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Real Property

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REAL PROPERTY

*Ellis L. Tudzin**
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*David E. Harrell****

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INTRODUCTION

THIS Article surveys real property law for the period October 1, 1993 through September 30, 1994. For the most part, the cases were not "earth shaking," although one of the cases decided during the Survey period did provide a slight tremor. That case is discussed in the Homestead section of the Survey. The Homestead section shows that the Fifth Circuit, in the early part of the Survey period, concluded that in certain instances mortgages secured by equity in the homestead were permissible even if such loans were not for purchase money, improvements, or taxes. However, on September 29, 1994 (the day before the Survey period ended) Congress passed and the President signed legislation which effectively overturned the Fifth Circuit's decision. Another advantageous case (for lenders' counsel) decided during the Survey period was the U.S. Supreme Court's decision overturning the so-called *Durrett* Rule. At the very least, real estate lawyers have one less matter to deal with on their commitments for title insurance, subject to Texas' "anti-deficiency" statutes. Also during the Survey period, Texas replaced the Condominium Act with the Uniform Condominium Act. A summary and comparison appears in the section titled "Condominiums." This Survey does not include every real property case decided during the Survey period; rather, it includes only ones the authors thought were important and should be included.

I. LENDING

A. Mortgages

The lead-off case dealing with mortgages is *Richards v. Suckle*,[1] which involves the equitable doctrine of subrogation. Two brothers, Barry and Stephen Suckle, were the owners as tenants in common of an undivided interest in a wrap around promissory note, secured by a vendor's lien and a deed of trust lien. In 1981, Barry and Stephen foreclosed, and they became the owners, as tenants in common, of the real property securing payment of the wrap around promissory note. Since the Suckle brothers' interest in the property was subject to an underlying note, which was secured by a deed of trust and vendor's lien, Stephen and Barry had continuing payment obligations to the underlying noteholder. In 1985 Stephen failed to pay his portion of the principal and interest due and owing, so Barry made the payment. Barry also paid off the underlying note in 1986 to protect his interest in the land, his brother again refusing to pay his share of the debt. The liens were released by the noteholder. Barry sued Stephen based on a theory akin to "am I my brother's keeper?"[2] In 1988 Stephen pledged his interest in the property to his attorney, and in 1989 his attorney foreclosed on that interest, recording a trustee's deed. In

1. 871 S.W.2d 239 (Tex. App.—Houston [14th Dist.] 1994, no writ).
2. *Genesis*, 4:9 (Story of Cain and Abel).

1990 Barry amended his pleadings and sought only subrogation and judicial foreclosure. The trial court decided in Barry's favor and granted his equitable subrogation to the deed of trust lien against Stephen's interest in the land. A sheriff's sale was held in 1992, and Barry was the highest bidder. Stephen's attorney appealed.

It is anticlimactic that the court of appeals affirmed the trial court. Nonetheless, the case provides some good resource material for comparing the concept of an equitable lien with that of the equitable right of subrogation. The court noted that "the equitable doctrine of subrogation holds that where a person, other than the principal obligor, pays a mortgage indebtedness on land in which he has an interest, equity will substitute him in place of the original mortgagee, and vest that mortgagee's rights in him."[3] The court, having noted that the appellant confused the concept of an equitable lien with that of the equitable right of subrogation,[4] then noted that "[a]n equitable lien, however, is one in which a court of equity implies [a]n agreement arising out of the relationship of the parties and the circumstances of their dealings."[5] The court further noted that "[t]he foundation of every equitable lien is a contract, either express or implied, which deals with or operates on some specific property; but the contract must be made by some authorized person, or arise by implication from his acts, before a lien in equity can be created against the property of the person to be affected by it."[6] The court noted that there was no agreement between Barry and Stephen for a "lien" against the property and that, further, Barry did not need a lien since he stood in the shoes of the original mortgagee. Thus, when Barry paid Stephen's debt, Barry acquired the right of subrogation which Barry asserted by the judicial foreclosure. The appellate court held that the lien to which Barry was subrogated came into existence before the appellant's deed of trust was created.[7] Therefore, the foreclosure of the appellant's inferior lien could not cut off Barry's superior rights. Note should be taken of the fact that the court did consider a possible defense to Barry's right of subrogation. The court notes that the appellant could have raised the defense that she was a good faith purchaser for value; the court further noted that a good faith purchaser for value wins over the holder of prior equitable title.[8] While the appellant could have raised the defense that she was a good faith purchaser for value, the court did not consider her a good faith purchaser for value. The "Genesis" for the underlying facts of this case (i.e., brother against brother) has some basis in history.

3. *Id.* at 241 (citing First Nat'l Bank Houston v. Ackerman, 70 Tex. 315, 8 S.W. 45, 47 (1888)); Johnson v. Koenig, 353 S.W.2d 478, 483 (Tex. Civ. App.—Austin 1962, writ ref'd n.r.e.).

4. 871 S.W.2d at 241.

5. *Id.*

6. *Id.* at 241-42.

7. *Id.* at 241-43.

8. *Id.* at 242.

The next case may emphasize the need for refresher courses in modern mathematics. In *McLemore v. Pacific Southwest Bank, FSB*,[9] a suit for a deficiency resulting from a real estate foreclosure, the issues are unremarkable except for the fact that the summary judgment in favor of the plaintiff (Bank) was revised twice by the trial court and once by the appellate court to correct mathematical errors on the part of the Bank in the calculation of interest. Thus, this case indicates that the trial court has discretion to convert the computation of amount due.[10] A peripheral issue involved the fact that, although the Bank sent the borrower notice of its intention to accelerate, it never notified the borrower prior to foreclosure that it had actually accelerated the note. The court of appeals held that one may "reasonably infer that a notice of intent to accelerate followed by a notice of a trustee's sale constitutes a notice of acceleration."[11] Interestingly, this is an issue that the Supreme Court specifically declined to consider in an earlier case.[12]

The Dallas Court of Appeals in *Giese v. NCNB Texas Forney Banking Center*[13] was faced with the question of "is it real?" and its answer was to the effect of "get real." The court was asked to decide the proper method for perfecting a lien on a mobile home that was affixed to real estate. In 1984, the appellant sold a parcel of land to Mr. and Mrs. Farmer. The land was improved with a 1981 Schult double-wide mobile home with plumbing, electricity, a septic system, a porch and a deck. In connection with the sale, the Farmers executed a note payable to appellant which was secured by a deed of trust on the property and a financing statement on the mobile home. The deed of trust and financing statement were filed in the county clerk's office. In 1986, the appellee Bank's predecessor in interest made a loan to the Farmers which was secured by the mobile home. The Bank's lien was noted on the certificate of title of the mobile home. When the Farmers defaulted on the Bank's note, the Bank repossessed the mobile home and sold it. The appellant sued the Bank, seeking a declaration that she possessed a superior lien (because her filing in the count records was a prior perfected lien) and also seeking damages for the destruction of the porch, deck and other improvements caused by the Bank's removal of the mobile home from the land. The appellate court reviewed the Texas Manufactured Housing Standards Act,[14] which governs perfection of security interests in mobile homes, and concluded that there are two methods for perfecting a lien on a mobile home which is permanently attached to the ground: "(1) a party can perfect her lien in the real property records *if* she surrenders and cancels her title documents; or (2) if the party does not surrender and cancel her title, the party

9. 872 S.W.2d 286 (Tex. App.—Texarkana 1994, writ dism'd by agr.).
10. *Id.* at 290-91.
11. *Id.* at 292.
12. Ogden v. Gibralter Savings Ass'n, 640 S.W.2d 232, 234 (Tex. 1982).
13. 881 S.W.2d 776 (Tex. App.—Dallas 1994, no writ).
14. TEX. BUS. & COM. CODE ANN. § 9.302(c)(2) (Tex. UCC) (Vernon 1991).

must note the lien on the certificate of title."[15] Since the title was not cancelled and the Bank's lien was the only lien noted on the certificate of title, it was not "real," and the court held that the Bank's lien was superior. Unfortunately for the Bank, the court remanded the case on the issue of whether the Bank's manner of removing the mobile home unreasonably caused damages to the various improvements; in fact, in her original petition, appellant alleged that she had real damages of $60,000.

B. Foreclosure

GOODBYE *DURRETT*! In *BFP v. Resolution Trust Corp.*[16] Justice Scalia has answered the perennial question facing a creditor who is conducting a mortgage foreclosure of real estate: "How much should I bid?" The Supreme Court overturned the so-called rule of *Durrett v. Washington National Insurance Co.*[17] and held that "a reasonably equivalent value"[18] means, for foreclosed real property, the price *in fact* received at the foreclosure sale, so long as all of the requirements of the state's foreclosure law have been met.[19] The crux of the opinion is that the term "fair market value" does not appear in section 548 of the Bankruptcy Code; rather, section 548 deals with the concept of "reasonably equivalent value." As the opinion notes, other sections of the Bankruptcy Code take into account "fair market value," but not section 548.[20] The court limited its opinion to foreclosures of mortgages on real estate only.

It is important to note that the court considered that the guarantors had a statutory right to notice of the foreclosure sale. Although not expressly stated in the case, the guarantors must have waived any rights to notice in the guaranty agreement.

During the Survey period the Corpus Christi Court of Appeals gave some insight into how to cover all the foreclosure bases. *Rosedale Partners v. Resolution Trust Corp.*[21] actually dealt, among other things, with the election of remedies by a mortgagee. In 1987, a lender obtained a declaratory judgment against the makers of a promissory note whereby the court ordered a judicial foreclosure of the property securing payment of the note and, in addition, declared that the lender had the right to post and sell the property at a non-judicial foreclosure. In 1992, the Resolution Trust Corporation (RTC), as the successor in interest to the lender, posted the property for a non-judicial foreclosure to be held on Decem-

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15. 881 S.W.2d at 781 (emphasis in original).
16. 114 S. Ct. 1757 (1994).
17. 621 F.2d 201 (5th Cir. 1980). The Fifth Circuit held that a foreclosure sale that yielded 57% of the property's fair market value could be set aside and indicated in its opinion that any sale for less than 70% of fair market value should be set aside—the so-called "*Durrett* Rule." Not all federal circuits followed the "*Durrett* Rule."
18. 11 U.S.C. § 548(a)(2) (1988).
19. 114 S. Ct. at 1765.
20. *Id.* at 1761.
21. 882 S.W.2d 622 (Tex. App.—Corpus Christi 1994, n.w.h.).

ber 1, 1992. The RTC was the highest bidder at the foreclosure sale. In January 1993, the RTC sold its rights under the 1987 judgment to Rosedale, specifically retaining all collateral upon which the RTC had foreclosed. The RTC subsequently entered into a sales contract with a third party, agreeing to convey the real estate with a closing to occur on February 16, 1993. Prior to the closing, Rosedale obtained a writ of execution on the 1987 judgment, and a sheriff's sale on the property was noticed for April 16, 1993. The RTC filed suit against Rosedale, seeking an injunction and damages and obtained a summary judgment in its favor. Rosedale appealed, claiming that the 1992 non-judicial foreclosure was void because there had been an election of remedies in the 1987 litigation and the lender had elected a judicial sale. Consequently, according to Rosedale, the power of sale under the deed of trust was abandoned or extinguished. The appellate court interpreted the 1987 judgment to give lender an "either - or" method of foreclosure; i.e., either conduct a sheriff's sale or foreclose non-judicially under the deed of trust.[22] Is there any good case law here? Probably not, but there is a moral - "you can have your cake and eat it too."

C. GUARANTY

TO ALL GUARANTORS (ESPECIALLY IN AND AROUND CORPUS CHRISTI): YOU ARE HEREBY GIVEN NOTICE THAT YOU WILL NOT BE GIVEN NOTICE. In *Long v. NCNB—Texas National Bank*,[23] the Bank sued the guarantors of a promissory note for the deficiency resulting from a real property foreclosure. The guarantors were not notified of the foreclosure sale before it took place. The court held "that the guarantors of a note secured by realty do not enjoy the right to notice of the foreclosure sale."[24] Furthermore, the court noted that (1) unlike the foreclosure of personal property, the term "debtor" as used in the Texas Property Code[25] does not include guarantors;[26] and (2) a guarantor does not have standing to contest the legal sufficiency of a non-judicial foreclosure unless the guarantor has a property interest in the foreclosed real estate.[27]

One case decided during the Survey period asked whether a guarantor is discharged from his or her obligation when there is a material alteration in the underlying contract. In *Sonne v. FDIC*[28] several guarantors agreed to be liable for fixed portions of a debt. The face amount of the debt was later increased, although the amount of the personal guaranties remained unchanged.[29] The guarantors argued that the increased indebt-

22. *Id.* at 628.
23. 882 S.W.2d 861 (Tex. App.—Corpus Christi 1994, n.w.h.).
24. *Id.* at 866.
25. TEX. PROP. CODE ANN. § 51.002(b)(3) (Vernon 1984).
26. 882 S.W.2d at 863.
27. *Id.* at 865-67.
28. 881 S.W.2d 789 (Tex. App.—Houston [14th Dist.] 1994, no writ).
29. *Id.* at 790-91.

edness on the underlying contract constituted a material alteration, which indicated that there was no meeting of the minds between the parties. Without a meeting of the minds, no contract was formed, which barred the guarantors' personal liability on the guaranties.[30] The court agreed that the increased debt was a material alteration, but found that the guarantors had waived the alteration, which maintained their liability on the note.[31] The court also noted that since the increased debt had not affected the amount for which each guarantor was liable on his fixed guaranty, the guarantors had failed to demonstrate harm from the alteration, as was their burden on the affirmative defense of material alteration.[32]

Ocean Transport, Inc. v. Greycas, Inc.[33] dealt with the statute of limitations in suits against guarantors. In *Ocean Transport* guarantors were personally liable for all claims against Ocean Transport, Inc. When the corporation defaulted on a promissory note to Greycas, Greycas brought suit to enforce the guaranties. One defense raised by the guarantors was that the suit was barred by the four-year statute of limitations.[34] They argued that a cause of action on the debt accrued on March 14, 1986 (when Greycas accelerated the debt), so the limitations period expired on March 14, 1990. Greycas filed a deficiency suit as a counterclaim against Ocean Transport on April 1, 1991, after taking a nonsuit in a previously filed action against Ocean Transport.[35] Greycas maintained that claims which arise under the Ship Mortgage Act[36] are not subject to a limitations period.[37]

The court first explored whether the limitations period had actually expired against the borrower, Ocean Transport. A cause of action generally accrues "when facts come into existence which authorize a claimant to seek a judicial remedy."[38] Here the promissory note authorized Greycas to declare the note payable, at its option, upon default of full payment of any installment.[39] Testimony indicated that a memorandum which accelerated the note was sent to one of the guarantors on March 14, 1986, so

30. *Id.* at 791.

31. *Id.* at 792. The increased debt had been initialled, although the record was silent as to whose initials appeared next to the alteration. *Id.* at 791. The court relied primarily on language in the guaranties which stated that "[t]he undersigned (Guarantors) jointly and severally agrees to pay to the Lender at its address set above, when due or declared, *all debt or other liability of every kind for which Debtor now is or hereafter shall be obligated to Lender. . . .*" *Id.* at 792 (emphasis in original). The court determined that the italicized language "accounted for any potential increases in the overall indebtedness under the note and intended to maintain the validity of the individual guaranties despite such increases." *Id.* Therefore, the guarantors had waived the right to complain of a material alteration in the promissory note.

32. *Id.* at 793-94.

33. 878 S.W.2d 256 (Tex. App.—Corpus Christi 1994, writ denied).

34. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3) (Vernon 1986); 878 S.W.2d at 266.

