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Real Property

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THIS article covers cases from 85 S.W.3d through 114 S.W.3d, 315 F.3d 533 through 345 F.3d 909, and 241 F. Supp. 2d 715 through 276 F. Supp. 2d 1382, which the authors believed were noteworthy by adding to the jurisprudence on the applicable subject. The authors acknowledge the assistance of Lorin Combs, Craig Davis, Noelle Garsek, Ben Herd, Carrah Key, Katie Kildebeck, Barbara LeBarron, Jason Marshall, Rob Pivnick, Bill Weinberg, Wade Williams and Steven Woods for the initial review and drafting of a portion of this article.

I. MORTGAGES, LIENS AND FORECLOSURES

West Trinity Properties, Ltd. v. Chase Manhattan Mortgage Corp.,[1] involved a dispute between two parties who purchased the same property at two different, competing foreclosure sales. The first lienholder, Chase Manhattan Mortgage Corporation, foreclosed on December 7, 1999, having posted the property for foreclosure during the debtor's pending bankruptcy proceeding. Chase claimed that it never received notice of the bankruptcy. In March, 2000, the homeowner's association, having obtained a judgment lien for association dues prior to the debtor's bankruptcy filing, foreclosed its lien and the property was sold to West Trinity Properties at that foreclosure sale. Chase, having subsequently learned of the debtor's bankruptcy filing, filed a motion with the bankruptcy court to reinstate the debtor's case for the purpose of granting Chase relief from the automatic stay. The motion was dismissed, and Chase rescinded and cancelled the recorded foreclosure sale. In a separate suit, the lien priority of West Trinity and Chase was argued, with the court holding that Chase's first lien was superior to the homeowners association's lien; therefore, West Trinity acquired title to the property subject to the Chase first lien debt.[2]

Hawk v. E.K. Arledge, Inc.,[3] also involved purchasers of competing foreclosure sales of the same property. Arledge, the purchaser at a tax lien sale, sued Hawk, the purchaser at a subsequent trustee's sale, to quiet title to the land. From February, 1988, until June 3, 1997, the date of the tax lien sale, the property in question was subject to deed of trust liens. The Resolution Trust Corporation (RTC) was appointed in 1990 as receiver of the owner of the various notes and deeds of trust. After various conveyances, the notes and liens were eventually assigned to Hawk who foreclosed on the liens in 1999. Various taxing authorities filed suit to collect delinquent ad valorem taxes, which was eventually tried in 1997 and resulted in a 1997 sheriff's sale of the property to Arledge.[4] Hawk

1. W. Trinity Props., Ltd. v. Chase Manhattan Mortgage Corp., 92 S.W.3d 866 (Tex. App.—Texarkana 2002, no pet.).

2. *Id.* at 867-69.

3. Hawk v. E.K. Arledge, Inc., 107 S.W.3d 79 (Tex. App.—Eastland 2003, pet. denied).

4. *Id.* at 81-82.

argued that the tax foreclosure was ineffective against its interest because of 12 U.S.C. § 1825(b)(2), a part of the Financial Institutions Reform, Recovery and Enforcement Act, which provided that, "[n]o property of the [RTC] shall be subject to levy, attachment, garnishment, foreclosure, or sale without the consent of the [RTC], nor shall any involuntary lien attach to the property of the [RTC]."[5] The court rejected Hawk's argument, explaining that the RTC was not the owner of the deed of trust liens at the time of foreclosure of the tax liens, and Hawk could not assert such RTC defense on its behalf. The time of enforcement, not the time of attachment, of the liens, was the relevant point of time for determining application of such statutory prohibition.[6]

Walker v. Geer[7] involved a conflict between a judgment lien and the limitations period from adverse possession. In 1995, Walker took a $296,000 judgment against a debtor and duly filed an abstract of judgment. The debtor subsequently sold the unimproved land in 1996, with Greer acquiring the property in 1999. In 2000, after a house had been constructed on the land, Walker filed suit to foreclose the judgment lien on the property.[8] The court ruled that Walker's claim was time-barred by the three year statute of limitations set forth in Texas Civil Practices and Remedies Code Annotated Section 16.024, where the purchaser shows peaceable adverse possession under color of title for three years or more. The three year clock starts when the creditor knew or, with the exercise of ordinary care, should have known about the sale of the property. The evidence showed that Walker knew of the sale for nearly four years prior to bringing suit.[9] Walker also made claims of civil conspiracy and fraudulent conveyance. Evidence that the title company and purchaser knew of Walker's judgment lien, was, in itself, insufficient to show an intent to hinder, delay or defraud, and there was no evidence that any of the property owners took any action to prevent Walker from foreclosing the lien or otherwise hinder, delay or defraud Walker in protecting her interests.[10]

In *N.P., Inc. v. Turboff*,[11] the Texas Supreme Court dealt with a developer's claim to payment under a contract with the Harris County Municipal Utility District (MUD), after the developer's property had been sold at foreclosure. In 1984, Turboff entered into a contract with the MUD for the construction of water and sewer facilities on a 135 acre tract that Turboff was developing. The contract provided that Turboff would build the facilities and convey them to the MUD in exchange for payment. Turboff financed the acquisition and development costs by a loan from First Texas Savings Association. Before Turboff completed construction

5. *Id.* at 82.
6. *Id.* at 83.
7. Walker v. Geer, 99 S.W.3d 244 (Tex. App.—Eastland 2003, no pet.).
8. *Id.* at 245-46.
9. *Id.* at 247.
10. *Id.* at 247-48.
11. N.P., Inc. v. Turboff, 111 S.W.3d 40 (Tex. 2003).

of the utility facilities, First Texas declared the loan to be in default and foreclosed on the property. Turboff disputed and the claims were eventually settled by a written agreement whereby First Texas would keep the land, but Turboff would retain any payment rights under the 1984 contract with the MUD. In 1995, N.P., Inc. acquired the property. The deed to N.P., Inc. expressly excluded any payment rights under the MUD contract. N.P., Inc. completed construction of the utility facilities and entered into its own contract with the MUD. In 1998, Turboff sued N.P., Inc. seeking a declaratory judgment that Turboff, not N.P., Inc., was entitled to payment from the MUD.[12] On appeal, the Texas Supreme Court explained that the right to payment under the MUD contract was not an interest running with the land. While an interest in utility facilities may run with the land, the 1984 MUD contract right was personal and did not run with the land. Furthermore, because Turboff was not able to complete performance under the MUD Contract due to the foreclosure, it was not entitled to payment from the MUD.[13]

In *TMS Mortgage, Inc. v. Golias*,[14] a second lienholder sued a first lienholder for failure to provide notice to the second lienholder of a motion to lift stay. Golias sold her home to the Grants, who financed the acquisition by a first loan from TMS and a second lien loan from Golias. The Grants defaulted under both loans and filed for bankruptcy. TMS filed a lift stay motion, but failed to notify Golias, because the Grants did not list Golias as a creditor in their bankruptcy filings. After TMS's foreclosure, Golias sued TMS, arguing that Local Bankruptcy Rule 9013 of the Eastern District of Texas requires a party seeking relief from the automatic stay to notify other parties claiming a security interest in the same property.[15] The court ruled that there is no legal duty of a superior lienholder to protect the security interest of a junior lienholder, distinguishing cases involving bankruptcy trustees whose fiduciary duties are inherent in the function of a bankruptcy trustee. Although TMS may have violated the bankruptcy rules, the Court refused to find liability because of the failure to comply with applicable bankruptcy procedure in the absence of a contractual or fiduciary relationship or intentional or malicious conduct.[16]

II. NOTES, LOAN COMMITMENTS AND LOAN AGREEMENTS

Parker v. Dodge[17] involved the determination of the applicable statute of limitation for a note. Parker executed a $120,000 promissory note requiring monthly interest payments of $1,000 on the first day of each month during a stated ten-year period and a balloon payment of $120,000

12. *Id.* at 41-43.
13. *Id.* at 43-46.
14. TMS Mortgage, Inc. v. Golias, 102 S.W.3d 768 (Tex. App.—Beaumont 2003, no pet.).
15. *Id.* at 769-71.
16. *Id.* at 771-72.
17. Parker v. Dodge, 98 S.W.3d 297 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

on October 1, 2000, the tenth anniversary. Parker made only one payment to Dodge in December, 1990. After maturity of the note on June 28, 2001, Dodge filed a petition seeking damages for Parker's failure to pay, and the court granted Dodge's summary judgment motion. On appeal, Parker argued that the note was a demand note and that the ten-year statute of limitations had run on the entirety of Dodge's claim pursuant to Texas Business and Commerce Code Section 3.118(b). A demand note is one payable on demand or at site, at the will of the holder, or one that does not state any time of payment.[18] Since there was a specific date for payment of interest and principal, the note was not a demand note and therefore was instead subject to a six-year statute of limitation (based on no demand for payment and no payment of either principal or interest for a continuous period of ten years) pursuant to Section 3.118(a). Dodge's claim to payments within the six-year statute of limitations was upheld, but not Dodge's claim to payments earlier than the six-year statute of limitations.[19] Parker also raised the affirmative defense of laches since Dodge had not demanded payment for the entire ten-year term of the note. A laches claim requires a showing of an unreasonable delay in asserting a legal or equitable right and a good faith change in position to the detriment of the claimant in reliance upon the delay. The failure of Dodge to make demand on a note with periodic payments was not an unreasonable delay. Furthermore, Parker's claim that he changed his financial position due to "getting older, combined with a lesser ability to work" was not a good faith change of position due to any reliance upon a delay by Dodge.[20]

In *Kent v. Citizens State Bank*,[21] in order to avoid foreclosure action on two defaulted notes held by Citizens State Bank, the Kents executed a renewal, extension and consolidation note that included a provision disallowing the assignment of the Kents' rights, duties and obligations. A deed in lieu of foreclosure was also executed by the Kents in favor of the bank. The loan agreement allowed for the filing of the deed by Citizens State Bank in the event that the Kents defaulted on the consolidation note, provided that the bank would attempt to market the property for twelve months and apply the proceeds of any sale to the consolidation note and pay to the Kents any surplus received. The Kents subsequently defaulted under the note and the deed was filed by the bank. Shortly after filing the deed in lieu of foreclosure, Citizens State Bank conveyed the property to another lender, subject to all agreements between the Kents and Citizens State Bank. Prior to the end of the twelve-month marketing period, the Kents negotiated the sale of the collateral realty to a third party who presented a check for the balance owed under the note to Citizens State Bank. Not being the current holder of the note, Citizens

18. TEX. BUS. & COM. CODE ANN. § 3.108(a).
19. *Parker*, 98 S.W.3d at 300-01.
20. *Id.* at 301.
21. Kent v. Citizens State Bank, 99 S.W.3d 870 (Tex. App.—Beaumont 2003, pet. denied).

State Bank refused to accept the check. The Kents argued that obligations under the loan agreement were not transferable by Citizens State Bank and that it should have accepted payment.[22] The court found that the non-assignability clause applied to the Kents and did not limit Citizen State's Bank rights of assignment and therefore, the assignment by Citizens State Bank was valid.[23]

Construction of a home equity constitutional provisions was presented in *Vincent v. Bank of America*.[24] The loan agreement evidencing the loan required that the payments were to be applied as if received on the first day of the month, regardless of when actually received. The payment was to be applied first to interest accrued on the assumed date of payment, second to scheduled principal reduction, third to any late charges, and the balance of the payment was to be applied to principal not yet paid. The payments were not applied by Bank of America as required by the loan agreement resulting in the accrual of interest in excess of the monthly interest amount for several months. The Vincents claimed that the breach by Bank of America violated Texas Constitution article XVI, Section 50(a)(6)(L)[25] and that the interest and principal due under the note should be forfeited. The court determined that the Texas Constitution dictates forfeiture of principal and interest only if the loan, as documented, violates a constitutional prohibition, and not upon a breach of a properly documented constitutionally mandated provision.[26]

In *Montgomery First Corp. v. Caprock Investment Corp.*,[27] a noteholder's summary judgment motion in a collection action was denied due to the holder's failure to establish the applicable interest rate, and therefore, the amount due on the note. Montgomery First Corp. (Montgomery) executed a note payable to Texas Bank & Trust Co. (TB&T). The note featured a variable interest rate of one percent over the TB&T base rate. TB&T failed and its assets were transferred to the FDIC; subsequently, Caprock Investment Corp. (Caprock) became the holder of the note. After Montgomery defaulted on the note, Caprock filed suit to collect. The trial court granted Caprock's summary judgment motion, and Montgomery appealed.[28] On appeal, the court noted that a summary judgment movant on a note collection matter must establish, among other things, that a certain balance is due and owing on the note. In order to establish this element, Caprock offered an affidavit explaining that the balance due was $395,394.60, with principal of $154,349.60 and interest of

22. *Id.* at 872-74.
23. *Id.* at 873-74.
24. Vincent v. Bank of Am., 109 S.W.3d 856 (Tex. App.—Dallas 2003, pet. denied).
25. This constitutional section provides that a home equity loan should be scheduled to be repaid in equal successive monthly installments beginning no later than two months from the date the extension of credit is made, and each of such monthly payments must equal or exceed the amount of accrued interest as of the date of the scheduled installment.
26. *Vincent*, 109 S.W.3d at 863-63.
27. Montgomery First Corp. v. Caprock Inv. Corp., 89 S.W.3d 179 (Tex. App.—Eastland 2002, no pet.).
28. *Id.* at 181-82.

$241,045.44. Attached to the affidavit was a chart that listed various interest rates including a "TB&T Rate." The affidavit did not refer to the chart, nor did it contain any other explanation of the interest rate used to calculate the claimed balance due. The court presumed that the TB&T Rate may have been used in the calculation, but noted that after TB&T failed, the TB&T Rate no longer existed. The court explained that when "a variable interest rate in a note is tied to a failed bank's prime or base rate, 'the trier of fact should apply a reasonable rate of interest, considering the facts of each case.'"[29] Because reasonableness is generally a fact question and there was no summary judgment evidence on this issue, the court reversed the lower court's judgment and remanded for further proceedings.[30]

Diversified Financial Systems, Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C.,[31] involves the ownership of a note. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C. (Hill) executed a $50,000.00 revolving promissory note in favor of Commonwealth Bank. The bank failed and the FDIC acquired the note. Diversified Financial Systems, Inc. (DFS) later purchased the note from the FDIC, and when Hill failed to pay the note, DFS filed suit. Hill challenged DFS's suit on the basis that, because there was no written assignment of the note from Commonwealth Bank to the FDIC, there was a break in the chain of title, and therefore, DFS was not the holder of the note.[32] The court first noted that, because the note expressly provided for multiple advances on a revolving basis, the note was not for a fixed sum of money and was not a negotiable instrument according to Section 3.104(a) of the Texas Business and Commerce Code. The court then looked to 12 U.S.C. § 1821(d)(2)(A), which provides that "[t]he [FDIC] shall, as conservator or receiver, and by operation of law, succeed to - (i) all rights, titles, powers, and privileges of the insured depository institution over which it is appointed."[33] The court then concluded that, due to the federal law, an assignment is not required to transfer ownership of a note, even a non-negotiable note, from a financial institution to the FDIC when the financial institution is placed in receivership.[34]

Hill also challenged DFS on the basis that the four-year statute of limitations provided by Texas Civil Practice and Remedies Code Section 16.004(a)(3) expired prior to the initiation of the suit, barring DFS's claim. The court ruled in favor of DFS, noting that pursuant to 12 USC § 1821(d)(14)(A), "the applicable statute of limitations with regard to any action brought by the [FDIC] as conservator or receiver shall be . . . the

29. *Id.* at 186.

