no "uncured defaults" on the date of the estoppel, which was not a false representation because the landlord at the time had not yet failed to make repairs that were requested or required pursuant to the terms of the lease. Practitioners should be wary of general terms such as "uncured default" which, according to the terms of the lease instrument, requires specific notice and cure provisions. Additionally, estoppel certificates should be addressed directly to the purchaser or party intended to rely upon the certificate.

In *Landry's Seafood House-Addison v. Snadon*, the court addressed damages for the breach by the tenant, Landry's Seafood House, under a lease with Snadon.[129] As a preliminary matter, the court first had to address issues raised by Landry's with respect to the proper party to recover under the lease. This arose because the original lease was with Daryl Snadon, who had assigned his interest under the lease to Lee Snadon. Subsequently, an assignment and assumption agreement was executed by Lee Snadon and Landry's, as the successor lessee. The subject property was later deeded from Lee Snadon to Daryl Snadon as trustee of a management trust, and then from the trust to Daryl Snadon himself. Landry's contended that the plaintiff, Daryl Snadon, had no interest under the lease based on the fact that the lease was subject to an assignment and

125. *Id.*

126. *Id.* at 501.

127. *Id.*

128. *Id.* at 504 n.21. The court notes, in footnote 21, that the estoppel certificate was addressed to Property Company of America and not 7979 Airport Garage, implying that the estoppel might not be actionable since it was not addressed to 7979 Airport Garage. *Id.*

129. 233 S.W.3d 430 (Tex. App.—Dallas 2007, pet. denied).

assumption executed by Lee Snadon, and the subsequent conveyance of the property contained no express assignment of the lease.[130] In reviewing this argument, the court found that Landry's did not raise the issue in a verified denial, which constituted a waiver of such right.[131] In support, the court noted that Texas Rule of Civil Procedure 93(2) requires a verified denial to be filed with the court upon an assertion that the subject party is not the proper party, failing which, the matter will be deemed admitted.[132] Therefore, it would be prudent to include assignment and assumptions of leases each time the underlying property is conveyed from grantor to grantee to avoid any possible controversy over to whom the lease payments are due.

Meridien Hotels v. LHO Financial Partnership I is an interesting case dealing with a hotel lease and an interpretation of the transfer provisions, default provisions, and default interest provisions. LaSalle entered into a lease with MHI Lease Co. Dallas, Inc. (Leaseco), a subsidiary of Meridien, which operated the hotel.[133] Ultimately, Meridien decided to sell substantially its entire hotel management businesses, including Leaseco, and gave notice to LaSalle, as required by the lease. LaSalle notified Meridien of LaSalle's intent to purchase Leaseco pursuant to the lease terms, and specified a closing date within the applicable period. Leaseco commenced arbitration proceedings to determine its fair market value, while Meridien instituted suit to defer closing until the fair market value determination was made. Further, Meridien sent a concurrent letter to LaSalle noting that Meridien would not participate in the closing. Immediately thereafter, LaSalle provided Leaseco a notice of default and termination of the lease based on its failure to cooperate in the closing and orderly transition of the hotel management from Leaseco to LaSalle's new tenant, Starwood Hotels. After years of pretrial maneuvering, the court rendered summary judgment and a jury verdict generally in favor of LaSalle. Upon appeal, Meridien and Leaseco attacked the summary judgment in favor of LaSalle concerning the breach of the lease and termination thereof. The court was forced to construe the meaning of the transfer and termination provisions of the lease.[134] In general, the transfer provision gave LaSalle, as the property owner, the right to acquire Leaseco in the event Meridien decided to sell all of its hotel management business. LaSalle had an option to elect to purchase for a fair market value to be agreed upon by the parties or, failing that, by arbitration. The termination provision allowed the landlord to terminate the lease upon the occurrence of a change of control in tenant other than as provided in the transfer provision. Meridien's argument was that until a purchase price had been established, there could not be a sale to LaSalle, and the transfer provisions were still effective. The court rejected such interpre-

130. *Id.* at 433.
131. *Id.* at 434.
132. TEX. R. CIV. P. 93(2).
133. 255 S.W.3d 807 (Tex. App.—Dallas 2008, no pet.).
134. These provision are quoted in full in the opinion. *See id.* at 816.

