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Real Property

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REAL PROPERTY

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TABLE OF CONTENTS

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This article covers cases from Volumes 498 through 527 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

Continuing the history of recent Survey articles, the courts are continuing to deal with issues of standing on challenges to non-judicial foreclosures, particularly in the residential home sphere. Also, in the foreclosure context, cases on text messages for a change of address and retroactive appointment of substitutes have been addressed.

Contract interpretations, mostly in the debtor/creditor context, shed further insight on drafting techniques for the practitioner. The use of turnover order, email signatures (for which there is now a split of authority among Texas appellate courts), and third party beneficiary requirements are also addressed.

With the recent hurricane and flooding issues in Texas, a number of cases are instructive as to insurance coverage. Most importantly, perhaps, is the Texas Supreme Court's clarification of the premises liability statute, including a matter of first impression on the second leg of the dual mandate of foreseeability and reasonableness for criminal act cases.

As in past years, the courts, particularly the Texas Supreme Court, gave practitioners practical guidance to assist with the interpretation of ambiguous contracts and the application of the statute of frauds. Although the statute of frauds has historically been one rarely dealt with by courts or practitioners, the issue seems to be arising with increasing frequency with each Survey period. This year, a relatively large number of cases before the courts hinged on application of the partial performance exception to the statute of frauds. These cases provide valuable guidance to practitioners, and are discussed in more detail below.

Unfortunately, in a notable Texas Supreme Court case, *Shields Limited Partnership v. Bradberry*,[1] the supreme court did not provide the helpful guidance desired by practitioners with respect to waiver of non-waiver clauses. In fact, in the *Shields* case, the supreme court left practitioners hopelessly confused about the best way to draft a non-waiver provision to

1. 526 S.W.3d 471 (Tex. 2017).

ensure that it would not later be waived by the parties. In *Shields*, the guidance offered by the supreme court can be boiled down to "we know it when we see it" which, unfortunately, leaves practitioners looking for a practical solution for their clients at a complete loss.

A number of illustrative cases dealing with conveyances and restrictions demonstrate the courts' trend to avoid rules of interpretation and drafting, and focus on the entirety of the document to discern intent. Also, the supreme court strained to find home equity liens "not valid" until cured and avoid a running of limitations that might bar claims by borrowers. However, forfeiture is a remedy to be determined under the loan documents pursuant to a breach of contract cause of action. Practitioners should note changes to Texas Property Code Chapter 12, with the legislative addition of Section 12.0071, giving a meaningful effect to an expungement. This legislative change is prospective and arose in response to the supreme court limiting the effect of an expungement to the notice of lis pendens itself. Finally, the relatively new correction instrument statute has been refined as to what constitutes a non-material and material correction.

II. MORTGAGES, LIENS AND FORECLOSURES

A. Foreclosure Details

Bauder v. Alegria[2] addresses the Texas Property Code Section 51.002(b)[3] requirement that a notice of foreclosure must be served by certified mail addressed to the debtor's last known address. Here, the notice address for the borrower in the loan documents was 704 Roosevelt Street. Several default or payment reminders were sent to that address. In May 2013, the lender sent a notice to cure to the Roosevelt address. Before sending such notice, the lender sent the borrower a text message stating that he had heard the borrower had sold the Roosevelt property and that he assumed the borrower's address on Neuman Street was her primary residence. There were also text messages for an extended period from the borrower requesting the lender to pick up payments at the Neuman address. Later, the lender sent a foreclosure notice to the Roosevelt address, but not to the Neuman address. The trustee foreclosed and the borrower sued to set aside the foreclosure, claiming that she did not receive proper notice. The foreclosure sale was set aside by the trial court, finding that the lender had reasonable notice of her change of address and that notice was sent to the wrong address. Since the Roosevelt address was shown in the deed of trust, it was urged that the borrower was required to give written notice of a change of address; however, the deed of trust was silent as to the obligation to give a notice of change of address. On appeal, the Fourteenth Houston Court of Appeals held, based upon the texting back and forth regarding the Neuman

2. 480 S.W.3d 92 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
3. Tex. Prop. Code Ann. § 51.002(b) (West 2014).

address, that the last known address of borrower as shown by the lender's records was the Neuman address. Consequently, practitioners should now review both emails and text messages prior to a determination of the notice address required by Texas foreclosure law.

In *Calvillo v. Carrington Mortgage Services*,[4] the law firm retained by the lender sent Calvillo a notice of acceleration and a foreclosure notice on December 9th, but the notice letter was not picked up by Calvillo. The notice was posted and filed on or about December 12th. A provision in the notice stated that one or more of named substitute trustees would conduct the foreclosure sale. On December 21st, an appointment of substitute trustees was executed, authorizing the persons named in the foreclosure notice to act as substitute trustees. The foreclosure occurred on January 3rd of the following year. After foreclosure, Calvillo sued claiming, among other things, that the required twenty-one days' notice of foreclosure had not been properly given, because the substitute trustees named in the notice were not appointed until December 21st, being twelve days after the foreclosure notice and twelve days before the foreclosure.

The El Paso Court of Appeals noted the general rule, stating

> [a]lthough, as a general rule, a substitute trustee has no power to act prior to his appointment, it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee's appointment, the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming his pre-appointment acts.[5]

Further, the court noted that the appointment of substitute trustees, although executed on December 21, was "designated to be effective as of December 12."[6] Therefore, the court concluded that the subsequent appointment ratified the prior actions of the subsequently appointed substitute trustees, which validated the prior notice of foreclosure sale.[7]

Sorrell v. Estate of Carlton[8] dealt with substantial compliance in the redemption of a property sold at a tax sale. Sorrell acquired certain property, previously owned by the Estate of Carlton, at a tax sale. The Estate attempted to redeem the property approximately one month prior to the deadline for redemption. The statutory redemption provision requires payment of: (1) the amount bid for the property; (2) the amount of deed recording fees; (3) the amount paid for taxes, penalties, interest and costs; and (4) a redemption premium of 25% of the aggregate total.[9] The tender by the Estate did not include the amount for taxes, penalties, interest and costs, and the tender included a letter requiring execution of a redemp-

4. 487 S.W.3d 626 (Tex. App.—El Paso 2015, pet. denied).
5. *Id.* at 631 (citing Chandler v. Guar. Mortg. Co., 89 S.W.2d 250, 254 (Tex. Civ. App.—San Antonio 1935, no writ)).
6. *Id.* at 632.
7. *Id.*
8. 504 S.W.3d 379 (Tex. App.—Houston [14th Dist.] 2016, pet. granted).
9. TEX. TAX CODE ANN. § 34.21 (West 2017).

tion deed and a statement to notify the Estate if there were any additional claimed expenses, which would be "paid, upon review."[10]

The Fourteenth Houston Court of Appeals reviewed authority on whether payments would constitute substantial compliance, noting that the determination was based, on a case by case basis, on the size of the amount paid and the size of the amount left unpaid, as well as the promptness of the late payment.[11] Other courts have concluded there was substantial compliance in payment where the amount of shortage was $172.72, and another where the amount was less than 1% of the amount owed;[12] however, in other cases the payment amount was not in substantial compliance when the tender was short by $7,782 and $6,076.[13] In the subject case, the shortage in payment by the Estate was approximately $11,700. Nevertheless, the amount tendered was not the sole factor for substantial compliance.[14] To effect a redemption after the tax sale, the prior owner must make an unqualified tender of the required amounts within the statutory time period; however, the *Sorrell* court would not view the Estate's tender as conditional merely for asking for the quitclaim deed allowed by statute. The court distinguished *Bluntson v. Wuensche Services, Inc.*[15] because the tendering party asked for the tendered checks to be held in trust pending the resolution of disputed costs, which was not an unconditional tender. However, in *Sorrell*, the Estate did not condition its offer on the resolution of any issue, nor did it threaten to dispute any itemization by Sorrell by reason of the language that such other costs would be paid "upon review."[16]

Chief Justice Frost dissented noting that the statutory payment amounts were clear and required and should be strictly construed, pointing out that if the purchaser at the tax sale refused to provide itemization, the statutory regime provided an alternative means to determine the exact amount needed to be tendered.[17] Further, Chief Justice Frost took issue as to whether the term "upon review" represented an unconditional tender, concluding that such language was not an unconditional agreement to pay the statutory requirements and, therefore, would not constitute an unconditional tender.[18]

B. Standing

EverBank, N.A. v. Seedergy Ventures, Inc.[19] involved a deed of trust which was bought and sold several times in a series of assignments. One

10. *Sorrell*, 504 S.W.3d at 382.
11. *Id.* at 383.
12. *Id.* at 384.
13. *Id.*
14. *Id.*
15. 374 S.W.3d 503 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
16. *Id.* at 386.
17. *Id.* at 388, 389.
18. *Id.* at 390.
19. 499 S.W.3d 534 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

assignment was executed in 2001 to Mortgage Electronic Registration Systems, Inc. (MERS), but was not recorded until 2013. MERS assigned the deed of trust to EverBank, but that assignment was recorded a month before the assignment into MERS. Between the assignments to and from MERS, the homeowners defaulted in paying homeowners association assessments, and the homeowners association foreclosed and sold the property to Seedergy. EverBank, as the assignee of the deed of trust, then posted for foreclosure. Seedergy obtained a temporary restraining order, claiming that EverBank lacked standing to foreclose. The Fourteenth Houston Court of Appeals, quoting Texas Property Code Sections 51.002 and 51.0025, noted that "a party has standing to initiate a nonjudicial foreclosure sale if the party is a mortgagee,"[20] which "includes the grantee, beneficiary, owner, or holder of a . . . deed of trust, or 'if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record.'"[21]

Seedergy argued that EverBank did not have standing to foreclose as a matter of law because (1) EverBank was not the last assignee of record of the deed of trust; (2) EverBank was not the holder of the note; and (3) EverBank was not the owner of the note with the right to enforce it. In its first point, Seedergy argued that there were three breaks in EverBank's chain of assignments, any one of which would defeat EverBank's standing to foreclose. The first break alleged was the assignment into Inland Mortgage Corporation which predated the deed of trust in favor of Kellibrook (the original mortgagee) based on the notary dates (December 18, 1996 for the deed of trust, and December 13, 1996 for the assignment). But the court concluded Seedergy did not conclusively establish that the assignment predated the deed of trust, since the assignment specifically referenced the prior recording information for the deed of trust, proving the deed of trust was recorded at the time the assignment was executed.[22]

The second assignment break allegedly occurred in the assignment from MERS to EverBank without specifying a concurrent assignment of the underlying note. Seedergy argued the familiar "split the note" theory of action, relying on an 1872 U.S. Supreme Court case[23] which dealt with Colorado Territory law and federal common law. But, the court rejected such authority, stating

> [i]n Texas, nonjudicial foreclosure sales are governed by the Texas Property Code, not by the law set forth in *Carpenter*. And as this court has previously explained, there is no provision in the Texas

20. *Id.* at 538 (quoting TEX. PROP. CODE §§ 51.002–.0025 (West 2014)).

21. *Id.* However, *in dictum*, the court wanders off-point stating that "[e]ven if a party does not have a recorded interest in a security instrument, the party may still have standing to foreclose if the party is the holder or owner of a note secured by the instrument. This rule derives from the common law maxim, now codified in Texas, that the mortgage follows the note." *Id.* (citing Campbell v. Mortgage Elec. Registration Sys., 2012 Tex. App. LEXIS 4030 (Tex. App.—Austin 2012, no pet.) (dealing specifically with a security interest in personalty); TEX. BUS. & COM. CODE § 9.203(g) (West 2017)).

22. *Id.* at 539.

23. Carpenter v. Longan, 83 U.S. 271 (1872).

Property Code that requires a foreclosing party to prove its status as holder or owner of the note.[24]

The third alleged break in title occurred between the assignment from the original mortgagee to Inland and the subsequent assignment from Irwin Mortgage Corporation to MERS. Inland and Irwin were the same entity, which had changed its name; consequently, Seedergy did not prove that EverBank lacked standing to foreclose.[25]

Further, Seedergy pursued its theory that EverBank was neither the holder nor the owner of the note.[26] But, in fact, EverBank held the original note indorsed in blank. Therefore, the court concluded that "[w]hen indorsed in blank, an instrument becomes payable to bearer and may be negotiated by transfer of possession alone until specially indorsed."[27] Under Texas law, a holder of a note indorsed in blank is presumed to be entitled to enforcement of the instrument merely by showing possession of that instrument; such holder is not also required to establish an unbroken chain of title.[28]

Lamell v. OneWest Bank, FSB[29] involved the transfer of servicing to IndyMac, a division of OneWest, on a home refinanced by Lamell. Lamell protested the property tax on his home, but did not pay the contested portion of the taxes. OneWest advanced the funds to pay those taxes and increased Lamell's payments to cover the costs. Lamell sued Harris County Appraisal District and the Harris County Tax Assessor-Collector and stopped paying on his mortgage. When OneWest threatened foreclosure, Lamell added OneWest to the lawsuit. Among other things, Lamell challenged the assignment of his loan to OneWest and the securitization of the loan based on alleged problems, relying on *Morlock, L.L.C. v. Nationstar Mortg., L.L.C.*[30] The Fourteenth Houston Court of Appeals held that Lamell had standing to make the challenges, since a homeowner's interest in the title to his property gives the homeowner a sufficient justiciable interest to advance arguments challenging the deed of trust.[31]

In his fraud claim, Lamell asserted that the deed of trust was void because it was securitized in violation of the terms of the applicable Pooling and Servicing Agreement, because it was not assigned to the securitiza-

24. *EverBank*, 499 S.W.3d at 539–40.

25. *Id.* at 540.

26. Seedergy relied on *Nueces Cty. v. MERSCORP Holdings, Inc.*, No. 2:12-CV-00131, 2013 WL 3353948 (S.D. Tex. July 13, 2013), which held that MERS was not a lender, nor holder, nor note owner, but was acting merely as the nominee or agent of the lender. However, in the subject case, MERS was a beneficiary, not a nominee or agent for another lender.*Id.* at 540–41.

27. *Id.* at 541.

28. *Id.*

29. 485 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

30. 447 S.W.3d 42 (Tex. Civ. App.—Houston [14th Dist.] 2014, pet. denied) (holding, in a suit to removed cloud on title, that the homeowner had a justiciable interest to challenge the deed of trust).

31. *Lamell*, 485 S.W.3d at 58.

tion trust before its start-up date, and because there is no evidence that the deed of trust was transferred into the trust by the depositor. However, neither Lamell nor the court found any authority that the breach of such securitization agreement rendered the deed of trust void.[32] Therefore, Lamell's fraud claim failed.

Lamell also challenged the right of OneWest, as the mortgage servicer, to foreclose if it was not the owner and holder of the note. The court held that OneWest did not need to be the owner or holder of the note to foreclose since OneWest was acting as the mortgagee servicer on behalf of the syndication trust, which held the deed of trust, relying on Texas Property Code Section 51.0025, that a mortgagee or a mortgage servicer may conduct non-judicial foreclosure proceedings without proving its status as the owner and holder of the note.[33]

C. Other Issues

Carmel Financial Corporation v. Castro[34] involved the assertion by Carmel Financial that its security interest in a single family house water treatment system was a valid lien against the entire real property. Though the financing statement in favor of Carmel Financial preceded the first lien mortgage on the house, priority lien status as to the real property was not granted to Carmel. The Fourteenth Houston Court of Appeals construed the language of the security interest to relate solely to the water treatment system and not to the home, refuting Carmel's reading of U.C.C. Sections 9.334(d) and 9.604(b).[35] Under U.C.C. Section 9.334(d), a perfected purchase money security interest, which arises before the goods become fixtures, takes priority over a conflicting lien on the real property. U.C.C. Section 9.604(b) allows, with respect to goods that are or are to become fixtures, a secured party to foreclose under either the U.C.C. or in accordance with real property rights. The court noted that the security agreement and financing statement did not describe the real property as collateral, but limited the collateral to the water treatment system, and that neither of such U.C.C. sections "operates independently to create a security interest in real property that the underlying security agreement did not authorize."[36] Therefore, Carmel's fixture filing did not create a lien on real property and was not prior to the interest of first lienholder on the real property.

Villanova v. Federal Deposit Insurance Corporation[37] concerned the sufficiency of a summary judgment motion and affidavit in connection with an alleged wrongful foreclosure. Villanova obtained a loan from Home Savings of American in the amount of $693,000, secured by the

32. *Id.*
33. *Id.* at 62 (citing Tex. Prop. Code Ann. § 57.0025 (West 2014)).
34. 514 S.W.3d 291 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
35. Tex. Bus. & Com. Code Ann. §§ 9.334(d), 9.604(b) (West 2017).
36. *Castro*, 514 S.W.3d at 296.
37. 511 S.W.3d 88 (Tex. App.—El Paso 2014, no pet.).

property being acquired (Frisco Home), and by an additional piece of collateral being Villanova's home in Corpus Christi (Corpus Christi Home). The closing documentation, typical for a home loan, included an affidavit of intent to permanently occupy the Frisco Home as Villanova's residence, and covenants in the deed of trust to occupy the Frisco Home as his primary residence and not to transfer an interest in the home without the lender's approval. In breach of these covenants, Villanova conveyed the Frisco Home to Christina Roth, a woman he had met months earlier on an internet dating site, www.sugardaddyforme.com, with Roth agreeing to pay Villanova $66,000 at maturity of a note she executed in favor of Villanova. Upon discovery of the breach, the lender filed for foreclosure, which was suspended upon reaching a settlement agreement requiring Villanova to make certain payments, agree to refinance the house by a certain date, or in failing to do so, to sell the house by a later date. Villanova breached all of those requirements and the lender eventually foreclosed all of its collateral, being the Frisco Home and the Corpus Christi Home.

Villanova sued; the lender filed for summary judgment and supported that motion for summary judgment with an affidavit of Paula Chin, the Vice President of Loan Servicing and Default Operations. The affidavit in this case did not specify whether Chin was the applicable vice president during the relevant time period or how her job duties in that role afforded her the knowledge about the specific facts in the case. An affidavit in support of a summary judgment motion must be based on personal knowledge of the affiant.[38] But, the El Paso Court of Appeals concluded that Chin did not have the requisite personal knowledge, based on the affidavit's defects due to lack of information concerning how she had personal knowledge.[39] This case is instructive to practitioners on what type of personal knowledge must be proved to be an effective affidavit in support of a summary judgment motion. A mere recitation of facts is not sufficient, in and of itself, and the title or position of a person does not carry with it an implied level of personal knowledge. The court required that statements in such an affidavit "need factual specificity such as place, time, and exact nature of the alleged facts."[40] In other words, the affidavit must explain how such person became familiar with the facts in the affidavit.[41]

III. CREDITOR/DEBTOR/GUARANTIES

A. Drafting Considerations

In *LSREF2 Cobalt (TX), LLC v. 410 Centre LLC*,[42] the Note and

38. *Id.* at 94 (citing Tex. R. Civ. P. Ann. 166a(f)).
39. *Id.* at 95.
40. *Id.*
41. *Id.* (citing Valenzuela v. State & Cty. Mut. Fire Ins. Co., 317 S.W.3d 550, 553–54 (Tex. App.—Houston [14th Dist.] 2010, no pet.)).
42. 501 S.W.3d 626 (Tex. App.—San Antonio, 2016, pet. denied).

Guaranty waived the borrower's and guarantor's rights to the statutory anti-deficiency claim.[43] There was a default and the parties began negotiating a settlement. Before negotiations began, the parties entered into a pre-negotiation agreement. The pre-negotiation agreement contained the following provision:

> 3. *No Waiver by Obligor*. [The borrower and guarantor] ha[ve] not in any way waived any rights or remedies it may have prior to and until the date of the Agreement with respect to the Loan or any of the Loan Documents, or otherwise available at law or in equity either directly in an action against Creditor, as a defense against any action by [the lender] against [the borrower or guarantor] or any other civil proceeding or otherwise.[44]

The borrower and guarantor acknowledged that such anti-deficiency right had been waived in the loan documents, but argued that Paragraph 3 of the pre-negotiation agreement revived their rights under that section. The San Antonio Court of Appeals disagreed.[45]

Paragraph 1 of the pre-negotiation agreement stated that nothing that occurred during settlement discussions would affect the parties' rights, remedies or defenses under the loan documents.[46] It further provided that the loan documents would not be affected by anything unless agreed to in writing.[47] There was no settlement or written modification of the loan documents. The pre-negotiation agreement, by its express terms, set the parameters for these negotiations and specified the precise procedures for modifying the loan documents and the guaranty. Thus, the commercial setting and other objective factors indicated that the pre-negotiation agreement was a stand-alone agreement that did not alter the parties' legal rights under the existing agreements.[48]

Rainier Income Fund I, Ltd. v. Gans[49] involved the guaranty of the repayment of partner loans and capital contributions. The guaranties executed by Gans provided that the guarantied obligations were to be paid if the partner loans and contributions were not repaid in full upon the liquidation of the partnerships. The partnership agreements provided that the partnerships would be dissolved and liquidated upon the occurrence of various dissolving events, including "a sale by the Partnership of the entire Project and the collection of all amounts derived from any such sale or sales."[50] The partnerships were developing two real estate projects with bank loans. Ultimately the projects failed and the bank foreclosed. The question presented was whether the foreclosure was a "dissolving event" giving rise to the guarantor's liability under the guaranties.

