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REAL PROPERTY

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I. INTRODUCTION

This article covers Real Property cases from Southwestern Reporter (Third) volumes 608 through 632 and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

No landmark cases were noted this Survey period, but there are many cases of first impression and clarification by the Texas Supreme Court. Notably, the legal aftermath of the COVID pandemic will be addressed in terms of foreclosure actions, leases, and insurance. The *Howard* case will be tracked through its various iterations on equitable subrogation and limitations.[1] There will be guidance on commercially reasonable dispositions of collateral in a very constrained circumstance.

As is typical for prior survey periods, a number of cases reflect the need for careful drafting of provisions and the differing judicial results emanating therefrom. Further, we continue to explore the complexities in premises liability cases: what are the improvements; what is an open and obvious danger; what are the different results as between a licensee and invitee; who is the owner; and what warnings are necessary.

The Texas Supreme Court weighed in on capacity and standing in the business organization context and defined "zoning" for the first time. It also weighed in on the requirements for filing a correction deed, actions that do (or do not) constitute ratification of an action, the enforceability of boundary agreements and, for the second time in as many years, the nemesis of all law students and many practitioners, the Rule Against Perpetuities. Although most of the holdings from the Texas Supreme Court reinforced current jurisprudence, on more than one occasion the Texas Supreme Court took a position seemingly contrary to long established jurisprudence. Practitioners should be cautioned that these cases seem to

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be very fact specific anomalies where the supreme court seemed to contort itself, and the law, in order to reach the decision the justices felt was equitable. As a result, these cases may not necessarily represent a legal sea change and practitioners should exercise caution before relying on any holdings that appear to fly in the face of long-established jurisprudence.

II. MORTGAGES/FORECLOSURES/LIENS.

A. Limitations Tolled by Bankruptcy; Abandonment of Acceleration.

Citibank, N.A. v. Pechua, Inc.[2] involved a home loan foreclosure that was contested on the lapse of the statute of limitations. The original home loan was made in 2003, and on March 4, 2009, the lender filed an application for Rule 736 foreclosure.[3] Thereafter, the debtor filed three subsequent bankruptcies. The duration of the bankruptcy filings were approximately seventeen months, thirty-eight months, and four months—nearly five years in the aggregate. On July 20, 2015, the lender notified the debtor that they were in default, issued a notice of default on March 2, 2016, accelerated the debt on April 29, 2016, and filed a second Rule 736 foreclosure application on July 26, 2016.[4] The new property owner, Pechua, claimed the creditor could not foreclose based on the expiration of the four-year limitation period.

On appeal, the Court of Appeals for the Fourteenth District of Texas at Houston focused on two issues. The first issue was that the three bankruptcy filings tolled the running of the limitation period, and the other issue was that the subsequent 2015 and 2016 notices of default effectively abandoned the prior acceleration of the loan. [5] In analyzing the first issue, the court noted that the automatic stay in bankruptcy does not statutorily provide for the tolling of the running of limitations.[6] Neither the Texas Supreme Court nor this court had previously addressed this issue, but such issue had been addressed by prior decisions in various opinions from the Fifth Circuit and non-precedential opinions issued by sister courts.[7] Those cases generally held that Texas common law allowed for the tolling of limitations where the exercise of legal remedies was prevented by pending legal proceedings.[8] Based on such authority, the court held that those bankruptcy filings tolled the running of limitations, which extended

2. PNC Mortgage v. Howard (*Howard I*), 618 S.W.3d 75 (Tex. App.—Dallas 2019, pet. granted) (mem. op); PNC Mortg. v. Howard (*Howard II*), 616 S.W.3d 581 (Tex. 2021) (per curiam); PNC Mortg. v. Howard (*Howard III*), 2021 WL 4236873 (Tex. App.—Dallas Sept. 17, 2021, pet. filed).

3. 624 S.W.3d 633, 635 (Tex. App.—Houston [14th Dist.] 2021, pet. denied).

4. *Id.* at 635–36.

5. *Id.* at 636.

6. *Id.* at 637.

7. *Id.* at 639 (citing 11 U.S.C. § 108(c); Gantt v. Gantt, 208 S.W.3d 27, 30–31 (Tex. App.—Houston [14th Dist.] 2006, pet. denied)).

8. *Id.* at 639.

the creditor's right of foreclosure.[9]

In the second issue, the court addressed whether the acceleration had been abandoned by the subsequent notices of default sent in 2015 and 2016; however, the court never addressed the 2015 notice of default and relied solely upon the language of the 2016 notice of default, which the court determined to be clear and unequivocal language relating to the unilateral abandonment of acceleration.[10] Four critical elements of the notice of default were applicable to the determination of its prior abandonment of acceleration: (1) the current notice allowed for a cure of the note by paying current past due amount; (2) a statement that the loan would be accelerated if the outstanding payments were not brought current; (3) that the loan might be accelerated in the future; and (4) that the notice was entitled "Notice of Intent to Accelerate," which represented a forward-looking statement negating that a prior acceleration was still effective.[11] In following the existing line of cases,[12] the court noticed and distinguished its holding in *Swoboda v. Ocwen Loan Servicing*,[13] in which it held that abandonment was not proven because the notice contained no suggestion that the original maturity date had been restored after the prior acceleration.[14] The court also distinguished *Pitts v. Bank of New York Melon Trust Co.*,[15] in which both a monthly statement and delinquency notice were rejected because neither contained language that indicated a possible future acceleration for non-payment of the noticed amount, thereby not negating the prior acceleration.[16] In a final effort, the homeowner contended that the creditor's waiver of acceleration (and the consequential reinstatement of the original maturity date) was inconsistent with the non-waiver clause in the existing Deed of Trust.[17] This position was rejected with the court citing favorably from *Ocwen Loan Servicing, L.L.C. v. REOAM, L.L.C.*,[18] which held "the provision's preservation of [the] lender's right to accelerate in the future did not affect its ability to abandon an existing acceleration."[19]

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9. *Id.* (citing Peterson v. Tex. Commerce Bank-Austin, N.A., 844 S.W.2d 291, 294 (Tex. App.—Austin 1992, no pet.); Hughes v. Mahaney & Higgins, 821 S.W.2d 154, 157 (Tex. 1991)).

10. *Id.* at 640.

11. *Id.*

12. *Id.*

13. Boren v. U.S. Nat'l Bank, 807 F.3d 99, 99 (5th Cir. 2015); Brannick v. Aurora Loan Servs., LLC, No. 03-17-00308-CV, 2018 WL 5729104, at *1 (Tex. App.—Austin Nov. 2, 2018, pet. denied).

14. Swoboda v. Ocwen Loan Servicing, LLC, 579 S.W.3d 628, 628 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

15. Citibank, N.A. v. Pechua, Inc., 624 S.W.3d at 641.

16. 583 S.W.3d 258, 258 (Tex. App.—Dallas 2018, no pet.).

17. *Citibank, N.A.*, 624 S.W.3d at 641 n.5.

18. *Id.* at 642 (The non-waiver clause read "Forbearance by Lender Not a Waiver . . . Any forbearance by Lender in exercising any right or remedy . . . shall not be a waiver of or prejudice the exercise of any right or remedy.").

19. 775 F. App'x 354, 357 (5th Cir. 2018) (per curium).

B. HUD Regulations.

In *Ferrell v. Union Home Mortg. Corp.*,[20] a homeowner failed to make payment on her home mortgage, and the lender sent notices of default, acceleration, and foreclosure sale. The homeowner filed suit alleging breach of contract based on failure to have received the default notice and the lender's failure to follow HUD regulations.[21] The court summarily disposed of the failure to receive notice claim. Both the deed of trust and the Texas Property Code[22] only required the giving or serving of notice, not the receipt thereof by the debtor.[23] The mere allegation of non-receipt has been repeatedly held insufficient to support a summary judgment claim.[24] The dispositive inquiry is only the giving or service of notice, which was supported by the lender's summary judgment evidence, being sworn testimony of an appropriate corporate representative of the lender.[25]

The second claim was that the lender failed to follow HUD regulations, which were incorporated into the deed of trust with the following provisions: "This Security Instrument does not authorize acceleration or foreclosure if not permitted by regulations of the [HUD] Secretary."[26] Specifically, the homeowner alleged the lender failed (1) to have a face-to-face meeting (pursuant to 24 C.F.R. § 203.604), and (2) to evaluate her for loss mitigation options (pursuant to 24 C.F.R. § 203.605). In analyzing the face-to-face meeting requirement, the court noted that the regulations required only a reasonable effort to arrange such a meeting,[27] but that such face-to-face meeting is not required when the debtor will not cooperate.[28] Therefore, the lender's evidence of a phone call with the debtor conclusively established the debtor's refusal to have such a meeting and satisfaction of such regulation.[29] The regulations specified that reasonable efforts would be satisfied with one certified letter sent to the mortgagor or one trip to see the mortgagor at the mortgaged property.[30] Because the lender had sent the debtor such a certified letter and provided evidence of the same for the summary judgment, and the debtor failed to disprove that the lender had met its burden, summary judgment was appropriate.

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20. *Citibank, N.A.*, 624 S.W.3d at 642.
21. No. 3:19-CV-00352, 2021 WL 1306685, at *1 (S.D. Tex., April 7, 2021).
22. *Id.* at *4.
23. Tex. Prop. Code Ann. § 51.002(e).
24. *Id.* at *5 (The deed of trust provided that such notice is "deemed to have been given . . . when mailed by first-class mail, and the foreclosure statute required such notice to "be placed in the mail.").
25. *See* Douglas v. Wells Fargo Bank, N.A., 992 F.3d 367, 376 (5th Cir. 2021).
26. *Ferrell*, 2021 WL 1306685, at *2–3.
27. *Id.* at *3.
28. 24 C.F.R. § 203.604(b) (2022).
29. *Id.* § 203.604(c)(3).
30. *Ferrell*, 2021 WL 1306685, at *3.

C. Howard I, II and III.

In *PNC Mortgage v. Howard*[31] (*Howard I*), the homeowner challenged a home foreclosure sale. Problems arose from the different parties that held the note and deed of trust from time to time. The loan was originated by Bank of Indiana on March 24, 2005. Bank of Indiana assigned the note and deed of trust on March 1, 2008 to National City Mortgage Co., a subsidiary of National City Bank. In November 2009, National City Bank merged with PNC. The default occurred in November 2008 and notice of default and intent to accelerate was issued by National City Bank on January 20, 2009.[32] A subsequent notice of acceleration was sent on June 19, 2009, by National City Bank's attorney; on that same day, Bank of Indiana appointed a substitute trustee. Another notice of acceleration was sent in March 2010 by the attorney for Bank of Indiana, as mortgagee, and PNC, as the loan servicer.[33] The non-judicial foreclosure occurred April 2016.

The problem alleged by Howard was that (1) the foreclosure sale was noticed by and conducted on behalf of Bank of Indiana at a time after it had assigned its interests in the loan, and (2) the substitute trustee was appointed by Bank of Indiana after it had assigned its loan interests. The trial court and Dallas appellate court agreed with Howard. Only the current mortgagee had the right to appoint a substitute trustee[34] and to initiate foreclosure.[35] The lender's plea that the court should have known that all of those mortgagee entities had been merged together[36] were to no avail because the lender failed to submit evidence as to such facts.[37] This serves notice on practitioners to be careful in drafting notices, appointments, and conducting foreclosures because ignoring the formalities of corporate assignments and mergers can be fatal to a valid foreclosure.

Another issue raised in *Howard I* related to the applicable statute of limitations on the note and foreclosure sale. Howard claimed that the foreclosure was void because of the four-year limitations pursuant to the Texas Civil Practice & Remedies Code[38]; the April 2016 foreclosure was more than four years after the June 2009 or March 2010 accelerations. On the other hand, the lender asserted a six-year limitations under the Uniform Commercial Code.[39] The Court of Appeals for the Fifth District of Texas at Dallas clarified the confusion, noting that the note and lien are separate obligations.[40] Even though the four-year limitation barred the

31. 24 C.F.R. § 604(d).
32. 618 S.W.3d 75, 75 (Tex. App.—Dallas 2019, pet. granted) (mem. op).
33. *Id.* at 78.
34. *Id.* at 79.
35. *Id.* at 81 (citing Burnett v. Manufacturer's Hanover Trust Co., 593 S.W.2d 755, 755 (Tex. App.—Dallas 1979, writ ref'd n.r.e.)).
36. *Id.* (citing Santiago v. BAC Home Loans Servicing, L.P., 20 F.Supp.3d 585, 589 (W.D. Tex. 2014)).
37. *Id.*
38. *Id.* at 82.
39. Tex. Civ. Prac. & Rem. Code Ann. § 16.004.
40. Tex. Bus. Com. Code Ann. § 3.118(a).

foreclosure sale,[41] the right to sue on a negotiable instrument under the UCC continued for a six-year limitation period.[42]

Further, *Howard I* raised an issue of equitable subrogation. The loan made by Bank of Indiana was used to pay off two prior existing liens on the subject property. When the lender realized its limitations problem for the foreclosure of its deed of trust lien, it resorted to a claim of equitable subrogation. The trial court disagreed and the appellate court, while acknowledging equitable subrogation, discussed balancing the equities of the doctrine with the negligence in promptly pursuing the foreclosure action.[43] Ultimately, the appellate court concluded the equity was in favor of Howard.[44] But on review by the Texas Supreme Court in *Howard II*,[45] that decision was overruled because those rights attached at the time of the refinancing. The supreme court stated that the error was "concluding that PNC's failure to timely foreclose under the deed of trust bars its subrogation rights."[46] The appellate court had relied upon the federal district court's decision in *Zepeda v. Federal Home Loan Mortgage Ass'n*,[47] without having the benefit of the Texas Supreme Court's answer to a certified question in that case.[48] The supreme court answered that equitable subrogation was applicable in a constitutionally defective home loan scenario.[49] So, the equitable subrogation doctrine applied to all extinguished liens. The supreme court distinguished *Howard I* (negligence in preserving its own lien rights) from *Zepeda* (failure to cure a constitutional default).[50] Further, there was no distinction between a home equity loan and a purchase money that would alter the final *Zepeda* conclusions.[51]

Nevertheless, two other related issues were raised by *Howard*: whether the deed of trust precluded equitable subrogation and whether the equitable subrogation rights were, themselves, time-barred. The supreme court remanded these issues back to the appellate court.[52]

On remand,[53] the appellate court addressed these issues. The court noted that the difficult question was not the four-year limitation period being applicable on the subrogation claim,[54] but rather the date of the accrual of the claim.[55] On that issue, the court found conflicting authority.

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41. *Howard I*, 618 S.W.3d at 85 (citing Aguero v. Ramirez, 70 S.W.3d 372, 374 (Tex. App.—Corpus Christi–Edinburg 2002, pet. denied)).
42. *Id.*
43. *Id.*
44. *Id.* at 84.
45. *Id.* at 85.
46. PNC Mortg. v. Howard (*Howard II*), 616 S.W.3d 581, 581 (Tex. 2021) (per curiam).
47. *Id.* at 584.
48. No. 4:16-cv-3121, 2018 WL 781666, at *1 (S.D. Tex. Feb. 8, 2018) (mem. op.).
49. Zepeda v. Fed. Home Loan Mortg. Corp., 935 F.3d 296, 301 (5th Cir. 2019.)
50. Fed. Home Loan Mortg. Corp. v. Zepeda, 601 S.W.3d 763, 764 (Tex. 2020).
51. *Howard II*, 616 S.W.3d at 584.
52. *Id.* at 585.
53. *Id.*
54. PNC Mortg. v. Howard (*Howard III*), 2021 WL 4236873, at *1 (Tex. App.—Dallas Sept. 17, 2021, pet. filed).
55. *Id.* at *2 (citing Brown v. Zimmerman, 160 S.W.3d 695, 700 (Tex. App.—Dallas 2005, no pet.)).

Kone v. Harper[56] first addressed the issue and concluded that the refinancing was similar to a renewal and extension of the original loan; therefore, the accrual date was determined by the maturity date of the refinancing loan.[57] This logic was followed in *Hays v. Spangenberg*.[58] However, a number of federal court opinions came to a different conclusion.[59] The federal decisions all followed a misreading of *Brown v. Zimmerman*, which "did not directly address the lien claim's accrual date."[60] *Zimmerman* did not have the dual subrogated lien maturity and refinancing maturity which was the core issue in *Howard I*.[61] Therefore, following *Kone*, the court held that upon the maturity (by acceleration or stated term) of the refinancing loan, "the debt is mature for purposes of both the lender's contractual rights [under the refinancing loan] and subrogation rights."[62] Nevertheless, with a petition for review filed, practitioners must wait to see if the Texas Supreme Court has the interest for a *Howard IV*.

D. COVID and Foreclosures.

In last year's Survey article, the Texas Attorney General's informal guidance letter on foreclosures during COVID restrictions was addressed.[63] That letter opined that while the general public was prohibited from attending foreclosure sales, the statutory requirements for a "public sale" were likely unattainable.[64] Consequently, most, but not all, non-judicial foreclosure sales were suspended. But, on March 2, 2021, Governor Greg Abbott issued Executive Order No. GA-34 relating to the opening of Texas in response to the COVID-19 pandemic. This Executive Order acknowledged prior Executive Order GA-08, issued March 19, 2020, which mandated social-distancing restrictions.[65] Executive Order GA-08 prohibited the public gatherings which were the basis of the attorney general informal guidance letter.[66] With GA-34, Governor Abbott lifted "COVID-19-related operating limits for any business or other establishment" not in a high hospitalization area.[67] Even in high hospitalization areas, there would be no state operating limits unless the county judge determined COVID-19 mitigation strategies were needed, but in such

56. *Howard III*, 2021 WL 4236873 at *5.
57. 297 S.W. 294, 299 (Tex. Civ. App.—Waco 1927), aff'd, 1 S.W.2d 857 (Tex. Comm'n App. 1928).
58. *Howard III*, 2021 WL 4236873 at *3.
59. 94 S.W.2d 899, 899 (Tex. Civ. App.—Austin 1936, no writ).
60. *Howard III*, 2021 WL 4236873 at *3.
61. *Id.*
62. *Id.*
63. *Id.* at *4.
64. J. Richard White & Amanda Grainger, Real Property, 7 SMU Ann. Tex. Surv. 217, 221 (2021).
65. 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).
66. The Governor of the State of Tex., Executive Order GA-08, 45 Tex. Reg. 2267, 2271 (2020).
67. *Id.*

case, operating limits were allowed up to a 50% capacity, but without limits for certain types of establishments (religious, school, and child care services).[68]

Although GA-34 did not specifically rescind GA-08, the new Executive Order effectively allowed non-judicial foreclosure to be conducted without concern about the attorney general informal guidance letter, except where a county judge in a high hospitalization area has further restricted public gatherings.

III. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES

A. Texas Debt Collection Act.

In *Douglas v. Wells Fargo Bank, N.A.*,[69] the U.S. Court of Appeals for the Fifth Circuit addressed claims under the Texas Debt Collections Act.[70] The lender sent two demand letters, each of which included unpaid principal and interest amounting to two additional months of payment. The statutory language in question prohibited a debt collector from misrepresenting the amount of the debts.[71] In analyzing this provision, the Fifth Circuit noted that *intent* to misrepresent was not an element.[72] Even the actual misrepresentation was not sufficient for a claim under the Texas Debt Collection Act,[73] based on *Miller v. BAC Home Loan Servicing, L.P.*,[74] which required the misrepresentation to cause the debtor to "think differently" about the "character, extent, amount, or status" of the debt.[75] The overstatement of interest was $6,000 in each of the two demand letters, which was double the amount of each monthly payment of approximately $3,000. The Fifth Circuit concluded that such misrepresentation did not satisfy the "think differently" standard under *Miller*. The debtors were aware of the loan default status before the demand letters, and the Fifth Circuit concluded that the misrepresented amount owing did not change their thinking as to the status of the debt; therefore, the "think differently" element was not established for violation of the Texas Debt Collection Act.[76] *Douglas* and *Miller* come from the federal bench. The rationale of these cases may be faulty and it is yet to be seen whether a state court would follow these decisions.

68. The Governor of the State of Tex., Executive Order GA-34, 46 Tex. Reg. 1561, 1568 (2021).

69. *Id.*

70. 992 F.3d 367, 367 (5th Cir. 2021).

71. Tex. Fin. Code Ann., ch. 392.

72. Tex. Fin. Code Ann. § 392.304(a)(8) (provides in relevant part: "a debt collector may not use a . . . misleading representation that . . . misrepresent[s] the character, extent, or amount of a consumer debt.").

73. *Douglas*, 992 F.3d at 374 (citing McCaig v. Wells Fargo Bank (Texas), N.A., 788 F.3d 463, 480–81 (5th Cir. 2015)).

74. Tex. Fin. Code Ann. § 392.304(a)(8).

75. 726 F.3d 717, 723 (5th Cir. 2013).

76. *Id.*

B. Commercially Reasonable Sale.

Airpro Mobile Air v. Prosperity Bank[77] involved a challenge to the commercial reasonableness for disposition of collateral, which was complicated by a landlord's refusal to allow a creditor access to the collateral. Airpro obtained a loan from Prosperity Bank secured by inventory, parts, accounts, equipment, and general intangibles, which were mostly located on leased premises owned by H&H Properties, LLC.[78] Airpro failed to pay rent on its premises, and the landlord locked out Airpro with the collateral located inside. Subsequently, Airpro defaulted on its loan to the bank, and when the bank sought foreclosure of the collateral, the landlord asserted a superior lien on the collateral and denied possession and access to the collateral.[79] Based on the landlord's actions, the bank sued the landlord for possession of the collateral and conversion, but concurrently continued its efforts at disposition of the collateral by a private sale. The only bidder at the private sale was Phoenix Mobile Air, which offered $17,500.00 for the collateral, which the bank accepted. The bank sued Airpro for the deficiency, and Airpro countered that the sale process was not commercially reasonable as required by UCC § 9.610(a). The Court of Appeals for the Fifth District of Texas at Dallas, based on *Regal Financial Co., Ltd v. Texas Star Motors, Inc.*,[80] noted that there were various non-exclusive factors to consider when analyzing commercial reasonableness of a disposition, which included efforts to obtain the best price possible; whether the sale was bulk or piecemeal; whether the sale was private or public; whether collateral was available for inspection before sale; the time of sale; expenses incurred for the sale; advertisement of the sale; whether multiple bids were received; the condition of the collateral; and the place of sale.[81] Because the trial court granted summary judgment to the bank, the court looked at the sufficiency of the evidence submitted for proof of commercially reasonable sale.

Airpro also alleged that the bank's sale was not commercially reasonable because it failed to follow its own internal policies, which included the requirements of determining the collateral value from a local public auction house, the preference for a public auction over a private sale, obtaining at least three bids for a private sale, and a determination that a private sale bid would yield more than a public auction.[82] But the bank provided testimony of its special assets officer (who had thirty-five years' worth of experience) that the landlord's interference prevented the bank from hiring third-party evaluations and auction services, and prevented the bank from preparing a detailed inventory of the collateral (which had been boxed up and piled against the leased premises walls). In fact, the

77. *Douglas*, 992 F.3d at 374.
78. 631 S.W.3d 346, 346 (Tex. App.—Dallas 2020, pet. denied) (mem. op.).
79. *Id.* at 349.
80. *Id.*
81. Regal Fin. Co., Ltd. v. Tex. Star Motors, Inc., 355 S.W.3d 595, 595 (Tex. 2010).
82. *Airpro Mobile Air*, 631 S.W.3d at 350.

bank contacted a public auctioneer whose proposal required organized inventory and advertising but was not hired due to the limited access to the collateral. The bank attempted to rent the premises to obtain access to the collateral, but numerous offers were rejected by the landlord.[83] Additionally, the bank located a prior employee of Airpro to move and store the collateral in a separate location, but the cost was too high in comparison to the actual value of the collateral. Consequently, the court held that these efforts by the bank satisfied the requirements of commercially reasonable efforts under the existing circumstances and interference caused by the landlord's actions.

Airpro also contended that the $17,500.00 sale price was commercially unreasonable, based on the bank's lawsuit against the landlord which alleged a value of $1,357,827.00. However, the court ignored this assertion and instead stated that the commercially reasonable standard was predicated upon whether a satisfactory price was obtained and not necessarily the highest price.[84] In support of its actions, the court noted that the bank presented multiple witnesses' testimonies as to the commercial reasonableness of the price.[85] This included the owner of the company that actually purchased the collateral, who characterized most of it as junk and obsolete, opining that based upon its condition the sale price was reasonable, notwithstanding that the purchaser later sold the collateral for three times its purchase price. The bank Special Assets Officer also testified that there was no alternative based on the landlord's interference, the bank's inventory assessment, and limited marketing and sale options of the property. Airpro's former employee testified that a greater price might have been obtained if the bank had access to the collateral and was able to conduct a proper inventory of the collateral. Airpro, on the other hand, had expert testimony from the attorney representing the taxing authority and from the principal of Airpro that the value of the sale price could have been higher.[86] But, the court refused to address the conflicting evidence and instead deferred to the findings by the trial court that reasonable efforts had been undertaken.[87]

Airpro also objected to the expert testimony offered by the bank; however, the court relied on *Regal* and found that "expert testimony is [not] required to prove commercial reasonableness."[88] Finally, the court addressed Airpro's contention that the landlord's interference was not applicable in the determination of a commercially reasonable sale price. Airpro suggested that the bank's position was that the landlord's interference negated its obligation to conduct a commercially reasonable sale; however, the court rejected that argument concluding that the bank offered testimony of the landlord's interference not to negate its obliga-

83. *Id.* at 351 n.5.
84. *Id.* at 351–52.
85. *Id.* at 352–53.
86. *Id.* at 353.
87. *Id.*
88. *Id.* at 353.

tions, but to reflect the circumstances under which it was forced to conduct a private sale of the collateral.[89]

C. Indemnity and Arbitration Carve-Out.

Wagner v. Apache Corp.[90] involved the interpretation of an indemnity claim and an arbitration provision. Apache sold several oil and gas interests to Wagner pursuant to a purchase and sale agreement and assignment. The purchase and sale agreement provided an indemnity clause reading generally as follows: "indemnify, release and hold harmless [Apache] against all losses, damages, liabilities and sanctions of every kind and character . . . which arise from or in connection with [ ] any of the . . . liabilities and obligations assumed by [Wagner]."[91] The purchase and sale agreement (PSA) also contained an arbitration clause reading generally as follows:

> Any disputes arising out of or in connection with this agreement . . . shall be finally and exclusively resolved by arbitration . . . *Notwithstanding the above*, in the event a third-party brings an action against [Wagner or Apache] . . . concerning this Agreement or the Assets or transactions contemplated herein, [Wagner and Apache] shall not be subject to mandatory arbitration under this section and [Wagner or Apache] shall each be entitled to assert their respective claims, if any, against each other in such third-party action.[92]

After such transaction, Wagner further assigned such assets to three other parties (Wagner Assignees). The PSA also provided it was "binding upon, and shall inure to the benefit of, the Parties hereto, and their respective successors and assigns."[93] The Wagner assignment provided that it was "subject to all terms, provisions and conditions contained in the APACHE Assignment, and Assignees assume and agree to be bound by and perform their proportionate parts of all obligations imposed upon Assignor by the APACHE Assignment."[94]

Problems arose when the surface landowners brought suit against Apache alleging environmental contamination caused during Apache's operations before sale of the assets to Wagner. Apache sued Wagner and the Wagner Assignees for indemnity pursuant to the above-quoted provisions. The indemnitors brought a declaratory action in Tarrant County, alleging they were not subject to arbitration or the indemnity provisions. The trial court agreed with the Wagner Assignees, but the appellate court reversed concluding that the purchase and sale agreement bound the Wagner Assignees to arbitrate the dispute.[95] The real issue was whether

89. *Id.* at 354.
90. *Id.*
91. 627 S.W.3d 277, 277 (Tex. 2021), *reh'g denied*.
92. *Id.* at 280.
93. *Id.* at 281 (emphasis in original).
94. *Id.*
95. *Id.*

the declaratory action brought by the Wagner Assignees fell within the arbitration carve-out contained in the sentence beginning "[n]otwithstanding" in the arbitration clause. The appellate court held that it did not, and petition to the supreme court followed.

The Wagner Assignees argued that the indemnity carve-out was applicable because of the third-party claim filed by them in the Tarrant County suit.[96] On the other hand, Apache contended such interpretation ignored certain provisions of the carve-out and violated basic grammar rules.[97] Therefore, the Texas Supreme Court analyzed the details of this carve-out provision. Based on standard contractual interpretation rules, the supreme court noted that all language should be given meaning.[98] The supreme court construed the "and" as a coordinating conjunction and not a disjunctive adjective.[99] This meant that the subject carve-out allowed for two options for the indemnity: first, the parties could not be made to accept arbitration because of the language "shall not be subject to mandatory arbitration;"[100] and second, their claims could be asserted in the third-party action therein referenced.[101] The supreme court rejected the theory that "and" made the two provisions alternative because such interpretation would render the second clause, particularly the "in such third-party action" language meaningless.[102] Because the conditions of the carve-out were not satisfied, the carve-out to arbitration did not apply.[103]

An additional issue was whether the Wagner Assignees were bound to the arbitration provision because they were not parties to the original PSA. Here, the supreme court recognized a number of ways in which a non-signatory party can be subject to the terms of a different contract: "(1) incorporation by reference; (2) assumption; (3) agency; (4) alter ego; (5) equitable estoppel; and (6) third-party beneficiary."[104] The assumption theory is supported by all three relevant documents. The PSA provided that it was "binding upon . . . [Wagner's] respective successors and assigns"; the Apache Assignment provided that it was "subject to the terms and conditions of that certain [PSA]"; and the Wagner Assignment stated it was "subject to all terms, provisions and conditions contained in the APACHE Assignment, and Assignees assume and agree to be bound by and perform . . . all obligations imposed upon Assignor by the APACHE Assignment."[105]The Wagner Assignees asserted the "proportionate share" language meant that they assumed only those obligations

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96. *Id.* at 282.
97. *Id.* at 283.
98. *Id.*
99. *Id.*
100. *Id.* at 284.
101. *Id.* at 283.
102. *Id.*
103. *Id.*
104. *Id.* at 285.
105. *Id.* at 285–86 (citing *In re* Kellogg Brown & Root, 166 S.W.3d 732, 739 (Tex. 2005)).

which were divisible obligations and not all obligations. The supreme court disagreed with that interpretation, although provided little rationale for its conclusion.[106] Also, the Wagner Assignees claimed the "subject to" language in the APACHE Assignment was not the equivalent of assumption language. The supreme court held that the assumption language was not required in this situation because the assumption provision in the PSA prevailed.[107] This case is another example that careful drafting by practitioners is needed to avoid controversy.

IV. LANDLORD–TENANT RELATIONSHIP/LEASES

A. Defamation/Intentional Inflection of Emotional Distress.

In *Chehab v. Edgewood Dev., Ltd.*,[108] the Court of Appeals for the Fourteenth District of Texas at Houston addressed whether the lockout of a tenant was grounds for a claim of defamation. The facts of the case are simple: Chehab was a tenant in an office building owned by Edgewood and managed by Gladys Lantzsch.[109] Chehab failed to pay his January rent, which was due on the first of the month. On January 19, 2019, Chehab emailed Lantzsch that he would not be paying his January or February rent on time but would be current by February 15th. Lantzsch agreed to accept the late payment on the condition that the "money MUST be in our bank account" on February 15th.[110]The rent was not paid on February 15th. On February 18th the locks were changed and a notice was posted on the door. The notice read as follows:

> Pursuant to Property Code 93.0002(f) [sic], this is to provide you with notice that Edgewood Development, Ltd., the Landlord, has changed the door lock of this suite. In order to obtain a new key, Tenant should contact Gladys Lantzsch at Caldwell Companies located at 13100 Wortham Center Drive, 3rd Floor, Houston, Texas 77065, (713) 933-3374 Monday through Friday 8AM to 5PM or (713) 690-0000.
>
> By this action, Landlord has not elected to terminate Tenant's lease, and shall do so only by written notice thereof. Tenant remains liable for the full performance of the lease, including the timely payment of all monetary amounts due there under.[111]

Chehab filed suit against Edgewood on July 13, 2019, claiming that the lockout notice was libelous per se. The suit was later amended to include defamation and intentional infliction of emotional distress.[112] The trial court granted Edgewood's motion for summary judgment. Chehab appealed the trial court's judgment claiming that there was a "genuine issue

106. *Id.* at 286.
107. *Id.*
108. *Id.* at 287.
109. 619 S.W.3d 828 (Tex. App.—Houston [14th District] 2021, no pet.).
110. *Id.* at 831.
111. *Id.*
112. *Id.* at 832.

of material fact" because the notice injured his reputation with clients and employees and "impeached his honesty, integrity or virtue."[113]

To establish defamation a person must prove "(1) publication of a false statement of fact to a third party, (2) that was defamatory concerning the plaintiff, (3) with the requisite degree of fault, and (4) damages, in some cases."[114] The issue of whether a publication has a defamatory meaning is a question of law.[115] A publication is defamatory if a person of ordinary intelligence would perceive it to be so in light of the surrounding circumstances.[116] Most importantly, a statement can be "unpleasant or objectionable" without being defamatory.[117] In this case, the court of appeals held that the lockout notice was not defamatory because it "is not reasonably capable of a defamatory meaning because it says nothing about Chehab's reputation or occupation, nor does it expose him to public hatred, contempt, ridicule, or financial injury, or impeach his honesty, integrity, or virtue."[118]

B. Ambiguity

In *Endeavor Energy Res., L.P. v. Energen Res. Corp.*,[119] the Texas Supreme Court reversed the holding of the trial court and the court of appeals to find a mineral lease to be ambiguous. The holding is remarkable, and surprising, given that in recent years the supreme court has tied itself in knots and engaged in various legal contortions to avoid finding even the most clearly ambiguous contract to be unambiguous. The holding of the supreme court in this particular case can only be explained by the fact that finding the language to be ambiguous was the only way to prevent termination of the lease. As all practitioners learned in law school, the law "abhors forfeiture."

113. Chehab failed to plead that the notice was extrinsically defamatory which is a cause of action whereby "a statement whose textual meaning is innocent becomes defamatory when considered in light of other facts or circumstances[.]" *Id.* at 835 (citing Dallas Morning News, Inc. v. Tatum, 554 S.W.3d 614, 626 (Tex. 2018)).

114. *Id.* at 834.

115. *Id.* at 834 (citing *In re* Lipsky, 460 S.W.3d 579, 593 (Tex. 2015)).

116. *Id.* at 835 (citing *Dallas Morning News, Inc.*, 554 S.W.3d at 625; Turner v. KTRK Television, Inc., 38 S.W.3d 103, 114 (Tex. 2000)).

117. *Id.* (citing *Turner*, 38 S.W.3d at 114–15; Durckel v. St. Joseph Hosp., 78 S.W.3d 576, 583 (Tex. App.—Houston [14th Dist.] 2002, no pet.)).

118. *Id.* (*See* Double Diamond, Inc. v. Van Tyne, 109 S.W.3d 848, 854 (Tex. App.—Dallas 2003, no pet.)).

119. *Id.* at 836 (citing Better Bus. Bureau of Metro. Houston, Inc. v. John Moore Servs., Inc., 441 S.W.3d 345, 356 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (explaining that "a communication that is merely unflattering, abusive, annoying, irksome, or embarrassing, or that only hurts the plaintiff's feelings, is not actionable" as being defamatory)). *See also, e.g.*, Musser v. Smith Protective Servs., Inc., 723 S.W.2d 653, 655 (Tex. 1987) (statement that former employee "relieved" his former employer of some of its accounts is not defamatory because it does not accuse employee of any wrongdoing); San Antonio Express News v. Dracos, 922 S.W.2d 242, 248 (Tex. App.—San Antonio 1996, no writ) (statement that employee walked off the job without an excuse is not defamatory because it did not suggest he did anything illegal or unethical).

The facts of this case are straightforward. The lease in question contained a "continuous drilling" clause permitting the tenant to preserve the lease as long as they drilled a new well every 150 days. The lease also permitted the tenant to "accumulate unused days in any 150-day term . . . in order to extend the *next* allowed 150-day term between the completion of one well and the drilling of a subsequent well."[120] The tenant argued that the lease permitted days to be "accumulated" and rolled from term to term. The tenant drilled twelve wells in the 150-day period before waiting 310 days to drill the thirteenth well. The landlord claimed the "accumulated days" could only be rolled into the "next" term and that the 160-day delay before drilling the next well terminated the lease. The tenant disagreed. They had drilled most of the earlier wells in advance of the 150-day requirement and had "banked" 377 days. The trial court and court of appeals sided with the landlord and found that the tenant did not commence the thirteenth well within the requisite 150-day period, resulting in the leasehold estate reverting to the landlord. The supreme court reversed the trial court and the court of appeals by relying on a long history of jurisprudence in Texas mineral lease cases that hold "when all available means of interpreting the lease are exhausted and the disputed provisions remains equally susceptible to multiple reasonable readings, the ambiguity will be resolved against imposition of a special limitation."[121] While the holding in this case seems to counter recent holdings from the supreme court, it may be more of an anomaly dictated by the equities of the case rather than a sea change.

