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Real Property

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Real Property

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This article covers cases from Volumes 464 through 498 of the South Western Reporter (Third Edition) and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

I. INTRODUCTION

This Survey period continues with the onslaught of cases arising from the home mortgage meltdown that began in 2008. Numerous cases of first impression on various aspects of foreclosures (a mortgage servicer is a debt collector under the Texas Fair Debt Collection Practices Act and collateral attacks on a tax lien sale) and home-equity liens are addressed. Tax lien cases also remain prevalent, presenting a few unique aspects. Two cases addressed the recission of acceleration notices. Most importantly, the Texas Supreme Court addressed issues of first impression on constitutional forfeitures and limitation periods in the home-equity lien context.

As in past years, the courts addressed the ambiguity of contracts, the Statute of Frauds, and the parol evidence rule in multiple cases. Historically, courts and practititioners have rarely dealt with the Statute of Frauds, but today the issue seems to arise with increasing frequency. In one notable case, the court dealt with the often relied-upon clause in transaction documents requiring all amendments to be in writing.

In connection with title matters, the courts continued trying to discern the intent of the parties or the desired outcome. There are a number of cases illustrating drafting considerations and procedures for perfecting title. Easement cases claiming a roadway were also further refined. Finally the Texas Supreme Court addressed various statutes providing limitations on premises liability.

II. MORTGAGES, LIENS, AND FORECLOSURES

A. Attorney Immunity Doctrine

U.S. Bank National Ass'n v. Sheena[1] dealt with whether an attorney's actions in representing a mortgagor, Optimum Arbor Oaks, are subject to the doctrine of attorney immunity. Attorney Sheena obtained insurance proceeds from the insurance company after the mortgagee, U.S. Bank, had provided a notice of default to the owner, a copy of which Sheena received. After receiving the default notice letter and the insurance proceeds, Sheena received a notice of intent to foreclose. Sheena deposited the insurance payment into his trust fund and made disbursements pursuant to his client's (the mortgagor's) instructions.[2] After a foreclosure, the bank sued the mortgagee and Sheena based on misappropriation of insurance proceeds, tortious interference with contract, conversion, conspiracy, fraudulent transfer, and negligence.[3]

Sheena asserted the attorney-immunity doctrine, which protects an attorney from liability to a third party for damages caused by the attorney's actions in the course of representation. An exception to the attorney-immunity doctrine arises when fraudulent actions are taken by an attorney, which U.S. Bank asserted was applicable to Sheena's actions. The trial court upheld Sheena's motion for summary judgment, and the Fourteenth Houston Court of Appeals analyzed the propriety of such action, beginning with the 1882 Texas Supreme Court case, *Poole v. Houston & T.C. Railway Co.*[4] In *Poole*, the supreme court recited that wrongful acts of an attorney that are "entirely foreign to the duties of an attorney" would not be proper for the attorney-immunity doctrine defense.[5]

After discussing numerous appellate court rulings attempting to clarify the attorney-immunity doctrine, the court of appeals discussed the more recent Texas Supreme Court case, *Cantey Hanger, LLP v. Byrd*.[6] In *Cantey Hanger*, the supreme court held that an attorney relying on the attorney-immunity doctrine must prove that the attorney's alleged wrongful misconduct, even if fraudulent, was part of the discharge of the attorney's duty to the client.[7] In summarizing the *Cantey Hanger* opinion, the court of appeals concluded that the *Cantey Hanger* analysis could relate to either the "complete immunity rule" or the "partial immunity rule," and proceeded to discuss both.[8] Under the partial immunity rule, the attorney must prove both (1) that the alleged conduct, even if fraudulent, was part of the discharge of the attorney's duties to the client in the litigation context; and (2) that the conduct was not "foreign to the duties of an attor-

1. 479 S.W.3d 475 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
2. *Id.* at 476.
3. *Id.*
4. 58 Tex. 134 (1882).
5. *Id.* at 137.
6. 467 S.W.3d 477 (Tex. 2015).
7. *Id.* at 484.
8. *Sheena*, 479 S.W.3d at 479 (citing *Cantey Hanger*, 467 S.W.3d at 483–85).

ney."[9] The complete immunity rule requires only the existence of the first criteria under the partial immunity rule; in other words, the attorney does not have to prove that the alleged conduct was not "foreign to the duties of an attorney."[10]

The court of appeals concluded that Sheena conclusively proved that his actions were part of his "duties to his client in the litigation context" and were not "foreign to the duties of an attorney."[11] Interestingly, the court of appeals based its reasoning on the basis of Sheena's actions in a litigation context, as it was in the *Cantey Hanger* opinion; however, the actions taken by Sheena in this case were actually taken prior to litigation when the mortgagee had only provided a notice of intent to foreclose, but had not yet foreclosed and not yet filed suit. Consequently, a question is raised as to whether *Sheena* or *Cantey Hanger* would be applicable to an attorney who obtains insurance proceeds and disburses such proceeds in contravention of a mortgage when litigation has not yet commenced and notice of intent to foreclose has not been given. Practitioners may not feel comfortable undertaking such action until further clarification is obtained from the courts.

B. Tax Lien Transfers

Issues dealing with the transfer of statutory tax liens continue during this Survey period, as they have over numerous prior survey periods. In *Billings v. Propel Financial Services, LLC*,[12] the property owners became delinquent in property taxes and arranged for a property tax lender to pay such taxes and obtain the transfer of the governmental tax lien pursuant to the Texas statutory provisions therefor.[13] Here, after the owner's tax lien was paid, the owner sued the tax lien lender, alleging violations of the Truth in Lending Act (TILA).[14]

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9. *Id.* (quoting *Cantey Hanger*, 467 S.W.3d at 485). Examples of attorney actions that are foreign to the attorney's duties are: "(1) participation in a fraudulent business scheme with a client outside the litigation context, (2) . . . drafting and filing fraudulent legal documents in a non-litigation context[ ] for the purpose of conspiring to hide the client's assets from judgment creditors in violation of [a statutory prohibition,] and (3) a physical assault committed by the attorney during trial." *Id.* at 480 (citing *Cantey Hanger*, 467 S.W.3d at 482; Essex Crane Rental Corp. v. Carter, 371 S.W.3d 366, 382 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)).

10. *Id.* at 480–81.

11. *Id.* at 481 (citing *Cantey Hanger*, 467 S.W.3d at 482–86).

12. 821 F.3d 608 (5th Cir), *cert. denied*, 137 S. Ct. 372 (2016).

13. *See* Tex. Tax Code Ann. §§ 32.06, 32.065 (West 2015). The required statutory procedure is for the owner to authorize a third party lender to pay the delinquent property taxes by means of a written authorization in favor of the tax lien lender, the payment by the tax lien lender of the delinquent property taxes, the issuance by the taxing authority of a tax receipt to the tax lien lender reflecting the payment, and the issuance of a transfer of the tax lien from the governmental entity to the tax lien lender. *See id.* Further, the typical procedure requires the owner to enter into a new contract or note with the tax lien lender evidencing the amount paid as well as other costs and fees payable in connection with such transaction. *See id.*

14. 15 U.S.C. §§ 16.02–.93r (2012).

The TILA applies to consumer credit transactions, and the issue presented was whether the TILA applied to a tax lien payment and transfer to a third-party lender/transferee. The Consumer Financial Protection Bureau interprets the TILA and has issued various regulations (known as "Regulation Z"), which provide that tax liens and assessments are excluded from the definition of "credit" unless the credit is a direct "third-party financing of such obligations," such as an owner acquiring a bank loan to pay his own tax liens.[15] This interpretation was confirmed by the U.S. Court of Appeals for the Fifth Circuit in *Tax Ease Funding, L.P. v. Thompson* (*In re Kizzee-Jordan*), which held that tax lien transfers are not extensions of credit pursuant to the provisions of the TILA.[16]

However, Billings's position was that the execution of a new note secured by the transfer of the tax lien represented a new extension of credit as opposed to a transfer of an existing tax obligation.[17] The Fifth Circuit held that the tax lien transfer was not a new extension of credit and recited its prior conclusions in *In re Kizzee-Jordan*: (1) the tax claim was transferred with the tax lien and not extinguished and replaced by a new debt; (2) the transfer of the tax lien preserved the existing tax lien claim (changing only the entity holding the claim without changing "the *nature* of the underlying debt"); and (3) the execution of the transfer and new promissory note did not satisfy the original obligation and did not create a new credit subject to the TILA.[18]

C. Foreclosure – Quasi-Estoppel

In *Freezia v. IS Storage Venture, LLC*, a foreclosure sale was upheld based upon the doctrine of quasi-estoppel against the property owner.[19] The property was originally owned by Designer Homes, Inc., which subsequently forfeited its charter for failure to pay franchise taxes, whereby ownership of the property reverted to its sole shareholder, the father of Freezia.[20] The father eventually died testate, and the property passed to Freezia and her three sisters. In connection with a subsequent financing transaction, however, Freezia learned that the property was still titled in the name of Designer Homes. Freezia therefore formed a new company called Original Designer Homes, Inc. (ODH), reciting in the incorporation documents that ODH succeeded to the interest of and was essentially the same as Designer Homes, but with a new name; however, there was no assignment of Designer Homes' property interest to ODH.

15. *Billings*, 821 F.3d at 610 (citing 12 C.F.R. pt. 1026, Supp. I, Subpart A, cmt. 2(a)(14)(I)(ii)).
16. Tax Ease Funding, L.P. v. Thompson (*In re* Kizzee-Jordan), 626 F.3d 239, 244 (5th Cir. 2010).
17. *Billings*, 821 F.3d at 612.
18. *Id.* at 612–13 (citing *In re Kizzee-Jordan*, 626 F.3d at 240–46; Pollice v. Nat'l Tax Funding, L.P., 225 F.3d 379, 409–11 (3d Cir. 2000)).
19. Freezia v. IS Storage Venture, LLC, 474 S.W.3d 379, 388–89 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
20. *Id.* at 382.

Freezia and ODH defaulted under the loan transaction, and the lender, JLE Investors, Inc. (JLE), foreclosed and acquired title at the foreclosure sale. JLE sold the property to IS Storage, with financing by Post Oak Bank. After the foreclosure, Freezia learned that ODH did not own the property since it had passed to Freezia's father through the charter forfeiture and then to her and her three sisters through the probate of her father's will.[21] Thus, Freezia sued her lender, her lender's deed of trust trustee, the purchaser, and the purchaser's lender for various causes of action.

Upon appeal from various summary judgments, the Fourteenth Houston Court of Appeals determined that Freezia presented sufficient evidence as to her claim of ownership to avoid the summary judgments rendered against her.[22] The interesting aspect of this case, however, was the affirmative defense raised by Freezia's lender, JLE, based upon quasi-estoppel, which the court explained as "[precluding] a party from asserting, to another's disadvantage, a right inconsistent with a position previously taken."[23] Freezia had executed a deed of trust, promissory note and other documents on behalf of ODH and a guaranty in her individual capacity. The various loan documents contained representations that ODH owned the property and had good title to the property. Consequently, the court of appeals held that Freezia was estopped by the equitable doctrine of estoppel by contract (one form of quasi-estoppel) such that she could not take the different position in the lawsuit that the property was not owned by ODH because it would result in Freezia receiving both the $360,000 loan and title to the property, thus unjustly enriching Freezia.[24]

The instructive aspects of this case may be things not discussed in the opinion and that may not have been done in connection with the actual transactions. First, JLE conducted the title search revealing that the property was owned by Designer Homes, which the court of appeals determined, as a matter of law and fact, to be incorrect.[25] There is no explanation as to why the provider of the title work was not included in the suit; presumably, there would have been a title policy insuring title in the wrong entity. Second, if Freezia had not obtained title by transfers from her sisters, would the result have been different? In other words, although Freezia was estopped from making the claim of title inconsistent with the representations in the loan documents, the result might have been different if the three other sisters had filed suit (without having made a transfer to Freezia) claiming title to the property. Since the three sisters would not have made any inconsistent representations in the loan documents—as they were not parties—would the three sisters have prevailed on this point? This could be a planning tool for practitioners faced with a similar situation.

21. *Id.*
22. *Id.* at 389.
23. *Id.* at 387.
24. *Id.* at 387–89.
25. *See id.* at 386.

D. Foreclosures – Debt Collector

In *Lamell v. OneWest Bank, FSB*,[26] a case of first impression for Texas, the Fourteenth Houston Court of Appeals considered whether a mortgage servicer constituted a debt collector within the meaning of the Texas Fair Debt Collection Practices Act (TFDCPA).[27] Homeowner Lamell entered into a mortgage transaction with Home123 Corporation as the mortgagee. Servicing of the mortgage was transferred to OneWest Bank, and the deed of trust was assigned to a securitization trust. Lamell defaulted, was foreclosed upon, and brought suit, alleging numerous errors with the assignment and securitization process. Among other allegations, Lamell asserted that OneWest was a debt collector under the TFDCPA[28] and had not complied with its applicable provisions. There are no statutory exceptions to the definition of debt collector under Texas law.[29] The court of appeals concluded that OneWest was a debt collector under the plain language of the TFDCPA.[30] As noted above, this was a case of first impression for the determination that a mortgage servicer is a debt collector under the TFDCPA; however, the court of appeals distinguished the TFDCPA from the federal Fair Debt Collection Practices Act.[31] The federal definition of debt collector[32] contains an exclusion covering "any person collecting or attempting to collect any debt owed or due . . . another to the extent such activity . . . concerns a debt which was not in default at the time it was obtained by such person,"[33] which would apply to a mortgage servicer such as OneWest. Since OneWest began servicing the debt prior to any default, this exclusion applied and the Federal Fair Debt Collection Practices Act was not applicable.[34]

E. Foreclosures – Bona Fide Error Defense

Alanis v. U.S. Bank National Ass'n[35] involves a suit against a foreclosing lender, the mortgage servicer, the law firm hired to handle the foreclosure, and the purchaser and its lender at the foreclosure sale. The First Houston Court of Appeals found that Alanis failed to present sufficient evidence to sustain her many alleged claims of wrongdoing in connection with the foreclosure, except for Alanis's claim that the law firm failed to

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26. 485 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
27. Tex. Fin. Code Ann. § 392.001 (West 2016).
28. *Id.* § 392.001(6) (defining a "debt collector" as "a person who directly or indirectly engages in debt collection . . . to collect consumer debts").
29. *Lamell*, 485 S.W.3d at 63 (citing Fin. § 392.001(6)).
30. *Id.*
31. 5 U.S.C. §§ 1692–1692p (2012).
32. Section 1692a(6) defines a "debt collector" as "any person who uses any instrumentality of interstate commerce or the mails in any business the principal purpose of which is the collection of any debts, or who regularly collects or attemps to collect, directly or indirectly, debts owed or due or asserted to be owed or due another."
33. *Id.* § 1692a(6)(F).
34. *Lamell*, 485 S.W.3d at 63.
35. 489 S.W.3d 485 (Tex. App.—Houston [1st Dist] 2015, pet. denied).

comply with the TFDCPA.[36] The law firm asserted the bona fide error defense in connection with its allegedly incorrect claims for various fees and other charges in its demand notices. Debt collectors, as stated in the TFDCPA, "may not use a fraudulent, deceptive, or misleading representation," which Alanis alleged had occurred because of the "incorrect" charges.[37] However, the bona fide error defense was available for debt collectors that proved, first, "that the violation was not intentional and resulted from a bona fide error" and, second, "that the creditor adopted procedures . . . designed to avoid and prevent [such] errors."[38] As to the second element, the court found that a "debt collector must show that it used reasonable procedures to prevent the error."[39]

As to the first element, the law firm had sufficiently proven that the mortgage servicer provided all information and documentation that the law firm used in connection with the foreclosure and that all amounts recited by the law firm were identical to the default amount and other fees and costs provided by the mortgage servicer.[40] As to the second element, the law firm partner's testimony regarding the measures taken to avoid errors in the receipt and use of information provided by the mortgage servicer—which included double checking all information received, verifying information used for the foreclosure, confirming that documents received from the mortgage servicer were proper and consistent, and exclusively relying on information believed to be correct—was sufficient for the bona fide error exception to apply.[41] Practitioners collecting consumer debt should take heed and establish appropriate procedures for verification against errors like those listed above.

