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Real Property

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REAL PROPERTY

*J. Richard White**
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I. INTRODUCTION

This article covers cases from Southwestern Reporter (Third) volumes 560 through 580 and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

This Survey period saw a number of cases of first impression, covering issues involving the waiver of security interest for failure to take remedial actions, the right for outsider reverse veil-piercing, and whether a limited partner could waive the attorney–client privilege for the partnership. The Texas Supreme Court provided jurisprudence on the parol evidence rule in a debt satisfaction matter and the “public use” doctrine in condemnation and broke new legal ground by permitting a tenant to terminate a lease for breach of express covenants in a lease when the lease expressly provided the only remedy to be damages.

Other important decisions addressed construction termination for mechanics lien filings, abandonment of a prior acceleration of debt, limitations based on an acceleration notice, contributions among co-guaran-

tors, evidence needed for a deficiency judgment, acknowledgment of a debt to avoid limitations, the duty of executive right holders toward non-executive right holders, the rules governing easements by necessity and easements by implication, the use of forcible detainer action to evict a tenant for something other than non-payment of rent, and, in what seems to be a yearly saga, when a case can be dismissed for failure to comply with the certificate of merit statute.

Cases of particular interest to practitioners, due to dissents, split of opinions, or absence of jurisprudence, involved whether to seek avoidance or damages under a contract, details for a demand notice, waivers of limitations, a termination option in a lease, electronic signatures, explicit maintenance provisions, and *res judicata* in foreclosure actions.

Perhaps most important was the purported waiver of limitations for a deficiency claim against a guarantor.

II. MORTGAGES/FORECLOSURE/LIENS

A. FORCIBLE DETAINER AFTER FORECLOSURE SALE

*Isaac v. CitiMortgage, Inc.*¹ involved a typical forcible detainer action after a non-judicial foreclosure. The deed of trust executed by Isaac contained a post foreclosure provision that read: “If possession is not surrendered, Borrower . . . shall be a tenant at sufferance and may be removed by writ of possession”² A notice to vacate was served by CitiMortgage upon Isaac by certified mail and personal delivery, but Isaac refused to vacate. In response to the forcible detainer action, Isaac pled to the jurisdiction of the court and alleged: first, there was no continuity between the deed of trust and CitiMortgage’s substitute trustee’s deed, which was a jurisdictional prerequisite; second, the pleadings were improperly verified; and third, there was no refusal to vacate.

As to the first challenge, the First Houston Court of Appeals discussed the apparent defect in title raised by Isaac in a separate district court suit (which Isaac lost in the trial court and on appeal)³ alleging lack of privity of contract between Isaac and CitiMortgage. It is well-established law in Texas that issues of title do not need to be adjudicated in a suit for possession, unless the right to immediate possession requires the resolution of a title dispute.⁴ In fact, the elements for a forcible detainer action require proof only that: “(1) the substitute trustee conveyed the property by deed . . . ; (2) a landlord-tenant relationship existed and the occupants became tenants at sufferance; (3) [the landlord] gave proper notice . . . to vacate . . . ; and (4) the occupants refused to vacate”⁵ None of these elements require proof of title. CitiMortgage proved the existence of the landlord-tenant relationship by submission of the deed of trust contain-

1. 563 S.W.3d 305 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

2. *Id.* at 312.

3. *Id.* at 308.

4. TEX. R. CIV. P. 510.3(e).

5. *Isaac*, 563 S.W.3d at 311.

ing the language quoted above;⁶ therefore, CitiMortgage had the right to immediate possession. As to the jurisdictional issue, Isaac presented no evidence to contradict long-standing Texas law that a deed of trust containing “tenant at sufferance” language would establish the landlord-tenant relationship⁷ and the trustee deed established the owner and landlord of the subject property. Therefore, the court of appeals had subject matter jurisdiction over the forcible detainer action.⁸

CitiMortgage’s pleadings were verified by its attorney of record, which was challenged by Isaac as not being in strict compliance with the requirements of Texas Rule of Civil Procedure 510.3(e).⁹ However, the court of appeals noted numerous cases supporting a petition in an eviction case verified by the party’s attorney of record.¹⁰ The court found such representative capacity was a necessity for entity parties for which execution is required by an individual person, and which has been authorized by Rule 500.4¹¹ in eviction cases in which entities can be represented by non-attorney employees or officers.¹² Further, Rule 502.1¹³ also allowed execution of pleadings by an attorney of record.¹⁴ Therefore, the court of appeals held Isaac’s argument was inappropriate due to the expressed language of applicable rules as well as the reality that business entities operate through agents.

Finally, as to Isaacs’ assertion that there was no evidence of their refusal to vacate the property, the court of appeals cited numerous examples of evidence Texas courts have accepted to prove refusal to vacate the property, including: (1) an appeal bond which listed the property address of the alleged tenant; (2) the alleged tenant having been served with the notice of the forcible detainer suit at the property; (3) a sworn complaint stating that the alleged tenant was given notice to vacate and refused to do so; and (4) that there is a tacit admission that the tenant remained in possession of the property by the continued prosecution of an appeal awarding possession to the lienholder.¹⁵ Isaac was served the notice to vacate by certified mail at the property and was served with notice of the forcible detainer petition at the property; consequently, the refusal to vacate was deemed sufficiently proven by such evidence submitted by CitiMortgage.¹⁶

6. *Id.*

7. *Id.* at 312.

8. *Id.*

9. TEX. R. CIV. P. 510.3(e).

10. *Isaac*, 563 S.W.3d at 313.

11. TEX. R. CIV. P. 500.4.

12. *Isaac*, 563 S.W.3d at 313.

13. TEX. R. CIV. P. 502.1.

14. *Isaac*, 563 S.W.3d at 314.

15. *Id.* at 315.

16. *Id.* at 316.

B. TAX LIEN TRANSFERS

*Fenlon v. Harris County*¹⁷ addressed sufficiency of the evidence in asserting a tax lien transfer. The original property owner, James, was delinquent on several years' taxes and sought assistance from Propel Financial Services' (Propel) predecessor for payment of the delinquent taxes. Initially, Propel paid taxes for the years 2003 through 2007, and obtained the two required tax lien transfer documents: (1) authorization from the owner to make such payments; and (2) certification of payment and tax lien transfer by the taxing authority.¹⁸ The taxing authority assigned the tax liens to Propel and James signed a note and deed of trust in favor of Propel to evidence and secure payment. During the pendency of the tax suit, the property was transferred by James's heirs to the plaintiff, Fenlon. Fenlon was added to the suit and the trial court appointed a tax master who found taxes were owed and that the taxing authority should recover for taxes for the years 2010 through 2016 and that Propel should recover taxes for the years 2003 to 2007.

On appeal, Fenlon alleged that property owner authorization for the payment of taxes was not in evidence. Propel prepared a business records affidavit which was filed with the district clerk on September 8, 2016. The appellate records contain the business records affidavit.¹⁹ The business records affidavit included: (1) a "Transferred Tax Lien Payoff Statement"; (2) a "Tax Lien Transfer Account Statement"; (3) the tax lien note and deed of trust documents; and (4) an "Affidavit Authorizing Payment of Taxes and Transfer of Tax Lien" signed by James.²⁰ The First Houston Court of Appeals found that the business records affidavit included the relevant information for the authorization from James for Propel to pay the taxes for the disputed years 2006 through 2007. Such affidavit clearly stated: "[R]equest and authorize [tax lender] . . . to pay the ad valorem taxes . . . for the tax year 2006–2007."²¹ The record also contained the required tax authority certification of payment, the transfer of the tax lien, and the recordation of the certification of same.²² Such evidence was held to show a valid tax lien transfer.²³

C. PRIORITY OF LIEN – "CONSTRUCTION TERMINATION" AND TAX LIEN SUBROGATION

In *Lyda Swinerton Builders, Inc. v. Cathay Bank*,²⁴ a construction lender's rights with respect to mechanic's lien claims and tax liens were examined for the termination date of the contract. Basically, Lyda Swinerton Builders contracted to construct improvements for Park 8.

17. 569 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

18. *Id.* at 787.

19. *Id.* at 793.

20. *Id.*

21. *Id.* (emphasis removed).

22. *Id.*

23. *Id.* at 794.

24. 566 S.W.3d 836 (Tex. App.—Houston [14th Dist.] 2018, pet. filed).

Park 8 was slow in making payments and the contractor suspended work as of October 4, 2007, but certain equipment was maintained on site in case the project resumed. On May 20, 2008, the contractor sent a notice of intent to terminate the contract and filed suit in October 2008. The construction project was started without financing, but during the term of the construction, Park 8 obtained financing from Cathay Bank. A loan disbursement by the bank paid off the existing tax liens. The contractor filed at least four separate mechanic's liens affidavits totaling over \$800,000, and a dispute arose between the lender and the contractor as to priority of liens. To determine the lien priorities, there had to be a determination of when the indebtedness accrued.²⁵ Under the statute, the indebtedness accrued on the last day of the month in which the contract was terminated, completed, finally settled, or abandoned.²⁶ In this case, there was not a written termination and the lender pushed for an abandonment termination as of the October 4, 2007 suspension of work.²⁷ However, the trial court held the construction contract was "constructively terminated" as of January 4, 2008, ninety days after the work suspension.²⁸ On appeal, the Fourteenth Houston Court of Appeals considered the definition of abandonment under the statute. The court of appeals concluded that the statute did not recognize the concept of "constructive termination" as a basis for determining when debt accrues.²⁹ Because the trial court's judgment on debt accrual depended solely upon its conclusion as to constructive termination, its findings were erroneous with respect to the timing of the debt accrual.³⁰

Also, Cathay Bank alleged that its foreclosure sale should have taken the priority over mechanic's liens because of the ad valorem tax liens that it paid off and to which it was equitably subrogated under common law principles.³¹ In the prior appellate proceeding between these parties,³² the Fourteenth Houston Court of Appeals recognized that for common law subrogation of a statutory tax lien right there are additional hurdles.³³ Those additional hurdles include prejudice to the contractor as well as to the lender and unjust enrichment to the contractor if the tax lien subrogation was not allowed.³⁴ Because the trial court relied solely on the prejudice to the contractor, it failed to consider all equitable factors necessary; consequently, its conclusion of law was in error and harmful to the bank.³⁵ On remand, the appellate court required consideration of all ap-

25. TEX. PROP. CODE ANN. § 53.053(b).

26. *Id.*

27. *Lyda Swinerton*, 566 S.W.3d at 839. Also, the court acknowledged that the absence of completion and final settlement were not in dispute. *Id.*

28. *Id.* at 840.

29. *Id.* at 842.

30. *Id.*

31. *Id.* at 842-43.

32. *Lyda Swinerton Builders, Inc. v. Cathay Bank*, 409 S.W.3d 221 (Tex. App.—Houston [14th Dist.] 2013, pet. denied).

33. *Id.* at 249-50.

34. *Lyda Swinerton*, 566 S.W.3d at 843-44.

35. *Id.* at 844.

propriate equities related to subrogation (such as unjustified enrichment if subrogation of the tax liens were not allowed) and not just whether the contractor would be prejudiced.³⁶

D. NON-WAIVER OF SECURITY INTEREST

As a matter of first impression, the Eleventh Eastland Court of Appeals in *Legacy Bank v. Fab Tech Drilling Equipment, Inc.*³⁷ addressed whether a prior perfected security interest in accounts receivable could be waived by failure of the secured party to take appropriate remedial action. A revolving line of credit existed between Legacy Bank, as the lender, and Canyon Drilling Company, as the debtor, evidenced by a note, security agreement, and lock box agreement. The trade creditor of Canyon Drilling, Fab Tech, obtained a default judgment against Canyon and filed a writ of garnishment against accounts receivables owed to Canyon. Legacy Bank's intervention in the garnishment action asserted its perfected security interest on the collateral. After the garnishment action commenced, Legacy Bank provided a notice of default to Canyon, but continued to advance funds to Canyon. Legacy Bank ultimately foreclosed on the collateral. Fab Tech alleged, and the jury agreed, that Legacy Bank lost its priority status due to a waiver by "intentionally surrender[ing] a known right."³⁸ On appeal, Legacy challenged the legal sufficiency of the jury findings and resulting court order. In its analysis, the court noted that under Uniform Commercial Code (U.C.C.) Section 9.317,³⁹ a prior perfected security interest has priority over a later judgment lien that is attached pursuant to a garnishment action.⁴⁰ That was consistent with other commentaries cited and reviewed by the court.⁴¹ Also, U.C.C. Section 9.201(a)⁴² generally provided that "a security agreement is effective according to its terms between the parties, against purchasers of the collateral, and against creditors."⁴³ Fab Tech asserted that Legacy implicitly waived its security interest in the accounts receivable of Canyon because Legacy:

(1) allow[ed] [the debtor] to remain in default for several years without making demand, accelerating the debt, liquidating collateral, or otherwise enforcing its security interest; (2) not demanding payment until a year after [the judgment creditor] received a judgment . . . and more than six months after . . . fil[ing] the writ of garnishment; and (3) making a "nominal halfhearted demand on [the debtor] solely to save face" before loaning [the debtor] more than \$2 million in additional funds.⁴⁴

36. *Id.*

37. 566 S.W.3d 922 (Tex. App.—Eastland 2018, pet. denied).

38. *Id.* at 925–26.

39. See TEX. BUS. & COM. CODE ANN. § 9.317.

40. *Fab Tech*, 566 S.W.3d at 926.

41. *Id.*

42. See TEX. BUS. & COM. CODE ANN. § 9.201(a).

43. *Id.*

44. *Fab Tech*, 566 S.W.3d at 927.

As a case of first impression, the court looked mostly to the Oregon Court of Appeals in *Davis v. F.W. Financial Services, Inc.*⁴⁵ The *Davis* court reviewed similar cases around the country, categorizing them into two types: the waiver approach and the trace and recapture approach, and concluded that the trace and recapture approach was more authoritative and persuasive.⁴⁶ The Texas *Fab Tech* court quoted favorably from *Davis* that “a garnishor is entitled to take the collateral; however, in doing so, the garnishor takes traceable collateral subject to the secured party’s interest.”⁴⁷

Additionally, the *Fab Tech* court specifically rejected the argument that the senior secured creditor waived its security interest under equitable principles by not enforcing its rights prior to the attachment of a junior creditor’s lien.⁴⁸ This position was supported under the U.C.C.⁴⁹ “[T]he disposition by a junior [creditor] would not cut off a senior’s security interest.”⁵⁰ Furthermore, a Texas writ of garnishment “fixes a lien on the debtor’s property or debts due him, ‘subject to prior valid rights and liens against such property or debt.’”⁵¹ Therefore, a garnishor obtains no rights greater than that of the judgment debtor.⁵² Even though waiver is a valid defense to enforcement of a security interest, a waiver must be an intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.⁵³ Consequently, there can be no implied waiver unless the person sought to be charged with committing the waiver says or does something that is inconsistent with an intent to rely upon such rights.⁵⁴

In this case, the security agreement contained a non-waiver clause, which in relevant part, read as follows: “[Legacy] shall not be deemed to have waived any rights . . . unless such waiver is given in writing and signed by [Legacy]. No delay or omission . . . in exercising any right shall operate as a waiver of such right”⁵⁵ The Eleventh Eastland Court of Appeals emphasized that non-waiver clauses had recently been approved by the Texas Supreme Court in *Shields Ltd. Partnership v. Bradberry*.⁵⁶ In conjunction to such non-waiver clause, U.C.C. Section 9.201⁵⁷ provided that “a security agreement is effective according to its terms between the parties, against purchasers of collateral, and against creditors.”⁵⁸ Fab

45. 317 P.3d 916 (2013).

46. *Id.* at 927–30.

47. *Fab Tech*, 566 S.W.3d at 928.

48. *Id.* at 930.

49. See TEX. BUS. & COM. CODE ANN. § 9.610 cmt. 5.

50. *Fab Tech*, 566 S.W.3d at 930.

51. *Id.*

52. *Id.*

53. *Id.* at 931.

54. *Id.*

55. *Id.* at 932.

56. 526 S.W.3d 471 (Tex. 2017) (as a general proposition, non-waiver provisions are binding and enforceable).

57. See TEX. BUS. & COM. CODE ANN. § 9.201(a).

58. *Id.*

Tech was bound by the terms and provisions of the security agreement, which contained a non-waiver provision. Because there was no evidence presented of actions constituting an express waiver of its rights, Legacy Bank prevailed. Consequently, practitioners have been alerted not to rely on pure delay of remedial actions, but must seek and present proof of specific, intentional acts of waiver.

E. ABANDONMENT OF ACCELERATION

*Swoboda v. Ocwen Loan Servicing, LLC*⁵⁹ addressed the abandonment of a note acceleration. Swoboda obtained a home equity loan but stopped making monthly payments in April 2008. The lender sent its first notice of acceleration on July 22, 2008 and filed for a foreclosure petition under Rule 736⁶⁰ on August 22, 2008; however, that proceeding was dismissed for want of prosecution. There were a second and third notice of acceleration and four more foreclosure petitions filed leading to the subject case. The last foreclosure petition was contested by Swoboda on the basis that the four-year statute of limitation had lapsed prior to the filing of the fourth foreclosure petition on May 6, 2013, more than four years from the date of the first acceleration. In response, the lender argued that it had voluntarily abandoned its prior two accelerations by certain events; in which event, only the third acceleration on January 28, 2013 was effective, which was clearly less than four years from the filing of the final foreclosure action.

Each party brought motions for summary judgment and the trial court denied Swoboda's motion and granted the lender's motion; the Fourteenth Houston Court of Appeals addressed the validity of the rulings on these two motions. First, the court reviewed the four-year statute of limitation,⁶¹ but noted that Texas law allowed for the unilateral abandonment of the acceleration by the lender.⁶² This acceleration abandonment concept is governed by both the general law of waiver and by Texas procedural rules.⁶³ Under common law waiver theory, the elements are: (1) an existing right; (2) actual knowledge of the right; and (3) intent to relinquish such right or conduct inconsistent with the right.⁶⁴ The procedural rules⁶⁵ required an abandonment by written notice of rescission given by the lender to all debtors.⁶⁶ The court of appeals described this statutory method as the "best means of achieving an abandonment" of acceleration.⁶⁷ However, written notice is not an exclusive method for abandon-

59. 579 S.W.3d 628 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

60. TEX. R. CIV. P. 736.

61. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(a).

62. *Swoboda*, 579 S.W.3d at 632 (citing *Holy Cross Church of God in Christ v. Wolf*, 44 S.W.3d 562, 566 (Tex. 2001)).

63. *Id.* at 632–33.

64. *Id.* at 632 (citing *Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008)).

65. TEX. CIV. PRAC. & REM. CODE ANN. § 16.038(a).

66. *Id.* § 16.038(b).

67. *Swoboda*, 579 S.W.3d at 633.

ment.⁶⁸ Therefore, the court looked at the other events the lender alleged constituted an abandonment. A typical event of abandonment is the acceptance by the lender of installment payments after the default;⁶⁹ however, that was not applicable in this case since Swoboda made no payments after the initial default.

The first alleged abandonment event was a loan modification agreement. The lender notified Swoboda of preapproval for a loan modification conditioned on execution of the loan modification agreement and making a down payment. Such notice was very specific on the requirements that the “loan modification will not be complete until . . . the documents [were] properly executed and the down payment[]” made.⁷⁰ Swoboda did not satisfy these conditions but requested other modifications, which were made. A loan modification agreement was ultimately signed and returned by Swoboda, but without a down payment, and was never implemented.⁷¹ Under these facts, the court concluded such events did not constitute an abandonment of the acceleration, rejecting the lender’s arguments.⁷² The first lender argument was that enforceability of the modification should be irrelevant for purposes of an abandonment. However, the court distinguished the lender’s case authorities from the current case because the debtor in those cases had actually remitted post-acceleration payments which were accepted by the lender, whereas Swoboda had remitted no payments.⁷³ The second lender argument was that the “mere offer” was sufficient to establish the abandonment of the acceleration. The court disagreed, noting that in this case the lender’s loan modification offers “did not unequivocally manifest an abandonment[.]”⁷⁴ based on the language in the notices to Swoboda requiring execution of documents and the down payment as a condition to the effectiveness of the loan modification.⁷⁵

Next, the lender argued that its subsequent June 15, 2019 statement was sufficient to evidence an abandonment. With respect to the mortgage statement, there was a split of authority between certain Texas courts of appeals and the Fifth Circuit, and the Texas Supreme Court had not addressed the issue.⁷⁶ Specifically, the Fifth Circuit had held “a post-acceleration mortgage statement that requests a lesser payment than the entire accelerated balance” was conclusive as to abandonment of the acceleration.⁷⁷ The *REOAM* holding was the basis for concurring opinions in the

68. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.038(e)).

69. *Id.*

70. *Id.*

71. *Id.* at 634.

72. *Id.* at 639.

73. *Id.* at 634.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Ocwen Loan Servicing, L.L.C. v. REOAM, L.L.C.*, 755 F. App’x 354, 356–57 (5th Cir. 2018) (per curiam).

Austin and Fort Worth Courts of Appeals.⁷⁸ Nevertheless, the subject court determined it was not obligated to follow those opinions, concluding that they originated from an “*Erie* guess” that the Texas Supreme Court would likely uphold a unilateral abandonment of acceleration by reason of a notice to the borrower requiring a lesser payment.⁷⁹ Even if the federal court rule reflected actual Texas law, the subject mortgage statement was insufficient to reflect an intentional abandonment of acceleration, even though the statement contained the original maturity date (rather than the accelerated maturity date) and the “Total Unpaid Amount” (being a monthly installment amount and not the full accelerated principal balance).⁸⁰ Further, the monthly statement was unclear as to intent, failing to clarify that the monthly installment amount would “bring his account current[.]”⁸¹

The third lender argument was that its 2009 acceleration was conclusive evidence of the abandonment of the earlier 2008 acceleration. However, the court refused to accept this position because the 2009 notice contained no statements which would suggest that Swoboda could believe that the original acceleration had been abandoned.⁸²

Fourth, the lender argued that short-sale discussions constituted an abandonment of the prior acceleration. Swoboda had contracted with a third party for a home sale at an amount less than the outstanding balance under the existing loan, i.e., a short sale. Such argument was problematic; there was no evidence that the lender had actually agreed to the terms of the short sale as requested by Swoboda,⁸³ and to the contrary, the lender told Swoboda that the lender was “unable to continue . . . because [Swoboda’s] realtor had ‘ceased to be involved in the short sale proceedings.’”⁸⁴ In furtherance of such “short sale” argument, the lender asserted that a mediator’s report was sufficient to evidence the abandonment. The mediation occurred during the course of the foreclosure proceeding, and five months after the third-party buyer had terminated the contract, and never mentioned a short sale.⁸⁵ Even the deposition of a lender representative was to the effect that Swoboda had never “received pre-approval for a short sale.”⁸⁶

Consequently, the court concluded that the lender had not met its burden in the summary judgment motions and the case was remanded for

78. *Swoboda*, 579 S.W.3d at 634 (first citing *Brannick v. Aurora Loan Servs., LLC*, No. 03-17-00308-CV, 2018 WL 5729104, at *3 (Tex. App.—Austin Nov. 2, 2018, pet. denied) (mem. op.); then citing *NSL Prop. Holdings, LLC v. Nationstar Mortg., LLC*, No. 02-16-00397-CV, 2017 WL 3526354, at *5 (Tex. App.—Fort Worth Aug. 17, 2017, pet. denied) (mem. op.)).