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43. TEX. PROP. CODE ANN. § 51.003 (West 2014).
44. *Id.*; *LSREF2 Cobalt*, 501 S.W.3d at 631.
45. *Id.* at 634.
46. *Id.* at 632.
47. *Id.*
48. *Id.* at 634.
49. 501 S.W.3d 617 (Tex. App.—Dallas 2016, pet. denied).
50. *Id.* at 623.

The Dallas Court of Appeals construed the guaranties according to the rule of *strictissimi juris*, requiring the terms of a guaranty to be strictly followed and not be extended beyond its precise terms by construction or implication.[51] There was a "sale" of the properties since legal title to the properties was transferred in exchange for money; but, to the court, the question was who sold the properties.[52] Rainier argued that once the partnerships did not own and operate the commercial real estate projects, whether the disposition was by a voluntary sale or foreclosure, the applicable provision was triggered. But the court disagreed and looked at the plain language of the partnership agreements, "which specifically require[d] the sale to be 'by the Partnership' for a dissolving event to occur."[53] Since the properties were sold by reason of a foreclosure sale, the strict language triggering the guaranties was not satisfied.[54]

Additionally, the partnership agreements required "the collection of all amounts derived from any such sale or sales."[55] Obviously, the partnerships did not collect the foreclosure sales proceeds. The court concluded that Gans's guaranty was only applicable if the investors would receive payment when the properties were sold by the partnership and funds were received in exchange, specifying "[i]n other words, the purpose of the guaranties was to preclude the general partner from selling the properties and then refusing to distribute the funds."[56] This case represents another drafting lesson for the practitioner to be extremely careful in the wording of guaranties, especially as to what constitutes the triggering event for the guarantor's obligation to be operative.

Kartsotis v. Bloch[57] involved contribution between co-guarantors pursuant to a Contribution and Indemnity Agreement (CIA), which had two primary operative provisions. Section 1 of the CIA provided "[i]f any Guarantor makes a payment in respect of the Obligations, such Guarantor shall have the rights of contribution and reimbursement set forth below."[58] The triggering provision was Section 2 of the CIA which provided

> [i]f any [Paid Guarantor] makes *a payment upon or in respect of the Obligations that is greater than it's Pro Rata Percentage [1/3] of the Obligations*, the Paid Guarantor shall have the right to receive from the other Guarantors who have not paid their Pro Rata Percentage . . . an amount such that the net payments made by the Paid Guarantor in respect of the Obligations shall be shared by Guarantors pro rata in proportion to their Pro Rata Percentage.[59]

51. *Id.* at 622.
52. *Id.* at 623.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.* at 624.
57. 503 S.W.3d 506 (Tex. App.—Dallas 2016, pet. denied).
58. *Id.* at 512.
59. *Id.* at 512–13.

The three principals, who were the guarantors under the CIA, entered into a number of financing transactions involving the Black Bull Run Development (a Montana golf course community), including (1) a construction loan (BBR Loan) with La Jolla Bank (transferred to OneWest Bank), which had been guaranteed by Bloch; (2) an indemnity from Bloch in favor of Commonwealth Title to indemnify against mechanics liens on the property; and (3) a golf equipment lease with Wells Fargo Financial Leasing, which Bloch had guaranteed. Also involved was an additional loan to CLB Capital (the partnership in which the three partners participated) from Guaranty Bank, guaranteed by each of the three parties. Ultimately, the Black Bull Run project was unsuccessful and the BBR Loan was settled by Bloch and another guarantor, Cureton, by the payment of money. The Commonwealth Title indemnity and the Wells Fargo leasing equipment loan were subjects of lawsuits which were also settled by Bloch (collectively, the BBR Settlements). The Guaranty Bank loan was extended twice and then finally matured. Kartsotis paid his share of the guarantor's debt on the Guaranty Bank loan, and when Bloch refused to pay his share, Kartsotis paid Bloch's share for him in order to retire the Guaranty Bank loan.[60] The parties sued each other under the CIA, and upon review of a summary judgment, the Dallas Court of Appeals interpreted the meaning of the CIA.[61]

The crux of this decision involved the interpretation of the defined term "Obligations" in the CIA. Bloch's interpretation was that the CIA covered any payments made by one of the guarantors in connection with the related financings. On the other hand, Kartsotis interpreted the CIA to only refer to payments made in excess of the designated percentage of the primary obligations related to the financing transactions. The payment by Bloch for the BBR Settlement was less than one-third of the debt owed on the primary obligations was covered by the CIA. The court interpreted Section 2 of the CIA, the triggering clause, to be triggered only upon a payment of the Obligations in an amount that exceeded the threshold test (i.e., one-third of the Obligations) before being entitled to a reimbursement or contribution.[62] The CIA defined Obligations as both "Future Obligations" and "Existing Obligations," with the Existing Obligations being set forth on an exhibit to the CIA (which specified the BBR Loan and the Wells Fargo lease, but not the Commonwealth Title indemnity).[63] Consequently, the court concluded that since Bloch's payment with respect to the BBR Settlement was less than one-third of the outstanding Obligations, then the triggering event (being a payment greater than one-third of the total debt) was not activated, and no contribution was required.[64]

60. *Id.* at 511–13.
61. *Id.* at 515.
62. *Id.* at 516–17.
63. *Id.* at 517.
64. *Id.* at 518.

This case presents a lesson for practitioners in the drafting of indemnity or contribution agreements, particularly as it relates to the description of both the obligations for which a contribution or indemnity is applicable, and the threshold or trigger at which contributions begin. Further, in interpreting the definition of "Obligations," the court held the provisions in the contract's recitals were somewhat inconsistent with the provisions in the body of the contract and that contract recitals are not deemed strictly part of the contract and will not control over the operative provisions in the body of the contract.[65] General contract construction favors the specific provisions (such as in the body of the contract) over general recital provisions. As a drafting lesson, specific and important defined terms should probably be dealt with in the body of the contract as opposed to recitals.

B. Judgment Indexing of Hispanic Names

Austin v. Coface Seguro De Credito Mex., S.A. De C.V.[66] is an important case for all practitioners with respect to Hispanic naming conventions. In this case, a bank obtained a judgment in Mexico and registered it in a Texas state court using the first and second surname of the debtor (Rafael Augusto Martin Ojeda Miranda). The bank then filed the judgment in the county records and the county clerk indexed the judgment under the last name of "Mirandas" instead of "Miranda." The bank later discovered that the debtor owned a house in Texas which had been sold to a third-party buyer. The name on the warranty deed was Rafael Ojeda. The bank attempted to foreclose on the house and the buyer sued. The trial court sided with the bank and the First Houston Court of Appeals affirmed, stating that if a "good faith purchaser acquires real property without actual or constructive notice of a lien, from the real property records or elsewhere, he takes the property free of the lien."[67] However, "a purchaser is charged with knowledge of every 'recital, reference, and reservation' that appears with in the chain of title."[68] In the case at hand, the real property records contained a lis pendes listing the debtor's full name which, in the eyes of the appellate court, gave the purchaser "constructive knowledge of Ojeda Miranda's full name."[69]

C. Turnover Orders

Gillet v. ZUPT, LLC[70] deals with turnover orders. Gillet owned forty-five percent of ZUPT, which was in the business of subsea surveying services. Gillet eventually decided to leave ZUPT and provided notice under a buy-sell agreement forcing the other ZUPT members to purchase his

65. *Id.*
66. 506 S.W.3d 707 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
67. *Id.* at 712.
68. *Id.* at 712–13 (citing Waggoner v. Morrow, 932 S.W.2d 627, 632 (Tex. App.—Houston [14th Dist.] 1996, no pet.)).
69. *Id.* at 713.
70. 523 S.W.3d 749 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

interest in ZUPT. A few months after such purchase notice was given, Gillet ceased his employment at ZUPT and began working for a competitor. Although his employment was with a competitor, Gillet never resigned as a member of ZUPT and at the time of the suit continued to own a forty-five percent interest. An appraiser was engaged to determine the value of Gillet's interest, presumably required under the buy-sell agreement.[71] The appraisal valued the entire company at $1,600,000, based on a sale of ZUPT, in its entirety, and based on the assumption that Gillet would sign a standard non-compete agreement.[72] Gillet refused to sign a non-compete agreement and the appraiser revised the value of Gillet's forty-five percent to be only $229,000.[73] Gillet sued ZUPT, which counterclaimed alleging misappropriation of confidential information and trade secrets and breach of fiduciary duty. The case was ultimately arbitrated, with a determination that Gillet was owed $499,050 for his forty-five percent interest, and that upon payment of such sum, Gillet should surrender all of his interest in ZUPT. Further, the arbitrator awarded ZUPT damages of $1,869,164 for breach of fiduciary duty relating to disclosure of trade secrets.[74] Then the trial court signed a final judgment confirming the arbitrator's award, and ZUPT sought a turnover order and receiver.

The trial court's turnover order and appointment of a receiver could be reviewed on appeal only for an abuse of discretion.[75] The Texas Turnover Statute[76] generally provides the authority for a turnover order "to reach assets of a judgment debtor that are otherwise difficult to attach or levy on by ordinary legal process."[77] In his challenge to the order, Gillet argued that the trial court did not have any evidence that Gillet owned any nonexempt property subject to a turnover order. Gillet's argument is based on the statutory prohibition from issuing a turnover order of property exempt from execution by any statute.[78]

In acknowledging this statutory prohibition, the Fourteenth Houston Court of Appeals noted that a trial court is not required to specify the property subject to a turnover order, and that lack of evidence supporting the turnover order is not an automatic invalidation but is only a relevant

71. *Id.* at 752.
72. *Id.*
73. *Id.* at 753.
74. *Id.*
75. *Id.*
76. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (West 2017).
77. *Gillet*, 523 S.W.3d at 754. The exact statutory language reads: "(a) A judgment creditor is entitled to aid from a court of appropriate jurisdiction through injunction or other means in order to reach property to obtain satisfaction on the judgment if the judgment debtor owns property, including present or future rights to property, that is not exempt from attachment, execution, or seizure for the satisfaction of liabilities." TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(a) (West 2017). Note that in the 2017 Texas Legislative Session, one of the requirements (that the property "cannot readily be attached or levied on by ordinary legal process") was removed from the statutory language. However, this case was decided prior to such removal. Act of June 15, 2017, 85th Leg., R.S., ch. 966, § 1, 2017 Tex. Sess. Law Serv. Ch. 966 (codified at TEX. CIV. PRAC. & REM. CODE § 31.002(a)).
78. TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(f) (West 2017).

consideration.[79] The only evidence that ZUPT presented at the hearing for the turnover order, was evidence of the constable's *nulla bona* return of the writ of execution, and two constable officers who testified that no exempt property of Gillet was located by such deputies.[80] Nevertheless, the appellate court concluded there was sufficient evidence for the trial court's conclusion based solely on the trial court's right to take judicial notice of its judgment rendering damages to Gillet of $499,000 which it had previously ordered.[81] The court noted other cases acknowledging that judgment debts were appropriate for a turnover order.[82] Also, the court noted that the purpose behind the turnover statute was "to facilitate the collection of assets such as 'contract rights receivable, accounts receivable, commissions receivable and similar acts to property or rights to receive money at a future date.'"[83] Finally, it was held that Gillet's nonexempt ownership interest in ZUPT was also subject to judicial notice.[84] With such judicial notice of nonexempt assets, and based on the evidence of the returned writ of execution as *nulla bona*, the appellate court concluded that the trial court had sufficient authority to issue the turnover order.[85] However, note that the issue regarding the *nulla bona* writ of execution would no longer be applicable under the 2017 statute which deleted the requirement that the assets could not readily be attached or levied on by ordinary legal process.[86]

The appellate court's ruling specifically approved of the trial court's turnover order which included the nonexempt property in the form of Gillet's judgment against ZUPT and Gillet's ownership interest in ZUPT.[87] However, the appellate court concluded that the turnover order as to all other assets which might be exempt was wrongful and an abuse of judicial discretion; thereby sustaining the court order in part and reversing it as to the other assets mentioned in the turnover order.[88]

Gillet also challenged the turnover order alleging that the appropriate remedy as to Gillet's membership interests in ZUPT was exclusively a charging order.[89] While acknowledging this statutory provision, the court

79. *Gillet*, 523 S.W.3d at 754. As to the nonspecificity of property in a turnover order, see TEX. CIV. PRAC. & REM. CODE ANN. § 31.002(h) (West 2017).

80. *Gillet*, 523 S.W.3d at 754.

81. *Id.* at 755.

82. *See* Goodier v. Duncan, 651 S.W.2d 25 (Tex. App.—Dallas 1983, writ ref'd. n.r.e.) (a judgment is an obligation owed by a party to pay money to the other); Milwaukee Cty. v. N.E. White Co., 296 U.S. 268, 275 (1935) (the judgment is an obligation to pay money in the nature of a debt).

83. *Gillet*, 523 S.W.3d at 756.

84. *Id.*

85. *Id.* at 756.

86. *See id.*

87. *Id.*

88. *Id.* at 757 (citing Stanley v. Reef Sec., Inc., 314 S.W.3d 659, 666–67 (Tex. App.—Dallas 2010, no pet.).

89. TEX. BUS. ORGS. CODE ANN. § 101.112(d) (West 2012) ("[t]he entry of a charging order is the *exclusive remedy* by which a judgment creditor of a member or any other owner of a membership interest may satisfy a judgment out of the judgment debtor's membership interest.") (emphasis added).

considered this to be a case of first impression where the judgment creditor was actually the entity for which the charging order was sought.[90] The court reviewed the rationale for such exclusivity provision, concluding that a "charging order was developed to prevent a judgment creditor's disruption of an entity's business by forcing an execution sale . . . to satisfy a debt of the individual partner or member."[91] Relying on dicta in *Khan v. Chaundhry*,[92] the court reached its conclusion based on two reasons, the first being that the charging order was actually sought by the "entity from which the membership interest derived,"[93] and the second, being that the charging order did not relate to the monetization of a judgment debt, the transfer of which was specifically required by the order.[94]

In a final argument, Gillet alleged the turnover order was a collateral attack on the final judgment because the order required the transfer of the ZUPT membership interest in consideration of payment of funds which Gillet had not yet received.[95] The court sustained Gillet's challenge since the turnover order was inconsistent with the final judgment. Consequently, practitioners should be careful in seeking turnover orders to verify they are consistent with the actual judgment upon which they are based.

D. Email Signatures

Khoury v. Tomlinson[96] involved a guaranty of a loan and whether an email constitutes a signature for purposes of a statute of frauds. Tomlinson was the president of PetroGulf, Ltd. which entered into an arrangement with its investor, Khoury, such that the company would pay Khoury a 14% interest on his investment along with a 10% interest in the net profits of the company. This transaction was initiated with a subscription agreement and evidenced by a signed promissory note. Eventually, Khoury became disenchanted, and, in a meeting, Tomlinson agreed to repay Khoury's loan over a four or five year period. A week after the meeting, Khoury emailed Tomlinson summarizing the agreements reached during that meeting, to which Tomlinson responded "[w]e are in agreement."[97]

When Tomlinson failed to make any such payments, Khoury sued alleging breach of contract to which Tomlinson asserted a statute of frauds defense. At trial, the jury found in favor of Khoury on his contract claims, and Tomlinson filed a motion for judgment notwithstanding the verdict,

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90. *Id.* at 757.
91. *Id.*
92. 2016 WL 1600444, at *4 n.1 (failure of the judgment debtor to advance the exclusivity argument in his appeal was sole basis for ruling).
93. *Gillet*, 523 S.W.3d at 758.
94. *Id.*
95. The actual judgment language required "Gillet surrender his ownership interest 'upon payment of this amount.'"*Id.* at 759.
96. 518 S.W.3d 568 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
97. *Id.* at 573.

alleging the contract was barred by the statute of frauds because it was too indefinite and while his email constituted a written response, it was not signed as required under the statute of frauds.[98]

In analyzing the statute of frauds argument,[99] the First Houston Court of Appeals noted evidence that the initial email was sent by Khoury, and a response was sent by Tomlinson. Though Tomlinson's name was not in the body of the email, his name and email address appeared in the "from" field of the email.[100] In analyzing whether a name in the "from" field of an email constituted a signature for purposes of the statute of frauds, the court first looked at the Texas Uniform Electronic Transaction Act (UETA).[101] UETA applies to: a "Transaction," defined as "an action or set of actions occurring between two or more persons related to the conduct of business, commercial, or governmental affairs,"[102] and to "electronic records and electronic signatures related to a Transaction."[103] UETA defines an "electronic record" as "a record created, generated, sent, communicated, received, or stored by electronic means" and an "electronic signature" as "an electronic sound, symbol or process attached to or logically associated with a record and executed or adopted by a person with the intent to sign the record."[104] The appellate court concluded that a name or email address in the "from" field satisfied the UETA requirement of a symbol logically associated with a record. The court then addressed the signature requirement, noting that an electronic signature is not the equivalent of "signed."[105] However, under both case law outlined by the court and under UETA,[106] the ultimate issue is a question of the intent of a party to adopt an agreement. Therefore, the establishment of the "from" field in the email, although set up prior to

98. *Id.*

99. The Texas Statute of Frauds reads: "a promise by one person to answer for the debt . . . of another person," TEX. PROP. CODE ANN. § 26.01(b)(2), "is not enforceable unless the promise or agreement, or a memorandum of it, is (1) in writing; and (2) signed by the party to be charged with the promise or agreement." TEX. PROP. CODE ANN. § 26.01(a)(1)–(2) (West 2014).

100. *Khoury*, 518 S.W.3d at 575.

101. TEX. BUS. & COM. CODE ANN. §§ 322.001–.021 (West 2015).

102. *Id.* § 322.002(15).

103. *Id.* § 322.003(a).

104. *Id.* §§ 322.002(6), (7).

105. *Khoury*, 518 S.W.3d at 576.

106. *See* TEX. BUS. & COM. CODE ANN. § 322.002, cmt. 7 (West 2015), which in relevant part reads as follows: "Whether any particular record is 'signed' is a question of fact. Proof of that fact must be made under other applicable law." This Act simply assures that the signature may be accomplished through electronic means, "including one's name as part of an electronic email communication may also suffice . . . . It also may be shown that the requisite intent was not present and accordingly the symbol, sound or process did not amount to a signature . . . . In any case the critical element is the intention to execute or adopt the sound or symbol or process for the purpose of signing the related record. The definition requires that the signor execute or adopt the sound, symbol, or process with the intent to sign the record." However, the essential attribute of a signature involves applying a sound, symbol, or process with an intent to do a legally significant act. It is that intention that is understood in the law as a part of the word "signed," without the need for a definition.

sending the email, did not preclude the same from being a signature.[107] The court also found additional authority supporting this condition, including the *The New Oxford American Dictionary*, *Black's Law Dictionary*, and other scholarly publications, and from decisions in other jurisdictions.[108]

The opinion in the subject case is contrary to the position taken by the Fort Worth Court of Appeals in *Cunningham v. Zurich American Insurance Co.*[109] In that case, the Fort Worth Court of Appeals found that a signature line at the end of an email did not constitute a signature. Although that court discussed issues concerning whether the signature block was generated automatically or manually inserted by the email respondent, it ultimately concluded the issue on the basis of an intent to form a contract, noting "no evidence suggests that the information was typed purposefully rather than generated automatically, [or] that Grabouski intended the typing of her name to be her signature."[110]

Nevertheless, and departing from the *Cunningham* decision, the First Houston Court of Appeals held in *Khoury* that the statute of frauds does not require an intent to be bound; rather only an intent to sign.[111] Consequently, the court concluded the "email name or address in the 'from' field satisfies the definition of a signature under existing law."[112] With such a disagreement among two appellate courts, practitioners may expect the Texas Supreme Court to settle the issue.