F. Foreclosure – Change-of-Address Notice by Text Message

In *Bauder v. Alegria*, a foreclosure sale was held invalid because the notices of default and foreclosure sale were sent to an incorrect address.[42] Alegria bought a house on Neuman Street, but the deed of trust financing such acquisition provided that her mailing address was on Roosevelt Street, not the secured property address. Through a series of text message exchanges between Alegria and Bauder, Bauder was informed that Alegria no longer lived at the Roosevelt Street address, having sold that home and moved to the Neuman Street address. Although Alegria never sent a change-of-address notice, Bauder texted Alegria that he was aware of her sale of the Roosevelt Street property and move to the Neuman

36. *Id.* at 511.
37. *Id.* at 503–04 (quoting Tex. Fin. Code Ann. § 392.304(a) (West 2016)); *see also* Fin. §§ 392.304–.404.
38. *Alanis*, 489 S.W.3d at 504 (quoting Torres v. Mid-State Trust II, 895 S.W.2d 828, 831 (Tex. App.—Corpus Christi 1995, writ denied)).
39. *Id.* (citing CA Partners v. Spears, 274 S.W.3d 51, 71 (Tex. App.—Houston [14th Dist.] 2008, pet. denied)).
40. *Id.*
41. *Id.*
42. Bauder v. Alegria, 480 S.W.3d 92, 93, 99 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

Street property, and he asserted that he would assume this was her new mailing address unless Alegria advised Bauder to the contrary, which she did not.[43] Bauder's attorney sent a notice of default and a notice to cure, as well as a notice of foreclosure sale, to Alegria at her Roosevelt address. The Fourteenth Houston Court of Appeals concluded that Bauder knew of the address change and should have used the Neuman Street address since Bauder was the mortgage servicer.[44] Despite allegations by Bauder to the contrary, the court of appeals further concluded that Alegria was not required to provide a change-of-address notice since the Neuman house was not her residence at the time of the deed of trust's execution as required under the Texas Property Code.[45] The exchange of text messages between Bauder and Alegria constituted notice in Bauder's records (as the mortgage servicer) as the latest mailing address for Alegria.[46]

G. Tax Lien Sale – Collateral Attack

In a case of first impression, *American Homeowner Preservation Fund, LP v. Pirkle*, the assignee of a deed-of-trust lienholder was held to have no standing to collaterally attack a tax lien sale.[47] Pirkle purchased property at a tax lien sale. Notice of the tax lien sale had been given and service had been accomplished on various parties excluding the then-existing deed-of-trust lienholder. American Homeowner Preservation Fund (Fund) was the purchaser of the existing deed of trust from the original lienholder, Stewardship Fund No. 3, LP (SF3). The tax lien suit was filed on August 27, 2010, and the judgment was entered on April 26, 2012. The tax lien foreclosure sale occurred on August 7, 2012, and the tax lien deed was recorded on August 27, 2012. Approximately two months later, SF3 assigned all of its rights in the deed of trust to the Fund. Although the Fund knew of the intervening tax lien sale, it did not follow the procedures for challenging the tax lien sale under the Texas Tax Code,[48] but chose to collaterally attack the tax lien judgment after the applicable limitation period. The Fund provided a notice of its foreclosure sale under the deed of trust, and the issue was joined when Pirkle filed a temporary restraining order against the foreclosure sale. The trial court held that the tax lien sale extinguished the Fund's rights under the assigned deed of trust.[49]

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43. *Id.* at 94.
44. The actual mortgagee was Gerald Bauder, but Gerald Bauder had executed a power of attorney in favor of his son, Robert Bauder, in order to collect mortgage payments. *Id.* at 94, 97–98. The court determined, in a footnote without any real discussion, that this was sufficient evidence to show that Robert was a mortgage servicer under the applicable provisions of the Texas Property Code. *Id.* at 95, n.6.
45. *Id.* at 97; *see* Tex. Prop. Code Ann. § 51.0001(2)(A) (West 2014).
46. *Bauder*, 480 S.W.3d at 97–98.
47. Am. Homeowner Pres. Fund, LP v. Pirkle, 475 S.W.3d 507, 508, 526 (Tex. App.—Fort Worth 2015, pet. denied).
48. *See* Tex. Tax Code Ann. § 34.08 (West 2015).
49. *Pirkle*, 475 S.W.3d at 511.

On appeal, the Fund argued that "SF3 was a necessary and indispensable party to the delinquent tax suit" and failure to join it would not bind the Fund to the tax sale judgment.[50] On the other hand, Pirkle contended that the tax sale operated to vest full, absolute title in Pirkle, as the tax lien purchaser, free of all subordinate claims. The applicable Texas Tax Code provision with respect to challenges to the validity of a tax lien sale stated:

> A person may not commence an action challenging the validity of a tax sale . . . against a subsequent purchaser for value who acquired the property in reliance on the tax sale. The purchaser may conclusively presume that the tax sale was valid and shall have full title to the property free and clear of the right, title, and interest of any person that arose before the tax sale . . . .[51]

The limitations period for such challenges is one year.[52] Although the Fund knew of the limitations period, it chose not to comply with the statutory time periods and related requirements, opting instead to collaterally attack the tax lien sale after the limitations period had expired.[53] The Fund claimed that it stood in the shoes of SF3 and could challenge the tax lien sale's validity because its predecessor-in-interest did not receive notice of the sale. The Fund cited *Security State Bank & Trust v. Bexar County*,[54] where a lienholder at the time of a tax sale had not received notice of the sale and later challenged the sale by a suit filed four days after the one-year limitations period had run, without making the required statutory deposit.[55] In *Security State Bank*, the San Antonio Court of Appeals held that, notwithstanding the delinquent filing and failure to make a deposit, the lienholder had proper standing to challenge the tax sale as void as to such lienholder.[56] However, the Fort Worth Court of Appeals noted that *Security State Bank* was distinguishable because a lienholder stands in a different position than a property owner and could collaterally attack a tax sale judgment after the statutory period applicable to a property owner.[57]

The *Pirkle* court of appeals distinguished *Security State Bank*, noting that the lienholder in that case did not have notice of the lawsuit, whereas in this case the Fund actually acquired the deed of trust by transfer with full knowledge of the tax lawsuit, the judgment, the tax sale, and the record of the sale deed.[58] However, in another provision of the *Pirkle* opinion, the court of appeals indicated that the Fund only learned of Pirkle's interest six months after recording the Pirkle tax sale deed.[59] Therefore,

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50. *Id.* at 512.
51. Tax § 34.08 (footnote omitted).
52. *Id.* § 33.54.
53. *Pirkle*, 475 S.W.3d at 514.
54. 397 S.W.3d 715 (Tex. App.—San Antonio 2012, pet. denied).
55. *Pirkle*, 475 S.W.3d at 514–15.
56. *Id.* at 514.
57. *Id.* at 514-515.
58. *Id.*
59. *Id.* at 521.

the court of appeals is actually discussing the Fund's constructive notice as opposed to its actual notice. The court of appeals confirmed that the tax statute required notice to an existing lienholder, that SF3 was an existing lienholder of record, that SF3 should have received notice of the tax suit, and that SF3 would have had the right to collaterally attack the tax judgment outside the limitations period.[60] Since SF3 did not attack the judgment, but sold its deed of trust to the Fund, the question was whether the Fund could assert the due process rights held by SF3 at the time of the tax sale. As stated by the court of appeals, "whether a lienholder's right to challenge a tax judgment and sale based upon due-process violations is assignable at all appears to be an issue of first impression in Texas."[61]

The general rule in Texas is that "causes of action are freely assignable";[62] however, there are exceptions to the standard rule.[63] Such exceptions involve applying public policy and considering the equities involved.[64] In analyzing whether due process claims can be assigned, a court must inquire into various notions of equity and public policy. The court discussed six types of equities applicable to the current case[65]: (1) equity favoring diligence; (2) public policy favoring limitations; (3) public policy favoring free and clear title; (4) public policy disfavoring promoting litigation; (5) collateral attacks being disfavored; and (6) considerations of comity.[66]

As to diligence, the court of appeals concluded that the Fund had access to recorded information, that it should have determined the existence of the tax lien sale, and that it should not be rewarded for such neglect.[67] On the other hand, the authors suggest that this duty is partially or wholly offset by the diligence that should have been undertaken by the taxing authority in identifying the existing lienholders at the time of the

60. *Id.* at 516.

61. *Id.* at 517.

62. *Id.* (citing City of Brownsville *ex rel.* Pub. Utils. Bd. v. AEP Tex. Cent. Co., 348 S.W.3d 348, 358 (Tex. App.—Dallas 2011, pet. denied)).

63. *Id.* (citing HSBC Bank USA, N.A. v. Watson, 377 S.W.3d 766 (Tex. App.—Dallas 2012, pet. dism'd) (citing State Farm Fire & Cas. Co. v. Gandy, 925 S.W.2d 696 (Tex. 1996))).

64. *Id.* at 518. The court cites four instances of invalidity of the general rule of assignability of due process claims: (1) legal malpractice claims, *id.* (citing Zuniga v. Groce, Locke & Hebdon, 878 S.W.2d 313, 314, 317–18 (Tex. App.—San Antonio 1994, writ ref'd)); (2) "Mary Carter" agreements (the assignment of part of a settling plaintiff's claim against nonsettling defendants to a settling defendant), *id.* (citing Elbaor v. Smith, 845 S.W.2d 240, 242, 246–50 (Tex. 1992)); (3) assignments from a tortfeasor of the right to sue a joint tortfeasor, *id.* (citing Int'l Proteins Corp. v. Ralston-Purina Co., 744 S.W.2d 932, 933–34 (Tex. 1988)); and (4) assignments relating to an estate interest, *id.* (citing Trevino v. Turcotte, 564 S.W.2d 682, 684–88 (Tex. 1978)).

65. *Id.* at 519. Although the court of appeals claims that *Gandy* and *HSBC* required courts to analyze equity and public policy, the authors disagree with this interpretation as it relates to *HSBC* because the *HSBC* court held that assignment of the due process right was not against public policy and would be allowed. *Id.* at 517 (citing *HSBC Bank USA*, 377 S.W.3d at 755).

66. *Id.* at 519–26.

67. *Id.* at 519–20.

tax lien suit and appropriately joining them in the litigation. It seems somewhat incongruous to allow the taxing authority's negligence in bringing suit to be totally overridden by a purchaser's negligent review of the deed records or reliance upon the tax jurisdiction's failure to provide appropriate notice as required by the statute.

Next, the court of appeals addressed the public policy favoring limitations, citing cases holding that it is "in society's best interest . . . that disputes be settled or barred within a reasonable time."[68] The Fund knew about the suit in time to file within the statutory period, but delayed taking action until the statutory period expired. Under these facts, the court of appeals held that the Fund should not be entitled to collaterally attack the judgment.[69] However, in the spirit of "bad facts make bad case law," what would have been the outcome if the Fund had not acquired the deed-of-trust lien from SF3 only months after the foreclosure sale and within the limitation periods, but rather, over a year after the tax sale? Under those circumstances, the Fund would not have been able to challenge within the statutory period of time and would have been required to rely upon a collateral attack. Is this a distinction the courts really want to sanction?

The third public policy was the favoring of free and clear title.[70] The court of appeals cited to similar concepts from various jurisdictions' tax-sale statutes.[71] However, the court of appeals did not discuss whether the other jurisdictions require notice to all existing tax lienholders as a condition to free and clear title. Furthermore, in the authors' opinion, it is no less appropriate for the taxing authority at a foreclosure sale to convey title subject to claims by other interest holders that were not noticed in the original suit. To do otherwise would promote litigation (as happened in *Pirkle*), which is against the public policy at issue, as well as another public policy (preventing litigation) cited by the court. Further, since tax liens take super priority over and can adversely affect a first lienholder who has taken no inappropriate actions to lose its lien position, it is no less a matter of public policy that the legislature and the courts should protect such first lienholders by requiring notice to them or transfer of title subject to their interests.

The fourth public policy disfavored the promotion of litigation.[72] The court of appeals concluded that by cutting off the Fund's rights to collaterally attack, it was furthering this public policy.[73] However, as mentioned before, the failure to provide notice to SF3 would not have prevented further litigation if the sale of the deed of trust had not occurred until over a year after the tax sale. In that event, the attempted

68. *Id.* at 520 (citing Wagner & Brown, Ltd. v. Horwood, 58 S.W.3d 732, 734 (Tex. 2001)).
69. *Id.* at 521.
70. *Id.* at 522.
71. *See id.*
72. *Id.* at 524.
73. *Id.*

sale by SF3 of its deed of trust would have revealed its loss of the deed-of-trust lien, thereby requiring SF3 to collaterally attack the tax lien judgment. The position of the court of appeals does not deter further litigation, but ensures that further litigation will be necessary due to the taxing authority's failure to provide appropriate notices to all lienholders of record at the time of the tax suit.

The fifth public policy disfavored collateral attacks.[74] Again, as noted above, this position would not have prevented a collateral attack by SF3 for a transfer more than one year after the tax sale. Taking this position as to an assignee seems to ignore the true realities of the situation.

Finally, the last public policy was comity.[75] The court of appeals concluded that it would be inappropriate to alter the judicial scheme adopted by the Texas legislature, which provided appropriate due process rights.[76] However, the court of appeals brushes off a contrary holding in *In re Paxton*,[77] which found no reversible error where a mortgage assignee was allowed to pursue the assignor's due process claims.[78]

While many of the points made by the court of appeals are accurate, the authors believe that the primary rationale for this holding was the Fund's bad faith[79] in not pursuing its claims timely under the Texas Tax Code provision when it had sufficient notice and opportunity to do so. In this sense, the authors believe this case would have been more appropriately decided on a narrow ruling based on the Fund's failure to take appropriate actions readily available to it. Instead, the court announced a new rule of law prohibiting all deed-of-trust assignees from asserting the due process rights of their assignor, which would not make sense in numerous cases, as noted above.

H. Rescission of Accelleration

During the Survey period, there were a number of cases dealing with the abandonment or rescission of an acceleration of a debt. As a prelude to discussion of these cases, Texas law provides for rescission or waiver of

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74. *Id.*
75. *Id.* at 525.
76. *Id.* at 525–26.
77. 440 F.3d 233, 236 (5th Cir. 2006).
78. *Pirkle*, 475 S.W.3d at 526 n.21.
79. For example, the court of appeals makes the following statements reflecting its general displeasure with the position and attitude taken by the Fund: (1) "[The Fund], aware of the tax code and its provisions . . . simply chose to ignore its statutory remedies." *Id.* at 526. (2) "[The Fund] *should have known* about the tax sale and constable's deed . . ., [and] certainly the record establishes that . . . [the Fund] *actually knew* that the tax sale had occurred." *Id.* at 527. (3) "[The Fund] acquired its lien on the property with full notice of the delinquent tax law suit, the judgment . . ., and the resulting tax sale itself. " *Id.* at 515 (even though the authors have already pointed out that these were only constructive notices and not actual notices). (4) "[The Fund] was aware of the . . . tax sale. . . . [The Fund] was still within the applicable limitations period . .   . [The Fund] had more than seven months to . . . file the challenge . . . ." *Id.* at 521. (5) "[The Fund] had more than ample opportunity to comply with the tax code and challenge the tax sale during the applicable period of limitations . . . ." *Id.*

acceleration pursuant to the Texas Civil Practice and Remedies Code.[80] In relevant part, this statute provides that once an acceleration has occurred, and assuming that the limitation period has not expired, the acceleration can be rescinded or waived by written notice from the lienholder to each debtor, served by first class or certified mail, postage prepaid, and "addressed to the debtor at the debtor's last known address."[81] This statutory framework is not an exclusive method for the waiver or rescission of acceleration,[82] and the two cases discussed below relate to other means of the rescission or waiver of acceleration.

In *Stewart v. U.S. Bank National Ass'n*,[83] U.S. Bank, the mortgage holder, accelerated the indebtedness of a home equity note made by Stewart on September 29, 2008. Two years later, the parties entered into a forbearance agreement delaying further action by the lender. After subsequent defaults, the lender eventually sent a notice of default, notice of acceleration, and notice of foreclosure sale in 2012. Stewart filed a suit on September 24, 2013, to prevent the foreclosure.[84] At the time of suit, the action was more than four years from the date of the initial acceleration, but less than four years from the date of the forbearance agreement. Consequently, the issue was whether the forbearance agreement constituted a waiver, rescission or abandonment of the acceleration.