79. *Id.* (citing *Boren v. U.S. Nat’l Bank Ass’n*, 807 F.3d 99, 105 (5th Cir. 2015)).

80. *Id.* at 635.

81. *Id.*

82. *Id.* at 636.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 637.

further consideration. This case presents some clear guidelines to practitioners on a unilateral acceleration abandonment, in the requirements for written abandonment, and in the action needed to support such position.

F. STATUTE OF LIMITATIONS

*Perry v. CAM XV Trust*⁸⁷ involved the statute of limitations for the filing of a foreclosure action based upon when acceleration of the debt occurred. The home equity loan originated in 2005 and after payment disputes, the creditor sent a September 3, 2010 notice declaring a default and establishing October 3, 2010 as the end of the cure period. The default notice specifically stated that “the mortgage payments will be accelerated . . . and foreclosure proceedings will be initiated” at the end of the cure period.⁸⁸ On October 3, 2010, the creditor sent a second notice stating that it had “elected to accelerate the maturity” of the debt.⁸⁹ And finally, on October 20, 2010, the creditor sent a third notice stating that the creditor had “elected to accelerate the maturity of the debt.”⁹⁰

Foreclosure suit was filed on October 20, 2014, and Perry asserted the affirmative defense of statute of limitations, claiming October 3, 2014 was the bar date for filing an action on the debt. Perry’s contention was that the deed of trust language together with the October 3, 2010 letter constituted the actual acceleration date. The relevant provisions of such deed of trust, read: “[i]f the default is not cured on or before the date specified in the notice, Lender at its option may require immediate payment in full of all sums secured by this Security Instrument without further demand and may invoke the power of sale”⁹¹ The thrust of Perry’s argument was that the deed of trust provision did not require further demand and made the notice of intent to accelerate the applicable acceleration date. The First Houston Court of Appeals rejected this argument holding that the debtor’s right to two separate notices (intent to accelerate and actual acceleration) was not waived by clear and unequivocal language in the deed of trust.⁹² Consequently, the creditor was required to give both a notice of intent to accelerate and a notice of acceleration in order to have validly accelerated the debt.⁹³ Further, the optional nature of the deed of trust language was characterized as not requiring only a single notice of intent letter. The language of the first notice letter, to this author, appears clear and unequivocal as to the creditor’s intention to accelerate, but the second letter was not so clear that it was not an actual acceleration. For practitioners, if deed of trust language does not require a second letter of acceleration and demand, the preliminary default notice letter and letter of notice of intent to accelerate should be clear and unequivocal that the

87. 579 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

88. *Id.* at 776.

89. *Id.*

90. *Id.* at 777.

91. *Id.*

92. *Id.*

93. *Id.*

election to accelerate will be done in a clear and unequivocal fashion in a subsequent letter.

III. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES

A. GUARANTY WAIVERS

*Wyrick v. Business Bank of Texas*⁹⁴ involved the interpretation of facts about a collateral assignment of security for a loan to Barquero Energy Services, LLC which was guaranteed by Wyrick and Ruhnke. The loan from Business Bank was to be secured by an assignment of leases covering the leasehold interest in the Barquero saltwater disposal well and an assignment of stock and insurance policies. When Barquero defaulted on the note, the bank sued the guarantors who defended based on fraud and other tortious actions by the bank. The gist of the guarantors' arguments was that the bank assured them, as a condition to executing the guaranty, that the loan would be secured by a valid security interest in the saltwater disposal well. Despite such assurances, the Unlimited, Unconditional Guaranty contained a waiver provision making the guarantor's obligation "unconditional irrespective of the . . . enforceability of the Note, the Assignment [of the saltwater disposal well], or any other . . . legal or equitable discharge of a surety or guarantor" and waiving "all rights and remedies accorded by law to guarantors and sureties" and "all rights to require Lender to (a) proceed against the borrower; (b) proceed against or exhaust any collateral held by Lender . . . or (c) pursue any other remedy it may now or hereafter have against the borrower."⁹⁵ Business Bank proceeded directly against the guarantors without recourse to its collateral; however, the bank could not foreclose on the Barquero saltwater disposal well because the bank had failed to obtain the necessary leasehold assignments and landowner consents for the collateral assignment to the bank.⁹⁶

The guarantors alleged fraudulent inducement as an affirmative defense based on the statements made by the bank as to the collateral for the debt (i.e., the assignment of rights to the saltwater disposal well). Analyzing the fraudulent inducement claims, the issue was whether the guarantors could justifiably rely on oral misrepresentations which were contrary to the unambiguous terms of the written guaranty agreement. Texas law was clear that "a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms."⁹⁷ Here, the guaranty explicitly provided (1) it was unconditional irrespective of enforceability of the debt or collateral; (2) for waiver of the benefits of all principles or provisions of law that contradict the guaranty terms; (3) it would not be subject to legal or equitable defenses; (4) it would not be affected if any collateral was surrendered; and (5) that the

94. 577 S.W.3d 336 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

95. *Id.* at 343–44.

96. *Id.* at 344.

97. *Id.* at 348 (citing *Thigpen v. Locke*, 363 S.W.2d 247, 251 (Tex. 1962)).

creditor need not proceed against collateral before enforcing the guaranty.⁹⁸ Further, as to Wyrick, justified reliance was not available because Wyrick testified that he knew the bank did not have a valid assignment of the lease because the landowner consent had not been obtained at the time of the loan.⁹⁹

Next, the guarantors alleged the guaranty's unconditionality language was overly expansive and insufficient to shift the risk to the guarantors; however, the Fourteenth Houston Court of Appeals pointed out that the Texas Supreme Court had rejected such theory (to require the contract and oral representations to explicitly speak to the subject matter) as unworkable.¹⁰⁰ Last, the guarantors alleged the bank made a false representation in the promissory note by means of a representation that the loan was secured by the Assignment of Leases; but the court rejected this argument because the note did not "clearly state that the [assignment of leases] had been secured"¹⁰¹ and "the [b]ank did not sign the note."¹⁰² There was no authority cited for these opinions, and, to this author, the latter is a very weak position taken by the appellate court.

Guarantors also alleged, as an affirmative defense, the existence of a mutual mistake: that neither of the guarantors nor the bank were aware that there was no valid effective collateral for the loan. However, guarantors relied on *Geodyne Energy Income Production Partnership I-E v. Newton Corp.*,¹⁰³ which relied upon the Restatement (Second) of Contracts, Section 154 to the effect that the risk of a mistake must be borne by the party if such risk is allocated to that party by the subject agreement.¹⁰⁴ The subject guaranty provided for liability of the guarantors if collateral for the debt had been surrendered; therefore, the guarantors were deemed to have accepted such risk even if it were a mutual mistake.¹⁰⁵

B. THIRD-PARTY BENEFICIARY; FAILURE OF CONSIDERATION

*Fortitude Energy, LLC v. Sooner Pipe LLC*¹⁰⁶ involved ineffective attempts at avoidance of an assumption of debt. Fortitude contracted with San Gabriel to operate Fortitude's mineral interests. San Gabriel obtained products from Sooner Pipe, but never paid for the products. Fortitude and San Gabriel entered into a Debt Agreement whereby San Gabriel paid \$500,000.00 for Fortitude's assumption of all debts owing by San Gabriel and its affiliate, Pecos Production. Fortitude never made pay-

98. *Id.*

99. *Id.* at 349.

100. *Id.* (citing *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648 (Tex. 2018)).

101. *Id.*

102. *Id.*

103. 161 S.W.3d 482 (Tex. 2005).

104. *Wyrick*, 577 S.W.3d at 350–51.

105. *Id.*

106. 564 S.W.3d 167 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

ment under the Debt Agreement to Sooner Pipe. San Gabriel filed bankruptcy and a month later Sooner Pipe, as a third-party beneficiary under the Debt Agreement, filed suit against Fortitude. In defense, Fortitude argued that Sooner was not a third-party beneficiary of the Debt Agreement. In addressing this claim, the First Houston Court of Appeals noted that a third-party beneficiary is established when the contract demonstrates an intent to secure a benefit to such third party.¹⁰⁷ Fortitude did not challenge the trial court's ruling; therefore, Sooner Pipe was deemed a third-party beneficiary.¹⁰⁸

Also, Fortitude alleged failure of consideration because San Gabriel failed to turn over the records as the operator so that Fortitude could continue operation of the wells. As the court explained, there are two types of failure of consideration: full and partial.¹⁰⁹ A full failure of consideration is the basis for a cancellation or rescission of the contract; a partial failure of consideration will not invalidate the contract and prevent recovery thereon, but allows a suit for damages.¹¹⁰ Because San Gabriel had partially performed the contract by paying the \$500,000.00 consideration, Fortitude could prove only a partial failure and not a total failure of consideration; therefore, the contract was not null and void. The court implied that a full failure of consideration may have occurred if Fortitude had refunded the \$500,000.00 payment, which it had not done.¹¹¹ Practitioners should be aware of this point if a contract is preferred to be voided as opposed to being a basis for damages.

Finally, Fortitude made a novel argument that the Debt Agreement was unenforceable because Fortitude had acquired, in San Gabriel's bankruptcy, all of San Gabriel's rights for breaches and causes of action under the Debt Agreement by payment of \$30,000.00 to the bankruptcy trustee; hence, it alleged it owned both sides of the contract.¹¹² However, Fortitude cited no authority for the contention that a third-party beneficiary (Sooner Pipe) under a contract could be precluded from bringing a cause of action because the cause of action of the actual account debtor (San Gabriel) was acquired by the other contract party (Fortitude).¹¹³ The court specifically held: "We conclude that Fortitude's acquisition of causes of action that San Gabriel could have brought against it does not raise a fact issue concerning the validity of the Debt Agreement."¹¹⁴

Fortitude also tried to avoid liability to Sooner Pipe by alleging Sooner Pipe's actions violated the automatic stay in San Gabriel's bankruptcy proceeding. The court determined that the suit was not against San

107. *Id.* at 181.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id.* (citing *Carter v. PeopleAnswers, Inc.*, 312 S.W.3d 308, 312 (Tex. App.—Dallas 2010, no pet.) (stating the "right of rescission is waived by . . . retention of the partial performance rendered.")).

112. *Id.* at 183.

113. *Id.* at 184.

114. *Id.*

Gabriel, as the debtor in the bankruptcy proceeding, but was an action directly against Fortitude under Sooner Pipe's third-party beneficiary rights.¹¹⁵

C. CO-GUARANTOR CONTRIBUTIONS

One guarantor sued another for equitable contribution in *Orr v. Broussard*.¹¹⁶ Orr, Broussard, and four other guarantors guaranteed a debt owed by Prince's Hamburgers No. 5 to Post Oak Bank. When the borrower defaulted, Orr paid the entire balance of the debt, and the bank assigned its note and security agreement to Orr. Demand on the other guarantors to pay their proportionate share was made, but the other guarantors failed to pay. Orr brought suit for equitable contribution.¹¹⁷ Broussard defended on the basis that Orr did not plead a cause under equitable contribution, but rather under a deficiency suit under the U.C.C.¹¹⁸ The Fourteenth Houston Court of Appeals rejected this on the basis that Texas's fair notice standard for pleading was satisfied by Orr's pleadings.¹¹⁹ Furthermore, the court of appeals concluded that Orr sufficiently proved up the elements for equitable contribution: (1) a shared common obligation; and (2) a compulsory payment or discharge of more than such party's fair share.¹²⁰

There were six guarantors, so Broussard owed Orr one-sixth of the amount of the guaranteed debt. Interestingly, Orr attempted to obtain a greater recovery from Broussard by arguing that Broussard's liability should be not one-sixth of the obligation but one-third of the obligation because three of the co-guarantors were no longer in existence (the other four guarantors were three limited liability companies and a limited partnership; therefore, the authors assume three of these entities had been dissolved or terminated).¹²¹ There was inadequate briefing on this point and no authority was presented, so the court declined to address this issue.¹²²

Also under review was the amount of reimbursement owed by Broussard because Orr, as the assignee of the security agreement, had foreclosed on restaurant equipment and received the right to, but did not, foreclose on a trademark.¹²³ Broussard was entitled to a credit for the \$750 foreclosure of such equipment.¹²⁴ The court determined Broussard was entitled to the full \$750 credit to his one-sixth share of the obligations

115. *Id.* at 185.

116. 565 S.W.3d 415 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

117. *Id.* at 419.

118. *Id.*

119. *Id.* at 420–21. The court ignored the pleadings' heading "Breach of Contract Against Co-Guarantors." *Id.* at 421.

120. *Id.* at 420.

121. *Id.* at 422–23.

122. *Id.* at 423.

123. *Id.*

124. *Id.*

paid by Orr.¹²⁵ Such holding seems incorrect to these authors because the \$750 should have been deleted from the total amount owed to Orr before allocation of the deficiency amount among the co-guarantors. While the dollar amount is relatively meaningless in this case, it could be significant in other cases. With no appeal, the opinion stands, but these authors advise caution as to this method of calculation of the foreclosure credit to co-guarantors' obligations.

There was also trademark collateral for the loan. Broussard tendered the trademark to Orr who refused it. The court considered U.C.C. Section 9.610(a), which read, in relevant part: “[a]fter default, a secured party [*may*] sell, lease, license, or otherwise dispose of any or all of the collateral”¹²⁶ Such language is permissive and not mandatory; therefore, the court held there was no offset due Broussard because Orr had no duty to dispose of such collateral.¹²⁷

D. DEFICIENCY SUIT

*Duarte-Viera v. Fannie Mae*¹²⁸ involved the sufficiency of evidence submitted for a deficiency claim against a guarantor after foreclosure. The guarantor, Duarte-Viera, alleged that the creditor failed to prove the default of the underlying debtor, because the evidence by Fannie Mae consisted primarily of an affidavit of its senior asset manager. Such affidavit covered: (1) the date on which the loan came into default; (2) that Fannie Mae posted for foreclosure on a certain date; (3) the foreclosure sale date; and (4) that Fannie Mae was the sole bidder and purchaser of the property.¹²⁹ These recitations, the guarantor argued, were conclusory and without probative effect. However, the Seventh Amarillo Court of Appeals pointed to an additional provision of the affidavit stating the debtor failed to pay amounts due and owing under the note and that the guarantor failed to pay the amounts due and owing under the guaranty, and concluded the two additional statements completed the proof of the default triggering the guarantor's liability.¹³⁰

In reaching this conclusion, the court reconciled the distinctions between *Skeen v. Glenn Justice Mortgage Co.*¹³¹ and *Ecurie Cerveza Racing Team, Inc. v. Texas Commerce Bank*.¹³² The *Skeen* court held that “the bare statement of ‘default . . . in payment’ amounts to a legal conclusion on the part of the affiant and cannot support the summary judgment.”¹³³ The *Ecurie Cerveza* court held an affidavit was not conclusory even though it stated that the debtor defaulted in payment, without further

125. *Id.*

126. TEX. COM. & BUS. CODE ANN. § 9.610(a) (emphasis added).

127. *Broussard*, 565 S.W.3d at 424.

128. 560 S.W.3d 258 (Tex. App.—Amarillo 2016, no pet.).

129. *Id.* at 262.

130. *Id.*

131. 526 S.W.2d 252 (Tex. Civ. App.—Dallas 1975, no pet.).

132. 633 S.W.2d 574 (Tex. App.—Houston [14th Dist.] 1982, no pet.).

133. *Skeen*, 526 S.W.2d at 254.

factual recitations.¹³⁴ The *Duarte-Viera* court distinguished the cases based on the number of payment default provisions contained in the loan documents.¹³⁵ In *Skeen*, there were numerous payment default provisions,¹³⁶ whereas in *Ecurie Cerveza*, there was only one payment default under its documents.¹³⁷ Consequently, the *Duarte-Viera* court determined the Fannie Mae affidavit was sufficient because the subject deed of trust contained only one payment default provision and the affidavit was not conclusory but a “statement of fact.”¹³⁸

The guarantor also attacked proof of the deficiency amount, which was outlined in an exhibit to the aforesaid affidavit, containing the following generic categories:

- Principal balance
- Regular interest, default interest and late charge
- Servicer advances and other fees paid
- Prepayment premium [but with further details of its computation]
- Insurance claim recoveries
- Funds swept credit
- Foreclosure bid amount credit
- Deficiency owed

Duarte-Viera alleged insufficient evidence as to which loan payments were missed for the calculation of late charges and default interest, that the acceleration date (for purposes of determining the prepayment premium) was not disclosed and there was no detail for the servicer advances and other fees paid.¹³⁹ Further, the affidavit did not contain a per diem amount for the default interest rate. Without considering the date upon which late charges accrued and default interest would have accrued, the court concluded that the affidavit contained sufficient facts regarding the debtor’s failure to pay and the guarantor’s liability and was not conclusory.¹⁴⁰

As to the servicer advances and other fees, the court concluded the recitation of principal and interest due and the payoff amount due was not conclusory, but was sufficient to support a summary judgment.¹⁴¹ The court distinguished *Lefton v. Griffith*¹⁴² as being inapplicable because it did not deal with notes and guaranties, but rather with a deceptive trade

134. *Duarte-Viera*, 560 S.W.3d at 263.

135. *Id.*

136. *Id.* The *Duarte-Viera* court stated: “the terms of the note allowed several acts or omissions to be treated as default in payment.” *Id.* (citing *Ecurie Cerveza*, 633 S.W.2d at 575).

137. *Id.* The *Ecurie Cerveza* court found “only one condition constitutes default in payment.” *Ecurie Cerveza*, 633 S.W.2d at 575.

138. *Duarte-Viera*, 560 S.W.3d at 264.

139. *Id.*

140. *Id.* at 267.

141. *Id.* at 266–67 (relying on *Rockwall Commons Assocs. v. MRC Mortg. Guarantor Tr. I*, 331 S.W.3d 500 (Tex. App.—El Paso 2010, no pet.)).

142. 136 S.W.3d 271 (Tex. App.—San Antonio 2004, no pet.).

practice claim.¹⁴³ Additionally, relying on *Keenan v. Gibraltar Savings Ass'n*¹⁴⁴ and *Obasi v. University of Oklahoma Health Science Center*,¹⁴⁵ the court found support for the lump sum stated amounts for late charges and ad valorem tax payments, which listed principal and interest due without elaboration.¹⁴⁶

For the prepayment penalty, the guarantor alleged that the affidavit did not show when or how the note was accelerated, but the summary judgment affidavit recited the “lookback day,” being the date the rate was determined.¹⁴⁷ Commentators on summary judgment practice in Texas, the court noted, did not require detailed proof reflecting calculations underlying the balance due.¹⁴⁸ Therefore, the affidavit was held sufficient.¹⁴⁹

Finally, the guarantor challenged the fair market value determination for the deficiency offset, but the guarantor’s affidavit included only two items: the declaration of value by the property owner and the tax appraisal valuation.¹⁵⁰ However, the deed of trust contained provisions requiring evidence on valuation of the property to be performed by certified appraisers.¹⁵¹ Even though the guarantor was not party to the deed of trust, the court found the deed of trust binding upon the guarantor, based on the guaranty’s merger clause referring to the “loan documents” and the deed of trust definition of loan documents to include the guaranty.¹⁵² The evidence presented by the guarantor was held inadmissible.¹⁵³

There was a compelling dissent issued by Justice Pirtle addressing the sufficiency of the evidence as it related to the various cost items contained in the affidavit.¹⁵⁴ In particular, the dissent discussed the prepayment penalty, concluding that, despite some details for computation, the establishment of the principal balance was a prerequisite for calculation of a prepayment penalty.¹⁵⁵ Further, the dissent takes issue with the lack of details for their calculation of the regular interest, default interest, and late charges, and the actual date of default.¹⁵⁶ Worse yet, pursuant to the

143. *Duarte-Viera*, 560 S.W.3d at 266.

144. 754 S.W.2d 392 (Tex. App.—Houston [14th Dist.] 1988, no pet.).

145. No. 04-04-000-16-CV, 2004 WL 2418009 (Tex. App.—San Antonio Oct. 27, 2004, pet. denied).

146. *Duarte-Viera*, 560 S.W.3d at 266.

147. *Id.* at 267.

148. *Id.* (citing TIMOTHY PATTON, SUMMARY JUDGMENTS IN TEXAS, PRACTICE, PROCEDURE AND REVIEW § 9.06[4][e] (3d ed. 2015)).

149. *Id.*

150. *Id.* at 268.

151. *Id.* at 269. The applicable provision stated the basis for valuation would be “(f) expert opinion testimony . . . only from a licensed appraiser certified by the State of Texas and . . . a member of the Appraisal Institute. . . .” *Id.*

152. *Id.* (relying on *In re Prudential Ins. Co. of Am.*, 148 S.W.3d 124 (Tex. 2004) (a guarantor of a lease was bound by the waiver of jury clause in the lease)).

153. *Id.* at 271.

154. *Id.*

155. *Id.* at 274.

156. *Id.*

dissent, is only the lump sum recitation for servicer advances and fees, insurance claims and funds swept, the amounts of which are not found in any of the loan documents.¹⁵⁷ *Rockwell Commons Associates, Ltd. v. MRC Mortgage Grantor Trust I*¹⁵⁸ was distinguished because there was other non-affidavit evidence, in the form of a letter with an attached billing statement and calculation tapes containing the calculation details that the court relied upon in finding sufficiency of the evidence to avoid the conclusory defense.¹⁵⁹ No petition was filed, but based on the dissent, a prudent practitioner should urge more details for the calculations to be safe from challenge. Practitioners can hope that this discrepancy will be clarified by the Texas Supreme Court.

E. THIRD-PARTY BENEFICIARY CLAIMS

*First Bank v. Brumitt*¹⁶⁰ was the third iteration of this lender liability case, which was previously reported on by these authors.¹⁶¹ In the prior case,¹⁶² the Texas Supreme Court held that First Bank was not liable for the claims from a third-party beneficiary relating to the bank's failure to approve and consummate a loan for the purchase of stock in an enterprise of the third-party beneficiary, despite certain assurances to the contrary.¹⁶³ In that case, the supreme court remanded back to the court the issue of whether the third-party beneficiary had negligent representation claims. In its analysis of negligent representation claims, the Fourteenth Houston Court of Appeals noted that negligent representation claims should be distinguished from breach of contract claims based upon whether the false information was about an existing fact (a negligent misrepresentation claim) or about promises for future conduct (a breach of contract claim).¹⁶⁴ The court analyzed the allegations and evidence presented by Brumitt, as the third-party beneficiary, which included the claims related to promises by the bank about closing and funding the loan on a future date, statements from the bank president that he would "get it done," and statements to the bank customer and Brumitt that they "would be happy."¹⁶⁵ These facts were a representation about future performance, which sounded in contract and would not support negligent misrepresentation claims.¹⁶⁶

F. ANTI-DEFICIENCY STATUTE OF LIMITATION WAIVER

One of the most important cases in this survey period is *Godoy v. Wells*

157. *Id.* at 275.

158. 331 S.W.3d 500 (Tex. App.—2010, no pet.).

159. *Duarte-Viera*, 560 S.W.3d at 275.

