

2021

Real Property

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Recommended Citation

J. Richard White & Amanda Grainger, *Real Property*, 7 SMU ANN. TEX. SURV. 217 (2021)
<https://scholar.smu.edu/smuatxs/vol7/iss1/10>

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REAL PROPERTY

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I. INTRODUCTION

This Article covers real property cases from the Southwestern Reporter (Third) volumes 580 through 607 and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

There were few cases of real significance in this Survey period. One of the more intriguing was the Texas “Taking Clause” addressed by the Texas Supreme Court with a near reversal of opinion within the written decision. In this year, how could the consequences of the COVID-19 pandemic be missed? As a harbinger for the future periods, a Texas Attorney General informal “guidance letter” affected foreclosures statewide. Partnership formation conditions were another important topic addressed by the Texas Supreme Court.

This Article will run the gambit from football players and brown recluse spiders in premises liability to a corporate “shoot-out” at the Fort Worth Stockyards. But in the more mundane cases, drafting precision was, again, at the forefront of such litigation.

The courts also examined the nature of the landlord–tenant relationship and the difference between a contract and a lease when it comes to termination provisions. As in previous years, there were several cases examining contract formation, the statute of frauds, and the interpretation of ambiguous conveyances. In one case of particular note, the Texas Supreme Court provided the practitioner with an invaluable roadmap to follow when conducting electronic negotiations. In several other cases, the Texas Supreme Court examined the parole evidence rule and reinforced the importance of ensuring the written contract reflects all material terms and conditions. Other important topics addressed include whether it was appropriate to imply a fixed width to blanket utility easements and when it was appropriate to dismiss a case for failure to comply with the certificate of merit statute.

II. MORTGAGES, FORECLOSURES, AND LIENS

A. NO STRICT REQUIREMENT FOR CURE PERIOD

*Casalicchio v. BOKF, N.A.*¹ involved the issue of strict compliance with the thirty-day default notice in a residential deed of trust foreclosure. The facts were simple and undisputed. The lender, following payment defaults by the borrower, sent a notice of default dated September 5, 2016, but the notice was not mailed until a week later on September 12, 2016.² The applicable deed of trust was clear in its requirement that the notice of breach must specify “a date, not less than 30 days from the date the notice is given . . . by which the default must be cured.”³ However, the notice of default instructed Casalicchio to deliver the past-due amount by October 5, 2016, which gave it less than thirty days to cure from the date the notice was given. Casalicchio alleged such failure voided the foreclosure sale, likening it to a “skydiver who ‘jump[s] without a parachute.’”⁴

On the other hand, the U.S. Court of Appeals for the Fifth Circuit noted that the incorrect deadline on the notice of default was immaterial and had no harmful effect on the borrower because: (1) the borrower admitted to not having funds sufficient to cure the default within either the actual stated cure period or the required thirty-day cure period; (2) the actual acceleration did not occur immediately after the reduced cure period; and (3) the lender offered other loan modifications on numerous occasions over the next nine months before acceleration actually occurred.⁵ The Fifth Circuit held that such a minor defect in an otherwise valid foreclosure sale did not void the foreclosure, relying on prior Texas Supreme Court decisions.⁶ In the first case, *University Savings Association v. Springwoods Shopping Center*, the Texas Supreme Court held that the requirement to record a notice of appointment of a substitute trustee would not invalidate the foreclosure when the appointment was recorded two days after the foreclosure sale but with the debtor having previously received actual notice of the substitute trustee’s appointment.⁷ In the second case, *Jasper Federal Savings & Loan Association v. Reddell*, the Texas Supreme Court held that failure to comply with a deed of trust provision requiring notice of a right to reinstate and right to bring a court action to assert defenses to acceleration or foreclosure would not void the foreclosure sale where, (1) the debtor had actual notice of such rights by prior consultation with legal counsel, and (2) the notice was “not otherwise required by law.”⁸ The Fifth Circuit concluded that any requirement

1. 951 F.3d 672, 672 (5th Cir. 2020).

2. *Id.* at 674, 674 n.2.

3. *Id.* at 674.

4. *Id.* at 676.

5. *Id.*

6. *Id.* at 678 (citing *Hemyari v. Stephens*, 335 S.W.3d 623, 628 (Tex. 2011)).

7. *Id.* at 677 (citing *Univ. Savs. Ass’n v. Springwoods Shopping Ctr.*, 644 S.W.2d 705, 706 (Tex. 1982)).

8. *Id.* (citing *Jasper Fed. Savs. & Loan Ass’n v. Reddell*, 730 S.W.2d 672, 673–75 (Tex. 1987)).

of strict compliance with deed of trust provisions was not absolute based on *Hemyari v. Stephens*.⁹ In *Hemyari*, the deed of trust and substitute trustee's deed failed to include the debtors'—two limited partnerships—actual names, “erroneously naming each partnership’s general partner” instead.¹⁰ Here, the Fifth Circuit approved the supreme court’s holding that “the mistake was ‘so obvious on its face as to be harmless’”¹¹ and that the defect was so minor that it would not void the foreclosure sale.¹² Consequently, the Fifth Circuit, applying Texas law, concluded that the failure to comply with a deed of trust provision, which causes no harm or prejudice to the debtor, will not void the foreclosure sale.¹³

B. MECHANIC’S LIEN—EXTINGUISHED BY SETTLEMENT AGREEMENT

*Nova Mud, Inc. v. Staley*¹⁴ involved the interpretation of a settlement agreement and whether it extinguished a claimed mechanic’s lien. Nova Mud, Inc. (Nova Mud) performed work at a drilling site for Heritage Standard Corporation (Heritage).¹⁵ There was no payment for the work, and a mechanic’s lien was asserted by Nova Mud against Heritage. George Staley (Staley) obtained a coworking interest in the well pursuant to a farmout agreement with Heritage. Suit to foreclose the mechanic’s lien was initiated in state court, but the suit was stayed when Heritage filed a bankruptcy case.¹⁶

Eventually, Nova Mud and Heritage entered into a settlement agreement. That settlement agreement specifically provided that “Nova Mud acknowledges and agrees that its recovery hereunder shall be in full and final satisfaction of its putative claims and *liens* against any interests of Heritage . . . and they shall not assert or enforce any claims and *liens* against any such interests.”¹⁷ The settlement agreement was approved by the bankruptcy court, and the automatic stay was lifted, allowing the state court proceeding to proceed. Ultimately, the state trial court found in its conclusions of law that “no debt was owed on the invoices, the lien claimed by Nova Mud had been extinguished, and that because the lien was extinguished, Nova Mud could not prevail on the claims it asserted against Staley.”¹⁸ Bankruptcy proceedings generally do not affect the lien against the property, still allowing an *in rem* recovery against the collateral.¹⁹ Nevertheless, the Eighth El Paso Court of Appeals concluded that Nova Mud elected to proceed with the claim in bankruptcy as opposed to a foreclosure suit on the mechanic’s lien; in other words, the settlement

9. *Id.* at 678 (citing *Hemyari*, 355 S.W.3d at 628).

10. *Id.* (citing *Hemyari*, 355 S.W.3d at 628).

11. *Id.* (quoting *Hemyari*, 355 S.W.3d at 628).

12. *Id.* (quoting *Hemyari*, 355 S.W.3d at 628).

13. *Id.*

14. 583 S.W.3d 728, 728 (Tex. App.—El Paso 2019, pet. denied).

15. *Id.* at 731.

16. *Id.* at 732.

17. *Id.* at 733–34 (emphasis added).

18. *Id.* at 734.

19. *Id.* at 736 (citing *Johnson v. Home State Bank*, 501 U.S. 78, 85 (1991)).

agreement released all of the debt and the accompanying lien.²⁰ Therefore, Nova Mud lost its right to foreclose the mechanic's lien claim against the working interest of Staley.²¹

C. COVID-19 FORECLOSURES

In an informal guidance letter dated August 1, 2020, from Ryan Bangert, Deputy First Assistant Attorney General of Texas, to Bryan Hughes, Texas senator, the effect of state and local orders relating to the COVID-19 pandemic on judicial and nonjudicial foreclosure sales was addressed.²² The issue was the effect of the local government's limit on the number of attendees at a foreclosure sale pursuant to local emergency orders.²³ This issue arose based on Executive Order GA-28 (Executive Order), issued by Texas Governor, Greg Abbott, which limited outdoor gatherings in excess of ten persons unless an exception applied or was approved by the applicable mayor or county judge.²⁴

Exemptions to the limitation contained in the Executive Order were specified therein, but Bangert's letter noted that foreclosure sales did not fall within any of the exemptions, including, specifically, the exemption contained in paragraph 1 of the Executive Order.²⁵ That paragraph exempted from capacity limitations "any services listed by the U.S. Department of Homeland Security's Cybersecurity and Infrastructure Workforce, Version 3.1."²⁶ Among those services listed are "real estate services, including settlement services."²⁷ Therefore, because a foreclosure sale must be a public sale,²⁸ the possible exclusion of anyone from the general public would violate the statutory requirements for a proper foreclosure auction.²⁹ Consequently, without local orders permitting an unlimited attendance, the Texas Deputy First Assistant Attorney General believed the statutory requirements could not be satisfied.³⁰

Of course, this is only informal guidance, and it does not carry the authority of a formal opinion of the Texas attorney general. This author is aware of many lenders' reluctance to proceed in the face of such "guidance," but many foreclosure sales are continuing to occur. It is antici-

20. *Id.* at 738.

21. *Id.* at 737.

22. Letter from Ryan Bangert, Deputy First Assistant Att'y Gen. of Tex., to Hon. Bryan Hughes, Tex. Sen. (Aug. 1, 2020) (on file with author).

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* (quoting The Governor of the State of Tex., Relating to the Targeted Response to the COVID-19 Disaster as Part of the Reopening of Texas, 45 Tex. Reg. 4589 (2020)).

27. *Id.* (quoting CYBERSECURITY & INFRASTRUCTURE SECURITY AGENCY, GUIDANCE ON THE ESSENTIAL CRITICAL INFRASTRUCTURE WORKFORCE: ENSURING COMMUNITY AND NATIONAL RESILIENCE IN COVID-19 RESPONSE, Version 3.1, p. 16 (May 19, 2020), https://www.cisa.gov/sites/default/files/publications/Version_3.1_CISA_Guidance_on_Essential_Critical_Infrastructure_Workers.pdf) [<https://perma.cc/C79L-FEBJ>].

28. *Id.* (quoting TEX. PROP. CODE ANN. § 51.002(a)).

29. *Id.*

30. *Id.*

pated that future survey periods will provide the opportunity to discuss cases based on foreclosure sales which occurred during this moratorium period.³¹

III. DEBTOR, CREDITOR, GUARANTIES, AND INDEMNITIES

A. DESCRIPTION OF COLLATERAL

In *Cheniere Energy, Inc. v. Parallax Enters. LLC*,³² the Fourteenth Houston Court of Appeals addressed whether a generic description of collateral was valid for Uniform Commercial Code (UCC) purposes. Cheniere Energy, Inc. (Cheniere) and Parallax Enterprises LLC (Parallax) had negotiated a potential joint venture agreement to develop liquified natural gas (LNG) facilities, but those negotiations never resulted in a final joint venture agreement. During the pendency of negotiations, Parallax began developing the LNG facilities with money provided by Cheniere. The nature of this arrangement (equity or debt) was disputed, but the parties actually signed a promissory note and a security agreement to evidence the advance of funds.³³

After advancing \$46 million, Cheniere stopped funding and sought foreclosure of the purported security interest provided by Parallax, being the equity interest Parallax held in a subsidiary, Live Oak LNG LLC (Live Oak).³⁴ Parallax filed suit and sought a temporary injunction, which the trial court granted and which was appealed. The court of appeals affirmed the trial court's grant of the application for a temporary injunction, but there was a concurring opinion by a single justice and a dissenting opinion by a single justice.³⁵ The majority concluded that the security interest in the equity interest in the subsidiary was not adequately described under the UCC.³⁶ The promissory note, which was also the security agreement, described the collateral as follows:

- [a]ll of [Parallax's] right, title and interest in and to the following . . .
1. All deposit, securities and other accounts and investment property
 2. All instruments, documents and chattel paper
 3. All inventory, equipment, fixtures and goods

31. As this Article was submitted for publication, Texas Governor Greg Abbott issued Executive Order GA-34, which essentially opened up Texas from the COVID-19 shut down. See The Governor of the State of Tex., Relating to the Opening of Tex. in Response to the COVID-19 Disaster, 46 Tex. Reg. 1567 (2021). More than likely, this means real property foreclosures are not generally stalled by the informal guidance of the Texas attorney general. Nevertheless, to perpetuate some uncertainty, Executive Order GA-34 failed to mention Executive Order GA-28, which was the lynchpin for the informal guidance letter. *Id.* However, the more reasonable interpretation is that, with no restrictions limiting the size of outdoor gatherings, foreclosures should now be valid. See Letter from Ryan Bangert, *supra* note 22.

32. 585 S.W.3d 70, 70 (Tex. App.—Houston [14th Dist.] 2019, pet. dismiss'd).

33. *Id.* at 74.

34. *Id.* at 75.

35. *Id.* at 86.

36. *Id.* at 78.

4. All contracts and permits
5. All letter-of-credit rights
6. All intellectual property
7. All real property
8. All other tangible and intangible property and assets of [Parallax].³⁷

Parallax's equity interest in Live Oak was not covered by Items 1–7, and Item 8 was a “‘super generic’ catch-all that, as a matter of law, ‘does not reasonably identify the collateral.’”³⁸ Such holding was based on UCC Section 9.108(c), which provided: “[a] description of collateral as ‘all the debtor’s assets’ or ‘all the debtor’s personal property’ or using words of similar import does not reasonably identify the collateral.”³⁹ Official Comment No. 2 to this section provides that this is a continuation of the existing case law on the subject.⁴⁰ However, the UCC official comment does note that, under UCC Section 9-504, a financing statement (as opposed to a security agreement) is sufficient if it describes collateral as “all assets or all personal property.”⁴¹ Based on the purported collateral not being appropriately described in the security agreement, the court of appeals found that there was not an appropriate authenticated security agreement that provided a description of the collateral⁴² as required by UCC Section 9.203(b)(3)(A).⁴³

Cheniere alleged that “intangible property” included the equity interest, as the term “general intangibles” is defined in the UCC.⁴⁴ The court of appeals acknowledged that Parallax's equity interest in Live Oak, as a general intangible, would have been covered had the listing of collateral included “general intangibles” but, since it did not, the description was inadequate.⁴⁵ To have been deemed adequate, the equity interest needed to be specifically described or identified by a “type of collateral” defined in the UCC.⁴⁶ The court of appeals concluded that the term “intangible property” was broader than “general intangibles” and thus failed because of the super-generic description exclusion.⁴⁷ The court of appeals also held that the super-generic description was insufficient, despite Cheniere's assertion that such collateral was within the intent of the parties, because intent could not substitute for a “description reasonably identifying the property.”⁴⁸ Interestingly, the parties had attached an organizational chart of Parallax to the promissory note, which Cheniere al-

37. *Id.*

38. *Id.* (quoting TEX. BUS. & COM. CODE ANN. § 9.108(c)).