tation, construing the transfer provisions as having two requirements: first, the transfer must be part of a sale of Meridien's hotel management business; and second, the transfer had to be made upon the terms and conditions set forth in all subparagraphs of the transfer provisions.[135] Since the subconditions to a permitted transfer had not occurred, the transfer was not a qualifying "permitted transfer" under such lease provisions. Therefore, the change of control in tenant was not accomplished in accordance therewith, and LaSalle was authorized to terminate the lease under the termination provision.[136]

The trial court judgment awarded LaSalle disgorgement from Meridien of all management fees paid to Meridien by Leaseco between the termination of the lease and Leaseco's vacation of the premises. Meridien alleged that disgorgement of management fees was an inappropriate measure of damages for trespass, and the court agreed. The court reviewed several cases applying damages for trespass, including damages for cost of restoration and repair, loss of use of the land, and loss of expected profits from use of the land.[137] However, Leaseco continued to pay LaSalle the rent that was due under the lease during the period of trespass. The trial court rendered judgment against Leaseco for the extra "holdover rent," being fifty percent greater than the minimum (or base) rent. The court held that "the measure of damages in a trespass case is the sum necessary to make the victim whole, no more, no less";[138] therefore, the management fees paid were not the proper measure of damage for a trespass.

Another related issue was prejudgment interest on holdover rent. In analyzing this issue, the court addressed two other lease provisions, the default interest rate provision and the holdover rent provision. The default interest rate provision generally provided that a default rate was due on all minimum rent, participating rent, or additional charges not finally paid.[139] The holdover rent provision of the lease provided that if the tenant holds over after termination, then the lease shall be a tenancy at sufferance with a rental rate of one and one-half times the "[r]ent and other charges."[140] Meridien argued that the holdover rental provision was punitive damages, which should not be subject to prejudgment interest. Although agreeing with the legal proposition, the court concluded that the holdover rent payment was not punitive damages, noting that the lease did not recite that holdover rent was a penalty, and distinguished Meridien's authorities, which dealt with prejudgment interest in a usury case and whether an insurance company failed to timely pay a claim.[141] Fur-

135. *Id.* at 817.
136. *Id.*
137. *Id.* at 821.
138. *Id.*
139. The full provision of the default rate provision, Section 3.2 of the lease, is quoted in full in the opinion. *See id.* at 822.
140. *Id.*
141. *Id.* at 822-23.

ther, the court analyzed whether there was any rent unpaid which was subject to the default interest rate provisions. During the term of the holdover, the tenant continued to pay rent at the minimum rent rate, but did not pay the additional fifty percent of rent under the holdover provision. Upon review, the court noted the default interest provision covered only minimum rent, participating rent, and additional charges, none of which included the holdover rents. Therefore, the court concluded that the default interest under the lease did not cover Leaseco's failure to pay the fifty percent premium on holdover rent.[142] Practitioner should take note of this holding and be careful in drafting default interest and holdover provisions if it is intended that the default interest would apply to the amount of holdover rent.

With respect to prejudgment interest, the court concluded that section 304.002 of the Texas Finance Code[143] was not applicable since it applied only where the contract provided for interest; here, the lease did not provide for interest on the holdover rent.[144] Further, the court rejected LaSalle's assertion for prejudgment interest under Texas Finance Code section 304.101,[145] which applied only to wrongful death, personal injury, or property damage, determining that property damage relates only to claims for damages to tangible property, not economic loss or loss of economic opportunity.[146] LaSalle also asserted prejudgment interest under the Finance Code section 302.202;[147] however, the court rejected this argument because such section does not apply to prejudgment interest.[148] Finally, the court agreed with LaSalle's position that it was entitled to prejudgment interest under common law.[149] The court concluded that Finance Code section 304.003[150] is the appropriate prejudgment interest statute pursuant to which LaSalle would be entitled to prejudgment interest.[151]

VII. TITLE MATTERS

A. Adverse Possession/Title Disputes

While there were not any substantive legal developments in the area of adverse possession during the Survey period, the courts continued to express disfavor with the use of fences to establish adverse possession. In *Moore v. Stone,* the court reversed a finding of adverse possession, indicating that an adverse possession claimant that relies upon grazing as evidence of adverse use and enjoyment must show that the land in dispute

