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Real Property

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I. MORTGAGES, LIENS, AND FORECLOSURES

There were three notable cases relating to tax sales during the Survey period. One case deals with attorneys' fees, another case analyzes the rights of a lienholder after it redeems the property, and the final case discusses lien priority issues of an unrecorded deed of trust.

In *Davis v. Kaufman County*,[1] the Dallas Court of Appeals analyzed the maximum amount an attorney may receive in fees from the proceeds of a tax sale when the property was owned by multiple parties. This was a case of first impression. When property taxes became delinquent, the taxing district seized the property and sold it at a tax sale. The sale resulted in excess proceeds of $28,024.91. Four of the property owners, excluding the appellant, retained an attorney to represent them in the proceedings to distribute the excess funds. The four owners' attorney filed a motion to enter judgment that included $3,500 as attorney fees. Appellant filed a response, claiming in part that the attorney was not entitled to such fees because the Texas Tax Code limited the attorney fees to $1,000 or twenty-five percent of the award, whichever was less.[2]

The court of appeals found that Section 34.04 of the Texas Tax Code governs the distribution of excess proceeds from tax sales.[3] Specifically, a fee charged to obtain excess proceeds for an owner may not be greater than twenty-five percent of the amount obtained or $1,000, whichever is less.[4] The court described the question before it as whether, in a distribution of excess proceeds to multiple owners, the fee for obtaining the proceeds for multiple owners is capped at twenty-five percent or $1,000 for the entire fund, or at twenty-five percent or $1,000 for each owner.[5] The court of appeals concluded that the language authorized a charge of up to twenty-five percent or $1,000 for each owner of the property for whom the person charging the fee obtained the excess proceeds.[6] Since there

1. 195 S.W.3d 847 (Tex. App.—Dallas 2006, no pet.).
2. *Id.* at 848-49.
3. *Id.* at 849.
4. *Id.*
5. *Id.*
6. *Id.*

were multiple owners of the property, the attorney was entitled to the lesser of $7,006.23 (twenty-five percent of $28,024.91) or $1,000 from each owner.[7] The court of appeals, therefore, upheld the $3,500 award to the attorney.[8]

UMLIC VP LLC v. T&M Sales and Environmental Systems, Inc.[9] involved determining the ownership rights of a real property lienholder after the lienholder redeemed the property following a tax sale. In July of 1989, T&M Sales and Environmental Systems, Inc. ("T&M") obtained a small business loan from the Small Business Administration ("SBA"). The note was secured by a deed of trust on land owned by T&M. The last payment T&M made on the note was on November 19, 1998, leaving $49,602.24 of unpaid principal. On October 15, 1999, UMLIC VP LLC ("UMLIC") purchased the note, the deed of trust and the other related loan documents from the SBA. The local taxing authorities then foreclosed on the property because of unpaid property taxes on February 1, 2000, with Pablo Gonzales acquiring the property at the sheriff's sale for $10,000. On June 6, 2000, UMLIC redeemed the property from Gonzalez for $12,500 (the $10,000 purchase price plus the statutory twenty-five percent penalty) and received a special warranty deed for the property.[10]

After sending T&M a notice to vacate the property, UMLIC offered to allow T&M to redeem the property if T&M paid the balance of the note. T&M did not accept and UMLIC filed a forcible detainer action. T&M countered by tendering a $12,500 cashier's check to UMLIC, which UMLIC refused. UMLIC sold the property by private sale on March 6, 2002 to LSS Investments, Inc. for $66,000. UMLIC did not credit the amount received from LSS Investments, Inc. against the balance due on the note. UMLIC sued T&M to collect the unpaid note balance and T&M counterclaimed. The jury found against UMLIC and for T&M on its wrongful foreclosure claim. On appeal, UMLIC argued that when it redeemed the property from the purchaser at a tax sale, it became vested with fee simple title and thus had the right to subsequently sell the property in a private sale rather than to initiate public foreclosure proceedings.[11]

The court of appeals construed section 34.21 of the Texas Tax Code, which provides that when a property is sold at a tax sale, the deed purchased vests good and perfect title in the purchaser and that purchaser's assigns, including the right to the use and possession of the property, subject only to the former owner's right of redemption.[12]

While the court of appeals agreed with UMLIC's argument that a purchaser of property at a tax sale would receive the purchaser's good and perfect title, it distinguished between the rights obtained by *purchasing*

7. *Id.*
8. *Id.*
9. 176 S.W.3d 595 (Tex. App.—Corpus Christi 2005, pet. denied).
10. *Id.* at 602-03.
11. *Id.* at 603, 605.
12. TEX. TAX CODE ANN. § 34.21 (Vernon Supp. 2004-2005).

property from a tax sale winner and *redeeming* the property.[13] UMLIC did not purchase the property from Gonzalez; rather, it exercised its statutory right of redemption. Therefore, the court of appeals found the issue to be much narrower: What title does a mortgagee[14] hold after it redeems property under the redemption statute?[15]

The court of appeals found that, unlike a purchase, the right of redemption does not establish new title; it restores the parties to the position they were in before the tax lien.[16] Where a co-owner redeems property from a tax sale, courts have concluded that it does not divest the other owner of its ownership rights in the property.[17] The court of appeals concluded that UMLIC's security interest in the property made it eligible as an "owner" under the redemption statute to exercise redemption rights.[18] However, the court of appeals also found that the designation of owner under the redemption statute also prevented UMLIC from divesting a co-owner of its interest in the property.[19] The redemption only paid the taxes and discharged the property of the tax lien. Title to the property remained as it was before the tax sale.[20] Therefore, the only interests that UMLIC retained after the redemption were those set forth in the deed of trust.[21] The court of appeals upheld the trial court, holding that UMLIC did not obtain fee simple title through redemption.[22]

ABN AMRO Mortgage Group v. TCB Farm and Ranch Land Investments[23] concerned the priority of a lien after a tax sale when the instrument creating the lien was not timely recorded. On September 6, 2002, the landowners refinanced a loan secured by real property with ABN AMRO Mortgage Group ("ABN"). The new deed of trust with ABN was not recorded until October 7, 2003. When the landowners became delinquent in the payment of property taxes, they arranged for payment of those taxes by Genesis Tax Loan Services, Inc. ("Genesis"). The landowners executed an Affidavit Authorizing Transfer of Tax Lien and a Deed of Trust in favor of Genesis, and the Denton County Tax Collector executed a certificate of transfer of tax lien in favor of Genesis. Such Deed of Trust and certificate of transfer of tax lien were recorded on September 23, 2003, approximately two weeks before ABN filed its deed of trust. When the landowners filed for bankruptcy, Genesis posted for a

13. TEX. TAX CODE ANN. § 34.21(e), (e)(2) (Vernon Supp. 2004-2005). Under a right to redemption, an owner may redeem the property by paying the purchaser the amount bid for the property, the deed recording fee, and any taxes, penalties, interest or costs on the property, plus a premium of twenty-five percent. § 34.21(3)(2).

14. Any person (including a lienholder) who has any interest in lands sold for taxes is considered an "owner" under the tax redemption statute. § 34.21.

15. *UMLIC*, 176 S.W.3d at 607.

16. *Id.* at 606.

17. *Id.* at 607.

18. *Id.*

19. *Id.*

20. *Id.* at 608.

21. *Id.*

22. *Id.*

23. 200 S.W.3d 774 (Tex. App.—Fort Worth 2006, no pet.).

nonjudicial foreclosure sale and notified all parties claiming an interest, including ABN. TCB Farm and Ranch Land Investments ("TCB") bought the property at the foreclosure sale. Both TCB and Genesis then rejected ABN's subsequent attempt to redeem the property. ABN brought suit against Genesis for wrongful foreclosure and against TCB for a declaratory judgment. The trial court denied ABN's motion for summary judgment and quieted title in TCB.[24]

At issue in the court of appeals was what a first lien is for purposes of Texas Tax Code section 32.06(i), which governs the right of redemption for a property that is sold at a tax sale.[25] ABN contended that, under a liberal interpretation of the Tax Code, as required by Texas law, its lien was the first lien under section 32.06(i), even though its lien was not filed of record when the tax lien was transferred to Genesis. TBN argued that "first lien" under the statute meant first recorded lien, so that Genesis's deed of trust lien became first in priority when it was recorded before the ABN deed of trust.[26]

The court of appeals rejected TCB's interpretation of section 32.06(i), as it would have required the court to insert the word "recorded" into the statute, which it viewed as being contrary to appropriate statutory construction.[27] Additionally, in looking at what constitutes a first lien, the court of appeals noted that state tax liens are "special liens" which are senior to other liens, such as the deed of trust lien in this case, but that such status would not defeat a deed of trust lien as being a valid first lien.[28] While not specifically stated in the opinion, it appears that the court of appeals was construing the deed of trust lien in favor of Genesis as having only the same effect as a tax lien would have, since the Genesis deed of trust lien appears to only have secured the tax lien payment.[29] Consequently, the court of appeals ignored the general law of priority and effect of a foreclosure by a senior lienholder on the junior lienholder's interest.[30] Further, the court of appeals construed such redemption statute to contain no indication that the transfer of a tax lien converts the tax lien into a "first lien" for purposes of such statute.[31]

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24. *Id.* at 775-76.

