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Real Property

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REAL PROPERTY

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This article covers cases from 60 S.W.3d through 84 S.W.3d, which the author believed were noteworthy by adding to the jurisprudence on the applicable subject. The author is indebted to the assistance of Lorin

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I. MORTGAGES AND FORECLOSURES

IN *Hance, Scarborough, Wright, Ginsberg & Brusilow, L.L.P. v. Kincaid*,[1] the court faced the task of distributing foreclosure proceeds among numerous payees of a note. The Callisons executed a $308,240 promissory note payable to Quanah Hospitality Inns, Inc. ("QHI"), secured by a deed of trust. At the same time, the Callisons sold the property to the Wrights, who in turn executed a $373,510 "wrap-around" promissory note. The note designated the Callisons and Kincaid as payees and was secured by a deed of trust subordinate to the vendor's lien and deed of trust executed by the Callisons in favor of QHI. Several years later, the Wrights defaulted on the note, and the Callisons and Kincaid foreclosed on the subordinate "wrap" deed of trust. Shortly thereafter, the Callisons defaulted on the senior note to QHI, and QHI foreclosed upon the property under the senior deed of trust. After the foreclosure, sale proceeds were credited against the outstanding balance of Callisons' senior note, a surplus of $53,555.64 remained. The payees of the Wright "wrap" note demanded the excess sale proceeds, but the trial court awarded the full amount to Kincaid.

The Callisons appealed, asserting that Kincaid's interest in the funds was limited to his proportionate interest in the Wrights' "wrap" note, citing the relevant language in the note that "Kincaid is entitled to the proportionate payment from the proceeds of this note herein, to the said extent of $63,099.47."[2] Kincaid countered, contending that the language entitled him to the full $63,099.47 under the note. The court disagreed, interpreting the provision to grant Kincaid a 16.893% total ownership interest in the note.[3] Since Kincaid maintained a 16.893% interest in the note itself, he was only entitled to 16.893% of the excess proceeds of the note.

In *Oles v. Curl*,[4] Oles executed a promissory note and deed of trust in favor of the Curls. When Oles defaulted, the Curls foreclosed on the deed of trust. Unbeknownst to the Curls, Oles filed for bankruptcy on the day prior to the foreclosure sale. In response, Oles filed suit, protesting that the foreclosure sale violated the automatic stay triggered by the bankruptcy filing. Filing a petition in bankruptcy imposes a stay, preventing actions from being taken against the bankruptcy estate, in-

1. Hance, Scarborough, Wright, Ginsberg & Brusilow, L.L.P. v. Kincaid, 70 S.W.3d 907 (Tex. App.—Amarillo 2000, pet. denied).

2. *Id.* at 909.

3. The court reached this number by dividing the maximum amount of Kincaid's interest in the note ($63,099.47) by the total amount of the note ($373,510.00).

4. Oles v. Curl, 65 S.W.3d 129 (Tex. App.—Amarillo 2001, no pet.).

cluding actions taken by creditors that create or enforce liens against property of the bankruptcy estate.[5] The court recognized that actions that violate the stay are void, regardless of whether a party has notice of the filing. Section 549(c) of the Bankruptcy Code, however, offers protection for good faith purchasers of real property if: (a) the purchaser did not have knowledge of the bankruptcy, (b) paid fair market value for the property, and (c) a notice of the petition was not filed in the real property records before the property was purchased.[6] The court precluded any argument that the Curls were good faith purchasers, having failed to introduce evidence that they lacked knowledge of the bankruptcy filing.

Allied Capital Corporation v. Cravens[7] confronted the issue of whether overzealous advertising for a foreclosure sale amounted to tortious interference with a contract. The Palmers executed two promissory notes secured by deeds of trust in favor of Allied Capital Corporation. Upon the maturity of the notes, the Palmers failed to make timely payments and Allied posted the properties for foreclosure. Subsequently, the parties entered into a rule 11 agreement whereby Allied agreed to postpone the foreclosure sale until October, provided the Palmers paid $245,000 by September 15. But by September 8, Allied had started advertising the foreclosure sale. Cravens filed a motion for a temporary injunction of the foreclosure sale, professing an ownership interest in a portion of the property. Cravens alleged that Allied's advertisement of the sale constituted tortious interference with a contract, in that the advertisement deterred potential purchasers of the property.

The court discussed the elements that must be proven to prevail on a claim of tortuous interference with prospective business relations: (a) a reasonable probability that the parties would have entered into a contractual relationship; (b) an independently tortious or unlawful act by the defendant that intervened with the formation of that relationship; (c) the defendants acted with a desire to prevent the relationship from occurring; and (d) actual damage, loss or harm suffered by the plaintiff, resulting from the defendant's interference.[8] In analyzing whether Allied's behavior in advertising the foreclosure sale constituted a tort, the court reviewed the statutory requirements for notice of a foreclosure sale under the Texas Property Code. According to Section 51.002 thereof, written notice must be given at least twenty-one days in advance and must be posted at the courthouse door in each county where the property is located, filed with the county clerk of those counties and sent to each debtor by certified mail.[9] The court determined, however, that these were the *minimum standards* required by law. Although Allied's advertise-

5. 11 U.S.C. § 362, 362(a)(4) (2000).