160. 564 S.W.3d 491 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

161. J. Richard White et al., *Real Property*, 4 SMU ANN. TEX. SURV. 357, 374 (2018).

162. *First Bank v. Brumitt*, 519 S.W.3d 95 (Tex. 2017).

163. *Id.* at 111.

164. *Brumitt*, 564 S.W.3d at 495.

165. *Id.* at 494.

166. *Id.* at 496.

*Fargo Bank, N.A.*¹⁶⁷ The appellate court case was discussed by last year's authors.¹⁶⁸ *Godoy* resolved whether a guarantor can waive for the benefit of the lender the two-year statute of limitations for anti-deficiency suits against the guarantor. The provisions of the guaranty involving the waiver under consideration, in relevant part, read:

Guarantor also waives any and all rights or defenses arising by reason of (A) any "one action" or "anti-deficiency" law or any other law which may prevent Lender from bringing any action, including a claim for deficiency, against Guarantor, before or after Lender's commencement or completion of any foreclosure action, either judicially or by exercise of a power of sale; . . . (E) any statute of limitations, if at any time any action or suit brought by Lender against Guarantor is commenced, there is outstanding indebtedness of Borrower to Lender which is not barred by any applicable statute of limitations; or (F) any defenses given to guarantors at law or in equity other than actual payment and performance of the Indebtedness¹⁶⁹

After resolving procedural issues, the Texas Supreme Court addressed the substance of the waiver issue. As a basis for the ruling in this and the underlying decisions, the supreme court approved its prior holding that "[i]t appears to be well settled that an agreement in advance to waive or not plead the statutes of limitation is void as against public policy."¹⁷⁰ Further, the supreme court approved the modifications made by the Fourteenth Houston Court of Appeals that waivers of statutes of limitations are void unless the waiver is "specific and for a reasonable time."¹⁷¹ Stated differently, the supreme court held: "Blanket pre-dispute waivers of all statutes of limitation are unenforceable, but waivers of a particular limitations period for a defined and reasonable amount of time may be enforced."¹⁷²

Analyzing the subject guaranty, the supreme court concluded that clauses (E) and (F) were both unenforceable because each attempted to completely waive all limitations periods, and as such, they were neither specific nor reasonable as to the limitation waiver.¹⁷³ In clause (A), the supreme court found the language specific (being the waiver of only the two-year limitation for bringing anti-deficiency suits).¹⁷⁴ But, the waiver time requirement was not so clear because there was no substitute limitation period and no specific end date.¹⁷⁵ Such provision might, absent

167. 575 S.W.3d 531, (Tex. 2019).

168. J. Richard White et al., *Real Property*, 5 SMU ANN. TEX. SURV. 317, 334 (2019).

169. *Godoy*, 575 S.W.3d at 533–34.

170. *Id.* at 537 (citing *Simpson v. McDonald*, 179 S.W.2d 239 (Tex. 1944)).

171. *Id.* at 537–38 (first citing *Am. Alloy Steel, Inc. v. Armco, Inc.*, 777 S.W.2d at 177 (Tex. App.—Houston [14th Dist.] 1989, no pet.); then citing *Duncan v. Lisenby*, 912 S.W.2d at 859 (Tex. App.—Houston [14th Dist.] 1995, no pet.); then citing *Titus v. Wells Fargo Bank Union & Tr. Co.*, 134 F.2d 223 (5th Cir. 1943)).

172. *Id.* at 538.

173. *Id.* at 539.

174. *Id.*

175. *Id.*

other factors, make the provision unenforceable; however, the supreme court concluded such provision was rehabilitated by operation of law because (1) the four-year limitation period under Texas Civil Practice & Remedy Code Section 16.004(a)(3)¹⁷⁶ also applied to collection of debts, which alone would satisfy the reasonable time requirement;¹⁷⁷ and (2) of the applicability and operation of the guaranty's savings clause, which read, in relevant part, as follows: "[I]f any such waiver is determined to be contrary to any applicable law or public policy, such waiver shall be effective only to the extent permitted by law or public policy."¹⁷⁸ Therefore, the four-year limitation on collection of debts and the savings clause caused the clause (A) waiver to be for a reasonable time and not a violation of public policy waiver doctrine and was, therefore, enforceable.¹⁷⁹ In dicta, the supreme court noted that clause (E) could also have been rehabilitated under the savings clause, but did not reach that conclusion as it was unnecessary.¹⁸⁰

Practitioners should take note of the language required for waivers of limitation periods to be enforceable. First, it must be specific. Second, it must have a reasonable time period. And third, although not a requirement, it should be accompanied by a contractual savings clause limiting enforcement to the extent allowed by applicable law and public policy.

G. INDEMNITY – ADVANCEMENT

*L Series, L.L.C. v. Holt*¹⁸¹ involved the interpretation of an advancement provision under an indemnity clause. Holt was the general manager of numerous car dealerships, and was also a member of each of the limited liability companies that owned the dealerships. Each of the limited liability company agreements contained an indemnity provision that, in relevant part, defined a person entitled to indemnification as a covered person "serving at the request of the Company and an officer, trustee, employee, agent, or similar functionary of the Company[.]"¹⁸² The right to indemnification, covered in a second provision, included a required payment or reimbursement to a covered person "who was, is or is threatened to be made a named defendant or respondent in a Proceeding [1] *in advance of the final disposition of the Proceeding* and [2] *without any determination as to the [Covered] Person's ultimate entitlement to indemnification . . .*"¹⁸³ The limited liability companies dismissed Holt for various types of financial fraud (such as booking fraudulent car sales) and sued Holt based on such action. Holt requested advancement of his legal fees and expenses under the indemnification clause. In its analysis, the

176. TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(3).

177. *Godoy*, 575 S.W.3d at 539.

178. *Id.* at 534.

179. *Id.* at 539–40.

180. *Id.* at 540 n.2.

181. 571 S.W.3d 864 (Tex. App.—Fort Worth 2019, pet. denied).

182. *Id.* at 874.

183. *Id.* at 873.

Second Fort Worth Court of Appeals approved a Delaware court's statement that "the right to indemnification and advancement are correlative, they are separate and distinct legal actions. The right to advancement is not dependent on the right to indemnification."¹⁸⁴ The court remarked how Delaware had come to grips with enforcement of indemnification and advancement clauses even in the case of serious misconduct,¹⁸⁵ and had chastised the lack of "carefully draft[ed] and narrowly tailor[ed] advancement rights[.]"¹⁸⁶ Therefore, and following Delaware law, the court dismissed the companies' arguments that Holt's actions were not within the scope of his employment and were irrelevant as to the advancement provision.¹⁸⁷ The court also held that Holt could enforce the advancement provision by specific performance, since failing to do so would "eviscerate the right for which he and the Companies bargained."¹⁸⁸

H. INDEMNITY – FAIR NOTICE REQUIREMENTS

*Banta Oilfield Services. v. Mewbourne Oil Co.*¹⁸⁹ involved the interpretation of an indemnity clause under a master services agreement relating to oil well operations. Mewbourne owned oil and gas properties in New Mexico and hired Banta Oilfield to perform services at the site. A 300-gallon battery tank was to be installed at the site by Banta, and Mewbourne contracted with Steve Kent Trucking and C&M Services for additional work in that regard. In moving the tank, Vargas, an employee of either Kent Trucking or C&M Services, was injured when the tank slipped off the chain while it was being moved by a Banta owned and operated truck. After addressing numerous procedural and choice of law issues, the Sixth Texarkana Court of Appeals addressed the substance of the indemnity provision, which read, in applicable part, as follows: "THE ASSUMPTIONS OF LIABILITY, RELEASES, AND INDEMNITIES SET FORTH IN THIS ARTICLE 5 SHALL APPLY TO ANY CLAIMS WITHOUT REGARD TO THE CAUSES THEREOF . . . OR THE NEGLIGENCE OF ANY PERSON OR PARTY, INCLUDING THE INDEMNIFIED PARTY OR PARTIES"¹⁹⁰

In discussing the enforceability of this provision, the court considered whether the provision complied with the Texas Fair Notice Requirements, which consist of two parts: (1) the express negligence doctrine; and (2) the conspicuousness doctrine.¹⁹¹ The plain language of the Master Services Agreement (quoted above) specified that the parties intended

184. *Id.* at 870 (quoting *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 212 (Del. 2005)).

185. *Id.* at 875; *Homestore*, 888 A.2d at 213–14.

186. *Holt*, 571 S.W.3d at 875; *Barrett v. Am. Country Holdings, Inc.*, 951 A.2d 735, 737 (Del. Ch. 2008).

187. *Holt*, 571 S.W.3d at 876.

188. *Id.* at 879.

189. 568 S.W.3d 692 (Tex. App.—Texarkana 2018, pet. denied).

190. *Id.* at 714–15.

191. *Id.* at 714.

Mewbourne to indemnify Banta, based on the phrases “without regard to the causes thereof” and “without regard to . . . the negligence of any person or party, including the indemnified party.”¹⁹² That satisfied the express negligence doctrine.¹⁹³ As to the conspicuousness requirement, the document was seven pages of single spaced, lower case, and unbolded text and the indemnity provision was capital letters and boldfaced type; that satisfied the conspicuousness doctrine requirements.¹⁹⁴

I. ACKNOWLEDGMENT OF DEBT

*DeRoeck v. DHM Ventures, LLC*¹⁹⁵ involved an acknowledgment of a debt otherwise barred by the statute of limitations. In this case, DeRoeck QTIP Trust (the Trust) made a loan to DHM Ventures, LLC, which loan was guaranteed by Moritz and Halsey. DHM failed to pay the debt and the Trust sued the debtor and the guarantors on the debt. But such suit was filed after the alleged expiration of the four-year statute of limitation. The trial court entered a summary judgment in favor of the debtor, which was appealed in a prior action and affirmed.¹⁹⁶ However, the Texas Supreme Court reversed the Third Austin Court of Appeals’ finding that the Trust had sufficiently pled acknowledgment of the debt and remanded it back for further consideration.¹⁹⁷ Therefore, in the current case, the Third Austin Court of Appeals looked at the sufficiency of the evidence presented by the Trust to sustain its acknowledgment claim.

To evidence the debt of DHM, the Trust presented checks drawn on DHM’s account which were payable to the Trust, dated within the four-year limitation period, and contained a notation in the memo section indicating “interest.”¹⁹⁸ Considering the sufficiency of this evidence, the court of appeals cited numerous Texas cases holding that a check was a sufficient written acknowledgment of a debt and avoided the limitations trap.¹⁹⁹ However, Texas law of acknowledgement does provide an exception if a check is accompanied by any circumstance negating the presumption of willingness or intention to pay.²⁰⁰ The record was absent any evidence of an unwillingness to pay the debt.²⁰¹ Consequently, the checks were sufficient evidence of material facts to justify denial of DHM’s summary judgment motion.²⁰²

192. *Id.* at 714–15.

193. *Id.* at 715.

194. *Id.* at 715–16.

195. 576 S.W.3d 875 (Tex. App.—Austin 2019, no pet.).

196. *DeRoeck v. DHM Ventures, LLC*, No. 03-15-00713-CV, 2016 WL 4270000 (Tex. App.—Austin Aug. 9, 2016) (mem. op.), *rev’d*, 556 S.W.3d 831 (Tex. 2018).

197. *DeRoeck v. DHM Ventures, LLC*, 556 S.W.3d 831 (Tex. 2018) (specifying the acknowledgment elements were: (1) a writing signed by the debtor; (2) an unequivocal acknowledgement of the justness or evidence of the debt; and (3) an expression of a willingness to honor the debt).

198. *DeRoeck*, 576 S.W.3d at 878.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.*

Also, the two individual guarantors asserted limitations against their guarantee of the debt. The court reviewed whether the guarantors had acknowledged their obligations to pay prior to the expiration of limitation period.²⁰³ The guaranty instrument had some ambiguity in the language, but the court harmonized the language in Sections 2 and 4. Section 2 of the guaranty provided that the guarantors “shall, immediately *upon demand* by Lender, pay the amount due on the Guaranteed Indebtedness to Lender[.]”²⁰⁴ On the other hand, Section 4 provided: “[i]n the event of default in payment or performance of the Guaranteed Obligations . . . Guarantor shall promptly pay the amount due thereon to Lender *without notice or demand, of any kind or nature.* . . .”²⁰⁵ In harmonizing these two seemingly conflicting provisions, the court interpreted them to mean that the guarantors were liable on the debt “immediately” upon maturity, but were only required to “promptly” pay in the event of a default without demand.²⁰⁶ Practitioners should pay attention to any such conflicting provisions and consider their impact upon litigation; the best practice, of course, is to verify that no conflicting provisions are included in the documentation.

As to the substance of the acknowledgment by the guarantors, the Trust introduced two emails, one from Halsey and one from Moritz. The Halsey email, dated August 29, 2012, was to Moritz, indicating that Halsey would cover “this month’s interest, and . . . I can cover the interest for balance of the year.”²⁰⁷ In the Moritz email, dated September 17, 2013, Moritz asked for verification of “interest . . . owed until 8/31/13 and then the interest that will be due 9/30/13.”²⁰⁸ It also continued with a statement that: “I would like to send in the interest . . .”²⁰⁹ These emails were determined to be in writing and signed, and acknowledged the existence of the DHM debt and the guarantors’ intent to pay the debt.²¹⁰ Analyzing whether these emails were on behalf of the individual guarantors or the company, the court of appeals determined that the emails were from Moritz and Halsey in their individual capacities as guarantors and not as officers or representatives of DHM.²¹¹ Consequently, the emails represented sufficient evidence of the guarantors’ acknowledgment of the debt to avoid the summary judgment in their favor.²¹²

J. OUTSIDER REVERSE VEIL-PIERCING; FRAUDULENT TRANSFERS

*Yamin v. Carroll Wayne Conn, L.P.*²¹³ involved a reverse piercing of

203. *Id.* at 879.

204. *Id.* at 879 n.7.

205. *Id.*

206. *Id.*

207. *Id.* at 880.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.*

212. *Id.* at 881.

213. 574 S.W.3d 50 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

the corporate veil argument, coupled with fraudulent transfer issues. Stephen Yamin had guaranteed a lease obligation for his son, and ultimately suffered a judgment on such guaranty. The guaranty was issued in 2004 and the judgment obtained in 2010. In 2006, at a time when Stephen and Mary Ann Yamin were insolvent and being supported by their daughter, Maryann formed Texas Black Iron, Inc. and its ownership was evidenced by a sole stock certificate in the name of Mary Ann, as her “sole and separate property.” Nevertheless, evidence showed that the business of Black Iron was run solely by the husband, Stephen, and Mary Ann had virtually no knowledge of its business activities, and no actual involvement in the business. In addition to the stock certificate characterization as separate property, the husband and wife executed a bill of sale which purported to transfer the husband’s interest in Texas Black Iron to the wife as her sole and separate property. In 2013, the husband and wife entered into a partition/stipulation agreement which reallocated the husband’s interest in Texas Black Iron to the wife, but also included the transfer of numerous other community property assets (excepting only a few assets held by the husband). To recover its judgment debt, the landlord creditor, Carroll Wayne Conn, L.P. sued Stephen, Maryann, and Texas Black Iron, alleging fraudulent transfers under Texas Family Code Section 4.106(a),²¹⁴ the Texas Uniform Fraudulent Transfer Act (TUFTA),²¹⁵ and under a theory of outsider reverse-piercing of the corporate veil.²¹⁶

Reverse veil-piercing was defined to be where a corporation is liable for a shareholder’s debts, which is the opposite of direct veil-piercing in which the shareholder is held liable for the debts of the corporation.²¹⁷ The Fourteenth Houston Court of Appeals recognized prior decisions upholding reverse veil-piercing which relied upon traditional veil-piercing theories.²¹⁸ However, the court held that the “legislature has now preempted the common law regarding traditional veil-piercing, but it has not addressed reverse veil-piercing, which continues to be a common-law doctrine.”²¹⁹ Also, the court distinguished between insider and outsider reverse veil-piercing, quoting from a commentator on reverse veil-piercing²²⁰ that defined insider reverse veil-piercing as involving a “dominant shareholder or other controlling insider who attempts to have the corporate entity disregarded” for his benefit and an outsider reverse veil-piercing as involving a third-party claimant who sues a corporate insider to

214. TEX. FAM. CODE ANN. § 4.106(a).

215. TEX. BUS. & COMM. CODE ANN. §§ 24.001–.013.

216. *Yamin*, 574 S.W.3d at 54–55.

217. *Id.* at 66.

218. *Id.* at 67 (citing *Richard Nugent & CAO, Inc. v. Estate of Ellickson*, 543 S.W.3d 243 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (first citing *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444 (Tex. 2008); then citing *Castleberry v. Branscum*, 721 S.W.2d 270 (Tex. 1986))).

219. *Id.*; see TEX. BUS. ORGS. CODE ANN. §§ 21.223–.225.

220. *Yamin*, 574 S.W.3d at 66 n.13.

pierce the corporate veil for the third party's benefit.²²¹

Next, the court considered whether the veil-piercing statute applied to reverse veil-piercing. The applicable statute read as follows:

The liability of a holder, beneficial owner, or subscriber of shares of a corporation, or any affiliate of such a holder, owner, or subscriber or of the corporation, for an obligation that is limited by Section 21.223 is exclusive and preempts any other liability imposed for that obligation under common law or otherwise.²²²

The obligations referred to in that statute are for, inter alia, “contractual obligation[s] of the corporation . . . on the basis that the [owner] . . . was the alter ego of the corporation or on the basis of actual or constructive fraud[.]”²²³ Reasoning that Section 21.223 limits liability “to the corporation or its obligees” for contractual obligations of the corporation, then reverse veil-piercing does not fit within this statutory framework and was inapplicable to the subject case.²²⁴ Despite such ruling, common law theories of outsider reverse veil-piercing were still applicable. Although the Black Iron shares were in Mary Ann's name, the court of appeals determined the shares to be community property and, therefore, Stephen and Mary Ann both had undivided interests in the shares, making each of them insiders and not outsiders.²²⁵ Consequently, the court specifically stated it was not ruling on whether the outsider reverse veil-piercing was available to a creditor of a corporate officer lacking such ownership interest.²²⁶

However, there was a dissent from Justice Frost on the outsider reverse veil-piercing issue. Justice Frost distinguished *Nugent* on the basis that reverse veil-piercing was not asserted in such case and could not be authoritative for that reason.²²⁷ The dissent continued by questioning if the actual fraud requirement of the statute²²⁸ should be analogous for the analysis under common law, and suggested it was a matter of first impression for Texas courts.²²⁹ The recent case *Clement v. Blackwood*²³⁰ was distinguished because the jury found fraud, but the issue of the requirements for fraud was not addressed by either of the parties.²³¹ The majority had rejected Black Iron's argument that actual fraud should be an element of outsider reverse veil-piercing, but Justice Frost reasoned that

221. Gregory S. Crespi, *The Reverse Pierce Doctrine: Applying Appropriate Standards*, 16 J. CORP. L. 33, 37 (1990).

222. TEX. BUS. ORGS. CODE § 21.224.

223. *Id.* § 21.223(a)(2).

224. *Yamin*, 574 S.W.3d at 68 (emphasis removed).

225. *Id.* at 69.

226. *Id.*

227. *Id.* at 72.

228. *Id.*; see TEX. BUS. ORGS. CODE ANN. § 21.223(b) (stating that “Section (a)(2) does not prevent or limit the liability of [an owner] . . . [for] actual fraud on the obligee primarily for the direct personal benefit of the [owner].”).

229. *Yamin*, 574 S.W.3d at 72.

230. No. 11-16-00087-CV, 2018 WL 826856 (Tex. App.—Eastland Feb. 8, 2018, pet. denied) (mem. op.).

231. *Yamin*, 574 S.W.3d at 72.

in the absence of any legislative mandate for fraud, actual fraud should be a necessary element of the common law outsider reverse veil-piercing theory based on principles of consistency and equity.²³²

With such dissent, and the fact that the Texas Supreme Court has not addressed the issue, practitioners should not assume that the viability and elements for an outsider reverse veil-piercing theory were established by the *Yamin* court. Perhaps the supreme court or legislature will take action on this issue to provide clarification.

K. SATISFACTION OF DEBT

In *West v. Quintanilla*,²³³ the Texas Supreme Court considered whether the parol evidence rule was applicable to documentation relating to whether a debt had been extinguished or satisfied. Of course, as with most parol evidence rule cases, the issues here could have been avoided by more careful drafting of the documentation. There were basically three agreements: (1) a 2014 Trading Agreement; (2) a 2015 Purchase Agreement; and (3) an oral March 2015 Sale Agreement. Under the Trading Agreement, West was given \$5 million to trade commodities, which he did well for a number of years, but ultimately resulted in a \$14 million loss; the two other documents were a “workout” of this loss. The Purchase Agreement provided for the sale of certain assets from West to Quintanilla, which included an “entire agreement” clause. The oral Sale Agreement provided that (1) West would convey to Quintanilla assets of West worth \$7 million; (2) Quintanilla could claim all of the \$14 million trading losses for a \$3 million tax benefit; and (3) a sale of West’s property at a price that was \$4.3 million less than fair market value. These three actions would have covered the \$14 million loss under the Trading Agreement. Quintanilla sued West claiming that West had not satisfied the debt obligations under the Trading Agreement, and asserted that the parol evidence rule prevented West from providing evidence of the nature of the Sale Agreement. The trial court allowed entry of such “parol evidence”; the Fourth San Antonio Court of Appeals reversed, and here the supreme court reversed and remanded. By the nature of this appeal, the issue was only whether West had provided prima facie evidence of the essential elements of his claims for slander of title and fraudulent lien claims against Quintanilla.

In discussing the parol evidence rule, the supreme court highlighted the difference between the parol evidence rule and the contract construction rule “that bars consideration of parol evidence to modify or add to [an] unambiguous written [contract].”²³⁴ When there is a “valid, written, integrated contract, the parol evidence rule precludes enforcement of any prior or contemporaneous agreement” which is inconsistent with the sub-

232. *Id.* at 73.

233. 573 S.W.3d 237 (Tex. 2019).

234. *Id.* at 243 n.11.

ject matter of the written contract.²³⁵ In fact, the parol evidence rule is a substantive rule of law, not a rule of evidence; therefore, it is not dependent upon whether the alleged agreement is oral or written, but whether the oral agreement is inconsistent with the written agreement.²³⁶ Quintanilla alleged that the Purchase Agreement and Sale Agreement were done contemporaneously and, therefore, the Sale Agreement was barred by the parol evidence rule, but the supreme court held the Sale Agreement was not barred by the parol evidence rule because it was “collateral to and consistent with” the Purchase Agreement.²³⁷

In analyzing the Purchase Agreement, the supreme court discussed “integrated contracts”²³⁸ and the “entire agreement” provision. The supreme court construed the Purchase Agreement as a partially integrated contract,²³⁹ which did not cover all agreements of the parties and did not supersede the Sale Agreement.²⁴⁰ In this regard, the supreme court found the “entire agreement” provision was final and complete only as to the terms in the Purchase Agreement, and that it did not “purport to address or supersede agreements related to other matters.”²⁴¹ The supreme court construed the Purchase Agreement narrowly as relating to the purchase and sale of the assets covered thereby,²⁴² and construed the Sale Agreement as being a collateral contract which was not inconsistent with the Purchase Agreement.²⁴³ The oral Sale Agreement related to the satisfaction of the debt accrued under the Trading Agreement and the Purchase Agreement related solely to the details and complexities of the acquisition of assets of West by Quintanilla.²⁴⁴ Consequently, the oral Sale Agreement was a collateral agreement and not inconsistent with the Purchase Agreement.²⁴⁵ Therefore, West had provided at least the prima facie evidence of the essential elements of his cause of action and the case was remanded for final hearing on the sufficiency of such evidence.²⁴⁶

The lesson to be learned from this case is the proper drafting of documents in the original transaction. If the Purchase Agreement and Sale

235. *Id.* at 243.