35. 878 S.W.2d at 261.

36. *See* 46 U.S.C. § 954(a) (1988).

37. 878 S.W.2d at 266.

38. *Id.* at 267 (citing Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990)).

39. *Id.*

that was the date upon which the promissory note was declared accelerated and the cause of action accrued. Even with the tolling of the limitations period to account for Greycas' non-suit, the limitations period expired before Greycas filed its later counterclaim in 1991.[40] Therefore, the limitations period had expired as to the claims against Ocean Transport.

The next question for the court was whether the limitations period as to Ocean Transport was applicable to the deficiency suit against the guarantors. The court first noted that since the Ship Mortgage Act did not establish a statute of limitations, the suit on the deficiency would be governed by the relevant state statute of limitations.[41] The court then stated that where a lender can sue the guarantor without suing the note's maker, the expiration of the limitations period as to the maker (here, Ocean Transport) is not a defense available to the guarantor.[42] The only instance in which limitations is an available defense is where the limitations period applies to the guaranty as well as to the principal obligation.[43] Since the guaranty language provided that Greycas did not have to sue Ocean Transport before it could sue the guarantors,[44] the guarantors could not defend on grounds of the limitations period expiring against Ocean Transport.

The court last turned to the question of whether the limitations period had expired against the guarantors. The guaranty agreements stated that Greycas was required to give written notice to the guarantors before the note accelerated. Written notice was given to the maker in November 1985. As to the obligors, however, there was no evidence as to when they received notice. Since limitations was their affirmative defense, and the guarantors had the burden of proof regarding accrual of the cause of action, the failure to present evidence as to the notice date barred their limitations defense.[45] Therefore, Greycas could not sue the maker under the note, but was able to maintain a suit against the guarantors.

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40. *Id.*

41. *Id.* at 266.

42. *Id.* at 267. This holding was challenged in another case during the Survey period. *See* Wiman v. Tomaszewicz, 877 S.W.2d 1, 5-7 (Tex. App.—Dallas 1994, no writ). In *Wiman* a guarantor argued that it was unfair to subject a guarantor to liability when the maker's liability was barred by limitations, since the guarantor could not then pursue recourse against the maker. 877 S.W.2d at 6. The court responded that often limitations runs concurrently as to both the maker and the guarantor. *Id.* at 7. Otherwise, the Texas rule is that the guarantor may be sued independently and may not assert the maker's limitations defense. *Id.*

43. *Id.*

44. The Guaranty provided in part that the guarantors' liability was "primary, direct and immediate. Guarantor[s] . . . agree that neither (i) the exercise or the failure to exercise by Greycas . . . of any rights or remedies conferred on it. . . . (ii) the recovery of a judgment against Borrower or Obligor. (iii) [T]he commencement of an action at law or the recovery of a judgment at law against Borrower or Obligor and the enforcement thereof . . . shall extinguish or affect the obligations of Guarantor[s] hereunder. . . ." *Id.* at 267-68.

45. *Id.*

D. Usury

D & S King's Way Ventures v. Texas Capital Bank—Richmond, N.A.[46] is noteworthy for its "what if" value. In this case, Texas Capital Bank filed suit against the appellants to recover on a defaulted note. The appellant answered and counterclaimed for usury. The trial court held that the bank failed to prove the amount of its deficiency and that appellants failed to prove their usury counterclaim. The note upon which the bank sued was secured by a deed of trust and security agreement giving the bank a first lien on certain residential property. The bank held a public sale, foreclosed on the real property, and purchased it for $225,000. The bank filed its original and first amended petitions which did not specifically reference the foreclosure sale or the purchase of the property by the bank. The first amended pleading continued to pray for judgment on the full amount of the note, i.e. $507,500. However, the second amended petition prayed for judgment in the amount of $507,500, less any credits being properly allowed by the court as a result of the foreclosure sale. The appellant's usury claim was based solely on the pleadings. The appellants contended that the bank's first amended petition constituted a "charge" of usurious interest because it did not reflect a credit for the amount received at the foreclosure. The appellants also contended that the bank "received" usurious interest because it "received" $225,000, but failed to credit it to the balance owed on the note.

Of course, the issue regarding the "charge" of usurious interest in a pleading is no longer open for consideration.[47] A more interesting issue related to the appellant's claim that the bank's last pleading, stating that the bank was owed $507,500, is an admission that the bank "received" or was attempting to receive usurious interest. The appellants asserted that the testimony showed that the $225,000 was not applied to reduce the $507,500 principal. The court, in holding against the appellants on the usury claim, referred to the fact that the appellants did not provide the court with citations to the record in which such evidence could be found.[48] The reliance on testimony showing that the $225,000 was not applied to reduce the $507,500 principal is questionable. Could a contrary finding have changed the result? The appellants made a distinction between the charging of a usurious amount of interest and the receiving of usury, and the court followed along.

In *Peoples State Bank of Clyde v. Andrews*[49] the court affirmed the principle that a claim of usury is restricted to the immediate parties to the transaction. In this case, the bank sued the makers of the note as well as

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46. 882 S.W.2d 573 (Tex. App.—Houston [14th Dist.] 1994, no writ).

47. In George A. Fuller Co. of Texas, Inc. v. Carpet Serv., Inc., 823 S.W.2d 603 (Tex. 1992), the Supreme Court held that a pleading by itself, even if it contains a claim for usurious interest, does not constitute a charge of usurious interest for purposes of the Texas usury statute. Claims which appear solely in a pleading do not constitute a charge for usurious interest.

48. 882 S.W.2d at 575.

49. 881 S.W.2d 520 (Tex. App.—Eastland 1994, no writ).

Andrews, whom the bank alleged was a "guarantor" of the debt. The trial court awarded the bank a judgment against the makers and, in addition, held that the bank's demand against Andrews constituted a usurious charge of interest. Andrews was awarded treble damages plus interest and court costs. The trial court found that Andrews did not assume the note in question and was not an obligor on the note.[50] In turn, the appellate court held that the mere sending of the demand letter cannot make a person an obligor on a note. The appellate court noted that "[a]s a stranger to the note, Andrews is not entitled to an award of penalties under Articles 5069-8.01 and 5069-8.02."[51]

II. HOMESTEAD

An inspection of the Texas homestead law during the early part of the Survey period revealed that the Texas homestead exemption had developed a crack in its foundation. Upon further inspection, however, it appears the crack has been repaired. In *First Gibraltar Bank FSB v. Morales*,[52] the Court of Appeals for the Fifth Circuit concluded that federal law preempts Texas homestead law insofar as the Texas homestead law prohibits federal savings associations and "state housing creditors"[53] from engaging in reverse annuity mortgages (RAMs) and line of credit conversion mortgages, thereby taking enforceable security interests in real estate that qualifies as homestead property under Texas law. In arriving at its conclusion, the court discussed the state of the current homestead law and noted that "[s]trong legal protection of the homestead from foreclosure has long been viewed as an important public policy in Texas."[54] In the court's discussion of the background of Texas homestead law, the court referred to *Wood v. Wheeler*[55] in which Chief Justice Hemphill, discussing the Texas homestead exemption, noted that "[t]he object of such exemption is to confer on the beneficiary a home as an asylum, a refuge which cannot be invaded nor its tranquility or serenity disturbed, and in which may be nurtured and cherished those feelings of individual independence which lie at the *foundation* and are essential to the permanency of our institutions."[56] Of course, the source of the Texas homestead exemption is the Texas Constitution, which provides as follows:

> [H]omestead of a family, or of a single adult person, shall be, and is hereby protected from forced sale, for the payment of all debts except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in con-

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50. *Id.* at 522.
51. *Id.*; *see also* TEX. REV. CIV. STAT. ANN. §§ 5069-8.01 -8.02 (Vernon 1987 & Supp. 1995).
52. 19 F.3d 1032 (5th Cir. 1994).
53. *See* 12 U.S.C. § 3803(a)(3) (1988) .
54. 19 F.3d at 1036.
55. 7 Tex. 13 (1851)
56. *Id.* at 22 (emphasis added).

> structing improvements thereon. . . . No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefor, or improvements made thereon, as hereinbefore provided.[57]

Although *First Gibraltar Bank FSB v. Morales* is now moot, the case is discussed in the next several paragraphs to provide the background for how the "foundation" was repaired.

First Gibraltar FSB is a federally chartered savings bank, and Beneficial Texas Inc. is a non-federally chartered financial services corporation licensed to do business in Texas. First Gibraltar and Beneficial (the "Banks") filed a complaint for declaratory judgment and injunctive relief in federal district court against Dan Morales as Attorney General for the State of Texas and Albert Endsley as Texas Consumer Credit Commissioner. The Banks requested the district court to (1) declare that federal law preempts Texas homestead law to the extent that Texas law prohibits federal savings associations from enforcing liens taken in alternative mortgage transactions secured by a homeowner's equity, such as in the case of reverse annuity mortgages and line of credit conversion mortgages, and (2) declare that the federal preemption also extends to state chartered institutions under the Alternative Mortgage Transaction Parity Act of 1982.[58] The United States District Court for the Western District of Texas granted summary judgment in favor of the Banks.[59] Several amici curiae, including the Office of Thrift Supervision (OTS), the Texas Association of Realtors and Texas Savings, filed briefs in the court of appeals. It is important to note that the issue, as defined by the court, was whether federal statutes and regulations have preempted Texas homestead law to the extent that Texas homestead law prohibits lenders from enforcing liens on home equity created in RAMs or line of credit conversion mortgages. The court expressly limited its preemption analysis and its decision to the RAM and line of credit conversion mortgage.[60] The Banks did not seek a declaration that Texas homestead law had been preempted in its entirety; rather, the Banks admitted that Texas homestead law would continue to apply in such contexts as "fixed rate, fixed-term home loan transactions, federal bankruptcies [in which state exemptions are claimed], and judgment creditor claims against individual debtors."[61] For purposes of the court's discussion, it noted that RAM and line of credit conversion mortgages come within the broad catch-all term "alternative mortgage transaction" (AMT), which describes mortgage instruments that do not conform to the traditionally fully amortized, fixed interest rate mortgage loan. The court does note, however, that AMTs include such instruments as the adjustable interest rate mortgage and the

57. TEX. CONST. art. XVI, § 50 (1876); *see also*, TEX. PROP. CODE ANN. § 41.001 (Vernon Supp. 1995) (providing for certain statutory homestead rights).
58. 12 U.S.C. §§ 3801-3806 (1988).
59. First Gibraltar Bank FSB v. Morales, 815 F.Supp. 1008 (W.D. Tex. 1993).
60. 19 F.3d at 1037.
61. *Id.*

graduated payment mortgage. The reason that the Banks focused on the RAM and the line of credit conversion mortgage is that these two forms of AMTs are directly foreclosed by the impact of the Texas homestead law, and that is not the case with respect to the adjustable interest rate mortgage and the graduated payment mortgage.[62] For purposes of its discussion, the court cited *Black's Law Dictionary*, which defined a RAM as "[a] mortgage format under which the mortgage loan proceeds are disbursed periodically over a long time period to provide regular income for the borrower-mortgagor. The loan will usually be repaid in a lump sum when the mortgagor dies or the property is sold."[63]

The court discussed the preemption doctrine,[64] and the authors of this article refer to the opinion for the court's discussion of this topic. Note, however, that the court cites *Louisiana Public Service Commission v. Securities and Exchange Commission*[65] and *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*[66] for the proposition that state law can be preempted by regulations promulgated by federal agencies acting within the scope of their congressionally delegated authority as well as by federal legislation. Further, agency decisions to preempt state law are entitled to judicial deference, and if an agency's choice to preempt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[67]

For purposes of its decision, the court considered the law before 1983 and since 1983, which represents the time at which the Federal Home Loan Bank Board (FHLBB) revised its regulatory scheme. In determining the preemption question, the court began with the Home Owners Loan Act (HOLA),[68] which provided for the creation of a system of federal savings and loan associations regulated by the FHLBB.[69] In 1989 Congress dissolved the FHLBB and created the Office of Thrift Supervision (OTS) in its place.[70]

In 1978, the FHLBB authorized federal savings associations to use three new types of mortgage instruments, including the RAM, on a nationwide basis. The purpose of the new regulations was to meet the needs of homeowners during different phases of their financial lifecycles.[71] In 1981 the FHLBB promulgated a number of amendments re-

62. *Id.*
63. BLACK'S LAW DICTIONARY 1011 (6th Ed. 1990); *see also* 12 C.F.R. § 545.33(a) (1993).
64. 19 F.3d at 1039, 1040.
65. 476 U.S. 355, 369 (1986).
66. 458 U.S. 141,153 (1982).
67. City of New York v. FCC, 486 U.S. 57, 64 (1988) (citing United States v. Shimer, 367 U.S. 374, 383 (1961)).
68. 12 U.S.C. §§ 1461-1468(c) (1988).
69. 19 F.3d at 1041 (citing *de la Cuesta*, 458 U.S. at 159-60).
70. 12 U.S.C. §§ 1462a-1464 (1988).
71. 43 Fed. Reg. 59,336 (1978).

garding the lending authority of federal savings associations, including 12 C.F.R. section 545.6-4(a)(ii), which authorizes certain alternative mortgage instruments (including RAMs). The amendment provides, in part, as follows:

> this regulation is promulgated pursuant to the plenary and exclusive authority of the Board to regulate all aspects of Federal associations .... This exercise of the Board's authority is preemptive of any state law purporting to address the subject of a Federal association's ability or right to make, purchase or participate in the alternative mortgage instrument set forth in this section, or to directly or indirectly restrict such ability.[72]

When the Supreme Court decided the *de la Cuesta* case in June 1982, it recognized that Congress may delegate its power to preempt state laws to federal agencies such as the FHLBB.[73] Further, the Supreme Court concluded that Congress had given the FHLBB the authority to regulate the lending practices of federal savings and loans so as to further HOLA's purposes.[74]

As noted, in 1983 the FHLBB discontinued its practice of promulgating regulations specifically empowering federal savings associations to act and to permit such associations to exercise all powers granted to them by HOLA subject only to limitations contained in the regulations. The provision concerning preemption was relocated to 12 C.F.R. section 542.2.[75]

As noted by the court of appeals, regulatory limitations on the power of savings associations to make loans on the security of real estate are found in 12 C.F.R. section 545.32,[76] one such limitation providing, in pertinent part, as follows: "a loan is made on the security of real estate if: ... (2) [t]he security interest of the Federal savings association may be enforced as a real estate mortgage or its equivalent pursuant to the law of the state in which the property is located ...."[77] This is the provision on which the *district court* relied for purposes of determining that Texas homestead law had *not* been preempted.

The court analyzed the application of the preemption doctrine under the rules set out in *de la Cuesta*.[78] The rule requires consideration of two questions, i.e. did the agency intend to preempt the state law in question and, if so, was that action within the scope of the agency's delegated authority? With respect to the agency's intent to preempt state law, the court of appeals reviewed the agency's intent prior to 1983 and since 1983. The court, citing *de la Cuesta*, notes that any ambiguity regarding agency intent arising from the text of the regulations themselves may be dispelled by reasonable agency constructions of the regulations.[79] The

72. 12 C.F.R. § 545.6-4(a)(ii) (1982).
73. 19 F.3d at 1041-42 (citing de la Cuesta, 458 U.S. at 153-54).
74. 19 F.3d at 1041-42.
75. 12 C.F.R. § 542.2 (1984).
76. *Id.* § 545.32 (1993).
77. *Id.* § 545.32(c)(2) (1993).
78. 458 U.S. at 154.
79. *Id.* at 158 n.13.

court notes that the regulations existing prior to 1983 clearly meet this test. State laws that "directly or indirectly" restricted the ability of federal savings associations to engage in graduated payment or RAMs were explicitly preempted by 12 C.F.R. section 545.6-48(a)(2).[80] The court noted that Texas homestead laws indirectly prohibit RAM lending on property classified as homestead property because RAM lending depends entirely on the enforceability of liens taken in the owner's equity.[81] Such laws were therefore in conflict with the FHLBB regulations existing prior to 1983.

