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Real Property

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THIS article covers cases from 115 S.W.3d through 142 S.W.3d and 346 F.3d through 385 F.3d, which the authors believed were noteworthy by adding to the jurisprudence on the applicable subject. *The authors acknowledge the assistance of Nichole Berklas, Jeanne Caruselle, Adam Darowki, Noelle Garsek, Ryan Harris, Katie Kildebeck, Jason Marshall, Rob Pivnick, Jimmy Schnurr, Tracy Scoggin, Lisa Smith, David Staas and Doug Sweet for the initial review and drafting of a portion of this article.*

I. MORTGAGES, LIENS AND FORECLOSURES

In *Chase Manhattan Mortgage Corp. v. Cook*,[1] Cook, the spouse of the grantor under a deed of trust against their homestead, brought a declaratory judgment action against Chase, the successor-in-interest to the original lienholder, claiming that Chase's interest was void against her homestead. While numerous issues were discussed, only the viability of the renewal and extension of a prior lien is relevant to this discussion. In 1992, Mr. Cook purchased two lots, then subsequently contracted for the construction of a home on the lots. Seven years later, Mr. Cook obtained a $54,900 mortgage loan from Irwin Mortgage Corporation and executed a deed of trust securing the loan. At trial, Mrs. Cook contended that the deed of trust did not meet the requirements to establish a lien against her homestead, since it did not fall within any of the constitutionally mandated requirements for a homestead.[2] Chase had no basis to sustain its claim, except under the refinancing of a homestead lien, and asserted that position at trial. The basis for such a claim was a renewal and extension rider in the deed of trust stating that the note was a renewal and extension of a prior $57,600 note executed by Mr. Cook in favor of Security State Bank secured by a previously recorded deed of trust. In fact, the note to Security State Bank was in the amount of only $5,760, and this note had been paid off in 1996, three years prior to the execution of the subject deed of trust. The court of appeals pointed out that while extensions and renewals of existing homestead liens can be extended, once a prior lien has been dissolved by payment, it cannot support a renewal and extension for the benefit of the current lien.[3]

Numerous foreclosure issues were raised in *Stanley v. Citifinancial Mortgage Co.*;[4] however, most were dismissed on summary judgment mo-

1. 141 S.W.3d 709 (Tex. App.—Eastland 2004, no pet.). Also discussed in Section XIII, *infra*, on homesteads.

2. TEX. CONST. art. XVI, § 50(a) authorizes liens against homestead for six types of transactions: (i) purchase money; (ii) ad valorem taxes; (iii) owelty partition; (iv) refinancing of a loan against the homestead; (v) a lien for construction of improvements; and (vi) a credit extension.

3. *Chase Manhatten Mortgage Corp.*, 141 S.W.3d at 714.

4. 121 S.W.3d 811 (Tex. App.—Beaumont 2003, pet. denied).

tion for failure to submit evidence. Challenges were made as to proper notice of default, notice of intent to accelerate, notice of sale, notice that further late payments would not be accepted and the fact that notice should have been sent to the wife of the grantor under the deed of trust. The court of appeals first addressed the third party notice requirements. The facts showed that Mrs. Stanley was not a party to the deed of the property to Mr. Stanley or to the deed of trust in favor of the predecessor to Citifinancial. The court concluded that no statutory provision requires notice of a foreclosure be sent to persons not a party to the deed of trust, but acknowledged that the deed of trust may contain such a requirement, in which case notice to the designated party would be a requirement to a valid foreclosure.[5] Because Mrs. Stanley did not file a copy of the deed of trust, there was no evidence and summary judgment was upheld. Also, Mrs. Stanley asserted equitable estoppel claiming that when the original deed of trust lien was granted in favor of Ford Motor Company, representatives of Ford Motor Company acknowledged that the company knew of her interest in the property and promised she would be kept apprised. The court, implying this defense could not be satisfied, looked to the promissory estoppel exception to this rule, which allows such defensive doctrine to be asserted to attack the enforceability of a promise when the party relied upon such promise.[6] Nevertheless, the court concluded that the promissory estoppel doctrine is available only for defensive actions and cannot constitute a basis for affirmative relief, and therefore dismissed the claim.[7]

With respect to the other foreclosure prerequisites raised by the plaintiffs, the court upheld summary judgment due to lack of evidence.[8] With respect to the notice of default, notice of intent to accelerate and notice of sale, the debtors asserted that they did not receive any of the certified mail sent by the defendant. The failure to receive the notice was not proof of the facts applicable to these issues, which would be established by proof of the lienholder's failure to comply with the applicable statutory provision under the Texas Property Code and the deed of trust.[9] The deed of trust was not submitted as evidence, and the statutory provisions require only constructive notice and not actual notice.[10] A writing must be sent by certified mail to each debtor to the last known address in the records of the holder of the debt.[11] Because the Stanleys offered no evidence as to the address contained in the lienholder's records, there was no evidence to support their allegations, thus giving rise to the summary judgment motion against them.[12] The court further pointed out that un-

5. *Id.* at 817.
6. *Id.* at 820.
7. *Id.*
8. *Id.* at 817-18.
9. *Id.* at 817.
10. *Id.*
11. *Id.*
12. *Id.*

like the specific statutory requirements for a notice of sale under section 51.002(b)(3) of the Texas Property Code,[13] the notice of default and notice of intent to accelerate are not subject to any statutory requirements or any existing case law.[14]

Martin v. Cadle Co.[15] involved a dispute over the priority of certain judgment liens and the rights after foreclosure of a deed of trust lien. Various judgment liens against Jack Pratt, Jr. attached in May 1989, January 1992, October 1994, and December 1992 as junior liens to the subject land, which was encumbered by vendor's and deed of trust liens held by the predecessor-in-interest to Compass Bank. The vendor's lien created by deed dated August 1, 1994 gave priority to the noteholder over the prior recorded judgment liens. In 1997, Compass Bank executed a release of lien for the vendor's and deed of trust lien, reciting full payment of the debt. Within two weeks of the recording of the release, a notice of substitute trustee's sale was issued under the same vendor's lien. One week after the foreclosure sale, Compass Bank executed a transfer of lien stating "[t]his Transfer of Lien is given in lieu and substitution of the Release of Lien executed by Compass Bank."[16] A few weeks after the sale, the property was transferred to the Martins from the purchaser at the sale. Various judgment creditors brought suits against the Martins claiming that their judgment liens were superior to the foreclosed interest because the release of lien voided the vendor's lien.

The main issue concerned the effect of Compass Bank's release and subsequent attempted correction of such release. The property owner argued that Compass Bank had the right to correct a mistake in the release of lien; however, the court of appeals pointed out that the lienholder had an equitable right to correction only in the event of a mutual mistake.[17] The subject case contained no proof of any mutual mistake, and without proof, the court refused to allow correction.[18] The court distinguished the plaintiff's authority, *First State Bank of Amarillo v. Jones*,[19] wherein the release of lien released only a portion of the secured property even though it stated the note was paid in full.[20] This presented a discrepancy on the face of the release itself.[21] Furthermore, both the debtor and the lienholder testified as to the mutual mistake of the "paid in full" language.[22] These facts significantly distinguished the subject case from that in *Jones*.[23] The court characterized the plaintiff's action as not one of correction but rather of rescission, which is an equitable remedy to extin-

13. TEX. PROP. CODE ANN. § 51.002(b)(3) (Vernon 1995).
14. *Stanley*, 121 S.W.3d at 818.
15. 133 S.W.3d 897 (Tex. App.—Dallas 2004, pet. denied).
16. *Id.* at 901.
17. *Id.* at 903.
18. *Id.*
19. 183 S.W. 874 (Tex. 1916).
20. *Martin*, 133 S.W.3d at 902-03.
21. *Id.* at 903.
22. *Id.* at 902-03.
23. *Id.*

guish a legally valid contract, that can be set aside only due to fraud, mistake or unjust enrichment.[24] These elements were not proven, so rescission was not available.[25]

The Martins then claimed that they obtained equitable title to the property as bona fide purchasers. The court found that the Martins could not be bona fide purchasers because they had inquiry notice of the release of lien in the chain of title of the property.[26] The chain of title for this property shows a gap in the chain of title between the release of the deed of trust lien and the transfer of lien, putting the Martins on inquiry notice of the lack of validity of the transfer to the trustee.[27]

II. NOTES, LOAN COMMITMENTS AND LOAN AGREEMENTS

Lender liability issues were presented in *Citizens National Bank v. Allen Rae Investments, Inc.*[28] Citizens National Bank (CNB) and a bank officer defended claims, including a claim for fraud, brought by a borrower, stemming from a loan that the borrower obtained to construct a Bed & Bath Inn. Prior to the loan for the Bed & Bath Inn, plaintiffs sought financing for a Motel 6 project. However, throughout the loan approval process and the construction advance process, CNB and the loan officer took several questionable actions or inactions including: persuading the borrower to invest in a Bed & Bath Inn instead of a Motel 6 without prior due diligence regarding Bed & Bath Inn; closing on the loan to borrower, even though Bed & Bath Inn was not cooperating with CNB's requests to review its financial information; hiring a construction management firm with the borrower's funds to investigate Bed & Bath Inn without the borrower's knowledge; failing to disclose any of the management firm's negative findings about Bed & Bath Inn to the borrower; convincing the borrower to return the performance bond that they secured for the project; continuing to release funds to Bed & Bath Inn despite the management firm's warning not to advance additional funds; and advancing funds even though lien releases were not secured. Eventually the borrower abandoned the construction project due to the mounting number of mechanic's and materialman's liens that had attached to the property due to Bed & Bath Inn's misappropriation of the construction funds.[29]

CNB defended the claims of fraudulent nondisclosure by asserting that the borrower had contractually waived and released its right to the withheld information. After reviewing the agreements, the court of appeals could not find a "specific, valid contractual release or waiver that in any way absolved CNB of its duty to disclose" material information such as

24. *Id.* at 903.
25. *Id.*
26. *Id.* at 905.
27. *Id.*
28. 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.).
29. *Id.* at 468-73.

Bed & Bath Inn's failure to provide adequate financial statements, CNB's reluctance to direct any more customers to Bed & Bath Inn, the recommendation of the management firm engaged by CNB not to advance more funds, and the failure of Bed & Bath Inn to document how the initial advance was spent.[30] CNB was assessed actual and exemplary damages for the fraud claims based on such non-disclosure.[31]

Alma Group, L.L.C. v. Palmer,[32] involved a suit on a note executed by Palmer to Bank United. After the FDIC was appointed as receiver of the original note and initiated non-judicial foreclosure proceedings, Palmer entered into a settlement agreement with the FDIC, which contained a final judgment clause and a non-assignment clause. Palmer executed a second note as part of the settlement agreement that contained neither the non-assignment clause nor any reference to the settlement agreement. After the FDIC transferred the second note and settlement agreement to Beal, Palmer defaulted. As a result of the default, Beal transferred the note back to the FDIC. Almost a year later, the FDIC transferred the second note and settlement agreement to Alma, who accelerated the note.[33]

Palmer argues that the transfer to Alma was invalid because the non-assignment language in the settlement agreement also applied to the second note. The court of appeals found that the transfer was authorized under the Financial Institutions Reforms, Recovery and Enforcement Act of 1989 (FIRREA), which permits the FDIC to transfer assets without consent or approval.[34] The court also found persuasive the fact that the second note did not contain or reference the non-assignment provisions.[35]

In re Wells Fargo Bank Minnesota N.A.[36] was a case of first impression involving a bank's motion for a writ of mandamus ordering the trial judge to enforce the waiver of jury trial found in a note[37] and guaranty[38] exe-

30. *Id.* at 476.
31. *Id.* at 491.
32. 143 S.W.3d 840 (Tex. App.—Corpus Christi 2004, pet. denied).
33. *Id.*
34. *Id.* at 845.
35. *Id.*
36. 115 S.W.3d 600 (Tex. App.—Houston [14th Dist.] 2003, orig. proceeding [mand. denied]).
37. The jury trial waiver in the note read as follows:
> Maker hereby agrees not to elect a trial by jury of any issue triable of right by jury, and waives any right to trial by jury fully to the extent that any such right shall now or hereafter exist with regard to this note, the mortgage [deed of trust] and the other security documents, or any claim, counterclaim or other action arising in connection therewith. This waiver of right to trial by jury is given knowingly and voluntarily by Maker, and is intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue. Payee is hereby authorized to file a copy of this paragraph in any proceeding as conclusive evidence of this waiver by Maker.

Id. at 603-04.
38. The jury trial waiver in the guaranty read as follows:
> Guarantor hereby agrees not to elect a trial by jury of any issue triable of right by jury, and waives any right to trial by jury fully to the extent that any

cuted by the borrower and guarantor, respectively. Wells Fargo Bank brought this action seeking a writ of mandamus to order the court of appeals to enforce the contractual jury waivers. The borrower and guarantor alleged that the Texas Constitution guarantees the right to a jury trial in all civil cases.[39] The court reviewed case law from other states, from federal courts and analogous Texas legal concepts in concluding that contractual jury waivers are enforceable in Texas.[40] The court noted that a majority of states enforce jury waivers if the waiver is knowing, voluntary and intentional.[41] Furthermore, the court pointed to the enforcement of contractual jury waivers in federal court despite a right to a jury trial contained in the Seventh Amendment to the United States Constitution.[42] Even in Texas, parties can waive jury trials under numerous procedural circumstances: agreement for a bench trial, failure to timely pay a jury fee, failure to timely request a jury trial, failure to appear for trial, and failure to object to a bench trial.[43] In addition to such procedural rules which effectively waive a jury trial, Texas courts have addressed contractual arbitration agreements whereby jury trials, as well as more inclusive rights, are waived.[44] Enforceability of such arbitration agreements have been clearly established in Texas.[45] Based on such persuasive authority, the court declared contractual jury waivers to be enforceable in Texas.[46]

If the waivers, however, are not knowing and voluntary, they will not be enforced.[47] In considering the borrower's and guarantor's attack on the knowing and voluntary nature of these waivers, the court first looked to the clear language of the waiver provisions pointing out explicit language that the waivers were "knowingly and voluntarily" made by the borrower and guarantor.[48] Further, the express language of the waivers authorized the payee to file a copy of such a jury waiver paragraph in any proceeding as conclusive evidence of waiver.[49] Such clear language shifted the burden of proof on the knowing and voluntary nature of the

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> such right shall now or hereafter exist with regard to this guaranty, the note, the mortgage, or the other loan documents, or any claim, counterclaim or other action arising in connection therewith. This waiver of right to trial by jury is given knowingly and voluntarily by Guarantor, and is intended to encompass individually each instance and each issue as to which the right to a trial by jury would otherwise accrue. Lender is hereby authorized to file a copy of this paragraph in any proceeding as conclusive evidence of this waiver by Guarantor.

Id. at 604.

39. TEX. CONST., art. I, § 15, art. V, § 10.
40. *In re* Wells Fargo Bank, 115 S.W.3d at 608-11.
41. *Id.* at 607 n.8.
42. *Id.*
43. *Id.* at 606-07.
44. *Id.* at 607.
45. *Id.* (internal citations omitted).
46. *Id.* at 607-08.
47. *Id.* at 609.
48. *Id.*
49. *Id.* at 610.

waiver to the party challenging it.[50] The first challenge was that there was no meaningful negotiation because the note and guaranty were standard forms submitted on a "take it or leave it" basis. No evidence was submitted on this claim; therefore, they failed to meet their burden of proof.[51] Secondly, the borrower and guarantor claimed that the waiver was not knowing and voluntary because they could not know what claims might accrue in the future. The court rejected this argument based upon the arbitration analogy whereby the arbitration provisions are enforced although the parties do not know every claim that might accrue in the future.[52] Furthermore, the court pointed to the explicit waiver language providing that the jury waiver covered "each instance and each issue as to which the right to a trial by jury would otherwise accrue."[53] This was deemed to encompass any conceivable future claims defeating such an argument.[54] In dicta, the court also considered other possible defenses that were not raised by the borrower and guarantor, although they were established in the record.[55] These other factors included: (i) the party's negotiations of the waiver provision; (ii) the conspicuousness of the provision; (iii) the relative bargaining positions; and (iv) whether the waiving party asked counsel to review the provision.[56] The court continued that conspicuousness was satisfied because the waiver provision was boldfaced, in all capital letters and set off in a separate paragraph.[57] The equality in bargaining power was satisfied because both parties were business entities and the borrower/guarantor testified regarding his substantial business enterprise.[58] The borrower/guarantor also testified that his attorney reviewed the closing documents, thereby satisfying the independent counsel review condition.[59]

Sibley v. RMA Partners, L.P./Sixth RMA Partners, L.P.[60] involved issues regarding attorneys' fees in a note collection case. Attorney's fees of $82,748.50 were upheld, even though the notes were only in the aggregate principal amount of $19,342.82 and had a principal and interest total of only $43,000 at the time of trial. Both of the notes contained identical language concerning collection costs, providing that upon default "the maker will be required to pay the lender's reasonable costs and attorney's fees incurred in enforcing its rights" and language concerning waiver, providing that "the maker waives certain legal requirements relating to the collection of notes, including presentment for payment."[61] Sibley

50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.* at 610 n.16.
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. 138 S.W.3d 455 (Tex. App.—Beaumont 2004, no pet.).
61. *Id.* at 457.

claimed that proper presentment was not made, thereby defeating the claim for attorneys' fees for the noteholder. The basis for this claim was that the debt was owed to "Sixth RMA Partners, L.P.," but the demand was made under the name of "RMA Partners," alleging a debt owed to RMA Partners. For attorneys' fees to be awarded under the Texas Civil Practice & Remedies Code, the claimant must present the claim to the opposing party.[62] Sibley contended that the claimant (Sixth RMA Partners, L.P.) did not make demand, but rather it was RMA Partners, L.P. Further, Sibley alleged that the failure of Sixth RMA Partners, L.P. to file an assumed name as "RMA Partners, L.P." was additional evidence that a presentment was not made by the claimant. However, the court of appeals did not have to reach a decision on this point because it found that the note's language provided a sufficient waiver of presentment such that the trial court was entitled to award attorneys' fees pursuant to the promissory note's terms rather than under the Texas Civil Practice & Remedies Code.[63]

III. GUARANTIES

The only noteworthy case relating to guaranties during the Survey period was *In re Wells Fargo Bank Minnesota N.A.*[64] This case (discussed above in connection with notes) confirmed that a proper contractual jury waiver provision in a guaranty is enforceable against the guarantor.[65]

IV. USURY

Third party expenses in a financing transaction are addressed in *Lovick v. Ritemoney, Ltd.*,[66] involving a class action claim against an automobile title loan broker and lender. Although this was an automobile loan governed by a specific non-real estate related statute, it has some general application to usury analysis of real estate cases. Betty Lovick requested a $2,000 title loan, which was to originate from Ritemoney, Ltd. as lender and CPCWA Company Ltd. as broker. Lovick agreed to pay a $1,500 fee to the broker for "loan brokerage and other credit services" for the loan.[67] Lovick claimed that the $1,500 broker's fee was "disguised interest" that, combined with the ten percent interest rate charged by the lender, made the loan usurious by exceeding the ten percent authorized by Texas law.[68] The trial court dismissed Lovick's complaint for failure to state a claim and Lovick appealed.