39. *Id.*

40. TEX. BUS. & COM. CODE § 9.108(c) cmt. 2.

41. *Id.*

42. *Cheniere Energy, Inc.*, 585 S.W.3d at 78–79.

43. *Id.* at 77 (quoting TEX. BUS. & COM. CODE § 9.203(b)(3)(A)).

44. *Id.* at 79 (quoting TEX. BUS. & COM. CODE § 9.102(a)(42)).

45. *Id.* at 79–80.

46. *Id.* at 79 (quoting TEX. BUS. & COM. CODE § 9.108(b)(3)).

47. *Id.* at 80.

48. *Id.*

leged was sufficient to identify the collateral; however, the language in the note which referred to the organizational chart did not purport to describe it as the collateral but merely to identify the corporate structure.⁴⁹

As noted above, there was a significant dissent by Chief Justice Frost. The dissent focused on the issue of whether the term “intangible property” qualified as an adequate legal description of the collateral.⁵⁰ In support, the dissent reminds us that the specific UCC provision for descriptions of collateral is written in such a way as to allow for the identification of that collateral; UCC Section 9.108(a) provides that a description of personal or real property is sufficient “whether or not it is specific, if it reasonably identifies what is described.”⁵¹ The dissent referred to commentary which had concluded that “[t]he overwhelming majority of courts uphold very broad descriptions [of collateral under UCC Section 9.203].”⁵² Furthermore, the dissent recited another provision in the promissory note granting a security interest in the collateral described on an exhibit which included “any *general intangibles* at any time evidencing or relating to any of the foregoing . . .”⁵³ Based on the language in the body of the security agreement referring to “any general intangibles,” the dissent concluded the collateral description was sufficient.⁵⁴ Further, the dissent argued that context must drive the meaning because the parties knew the only collateral owned by Parallax was its equity interest in Live Oak and such knowledge made the description identifiable.⁵⁵ Such conclusion relied on the UCC Section 9.108, Official Comment No. 2, which explains both that the purpose of collateral description is evidentiary and that the so-called serial number test is rejected.⁵⁶

Unfortunately, this again represents a case of a failure of draftsmanship where a simple change or addition would have made a significant difference in this case. Despite this dissenting opinion, prudent drafting of a security agreement should always contain either very detailed descriptions of the collateral intended or inclusion of all applicable “UCC categories.”

B. DISSIPATION OF ASSETS

*RWI Construction, Inc. v. Comerica Bank*⁵⁷ involved a unique set of circumstances where Comerica Bank (Comerica) was both a partner and a lender to Lone Star Opportunities Fund V, LP (Lone Star) and its subsidiaries RWI Construction, Inc. (RWI Construction), RWI Acquisition,

49. *Id.* at 81.

50. *Id.* at 89–90 (Frost, J., dissenting).

51. *Id.* at 89 (quoting TEX. BUS. & COM. CODE ANN. § 9.108(a)).

52. *Id.* at 90 n.11 (quoting U.C.C. § 910 (AM. LAW INST. & UNIF. LAW COMM’N 2018)).

53. *Id.* at 90.

54. *Id.* at 92.

55. *Id.* at 91.

56. *Id.* at 91 n.15 (quoting TEX. BUS. & COM. CODE ANN. § 9.108 cmt. 2).

57. 583 S.W.3d 269, 269 (Tex. App.—Dallas 2019, no pet.).

LLC (RWI Acquisition), and RWI Constructions Holdings, LLC (RWI Holdings), (collectively, the RWI entities). Comerica's loan to RWI Construction and RWI Acquisition was guaranteed by Lone Star. However, Comerica was also a limited partner in Lone Star.⁵⁸ While Comerica was owed money on its outstanding loan to the RWI entities, Lone Star made a capital call; Comerica paid its share, but the general partner of Lone Star failed to pay its share. Comerica's funds were deposited at Texas Capital Bank, which had a revolving loan to Lone Star. The vast majority of Comerica's capital contributions paid down the Texas Capital Bank loan, and the balance was distributed to Lone Star's subsidiary portfolio companies for their operations and could not be refunded. When Lone Star later made an additional capital call, Comerica paid its pro rata share (and again, Lone Star's general partner failed to pay its pro rata share), but Comerica filed suit seeking an injunction that would prohibit the excess proceeds from such capital call (after payment of the existing Texas Capital Bank loan) from being dissipated, as was done with the prior capital call excess proceeds.⁵⁹ The single issue on appeal was whether Comerica had established "that it would suffer an irreparable injury for which the remedy at law would be inadequate" and in finding that Comerica had established such, whether the trial court "abused its discretion in entering the injunction" because of such finding.⁶⁰ The Fifth Dallas Court of Appeals recited the long-standing history of judicial precedent which "forecloses resort to injunctive relief simply to sequester a source of funds to satisfy a future judgment."⁶¹ However, the court of appeals did acknowledge that Comerica had an interest in an \$800,000.00 settlement of a receivable, which RWI collected and refused to use to pay the Comerica debt.⁶² In this situation, the court of appeals recognized an exception to the general rule⁶³ because such receivable was "logically and justifiably connected to Comerica Bank's breach of contract claim" for which injunctive relief was sought.⁶⁴

The issue of Lone Star's solvency also played into whether an adequate remedy was available to Comerica. Lone Star claimed that, since the trial court had not concluded Lone Star was insolvent, Comerica could not prove insolvency, which would constitute the inadequate remedy required.⁶⁵ The court of appeals held that insolvency was not a requirement to establish a lack of an adequate remedy at law, and that the evidence of Lone Star's lack of financial wherewithal (including limited cash resources, the questionable value of assets, and a history of converting and dissipating Comerica's collateral) would be sufficient evidence for the

58. *Id.* at 272.

59. *Id.* at 272–74.

60. *Id.* at 272.

61. *Id.* at 277.

62. *Id.*

63. *Id.* (citing *Khaledi v. H.K. Glob. Trading, Ltd.*, 126 S.W.3d 273, 278–79 (Tex. App.—San Antonio 2003, no pet.)).

64. *Id.*

65. *Id.*

trial court to find an inadequate remedy at law.⁶⁶

C. NONDISCHARGEABILITY OF DEBT

In *Veritex Community Bank v. Osborne (In re Osborne)*,⁶⁷ the U.S. Court of Appeals for the Fifth Circuit discussed the due diligence requirements of a creditor as a condition to asserting the nondischargeability of debts based on financial misrepresentations. Doctor John Osborne (Osborne) formed a new medical practice entity and sought a loan from Veritex Community Bank (Veritex). Personal financial statements were provided, including a statement that Osborne would notify Veritex “of any material unfavorable change in his financial condition.”⁶⁸ The loan was made to the new entity, and Osborne signed a guaranty. To facilitate his medical practice, Osborne had the borrowing entity enter into a lease of medical equipment in the amount of \$1 million and Osborne signed a guaranty of this lease obligation. Within two years, the medical practice entity defaulted on the medical equipment lease and entered into a settlement agreement but later defaulted on that settlement agreement.⁶⁹ The equipment lessor obtained a Pennsylvania judgment by confession in the amount of over \$2 million. Veritex was never informed by Osborne or the medical practice entity of the execution of the equipment lease, the default thereunder, or the judgment.

Just prior to the equipment lease judgment, Osborne was working with Veritex to extend the medical practice loan.⁷⁰ In connection with that request, Veritex asked for updated financial statements from Osborne. Financial statements were provided reflecting a net worth of over \$1.5 million but without deduction for the judgment entered against him in Pennsylvania. Furthermore, Osborne did not update his previous financial statement as required by Veritex’s documents.⁷¹ There was a personal meeting regarding the loan extension between a commercial loan officer for Veritex and Osborne in which Osborne failed to reveal both the default on the lease and the ensuing judgment regarding that default. Nevertheless, Veritex did obtain a credit report which was dated one week after the judgment was entered, but such judgment was not reflected in that credit report. In fact, this credit report showed that Osborne’s credit score had increased slightly since his previous credit report.⁷² The loan extension was granted and closed a few months later in March 2014. In late April 2014, the medical practice entity filed for Chapter 11 bankruptcy, and Osborne filed for Chapter 7 bankruptcy shortly thereafter. In those bankruptcy proceedings, Veritex asked that such debt not be dis-

66. *Id.* at 278.

67. 951 F.3d 691, 691 (5th Cir. 2020).

68. *Id.* at 695.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 696.

charged because of materially false written statements submitted to Veritex by Osborne.

[A] debt is exempted from discharge if it was obtained by (1) a written statement; (2) that is materially false; (3) respecting the debtor's or an insider's financial condition; (4) on which the creditor whom the debtor is liable for such credit reasonably relied; and (5) that the debtor caused to be made and published with the intent to deceive.⁷³

The bankruptcy court found that Veritex did not reasonably rely upon the financial statements provided by Osborne.⁷⁴

On the reasonable reliance issue, the Fifth Circuit noted it was a fact question, which must be proved by a preponderance of the evidence by the creditor.⁷⁵ The congressional intent for such Bankruptcy Code section was meant "to target creditors acting in bad faith to prevent debtors from discharging debts."⁷⁶ In one of the U.S. Court of Appeals for the Fifth Circuit's prior decisions, it established three factors for consideration: (1) whether the debtor and creditor had previous business dealings that created a trust relationship; (2) whether any "red flags" existed which would have alerted an ordinarily prudent lender as to potential inaccuracies; and (3) whether minimal investigations would have revealed the inaccuracy of the misrepresentations.⁷⁷ However, other factors might be applicable to a reasonable reliance test, such as fairness of erroneous financial statements⁷⁸ and alterations in financial statements.⁷⁹ Armed with a standard targeting only bad-faith creditors who ignored red flags, the Fifth Circuit analyzed the facts in this case.

The Fifth Circuit found that Osborne's "sense of detachment about his financial statements" and his failure to update them to reflect the equipment loan guaranty and default did not constitute an intent to deceive that would override the bankruptcy court's ruling of non-deceit.⁸⁰ As for reasonable reliance, the Fifth Circuit discussed the bankruptcy court's findings that Osborne had built up a working relationship with Veritex for thirteen months and that he also had a reputation as an excellent cardiologist.⁸¹ Additionally, the Fifth Circuit noted that "the bankruptcy court [had] criticized Veritex for relying on the financial statement" that was provided in connection with the potential extension of the medical practice loan "because it was not on Veritex's own form and was unsigned."⁸²

73. *Id.* at 696 (citing 11 U.S.C. § 523(a)(2)(B)).

74. *Id.*

75. *Id.* at 697 (first citing *Coston v. Bank of Malvern (In re Coston)*, 991 F.2d 257, 259 (5th Cir. 1993) (en banc) (per curiam); and then citing *Norris v. First Nat'l Bank in Luling (In re Norris)*, 70 F.3d 27, 29 (5th Cir. 1995)).

76. *Id.* (citing H.R. REP. No. 95-595, at 130-31 (1977)).

77. *Id.* at 697-98 (quoting *In re Coston*, 991 F.2d at 261).

78. *Id.* at 698 (citing *In re Norris*, 70 F.3d at 30).

79. *Id.* (citing *Young v. Nat'l Union Fire Ins. Co. of Pittsburg (In re Young)*, 995 F.2d 547, 549 (5th Cir. 1993)).

80. *Id.* at 700.

81. *Id.*

82. *Id.*

However, the Fifth Circuit noted that Veritex provided evidence that it had followed “its standard practice in extending the loan” by allowing clients to provide non-bank forms as financial statements.⁸³

Further disagreeing with the bankruptcy court, the Fifth Circuit dismissed unreasonable reliance based on the exclusion of contingent liabilities because the bank knew of, and made, the medical practice loan.⁸⁴ The Fifth Circuit also dismissed any red flags which could have arisen from knowledge of the medical practice’s financial struggles and its financial statements changing to a cash basis.⁸⁵ Finally, reliance was deemed reasonable even though the financial statements were seven months old because Veritex made further inquiries as to the then-current financial condition of Osborne, which was supported by the then-current credit report reflecting a slightly increased credit standing.⁸⁶ Therefore, the Fifth Circuit found Veritex had exercised the necessary reasonable diligence in evaluating Osborne’s financial condition to meet the Bankruptcy Code’s reasonable reliance standard for the nondischarge of the debt.⁸⁷

D. ABANDONMENT OF ACCELERATION

In *Pitts v. Bank of New York Mellon Trust Co.*,⁸⁸ a loan was made in 1994 and went into default in September 2010. An initial acceleration letter was sent on December 17, 2010. In September 2013, after Ocwen Loan Servicing, LLC (Ocwen) became the new servicer, there were additional notices sent to the borrower, including various monthly statements indicating the missed payments but not indicating the full outstanding principal balance that was due.⁸⁹ A delinquency notice sent in May 2014 demanded payment of less than the full outstanding principal and interest. In March 2015, a notice of default and intent to accelerate was sent to the borrower. Finally, on January 26, 2016, an acceleration notice was sent.⁹⁰ To stop the foreclosure, Pitts alleged the foreclosure was barred by the statute of limitations because the foreclosure had not occurred within four years after the December 17, 2010 acceleration. Conversely, the creditor alleged that it had taken demonstrable actions which evidenced an abandonment of acceleration.⁹¹

An abandonment of acceleration can take one of at least two forms: (1) express notice of rescission to the debtor, or (2) conduct consistent with an abandonment of acceleration.⁹² There have been numerous cases deal-

83. *Id.* (citing *In re Young*, 995 F.2d at 549).

84. *Id.* at 700–01 (citing *Norris v. First Nat’l Bank in Luling (In re Norris)*, 70 F.3d 27, 30 (5th Cir. 1995)).

85. *Id.* at 701.

86. *Id.* at 701–02.

87. *Id.* at 702.

88. 583 S.W.3d 258, 260 (Tex. App.—Dallas 2018, no pet.).

89. *Id.*

90. *Id.*

91. *Id.* at 261.

