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Real Property

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This article covers cases from 374 S.W.3d through 404 S.W.3d and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

I. INTRODUCTION

This survey period continues with trends established during prior periods. Tax liens and foreclosure challenges dominate the secured real property arena, with cases based on "robo signing" now appearing. Attacks on residential foreclosures were plentiful, and the authors have selected the most illuminating of these cases to discuss. One court discussed and confused the requirements for a valid waiver of notice of intent to accelerate; hopefully, future courts will follow the logic set forth herein. Also addressed are cases dealing with recourse carve-outs and related procedural issues, and the fair notice doctrine, each of which provides good lessons to practitioners.

In the context of sales, a significant number of cases addressed breach of implied warranties and fraud in the inducement. One particular case on fraud in the inducement contains a majority, concurring, and dissenting opinions concerning the perplexing "as-is" clause, which continues to elude concise judicial interpretation and appropriate drafting. Quite a few cases from the survey period provide drafting lessons, again addressing disclaimer-of-reliance provisions, reverters, and legal descriptions. Easements and public roads also found their way into the cases, and the courts revisited causes of action for declaratory judgment versus trespass to try title and jurisdiction of the Justice Court for suits for possession versus those for title. Finally, the Texas Supreme Court dealt with the important issue of a rolling easement along the Texas gulf coast and found that there is none if the shoreline change is the result of an avulsive event.[1]

1. Severance v. Patterson, 370 S.W.3d 705, 724–25 (Tex. 2012).

II. MORTGAGES, LIENS AND FORECLOSURES

A. TAX LIENS

In re Cowin involves a tax lien conspiracy.[2] The co-conspirators entered into a scheme whereby one co-conspirator would acquire condominium units purchased at a homeowners association assessment lien foreclosure sale.[3] Immediately thereafter, *ad valorem* taxes on the real property were paid by third-party financing secured by a tax lien transfer and deed of trust.[4] The property owner defaulted on the tax lien transfer documentation resulting in a tax lien foreclosure, with all tax lien foreclosure sale proceeds used to pay expenses, satisfy the tax lien debt, and pay the tax lienholder the balance.[5] In *Cowin*, the tax lien foreclosure trustee failed to pay any of the proceeds from the tax lien sales to the existing first lienholder.[6] The tax lien deed of trust had distribution provisions providing for distribution of foreclosure proceeds to expenses, tax lien debt, any amounts required by law to be paid, and to the grantor, in that order.[7]

In the subject case, Cowin altered the distribution provisions to exclude payments of amounts required by law to be paid.[8] Cowin attempted to defend this position under Texas Tax Code § 32.06(j), which directs application of proceeds from judicial foreclosure of a tax lien to court costs, the judgment amount, attorney's fees awarded in the judgment, and the remaining proceeds to holders of liens on the property in the order of their priority.[9] Cowin argued this statute was inapplicable because the subject tax lien foreclosure was pursuant to the contractual non-judicial foreclosure provisions contained in the tax lien deed of trust, not a judicial foreclosure contemplated by that statute.[10] The federal court rejected that argument, concluding that the statute covered additional provisions for a judicial foreclosure, but did not overturn standard Texas foreclosure law requiring application of foreclosure sale proceeds (to the extent of excess proceeds) to be paid to inferior lienholders.[11]

As an ancillary defense, Cowin alleged that the noteholder had no standing because it was not a beneficiary of record on the first lien deed of trust.[12] In each of the three properties covered in this opinion, the original deed of trust recited the beneficiary as Mortgage Electronic Registration Systems, Inc. (MERS), as nominee for the actual noteholder.[13] Subsequent assignments of each deed of trust were made without recordation in the applicable county's real property

2. *In re* Cowin, 492 B.R. 858, 867 (Bankr. S.D. Tex. 2013).
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.* at 874–75.
7. *Id.* at 875.
8. *Id.* at 875–76.
9. *Id.* at 894 (citing TEX. TAX CODE ANN. § 32.06(j) (West 2005)).
10. *Id.* at 895.
11. *Id.*
12. *Id.*
13. *Id.* at 871–73.

records, although such assignments were noted and recorded with MERS.[14] Cowin alleged that each noteholder had no standing since it had not complied with the statutory requirement to the transfer or assignment of a deed of trust pursuant to the Texas Local Government Code.[15] The court noted numerous prior cases holding that the failure to record does not affect the validity of the assigned deed of trust.[16] Those cases dealt with the original homeowner and original lender, but in this case, neither the original owner nor the original lender was involved; all parties were either an assignee lender or owner, making this a case of first impression (as to assignee lenders and owners).[17] Analyzing this issue, the court noted that in *In re Perry*[18] the focus was on whether the claimant had a duty of inquiry regarding the deed of trust, with the conclusion that the recorded deed of trust put a bona fide purchaser on inquiry notice as to the status of the recorded deed of trust.[19] Consequently, this court concluded the concept of inquiry notice was equally applicable to third parties to an assigned deed of trust; therefore, notwithstanding the statutory provision, a person is under a duty to inquire further about assignments of a deed of trust.[20]

B. WAIVER

Richardson v. Wells Fargo Bank addressed the issue of waiver of rights in a case that involved a residential property foreclosure.[21] Richardson obtained a residential property loan from Fannie Mae, which Wells Fargo serviced.[22] Richardson defaulted in the mortgage payments and after communications between the parties, Wells Fargo offered "temporary trial modification payment plan" under a program known as the Home Affordable Mortgage Program (HAMP Plan).[23] Documentation covering the HAMP Plan provided for trial monthly payments and that payments under the HAMP Plan would not be a waiver of acceleration of the loan or foreclosure action and would not constitute a cure of the mortgage default.[24] Richardson made the trial payments, but did not cure the existing defaults as required under the HAMP Plan.[25] Richardson continued to make monthly payments, and the parties communicated regarding a permanent modification until June 3, 2010, when Wells Fargo notified Richardson that she did not qualify for a permanent HAMP Plan modification.[26] Nevertheless, on August 4, 2010, Wells Fargo issued a letter offering a special forbearance plan (Forbearance Plan), which specified that

14. *Id.*
15. *Id.* at 888 (citing TEX. LOC. GOV'T CODE ANN. § 192.007(a) (West 2008)).
16. *Id.* at 889.
17. *Id.*
18. Hill vs. U.S. Bank, N.A. (*In re* Perry), No. 11-35205, 2013 Bankr. LEXIS 534 (Bankr. S.D. Tex. Feb. 8, 2013).
19. *In re Cowin*, 492 B.R. at 889.
20. *Id.*
21. Richardson v. Wells Fargo Bank, N.A., 873 F. Supp. 2d 800, 805–06 (N.D. Tex. 2012).
22. *Id.* at 806.
23. *Id.*
24. *Id.*
25. *Id.* at 807.
26. *Id.*

performance would not bring the loan contractually current, that it would not obligate the lender to enter into a further agreement, that it did not constitute a waiver of the lender's rights to insist upon strict performance in the future, that all provisions of the note and deed of trust continued in full force and effect, and that failure to comply with the Forbearance Plan would render the forbearance null and void.[27] Richardson failed to execute and return a copy of the Forbearance Plan but did make the initial payment thereunder, which caused Wells Fargo to suspend the pending foreclosure sale.[28] Upon Richardson's failure to make additional payments, Wells Fargo commenced and completed the foreclosure process.[29]

Richardson alleged that Wells Fargo waived its right to accelerate and foreclose by reason of its actions.[30] The standard rule to prove waiver requires a showing of (1) an existing right, benefit, or advantage; (2) actual or constructive knowledge of its existence; and (3) an actual intent to relinquish the right (which can be inferred from conduct).[31] However, to prove waiver based on an inference from Wells Fargo's conduct, the court noted that Richardson had the onerous burden to produce conclusive evidence that Wells Fargo unequivocally manifested its intent to no longer assert its claim.[32] Richardson asserted waiver based on the following facts: (1) Wells Fargo proceeded with foreclosure even though Richardson had not missed a payment under the HAMP Plan; (2) Wells Fargo advised Richardson it would not foreclose during the existence of a formal loan modification plan; (3) Richardson had made the first payment under the Forbearance Plan; (4) Wells Fargo did not notify Richardson that her only payment under the Forbearance Plan had been returned for insufficient funds; (5) Wells Fargo had forwarded a permanent loan modification agreement (based on Richardson's request, but which Richardson failed to sign and return); and (6) Wells Fargo acknowledged the foreclosure sale was due to a servicer's error.[33] The court summarily rejected each of Richardson's arguments, holding that they could not be construed as an unequivocal manifestation of an intent not to assert its claim.[34] In support, the court observed that Wells Fargo repeatedly asserted its intent to maintain its right to accelerate and foreclose, and specifically noted such provisions in the note, deed of trust, HAMP Plan, and Forbearance Plan.[35] This case is instructive to practitioners to be diligent in all correspondence and documentation as to whether the lender is waiving or

27. *Id.* at 807–08.
28. *Id.* at 808.
29. *Id.*
30. *Id.* at 810.
31. *Id.*
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.* The note provided that if during a default full payment was not required, the holder would "still have the right to [accelerate] if [maker is] in default at a later time"; the deed of trust provided that any forbearance in exercising rights and remedies or acceptance of partial payments "shall not be a waiver of or preclude the exercise of any right or remedy"; the HAMP Plan stated that acceptance of payments during the trial period "will not be deemed a waiver of the acceleration . . . or foreclosure action"; and the Forbearance Plan stated that it "shall not constitute a waiver of the lender's right to insist upon strict performance in the future." *Id.*

preserving its rights and remedies in connection with any intervening workout attempts on a defaulted loan.

C. ROBO SIGNING

Over the last five or so years, there have been countless number of claims based on "robo signing," a phrase adopted by the media.[36] In general, these cases involve the signing of mortgage foreclosure documents and assignments of underlying mortgage instruments by a person not technically authorized by appropriate formalities to execute such documents.[37] Such signatory was colloquially denominated as a "robo signer."[38] Such "robo signing" was present in *Marsh v. JPMorgan Chase Bank, N.A.*[39] Marsh was selected for this presentation for two reasons: first, it exemplifies the thousands of similar cases relating to the "robo signing," and second, it addresses an issue of first impression related to the creation of fraudulent liens.[40] In this case, Marsh acquired residential real estate, financing it with the execution of a note payable to MIT Lending secured by a deed of trust in favor of "Mortgage Electronic Regulation Systems, Inc., as Nominee for Lender and Lender's Successors and Assigns."[41] Subsequently, Mortgage Electronic Regulation Systems, Inc. (MERS) assigned the note and deed of trust to Bank of America, as trustee, for servicing.[42] Christina Trowbridge (the "robo signer") executed the assignment, as an authorized signatory for MERS; however, MERS never authorized this person to execute such conveyance.[43] Upon an attempted foreclosure, Marsh sued in state court to enjoin the foreclosure, and the lender removed to the federal court,[44] which is the typical procedure in these cases.

The court concluded that Marsh did not have standing to attack such assignment based on the assignment signatory's alleged lack of authority because Marsh was not a party to the assignment between MERS and Bank of America as trustee, citing numerous published and unpublished cases from Texas consistent with that holding.[45] Since the deed of trust clearly identified MERS as the nominee for the original lender, the court concluded MERS was a mortgagee under the Texas Property Code[46] and therefore could authorize Bank of America, as trustee, to service and foreclose the loan regardless of whether

36. Jacob L. White, *"Robo-Signing": A Symptom of the Shortcomings in Maryland's Policy of Expediting Foreclosure Proceedings*, 1 U. BALT. J. LAND & DEV. 81, 81–82 (2011).

37. *Id.* at 86–87.

38. *See id.*

39. Marsh v. JPMorgan Chase Bank, N.A., 888 F. Supp. 2d 805, 810 (W.D. Tex. 2012).

40. *Id.* at 810, 813; *see also* TEX. GOV'T CODE ANN. § 51.903(a) (West 2013) (addresses fraudulent liens).

41. *Marsh*, 888 F. Supp. 2d at 810.

42. *Id.* at 807.

43. *Id.* at 808.

44. *Id.* at 807.

45. *Id.* at 809; but see the holding in *Miller v. Homecomings Financial* discussed in Section II.D., which concludes that a debtor/mortgagor has standing to challenge the authority or right of the foreclosing mortgagee.

46. *Marsh*, 888 F. Supp. 2d at 811. The court failed to specify the provision of the Texas Property Code to which it referred, but this author believes that it would be TEX. PROP. CODE ANN. § 53.025 (West 2013).

MERS was the true owner of the note.[47]

Marsh also contended that the assignment was a fraudulent document within the meaning of Texas Government Code § 51.901(c),[48] but the court determined that Marsh lacked standing to allege the fraudulent lien claim because Marsh was not a party to the assignment.[49] Nevertheless, the court proceeded to analyze Section 51.903(a) of the Texas Government Code as well as Section 12.002(a) of the Texas Civil Practice and Remedies Code, which prevents a person from making or recording a document with knowledge that the document is a fraudulent lien or claim against real property.[50] Two federal cases had conflicting decisions and there were no Texas state courts which had yet considered the issue of "whether an assignment of a note and deed of trust can constitute a lien under chapter 12 of the Texas Civil Practice and Remedies Code."[51] In *Garcia v. Bank of New York Mellon*, a lien was considered a claim in property for payment of a debt secured by a security interest, and the court held that chapter 12 did not govern the assignment.[52] On the other hand, *Kingman Holdings, LLC v. CitiMortgage, Inc.* suggested that an assignment of a deed of trust may constitute a "lien" under chapter 12 in the context of a Rule 12(b)(6) motion[53] to dismiss.[54] In its analysis, the *Marsh* court looked at the plain and common meaning of the statute's words and the Texas legislative history.[55] The plain and common meaning of the statute's words lead to the conclusion that the Texas legislature did not intend to address mortgage assignments in chapter 12 since "[t]he assignment or transfer of an interest in property is distinct from a 'claim' in property."[56] Further, the court found legislative history indicating the purpose of the statute was to "create a private cause of action against a person who files fraudulent judgment liens or fraudulent documents purporting to create [as opposed to assign] a lien or claim against real . . . property."[57] Consequently, the court concluded that a cause of action under Section 12.002 of the Texas Civil Practice and Remedies Code must challenge the lien instrument directly and not an assignment of the lien.[58]

D. STANDING—ASSIGNMENT OF MORTGAGE

Miller v. Homecomings Financial concerns a challenge on the chain of title for assignments of a mortgage on residential real property securing a home equity

47. *Id.* at 811; *see also infra* text accompanying notes 12–20 (discussion of similar issue in *Cowin*).

48. TEX. GOV'T CODE ANN. § 51.901(c) (West 2013).

49. *Marsh*, 888 F. Supp. 2d at 811.

50. *Id.* at 812–14 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 12.002(a) (West 2012)).

51. *Marsh*, 888 F. Supp. 2d at 813.