In *Muzquiz v. Para Todos, Inc.*,[122] the landlord and tenant had entered into a lease which purported to contain a "perpetual" term without allowing for increased rent and required the landlord to pay for common area maintenance, taxes, and insurance. The landlord attempted to renegotiate the lease, and when that failed, he filed suit alleging the lease was unconscionable and violated public policy.[123] Among other holdings, the trial court held that the lease was not "unenforceable or void because it contains a perpetual term," and the landlord failed to produce evidence establishing that the lease is unconscionable or void as against public policy.[124] The landlord appealed the trial court's holding.

The trial court reached its holding by concluding that the lease was a "perpetual renewal" lease as opposed to a "perpetual term" lease. In Texas, the case law distinguishes between a perpetually renewing lease and a lease with a perpetual term.[125] A perpetually renewing lease is disfavored but upheld if the lease is unambiguous, whereas a perpetual term

120. 615 S.W.3d 144, 144 (Tex. 2020).
121. *Id.* at 147 (emphasis added).
122. *Id.* at 149 (citing Decker v. Kirlicks, 216 S.W. 385, 386 (Tex. 1919); W.T. Waggoner Est. v. Sigler Oil Co., 19 S.W.2d 27, 31 (Tex. 1929); York v. McBee, 308 S.W.2d 951, 956 (Tex. Civ. App.—Waco 1957, writ ref'd n.r.e.)).
123. 624 S.W.3d 263, 263 (Tex. App.—El Paso 2021, pet. filed).
124. *Id.* at 265–66.
125. *Id.* at 268.

is treated as a tenancy at will.[126]

The lease in question was drafted by the tenant and signed by the eighty-year-old landlord without review by a lawyer. The term stated it was "perpetual and terminable at Lessee's sole discretion upon thirty days written notice to Lessor."[127] The Court of Appeals for the Eighth District of Texas at El Paso found that the language at issue clearly was intended to create a perpetual term, which is a violation of the rule against perpetuities.[128] In Texas, the rule against perpetuities is enshrined in Article I, § 26 of the constitution and states "[p]erpetuities and monopolies are contrary to the genius of a free government and shall never be allowed."[129] The seminal case in Texas on perpetual leases is *Hull v. Quanah Pipeline Corp.*,[130] which featured a pipeline leased to a company for a one-year term with perpetual one-year renewals. The Court of Appeals for the Fourth District of Texas at San Antonio in *Hull* adopted the following rule: "[a]lthough there is some contrary authority, the generally accepted view is that a provision clearly giving the lessee and his assigns the right to perpetual renewals is valid in the absence of some statutory prohibition, and will be enforced by the courts, although such a provision in a lease is not favored by the courts, and a lease will be construed as not making such a provision unless it does so clearly."[131] However, in contrast to *Hull*, the Court of Appeals for the Eighth District of Texas at El Paso found that the language in question clearly created a "perpetual lease" and not a "perpetual renewal term."[132] As a result, the lease created a tenancy at will. The court of appeals further found that the lease was void for substantive unconscionability.[133] As a general rule, courts in Texas will not examine the "fairness" of a contract, however, "grossly unfair bargains should not be enforced."[134] In this particular case, the court of appeals found that (1) the landlord was obligated for the upkeep and the taxes and (2) the rental payment was perpetually fixed to be "so one-sided and grossly unfair that no person in his or her right mind would have agreed to the position in which [the landlord] put herself and her successors."[135] The lone dissent to the court's holding was based on the

126. *Id.* (citing Hull v. Quanah Pipeline Corp., 574 S.W.2d 610, 612 (Tex.Civ.App.—San Antonio 1978, writ ref'd n.r.e.)). On the other hand, leases with a perpetual term are not, unenforceable. *See, e.g.*, Philpot v. Fields, 633 S.W.2d 546, 546 (Tex.App.—Texarkana 1982, no writ). Rather, leases with indefinite initial terms are treated as terminable at will by either party. *See, e.g.*, Holcombe v. Lorino, 124 Tex. 446, 79 S.W.2d 307, 310 (Tex. 1935) (lease with perpetual initial term deemed terminable at will by either party); Effel v. Rosberg, 360 S.W.3d 626, 630-31 (Tex.App.—Dallas 2012, no pet.) (lease with indefinite initial term based on life of tenant deemed terminable at will by either party).

127. *Muzquiz*, 624 S.W.3d at 269.

128. *Id.* at 266.

129. *Id.* at 274.

130. Tex. Const. art I, § 26

131. 574 S.W.2d at 612.

132. *Muzquiz*, 624 S.W.3d at 270 (citing *Hull*, 574 S.W.2d at 612).

133. *Id.* at 273.

134. *Id.* at 277.

135. *Id.* at 275 (citing Venture Cotton Co-op v. Freeman, 435 S.W.3d 222, 228 (Tex. 2014)).

theory that the case should be dismissed because it fell outside the statute of limitations. Since the dissent did not address the perpetual lease issue and the focus of this article is real estate, not civil procedure, we will not address the substance of the dissent.

C. Forum Selection

In *SH Salon L.L.C. v. Midtown Market Missouri City, TX, L.L.C.*,[136] the Court of Appeals for the Fourteenth District of Texas at Houston addressed a tenant's challenge to the enforceability of a venue selection clause, which set venue in New York, in a lease for property located in Missouri City, Texas. The tenant sued the landlord under the Deceptive Trade Practices Act, claiming that the landlord failed to ensure the safety of the premises which impacted the business of the salon.[137] The tenant argued that their claims against the landlord sounded in tort and were therefore not governed by the terms of the lease and not bound by the forum selection clause found in the lease. The court of appeals disagreed and found that the claims "arose" out of and were related to the lease and were therefore subject to the forum selection clause.[138]

The second argument made by the tenant was that the forum selection clause was unenforceable. In Texas, forum selection clauses are generally enforceable and presumed valid, and the opponent to the clause bears the burden of proof of showing that: "(1) enforcement would be unreasonable or unjust, (2) the clause is invalid for reasons of fraud or overreaching, (3) enforcement would contravene a strong public policy of the forum where the suit was brought, or (4) the selected forum would be seriously inconvenient for trial."[139] The tenant argued that all the witnesses to the case were located in Texas and that holding a trial in New York would be expensive and inconvenient. Unfortunately for the tenant, it is well established in Texas that merely "stating financial and logistical difficulties" is not sufficient to void a forum selection clause.[140]

V. PURCHASER/SELLER

A. Statute of Frauds

In *Gutierrez v. Rios*,[141] the trial court held that the plaintiff failed to present evidence of the existence of an oral contract for the sale of a home. The facts of the case are both simple and confusing. Gutierrez and Rios had an unusual arrangement. Gutierrez remodeled Rios's house and then lived in the house with Rios's consent. Gutierrez alleged that he had an oral agreement to buy Rios's house for $40,000.00.[142] To begin, Gu-

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136. *Id.* at 277.
137. 632 S.W.3d 655, 655 (Tex. App.—Houston [14th District] 2021, no pet.).
138. *Id.* at 657.
139. *Id.* at 658–59.
140. *Id.* at 659.
141. *Id.*
142. 621 S.W.3d 907, 907 (Tex. App.—El Paso 2021, no pet.).

tierrez paid Rios $1,000.00 per week (which Rios acknowledged to be high for the market) until he paid Rios $15,000.00. Then Gutierrez suspended making payments while he extensively renovated the house. In December 2015, Gutierrez and his daughter moved into the house and recommenced paying Rios. He also paid the property tax payments. In 2016, Gutierrez attempted to tender the final $4,000 payment in exchange for the deed. Gutierrez admits that Rios did not commit to selling the house at that specific point. However, Rios eventually called Gutierrez in December 2016 and told him she had the deed.[143] Gutierrez was in Arizona when Rios contacted him, and when he returned to town in 2017, Rios did not return his phone calls. At some point in January 2017, Rios attempted to evict Gutierrez and Gutierrez filed suit for breach of an oral agreement. The trial court found that Gutierrez did not meet the burden of proof to establish a meeting of the minds and the existence of a contract. Fundamentally, the formation of a contract requires a meeting of the minds; without a meeting of the minds, there can be no contract.[144] Gutierrez appealed, contending that the evidence was legally and factually sufficient to establish a meeting of the minds. However, it has long been the law in Texas, and most other states, that the statute of frauds requires a contract for sale of real property to be in writing and "signed by the person to be charged with the promise or agreement."[145] Gutierrez contended that the partial performance exception to the statute of frauds applied. Unfortunately, without a contract (written or oral), the partial performance exception is irrelevant. Furthermore, a fundamental component of the partial performance doctrine is that the performance must be clearly connected to fulfillment of the contract. The Court of Appeals for the Eighth District of Texas at El Paso relied upon the Texas Supreme Court's holding in *National Property Holdings, L.P. v. Westergren*, where the supreme court stated that:

> the purpose of the alleged acts of performance must be to fulfill a specific agreement. If the evidence establishes that the party who performed the act that is alleged to be partial performance could have done so for some reason other than to fulfill obligations under the oral contract, the exception is unavailable.[146]

Rios testified that the payments were rental payments, and the trial court found that a tenancy relationship was one of many possible explanations for the payments made between the parties. Gutierrez argued that the absence of a lease was prima facie evidence that he was not a tenant. The court of appeals dismissed this argument by reiterating that the court had previously held that "[o]ne in lawful possession of premises

143. *Id.* at 911.
144. *Id.*
145. *Id.* at 913 (citing USAA Texas Lloyds Co. v. Menchaca, 545 S.W.3d 479, 501 n.21 (Tex. 2018); David. J. Sacks, P.C. v. Haden, 266 S.W.3d 447, 450 (Tex. 2008) ("A meeting of the minds is necessary to form a binding contract.")).
146. *Id.* at 915 (citing Tex. Bus. & Com. Code Ann. § 26.01(a), (b)(4); First Nat. Bank in Dallas v. Zimmerman, 442 S.W.2d 674, 675 (Tex. 1969)).

by permission of the owner or landlord and for no fixed term is a tenant at will and. . . one's status as a tenant at will is not dependent on the existence, and termination, of a lease agreement." [147] The evidence presented at trial indicated that Gutierrez was present in the house with Rios's permission and there was no fixed term, making Gutierrez a tenant at will.

B. Parol Evidence Rule

In *Maxey v. Maxey*,[148] the Court of Appeals for the First District of Texas at Houston reversed the holding of the trial court which relied on parol evidence to interpret a settlement agreement and remanded the case back to the trial court for additional proceedings. *Maxey* involved a dispute between two sisters, Mary and Carolyn, over the terms of a settlement agreement, which was signed after a dispute arose between the sisters regarding how to allocate their parents' assets. The terms of the settlement agreement provided that a particular piece of property located in Marble Falls would be partitioned between the sisters with each sister receiving a parcel valued at $180,957.00. An exhibit attached to the settlement agreement provided that the "Mary Maxey Trust [is] to receive West 50% and Carolyn Maxey Trust [is] to receive East 50%."[149] The settlement agreement contained language establishing that the agreement was binding and irrevocable and also provided that "it may not be contradicted by evidence of prior, contemporaneous, or subsequent oral or written agreements between or among one or more of the parties hereto."[150]

After the settlement agreement was entered into, Mary contended that Carolyn did not equally divide the Marble Falls property and instead she divided the property into two unequal parcels. Mary argued that the division of the tracts favored Carolyn as to both acreage and value of the property. Carolyn contended that during settlement discussions the parties referred to a survey that had been conducted (the Brookes Baker Survey) which divided the property into East and West Tracts of unequal size and value and that both parties agreed to the division of the property according to the parcels depicted on the Brooks Baker Survey. At trial, a real estate appraiser testified that Carolyn's tract of property was worth $1,180,000.00 and was 31.939 acres.[151] Mary's tract of property was worth $935,000.00 and was 27.438 acres.[152] Carolyn argued that the settlement agreement was ambiguous without the use of extrinsic evidence, namely the Brooks Baker Survey, to give meaning to the settlement agreement's reference to "West 50%" and "East 50%." Mary argued that the use of

147. *Id.* at 916 (citing Nat'l Prop. Holdings, L.P. v. Westergreen, 453 S.W.3d 419, 426–27 (Tex. 2015) (internal quotation marks omitted)).
148. *Id.* at 919 (citing ICM Mortg. Corp. v. Jacob, 902 S.W.2d 527, 530 (Tex. App.—El Paso 1994, writ denied)).
149. 617 S.W.3d 207, 207 (Tex. App.—Houston [1st Dist.] 2020, no pet.).
150. *Id.* at 211.
151. *Id.* at 212.
152. *Id.* at 214.

the Brooks Baker Survey violated the parol evidence rule because it used external evidence to vary the meaning of the written terms provided for in the settlement agreement. Mary argued that the reference to the "East 50%" and the "West 50%" was an unambiguous partition of the property. At trial, the court permitted the lawyers who negotiated the settlement agreement to testify about the process. Mary's counsel testified that the property was to be divided in half with each trust receiving equal value. As expected, Carolyn's attorney testified that the Brooks Baker Survey formed the basis of what the parties meant by "East 50%" and "West 50%." The trial court held that the settlement agreement was ambiguous and that Carolyn should recover from Mary for violation of the settlement agreement. The judgment also awarded Carolyn attorney fees. Mary moved for a new trial, alleging, among many issues, that the trial court erred by allowing the introduction of parol evidence in the form of the Brooks Baker Survey and asking the jury to interpret the terms of the settlement agreement which, on its face, was unambiguous.

The parol evidence rule precludes enforcement of prior or contemporaneous agreements,[153] but it does not "prohibit consideration of surrounding circumstances that 'inform, rather that vary from or contradict, the contract text.'"[154] As we have discussed frequently in the last few years, the Texas Supreme Court has actively been putting forth guidance on the use of parol evidence to construe a contract. In *Americo Life, Inc. v. Myer* decided in 2014, the Texas Supreme Court held that "[c]ourts may consider facts and circumstances including 'the commercial or other setting in which the contract was negotiated and other objectively determinable factors that give context to the parties' transaction,'" but that extrinsic facts cannot be used to "create ambiguity."[155] The inquiry is controlled by objective intent so that only objective evidence should be utilized.[156] "Extrinsic evidence cannot be used to show that the parties probably meant, or could have meant, something other than what their agreement stated."[157] As a result, following a recent trend in Texas Supreme Court cases which disfavor finding ambiguity, and relying in particular on the Texas Supreme Court's holding in *Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, which was analyzed at length in last year's update, the Court of Appeals for the First District of Texas at Houston overturned the trial court and found that the settlement agreement was not ambiguous.[158] The trial court had found the settlement agreement ambiguous because it did not explain precisely how the Marble Falls Property was to be divided. Unfortunately for the trial court, the courts in Texas

153. *Id.*
154. *Id.* at 220 (citing Houston Expl. Co. v. Wellington Underwriting Agencies, Ltd., 352 S.W.3d 462, 469 (Tex. 2011)).
155. *Id.* (citing *Houston Expl.*, 352 S.W.3d at 469; Anglo-Dutch Petroleum Int'l Inc. v. Greenberg Peden, P.C., 352 S.W.3d 445, 451 (Tex. 2011)).
156. *Id.* (citing Americo Life, Inc. v. Myer, 440 S.W.3d 18, 22 (Tex. 2014)).
157. *Id.* (citing URI, Inc. v. Kleberg Cty., 543 S.W.3d 755, 768 (Tex. 2018)).
158. First Bank v. Brumitt, 519 S.W.3d 95, 110 (Tex. 2017).

have repeatedly held that silence is not the same as ambiguity.[159] Ambiguity is the use of language that is susceptible to more than one meaning and is legally different from silence.[160] "Courts are without authority to supply the missing terms of a contract which the parties themselves had either not seen fit to place in their agreement, or which they omitted to agree upon."[161]

C. Damages

In *Juen v. Rodriguez*,[162] CSDT and Rodriquez entered into a contract for CSDT to purchase Rodriquez's single-family residence for $759,000.00. The transaction never closed. Rodriguez sued CSDT for fraud and breach of contract. The trial court granted Rodriguez's motion for summary judgment and awarded him damages of $317,000.00. The amount of the award was comprised of the difference between the fair market value of the property and the contract price ($259,000.00) and an additional sum that Rodriquez had to pay to his ex-wife ($58,000.00) because the house sale never closed. CSDT appealed the trial court's summary judgment challenging, among many items, the amount of damages and the award of consequential damages. As a matter of law, damages for breach of contract related to the sale of real estate are calculated as "the difference between the contract price and the property's market value at the time of breach."[163] The fair market value established at the trial court level was based only upon Rodriquez's testimony that he had received an offer of $500,000.00 from another party and his assertion that "[b]ased on market conditions, and the multiple discussions that I have had with my realtors, I believe the current fair market value of the Property at this time is approximately $500,000.00."[164] Unfortunately for Rodriquez, "Texas courts have long held that unaccepted offers to purchase property are no evidence of market value of property."[165] Furthermore, although the "Property Owner Rule" established by the Texas Supreme Court does allow for an owner to testify to the value of their property, it requires that the testimony be based on fact rather than conclusory.[166] The burden that the Texas Supreme Court places on property owners to establish the value of their homes is not high, "[e]vidence of price paid, nearby sales, tax valuations, appraisals, online resources, and any other

159. *Maxey*, 617 S.W.3d at 222.
160. *Maxey*, 617 S.W.3d at 222 (citing Providence Land Servs., LLC v. Jones, 353 S.W.3d 538, 543 (Tex. App.—Eastland 2011, no pet.); E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc., 242 S.W.3d 117, 122 (Tex. App.—El Paso 2007, no pet.)).
161. *Id.* (citing *Providence Land Servs.*, 353 S.W.3d at 543).
162. *Id.* at 223 (quoting Dempsey v. King, 662 S.W.2d 725, 728 (Tex. App.—Austin 1983, writ dism'd)).
163. 615 S.W.3d 362, 362 (Tex. App.—El Paso 2020, no pet.).
164. *Id.* at 366 (citing Barry v. Jackson, 309 S.W.3d 135, 140 (Tex. App.—Austin 2010, no pet.)).
165. *Id.*
166. *Id.* 367 (citing Lee v. Lee, 47 S.W.3d 767, 785 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

relevant factors may be offered to support the claim."[167] Because Rodriquez failed to meet the burden established by the Property Owner Rule, the trial court erred in awarding summary judgment.[168] The Court of Appeals for the Eighth District of Texas at El Paso further held that the evidence Rodriquez offered regarding the contract with his ex-wife was similarly conclusory and did not support the summary judgment award of consequential damages.[169]

Sanchez v. Barragan[170] is another case featuring a transaction that never closed. Leonardo Sanchez and Hector Barragan entered into an agreement for Sanchez to sell property to Barragan. Barragan paid Sanchez the purchase price and Sanchez refused to tender the deed. The trial court rendered summary judgment in favor of Barragan and the court of appeals affirmed the holding.