Lovick contended that the relationship between the broker and the lender was sufficient to attribute the brokerage fee as interest to the

62. TEX. CIV. PRAC. & REM. CODE ANN. § 38.002 (Vernon 1997).
63. *Sibley*, 138 S.W.3d at 458.
64. *In re Wells Fargo Bank Minnesota N.A.*, 115 S.W.3d 600 (Tex. App.—Houston [14th District] 2003, orig. proceeding [mand. denied]).
65. *See supra* notes 35-57 and accompanying text.
66. 378 F.3d 433 (5th Cir. 2004).
67. *Id.* at 436.
68. *Id.* at 437.

lender. Lovick alleged that the broker performed tasks ordinarily performed by a lender, including advertising, credit review, paperwork preparation, and issuance and cashing of checks; these activities shifted the lender's overhead to the broker. The court of appeals stated that broker services are separate services for which the broker may charge a reasonable fee; they do not constitute interest simply because those services could have been part of the lender's overhead in non-brokered transactions.[69] Lovick also contended that the brokerage fee should be attributed to the lender because of the agency relationship between the lender and the broker; all loans were brokered to the lender, and the lender made all of its loans through the broker. However, Texas case law provides that the lender must benefit from the broker's fee in some way that is not incidental in order to transform reasonable fees charged by the broker into interest attributable to the lender.[70] Lovick failed to demonstrate any direct benefit to the lender, such as the flow of all or part of the brokerage fee to the lender.[71] Unlike normal real estate transactions, the Credit Services Organizations Act (CSOA)[72] governs loan brokers and permits a broker to charge a brokerage fee in connection with its services; such fees are not interest. Essentially, CSOA expressly or impliedly permits the activities allegedly engaged in by the broker. Nevertheless, for general real estate financing transactions, the failure to prove a beneficial interest in favor of the lender or to a general (as opposed to special) agent should prevent fees paid to third party providers from being deemed interest to the lender.[73]

In *Swank v. Sverdlin*,[74] agents and investors of a corporation appealed a court's judgment of $180 million in favor of Anatoly Sverdlin, the former corporate CEO. Sverdlin, CEO of Automated Marine Propulsion Systems, Inc. (AMPS), developed and secured patents for technology that allegedly improved marine engine efficiency and lowered costs. Sverdlin attracted investors who created L.D.E. Associates, L.L.C. (LDE) to continue developing and marketing the technology. AMPS obtained a two million dollar loan from LDE, and Sverdlin pledged stock options in AMPS and assigned his patents—with an immediate, exclusive, and royalty-free license to AMPS—to LDE to secure the loan. Sverdlin alleged that the value of the assigned patents was interest that resulted in usury. The trial court found that the patent rights and stock options were compensation for the use of money and rendered judgment against LDE for usury. On appeal, the court of appeals concluded that a usurious transaction is tested not by what the debtor parts with, but rather by what

69. *Id.* at 439.
70. *Id.* at 440.
71. *Id.* at 440-41.
72. TEX. FIN. CODE § 393.001-.505 (Vernon 1998 & Supp. 2004-2005).
73. *Lovick*, 378 F.3d at 441.
74. 121 S.W.3d 785 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).

the creditor receives.[75] Because LDE did not have the right to sell, use or license such patents, LDE did not benefit from the full value of the patents.[76]

V. DEBTOR/CREDITOR

In *Mehan v. Wamco XXVVIII, Ltd.*,[77] Mehan sold a tract of real property and the inventory and equipment on the property to Best, who obtained financing from both Mehan (who retained a first priority security interest in the real property and equipment and a second priority security interest in the inventory) and a bank (who retained a first priority security interest in the inventory and a second priority security interest in the equipment). Wamco subsequently purchased the bank's security interest. When Best defaulted on both loans, Mehan notified Wamco that it intended to hold a foreclosure sale of the real property, inventory and equipment; Wamco responded and claimed a superior lien on both the equipment (which it later dropped after learning it did not have first priority in such equipment) and the inventory. Mehan subsequently foreclosed on its interest in the equipment and inventory and purchased both at the foreclosure sale, which extinguished Wamco's second priority security interest in the equipment. The court of appeals found that Wamco did not have actual possession of the inventory and equipment, because Wamco was not allowed on Mehan's property where the items were stored and such property was locked and fenced.[78] Wamco did not have constructive possession of the property, because Wamco did not have the ability to exercise control and dominion over the inventory without the assistance of the court (because it could not do so without breaching the peace).[79] The court disagreed with Mehan's contentions that Wamco became a trespasser on Mehan's property when it failed to remove the inventory within a reasonable time.[80] Additionally, the court determined that the trial court's judgment allowing Wamco to conduct a sale of the inventory on Mehan's property was sufficient, even though it addressed only entry rights, amount and timing of rental payments and deemed abandonment for items left on the property, but failed to address insurance, safety supervision, utility charges, and rights of lessees of the property.[81] The court concluded that there was no authority indicating that the trial court must provide for all aspects of the sale to comply with the applicable statute.[82]

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75. *Id.* at 795 (quoting Stewart v. Briggs, 190 S.W. 221, 222 (Tex. Civ. App.—Texarkana 1916, no writ).

76. *Id.*

77. 138 S.W.3d 415 (Tex. App.—Fort Worth 2004, no pet.).

78. *Id.* at 418.

79. *Id.* at 419.

80. *Id.*

81. *Id.*

82. *Id.* at 419-20.

In *Harding v. Lewis*,[83] Lewis sought an equitable exception to the dormant judgment rules. Before Lewis' judgment against Harding became dormant, Harding transferred six acres to his brother, who later transferred the acreage back to Harding. Harding did not record the deed evidencing such transfer until after the statutory period of time to revive a dormant judgment. Harding claimed his conduct did not prevent Lewis from satisfying the judgment. However, Harding admitted that he knew of the judgment-dormancy guidelines and that Harding's brother never paid for the transferred property (in fact, Harding continued to pay for it). Harding's brother testified that Harding wanted to hide such property from the lawsuit and threatened his brother if he were to disclose the concealment. The court of appeals determined that both direct and circumstantial evidence supported the trial court's conclusion that Harding performed a studied course in collection avoidance, which was sufficient for revival of the dormant judgment.[84] Harding further argued a lack of reasonable diligence on Lewis' part to discover assets. The record revealed that while no "legal" discovery (meaning post judgment discovery conducted through the judicial system) was conducted, the creditor, during the ten year period of the abstract of judgment, researched the courthouse real property records for transactions involving the judgment debtor and monitored the judgment debtor's mother's homestead and obituaries.[85] A business asset search was also conducted.[86] These constituted reasonable due diligence in the court's view.[87] Furthermore, the court agreed with Lewis that the reasonable diligence duty applied to the discovery of the fraud, not merely to the asset searches.[88] The court noted that fraudulent behavior tolls limitations until the plaintiff discovers or could have discovered the fraud with reasonable diligence.[89]

Sterquell v. Scott was another fraudulent transfer case.[90] Sterquell previously filed suit against Scott to recover the balance due on a note secured by a lien on certain real estate and recovered a judgment, which he filed an abstract of in the Potter County Clerk's office. Scott then filed this suit, alleging that such an abstract of judgment created a lien on all property owned by Scott in Potter County at that time and that Scott transferred many properties to various trusts and entities in an attempt to hide, transfer and conceal assets. The court of appeals set forth in detail the various transfers that took place, the various trusts and other entities involved in such transfers, and Scott's control or lack thereof over such transfers, trusts and other entities. Scott claimed such transfers took place as estate planning efforts by his mother. The court noted that a

83. 133 S.W.3d 693, 694 (Tex. App.—Corpus Christi 2003, no pet.).
84. *Id.* at 696.
85. *Id.* at 696-97.
86. *Id.* at 697.
87. *Id.*
88. *Id.* at 697-98.
89. *Id.* at 697 (citing Estate of Stonecipher v. Estates of Butts, 591 S.W.2d 806, 809-10 (Tex. 1992)).
90. 140 S.W.3d 453, 455 (Tex. App.—Amarillo 2004, no pet.).

fraudulent intent must be affirmatively shown, not presumed, and that, while the evidence was sufficient to raise issues of fact, the court could not say that the trial court's judgment in favor of the debtor was against the great weight of the evidence.[91] The court noted, for example, that there was no evidence, with respect to a limited partnership that purchased and foreclosed on one of the liens involved, that Scott had any part in the creation of the limited partnership, nor that he transferred any property to that entity.[92] Other transfers support the trial court's judgment, as the trial court could have (i) placed emphasis on the lack of evidence in connection with whether the properties transferred constituted all or a substantial part of the property owned or that might have been owned by Scott, (ii) accepted the testimony that the various entities were created for legitimate estate planning purposes (and in most instances were not created by Scott), and (iii) placed some credence on the fact that the transfers involved were not hidden, but were instead matters of public record.[93]

Although the next case deals with fraud in a deposit account context, it could be applicable to real estate financing transactions that are tax motivated. *Lewis v. Bank of America NA*[94] involved a petition for rehearing. Previously, Lewis sued the bank and a loan officer alleging fraud and breach of contract when the parties failed to place funds in tax-deferred certificates of deposit. The action was removed, and a jury found for the borrower and the United States District Court for the Northern District of Texas denied the defendant's renewed motion for judgment as a matter of law and entered judgment for the borrower. The parties cross-appealed and the court of appeals reversed.[95] On borrower's petition for rehearing, Lewis argued that the bank's loan officer had a duty to disclose the taxability of the new account according to *Union Pacific Resources Group, Inc. v. Rhone*.[96] *Rhone* held that a duty to speak arises by operation of law when one party voluntarily discloses some but less than all material facts, so that he must disclose the whole truth (i.e., all material facts), lest his partial disclosure convey a false impression.[97] The court agreed that *Rhone* correctly stated current Texas law but determined that even if the loan officer knew of such tax consequences and had an obligation to advise Lewis accordingly, Lewis still had not satisfied the requirement that he was justified in relying on the loan officer for tax advice.[98]

Reliant Energy Services v. Enron Canada Corp.[99] involved a Master Netting, Setoff and Security Agreement ("Netting Agreement") between several Reliant-affiliated entities ("Reliant Parties") and five subsidiaries

91. *Id.* at 460-61.
92. *Id.* at 461.
93. *Id.*
94. 347 F.3d 587 (5th Cir. 2003).
95. Lewis v. Bank of Am. NA, 343 F.3d 540 (5th Cir. 2003).
96. Union Pac. Res. Group, Inc. v. Rhone, 247 F.3d 574 (5th Cir. 2001).
97. *Id.* at 574.
98. *Lewis*, 343 F.3d at 547.
99. 349 F.3d 816 (5th Cir. 2003).

of the Enron Corporation (collectively, "Enron Parties"). The Reliant Parties and Enron Parties previously entered into various master sales agreements regarding the trade and sale of natural gas, electricity and broadband data capacity (with each such agreement being entered into between a single Enron party and a single Reliant party). When questions arose regarding Enron Corporation's accounting practices and financial statements, the Enron Parties and Reliant Parties entered into the Netting Agreement, which combined all underlying master agreements into one single integrated agreement. The Netting Agreement provided that if one of the parties defaulted, the non-defaulting party could declare all of the underlying master agreements in default (or "cross-default"), upon which the non-defaulting party could accelerate the transactions and exercise certain setoff rights, among other things. Upon such a close out of the transactions, a "Settlement Amount" would be determined, which would be the net amount due and payable by one party to the other. The Netting Agreement further provided for a netting or offsetting of the settlement amounts from each underlying master agreement, so the parties could arrive at a final settlement amount. The procedures set forth stated in pertinent part that "[t]he Final Settlement Amount shall be payable by the Group from whom such payment is due on the third Business Day after the statement is provided."[100]

Reliant notified the Enron Parties of one of the Enron Parties' default of an underlying master agreement on November 30, 2001. On December 2, 2001, the Enron Parties, except for Enron Canada (one of the Enron subsidiaries who was a party to the Netting Agreement), filed for Chapter 11 bankruptcy protection, after which such Enron Parties were protected from suit by reason of the automatic stay. After netting the settlement amount as required under the Netting Agreement, Reliant sought the settlement amount ($78,468,996.60) from Enron Canada, arguing that the terms of the Netting Agreement made Enron Canada jointly liable for such damages. Enron Canada responded that it was not subject to the court's personal jurisdiction, that Reliant violated the bankruptcy stay, and that Enron Canada was not liable for the debts of its affiliates under the Netting Agreement.

The court of appeals noted that, as a general rule, an obligation entered into by more than one person is presumed to be joint, but this presumption can be overcome by express words of severance, an indication of an intention to be bound severally, or a statute declaring such contract several.[101] Without such an applicable statute, the court analyzed whether the language of the Netting Agreement imposed several or joint obligations, either expressly or though an indicated intention.[102] After careful analysis of the language noted above with respect to payment of the settlement amount, the court determined that the language was ambiguous,

100. *Id.* at 820.
101. *Id.* at 823.
102. *Id.*

as two different meanings of the language were plausible. The court remanded the case to the district court to make a factual determination as to the intentions of the parties.[103] This case is instructive to practitioners who sometimes carelessly use the phrase "as applicable" to simplify drafting but which leaves the contract ambiguous.[104]

The court then analyzed whether the case constituted the type of unusual circumstance that should extend a bankruptcy stay.[105] The court noted that an automatic stay usually applies only to the debtor, and not co-debtors, but that an exception may be invoked where "there is such identity between the debtor and the third-party defendant that the debtor may be said to be the real party defendant and that a judgment against the third-party defendant will in effect be a judgment or finding against the debtor."[106] The court determined that the district court's finding that this exception extended to Enron Canada was premised largely on the district court's finding that Enron Canada was not obligated under the contract for the debts of the other Enron Parties.[107] Therefore, the court remanded the case to the district court to reconsider this issue in light of its findings as to the meaning of the Netting Agreement.[108] Circuit Judge Carl E. Stewart dissented, stating that the terms of the Netting Agreement were not ambiguous, and Enron Canada should not be obligated to pay the debts of any other Enron party.[109]

VI. PURCHASER/SELLER

McMillan v. Dooley[110] involved the enforcement of rights of first refusal. The three plaintiffs were original lessees of three different leases; the plaintiffs entered into farmout agreements specifying that the lessee would assign its interest in the applicable lease if successful drilling occurred. The farmout agreements further reserved for each lessee a pref-

103. *Id.* at 824-25.