236. *Id.*

237. *Id.* at 244.

238. *Id.* (relying on *Integrated Contract*, BLACK’S LAW DICTIONARY (10th ed. 2014), to explain an integrated contract as one or more writings which cover all terms of an agreement between the parties, which is sometimes called a “partially” integrated contract, as distinguished from a “completely” integrated contract as being the same but in one exclusive writing.).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.*

243. *Id.* at 245.

244. *Id.* at 248.

245. *Id.* at 245. The court viewed its holding as consistent with *Swinnea v. ERI Consulting Engineers, Inc.*, 236 S.W.3d 825 (Tex. App.—Tyler 2007), *aff’d in part, rev’d in part*, 318 S.W.3d 867 (Tex. 2010), and *Hubacek v. Ennis State Bank*, 317 S.W.2d 30 (1958), holding that the oral agreement related to the written documents which addressed related subject matters, but did not contradict the written agreements and was not inconsistent.

246. *West*, 573 S.W.3d at 248.

Agreement had been a single document, all of the issues in this case would have been avoided.

IV. LANDLORD–TENANT RELATIONSHIP/LEASES

A. LANDLORD–TENANT RELATIONSHIP

In *St. Anthony's Minor Emergency Center, L.L.C. v. Ross Nicolson 2000 Separate Property Trust*,²⁴⁷ the Fourteenth Houston Court of Appeals affirmed the trial court's grant of summary judgment in a case involving the lockout of a sublessee by a lessor.²⁴⁸ The facts of this case are straightforward: the sublessee had been paying rent to the sublessor but the sublessor had not been paying the rent to the lessor. The terms of the lease specifically prevented the sublease of the premises without the lessor's prior written consent.²⁴⁹ Although the lessor knew about the sublease, the lessor never expressly consented to the sublease as required by the lease. As a result, there was no privity of estate and no landlord–tenant relationship.²⁵⁰ The sublessee had no grounds to assert wrongful lockout and constructive eviction.²⁵¹ This case is a reminder to all practitioners to ensure that the lessor has consented to a sublease or to confirm such consent is not required per the terms of the lease between the lessor and the lessee.

B. OPTION TO PURCHASE

In *Weaver v. H.E. Lacey, Inc.*,²⁵² the Sixth Texarkana Court of Appeals examined whether language in a lease granted a tenant a right of first refusal, which would survive termination of the lease, or an option to purchase which would expire upon termination of the lease. The landlord, Lacey, and the tenant, Weaver, entered into a one-year lease in February 1998. The lease contained the following language, "During the one-year lease, MR. WEAVER will have first option of refusal for ONE HUNDRED SEVENTY FIVE THOUSAND DOLLARS (\$175,000.00)."²⁵³ The tenant and the landlord entered into an earnest money contract on December 7, 1998.²⁵⁴ For a variety of reasons not relevant to the court's holding, the purchase was never finalized. Nevertheless, the tenant remained on the property until 2016. Unfortunately for Weaver, the parties never entered into a new lease which resulted in Weaver being a holdover tenant for over seventeen years. In 2016, the landlord received a purchase offer from a third party for \$225,000.00.²⁵⁵ The landlord sent a letter to the tenant giving the tenant the opportunity to purchase the property at

247. 567 S.W.3d 792 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

248. *Id.* at 796.

249. *Id.* at 795.

250. *Id.* at 800.

251. *Id.*

252. 562 S.W.3d 114 (Tex. App.—Texarkana 2018, pet. denied).

253. *Id.* at 119.

254. *Id.* at 116.

255. *Id.* at 118.

the same price.²⁵⁶ The tenant refused and the landlord eventually filed a declaratory judgment action.²⁵⁷ The tenant maintained that the terms of the lease extended into the holdover tenancy and the tenant still had an option to purchase the property for \$175,000.00. The trial court found that the language created an option to purchase which was not properly exercised during the one-year period and, therefore, was no longer valid.²⁵⁸ As the court of appeals stated, “The law requires strict compliance with the terms of an option contract.”²⁵⁹ Furthermore, once the parties entered into the purchase agreement, the tenancy was terminated.²⁶⁰

C. TERMINATION OF LEASE/DAMAGES/ATTORNEY’S FEES/HOLDOVER

*Rohrmoos Venture v. UTSW DVA Healthcare, LLP*²⁶¹ was a case that wound its way through the Texas court system for many years until it was ultimately settled by the Texas Supreme Court. The case dealt with whether a tenant can terminate a commercial lease for a landlord’s breach of express lease covenants. The facts are straightforward: Rohrmoos Ventures leased a building to UTSW DVA Healthcare (UTSW) for use as a dialysis center. UTSW began experiencing moisture issues in 2007 and was ultimately cited by state health inspectors with respect to the moisture issues. Despite Rohrmoos’s efforts to fix the issues, the issues continued for several years, well into 2009.²⁶² UTSW finally terminated its lease early with over \$250,000.00 in rent allegedly still owing to the landlord.²⁶³ The lease expressly allowed for damages for breach and did not contain an express termination clause.²⁶⁴ UTSW sued Rohrmoos for breach of contract and breach of the implied warranty of suitability. The jury found that both parties failed to comply with the lease but Rohrmoos breached the lease first and that Rohrmoos also breached the implied warranty of suitability.²⁶⁵ Rohrmoos appealed and attacked the jury’s finding that it breached the implied warranty of suitability. In Texas, the implied warranty of suitability was first created by the Texas Supreme Court’s holding in *Davidow v. Inwood North Professional Group—Phase 1*.²⁶⁶ Rohrmoos argued that unless the implied warranty from *Davidow* is expressly waived under the lease or the lease contains a provision that superseded *Davidow*’s implied warranty, a tenant can only

256. *Id.*

257. *Id.* at 117.

258. *Id.* at 119.

259. *Id.* (citing *Besteman v. Pitcock*, 272 S.W.3d 777, 784 (Tex. App.—Texarkana 2008, no pet.)); see *Chambers v. Hunt Petroleum Corp.*, 320 S.W.3d 578, 583 (Tex. App.—Tyler 2010, no pet.).

260. *Weaver*, 562 S.W.3d at 119.

261. 578 S.W.3d 469 (Tex. 2019).

262. *Id.* at 476–77.

263. *Id.*

264. *Id.* at 477.

265. *Id.* at 476–77.

266. 747 S.W.2d 373, 377 (Tex. 1988) (holding that “there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.”).

terminate a commercial lease by proving a breach of the implied warranty of suitability and not for a material breach of the express duty to repair. Rohrmoos further argued that under the *Davidow* holding the proper remedy for breach of an express duty, such as the duty to repair, is damages unless there is an express provision to the contrary permitting an alternative remedy such as termination. The supreme court disagreed with Rohrmoos's interpretation of the *Davidow* holding, finding that while *Davidow* expressly dealt only with the remedy for the breach of the implied warranty, the holding should not be read to imply that the same remedy was not available for other breaches.²⁶⁷

At first glance, the supreme court's analysis in *Rohrmoos* seems to be a natural extension of *Davidow* and does not seem particularly troubling. However, when the case is read in connection with another Texas Supreme Court case, *Regency Advantage Ltd. Partnership v. Bingo Idea-Watauga, Inc.*,²⁶⁸ one's perception of the significance of the holding dramatically changes, particularly if one is a lender and investor, or a practitioner representing either. In *Regency*, the supreme court, relying on Restatement (Second) Property Section 16 comment. h, held that a tenant may elect to terminate a lease for landlord default or have a defense to the obligation to pay rent *even* if the default occurred prior to the lease being assigned to a new landlord/property owner.²⁶⁹ When read collectively, the message from these cases for practitioners who advise clients buying portfolios of leased properties is threefold: (1) do not find comfort in the absence of a "termination cause"; (2) buyer beware; and (3) think twice before waiving tenant estoppels for larger, important leases. Furthermore, real estate practitioners should carefully ponder the value of negotiating termination options out of leases versus making the option very difficult to exercise.

*Tuttle v. Builes*²⁷⁰ involved a commercial tenant holding over after the expiration of its lease and provides the practitioner not only a good review on the rights and remedies against tenants at sufferance versus tenants at will (and the appropriate damage award in each scenario), but also presents several cautionary tales—one on proper lease drafting and one on enforcement of remedies. Counsel in this case made a crucial mistake sending a termination notice for a defaulted lease when they should have merely sent a notice of default. The facts of the case are straightforward: in January 2007, Xenco signed a five-year lease with Tuttle which expired December 31, 2011. The parties also signed a separate option to lease that was only applicable during the lease term. In May 2010, the parties superseded the old lease and entered into a new lease reflecting a revised rental payment. The new lease contained the following holdover provision:

267. *Rohrmoos*, 578 S.W.3d at 483.

268. 936 S.W.2d 275 (Tex. 1996).

269. *Id.* at 277–78.

270. 572 S.W.3d 344, 349 (Tex. App.—Eastland 2019, no pet.).

Any holding over after the expiration of this lease, with Landlord's consent, shall be construed to be a tenancy from month to month, cancellable upon thirty (30) days written notice, and at a minimum rental of TWO HUNDRED PERCENT (200%) of the minimum rental, and upon the terms that existed during the last year of the term of this lease.²⁷¹

Xenco sent notice of intent to exercise the option to purchase, which was received by Tuttle on December 23, 2011. Tuttle never responded to Xenco's letter. After the lease terminated on December 31, Xenco continued to attempt to negotiate the purchase of the property, but failed to make regular monthly rental payments with the exception of one payment of \$6,000.00 on January 12, 2012. This rent payment was accepted by Tuttle. In March, Tuttle sent Xenco two letters notifying Xenco it was in default and terminating the lease. Despite having sent two letters terminating the lease, Tuttle maintained Xenco was a holdover tenant at will and owed holdover rent of 200% as well as late fees totaling over \$4,211,975.00. Tuttle argued that Xenco was a tenant at will because Xenco made and Tuttle accepted one rental payment after the natural expiration of the lease but BEFORE Tuttle sent the letter of termination. The monthly rental rate under the lease was \$6,000.00 per month. Xenco alleged that this rental rate was well above market and was actually an installment purchase contract. According to Xenco, the parties had agreed that the reasonable rental rate was \$1,200.00 a month and the additional \$3,800.00 per month was part of the purchase agreement. Furthermore, Xenco alleged it was a tenant at sufferance despite the fact that it had paid one month's rent after the natural termination of the lease. Xenco's position was that the payment was a "good faith" payment towards the purchase of the property.²⁷² The trial court held Xenco was a tenant at sufferance and that Tuttle was only entitled to reasonable value of rent per month, which they determined to be \$1,200.00 with a total amount of unpaid rent owing equal to \$63,000.00.²⁷³ The Eleventh Eastland Court of Appeals stated clearly that acceptance of a one-time partial payment of rent "does not automatically create a tenancy at will"²⁷⁴ and found Xenco to be a tenant at sufferance.²⁷⁵ The appropriate measure of damages for a tenancy at sufferance was reasonable rental value.²⁷⁶ The difference in this case was over four million dollars, a very expensive mistake for the practitioner and the landlord.

271. *Id.* at 350 (emphasis added).

272. *Id.* at 352.

273. *Id.*

274. *Id.* at 354 (citing *Fed. Deposit Ins. Corp. v. Inducto-Bend, Inc.*, 753 F. Supp. 651, 654 (S.D. Tex. 1991) (applying Texas law)).

275. *Id.* at 354–55.

276. *Id.* at 358.

D. JURISDICTION OF THE JUSTICE COURTS

It seems a yearly ritual that plaintiffs feel compelled to challenge the jurisdiction of the justice courts over issues of forcible entry and detainer. *Mendoza v. Bazan*²⁷⁷ is worth mentioning here because it involved several slightly different twists on the normal facts and provides a useful refresher to the practitioner. *Mendoza* involved a landlord, whose title in the property was questioned, bringing both a forcible detainer action and a suit for unpaid rent. The tenant argued the suit was in excess of the jurisdictional limit of the justice court of \$10,000.00. As most practitioners are aware, pursuant to Section 27.031(a)(1) and (2) of the Texas Government Code, the justice court clearly has jurisdiction over cases with an amount in controversy less than \$10,000.00 and over all cases involving forcible entry and detainer.²⁷⁸ Although the holding of the Eighth El Paso Court of Appeals is not as plainly stated as one would like because the court fails to definitively address several important issues (such as whether the justice court has jurisdiction over forcible detainer actions involving amounts in excess of \$10,000.00), these authors feel that the court rightfully found that the justice court had jurisdiction over the present case. The court of appeals also addressed the issue of whether the justice court had the right to decide a forcible detainer case where there was a question as to the title of the landlord. The details needed to clearly analyze the issue are missing from the court's holding and are, therefore, not addressed in this article. Nonetheless, the authors do wish to point out to practitioners that although the tenant was essentially a holdover tenant, the legal title of the landlord to the property was, for a period of time, in question. The court held that the fact that the landlord's legal title was in question was irrelevant in a forcible detainer action because "a plaintiff is not required to prove title, but is only required to show sufficient evidence of ownership to demonstrate a superior right to immediate possession."²⁷⁹

Another unique aspect of the *Mendoza* case is that this was the second forcible detainer action brought by the landlord. The first forcible detainer action had been decided against the landlord. The tenant claimed *res judicata* and collateral estoppel barred the present case. However, as has been well established in Texas courts over the years, a forcible detainer action is "uniquely limited in time" to the party that has the right to superior possession at the time the case is brought.²⁸⁰ Or, more explicitly "an award of possession on a particular date does not determine a party's possessory interests on a future date[.]"²⁸¹

277. 574 S.W.3d 594 (Tex. App.—El Paso 2019, pet denied).

278. *Id.* at 601; *see also* TEX. GOV'T CODE ANN. § 27.031(a)(1)–(2).

279. *Mendoza*, 574 S.W.3d at 602 (citing *Molinar v. Refaei*, No. 08-14-00299-CV, 2016 WL 5121988, at *2 (Tex. App.—El Paso Sept. 21, 2016, pet. denied) (mem. op.) (citing *Rice v. Pinney*, 51 S.W.3d 705, 709 (Tex. App.—Dallas 2001, no pet.)).

280. *Id.* at 605 (citing *Puentes v. Fannie Mae*, 350 S.W.3d 732, 738 (Tex. App.—El Paso 2011, pet. dism'd)).

281. *Id.*

In yet another forcible detainer action—*Sloane v. Goldberg B’Nai B’rith Towers*²⁸²—the Fourteenth Houston Court of Appeals addressed the circumstances under which a landlord has the right to possession under a forcible detainer action for a lease that was terminated for a reason other than non-payment, as is the normal circumstance in forcible detainer cases, but instead for alleged violations of the “House Rules” by the tenant and other lease terms. In the case at hand, the tenant was alleged to have threatened other tenants, including threatening to shoot management (which the tenant alleged was only a joke) and repeatedly used vulgar and disparaging words when talking to management or other tenants. Ultimately, after multiple incidents over several years, the landlord sent the tenant a letter of termination. The tenant argued an affirmative defense that his breach of the lease and the “House Rules” were excused because of prior material breaches by the landlord of the lease and the failure of the landlord to enforce the “House Rules” for other tenants. The case law in Texas is clear that although further performance of a contract is generally excused after a breach by one party, “[w]hen a party treats a contract as continuing despite the other party’s prior breach, the party may not rely on prior material breach to excuse his own performance.”²⁸³ The lease stated that “[w]hensoever the Landlord has been in material noncompliance with this Agreement, the Tenant may in accordance with State law terminate this Agreement by so advising the Landlord in writing.”²⁸⁴ As a result, the court of appeals held that “[a] landlord is entitled to possession under a forcible detainer action when the landlord lawfully terminates a tenant’s lease.”²⁸⁵ Although the court acknowledged, in a footnote, that the tenant arguably had some valid concerns and complaints about accessibility issues, the only valid issue in a forcible detainer action is superior right of possession and the only dispositive issue is whether the lease was validly terminated according to the terms.²⁸⁶

V. PURCHASER/SELLER

A. FIDUCIARY DUTY

In *Texas Outfitters Ltd., LLC v. Nicholson*,²⁸⁷ the trial court and Fourth San Antonio Court of Appeals found that the holder of the executive rights for mineral interests owed a fiduciary duty to the non-executive interest holders and awarded the non-executive mineral interest

282. 577 S.W.3d 608 (Tex. App.—Houston [14th Dist.] 2019, no. pet.).

283. *Id.* (citing *Long Trs. v. Griffin*, 222 S.W.3d 412, 415–16 (Tex. 2006) (per curiam) (holding that a party “who elects to treat a contract as continuing deprives himself of any excuse for ceasing performance on his own part.”)).

284. *Id.* at 618.

285. *Id.* at 617 (first citing TEX. PROP. CODE ANN. § 24.002; then citing *Moon v. Spring Creek Apartments*, 11 S.W.3d 427, 435 (Tex. App.—Texarkana 2000, no. pet.)).

286. *Id.* at 617 n.8.

287. 572 S.W.3d 647 (Tex. 2019).

holders monetary damages for breach of the fiduciary duty.²⁸⁸ The issuance of holding was recently affirmed by the Texas Supreme Court although these authors feel the supreme court's holding creates more questions than answers. As discussed in last year's article as well, given the facts of the case, explained in more detail below, the outcome reached by the supreme court seems to be the right answer from an equity standpoint, however, arguably the holding will dramatically impact existing business practices of executive rights holders in the state of Texas. Given the lack of clear direction from the Texas Supreme Court, it will also, almost undoubtedly, open the floodgates to future litigation over whether the executive rights holders breached their "fiduciary duty."

The facts of the case are relatively straightforward: the Carter family sold the surface estate and the executive rights to Texas Outfitters while retaining the majority of the mineral interest.²⁸⁹ The transaction was partially seller financed.²⁹⁰ Texas Outfitters then received multiple seemingly competitive offers to lease the mineral interests that it turned down.²⁹¹ The Carter family attempted to negotiate with Texas Outfitters, but Texas Outfitters refused to enter into a lease unless the Carters made a number of concessions, including, but not limited to, giving up substantially more of their mineral interests, agreeing to non-market surface restrictions, and reducing the outstanding indebtedness on the seller financed promissory note.²⁹² Ultimately, the Carter family sued Texas Outfitters²⁹³ seeking to compel a lease of the mineral interests. The holding by the San Antonio Court of Appeals, affirmed in part by the Texas Supreme Court, that Texas Outfitters breached their fiduciary duty, relied on a long line of Texas Supreme Court cases that have held that "the executive owes other owners of the mineral interest a duty of 'utmost fair dealing.'"²⁹⁴

The holding in *Lesley v. Veterans Land Board of Texas*²⁹⁵ is one of the seminal Texas Supreme Court cases relied upon by the court of appeals in their holding. In *Lesley*, the supreme court applied the "fiduciary duty" standard to the refusal of an executive owner to lease property "[i]f the refusal [to lease] is arbitrary or motivated by self-interest to the non-executive's detriment."²⁹⁶ Interestingly, in recent years the supreme court has qualified this precedent to clarify that although the duty is "fiduciary in nature" it does not require one to "place the interest of the other party

288. *Tex. Outfitters Ltd., LLC v. Nicholson*, 534 S.W.3d 65, 66 (Tex. App.—San Antonio 2018, pet. granted), *aff'd* 572 S.W.3d 647 (Tex. 2019).

289. *Id.*

290. *Id.*

291. *Id.* at 69.

292. *Id.* at 70.

293. *Id.*

294. *Id.* (citing *Lesley v. Veterans Land Bd. of Tex.*, 352 S.W.3d 479, 480–81 (Tex. 2011)).

295. *Lesley*, 352 S.W.3d at 480–81.

296. *Id.* at 491.

before [its] own.”²⁹⁷ The supreme court stuck to this fine line with its holding in *Texas Outfitters* stating that “we cannot and do not say that an executive primarily interested in the surface necessarily breaches his duty by engaging in conduct that benefits the surface but not the mineral estate” while simultaneously finding that under the circumstances presented in the case at hand, Texas Outfitters had, in fact, breached its duty.²⁹⁸ Although the authors agree with the holding, they cannot help but be disappointed in the failure of the supreme court to issue unequivocal guidance. Instead, once again, the supreme court has created uncertainty for businesses across Texas, and likely increased litigation, by adopting a “we know it when we see it approach” as opposed to giving clear guidance for executive rights holders to follow.

B. STATUTE OF FRAUDS

Following the trend in recent years, *Copano Energy, LLC v. Bujnoch*²⁹⁹ is another interesting Texas Supreme Court case that these author find, like *Texas Outfitters*, does more to confuse than clarify issues. Practitioners throughout Texas had their fingers (and toes) crossed in the hope that the supreme court would settle a current split among the various appeals courts regarding what type of “electronic” signatures are sufficient to meet the requirements of the statute of frauds. Various appeals courts in Texas have found the following actions both do (or do not—depending on the court) comply with the statute of frauds: (1) entering your name in the e-mail from field; (2) sending an e-mail with an automatically generated signature block; or (3) typing your name at the end of the e-mail.

In the case at hand, the parties exchanged a series of e-mails about a new easement. The various e-mails covered issues such as the price, the location, and the parties. The emails were exchanged between the lawyer for the property owners, Marcus Schwartz, and the Director of Right-Away Services, James Sanford, for the energy company, Copano, that wished to acquire the additional easement. On January 30, 2013, Sanford emailed Schwartz agreeing to pay Schwartz’s “clients \$70.00 per foot for the second 24 inch line.” Sanford typed his name below his message. Schwartz accepted the offer via email. Schwartz’s secretary then sent an email to Sanford with a formal amendment to an existing easement incorporating the agreed to terms. Sanford responded to the email stating “I am fine with these changes” and again typed his name below the message. Following this exchange, two different Copano representatives sent two different agreements to the property owners each containing prices far below the amount negotiated between Sanford and Schwartz. Schwartz emailed the offer to Sanford with a note that said “THIS IS NOT OUR DEAL WHAT IS GOING ON?” Sanford responded with a long note

297. *Id.* at 490.

298. *Tex. Outfitters v. Nicholson*, 572 S.W.3d 647, 656–57 (Tex. 2019).