52. Garcia v. Bank of N.Y. Mellon, No. 3:12-CV-0062-D, 2012 WL 692099, at *1 (N. D. Tex. Mar. 5, 2012).

53. FED. R. CIV. P. 12(b)(6).

54. Kingman Holding, LLC v. CitiMortgage, Inc., No. 4:10-CV-619, 2011 WL 1883829, at *4–6 (E.D. Tex. Apr. 21, 2011).

55. *Marsh*, 888 F. Supp. 2d at 813.

56. *Id.*

57. *Id.*

58. *Id.*

loan.[59] The court's opinion is well-reasoned, concise, and authoritative, pointing out fallacies in numerous other federal court cases.[60] The facts in *Miller* follow the typical factual context: the debtor obtains a residential home loan with a lender; the mortgage debt is assigned one or more times to the foreclosing lender; the debtor challenges the foreclosure in a state court proceeding; and the foreclosing lender removes the case to federal court based on diversity jurisdiction.[61] Miller's home equity loan was from Homecomings Financial Network, Inc.[62] Upon default, Bank of New York Mellon Trust Company initiated foreclosure proceedings, as the assignee of the deed of trust from JPMorgan Chase Bank as trustee.[63] There was no evidence reflecting an assignment from Homecomings Financial Network, Inc. to any of the defendant lenders, including JPMorgan Chase Bank as trustee or Bank of New York Mellon Trust Company.[64]

Miller challenged the pending foreclosure because a proper chain of title to the note and deed of trust could not be shown.[65] The lenders challenged the standing of Miller to contest the assignment because Miller was not a party to such documents and no cognizable legal theory supported their lack of authority to foreclose.[66] The court began by discussing the cognizable legal claim, citing numerous Texas cases recognizing a debtor's right to challenge a wrongful foreclosure.[67] The court concluded that the only party with standing to initiate a non-judicial foreclosure sale is the mortgagee or mortgage servicer acting on behalf of the current mortgagee.[68] If the foreclosing mortgagee is not the original mortgagee named in the deed of trust, then factual issues may arise as to the authority of such foreclosing party, who must be able to verify its chain of title back to the original mortgagee.[69]

Status as an appropriate mortgagee for foreclosure can be established in one of two ways.[70] First, the party can prove "it is the 'holder' of the note secured by the deed of trust."[71] The holder of a negotiable instrument can be shown by proof that the party is the payee or a holder by negotiation with a transfer of physical possession of the note.[72] "[N]egotiation requires both the transfer of possession and written indorsement by the holder."[73] Therefore, a party other

59. Miller v. Homecomings Fin., 881 F. Supp. 2d 825 (S.D. Tex. 2012).
60. *See id.* at 825–33.
61. *See id.* at 827.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 828, 831.
67. *Id.* at 828 (citing League City State Bank v. Mares, 427 S.W.2d 336 (Tex. Civ. App.—Houston [14th Dist.] 1968, writ ref'd n.r.e.); Martin v. New Century Mortgage Co., 377 S.W.3d 79, 81–82 (Tex. App.—Houston [1st Dist.] 2012, no pet.); Wells Fargo Bank, N.A. v. Ballestas, 355 S.W.3d 187, 189–90 (Tex. App.—Houston [1st Dist.] 2011, no pet.); Leavings v. Mills, 175 S.W.3d 301, 306 (Tex. App.—Houston [1st Dist.] 2004, no pet.)).
68. *Id.* at 828 (citing TEX. PROP. CODE ANN. § 51.001(4) (West 2013)).
69. *Id.* at 829.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

than the original payee of a note "must prove 'successive transfers of possession and indorsement' establishing an 'unbroken chain of title.'"[74] The second method of establishing appropriate mortgagee status is to prove the "party is the 'owner' of the note under common law principles of assignment."[75] In conclusion, the court held that "[a]s a matter of Texas law, . . . homeowners such as the Millers do have a cognizable cause of action to challenge a party's right to foreclosure on their property."[76] Consequently, the court concluded that the ubiquitous "show me the note" defense is only partially correct in that being the holder of the "original note is only one way to establish the right to foreclose, but it is not the only way."[77] The court approved Miller's contention that the lenders must show a proper chain of title to the deed of trust.[78] Traditionally, this is proven by chain of title pursuant to instruments filed in the real property records.[79] The court noted that "[t]he Texas Property Code provides that 'if the security instrument has been assigned of record, the last person to whom the security interest has been assigned of record' is the mortgagee."[80]

Furthermore, the court recognized the Texas statute requiring "that any transfer or assignments of recorded mortgages must also be recorded in the office of the county clerk."[81] The court declared that Texas Local Government Code § 192.007(a) has not been interpreted, citing *Dallas County v. MERSCorp, Inc.*[82] Consequently, the court noted that the gap in the chain of title of assignments was sufficient to entitle the homeowner to injunctive relief against the threatened foreclosure.[83]

Next, the defendant lenders challenged the plaintiffs' standing because they were not parties to the assignment.[84] Although the lenders cited numerous federal district cases disallowing standing, the court totally emasculated those prior decisions by indicating that six were issued by the same magistrate judge, none cited any Texas case law or statute, and all but one of the cases relied upon a single federal case, *Eskridge v. Federal Home Loan Mortgage Corp.*,[85] which cited no state or federal authority.[86] On the other hand, the court noted Texas courts have "long followed the common law rule which permits a debtor to assert

74. *Id.* (citing Leavings v. Mills, 175 S.W.3d 301, 310 (Tex. App.—Houston [1st Dist.] 2004, no pet.)).

75. *Id.*

76. *Id.* at 829–30.

77. *Id.* at 830.

78. *Id.* at 830–31.

79. *Id.* at 830.

80. *Id.* (citing TEX. PROP. CODE ANN. § 51.001(4)(C) (West 2013)).

81. *Id.* (discussing TEX. LOC. GOV'T CODE ANN. § 192.007(a) (West 2013) (In relevant part, this statute reads: "To . . . assign . . . an instrument that is . . . recorded in the office of the county clerk, a person must . . . record another instrument relating to the action in the same manner as the original instrument is required to be . . . recorded.")).

82. *Id.* (citing Dallas County v. MERSCorp., Inc., 11-CV-2733, 2013 WL 5903300 (N.D. Tex. Nov. 4, 2013)).

83. *Id.* at 830–31.

84. *Id.* at 831.

85. *Id.* (citing Eskridge v. Fed. Home Loan Mortg. Corp., 2011 WL 2163989, at *5 (W.D. Tex. Feb. 28, 2011).

86. *Id.*

against an assignee any ground that renders the assignment void or invalid."[87] Further, the court looked to *Corpus Juris Secundum* and *American Jurisprudence* in support of such general rule of law.[88] The only exception to this general rule related to "voidable" defenses, not applicable in the current case.[89] Further, the court cited federal district court cases that allowed chain of title challenges to foreclosures.[90] In support of this, the court noted the rationale that a debtor could be subject to foreclosure of its property by one foreclosing creditor, while at the same time being liable on a debt in the hands of another creditor.[91] Therefore, to avoid the double jeopardy, the chain of title must be proven from the original owner and holder of the note and deed of trust to the current foreclosing lender.[92] Thus, "under Texas law homeowners have legal standing to challenge the validity or effectiveness of any assignment or chain of assignments under which a party claims the right to foreclose on their property."[93]

E. RULE 736 FORECLOSURE

Wells Fargo Bank v. Robinson deals with foreclosure of a home equity loan made pursuant to the Texas Constitution and pursuant to an expedited foreclosure under Rule 736 of the Texas Rules of Civil Procedure.[94] In *Robinson*, the home equity loan was in default, and Wells Fargo proceeded with an application for court approval of the foreclosure.[95] The parties ultimately reached an agreement allowing Robinson an additional time period to sell the house, and the trial court signed an order under Rule 736 stating that Wells Fargo was authorized to proceed with foreclosure, to post the property before April 14, 2008, and foreclose on May 6, 2008.[96] However, Wells Fargo did not post until May 12, 2008 and conducted a foreclosure on June 3, 2008.[97] The court held that the court order did not authorize Wells Fargo to foreclose on a date other than the date specified in the court order, and therefore, it wrongfully foreclosed.[98] In support, the court analyzed the applicable provisions of the Texas Constitution, which includes a requirement that the lien of a home equity loan may be foreclosed upon only by court order.[99] By violating the court

87. *Id.*

88. *Id.* (citing 6A C.J.S. *Assignment* § 132 (May 2012)); 6 *Am. Jur. 2d Assignment* § 119 (May 2012)).

89. *Id.* at 831–32.

90. *Id.* at 832 (citing Millet v. JPMorgan Chase, N.A., No. SA-11-CV-1031-XR, 2012 WL 1029497, at *4 (W.D. Tex. Mar. 26, 2012); Norwood v. Chase Home Finance LLC, No. A-09-CA-940-JRN, 2011 WL 197874 (W.D. Tex. Jan. 19, 2011)).

91. *Id.*

92. *Id.*; *but see* TEX. PROP. CODE ANN. § 51.0001(4) (West Supp. 2013) (defining a proper "mortgagee" for foreclosure only in terms of being the holder of a security instrument with no mention of a note).

93. *Miller*, 881 F. Supp. 2d at 832.

94. Wells Fargo Bank v. Robinson, 391 S.W.3d 590, 592–95 (Tex. App.—Dallas 2012, no pet.).

95. *Id.* at 592–93.

96. *Id.* at 593.

97. *Id.*

98. *Id.*

99. TEX. CONST. art. XVI, § 50(a)(6).

order in deferring the foreclosure for a month, Wells Fargo wrongfully foreclosed.[100] Practitioners should take note of this narrow holding and seek court orders under Rule 736 proceedings to allow for foreclosure on a specified date or within some period thereafter.

F. EXECUTION DEED

Mosby v. Post Oak Bank involved a dispute between a deed of trust lien foreclosure purchaser and an execution sale purchaser.[101] Post Oak Bank held a deed of trust executed by Tinmore and filed on April 17, 2007.[102] Judgment was rendered in favor of Morrell Masonry against Tinmore on September 30, 2008 with a writ of execution and order of sale issued on December 9, 2008.[103] The execution sale occurred on February 3, 2009, pursuant to which Mosby acquired the subject property.[104] An execution deed was recorded on March 18, 2009, conveying to Mosby all of the right, title, and interest of the judgment debtor Tinmore.[105] Post Oak Bank ultimately foreclosed on its deed of trust lien on June 2, 2009, setting up the dispute between the bank as the deed of trust foreclosure purchaser and Mosby as the execution sale purchaser.[106] In what the court described as a case of first impression, the court addressed the meaning of the execution section under the Texas Property Code.[107] This statute provides that the "conveyance of real property by an officer legally authorized to sell the property . . . passes absolute title to the property to the purchaser."[108] Mosby relied on the "absolute title" language by asserting that it extinguished the prior deed of trust lien held by Post Oak Bank.[109] The court rejected this contention, noting that subsection (a) of the statute excludes any affect against a person who does not claim under a party to the conveyance or judgment.[110] In this case, Post Oak Bank was neither a party to the conveyance by the execution deed nor a party to the original judgment.[111] Additionally, the court noted that the execution deed only conveyed "whatever interest Tinmore . . . had in the [p]roperty."[112] Consequently, the execution sale under the statute did not affect the superior lien position of Post Oak Bank.[113]

100. *Robinson*, 391 S.W.3d at 593.
101. Mosby v. Post Oak Bank, 401 S.W.3d 183, 185 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).
102. *Id.*
103. *Id.*
104. *Id.*
105. *Id.*
106. *Id.* at 186.
107. *Id.* at 187 (discussing TEX. PROP. CODE ANN. § 5.004(a) (West 2010)).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at 187 n.3.
113. *Id.* at 187.

III. DEBTOR/CREDITOR

A. INSURANCE ESCROWS

Garcia v. Bank of America Corp. deals with insurance placed by the lender when the borrower failed to obtain insurance for the mortgaged property.[114] Garcia, as the homeowner, obtained a loan and executed a deed of trust that contained a typical insurance escrow provision requiring Garcia to maintain insurance sufficient to protect the mortgagee's interest in the property; however, if Garcia failed to provide such insurance, the mortgage authorized the mortgagee to purchase insurance for the property, but it did not require mortgagee to protect the homeowner's interest in the property.[115] After the court concluded that Garcia was not a third party beneficiary under the forced placed insurance, it addressed issues of good faith and fair dealing, and the fiduciary duty of the lender to renew the homeowner's insurance policy and use the escrow account funds for payment of the insurance premiums.[116] As to the duty of good faith and fair dealing, the escrow provisions in Garcia's mortgage did not create a special relationship and, therefore, created no duty of good faith and fair dealing.[117]

On the issue of fiduciary duty, the language of the mortgage proved instrumental in that it required the lender to use funds in the escrow account to pay insurance premiums, but it did not require the lender to obtain a renewal of the insurance policy, which was an obligation of the homeowner.[118] Consequently, since Garcia allowed the insurance policy to lapse without furnishing a renewal invoice to the lender for payment of the premium, the lender had no duty to affirmatively seek out a renewal of the homeowner's insurance policy and pay the premiums using funds from the insurance escrow account.[119] Practitioners should be certain that escrow provisions in their documents clearly establish the distinction between the duty to obtain or renew the insurance as opposed to the mere payment of the premiums when an invoice is presented.

B. DEFICIENCY LAWSUIT

In a deficiency lawsuit following foreclosure, *Preston Reserve, L.L.C. v. Compass Bank* demonstrates clearly what a lender should not do.[120] Preston Reserve owned land upon which there was a debt at the time of foreclosure of $2.4 million, which was guaranteed by Howe.[121] The lender foreclosed and bid $1.2

114. Garcia v. Bank of America Corp., 375 S.W.3d 322, 324 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

115. *See id.*

116. *Id.* at 326–34.

117. *Id.* at 332.

118. *Id.* at 334.

119. *Id.* at 334–35.

120. *See* Preston Reserve, L.L.C. v. Compass Bank, 373 S.W.3d 652, 656 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

121. *Id.*

million, leaving a deficiency.[122] Upon suit for the deficiency amount, the parties had to present evidence of the fair market value of the property.[123] During trial, Howe testified as an expert witness that the value of the property was $2.7 million; however, the lender did not introduce any expert opinion testimony as to the fair market value of the property, relying upon the Property Owner Rule to allow one of its corporate officers to testify as to fair market value.[124] In this case, the lender's workout loan officer, Scott, testified that his experience included the foreclosure on real estate collateral and the reselling of over 5,000 properties after foreclosure.[125] Based on this testimony, the court deemed Scott an officer with a managerial position and duties related to the property, making him a proper party to testify under the Property Owner Rule.[126]

However, as to his opinion on fair market value of the property, Scott testified that his opinion was based upon (1) offers received, (2) information provided by internal and external valuation experts, (3) zoning for the property, (4) plat deadlines for development, (5) a flood plain determination, and (6) availability of financing for raw land.[127] The Property Owner Rule requires that the witness must testify as to his personal familiarity with the property and its fair market value, and that if such officer or employee lacks personal knowledge, then his testimony does not constitute evidence under the Property Owner Rule.[128] Consequently, the court concluded that the factors considered by Scott did not "demonstrate Scott's personal familiarity with the property's value and knowledge of the market at the time of the foreclosure sale."[129] However, there is a dissenting opinion that finds the knowledge of each of these factors to be evidence of personal familiarity with the property and its fair market value.[130]

Also, additional information presented at trial on the property's fair market value was deemed no evidence and could not support the trial court's judgment.[131] The first was the foreclosure sale bid price.[132] Texas law is clear that a foreclosure sale bid does not constitute fair market value.[133] Under Texas law, fair market value is "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who

122. *Id.*

123. *Id.* (citing TEX. PROP. CODE ANN. § 51.003(b) (West 2010) (providing, in relevant part, that the court "determine the fair market value of the real property as of the date of the foreclosure sale.")).