30. *Id.* at 187.

31. Diversified Fin. Sys., Inc. v. Hill, Heard, O'Neal, Gilstrap & Goetz, P.C., 99 S.W.3d 349 (Tex. App.—Forth Worth 2003, no pet.).

32. *Id.* at 352-54.

33. *Id.* at 357.

34. *Id.* at 358.

[six]-year period beginning on the date the claim accrues."[35] The court further noted that this benefit extends to the purchasers of assets from the FDIC.[36]

The case of *Shepard v. Boone*[37] dealt with a homeowner's suit to set aside a wrongful foreclosure on the grounds that the creditor was not the owner and holder of the note. In 1986, Boone signed a contract for improvements to his home, evidenced by a $45,011.00 promissory note and secured by a deed of trust covering his home. The original holder of the note and deed of trust executed an assignment to Shepard that conveyed all of the holder's interest in the "Contract for Improvements" and the "Deed of Trust" but did not assign the note. Shortly after the assignment, Shepard sent Boone a letter explaining that he had purchased the note and deed of trust. After a default and foreclosure, Boone filed suit to set aside the sale on the grounds that Shepard was not the owner and holder of the note at the time of the foreclosure sale. The trial court ruled in favor of the homeowner and Shepard appealed.[38] On appeal, the court stressed that Texas Business and Commerce Code Section 3.201 provides that the transfer or "negotiation" of a note requires "transfer of possession of the instrument and its endorsement by the holder."[39] In this instance, there was no written endorsement or written assignment of the note. In certain circumstances a note can be transferred without a written assignment or proper endorsement, so long as there is proof of the transaction through which the note was acquired. In the present case, Shepard did not present any proof of the transfer other than the written assignment which neglected to mention the note, which was insufficient; hence, the foreclosure was wrongful.[40]

III. GUARANTIES

In *Material Partnerships, Inc. v. Ventura*,[41] the court discussed whether a particular guaranty constituted a personal guaranty of an officer of a company and the elements necessary to create a binding guaranty. Lopez, the general manager of Sacos Tubulares, executed a guaranty which stated "I, personally, guaranty all outstandings [sic] and liabilities of Sacos Tubulares with Material Partnership as well as future shipments."[42] When Sacos failed to pay, the vender brought suit against Sacos and Lopez, personally, seeking to enforce the guaranty. Lopez asserted that the guaranty was ambiguous as to whether Lopez was personally bound

35. *Id.* at 359.
36. *Id.*
37. Shepard v. Boone, 99 S.W.3d 263 (Tex. App.—Eastland 2003, no pet.).
38. *Id.* at 264-65.
39. *Id.* at 265.
40. *Id.* at 266-67.
41. Material P'ships v. Ventura, 102 S.W.3d 252 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
42. *Id.* at 256.

under its terms.[43] The Court determined that the language "I . . . personally, guaranty" was unambiguous and evidenced a clear intent to create personal liability on Lopez. The Court also evaluated whether the document executed by Lopez contained the requisite elements necessary to create a binding guaranty. The Texas Statute of Frauds provides that a promise or agreement is not enforceable unless it is in writing and is signed by the person charged with such promise.[44] Case law requires that a guaranty must identify the parties involved, an intent to guaranty an obligation, a description of the obligation and must be supported by consideration. The Court easily determined that these elements were met: the language "I personally, guaranty" was sufficient to evidence an intent to guaranty an obligation, the parties were clearly identified, the obligation was adequately identified as "all outstandings [sic] and liabilities of Sacos Tubulares with Material Partnerships as well as future shipments," and consideration was evidenced by the vendor resuming shipments after Lopez executed the guaranty. As such, the guaranty was valid and enforceable against Lopez personally.[45]

IV. USURY

In *Garcia v. Texas Cable Partners, L.P.*,[46] Garcia, a cable-television subscriber, brought an attempted class-action suit against his cable provider claiming that a five dollar ($5) late fee constituted usurious interest. The trial court granted the cable company's motion for summary judgment on the ground that the late fee was not usurious as a matter of law.[47] On appeal, the court affirmed the trial court's decision. As the source of Texas's usury statutes, the court examined the Texas Constitution, which grants the legislature the "authority to classify *loans and lenders*, license and regulate *lenders*, define interest and fix maximum rates of interest."[48] The court stated that for usury laws to apply, there must be an overcharge by a lender for the use, forbearance or detention of money. The court examined several cases involving claims of usury in the context of rental agreements, each holding that late fees charged in such agreements were not interest. Although not involving a rental agreement, the Court also looked to the case of *First Bank v. Tony's Tortilla Factory, Inc.*,[49] in which the Texas Supreme Court concluded that where a bank charged an NSF fee for handling bad checks, and such fee was charged to all customers in the same amount and had no relationship to the amount of funds advanced, the NSF fee was consideration for the processing of the bad checks, rather than for the funds advanced. *First*

43. *Id.* at 255-57.
44. TEX. BUS. & COM. CODE ANN. § 26.01(a)(b) (Vernon 2002).
45. *Ventura*, 102 S.W.3d at 261-62.
46. Garcia v. Tex. Cable Partners, L.P., 114 S.W.3d 561 (Tex. App.—Corpus Christi 2003, no pet.).
47. *Id.* at 563.
48. *Id.* at 564 (quoting TEX. CONST. art. XVI, § 11).
49. First Bank v. Tony's Tortilla Factory, Inc., 877 S.W.2d 285 (Tex. 1994).

Bank held that the NSF fee was not interest on the amount advanced to cover the bad checks.[50]

Because a notice was sent to subscribers that it was not providing credit and that the late fee was charged to all customers regardless of the amount owed, the Court found that the late fee was consideration for the additional cost of processing the late payments. Since the late fee was consideration for services other than a lending transaction, the late fee was not for the use, forbearance or detention of the cable provider's money, and therefore, was not interest and could not support a claim for usury.[51]

In re CPDC, Inc.,[52] addressed the issue of what constitutes "actual discovery" under what is now Section 305.103 of the Texas Finance Code.[53] In August 1994, CPDC, Inc., as borrower, in connection with the acquisition of unimproved real property and stock in a related utility company, gave the seller a $1,095,000 note secured by a deed of lien on the realty and a $200,000 note secured by a security interest in the stock of the utility company. Additionally, CPDC entered into a security services consulting agreement with Ideal Systems, an affiliate of Zer-Ilan. A few weeks after the documents were executed, Zer-Ilan's attorney concluded that the interest rate was usurious and the parties entered a modification retroactively reducing the interest rate from 18% to 10% and reiterating their intention not to charge usurious interest. After a payment default and during extended workout negotiations, in April 1995, Zer-Ilan's attorney sent a notice letter renouncing Zer-Ilan's right to receive any usurious interest and Ideal waived its rights to compensation under the consulting agreement. CPDC subsequently filed bankruptcy and the Chapter 11 trustee filed a complaint against Zer-Ilan and Ideal alleging, among other things, usury. On appeal to the Fifth Circuit, CPDC argued that Zer-Ilan and Ideal did not cure the usury violation within sixty days of actually discovering the violation, as required by statute.[54]

CPDC contended that actual discovery occurs when the lender discovered the fact forming the basis of a usury violation, relying on two events: first, the August 16, 1994 advice of usury from Zer-Ilan's attorney leading to the modification, and second, the vesting of rights to payment under the consulting agreement which occurred on October 17, 1994. Apparently, CPDC did not allege (or attempt to prove) that Zer-Ilan had subjective knowledge of the usury violation. The court found the statute unambiguous and that "actually discovered" may not be interpreted in a

50. *Id.* at 563-64.

51. *Id.* at 563-66.

52. *In re* CPDC, Inc., 337 F.3d 436 (5th Cir. 2003).

53. Although *In re CPDC, Inc.* was decided under TEX. REV. CIV. STATS. ANN. art. 5069-1.06(4)(A-B) (Vernon 1993), the applicable text of the statute remains unchanged as codified in TEX. FIN. CODE ANN. § 305.103 (Vernon 1998 & Supp. 2004).

54. Such statute provides, in relevant part, that a person has no usury liability if: "within 60 days after the date the person actually discovers the violation the person corrects the violation." TEX. FIN. CODE ANN. § 305.103 (Vernon 1998 & Supp. 2004)

manner that refers to the date when an ordinarily prudent person should have discovered the violation through reasonable diligence, but rather occurs on the date of the discovery of the violation in fact.[55]

The court stated that "concerns" which were expressed by Zer-Ilan's attorneys around the time the notes were executed that the transaction might be usurious were not sufficient to constitute "actual discovery." Although not expressly noting what does constitute actual discovery, the court did state that neither the creditors nor their attorney "concluded" that usury was present.[56] Consequently, it appears that if the creditor or its attorney reaches a conclusion that usury has occurred, the sixty-day time period commences. As to what lesser facts would constitute "subjective discovery" will have to be addressed in further decisions or statutory enactments.[57]

V. DEBTOR/CREDITOR

National Loan Investors, L.P. v. Robinson[58] dealt with an alleged fraudulent conveyance. National Loan Investors, L.P. (NLI) was the holder of a note executed by Robinson. Subsequent to executing the note, Robinson transferred certain stock and real estate to a related entity. NLI filed suit to set aside the transfers as fraudulent conveyances. At trial, NLI offered evidence to demonstrate that, from a creditor's perspective, Robinson did not receive equivalent value for the transfers and that Robinson was insolvent when the transfers were made. The trial court refused to admit the evidence on the grounds that value and solvency must be determined from the debtor's perspective.[59] On appeal, the court cited Texas Business & Commerce Code Section 24.006(a), which provides in part that "a transfer is fraudulent as to a creditor whose claim arose before the transfer was made (1) if the debtor made the transfer 'without receiving a reasonably equivalent value in exchange,' and (2) 'the debtor was insolvent at that time or . . . became insolvent as a result of the transfer.'"[60] The court noted that fraudulent conveyance laws exist for the benefit of creditors and it is well settled in Texas that the creditor's, not the debtor's, perspective is the relevant focal point when determining issues of value and solvency.[61]

The question of whether the execution of a deed of trust to secure an antecedent debt constituted a fraudulent conveyance was presented in *First National Bank of Seminole v. Hooper*.[62] On January 4, 1990, First National Bank of Seminole (Bank) loaned Ernest Thornton $300,000 to

55. *In re* CPDC, Inc., 337 F.3d at 442.
56. *Id.* at 443.
57. *Id.*
58. Nat'l Loan Investors, L.P. v. Robinson, 98 S.W.3d 781 (Tex. App.—Amarillo 2003, pet. denied).
59. *Id.* at 782-83.
60. *Id.* at 783 (quoting TEX. BUS. & COM. CODE ANN. § 24.006(a)).
61. *Id.* at 784-85.
62. First Nat'l Bank of Seminole v. Hooper, 104 S.W.3d 83 (Tex. 2003).

consolidate his debt in connection with a twenty-eight-mile gas pipeline system. To secure the debt, Thornton pledged security interests in accounts, equipment and general intangibles, but not any of the pipe line easements. In 1993, Hooper obtained a fraud judgment against the Debtor. Two weeks later, Thornton executed a deed of trust in favor of the Bank, post-dated as of January 4, 1990 (the original loan date), which covered the pipeline easements for the entire pipeline system. Hooper sued the Bank alleging that the execution of the deed of trust lien was a fraudulent conveyance under the Texas Uniform Fraudulent Transfer Act (TUFTA).[63] The trial court found that Thornton, but not the Bank, intended to hinder and defraud Hooper when he granted the deed of trust lien, that Thornton was insolvent when the transfer occurred, and that the lien was not exchanged for reasonably equivalent value. The court of appeals affirmed the trial court's judgment.[64] On appeal to the Supreme Court of Texas, the court noted that, pursuant to Section 24.009(a) of TUFTA, notwithstanding a debtor's fraudulent intent, a transfer is not voidable against a person who received the transfer in good faith and for reasonably equivalent value. Therefore, the focus was whether reasonably equivalent value was given. TUFTA Section 24.004(a) specifically provides that value is given for a transfer to secure an antecedent debt. With respect to the requirement of reasonably equivalent value, both the trial court and the court of appeals considered the asset transferred to be the entire pipeline system valued at $700,000. The supreme court disagreed, explaining that what was transferred was not a tangible asset but merely a lien that had a defined value when it was created. The deed of trust did not convey the pipeline to the Bank but merely perfected a security interest in the pipeline up to the amount of Thornton's debt.[65] Accordingly, the value of the asset transferred was no more than Thornton's pre-existing debt, and the value of the actual collateral is irrelevant. All other creditors will still have the opportunity to realize the value of the collateral in excess of the secured party's debt.