The court next considered whether the 1983 revision of the real estate lending regulations manifested a contrary non-preemptive intent. Based on its analysis, the court concluded that the FHLBB did not manifest an intent to end its preemption of inconsistent state laws such as Texas homestead laws in its 1983 revision of its real estate lien regulations.[82] The only stumbling block for the court of appeals was 12 C.F.R. section 545.32(c)(2),[83] upon which the district court relied in determining that the OTS regulations did not preempt Texas homestead law.[84] The court of appeals reviewed the history of section 545.32(c)(2) and determined that it was adopted to deal with the problem of classifying property interest in time-share units, thus granting an association the opportunity to make a real estate loan on the security of a unit if the property is real estate property under state law. The court, relying on *de la Cuesta*, stated that

> we may recognize that 12 C.F.R. § 545.32(c)(2) incorporates state law generally concerning the creation of an enforceable security interest in real property, and, at the same time, conclude that other provisions of the OTS's regulations have preempted one aspect of state law affecting the enforceability of a security interest in real property—the homestead law—in part.[85]

The second question under *de la Cuesta* required the court to determine whether the OTS's attempted preemption of Texas homestead law is within the scope of the agency's delegated authority.[86] The court concluded that the OTS did not exceed its authority in preempting Texas homestead law insofar as that law prohibits federal savings associations from engaging in RAMs and line of credit conversion mortgages and thereby taking enforceable security interest in real estate that qualifies as homestead property under Texas law.[87] In reaching its conclusion, the court noted that the purpose of HOLA was to provide the country with sources of housing financing, and the purpose has been carried forward in 12 U.S.C. section 1464(a), which authorizes the OTS to regulate the or-

80. 12 C.F.R. § 545.6-48(a)(2) (1982)
81. 19 F.3d at 1045.
82. *Id.* at 1045.
83. 12 C.F.R. § 545.32(c)(2) (1993).
84. 19 F.3d at 1046 (citing *First Gibraltar Bank*, 815 F. Supp. at 1014); *see also* 12 C.F.R. § 545.32(c)(2) (1993).
85. 19 F.3d at 1046 (citing *de la Cuesta*, 458 U.S. at 1057).
86. *Id.* at 1049 (citing *de la Cuesta*, 458 U.S. at 1054).
87. *Id.* at 1052.

ganization and operation of federal savings associations "[i]n order to provide thrift institutions for the deposit of funds and for the extension of credit for homes and other goods and services."[88] The court noted that

> [t]he decision of the FHLBB/OTS to preempt Texas homestead law in the case of RAMs and line of credit conversion mortgages, thereby greatly expanded the pool of collateral available to Texans for borrowing purposes, is entirely consistent with the HOLA's purpose of ensuring the broadest availability of credit for general consumer purposes.[89]

The final issue considered by the court is whether the federal statutes and regulations at issue preempt Texas homestead law so as to allow non-federally chartered associations to engage in RAM and line of credit conversion mortgage lending. The court noted the Parity Act was enacted with the express purpose of putting non-federally chartered housing lenders on a level playing field with federal savings associations.[90] The court had little difficulty in concluding that Congress empowered the OTS to authorize state housing creditors to engage in RAM and line of credit conversion mortgage lending through the Parity Act.

The court's opinion was handed down April 29, 1994, and, of course, made for nice reading and discussion for exactly five months until September 29, 1994 when the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994 was enacted in the second session of the 103d Congress.[91]

Several other opinions decided during the Survey period deserve mention. In *Bransom v. Standard Hardware, Inc.*[92] (citing *First State Bank v. Zelesky*[93] and *Smith v. Green*[94]), the court held that property purchased or improved with stolen funds can never acquire homestead rights as they are held in trust for the rightful owners of the funds.[95] In *Bransom*, the

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88. 12 U.S.C. § 1464(a) (1988).
89. *First Gibraltar Bank*, 19 F.3d at 1051.
90. 12 U.S.C. § 3801(b) (1988).
91. Pub. L. 103-328, 108 Stat. 2338. On September 29, 1994 (one day before the end of the Survey period) Congress amended HOLA by inserting the following new subsection:

> (f) STATE HOMESTEAD PROVISIONS.—No provision of this Act or any other provision of law administered by the Director shall be construed as superseding any homestead provision of any State constitution, including any implementing State statute, in effect on the date of enactment of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, or any subsequent amendment to such a State constitutional or statutory provision in effect on such date, that exempts the homestead of any person from foreclosure or forced sale, or the payment of all debts, other than a purchase money obligation relating to the homestead, taxes due on the homestead, or an obligation arising from work and material used in constructing improvements on the homestead.

So there you have it—the foundation of the Texas homestead exemption has been repaired and even strengthened until such time as the voters of the state of Texas amend the Texas Constitution.

92. 874 S.W.2d 919 (Tex. App.—Fort Worth 1994, writ denied)
93. 262 S.W. 190,192 (Tex. Civ. App.—Galveston 1924, no writ).
94. 243 S.W. 1006, 1008 (Tex. Civ. App.—Amarillo 1922, writ ref'd).
95. *Bransom*, 874 S.W.2d at 928.

appellant, Donald Bransom, was married to Angela Bransom who was an officer and director of Standard Hardware. During her employment from 1986 to September 15, 1991, she served as comptroller and bookkeeper and she was in charge of Standard's financial affairs. Beginning May 18, 1988, she began embezzling funds from two bank accounts owned by Standard. The court found that Angela fraudulently converted approximately $480,000. The court of appeals concluded that the evidence was legally insufficient to support the trial court's finding that appellant (Donald) knew the family's expenditures far exceeded that reasonably affordable on his and his wife's legitimate income, participated in the fraud, had constructive knowledge of the fraud, and knowingly and willingly received the benefits of the fraud.[96] However, the court of appeals did affirm the trial court's judgment that appellant was unjustly enriched in the amount of approximately $480,000. The court of appeals affirmed the imposition of a constructive trust on the proceeds of the sale of appellant's homestead.[97] The court indicated that constructive trusts, being remedial in nature, have the very broad function of redressing wrongs or unjust enrichment in accordance with basic principles of equity and justice.[98] The court, citing *Pace v. McEwen*[99] among other cases, indicated that the homestead protection afforded by the Texas Constitution was never intended to protect stolen funds.

The court noted, however, that its holding is contrary to that of the Dallas Court of Appeals which held that the Texas Constitution homestead protection barred the foreclosure of a judicial equity lien to recover embezzled funds.[100] In the *Curtis Sharp Custom Homes, Inc.* case, the court declared the lien void because the mandatory protection provided by the Constitution divested the trial court of subject matter jurisdiction. The view of the court in *Bransom* is that this is both contrary to the intentions of the Constitution's framers and a distortion of the homestead protection.[101] Thus, *Bransom* is another case in which the homestead exemption is not so sacrosanct.

Finally, how can one have a survey of Texas homestead cases without including at least one "pretend sale" case? This year's case, however, definitely has a twist. In *Ketcham v. First Nat'l Bank of New Boston, Texas*[102] the appellant's son stated in an affidavit that he (the son) requested a loan from the Bank; that the Bank officer told him that he needed more collateral; that the Bank officer asked him (appellant's son) if his parents would sell him their homestead which he could use as collateral; and that the Bank said that they (appellant and her husband) would

96. *Id.* at 927.
97. *Id.* at 928.
98. *Id.* (citing Meadows v. Bierschwale, 516 S.W.2d 125, 131 (Tex. 1974)).
99. 617 S.W.2d 816, 818 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
100. Curtis Sharp Custom Homes, Inc. v. Glover, 701 S.W.2d 24, 28 (Tex. Civ. App.—Dallas 1985, writ ref'd n.r.e.).
101. 874 S.W.2d at 928.
102. 875 S.W.2d 753 (Tex. App.—Texarkana 1994, no writ).

not really sell the home. The son, not the appellant, considered the conveyance to be a sham. Of course, the typical pretend sale case involves a situation where the owner of the homestead "sells" the homestead to obtain a loan. In such cases, the key issue to be resolved in determining whether a sale is real or pretended is the factual question of whether the parties intended title to vest in the purchaser.[103] In *Ketcham*, Lorene Ketcham brought suit against the Bank alleging that it had committed fraud by breaching its fiduciary duty to disburse funds of $60,000 that came available upon the sale of her house to her son. The Bank, through affidavit and testimony, showed that (1) it advanced the funds to a trust account belonging to the attorney who assisted with the sale; (2) the attorney gave a check for the balance to Lorene Ketcham and her husband; that the check was endorsed back to the attorney; and (3) at Ketcham's direction, the attorney wrote a check making the balance of the proceeds payable to her son and daughter-in-law. The court of appeals believed that the evidence was sufficient to raise a factual issue as to whether the transfer was part of a "pretended sale" instigated by the Bank for the purpose of circumventing Constitutional homestead protections.[104] The fact that the money was not applied to Lorene's loans did not matter to the court. The court noted that the Constitution does not impose such restriction and the court would not infer one.[105]

III. DEEDS/CONVEYANCES

There are several cases reported during the Survey period with interesting fact situations; nonetheless, the facts may change but the law stays the same. In *Club Corporation of America v. Concerned Property Owners for April Sound*[106] the trial court considered cross motions for summary judgment on one issue, i.e. whether or not there were any *unsold* lots in April Sound. The appellee, Concerned Property Owners for April Sound, was an unincorporated association of a twelve-member group of persons who were residential lot owners at April Sound subdivision near Conroe, Texas. The appellee alleged that it was entitled to elect five trustees to operate the April Sound Property Owners Association, Inc. (the "POA" and not to be confused with the Concerned Property Owners for April Sound, an unincorporated association). The appellee's basis for maintaining its right to elect five trustees to operate the property owners association stems from its contention that all necessary prerequisites to the development of April Sound subdivision had been met, including the fact that there were no longer any *unsold* building sites in the April

103. *See, e.g.*, Hardie & Co. v. Campbell, 63 Tex. 292 (1885); McGahey v. Ford, 563 S.W.2d 857, 862 (Tex. Civ. App.—Fort Worth 1978, writ ref'd n.r.e.); Nowlin v. William Cameron & Co., 54 S.W.2d 1035 (Tex. Civ. App.—Fort Worth 1932, writ ref'd); Eckard v. Citizens Nat'l. Bank of Abilene, 588 S.W.2d 861 (Tex. Civ. App.—Eastland 1979, writ ref'd n.r.e.).

104. *Ketcham*, 875 S.W.2d at 756.

105. *Id.*

106. 881 S.W.2d 620 (Tex. App.—Beaumont 1994, no writ).

Sound subdivision. The POA was established in 1972 as a nonprofit corporation. The bylaws for the POA provided that no member of the POA was entitled to vote as long as building sites in April Sound remained *unsold*. The bylaws defined the term "unsold" as follows: "The term 'unsold' when used with reference to a building site in April Sound shall mean that the title to such building site has not been conveyed out of Developer and that Developer is actively engaged in activities designed to promote the sale of the building site to any person or entity not affiliated with the Developer."[107] It is interesting to note that an affidavit which was part of the summary judgment evidence contained a statement that the developer currently held title to at least 290 building sites in April Sound, so how is it that the appellee could argue that there were no unsold buildings sites?

The answer was contained in the "Agreement" between the developer/seller and the purchaser of a lot or building site. The Agreement in this case provided "[f]or the consideration and under the terms and considerations set forth, Seller agrees to sell and convey to Purchaser, and Purchaser agrees to purchase . . . the surface and surface rights to a lot to be designated by Seller. . . ."[108] The Agreement provided that once the purchaser had fulfilled its obligations under the Agreement, the seller would designate a lot and the purchaser could commence construction of its residence. The court did note that under the terms of the "Agreement" the purchaser could not specifically enforce the Agreement to require the seller to sell any specific lots.[109] The "Agreement" also provided as follows: "[i]t is expressly understood that this agreement shall not be construed as a conveyance or sale of the property above described but shall be construed as a mere agreement to sell the property . . . ."[110] The appellee's contention to the trial court was that the "agreement" was a contract of sale (sometimes referred to as a contract for deed) under which the lots were sold and equitable title to the lots were conveyed out of the Developer. The trial court, relying upon *Leeson v. City of Houston*,[111] determined that the mere execution of the "agreement" conveyed equitable title to the purchaser. The Beaumont Court of Appeals reviewed *Leeson* and the line of cases stemming from it and compared these cases with *Johnson v. Wood*.[112] The court, for purposes of resolving the conflict, reviewed the discussion of the *Leeson* and *Johnson* cases in *In re Finley*,[113] and quoted the following:

> [t]he seminal case in modern Texas jurisprudence on this issue is *Johnson v. Wood*. . . . In *Johnson*, the court found that purchaser of an executory contract possess[es] only an equitable right to consum-

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107. *Id.* at 621.
108. *Id.* at 623.
109. *Id.*
110. *Id.* at 624.
111. 243 S.W. 485 (Tex. Comm'n App. 1922, judgm't adopted).
112. 138 Tex. 106, 157 S.W.2d 146 (Tex. Comm'n App. 1941).
113. 138 B.R. 181, 182-84 (Bankr. E.D. Tex. 1992).

> mation of that contract upon performance, i.e., full payment under the terms of the contract. At the time of performance "that [equitable right] ripen[s] into an equitable title . . . ." As explained by the court in *In re Waldren*, until a purchaser under a contract for deed fully performs, the only interest that the purchaser possesses is his right to perform under the contract.[114]

The court, in *Club Corporation of America*, pointed out that the holding in *Johnson* has been precedent in Texas for fifty years and has been followed by numerous courts. Of course, the court failed to note that the *Leeson* case was decided in 1922, which would make it precedent in Texas for over seventy years. Nonetheless, the court noted that the precedential value of *Leeson* and its progeny was questionable.[115] The court does discuss the distinction between *Leeson* and *Johnson*, which were both decided by the Texas Commission of Appeals. The distinction is that the Supreme Court of Texas adopted the opinion in *Johnson*, which is considered more significant than merely adopting the judgment without regard for the Commission's holding or reasoning, which was the case in *Leeson*. Consequently, the court determined that *Johnson* provides the better result, and it thus appears accurate to say that a purchaser under a contract for deed possesses only an equitable right under the contract instead of an equitable title. Since the "Agreement" did not convey equitable title, the lots remained "unsold".