104. The ambiguous provision from the Netting Agreement regarding the express covenant of payment of the Final Settlement Amount provides, in relevant part, that the Final Settlement Amount shall be payable by "the Group from whom such payment is due." *Id.* at 823. The Netting Agreement defined "Group" as the Enron Group or Counter Party Group, as applicable, and defined "Enron Group" to mean all Enron Parties (which would include Enron Canada). If the term "all Enron Parties" is substituted for the word "Group," the provision reads that the Final Settlement Amount is payable by all Enron Parties from whom such payment is due. This interpretation would make the obligations of the Enron Parties several as to their own indebtedness. The other possible interpretation of this language is that the phrase "applicable" relates to the word "Group." Under this interpretation, the applicable phrase reads that either the Enron Group or the Counter Party Group, as applicable, would make the payment of the Final Settlement Amount. Such interpretation would render all Enron Parties jointly liable for the Final Settlement Amount. The remainder of the Netting Agreement was not sufficiently clear to be able to determine which of these interpretations was intended by the parties.

105. *Id.* at 825.

106. *Id.* (quoting A.H. Robins Co. v. Piccinin, 788 F.2d 994 (4th Cir. 1986)).

107. *Id.* at 825-26.

108. *Id.* at 826.

109. *Id.* at 826-27 (Stewart, J., dissenting).

110. 144 S.W.3d 159 (Tex. App.—Eastland 2004, pet. denied).

erential right to purchase the lease in the event the assignee later sold the lease. They also provided that the assignee must notify such lessee prior to its subsequent sale of the lease and the lessee would have ten days to purchase for the price offered (after which the assignee was free to sell). The leases were each assigned by the lessees under the respective farmout agreements to third parties who were affiliated with one another, and such assignees then subsequently assigned all three leases to one party in a package conveyance, without notice being given to any of the preferential purchase rightholders.[111]

When Dooley (one of the preferential purchase right holders) informed the subsequent assignees of his preferential purchase right, the subsequent assignees offered to sell Dooley the package of leases for the same price that they had paid. Dooley declined the offer (as he was only interested in purchasing the Dooley lease portion of the package). Dooley demanded information pertaining to the terms of the conveyance but was told there was no way to divide the properties. Dooley eventually filed suit against the assignees under the farmout agreements, and the subsequent assignees and Smith and Johnson (the preferential purchase right holders in the other two leases) joined as plaintiffs.[112]

The court of appeals found that the assignee's previous breaches of the preferential purchaser rights under the farmout agreement (upon various conveyances of fractional interests) did not bar the suit because the suit was brought within the limitations period of this particular conveyance. The court further found that the plaintiffs had not waived their claims based on earlier breaches, as such earlier breaches were for fractional interests and did not evidence waiver in the event of a conveyance of all interests.[113] The court stated that when a sale is made in breach of a preferential purchase right, the rightholder obtains an enforceable option to acquire the property according to the terms of the conveyance, but that such an option is not perpetual and must either be accepted or rejected within the specified time frame, as if notice had been properly given.[114] The court discussed whether the provision in this case was a "price" agreement (where the provision specifies the price at which the right may be exercised) or a "terms and conditions" agreement (where the property owner can strike its best deal and require the rightholder to match that bargain) and determined that, although the provision used the term "price," the provision otherwise did not contain any limitations on the bargain the original assignee could negotiate with a subsequent potential purchaser.[115]

The court further determined that the inclusion of the other leases in the offer presented to Dooley did not violate the express terms of the

111. *Id.* at 164-66.
112. *Id.* at 166-69.
113. *Id.* at 170-71.
114. *Id.* at 172.
115. *Id.* at 174-75.

preferential purchase provision with respect to the terms of conveyance to which the assignee and purchasers could have agreed, and that the offer given to Dooley was therefore not invalid.[116] The court held that the defendants made a sufficient presentment of the preferential right if they made a reasonable disclosure to Dooley of the terms of the contemplated conveyance, regardless of whether the offer included property not covered by the preferential purchase right.[117] The court noted that exercising an option is equivalent to accepting an offer, and the general rule is that to accept an offer, one cannot change or qualify its terms.[118] However, the court determined that since "a rightholder is not permitted to expand its preferential purchase right to include property not covered by the provision, it would be improper for him to be required to accept other property not covered by his preferential purchase right."[119] Although Dooley was not required to accept the other leases in order to exercise his preferential purchase right, Dooley did not thereafter continue to possess the opportunity to exercise the right with respect to the Dooley lease portion indefinitely.[120] Dooley's rejection of the "package" offer thus prevented him from subsequently attempting to exercise the preferential purchase right as to the specific property.[121] Dooley was required to take affirmative steps within the time period specified to preserve the viability of his option, such as notifying the property owner that he intended to exercise his preferential purchase right subject to his objection to the disputed terms, filing a declaratory judgment action prior to the date required for acceptance with regard to the disputed terms, or demanding that the right of first refusal be honored and depositing earnest money as tender of intended performance.[122]

With regard to Smith's claims, the court determined that although the subsequent purchasers were not parties to the original agreement, they expressly assumed responsibility for complying with its obligations, and their abandonment of the lease triggered their obligation to provide Smith with an opportunity to purchase the lease (independently of the original assignor's obligation to provide Smith notice when such original assignor conveyed the lease).[123] With regard to Johnson's claims, the court determined that, despite various conveyances made by Johnson with respect to the lease, Johnson reserved the preferential purchase right in his capacity as the lessee of the lease, and the other conveyances did not include the conveyance of such interest.[124] The preferential purchase right is a covenant running with the land, and, therefore, the purchaser was bound by the preferential purchase right provision upon obtaining

116. *Id.* at 173-75.
117. *Id.* at 174-76.
118. *Id.* at 178-79.
119. *Id.* at 179.
120. *Id.*
121. *Id.* at 180.
122. *Id.*
123. *Id.* at 182.
124. *Id.* at 184.

the lease; however, Johnson was not required to own a real property interest in order to enforce the right he still had, as that would be contrary to the intentions of the parties as evidenced in the documents.[125]

Lastly, the court determined that the subsequent purchasers were not trespassers on the Dooley lease land, as Dooley did not possess a property interest in such land that could be subject to trespass (because his right terminated).[126] Additionally, Johnson did not have a sufficient interest in his applicable property to claim trespass, as the gist of an action of trespass to realty is the injury to the right of possession. Johnson did not have such a right of possession prior to obtaining relief from the trial court.[127]

In *Cendant Mobility Services Corp. v. Falconer*,[128] Falconer, through Cendant, purchased a house with serious latent structural flaws. Falconer sued, asserting fraud and violations of the Texas Deceptive Trade Practices—Consumer Protection Act (DTPA). Falconer claimed that Cendant failed to disclose that the house's foundation showed evidence of substantial movement and that Cendant provided only a portion of the relevant engineer's report for his review. The court of appeals noted, however, that Cendant initialed each page of an engineering report that disclosed such information about the foundation.[129] The court disagreed with Falconer's contention that he was misled by Cendant's agent because the agent orally explained only portions of the report to him, and held that there was no duty under the DTPA requiring sellers to orally disclose the contents of a written contract.[130] The court noted that it is well settled that parties to a contract have an obligation to read what they sign and that the exception to this rule only applies in cases of false representations that induce another party to contract.[131] The court found no evidence of fraud, as the applicable information was disclosed in written form and the information given orally did not contradict such written information.[132] The court held that there was no evidence showing Cendant failed to disclose any information in an attempt to fraudulently induce Falconer to contract, but that Cendant did disclose all material matters.[133]

In *Lyman D. Robinson Family Ltd. v. McWilliams & Thompson*,[134] the appellee (acting as escrow agent) mistakenly released to the appellant escrowed amounts that pertained to two different transactions instead of

125. *Id.* at 185.
126. *Id.* at 188.
127. *Id.* (citing Pentagon Enter. v. S.W. Bell Tel. Co., 540 S.W.2d 477, 478 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.)).
128. 135 S.W.3d 349 (Tex. App.—Texarkana 2004, no pet.).
129. *Id.* at 352.
130. *Id.* at 354.
131. *Id.* (citing First City Mortgage Co. v. Gillis, 694 S.W.2d 144, 146-47 (Tex. App.—Houston [14th Dist.] 1985, writ ref'd n.r.e.).
132. *Id.*
133. *Id.*
134. 143 S.W.3d 518 (Tex. App.—Dallas 2004, pet. denied).

the one requested amount that applied to the transaction at hand. Appellee requested that the overpayment be repaid, and appellant refused. The court of appeals noted that it is a general rule that money paid under a mistake of fact may be recovered and that negligence in paying does not give the payee the right to keep what was not his, unless he was misled or prejudiced by the mistake.[135] The court determined that the fact that appellant paid taxes on such extra amount of money and made other expenditures in reliance on the payment did not prejudice appellant, as appellant's receiving money to which it was not entitled, or claiming, paying taxes on and spending such money, did not "prejudice" appellant.[136] Additionally, the court determined that appellant's argument with regard to such being a unilateral mistake did not apply, as such argument involved case law applicable to money paid voluntarily with full knowledge of all facts, as opposed to the case at hand where money was paid by mistake.[137]

In *Catalina Development, Inc. v. County of El Paso*,[138] the Texas Supreme Court analyzed whether a county waived its immunity from suit by soliciting bids for purchasing a parcel of land, accepting the highest bid, depositing the tendered earnest money, and sending the purported buyer a warranty deed and affidavit to close the transaction. When the county delayed authorization to sign the deed and a newly elected commissioners court refused to approve the sale, the buyer sued. The supreme court held that the county, by its conduct, did not waive its immunity from suit.[139] When a governmental unit contracts with a private party, it waives immunity from liability but not immunity from suit (which it can do only through express consent).[140] The supreme court found that the actions of the county are the kind that are necessary and expected during contract formation, and noted that the supreme court had previously made clear that contract formation, by itself, is not sufficient to waive a governmental unit's immunity from suit.[141] Such a waiver may be recognized by conduct in some situations, but the supreme court found that the equitable basis for such a waiver did not exist on the facts.[142] The supreme court further noted that the bidding statutes under which the sale of the land was conducted support this conclusion and that a governmental entity acting under the statutes is not required to accept any bid or complete a sale.[143] Justice Enoch dissented, noting that the supreme

135. *Id.* at 520 (citing Hall v. Freedman, 383 S.W.2d 236, 239 (Tex. Civ. App.—Fort Worth 1964, writ ref'd n.r.e.)).

136. *Id.*

137. *Id.* at 521.

138. 121 S.W.3d 704 (Tex. 2003).

139. *Id.* at 707.

140. *Id.* at 705 (citing Travis County v. Pelzel & Assocs., Inc., 77 S.W.3d 246, 248 (Tex. 2002)).

141. *Id.* at 706.

142. *Id.*

143. *Id.* at 707.

court's position is unique among most states.[144]

In *Oat Note, Inc. v. Ampro Equities, Inc.*,[145] Oat Note sold a piece of land to M&L England under a contract which required M&L England to improve an existing low-water crossing on the property per city regulations. The contract also required Oat Note to construct a road leading from the highway to such low-water crossing on the adjacent land it retained within six months of completion of the law-water crossing. Oat Note subsequently sold the adjacent land to Ampro, who assumed the obligation to build the road. Although the President of Oat Note was informed that the low-water crossing was complete, he did not inform Ampro of such fact. When M&L England sued those involved, Ampro entered into a settlement with M&L England, and then filed a cross-claim against Oat Note claiming fraud and misrepresentation regarding the construction obligations. The court of appeals found that the fact that the property was conveyed "as-is" was not determinative because Ampro's damages were not a result of factors that fell under the agreement, but instead were caused by the misrepresentation made as to whether M&L England believed the low-water crossing was complete.[146] The court found that evidence was sufficient to support the jury's findings that Oat Note's misrepresentations with regard to whether the low-water crossing was complete caused Ampro's damages.[147] The court further held that damages were proper in this case because the damages involved stemmed from an injury independent of the relative benefit of the bargain itself.[148]

In *Dickey v. McComb Development Co., Inc.*,[149] the Dickeys entered into a deed contract with McComb, subsequently made improvements to the property, moved onto the property, moved off the property, and eventually leased it to a third party. After eight years of making payments to McComb, the Dickeys received notice that they were delinquent in two payments and failed to pay certain property taxes and that they had thirty days to correct such defaults, or the contract would be terminated. The Dickeys tendered payment one day after the deadline and, although McComb physically took the payment, McComb notified the Dickeys that the payment was too late and terminated the contract. The Dickeys sued, claiming that McComb wrongfully terminated the parties' contract for the sale of land, failed to provide proper notice of a default in payment for the land, and failed to give the Dickeys a sufficient opportunity to cure the default. The court of appeals found that the Dickeys were not entitled to a sixty-day cure period, as is required in connection with certain residential properties under the Texas Property Code, because the property was not being used as a residence. Nor did the evi-

144. *Id.* (Enoch, J., dissenting).
145. 141 S.W.3d 274 (Tex. App.—Austin 2004, no pet.).
146. *Id.* at 279.
147. *Id.*
148. *Id.* at 280.
149. 115 S.W.3d 42 (Tex. App.—San Antonio 2003, no pet.).

dence prove the Dickeys' intent to reside on the property in the future.[150] The fact that McComb physically took the payment did not amount to a waiver or acceptance, as the Dickeys were informed at the time of attempted payment that the payment was too late. McComb did not in any other manner accept the payment as timely or curative.[151] Justice Stone concurred with the opinion and noted that the case displays the inherent unfairness that can arise when a contract for deed is used to obtain real property.[152]

In *Denman v. Citgo Pipeline Co.*,[153] property owners sued defendants for contamination and injuries to their land caused by the presence of oil and gas equipment. The court of appeals noted that a cause of action accrues when a plaintiff first becomes entitled to file a lawsuit based on a legal wrong and that the right to sue is a personal right belonging to the person owning the property at the time of the injury.[154] Without an express provision stating otherwise, such right does not pass to a subsequent purchaser of the property.[155] The facts of the case showed that Citgo sold the pipeline before the Denmans purchased the property and that, since the sale, Citgo had not conducted operations on the Denman property.[156] Evidence that Citgo had a second pipeline on the property was insufficient, and the fact that Citgo's signs had not been removed or replaced was not determinative as to whether Citgo owned a second pipeline or was continuing to operate on the property.[157] The court determined that the Denmans lacked standing to sue because any injury to their property occurred before they purchased it and their deed contained no assignment of any cause of action.[158] Whether the injury was temporary or permanent is meaningless with respect to the issue of standing, so long as the injury occurred prior to the plaintiff's purchase of the land.[159]

In *Roundville Partners, L.L.C. v. Jones*,[160] Roundville sued Jones seeking specific performance of a commercial earnest money contract. The court of appeals noted that to assert a right under an escrow contract, a party must show that it complied with the conditions of escrow, in that it actually tendered performance or that it offered to perform and was prevented from performing through no fault of its own.[161] It was undisputed that Roundville did not actually tender performance on the contract within the time specified, as Roundville had not executed the required documentation, among other things. The court found that Jones' inaction

150. *Id.* at 45.
151. *Id.* at 46.
152. *Id.* at 47 (Stone, J., concurring).
153. 123 S.W.3d 728 (Tex. App.—Texarkana 2003, no pet.).
154. *Id.* at 732 (citing Zidell v. Bird, 692 S.W.2d 550, 554 (Tex. App.—Austin 1985, no writ)).
155. *Id.*
156. *Id.* at 733.
157. *Id.* at 734.
158. *Id.*
159. *Id.* at 735.
160. 118 S.W.3d 73 (Tex. App.—Austin 2003, pet. denied).
161. *Id.* at 79 (citing Bell v. Rudd, 191 S.W.2d 841, 844 (Tex. 1946)).

with respect to closing the transaction did not rise to the level of affirmatively preventing Roundville from tendering his performance.[162] Roundville previously executed documents and a lien note with respect to a previous transaction with Jones, in spite of Jones' similar failures, and there was no evidence that Roundville could not have done the same in this situation.[163] Because Roundville did not tender performance and failed to establish that he was prevented from tendering performance, Roundville was not entitled to the remedy of specific performance.[164]

In *Garrod Investments, Inc. v. Schlegel*,[165] Schlegel used a standard form contract to make a written and signed offer to sell a condominium to Garrod. Garrod altered the financing terms and closing date of the offer, signed it, and returned it to Schlegel. The court of appeals noted that any material change in a proposed contract constitutes a counteroffer, which must be accepted by the other party for a contract to exist.[166] The court determined that Garrod's changes to the contract were made to material terms to the contract, and therefore constituted a counteroffer.[167] The Schlegels' evidence showed that they never signed the contract after such changes were made by Garrod; therefore, the court held that the contract did not satisfy the Statute of Frauds and could not be enforced.[168]

In *Overton v. Bengel*,[169] Overton signed a "First Right of Refusal" with a representative of the trust that held title to the property in question. The "First Right of Refusal" gave Overton thirty days to purchase two tracts of land at a set price after receiving notice of the death of the survivor of certain parties to the trust. After such death, the executor signed a contract to sell the applicable land to Cherokee. When Overton tried to enforce his "First Right of Refusal," Cherokee refused to release the estate from its contract. The court found that, despite the title of the document, the agreement was in fact an option to purchase the property, as it gave Overton a right to purchase such property for a fixed price within a set time period.[170] The court further found that because a sales contract that was to be attached to the option contract was not attached, and because the sales contract the Overtons cited as the correct one was not signed by the party to be charged, the contract was unenforceable because it did not comply with the Statute of Frauds.[171] When agreements are defined within a memorandum, the memorandum must contain all the essential elements of the agreement, so that such agreement can be

162. *Id.* at 81.
163. *Id.*
164. *Id.*
165. 139 S.W.3d 759 (Tex. App.—Corpus Christi 2004, no pet.).
166. *Id.* at 764-65 (internal citations omitted).
167. *Id.* at 764.
168. *Id.* at 765.
169. 139 S.W.3d 754 (Tex. App.—Texarkana 2004, no pet.).
170. *Id.* at 757.
171. *Id.* at 758.

understood from the writings without resorting to oral testimony.[172] If one document refers to another, such reference must contain sufficient details of the separate contract and merely alluding to such contract is insufficient.[173]

In *In re Fitzmaurice*,[174] the court of appeals analyzed whether an adequate nexus existed between a party's claims and the property that was subject to a lis pendens. A party may file a lis pendens to give constructive notice to those taking title to property that the property is subject to a claim.[175] In this case, purchasers of property in a residential subdivision sued the developers, alleging that the developers made representations regarding the construction of certain amenities in the subdivision, and the purchasers filed a lis pendens against 700 acres of land. The defendants argued that the suit did not involve a dispute over the ownership of the property described in the lis pendens and that the lis pendens should therefore be canceled. Plaintiffs sought to impose a constructive trust over the remaining property owned by the developer to prevent unjust enrichments. The plaintiffs also sought to have the properties delivered to them so that they could operate such properties for the benefit of the homeowners as was represented by the defendants. The court held that the pleading of the parties did not identify any specific property where the alleged amenities were to be built, but instead applied the lis pendens to all unsold lots plus adjacent property outside the subdivision.[176] The court found that no adequate nexus existed between the claims and the property, and, therefore, the motion to cancel the lis pendens was granted.[177]

VII. DECEPTIVE TRADE PRACTICES ACT

There were a few notable cases decided during the Survey period involving real property and claims of violations under the Texas Deceptive Trade Practices—Consumer Protection Act ("DTPA").