In *Flores v. Millennium Interests, Ltd.*,[66] a landowner that signed a contract for deed to buy a vacant lot sued the seller and its account servicer for violations of the Fair Debt Collections Practices Act (FDCPA).[67] In 1998, Flores executed a contract for deed. In 2002, Flores became delinquent on his regular monthly payments and received several late payment notices from Millennium through its account servicer, Concord Servicing. Flores alleged that the late payment notices failed to comply with the FDCPA.[68] The court first noted that the FDCPA regulates companies that regularly collect debts for third parties. A company collecting debts in connection with loans that were not in default when the company be-

63. TEX. BUS. & COM. CODE ANN. §§ 24.001-24.012 (Vernon 2002).
64. *Hooper*, 104 S.W.3d at 84-85.
65. *Id.* at 86-87.
66. Flores v. Millennium Interests, Ltd., 273 F. Supp. 2d 899 (S.D. Tex. 2003).
67. 15 U.S.C. § 1692(a); TEX. PROP. CODE ANN. § 5.077 (Vernon 2003).
68. *Flores*, 273 F. Supp. 2d at 899-900.

gan servicing the loans, however, is not a "debt collector" under the FDCPA. Because Concord Servicing was providing several account management services to the seller long before Flores' default, Concord Servicing was not subject to the FDCPA, and therefore, did not need to furnish any FDCPA mandated data in its notice letters. Although the court already determined that the FDCPA was inapplicable, the court addressed Flores' contention that the various notice letters omitted certain consumers' rights disclosures and therefore, violated the FDCPA. The court explained that the first letter actually did comply with the FDCPA and that as long as the initial letter contained the required disclosures, subsequent letters do not need to repeat the information.[69] With respect to Texas Property Code Section 5.077, Flores argued that Millennium's annual account status notices to Flores for 2001 and 2002 failed to contain certain necessary information, such as the number of payments remaining and the amount still owed, thereby entitling Flores to statutory damages. The court ruled that statutory damages are only available when a seller of a contract for deed fails to send an annual notice, not when the notice merely omits certain information. In any event, the court noted that Flores neither pleaded nor suffered actual harm from Millennium's omission.[70]

VI. PURCHASER/SELLER

The issue in *Joppich v. 1464-Eight, Ltd.*[71] involved the adequacy of consideration of an option contract. 1464-Eight, Ltd., a property developer, sold property to Joppich, and the parties simultaneously executed an option contract granting 1464-Eight, Ltd. an option to repurchase the property if Joppich did not begin construction within a certain period of time. Since construction was not timely commenced, 1464-Eight, Ltd. exercised its right to repurchase the property. Joppich refused to perform and 1464-Eight, Ltd. filed suit for specific performance. The option contract contained standard consideration language: "In consideration of the sum of Ten and No/100 ($10.00) Dollars ('Option Fee') paid in cash by Developer, the receipt and sufficiency of which is hereby acknowledged and confessed."[72] Joppich alleged the $10 consideration was never paid, raising a fact issue. The court held that this language was a mere recitation of consideration, which, as a statement of fact, could be contradicted by parol evidence; therefore, summary judgment was improper. The court distinguished this case from other cases in which consideration was given in addition to the stated dollar amount.[73] If the option contract had included obligations on the part of 1464-Eight, Ltd., such would have been additional consideration and 1464-Eight, Ltd. probably would have pre-

69. *Id.* at 900-01.
70. *Id.* at 901-02.
71. Joppich v. 1464-Eight, Ltd., 96 S.W.3d 614 (Tex. App.—Houston [1st Dist.] 2002, pet. granted).
72. *Id.* at 615 n.1.
73. *Id.* at 616-17.

vailed. Consequently, if the contract does not obligate the optionee to do anything or does not provide for non-monetary consideration, actual payment of the stated monetary consideration is mandated. As a practical matter, it may have been prudent for 1464-Eight, Ltd. to include the right of repurchase in the deed conveying the property to Joppich, so that the sale of the land would provide the additional consideration.

Adequacy of consideration was also addressed in *Carrico v. Kondos*.[74] Carrico sold property to Kondos. Three months later, Carrico and Kondos executed an agreement (ROFR) granting Carrico a right of first refusal to purchase that same property upon the terms of any offer Kondos received from a third party. Under the ROFR, Kondos was required to give Carrico notice of any bona fide third-party offer to purchase the property. Several years later, Kondos received an offer to purchase the property from Robbins, who later purchased the property. Kondos did not send Carrico notice of the offer until after the property was sold to Robbins. Robbins sued to quiet title and obtain a declaratory judgment that Robbins owned the property free and clear of any claim from Carrico. Carrico and Robbins settled that claim, but Carrico brought a cross-claim against Kondos for breach of the ROFR. Kondos obtained a summary judgment on the ground that Carrico's action was barred by the election of remedies doctrine.[75] The appellate court held that the election of remedies doctrine did not apply, and that whether the consideration stated in the ROFR (which the court quoted as stating "for and in consideration of Ten and No/100 Dollars ($10.00) and other good and valuable consideration") was actually paid was a fact question and could be controverted by evidence outside of the four corners of the agreement.[76] Like in *Joppich, infra*, the court focused on the fact that this was a "recital of acknowledgment of consideration" and was just a statement of fact.[77]

De La Cruz v. Brown,[78] is one of three cases in this article involving contracts for deed.[79] The *De La Cruz* case involved statutory construction of Texas Property Code Section 5.102 (which was amended in 2001 and renumbered as Section 5.079), which was a matter of first impression in Texas. Section 5.102(a) required [which subsection was not amended when renumbered as Section 5.079(a)] that a seller under a contract for deed record the deed within thirty days after the seller receives the purchaser's final payment. Section 5.102(b) set forth a statutory penalty sellers are required to pay if Section 5.102(a) is violated. Since the subject cause of action occurred prior to September 1, 2001, the court interpreted

74. Carrico v. Kondos, 111 S.W.3d 582 (Tex. App.—Fort Worth 2003, pet. denied).

75. *Id.* at 584.

76. *Id.* at 586.

77. *Id.* at 587.

78. De La Cruz v. Brown, 109 S.W.3d 73 (Tex. App.—El Paso 2003, pet. granted).

79. In a contract for deed, the seller provides acquisition financing, but title to the property passes only after all required periodic payments have been made to the seller.

Section 5.102 rather than Section 5.079.[80]

De La Cruz purchased property from Brown through a contract for deed, in which the final payment was made on June 9, 1997. Brown did not record the deed until March 30, 2001, after De La Cruz sued for damages under Section 5.102. Brown contended that Section 5.102 did not give De La Cruz a private cause of action and that the penalty could only be sought by the Texas Attorney General. The trial court agreed and granted Brown's motion for summary judgment.[81] The appellate court considered the legislative history of this statute as originally enacted and amended. Originally, the statue was introduced to address "colonias," which were generally substandard subdivisions along the Texas—Mexico border; the statute covered certain geographical and income brackets; and referred to the remedy as a "penalty." Revisions introduced in 2001 removed the income and geographical brackets, extending the provisions statewide, and replaced the "penalty" language with "liquidated damages" and a provision for recovery of reasonable attorneys' fees. Brown contended that the language of the original enactment, which governed in this case, only authorized the Texas Attorney General to recover penalties and did not provide for a private cause of action, which was permitted only after the 2001 amendments.[82] The court considered Texas Constitution art. IV, Section 22, defining the powers and duties of the Texas Attorney General and the provisions of the subject statute as well as other statutes, concluding that Texas Property Code Section 5.102 did not contain any language indicating the legislature intended the State of Texas to collect penalties, unlike numerous other statutory provisions which made such intent clear in other cases. Furthermore, the legislative history indicated that the legislation was intended to address problems which individual purchasers faced when entering into contracts of deeds. Therefore, the intent of the legislature was for the statute to grant an individual cause of action.[83]

Malnar v. Mechell[84] also involved a contract for deed. Malnar purchased property from Mechell under a contract for deed. After two years, Malnar defaulted on a payment and received notice of default from Mechell. When Malnar did not cure the default within thirty days, Mechell brought an action for trespass to title. The issue in the case was whether Mechell afforded Malnar the appropriate notice under Texas Property Code Section 5.062 (now Texas Property Code Section 5.063). Under former Section 5.062, a purchaser was entitled to receive sixty days' notice of default if they had paid twenty percent or more of the purchase price. In all other circumstances, a purchaser was only entitled to thirty days' notice. The appellate court held that notice was properly

80. It is the authors' belief that the case would have the same outcome had the amended TEX. PROP. CODE ANN. § 5.079 applied.

81. *Brown*, 109 S.W.3d at 74.

82. *Id.* at 76-77.

83. *Id.* at 77-79.

84. Malnar v. Mechell, 91 S.W.3d 924 (Tex. App.—Amarillo 2002, no pet).

given by Mechell since less than twenty percent of the purchase price had been paid. It is important to note how the court calculated the percentage of payments made by Malnar: any portion of the payments that were not attributable to principal (here, interest and escrow) were not included in the calculation of whether twenty percent of the purchase price had been paid.[85] The *Malnar* case also addressed calculation of time periods required under the Texas Property Code. The court held that "[i]n computing a period of days under the Texas Property Code, the first day is excluded from the calculation while the last is included."[86] Since Mechell rescinded the contract for deed on the thirtieth day after giving notice, instead of waiting for the thirty-day period to expire, the court held that Mechell did not comply with the required time period.[87]

Flores v. Millennium Interests, Ltd.[88] involved Texas Property Code Section 5.077 which governs the sending of annual notices from a seller to a purchaser under a contract for deed. The seller sent the annual statement required by Section 5.077(a) but left out two of the seven required pieces of information—the amount paid under the contract and the remaining amount owed under the contract.[89] Flores brought this claim seeking the statutory damages provided under Section 5.077(c). The court held that because the missing information could be calculated by the remaining information in the statement and because Flores suffered no actual injury due to the missing information, Flores was not entitled to recover under Section 5.077(c). In order to recover under Section 5.077(c), the court held that a purchaser must have: (i) received no statement at all, (ii) received a statement that was so deficient that it constituted no statement at all, or (iii) suffered actual injury resulting from an omission in an incomplete statement.[90]

The claim in *Davis v. Estridge*[91] involved a fraudulent misrepresentation involving the disclosure of foundation problems and structural repairs to a house. The jury found that the sellers committed statutory fraud in a real estate transaction and awarded the purchasers $2,500 in damages. The trial court ordered rescission of the contract rather than awarding the damages found by the jury.[92] The appellate court, in holding that the trial court abused its discretion by ordering the contract rescinded and reinstating the jury's verdict, made two noteworthy holdings regarding rescission of a contract. First, a purchaser must give timely notice to the seller that a contract is being rescinded, and the purchaser must either return or offer to return the property along with the value of any benefit derived from possession of the property. In this case, in order

85. *Id.* at 922.
86. *Id.* at 927-28 (citing TEX. GOV'T. CODE ANN. § 311.014(a) (Vernon 1998)).
87. *Id.* at 928.
88. Flores v. Millennium Interests, Ltd., 273 F. Supp. 2d 899 (S.D. Tex. 2003).
89. *Id.* at 899-900.
90. *Id.* at 901.
91. Davis v. Estridge, 85 S.W.3d 308 (Tex. App.—Tyler 2001, pet. denied).
92. *Id.* at 309-10.

to return the parties to status quo, the Estridges, as the purchasers, would be required to also tender to seller the value the Estridges obtained from using the property during the period of time between the purchase and the trial.[93] Second, the court described in a footnote what the "[b]enefits derived from possession of the property" could include: (i) rental value, (ii) the lease value of the land, (iii) the benefit gained from running cattle, or (iv) profit from growing a crop.[94]

Enforcement of specific performance was involved in *Limestone Group, Inc. v. Sai Thong, L.L.C.*[95] Limestone Group entered into a contract to purchase property from Sai Throng. The contract required Limestone Group to pay $75,000 earnest money, of which amount only $25,000 was paid at the time the action was brought. Limestone Group sought specific performance when the transaction was not completed. In order to enforce specific performance, the contract provided that Limestone Group must not be in default. Limestone Group argued that only a material breach could prevent a party from pursuing specific performance. The court did not disagree with Limestone Group's interpretation of two cases, but noted that neither of the cases involved a contract that specifically addressed the party's right of specific performance.[96] Since this contract set forth that Limestone Group must not be in default in order to enforce specific performance, and since the contract did not include any language modifying the degree of such default, the court held that the contract restricted Limestone Group's right to enforce specific performance. Because Limestone Group was in default, it was not entitled to specific performance.[97]

VII. DECEPTIVE TRADE PRACTICES ACT

In *Miller v. Keyser*,[98] the sales agent of a homebuilder sold homes that were subject to a drainage easement. During the course of the sales, Keyser as the agent, unknowingly misrepresented to the purchasers both the size of the lots and where the fencing could be placed along the back of the lots. The purchasers sued both the homebuilder and the sales agent under the DTPA for such misrepresentations.[99] The Texas Supreme Court noted that the DTPA allows a consumer to bring suit against any "person," which is broadly defined in the Act, whose false, misleading, or deceptive acts, or other practices enumerated in the Act, are the producing cause of the consumer's harm. The sales agent involved had personally participated in each sale and personally made each of the representations and was the only person with whom the homeowners had

93. *Id.* at 310-11.
94. *Id.* at 311 n.3.
95. Limestone Group., Inc. v. Sai Thong, L.L.C., 107 S.W.3d 793 (Tex. App.—Amarillo 2003, no pet.).
96. *Id.* at 796-97.
97. *Id.* at 797.
98. Miller v. Keyser, 90 S.W.3d 712 (Tex. 2002).
99. *Id.* at 714-15.

any contact. Therefore, he was liable for his own DTPA violations. The fact that Keyser did not know that his representations were false did not matter, because the DTPA does not require that the consumer prove the person acted knowingly or intentionally, just that the misrepresentations were false and were the producing cause of the consumer's damages.[100] The fact that Keyser was acting solely on behalf of his employer did not matter; a corporate agent is personally liable for his own fraudulent or tortious acts. The DTPA protects employees by including an indemnification provision that allows an agent to seek indemnity from his employer if he was truly just passing along company information. Such indemnity provision is further evidence of the legislature's intent to hold agents liable for their own misrepresentations, regardless of their status as agents.[101]

In *Bennett v. Bank United*,[102] Bennett financed the purchase of a residence and agreed to reimburse the mortgage company for the private mortgage insurance (PMI) premiums on an insurance policy the company obtained for its own benefit. No provision in the deed of trust allowed Bennett to terminate the PMI payments, but instead required the PMI premium as part of her monthly escrow payments "until the Note is paid in full" and reimbursement of the premium amount "until such time as the requirement for such insurance terminates in accordance with Borrower's and Lender's written agreement or applicable law."[103] After paying the premiums for almost twenty years, Bennett requested the Bank, as the loan servicer, to discontinue charging for PMI since Bennett had achieved a loan-to-value ratio below the amount which typically requires PMI premiums. First Boston Mortgage, the holder of the deed of trust, refused to cancel the requirement, and Bennett sued under the DTPA. Bennett was considered a consumer because the loan, with its requirement of PMI, was incidental to the purchase of the residence, which is a good; therefore, the Bank became connected to Bennett's transaction and subject to the DTPA's provisions. However, the Bank's actions were not unconscionable because they committed no "glaringly noticeable, flagrant, complete and unmitigated" action against Bennett and First Boston Mortgage was under no obligations to cancel the PMI.[104] The court further found that the Bank's failure to provide Bennett with written notice of her possible right to cancel the PMI, as required under the insurance code, was not unconscionable, because Bennett had already expressly agreed to pay the premiums, and therefore could suffer no injury from the lack of notice. Lastly, the court would not allow Bennett to claim third-party-beneficiary status to achieve standing to sue for violations of the DTPA because there was no evidence that the contract lan-