25. *Id.* at 777. Section 32.06(i) of the Texas Tax Code, in relevant part, reads, "The person whose property is sold . . . or any person holding a first lien against the property is entitled, within one year after the date the property is sold, to redeem the property from the purchaser at the tax sale."

26. *ABN AMRO*, 200 S.W.3d at 778.

27. *Id.*

28. *Id.* at 779.

29. The Genesis deed of trust recited: "This Lien is a Transfer Tax Lien Executed Pursuant to Section 32.06 of the Texas Tax Code. This Lien Is a Superior Lien and Takes Priority over a Homestead Interest in the Property and Takes Priority over the Claim of Any Holder of a Lien on Property Encumbered by this Tax Lien." *Id.* at 776.

30. *Id.*

31. *Id.* at 779. The court, in footnote 3, noted that the Texas Constitution classifies a tax lien as an inextinguishable "special lien" which must be paid to the sovereign and does not classify it as a first lien. *See* TEX. CONST. art. VII, § 15.

TCB further argued that the ABN deed of trust lien should be void as to Genesis because there was nothing in the record to indicate Genesis's notice of the ABN deed of trust lien.[32] Under the Texas Property Code, an unrecorded deed of trust is void as to a subsequent creditor who extends its loan and acquires its lien without notice of the earlier lien.[33] However, the court of appeals determined that the record affirmatively established knowledge by Genesis of the existence of the ABN deed of trust pursuant to the redemption statute and express provisions in the Genesis deed of trust.[34] Without quoting the exact language, the court of appeals characterized the Genesis deed of trust as being subject to the statutory rights of redemption of the owner and first lienholder.[35] The court opinion contains no recitation of any facts reflecting actual knowledge by Genesis of the ABN deed of trust, and there was no constructive knowledge by Genesis since the ABN deed of trust was actually recorded two weeks after the transfer of tax lien was recorded. The recited language merely parrots the language of the redemption statute, and in this author's opinion, does not represent adequate authority of actual knowledge of the existence of a prior deed of trust lien. In further support of its leap to such a conclusion, the court of appeals launched into an explanation of how a tax sale purchaser always buys with knowledge that his title may be defeated by redemption and cannot be considered absolute until the redemption period expires.[36] This seems weak support for the contention that the unrecorded ABN deed of trust constituted a valid first lien. Nevertheless, the court of appeals concluded that the unrecorded deed of trust lien of ABN was not extinguished by the tax lien foreclosure sale and allowed ABN to exercise its right of redemption as a first lienholder.[37]

Murphy v. Countrywide Home Loans, Inc.[38] deals with the elements required to effect a forcible detainer action against the owner of the property after foreclosure under a deed of trust. Countrywide Home Loans, Inc. ("Countrywide") purchased property at a foreclosure sale under a deed of trust executed by Murphy. The deed of trust was originally executed in favor of Federal Home Loan Mortgage Corporation, and was subsequently transferred to Countrywide causing the foreclosure sale to be conducted.[39] The court of appeals reiterated the elements to sustain a forcible detainer action to include the following elements: (1) the movant is the owner of the property, (2) the nonmoving party was an occupant at the time of foreclosure, (3) the foreclosure was of a lien superior to the right of such occupant's possession, (4) a statutorily sufficient

32. *ABN AMRO*, 200 S.W.3d at 779.
33. TEX. PROP. CODE ANN. § 13.001(a) (Vernon 2004).
34. *ABN AMRO*, 200 S.W.3d at 780.
35. *Id.*
36. *Id.*
37. *Id.* at 781.
38. 199 S.W.3d 441 (Tex.App.—Houston [1st Dist.] 2006, pet. denied).
39. *Id.* at 443.

written demand of possession is made by the movant, and (5) the occupant refused to leave.[40] Countrywide prevailed in its proof of such elements. Concerning elements of ownership, Countrywide attached to its affidavit for summary judgement the substitute trustee's deed and affidavit of mortgage which were recorded in connection with the foreclosure. The attachment of a certified copy of the deed of trust served as evidence that Murphy was the occupant at the time of foreclosure. As to the priority of lien, Countrywide relied on the deed of trust and substitute trustee's deed. Demand for possession was established by attaching the notice to vacate given by Countrywide to Murphy after the foreclosure sale.[41]

Murphy contended that the attached documents were not authenticated, and should not be sufficient and admissible as evidence; however, the court of appeals held these documents were self-authenticated under the auspices of Rule 902(4) of the Texas Rules of Evidence.[42] Murphy further contended that the evidence did not show Countrywide as the owner of the lien since the deed of trust was in favor of Federal Home Loan Mortgage Corporation rather than Countrywide.[43] Nevertheless, the court of appeals found the introduction of a business records affidavit of the attorney for Federal Home Loan Mortgage Corporation sufficient to authenticate the right of Countrywide, as the authorized servicing agent for Federal Home Loan Mortgage Corporation, to provide the notice to vacate.[44] In this respect the court of appeals found that Rule 746 of the Texas Rules of Civil Procedure did not require proof of title by Countrywide, but only required evidence of ownership to demonstrate a superior right of possession.[45]

Another case dealing with forcible detainer after a foreclosure sale is *Villalon v. Bank One*.[46] This action arose out of a foreclosure by Bank One against Villalon and the subsequent forceable detainer action brought in justice court, retried *de novo* in county court with a ruling adverse to Villalon and appealed to the district court. Villalon's position concerns a question regarding lawful title to the property based on whether the deed of trust foreclosure was valid, due to alleged violations of the Fair Debt Collection Practices Act[47] by the creditor's debt collectors.[48] In concluding that the forcible detainer action was valid, the court of appeals noted that the forcible detainer rule is designed to provide simplicity and swift remedy, and not one for determining title to the property.[49] The court of appeals reiterated numerous authorities supporting

40. *Id.* at 445.
41. *Id.* at 446-47.
42. *Id.* at 446.
43. *Id.*
44. *Id.*
45. *Id.*
46. 176 S.W.3d 66 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
47. *See* 15 U.S.C. § 1692(a), (b) (2006).
48. *Villalon*, 176 S.W.3d at 68-69.
49. *Id.* at 70.

the proposition that proof of title is not required in a forcible detainer action, but only a showing of evidence of ownership of a superior right is necessary as a condition to immediate possession.[50] Furthermore, the court of appeals noted that the property owner is not so harmed, because the owner can raise the question of title in an action brought in district court.[51] The court of appeals held that the substitute trustee's deed flowing from the foreclosure sale was sufficient to establish ownership and that the deed of trust was sufficient to establish the landlord/tenant relationship after foreclosure, for purposes of the forcible detainer rule.[52]

Construction of condemnation provisions in a deed of trust was addressed in *Wells Fargo Bank, Minnesota v. North Central Plaza I, L.L.P.*[53] North Central Plaza I (NCPI) purchased 4.45 acres of land, improved with an office building, along Central Expressway in Dallas, Texas, with funds from a $14,400,000 loan secured by a deed of trust on the property. Prior to NCPI's purchase of the property, the State of Texas had commenced condemnation proceedings to take 0.1956 acres of property for use in the Interstate Highway 635 and U.S. Highway 75 interchange construction. The commissioner's condemnation award was made, and NCPI appealed on June 11, 2002. NCPI subsequently defaulted and the property was foreclosed upon on December 3, 2002, in an amount leaving a deficiency of over $9,000,000. Wells Fargo intervened in the condemnation case to protect its rights to the condemnation awards.[54]

Upon jury trial, condemnation awards were granted in the amount of $875,000 to NCPI. Wells Fargo appealed contending that the applicable provisions of the Deed of Trust were improperly interpreted by the trial court. The court of appeals considered two provisions of the deed of trust: (1) the definition of the mortgaged property, and (2) the condemnation provisions. The definition of the mortgaged property included all condemnation awards except with respect to the Interstate Highway 635/ U.S. Highway 75 interchange condemnation, provided such condemnation did not impair the use or decrease the value of the subject premises or improvements.[55] The court of appeals concluded that the only evidence as to valuation following the condemnation came from NCPI's own appraiser, whose report and testimony evidenced a market value decrease of over $5,000,000 by reason of the condemnation.[56] Nevertheless, NCPI asserted that a specific provision in the condemnation section of the deed of trust should prevail. Subsection (e) provided that "notwithstanding any provisions contained in this paragraph . . .Trustor shall be entitled to retain any award paid in connection with the IH 635/U.S.