124. *Id.* at 656, 658. Under general Texas law, a property owner is qualified to testify concerning the value of his own property even if he is not an expert and could not be qualified as such. *Id.* at 659 (citing Porras v. Craig, 675 S.W.2d 503 (Tex. 1984)). However, as to corporate entities, the "Property Owner Rule" allows for officers "in a managerial position with duties" related to the property, or employees of the entity with substantial equivalent positions and duties to testify as a "owner" as to the property's fair market value. *Id.*

125. *Id.*

126. *Id.* at 659.

127. *Id.* at 660–61.

128. *Id.* at 661.

129. *Id.* at 662.

130. *Id.* at 671 (McCally, J., dissenting).

131. *Id.* at 663–66 (Boyce, J., majority).

132. *Id.* at 663.

133. *Id.*

desires to buy, but is under no necessity of buying."[134] Second, evidence of the property's resale price a year after foreclosure was not deemed competent evidence because the record did not include evidence of whether the sale was out of the ordinary, how the property was marketed, and whether market conditions were comparable to the time of the foreclosure sale.[135] Third, an unaccepted offer presented to the bank two weeks after the foreclosure sale was not competent evidence since unaccepted offers to purchase property are not evidence of the market value of the property.[136] The court concluded that since there was insufficient evidence to support the trial court's finding of a fair market value of $2.4 million, and since the only legally sufficient evidence was that of Howe's testimony of a $2.7 million value, the summary judgment could not be sustained and was reversed.[137]

This case should be instructive to practitioners on proving the fair market value of a property. However, this author finds the position of the dissenting opinion on the "personal familiarity" of the witness to be more persuasive.[138] Hopefully, this can be reconsidered and clarified in future decisions, but in the interim, practitioners should be mindful of the majority view in this case.

C. FRAUDULENT TRANSFER

Basley v. Adoni Holdings addressed a fraudulent transfer issue.[139] Dodeka obtained an $8,614.64 judgment against Whitt for a credit card debt.[140] Eventually, Dodeka discovered a house owned by Whitt and obtained a writ of execution.[141] On February 2, 2010, a constable sale was conducted, and the property was sold for $4,442.43 to Adoni.[142] On February 18, 2010, before the constable's deed to Adoni was recorded, Whitt signed a general warranty deed conveying the property to her niece, her sister, and her brother, who promptly recorded the deed.[143] Upon discovering the Whitt conveyance, Dodeka brought an action alleging fraudulent transfer under the Fraudulent Transfer Act.[144] On appeal, the issue was whether the evidence presented at trial was sufficient to establish a fraudulent transfer.[145] At trial, Whitt summarized her assets as including her home (subject to a mortgage), her automobiles, personal property,

134. *Id.* at 658 (citing Exxon Corp. v. Middleton, 613 S.W.2d 240, 246 (Tex. 1981)).

135. *Id.* at 663.

136. *Id.* at 664 (citing Lee v. Lee, 47 S.W.3d 767 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

137. *Id.* at 666, 669–70.

138. *See generally id.* at 671 (McCally, Jr., dissenting).

139. Basley v. Adoni Holdings, LLC, 373 S.W.3d 577, 582 (Tex. App.—Texarkana 2012, no pet.).

140. *Id.* at 581.

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* (referring to the TEX. BUS. & COM. CODE ANN. § 24.006(a), (b) (West 2009) (providing in relevant part that a fraudulent transfer occurs "if the debtor made the transfer . . . without receiving reasonable equivalent value . . . and the debtor was insolvent at that time." Further, the Fraudulent Transfer Act defines when a debtor is insolvent as being when "the sum of the debtor's debts is greater than all of the debtor's assets at a fair valuation.")).

145. *Id.* at 582.

and a bank account.[146] However, Dodeka's counsel never asked about the balance of the bank account and did not establish evidence of her assets at the time of transfer, as opposed to the time of trial.[147] Consequently, the court determined that the creditor had the burden to establish the amount and nature of Whitt's assets and liabilities at the time of the transfer but failed to establish either.[148]

Failing this, the creditor argued a presumption of insolvency under the Fraudulent Transfer Act due to the debtor generally not paying debts as they came due.[149] Evidence established that Whitt had not paid the judgment and was delinquent in *ad valorem* taxes on the property, but there was no further evidence of Whitt's debt and payment status.[150] The court found this to establish a mere suspicion, which was less than a scintilla of evidence, and accordingly, was insufficient to support a conclusion of insolvency.[151] In support, the court noted the Uniform Fraudulent Transfer Act (UFTA) comments as to whether a debtor was genuinely paying its debts as they became due.[152] The list of factors under the UFTA were the amount of debt, due date of the debts, number of debts, proportion of debts not being paid, duration of the nonpayment, existence of bona fide disputes, and other special circumstances, as well as consideration of the debtor's payment practices and the payment practices of the debtor's trade or industry.[153] Since the creditor in *Basley* failed to establish anything other than the credit card debt and the delinquency in *ad valorem* taxes, the court held that it was insufficient evidence to support a conclusion that Whitt was insolvent.[154] While this case does not present any unique principal, it is informative to practitioners as to the details needed to establish a debtor's insolvency at the time of an alleged fraudulent transfer.

D. USURY CURE

In *Lagow v. Hamon ex rel. Roach*, the court addressed the cure by a lender of a usury claim under the Texas Finance Code.[155] Lagow obtained a loan from Hamon and ultimately defaulted. When Hamon filed suit to collect, Lagow counterclaimed for usury.[156] Hamon responded with a general denial and a plea

146. *Id.* at 582–83.
147. *Id.* at 583.
148. *Id.*
149. *Id.* (citing TEX. BUS. & COM. CODE ANN. § 24.003(b) (West 2009)).
150. *Id.* at 584.
151. *Id.*
152. *Id.* (citing UNIF. FRAUDULENT TRANSFER ACT § 2, cmt. 2, 7A U.L.A. 38 (2006)).
153. *Id.*
154. *Id.*
155. Lagow v. Hamon *ex rel.* Roach, 384 SW.3d 411, 415–16 (Tex. App.—Dallas 2012, no pet.) (discussing TEX. FIN. CODE ANN. § 305.006(d) (West 2006) (providing, in relevant part, that a creditor may avoid liability for usury when a defendant files a counterclaim alleging usurious interest, if the creditor upon application to the court, files an abatement for sixty days, and "[d]uring the abatement period the creditor may correct a violation," and as part of the correction, "the creditor shall offer to pay the obligor's reasonable attorney's fees as determined by the court.")).
156. *Id.* at 414.

in abatement, which the trial court granted.[157] Later on the same day, Hamon filed two motions for summary judgment.[158] Lagow asserted that Hamon had waived the right to correct the usury violation by filing the motions for summary judgment.[159] First, Lagow argued that the applicable provisions of the Texas Finance Code were similar to provisions in the Texas Deceptive Trade Practices—Consumer Protection Act, which required the plea in abatement at the time of filing an answer or very soon thereafter.[160] The court distinguished the Deceptive Trade Practices Act from the Texas Finance Code on the basis that the usury statute is considered penal in nature and that the Texas Supreme Court has held the Deceptive Trade Practices Act to be non-penal in nature.[161] Since the usury statute is penal in nature, the court must construe that section leniently as to the creditor.[162] Consequently, the prompt plea in abatement requirement under the Deceptive Trade Practices Act is not applicable to the usury penalty provisions under the Texas Finance Code.[163] Further, the court determined that Hamon's motion for continuance was not a *de facto* abatement since the motion for continuance related solely to additional time for discovery and exploration of settlement and mediation, but it did not include any facts for which a plea in abatement would be applicable.[164]

Furthermore, Lagow asserted the summary judgment motions constituted a waiver of the abatement rights.[165] In this regard, the court noted that although Hamon filed the plea in abatement and motions for summary judgment contemporaneously, Hamon did not file them in the alternative.[166] However, in the hearing on the plea in abatement, the creditor's council stated that the motions for summary judgment were "contingent on how the [trial] court rules on the plea in abatement."[167] Consequently, the court concluded that Hamon did not waive a plea in abatement.[168]

The facts showed that Hamon, within the applicable sixty day period, provided notice to Lagow of a correction in the interest rate charged and offered to pay all of Lagow's legal fees related to the usury defense.[169] The trial court ordered that the attorney's fees awarded to Lagow on her usury counterclaim would be offset against the amounts owed to Hamon under the promissory notes.[170] Hamon alleged that this was error, and the court reviewed the

157. *Id.* at 414–15.
158. *Id.*
159. *Id.* at 415.
160. *Id.* at 416 (citing TEX. BUS. & COM. CODE ANN. § 17.505 (West 2011)).
161. *Id.* at 417 (citing Pennington v. Singleton, 606 S.W.2d 682, 690–91 (Tex. 1980)).
162. *Id.*
163. *Id.*
164. *Id.* at 418 (noting that "a plea in abatement challenges the plaintiff's pleading by asserting that facts outside the pleading prevent the suit from going forward until the problem can be cured").
165. *Id.*
166. *Id.*
167. *Id.* at 418.
168. *Id.* at 419.
169. *Id.* at 414, 419–20.
170. *Id.* at 420.

applicable provisions of the Texas Finance Code.[171] The court noted that the plain language of the statutory provisions did not direct how attorney's fees should be paid.[172] Accordingly, the court concluded that the trial court did not err by ordering the attorney's fees to be offset against amounts owed under the promissory note.[173] This case presents a valuable lesson in the procedural aspects of curing a usury claim.

E. NOTICE OF INTENT TO ACCELERATE

Mathis v. DCR Mortgage III SUB I, L.L.C. involved a suit on a promissory note and construction of the waiver of notice of intent to accelerate.[174] Mathis executed a note and deed of trust in favor of DCR Mortgage.[175] The note included a fairly standard waiver provision providing: "except as expressly provided herein, [maker] waives all notices (including, without limitation, notice of intent to accelerate [and] notice of acceleration)."[176] However, the deed of trust provided in the default provisions: "If grantor defaults on the note . . . and the default continues after [lender] gives [grantor] notice of the default and the time within which it must be cured . . ., then [lender] may . . . declare the unpaid principal balance and earned interest on the note immediately due."[177] The facts disclosed that Mathis was perennially late in making payments and that DCR did not issue a separate notice letter regarding its intent to accelerate.[178] The issue on appeal was whether the note and deed of trust, read together, were effective to waive the obligation of the lender to give a notice of intent to accelerate.[179] The court acknowledged that a provision waiving a notice of intent to accelerate, whether contained in a note or deed of trust, is effective as long as the waiver is clear and unequivocal.[180] However, since the note and deed of trust were signed concurrently, both documents must be read together, and the note and deed of trust did not demonstrate a clear and unequivocal waiver of the right to receive a notice of intent to accelerate.[181]

While the statement of law in this case appears well founded, this author believes the court has misconstrued the applicable note and deed of trust provisions. The deed of trust contains the default language that creates the uncertainty.[182] That provision provided that upon failure to make timely payments, if such default continued after notice of the default was given and the

171. *Id.* (citing TEX. FIN. CODE ANN. § 305.006(d) (West 2005) (providing, in relevant part: "[T]he creditor shall offer to pay the obligor's reasonable attorney's fees as determined by the court based on the hours reasonably expended by the obligor's counsel with regard to the alleged violation before the abatement.")).

172. *Id.* at 421.

173. *Id.*

174. Mathis v. DCR Mortg. III SUB I, L.L.C., 389 S.W.3d 494, 496 (Tex. App.–El Paso 2012, no pet.).

175. *Id.*

176. *Id.* at 498.

177. *Id.*

178. *Id.*

179. *Id.* at 505.

180. *Id.*

181. *Id.* at 507–08.

182. *See id.* at 505–06.

cure period had lapsed without cure, then the note could be accelerated.[183] This opinion confuses the difference between a notice of default with a cure period and a notice of intent to accelerate.[184] Under the circumstances of this case, a notice of default and right to cure should have been sent to the borrower. The failure to cure such a default within the applicable time period would have caused the default to ripen into an event allowing acceleration. At that time, the waiver of notice of intent to accelerate, contained in a separate sentence in the default provision of the deed of trust, would have become applicable.[185] Without correcting this distinction, this case could become problematic for a lender that, pursuant to its loan documents, having given a notice of default and the cure period having elapsed, would be faced with a question of whether a waiver of intent to accelerate at that time is applicable or whether an additional notice of intent to accelerate is required under the *Mathis* holding. Hopefully, subsequent decisions can clarify the answer to this question.

IV. GUARANTIES/INDEMNITIES

A. RECOURSE CARVEOUTS

The issue of recourse carveouts was discussed in *Wells Fargo Bank v. Smuck & White*, a case falling just outside the survey period but important enough to include.[186] MBS-The Falls, Ltd. obtained a nonrecourse loan that was subject to certain nonrecourse carve-outs, which are exceptions to the nonrecourse language in a note and which create full or partial liability for the debtor in the event of certain occurrences.[187] As a loan condition, the lender required two principals of the borrower, Smuck and White, to execute a document entitled Non-Recourse Indemnification Agreement.[188] Upon default, Wells Fargo sued the borrower and the two individual indemnitors/guarantors in Tarrant County under the non-recourse exceptions, alleging waste and impairment of foreclosure rights due to the filing of prohibited liens.[189] Wells Fargo obtained an

183. *Id.*

184. *See id.* at 507–08.

185. *See id.* at 505.

186. Wells Fargo Bank v. Smuck & White, 407 S.W.3d 830, 832 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

187. *Id.* The applicable nonrecourse exceptions in the subject note read, in relevant part, as follows:

> Borrower's liability under this Note . . . shall only extend to the Mortgaged Property . . . ; provided, however, the foregoing shall not: (a) impair the right of Lender to bring suit and obtain personal, recourse judgment against . . . Borrower . . . relating to . . . waste . . . ; (b) impair the right of Lender to . . . obtain a judgment . . . or to foreclose. . . . Borrower's liability under the Non-Recourse Exceptions . . . shall be limited to the amount of any losses or damages sustained by Lender in connection with such Non-Recourse Exceptions . . . .

Id. at 832–33.