In the *Citizens National Bank*[178] case, one issue before the court of appeals was whether the size of ARI's construction loan with the bank exceeded the threshold requirement for bringing a claim under the DTPA. The DTPA does not apply to "a cause of action arising from a transaction, a project, or a set of transactions relating to the same project, involving total consideration by the consumer of more than $500,000, other than a cause of action involving a consumer's residence."[179] Citi-

172. *Id.* (citing Cohen v. McCutchin, 575 S.W.2d 230, 232 (Tex. 1978)).
173. *Id.* (citing EP Operating Co. v. MJC Energy Co., 883 S.W.2d 263, 267 (Tex. App.—Corpus Christi 1994, writ denied)).
174. 141 S.W.3d 802 (Tex. App.—Beaumont 2004, no pet.).
175. *Id.* at 803 (citing TEX. PROP. CODE ANN. § 12.007 (Vernon 2004)).
176. *Id.* at 805.
177. *Id.*
178. Citizens Nat'l Bank v. Allen Rae Invs., Inc., 142 S.W.3d 459 (Tex. App.—Fort Worth 2004, no pet.).
179. *Id.* at 473 (citing TEX. BUS. & COM. CODE ANN. § 17.49(g) (Vernon Supp. 2004)).

zens National Bank ("CNB") made a construction loan to ARI in the principal amount of $600,000. CNB contends that the consideration was in excess of $500,000, so the DTPA does not apply. ARI, on the other hand, contends that since only $463,193.45 was advanced to ARI, the DTPA applies. The court recognized that the issue of whether the term "consideration" as used in the statute involves only detriment actually incurred or detriment that a consumer promises to incur in the future was an issue of first impression in Texas.[180] However, the court determined that it did not need to decide that issue.[181] The court noted that ARI paid $122,096.81 to CNB at closing ($90,000 of which was for purchasing the lot on which the hotel would be built, and the other amount was presumably for closing costs of the loan), and that amount, even if just added to the $463,193.45 amount, would cause the total consideration to exceed $500,000.[182] Therefore, the court held that the DTPA did not apply and held that the trial court abused its discretion in submitting the DTPA jury question and allowing ARI to recover from CNB under the DTPA.[183] The question as to whether "consideration" under the DTPA would only involve an amount of a loan actually advanced or the entire amount of the note was not decided by the court.[184]

The *Barnett v. Coppell North Texas Court, Ltd.*[185] case involved false representations made by a construction contractor. CNTC hired Barnett to construct an athletic facility, and the parties entered into a construction contract. Barnett ceased construction before the project was finished, the bank foreclosed, and this lawsuit followed; CNTC brought claims against Barnett for violations of the DTPA. The trial court found for CNTC. Barnett appealed on various issues, including that the evidence was insufficient to establish CNTC's DTPA claim.

The court of appeals affirmed the trial court's decision, holding that the evidence supporting the jury's finding was not so weak as to be clearly unjust and wrong.[186] Barnett's representations, on which the trial court entered judgment for CNTC, included the following: (i) he promised to build "three times the facility for one and a half times the amount of money;" (ii) he stated that the contractual amount of $1.96 million was "more than adequate to build this project;" (iii) he "guaranteed" he would finish the project "no matter what" for $180,000, regardless of whether costs increased; (iv) he represented that the building would be completed in six months and that he would have "time to spare;" (v) he said the quality of construction would be "great"; and (vi) he indicated that he had adequate crews of approximately twenty or more men to

180. *Id.*
181. *Id.* at 474.
182. *Id.*
183. *Id.*
184. *Id.*
185. 123 S.W.3d 804 (Tex. App.—Dallas 2003, pet. denied).
186. *Id.* at 822.

"knock it out real quick."[187] In his appeal, Barnett claimed that construction contracts are exempt from DTPA, but because this was not raised in the trial court, he waived his right to raise it on appeal.[188]

VIII. LEASES

Several cases were decided during the Survey period relating to landlord and tenant disputes. In particular, issues presented this year with respect to commercial leases included the implied warranty of suitability for commercial purposes and title to improvements constructed on the leased premises.

Lee v. Perez[189] involved the implied warranty of suitability for commercial purposes. Perez entered into a commercial lease with Lee for the lease of two lots in Houston. The lease specifically provided that the lots could be used only for the sale, financing and insurance of automobiles. Perez received a letter from an attorney with the City of Houston informing him that he was in violation of a deed restriction limiting the property to residential use. Perez ceased operating his business on the lots and sued Lee, his landlord. The trial court held that Lee breached the lease and awarded actual damages to Perez. The court of appeals affirmed the trial court's decision. The court held that the deed restriction rendered the lots unsuitable for the purpose required under the lease.[190]

The court cited authority for the proposition that there is an implied warranty under Texas law that a commercial lease is suitable for the intended commercial purpose.[191] This implied warranty of suitability for commercial purposes only applies to latent defects.[192] Lee argued that the deed restriction was not a latent defect because it was filed against the premises in the real property records of the county. Because the document was recorded, Lee contended that Perez had constructive notice of the restriction. The court rejected Lee's argument, holding that the doctrine of constructive notice applies to buyers of real property and therefore declining to extend its application to tenants.[193]

Lee also argued that the implied warranty did not apply because the lease contained an "as-is" clause by which Perez accepted the leased premises. The court held that the "as is" clause only related to the physical condition of the property and did not contain a waiver of any express or implied warranties of suitability.[194] The "as is" clause provided that "Tenant has examined and accepts the leased premises in its present as is condition as suitable for the purposes for which the same are leased, and

187. *Id.* at 822-23.
188. *Id.* at 822.
189. 120 S.W.3d 463 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
190. *Id.* at 466.
191. *Id.* at 467 (citing Davidow v. Inwood N. Prof'l Group—Phase I, 747 S.W.2d 373, 377 (Tex. 1988)).
192. *Id.*
193. *Id.*
194. *Id.* at 467-68.

does hereby accept the leased premises."[195] If the "as-is" language had included an express disclaimer and waiver by Perez of any warranty, express or implied, for the suitability or fitness of the leased premises for a particular purpose, the court implied that it probably would have reached a different conclusion.[196]

Travis Central Appraisal District v. Signature Flight Support Corp.[197] also involved a commercial lease. Here, the issue was whether the tenant or the landlord owned improvements on leased property when the tenant constructed such improvements. The tenant entered into a lease with the City of Austin for property at the Austin-Bergstrom International Airport. The lease required the tenant to construct certain airport facilities. The Travis Central Appraisal District ("TCAD") assessed property taxes against the tenant, asserting that the tenant owned or had a taxable ownership interest in the improvements. Tenant then initiated a suit seeking declaratory judgment that the property taxes assessed against the tenant were invalid, arguing that the improvements are owned by the City for a public use and thus are tax exempt.

In Texas, the general rule is that improvements become part of the land on which they are constructed and belong to the landowner unless the parties agree otherwise.[198] The court of appeals reviewed the language in the lease and concluded that the parties intended that the improvements would be owned by the city.[199] The language in the lease provided: "Legal title to Facilities constructed by Tenant shall be held by the City after acceptance of the Facilities by the City and shall be completely vested in the city at the end of the term of this Agreement."[200] The evidence at trial indicated that the city accepted the improvements in 2000, and thus, the court held that the city held title to the improvements since 2000.[201]

TCAD pointed to several other provisions in the lease, arguing that they were contrary to a finding that the parties intended that the city owned the improvements. Among the provisions TCAD addressed was a provision in the lease that allowed the tenant to "sell the Facilities."[202] The court interpreted this provision as granting the tenant the right to sell its ownership interest in the leasehold, but not a right to sell the improvements.[203]

The issue before the Texas Supreme Court in *Universal Health Services v. Renaissance Women's Group, P.A.*[204] was whether the landlord had a covenant to continue operating a hospital located in the same building as the leased premises. The tenants were physicians who entered into an

195. *Id.* at 468.
196. *Id.*
197. 140 S.W.3d 833 (Tex. App.—Austin 2004, no pet.).
198. *Id.* at 838 (citing Lindsley v. Lewis, 84 S.W.2d 994, 995-96 (Tex. 1935)).
199. *Id.* at 840.
200. *Id.* at 839.
201. *Id.* at 843.
202. *Id.* at 841.
203. *Id.*
204. 121 S.W.3d 742 (Tex. 2003).

agreement with the owner of a hospital to lease office space in the same building as the hospital. The owner contacted the physicians to promote the owner's women's health center concept. During the second year of the ten-year lease, the owner decided to close the hospital. The physicians sued for damages and sought injunctive relief to keep the hospital open, alleging that the owner was bound by the lease to keep the hospital open throughout the term of the lease. The trial court ruled in favor of the physicians, and the decision was affirmed on appeal. The Texas Supreme Court reversed, holding that nothing in the lease required the hospital to stay open.[205]

The physicians relied on language in the lease (and in related letter agreements) that provided that the project "will be composed of a women's hospital located on the first floor."[206] The supreme court held that this language was merely a general description of the project and did not constitute an obligation on the part of the owner to continue operation of the hospital.[207] The physicians also relied on language that required the owner to "use diligent efforts to obtain all licenses and permits required . . . to operate the women's hospital" and to "use reasonable efforts to obtain, and maintain in full force and effect throughout the Term of the Lease, written agreements . . . certifying the Project as an approved hospital by . . . health insurance companies. . .for which [the physicians] . . . are approved providers."[208] The supreme court also held that these provisions did not expressly impose an obligation on the owner to operate the hospital.[209]

The supreme court analogized these facts to a "permitted use clause" in a lease. If a lease states, for example, that the premises will be used for the sale of clothing and for no other purpose, that provision does not impart an obligation on the tenant to use or continue to use the premises for that purpose.[210] The court did not decide whether the lease or letter agreements in this case implied an obligation on the owner to operate the hospital for the lease term because the physicians failed to plead that claim and waived any right to an implied covenant of continuous operation.[211]

Several issues were before the Texarkana Court of Appeals in the *Flagship Hotel* case,[212] but the most noteworthy issue regarding landlord and tenant matters was whether an amendment created a new lease for purposes of section 307.023 of the Texas Government Code. The predecessor-in-interest of Flagship Hotel, Ltd. entered into a lease agreement with

205. *Id.* at 748.
206. *Id.* at 746.
207. *Id.* at 746-47.
208. *Id.* at 746.
209. *Id.* at 747.
210. *Id.* (citing Weil v. Ann Lewis Shops, Inc., 281 S.W.2d 651, 653 (Tex. Civ. App.—San Antonio 1955, writ ref'd)).
211. *Id.* at 748.
212. Flagship Hotel, Ltd. v. City of Galveston, 117 S.W.3d 552 (Tex. App.—Texarkana 2003, pet. denied).

the City of Galveston, pursuant to which the city agreed to construct a hotel on a pier, in return for the hotel leasing the pier and operating the hotel. Section 307.023 of the Texas Government Code provides that the City of Galveston, as a governing body of a municipality, cannot enter into a lease for the pier with a term in excess of forty years from the date of the lease.[213]

The original lease for the Flagship Hotel was executed on May 20, 1963, with a commencement date of January 18, 1966 and a term of forty years, expiring on January 18, 2006. An amendment to the lease was executed on January 28, 1981, which granted the tenant the option to renew the lease for three additional five-year periods (if exercised, the lease would expire on January 18, 2021, which is thirty-nine years, eleven months and twenty days from the date of the second amendment). The lease was amended by a fourth amendment executed in May 1988, which granted the tenant the option to renew the lease for five additional five-year periods (if exercised, the lease would expire on January 18, 2031, which is forty-two years and seven months from the date of the fourth amendment). The lease was further amended by a fifth amendment in August 1993, which limited the tenant's right to exercise the five additional five-year renewal options by requiring, as a condition precedent to exercising such options, that the tenant spend $250,000 on improvements to the hotel. If the renewal options were exercised, the lease would still expire on January 18, 2031, but this would be thirty-seven years and five months from the date of the fifth amendment, as opposed to forty-two years and seven months from the date of the fourth amendment.

The court held that the lease expires on January 18, 2031.[214] In determining whether the forty-year limit in section 307.023 of the Texas Government Code was violated, the court held that the date of the amendment, rather than the date of the lease, should be used to calculate the term.[215] The court's rationale was that new consideration was given each time the lease was amended.[216] The court held that the intent of the forty-year limit in section 307.023 is to prevent the city from agreeing to a commitment that obligates the city for more than forty years.[217] Because the January 18, 2031 expiration date is less than forty years from the date of the fifth amendment, the court held that section 307.023 was not violated.[218] Applying the same rationale, the court held that the fourth amendment was void because the renewal rights granted therein extended the term beyond forty years after the date of the fourth amendment.[219] However, portions of the fourth amendment were validly incorporated into the fifth amendment when it was negotiated and exe-

213. *Id.* at 559-60 (citing TEX. LOC. GOV'T CODE ANN. § 307.023 (Vernon 1999)).
214. *Id.* at 560.
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*

cuted by the parties.[220] Because spending the $250,000 in repairs was a condition precedent to the exercise of the five additional five-year renewal options, those renewal options were incorporated into the lease.

The issue in *Lazell v. Stone*[221] was whether an owner who succeeded to a lease was liable for the breach of the lease made by the prior owner. The court of appeals agreed with the controlling principle that a transferee of an interest in leased property will not be liable for any breach that occurred prior to the date that the transferee acquired its interest.[222] However, the court applied the precedent of the *Regency*[223] case and held that the tenant did have the right to terminate the lease even if the current landlord was not liable for the breach.[224]

The *Sisters of Charity*[225] case involved an implied landlord-tenant relationship. A member of a health club locked his watch and money in a locker at the health club while he swam. He sued the health club for damages after his property was stolen from the locker, on the theory of bailment. The court of appeals held that a member's storing of personal property in a locker at a health club creates a landlord-tenant relationship, rather than a bailment.[226] The health club owner, as the lessor, had the duty of ordinary care in maintaining the premises (the locker) but had no duty to exercise care regarding the property stored on the premises.[227] Therefore, the health club owner was not responsible for the property stolen from the locker.[228]

There were also several cases decided during the reporting period relating to residential leases. The *Urena*[229] case and the *Kukis*[230] case both involved premises liability issues.