50. *Id.*
51. *Id.*
52. *Id.*
53. 194 S.W.3d 723 (Tex. App.—Dallas 2006, pet. denied).
54. *Id.* at 725.
55. *Id.* at 725-26.
56. *Id.*

Highway 75 interchange condemnation."[57] The court of appeals concluded that the "notwithstanding" language in such subsection (e) referred to subsections (a) through (d) of the condemnation paragraph and did not override the granting provisions contained in the definition of mortgaged property.[58] The court of appeals concluded that the provisions governing the granting of Interstate Highway 635/U.S. Highway 75 condemnation proceeds upon a decrease in the value of the property was more specific than the general provision that NCPI retained condemnation awards from the Interstate Highway 635/U.S. Highway 75 interchange condemnation.[59] Since specific provisions rule over general provisions, the court of appeals held that Wells Fargo's construction of these provisions was accurate and that the condemnation awards were the property of Wells Fargo.[60]

II. NOTES, LOAN COMMITMENTS, AND LOAN AGREEMENTS

There were no noteworthy cases during the Survey period.

III. GUARANTIES

Mid-South Telecommications Co. v. Best[61] addressed the date of accrual of an action against a guarantor. Mid-South made a loan to VidiMedix that was guaranteed by Best and Faris. After VidiMedix defaulted on the loan, Mid-South demanded payment from the guarantors and eventually brought suit against them for breach-of-contract when they refused to perform under the guaranty. The trial court granted Best's and Faris's cross-motion for summary judgment based on the claim that the four-year statute of limitations for a suit on debts had expired.[62] The court of appeals affirmed Best's and Faris's claim that Mid-South's claim was barred by the four-year statute of limitations, since four years had passed since the cause of action accrued.[63] The court of appeals examined the note and guaranty to determine when the event of default occurred and the breach-of-contract claim accrued against the guarantors. Based on the language in the guaranty that each of the undersigned guarantors severally, unconditionally and irrevocably guaranteed the prompt and complete payment of all amounts [VidiMedix] owed to [Mid-South] under the Note, the court of appeals determined that the guaranty was an absolute guaranty solely contingent on the default of the principal obligor on the note.[64] Therefore, the terms in the note were the operative language establishing the guarantor's obligation, and the maturity date of

57. *Id.* at 727.
58. *Id.*
59. *Id.* at 728.
60. *Id.*
61. 184 S.W.3d 386 (Tex. App.—Austin 2006, no pet).
62. *Id.* at 387-89.
63. *Id.* at 390.
64. *Id.* at 391.

the note was the date of accrual of the action against the guarantors under the guaranty.[65] Mid-South contended that accrual of the action did not occur until the demand letter was sent to the guarantors. However, the court of appeals concluded that demand was not an integral part of the cause of action or a condition precedent to Mid-South's right because the guaranty waived notice of demands for performance.[66] Consequently, the date of the accrual of the action against the guarantors was the maturity date of the Note.[67]

IV. USURY

There were no noteworthy cases during the Survey period.

V. DEBTOR/CREDITOR

In *Clovis Corp. v. Lubbock National Bank*,[68] the Amarillo Court of Appeals considered whether a good faith term could be implied into a contract provision that did not on its face contain such a term. Clovis and Diversified Lenders, Inc. executed a Security and Factoring Agreement setting forth the terms of a factor transaction under which Diversified would purchase various accounts receivable from Clovis. Shortly after the agreement was executed, Diversified assigned its interest in the agreement to Lubbock National Bank. Under the terms of the agreement the Bank could reserve and withhold an amount in a reserve account equal to twelve and three-quarters percent of the gross face amount of all accounts purchased. The contract further provided that "additional reserve may be taken when deemed necessary by FACTOR." After the Bank increased the reserve from twelve and three-quarters percent to seventeen and three-quarters percent, Clovis filed suit against the Bank claiming that the Bank acted in bad faith by increasing the reserve. The trial court granted summary judgment in favor of the Bank and Clovis appealed.[69] The court of appeals observed that because there was no good faith term written anywhere in the Security and Factoring Agreement, Clovis was reading into the agreement an implied term obligating the Bank to act in good faith.[70] The court of appeals noted that the parties expressly agreed that the reserve could be raised when "deemed necessary by [the] FACTOR," and hence necessity, and not good faith, was the triggering factor.[71] Because an express provision encompassed when and how the reserve could be modified, an additional covenant (in this case, a covenant of good faith) involving the same topic could not be implied.[72]

65. *Id.*
66. *Id.*
67. *Id.*
68. 194 S.W.3d 716 (Tex. App.—Amarillo 2006, no pet.).
69. *Id.* at 718.
70. *Id.* at 719.
71. *Id.*
72. *Id.*

VI. PURCHASER/SELLER

In *Henderson v. Love*,[73] Henderson agreed to purchase a house from Love under a contract for deed. At the time of the contract, neither the contract nor applicable law required an annual accounting statement to be provided to Henderson by Love. In 2001, changes to section 5.077 of the Texas Property Code required Love, beginning in January, 2002, to provide Henderson with an annual report, and imposed liquidated damages in the amount of $250 per day after January 31 for each year such report was not provided. Love failed to provide such report and Henderson sued, alleging joint and several liability for the daily liquidated damages. The court determined that section 5.077 of the Texas Property Code was unconstitutional, as applied in this case.[74] The Waco Court of Appeals reversed, ruling that section 5.077 was constitutional and could support liquidated damages in excess of $750,000.[75] Such a figure stands in stark contrast to the originally financed $38,500. In its analysis, the court of appeals turned to chapter 41 of the Texas Civil Practice and Remedies Code, which covers exemplary damages and noted that since the penalty provided by section 5.077 was limited by chapter 41, section 5.077 fit within the legislative scheme.[76]

In *Flores v. Millennium Interests*,[77] the Texas Supreme Court addressed whether section 5.077(c)'s liquidated damages are owed when a seller delivers a timely annual statement that omits some of the information required by subsection (b) of that statute. The company hired by Millennium Interests to service its financial transactions was apparently unaware of the recently enacted disclosure requirements specifically applicable to executory contracts and accordingly sent the same statements it used to service traditional mortgage loans. Those statements provided two of four items of information required by section 5.077(b).[78] The supreme court reasoned that the omissions, while significant, did not demonstrate a blatant attempt to circumvent the disclosure requirements as to render the annual statement a nullity, and that the purchaser need not prove actual harm or injury to recover statutory damages for an incomplete annual statement.[79]

In *Coldwell Banker Whiteside Associates v. Ryan Equity Partners, Ltd.*,[80] Ryan Equity Partners, Ltd. purchased real estate and employed Coldwell Banker Whiteside Associates as its real estate broker. Ryan Equity challenged the trial court's finding that the seller of the property breached the contract by failing to disclose the status of zoning, and the

73. 181 S.W.3d 810 (Tex. App.—Waco 2005, no pet.)
74. *Id.* at 812.
75. *Id.*
76. *Id.* at 817.
77. 185 S.W.3d 427 (Tex. 2005).
78. *Id.* at 429-30.
79. *Id.* at 434.
80. 181 S.W.3d 879 (Tex. App.—Dallas 2006, no pet.).

denial to Seller of a Special Use Permit.[81] The Dallas Court of Appeals noted that the zoning status of the property was not a material defect to the property within the meaning of the purchase contract, and that denial of the Seller's application for a Special Use Permit was a determination of the property's legal status pursuant to the zoning ordinance and not a material defect to the property.[82] Additionally, the court of appeals disposed of Ryan Equity's fraud claim, explaining that Ryan Equity did not explain why the zoning status and denial of the application for the Special Use Permit were not discoverable through the exercise of ordinary care, reasonable diligence, or a reasonable investigation.[83]

VII. LEASES; LANDLORD/TENANT

In *4901 Main, Inc. v. TAS Automotive, Inc.*,[84] TAS accepted occupancy of leased premises "as is" and acknowledged that the premises were suitable for TAS's intended purpose. The lease required TAS to maintain and repair the premises except for the roof and structure. Main claimed that TAS waived its right to require Main to repair the roof by virtue of signing an "as is" lease.[85] The Houston Court of Appeals for the Fourteenth District disagreed and held that an "as is" clause cannot waive maintenance obligations imposed upon a landlord in the same lease.[86]

Krayem v. USRP (PAC), L.P.[87] addressed the issue of proper exercise of a purchase option granted under a lease. In April 2003, Krayem executed an agreement to lease a gas station in Irving, Texas, which also gave Krayem the option to purchase the premises. Less than two months later, USRP sold the premises to MacArthur Field Center, Inc. In July 2003, Krayem sent an unsigned letter to his new landlord stating that he was exercising his option to purchase the premises. In August, MacArthur sent Krayem a letter terminating his lease for failure to comply with the lease's insurance requirements. The defendants stated that Krayem's failure to sign the notice letter meant the notice was ineffective since the lease required "written irrevocable notice."[88] The Dallas Court of Appeals held that "written irrevocable notice" does not require such notice to be signed unless the lease specifically states that all correspondence and notices be signed by a party.[89]