Another case decided during the Survey period, *Dickens v. Harvey*,[116] is a good reminder of the fact that lawyers, as drafters of conveyancing documents, should make certain that they understand the meaning and effect of the clauses used in legal forms. In 1977, C.J. Rutten executed a coal and lignite lease which covered an 1162-acre tract of land which Rutten owned. In 1982, Rutten conveyed fifty acres out of the 1162-acre tract to Charles Harvey, the appellee. The deed to Harvey reserved from the conveyance "all mineral reservations, royalty reservations and/or mineral leases" in Rutten's chain of title.[117] The deed also provided that "No Minerals are transferred by this Deed."[118] Rutten later divided the ownership of the minerals under the property among Dickens and others. Harvey sued Dickens in 1992, seeking a declaratory judgment that the 1982 deed conveyed the coal and lignite to Harvey as a matter of law because the substances were not expressly excepted from the conveyance and were therefore part of the surface estate. The trial court granted Harvey a summary judgment, which, among other things, declared that the deed conveyed the coal and lignite to Harvey, and that the reservation clause did not reserve any right, title or interest in the coal and lignite. The court, referring to *Acker v. Guinn*,[119] opined that "parties

114. *Club Corp.*, 881 S.W.2d at 625 (citing *Johnson*, 138 Tex. at 106, 157 S.W.2d at 146, and *In re* Waldren, 65 B.R. 169, 173 (Bankr. N.D. Tex. 1986)).
115. 881 S.W.2d at 625.
116. 868 S.W.2d 436 (Tex. App.—Waco 1994, no writ).
117. *Id.* at 438.
118. *Id.*
119. 464 S.W.2d 348 (Tex. 1971).

ordinarily do not contemplate that the surface estate will be destroyed or substantially impaired by production of the minerals" and related the holding of the *Acker* court which provided, in pertinent part, as follows: "[u]nless the contrary intention is affirmatively and fairly expressed, therefore, a grant or reservation of 'minerals' or 'mineral rights' should not be construed to include a substance that must be removed by methods that will, in effect, consume or deplete the surface estate."[120] Furthermore, in *Reed v. Wiley*[121] the Texas Supreme Court relied upon *Acker* in holding "[b]ecause it is not expected that the parties to the instrument would have intended the destruction of the surface by the mineral owner in the absence of an expression of that intention, their use of 'mineral' in the instrument is not construed to include the near surface substances."[122] Ultimately, the case was retried and again reached the Texas Supreme Court (the "*Reed II*" case).[123] In *Reed II* the court held that coal and lignite deposits within 200 feet of the surface are "near surface" as a matter of law. The court stated that a person claiming ownership of coal and lignite as part of the surface estate must prove either (1) that the substances lie within 200 feet of the surface, or (2) that their mining may substantially impair or destroy the surface.[124] *Dickens* is perplexing in that Harvey acquired his fifty acre tract subject to an existing coal and lignite lease, and his deed expressly provided that no minerals are transferred by this deed. The *Dickens* court remanded so that the trial court might consider whether the coal and lignite were "near surface" and therefore a part of the surface rather than a part of the minerals.[125]

The court's decision in *Dickens* is consistent with *Graham v. Kuzmich*,[126] in which the court stated that "[r]eservations must be by clear language."[127] In this case, Jose Ortiz acquired 17.06 acres from Ricardo Ortiz. Ricardo Ortiz executed a warranty deed with vendor's lien which expressly conveyed water rights associated with such tract. On the same day that Jose Ortiz acquired the property, he gave a deed of trust to International Bank of McAllen as security for a note pledging the 17.06 acres of land. Although the deed of trust did not expressly reference the water rights, it did include a provision that the conveyance, pursuant to the deed of trust, included "appurtenances, servitudes, rights, ways, privileges, prescriptions, and advantages thereunto, belonging to or in anywise appertaining."[128] The court believed this language reflected the bank's

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120. *Id.* at 352.
121. 554 S.W.2d 169 (Tex. 1977).
122. *Id.* at 170-71.
123. *See* Reed v. Wiley, 597 S.W.2d 743 (Tex. 1980).
124. 868 S.W.2d at 439 (citing Reed v. Wiley, 597 S.W.2d at 747, 748).
125. At least one moral of the case is that clients should be asked whether their coal and lignite deposits are within 200 feet of the surface so that any mineral reservation will also include those deposits.
126. 876 S.W.2d 446 (Tex. App.—Corpus Christi 1994, writ ref'd n.r.e.).
127. *Id.* at 449 (citing Reeves v. Towery, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.)).
128. *Id.* at 447.

intent to obtain as security all of the interest in the land owned by Jose Ortiz.[129] Jose Ortiz defaulted under the note and/or deed of trust and the bank foreclosed and thereafter sold the property to Kuzmich. A dispute arose regarding ownership of the water rights. The court noted that "[a] permanent water right is an easement and passes with title to the land,"[130] and that the general rule in Texas is that "[d]eeds are construed to convey to the grantee the greatest estate possible."[131] The court further noted that "a deed that does not except property owned by the grantor conveys the grantor's entire estate."[132] The court held that the water rights were included in the grant to the trustee in the absence of a reservation or exception.[133] In this case, the deed of trust contained no such reservation or exception and thus the entire estate, including water rights, were sold at the foreclosure sale. Accordingly, the warranty deed to Kuzmich also included the water rights.

The final case in this section is *Robbins v. HNG Oil Co.*[134] Although this case is reasonably fact intensive, the outcome is predictable—the plaintiff hits a dry hole. The appellant was the attorney-in-fact for the heirs of a grantee named in a deed executed in 1911. The appellant brought an action against various oil companies seeking to recover mineral royalties for property in the Spindletop oil field allegedly conveyed to grantee in the 1911 deed. The 1911 deed specifically described four tracts which were conveyed to the grantee. The 1911 deed recited that the described four tracts conveyed by the deed represented all of the property that J.H. McFadden, R.D. McFadden and A.J. McFadden inherited through their ancestor, William McFadden. Appellant sought to expand the 1911 deed so that it was construed to include approximately thirty-seven additional tracts of real property comprising the Spindletop oil field in Jefferson County. It is worth noting that the appellant did not contend that the 1911 deed was ambiguous. Since the question of ambiguity was not presented in the trial court, the deed's construction became a question of law for the trial court.[135] The court, citing *Coffee v. Manly*,[136] noted that

> where a recitation was made to another deed or another record for the purpose of showing from what source the real property had been derived and as a help in tracing the title, then such a reference or referral will not and could not operate to enlarge the specific description given in the deed which contained the reference.[137]

129. *Id.* at 447.

130. *Id.* at 448 (citing TEX. WATER CODE ANN. § 11.040(a) (Vernon 1986); Edinburgh Irrigation Co. v. Paschen, 235 S.W. 1088, 1090 (Tex. 1922)).

131. 876 S.W.2d at 448 (citing Reeves v. Towery, 621 S.W.2d 209, 212 (Tex. Civ. App.—Corpus Christi 1981, writ ref'd n.r.e.)).

132. 876 S.W.2d at 449.

133. *Id.*

134. 878 S.W.2d 351 (Tex. App.—Beaumont 1994, no writ).

135. *Id.* at 354.

136. 166 S.W.2d 377 (Tex. Civ. App.—Eastland 1942, writ denied).

137. *Robbins*, 878 S.W.2d at 354-55.

This principle of law applied to the 1911 deed because there was in that deed an adequate and specific, unambiguous description of the four tracts—hence, the reference in the 1911 deed cannot be given the effect of enlarging the specific descriptions to include different, additional tracts of land. This reference only served to show the source from which the real property has been derived. None of the four tracts specifically described in the 1911 deed contained any production; thus, the appellant hit another dry hole.

IV. COTENANCY

There are two cases worthy of mention, although neither represents a change in the law. The first case, *York v. Flowers*,[138] discusses several areas affecting Texas real estate law. In this case plaintiff brought suit in May 1992 to establish that she was the illegitimate biological daughter of Coburn Barlow and thus entitled to inherit his interest in a 41.5 acre tract of land. Coburn Barlow died in 1944.[139] The defendant filed a motion for summary judgment which the trial court granted in all respects, in effect finding that a recognized illegitimate child is not entitled to inherit from the estate of her biological father who died intestate; that York's claim was barred by the three, five, ten and twenty-five year statutes of limitations,[140] and the plaintiff was barred by the four-year residual statute of limitations from seeking any entitlement to Barlow's estate.[141] For purposes of the appeal, the court of appeals presumed that the plaintiff was the illegitimate daughter of Coburn Barlow. Plaintiff was adopted by Catherine Flowers. After the adoption, Catherine Flowers married Coburn Barlow. During that marriage Coburn Barlow and Catherine Flowers Barlow purchased a 41.5 acre tract of land. There was administration of Coburn Barlow's estate when he died in 1944. In 1955, Catherine Flowers Barlow conveyed the 41.5 acre tract of land to Nathan Flowers, who is the defendant's predecessor in title. It was noted that under Texas law a recognized illegitimate child is entitled to inherit from his/her father.[142] When Coburn Barlow died in 1944 his wife took her one-half interest in the 41.5 acre tract of land and his daughter, the plaintiff, inherited her father's one-half community interest in the 41.5 acre tract.[143] Thus, when Catherine Flowers Barlow executed the deed to Nathan Flowers, she conveyed only her one-half community interest in the tract of land, thus creating a cotenancy between plaintiff and Catherine's successors. The court noted that "[a] cotenant will not be permitted to claim the protection of the adverse possession statutes unless it clearly appears that he has repudiated the title of his co-tenant and is holding

138. 872 S.W.2d 13 (Tex. App.—San Antonio 1994, writ denied).
139. *Id.* at 14.
140. TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024-.028 (Vernon 1986).
141. *Id.* § 16.051 (Vernon 1986).
142. 872 S.W.2d at 14.
143. *Id.* (citing TEX. PROB. CODE ANN. § 45 (Vernon Supp. 1994)).

adversely to it."[144] The court of appeals determined that there was no evidence of actual notice of repudiation by Nathan Flowers.[145] The final issue considered by the court related to the residual four-year statute of limitations which provided that: every action for which there is no express limitation, except for an action for recovery of real property, must be brought not later than four years after the cause of action accrued.[146] The court noted that this language had been a part of Texas law since 1879 and that the plain words of the statute excepted the four-year statute of limitations from an action for the recovery of real property.[147]

The second case dealing with cotenancy was *In re Fender*.[148] In a nutshell, this concerned a dispute between TransAmerican Natural Gas Corporation and Zapata Partnership, Ltd. regarding the meaning of a settlement agreement. TransAmerican and Zapata had mineral interests in the La Perla B Tract, which was part of the La Perla Ranch in Zapata County, Texas. Zapata owned a 27.77% interest in the tract. TransAmerican was the operator but was unable to lease Zapata's interest. TransAmerican and Zapata were cotenants in the minerals.[149] This case arose out of a bankruptcy adversary proceeding. The proceeding was settled and a settlement agreement was entered into between TransAmerican and Zapata. The settlement agreement included a provision regarding Zapata's right to receive a pro rata portion of any money which TransAmerican recovered in its take-or-pay litigation with El Paso Natural Gas Company. When the El Paso Natural Gas Company litigation was settled, Zapata and TransAmerican disagreed as to the meaning of Zapata's pro rata portion. Although there were several issues considered by the Fifth Circuit, for purposes of this Survey the issue for consideration is whether, under Texas law and particularly cotenancy law, there is a fiduciary or agency relationship between cotenants. The bankruptcy court determined that TransAmerican owed Zapata a duty of good faith and fair dealing and that TransAmerican breached this duty when it settled with El Paso Natural Gas Company without Zapata's knowledge or consent.[150] The Fifth Circuit noted that "under Texas law, there is no duty of good faith and fair dealing in contracts generally, and in cotenancy law, there is no fiduciary or agency relationship (which might create such a duty) between cotenants unless they create it by agreement."[151] This must have made TransAmerican feel good—but only for a short time. The amount TransAmerican wanted to pay Zapata was $806, which was

144. 872 S.W.2d at 15 (citing Todd v. Bruner, 365 S.W.2d 155, 156 (Tex. 1963)).
145. 872 S.W.2d at 15.
146. TEX. CIV. PRAC. & REM. CODE ANN. § 16.051 (Vernon 1986).
147. 872 S.W.2d at 16.
148. 12 F.3d 480 (5th Cir. 1994).
149. *Id.* at 482.
150. *Id.* at 486.
151. *Id.* at 486 nn.7-8 (citing English v. Fisher, 660 S.W.2d 521, 522 (Tex. 1983)); Manufacturers Hanover Trust Co. v. Kingston Investors Corp., 819 S.W.2d 607, 610-11 (Tex. App.—Houston [1st Dist.] 1991, no writ); Donnan v. Atlantic Richfield, 732 S.W.2d 715, 717 (Tex. App.—Corpus Christi 1987, writ denied).

easily affordable out of $300 million cash settlement; but alas, good faith and fair dealing had nothing to do with Zapata's award of $7.3 million.

V. EASEMENTS

Robert Frost writes that "good fences make good neighbors." Robert Frost did not know the McDaniels or the Calverts, because if he had he may have written that good fences make good case law. In *McDaniel v. Calvert*[152] the Calverts obtained a permanent injunction against the McDaniels enjoining them from obstructing a roadway easement. The roadway was more than seventy-seven years old, and in 1992 the McDaniels constructed a gate across the roadway. In 1981, the property owner whose land abutted the roadway granted an express thirty foot roadway easement to the Veterans Land Board, the Federal Land Bank of Texas, and to Hill. These easements were granted so that Hill could meet the requirements of the Veterans Land Board to obtain financing for the purchase of a tract of land which he later sold to Belew. Belew then sold the land to the Calverts. McDaniels claimed that the easement was an easement in gross because it was granted for the benefit of Hill. An easement in gross is personal to the grantee only and is generally not assignable or transferrable.[153] The court noted that an easement is never presumed to be in gross when it can fairly be construed to be appurtenant.[154] An easement appurtenant is an easement interest which attaches to the land and passes with it.[155] The court had no trouble concluding that the grant of the easement was to benefit the property abutting the roadway and not a specific person. In this case, the easement provided that "the roadway easement[s] [are] not exclusive, but shall be held and used jointly and in common, by both the grantors and grantees herein, and their respective heirs and assigns in title to any lands abutting said roadway."[156] That being the case, the court held that the easement described was an easement appurtenant which is usually transferrable.[157] The court noted that "[a] transfer of the dominant estate automatically includes the easement across the servient tenement's land."[158] The McDaniels also argued that the Calverts owned no interest in the easements because the conveyances from Hill to Belew and from Belew to the Calverts did not contain legal descriptions of the easement. The court noted that the habendum clauses granted the recipients "the premises, together with all and singular rights and appurtenances thereto and any-

152. 875 S.W.2d 482 (Tex. App.—Fort Worth 1994, n.w.h.).

153. *Id.* at 484 (citing Farmer's Marine Copperworks, Inc. v. City of Galveston, 757 S.W.2d 148, 151 (Tex. App.—Houston [1st Dist.] 1988, no writ)).

154. 875 S.W.2d at 484 (citing Genther v. Bammel, 336 S.W.2d 759, 763 (Tex. Civ. App.—Waco 1960, no writ)).

155. First Nat'l Bank v. Amarillo Nat'l Bank, 531 S.W.2d 905, 906 (Tex. Civ. App.—Amarillo 1975, no writ).

156. 875 S.W.2d at 484.

157. *Id.*

158. *Id.* (citing Van de Putte v. Cameron County, W.C. and Improvement Dist. No. 7, 35 S.W.2d 471, 473 (Tex. Civ. App.—San Antonio 1931, no writ)).

wise belonging unto the said Veteran's Land Board of the State of Texas, its successors and assigns forever. . . ."[159] The court noted that the deed conveying the affected land did not specifically have to mention an existing easement because the easement follows the land without any mention whatsoever.[160] As a result, the McDaniels had interfered with the Calverts' easement rights.[161] The conclusion to be drawn from this case is that the court disagreed with Robert Frost by tearing down the literary fence.