6. *Id.* § 549(c).

7. Allied Capital Corp. v. Cravens, 67 S.W.3d 486 (Tex. App.—Corpus Christi 2002, no pet.).

8. *Id.* at 491.

9. TEX. PROP. CODE ANN. § 51.002(b) (Vernon 1995).

ment of the foreclosure sale exceeded the minimum legal requirements, its actions did not comprise a tort.

In the case of *Kaplan v. Tiffany Development Corporation*,[10] Tiffany Development Corporation signed a promissory note evidencing a $220,000 loan from Kaplan, secured by real property. When Tiffany defaulted on its payment obligations, Kaplan posted the property for foreclosure sale. On the day prior to the sale, Tiffany sought a temporary restraining order to prevent Kaplan from conducting the sale, contending that the promissory note was usurious. The court granted the temporary restraining order, conditioned on Tiffany posting a $30,000 bond with the court. When Tiffany failed to post the bond, Kaplan conducted the foreclosure sale. Tiffany then filed a Motion to Void the Foreclosure Sale and for Issuance of Writ of Temporary Injunction. When the trial court voided the sale, Kaplan appealed.

To obtain a temporary injunction, a petitioner must prove three elements: (a) a cause of action against the defendant; (b) a probable right to the relief sought; and (c) a probable, imminent, and irreparable injury in the interim.[11] Kaplan challenged Tiffany's assertion that it had a probable right to the relief sought. In discussing whether Tiffany could support an allegation of usury, the court determined that one must show that the creditor loaned money to the debtor who had an absolute obligation to repay the principal and that the interest charged, contracted for, or received by the creditor exceeded the maximum amount allowed under law. Tiffany proved that the interest rate under the note amounted to 37.54% and when modified totaled 45.88%.[12] In response, Kaplan argued that a savings clause in the original note precluded Kaplan from charging interest at an usurious rate. The court followed a long line of decisions holding that a savings clause will not prevent a contract from being usurious if the contract is usurious by its terms. Finding that the original note and modified note were usurious, the court upheld the trial court's issuance of a temporary injunction.

Hoffman, McBryde & Co., P.C. v. Heyland[13] addressed the issue of whether an abstract of judgment must show the balance due on the date the abstract was issued by the court or on the date the abstract was filed. According to the facts of the case, Hoffman, McBryde & Co., P.C. ("HMCo") and the Patricks entered into a judgment in a separate lawsuit. An abstract of judgment was issued in 1992, indicating that the Patricks still owed $13,000 to HMCo. HMCo, however, did not file the abstract for several years. In the interim, the Patricks paid the remaining balance down to $6,000. HMCo then filed the original abstract. The Patricks sold property to the Heylands and when the proceeds of the sale

10. Kaplan v. Tiffany Dev. Corp., 69 S.W.3d 212 (Tex. App.—Corpus Christi 2001, no pet.).

11. *Id.* at 218.

12. *Id.* At the time, the maximum interest rate under Texas law was 18%.

13. Hoffman, McBryde & Co., P.C. v. Heyland, 74 S.W.3d 906 (Tex. App.—Dallas 2002, pet. denied).

were not enough to satisfy the outstanding balance owed to HMCo. HMCo brought suit against Heyland for a declaratory judgment and to foreclose against the property. Heyland filed a motion for summary judgment, alleging that since the abstract of judgment did not reflect the credits the Patricks had paid against the original $13,000 due, the abstract failed to comply with the requirements of the Texas Property Code, which requires an abstract of judgment to show "the amount for which the judgment was rendered and the balance due."[14] When the trial court granted Heyland's motion for summary judgment, HMCo appealed.

After concluding that the abstract of judgment was correct when it was issued and that it was recorded and indexed correctly, the court deliberated whether the abstract was void because it failed to reflect payments against the outstanding indebtedness prior to filing. Section 52 of the Texas Property Code imposes no such requirement,[15] and the court refused to imply a responsibility on the part of the judgment creditor to amend the indebtedness listed on the abstract, explaining that such a requirement would be burdensome.[16] The court acknowledged that its decision contradicted a number of earlier cases that utilized the "stand-alone" test in its analysis. Under this approach, one should be able to determine the correct amount of the judgment from the abstract of judgment alone. The court rejected this evaluation, responding that the stand-alone test assumes the missing information is required by statute, while section 52 of the Texas Property Code is silent as to whether the amount of credits is required as of the date the abstract of judgment is recorded.[17]

A number of cases during this survey year involved foreclosures instituted by homeowner associations. *Cottonwood Valley Home Owners Association v. Hudson*[18] addressed the issue of whether a trial court has the right to deny the foreclosure of a lien, and whether a mandatory homeowners' association is entitled to foreclose on a recorded lien securing a payment obligation for homeowners' assessments. Cottonwood Valley Home Owners Association sued Hudson to collect outstanding homeowners' assessments. Cottonwood had previously sent Hudson notices for payment of the assessments, and when Hudson failed to pay, Cottonwood filed a notice of lien against Hudson's property. The trial court rendered judgment in favor of Cottonwood but refused to grant Cottonwood's request for foreclosure of Hudson's property. Cottonwood appealed, claiming they had a right of foreclosure.