In *Zinda v. McCann Street, Ltd.*,[90] McCann Street, Ltd. owned and operated a restaurant called McCann Street Bar & Grill which Zinda managed and of which he was a limited partner. The other limited partners

81. *Id.* at 882-84.
82. *Id.* at 886.
83. *Id.* at 888.
84. 187 S.W.3d 627 (Tex. App.—Houston [14th Dist.] 2006, no pet.).
85. *Id.* at 629-30.
86. *Id.* at 633.
87. 194 S.W.3d 91 (Tex. App.—Dallas 2006, pet. denied).
88. *Id.* at 92-93.
89. *Id.* at 94.
90. 178 S.W.3d 883 (Tex. App.—Texarkana 2005, pet. denied).

were several brothers and sisters of the Smith family. The Smiths learned that Zinda had taken substantial money out of the business for his personal use and, as a result, foreclosed upon Zinda's partnership interest. The Smiths began the process of eviction. Zinda sued the partnership for exclusion from the business and the Smiths countersued Zinda for unpaid rent. On appeal, Zinda contended that the partnership did not comply with section 93.002(f) of the Texas Property Code, because it did not put a written notice on the restaurant's front door stating where Zinda could obtain a new key.[91] The Texarkana Court of Appeals held that unlike an absentee landlord situation that would be remedied by posting a formal notice on the door, there was no evidence that Zinda was harmed by the failure to post a notice since all parties were fully involved in the proceedings up to the changing of the locks.[92] Therefore, the eviction was proper under the lease and Texas law.[93]

VIII. TITLE MATTERS

A. Adverse Possession

In *Masonic Building Association of Houston, Inc. v. McWhorter*,[94] the Houston Court of Appeals for the First District held that although claimant's predecessor in interest did not consciously intend to take the defendant's property when he erected a wooden fence, evidence existed that he intended to claim the property as his own, used the portion of the property to the exclusion of the defendant, and intended to convey the disputed property to his successor in interest, and therefore, intended to exercise rights to the property that were inconsistent with that of the true owner.[95] However, the court of appeals rejected claimant's contention that a hypothetical continuation of an existing fence line, as opposed to an actual fence or other obstruction, was legally sufficient to establish an adverse possession claim.[96]

B. Deeds and Conveyances

Interpretation of conveyances and construction of deeds have prompted courts to apply well-settled law and attempt to harmonize legal issues that are not so settled. An example of the former can be found in *Johnson v. Driver*.[97] A 1979 deed from Lillian Edge to Tommy C. Stringfield unambiguously recited that Edge "granted, sold, and conveyed" the property in question "in consideration of ten dollars and other valuable consideration."[98] The court refused to admit affidavits that the deed was

91. *Id.* at 887-88.
92. *Id.* at 890.
93. *Id.*
94. 177 S.W.3d 465 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
95. *Id.* at 474.
96. *Id.* at 475.
97. 198 S.W.3d 359 (Tex. App.—Tyler 2006, no pet.).
98. *Id.* at 361.

a gift because the deed was not ambiguous on its face.[99] The court stated that when there is no facial ambiguity, a grantor's mistake as to the legal effect of what he signed is not the kind of mistake that will avoid the bar of the parol evidence rule.[100] Parol evidence cannot be used to create ambiguity when the deed itself is unambiguous. Thus, the express, unequivocal language of the deed could not be refuted by affidavits.[101]

Likewise, *Centerpoint Energy Houston Electric, L.L.P. v. Old TJC Co.*[102] involved two deeds, an original deed and a correction deed. The original deed expressly reserved only a reversion interest in the subject property that would be triggered if the grantee ceased to use the land as a public park. The correction deed granted all "right, title and interest" to the property to the grantee and failed to reference the public-park-use restriction.[103] The Tyler Court of Appeals emphasized that it must harmonize the provisions of both deeds so that no provision is rendered meaningless and no single provision is controlling.[104] The court of appeals concluded that the granting clause of the correction deed could only pertain to the reversionary interest reserved in the original deed.[105] Furthermore, the correction deed contained a new habendum clause expressly stating that the grantor shall not have any right or title to the subject property.[106] Because the correction deed could be performed as written, no further clarification was necessary.[107] Regardless of what the parties to the transaction meant to say, effect must be given to what the parties did say.[108] The correction deed contained an unambiguous granting clause and, because the grantor did not seek reformation or allege fraud, accident, or mistake, the language of the correction deed must be enforced without consideration of extrinsic evidence.[109]

C. EASEMENTS

In *Cummins v. Travis County Water Control and Improvement District*,[110] the Austin Court of Appeals considered the issue of whether a conveyance of lakefront property necessarily provided the owner of such property with littoral or riparian rights, or, alternatively an easement, any of which would entitle the owners of such property to construct a recreational boat dock on submerged lands near a drinking water intake barge. To succeed on a riparian or littoral rights claim, the claimant must (1) trace title back to a grant from the sovereign prior to 1895, and (2)

99. *Id.* at 363.
100. *Id.* at 364.
101. *Id.*
102. 177 S.W.3d 425 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).
103. *Id.* at 427-29.
104. *Id.* at 430.
105. *Id.* at 432.
106. *Id.* at 433.
107. *Id.* at 432.
108. *Id.* at 433.
109. *Id.* at 434.
110. 175 S.W.3d 34 (Tex. App.—Austin 2005, pet. denied).

establish that the land borders on a natural lake with a "normal flow" of water.[111] The claimants in this case could do neither as their chain of title extended no further than 1904 and Lake Travis is not a "natural" flow, but is floodwater.[112] Moreover, the court of appeals determined that even if the claimants could establish littoral rights, such rights would have to yield to the state's police power to regulate public trust property, in this case a two-hundred-foot zone around a public drinking water intake barge.[113] An express easement for ingress and egress, even if it had survived the chain of title to the claimant, would not have given the claimant the right to build a recreational boat dock as such was not "reasonably necessary" for ingress and egress.[114] Finally, the court of appeals determined that an easement could not be implied as the claimants had not been able to demonstrate any previous use of a boat dock (and certainly not the required "apparent, continuous and necessary" use).[115] In any event, an easement would not be implied where, as here, its purpose would be contrary to the public policy interest in preventing recreational water uses within the protected zone surrounding a public drinking water intake barge.[116]

D. Restrictive Covenants, Condominiums, and Owners Associations

In *Montfort v. Trek Resources, Inc.*,[117] the Eastland Court of Appeals addressed a mineral estate's duty to provide fresh water to the surface owners and whether it constituted a covenant running with the land. The court of appeals found that the use of the phrase "successors and assigns," while helpful, was not dispositive in determining whether the parties intended the covenant to run with the land, nor was it necessary to create a covenant running with the land.[118] The court of appeals also noted that a benefit upon a grantor is not a requirement for a covenant to run with the land, and that the deed also provided that upon the termination of the oil and gas lease, Citation or its successors and assigns would relinquish title to the fresh water rights and the water gathering system.[119] But the deed failed to mention any obligation to relinquish title to a particular owner.[120] The court of appeals interpreted this omission to mean that the parties contemplated that the original grantee might not necessarily be the owner of the surface rights at the time the oil and gas lease terminated.[121]

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111. *Id.* at 44-45.
112. *Id.* at 45.
113. *Id.*
114. *Id.* at 51-52.
115. *Id.* at 61.
116. *Id.*
117. 198 S.W.3d 344 (Tex. App.—Eastland 2006, no pet.).
118. *Id.* at 355.
119. *Id.* at 356.
120. *Id.*
121. *Id.*

In *Wilchester West Concerned Homeowners LDEF, Inc. v. Wilchester West Fund, Inc.*,[122] two adjacent homeowners associations circulated petitions throughout their respective neighborhoods, which collected enough signatures to pass proposed amendments to their respective deed restrictions to increase the annual assessments and grant memberships in a nearby recreational club to all members. Wilchester LDEF filed suit against the club and both homeowners associations, seeking a declaratory judgment that the contracts with the club and the amendments to the deed restrictions were void. The homeowners associations and the club challenged Wilchester LDEF's standing to bring suit on behalf of the homeowners, asserting that Wilchester LDEF was not an owner of property in either subdivision.[123] In finding standing, the court of appeals noted that the elements of whether an organization has standing to bring suit include: (1) whether its members have standing to bring suit on their own behalf; (2) whether the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim nor the relief requested requires the participation of the individuals in the suit.[124] However, after a traditional analysis, the court of appeals held that the homeowners associations had the ability and the authority to execute the contract with the club and that the amendments to both sets of deed restrictions were valid.[125]

E. HOMESTEAD

In *Jordan v. Hagler*,[126] the Fort Worth Court of Appeals held that a constructive trust could not be imposed on materials affixed to the homestead because sections 41.001 and 53.254 of the Texas Property Code clearly provide that a lien, not a constructive trust, is the only encumbrance that may be placed on a homestead for labor and materials so long as the person furnishing the material or performing labor executes a written contract with the owner.[127]