92. *Id.* at 262 (quoting *Bracken v. Wells Fargo Bank, N.A.*, No. 05-16-01334-CV, 2018 WL 1026268, at *3 (Tex. App.—Dallas Feb. 23, 2018, pet. denied) (mem. op.)).

ing with abandonment of acceleration from the U.S. Court of Appeals for the Fifth Circuit and six Texas cases. The U.S. Court of Appeals for the Fifth Circuit, in *Boren v. U.S. National Bank Ass'n*, held by way of an “*Erie* guess” that a creditor’s notice to the debtor, which does not seek to collect the full accelerated balance, would constitute an abandonment of acceleration, thereby resetting the running of the statute of limitations.⁹³ Five of the six Texas cases have held that subsequent notices requesting partial payment constituted an abandonment of acceleration.⁹⁴ However, the distinguishing factor in the subject case was that subsequent notices demanded less than the accelerated balance, but none of the notices contained language, as contained in *Boren* and the five Texas cases, indicating that the loan would be accelerated if the borrower failed to make the lesser payments.⁹⁵ A statement that the loan would be accelerated for such failure is clearly inconsistent with an earlier acceleration; therefore, it evidences an objective indication that the prior acceleration has been abandoned.⁹⁶ Such failure to include the intent to accelerate language violates one of the two prongs set forth in *Boren*.⁹⁷ In the subject case, the notice language that the loan was “in foreclosure,” or to that effect, was inconsistent with an abandonment of acceleration.⁹⁸ Further, the fact that a second delinquency notice did not contain language about being “in foreclosure” did not override the inconsistent position taken in prior notices.⁹⁹ Therefore, the inconclusive nature of the notices could not support a summary judgment.¹⁰⁰ This is another case where more precise drafting would have prevented a lot of legal woes.

E. APPRAISAL FRAUD

*Credit Suisse AG v. Claymore Holdings, LLC*¹⁰¹ involved a suit among lenders within a syndicated lending group. All disputes were governed by New York law, as is typical in most syndicated loan transactions, which is relevant to those practitioners involved in syndicated transactions in Texas.¹⁰² Claymore Holdings, LLC (Claymore) was one of the lender participants in the loan and conditioned its participation on having an appro-

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

94. *Pitts*, 583 S.W.2d at 264–65 (first citing *Brannick v. Aurora Loan Servs., LLC*, No. 03-17-00308-CV, 2018 WL 5729104 (Tex. App.—Austin Nov. 2, 2018, no pet. h.) (mem. op.); then citing *Farmehr v. Deutsche Bank Nat'l Trust Co.*, No. 05-17-00563-CV, 2018 WL 2749634 (Tex. App.—Dallas May 31, 2018, no pet.) (mem. op.); then citing *Bracken*, 2018 WL 1026268; then citing *Emmert v. Wilmington Sav. Fund Soc'y, F.S.B.*, No. 02-17-00119-CV, 2018 WL 1005002 (Tex. App.—Fort Worth Feb. 22, 2018, no pet.) (mem. op.); and then citing *NSL Prop. Holdings, LLC v. Nationstar Mortg., LLC*, No. 02-16-00397-CV, 2017 WL 3526354 (Tex. App.—Fort Worth Aug. 17, 2017, pet. denied) (mem. op.)).

95. *Id.* at 265.

96. *Id.*

97. *Id.*

98. *Id.* at 266.

99. *Id.*

100. *Id.* at 266–67.

101. 610 S.W.3d 808, 808 (Tex. 2020).

102. *Id.* at 812.

priate “Qualified Appraisal.” Credit Suisse AG (Credit Suisse) engaged and worked with the appraiser, an employee of CBRE, Inc. (CBRE), who initially returned an appraisal on the subject collateral (the Lake Las Vegas development) in the amount of \$513 million. But “[a]t the behest of Credit Suisse,” the appraisal value was reworked to show a value between \$511 million and \$891 million.¹⁰³ The definition of Qualified Appraisal required the appraisal to be in accordance with the Financial Institutions Reform, Recovery, and Enforcement Act of 1989, and based on the Uniform Standards of Professional Appraisal Practice. The appraisal was determined to be inconsistent with such standards because: (1) discounted cash flows were to an incorrect date; (2) the absorption period for sale of lots was improperly accelerated; (3) premiums based on “view” were improperly calculated; (4) golf course revenues were improperly reported; (5) investment income was not appropriately supported; and (6) the appraiser did not act independently.¹⁰⁴ A few months after the loan closing, the real estate bubble of 2008 burst, creating a near total loss, which generated the subject lawsuit.

The biggest issue related to the trial court’s award of equitable rescission damages (a New York law concept). At trial, Claymore presented extensive evidence of actual damages, and the jury awarded \$40 million in damages to Claymore based on the value of the asset promised (based on the fraudulent appraisal) versus the value of the asset actually received (i.e., the property’s true value). But the trial court, under New York law’s equitable rescissory damages, awarded an additional \$211 million in damages.¹⁰⁵ The Texas Supreme Court, following New York law, held that the equitable remedy was not justified because actual damages, even though difficult to ascertain, had actually been presented to the jury through extensive evidence submitted by Claymore, and an actual damage award was made.¹⁰⁶ Therefore, an equitable remedy was not available, and the \$211 million equitable damages award by the trial court was reversed.¹⁰⁷

But the more important aspect of this case dealt with the supreme court’s interpretation of the disclaimer provisions in the credit agreement applicable to the fraudulent inducement or fraudulent misrepresentations alleged against Credit Suisse by Claymore. Section 8.8 of the credit agreement provided that each lender “independently and without reliance upon any Agent [e.g., Credit Suisse] . . . made its own credit analysis and decision . . . independently and without reliance upon . . . any Agent.”¹⁰⁸ However, Claymore countered that the predominant provision in the credit agreement was Section 3.1(H)(vi) requiring, as a condition precedent to making the loan, that the agent (Credit Suisse) “shall have re-

103. *Id.* at 813–14.

104. *Id.* at 814.

105. *Id.* at 817.

106. *Id.* at 819–20.

107. *Id.* at 824–25.

108. *Id.* at 815.

ceived . . . from the Borrowers . . . a Qualified Appraisal . . . in a form reasonably acceptable to the Administrative Agent.”¹⁰⁹ In construing New York law, the supreme court noted “that a plaintiff’s contractual disclaimer of reliance on the defendant’s misrepresentations or omissions is ineffective unless: (1) the disclaimer is made sufficiently specific to the particular type of fact misrepresented, and (2) the alleged misrepresentation did not concern facts peculiarly within the defendant’s knowledge.”¹¹⁰ The supreme court determined that the errors in the appraisal were within the “peculiar knowledge” of Credit Suisse; therefore, the disclaimers would not be applicable to bar Credit Suisse’s liability.¹¹¹

F. TURNOVER ORDER/RECEIVERSHIP

*Hamilton Metals, Inc. v. Global Metal Services, Ltd.*¹¹² involved the interpretation and application of § 31.002 of the Texas Civil Practice and Remedies Code (the turnover statute).¹¹³ Global Metal Services, LTD. (Global) obtained a final money judgment on October 2, 2016, against Hamilton Metals, Inc. (Hamilton) and initiated garnishment proceedings against PNC Bank. Additionally, Global filed an application for a turnover order and an appointment of a receiver. The trial court appointed the receiver, vesting it with power to take possession of any nonexempt property. After such an order, “but before the trial court ruled on the application, the Texas Legislature amended Section 31.002(a)” of the turnover statute; therefore, there was a change in the statute during the pendency of the pending application.¹¹⁴ Global’s application listed numerous categories of generic assets that might be owned and held by Hamilton¹¹⁵ but did not address whether those assets could or could not be readily attached or levied on by ordinary legal process as required by the then turnover statute.¹¹⁶ Global did not present any evidence on whether any assets could be levied on by ordinary legal process. However, after the May 11, 2017 application was made and before the court ruling on July 25, 2017, the Texas legislature amended, effective June 15, 2017, the turn-

109. *Id.* at 814.

110. *Id.* at 825 (first citing *Loreley Fin. (Jersey) No. 3 Ltd. v. Citigroup Glob. Mkts. Inc.*, 987 N.Y.S.2d 299, 304 (2014); and then citing *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 980 N.Y.S.2d 21, 28 (2014)).

111. *Id.* at 825–29.

112. 597 S.W.3d 870, 870 (Tex. App.—Houston [14th Dist.] 2019, pet. filed).

113. *Id.* at 873–74 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 31.002).

114. *Id.* at 876.

115. *Id.* at 879.

116. *Id.* at 875. The applicable turnover statute at the time the application was filed read, in relevant part, as follows: “[a] judgment creditor is entitled to . . . injunction or other means in order . . . to obtain satisfaction on the judgment if the judgment debtor owns property . . . that: (1) cannot readily be attached or levied on by ordinary legal process; and (2) is not exempt from attachment, execution, or seizure for the satisfaction of liabilities.” *Id.* (quoting Act of May 17, 1985, 69th Leg., R.S., ch. 959, § 1, 1985 Tex. Gen. Laws 3242, 3269 (amended 2017, 2019) (current version at TEX. CIV. PRAC. & REM. CODE ANN. § 31.002)).

over statute to delete § 31.002(a)(1).¹¹⁷ Hamilton alleged that the statutory requirement in effect at the time of filing of the application had to be complied with, but the Fourteenth Houston Court of Appeals disagreed, noting the unambiguous language of the statute which “applie[d] to the collection of any judgment, regardless of whether the judgment was entered before, on, or after the effective date of this Act.”¹¹⁸ The court of appeals also rejected Hamilton’s retroactive application argument, noting that the legislature “did not provide [language] that the prior version of the statute would continue in effect and apply to all applications pending on the statute’s effective date.”¹¹⁹ Therefore, Global’s application did not need to address the legal process provision of the prior turnover statute.¹²⁰

The second arm of the prior (and current) version of the turnover statute required that the judgment creditor prove that the judgment debtor owned property for which the turnover order was applicable.¹²¹ The analysis of this issue focused on three types of evidence submitted by Global. The first was the receivership application which was verified by Global’s counsel as to her personal knowledge and was true and correct to the best of her knowledge. However, the listing of assets included only general categories of property which were held not legally sufficient to support the conclusion that Hamilton held any such property.¹²² The next type of evidence was a group of exhibits attached to Global’s reply to Hamilton’s objections. Hamilton objected to the late introduction of this evidence as not being consistent with summary judgment evidence rules under Texas Rule of Civil Procedure 166a, but the court of appeals concluded that summary judgment evidence deadlines do not apply for evidence supporting an application under the turnover statute.¹²³ One exhibit was a letter from the attorney for the purchaser of Hamilton’s assets at the UCC foreclosure sale held by PNC Bank under its secured line of credit. That letter merely stated that not all of Hamilton’s assets were foreclosed on by PNC Bank and that other assets existed. Because specific assets were not stated by the purchaser’s attorney, the court of appeals held such a letter as legally insufficient to support a finding that Hamilton owned any such property.¹²⁴ Another exhibit was an answer from PNC

117. *Id.* at 876 (citing Act of May 24, 2017, 85th Leg., R.S., ch. 996, § 1, 2017 Tex. Sess. Law Serv. 4026, 4026).

118. *Id.* (quoting Act of May 24, 2017, 85th Leg., R.S., ch. 996, § 1, 2017 Tex. Sess. Law Serv. 4026, 4026).

119. *Id.* at 877.

120. *Id.* at 878 (citing Act of May 24, 2017, 85th Leg., R.S., ch. 996, § 1, 2017 Tex. Sess. Law Serv. 4026, 4026).

121. *Id.* at 878 (first citing Act of May 24, 2017, 85th Leg., R.S., ch. 996, § 1, 2017 Tex. Sess. Law Serv. 4026, 4026; and then citing *Gillet v. ZUPT, LLC*, 523 S.W.3d 749, 757 (Tex. App.—Houston [14th Dist.] 2017, no pet.)).

122. *Id.* at 880 (citing *Rohrmoos Venture v. UTSW DVA Healthcare, LLP*, 578 S.W.3d 469, 503–04 (Tex. 2019)).

123. *Id.* (citing *Gillet*, 523 S.W.3d at 754).

124. *Id.* at 880–81 (first citing *Rohrmoos Venture*, 578 S.W.3d at 503–04; and then citing *Gillet*, 523 S.W.3d at 757).

Bank under the garnishment action to the effect that PNC Bank “was unable to definitively determine whether it was indebted to Hamilton at the time,” which the court of appeals determined was legally insufficient to support the turnover application.¹²⁵ Finally, there was an affidavit from the CEO of Hamilton that included a “Schedule 5” list of assets not sold in the UCC sale by PNC Bank. But again, the court of appeals found this evidence legally insufficient because it did not contain an actual statement that Hamilton owned any such assets¹²⁶ except for ten specific assets, which the court of appeals found were the only sufficient evidence of Hamilton’s ownership of qualifying assets.¹²⁷

IV. LANDLORD–TENANT RELATIONSHIP AND LEASES

In *Don Haskins, Ltd. v. Xerox Commercial Solutions, LLC*,¹²⁸ the Eighth El Paso Court of Appeals examined whether a Temporary Parking Agreement (TPA) signed by the tenant of a building was a lease or a contract. This case provides an important drafting reminder for practitioners regarding termination clauses and the distinction between how such clauses operate in leases versus other property-related agreements. Lease agreements which do not contain a “specific length of duration or end date are . . . considered to be tenancies at will, or terminable at will by either party.”¹²⁹ The TPA in question contained no term, and the landlord argued that it was effectively a lease and, therefore, terminable at will. The tenant argued that, although the TPA amended the lease with respect to the parking provisions, it was not a lease but a standalone agreement and, therefore, was not terminable at will. The court of appeals agreed with the tenant, stating that “[a]s a matter of law, a lease is defined as a grant of an estate in land for a limited term, with conditions attached.”¹³⁰ In fact, the Texas Supreme Court has held that a “lease must contain a ‘granting clause,’ or terms which reflect an intention on the part of the landowner to transfer an interest in and possession of the property described.”¹³¹

In the case at hand, the TPA lacked a granting clause and simply contained two obligations: (1) to provide alternative parking spaces, and (2) to restrict adjacent tenants from routing truck traffic through the parking area.¹³² In addition, evidence was produced at trial that the original draft of the TPA contained a clause allowing it to be terminable at will; how-

125. *Id.* at 881 (citing *Gillet*, 523 S.W.3d at 757).

126. *Id.* at 882.

127. *Id.* at 883 (citing *Gillet*, 523 S.W.3d at 756).

128. 584 S.W.3d 53, 53 (Tex. App.—El Paso 2018, pet. denied).

129. *Id.* at 68 (citing *Providence Land Servs., LLC v. Jones*, 353 S.W.3d 538, 542 (Tex. App.—Eastland 2011, no pet.)).