E. Third Party Beneficiaries

In *First Bank v. Brumitt*,[113] the Texas Supreme Court addressed third party beneficiaries in the context of a loan commitment. In this case, Oprea, as president of DTSG, Ltd., sought to acquire from Brumitt all of the equity interest in Southway Systems, Inc. Oprea approached First Bank, which assured Oprea that a loan could be obtained in a timely manner to facilitate the acquisition. Nevertheless, the bank failed to deliver a loan, giving an excuse virtually every month for delaying the loan closing. Ultimately, DTSG and Brumitt sued the bank for their failure to perform under one of three different loan commitments issued by the bank for financing of such equity acquisition. At trial, First Bank was found in breach of the contract, and an award in favor of Brumitt was granted, which award and rights to recover as a third party beneficiary were affirmed on appeal to the Fourteenth Houston Court of Appeals.[114]

The supreme court reviewed the law on third party beneficiaries, concluding Brumitt did not satisfy the requirements to establish himself as a

107. *Khoury*, 518 S.W.3d at 576.
108. *Id.* at 577.
109. 352 S.W.3d 519 (Tex. App.—Fort Worth 2011, pet. denied).
110. *Id.* at 578.
111. *Khoury*, 518 S.W.3d at 578.
112. *Id.* at 579.
113. 519 S.W.3d 95 (Tex. 2017).
114. *Id.* at 101.

third party beneficiary of the contract with a right to sue for breach thereof. In reaching this conclusion, the supreme court noted the standard rule that "the benefits and burdens of a contract belong solely to the contracting parties,"[115] with the exception for persons who qualify as a third party beneficiary.[116] The requirement for a third party beneficiary right is dependent upon the contracting party's intent to provide a benefit to such third party.[117] Further, the fact that Brumitt would have benefitted from the sale of his assets by means of the First Bank financing was not sufficient to create a third party beneficiary status.[118] An expected benefit from a third party does not in and of itself constitute such party as a third party beneficiary.[119] Thus, the issue was resolved by an analysis of "the contract's language, construed as a whole."[120]

After detailing numerous cases both supporting a third party beneficiary claim and denying a third party beneficiary claim, the supreme court concluded that none of the three loan commitment letters expressly indicated the parties' intention to make Brumitt a third party beneficiary,[121] and the mere purpose of the letter, being the financing of the acquisition of the equity interest in Subway, which would have benefitted Brumitt, could not be relied upon as clear intent to make Brumitt a third party beneficiary.[122] While this case does not provide any change in jurisprudence on third party beneficiaries, it does serve as a reminder to practitioners representing sellers, that if they anticipate a loan commitment breach by the purchaser's lender to be actionable by such seller, express third party beneficiary language must be included in the loan commitment to the purchaser.

IV. LANDLORD/TENANT/LEASES

A. Security Deposits

Although not a groundbreaking case, *FP Stores, Inc. v. Tramontina US, Inc.*[123] is an important case to bring to the attention of commercial real estate practitioners because it is the first time a court has addressed the "bad faith" element of Section 93.011 of the Texas Property Code and only the sixth time a court has provided any guidance on Section 93.011.[124] Section 93.011 of the Texas Property Code was enacted to impose liability on a *commercial landlord* who retains a security deposit in

115. *Id.* at 102.
116. *Id.*
117. *Id.* (citing S. Tex. Water Auth. v. Lomas, 223 S.W.3d 304, 306 (Tex. 2017) (per curiam)).
118. *Id.* (citing Sharyland Water Supply Corp. v. City of Alton, 354 S.W.3d 407 (Tex. 2011)).
119. *Id.* (citing Banker v. Breaux, 128 S.W.2d 23 (1939)).
120. *Id.* (citing Southland Royalty Co. v. PanAm. Petr. Corp., 378 S.W.2d 50, 53 (Tex. 1964); Citizens Nat'l Bank in Abilene v. Tex. & P.R. Co., 150 S.W.2d 1003, 1006 (1941)).
121. *Id.* at 104.
122. *Id.* at 104, 105.
123. 512 S.W.3d 684 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
124. *Id.* at 691 n.3.

bad faith.[125]

In *FP Stores*, the tenant sued the landlord for breach of contract and retaining a security deposit in bad faith.[126] The applicable provision of the sublease provided that "within 60 days after Sublessee surrenders the leased premises and provides written notice to Sublessor of Sublessees forwarding address, Sublessor will refund the security deposit less any amounts applied toward amounts owed by Sublessee or other charges authorized by this sublease."[127] The provisions in the sublease were remarkably similar to the requirements of Section 93.011.[128] The primary difference being that Section 93.011 includes a presumption of bad faith if a landlord fails to act within such sixty day period. The provision provides a penalty for such "bad faith" in an "amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld and reasonable attorneys' fees."[129] Under the provisions of Section 93.011, the burden falls on the landlord to prove that any retention of a security deposit is reasonable and not in bad faith.[130] In *FP Stores*, the evidence presented at trial clearly established that the landlord had not returned the security deposit within the required sixty day period.[131] As a result, the trial court granted summary judgment in favor of the tenant.[132] The landlord appealed the grant of summary judgment, and the First Houston Court of Appeals agreed that there was sufficient evidence presented at trial that the landlord may have acted in good faith when it failed to return the security deposit and, as a result, summary judgment was inappropriate.[133]

Because the court of appeals was interpreting the "bad faith" requirement for the first time, the court reviewed other Texas court interpretations of Section 92.109 of the Texas Property Code, a parallel statute that applies only to residential leases, to aid in its analysis.[134] The court ultimately held that under Section 93.011 of the Texas Property Code "a commercial landlord retains a tenant's security deposit in bad faith if it retains the security deposit in *honest disregard* of the tenant's rights or with the *intent to deprive* the tenant of a lawful refund."[135]

The decision of the court made it abundantly clear that, in its opinion, any court interpreting Section 93.011 should presume that a landlord acted in bad faith if the tenant shows that the landlord failed to timely provide a refund of the security deposit or an accounting.[136] In order to rebut

125. *See* TEX. PROP. CODE ANN. § 93.001 (West 2014).
126. *Id.* at 688.
127. *FP Stores*, 512 S.W.3d at 686.
128. *Id.*
129. TEX. PROP. CODE ANN. § 93.001 (West 2014).
130. *FP Stores*, 512 S.W.3d at 692.
131. *Id.* at 687.
132. *Id.* at 689.
133. *Id.* at 695.
134. *Id.* at 691.
135. *Id.* at 693 (citing Johnson v. Waters at Elm Creek, 416 S.W.3d 42, 47 (Tex. App.—San Antonio 2013, pet. denied)) (emphasis added).
136. *FP Stores*, 512 S.W.3d at 693 (citing TEX. PROP. CODE ANN. § 93.011(d) (West 2014)).

this presumption of bad faith, the landlord must "present more than a scintilla of evidence that it acted in good faith."[137] The Landlord in the *FP Stores* case had presented some evidence to the trial court that the failure to return the security deposit was a mere accident that was the result of some management changes.[138] The court felt that this evidence was sufficient to possibly overcome the presumption of bad faith, and, because there were issues of fact to be decided, it held that summary judgment was inappropriate.[139] The court reversed the trial courts summary judgment finding for the tenant and the court remanded the case for additional proceedings.[140]

Although *Garden Ridge L.P. v. Clear Lake, L.P.*[141] is generally procedural in nature, there were a few interesting legal nuggets in this case that serve as useful reminders to practitioners. The issue in this case was a dispute between a landlord and a tenant over monthly management fees being included in common area maintenance (CAM).[142] The first important reminder that came out of this case is that leases are generally treated "as installment contracts and the statute of limitations begins to run for separate breach of contract claims on each monthly payment."[143] In this case, the Fourteenth Houston Court of Appeals extended this principle to other periodic payments due under a lease, such as payments of monthly operating expenses.[144] The tenant had unsuccessfully tried to argue that the statute of limitations began to run at a later date, such as the date that the yearly reconciliation of CAM occurred, and the discrepancy was "discovered."[145]

Another interesting practice pointer for the practitioner arising out of *Garden Ridge*, was the fairly predictable holding in which the court in *Garden Ridge* strictly interpreted the multiple provisions of the lease that provided for interest on past due payments from the tenant to the landlord.[146] The tenant had attempted to use these provisions to claim they were owed interest on past due payments form the landlord.[147] Unfortunately, the tenant had not specifically negotiated a provision requiring interest payments to accrue on past due payments and the court refused to extend the benefit of the landlord's negotiated provisions to the tenant.[148] Therefore, although it may seem self-evident to most, any practitioner representing tenants must ensure that they specifically contract for

137. *Id.* at 695 (citing Buck v. Palmer, 381 S.W.3d 525, 527 (Tex. 2012)).
138. *Id.* at 687.
139. *Id.* at 695.
140. *Id.*
141. 504 S.W.3d 428 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
142. *Id.* at 439.
143. *Id.* at 446; *see* Discovery Grp., Inc. v. Kammen, No 01-15-002430CV, 2015 WL 7300690, at *3 (Tex. App.—Houston [1st Dist.] Nov. 19, 2015, pet. denied) (mem op.).
144. *Id.* at 447.
145. *Id.*
146. *Id.* at 450.
147. *Id.*
148. *Id.*

the right past due payments to the tenant to accrue interest.[149]

B. Waiver of Nonwaiver Clauses

In what the authors feel is one of the most frustrating cases decided during the Survey period, in *Shields Limited Partnership v. Bradberry*,[150] the Texas Supreme Court stepped in to try to clarify what it felt was inconsistent handling of non-waiver provisions by the lower courts. Unfortunately, instead of clarifying matters for practitioners, the decision in this case only muddies the waters more.[151] The facts in the case are deceptively simple: the tenant claims to have exercised an option to extend the lease through May 31, 2017, and the landlord claims the tenant is a holdover tenant.[152] The lease in question contained two five year extension periods, with the last running from June 1, 2012, to Mary 31, 2017.[153] The terms of the extensions were dependent upon the tenant having "fulfilled all terms and conditions of the lease."[154] The lease also contained the following relevant provisions:

- the rent was due each month "without . . . prior demand" on the first day of each month;[155]
- failure to pay rent by the tenth day of the month is "an event of default" under the lease";[156]
- "Landlord's failure to enforce any provision of this Lease or its acceptance if late installments of Rent shall not be a waiver . . . ";[157]
- all waivers had to be in a writing signed by the waiving party; and
- forbearance of enforcement would not constitute a waiver.[158]

Throughout the term of the lease, the tenant frequently paid the rent late and the landlord frequently accepted such late payments.[159] The landlord eventually instituted eviction proceedings and surprisingly lost at both the justice court and appeals court level on the ground that the acceptance of the late payments acted as a waiver to the requirement in the lease to timely pay rent.[160] The landlord appealed to the supreme court arguing that a non-waiver provision may not be waived by engaging in the very act the contract disclaims as constituting waiver.[161] The tenant contended that the landlord's conduct in accepting late rental payments waived the contractual non-waiver clause.[162] The tenant further argued

149. *Id.* at 451.
150. 526 S.W.3d 471 (Tex. 2017).
151. *Id.* at 479.
152. *Id.* at 475.
153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at 476.
160. *Id.* at 477.
161. *Id.* at 478.
162. *Id.* at 481.

that non-waiver provisions are "wholly ineffective" and can be waived to the same extent as any other contractual provision.[163]

The supreme court overturned the lower courts and found that "as a matter of law, accepting late rental payments does not waive the non-waiver provision in the underlying lease."[164] In making its decision the supreme court relied heavily on "Texas's public policy that strongly favors freedom of contract."[165] The supreme court stated that "[g]iven Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, non-waiver provisions are binding and enforceable."[166] In the *Shields* case, however, the issue was not whether a "non-waiver is enforceable, but whether that clause is waivable and, if so, the circumstances under which waiver may occur."[167] As the supreme court explained in some detail, individuals have the right of self-determination and the idea that a competent adult should have the right to abandon a legal right.[168] The conundrum faced by the supreme court was how to determine if a party had intended to abandon a legal right?

In the case at hand, the non-waiver provision specifically stated that the acceptance of late rent would not be waiver and the court held it had, in fact, not been waived.[169] As a result, the supreme court held that "engaging in the very conduct disclaimed as a basis for waiver is insufficient as a matter of law to nullify the non-waiver provision in the parties' lease agreement."[170] However, the supreme court complicated matters and created a mess for practitioners by also agreeing with the tenant, saying "[w]e agree that a non-waiver provision absolutely barring waiver in the most general terms might be wholly ineffective."[171]

Unfortunately, the Texas Supreme Court's holding in the *Shields* case, along with its statement that a general non-waiver clause "might be wholly ineffective," gives the practitioner very little guidance on how to craft an effective non-waiver clause. The holding effectively puts the non-waiver clause in the same grey area as pornography—with the guidance from the supreme court effectively boiling down to "we will know it when we see it."[172] Given this guidance from the supreme court, the cautious practitioner would be well advised to carefully and exhaustively examine each non-waiver clause and to attempt to specifically account for and enumerate all of the various iterations of behavior which they do not intent to result in waiver of a non-waiver clause. A task that is not only herculean in nature but clearly much easier said than done.

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163. *Id.*
164. *Id.* at 480.
165. *Id.* at 481 (citing Gym-N-I Playgrounds v. Snider, 220 S.W.3d 905, 912 (Tex. 2007)).
166. *Id.*
167. *Id.* at 482.
168. *Id.* at 481.
169. *Id.* at 484.
170. *Id.* at 485.
171. *Id.* at 484.
172. *See* Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring).

In fact, the sad reality is that such a task is realistically impossible to accomplish. Despite creative lawyers' best efforts, there is only ever one truly predictable outcome: humans are always more creative and unpredictable than even the most creative lawyer can foresee. This end result leaves practitioners attempting to draft effective non-waiver clauses floundering. The only option left to them is to draft extremely long and extensive non-waiver clauses with recitals to every imaginable activity that will not give rise to waiver. But one foregone conclusion looms over these drafters: someone will, without a doubt, still engage in behavior that the practitioner never anticipated and the well-crafted and thoughtful non-waiver provision will be, once again, rendered wholly ineffective.

C. Jurisdiction of the Justice Courts

As in previous years, we continue to see cases challenging the exclusive jurisdiction of the justice courts to hear cases regarding the right to possession.[173] In *Midway CC Venture I, LP v. O&V Venture, LLC*,[174] the landlord and tenant had been parties to a lease agreement since 2010.[175] In 2015, the parties mutually amended the lease so that the tenant could move into temporary space while the original space was converted to a wine bar.[176] After a series of permit delays, the tenant ultimately moved back into the original space in August 2016.[177] The landlord and tenant had a disagreement over the amount of rent credit the tenant should receive and the landlord ultimately notified the tenant on December 27, 2016, that they were in default and that the landlord was terminating the lease.[178] The tenant filed an action in a Harris County district court seeking a declaratory action that it was entitled to certain credits and it was not in default under the Lease.[179] The tenant also sought a temporary injunction, which was granted, preventing the landlord from "filing any action seeking to disposes [Tenant] of it right to access and conduct business at the [premises]."[180] The landlord filed an interlocutory appeal over the trial court's abuse of discretion.[181]

Finding that the district court abused its discretion, the First Houston Court of Appeals relied on the Supreme Court of Texas's holding in *McGlothlin v. Kliebert*.[182] In *McGlothlin*, the supreme court held that "an injunction will not be granted where there is a plain and adequate remedy at law."[183] The court of appeals unequivocally stated that "[i]n Texas, the

173. Midway CC Venture I, LP v. O&V Venture, LLC, 527 S.W.3d 531 (Tex. App.—Houston [1st Dist.] 2017, no pet.).
174. *Id.* at 532.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 533.
179. *Id.* at 530.
180. *Id.* at 532.
181. *Id.* at 533.
182. 672 S.W.2d 231, 232 (Tex. 1984).
183. *Id.*

method for determining the right to possession of real property, if there is no unlawful entry, is the action of forcible detainer.[184] Jurisdiction to hear forcible detainer is expressly given to the justice court of the precinct where the property is currently located."[185]

The court held that because the tenant in this case had a clear remedy at law, there was nothing preventing the justice court from hearing the tenant's rent claims and determining the final outcome and, therefore, the trial court erred in granting the injunction.[186]

V. PURCHASER/SELLER

A. Contractual Interpretation/Ambiguity

In *Harkins v. North Shore Energy, L.L.C.*,[187] the Texas Supreme Court, without hearing oral argument, overturned the trial court and the Corpus Christi Court of Appeals, and, once again, in what the authors feel is a recurring theme throughout the last several Survey periods, schooled practitioners on the law of ambiguity and contractual interpretation.[188] The *Harkins* case was about a complex and long running dispute between a landowner and a well operator in which the landowner argued that an oil well drilled by the operator trespassed on the landowner's property.[189] The crux of the case involved construction of legal descriptions attached to an option agreement for oil and gas leases.[190] The option agreement had been drafted by the operator.[191] The description in question stated "[b]eing 1,210.8224 acres of land, more or less, out of the 1,673.69 acres out of the Caleb Bennett Survey, A-5, Goliad County, Texas and being the same land described in the [Export Lease]."[192] The land description in the Export Lease stated "being all of the 1,673.69 acre tract . . . SAVE AND EXCEPT a 400.15 acre tract described in the [Haman Lease]."[193] The oil well operator interpreted the option agreement to give them the right to select up to 1,210.8224 acres out of the entire 1,673.69 acres and argued that the option agreement was ambiguous because there was a slight acreage discrepancy (the Export Lease described a 1,273.54 acre tract and not a 1,210.8224 acre tract).[194] The landowner argued that the property description was clear and specifically excluded the approximately 400.15 acres where the operator had drilled an extremely lucrative

184. *Midway CC*, 527 S.W.3d at 535 (citing TMC Med., Ltd. v. Lasaters French Quarter P'Ship, 880 S.W.2d 789, 790 (Tex. App.—Tyler 1993, writ dism'd w.o.j.)).
185. *Id.* (citing Tex. Prop. Code Ann. § 24.004 (West 2014)).
186. *Id.*
187. 501 S.W.3d 598 (Tex. 2016).
188. *Id.*
189. *Id.* at 600.
190. *Id.*
191. *Id.*
192. *Id.* at 603.
193. *Id.* at 604.
194. *Id.* at 602.

the well.[195] The trial court held for the operator on summary judgment.[196] The appeals court reversed and remanded, holding that the description was ambiguous and, therefore, a question of fact for a jury which made summary judgment inappropriate.[197] The case wound its way up and down through the Texas court system for six years before finally being settled in October 2016 by the Texas Supreme Court.

The supreme court ultimately held that the option agreement was not ambiguous and in doing so relied on various cases where the court has previously held that a contract is not ambiguous if "the contract's language can be given a certain or definite meaning."[198] The supreme court stated that merely because parties argue that certain language has a different meaning does not, in and of itself, make language ambiguous.[199] A contract is only ambiguous if both interpretations given to specific language are reasonable.[200] The supreme court found that, in order to accept the operator's argument that the description was ambiguous, one would be required to ignore the "plain and express wording of the Option Agreement" which clearly excluded the 400.15 acres.[201] In contrast, because the description attached to the Option Agreement included the phrase "more or less," the two slightly different acreages contained in the property descriptions could be harmonized which prevented the descriptions from being ambiguous.[202] The supreme court held that because there was "only one reasonable interpretation of the Option Agreement, the Option Agreement is not ambiguous."[203]

Greer v. Shook[204] also dealt with construction of an instrument that some argued was ambiguous. *Greer* dealt with conflicting interpretations of a 1927 instrument from Lynn Eddins to John Bordon whereby Eddins granted Borden a series of interests that appear upon first impression to be contradictory.[205] The case is an important read for any practitioner faced with interpreting old mineral deeds because the El Paso Court of Appeals helpfully lays out the rules of construction and engages in a lengthy analysis to guide the practitioner faced with a similar dilemma. However, in order to begin to understand the court's analysis, we must first lay out the various grants in some detail:

(1) In paragraph 1 of the instrument, "an undivided one sixteenth (1/16) interest in and to all of the oil, gas and other minerals [which] may be produced . . . ."[206]

195. *Id.* at 603.
196. *Id.* at 600.
197. *Id.* at 602.
198. *Id.* (quoting Reilly v. Rangers Mgmt., Inc., 727 S.W.2d 527, 530 (Tex. 1987)).
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.* at 604.
203. *Id.*
204. 503 S.W.3d 571 (Tex. App.—El Paso 2016, pet. denied).
205. *Id.* at 575.
206. *Id.* at 576.