In *McKee v. Wilson*,[128] the Waco Court of Appeals held the proper time to determine whether property is homestead property, for purposes of satisfying the statutory requirements for mechanic's liens, is the date of the construction agreement, not the date the lien is filed.[129] Since the construction contract was entered into at the time the McKees resided in their prior homestead, the mechanic's lien filed by Wilson on the new home was not for homestead property.[130] Accordingly, the court of appeals determined that the statutory requirements for a mechanic's lien on

122. 177 S.W.3d 552 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).
123. *Id.* at 555.
124. *Id.* at 561.
125. *Id.* at 566.
126. 179 S.W.3d 217 (Tex. App.—Fort Worth 2005, no pet.).
127. *Id.* at 220.
128. 174 S.W.3d 842 (Tex. App.—Waco 2005, no pet).
129. *Id.* at 845.
130. *Id.*

homestead property was not required.[131]

F. Title Insurance

In *Smith v. McCarthy*,[132] the Fort Worth Court of Appeals applied the "eight corners" rule, which states that whether a title company has a duty to defend is determined only by the allegations in the underlying pleadings and the language in the insurance policy, with the allegations in the pleadings being given a liberal interpretation in favor of the insured, but without looking outside of the pleadings or reading facts into the pleadings in making such a determination.[133] The title company argued that it was not obligated to defend the Smiths due in part to Schedule B, Exception 6(g) of the title policy, which excluded coverage for losses and costs resulting from "rights of parties in possession."[134] McCarthy's pleadings alleged that she was the owner "by adverse possession" of the property in question, and detailed her continued use of the property over the course of many years.[135] Therefore, looking at the pleadings and the insurance policy alone, McCarthy's claims included allegations of possession, a cause of action which was excluded under the coverage of the Smith's policy by the parties in possession exclusion, regardless of whether McCarthy would have actually prevailed on the claim.[136]

Similarly in *Spurgeon v. Coan & Elliot*,[137] the Eastland Court of Appeals noted that an insurer is only obligated to defend its insured when the petition contains allegations which come within the scope of the title policy's coverage.[138] Spurgeon's title policy excluded from coverage, among other things, any defects or adverse claims which were created or agreed to by the insured claimant, or not known to the title company or recorded in the public records as of the date of the policy, but known to the insured claimant and not disclosed to the title company.[139] The claim against Spurgeon's property arose from an alleged agreement which was not of record and of which the title company had no knowledge, which allegations fell within both such exclusions, regardless of whether or not the agreement actually existed.[140]

In *Holder-McDonald v. Chicago Title Insurance Co.*,[141] the Dallas Court of Appeals analyzed the differences between the duties of the title insurer and the escrow agent. The court of appeals found that Chicago Title did not breach its fiduciary duty when acting as escrow agent by attaching an incorrect legal description of the property to the closing doc-

131. *Id.*
132. 195 S.W.3d 301 (Tex. App.—Fort Worth 2006, pet. denied).
133. *Id.* at 307-08.
134. *Id.* at 308.
135. *Id.* at 310.
136. *Id.* at 311.
137. 180 S.W.3d 593 (Tex. App.—Eastland 2005, no pet.).
138. *Id.* at 598.
139. *Id.* at 599.
140. *Id.*
141. 188 S.W.3d 244 (Tex. App.—Dallas 2005, pet. denied).

uments, because the closing instructions to the escrow agent directed the "Title Company" to determine the correct legal description of the property in question, not the escrow agent.[142] The court of appeals stated that enforcing an independent duty on the escrow agent to ensure the correctness of the legal description prepared by the title insurer would, in effect, cause the escrow agent to become a second title insurer with unlimited liability.[143] The court of appeals similarly found that the escrow agent could not have breached a fiduciary duty in connection with the delivery of a second incorrect document, as the document was prepared by Chicago Title as part of its issuance of the title insurance policy, not as part of the duties of the escrow agent.[144]

IX. CONSTRUCTION CONTRACTS, MECHANICS' LIEN, AND CONSTRUCTION ISSUES

In *Gentry v. Squires Construction, Inc.*[145] a builder brought suit against a homeowner for breach of a construction contract and lien foreclosure or, in the alternative, for quantum meruit. The homeowner countersued alleging fraud, violations of the Texas Deceptive Trade Practices Act ("DTPA"), and breach of contract and implied warranty.[146] The Dallas Court of Appeals held that the Texas Residential Construction Liability Act ("RCLA") does not preempt claims against the builder for breach of contract, breach of warranty, and fraud, or claims under the DTPA.[147]

In *TA Operating Corp. v. Solar Applications Engineering, Inc.*[148] the appellant contracted with appellee to build a truck stop. Various delays occurred and numerous change orders were issued. Upon substantial completion, appellee sent appellant a list of items that needed to be done to complete the building and appellant disputed several of the items. Appellee then filed suit prior to submitting an all-bills-paid affidavit, a condition precedent to final payment. The issue at hand was whether the doctrine of substantial performance excuses a contractor's failure to comply with an express condition precedent to final payment when such condition is unrelated to completion of the building.[149] The San Antonio Court of Appeals held that, while the substantial performance doctrine permitted contractors to sue, it did not ordinarily excuse the non-occurrence of an express condition precedent.[150] While appellee was permitted to sue under the contract, appellee did not plead or prove that it complied with the express condition precedent to final payment and, con-

142. *Id.* at 248.
143. *Id.*
144. *Id.* at 249.
145. 188 S.W.3d 396 (Tex. App.—Dallas 2006, no pet.).
146. *Id.* at 401-02.
147. *Id.* at 405.
148. 191 S.W.3d 173 (Tex. App.—San Antonio 2005, pet. granted).
149. *Id.* at 176-78.
150. *Id.* at 180.

sequently, it did not trigger the duty to pay.[151]

In *Redland Insurance Co. v. Southwest Stainless, L.P.*[152] the insurer contended that the subcontractor was required to send the copies of notices it sent to the prime contractor and that such notices were required to be sent by certified mail with return receipt requested. The insurer contended that the subcontractor's failure to do this precluded recovery on the payment bond.[153] The Fort Worth Court of Appeals reasoned that, because the McGregor Act, chapter 2253 of the Texas Government Code, was remedial in nature, it should be given the most liberal construction possible.[154] The court of appeals further reasoned that the notice requirements were satisfied by substantial compliance, despite the fact that they had been sent by first-class regular mail instead of by certified mail, because the notices had been sent on time and were timely received.[155]

In *Jordan v. Hagler*,[156] Burl and Brenda Hagler, the homeowners, brought an action against the contractor, John Jordan, to obtain declaratory judgment and removal of liens. Contractor filed lis pendens and counterclaimed for constructive trust. The trial court ordered the removal of the liens and prohibited new ones, ruled against the contractor on the claim for constructive trust, declared the lis pendens invalid, and awarded attorney fees to homeowners.[157] The Fort Worth Court of Appeals held that the contractor was not entitled to a constructive trust on the homestead.[158] A constructive trust is not a trust at all, but an equitable remedy created by the legal system to prevent unjust enrichment, and its purpose is to right wrongs that cannot be addressed under other legal theories.[159] Because the property was the owners' homestead, the court of appeals found Jordan failed to perfect the liens, agreed to the order removing the liens and prohibiting new filings, and found that the contractor failed to post bond to stay removal of liens.[160] Moreover, the court of appeals ruled the contractor's attempt to impose a constructive trust on materials affixed to the homestead ran contrary to the plain language of the statute which detailed the method by which an encumbrance, or lien, could be fixed on a homestead.[161] The court of appeals stated:

> The suit on which the lis pendens is based must claim a direct interest in the real property, not a collateral one [internal citations omitted]. In the instant case Jordan argues that he has given notice of an interest in the [owners'] property pursuant to section 12.007 because the

151. *Id.*
152. 181 S.W.3d 509 (Tex. App.—Fort Worth 2005, no pet.).
153. *Id.* at 510-11.
154. *Id.* at 512.
155. *Id.*
156. 179 S.W.3d 217 (Tex. App.—Fort Worth 2005, no pet.).
157. *Id.* at 218-19.
158. *Id.* at 221.
159. *Id.* at 220.
160. *Id.* at 219.
161. *Id.* at 220.