The facts of the case are fairly straight forward. Between 2009 and 2014, Barragan paid Sanchez a total of $52,000.00 in installment payments pursuant to the terms of their agreement. After the final payment was made, Sanchez refused to tender the warranty deed and bill of sale and Barragan filed suit. Sanchez alleged a number of reasons for failing to honor the agreement, among them that the agreement was unenforceable because it referenced the property as "1223 Tio Dick" when the correct address was "1223 Tio Dink" and the contract also lacked a legal description.[171] The courts in Texas have historically held "[w]ith respect to typographical errors, 'written contracts will be construed according to the intention of the parties, notwithstanding errors and omissions, by perusing the entire document and to this end, words, names, and phrases obviously intended may be supplied.'" [172] Despite deeming it merely a typographical error, the Court of Appeals for the Eighth District of Texas at El Paso also permitted parol evidence of the parties' intent to enter into a contract regarding "Tio Dink." As the court stated, "[i]t is well-established that parol evidence cannot be used to show the intent of parties contracting for the sale of land, and the essential terms of such contract must be included in the contract.[173] However, while 'essential elements [of a contract] may never be supplied by parol[,] [t]he details which merely explain or clarify the essential terms appearing in the instrument may ordinarily be shown by parol[,]' so long as the parol evidence relied upon does 'not constitute the framework or skeleton of the agreement.'"[174]

167. *Id.* (citing Nat. Gas Pipeline Co. of Am. V. Justiss, 397 S.W.3d 150, 155 (Tex. 2012)).

168. *Id.* at 366 (citing *Justiss*, 397 S.W.3d at 159).

169. *Id.* at 369.

170. *Id.* at 368.

171. 624 S.W.3d 832 (Tex. App.—El Paso 2021, no pet.).

172. *Id.* at 836.

173. *Id.* at 840 (quoting Falk & Fish, LLP v. Pinkston's Lawnmower and Equip., Inc., 317 S.W.3d 523, 527–28 (Tex.App.—Dallas 2010, no pet.)).

174. *Id.* at 841.

In *NLD, Inc. v. Huang*,[175] the trial court granted summary judgment and awarded a real estate broker, Huang, $38,250.00 in damages, plus attorney's fees, with respect to an unpaid brokerage commission for a hotel. The owner of the hotel appealed, contending that Huang was not entitled to the commission because there was no written contract. The Court of Appeals for the First District of Texas at Houston affirmed the trial court's decision.[176] Although Huang did not broker the sale in question, he had introduced the parties and was the broker of record for an earlier attempt to sell the same hotel, known as the West Airport Inn. The first sales contract was executed in August 24, 2014, by Lan Nguyen and Mahendra Bhakta. Lan Nguyen signed the contract presumably as the president of NLD, the owner of the property, but the seller on the signature page of the contract was identified as "Lan [Nguyen]/West Airport Inn . . . By: Lan [Nguyen]."[177] The real estate contract listed Huang's employer, Champion Real Estate Group, as the "Principal Broker" and Huang as the "agent." The agreement further provided that the commission would be paid from the seller's proceeds. The sale never closed because the city of Stafford filed a nuisance lawsuit which Bhakta argued was a cloud on title.[178] However, Bhakta failed to give written notice to terminate the contract as required by the date, September 26, 2014, stated in the contract. Notwithstanding Bhatka's failure to terminate the contract, Huang circulated a "Release of Earnest Money" form, which was signed by Nguyen, Bhakta, and Huang, on behalf of Champion. The form stated:

> NOTICE: This form provides for the release of the parties, brokers, and title companies from all liability under the contract (not just for disbursement of earnest money). Do not sign this form if it is not your intention to release all the persons signing this form from all liability under the contract. READ THIS RELEASE CAREFULLY. If you do not understand the effect of this release, consult your attorney BEFORE signing.
>
> A. The undersigned Buyer and Seller release *each other, any broker*, title company, and escrow agent from any and all liability under the aforementioned contract.
>
> B. The undersigned direct Caryn Tran/Chicago Title Co. (escrow agent) to disburse the earnest money as follows: $10,000—to Mahendra Makan Bhakta.[179]

In May 2015, the city non-suited their lawsuit and in April 2015, NLD deeded the hotel to Ansdil LLC. The 2015 contract was between a person named Usha Bhakta and Nguyen, on behalf of NLD and NLAVICO. Bhakta had a forty percent ownership interest in Ansdil with his brother

175. *Id.* (citing Wilson v. Fisher, 188 S.W.2d 150, 152 (Tex. 1945)).
176. 615 S.W.3d 444, 446 (Tex. App.—Houston [1st Dist.] 2019, pet. denied).
177. *Id.* at 453.
178. Id. at 446.
179. *Id.* at 447.

owning the remainder.[180] The sale was structured differently than the original, with a reduced purchase price of $1,275,000.00 (compared to $1,400,000.00) and NLD providing ten-year seller financing followed by a balloon payment. After the sale closed and Huang was not paid a commission, Huang sued Nguyen for breach of contract. Nguyen and NLD claimed that (1) Section 1101.806(c) of the Texas Occupations Code, which is a section of the Real Estate License Act (RELA), barred the action because the first sales contract was not signed by NLD but by Nguyen and (2) the consummated transaction was to a different buyer on different terms.[181] The RELA states in part:

> A person may not maintain an action in this state to recover a commission for the sale or purchase of real estate unless the promise or agreement on which the action is based, or a memorandum, is in writing and signed by the party against whom the action is brought or by a person authorized by that party to sign the document.[182]

Courts in Texas have historically required "strict compliance" for a broker to recover fees under the RELA and found that commission agreements must specifically comply with the following:

> (1) be in writing and must be signed by person to be charged with commission; (2) promise that definite commission will be paid or refer to written commission schedule; (3) state name of broker to whom commission is to be paid; and (4) either itself or by reference to another existing writing, identify with reasonable certainty land to be conveyed.[183]

At trial, evidence was introduced that: (1) NLD owned the property, (2) NLD's address was the same as the hotel, and (3) W. Airport Inn & Suites was a DBA for NLD.

The courts in Texas have consistently held "a corporation may act only through its agents."[184] Texas courts have also held that "an agent need not disclose the identity of the principal in order to act on behalf of that principal [and] the undisclosed principal may be bound to a contract if the agent, acting with authority, was intending to act on behalf of the principal."[185] Because NLD was the owner of the hotel, not Nguyen, Nguyen could only have executed the first contract on "behalf of her principal, NLD."[186] In addition to arguing that the contract was between Nguyen and Bhakta, NLD argued that the contract was superseded by the Earnest Money Release which, specifically by its terms, only provided for a release by Buyer and Seller *of each other* and "any broker, title company, and escrow agent from any and all liability under the afore-

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180. *Id.* (emphasis added).
181. *Id.* at 448.
182. *Id.*
183. Tex. Occ. Code Ann. § 1101.806(c).
184. Huang, 615 S.W.3d at 449 (citing Lathem v. Kruse, 290 S.W.3d 922, 925 (Tex. App.—Dallas 2009, no pet.)).
185. *Id.* at 450 (citing In re Vesta Ins. Grp., Inc., 192 S.W.3d 759, 762 (Tex. 2006)).
186. *Id.* (citing Latch v. Gratty, Inc., 107 S.W.3d 543, 545 (Tex. 2003) (per curiam)).

mentioned contract."[187] The release did not mention the broker releasing any claim. The court relied on the decision by the Court of Appeals for the Second District of Texas at Fort Worth in *Frady v. May*[188] and the Court of Appeals for the First District of Texas at Houston in *Morgan v. Letellier*[189] to conclude that NDL owed the commission to Huang because the contract under which they had agreed to pay the commission was still intact and the transaction Huang negotiated was ultimately consummated.[190]

VI. CONSTRUCTION MATTERS

A. Arbitration

In *Lennar Homes of Texas Land & Construction, Ltd. v. Whiteley*,[191] the homeowner sued, asserting various claims connected to the construction of her home, and the contractor argued that the claims were subject to mandatory arbitration as a result of arbitration clauses that had been: (1) included in the warranty deed and (2) were inserted in a separate home warranty agreement. The house in question was sold to the homeowner by a third-party and the homeowner did not have direct privity with the contractor. The issue of most interest to real estate practitioners is the contractor's claim that the homeowner was bound by the arbitration agreements inserted in the special warranty deed because the arbitration agreement was a covenant running with the land.[192] The deed in question contained the following language (emphasis added):

> This conveyance, however is made subject to:
>
> A. Any and all restrictions, encumbrances, easements, covenants, conditions, outstanding mineral interests held by third parties, and reservations, if any, relating to the hereinabove described property as the same are filed for record in the County Clerk's Office of Galveston County, Texas.
> B. The arbitration provisions referred to on Exhibit "A" attached hereto.[193]

In the state of Texas, there are four requirements for a covenant to run with the land: (1) it must touch and concern the land; (2) it relates to a thing in existence or binds the parties; (3) is intended to run with the land; and (4) the successor to the burden has notice.[194] The important requirement in this situation is what it means to "touch and concern the

187. *Id.* at 451.
188. *Id.* at 453.
189. *Id.* at 451 (citing Frady v. May, 23 S.W.3d 558, 558 (Tex. App.—Fort Worth 2000, pet. denied)).
190. *Id.* (citing Morgan v. Letellier, 677 S.W.2d 165, 165 (Tex. App.—Houston [1st Dist.] 1984, writ ref'd n.r.e.)).
191. *Id.* at 453.
192. 625 S.W.3d 569, 569 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).
193. *See id.* at 576.
194. *Id.* at 576.

land."[195] In *Blasser v. Cass*,[196] the Texas Supreme Court relied on a standard set forth in the Restatement of the Law of Property to conclude that a covenant running with the land is "one intertwined with and affecting the 'physical use or enjoyment' of the property."[197] The Court of Appeals for the Fourteenth District of Texas at Houston then examined a long line of Texas cases in which the courts have "held that covenants running with the land are those affecting the nature, quality, or the value of the subject property."[198] On the other hand, covenants that do not "burden or restrict" the use of property do not run with the land.[199] As a result, the court concluded that the purpose of the arbitration provision was to provide an alternative to traditional litigation, which is a benefit to the parties and not the property.[200] Arbitration does not concern the "physical use or enjoyment of the . . . property."[201] The court of appeals also went on to discuss the six different scenarios in which the Texas Supreme Court has held that a "nonsignatory to an arbitration agreement may be bound by its terms."[202] The court of appeals felt that interpreting current jurisprudence to allow covenants to run with the land to require binding arbitration would be a significant expansion of the parameters set out in current jurisprudence and require the adoption of new principles of law unsupported by existing case law.[203]

The issue of whether a covenant runs with the land was also discussed in the context of the Sanchez Energy Corporation's bankruptcy in *Occidental Petro. Corp. v. Sanchez Energy Corp.*[204] In the case, the U.S. Bankruptcy Court for the Southern District of Texas distinguished between real property covenants that could not be rejected and executory

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195. *Id.* at 576–77 (citing Inwood N. Homeowners' Ass'n, Inc. v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).

196. *Id.* at 576.

197. 314 S.W.2d 807, 807 (Tex. 1958).

198. *Lennar Homes of Tex. Land & Constr., Ltd.*, 625 S.W.3d at 576 (citing *Blasser*, 314 S.W.2d at 809 (Tex. 1958)).

199. *Lennar Homes of Tex. Land & Constr., Ltd.*, 625 S.W.3d at 577 (*See, e.g.*, Inwood N. Homeowners' Ass'n, Inc., v. Harris, 736 S.W.2d 632, 635 (Tex. 1987) (a "covenant to pay maintenance assessments for the purpose of repairing and improving the common areas and recreational facilities" in the neighborhood was a covenant running with the land); Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 910–11 (Tex. 1982) (agreement to assign interests in oil and gas leases was a covenant running with the land that "clearly affected the nature and value of the estate conveyed"); MJR Oil & Gas 2001 LLC v. AriesOne, LP, 558 S.W.3d 692, 700–04 (Tex. App.—Texarkana 2018, no pet.) (right of first refusal in certain oil and gas leases was a covenant running with the land); Montfort v. Trek Res., Inc., 198 S.W.3d 344, 355–56 (Tex. App.—Eastland 2006, no pet.) (obligation to furnish water to grantee's house and to grantee for purpose of watering livestock was a covenant running with the land); Ehler v. B.T. Suppenas Ltd., 74 S.W.3d 515, 520–21 (Tex. App.—Amarillo 2002, pet. denied) (covenant restricting alcohol sales on servient estate met requirements for covenant running with the land)).

200. *Id.*

201. *Id.* at 578.

202. *Id.*

203. *Id.* at 576 (*See* Jody James Farms, JV v. Altman Group, Inc., 547 S.W.3d 624, 633 (Tex. 2018)).

204. *Id.*

obligations contained in a contract that could be rejected.[205] The bankruptcy court concluded that a Development Agreement which required the drilling of wells or the payment of a fine was an executory contract that could be rejected and not a covenant that ran with the land, whereas agreements dedicating hydrocarbon production to a gathering system were covenants that could not be rejected. As the bankruptcy court explained, "the appropriate analysis is" to determine "what benefit was previously bestowed by the debtor on the non-rejecting party that remains post-rejection and what future performance by the debtor is excused by the rejection."[206] Specifically, "dedications of its oil and gas and grants of surface easements formed real property covenants which survive rejection[.]"[207]

VII. TITLE/CONVEYANCES/RESTRICTIONS

A. Adjudication of Water Rights

Pape Partners, Ltd. v. DRR Family Properties LP[208] concerns the issue of whether the courts or TCEQ have the right to make "water rights adjudications." The majority of the Waco Court of Appeals held in the case that the "[l]egislature has vested the TCEQ with the exclusive jurisdiction to determine water rights," which required the plaintiff in this case to exhaust their administrative remedies prior to turning to the courts.[209] The dissent by Justice Gray which he entitles "The Coon Hunt," is not only one of the most amusing dissents in recent memory, it is also one of the most articulate, clear, and convincing opinions. Justice Gray likens the majority's opinion, which requires the plaintiff to exhaust their judicial remedies before turning to the courts to adjudicate a property rights issue, to a coon dog barking up the wrong tree.[210] Although Justice Gray acknowledges that the Texas Water Code uses the phrase "water rights adjudication" when describing the jurisdiction of the TCEQ, Justice Gray believes this phrase has a long-standing and accepted "short-hand" reference to the powers to "regulate the conservation of natural resources of surface water by determining the amount of use, place of use, purpose of use, point of diversion, rate of diversion, and in the appropriate situation, included, the acreage to be irrigated."[211] Justice Gray then continues to discuss how unworkable it would be to require every "will contest, every contract, every deed, and every other dispute" revolving around a water right to be first decided by TCEQ while the similar dispute to land (adjacent to said water) would be decided by the courts with the potential for

205. *In re* Sanchez Energy Corp. 631 B.R. 847, 847 (Bankr. S.D. Tex. 2021).
206. *Id.* at 859.
207. *Id.* at 859 (citing In re Chesapeake Energy Corp., 622 B.R. 274, 281 (Bankr. S.D. Tex. 2020)).
208. *Id.* at 863.
209. 623 S.W.3d 436, 436 (Tex. App.—Waco 2020, pet. granted).
210. *Id.* at 441.
211. *Id.* at 442 (Gray, C.J., dissenting).

contradictory results.[212] The Texas Supreme Court granted the plaintiff's petition in January of 2022 and may adamantly agree with Justice Gray's dissent, which is the most reasonable and practical interpretation of the Texas Water Code.

B. Ratifications

BPX Operating Co. v. Strickhausen[213] is a Texas Supreme Court case that sounds a note of caution for legal practitioners of all fields. The facts of the case are very straightforward. Margaret Strickhausen leased her minerals to BPX. The lease required Ms. Strickhausen to give her express written consent to any mineral pooling arrangements and stated explicitly that without such consent "pooling for oil and gas is expressly denied and shall not be allowed under any circumstances."[214] Despite the terms of the lease, BPX pooled the minerals and sent Strickhausen a letter on September 20, 2012, asking her to sign a pooling consent agreement. This started a series of negotiations between Strickhausen's attorney and BPX. The attorney for Strickhausen attempted to negotiated additional financial concessions in return for permitting the pooling. The parties were unable to agree, and BPX ultimately warned that if the parties couldn't reach an agreement the royalties would have to be "placed in suspense." Finally, on February 18, 2013, BPX filed a certificate of pooling with the Railroad Commission and on February 20, 2013, sent Strickhausen a royalty check for $249,901.73. The check contained the notation "WK UNIT 4 1H." On March 8, Strickhausen's attorney sent a letter to BPX rejecting the most recent settlement offer and making a counter offer which had an expiration date of March 18, 2013. BPX never responded to the counteroffer and Strickhausen deposited the check on March 11, 2013. Strickhausen continued to deposit royalty checks received thereafter which cumulatively totaled over $700,000. Strickhausen sued BPX on August 1, 2014 over the forced pooling. BPX took the position that Strickhausen had ratified the pooling by depositing the royalty checks. Strickhausen countered by arguing that if the minerals had not been pooled, she would be entitled to more royalty money than she had received and she was just depositing a down payment on what she was owed. The trial court granted summary judgment for BPX and Strickhausen appealed. The Court of Appeals for the Fourth District of Texas at San Antonio reversed, finding that there was an issue of fact regarding ratification. BPX appealed the ruling and the Texas Supreme Court took the case. The reason this case is of interest to petitioners is the supreme court's narrow five to four opinion which affirmed the holding of the court of appeals. The dissent in the case believes the majority's holding flies in the face of a strong line of Texas case law on ratification, particularly with respect to royalty cases. The dissent begins by stating

212. *Id.* at 443 (Gray, C.J., dissenting).
213. *Id.*
214. 629 S.W.3d 189, 189 (Tex. 2021).

that the law has long recognized that "actions may speak louder than words."[215] As the dissent explained in some detail, "[i]mplied ratification occurs when a person (1) has knowledge of all the material facts regarding a prior, unauthorized act, and (2) engages in conduct that demonstrates an intent to retroactively authorize the act or that is inconsistent with an intent to reject it.[216] Furthermore, in the absence of a disputed fact, ratification can be decided as a matter of law.[217] In the dissent's opinion, the evidence was clear that Strickhausen knowingly deposited the royalty checks. A long line of Texas cases have clearly established that "accepting royalties from the pool" ratifies the pooling.[218] This case may be indicative of many recent examples where the supreme court has bent over backwards to mold the law so that it "gives" the result they desire regardless of whether the facts of the case are actually supported by jurisprudence. The dissent's arguments are strong, compelling, and clearly supported by the historical weight of case law. However, it is likely that the majority's decision is not a sea change on the law of ratification but is an anomaly, and should be treated as such by practitioners.

