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Real Property

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I. LENDING

A. MORTGAGES

THE Fort Worth Court of Appeals in *Travelers Insurance Co. v. Bosler*[1] ruled for a lender in a case involving a nonrecourse provision and its effect on a guaranty agreement. Travelers became the owner and holder of a promissory note in the original principal amount of $11,600,000.00 by way of (1) an assignment of a 90% participation interest from the prior owner and holder and (2) an assignment of the remaining 10% interest by the Resolution Trust Corporation as the receiver of the prior owner and holder. The note was secured by a deed of trust on an apartment complex and by a continuing guaranty agreement dated as of the date of the note executed by seven guarantors. The prior owner and holder of the note subsequently entered into a modification agreement with the borrower, which contained a nonrecourse provision. The guarantors also executed a second guaranty agreement at the time the modification agreement was signed. The borrower defaulted under the note and Travelers foreclosed on the apartment complex. In the meantime, the guarantors filed a petition seeking a declaratory judgment that they were not personally liable under the note or the guaranty agreements because of the nonrecourse provisions of the modification agreement. Travelers counterclaimed for its deficiency, the amount of which had been stipulated to by the parties. The parties filed competing motions for summary judgment and the guarantors won the first round when the trial court granted their motion and denied Travelers'. Travelers appealed and the court of appeals had little trouble in holding that while the nonrecourse provision absolved the borrower and the borrower's general partners from personal liability in their maker and partner capacities, the guarantors remained fully liable for the deficiency in their capacities as guarantors under both the first and second guaranty.[2] The court raced through the plaintiff's other points, denying them all, and then reversed the trial court's summary judgment in favor of the plaintiff. The court

1. 906 S.W.2d 635 (Tex. App.—Fort Worth 1995, writ denied).
2. *Id.* at 643.

was able to render judgment in favor of Travelers since the lender wisely obtained a stipulation from the other side as to the amount of the deficiency.

The next case started its way through the appellate process in 1992 and was finally decided in 1995. It provides another reason for lenders to read their loan documents and to abide by their terms. In *Edwards v. Holleman*[3] the borrower defaulted on two promissory notes to Galveston Savings and Loan which were secured by first and second lien deeds of trust on the borrower's home. The lender instituted foreclosure proceedings, but before the foreclosure occurred, the borrower found a buyer for the property and requested a payoff from the lender. The amount which the lender provided not only included the unpaid principal and interest, but also over $18,000.00 in attorney's fees, trustee's fees, and trustee's expenses. The borrower paid under protest and then sued the lender and the president of the savings and loan, as well as the trustee under the deeds of trust. The jury found that reasonable trustee's fees and expenses were less than what was charged and as a result awarded the borrower $10,000.00 in punitive damages against the defendants for breaching their fiduciary duty to the borrower. The lender was declared insolvent after the judgment and only the president appealed. The court of appeals held that the borrower was liable only for the lender's attorney's fees, but not the trustee's fees and expenses since the foreclosure had not taken place.[4] On further appeal, the Texas Supreme Court held that the provisions of the notes and deeds of trust required the borrower to pay reasonable fees and expenses of the trustee, even though the deed of trust lien was not foreclosed.[5] The supreme court remanded the case to the court of appeals to consider other points of error raised by the president. On remand, the court of appeals discussed the trustee's fees and the trustee's expenses. The president testified that he calculated his trustee's fees by charging 10% of the unpaid balance of the delinquent debt. The first lien deed of trust, however, provided only for a reasonable trustee's fee. The second lien deed of trust provided for a 5% commission if the property was sold at foreclosure. The court also considered the fact that the president was an employee of the savings and loan and not a third-party trustee. He did not receive a separate trustee's fee from the savings and loan. The court affirmed the jury's findings that the trustee's fee and expenses were unreasonable and breached the president's fiduciary duty to the borrower.[6]

Howell v. Murray Mortgage Co.[7] presents the interesting question of whether an administrator of a dependent administration is subject to a due-on-sale clause contained in a deed of trust of the dependent estate.

3. 893 S.W.2d 115 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
4. Edwards v. Holleman, 842 S.W.2d 704 (Tex. App.—Houston [1st Dist.] 1992), *rev'd per curiam*, 862 S.W.2d 580 (Tex. 1993).
5. *Edwards*, 862 S.W.2d at 581.
6. *Edwards*, 893 S.W.2d at 119.
7. 890 S.W.2d 78 (Tex. App.—Amarillo 1994, writ denied).

During the administration of his brother's estate, the administrator obtained an order from the probate court authorizing the sale of his brother's home. The administrator accepted an offer from a purchaser calling for an assumption of the existing note and the execution of a second lien note in favor of the estate. The sales contract was conditioned on the approval by the lender of the sale and the assumption because the deed of trust contained a due-on-sale clause. The lender refused to grant its approval and the sale did not take place. The administrator sued the lender seeking a declaratory judgment canceling the restriction on the transfer of the property and an injunction requiring the lender to record a release of the transfer restriction. The trial court granted summary judgment in favor of the lender and the administrator appealed. The appellant argued the property was under the control of the probate court in *custodia legis* (custody of the law) and therefore the property was released from the constraints of the due-on-sale clause.[8] Appellant based this theory on the line of cases holding that a dependent administration suspends certain contractual provisions.[9] The court agreed that

> [c]learly, the "opening of administration" suspends a creditor's right to contractually repossess or sell property subject to the administration. The administrator has the absolute right to administer the estate and dispose of the property, but this right does not extend to extinguishing a creditor's right to be paid upon the sale of estate property.[10]

Appellant also relied on a section from the probate code which states that upon order of the probate court "equity in land securing an indebtedness may be sold subject to such indebtedness, or with an assumption of such indebtedness, at public or private sale, as appears to the court to be for the best interest for the estate."[11] The court held that this section only "speaks to the right of the court to approve a credit sale. It does not empower the court to require a creditor to make a loan, extend a loan or make a loan assumable."[12] The court also ruled against appellant's public policy argument. Because of the absence of any statutory or case law precedent, the court upheld the summary judgment in favor of the lender.[13]

Oryx Energy Co. v. Union National Bank[14] presents another look at the Texas courts' struggle with the concept of an absolute assignment of rents. In this case, the bank made a purchase money loan to Santa Fe for the acquisition of a building which was already leased to Oryx. Oryx was

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8. *Id.* at 81.

9. *See* Pearce v. Stokes, 155 Tex. 364, 291 S.W.2d 309, 310 (1956); Rivera v. Morales, 733 S.W.2d 677, 678 (Tex. App.—San Antonio 1987, writ ref'd n.r.e.); Bozeman v. Folliott, 556 S.W.2d 608, 613 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e); Universal Credit Co. v. Ratliff, 57 S.W.2d 238 (Tex. Civ. App.—Waco 1933, no writ).

10. *Howell*, 890 S.W.2d at 83.

11. TEX. PROB. CODE ANN. § 348 (Vernon 1985).

12. *Howell*, 890 S.W.2d at 81.

13. *Id.* at 87.

14. 895 S.W.2d 409 (Tex. App.—San Antonio 1995, writ denied).

required to execute a subordination and non-disturbance agreement at closing. The deed of trust executed by Santa Fe contained an "absolute" assignment of rents. In 1988, Oryx decided to close its office and approached the bank about buying out the lease. Oryx was told by the bank to negotiate directly with Santa Fe instead of the lender. Oryx negotiated a buy-out with Santa Fe that included the payment of $750,000.00 to Santa Fe and $300,000.00 to Santa Fe's president. Santa Fe missed two of its note payments to the bank in 1989. The bank sued Oryx, Santa Fe, and Santa Fe's president for breach of contract and under various tort theories. The court granted the bank's motion for partial summary judgment on the contract claim against Oryx to the tune of $1,050,000.[15] Oryx appealed after the court severed the remaining claims. The main issue before the San Antonio Court of Appeals was whether Oryx breached any contractual obligations with the lender by paying the buy-out proceeds directly to Santa Fe and its president.[16] The only agreement executed by Oryx was the Subordination and Non-disturbance Agreement. The court found the document did not contain any agreement by Oryx to pay rent directly to the lender.[17] The subordination agreement did reference the assignment of leases in the deed of trust, although Oryx was not a party to the deed of trust. The deed of trust gave Santa Fe a license to collect the rents unless the bank terminates the license as a result of an event or default. The dispute centered on whether or not the license had been revoked. The court held that there was a contested fact issue that made summary judgment in favor of the lender improper.[18] The lender also argued that the assignment of leases was absolute and, therefore, a revocation of the license was unnecessary. The court found the assignment required affirmative action on the part of the lender, so it was a pledge instead of an absolute assignment.[19] The court noted the assignment did not even allow Oryx to make rent payments directly to the bank.[20] Because the terms of the deed of trust were susceptible to more than one meaning, it was ambiguous and summary judgment was improper.[21]

WTFO, Inc. v. Braithwaite[22] involves a suit for deficiencies remaining after non-judicial foreclosure sales. The Federal Deposit Insurance Corporation ("FDIC") conducted foreclosures on properties subject to two separate deeds of trust which secured two separate promissory notes executed by the borrower. WTFO subsequently acquired the notes and sued the borrower for the deficiencies. The borrower filed a motion for summary judgment alleging that notice of the foreclosure sales was not given

15. *Id.* at 412.
16. *Id.* at 413.
17. *Id.* at 414.
18. *Id.* at 417.
19. 895 S.W.2d at 415.
20. *Id.*
21. *Id.* at 417.
22. 899 S.W.2d 709 (Tex. App.—Dallas 1995, no writ).

pursuant to the deeds of trust and section 51.002 of the Property Code.[23] The court detailed the rather sloppy notification on the part of the FDIC, sending two demand letters in July of 1990 to an incorrect address and then correcting the error by remailing both letters in the same envelope to a correct address a few weeks later. The foreclosure sales were conducted by the FDIC the next year. According to the record, the FDIC sent no other notices of the sales. WTFO attempted to controvert the borrower's affidavit, but its summary judgment proof was not filed until four days prior to the summary judgment hearing. Because the trial court did not grant leave for the late filing, the court of appeals did not consider WTFO's summary judgment proof. The trial court's summary judgment for the borrower was affirmed.[24]

A new section was added to the Tax Code regarding loans secured by a lien on land used for agriculture.[25] The amendment prohibits lenders from requiring that a borrower waive its right to claim or apply for an agricultural exemption as a condition to granting or amending the terms of a real estate loan. The lender may, however, require the borrower to pay into an escrow account an amount equal to the additional taxes and interest that would be due should a change of use occur which eliminates the agricultural exemption. The escrow account must accrue interest monthly. The proceeds may be used to pay additional taxes and interest resulting from a loss of the exemption, but any balance must be refunded to the borrower. Funds in the escrow account are refunded to the borrower when the loan is paid in full.[26]

B. VENDOR PURCHASER

1. New Legislation

In 1995 the legislature found that contracts-for-deed are frequently utilized to allow low income persons to purchase property in colonias and substandard housing developments, since these individuals lack access to traditional financing and the assistance of professional builders.[27] Under the contracts-for-deed arrangements, the statutory law did not ensure (1) that information such as the availability of utilities, flood plain information or encumbrances of title are disclosed to purchasers; (2) that the contract is properly recorded to provide notice to subsequent creditors; (3) that legal title is properly transferred; or (4) that the purchaser's equity in the property is protected. For these reasons, the contract-for-deed purchaser faces problems requiring statutory protection. As a result, Subchapter D of Chapter 5 of the Property Code was amended to provide statutory protection for purchasers under contracts-for-deed.

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23. TEX. PROP. CODE ANN. § 51.002 (Vernon Supp. 1996).
24. *WTFO, Inc.*, 899 S.W.2d at 721.
25. TEX. TAX CODE ANN. § 23.47 (Vernon Supp. 1996).
26. *Id.* §§ 23.47, 23.58.
27. Act of May 27, 1995, 74th Legis., R.S., ch. 994, § 2, 1995 Tex. Gen Laws 4982, 4982 (codified at TEX. PROP. CODE ANN. § 5.062 (Vernon Supp. 1996)).

Significantly, the amendments to section 5.062 require notices of default to state in plain language any remedies the seller intends to enforce against the purchaser, and specifically state the contract term violated by the purchaser and any action necessary to cure the violation.[28] Additionally, Subchapter E was added to Chapter 5 of the Property Code, relating to requirements for executory contracts for conveyance applicable to certain counties. This subchapter is applicable to areas that the Texas Department of Housing and Community Affairs find have per capita income twenty-five percent below the state average and are within 200 miles of an international border.[29] Sellers must disclose to purchasers the property's condition by providing a survey, legible copies of any documents that describe encumbrances or other claims, and a statutory notice listing items such as the availability of utilities, road maintenance and the existence of liens against the property.[30] Violations of the notice requirement by sellers is both a violation of the Deceptive Trade Practices Act[31] and entitles purchasers to cancel or rescind the executory contract.[32] A seller must also disclose all financing terms to the purchaser, including the purchase price, interest rate, estimate of the dollar amount of interest, total amount to be paid, late charges to be assessed, if any, and the fact that the seller may not charge a prepayment penalty if the purchaser pays early.[33] The seller may not impose additional late fees exceeding eight percent of the monthly payment or the actual administrative costs of processing late payments, pledge the purchasers' interest as security for loans, or impose prepayment penalties if the purchaser makes early payments under the contract.[34]

The purchaser may cancel or rescind the executory contract for any reason by providing notice by telegram or certified/registered mail, or delivering a written notice in person, not later than the fourteenth day after the date of the contract.[35] The contract-for-deed must contain a notice to the purchaser that the purchaser has a right of cancellation.[36] The seller has the responsibility of recording the executory contract and any instrument that terminates that contract.[37] The Act also limits a seller's remedies in default. Where a purchaser defaults after paying forty percent or more of the amount due, or the equivalent of forty-eight monthly payments, the seller may sell, through a trustee, the purchaser's interest in the property, although the seller may not enforce any remedies through rescission, forfeiture or acceleration.[38] The seller must notify a purchaser

28. TEX. PROP. CODE ANN. § 5.062(b) (Vernon Supp. 1996).
29. *Id.* § 5.091(a).
30. *Id.* § 5.094(a).
31. TEX. BUS. & COM. CODE ANN. § 17.46 (Vernon 1987).
32. TEX. PROP. CODE ANN. § 5.094(d) (Vernon Supp. 1996).
33. *Id.* § 5.095.
34. *Id.* § 5.096.
35. *Id.* § 5.097.
36. *Id.* § 5.097(d).
37. TEX. PROP. CODE ANN. § 5.099 (Vernon 1996).
38. *Id.* § 5.101(a).

of default and allow sixty days to cure the default.[39] Where a purchaser defaults before paying forty percent of the amount due or forty-eight monthly payments, the seller may enforce remedies of rescission or forfeiture and acceleration.[40]

2. Case Law

The Survey period saw few landmark developments in vendor/purchaser law. In *Humphrey v. Camelot Retirement Community*[41] plaintiff attempted to purchase a home from defendant builders. The defendants began constructing the house, but the purchaser died before she and the builders could close on the home. Subsequently, the purchaser's estate informed the builder that it had defaulted on the earnest money contract by failing to timely deliver a title policy to the purchaser and demanded return of the earnest money.[42] The appellate court found that the builder's failure to deliver a commitment for title insurance (or title binder) within thirty days of the date of the earnest money contract was a breach that went to the essence of the contract and supported rescission in favor of the purchaser.[43]