The U.S. District Court for the Southern District of Texas concluded that the forbearance agreement constituted an abandonment of the acceleration and a reinstatement of the original terms of the note, noting that "[a] forbearance agreement . . . establish[ing] monthly payments in exchange for not foreclosing," and which otherwise does not declare the full amount immediately due and payable, "constitute[d] an agreement to abandon acceleration."[85] Further, an agreement for the tender and acceptance of payments less than the full amount due constituted an agreement for abandonment of an acceleration.[86] Although Stewart contended that the failure to specifically mention a reinstatement prohibited the abandonment, the district court concluded that "abandoning acceleration does not require an explicitly stated agreement that the original maturity date is restored" and "[b]ecause the Forbearance Agreement did not provide a different maturity date, the original maturity date of the Note remained in full force and effect."[87]

The district court also rejected the argument that the forbearance agreement provision providing that the loan would not be current did not

80. TEX. CIV. PRAC. & REM. CODE ANN. § 16.038 (West 2002).
81. *Id.* § 16.038(b), (c).
82. *Id.* § 16.038(e).
83. 107 F. Supp. 3d 705 (S.D. Tex. 2015).
84. *Id.* at 707.
85. *Id.* at 709 (citing Rosas v. Am.'s Servicing Co. (*In re* Rosas), 520 B.R. 534, 540–42 (Bankr. W.D. Tex. 2014)).
86. *Id.* (citing Clawson v. GMAC Mortg., LLC, No. 3:12-CV-00212, 2013 WL 1948128, at *3 (S.D. Tex. May 9, 2013)).
87. *Id.* at 709–10 (citing Khan v. GBAK Props., Inc., 371 S.W.3d 347, 353 (Tex. App.—Houston [1st Dist.] 2012, no pet.)).

mean that the acceleration continued.[88] An additional argument by Stewart was that since the forbearance agreement did not inhibit the exercise of any rights available after acceleration, that acceleration could not be deemed abandoned.[89] This argument was rejected since no provision of the forbearance agreement specifically retained the bank's rights that were available after acceleration.[90] Based on this opinion, if the acceleration is to be maintained during the pendency of the forbearance agreement, practitioners should include specific provisions providing that an abandonment of the acceleration is not intended. Additionally, practitioners should reiterate the accelerated maturity and assert the lender's current right to pursue foreclosure or other remedies available after the acceleration.

The other rescission case, *Boren v. U.S. National Bank Ass'n*,[91] addressed an issue of first impression as to whether a lienholder could unilaterally abandon its acceleration of a note. The home equity loan defaulted, a default was declared, acceleration of the debt occurred, and the lienholder filed for a Rule 736[92] application for foreclosure. The above scenario occurred on four separate occasions from 2009 through 2013. On the final occurrence, the homeowner alleged that the foreclosure action was barred by the four-year statute of limitations. The bank countered that it had unilaterally abandoned its acceleration. In undertaking its "*Erie* guess," the U.S. Court of Appeals for the Fifth Circuit reviewed various Texas appellate court opinions to determine how the Texas Supreme Court would decide such issue.[93] Texas courts had used traditional principles of waiver in analyzing these cases and the elements of waiver.[94] The Fifth Circuit concluded that the creditor's subsequent notice of default, allowing the debtor to pay less than the whole amount due, was the equivalent of a unilateral abandonment of the acceleration of the debt.[95] Practitioners should be wary of this holding when dealing with accelerated debt and how the actions of the creditor might be construed as a unilateral rescission.

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88. *Id.* at 710.
89. *Id.*
90. *Id.*
91. 807 F.3d 99 (5th Cir. 2015).
92. *See* Tex. R. Civ. P. 736.8 (requiring an abbreviated court determination as a condition precedent to foreclosure under a home equity loan in Texas); *see also* Tex. R. Civ. P. 736.1.
93. *See Boren*, 807 F.3d at 105.
94. The Fifth Circuit quoted those elements as including "(1) an existing right, benefit, or advantage held by a party; (2) the party's actual knowledge of its existence; and (3) the party's actual intent to relinquish the right, or intentional conduct inconsistent with the right." *Id.* (citing Thompson v. Bank of Am. Nat'l Ass'n, 783 F.3d 1022, 1025 (5th Cir. 2015) (quoting Ulico Cas. Co. v. Allied Pilots Ass'n, 262 S.W.3d 773, 778 (Tex. 2008))).
95. *Id.* at 106.

I. Home Equity Lien – Constitutional Forfeitures and Limitations

The Texas Supreme Court has issued two important cases on the forfeiture and limitation provisions with respect to Texas home-equity loans. In *Garofolo v. Ocwen Loan Servicing, L.L.C.*,[96] a homeowner performed under its loan and paid off the loan on April 1, 2014. Ocwen recorded a release of lien on April 28, 2014, but did not furnish a copy of the release to Garofolo as required by the terms of her home-equity documents. Garofolo notified Ocwen of the failure and gave the required sixty-day notice to cure, but Ocwen did nothing. After the cure period expired, Garofolo sued Ocwen for violating the home-equity lending provisions of the Texas Constitution.[97] Because Ocwen did not return the cancelled promissory note and deliver a recordable release of lien, Garofolo sought forfeiture, under the applicable constitutional provisions, of principal and interest on the home-equity loan.

The supreme court addressed this in answers to two questions certified by the U.S. Court of Appeals for the Fifth Circuit, framing the issue as whether a home-equity lender's subsequent breach of the constitutional requirements for a home-equity loan would create a cause of action under the Texas Constitution.[98] The applicable constitutional provision required the lender, after full payment of the loan, to return to the borrower the cancelled promissory note and a release of lien in recordable form.[99] To enforce the strict home-equity lending rules, a forfeiture of principal and interest is mandated if the constitutional requirements are not complied with or are not cured within the sixty-day cure period after notice.[100] The supreme court concluded that there was no constitutionally protected right to shield the debtor from foreclosure, but that the right of protection from foreclosure must be asserted under the loan documents' contractual provisions.[101] As to the first certified question, the supreme court stated, "The constitution prohibits foreclosure when a home-equity loan fails to include a constitutionally mandated term or condition, but it does not address post-origination enforcement of a loan's provisions."[102] The dissenting justices concurred with this holding.[103]

The second question addressed by the supreme court was on the issue of forfeiture of principal and interest because the lender failed to return a cancelled promissory note and deliver a recordable release of lien within the constitutionally and contractually required sixty-day notice and cure period. Understanding the draconian nature of the forfeiture provision, the supreme court inquired whether Ocwen could have satisfied one of

96. 497 S.W.3d 474 (Tex. 2016).
97. Tex. Const. art. XVI, § 50(a).
98. *Garofolo*, 497 S.W.3d at 475.
99. *Id.* at 477; *see* Tex. Const. art. XVI, § 50(a)(6)(Q)(vii).
100. Tex. Const. art. XVI, § 50(a)(6)(Q)(x).
101. *Garofolo*, 497 S.W.3d at 478.
102. *Id.* at 479.
103. *See id.* at 489 (Boyd, J., dissenting).

the six corrective measures presented by the constitution.[104] The first five curative provisions were clearly inapplicable for a cure, so the "catch-all" curative provision was considered but also dismissed as inapplicable.[105] Concluding that none of the six corrective measures represented an appropriate cure, the supreme court decided that the intent of the forfeiture provision was to encourage lenders to correct the underlying noncompliant provisions.[106] Rather than strictly construe the statutory language, the supreme court found that the curative provisions "do not speak to every manifestation of a lender's failure to comply."[107] Therefore, absent a constitutional remedy, the borrower had only contractual damage remedies.[108] In other words, a constitutionally-mandated forfeiture would not be available if any of the six specific corrective measures did not apply.[109] Justices Boyd and Johnson dissented to this conclusion, reasoning that the catch-all curative provision was applicable because it was constitutionally mandated and practically available.[110]

An interesting aspect of this case is that, although the supreme court acknowledged that Ocwen recorded a release of lien, there is no discussion as to why the recording of a release of lien is not a cure equivalent to delivery of a recordable release of lien; it would be cheaper for the borrower and would avoid requiring extra (and often unfamiliar) actions to be taken.[111] What if, after recording the release of lien, Ocwen had responded to the borrower's demand with a letter providing a copy of the recorded release or a letter advising of the recording with a promise to furnish the release when available? Since a recorded document is public record, one would think that the supreme court could have found a more narrow basis to support its position instead of requiring a suit for contractual damages. However, unless further clarification is forthcoming, the Texas rule of law is now that a home-equity lender who fails to perform post-payment obligations will be liable pursuant to only contractual damage remedies and will not be subject to a constitutional forfeiture.

Another home-equity case, *Wood v. HSBC Bank USA, N.A.*,[112] involved the charging of excessive fees in connection with a home-equity loan. The home-equity debtors in this case (Wood) waited eight years

104. The sixty-day cure period allows for correction of a noncompliant provision by taking one of six specified actions: (1) refunding overcharge payments; (2) providing written acknowledgment of the validity of the lien in the appropriate amount; (3) providing written notice modifying the illegal provisions to bring them into compliance and making appropriate adjustments as necessary; (4) delivering required loan-closing documents; (5) providing written notice of abatement of interest in certain cases; and (6) if none of the foregoing five curative actions are applicable, paying $1,000 and offering to refinance the existing credit. Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(a)–(f).

105. *Garofolo*, 497 S.W.3d at 482.

106. *Id.*

107. *Id.*

108. *See id.* at 484.

109. *Id.*

110. *Id.* at 487–89 (Boyd, J., dissenting).

111. *See id.* at 481–82.

112. 505 S.W.3d 542 (Tex. 2016).

after closing to notify the lender that it had violated the home-equity requirements regarding fees exceeding 3% of the loan amount and sued the lender for the constitutional forfeiture of principal and interest. In defense to Wood's allegations, the lender countered that the claims were barred by the statute of limitations. Based on the *Garofolo* case, decided earlier that day, the Texas Supreme Court concluded that Wood did not have a constitutional right to forfeiture but had to rely on a breach-of-contract action and damages arising therefrom.[113]

The statute of limitations issue deals with a different provision of the Texas Constitution.[114] Since the suit was brought eight years after the loan closing, the action would be barred by limitation unless the borrower could prove that the limitations period was inapplicable because the deed of trust was a void instrument; the four-year statute of limitations applied to a voidable instrument. Also coming into play in this decision was the Texas Supreme Court's prior decision in *Doody v. Ameriquest Mortgage Co.*,[115] where the supreme court held that a home mortgage lien that was noncompliant with constitutional requirements could be made valid at a later date if the right to cure existed under the constitution or statutes.[116] The supreme court wrestled with the appropriate characterization of this instrument in light of the constitutional provision and the long line of Texas cases holding that the limitations period applies to suits seeking to invalidate constitutionally defective homestead liens, while distinguishing its holding in *Doody* on the theory that it related to the constitutional cure provisions as opposed to an invalid lien under the provisions of Section 50(c).[117] Creation of a new common law category of lien (i.e., void until cured) was specifically disclaimed, and the plain language of Section 50(c) was interpreted as being one that "defies common-law categorization."[118]

However, the dissent by Chief Justice Hecht asserted that the majority opinion "inject[s] instability into land titles" and that such position "has been rejected by the Fifth Circuit and by four Texas Courts of Appeals—every appellate court that has considered the matter."[119] In contrast, the majority distinguished the long line of cases, relying on *Rivera v. Countrywide Home Loans, Inc.*,[120] which they viewed as having incorrectly cited *Rivera* for the proposition that the four-year limitations period applies to constitutionally defective homestead liens, noting that the issues presented in *Rivera* related only to the time of accrual of action rather than the application of a limitations period.[121] The supreme court sup-

113. *Id.* at 546, 551.
114. *See* TEX. CONST. art. XVI, § 50(c) (providing, in relevant part, that "[n]o . . . lien on the homestead shall ever be valid unless it secures a debt described by this section").
115. 49 S.W.3d 342 (Tex. 2001).
116. *Wood*, 505 S.W.3d at 548–49 (citing *Doody*, 49 S.W.3d at 345–47).
117. *Id.* at 548–50.
118. *Id.* at 549.
119. *Id.* at 552 (Hecht, C.J., dissenting).
120. 262 S.W.3d 834 (Tex. App.—Dallas 2008, no pet.).
121. *Wood*, 505 S.W.3d at 548.

ported its position by reading the applicable constitutional provision as indicating that no lien on a homestead "shall ever be valid" unless the debt instrument meets the applicable requirements.[122] Therefore, "constitutionally noncompliant loans are invalid before the defect is cured" and "no statute of limitations applies to cut off a homeowner's right to quiet title to real property encumbered by an invalid lien under section 50(c)."[123] As of this time, the statute of limitations is not a valid defense against a homeowner's right to invalidate a noncompliant home-equity lien.[124]

III. DEBTOR/CREDITOR

A. Turnover Orders – Counterclaims

A turnover order was at issue in *In re Great Northern Energy, Inc.*[125] Circle Ridge Production had obtained a judgment in a suit against Great Northern Energy and, as part of the collection efforts, obtained a turnover order with respect to various matters, including Great Northern's counterclaim in another lawsuit entitled *Baker v. Great Northern Energy, Inc.*[126] This decision arose out of a request for a writ of mandamus on the existing turnover order, which can only be granted if there is an inadequate remedy by appeal.[127] Generally, "turnover orders are final appealable orders" that "must be attacked on direct appeal";[128] however, there is an exception allowing mandamus where appellate remedy is inadequate due to special circumstances.[129] Inadequate appellate remedies include "those that (1) violate public policy, (2) violate the open-courts doctrine, and (3) extinguish a cause of action."[130]

Great Northern showed that the counterclaim subject to the turnover order represented a defensive action in its *Baker* lawsuit and constituted a significant portion of its defense strategy, and that the turnover order creditor, Circle Ridge, had no desire to pursue the claim against Baker, but would merely sell the counterclaim rights to Baker in settlement of a portion of Circle Ridge's judgment. In these circumstances, the Texarkana Court of Appeals concluded that such action would violate both the open court doctrine and the extinguishment of a cause of action doctrine, thereby entitling Great Northern to a mandamus action to vacate the turnover order as to such counterclaim.[131]

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122. *Id.* (citing Tex. Const. art. XVI § 50(c)).
123. *Id.* at 550.
124. *Id.* at 550–52.
125. 493 S.W.3d 283 (Tex. App.–Texarkana 2016, orig. proceeding).
126. *See* 64 F. Supp. 3d 965 (N.D. Tex. 2014).
127. *In re Great Northern*, 493 S.W.3d at 286.
128. *Id.* at 288–89.
129. *Id.* at 290.
130. *Id.* (citing Criswell v. Ginsberg & Foreman, 843 S.W.2d 304, 306–07 (Tex. App.—Dallas 1992, no writ.)).
131. *Id.* at 291.

B. Independent Suits During Bankruptcy

In *Judgment Factors, L.L.C. v. Packer* (*In re Packer*),[132] the U.S. Court of Appeals for the Fifth Circuit discussed a creditor's rights to independently assert alter ego and reverse veil piercing theories against its judgment debtor during the pendency of a bankruptcy. Judgment Factors had obtained an assignment of a judgment against Packer.[133] In pursuing the acquired judgment claim, Judgment Factors filed suit alleging various activities that constituted a bar to discharge in bankruptcy, including alter ego and reverse veil piercing claims. However, such claims resided with the bankruptcy trustee, as they are "property of the estate" and may not be brought independently by a creditor.[134] Since the judgment creditor in this case failed to prove that the bankruptcy trustee unjustifiably refused to pursue the claim and to obtain the bankruptcy court's permission to pursue the claim on behalf of the estate, the judgment creditor was not entitled to an independent cause of action.[135]

C. Non-Waiver Provision

In *Martin v. Federal National Mortgage Ass'n*, the inclusion of a "non-waiver" provision in a deed of trust was instrumental in a holding in favor of the lienholder.[136] Martin executed a deed of trust with a non-waiver provision, subsequently defaulted on payments, and a foreclosure sale occurred.[137] Martin missed a December 9, 2009 payment, but continued to make subsequent payments until May and June of 2011. A notice of foreclosure was sent in June, 2011 and foreclosure occurred in July, 2011. Martin alleged that the acceptance of payments for sixteen months after the initial default constituted a waiver of the right to foreclose by the mortgagee.