In *Wallace v. McKinzie*[162] the court again helped a landowner who required an easement across his neighbor's property. The McKinzies were the owners of the north 1/2 of Section 44, which was landlocked. The McKinzies' access to their property was a road that ran through the Wallaces' property to McKinzies' property. The McKinzies bought the property in 1920 and had been using the road since that time. The McKinzies filed an affidavit in the Deed Records of Kent County, Texas claiming an easement by prescription over the roads on Wallaces' property for the purpose of ingress and egress to Section 44. The Wallaces, after discovering the affidavit, sued to cancel the affidavit and remove the resulting cloud on the title to their property. The McKinzies affirmatively pleaded that they were entitled to an easement by estoppel. The jury found that the McKinzies had an equitable easement over the road leading to Section 44.[163] The trial court granted the McKinzies a permanent equitable easement of "sufficient width to permit the full possession, use and enjoyment of said Section 44."[164] The Wallaces appealed challenging the existence, description, and permanence of the easement. The court discussed the doctrine of equitable estoppel or estoppel *in pais* and, quoting *Campbell v. Pirtle*,[165] noted that "the formal equitable estoppel or estoppel *in pais*—arises when one is not permitted to disavow his conduct which induced another to act detrimentally in reliance upon it."[166] Further, quoting from *Brown v. Federal Land Bank of Houston*,[167] the court noted

> [t]here are so many ways in which estoppel may arise, they need not be defined here, but broadly speaking, the general rule seems to be laid down in 17 TEX. JUR. 128 Sec. 2 where this is said: "The idea or notion which inheres in the word 'estoppel' is that one, who by his speech or conduct has induced another to act in a particular manner, ought not to be permitted to adopt an inconsistent position, attitude

159. 875 S.W.2d at 484.
160. *Id.*
161. *Id.* at 485.
162. 869 S.W.2d 592 (Tex. App.—Amarillo 1993, writ denied).
163. *Id.* at 595.
164. *Id.*
165. 790 S.W.2d 372, 374 (Tex. App.—Amarillo 1990, no writ).
166. *Id.* (quoting *Campbell*, 790 S.W.2d at 374).
167. 180 S.W.2d 647, 652 (Tex. Civ. App.—Fort Worth 1944, writ ref'd w.o.m.).

or course of conduct and thereby cause loss or injury to such other."[168]

The court, having said that, found that the Wallaces, by speech and conduct, induced the McKinzies to act in a particular manner. In this case the evidence showed that the McKinzies had used the roadway for seventy years and the Wallaces never objected. The court concluded that the Wallaces, through their permissive and acquiescing behavior, engaged in representations by their conduct.[169] The court also took note of two conversations which A.D. McKinzie had with Bert Wallace and Bilby Wallace regarding the McKinzies' use of the road. Taking into account the Wallaces' speech and conduct, the court affirmed that an equitable easement existed because the necessary elements as defined in the jury charge were met, i.e., that representations were made by the landowner to the adjacent landowner that certain rights exist to use the landowner's property, that the adjacent landowner believed the representations to be true, and that the adjacent landowner relied upon such representations.[170]

The Wallaces next argued that the easement was not described with sufficient certainty in the judgment.[171] The judgment contained a general description of the road and how it was situated with respect to the McKinzies' and the Wallaces' properties. The judgment also contained a map which was attached to and made a part of the judgment. The court, citing *Vrabel v. Donahoe Creek Watershed Authority* and *Bear v. Houston & T.C. Ry. Co.*,[172] noted that the rule in Texas is well settled that sufficiency of easements is the same as that required of conveyances of land and that it is proper to attach to an instrument conveying land a map showing the property conveyed.[173]

VI. RESTRICTIVE COVENANTS

A. "DWELLING"

A major area of discussion during the Survey period involved the meaning of the word "dwelling" in restrictive covenants. One of the largest developments in the area of restrictive covenants involved the operation of community homes for mentally handicapped individuals in residential areas. In *Deep East Texas Regional Mental Health & Mental Retardation Services v. Kinnear*[174] the Beaumont court was faced with a challenge by individuals who objected to the construction of a community home in their subdivision. The trial court enjoined the home's construc-

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168. 869 S.W.2d at 595-96.
169. *Id.* at 596.
170. *Id.*
171. *Id.*
172. 545 S.W.2d 53, 54 (Tex. Civ. App.—Austin 1976, no writ); Bear v. Houston & T.C. Railway Co., 265 S.W. 246, 249 (Tex. Civ. App.—Galveston 1924, no writ).
173. 869 S.W.2d at 597 (citing River Road Neighborhood v. South Texas Sports, 720 S.W.2d 551, 558 (Tex. App.—San Antonio 1986, writ dism'd w.o.j.)).
174. 877 S.W.2d 550 (Tex App.—Beaumont 1994, n.w.h.).

tion based upon two restrictive covenants.[175] The appellate court reversed, holding the restrictive covenants ineffective to prevent construction of a community home.[176]

The first restrictive covenant relied on by the district court required the construction of single family dwellings.[177] The trial court concluded that the restriction barred the construction of a community home, since it would be inhabited by multiple individuals who were not in a family unit.[178] The appellate court disagreed, saying that the restriction only related to construction, not use.[179] The restriction only referred to the architectural design of the building. If the home was built to resemble a single-family structure, it would meet the covenant. Additionally, the only use restrictions referred to residential, as opposed to commercial, activity. Since the community home was residential in nature, it did not violate the commercial use restrictions found in the covenant.[180]

The second restriction prohibited nuisances and annoyances in the subdivision.[181] The court concluded that there was no evidence to support either a finding of nuisance per se under *City of Sundown v. Shewmake*[182] or nuisance in fact, which is factually determined on a case by case basis.[183] Consequently, the second restrictive covenant could not bar construction of the proposed community home.

After ruling that the trial court had improperly enjoined the community home's construction, the appellate court turned to the issue of how the covenants should be viewed in light of applicable statutes.[184] Reading relevant state statutes, the court determined that the restrictive covenants could not act to bar construction of a community home.[185] Specifically, the Community Homes for Disabled Persons Location Act[186] allowed the use by right of a community home in any residentially zoned district.[187] Further, Texas Property Code section 202.003(b) prohibited the application of restrictive covenants to prevent the use of property as a family

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175. *Id.* at 554.

176. *Id.*

177. *Id.* at 554. The covenant read "[a]ll lots shall be known and described as lots for residential purposes only. Only one one-family residence may be erected, altered, placed or be permitted to remain on any lot. Said lots shall not be used for business purposes or [sic] any kind nor for any commercial, manufacturing or apartment house purposes." *Id.*

178. The community home was to house six women, not of the same family, as well as two supervisors.

179. *Id.*

180. *Id.*

181. The restriction read "[n]o noxious or offensive activity shall be carried on upon any lot, nor shall anything be done thereon which may be or become an annoyance or nuisance to the neighborhood." *Id.*

182. 691 S.W.2d 57 (Tex. App.—Amarillo 1985, no writ).

183. 877 S.W.2d at 555.

184. *Id.* at 556-62.

185. *Id.* at 560-62.

186. TEX. HUM. RES. CODE ANN. § 123.001-.010 (Vernon Supp. 1995).

187. 887 S.W.2d at 560; *see also* TEX. HUM. RES. CODE ANN. § 123.003 (Vernon Supp. 1995).

home or community home.[188] The court determined that those statutes were not so vague as to be unconstitutional,[189] and that any construction of a restrictive covenant "that would restrict the use of the property as a family home or a community home *is disallowed*."[190]

In another case involving the interpretation of "dwelling" in a restrictive covenant, *Davis v. City of Houston*,[191] a landowner operated a beauty parlor on property restricted to single family dwellings.[192] Davis did not live on her property, nor was it reserved for commercial use, as were other tracts within her subdivision (thus exempting those tracts from the single family dwelling restriction). Relying on cases similar to *Kinnear*, she argued that the phrase "single family dwelling" referred to the type of structure involved, not the uses for the structure. The court disagreed, however, noting that the beauty parlor was a commercial use of the property.[193] Using the ordinary meaning of the word "dwelling," the court determined that the use of the property for a beauty parlor violated the use restrictions in the covenants.[194]

B. Reformation

In another case, the Austin Court of Appeals had to determine whether a covenant which was the product of mutual mistake should be reformed, and whether two restaurants were competitors, as barred by the restrictive covenants.[195] A factory outlet center sold property to IHOP so that IHOP could open a coffee-shop style restaurant.[196] The contract for sale included language which prevented the outlet center from selling property to one of IHOP's competitors.[197] The version of the restrictive covenant which appeared in the deed varied slightly.[198] During the

188. Tex. Prop. Code Ann. § 202.003(b) (Vernon Supp. 1994); 877 S.W.2d at 561.
189. *Id.* at 562.
190. *Id.* at 561.
191. 869 S.W.2d 493 (Tex. App.—Houston [1st Dist.] 1993, writ denied).
192. The deed restriction stated "[n]o structure shall be erected, altered, placed or permitted to remain on any lot or other building plot other than one detached *single family dwelling* and a private garage for not more than two cars and other out-buildings *incidental to residential use*, other than as specifically set forth herein." *Id.* at 494-95.
193. *Id.*
194. *Id.* at 495-96.
195. New Braunfels Factory Outlet Ctr. v. IHOP Realty Corp., 872 S.W.2d 303 (Tex. App.—Austin 1994, n.w.h.).
196. *Id.* at 305.
197. The contract for sale included a provision which stated:

> [s]eller, for itself and its successors and assigns shall covenant at closing that, for a period of thirty (30) years after the closing, it will not permit, lease, allow or use, either by itself or any tenants thereof, directly or indirectly, any portion of the Shopping Center (exclusive of the Property) acquired by Seller or any of its affiliates or any property located within one (1) mile of the boundaries of the property owned or controlled by Seller or its affiliates for *any kind of family-oriented, coffee shop styled restaurant that would directly compete* with the purchaser's restaurant operation, such as, but not limited to . . . .

Id. at 305.
198. The deed included language which prohibited "any kind of family-oriented coffee shop *or* restaurant that would directly compete." *Id.*

negotiations with IHOP, the outlet center entered into discussions with another purchaser interested in a tract in the outlet center, which later proved to be a Cracker Barrel restaurant.

Before the outlet center could complete the sale to Cracker Barrel, it needed IHOP's approval. IHOP reviewed Cracker Barrel's menu and other information, determined that it was too direct a competitor, and refused to consent to the sale pursuant to the restrictive covenant.[199] New Braunfels Outlet Center later sued IHOP, seeking to recover damages, to reform the restrictive covenant in the deed based on mutual mistake, and to void the restrictive covenant for lack of consideration. The jury found that there was no mutual mistake and that either version of the restrictive covenant would prevent the sale to Cracker Barrel.[200]

The outlet center first argued that it was entitled to reformation of the restrictive covenant based upon mutual mistake. IHOP argued that the doctrine of estoppel barred the outlet center from asserting mutual mistake.[201] The court found no evidence to support IHOP's estoppel argument, and the court further noted that the outlet center's negligence in discovering the errant wording would not bar reformation.[202] Since the jury found mutual mistake, and there was no estoppel, the appellate court ordered the reformation of the restrictive covenant in the deed.[203]

The court next discussed the effect, if any, which reformation had on the restrictive covenant. The outlet center interpreted the covenant as prohibiting only those restaurants specifically enumerated in the restriction and restaurants which were family-oriented, coffee shop style restaurants that would directly compete with IHOP.[204] Alternatively, IHOP contended that the restrictive covenant created two classes of restaurants: those which were prohibited by the covenant, and those which were permitted.[205] The only relevant inquiry would be which class Cracker Barrel

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199. *Id.* at 306.

200. *Id.*

201. *Id.* at 307. The necessary elements for equitable estoppel are (1) false representation or concealment of material facts with intent that another act on that representation or concealment; (2) made by a party with knowledge of the facts; (3) to a party without knowledge of the facts or means of knowledge; (4) who detrimentally relies on the misrepresentation. *Id.* (citing Gulbenkian v. Penn, 252 S.W.2d 929, 932 (Tex. 1952)). IHOP also asserted quasi-estoppel, which is similar to equitable estoppel but requires no showing of false representation of detrimental reliance. 872 S.W.2d at 307.

202. *Id.*

203. *Id.* at 308. The reformed deed replaced the phrase "family-oriented coffee shop or restaurant" with "family-oriented, coffee shop styled restaurant." *Id.*

204. *Id.* This interpretation was based upon a reading of only the prohibitive language in the covenant. Since Cracker Barrel was not specifically barred by name in the covenant, the outlet center contended that Cracker Barrel was barred only if it was family-oriented, coffee shop styled, and directly competitive with IHOP. *Id.* at 308-09.

205. The prohibited class was described as those which were family-oriented, coffee shop styled restaurants that directly competed with IHOP. The permitted class was those restaurants which did not directly compete with IHOP. 872 S.W.2d at 309.

best fit. The court determined that IHOP's explanation was more reasonable.[206]

Having concluded that IHOP's interpretation was the proper one, the court had to determine whether there was evidence to support the jury's failure to find that a Cracker Barrel Restaurant was permitted by the restrictive covenant. There was evidence that Cracker Barrel had evolved into what the court described as a "modern coffee shop" restaurant, as well as evidence that Cracker Barrel was a direct competitor of IHOP's.[207] Although the outlet center maintained that the covenant was only effective against restaurants which were both coffee shop styled and direct competitors, the court said only one of the two was necessary, although both were met.[208] Consequently, the outlet center was prohibited by the covenant from selling the property to Cracker Barrel.

C. INJUNCTION

In a final case, the El Paso court dealt with injunctions to enforce restrictive covenants. In *Ramsey v. Lewis*[209] the Ramseys purchased a duplex with an unobstructed view of the El Paso skyline. The duplex agreement prevented other owners on the duplex lots from doing any "act which would tend to depreciate the value of his dwelling unit, the duplex of which it is a part, *or any duplex situated on the above described property*."[210] The vendor allegedly informed the Ramseys that he intended to build only a one-story duplex on the adjacent lot, so as not to obstruct their view of the skyline. Later, however, he began construction on a duplex with a peaked roof which would restrict or obstruct the Ramseys' view of El Paso. The trial court denied their request for a temporary injunction against the construction, stating that the Ramseys had an adequate remedy at law for damages.

The appellate court noted that the Ramseys were not required to show that they had no adequate remedy at law before they were entitled to a temporary injunction.[211] Unfortunately, the Ramseys were unable to show that they were probably entitled to a permanent injunction. The court determined that the restrictive covenant only applied to acts an owner may commit regarding his or her own duplex, not construction on adjoining lots.[212] There was no promise or representation that the Ramseys' duplex would have an unobstructed view of the skyline. Finally, the

206. The court noted that IHOP's construction was in keeping with the general rule that portions of written instruments are not to be read in isolation, but rather in the context of the entire instrument. *Id.* at 309 n.4.

207. *Id.* at 309. Evidence was presented that the two restaurant's were factually competitive, in that they sold similar items at similar prices. There was also evidence that the industry treated them as competitors, based upon evidence appearing in industry and trade literature. *Id.*

208. *Id.*

209. 874 S.W.2d 320 (Tex. App.—El Paso 1994, n.w.h.).

210. *Id.* at 322.

211. *Id.* at 323; *see* TEX. CIV. PRAC. & REM. CODE ANN. § 65.011 (Vernon 1986).

212. 874 S.W.2d at 324.

covenant and negative easement suggested by the Ramseys would be subject to the statute of frauds, so it could not be proven by parol evidence.[213] Since the Ramseys could not show that they were entitled to the equitable relief they ultimately sought, they could not enjoin the construction on the adjacent lot.