C. Conveyances

In *Parker v. Jordan*, the Court of Appeals for the Eighth District of Texas at El Paso examined a conveyance of a vested remainder interest. The facts are long and somewhat convoluted, so we have simplified the fact pattern as the facts are not relevant to the holding or for the lesson for practitioners. The basic facts are as follows, J. Loyd Parker, III's father (Loyd Jr.) and mother (Ruthie) owned fifty percent of the Cottonwood Ranch as community property and Ruthie separately owned a one-sixth interest. When Loyd Jr. died, his will devised "all of [his] estate, both real and personal, and both community and separate to [his] wife [Ruthie] in a life estate with remainder to [his] children[,]"[219] Loyd III and Pamela. As a result, Ruthie owned her one-sixth interest, a one-fourth interest (one-half of the 50% she owned with Loyd), and had a

215. *Id.* at 192.

216. *BPX Operating Co.*, S.W.3d at 204 (citing *In re* Occidental Chem. Corp., 561 S.W.3d 146, 158–59 (Tex. 2018) ("Actions speak louder than words."); Republic v. Skidmore, Dallam 581, 582 (Tex. 1844) ("Nor can much reliance be placed on his loose and idle declarations, that he intended to return to Texas. Actions speak louder than words."); *see also* Honig v. Doe, 484 U.S. 305, 319 n.6, 108 S. Ct. 592, 98 L. Ed. 2d 686 (1988) ("[W]e believe respondent's actions over the course of the last seven years speak louder than his counsel's momentary equivocation during oral argument."); Colonial Refrigerated Transp., Inc. v. Mitchell, 403 F.2d 541, 549 (5th Cir. 1968) ("In law, as elsewhere, actions may speak louder than words."); Restatement (Third) of Agency § 1.03 cmt. e (Am. L. Inst. 2006) ("For example, if a lawyer accepts a retainer and files a complaint on behalf of a person, a client-lawyer relationship results although the lawyer has disclaimed in writing any intention to have such a relationship. Actions may speak louder than words.").

217. *BPX Operating Co.*, S.W.3d at 204 (citing Rosenbaum v. Tex. Bldg. & Mortg. Co., 167 S.W.2d 506, 508 (Tex. [Comm'n Op.] 1943)).

218. *Id.* at 205 (citing Country Hollow Joint Venture v. Enter. Cap. Co., N.V., 979 F.2d 1534 (5th Cir. 1992) (applying Texas law)).

219. *Id.* at 189 (citing Montgomery v. Rittersbacher, 424 S.W.2d 210, 214–15 (Tex. 1968)).

separate one-fourth life estate with the remainder going to Loyd III and Pamela. In 1990, Ruthie deeded her undivided one-fourth interest to Loyd III and Pamela, leaving Loyd III and Pamela with one-eight each. Loyd III then decided to gift his one-eighth interest to his daughters, Elise and Allison. The warranty deed conveyed "all of [his] right, title and interest in and to [the Cottonwood Ranch]." The deed did not specify whether Loyd III was gifting his one-eighth interest he received from Ruthie or his one-eighth remainder interest he would receive after Ruthie's death. Ruthie died in 2006 and Loyd III and Pamela inherited the remainder. From 2006 to 2013, there were multiple documents signed and actions taken by the parties in which Elise confirmed her belief she owned one-sixteenth interested in Cottonwood. In 2013, a new entity succeeded to the leases and informed Elise that they thought she owned one-eighth of Cottonwood. This was based on the assumption that Loyd's gift deed passed not only his current ownership interest but his contingent remainder. Loyd died in 2014, and Kathy, his wife, inherited his real and personal property. In 2016 Elise was credited with a one-eighth interest in a division order, and Kathy filed a trespass to try title action. The trial court granted summary judgment in favor of Elise, holding the gift deed conveyed the remainder interest. As we have discussed in previous years, a deed in Texas is generally construed to convey the greatest estate the terms of the instrument will permit.[220] However, there is an exception to this general rule with respect to future interests, "an instrument is not given effect as an assignment of an expectancy or future interest unless it clearly manifests the intention of the prospective heir to sell, assign or convey his expectancy or future interest."[221] Because Ruthie was still alive and had a life estate in Cottonwood, Loyd's interest was only a future interest and could not be conveyed by the gift deed absent a clear and express intention to do so.

The issue in *Wheatley v. Farley*[222] was the requirement for "delivery" of a deed. Delivery of a deed is a fundamental component of conveyance by deed.[223] Delivery encompasses two elements: "(1) the grantor must place the deed within the control of the grantee and (2) with the intention that the instrument become operative as a conveyance."[224] However, physical possession over the deed is not required for "delivery" to have occurred; "control" is sufficient and dependent upon the intent of the grantor.[225] In

220. *Id.* at 108.
221. *Id.* at 116.
222. *Id.* (citing Clark v. Gauntt, 161 S.W.2d 270, 273 (Tex. 1942); *see also* McConnell v. Corgey, 262 S.W.2d 944, 947 (Tex. 1953); *see also* Cavazos v. Cavazos, 246 S.W.3d 175, 180 (Tex. App.—San Antonio 2007, pet. denied) ("There is no dispute that a prospective heir may convey an estate that commences in the future, in the same manner as by a will . . . But, such an instrument must clearly manifest the intention of the prospective heir to sell, assign or convey his expectancy or future interest.")).
223. 610 S.W.3d 511, 513 (Tex. App.—El Paso 2020, pet. denied).
224. *Id.* at 516 (citing Hernandez v. Hernandez, 547 S.W.3d 898, 901 (Tex. App.—El Paso 2018, pet. denied); *accord* Noell v. Crow-Billingsley Air Park Ltd. P'ship, 233 S.W.3d 408, 415 (Tex. App.—Dallas 2007, pet. denied)).
225. *Id.* at 517 (citing *Hernandez*, 547 S.W.3d at 901; *accord Noell*, 233 S.W.3d at 415).

the case at hand, Travis Kirchner, who was jailed for murdering his mother, executed six warranty deeds which "purportedly conveyed [property] to Judith ("Judy") Wheatley."[226] The deeds were dated November 30, 2011, but were not recorded until June 26, 2017, when they were discovered in Judy's property after she had passed away. Travis passed away before Judy and all of his belongings were moved into her house, so there was no evidence as to whether the deeds were actually in Judy's possession or in Travis's possession. Unfortunately for Judy and her decedents, Travis also took several actions after the date on the deeds that indicated he still believed he owned the property. For example, in a holographic will, he listed the properties as his possessions and willed them to someone besides Judy. Travis also took actions to attempt to sell the properties. Based on these facts, the trial court found that "no inference of delivery can be made from the record." The Court of Appeals for the Eighth District of Texas at El Paso reversed, relying on the Texas Supreme Court's holding in several cases that there is a rebuttable presumption of delivery by the grantor when a deed is found in the possession of a grantee.[227] Although this is a rebuttable presumption, the court of appeals found with the facts of this case that the "evidence of non-delivery is not sufficient to overcome the presumption of delivery".[228] As a result, the trial court erred in granting the directed verdict. The sole dissent in the case, Chief Justice Alley, agreed with the trial court that there was not sufficient evidence to support delivery.[229]

D. Quiet Title/Trespass-To-Try-Title

Sustainable Texas Oyster Resource Management, LLC. v. Hannah Reef, Inc.[230] is another case questioning whether trespass-to-try-title or declaratory relief was the correct judicial path. The case concerned oystermen in Galveston Bay who were accused of trespass by a party who claimed to have a superior lease granted from the state. In the case at hand, the Texas Parks and Wildlife Department had issued oyster production permits, leases and licenses for oyster fishing in Galveston Bay to six oystermen and the Chambers-Liberty Counties Navigation District had issued a Coastal Surface Lease to Sustainable Texas Oyster Resource Management (STORM) in 2014. The Court of Appeals for the First District of Texas at Houston concluded that "the declaratory-judgment claim regarding whether STORM had the right under the Coastal Surface Lease to exclude licensed oyster fishermen from the public fishing areas" was different from a trespass-to-try-title claim and not required to be brought together. The oystermen were merely seeking a declaration that the defendant did not have the authority to obstruct the oystermen's ac-

226. *Id.* (citing *Noell*, 233 S.W.3d at 416).
227. *Id.* at 513.
228. *Id.* at 518.
229. *Id.*
230. *Id.* at 520.

cess, given the oystermen possessed permits and licenses which were "non-possessory interests" that they were seeking to assert prevented STORM from excluding them from the fishing grounds. As a result, declaratory relief under the Declaratory Judgment Act was an appropriate remedy. This is similar to how the Texas Supreme Court has held that that the trespass-to-try-title statute does not apply to a claimant who seeks to establish an easement, because such a claimant does not have such a possessory right. "An easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes."[231]

Ridgefield Permian, LLC v. Diamondback[232] concerned the foreclosure of a tax lien against a royalty interest. As usual with cases involving mineral interests, the history is somewhat complex and not entirely relevant to understanding the court's holding, so we have simplified it where possible. A large portion of land and minerals in question had been held by members of the Griffith family for many years. The minerals were leased by various members of the Griffith family to Meriwether, reserving a one-eighth royalty. The lease contained a primary term of three years and was extended into its secondary term by the drilling and production from a well drilled on the tract. The Griffith family failed to pay the taxes on the royalty and in 1999 Reeves County held a foreclosure sale. The interests owned by the Griffith family were ultimately sold to Magnolia. In 2012, the well stopped producing, which caused the lease to terminate. In 2015, Magnolia believed that the property they had bought, which originated with the sheriff's sale, included the possibility of reverter and they subsequently leased the property which was ultimately transferred to Diamondback. In 2016, the Griffith family trust executed a lease to Ridgefield. Ridgefield and the Trust sued Magnolia and Diamondback seeking to quiet title. The issue in the case was whether the possibility of reverter in the minerals leased to Meriwether was foreclosed upon and conveyed by the sheriff's deed. The Court of Appeals for the Eighth District of Texas at El Paso began its analysis by noting that the possibility of reverter is a non-taxable interest.[233] Furthermore, the possibility of reverter remained attached to the surface estate and the taxes on the surface estate were fully paid, and continued to carry the possibility of a reverter. The court also relied on the plain wording of the Tax Judgment which clearly listed the interest being foreclosed as only the royalty interest.

Concho Resources Inc. v. Ellison[234] is a convoluted and complicated trespass-to-try-title case between the lessees of adjacent mineral estates

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231. Sustainable Tex. Oyster Res. Mgmt., L.L.C. v. Hannah Reef, Inc., 623 S.W.3d 851, 851 (Tex. App.—Houston [1st Dist.] 2020, pet. denied).

232. *Id.* at 865 (citing Lance v. Robinson, 543 S.W.3d 723, 736 (Tex. 2018)).

233. Ridgefield Permian, LLC v. Diamondback E & P LLC, 626 S.W.3d 357, 366 (Tex. App.—El Paso 2021, pet. filed).

234. *Id.* at 365 (citing Texas Tpk. Co. v. Dallas Cnty., 271 S.W.2d 400, 478 (Tex. 1954) (holding that, like a contingent remainder in property, a possibility of reverter is not a taxable title)).

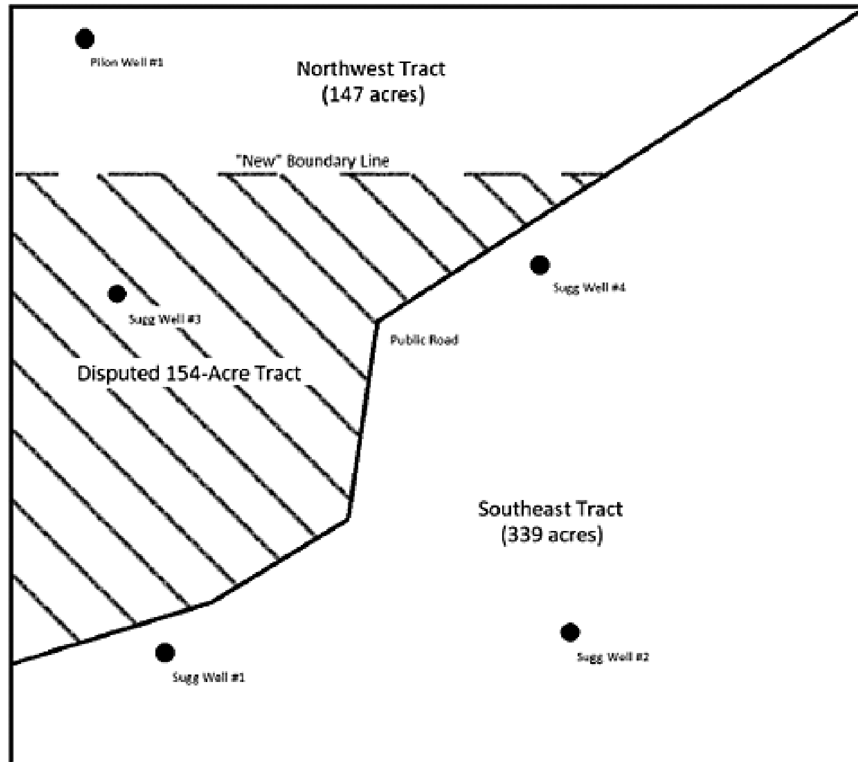
about a disputed 154 acre tract of land. Although the facts are complex, the takeaway for legal practitioners is quite simple. The history and the genesis of the dispute begin 1925 but aren't particularly relevant to the holding and will not be addressed in this paper. The relevant fact for the analysis is that the original conveyances from the early 1900s described the land being conveyed as being either north and west of a public road or south and east. Unfortunately, the same deeds also contained incorrect acreage and legal descriptions that would lead one to believe that, but for the description of the land being southeast of the public road, the land actually formed a rough rectangle covering the entire southern portion of the 640 acre unit and included approximately 154 acres north of the public road. The Northwest deed described the conveyance as 147 acres when it was in fact 301 acres. The southeast deed described the land as being 493 acres when it is fact 339 acres. The northwest tract of land was conveyed many times over the intervening years. Ultimately, Samson Resources Company was granted an oil and gas lease over the southern land. In 2008, Samson prepared a "Boundary Stipulation of Ownership and Mineral Interest" between the owners of the southeast tract mineral estate (Farmer) and the owners of the northwest tract mineral estate (Richey). The purpose of the stipulation was to establish the location of the 143 acre tract of land and the 493 acre tract of land. The stipulation was signed by both owners in September 2008 and recorded. Meanwhile, Samson sent a copy of the stipulation to Ellison, the lessee of the Richey mineral interests, pursuant to leases called the "Pilon Leases." The letter requested that Ellison "signify your acceptance of the description of the Richey 147 acre tract as set out in the Stipulation (your leasehold), by signing both copies of the letter in the space provided below and returning one copy[.]"[235] The letter also stated "[u]pon your acceptance, a more formal and recordable document will be provided." Ellison signed and returned the letter. The "more formal" document was never provided. Samson subsequently drilled a well in the disputed tract. Ellison died in 2011, and his wife filed suit arguing that the Pilon Leases covered all land located north and west of the public road. The trial court found that the stipulation was an enforceable agreement between Ellison and Sampson and that Ellison failed to comply. Ellison appealed and the court of appeals reversed and remanded. In rendering its judgment for Ellison, the Court of Appeals for the Thirteenth District of Texas at Corpus Christi—Edinburg held that "the boundary stipulation is void and thus incapable of being ratified."[236] The court of appeals reasoned that earlier deeds were unambiguous as to the public road being the "true" location of the boundary and the subsequent agreement to establish a different boundary line was void.[237] The Supreme Court of Texas re-

235. 627 S.W.3d 226, 226 (Tex. 2021).

236. *Id.* at 230.

237. *Id.* at 232 (citing Ellison v. Tree Rivers Acquisition LLC, 609 S.W.3d 549, 562 (Tex. App.—Corpus Christi 2019, pet. granted)).

versed, stating that "settlements of boundary are common, approved and encouraged by the courts, and ought not to be disturbed," regardless of whether "it was afterwards shown that they had been erroneously settled."[238] The supreme court also agreed with Concho's argument that to hold otherwise would result in uncertainty as people would never know whether a boundary settlement was effective until it was reviewed by a court thereby discouraging the private sentiment of disputes.[239]



E. Correction Deeds

In perhaps the most important case of the year, *Broadway National Bank v. Yates Energy Corp.*,[240] the Supreme Court of Texas examined Section 5.029 of the Texas Property Code, which allows for the correction of a "material error in a recorded original instrument of conveyance by agreement."[241] The case was very divisive, with the majority opinion of the supreme court consisting of only five justices while the dissenting opinion was joined by four. The case revolved around the interpretation of the words "if applicable" as used in Section 5.029 of the Texas Property

238. *Id.* at 235.
239. *Id.* at 234 (citing Levy v. Maddux, 16 S.W. 877, 878 (Tex. 1891)).
240. *Id.* at 235.
241. Broadway Nat'l Bank v. Yates Energy Corp., 631 S.W.3d 16, 16 (Tex. 2021).