130. *Id.* at 68–70. (first citing *Holcombe v. Lorino*, 79 S.W.2d 307, 310 (Tex. 1935); and then citing *Virani v. Syal*, 836 S.W.2d 749, 751 (Tex. App.—Houston [1st Dist.] 1992, writ denied)).

131. *Id.* at 69 (citing *Vallejo v. Pioneer Oil Co.*, 744 S.W.2d 12, 14–15 (Tex. 1988) (per curiam)).

132. *Id.*

ever, this clause was not included in the final agreement.¹³³ In the case of a contract, not a lease, a court will imply a reasonable term if a contract is silent.¹³⁴ The court of appeals implied a reasonable term as a term that was coterminous with the lease, and the landlord was liable for breach of contract.¹³⁵

In *Tatro v. State*,¹³⁶ the Fourteenth Houston Court of Appeals examined the landlord–tenant relationship in the context of a criminal trespass charge. The appellant in the case claimed he was a tenant and not guilty of criminal trespass. The appellant was dating the daughter of the owner of the premises with whom he also had three daughters.¹³⁷ The appellant’s occupation of the house in many ways was similar to a tenant. The appellant slept in the house, kept clothes and toiletries there, and even cooked food in the kitchen. One night, the appellant tried to enter the house intoxicated. The owner of the house asked the appellant to leave, and he refused. A person commits criminal trespass “if the person enters or remains on the property of another, without effective consent, and the person had notice that the entry was forbidden or received notice to depart but failed to do so.”¹³⁸ The Texas Property Code defines a “tenant” as “a person who is authorized by a lease to occupy a dwelling to the exclusion of others and . . . who is obligated under the lease to pay rent.”¹³⁹ “An essential element of . . . tenancy is a right of exclusive possession by the tenant.”¹⁴⁰ The person in question is generally considered a lodger or guest and not a tenant if there is “evidence that the owner cares for the rooms, retains a key, or resides on the premises as part of hiring out rooms.”¹⁴¹ In the case at hand, even if there was a lease, the evidence presented at trial established the tenant was forbidden to be at the house if he was intoxicated.¹⁴² The law is clear that where the terms of a lease prohibit entry under certain conditions and the tenant had notice of those conditions, the tenant can be guilty of criminal trespass.¹⁴³

V. PURCHASER AND SELLER

A. STATUTE OF FRAUDS

Following the trend in recent years, *Copano Energy, LLC v.*

133. *Id.* at 70.

134. *See id.* (citing *Fischer v. CTMI, LLC*, 479 S.W.3d 231, 239 (Tex. 2016)).

135. *Id.* at 71–72.

136. 580 S.W.3d 740, 740 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

137. *Id.* at 742.

138. *Id.* at 743 (citing TEX. PENAL CODE ANN. § 30.05(a)(1), (2)).

139. *Id.* at 744 (citing TEX. PROP. CODE ANN. § 92.001(6)).

140. *Id.* (citing *Mallam v. Trans-Texas Airways*, 227 S.W.2d 344, 346 (Tex. App.—El Paso 1949, no writ)).

141. *Id.* (citing *Byrd v. Feilding*, 238 S.W.2d 614, 616 (Tex. App.—Amarillo 1951, no writ)).

142. *Id.* at 745.

143. *Id.* (citing *Munns v. State*, 412 S.W.3d 95, 102 (Tex. App.—Texarkana 2013, no pet.)).

*Bujnoch*¹⁴⁴ is another interesting Texas Supreme Court case examining the types of electronic communications that can create a contract. Practitioners throughout Texas had their fingers (and toes) crossed in the hope that the supreme court would settle a current split among the various courts of appeals regarding what type of “electronic” signatures are sufficient to meet the requirements of the statute of frauds. Various courts of appeals 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;¹⁴⁵ (2) sending an e-mail with an automatically generated signature block;¹⁴⁶ or (3) typing your name at the end of the e-mail.¹⁴⁷ Unfortunately, this case does not address the electronic signature issue,¹⁴⁸ and, instead, the supreme court relied on other factors to find that a contract had not been formed.¹⁴⁹

In the case at hand, the parties exchanged a series of e-mails about a new easement.¹⁵⁰ The various e-mails covered issues such as the price, location, and parties. The e-mails were exchanged between the lawyer for the property owners, Marcus Schwartz, and the Director of Right-of-Way Services for Copano Energy, LLC (Copano) (the party that wished to acquire the easement), James Sanford. On January 30, 2013, Sanford e-mailed Schwartz agreeing to pay Schwartz’s “clients \$70.00 per foot for the second 24-inch line.”¹⁵¹ Sanford typed his name below his message. Schwartz accepted the offer via e-mail. Schwartz’s secretary then sent an e-mail to Sanford with a formal amendment to an existing easement incorporating the agreed to terms. Sanford responded to the e-mail by stating “I am fine with these changes” and again typed his name below the message.¹⁵²

Following this e-mail exchange, other Copano representatives sent a different proposal to the property owners which contained prices far below the amount negotiated between Sanford and Schwartz. In response, Schwartz sent an e-mail to Sanford stating that “THIS IS NOT OUR DEAL[.] WHAT IS GOING ON?”¹⁵³ Sanford responded with a long note assuring Schwartz that it was a mistake and that their deal “still stands.”¹⁵⁴ Ultimately, however, Copano refused to close on the original deal, and the property owners sued.

144. 593 S.W.3d 721, 721 (Tex. 2020).

145. *Bujnoch v. Copano Energy, LLC*, 581 S.W.3d 262, 272 (Tex. App.—Corpus Christi–Edinburg 2017) (mem. op.) (citing *Khoury v. Tomlinson*, 518 S.W.3d 568, 575 (Tex. App.—Houston [1st Dist.] 2017, no pet.)), *rev’d*, 593 S.W.3d 721, 724 (Tex. 2020).

146. *Id.* (citing *Cunningham v. Zurich Am. Inc. Co.*, 352 S.W.3d 519, 530 (Tex. App.—Fort Worth 2011, pet. denied)).

147. *Id.*

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

149. *Id.* at 732.

150. *Id.* at 724.

151. *Id.* at 725.

152. *Id.* at 726.

153. *Id.*

154. *Id.* at 726–27.

The trial court granted Copano's motion for summary judgment on the basis "that the statute of frauds barred enforcement of any agreement to purchase the second easement"¹⁵⁵ 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 emails contained "futuristic" language; and (4) the parties did not agree to transact business by electronic means.¹⁵⁶

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.¹⁵⁷ 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.¹⁵⁸ Furthermore, § 322.007 of the Texas Business and Commerce Code states that "electronic signatures are legally effective to bind parties"¹⁵⁹ provided that an electronic symbol is used showing one's "intent to sign."¹⁶⁰ Unfortunately, in Texas, the courts have split on what is required to show your "intent."¹⁶¹ In the case at hand, the court of appeals felt that typing the name was sufficient evidence of intent to be bound.¹⁶² Having disposed of the issue of electronic signature, the court of appeals quickly concluded that there was sufficient information in the e-mails to also establish the identity of the parties and the description of the easement¹⁶³ which was described in the e-mails to "be 'an additional 20 feet' wide [and] . . . 'contiguous to the first easement.'"¹⁶⁴

The Texas Supreme Court disagreed with the court of appeals and overturned the holding.¹⁶⁵ 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.¹⁶⁶ The supreme court described the e-mails as essentially a series of communications about a future meeting to be held and the terms that the party intends to offer at the meeting, not the terms the party actually offered.¹⁶⁷ The supreme court quoted the U.S. Court of Appeals for the Fifth Circuit in noting that "a writing that contemplates a contract to be made in the future does not satisfy the

155. *Bujnoch v. Copano Energy, LLC*, 581 S.W.3d 262, 269 (Tex. App.—Corpus Christi–Edinburg 2017) (mem. op.), *rev'd*, 593 S.W.3d 721, 724 (Tex. 2020).

156. *Id.* at 270.

157. *Id.* at 276.

158. *See id.* at 272.

159. *Id.* at 271 (citing TEX. BUS. & COM. CODE ANN. § 322.007).

160. *Id.* (citing TEX. BUS. & COM. CODE § 322.002(8)).

161. *Id.*

162. *See id.* at 272.

163. *Id.* at 273–75.

164. *Id.* at 274.

165. *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 732 (Tex. 2020).

166. *Id.* at 731–32.

167. *Id.* at 729.

requirements of the statute of frauds.”¹⁶⁸ The supreme court did not address the signature issue because the issue was not argued on appeal.¹⁶⁹ Although ultimately the supreme court did not find that a contract existed,¹⁷⁰ the case is yet another reminder to practitioners to be careful in electronic communications. When read together with the following case, *Chalker*, the supreme court appears to be trying to give practitioners some clear guidance regarding the types of electronic communications a party can engage in without creating a binding contract. In the case at hand, it could be argued that Copano “got lucky” in that the supreme court did not find that a contract had been formed. There were many strong facts arguing for contract formation. In contrast, the following case, *Chalker*, presents a roadmap for practitioners who would prefer to rely on skill and not luck when engaging in electronic transactions.

B. CONTRACT FORMATION AND WAIVER

In *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*,¹⁷¹ the Texas Supreme Court reversed the First Houston Court of Appeals, holding, as a matter of law, that the parties’ exchange of e-mails did not constitute a definitive agreement.¹⁷² In the case at hand, prior to engaging in negotiations to sell assets, the parties entered into a confidentiality agreement which contained a “No Obligation Clause.” Ultimately, this clause is the linchpin of the supreme court’s holding. The clause stated:

No Obligation. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term “definitive agreement” does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.¹⁷³

The parties subsequently exchanged e-mails whereby one of the sellers, Chalker Energy Partners III, LLC (Chalker), informed the potential purchaser’s principal, David Le Norman (Le Norman), that Chalker and the other sellers were “on board . . . subject to a mutually agreeable [purchase-and-sale agreement] (PSA).”¹⁷⁴ Shortly after exchanging the e-mails, which implied that the parties “had a deal,” Chalker, instead, entered into a binding PSA with a different purchaser. Le Norman Operat-

168. *Id.* (quoting *Southmark Corp. v. Life Invs., Inc.*, 851 F.2d 763, 767 (5th Cir. 1988)).

169. *Id.* at 728 n.6.

170. *Id.* at 731–32.

171. 595 S.W.3d 668, 668 (Tex. 2020).

172. *Id.* at 677–78.

173. *Id.* at 670.

174. *Id.* at 671.

ing LLC (LNO) (as the potential purchaser) sued Chalker claiming Chalker had breached the e-mail agreement between the parties. The trial court granted the sellers' motion for summary judgement, concluding that the parties did not intend to be bound until a definitive PSA was entered into.¹⁷⁵ The court of appeals reversed, concluding that there was "a fact issue as to whether the e-mail chain satisfies the definitive-agreement requirement because the e-mails set out the assets to be sold, the purchase price, a closing day, and 'other key provisions.'"¹⁷⁶ The supreme court reversed, holding that the No Obligation Clause was unambiguous and prevented there from being an issue of fact.¹⁷⁷ The supreme court felt that holding otherwise would strip no obligation clauses of their "meaning and utility."¹⁷⁸

This case provides practitioners representing sellers with a textbook example of how to freely conduct negotiations without binding oneself in the process. The supreme court sets out a roadmap to be followed by practitioners: a no obligation clause combined with an affirmative statement in the confidentiality agreement that the seller had the right to "conduct the process relating to a possible transaction in any manner it deems appropriate or change the procedure for conducting that process."¹⁷⁹ These safeguards, combined with a provision that provided the confidentiality agreement would "terminate after one year or on the date that the parties entered into a further written agreement covering the confidentiality of the Confidential Information," allowed the parties to freely negotiate without fear that they would inadvertently become bound.¹⁸⁰ The supreme court also placed significant emphasis on the fact that, at every step, the sellers reiterated the intention that the negotiations were subject to a "mutually agreeable PSA."¹⁸¹

VI. CONSTRUCTION MATTERS

In *LaLonde v. Gosnell*,¹⁸² 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 Gosnell family 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 by certain defendants.¹⁸³ After mediation and discovery, the defend-

175. *Id.* at 672.

176. *Id.* at 675 (citing *Le Norman Operating LLC v. Chalker Energy Partners III, LLC*, 547 S.W.3d 27, 42 (Tex. App.—Houston [1st Dist.] 2017), *rev'd*, 595 S.W.3d 668, 678 (Tex. 2020)).

177. *Id.* at 676.

178. *Id.*

179. *Id.*

180. *Id.*

181. *Id.* at 677.

182. 593 S.W.3d 212, 212 (Tex. 2019).

183. *Gosnell v. LaLonde*, 559 S.W.3d 559, 560 (Tex. App.—Fort Worth 2016) (mem. op.), *aff'd*, 593 S.W.3d 212 (Tex. 2019).

ants filed a motion to dismiss in January 2015.¹⁸⁴ The motion to dismiss was filed 1,219 days after the suit was first filed.¹⁸⁵ 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. The trial court agreed and dismissed the case.¹⁸⁶ The court of appeals reversed the trial court,¹⁸⁷ and the supreme court affirmed the court of appeals.¹⁸⁸ The supreme court found that in the case at hand, the defendants could 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 defendants substantially invoked the judicial process.¹⁸⁹ The Texas Supreme Court addressed this very issue in *Crosstex Energy Services, LP v. Pro Plus, Inc.*¹⁹⁰ In that case, the supreme court held that there was no one factor that would result in waiver.¹⁹¹ Courts must look at the totality of the circumstances.¹⁹² Following *Crosstex* guidance, the supreme court found in *LaLonde* that the court of appeals was correct in its finding that the over three-year delay in filing for dismissal, the participation in the discovery process, and the repeated attempts to settle the case informally¹⁹³ were all indications that “paint[] the picture of defendants who did not intend to take advantage of their right to dismissal.”¹⁹⁴

VII. TITLE, CONVEYANCES, AND RESTRICTIONS

A. CONVEYANCES

Piranha Partners v. Neuhoff concerns the assignment of an overriding royalty interest (ORI) in minerals.¹⁹⁵ A dispute arose regarding “whether the assignment conveyed the assignor’s interest only in the production from the identified well, in production from any well drilled on the identified land, or in all the production under the identified lease.”¹⁹⁶ The Texas Supreme Court reversed the Seventh Amarillo Court of Appeals and reinstated the trial court’s judgment that the assignment assigned all of the assignor’s production under the lease and not just the production under a specific well.¹⁹⁷ The facts of the case are straightforward. In 1975,

184. *Id.* at 561.

185. *LaLonde*, 593 S.W.3d at 216.

186. *Id.* at 217.

187. *Id.*

188. *Id.* at 229.