Galveston Terminals, Inc. v. Tenneco Oil Co.[44] began with Galveston Terminal's agreement to sell a portion of Pelican Island in Galveston, Texas to Tenneco Oil Company. The agreement included an option contract with a right of first refusal. If Tenneco were to sell any or all of the tract, it must first offer the tract to Galveston Terminals at the same price.[45] Fina Oil acquired title to the tract in 1989 without notice to Galveston Terminals. Fina signed an earnest money contract to sell the tract to another defendant who then assigned its rights to Tatsumi U.S.A. Corp. Fina informed Galveston Terminals they had agreed to sell the property to Tatsumi.[46] Galveston Terminals brought suit alleging breach of the right of first refusal, and seeking specific performance. The defendants argued that none of the transactions constituted a "sale" as required by the right of first refusal. Tenneco argued that it had formed a subsidiary, to which it transferred real property including the tract on Pelican Island. Tennecco maintained it and Fina entered into a stock purchase agreement with the sale of 100 percent of the subsidiary's stock to Fina. Thus, Fina took control of the subsidiary, which at that time owned the Pelican Island tract. Fina then had all the assets of the subsidiary distributed to itself as a liquidating dividend to its sole shareholder, by which Fina acquired title to the tract.[47] The defendants argued the

39. *Id.* § 5.101(b).
40. *Id.* § 5.101(g).
41. 893 S.W.2d 55 (Tex. App.—Corpus Christi 1994, no writ).
42. *Id.* at 57-58.
43. *Id.* at 59.
44. 904 S.W.2d 787 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
45. *Id.* at 788.
46. *Id.* at 789.
47. *Id.* at 789-90.

acquisition was not a sale of real property. The court disagreed, finding that Tenneco had the burden of proving that there was no election to sell the real estate on Tenneco's part. Without adequate proof, a summary judgment in favor of Tenneco was improper, and the court reversed it.[48]

In *Pfluger v. Clack*[49] the court considered whether a seller could contractually force a purchaser to close when the purchaser raises a clear title defect omitted by the title company in its commitment letter.[50] The court began by noting that the purchasers did have a valid objection to title because while they were conveyed the surface estate, including water rights, the water rights had previously been severed and conveyed in a separate transaction.[51] The court then determined that the contractual language in the title commitment allowed the buyer to make objections to defects not covered in the commitment after the commitment had been issued.[52] Finally, the court concluded that the title objections were timely raised. The court concluded that the 1965 water reservation effecting title was a previously undisclosed title defect, and, thus, the purchasers were not provided with copies of all documents creating exceptions to title. Therefore, the objection was timely raised. The appellate court affirmed the trial court's holding that because the sellers could not convey good and marketable title or furnish title insurance to guarantee good and indefeasible title, the purchasers were entitled to terminate the contract.[53]

C. USURY

The following usury cases are the ones the authors consider to be most significant during the Survey period. In *Dunnam v. Burns*,[54] the court noted that the four-sentence instrument evidencing appellant's indebtedness to appellee was "not a model of drafting precision."[55] The instrument provided exactly as follows:

> The officers of Tornado Shelter Inc. on this date 8/23/88, did borrow $35,000.00 from Mr. Ken Burns, Jr. They agree to pay the entire balance plus $5,000.00 by 2/23/89. The officers put up as collateral; 1-36 ft. gooseneck trailer, 1-24 ft. gooseneck trailer, 4-16 ft. trailers, 5 fiberglass molds. There are no liens [sic] on the above assets.[56]

The issue was whether the $5,000 additional sum contained in the promissory note constituted interest.[57] If you represent lenders you are

48. *Id.* at 792.
49. 897 S.W.2d 956 (Tex. App.—Eastland 1995, writ denied).
50. *Id.* at 959.
51. *Id.* at 959-60.
52. *Id.* at 961. Two separate paragraphs of the commitment were implicated. One referred to a buyer's objections to previously undisclosed exceptions, while the other referred to title objections raised by the buyer. The court held that such paragraphs would be rendered meaningless if the purchaser could not raise title objections after the title commitment had been issued.
53. *Id.* at 962.
54. 901 S.W.2d 628 (Tex. App.—El Paso 1995, no writ).
55. *Id.* at 629.
56. *Id.* at 634.
57. *Id.* at 631.

definitely pulling for the appellee in this case, since the promissory note's effective rate of interest was 28.57%. Nonetheless, the appellee argued that *he* did not "charge" interest because the instrument was drafted by appellant and because appellee was only interested in collecting the principal amount of the note. What can we learn from this case? First, "[t]he drafter of the usurious promissory note is simply irrelevant."[58] Once a lender agrees to a loan transaction providing for usurious interest, the lender has "charged" such interest and subjected itself to the law of usury. The next question then is how severe the penalty? There is no stated rate of interest in the promissory note. If no rate is stated, then the maximum amount of interest which is allowed is 6% per annum.[59] But if the parties agree to an interest rate, then the maximum rate chargeable is 18% per annum.[60] The court noted that "[a]n 'agreed interest rate' does not have to be specified as a numeric rate" so long as the promissory note provides the following three required elements: (1) the total amount of interest; (2) the amount of principal; and (3) the duration of the loan in which case interest rate may be calculated.[61] Because the note at issue provided the three required elements, the court considered the ceiling to be 18% and not 6%. What if this had been a demand note with no stated maturity date?

In *Coxson v. Commonwealth Mortgage Co. of America*[62] the Coxsons, Chapter 13 debtors, brought suit against First Nationwide Bank and Commonwealth, the loan servicing agent and holder of a promissory note executed by the plaintiffs in connection with the purchase of a residence in Dallas, Texas in March, 1974. The note was secured by the house and lot purchased. The lender considered the plaintiffs in default of their payment obligation and wanted to foreclose. The plaintiffs sought to prevent foreclosure of their home. One of the arguments made by the plaintiffs to delay foreclosure was that the note executed by them violated the Texas Usury Law.[63] The plaintiffs also claimed that the loan documents executed in connection with the purchase of their residence violated the Federal Truth in Lending Act ("TILA").[64] The Bankruptcy Court held that the applicable statutes of limitations barred the usury and TILA claims.

The Coxsons appealed to the district court which determined that the usury and TILA claims were not barred by applicable statutes of limitations. Nonetheless, the court determined that the note was not usurious under Texas law. The court did, however, find merit in the TILA claim and awarded the plaintiffs a $2,000 offset against the debt.

58. *Id.* at 632.
59. TEX. REV. CIV. STAT. ANN. art. 5069-1.03 (Vernon 1987).
60. *Id.* art. 5069-1.04.
61. *Dunnam*, 901 S.W.2d at 632.
62. 43 F.3d 189 (5th Cir. 1995).
63. *Id.* at 190.
64. 15 U.S.C. §§ 1601-13, 1631-48, 1671-77 (1994).

Going into the court of appeals, the Coxsons were "hitting" 2 for 3, i.e., they prevailed on their TILA claims, and stalled the foreclosure. The court of appeals provided a brief historical overview of the regulation of interest rates in Texas which has its roots in the Texas Constitution.[65] The court noted that "[t]he provisions of legislature's usury statute are not as clear-cut as the Constitution."[66] I would suggest that this is a proverbial understatement. The usury issue in *Coxson* is whether a contract is usurious if it has no express provision for the refund or credit of unearned interest which would otherwise render the contract usurious upon the occurrence of some contingency. The contingency in *Coxson* is the application of the note's acceleration clause which would render the entire debt, including principal and *unearned* interest, due upon the borrower's default.[67] The unearned interest contemplated refers to various closing fees which the court noted are considered interest in Texas which could render the interest rate usurious if the note were accelerated early in its term, and there was no usury savings clause. The court compared the facts in *Coxson* with those in *Smart v. Tower Land & Investment Co.*[68] In *Smart* the court noted that "unless the contract by its express and positive terms evidences an intention which requires a construction that unearned interest was to be collected in all events, the court will give it the construction that the unearned interest should not be collected."[69] In *Smart* the contract specifically provided for the collection and retention of unearned usurious interest. However, in *Coxson* the contract is silent on the issue of whether such interest should be refunded or credited to the principal of the debt in the event of acceleration. The court relied on *Walker v. Temple Trust Co.*[70] in applying the general rule that courts interpret contracts in a way the parties intended; here the intention was that the unearned interest would not be retained at foreclosure. Thus, even if the contingency materialized, the lender would not get more than the lawful rate of interest, which the court determined the contract was not usurious. In *Coxson*, Commonwealth argued on appeal that the district court erred in allowing the Coxsons to assert their TILA claim defensively and recoupment against the note, thereby avoiding a one year statue of limitations for TILA actions. The TILA expressly provides:

> [a]ny action under this section may be brought . . . within one year from the date of the occurrence of the violation. This subsection does not bar a person from (sic) asserting a violation of this subchapter in an action to collect the debt which was brought more than one year from the date of the occurrence of the violation as a matter of defense by recoupment or set-off in such action, except as otherwise provided by State law.[71]

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65. *Coxon*, 43 F.3d at 191.
66. *Id.*
67. *See* Tanner Dev. Co. v. Ferguson, 561 S.W.2d 777, 787 (Tex. 1977).
68. 597 S.W.2d 333, 341 (Tex. 1980).
69. *Id.*; *see also Coxon*, 43 F.3d at 192.
70. 124 Tex. 575, 80 S.W.2d 935, 937 (1935).
71. 15 U.S.C. § 1640(e) (1994).

Commonwealth argued plaintiffs' TILA claim was not a defensive recoupment action. The court relied on the definition of "recoupment" as defined in Ballantine's Law Dictionary, which provides:

> [T]he right of a defendant, in the same action, to cut down the plaintiff's demand even because the plaintiff has not complied with some cross obligation of the contract on which he sues or because he has violated some duty which the law imposes on him in the making or performance of that contract.[72]

The United States Supreme Court has held that recoupment is in the nature of a defense arising out of some feature of the transaction upon which the plaintiff's action is grounded.[73] Such a defense is never barred by the statute of limitations so long as the main action itself is timely. Commonwealth argued that the Coxsons' TILA claim was not raised defensively since the Coxsons initiated the law suit. The Coxsons relied on the theory that the best defense is a good offense. The district court noted that the Coxsons filed the suit in response to Commonwealth's filing of the proof of claim in the Bankruptcy Court and its foreclosure actions. The district court considered the filing of a proof of claim as an action to collect the debt, and therefore the TILA claim was timely. The court noted that the mere fact that the Coxsons were the plaintiffs in the case below does not preclude the finding that the TILA claim was raised defensively, thus proving up the Coxsons' theory. The court noted that this is consistent with other Texas cases holding that a TILA claim may be asserted defensively as a recoupment action against the lender attempting to enforce contractual obligations.[74]

In *Ginsburg 1985 Real Estate Partnership v. Cadle Co.*,[75] the Court reminds us that (1) it is okay to use an analogous prime rate in the event of an unforeseeable "benchmark" bank failure; (2) that usury is a personal defense and may not be asserted by a guarantor; and (3) a decision by a corporation's board of directors is not required before the corporation has the authority to execute a guaranty. In this case, Ginsburg 1985 Real Estate Partnership (the "Partnership") executed a promissory note payable to Republic Bank-Tyler. The note specified an interest rate equal to the prime interest rate charged by Republic Bank-Dallas plus 1%. First Republic Bank-Dallas, the successor to Republic Bank-Dallas, was declared insolvent and placed into receivership; First Republic Bank-Tyler, successor to Republic Bank-Tyler, failed and was placed into receivership. The note and several guaranties securing payment of the note were purchased by what is now known as NationsBank of Texas, N.A. (the "Bank"). A dispute arose between the Bank and the Partnership regarding the allocation of payments on the note between principal and interest

72. BALLENTINE'S LAW DICTIONARY 1070 (3d ed. 1969).
73. Bull v. United States, 295 U.S. 247, 262 (1935).
74. *See* Cooper v. Republic Bank, 696 S.W.2d 629, 634 (Tex. App.—Dallas 1985, no writ); Garza v. Allied Fin. Co., 566 S.W.2d 57, 62-63 (Tex. Civ. App.—Corpus Christi 1978, writ denied).
75. 39 F.3d 528 (5th Cir. 1994).

and allegedly the Bank advised the Partnership to cease making payments until the dispute could be resolved. Thereafter, the Bank transferred the note to the FDIC who then sold it to the Cadle Company. Cadle requested payment on the note and made demand upon the guarantors. The Partnership filed suit seeking damages for usury, negligence, gross negligence and breach of contract. The district court granted Cadle's motion for summary judgment and awarded Cadle the outstanding principal amount of the note, together with accrued interest at the default rate of 18% per annum.[76] The Partnership and the guarantors argued that when First Republic Bank-Dallas failed, its prime interest rate failed to exist and therefore the maximum rate of interest was 6% which is the rate permitted pursuant to Article 5069-1.03 when no specified rate of interest is agreed upon by the parties.[77] The Partnership argued since Cadle charged more than 6% interest, there must be a statutory usury violation. For purposes of determining interest accrued on the note, Cadle calculated interest at the 18% default rate but additionally calculated interest by referring to the NationsBank prime rate. The court noted that Cadle's "substitution" approach, or its application of a "continuing" interest rate, was supported by Texas law and precedent in the Fifth Circuit. The court provided a summary of a prior Fifth Circuit case[78] noting that Texas law favors continuity in the rate of interest. The Partnership apparently wanted the court to distinguish between the rate of a "successor" bank and that of a "non-successor" bank (NationsBank not being considered a legal successor of First Republic Bank-Dallas) for purposes of determining the applicability of the 6% interest rate ceiling. The court, however, focused on the fact that the "continuing" rate need only be an analogous rate. Notwithstanding that the Court did not find a usury violation, it nonetheless considered the arguments by the guarantors of the Partnership note. The court, citing *Houston Sash & Door v. Heaner,*[79] noted that in Texas a guarantor may not assert usury defenses that stem from the underlying principal obligation.[80]

Perhaps the most significant discussion coming out of this case relates to the validity of the guaranty agreement executed by a corporate guarantor. The corporate guarantor argued that without a corporate resolution by which the Board of Directors determines that the guaranty benefits the corporation, it cannot be assumed that the corporation possesses authority to execute the guaranty.[81] Article 1302-2.06(B) provides that "[t]he decision of, or a decision made pursuant to authority granted by, the Board of Directors that the guaranty may reasonably be expected to benefit, directly or indirectly, the guarantor of corporation shall be bind-

76. *Id.* at 537.
77. TEX. REV. CIV. STAT. ANN. § 5069-1.03 (Vernon 1987).
78. FDIC v. Blanton, 918 F.2d 524 (5th Cir. 1990).
79. 577 S.W.2d 217, 222 (Tex. 1979).
80. *Id.*
81. *See* TEX. REV. CIV. STAT. ANN. art. 1302-2.06(B) (Vernon 1980).

ing upon the guarantor of corporation . . . . "[82] Cadle contended that a decision by the Board of Directors is not required before the corporation has the authority to execute a guaranty and the court agreed. The court noted that the language of the statute does not indicate that a Board decision or resolution is mandatory. The court does point out, however, that a Board decision will provide a lender with a guaranty enforcement mechanism if the lender chooses to require a formal Board decision or resolution.[83]

D. FORECLOSURE

1. Case Law

In *Bluebonnet Savings Bank v. Grayridge Apartment Homes, Inc.*[84] the court of appeals absolved the lender from a jury verdict which found that it was grossly negligent in misrepresenting that a delinquent loan would be refinanced. This litigation resulted when the lender sued Grayridge Apartment Homes and Mr. Harry, the guarantor, for a deficiency judgment after it foreclosed on its deed of trust on the Grayridge Apartments. Grayridge and Harry filed a counterclaim against the lender which the jury upheld by awarding actual damages of $158,000 and exemplary damages of $474,000. The court of appeals reversed, in part, and rendered the trial court's judgment. Justice Cohen stated that to prove negligent misrepresentation, a claimant must show:

> 1. that the informant supplied false information in a pecuniary transaction;
> 2. that the information was supplied for the guidance of others in their business transactions;
> 3. that the claimant justifiably relied upon this information;
> 4. that the claimant suffered a pecuniary loss; and
> 5. that the informant failed to exercise reasonable care or competence in obtaining or communicating the information to the injured party.[85]

After reviewing all of the evidence, the court found that there was no evidence of justifiable reliance by a reasonable business person. The court specifically pointed out the fact that during settlement negotiations, the lender's representative and Mr. Harry executed a document entitled "Settlement Negotiations Agreement" in which the parties agreed as follows:

> This meeting was held for the purposes of settlement negotiations and in the interest of open and frank discussions. All of the parties agreed that such discussions were in the context of settlement negotiations, and that none of the discussions or communications at the

82. *Id.*
83. Cadle, 39 F.3d at 535 (citing Kerry W. Conner, *Enforcing Commercial Guaranties in Texas: Banishing Limitation, Remaining Questions*, 12 TEX. TECH. L. REV. 785, 800 (1981)).
84. 907 S.W.2d 904 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
85. *Id.* at 908.