100. *Id.* at 716.
101. *Id.* at 718-19.
102. Bennett v. Bank United, 114 S.W.3d 75 (Tex. App.—Austin 2003, no pet.).
103. *Id.* at 78.
104. *Id.* at 82.

guage in any way indicated that the contract was to her benefit.[105]

Allison v. Fire Insurance Exchange,[106] involved an insured homeowner's suit against its insurance company for numerous claims, including deceptive trade practices. Ballard bought a large house and insured it with FIE. Ballard began noticing plumbing leaks and filed insurance claims for repairs. The problems continued, and eventually Ballard moved her family out of the house after finding evidence of mold. Ballard then filed suit against FIE for breach of contract, deceptive trade practices, breach of the duty of good faith and fair dealing in the claims handling process, and negligence. Ballard's causes of action revolved around the following acts: (1) FIE's statement that "complete" plumbing tests had been performed on the house, when in fact the tests were complete according to the standards of the plumbing company, (2) a letter from FIE's claims adjuster stating that FIE required a forty-five day extension to complete the claim investigation, when the adjuster later testified the extension was necessary only for her to obtain authority to pay the claim, and (3) FIE's refusal to pay the claims once it obtained all the information it needed to pay the claims. After the jury found that FIE violated the DTPA in numerous ways, the court of appeals reviewed the sufficiency of the evidence.[107] The court found that the letter regarding the "complete" plumbing tests was some evidence to support the jury's finding of a DTPA violation, because the jury could have reasonably concluded that the characterization of the test was a misrepresentation of the work performed and that Ballard's reliance on such characterization caused further damages. However the court found insufficient evidence to support the jury's finding that FIE engaged in an unconscionable action or course of action, noting that not every misrepresentation of fact, even if intentional, constitutes unconscionable conduct. The record does not provide evidence that the consumer was taken advantage of to a grossly unfair degree, which is the requirement for a finding of unconscionable conduct. Lastly, the court found there was no evidence to support the jury's finding that FIE knowingly engaged in deceptive acts or practices. "Knowingly" means actual awareness of the falsity, unfairness, or deception of the conduct, and is more than conscious indifference. Since the DTPA requires the finding of a "knowing" violation to uphold punitive and mental anguish damages, and since there was no evidence of such a violation in this case, the court reversed the jury's awards for those damages.[108]

In *Branton v. Wood*,[109] Branton purchased a home from Wood. The home was located in a flood plain with a history of flood damage, and Wood had recently made extensive repairs after the latest flood. After the purchase, a flood washed the house completely off its foundation into

105. *Id.* at 84-85.
106. Allison v. Fire Ins. Exch., 98 S.W.3d 227 (Tex. App.—Austin 2002, pet. abated).
107. *Id.* at 234-37.
108. *Id.* at 251-52, 256-58.
109. Branton v. Wood, 100 S.W.3d 645, 646 (Tex. App.—Corpus Christi 2003, no pet.).

neighboring trees, causing irreparable damage. An expert inspected the home and concluded that the damage had occurred because the foundation bottom which attached the house to the foundation had rotted from prior flood damage. Branton sued under the DTPA, alleging that Wood violated the DTPA in numerous ways, specifically asserting that the house did not comply with representations made before the sale. In the "Seller's Disclosure of Property Condition," Wood stated that "repairs were made totally after flooding occurred."[110] Branton claimed that this representation was a false, misleading or deceptive act because the incident would not have occurred but for appellee's failure to repair the rotten wood. The expert reported that "[i]n inspecting further, it became evident to me that the structure had sustained previous water damage to the plates allowing them to rot and weaken so much as to allow the structure to lift and float off the slab."[111] The court noted that to constitute competent, non-conclusory summary judgment evidence, an expert must explain the basis of his statements to link his conclusions to the facts. Because the expert's report in this case had no factual support underlying the opinions, the court found that the statement was conclusory in nature and not competent summary judgment evidence to establish the DTPA claim. It did not prove that the base plates were rotten because of previous damage or that such damage was not repaired after the previous flood, and it failed to discount other plausible sources of the cause of the rotting of the base plates. Because Branton failed to produce evidence of a false, misleading, or deceptive act, the court held that the trial court did not err in granting Wood's motion for partial summary judgment.[112]

VIII. LEASES

Two cases were decided involving the outdoor sign industry. The first case dealt with the enforceability of a restrictive covenant contained in a lease, and the second case dealt with the adequacy of notice prior to termination of a lease.

In *Reagan National Advertising of Austin, Inc. v. Capital Outdoors, Inc.*,[113] the issue before the court was the enforceability of a restrictive covenant contained in a lease. Reagan National Advertising (Reagan) leased a billboard from Met NYTEX, Ltd. (Met). The lease contained a provision prohibiting Met from releasing the premises to any other advertiser for five years if Reagan's lease was not renewed. Met did not renew Reagan's lease. Approximately two months prior to the expiration of Reagan's lease, Met sold a perpetual and assignable easement to Capital Outdoors, Inc. (Capital) to build and maintain a billboard on the same site. After attempting to sue the City of Austin and Met without success,

110. *Id.* at 647.
111. *Id.* at 648.
112. *Id.* at 648-49.
113. Reagan Nat'l Adver. of Austin, Inc. v. Capital Outdoors, Inc., 96 S.W.3d 490 (Tex. App.—Austin 2002) (review granted judgment vacated).

Reagan sued Capital seeking to enforce the lease clause against Capital. The court of appeals held that neither Met nor Capital violated the restriction on releasing the site since Met conveyed an easement to Capital and the clause only prohibited releasing.[114]

In *Outdoor Systems, Inc. v. BBE, L.L.C.*,[115] Outdoor Systems, Inc. (Outdoor) was the lessor of two tracts of land in Dallas County, Texas on which it maintained two billboards. Outdoor ground leased this land from BBE, L.L.C (BBE), which acquired the pre-existing ground leases on June 29, 1999, from the prior owner, Sun NLF Limited Partnership (Sun). On or about June 28, 1999, Sun sent a letter to Outdoor stating that the land had been sold and to send its future rent payments to BBE. Prior to receiving this notice, Outdoor had already sent its July, 1999 rent payment to Sun. On July 2, 1999, BBE sent Outdoor a letter stating simply that all future rent payments should be made to BBE. An employee of Outdoor contacted an employee of BBE and asked that it be permitted to reissue the July check and send it with the August payment. BBE's employee indicated that he would get back to her. Instead, on July 16, 1999, BBE sent a second letter to Outdoor stating that it did not receive its July rent payment and that it had discovered a discrepancy in the manner in which Outdoor had calculated the amount it owed in rent in the past and demanded that Outdoor (i) pay the total amount of arrearages from the miscalculation beginning with the leases inceptions and (ii) provide BBE with all advertising contracts utilized for these billboards from the inception of the leases. Outdoor tendered both the July and August rent payments to BBE which were both rejected. BBE sent Outdoor a notice of termination on August 11, 1999.[116]

The court held that in order for there to be a "default" under the leases, BBE was required to give Outdoor written notice specifying the default. The court also noted that where forfeiture of a lease is dependent on making of a demand for performance (which was the case in this lease), that demand must be a proper, specific and reasonable one. Additionally, the notice of default in payment of rent must convey a message that the notifier is initiating steps necessary to finally assert his legal rights that if default is not cured, he may take final action as provided in the contract. The court held that the July 2 letter made no demand and the July 16 letter demanded too much as the "demand was not specific but was excessive, unreasonable, imprecise, and required [Outdoor] to perform acts not required by the leases [the provision to BBE of the advertising contracts]"[117] and as such, the August 11 termination notice sent by BBE was ineffective because it was not preceded by a proper notice of default.

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114. *Id.* at 493-95.

115. Outdoor Sys., Inc. v. BBE, L.L.C., 105 S.W.3d 66 (Tex. App.—Eastland 2003, pet. denied).

116. *Id.* at 69-70, 72.

117. *Id.* at 71.

The next two cases addressed the fact that a right of first refusal is a dormant option that springs to life upon an offer to sell/purchase the subject property and that the terms of the right and the actions of the right holder should be carefully considered.

In *A.G.E., Inc. v. Buford*,[118] Buford acquired a piece of commercial property subject to a pre-existing ground lease. The lease contained a right of first refusal granting the lessee the option to buy the property on the same terms as any contemplated sale. No notice of the sale to Buford was given to the then-current tenant, Mid Texas Bancshares, Inc. (Mid Texas). When Mid Texas was finally made aware of the conveyance to Buford, Mid Texas threatened to file suit to enforce its right of first refusal unless Buford consented to a new sublease. Buford consented to the requested sublease to A.G.E., Inc. (AGE). Three years later, Mid Texas assigned all of its leasehold interest to AGE, and AGE notified Buford that it intended to exercise the right of first refusal contained in the lease with respect to Buford's acquisition of the property. Buford responded by (i) notifying AGE by letter that the right of first refusal was no longer viable as Mid Texas earlier declined to exercise its option in exchange for Buford granting the original sublease to AGE and (ii) that he was terminating the lease due to AGE's failure to provide certificates of insurance relating the insurance coverage on the leased property. AGE sued Buford seeking actual damages, specific performance of its purchase option and attorney's fees.[119]

The court held that a holder of a right of first refusal must elect to either purchase the property or decline to purchase it and allow the owner to sell it to another. The court stated, however, that the option is not perpetual; and the right holder must choose between exercising it or acquiescing in the transfer of the property. Additionally, the court held that when a right holder learns of a sale in violation of its right, it again has the opportunity to either accept or reject within the time specified in the operative agreement, just as if the sale had been properly noticed.[120] In this instance, Mid Texas, in exchange for Buford's consent to the sublease, elected to effectively decline its option to purchase the property by failing to prosecute the claim any further. By allowing its option to lapse after learning of the sale to Buford, Mid Texas had no such right concerning the sale of the property to assign to AGE, and all subsequent attempts by AGE to exercise an option against Buford were without legal effect and thus ineffective.[121]

In *Comeaux v. Suderman*,[122] Comeaux held a right of first refusal on property used by Comeaux as a public fishing pier pursuant to a lease between Comeaux and Suderman. The terms of the lease required Sud-

118. A.G.E., Inc. v. Buford, 105 S.W.3d 667 (Tex. App.—Austin 2003, pet. denied).
119. *Id.* at 671-72.
120. *Id.* at 673.
121. *Id.* at 675.
122. Comeaux v. Suderman, 93 S.W.3d 215 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

erman to notify Lessee in writing of the "true and complete terms and conditions of any proposed sale to a third party" at least 90 days prior to the sale, at which point Comeaux would have 30 days from receipt of the notice to purchase the property at the offered terms.[123] On March 30, 1997, Suderman notified Comeaux of an offer to purchase the leased premises and a certain amount of adjoining property for the amount of $350,000. The notice did not specify the total acreage to be sold, but instructed Comeaux to call Suderman's real estate agent if he was interested in purchasing the property. After speaking with the real estate agent, Comeaux informed Suderman that he would not exercise his rights due to the amount of the purchase price. Suderman subsequently sold the property, including the leased premises, to a third party. Comeaux continued to lease the premises from the new owner until the fall of 1998, at which time the fishing pier was destroyed by a storm. At this time, Comeaux filed suit against Suderman and the new owners, alleging that Suderman failed to comply with the terms of the right of first refusal and tortiously interfered with his right to exercise the right. The trial court granted summary judgment against Comeaux without explanation.[124]

On appeal, Comeaux asserted that the trial court erred in granting summary judgment for several reasons, including that he was never given notice that he could have purchased just the leased premises, he was never given the opportunity to purchase just the leased premises, and the notice was not in compliance with the lease requirements because it did not reveal all of the terms of the sale and was received less than ninety days prior to the sale. In response to Comeaux's argument concerning sufficiency of the lease, the court concluded that the notice was not defective because Comeaux had the opportunity to obtain all of the terms of the offer, and actually affirmatively declined to exercise his rights. In its analysis, the court distinguished between an option to purchase and a right of first refusal by stating that a right of first refusal only ripens into an option when the property owner elects to sell. Therefore, the right is not ripe until the right holder receives notice of a proposed sale.[125] In this case, because Comeaux received a valid, if not completely clear, notice, and affirmatively declined his rights after speaking with Suderman's real estate agent, he waived his right and thereby allowed Suderman to freely sell the property. The court reasoned that it did not need to consider whether Comeaux should have been offered the right to only purchase the leased premises and whether the notice may have been technically deficient, because he had actual notice of the sale and chose to decline his right. The court held that when a property owner makes a reasonable disclosure to the holder of a right of first refusal, that right holder has a duty to undertake a reasonable investigation of any unclear

123. *Id.* at 217.
124. *Id.* at 217-18.
125. *Id.* at 219-20.

terms.[126] Because Comeaux simply declined the offer without clarifying the unclear terms, he was barred from later complaining about the sufficiency of the notice. The Court therefore overruled Comeaux's point of error and affirmed the judgment of the trial court.