188. *Id.* at 833. The Non-Recourse Indemnification Agreement, characterized by the court as a guaranty, read, in relevant part, as follows: "Indemnitor hereby assumes liability for . . . any and all liabilities, obligations, losses, damages, costs and expenses . . . incurred by or awarded against Lender and for which Borrower at any time may be personally liable pursuant to the Nonrecourse Exceptions." *Id.* at 833, 835.

189. *Id.* at 833–34.

interlocutory summary judgment on its non-recourse claims against the borrower, and when that summary judgment became final, Wells Fargo, in a bit of clever procedural maneuvering, nonsuited without prejudice its claims against the individual guarantors, Smuck and White.[190] Then Wells Fargo sued the individuals in Harris County under the indemnification agreement, offering evidence only of the note, indemnification agreement, and the Tarrant County case pleadings and final judgment.[191] The Harris County court ruled against Wells Fargo.[192] The issue on appeal was whether the Tarrant County judgment established the basis upon which Smuck and White were liable under the Non-Recourse Indemnification Agreement.[193]

Smuck contended that the indemnity was only applicable to claims brought against Wells Fargo by a third party, not as to Wells Fargo's own losses caused by the borrower's breach.[194] The court analyzed the contract language without relying on the title of the document.[195] The court concluded that the provisions clearly encompassed Wells Fargo's own losses, damages, costs, and expenses, and that the indemnification agreement was essentially a guaranty.[196] Further, the court analyzed the purpose of the document and concluded that provisions relating to waste and impairment of rights to foreclose were inconsistent with Smuck's argument that the document only related to third party claims.[197] Also, the court noted and distinguished other cases relating to the same parties in similar financing arrangements.[198] Moreover, the court stated that allowing these individual indemnitors/guarantors to require Wells Fargo to reprove all of the elements for recovery "would amount to allowing an impermissible, collateral attack on the Tarrant County Judgment."[199] Wells Fargo either had to prove it had obtained the Tarrant County judgment based on the non-recourse exceptions or, absent such judgment, prove the non-recourse exceptions; the court determined that Wells Fargo had established the Tarrant County judgment based on non-recourse exceptions and that the indemnitors/guarantors could not attack such judgment since it would be an impermissible collateral attack.[200] Practitioners are hereby warned that not addressing directly any defenses under a non-recourse exceptions provision in a note may have adverse consequences on subsequent actions against a guarantor who had recourse liability if the borrower/obligor was found to be personally liable.

190. *Id.* at 834.
191. *Id.*
192. *Id.*
193. *Id.*
194. *Id.* at 835.
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at 836–37 (discussing Wells Fargo Bank v. MBS-The Hills, Ltd., No. 02-10-00289-CV, 2013 WL 4033622 (Tex. App.—Fort Worth Aug. 8, 2013, no pet.) (holding that a similar indemnification agreement was a guaranty of the Borrower's liability under the Non-Recourse Exceptions, including Wells Fargo's own losses in connection with the Non-Recourse Exceptions)).
199. *Id.* at 838.
200. *Id.* at 843.

B. FAIR NOTICE DOCTRINE

The fair notice doctrine for indemnification provisions was addressed in *Tutle & Tutle Trucking v. EOG Resources*.[201] While this case related to a personal injury rather than real property, the ruling on the indemnification applies to typical real estate indemnity provisions. Tutle entered into a master service contract with EOG to haul sand to be used for oil and gas well fracking.[202] Henderson, an employee of Tutle, was assisting a third party, Frack Source, in unloading the sand when equipment run by Frack Source, which had been defectively modified, caused an injury to Henderson.[203] Frack Source demanded EOG indemnify it under a separate service contract, and EOG made demand on Tutle for defense and indemnity.[204]

The master service agreement between EOG and Tutle contained various indemnity provisions in paragraphs 6A through 6E.[205] Paragraphs 6A and 6B were typical broad indemnification provisions between EOG and Tutle, which were set forth in capital letters and larger font than the rest of the contract.[206] However, the "pass through provisions" were contained in paragraph 6E, which had neither capital letters nor larger font.[207] In analyzing the fair notice doctrine, the court dismissed the first requirement, being the express negligence doctrine, because the facts did not relate to the party's own negligence.[208] This left the focus on the conspicuousness requirement.[209] Even though the pass through paragraph was not capitalized or in a larger font, the court found it was conspicuous because (1) the numbering for the paragraph was capitalized, which was different from other non-indemnity provisions in the contract; (2) the location of the pass through paragraph, being paragraph 6E, was numerically linked to paragraphs 6A and 6B, the capitalized and larger font indemnity provisions between the two parties; (3) paragraph 6E was not buried within the contract or located away from the other indemnity provisions; and (4) it was on the same page as part of the other conspicuous indemnity provisions.[210] While this decision seems, to this author, to be weak on substance, practitioners should be aware of the consequences of such provisions, as well as drafting requirements needed for conspicuousness.

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201. Tutle & Tutle Trucking v. EOG Res., 391 S.W.3d 240, 245 (Tex. App.—Waco 2012, pet. dism'd) (The fair notice doctrine holds that indemnity provisions are valid and enforceable if they satisfy two fair notice requirements: (1) the express negligence doctrine requiring the intent of the parties to be specifically stated, and (2) the conspicuousness requirement for the indemnity language in the document.).

202. *Id.* at 242.

203. *Id.*

204. *Id.*

205. *Id.* at 242–43.

206. *See id.* at 243.

207. *Id.* at 243–44. The "pass through provisions" required indemnification from claims of third parties where the indemnities related to or were ancillary to the work contemplated under the master service contract. *Id.*

208. *Id.* at 247.

209. *Id.* at 245–47.

210. *Id.* at 246.

C. WAIVER OF DEFICIENCY OFFSET

Interstate 35/Chisam Road, L.P. v. Moayedi considered the effectiveness of waiving the Texas deficiency offset statute with broad, generic waiver language contained in a guaranty.[211] Moayedi executed a guaranty of debt incurred by an affiliated entity, which contained broad waivers of defenses.[212] Moayedi argued that the guaranty waiver provisions were not effective to waive the provisions of the Texas deficiency offset statute because such a waiver would frustrate the stated purpose of that statute.[213] The court rejected Moayedi's position, concluding that the waiver language was "enforceable as a matter of law to waive the offset rights" under the Texas deficiency offset statute.[214]

First, the court noted that Texas had a strong public policy in favor of preserving the freedom of contract under the Texas constitution.[215] Furthermore, the court noted that the legislature had the opportunity but chose not to provide that this statute was non-waivable, noting legislative history;[216] two prior cases holding that such statute was waivable;[217] and the use of the words "any," "each," and "every" in the waiver paragraph as being broad, conclusive, and conveying the intent that the guaranty would be subject to no defenses other than payment.[218] Further, four other paragraphs supported its conclusion.[219]

V. PURCHASER/SELLER

A. LIMITATIONS—DISCOVERY RULE

Collective Asset Partners, LLC v. McDade addressed the discovery rule allowing the extension of the two-year statute of limitation period in a negligent misrepresentation case.[220] Collective Asset Partners (CAP) acquired property from Schaumburg with financing from Legend Bank.[221] As part of the financing

211. Interstate 35/Chisam Road, L.P. v. Moayedi, 377 S.W.3d 791, 793 (Tex. App.—Dallas, 2012, pet. granted) (addressing the agreement's impact on TEX. PROP. CODE ANN. § 51.003(b) (West 2007)).

212. *Id.* at 794. Specifically, the guaranty provided as follows: "Guarantor further agrees that this Guaranty shall not be discharged, impaired or affected by . . . (b) any defense (other than the full payment of the indebtedness" and "each and every such defense being hereby waived by the undersigned Guarantor." *Id.*

213. *Id.* at 795.

214. *Id.* at 801.

215. *Id.* at 797.

216. *Id.*

217. *Id.* at 798 (citing LaSalle Bank N.A. v. Sleutel, 289 F.3d 837 (5th Cir. 2002); Segal v. Emmes Capital L.L.C., 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd) (Op. on Reh'g)).

218. *Id.* at 800.

219. *Id.* 800–01 (citing paragraph 1 ("'unconditionally, absolutely and irrevocably' guaranteeing payment"); paragraph 2 (waiving diligence and collection); paragraph 3 (allowing enforcement of guaranty without exhaustion of collateral); and paragraph 5 (allowing release of collateral security without impairment or diminishment of the guaranty obligations)).

220. Collective Asset Partners, LLC v. McDade, 400 S.W.3d 213, 218 (Tex. App.—Dallas 2013, no pet.).

221. *Id.* at 215–16.

process, Legend acquired an appraisal that valued the property at $10,250,000 and noted that it was located in flood zone AE.[222] The appraisal specified that it was solely for the benefit of Legend Bank and no other parties could rely upon it.[223] CAP obtained knowledge of the flood zone in connection with and at the time of closing by reason of (1) the appraisal's executive summary that revealed the flood zone; (2) the FEMA map showing the property in the flood zone, which was received at closing; (3) a survey of the property showing the flood plain; and (4) the knowledge imparted to CAP by the execution of two loan documents relating to flood zone determination and hazards.[224] Based on that information, the court held that CAP had sufficient notice to cause a reasonable person to inquire further and, therefore, the two year limitation period began to run at the date of the original closing, not at the subsequent date when a second appraisal obtained by CAP indicated the flood plain.[225]

B. BREACH OF IMPLIED WARRANTY; ATTORNEY'S FEES

Howard Industries v. Crown Court & Seal Co. addressed whether attorney's fees were applicable to a breach of implied warranty claim.[226] Crown bought an industrial transformer for its facility.[227] When the transformer failed, Crown sued the manufacturer, installer, and various distributors for breach of an implied warranty of merchantability.[228] The sole issue was whether attorney's fees are applicable to a breach of implied warranty claim.[229] The court cited the general rule that attorney's fees may be awarded only if authorized by statute or contract.[230] Here, the breach occurred under the Uniform Commercial Code (UCC) provision warranting that goods shall be merchantable if implied in a sales contract where the seller is a merchant with respect to goods of that kind.[231] The UCC, as a statutory enactment, does not authorize attorney's fees; therefore, the court had to determine whether the Texas Civil Practices and Remedies Code allows for attorney's fees if the claim is based on an oral or written contract.[232] In analyzing this issue, the court looked at three prior Texas Supreme Court cases, concluding that the damages plead generally dictate whether the claim is based in contract (with attorney's fees) or in tort (without attorney's fees).[233] The UCC breach of an express warranty claim here was a suit on a contract; consequently, when the pleadings alleged pure economic

222. *Id.* at 215.
223. *Id.* at 215–16.
224. *Id.* at 217–18.
225. *Id.* at 219.
226. Howard Indus. v. Crown Court & Seal Co., 403 S.W.3d 347, 348 (Tex. App.—Houston [1st Dist.] 2013, no pet.).
227. *Id.*
228. *Id.*
229. *Id.* at 349.
230. *Id.*
231. *Id.* at 349, 351 (referring to TEX. BUS. & COM. CODE ANN. § 2.314(a) (West 2009)).
232. *Id.* at 349 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 38.001(8) (West 2008)).
233. *Id.* at 349–52 (citing Medical City Dallas, Ltd. v. Carlisle Corp., 251 S.W.3d 55 (Tex. 2008); 1/2 Price Checks Cashed v. United Auto. Ins. Co., 344 S.W.3d 378 (Tex. 2011) (a dishonored check was held to be a suit on a contract); JCW Elecs., Inc. v. Garza, 257 S.W.3d 701 (Tex. 2008)).

damages, the claim sounded in contract, as opposed to claims alleging damages for death or personal injury, which sound in tort.[234] This case is noteworthy to the practitioner seeking attorney's fees to be mindful that pleadings should only allege economic damages to preserve the claims for attorney's fees.

C. FRAUD AND PROMISSORY ESTOPPEL

Mavex Management v. Hines Dallas Hotel Ltd. involved the purchase of unimproved property with the intention to develop a condominium project.[235] Mavex acquired a one acre lot and a 10.37% interest in an adjacent parking tract and parking deck with the intention to develop a multi-story, 126-unit condominium tower in the Galleria area of Dallas.[236] The property was subject to an existing Reciprocal Easement Agreement (REA) limiting the development to a hotel.[237] The purchase and sale agreement was executed subject to the obtainment of an amendment to the REA allowing the condominium development.[238] Mavex prepared plans for the condominium unit and submitted them to the city for site plan approval, as well as to the seller to obtain various approvals from the owners of other property under the REA, which included the Tower One Tract, Tower Two Tract, and the unimproved property being acquired.[239] Mavex claimed that it relied upon representations in the contract that the condominium could use 252 spaces in the parking garage and 57 common use spaces for the condominium center after-hours events.[240] However, at the time of closing, the owners of Tower One Tract and Tower Two Tract had made no written assurances regarding the parking spaces.[241] While the Tower One owner ultimately approved the plans, the Tower Two owner (who was the transferee from the original owner) refused to accept the plans.[242] Mavex sued Hines on fraud and promissory estoppel arguments, but the trial court granted summary judgment in favor of Hines.[243]

The appellate court noted that the evidence submitted by Mavex, constituting primarily an affidavit of its principal, was merely conclusory in nature, not having identified with any specificity when the alleged statements were made or what specific actions Mavex took in reliance on the statements; therefore, the affidavit did not raise fact issue sufficient to defeat the summary judgment.[244] Also, Mavex failed to introduce any proof that statements made by Hines were false at the time they were made, which also did not support an attack on the summary judgment in favor of Hines.[245] While the law in this case is not

234. *Id.* at 352.
235. Mavex Mgmt. Corp. v. Hines Dallas Hotel Ltd. P'ship, 379 S.W.3d 456, 458 (Tex. App.—Dallas 2012, no pet.).
236. *Id.*
237. *Id.*
238. *Id.*
239. *Id.*
240. *Id.* at 459.
241. *Id.*
242. *Id.*
243. *Id.* at 459–60.
244. *Id.* at 461.
245. *Id.* at 461–62.

particularly noteworthy, this case demonstrates the problems encountered when important title and development issues are not fully negotiated and documented prior to a closing.