> meeting could be introduced by either party against the other party in any litigation.[86]

The court also noted Mr. Harry's considerable experience in real estate. It is possible that, in the absence of these two factors, the court would have upheld the verdict. In another victory for the lender, the court remanded the cause to the trial court to determine the amount of the judgment because the jury found the deficiency to be "none".

Lighthouse Church v. Texas Bank[87] demonstrates the inadvisability of a lender taking possession of real property prior to a foreclosure, especially when that action is not authorized by the loan documents. In *Lighthouse Church*, a defunct corporation acquired certain real property from Texas Bank in exchange for a note, a deed of trust covering the property, and a security agreement. The Church subsequently defaulted on its payments to Texas Bank. On January 16, 1992, the bank entered the property, locked out the Church, and posted a guard on the premises. Two months later they conducted a non-judicial foreclosure of the property. The Church and David Montgomery, individually and doing business as three separate entities, sued Texas Bank alleging trespass, conversion of real and personal property, and wrongful foreclosure. The plaintiffs appealed the granting of a summary judgment by the trial court in favor of Texas Bank. The court of appeals first considered the plaintiffs' standing to bring the claims. A corporation which has forfeited its corporate charter cannot maintain a suit in state court.[88] Likewise, a party who fails to file an assumed name certificate cannot maintain a suit in a Texas court under that name.[89] Texas Bank, however, waived these defects by failing to file a motion to abate the cause of action. The bank also claimed that Montgomery had no standing to sue since the bank's contract was with the church. The court, however, pointed out that trespass, conversion and wrongful foreclosure sound in tort. No contractual relationship is necessary.[90] The court next considered the bank's attack on the conveyance. Texas Bank argued that the deed to the defunct corporation was void, therefore, the bank still owned the property and had the right to take possession. The court found otherwise. While a deed to a grantee that does not exist at the time the deed is executed is void, because the corporation had a statutory right to have its corporate charter reinstated, it was not wholly extinguished as a legal entity.[91] The court found the deed was not void. The court went on to say that even if it were void, there is no support for the proposition that one may unilaterally declare a deed void without resorting to the courts for a determination of its status. In other words, the bank had no legal right to repossess the realty until a court declared the deed void.

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86. *Id.* at 909.
87. 889 S.W.2d 595 (Tex. App.—Houston [14th Dist.] 1994, writ denied).
88. TEX. TAX CODE ANN. § 171.252(1) (Vernon Supp. 1994).
89. TEX. BUS. & COM. CODE ANN. § 36.10(a) (Vernon 1987).
90. *Lighthouse Church*, 889 S.W.2d at 600.
91. *Id.* at 600-01.

The bank also argued that there was no trespass since the Texas Business and Commerce Code ("UCC") and the bank's security agreement granted the right to repossess collateral by entering the premises if possible without a breach of the peace. The court pointed out that Chapter 9 of the UCC and the provisions of the security agreement apply only to personal property. The court held that seizure of real property prior to foreclosure is not condoned by Texas law, except where the property is voluntarily relinquished by the debtor.[92] The court went on to say that even if a contractual, self-help repossession is authorized, the bank's loan documents contained no such agreement. The security agreement did not cover real property (only personal property) and the deed of trust contained no clause authorizing the bank to take possession of the realty prior to foreclosure. Just when the plaintiffs thought they were on a roll, the court stated that it could not address the wrongful foreclosure claim because it was not properly assigned as a point of error. The court affirmed that part of the summary judgment relating to wrongful foreclosure and reversed and remanded the balance of the case.

2. *New Legislation*

New legislation was passed which covers deeds in lieu of foreclosure. The holder of a debt who accepts a deed conveying real property in satisfaction of the debt may void the deed before the fourth anniversary of the execution of the deed and instead foreclose under the original deed of trust if (1) the debtor did not disclose a lien or encumbrance on the property to the debt holder and (2) the debtholder had no personal knowledge of the undisclosed lien or encumbrance.[93] An affidavit regarding the voiding of the deed is conclusive as to a third party. The holder may foreclose its deed of trust with or without voiding the deed.[94]

Another amendment added a new chapter to the Property Code which covers the forced sale of an owner's interest in real property as reimbursement for property taxes paid by the co-owner. If a person owns an undivided interest in non-exempt property received as a result of the death of another person (excluding a survivorship agreement between spouses for community property), he may file a petition in the district court for an order requiring the other undivided interest owner to sell his interest to the petitioner if (1) the petitioner has paid the other owner's share of ad valorem taxes on the property for any three years in a five year period and (2) the other owner has not reimbursed the petitioner for more than half of the total amount paid by petitioner on the other owner's behalf.[95] The court is authorized to enter an order that divests the defendant's interest in the real property and that orders the petitioner to pay to the defendant an amount computed by subtracting the outstand-

92. *Id.* at 602-03.
93. TEX. PROP. CODE ANN. § 51.006 (Vernon Supp. 1996).
94. *Id.*
95. *Id.* §§ 29.001-.004.

ing amount the defendant owes to the petitioner for taxes from the fair market value of the defendant's interest in the property as determined by an independent appraiser appointed by the court. The court may also order the defendant to execute and deliver to the petitioner a deed conveying the defendant's interest in the property.[96]

II. HOMESTEAD

First Gibraltar Bank, FSB v. Morales[97] presents Part III of the continuing saga of First Gibraltar's attempt to obtain a judicial declaration that portions of the Texas homestead law have been statutorily preempted by federal law. For those with short-term memory problems, Part I was the Fifth Circuit's conclusion that federal law preempts Texas homestead law as it relates to two alternative mortgage instruments—the reverse annuity mortgage and the line of credit conversion mortgage.[98] Part II was the passage of the Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994[99] (the "Amendment"), which purported to limit the authority of the Office of Thrift Supervision to preempt any homestead provision of any state. In the latest installment, Gibraltar appealed to the Fifth Circuit attacking the constitutionality of the Amendment. Despite admirable arguments on the part of First Gibraltar, the Fifth Circuit, in a mercifully brief opinion, held the Amendment to be constitutional. The court declined to accept First Gibraltar's unique argument that the Amendment could not "resurrect" homestead law which had already been preempted on the date of the Amendment's enactment. The court explained that because the Texas homestead laws had not been repealed, they were still in effect outside of the context of federal bank regulation. Once the agency's preemption authority was removed, the Texas homestead provisions, already in affect in other areas, were resurrected in the area of federal bank regulation.

Crowder v. Benchmark Bank[100] is an important case, and its holding resulted in a change in the law regarding liens on homesteads. Crowder converted his sole proprietorship to a corporation in 1983. Unfortunately for Crowder, the corporation's 1984 corporate withholding taxes were paid under the sole proprietorship's tax identification number and, even more unfortunately, the corporation failed to pay withholding taxes in 1985. The Internal Revenue Service ("IRS") filed tax liens against Crowder and the corporation in 1985 and 1986. Crowder obtained a loan from Benchmark to pay the IRS taxes. Mr. and Mrs. Crowder signed a note payable to Benchmark and a deed of trust purporting to create a lien against the Crowders' urban homestead consisting of 1.85 acres of land.

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96. *Id.*

97. 42 F.3d 895 (5th Cir. 1995).

98. First Gibraltar Bank, FSB v. Morales, 19 F.3d 1032 (5th Cir.), *cert. denied*, 115 S. Ct. 204 (1994) (opinion vacated and substituted by 42 F.3d 895 (1995)).

99. Riegle-Neal Interstate Banking and Branching Efficiency Act of 1994, Pub. L. No. 103-328, 108 Stat. 2338 (1994).

100. 889 S.W.2d 525 (Tex. App.—Dallas 1994, writ granted).

After the note became delinquent, Benchmark foreclosed on the Crowders' homestead. There was no segregation prior to the foreclosure of the exempt one acre from the excess. The Crowders sued Benchmark for wrongful foreclosure and breach of contract claiming (1) that Benchmark did not have a valid lien because Benchmark was not subrogated to any lien against the homestead, and (2) only the federal government could foreclose a federal tax lien against a homestead. The trial court granted Benchmark's motion for summary judgment and denied the Crowders' motion. After reviewing the Texas Constitution[101] and the applicable Texas statute,[102] the Dallas Court of Appeals concluded that the Supremacy Clause of the United States Constitution permits only the federal government to enforce its nonproperty tax liens against Texas homesteads.[103] Although the IRS could have foreclosed its tax lien, the court held that "a private party cannot obtain or enforce a government's lien that is contrary to the Texas Constitution, Texas statutes, or Texas public policy. As a matter of law, Benchmark did not have a valid and enforceable lien interest against the Crowders' one-acre homestead."[104] The court also upheld the Crowders' argument that prior to foreclosure, Benchmark was required to segregate the exempt part of the homestead from the nonexempt part, if the party asserting the homestead right failed to do so voluntarily.[105] "If the property cannot be partitioned, only that percentage attributable to the nonexempt property should be offered for sale . . . . A foreclosure sale conducted on an unsegregated estate is a nullity."[106] The court of appeals reversed the trial court's judgment and remanded the case for further proceedings.

The ruling in *Crowder* led to Senate Bill 1032, which amends Section 41.00 of the Texas Property Code and Section 50, Article XVI of the Texas Constitution.[107] As we learned from *Crowder*, a homestead is protected from forced sale except for purchase money, taxes against the property itself, and improvements to the homestead. This amendment adds the following to that list of exceptions:

> (1) an owelty of partition imposed against the entirety of the property by court order or by written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or award of a family homestead in a divorce proceeding; and
>
> (2) a refinance of a lien against a homestead, including a federal tax lien resulting from the tax debt of both spouses, if the homestead

101. TEX. CONST. art. XVI, § 50.

102. TEX. PROP. CODE ANN. § 41.001(b)(2) (Vernon 1984).

103. *Crowder*, 889 S.W.2d at 528.

104. *Id.* at 529.

105. *Id.* at 530 (citing TEX. PROP. CODE ANN. §§ 41.021-.023 (Vernon Supp. 1996)).

106. *Id.* (citing Mallou v. Payne & Vendig, 750 S.W.2d 251, 255, 257 (Tex. App.—Dallas 1988, writ denied)).

107. Act of May 8, 1995, 74th Leg., R.S., ch. 121, § 2.01 Tex. Gen. Laws 933, 933 (to be codified at TEX. PROP. CODE ANN. § 41.001(b) (Vernon Supp. 1996)).

is a family homestead, or from the tax debt of the owner.[108]
In addition, this amendment addresses prior adverse decisions holding that a false non-homestead affidavit does not estop the owner from later claiming the property is homestead. The amendment provides that a purchaser or lender for value without actual knowledge may *conclusively* rely on an affidavit that designates other property as the homestead of the affiant and that states that the property to be conveyed or encumbered is not the homestead of the affiant.

III. DEEDS

Burgess v. Easley[109] involves the examination of a deed executed by the grantor during the marriage of the grantee and his spouse to determine whether the property conveyed is the community property of the grantee and his spouse or the separate property of the grantee. On July 28, 1980, Michael Easley's parents executed and acknowledged a deed that conveyed certain property to Michael for and in consideration of ten dollars. Michael and Emma were married on January 25, 1980, and divorced on May 18, 1984. When Emma subsequently discovered the existence of the deed, she sued Michael to partition the overlooked community property. The court of appeals pointed out that to be effective, an instrument conveying real property must be "subscribed *and* delivered" by the conveyor.[110] "Without evidence to the contrary, the law presumes a grantor delivers a deed on the date of execution and acknowledgement."[111] Michael's father testified that the conveyance was a gift, that the deed was never delivered to Michael, and that it was not recorded until July 18, 1984. "Recording the deed constructively delivered the deed to Michael."[112] Emma objected to the testimony about the deed because the deed itself is unambiguous. The court held that while extrinsic evidence may not be admitted to modify the terms of an unambiguous deed, testimony is admissible to show the time of delivery. Because Michael's rights in the deed did not vest until after the divorce, the property was not community property subject to partition. Emma also struck out when it came to her attorney's fees. The trial court's decision not to award attorney's fees to Emma was approved by the appellate court.