189. *Id.* at 227–28.

190. *Id.* at 216 (citing *Crosstex Energy Servs., L.P. v. Pro Plus, Inc.*, 430 S.W.3d 384, 386, 393–95 (Tex. 2014)).

191. See *Crosstex Energy Servs., L.P.*, 430 S.W.3d at 393 (citing *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003) (per curiam)).

192. *LaLonde*, 593 S.W.3d at 220 (first citing *In re Nationwide Ins. Co. of Am.*, 494 S.W.3d 708, 713 (Tex. 2016); then citing *Crosstex Energy Servs., L.P.*, 430 S.W.3d at 393; and then citing *Perry Homes v. Cull*, 258 S.W.3d 580, 591 (Tex. 2008)).

193. *Id.* at 227–29.

194. *Id.* at 220, 220 n.26.

195. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 742 (Tex. 2020).

196. *Id.*

197. *Id.* at 755.

Neuhoff Oil & Gas and the Neuhoffs (collectively, Neuhoff) purchased a two-thirds interest in a mineral lease known as the Puryear Lease. The lease covered all the minerals under the land known as Section 28. Years later, Neuhoff sold and assigned its two-thirds interest but reserved a 3.75% ORI in all the production under the Puryear Lease.¹⁹⁸ From 1975 to 1999, there was only one well completed in Section 28. This well was named the Puryear B #1-28 well. In 1999, Neuhoff sold its ORI at auction to Piranha Partners. After 1999, the operator drilled additional wells in Section 28 and the operator paid the ORI on the additional wells to Neuhoff (not Piranha Partners), believing that Neuhoff had only conveyed the ORI in the Puryear B #1-28 well. In 2012, the operator obtained title opinions that said that the ORI for the additional wells was owned by Piranha Partners. As a result of these opinions, the operator demanded a refund from Neuhoff.¹⁹⁹

The language in question was found in a document entitled “Assignment of Overriding Royalty Interests and Oil and Gas Leases” (Assignment).²⁰⁰ The language in question read as follows:

[Neuhoff Oil] does hereby assign, sell and convey unto [Piranha] . . . without warranty or covenant of title, express or implied, subject to the limitations, conditions, reservations and exceptions hereinafter set forth . . . all of [Neuhoff Oil’s] right, title and interest in and to the properties described in Exhibit “A” (the “Properties”).

. . . .
All oil and gas leases, mineral fee properties or other interests, IN-SOFAR AND ONLY IN-SOFAR AS set out in Exhibit A . . . whether said interest consists of leasehold interest, overriding royalty interest, or both . . . which [interest] shall include any working interest, leasehold rights, overriding royalty interests and reversionary rights held by [Neuhoff Oil], as of the Effective Date.

. . . .
All presently existing contracts to the extent they are assignable and to the extent they affect the Leases, including agreements for the sale or purchase of oil, gas and associated hydrocarbons, division orders, unit agreements, operating agreements, and all other contracts and agreements arising from, connected with, or attributable to the production therefrom.²⁰¹

Exhibit A described the lands associated with one specific well, the “Puryear #1-28,” but it also listed separately the Lease.²⁰² Exhibit A read as follows:

Lands and Associated Well(s): Puryear #1-28
Wheeler County, Texas
NW/4, Section 28, Block A-3, HG&N Ry Co. Survey

198. *Id.* at 742.

199. *Id.* at 743.

200. *Id.*

201. *Id.* at 744, 753–54 (emphasis omitted).

202. *Id.* at 745.

Oil and Gas Lease(s)/Farmout Agreement(s):
Oil & Gas Lease(s)
Lessor: [the Puryears]
Lessee: Marie Lister
Recorded: Volume 297, Page 818.²⁰³

The majority of the supreme court looked at the entirety of the document, not just Exhibit A, to hold that the document was unambiguous and conveyed Neuhoff's entire interest under the lease, not just its interest in the Puryear well.²⁰⁴ The supreme court found particular support in language that made reference to the granting of all contracts "to the extent they affect 'the Leases'" which it argued would not be necessary if the conveyance was only of an ORI interest in one particular well.²⁰⁵ Neuhoff and the dissent argued that the supreme court's interpretation rendered the references in Exhibit A to the specific well meaningless.²⁰⁶ The majority pointed out that by the dissent's reasoning, if the supreme court had given precedence to the reference to the specific well, then it would have rendered the reference to the lease as meaningless, thereby "any of the three possible constructions would be impermissible."²⁰⁷

The authors of this Article think the preceding sentence in this Article summarizes extremely effectively the flaw in the majority's argument and explains succinctly why the agreement is ambiguous. There is no possible interpretation of the agreement that can harmonize the whole document. Every interpretation requires ignoring certain parts of the document which is exactly what the majority ended up doing in its analysis. Although the document was clearly written to have Exhibit A define the conveyance and Exhibit A was, as the majority admitted, ambiguous,²⁰⁸ the majority bent over backwards to find support for their theory in the remainder of the document to ultimately conclude that the Assignment, as a whole, was not ambiguous.²⁰⁹ As the dissent stated: "when competing interpretations are reasonable, and no context favors one reasonable interpretation over another, then the contract is ambiguous."²¹⁰ If the majority's analysis was correct, then Exhibit A would need to have said nothing more than make reference to the lease agreement. The rest of Exhibit A was superfluous. Therefore, the authors agree with the compelling dissent which noted that because the Exhibit A description was clearly ambiguous, a fact with which the majority agreed, it rendered the document, as a whole, ambiguous, and the case should have been remanded for a jury to interpret the parties' intent.²¹¹

203. *Id.*

204. *Id.* at 755.

205. *Id.* at 754.

206. *Id.* at 754, 756 (Bland, J., dissenting).

207. *Id.* at 754 n.22.

208. *Id.* at 752.

209. *Id.* at 755.

210. *Id.* at 756-57 (Bland, J., dissenting).

211. *Id.* at 759.

*Rahlek, Ltd. v. Wells*²¹² involved the interpretation of an arguably ambiguous deed. The deed in question conveyed “all and singular the rights and appurtenances thereto in any wise belonging” to the property.²¹³ The parties to the dispute agreed that this language was a general conveyance of the entire mineral estate.²¹⁴ This general conveyance was subject to an express reservation that read as follows: “Grantor RESERVES unto itself and its successors and assigns all current oil and gas production.”²¹⁵ The parties’ dispute centered on the specific conveyance that read as follows: “Grantor CONVEYS unto Grantee and its successors and assigns one-eighth (1/8) of mineral and royalty on all new production which are owned by Grantors upon the date of this conveyance.”²¹⁶

At the time of the conveyance, the two grantors (collectively, Grantors) each owned one-eighth (collectively, one-fourth) of the mineral estate.²¹⁷ Therefore, the question posed was whether the Grantors conveyed the entirety of each of their fractional interests or only a fraction of each of their fractional interests.²¹⁸ A general rule of construction for deeds is that “[g]enerally, deeds are construed to confer upon the grantee the greatest estate that the terms of the instrument will allow.”²¹⁹ In order for a deed to be interpreted as conveying less than the entire estate, the deed must contain “reservations or exceptions that reduce the estate conveyed.”²²⁰ Furthermore, “[b]oth reservations and exceptions in deeds must be clear and specific.”²²¹ Courts “will not find ‘reservations by implication.’”²²² The Eleventh Eastland Court of Appeals held that reading

the specific conveyance as limiting the mineral and royalty interests being conveyed to only a fractional carveout of the grantors’ collective one-quarter (1/4) interest, as opposed to the entirety of their fractional interests . . . would contradict and conflict with the general conveyance . . . and would render the general conveyance meaningless and superfluous.²²³

Furthermore, to read the specific conveyance as granting a lesser estate would allow a reservation by implication²²⁴ which the Texas Supreme Court, just recently, specifically refused to permit in its decision in *Perryman v. Spartan Texas Six Capital Partners, Ltd.*²²⁵ The only interpretation

212. 587 S.W.3d 57, 57 (Tex. App.—Eastland 2019, pet. denied).

213. *Id.* at 65.

214. *Id.* at 66.

215. *Id.* at 67.

216. *Id.* at 66.

217. *Id.* at 62.

218. *Id.* at 66.

219. *Id.* at 64 (citing *Lott v. Lott*, 370 S.W.2d 463, 465 (Tex. 1963)).

220. *Id.* (citing *Cockrell v. Tex. Gulf Sulphur Co.*, 299 S.W.2d 672, 675 (Tex. 1956)).

221. *Id.* at 65.

222. *Id.* (citing *Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 119 (Tex. 2018)).

223. *Id.* at 67.

224. *Id.*

225. 546 S.W.3d at 119.

which gives meaning to all portions of the deed is the interpretation that the specific conveyance of the one-eighth interests was intended to confirm “the specific quantity and extent of the grantors’ mineral interest being conveyed to the grantee through the general conveyance—the entirety of their individual one-eighth interests on new production.”²²⁶

In *Trial v. Dragon*,²²⁷ the Texas Supreme Court overturned a summary judgment holding granted by the Fourth San Antonio Court of Appeals which was based on estoppel by deed. In the case at hand, Leo Trial, along with several of his siblings, owned real property. In 1983, Leo gifted his wife, Ruth, with one-half of his one-seventh interest in the property. Nine years later, in 1992, Leo and his siblings purportedly conveyed the entirety of the land to the Dragons via separate but identical deeds, none of which contained Ruth’s signature.²²⁸ The deeds contained a fifteen-year mineral reservation that terminated in 2008. Leo passed away in 1996, and Ruth passed away in 2010. The issue in the case was 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.²²⁹ The Dragons attempted to make two different arguments to establish their primary claim to the property: Leo’s sons are subject to (1) the estoppel by deed doctrine and (2) the after-acquired title doctrine.²³⁰

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.”²³¹ The Dragons claimed and the court of appeals found that, because Leo’s sons ultimately inherited from Leo, they were “privies in blood” and were estopped from claiming an interest in the property contrary to the deed their father had signed.²³² 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.²³³ Therefore, the supreme court held that the sons were not estopped from claiming their interest in the property.²³⁴ The Dragons also attempted to argue that the property was rightfully theirs via the after-acquired title doctrine but “because the Trial sons [did] not assert an in-

226. *Rahlek, Ltd.*, 587 S.W.3d at 67.

227. 593 S.W.3d 313, 313 (Tex. 2019).

228. *Id.* at 315.

229. *Id.* at 315–16.

230. *Id.* at 317–18.

231. *Id.* at 318 (quoting *Sauceda v. Kerlin*, 164 S.W.3d 892, 915 (Tex. App.—Corpus Christi–Edinburg 2005) (quoting *Wallace v. Pruitt*, 20 S.W. 728, 728–29 (1892, no writ)), *rev’d*, 263 S.W.3d 920 (Tex. 2008)).

232. *Id.* at 316 (quoting *Dragon v. Trial*, 568 S.W.3d 160, 168–69 (Tex. App.—San Antonio 2017), *rev’d*, 593 S.W.3d 313 (Tex. 2019)).

233. *Id.* at 324.

234. *Id.*

terest derived from Leo's grant in the 1992 deed, the after-acquired title doctrine likewise [did] not apply to divest the Trial sons of their interest and immediately vest the same in the Dragons."²³⁵

*In re Estate of Tatum*²³⁶ concerned the validity of a deed signed by some but not all the grantors. The appellee claimed the deed was valid to convey the interests of the grantors who executed the deed.²³⁷ The appellants, who had executed the deed, claimed it was understood that the signature of all grantors would be required for the deed to be valid.²³⁸ The trial court granted summary judgment in favor of appellee and held that the deed was a valid conveyance "against the eight grantors who signed" it.²³⁹ On appeal, the appellee contended that the parole evidence rule precluded the consideration of extrinsic evidence of the intent of the grantors.²⁴⁰ The Eleventh Eastland Court of Appeals disagreed, reversed, and remanded, finding there was a genuine issue of material fact as to whether the deed was conditioned on receipt of all signatures.²⁴¹ The court of appeals held that an exception to the parole evidence rule allows for the admission of evidence to establish an oral condition precedent if it is not inconsistent with the written terms.²⁴² In the case at hand, the deed was silent on the issue of whether it was valid unless executed by all parties but, as written, was drafted to convey the entire fee estate and not a portion.²⁴³ Because the deed was drafted to convey all, but not a portion, of the fee, the authors feel that the court of appeals was correct in reversing the trial court.

*Chicago Title Insurance Co. v. Cochran Investments, Inc.*²⁴⁴ 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.²⁴⁵ Ownership of the duplex was subject to a deed of trust held by EMC Mortgage (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.²⁴⁶ EMC foreclosed its lien on the duplex in December 2010, and the duplex was sold at a foreclosure sale to Cochran for approximately \$36,000.00. Cochran sold the duplex to Ayers in June 2011 for

235. *Id.* at 321.

236. 580 S.W.3d 489, 489 (Tex. App.—Eastland 2019, pet. denied).

237. *Id.* at 492.

238. *Id.*

239. *Id.*

240. *Id.* at 493.

241. *Id.* at 494.

242. *Id.* at 495 (first citing *Baker v. Baker*, 183 S.W.2d 724, 728 (Tex. 1944); and then citing *DeClaire v. G & B McIntosh Family Ltd. P'ship*, 260 S.W.3d 34, 45–46 (Tex. App.—Houston [1st Dist.] 2008, no pet.)).

243. *Id.* at 494.

244. 602 S.W.3d 895, 895 (Tex. 2020).

245. *Id.* at 897.

246. *Id.* at 898.

\$125,000.00. Cochran and Ayers executed a residential sales contract. The contract called for a general warranty deed to be delivered at closing and contained a savings clause which read as follows: “REPRESENTATIONS: All covenants, representations, and warranties in this contract survive closing. If any representation of Seller in this contract is untrue on the Closing Date, Seller will be in default.”²⁴⁷

At closing, title was conveyed through a special warranty deed. The deed’s granting clause stated: “[t]hat 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.”²⁴⁸ The granting clause is followed by a description of the property. The deed also included a special warranty clause that stated:

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.*²⁴⁹

Chicago Title issued an Owner’s Policy of Title Insurance pursuant to which Chicago Title agreed to “pay [Ayers] or take other action if [Ayers] ha[d] a loss resulting from a covered title risk.”²⁵⁰ Chicago Title was a party via contractual subrogation after paying the loss to the buyer (i.e., the insured). Ayers asserted claims for breach of the implied covenant of seisin, breach of contract, money had and received, and unjust enrichment. Black’s Law Dictionary defines the covenant of seisin as follows:

A covenant . . . appearing in a warranty deed, stating that the grantor has an estate, or the right to convey an estate, of the quality and size that the grantor purports to convey. For the covenant to be valid, the grantor must have both title and possession at the time of the grant.²⁵¹

The Fourteenth Houston 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.”²⁵²

The Texas Supreme Court affirmed the holding on different grounds. The supreme court found that the language of the deed limited the grantor’s liability for failures of title to claims asserted by individuals “by, through, and under” the grantor.²⁵³ Because the claim was not “by,

247. *Id.*

248. *Cochran Invs., Inc. v. Chi. Title Ins. Co.*, 550 S.W.3d 196, 199–200 (Tex. App.—Houston [14th Dist.] 2018), *aff’d*, 602 S.W.3d 895 (Tex. 2020).