IX. ADVERSE POSSESSION

In *Louisiana Pacific Corp. v. Holmes*,[127] many of the facts on which the jury relied in granting title to the claimant were consistent with the adverse possession claim (e.g., open and notorious possession, attempting to stop other's activities on the land, continuous possession for the statute of limitations period, and one that is not so common, such as firing shots at others to prevent them from coming on the land), yet the jury did not put any weight on the set of facts upon which the appellate court relied in reversing the trial court. The most salient of these facts was that the claimant and fee owner had a landlord/tenant relationship that was specifically recognized by the adverse possession claimant. The court pointed out that in the event of the existence of a landlord/tenant relationship, in order to claim adverse possession, the tenant/claimant must prove that there was a repudiation of the relationship, assert a claim of right adverse to the owner, and show that notice of such repudiation had been given to the owner.[128] Here, the claimant admitted in the trial court that he was a tenant and never made it known to the fee owner that he claimed the property as a non-tenant. The claimant on several occasions had actually requested a reduction in the rent payments and sought an easement from the fee owner for an electrical line. In addition, the claimant actually paid the owner for timber that the claimant had harvested on portions of the fee property. These facts were sufficient for the appellate court to reverse the trial court because such facts are in direct contravention to the claimant's assertion that his title was adverse to the owner's or that the lease has been repudiated.[129]

X. DEEDS AND CONVEYANCES

Herman v. Shell Oil Co.[130] involved an option agreement granting Shell the option to purchase a tract of land. The option further provided that if Shell purchased such property, no other gas stations would be allowed on a surrounding eight-acre tract of property. Shell exercised its option, and the deed contained the gas station restriction, but the affected property included twenty acres rather than the original eight acres contemplated by the option agreement. Herman, the owner of certain property within

126. *Id.* at 221.
127. La. Pac. Corp. v. Holmes, 94 S.W.3d 834 (Tex. App.—San Antonio 2002, pet. denied).
128. *Id.* at 839.
129. *Id.* at 840.
130. Herman v. Shell Oil Co., 93 S.W.3d 605 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

the twenty-acre area, brought this claim to quiet title and for slander of title, relating to damages claimed by Herman after he was unable to renew a lease with a major supermarket retailer wanting to develop a gas station on its leased premises. The court held that even though Herman's deed was not expressly subject to the restriction, Herman had constructive notice of the restriction since it appeared in Herman's chain of title.[131]

In *Earwood v. Smart*,[132] Earwood and Walker owned adjoining property. After having his property resurveyed, Walker found that a vacancy existed between the two properties. To settle the claim as to who owned this vacancy, Earwood purchased the surface rights of the property from Walker, and the deed reserved the mineral rights to Walker. Many years later, gas was discovered on the "vacancy" property. Earwood claimed ownership of the mineral rights, arguing that no vacancy existed and that the property was his all along. Walker's successors-in-interest provided evidence that a vacancy did in fact exist, and further claimed that Earwood was estopped by the deed from claiming he owned the property all along. The court agreed with Walker's successors-in-interest and held that Earwood was estopped from claiming he owned the property, stating "recitals in a deed are binding only when the parties thereto claim under such deed."[133]

XI. EASEMENTS

In *Stephenson v. Vastar Resources, Inc.*,[134] surface owners sued a pipeline operator to enjoin it from using and operating a pipeline across their land and to terminate the easement granting the pipeline right-of-way. Stephenson claimed that the easement had terminated and that Vastar had not complied with the easement and could not transmit oil and gas through the pipelines which comes from sources outside of the land which is a part of the mineral estate. Vastar owned the fee mineral estate under a large area of land, and Stephenson owned the surface estate over a small portion of that land. The pipeline was originally installed pursuant to an easement granted in 1924, which provided that the party had the right-of-way to "construct, maintain, operate, repair and remove an oil and gas pipeline . . . over, through and upon" certain lands, and granted them the right to lay a second pipeline adjacent to the first pipeline for the same purposes.[135] Another pipeline was laid pursuant to rights and mineral estate ownership reserved under 1916 deeds, which expressly reserved from the conveyance the right to all oil and gas and "perpetual rights of ingress and egress to prospect for, take, use, enjoy and remove"

131. *Id.* at 608.
132. Earwood v. Smart, 107 S.W.3d 1 (Tex. App.—San Antonio 2002, pet. denied).
133. *Id.* at 5.
134. Stephenson v. Vastar Res., Inc., 89 S.W.3d 790, 791 (Tex. App.—Corpus Christi 2002, pet. denied).
135. *Id.* at 792.

the same.[136] The 1924 easement stated that the easement would end if not used for a period of two years, but didn't define the words "not used." Stephenson claimed that such easement terminated because of a two-year period of non-use when the previous owner deactivated and purged gas from a section of the pipeline, but continued to use the pipeline until it sold that section and easement right to Vastar. The continued use was evidenced in several ways, including the maintaining, inspection, and keeping up the pipeline and right-of-way, and the owner's continued use of the pipeline across the other lands under the 1924 easement. The court found that, as a matter of law, the undisputed facts precluded termination of the easement under the non-use provisions of the easement.[137]

As new telecommunication systems come into mainstream use, old easement language is challenged to "keep up," as these next two cases demonstrate. Property owners sued a cable company for trespass and negligence when the cable company placed its cable lines over their property pursuant to an easement granted to the utility company in *Marcus Cable Associates, L.P. v. Krohn.*[138] The easement in question permitted the holder to use the private property for the purpose of constructing and maintaining an "electric transmission or distribution line or system."[139] The electric company who held the easement entered into a "Joint Use Agreement" with a cable-television provider, which later assigned its rights to Marcus Cable Associates, L.P. (Marcus Cable). Under the agreement, Marcus Cable could attach its cable lines to the utility company's poles. The Krohns, who owned the property, sued Marcus Cable, alleging that they did not have a valid easement and had placed the wires over their property without their knowledge or consent, asserting trespass and that Marcus Cable was negligent in failing to obtain their consent before installing the lines. The Krohns sought an injunction ordering the wires' removal and actual and exemplary damages.[140] The Texas Supreme Court stated that the scope of the interest conveyed is determined by the contracting parties' intentions, as expressed in the grant. No rights are implied, unless they are reasonably necessary to fairly enjoy those rights that are expressly granted.[141] While the easement's use may change over time to accommodate technological development, such changes must still be within the purposes for which the easement was originally created. Even if a public benefit would result from the changed use of the easement, or such new use does not materially increase the burden to the servient estate, the courts cannot circumvent the parties' intent by disregarding an easement's express terms and purpose.[142]

136. *Id.* at 793.
137. *Id.* at 794.
138. Marcus Cable Assocs., L.P. v. Krohn, 90 S.W.3d 697, 699 (Tex. 2002).
139. *Id.* at 699.
140. *Id.* at 699-700.
141. *Id.* at 700-01.
142. *Id.* at 701-03.

The supreme court found that the grant of an easement for the purpose of constructing and maintaining an "electric transmission or distribution line or system" did not include the use of cable television lines, because at the time of the conveyance those words were commonly associated with the conveyance of electricity only. The court refused to broaden this meaning for public policy reasons to embrace modern developments such as cable, as other cases have, because in those cases the grant involved was more broad, and involved easements for communications media as well.[143] The court also found that Section 181.102 of the Texas Utilities Code, which permits cable companies to install lines on a utility easement, does not apply to private easement grants because the language of the statute implies that it is discussing only those properties that are generally dedicated to public use, the legislative history supports such interpretation, and such interpretation avoids constitutional infirmities.[144] Justice Hecht filed a dissenting opinion analyzing the majority's opinion and stating that he would hold that the easement could be shared with a cable television provider based on the development of cable television since the easement was granted, as long as the servient estate would not be additionally burdened.[145]

Corley v. Entergy Corp.,[146] involved the interest granted by an easement in connection with the extension of electrical power infrastructure. The four easements involved were of the following four types: (1) electricity only, (2) electricity and Entergy's internal communications, (3) electricity and telephone, and (4) electricity and communications. It was undisputed that all four of the easements contemplated use of the property for the transmission of electricity, and that the last three types of easements expressly granted the right to use the property for the transmission of internal communications related to the transmission of electricity.[147] The issues were whether any of the easements allowed the use of plaintiffs' property to transmit communications between third parties unrelated to Entergy's internal communications, and whether the first type of easement granted by implication the right to use the property for the transmission of internal communications related to the transmission of electricity. The court found that the defendant's use of any of the four easements to transmit third party communications was not a right incidental to the right in the easements to transmit electricity, and was not necessary for Entergy to fully enjoy the express grant in the easements to transmit electricity. Even if the proposed use does not materially increase the burden on the servient estates, it is still an unauthorized presence if it does not serve the easement's express purpose.[148]

143. *Id.* at 703-06.
144. *Id.* at 706-07.
145. *Id.* at 708 (Hecht, J., dissenting).
146. Corley v. Entergy Corp., 246 F. Supp. 2d 565, 567-568 (E.D. Tex. 2003).
147. *Id.* at 570-71.
148. *Id.* at 575-76.

The court found that the first type of easement (for "electricity only") expressly conveyed the right to install the "usual fixtures" for the transmission of electricity, which includes lines of communication necessary to control the electric current. The court further found that the incidental use doctrine entitled Entergy to also use that easement for constructing, operating and maintaining a system for controlling the flow of the electricity that it had an easement to transmit. Therefore, an internal communications system was necessary for the full enjoyment of the electrical easement, and Entergy could install a network for the transmission of its internal communications. However, such use was limited by the object and purpose of the easement, which was to transmit electricity, and therefore the network could not be used to transmit third party communications.[149] As to the language of the second type of easement (for "electricity and Entergy's internal communications") allowed use of the network for internal communications, but limited such use to grantee's communications. Therefore the network could not be used for any communications other than Entergy's, and it could not be used for the transmission of third party communications unrelated to Entergy's internal communication needs.[150]

The third type of easement (permitting "telephone or telegraph" communications) allowed the use of such easement for both internal communications and third party voice and data communications, as such use is simply a technologically advanced means of accomplishing the communicative purpose. However, in discussing the use of the easement for cable-television, the court noted that under Texas law the question is not whether the proposed use results in an increased burden on the servient estate, but whether the grant's terms authorize the proposed use. The court found that the use of the easement for cable-television was not consistent with the ordinary meaning of the easement.[151] Lastly, the fourth type of easement (allowing "communications") did not limit the easement grant to grantee's internal use. Given the ordinary meaning of the term "communications," it would appear to include not only voice and data, but also video transmission.[152]

The court further found that Texas Public Utility Code Section 181.007, which provides that a gas or electric corporation has the power to own, hold, or use easements as necessary for the purpose of the corporation, does not limit the uses for which utilities can hold property obtained by voluntary agreement. The court also found that Texas Public Utility Code Sections 163.013(a) and 163.014, which discuss the statutory powers of joint agencies, have no bearing on the easement issues, and do not generally apply to electric utilities.[153]

149. *Id.* at 576-77.
150. *Id.* at 577-78.
151. *Id.* at 578.
152. *Id.* at 578-79.
153. *Id.* at 579-82.

XII. RESTRICTIVE COVENANTS, CONDOMINIUMS AND OWNERS ASSOCIATIONS

The Court in *Air Park-Dallas Zoning Committee v. Crow Billingsley Airpark, Ltd.*[154] addressed the issues of (1) whether an owner's forfeiture of voting rights under restrictive covenants applied to all lots owned by the owner and (2) whether laches prevented a zoning committee's right of first refusal on the sale of lots in a neighborhood. The zoning committee argued that Billingsley, the owner of thirty-two lots in the neighborhood, was precluded from running in the zoning committee election because Billingsley had lost its voting rights for non-compliance with the restrictive covenants. The restrictive covenant provided that the zoning committee had the right to suspend an owner's right to participate in any election for non-compliance with the covenants and restrictions or contract.[155] The court agreed that the zoning committee had the authority to prevent Billingsley from participating in zoning committee elections with respect to its non-complying lots. However, the court found that because the deed restrictions provided that each owner is entitled to one vote per lot, the zoning committee could not prevent Billingsley from participating in the election with respect to the lots that were in compliance.[156] The zoning committee also urged the court to grant specific performance to the zoning committee in exercising a right of first refusal with respect to certain lots owned by Billingsley. Billingsley argued that the failure of the zoning committee to assert its right of first refusal for two years was unreasonable and that Billingsley had paid taxes on the property for several years based on the failure of the zoning committee to assert its right of first refusal. The court agreed with Billingsley's arguments and ruled that the zoning committee was precluded from asserting its right of first refusal as to the lots owned by Billingsley.[157]

XIII. HOMESTEAD

In re Bouchie[158] involved a question of first impression with respect to the applicability of homestead laws. The creditors challenged the bankruptcy court finding, as affirmed by the district court, that all approximate eighty-four acres of land owned by the debtor is a rural homestead under Texas law. The creditors claimed that such a determination should be based, at least in part, on the "multiple factors" test adopted in *United States v. Blakeman.*[159] The court concluded that the *Blakeman* approach does not consider the 1999 amendments to Section 41.002(c) of the Texas Property Code, and, hence, that section is "the exclusive vehicle for dis-

154. Air Park-Dallas Zoning Comm. v. Crow Billingsley Airpark, Ltd., 109 S.W.3d 900 (Tex. App.—Dallas 2003, no pet.).
155. *Id.* at 904-05.
156. *Id.* at 909-10.
157. *Id.* at 911.
158. *In re* Bouchie, 324 F.3d 780 (5th Cir. 2003).
159. United States v. Blakeman, 977 F.2d 1084 (5th Cir. 1992).

tinguishing between rural and urban homesteads."[160]

In a rather lengthy opinion, the Fifth Circuit Court of Appeals, in *In re Perry*,[161] held that it is not necessarily the case that a business of any kind can never be part of a rural homestead, and that the court is "unable to say that Texas would necessarily adopt such an unequivocal statement regarding the effect of business activity on a single contiguous piece of rural homestead property as never being a part of a rural homestead."[162] Neither the Texas Property Code nor the Texas Constitution prohibits a rural resident from operating a business on the property on which he resides; however, because the traditional business operation on a rural homestead is agricultural, the Texas Supreme Court had not yet had the opportunity to review a case involving (1) a rural resident, (2) claiming rural property that is (3) on the same tract as his residence and (4) which is used for non-agricultural business purposes. The court does note, however, that several lower-level courts have faced this issue. The court unequivocally stated that it would not hold that the operation of a business without more, "necessarily forfeits a rural homestead interest."[163] In the case at bar, the debtor had leased a portion of his rural property for the use of a mobile home park, and lived on a separate part of the property. The court pointed out that one who rents a portion of the property to others on a continuous basis abandons that portion of the property for the purposes of homestead laws because the individual claiming homestead evidences an intention to abandon such land for homestead purposes. However, renting property may not always necessarily be for a permanent time period and, indeed, some leases are done on a temporary basis, in which case the homestead is not abandoned. The court stated that although it could not "agree that the operation of a non-agricultural business on a rural homestead necessarily sacrifices the homestead character of that portion of the property," it was not willing to go any further and state that by operating a mobile home park, the landowner does not abandon that tract for homestead purposes.[164] As a result, the court remanded the case for a determination on that particular issue.

XIV. BROKERS

In *Miller v. Keyser*,[165] the Supreme Court of Texas held that a homebuilder's sales agent was individually subject to the Deceptive Trade Practices Act ("DTPA"), and therefore was individually liable for misrepresentations made to the plaintiffs, but had the right to seek statutory contributions or indemnification from his employer. For a more com-

160. *In re* Bouchie, 324 F.3d at 785.
161. *In re* Perry, 345 F.3d. 303 (5th Cir. 2003).
162. *Id.* at 315.
163. *Id.* at 318.
164. *Id.* at 319.
165. Miller v. Keyser, 90 S.W.3d 712 (Tex. 2002).

plete discussion, refer to the Deceptive Trade Practices Act section of this article.