The U.S. Court of Appeals for the Fifth Circuit concluded that the non-waiver provision applied to this claim.[138] Relying on general Texas law of waivers, as discussed above in *Boren*,[139] the Fifth Circuit concluded that the non-waiver provision allowed the lender to accept payments that were smaller than the entirety and to postpone acceleration or foreclosure without waiving any rights, and further that the lender was engaged

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132. 816 F.3d 87 (5th Cir. 2016) (per curiam).

133. Actually, the principals of Judgment Factors were the spouses of prior partners of Packer, whose prior partners were also joint defendants with Packer, and the prior partners with Packer were all subject to the same judgment claim. *Id.* at 89–91.

134. *Id.* at 92 (citing Cadle Co. v. Mims (*In re* Moore), 608 F.3d 253, 258–59 (5th Cir. 2010)).

135. *Id.*

136. Martin v. Fed. Nat'l Mortg. Ass'n, 814 F.3d 315, 318 (5th Cir. 2016).

137. The relevant provisions of the non-waiver provision are as follows: "Any forbearance by Lender in exercising any right or remedy including, without limitation, Lender's acceptance of payments from third persons, entities or Successors in Interest of Borrower or in amounts less than the amount then due, shall not be a waiver of or preclude the exercise of any right or remedy." *Id.* at 316.

138. *Id.* at 317.

139. *See supra* text accompanying note 91.

in conduct contemplated and permitted by the non-waiver provision.[140] While the Fifth Circuit discussed other actions that may constitute a waiver of rights, this case is an important reminder to practitioners to include these "boilerplate" provisions to assure maximum flexibility in asserting non-waiver rights.[141]

IV. GUARANTIES/INDEMNITIES

A. Abstract of Judgment

In *Transcontinental Realty Investors, Inc. v. Orix Capital Markets LLC*,[142] the Dallas Court of Appeals addressed whether an order under Texas Property Code Section 52.0011[143] was appealable. Although the filing of an abstract of judgment by a judgment creditor against a guarantor constitutes a lien on the real estate of the guarantor,[144] there is an exception to that rule. Under Section 52.0011, the abstract of judgment is not a lien if appropriate security has been posted and the trial court makes a determination based on a balancing between the lien rights of the creditor and the cost of and effects upon the defendant after exhausting all appellate remedies.[145] The court of appeals concluded that such a statutory exception was appropriately characterized as ancillary to the original court judgment and could not be appealed independently of the judgment.[146]

B. Change of Notice Address

The importance of a guarantor providing updates to its mailing address under notice provisions in a guaranty document is highlighted in *Nussbaum v. Builders Bank*.[147] Because Nussbaum failed to provide an update in his guaranty notice address, a suit on the guaranty ended in a default judgment that Nussbaum was barely able to overturn in a bill of review. The original service of process to Nussbaum's guaranty notice address went through the Texas Secretary of State and was returned as undeliverable, supported by a "Whitney" certificate from the Texas Secretary of State.[148] In Builders Bank's summary judgment motion and supporting affidavit, the bank verified that it mailed a copy of the order to the guarantor's address, which was a new address to which the guarantor had moved. However, Builders Bank's affidavit of last known address recited the guaranty notice address, not the new address. The Fort Worth Court of Appeals originally ruled that Nussbaum was negligent in failing to up-

140. *Martin*, 814 F.3d at 319.
141. *Id.* at 318–319.
142. 470 S.W.3d 844 (Tex. App.—Dallas 2015, no pet.).
143. Tex. Prop. Code Ann. § 52.0011 (West 2014).
144. *Transcon. Realty Inv'rs, Inc.*, 470 S.W.3d at 847 (citing Prop. § 52.001 (West 2014)).
145. *Id.*
146. *Id.*
147. 478 S.W.3d 104 (Tex. App.—Fort Worth 2015, pet. denied).
148. *Id.* at 107.

date his address, which prohibited him from challenging the default judgment.[149] However, in the recently decided Texas Supreme Court case, *Katy Venture, Ltd. v. Cremona Bistro Corp.*, the Texas Supreme Court drew a distinction between a defendant's negligence in updating its registered agent address and a plaintiff's knowing use of an outdated address in its certificate of last known address for purposes of Rule 239a.[150] Since the Builders Bank affidavit reflected the wrong last known address, the court of appeals determined that it was a sufficient basis for the bill of review on behalf of the guarantor.[151] This case should be sufficient warning for practitioners to advise their guarantor and other clients to diligently provide updates to official notice addresses in documents as well as registered agent addresses with the Secretary of State.

C. Guaranteed Indebtedness

Abel v. Alexander Oil Co.[152] involved the strict construction of a guaranty. Abel signed a personal guaranty for John Steele's sole proprietorship, John Steele Trucking, in favor of Alexander Oil. John Steele's wife and Abel's daughter, Shannon Steele, later formed a separate entity called John Steele Trucking, LLC. John Steele Trucking had an open account with Alexander Oil, but after the formation of the limited liability company by Shannon Steele, the new company began using the account on behalf of John Steele Trucking, LLC. After default on this account, Alexander Oil sued Abel under her personal guaranty. The guaranty language specified that Abel guaranteed "all amounts due by [John Steele Trucking] to Alexander Oil Company."[153] The confusion in this case concerned the jury instructions and answers, which determined that John Steele was personally liable for the obligations of John Steele Trucking, LLC. However, as the Fourteenth Houston Court of Appeals properly noted, the guaranty related only to obligations of the sole proprietorship, John Steele Trucking, and not to obligations of John Steele personally with respect to a third party principal (i.e., John Steele Trucking, LLC).[154] Consequently, Abel was not liable under her guaranty for debts owed by John Steele with respect to a party other than his sole proprietorship.[155] This case provides guidance to practitioners to carefully draft guaranties, particularly with respect to the description of whose obligations are being guaranteed.

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149. *Id.* at 109.
150. Katy Venture, Ltd. v. Cremona Bistro Corp., 469 S.W.3d 160, 162 (Tex. 2015) (per curiam); Tex. R. Civ. P. 239a.
151. *Nussbaum*, 478 S.W.3d at 110.
152. 474 S.W.3d 795 (Tex. App.—Houston [14th Dist.] 2014, no pet.).
153. *Id.* at 797.
154. *Id.* at 801.
155. *Id.*

V. PURCHASER/SELLER

A. Remedies; Contract Interpretation

Jetall Companies, Inc. v. Four Seasons Food Distributors, Inc.,[156] provides the practitioner with a very simple reminder: "One cannot convey a right which one does not have."[157] In *Jetall*, the Four Seasons was the highest bidder in an auction for a shopping center.[158] The purchase and sale agreement contained a provision stating, "Buyer shall not assign this Agreement or its rights hereunder to any individual or entity without the prior written consent of Seller, which consent Seller may grant or withhold in its sole and absolute discretion, and any such assignment shall be null and void ab initio."[159] After executing the purchase and sale agreement, Four Seasons changed its mind and entered into a one page assignment with Jetall, the second highest bidder.[160] The assignment provided in relevant part "Assignor does hereby assign all right, title and interest of Assignor under the [purchase and sale] Agreement . . . to Assignee."[161] Four Seasons attempted to negotiate with the seller of the property for their consent to the assignment but was unsuccessful.[162] Ultimately, Four Seasons decided to go through with the purchase of the property despite the assignment to Jetall.[163] Jetall sued Four Seasons for breach of the assignment.[164] In the motion for summary judgment filed by Four Seasons, Four Seasons claimed that "Jetall's breach of contract claim is foreclosed as a matter of law because (1) the June 16, 2011 assignment agreement is void ab initio; (2) any breach is excused by the failure of a condition precedent; and (3) any breach is excused by the mutual mistake."[165] The trial court granted the Four Seasons' motion for summary judgment and Jetall appealed.[166] Jetall contended that the anti-assignment clause was in a contract between Four Seasons and the Seller, *not* the Four Seasons and Jetall and, therefore, the rights and remedies of the contract between Four Seasons and Jetall could not be rendered moot by an agreement to which Jetall was not a party.[167] The Fourteenth Houston Court of Appeals disagreed with Jetall's analysis and emphasized that under Texas common law "an assignee . . . stands in the shoes of the assignor."[168]

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156. 474 S.W.3d 780 (Tex. App.—Houston [14th Dist.] 2014, no pet).
157. *Id.* at 783 (citing Camco Int'l, Inc. v. Perry R. Bass, Inc., 926 S.W.2d 632, 636 (Tex. App.—Fort Worth 1996, writ denied); Carter v. Assocs. Disc. Corp., 550 S.W.2d 399, 401 (Tex. Civ. App.—Amarillo 1977, no writ)).
158. *Id.* at 781.
159. *Id.*
160. *Id.* at 781–82.
161. *Id.* at 782.
162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 782.
167. *Id.* at 783.
168. *Id.* (citing Jackson v. Thweatt, 883 S.W.2d 171, 174 (Tex. 1994)); *see also* Davis v. Ward, 905 S.W.2d 446, 447 (Tex. App.—Amarillo 1995, writ denied).

In *Ranchero Esperanza, Ltd. v. Marathon Oil Co.*, the El Paso Court of Appeals addressed what it referred to as "the well-established rule in Texas that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere subsequent purchaser does not have standing to recover for injuries committed before his purchase."[169] In *Ranchero*, the plaintiff purchased property in 2004 that contained multiple oil wells, including one that had been plugged and abandoned in 1989 by Marathon Oil Company.[170] In 2008, injection activity being conducted at a proximate location supposedly caused the well plugged in 1989 to leak salt water, which in turn caused fairly extensive surface damage.[171] The crux of the case was the argument between the plaintiff and defendant regarding how to define when the injury occurred.[172] Did the legal injury occur when the well was negligently plugged or when the salt water leaked from the well?[173] The trial court found that the plaintiff did not have standing to sue the defendant because the plaintiff was a subsequent purchaser and did not own the property when the damage occurred.[174] The court of appeals reversed the trial court's finding that the plaintiff did not have standing.[175] Instead, the court of appeals found that the injury occurred during the plaintiff's ownership of the property because, until the "plug allegedly failed and caused surface damages," there was no cause of action.[176]

Marx v. FDP, LP concerns a dispute over a farm and ranch contract.[177] Robert and Debbie Marx were the sellers in the contract and FDP, LP was the buyer.[178] The farm and ranch contract at issue was for the purchase of approximately 500 acres.[179] In addition to the purchase of the 500 acres, which was to be paid for with a $300,000.00 payment and a seller-financed note for the balance, the contract contained the following "Special Provisions":

> Buyer and Seller agree to the following details to be worked out before closing: 1. Seller will survey out approximately 21 acres which will not [be] convey[ed] with this sale. 2. Seller will sign a first right of refusal and option agreement for the 21 acres which will allow buyer to purchase the property in the future. 3. Seller will retain an easement for access to the 21 acres. 4. Seller agrees to fence the 21 acres within 120 days after closing.[180]

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169. Ranchero Esperanza, Ltd. v. Marathon Oil Co., 488 S.W.3d 354, 355–56 (Tex. App.—El Paso 2015, no pet.).
170. *Id.* at 356.
171. *Id.*
172. *Id.* at 359.
173. *Id.* at 359–60.
174. *Id.* at 356.
175. *Id.* at 366.
176. *Id.* at 356, 363.
177. Marx v. FDP, LP, 474 S.W.3d 368, 371 (Tex. App.—San Antonio 2015, pet. denied).
178. *Id.*
179. *Id.*
180. *Id.* (alteration in original).

When the Marxes refused to sell the property to FDP, FDP and the Marxes entered into a mediated settlement agreement which provided for: (1) FDP to purchase 421 acres at $5,000 per acre per "Closing per existing EMK—October 1, 2013"; (2) the Marxes would hold their homestead property for up to eight years; (3) the homestead property would be pursuant to mutual agreement; (4) if mutual agreement was not possible, the issue would be settled by arbitration; (5) FDP retained its right of first refusal on the homestead property; and (6) all claims were mutually released.[181] When the Marxes again refused to perform, FDP went to court to enforce the settlement agreement.[182] The Marxes responded by arguing that the mediated settlement agreement was not subject to specific performance because it was ambiguous and contained certain "uncertain" terms, which included:

> the size, location and boundaries of the land to be sold; the identity of the buyer, the manner in which the sale price is to be paid; the portion of the sale price which is to be paid in cash; and the portion of the sales price which is to be owner financed.[183]

The trial court sent the parties back to mediation which was ultimately unsuccessful.[184] FDP moved for specific performance, which was granted by the trial court and ultimately affirmed by the San Antonio Court of Appeals.[185]

On appeal, the Marxes argued to the court of appeals that: (1) the option to purchase the Homestead was unenforceable for lack of consideration; (2) they rescinded their consent to the settlement agreement; (3) the settlement agreement lacked certain facts regarding how the purchase would be financed, so there was "no meeting of the minds . . . as to those material and essential" elements which precluded enforcement of the settlement agreement; and (4) FDP's motion for summary judgment failed to address the Marxes's affirmative defenses.[186] The court of appeals did not address the issue of their rescinded consent because they found that the Marxes did not sufficiently brief the issue.[187] The court of appeals instead focused on the Marxes's argument that there was no meeting of the minds on the financing of the purchase.[188] Ultimately, the court of appeals affirmed the trial court's decision because the Marxes argued different concepts at the trial court level than they argued to the appeals court.[189] The Marxes argued ambiguity at the trial level, centering around the fact that the settlement agreement changed certain numbers in the original purchase contract without changing all the numbers, which there-

181. *Id.* at 371–72.
182. *Id.* at 372.
183. *Id.*
184. *Id.*
185. *Id.* at 373.
186. *Id.* at 373, 375.
187. *Id.* at 375.
188. *Id.*
189. *Id.* at 377.

fore created ambiguity.[190] At the court of appeals, the Marxes argued indefiniteness.[191] The court of appeals differentiated the legal meaning of ambiguity from indefiniteness.[192] According to the court of appeals, "[a] contract is ambiguous if 'the contract language is susceptible to two or more reasonable interpretations.'"[193] If a contract is ambiguous, the court resolves the ambiguity and the contract is then enforceable.[194] Indefiniteness, on the other hand, has a distinct and separate legal meaning and makes a contract unenforceable because there is no meeting of the minds.[195] As a general rule, courts are reluctant to hold contracts unenforceable for indefiniteness and try to interpret contracts "in such a manner as to render performance possible rather than impossible."[196] One can only guess how the court of appeals would have come out had this fatal mistake not been made, but the case presents an important cautionary tale for practitioners.