VII. ADVERSE POSSESSION

In *York v. Flowers*[214] the San Antonio court addressed the issue of adverse possession by co-tenants. The case is discussed in the cotenancy section of this Survey. However, of interest here is the fact that the court, relying on *Todd v. Bruner*,[215] noted that a co-tenant cannot claim title through adverse possession unless he clearly repudiates his co-tenant's title and holds adversely to his co-tenant's claim.[216]

In a second adverse possession case, *Clements v. Corbin*,[217] a group of plaintiffs brought an action against Clements to quiet title to approximately eighty acres of land in Jackson County claimed by Clements. Clements claimed title to the land through adverse possession,[218] asserting the ten-year statute of limitations.[219] The court stated that for Clements to claim possession through limitations, he had to secure possession of the property on or before December 21, 1980[220] and his possession had to be "open and notorious enough to raise a presumption of notice to an owner of the property for a ten year period."[221] Testimony suggested that Clements and his father began herding cattle on the land in 1978,[222] that Clements had repaired existing fences on the land, cleared heavy brush from the land, and began farming the land in 1980. Another member of the community who used the land for grazing had given "disclaimers" to anyone who questioned the community member's intentions in using the land for grazing. Furthermore, the community member's

213. *Id.* at 323-24. The promise not to obstruct the duplex owner's view would create a negative easement which would run with the land. Since it would effect an interest in real estate and could not be performed within one year, it would be subject to the statute of frauds. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 1987).

214. 872 S.W.2d 13 (Tex. App.—San Antonio 1994, writ denied).

215. 365 S.W.2d 155, 156 (Tex. 1963).

216. 872 S.W.2d at 15.

217. 880 S.W.2d 516 (Tex. App.—Corpus Christi 1994, n.w.h.). This opinion has been withdrawn by the publisher because the opinion was not yet final.

218. TEX. CIV. PRAC. & REM. CODE ANN. § 16.021 (Vernon 1986) defines adverse possession as "actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person." *See* 880 S.W.2d at 518.

219. *Id.*

220. Clements filed a third-party petition against unknown property owners in the eighty acre tract on December 21, 1990. To claim title through limitations under the ten-year statute, he would need possession ten years before that date.

221. 880 S.W.2d at 518.

222. The only evidence regarding the Clements' use of the land for grazing purposes came from their own testimony. No other witnesses saw them herding cattle on the pasture land. No witnesses recalled seeing "Posted" signs around the property. *Id.* at 519.

widow testified that she had been unaware that Clements claimed title to the land.

The court noted only the Clements' testimony suggested that they used the land for grazing, although their cultivation for farming would generally be enough to establish adverse possession. The town mayor, however, claimed that he was unaware that Clements was claiming title to the property; he thought Clements was making the same common use of the property as did the remainder of the community. The court ruled that common usage of the tract by others in the town, in a manner similar to Clements' usage, justified a finding that Clements' usage was insufficiently visible, notorious and hostile to provide notice of his claim through adverse possession.[223]

In a case involving implied dedication of a private roadway,[224] the San Antonio court was faced with the question of whether evidence was sufficient to raise a question of material fact to avoid summary judgment against the government. The landowner constructed and maintained a road for his own private use. When his successor attempted to construct a gate across the road, the county argued that the road was subject to implied dedication.[225] On summary judgment, the landowner only challenged the county's evidence on the first element of implied dedication, which was that the landowner's acts indicated his intention to dedicate the roadway to public use. While the court noted that the county would have an extremely difficult burden of proof to convince a jury that the landowners intended to dedicate the road to public use, the county on summary judgment only had to introduce evidence to suggest that there was a genuine issue of material fact regarding the landowners' intent for the roadway.[226] The county presented evidence that the county may have financed and built the road, that it may have built and installed a gate across the road, that it maintained the road, that the gate across the road was not locked to prevent public access, that the road was continuously used by the public, and that the deed to the property on which the road was located included an easement for ingress and egress through the road.[227] That evidence was sufficient to prevent summary judgment in favor of the landowner.

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223. *Id.* To prove adverse possession, the possession must be actual, visible, continuous, notorious, distinct, hostile, and of a manner to indicate an unmistakable assertion of a claim of ownership. *Id.*

224. County of Real v. Hafley, 873 S.W.2d 725 (Tex. App.—San Antonio 1994, writ denied).

225. The elements of common law implied dedication are: " '(1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) he was competent to do so; (3) the public relied on these acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.' " 873 S.W.2d at 727 (quoting Las Vegas Pecan & Cattle Co. v. Zavala County, 682 S.W.2d 254, 256 (Tex. 1984)).

226. 873 S.W.2d at 728.

227. *Id.* at 728-29.

VIII. EMINENT DOMAIN / INVERSE CONDEMNATION

A. SCHMIDT FACTORS

One major area dealt with by the Texas courts during the Survey period involved eminent domain and inverse condemnation proceedings. Several cases, in fact, arose out of one set of circumstances involving the conversion of Highway 183 in Austin into a controlled access highway. In the principal case, *State v. Schmidt*,[228] the state condemned a seven-foot-wide strip of land running across the front of adjacent tracts of land owned by Schmidt and Austex. Schmidt and Austex used their tracts to operate freestanding commercial developments. The state intended to use the additional land as a right-of-way so that Highway 183 could be converted.

Ultimately, the highway would be elevated to eliminate grade crossings. The buildings would then be less visible to motorists, and most of the traffic through the area would be diverted to the main highway, which would require motorists to exit a ramp to reach the businesses, thus making it more difficult for motorists to access the businesses.[229] Although the state paid for the taken lands, the landowners maintained they were due additional compensation for the "impairment of its visibility from the main highway, . . . the inconvenience and disruption caused by construction activities, . . . the diversion of traffic from the highway, . . . and the resulting circuity of travel required to gain access to the tract."[230] The landowners argued that under the Texas Constitution[231] they were entitled to compensation not only for the property taken, but also for damage to the remaining property.[232]

The Supreme Court of Texas held that there was no right to recover under an inverse condemnation theory for impaired visibility, inconvenience, traffic diversion, and more circuitous travel.[233] It noted that "[j]ust as a landowner has no vested interest in the volume or route of passersby, he has no right to insist that his premises be visible to them."[234] While recovery may be allowed in cases of total temporary or partial permanent restriction of access, or partial temporary restriction of access due to ille-

228. 867 S.W.2d 769 (Tex. 1993).

229. *Id.* at 771-72. After the highway was elevated, motorists would be required to exit the freeway before they could enter the Schmidt and Austex developments.

230. *Id.* at 772. Later cases refer to these damages as *Schmidt* factors. *See, e.g.*, State v. Munday Enters., 868 S.W.2d 319, 320 (Tex. 1993).

231. "No person's property shall be taken, damaged or destroyed for or applied to public use without adequate compensation being made. . . ." TEX. CONST. art. I, § 17.

232. 867 S.W.2d at 772-73. The landowners argued that "traffic patterns, convenience of access, visibility, and the disruption of construction activities over an extended period of time can affect the market value of property. Therefore, these factors must be taken into consideration in ascertaining severance damages." *Id.* at 773.

233. *Id.* at 773-75.

234. *Id.* at 774 (citing JULIUS L. SACKMAN & PATRICK J. ROHAN, NICHOLS, THE LAW OF EMINENT DOMAIN § 14.13[2], at 14-310 (3d ed. rev. 1992)).

gal or negligent activity, inconveniences affecting the property or the ease of access to the property do not constitute compensable damage.[235]

While the landowners conceded that they could not recover under an inverse condemnation theory, they argued the standard should be differently applied since there was a physical taking of property (here the seven-foot-wide strip). Since there was a taking, all factors affecting property value, including those advanced by the landowners, had to be considered when calculating damages for eminent domain and condemnation. The court disagreed, stating that the factors to be considered in a recovery for eminent domain included the same factors as those for a taking under inverse condemnation.[236]

The court also noted that the landowners were not entitled to compensation because their damages arose from the state's use and modification of an existing right-of-way rather than the taking of property.[237] The condemnation statute only authorizes consideration of the effect of condemnation on a landowner's remaining property.[238] In *Schmidt*, the damages from diminution in value claimed by the landowners were not caused by the taking of the seven-foot-wide strip of land, but rather from the state's modification of the existing highway.[239] Consequently, the Property Code did not authorize recovery for the landowners.

The court further determined that the damages were community damages, which are not compensable.[240] While community damages were not necessarily those in which injury was common to everyone on a street where property was taken by eminent domain, they did require some particularity and locality to the affected property.[241] The court announced that the test for community injury or benefit was not based primarily upon geography, but rather on the kind of injury suffered. The court held "[i]t is the nature of the injury rather than its location that is critical in determining whether it is community."[242] The supreme court concluded that traffic diversion, inconvenient access, impaired visibility and construction-related disruption were shared by the entire area bordering Highway 183, and there was no claim of a unique effect to the particular landowners from the conversion project.[243] Consequently, there could be no recovery for damages.

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235. 867 S.W.2d at 775.

236. *Id.* at 775. The Court noted that allowing recovery for condemnation while not allowing for similar injuries in inverse condemnation would create an anomaly. Had property been taken from only one of the two adjacent landowners in *Schmidt*, both would experience the same injuries, but only one would recover for those injuries. To solve the problem, the Court denied recovery to both.

237. *Id.* at 777.

238. TEX. PROP. CODE ANN. § 21.042(c) (Vernon 1984); *see also* 867 S.W.2d at 777.

239. 867 S.W.2d at 778.

240. *Id.* at 779. TEX. PROP. CODE ANN. § 21.042(d) (Vernon 1984) only authorizes recovery for injuries "peculiar to the property owner" and may not consider "an injury . . . that the property owner experiences in common with the general community."

241. 867 S.W.2d at 780.

242. *Id.* at 781.

243. *Id.*

Other cases involved the same facts surrounding the elevation of Highway 183. In *State v. Munday Enterprises*[244] a landowner operated an automobile dealership along Highway 183. The state condemned approximately one-tenth of the dealership acreage, for which the landowner was compensated, which included compensation for damages to the remaining acreage for a bisected building and partial permanent denial of access to the roadway, as well as the relocation of buildings and driveways. The landowner sought greater compensation at trial. The jury was not instructed regarding the disallowable factors decided in *Schmidt*,[245] but rather was asked in a single broad-form question the difference in value in the entire tract with and without the taking. After an exorbitant award was returned in the landowner's favor, the Supreme Court of Texas noted that evidence had been presented regarding the *Schmidt* factors and that the jury had improperly considered those factors in returning its verdict.[246] Consequently, the court remanded the case for new trial without consideration of the *Schmidt* factors. In a later case, one court relied on *Munday* as authorizing the merger of questions regarding the value of land taken with remainder damages in broad-form submission to a jury.[247]

A final case involving the Highway 183 elevation is *State v. Centennial Mortgage Corporation*[248] In that case, the elevation project devalued a shopping center by causing the *Schmidt* injuries, destroying detention ponds, and decreasing parking spaces. The court disallowed recovery for decreased accessibility and visibility, as it did in *Schmidt*.[249] The court did allow consideration of losses such as the detention ponds and parking spaces, since those damages were compensable.[250]

B. Effect of Government Action on Property Scheduled for Condemnation

During the Survey period the Supreme Court of Texas also addressed the actions a government or municipal authority may take which influence the value of land scheduled for condemnation. In *State v. Biggar*[251] the landowners sought to exchange access easements with the state so that the landowners' property could be further developed. After the state gave technical approval of the exchange, the county began negotiating with the landowners in condemnation proceedings; however, they were unable to reach an agreement as to a fair price for the property. Shortly thereafter, the county communicated to the state its intent to con-

244. 868 S.W.2d 319 (Tex. 1993).
245. *See supra* note 230 and accompanying text.
246. 868 S.W.2d at 320-21.
247. State v. Enterprise Bank-Houston, 873 S.W.2d 117, 119 (Tex. App.—Waco 1994, writ denied).
248. 867 S.W.2d 783 (Tex. 1993).
249. 867 S.W.2d at 784.
250. *Id.*
251. 873 S.W.2d 11 (Tex. 1994).

demn the property, so the state refused to exchange easements with the landowners, which substantially decreased the property's value. The County then condemned the land, and the landowners sued the state and county, alleging that the "State intentionally caused the . . . decrease in the value of the . . . tract by denying their requests for an easement exchange."[252]

The court recognized that an action for inverse condemnation was available where "the government acts to gain an unfair advantage 'against an economic interest of an owner.' "[253] Since the state is able to compel a sale from a landowner, it is required to give the landowner just compensation for taken property.[254] The state maintained, however, that the refusal to exchange easements was a discretionary act, so it need not have a rational reason for denying the exchange, and no cause of action could lie for that denial. The court determined, however, that although the exchange was a discretionary act, the refusal was used to prevent land development in an effort to reduce the land's value.[255] There was no other evidence of a reason for denying the exchange. Ultimately, the court held that "when the State takes action specifically designed to decrease the value required to acquire part of the landowner's property by power of eminent domain and simultaneously damages the entire tract's value, . . . the landowner may recover."[256]

In *Taub v. City of Deer Park*[257] the Texas Supreme Court reexamined its holding in *Biggar*. In *Taub* the city sought to condemn portions of Taub's property for street improvements and the construction of drainage ditches. Two years later, while the condemnation actions were proceeding, the landowner sought to re-zone his land to allow the development of multi-family dwellings, which would increase his land's value. In meetings before the Zoning and Planning Commission, numerous objections were raised to re-zoning Taub's land, and his request was denied.[258] During the condemnation proceedings, Taub's property was priced at the lower single-family value rather than at the higher multi-family usage value. Taub later brought suit against the city, arguing that the city took his property by "refusing to rezone it . . . thus preventing him from profitably developing the property."[259] The supreme court disagreed, stating that the land had not been rendered completely useless or "deprived of all economically beneficial use."[260] Although the land perhaps could not be developed profitably, the government had no duty to underwrite

252. *Id.* at 12.
253. *Id.* at 13 (quoting City of Austin v. Teague, 570 S.W.2d 389, 393 (Tex. 1978)).
254. 873 S.W.2d at 13; *see also* Tex. Const. art. I, § 17.
255. *Id.* at 14.
256. *Id.*
257. 882 S.W.2d 824 (Tex. 1994).
258. Evidence was presented at the meeting that re-zoning would require new city facilities and personnel, prevent the provision of adequate fire, police, or school facilities for the requested development, and cause traffic and sewer problems. *Id.* at 826.
259. *Id.*
260. *Id.*

Taub's investment as a profitable venture. Since the taking had no constitutional implications, the failure to rezone the property was not a compensable act.[261] Relying on *City of Austin v. Teague*, Taub argued that the dual role of a condemning agent and re-zoning agent provided the city with an inherent conflict of interest. The court acknowledged the potential for conflict, but dismissed Taub's cause, noting that he had presented no evidence to show that the city denied the rezoning request in an effort to lower Taub's property values and save the city money in future condemnation proceedings.[262]

C. WHO IS ENTITLED TO COMPENSATION?

The appellate courts have also wrestled with the question of who is entitled to compensation in eminent domain proceedings. In *G.P. Show Productions, Inc. v. Arlington Sports Facilities Development Authority, Inc.*,[263] G.P. Show was a tenant on property condemned for use in the construction of a baseball stadium. G.P. Show requested compensation for moving[264] or relocation[265] expenses. Those expenses were denied on the basis that only property owners[266] are entitled to moving or relocation expenses, and G.P. Show was only a tenant rather than a property owner.[267] The Fort Worth court disagreed, noting that before the Property Code was codified, the relevant provisions in the civil statutes included lessees as property owners for the compensation of expenses.[268] Although the phraseology changed with the recodification, the court noted that there was no indication of a legislative intent to effect the interpretation of the law. Since lessees had been entitled to compensation under prior law, they were entitled to compensation under the current, re-codified law.[269] Although there were no judicial decisions under the prior laws of the meaning of "owner of the land," the later sections were read consistently with the prior definitions of "property owner," so the tenant was a property owner entitled to compensation.[270]

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261. *Id.*

262. *Id.* at 827. Without such evidence, the Court was unwilling to invalidate the refusal to rezone.