(2) In paragraph 4 of the instrument, it stated "[b]e it expressly understood between the parties that the vendor is the owner of all of the royalty and that the grantee is purchasing one half (1/2) of the royalty [ ] one half (1/2) of the minerals, produced in and from wells or other operations . . . ."[207]

(3) In paragraph 5, the instrument went on to provide that "[s]aid land being now under an oil and gas lease executed in favor of John Ross, . . . this sale is made subject to the terms of said lease, but covers and includes one half (1/2) of all the oil royalty . . ."[208] Under the terms of the lease referred to in paragraph 5, Eddins retained a 1/8 royalty interest in the production.[209]

(4) Finally, in paragraph 6, the instrument provided that in the "event the above described lease for any reason becomes cancelled or forfeited, than and in that event an undivided one sixteenth (1/16) of the lease interest and all future rentals on said land . . . shall be owned by said Grantee, he owning one sixteenth of all oil, gas and other minerals in and under said lands . . . ."[210]

At some point the original lease expired and Eddins's successors entered into a new lease with Patriot Resources, Inc. with an average royalty of approximately 1/4.[211] In 2013, Patriot determined the deed was ambiguous and it was unclear whether Borden's successors were entitled to: (1) 1/16 of all production regardless of the size of the royalty interest; or (2) 1/2 of any royalty interest established pursuant to the terms of a lease.[212] Patriot filed an interpleader to have the court settle the matter.[213] Eventually both the Borden and the Eddins successors filed motions for partial summary judgment.[214] The trial court found that the successors of John Borden were entitled to a 1/2 mineral interest in any production.[215] The successors of Eddins appealed.[216] The El Paso Court of Appeals affirmed the finding of the trial court.[217]

As mentioned above, the rules of interpretation along with the historical color provided by the court make the case helpful reading for any practitioner faced with a similar interpretation dilemma. The first rule of construction the appeals court referred to is the "Double Fraction Problem and the Legacy of the 1/8 Royalty."[218] The court explained, referring to the Texas Supreme Court's discussion of the issue in *Hysaw v.*

207. *Id.*
208. *Id.*
209. *Id.* at 575.
210. *Id.* at 576.
211. *Id.* at 577.
212. *Id.*
213. *Id.*
214. *Id.*
215. *Id.* at 581.
216. *Id.* at 582.
217. *Id.* at 575.
218. *Id.* at 579.

Dawkins,[219] that historically the royalty in virtually all oil and gas leases was 1/8.[220] Therefore, when granting a portion of their retained interest parties would tend to either use a double fraction (1/2 of 1/8) or simply say the "single fraction of 1/16, to express that he was actually giving the grantee 1/2 of his entire royalty interest."[221] Another related concept is what the court referred to as the "estate misconception doctrine."[222] Under this doctrine, the court explained that many land owners who "leased their minerals to an operator [thought] they only retained 1/8 of the minerals in place, rather than a fee simple determinable with the possibility of reverter in the entirety of the mineral estate."[223] The court found that, when applying these two doctrines to the conveyance at issue in this case, one can easily resolve all of the apparent contradictions and it was clear that the instrument conveyed a 1/2 mineral interest which "*included* a corresponding royalty interest."[224] Furthermore, the court stated that the arguments put forth by the Borden successors would require one to ignore all but two sentences of the instrument, which ignores years of Texas Supreme Court guidance on the interpretation of mineral instruments.[225] As stated by the court, the Texas Supreme Court has repeatedly held that a mineral deed must be interpreted in its entirety by "construing each and every provision in the deed and harmonizing any apparent conflicts found in the deed as a whole" and without rendering any provision meaningless.[226]

In *Jackson v. Wildflower Production Co.*,[227] following a bank foreclosure, two different parties were granted a mineral interest by the same grantor (the bank) seven days apart.[228] The first grant, to Jackson, was "a Mineral Deed Without Warranty" dated November 23, 1993 and recorded on December 3, 1993.[229] The second grant, to Wildflower Production, was also a "Mineral Deed Without Warranty" dated November 30, 1993 and recorded on December 14, 1993.[230] The trial court found that via the second grant Wildflower "acquired a superior claim of title" by virtue of being an innocent purchaser for value without actual or constructive notice of Jackson's ownership interest, because the Jackson Warranty Deed "was not filed of record when Wildflower purchased the mineral interest from the grantor."[231] The Amarillo Court of Appeals re-

219. 483 S.W.3d 1, 9 (Tex. 2016).
220. *Greer*, 503 S.W.3d 579.
221. *Id.*
222. *Id.*
223. *Id.* (citing *Hysaw*, 483 S.W.3d at 10).
224. *Id.* at 587.
225. *Id.*
226. *Id*. at 584 (citing *Hysaw*, 483 S.W.3d at 13; Stribling v. Millican DPC Partners, L.P., 458 S.W.3d 17, 20 (Tex. 2015); Luckel v. White, 819 S.W.2d 459, 362 (Tex. 1991); Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983)).
227. 505 S.W.3d 80 (Tex. App.—Amarillo 2016, pet. denied).
228. *Id.* at 83.
229. *Id.*
230. *Id.*
231. *Id.*

versed the trial court's decision.[232] The case turned on the difference between the type of title conveyed by a deed versus a quitclaim which determined whether the second grantee qualified as an innocent purchaser for value without notice.[233] According to the appeals court:

> [i]f, when taken as a whole, the instrument discloses a purpose to convey the property itself, and not merely a transfer of the grantor's interest, it will be given the effect of a deed, even though it may have some characteristics of a quitclaim. Conversely, if the instrument, taken as a whole, indicates the grantor's intent to merely transfer whatever interest the grantor may own, it will be treated as a quitclaim deed.[234]

Under the Texas recording system, "the grantee under a later deed will prevail over the grantee in a prior unrecorded deed of the same property, *unless* the purchaser had notice of the prior unrecorded conveyance."[235] However, a very important, and little understood caveat, to this general rule is that a "party receiving a quitclaim deed to land cannot avail himself of the defense of innocent purchaser for value without notice."[236] Essentially, the courts in Texas feel that the very essence of quitclaim deed "conveys upon its face doubts about the grantor's interest and a buyer is necessarily put on notice as to those doubts."[237] The recipient of a quitclaim deed is "deemed to be on notice of all legal or equitable claims, recorded *or unrecorded*, existing in favor of a third party at the time the quitclaim deed was delivered" and takes the property subject to those adverse legal claims.[238] The appeals court goes on to discuss what makes a document a quitclaim and takes great pains to clarify that the *mere* use of quitclaim words, such as "all of my right, title and interest, is not the litmus test for determining whether a particular instrument is a quitclaim."[239]

Wildflower argued that the Texas Supreme Court's decision in *Bryan v. Thomas*,[240] where Justice Culver stated "[t]o remove the question from speculation and doubt we now hold that the grantee in a deed which purports to convey all of the grantor's undivided interest in a particular tract of land, *if otherwise entitled*, will be accorded the protection of a bona fide purchaser" supported their argument that the instrument was a deed and

232. *Id.* at 95.
233. *Id.*
234. *Id.* at 90.
235. *Id.* (emphasis added); *see* Houston Oil Co. v. Kimball, 122 S.W. 533, 536 (Tex. 1909); Diversified, Inc. v. Hall, 23 S.W.3d 403, 406 (Tex. App.—Houston [1st Dist.] 20000, pet. denied); *see also* Gibraltar Sav. Ass'n v. Martin, 784 S.W.2d 555, 557 (Tex. App.—Amarillo 1990, writ denied).
236. *Jackson*, 505 S.W.3d at 91; *see* Richardson v. Levi, 3 S.W. 444, 446 (1887); *see also* Cook v. Smith, 74 S.W. 1094, 1095–96 (Tex. 1915).
237. *Jackson*, 505 S.W.3d at 91 (citing South Plains Switching Ltd. v. BNSF Ry. Co., 255 S.W.3d 690, at 707 (Tex. App.—Amarillo 2008, pet. denied)).
238. *Id.* (citing Woodward v. Ortiz, 237 S.W.2d 286, 291–92 (1951); Tate v. Kramer, 23 S.W. 255, 257 (Tex. Civ. App.—Austin 1892, no writ)).
239. *Id.* at 93.
240. 365 S.W.2d 628 (Tex. 1963).

not a quitclaim.[241] The appeals court distinguished the holding in *Bryan* by explaining that: (1) the deed in Bryan contained a warranty clause; and (2) to be a quitclaim an instrument must have other indicators of the grantor's intent, such as "the absence of a covenant of seisin or a warranty of title."[242] The appeals court concluded that the Wildflower Deed was a quitclaim because it (1) conveyed only the "grantor's right, title, interest, and estate"; (2) contained no covenant of seisin; (3) included no warranty of title; and (4) otherwise "did not express and intent to convey the property itself."[243]

B. Purchase Agreements/Option Contracts

In *Capcor at Kirby Main, L.L.C. v. Moody Nat'l. Kirby Houston S, L.L.C.*,[244] a prospective purchaser of commercial property sued the vendor for breach of the sales contract and the escrow agent for tortious interference with the contract and breach of fiduciary duty with respect to a failed closing.[245] The trial court had awarded the seller attorney fees, the escrowed funds, and contractual liquidated damages and the prospective purchaser appealed.[246] At issue in the case was the title company's refusal to accept a cashier's check delivered after 5:00 pm on the day of closing when the escrow agent had informed the purchaser's lawyer the day before the transaction, and the purchaser on the morning of the closing, that a wire would be required.[247] The contract at issue was the standard Texas "Unimproved Property contract" promulgated by the Texas Real Estate Commission.[248] The contract contained a specific closing date and stated "[a]t closing . . . Buyer shall pay the Sales Price in good funds acceptable to the escrow agent."[249] The contract went on to provide that failure to close on the closing date entitled the other party "to exercise its contractual remedies, which included terminating the contract and receiving the earnest money as liquidated damages."[250] Although the Texas Title Manuel considers a cashier's check to be a form of good funds,[251] Fidelity National Title had a policy not to accept cashier's checks because of the increase in the number of fraudulent checks.[252] Furthermore, cashier's checks are subject to a three day recall, which meant that the transaction could not close and fund the day the agent received the check.[253] The day after the scheduled closing, the purchaser offered to send a wire

241. *Jackson*, 505 S.W.3d at 92 (quoting Bryan v. Thomas, 365 S.W.2d 628 (Tex. 1963)).
242. *Id.*
243. *Id.* at 95.
244. 509 S.W.3d 379 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
245. *Id.* at 380.
246. *Id.* at 384.
247. *Id.*
248. *Id.* at 382.
249. *Id.*
250. *Id.*
251. *Id.* at 388; *see* 28 Tex. Admin. Code § 9.1 (2013) (Tex. Dep't of Insurance, Basic Manual of Rule, Rates and Forms for the Writing of Title Insurance in the State of Texas).
252. *Id.* at 383.
253. *Id.* 384.

but the seller refused and instead cancelled the contract.[254] The purchaser sued.[255] In addition to the arguments against the agent, the purchaser claimed that failure to deliver good funds on the day of closing was not a material breach.[256]

The First Houston Court of Appeals began their analysis by reiterating the well accepted legal premise that a material breach of a contract by one party excuses the other from performance.[257] The court went on to explain that although time is not "ordinarily of the essence,"[258] "[t]imely performance" may be a material term if "it is clear the parties intend that time be of essence."[259] In order for "time to be of the essence" in a contract, a contract must either (1) explicitly state that time is of the essence; or (2) there must be something about the deal that makes it apparent to the parties that time is of the essence.[260] If a party has the right to cancel a contract that is not consummated at a certain date and time, the courts generally interpret the right to cancel for failure to perform as an indicator that time was of the essence.[261] In this case, the terms of the contract clearly allowed the seller to terminate the contract and retain the earnest money if the purchaser failed to deliver good funds acceptable to the escrow agent by the closing date.[262] Therefore, the court of appeals found that time was of the essence to the transaction and reaffirmed the trial courts holding.[263]

Although *Tregellas v. Carol M. Archer Trust No. Three*[264] is at its core a mineral interest case, the authors think most transactional practitioners will find the Amarillo Court of Appeals holding highly troubling because the holding has far-reaching impacts for all real estate transactions and effectively renders any option to purchase real property essentially worthless. The *Tregellas* case concerns a right of first refusal with respect to a mineral interest.[265] In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Archer Trustees.[266] In a separate agreement, entered into simultaneously, the Archer Trustees were granted a "Right of First Refusal" (ROFR) to purchase the minerals under the surface they had already purchased.[267] The ROFR specifically provided that it was subordinate to mortgages and

254. *Id.*
255. *Id.*
256. *Id.* at 389.
257. *Id.* at 390.
258. *Id.* (citing Kennedy Ship and Repair, L.P. v. Pham, 210 S.W.3d 11, 19 (Tex. App.—Houston [14th Dist.] 2016, no pet.)).
259. *Id.* (citing Mustang Pipeline Co. v. Driver Pipeline Co., 134 S.W.3d 195, 196 (Tex. 2004) (per curium)).
260. *Id.* at 390 (citing *Kennedy*, 210 S.W.3d at 19).
261. *Id.*
262. *Id.*
263. *Id.* at 391 (citing Cooker v. Cooker, 650 S.W.2d 391, 393 (Tex. 1983)).
264. 507 S.W.3d 423 (Tex. App.—Amarillo 2016, pet. granted).
265. *Id.* at 426.
266. *Id.*
267. *Id.*

other encumbrances.[268] Unfortunately, although the property description in the ROFR was correct, it contained the incorrect county, listing the county as Ochiltree instead of Hansford.[269] The Archer Trustee's attorney prepared a correction and sent it to the grantors for signature but only two of the many grantors (the Tidwells) signed and returned the correction.[270] The correction was filed of record in Hansford County in September 2004.[271] Two of the original grantors of the ROFR (the Farbers) sold their mineral interests on March 28, 2007 to Tregellas.[272] The Archer Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.[273]

To further complicate matters, in 2008, another set of heirs of one of the original grantors of the ROFR (the Smiths) also sold their interest to Tregellas.[274] After they learned of the Archer Trustee suit, the Smith transaction was restructured into a loan secured by a deed of trust with a note payable in ninety days.[275] No payments were ever made on the note by the Smiths and, in August 2012, Tregellas acquired the Smith interest at a non-judicial foreclosure sale.[276]

Upon finding out about the foreclosure transaction, the Archer Trustees amended their petition and alleged that Tregellas "obtained the Smith minerals by subterfuge, artifice, or device."[277] The trial court granted specific performance to the Archer Trustees with respect to both the Farber and Smith ROFR interest.[278]

Tregellas appealed and argued, among other issues, that the correction instrument did not comply with the requirements of the Texas Property Code, which allows individuals with personal knowledge of facts to prepare and execute an instrument that effect non-material corrections that result from clerical error.[279] The correction of a county name is included in the list of non-material corrections permitted to be made.[280] Tregellas argues the correction instrument did not substantially comply with the requirements of Section 5.028 because: (1) the instrument does not state the basis for the Tidwells' personal knowledge; (2) a signed copy was not sent to the Farbers or the Smiths; and (3) a copy was not filed in the original incorrect county (Ochiltree) but instead was filed only in Hansford County.[281] Although the instrument did not state the basis for the Tidwells' knowledge, the court found that because the Tidwells were

268. *Id.* at 427.
269. *Id.*
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*
274. *Id.*
275. *Id.*
276. *Id.* at 427–28.
277. *Id.* at 428.
278. *Id.*
279. TEX. PROP. CODE § 5.028 (West 2014).
280. *Tregellas*, 507 S.W.3d 428.
281. *Id.*

among the list of grantors one could infer their personal knowledge and that the instrument, therefore, substantially complied with the personal knowledge element of Section 5.028.[282]

The court also found substantial compliance with the notice requirement because the Archer Trustees had sent the unsigned notice to all of the Grantors.[283] Finally the court found that the correction complied with the recording requirements.[284] Although a literal reading of Section 5.028(d)(1) requires the correction to be filed in all counties where the original was filed, because the correction contained the recording information for the original document, the court found substantial compliance.[285]

The next argument put forth by Tregellas was that the Archer Trustees' claim for specific performance, with respect to the Farbers' interest, was barred by the statute of limitations.[286] Generally, when a grantor of a ROFR sells property in breach of a ROFR "there is created in the holder an enforceable option to acquire the property according to the terms of the sale."[287] However, Section 16.004(a)(1) of the Texas Civil Practices and Remedies Code requires "a suit for specific performance of a contract for conveyance of real property to be brought no later than four years after the cause of action accrues."[288] The appeals court held that the breach occurred on March 28, 2007, when the Farbers sold their property to Tregellas and that the suit for specific performance was barred because it was filed outside the four year statute of limitations period. The appeals court relied on the Texas Supreme Court's holding in *S.V. v. R.V.*,[289] where the supreme court stated "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."[290]

The Archer Trustees tried, unsuccessfully, to argue that with respect to rights of first refusal the right is "dormant" until the holder is notified of a potential sale.[291] The appeals court disagreed and said that supporting the Archer Trustees' argument would result in profound uncertainty that was "inconsistent with the purpose of the statutes of limitation,"[292] which

282. *Id.* at 429 (citing Santos v. Guerra, 570 S.W.2d 437, 440 (Tex. Civ. App.—San Antonio 1978, writ ref'd n.r.e.)).

283. *Id.*

284. *Id.*

285. *Id.*; *see* TEX. PROP. CODE ANN. § 5.028 (West 2014). Substantial compliance was all that was required for documents recorded prior to September 1, 2011, when the law was revised. The law was further revised in 2013. *See* Act of May 24, 2013, 83rd Leg., R.S., ch. 158, § 1, 2013 Tex. Sess. Law Serv. Ch. 158.

286. *Tregellas*, 507 S.W.3d at 429.

287. *Id.* at 430 (citing A.G.E., Inc. v. Buford, 105 S.W.3d 667, 673 (Tex. App.—Austin 2003, pet. denied)).

288. *Id.* at 430 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(1) (West 2002)).

289. 933 S.W.2d 1, 4 (Tex. 1996).

290. *Tregellas*, 507 S.W.3d at 431 (quoting *S.V.*, 933 S.W.2d at 4).

291. *Id.*

292. *Id.*

according to the supreme court's holding in *S.V.* is to "establish a point of repose and to terminate stale claims."[293]

The Archer Trustees then try to argue for application of the discovery rule which tolls the accrual of a cause of action until the party learns of the injury or, through reasonable due diligence, could have learned of the injury.[294] The court dismissed the Archers Trustees' arguments and relied on the Texas Supreme Court's holding in *Cosgrove v. Cade*,[295] which limits its application of the discovery rule to injuries that are "inherently undiscoverable"[296] and not ones that are discoverable by the exercise of "reasonable due diligence" such as a search of public records.[297] Furthermore, the appeals court emphasized that the Texas Supreme Court has specifically held that there are only rare instances where the discovery rule should be applied to breach of contract cases as each party to a contract is required to protect their own interests and "diligent contracting parties should generally discover any breach during a relatively long four-year limitations period."[298]

In response, the Archer Trustees argued that it is well settled in Texas that "owners of property are under no duty [to] routinely . . . search the deed records for later-filed documents impugning their title."[299] The appeals court distinguished the case at hand because the Archer Trustees did not own an interest in land; they only owned an option to acquire a mineral interest, which is only a contract right.[300] The appeals court reversed the trial court with respect to the Farbers' interest and upheld the trial court with respect to the Smiths' interest.[301]

A petition has been granted with the supreme court. Given the substantial uncertainty this holding creates for a very common transactional practice, rendering it virtually useless, the author hopes that the supreme court will clear up the issue.

The *McCarthy v. Realty Austin, LLC*[302] case dealt with the definition of "procuring cause" regarding a real estate broker who claimed to be entitled to a commission for a real estate purchase that was arranged by a different real estate broker.[303] In this case, a real estate broker assisted a client with leasing a property on Lake Austin.[304] After leasing the property, the client later decided to buy the property and worked with another broker.[305] The original broker sued the client for the brokerage commis-

293. *Id.* at 432 (quoting *S.V.*, 933 S.W.2d at 3).
294. *Id.* at 432 (citing Cosgrove v. Cade, 468 S.W.3d 32, 36 (Tex. 2015)).
295. 468 S.W.3d 32, 36 (Tex. 2015).
296. *Tregellas*, 507 S.W.3d at 432 (citing *Cosgrove*, 468 S.W.3d at 36).
297. *Id.* (citing Wagner & Brown v. Horwood, 58 S.W.3d 732, 734–35 (Tex. 2001)).
298. *Id.* (citing Via Net v. TIG Ins. Co., 211 S.W.3d 310, 315 (Tex. 2006)).
299. *Id.* at 433 (citing Vanderbilt Mortg. & Fin., Inc. v. Flores, 692 F.3d 358, 369 (5th Cir. 2012)).
300. *Id.* at 433–34.
301. *Id.* at 437.
302. 500 S.W.3d 677, 678 (Tex. App.—Amarillo 2016, pet. denied).
303. *Id.* at 678–79.
304. *Id.* at 678.
305. *Id.*at 679.

sion, claiming he was the "procuring cause of the sale."[306] At trial, the jury agreed that the original broker was the "procuring cause" and awarded the broker $250,000 for the commission plus attorneys' fees.[307] In overturning the trial court's holding, the Amarillo Court of Appeals relied on a 1923 Texas Supreme Court case, *Keener v. Cleveland*,[308] which held:

> that when a real estate broker is instrumental in bringing together the seller and a purchaser who is acceptable to him, and they consummate a sale and purchase of property on terms that are satisfactory to the seller, this constitutes the agent the procuring cause of the sale, and he is entitled to the commission agreed upon.[309]

In the case at hand, the evidence clearly established that when the first broker arranged the lease, the buyer had no intention of buying the property.[310] In fact, several months after entering into the lease, the buyer purchased another property on Lake Austin before deciding the house he had purchased was too small and finally deciding to purchase the house he was leasing.[311] As the court stated, "simply introducing the property in question to the buyer, without more, is not sufficient to earn the brokerage commission, rather the broker must produce a buyer who is ready, willing, and able to buy the property at issue while the contract is in force."[312]

C. Statute of Frauds/Partial Performance

As in previous years, there has been an increase in cases dealing with the statute of frauds. In three cases during the Survey period, *Zaragoza v. Jessen*,[313] *Thomas v. Miller*,[314] and *Burrus v. Reyes*,[315] the courts found that the partial performance exception to the statute of frauds applied.