The court looked to *Inwood North Homeowners' Association v. Harris*,[19] to determine whether Cottonwood was entitled to foreclose for fail-

14. *Id.* at 908. *See also* TEX. PROP. CODE ANN. § 52.003(a)(6) (Vernon 1995).
15. *Heyland*, 74 S.W.3d at 910.
16. *Id.* at 911.
17. *Id.* at 913.
18. Cottonwood Valley Home Owners Ass'n v. Hudson, 75 S.W.3d 601 (Tex. App.—Eastland 2002, no pet.).
19. Inwood N. Homeowners' Ass'n v. Harris, 736 S.W.2d 632 (Tex. 1987).

ure to pay assessments. In *Inwood*, the court recognized that courts must enforce homeowner assessment agreements, and a homeowners' association has the right to foreclose for nonpayment of assessments.[20] Applying this rationale, the court ruled that the trial court abused its discretion by refusing to grant Cottonwood's request for judicial foreclosure. As such, the court modified the trial court's order and entered an order for a judicial foreclosure against Hudson.

Similarly, a condominium owners' association foreclosed on several units for failure to pay maintenance fees in *Aghili v. Banks*.[21] The Texas Uniform Condominium Act recognizes that the recordation of a condominium declaration creates a perpetual lien on a condominium to secure payment of such fees.[22] Unless the declaration provides otherwise, no further recording of the lien is necessary for purposes of notice and perfection.[23] Aghili attempted to void the foreclosure sale, maintaining that the particular condominium declaration in question required additional recording of a notice of lien, which the owner's association failed to file. An analysis of the declaration disclosed that further recordation was optional at the discretion of the owners' association and the declaration expressly stated that the lien could be enforced "by all methods available for the enforcement of such liens. . . ."[24]

In *Nipper-Bertram Trust v. Aldine Independent School District*,[25] Oscar Nipper and Nipper-Bertram Trust failed to pay ad valorem taxes on two lots. Aldine Independent School District brought suit and was awarded judgments *in personam* and *in rem* for foreclosing the tax liens on the properties. Lot 6 was purchased by a third party, resulting in a surplus of funds, while the sale of Lot 7 failed to attract bidders and was sold to Aldine for the minimum bid. In the interim, taxes became due on both properties. Aldine filed a motion to recover the excess funds to offset the deficiency on Lot 7. When the trial court awarded the excess funds to Aldine, Nipper-Bertram appealed, contending that the trial court erred by allowing Aldine to apply the excess funds from Lot 6 to satisfy the deficiency on Lot 7.

The court first examined whether the excess proceeds could be used to pay outstanding post-judgment taxes, interest and penalties owing on Lot 6. An inspection of Section 34.04 of the Tax Code[26] revealed that Aldine was clearly entitled to use the excess funds for payment of post-judgment amounts due on Lot 6.[27] The court then reviewed Section 34.04(c)(4) of the Tax Code to decide whether the excess proceeds from

20. *Id.* at 636.
21. Aghili v. Banks, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
22. TEX. PROP. CODE ANN. § 82.113(a) (Vernon 1995).
23. *Aghili*, 63 S.W.3d at 816.
24. *Id.* at 817.
25. Nipper-Bertram Trust v. Aldine Indep. Sch. Dist., 76 S.W.3d 788 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).
26. TEX. TAX CODE ANN. § 34.04(c)(4) (Vernon 2002).
27. *Nipper-Bertram*, 76 S.W.3d at 792.

Lot 6 could be credited against the deficiency on Lot 7. Scrutinizing the provision from Section 34.04(c)(4) that "the court shall order that the proceeds be paid according to the following priorities . . . to a taxing unit for any unpaid taxes, penalties, interest, or other amounts adjudged due under the judgment that were not satisfied from the proceeds from the tax sale . . .," the court focused on the language "amounts adjudged due under the judgement."[28] Determining there was only one judgment *in rem* that authorized the sales of Lot 6 and Lot 7, the court held that the sale proceeds could be allocated between the two properties as Aldine chose.