263. 873 S.W.2d 120 (Tex. App.—Fort Worth 1994, n.w.h.).

264. TEX. PROP. CODE ANN. § 21.043 (Vernon 1984).

265. TEX. PROP. CODE ANN. § 21.046 (Vernon 1984).

266. *See* TEX. PROP. CODE ANN. § 21.042 (Vernon 1984). The primary debate revolved around the meaning of "property owner" found in this section, which was then applied to the statutes authorizing compensation of owner's expenses.

267. 873 S.W.2d at 121-22.

268. The writ cited to TEX. REV. CIV. STAT. ANN. art 3265, § 7 (Vernon 1925) (current version at TEX. PROP. CODE ANN. § 21.043 (Vernon 1984)).

269. 873 S.W.2d at 122-23. The Court stated that "a mere change of phraseology in the revision of a statute in force before will not change the law previously declared, unless it indisputably appears the legislature intended change." *Id.* at 122 (citing Palmer v. Palmer, 831 S.W.2d 479 (Tex. App.—Texarkana 1992, no writ)).

270. 873 S.W.2d at 123.

D. INVERSE CONDEMNATION

In *Green International, Inc. v. State*[271] the court addressed whether the state's failure to pay on a contract can amount to a constitutional "taking" which requires compensation. Green International contracted with the state to construct three prison units. After the units were substantially completed, the state refused to pay the amounts due on the contracts, and the governor vetoed a resolution which would have given Green International permission to sue the state for breach of contract. Despite sovereign immunity, however, Green International could maintain a suit without permission if the state's acts amounted to a compensable taking in contravention of the Texas Constitution.[272]

The Austin Court of Appeals acknowledged that the appropriation of a contract can amount to a constitutional taking which requires compensation,[273] although such is not true in all cases. Frustration of contract alone is not enough.[274] To maintain an action for inverse condemnation against the state, Green International was required to show (1) that the state intentionally performed certain acts, (2) which resulted in a taking of property (3) for public use.[275] The court found that the state's actions did not amount to an inverse condemnation.[276]

The court identified four reasons why Green International was not entitled to compensation. First, since the state had acted consistently with contract procedures, there was no intent to take unconstitutionally.[277] Also, a state's actions within a color of right only indicated an intent to contract, not an intent to take. Since the state believed it could rightfully withhold payment, there was no intent to take.[278] Third, Green International voluntarily entered into a contract with, and delivered property to the state, so there was no actual "taking" without Green's consent.[279] Finally, the Austin court specifically disagreed with a decision of the Dallas court in *Industrial Construction Management v. DeSoto Independent School District*,[280] which held that a state waives sovereign immunity when it enters into a contract with a private entity and that by not paying on a contract, a government entity commits a compensable taking.[281] Instead, the Austin court held that the formation of a contract only admits to the state's liability on the contract; it does not give a party the right to

271. 877 S.W.2d 428 (Tex. App.—Austin 1994, n.w.h.).

272. *Id.* at 433. Based upon Steele v. City of Houston, 603 S.W.2d 786 (Tex. 1980), an action for compensation following a condemnation in eminent domain or inverse condemnation is an exception to the state's general sovereign immunity.

273. *Id.* at 434.

274. *Id.*

275. *Id.*

276. *Id.*

277. 877 S.W.2d at 434.

278. *Id.*

279. *Id.* at 435.

280. 785 S.W.2d 160 (Tex. App.—Dallas 1989, no writ).

281. *Id.* at 163.

sue the state to enforce that liability.[282] This split among the appellate courts has not been specifically addressed by the Texas Supreme Court.

A final case, *Harris County v. Felts*,[283] focused on the second element of inverse condemnation, which requires the showing of a "taking" of property. In *Felts* the county intended to use one square foot of a landowner's property for a road-widening project, which would entitle Felts to payment. The county then redesigned the roadway so that it skirted the property without taking any land. Although the County's appraiser admitted that the property was damaged by its proximity to the roadway, the county refused to compensate Felts fully for the property's decreased value. Despite the admission of damages, Felts was unable to recover since there was no actual taking of property.[284] Taking requires a physical appropriation of property, denial of access to the property, or some other direct restriction on the use of property.[285] None of those requirements were met in *Felts*, so there was no compensable taking.

IX. MECHANIC'S LIENS

Two mechanic's lien cases of note were decided during the Survey period. The question in *Hubble v. Lone Star Contracting Corp.* asked:[286] when does a cause of action on a debt accrue for purposes of determining whether the statute of limitations has run? The owner of the property involved in the project missed several project payments to the general contractor. The general contractor filed a lien on the property and subsequently filed suit to foreclose its lien. Since the contract in *Hubble* was executed prior to the effective date of the current two-year statute,[287] the four-year statute of limitations governed.[288] The court stated that

> [l]imitations begins to run on a continuing contract at the earlier of the following: (1) when the work is completed; (2) when the contract is terminated in accordance with its terms; or (3) when the contract is anticipatorily repudiated by one party and this repudiation is adopted by the other party. . . . Repudiation is conduct which shows a *fixed* intention to abandon, renounce, and refuse to perform the contract.[289]

The court held that the filing of a mechanic's lien or the temporary stoppage of work on the project did not constitute a repudiation.[290] There-

282. 877 S.W.2d at 435.

283. 881 S.W.2d 866 (Tex. App.—Houston [14th Dist.] 1994, writ requested).

284. Felts argued that building a roadway in close proximity to his property, as well as the noise and dust from construction, constituted an appropriation of property. *Id.* at 869-70.

285. *Id.* at 868-69.

286. 883 S.W.2d 379 (Tex. App.—Fort Worth 1994, writ requested).

287. TEX. PROP. CODE ANN. § 53.158 (Vernon Supp. 1995) provides for a two-year limitations period for contracts entered into after September 1, 1989.

288. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004 (Vernon 1986).

289. 883 S.W.2d at 382.

290. *Id.* at 383.

fore, the four-year statute of limitations had not run when the contractor filed its suit.

The second mechanic's lien case concerns a claim under the McGregor Act.[291] In *S. A. Maxwell Co. v. R. C. Small & Associates, Inc.*,[292] the sub-subcontractor was not paid for the delivery of wallcovering materials, and it filed suit against the general contractor and the surety for recovery under the general contractor's payment bond. The questions involved were whether the claimant's notice of nonpayment complied with the timeliness and substantive requirements of the McGregor Act. To determine whether the claimant's notices were timely, the court had to determine when delivery of the materials occurred, since the notice limitations period began to run from that date. The general contractor and the surety argued that delivery occurred when the materials arrived at the claimant's warehouse because, under the Uniform Commercial Code, that is when title passed to the subcontractor.[293] However, the court held "that under the language of the McGregor Act, delivery meant the actual physical delivery of materials."[294] In this case, delivery of materials occurred in May and June. Therefore, the notice deadline for the May delivery was July 15 and the notice deadline for the June delivery was August 15. Since the claimant sent its notice for all of the materials on July 26, its notice as to the May delivery was untimely and its notice as to the June delivery was timely. In examining the sufficiency of the notices, the court stated that the "McGregor Act's notice provisions require only substantial compliance."[295] The court proceeded to examine in detail the two notices that were sent by the claimant and concluded that they both substantially complied with the requirements of the McGregor Act.[296] The court's discussion of this issue is helpful in understanding the McGregor Act's complex notice requirements.

X. LANDLORD / TENANT

Several cases during the Survey period involved Landlord / Tenant relations. In *Wal-Mart Stores, Inc. v. Alexander*[297] the Supreme Court of Texas addressed whether a lessee was responsible for common areas outside the expressly leased premises. In *Alexander* the plaintiff tripped over a ridge between an access ramp built by Wal-Mart and Wal-Mart's parking area. She brought suit against Wal-Mart, maintaining that it, as lessee, had a duty to maintain the ramp area to prevent accidents. Wal-Mart responded that its lease with the property owner made Wal-Mart

291. TEX. REV. CIV. STAT. ANN. art. 5160 (Vernon 1987) (current version at TEX. GOV'T CODE ANN. §§ 2253.001-.079 (Vernon Supp. 1995)).
292. 873 S.W.2d 447 (Tex. App.—Dallas 1994, writ denied).
293. *See* TEX. BUS. & COM. CODE § 2.401 (Tex. UCC) (Vernon 1994).
294. 873 S.W.2d at 453.
295. *Id.* at 454.
296. *Id.* at 454-56.
297. 868 S.W.2d 322 (Tex. 1993).

liable only for areas within its store's exterior walls.[298] Since the lessor was responsible for the sidewalks and parking areas, Wal-Mart argued that it, as lessee, had no duty to maintain those areas, and thus no liability for accidents occurring in those areas. The court disagreed, noting that Wal-Mart built the ramp at its own expense and initiative.[299] Once it built the ramp, it assumed control of the ramp. Consequently, Wal-Mart had to exercise a "duty of reasonable care to maintain the safety of the ramp once it built and exercised control over it."[300]

The Fifth Circuit Court of Appeals dealt with the issue of mitigation of damages by a landlord after a tenant fails to pay accrued rent during a holdover lease.[301] In *RTC v. Cramer* two tenants under lease agreements held over after the end of the primary term of the leases. During the "holdover" periods, the tenants failed to pay the majority of their rents. When the landlord later brought suit for the accrued rents, the district court instructed the jury that the landlord has a duty to mitigate damages.[302] The appellate court noted that when the lessee abandons a lease during the primary term, the landlord generally is not required to mitigate damages.[303] In the instant case, however, the abandonment occurred not during the primary term, but rather during the holdover period. The holdover created a month-to-month rental arrangement. In that instance, since the landlord had no common law duty to evict the tenants when they failed to pay their rent,[304] there was no duty to mitigate damages.[305]

In *Markert v. Williams*[306] the appellate court dealt with another question of first impression, specifically, whether failure to exercise a right of first refusal, with a subsequent sale of the subject property, terminated a fixed-price option to purchase the subject property. In that case, the lessor granted to the lessee a right of first refusal on the leased premises.[307] The same lease also granted the lessee a fixed-price option to purchase

298. The lease stated "[t]he maintenance by Lessor is to include, without limitation, the following: (a) Maintaining the surfaces of all sidewalks, paved and parking areas in a smooth and evenly covered condition. . . ." *Id.* at 324.

299. *Id.* at 324.

300. *Id.* at 325. The Court later reversed the punitive damages verdict against Wal-Mart, finding that it had not been grossly negligent in its failure to maintain the ramp and parking area. *Id.* at 327.

301. RTC v. Cramer, 6 F.3d 1102 (5th Cir. 1993).

302. *Id.* at 1108.

303. *Id.* The landlord has the option of either treating the abandonment as an anticipatory repudiation of the lease and suing for damages, or disregarding the abandonment, enforcing the lease and suing for accrued rents. *Id.*

304. The tenants quit paying the month-to-month rent in May of 1990, although they held over as month-to-month tenants until December of 1990. *Id.* at 1105.

305. *Id.* at 1108.

306. 874 S.W.2d 353 (Tex. App.—Houston [1st Dist.] 1994, writ denied).

307. The lessee held the "exclusive right to purchase the demised premises . . . on the same terms and at the same price as any bona fide offer for said premises received by Lessor." *Id.* at 354.

the leased premises.[308] During the lease's primary term, the property was sub-leased. The lessor received an offer on the property, and the lessee declined to exercise its right of first refusal. After the property was sold, the sub-lessee purchased the lessee's interest in the lease and attempted to exercise the fixed-price option against the lessor's successor. The court determined that the failure to exercise the right of first refusal did not terminate the fixed-price option; however, the subsequent sale following the failure to exercise the refusal right did terminate the lessee's option to purchase.[309] In effect, therefore, a lessee's option terminates after the sale is closed.[310]

In *Parkway/Lamar Partners, L.P. v. Tom Thumb Stores, Inc.*,[311] the court addressed the issue of how to determine a tenant's insolvency. In *Parkway/Lamar* the lessor brought suit to terminate a commercial real estate lease, claiming that the lessee and its guarantor were in default on the lease because they were insolvent.[312] The appellate court primarily addressed the meaning of the term "insolvency," holding that the term depends upon the context in which it is used.[313] The lessee argued that insolvency only occurs when a corporation is unable to pay its debts as they come due in the usual course of business. The lessor maintained that insolvency occurs when a corporation either ceases to pay its debts in the usual course of business, cannot pay debts as they come due, or is insol-

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308. The Lessee held "[t]he right to purchase the demised premises . . . at any time during the term of this lease or any extension thereof, for the sum of Seventy Five Thousand (75,000.00) Dollars . . . ." *Id.*

309. *Id.* at 358.

310. The authors have a difficult time coming to grips with the holding in this case. The lease specifically provided as follows:

> Lessor hereby grants to Lessee: (a) the right to purchase the demised premises, together with all improvements and equipment thereon, free and clear of all liens and encumbrances at any time during the term of this lease or any extension thereof, for the sum of Seventy-five Thousand (75,000.00) Dollars; and, (b) The exclusive right to purchase the demised premises with all improvements including the tanks, and equipment thereon, except gasoline marketing equipment above the ground, free and clear of all liens and encumbrances, at any time during the term of this lease, or any extension thereof, on the same terms and at the same price as any bona fide offer for said premises received by Lessor and which offer Lessor desires to accept. Lessor shall notify Lessee of each such offer received and Lessee shall have twenty (20) days after receipt of notice in which to exercise Lessee's prior right to purchase.

Clearly, the lessee's fixed-price option is for the full term of the lease and any extension of the lease. Nonetheless, the court construed the lease to provide that if the lessor receives a bona fide offer at any time during the term of the lease, the lessee can purchase the property at a price equal to the lesser of the fixed price option amount or the bona fide offer amount. We cannot read the lease in this manner. When the original owner (Lessor) sold the property to the new owner, the new owner acquired title subject to the lease and the leasehold. The new owner knew what he was purchasing. If the new owner does not have to give effect to the provision of the lease governing the lessee's fixed-price option right, then why wouldn't the new owner be bound by any other terms under the lease? The conveyance itself did not terminate the lease.

311. 877 S.W.2d 848 (Tex. App.—Fort Worth 1994, writ denied).

312. The lease gave the lessor the right to re-enter the premises if the lessee became "bankrupt or insolvent." *Id.* at 850.

313. *Id.* at 849.

vent within the meaning of the federal bankruptcy laws, which requires that debts are greater than assets or property.[314] Since the lessor's definition included bankruptcy as a test for insolvency, and the lease specified bankruptcy and insolvency as separate grounds for re-entry, the court construed insolvency as something distinct from bankruptcy.[315] Consequently, the court interpreted insolvency to mean an inability to pay debts as they come due in the usual course of business,[316] and the lessee and its guarantors were not in default under the lease.