In the *Zaragoza* case, the Jessens entered into negotiations with the Zaragozas to buy a house for their daughter.[316] The testimony presented at court showed that Mrs. Jessen and Mrs. Zaragoza prepared a document outlining the terms of the transaction, which was never signed.[317] Under the terms of the unsigned agreement, the Jessens were to: (1) pay the Zaragozas a down payment of $73,010; and (2) "assume payment of the first mortgage" with a balance of $33,990.00.[318] The Zaragozas were

306. *Id.* at 680.
307. *Id.*
308. 250 S.W. 151, 152 (Tex. 1923).
309. *Id.*
310. *McCarthy*, 500 S.W.3d at 681.
311. *Id.*
312. *Id.*
313. 511 S.W.3d 816, 823 (Tex. App.—El Paso 2016, no pet.).
314. 500 S.W.3d 601, 604 (Tex. App.—Texarkana 2016, no pet.).
315. 516 S.W.3d 170, 185 (Tex. App.—El Paso 2017, pet. denied).
316. *Zaragosa*, 511 S.W.3d at 819.
317. *Id.*
318. *Id.*

to use the down payment to pay off a second mortgage.[319] Once the first mortgage was paid off, the Zaragozas agreed to deed the property to the Jessens.[320] The Jessens paid the down payment and the Zaragozas turned over possession on the house on June 18, 2007.[321] The Jessens then made over $9,717.41 in improvements to the house.[322] In September 2009, the Jessens paid the first mortgage in full.[323] Not only did the Zaragozas refuse to sign over the deed to the house, but they also failed to pay off the second mortgage.[324] The Jessens sued for breach of contract, and the Zaragozas claimed that the statute of frauds prevented enforcement because the contract was never signed.[325] The El Paso Court of Appeals held that "the statute of frauds is subject to a well-recognized exception under the doctrine of partial performance."[326] "Under this exception," if a contract has been partly performed it may be

> enforced in equity if denial of enforcement would amount to a virtual fraud in the sense that the party acting in reliance on the contract has suffered a substantial detriment, for which he has no adequate remedy, and the other party, if permitted to plead the statute, would reap an unearned benefit.[327]

The court went on to outline the elements required for a purchaser to enforce an oral contract based on partial performance: (1) payment; (2) possession; and (3) improvements or other facts that would create "a fraud on the purchaser if the contract remained unenforced."[328] The Jessens were clearly able to establish every element of the three prongs laid out by the court.

In the *Miller* case, the seller (Thomas) and purchaser (Miller) entered into an oral agreement whereby Miller agreed to pay the mortgage on Thomas's property on the understanding that when the mortgage was paid off, Miller would own the property.[329] The Millers, based on this oral agreement, moved into the property in question, paid the monthly mortgage and property taxes for approximately six years and spent over $30,000 improving the house.[330] After several years, Thomas took the position that he had leased the property to the Millers and attempted to evict them.[331] Eventually, the Millers moved out and Thomas deeded the property to another party and the Millers filed suit.[332] As in *Zaragoza*,

319. *Id.*
320. *Id.*
321. *Id.*
322. *Id.*
323. *Id.*
324. *Id.*
325. *Id.* at 820.
326. *Id.* at 823 (citing Carmack v. Beltway Dev. Co., 701 S.W.2d 37, 40 (Tex. App.—Dallas 1985, no writ)).
327. *Id.*
328. *Id.*
329. Thomas v. Miller, 500 S.W.3d 601, 603 (Tex. App.—Texarkana 2016, no pet.).
330. *Id.* at 605, 611.
331. *Id.* at 605.
332. *Id.* at 606.

the Texarkana Court of Appeals found that the partial performance exception to the statute of frauds applied, stating that "the kind of performance that justifies the exception to the statute of frauds is 'performance which alone and *without the aid of words of promise* is unintelligible or at least extraordinary unless as an incident of ownership, assured, if not existing.'"[333]

In the final case, *Burrus*,[334] the parties disputed whether the arrangement was a lease arrangement or an oral contract for deed. The property owner, Burrus, a licensed real estate agent for over forty years, contended that she was only leasing the property to the Reyes family.[335] The facts presented at trial established that the Reyes family had lived in a mobile home on the property for over seventeen years when Burrus sold the property to a third party.[336] During the seventeen year period, the Reyes family made over $22,000[337] in improvements to the property, including adding a porch, several rooms, a shed, and a dog kennel.[338] Although the Reyes family did not move to the property in question until 1993,[339] the facts presented at trial also established that after Burrus bought a 10.75 acre plot of land in 1988 (which included the property in question),[340] Burrus approached the current residents of the various lots within the parcel and asked if they wanted to enter into an oral arrangement to purchase the property from her by paying monthly payments to her until they had paid for the full purchase price.[341] This type of purchase transaction is generally called a contract-for-deed transaction and is regulated in depth by the Texas Property Code.[342] However, Section 5.072(a) of the Property Code explicitly requires such executory contracts to be in writing.[343]

On January 31, 2012, Burrus signed a purchase and sale agreement with a third party to sell the property where the Reyes family lived.[344] Sometime thereafter, the purchaser hired workers to demolish some of the improvements that the Reyes family had installed.[345] The Reyes family filed suit in April 2012.[346] The purchaser filed a forcible detainer action against Reyes and a breach of contract action against Burrus.[347] After the trial court granted a temporary injunction, the purchaser and the Reyes family

333. *Id.* at 610 (quoting Nat'l Prop. Holdings L.P. v. Westergren, 453 S.W.3d 419, 427 (Tex. 2015)).
334. Burrus v. Reyes, 516 S.W.3d 170 (Tex. App.—El Paso 2017, pet. denied).
335. *Id.* at 176–77.
336. *Id.* at 177–78.
337. *Id.* at 178.
338. *Id.* at 177–78.
339. *Id.* at 177.
340. *Id.* at 176.
341. *Id.*
342. *See* TEX. PROP. CODE ANN. § 5.072(a) (West 2014).
343. *Id.* ("An executory contract is not enforceable unless the contract is in writing and signed by the party to be bound . . . .")
344. *Burrus*, 516 S.W.3d at 178.
345. *Id.* at 179.
346. *Id.*
347. *Id.*

entered into a settlement agreement whereby the Reyes family agreed to move in exchange for $64,000.[348] The Reyes's continued their suit against Burrus. The jury ruled in the Reyes family's favor, finding that Burrus and the Reyes family had an oral agreement which fell within the partial performance exception to the statute of frauds.[349] The jury also found that because Reyes had entered into two or more executory contracts within a year, the Reyes's were entitled to liquidated damages pursuant to Section 5.077(d)(1) of the Texas Property Code because Reyes failed to provide the annual statements required by Section 5.077(a).[350] Burrus appealed on the basis that there was insufficient evidence to support the finding that the partial performance exception applied.[351] Burrus argued that the Reyes family needed to show not just that improvements had been made to the property, but that "the improvements were substantial and added materially to the value of the property."[352]

Burrus relied on the Texas Supreme Court's holding in *McGinty v. Hennen*,[353] in which a homeowner sued a contractor for the cost of repairing the contractor's poor work that led to water leaks and mold.[354] In *McGinty*, the homeowner established the expenses related to the repairs, but failed to establish that the repairs were "reasonable and necessary."[355] The El Paso Court of Appeals distinguished *McGinty* from the *Burrus* case because in order to support their partial performance claim, Reyes only needed to establish that the repairs were "valuable and permanent."[356] Burrus also argued "that the Reyes Family was not entitled to liquidated damages because the contract was not in writing" as required by Section 5.072.[357] However, the requirement that executory agreements must be in writing was only added to the Texas Property Code in 2001, well after the agreement at issue in this case.[358]

VI. TITLE/CONVEYANCES/RESTRICTIONS

A. Conveyances

The Survey period also included a number of cases construing deed language. In one case that was reported and questioned last Survey pe-

348. *Id.*
349. *Id.* at 180.
350. *Id.*; *see also* Tex. Prop. Code Ann. § 5.077(d)(1) (West 2014) ("A seller who conducts two or more transactions within a 12-month period under this section who fails to comply with Subsection (a) is liable to the purchaser for: (1) liquidated damages in the amount of $250 a day for each day after January 31 that the seller fails to provide the purchaser with the statement, but not to exceed the fair market value of the property"). At trial, the Reyes family introduced evidence that another family had entered into a similar arrangement with Burrus in May 1994. *Burrus*, 516 S.W.3d at 195.
351. *Id.* at 181.
352. *Id.* at 182.
353. 372 S.W.3d 625, 627–29 (Tex. 2012).
354. *Id.* at 626.
355. *Id.*
356. *Burrus*, 516 S.W.3d at 183.
357. *Id.* at 195.
358. *Id.*

riod, *Davis v. Mueller*,[359] the Texas Supreme Court reversed the Texarkana Court of Appeals[360] to find a general grant of "all" the property "owned by Grantor in Harrison County" was sufficient to grant all of the property owned by the grantor in Harrison County.[361] In this case, the statute of frauds was tested, and the specific granting clause listed ten vaguely described tracts in Harrison County, but the following paragraph in the deed included a Mother Hubbard clause indicating that the "Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described."[362]

The grantee of a subsequent conveyance to two of the tracts, also in Harrison County, brought the trespass-to–try-title case to determine ownership of those tracts. The supreme court restated Texas law that a general conveyance of all the grantor's property in a geographic area will be given effect.[363] The subsequent grantee challenged the deed and claimed it was ambiguous because the general granting clause was in the same paragraph as a Mother Hubbard clause. "A Mother Hubbard clause is not effective to convey a significant property interest not adequately described . . . ."[364] However, the supreme court found meaning in the general grant, stating "all meant all."[365] The grant of all the property saved the earlier vague descriptions.

The El Paso Court of Appeals used a similar approach in determining whether a grant of a right of way was an easement or fee simple in *BNSF Railway Co. v. Chevron Midcontinent, L.P.*[366] The court specifically used a "four corners" rule to determine the intent of the parties, rather than using "arbitrary" construction rules.[367] The court made an effort to interpret the deeds so that no clause was rendered meaningless, and found that the use of the phrase "right of way" did not automatically convey an easement or a fee simple.[368] In *BNSF*, the determining feature was the description of the property by referencing a line traced by surveyors that went over, through, and across various sections of land. Moreover, the granting language suggested that the conveyance was intended to be an easement. The court found the following factors to be persuasive:

(1) "The opening recitals of the deed" recognized that the grantor "would receive valuable benefits if the railroad passed over the land he was conveying";

359. 528 S.W.3d 97, 104 (Tex. 2017).
360. Mueller v. Davis, 485 S.W.3d 622, 633 (Tex. App.—Texarkana 2016), *rev'd*, *Davis*, 528 S.W.3d at 104.
361. *Davis*, 528 S.W.3d at 102.
362. *Mueller*, 485 S.W.3d at 629.
363. *Davis*, 528 S.W.3d at 98.
364. *Id.* at 102.
365. *Id.*
366. 528 S.W.3d 124, 125 (Tex. App.—El Paso 2017, no pet.).
367. *Id.* at 128.
368. *Id.* at 128–29.

(2) "The phrase 'for a right of way' appear[ed] in the granting clause directly in front of the phrase 'that strip of land.'" This was a defining phrase limiting the estate being granted;
(3) The conveyance was described by reference to a "line traced by a surveyor . . . [o]ver, though, and across the land";
(4) "The deed specifi[ed] that the conveyance c[a]me[ ] . . . with the right . . . [to take] wood, water, stone, timber and other material" used for convenience in the "construction and maintenance of [the] railway." If the grant was a fee simple estate these would not "need to be specified"; and
(5) The court found that the use of the term "premises" "suggest[ed] that a conveyance transfer[red] only an easement." Interestingly enough, the term "fee simple" was used in the addendum clause, but the court found that not determinative.[369]

The Tyler Court of Appeals also showed the importance of word choice in *Richardson v. Mills*[370] when it focused on the word "forever" in the addendum clause and in the warranty.[371] The court found that this language made a 1906 document a mineral deed and not a lease. It was clear that it was not intended to grant temporary rights. A subsequent document in 1908 sought to release the earlier lease, but it utilized the wrong year, July 9, 1907, and not July 9, 1906. The court found that the 1908 document, by its liberal terms, released something different, and did not affect the 1906 deed.[372]

Particularly in the oil and gas field, practitioners are aware of the Duhig Rule, an estoppel rule by which the grantor is found to have conveyed the greatest estate warranted by deed, whether by estoppel or after acquired title. In *Combest v. Mustang Minerals, LLC*,[373] the San Antonio Court of Appeals distinguished the Duhig Rule to find the deed unambiguous based upon the "four corners" rule interpretation of the parties' intent. This follows the current trend in deed interpretation. The court found that a reservation to the grantors of a one-half fraction of the minerals under the entire tract, rather than reserving only one-half of grantors mineral interest, did not convey to the grantee a one-half mineral interest.[374] The deed specifically excepted from the conveyance and warranty and reserved to the grantors, their heirs, and assigns, one-half of all oil, gas, and other minerals. This exception, together with the limited general warranty, did not create an estoppel or a breach of warranty situation to which the Duhig Rule might apply.[375]

In another case dealing with deeds, *Aguilar v. Sinton*,[376] the El Paso

369. *Id.* at 133–34.
370. 514 S.W.3d 406, 414 (Tex. App.—Tyler 2017, pet. denied).
371. *Id.* at 416.
372. *Id.* at 416–18
373. 502 S.W.3d 173, 179 (Tex. App.—San Antonio 2016, no pet.).
374. *Id.* at 180.
375. *See* Duhig v. Peavy-Moore Lumber Co., 144 S.W.2d 878 (Tex. 1940).
376. 501 S.W.3d 730, 734 (Tex. App.—El Paso 2016, pet. denied).

Court of Appeals restated the principle that a deed is not effective unless delivered. The court went further, noting that mere delivery is not enough in the absence of acceptance of the conveyance.[377] In this case, an attempted special warranty deed purporting to convey a contaminated portion of property back to the former property owners was null and void. The former owners never agreed to accept a conveyance of the contaminated property and, in this case, delivery alone was insufficient.[378] Typically, acceptance questions arise in the context of a deed into a government entity, but here the same principle applied when a grantor sought to rid itself of undesirable property by simply deeding it to another.[379]

B. Trespass-to-Try-Title

Several cases dealt with nuances of trespass-to try-title during the Survey period. In *Rife v. Kerr*,[380] the San Antonio Court of Appeals restated the basic premises of trespass-to-try-title, including the means by which a plaintiff can prevail. This case involved a common source by which both parties claimed title from a single individual that held title to the lots as a trustee. There is a good discussion relating to dry passive trusts, such that the trustee who was also a beneficiary could only transfer title to a one one-half interest. This is because a dry or passive trust immediately vests title in the beneficiaries. Moreover, the parties receiving the deed claimed adverse possession based on a 1932 deed. The court of appeals found that there was some evidence of hostility, but noted a significantly high burden to establish adverse possession against a cotenant particularly with respect to mineral interests.[381] Essentially, this case restates the premise that a cotenant can rarely, if ever, dispossess or adversely possess against another cotenant.[382]

C. Restrictions

In *Elbar Investments, Inc., v. Garden Oaks Maintenance Organization*,[383] the restrictive covenants stated "[n]o residence shall be erected on a lot or homesite of less frontage than seventy-five (75) feet."[384] In this case, the original residence was built on a single lot having frontage of seventy-five feet. Subsequently, an owner split the lot in half, resulting in the two halves of the duplex separately occupying two lots. Each new lot had a frontage of 37½ feet. The owner contended that no violation of the deed restrictions existed because the original residence that was built

377. *Id.*
378. *Id.* at 735.
379. *Id.* at 733.
380. 513 S.W.3d 601, 609–10 (Tex. App.—San Antonio 2016, pet. denied).
381. *Id.* at 616–17.
382. *But see* Tex. Civ. Prac. & Rem. Code Ann. § 16.0265(c) (West 2002) (adverse possession by cotenant heirs against each other).
383. 500 S.W.3d 1, 2 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
384. *Id.*

was on a lot that had a frontage of seventy-five feet. He had not constructed anything new on the property. The decision turned on the meaning of "erected," and the First Houston Court of Appeals concluded that the meaning was clear in this case.[385] The subsequent lot division did not cause a violation of the restrictive covenant.

In *Garrett v. Sympson*,[386] the homeowner filed suit against an owner's use of the house for short-term vacation rentals, claiming that such a use violated the restrictive covenant requiring the lots to be used for single-family residence purposes. The restrictions also prohibited commercial use of the lots. The Fort Worth Court of Appeals found that the phrase "resident purposes" was ambiguous, and had to be construed against the neighbors who objected to the use of the house for short-term rentals.[387] In addition, "commercial purposes" did not specify what activities constituted commercial purposes.[388] Together, the wording of these restrictions did not prohibit short-term vacation rentals where the vacation renters used the house for residential purposes, and the receipt of rental income did not detract or change the residential characteristics of the property.

Tarr v. Timberwood Park Owners Association[389] dealt with a similar situation and, in this case, the restrictive covenant mandated that the subdivision tracts be "used *solely for residential purposes*." The San Antonio Court of Appeals determined that a residence required a "physical presence and intention to remain" and that this would prohibit a temporary occupation without any intention of making that place the person's home.[390] Such a situation would not be a person's residence.

There were also some miscellaneous cases in the area of restrictions worth noting. In *Houston Laureate Associates, Ltd., v. Russell*,[391] the Fourteenth Houston Court of Appeals found that homeowners had standing and capacity to sue in connection with a recreational purpose easement. The court noted that standing is when a party is "personally aggrieved," whereas capacity addressed the "legal authority to act."[392] With both standing and capacity, the homeowners were able to enforce the recreational easement and preclude limitations and charges for its use by an encroaching landowner.[393] In another case dealing with easements, *Horse Hollow Generation Tie, LLC v. WhitWorth-Kinsey #2, Ltd.*, the Austin Court of Appeals allowed reformation of a wind easement to reflect the actual agreement of the parties as to the calculation of payment

385. *Id.* at 5.

386. 523 S.W.3d 862, 864 (Tex. App.—Fort Worth 2017, pet. denied) (mem. op.).

387. *Id.* at 868.

388. *Id.*

389. 510 S.W.3d 725, 729 (Tex. App.—San Antonio 2016, no pet.).

390. *Id.* at 730 (quoting Manson v Milton, 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied)).

391. 504 S.W.3d 550, 557–58 (Tex. App.—Houston [14th Dist.] 2016, no pet.).

392. *Id.* at 556.

393. *Id.* at 571.

for use of the easement.[394] Also, a note to those serving on association boards, the Fourteenth Houston Court of Appeals in *Brown v. Hensley* reaffirmed that the Texas Charitable Immunity and Liability Act provided immunity and protection from personal liability for acts discharged within the scope of authority, even if the specific act was wrong or negligent.[395] In this case, the suit revolved around claims that the board failed to repair hurricane and fire damage to the complex, resulting in later steps to demolish the buildings.

D. Lis Pendens

A decision by the Texas Supreme Court in a case litigating the effect of the expungement of a notice of lis pendens led to a legislative remedy: Texas Property Code Section 12.0071. In *Sommers v. Sandcastle Homes, Inc.*,[396] a property was sold to a third-party who had actual knowledge of claims involving a lack of authority by a general partner. The plaintiff alleged that the earlier transfer of the property was fraudulently made and outside the general partner's scope of authority. The defendants obtained an expungement of the notice of lis pendens by convincing the court that the lawsuit did not involve title, but was rather a monetary dispute.[397] The supreme court held that, regardless of the expungement or the then existing language of the Texas Property Code, independently gained knowledge was not eliminated by the expungement and that the purchasers could not be bona fide purchasers.[398]

At the time this case was pending before the supreme court, the Texas Legislature undertook a review of the lis pendens statute, recognizing the uncertain results and ineffectiveness of an expungement in the context of the issue before the court. As noted, the Texas Legislature amended the Texas Property Code to add Section 12.0071, which gave teeth to an expungement—making the finding conclusive that the lawsuit did not involve a claim against title to the property. However, the change in the law was prospective, and did not apply to the *Sommers* case.