IV. TENANCY IN COMMON

In *In re Thurmond*[113] the court examined various relationships, however, only those dealing with real property are discussed here. In 1989, Mr. and Mrs. Thurmond moved to Texas and purchased a home for $198,809. The down payment in the amount of $53,809, or 27.07% of the

108. *Id.*
109. 893 S.W.2d 87 (Tex. App.—Dallas 1994, writ denied).
110. *Id.* at 90 (citing TEX. PROP. CODE ANN. § 5.021 (Vernon 1984) (emphasis added)).
111. *Id.*
112. *Id.* at 91.
113. 888 S.W.2d 269 (Tex. App.—Amarillo 1994, writ denied).

purchase price, came from a testamentary trust created by Mr. Thurmond's father, i.e., Mr. Thurmond's separate property. The remaining portion of the purchase price was paid by what the court referred to as community debt. Nonetheless, this community debt was paid exclusively out of the separate property income of the trust. In 1991, Mrs. Thurmond filed a petition for divorce in which she sought, among other things, a division of community property. The trial court awarded exclusive possession of the parties' residence to Mrs. Thurmond until the emancipation of the minor child. The court ordered at that time that the house was to be sold and 40% of the proceeds were to go to Mr. Thurmond and 60% to Mrs. Thurmond. The trial court noted that Mr. Thurmond failed to prove by clear and convincing evidence that any separate property reimbursement was due or that he had any separate property interest in the house. The court noted that when both separate and community resources are used to acquire property during the marriage, Texas courts have consistently referred to the relationship between the separate estates and the community estates as a "type of tenancy in common."[114] The court further noted that Texas courts have variously referred to the rights of the spouses' separate estate as a "pro tonto ownership,"[115] "a part interest,"[116] "equitable title,"[117] "separate interests,"[118] and "constructive trust."[119] The court in *Thurmond* preferred to characterize the separate estate as that of an "equitable title" thus following *Goddard*. The court noted that equitable title is a property right, greater than a right of reimbursement. As a property right it may not be divested from a spouse at divorce without violating our state constitution.[120] The court, citing *Cockerham v. Cockerham*,[121] noted that it is well established in Texas that when a spouse uses separate property to acquire property during marriage, and takes title of that property in the names of both spouses, a presumption arises that the purchasing spouse intended to make a gift of one-half of the separate funds to the other spouse. Texas law does not recognize a gift by a spouse to the community estate, thus to the extent there is a presumption of a gift, it must be to the other spouse. The presumption is rebuttable, however Mr. Thurmond was unable to rebut the presumption and thus Mrs. Thurmond ended up with the 13.535% separate property interest which under equitable title is an un-

114. *Id.* at 272 (citing Gleich v. Bongio, 128 Tex. 606, 99 S.W.2d. 881, 883-84 (1937); *see also* Cook v. Cook 679 S.W.2d 581, 583 (Tex. App.—San Antonio 1984, no writ); Carter v. Grabeel, 341 S.W.2d 458, 462 (Tex. Civ. App.—Amarillo 1960, no writ)).

115. *Thurmond*, 888 S.W.2d at 272 (citing Broussard v. Tian, 156 Tex. 371, 295 S.W.2d 405, 406 (1956), *cert. denied sub nom.*, 353 U.S. 941 (1957)).

116. *See Gleich*, 99 S.W.2d at 883.

117. *See* Goddard v. Reagan, 28 S.W. 352, 353 (Tex. Civ. App.—San Antonio 1894, no writ).

118. *Cook*, 679 S.W.2d at 583.

119. Maxie v. Maxie, 635 S.W.2d 175, 177 (Tex. App.—Houston [1st Dist.] 1982, writ denied).

120. *See* Eggemayer v. Eggemayer, 554 S.W.2d 137, 142 (Tex. 1977).

121. 527 S.W.2d 162, 168 (Tex. 1975); *see also* Graham v. Graham, 836 S.W.2d 308, 310 (Tex. App.—Texarkana 1992, no writ).

divestable property right. It was not a total loss for Mr. Thurmond; he retained a 13.535% separate property interest, and was entitled to a reimbursement for payments of community debt made out of his separate estate. Mr. Thurmond did not, however, raise the issue of reimbursement, and therefore did not receive any. If you read the full text of this case you will note that, in fact, Mrs. Thurmond wanted the house to be characterized as community property; thus from the court's perspective it was Mr. Thurmond who could not be divested of his separate property interest. You should also note from the record that the estimated value of the house at the time of trial was $406,000 or a $207,000 (approximately) increase in value from the time of purchase, a very nice gift to Mrs. Thurmond.

V. EASEMENTS

If you read last year's survey you learned (or at least had your memory refreshed) that an easement in gross is personal to the grantee only and is generally not assignable or transferrable. An easement appurtenant is an easement interest which attaches to the land and passes with it. An easement is never presumed to be in gross when it can fairly be construed to be appurtenant. *Walchshauser v. Hyde*,[122] was an appeal from a declaratory judgment finding the plaintiff did not have an easement appurtenant for ingress and egress across property belonging to the appellees. Appellant purchased his land (which had an airplane hanger on it) from Lincoln Financial, Inc. Appellant's contract with Lincoln specified that the hanger building must have access to the runway. Lincoln knew this was no problem since it had obtained a default judgment against the same appellees, awarding Lincoln an ingress and egress easement from the Lincoln property to the Hyde property. The judgment provided that Lincoln's easement "shall run with the land and this judgment shall have the same force and effect as a fully warranted grant or conveyance of such easement."[123] The deed from Lincoln to appellant in this case did not specifically describe the easement but did convey any "appurtenances thereto in anywise belonging."[124] The appellees contended that the easement obtained by Lincoln was a nonassignable easement in gross not an easement appurtenant. The appellees' argument was based, in part, upon their assertion that there is no legal description of the land over which the easement runs because the default judgment that granted the easement referred to the property description as that described on the attached Exhibit "A," and there was no Exhibit "A" attached to the default judgment. The court noted that although there is no Exhibit "A" attached to the default judgment, there is a property description with the default judgment and the court records. The court held that the property description with the default judgment is the Exhibit "A" referred to by the

122. 890 S.W.2d 171 (Tex. App.—Fort Worth 1994, writ denied).
123. *Id.* at 172.
124. *Id.*

default judgment even though it does not bear that notation on its face. Thus the court found that the judgment does contain a legal description of the land subject to the easement that was granted to Lincoln.[125] The appellees, relying on the cases of *Greer v. Greer*[126] and *McWhorter v. City of Jacksonville*,[127] argued that an instrument conveying real estate is void under the Statute of Frauds unless the real estate description is so definite and certain upon the face of the instrument itself, or in some other writing referred to, the land can be identified with reasonable certainty. The court noted, however, that even though the Exhibit "A" to which the default judgment refers is not attached, it is nonetheless a part of record. The ultimate holding in this case is that appellees' arguments just won't fly.

In *Bennett v. Tarrant County Water Control & Improvement District No. One*,[128] the court determined that the appellants were all wet. Unfortunately, in this case being all wet must be taken in its most literal context. The appellant land owners sued the appellee for damages to their land which is encumbered by flowage easements owned by the Water District. The flowage easements permit the Water District to flood the landowners' property without incurring liability. The landowners purchased their respective tracts of land, predominantly encumbered with flowage easements, with the intent to use the tracts for residential or recreational purposes. The landowners alleged several causes of action including inverse condemnation, misrepresentation, fraud, abandonment of the easements, and deceptive trade practices. The only discussion here will be in connection with the construction of the deeds conveying the property to the landowners and the flowage easements. The landowners argued that the flowage easements are invalid and void as against public policy. They further argued that the flowage easements conflicted with the property restrictions limiting use of property to one single family resident per tract. The court, noting that the rules applicable to the construction of deeds are also applicable to the construction of easements,[129] referred to its primary duty as deemed to ascertain the intent of the parties by a fundamental rule of construction known as the "four corners" rule.[130] The court effortlessly dismissed the landowners' arguments that the flowage easements are invalid because they conflict with the landowners' fee simple ownership rights and their use of the property for single family residential purposes. There is nothing extraordinary about the way the court handled the construction issue. What is interesting about this case is the fact

125. *Id.* at 173-74.
126. 144 Tex. 528, 191 S.W.2d 848, 849 (1946).
127. 694 S.W.2d 182, 184 (Tex. App.—Tyler 1985, no writ).
128. 894 S.W.2d 441 (Tex. App.—Fort Worth 1995, writ denied).
129. *Id.* at 446 (citing Jones v. Fuller, 856 S.W.2d 597, 602 (Tex. App.—Waco 1993, no writ) and Boland v. Natural Gas Pipeline Co., 816 S.W.2d 843, 844 (Tex. App.—Fort Worth 1991, no writ)).
130. *Id.* (citing Luckel v. White, 819 S.W.2d 459, 461 (Tex. 1991); Cherokee Water Co. v. Forderhouse, 641 S.W.2d 522, 524 (Tex. 1982) and Garrett v. Dils Co., 157 Tex. 92, 299 S.W.2d 904, 906 (1957)).

that in validating the Water District's flowage easement, the court noted that public policy strongly favors the Water District's use of the flowage easements in connection with the State's duty to prevent floods and take steps necessary for the conservation of natural resources.[131]

VI. RESTRICTIVE COVENANTS

A. NEW LEGISLATION

During the Survey period, the legislature created a procedure to amend existing property restrictions on subdivisions.[132] The legislature found that homeowner's associations enjoyed a special relationship with property owners within subdivisions, that subdivisions needed a procedure to easily facilitate increases in the amount of assessments for the benefit of the associations, and that restrictions on regular assessments were detrimental to the maintenance of subdivision common area facilities.[133] Subsequently, Chapter 204 was added to the Property Code.

Chapter 204 is entitled "Powers of Property Owners' Association Relating to Restrictive Covenants in Certain Subdivisions." The chapter is applicable to residential real estate subdivisions, excluding condominium developments, in counties with a population with 2.8 million or more.[134] The chapter is applicable regardless of a restriction's effective date.[135] The chapter is also inapplicable to subdivision areas that are zoned for or contain commercial structures, industrial structures, apartment complexes or condominium developments.[136] The chapter provides a means of extending, adding or modifying restrictive covenants; restrictions contained in documents which have their own means of extending, adding or modifying restrictive covenants take precedence over these statutory provisions.[137] The chapter allows the extension, addition or modification of existing restrictive covenants if both the homeowner's association circulates a petition which is approved by the owners of at least seventy-five percent of the real property in the subdivision or a smaller percentage required by a dedicatory instrument, and the petition is filed as a dedicatory instrument with the county clerk of the county in which the subdivision is located.[138] Once approved, the petition is binding on all properties in the subdivision or section.[139] Modified restrictions are binding on lienholders, except for restrictions relating to regular or special assessment increases if the assessment is not subordinated to purchase

131. *See* TEX. CONST. art. XVI, § 59.
132. Act of May 27, 74th Leg., R.S., ch. 1040, § 2, 1995 Tex. Gen. Laws 5170, 5171 (amending TEX. PROP. CODE ANN. by adding chapter 204).
133. *Id.*
134. TEX. PROP. CODE ANN. § 204.002(a) (Vernon Supp. 1996).
135. *Id.* § 204.002(b).
136. *Id.* § 204.002(c).
137. *Id.* § 204.003.
138. *Id.* § 204.005(b).
139. TEX. PROP. CODE ANN. § 204.005(d) (Vernon Supp. 1996).

money or home improvement liens.[140] The petition may be adopted by written ballot, meeting of the homeowner's association held with written notice, door-to-door circulation of the petition, on any means permitted by the existing restrictions or a combination of these methods.[141]

B. Case Law

In *Simms v. Lakewood Village Property Owner's Ass'n*[142] a developer filed a plat for a subdivision named Lakewood Village, which was designed for mobile homes, modular homes and recreational vehicles. Each contract conveying property in the subdivision included language to the effect that each purchaser read and accepted various restrictive covenants and property assessments by the subdivision.[143] In 1984 the developer, with the assistance of homeowners, formed an advisory board to advise and assist with the management of the subdivision. The advisory board handled the collection of assessment fees and the management of common areas in the subdivision. Restrictive covenants were recorded in 1987, and the developer turned the subdivision over to Harlingen National Bank in 1988. The bank gave the association management and ownership of the property's common areas, and shortly afterward the homeowner's association signed articles of incorporation and elected a board of directors.[144]

One year later, a homeowner filed suit against the association claiming they were charging assessments based on the number of houses built, rather than the number of lots owned by each property owner in violation of the restrictive covenants. After an agreed judgment was entered, the association began to make assessments based on the number of lots owned. At that time, homeowners who had houses built on multiple lots brought suit claiming the homeowner's corporation was illegally employed, had no authority to accept management or control over the common areas, had no authority to levy assessments and that the homeowners had no actual notice of the restrictive covenants.[145] The appellate court determined that the homeowner's corporation was formed appropriately because the developer declared in the covenants that it would transfer management and ownership of the subdivision's common areas to a homeowner's association. The covenants, through use of the word "may," gave the developer discretion in choosing when and how he would turn control of the subdivision over to a homeowner's association.[146] Thus, the homeowner's association formed by the developer, was consistent with the restrictive covenants regarding subdivision

140. *Id.* § 204.007(a).
141. *Id.* § 204.008.
142. 895 S.W.2d 779 (Tex. App.—Corpus Christi 1995, writ denied).
143. *Id.* at 782.
144. *Id.*
145. *Id.*
146. *Id.* at 783-84.

management.[147]

The court next found that the association had authority to accept management and ownership of the common areas, since the record did not reflect that the appellant homeowners voted against the formation of the homeowner's association. Additionally, no homeowner challenged the formation of the homeowner's association until two years after it accepted management and ownership of the property.[148] The failure to object provided some evidence of acquiescence and ratification of the association's management over the property.[149]

The court found that the bank gave up its right to levy assessments or its authority to assess against the subdivision. While the bank maintained ownership of the property, it was the actual "declarant" which transferred its rights to the incorporated association to make assessments. It was not bound by the prior developers' acts and, in fact, was the instigator for the formation of a homeowner's association. Thus, the court held that the bank's action in transferring management and ownership of the property to the association granted authority to make assessments on each lot in the subdivision.[150]

Finally, the homeowners argued that although there was a set of restrictive covenants in place, numerous violations of those restrictions occurred within the subdivision, indicating a waiver of the restrictive covenants. Such violations included the construction of brick homes in areas restricted to mobile or modular homes, mobiles homes located in recreational vehicle areas, waivers of assessments, the failure to properly use an architectural control committee, and the construction of buildings across lot lines.[151] The court agreed that there had been violations of the restrictive covenants, however, the court could equitably overlook any waiver or abandonment of subdivision plans if there was a benefit to the original plan that could still be realized. Thus, the court was forced to weigh the equities in favor of maintaining the plan against the equities in favor of waiver.[152] The court found evidence that the developer had used the restrictions in his promotional literature to attract purchasers. There was evidence that some purchasers bought their property in reliance on the restrictive covenants. There was evidence that the general scheme and plan of the subdivision had been followed. Finally, there was evidence that after incorporation, the homeowner's association regularly met and made assessments; the association also frequently made repairs to the subdivision. Thus, the court agreed with the trial court's finding that any acts in violation of the restrictive covenants did not waive those covenants or restrictions.[153]

147. *Simms*, 895 S.W.2d at 784.
148. *Id.*
149. *Id.* at 784-85.
150. *Id.* at 785.
151. *Id.*
152. 895 S.W.2d at 786.
153. *Id.* at 787-88.