299. 593 S.W.3d 721 (Tex. 2020).

assuring Schwartz that it was a mistake and their deal “still stands.” Ultimately, however, Copano refused to close on the original deal and the property owners sued. The trial court granted the motion for summary judgment on the basis that the statute of frauds barred enforcement of any agreement to purchase the second easement because: (1) the emails may not be read together to make out a written memorandum, and no single email contained the essential terms of the agreement; (2) even if the emails may be read together, they omitted essential terms of the agreement, such as (i) the identity of the parties, and (ii) a description of the easement; (3) the e-mails contained “futuristic” language; and (4) the parties did not agree to transact business by electronic means.³⁰⁰ The Thirteenth Corpus Christi–Edinburg Court of Appeals overturned the trial court’s holding, finding that the elements of the statute of frauds could be satisfied. On the issue of reading the e-mails together, the court of appeals stated that instruments that are signed may be read together and Sanford had signed each of the e-mails. Furthermore, the Texas Business and Commerce Code states in Section 322.007 that electronic signatures are legally effective to bind parties provided that an electronic symbol is used showing his “intent” to sign.³⁰¹ Unfortunately, in Texas, the courts have split on what is required to show your “intent.”³⁰² In the case at hand, the court felt that typing the name was sufficient evidence of intent to be bound.³⁰³ Having disposed of the issue of electronic signature, the court of appeals quickly concluded that there was sufficient information in the emails to also establish the identity of the parties and the location of the easement which was identified in the emails to be a “20 feet easement contiguous to the first easement[.]”³⁰⁴

The supreme court disagreed with the court of appeals and overturned the holding.³⁰⁵ The supreme court felt that there was no single writing or even multiple writings taken together that clearly expressed the intent of the parties to be bound.³⁰⁶ The supreme court described the e-mails as a series of communications about a future meeting to be held and the terms that the party intends to offer at the meeting and not the terms the party actually offered.³⁰⁷ As the supreme court stated: “a writing that contemplates a contract to be made in the future does not satisfy the requirements of the statute of frauds.”³⁰⁸ The supreme court did not address the

300. *See id.* at 723–27.

301. *Id.* at 730–31.

302. *Bujnoch v. Copano Energy*, 581 S.W.3d 262, 271 (Tex. App.—Corpus Christi–Edinburg 2017, pet. granted), *rev’d*, 593 S.W.3d 721 (Tex. 2020).

303. *Id.* at 272.

304. *Id.* at 267, 275.

305. *Copano Energy*, 593 S.W.3d at 731–32.

306. *Id.* at 727–28.

307. *Id.* at 724.

308. *Id.* at 729 (citing *Southmark Corp. v. Life Inv’rs, Inc.*, 851 F.2d 763, 767 (5th Cir. 1988) (applying Texas law)); *see* *Hugh Symons Grp., PLC v. Motorola, Inc.*, 292 F.3d 466, 470 (5th Cir. 2002) (holding that “an overture to further joint discussion or ongoing negotiations” is not a “binding agreement”); *Columbia/HCA of Hous., Inc. v. Tea Cake French Bakery & Tea Room*, 8 S.W.3d 18, 21 (Tex. App.—Houston [14th Dist.] 1999, pet. denied)

signature issue because the issue was not argued on appeal.³⁰⁹

C. STATUTE OF LIMITATIONS

Although covered in last year's materials, we are again covering *Archer v. Tregellas*³¹⁰ because the Texas Supreme Court heard oral arguments on September 13, 2018, and issued an opinion on November 16, 2018, overturning the Seventh Amarillo Court of Appeals' decision. In the authors' opinion, the supreme court's decision overturning the holding of the court of appeals should have been welcome news for practitioners all over the state. As the authors stated in last year's review, the holding of the court of appeals was not only extremely troubling for real estate transactional attorneys, but it also created severe uncertainty for anyone who engages in the buying and selling of real estate. Luckily for all real estate practitioners, and more so for all of the participants in the real estate market, the clearly erroneous holding of the court of appeals was reversed. The case, and its many progeny, are very long and involved, so what follows is a condensed version of the case and the most relevant court holdings, including the reversal by the supreme court.

At its core, the *Tregellas* case concerned a right of first refusal with respect to a mineral interest. In June 2003, a warranty deed transferred the surface of certain property located in Hansford County, Texas to the Archer Trustees. In a separate recorded agreement, entered into simultaneously, the Archer Trustees were granted a right of first refusal (ROFR) to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Two of the original grantors (the Farbers) sold their mineral interests on March 28, 2007 to the Tregellas. The Archer Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011. To further complicate matters, in 2008, heirs of one of the original grantors (the Smiths) sold their interest to the Tregellas. After they learned of the Archer Trustee suit, the Smith transaction was restructured into a loan secured by a deed of trust with a note payable in ninety days on which the Smiths never made payment. In August 2012, the Tregellas acquired the Smith interest at a non-judicial foreclosure sale.

Upon finding out about the foreclosure transaction, the Archer Trustees amended their petition and alleged that the Tregellas "obtained the Smith minerals by subterfuge, artifice, or device[.]"³¹¹ The trial court granted specific performance to the Archer Trustees with respect to both the Farber and Smith ROFR interest.³¹² The Tregallas put forth a number

(holding that a letter constituting the "initial starting point for the negotiations" could not "constitute a binding written agreement").

309. *Copano Energy*, 593 S.W.3d at 728 n.6.

310. 566 S.W.3d 281 (Tex. 2018) (overturning *Tregallas v. Carol M. Archer Tr. No. Three*, 507 S.W.3d 423 (Tex. App.—Amarillo 2016)).

311. *Tregallas*, 507 S.W.3d at 428.

312. *Id.* at 426.

of arguments on appeal, but, for the sake of brevity, we will focus on the issues most relevant to practitioners and the subject of the supreme court's recent opinion, specifically that the Archer Trustee's claim for specific performance, with respect to the Farber interest, was barred by the statute of limitations.³¹³ Generally, when a grantor of a ROFR sells property in breach of a ROFR, "there is created in the holder an enforceable option to acquire the property according to the terms of the sale."³¹⁴ However, Section 16.004(a)(1) of the Texas Civil Practice & Remedies Code requires "[a] suit for specific performance of a contract for the conveyance of real property must be brought no later than four years after the cause of action accrues."³¹⁵ The appeals court held that the breach occurred on March 28, 2007, when the Farbers sold their property to Tregallas and that the suit for specific performance was barred because it was filed outside the four-year statute of limitations period. The appeals court based their holding on the Texas Supreme Court's holding in *S.V. v. R.V.*,³¹⁶ where the supreme court stated "a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred."³¹⁷

The Archer Trustees tried, unsuccessfully, to argue that with respect to rights of first refusal, the right is "dormant" until the holder is notified of a potential sale. The court of appeals disagreed and said that supporting the Archer Trustee's argument would result in profound uncertainty that was "inconsistent with the purpose of the statutes of limitation," which according to the supreme court's holding in *S.V.* is to "establish a point of repose and to terminate stale claims."³¹⁸

The Archer Trustees went on to argue for application of the discovery rule, which tolls the accrual of a cause of action until the party learns of the injury or, through reasonable due diligence, could have learned of the injury. The court of appeals dismissed the Archers Trustees' arguments and relied on the Texas Supreme Court's holding in *Cosgrove v. Cade*,³¹⁹ which the court argued limited application of the discovery rule to injuries that are "inherently undiscoverable" and not ones that are discoverable by the exercise of "reasonable diligence" such as a search of public records, including the county clerk's real property records or the tax rolls.³²⁰ Furthermore, the court of appeals emphasized that the Texas Supreme Court has specifically held that there are only rare instances where the discovery rule should be applied to breach of contract cases as each

313. *Id.* at 430; *see also* Archer v. Tregallas, 566 S.W.3d 281, 284 (Tex. 2018).

314. *Tregallas*, 507 S.W.3d at 430.

315. *Id.* (first citing TEX. CIV. PRAC. & REM. CODE ANN. § 16.004(a)(1); then citing *Gilbreath v. Steed*, No. 12-11-00251-CV, 2013 WL 2146239 (Tex. App.—Tyler May 15, 2013, no pet.) (mem. op.)).

316. 933 S.W.2d 1, 4 (Tex. 1996).

317. *Id.*

318. *Tregallas*, 507 S.W.3d at 431–32 (citing *S.V.*, 933 S.W.2d at 3).

319. 468 S.W.3d 32, 36 (Tex. 2015).

320. *Tregallas*, 507 S.W.3d at 433 n.10.

party to a contract is required to protect their own interests and “diligent contracting parties should generally discover any breach during the relatively long four-year limitations period.”³²¹

In response, the Archer Trustees argued that it is well settled in Texas that “owners of property are under no duty routinely to search the deed records for later-filed documents impugning their title.”³²² The court of appeals distinguished the case at hand because, in the court’s opinion, the Archer Trustees did not own the mineral interest—they only owned an option to acquire a mineral interest, which was a contract right and *not* a real property right.³²³ The court of appeals reversed the trial court with respect to the Farber interest and upheld the trial court with respect to the Smith interest.

In overturning the holding of the court of appeals, the supreme court specifically found that

a grantor’s conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor’s intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder’s cause of action until he knew or should have known of the injury.³²⁴

Although the supreme court (in a footnote) specifically limited its holding to the very narrow set of circumstances found in this case by stating “[w]e limit our holding to this particular breach—conveyance with *no* notice of the intent to sell or the existence of an offer—of this particular type of right,” the holding is welcome news for real estate practitioners and holders of all forms of options or rights of first refusal in the State of Texas.³²⁵ As stated in last year’s review, the authors feel it is no exaggeration to state that if the holding of the court of appeals had been upheld, thousands (if not millions) of real estate deals across the State of Texas would have been thrown into a state of uncertainty and chaos with holders of rights of first refusals and options denied the benefit of their bargain and the rights they negotiated for (and often times paid handsomely for) at the time the bargain was struck. With a stroke of the pen, the court of appeals had suddenly rendered once valuable rights worth less than the paper they were written on.

D. DUE DILIGENCE/COMPLIANCE WITH CONTRACT TERMS

In *CHW-Lattas Creek, L.P. by GP Alice Lattas Creek, L.L.C. v. City of Alice*,³²⁶ a case involving a development agreement between a private party and the City of Alice (City), the Fourth San Antonio Court of Ap-

321. *Id.* at 432 (citing *Via Net v. TIG Ins. Co.*, 211 S.W.3d 310, 315 (Tex. 2006) (per curiam)).

322. *Id.* at 433.

323. *Id.*

324. *Tregallas v. Carol M. Archer Tr. No. Three*, 566 S.W.3d 281, 292 (Tex. 2018).

325. *Id.* at 292 n.10.

326. 565 S.W.3d 779 (Tex.App.—San Antonio 2018, pet. denied).

peals examined the issue of whether a city's activities pursuant to the Development Agreement were governmental functions which entitled the city to the protections of sovereign immunity or if the activities were "proprietary functions" which were not immune.³²⁷ The essence of the case is the nature of the services provided. The Texas Legislature has enumerated thirty-six "governmental and proprietary functions for the purposes of determining whether immunity applies to tort claims against a municipality."³²⁸ One of the specifically enumerated items is development activities authorized by Chapters 373 and 374 of the Local Government Code.³²⁹ CHW attempted to argue that the Development Agreement does not fall under the protections because CHW was providing services to the City. However, previously, Texas courts have consistently dismissed this argument, finding that while actions performed under a Development Agreement may bring general benefit to a city and facilitate the development of property owned by a private party, the "services" are not being provided to a city per se and do not result in the waiver of governmental immunity under Chapter 271.³³⁰ The court also addressed the fact that the recitals of the Development Agreement specifically stated that goods and services were being provided to the City and cited a long list of Texas cases supporting the fact that "recitals cannot be used to contradict the operative terms of a contract."³³¹ CHW made several other interesting arguments for immunity, but the one that will be of most interest to practitioners here is the argument that the City was estopped from asserting immunity because the Development Agreement contained a specific waiver of sovereign immunity.³³² The City argued in response that only the Legislature can waive immunity.³³³ The court of appeals sided with the City based on a long line of Texas cases where it was held that "[t]he general rule has been in this state that when a unit of government is exercising its governmental powers, it is not subject to estoppel."³³⁴ However, there are some very limited circumstances where courts have found an exception to the general rule if "justice requires" in order to prevent "manifest injustice."³³⁵ The general rule "derives from our structure of government, in which the interest of the individual must at times yield to the public interest and in which the responsibility for public policy must rest on decisions officially authorized by the govern-

327. *Id.* at 784–85 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.0215(b)).

328. *Id.* at 787 (quoting TEX. CONST. art. XI, § 13).

329. *Id.*

330. *Id.* at 788.

331. *Id.* at 789 (first citing *Griffith Techs., Inc. v. Packers Plus Energy Servs. (USA), Inc.*, No. 01-17-00097-CV, 2017 WL 6759200, at *4 (Tex. App.—Houston [1st Dist.] Dec. 28, 2017, no pet.) (mem. op.) (noting recitals "cannot be used to contradict the operative terms of a contract"); then citing *All Metals Fabricating, Inc. v. Ramer Concrete, Inc.*, 338 S.W.3d 557, 561 (Tex. App.—El Paso 2009, no pet.) (noting recitals "will not control a contract's operatives [sic] clauses unless those clauses are ambiguous.")).

332. *Id.*

333. *Id.*

334. *Id.* at 790 (citing *City of Hutchins v. Prasifka*, 450 S.W.2d 829, 835 (Tex. 1970)).

335. *Id.*

ment's representatives, rather than on mistakes committed by its agents."³³⁶ The court held "parties who enter into an agreement with a local governmental entity should be charged with the law regarding the entity's immunity and enter into the agreement at the parties' own peril."³³⁷ The conclusion of this case is a cautionary tale for all practitioners that negotiate governmental agreements.

In *Van Duren v. Chife*,³³⁸ the First Houston Court of Appeals examined the law regarding the enforceability of as-is clauses with respect to a residential house purchase. In the case at hand, the contract did not specifically use the phrase "as-is," instead it contained what the court described as a "present condition clause."³³⁹ Although the purchasers did not obtain an inspection, they argued they relied on the written Disclosure Notice where the sellers indicate that they were not aware of any issues. In addition, the purchaser asserted there were verbal representations from the broker regarding a previous inspection that had not revealed any issues. In Texas, "as-is" clauses are generally enforceable provided that it is "an important part of the basis of the bargain, not an incidental or 'boiler-plate' provision, and is entered into by parties of relatively equal bargaining position."³⁴⁰ However, an enforceable as-is clause may be defeated if one of the following has occurred: (1) fraudulent inducement;³⁴¹ or (2) obstruction of the right to inspect.³⁴² The purchasers of the house argued that a "present condition" clause is not the same as an "as-is" clause because it does not disclaim reliance. They were unable to prevail on this point because Texas courts have long held that "present-condition clauses operate as as-is clauses."³⁴³ The court held that the broker could not be liable for the seller's disclosures because the law imposes the obligation to disclose on the sellers only (not the broker) unless there was some evidence that the broker had "any reason to believe that the sellers disclosures are false or inaccurate."³⁴⁴ Because the purchasers had waived the right to inspection, the purchasers were not

336. *Id.* (citing *City of White Settlement v. Super Wash, Inc.*, 198 S.W.3d 770, 773 (Tex. 2006)).

337. *Id.* at 791 (citing *City of Galveston v. State*, 217 S.W.3d 466, 469 (Tex. 2007)).

338. 569 S.W.3d 176 (Tex.App.—Houston [1st Dist.] 2018, no pet.).

339. *Id.* at 185–86.

340. *Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd.*, 896 S.W.2d 156, 162 (Tex. 1995); *Bynum v. Prudential Residential Servs.*, 129 S.W.3d 781, 789 (Tex. App.—Houston [1st Dist.] 2004, pet. denied).

341. *Prudential*, 896 S.W.2d at 161–62; *Bynum*, 129 S.W.3d at 788.

342. *See Prudential*, 896 S.W.2d at 162; *Bynum*, 129 S.W.3d at 788–89.

343. *Van Duren*, 569 S.W.3d at 186 (citing *Lutfak v. Gainsborough*, No. 01-15-01068-CV, 2017 WL 2180716, at *3 (Tex. App.—Houston [1st Dist.] May 18, 2017, no pet.) (mem. op.)). The language "in its present condition" is not ambiguous. *See Birnbaum v. Atwell*, No. 01-14-00556-CV, 2015 WL 4967057, at *6 (Tex. App.—Houston [1st Dist.] Aug. 20, 2015, pet. denied) (mem. op.). Rather, "in its present condition" is a readily understood equivalent of "as is." *See BLACK'S LAW DICTIONARY* 108–09, 1202 (7th ed. 1999) (defining "as is" as "[i]n the existing condition without modification" and "present" as "[n]ow existing; at hand").

344. *Van Duren*, 569 S.W.3d at 176 (citing *Sherman v. Elkowitz*, 130 S.W.3d 316, 320–21 (Tex. App.—Houston [14th Dist.] 2004, no pet.)). The seller's liability was not addressed as the sellers had counterclaimed and those claims were still pending. *Id.*

able to prevail in their claim against the broker. It is important to point out to Texas practitioners that the “present condition” clause at issue here was the text from the promulgated Texas Real Estate Commission form. The form has two options when it comes to acceptance of a property’s condition; the Buyers either accept it: (1) “in its present condition”; or (2) subject to specified repairs.³⁴⁵

VI. CONSTRUCTION MATTERS

A. BREACH OF CONTRACT

In *De Avila v. Espinoza Metal Building & Roofing Contractors*,³⁴⁶ the Eighth El Paso Court of Appeals upheld the lower court’s finding that De Avila breached a roofing repair contract with Espinoza when he evicted Espinoza from a job site before work was finalized. Eduardo De Avila entered into a contract with Espinoza Metal Building & Roofing Contractor in February 2011 to preform roofing repairs.³⁴⁷ The contract required Espinoza to install a type of energy-efficient roofing-system, which Espinoza had been specially certified to install by the manufacturer.³⁴⁸ The contract provided Espinoza would be paid \$87,475 for the job.³⁴⁹ No timetable or date of completion was specified for the installation, but the contract provided that “[t]ime is of the essence of the Subcontract.”³⁵⁰ A provision of the contract also allowed De Avila to terminate the contract with or without cause by providing forty-eight hours notice of termination in writing.³⁵¹ The contract further required that any modifications to the agreement be made in a writing signed by both parties.³⁵² Espinoza and De Avila got into a dispute over a change order required to fix damage to the roof already installed by Espinoza caused by the installers of AC units. While Espinoza was waiting for De Avila’s agreement to the requested change order, De Avila ordered Espinoza to vacate the job site. De Avila never sent Espinoza a notice of termination as required by the contract but instead hired another contractor to replace Espinoza. Espinoza sued. The court found that

[w]hen a party to a valid and enforceable contract wrongfully interferes with another party’s ability to render its performance under the contract, and thereby makes the party’s performance impossible, the party committing the interference is in breach of contract and the afflicted party is entitled to damages sustained by the breach.³⁵³

345. *Id.* at 186.

346. 564 S.W.3d 150 (Tex. App.—El Paso 2018, no pet.).

347. *Id.* at 153.

348. *Id.*

349. *Id.*

350. *Id.*

351. *Id.*

352. *Id.*

353. *Id.* at 154–55.

B. WAIVER OF CERTIFICATE OF MERIT

In *LaLonde v. Gosnell*,³⁵⁴ the Texas Supreme Court concurred with the Second Fort Worth Court of Appeals' interpretation of the Certificate of Merit statute. In the case at hand, the Gosnells filed suit in September 2011 for structural damage to their home allegedly caused by the destabilization of the foundation after a chemical was injected into the soil.³⁵⁵ After mediation and discovery, the engineers filed a motion to dismiss in January of 2015. This was over 1,219 days after the suit was first filed.³⁵⁶ The motion to dismiss was based on the failure of the Gosnells to abide by the Certificate of Merit statute when they filed their initial suit.³⁵⁷ The trial court agreed and dismissed the case.³⁵⁸ The court of appeals reversed the trial court, and the supreme court affirmed the court of appeals' holding.³⁵⁹ The Texas Supreme Court addressed this very issue in *Crosstex Energy Services, L.P. v. Pro Plus, Inc.*,³⁶⁰ where the supreme court held that there was no one factor that would result in waiver. The court of appeals found that the courts must look at the totality of the circumstances.³⁶¹ A review of recent cases shows that by and large the lower courts are struggling to follow the guidance put forth by the Second Fort Worth Court of Appeals in *Gosnell* that "a defendant may be considered to have waived the right to dismissal for failure to file a certificate of merit when, under the totality of the circumstances, the defendant has substantially invoked the judicial process."³⁶² However, in the case at hand, the court of appeals correctly found that the over three-year delay in filing for dismissal, the participation in the discovery process and trying to settle the case informally were all indications that "paint[] the picture of defendants who did not intend to take advantage of their right to dismissal."³⁶³

VII. TITLE/CONVEYANCES/RESTRICTIONS

A. CONVEYANCES

In *Trial v. Dragon*,³⁶⁴ the Texas Supreme Court overturned a summary judgment holding granted by the Fourth San Antonio Court of Appeals supported by finding estoppel by deed. In the case at hand, Leo Trial, along with several of his siblings, owned real property.³⁶⁵ In 1983, Leo gifted his wife, Ruth, with half of his one-seventh interest in the prop-

354. 593 S.W.3d 212 (Tex. 2018).

355. *Id.* at 1217.

356. *Gosnell v. LaLonde*, 559 S.W.3d 559, 561.

357. *Id.*

358. *Id.*

359. *Id.*

360. 430 S.W.3d 384 (Tex. 2014).

361. *Gosnell*, 559 S.W.3d at 568.

362. *Id.* at 561.

363. *Id.* at 567.

364. 593 S.W.3d 313 (Tex. 2019).

365. *Id.* at 314-15.

erty.³⁶⁶ Nine years later, in 1992, Leo and his siblings purportedly conveyed the entirety of the land to the Dragons. Ruth did not sign the conveyance.³⁶⁷ The conveyance contained a fifteen-year mineral reservation which terminated in 2008.³⁶⁸ Leo passed away in 1996, and Ruth passed away in 2010.³⁶⁹ The issue in the case is whether Ruth's sons inherited her one-fourteenth interest or whether they were estopped from claiming the interest because their father had signed the warranty deed claiming to convey the entire interest.³⁷⁰ The Dragons attempted to make two different arguments to establish their primary claim to the property: Leo's sons are subject to (1) estoppel by deed; and (2) the doctrine of after acquired property.

Over the years, the doctrine of estoppel by deed developed to stand for the proposition that "all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate, and privies in law."³⁷¹ The Dragons claimed that because Leo's sons ultimately inherited from their father they were "privies in blood" and are estopped from claiming an interest in the property contrary to the deed their father had signed.³⁷² However, because the sons inherited the property from their mother, who did not sign the deed and who held the one-fourteenth interest as her sole property, they did not hold the property as Leo's privies but as Ruth's.³⁷³ Therefore, the supreme court held they are not estopped from claiming their interest in the property.³⁷⁴ The Dragons also attempted to argue after-acquired property but because Leo did not hold the property claimed by the Dragons after the time it was conveyed to the Dragons, the after-acquired property doctrine did not apply.³⁷⁵

*Cochran Investments, Inc. v. Chicago Title Insurance Co.*³⁷⁶ may have drawn the most attention among the title cases during the survey period, and it continues to draw debate. The facts of the case are fairly simple. William England and Medardo Garza owned an east Houston duplex in equal shares. Ownership of the duplex was subject to a deed of trust held by EMC. England conveyed his one-half interest in the duplex to Garza in September 2009. An involuntary bankruptcy proceeding was commenced against England in December 2009. England's conveyance of his interest in the duplex was set aside as a fraudulent transfer. EMC foreclosed its lien on the duplex in December 2010 and the duplex was sold at

366. *Id.* at 315.