In *Urena*, a tenant of an apartment complex sued her landlord after her son was sexually assaulted by another tenant of the complex. Though the facts here are different from those in the *Timberwalk*[231] case (*Timberwalk* involved a rape of a tenant by a non-tenant and the facts here involve the sexual assault of a tenant by another tenant), the court of appeals nonetheless held that *Timberwalk* applied and provided the necessary requirements to establish a duty to protect invitees from crimi-

220. *Id.*
221. 123 S.W.3d 6 (Tex. App.—Houston [1st Dist.] 2003, pet. denied).
222. *Id.* at 11 (citing RESTATEMENT (SECOND) OF PROPERTY § 16.1(3) (1977)).
223. Regency Advantage Ltd. P'ship v. Bingo Idea-Watauga, Inc., 936 S.W.2d 275, 277 (Tex. 1996).
224. *Id.*
225. Sisters of Charity of the Incarnate Word, Houston v. Meaux, 122 S.W.3d 428 (Tex. App.—Beaumont 2003, pet. denied).
226. *Id.* at 432 (citing Marsh v. Am. Locker Co., 72 A.2d 343, 345-46 (N.J. App. Div. 1950)).
227. *Id.* at 431-32.
228. *Id.* at 432-33.
229. Urena v. W. Invs., Inc., 122 S.W.3d 249 (Tex. App.—Houston [1st Dist.] 2003, pet. granted), *rev'd*, No. 83-0919, 2005 WL 783879 (Tex. Apr. 8, 2005) .
230. Kukis v. Newman, 123 S.W.3d 636 (Tex. App.—Houston [14th Dist.] 2003, no pet.).
231. Timberwalk Apartments, Partners, Inc. v. Cain, 972 S.W.2d 749 (Tex. 1998).

nal acts of a third person.[232]

Applying the law in *Timberwalk*, the court held that the trial court's grant of summary judgment in favor of the landlord was not proper because genuine issues of material fact existed as to the determination of whether the landlord owed Urena a legal duty to protect her and her family from criminal acts of third parties and as to whether the landlord used ordinary care to do so.[233]

To determine whether an issue of material fact existed, the court cited the following relevant facts which could have led to foreseeability of the sexual assault of Urena's son: (i) eight violent crimes occurred at the apartment complex within a period of less than three years (as compared to no violent crimes occurring within the ten previous years in the *Timberwalk* case); and (ii) the crimes (attempted sexual assault, robbery, aggravated assault, aggravated robbery, capital murder, and murder) were not identical to the one in question, but they were substantially similar because they were all violent crimes against a person.[234]

In *Kukis*, the court of appeals applied the law established in a prior line of cases, holding that a landlord does not have a duty to tenants or their invitees for dangerous conditions on the leased premises.[235] Texas courts have held that there are three exceptions to this general rule: (1) lessor's negligent repairs; (2) concealed defects of which the lessor was aware when the premises were leased; and (3) a defect on a portion of the premises that remained under the lessor's control.[236] In this case, the Newmans leased a house from Kukis. The stairwell did not have a handrail, and the Newmans sued Kukis after Mrs. Newman fell down the stairs and broke her ankle. The Newmans claimed that the absence of a handrail was a concealed defect and fell within an exception to the general rule. The court, however, disagreed and held that the absence of a handrail "is not a condition the Newmans would not have had reason to know or that Kukis would have had reason to suspect the Newmans would not discover."[237] The holding is similar to the holding in *Brownsville Navigation District v. Izaguirre*,[238] in which the Texas Supreme Court held that soil becoming soft and muddy when wet was not a concealed defect.[239]

The *McBeath*[240] case involved interpretation of section 92.202 of the Texas Property Code. The landlord in *McBeath* failed to disclose the name and address of the apartment owner to the tenant when requested

232. *Urena*, 122 S.W.3d at 253.
233. *Id.* at 256.
234. *Id.* at 255.
235. *Kukis*, 123 S.W.3d at 639 (citing Johnson County Sheriff's Posse v. Endsley, 926 S.W.2d 284, 285 (Tex. 1996)).
236. *Id.* at 639-40 (citing Lampasas v. Spring Ctr., Inc., 988 S.W.2d 428, 434 n.3 (Tex. App.—Houston [14th Dist.] 1999, no pet.)).
237. *Id.* at 641.
238. 829 S.W.2d 159 (Tex. 1992).
239. *Id.* at 160-61.
240. McBeath v. Estrada Oaks Apartments, 135 S.W.3d 694 (Tex. App.—Dallas 2003, no pet.).

as required under section 92.201 of the Texas Property Code. Tenant's notice to the landlord requesting such information indicated that she "may take legal action" if the landlord did not respond within seven days. Section 92.202 provides that a landlord is liable to a tenant if the landlord fails to respond with such information before the eighth day following written notice from a tenant and the tenant "may exercise remedies under this subchapter if the landlord does not comply with the request by the tenant . . . within seven days."[241] The landlord in *McBeath* argued that the tenant's failure to reference the section of the Texas Property Code precluded her from recovering damages because she failed to comply with all conditions precedent to recovery set forth in section 92.202. The court of appeals overruled, holding that the words "may take legal action" in tenant's notice were sufficient for complying with the requirement in section 92.202 that tenant's notice state it "may exercise remedies under this subchapter."[242]

IX. ADVERSE POSSESSION

In *Perkins v. McGehee,*[243] the Fort Worth Court of Appeals focused on three elements of an adverse possession claim to find that appellees acquired title to a portion of their neighbor's property enclosed by a fence line. The first factor the court focused on was whether the appellees identified the claimed land with "reasonable certainty."[244] Instead of simply using the description of the land contained in the deeds of the parties, the court also relied on maps, aerial photographs, and the lower court's ruling which stated "appellees have legal title to and are entitled to possession of the area of real property north of the fence line" to find that the property was sufficiently identified.[245]

The second element the court analyzed was whether appellees actually appropriated the land.[246] The appellees relied on the fact that they and their predecessors in interest had (1) used the property to graze cattle, (2) repaired and improved the existing fence, and (3) removed trees and brush from the property. The court reiterated the law with respect to demonstrating appropriation of property by grazing, stating that the claimant "must present evidence that he designedly enclosed the land at issue."[247] However, the court also noted that an exception to the designed enclosure standard exists if the claimant can show a sufficient nongrazing use of the land so that the true owner would have been put on notice.[248] Factors that distinguished this case from other designed enclosure cases included: (1) the tract had been constantly used for grazing;

241. *Id.* at 697 (citing TEX. PROP. CODE ANN. § 92.202(a)(2) (Vernon 1995)).
242. *Id.*
243. 133 S.W.3d 287 (Tex. App.—Fort Worth 2004, no pet.).
244. *Id.* at 291.
245. *Id.*
246. *Id.* at 291-93.
247. *Id.* at 292.
248. *Id.*

(2) the tract was contiguous to the appellees' record title of land and enclosed within it; (3) appellees' predecessor in interest had rebuilt and replaced the fence; and (4) the reputation in the community was that the tract was part of appellees' property.[249] Thus, the court held that the appellees sufficiently appropriated the land.[250]

The third and final element the court examined was whether appellees used the property exclusively. The fact that the appellant's son used the property for hunting and that appellees failed to post trespassing signs or other means of excluding people from the property did not alter the fact that appellees used the property exclusively.[251] Factors the court considered included that the appellees told appellant that he could not erect another fence on the area enclosed within the existing fence and that the appellees gave appellant's son permission to enter onto the property.[252]

Harlow v. Giles[253] also examined various elements of the adverse possession statute. Harlow claimed that he acquired title to two tracts of land adjacent to Giles' and other land owners' property by adverse possession. The court of appeals first rejected Harlow's claim that his fencing of the property satisfied the element of actual and visible use. Because Harlow could not produce evidence concerning the purpose of the fence, the court ruled that the fence was a casual fence and not designedly enclosed. Harlow's grazing of two sheep and one horse and the building of a water well on the property was not sufficient to establish actual and visible use of the property. Also, the fact that Harlow leased the property to hunters did not persuade the court that such action was actual and visible appropriation, because the adverse parties were not aware of such leases. Harlow's payment of taxes on the property was also not enough for the court to find adverse possession as a matter of law. Further defeating Harlow's claim that he exclusively used the property was the fact that the adverse parties also used the property.[254]

In *King Ranch, Inc. v. Chapman*,[255] the Texas Supreme Court looked at the controversy involving the title to the King Ranch and whether King Ranch, Inc. established a valid claim of adverse possession against the heirs of its one-time co-tenant, Helen Chapman. Chapman's heirs filed a trespass to try title claim alleging that an earlier judgment in 1883, vesting title to the King Ranch in Richard King, was void as to them. The King Ranch responded that it acquired title by adverse possession.[256]

The court stated that a "co-tenant may not adversely possess against another co-tenant unless it clearly appears he has repudiated the title of

249. *Id.* at 293.
250. *Id.*
251. *Id.*
252. *Id.*
253. 132 S.W.3d 641 (Tex. App.—Eastland 2004, pet. denied).
254. *Id.* at 647-50.
255. 118 S.W.3d 742 (Tex. 2003).
256. *Id.* at 745-57.

his co-tenant and is holding adversely to it."[257] The court noted that, in most instances, repudiation is a fact question but in some cases, such as in this case, it can be established as a matter of law. In this instance, it was undisputed that Richard King repudiated the title of his co-tenant Helen Chapman, with Chapman admitting in her 1879 original petition that King "entered upon said premises and ejected . . . petitioner therefrom."[258] Furthermore, the Court reasoned that the original judgment quieting title in Richard King was a clear act of ouster and that repudiation occurred no later than the day the judgment was entered.[259]

The *King Ranch* case also presented evidence on the remaining elements of adverse possession, and the court held as a matter of law that it established its use and cultivation of the land for over one-hundred years. The court went on to admonish the lower court for holding that a genuine fact issue existed as to King Ranch's use of the property and that such holdings "frustrated the policy behind our adverse possession statutes" of settling title disputes.[260]

In *Martin v. Amerman*,[261] the Supreme Court of Texas clarified whether disputes over boundaries are to be tried as a trespass to try title claim or could also be brought under a declaratory judgment action. The supreme court noted that because the trespass to try title action requires strict pleadings and proof requirements in order to prevail, the supreme court lessened those requirements when the issue was solely one involving a boundary dispute. However, the supreme court had never intended to create a distinct cause of action for boundary disputes. The supreme court held that even though the dispute was over the boundary of two properties, such boundary disputes necessarily involve title.[262] Therefore, the action must be brought under the trespass to try title theory.[263] The supreme court also took steps to retract its dicta in *Brainard v. State*[264] that a "declaratory judgment is one way to resolve a boundary dispute."[265] Lower courts' decisions that relied on such dicta were also disapproved.[266]

In *Witcher v. Bennett*,[267] the court of appeals held that before a party who has held possession of property as a permissive tenant or tenant at sufferance can begin to adversely possess the property, he or she must first overtly repudiate the tenancy. In this case, a judgment had been entered against Witcher in a trespass to try title suit in 1987 concerning the disputed land, but despite such judgment, Witcher remained in pos-

257. *Id.* at 756.
258. *Id.* at 757.
259. *Id.*
260. *Id.*
261. 133 S.W.3d 262 (Tex. 2004).
262. *Id.* at 267.
263. *Id.*
264. 12 S.W.3d 6 (Tex. 1999).
265. *Id.* at 267-68 (quoting *Brainard*, 12 S.W.3d at 29).
266. *Id.* at 268.
267. 120 S.W.3d 922 (Tex. App.—Texarkana 2003, pet. denied).

session. In a subsequent suit in 1989, a permanent injunction was entered against Witcher prohibiting him from entering the property; Witcher continued to possess the disputed land. The court held that a party who holds over after an adverse judgment has been rendered against it is merely a permissive tenant, or a tenant at sufferance, and must repudiate such tenancy before he or she can begin to adversely possess such land. The court found no evidence of such a repudiation in this case.[268]

X. DEEDS AND CONVEYANCES

McMillan v. Dooley[269] involved a preferential right to purchase an oil and gas lease. The main issue concerned how such right was treated when the lease in question was part of a multiple lease conveyance. Dooley was the holder of the preferential right to purchase an oil and gas lease reserved out of an assignment of that lease. The assignee eventually sold the oil and gas lease as part of a package deal along with two other oil and gas leases. Dooley did not learn of the conveyances until after they already occurred. When he contacted the new owners of the lease and informed them of his preferential right to purchase, the new owners offered to sell all three of the leases to Dooley. However, Dooley, only wanting to purchase the one lease, asked what the purchase price was for the one lease but was given only the total purchase price for all three leases. Dooley eventually filed a lawsuit claiming that the new owners breached his preferential right to purchase. Plaintiffs Smith and Johnson, each owners of a preferential purchase right to the other two leases included in the package deal, joined in the suit.[270]

The court of appeals noted that once a conveyance has been made in violation of a preferential purchase right, the rightholder has an option to purchase the property according to the terms of the conveyance. The issues in this case were somewhat difficult because of the package conveyance of the three leases.[271]

Dooley alleged that he was not required to undertake actions to exercise his right to purchase because the new owners' presentment of the offer was improper for several reasons. The first reason asserted was that the presentment did not comply with the express terms in the original conveyance of the preferential right. The court noted that there is a distinction between preferential right to purchase agreements, which base the rightholder's purchase contract on a certain price, and agreements that base the election on the terms and conditions of the offer to the third party. In this case, the court held that even though the conveyance stated that Dooley's offer would be based on the "price" of an offer to a third party, it was really one that was based on the terms and conditions of the

268. *Id.* at 923-26.
269. 144 S.W.3d 159 (Tex. App.—Eastland 2004, pet. filed); *see supra* notes 108-24 and accompanying text.
270. *Dooley*, 144 S.W.3d at 164-69.
271. *Id.* at 172.

offer because there was no language that stated it should be so strictly construed. Therefore, the court held that the current owners' offer to Dooley was sufficient.[272]

Dooley also argued that the presentment of the offer was defective because the owners' offer included all three leases and did not separate Dooley's lease from the others. The court held that the owners made a reasonable presentment because they disclosed the material terms of the conveyance.[273]

Dooley alleged that he was not required to accept the other leases in order to exercise his right and that he had no obligation to exercise his right to purchase. The court agreed that Dooley did not have to accept the other leases in order to exercise his right, given that other Texas cases held that a rightholder was not allowed to expand his right to purchase other land not subject to the preferential purchase right. If a right holder is not allowed to expand his right to purchase, he is also not required to exercise his right to purchase in regard to property not contemplated in the right to purchase. However, the court held that Dooley was required to take affirmative steps to exercise his option to purchase. Because Dooley rejected the initial offer to purchase all three leases within the required ten days, his right to purchase expired. To preserve his right to purchase, a rightholder should inform the seller that he is exercising his option to purchase subject to the provisions to which he objects.[274]

The new owners also argued that they were not subject to the terms of the preferential purchase rights because they were not parties to the instrument that originally conveyed the right. However, the court declined to accept this argument because the written assignment that assigned the lease to the new owners was made expressly subject to the instrument containing the preferential agreement. The court also rejected the new owners' claims that one of the rightholders, Johnson, no longer possessed the preferential right because of certain conveyances he had made. The court reasoned that Johnson was, at one point, both the lessor and the lessee of the mineral interest in the property. Later, as lessee, Johnson reserved the preferential purchase right out of his assignment of the lease. The court held that Johnson's various conveyances of his interests in the surface of the land and the minerals and other real property interests arose out of his relationship as owner/lessor of the land and not as lessee. Thus, his conveyance of these real property interests did not convey any contractual right affecting the property, and he still held the preferential purchase right.[275]

In *H.H. Holloway Trust v. Outpost Estates Civic Club Inc.*,[276] the primary issue was whether two lots in a subdivision fell within the deed re-

272. *Id.* at 174-77.
273. *Id.* at 177.
274. *Id.* at 178-81.
275. *Id.* at 182-85.
276. 135 S.W.3d 751 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

strictions for that subdivision. The Holloway Trust wished to use the two lots it purchased in a subdivision for commercial purposes but was informed that the lots were subject to deed restrictions that limited the uses of the lots to residential purposes. The Holloway Trust argued that because the original deed from the original owners did not specify where the deed restrictions were filed, the lots could not be bound by the deed restrictions. The court of appeals noted that this was not a case in which the restrictions were mentioned just as a general statement but instead involved a specific statement by the grantor.[277] Even though the actual place of filing the deed restrictions was incomplete in the deed, the statement "SAID LOT IS RESTRICTED IN ITS . . ." was enough to put future purchasers on notice that the lots were subject to the restrictions.[278]

In *Dickey v. McComb Development Co., Inc.*,[279] the Dickeys entered into a contract for deed for the purchase of land. After making payments on the property for eight years, the Dickeys received notice from McComb that they were late on a payment and that if they failed to cure such failure by July 13, 2000, the contract would be terminated. The payment was received one day late and the contract was terminated.[280]

On appeal, the Dickeys argued that they were protected by sections 5.061 and 5.063 of the Texas Property Code, which mandate a sixty-day cure period before a seller may enforce forfeiture of purchaser's interest in the property if: (i) at least twenty percent of the purchase price has been paid; and (ii) the property is used as a residence.[281] Because twenty percent of the purchase price had been paid, the only issue on appeal was whether the Dickeys used the property as their residence.[282] Factors considered by the court of appeals in determining that the Dickeys did not live at the property included the fact that the Dickeys: (i) did not live on the property at the time of the late payment; (ii) had attempted to sell the property; (iii) leased the property to a third person; (iv) did not receive mail at the property; (v) had the homestead designation removed from the property; and (vi) could not produce evidence of any definite plans to return to the property.[283] Therefore, it was determined that the Dickeys were not entitled to the protection of section 5.061 of the Property Code.[284] The court also held that McComb had not accepted the late payment as cure for the default.[285] The concurring opinion noted that this case exemplifies the serious problem with Texas law that allows purchasers under contracts for deeds to lose all interest in a nonresidential