Code. The history of the controversy is rather straightforward. Mary Frances Evers created a trust for her children. The trust agreement divided the property equally among Mary's four children, but one child's share (John) was put into a separate supplemental needs trust for the duration of his life with the corpus of the trust to be divided between one of Mary's daughters and her grandsons after John's death. After Mary's death, the trustee of the trust, Broadway National Bank, executed mineral deeds that mistakenly divided property in Gonzales and DeWitt counties evenly among the children instead of granting John a life estate in the property. In 2006, the trust unilaterally executed and filed a "Corrected Mineral Deed" to fix the mistake. At the time, the mineral interests had been leased to Yates Energy Corporation, so the trust sent a notice to Yates with instruction to pay royalties per the corrected deed. In 2012, John conveyed his royalty interest under the 2005 deed to Yates. Subsequently, Yates assigned seventy percent of the royalty interests to EOG Resources with the remaining thirty percent assigned to other parties. A title examination by EOG revealed that the correction deed had only been executed by the Bank, in its role as trustee for the grantor and not by the grantees. As a result in 2013, the Bank filed a second correction deed that was signed by the Bank and by all of the grantees under the 2005 deed. After John died, a dispute arose over the conveyance to Yates. The Bank alleged that Yates (and its subsequent assignees) acquired John's life estate in the minerals and upon John's death the fee reverted to the remaindermen. Yates contended that via the 2005 deed John acquired fee simple absolute and the 2012 deed from John to Yates conveyed the full interest to Yates. Yates contended that the 2005 and the 2013 correction deeds did not affect Yates's title. The Bank sought declaratory relief from the probate court. The probate court found for the Bank and the remaindermen and also held that Yates was not a bona fide purchaser because the 2006 correction deed provided notice. The Court of Appeals for the Fourth District of Texas at San Antonio reversed, holding that the 2013 correction deed was invalid and that Yates (and subsequent assignees) were the holders of the fee simple interest in the property.

Section 5.029 of the Texas Property Code provides in relevant part as follows:

> (1) executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, *if applicable*, a party's heirs, successors, or assigns; and
> (2) recorded in each county in which the original instrument of conveyance that is being corrected is recorded.[242]

The controversy in the case centers around the phrase "if applicable." The Bank contends that the phrase requires successors and assigns to sign a correction instrument only if the original parties are not available to sign. Yates contends that the correction deed cannot be valid unless it is

242. *Id.* at 18 (citing TEX. PROP. CODE ANN. §5.029).

signed by the successors and assigns, the parties who currently own the property. The Supreme Court of Texas examined the statute in depth and found that the legislative scheme contained specific protections for bona fide purchasers, which would not have been necessary if the legislature intended for all current owners of the property to execute a deed. Specifically Section 5.030 states "[a] correction instrument is subject to the property interest of a bona fide purchaser" that was "acquired on or after the date the original instrument" was recorded "and before the correction instrument" was recorded.[243] As the supreme court stated, "[a]fter all, those protections are necessary only when a bona fide purchaser has not consented to the change but still is affected by it—a situation that may occur when the original parties to an instrument all sign on to a correction instrument."[244]

Furthermore, as the supreme court pointed out, if the legislature had intended for all owners of the property to be required to sign a material correction deed, they could have said it more directly. As a result, the supreme court reversed the court of appeal's holding that the correction deed was invalid.[245] The supreme court also addressed the second argument made by Yates that the correction deed was filed eight years after the original conveyance and was, therefore, outside the four-year statute of limitations. Yates alleged that the declaratory judgment action was in fact a suit to reform the deed. The court disagreed with Yates stating that "[c]auses of action and self-help provisions are not interchangeable concepts."[246] As the supreme court pointed out, "the Property Code does not require that parties correcting an instrument pursuant to Section 5.029 do so within four years of the mistake."[247] Furthermore, the legislative intention was to allow for the correction of mistakes without having to take action in court.[248]

Four justices joined in the dissent, arguing that the majority's holding essentially eliminates the words "if applicable" from the statute and is nonsensical because it allows for someone who no longer owns an interest in a property or regrets a previous decision to part with property to abuse the process.[249] The dissent argues that the majority's holding essentially allows "former owners to strip current owners of their property without notice, much less their assent to a correction—that is, without due course of law."[250] The dissent also points out an incongruence between the material and non-material correction provision. As interpreted by the majority, a current owner of property receives more statutory protection when

243. TEX. PROP. CODE ANN § 5.029.
244. *Id.* at 37 (citing TEX. PROP. CODE ANN. § 5.030(c)).
245. *Id.* at 26.
246. *Id.* at 27.
247. *Id.* at 28.
248. Broadway Nat'l Bank v. Yates Energy Corp., 631 S.W.3d 16, 28 (Tex. 2021).
249. *Id.* (citing Myrad Properties, Inc. v. LaSalle Bank Nat'l Ass'n, 300 S.W.3d 746, 749–750 (Tex. 2009); Tanya L. McCabe Trust v. Ranger Energy, LLC, 531 S.W.3d 783, 794 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)).
250. *Id.* at 30.

a non-material correction is made than when a material correction is made. When a non-material correction is made, the current owner must be informed, but no such protection exists for material corrections, adding further support to the dissent's position that current owners are intended to be the signatories of the material correction deed, not the parties who no longer own the interest.[251] Finally, the dissent argues that the majority's interpretation places a heavy burden on current property owners to constantly check property records and ensure that they have not had their title stripped from them without notice; the dissent argues that the majority's interpretation now subjects those owners to the vagaries of adverse possession and statutes of limitations that could prevent them from reclaiming land that is rightfully theirs. The dissent concludes its analysis by referencing the Standard 2.20 of the Texas Title Examination Standards which currently considers a correction effective only if "joined by all parties whose interests are effected."[252]

F. Rule Against Perpetuities

Yowell v. Granite Operating Co.[253] is the second Texas Supreme Court case in many years dealing with the Rule Against Perpetuities. The background to the case is rather complicated, with a series of assignments and corporate acquisitions and has been simplified to allow for ease of discussion. After multiple assignments, Granite Operating Company was the lessee under an oil and gas lease that was originally entered into by Aikman Oil in 1986 (the 1986 lease) and was assigned to Haber before making its way to Granite. Aikman reserved an ORRI which purported to apply to "extensions, renewals or new leases executed by Haber or its successors in interest." Ultimately, Yowell obtained Aikman's reserved ORRI. In 2007, Amarillo Production Company executed a top lease with the same mineral owner covering the same property as the 1986 lease (the 2007 lease). Granite refused to pay Yowell the royalty on the 2007 lease and Yowell sued. The trial court and the Court of Appeals for the Seventh District of Texas at Amarillo found that the rule of perpetuities prevented the ORRI from attaching to the 2007 lease and refused to apply Section 5.043 of the Texas Property Code (the Reformation Statute) based on the position that the Reformation Statute only applied to "inter vivos instruments" and that regardless of the Reformation Statute, the statute of limitations also barred application of the Reformation Statute.[254]

Perpetuities are prohibited by Article 1, Section 26 of the Texas Constitution which provides that "[p]erpetuities and monopolies are contrary to the genius of a free government, and shall never be allowed." Texas com-

251. *Id.*
252. *Id.* at 35.
253. *Id.* at 39 (citing Tex. Title Examination Standards, Standard 2.20, reprinted in Tex. Prop. Code, tit. 2, app).
254. Yowell v. Granite Operating Co., 620 S.W.3d 335, 355 (Tex. 2020).

mon law interprets the constitutional provision as preventing conveyances that do not vest within twenty-one years "after the death of some life or lives in being at the time of conveyance." The Supreme Court of Texas has long held that ORRIs are non-possessory property interests.[255] If the ORRI did not vest at the time of creation or within the rule's prescribed timeframe, it violates the Rule Against Perpetuities.[256] The supreme court agreed with the court of appeals and trial court and found that the ORRI violated the Rule Against Perpetuities because the ORRI would not apply to a new lease unless: "(1) the 1986 lease terminated; (2) the lessor granted a new lease covering all or part of the same mineral interest; and (3) the new lease was obtained by a successor of Haber, the lessee at the time of the reservation."[257] Although the situation in *Yowell* did not fall underneath the rational in *ConocoPhillips Co. v. Koopmann*,[258] whereby the supreme court "declined to invalidate such an interest . . . when doing so would not serve the purpose of the Rule," they found that the ORRI in question required three remote contingencies to occur and therefore the ORRI violated the Rule. However, unlike the trial court and the court of appeals, the supreme court found that that Section 5.043 of the Texas Property Code required the ORRI to be reformed because Section 5.043 is "a judicial mandate to which limitations do not apply, and it requires reformation of commercial instruments creating property instruments that violate the Rule."[259] Section 5.043 provides as follows:

> (a) Within the limits of the rule against perpetuities, a court shall reform or construe an interest in real or personal property that violates the rule to effect the ascertainable general intent of the creator of the interest. A court shall liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's intent.
>
> (b) The court may reform or construe an interest under Subsection (a) of this section according to the doctrine of cy pres by giving effect to the general intent and specific directives of the creator within the limits of the rule against perpetuities.
>
> (c) If an instrument that violates the rule against perpetuities may be reformed or construed under this section, a court shall enforce the provisions of the instrument that do not violate the rule and shall reform or construe under this section a provision that violates or might violate the rule.
>
> (d) This section applies to legal and equitable interests, including noncharitable gifts and trusts, conveyed by an inter vivos instrument

255. *Id.* at 351–352 (citing Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982)).
256. *Id.* at 344 (citing State v. Quintana Petroleum Co., 133 S.W.2d 112, 114–15 (Tex. 1939)).
257. Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982).
258. *Yowell*, 620 S.W.3d at 346.
259. ConocoPhillips Co. v. Koopmann, 547 S.W.3d 858, 873 (Tex. 2018).

or a will that takes effect on or after September 1, 1969[.][260]

The supreme court dismissed Granite's argument that the statute only applied to trusts and wills or alternatively that it only applied to "persons." The supreme court provided a detailed rejection of these arguments that we will not review as they are of limited relevance to the conclusion the court reached. The supreme court's final argument for rejecting the holding by the trial court and court of appeals is that the statute as written requires the courts to "liberally construe and apply this provision to validate an interest to the fullest extent consistent with the creator's interest" which argues against a narrow construction that excludes all commercial interests.[261] The supreme court also noted that the legislative history was also informative as the original draft stated that it "only" applied to "inter vivos trusts" and the word "only" was subsequently removed.[262] The supreme court also dismissed the argument that the four year statute of limitations prevented the application of the Reformation Statute by literally construing the words of the Reformation Statute that states the court "shall" reform and "shall" liberally construe and apply the statute to "validate an interest to the fullest extent consistent with the creator's intent."[263] The supreme court remanded the case for reformation.

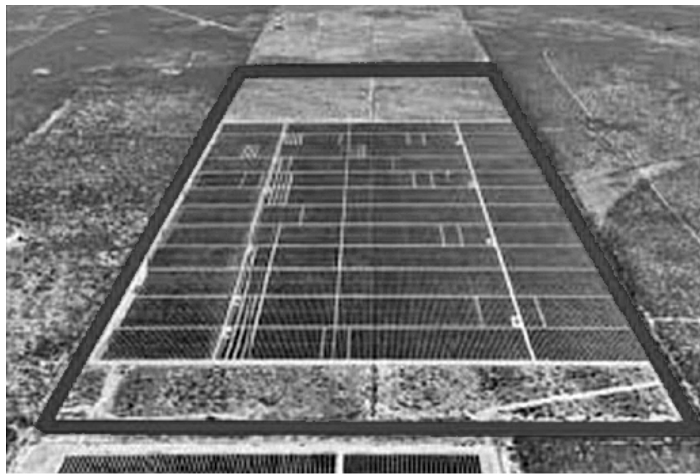
G. Surface Use

Lyle v. Midway Solar, LLC[264] concerns a dispute between the mineral owners and the surface owners and whether the surface owner developed the surface in a manner that effectively prevents the mineral owner from developing the mineral estate thereby giving the mineral owner the right to be paid damages for the "lost opportunity" to develop the mineral estate. As all Texas practitioners know, it has long been established in the state of Texas that the mineral estate is the dominant estate and the mineral owner is granted the right to use the surface to extract minerals because "a grant or reservation of minerals would be wholly worthless if the grantee or reserver could not enter upon the land in order to explore for and extract the minerals granted or reserved."[265] However, the dominance of the mineral estate has limits and the limits are established by the "accommodation doctrine," which was first pronounced in 1971 by the Supreme Court of Texas in *Getty Oil Co. v. Jones*.[266] As the Court of Appeals for the Eighth District of Texas at El Paso explained, "[t]he doctrine holds that the 'mineral and surface estates must exercise their respective rights with due regard for the other's,' and has in general provided a 'sound and workable basis' for resolving conflicts between

260. *Yowell*, 620 S.W.3d at 350.
261. *Id.* (citing Tex. Prop. Code Ann. § 5.043).
262. *Id.*
263. *Id.* at 351.
264. *Id.* at 352.
265. 618 S.W.3d 857, 857 (Tex. App.—El Paso 2020, pet. denied).
266. *Id.* at 869 (citing Harris v. Currie, 176 S.W.2d 302, 305 (Tex. 1943)).

ownership interests."[267] The doctrine requires the surface owner to establish that "(1) the mineral owner's use of the surface completely precludes or substantially impairs the surface owner's existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued."[268] The surface owner must also establish that the mineral owner has reasonable alternatives that "will allow recovery of the minerals and also allow the surface owner to continue the existing use."[269] If the evidence establishes that the mineral owner has only one option for developing the minerals, then "the mineral owner has the right to pursue that use, regardless of surface damage."[270] However, the accommodation doctrine is not the end of the story because Texas also recognizes the right of parties to contract around the accommodation doctrine "when the parties' deed or contract is silent or unclear on the parties' respective rights, or when there is substantial disagreement regarding the parties' intent in the terms used in a deed, the accommodation doctrine will be applied."[271]

In the case at hand, the Lyle family owns a portion of a mineral estate underlying a 315 acre tract that has been significantly developed with solar panels so that 70% of the surface was covered. The following picture visually illustrates the problem:



267. *Id.* (citing Getty Oil Co. v. Jones, 470 S.W.2d 618, 623 (Tex 1971)).

268. *Id.* (citing Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d at 60, 63 (Tex. 2016); Warren Petrol. Corp. v. Martin, 271 S.W.2d 410, 413 (Tex. 1954) ("Of course each [that is, the surface estate and the mineral estate] must exercise their respective rights of state with due regard for the rights of the other."). The accommodation doctrine was developed with the intent of balancing the rights of the surface owner and the mineral owner in the use of the surface. Tarrant County Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993)).

269. *Id.* (Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249 (Tex. 2013)).

270. *Id.* (citing *Merriman*, 407 S.W.3d at 249).

271. Lyle v. Midway Solar, LLC, 618 S.W.3d 857, 869 (Tex. App.—El Paso 2020, pet. denied) (citing *Haupt*, 854 S.W.2d at 912); *see also* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 492 n.79 (Tex. 2011)).

The Lyles trace their mineral estate back to a 1948 deed that severed the mineral and surface estate. Despite owning a portion of the mineral estate, the Lyles have never leased out the mineral estate, they have not conducted any due diligence on the potential productivity of the estate and have not even received a request to lease out the estate. The surface owner, Drgac, leased the property to Midway Solar, LLC. Midway Solar's lease provided that Midway "has the right to free and unobstructed use and development of solar energy resources for up to 55 years."[272] However, the lease did acknowledge that Drgac did not own the mineral estate and could not control development of the estate. At some point after the original leases were entered into, the leases were amended to designate drill sites on the northernmost and southernmost ends of the tract that could not be encumbered by solar panels. The Lyles eventually filed suit and among the claims at issue was that the development of the tract by Midway denied the Lyles reasonable access to their minerals and, therefore, was a breach of the 1948 deed. The Lyles claimed that the following provisions of the 1948 deed were specific allocations of the parties' rights and therefore, the accommodation doctrine did not apply:

> Grantors further reserve unto themselves, their heirs and assigns, the right to such use of the surface estate in the lands above described as may be *usual*, necessary or convenient in the use and enjoyment of the oil, gas, and general mineral estate hereinabove reserved.

Texas courts have previously held that the terms "necessary" or "convenient" in a deed are not specific enough to contract around the accommodation doctrine.[273] The Lyles, however, focused on the use of the word "usual" arguing that the use of the word "usual" means that the mineral owner should be entitled to use the "usual" methods for developing the surface estate and that the "usual" method of drilling when the deed was executed was vertical drilling. Although there is an argument that horizontal drilling could currently be deployed to access the mineral estate, horizontal drilling did not exist at the time the deed was executed. The court of appeals disagreed with the Lyles' "unusual" interpretation of the word "usual" and found the word "usual" like the words "necessary" and "convenient" was no more precise as to what the grantors intended with respect to the use of the surface.[274] The Lyles also argued that a provision, which provided that the grantors would have no liability for any surface damage resulting from the "exercise of the rights and privileges hereinabove reserved," was clearly intended to mean that the grantor could destroy the surface in their development of the mineral estate and therefore "negates any basis for accommodating competing surface uses."

272. *Lyle* at 869, 870 (citing Coyote Lake Ranch, LLC v. City of Lubbock, 498 S.W.3d 53, 59–60, 67 (Tex. 2016)).
273. *Id.* at 863.
274. *Id.* at 870 (citing *Coyote Lake Ranch*, 498 S.W.3d at 67 (Boyd, J., concurring)); Moser v. U.S. Steel Corp., 676 S.W.2d 99–100, 103 (Tex. 1984) (applying the accommodation doctrine when deed conveyed "all necessary and convenient" easements to the mineral estate owner for the purpose of developing its estate).

The court of appeals disagreed, holding that the language merely reiterated the common law that "the mineral owner is not liable for surface damage in connection with oil and gas operations on the property except in cases of negligence or excessive use."[275] The clause does not "address the surface owner's right to use the surface, nor does it purport to restrict or limit their rights in any way."[276] As a result, the surface owners successfully convinced the court of appeals to dismiss the mineral owner's claim based on the fact that the mineral owners had not even attempted to develop the mineral estate.