142. *Id.* at 823.
143. Tex. Fin. Code Ann., § 304.002 (Vernon 2006).
144. *Meridien Hotels*, 255 S.W.3d at 823.
145. § 304.101.
146. 255 S.W.3d at 824.
147. § 302.002.
148. 255 S.W.3d at 824.
149. *Id.*
150. § 304.003(a).
151. 255 S.W.3d at 825.

was "designedly enclosed."[152] Casual or incidental enclosures and occasional grazing did not amount to adverse and hostile possession.[153] The court suggested that evidence was required showing not only the erection and maintenance of the fence by the claimant, but the purpose for which it was erected.[154] Moreover, sporadic cultivation did not constitute adverse possession.[155] Also of note, the court of appeals gave little credence to acquiescence, requiring affirmative proof of an initial uncertainty or dispute over the boundary line and an acquiescence or recognition of the line as the boundary.[156] A mistaken belief would not support a finding of acquiescence when there was clear proof as to the true location of the boundary line.[157]

The El Paso Court of Appeals similarly expressed disfavor towards casual fences in *Martin v. McDonnold* and logically found that a tenant could not adversely possess against a landlord in the absence of a repudiation of the relationship and an assertion of an adverse claim, together with notice of the repudiation given to the landlord/owner.[158] As is fairly established law, joint or common possession between parties precludes an adverse possession claim because of the lack of exclusiveness.

In yet another survey case, *Silver Oil & Gas, Inc. v. EOG Resources, Inc.*, the San Antonio Court of Appeals reminded us that in spite of the many rules for interpreting surveys, the ultimate question is one of the original survey.[159] This case provides a good discussion of survey rules, noting the importance of artificial objects and monuments. When those monuments could be located, a junior survey could not be used to create ambiguity or to change the boundary lines of the senior survey. Rather, it is the purpose of a junior survey to be used as evidence of the location of the lines of the senior survey. Also important to this case, a call for adjoinder has the dignity of a call for an artificial object.

In the context of an easement case, the Texas Supreme Court provided guidance in connection with the statute of limitations for a statutory fraud claim. First, the court noted the distinction between a void and a voidable document, pointing out that deeds obtained by fraud are voidable rather than void.[160] Such deeds remain effective until set aside.[161] Thus, claims to quiet title or other actions to set aside a conveyance for statutory fraud, would be subject to a statute of limitations.[162] The limitations period was triggered by the recordation of instruments in a grantee's chain of title. Had the contested conveyance been void, it would have

152. 255 S.W.3d 284 (Tex. App.—Waco 2008, pet. denied).
153. *Id.* at 288.
154. *Id.*
155. *Id.*
156. *Id.* at 291-92.
157. *Id.*
158. 247 S.W.3d 224, 236 (Tex. App.—El Paso 2006, no pet.).
159. 246 S.W.3d 197 (Tex. App.—San Antonio 2007, no pet.).
160. Ford v. Exxon Mobile Chem. Co., 235 S.W.3d 615, 618 (Tex. 2007).
161. *Id.*
162. *Id.*

resulted in a different treatment because the suit to quiet title would have simply been addressing a declaration that the conveyance was void. On the other hand, as noted, a conveyance that is voidable is subject to the running of limitations.[163]

A number of cases dealt with procedural issues in the context of title disputes. First, *Snow v. Donaldson* was a partition case with a good, detailed explanation of the partition process, noting the existence of two appealable orders.[164] The two appealable orders include the determination of the title interests and the partition based upon the commissioner's report.[165] In this case, the duty to follow proper appellate procedures fell upon a successor in interest.[166]

In *Taylor v. Hill*, the court discussed the virtual representation doctrine by which an unnamed party may become bound by a judgment based upon privity of estate, title, or interest appearing in the record.[167] Such a party was entitled to undertake an appeal from a trial court judgment—in this case, an heir of the property owners. On the other hand, in *Longoria v. Exxon Mobile Corp.*, a declaratory judgment action required actual joinder of all royalty interest holders for determination of the various title interests.[168]