The sufficiency of evidence of the fair market value of property under the Texas Anti-Deficiency Statute[29] was addressed in *Lairsen v. Slutzky*.[30] The debtor, Lairsen, asserted his right to offset under the anti-deficiency statute, which the creditor, The Longitudinal Trust, claimed was not appropriately proved at trial. This statute allows several methods for determining the fair market value of the property, including "expert opinion testimony, comparable sales, anticipated marketing time and holding costs, cost of sale, and the necessity and amount of any discount to be applied to the future sales price or the cash flow generated by the property."[31] Lairsen's evidence included testimony of a local real estate agent regarding prior purchase offers for the subject property which were received by the then owner and current creditor. The court concluded that such evidence was competent evidence and legally sufficient to establish the fair market value of the property. In this case, the real estate agent testified that she had at least four years of experience in the subject area, familiarity with the subject property, prior sales of property across the street within a year of the default, sales of property adjacent to the subject property within three years, and a sale of a property one-half block away subsequent to the default and prior to the time of testimony. Another real estate agent and investor testified about the value of the property and his qualifications, including thirty-five years as a real estate investor in the county, an investigation of the subject property for an investor group, the offer made for such property, and his opinion of the fair market value. The court held that such evidence, together with the evidence of the purchase money creditor of prior offers, was sufficient to support the jury's finding of the fair market value of the property.

II. PROMISSORY NOTES, LOAN COMMITMENTS, AND LOAN AGREEMENTS

Fein v R.P.H., Inc.[32] presented a situation in which the holder of a non-

28. *Id.*
29. TEX. PROP. CODE ANN. § 51.003(b) (Vernon 1995).
30. Lairsen v. Slutzky, 80 S.W.3d 121 (Tex. App.—Austin 2002, pet. denied). This case is discussed more fully in section IV hereof.
31. TEX. PROP. CODE ANN. § 51.003(b) (Vernon 1995).
32. Fein v. R.P.H., Inc., 68 S.W.3d 260 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

recourse promissory note sought to collect on the collateral securing the note only to find the collateral had been converted into other assets of the debtor. In 1994, Fein executed a $125,000 promissory note in favor of R.P.H., Inc. secured by a five percent interest in Surgical Care Centers of Texas, L.C. ("Surgicare"). The note provided that Fein would pay the amount due "without lability [sic], warranty or obligation" and "there is *no personal guaranty* of Steven A. Fein, M.D . . . of this promissory note or indebtedness."[33] In 1995, R.P.H. was negotiating a merger between Surgicare and Amedisys, Inc. ("Amedisys") that entailed the exchange of Surgicare stock for Amedisys stock. R.P.H. demanded that Fein discharge the debt under the note. In response to R.P.H.'s request for payment, Fein replied that he planned to exchange his interest in Surgicare for 50,000 shares of Amedisys stock, and that he had no intention of paying off the note. Two years later, R.P.H. made a written demand for Fein to surrender the Surgicare stock, and when Fein failed to respond, R.P.H. filed suit. When R.P.H. learned that in the interim Fein had sold his Amedisys stock for $250,000 R.P.H. amended its petition to include the recovery of the $250,000. When the trial court awarded R.P.H. $185,909.90 for Fein's failure to repay the note, Fein appealed.

On appeal, the court of appeals first considered Fein's assertion that the trial court erred in holding him personally liable under the note because R.P.H.'s sole remedy was limited to recovery of the collateral. In response, R.P.H. contended that Fein had failed to waive his personal liability under the note. The court disagreed, noting that the language of the note stated twice (as quoted above) that Fein was not personally liable. The absence of language in the note that R.P.H.'s "sole remedy" was to resort to the collateral was not compelling.[34]

R.P.H. argued in the alternative that it was entitled to the proceeds from the sale of the Amedisys stock. The court overruled this point, explaining that the Surgicare Stock and the Amedisys stock were not interchangeable because a non-recourse note is repayable only from the proceeds of the sale of the specific collateral securing the note.[35] In addition, R.P.H. had an opportunity to substitute the Amedisys stock as new collateral under the note when Fein told R.P.H. that he was going to exchange his interest in Surgicare for the Amedisys stock. The Amedisys stock was Fein's personal asset and allowing R.P.H. to recover the Amedisys proceeds would undermine the note's non-recourse character.

The court in *Aguero v. Ramirez*[36] interpreted the statute of limitations in connection with the enforcement of remedies on a note secured by a deed of trust and a vendor's lien. Aguero executed a $36,000 note payable to Ramirez and secured by a deed of trust and vendor's lien on real

33. *Id.* at 263.
34. *Id.* at 267.
35. *Id.* at 266 (discussing Burns v. Resolution Trust Corp., 880 S.W.2d 149, 153 (Tex. App.—Houston [14th Dist.] 1994, no writ)).
36. Aguero v. Ramirez, 70 S.W.3d 372, 373 (Tex. App.—Corpus Christi 2002, pet. denied).