The court then moved on to analyze the more novel issues of the case, which concerns two alternative pleadings from the Lyles. The first question was whether the accommodation doctrine requires a mineral owner to be developing or attempting to develop a mineral estate in order to bring a claim for damages. In the alternative, the plaintiff questioned whether a surface owner can be sued for trespass because the surface owner's use of the surface effectively prevents the mineral owner from developing the minerals. With respect to the first issue, *Lyle* and *Midway* each relied on alternative Texas Supreme Court cases. Midway relied on *Lightening Oil* and Lyle relied heavily on *Haupt*. The court essentially held that neither case was relevant because Lyle was not attempting to use the mineral estate and, therefore, there was "nothing to be accommodated."[277] As the court explained, to hold the alternative would allow a mineral owner who makes no effort to develop their minerals to claim damages.[278] The court found that their analysis applied equally to the accommodation doctrine and the trespass and breach of contract claims because "both parties have rights to the surface, Midway has not encroached on the Lyles surface rights until the Lyles actually seek to exercise their rights."[279] The Lyles petitioned the Supreme Court of Texas but the supreme court declined to take the case, so for now, one could argue that this case places previously unforeseen limits on the historical dominance of the mineral estate in the state of Texas.

VIII. MISCELLANEOUS

A. Premises Liability

1. *Improvements; Open and Obvious Danger*

Los Compadres Pescadores, LLC v. Valdez[280] is a premises liability case brought by workers injured while installing pilings for a condominium construction project. The property was owned by Los Compadres Pescadores, which engaged a project manager. The pilings contractor was

275. *Id.*
276. *Id.* at 871 (citing Humble Oil & Refining Co. v. Williams, 420 S.W.2d 133, 134 (Tex. 1967)).
277. *Id.*
278. *Id.* at 874.
279. *Id.*
280. *Id.* at 875.

Luis Paredes, Jr., and his workers, Valdez and Teran, were the injured workers. The injury occurred when a rebar over twenty feet long was being placed into a piling hole came into contact with an energized overhead power line.

The Supreme Court of Texas reviewed whether the premises liability statute was applicable.[281] Knowledge of the condition of the property and overhead power line was imputed to the owner because the project manager had knowledge of such conditions.[282] But the real issue was whether a dangerous condition existed on the improvements being constructed, repaired, renovated, or modified by the workers.[283] In discussing the interpretation of "improvements" under the statute, the court noted that the issue was not whether the power line was a dangerous condition of the "workplace" in general, but rather as to the improvement on which work was being done.[284] Combining this mental exercise with the energized "condition" of the power line, the court stated: "[w]hether the power line constituted a dangerous condition of the piling necessarily depends on the piling's proximity to the power line."[285] It then concluded: "[i]f a dangerous condition, by reason of its proximity to an improvement, creates a probability of harm to one who 'constructs, repairs, renovates, or modifies' the improvement in an ordinary manner, it constitutes a condition of the improvement itself."[286] Therefore, the premises liability doctrine was applicable.[287]

The next issue was whether the energized "power line condition" was open and obvious, and whether the owner had a duty to warn or make safe. On this point, the court made a distinction between the presence and the energized nature of the power line.[288] Although the line's presence was known to the workers, the court did not find sufficient evidence to prove that they knew whether it was energized, citing one worker's testimony that he was told by the contractor that power had been cut off and the other worker's testimony that in his past dealings with the contractor the power lines were always de-energized.[289] Consequently, the condition was not open and obvious.[290]

2. *Licensee vs Invitee*

Catholic Diocese of El Paso (San Lorenzo Church) v. Porter[291] addressed whether injured workers at a church festival were licensees or invitees. The injured workers were at the 4-H Club booth when they were

281. 622 S.W.3d 771, 776 (Tex. 2021).
282. Tex. Civ. Prac. & Rem. Code Ann. § 95.003.
283. *Los Compadres Pescadores*, 622 S.W.3d at 780–82.
284. *Id.* at 784, referencing Tex. Civ. Prac. & Rem. Code Ann. § 95.002(2).
285. *Id.* at 784.
286. *Id.* at 785.
287. *Id.* at 785–6.
288. *Id.* at 786.
289. *Id.* at 789–90.
290. *Id.* at 789.
291. *Id.* at 790.

injured by a propane fire within the club's booth. The business arrangement for this booth was that the club paid the church a fixed fee for the right to set-up and operate the booth, unlike other booth vendors who paid a percentage of sales proceeds to the church.

On these facts, the Texas Supreme Court considered whether the workers were invitees or licensees because their status determined the duty owed by the premises owner.[292] An invitee is one who (1) enters the property of another, (2) with the owner's knowledge, and (3) for the mutual benefit of both,[293] whereas a licensee is one who (1) enters the property of another, (2) by mere permission of the owner, whether expressed or implied, and (3) not for their mutual benefit. The primary distinction between the two classes of persons to whom a duty is owed is the mutual benefit element. Here, the supreme court found the shared business or economic interest was between the workers and the club, not between the workers and the church.[294] Because the club had a fixed payment to the church, the only benefit for the workers' presence on the property was for the benefit of the club.[295] Therefore, the workers were licensees of the church and the church owed them the lesser duty associated with a licensee.[296] The fact that the workers were welcomed to visit other activities of the festival was irrelevant because they were in the club's booth when the injuries occurred.[297] Based on the licensee status, the duty of the church was to use ordinary care to warn of or make safe any dangerous condition known to the owner and not to the licensee.[298] The trial evidence supported the jury finding that the church did not know of the danger from the propane tank; therefore, it owed no duty to the injured workers at the club's booth.[299] This case reminds practitioners that the proper classification of the injured person (invitee, licensee or trespasser, which is principally determined by the contractual structure) is critical.

3. Owner vs Independent Contractor

In re Eagleridge Operating, LLC discussed the liability of an owner and an independent contractor with respect to a defective property condition.[300] Here, a gas line rupture at a well facility near Bridgeport, Texas, caused injury to Lovern, an employee at the facility. Prior to the incident, the property was owned in part by USG Properties (USG) and by Aruba Petroleum (Aruba), which held a minority interest. Before the incident, Aruba contracted with USG to make certain improvements and repairs to the facility, which ended up being the cause of the explosion months

292. 622 S.W.3d 824, 829 (Tex. 2021).
293. *Id.*
294. *Id.*
295. *Id.* at 831. The court expressly held, *in dicta*, that it was not addressing the "public invitee" doctrine under the Restatement (Second) of Torts § 332 (1965). *Id.* at n.31.
296. *Id.*
297. *Id.* at 832.
298. *Id.* at 831–32.
299. *Id.* at 832.
300. *Id.*

later. However, Aruba sold its interest in the property to USG prior to the explosion and was, therefore, not an owner at the time the defective property condition caused injury to Lovern. Lovern sued the then current operator, Eagleridge, who attempted to join Aruba in the suit. Upon dismissal of that motion, this appeal occurred. The issue presented to the Court of Appeals for the Fifth District of Texas at Dallas was whether Aruba should have been joined as a party, which depended upon whether it was an owner at the time of the accident under premises liability law or whether it had general negligence liability as an independent contractor. The majority held that the claim was based on a condition of the property (premises liability) and not because of an action or inaction by a party (negligence). The court concluded, without much discussion or support, that Aruba acted only as an owner in making improvements in property it owned, and not as an independent contractor for a third-party property owner; therefore, Aruba could not be joined because it did not, at the time of the injury, have an ownership interest in the property. In reaching this conclusion, the court characterized *Occidental Chemical Corp. v. Jenkins* as disapproving a dual role analysis;[301] however, the dissent took issue with that characterization. The dissent believed that there was more than a scintilla of evidence supporting the independent contractor designation for Aruba and that *Occidental* and *Strakos v. Gehring* allowed for the recognition of two different roles with different standards (premises liability or ordinary negligence) for each.[302] Since no petition was filed, this case will stand as decided by the majority, but practitioners might expect further analysis by the Texas Supreme Court to clarify its prior position in *Occidental* and *Strakos*.

4. *Duty to Warn*

Barfield v. SandRidge Energy, Inc.[303] discussed the sufficiency of a warning of a dangerous condition on the premises. Barfield was a linesman working for OTI, an independent contractor for the property owner, SandRidge. The work required the modification of distribution lines attached to electrical poles with respect to the substation and distribution lines owned by SandRidge and needed for its oil and gas production business. The work was to be done while adjoining lines were "hot," not de-energized. But, Barfield came into contact with the energized line and suffered a severe electrical shock causing the loss of his left arm and half of his right arm. The trial court granted SandRidge's summary judgment; the Court of Appeals for the Eighth District of Texas at El Paso discussed the adequacy of the evidence for that ruling.

Under the premises liability limitation for owners pursuant to Texas Civil Practice & Remedies Code sections 95.002 and 95.003, the initial

301. 627 S.W.3d 478, 478 (Tex. App.—Dallas 2020, pet denied) *subsequent mandamus proceeding,* 642 S.W.3d 18 (Tex. 2022).
302. 478 S.W.3d 640, 640 (Tex. 2016).
303. 360 S.W.2d 787, 787 (Tex. 1962).

requirements for applicability included: (1) a property owner or contractor sued for personal injuries or death to an employee of the owner or contractor, and (2) the condition or use of the improvements on which work is being done. These were uncontested in this case. Further, the statute required proof of the owner failing to provide a safe workplace, which could be established by the property owner maintaining control over the work performed, having actual knowledge of the dangerous condition, and failing to provide an adequate warning. Here, the court found SandRidge did retain control over the work being performed by OTI and its employee, Barfield, just because SandRidge refused to allow the adjacent electric lines to be de-energized, even in contradiction to its stated policy manual for safety. Following *Redinger v. Living, Inc.*,[304] which had adopted the Restatement (Second) of Torts § 414, the court stated that the premises owner "becomes liable only if it controls the details or methods of the independent contractor's work to such an extent that the contractor is not entirely free to do the work in his own way." In other words, the control must extend to the "operative details of the subcontractor's work." In *Barfield*, the court held the evidence sufficient to meet the summary judgment scintilla of evidence requirement. The next element required both knowledge (actual or constructive) and an adequate warning. The knowledge element was not contested; therefore, Barfield had sufficient evidence for summary judgment on this element.

Consequently, the question of adequate warning was essential to the court's decision. SandRidge took the position that the knowledge of the energized wires was known to Barfield; therefore, it had no duty to warn of this particular hazardous condition. The court, relying on *Austin v. Kroger Texas, L.P.*,[305] pointed to the *Kroger* opinion qualifiers of "generally," "ordinarily," and "in most cases" for the proposition that a warning of an obvious open or obvious danger must be reasonable as a matter of law. Based on safety precautions set forth in SandRidge's safety policy manual and the fact that no specific pre-work meeting was held to discuss the details of the hazard and actions to be taken to avoid injury, SandRidge did not provide a sufficient warning. The court stated that "the liability protection of section 95.003 requires an adequate warning when a dangerous condition is known by a property owner."[306] It is this aspect of the holding to which one dissenting justice took issue, and may have been the basis for the granting of the petition by the Texas Supreme Court. The dissent argued that the adequacy of the warning must necessarily consider the knowledge of the recipient, and concluded that no meetings or other actions would have increased the knowledge of OTI or Barfield as to the hazardous condition.[307] Practitioners should be careful in relying on the majority holding until the supreme court has clarified its position.

304. 630 S.W.3d 109, 109 (Tex. App.—El Paso 2020, pet. granted), *rev'd* 642 S.W.3d 560 (Tex. 2022).
305. 689 S.W.2d 415, 415 (Tex. 1985).
306. 465 S.W.3d 193, 203 (Tex. 2015).
307. *Barfield*, 630 S.W.3d at 130.

B. Entities

1. Capacity vs Standing

In *Pike v. Texas EMC Management, LLC*,[308] a dispute among partners resulted in the Texas Supreme Court addressing the distinction between capacity and standing. The Class A partner was the holder of a patent for a new concrete process, known as "energetically modified cement." The Class B partners were the finance partners for the partnership. The new venture proved unsuccessful and the loan was accelerated and set for foreclosure, but the Class B partners bought the loan and at the foreclosure sale, the plant equipment was purchased by an entity composed of the Class B partners and a third party (who had previously been in negotiation with the partnership for a substantial investment therein). The purchaser at foreclosure hired the existing plant manager and continued operations at the plant as previously conducted.

The Class A partner sued on various theories of breach of contract and fiduciary duty, tortious interference, and others. As a defensive strategy, the Class B partners alleged that the Class A partner lacked standing to sue on behalf of the partnership. In its review of this case, the supreme court discussed the distinction between capacity and standing. "Standing" would exist when the plaintiff had been "personally aggrieved"[309] and "capacity" would exist when the plaintiff had "legal authority to act" for the entity.[310] This distinction is critical in stakeholder actions on behalf of a business organization,[311] as it would determine the issue of constitutional subject matter jurisdiction.[312] The supreme court concluded that "a partner or other stakeholder in a business organization had constitutional jurisdiction to sue for an alleged loss in the value of its interest in the organization."[313]

Because the Class B partners' position was held not to implicate subject matter jurisdiction,[314] the issue of capacity was then relevant. Under Texas procedural rules, a challenge to capacity required a verified plea.[315] Here, the Class B partners failed to file a verified plea; therefore, the authority of the Class A partner to bring a claim on behalf of the entity was at issue.[316] The supreme court discussed the statutory requirements for derivative actions under Texas Business Organization Code Sections 152.210 and 152.211, but noted that the Class A partner did not sue in a

308. *Id.* at 133.
309. 610 S.W.3d 763, 763 (Tex. 2020).
310. *Id.* at 775.
311. *Id.*
312. *Id.*
313. *Id.* at 776 (citing Franchise Tax Board of Calif. v. Alcan Aluminum Ltd., 493 U.S. 331, 331 (1990) (shareholder had right to sue authority for damage to the value of their stake holdings)); Ensley v. Cody Resources, Inc., 171 F.3d 315, 320 (5th Cir. 1999) (a claim for money owed to a corporation by an individual shareholder related not to jurisdictional standing, but to the damages suffered by the shareholder for diminution in his share value).
314. *Id.* at 778.
315. *Id.*
316. *Id.* (citing Tex. R. Civ. P. 93(2)).

derivative capacity.[317] Based on *In re Fisher*,[318] the Class A partner could assert claims for "injuries . . . suffered directly."[319] Consequently, the verified plea requirement was not relevant because the claim did not represent an issue of capacity to act on behalf of the entity as a derivative claimant.[320] Note, however, that there was a single justice dissent challenging the right of a partner to sue for a wrong occasioned only to the partnership.[321]

In *Cooke v. Karlseng*,[322] the Texas Supreme Court reasserted its position in *Pike* that a limited partner could recover for loss of value of his partnership interest. Cooke and Karlseng had various real estate-related partnerships. Cooke alleged Karlseng moved partnership assets without compensation. The Court of Appeals for the Fifth District of Texas at Dallas held in favor of Cooke based on a plea to the jurisdiction raised by Karlseng asserting Cooke's claims belonged to the partnership. The supreme court remanded, based on *Pike*, reasserting that the authority of a partner to sue for "injury to the value of its interest in the partnership is not a matter of constitutional standing that implicates subject matter jurisdiction."[323]

2. Partnership Formation

Adam v. Marcos[324] involved a dispute on whether a partnership existed between Adam and his attorney, Marcos. Marcos alleged a "fist-bump" partnership agreement with Adam to participate on a 50/50 basis in various businesses operated by Adam. Marcos alleged that he paid $250,000 upfront and provided free legal services over a seven year period amounting to $1.8 million in time and expenses. On the other hand, Adam took the position that the original investment was not as a partner, but a loan to Adam to earn a return for Marcos and that they had entered into a bartering agreement whereby the legal services would be off-set by Adam providing his business services for free to Marcos (which included two auto collision repair jobs).

Although there could be much to say about these parties' dealings and various allegations of wrongdoing, the important point for this presentation is the special rules for contract formations between an attorney and client. Under Texas law, an attorney-client relationship creates a fiduciary relationship, with the attorney being held to high standards of ethical conduct.[325] In addition, negotiation of such contracts are closely scruti-

317. *Id.*
318. *Id.* at 780.
319. 433 S.W.3d 523, 527 (Tex. 2014).
320. *Pike*, 610 S.W.3d at 780.
321. *Id.* at 780–81.
322. *Id.* at 795–807.
323. 615 S.W.3d 911, 911 (Tex. 2021) (per curiam).
324. *Id.* at 913.
325. 620 S.W.3d 488, 488 (Tex. App.—Houston [14th Dist.] 2021, pet. filed).

nized by the courts with a *presumption* of unfairness or invalidity.[326] Consequently, as the Court of Appeals for the Fourteenth District of Texas at Houston noted, the "burden is on the attorney to prove the fairness and reasonableness of the agreement."[327] As a fiduciary, the attorney also has the burden to establish that the client was "informed of all material facts relating to the agreement."[328] The determination of fairness must have considered other factors including whether the consideration was adequate and whether independent advice was suggested by the attorney and obtained by the client.[329] Marcos failed in his burden of proving a fair contract. The court listed as evidence of an unfair contract, the following: the attorney allowing a "fist-bump" deal without a formal writing, listing the attorney on formal documents as an owner, the attorney not guaranteeing a principal debt obligation that the client guaranteed, the fact that the "silent partner" nature of the lawyer's involvement possibly violated bank and tax laws, the failure of the lawyer to inform the client of the legal ramifications of such an oral arrangement, and failure to encourage consultation with independent counsel. Though all of such enumerated indicia of fairness were important, practitioners should note that the failure to advise the client to seek third-party counsel was the most important.

C. Insurance

1. *COVID-19 & Business Interruption*

Diesel Barbershops, LLC v. State Farm Lloyds[330] addressed business interruption policy coverage based on the COVID-19 pandemic and state and local executive orders which banned operation of "non-essential" businesses. The plaintiff's barbershop operations were a non-essential business under Texas Governor Greg Abbott's and San Antonio's County Judge Nelson Wolff's executive orders.[331] The barbershop sued the insurer for business interruption based on these orders. The insurer defended asserting the policy provisions required a physical loss as a condition precedent to recovery, and that the Virus Exclusionary Endorsement and the Civil Action Exclusionary Endorsement would further bar recovery.