D. SPECIFIC JURISDICTION

A long arm jurisdictional issue is presented in *Tabacinic v. Frazier*.[246] Tabacinic, through a partnership entity, sold Frazier a house for $1,500,000 with a separate punch list agreement detailing the construction items to be completed.[247] When the work was not completed and mechanic's liens surfaced against the property, Frazier sued Tabacinic, a resident of Florida.[248] Tabacinic challenged the jurisdiction of the court, but the appellate court held there were sufficient contacts to assert specific jurisdiction over Tabacinic, noting Texas courts may exercise personal jurisdiction over nonresident defendants pursuant to its long arm statute.[249] Furthermore, such jurisdiction is allowed under the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution if "the nonresident has established minimum contacts with the forum state and the exercise of jurisdiction comports with traditional notions of fair play and substantial justice."[250] The facts in this case showed that Tabacinic individually invested in multiple properties in Dallas, was the individual responsible for making all decisions concerning actions of the various corporate entities, and signed the purchase and sale agreement and punch list agreement by his individual name without indicating any corporate capacity.[251] Consequently, the court concluded that Frazier established sufficient evidence to assert special jurisdiction over Tabacinic.[252] The Tabacinic defense of representative capacity was deemed insufficient due to the actions noted above taken in a non-representative capacity.[253]

Tabacinic also alleged that a single contract would be insufficient for special jurisdiction; the court disagreed, noting that contracts for the purchase or sale of Texas property are types of contract that can show a purposeful availment of the benefits of the forum jurisdiction.[254] By its very nature, a real estate contract typically involves many contacts over a long period of time, implying various continuing obligations and leaving no doubt of the continuing relationship with Texas.[255] The court concluded that "the manner in which [Tabacinic] signed the contract, coupled with the nature of the contract itself [being a contract covering

246. Tabacinic v. Frazier, 372 S.W.3d 658, 662 (Tex. App.—Dallas 2012, no pet).

247. *Id.* at 665.

248. *Id.* at 662.

249. *Id.* at 662–63. (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 17.041–.045 (West 2008) (the Texas long arm statute)).

250. *Id.* at 663 (citing Burger King Corp. v. Rudzewicz, 471 U.S. 462, 471–72, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985); Int'l Shoe Co. v. Washington, 326 U.S. 310, 319, 66 S. Ct. 154, 90 L. Ed. 95 (1945)).

251. *Id.* at 665.

252. *Id.*

253. *Id.* at 666.

254. *Id.* at 666–68.

255. *Id.* at 667 (citing Michiana Easy Livin' Country, Inc. v. Holten, 168 S.W.3d 777 (Tex. 2005)).

Texas real property], constitute[d] sufficient[] purposeful contacts to support the exercise of [specific] jurisdiction."[256] Further, the court found that the fiduciary shield doctrine used in tort cases would be inapplicable in this case because an individual committed the alleged tortious actions.[257] Finally, the court decided that the assertion of jurisdiction over Tabacinic did not violate the fair play and substantial justice requirements, noting that litigation in Texas would not be unfair or unjust despite the geographical distance, that the property owner/purchaser had a significant interest in seeking convenient relief, and that Texas had strong interest in adjudicating disputes concerning real property within its borders.[258] This case brings home the importance that nonresident parties carefully document simple representative capacity acts (such as signing) to avoid special jurisdiction in Texas.

E. FRAUDULENT INDUCEMENT DAMAGES; AS IS CLAUSES

Fazio v. Cypress/GR Houston I, L.P. contains a good discussion of damages relating to a fraudulent inducement in the sale of commercial real property.[259] Fazio entered into a purchase agreement with Cypress to acquire a retail site, which had as its primary tenant Garden Ridge Pottery.[260] During the letter of intent stage, Fazio asked for all information in the possession of Cypress concerning the property.[261] At this time, Garden Ridge was in financial distress, which Cypress knew.[262] Garden Ridge had written to Cypress indicating it was undergoing a corporate restructure and requested a thirty percent rent reduction.[263] Cypress's lender had also expressed concern about the financial viability of Garden Ridge, even requiring an additional personal guaranty from Cypress's chief executive officer.[264] On the other hand, Fazio had undertaken its own independent investigation of Garden Ridge, which included reviewing the lease terms and Garden Ridge's audited financial statements, and contacting Garden Ridge's chief financial officer for an assessment of its financial condition (who advised Fazio of the restructuring and financial issues facing Garden Ridge).[265] After such investigations, Fazio executed a purchase agreement with Cypress, which contained a fairly typical "as is" clause.[266] Within a few months, Garden Ridge had defaulted, declared bankruptcy, and rejected its lease.[267] Fazio could not lease the space and sold the property within three years for approximately fifty percent of the original sales price and sued Cypress for fraudulent inducement for failing to disclose the financial condition of

256. *Id.* at 668.
257. *Id.* at 668–69.
258. *Id.* at 671.
259. Fazio v. Cypress/GR Houston I, L.P., 403 S.W.3d 390, 394–97 (Tex. App—Houston [1st Dist.] 2013, pet. denied).
260. *Id.* at 392–93.
261. *Id.* at 393.
262. *Id.*
263. *Id.*
264. *Id.*
265. *Id.*
266. *See id.* at 393, 406.
267. *Id.* at 393.

Garden Ridge.[268] The trial court submitted two damage questions to the jury, one of which was legally inapplicable.[269] The appellate court noted that there were "two appropriate measures of direct damages in a fraud case: out-of-pocket and benefit-of-the-bargain" damages, both of which are measured at the time of the sale induced by the fraud.[270] Therefore, the jury instruction on damages that asked for the difference between the price Fazio paid for the property and the value of the property at the time of acquisition was a proper measure of out of pocket damages.[271] The noteworthy aspects of this case, however, lie in the concurring and dissenting opinions.

The concurring opinion is written in response to the dissent, which focused on the disclaimer of reliance.[272] The concurring opinion noted that the purchase and sale agreement was a fully integrated written agreement that recited that the buyer would "rely solely upon its own investigation with respect to the Property, including, without limitation, the Property's . . . economic condition"; that clearly and unequivocally disclaimed the buyer's reliance on the seller's representations and omissions with respect to the property's economic condition; and that clearly and unequivocally disclaimed the seller's liability with respect to seller's representations and omissions.[273] The initial letter of intent was "displaced by and replaced with the terms of the Purchase Agreement," such that the letter of intent was merely a proposal and not binding upon the parties until a formal purchase agreement was executed.[274] Numerous provisions in the letter of intent supported this conclusion.[275] Further, the concurring opinion noted the existence of a "merger clause," which indicated that the initial purchase and sale agreement was the entire agreement of the parties and not one of multiple agreements (including the letter of intent) addressing the transaction.[276] The result of the merger clause was to override the letter of intent's due diligence provisions and adopt the detailed inspection provisions contained in the purchase and sale agreement.[277] The concurring opinion also addressed the disclaimer provision, concluding it was a clear and unequivocal disclaimer of the borrower's reliance on the completeness of the documentation provided by seller.[278] The disclaimer provision was sufficient to limit the scope of the seller's obligations to search for and investigate

268. *Id.*

269. *Id.* at 394–95. The inapplicable question asked the difference between the price Fazio paid for the property and the amount they received when sold. *Id.*

270. *Id.*

271. *Id.* at 395.

272. *Id.* at 399 (Massengale, J., concurring).

273. *Id.* at 399.

274. *Id.* at 400.

275. *Id.* at 401 (noting that the letter of intent contained the following concepts: (i) the letter of intent was an indication of negotiating for a purchase agreement; (ii) the escrow deposit was only applicable upon an execution of a formal purchase agreement, and would be increased and become nonrefundable upon removal of contingencies in the purchase agreement; (iii) the letter of intent allowed Fazio in his sole judgment to determine whether to proceed with the purchase; and (iv) the language that the letter of intent was an "expression of understanding and intention only" and would not be binding until a formal purchase agreement was executed.).

276. *Id.* at 402 (citing the entire merger clause).

277. *Id.* at 402–03.

278. *Fazio*, 403 S.W.3d at 403–04 (quoting the entire reliance clause).

documents, although it did not affirmatively authorize the seller to misrepresent the truth or to knowingly conceal information.[279] However, the same provision continued with an expressed disclaimer and waiver of any and all liabilities for representations and warranties in or omissions from the various documents and communications.[280] The existence of an "as is" provision was also viewed as further evidence that the buyer intended to rely solely on its own investigation.[281]

Additionally, the concurring opinion discussed recent cases on disclaimer provisions, such as *Italian Cowboy*,[282] which did not contain a "clear and unequivocal" disclaimer because of "the absence of a disclaimer of reliance" and was distinguished from *Fazio*'s merger provision (based on use of the term "rely" and the waiver of "liability" in the disclaimer and "as is" provisions).[283] *Italian Cowboy* is in contrast to the other Texas Supreme Court cases of *Schlumberger*[284] and *Forest Oil*.[285] Each of those cases had an effective disclaimer of reliance with language that was clear and unequivocal in expressly disclaiming reliance on representations and affirming reliance on one's own judgment.[286] The provisions in the "as is" clause in *Fazio* were similar to the approved disclaimer provisions in *Schlumberger* and *Forest Oil* in that the buyer agreed to rely solely upon its own investigation and waived any and all liabilities arising from such representations.[287] However, the concurring opinion did not discuss the five prong test established by the Texas Supreme Court in *Italian Cowboy*, which is: (1) whether the contract terms were negotiated or boiler plate; (2) whether the complaining party was represented by counsel; (3) whether the parties dealt with each other at arm's length; (4) whether the parties were knowledgeable in business matters; and (5) whether the release language was clear.[288] In this case, Fazio was a sophisticated real estate investor (factor 4 above), the release and waiver language was clear and unambiguous (factor 5 above), Fazio was able to negotiate changes (factor 1 above), and Fazio had the resources to engage counsel but voluntarily chose to forego such assistance (factor 2 above); therefore, the concurring opinion concluded that the *Italian Cowboy*'s factors, as well as the magnitude of the loan, were sufficient to give effect to the clear disclaimer language of the contract.[289]

In the lengthy, detailed, vigorous, and authoritative dissent, Justice Evelyn Keyes took issue with the damages, apportionment of liability, exemplary damages, and the basic fraudulent inducement claims; however, it is the

279. *Id.* at 404–09.
280. *Id.* at 404.
281. *Id.* at 406 (quoting the "as is" clause).
282. Italian Cowboy Partners, Ltd. v. Prudential Ins. Co., 341 S.W.3d 323 (Tex. 2011); *see also* J. Richard White & G. Roland Love, *Real Property*, 66 SMU L. REV. 1081, 1101–08 (2013) (detailed discussion of *Italian Cowboy Partners*).
283. *Fazio*, 403 S.W.3d at 406–09.
284. *See* Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 179–80 (Tex. 1997).
285. *See* Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 62 (Tex. 2008).
286. *Fazio*, 403 S.W.3d at 407.
287. *Id.*
288. *Id.* at 407–08.
289. *Id.* at 408–09.

dissent's focus on the fraudulent inducement claim that is noteworthy.[290] The crux of the dissent's argument is two-fold. First, the fraudulent inducement occurred at the letter-of-intent stage, which caused the execution of the purchase and sale agreement, and second, the "as is" disclaimer and merger clauses are not clear and unequivocal waivers as to financial matters rather than property conditions.[291]

The dissent argued that the fraud in the inducement occurred during the letter of intent stage and that the law is well established that a disclaimer of reliance does not waive fraud in the inducement.[292] Cypress's withholding of vital information concerning Garden Ridge's financial conditions occurred during the letter of intent stage, during which Fazio had requested every piece of information held by Cypress.[293] The dissent analyzed the exact language in the purchase and sale agreement.[294] Disclosure requirements of the purchase and sale agreement were contained in Section 5.2, entitled "Document Review," which related to the "truth, accuracy or completeness of the [d]ocuments" and waived liabilities for "representations or warranties . . . and other matters contained in the [d]ocuments."[295] These documents included the lease, survey, plans, architectural and engineering reports, service contracts, and permits, all of which the dissent characterized as being property due diligence items and distinguished from the economic condition of the tenant and property, which were covered in the letter of intent.[296] Therefore, the language was not clear and unequivocal as to waive Cypress's duty to disclose economic information as opposed to the property condition information.[297] Similarly, the dissent reviewed the "as is" clause and found its terminology related solely to acceptance of the property and its physical and environmental conditions.[298] Then, as to the merger clause, the dissent concluded it could not reasonably be interpreted to waive a fraudulent inducement claim.[299] Consequently, the dissent concluded that there was not clear and unequivocal language disclaiming reliance on representations under the disclaimer, "as is," and merger clauses that would effectively waive a fraudulent inducement claim based on the concealment by Cypress of relevant economic information concerning the tenant Garden Ridge.[300]

Based on its analysis of the narrowly construed disclaimer, "as is," and merger clauses, the dissent addressed whether there was a duty to disclose that was a condition precedent.[301] A duty to disclose was applicable under Texas law in a number of instances, such as when a partial disclosure conveys a false

290. *Id.* at 412–32 (Keyes, J., dissenting).
291. *Id.* at 417–22.
292. *Id.* at 419.
293. *Id.* at 417–19.
294. *Id.* at 420–22.
295. *Id.* at 420 (internal quotations omitted).
296. *Id.* at 420–22.
297. *Id.* at 422.
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 417.

impression, as noted by the dissent, citing *Bradford* and *JSC Neftegas-Impex*.[302] Based on this analysis, the dissent concluded that Cypress had a common law and contractual duty to provide the economic information it concealed.[303]

The majority, concurring, and dissenting opinions reflect the continuing problems courts have in fraudulent inducement cases with the interpretation of (and practitioners have in drafting) the disclaimer, "as is," and merger clauses. These authors have reported on numerous other similar cases in prior years' review.[304] Clear, concise, and detailed provisions on the nature and scope of such clauses will hopefully provide the practitioner with the intended results.

VI. LEASES; LANDLORD/TENANT

The courts also revisited the *Italian Cowboy* decision in a leasing context in *Dragon Fish, LLC v. Santikos Legacy, Ltd.* and found the following clause sufficient to disclaim reliance:

> *Reliance*. LANDLORD AND TENANT HEREBY ACKNOWLEDGE THAT THEY ARE NOT RELYING UPON ANY BROCHURE, RENDERING, INFORMATION, REPRESENTATION OR PROMISE OF THE OTHER, OR AN AGENT OR BROKER, IF ANY, EXCEPT AS MAY BE EXPRESSLY SET FORTH IN THIS LEASE.[305]

As in *Fazio*, the court conducted an extensive analysis of the *Schlumberger* and *Forest Oil* decisions, together with *Italian Cowboy*, and found the disclaimer language here was sufficient, clear, and unequivocal.[306] Particularly in this case, the parties negotiated the terms of the contract; the tenants were represented by counsel; the parties dealt with each other at arm's length; and the parties were knowledgeable in business matters.[307] And, again, the disclaimer language was clear.[308] Accordingly, a claim for fraudulent inducement did not lie.[309]

A guaranty also existed where the guarantor guaranteed "the 'payment and performance of all liabilities, obligations and duties' 'imposed upon Tenant under the terms of the Lease as if Guarantor had executed the Lease as Tenant thereunder.'"[310] With this clause in place, the guarantor was bound by the provisions in the lease, as those terms were incorporated into the guaranty.[311] Similarly, in *Futerfas Family Partners v. Griffin*, it was a fact question as to whether a change to a lease was a material alteration injuring or enhancing the risk of

302. *Id.* at 416 (citing Bradford v. Vento, 48 S.W.3d 749, 755 (Tex. 2001); JSC Neftegas-Impex v. Citibank, N.A., 635 S.W.3d 387 (Tex. App.—Houston [1st Dist.] 2011, pet. denied)).