In *Gonzales v. American Title Co. of Houston*,[166] the broker of a homeowner was not the agent of the buyer of the homeowner's promissory note and deed of trust. In May 1997, Gonzales applied for and obtained a home loan from Woodforest Bancshares, Inc. (Woodforest). Several months later, Woodforest transferred the loan and deed of trust to Resource Bancshares Mortgage Group (RBMG). RBMG notified Gonzales that the monthly payment would be higher than Gonzales contemplated, which included amounts for principal, interest, and private mortgage insurance (PMI).[167]

Gonzales filed suit against several defendants, including RBMG, alleging against RBMG claims of misrepresentation, fraud, fraud in the inducement, conspiracy, violations of both the Deceptive Trade Practices Act and Consumer Protection Act, and unauthorized PMI charges. Central to Gonzales's claims against RBMG was the theory that Woodforest was RBMG's agent in making the loans. The basis for Gonzales's agency claim was that Woodforest had sent the loan applications to RBMG, which had then determined (i) the loan's interest rate, (ii) the monthly loan payment, and (iii) whether PMI would be required, and had generally controlled the actions of Woodforest throughout the transaction. The court rejected this claim, noting that although a "wholesale mortgage agreement" existed between Woodforest and RBMG allowing Woodforest to sell loans to RBMG, this agreement did not require such a sale, and specifically disclaimed an agency relationship between the parties.[168] The court noted that no evidence existed indicating that either Woodforest was authorized to act for RBMG, or that Woodforest was "subject to the control" of RBMG, two central elements of an agency claim. The court therefore held that RBMG was not responsible for the actions against Woodforest.[169]

XV. TITLE INSURANCE

In *Hispanic Housing & Education Corp. v. Chicago Title Insurance Co.*,[170] the court affirmed the trial court's ruling that a title company was not liable when an updated title commitment disclosed a pre-existing lien not disclosed on its previous commitment. In that case, eight months after the first commitment was issued, the title company issued an updated commitment which disclosed on Schedule C a lien in the amount of $650,000 that was not shown on the original commitment (the lien had been filed prior to the original commitment, and the lien had in fact been

166. Gonzales v. Am. Title Co. of Houston, 104 S.W.3d 588 (Tex. App.—Houston [1st. Dist.] 2003, pet. denied).
167. *Id.* at 591-92.
168. *Id.* at 593.
169. *Id.*
170. Hispanic Hous. & Educ. Corp. v. Chicago Title Ins. Co., 97 S.W.3d 150 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

paid off, though no release had been recorded.) The sale of the property never occurred and no policy was ever issued. The plaintiff argued that the statements in the first title commitment were affirmative representations and that the title company's failure to include the existing lien on the first title commitment and its inclusion in the second commitment were negligent misrepresentations upon which the plaintiff relied.[171] The court disposed of plaintiff's argument on the basis that a title company's only duty is to indemnify the insured against losses for defects in title, not to point out any outstanding encumbrances (although the court noted that in cases in which a title company makes affirmative representations—e.g., when a commitment affirmatively represents that there are no restrictions of record—there may be liability under the DTPA or otherwise).[172] The plaintiff did not argue the DTPA, and the court found that there were no affirmative representations on Schedule C.[173]

Stewart Title Guaranty Co. v. Hadnot[174] addressed when an action accrues under a title policy for purposes of the statute of limitations. Hadnot purchased a newly constructed house in the spring of 1994 and procured a title insurance policy from the defendant. Shortly after receiving lien claims from subcontractors, Hadnot submitted a claim to the title company, which denied payment. The subcontractors sued and prevailed against Hadnot in November, 1995. A second and third letter requesting coverage was sent to the title company, followed by a fourth letter in February, 1998, after the amounts owed to the subcontractors were finalized. Each time coverage was denied. Hadnot brought suit against the title company in August, 2001, alleging that the limitations period did not begin to run until the title company rejected the second proof of loss claim, since they did not sustain "out of pocket" losses until the suit with the contractors was final. Summary judgment was granted to the homeowners.[175] However, on appeal, the court reversed, holding that the statute began to run on the date coverage was first denied, since the injury to the insured was not just the refusal to pay the claim but also the refusal to defend the suit.[176]

XVI. CONSTRUCTION CONTRACTS, MECHANICS LIEN AND CONSTRUCTION ISSUES

In *J.M. Krupar Construction Co. v. Rosenberg*,[177] the homeowner brought suit against the general contractor, Abercombie Builders, Inc. (Abercombie), and the subcontractor, JMK Construction (JMK), for vio-

171. *Id.* at 151-52.
172. *Id.* at 153-54.
173. *Id.* at 154.
174. Stewart Title Guar. Co. v. Hadnot, 101 S.W.3d 642 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).
175. *Id.* at 643-44.
176. *Id.* at 646.
177. J.M. Krupar Constr. Co. v. Rosenberg, 95 S.W.3d 322 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

lations of the Texas Residential Construction Liability Act and the DTPA stemming from damages allegedly resulting from faulty design and construction of the foundation of his home. The trial court rendered judgment in favor of Rosenberg against Abercombie and JMK and in favor of Abercombie against JMK.[178] The appellate court ruled that the two year statute of limitations had expired and was not tolled by the discovery rule. The DTPA incorporates the discovery rule into the statute, providing that the claim accrues when the consumer discovered or in the exercise of reasonable diligence should have discovered the occurrence of the false, misleading, or deceptive act or practice.[179] Here, the court ruled that the homeowner knew or reasonably should have known of the faulty foundation almost three years earlier when he had two separate inspections done on the foundation to investigate cracks in the walls. Both inspection reports had stated there was likely foundation problems possibly caused by faulty construction and suggested further tests be conducted. In addition, the court ruled that a homeowner may not assert a claim for breach of a good and workmanlike performance against a subcontractor, reasoning that an implied warranty will not be imposed unless there is a demonstrated, compelling need for it. In the subject case, the court concluded Rosenberg's remedy was against Abercombie, which then may look to JMK for contribution or indemnity as applicable. On another point, JMK argued that the indemnity clause of the service contract was inadequate to compel its indemnification of Abercombie for Abercrombie's own negligence. The court agreed, stating that as the service contract was ambiguous as to the indemnification by JMK for Abercombie's own negligence, and failed the express negligence test.[180]

Centex Homes v. Buecher,[181] involved an action by the homeowners seeking an injunction against the builder, Centex, from asserting that homeowners had waived the implied warranty of habitability and good and workmanlike construction when they purchased their homes. Each homeowner signed a standard form sales agreement that contained a one year limited express warranty in lieu of and waiving the implied warranties of habitability and good workmanlike construction. Addressing conflicting case law, the Texas Supreme Court ruled that the implied warranty of good workmanship may be disclaimed by the parties when their agreement provides for the manner, performance, or quality of the desired construction. The implied warranty of habitability generally may not be disclaimed. However, if the defects making the home uninhabitable are adequately disclosed, such as when a purchaser buys a problem house with express and full knowledge of the defects that affect its habitability, then even the implied warranty of habitability can be disclaimed.

In *CVN Group, Inc. v. Delgado*,[182] the Texas Supreme Court, after

178. *Id.* at 325-29.
179. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).
180. *Rosenburg*, 95 S.W.3d at 332.
181. Centex Homes v. Buecher, 95 S.W.3d 266 (Tex. 2002).
182. CVN Group, Inc. v. Delgado, 95 S.W.3d 234 (Tex. 2002).

much discussion, held that the parties affected by a mechanic's lien can agree to arbitrate its existence. The homeowners' contract with the contractor provided all disputes between the parties would be subject to arbitration. The arbitrator awarded the contractor damages and found a valid lien against the homeowners. As required by Texas Property Code Section 53.154, the contractor applied to the district court to confirm the award and foreclose its lien. The court overruled the arbitration award stating the evidence did not support a valid mechanic's and materialman's lien and that allowing the foreclosure of such liens would be against the public policy of protecting homesteads.[183] Upon review, the Texas Supreme Court ruled that the lower courts exceeded their authority to review an arbitration award. The court went on to say that an award of arbitrators upon matters submitted to them is given the same effect as the judgment of a court of last resort. The court concluded that the lower courts ability to review arbitration decisions on the validity of mechanic's and materialman's liens would not be allowed unless there was a complete disregard by the arbitrator as to the constitutional and statutory requirements for perfecting such liens and in the subject case, there was no indication of such a disregard.[184]

In *Page v. Structural Wood Components, Inc.*[185] and *Page v. Marton Roofing, Inc.*,[186] Page hired a general contractor, Sepolio, to remodel and expand a building that Page owned. Sepolio hired several subcontractors, including Structural Wood and Marton to provide labor and materials. Before the project was finished, the contract between Page and Sepolio was terminated, and Page hired six new contractors who finished the project without hiring new subcontractors. Because Sepolio failed to pay in full for the labor and material provided, Structural Wood and Marton filed affidavits claiming liens on the property more than thirty days after Page terminated the contract with Sepolio. Structural Wood and Marton brought actions against Page to enforce its mechanic's and materialman's liens. The Texas Supreme Court held that a subcontractor that filed its lien affidavit more than thirty days after the owner terminated the original contract with the general contractor, but well before the replacement contractors finished the project, had failed to satisfy the statutory requirement that a lien be filed not later than the thirtieth day after the work is completed. In *Structural Wood*, the court concluded the term "work completed" must be defined in relation to a particular contract and not based on the overall work of a project for determining compliance with Texas Property Code Section 53.103.[187] In *Marton*, the Court held that the fund-trapping provisions of Texas Property Code Sections 53.081 and 53.084 must relate to a particular contract, and Page was not authorized, and was not liable for failing to withhold funds from the replacement

183. *Id.* at 235-36.
184. *Id.* at 239-40.
185. Page v. Structural Wood Components, Inc., 102 S.W.3d 720 (Tex. 2003).
186. Page v. Marton Roofing, Inc., 102 S.W.3d 733 (Tex. 2003).
187. *Structural Wood*, 102 S.W.3d at 723.

contractors who had no relationship to Marton.[188]

XVII. CONDEMNATION

The case of *State v. Ware*[189] involved a tract of property that was originally the subject of a highway easement condemnation by the State in 1968. The State did not utilize the entire tract for highway purposes and it later sought to condemn any remaining fee interest that the property owner may hold on the property. The court rejected the trial court's use of the undivided fee rule, and noted that the only issue to be determined was the value of the property owner's fee interest in the land as encumbered by the State's highway right-of-way easement. While the court noted that the practical effect of the existing highway easement was to deny the property owner all beneficial use of the property, the case was remanded for a proper determination of whether and how much the property owner may be entitled to damages for condemnation of its remaining fee interest.[190]

In a case examining the sufficiency of expert appraisal testimony, the Texas Supreme Court found that the subject expert had failed to consider the before-and-after rule, which requires measuring the difference and value of the land immediately before and immediately after the taking. In *Exxon Pipeline Co. v. Zwahr*,[191] the expert appraiser's valuation testimony was premised upon the existence of the condemnation, and therefore improperly included the project enhancement in the valuation. The expert ultimately admitted that the value he placed upon the land did not exist prior to the condemnation. Because the expert witness did not consider the before and after value of the entire tract, and improperly included project enhancement, the court held that the trial court abused its discretion in admitting the testimony.[192]

In *Metropolitan Transit Authority v. Graham*,[193] the property being condemned was held in a number of undivided interests. Despite naming all the interests in the condemnation proceeding, the condemning authority was unable to serve two of the property owners and elected to proceed with the case against only those property owners who had been served. After a special commissioner's award was issued, the property owners who had been served claimed that the trial court lacked jurisdiction because other interest holders had not been served. However, the court found that the condemning authority's decision to go forward without service upon some of the owners did not invalidate jurisdiction over those owners and property interests who had been served and that nothing under Texas law prevents a condemning authority from proceeding

188. *Marton*, 102 S.W. 3d at 735.
189. State v. Ware, 86 S.W.3d 817 (Tex. App.—Austin 2002, no pet.).
190. *Id.* at 827.
191. Exxon Pipeline Co. v. Zwahr, 88 S.W.3d 623 (Tex. 2002).
192. *Id.* at 631.
193. Metro. Transit Auth. v. Graham, 105 S.W.3d 754 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

against only a portion of the undivided property interest of a tract because the judgment would only apply against those property owners who had been served and their respective interests. The proceedings were not improper.

In the case of *County of Bexar v. Santikos*,[194] the court reviewed whether damages resulting from unsafe access and from diminished market perception were compensable. The court held that a trier of fact is allowed to consider unsafe access when determining compensation. Further, in a matter of first impression, the court held that a jury instruction regarding the impact of diminished market perception upon the fair market value of the subject property was not improper.

In the condemnation matter of *Dahl v. State*,[195] the court reviewed the question of whether the holder of a purchase money mortgage note has a valid inverse condemnation claim for the balance remaining on the note in excess of the condemnation award. The court noted that if mortgage holders were allowed to seek recovery of the full amount of outstanding debts in the event that a condemnation award was less than that debt, the state would become the insurer of all purchase money mortgages. Finding that no state or federal law warranted such a proposition, the court held that the mortgage holder did not assert a valid claim for inverse condemnation and the state was entitled to a sovereign immunity defense.

In a case revolving around both freedom of speech and regulatory taking, the court in *Eller Media Co. v. City of Houston*,[196] ultimately held that a billboard ordinance prohibiting the construction of new billboards was not a compensable regulatory taking and was a valid exercise of police power. The court noted that regulations that diminished property values do not necessarily rise to the level of a taking, and that the amortization period provided for in the subject ordinance protected the investment of the property owner because the regulations allowed sufficient time for the property owner to recoup his investment.

The Fort Worth Court of Appeals reviewed two flooding-related inverse condemnation cases with distinct results. In *Berry v. City of Reno*,[197] the court held that no viable cause of action existed against the city because the landowner failed to prove the "public use" of the alleged taking. The court found that the summary judgment evidence of the property owner merely showed that they did not know why the city had constructed the drainage system, and therefore evidence that the city constructed the system for a public use was not presented in the summary judgment proceeding. The trial court's grant of summary judgment for

194. County of Bexar v. Santikos, 107 S.W.3d 677 (Tex. App.—San Antonio 2003, pet. granted).

195. Dahl v. State, 92 S.W.3d 856 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

196. Media Co. v. City of Houston, 101 S.W.3d 668 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

197. Berry v. City of Reno, 107 S.W.3d 128 (Tex. App.—Fort Worth 2003, no pet.).

the city was affirmed. In the case of *City of Keller v. Wilson*,[198] the court overruled the city's contention that its drainage system was not provided for public use by pointing to the city's master drainage plan as an indication that drainage across the subject property benefited the community as a whole. Further, the court found that the city had intentionally taken the subject land since it knew that water flowing from new developments that it had approved would necessarily flow across the land. This knowledge along with the decision to construct a drainage channel on adjoining property evidenced an intentional taking of the subject property. In the *Keller* case, the court upheld the inverse condemnation award.

The Beaumont Court of Appeals also reviewed a flooding claim in *Sabine River Authority of Texas v. Hughes*,[199] determining that a River Authority's intentional act of releasing water from a reservoir did not result in a taking. In reversing the summary judgment in favor of the landowners, the court found that evidence existed that the released water mixed with water from other sources before causing the flooding. The court held this evidence was sufficient to negate the taking element of the property owner's inverse condemnation claim.