property. In 1994, Aguero failed to pay under the note. In 1999, Ramirez sued, seeking to recover principal and interest. The trial court entered judgment in favor of Ramirez, and Aguero appealed. On appeal, Aguero maintained that Ramirez's claim was barred by the statute of limitations. Section 16.035 of the Texas Civil Practice and Remedies Code provides that "[a] person must bring suit for the recovery of real property under a real property lien or the foreclosure of a real property lien not later than four years after the day the cause of action accrues."[37] The court did not dispute Aguero's assertion that Ramirez brought legal action more than four years after the cause of action originated. The court, however, disagreed with Aguero's application of the Texas Civil Practice and Remedies Code, distinguishing the circumstances of Ramirez's petition. When a note is secured by a lien, the note and the lien comprise separate and distinct obligations.[38] The court determined that since Ramirez brought suit to recover under the note alone and not under the deed of trust, section 16.035 of the Texas Civil Practice and Remedies Code was inapplicable. Instead, the court applied Section 3.118 of the Texas Business and Commerce Code, which provides that an action to enforce the payment of a note must be brought within six years after the amount becomes due.[39] Because only five years had passed since the cause of action commenced, the court affirmed the trial court's decision.

In *Vernor v. Southwest Federal Land Bank Association, FLCA*,[40] the Vernors borrowed $130,500 from the Federal Land Bank of Texas, secured by 240 acres of real property. Federal Land Bank then assigned the note to Southwest Federal Land Bank Association, FLCA. When the Vernors defaulted on the note and failed to respond to the bank's demand, Southwest accelerated the note and sought a judicial foreclosure of the property. After the trial court rendered judgment for Southwest, the Vernors appealed. On appeal, the Vernors argued that Southwest lacked standing to initiate legal proceedings because the note was non-transferable. The court dismissed this allegation, observing the language in the note specifying that "said Bank or the owner or holder of the note" contemplated the possibility that someone other than Federal Land Bank could be the holder of the note.[41] An analysis of the note revealed that it did not prohibit assignment. Absent such language, a note is generally assignable under Texas law.[42]

In *Patel v. Kuciemba*,[43] the court refused to hold a widow liable for four promissory notes her husband had executed. The evidence revealed that the wife was not involved in her husband's business, had no knowledge of

37. TEX. CIV. PRAC. & REM. CODE ANN. § 16.035(a) (Vernon 2002).

38. *Aguero*, 70 S.W.3d at 374 (citing Whittington v. Whittington, 853 S.W.2d 193, 195 (Tex. App.—Beaumont 1993, no writ).

39. TEX. BUS. & COM. CODE ANN. § 3.118(a) (Vernon 2002).

40. Vernor v. S.W. Fed. Land Bank Ass'n, 77 S.W.3d 364 (Tex. App.—San Antonio 2002, pet. denied).

41. *Id.* at 366.

42. *Id.*

43. Patel v. Kuciemba, 82 S.W.3d 589 (Tex. App.—Corpus Christi 2002, pet. denied).

any security for the notes, refused to acknowledge that she was liable for the outstanding principal and interest, and did not ratify any of the notes. On a related issue, the court refused to void a sale of collateral property as a fraudulent transaction where the beneficiaries under a deed of trust posted the property for a non-judicial foreclosure sale. The grantor sold the property to a related party immediately prior to the sale and used the sale proceeds to extinguish the debt, even though the sales price was substantially below market value.[44]

III. GUARANTIES

Glazner v. Haase[45] reminds us of the basics of guaranty contract formation. In this case, Glazner went to work for Haase, the owner of a Whataburger franchise in the Longview area. Glazner wanted to own and operate a Whataburger franchise of his own and worked out a tentative agreement with Haase. Haase had entered similar agreements before, whereby Haase would support a franchisee in his application for a Whataburger franchise. Haase guaranteed the franchisee's success by agreeing to a reciprocal purchase options upon certain events. There was no formal documentation entered into between Glazner and Haase. Glazner was ultimately not granted a franchise, but Haase, sometime thereafter, did receive a franchise for the south Longview area in which Glazner was interested. Glazner brought suit, and Haase defended on the ground that the claims were barred because the contract was unenforceable by reason of the Statute of Frauds.[46] As a basis for establishing a written contract, Glazner asserted four writings, three of which were letters signed by Haase or otherwise referred to in letters signed by Haase, with the fourth being a written cash flow statement. The three letters expressed the "tentative agreement" that "essentially states" the arrangement between the parties.[47] Glazner alleged that the cash flow statement reflected Haase's agreement to accept two percent of the net sales proceeds from the new Whataburger franchise in return for Haase's relinquishment of rights to this franchise location. In considering the alleged guaranty under the Statute of Frauds, the court held it unenforceable. As to the cash flow statement, the court noted that it could not be validated under the Statute of Frauds, since it was not plainly referred to in any signed document.[48] As to the three written and signed letters, the court also concluded these did not satisfy the essential elements of a binding agreement. First, the court concluded that they were not supported by sufficient consideration since the cash flow statement could not be

44. *See* Section V *infra*.

45. Glazner v. Haase, 61 S.W.3d 10 (Tex. App.—Texarkana 2000), *aff'd in part and rev'd in part*, 62 S.W.3d 795 (Tex. 2001).

46. TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2002).

47. *Haase*, 61 S.W.3d at 15.

48. The court recognized that unsigned papers may be incorporated by reference, but the express language in the signed document must expressly refer to the other writing, citing *Owen v. Hendricks*, 433 S.W.2d 164, 166-67 (Tex. 1968).

valid consideration for the reasons discussed above. Additionally, the court concluded that the three letters were so indefinite that they were unenforceable, referring to specific language in the letters such as "tentative agreement," "essential terms," and "agreement in principle," all of which evidenced an ongoing negotiation and not a final agreement. Also, the letters were too indefinite as to the time of performance, the purchase price, and the method for calculating a purchase price.

The questions of an implied assignment of a guaranty and waiver of presentment and demand for guarantees were addressed in *Escalante v. Luckie*.[49] This case dealt with three separate notes and three separate guarantees relating to each of the notes. In each case, Escalante pledged CDs in return for a guaranty agreement from Luckie and Meyers to secure obligations of American Teletronics, Inc. and Bent Tree Group, Inc. to Mainbank. When the notes and loans of these two payors went into default, Escalante cashed his CDs, purchased the notes and loans from Mainbank, and brought suit under the guarantees to collect the principal and interest outstanding under the notes. As to the first note, Escalante was successful in proving his ownership of the guaranty agreements by furnishing proof that he was the named payee, had possession of the note, which was produced in court, and that the court admitted it into evidence.[50] The guarantors were nevertheless successful in defending their guaranty on note one, since the guaranty related to a different certificate of deposit pledged by Escalante, and Escalante failed to prove that the certificate of deposit used to satisfy this note obligation was the certificate of deposit referenced in the guaranty agreement. The court held that the guaranty must be strictly construed and not extended by construction or implication beyond its precise terms.[51]

With respect to the second note, testimony proved the execution of note two and its related guaranty agreements as well as the assignment of note two from Mainbank to Escalante. When Mainbank endorsed note two to Escalante, it also delivered possession of the guaranty agreements to Escalante. Each of these guaranty agreements was an absolute guarantee of payment and not of collection. Cases recited by the court recognize the implied transfer of a guaranty with the assignment of the promissory note to which it relates. Factors indicating such an implied assignment include the following: the mere assignment of the promissory note,[52] a sales agreement (without a formal guaranty assignment) referring to all loans which by definition include related collateral documents including guarantees,[53] and competent witness testimony of such a trans-

49. Escalante v. Luckie, 77 S.W.3d 410 (Tex. App.—Eastland 2002, pet. denied).

50. *Id.* at 416; *see also* Schubiger v. First Newport Realty Investors, 601 S.W.2d 218, 222 (Tex. Civ. App.—Dallas 1980, writ ref'd n.r.e.).

51. *Escalante*, 77 S.W.3d at 417 (citing McKnight v. Va. Mirror Co., 463 S.W.2d 428, 430 (Tex. 1971)).

52. Ray v. Spencer, 208 S.W.2d 103 (Tex. Civ. App.—Texarkana 1947, writ ref'd).

53. Boyd v. Diversified Fin. Sys., 1 S.W.3d 888 (Tex. App.—Dallas 1999, no pet.).

fer.[54] Assignments of guarantees, however, are not assumed in connection with every assignment of a note. For instance, in *Ashcraft v. Lookadoo*,[55] an implied assignment was not present where the guaranty did not exist in the asset file with the note, the assignee did not possess the guaranty, the assignee could not produce the original guaranty, there was no proof that the alleged guarantor had ever executed the guaranty, and the guaranty was not specific to the particular note assigned. In the present case, however, the guaranties of Luckie and Meyers specifically related to the payment of note two, and Escalante proved the note had been endorsed to him and he possessed the guaranty. Under such circumstances, the court concluded the guarantees were assigned to him by implication.

In regard to note three, the trial court concluded that Escalante did not make a demand for payment on the guarantors and held in favor of the guarantors. The appellate court reversed, finding that Escalante proved, by a preponderance of the evidence, the principal and interest due on note three, the obligation of Escalante to Mainbank with respect to note three, and the foreclosure on the collateral therefor. As to the requirement for demand, the court looked to the language of the guaranty, which provided that the guarantors "*waive presentment, demand*, protest, notice of protest and *notice of dishonor* as to each and all items constituting the indebtedness or obligation hereby guaranteed."[56] The appellate court upheld these waiver provisions and concluded that based on the language of the guaranty, no demand on Luckie and Meyers was required of Escalante.

Finally, Escalante demanded attorneys' fees, but the guarantors claimed that Escalante had failed to make demand as required by Texas Civil Practice and Remedy Code sections 38.001 and 38.002 (Vernon 1997).[57] Escalante pleaded attorneys' fees under both the Texas Civil Practice and Remedy Code and pursuant to the terms of the guaranty agreement.[58] Since there was a waiver of presentment and demand, the court concluded Escalante was entitled to attorneys' fees based on the language of the guaranty.