367. *Id.*

368. *Id.*

369. *Id.*

370. *Id.* at 314–15.

371. *Id.* at 318.

372. *Id.* at 316.

373. *Id.* at 324.

374. *Id.*

375. *Id.* at 323.

376. 550 S.W.3d 196 (Tex. App.—Houston [14th Dist.] 2018, pet. granted).

a foreclosure sale to Cochran for approximately \$36,000.00. Cochran sold the duplex to Ayers in June 2011 for \$125,000.00. Cochran and Ayers executed a residential sales contract and title was conveyed through a special warranty deed. The deed's granting clause states: "That Cochran Investments, Inc. . . . has GRANTED, SOLD AND CONVEYED and by these presents does hereby GRANT, SELL AND CONVEY unto Grantee, all of that certain tract of land lying and being situated in Harris County, Texas described as follows" ³⁷⁷ The granting clause is followed by a description of the property. The deed also includes a special warranty clause that states:

Grantor does hereby bind Grantor and Grantor's successors and assigns to WARRANT AND FOREVER DEFEND, all and singular the Property, subject to the matters stated herein, unto Grantee and Grantee's successors and assigns, against every person whomsoever lawfully claiming or to claim the same or any party thereof *by, through and under Grantor, but not otherwise.* ³⁷⁸

"In connection with Ayers's purchase of the duplex, Chicago Title issued an Owner's Policy of Title Insurance. Chicago Title agreed to 'pay [Ayers] or take other action if [Ayers] ha[d] a loss resulting from a covered title risk.'" ³⁷⁹ Chicago Title was a party via contractual subrogation after paying the loss to the buyer/insured. Ayers asserted claims for breach of the implied covenant of seisin, breach of contract, money had and received, and unjust enrichment. Ayers had suffered a complete failure of title due to a mishandling of the England bankruptcy. The court of appeals found "that (1) the deed that conveyed the duplex to Ayers did not imply the covenant of seisin; and (2) the merger doctrine bars recovery for a breach of contract." ³⁸⁰

In order for a covenant of seisin to be implied, there must be a representation or claim of ownership by the grantor. A covenant is implied in a real property conveyance if

it appears from the express terms of the contract that "it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it," and therefore they omitted to do so, or "it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument." ³⁸¹

In this case, there was only the standard "grant, sell and convey" language—nothing about having the right and authority to sell and convey or similar language. ³⁸² The "grant, sell and convey" language only implies a covenant that the property has not been encumbered or previously con-

377. *Id.* at 199–200.

378. *Id.* at 200.

379. *Id.*

380. *Id.* at 205.

381. *Id.* at 202.

382. *Id.* at 203–04.

veyed by the grantor.³⁸³

Moreover, the contract merged into the deed such that the breach of contract claim for failure to deliver title did not stand.³⁸⁴ There is clearly a drafting lesson in this case, both for the contract and possibly the deed, as appropriate. As a result of poor drafting, the transaction suffered a complete failure of consideration, but the seller/grantor kept the payment for the property. Some commentators have noted the end result was the same as delivering a quit claim. The controversy over the case continues as the Texas Supreme Court granted the petition of appeal and heard oral argument on January 30, 2020.

In *Mercedes-Benz USA, LLC v. Carduco, Inc.*,³⁸⁵ the Texas Supreme Court applied its analysis from *Orca Assets* (discussed in more detail in last year's Survey) to find that a dealership could not prevail on a fraudulent inducement claim which was directly contradicted by the express terms and conditions of the contract entered into by the parties. The facts are simple: Mercedes-Benz and the plaintiff, Carduco, negotiated to buy a Mercedes-Benz dealership. There was some evidence that Carduco's son had been urged by Mercedes to move the dealership to an alternative location but never followed through. The father had several discussions with Mercedes about possible alternative locations, and employees from Mercedes even toured several of these locations. However, the express terms of the contract entered into between the father and Mercedes specifically (1) prohibited Carduco from changing locations without Mercedes's written consent; (2) identified Carduco's Area of Influence (a geographic area that Mercedes assigned to the dealer for purposes of evaluating the dealer's performance); (3) stated that Carduco did not have an exclusive right to sell Mercedes-Benz Passenger products in its Area of Influence; and (4) specifically permitted Mercedes to add new dealers or relocate dealers into Carduco's Area of Influence.

Carduco argued he was justifiably entitled as a matter of law to rely on statements made (or not made) by employees of Mercedes during negotiations despite the fact that these statements were directly contradicted by the agreement. The supreme court found that the franchisee had a duty "to protect its own interests through the exercise of ordinary care and reasonable diligence rather than blindly relying upon another party's vague assurances."³⁸⁶ As the supreme court explained, if the issue was of real importance, Carduco had a duty to make sure the contract reflected the terms. Therefore, the fact that the contract directly contradicts the terms was the franchisee's fault not the franchisor's. Carduco also argued that Mercedes had a duty to disclose they were in negotiations with a third party for the location. The supreme court disagreed, stating un-

383. *Id.*

384. *Id.* at 205.

385. 583 S.W.3d 553 (Tex. 2019).

386. *Id.* at 558 (citing *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.*, 546 S.W.3d 648, 660 (Tex. 2018)).

equivocally that “failure to disclose information does not constitute fraud unless there is a duty to disclose the information.”³⁸⁷ The nature of the franchisor/franchisee relationship is not one of a “fiduciary” nature.³⁸⁸

The results in *Cochran* and *Carduco* are supported by *JPMorgan Chase, N.A. v. Orca Assets G.P., L.L.C.*,³⁸⁹ discussed in last year’s Survey, in which the Texas Supreme Court declined to imply any covenants when the contract (an oil and gas lease) allocated risk to the lessee and warranties were expressly disclaimed.

*TLC Hospital, LLC v. Pillar Income Asset Management, Inc.*³⁹⁰ presented a number of issues at interest to real estate practitioner. In *TLC*, the parties entered into a purchase and sale agreement regarding an apartment complex. The first issue that arose was that although the contract referenced an attached legal description, the parties failed to attach the description so the only description of the property to be purchased was the street address. The second issue was that the contract required Pillar, the purchaser, to assume the Department of Housing and Urban Development financing within fifteen days. TLC failed to provide the necessary information to the lenders to allow Pillar to apply for and assume the financing. TLC then terminated the contract and two months later sent Pillar a letter of default. Pillar filed a lawsuit claiming breach of contract and promissory estoppel among other claims. The trial court granted Pillar specific performance and monetary damages equal to lost revenue. TLC appealed on several issues, one of which is that Pillar lacked standing because it was “never going to buy the property” because the contract allowed for Pillar to assign the contract to a third party.³⁹¹ TLC argued its performance was excused since Pillar breached the agreement first and the contract did not contain a legal description; therefore, it was void under the statute of frauds. In Texas, a “street address or a commonly-known name for property may be a sufficient property description if there is no confusion.”³⁹²

*Teal Trading and Development, LP v. Champee Springs Ranches Property Owners Ass’n*³⁹³ involved the Declaration of Champee Springs Ranches Property Owners Association that included a non-access easement which essentially restricted access to a main entrance creating a “one-way-in-one-way-out” subdivision.³⁹⁴ The Declaration provided, es-

387. *Id.* at 562 (citing *Bradford v. Vento*, 48 S.W.3d 749, 755 (Tex. 2001)).

388. *Id.*

389. *Orca Assets*, 546 S.W.3d at 648.

390. 570 S.W.3d 749 (Tex. App.—Tyler 2018, pet. denied).

391. *Id.* at 764.

392. *Id.* at 767; see *Apex Fin. Corp. v. Garza*, 155 S.W.3d 230, 237 (Tex. App.—Dallas 2004, pet. denied); see also *Hahn v. Love*, 394 S.W.3d 14, 26 (Tex. App.—Houston [1st Dist.] 2012, no pet.); *Nguyen v. Yovan*, 317 S.W.3d 261, 268 (Tex. App.—Houston [1st Dist.] 2009, no pet.); *Butler v. Benefield*, 589 S.W.2d 778, 780 (Tex. Civ. App.—Dallas 1979, writ ref’d n.r.e.); cf. *A.A.A. Realty Co., Inc. v. Neece*, 292 S.W.2d 811, 815 (Tex. Civ. App.—Fort Worth 1956), *aff’d* 299 S.W.2d 270 (Tex. 1957).

393. 593 S.W.3d 324 (Tex. 2020).

394. *Id.* at 329.

entially, that the declarant reserved, for the exclusive use of declarant and its successors and assigns, a one-foot easement for precluding and prohibiting access to the property and other nearby roads by adjacent property owners. It reserved one access entrance across the restrictive easement for the Champee Ranches Subdivision, and no one else was to be granted access without the consent of the declarant. After several transfers and a foreclosure, Teal Trading acquired title to the 660-acre tract referred to as the Privilege Creek Tract, which was subject to the Declaration. Teal Trading also acquired the contiguous 1,173 acres, which were not subject to the Declaration. However, the non-access easement effectively divided the 1,173 acres owned by Teal Trading from the Privilege Creek Tract it acquired. The prior owner of the Privilege Creek Tract (Champee Springs) brought suit to enforce the non-access easement and to prevent the development of the road crossing the non-access easement.³⁹⁵ At trial, Champee Springs sought enforcement of the non-access easement by declaratory judgment; Teal Trading denied it was bound by the restriction and sought a declaratory judgment that the non-access easement was an unreasonable restriction against alienation and that Champee Springs had waived its right to enforce the same.³⁹⁶ The trial court, court of appeals, and Texas Supreme Court all found in favor of Champee Springs.

Texas has adopted the Restatement of Property as to what constitutes an unreasonable restraint on alienation, which can be summarized as follows: (1) a disabling restraint (attempt by a conveyance to make a later conveyance void); (2) a promissory restraint (attempt to cause a later conveyance to impose contractual liability on a subsequent conveyance, where liability results from breach of an agreement not to convey); and (3) forfeiture restraint (attempt to terminate all or part of the interest in property conveyed). There was no direct restraint on alienation by virtue of the non-access easement; the evidence presented at trial showed, at best, an indirect restraint.³⁹⁷ An indirect restraint can only be stricken if it bears some relationship to the evil which the rules prohibiting restraints on alienation are designed to prevent, and the Restatement of Property further provides that indirect restraints are valid unless they lack a rational justification, an issue on which Teal Trading failed to present any evidence.³⁹⁸

Ultimately, the judgment that the non-access easement was valid and enforceable was affirmed, based on the fact that negative easements and restrictive covenants are expressly recognized as valid by the Restatement of Property.³⁹⁹ The supreme court specifically declined to void the restrictive access easement on public policy grounds.⁴⁰⁰

395. *Id.* at 328.

396. *Id.* at 329.

397. *Id.* at 336.

398. *Id.* at 337.

399. *Id.*

400. *Id.* at 338–39.

B. TRESPASS-TO-TRY-TITLE

In *M&M Resources, Inc. v. DSTJ, LLP*,⁴⁰¹ the Ninth Beaumont Court of Appeals once again reiterated that the proper way to establish title to property is a trespass-to-try-title action and not a declaratory judgment action and that parties could not attempt to “back door” into attorney’s fees by bringing a declaratory judgment act claim.⁴⁰² This complicated lawsuit involved a dispute over mineral leases. M&M sought a declaratory judgment that it is “‘the owner of the mineral interests’ and awarding it title to all personal property and fixtures ‘located on, or held in connection with the twenty-one (21) leases[.]’”⁴⁰³

Whether a claimant must seek relief related to property interests through a trespass-to-try-title action, as opposed to a suit under the Declaratory Judgments Act, has long been a source of confusion. “Generally, a trespass to try title claim is the exclusive method in Texas for adjudicating disputed claims of title to real property.”⁴⁰⁴ The Declaratory Judgment Act found at Section 37.004(a) of the Texas Civil Practice & Remedies Code states a “person interested under a deed . . . or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.”⁴⁰⁵ Having rights under some instruments determined in a declaratory judgment action can be efficient for the parties.

The Texas Property Code provides a “trespass to try title action is *the* method of determining title to lands, tenements, or other real property.”⁴⁰⁶ Texas Rules of Civil Procedure 783 through 809 governing trespass-to-try-title actions require detailed pleading and proof. “[A] plaintiff must usually (1) prove a regular chain of conveyances to the sovereign, (2) establish superior title out of a common source, (3) prove a title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned.”⁴⁰⁷

If a dispute involves a claim of superior title and the determination of possessory interests in property, it must be brought as a trespass-to-try-title action.⁴⁰⁸ “Moreover, when the ‘trespass-to-try-title statute governs the parties’ substantive claims . . . [a party] may not proceed alternatively under the Declaratory Judgments Act to recover their attorney’s

401. 564 S.W.3d 446 (Tex. App.—Beaumont 2018, no pet.).

402. *Id.* at 454.

403. *Id.* at 453.

404. *Id.* at 454 (citing *Tex. Parks & Wildlife Dep’t v. Sawyers Tr.*, 354 S.W.3d 384, 389 (Tex. 2011)).

405. *Id.*

406. *Id.* (citing *Lance v. Robinson*, 543 S.W.3d 723, 735 (Tex. 2018)).

407. *Id.* (citing *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004)).

408. *Id.* (citing *Jinkins v. Jinkins*, 522 S.W.3d 771, 786 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (citing *Coinmatch Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 926 (Tex. 2013))).

fees.’”⁴⁰⁹ Here, because the underlying dispute involved ownership of the possessory interest in the mineral estates at issue, the supreme court concluded the proper and mandatory vehicle for resolving those claims is a trespass-to-try-title action.⁴¹⁰

C. EASEMENTS

In *R2 Restaurants, Inc. v. Mineola Community Bank, SSB*,⁴¹¹ the Eighth El Paso Court of Appeals addressed the issue of the termination of easements for non-use. In 1994 a piece of property adjacent to a Wal-Mart parking lot consisted of two vacant lots. Wal-Mart conveyed the parcels to Perimeter along with easements that burdened the Wal-Mart property and allowed pedestrian and vehicle ingress and egress to the extent necessary and convenient for access to State Highways 37 and 564. In 1995, Perimeter conveyed the northern portion of the parcel (Tract 2) to UP Enterprises for a Taco Bell franchise. Perimeter and UP also entered into a reciprocal easement agreement (REA) that stated in relevant part:

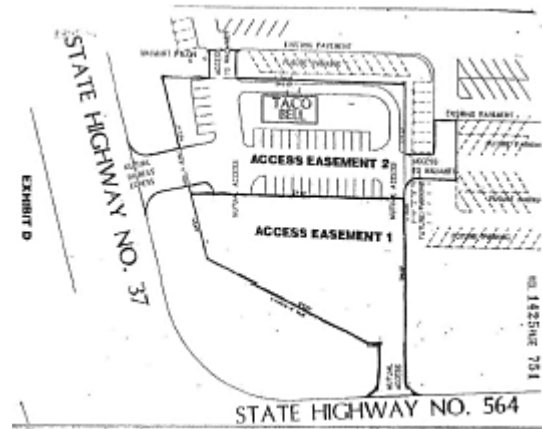
UP Enterprises, Inc. does hereby grant to Perimeter Properties, L.P. a perpetual, non-exclusive easement for vehicular and pedestrian ingress and egress over and across the drive lanes, sidewalks and entrances on Tract 2 identified as (the “Access Easement 2”) attached hereto as *Exhibit D* and made a part hereof. Perimeter Properties, L.P. shall use Access Easement 2 for vehicular and pedestrian ingress, access, and egress. The Access Easement 2 granted hereunder is a permanent easement and will continue in full force and effect so long as the easement is used by the owners of Tract 1 and Tract 2, its successors and assigns pursuant to this document recorded in the Real Property Records of Wood County, Texas. The Access Easement 2 shall be used by Perimeter Properties, L.P., its customers, employees, tenants and invitees.⁴¹²

409. *Id.* (citing *Martin*, 133 S.W.3d at 267).

410. *Id.* 454–55 (first citing *Lackey v. Templeton*, No. 09-17-00183-CV, 2018 WL 3384570, at *6 (Tex. App.—Beaumont July 12, 2018, pet. denied) (mem. op.); then citing *Jenkins*, 522 S.W.3d at 786)).

411. 561 S.W.3d 642 (Tex. App.—Tyler 2018, pet. denied).

412. *Id.* at 648–49.



The REA provided that the covenants, conditions, and restriction should remain in place for fifty years.⁴¹³ UP established a “mutual access” lane between the two tracts, but Perimeter never installed the “mutual access driveway.”⁴¹⁴ UP owned and operated a Taco Bell franchise continuously on Tract 2 since 1995. Tract 1 remained vacant until 2002.⁴¹⁵ In 2002, Perimeter and UP entered into an amendment to the REA.⁴¹⁶ Fifteen Thirteen, LLC acquired Tract 1 and established a car wash in 2002.⁴¹⁷ The car wash was demolished in 2011.⁴¹⁸ Fifteen Thirteen sold the South Lot to MCB.⁴¹⁹ In 2016, R2/Taco Bell commenced reconstruction and built a dumpster enclosure over the southeast easement and closed the curb cut on the west side.⁴²⁰ The Texas Department of Transportation denied MCB’s permit to build the south access to Highway 564.⁴²¹ MCB filed suit for declaratory judgment that the REA remained in effect and granted MCB access over the north lot.⁴²² R2 counterclaimed that the REA terminated from non-use, breach of the REA for failure to construct the Highway 564 entrance, and no access rights pursuant to the Wal-Mart easement.⁴²³ The trial court found for MCB and the court of appeals affirmed.⁴²⁴ The court of appeals found that, with respect to the termination of an easement, the “intent to abandon an easement must be established by clear and satisfactory evidence, and abandonment of an easement will not result from nonuse alone; instead, the circumstances must disclose some definite act showing an intention to abandon

413. *Id.* at 649.

414. *Id.* at 651.

415. *Id.*

416. *Id.*

417. *Id.*

418. *Id.*

419. *Id.*

420. *Id.*

421. *Id.* at 652.

422. *Id.*

423. *Id.*

424. *Id.*

and terminate the right possessed by the easement owner.”⁴²⁵ The REA stated it “will continue in full force and effect so long as [they are] used by the owners of Tract 1 and Tract 2, [their] successors and assigns.”⁴²⁶ Although the durational clause only applied to covenants and restrictions, the court of appeals held that the trial court could have used the fifty-year term as a guide in its decision making as to what period of time was a reasonable period of nonuse.⁴²⁷

The REA mandated that UP install the curb cuts but contained no similar requirement with respect to Perimeter.⁴²⁸ The REA only stated the “access easement” includes common areas as “*may* from time to time exist on [the south lot].”⁴²⁹ The court concluded that based on the use of the word “*may*” there was nothing in the REA, requiring Perimeter, or its successors, including MCB, to construct a curb cut, driveway, or other entryway from the south lot to Highway 564, and the owners of the south lot’s failure to undertake such construction, without more, had not interfered with R2’s right of access to that portion of the south lot. Therefore, MCB as Perimeter’s successor was not in breach for failure to have constructed the Highway 564 entrance.⁴³⁰

In *Clearpoint Crossing Property Owners Ass’n & Cullen’s LLC v. Chambers*,⁴³¹ the First Houston Court of Appeals dealt with the interpretation of express easements and whether an easement by necessity could exist when a property had access via express easements that were less convenient.⁴³² To understand how the issues arose, first you have to understand the history. “Drill Site BB” was a seven-acre tract that was once owned by Exxon. The Chambers then owned 32 acres that included “Drill Site BB.” Exxon first owned Drill Site BB and then later bought the remaining part of the Chambers Site before selling the land in its entirety. At one point, Exxon had an easement that gave access across the Clearpoint tract but abandoned that easement in exchange for two express easements which, collectively, gave Exxon access across the Clearpoint Tract to Spacepoint Boulevard. Both easements explicitly stated their purpose was to give “‘free and uninterrupted pedestrian and vehicular ingress to and egress from’ a parcel of the Chambers tract identified as ‘Drill Site B.’”⁴³³ The Chambers bought the land and began using the easements for the benefit of the entire property.

425. *Id.* at 654 (citing *Toal v. Smith*, 54 S.W.3d 431, 437 (Tex. App.—Waco 2001, pet denied)).

426. *Id.*

427. *Id.* at 656.

428. *Id.* at 655.

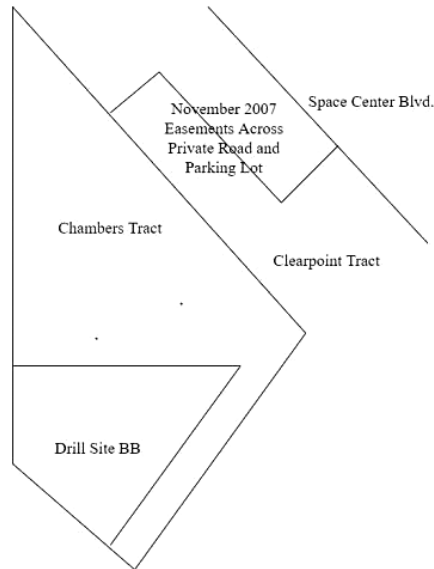
429. *Id.*

430. *Id.*

431. 569 S.W.3d 195 (Tex. App.—Houston [1st Dist.] 2018, pet. denied).

432. *Id.* at 197.

433. *Id.* at 198.



At the jury trial, the trial court entered a judgment in favor of Chambers which held that: (1) the express easements provide an unqualified right of access to the entire tract; and (2) an implied easement by necessity existed which also had an unqualified right of access.⁴³⁴ The court of appeals reversed, finding that: (1) the terms of the express easement were unambiguous and limited the access to Drill Site BB; and (2) because there was an express easement giving access, there could not be, by definition, an implied easement by necessity.⁴³⁵ An easement of necessity requires a showing that there is “no way” to access its land without the easement.⁴³⁶

The holding of the court of appeals should come as no surprise to real estate practitioners, following as it does from well-established case law learned in law school.⁴³⁷ In fact, the most surprising portion of case came in a separate concurring opinion related to denial of en banc reconsideration. In that decision, Justice Goodman discussed the court’s rationale behind inferring an obligation into the “express” easements for the dominant estate holder to pay a portion of the upkeep and maintenance even though the easement was silent as to maintenance and upkeep terms.⁴³⁸ The court relied on the Restatement of Property which states that unless an easement states otherwise “joint use by the owners of the dominant and servient estates ‘gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of

434. *Id.* at 199.

435. *Id.* at 202.

436. *Id.* at 202–03.

437. *Id.*

438. *Id.* at 203–04.

the servient estate or improvements used in common.’’⁴³⁹ In Justice Goodman’s opinion he stated that he felt the “joint-contribution rule” is likely to be adopted by the Texas Supreme Court.⁴⁴⁰

The message for practitioners, who may have adopted the attitude over the years to be “silent” on the sometimes controversial issue of maintenance expenses, is that doing so is no longer a wise strategic course during negotiations because the courts may very well read such terms into your agreement whether you intended it or not.