XVIII. AD VALOREM TAXATION

In the matter of *Appraisal Review Board of El Paso v. Fisher*,[200] it was stipulated that the property owner had received no notice of the increase in the appraised tax value of his property from 1985 to 1992, even though he had recorded a deed to the property in 1984. The court noted that the law unambiguously prohibits taxing authorities from increasing an appraised value without due process. Because the taxing entities failed to provide the required notice to the property owner for a number of years, any taxes and penalties assessed during that period were void. The court also noted that the voluntary payment rule does not apply against a taxpayer when the underlying tax is considered void due to a violation of due process.

The Houston Court of Appeals also rendered a decision regarding the remedies of property owners who failed to receive notices of increased valuations. In *Houston Land & Cattle Co. v. Harris County Appraisal District*,[201] the property owner had purchased property with knowledge that taxes were delinquent for a number of years. The property owner challenged the validity of these taxes on the grounds that the taxing authorities had failed to deliver notices of increases to the appraised value to the previous owner. Relying upon the language that appears in Texas Tax Code Section 41.11(c), the court held that the statute restricted nulli-

198. City of Keller v. Wilson, 86 S.W.3d 693 (Tex. App.—Fort Worth 2002, pet. filed).
199. Sabine River Auth. of Tex. v. Hughes, 92 S.W.3d 640 (Tex. App.—Beaumont 2002, pet. filed).
200. Appraisal Review Bd. of El Paso v. Fisher, 88 S.W.3d 807 (Tex. App.—El Paso 2002, pet. denied).
201. Houston Land & Cattle Co. v. Harris County Appraisal Dist., 104 S.W.3d 622 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

fication of increases in appraised value to owners at the time of the increases, and not subsequent owners. Based upon this strict interpretation of the Texas Tax Code, the current property owner did not have the right to challenge the previous owner's failure to receive notice and the delinquent taxes were valid.

In yet another case critiquing the sufficiency of a taxing authority's procedures, a property owner challenged his obligation to pay taxes when his property was not properly described by the taxing authorities on the tax rolls. In *Spring Branch Independent School District v. Siebert*,[202] the property owner had divided a tract of land into three separate lots with identification of those lots appearing on the recorded plat. However, because the certified tax appraisal roll did not identify two of the three lots with the reasonable certainty required by Texas Tax Code Section 25.03(a), the court held that the property owner was not required to pay taxes on the misidentified properties.

In *St. Joseph Orthodox Christian Church v. Spring Branch Independent School District*,[203] the court confirmed the proposition that alleged entitlement to an exemption may not be raised for the first time as a counterclaim in a delinquent tax collection lawsuit. A taxpayer seeking entitlement to an exemption must timely apply for and challenge an appraisal district's failure to grant that exemption under the Texas Tax Code.

XIX. ENTITIES

In *Landrum v. Thunderbird Speedway, Inc.*,[204] the relatives of a bystander killed in the raceway pits by a flying tire sued the corporate lessor of the raceway for negligence in the accident. The company was granted summary judgment on the ground that it had forfeited its corporate status sixteen months before the accident and, thus, could not be held liable. The Dallas Court of Appeals agreed, noting that under the express terms of Article 7.12, Section F(1) of the Texas Business Corporations Act, the 1995 forfeiture of Thunderbird's charter also resulted in dissolution under the law then in effect. Under the TBCA a dissolved corporation's corporate existence continues for three years after dissolution only for limited purposes, including permitting the survival of any *existing* claims against the corporation, but not for the purposes of allowing any future claims to accrue. The accident here in question occurred after the corporate dissolution, and therefore the company was not liable.

In *Pinnacle Data Services, Inc. v. Gillen*,[205] Pinnacle, which owned a

202. Spring Branch Indep. Sch. Dist. v. Siebert, 100 S.W.3d 520 (Tex. App.—Houston [1st Dist.] 2003, no pet.).

203. St. Joseph Orthodox Christian Church v. Spring Branch Indep. Sch. Dist., 110 S.W.3d 477 (Tex. App.—Houston [14th Dist.] 2003, no pet.).

204. Landrum v. Thunderbird Speedway, Inc., 97 S.W.3d 756 (Tex. App.—Dallas 2003, no pet.).

205. Pinnacle Data Servs., Inc. v. Gillen, 104 S.W.3d 188 (Tex. App.—Texarkana 2003, no pet.).

fifty percent ownership interest in a limited liability company brought suit against certain members of the company, alleging that the defendant members had breached the company's regulations in voting to change the management of the company from the members to managers. The company regulations allowed the management of the company to be changed from member-managed to manager-managed (by amendment of the Articles of Organization) by a vote of two-thirds of the *ownership interest*, whereas the Articles allowed for this change by a vote of two-thirds of the *members*. The court held that both under the Texas Limited Liability Company Act and by the express terms of the regulations themselves, the regulations were subject to the Articles, and that in the event of any conflict between the two, the Articles should govern. Thus, the plaintiffs claims based on the regulations failed.

XX. INDEMNITIES

In *Hernandez v. Big 4, Inc.*,[206] an indemnification agreement was unenforceable under Texas law because it failed to meet the requirements of the express negligence doctrine. The contract provision required the subcontractor to defend and indemnify the contractor against all claims, causes of action, lawsuits and liability for injury or property damage due to the subcontractor's work. Although the subcontractor's duty to indemnify was limited to damage caused by the subcontractor's negligence, its duty to defend extended to damage caused by the contractor's negligence. For any indemnity agreement to be enforced against the indemnitor with respect to the indemnified party's own negligence, the agreement must comply with the express negligence doctrine and the conspicuousness requirement in order to provide the indemnitor with "fair notice" as to such obligations. The court found that the express negligence doctrine was not satisfied because of ambiguity in determining who was an "indemnified party." The court based its finding of ambiguity on the fact that in no place was "indemnified party" capitalized and treated as a defined term.

In *American Indemnity Lloyds v. Travelers Property & Casualty Insurance Co.*,[207] AIL, the subcontractor's (Elite) insurer, sued TPC, the contractor's insurer, for payment of a portion of the defense costs and settlement paid to Elite's injured employee in his lawsuit against both the contractor (Caddell) and Elite. Elite's primary commercial general liability insurer was AIL, with Caddell listed as an additional insured as required by the subcontract between Elite and Caddell. Caddell's primary commercial general liability insurer was TPC, and Elite was not named as an insured under that policy. AIL contended that the virtually identical "other insurance" provisions in both the AIL and TPC policies requires that TPC pay a portion of its costs in this case due to the fact that TPC

206. Hernandez v. Big 4, Inc., 241 F. Supp. 2d 715 (S.D. Tex. 2003).
207. Am. Indem. Lloyds v. Travelers Prop. & Cas. Ins. Co., 335 F.3d 429 (5th Cir. 2003).

and AIL were providing concurrent primary coverage to Caddell. Arguing that it should not have to pay AIL for any portion of AIL's costs, TPC relied upon the indemnity agreement between Elite and Caddell, which required that Elite indemnify Caddell in all cases, unless there was a judicial determination that the injury in question resulted from Caddell's sole fault or negligence. Finding no Texas case directly on point, the court reasoned that a valid indemnity agreement, as found in this case, would be made ineffectual if the indemnitor's insurance company was allowed to recover against the indemnitee's insurance company simply because the indemnitee also carried general liability insurance. Such a holding would lead to circuitous litigation because the indemnitee's insurance company, subrogated to the rights of its insured, could then sue the indemnitor, the insured party under the policy already paid on, for reimbursement under the indemnity agreement. The court held that a valid indemnity agreement will control over the "other insurance" provisions of the respective parties' insurance policies, absent some indication to the contrary.

In *Banner Sign & Barricade, Inc. v. Price Construction, Inc.*,[208] the contractor, Price, sought a declaratory judgment against Banner, the subcontractor, that the contractual indemnity in the subcontract was valid and enforceable, requiring Banner to contribute in an action against Price and Banner. The indemnity provision at issue sought to indemnify Price, even from the consequences of its own negligence. The court held that the language of this particular indemnity provision did satisfy the express negligence doctrine's requirement that it be specifically and conspicuously stated within the four corners of the document, noting that the phrase "regardless of the cause or of the sole, joint, comparative or concurrent negligence or gross negligence of [Price], its officers, agents or employees"[209] specifically asserts that it covers the negligence of the indemnified party. Thus, despite the fact that Banner was found not negligent by the jury in the underlying case, Price's claims for contribution and indemnification were successful.

XXI. MISCELLANEOUS

A. NUISANCE

In *Union Pacific Resources Co. v. Cooper*,[210] the owners executed an oil, gas and mineral lease to the predecessor in interest of Union Pacific. The owners brought suit against Union Pacific for damages based on nuisance and the trial court awarded $85,000 because the owners were forced to leave their home for over a month during the drilling of a well based on fear and apprehension that the escape of poisonous gas would

208. Banner Sign & Barricade, Inc. v. Price Constr., Inc., 94 S.W.3d 692 (Tex. App.—San Antonio 2002, pet. denied).

209. *Id.* at 697.

210. Union Pac. Res. Co. v. Cooper, 109 S.W.3d 557 (Tex. App.—Tyler 2003, pet. denied).

kill them.[211] Union Pacific agreed to reimburse the owners for their expenses in connection with their relocation, but the owners refused payment and brought suit instead. Although a nuisance can occur by emotional harm to a person from the deprivation of the enjoyment of his or her property, such as fear, apprehension, offense or loss of peace of mind, because there was only a fear and apprehension of what might occur, and no sour gas was released from the well in question, and no physical injury occurred, the court stated that fear of the unknown is not a nuisance. The court gave weight to the argument that Texas is an industry (specifically energy-related) driven state and allowing a cause of action to persons who have not been harmed but might be afraid that they one day will be harmed would open the courts to needless litigation.

In *Bates v. Schneider National Carriers, Inc.*,[212] the court was faced with the issue of whether damages resulting from a chemical plant constituted a permanent or temporary nuisance. The court cited numerous cases for the proposition that permanent injuries give rise to a cause of action for permanent damages (the amount of which is discussed *infra* in the case of *H.E. Stevenson v. E.I. DuPont*) and temporary injuries give rise to temporary damages, which are the amount of damages that accrue during the continuance of the injury covered by the period for which the action is brought. The characterization of an injury as either permanent or temporary must be determined by its duration. A permanent injury must be constant and continuous, rather than occasional or intermittent. Temporary injuries however are the subject of some sporadic activity that may be contingent upon an irregular force. Another indication of a temporary injury is the ability of a court to enjoin the injury causing activity – an injury that can be terminated by its very nature cannot be considered permanent. Based on the foregoing descriptions of the nature of an injury and the facts presented in the case, the appeals court remanded to the trial court for determination of whether the nuisance was permanent or temporary.

B. Professional Responsibility

In *Lewis v. Nolan*,[213] a client brought a malpractice claim against his attorney for failure to respond to a summary judgment motion in a case in which judgment was entered against the client six years earlier. The client discovered the judgment only when, in connection with the sale of some land, an abstract of judgment was revealed. The defendant contended that the claim was barred by the two-year statute of limitations

211. In the drilling industry, it is apparently common knowledge that hydrogen sulfide gas ("sour gas") may be encountered when drilling at depths between fifteen and seventeen thousand feet – this gas is poisonous and can cause death to those who come in contact with it.

212. Bates v. Schneider Nat'l Carriers, Inc., 95 S.W.3d 309 (Tex. App.—Houston [1st Dist.] 2002, pet. granted).

213. Lewis v. Nolan, 105 S.W.3d 185 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).

because the abstract of judgment, filed in 1995, gave constructive notice of the judgment. The trial court granted summary judgment to the defendant. On appeal, the court held that the mere recording of abstracts is insufficient to establish as a matter of law that the client discovered or should have discovered the facts establishing his claim and therefore reversed and remanded the case.

In the case of *In re Skiles*,[214] the court addressed the issue of attorney disqualification under the joint defense privilege. The plaintiff bought a house from defendant and thereafter brought an action alleging violations of the DTPA. Defendant initiated a coverage suit against Farmers Insurance Exchange, which was defended by a law firm. After settling the coverage suit, the plaintiff's attorney joined such law firm. In granting the defendant's motion to disqualify plaintiff's attorney, the court held that the joint defense privilege protecting confidential communications made for the purpose of facilitating the rendering of legal services does not just apply to codefendants, but can be applied to prevent the disclosure of confidential communications made by the client's lawyer to a lawyer representing another party in a pending action or a matter of common interest. Because the defendant's attorney discussed the DTPA claim with Farmers' law firm, which subsequently included plaintiff's attorney, the court held that the plaintiff's attorney should be disqualified.

C. MINERALS

The court in *Exxon Corp. v. Pluff*,[215] held that a landowner had no standing to bring a cause of action against Exxon for failure to remove oil field equipment that had been placed there many years previously when the property was owned by a previous owner, because there was no evidence that the party who owned the property at the time of the injury had assigned its rights in the action to the plaintiff. Injury to land is a personal right that accrues at the time of the injury. Plaintiff failed to support his contention that the language in the deed that conveyed "all and singular the rights and appurtenances thereto in anywise belonging" was sufficient to assign the cause of action, and there was also no evidence that the injury occurred during the time that plaintiff's grantor owned the property.[216] Furthermore, the court determined that Exxon's right to remove the equipment at the expiration of the lease did not impose a duty to remove the equipment.

D. TRESPASS

In *H.E. Stevenson v. E.I. DuPont DeNemours & Co.*,[217] a chemical plant owned by DuPont emitted metal particulates that contaminated the plaintiffs' property. In a case of first impression in Texas, the Fifth Circuit

214. *In re* Skiles, 102 S.W.3d 323 (Tex. App.—Beaumont 2003, no pet.).
215. Exxon Corp. v. Pluff, 94 S.W.3d 22 (Tex. App.—Tyler 2002, pet. denied).
216. *Id.* at 28.
217. H.E. Stevenson v. E.I. DuPont DeNemours & Co., 327 F.3d 400 (5th Cir. 2003).

addressed the question of whether an airborne contaminant may be considered a trespass. The court cited established Texas precedent that "[t]o constitute trespass there must be some physical entry upon the land by some 'thing.'"[218] Because the only showing necessary is entry over land by some "thing," the Court concluded Texas law does permit recovery for airborne particulates. If a permanent trespass occurred, the plaintiffs could recover the difference in the market value of the land immediately before and immediately after the trespass. However, recovery for temporary trespass is limited to the amount necessary to place the owner of the property in the same position he occupied prior to the injury. The court held that "in absence of proof that repair is actually or economically feasible, the injury may be deemed permanent" and damages may be awarded on such basis.[219] Because, however, the measure of damages in the context of a permanent trespass is based on the difference of the market value of the land immediately prior to and immediately after the trespass occurred, it follows that two different valuations must be present in order to calculate damages. Because the plaintiff only presented one valuation of the property, the court remanded to the trial court for a determination of damages only.