In one of the most significant cases in this category during the Survey period, the Dallas Court of Appeals ran past years of precedent in dealing with equitable subrogation and threw the question into the fact question mix. In *Murray v. Cadle Co.*,[169] the Dallas Court of Appeals eroded decades of equitable subrogation law by proclaiming that the ability to equitably subrogate in a situation where a prior lien was paid off is a question of fact to be examined under the circumstances of the transaction.[170] Moreover, in order to get there, the court suggested that a title company agent might be a purchaser's agent, such that the title company's knowledge of a judgment lien could be imputed to the purchasers.[171] Again, this was a decision clearly contrary to established law in the context of the fiduciary duties and escrow duties of title companies. Thus, even though a judgment creditor's position was unchanged by reason of the equitable subrogation, the court found that negligence on the part of one claiming a right to equitable subrogation might be relevant in balancing the equities and the right to equitable subrogation. In other words, if the party claiming equitable subrogation had notice of the intervening lien, this would be relevant to the question of equitable subrogation. This conflicts with longstanding Texas precedent permitting

163. *Id.*
164. 242 S.W.3d 570, 577 (Tex. App.—Waco 2007, no pet.).
165. *Id.* at 572.
166. *Id.* at 572-73.
167. 249 S.W.3d 618 (Tex. App.—Austin 2008, pet. denied).
168. 255 S.W.3d 174, 180-83 (Tex. App.—San Antonio 2008, pet. denied).
169. 257 S.W.3d 291, 300 (Tex. App.—Dallas 2008, pet. denied).
170. *Id.* at 300-02.
171. *Id.* at 300.

equitable subrogation to the extent of the payoff regardless of knowledge of the intervening lien. While the case is complicated by difficult facts, some apparent lack of proof and the lack of the purchase money lender as a party, it does suggest inroads on the theory of equitable subrogation—inroads unjustified by Texas precedent.

B. Deeds and Conveyances

While *Ford*[172] noted that a claim based on statutory fraud attacks a conveyance as voidable, the San Antonio Court of Appeals in *Dwairy v. Lopez*[173] reaffirmed that a forged deed is void *ab initio*. In this case, the notary testified that she did not notarize the deed and, together with the grantor's testimony that he did not sign the deed, the court found the deed to be forged and therefore void.[174]

There were also a number of cases dealing with deed interpretations. The Texarkana Court of Appeals in *Corine, Inc. v. Harris* noted the court's duty to determine whether or not a deed was ambiguous before permitting a fact question and testimony outside the deed.[175] The court noted that an ambiguity does not arise simply because the parties advance conflicting interpretations if the court could determine within reason that there was no ambiguity in a deed.[176] In this case, a mineral reservation of "one-half of the usual one-eighth royalty in all oil, gas, casing head gas and gasoline," was not susceptible to more than one reasonable interpretation.[177] In another deed construction case, *Cavazos v. Cavazos*, the San Antonio Court of Appeals used a liberal construction to uphold a conveyance, allowing parol evidence to explain descriptive words and identify the land.[178] In what was really a statute of frauds case, the court upheld the deed purporting to convey "all that certain interest in the estate . . . that she is now in possession of."[179] Also of interest in this case, a quitclaim was sufficient to transfer a future interest in property, albeit a future interest which existed at the time of the quitclaim. In a similar case, *Fears v. Texas Bank*, the court opined that language such as "my property," "my land," or "owned by me" was sufficient to satisfy the statute of frauds, if extrinsic evidence showed that the party signing the memorandum of contract owned a single tract, and only one tract of land fit the description in the memorandum.[180] However, the description of land "off of the west end" was inadequate to describe the shape.[181]

172. Ford v. Exxon Mobile Corp., 235 S.W.3d 615 (Tex. 2007).
173. 243 S.W.3d 710, 712 (Tex. App.—San Antonio 2007, no pet.).
174. *Id.* at 712-13.
175. 252 S.W.3d 657, 659-60 (Tex. App.—Texarkana 2008, no pet.).
176. *Id.* at 660.
177. *Id.* at 659-60.
178. 246 S.W.3d 175, 180 (Tex. App.—San Antonio 2007, pet. denied).
179. *Id.* at 177.
180. 247 S.W.3d 729, 739 (Tex. App.—Texarkana 2008, pet. denied).
181. *Id.*

The Houston Court of Appeals in *Chappell Hill Bank v. Smith* extended the theory of estoppel by deed in a case involving a quitclaim to a first lot and interpretation of a second deed to an adjacent second lot.[182] In the quitclaim deed, the lot owner had quitclaimed an interest in an easement behind a first lot. Subsequently, the same person acquired an adjacent second lot which included the easement by reference. The court interpreted the second deed to include the easement only as adjacent to the second property and held the claimant estopped by its earlier quitclaim from claiming an easement behind the first lot.[183]