The issue of whether a letter agreement was a conditional guaranty or an unconditional guaranty of payment was presented in *Farmers &*

54. Vaughn v. DAP Fin. Servs., Inc., 982 S.W.2d 1 (Tex. App.—Houston [1st Dist.] 1997, no pet.).

55. Ashcraft v. Lookadoo, 952 S.W.2d 907 (Tex. App.—Dallas 1997), *pet. denied*, 977 S.W.2d 562 (Tex. 1998) (per curium).

56. *Escalante*, 77 S.W.3d at 421.

57. Section 38.002 requires as a condition to recovery of attorneys' fees that "the claimant must present the claim to the opposing party or to a duly authorized agent of the opposing party."

58. Attorneys' fees are authorized only when provided for by statute or by contract between the parties. *See* Travelers Indem. Co. of Conn. v. Mayfield, 923 S.W.2d 590 (Tex. 1996).

Merchants State Bank v. Reece.[59] The letter guaranty agreement was from a bank to Reece to assure payment for products shipped by Reece for the benefit of G.R.A.V.I.T.Y., Inc. The specific letter from the bank provided that "each order placed by G.R.A.V.I.T.Y., Inc. will be paid *as agreed*, seven (7) days after shipment. . . ."[60] Reece shipped the transformers as requested, but they were rejected as being unfit and unsafe pursuant to the agreement between G.R.A.V.I.T.Y., Inc. and Reece. No payment was made under the purchase contract, and Reece made demand upon the bank, which refused payment, claiming that the letter agreement amounted to a conditional payment guaranty and not an absolute payment guaranty. The applicable provision in the letter used the words "as agreed," which the court concluded could only modify the word "paid." The court concluded that the language could only have meaning within the four corners of the letter if the "as agreed" term referred to the amount to be paid, as opposed to a separate specification document not otherwise mentioned, referred to, or incorporated into the guaranty agreement. Therefore, the court held that such language was unambiguous and constituted an unconditional payment guaranty. Because Reece had repossessed all the transformers subsequent to the failure to make payment, the bank asserted an offset and a failure of consideration. The court disagreed with the lack of consideration argument, citing the detriment to the creditor of its promise to pay the amount as agreed. The court also cited Reece's detrimental reliance on such promise and Reece's actual shipment of the transformers. Furthermore, the court held that the defenses of offset and failure of consideration were unavailable to the guarantor since it was a primary, absolute and unconditional guaranty.

The Fifth Circuit, in a case of first impression, considered the effectiveness of waivers by a guarantor under the Texas Anti-Deficiency Statute.[61] In *LaSalle Bank National Association v. Sleutel*,[62] the guaranty securing the defaulted note provided that the guarantor expressly waived and relinquished "all rights and remedies now or hereafter accorded by applicable law to guarantors or sureties, including, without limitation . . . any defense, right of offset or other claim which Guarantor may have against Borrower or which Borrower may have against Lender or the Holder of the Note . . . ."[63] In concluding that a guarantor[64] could waive such statutory offset rights, the court relied upon the principle of *inclusio unius est exclusio alterius*, meaning that it is assumed that the purposeful inclusion of certain terms implies the purposeful exclusion of terms that are absent.

59. Farmers & Merch. State Bank v. Reece Supply Co., 79 S.W.3d 615 (Tex. App.—Eastland 2002, pet. denied).

60. *Id.* at 617.

61. TEX. PROP. CODE ANN. § 51.003 (Vernon 1995).

62. LaSalle Bank Nat'l Assoc. v. Sleutel, 289 F.3d 837 (5th Cir. 2002).

63. *Id.* at 840.

64. The court specifically did not decide whether such a deficiency could be validly waived by any other party. *Id.* at 841 n.4.

The court cited numerous other provisions of the Texas Property Code that specifically prohibited the waivers of certain statutory provisions.[65] It should be noted that the applicable guaranty provision in this case was included in the typical "boilerplate" waivers provisions, and not in a provision specifically relating to the deficiency after a foreclosure sale.

IV. USURY

In *Hoxie Implement Co., Inc. v. Baker*,[66] the court addressed what constituted debt, detention of money, and interest in connection with a usury cause of action. Hoxie Implement Company and Jim Baker (d/b/a Baker Harvesting), who had an ongoing business relationship with an existing receivable balance of $3,137.70, entered into a contract for the purchase and sale of six combines for $1,025,636.00. For reasons not disclosed in the opinion, Baker failed to purchase the combines, and Hoxie demanded payment for same, alleging breach of contract with damages in the amount of the purchase price and other sums. Prior to filing suit, Hoxie sent a demand letter with an attached petition that Hoxie said it may file. The demand letter admonished Baker to read the petition allegations carefully. Taken together, the demand letter and attached petition alleged the breach of contract and asserted interest cost of eighteen percent (18%) per annum from the date accrued. The trial court granted a motion for instructed verdict in favor of Baker, concluding that the demand letter with the attached petition constituted a demand for interest under the applicable statute, and that there was usury under two propositions: first, the allegations made in the demand letter consisting of interest charges of $91,135.00, and second, for prejudgment interest at the actual rate at which they were accruing on the purchase price of Hoxie for the combines from the manufacturer. The evidence was undisputed that Baker did not enter into an agreement to pay any interest to Hoxie, and that the interest Hoxie attempted to capture exceeded 12% per annum. Notwithstanding the directed verdict on the usury claims, the court refused to direct a verdict with regard to the breach of contract claim. After trial on this issue, the jury found that no such breach had occurred.