B. Contracts for Deed

As in years past, courts addressed Chapter 5, Subchapter D of the Texas Property Code, Executory Contracts for Conveyance, and reinforced what some characterize as draconian remedies available under Subchapter D.[197] As the Tyler Court of Appeals explained in *Weaks v. White*, a contract for deed is not like your typical secured transaction.[198] Under a contract for deed the seller maintains title to the property until the property has been paid for in its entirety.[199] Subchapter D of the Property Code contains detailed requirements that a seller must comply with.[200] Failure to so comply can result in the buyer having the right to "'cancel and rescind' a contract for deed and 'receive a full refund of all payments made to the seller.'"[201] In *Weaks*, the Weakses, as the sellers, entered into a "Contract for Deed" with White, as the buyer, on June 5, 2002, whereby White agreed to make ten years of installment payments to purchase a small lot and the accompanying mobile home.[202] After al-

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190. *Id.* at 376–77.
191. *Id.* at 377.
192. *Id.* at 375–76.
193. *Id.* at 375 (quoting Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154, 157 (Tex. 2003)); *accord* Coker v. Coker, 650 S.W.2d 391, 393–94 (Tex. 1983); Thompson v. CPN Partners, L.P., 23 S.W.3d 64, 71 (Tex. App.—Austin 2000, no pet)).
194. *Id.* at 376.
195. *Id.* at 376. (citing Gen. Metal Fabricating Corp. v. Stergiou, 438 S.W.3d 737, 744 (Tex. App.—Houston [1st Dist.] 2014, no pet.); Wilson v. Wagner, 211 S.W.2d 241, 243 (Tex. Civ. App.—San Antonio 1948, writ ref'd n.r.e)).
196. *Id.* (quoting Guzman v. Acuna, 653 S.W.2d 315, 319 (Tex. App.—San Antonio 1983, writ dism'd) (citing Estate of Eberling v. Fair, 546 S.W.2d 329, 334 (Tex. Civ. App.—Dallas 1976, writ ref'd n.r.e.)).
197. Tex. Prop. Code. Ann. §§ 5.061–.085 (West Supp. 2016).
198. Weaks v. White, 479 S.W.3d 432, 436 (Tex. App.—Tyler 2015, pet. denied).
199. *Id.*
200. *Id.* (quoting Tex. Prop. Code. Ann. §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2) (West 2014)).
201. *Id.* (citing Prop. §§ 5.069(d)(2), 5.070(b)(2), 5.072(e)(2)).
202. *Id.* at 435.

most ten years, in December 2011, White stopped making payments.[203] In February, the Weakses made a demand that White pay the total amount remaining under the contract along with the past due amount.[204] Also in February, the water meter was removed from the property, which effectively shut off White's access to water.[205] White eventually filed suit against the Weakses for breaches of their duties of good faith and fair dealing along with Texas Property Code Chapter 5, Subchapter D violations while still occupying the mobile home.[206] The trial court ultimately ruled in White's favor and awarded White $43,319.58, plus an additional $1,000 for violation of Section 5.077 and attorney's fees, less the rental value of the property for the months she continued to occupy the mobile home *after* she stopped paying on the contract.[207] The trial court found that the rental value of White's occupation of the Property for the twenty-one month period from the day White filed suit until judgment was entered was $7,493.01.[208]

Among other issues, the Weakses disagreed with the amount the trial court held they were owed for White's occupation and appealed.[209] The trial court had limited White's recovery to the time period after rescinding of the contract.[210] The Weakses argued that White should have to pay the rental value for her full occupation of the property over the almost ten year period.[211] The Weakses argued that failing to allocate White the rental expense during her occupation would result in an "unfair windfall."[212] Citing the Texas Supreme Court's holding in *Morton v. Nguyen*,[213] the court of appeals agreed with the trial court and found that, while White was entitled to reimbursement for all payments made to the Weakses, the Weakses were only entitled to reimbursement for the "interim occupation of the property upon cancellation and rescission of the contract for deed."[214] This case once again presents a warning to all practitioners on the extreme importance of closely adhering to the requirements of Chapter 5, Subchapter D of the Texas Property Code in order to avoid providing buyers with what could amount to a "windfall" in the form of rent-free occupation of a property over many years.

C. Conditions Precedent vs. Covenants

As in years past, during the review period the courts dealt with several cases addressing the difference between a covenant and condition. In *KIT*

203. *Id.*
204. *Id.*
205. *Id.*
206. *Id.*
207. *Id.* at 435–36.
208. *Id.* at 436.
209. *Id.*
210. *Id.* at 435–36.
211. *Id.* at 436.
212. *Id.*
213. 412 S.W.3d 506, 509–10 (Tex. 2013).
214. *Weaks*, 479 S.W.3d at 436 (citing *Morton*, 412 S.W.3d at 508).

Projects, LLC vs. PLT Partnership,[215] the seller and purchaser entered into a real estate contract on January 28, 2013. On March 28, 2013, the buyer did not have sufficient funds to close the transaction and requested a thirty-day extension from the seller in exchange for $10,000.[216] The relevant part of the extension executed by both parties reads as follows: "In consideration for this 30 day extension Buyer agrees to pay an additional $10,000 extension fee directly to [the Seller]. This fee is non refundable and not applicable to the sales price."[217] Although the buyer was unable to pay the $10,000 when the extension was agreed to, the buyer did tender a check to the seller with instruction not to deposit the check.[218] The buyer executed the extension and provided the signed extension agreement to the seller on April 4, 2013.[219] When the seller still had not provided the funds by April 9, 2013, the seller sent the buyer an email that stated "'there is no existing contractual agreement between' the Seller and the Buyer."[220] The buyer sued the seller for breach of contract and each party filed a motion for summary judgment.[221] The trial court granted the seller's motion for summary judgment and denied the buyer's motion for specific performance.[222] The buyer appealed.[223] The Fourteenth Houston Court of Appeals reversed the trial court and remanded.[224] The analysis of the court of appeals primarily relied on its examination of two separate issues: (1) whether the payment of the $10,000 was a covenant or a condition;[225] and (2) whether the amendment was supported by adequate consideration.[226]

With respect to the issue of whether the $10,000 was a contractual covenant versus a condition precedent to the extension of the closing date, the court of appeals noted that although the parties failed to use any of the special words that generally indicate a condition, such as "if," "provided that," or "on condition that," the use of such words are not the determining factor.[227] Instead, the court emphasized the need to examine the contract as a whole to determine the intention of the parties.[228] As the court of appeals noted, the general rule is that "conditions are not favored in the law" because the consequences of contractual conditions are harsh.[229] Therefore, as the court of appeals noted, if "the intent of the

215. 479 S.W.3d 519, 524 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
216. *Id.* at 525.
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 521.
222. *Id.*
223. *Id.*
224. *Id.*
225. *Id.* at 525–26.
226. *Id.* at 526.
227. *Id.* (citing Hirschfeld Steel Co. v. Kellogg Brown & Root, Inc., 201 S.W.3d 272, 281 (Tex. App.—Houston [14th Dist.] 2006, no pet.)).
228. *Id.* at 536.
229. *Id.* at 526.

parties is doubtful, courts will interpret the agreement as creating a covenant rather than a condition."[230] Because the parties did not use the "special words" and the context of the entire agreement did not otherwise indicate the parties' intent to create a condition, the court of appeals found that the "payment of the $10,000 is not a condition precedent to the extension of the closing date."[231]

The court of appeals then examined the issue of consideration.[232] Was the consideration for the contract extension: (1) the promise to pay the extension fee; (2) the payment of the extension fee via check without sufficient funds; or (3) the "valid tender of the fee"?[233] The court of appeals found that the consideration was the promise to pay the fee and not the actual payment of the fee.[234]

The court of appeals then went on to examine the seller's related, but different, argument—that there was never a binding agreement because there was "failure of consideration."[235] The court of appeals distinguished a "failure of consideration" from a "lack of consideration" as follows: failure of consideration is an affirmative defense.[236] According to the court of appeals, "[a] 'failure of consideration' does not mean that there never was any binding amendment."[237] "[F]ailure of consideration" is alleged when "a party does not receive the promised performance under a binding contract."[238] The court of appeals discussed the issue of "failure of consideration" with respect to the trial court's holding,[239] but they ultimately did not address the issue because the parties had entered into a Rule 11 Agreement whereby they had agreed that the sole issue to be addressed by the courts was described as follows:[240]

> ISSUE TO BE DECIDED BY THE COURT: As a matter of law, was the Amendment to the real estate earnest money contract [to extend the closing date for the sale of the property] a binding contract between the parties even though [the Buyer] did not pay the $10,000 extension fee to [the Seller] prior to [the Seller] sending a letter to [the Buyer] stating that "there is no existing contractual agreement" between [the Seller] and [the Buyer]?[241]

230. *Id.* (citing *Hirschfeld Steel Co.*, 201 S.W.3d at 281).

231. *Id.*

232. *Id.* at 526–27.

233. *Id.* (citing Helmerich & Payne Int'l Drilling Co. v. Swift Energy Co., 180 S.W.3d 635, 646–47 (Tex. App.—Houston [14th Dist.] 2005, no pet.)).

234. *Id.*

235. *Id.* at 527.

236. *Id.*

237. *Id.* (citing Cheung-Loon, LLC v. Cergon, Inc., 392 S.W.3d 738, 747–48 (Tex. App.—Dallas 2012, no pet.); Burges v. Mosley, 304 S.W.3d 623, 628–29 (Tex. App.—Tyler 2010, no pet.); Walden v. Affiliated Comput. Servs., 97 S.W.3d 303, 320–21 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

238. *Id.*

239. *Id.* at 527–28.

240. *Id.* at 522.

241. *Id.* at 523 (alteration in original) (footnote omitted).

As a result, because the parties had limited the issue before the court to effectively exclude a determination on the failure of consideration, the court of appeals had no choice but to overrule the trial court's granting of a summary judgment motion on behalf of the seller.[242]

VI. LEASES; LANDLORD/TENANT

A. Damages

In *Philadelphia Indemnity Insurance Co. v. White*,[243] the Texas Supreme Court broadly addressed multiple provisions of the Texas Property Code with respect to the landlord's duty to repair. The *Philadelphia* case dealt with the enforceability of Section 12 of the Texas Apartment Association form lease and, therefore, is important for every lawyer that represents landlords in Texas to know and understand. The provision of the Texas Apartment Association form lease at issue in the Philadelphia case provides, in part:

> DAMAGES AND REIMBURSEMENT. You must promptly pay or reimburse us for loss, damage, consequential damages, government fines or charges, or cost of repairs or service in the apartment community due to: a violation of the Lease Contract or rules; improper use; negligence; other conduct by you or your invitees, guests or occupants; or any other cause not due to [the Landlord's] negligence or fault. You will indemnify and hold us harmless from all liability arising from the conduct of you, your invitees, guests, or occupants, or our representatives who perform at your request services not contemplated in this Lease Contract.[244]

The tenant in the *Philadelphia* case argued that the provision in question was not only ambiguous but also a violation of public-policy because it contradicted Section 92.006(c) of the Texas Property Code[245] (generally prohibiting the waiving of repair duties and available remedies provided by statute) and Section 92.052[246] (outlining the landlord's duty to repair).[247] The insurance company for the landlord argued that "section 92.006's list of authorized contractual arrangements is permissive, but not exclusive, and that the Property Code neither prohibits agreements making tenants responsible for damages . . . nor requires tenant fault to shift responsibility for tenant-caused damages."[248]

The case involved an extensive apartment fire that occurred in a clothes dryer owned by the tenant.[249] At the trial, the jury had not found

242. *Id.* at 528.
243. 490 S.W.3d 468 (Tex. 2016).
244. *Id.* at 472 (alteration in original) (emphasis omitted).
245. Tex. Prop. Code Ann. § 92.006(c) (West Supp. 2016).
246. *Id.* § 92.052.
247. *Phila. Indem. Ins. Co.*, 490 S.W.3d at 474.
248. *Id.* at 474 (citing Churchill Forge, Inc. v. Brown, 61 S.W.3d 368, 371 (Tex. 2001) (discussing Section 92.006, "[l]egislative permission to contract under certain circumstances does not necessarily imply that contracting under other circumstances is prohibited")).
249. *Id.* at 471.

the tenant negligently caused the fire but nonetheless found the tenant liable for the damage pursuant to the lease agreement.[250] The trial court entered a take-nothing judgment notwithstanding the verdict but did not specify the exact grounds.[251] The court of appeals affirmed on the basis that the lease agreement shifted responsibility for repairs to the tenant in violation of the requirements of the Texas Property Code and was therefore void and unenforceable.[252] Overturning the trial court and the court of appeals, the supreme court relied on its analysis in *Churchill Forge*, where it held that "(1) Section 92.006(c) does not restrict freedom of contract unless the landlord has a duty to repair, and (2) under Section 92.052(b) a landlord has no duty to repair conditions 'caused by' the tenant."[253] The supreme court went on to address the types of provisions that are generally void because of public policy.[254] The supreme court distinguished between "a contract provision unenforceable as written and one that is capable of being enforced as written."[255] Citing *Lewis v. Davis*, the supreme court went on to state that "a contract will not be declared void merely because it *could have been* performed illegally or contrary to public policy."[256] Importantly the supreme court emphasizes repeatedly that given the "State's strong commitment to the principle of contractual freedom, [the courts] should hesitate to infer a general prohibition from a statutory clause granting specific permission to contract"[257] and that "all rights not inconsistent with the statute remain intact."[258] With respect to the damages provision at issue in the *Philadelphia* case, the supreme court went on to state that "[t]he provision would be unenforceable per se only if it could not be performed without violating the Property Code."[259]

The supreme court also addressed whether the tenant or the landlord had the duty of proving the party responsible for the damages. The *Philadelphia* supreme court focused its analysis on Section 92.053 of the Texas Property Code, which provides in part:

(a) *Except as provided by this section*, the tenant has the burden of proof in a judicial action to enforce a right resulting from the landlord's failure to repair or remedy a condition under Section 92.052.

(b) If the landlord does not provide a written explanation for delay in performing a duty to repair or remedy on or before the fifth day after receiving from the tenant a written demand for an explanation, the landlord has the burden of proving that he made a

250. *Id.*
251. *Id.* at 473.
252. *Id.* at 471.
253. *Id.* at 474 (citing *Churchill Forge, Inc.*, 61 S.W.3d at 371–72).
254. *Id.* at 483.
255. *Id.* at 483 n.8 (citing Lewis v. Davis, 199 S.W.2d 146, 148–49 (Tex. 1947)).
256. *Id.* (citing *Lewis*, 199 S.W.2d at 149).
257. *Id.* at 481 (quoting *Churchill Forge, Inc.*, 61 S.W.3d at 371).
258. *Id.* at 479 (citing Tex. Prop. Code Ann. § 92.061 (West 2014)).
259. *Id.* at 483.

> diligent effort to repair and that a reasonable time for repair did not elapse.[260]

The *Philadelphia* supreme court went on to conclude that "[t]aken together, sections 92.052 and 92.053 create a presumption that damage to premises under the tenant's control was caused by the tenant and the tenant must prove otherwise."[261]

Four Justices filed dissenting opinions strongly disagreeing with the majority opinion on the issue of burden of proof.[262] In their dissent, the Justices also relied on *Churchill* and argued that, as they stated in *Churchill* and pursuant to the plain language of the statute, the burden was on the landlord to prove that the tenant caused the fire and not on the tenant to prove she did not cause the fire.[263] The dissent believed the burden was on the landlord and not the tenant because the fact that the tenant caused the fire is an affirmative defense to the landlord's unwaivable duty to repair, and the burden is therefore on the landlord to establish the benefit of the exception.[264] The dissent went on to cite a number of cases where the Texas Supreme Court held that "'the burden of proving a statutory exception rests on the party seeking benefit from the exception,' not on the party seeking to avoid that benefit."[265] The dissent agreed that at common law, absent the statutory provision in question, the tenant would be obligated to pay for the damages.[266] Although the majority acknowledged that the statutory interpretation given in *Churchill* was different, they dismissed it as dicta with no bearing on the conclusion reached in the case.[267]

The dissent also addressed the issue of proof, arguing that the majority was essentially asking the tenant to "prov[e] a negative," which is a position that the court has consistently recognized in the past as "difficult and frequently impossible."[268]

B. Statute of Frauds; Parol Evidence Rule

In *Dupree v. Boniuk Interests, Ltd.*, the tenant, Dupree, signed a promissory note with her landlord, Boniuk, whereby the tenant promised to repay $21,499.00 "in sixty (60) equal monthly installments of FOUR

260. *Id.* at 486–87 (quoting Prop. § 92.053).
261. *Id.* at 487.
262. *Id.* at 491–97.
263. *Id.* at 494.
264. *Id.* at 493–95 (citing Churchill Forge, Inc. v. Brown, 61 S.W.3d 368, 372 (Tex. 2001) ("Without showing that the damage was caused by the tenant, the landlord would otherwise have a duty to bear the cost of repair . . . .")).
265. *Id.* at 494 (citing Better Bus. Bureau of Metro. Dall., Inc. v BH DFW, Inc., 402 S.W.3d 299, 309 (Tex .App.—Dallas 2013, pet. denied) (quoting City of Houston v. Jones, 679 S.W.2d 557, 559 (Tex. App.—Houston [14th Dist.] 1984, no writ))).
266. *Id.* at 492.
267. *Id.* at 487 n.10.
268. *Id.* at 495 (citing 20801, Inc. v. Parker, 249 S.W.3d 392, 397 (Tex. 2008) (quoting State Farm Mut. Auto. Ins. Co. v. Matlock, 462 S.W.2d 277, 278 (Tex. 1970))).