In *Ashcreek Homeowner's Ass'n v. Smith*,[154] a homeowner's association sought damages and attorney's fees for violations of deed restrictions where a homeowner's basketball goal lacked a backboard and his fence had a broken slat. The trial court granted a motion for summary judgment in favor of the homeowner. The subdivision argued that the trial court abused its discretion by refusing to liberally construe restrictive covenants to find that the unrepaired fence and basketball goal were nuisances. In 1987, the Supreme Court of Texas in *Wilmoth v. Wilcox*[155] declared that restrictive covenants are to be strictly construed against the party seeking to enforce them. The subdivision argued that Property Code section 202.003(a), which requires that restrictive covenants be liberally construed to give affect to their purpose and intent, reversed *Wilmoth*. The *Ashcreek* court disagreed, holding that there is no conflict between liberally construing a covenant to give effect to its purpose and strictly construing the covenant against the party seeking to enforce it.[156] The subdivision sought to have the court declare that its notice of violation, while not specifically mentioning a broken fence slat and faulty basketball goal, still gave fair notice under nuisance provisions; with liberal construction of the nuisance and notice requirements, proper notice would have been given. The court disagreed, claiming strict construction of the notice requirements is necessary, and thus the trial court had not abused its discretion by ruling in favor of the homeowner.[157]

VII. ZONING

A. NEW LEGISLATION

In the wake of NAFTA, the Texas legislature has addressed the problems of undeveloped subdivisions along the U.S.-Mexico border. The legislature found that conditions along the border have "resulted in a proliferation of substandard housing developments in which the lack of basic infrastructure has caused a serious and unacceptable health and safety risk."[158] To provide counties with the ability to cancel high-risk, low-development subdivisions, provisions were created for the cancellation of subdivisions where land remains undeveloped over time.[159] These provisions deal with real property, located outside municipalities, defined as an "affected county" under the Water Code,[160] and along an international border.[161] Commissioner's courts are allowed to cancel, after notice and hearing, a subdivision platted before September 1, 1989, if development of improvements in the subdivision were not started before

154. 902 S.W.2d 586 (Tex. App.—Houston [1st Dist.] 1995, no writ).
155. 734 S.W.2d 656, 657 (Tex. 1987).
156. *Ashcreek*, 902 S.W.2d at 589.
157. 902 S.W.2d at 589-90.
158. Act of May 16, 1995, 74th Leg., R.S., ch. 277, § 2, 1995 Tex. Gen. Laws 2617, 2618 (amending TEX. LOC GOV'T CODE ANN. § 232.0085).
159. TEX. LOC. GOV'T CODE ANN. § 232.0085 (Vernon Supp. 1996).
160. TEX. WATER CODE ANN. § 16.341 (Vernon 1995).
161. TEX. LOC. GOV'T CODE ANN. § 232.0085(a) (Vernon Supp. 1996).

June 5, 1995, and the commissioner's court finds by resolution that the land is likely to be developed as a colonia.[162] At the hearing, the court may not rescind or cancel a subdivision if the cancellation interferes with the rights of a person who is a nondeveloper owner, unless the person agrees to the cancellation, or the owner of the entire subdivision can show that the owner is able to comply with the minimum standards established in the Water Code[163] where the land was developed or improved between September 1, 1989 and June 5, 1995.[164]

B. DEDICATION

The *City of Stafford v. Gullo*[165] involved two developers who owned six acres of land in Stafford, Texas. They sold 4.6 acres of that land to Wal-Mart Stores, Inc., but they neglected to have a subdivision approved by the City. Stafford ordinances forbid subdivision of land unless a plat has been approved by the City Planning Commission, and the Commission may not issue permits to improve lands without a plat.[166] The developers conceded that their sale of land to Wal-Mart was a subdivision and submitted plats to the City. The City then conditioned its approval of the subdivision upon the developers' dedication of a right-of-way to the City and their payment for the costs of widening streets adjacent to the development. Rather than dedicating the right-of-way or providing a bond for construction costs, the developers brought suit and sought a summary judgment contending that Stafford ordinances did not authorize the City to condition platting upon the dedication of a right-of-way or the developers' payment of construction costs.[167]

Although cities may regulate the platting and subdivision of land, the municipality may only require dedication of land if it is authorized by constitutional, statutory or charter authority.[168] The court held that section 17-144 of the Stafford Ordinances was inapplicable because the City was not authorized to require the provision of a right-of-way greater than one hundred feet when there was already a right-of-way in existence in an adjacent thoroughfare.[169] The court also held that a general ordinance

162. *Id.* § 232.0085(b). The term "colonia" is undefined in the Act.
163. TEX. WATER CODE ANN. § 16.343 (Vernon Supp. 1996).
164. TEX. LOC. GOV'T CODE ANN. § 232.0085(d) (Vernon Supp. 1996).
165. 886 S.W.2d 524 (Tex. App.—Houston [1st Dist.] 1994, no writ).
166. *Id.* at 524.
167. *Id.*
168. *Id.*
169. Section 17-144(b) states:

> the minimum width of the right-of-way to be dedicated for any designated major thoroughfare shall not be less then 100 feet. In those instances where the proposed subdivision is located adjacent to an existing major thoroughfare having a right-of-way less than 100 feet, sufficient additional right-of-way must be dedicated to accommodate the development of the major thoroughfare in question on the basis of a total right-of-way width of 100 feet. Where the construction of concrete pavement with curbs, gutters and storm sewers as determined by the planning commission and the council to be not feasible and open-ditch drainage is therefore required, the minimum right-of-way width required for the development of a designated major thoroughfare

with allowed the City to require developers to pay for improvements which were necessary to provide adequate streets to the subdivision was limited by section 17-144(b), which limited the amount of right-of-way that could be required when a proposed subdivision is adjacent to an existing major thoroughfare, as was the case for the developers.[170] Thus, the court concluded that the City's own ordinances did not allow them to condition platting upon dedication of an additional right-of-way or the payment for construction costs; in fact, the City's ordinances prevented such a conditioning.

Bowen v. Ingram[171] involved an alleyway easement within and adjacent to a subdivision and whether that alleyway was limited to utility purposes or could be used as a public street. In 1972, the subdivision developer executed a "Dedication of Alleyway and Easement" which dedicated a utility easement. The easement was dedicated for the use, enjoyment and benefit of landowners in the subdivision adjacent to the strip of land, as well as the use, benefit and enjoyment of the public generally. It was also for the use and benefit of any public utility, municipality or other person or firm furnishing gas, water, electricity or other utilities. When the developer later conveyed the subdivision to its residents, the conveyance excepted the alleyway and easement dedicated in 1972.

The landowners in the subdivision argued that the dedication instrument was a mere offer of dedication, which was not accepted by the county before the landowners perfected title by limitation. Relying on *Biscardi v. Pagestka*,[172] the court held that express acceptance of dedication is unnecessary; instead, implied acceptance is sufficient.[173] Additionally, the court noted that the dedication instrument referred to the use of the public generally prior to a conjunctive reference to a utility usage. Finally, the instrument noted that utility installations could not be constructed to interfere with the free passage of public vehicles across the easement. The court rejected the appellants contention that their construction of a fence across the easement gave them title by limitations, noting that Article 5517 of the Texas Revised Civil Statutes Annotated specifically includes alleys as public areas which cannot be lost by adverse possession.[174]

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shall be more than 100 feet and of sufficient width to accommodate the approved roadway pavement and attendant drainage facilities.

STAFFORD, TEX., CODE OF ORDINANCES, ch. 17, art. VC, § 17-144(b).

170. *Id.*

171. 896 S.W.2d 331 (Tex. App.—Amarillo 1995, no writ).

172. 576 S.W.2d 16 (Tex. 1978).

173. 896 S.W.2d at 334 (citing *Biscardi*, 576 S.W.2d at 19).

174. *Id.* at 335.

VIII. EMINENT DOMAIN

A. NEW LEGISLATION

In condemnation proceedings, the condemning authority often relies upon appraisal reports in determining what amount to offer a landowner. Now the governmental entity seeking to acquire real property for a public use must disclose to the landowner, when an offer to purchase is made, any and all existing appraisal reports "produced or acquired by the governmental entity relating specifically to the owner's property and used in determining the final valuation offer."[175] Likewise, within ten days of receiving the government's appraisal reports (but no later than ten days prior to the special commissioner's hearing) the property owner must disclose to the acquiring entity any and all existing reports produced or acquired by the landowner relating to that owner's property used in determining the owner's valuation.[176] These provisions do not apply to acquisitions for which a governmental entity does not have eminent domain authority.[177] Additionally, the statute does not require the disclosure of an appraisal report not in existence when an offer to purchase was made, appraisal reports not used in determining a final valuation offer, or reports not specifically related to the property sought to be acquired. Furthermore, the amendment is not retroactive to offers to purchase made before August 28, 1995.[178] In 1995 the Texas legislature also amended the government code by adding the Private Real Property Rights Preservation Act.[179] The Act applies to the taking of real property through the adoption or issuance of an ordinance, rule, regulatory requirement, resolution, policy, guideline, acts that impose a physical invasion or require a dedication or exaction of private real property, acts of municipal annexation which are not uniform throughout the annexing municipality.[180] Where the Act applies, governmental immunity is waived, and the government extends permission to sue to real property owners, although the Act does not authorize persons to execute judgments against property of the state or a governmental entity.[181] To determine whether there has been a taking of private property, a property owner may bring suit under the Act against a governmental entity in district court in the county in which the property is located[182] or bring administrative proceeding against a state agency.[183] The question of a governmental taking is a question of fact, and the property owner is only

175. TEX. PROP. CODE ANN. § 21.0111(a) (Vernon Supp. 1996).
176. *Id.* § 21.0111(b).
177. *Id.*
178. Act of May 26, 1995, 74th Leg., R.S., ch 566, § 1, 1995 Tex. Gen. Laws 3362, 3363.
179. TEX. GOV'T CODE ANN. §§ 2007.001-.045, 2002.011 (Vernon Supp. 1996); TEX. TAX CODE ANN. § 23.11 (Vernon Supp. 1996).
180. *Id.* § 2007.003(a).
181. *Id.* § 2007.004.
182. *Id.* § 2007.021(a).
183. *Id.*

entitled to invalidation of the governmental action or taking.[184] Once a final decision or order is entered based upon a fact finding, the governmental entity may elect to pay damages to the property owner rather than invalidate its taking, in which case governmental immunity to liability is waived.[185]

B. Case Law

In *Aquila Southwest Pipeline Corp. v. Gupton*[186] the court addressed the sufficiency of a property description in a condemnation petition. The sufficiency of the description is a jurisdictional issue.[187] A description is sufficient if it is such that "a surveyor, or other person skilled in such matters, could take such description and definitely locate the same on the ground."[188] Essentially, the description must be sufficient to be recorded in a deed.[189] In *Aquila* there were two separate property descriptions: one for a temporary construction easement and one for a permanent construction easement. The court found that the temporary construction easement description was vaguely pleaded; however, vague pleading of the temporary easement did not affect the sufficiency of pleading for the permanent easement. The description of the permanent construction easement was sufficient, and thus "the vagueness of the description of the *temporary* easement did not deprive the trial court of jurisdiction over the whole case."[190]

In another case, *State v. Schmidt*,[191] the court addressed the question of whether the state was required to pay costs of court when a property owner whose property had been condemned prevailed at trial. The property owners had rejected the State's original offer to purchase the property, and in fact, the administrative tribunal found the owners' damages to be more than twice the State's offer.[192] At trial, the owners were awarded slightly less than the tribunal's offer but considerably more than the State had offered. The trial court adjudged all costs of the proceedings against the State.[193] The State argued that the Property Code was

184. Tex. Gov't Code Ann. § 2007.023 (Vernon Supp. 1996).
185. *Id.* § 2007.024(c).
186. 886 S.W.2d 497 (Tex. App.—Houston [1st Dist.] 1994, no writ).
187. *Id.* at 501.
188. *Id.* (citing City of Dallas v. Megginson, 222 S.W.2d 349, 351 (Tex. Civ. App.—Dallas 1949, writ ref'd n.r.e.)).
189. *Id.* at 501-02.
190. *Id.* at 502 (emphasis in original). Additionally, the court held that the temporary construction easement was sufficiently described to gave the property owners notice of the general location of the temporary easement and provided them an opportunity to decide exactly what area the temporary easement would cover, and thus it was sufficient. *Id.*
191. 894 S.W.2d 543 (Tex. App.—Austin 1995, no writ).
192. *Id.* at 544.
193. *Id.* Tex. Prop. Code Ann. § 21.047(a) (Vernon 1994) provides as follows:
> Special commissioners may adjudge the costs of an eminent domain proceeding against any party. If the commissioners award greater damages than the condemnor offered to pay before the proceedings began or if the decision of the commissioners is appealed and a court awards greater damages than the commissioners awarded, the condemnor shall pay all costs. If the commis-

ambiguous, unless the trial court could divide costs between the parties, assessing a portion to the State and the remainder to the property owners. The court disagreed stating that the obvious purpose of section 21.047(a) is to encourage the State to offer the true value of the land and discourage the property owner from making extravagant demands.[194] As a result, the court held that the statute requires a comparison of the amount recovered to the amount offered before condemnation proceedings begin.[195] Thus, if the owner recovers more than the condemnor offered, the condemnor is required to pay all costs, and no apportioning is necessary or even allowed.[196]

In *State v. Carlton*[197] a condemnee objected to a special commissioner's award regarding the valuation of his property. Shortly before trial, the condemnee then attempted to file a non-suit and motion asking the trial court to render judgment and award him the value of his property as established by the special commission, which the trial court did. The appellate court held that with the filing of objections and service of citation on the adverse party, here the state, the administrative proceeding was ended and there could be no reinstatement of the commissioner's award. Despite the condemnee's attempts to non-suit his case, there was no absolute right to reinstate the relief awarded by the special commissioner.[198] Additionally, the appellate court noted that by requesting that the trial court render judgment on the commissioners' award, the condemnee was seeking affirmative relief; this was inconsistent with styling his motion to dismiss and render judgment as a non-suit. A similar result was reached one week later in *State v. Martini*.[199]

IX. MECHANIC'S LIENS

In *Crest Construction, Inc. v. Murray*[200] Jim Murray acted as a concrete subcontractor under Crest on three different projects. Due to serious health problems, Mr. Murray walked off the three jobs. Mr. Murray subsequently accepted an unsecured note from Crest in settlement of all claims on one of the projects and in return executed a lien waiver. "Thereafter, Mr. Murray passed away—a very regrettable calamity."[201] In spite of the waiver, his widow filed a lien affidavit on the project which prevented Crest from being paid by the general contractor. Crest sued Mrs. Murray for tortious interference with Crest's contract with the gen-

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sioners' or the court's determination of the damages is less than or equal to the amount the condemnor offered before proceedings began, the property owner shall pay the costs.

194. 894 S.W.2d at 545.
195. *Id.*
196. *Id.*
197. 901 S.W.2d 736 (Tex. App.—Austin 1995, no writ).
198. *Id.* at 738.
199. 902 S.W.2d 138, 141-43 (Tex. App.—Houston [1st Dist.] 1995, no writ).
200. 888 S.W.2d 931 (Tex. App.—Beaumont 1994), *rev'd per curiam*, 900 S.W.2d 342 (Tex. 1995).
201. 888 S.W.2d at 951.

eral contractor. Mrs. Murray counterclaimed on a quantum meruit theory. The jury found in favor of Mrs. Murray on all of her claims. In a lengthy opinion by Justice Brookshire, the Beaumont Court of Appeals reversed the jury verdict, holding that (1) a written waiver and release of a mechanic's lien, if supported by consideration (which can include a promise from the party benefiting from the release) is absolute and irrevocable, and (2) the term "contract" should not be whispered, spoken or written in a case that involves a claim of quantum meruit or that theory will be "eviscerated and disemboweled."[202] The supreme court, in a very brief opinion, stated that Crest repudiated the settlement agreement when it indicated that it would not perform on the promissory note when its performance became due. "Once Crest repudiated the Beaumont settlement agreement, Murray was under no obligation to honor the waiver of lien. When a claim is released for a promised consideration that is not given, the claimant may treat the release as rescinded and recover on the claim."[203] Because Murray had the legal right to file a mechanic's lien on the project, Crest could not, as a matter of law, prevail on its tortious interference claim.[204] The supreme court went on to state that generally a party may not recover under quantum meruit when there is an express contract. Construction contracts, however, are an exception to this rule.[205] Even though Murray breached the express contract, he could bring an action in quantum meruit to recover the amount of benefits conferred to Crest by Murray's partial performance.[206] The judgment of the court of appeals was reversed and rendered in favor of Mrs. Murray.