Finally, *Brinston v. Koppers Indus., Inc.* points out that a warranty deed does not convey a right to sue.[184] While a grantor had a cause of action for damaged property, that cause of action was not conveyed pursuant to a warranty deed to the plaintiff grantee. In another miscellaneous case, *Irannezhad v. Aldine ISD*, the court's ruling provides a warning to those buying properties at a tax sale.[185] In this case, a third-party purchaser at the tax sale was subject to a subsequent suit brought by the taxing authority against the purchaser for taxes which arose post-judgment. This was so even though the sale occurred at a time not only obviously after the judgment, but also after the time the subsequent tax liability as to the property had arisen.

C. Easements

Estoppel was also extended into the easement area pursuant to the easement-by-estoppel doctrine, which has seen a recent resurgence in the reported cases. In *Mitchell v. Garza*, an adjacent property owner alleged an easement by estoppel to use his neighbor's driveway.[186] To establish the existence of an easement by estoppel, the promisee has the burden of proving the typical elements of estoppel, including that a representation was made which was intended to be relied upon and which was relied upon by the recipient. While the court noted that acquiescence or a failure to object could give rise to a representation, in this case, the occasional use of the driveway was insufficient.[187] Moreover, and most importantly, in this area of the law, no easement of estoppel will be imposed against a subsequent purchaser for value who has no notice, actual or constructive, of the claimed easement.[188]

The extent of an easement also received a good analysis in *South Tex. 66 Pipeline Co. v. Spoor*.[189] In this case, while a pipeline easement was assignable, the burden imposed upon the land by the pipeline easement could not be increased beyond what was contemplated in the original

182. 257 S.W.3d 320, 326 (Tex. App.—Houston [14th Dist.] 2008, no pet.).
183. *Id.* at 329.
184. 538 F. Supp. 2d 969 (W.D. Tex. 2008).
185. 257 S.W.3d 260 (Tex. App.—Houston [1st Dist.] 2008, no pet.).
186. 255 S.W.3d 118 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).
187. *Id.* at 123-24.
188. *Id.* at 123.
189. 238 S.W.3d 538 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

grant.[190] Also of interest in this case, the court found that an easement in gross, typically considered personal to the grantee only, can be made assignable through express assignment provisions.[191]

In a similar vein, in *Brownlow v. State of Texas*, the court limited an easement obtained by inverse condemnation.[192] The court found that an easement for a detention facility did not include extraction and use of the soil.[193] When an easement is given, in this case obtained by condemnation, nothing passes by implication.[194] It was unnecessary for the grantor to make any reservation in the grant to protect his interests.

D. Restrictive Covenants, Condominiums, and Owners' Associations

In connection with restrictive covenants, condominiums, and owners' associations, there were only a few cases providing substantive guidance. In *Owens v. Ousey*,[195] the court held that Declarations of Covenants, Conditions, and Restrictions (CCRs) could not be amended or extended after they had expired by their terms. This case dealt with a mobile home which had been prohibited by the restrictions. The court held that a reciprocal negative easement could not be implied when there were express restrictions, even though those restrictions had expired by their terms.[196] Clearly, the court sent a strong drafting lesson and a directive to property owners' associations to monitor the restrictions.

The courts also took steps to avoid ruling on CCRs, finding in multiple cases that the issues were not ripe. In *Schroeder v. Rancho Escondido Community Improvement Ass'n*, the court found that contemplated amendments to the subdivision deed restrictions were not ripe for consideration until the amendment occurred.[197] Similarly, in *Noel v. Airpark Homeowners Ass'n*, the court again found a dispute over an air park's restrictions on homeowner duties was not ripe.[198] Finally, in *Rakowski v. Committee to Protect Clear Creek Village Homeowners' Rights*,[199] a dispute over use of a park for commercial purposes was not ripe. The court did indicate that reference to CCRs through a plat would make existing CCRs applicable.