HUNDRED FORTY AND 00/100 DOLLARS ($440.00)."[269] The promissory note did not state how or when the tenant received the principal amount.[270] The tenant contended that the principal amount was intended as a personal loan and the landlord contended that the principal amount was a credit against the tenant's unpaid lease payments.[271] The trial court permitted the testimony of the landlord that at the time the promissory note was executed the tenant had an unpaid balance of over $41,000 and that the $21,499 was "placed against [the tenant's] account; so [it was] effectively paid to her."[272] The tenant partially appealed the trial court's ruling against her on the basis that the trial court should not have allowed parol evidence to construe the note because the note was unambiguous on its face.[273] In *Dupree*, the First Houston Court of Appeals held that the parol evidence rule did not bar the use of parol evidence to "show collateral, contemporaneous agreements that are consistent with the underlying agreement to be construed, but this exception to the parol evidence rule 'does not permit parol evidence that varies or contradicts either the express terms or the implied terms of the written agreement.'"[274]

In *Wood v. Kennedy*,[275] the Fourteenth Houston Court of Appeals again examined the applicability of the Statute of Frauds to an oral agreement to lease space. George Wood claimed that in September 2012, he and Doyle Murphee, Sr. entered into an oral agreement to allow Wood to store materials relating to his business in a building owned by Murphee for $250 per month. Wood also claimed that Murphee had agreed to give Wood the option to purchase the property within one year. At some point after Wood moved items into the building, Wood claimed he received multiple calls from a person (the name of which he could not recall) stating that the rent was not $250 but $1,500 per month. In October 2012, Murphee's daughter became the guardian of Murphee's estate. Murphee's daughter contacted Wood in September 2012 and told Wood that she had "power of attorney from her father, and that the building was not for sale, 'so the deal was off.'"[276] Wood then spoke to Murphee and Murphee confirmed what the daughter had said. During the same conversation, the daughter told Wood to remove his property from the rented building. Wood never removed his property and never paid rent. In November 2012, Murphee died. In a somewhat complicated series of events not relevant to this discussion, the case ultimately ended up under

269. Dupree v. Boniuk Interests, Ltd., 472 S.W.3d 355, 366–67 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
270. *Id.* at 367.
271. *Id.*
272. *Id.*
273. *Id.* at 366.
274. *Id.* (quoting DeClaire v. G & B Mcintosh Family Ltd. P'ship, 260 S.W.3d 34, 35 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (citing Dameris v. Homestead Bank, 495 S.W.2d 52, 54 (Tex. Civ. App.—Houston [1st Dist.] 1973, no writ))).
275. 473 S.W.3d 329, 333 (Tex. App.—Houston [14th Dist.] 2014, no pet.).
276. *Id.*

the jurisdiction of the probate court.[277] In the probate court, Murphee's descendants sought eviction, possession, and ten months of unpaid rent along with legal costs.[278] The probate court issued a writ of possession, awarded the decedents $6,250 for the unpaid rent, $297 in court fees, and $9,189.20 in legal expenses.[279] Wood appealed, challenging the evidence to support the damages awarded and the award of legal fees.[280]

In order to determine the proper damages in an action for unpaid rent, one must first determine the "nature of an individual's tenancy"—are they a "tenant at will" or a "tenant at sufferance?"[281] Citing the Texas Supreme Court holding in *Coinmach*, the Fourteenth Houston Court of Appeals stated "[i]f the holdover tenant continues to pay rent, and the landlord knows of the tenant's possession and continues to accept rent without objection, the tenant is a tenant at will and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary."[282] With a tenant at sufferance, there is no new agreement, and "the proper measure of damages is the reasonable rental value during the holdover period."[283] Because Wood never paid rent and had been asked to vacate the premises, the court of appeals determined that Wood was a tenant at sufferance but that there was insufficient evidence to support the trial court's conclusion that the reasonably-calculated rental value of the building was $6,250.[284] As a tenant at sufferance, the terms of Wood's lease were no longer applicable to determine the unpaid rental value; however, they could be evidence of the fair market value of the property.[285] The court of appeals found that "there was evidence that Murphee Sr. had accepted Wood's offer to lease the property for $250 per month[,]" which demonstrates the fair market value of the property.[286]

C. Lease Interpretation

In *Tri-County Electric Cooperative, Inc. v. GTE Southwest Inc.*,[287] the Fort Worth Court of Appeals examined the purported existence of a perpetual lease for the use of telephone poles, the obligations of parties to remove attachments from the telephone poles at the end of the lease if the lease was not perpetual, and whether a holdover tenant is guilty of trespass. *Tri-County* involved two different agreements between Tri-County Electric Cooperative (Tri-County) and predecessors of Verizon,

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277. *Id.* at 334.
278. *Id.*
279. *Id.*
280. *Id.*
281. *Id.* at 335.
282. *Id.* (citing Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 916 (Tex. 2013)).
283. *Id.* (citing Alford v. Johnston, 224 S.W.3d 291, 297 (Tex. App.—El Paso 2005, pet. denied).
284. *Id.* at 336.
285. *Id.* at 340.
286. *Id.*
287. 490 S.W.3d 530, 534 (Tex. App.—Fort Worth 2016, no pet.).

which governed the joint use of utility poles.[288] One of the agreements was originally negotiated in 1959 and the other in 1975, and both agreements provided for periodic adjustments of the rental rates.[289] In 2003, Tri-County requested a rental rate adjustment pursuant to the methodology outlined in the agreements requiring the sharing of certain operating cost details.[290] After Verizon failed to respond to the written request, Tri-County notified Verizon in 2005 of its intent to terminate the agreements effective February 2, 2008, along with a new rental rate (based on public FCC filings) effective for the remaining three-year term.[291] Tri-County also notified Verizon that Verizon would be required to remove all attachments from Tri-County's poles.[292] After sending the letter, Tri-County realized that Verizon was also in breach of the agreements because it had failed to notify Tri-County that it had been placing new attachments on the poles.[293] Ultimately, Tri-County sued Verizon for (1) breach of contract for failing to pay rentals after 2005; (2) breach of contract, wrongful holdover, trespass, and trespass to try title for failing to remove attachments after the termination; and (3) breach of contract for failure to comply with the agreements' requirements that Verizon obtain approval for additional attachments.[294] In response, Verizon argued that (1) the agreements required increases in the rental rate to be mutually agreed upon; (2) the agreements did not contain a removal provision, so Verizon had the right to remain on Tri-County's poles in perpetuity; and (3) the inventory Tri-County had performed of the Verizon attachments was faulty.[295] Verizon and Tri-County each filed motions for summary judgment and the trial court verbally granted Verizon's motion.[296]

The court of appeals disagreed with the majority of the trial court's ruling.[297] The first issue the court of appeals addressed was whether Verizon was required to remove their attachments after termination or if the agreements allowed the attachments to remain in perpetuity.[298] Although the agreements did not specifically address the removal of attachments after termination, they did address removal of attachments in the event a nonowner of a pole decided it no longer desired to use a pole that has attachments of the nonowner.[299] The provision effectively provided that "the parties intended that nonowner attachments would be allowed to remain only on owner-designated joint use poles for which rental is paid

288. *Id.* at 534–35.
289. *Id.*
290. *Id.* at 535.
291. *Id.*
292. *Id.*
293. *Id.*
294. *Id.* at 535–36. Tri-County actually amended their petition twice. This is a broad summary of the ultimate issues.
295. *Id.* at 538.
296. *Id.* at 536.
297. *Id.* at 534.
298. *Id.* at 544.
299. *Id.*

unless the nonowner desired to purchase the pole."[300] Furthermore, another provision clearly provided that the use of the poles was subject to the "duration and scope of [senior landowner] easements."[301] The court of appeals concluded that both provisions clearly "weigh[ed] against a conclusion that the parties intended a perpetual lease of the joint use poles" and, therefore, the attachments were required to be removed after the termination of the agreements.[302]

The court of appeals then addressed the trespass-based claims.[303] Verizon contended that because Tri-County demanded rent for the period of time after the termination of the agreement, Tri-County had elected to treat Verizon as a tenant and not a trespasser.[304] The court of appeals relied on the Texas Supreme Court's holding in *Coinmach* to differentiate between a tenant at will, which remains in possession of premises with the landlord's consent and therefore cannot, by definition, be guilty of trespass, and a tenant at sufferance who retains possession without consent and is, by definition, guilty of trespass.[305] Because the court of appeals felt that a genuine issue of material fact existed with respect to whether Tri-County "elected to treat [Verizon] as a tenant at will rather than a tenant at sufferance," the court of appeals remanded the case for determination of that fact.[306]

D. Reasonable Accommodation for Disabilities

In an important case for landlords, *Chavez v. Aber*, the U.S. District Court for the Western District of Texas, El Paso Division, addressed the issue of housing discrimination on the basis of the defendants' refusal to accommodate the plaintiff's minor son's mental health disability.[307] The plaintiff in the case, Yvonne Chavez, sought damages she claimed resulted from the defendants' refusal to permit her son's service dog.[308] The plaintiff had rented a duplex apartment from the defendants since 2006.[309] In January 2010, the plaintiff signed a new lease with defendants that contained a "no pets" policy.[310] In 2011, the son's doctor recommended the son utilize an emotional support animal and the plaintiff adopted a three-month old pit bull mix.[311] Although the plaintiff's lease contained a no pets policy, multiple other tenants in the building owned dogs.[312] The defendants, however, did not want a pit bull on their prop-

300. *Id.* at 545
301. *Id.* at 546.
302. *Id.*
303. *Id.*
304. *Id.*
305. *Id.* at 547 (citing Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 917 (Tex. 2013)).
306. *Id.* at 551.
307. Chavez v. Aber, 122 F. Supp. 3d 581, 586 (W.D. Tex. 2015).
308. *Id.*
309. *Id.*
310. *Id.* at. 587.
311. *Id.*
312. *Id.*

erty and requested that the plaintiff get rid of the dog.[313] The plaintiff explained the situation to the defendants and asked the defendants to make an accommodation to their no pets policy.[314] The defendants initially refused the request for accommodation but eventually built a fenced area to separate the plaintiff's yard from her neighbors.[315] Nonetheless, during a period of over a year, which spanned the time the fence was built, the defendants sent the plaintiff multiple notices to vacate, demanded an additional deposit for the support animal, attempted to raise the plaintiff's rent by $200, refused to conduct repairs, called animal control on multiple occasions, and filed multiple suits to evict the plaintiff.[316] The plaintiff ultimately moved into a new apartment that cost $220 more per month and filed against the defendants for "(1) housing discrimination under the FHA, (2) unlawful retaliation under the FHA, (3) discrimination under the Texas Fair Housing Act ("THFA"), and (4) unlawful retaliation under [Section] 92.331 of the Texas Property Code."[317] The defendants moved to dismiss on the ground that the plaintiff's claims were moot because the defendants built the fence separating the yards, and the plaintiff lacked standing to bring individual claims.[318] The district court ruled that the building of the fence did not moot the plaintiff's claims because the plaintiff never requested the building of the fence.[319] Furthermore, the district court ruled that the plaintiff had (1) individual standing under the FHA;[320] (2) pled plausible claims against the apartment manager and the complex;[321] (3) sufficiently pled that the defendants had knowledge of the disability;[322] (4) sufficiently pled that the accommodation requested by the plaintiff was reasonable;[323] (5) sufficiently pled that the defendants refused to make the requested accommodation;[324] (6) sufficiently pled a case for retaliation under the FHA and the Texas Property Code;[325] and (7) sufficiently pled a case for discrimination under Section 301.025, Subsections (a), (b), and (c)(2) of the Texas Property Code.[326] As a result of the district court's findings, the defendants' motion to dismiss was denied.[327] Although there is no record of a final decision in this case, the discussion of the facts of the case and the district court's analysis present an important warning to landlords regard-

313. *Id.*
314. *Id.*
315. *Id.* at 587, 589.
316. *Id.* at 587–90.
317. *Id.* at 589–90.
318. *Id.* at 591–92.
319. *Id.*
320. *Id.* at 592.
321. *Id.* at 593–601.
322. *Id.* at 595–96.
323. *Id.* at 596–97.
324. *Id.* at 597–99.
325. *Id.* at 599–601.
326. *Id.* at 601.
327. *Id.* at 602.

ing the need to reasonably accommodate disabilities, including the use of related support animals.

E. Holdover Rent; Damages

Pointe West Center, LLC v. It's Alive, Inc.[328] provides several important tips for landlords. In *Pointe West Center*, the landlord, Pointe West Center, sued the tenant, It's Alive, Inc., for holdover rent and approximately $57,373 in damages to the premises discovered after the tenant vacated.[329] The lease in question was a five-year lease that expired on August 15, 2012.[330] Prior to expiration of the lease, in May of 2012, the tenant sent the landlord a letter requesting the ability to remain on the premises after expiration of the lease on a month-to-month basis at the current rent, but the landlord did not respond to the letter.[331] After the expiration of the lease, the tenant paid the landlord its current rent for August and September.[332] After deciding to move out, the tenant damaged the space.[333] The landlord prepared the space for the next occupant and repaired the damage simultaneously.[334] At trial, the jury only awarded $15,000 in repair costs and nothing for the holdover penalty.[335] The landlord appealed.[336] During the course of the trial, the landlord had easily established the injury to the Premises by admitting photographs into evidence documenting the injury.[337] Unfortunately, the landlord failed to document that the repair costs were reasonable or what the actual costs were.[338] The landlord was unable to isolate the repair expenses from the normal wear and tear expenses incurred in turning a rental space or from repairs conducted on other premises.[339] The First Houston Court of Appeals found that "[b]ecause there was no proof of the actual amount of damages, there was no proof that the damages presented were reasonable or necessary."[340] Because the actual amount of damages was indeterminable from the evidence introduced at trial, the court of appeals remanded for a new trial on the issues of liability and damages.[341] The lesson for landlords is to carefully document all expenses related to repairing tenant damage, including the hours spent to fix each item and the cost of items purchased for the repairs. Landlords also need to be able to

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328. 476 S.W.3d 141 (Tex. App.—Houston [1st Dist.] 2015, pet denied).
329. *Id.* at 145–46.
330. *Id.* at 145.
331. *Id.*
332. *Id.*
333. *Id.* at 145–46.
334. *Id.* at 146
335. *Id.* at 147.
336. *Id.* at 145.
337. *Id.* at 148–49 (citing McGinty v. Hennen, 372 S.W.3d 625, 627 (Tex. 2012) (per curiam) (citing Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 200 (Tex. 2004) (per curiam))).
338. *Id.* at 149.
339. *Id.*
340. *Id.* at 149 (citing *McGinty*, 372 S.W. 3d at 627).
341. *Id.* at 150.

distinguish between repairs for regular wear and tear and repairs related to tenant damage.