249. *Id.* at 200.

250. *Id.*

251. *Covenant of Seisin*, BLACK’S LAW DICTIONARY (11th ed. 2019).

252. *Cochran Invs., Inc.*, 550 S.W.3d at 210.

253. *Chicago Title Ins. Co. v. Cochran Invs., Inc.*, 602 S.W.3d 895, 902 (Tex. 2020).

through, or under” the grantor, the grantor was not liable.²⁵⁴ The supreme court did agree with the court of appeals on the merger doctrine finding that the contract merged into the deed such that the breach-of-contract claim for failure to deliver title did not stand.²⁵⁵ Holding that the savings clause permits a breach-of-contract claim for the same failure of title for which the special warranty bars recovery would undo the effect of that warranty, rendering it meaningless.²⁵⁶ Accordingly, the special warranty foreclosed Chicago Title’s recovery for breach of contract.²⁵⁷

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 (i.e., the grantor) kept the payment for the property. Some commentators have noted the end result was the same as delivering a quitclaim deed.

*Teal Trading & Development, LP v. Champee Springs Ranches Property Owners Ass’n*²⁵⁸ involved the Declaration of Champee Springs Ranches Property Owners Association (Declaration) that included a non-access easement which essentially restricted access to a main entrance creating a “one-way-in-one-way-out” subdivision. The Declaration provided, essentially, that the declarant reserved, for the exclusive use of the 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.²⁵⁹ After several transfers and a foreclosure, Teal Trading and Development (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.²⁶⁰ 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. 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.²⁶¹ The trial court, the Fourth San Antonio Court of Appeals, and the Texas Supreme Court all found in

254. *Id.*

255. *Id.* at 908.

256. *Id.* at 907–08.

257. *Id.*

258. 593 S.W.3d 324, 324 (Tex. 2020).

259. *Id.* at 328.

260. *Id.* at 329.

261. *Id.*

favor of Champee Springs.²⁶²

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).²⁶³ 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. 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.²⁶⁴ 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.²⁶⁵

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.²⁶⁶ The supreme court specifically declined to void the restrictive-access easement on public policy grounds.²⁶⁷

B. EASEMENTS

In *Southwestern Electric Power Co. v. Lynch*,²⁶⁸ the Texas Supreme Court reversed the decision by the trial court and the Sixth Texarkana Court of Appeals which had utilized extrinsic evidence to attribute a width to a blanket utility easement. The easement in question read in part as follows:

an easement or right-of-way for an electric transmission and distributing line, consisting of variable numbers of wires, and all necessary or desirable appurtenances (including towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys), at or near the location and along the general course now located and staked out by the said Company over, across and upon the following described lands

Together with the right of ingress and egress over [the Landowners' predecessors-in-title's] adjacent lands to or from said right-of-

262. *Id.* at 339–40.

263. *Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n*, 432 S.W.3d 381, 396 (Tex. App.—San Antonio 2014, pet. denied) (first citing *Sonny Arnold, Inc. v. Sentry Sav. Ass'n*, 633 S.W.2d 811, 813–15 (Tex. 1982); and then citing RESTATEMENT (FIRST) OF PROPERTY § 404 (AM. L. INST. 1940)).

264. *Id.* at 397 (citing RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.5 (AM. L. INST. 1998)).

265. *Id.*

266. *Teal Trading & Dev., LP*, 593 S.W.3d at 328.

267. *Id.*

268. 595 S.W.3d 678, 678 (Tex. 2020).

way for the purpose of constructing, reconstructing, inspecting, patrolling, hanging new wires on, maintaining and removing said line and appurtenances; the right to remove from said lands all trees (fruit trees excepted) and parts thereof, or other obstructions, which endanger or may interfere with the efficiency of said line or its appurtenances; and the right of exercising all other rights hereby granted.²⁶⁹

The supreme court held that the easement in question had no fixed width, but the utility company's use of the easement must be "reasonable and necessary."²⁷⁰ The supreme court stated that "courts have long been reluctant to write fixed widths into easements when the parties to the easements never agreed to a particular width . . . We see no reason to disturb this Court's and the courts of appeals' long-standing treatment of general easements in Texas."²⁷¹

The supreme court further elaborated on its holding by explaining that "[t]he use of a general easement without a fixed width is a strategic decision that does not render an easement ambiguous or require a court to supply the missing term."²⁷²

VIII. HOMESTEAD AND HOME-EQUITY LENDING

A. SUBROGATION DESPITE UNCONSTITUTIONAL LIEN

In *Zepeda v. Federal Home Loan Mortgage Corp.*,²⁷³ the U.S. Court of Appeals for the Fifth Circuit certified a question to the Texas Supreme Court dealing with subrogation and invalid constitutional home-equity liens.²⁷⁴ The specific certified question was: "Is a lender entitled to equitable subrogation, where it failed to correct a curable constitutional defect in the loan documents under [section] 50 of the Texas [c]onstitution?"²⁷⁵ The Texas Supreme Court answered "yes."²⁷⁶

Zepeda obtained a valid homestead loan in 2007 which was paid off and refinanced with a home-equity loan in 2011. Years later, Zepeda notified the initial lender (predecessor to Federal Home Loan Mortgage Corporation (Federal)) of the constitutional defect in the home-equity-refinancing loan for failure of the lender to sign an acknowledgement of the homestead's fair market value pursuant to Texas constitution, art. XVI, section 50.²⁷⁷ The original lender failed to cure such defect within the sixty-day constitutional cure period, and, after the assignment of the loan to Federal, Federal also failed to timely cure such defect. Zepeda sued to quiet title to the property claiming the home-equity-refinance

269. *Id.* at 686.

270. *Id.* at 680.

271. *Id.* at 689.

272. *Id.* at 690.

273. 935 F.3d 296, 296 (5th Cir. 2019).

274. *Id.* at 298–99.

275. *Id.* at 301.

276. *Fed. Home Loan Mortg. Corp. v. Zepeda*, 601 S.W.3d 763, 764 (Tex. 2020).

277. *Zepeda*, 935 F.3d at 300.

loan was constitutionally invalid, but Freddie Mac asserted equitable subrogation rights.²⁷⁸

First, the supreme court distinguished between equitable subrogation and contractual subrogation, declining any potential contractual subrogation analysis and focusing solely on equitable subrogation rights.²⁷⁹ The supreme court reiterated the long-standing, historical Texas protection of the homestead, but acknowledged that modern day constitutional amendments added additional ways to create a constitutional lien on homestead property.²⁸⁰ The supreme court acknowledged that current constitutional framework validated a lien that failed to meet the “litany of exacting terms and conditions” of the Texas constitution.²⁸¹ However, the question presented was not whether Freddie Mac sought to foreclose its home equity lien but rather the assertion of equitable subrogation rights, which have been recognized since at least 1890.²⁸²

The supreme court reviewed prior cases addressing this equitable subrogation principle. In *Texas Land & Loan Co. v. Blalock*,²⁸³ a lender failed to comply with existing constitutional prohibitions but had discharged a prior, purchase-money loan which entitled the lender to subrogation. The *Blalock* Texas Supreme Court held that the right to subrogation became effective upon the payment of the valid prior lien.²⁸⁴ Also, in *LaSalle Bank N.A. v. White*,²⁸⁵ an invalid agricultural home-equity loan did not defeat the lender’s right to subrogation for a \$260,000.00 purchase-money mortgage paid off with the agricultural home-equity loan.²⁸⁶ Finally, the Texas Supreme Court rejected Zepeda’s claim that the enactment of the home-equity constitutional lien provisions destroyed the equitable subrogation rights that have long existed under Texas law.²⁸⁷

B. APPRAISAL AND DOCUMENT DELIVERY REQUIREMENTS

*Melton v. CU Members Mortgage*²⁸⁸ involved the appraisal provisions of the Texas constitution with respect to home equity loans. Melton had an existing \$70,000.00 homestead lien against his home and refinanced with a \$223,648.00 home equity loan. Melton was required to extinguish the existing lien as a condition to the funding of the new home equity loan. After closing the new loan and making payments for nearly four

278. *Id.*

279. *Fed. Home Loan Mortg. Corp.*, 601 S.W.3d at 765 n.3.

280. *Id.* at 765–66.

281. *Id.* at 766.

282. *Id.*

283. 13 S.W. 12, 12 (Tex. 1890).

284. *Fed. Home Loan Mortg. Corp.*, 601 S.W.3d at 767 (citing *Blalock*, 13 S.W. at 13–14).

285. 246 S.W.3d 616, 616 (Tex. 2007) (per curium).

286. *Fed. Home Loan Mortg. Corp.*, 601 S.W.3d at 767 (citing *White*, 246 S.W.3d at 618–19).

287. *Id.* at 768.

288. 586 S.W.3d 26, 26 (Tex. App.—Austin 2019, pet. denied).

years, Melton sued the lender alleging an unconstitutional loan because the loan amount exceeded the constitutional 80% loan to value requirement.²⁸⁹ Melton had signed an Acknowledgment Regarding Fair Market Value of Homestead Property at the closing, listing the market value of the homestead at \$300,000.00.²⁹⁰ But in his pleadings, Melton took the position that the appraisal failed to consider various property repairs needed which would have reduced the value of the property. Melton's evidence included a declaration indicating that the appraiser failed to account for the repairs needed, but it did not contain any further explanation.²⁹¹

The trial court excluded this declaration evidence as a "sham affidavit," and the Third Austin Court of Appeals upheld the trial court's ruling.²⁹² As explained, the sham affidavit rule prevents a party from "submitting sworn testimony that materially conflicts with the same witness's prior sworn testimony, unless there is a sufficient explanation for the conflict."²⁹³ The conflicting evidence was, of course, the acknowledgment of value which Melton signed at the closing. Because there was no explanation in the declaration of the contradiction in the facts between the document signed at closing and the declaration, the court determined it was a sham affidavit, and upheld the trial court's exclusion.²⁹⁴

Melton claimed another constitutional violation because he did not receive copies of all documents executed at closing. He alleged that signatures were missing from the closing documents.²⁹⁵ Melton relied upon *Pelt v. U.S. Bank Trust N.A.*,²⁹⁶ which the court construed as holding that copies of the document signed by the borrower but without the lender's signature sufficiently complied with the constitutional requirements.²⁹⁷ Further, *Pelt* required only copies of the documents without any signatures that complied with the constitutional requirements; however, such constitutional provision had since been amended to require copies of signed documents.²⁹⁸ Although the lender did not sign the acknowledgment of value—the only document it was required to sign—such oversight was held to have been cured by compliance with the cure provisions under article XVI, section 50(a)(6)(Q)(x)–(xi) of the Texas constitution.²⁹⁹

289. *Id.* at 31 (citing TEX. CONST. art. XVI, § 50(a)(6)(B)).

290. *Id.*

291. *Id.*

292. *Id.*

293. *Id.*

294. *Id.*

295. *Id.* at 35.

296. 359 F.3d 764, 764 (5th Cir. 2004).

297. *Id.* at 768.

298. *Melton*, 586 S.W.3d at 35 (citing TEX. CONST. art XVI, § 50(a)(6)(Q)(v)).

299. *Id.* at 35–36.

IX. MISCELLANEOUS

A. PREMISES LIABILITY

1. *Arbitration*

*Houston NFL Holding L.P. v. Ryans*³⁰⁰ involved a claim of premises liability by a former professional football player, DeMeco Ryans, who—while playing for the Philadelphia Eagles in an away game against the Houston Texans—ruptured his Achilles tendon in a non-contact injury that ended his career. Claiming a failure to exercise its duty to maintain a reasonably safe condition of the playing surface, Ryans alleged premises liabilities against the Houston Texans based on the condition of the field. The Texans defended by asserting arbitration under the collective bargaining agreement of the NFL Players Association to which Ryans was bound.³⁰¹ The trial court denied that motion, which was appealed.³⁰² While this case focused mostly on the arbitration requirements under the collective bargaining agreement,³⁰³ the important aspect for real estate practitioners is that in certain cases, premises liabilities can be preempted by third-party documents. The collective bargaining agreement and the NFL’s rules regarding playing surface requirements were deemed to be applicable, which required arbitration as opposed to the state law remedy for premises liability.³⁰⁴ Therefore, Ryans’s premises liability claim was preempted by the terms of the arbitration. The court specified that “Ryans’[s] premises-liability claim falls within the scope of . . . the [collective bargaining agreement] because the claim involves the interpretation and application of NFL Rules pertaining to the terms and conditions of employment of NFL players.”³⁰⁵ Practitioners should be alert for any such third-party documents that might alter provisions of Texas law governing premises liability.

2. *Superseding Criminal Activity*

*Nguyen v. SXSX Holdings, Inc.*³⁰⁶ arose out of the 2014 South by Southwest Festival in Austin, Texas, where a driver fleeing a police chase breached a number of roadblocks and barricades and crashed into a pedestrian crowd, which killed four people and injured many others. The injured pedestrians sued the city and the festival organizer for negligence and premises liability.³⁰⁷

As to the city, the trial court should have dismissed the city based on its plea in abatement for governmental immunity.³⁰⁸ As to the festival own-

300. 581 S.W.3d 900, 900 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).

301. *Id.* at 903.

302. *Id.*

303. *Id.* at 911.

304. *Id.*

305. *Id.*

306. 580 S.W.3d 774, 774 (Tex. App.—Houston [14th Dist.] 2019, pet. denied).

307. *Id.* at 779.