Lively v. Carpet Services, Inc.[207] presents a case of first impression regarding the exclusivity of the remedies provisions of the Texas Construction Trust Fund Act[208] (the "Act"). CSI was the carpet subcontractor on several projects for which Lively's corporation, Wayward, was the general contractor. CSI was not paid and Wayward filed for protection under Chapter 7 of the United States Bankruptcy Code. CSI did not perfect a mechanic's lien on the projects or file a claim in the bankruptcy proceeding, but instead, sued Lively under the Act. Lively appealed after the trial court granted a summary judgment in favor of CSI. Lively first argued on appeal that the penalty provision of the Act is the exclusive remedy for violations under the statute. The court of appeals overruled that point and held that civil liability exists if (1) the duty imposed by the Act has been breached, and (2) the plaintiff is within the class of people the Act was designed to protect and has asserted the type of injury the Act was intended to prohibit.[209] The court reasoned that "[t]he mere fact that

202. *Id.* at 938.
203. 900 S.W.2d at 344.
204. *Id.* at 345.
205. *Id.*
206. *Id.*
207. 904 S.W.2d. 868 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
208. TEX. PROP. CODE ANN. §§ 162.001-.003 (Vernon 1995).
209. 904 S.W.2d at 873.

a statute provides for criminal punishment or for the payment of money as a penalty to one aggrieved, does not by itself prevent the imposition of liability."[210] Although the Act does not expressly provide for a private right of action, it does not specifically exclude civil liability. Lively next argued that he should not be held individually liable. The court held that the sole owner and officer of a corporation, such as Lively, can be individually liable. "The Act defines 'trustee' as a 'contractor, subcontractor, or *owner or an officer, director, or agent* of a contractor, subcontractor, or owner, who receives trust funds or who has control or direction of trust funds.'"[211] Lively's third point was that the claim violated the automatic stay provisions of the bankruptcy code. Because a third party can enforce the fiduciary duty created by the Act directly against the individual officer of the bankrupt corporation, the automatic stay provisions of the bankruptcy code are inapplicable.[212] The court went on to overrule Lively's next point by holding that intent to defraud is not an element of a civil cause of action under the Act. Unfortunately for CSI, the summary judgment affidavit of Lively stated that the funds were used to pay actual expenses directly related to the construction and office overhead associated with the construction projects. The court found that the Act does not prohibit the use of construction trust funds for overhead and other directly related expenses. Because Lively's sworn affidavit created a fact issue as to what Lively did with the funds, the court reversed and remanded the case. It is interesting to note that Justice O'Connor dissented on the last point of error stating that Lively's sworn affidavit contained only conclusions and not facts.[213] The court ruled that Lively's affidavit did not create a fact issue.

The requirements pertaining to involuntary liens for architects, engineers or surveyors were revised in the last legislative session. The amendment deleted the requirements that (1) a written contract be recorded with the County Clerk where the land is situated; and (2) the work product must be used in the actual construction of the project.[214] Only a written contract is required. Lien inception is the date of recording of a lien affidavit and lien priority is determined by date of recording. The lien is not valid or enforceable against a grantee or purchaser who acquires an interest in the real property before the time of the inception of the lien.[215]

210. *Id.*
211. *Id.* (citing TEX. PROP. CODE ANN. § 162.002 (Vernon 1995) (emphasis added by court)).
212. *Id.*
213. *Id.* at 876-77 (O'Connor, J., dissenting).
214. TEX. PROP. CODE ANN. § 53.021(c) (Vernon Supp. 1996).
215. *Id.* § 53.124(e).

X. LANDLORD/TENANT

A. NEW LEGISLATION

In 1995 the legislature sought to protect tenants from the disconnection of utility services. The Property Code was amended to prevent the landlord's interruption of water, wastewater, gas or electric service furnished to a tenant by the landlord, unless done as the result of bona fide repairs, construction or emergency.[216] If electrical service is individually metered or submetered for the tenant's unit, is in the landlord's name, and the landlord complies with Public Utility Commission of Texas Rules for Discontinuance of Submetered Electrical Service, the landlord may discontinue electrical service to the tenant.[217] Where the electrical service is not individually metered for the tenant, the landlord may interrupt service if the connection is in the landlord's name, the tenant is at least seven days late in rental payments, and the landlord mailed or hand-delivered to the tenant a written notice.[218] The written notice must state the first date of interruption, the amount to be paid to prevent interruption and the name and location of the entity to whom payment is to be made, on or before five days before the date the service is to be interrupted, if the interruption does not begin before or after the landlord's normal business hours or a day immediately preceding a day when the landlord is unavailable to accept rent and restore service.[219] Once the tenant tenders rental payments, the landlord must restore electrical service within two hours.[220] The landlord's violation of this section will result in the tenant's recovery of possession of the premises or the option to terminate the lease, and recovery from the landlord of an amount equal to the tenant's actual damages, one month's rent or $500, whichever is greater, reasonable attorney's fees and court costs, less any delinquent rents.[221]

Two other statutes have been enacted, one of which is designed to ensure tenant safety. During the Survey period, the legislature amended the Smoke Detection Provision of the Property Code which require landlords to place and maintain in good working order proper smoke detecting equipment.[222] Additionally, the legislature has amended the Property Code concerning a landlord's ability to lock out tenants in residential leases.[223] In the lock out situation, landlord must place a written notice on the tenant's door stating an on-site location where the tenant may recover a key twenty-four hours a day, state that the landlord must provide a new key to the tenant whether delinquent rent is paid or not, and the amount of rent and other charges for which the tenant is delin-

216. TEX. PROP. CODE ANN. § 92.008(b) (Vernon Supp. 1996).
217. *Id.* § 92.008(c).
218. *Id.* § 92.008(d).
219. *Id.*
220. *Id.* § 92.008(e).
221. *Id.* § 92.008(f).
222. *See generally* TEX. PROP. CODE ANN. §§ 92.258-.2611 (Vernon Supp. 1996).
223. *Id.* § 92.0081.

quent.[224] In essence, lock out is no longer a viable remedy for landlords, since the tenant may not actually be locked out for failure to pay rent, and lock out is only a threat which the tenant may remedy by requesting a key.

B. Implied Warranty of Suitability

In *Davidow v. Inwood North Professional Group*,[225] the Supreme Court of Texas recognized the existence of an implied warranty of suitability by commercial landlords.[226] The court held that a tenant's obligation to pay rent is mutually dependent upon the landlord's implied warranty of suitability of the commercial premises.[227] In *Neuro-Developmental Associates v. Corporate Pines Realty Corp.*,[228] the court of appeals addressed the question of whether a tenant must establish damages from a landlord's breach of the implied warranty of suitability for the tenant to have a defense for failure to pay rent. In *Neuro-Developmental Associates*, the tenant was delinquent in rents in the amount of approximately $13,700. The landlord sued for the outstanding rentals, and the tenant counterclaimed and established the defense that the commercial premises were not suitable for their commercial purposes, which was a breach of the implied warranty of suitability.[229] The trial court submitted a question regarding breach of the implied warranty of suitability for commercial purposes which combined the concept of breach and producing cause. The tenant argued that since breach of the implied warranty alone was enough to justify the withholding of rent, it was not required to show any damages or causation of damages resulting from the breach of the implied warranty of suitability. The appellate court agreed, holding that because *Davidow* recognized that the obligation to pay rent and the implied warranty are mutually dependent, "[i]t is illogical that the tenant would bear the additional burden of proving damages to avoid liability."[230] Thus, it is held that a tenant need only prove a breach of the implied warranty of suitability, rather than breach and damages therefrom, to establish a defense to failure to pay rent.

Compare the pre-emption in *Gilstrap v. Parklane Townhome Ass'n*.[231] In *Gilstrap* a one-year-old child died in a condominium fire. The condominium was leased to his mother and the defendant townhome association was not the owner, lessor nor sublessor of the unit. Plaintiff brought causes of action alleging negligence, gross negligence, breach of implied warranty of habitability, and violations of the DTPA for failing to install a

224. *Id.* § 92.0081(c).
225. 747 S.W.2d 373 (Tex. 1988).
226. *Id.* at 377.
227. *Id.*
228. 908 S.W.2d 26 (Tex. App.—Houston [1st Dist.] 1995, writ denied).
229. *Id.* at 27.
230. *Id.* at 28.
231. 885 S.W.2d 589 (Tex. App.—Amarillo 1994, no writ).

smoke detector in the condominium.[232] The townhome association claimed that these causes of action were pre-empted by the Texas Property Code, which states "[t]he duties of a landlord and the remedies of a tenant under this subchapter are in lieu of common law, other statutory law and local ordinance regarding a residential landlord's duty to install, inspect or repair a smoke detector in a dwelling unit."[233] In response, plaintiff maintained that the child was not a tenant, since he did not reside in the townhome, and the association was not a landlord, but rather a homeowner's or condominium owner's association, and thus the pre-emptive language did not apply. The association argued that the legislature clearly intended to pre-empt smoke detector claims against associations which do not own, occupy, control or make repairs to condominiums, since those same claims are pre-empted against landlords who do have control over the condominiums. The court disagreed holding that since the Property Code chapter in question "applies only to the relationship between landlords and tenants of residential property,"[234] the townhouse association failed to prove that it was entitled to pre-emption under the Texas Property Code provision barring common law claims by tenants against landlords.[235] Thus, the court ruled that the trial court erred in granting summary judgment for the townhouse association based upon the pre-emptive language of the Texas Property Code.

C. Premises Liability

Stein v. Gill[236] is a premises liability case in which a duplex owner leased the downstairs level of the duplex to a tenant, and that tenant slipped on two stairs leading from a sliding glass door in her apartment to a deck behind her apartment which resulted in a broken leg. She sued the owner for failure to maintain the steps, failure to provide hand rails and failure to provide a non-slip surface. The owner moved for summary judgment claiming that the steps were not a common area but were for the tenant's exclusive use; consequently, he owed no duty to the tenant.[237] The court noted that generally a landlord retaining control over premises owes a duty to exercise ordinary care; although when the landlord transfers possession and control of the premises to the tenant, he owes no further duties to the tenant.[238] The court held that since the steps were only a means of access to the tenant's apartment and deck, they did not constitute a common area; they were part of the leased property over which the tenant had exclusive control and possession. Consequently, the landlord owed no duty to the tenant, unless he failed to

232. *Id.* at 590.
233. Tex. Prop. Code Ann. § 92.252(a) (Vernon 1984 & Supp. 1996).
234. *Id.* § 92.002.
235. 885 S.W.2d at 591.
236. 895 S.W.2d 501 (Tex. App.—Ft. Worth 1995, writ denied).
237. *Id.* at 501.
238. *Id.* at 502.

disclose a hidden defect with the allegedly defective steps.[239] Thus, the court indicates factual limits to removing liability from landlords in instances of leased residential premises over which the tenants have exclusive control and possession.

Moreno v. Brittany Square Associates[240] involved a plaintiff who fell on stairs inside her apartment. She filed suit against the apartment and management company for negligence and failure to provide rails on the stairway. The apartment complex and management company moved for summary judgment based upon plaintiff's failure to comply with the notice provisions of Chapter 92 of the Texas Property Code.[241] While the plaintiff conceded she did not provide the appellees written notice of the alleged property defect, she claims this was unnecessary because the Property Code notice requirements are inapplicable to personal injury claims based upon common law negligence. The court held that section 92.061 was not meant to limit or preclude causes of action for personal injury related to dangerous conditions on a leased property. In fact, a plaintiff could never give notice of a hidden defect because the plaintiff would be unaware of such a hidden defect. Thus, the Property Code does not prohibit personal injury claims for failure to give notice.[242]

In *Centeq Realty, Inc. v. Siegler*[243] the plaintiff in the trial court had been attacked and kidnapped from the parking garage of her highrise condominiums. She later filed suit against the highrise's marketing unit, Centeq, as well as the homeowners' association maintaining that they were negligent in failing to provide adequate security at the condominiums. She alleged that Centeq, the marketing agent, owned, controlled and/or managed the premises and was an agent for owner in the daily operation of the premises.[244] The court noted that in a landlord/tenant relationship, the landlord who retains control over the safety and security of the premises owes a duty to a tenant's employee to use ordinary care to protect that employee against foreseeable and unreasonable risks of harm from criminals acts of third parties.[245] The court noted that a homeowners' association is a separate legal entity from the unit owners, thus the court declined to apply something akin to an alter ego theory and hold that the homeowners' association was a mere "conduit" through which Centeq exercised power over security decisions. While Centeq did have power to elect the majority of the board of the homeowners' association, the court found that control was independent from any control over security. Centeq had no power to make security decisions and thus had no specific control over the security of the premises.[246]

239. *Id.* at 503.
240. 899 S.W.2d 261 (Tex. App.—Houston [14th Dist.] 1995, writ denied).
241. *Id.* at 261.
242. *Id.* at 263.
243. 899 S.W.2d 195 (Tex. 1995).
244. *Id.* at 196.
245. *Id.* at 197.
246. *Id.* at 198-99.

D. Forcible Entry and Detainer

Kennedy v. Highland Hills Apartments[247] involved a situation in which an apartment complex was trying to evict an indigent tenant. The tenant paid $31.00 per month in rent because she received federal assistance. In the initial trial, the county court entered a default judgment in favor of the complex because the appellant failed to appear. On April 11, she filed a motion for a new trial which was granted, and the case was reset. On that same date, she deposited a $31.00 check for her April rent, although the rent was due on April 1. At trial, the apartment complex filed a notice of default alleging that Texas Rule of Civil Procedure 749b(2) required the writ deposit be made within five days of the due date, or on or before April 6. The court determined that appellant failed to comply with Rule 749b and entered a default judgment. The tenant filed a pauper's affidavit to perfect her appeal.