303. *Id.* at 417.

304. *See* White, *supra* note 282, at 1098–1101; J. Richard White & G. Roland Love, *Real Property*, 61 SMU L. REV. 1073, 1088–92 (2008).

305. Dragon Fish, LLC v. Santikos Legacy, Ltd., 383 S.W.3d 175, 179–85 (Tex. App.—San Antonio 2012, no pet.) (opinion withdrawn).

306. *Id.*

307. *Id.* at 184–85.

308. *Id.* at 185.

309. *Id.*

310. *Id.* at 187.

311. *Id.*

injury to a guarantor, thereby releasing the guarantor.[312]

Ashford Partners, Ltd. v. Eco Resources, Inc. reminds us that an assignee of the owner takes on the obligations of the landlord, which in this case included construction and finish out of an interior space.[313] Also of interest, the measure of damages was the difference between the agreed rental and the reasonable cash-market value of the leasehold, not the cost of remedying the defects.[314] The cost of property repair would not compensate the lessee for the difference between the condition of the lease premises as promised and the actual value—that is, the benefit of the bargain.[315]

A number of the cases provided guidance in drafting. In *Parkway Dental Associates, P.A. v. Ho & Huang Properties, L.P.*, an original landlord-developer had agreed with a tenant to not allow a competing dental operation in the shopping center.[316] A portion of the property was then sold, and a new tenant leased space inside the premises now owned by another.[317] The sale documents, deed, and new lease had no competing tenant clause, and the new tenant started a dental operation.[318] The earlier tenant could not prevent this business because no prohibition existed in the new lease.[319] Thus, the original landlord may have been in violation of and in breach of its original lease agreement, but the new partial owner and tenant were not.[320] The lesson learned is that counsel should take care to review existing leases and non-compete provisions in connection with the sale of a portion of a larger property. Thorough drafting could have prevented this problem.

Another decision by the Austin Court of Appeals is of interest because of its discussion of the Texas Uniform Unincorporated Non-Profit Association Act (TUUNAA), which rarely shows up in the case law.[321] In *M.T. Falcon Investments, LLC v. Chisolm Trail Elks Lodge*, an association had taken steps to comply with TUUNAA.[322] The court found that such an association was a distinct entity, with the members and agents not liable for the association's actions.[323] A landlord who rented commercial space to the association formed under TUUNAA could not seek damages for breach of a lease agreement against the individuals.[324] This case clearly demonstrates the value of TUUNAA to clubs, loose associations, and other similar groups.

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312. Futerfas Family Partners v. Griffin, 374 S.W.3d 473, 479 (Tex. App.—Dallas 2012, no pet.).

313. Ashford Partners, Ltd. v. Eco Res., Inc., 379 S.W.3d 300, 308 (Tex. App.—Houston [1st Dist.] 2010), *rev'd*, 401 S.W.3d 35 (Tex. 2012).

314. *Id.*

315. *Id.*

316. Parkway Dental Assocs., P.A. v. Ho & Huang, L.P., 391 S.W.3d 596, 600 (Tex. App.—Houston [14th Dist.] 2012, pet. denied).

317. *Id.*

318. *Id.*

319. *Id.*

320. *Id.* at 601–07.

321. *See* M.T. Falcon Invs., LLC v. Chisholm Trail Elks Lodge, 400 S.W.3d 658, 661 (Tex. App.—Austin 2013, pet. denied).

322. *Id.* at 659–60.

323. *Id.* at 667.

324. *Id.*

A number of cases dealt with forcible detainer actions. In *Fontaine v. Deutsch Bank National Trust Co.*, the foreclosure purchaser challenged an existing tenant's rights under the Protecting Tenants from Foreclosure Act of 2009 (PTFA).[325] The only available precedent, which was non-binding, indicated that a foreclosure purchaser carried the burden to demonstrate that a lease was not bona fide.[326] This federal act was passed during the recession to protect tenants and provide at least a ninety-day notice for termination of certain leases in the event of a foreclosure, if the leases were indeed bona fide.[327] Tenants have utilized the PTFA to protect their possession of property many times since its enactment.[328] However, parties should remember that this act, found at 12 U.S.C. § 5220, sunseted on December 13, 2014.[329]

Several cases also revisited the jurisdictional question for a Justice Court—always a headache for the courts. The Justice Court has authority to determine right of possession but does not have jurisdiction to determine title.[330] As simple as that may seem, the issues are often intertwined and difficult to determine.

In *Pina v. Pina*, the Justice Court did not have jurisdiction because there was a title dispute between family members and the right of possession could not be determined without resolution of that title question.[331] There was a deed from the now deceased mother to the sisters, which the sons contended was obtained by fraud.[332] With a somewhat contrary approach, the Court of Appeals in Dallas in *Lugo v. Ross* confirmed the right to determine possession, even though the tenants argued that they had an option agreement that permitted them to obtain title.[333] The tenants had attempted to exercise the purchase option but there was a dispute over that exercise.[334] No closing had taken place.[335] The court found that such a claim had to be decided in a separate court with jurisdiction, but at the present time, there was no title dispute to be resolved, and the owner was entitled to his eviction.[336]

In another case, which highlights a developing defense and one for which we can only hope the courts exercise restraint, the party in possession raised a claim of adverse possession.[337] The court found that "the county court, in considering the pleadings before it, would have had to determine title to the property in order to determine whether the [Plaintiff] had a superior right to possession."[338]

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325. Fontaine v. Deutsch Bank Nat'l Trust Co., 372 S.W.3d 257, 259 (Tex. App.—Dallas 2012, pet. dism'd).

326. *Id.* at 261.

327. Carsten Grellmann, Comment, *Why State Courts May Prove Most Effective at Allowing the Protecting Tenants at Foreclosure Act to Protect Tenants*, 20 J. AFFORDABLE HOUSING & COMMUNITY DEV. L. 295, 298–99 (2012).

328. *Id.* at 305.

329. *Id.* at 300.

330. Pina v. Pina, 371 S.W.3d 361, 365 (Tex. App.—Houston [1st Dist.] 2012, no pet.).

331. *Id.* at 365–66.

332. *Id.* at 363.

333. *See* Lugo v. Ross, 378 S.W.3d 620, 620–26 (Tex. App.—Dallas 2012, no pet.).

334. *Id.* at 621.

335. *Id.*

336. *Id.* at 623–25.

337. *See* Bynum v. Lewis, 393 S.W.3d 916, 919 (Tex. App.—Tyler 2013, no pet.).

338. *Id.*

The concern here of course is that any tenant might assert adverse possession as a defense thereby taking jurisdiction away from the Justice Court.[339] Hopefully, the courts will review the circumstances and limit the application, particularly if there is or was a lease in place and the party was clearly initially in possession as a tenant.

VII. CONSTRUCTION MATTERS

The survey period included a number of construction cases, most of which are limited to their facts or procedures, but there were a few warranting attention. First, in *Jewelry Manufacturer's Exchange, Inc. v. Tafoya*, an original subcontractor was not entitled to fund trap dollars to be paid to a new subcontractor hired to replace that original subcontractor when it stopped work.[340] Under the facts of this case, Tafoya was an electrical subcontractor that stopped work at about 80% of completion.[341] The general contractor hired a replacement contractor who completed the work.[342] Tafoya sought to fund trap against payments being paid to the new contractor.[343] However, the court found that the original contractor was not authorized to withhold funds from the replacement contractor who had no relationship to the contractor it had replaced.[344]

The Dallas Court of Appeals also somewhat eroded the Certificate of Merit Statute by prohibiting a construction defect case for negligence but allowing it as a breach of contract, even in the absence of a certificate of merit.[345] In *JJW Development, LLC v. Strand Systems Engineering, Inc.*, the court found that Texas Civil Practice and Remedies Code § 150.002, in effect in 2008, required a certificate of merit to bring a claim based on professional services.[346] This case involved the design of a concrete foundation.[347] The court limited the affidavit requirement to claims for negligence and not for contract, noting that an action in contract is for the breach of an either expressed or implied duty arising under the contract, while an action in tort is for the breach of a duty imposed by law.[348] A contractual relationship can create duties under both contract law and tort law.[349] However, in such a case, "the nature of the injury most often determines which duty or duties are breached. When the injury is only the economic loss to the subject of the contract itself, the action sounds in contract alone."[350] In this case, the allegations were not that the services were performed

339. *See generally id.* at 919–20.

340. Jewelry Mfgs. Exch., Inc. v. Tafoya, 374 S.W.3d 639, 643 (Tex. App.—Dallas 2012, pet. denied).

341. *Id.* at 640–41.

342. *Id.* at 641.

343. *Id.*

344. *Id.* at 643.

345. *See* JJW Dev. LLC v. Strand Sys. Eng'g, Inc., 378 S.W.3d 571 (Tex. App.—Dallas 2012, pet. denied).

346. *Id.* at 578.

347. *Id.* at 573–74.

348. *Id.* at 579.

349. *Id.*

350. *Id.* (internal quotations omitted).

improperly, but that they were not performed at all as required by the contract.[351] Moreover, repair costs and diminution in value were determined to be the benefit-of-the-bargain or economic-loss damages,[352] indicating a breach of contract. The court found that a certificate of merit was not required for a claim for tortious interference.[353]

A similar analysis can be found in *Retherford v. Castro*, dealing with the professional services exception under the Deceptive Trade Practices Act (DTPA).[354] This case is important in that it finds that a professional home inspector licensed by the Texas Real Estate Commission is a professional excepted from liability under the DTPA.[355] Thus, no DTPA claim can be brought against the individual because the essence of the service was providing advice, judgment, or opinion based on specialized knowledge or training.[356] The professional real estate inspector was not exempted under the above referenced Certificate of Merit Statute but did qualify under § 17.49(c) of the DTPA.[357] However, the exemption was not available for a negligent misrepresentation claim, which the court remanded for further consideration.[358]

Two more cases also dealt with subcontractors. In *Yost v. Jered Custom Homes*, a homeowner who had suffered a loss of the home due to foreclosure still had standing to assert claims against the builder for negligence and breach of implied warranties of habitability and of good and workmanlike construction.[359] The homeowner may have been harmed by a reduction in the home's sale price at foreclosure.[360]

Also, in *Courtland Building Company, Inc. v. Jalal Family Partnership, Ltd.*, a contractor had a right to compel arbitration to resolve a dispute involving a subcontractor's performance and property owned by a partnership, even though not all of the partners had executed the building contract that included the arbitration clause.[361] The court applied a doctrine of "direct benefits estoppel" to compel arbitration because the non-signatory party sought to derive a direct benefit from the contract that contained the arbitration clause.[362]

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351. *Id.* at 580.

352. *Id.* at 581.

353. *See* Jay Miller & Sundown, Inc. v. Camp, Dresser & McKee, Inc., 381 S.W.3d 635, 643–44 (Tex. App.—San Antonio 2012, no pet.).

354. Retherford v. Castro, 378 S.W.3d 29, 32–37 (Tex. App.—Waco 2012, pet. denied).

355. *Id.* at 31.

356. *Id.* at 36–37.

357. *Id.* at 35.

358. *Id.* at 37–38.

359. Yost v. Jered Custom Homes, 399 S.W.3d 653, 658–59 (Tex. App.—App. Dallas 2013, no pet.).

360. *Id.* at 658.

361. Courtland Bldg. Co., Inc. v. Jalal Family P'ship Ltd., 403 S.W.3d 265, 271 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

362. *Id.*

VIII. TITLE MATTERS

A. ADVERSE POSSESSION/TITLE DISPUTES

In a case that dealt with the area of public roads and implied dedication, the El Paso Court of Appeals found that a dirt road that ran through the property had been impliedly dedicated for public use.[363] In *McCulloch v. Brewster County*, the dispute originated when the county designated Mills Road as a county road on its county road map.[364] The plaintiffs timely filed a challenge to that designation within the statutorily required two year period.[365] In particular, the plaintiffs sought a Declaratory Judgment that Mills Road was a private road.[366] Implied dedication involves the landowner causing the public to believe that he planned to dedicate the road to public use; that he was legally capable to dedicate it; that the public acted upon that belief and will benefit from the dedication; and that the landowner offered and the public accepted the dedication.[367] Permitting a governmental authority "to grade, repair, improve, or fence off the roadway" may establish donative intent, but even a "long and continued use of the disputed road by the public raises a presumption of dedication."[368] In this case, older maps showed the road, and the county had maintained the road. Of particular interest in this case is that the origin of the road was "shrouded in obscurity" and there was evidence of "long and continued use of the road by the public."[369] This created a presumption that the land owner intended to dedicate the road to the public.[370]

In one adverse possession case worthy of note, *Blaylock v. Holland*, the Texas courts' general disregard for fences did not play out.[371] The construction of a chain link fence began the running of limitations, but suit was filed just prior to the ten year period.[372] Earlier activity when the fence did not exist was insufficient to create notice of an assertion of a hostile claim to the property.[373]

Also, the question of trespass-to-title-versus-declaratory-judgment causes of action continues to be an issue for the courts. A declaratory judgment action is often more attractive to a plaintiff because it provides a basis to obtain attorney's fees.[374] Trespass to try title does not permit recovery of attorney's fees, as has been discussed in previous survey issues, although there are limited circumstances permitting it under the adverse possession statutes involving a dispossession.[375] In *Richmond v. T.N. Wells*, a declaratory judgment action was

363. McCulloch v. Brewster County, 391 S.W.3d 612, 619 (Tex. App.—El Paso 2012, no pet.).
364. *Id.* at 614.
365. *Id.*
366. *Id.*
367. *Id.* at 616.
368. *Id.*
369. *Id.*
370. *Id.* at 618.
371. *See* Blaylock v. Holland, 396 S.W.3d 720, 723 (Tex. App.—Dallas 2013, no pet.).
372. *Id.* at 722–23.
373. *Id.* at 723.
374. *See* TEX. CIV. PRAC. & REM. CODE § 37.009 (West 2008).
375. J. Richard White & G. Roland Love, *Real Property*, 61 SMU L. REV. 1073, 1103 (2008).

appropriate to interpret a deed.[376] The court further noted that "generally, non-possessory interests are not proper subjects for a trespass-to-try-title action."[377] Moreover, the court touched on the question of actual notice by possession since, in this case, there was a lack of constructive notice, and it found that the existence of a pump jack did not put a grantee on notice of any interest claimed by a third party.[378]

Vernon v. Perrien is another instance where the court distinguishes the declaratory judgment from a trespass-to-try-title action by noting that a trespass-to-try-title action is statutory and relies on the superior title of the plaintiff.[379] "A suit to quiet title relies on the invalidity of the defendant's claim to the property," the effect of which is to declare invalid or ineffective a defendant's claim to title.[380]

In *Wilhoite v. Sims*, the court of appeals found a declaratory judgment action appropriate to cancel a deed that was voidable as opposed to requiring a trespass-to-try-title action.[381] "A suit for cancellation of a deed [was] an assertion of an equitable title" and was "not a claim of right to title and possession of [the] real property."[382] In this case, during the pendency of a divorce, the wife had attempted to transfer by quitclaim her one-half interest in the property.[383]