It is hoped that this change will give real meaning to an expungement. More importantly, it will encourage parties to file a notice of lis pendens, and potentially put parties that do not file a notice of lis pendens at risk when there is a claim to real property pending in the litigation. Of course, the notice of lis pendens is "notice to the world" of the lawsuit itself regarding ownership of the property, and when used properly, it is beneficial to provide notice of a true claim to title.[399] The courts should be able to review litigation and identify those lawsuits where a notice of lis

394. Horse Hollow Generation Tie, LLC v. WhitWorth-Kinsey #2, Ltd., 504 S.W.3d 324, 325, 329 (Tex. App.—Austin 2016, no pet.).
395. Brown v. Hensley, 515 S.W.3d 442, 448–49 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
396. 521 S.W.3d 749, 754 (Tex. 2017).
397. *Id.* at 752.
398. *Id.* at 756–57.
399. *Id.* at 758.

pendens is inappropriate, thereby potentially tying up property. Under the Texas Property Code Section 12.0071, the courts now have real authority to expunge a notice of lis pendens and allow the parties to transfer the property; it does not affect the ongoing lawsuit. The supreme court's decision was not unanimous in *Sommers*; Justice Lehrmann concurred in part and dissented in part with Justices Willett, Hecht, and Devine joining in the dissenting opinion. While the dissenting opinion is believed to be the better analysis of legislative intent to give effect to the existing statute, it would appear that the amendment to the statute will achieve clearer results.

E. Correction Instruments

Tanya L. McCabe Trust v. Ranger Energy[400] construed the relatively new "correction instruments" statutes.[401] The issue addressed was whether the addition of new property in a corrected deed of trust constituted a non-material or material correction. Since the facts are complex, the following is a liberal summary. In 2011, the Trust obtained a conveyance of overriding royalty interests of various percentages in various different assignments, some excluding and some including the disputed McShane Fee and Bruce Lease. However, a correction instrument in November 2011 included these disputed tracts. The prior owner, Mark III, obtained all six overriding royalty interests, but excluded the two disputed tracts, from Tomco in 2008. Mark III obtained a mortgage in late 2008 from Peoples Bank, which covered only the six properties, omitting the McShane and Brice tracts. Ultimately, when these errors were discovered, Tomco and Mark III executed a correction assignment in December 2011, which was after the conveyances to the Trust. Mark III defaulted on the Peoples Bank loan and entered into a 2012 settlement agreement and a renewal deed of trust containing only the six properties, omitting McShane and Brice. However, the error was eventually discovered by Peoples Bank and a corrected deed of trust (including the McShane and Brice tracts) was filed by Peoples Bank in January 2013. Thereafter, Mark III defaulted and Peoples Bank foreclosed under its corrected deed of trust, claiming that such foreclosure wiped out the Trust's overriding royalty interests, to which the Trust objected and brought suit.[402]

At issue was the effect of the various correction instruments on the state of title concerning the interests of the Trust. The correction instruments statue divides correction instruments into those dealing with nonmaterial corrections[403] and material corrections.[404] A nonmaterial correction includes the correction of "a legal description prepared in connection with the preparation of the original instrument but inadvertently

400. 531 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2016, pet. denied), *superseding* 508 S.W.3d 828.
401. Tex. Prop. Code Ann. §§ 5.027, 5.028, 5.029, 5.030 (West 2014).
402. *Tanya L. McCabe Trust*, 531 S.W.3d at 185–93.
403. Tex. Prop. Code Ann. § 5.028 (West 2014).
404. *Id.* § 5.029.

omitted from the original instrument."[405] The First Houston Court of Appeals majority concluded the corrected deed of trust was a material correction since it "add[ed] . . . land to a conveyance that correctly convey[ed] other land."[406] As to a material correction, the statute required the corrected instrument to have been executed by each party; in the subject case, Peoples Bank had independently made the correction, filed it, and provided a copy and notice to the debtor. Therefore, the Trust alleged the correction instrument was invalid and not effective since it did not comply with the statutory requirement for execution of a material correction. The court agreed and found the correction instrument invalid.[407]

Further, such correction instrument statutes provided that the correction instrument replaces and is a substitute of the original instrument, and may be relied upon by a bona fide purchaser. But the correction instrument is subject to the interests of an intervening creditor or subsequent purchaser for valuable consideration without notice acquired after the date of the original instrument but prior to the date of the correction instrument.[408] Since the court determined that the correction instrument was invalid, the correction instrument did not constitute "notice to a subsequent buyer."[409] Consequently, the interests of the Trust was not extinguished by the Peoples Bank foreclosure.[410]

There was a strongly-worded dissenting option by Justice Evelyn Keyes, who viewed the correction instruments as being nonmaterial as opposed to material, which is legal analysis this author finds unconvincing. Justice Keyes' basic premise is that the addition of the McShane and Brice properties was immaterial[411] and could have been corrected by a knowledgeable person under the statute (in lieu of both parties signing the correction deed of trust). This is based on the rationale that because the original conveyance of the properties contained all eight properties (including McShane and Brice), the omission of the McShane and Brice properties in the subsequent mortgages was a clerical error.[412] Apparently, the Justice does not consider it feasible that not all of the properties would be mortgaged. Continuing that reasoning, Justice Keyes thinks the assignee should have known the deed of trust should have included all of the property acquired by the assignee (Trust).[413] Most real estate practitioners, the author believes, would find this faulty reasoning. By the same token, Justice Keyes finds that the Trust could not be a bona fide purchaser, since it could not prove it had no notice that it's overriding royalty

405. *Id.* § 5.028(a-1)(1).
406. *Tanya L. McCabe Trust*, 531 S.W.3d at 795 (quoting TEX. PROP. CODE ANN. § 5.029(a)(1)(C) (West 2014)).
407. *Id.* at 797–98.
408. *See* TEX. PROP. CODE ANN. § 5.030(b), (c) (West 2014).
409. *Tanya L. McCabe Trust*, 531 S.W.3d at 798.
410. *Id.* at 799.
411. *Id.* at 801 (Keyes, J., dissenting).
412. *Id.* at 808–09.
413. *Id.* at 809.

interests in McShane and Brice should have been included in the original deed of trust to Peoples Bank.[414] Justice Keys somehow ignored the fact that record title, as reflected the original deed of trust, did not include those two properties. As a sole dissent, practitioners can hopefully ignore such opinion.

VII. HOMESTEAD/HOME EQUITY LENDING

One of the most significant cases during the Survey period arose in the context of home equity lending. In *Wood v. HSBC Bank USA, N.A.*,[415] the Texas Supreme Court addressed limitations and the issue of forfeiture in connection with an overcharge fee in connection with a home equity loan origination. The supreme court determined that the home equity lien remained "not valid unless and until the loan defect was cured."[416] No statute of limitations applied to the borrower's action to quiet title.[417] But, the right to forfeiture was not immediately available.[418] It was the subject of a breach of contract claim based on the loan documents.[419] The lender, upon notice, had a right to cure under the Constitution and, upon the cure, the lien would become valid.[420] Essentially, the supreme court used an extraordinarily literal reading of the Constitution to avoid the limitations issue while preserving the right of the lender to cure a defect upon notice. Moreover, the supreme court noted that the lender could correct a defect even without notice.[421] The forfeiture provision in the Constitution was not a cause of action, but rather a remedy in the context of the breach of contract. Bottom line (and the primary takeaway from this case): no statute of limitations applies and the lien remains invalid until cured. Because the issue of whether or not the borrower did pay closing fees of more than 3% was not before the supreme court, it was not addressed in the supreme court's opinion.

Several cases were caught in a time gap by this decision. In particular, *Kyle v. Strasburger*[422] reversed the Corpus Christi Court of Appeals in part, and remanded because the court of appeals originally had determined that limitations applied to a claim by a spouse that she had been defrauded by loans initiated by her husband using a power of attorney. The Texas Supreme Court reversed, indicating that the four-year statute of limitations did not apply, and again emphasized that forfeiture was not an independent cause of action.[423] The case was remanded to address the wife's action to declare the Deed of Trust and Special Warranty Deed

414. *Id.*
415. 505 S.W.3d 542, 551 (Tex. 2016).
416. *Id.*
417. *Id.* at 550.
418. *Id.* at 544.
419. *Id.* at 546.
420. *Id.* at 547.
421. *Id.* at 549.
422. 522 S.W.3d 461, 467 (Tex. 2017).
423. *Id.* at 463; *see* Garofolo v. Ocwen Loan Servicing, 497 S.W.3d 474, 489 (Tex. 2016).

invalid. The Fourteenth Houston Court of Appeals likewise followed *Wood* in *Morris v. Deutsche Bank National Trust Co.*[424] The court there noted that limitations did not apply to the claim of a noncompliant lien and remanded the case back to the trial court.

Separately, in another homestead case, the First Houston Court of Appeals affirmed that an abstract of judgment lien does not attach to homestead, even when the property is the subject of a divorce with one spouse retaining the homestead.[425] In *Hankins v. Harris*, the court noted that, in the context of the divorce, the property was transferred as part of a marital property settlement agreement.[426] In many cases, this involves the payment of money as consideration for the conveyance. This is treated as a sale of the land and the property retains its homestead character. The court distinguished *Laster v. First Huntsville Properties Co.*,[427] in which a husband had a future interest in the homestead property awarded to the wife as part of the divorce agreement. In that case, the vested future interest was not homestead and was an interest that could be freely mortgaged or alienated.[428] The husband was able to use that interest to secure a promissory note. Once the default occurred and the lender obtained the vested future interest, it was subsequently able to partition the residence. In *Hankins*, there was no such vested future interest in the homestead, but rather the spouse received an undivided possessory homestead interest to which a judgment lien would not attach.[429]

VIII. CONDOMINIUM/OWNER ASSOCIATIONS

A number of cases addressed condominiums, homeowners associations, and related restrictions. In *Yeske v. Piazza Del Arte, Inc.*,[430] the homeowner argued that the homeowners association had not filed an assumed name certificate until after it sought to foreclose for unpaid assessments. In that regard, the homeowners association was never properly incorporated, and Yeske argued that Section 82.101 of the Texas Property Code required a certificate of incorporation for a homeowners association prior to the homeowners association conveying any units. Therefore, the homeowners association had no authority to collect assessments or foreclose on his unit. The Fourteenth Houston Court of Appeals held that a technical violation of the Act did not excuse payment of condominium assessments.[431]

Note that in *Savering v. City of Mansfield*,[432] lots were reserved to the

424. 528 S.W.3d 187, 190 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
425. Hankins v. Harris, 500 S.W.3d 140 (Tex. App.—Houston [1st Dist.] 2016, pet. denied).
426. *Id.*
427. 826 S.W.2d 125 (Tex. 1991).
428. *Id.* at 131.
429. *Hankins*, 500 S.W.3d at 147.
430. 513 S.W.3d 652, 667 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
431. *Id.* at 668.
432. 505 S.W.3d 33, 38 (Tex. App.—Fort Worth 2016, pet. denied) (en banc).

homeowners association as part of forming the homeowners association before the homeowners association entity was created. The Fort Worth Court of Appeals found that the declaration conveyed the lots to the homeowners association.[433] Essentially, the court found that all of the activities in connection with the formation of the homeowners association and the reservation of the lots were contemporaneous and involved the same individuals.[434]

However, a word to the wise in connection with formation of homeowners associations can be found in *Western Hills Harbor Owners Association v. Baker*,[435] in which the El Paso Court of Appeals found that simply filing bylaws, which provided means for amendment of the restrictions, was insufficient.[436] The association declaration made no reference to the bylaws, nor was there any evidence that contemporaneous original bylaws existed. In this case, Chapter 209 of the Texas Property Code controlled, requiring a 67% vote to amend a declaration. The declaration was ultimately found to create mandatory membership in the association and a right to make mandatory assessments on all lot owners.[437] However, the association failed to prove that 67% of the voting property members voted, and thus the increased assessments were inappropriate under the Texas Property Code.[438]

IX. CONSTRUCTION AND MECHANICS LIENS

A. Certificate of Merit Statute

As in previous years, there were a significant number of cases dealing with the deceptively simple Certificate of Merit Statute.[439] This year, the Texas Supreme Court apparently decided it was tired of the frequent statutory misinterpretations and accepted two separate cases dealing with interpretation of the Certificate of Merit Statute.[440] In addition, in one of its holdings, it endorsed the First Houston Court of Appeals' holding in *Gaertner v. Langhoff*.[441] Collectively, these three cases give practitioners a tremendous amount of insight into the supreme court's interpretation of the Certificate of Merit Statute. One would hope this guidance will cut down on the abundance of litigation over the statute's requirements the Texas court system has seen in recent years.

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433. *Id.* at 44.
434. *Id.* at 46.
435. 516 S.W.3d 215 (Tex. App.—El Paso 2017, no pet.).
436. *Id.* at 221–22.
437. *Id.* at 225.
438. *Id.* at 225–26 (The highlighted sentence is not true, the lot owners won, not the association and the assessments were improper).
439. Tex. Civ. Prac. & Rem. Code Ann. §150.002 (West 2011).
440. *See* Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp., 520 S.W.3d 887 (Tex. 2017); Levinson Alcoser Assocs., L.P. v. El Pistolon II, Ltd., 513 S.W.3d 487, 489 (Tex. 2017).
441. 509 S.W.3d 392 (Tex. App.—Houston [1st Dist.] 2014, no pet).

In *Gaertner v. Langhoff*, an interlocutory appeal, the architect contended that the Certificate of Merit Statute requires that the affiant providing a certificate of merit must have knowledge in the specific subspecialty at issue in the case.[442] The trial court found that the record supported that the affiant was knowledgeable in the same area and that there was no statutory requirement for the affiant to be knowledgeable in the specific sub-area.[443] The architect appealed.[444] The First Houston Court of Appeals affirmed the trial court's decision,[445] and the Texas Supreme Court effectively endorsed the holding by its decision in *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*[446]

In *Levinson Alcoser Associates, L.P. v. El Pistolon II, Ltd.*,[447] the Texas Supreme Court attempted to resolve what it felt were inconsistencies in the interpretation of Chapter 150 of the Civil Practice and Remedies Code. In this particular case, both the trial court and the Corpus Christi Court of Appeals felt that the proffered certificate of merit was sufficient.[448] The supreme court disagreed, and held that the certificate did not substantiate that the affiant had the requisite knowledge and reversed the lower court's ruling.[449] The affidavit at issue stated in part "I am a professional architect who is registered to practice in the State of Texas, license number 11655. I have been a registered architect in Texas since 1980, and have an active architecture practice in the State of Texas today."[450] The supreme court stated that the certificate failed to meet the requirements of Chapter 150 because it did not "describe any familiarity with, or knowledge of, the defendants' area of practice."[451] The supreme court held that the knowledge requirement is a separate element and distinct from the licensure and active-practice requirements, and that establishing licensure and active practice alone is not sufficient.[452] The supreme court did note, however, that it is not always required that the certificate contain the details of the affiant's knowledge, only that there must be some way to infer from the record the requisite knowledge.[453] In the case before the court, the record contained no such substantiation.[454]

In *Melden & Hunt, Inc. v. East Rio Hondo Water Supply Corp.*,[455] also an interlocutory appeal, the Texas Supreme Court stepped in for the second time during this Survey period to try to put to rest what it felt were ongoing misconceptions about the requirements of the Certificate of

442. *Id.* at 394.
443. *Id.*
444. *Id.*
445. *Id.* at 398.
446. 520 S.W.3d 887, 890 (Tex. 2017).
447. 513 S.W.3d 487, 490–91 (Tex. 2017).
448. *Id.* at 490.
449. *Id.* at 494.
450. *Id.* at 492.
451. *Id.* at 493.
452. *Id.* at 494.
453. *Id.*
454. *Id.*
455. 520 S.W.3d 887, 889 (Tex. 2017).

Merit Statute and perceived inconsistencies in the interpretation provided by various Texas courts.[456]

In this case, the contractor, Melden, had moved for dismissal at the trial court level on the basis that the certificate of merit failed to satisfy the requirements of Chapter 150 because: (1) the certificate contained conclusory assertions regarding the professional's competency to testify; (2) the professional was not actively engaged in the practice of engineering; and (3) the certificate did not address every theory of recovery and provide the "factual basis for each such claim."[457]

With respect to the first point, the contractor essentially tried to persuade the supreme court that a professional providing a certificate should undergo the same degree of scrutiny normally reserved for the competence and admissibility of expert testimony.[458] This is a standard that is not contained in the statute; the only requirement in the statute is that the affiant "is knowledgeable in the area of practice of the defendant."[459] There is no requirement that the "statements in a certificate of merit must be competent as evidence" with respect to the qualifications of the professional.[460] The supreme court held that the only requirement is that a trial court is able to ascertain that the professional possesses the requisite knowledge.[461]

With respect to the second point, the supreme court fully agreed with the strict statutory approach of the court of appeals, which concluded that Chapter 150 "neither requires the affiant to explicitly state that he or she is actively engaged in engineering practice nor imposes requirements or limitations on how the trial court determines whether the affiant is actively engaged."[462] The supreme court further agreed that the trial court had not abused its discretion in determining the engineer was qualified.[463] The supreme court also repeatedly distinguished the case at hand from its finding in *Levinson Alcoser* where there was nothing in the record to support a finding by the trial court that the expert had relevant knowledge or experience.[464]

With respect to the final point, the court of appeals had held that the point of the certificate was to simply provide "a basis for the trial court to determine merely that the plaintiff's claims are not frivolous and to thereby conclude that the plaintiff is entitled to proceed in the ordinary

456. *Id.* at 892 n.3.
457. *Id.* at 890.
458. *Id.*
459. *Id.* at 747 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 150.002(a)(3) (West 2011)).
460. *Id.* (quoting Charles Durvivage, P.E. v. La Alhambra Condo. Ass'n, No. 13-11-00324-CV, 2011 WL 6747384, at *2–3 (Tex. App.—Corpus Christi Dec. 21, 2011, pet. dism'd) (mem. op)).
461. *Id.* at 896.
462. Melden & Hunt, Inc. v. E. Rio Hondo Water Supply Corp., 511 S.W.3d 743, 748 (Tex. App.—Corpus Christi 2015), *aff'd*, 520 S.W.3d 887 (Tex. 2017).
463. *Melden*, 520 S.W.3d at 889.
464. *Id.* at 890.

course to the next stages of litigation."[465] The court of appeals also held that the certificate proffered in the present case was sufficient and clearly met the requirements of the statute.[466] The supreme court agreed and affirmed.[467]

The supreme court addressed in detail the contractor's argument that the "factual-basis requirement obligated [the engineer] to provide factual support for the elements of each theory or cause of action pled by the plaintiff."[468] The contractor attempted to argue that the certificate of merit was similar to the expert report required for health care liability claims under the Chapter 74 of the Civil Practices and Remedies Code.[469] The supreme court examined the plain language of Chapter 150 along with the historical iterations and disagreed with the contractor's interpretation.[470] The language of Chapter 150 provides that the expert affidavit:

> set forth specifically for each theory of recovery for which damages are sought, the negligence, if any, or other action, error or omission of the licensed or registered professional in providing the professional service, including any error or omission in providing advice, judgment, opinion, or a similar professional skill claimed to exist and the factual basis for each such claim.[471]

The supreme court pointed out that the original statute had been amended three times since it was enacted in 2003 in order to clarify that it was not limited to professional negligence claims, but to all claims against professionals.[472] The contractor argued that the "factual basis for each such claim" modified the "each theory of recovery" and required the expert to address the legal elements for each cause of action.[473] The supreme court rejected this interpretation and held that the "each theory of recovery" language was added in an attempt to clarify that the statute did not just apply to negligence actions.[474] The "factual basis of each such claim" was in the original statute and refers to the "negligence, if any, or other action, error or omission" and simply requires the expert to include in the certificate a statement regarding the errors the expert believes occurred with respect to the professional services at issue.[475]

B. Notice of Claims

El Paso County v. Sunlight Enterprises Co.[476] is of particular interest to

465. *Melden*, 511 S.W.3d at 749 (citing CBM Eng'rs, Inc. v. Tellepsen Builders, L.P., 403 S.W.3d 339, 346 (Tex. App.—Houston [1st Dist.] 2013, pet. denied)).
466. *Melden*, 520 S.W.3d at 891.
467. *Id.*
468. *Id.* at 892.
469. *Id.* at 892–93.
470. *Id.* at 893.
471. Tex. Civ. Prac. & Rem. Code Ann. § 150.002(b).
472. *Melden*, 520 S.W.3d at 894.
473. *Id.* at 893.
474. *Id.*
475. *Id.*
476. 504 S.W.3d 922, 924 (Tex. App.—El Paso 2016, no pet.).