The tenant maintained that the funds required by Rule 749b are supersedeas in nature and relate only to the issue of possession of the premises; Rule 749b does not authorize default judgments.[248] The court noted that forcible entry and detainer proceedings are intended to be summary, speedy and inexpensive.[249] Where the basis for default is the nonpayment of rent, a tenant who appeals by filing a pauper's affidavit under Texas Rule of Civil Procedure 749a is entitled to remain in possession of the premises during the appeal if the tenant properly follows Rule 749b. That Rule requires that the tenant pay into the court registry one month's rent within five days of filing a pauper's affidavit and continue to pay rent as it becomes due into the court registry within five days of the due date. Where the tenant fails to make timely payments into the court registry, the landlord may file a notice of default in the county court, and that court shall issue a writ of restitution. Since the purpose of Rule 749b is to prevent an indigent appellant from maintaining possession of the premises during the appeal, Rule 749b(3) allows that failure to make payments into the registry of the court prevents the tenant's entitlement to maintain possession of the premises during the appeal. That Rule does not, however, expressly authorize the county court to enter default judgments. Additionally, Rule 753 only allows the entry of default judgments against a defendant in forcible detainer actions when no answer has been made in the justice or county court. Since the indigent appellant filed a written answer, the court could not enter a default judgment and was limited to entering only a writ of restitution dispossessing the tenant during the pendency of the appeal.[250]

In *ICM Mortgage Corp. v. Jacob*,[251] Jacob entered into a lease with property owners, whose property was later purchased at a foreclosure

247. 905 S.W.2d 325 (Tex. App.—Dallas 1995, no writ).
248. *Id.* at 326.
249. *Id.*
250. *Id.* at 328.
251. 902 S.W.2d 527 (Tex. App.—El Paso 1994, writ denied).

sale by ICM Mortgage. Upon learning of the foreclosure, Jacob expressed to ICM her desire to continue living in the premises or purchase the property. ICM brought a forcible entry and detainer action against the prior owners and told Jacob that they could not sell her the property or discuss renting the property to her until after that action was completed. Eventually, a writ of possession was provided to ICM by the justice court, and a few days later, without notice to Jacob, the locks on her doors were changed and her possessions were moved out of the house. Thereafter, she was allowed to make an offer to purchase the home.[252] Jacob brought suit against ICM alleging negligence and gross negligence in obtaining and executing a forcible entry detainer judgment against her leased residence.

Following a jury award of $104,000 in favor of Jacob, the appellate court stated that Jacob was a tenant-at-sufferance, rather than a tenant-at-will.[253] As a tenant-at-sufferance, Jacob was merely an occupant in "naked possession" of the property.[254] When a tenant's landlord/mortgagor is foreclosed upon by the mortgagee, a tenant's lease is generally terminated.[255] The court found that the tenant was not a necessary party to a foreclosure action, and that the foreclosure terminated the landlord/tenant relationship between ICM and Jacob. Upon the termination of the landlord/tenant relationship, no further duty was owed to Jacob which would support a finding of negligence.[256] Thus, the court reversed the trial court's verdict in favor of Jacob.

XI. CONSUMER PROTECTION AND DTPA

Prudential Insurance Co. of America v. Jefferson Associates[257] involved an individual who purchased a four-story office building in Austin. After the purchase, the purchaser discovered that the building contained asbestos fireproofing, and he filed suit against the seller. The purchaser, Goldman, maintained that Prudential misrepresented the condition of the building and failed to disclose that it contained asbestos, which impaired its value.[258] The court began by analyzing the DTPA's causation requirements, considering Goldman's purchase of the building "as is." The DTPA requires only that producing cause be shown.[259] This requires a showing of actual causation in fact,[260] which involves showing the act or omission was a substantial factor in bringing about an injury which would not otherwise have occurred. The court held that by purchasing the building "as is," the purchaser agrees to "make his own appraisal of the

252. *Id.* at 528-30.
253. *Id.* at 530.
254. *Id.*
255. *Id.*
256. 902 S.W.2d at 530.
257. 896 S.W.2d 156 (Tex. 1995).
258. *Id.* at 159.
259. TEX. BUS. & COM. CODE ANN. § 17.50(a) (Vernon 1987); 896 S.W.2d at 161.
260. 896 S.W.2d at 161.

bargain and to accept the risk that he may be wrong."[261] Thus, the "as is" agreement negated all necessary causation showings under the DTPA, since the purchaser's injury is caused by the purchaser's admission, by the purchaser himself.[262] The court was careful to hold that an "as is" agreement would not bar recovery under the DTPA if that "as is" agreement is induced by some fraudulent representation of concealment of information.[263] Additionally, the purchaser would not be bound by an "as is" agreement if he is impaired from inspecting the building by the sellers' conduct.[264]

The purchaser tried to avoid his "as is" agreement with three arguments. First, he argued that the seller knew that there was asbestos present in the building. The court held that there was evidence that the seller might have suspected the existence of asbestos, but no evidence indicated that the seller actually knew asbestos was present. Since the seller has no duty to disclose facts he does not know, nor is he liable for failing to disclose what he should have known, the seller had no liability under the DTPA for nondisclosure.[265] Additionally, the seller had no duty to investigate whether asbestos was present. The purchaser carried that duty.[266] Second, the purchaser argued that the seller withheld plans and specifications requested by the purchaser, which interfered with his investigation. The court held that this was immaterial, since the plans and specifications would not indicate whether any asbestos bearing products were used in the construction of the building.[267] Finally, the purchaser said that the building's maintenance supervisor represented that the building was "superb," "superfine" and "one of the finest little properties in the City of Austin," which constituted a fraudulent misrepresentation.[268] The court held that such statements were mere puffing, not misrepresentations.[269]

One additional issue remained. The court held that an "as is" purchase is not a waiver by a consumer of DTPA provisions, since such a waiver is against public policy.[270] It is simply a statement that no warranties were made, not that he would never sue for breach of any warranties. Three justices disagreed with this conclusion, holding that the "as is" provision was indeed a waiver of rights under the DTPA.[271]

In *Parkway Co. v. Woodruff*[272] a real estate development company sold a vacant lot in a master planned community, and several years later negli-

261. *Id.* (citing Midcontinent Aircraft Corp. v. Curry County Spraying Serv., Inc., 572 S.W.2d 308, 313 (Tex. 1978)).
262. 896 S.W.2d at 161.
263. *Id.* at 162.
264. *Id.*
265. *Id.*
266. *Id.*
267. 896 S.W.2d at 163.
268. *Id.*
269. *Id.*
270. *Id.*; *see* TEX. BUS. & COMM. CODE ANN. § 17.42 (Vernon 1987).
271. 896 S.W.2d at 165-67 (Cornyn, J. concurring).
272. 901 S.W.2d 434 (Tex. 1995).

gently caused a home built on that lot to be flooded. The homeowners argued that negligent construction of the house breached implied warranties from the developer that its future development services would be performed in a good and workmanlike manner and constituted an unconscionable act; those acts (breach of warranty and unconscionability) were argued to be DTPA violations.

The court began with the statement that to be actionable under the DTPA, implied warranties must be recognized by common law or created by statute.[273] The question became whether Texas recognized an implied warranty to perform future development services. In holding that no such implied warranty existed, the court noted that the consumers neither sought nor acquired the services about which they complained.[274] The court stated that the only transaction which could have created such an implied warranty was the sale of the undeveloped lot from the developer to the home builder. While that sale conveyed goods (land),[275] there was no implication that the developer would perform future services for the ultimate homeowner's benefit.[276] The court also found that no unconscionability existed, since no violative acts were found at the time of the sale of the property from the developer to the home builder.[277]

In *Kuehnhoefer v. Welch*[278] a landowner, who owned agricultural real estate, leased his ranch to a married couple. When the lease expired and the parties began to negotiate a renewal, a dispute arose, and the couple filed a DTPA cause of action.[279] On appeal the lessor maintained that the plaintiffs were not consumers under the DTPA. The DTPA mandates that the plaintiff or claimant be a consumer as a prerequisite to maintaining a cause of action, which requires that the plaintiff attempt to purchase goods or services which form the basis of the complaint.[280] The DTPA defines real property leased for use as "goods."[281] The court held that the lessees attempt to acquire the goods, in the form of land, was sufficient to give them standing as consumers under the DTPA.[282]

In *Smith v. Herco, Inc.*[283] Smith sought to purchase a townhouse from Herco. At closing, a survey was provided to Smith stating that the building plan was true and correct, and that there were no encroachments on the property.[284] Smith later tried to sell the townhouse, at which time it was discovered that the townhouse encroached over the building line into

273. *Id.* at 438.
274. *Id.* at 439.
275. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987).
276. 901 S.W.2d at 439. The fact that the community was a master planned community had no affect on any implied warranties, since such a phrase is a term of art. *Id.* at 440.
277. *Id.* at 434.
278. 893 S.W.2d 689 (Tex. App.—Texarkana 1995, writ denied).
279. *Id.* at 691.
280. *Id.* at 693 (citing Sherman Simon Enters., Inc. v. Lorac Serv. Corp., 724 S.W.2d 13 (Tex. 1987)).
281. TEX. BUS. & COM. CODE ANN. § 17.45(1) (Vernon 1987).
282. 893 S.W.2d at 693-94.
283. 900 S.W.2d 852 (Tex. App.—Corpus Christi 1995, writ denied).
284. *Id.* at 855.

a neighboring development's common area. Smith was unable to secure waivers by all property owners in the development, which prevented his selling the property, upon which he was eventually forced to stop making mortgage payments.[285] Smith then sued Herco and the surveyor for DTPA violations. The surveying company successfully asserted the two-year statute of limitations in the DTPA.[286] Smith had asserted that the ten-year statute of limitations applicable to surveyors controlled this action.[287] The court disagreed, holding that the statutory DTPA action was to be controlled exclusively by its own statutory limitations, not by a separate statute.[288] Consequently, only the developer remained in the litigation.

The essential question of Smith's claim against Herco was whether Herco made an affirmative misrepresentation regarding the townhouse's encroachments. Herco claimed that it had no knowledge that the townhouse encroached on the common areas. The court responded that Herco had made affirmative oral and written representations that it would "sell, deed and give title to Smith of all [the townhouse]."[289] That representation was false, and Herco had a duty to know if its representations were true. The court stated that when a representation is false, it is no defense of the representation to claim that Herco had some particular basis for the reason of its representations' falsity.[290] Thus, Smith could maintain an action under the DTPA for misrepresentations associated with the sale of the townhouse.

XII. TAX

A. CASE LAW

The first case for consideration is an "omitted property" case, and it stands for the proposition that property rendered for taxation is still "omitted property" when the Chief Appraiser fails to do his job. *Harris County Appraisal District v. Reynolds/Texas, J.V.*[291] related to the right of the County Appraisal Review Board ("ARB") to assess back tax liability for improvements to a taxpayer's land that an ARB determines to be "omitted property." In *Reynolds*, the taxpayer hired a tax agent/consultant to handle ad valorem property tax matters affecting the taxpayer's property. Each year the taxpayer's agent filed a rendition with the Harris County Appraisal District and each year the rendition reported the value of the taxpayer's land. The rendition also included a line item for improvements, but no amount was inserted for a value for the improvements. The Appraisal District considered the improvements to be

285. *Id.* at 856.
286. TEX. BUS. & COM. CODE ANN. § 17.565 (Vernon 1987).
287. TEX. CIV. PRAC. & REM. CODE ANN. § 16.011 (Vernon Supp. 1996).
288. 900 S.W.2d at 857.
289. *Id.* at 859.
290. *Id.*
291. 884 S.W.2d 526 (Tex. App.—El Paso 1994, writ denied).

"omitted property" within the meaning of section 25.21 of the Texas Property Tax Code.[292] At the trial court level, the taxpayer noted that section 22.01 of the Tax Code deals with rendition of property and it provides that with respect to real property (the land and improvements thereon) a person *may* render such property for taxation. However, a person is not required to render land or the improvements on it for taxation. Further, section 22.24 provides that a rendition or report form *shall permit but may not require* a property owner to state his opinion about the market value of his property. Further, the Property Tax Code provides that the burden is upon the chief appraiser to give the property owner notice of the appraised value if the appraised value of the property is greater than the value rendered by the property owner.[293] The trial court determined that the improvements were not "omitted property." Clearly, if a property owner had followed these steps, it has complied with the Tax Code, in which case the property should not be considered "omitted property" and the chief appraiser should be obligated to do his job. However, the El Paso Court of Appeals, although presented with the arguments, failed to consider or at least discuss the rendition issues. The court of appeals reversed the trial court's grant of summary judgment in favor of the taxpayer. In view of the fact that the taxpayer prevailed on the argument that the Appraisal District could back assess for only five years rather than the ten-year period previously provided, the economics did not warrant, in the opinion of the property owner, that the case be appealed. With regard to this case, the court of appeals makes reference to the fact that "[e]ven assuming that the documents submitted by Reynolds to the appraiser did properly render the improvements upon its land for taxation, that did not bar the appraisal district's subsequent correction of its erroneous appraisal, so long as that correction was within the deadline imposed by the statute."[294] The court did not consider the proper "deadline" statute since section 25.19 requires the chief appraiser to make such "correction" by May 15 of the tax year. Section 25.25 of the Property Tax Code also contains specific provisions regarding correction of an appraisal roll, but the facts of this case do not fall within the parameters of that section.

In *Gregg County Appraisal District v. Laidlaw Waste Systems, Inc.*[295] the principal dispute concerns valuations of land for ad valorem tax purposes. This would not otherwise be considered a case for discussion purposes in this survey because there is nothing particularly "legal" about the valuation process, but there are a few things noteworthy. Defendant

292. Section 25.21(a) provides that "[i]f the chief appraiser discovers that real property was omitted from an appraisal role in any one of the five (5) preceding years . . . he shall appraise the property as of January 1 of each year that it was omitted and enter the property and its appraised value in the appraisal records." TEX. TAX CODE ANN. § 25.21(a) (Vernon Supp. 1996). Prior to January 1, 1992 the statute permitted the chief appraiser to back assess for ten years rather than five.

293. *See* TEX. TAX CODE ANN. § 25.19 (Vernon 1992).

294. 884 S.W.2d. at 529.

295. 907 S.W.2d. 12 (Tex. App.—Tyler 1995, writ denied).

Four-S owned a tract of land in Gregg County. Four-S leased the land to Tiger Corporation under an agreement dated March 19, 1981 for use as a solid waste landfill. The term of the lease was twenty-five years. Tiger Corporation was purchased by Laidlaw Holdings and Tiger Corporation's name was changed to Laidlaw Waste System (Texas), Inc. Four-S appointed Laidlaw Texas as its designated agent for ad valorem tax purposes. Laidlaw Holdings is owned by Laidlaw Delaware. Prior to 1990, the district appraised the land at approximately $600,000, but the district reappraised the land in 1990 and increased its value to approximately 7.1 million dollars. If that was not enough of an increase for Laidlaw, in 1991 the appraised value went to approximately 8.5 million dollars and in 1992 it went to approximately 9.5 million dollars. The Appraisal Review Board approved the Appraisal District's valuations for 1990 and 1991, but reduced the 1992 valuation to 5.9 million dollars. The trial court reduced the value to $587,220.00. The Appraisal District challenged the trial court's jurisdiction for tax years 1990 and 1991 on the grounds that the appeal was filed by Laidlaw Delaware, the parent of the parent, but not the property owner nor its designated agent for property tax purposes. Thus, the Appraisal District's argument is that neither the property owner, Four-S, nor its agent, Laidlaw Texas, filed the appeal within the forty five day requirement of the Property Tax Code.[296] The Appraisal District argued that section 42.21 is jurisdictional and that the failure of the property owner or its designated agent to be included at the time suit was filed deprived the trial court of jurisdiction for years 1990 and 1991. Laidlaw Texas was joined as a party in the suit more than 45 days after receipt of notice of the Appraisal Review Board's final order which triggered the time for filing the Petition in a trial court. Four-S intervened even later. The court, citing *Appraisal Review Board v. International Church of the Foursquare Gospel*[297] and several other cases, held that the requirements of section 42.21 of the Tax Code are jurisdictional and the failure of the property owner to timely file its Petition appealing an Appraisal Review Board's order determining protest deprived the trial court of jurisdiction.[298] The moral of the story is that you can't let your parents do everything for you, especially in dealing with ad valorem taxes. The Laidlaws made a number of good arguments, even compelling arguments, the best being in the author's opinion a reverse upstream piercing of its own corporate veil but to no avail.[299] See the comments at the end of this section regarding "New Legislation" and the rights of a lessee to protect the Appraisal District's valuation.