In one other restrictive covenant case of note, *Smith v. Houston*, a property was deeded, subject to conditions and obligations.[200] The court found that a grantee under such a deed takes with the limits stated

190. *Id.* at 546.
191. *Id.*
192. 251 S.W.3d 756 (Tex. App.—Houston [14th Dist.] 2008, pet. filed).
193. *Id.* at 762.
194. *Id.* at 761.
195. 241 S.W.3d 124, 130 (Tex. App.—Austin 2007, pet. denied).
196. *Id.* at 131.
197. 248 S.W.3d 415, 447 (Tex. App.—Beaumont 2008, no pet.).
198. 246 S.W.3d 827, 835 (Tex. App.—Dallas 2008, pet. filed).
199. 252 S.W.3d 673, 683-84 (Tex. App.—Houston [14th Dist.] 2008, pet. denied).
200. 251 S.W.3d 808 (Tex. App.—Fort Worth 2008, pet. denied).

therein and was not required to sign the deed.[201]

E. Homestead

Three cases in the survey period addressed homestead, particularly home equity lending. In *Fix v. Flag Star Bank, FSB*, the court noted that the cure provisions available via the Texas Constitution applied according to when the home equity loan was created.[202] In this case, because the sixty-day specific cure provisions were enacted after the date of the loan, the previous law requiring a cure within a reasonable time period applied.

The Amarillo Court of Appeals in *Meador v. EMC Mortgage Corp.* also noted, in addressing an alleged violation of the constitutional provisions relating to home equity lending, that a separate unsecured loan was not additional funds nor part of the 80% debt to fair market value limitation.[203] Finally, in *Smith v. Hennington*, the court noted that the rural character of a property could change over time.[204] In *Smith*, property that was originally rural had become urban because of the extension of the city limits, as voted by the residents, and application of the Property Code factors in section 41.001.

F. Lis Pendens

In *Countrywide Home Loans, Inc. v. Howard*, the Austin Court of Appeals provides an excellent discussion of the purposes of lis pendens and the limitations of such a notice.[205] In this case, the court noted that the lis pendens only gave notice of the pleadings on file at the time of the transaction with respect to the property occurred.[206] Moreover, a lis pendens is only appropriate when the litigation involves a claim to title or an interest in real property, and it is not appropriate when real property is only collaterally relevant to the issue at hand.[207] Because the pleadings sought to impose a lien arising via a constructive trust based on illegally obtained monies that had been used to buy the property, this was not sufficient to support a lis pendens.[208] In other words, the claimant did not seek a direct interest in the property or a return of the property but rather only sought to impose a right to recover the monies used to buy the property. This decision is a close one with many cases on either side of the question. When illegally obtained money is used to acquire real property and a claimant seeks to impose a lien against the property, such a lien would arguably encumber the real property title. This case probably turned

201. *Id.* at 823.
202. 242 S.W.3d 147, 157-59 (Tex. App.—Fort Worth 2007, pet. denied).
203. 236 S.W.3d 451, 452 (Tex. App.—Amarillo 2007, pet. denied).
204. 249 S.W.3d 600, 603-04 (Tex. App.—Eastland 2008, pet. denied).
205. 240 S.W.3d 1 (Tex. App.—Austin 2007, pet. denied).
206. *Id.* at 5.
207. *Id.*
208. *Id.* at 6.

more on timing and late pleadings than a question of whether or not it was a claimed interest in the property.

VIII. MISCELLANEOUS

A. Deceptive Trade Practices Act

In the area of deceptive trade practices, the only case dealing with anything of significance during this survey period was *Fix v. Flagstar Bank, FSB*.[209] In this case, the court noted that a loan transaction, even though it involved real estate as collateral, would not support a deceptive trade practices claim.[210] The borrowing of money was neither the acquisition of goods nor services.[211] Thus, an alleged violation of the home equity lending constitutional requirements would not give rise to a deceptive trade practices claim.

B. Premises Liability

In the area of premises liability, the Texas Supreme Court did extend the responsibility of a pet owner in *Bushnell v. Mott*.[212] In this case, even though the pet dog was not known to be vicious, once an attack against a person began, the owner of that dog had a duty to attempt to stop the attack. The dog owner demonstrated no knowledge of any viciousness in the dog, but he failed to do anything to stop the attack after it started.[213] This created a question of whether the owner failed to exercise ordinary care over the dog once the attack began.

209. 242 S.W.3d 147 (Tex. App.—Fort Worth 2007, pet. denied)
210. *Id.* at 160-61.
211. *Id.* at 160.
212. 254 S.W.3d 451 (Tex. 2008).
213. *Id.* at 452.