> materials he purchased and used to perform the remediation and reconstruction work on their property are not removable . . . and [became] "one with the real property." . . . Jordan did not seek a lien to recover a judgment, but instead sought a constructive trust. . . . Under the particular facts of this case, however, we recognize that the only means by which Jordan could have asserted an interest in the property was by obtaining a mechanic's lien. . . . the trial court entered an agreed order which removed all liens and prohibited Jordan from filing any further liens. . . . Accordingly, the lis pendens is voidable and capable of being cancelled by the trial court because it gives notice of a claim that is unavailable to Jordan.[162]

Finally, the court of appeals rejected the trial court's ruling on attorneys fees.[163] The court of appeals ruled the homeowners were not entitled to declaratory relief or attorneys fees under the Uniform Declaratory Judgment Act.[164] The Uniform Declaratory Judgment Act has a provision which permits declaratory relief on construction or validity of a deed, will, written contract, or other writing constituting a contract.[165] The court of appeals ruled a lis pendens is not a deed, will, written contract or other writing constituting a contract within the meaning of the Act.[166]

X. AD VALOREM TAXATION

In *Williams v. County of Dallas*,[167] a taxpayer appealed a trial court's finding against her for delinquent ad valorem taxes on the grounds that the tax statements were not properly certified as public records, she was unfairly surprised by untimely disclosure of tax statements, and that she was not the alleged owner of the property.[168] The tax statement was held to be properly certified because it "contained a certification that it was a true and correct photocopy of the original record of the Dallas County Certified Tax Roll now in the lawful custody and possession of the Dallas County Tax Department" and "it was signed by a Dallas County deputy tax assessor-collector and contained the county seal."[169] Next the court of appeals held that a taxpayer is not unfairly surprised where a tax statement is "a certified public record with the seal of the official, the pleadings gave taxpayer notice that taxing units were seeking to collect all unpaid taxes . . . and taxpayer had the same access to public records as taxing units."[170] Finally, the court of appeals dismissed the taxpayer's final grounds for appeal because "in a suit to collect delinquent taxes, non-ownership of property is an affirmative defense that must be pleaded

162. *Id.* at 221-22.
163. *Id.* at 222-23.
164. *Id.*
165. *Id.* at 222.
166. *Id.*
167. 194 S.W.3d 29 (Tex. App.—Dallas 2006, pet. denied).
168. *Id.* at 32.
169. *Id.*
170. *Id.* at 32-33.

or it is waived."[171]

In *Devon Energy Production, L.P. v. Hockley County Appraisal District*,[172] Devon Energy sought relief from the district's tax assessment of its working interest in an oil and gas reservoir located outside of the county in which the district was located. Devon Energy challenged the district's authority to assess this way and the Amarillo Court of Appeals held that the district had the burden to establish that the property lay within the district's borders, saying "[i]f it cannot, then it cannot lawfully tax the realty. And, if it cannot lawfully tax the realty, then the appraisal district has no authority to incorporate the realty into its assessment."[173]

In *American Heritage Apartments, Inc. v. Bowie County Appraisal District*,[174] the Texarkana Court of Appeals interpreted section 11.182 of the Texas Tax Code to mean that the taxpayer's exclusive purpose must be to make its housing available to low- or moderate-income persons, rather than to mean that the taxpayer must provide housing exclusively for low- or moderate-income persons.[175]

XI. INDEMNITIES

English v. BGP International, Inc.[176] concerned the obligation of one party, BGP International, Inc. ("BGP"), to defend and indemnify Cynthia English d/b/a English Land Service and American States Insurance Company ("English") with regard to forty-three suits from various landowners against English in respect to the unauthorized seismic testing of their properties. The contract between the two parties provided that BGP would

> [P]rotect, defend, indemnify and hold harmless [English] . . . against loss or damage resulting out of any claim or suit, including trespass (whether geophysical or surface), property loss or damage, or any civil fines or penalties imposed . . . resulting from operations when BGP commence[s] field operations without the permit acquisition of 100% of the mineral owners and 100% of the surface owners, or any claim or suit arising out of the negligent actions or omissions of BGP. . . .[177]

The trial court held in favor of BGP on the theory that English's request for indemnification was premature and not ripe for adjudication until the underlying suits were resolved.[178] The trial court's decision was appealed by English on the contention that the contract provided that BGP was not only obligated to "indemnify" English but was also obligated to *defend* English, and a duty to defend can arise before liability is

171. *Id.* at 33-34.
172. 178 S.W.3d 879 (Tex. App.—Amarillo 2005, pet. denied).
173. *Id.* at 883.
174. 196 S.W.3d 850 (Tex. App.—Texarkana 2006, pet. denied).
175. *Id.* at 855.
176. 174 S.W.3d 366 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
177. *Id.* at 368.
178. *Id.*

determined.[179] The Houston Court of Appeals for the Fourteenth District agreed with English and stated that numerous courts have held that the duty to defend is a separate obligation from a duty to indemnify and that the duty to defend is in most situations a justiciable issue.[180] The court of appeals additionally ruled that there are even instances where a party's duty to defend arises even when it is later determined that the party has no duty to indemnify.[181]

XII. MISCELLANEOUS

A. NUISANCE/TRESPASS

In the case of *Dominey v. The Unknown Heirs and Legal Representatives of Linda Lokomski*,[182] the Fort Worth Court of Appeals considered whether certain specific circumstances may constitute a trespass. In 1987, appellees purchased a home for the combined consideration of cash and a $23,000 promissory note (secured by a deed of trust and vendor's lien). Appellants acquired the deed of trust and vendor's liens and entered onto the property and contracted with a third party for the sale of the home. When the title search showed that title was still vested in appellees (now deceased), appellants brought an action for foreclosure on the liens. The trial court concluded that appellants wrongfully took possession of the property and committed trespass.[183] The court of appeals held that appellants were required to institute foreclosure proceedings in accordance with the terms of the deed of trust.[184] Appellants' insistence that they had an implied right of possession was not supported by the law.[185]

The case of *Gleason v. Taub*[186] involved the issues of standing to claim trespass and the right to enter land subject to a public easement. Appellants in this case were property owners who brought an action for trespass and damage to property against a construction manager who destroyed vegetation and removed 16,000 cubic feet of dirt from their property. The entire property was subject to a public drainage easement. The construction manager filed a plea to the jurisdiction, contending that appellants did not have standing to sue and moved for summary judgment, arguing that he did not owe any duty to refrain from removing the dirt because it was subject to a public easement.[187] First, the Fort Worth Court of Appeals stated that although a public easement grants possession and control to the public, ownership is not surrendered.[188] The court of appeals noted that no Texas case supported the proposition that a fee

179. *Id.*
180. *Id.* at 371.
181. *Id.*
182. 172 S.W.3d 67 (Tex. App.—Fort Worth 2005, no pet.).
183. *Id.* at 69.
184. *Id.* at 72.
185. *Id.* at 72-73.
186. 180 S.W.3d 711 (Tex. App.—Fort Worth 2005, pet. denied).
187. *Id.* at 712-13.
188. *Id.* at 713.

owner lacks standing to sue a private party for trespass on private property that is subject to a public easement.[189] Appellants therefore had standing to sue for trespass because their property rights had been aggrieved by the alleged wrong.[190] To win summary judgment on this point the court of appeals stated that he would need to show conclusively that appellants did not own the property where the alleged trespass took place.[191] Appellee's own evidence conclusively proved the opposite according to the court of appeals.[192]

B. Professional Responsibility

In *In re Drake*,[193] the San Antonio Court of Appeals considered whether an attorney violated the Texas Disciplinary Rules of Professional Conduct by representing taxpayers in a suit against an appraisal district that was his former client. Dennis Drake had represented the Bexar County Appraisal District for over twenty years before informing the district in 2003 that he was ceasing his representation. The following year he represented two parties in suits challenging the district's valuation of their properties. The District filed a motion to disqualify Drake on the basis of Texas Disciplinary Rule of Professional Conduct 1.09, which prohibits an attorney from representing a party in a matter adverse to a former client. The trial court granted the motion for disqualification.[194] The court of appeals overturned the trial court's disqualification order because the lack of a relationship between Drake's former representation and the pending litigation meant that no confidential information was at risk of being revealed.[195]

C. Lis Pendens

In the case *In Re Collins*,[196] the Fort Worth Court of Appeals focused on whether the trial court wrongly voided a notice of lis pendens by looking beyond the pleadings and hearing evidence of the filing parties' claimed interest in the property at issue. Burk Collins and various other entities had filed a lis pendens on a retail mall property located in Tarrant County, Texas, claiming that they owned a fifty percent ownership interest in that property (which had been foreclosed on and later purchased by Collins' former business partner, Richard Kest). The trial court later ruled that Collins owned no direct interest in the property and vacated the lis pendens.[197] The court of appeals noted that in order to file a valid lis pendens notice, the suit on which the lis pendens notice is based must

189. *Id.* at 714.
190. *Id.* at 715.
191. *Id.*
192. *Id.*
193. 195 S.W.3d 232 (Tex. App.—San Antonio, 2006, no pet.).
194. *Id.* at 234.
195. *Id.* at 237.
196. 172 S.W.3d 287 (Tex. App.—Fort Worth 2005, no pet.).
197. *Id.* at 290-92.

claim a direct interest in the real property, not a collateral one.[198] If the suit seeks a property interest only to secure recovery of damages or other relief that the plaintiff may be rewarded, then the notice of lis pendens is not available.[199]