308. *Id.* at 784.

ers, the Fourteenth Houston Court of Appeals found that the festival owners negated the duty element in the various claims of the plaintiffs (premises liability, nuisance, and general negligence).³⁰⁹ Texas law provides that a duty of responsibility is negated by criminal acts of a third party, although such abolition of duty is not absolute.³¹⁰ The existence of criminal acts negates duty except when a party knows or has reason to know of an unreasonable and foreseeable risk of harm that could affect the invitee.³¹¹ So, a duty can occur under a situation where the “general danger” is foreseeable, which in a criminal activity context can be proven with evidence of specific previous crimes on or near the premises. This is the *Timberwalk* test.³¹² Alternatively, duty can occur when the premises owner or occupier had “actual and direct knowledge” of an “imminent” criminal activity. This is the *Del Lago* test.³¹³

In considering the *Timberwalk* test, the Texas Supreme Court has held that to negate duty there must be more than just the occurrence of criminal conduct—it must have been foreseeable.³¹⁴ The factors for the foreseeability analysis include whether: (1) the intervening force causing the harm was different in kind; (2) the intervening force was extraordinary rather than normal; and (3) the intervening force was independent.³¹⁵ Consequently, the supreme court considered whether twenty-three criminal occurrences presented by the plaintiffs satisfied the *Timberwalk* test.³¹⁶ Each of these separate instances was analyzed under the *Timberwalk* factors of proximity, recency, frequency, similarity, and publicity.³¹⁷ All twenty-three separate instances were found to be inapplicable based upon these factors, so foreseeability was not proven.³¹⁸

Next, under the *Del Lago* analysis, the supreme court noted there was no evidence of any knowledge of imminent criminal conduct. “Imminent” under *Del Lago* was considered to be ninety minutes before a melee broke out.³¹⁹ Therefore, the majority held there was no proven duty based on the superseding criminal activity.³²⁰

In a dissenting opinion, Justice Hassan concluded that the majority failed to utilize the “risk-utility test” to balance risk, foreseeability, likelihood against social utility, the magnitude of the burden, and consequences of the burden denied.³²¹ Evidence was presented that showed that the festival owners actually foresaw the chances of a vehicle-pedes-

309. *Id.* at 786.

310. *Id.* at 784.

311. *Id.* at 784–85.

312. *Timberwalk Apartments, Partners, Inc. v. Cain*, 972 S.W.2d 749, 756 (Tex. 1998).

313. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 769 (Tex. 2010).

314. *Nguyen*, 580 S.W.3d at 785.

315. *Id.*

316. *Id.* at 789.

317. *Id.*

318. *Id.* at 791.

319. *Id.*

320. *Id.*

321. *Id.* at 793–95 (Hassan, J., dissenting).

trian collision.³²² The dissent can be summarized in its statement: “I reject the majority’s novel conclusion that victims of third-party criminal car chases are precluded from prevailing in negligence actions where similarly-situated victims of third-party negligence can succeed (e.g., non-criminal conduct of drivers in medical distress or mechanical failure of vehicles).”³²³

3. Ferae Naturae—Artificial Structure

*Hillis v. McCall*³²⁴ involved a premises liability case dealing with the doctrine of *ferae naturae*. The case involved a brown recluse spider bite and whether the landowner owed a duty to the invitee.³²⁵ Hillis owned a bed and breakfast (B&B) premises in Fredericksburg, Texas, and McCall rented a small cabin behind the B&B but occasionally performed work for Hillis at the B&B.³²⁶ Both Hillis and McCall were aware of spiders occasionally in the B&B, but neither had specific knowledge of the existence of brown recluse or other venomous spiders. While McCall was in the B&B fixing a leaking sink, he was bitten by a brown recluse spider; he brought suit against Hillis claiming Hillis owed him a duty of notice and failed to give notice.³²⁷

The trial court granted summary judgment for Hillis, but the Fourth San Antonio Court of Appeals reversed and held that Hillis had failed to establish the absence of a duty to warn or make safe under the doctrine of *ferae naturae*.³²⁸ The appellate court noted that Hillis admitted knowledge of the brown recluse spider population in his deposition, but the Texas Supreme Court found no such deposition testimony.³²⁹ This fact was material in the supreme court’s decision to reverse and render judgment.

The general rule for an invitee, and the duty owed by the premises owner to the invitee,³³⁰ is that “the landowner owes a ‘duty to make safe or warn against any concealed, unreasonably dangerous conditions of which the landowner is, or reasonably should be aware, but the invitee is not.’”³³¹ By corollary, no duty is owed by the landowner when the invitee knows of the condition or the condition is obvious to the invitee.³³² With respect to indigenous wild animals, the law generally provides that both the premises owner and invitee have similar knowledge and duties.³³³

322. *Id.* at 793–94.

323. *Id.* at 794.

324. 602 S.W.3d 436, 436 (Tex. 2020), *cert. denied*, 141 S. Ct. 880 (2020).

325. *Id.* at 438.

326. *Id.* at 439.

327. *Id.*

328. *Id.*

329. *Id.* at 439 n.4.

330. A person is an invitee when he enters the third party’s property for the mutual benefit of both the person and the property owner. *Id.* at 440 n.6 (citing *Rosas v. Buddies Food Store*, 518 S.W.2d 534, 536 (Tex. 1975)).

331. *Id.* at 440 (citing *Austin v. Kroger Tex., L.P.*, 465 S.W.3d 193, 203 (Tex. 2015)).

332. *Id.*

333. *Id.* at 441.

The only exception to this is when the property owner thinks the wild animals under his possession are controlled, has introduced non-indigenous wild animals, or has affirmatively attracted wild animals to his property.³³⁴ Subsequent case law has added an additional exception to the *ferae naturae* doctrine when the indigenous wild animals were found in an “artificial structure,” but only if the landowner knew or should have known of an unreasonable risk of harm to the invitee.³³⁵ Because the facts showed that neither Hillis nor McCall knew of the actual presence of brown recluse spiders (also holding that the existence of harmless spiders did not equate to a knowledge of the existence of venomous spiders),³³⁶ and there was no other evidence (such as customer reviews) of the existence of venomous spiders; there was no duty owed as a matter of law.³³⁷

B. ENTITIES

1. Piercing the Corporate Veil

In *Durham v. Accardi*,³³⁸ Durham, who was injured while performing a job function, sued the principals of his employer seeking to pierce the corporate veil. The trial court ordered summary judgment in favor of Accardi, the principal of the employer. The Fourteenth Houston Court of Appeals affirmed the trial court’s ruling because Durham failed to provide evidence sufficient to support the alter ego/piercing the corporate veil theory.³³⁹ In analyzing the evidence presented, the concept of “total dealings” between the corporation and the individual had to be considered.³⁴⁰ The evidence which supports such a theory includes: (1) payment of corporate debts with personal funds or the comingling of corporate and personal funds; (2) representations that the individual will financially back the entity; (3) conversion of entity profits to the individual’s use; (4) inadequate capitalization; (5) failure to keep separate the assets of the entity and the individual; (6) degree of adherence to corporate formalities; (7) degree and amount of financial interest; (8) ownership and control by the individual over the entity; and (9) use of the entity for personal purposes.³⁴¹

In the subject case, Durham relied *exclusively* on inadequate capitalization and failure to follow corporate formalities.³⁴² In response, Accardi argued that Durham had failed to present evidence of (1) the comingling of the individual and business assets; (2) the financial interest, ownership, or control by a party over the entity; (3) the use by Accardi of the entity

334. *Id.* (citing *Union Pac. R.R. Co. v. Nami*, 498 S.W.3d 890, 897 (Tex. 2016)).

335. *Id.* (citing *Nami*, 498 S.W.3d at 897).

336. *Id.* at 443.

337. *Id.*

338. 587 S.W.3d 179, 179 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

339. *Id.* at 186.

340. *Id.* at 185.

341. *Id.* at 185–86.

342. *Id.*

for individual purposes; (4) the payment of corporate debts with personal funds; (5) the representations of financial backing; and (6) that the profits were diverted from the entity to the individual.³⁴³ As to the corporate formality requirements, Durham relied on Accardi's deposition testimony that the entity did not "do formal stuff" indicated a general lack of knowledge on corporate formalities.³⁴⁴ Nevertheless, the court concluded that failure to observe corporate formalities was no longer a controlling factor in considering whether the corporate veil can be pierced under the Texas Business Organizations Code.³⁴⁵ On the undercapitalization theory, Durham cited evidence of the entity's failure to carry workers' compensation, or other insurance which would have covered his injuries, and testimony from Accardi that the entity had more liabilities than assets. But such evidence was insufficient to support the undercapitalization theory.³⁴⁶

Sustaining an alter ego theory required evidence on more than just a few of the suggested factual scenarios. Durham's failure to offer evidence of the comingling of properties; Accardi's financial interest, ownership and control over the entity; payment of corporate debts with personal funds; representations of financial backing; and the diversion of entity funds for personal use, did not satisfy the totality of the factors.³⁴⁷

2. *Dueling Venues Provisions*

Different venue provisions were the subject of the Texas Supreme Court's opinion in *In re Fox River Real Estate Holdings, Inc.*³⁴⁸ Suit for wrongful disposition of a partnership's assets was initiated by Fox River, a limited partner, against the general partner, Metropolitan Water Company of Texas.³⁴⁹ Fox River alleged that Metropolitan Water usurped assets of the partnership by disposing of groundwater leases, which otherwise would have been sold to central Texas municipalities.

Pursuant to the injunction venue statute,³⁵⁰ suit was filed in Washington County, the domicile of Metropolitan Water. However, Metropolitan Water moved to transfer venue to Harris County pursuant to the limited partnership agreement³⁵¹ and the "major transaction" mandatory venue statute.³⁵² Metropolitan Water characterized the mandatory venue provision as a super-priority provision. But an exception to the mandatory venue provisions of § 15.020 of the Texas Civil Practice and Remedies

343. *Id.* at 186.

344. *Id.*

345. *Id.* (citing TEX. BUS. ORGS. CODE ANN. § 21.223(a)(3)).

346. *Id.*

347. *Id.* at 187.

348. 596 S.W.3d 759, 759 (Tex. 2020).

349. *Id.* at 761.

350. TEX. CIV. PRAC. & REM. CODE ANN. § 65.023(a).

351. *In re Fox River*, 596 S.W.3d at 762 n.3. Section 12.06 of the partnership agreement provided: "[t]he proper venue for resolution of any dispute related to this Agreement is only in Harris County, Texas." *Id.*

352. TEX. CIV. PRAC. & REM. CODE ANN. § 15.020.

Code is contained in § 15.020(d), which overrides the super-priority nature thereof if venue is established by another statute other than Title II (which includes the mandatory venue provisions but not the injunction provisions).³⁵³ Because the injunction venue section resided in Title III and not Title II of the Texas Civil Practice & Remedies Code, the injunction venue should prevail. However, the supreme court looked to the commonsense meanings of the pleadings from Fox River and concluded that the pleadings were not “purely or primarily injunctive,”³⁵⁴ but rather related to the removal of Metropolitan Water as a partner and recovery of monetary damages.³⁵⁵ Therefore, the venue was effective as a major transaction under the mandatory venue statute.³⁵⁶ The supreme court further stated that although this statute was preemptory as to all other venue provisions, it was not a “super mandatory” venue provision that would apply in the face of a validly presented injunction venue suit.³⁵⁷

3. Partnership Formation

*Energy Transfer Partners, LP v. Enterprise Products Partners, LP*³⁵⁸ involved a case of first impression as to whether a condition precedent to the formation of a partnership prevails over statutory provisions. Energy Transfer Partners, LP (ETP) and Enterprise Products Partners, LP (Enterprise), both large United States energy companies, entered into a number of agreements (a Confidentiality Agreement, a Letter Agreement, and a Reimbursement Agreement). Each indicated that the parties were not obligated to form a partnership to pursue the development of a pipeline running south from Cushing, Oklahoma to the Gulf Coast until certain conditions precedent had been met.³⁵⁹ Those conditions precedent were a definitive executed agreement and board approval from each party. Ultimately, Enterprise withdrew and began negotiating with a third party, ConocoPhillips. ETP sued Enterprise claiming a partnership was formed and Enterprise had breached it by working with ConocoPhillips.³⁶⁰

In reviewing the issues, the Texas Supreme Court noted that longstanding Texas common law and statutes required five factors to create a partnership: (1) an agreement to share profits; (2) expression of intent to be partners; (3) participation in control of the business; (4) agreement for sharing of losses and liabilities; and (5) contribution of money or property.³⁶¹ Further, none of these factors were controlling, but should be considered in a “totality-of-the-circumstances test.”³⁶² The statutory pro-

353. *See id.*

354. *In re Fox River*, 596 S.W.3d at 765.

355. *Id.* at 768.

356. *Id.*

357. *Id.*

358. 593 S.W.3d 732, 732 (Tex. 2020).

359. *Id.* at 734.

360. *Id.* at 736.

361. *Id.* at 737.

362. *Id.*

vision, Texas Business Organizations Code § 152.003, allowed the consideration of other “principles of law and equity” in the analysis of whether a partnership was formed, which the supreme court held to include the longstanding and recognized public policy favoring freedom of contract.³⁶³

In determining whether the contractual conditions precedent could override the statutory test, the supreme court distinguished two prior cases: *Coastal Plains Development Corp. v. Micrea, Inc.*³⁶⁴ and *Root v. Tomberlin*.³⁶⁵ In *Coastal Plains*, the Texas Supreme Court determined the intent of the parties will not control over a different status determination from that stated in the contract;³⁶⁶ in *Root*, where condition precedents suggested no formation of a partnership, the Eighth El Paso Court of Appeals’ determination was actually made on the basis that there was no sharing of profits.³⁶⁷

In further support of its opinion, the supreme court construed Texas Business Organizations Code § 152.003 to authorize the supplementation of the partnership formation rules.³⁶⁸ Therefore, the supplementation included Texas’s freedom of contract principle, allowing the parties to contract for conditions precedent to the formation of a partnership.³⁶⁹

4. Derivative Litigation

*In re Murrin Bros. 1885, Ltd.*³⁷⁰ is a mandamus case to the Texas Supreme Court regarding the trial court’s denial of a motion to disqualify the law firm representing one of two competing ownership groups (the Murrin Group and the Hickman Group) with respect to the management of the world’s largest honky-tonk, Billy Bob’s, in the Fort Worth Stockyards. The Hickman Group attempted to relieve Minnick of management authority over Billy Bob’s, which was opposed by the Murrin Group. Although the Hickman Group had the majority of the ownership entity’s (Billy Bob’s Texas Investments (BBT)) board of managers and a majority of the ownership interest, the operating agreement of BBT required unanimity on “major decisions.” These “major decisions” included “settling, prosecuting, defending or initiating any lawsuit, administrative or similar actions concerning or affecting the business of BBT” or its properties.³⁷¹ The Murrin Group filed suit both individually and derivatively on behalf of BBT. The Hickman Group hired a law firm to represent the Hickman Group individually and on behalf of BBT, which was the same law firm that had previously represented the BBT entity prior to the suit. After a

363. *Id.* at 738.

364. 572 S.W.2d 285, 285 (Tex. 1978).

365. 36 S.W.2d 596, 596 (Tex. App.—El Paso 1931, writ ref’d).