the construction industry because it interprets Section 16.071(a) of the Texas Civil Practice and Remedies Code which "provide[s] that a contract stipulation requiring a claimant to give notice of a claim for damages as a condition precedent to the right to sue on a contract is not valid unless it is reasonable, and that a stipulation requiring notification within less than 90 days is void."[477] Although the language of Section 16.071(a) has been in its current form since 1891, "no court has specifically addressed whether Section 16.071(a) applies to the notice-of-claims provisions" which are typically found in construction contracts.[478] In this case, Sunlight Enterprises (Sunlight) entered into a construction contract with El Paso County (the County).[479] The County terminated the contract for lack of performance. Sunlight sued for breach of contract claiming that it had incurred costs as a direct result of the County's actions to delay and/or hinder Sunlight's performance under the contract.[480] The contract in question had a clause requiring Sunlight to file any claims regarding additional compensation within seven days, or they would be deemed waived.[481] Sunlight argued that the deadlines imposed by the contract were voided by Section 16.071(a), and the trial court issued a partial summary judgment in favor of Sunlight.[482]

The El Paso Court of Appeals reversed the trial court and held that Section 16.071(a) does not apply to the conditions of a contract requiring notice of requests for extensions of time or additional compensation because these are not the same as a "claim for damages."[483] The appeals court reasoned "that Section 16.071(a) must be strictly construed because it is restrictive and in derogation of the common-law right to freely contract."[484] The appeals court went on to state that despite the fact that many construction contracts provide broad notice provisions that require notice as a condition precedent to the right to sue on the contract and are often times related to conditions that may lead to a claim for damages, these provisions are not the same as a "notice of a claim for damages."[485]

C. Residential Construction Liability Act

Although the majority of construction liability cases this year seemed to center around the Certificate of Merit Statute, in *Vision 20/20, Ltd. v. Cameron Builders Inc.*,[486] the Fourteenth Houston Court of Appeals had the opportunity to address the Residential Construction Liability Act (RCLA) and provide an important reminder to practitioners not to over-

477. *Id.* (citing Tex. Civ. Prac. & Rem. Code Ann. § 16.071(a) (West 2002)).
478. *Id.* at 927.
479. *Id.* at 924.
480. *Id.*
481. *Id.* at 925.
482. *Id.* at 925–26.
483. *Id.* at 926.
484. *Id.* at 927 (citing Travelers' Ins. Co. of Hartford, Conn. v. Scott, 218 S.W. 53, 57 (Tex. Civ. App.—Fort Worth 1919, writ ref'd)).
485. *Id.* at 930.
486. 525 S.W.3d 854, 855 (Tex. App.—Houston [14th Dist.] 2017, no pet.).

look its statutory requirements when dealing with any issues arising from a residential construction defect.[487] In *Vision 20/20*, a plumbing failure in a house caused significant damage to the structure, furniture, and personal possessions.[488] After all of the work had been completed to remediate the damages, the insurance company sent a letter to the contractor who built the original house, Cameron Builders, demanding repayment of $207,701.05.[489] After Cameron refused payment, Vision 20/20 filed suit, alleging various causes of action, including negligence, breach of warranty, and violations of the Texas Deceptive Trade Practices Act.[490] The builder claimed that the claims were barred by Section 27.0003(a)(2) of RCLA, which requires that a claimant be given written notice of a "construction defect" and the opportunity to inspect and repair the damages prior to repairs being commenced.[491] The trial court agreed and granted the builder's motion for summary judgment.[492] Vision 20/20 appealed on the basis that RCLA only applied to the opportunity to cure the construction defect and not to the damage caused by the defect.[493] The language relied on by Vision 20/20 is found in Section 27.001(4) of RCLA, which defines "construction defect" as "'a matter *concerning* the design, construction, or repair of a new residence . . . on which a person has a complaint against a contractor. The term *may include* . . . any appurtenance, or the real property on which the residence and appurtenance are affixed proximately caused by a construction defect.'"[494] Vision 20/20 argued that as a result of the inclusion of the phrase "may include" the inclusion of physical damage was not mandatory but, instead, discretionary.[495]

The court of appeals disagreed and thought that such an interpretation of the statute weighed against the plain language of the statute, which clearly states that a "complaint against the contractor such as alleged here 'arises' from a 'construction defect' if it merely 'concerns' the construction of a new residence."[496] Furthermore, the court argued, such an interpretation would be contrary to the purpose of the statute, which was enacted to "encourage settlement and prevent[ ] the cost of litigation."[497] One gets the feeling that Vision 20/20's argument on appeal was more a desperate attempt to salvage what turned out to be a very expensive oversight than a serious and well-constructed legal position. That being said, this case presents an excellent reminder for all practitioners not to

487. *See* TEX. PROP. CODE ANN. § 27.001–.007 (West 2014).
488. *Vision 20/20*, 525 S.W.3d at 855.
489. *Id.*
490. *Id.*
491. *Id.*
492. *Id.*
493. *Id.* at 856.
494. *Id.* at 857 (TEX. PROP. CODE § 27.001(4) (West 2014)).
495. *Id.*
496. *Id.* (citing *In re* Wells, 252 S.W.3d 439, 448 (Tex. App.—Houston [14th Dist.] 2008, orig. proceeding)).
497. *Id.* at 858.

overlook the RCLA notice requirements when dealing with residential construction defects.

X. MISCELLANEOUS

A. Insurance Coverage

Housing & Community Services v. Texas Windstorm Insurance Association[498] involved a claim for wrongful denial of coverage relating to hail damage to an apartment project. The Lantana Square Apartments was owned by Housing & Community Services (HCS), and the property was insured against wind and hail storm events through Texas Windstorm Insurance Association (TWIA), a quasi-governmental body established to provide Texas coastal communities with windstorm and hail coverage pursuant to a special legislative act known as the Texas Windstorm Insurance Association Act.[499] The Lantana property sustained damage from a hailstorm on May 15, 2012. HCS filed a claim under the TWIA policies on May 28, 2013, thirteen days after the one-year limitation period for filing claims. In its denial letter, the insurance company advised HCS of a one-time, 180-day extension for the filing period upon a showing of good cause presented to the Texas Commissioner of Insurance. HCS filed such extension request, but was denied and brought suit alleging substantial compliance with the insurance policy and a showing of no harm to the insurer for the thirteen-day delinquent filing.

Numerous Texas cases have held that where the insured is not prejudiced, strict compliance is not required. However, the Corpus Christi Court of Appeals pointed out the special statutory nature of the windstorm coverage and the specific legislative act creating it, noting this was a matter of first impression.[500] The court concluded this case was distinguishable from typical insurance claim cases, considering the special statutory nature of coverage.[501] The statute "set[ ] forth a clear and unambiguous one-year limitation period . . . subject to the 180-day discretionary extension" for good cause; therefore, TWIA was justified in denying any untimely claims filed, regardless of whether TWIA was prejudiced by the untimely filing of a claim.[502] In so holding, the court noted the draconian consequences for *de minimis* deviations, and expressed disgust, but advised that changes must come from the Texas Legislature.[503] Practitioners must be alert to the strict claim filing limitation when dealing with the statutory insurance.

Triyar Co., LLC v. Fireman's Fund Insurance Co.[504] involved insurance claims arising from damage caused by Hurricane Ike to two proper-

498. 515 S.W.3d 906, 907–08 (Tex. App.—Corpus Christi 2017, no pet.).
499. *Id.* at 907; *see* Tex. Ins. Code Ann. § 2210.001 (West 2015).
500. *Id.* at 908–09.
501. *Id.* at 909.
502. *Id.* at 910.
503. *Id.*
504. 515 S.W.3d 517, 519 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).

ties: San Jacinto Mall and Greenspoint Mall. The policy applicable to these claims contained a "replacement cost" provision which was payable only after repairs had been completed, or, at the election of the insured under certain circumstances, payment of the "Actual Cash Value," which pays the actual cost to repair or replace the property subject to depreciation but does not require the repair or replacement to have been contemplated before payment of insurance proceeds.[505] Triyar did not repair and replace the damaged property (mostly a new roof), so Fireman's Fund made payments under the Actual Cash Value computation method. Based on the jury's finding as to the San Jacinto Mall property, Fireman's Fund made payment on damages of $5,876,420, whereas the Actual Cash Value damage was only $4,400,000, representing an excess payment of $1,476,420. Similarly, on the Greenspoint Mall property, Fireman's Fund made payment on damages of $2,227,000 and the jury found the Actual Cash Value damage was $2,200,000, representing an overpayment of $27,156. Since Triyar failed to comply with the policy requirements for the actual repair and replacement of the damaged property, the Fourteenth Houston Court of Appeals limited Triyar's recovery to the amount of the Actual Cash Value, which Fireman's Fund overpaid. Therefore, Triyar was not entitled to any additional recoveries.[506]

Triyar also attempted to seek recovery for lost business income, which the policy covered, and which the jury found was $250,000. One mall was closed for nine days and the other for fifteen days. The insurance policy excluded the first eighteen days of business income loss, so there was no obligation for Fireman's Fund to pay any business income loss.[507] Additionally, Triyar sought recovery for "temporary repairs" to bring the property into operational order after Hurricane Ike. Triyar was unsuccessful on this point because the title policy covered only "Extra Expenses" and not "temporary repairs."[508] The evidence submitted at the trial and the jury responses provided an amount for the Actual Cash Value loss, but nothing specific as to "Extra Expenses." Therefore, Triyar could not recover any additional expenses called "temporary repairs."[509] With the recent storm damage along the coast, practitioners need to be focused on the details of insurance policies, which may provide recoveries.

B. Water

Lone Star Groundwater Conservation District v. City of Conroe[510] involved a challenge by large water users (mostly municipal entities) against rules established by the water district limiting the amount of groundwater that could be produced. While this case is mostly procedural

505. *Id.* at 519.
506. *Id.* at 523–25.
507. *Id.* at 525.
508. *Id.* at 526–28.
509. *Id.* at 528.
510. 515 S.W.3d 406, 409 (Tex. App.—Beaumont 2017, no pet.).

in nature relating to the plea to the jurisdiction based on governmental immunity, there was an important substantive law aspect relating to the Texas Water Code. The Beaumont Court of Appeals concluded the rules made by the district were subject to challenge under Section 36.251 of the Texas Water Code, which provides, in relevant part, that a person "affected by or dissatisfied with any rule or order made by a district . . . is entitled to file a suit against the district . . . to challenge the validity of the law, rule, or order."[511] Consequently, governmental immunity does not shield the district from a suit based on its rules.[512]

C. Premises Liability

Ineos USA, LLC v. Elmgren[513] addressed the gas explosion at a petrochemical plant in Alvin, Texas. The plant was owned by Ineos USA, and Elmgren worked as a boilermaker for Zachry Industrial, an independent contractor providing maintenance services at the plant. At the time of the accident, Elmgren was replacing two valves on a furnace header. Before the work began, employees of Ineos and Zachry conducted a lockout-tagout procedure and a sniff test to determine that there was no gas in the pipeline upon which Elmgren was working. After the gas explosion occurred, Elmgren brought suit against Ineos and Ineos' employee, Pavlovsky, who had conducted the tests. The Texas Supreme Court analyzed and construed the applicable statutory provisions[514] relating to owner protection from premises liability claims. The statute modified the common law, which made a property owner responsible for premises liability for negligence if the owner "knew or reasonably should have known of the risk or danger."[515] By enacting Chapter 95 of the Texas Civil Practice and Remedies Code, the Texas Legislature changed the scope of premises liability of an owner to those conditions or acts which the plaintiff can prove that the owner had "actual knowledge of the danger or condition."[516]

The supreme court, affirming its prior decision in *Abutahoun v. Dow Chemical Co.*,[517] stated that Chapter 95 related to claims based upon the negligent actions of a premises owner.[518] "The statute defines 'claim' to mean 'a claim for damages caused by negligence,' and does not distinguish 'between . . . categories of negligence claims.'"[519] Further, the supreme court noted that claims must arise from the "*condition or use* of an improvement to real property,"[520] confirming their prior decisions interpreting "'condition' [to] refer[ ] to premises and 'use' [to] refer[ ] to activ-

511. Tex. Water Code Ann. § 36.251 (West 2017).
512. *Lone Star Groundwater Conserv. Dist.*, 515 S.W.3d at 414.
513. 505 S.W.3d 555, 559 (Tex. 2016).
514. *See* Tex. Civ. Prac. & Rem. Code Ann. § 95.001–.004 (West 2017).
515. *Ineos*, 505 S.W.3d at 561.
516. *Id.*
517. 463 S.W.3d 42, 53 (Tex. 2015).
518. *Ineos*, 505 S.W.3d at 561.
519. *Id.* at 562 (quoting *Abutahoun*, 463 S.W.3d at 48).
520. *Id.* (quoting *Abutahoun*, 463 S.W.3d at 48).

ities."[521] Consequently, the supreme court concluded that Chapter 95 applied both to Elmgren's premises liability claims as well as to negligence-based claims against the premises owner.[522]

As an Ineos employee, Pavlovsky attempted to piggyback on the provisions of Chapter 95 relating to premises owners. The supreme court rejected this position, noting that nothing in Chapter 95 applied to claims of a property owner's employees.[523] In doing so, the supreme court concluded that the term "entity" as used in the statute could not be expanded beyond its common definition (an organization with a separate legal entity apart from its members or owners), and that it would not be expanded, as Pavlovsky suggested, to cover the legal entity and its employees.[524]

Furthermore, the supreme court rejected the argument that Chapter 95 related to a premises owner's agent,[525] thereby rejecting the holding in *Fisher v. Lee & Chang P'shp.*[526] The supreme court noted that *Fisher* incorrectly relied upon the Texas Property Code definition of "landlord," which included the agent of the landlord, in reaching a determination of the meaning for Chapter 95. However, Chapter 95 contained no language applicable to a property owner's agent.[527] Finally, Pavlovsky asserted that if the employee was not covered under Chapter 95, the legal theory of respondeat superior would make the property owner liable for acts of the employee. As to this argument, the supreme court clearly announced that the protections afforded by Chapter 95 cut off any claims of liability under the theory of respondeat superior.[528]

Elmgren asserted that the location of his workplace at the plant represented a different "improvement" under the definition in Chapter 95. The plant had numerous furnaces as part of an overall gas processing system, and Elmgren attempted to divide all of the systems into different "improvements" for purposes of Chapter 95. Nevertheless, the supreme court concluded that the valves upon which Elmgren was working were part of a single processing system within a single plant, and could not be separated for purposes of the statute.[529] Finally, Elmgren attempted to define the dangerous condition to be not the single gas leak causing the explosion, but rather the presence of explosive gases in the plant as a whole. The supreme court rejected this argument, noting it was not the existence of explosive gases at the plant that caused the accident, but the specific gas leak that caused the accident.[530]

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521. *Id.*
522. *Id.*
523. *Id.* at 563–64.
524. *Id.*
525. *Id.* at 565–66.
526. 16 S.W.3d 198, 202–03 (Tex. App.—Houston [1st Dist.] 2000, pet. denied), *overruled by Ineos*, 505 S.W.3d at 565–66.
527. *Ineos*, 505 S.W.3d at 565.
528. *Id.* at 566.
529. *Id.* at 568.
530. *Id.* at 569.

In *Lopez v. Ensign U.S. Southern Drilling, LLC*,[531] a case relying upon *Ineos*, the Fourteenth Houston Court of Appeals held that a well and drilling rig do not constitute a single improvement to real property.[532] Here, a subcontractor's employee who was doing mud logging services on the well by means of utilizing a stairway on the drilling rig could not come within the statutory premises liability provision since the employee's services related to the well and not to the construction repair renovation or modification of the rig.[533]

Phillips v. Abraham[534] involved a premises liability suit decided under the Texas Supreme Court opinion in *Austin v. Kroger Texas L.P.*[535] Phillips had leased residential property from Abraham, which contained a driveway that eventually became in disrepair with loose and broken rocks in certain portions of the driveway. Phillips stepped on loose rocks and broke two bones in his foot six months before the current accident where he stepped on loose rocks, fell, and broke his back. Citing *Austin*, the Fourteenth Houston Court of Appeals affirmed Abraham's summary judgment victory based on having no duty to warn Phillips of the driveway's condition. "[A] landowner owes an invitee a negligence duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be, aware but the invitee is not."[536] Therefore, the *Austin* standard is to either give notice or make a condition not unreasonably dangerous, but not both.[537]

There are two exceptions to the general premises liability rule established in *Austin*: (1) "dangerous condition[s] result[ing] from the foreseeable criminal activity of third parties"; and (2) "unreasonably dangerous premises" for which the invitee, although aware of, is "incapable of taking precautions that will adequately reduce the risk."[538] In this case, the first exception was inapplicable, and the court viewed Phillips's allegation of the second exception as being inapplicable since Phillips had no need to walk on the damaged portion of the driveway to access the house or parked vehicle or other important portions of the residential property.[539] Consequently, because Phillips knew of the dangerous situation and was not subject to the necessary use exception, Phillips was not entitled to damages under a premises liability theory.

UDR Texas Properties, Ltd. v. Petrie[540] is a premises liability case, which, for the first time in Texas, addresses the reasonableness for premises liability with respect to prevention of a criminal act. Petrie arrived at the Gallery Apartments at 2:00 a.m. for a party thrown by one of his co-

531. 524 S.W.3d 836, 845 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
532. *Id.*
533. *Id.*
534. 517 S.W.3d 355, 357–58 (Tex. App.—Houston [14th Dist.] 2017, no pet.).
535. 465 S.W.3d 193, 203 (Tex. 2015).
536. *Phillips*, 517 S.W.3d at 360 (citing *id.*).
537. *Id.*
538. *Id.* at 361.
539. *Id.*
540. 517 S.W.3d 98, 100 (Tex. 2017).

workers. Petrie parked in a visitor parking lot outside the gated and fenced apartment community, and was immediately assaulted and robbed in the parking lot. Petrie brought suit against UDR as the apartment owner for failure to provide adequate protection against such criminal acts. The trial court determined that UDR owed no duty to Petrie, but the Fourteenth Houston Court of Appeals reversed, holding that there was sufficient "evidence of the foreseeability of an unreasonable risk of harm" for violent criminal conduct.[541]

The Texas Supreme Court determined that the court of appeals incorrectly interpreted and applied its decision in *Timberwalk Apartments, Partners, Inc. v. Cain*.[542] The general rule in Texas on premises liability is that a property owner has "'no legal duty to protect persons from third party criminal acts,'"[543] but with an exception for an owner who controls the premises that such owner "'does have a duty to use ordinary care to protect invitees from criminal acts of third parties if [the property owner] knows, or has reasonable reason to know of, an unreasonable and foreseeable risk of harm to the invitee.'"[544] Therefore, to impose a duty on such a property owner, there must be both foreseeability and unreasonableness as a condition to impose a duty.[545] At the appellate level, the court only considered the *Timberwalk* factors on foreseeability;[546] however, the court of appeals failed to consider whether remedial action by the property owner was unreasonable under the circumstances. The supreme court noted that it had rendered previous decisions on the foreseeability factor, but never on the unreasonableness grounds.[547] Therefore, since the *Timberwalk* factors measured only foreseeability, a determination of reasonableness or unreasonableness was additionally needed to determine premises liability for a criminal act.

In addressing the unreasonableness criteria, the supreme court specified: "[a] risk is unreasonable when the risk of a foreseeable crime outweighs the burden placed on property owners—and society at large—to

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541. *Id.*

542. *Id.* at 101; *see* 972 S.W.2d 749, 759 (Tex. 1998).

543. *UDR Texas Props.*, 517 S.W.3d at 100 (quoting Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996)).

544. *Id.* (quoting Lefmark Mgmt. Co. v. Old, 946 S.W.2d 52, 53 (Tex. 1997)).

545. *Id.* at 101.

546. The *Timberwalk* foreseeability factors are: (1) proximity, being whether any criminal activity previously occurred on or near the property; (2) recency and frequency, being how recently and how often prior criminal conduct occurred; (3) similarity, being how similar the subject criminal conduct was to the prior criminal conduct on the property; and (4) publicity, being the publicity previously given on prior occurrences which would provide the landowner knowledge or constructive knowledge as to the existence of the criminal activity. *Timberwalk Apartments*, 972 S.W.2d at 757–59.