The next case for discussion, *Harris County Appraisal District v. World Houston, Inc.*,[300] is a nice case for the lawyers who like to do things the old fashioned way, i.e., at the courthouse, as opposed to using some

296. TEX. TAX CODE ANN. § 42.41 (Vernon 1992).
297. 719 S.W.2d. 160 (Tex. 1986).
298. 907 S.W.2d. at 16.
299. *Id.* at 17.
300. 905 S.W.2d. 594 (Tex. App.—Houston [14th Dist.] 1995, no writ).

"newfangled" alternative dispute resolution procedure. This case is mentioned here only as a reminder to those who do not regularly work in the "Property Tax" area and whose client walks in the door for assistance after the protest period has passed. In this case, the property owners did not like the valuation placed upon their property by the Appraisal District. The "normal" method of protesting a bad appraisal by the Appraisal District is to file a protest pursuant to section 41.41 of the Tax Code which gives the property owner the right to appear before the Appraisal Review Board. If the property owner does not like the Appraisal Review Board's determination, then the property owner has a right to bring an action in the district court. Once the property owner's petition is filed in the district court, the property owner can have a trial de novo or have its appeal resolved through binding arbitration.[301] World Houston did not protest but instead relied upon the provisions of section 25.25(d) of the Tax Code.[302] World Houston filed a motion pursuant to section 25.25(d) and did get some relief, but not enough. It further appealed to the district court and requested that the matter be referred to arbitration which the trial court did. The Appraisal District obviously did not like the result so it appealed based upon the argument that section 25.25(g) of the Tax Code does not permit arbitration.[303] The court of appeal's decision is based upon sound reasoning and upholds the Appraisal District's position which is a step back for ADR proponents.

In *Jim Sowell Construction Co. v. Dallas Central Appraisal District*[304] the Dallas Court of Appeals also had the opportunity to consider section 25.25(d) of the Tax Code. In this case the property was owned by one party on January 1, 1991, and sold to Sowell on July 2, 1991. On or about May 15, 1991, the Appraisal Review Board appraised the property for approximately 7.1 million dollars. The first owner filed a Notice of Protest pursuant to Chapter 41 of the Tax Code and the Appraisal Review Board scheduled a hearing on July 2, 1991. The seller (first owner) withdrew the protest because of its pending sale to Sowell. Sowell acquired the property for approximately 4 million dollars. Sowell in December, 1991, filed a motion to correct the valuation pursuant to section 25.25(d).

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301. TEX. TAX CODE ANN. § 42.225 (Vernon 1992).

302. Section 25.25(d) provides that:

> At any time prior to the date that taxes become delinquent, a property owner or the chief appraiser may file a motion with the appraisal review board to change the appraisal role to correct an error that resulted in an incorrect appraised value for the owner's property. However, the error may not be corrected unless it resulted in an appraised value that exceeds by more than one-third the correct appraised value . . . . The roll may not be changed under this subsection if the property was the subject of a protest brought by the property owner under Chapter 41 . . . .

Id. § 25.25(d).

303. Section 25.25(g) states that "[w]ithin 45 days after receiving notice of the appraisal review board's determination of a motion under this section, the property owner or the chief appraiser may file suit to compel the board to order a change in the appraisal role as required by this section." *Id.* § 25.25(g).

304. 900 S.W.2d. 82 (Tex. App.—Dallas 1995, writ denied).

The Appraisal Review Board denied Sowell's request for a hearing and Sowell filed an action in the trial court. The Appraisal Board argued that Sowell was not entitled to a hearing on its 25.25(d) motion because protest was filed under Chapter 41 and, whether or not adjudicated, relief was barred under 25.25(d). The court disagreed and determined that because there was never a hearing on the Chapter 41 protest, Sowell can avail itself of 25.25(d). Thus, the court noted as a matter of law that an unadjudicated notice of protest filed by a prior property owner which is later withdrawn does not bar a hearing on a subsequent section 25.25(d) motion by the new property owner.

In *Syntax, Inc. v. Hall*[305] the Texas Supreme Court determined that the "syntax" should be construed in favor of Syntax. Does this make sense? Not really. In 1988 the Klein Independent School District (K.I.S.D.) and Harris County secured a judgement against Verna Neal for delinquent real property taxes and for foreclosure of their tax lien. On May 3, 1988, a tax sale was held by public auction but no bids were received. The property was "struck off" to K.I.S.D. for the minimum bid amount, the amount of the delinquent taxes. After the two-year redemption period passed, K.I.S.D. arranged to sell the property, and in 1991 John L. Hall, Sr. and Steve Ray Kasprzak bought the property for $85,000.00. K.I.S.D. paid Harris County the amount of taxes to which it (Harris County) was entitled, and K.I.S.D. pocketed the difference. After the sale to Hall and Kasprzak, Ms. Neal executed an Assignment to Syntax assigning her rights to receive any excess funds. Syntax recorded the assignment and Hall and Kasprzak filed suit to quite title to the property. Syntax filed counterclaims against Hall and Kasprzak as well as against K.I.S.D. and Harris County to recover those excess funds. The trial court and the court of appeals let K.I.S.D. keep the excess funds, which seems like a good result, but nonetheless the Texas Supreme Court held that the "syntax" of sections 34.02 and 34.06 of the Tax Code requires that the excess funds be paid to Syntax.[306] In reviewing the case, it is important to distinguish between the sale of real property at a tax foreclosure sale and a resale of property purchased by a taxing unit at a tax foreclosure sale. Section 34.06 deals with the distribution of the proceeds in the case of a resale of property purchased by a taxing unit at a tax foreclosure sale.[307] K.I.S.D. argued that section 34.01(c) of the Tax Code extinguishes any rights of Mrs. Neal and her successor Syntax, Inc. This section provides in part that "[t]he taxing unit's title includes all of the interest owned by the defendant, including the defendant's right to the use and possession

305. 899 S.W.2d. 189 (Tex. 1995).
306. *Id.*
307. Section 34.06 provides that:

> (a) the proceeds of a resale of property purchased by a taxing unit at a tax foreclosure sale shall be paid to the purchasing taxing unit;
>
> (b) the purchasing taxing unit shall pay all costs and expenses of court and sale and shall distribute the remainder of the proceeds as provided by § 34.02 of this code or distribution of proceeds after payment of costs.

TEX. TAX CODE ANN. § 34.06 (Vernon 1992).

of the property, subject only to the defendant's right of redemption."[308] Syntax argues that 34.06 "kicks" you back to section 34.02 which deals with distribution of proceeds of a tax sale. It is clear under section 34.02 that if the sale is pursuant to foreclosure of a tax lien, the officer conducting the sale must pay any excess proceeds after payment of all cost and of all taxes, penalties and interest due to all participants in the sale, to the clerk of the court issuing the order of sale. The court's conclusion is that a resale of the property acquired by K.I.S.D. at a foreclosure sale is the same as a sale pursuant to foreclosure of a tax lien. Certainly, when property is foreclosed pursuant to foreclosure of a tax lien and it is struck off to a third party, i.e. a party other than a taxing unit, the application of excess proceeds is consistent with what we consider to be normal distribution of proceeds under a nonjudicial power of sale foreclosure. When a lender exercises its right to foreclose under its power of sale, it will pay the excess proceeds to a debtor. However, if the lender acquires the property at the foreclosure sale and subsequently resells it, there is no obligation to pay any excess amounts to the debtor. Section 34.05 provides that if property is sold to a taxing unit that is a party to the judgment (such as K.I.S.D.) the taxing unit *may* sell the property at any time, subject to any right of redemption existing at the time of the sale. There are no other qualifications. Further, section 34.06(b) provides that the purchasing taxing unit shall pay all costs and expenses of court and sale and shall distribute the remainder of the proceeds as provided by code section 34.02 for distribution of proceeds after *payment of cost.* Section 34.02(a) describes the distribution after payment of cost, and it provides that the remainder is distributed to all taxing units participating in the sale in satisfaction of the taxes, penalties and interest due each period. However, 34.02(c) imposes upon the officer conducting a foreclosure tax sale, the duty after paying all costs, taxes, penalties and interest to all participants, to deposit excess proceeds in the court, but this is limited to circumstances in which the sale is pursuant to foreclosure of a tax lien. Clearly, 34.01 and 34.02 deal with foreclosure of a tax lien and 34.01 through 34.04 should be considered together, but 34.05 deals with a different type of sale, i.e. a resale, and that resale does not have to be pursuant to a public sale by an officer.[309] Three of the justices dissented and their dissent makes a compelling argument.

B. New Legislation

There are several new pieces of legislation worth noting. Chapter 41 of the Tax Code was amended by adding section 41.413 which provides, in part, that a person leasing real estate who is contractually obligated to reimburse the property owner for taxes imposed on the property is entitled to protest before the Appraisal Review Board a determination of the appraised value of the property, if the property owner does not file a

308. *Id.* § 34.01.
309. *See* Op. Tex. Att'y Gen. No. JM-1232 (1990).

protest relating to the property. Additionally, Chapter 42 of the Tax Code was amended by adding section 42.015 which also gives the lessee the right to appeal an order of the Appraisal Review Board determining a protest brought under section 41.413.

Also, the Tax Code was amended by adding section 31.115 to provide that payment of an ad valorem tax is involuntary if the taxpayer indicates that it is being paid under protest on the instrument by which the tax is paid or in an accompanying document.

Finally, section 11.13 of the Tax Code was amended to permit a surviving spouse who is at least fifty-five years old to continue receiving an exemption for the residence homestead of a person sixty-five or older so long as the surviving spouse continues to occupy the residence as his/her homestead.

XIII. BROKERS

A. NEW LEGISLATION

The Real Estate License Act ("RELA") was relegislated by the addition of section 15F. That section states that parties to a transaction are not liable for misrepresentations or concealments of material fact made by brokers unless the party knew of the misrepresentation or concealments and failed to disclose the party's knowledge of the statement or concealment.[310] Similarly, a broker is not liable for a party's misrepresentations or concealments of material fact unless the broker was aware of those statements or concealments. Finally, neither the party nor the broker is liable for misrepresentations or concealments by a subagent unless they were aware of those statements or concealments. Thus, RELA has modified any common law obligations of parties, brokers or subagents in transactions with regard to liability for misrepresentations or concealments.[311]

B. REAL ESTATE RECOVERY FUND

The Real Estate Recovery Fund was established as part of RELA to protect a person who has an uncollectible judgment against a licensed broker. A person with an uncollectible judgment may file a claim against the Fund in the court in which judgment was rendered and apply for an order directing payment out of the Fund.[312] At a hearing on application for reimbursement from the Fund, the claimant holding the uncollectible judgment must show that the judgment is against a licensed broker who caused the claimant's damages in an act that violated either section 15(a)(3) or section 15(a)(6) of RELA. In *Gamble v. Norton*[313] the court was faced with the issue of whether a broker who acted as a principal in a

310. TEX. REV. CIV. STAT. ANN. § 15F(a) (Vernon Supp. 1996).
311. *Id.* § 15F(d).
312. *Id.* § 8(e).
313. 893 S.W.2d 129 (Tex. App.—Houston [1st Dist.] 1995, no writ).

transaction could subject the Fund to a claim for payment. Norton, the broker, acted with an investor in joint ventures to purchase three properties. Norton's joint venturers maintained that Norton breached fiduciary duties owed to them by putting title to the property in his name, using the property as collateral for loans, and paying himself undisclosed commissions.[314] The court held that with regard to putting title in Norton's name, Norton was the managing partner for two of the properties, so he acted as a co-venturer and not "for another person" as required by RELA to allow recovery from the Fund.[315] Similarly, the court held that Norton's use of the property as collateral for loans used to pay partnership obligations was an act taken by Norton as a partner, rather than as a broker acting on behalf of another person. Since he was not acting for another person, Norton did not violate RELA; thus, the Fund was not subject to recovery.[316] Finally, regarding the undisclosed commissions, the court held that although Norton was acting as a broker or real estate agent, he was entitled to the commissions by contract. Thus, his conduct did not violate RELA.[317] From this case we can surmise that the courts strictly construe the phrase "for another person" in RELA, before they allow recovery against the Real Estate Recovery Fund.

C. Sufficiency of Commission Agreement

RELA contains its own version of the statute of frauds, which requires that agreements for the payment of real estate commissions to brokers must be in writing.[318] *Warner Communications, Inc. v. Keller*[319] addressed the question of whether particular commission agreements were a sufficient writing or memorandum of the agreement to pay commissions. The court stated that the writing must meet four requirements: it must (1) be signed by the person to be charged with the commission, (2) contain a promise to pay a definite commission or refer to a commission schedule, (3) state the name of the broker to be paid, and (4) identify with reasonable certainty the land conveyed.[320] The writing's essential elements cannot be supplied by parol testimony, and the requirements of the statute of frauds must be strictly enforced.[321]

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314. *Id.* at 136-37.
315. *Id.* at 137.
316. *Id.*
317. *Id.* at 137-38.
318. Tex. Rev. Civ. Stat. Ann. art. 6573a, § 20(b) (Vernon Supp. 1996). This version of the statute of frauds requires that:

> An action may not be brought in this State for the recovery of a commission for the sale or purchase of real estate unless the promise or agreement on which the action is brought, or some memorandum thereof, is in writing and signed by the party to be charged or signed by a person lawfully authorized by him to sign it.

Id.
319. 888 S.W.2d 586 (Tex. App.—El Paso 1994, writ denied).
320. *Id.* at 591-92.
321. *Id.* at 592.

The broker in *Warner Communications*, James Keller, did not have a written commission agreement. Keller did have, however, an informational letter sent by the property owner to all commercial brokers in the El Paso area, which listed buildings available for lease and that the owner, Texas Builders, would pay a six percent commission for all signed leases. The court held that because the letter stated the property to be leased by address (12050 Rojas) was signed by the owner's property manager, stated the commission to be paid (six percent) and named the realty firm to which the letter was addressed, the letter was sufficient to meet the statute of frauds contained in section 20(b).[322] The court noted that the writing need not describe the property with the exact specificity required in deeds; in fact, a street address alone would be reasonably certain as a description of the property to justify a commission where the broker presents extrinsic evidence explaining or clarifying the data contained in the writing.[323] Thus, the landlord was held liable under the statute of frauds for commissions owed to a real estate broker merely by virtue of an informational brochure sent to the broker identifying properties available for lease.

322. *Id.*
323. *Id.* at 593-95.