In *Pointe West Center*, the court of appeals also addressed the Statute of Frauds and a provision found in virtually all agreements.[342] At trial, the jury failed to award the Landlord the holdover penalty and the landlord appealed.[343] The tenant claimed that the landlord and tenant had orally modified the lease.[344] The landlord claimed that there could be no oral modification because the lease, like most contracts, required all amendments to be in writing.[345] The court of appeals pointed out that "[a] written contract not required by law to be in writing, may be modified by a subsequent oral agreement even though it provides it can be modified only by a written agreement."[346] Although the court of appeals agreed that the Statute of Frauds applies to a lease of real estate for a period greater than one year (which, in the present case, would have ordinarily required that any amendment to the lease be in writing) the court of appeals held that the same is not true for a lease that is on a month-to-month basis for an indefinite period of time.[347] As a result, it was possible for the jury to have found that the landlord was not entitled to a holdover penalty because the lease was month to month, which meant that it could be orally modified and, therefore, the appeals court affirmed the jury's failure to award the holdover penalty.[348]

VII. CONSTRUCTION MATTERS

A. Certificate of Merit Statute

In *Frazier v. GRNC Realty, LLC*,[349] the Corpus Christi Court of Appeals once again addressed the certificate of merit issue. In *Frazier*, the project owner filed suit against the construction company and many of the subcontractors, including the architect, for negligence and other miscellaneous claims related to the design of the heating, ventilation, and air conditioning system.[350] In *Frazier*, there was no dispute that the plaintiff, GRNC Realty, failed to file the required certificate of merit with its original suit.[351] However, the defendant, Frazier, who was proceeding pro se,

342. *Id.* at 150–52.
343. *Id.* at 147.
344. *Id.* at 151.
345. *Id.*
346. *Id.* (quoting Robins v. Warren, 782 S.W.2d 509, 512 (Tex. App.—Houston [1st Dist.] 1989, no writ) (citing Mar-Lan Indus., Inc. v. Nelson, 635 S.W.2d 853, 855 (Tex. App.—El Paso 1982, no writ))); *accord* Roehrs v. FSI Holdings, Inc., 246 S.W.3d 796, 808 (Tex. App.—Dallas 2008, pet. denied); Double Diamond, Inc. v. Hilco Elec. Coop., Inc., 127 S.W.3d 260, 267 (Tex. App.—Waco 2003, no pet.).
347. *Id.* at 151 (citing Tex. Bus. & Com. Code Ann. §§ 26.01(a)(1), (b)(5) (West 2015); Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 915–16 (Tex. 2013); Robb v. San Antonio St. Ry., 82 Tex. 392 (1891)); *cf.* Miller v. Riata Cadillac Co., 517 S.W.2d 773, 775–76 (Tex. 1974).
348. *Id.* at 151–52.
349. 476 S.W.3d 70, 71 (Tex. App.—Corpus Christi 2014, pet. denied).
350. *Id.* at 72.
351. *Id.*

filed an answer to the suit in May of 2011, whereby not only did he fail to "assert a general denial to deny the five allegations of design negligence against him,"[352] he also admitted liability.[353] Furthermore, at a later point during the suit, Frazier provided discovery in which he admitted liability.[354] Frazier also outlined in his original answer the actions he took to remedy the situation.[355] In August 2012, Frazier finally filed a motion to dismiss under Section 150.002 of the Texas Civil Practice and Remedies Code, related to the failure to file a certificate of merit, which was denied by the trial court.[356] The *Frazier* court of appeals, citing the Texas Supreme Court's holding in *Crosstex Energy Services, LP v. Pro Plus, Inc.*,[357] stated that "Section 150.002 imposes a mandatory, non-jurisdictional filing requirement, and a defendant may waive its right to seek dismissal under the statute."[358]

The *Frazier* court of appeals went on to cite a 1981 case, *Alford, Meroney & Co. v. Rowe*,[359] which established the elements of waiver.[360] The elements of waiver discussed by the Frazier court of appeals are:

> (1) express renunciation of a known right; (2) silence or inaction, coupled with knowledge of the known right, for such an unreasonable period of time as to indicate an intention to waive the right; or (3) other conduct of the party knowingly possessing the right of such a nature as to mislead the opposite party into an honest belief that the waiver was intended or assented to.[361]

The court of appeals then went on to address the issue of waiver, specifically with respect to cases involving Chapter 150.[362] The court of appeals stated that whether a party has waived its right to dismiss under Section 150.001 is usually a question of intent.[363] The court of appeals then cited what appeared on their face to be two contradictory holdings to support its conclusion that "Frazier's actions prior to seeking dismissal amount to a waiver of his right to seek dismissal under section

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352. *Id.* at 72, 74.

353. *Id.* at 74 ("[T]he design of the HVAC system was, in fact, faulty in design created a negative pressure in the building [sic].").

354. *Id.* at 75. ("[I]n his responses to Requests for Admission, he answered as follows: Request for Admission No. 5: Admit that as the architect who designed the plans for Ganado Nursing Facility, it was part of your duties to ensure that the facility was constructed pursuant to the requirements and regulations contained in Title 40 of the Texas Administrative Code, Chapter 19, Nursing Facility Requirements for Licensure and Medicaid Certification. [Frazier's Response]: Admit.").

355. *Id.* at 74.

356. *Id.* at 72–73.

357. 430 S.W.3d 384 (Tex. 2014).

358. *Frazier*, 476 S.W.3d at 73–74.

359. 619 S.W.2d 210 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.).

360. *Frazier*, 476 S.W.3d at 74.

361. *Id.* (citing *Alford*, 619 S.W.2d at 213).

362. *Id.*

363. *Id.*

150.002."[364] The first case cited by the court of appeals was *Crosstex*.[365] In *Crosstex*, the facts appear to be analogous to the *Frazier* case because the defendant filed an answer, participated in discovery, and availed itself of other procedural matters. However, in *Crosstex*, the Texas Supreme Court found that despite these facts, the "defendant did not waive its right to a certificate of merit."[366] In the second case cited by the Frazier court of appeals, *Murphy v. Gutierrez*,[367] the Fort Worth Court of Appeals found that "a party can substantially invoke the judicial process to such an extent that it is clear the litigant is abandoning the right to dismiss the case under section 150.002."[368]

The court balanced the seemingly contrary cases, and justified its own conclusion by citing a 2013 Texas Supreme Court Case, *CTL/Thompson Texas, LLC v. Starwood Homeowners Association, Inc.*, where the supreme court emphasized that the intent behind Chapter 150 "is to deter meritless claims and bring them quickly to an end."[369] Because the defendant in this case had openly admitted that the case was not meritless, the court of appeals felt that "granting a motion to dismiss in this case would defeat the purpose of this statute."[370]

In a well-argued dissent, Justice Perkins cites numerous cases where defendants substantially invoked the judicial system and were much more active than in *Frazier* yet were still able to rely on Section 150.002 to obtain dismissal.[371] Furthermore, the dissent pointed out that the *Murphy* case relied upon by the majority was an outlier and the only appellate court case that had examined the issue of waiver in the "context of section 150.002 [and] . . . found waiver to exist."[372] Regardless of whether you find the arguments of the majority or the dissent more persuasive, the message to practitioners is clear—to be safe, Section 150.002 should be invoked in all cases involving a negligence claim in construction at the commencement of the suit and not after a defendant has substantially availed himself of the judicial process.

The Dallas Court of Appeals also addressed the certificate of merit statute in *Jennings, Hackler & Partners, Inc. v. North Texas Municipal Water District*.[373] In *Jennings*, the plaintiff, the North Texas Municipal

364. *Id.*
365. *Id.* (citing Crosstex Energy Servs., L.P. v. Pro Plus, Inc., 430 S.W.3d 384, 394–95 (Tex. 2014)).
366. *Id.* (citing *Crosstex Energy Servs.*, 430 S.W.3d at 394–95; Jernigan v. Langley, 111 S.W.3d 153, 156–57 (Tex. 2003) (per curiam); Tenneco, Inc. v. Enter. Prods. Co., 925 S.W.2d 640, 643 (Tex. 1996)).
367. *Id.* (citing Murphy v. Gutierrez, 374 S.W.3d 627, 633–35 (Tex. App.—Fort Worth 2012, pet. denied)).
368. *Murphy*, 374 S.W.3d at 631.
369. *Frazier*, 476 S.W.3d at 75 (quoting CTL/Thompson Tex., LLC v. Starwood Homeowner's Ass'n, 390 S.W.3d 299, 301 (Tex. 2013) (per curiam)).
370. *Id.*
371. *Id.* at 76 (Perkes, J., dissenting) (citing *Crosstex*, 430 S.W.3d at 394–95; Ustanik v. Nortex Found. Designs, Inc., 320 S.W.3d 409, 414 (Tex. App.—Waco 2010, pet. denied)).
372. *Id.* (citing *Murphy*, 374 S.W. 3d at 630).
373. 471 S.W.3d 577 (Tex. App.—Dallas 2015, pet. denied).

Water District, hired the defendant (Jennings), an architecture firm, to "provide architectural, civil engineering, MEP engineering, structural engineering and geotechnical engineering services."[374] The defendant then subcontracted the mechanical engineering services to TurkWorks.[375] After the building was finished, the defendant had significant problems with the HVAC system and, after those problems were not corrected by the defendant, the plaintiff ultimately filed suit against the defendant alleging direct and vicarious negligence.[376] The plaintiff attached an affidavit to its original petition stating that "TurkWorks failed to exercise reasonable care."[377] The affidavit was signed by Gregory G. Schober, M.S., P.E. Because the affidavit was not provided by an architect, Jennings moved to dismiss using Section 150.002 of the Texas Civil Practice and Remedies Code.[378] The trial court denied the defendant's motion to dismiss and the defendant appealed.[379] The court of appeals partially reversed the trial court's ruling and found that although a certificate of merit signed by an architect was required for the plaintiff to proceed against the defendant on direct negligence claims, it was not required for the vicarious liability claims because a vicarious liability claim does not require "any wrongful conduct by the professional."[380]

In *Couchman v. Cardona*,[381] the First Houston Court of Appeals also addressed the certificate of merit issue. The plaintiff, Cardona, filed suit against the defendants, Toby Paul Couchman and Pro-Surv, claiming that they failed to correctly indicate that property she purchased was in a flood plain.[382] Unfortunately, the plaintiff failed to file a certificate of merit with the suit, and, after the defendants moved to dismiss, the plaintiff nonsuited the claim and the suit was dismissed without prejudice.[383] The plaintiff then refiled the suit, including the certificate of merit.[384] The defendants filed a motion to dismiss on several grounds, including the ground that the second suit was barred because the plaintiff "was required to file a certificate of merit with her 'first-filed' petition."[385] The trial court denied the defendants' motion to dismiss and the defendants appealed.[386] The defendants' case relied upon language in two cases decided by the First Houston Court of Appeals, *Pelco Construction., Inc. v.*

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374. *Id.* at 579. The acronymn MEP stands for mechanical, electrical, and plumbing.
375. *Id.*
376. *Id.*
377. *Id.*
378. *Id.*
379. *Id.*
380. *Id.* at 584 (citing United Servs. Auto. Ass'n v. Brite, 215 S.W.3d 400, 403 (Tex. 2007); Dall. Merch.'s & Concessionaire's Ass'n v. City of Dallas, 852 S.W.2d 489, 493 n.7 (Tex. 1993)).
381. 471 S.W.3d 20 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
382. *Id.* at 22.
383. *Id.* at 22–23.
384. *Id.* at 23.
385. *Id.*
386. *Id.*

Dannenbaum Engineering Corp.[387] and *Pakal Enterprises, Inc. v. Lesak Enterprises LLC*.[388] Although the court of appeals in those cases used the "first-filed" language when describing the requirements of Section 150.002(a), neither case actually involved the filing of an earlier case that was dismissed.[389] The language relied upon by the defendants, therefore, was dicta and did not appear in the statute.[390] The court of appeals sustained the trial court's refusal to grant the motion to dismiss for failure to file a certificate of merit in the "first-filed" petition.[391]

VIII. TITLE MATTERS

A. Adverse Possesssion/Title Disputes

There were only a few cases addressing adverse possession during this Survey period and a few other cases discussing specific aspects of title disputes. These are discussed below.

First, with respect to adverse possession, the case of *NAC Tex Hotel Co. v. Greak*[392] highlights the need to give notice to vacate in an adverse possession case if there is a desire to recover attorney's fees. There are specific aspects of Section 16.034 of the Texas Civil Practice and Remedies Code that must be followed in order to recover attorney's fees, including a ten-day period after sending notice by certified mail before filing the claim for recovery of possession.[393] Also of interest in this case, the claimant "testified that she would 'never intentionally take anything.'"[394] This raised the question as to intent and hostility and resulted in a jury question.[395] Also, a very factual investigation and good discussion of adverse possession can be found in *Estrada v. Cheshire*.[396] Otherwise, this case really raises nothing new with respect to the ten-year and twenty-five year adverse possession statutes.

Similarly, *Williams v. Mai*[397] has a good discussion regarding the processes for partition, but does not raise anything new. The Fourteenth Houston District Court of Appeals in *Goodman-Delaney v. Grantham*[398] also noted and somewhat clarified a confusing concept regarding the "possession" of property. In this case, in the absence of a landlord-tenant

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387. 404 S.W.3d 48, 53 (Tex. App.—Houston [1st Dist.] 2013, no pet.).
388. 369 S.W.3d 224, 228 (Tex. App.—Houston [1st Dist.] 2011, pet. denied).
389. *Couchman*, 471 S.W.3d at 24. "When required, the certificate of merit must be filed with the first-filed petition asserting the relevant claim against a professional." *Id.* (quoting *Pelco*, 404 S.W.3d at 53). "[S]ection 150.002 requires a plaintiff to file a certificate of merit with the first-filed petition asserting a negligence claim against a professional." *Id.* (quoting *Pakal*, 369 S.W.3d at 228).
390. *Id.* at 24–25.
391. *Id.* at 27.
392. 481 S.W.3d 327 (Tex. App.—Tyler 2015, no pet.).
393. Tex. Civ. Prac. & Rem. Code Ann. § 16.034 (West 2012).
394. *Greak*, 481 S.W.3d at 331.
395. *Id.* at 332–33.
396. 470 S.W.3d 109 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).
397. 471 S.W.3d 16 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
398. 484 S.W.3d 171 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

relationship, the justice court lacked jurisdiction to address the right to possession between an owner and an occupier.[399]

Two title dispute cases raised interesting new questions. In *West 17th Resources, LLC v. Pawelek*, the San Antonio Court of Appeals found that a deed purporting to convey the entirety of the property, but which was only signed in an individual capacity, also included the interest held by a trust for which the individual was the trustee.[400] There was no specification of the trust as a grantor nor did the individual sign the deed as trustee, but rather only as an individual. The court of appeals looked at the overall intent of the deed to convey the entirety of the property, which could only be accomplished if the trust was part of the conveyance.[401] Accordingly, the deed was construed "to confer upon the grantee the greatest estate that the terms of the instrument w[ould] permit."[402] The court of appeals felt that not including the interest of the trust would be an implied reservation, which was disfavored in view of the intent of the deed to convey the entirety of the property.[403] This decision is troublesome in that while there might have been a breach of warranty, the separateness of the trust was not observed. The trust was not named as a grantor and essentially was written into the deed by the conduct of the court of appeals.

B. Deeds and Conveyances

The courts addressed a number of miscellaneous issues in the area of deeds and conveyances during the Survey period. In *Mueller v. Davis*, the Texarkana Court of Appeals found the use of a catch-all phrase, "all of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as," insufficient to adequately identify the contested property.[404] The deed then listed parcels by production units and acreage. No metes and bounds descriptions were included, and the legal descriptions were insufficient.[405] But, the deed also included a "Mother Hubbard Clause" for the entire county in the same paragraph as the stripes and gores language. An argument was made that the grant of all property in Harrison County saved the inadequate legal description.[406]

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399. *Id.* at 175.

400. W. 17th Res., LLC v. Pawelek, 482 S.W.3d 690, 696 (Tex. App.—San Antonio 2015, pet. denied).

401. *Id.* at 695.

402. *Id.* (quoting Large v. T. Mayfield, Inc., 646 S.W.2d 292, 294 (Tex. App.—Eastland 1983, writ ref'd n.r.e.).

403. *Id.*

404. Mueller v. Davis, 485 S.W.3d 622, 625 (Tex. App.—Texarkana 2016), *rev'd*, No. 16-0155, 2017 WL 2299316, at *1 (Tex. 2017). The Texas Supreme Court reversed the Texarkana Court of Appeals in this decision after the Survey period, finding that the language in the deed unambiguously conveyed the property.

405. *Id.* at 625, 628.

406. *Id.* at 629; *see also* Huggins v. Royalty Clearinghouse, Ltd., 121 F. Supp. 3d 646, 655, 657 (W.D. Tex. 2015) (where a grant of all of the grantor's property in a survey in Burleson County was sufficient, and the court found that the error was discoverable at the point of the conveyance such that a four year limitations period to reform applied.).