547. *UDR Texas Props.*, 517 S.W.3d at 102. *See Timberwalk*, 972 S.W.2d at 759 (since sexual assault was not foreseeable, unreasonableness was not reached); Mellon Mortg. Co. v. Holder, 5 S.W.3d 654, 655 (Tex. 1999) (a sexual assault in a parking garage was determined on the basis of foreseeability without reaching unreasonableness); Trammell Crow Central Texas, Ltd. v. Guitierrez, 267 S.W.3d 9, 9 (Tex. 2008) (liability for a parking lot shooting was held to be unforeseeable without reaching the reasonableness test).

prevent the risk."[548] The consideration of the unreasonableness test required separate elements with independent proof and could not be considered together with the foreseeability factor. Therefore, the court of appeals failed to consider the unreasonableness of a foreseeable risk to Petrie.[549] Since Petrie offered no evidence on the foreseeability criteria, and the appellate court did not consider that criteria independently, the supreme court rendered judgment in favor of the property owner.[550] Practitioners should take note that evidence must be presented of both the foreseeability and the unreasonableness criteria with respect to a premises liability claim based on a criminal act.

Additionally, there was a concurring opinion by two justices that questioned how courts should make decisions on the issue of duty when negligence and proximate cause are typically within the providence of the jury.[551] As to these issues, the concurring justices noted they were "only flagging these issues" and hoped "to kindle further study from the bench, the bar, and academy."[552] This may be ripe ground for further jurisprudence.

United Scaffolding, Inc. v. Levine[553] involved a premises liability case where the Texas Supreme Court distinguished pleadings based on general negligence theory and premises liability theory. This case arose when a pipe fitter, Levine, fell through a hole at Valero Energy Corporation's Port Arthur Refinery caused by unsecured planks in scaffolding erected by an independent contractor, United Scaffolding, Inc. (USI). The basis for USI's appeal is that Levine submitted trial court evidence and jury charges based on a general negligence theory even though all evidence presented represented a premises liability theory issue. The majority's ruling strenuously affirms the supreme court's prior holding in this regard in *Clayton W. Williams, Jr., Inc. v. Olivo*[554] and other cases for two decades, noting that "a premises defect case improperly submitted to the jury under only a general negligence question, without the elements of premises liability as instructions or definitions, causes the rendition of an improper judgment."[555] This is necessary, as the supreme court explains, because a general negligence theory relates to "negligent activity encompass[ing] a malfeasance . . . based on affirmative, contemporaneous conduct by the owner that caused the injury," whereas a premises liability theory "encompasses a nonfeasance theory based on the owner's failure to take measures to make the property safe."[556] Furthermore, for a premises liability case, the complaining parties are required to additionally

548. *UDR Texas Props.*, 517 S.W.3d at 103.
549. *Id.*
550. *Id.*
551. *Id.* at 105–08 (Willett, J., concurring).
552. *Id.* at 108.
553. 537 S.W.3d 463, 467 (Tex. 2017).
554. *Id.* at 486 (citing 952 S.W.2d 523, 528–29 (Tex. 1997)).
555. *Id.* at 469–70 (citing *Olivo*, 952 S.W.2d at 529).
556. *Id.* at 471 (citing Delago Partners, Inc. v. Smith, 307 S.W.3d 762, 776 (Tex. 2010)).

prove the *Corbin* elements.[557]

In analyzing the facts and pleadings, the supreme court noted that Levine's injury was a typical slip and fall case, which historically had been treated as defect cases rather than ordinary general negligence cases.[558] In such cases, the duty with respect to the premises was on the party that had control of the premises.[559] So, the issue of this case was whether the premises were under the control of USI as the owner of the scaffolding equipment (and which undertook the assembling, erection, and supervision of the scaffolding), or Valero, which owned the refinery premises and determined when scaffolding was to be used. Looking at all of the evidence and pleadings, the supreme court concluded that USI was in control of the scaffolding as a matter of law based upon contractual obligations to erect, construct, and supervise the scaffolding.[560] Valero's various scaffolding policies that required the contractor to insure the scaffolding was inspected before each work shift and gave the contractor sole authority to authorize Valero employees' use of the scaffolding also played a role in the decision.[561] The latter policy was applicable even though USI did not have an employee inspect the scaffolding on the day of its use.[562] The supreme court concluded that "once Valero placed USI in the sole position to authorize the use of scaffolds it constructed, USI attained the sufficient right to control those scaffolds."[563]

Further, the supreme court negated the theory that any joint control which Valero may have had was relevant, noting that "the duty question must focus on USI's right to control the scaffold and subsequent responsibility to warn about or remedy a dangerous condition on the scaffold," and "not whether Valero also had control."[564] This case supports existing theory of law, but it is a clear warning to practitioners that the theory of recovery must be appropriately pled and the evidence presented at trial must support the theory raised. However, there was a three-justice dissenting opinion, vigorously opposed by the majority, alleging numerous misstatements.[565] Based on the number of dissenters, the continuing authority of the *United Scaffolding Inc.* majority must be understood in the context of the current supreme court makeup, and that its opinion may change with subsequent changes in the court makeup.

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557. The *Corbin* elements are "(1) that [the premises owner] had actual or constructive knowledge of some condition on the premises; (2) that the condition posed an unreasonableness risk of harm . . . ; (3) that [the premises owner] did not exercise reasonable care to reduce or eliminate the risk; and (4) that [the premises owner's] failure to use such care proximately caused [the injury]." Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 296 (Tex. 1983).

558. *United Scaffolding Inc.*, 537 S.W.3d at 472.

559. *Id.* at 473.

560. *Id.* at 478–79.

561. *Id.* at 475–76.

562. *Id.* at 478–79.

563. *Id.* at 479.

564. *Id.*

565. *Id.* at 483–501 (Boyd, J., dissenting).

D. Entities

Bruce v. Cauthen[566] involved a U.C.C. foreclosure of a partner's interest in a limited partnership. Bruce and Cauthen were co-owners in a medical staffing company, Alliance Recruiting Resources, and a partnership owning undeveloped land, Kingwood Place Investments 1, LP. Bruce owned 60.4% and Cauthen owned 39.6% of Alliance and Kingwood, and Kingwood's general partner was an entity owned entirely by Bruce. As business disputes arose in Alliance, Cauthen resigned from Alliance but maintained her interest in Kingwood. Pursuant to a buy-sell agreement with respect to Alliance, Cauthen was entitled to a buyout payment. However, Cauthen set up a competing business and filed suit against Bruce for declaratory judgment, allowing her to continue in her business and confirming she did not have trade secrets of Alliance.

As to the land development venture, Alliance had a "verbal lease" with Kingwood for lease payments equaling the mortgage payments to be made by Kingwood. Eventually, Bruce sent invoices to Cauthen for her share of the mortgage payments, which she never made. Bruce attempted to foreclose Cauthen's limited partnership interest pursuant to a private sale of collateral under U.C.C. Section 9.610.[567] Cauthen argued this was a wrongful foreclosure since Section 9.610 requires a disposal of collateral in a commercially reasonable manner, and that a secured party may not purchase the collateral if the private sale is not of collateral of a kind that is "customarily sold on a recognized market or the subject of widely distributed standard price quotations."[568] Therefore, Cauthen argued that since the foreclosure could not have occurred under Section 9.610, it must have occurred under Section 9.620,[569] which requires the debtor's written consent, which she claimed she never gave.[570] However, Bruce argued that U.C.C. Section 9.610(c) may be modified by agreement of the parties, and asserts that the limited partnership agreement of the parties is such a written modification specifically allowing a private sale to a restricted class of purchasers, and that Bruce met the definition for such a restricted purchaser.[571]

A partnership agreement provision granted to a non-defaulting partner, as a secured party, a lien, and right to foreclose the lien in accordance with the Texas U.C.C.[572] This provision expressed (1) "that the partners acknowledge[d] that [a public sale would be unlikely due to securities law restrictions]"; (2) that a "private sale[ ] to a restricted group of purchasers [would probably need to occur]"; (3) that a "private sale [might] result in prices [and] terms less favorable [than a public sale];" and (4) "each partner agree[d] that [such] a private sale [would be] com-

566. 515 S.W.3d 495, 500 (Tex. App.—Houston [14th Dist.] 2017, pet. denied).
567. *Id.* at 500–01; *see* Tex. Bus. & Com. Code Ann. § 9.610 (West 2017).
568. *Bruce*, 515 S.W.3d at 503.
569. *Id.*; *see* Tex. Bus. & Com. Code Ann. § 9.620 (West 2017).
570. *Bruce*, 515 S.W.3d at 503.
571. *Id.* at 503–04.
572. *Id.* at 504.

mercially reasonable."[573] Despite seemingly addressing the requirements under U.C.C. Section 9.610(c), the Fourteenth Houston Court of Appeals determined this language was insufficient because: (1) the partnership agreement did not have express language that such provision was a modification of U.C.C. Section 9.610(c); (2) the provision had no language permitting a secured party (a partner) to acquire the defaulting party's partnership interest at a private sale; and (3) the provision did not expressly modify U.C.C. Section 9.610(c) to allow the potential purchaser to be a limited partner who was also a secured party.[574] Consequently, the court held that the lack of such express language would be insufficient to constitute an appropriate modification under U.C.C. Section 9.610(c).[575] For practitioners, applicable remedy provisions of your partnership agreement should be modified to specify these points.

Siddiqui v. Fancy Bites, LLC[576] is a rather complex set of facts, which principally addressed the issue of informal fiduciary duty. To simplify the facts, the two Siddiqui brothers (Brothers) owned a construction company, Suncoast Environmental and Construction, and land upon which construction was being undertaken for a Hartz Chicken restaurant. The Brothers met Qureshi and Ali (collectively, Investors) and began to consider a new business venture for the completion of the first Hartz Chicken location (Brammel property), the acquisition of land (currently owned by Qureshi), and the development of a new Hartz Chicken restaurant (Antoine property). Qureshi and Ali each invested money to own a 25% interest in two entities, Quick Eats LLC and Fancy Bites LLC, owned by the Brothers. In connection with this investment, the Brothers represented that the Brammel property was owned by one of these two entities. However, the Brammel property was actually owned by Sunnyland Development, Inc. (which was wholly owned by the Brothers). When the two restaurant businesses failed, the parties filed suit alleging various acts of fraud and breach of fiduciary duty.

The Investors alleged various wrongdoings with respect to the construction of the two projects by the Brothers and Suncoast. However, the construction contract was between Suncoast (a Qureshi owned construction company) and Blueline Real Estate, LP, a limited partnership that owned the Brammel property, and of which Fancy Bites and Quick Eats were the general and limited partners. The Brothers challenged the standing of the Investors to sue for construction costs related claims, since the contracts were between Blueline and Suncoast. Blueline subsequently filed for bankruptcy and was dropped from the suit. The Fourteenth Houston Court of Appeals concluded that the Investors had no standing to challenge the construction cost aspects since they were Blueline's claims and not the individual equity owners.[577] Consequently, all claims

573. *Id.*
574. *Id.* at 505.
575. *Id.*
576. 504 S.W.3d 349, 364 (Tex. App.—Houston [14th Dist.] 2016, pet. denied).
577. *Id.* at 361.

for overcharging and unjust enrichment related to the construction cost claims were dismissed.[578]

Further, the Investors alleged damages which they would not have incurred but for the breach of the fiduciary duty owed to them by the Brothers. The court noted the standard rule that "fiduciary duty arises as a matter of law in certain formal relationships such as attorney-client or trustee relationship[s];" however, an "informal fiduciary duty may arise from a moral, social, domestic or purely personal relationship of trust and confidence."[579] "To impose an informal fiduciary duty in a business transaction, the special relationship of trust and confidence must exist before and apart from the agreement made the basis of the suit."[580] Since there had been no formal relationship between the Brothers and the Investors prior to this specific investment, the requirements for an informal fiduciary duty were not present.[581] Nevertheless, the Investors sought an exception to this rule for special circumstances or facts warranting the expansion of the rule. However, no such special relationship or facts were warranted by the contracts between the parties—specifically where the LLC agreements provided all partners were co-equal managers and owners, permitted the LLCs and Blueline to contract with affiliates, and specified that Suncoast would perform the buildout and construction for the two restaurants.[582] The testimony evidenced that the Investors had sufficient ability to engage in a financial review of the entities' affairs as well as having some operational control of the entities that negated any expansion of the rule's requirements for finding an informal fiduciary duty.[583]

Although the Brothers were successful on the previously mentioned fronts, the Investors were successful in proving fraud in the inducement by the Brothers with respect to the Investors' acquisition of the 50% interest in the two entities. The Brothers' statement that the Brammel property was owned by either Blueline, Fancy Bites, or Quick Eats was deemed to have been a known misrepresentation, which was sufficient to cause a fraudulent inducement.[584] The fact that the Brothers ultimately conveyed the title to the Brammel property from Sunnyland into Blueline in connection with obtaining a construction loan for the Antoine property was not sufficient to overcome the initial misrepresentation and did not eliminate damage.[585] Therefore, practitioners should take note that correction of such misrepresentations will not be sufficient to cure the actual fraudulent misrepresentation even if a cure is accomplished, and should pay attention to the exact entities that are parties to a document.

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578. *Id.* 362.
579. *Id.* at 364–65 (citing Meyer v. Cathey, 167 S.W.3d 327, 331 (Tex. 2005)).
580. *Id.* at 365 (citing *Meyer*, 167 S.W.3d at 331; Ritchie v. Rupe, 443 S.W.3d 856, 874 n.27 (Tex. 2014)).
581. *Id.* at 365–66.
582. *Id.* at 367.
583. *Id.* at 367–68.
584. *Id.* at 369–71.
585. *Id.* at 371.

In *Mission Grove, L.P. v. Hall*,[586] Mission Grove (Developer) signed a contract (Contract) with Texas Classic Homes (Builder) to be the exclusive builder for a subdivision. The Contract was signed by Hall, as the president of Builder. Paragraph 11 of the Contract provided in part "[t]he obligations under this agreement are also the personal obligations of the builder representative signing below."[587] Builder filed for bankruptcy and did not perform under the Contract. Developer sued Hall personally for breach of contract, and Hall filed a motion for summary judgment on the basis that he did not sign the contract in his individual capacity. More than four years later, Developer amended the original petition to include additional claims for promissory estoppel, fraud, and negligent misrepresentation. Hall filed a second motion for summary judgment, claiming that the four year statute of limitations had expired. The trial court granted both motions for summary judgment, and Developer appealed.

The Fourteenth Houston Court of Appeals agreed with the trial court that Hall was not personally liable under the Contract, and reversed and remanded the case for further proceedings relating to the other claims. In handing down their decision, the court reiterated the basic and well established tenet of agency law that a person making or purporting to make a contract with another as an agent for a disclosed principal does not become a party to the contract unless the parties have otherwise agreed.[588] Developer argued that the language in Paragraph 11 of the Contract clearly indicated the parties' intent for Hall to be personally bound. With respect to the Paragraph 11 language, the court stated it would have been a closer decision had the language named Hall specifically instead of merely reciting "the builder representative signing below."[589] The court also cited an analogous case[590] in which one place in the body of an airplane lease identified an individual person as the lessee along with the statement, "I am responsible for the operational contract of the aircraFort".[591] Despite the statement of responsibility, the *Prent* court found that, when interpreting the lease as a whole, it was unambiguous that the lease was executed in a representative capacity on behalf of the entity and not in the individual's personal capacity.[592] This case highlights the critical importance for practitioners to carefully draft or review documents to verify the content is as intended.

E. Nuisance

Two notable cases dealt with the area of nuisance. In *Crosstex N. Tex.*

586. 503 S.W.3d 546 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
587. *Id.* at 552.
588. *Id.* at 552.
589. *Id.* at 553.
590. *Id.* (citing Prent v. rJet, L.L.C., No. 01-14-00408-CV, 2015 WL 1020207, at *2–4 (Tex. App.—Houston [1st Dist.] Mar. 5, 2015, no pet) (mem. op.)).
591. *Id.*
592. *Id.*

Pipeline, L.P. v. Gardner,[593] the Texas Supreme Court confirmed its rule that the defendant's liability for creating a nuisance does not depend simply on showing that the defendant acted or used the property illegally or unlawfully. Rather "a defendant can be liable for creating a nuisance based on 'negligence or other culpable conduct.'"[594] The complained of acts involved a natural gas line compressor station that generated continuous loud noise and vibrations. The supreme court noted that the claimed nuisance did not refer to the wrongful act or to damages, but to the injury itself.[595] "The interference [must be] 'substantial' and cause[ ] 'discomfort or annoyance' that is 'unreasonable.'"[596] In this case, "the evidence was legally sufficient to support the jury's finding" that the compressor station created a condition on the neighbor's property that "substantially interfered" with the neighbor's use and enjoyment of their land and thus created a nuisance.[597] But note, in *1717 Bissonnet, LLC v. Loughhead*,[598] the construction of a high-rise building in a residential neighborhood did not constitute an actionable nuisance. Part of the problem with the *Bissonnet* case was that much of the argument was about a prospective nuisance rather than a current interference.[599]

XI. CONCLUSION

Texas law now recognizes text messages as a means for notifying of a change of address prior to foreclosure, requiring additional inquiries for the practitioner. Although the full scope of materiality with regards to correction instruments may not be known, practitioners should be careful in their analysis of, and compliance with, the details of the statutory requirements to avoid a correction instrument being declared void. And, in the unusual *Villanova* case, the scope of personal knowledge of a corporate officer for an affidavit in support of a motion for summary judgment is detailed. Practitioners should conform to such knowledge requirements in their supporting affidavits.

In drafting guaranty instruments, particular attention must be used to describe the triggering event, such as for a precedent sale of property (i.e., a voluntary sale or a foreclosure) or how much underlying debt must be paid (i.e., any payment amount or a threshold payment amount). The effectiveness of email signatures, whether typed at the bottom of a message or merely automatically inserted in the "from" field in an email, is now subject to a split of authority between Texas appellate courts. Will the Texas Supreme Court intervene?

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593. 505 S.W.3d 580, 601 (Tex. 2016).
594. *Id.* at 602 (quoting Gulf, C. & S.F. Ry. Co. v Oakes, 58 S.W. 999, 1002–03 (Tex. 1900)).
595. *Id.* at 584–90 n.2.
596. *Id.* at 595.
597. *Id.* at 612.
598. 500 S.W.3d 488 (Tex. App.—Houston [14th Dist.] 2016, no pet.).
599. *Id.* at 497.

As a matter of first impression, practitioners must now be aware of the strict adherence to claim filing deadlines under the statutory Texas Windstorm Insurance Association Act. Additionally, there is now Texas Supreme Court authority rejecting *Fisher* in premises liability cases, clarifying that neither employers nor agents of a premises owner are covered by the owner premises liability statute. Further, and most importantly, as a matter of first impression, the Texas Supreme Court has announced the dual mandate of reasonableness and foreseeability in the context of a premises liability case based upon a third party criminal act. Property owners who control their premises have a duty to use ordinary care to protect invitees from known or reasonably foreseeable criminal acts which have an unreasonable and foreseeable risk of harm.

As with previous years, the courts dealt with several cases where they made it abundantly clear that when it comes to draconian results, or harsh consequences such as a forfeiture, you must draft the agreement and the specific provision very carefully and very clearly. This was the case in *Shields*, where the Texas Supreme Court reached the correct conclusion, and found that a non-waiver clause had not been waived because the clause clearly addressed the behavior in question. Unfortunately, the *Shields* case also made it clear that the Texas courts would unlikely uphold a generic waiver clause, particularly if the result of upholding such a clause would result in forfeiture for one party.

Unfortunately, as frustrating as the holding in *Shields* may be for the average practitioner looking for guidance on how to draft an effective non-waiver clause, most practitioners are crossing their fingers that the Texas Supreme Court will overturn the Amarillo Court of Appeals holding in *Tregellas v. Archer Trust*.[600] As discussed in greater detail above, in *Tregellas*, the court found that an option contract to purchase real estate was not a real property right, but a contract right. This distinction essentially resulted in a forfeiture for the option holder, and the holding has potentially wide-ranging and severe consequences for the transactional world where options are used every day and parties pay valuable money to secure them. One can only hope the supreme court handles the case in the manner of the *Shields* case, so that holders of options to purchase real property do not find themselves unexpectedly holding very expensive, but meaningless, pieces of paper.

However, the courts continued to relax rules of drafting and interpretation in the context of conveyancing. The "Four Corners Rule" has become the dominant focus for a court being asked to find the parties' intent within the document. A similar analysis applied to restrictions, homeowners associations, and condominiums.

Important changes in jurisprudence occurred in home equity lending. An attempted lien—under the Texas Constitution Article XVI § 50(a)(6)—remained "not valid" until cured, such that limitations did

600. 507 S.W.3d 423, 437 (Tex. App.—Amarillo 2016, pet. granted).

not bar a challenge. And forfeiture was not an independent cause of action, but rather a remedy under the loan documents.

Finally, practitioners should note new Texas Property Code Section 12.0071, addressing expungement of a notice of lis pendens. In response to a pending Supreme Court case potentially undermining the effect of an order of expungement, the Texas Legislature took steps to make its intent clear that the expungement cleared the property title for transfer over any matters asserted in the litigation.