Similar issues regarding implied easements were broached in *Trujillo Enterprises, Ltd. v. Davies*.⁴⁴¹ To understand the issues in this case, the practitioner both has to understand the history and the layout of the property. The property was the old “Harry Mitchell Brewery” located in El Paso, Texas that was originally developed in 1933 and was subdivided sometime in 2008 into two parcels. The first parcel was purchased by the Parkers and represented the southeastern portion of the property. The second parcel was purchased by Trujillo Enterprises and represented the northeastern end of the property.



439. *Id.* at 204 (citing RESTATEMENT (THIRD) OF PROPERTY (Servitudes) § 4.1.3(3)).

440. *Id.*

441. 573 S.W.3d 297 (Tex. App.—El Paso 2019, no pet.).

The property was bordered on the entire east side by a railroad right of way so all access must be from the western side. Trujillo leased their property to a variety of businesses, including, but not limited to, a furniture maker who occupies the property immediately to the north of the Parker's property and accesses the loading dock via North Lattas Street, which separates the Parker property from the Trujillo property. The Parker's deed granted them ownership over the street up to the edge of the loading dock. The Parkers had previously allowed the furniture maker to access their property but, in 2013, began closing the gate to the loading dock. Trujillo claimed an implied necessity easement.⁴⁴² The trial court found that there was no implied easement and the Eighth El Paso Court of Appeals agreed. Texas recognizes two forms of implied easement: (1) by necessity; and (2) prior use easements.⁴⁴³ The authors discussed the law regarding necessity easements above, and it was clear in this case that the owner could not say there was "no other way" to access the loading dock.⁴⁴⁴ In fact, the evidence at trial established there were possible alternative options but that these options had not been investigated, thereby ruling out the ability to establish easement by necessity. Because of the historical difficulty with meeting the high standards for an easement by necessity, the courts in Texas developed the doctrine of prior use,⁴⁴⁵ which is applicable when "a landowner can show a historical use and some reasonable necessity."⁴⁴⁶ However, the "Texas Supreme Court has recently made clear that a necessity easement is the only option for one landowner seeking a *roadway* across another landowner's property."⁴⁴⁷ Because Trujillo was unable to meet the strict necessity test, he could not successfully impose a roadway easement across the Parker's land.⁴⁴⁸ Trujillo's land failed the test because: (1) the parcel is not landlocked; (2) only one particular use of the building is impaired (use of the loading dock); and (3) although perhaps expensive, or not convenient, the testimony established it was likely that Trujillo could have gained access via his own property (something he did not bother to investigate before filing suit).⁴⁴⁹

442. *Id.* at 302.

443. *Hamrick v. Ward*, 446 S.W.3d 377, 381 (Tex. 2014) (first citing *Koonce v. J.E. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984) (necessity easement); then citing *Bickler v. Bickler*, 403 S.W.2d 354, 357 (Tex. 1966), *abrogated by Hamrick v. Ward*, 446 S.W.3d 377, 381 (Tex. 2014) (prior use easement)).

444. *Trujillo*, 573 S.W.3d at 307 (citing *Duff v. Matthews*, 311 S.W.2d 637, 643 (Tex. 1958)).

445. *Id.* at 306.

446. *Id.*

447. *Id.* (citing *Hamrick*, 446 S.W.3d at 384 ("We clarify that courts adjudicating implied easements for roadway access for previously unified, landlocked parcels must assess such cases under the necessity easement doctrine.")).

448. *Id.*

449. *Id.*

D. PRIVATE TRANSFER FEE OBLIGATIONS

The Attorney General of Texas, Ken Paxton, issued an opinion on April 23, 2018, regarding the limitations imposed on private transfer fee obligations pursuant to Section 5.201 of the Texas Property Code.⁴⁵⁰ A “private transfer fee” is defined by the Texas Property Code as “an amount of money, regardless of the method of determining the amount, that is payable on the transfer of an interest in real property or payable for a right to make or accept a transfer.”⁴⁵¹ The legislation became effective on June 17, 2011, and made any transfer fee obligation created after the effective date of the legislation void and unenforceable. To the extent a private transfer fee obligation was in existence prior to the legislation, the recipient of the fee was required to file a “Notice of Private Transfer Fee Obligation” (complying with the requirements provided in the legislation) in the real property records on or before January 31, 2012, and at certain regular intervals.⁴⁵² The legislation also required a seller of property to provide notice to the purchaser of the private transfer fee obligation. The Attorney General issued the following opinions with respect to the legislation:

- (1) Failure to strictly comply with the notice requirement in all respects voids the private transfer fee obligation.
- (2) Although failure to provide notice to a purchaser does not void the obligation, the purchaser may attempt to void the transaction.⁴⁵³

E. RESTRICTIONS

A fascinating case that settled a split between several different courts is *Tarr v. Timberwood Park Owners Ass’n*,⁴⁵⁴ where the Fourth San Antonio Court of Appeals examined the interpretation of the “residential” restrictions and the short-term rentals of homes. In *Tarr*, a homeowner entered into thirty-one short-term rental arrangements that totaled 102 days over five months.⁴⁵⁵ The deed restrictions for the Timberwood Park Owners Association (the HOA) provided that homes should be “used *solely for residential purposes*.”⁴⁵⁶ The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions.⁴⁵⁷ Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no “durational” requirement in the deed restrictions.⁴⁵⁸ Tarr and the HOA both filed motions for summary judgment, and the trial court

450. Tex. Att’y Gen. Op. No. KP-0195 (2018).

451. TEX. PROP. CODE ANN. § 5.201(4).

452. Tex. Att’y Gen. Op. No. KP-0195 (2018).

453. *Id.*

454. 510 S.W.3d 725 (Tex. App.—San Antonio 2016), *rev’d*, 556 S.W.3d 274 (Tex. 2018).

455. *Id.* at 727.

456. *Id.* at 729.

457. *Id.*

458. *Id.*

granted the HOA's motion.⁴⁵⁹

On appeal, Tarr argued the following: (1) the HOA allows rentals and does not require that a homeowner personally occupy his home; and (2) the individuals that Tarr rented to were using the house for residential purposes.⁴⁶⁰ Relying on the San Antonio Court of Appeals opinion in *Munson v. Milton*,⁴⁶¹ the HOA argued that short-term renters were not residents but “transients.”⁴⁶² The court of appeals agreed with the HOA. Although the appeals court noted that “[c]ovenants restricting the free use of land are not favored by the courts, [they] will be enforced if they are clearly worded and confined to a lawful purpose.”⁴⁶³ Furthermore, Section 202.003(a) of the Texas Property Code requires that “[a] restrictive covenant shall be liberally construed to give effect to its purpose and intent.”⁴⁶⁴ In this case, the court of appeals found the restrictive covenant to be unambiguous.⁴⁶⁵ The court went on to note that, as noted by the *Munson* court, the “Texas Property Code draws a distinction between a permanent residence and transient housing, which includes rooms at hotels, motels, inns and the like.”⁴⁶⁶ The court also agreed with the *Munson* court that the term “‘residence’ generally requires both physical presence and an intention to remain.”⁴⁶⁷

The supreme court disagreed with the court of appeals and clearly stated that the lower court's obsession with Section 202.003(a) of the Texas Property Code was misplaced.⁴⁶⁸ In their eyes, the issue was not one of “strict” or “liberal” construction of the covenants.⁴⁶⁹ Instead, the covenant at issue simply did not address the use contemplated by the case at hand.⁴⁷⁰ The lower courts held that Tarr had leased to groups consisting of “multiple” families at one time, thereby violating the “single-family” residence restrictions.⁴⁷¹ The supreme court held that the restriction referred to the type of housing that could be constructed—not the composition of the family or individuals that could inhabit the home.⁴⁷²

With respect to the second argument put forth by the association, that “residential” use did not include transient use, the supreme court noted that the HOA was once again focused on the wrong language.⁴⁷³ The covenant stated that “no business shall be conducted on any of these tracts which is noxious or harmful,” thereby by focusing on what is hap-

459. *Id.*

460. *Id.*

461. 948 S.W.2d 813 (Tex. App.—San Antonio 1997, writ denied).

462. *Tarr*, 510 S.W.3d at 729.

463. *Id.* at 728.

464. TEX. PROP. CODE ANN. § 202.003.

465. *Tarr*, 510 S.W.3d at 731.

466. *Id.* at 730 (citing *Munson*, 948 S.W.2d at 817).

467. *Id.*

468. *Tarr v. Timberwood Park Owners Ass'n*, 556 S.W.3d 274 (Tex. 2018).

469. *Id.* at 279.

470. *Id.* at 277.

471. *Id.* at 278.

472. *Id.* at 279.

473. *Id.* at 288.

pening on the property rather than how the owner is using the property.⁴⁷⁴ Furthermore, the supreme court directly addressed its disapproval of findings of other courts in similar cases that “impose an intent or physical-presence requirement when the covenant’s language includes no such specification and remains otherwise silent as to durational requirements.”⁴⁷⁵

F. PARTITION

In *Bowman v. Stephens*,⁴⁷⁶ the First Houston Court of Appeals was asked to once again decide the equity of partition in kind versus partition by sale. As most practitioners are aware, the courts in Texas prefer partition in kind, and the party seeking partition by sale has the duty to prove that partition in kind is “impractical or unfair.”⁴⁷⁷ The case involved an approximately 117-acre waterfront property that had been held by a family for generations. Three siblings now owned the property. Two of the three siblings wanted to sell the entire property while the third sibling wished, for sentimental reasons, to retain a small portion of the property that contained an old family cottage and a dock. The decision was complicated by the fact that the entire parcel was practically land locked and a large portion was “unbuildable” because it was on a large rock slope.⁴⁷⁸ A portion of the property did have access through a verbal license from a neighbor, but there were no enforceable easement agreements that could be conveyed to third parties. These limitations caused extremely divergent estimates to be received from the siblings’ various experts depending on whether the estimate was for the entire parcel, the sale price for equal thirds, or the sale price with or without access. The trial court found the property was susceptible to partition in kind, and the brothers appealed.⁴⁷⁹ The brothers had the burden of proving that partition in kind would not be fair and equitable. The evidence presented at trial was conflicting, and it was within the trial court’s authority to determine. The court of appeals upheld the trial court’s holding.⁴⁸⁰

*Rodriguez v. Rivas*⁴⁸¹ was another partition case in which the trial court ordered a unique solution when a couple broke up and one member requested that a home they owned as co-tenants be partitioned by sale. The trial court ordered that one party had right to possession of the house while the other would be paid back their portion of the value over time. The Seventh Amarillo Court of Appeals reversed the decision holding that the law in Texas is clear: “Texas law will not force a reluctant joint

474. *Id.* at 289.

475. *Id.* at 291.

476. 569 S.W.3d 210 (Tex. App.—Houston [1st Dist.] 2018, no pet.).

477. *Id.* at 220.

478. *Id.*

479. *Id.* at 210.

480. *Id.*

481. 573 S.W.3d 447 (Tex. App.—Amarillo 2019, no pet.).

owner of real property to maintain joint ownership.”⁴⁸² The court further held that although Texas courts prefer partition in kind, if partition in kind is not possible, as both parties agreed it was not in this case, partition by sale is the only option.⁴⁸³ The court elaborated on their decision to overturn the trial court’s arguably more “equitable holding” by explaining:

[e]quitable rules apply in determining *how* the property is to be partitioned, once partition is granted, but equitable principles [sic] are not material in determining whether or not the right of partition may be exercised. It may sometimes be inequitable to one or more of the joint owners if another co-owner is permitted to enforce partition of the jointly owned property; but this is one of the consequences which one assumes when he becomes a co[]tenant in land. If he does not provide against it by contract, he may expect his cotenant to exercise his statutory right of partition at will.⁴⁸⁴

VIII. HOMESTEAD/HOME EQUITY LENDING

A. NEW CONSIDERATION; PLACE OF TENDER

In *Mulvey v. U.S. Bank National Ass’n*,⁴⁸⁵ the Eighth El Paso Court of Appeals addressed sufficiency of summary judgment evidence after a foreclosure on a home equity loan. The homeowner, Mulvey, alleged illegality of a modification to his home equity loan; however, he did not specify any details in his affidavit to support such proposition. Because Mulvey was not an expert witness, his lay conclusions were non-evidence as to the illegality issue.⁴⁸⁶ Nevertheless, the court surmised that Mulvey was complaining that the capitalization of interest violated the constitutional requirements for an extension of credit.⁴⁸⁷ When the modification was effected, the existing unpaid interest was capitalized and added to the principal balance of the loan to be repaid.⁴⁸⁸ The Texas Supreme Court held in *Sims v. Carrington Mortgage Services, L.L.C.*⁴⁸⁹ that there was no additional extension of credit where “the restructuring of a home equity loan that . . . involves capitalization of past-due amounts . . . is not a new extension of credit that must meet the requirements of [Texas Constitution, article XVI] § 50.”⁴⁹⁰ The court viewed such holding as being similar to the subject case.⁴⁹¹ But, the court of appeals included caveats to its holding that such restructure must not be a “satisfaction or replacement

482. *Id.* at 451 (citing *Bowman v. Stephens*, 569 S.W.3d 210, 220 (Tex. App.—Houston [1st Dist.] (2018, no pet.)).

483. *Id.* at 452.

484. *Id.* at 453 (citing *Moseley v. Hearrell*, 171 S.W.2d 337, 338–39 (Tex. 1943)).

485. 570 S.W.3d 355 (Tex. App.—El Paso 2018, no pet.).

486. *Id.* at 361.

487. *Id.*

488. *Id.* at 357.

489. 440 S.W.3d 10, 15 (Tex. 2014).

490. *Mulvey*, 570 S.W.3d at 361 (citing *Sims*, 440 S.W.3d at 17).

491. *Id.*

of the original note, an advancement of new funds, or an increase in the obligations created by the original note.”⁴⁹² The court did not discuss these qualifications, except to emphasize a specific recitation in the modification agreement that the loan documents would “remain unchanged” and that the parties would be bound by the original documents “except as specifically amended.”⁴⁹³ To these authors, it was reasonable to assume that the no increase in the original debt was satisfied because the capitalized interest was part of the original debt and is not new debt, but that means that the future interest will be greater because the principal had been increased. Based on *Sims* and *Mulvey*, that result will not be new consideration under the applicable constitutional provision.

Mulvey next argued that he made a proper tender of payment that was refused, which should have excused his performance. Mulvey’s affidavit asserted an attempted tender sometime during the month of July or August at a Texas Wells Fargo Bank branch, which the court held was a wrongful tender because the note required payment to an address in Baltimore, Maryland.⁴⁹⁴ Further, Mulvey’s affidavit indicated that his tender was of one monthly payment when there were additional monthly payments due.⁴⁹⁵ The court concluded that Mulvey made an improper tender of payment, noting that proper tender required a tender at the proper place and time specified in the contract.⁴⁹⁶ Additionally, the court concluded the Mulvey did not present evidence as to how a single payment refusal, even if improper, would excuse all subsequent payments.⁴⁹⁷ So, for practitioners, the question is how many improper payment refusals are necessary to sustain such a payment defense, if tender was at the exact location required for payment under the contract?

B. RES JUDICATA

In *Perry v. CAM XV Trust*,⁴⁹⁸ discussed in more detail above at II.F., the First Houston Court of Appeals addressed the res judicata doctrine in a home equity lending scenario. In *Perry*, the debtor brought a 2012 suit alleging Deceptive Trade Practice Act violations, but the creditor did not assert foreclosure claims in that suit.⁴⁹⁹ Perry claimed such failure activated the res judicata bar on subsequent foreclosure claims. In rejecting that position, the court cited *Steptoe v. JPMorgan Chase Bank*⁵⁰⁰ for the proposition that due to the alternative foreclosure remedies in a home equity deed of trust (being either a judicial foreclosure or a non-judicial foreclosure), that the res judicata doctrine was not applicable.⁵⁰¹ The

492. *Id.* (citing *Sims*, 440 S.W.3d at 17).

493. *Id.*

494. *Id.* at 363.

495. *Id.* at 358.

496. *Id.* at 363.

497. *Id.*

498. 579 S.W.3d 773 (Tex. App.—Houston [1st Dist.] 2019, no pet.).

499. *Id.*

500. 464 S.W.3d 429 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

501. *Perry*, 579 S.W.3d at 778.

Steptoe court concluded that the alternative remedies could not form the basis for res judicata because that would have allowed the debtor to force the creditor into an election of remedies (judicial foreclosure instead of non-judicial foreclosure) in the prior suit, which would be inconsistent with the alternative provisions contained in the deed of trust contractual provisions, and, therefore, this circumstance was an exception to the res judicata doctrine.⁵⁰²

A sole dissenting opinion by Justice Goodman argued that the subject case was substantially similar to *McKeehan v. Wilmington Savings Funds Society*,⁵⁰³ where the debtor was allowed to assert a payment defense in a subsequent foreclosure action despite the lender's assertion of res judicata as a "weapon" to thwart a payment defense.⁵⁰⁴ The majority in *Perry* distinguished *McKeehan* on the basis that no foreclosure action was pending in *McKeehan*'s prior constitutional challenge suit and, therefore, res judicata did not apply, whereas in *Perry*, the debtor did not assert constitutional home equity lending claims in the Deceptive Trade Practices Act suit despite the anticipated foreclosure proceedings.⁵⁰⁵ The dissent characterized *McKeehan* simply as holding that "the doctrine of res judicata did not apply to previously unasserted defenses to foreclosure in a [subsequent] judicial foreclosure action."⁵⁰⁶ Both *McKeehan* and *Perry* involved a number of prior foreclosure attempts and a suit on other grounds before the then current foreclosure action alleging res judicata.⁵⁰⁷ The dissent found these cases indistinguishable and characterized the majority's opinion as abandoning *McKeehan* and sowing confusion. Because of this, the dissent suggested it would invite more litigation on these issues in the future.⁵⁰⁸ Without intervening Supreme Court jurisprudence, practitioners may anticipate further action on this issue at the appellate level.

IX. MISCELLANEOUS

A. INSURANCE

1. Proof of Liability

*Texas Windstorm Insurance Ass'n v. Dickenson Independent School District*⁵⁰⁹ involved insurance coverage issues caused by Hurricane Ike. The dispute between the insured and insurer ultimately resulted in the insurance company requiring an appraisal pursuant to the terms of the policy. An appraisal was obtained four years after the hurricane and

502. *Id.* at 778–79.

503. 554 S.W.3d 692 (Tex. App.—Houston [1st Dist.] 2018, no pet.). This case was discussed in more detail by the authors of last year's Survey article. See J. Richard White et al., *Real Property*, 5 SMU ANN. TEX. SURV. 320 (2019).

504. *Perry*, 579 S.W.3d at 781.

505. *Id.*

506. *McKeehan*, 554 S.W.3d at 701.

507. *Perry*, 579 S.W.3d at 783.

508. *Id.* at 783–84.

509. 561 S.W.3d 263 (Tex. App.—Houston [14th Dist.] 2018, pet. denied).

found damages to the Dickenson Independent School District (School District) in an amount in excess of \$10,000,000.00. The School District filed summary judgment motions based upon the appraisal award with respect to causation of the damages and the amount of the damages; the trial court granted those motions.⁵¹⁰ The insurer challenged the summary judgment awards, alleging that the appraisal award, being the only substantive piece of evidence submitted for the partial summary judgment motion, was insufficient to carry the insured's burden. The appraisal award purported to set forth the amount of damages covered by the insured losses; however, the court, relying on *State Farm Lloyds v. Johnson*⁵¹¹ held that the appraisal was limited to determining the amount of loss, not whether an insurer was liable to pay (i.e., a covered loss).⁵¹² Consequently, practitioners should be mindful of the need to provide expert testimony on the causation of the damage and not rely on an appraisal award to establish a covered loss.

B. APPRAISAL AWARDS

This year's Survey period covered a number of cases dealing with allegations of an insurer's breach of contract based on the initial estimate of damages being less than the amount of damages ultimately determined by an appraisal award issued pursuant to the insurance policy's appraisal provisions, even when the appraisal provision was elected after commencement of a breach of contract suit against the insurer.⁵¹³

In *Ortiz v. State Farm Lloyds*,⁵¹⁴ the Texas Supreme Court agreed that "an insurer's payment of an appraisal award in the face of similar allegations of pre-appraisal underpayment forecloses liability on a breach of contract claim."⁵¹⁵ Furthermore, as to an insured's bad faith claim for adjusting a loss, the supreme court confirmed appellate court cases that the discrepancy between an initial estimate and an appraisal award amount did not constitute intentional under-valuation of the claim, absent evidence of an independent injury.⁵¹⁶ But, as to the insured's claim under the Texas Prompt Payment of Claims Act (TPPCA),⁵¹⁷ the supreme court stated that the "insurer's payment of an appraisal award does not as a matter of law bar an insured's claims under the [TPPCA]."⁵¹⁸

510. *Id.* at 269–70.

511. 290 S.W.3d 886 (Tex. 2009).

512. *Tex. Windstorm*, 561 S.W.3d at 278.

513. *See Biasatti v. Guideone Nat'l Ins. Co.*, 560 S.W.3d 739 (Tex. App.—Amarillo 2018), *rev'd*, No. 18-0911, 2020 WL 1898538 (Tex. 2020); *Ortiz v. State Farm Lloyds*, 568 S.W.3d 156 (Tex. App.—San Antonio 2017), *aff'd in part, rev'd in part*, 589 S.W.3d 127 (Tex. 2019); *Hinojos v. State Farm Lloyds*, 569 S.W.3d 304 (Tex. App.—El Paso 2019, pet. granted).

514. *Ortiz v. State Farm Lloyds*, 589 S.W.3d 127 (Tex. 2019).

515. *Id.* at 132.

516. *Id.* at 133–34 (citing *USAA Tex. Lloyds Co. v. Menchaca*, 545 S.W.3d 479 (Tex. 2018)).

517. TEX. INS. CODE ANN. § 542.

518. *Ortiz*, 589 S.W.3d at 135 (citing *Barbara Techs. Corp. v. State Farm Lloyds*, 589 S.W.3d 806 (Tex. 2019)).

In *Barbara Technologies. Corp. v. State Farm Lloyds*,⁵¹⁹ the Texas Supreme Court addressed the issue of liability for damages for delayed payments under the TPPCA.⁵²⁰ A wind hailstorm caused damage to Barbara Technologies' commercial property on March 31, 2013.⁵²¹ Barbara Technologies filed a claim with State Farm on October 17, 2013, which was denied on November 4, 2013, because State Farm's assessment of damages was less than the deductible under the policy. A request for a second inspection resulted in no change; therefore, Barbara Technologies filed suit on July 14, 2014. State Farm invoked the appraisal provisions under the policy on January 9, 2015. The final appraised value agreed upon was \$195,000.00, which was determined on August 18, 2015, received by State Farm on August 19, 2015, and paid on August 25, 2015. Barbara Technologies alleged that State Farm violated the TPPCA by not paying within the sixty-day statutorily required time limit.⁵²² In defense, State Farm asserted that such a claim was not available after State Farm had paid the appraisal award amount.