XI. ALIENATION OF PROPERTY

One case during the Survey period involved the issue of whether a corporation dissatisfied with an agreement into which it entered voluntarily could avoid that agreement under the public policy against restraints on the alienability of property.[317] In that case, Procter Company sold Jefferson Drug Company to Foxmeyer, which then merged Jefferson into an existing subsidiary. The only real estate involved in the transaction was a warehouse in Beaumont. The merger agreement stated that should Foxmeyer fail to utilize the warehouse, Procter would have a thirty-day option, beginning from the termination of the warehouse's use, to repurchase the warehouse at book value. Following the merger, Foxmeyer ceased use of the warehouse. Procter sent Foxmeyer a cashier's check for the book value of the warehouse,[318] which Foxmeyer refused to accept. Foxmeyer then filed a lawsuit seeking a declaration that the option in the merger agreement was an unreasonable restraint on alienation of property.[319] The trial court granted summary judgment in Foxmeyer's favor.[320]

Procter argued that the option did not constitute an unreasonable restraint on alienation because it was similar to a right of first refusal, which

314. The lessor based its definition primarily upon the Texas Uniform Commercial Code, TEX. BUS. & COM. CODE ANN. § 1.201(23) (Tex. UCC) (Vernon 1968). The court ultimately rejected that definition since the term insolvency was used in connection with a lease transaction, which is outside the scope of the UCC. 877 S.W.2d at 849.

315. 877 S.W.2d at 850.

316. The court based its reasoning on the use of bankruptcy as a separate basis for default, the definition of insolvency found in the Business Corporation Act, TEX. BUS. CORP. ACT ANN. § 1.02(10) (Vernon Supp. 1994), and the general definition of insolvency. 877 S.W.2d at 850.

317. Procter v. Foxmeyer Drug Co., 884 S.W.2d 853, 956 (Tex. App.—Dallas 1994, n.w.h.).

318. The book value when Procter exercised its option was $79,955.38. The market value of the warehouse at that time was $550,000. *Id.* at 857.

319. The Court noted that most cases involving options to purchase involve the rule against perpetuities. Neither Procter nor Foxmeyer raised the rule against perpetuities, therefore, the court did not address it. Relying on Mattern v. Herzog, 367 S.W.2d 312, 319-20 (Tex. 1963), the court noted that the alienation doctrine may be more applicable to commercial transactions than is the rule against perpetuities. 884 S.W.2d at 857 n.2.

320. As a portion of that holding, the trial court stated that paragraph 10.7 of the merger agreement made the option unlimited in duration. That paragraph stated "[a]ll terms and provisions of this Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns." 884 S.W.2d at 857.

itself does not constitute an unreasonable restraint on alienation. A right of first refusal requires a property owner to offer the property to a particular purchaser at a stipulated price before the owner can sell to another purchaser.[321] Procter argued that with both options to purchase and rights of first refusal, the landowner must unilaterally decide to stop using the property before the option becomes effective. Therefore, in neither case can the option-holder force a sale. Procter then argued that rights of first refusal were acceptable under the Restatement (Second) of Property (Donative Transfers),[322] so by analogy, options to purchase would not be in contravention of the policy against alienation.

The court rejected Procter's argument, noting that a right of first refusal allows a purchaser to buy on terms offered by a bona fide purchaser. The price is not determined by prior agreement, but rather is set when an offer is received from a third party. Therefore, the right of first refusal is not an acceptable analogy to justify an option as in *Procter*, since Procter's price was set by a preexisting agreement.[323] The court also held that the Restatement provisions regarding donative transfers were only effective to declare transactions valid; they were ineffective to declare commercial transactions invalid (since commercial transactions are not donative in nature).[324] Further, the court determined as a matter of law that book value was not a reasonable price, as required by Restatement section 4.4.[325] Additionally, the court held that the option's duration was unlimited, since paragraph 10.7 of the agreement extended the option to the parties' successors and assigns. Since the duration was unlimited, the option violated section 4.4.[326] Finally, the court concluded that the option was a restraint on alienation, since the sale of the warehouse by the subsidiary to a third party would terminate the subsidiary's use of the warehouse, which would trigger Procter's option to purchase. Consequently, the subsidiary could never transfer the warehouse, since that transfer would allow Procter to purchase the warehouse. Procter therefore could not justify the option based upon the Restatement (Second) of Property.[327]

Having decided that it could not, as a matter of law, enforce the agreement, the court finally turned to whether the option was unreasonable as a matter of law.[328] If not, the option would still be enforced as written.

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321. *Id.* at 359.

322. The terms of the right of first refusal must be reasonable regarding both price and time for exercise. RESTATEMENT (SECOND) OF PROPERTY § 4.4 (1981); 884 S.W.2d at 859 (relying on Randolph v. Terrell, 768 S.W.2d 736, 739 (Tex. App.—Tyler 1987, writ denied) (adopting § 4.4)).

323. 884 S.W.2d at 859.

324. *See* 884 S.W.2d at 858. Consequently, the court could not rule in Foxmeyer's favor on Procter's theory; instead, the Court could only fail to find in Procter's favor on the Restatement argument.

325. *Id.* at 859.

326. 884 S.W.2d at 860-61.

327. *Id.* at 861.

328. The court first determined whether Procter met its burden of proving that it was entitled to enforcement of the option. Since it did not, the court would still have to enforce

The two criteria for analyzing options are the reasonableness of its time limit and whether the option "bears some relationship to the harm the policy against undesirable restraints on alienation was designed to prevent."[329] As noted, the court decided that the duration was indeed unlimited. The court then examined the policy against restraints on alienation. Those policies are: (1) balancing the interests of current and future property owners in the same property; (2) reducing the risk of property investment; and (3) allowing owners the current enjoyment of their property as necessary within a competitive economy.[330] Only if the option violated one or more of those three policies would the option be voided.

The court then concluded that the option violated the second and third policies. The second policy, that of reducing the risk of property investment, was violated because the subsidiary could only use the warehouse or sell it to Procter; it could never sell to a third party who offered a higher price without triggering Procter's option to purchase.[331] Since there existed a broad disparity between the book value and market value of the property, and Procter was entitled to purchase at the lower value, Foxmeyer could never dispose of the property. The third policy of allowing owners the current enjoyment of their property was violated because the vast disparities in values prevented Foxmeyer from realizing approximately $470,000 in a sale or transaction money which would have been available to meet current exigencies.[332]

To summarize, since the option was not analogous to a right of first refusal, and the donative transfer law was only applicable to the validity of commercial transactions rather than their invalidity, the option agreement could not be justified on its face. The burden then shifted to Foxmeyer to show the option's invalidity. The court determined that the fixed-price option, which carried an unlimited duration, was invalid as a matter of law since the option violated public policies against restraints on alienation of property. Therefore, the option itself was invalid and Foxmeyer could avoid its contract with Procter.

XII. CONDOMINIUMS

Effective January 1, 1994, Texas has replaced the Condominium Act[333] with the Uniform Condominium Act (Uniform Act),[334] which has already been adopted in eleven other states.[335] The newly adopted Uniform Act

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the option unless Foxmeyer could prove that the option was unreasonable as a matter of law. Thus, the case's procedural posture forced the court to review the option from two separate viewpoints.

329. 884 S.W.2d at 862.

330. *Id.*

331. *Id.* at 862.

332. *Id.*

333. TEX. PROP. CODE ANN. §§ 81.001-.210 (Vernon 1984 & Supp. 1995).

334. TEX. PROP. CODE ANN. §§ 82.001-.164 (Vernon Supp. 1995).

335. Those jurisdictions include Alabama, ALA. CODE §§ 35-8A-101 to -417 (1994); Arizona, ARIZ. REV. STAT. ANN. §§ 33-1201 to -1270 (1994); Maine, ME. REV. STAT. ANN. tit.

generally applies to all condominium declarations recorded on or after January 1, 1994,[336] as well as declarations recorded before January 1, 1994 if either (1) the unit owners vote to amend the declaration to have the Uniform Act apply,[337] or (2) the recorded declaration states that the Uniform Act will apply after January 1, 1994.[338] All other condominium declarations are governed by the former Condominium Act,[339] with some notable exceptions.[340]

A. New Provisions

The Uniform Act expands the content requirements for condominium declarations. Declarations must now contain the word "condominium" in the association name,[341] identify each county where any part of the condominium is located,[342] and state the maximum number of units which the declarant may create.[343] The Uniform Act also requires a description of all real property that may be allocated as common elements, excluding real property subject to development rights.[344] The declaration must state "any restrictions on use, occupancy, or alienation of the units."[345] The Uniform Act requires that the declaration include descriptions of the recording data for easements and licenses "appurtenant to or included in the condominium,"[346] a description of the declarant's reserved development rights,[347] and a statement regarding any varying development rights.[348] Finally, the declaration must contain a statement regarding the condominium association's obligation to rebuild or repair the condominium after a casualty.[349]

The Uniform Act also contains several new provisions, including guidelines for leasehold condominiums.[350] The Act also contains provisions

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33, §§ 1601-101 - 1604-118 (1994); Minnesota, MINN. STAT. ANN. §§ 515A.1-101 to .4-117 (1994); Missouri, MO. ANN. STAT. §§ 448.1-101 to .4-120 (1994); New Mexico, N.M. GEN. STAT. ANN. §§ 47-7A-1 to 47-7D-20 (1994); North Carolina, N.C. GEN. STAT. §§ 47C-1-101 to -4-120 (1994); Pennsylvania, 68 PA. CONS. STAT. ANN. §§ 3101-3414 (1994); Rhode Island, R. I. GEN. LAWS §§ 34-36.1-1.01 to -4.20 (1994); Virginia, VA. CODE ANN. 55-79.39 to -79.103 (1994); and Washington, WASH. REV. CODE ANN. 64.34.010 to -.950 (1994).

336. TEX. PROP. CODE ANN. § 82.002(a) (Vernon Supp. 1995).

337. *Id.* § 82.002(a)(1).

338. *Id.* § 82.001(a)(2).

339. *Id.* § 82.0011.

340. *Id.* § 82.002(c).

341. TEX. PROP. CODE ANN. § 82.055(1) (Vernon Supp. 1995).

342. *Id.* § 82.055(2).

343. *Id.* § 82.055(5).

344. *Id.* § 82.055(7).

345. *Id.* § 82.055(9).

346. TEX. PROP. CODE ANN. § 82.055(10) (Vernon Supp. 1995).

347. *Id.* § 82.055(14).

348. *Id.* § 82.055(15). "Varying developments rights" refers to development rights which may be exercised differently with respect to "different parcels of real property at different times." *Id.*

349. *Id.* § 82.055(13).

350. *Id.* § 82.056.

for the alteration,[351] relocation,[352] and subdivision of condominium units.[353] New provisions enumerate and limit the management role played in condominium regimes by secured lenders.[354] Finally, the Uniform Act creates a statutory lien on behalf of the association for common expense assessments,[355] and includes new disclosure requirements designed to protect condominium purchasers.[356]

The Uniform Act varies from the prior Condominium Act in several respects. The prior act required, at a minimum, a sixty-seven percent vote of a condominium's ownership before a condominium declaration could be amended.[357] The Uniform Act maintains the sixty-seven percent minimum vote, although a lesser percentage may be stated in the declaration if the condominium is reserved exclusively for non-residential use.[358] The prior act contained no lesser minimum for exclusively non-residential use.

The Uniform Act also contains revised provisions for the termination of a condominium regime.[359] While the Condominium Act required approval of at least sixty-seven percent of the owners to terminate a condominium regime,[360] if the declaration was silent regarding termination, 100 percent approval was required.[361] After a declaration was recorded, it could not be amended to reduce the percentage required to terminate the condominium regime.[362] The Uniform Act retains the requirement of 100% approval to terminate a condominium regime where the declaration is silent as to termination approval.[363] The Uniform Act does not, however, retain the absolute sixty-seven percent minimum from the Condominium Act, although it does contain a new provision requiring an eighty percent minimum approval to terminate an exclusively residential condominium regime.[364] The Uniform Act also provides for termination

351. TEX. PROP. CODE ANN. § 82.061 (Vernon Supp. 1995). Although the Condominium Act purported to contain provisions for the alteration of condominium units, those provisions only applied to the partitioning and conveyancing of common elements. *See* TEX. PROP. CODE ANN. §§ 81.108-.109 (Vernon 1984).

352. TEX. PROP. CODE ANN. § 82.062 (Vernon Supp. 1995).

353. *Id.* § 82.063.

354. *Id.* § 82.069.

355. *Id.* §§ 82.112-.113.

356. *Id.* §§ 82.151-.162. The Uniform Act requires a condominium to maintain an information statement regarding the condominium, which is available to purchasers. The declarant or vendor is liable for all information presented in the disclosure. TEX. PROP. CODE § 82.152 (Vernon Supp. 1995). Violations of the disclosure requirements are actionable by the purchaser. TEX. PROP. CODE § 82.161 (Vernon 1995).

357. TEX. PROP. CODE ANN. § 81.102(a)(7) (Vernon 1984).

358. *Id.* § 82.067.

359. *Id.* § 82.068.

360. *Id.* § 81.110(a).

361. *Id.* § 81.110(a).

362. TEX. PROP. CODE § 81.110(a) (Vernon 1995).

363. *Id.* § 82.068(a).

364. *Id.*

agreements among the unit owners[365] as well as contracts for termination entered into by the association on behalf of the unit owners.[366]

The managerial role played by the Condominium Association is more clearly defined in the Uniform Act than in the Condominium Act. The Condominium Act generally empowered a council of owners to manage a condominium regime.[367] The Uniform Act more specifically enumerates the powers of the condominium association.[368] The Uniform Act also places obligations and standards for conduct on association board members.[369] The association may also terminate contracts between the association and its declarant if: (1) the contract is entered into while the declarant controls the association; (2) it is terminated within one year of the elected board taking office; and (3) the association gives ninety days notice of its intent to terminate the contract.[370]

B. Universally Applicable Provisions

Several provisions of the Uniform Act apply to all condominiums, regardless of the declaration's recordation date.[371] Now, all units not owned by the declarant are separately taxed parcels of real property.[372] The Uniform Act also prescribes the applicability of local laws to condominium associations.[373] All units are now controlled by the condemnation provisions contained in the Uniform Act.[374] New provisions also control the applicability and interpretation of bylaws and the recorded declaration,[375] as well as the required unit descriptions.[376] All enumerated powers of owner's associations apply to all condominium units, whenever declared, including those powers regarding bylaws, budgets, agency authority, and the ability to contract.[377] The insurance and lien provisions are also universally applicable.[378] Finally, the provisions for

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365. *Id.* § 82.068(b).

366. *Id.* § 82.068(c). Such a contract requiring termination of the condominium regime is not binding on the unit owners until the actual termination has been approved by the requisite vote. *Id.*

367. Tex. Prop. Code Ann. § 81.201 (Vernon 1984).

368. *Id.* § 82.102(a) (Vernon Supp. 1995). Among other items, the association, acting through its board, can adopt and amend bylaws, § 82.102(a)(1); collect assessments, § 82.102(a)(2); engage in litigation, § 82.102(a)(4); enter into contracts, § 82.102(a)(5); regulate condominium structure and appearance, § 82.102(a)(6); and acquire and hold property, § 82.102(a)(9).

369. Tex. Prop. Code Ann. § 82.103(a) (Vernon Supp. 1995). The Uniform Act makes board members and officers liable to unit owners as fiduciaries. *Id.*

370. *Id.* § 82.105.

371. *Id.* § 82.002.

372. *Id.* § 82.005.

373. *Id.* § 82.006.

374. Tex. Prop. Code Ann. § 82.007 (Vernon Supp. 1995). The Uniform Act prescribes specific methods of determining compensable losses.

375. *Id.* § 82.053.

376. *Id.* § 82.054.

377. *Id.* § 82.102(a)(1-7) & § 82.102(a)(12-22).

378. *Id.* §§ 82.111, 82.113.

record-keeping,[379] management certificates,[380] resale,[381] and attorney's fees for actions arising out of failure to disclose[382] are applicable to all condominiums, whenever declared.

379. TEX. PROP. CODE ANN. § 82.114 (Vernon Supp. 1995).
380. *Id.* § 82.116.
381. *Id.* § 82.157.
382. *Id.* § 82.161.