The court of appeals found this created an ambiguity as to intent, thereby creating a jury question.[407]

A good drafting discussion for mineral conveyances can be found in *Kardell v. Acker*.[408] Unlike the *Mueller* case, the San Antonio Court of Appeals looked to all the language in the deed, and created harmony between and gave effect to all parts of the deed in order to give every provision meaning.[409] The words and the phrases of the deed were "construed together and in context" to determine intent.[410] The court of appeals did not find a fact question requiring jury determination.[411] The court of appeals spent some time discussing *Garza v. Prolithic Energy Co.*[412] and *Altman v. Blake*[413] with respect to the "five essential attributes of a severed mineral estate."[414] While there was a mineral lease in place granting a one-eighth royalty, the grant of one-fifth of the mineral estate was just that—and not one-fifth of one-eighth.[415]

In another case out of San Antonio, *Lemus v. Aguilar*,[416] the San Antonio Court of Appeals addressed the effect of a handwritten will, which was alleged by certain heirs to act as a gift deed after the will did not qualify as a valid last will and testament. The outcome should have been obvious, but the court of appeals reaffirmed that a will is not a deed.[417] The court of appeals took it a step further to reemphasize that the decedent lacked capacity and the execution of a deed by a grantor without mental capacity would be void.[418] This analysis could become important in the face of pending legislation that mandates acceptance of a power of attorney generally created for estate planning purposes. The basis and the requirements for rejecting a power of attorney are limited and the lack of capacity of the principal could be a difficult determination, especially after the passage of time from the original execution of the power of attorney. Parts of the proposed legislation in the current legislative session provide that a bona fide acceptance of the power of attorney makes it binding, which in effect could validate what would have been a defective deed or void deed if executed by the grantor.[419] This issue of course would most likely arise in the context of a durable power of attorney.

In *York v. Boatman*,[420] the Texarkana Court of Appeals addressed an

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407. *Mueller*, 485 S.W.3d at 630–31.
408. 492 S.W.3d 837 (Tex. App.—San Antonio 2016, no pet.).
409. *Id.* at 842.
410. *Id.* (quoting Hysaw v. Dawkins, 483 S.W.3d 1, 13 (Tex. 2016)).
411. *Id.*
412. 195 S.W.3d 137 (Tex. App.—San Antonio 2006, pet. denied).
413. 712 S.W.2d 117 (Tex. 1986).
414. *Kardell*, 492 S.W.3d at 843.
415. *Id.* at 844.
416. 491 S.W.3d 51 (Tex. App.—San Antonio 2016, no pet.).
417. *Id.* at 58.
418. *Id.* at 60.
419. Act of May 26, 2017, 85th Leg., R.S., H.B. 1974 (to be codified as an amendment to Tex. Est. Code ch. 751).
420. 487 S.W.3d 635 (Tex. App.—Texarkana 2016, no pet.).

issue that is relevant to Transfer of Death Deeds and Lady Bird Deeds now more commonly being utilized. The parties were debating the efficacy of a deed that granted a future interest in a piece of property. This analysis is of interest because it found that even though the estate might commence in the future, the interest was present because it was defined and was immediately effective.[421] This is to be distinguished from a deed of an interest that might arise in the future. Alternatively, a transfer on death may now be accomplished by statute, and does not grant any interest until the death of the grantor, and then only if the interest is still in place or the transfer-on-death deed was not revoked in some other manner. A Lady Bird Deed grants a present interest such as a life estate with the remainder vested upon death. In the context of the Lady Bird Deed, the holder of the life estate retains the right to revoke or otherwise transfer the entirety of the estate before death.

C. Easements

The Texas Supreme Court followed, but clarified, its earlier decision in *Hamrick v. Ward*[422] in the 2016 case of *Staley Family Partnership, Ltd. v. Stiles*.[423] In the *Staley Family* litigation, the issue involved a land-locked tract and a roadway easement across adjacent property to a public roadway. The Staley tract at all times was bounded on the east and the south by an unnamed tributary of Honey Creek. The creek separated the Staley tract from the Frances Helm property subject to an earlier conveyance. The case includes a good illustrative drawing.[424] The public road in question was along the northern boundary of an original tract, which property was originally a singular tract. In 1866, a probate court partitioned the tract among other land into three portions to Axia Ann Helms, James Helms, and Frances Helms. Frances Helms conveyed her property to James in 1870, but not including the Staley tract portion between the creeks. Subsequently, all of the Axia and James Helms tracts, not including the portion acquired from Frances Helms, were conveyed to the Stiles. In 2009, the Staley Family Partnership acquired the 10.129 acres to the west of the tract conveyed by Frances Helms and lying between the two creeks. The Staley Family Partnership sought an easement across the Stileses' property to the County Road 134 to the north but the evidence determined that the County Road 134 did not exist at the time of the severance of the properties.[425] Accordingly, while an easement by necessity is created when there is a unity of ownership and there is a necessity for an easement to access a public road, it does not apply if there was no public road at the time of the severance.[426] Essentially, the Staley Family Partnership bought property that was land-locked at the time and not

421. *Id.* at 640–41.
422. 446 S.W.3d 377 (Tex. 2014).
423. 483 S.W.3d 545, 549–50 (Tex. 2016).
424. *Id.* at 546.
425. *Id.* at 547, 549–50.
426. *Id.* at 548–50.

part of a severance purchase. One can wonder what other historical evidence was not included in the litigation, as it is probable that there was some access for the Frances Helms tract when originally severed.

Also of interest, in *Union Pacific Railroad Co. v. Seber*, the Fourteenth Houston Court of Appeals declined to permit Seber to assert an implied easement by prior use.[427] The court of appeals noted the Texas Supreme Court decision of *Hamrick v. Ward* and the clarification of the law on implied easements, but the court of appeals remanded the case for a determination as to whether or not the railroad crossing, a roadway, was an easement by necessity.[428]

D. Restrictive Covenants, Condominiums, and Owners Associations

The only case during the Survey period believed to be worthy of note is *Trant v. Brazos Valley Solid Waste Management Agency, Inc.*,[429] in which an option contract provided the cities of Bryan and College Station the right to purchase certain property from the Trants. The option contract stated that the cities contemplated using the property as a landfill. The cities did indeed use a portion of the property as a landfill, but also determined to use a portion of the property as a firing range. The Trants contended that the property could only be used as a landfill as the terms and conditions and representations in the option contract were incorporated into the warranty deed by which the property was acquired. The Texas Supreme Court observed that when interpreting restrictive covenants, those restricting the free use of land were not favored.[430] In this case the supreme court found that a statement of intent in the option agreement did not rise to the level of a restricted covenant.[431] This is a drafting lesson worthy of note.

IX. MISCELLANEOUS

A. Nuisance/Trespass

The Supreme Court of Texas addressed the difficult issue (5-4) of inverse condemnation in the context of a trespass case. In *Harris County Flood Control District v. Kerr*,[432] the county was alleged to have approved new developments without mitigating resulting runoff drainage issues, which caused the plaintiffs' homes to flood. The homeowners claimed that the governmental entities knew this development would lead to flooding, and that they approved the development without appropriately addressing mitigation. The county argued that it could not have

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427. Union Pac. R.R. Co. v. Seber, 477 S.W.3d 424, 433–34 (Tex. App.—Houston [14th Dist] 2015, no pet.).
428. *Id.* at 434–35.
429. 478 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).
430. *Id.* at 59 (citing J.M. Davidson, Inc. v. Webster, 128 S.W.3d 223, 229 (Tex. 2003)).
431. *Id.* at 60.
432. 499 S.W.3d 793 (Tex. 2016).

been consciously aware that the approval of the development would result in the flooding of the plaintiffs' homes. The county claimed, and the supreme court agreed, that it never intended to cause flooding, and many years and resources were spent developing and partially implementing flood-control plans to prevent future flooding issues.[433] The supreme court found that a "requisite intent [for an inverse condemnation] is present when a governmental entity knows that a specific act is causing identifiable harm or knows that the harm is substantially certain to result."[434] The intent element is not about the act itself, but rather the knowledge that the harm will occur, but negligence is not sufficient.[435] The supreme court held that the homeowners had failed to raise a fact question regarding intent.[436] The county won because the majority found that it is not responsible for predicting floods and it never intended to cause them.[437] Furthermore, the government is not liable under the takings clause for natural disasters, such as storms that may cause flooding.[438] Justice Lehrmann filed a concurring opinion expressing concern regarding the need to compensate for a taking for private use.[439] Justices Devine, Hecht, Green, and Boyd dissented.[440] The dissenting justices found that the homeowners had raised the fact question regarding intent that could be submitted to the jury because the homeowners presented evidence that the governmental entities knew this development would lead to flooding, and that the development was approved without appropriately mitigating it.[441]

B. Premises Liability

The Texas Supreme Court also delivered an important opinion relating to Chapter 95 of the Texas Civil Practice and Remedies Code, which limits a property owner's liability from injuries to a contractor.[442] The decision in *First Texas Bank v. Carpenter* determined that "a contractor is simply someone who works on an improvement to real property" and "an actual contract . . . to perform a specific kind of work" for stated compensation was not required.[443] In this case a roofing contractor who routinely assisted the owner of the real property was injured while working with an insurance adjuster to demonstrate damage to the roof. He "argued that Chapter 95 [was] inapplicable because he had no contract with the bank

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433. *Id.* at 797–99.
434. *Id.* at 799 (quoting Tarrant Reg'l Water Dist. v. Gragg, 151 S.W.3d 546, 555 (Tex. 2004)).
435. *Id.* at 799, 810 n.64.
436. *Id.* at 807.
437. *See id.* at 808.
438. *See id.*
439. *Id.* at 811–13 (Lehrmann, J., concurring).
440. *Id.* at 813–20 (Devine, J., dissenting).
441. *Id.* at 816–17.
442. Tex. Civ. Prac. & Rem. Code Ann. §§ 95.001–.004 (West 2011).
443. First Tex. Bank v. Carpenter, 491 S.W.3d 729, 730, 731 (Tex. 2016).

and was therefore not its contractor."[444] The supreme court found that applicability of Chapter 95 "turn[ed] on the kind of work being done, not on whether an agreement for the work to be done was written, or formal, or detailed."[445] "The statute cannot fairly be read to cover only contractors with formal written contracts, but still cover subcontractors and employees with no contracts at all."[446] One might argue that the carpenter was only a consultant in particular circumstances, but the contrary argument was that the carpenter was assisting the insurance adjuster as part of his overall scope of performing the roofing repairs. Because the record was not clear that the bank had been paying the carpenter to perform work covered by Chapter 95 during the time he was injured, the case was remanded for determination on both issues.[447]

The Texas Supreme Court also addressed the recreational use statute in *Lawson v. City of Diboll*,[448] in which a spectator at a youth softball game was injured via a trip-and-fall accident while exiting a baseball complex. The issue before the supreme court was "whether the recreational use statute encompasse[d] the spectator's claims against the city."[449] The supreme court held that the act of watching a youth softball game in the city park was not "'recreation' under the recreational use statute," therefore the city was not limited in the damages it owed to the injured party.[450] By way of example, in *City of El Paso v. Collins*, it was sufficient that the parents of an injured child alleged that the city had subjective knowledge of dangerous conditions at the pool on the day that a child suffered injuries swimming at the pool.[451] This case in particular dealt with whether subjective intent was sufficient to establish gross negligence, but it also demonstrated the difference between watching or spectating, and actual use of the recreational facilities.[452] The recreational use statute also controlled the situation and a separate claim under the Texas Tort Claims Act was not available.[453]

Slip and falls also found their way into two other cases dealing with the application of various statutes. In one, *Cage v. Methodist Hospital*, a hospital visitor's claim that she slipped on a wet floor and fell while visiting a hospital patient did not meet the definition of a healthcare liability claim under the Texas Medical Liability Act.[454] The implication of this was that the claim would not require an expert medical or healthcare report

444. *Id.* at 731.
445. *Id.* at 732.
446. *Id.*
447. *Id.* at 733.
448. 472 S.W.3d 667 (Tex. 2015) (per curiam).
449. *Id.*
450. *Id.* at 669 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 75.001(3) (West 2011)).
451. City of El Paso v. Collins, 483 S.W.3d 742, 742, 752 (Tex. App.—El Paso 2016, no pet.).
452. *See id.*
453. *Id.* at 757, 759.
454. Cage v. Methodist Hosp., 470 S.W.3d 596, 602 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

before filing. Also, in *East Texas Medical Center Gilmer v. Porter*,[455] a patron had a slip and fall while walking through the emergency room and brought a negligence action against the hospital. The hospital argued that the patient did not meet the statutory prerequisite of attaching an expert report with her claim, as is required for HCLCs.[456] The Tyler Court of Appeals held that the patron's claim against the hospital was not a covered HCLC since the patron was not yet a patient.[457]

C. ENTITIES

Several cases during the Survey period dealt with the forfeiture of corporate privileges. In *Willis v. BPMT, LLC*,[458] the corporation entered into a lease agreement and, at the time, was in good standing. Subsequently, the corporation went into default and lost its corporate privileges, including forfeiture of the corporation for failure to comply with franchise tax requirements. The debt, even though the amount was not known until later, was created at the time of execution of the lease and the president and owner of the company did not become individually liable.[459] The same held true in *Hovel v. Batzri*, in which an LLC breached a construction contract and then forfeited its charter and privileges by failing to pay its franchise tax.[460] The individual owner was not liable for the LLC's breach of contract.[461] In *TransPecos Banks v. Strobach*,[462] the El Paso Court of Appeals pointed out that "[a] corporation does not cease to exist merely because its charter has been forfeited, so long as there is a statutory right to have the charter reinstated' . . . its legal existence is not fully extinguished until the corporation is formally dissolved."[463]

One other case that may have a drafting lesson is *Alta Mesa Holdings, L.P. v. Ives*, in which the First Houston Court of Appeals pointed out that the Texas Civil Practices and Remedies Code, Chapter 38, which provides for attorney's fees for breach of contract, does not apply to an LLC but only a corporation because of the language of the statute.[464] Prudent counsel, should they desire to provide for attorney's fees for breach of contract, should provide for such a provision in any contractual agreements.

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455. 485 S.W.3d 127 (Tex. App.—Tyler 2016, no pet.).
456. *Id.* at 129.
457. *Id.*
458. 471 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
459. *Id.* at 34–35.
460. Hovel v. Batzri, 490 S.W.3d 132, 133, 149 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).
461. *Id.* at 149.
462. 487 S.W.3d 722 (Tex. App.—El Paso 2016, no pet.).
463. *Id.* at 736 (quoting Doucakis v. Speiser, Krause, Madole, P.C., No. 08-00-00296-CV, 2002 WL 1397155, *1, *5 (Tex. App.—El Paso 2002, pet. denied) (mem. op., not designated for publication)).
464. Alta Mesa Holdings, L.P. v. Ives, 488 S.W.3d 438, 452–55 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).

X. CONCLUSION

Guidance for the practitioner on the use of the Attorney Immunity Doctrine, pursuant to *Sheena*, and the Bona Fide Error Defense, pursuant to *Alanis*, should be carefully considered and applied by those in the workout/foreclosure area. Also in that arena, mortgage servicers of home mortgages should be aware of their classification as a debt collector under the TFDCPA. With the holding in *Stewart*, practitioners involved in the restructure of defaulted loans should give special attention to the acceleration and reinstatement of a note and the language used in any forbearance or similar agreement. Based on the Texas Supreme Court's *Wood* and *Garofolo* decisions, the contractual provisions of a home-equity lien will govern the parties' rights, rather than claims of constitutional forfeitures, and a noncompliant home-equity lien is a void instrument until all constitutional defects are cured. Furthermore, limitations will not run on such a void home-equity lien.

As in years past, Texas cases also continued to present drafting lessons for the real estate practitioner, particularly with respect to conditions precedent or other contractual provisions that the court "feels" may result in seemingly harsh consequences. The overall message to practitioners from the collective cases discussed above is very clear: if you intend for a somewhat draconian result, or harsh consequences, such as a forfeiture, you must draft the agreement and the specific provision very carefully and very clearly. Otherwise, if there is any other feasible interpretation to be given to the provision, the courts will most likely construe the provision in such a way as to avoid the harsh consequences you actually intended.

The conveyancing cases reported during the Survey period again demonstrate the need to use precise language and specify any particular points. Time must be taken to give good legal descriptions and reservations, exceptions, and restrictions must be clearly stated. Moreover, the authority to convey and the necessary parties must always be a consideration. In addressing an adverse possession dispute, a condemnation, or even a partition, counsel must first understand the process and the necessary evidence and information.