Upon appeal from summary judgment motions, the supreme court considered the interplay between the TPPCA and the policy's appraisal provisions, found that the TPPCA did not address the appraisal process, and concluded that the TPPCA contained neither deadlines for the appraisal process nor exemption of the appraisal process from the TPPCA deadlines.⁵²³ The supreme court specifically disapproved of prior cases that excused an insurer from prompt payment liability because it paid an appraisal award.⁵²⁴ The TPPCA did not impose liability upon invocation of the appraisal process, but it did impose liability after the insurer accepts liability or is otherwise adjudicated liable on the claim;⁵²⁵ however, payment of a claim did not, by itself, establish the liability element.⁵²⁶ In other words, an appraisal award establishes only the amount of the damages, not liability under the policy. The conclusion, as stated by the court, was "that invocation of the contractual appraisal provision . . . neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages."⁵²⁷

In his dissent, Justice Boyd concluded that the voluntary and unconditional payment of the appraisal award was a concession of liability and claim amount by the insurer.⁵²⁸ An additional dissent by Chief Justice Hecht and Justices Brown and Blacklock characterized the majority as ignoring several Texas appellate courts, the Fifth Circuit, and U.S. District Courts for all four Texas districts, and the absence of changes to the

519. *Barbara Techs.*, 589 S.W.3d 806 (Tex. 2019).

520. TEX. INS. CODE ANN. § 542.

521. *Barbara Techs.*, 589 S.W.3d at 809.

522. TEX. INS. CODE ANN. §§ 542.055(a)(1)–(3), .056(a), .058(a), .060.

523. *Barbara Techs.*, 589 S.W.3d at 814.

524. *Id.* at 819.

525. *Id.*

526. *Id.* at 820.

527. *Id.* at 827.

528. *Id.* at 829.

statute from eight legislative sessions holding that payment of an appraisal award avoids penalty liability under the TPPCA.⁵²⁹ Based on the split decision in *Barbara Technologies*, practitioners must wonder what changes may occur with a change in the composition of the Texas Supreme Court.

C. BUSINESS ORGANIZATIONS

1. Conflict Waivers

In *In re Luecke*,⁵³⁰ a limited partner in a derivative action attempted to waive a conflict of interest of his attorney who represented not only the limited partnership but also another defendant in a case concerning actions of the person who was the general partner of the partnership. In what appears to be a case of first impression, the Third Austin Court of Appeals concluded that the limited partner had a right to bring a derivative action on behalf of the limited partnership, the right to choose an attorney, and the right to waive any potential conflicts of interest for purposes of the derivative action.⁵³¹

2. Former Member Review of Records

*Davis v. Highland Coryell Ranch, LLC*⁵³² addressed the issue of whether a former member of a limited liability company had access to the LLC's books and records. Davis was an original member of Highland Coryell Ranch, LLC (Highland), but had relinquished his interest prior to the time he made a request to see Highland's books and records for the time he was a member. Although some books and records were produced, others were not. Highland alleged that as a former member, Davis was not entitled to see any books or records of the LLC. The appellate court held, in a specifically narrow holding, that "a former member of a limited liability company is not prohibited from accessing business records of the company for a proper purpose simply because he is not a member at the time of the request."⁵³³

In reaching such conclusion, the Seventh Amarillo Court of Appeals analyzed Texas Business Organizations Code Section 101.502(a), which provided a "member of a limited liability company . . . may examine and copy at any reasonable time . . . records required under Sections 3.151 and 101.501; and . . . other information regarding the business, affairs, and financial condition of the company that is reasonable for the person to examine and copy,"⁵³⁴ and Texas Business Organizations Code Section 3.153, which provided that "[e]ach owner or member . . . may examine

529. *Id.* at 845.

530. 569 S.W.3d 313 (Tex. App.—Austin 2019, no pet.).

531. *Id.* at 381.

532. 578 S.W.3d 242 (Tex. App.—Amarillo 2019, pet. denied).

533. *Id.* at 249.

534. TEX. BUS. ORGS. CODE ANN. § 101.502(a).

the books and records” of the LLC entity.⁵³⁵ Additionally, Texas Business Organizations Code Section 1.002(53)(A) defined a “member” as “a person who is a member or has been admitted as a member in the limited liability company under its governing documents.”⁵³⁶

Under these statutory parameters and standard statutory construction, the court of appeals held that it must give effect to the additional phrase “or has been admitted as a member” and concluded that the only feasible purpose for this language was to describe former members who were not currently a member of the LLC.⁵³⁷

A dissenting opinion by Justice Campbell took issue with the court’s interpretation and holding as to the meaning of the second phrase in the statute.⁵³⁸ To these authors, it appears to be a rather weak and misleading dissent because the majority was addressing only rights as it related to review of books and records of the entity. But, the dissent, heading down a rabbit hole, discussed the interpretation in the context of former member’s approval for admission of new members, issuance of cash calls, distributions to members, annual meetings, membership approvals, and that an assignor of a membership interest remaining a member until the assignee becomes a member of the company.⁵³⁹ As stated above, this dissent seems to be misguided and hopefully will not be cited in further cases addressing such issue.

D. INJUNCTIVE RELIEF – IRREPARABLE INJURY

*Flamingo Permian Oil & Gas L.L.C. v. Star Exploration, L.L.C.*⁵⁴⁰ involved a dispute between the operator of an oil and gas lease and the non-operating interest holder under a joint operating agreement. Flamingo, as the operator, had performed poorly, and Star called a meeting of interest owners to dismiss Flamingo. Flamingo filed suit to enjoin such action, and the court discussed the requirements for a temporary injunction.⁵⁴¹ Due to the nature of the future production of oil and gas, an exact value of loss could not be established; however, the court noted that, in the absence of evidence to the contrary, the injury element could be satisfied by a showing that the defendant could not pay damages.⁵⁴² Star presented the following evidence: Flamingo “repeatedly failed to pay debts, allowed liens to accrue against the property in violation of the [joint operating agreement], and did not participate in legal proceedings

535. TEX. BUS. ORGS. CODE § 3.153.

536. TEX. BUS. ORGS. CODE § 1.002(53)(A).

537. *Davis*, 578 S.W.3d at 246, 247. Interestingly, the court cited The Animals’ hit rock song *Don’t Let Me Be Misunderstood*. *Id.* at 248.

538. *Id.* at 249.

539. *Id.* at 249 n.1.

540. 569 S.W.3d 329 (Tex. App.—El Paso 2019, no pet.).

541. *Id.* at 330–31. The elements to obtain a temporary injunction are: “(1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim.” *Id.* at 332.

542. *Id.*

such that several default judgments had been taken against Flamingo.”⁵⁴³ The Eighth El Paso Court of Appeals concluded this was sufficient to satisfy the injury element.⁵⁴⁴

E. DUTY TO LICENSEE

*Wilson v. Northwest Texas Healthcare System, Inc.*⁵⁴⁵ is instructive as to the various types of plaintiffs to which premises liability suits are applicable. In this case, Wilson was visiting his wife in a hospital run by Northwest Texas Healthcare. Walking down the hall, Wilson passed between a cleaning machine and an elevator and slipped on alleged water on the floor. The hospital’s floor technician (janitor), Hill, was transporting the cleaning machine to another floor at the time of the accident. After having cleaned it, Hill verified that it was drained and dry and had not noticed any water on the floor prior to the fall. In considering the motion for summary judgment, the court noted there were three types of claimants: invitees, licensees, or trespassers.⁵⁴⁶ An invitee status occurs when the person entered the property with the owner’s knowledge and for the mutual benefit of both owner and the invitee.⁵⁴⁷ A licensee is one who entered the premises with the owner’s consent, but for the licensee’s own convenience or “business with someone other than the owner.”⁵⁴⁸ And finally, a trespasser is a person who entered without permission. The court of appeals concluded that Wilson was a licensee since he entered with consent but without business with the owner, his business being purely for his own purpose in visiting with his wife.⁵⁴⁹ Therefore, the duty owed to such licensee was “not to injure the licensee willfully, wantonly, or through gross negligence,” and if knowledge of the dangerous condition was known, “to warn [licensee] of or make safe the dangerous condition.”⁵⁵⁰

F. DUTY TO WARN

*Reyes v. Brookshire’s Grocery Company*⁵⁵¹ involved a slip and fall on a grocery store premise. Reyes entered the grocery store and at the end of a refrigerated aisle, passed a three and one-half foot tall four-sided yellow sign which read “caution/wet floor.”⁵⁵² As an invitee, Reyes was owed a duty by Brookshire’s Grocery to keep the premises safe or to warn of the dangerous condition. Therefore, the Twelfth Tyler Court of Appeals con-

543. *Id.*

544. *Id.*

545. 576 S.W.3d 844 (Tex. App.—Amarillo 2019, no pet.).

546. *Id.* at 850.

547. *Id.* (citing *Am. Indus. Life Ins. Co. v. Ruvalcaba*, 64 S.W.3d 126, 134 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

548. *Id.* (citing *Mayer v. Willowbrook Plaza Ltd. P’ship*, 278 S.W.3d 901, 909 (Tex. App.—Houston [14th Dist.] 2009, no pet.)).

549. *Id.*

550. *Id.* (citing *Sampson v. Univ. of Tex. at Austin*, 500 S.W.3d 380, 391 (Tex. 2016)).

551. 578 S.W.3d 588 (Tex. App.—Tyler 2019, no pet.).

552. *Id.* at 590.

cluded that Brookshire's Grocery's duty with respect to the defective condition was discharged by its warning of the condition, in the form of the yellow sign, which a reasonable person would have perceived and understood.⁵⁵³

G. CONDEMNATION

KMS Retail Rowlett, LP v. City of Rowlett,⁵⁵⁴ the Texas progeny of *Kelo v. City of New London*,⁵⁵⁵ addressed the applicable Takings Clause under the state constitution. Here, KMS owned a commercial tract of land with retail establishments fronting Lakeview Parkway, but with a private access road along the rear of the property paralleling Lakeview Parkway and connecting with the street on the western boundary, Kenwood Drive. The property to the east was owned by Briarwood, which was negotiating with Sprouts Farmers Market for a grocery store on its tract. Desperate to attract Sprouts to its community, the city entered into an economic development agreement with Briarwood to facilitate leasing of the site to Sprouts. Sprouts' lease required access westward to Kenwood Drive along the private road or a significant reduction in rent would result. Briarwood attempted to negotiate access rights to connect with KMS's existing private road, but such negotiations proved fruitless. Condemnation proceedings were commenced by the city, and a motion for summary judgment was rendered against KMS and in favor of the city, to which an appeal was taken. The Dallas Fifth Court of Appeals ruled in favor of the city.⁵⁵⁶ Review was granted, and the Texas Supreme Court affirmed the decisions.⁵⁵⁷ At issue was whether (1) the recent Texas statute limiting public use condemnation⁵⁵⁸ was applicable to such taking; and (2) the taking was appropriate under the Takings Clause of the Texas Constitution.⁵⁵⁹ These constitutional and statutory provisions provided the framework for a lawful condemnation, which required a public use⁵⁶⁰ and that the taking be necessary for a public use.⁵⁶¹ Both the constitutional and statutory takings provisions were affected in 2005 by the United States Supreme Court's opinion in *Kelo*, which held that a city could condemn a private home as part of an economic redevelopment plan that would turn over the taken land to a private business.⁵⁶² In response to the *Kelo* case, the Texas legislature, in a special called session,

553. *Id.* at 594.

554. 593 S.W.3d 175 (Tex. 2019).

555. 454 U.S. 469 (2005).

556. *KMS Retail Rowlett, LP v. City of Rowlett*, 559 S.W.3d 192 (Tex. App.—Dallas 2017), *aff'd*, 593 S.W.3d 175 (Tex. 2019).

557. *KMS Retail*, 593 S.W.3d at 175.

558. TEX. GOV'T CODE ANN. § 2206.

559. TEX. CONST. art. I, § 17.

560. *Id.* Section 17 reads “[n]o person's property shall be taken . . . or applied to public use without adequate compensation being made” *Id.*

561. TEX. GOV'T CODE ANN. § 251.001(a) (“[w]hen the governing body of a municipality considers it necessary, the municipality may exercise the right of eminent domain for a public use to acquire public or private property”).

562. *KMS Retail*, 593 S.W.3d at 181–82.

adopted a more limited condemnation statute.⁵⁶³ That statute prohibited takings (1) that “confer[] a private benefit on a . . . private party”; (2) “for a public use that is merely a pretext to confer a private benefit to a particular private party”; (3) “for economic development purposes”; or (4) “not for a public use.”⁵⁶⁴ However, there was an exception to such prohibition that authorized the taking of private property for transportation projects, including public roads.⁵⁶⁵

First, the supreme court analyzed the statutory provision and determined that the transportation exception overruled the prohibitions in the statute “ulterior motives notwithstanding.”⁵⁶⁶ The supreme court reasoned that there was “no statutory language ‘on which to add an exception to the application of [the transportation exceptions to the prohibitions] if a transportation project is illegitimate.’”⁵⁶⁷ The essence of the supreme court’s opinion was summed up as follows:

[a]ccordingly, if a taking is for a transportation project, the condemnor is constrained only by the statutory provisions that grant it condemnation authority (and any other relevant statutes) and the limitations imposed by the constitution and our case law. The condemnor is free of the additional limitations imposed by section 2206.001(b).⁵⁶⁸

In furtherance of such position, KMS argued that the subject taking was not for a “transportation project” for a “public road.”⁵⁶⁹ In support of its nontransportation argument, KMS relied upon definitions in the Regional Mobility Authority Act.⁵⁷⁰ Those provisions were distinguished by the supreme court as relating to a different purpose than the use of the words in the statutory takings prohibitions exemption.⁵⁷¹ With respect to the public roads challenge, KMS argued that the private road did not meet the width standards in the city’s Master Thoroughfare Plan. But the supreme court decided that the common meaning of public road would override any local municipality’s standard for a road,⁵⁷² and relied upon the city’s council resolution authorizing the need for the acquisition of the private roadway of KMS.⁵⁷³

Next, the supreme court turned to its constitutional analysis of public use. Under the Texas Constitution, a taking is authorized for just compen-

563. TEX. GOV’T CODE § 2206.

564. *Id.*; *KMS Retail*, 593 S.W.3d at 178.

565. TEX. GOV’T CODE § 2206.001(c)(1).

566. *KMS Retail*, 593 S.W.3d at 183.

567. *Id.* at 181 (citing *Austin v. Whittington*, 384 S.W.3d 766 (Tex. 2012)).

568. *Id.* at 184.

569. *Id.* at 185.

570. TEX. TRANSP. CODE ANN. § 370.031(a).

571. *KMS Retail*, 593 S.W.3d at 185. The distinction being that the Government Code related to condemnation for transportation projects, whereas the Regional Mobility Authority Act defined transportation projects only for the administrative purpose of authorization of types of projects greater than local roads or minor rural collector roads. *Id.*

572. *Id.* at 186.

573. *Id.*

sation only when there is a public use.⁵⁷⁴ Considering what a public use included, the supreme court noted that the public must derive “some definite right or use in” the property taken,⁵⁷⁵ and that it was immaterial if the use was limited to citizens of only a local neighborhood so long as it was open to all other citizens.⁵⁷⁶ However, “a private benefit [for] a private party” had previously been denounced.⁵⁷⁷ Also, the supreme court noted that the determination of a public use was a legislative decision, to which the courts should give deference.⁵⁷⁸ This deference for determination of public use by a governmental authority can be overturned only by judicial review when the decision “was fraudulent, in bad faith, or arbitrary and capricious.”⁵⁷⁹ Public use was involved in this taking, because (1) the city council resolutions stated its necessity; (2) a city staff report indicated such a road would serve a public purpose, provide better circulation between retail locations, reduce traffic flow on the main artery (Lakeview Parkway), and provide emergency vehicle access to first responders (however, the court in a footnote noted that an internal city report would receive less deference than other evidence);⁵⁸⁰ and (3) the testimony of the director of economic development stated the necessity of the access easement between the adjoining properties.⁵⁸¹ There was no evidence submitted by KMS that negated any of such public purposes.⁵⁸² Much of KMS’s defense relied upon what it alleged were the improper motivations of the city; however, the court refused to consider the ulterior motive of the city when a facially valid public use was presented. Any issues as to fraudulent activity had to be addressed separately under the judicial exclusions for constitutionality of takings by means of fraud, bad faith or arbitrary, or any capricious action.⁵⁸³

Consequently, the supreme court considered the potential fraudulent actions of the city. First, the supreme court defined fraud in the condemnation context. It was wrongly defined by the appellate court, which used the typical common law fraud definition.⁵⁸⁴ In the context of a condemnation case, fraud existed when “contrary to the ostensible public use, the taking would actually confer only a private benefit.”⁵⁸⁵ In other words, the taking of property for a public use can be fraudulent even if there was

574. *Id.* at 181.

575. *Id.* at 187 (citing *Coastal States Gas Producing Co. v. Pate*, 309 S.W. 2d 828 (Tex. 1958)).

576. *Id.* (citing *Hous. Auth. of City of Dall. v. Higginbotham*, 143 S.W.2d 79 (Tex. 1940)).

577. *Id.* (citing *Maher v. Lasata*, 354 S.W.2d 923 (Tex. 1962); *Phillips v. Naumann*, 275 S.W.2d 464 (Tex. 1955)).

578. *Id.* at 182.

579. *Id.* at 184 (citing *City of Austin v. Whittington*, 384 S.W.3d 766, 777 (Tex. 2012)).

580. *Id.* at 188 n.1.

581. *Id.* at 188.

582. *Id.*

583. *Id.*

584. *Id.* at 189–90.

585. *Id.* at 190 (citing *FKM P’ship, Ltd. v. Bd. of Regents of the Univ. of Hous. Sys.*, 255 S.W.3d 619 (Tex. 2008) (quoting *City of Austin v. Whittington*, 384 S.W.3d 766, 777 (Tex. 2012))).

not “fraudulent intent on the part of the condemnor,” if the public use is only a guise for private use.⁵⁸⁶ KMS alleged that the city’s ulterior motive was to provide an economic benefit to Briarwood, Sprouts, or both. However, the city was considering condemnation before Briarwood was unable to negotiate an easement because the Sprouts deal would not have been consummated without an easement, and there was no evidence negating a need for traffic relief or emergency vehicle access.⁵⁸⁷ The supreme court determined that the economic incentive did “not negate any of the city’s ostensible public uses justifying the taking.”⁵⁸⁸ Consequently, the motive behind the taking, as long as it provided a public use, and not solely a private benefit, would not be questioned.⁵⁸⁹ KMS argued that there was quid pro quo between the city and Briarwood evidenced by a letter amendment to the economic development agreement that reduced the payments the city would make to Briarwood by the costs incurred in connection with the condemnation process. But this was viewed as nothing more than favorable negotiations.⁵⁹⁰ Further, the court refused to read “nefarious motives” into deferring condemnation until after private negotiations failed and reducing the economic benefits by its costs of condemnation.⁵⁹¹ Practitioners should consider the daunting task of proving that no public use could ever be established for any particular taking.

But, there was a rather powerful dissent by three justices, making this opinion a 6–3 decision. The dissent agreed with the majority’s ruling that such Texas condemnation statute was not applicable because of the specificity of the statutory exclusionary language for transportation projects. Instead, the dissent focused on the deference to governmental body decisions,⁵⁹² and argued for (1) overruling of existing precedent due to the Texas constitutional 2009 amendment; (2) eliminating deference to governmental declarations of public use; and (3) shifting the burden of proof to the government.⁵⁹³ Current judicial precedents, believed the dissent, were not based upon the current Texas Constitution; they were based upon principles developed under the pre-2009 amendments to the Texas Takings Clause.⁵⁹⁴ Such amendments, in response to *Kelo*, reflected the Texas limitation of governmental taking powers, and a new line of reasoning should be developed based upon such amendments requiring ownership, use, and enjoyment by the public as a whole.⁵⁹⁵

As to its deference position, the dissent urged the court to continue to move away from the undue deferential authority given governmental entities, asserting that “[u]nadorned assertions of public use are constitu-

586. *Id.* (citing *City of Austin*, 384 S.W.3d at 779).

587. *Id.* at 188.

588. *Id.* at 191.

589. *Id.*

590. *Id.* at 193.

591. *Id.*

592. *Id.* at 195.

593. *Id.* at 195–96.

594. *Id.* at 197–98.

595. *Id.* at 195–98.

tionally insufficient' in determining whether a use will 'in fact be public rather than private.'"⁵⁹⁶ The dissent quoted favorably from the *Kelo* dissent of Justice O'Connor, claiming that "no coherent principle limits what would constitute a valid public use."⁵⁹⁷ Also, the dissent delved into the murky distinction between a "public use" and a "public purpose," noting that the current Texas Constitution's "public use" requirement had always required that the property taken must be used for ownership, use, or enjoyment by the government or public at large.⁵⁹⁸ The dissent also complained that limiting a property owner's constitutional defenses to fraud, bad faith, and arbitrariness, was confusing and had no precedent for excluding other defenses.⁵⁹⁹ Consequently, the dissent would shift the burden of proof to the government to prove it had a legitimate public use purpose as a condition to the condemnation.⁶⁰⁰

Moreover, to further confuse practitioners, the majority opinion addressing the dissent, noted the persuasive comments as to reconsideration of the changes in judicial interpretation after the 2009 constitutional amendments and the prior public use jurisprudence, and stated that the majority "would welcome the opportunity to further explore [the dissent's] position in a future case in which the issue is directly presented."⁶⁰¹ Based on *KMS Retail*, practitioners should realize that the saga will continue on how public use condemnations will be governed.

X. CONCLUSION

This year's cases again emphasized the need for careful and considered drafting in contracts of all types. (1) Deeds of trust need a proper tenant at sufferance clause (*Isaac*); (2) security agreements benefit from a well-drafted non-waiver clause (*Fab Tech*); and (3) clear terms of un-conditionality in a guaranty are important (*Wyrich*). Also, proper drafting was critical in the anti-deficiency limitations waiver contained in *Godoy*. On the other hand, proper drafting would have avoided the satisfaction of debt issues presented in *Quintanilla*.

But, other cases left open, or created, issues for the future. In *Orr*, issues remain on proper accounting for contribution among co-guarantors. Differences in proving debt exist after *Duarte-Viera*. The necessary elements for an outsider reverse veil-piercing claim were questioned in the *Yamin* dissent. Issues of res judicata in foreclosure actions subsequent to prior litigation is still open to further jurisprudence after *Perry*. And finally, the jurisprudence on "public use" condemnation should have been further resolved in *KMS*, but was, more likely, turned on its head.

596. *Id.* at 195 (citing *Tex. Rice Land Partners, Ltd. v. Denbury Green Pipeline-Tex., LLC*, 363 S.W.3d 192 (Tex. 2012)).

597. *Id.* at 197.

598. *Id.* at 197-98.

599. *Id.* at 199-200.

600. *Id.* at 199.

601. *Id.* at 194.

Furthermore, the Texas Supreme Court's decision in *Texas Outfitters*, and its adoption of the "we know it when we see it approach" all but guaranteed there will be future litigation over the duty of Executive Rights holders in the state of Texas. An almost equally controversial decision in *Rohrmoos* will have practitioners questioning their historical lease negotiating strategy and investors questioning the security of their investments as it no longer matters whether your lease contains a termination option: the Texas Supreme Court will, under certain circumstances, simply imply one exists.

Texas courts have now adopted an outsider reverse veil-piercing theory in *Yamin*. The failure to take remedial action may not necessarily waive a secured party's interest according to *Fab Tech*. The supreme court has now resolved that insurance appraisal awards address only damages and not liability issues per *Barbara Technologies* (at least until the composition of the supreme court changes).