Finally, in the category of "no good deed goes unpunished," a property owner that had maintained a small family cemetery that was not his family's was precluded from arguing that the cemetery was an "abandoned cemetery" under Health and Safety Code § 711.010(b).[384] This prevented the property owner from relocating the cemetery to assist with oil and gas operations and from seeking removal (or permitting exhumation) to transfer the human remains to a perpetual cemetery.[385]

B. DEEDS AND CONVEYANCES

Several cases dealt with legal descriptions, including compliance with the Statute of Frauds. In one case, an appellate court considered the issue of a road dedicated to public use that stated it was one hundred feet wide but also provided that the dedication was subject to the condition that the curb line on the road would be fifteen feet inside the street line.[386] In effect, this limited the roadway to seventy feet.[387] At the same time, the dedication as a roadway did not state an easement for other than roadway purposes, and the thirty-foot space was

376. Richmond v. T. N. Wells, 395 S.W.3d 262, 267 (Tex. App.—Eastland 2012, no pet.).
377. *Id.*
378. *Id.* at 268.
379. Vernon v. Perrien, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied).
380. *Id.*
381. Wilhoite v. Sims, 401 S.W.3d 752, 760 (Tex. App.—Dallas 2013, no pet.).
382. *Id.* at 756.
383. *Id.*
384. Levandovsky v. Targa Res., Inc., 375 S.W.3d 593, 597–98 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
385. *Id.*
386. State v. NICO—WF1, LLC, 385 S.W.3d 45, 48 (Tex. App.—Corpus Christi 2010), *rev'd*, State v. NICO—WF1, LLC, 384 S.W.3d 818 (Tex. 2012).
387. *Id.*

not available for use, even for the public benefit, when it was inconsistent with the dedication.[388] The Supreme Court of Texas in reversed the decision in *State v. NICO–WF1, LLC.*[389] The court found that the dedication of an easement as a public right of way could not carry private restrictions that impaired the state's control and public use of the dedicated street.[390] A dedication of land for public use may include reasonable restrictions and limitations, but those limitations cannot be repugnant to the dedication or against public policy.[391] Rather than declare the entire grant as ineffective, the court sustained the dedication and found the condition ineffective.[392] In this case, then, a building that encroached several feet into the 100-foot right of way could be removed by the state.[393] For those seeking to expand their vocabulary, the encroachment was a "purpresture" or "an appropriation to private use to that which belongs to the public."[394]

In *El Dorado Land Company, L.P. v. City of McKinney*, a property conveyed to the city included a reversionary interest in the event that the land was used for anything other than a community park.[395] When the city violated the restriction, statutory immunity included an inability to force the city to re-grant.[396] The court treated the reverter as a conditional future interest.[397] Thus, while the dedicating grantor could not cause a reverter, it did have a right to seek compensation for the inverse condemnation.[398]

The Court of Appeals for El Paso took a somewhat similar approach in *Singer v. State*.[399] Two donation deeds to the State of Texas for public highway purposes included a reverter clause in the event that the land was not used for public highway purposes on or before January 1, 2000.[400] The grantors in this case did take steps to assert inverse condemnation.[401] The state argued that the language of the deeds created a condition subsequent, which, having been satisfied, though late, could not result in the automatic reversion and revestment of title.[402] A condition subsequent is language designating an event upon which the grantor has the power to terminate the grantee's interest.[403] The grantor must take steps to reenter or take an equivalent action to terminate the grantee's estate.[404] "A possibility of reverter is 'a future interest retained by a grantor after conveying a fee simple determinable, so that the grantee's estate terminates

388. *Id.* at 50–51.
389. State v. NICO–WF1, LLC, 384 S.W.3d 818, 820 (Tex. 2012).
390. *Id.* at 824.
391. *Id.* at 822.
392. *Id.* at 824.
393. *Id.*
394. *Id.* at 824 at n.2.
395. El Dorado Land Co., L.P. v. City of McKinney, 395 S.W.3d 798, 799–800 (Tex. 2013).
396. *Id.* at 801.
397. *Id.* at 800–01.
398. *Id.* at 804.
399. *See* Singer v. State, 391 S.W.3d 627 (Tex. App.—El Paso 2012, pet. denied).
400. *Id.* at 630.
401. *Id.* at 632.
402. *Id.*
403. *Id.* at 632 n.1.
404. *Id.* at 631–33.

automatically and reverts to the grantor if the terminating event ever occurs.'"[405] The court indicated that there were no specific words that controlled, but rather, the key was the intent at the time of the grant.[406] Language such as "while," "during," "until," or "so long as" typically establish an intent to create a fee simple determinable.[407] Phrases such as "upon condition that," "provided that," "but if," or "if it happens that" create a condition subsequent.[408] The deeds in question, even though they utilize a reference to reversion, did not specifically contain automatic reversion language.[409] Because the language in the deeds was unclear as to whether it created a condition subsequent or a possibility of reverter, any doubt was to be resolved in favor of a condition subsequent.[410] In addition, the deed used traditional fee simple absolute language, including "grant, give and convey" and a habendum clause that used the words, "to have and to hold the premises herein described and herein conveyed unto the State of Texas and its assigns forever."[411]

As a condition subsequent, because some activity had already begun by January 1, 2000, the court found that the grantors had failed to establish a right to title.[412] The grantors failed to timely reenter or take equivalent action to terminate the state's interest.[413] This case is a bit frightening in that it would appear the grantors generally intended for the property to return to them if not timely used for public highway purposes. The case demonstrates the effort to which the courts will go to protect public interests and to avoid finding a reverter. Any attorney drafting a deed to include a reverter, particularly when dealing with a public entity, should go to great lengths to set out the reversion and to make it clear that it is not a fee simple absolute and the grant is subject to reverter, *ipso facto*, without requiring the grantor to take any further action.

In *Ardmore, Inc. v. Rex Group, Inc.*, a description of the property that identified three sides with the fourth side being a line on an attached map was sufficient to describe the property.[414] This case was in a leasing context, but the court found that there was no distinction between determining an adequate legal description under deeds or a leasing instrument.[415] The map of a larger tract under lease was attached as an exhibit in support of a purchase option.[416] However, note that in *May v. Buck*, 100 acres centered on a point was an inadequate description.[417] Obviously, a 100-acre shape with a center point could be not only a circle, but also a square or even an irregular shape with a center point. The use of acreage to describe a legal description is rarely adequate because acreage is only a

405. *Id.* at 632 n.1.
406. *Id.* at 632 n.2.
407. *Id.*
408. *Id.*
409. *Id.* at 633.
410. *Id.*
411. *Id.*
412. *Id.* at 634.
413. *Id.*
414. Ardmore, Inc. v. Rex Grp., 377 S.W.3d 45, 59 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).
415. *Id.* at 55–60.
416. *Id.* at 51–52.
417. May v. Buck, 375 S.W.3d 568, 677 (Tex. App.—Dallas 2012, no pet.).

measure of area.

In another case, *Hahn v. Love*, the court of appeals in Houston again confirmed that the use of a tax ID number and a street address can be a sufficient legal description for purposes of conveying real property.[418] This case includes an interesting discussion of the judgment liens and their duration, and of the renewal and dormancy of a judgment.[419] This is an area often confused, and the court does an excellent job of separating a judgment, a writ of execution, and a dormancy from the lien created by an abstract of judgment under Texas Property Code Chapter 52.[420] No lien exists under a judgment until it is abstracted, recorded, and indexed.[421] In this case, the judgment debtor purchased property to which a judgment lien attached, but during the debtor's ownership, the judgment lien expired.[422] The judgment also became dormant for failure to issue a new writ of execution within ten years of its initial issuance.[423] When the application was filed to revive the judgment, a deed was recorded before the judgment could be revived and a new judgment lien abstracted.[424] However, subsequent to all of these events, a correction deed was filed to deal with the possible inadequate legal description noted above.[425] The judgment creditor argued that this was evidence that the first deed was void for lack of an adequate legal description and that the correction deed put a subsequent purchaser on notice of the second judgment lien.[426] The court found that this was not the case, that the first deed was adequate, and that the second judgment lien came too late.[427] Further, the court found that the correction deed was outside the chain of title and did not excite inquiry.[428]

Again, note that the court found that a subsequent correction deed in 2004 to add a proper legal description was not relevant since the earlier deed was adequate and that it was outside the chain of title.[429] This last finding is subject to some question since the statutory scheme for correction instruments indicates that they do "replace and substitute" for the original deed.[430] It also highlights some of the problems with current correction instrument legislation and indexing by the county clerks, which remains an issue for real property records and the county clerk's filing systems. It may well require the legislature to fix Texas Local Government Code §§ 193.003(a), (b) and 193.005.

More evidence of drafting lessons can be found in a number of 2012 Texas cases. Similar to *Hahn*, an exception for a riverbed acreage was sufficient to

418. Hahn v. Love, 394 S.W.3d 14, 20, 26–27 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).
419. *See id.* at 27–28.
420. *See id.*
421. *Id.*
422. *Id.*
423. *Id.*
424. *Id.*
425. *Id.* at 27.
426. *Id.*
427. *Id.* at 27–28.
428. *Id.* at 28.
429. *Id.* at 27–28.
430. TEX. PROP. CODE ANN. § 5.030(b) (West Supp. 2013).

except the property from a conveyance.[431] In *Hunsaker v. Brown Distributing Co.*, the terminology "now owned by grantor" referred to the fractional interest owned by the grantor so that the 1/2 conveyance resulted in the grantor conveying 1/2 of his interest instead of his entire 1/4 interest.[432] Finally, *Arco Petroleum Corp. v. BNW Property Co.* and *Chesapeake Exploration, L.L.C. v. BNW Property Co.* demonstrated that an executive right follows a conveyance of minerals unless expressly reserved.[433]

Also worth mentioning, the Texarkana Court of Appeals in *Champion v. Robinson* pointed out the presumption in favor of partitioning property in kind as opposed to partitioning by sale.[434] The court further presumed that minerals are equally distributed throughout a property unless there is a showing to the contrary.[435] In this case, there were numerous property interests in irregular sized properties and partition in kind was simply not appropriate.[436]

C. EASEMENTS

The Eastland Court of Appeals provides a good discussion of various easements in its decision in *Harrington v. Dawson–Conway Ranch, Ltd.*[437] The case itself is a reversal of a summary judgment granted to the dominant estate to the north.[438] The court reviewed, in particular, two theories of easements, by prescription and by necessity.[439] The court disregarded the possibility of an implied easement appurtenant because it was not pleaded.[440] To find an easement by necessity, the key points were that the necessity had to be a *strict* necessity, existing both at the time of severance and continuing at the present date.[441] Here, the dominant estate failed to prove that the necessity was continuing.[442]

The easement by prescription was also not available because the parties had jointly used the road, and such a use could not ripen into an easement by prescription.[443] The court spent significant time discussing the *Scott v. Cannon* case, which created a very limited exception to the exclusivity requirement for road usage.[444] It noted, specifically, that in *Scott* there was a dispute over a right

431. *See* Buckingham v. McAfee, 393 S.W.3d 372, 374 (Tex. App.—Amarillo 2012, pet. denied).

432. Hunsaker v. Brown Distrib. Co., 373 S.W.3d 153, 159 (Tex. App.—San Antonio 2012, pet. denied).

433. Arco Petroleum Corp. v. BNW Prop. Co., 393 S.W.3d 846, 852 (Tex. App.—El Paso 2012, pet. denied); Chesapeake Exploration, L.L.C. v. BNW Prop. Co., 393 S.W.3d 852, 857 (Tex. App.—El Paso 2012, pet. denied).

434. Champion v. Robinson, 392 S.W.3d 118, 125–26 (Tex. App.—Texarkana 2012, pet. denied).

435. *Id.* at 125.

436. *Id.*

437. Harrington v. Dawson–Conway Ranch, Ltd., 372 S.W.3d 711 (Tex. App.—Eastland 2012, pet. denied).

438. *Id.* at 714, 726.

439. *Id.* at 716–26.

440. *Id.* at 722.

441. *Id.* at 722–23.

442. *Id.* at 724.

443. *Id.* at 722.

444. *Id.* at 717–18 (discussing Scott v. Cannon, 959 S.W.3d 712 (Tex. App.—Austin 1998, pet.

to use the road.[445] The dominant estate had filed an affidavit claiming the road as a public road, had maintained and improved the road, and had performed other independent acts that were distinct and positive assertions of a right to use the road.[446]

The Eastland Court of Appeals again dealt with easements, this time with one that was written. In *McKenna v. Caldwell*, the granting party had reserved an easement "for purposes of providing a perpetual free, uninterrupted and unobstructed easement for access, ingress and egress to and from [the property]."[447] The fight was over the right to place a cattle guard and to install a gate across the property line.[448] Because the language was ambiguous as to these items, the court found a fact question for the jury.[449] Whether the language of the easement allowed for a gate or cattle guard depended on the intent of the parties.[450] For attorneys drafting easements to be reserved or granted, the Eastland Court directed attention to *Knight v. Buckbrier*, where easements were found to be unambiguous.[451] The easements in that case "specifically stated no barriers of any kind were to be erected, other than two gates already in existence, that would interfere with the free flow of access."[452] The court did note that most cattle guards would not be considered an interruption or obstruction, yet still returned the entire question back to the trial court for submission to the jury.[453]

D. RESTRICTIVE COVENANTS, CONDOMINIUMS, AND OWNERS' ASSOCIATION

Two cases highlight the potential dilemma to a developer of real property that seeks to retain the minerals. If the developer does not hold 100% of the minerals but does hold the executive rights, it may well find itself in a fiduciary quandry. The holder of the executive rights has a fiduciary duty to other mineral interests to develop the minerals, while the developer may desire to protect the real estate development from any oil and gas exploration and development, often through the use of restrictive covenants.[454] In *Friddle v. Fisher*, the existence of this dilemma and the fiduciary duty created a fact question for the jury.[455] Likewise, the Ft. Worth Court of Appeals found a fact question as to breach of duty in *Bradshaw v. Steadfast Financial, LLC*.[456] The *Bradshaw* case also involved issues of self-dealing in connection with structuring bonus payments and

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denied)).

445. *Id.*

446. *Id.*

447. McKenna v. Caldwell, 387 S.W.3d 830, 832–33 (Tex. App.—Eastland 2012, no pet.).

448. *Id.* at 833.

449. *Id.* at 836.

450. *Id.*

451. *Id.* at 835 n.2 (citing Knight v. Buckbrier, No. 04-01-00539-CV, 2002 WL 1285292 (Tex. App.—San Antonio June 12, 2012, no pet.) (mem. op., not designated for publication)).

452. *Id.*

453. *Id.* at 835.

454. *See* Friddle v. Fisher, 378 S.W.3d 475, 480–81 (Tex. App.—Texarkana 2012, pet. denied).

455. *Id.* at 428.