In addressing these issues, the physical loss requirement was determinant. No physical loss was present in this case. However, the U.S. District Court for the Western District of Texas reviewed cases in which tangible

326. *Id.* at 504 (citing Meyer v. Cathey, 167 S.W.3d 327, 330–31 (Tex. 2005) (per curiam) ; Hoover Slovacek, LLP v. Walton, 206 S.W.3d 557, 561 (Tex. 2006)).
327. *Id.* (citing Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA, 20 S.W.3d 692, 699 (Tex. 2000)).
328. *Id.* (citing Archer v. Griffith, 390 S.W.2d 735, 739 (Tex. 1964)).
329. *Id.* at 505.
330. *Id.* (citing Wilson v. Fleming, 566 S.W.3d 410, 426 (Tex. App.—Houston [14th Dist.] 2018, pet filed)).
331. 479 F.Supp.3d 353, 353 (W.D. Tex. 2020).

damage was determined not to be required,[332] citing *TRAVCO Insurance Co. v. Ward*,[333] *Port Authority of New York & New Jersey v. Affiliated FM Insurance Co.*,[334] *Lambrecht & Associates, Inc. v. State Farm Lloyds*,[335] and *Essex Insurance Co. v. Bloomsouth Flooring Corp*.[336] But, the district court concluded that the more authoritative cases, those in the Fifth Circuit, required the existence of tangible physical damages to the insured property.[337]

Further, the district court concluded that the Virus Exclusionary Endorsement (also known as the anti-concurrent causation clause) would bar coverage because the COVID-19 virus was the underlying reason for the business closure and that the executive orders were only a sequential cause of the loss.[338] The Civil Authority Exclusion was not triggered because it applied only when the civil authority action has caused a physical damage to the insured property.[339]

Selery Fulfillment, Inc. v. Colony Insurance Co.[340] was in agreement with *Diesel Barbershops*, holding that Selery never alleged a physical loss to the property. On the other hand, *Cinemark Holdings v. Factory Mutual Insurance Co.*[341] held that Cinemark alleged sufficient facts as to the damages to its property to stave off a motion to dismiss by the insurer. Cinemark alleged facts to show a property loss due to a change in the content of the air within its theaters. Over 1,700 employees were affected by the COVID-19 virus, and they were on the premises immediately prior to testing positive for the virus. This was sufficient to avoid dismissal of its suit, but this was not a determination that the policy requirements for coverage were satisfied.

Risinger Holdings v. Sentinel Insurance Co.[342] involved another COVID business loss insurance case. Unlike most of the COVID business loss insurance cases reported,[343] this case was different based on the wording of the insurance policy provisions. Risinger had orthodontic practices in the gulf coast area, which were all locked-down during the coronavirus epidemic pursuant to Governor Abbott's Executive Order GA-15. The issue addressed by the U.S. District Court for the Eastern District of Texas was whether the exclusion in the insurance policy for "fungi, wet rot, dry rot, bacteria or viruses" was applicable for the busi-

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332. *Id.* at 355–56.
333. *Id.* at 359–360.
334. 715 F.Supp.2d 699, 708 (E.D. Va. 2010), *aff'd*, 504 F. App'x 251 (4th Cir. 2013) (property rendered unusable by physical force).
335. 311 F.3d 226, 236 (3d Cir. 2002) (asbestos threat of being released destroyed structure's function).
336. 119 S.W.3d 16, 24–26 (Tex. App.—Tyler 2003, no pet.) (damages to electronic media and records and stored data was a physical property loss).
337. 562 F.3d 399, 406 (1st Cir. 2009) (order constituted physical damages).
338. *Diesel*, 479 F.Supp.3d at 360.
339. *Id.* at 360–62.
340. *Id.* at 362.
341. 525 F.Supp. 3d 771, 776 (E.D. Tex. 2021).
342. 500 F.Supp.3d 565, 569 (E.D. Tex. 2021).
343. No. 1:20-CV-00176, 2021 WL 4520968, at *1 (E.D. Tex. 2021).

ness interruption coverage under the policy based on the governmental lock-downs during the COVID-19 pandemic. Unlike many other insurance company policy provisions which clearly defined virus, this policy failed to define virus, but also used the term "virus" in connection with computer systems, thereby confounding the definitional problems within the policy. In analyzing these definitional difficulties, the district court said:

> But the greatest interpretive problem is caused by this merry troupe of misfits: "fungi, wet rot, dry rot, bacteria or virus." Under the Court's microscope applying *noscitur a sociis* does not result in an exclusion that broadly excludes all losses caused by viruses. Instead, under the harsh glare of *contra proferentem*, the "lowest common denominator" being the terms "fungi," "wet rot," "dry rot," "bacteria" and "virus" suggest the exclusion applies only to viruses that cause structural or mechanical damage or failure.

Continuing its analysis of the meaning of virus, the district court noted that the majority of cases addressing business loss coverage based on COVID shutdowns contained insurance provisions which defined the virus as producing a physical distress, illness, or disease,[344] which was not contained in the subject insurance policy. However, the district court noted different uses of the term virus, which required damage to the physical structure, and the resulting effect as to whether it was a covered loss. Further, the district court distinguished between direct losses where the applicable element (fungus, virus, etc.) caused direct structural or mechanical damage as compared to indirect losses which resulted from an ordinance or law which required the demolition, repair, or remediation of property because of the existence of the substance (virus, etc.). Because the policy was not clear, the district court relied upon the doctrine of *contra proferentem*, and construed the policy against the insurer. Therefore, the exclusionary language of coverage in this policy did not prevent the recovery of business losses based on the COVID-19 Executive Order GA-15.[345]

D. Governmental Matters

1. Zoning

Powell v. City of Houston[346] is the Texas Supreme Court's review of the same case reported on last year. In question was Houston's ordinance that protected historical preservation districts, which was challenged by owners in the Heights East District as violating Houston's City Charter limiting zoning and for failure to comply with Chapter 211 of the Texas Local Governmental Code.

In addressing the Houston ordinance, the supreme court asserted this

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344. *Id.* *14 n. 7.
345. *Id.* at *8.
346. *Id.* at *13.

was a case of first impression for it on the definition of zoning.[347] It looked at definitions in *Black's Law Dictionary*, *Merriam-Webster.com Dictionary*, and prior federal and Texas lower court decisions, and concluded that zoning has these identifying features: (1) a city-wide comprehensive plan, (2) geographical districts of division, (3) use specifications for land within each district, and (4) enforcement and penalties for violation.[348] So for general purposes, it defined zoning as "the district-based regulation of uses to which land can be put and the height, bulk [density] and placement of buildings on land, with the regulations being uniform within each district and implementing a comprehensive plan. Zoning regulations also tend to be comprehensive geographically by dividing an entire city into districts, though this will not always be the case."[349]

In this case, the ordinance did not regulate the purpose or use of land.[350] The supreme court distinguished between use restrictions and preservation of exterior architectural characteristics of historical significance.[351] Looking only at the site regulations, the ordinance did not cover all property uniformly, but rather focused on each property's particular exterior feature.[352] Secondly, the uniformity element was satisfied only as to the properties in the historical district, not to the city as a whole, noting the historical districts covered only 1% of the city area.[353] And third, the enforcement and penalty provisions were more similar to normal ordinances than they were to a zoning code, such as the small $500.00 fine instead of damages equal to the restoration or construction costs needed to bring the improvements into zoning compliance.[354]

Nevertheless, the court determined that for purposes of Texas Local Government Code Chapter 211, the ordinance *did* constitute zoning because that statute included historical preservation as one of the governmental actions covered.[355] Under that statute, the ordinance must be adopted as a comprehensive plan, which the supreme court concluded was established because (1) the plan covered all historical districts, (2) it had detailed provisions on prohibited changes, and (3) the plan was tailored and extensive.[356] Hence, the subject ordinance was a zoning regulation adopted pursuant to a comprehensive plan as contemplated in Texas Local Government Code § 211.004(a). Despite being a home-rule city and exercising the power of a home-rule city, such city's ordinances do not preempt state law shown to be applicable.[357] Therefore, because the

347. 628 S.W.3d 838, 838 (Tex. 2021).
348. *Id.* at 844.
349. *Id.* at 846.
350. *Id.* at 849.
351. *Id.*
352. *Id.* at 850.
353. *Id.* at 851.
354. *Id.* at 851–52.
355. *Id.* at 852.
356. *Id.* at 855.
357. *Id.* at 857–58.

city failed to follow the applicable statutory procedures, it had violated such state law and the ordinance was not valid.

2. *Short Term Rentals*

Draper v. City of Arlington[358] involved a challenge to Arlington's recently enacted short-term rental ordinances. Based on community outcry, and after a significant period of community meetings and input, Arlington adopted two ordinances: (1) a zoning ordinance restricting short-term rentals to neighborhoods surrounding its entertainment areas as well as other high density use areas; and (2) a short-term rental ordinance restricting and regulating the operation and use of improvements for short-term rentals. Short-term rentals were defined as being for less than thirty consecutive days. This ordinance prohibited congregation of occupants between 10:00 p.m. and 9:00 a.m., proscribed advertising of various events or parties, limited the number of short-term rental occupants, limited the number vehicles that could be parked on the premises, prohibited physical conversion of houses to add bedrooms, disallowed amplified sound equipment, and prohibited early trash receptacle set-outs.

On appeal, the Court of Appeals for the Second District of Texas at Fort Worth found the plaintiff homeowners were unable to establish a likelihood to prevail on their various constitutional arguments. The homeowners alleged a violation of their substantive due course of law rights under the Texas Constitution, article I, section 19, which does not allow deprivation of life, liberty, property, privileges, or immunities except by due course of law. The court held that the ordinances were appropriate for governmental regulations safeguarding life, health, safety, and property as well as minimizing adverse effects from increased transient rentals.[359] Regarding the assembly and freedom of movement issues under the Texas Constitution, the court found that the homeowners did not have standing to assert these rights on behalf of their prospective tenants.[360] Finally, under the homeowners' equal protection claim, the court again held that the ordinances were "rationally related to objectives within the City's police powers."[361]

3. *Governmental Immunity; Inverse Condemnation*

San Jacinto River Authority v. Medina[362] involved a Hurricane Harvey induced flooding case reported on last year The Authority released water behind its Lake Conroe dam and caused downstream flooding of numerous homes. The trial court and appellate court affirmed the landowners' cause of action pursuant to the Private Real Property Rights Preservation

358. *Id.* at 855.
359. 629 S.W.3d 777, 777 (Tex. App.—Ft. Worth 2021, pet. denied).
360. *Id.* at 794.
361. *Id.* at 791.
362. *Id.* at 792.

Act.[363]

The Texas Supreme Court denied the Authority's claim of governmental immunity under Chapter 2007 as being only for regulatory takings as opposed to physical takings.[364] Physical takings occur when governmental action takes property, but regulatory takings occur when governmental actions restrict a property owners' rights such that it is a physical seizure.[365] The supreme court concluded that Subchapter B of Section 2007 authorized a suit because of governmental immunity waiver in a statutory (physical or regulatory) taking.[366] Further, the supreme court held the pleadings were insufficient to establish the statutory exclusion asserted by the Authority (action taken to pursuant a "grave and immediate threat to life or property" or "in response to a real and substantial threat to public health and safety").[367]

E. Trespass and Nuisance

Enterprise Crude GP LLC v. Sealy Partners, LLC[368] involved multiple claims, but this presentation will focus only on the nuisance claims asserted. Suit arose between two neighboring property owners, with the property owned by Sealy Partners being intended to be developed for commercial real estate purposes, and the adjoining parcel was owned by Enterprise. Enterprise had four existing above-ground crude storage tanks and approached Sealy Partners about relocating a drainage easement and retention pond so that additional above-ground crude storage tanks could be constructed on Enterprise's property. Sealy Partners had a concern about the relocation of the drainage easement, which would allow for storage tanks to be built closer to its property and put its prospective commercial development property within the blast impact zone of the crude storage tanks in the event of an explosion. Nevertheless, Sealy consented to the relocation of the easement and retainage pond with the expectation that it would be consulted prior to installation of new storage tanks. Ultimately, Enterprise began construction of five new above-ground crude storage tanks near the property line with Sealy Partners, which caused all of Sealy Partners' property to be within the potential blast zone. Such construction activities prompted Sealy Partners to file suit against Enterprise on numerous theories of recovery, including nuisance.

Sealy Partners alleged both intentional nuisance and negligent nuisance. In a leading case for nuisance jurisprudence, the Texas Supreme Court held that nuisance "is a condition that substantially interferes with the use and enjoyment of land by causing unreasonable discomfort or

363. 627 S.W.3d 618, 618 (Tex. 2021).
364. *Id.* at 622 (citing Tex. Gov't. Code Ann. § 2007.021).
365. *Id.*
366. *Id.*
367. *Id.* at 631.
368. *Id.* at 628 (citing Tex. Gov't. Code Ann. §§ 2007.003(b)(7), (13)).

annoyance to persons of ordinary sensibilities attempting to use and enjoy it."[369] In *Enterprise*, the court set forth the elements of culpability, interference and loss or damage.[370] Addressing whether the storage tank was in fact a nuisance, the court focused on whether there was a substantial discomfort or annoyance that was unreasonable.[371] In this case, the interference with Sealy Partners' property was the loss of value for its development plans for a hotel, apartment project, restaurant, and convenience store due to the proximity to the blast zone. The loss of rent and loss in market value had been previously held as recoverable damages for such harm under a nuisance theory.[372] The Court of Appeals for the Fourteenth District of Texas at Houston noted numerous types of usage that constituted a nuisance, including, significantly, adjacent oil storage tanks.[373] The evidence presented by Sealy Partners as to the existence of the new storage tanks and blast zone radius was competent evidence for a nuisance theory.[374]

The next issue was whether Enterprise's action in building the new storage tanks adjacent to the property line constituted culpable negligence. Sealy Partners did not sustain its intentional nuisance claim because it presented no evidence or argument as to actual intent.[375] The court then looked at negligent nuisance, which is determined under ordinary negligence principles. As to the element of duty, Texas law generally requires a person to exercise ordinary care to avoid injury or damage to the property of others, and Enterprise had such duty to Sealy Partners.[376] The next element was whether Enterprise's actions were consistent with what a person of ordinary prudence would have done. Sealy Partners met this burden by presenting evidence that Enterprise was aware that Sealy Partners had plans to develop its property for commercial use and had represented to Sealy Partners that it would research set-back issues due to blast area concerns. Such evidence was sufficient to move to trial.[377] Finally, on the issue of damages, Sealy Partners had presented evidence in the form of brokers' opinions regarding the loss in value of its property, and its inability to obtain economic financing for such development, which supported the damage issue.[378]

In *Mahoney v. Webber, LLC*,[379] the issue of nuisance was raised because of a concrete batching plant constructed by Webber in connection with the construction of the Westpark Tollway extension. Mahoney al-

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369. 614 S.W.3d 283, 238 (Tex. App.—Houston [14th Dist.] 2020, no pet.).
370. CrossTex N. Tex. Pipeline, L.P. v. Gardiner, 505 S.W.3d 580, 600 (Tex. 2016).
371. 614 S.W.3d at 300 (citing *CrossTex*, 505 S.W.3d at 601, 604–07).
372. *Id.* at 302.
373. *Id.* at 301 (citing *CrossTex*, 505 S.W.3d at 610–11; Comminge v. Stevenson, S.W. 556, 557 (Tex. 1890); Burditt v. Swenson, 17 Tex. 489, 504 (1856)).
374. *Id.* at 301 (citing Boren v. Magnolia Petroleum Co., 266 S.W. 623, 624 (Tex. App.—Texarkana 1924, no writ)).
375. *Id.* at 302.
376. *Id.* at 303.
377. *Id.* (citing *CrossTex*, 505 S.W.3d at 614).
378. *Id.* at 304.
379. *Id.* at 304–305.

leged unreasonable noise levels, unreasonable amount of dust, unreasonable amount of light pollution, and an unsightly view relating to the construction and batching plant operations. Webber asserted governmental immunity as a contractor for the Texas Department of Transportation under Texas Civil Practices & Remedies Code § 97.002. Because Webber was a direct contractor with the county rather than TxDOT, the issue presented was the reach of the statutory immunity.

The Court of Appeals for the Fourteenth District of Texas at Houston, analyzed the statute, noting its lack of a "contractor" definition and privity requirement with a state agency (such as TxDOT).[380] Nevertheless, the court determined that the statute only required work under a contract "for construction or repairing a highway, road or street *for* TxDOT."[381] In support of this reading, the court relied upon other statutory provisions requiring the county's involvement in the road project and that the completed road would be part of the state highway system.[382] Therefore, Webber was entitled to the statutory immunity from liability.

IX. CONCLUSION

Despite the lack of any landmark decision, there were a number of important judicial decisions. In the post-COVID world of shutdowns, Governor Abbott's Executive Order GA-34 should have resolved any issues on nonjudicial foreclosures held after the effective date of such Executive Order, but the authors expect future litigation on foreclosures held during the effective period of the governmental shutdowns. Further, the availability of proceeds from business interruption insurance from COVID shutdowns has been clarified in *Diesel Barbershops*, *Selery Fulfillment*, *Cinemark*, and *Risinger*.

There were a number of legal principles taken on a petition for review by the Texas Supreme Court that may result in new jurisprudence for the future. In the long-running episode that is *Howard I*, *Howard II* and *Howard III*, the supreme court may bring clarity to the limitation clock on subrogated lien claims. The requirements for an adequate warning in a premises liability case may be clarified in *Barfield*. In *Pape Partners, Ltd.* the Texas Supreme Court will address whether TCEQ or the courts have the right to make "water rights adjudications." In another interesting case, not yet accepted by the Texas Supreme Court, the court has been asked in *Lennar Homes* to address whether an arbitration provision in a warranty deed is a covenant that runs with the land. And as usual, some of the most dramatic holdings can be found in the cases the Texas Supreme Court declines to take. Such was the case in *Lyle*. The fact that the Texas Supreme Court declined to take the case has alarmed many oil and gas operators because the holding by the court of appeals arguably places

380. 608 S.W.3d 444, 444 (Tex. App.—Houston [1st Dist.] 2020, no pet.).
381. *Id.* at 447–8.
382. *Id.* at 448 (emphasis added).

new constraints on the arguably heretofore absolute dominance of the mineral estate in Texas.

Typical drafting lessons have been taught in *Wagner* and *Endeavor Energy* and the importance of written contracts (if ever in doubt) was reinforced by *Gutierrez*.

From the number of premises liability cases covered, practitioners have learned from *Valdez* that electric power lines are not necessarily an open and obvious danger; that for church festivals, the church is better protected from premises liability claims by a fixed price rather than a percentage of sales structure, under *Porter*; and that the supreme court may clarify the adequacy or elements of the warning in *Barfield*.

Draper provides guidance on the effectiveness of local ordinances against short-term residential rentals (such as Airbnb). In *Chehab*, landlords were given reassurance that locking out a tenant was not grounds for a claim of defamation.

Finally, in one of the most important cases of the year, in *Broadway National Bank* the Supreme Court of Texas provided important, if not controversial, guidance on Section 5.029 of the Texas Property Code concerning both the time period for the use of correction deeds and the parties required to execute a correction deed.