Collins' pleading alleged a direct interest in the property by stating that Kest had promised Collins a fifty percent interest in the property in exchange for his allowing the property to be foreclosed upon and other various incentives. Kest, in his motion seeking to vacate the lis pendens, challenged that Collins never owned a personal interest in the property because the mall was owned by the partnership entity that Collins and Kest were partners in and that Collins had specifically waived any interest in the property in a document signed by Collins. Collins countered this evidence by providing various memoranda in which Kest acknowledged that Collins had an interest in the property and that he, Collins, would be awarded a fifty percent interest if the property was foreclosed upon.[200] Thus, the court of appeals ruled that there was a question of fact as to whether Collins' interest in the property was a direct interest and held that the trial court wrongly voided the lis pendens filing.[201]

In *Jordan v. Hagler,*[202] the Fort Worth Court of Appeals held that a general contractor not only filed a lis pendens notice in violation of a court order, but also that the general contractor's interest in the property was not a direct interest.[203] Jordan, a general contractor, had performed various types of construction work at the Haglers' home and had filed several mechanic's liens against the property when the Haglers refused to pay Jordan for his work. Due to certain determined defects in the perfection of the liens, the trial court upheld the removal of the liens and prohibited Jordan from filing any further liens. Jordan then filed a notice of lis pendens claiming that he owned a direct interest in the property because the materials he used in the construction had become part of the property.[204] The court of appeals held that his attempt to file a lis pendens was a way to try to circumvent the trial court's order prohibiting him from filing further liens.[205] Furthermore, the court of appeals held that Jordan had no direct interest in the property, but only a collateral interest (in that he sought to use the property as security for his damages).[206]

198. *Id.* at 293.
199. *Id.*
200. *Id.* at 295-97.
201. *Id.* at 297.
202. 179 S.W.3d 217 (Tex. App.—Fort Worth 2005, no pet.).
203. *Id.* at 222.
204. *Id.* at 218-19.
205. *Id.* at 222.
206. *Id.*

D. Deceptive Trade Practices Act

In *Pirtle v. Kahn*,[207] an apartment complex tenant brought actions against the landlord for premises liability, negligence, fraud, and state Deceptive Trade Practice Act ("DTPA") violations after she discovered that a mold leak in her apartment had led to her mold related illnesses. The landlord moved for summary judgment, arguing that the plaintiff's actions were barred by each cause of action's respective statute of limitations. The trial court granted the landlord's motion for summary judgment on all causes of action. The tenant appealed.

The limitations period for a claimant to bring a DTPA violation is two years.[208] The cause of action would generally accrue when an injury results from a wrongful act, regardless of when the plaintiff learned of the injury.[209] However, the limited discovery rule provides an exception to this standard rule when the nature of the injury is inherently undiscoverable and evidence of the injury is objectively verifiable.[210] In applying this exception, the courts will determine the point in time at which "the plaintiff knows, or through the exercise of reasonable care and diligence should have discovered, the nature of his injury and the likelihood that it was caused by the wrongful acts of another."[211] The landlord argued that the statute of limitations began to run when the appellant moved into the apartment complex and became immediately ill. The Houston Court of Appeals for the First District determined that she "obtained facts sufficient to require her to investigate a causal connection between the mold and her illnesses . . . when she found the leak in her apartment, saw the mold, and immediately drew the inference that the mold caused her illnesses."[212] The two-year limitations period had passed for the DTPA case, but the court of appeals sustained appellant's issue with respect to the fraud claim, which was governed by a four-year statute of limitations period.[213]

In *American Title Co. v. Bomac Mortgage Holdings*,[214] Bomac Mortgage sued American Title of Houston for breach of contract, fraud, violations of the DTPA, and various other claims arising out of a mortgage finance transaction in which Bomac was the mortgagee. In July 2000, Bomac loaned Anthony Norris $288,000 to purchase property in Galveston, Texas. American Title served as escrow agent for the transaction. Bomac argued that unbeknownst to Bomac, a "flip" of the property took place and both sales were funded by the loan proceeds. In addition, certain unauthorized payments were made out of the loan proceeds, and American Title represented in mortgage documents that Norris paid a

207. 177 S.W.3d 567 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).
208. Tex. Bus. & Com. Code Ann. § 17.565 (Vernon 2002).
209. *Id.*
210. *Id.*
211. *Pirtle*, 177 S.W.3d at 571.
212. *Id.* at 573.
213. *Id.* at 574.
214. 196 S.W.3d 903 (Tex. App.— Dallas 2006, pet. granted, judgm't vacated w.r.m.).

down payment, which he had not paid. The fact that a "flip" had transpired was not disputed by the defendant. American Title altered the title commitment to omit ownership information. The facts were heavily disputed, but the jury found that American Title had defrauded Bomac, committed theft, and acted unconscionably. In the second phase of the bifurcated trial, the jury awarded Bomac $250,000 in punitive damages under the DTPA for the title company's knowing conduct.[215]

American Title appealed, arguing that the damages sought by Bomac were special damages, and were not pleaded properly under rule 56 of the Texas Rules of Civil Procedure. American Title contended that these damages were not direct damages from breach of the contract but were consequential damages.[216] The Dallas Court of Appeals explained that the cases American Title cited to support its argument that the damages were consequential damages were breach of contract cases, while the present case had been brought under fraud and violations of the DTPA.[217] The DTPA allows recovery for actual damages suffered by the consumer as a result of the deceptive action of the defendant.[218] Under the DTPA, the plaintiff can recover direct damages "for loss that is conclusively presumed to have been foreseen or contemplated by the party as a consequence of its breach of contract or wrongful act under the greater of the 'benefit of the bargain' or the 'out of pocket' measure."[219] The court of appeals determined that the loss was the amount of the loan not repaid by Norris.[220] The fact that Bomac paid this amount over to a third party subject to a contract of which the Title Company was not aware did not change the characterization of this loss.[221]

American Title also challenged the legal sufficiency of the evidence supporting the jury's verdict regarding unconscionability, causation, damages, and conspiracy. As to the unconscionability claim, the DTPA defines an unconscionable action or course of action as "an act or practice which, to a consumer's detriment, takes advantage of the lack of knowledge, ability, experience, or capacity of the consumer to a grossly unfair degree."[222] When determining whether the defendant's conduct is unconscionable, the courts look at the transaction as a whole.[223] "Grossly unfair degree" means a consumer shows that "the resulting unfairness was glaringly noticeable, flagrant, complete and unmitigated."[224] American Title argued that Bomac's level of knowledge of the situation (American Title argued that Bomac did not rely on the altered title commitment but had the altered HUD-1 form showing, among other things, payment

215. *Id.* at 906-07.
216. *Id.* at 910.
217. *Id.* at 911.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.*
222. *Id.* at 914.
223. *Id.*
224. *Id.*

of rent for the personal place of an employee) and its industry sophistication negated the finding of unconscionability against the title company. The court of appeals found that there was enough evidence from which the jury could have determined it was unfair to Bomac, even as an experienced mortgage lender, for American Title to obtain the loan funds by concealing the nature of the transaction, and that such unfairness was glaringly noticeable, flagrant, complete and unmitigated.[225]

In *Main Place Custom Homes v. Honaker*,[226] homeowners sued the construction company (owned by Ron Smith), which built their home, and the construction company's owner after the home and property was damaged because of slope failure and related soil movement. Appellants argued that the facts supported the finding that the sprinkler installer was the primary cause of the slope failure. A plaintiff must prove that the defendant's actions were the "producing cause" of the plaintiff's injuries to prevail on a DTPA case.[227] Producing cause means that the acts of the defendant were both the cause-in-fact and a substantial factor in the injury.[228] There may be more than one producing cause.[229] After reviewing the evidence, the Fort Worth Court of Appeals determined that there were several causes of the injury to the Honakers, and therefore, held that the evidence could support the percentages of responsibility.[230]

One important contention made by the appellants was that the evidence of the case did not legally and factually support the trial court's findings that appellants violated the DTPA. Appellants argued that the evidence did not support a violation of any of the laundry list violations set forth in subsections 5, 7, 12, 13, 20, and 24 of section 17.46 of the DTPA. The DTPA prohibits "[f]alse, misleading, or deceptive acts or practices in the conduct of any trade or commerce."[231] To recover under the DTPA, a plaintiff must show that he or she was a consumer, the defendant engaged in a false, misleading, or deceptive act, and the act constituted a producing cause of economic damages or damages for mental anguish.[232] Section 17.46(b) of the DTPA sets forth the ways in which one can engage in false or misleading practices for purposes of a DTPA claim.[233] The appellants' main argument hinged on characterizing the statements that Smith made to the Honakers about the stability of the home and the soil as statements of opinion and not misrepresentations of fact. Appellants also pointed out that some of the laundry list items required that defendant knowingly and intentionally made the misrepresentations. The appellants argued that the evidence showed Smith had no intent to misrepresent the stability of the home or any knowledge that