456. Bradshaw v. Steadfast Fin., LLC, 395 S.W.3d 348, 370 (Tex. App.—Ft. Worth 2013, no pet.).

royalties.[457]

E. HOMESTEAD

There were not many case developments in the area of homestead during the survey period, but one case out of the U.S. Bankruptcy Court in the Western District of Texas should draw some attention.[458] In this case, the Chapter 7 trustee objected to the debtor's homestead exemption, as did a judgment creditor, because the judgment resulted from a violation of Texas securities laws that was not dischargeable under 11 U.S.C. § 523(a)(19).[459] The Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 (BAPCPA) caps a "debtor's homestead exemption for certain violations of federal or state securities laws."[460] The interesting aspect of this case arises because the debtor's non-filing spouse had her own business that provided income for the support of the family.[461] The case spends much time talking about valuation and income but the most interesting part is the court's handling of the determination to sell the homestead because it exceeded the BAPCPA cap.[462] The court declined to allow the non-debtor spouse to assert a separate homestead exemption for the homestead property.[463]

Community property and jointly owned property are part of the bankruptcy estate even if only one spouse files for bankruptcy.[464] However, the court determined that the non-filing spouse does not have an independent interest in the homestead so as to stack the caps.[465] On the other hand, had both husband and wife filed as joint debtors they would have been entitled to claim a stacking of the homestead exemptions.[466] Most troubling though, the court followed *Kim* and indicated that not only could the non-debtor not claim an exemption but that "[t]here is also no provision for compensation for the non-filing spouse's property interest."[467] Not even the Internal Revenue Service in seeking to enforce a federal tax lien against one spouse enjoys that benefit.[468]

The court's analysis would appear flawed in that it failed to give any respect to the community property or homestead interest of the non-debtor spouse, whether through handling sale proceeds or through allowing an exemption. How would the court have determined the case if both spouses were debtors or if the spouses were tenants in common? The court seems to reach a conclusion that makes no difference whether the property was community or separate and, again, gives a judgment creditor even more rights than the federal government

457. *Id.* at 351.
458. *See In re* Bounds, 491 B.R. 440 (Bankr. W.D. Tex. 2013).
459. *Id.* at 443.
460. *Id.* at 444.
461. *Id.* at 446.
462. *Id.* at 450–52.
463. *Id.* at 451.
464. *Id.* (discussing *In re* Kim, 405 B.R. 179 (Bankr. N.D. Tex. 2009)).
465. *Id.*
466. *See id.* at 451–52.
467. *Id.*
468. *See* Benchmark Bank v. Crowder, 919 S.W.2d 657, 662 (Tex. 1996).

would have in pursuing a federal tax lien.[469]

F. TITLE INSURANCE

Hahn v. Love, discussed previously regarding deeds and legal descriptions, also includes a thorough discussion regarding title insurance examination and imputed knowledge to the parties.[470] This case involved claims of fraudulent transfer, and the plaintiff sought to defeat the bona-fide-purchaser position taken by the purchaser.[471] The court repeated the basic premise that the title company searches for its own benefit in issuing a title insurance policy and has no duty to examine title or disclose what it may or may not find.[472] Most importantly, "an examination is not undertaken for the prospective grantee or lienholder to whom the policy will finally issue," and any information discovered by the title company was not imputed to the purchaser.[473] The title company had no duty to even disclose what it might find in its examination, potentially adverse or not.[474]

IX. MISCELLANEOUS

A. NUISANCE/TRESPASS

During the survey period a very good discussion of nuisance and trespass was authored by the Tyler Court of Appeals in *Mathis v. Barnes*.[475] This case involved flooding caused by a neighbor's construction of a road.[476] The situation arose from two adjoining rural properties with a creek running through them.[477] The plaintiff was upstream and had sought to cultivate "pristine wetlands" on a portion of his property.[478] The property was a "watering, nesting, and roosting place for waterfowl" and had "only limited seasonal fluctuation" due to "multiple beaver dams" and other natural effects.[479] The property downstream was used mostly as pastureland, and the owner constructed a road across the property "so that he could more easily access the back pasture."[480] However, this "road . . . effectively served as a dam where it crossed [the creek]."[481] This dam/road caused water to rise upstream.[482] The downstream owner sought to install culverts to address some of the problem, but, during a flood, the road washed away and the water level on the upstream property significantly

469. *See id.*
470. Hahn v. Love, 394 S.W.3d 14, 35–36 (Tex. App.—Houston [1st Dist.] 2012, pet. denied).
471. *Id.* at 21.
472. *Id.* at 35.
473. *Id.*
474. *Id.*
475. Mathis v. Barnes, 377 S.W.3d 926, 930–31 (Tex. App.—Tyler 2012, no pet.).
476. *Id.* at 928.
477. *Id.*
478. *Id.*
479. *Id.*
480. *Id.*
481. *Id.*
482. *Id.*

retreated.[483] In essence, the beavers and other natural circumstances had adjusted to the road/dam, but the water was gone once the situation was out of kilter.[484] The upstream owner asserted a nuisance and trespass among other claims.[485]

The court noted that "[a] nuisance is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or annoyance to persons of ordinary sensibilities attempting to use and enjoy it."[486] A determination of the nuisance depends upon the "kind of damage done, rather than any particular type of conduct."[487] Of note, the downstream owner raised the "feral hog defense," among other things, and the jury found that the flooding was not such that it was a nuisance.[488] There was also disputed evidence as to whether the beavers would return to repair the dams to return the property to its wetland condition.[489]

With the respect to trespass, the court defined it as an "unauthorized entry upon the land of another."[490] Again, the jury agreed with the downstream owner that no damage was done, even though a trespass may have occurred by reason of the waters being forced back upstream.[491] Possibly the jury in this case was not very sympathetic to the upstream owner and the case turns on its facts, but the discussion of nuisance and trespass is useful. It also brings to life the "feral hog defense."[492]

B. PREMISES LIABILITY

In the area of premises liability, the Houston Court of Appeals for the 14th District rendered a very "tough" decision in yet another case that proves the old adage of "no good deed goes unpunished." In *Plunket v. Nall*, the homeowners held a New Year's Eve party.[493] The homeowners advised guests that anyone remaining at midnight was to spend the entire night at the home.[494] This action was to help ensure that "no party guest drove while intoxicated."[495] Thus, the homeowners took on a duty not otherwise imposed under Texas law.[496] The homeowners took no steps to enforce the rule in that they did not retain car keys or take any other action to prevent guests from leaving.[497] Of course, a

483. *Id.*
484. *Id.* at 929.
485. *Id.*
486. *Id.* at 930.
487. *Id.*
488. *Id.*
489. *Id.*
490. *Id.* at 931.
491. *Id.*
492. *Id.* at 930.
493. Plunket v. Nall, 374 S.W.3d 584, 585 (Tex. App.—Houston [14th Dist.] 2001), *rev'd*, 404 S.W.3d 552 (Tex. 2013)).
494. *Id.*
495. *Id.*
496. *See* Graff v. Beard, 858 S.W.2d 918, 918–22 (Tex. 1993).
497. *Plunket*, 374 S.W.3d at 585.

guest and his girlfriend attempted to leave at 2 a.m. and an accident occurred.[498] Accordingly, while no social host liability might exist, a cause of action for negligence for the assumed duty survived a motion for summary judgment.[499]

In other cases dealing with premises liability, the San Antonio Court of Appeals in *Dietz v. Hill Country Restaurants, Inc.* found no evidence that uneven pebbles and concrete in an aggregate walkway posed an unreasonable risk of harm or that the owner was on notice.[500] In *City of Dallas v. Prado*, the Dallas Court of Appeals found that liability under the Texas Tort Claims Act required actual knowledge of a premises defect.[501] Moreover, in *Dow Chemical Company v. Abutahoun* the court pointed out that Texas Civil Practice and Remedies Code § 95.003 requires actual knowledge in the area of owner liability to a contractor's employees.[502]

C. BROKERS

With respect to the Texas Finance Code § 156.406(b), commonly referred to as the Broker Licensing Requirements, a lender/mortgagee did not have standing as "an aggrieved person" to seek recovery against an unlicensed broker.[503] In order to be an "aggrieved person" with standing to assert a cause of action under this section of the Finance Code, it is necessary that the person directly paid the brokerage fee to the unlicensed broker.[504] In *Dohalick v. Moody National Bank*, the bank advanced loan funds to a borrower who then used those loan proceeds to pay the brokerage fee.[505] This was not a direct payment but rather a payment by the borrower, even though it used loan proceeds to make the payment.[506] Note also that in this case there were no lender instructions requiring the use of the proceeds to make such a payment.[507]

D. WATER RIGHTS

The Texas Supreme Court dealt with the interpretation and application of the Open Beaches Act to easements for public beachfront access.[508] In *Severance v. Patterson*, the case dealt with whether or not a "rolling" public beachfront access easement existed under Texas law.[509] Along the Gulf Coast, there exist two easements:

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498. *Id.*
499. *Id.* at 588–89.
500. Dietz v. Hill Country Rests., Inc., 398 S.W.3d 761, 767 (Tex. App.—San Antonio 2011, no pet.).
501. City of Dallas v. Prado, 373 S.W.3d, 848, 853 (Tex. App.—Dallas 2012, no pet.) (discussing TEX. CIV. PRAC. & REM. CODE ANN. §§ 101.021(2), 101.022(a) (West 2011)).
502. Dow Chemical Co. v. Abutahoun, 395 S.W.3d 335, 343 (Tex. App.—Dallas 2013, pet. denied).
503. Dohalick v. Moody Nat'l Bank, 375 S.W.3d 537, 540–41 (Tex. App.—Houston [14th Dist.] 2012, no pet.).
504. *Id.* at 541.
505. *Id.* at 539.
506. *Id.* at 543.
507. *See id.* at 544.
508. Severance v. Patterson, 370 S.W.3d 705, 713 (Tex. 2012).
509. *Id.*

(1) The first one extends from low tide to high tide. This is land that is always public and reserved to the state. It is often referred to as a "wet" beach.
(2) The second more difficult easement is the "dry" beach that extends from high tide to the mean vegetation line.[510]

This second easement only exists if retained by the state initially or if an easement has been granted to the state by a private landowner.[511] In the case of the west beach of Galveston Island, the state had not retained a dry beach easement but had obtained certain easements from private interests.[512] As boundaries along the ocean change due to slow erosion or accretion, the easement may slightly move.[513] These changes are typically gradual and imperceptible.[514] However, avulsive events such as storms and hurricanes can drastically alter preexisting boundaries.[515] This was the case with Hurricane Rita.[516]

The question then arose as to whether or not the easement rolled forward onto the beach due to significant changes in the high tide and vegetative line.[517] In this case, a rolling easement would have placed Ms. Severance's home in the public beach access easement and permitted the state to remove the home.[518] The Texas Supreme Court held that a public beachfront dry easement did not roll forward, and the public accordingly lost any interest in the privately owned dry beach.[519] In other words, the easement did not migrate or roll landward to encumber other parts of the parcel as a result of an avulsive event.[520] Thus, while the public has an important interest in the enjoyment of Texas public beaches, the right to exclude others from privately owned realty is a fundamental right possessed by private property owners.[521] A taking of Ms. Severance's property would have resulted in a taking in violation of the 5th Amendment of the U.S. Constitution.[522] Note, however, the wet beach is always public property and owners like Ms. Severance can lose improvements if the mean high tide line captures it.[523] To the contrary, in the event of avulsive action, where the public once had access across a "dry" beach public easement, there may now be no public access.[524] Thus, a public "wet" easement may, in realty, become a private beach.[525]

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510. *Id.* at 713–14.
511. Luttes v. State, 324 S.W.2d 167 (Tex. 1958).
512. *Severance*, 370 S.W.3d at 724.
513. *Id.* at 724–25.
514. *Id.*
515. *Id.*
516. *Id.* at 715.
517. *Id.*
518. *Id.*
519. *Id.* at 723–24.
520. *Id.* at 724–25.
521. *Id.*
522. *Id.* at 725.
523. *See id.*
524. *Id.* at 723–24.
525. *See id.*

X. CONCLUSION

As would be expected following an economic downturn, there were significant numbers of cases addressing foreclosure issues; unfortunately, some of these decisions were wrongly decided. Decisions regarding the standing of a property owner to challenge the legal authority of assignees of the mortgage were cogently addressed and confirmed in *Homecomings Financial*.[526] This concept, while not directly addressed, was supported by the decision in *Cowin*.[527] On the other hand, the *Marsh* decision, while adequately addressing the "robo signer" issues regarding proof of authority to execute documentation, added to the confusion on standing of a property owner to challenge mortgage assignments by concluding just the opposite from *Homecomings Financial*.[528] Hopefully, future case law will clarify this matter.

As is normally the case, a number of cases reflect the importance in careful drafting of documentation. In *Garcia*, practitioners are warned to draft escrow provisions to distinguish between the duty to obtain or renew insurance as opposed to the mere payment of premiums therefor.[529] Clear documentation of the representative capacity in which an individual signs was lacking in and determinative of jurisdiction in *Tabacinic*.[530] The drafting and interpretation of reliance provisions, "as-is" clauses, and merger clauses continue to prove thorny for both the practitioner (in drafting) and the courts (in interpretation and enforcement). *Fazio* presents an excellent analysis of such difficulties in the majority, concurring, and dissenting opinions.[531]

While the courts revisited, defined, and clarified a number of areas, such as FED jurisdiction, declaratory judgments, roads and easements, and water rights, they also created confusion and concern in some other areas. Most of this was motivated by protection of the state or the attempt to avoid what was perceived as an inequitable result. The protective requirements of a certificate of merit and other protections provided to professionals were somewhat eroded, and the court stretched to turn reverters into conditions subsequent and sustain legal descriptions. Also, concerns that may require legislative action arose in the areas of homestead rights in bankruptcy and the use of correction deeds. Finally, land use planners should also be very aware of the legal dilemma that may arise for the developer seeking to avoid mineral exploration and development but who at the same time holds the executive rights, which results in a fiduciary duty to other mineral interests.[532]

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526. *See* Miller v. Homecomings Fin., 881 F. Supp. 2d 825 (S.D. Tex. 2012).

527. *See In re* Cowin, 492 B.R. 807 (Bankr. S.D. Tex. 2013).

528. *Compare id.*, *with Miller*, 881 F. Supp. 2d at 825.

529. *See* Garcia v. Bank of N.Y. Mellon, No. 3:12-CV-0062-D, 2012 WL 692099, at *1 (N.D. Tex. Mar. 5, 2012).

530. *See* Tabacinic v. Frazier, 373 S.W.3d, 658 (Tex. App.—Dallas 2012, no pet.).

531. *See* Fazio v. Cypress/GR Houston I, L.P., 403 S.W.3d 390 (Tex. App.—Houston [1st Dist.] 2013, pet. denied).

532. *See* Bradshaw v. Steadfast Fin., LLC, 395 S.W.3d 348 (Tex. App.—Ft. Worth 2013, no pet.).