277. *Id.* at 754-56.
278. *Id.* at 755-56.
279. 115 S.W.3d 42 (Tex. App.—San Antonio 2003, no pet.); *see supra* notes 146-49 and accompanying text.
280. *Dickey*, 115 S.W.3d at 44.
281. *Id.* at 45.
282. *Id.*
283. *Id.* at 45-46.
284. *Id.* at 46.
285. *Id.*

property simply because one payment is one day late.[286]

XI. EASEMENTS

In *LaTaste Enterprises v. City of Addison*,[287] the court of appeals confirmed that an easement by estoppel can only be created if the owner of the servient estate actually represents to the dominant estate owner that there is an easement. Appellants, owners of lots close to Addison Airport, asserted that they had an easement by estoppel to use the airport free of charge. The court focused on the fact that the owner of the airport never promised or represented to the appellants that they had free use of the airport. The court ruled that the fact that some of the appellants did use the airport freely for years is not evidence that actual representations were made by the owner of the airport. Also, the fact that a brochure provided by the airport promises access to the airport was not, in the court's view, a representation that the owners would have free access. However, the court did hold that one appellant presented some evidence of a representation by stating that, at the time of the purchase of his property, he was promised free access to the airport. The court further found that this individual relied on this promise and evidence of that reliance could be found in the fact that he built improvements, even if such improvements were built on the dominant estate. The court also held that there was no implied easement because the appellants could not prove unity of ownership at the time of severance of the dominant and servient estates.[288]

Koelsch v. Industrial Gas Supply Corp.[289] analyzed the interpretation of the language that granted Industrial an easement for gas pipelines over Koelsch's property. The instrument gave Industrial's predecessor in interest an easement to "lay, operate, renew, alter, inspect and maintain two pipe lines . . . upon, over, under and through the following described land."[290] The instrument also stated that "Grantee agrees to bury such pipe lines."[291] The Koelsches brought the action against Industrial because a block valve assembly, which was a necessary safety feature of the pipe line, was located above ground on their property. The court of appeals, however, stated that the right to build the block valve above ground was naturally encompassed by the plain language of the conveyance and was necessary for enjoyment of the easement. The court stated that this meaning also harmonized with the granting instrument because it would not make sense to require every item necessary for the operation of the pipelines to be buried. To hold that anything associated with the easement must be buried would render the first clause of the granting

286. *Id.* at 47 (Stone, J., concurring).
287. 115 S.W.3d 730 (Tex. App.—Dallas 2003, pet. denied).
288. *Id.* at 732-39.
289. 132 S.W.3d 494 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).
290. *Id.* at 496.
291. *Id.*

instrument meaningless.[292]

XII. RESTRICTIVE COVENANTS, CONDOMINIUMS AND OWNERS ASSOCIATIONS

Brooks v. Northglen Association[293] involved a residential property owners' association in Houston governed by chapter 204 of the Texas Property Code. The case involved the interpretation of section 204.010(a)(16) of the Texas Property Code, which allows an owners' association to cumulatively increase assessments in one year, effectively providing for a "catch-up" if assessments had not been increased for a period of years. However, this cumulative increase is only permitted if the restrictions allow for annual increases without a vote of the members and if not otherwise provided by the restrictions.[294] The case turned on the application of the "unless otherwise provided by the restrictions" limitation. The court narrowly construed the powers of an owners' association to cumulatively increase assessments pursuant to this statute by holding that the owners' association's attempt to cumulatively increase assessments was not allowed because the restrictions tied the annual allowed increase to an escalator over the prior year's assessment.[295] The reference in the escalation provision to the prior year's assessment was sufficient for the court to find that the restrictions addressed (and prohibited) cumulative increases, trumping the applicability of the statute.[296]

In this case, the Texas Supreme Court also upheld a challenge to the constitutionality of section 204.010(a)(10) of the Texas Property Code, which allows an association to charge a late fee on past due assessments, unless otherwise provided by the restrictions.[297] The supreme court found that this statute did not violate the Contracts Clause of the United States or Texas Constitutions, in that it did not substantially impair the contract and that it is a proper exercise of the State's police power. The supreme court further held that the owners' association could not foreclose on the homestead of a property owner for its failure to pay late charges assessed pursuant to this statute. Although foreclosure is available on a homestead for failure to pay assessments under deed restrictions, the supreme court distinguished these late charges because they were not created by the deed restrictions.[298]

In *Cimarron County Property Owners Association v. Keen*,[299] the court of appeals applied the doctrine of quasi estoppel to allow homeowners to pursue activities from their home that were specifically prohibited by the deed restrictions. The restrictions at issue prohibited homeowners from

292. *Id.* at 497-99.
293. 141 S.W.3d 158 (Tex. 2004).
294. *Id.* at 160-66.
295. *Id.* at 166-68.
296. *Id.* at 168.
297. *See* TEX. PROP. CODE ANN. § 204.010 (Vernon Supp. 2005).
298. *Brooks*, 141 S.W.3d at 168-71.
299. 117 S.W.3d 509 (Tex. App.—Beaumont 2003, no pet.).

establishing any business operation in their home. The homeowners requested permission from the owners' association to run a day-care center from a home shortly after moving into a residence subject to the deed restrictions. The owners' association approved the request, subject to compliance with certain conditions, including no outside employees. The doctrine of quasi estoppel precludes a party from asserting, to another party's disadvantage, a right inconsistent with a position previously taken by such party when it would be unconscionable to allow such party to maintain that position inconsistent with one to which that party acquiesced. Quasi estoppel also requires that the party claiming reliance on the position of the other party show that harm would result if the other party's previous position was enforced. The court found that the elements of quasi estoppel were present because of the correspondence from the homeowners' association in which the association allowed the business use as long as certain conditions were satisfied, and the homeowners relied on this position when purchasing their home and starting their business.[300]

In *Myer v. Cuevas*,[301] an individual condominium unit owner sued members of the board of directors of the condominium association alleging various causes of action, including mismanagement of corporate assets and breach of fiduciary duty relating to actions of the board in expending assessments for the maintenance of the common elements of the condominium and allegedly expending assessments for their personal benefit.[302] The trial court dismissed the case on the basis that the individual unit owner lacked standing to sue. The court of appeals affirmed because: (1) one owner cannot recover damages to land owned in common without joining the other co-owners in the suit (unless the joinder of all co-owners would be impractical); (2) the directors owe a fiduciary duty to the corporations they serve, but not to the individual shareholders (homeowners); and (3) when a corporation suffers injustice at the hands of the board, only the corporation has standing to sue, even though an individual owner may be injured.[303] The court analyzed section 81.201(b) of the Texas Property Code and concluded that it establishes that the owners' association has standing to institute litigation on behalf of two or more owners concerning a matter related to the common elements of the condominium, but it does not establish standing for individual unit owners to maintain such a cause of action.[304]

In *Anderson v. New Property Owners' Association of Newport, Inc.*,[305] the plaintiff attempted to enforce the denial of a plan to modify a homeowner's driveway. The plaintiff purportedly acted as the architectural control committee. The court of appeals held that such entity did not

300. *Id.* at 511-13.
301. 119 S.W.3d 830 (Tex. App.—San Antonio 2003, no pet.).
302. *Id.* at 832.
303. *Id.* at 833-36.
304. *Id.* at 835 (citing TEX. PROP. CODE ANN. § 81.210(b) (Vernon 1995)).
305. 122 S.W.3d 378 (Tex. App.—Texarkana 2003, pet. denied).

have the rights of the architectural control committee at the time in question; therefore, it did not have standing to enforce its purported denial of the plan approval. After a series of transfers and a bankruptcy affecting the initial developer of the subdivision and its successors in ownership of undeveloped lots, the plaintiff contended that the rights of the architectural control committee vested in it. However, the court disagreed, finding that the assignment document relied upon by the plaintiff did not explicitly and specifically assign to it the right to act as architectural control committee.[306] The court held that section 202.004(b) of the Texas Property Code did give the plaintiff the right, as a representative designated by an owner of real property affected by the deed restrictions, to bring a suit to enforce the deed restrictions, but did not give the plaintiff the right to act as the architectural control committee in approving or disapproving plans.[307] The appeals court also found Section 204.011(b) of the Texas Property Code, which allows for automatic vesting of an architectural control committee's authority in the property association upon the occurrence of certain events, to be inapplicable under the facts of this case because the plaintiff was not the acting property association at the relevant time. The plaintiff did become the acting property association by virtue of a proper amendment to the deed restrictions, replacing the original organization established by the original developer, but this did not occur until after the request for approval of the driveway at issue in this case was submitted and denied by the plaintiff.[308] The court did find in favor of the plaintiff on the homeowner's claim for attorney's fees under section 5.006(a) of the Texas Property Code, which provides that "[i]n an action based on breach of a restrictive covenant pertaining to real property, the court shall allow to a prevailing party who asserted the action reasonable attorney's fees . . ." because the homeowner was not the party that asserted the action for breach of a restrictive covenant.[309]

XIII. HOMESTEAD

In *Pelt v. U.S. Bank Trust National Association*,[310] the United States Fifth Circuit Court of Appeals considered whether Article XVI, § 50(a)(6)(Q)(v) of the Texas Constitution requires lenders to provide borrowers with signed copies of all loan documents signed at closing, or whether unsigned copies of such documents satisfy the constitutional requirement, the violation of which results in a forfeiture of all principal and interest by the lender. In this case, the plaintiffs obtained a home equity loan from the defendant bank's predecessor. The plaintiffs ceased

306. *Id.* at 382-90.

307. *Id.* at 388; *see* TEX. PROP. CODE ANN. § 202.004(b) (Vernon 1995) (providing in part that "[a] property owners' association or other representative designated by an owner of real property may initiate, defend . . . in litigation or an administrative proceeding affecting the enforcement of restrictive covenant . . . .").

308. *Anderson*, 122 S.W.3d at 389-90.

309. *Id.* at 390 (citing TEX. PROP. CODE ANN. § 5.006(a) (Vernon 1984)).

310. 359 F.3d 764 (5th Cir. 2004).

making payments on the loan, and the defendant bank initiated foreclosure proceedings in state court.[311] Plaintiffs brought a diversity action in federal court alleging that the lender failed to comply with Article XVI, § 50(a)(6)(Q)(v) of the Texas Constitution, which "requires that the lender provide the borrower copies of all documents signed at the closing."[312]

The district court instructed the jury that "[t]he Texas Constitution requires that 'a copy of all documents signed by the owner' be provided." It does not state that the owner be provided "a signed copy."[313] The court of appeals agreed with the district court's plain language interpretation of the Texas Constitution, holding that the borrower need not be provided with a signed copy of all documents signed by the borrower at closing; the court dismissed the plaintiffs' argument that the policy of Texas courts to liberally construe statutes and constitutional provisions in favor of homestead owners should influence the court's interpretation of the constitutional provision at issue. The court reasoned that the borrower would not be harmed in any way by this interpretation because the borrower is to receive accurate copies of the loan documents. The court stated, "the copies given [must] be accurate facsimiles of the loan documents."[314] In other words, the copies provided must include all alterations between the form provided to the borrower and the documents executed by the borrower.[315]

A Texas court considered a case during this Survey period involving a purported renewal and extension of a lien secured by the borrower's homestead. In *Chase Manhattan Mortgage Corp. v. Cook*,[316] the Eastland Court of Appeals upheld the trial court's determination that the lender's lien was void and unenforceable as a lien against the borrower's homestead.

In that case, a 1999 deed of trust purported to renew and extend a 1992 purchase money deed of trust against a homestead. However, the note secured by the 1992 deed of trust was paid and a release of lien was executed in 1996. The court concluded that "parties cannot create a lien against a homestead by purporting to renew and extend a prior lien that has been dissolved by payment."[317] The appellant sought to amend its claim asserting that the extension and renewal provision in the deed of trust be reformed to reflect the mutual mistake of the parties in improperly describing the lien to be renewed and extended, which the appellant claimed was not the purchase money lien. The appellant claimed that it was instead a lien in favor of Jim Walter Homes securing the construction of the home on the property, which appellant contended was paid off

311. *Id.* at 766.
312. *Id.* at 767 (citing TEX. CONST. art. XVI, § 50(a)(6)(Q)(v)).
313. *Id.*
314. *Id.* at 768.
315. *Id.* at 767-68.
316. 141 S.W.3d 709 (Tex. App.—Eastland 2004, no pet.).
317. *Id.* at 714.

with the proceeds of its loan. The trial court denied the application to amend the claim as prejudicial and untimely. The court of appeals affirmed and further rejected appellant's subrogation claim with respect to such lien because it failed to plead such theory in the trial court, and even if properly pleaded, the court stated that such theory was unsupported by the evidence.[318]

The appellant also argued that the retention-of-benefits rule applied to this case, as the appellees were simultaneously attempting to repudiate the 1999 deed of trust while keeping the disbursements of the loan secured by that instrument. The court held that the rule did not apply because the note remained enforceable, albeit unsecured.[319]

XIV. BROKERS

There were no noteworthy cases on this topic during the Survey period.

XV. TITLE INSURANCE

There were no noteworthy cases on this topic during the Survey period.

XVI. CONSTRUCTION CONTRACTS, MECHANICS' LIENS AND CONSTRUCTION ISSUES

The Texas Supreme Court recognized the validity of pass-through claims brought by contractors on behalf of subcontractors in *Interstate Contracting Corporation v. City of Dallas*.[320] A pass-through claim exists when a subcontractor lacks privity of contract to sue an owner directly, so the contractor sues the owner on behalf of the subcontractor. Under the typical pass-through liquidation agreement, the subcontractor releases the contractor from liability if the contractor files the subcontractor's claim against the owner and agrees to remit any recovery to the subcontractor. In *Interstate*, the United States Fifth Circuit Court of Appeals asked the Texas Supreme Court certified questions regarding whether Texas recognizes pass-through claims, and if so, what requirements exist for a contractor to bring a pass-through claim on behalf of a subcontractor. In *Interstate*, the City of Dallas refused to pay a claim submitted by Interstate Contracting Corporation ("ICC"), the contractor, on behalf of Mine Services, Inc. ("MSI"), a subcontractor, for expenses incurred by MSI in the production of fill material. ICC sued the City of Dallas on behalf of MSI to collect the money owed. The prior rule in Texas was that in such circumstances, a subcontractor needed to sue the contractor for payment, and the contractor would then need to sue the owner.[321] The supreme court noted that the matter presented "difficult issues of

318. *Id.* at 711-17.
319. *Id.* at 717-18.
320. 135 S.W.3d 605 (Tex. 2004).
321. *Id.* at 607-10.

first impression for this Court."[322] The supreme court ruled that Texas now recognizes pass-through claims for three reasons. First, pass-through claims are common practice in the construction industry, and federal case law and eighteen of the nineteen states that had reviewed the matter recognized the validity of pass-through claims. Second, pass-through claims protect subcontractors against breaches of contract by an owner, where an owner refuses to pay a legitimate bill submitted by a contractor. Third, pass-through claims promote judicial economy by eliminating the need for suits by a subcontractor against a contractor, and then a contractor against an owner.[323] The supreme court held that in order for a contractor to bring a pass-through claim, the contractor must be liable to the subcontractor at the time the claim is brought. The supreme court respected the industry standard liquidation agreement as satisfying this test. The supreme court did not address the city's contention that a waiver of sovereign immunity by the city is a condition to recovery, as this question was not properly presented in the case.[324]

In *Martin K. Eby Construction Co., Inc. v. Dallas Area Rapid Transit*,[325] the United States Fifth Circuit Court of Appeals addressed the issue of whether a contractor can sue a regional transportation authority created under chapter 452 of the Texas Transportation Code for breach of contract without first submitting its claim to the authority's administrative process. The court noted this was "a question of first impression in Texas" due to the fact that the administrative procedures were not promulgated by statute, but rather the statute delegated the right to the authority to promulgate the administrative process.[326] The Fifth Circuit affirmed the lower court's ruling that Eby must exhaust DART's administrative remedies before suing in court.[327] In *Eby*, a construction company ("Eby") was awarded a contract to build part of the DART rail system in downtown Dallas. Eby commenced work in June 2002 and immediately ran into delays, which Eby alleged were due to design deficiencies and inaccuracies in the plans DART provided as part of the bid solicitation process. The contract Eby entered into with DART contained a provision mandating that Eby must exhaust its remedies under DART's self-created administrative process for resolving disputes before seeking judicial review for any disputes arising under the contract. Instead of exhausting its administrative remedies, Eby sued DART in district court for breach of contract and misrepresentation. The district court dismissed Eby's claims, in part because Eby failed to exhaust its remedies under DART's administrative procedures. The Fifth Circuit affirmed, noting that Eby must first exhaust its remedies under the administrative process for resolving contract disputes created by DART before suing in court

322. *Id.* at 607.
323. *Id.* at 619.
324. *Id.* at 619-20.
325. 369 F.3d 464 (5th Cir. 2004).
326. *Id.* at 468.
327. *Id.* at 472.

because the Texas Legislature delegated to DART the authority to create administrative procedures to resolve disputes with DART's contractors; Eby expressly agreed to submit any disputes to such process.[328] The Fifth Circuit disagreed with the district court on one matter, however. The district court dismissed Eby's misrepresentation claim as a tort claim barred by governmental immunity. The Fifth Circuit ruled that the misrepresentation claim was a contractual claim that must be submitted to DART's administrative process.[329] A question not addressed by the court was whether the enabling statute in chapter 452 of the Texas Transportation Code provides a waiver of immunity of regional transportation authorities from suit, as any such suit would not arise until the administrative process has run its course.