366. *Energy Transfer*, 593 S.W.3d at 739.

367. *Id.* at 739–40.

368. TEX. BUS. ORGS. CODE ANN. § 152.051(b).

369. *Energy Transfer*, 593 S.W.3d at 740.

370. 603 S.W.3d 53, 53 (Tex. 2019).

371. *Id.* at 55.

couple of years of litigation activity—and three months before trial—the Murrin Group filed a motion to disqualify the Hickman Group’s law firm counsel. This motion was denied, the Second Fort Worth Court of Appeals affirmed, and the supreme court considered whether the trial court abused its discretion in denying the disqualification motion.³⁷²

The important legal point discussed by the supreme court related to the characterization of the company as either a plaintiff or a defendant in a shareholder derivative action.³⁷³ The supreme court noted that in shareholder derivative actions, the company is often noted as a plaintiff, a nominal defendant, or both.³⁷⁴ Concluding that companies in derivative actions are both simultaneously the plaintiff and the defendant, the supreme court took the position that the appropriate inquiry was whether the lawyer is required to take conflicting positions, or a position that risks harming one of the attorney’s clients.³⁷⁵ The supreme court found differences in other jurisdictions’ approaches to this issue, noting distinctions between California³⁷⁶ and Delaware.³⁷⁷

After consideration of these positions, the supreme court held “[w]e announce no categorical rule governing dual representation in derivative litigation. Whether a company and the individual defendants are ‘opposing parties’ . . . requires consideration of the true extent of their adversity under the circumstances.”³⁷⁸ The supreme court held that the trial court did not abuse its discretion in denying the disqualification motion, noting the legislative acknowledgement of control fights with a statute allowing derivative proceedings to be brought by a member for its own benefit as opposed to derivatively, if justice so requires.³⁷⁹ Further, the supreme court found that there was no showing that the law firm possessed confidential information belonging to the Murrin Group, the disqualification motion was brought too late in the litigation process, rejecting the Murrin Group’s argument would irrevocably prejudice the jury, and that jury instructions or other parameters would have helped level the playing field.³⁸⁰ In conclusion, the supreme court made this statement (one of the authors’ favorite judicial comments):

Gone are the days when a family feud over a dance hall and saloon in the Fort Worth Stockyards would be solved by six-shooters. These days, we use lawyers instead of lead. Thank goodness for that. As complicated, expensive, and frustrating as litigation can be, it sure beats a shootout at the stockyards.³⁸¹

372. *Id.*

373. *Id.* at 58.

374. *Id.*

375. *Id.*

376. *See In re Oracle Sec. Litig.*, 829 F. Supp. 1176, 1188–89 (N.D. Cal. 1993).

377. *See Respler ex rel. Magnum Hunter Res. Corp. v. Evans*, 17 F. Supp. 3d 418, 421 (D. Del. 2014).

378. *In re Murrin Bros. 1885, Ltd.*, 603 S.W.3d at 59.

379. *Id.* at 60 (citing TEX. BUS. ORGS. CODE ANN. § 101.463c(c)).

380. *Id.*

381. *Id.* at 62.

C. INSURANCE

1. Appraisal Awards

This year's Survey period covered two important 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.

In *Ortiz v. State Farm Lloyds*,³⁸² 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."³⁸³ Furthermore, as to an insured's bad faith claim for adjusting a loss, the supreme court confirmed appellate court cases holding 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.³⁸⁴ But, as to the insured's claim under the Texas Prompt Payment of Claims Act (TPPCA), 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]."³⁸⁵

*Barbara Technologies Corp. v. State Farm Lloyds*³⁸⁶ is the seminal case addressing the issue of liability for damages for delayed payments under the TPPCA. In this case, a wind hailstorm caused damage to Barbara Technologies' commercial property on March 31, 2013. 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.³⁸⁷ A request for a second inspection resulted in no change; therefore, Barbara Technologies filed suit on July 14, 2014. State Farm invoked the policy appraisal provisions on January 9, 2015. The final agreed appraised value of \$195,000.00 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.³⁸⁸ In defense, State Farm asserted that such a claim was not available after State Farm had paid the appraisal award amount.³⁸⁹

Upon appeal from summary judgment motions, the Texas Supreme Court considered the interplay between the TPPCA and the policy's ap-

382. 589 S.W.3d 127, 127 (Tex. 2019).

383. *Id.* at 132.

384. *Id.* at 134.

385. *Id.* at 135.

386. 589 S.W.3d 806, 806 (Tex. 2019).

387. *Id.* at 809.

388. *Id.* at 815.

389. *Id.*

praisal 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.³⁹⁰ The supreme court specifically disapproved of prior cases that excused an insurer from prompt payment liability because it paid an appraisal award.³⁹¹ The TPPCA does not impose liability upon invocation of the appraisal process, but it does impose liability after the insurer accepts liability or is otherwise adjudicated liable on the claim; however, payment of a claim does not, by itself, establish the liability element.³⁹² In other words, an appraisal award establishes only the amount of the damages, not liability under the policy. The conclusion, as stated by the supreme court, was “that invocation of the contractual appraisal provision . . . neither subjects an insurer to TPPCA damages nor insulates the insurer from TPPCA damages.”³⁹³

In a 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.³⁹⁴ 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 such provisions holding that payment of an appraisal award avoids penalty liability under the TPPCA.³⁹⁵ 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.

2. Prompt Payment

*Biasatti v. GuideOne National Insurance Co.*³⁹⁶ involved a claim under the TPPCA. The insurance company estimated the plaintiff’s property damage was under the \$5,000.00 deductible amount. The insurance company had this reappraised a second time but refused a third appraisal. Therefore, the property owner filed suit and the insurer asserted the “unilateral appraisal clause.”³⁹⁷ The unilateral appraisal clause basically provided that the “[insurer] can demand that the amount of loss be set by appraisal.”³⁹⁸ The ultimate award asserted liability against the insurer under the TPPCA. This case was filed after the Texas Supreme Court had issued its opinions in *Barbara Technologies* and *Ortiz*, but neither of those cases addressed the liability issue in the TPPCA claim because of the unilateral appraisal clause. The supreme court acknowledged that the

390. *Id.* at 824–26.

391. *Id.* at 819.

392. *Id.* at 827.

393. *Id.*

394. *Id.* at 829 (Boyd, J., concurring in part and dissenting in part).

395. *Id.* at 844–45 (Hecht, J., dissenting).

396. 601 S.W.3d 792, 792 (Tex. 2020) (per curiam).

397. *Id.* at 793.

398. *Id.* at 793 n.1.

unilateral appraisal was still undecided and remanded the case to the trial court to consider the claims based on the unilateral appraisal clause.³⁹⁹

3. Takings for Public Use

KMS Retail Rowlett, LP v. City of Rowlett,⁴⁰⁰ the Texas progeny of *Kelo v. City of New London*,⁴⁰¹ addressed the applicable Takings Clause under the state constitution. Here, KMS Retail Rowlett, LP (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 the site to Sprouts.⁴⁰² Sprouts's 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 Fifth Dallas Court of Appeals ruled in favor of the city. Review was granted, and the Texas Supreme Court affirmed the decision.⁴⁰³

At issue was whether (1) the recent Texas statute limiting public use condemnation⁴⁰⁴ was applicable to such taking, and (2) the taking was appropriate under the Takings Clause of the Texas constitution.⁴⁰⁵ These constitutional and statutory provisions provided the framework for a lawful condemnation, which required a public use and that the taking be necessary for a public use. Both the constitutional and statutory taking 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.⁴⁰⁶ In response to the *Kelo* case, the Texas legislature, in a special called session, adopted a more limited condemnation statute.⁴⁰⁷ 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.⁴⁰⁸ However, there was an ex-

399. *Id.* at 795.

400. 593 S.W.3d 175, 175 (Tex. 2019), *reh'g denied* (Oct. 4, 2019).

401. 545 U.S. 469, 472 (2005).

402. *KMS Retail Rowlett, LP*, 593 S.W.3d at 179.

403. *Id.* at 194.

404. TEX. GOV'T. CODE ANN. § 2206.001.

405. TEX. CONST. art. I, § 17.

406. *Kelo*, 545 U.S. at 489–90.

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

408. *Id.* at 182.

ception to such prohibition that authorized the taking of private property for transportation projects, including public roads.⁴⁰⁹

First, the supreme court analyzed the statutory provision and determined that the transportation exception overruled the prohibitions in the statute “ulterior motives notwithstanding.”⁴¹⁰ The supreme court relied on *City of Austin v. Whittington*⁴¹¹ in finding 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.”⁴¹² 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).⁴¹³

In furtherance of such position, KMS argued that the subject taking was not a “transportation project” for a “public road.” In support of its non-transportation argument, KMS relied upon definitions in the Regional Mobility Authority Act.⁴¹⁴ Those provisions were distinguished by the supreme court as relating to a different purpose than for the statutory takings prohibitions exemption.⁴¹⁵ Also, KMS argued that the private road did not meet the width standards in the city’s Master Thoroughfare Plan. But the supreme court found that the common meaning of public road would override any local municipality’s standard for a road and relied upon the city council’s resolution authorizing the need for the acquisition of the private roadway of KMS.⁴¹⁶

Next, the supreme court turned to a constitutional analysis of public use. Under the Texas constitution, a taking is authorized for just compensation only when there is a public use.⁴¹⁷ Considering what a public use included, the supreme court noted that the public must derive “some definite right or use in” the property taken, and that “[i]t is immaterial if the use is limited to the citizens of a local neighborhood . . . so long as it is open to all” other citizens.⁴¹⁸ Also, the supreme court noted that the determination of a public use was a legislative decision, to which the courts should give deference.⁴¹⁹ This deference for determination of public use by a governmental authority can be overturned only by judicial review

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

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

411. 384 S.W.3d 766, 766 (Tex. 2012).

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

413. *Id.* at 184.

414. TEX. TRANSP. CODE ANN. § 370.003.

415. *KMS Retail*, 593 S.W.3d at 185.

416. *Id.* at 186.

417. *Id.*

418. *Id.* at 187.

419. *Id.* at 182.

when the decision “was fraudulent, in bad faith, or arbitrary and capricious.”⁴²⁰

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, reduced traffic flow on the main artery (Lakeview Parkway), and provide emergency vehicle access to first responders; and (3) the testimony of the director of economic development stated the necessity of the access easement between the adjoining properties.⁴²¹ There was no evidence submitted by KMS that negated any of such public purposes. Much of KMS’s defense relied upon what it alleged were the improper motivations of the city; however, the supreme court refused to consider the ulterior motive of the city when a facially valid public use was presented.⁴²² 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.⁴²³

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. 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.”⁴²⁴ In other words, the taking of property for a public use can be fraudulent even if there was not fraudulent intent on the part of the condemner, if the public use is only a guise for private use. KMS alleged that the city’s ulterior motive was to provide an economic benefit to Briarwood, Sprouts, or both.⁴²⁵ 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. The supreme court determined that the economic incentive did “not negate any of the city’s ostensible public uses justifying the taking.”⁴²⁶ Consequently, the motive behind the taking, as long as it provided a public use, and not solely a private benefit, would not be questioned.⁴²⁷ 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.⁴²⁸ But this was viewed as

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

421. *Id.* at 187–88.

422. *Id.* at 189.

423. *Id.*

424. *Id.* at 190 (quoting *FKM P’ship., Ltd. v. Bd. of Regents of the Univ. of Hous. Sys.*, 255 S.W.3d 619, 629 n.9 (Tex. 2008)).

425. *Id.* at 191.

426. *Id.*

427. *Id.*

428. *Id.* at 193.

nothing more than favorable negotiations. Further, the supreme court refused to read “nefarious motives” into deferring condemnation until after private negotiations failed and reducing the economic benefits by its costs of condemnation.⁴²⁹ Practitioners should consider the daunting task of proving that no public use could ever be established for any particular taking.

There was a rather powerful dissent by three justices, making this opinion a 6–3 decision. The dissent focused on the deference to governmental body decisions, and argued for (1) the overruling of existing precedent because of the 2009 amendment to the Texas constitution;⁴³⁰ (2) eliminating deference to governmental declarations of public use; and (3) shifting the burden of proof to the government.⁴³¹ The dissenters believed that current judicial precedents were not based upon the current Texas constitution; they were based upon principles developed under the pre-2009 amendments to the Texas Takings Clause.⁴³² 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.

As to its deference position, the dissent urged the supreme court to continue to move away from the undue deferential authority given governmental entities, asserting that “[u]nadorned assertions of public use are constitutionally insufficient” in determining whether a use will ‘in fact be public rather than private.’⁴³³ The dissent quoted favorably from the *Kelo* dissent of Justice O’Connor, claiming that “no coherent principle limits what could constitute a valid public use.”⁴³⁴ 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.⁴³⁵ 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.⁴³⁶ 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.⁴³⁷

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

429. *Id.*

430. *Id.* at 196 (Hecht, J., dissenting).

431. *Id.* at 200.

432. *Id.* at 196–98.

433. *Id.* at 195.

434. *Id.* at 197.

435. *Id.* at 198.

436. *Id.* at 200.

437. *Id.*

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.”⁴³⁸ Based on *KMS Retail*, practitioners should realize that the saga will continue on how public use condemnations will be governed.

X. CONCLUSION

The most impactful authority during this Survey period was the informal guidance from the Texas Attorney General, which virtually stopped all foreclosures in their tracks; future litigation over foreclosures that proceeded in the face of such letter will undoubtedly be a topic in future survey articles. But looking forward, the *KMS Retail* ruling may be the most impactful, especially if the Texas Supreme Court follows through in its “promise” to reconsider the requirements in a taking of private property.

Based on the oil patch deal in the *Energy Transfer Partners* case, practitioners now have clear approval to draft contractual conditions precedent to the formation of a partnership which will supersede the statutory requirements in Texas Business Organizations Code § 152.003. As always, drafting precision will still be paramount, as evidenced by the unartful description of collateral in *Cheniere*, and the conflict caused by subsequent loan statements reflecting the full balance due after a purported abandonment of acceleration in the *Pitts* decision. The Texas Supreme Court gave additional drafting advice in *Rahlek* and *Mercedes-Benz*. Two additional cases, *Chalker* and *Copano*, provided essential guidance to practitioners on how to conduct negotiations via email.

For comfort to practitioners, in *Zepeda*, the Texas Supreme Court put to bed any doubt that longstanding equitable subrogation rights would prevail under the new constitutional home equity lending regime. Practitioners can also take comfort in the Texas Supreme Court’s decision in *Southwestern Electric Power* which reaffirmed Texas courts’ historical treatment of upholding blanket easements.

438. *Id.* at 194.