In *Russell v. American Real Estate Corp.*,[220] the tenant at sufferance sued the foreclosure purchaser's property manager for trespass. The tenant, Russell, was informed of an April 6, 1999 foreclosure sale of the house. Prior to the sale, Russell found a new place to live, moved most of his possessions to the new residence and turned off the electricity at the old residence. Russell was out of town during the week of the foreclosure sale but intended to return and finish moving his property. Immediately after the foreclosure sale, the purchaser instructed its property manager (AREC) to visit the house; if the house was vacant, AREC was to re-key it. But, if the house was occupied, AREC was to place a notice on the door and call the owner for further instructions. Upon visiting the house, and without entering it, AREC noticed that the garbage can was overflowing, several newspapers were on the ground, and the mailbox was full of junk mail; AREC also verified that the electricity was disconnected. AREC later entered the house, took an inventory of the remaining items, and removed them to off-site storage. Russell returned to the old house a few days later and discovered that his property was missing and sued for trespass. On appeal from summary judgment in favor of Russell, the court noted that trespass only requires proof of interference with the right of possession, even if no damage is done. AREC argued that Russell's lease was terminated and, therefore, Russell had no right of possession. Although the foreclosure sale terminated the existing lease, Russell automatically became a tenant at sufferance. Texas Property Code Sec-

218. *Id.* at 406 (quoting Railroad Comm'n of Tex. v. Manziel, 361 S.W.2d 560, 567 (Tex. 1962)).

219. *Id.* at 408.

220. Russell v. Am. Real Estate Corp., 89 S.W.3d 204 (Tex. App.—Corpus Christi 2002, no pet.).

tion 24.005(b) requires the purchaser at a foreclosure sale to give a residential tenant at sufferance, not otherwise in default under its lease, 30 days notice to vacate before filing a forcible entry and detainer suit. Russell could not be removed until the eviction process was complete.

In *Amerman v. Martin*,[221] a garden variety boundary dispute between adjoining landowners, the court set forth the matters a plaintiff must prove in a trespass to try title action: the plaintiff must prove (1) a regular chain of conveyances from the sovereignty, (2) superior title out of a common source, (3) title by limitations, or (4) prior possession which has not been abandoned. The court also pointed out that although boundary disputes may be tried by a statutory action of trespass to try title, such suits are not pure trespass to try title actions but are in fact merely boundary disputes that may involve questions of title and that it is not necessary for the plaintiff to establish superior title in the manner required by a formal trespass to try title action; a recorded deed showing plaintiff's interest in the disputed property is sometimes sufficient to establish a present legal right of possession in such suits. The outcome of the dispute was decided on the basis of conflicting surveys, with the court stating that the law and principle of surveys establish a priority of calls, in which priority is granted first to calls for natural objects, then to calls for artificial objects, then to calls for course and distance, and finally to calls for quantity or acreage.

E. Lis Pendens

In *Silver Chevrolet Pickup VIN 1GCEC14T7YE257128 Tag No. 3TM16 v. State*,[222] a plaintiff whose real property was seized by the state after a marijuana crop was discovered on his property challenged the forfeiture of his property on the basis that the state had not filed a lis pendens within three days following initiation of the forfeiture proceeding as required by criminal statute. The court agreed, relying on the clear language of the statute and the principle that forfeiture should be strictly construed. It also noted that, contrary to the state's contention that a lis pendens is merely to put third parties on notice of a claim and thus failure to file the lis pendens did not harm the plaintiff, the intent of a lis pendens is to protect prospective purchasers and creditors by giving them notice of the claim.

F. Annexation

In *City of Burleson v. Bartula*,[223] the court addressed the permitted measure of the term "inhabitants" as used in connection with a home-rule municipality's annexation rights and a municipality's right to determine the number of its inhabitants. The City of Burleson had sought to annex

221. Amerman v. Martin, 83 S.W.3d 858 (Tex. App.—Texarkana 2002, pet. granted).
222. Silver Chevrolet Pickup VIN 1GCEC14T7YE257128 Tag No. 3TM16 v. State, 99 S.W.3d 874 (Tex. App.—Amarillo 2003, pet. filed).
223. City of Burleson v. Bartula, 110 S.W.3d 561 (Tex. App.—Waco 2003, no pet.).

property owned by forty-six individuals and one business, and those property owners filed for a temporary injunction, alleging, among other things, that the annexation was illegal because it included some property outside the extraterritorial jurisdiction (ETJ) of the city. Under Section 42.021 of the Texas Local Government Code, the ETJ of a municipality with 5,000 to 24,999 inhabitants is one mile, while the ETJ of a municipality with 25,000 to 49,999 inhabitants is two miles. The property owners argued that the federal census report showed that the population of Burleson was less than 25,000 (and thus the city's ETJ was only one mile). Burleson maintained that it could rely on a resolution it had passed that its population was 25,575. The court held that the city had the authority to determine its population notwithstanding the federal census so long as it was made in good faith with no proof of fraud.

City of Balch Springs v. Lucas,[224] dealt with issues of standing in bringing actions challenging annexation. Property owners filed a petition and application for declaratory and injunctive relief, alleging that the city's proposed annexation was unlawful because it did not comply with a new statute that requires municipalities to prepare an annexation plan identifying anticipated annexations and to wait three years before annexing those identified properties. The city challenged the property owners' standing to bring the suit. The trial court granted the injunction and prohibited the city from voting on the annexation. On appeal, the court discussed the distinction between challenges to a municipality's authority to annex certain property (in which private actions are permitted) and mere violations of statutory procedure (which may be brought only by the state through a *quo warranto* proceeding.) The court dissolved the temporary injunction issued by the trial court, ruling that the city's lack of compliance was merely procedural and further ruling that, since no private cause of action can be brought to attack an annexation unless it is "void" (and since there was never a vote on the ordinance it could not be "void," only "voidable"), an action challenging the annexation could be brought only through a *quo warranto* proceeding.

G. Premises Liability

In *Dow Chemical Co. v. Bright*,[225] an employee of the general contractor was injured. The issue was whether the owner owed the employee a duty as being governed by the law concerning a general contractor's duty to a subcontractor. The court stated that two types of premises defect cases exist in that context: (1) defects that existed on the premises when the independent contractor entered, and (2) defects created by the independent contractor. The employee argued that the owner was liable under the second category of cases. The court stated that, in this category, although in general a premises owner does not owe a duty to an independent contractor, liability may attach if the owner retains some

224. City of Balch Springs v. Lucas, 101 S.W.3d 116 (Tex. App.—Dallas 2002, no pet.).
225. Dow Chem. Co. v. Bright, 89 S.W.3d 602 (Tex. 2002).

control over a contractor's work yet fails to exercise reasonable care to ensure the contractor's safety. In this instance, the employer's role must be something more than a "general right to order the work to start or stop, to inspect the progress or receive reports."[226] The court set forth two ways through which a plaintiff can prove that a right to control existed: (1) evidence of a contractual agreement that explicitly grants control to the owner, and (2) evidence that the owner actually exercised control over the manner in which the subcontractor performed its work. In addition, any control evidenced by the owner must relate to the injury caused by the negligence. Although the owner's safety inspector inspected the work site prior to allowing the subcontractor to work in the area and had a safety inspector on site, the court held that this was not enough to establish the owner's actual control of the subcontractor because it is not evidence that the subcontractor was not free to do his work in the manner he desired. Furthermore, the court stated that the construction contract between the general contractor and the owner indicated that the contractor knew it was responsible for the safety of its employees, and that the presence of the owner's safety inspector did not cause either the subcontractor or the general contractor to lower its safety consciousness.

In *Batra v. Clark*,[227] the court addressed what it called an issue of first impression when it held that an absentee residential landlord did not owe a duty of ordinary care to a neighbor girl who was attacked by the tenant's pit bulldog because the landlord did not have actual knowledge of the dog's "vicious propensities." In violation of the lease agreement, the tenant kept a pit bull at the premises which was usually chained behind a fence at the side of the house. The victim of the attack was standing by the fence attempting to distract the animal so that the tenant's daughter could exit the house. The animal broke through the fence and bit the victim several times. In a suit filed by the victim's next friend against both the landlord and tenant alleging negligence, the trial court found the landlord and tenant each fifty percent liable. On appeal, the landlord argued that since he was an out-of-possession landlord who did not retain control of the premises, he owed no duty of reasonable care to prevent the dog's attack. The victim argued that (1) the landlord did possess actual knowledge that the dog was on the premises and imputed knowledge of the dog's dangerous propensities, (2) the lease retained for the landlord the ability to control the property because the lease allowed him access at any time, and (3) the landlord had retained the ability to control the dog because of the provisions in the lease prohibiting pets without landlord's consent and granting landlord the right to remove any unauthorized pets. The court held that an out-of-possession landlord owes a duty of ordinary care to third parties if the landlord has actual knowledge, not imputed knowledge, of an animal's presence on the leased

226. *Id.* at 606.
227. Batra v. Clark, 110 S.W.3d 126 (Tex. App.—Houston [1st. Dist] 2003, no pet.).

premises and its dangerous propensities. Because the facts of the case showed only that the landlord had imputed knowledge of the dog's vicious propensities, the court ruled that the landlord did not owe the victim a duty of ordinary care.

Two slip and fall cases, *Wal-Mart Stores, Inc. v. Diaz*,[228] and *Brookshire Food Stores, L.L.C. v. Allen*,[229] followed the Texas Supreme Court's recent ruling in *Wal-Mart Stores, Inc. v. Reese*.[230] In *Reese*, the Texas Supreme Court held that close proximity of a premises owner's employee to a dangerous condition, without more, is legally insufficient to charge the premises owner with constructive notice, and that some proof must exist of how long the hazard was present before the owner can be held liable for failing to discover and warn of the dangerous condition. In *Diaz*, the Fort Worth Court of Appeals overruled its decision in *Wal-Mart Stores, Inc. v. Rangel*,[231] which held that a store's policy of allowing customers to bring drinks into the store was sufficient by itself to establish negligence. In *Diaz* and *Allen*, the respective courts of appeals each found for the premises owner, requiring the plaintiffs to prove the length of time that a hazard had been present before constructive knowledge can be imputed to the premises owner.

In *Brookshire Grocery Co. v. Taylor*,[232] the plaintiff filed a premises liability claim after she slipped and fell on a melted ice cube which had fallen from a soda dispenser in the deli section of a grocery store. The plaintiff contended that the dispenser itself was the "dangerous condition," whereas the defendant argued that the puddle, not the dispenser, was the danger. The court agreed with the plaintiff, finding that the dangerous condition was the dispenser itself, noting that evidence indicated that ice fell onto the floor on a daily basis, and that the defendant's employees admitted during testimony that the ice caused a hazard.

In *Houston v. Northwest Village, Ltd.*,[233] the plaintiff, a newspaper delivery person, slipped and fell on ice on a sidewalk of an apartment complex at which she was delivering newspapers to residents. She filed suit against the owners of the complex and the complex management alleging that the ice on the sidewalks was a premises defect for which the defendant was liable. At trial, the apartment complex manager stated that she had not yet been outside of her apartment at the time of the plaintiff's fall, and therefore was not aware of the condition of the sidewalks. On appeal, the court defined the sole issue as whether the plaintiff was on the

228. Wal-Mart Stores, Inc. v. Diaz, 109 S.W.3d 584 (Tex. App.—Fort Worth 2003, no pet.).

229. Brookshire Food Stores, L.L.C. v. Allen, 93 S.W.3d 897 (Tex. App.—Texarkana 2002, no pet.).

230. Wal-Mart Stores, Inc. v. Reese, 81 S.W.3d 812 (Tex. 2002).

231. Wal-Mart Stores, Inc. v. Rangel, 966 S.W.2d 199 (Tex. App.—Fort Worth 1998, pet. denied).

232. Brookshire Grocery Co. v. Taylor, 102 S.W.3d 816, (Tex. App.—Texarkana 2003, pet. filed).

233. Houston v. N.W. Village, Ltd., 113 S.W.3d 443 (Tex. App.—Amarillo 2003, no pet.).

premises as a licensee or invitee. The defendants argued that the plaintiff was only a licensee because she did not have any business relationship with the defendants from which invitee status could be implied. The court responded that the defendants' relationship with the plaintiff was not determined solely by the nature of her relationship with the defendants. Rather, the plaintiff had a business relationship with the tenants, pursuant to which the plaintiff agreed to deliver newspapers to certain apartments in return for payment, and this business relationship was sufficient to imply that the plaintiff was invited by the tenants for that purpose. Because the plaintiff had entered the property as an invitee, even if not an invitee of the defendants, rather than as a licensee, the fact that the defendants did not yet have actual knowledge of the dangerous condition present in the form of icy sidewalks was not sufficient to defeat the duty owed by the defendants to that invitee.

H. ZONING

City of San Antonio v. Arden Encino Partners, Ltd.,[234] addressed a plaintiff's claim that the city's "downzoning" of the plaintiff's property constituted impermissible "spot-zoning" (that its property had been singled out for different treatment for no justifiable reason). Encino had purchased its property in 1994, when it was zoned B-2, which permits multi-family apartment complexes. Five years later an adjacent tract was rezoned from single-family residential to B-2, which prompted action by nearby homeowners. Downzoning was subsequently effected. Encino argued that there were no legitimate public concerns for the change in zoning and that it was effected merely to placate a few disgruntled homeowners and was therefore spot-zoning. The court found that there was sufficient evidence in the record that there had been changes in conditions due to growth and that plaintiff had not met its admittedly heavy burden to show no valid relationship between the rezoning and public welfare.

I. ORDINANCES

In *Jamestown Partners, L.P. v. City of Fort Worth*,[235] the court determined that when a municipality and a property owner entered into an agreement which provided that the municipality would proceed with a building standards commission ("BSC") review of the property unless the owner satisfied the requirements of the agreement, the municipality's obligation to forgo the BSC review did not preclude it from pursuing other remedies against the property owner for alleged breaches of city ordinances. Fort Worth ordinances provided for various options for the city to address violations of code provisions, and the court held that because

234. City of San Antonio v. Arden Encino Partners, Ltd., 103 S.W.3d 627 (Tex. App.—San Antonio 2003, no pet.).

235. Jamestown Partners, L.P. v. City of Fort Worth, 83 S.W.3d 376 (Tex. App.—Fort Worth 2002, pet. denied).

the legislature made a clear distinction between civil actions to enforce ordinances and quasi-judicial enforcement through a BSC (since they are located in distinct subchapters of Chapter 54 of the Texas Local Government Code), the city could proceed with a civil action to enforce city ordinances.