In *In re First Texas Homes, Inc.*,[330] the Supreme Court of Texas, without hearing oral argument, overruled the lower court decision that certain claims brought by the homeowners against their homebuilder were not subject to arbitration, even though the contract between them provided that all disputes arising between them were subject to binding arbitration.[331] April and Cornell Greene purchased a home built by First Texas Homes, Inc. The purchase contract contained a provision stating that all disputes between the parties would be submitted to binding arbitration. Upon finding problems with their house, the Greenes sued First Texas Homes in court alleging breach of contract, breach of warranty, fraud, negligence, violations of the DTPA, violations of the Texas Fair Housing Act, violations of the federal Fair Housing Act, and intentional infliction of emotional distress. The lower court ordered that all claims be submitted to arbitration except the claims for violation of the Texas and federal Fair Housing Acts and any claims for intentional infliction of emotional distress arising after the parties signed the purchase contract. The Texas Supreme Court overruled the lower court and ordered that all of the Greene's claims be submitted to arbitration as they were all covered by the broad arbitration provision in the contract. The supreme court noted that the arbitration provision was enforceable because it was not procured by fraud and was not otherwise unconscionable.[332]

XVII. CONDEMNATION

This section covers cases involving the acquisition of property by governmental entities for use as a public purpose.

328. *Id.* at 470-72.

329. *Id.* at 471-72.

330. 120 S.W.3d 868 (Tex. 2003).

331. This case arose prior to the effectiveness of The Texas Residential Construction Commission Act, codified in chapter 401 of the Texas Property Code and the related significant amendments to the Residential Construction Liability Act, Texas Property Code Chapter 27, both of which became effective for causes of action accruing after September 1, 2003. TEX. PROP. CODE ANN. §§ 401-38, 27.001-.007 (Vernon Supp. 2004-2005).

332. *In re* First Texas Homes, Inc., 120 S.W.3d at 868-70.

In a case exploring the pre-condemnation requirement that the condemning authority and the subject property owner are unable to agree on damages, the Texas Supreme Court found that the authorities satisfied the requirement.[333] In *Hubenak v. San Jacinto-Transmission Co.*,[334] it was held that the "unable to agree" requirement was not jurisdictional and that the condemning entities satisfied this requirement by making offers to purchase the property.[335] The supreme court held that the amount of such offer and whether or not the offer was expressly rejected by the property owner is not relevant to this determination. In holding that the "unable to agree" requirement is not jurisdictional, the supreme court noted that the proper remedy in the event of the failure of this requirement to be met is abatement of the proceeding until the requirement that the parties "are unable to agree" has been satisfied.[336]

In *Coble v. City of Mansfield*,[337] the Fort Worth Court of Appeals reviewed a claim by a landowner that he was entitled to additional damages in contemplation of a future requirement to erect a screening wall and landscaping. The property owner asserted that upon condemnation of the subject right-of-way and installation of a highway, the property owner would be required to install a retaining wall pursuant to city ordinances if the property was developed as a residential subdivision. The court concluded that the property owner was not entitled to damages equaling the projected cost of the retaining wall and landscaping because the landowner's property was not platted for residential use, and therefore, it was speculative as to whether the additional costs would be incurred.[338] The court did not address whether the ordinance requiring the screening wall and landscaping would constitute a regulatory taking upon the development of the property for residential use, as it held that such issue was not ripe for adjudication.[339]

XVIII. AD VALOREM TAXATION

On an issue of first impression, the San Antonio Court of Appeals held that a "possibility of reverter" interest in property is not a taxable interest subject to a tax lien. In *Cypress-Fairbanks Independent School District v. Glenn W. Loggins, Inc.*,[340] the property was held subject to a possibility of reverter that was determined to be an interest in property, rather than a claim, and thus could not be extinguished by a tax foreclosure sale.[341] Because the interest was non-taxable, the court reasoned that the interest could not be divested for delinquency in real estate taxes; therefore, any

333. See TEX. PROP. CODE ANN. § 21.012 (Vernon 2004).
334. 141 S.W.3d 172 (Tex. 2004).
335. *Id.* at 175.
336. *Id.* at 174-84.
337. 134 S.W.3d 449 (Tex. App.—Fort Worth 2004, no pet.).
338. *Id.* at 451.
339. *Id.* at 458.
340. 115 S.W.3d 67 (Tex. App.—San Antonio 2003, pet. denied).
341. *Id.* at 70-71.

purchaser of the subject property at a tax sale took title subject to the possibility of reverter.[342]

In the matter of *Coastal Liquids Partners, L.P. v Matagorda County Appraisal District*,[343] the Corpus Christi Court of Appeals reviewed the narrow question of whether underground natural gas storage domes were subject to appraisal (and taxation) separate from the surface land. The court reversed the lower court decision and held that the salt caverns used for gas storage were not improvements to the land or an estate or interest in land (such as a mineral interest) and therefore were not subject to separate tax assessment.[344]

In *Whitehead v. Jasper County Water Control and Improvement District No. 1*,[345] the Beaumont Court of Appeals upheld the validity of a redemption deed obtained by a taxpayer. The case involved property that was obtained by the taxing entity at a tax foreclosure sale, but subsequently redeemed by the taxpayer. Only after issuance of the redemption deed was it discovered that a mistake was made regarding the existence of improvements on the subject tract. The court found that any mistake in the original tax judgment would not be transformed into a right to rescind the redemption deed and denied the taxing authority's request for rescission of the redemption deed based upon the mistake.[346]

WHM Properties, Inc. v. Dallas County[347] focused upon whether the taxing authorities had presented sufficient evidence to trigger a presumption of delivery of notice of tax delinquency. Upon a review of the record, it was determined that no evidence existed that the authorities ever mailed the challenged notices, and the trial court's entry of judgment in favor of the taxing authorities upholding penalties and interest on the delinquent taxes was reversed.[348] *Aldine Independent School District v. Ogg*[349] also addressed the cancellation of penalties and interest on delinquent taxes pursuant to the since amended section 33.04 of the Texas Tax Code. In this case, the court held that the evidence was not sufficient to show that the taxing authorities sent certain of the required notices of delinquency nor sent timely tax bills for certain years; therefore, the corresponding penalties and interest were not collectible by the taxing authorities.[350]

An issue of proper valuation methodology was raised in *Houston R.E.*

342. *Id.* at 73.
343. 118 S.W.3d 464 (Tex. App.—Corpus Christi 2003, pet. granted).
344. *Id.* at 468-69.
345. 118 S.W.3d 485 (Tex. App.—Beaumont 2003, pet. denied).
346. *Id.* at 486-87.
347. 119 S.W.3d 325 (Tex. App.—Waco 2003, no pet.).
348. The version of TEX. TAX CODE § 33.04 in effect at the time provided that penalties and interest on taxes delinquent more than five years are cancelled if the collector has not delivered the required notice. The provision at issue was subsequently repealed. *Id.* at 327; *see* Act of June 19, 1999, 76th Leg., R.S., ch. 1481, § 16, 1999 Tex. Sess. Law Serv. 1481.
349. 122 S.W.3d 257 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
350. *Id.* at 271-72.

Income v. Waller County Appraisal District.[351] The Houston Court of Appeals reviewed the appropriateness of "blending" two valuation approaches. The trial court blended the income and market sales approaches to value. The reviewing court found that such a blending of two accepted approaches produced relevant and reliable evidence of market value, and further, that the trial court's finding of value was within the range of evidence presented by the expert witnesses.[352]

A review of the application of the ten percent cap on increases in homestead valuation was the subject of *Bader v. Dallas Central Appraisal District.*[353] In *Bader*, the homeowner alleged that the statutory cap on value increases applied separately to the improvement value and the land value so that neither component could increase more than ten percent in one year. The Dallas Court of Appeals disagreed and found that the statutory cap applied to the overall market value and not the individual components of that value.[354]

In *Travis Central Appraisal District v. Signature Flight Support Corp.*,[355] it was held that improvements located on public property were entitled to a tax exemption. The opinion addressed the taxation of leasehold improvements located on airport property owned by a municipality that were leased to ground lessees under long-term ground leases. The improvements were constructed by the ground lessees on the public property, but title to the improvements had vested in the municipality pursuant to the terms of the lease. The court concluded that the municipality owned the improvements and that they were exempt from taxation because of their use for a public purpose as part of a public transportation facility owned by the city.[356] Had the improvements been owned by the lessees, they would not have been tax exempt.[357] The leasehold interest in this case was not subject to taxation because the property was being used for a public purpose as part of a public transportation facility owned by the city.[358]

XIX. ENTITIES

In *McDowell v. McDowell*,[359] the court of appeals affirmed the trial court determination that a partnership existed between brothers James and Greg McDowell, and therefore, James owed Greg fifty percent of the proceeds of the sale of the partnership property. The partnership property consisted of a tract of land originally owned by a corporation whose

351. 123 S.W.3d 859 (Tex. App.—Houston [1st Dist.] 2003, no pet.).
352. *Id.* at 860-62.
353. 139 S.W.3d 778 (Tex. App.—Dallas 2004, pet. denied).
354. *Id.* at 783.
355. 140 S.W.3d 833 (Tex. App.—Austin 2004, no pet.).
356. *Id.* at 838-45; *see* TEX. TAX CODE ANN. § 11.11 (Vernon Supp. 2004-2005).
357. TEX. TAX CODE ANN. § 25.08(b) (Vernon Supp. 2004-2005).
358. *Travis Cent. Appraisal Dist.*, 140 S.W.3d at 838-45; *see* TEX. TAX CODE ANN. § 25.07 (Vernon 2001).
359. 143 S.W.3d 124 (Tex. App.—San Antonio 2004, pet. denied).

principals were James, Greg and their mother. Several years later it became necessary for the land to be held in the name of a single person, so Greg and his mother transferred their interests to James. Greg claimed, at the time of the transfer, that the parties agreed he would be a silent partner, but when the property was later sold, James denied the existence of a partnership and refused to pay fifty percent of the proceeds to Greg. James asserted that two essential elements of a partnership were missing: an agreement to share losses and participation in control of the business. In reviewing the Texas Revised Partnership Act, the court found that although these are two elements of a partnership, no one factor is dispositive and the intent of the parties as to whether a partnership exists is a key consideration.[360] In fact, the two brothers held themselves out as partners in their tax returns, in which they split income and expenses from the partnership property equally. There was ample evidence for the trial court's finding that a partnership existed between the two brothers; therefore, the decision was upheld.[361]

In *Potter v. GMP, L.L.C.*,[362] the court affirmed a jury verdict in favor of GMP in an action for breach of contract against one of its members, Bertie Potter, who refused to comply with a capital contribution call. Potter and two other men formed GMP, which served as the general partner of two limited partnership entities established for the operation of a quarry. In 2001, GMP made a capital contribution call on all members for additional operational funds. Potter refused to contribute, asserting that the regulations of GMP provided that capital contributions were not mandatory on members who objected. GMP asserted that the regulations were clear that if the majority in interest of the members agree to the capital call, then it is mandatory on all. The court held that the regulations were ambiguous; therefore, it was proper to submit to the jury the issue of whether the capital contribution call was mandatory. Because the evidence was sufficient to support the jury's determination, the verdict was upheld.[363]

In *Harris v. Archer*,[364] Harris, Archer and Sterquell formed a partnership to purchase an airport building. Several disputes arose among the partners, and at one point Harris attempted to sell his partnership interest to Archer's brother, contingent on Sterquell doing the same. However, Sterquell refused to sell his interest. Archer then began to unilaterally negotiate the sale of the airport building to a third party, but he did not disclose the negotiations to his partners. Instead, Archer negotiated an agreement to buy out Harris's and Sterquell's partnership interests. Archer then immediately sold the building to the third party and refused to share the profits with his former partners. Sterquell and Harris

360. *Id.* at 129; *see* TEX. REV. CIV. STAT. art. 6132b-2.03(a) (Vernon Supp. 2004-2005) (listing five factors a court can consider in determining whether a partnership exists).
361. *McDowell*, 143 S.W.3d at 126-30.
362. 141 S.W.3d 698 (Tex. App.—San Antonio 2004, pet. dism'd).
363. *Id.* at 700-03
364. 134 S.W.3d 411 (Tex. App.—Amarillo 2004, pet. denied).

sued Archer for fraud and breach of fiduciary duty, and Archer counterclaimed to rescind the partnership on the basis that he was fraudulently induced to enter the partnership. After a lengthy recitation of the facts and discussion of the procedural history of the case, the court rejected Archer's fraudulent inducement claim, finding that such claim was waived because Archer subsequently ratified the partnership agreement by his actions in furtherance of the partnership with knowledge of the issues forming the basis of his fraudulent inducement claim.[365] The court further found that Archer owed Sterquell and Harris a fiduciary duty to disclose the negotiations of the potential sale of the building. The court found that the fiduciary duty claim was not released in the settlement and release agreement executed by Sterquell and Harris in connection with the sale of their partnership interests to Archer. This was the result because they lacked knowledge of the negotiations for the sale of the partnership property, and a breach of fiduciary duty claim for nondisclosure of material information will not be deemed to be released absent the express intent in the release to cover such claim.[366]

XX. INDEMNITIES

In *ABB Kraftwerke Aktiengesellschaft v. Brownsville Barge & Crane, Inc.*,[367] the court of appeals affirmed the trial court's ruling upholding a contractual indemnity agreement in a negligence case. ABB arranged for the shipment of a generator through an intermediary that contracted with Brownsville Barge to handle the shipment. The intermediary and Brownsville Barge executed a Lifting Services Agreement related to the shipment. Before the generator was lifted onto the barge, Brownsville Barge informed ABB that it would not perform the lift unless ABB signed an indemnity agreement, attached as an exhibit to the Lifting Services Agreement, that included indemnification for the negligence of Brownsville Barge. ABB signed the indemnity agreement. During the lift, a longshoreman was killed when a jacking plate fell from the generator. The longshoreman's family sued for wrongful death, and the lawsuit was settled. Brownsville Barge filed a cross-claim against ABB, asserting that ABB was obligated to indemnify it for the legal fees from the lawsuit. The trial court found in favor of Brownsville Barge.[368]

On appeal, ABB claimed the indemnity agreement was unenforceable because it was not signed by Brownsville Barge, and there was no consideration for the agreement. The court found that the indemnity agreement was a binding contract even though it was not executed by Brownsville Barge. The court relied on the principle of contract law that a signature is not required on a contract to make it effective as long as the

365. *Id.* at 427-28.
366. *Id.* at 430-31.
367. 115 S.W.3d 287 (Tex. App.—Corpus Christi 2003, pet. denied).
368. *Id.* at 289-90.

party has given its consent to the terms of the contract.[369] ABB's lack of consideration argument was predicated on its assertion that Brownsville Barge was already obligated to perform the lift pursuant to the Lifting Services Agreement.[370] However, the court construed the Lifting Services Agreement not to be an obligation to perform the services, but rather the framework for the performance of the services should Brownsville Barge subsequently agree to perform the services. Therefore, Brownsville Barge's agreement to perform the lift services served as consideration for the indemnity.[371] The court also found that the indemnification for Brownsville Barge's negligence satisfied the fair notice requirements of the express negligence doctrine and conspicuousness requirement.[372]

SpawGlass, Inc. v. E.T. Services, Inc.[373] illustrated the application of the express negligence rule. The case involved a construction contract between SpawGlass, the contractor, and ET Services (ETS), the subcontractor. The contract contained an indemnification of the contractor by the subcontractor, expressly including claims arising from the contractor's negligence. An employee of ETS was injured on the job and sued SpawGlass for negligence. The contractor filed a third-party claim against ETS based on the indemnity contained in the contract. The court found that the express negligence rule was satisfied because the intent stated in the four corners of the indemnity provision included claims of injury by virtue of the contractor's negligence. Therefore, the court reversed the trial court's grant of summary judgment in favor of the subcontractor and remanded.[374]

XXI. MISCELLANEOUS

A. NUISANCE

In *City of Dallas v. Jennings*,[375] the Jenningses brought suit against the City of Dallas to recover damage caused by a backup in a city sewer line that resulted in the flooding of their house with raw sewage. The Jenningses sought recovery for their damages on a takings theory under Article 1, section 17 of the Texas Constitution and alternatively as a nuisance. Negligence was not an issue in this case. Instead, the Jenningses claimed that occasional flooding damage is inherent in the operation of any sewer system and that the city should bear the cost of such damage. At issue in the takings claim was the type of intent that must be shown. The Jenningses argued that intent to commit the act is all that is required, while the city countered that intent to cause the damage must be shown.[376] The

369. *Id.* at 291-92.
370. *Id.* at 293.
371. *Id.*
372. *Id.*
373. 143 S.W.3d 897 (Tex. App.—Beaumont 2004, pet. denied).
374. *Id.* at 899-901.
375. 142 S.W.3d 310 (Tex. 2004).
376. *Id.* at 311-12.