225. *Id.*
226. 192 S.W.3d 604 (Tex. App.—Fort Worth 2006, pet. denied).
227. *Id.* at 616.
228. *Id.*
229. *Id.*
230. *Id.* at 619-20.
231. *Id.* at 623.
232. *Id.*
233. *Id.*

what he said was untrue.[234]

The court of appeals noted that misrepresentations are actionable under the DTPA "so long as they are of a material fact and not merely 'puffing' or opinion."[235] The court of appeals looked at three factors in making this distinction: (1) the specificity versus the vagueness of the statement; (2) the comparative knowledge of the buyer and seller; and (3) whether the representation relates to a past or current event or condition versus a future event or condition.[236] The court of appeals found: (1) Smith's direct statements regarding the stability of the home and the property's ability to support the home and the fill dirt were very specific and not vague; (2) Smith as the representative of the homebuilder was in a better position to know about the condition of the home as opposed to the Honakers (who were both physicians); (3) although this was Smith's first multimillion dollar home and he relied on the engineers to interpret the reports given to him by the developer, he had been building homes for several years; and (4) Smith's representations about the home applied both to the present and future condition of the home.[237]

In another point of error, the appellants argued that the evidence was legally and factually insufficient to support a finding that they knowingly committed one of the laundry list violations. A finding of knowledge is a prerequisite to an award for mental anguish under the DTPA.[238] The plaintiff

> must show that the misrepresentations were made with "actual awareness, at the time of the act or practice complained of, of the falsity, deception or unfairness of the act or practice giving rise to the consumers claim, or in an action brought under Subdivision (2) of Subsection (a) of Section 17.50 [breach of express or implied warranty], actual awareness of the act, practice, condition, defect, or failure constituting the breach of warranty, but actual awareness may be inferred where objective manifestations indicate that a person acted with actual awareness."[239]

Smith argued that he did not know that his statements were false and depended on his engineer's interpretation of the engineering reports concerning the land report. The appellees argued that appellants' receipt of an engineering report (not given to appellees but given to appellant by the developer), which highlighted potential problems regarding the stability of the soil and home placement, conferred knowledge of the property conditions on the appellant. The Honakers' engineer, however, testified that the report in question would have raised red flags to most *engineers* familiar with the formations on which the property was built.[240] The

234. *Id.* at 624.
235. *Id.*
236. *Id.*
237. *Id.* at 624-25.
238. *Id.* at 625.
239. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 17.45(9) (Vernon 2002)).
240. *Id.* at 626.

court of appeals held that there was no evidence that anyone other than an engineer would have been alerted by the report to a problem with the soil's stability and sustained this portion of appellants' argument.[241]

E. Premises Liability

In *Rueda v. Paschal*,[242] the Houston Court of Appeals for the First District addressed the interpretation of a statute relating to a landowner's liability for dangerous conditions on the landowner's property that harm contractors or subcontractors. The Paschals owned a ranch and hired a contractor to perform certain construction work on the ranch. The contractor hired a subcontractor, and the subcontractor hired several workers, including Rueda. The subcontractor directed Rueda to retrieve Paschal's tools from Paschal's basement. Rueda used a wooden ladder supplied by Paschal to enter the basement and retrieve the tools. As Rueda climbed back up the ladder from the basement, the ladder slipped and Rueda fell to the concrete floor, sustaining injuries. Rueda sued the Paschals. The Paschals filed a motion for summary judgment, alleging that Rueda had not satisfied the requirements of section 95.003 of the Texas Civil Practice and Remedies Code. The trial court granted the Paschals' motion for summary judgment and Rueda appealed.[243] Section 95.003 of the Texas Civil Practice and Remedies Code ("TCPRC") protects a property owner from liability for personal injury, death or property damage to a contractor, subcontractor or their employees unless: (1) the property owner exercises or retains control over the manner in which the work is performed (other than the commencement, cessation or inspection of work or the right to receive reports); or (2) the property owner had actual knowledge of the danger or condition resulting in personal injury, death or property damage and failed to adequately warn the contractor, subcontractor or their employee.[244]

The court of appeals first addressed the issue of whether the Paschals had knowledge of the danger that caused Rueda's injuries. Rueda claimed that the language of the statute required knowledge by the property owner of a danger *or* condition, and that the Paschals' knowledge of the ladder presented a genuine issue of material fact sufficient to defeat the motion for summary judgment.[245] The court of appeals noted that Rueda did not provide any evidence that the Paschals had knowledge of any danger.[246] The court of appeals cited a prior court decision in concluding that a property owner is only required to warn of dangers and that knowledge of the existence of the ladder did not constitute knowledge of a dangerous condition under section 95.003.[247]

241. *Id.*
242. 178 S.W.3d 107 (Tex. App.—Houston [1st Dist.] 2005, no pet.).
243. *Id.* at 108-09.
244. *Id.* at 109.
245. *Id.*
246. *Id.*
247. *Id.* at 109-10.

Rueda additionally claimed that TCPRC section 95.003 required the Paschals to prove (in connection with and response to the motion for summary judgment) that they lacked knowledge of both the "danger" and "condition" relating to the property. Rueda argued that a property owner is shielded from liability only if it had actual knowledge of the danger *or* condition resulting in the injury, and that at trial Rueda would only have to prove that the Paschals had knowledge of either the danger or condition in order to remove the protections of TCPRC section 95.003 from the Paschals. The court of appeals reviewed prior interpretations of the knowledge component of TCPRC section 95.003 and determined that the prior case law interpreted "danger or condition" to mean a "dangerous condition."[248] Based on prior case law and its review of the statute in context, the court of appeals concluded that the statute requires the property owner to have knowledge of a danger or dangerous condition in order for the protections of the statute to be removed.[249]

Finally, Rueda argued that the Paschals were required to establish the satisfaction of all of the elements of TCPRC section 95.003 as an affirmative defense in order to be shielded from liability. The court of appeals determined that the burden of proof in showing "control" and "knowledge" by the property owner under TCPRC section 95.003 rests with the plaintiff, and not the defendant.[250] Accordingly, the defendant has the burden of proving the applicability of chapter 95 of TCPRC to the claim, but the plaintiff has the burden of proving control and knowledge under TCPRC section 95.003.[251]

In *Parker v. 2081, Inc.*,[252] the Houston Court of Appeals for the Fourteenth District considered whether the Dram Shop Act (section 2.03 of the Texas Alcoholic Beverage Code) precluded the common law cause of action for premises liability. Parker, an intoxicated patron of a pool hall, was asked by the manager to leave the pool hall (owned by 20801, Inc. ["20801"]), and later engaged in a fight with Griffin, another intoxicated pool hall patron, in the pool hall parking lot, resulting in serious injuries to Parker. Parker sued 20801 under the Dram Shop Act and for premises liability, alleging that 20801 breached its duty to Parker to exercise reasonable care. Parker alleged four ways that 20801 was negligent in connection with his injuries. 20801 filed a motion for summary judgment, arguing, among other points, that the Dram Shop Act prohibited Parker's common law causes of action. The trial court granted 20801's motion for summary judgment (without specifying the grounds for such grant), and Parker appealed.[253]

The Dram Shop Act imposes liability on providers of alcoholic beverages for the actions of their intoxicated customers under certain circum-

248. *Id.* at 110.
249. *Id.* at 110-11.
250. *Id.* at 111.
251. *Id.*
252. 194 S.W.3d 556 (Tex. App.—Houston [14th Dist.] 2006, pet. granted).
253. *Id.* at 558-59.

stances described in sections 2.01 and 2.02 of the Texas Alcoholic Beverage Code.[254] However, section 2.03 of the Dram Shop Act states that the liability of alcohol providers under the Dram Shop Act is "in lieu of common law or other statutory law warranties and duties" and is the "exclusive cause of action" for providing an alcoholic beverage to a person eighteen years of age or older.[255]

After explaining the causes of action in the Dram Shop Act, the court of appeals noted that no other court had addressed the "exclusivity" language in the Dram Shop Act in the context of premises liability.[256] However, the court of appeals analyzed Texas Supreme Court and various other court decisions involving both the Dram Shop Act and other common law causes of action, and determined that courts have "clearly" held that the Dram Shop Act prohibits common law causes of action against an alcohol provider that is liable under the Dram Shop Act.[257] While the court of appeals recognized that a defendant has a duty to prevent the criminal acts of third parties when the criminal conduct is foreseeable, it held that the plain language of the Dram Shop Act, stating that the liability of an alcohol provider is "in lieu of common law or other statutory law warranties and duties," precluded Parker's premises liability claim against 20801.[258]

F. Brokers

There were no noteworthy cases concerning brokers for this Survey period.

254. *Id.* at 560.
255. *Id.*
256. *Id.*
257. *Id.* at 560-62.
258. *Id.* at 562-63.