Texas Supreme Court held that a governmental entity may be liable under Article 1, Section 17 for damage to property caused by it in order to confer a public benefit "if it (1) knows that a specific act is causing identifiable harm; or (2) knows that the specific property damage is substantially certain to result from an authorized government action."[377] In this case, there was no substantial certainty that the work performed by the city in unclogging a blocked sewer main would cause a backup in another portion of the sewer system and result in flooding of the Jenningses house with raw sewage.[378] The plaintiffs' nuisance claim also failed because the supreme court held that in order to recover, the government's sovereign immunity must be expressly waived.[379] The supreme court stated that nuisance is not an independent exception to sovereign immunity and absent an express waiver, immunity can only be waived by operation of the Tort Claims Act (which did not apply to this situation) or by establishment of a takings claim.[380] Because the nuisance did not rise to the level of a constitutional taking, the Jenningses could not recover on their nuisance claim.[381] The court held that the court of appeals erred in reversing the trial court's grant of summary judgment to the City.[382]

In *Coyne v. Kaufman County*,[383] the court of appeals followed the *Jennings* ruling on a similar claim where the plaintiffs sought recovery on both taking and nuisance theories. Some of the plaintiff's claims related to the county's failure to pave and widen the county roads at issue and implement traffic control measures to prevent trucks from damaging their adjacent property. The court characterized these claims of omission as negligence claims; negligence claims, according to the court, cannot form the basis of a takings claim because this would conflict with a governmental entity's general immunity for its negligence.[384] As to the plaintiffs' claims relating to use of the roads by the county's trucks and the county's maintenance of the roads, the court stated that these acts of commission could support nuisance and takings claims under *Jennings*. There was a factual question as to whether the county knew that damage to the plaintiff's property for a public purpose would be a substantially certain result of the county's actions.[385] The court reversed the trial court's grant of summary judgment on these claims and remanded the claims to the trial court.[386]

B. Professional Responsibility

In *American Home Assurance Co., Inc. v. Unauthorized Practice of*

377. *Id.* at 314.
378. *Id.* at 315.
379. *Id.* at 315-16.
380. *Id.*
381. *Id.*
382. *Id.* at 316.
383. 144 S.W.3d 129 (Tex. App.—Eastland 2004, no pet.).
384. *Id.* at 135-36.
385. *Id.*
386. *Id.* at 136.

Law Committee,[387] the court was faced with the issue of whether insurance companies were engaged in the unauthorized practice of law by using staff attorneys to represent their insureds. There was no dispute that the staff attorneys were properly licensed to practice law. The court held that because the insurance companies had a direct financial interest in the matter, the use of staff attorneys to represent insureds does not constitute the unauthorized practice of law.[388] The court reasoned that an insurance company is seeking to protect its own interests when it provides a staff attorney to the insured (much like any company using attorneys it directly employs to defend a claim against itself), and although the triparty relationship among attorney, insurance company, and insured may create conflicts of interest, such conflicts can be properly handled by other ethics rules and do not elevate the activity to the unauthorized practice of law.[389] The court rejected the UPLC's argument that the insurance company's right to control the details of the work of staff attorneys creates an irreconcilable conflict with the interests of the insureds, noting that an employee attorney does not owe an absolute duty of loyalty to his or her employer. Further, the court held that such an arrangement has long been acknowledged by Texas courts and has not been prohibited by the Texas Legislature.[390]

C. MINERALS

Natural Gas Pipeline Co. of America v. Pool,[391] involved long-standing oil and gas leases dating back to the 1920's and 1930's that contained typical provisions that the leases remain in effect as long as oil or gas is produced. The factfinder determined that there were several periods of nonproduction throughout the years, that ranged in length from thirty days to 153 days. The lower court ruled in favor of the lessors and held that the leases terminated due to cessation of production, and the court awarded damages. The Texas Supreme Court reversed. The supreme court did not reach the issue of whether the periods of cessation in production were reasonable so as to keep the leases in force under the temporary cessation of production doctrine, but rather held that, even if the leases had been terminated, the lessees acquired the same property interest under an adverse possession theory. The supreme court's adverse possession determination focused on the "hostile" requirement. It reasoned that notice of hostile possession must be brought home to the titleholder; however, such notice need not be actual notice. The supreme court stated that long-continued use can serve as such constructive notice, as in this case. The interest acquired by the lessees by adverse possession was a fee simple determinable interest in the mineral estate, which is the

387. 121 S.W.3d 831 (Tex. App.—Eastland 2003, pet. granted).
388. *Id.* at 842.
389. *Id.* at 836.
390. *Id.* at 839-40.
391. 124 S.W.3d 188 (Tex. 2003).

same interest the lessees had under the oil and gas lease.[392]

D. Trespass

In *Mehan v. Wamco XXVIII, Ltd.*,[393] the court held that a secured party does not commit trespass on another's land by failing to exercise its "discretionary" right to foreclose its security interest in or repossess collateral located on another's land. In this case, Wamco held a security interest in inventory located on Mehan's land. Mehan and Wamco's predecessor were both originally secured creditors with respect to the land and the inventory. Mehan had a first priority security interest in the land and a second priority security interest in the inventory, while Wamco's predecessor had a first priority security interest in the inventory. Mehan foreclosed its security interests in the land and the inventory, taking the inventory subject to Wamco's prior security interest. The court upheld the trial court's order allowing Wamco to hold a sale of the inventory on Mehan's land, which required Wamco to pay rent to Mehan during the period of such entry.[394]

E. Lis Pendens

In *In re Fitzmaurice*,[395] the purchasers of lots in a subdivision filed tort and contract claims against the developer alleging that the developer was responsible for or made representations regarding the construction of amenities, including lakes, a recreational park and retention pond. One of the property owners filed a lis pendens against all remaining property owned by the developer. The court of appeals, citing existing case law, stated that the use of lis pendens has been disapproved where only collateral questions are involved that might ultimately affect an interest in the property.[396] In this case, the lot purchasers were not maintaining an action involving title to the subject property, the establishment of an interest in the subject property, or the enforcement of an encumbrance against the subject property. The lot owners did not identify any specific property where the alleged amenities were to be built. Their assertion that a constructive trust be imposed on all remaining property owned by the developer to secure their tort and contract claims is no more than a collateral interest in the property.[397] As such, the court found that there was no adequate nexus existing between the claims of the lot purchasers and the property as to which the lis pendens was filed. Therefore, the court ordered the cancellation of the lis pendens.[398]

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392. *Id.* at 195-97.
393. 138 S.W.3d 415 (Tex. App.—Fort Worth 2004, no pet.).
394. *Id.* at 419.
395. 141 S.W.3d 802 (Tex. App.—Beaumont 2004, no pet.).
396. *Id.* at 803.
397. *Id.* at 804.
398. *Id.* at 805.

F. ANNEXATION

In *Werthmann v. City of Fort Worth*,[399] property owners brought an action challenging the city's authority to annex approximately 7,744 acres. The owners alleged that the city failed to prepare an annexation plan as required by section 43.052(c) of the Texas Local Government Code. The city asserted that the property owners did not have standing to challenge the annexation and that only the state could challenge the action pursuant to a *quo warranto* proceeding. The court cited existing case law in stating that an action attacking the validity of a city's annexation of territory for irregular use of power must be brought by a *quo warranto* proceeding unless the annexation is wholly void. The State must bring an action in *quo warranto* to avoid the specter of numerous suits by private citizens. Private parties can challenge an annexation only when the annexation is void because the municipality exceeds its authority to annex.[400] Typically, Texas courts hold that an annexation exceeds a municipality's authority when the annexation (1) exceeds the statutory limits on size, (2) attempts to annex areas within the jurisdiction of another city, (3) attempts to annex areas not contiguous with city limits, and (4) attempts to annex an area within an open boundary area.[401] The court concluded that the grounds asserted by the property owners, *i.e.* the city's failure to prepare an annexation plan, relate to procedural matters and do not question the city's inherent authority to annex. As such, the court found the property owners lacked standing to challenge the annexation.[402]

In *City of Missouri City v. City of Alvin*,[403] the State of Texas brought a *quo warranto* action against Missouri City alleging that the city illegally extended its incorporated area by annexing land that was contiguous to municipal territory that was less than one-thousand feet wide at its narrowest point.[404] This case involved the interpretation of section 43.0545 of the Texas Local Government Code, which states in relevant part that "[a] municipality may not annex an area that is located in the extraterritorial jurisdiction of the municipality only because the area is contiguous to municipal territory that is less than 1,000 feet in width at its narrowest point."[405] Missouri City argued that the language "because the area" modifies the verb "annex," thus because it had another reason for annexing the land, namely a need for developing that area, the city did not violate the section. The state argued that the language modifies the verb "is located," and because the annexed land extended from a strip of land in Missouri City that is only twenty-five feet wide, the annexation violates the statute. The court found that the legislature enacted this statute to

399. 121 S.W.3d 803 (Tex. App.—Fort Worth 2003, no pet.).
400. *Id.* at 805.
401. *Id.* at 806.
402. *Id.* at 807.
403. 123 S.W.3d 606 (Tex. App.—Houston [14th Dist.] 2003, pet. denied).
404. *Id.* at 608-09.
405. *Id.* at 609.

curb abuse of power by cities in annexing long narrow strips of land. Therefore, it must be the case that the state has the correct interpretation because it would always be the case that a city has more than one reason for annexing a strip of land, and thus would never violate this section, leaving the section pointless. Therefore, the court affirmed the trial court's ruling in favor of the state declaring the Missouri City annexation ordinance null and void.[406]

G. Premises Liability

Urena v. Western Investments, Inc.,[407] was a case addressing whether a landlord is liable to a tenant for injury due to criminal activity in an apartment complex. Urena and her minor children were residents of the Front Royale Apartment Complex. One day, Urena left her children with her sister, who also lived in the Front Royale Apartment Complex, while she worked. While playing outside of her sister's apartment, Urena's son decided to return to their apartment to retrieve some toys and was lured into an apartment occupied by another tenant, where he was sexually assaulted. The court of appeals stated that generally, there is no legal duty to protect another from the criminal acts of a third party, however, an exception to this general rule is where a landlord retains control over security and safety of the premises.[408] In such a case, a landlord has a duty to use ordinary care to protect invitees from criminal acts if the risk of criminal conduct is so great that it is both unreasonable and foreseeable.[409] The court set forth five factors in determining whether the crime was foreseeable: (1) whether any criminal conduct occurred at or near the property; (2) how recently the conduct occurred; (3) how often it occurred; (4) how similar the prior conduct was to the conduct on the property; and (5) what publicity was given to the occurrences.[410] In this instance, evidence was presented that there were a number of violent crimes that occurred within a period of three years, that the landlord had actual knowledge of many of those crimes, and that the landlord had terminated and not replaced its security company. The court held that there was a genuine issue of material fact as to whether the crime at issue was reasonably foreseeable and as to whether the landlord exercised ordinary care to protect the tenants from such harm.[411]

In *Howard v. East Texas Baptist University*,[412] while visiting an outdoor swimming pool owned by East Texas Baptist University (ETBU), a private university that was open to public use for a nominal fee, Howard was injured when the diving board "double bounced." Howard sued ETBU

406. *Id.* at 614-16.
407. 122 S.W.3d 249 (Tex. App.—Houston [1st Dist.] 2003, pet. granted), *rev'd*, No. 83-0919, 2005 WL 783879 (Tex. Apr. 8, 2005).
408. *Id.* at 254.
409. *Id.*
410. *Id.*
411. *Id.* at 255-56.
412. 122 S.W.3d 407 (Tex. App.—Texarkana 2003, no pet.).

for premises liability. At issue was the applicable standard of care. ETBU argued that the Texas Recreational Use Statute[413] applied, which dictates that the standard of care is that owed by a landowner to a trespasser; thus, ETBU would only be liable for injuries incurred through its willful, wanton or grossly negligent conduct. Howard contended that the Texas Recreational Use Statute did not apply because it is only applicable to an owner that charges for entry to its premises, where the total charges collected for the previous calendar year for all recreational uses of the entire premises are not more than twice the total amount of ad valorem taxes imposed on the premises for the previous calendar year.[414] ETBU contended that the relevant issue was the ad valorem taxes for the entire property owned by ETBU, while Howard contended that the ad valorem taxes collected on the area around the swimming pool, which was zero, was the relevant inquiry. The court of appeals found that the statute was intended to include the entire premises and not just the area of the swimming pool, reasoning that to rule as Howard proposed would be contrary to the legislative intent to make such land available to the public for recreational purposes by providing the owners of such land with a lower standard of care. Given that finding, the court found that there was no evidence presented to the trial court suggesting ETBU was grossly negligent because, while it knew that there were problems with the diving board shifting, no one had ever been hurt or even complained.[415]

In *Villegas v. Texas Department of Transportation*,[416] passengers in an automobile brought a claim against the Texas Department of Transportation (TxDOT) as a result of injuries sustained when their vehicle spun out of control after hitting water on the roadway, which the plaintiffs alleged resulted from improper drainage caused by the state's failure to keep the grass along the road properly mowed. As a state agency, TxDOT is immune from suit unless its sovereign immunity is waived. The Texas Tort Claims Act creates a limited waiver of sovereign immunity when injury is caused by a premises defect.[417] The court of appeals determined that the water on the road was not a "special" defect (which would have resulted in a higher duty of care), but because it was neither unexpected nor unusual for a motorist to encounter a pool of water on a roadway after a rain, it was a "premises" defect. Therefore TxDOT owed Villegas the same duty that a private landowner owes to a licensee.[418] To establish liability, a licensee must prove that: "(1) a condition of the premises created an unreasonable risk of harm to the licensee; (2) the owner actually knew of the condition; (3) the licensee did not actually know of the condition;

413. TEX. CIV. PRAC. & REM. CODE ANN. § 75.002(c) (Vernon 2005).

414. *Id.* § 75.003(c)(2). The statute was subsequently amended, effective as to causes of action accruing on or after September 1, 2003, providing that the statute applies if revenues are not more than twenty times ad valorem taxes.

415. *Howard*, 122 S.W.3d at 408-12.

416. 120 S.W.3d 26 (Tex. App.—San Antonio 2003, pet. denied).

417. TEX. CIV. PRAC. & REM. CODE ANN. §101.022(a) (Vernon 2005).

418. *Villegas*, 120 S.W.3d at 30-33.

(4) the owner failed to exercise ordinary care to protect the licensee from danger, and (5) the owner's failure was a proximate cause of the injury to licensee."[419] The court determined that in this case, Villegas failed to provide any evidence that TxDOT had actual knowledge that there was water on the roadway, which was a necessary element to establish a duty of care for TxDOT. Therefore, TxDOT was entitled to summary judgment.[420]

Similarly, in *Taylor v. Wood County*,[421] motorists were driving on a county road shortly after a rain storm when they drove into a four to six foot deep hole where a culvert beneath the road had washed out. In order to be held liable, the county must have waived sovereign immunity. As in *Villegas*, the Texas Tort Claims Act creates a waiver of immunity for premises defects. However, unlike in *Villegas* the culvert washout was a "special" defect.[422] A special defect is defined to include "excavations or obstructions on highways, roads, or streets."[423] "For a condition to rise to the level of a special defect . . . it must not only present a threat to the ordinary user of a roadway, but the danger must also be unexpected and unusual."[424] In this case, the evidence conclusively established the culvert washout was a special defect because, unlike a pothole or rut, this collapse left an impassable hole. Where a claim arises because of a special defect, the agency owes the same duty as owed to an invitee of the owner of a private premises, which requires the owner to use ordinary care to protect an invitee from a dangerous condition of which the owner is or reasonably should be aware. The court of appeals found that the county did not have actual notice of the problem nor should it reasonably have known of the problem by virtue of the work it performed on a culvert in the same area two months before. Therefore, the county did not breach any duty to Taylor with respect to this condition.[425]

In *M.O. Dental Lab v. Rape*,[426] Rape brought a premises liability claim against a land owner after she slipped and fell on mud on the sidewalk of the property. The parties do not contest that Rape was an invitee of the property owner. To prevail in a premises liability claim, the invitee must prove, among other elements (including knowledge and exercise of ordinary care), that a condition on the premises posed an unreasonable risk of harm to the invitee. The Texas Supreme Court held that mud which accumulates naturally on a manmade surface does not pose an unreasonable risk of harm.[427] The court stated that holding otherwise would subject landowners to a significant burden that could not be mitigated by

419. *Id.* at 34-35.
420. *Id.* at 34.
421. 133 S.W.3d 811 (Tex. App.—Texarkana 2004, no pet.).
422. *Id.* at 813.
423. *Id.*
424. *Id.*
425. *Id.* at 814-15.
426. 139 S.W.3d 671 (Tex. 2004).
427. *Id.* at 676.

precautions and that invitees are at least as aware of the presence of mud after rain as landowners are.[428]

428. *Id.*