On appeal, the usury verdict was overruled in part. Hoxie claimed that in the absence of an absolute obligation to pay a definitive principal amount, there could not be a charge of usurious interest and that if it was

65. These included a purported waiver of prompt payment to contractors and subcontractors, TEX. PROP. CODE ANN. § 28.006(a) (Vernon 2000); waiver of landlord's lien, TEX. PROP. CODE ANN. § 54.043(b) (Vernon 1995); waiver of rights relating to self-service storage facilities' lien, TEX. PROP. CODE ANN. § 59.004 (Vernon 1995); waiver of a broker's right to a lien, TEX. PROP. CODE ANN. § 62.002 (Vernon Supp. 2003); waiver of rights under the Texas Uniform Condominium Act, TEX. PROP. CODE ANN. § 82.004 (Vernon 1995); waiver of the landlord's duties to mitigate damages with respect to leases, TEX. PROP. CODE ANN. § 91.006(b) (Vernon Supp. 2003); and waiver of a purchaser's cancellation rights under the Texas Timeshare Act, TEX. PROP. CODE ANN. § 221.041(c) (Vernon 1995).

66. Hoxie Implement Co., Inc. v. Baker, 65 S.W.3d 140 (Tex. App.—Amarillo 2001, pet. denied).

charged, it was subsequently corrected. As to the first contention, the court took a procedural side step, stating that Hoxie did not raise the continent nature of the debt at trial. Hence, Hoxie waived such argument by failing to affirmatively plead them at the earliest opportunity as required.[67] On motion for rehearing, the appellate court reversed itself as to the waiver of the contingent obligation argument. Hoxie asserted that there was no absolute obligation to pay a debt and that Baker failed to prove the existence of an underlying debt. The court noted that the directed verdict on the usury claim was granted prior to the jury's finding that there was no breach of contract, hence no "debt." The court also stated that the interest statute was clear in its requirement of an "actual" as opposed to "alleged" use, forbearance or detention of money, concluding that if there was no actual use, forbearance or detention of money, then there can be no interest and, consequently, no usury violation.

Next the court addressed whether Hoxie demanded usurious interest with respect to the breached purchase agreement as well as to the existing account receivable. Usury occurs only when one "contracts for, charges, or receives interest that is greater than the amount authorized by [law]."[68] Hoxie claims that its demand letter did not constitute a charge of interest but was merely notice of the interest Hoxie was incurring and that a petition may be filed. The court reiterated that the solicitation of interest by a demand letter could constitute a "charge" of interest for purposes of the usury statute.[69] *Woodcrest* and the cases therein cited required the intent of the demand letter to be the controlling factor. The court found sufficient intent in the cover letter and draft of the petition to find Hoxie intended to make an unequivocal and express claim for such sums.[70]

Next the court addressed whether the interest sought was within the purview of Section 305.001 of the Finance Code.[71] The court found that withholding payment under a contract where a debt has become due and payable, but not paid, is the detention of money for which interest thereon comes within the purview of that statute. In a footnote[72] the

67. TEX. R. APP. P. 33.1(a).

68. TEX. FIN. CODE ANN. § 305.001(a) (Vernon 2003).

69. *Hoxie*, 65 S.W.3d at 146 (citing Woodcrest Assocs., Ltd. v. Commonwealth Mortgage Corp., 775 S.W.2d 434, 437 (Tex. App.—Dallas 1989, writ denied)).

70. The claims and demands in the cover letter and petition were not worded in a contingent manner. The demand letter referred to the breach of contract alleging "sums due and owing," a reference to damages suffered by Hoxie in the "form of interest cost of 18% per annum" from the date performance was allegedly due until paid, to a statement that Baker was indebted to Hoxie in the amount of $1,025,636.00, plus interest thereon at the rate of 18% per annum, and to a demand for such recovery. *Id.* at 144. There is additional discussion in the case concerning the manner of the claim of interest Hoxie was accruing on its purchase from its supplier. Rather than clearly stating such sums as a loss or damage to Hoxie, the demand letter characterizes such monetary loss as an interest claim of Baker to Hoxie, and the appellate court concluded that it must be characterized as an interest charge by Hoxie against Baker due to its specific language.

71. For purposes of usury determinations, interest means compensation for the use, forbearance or detention of money. TEX. FIN. CODE ANN. § 301.002(a)(4) (Vernon 2003).

72. *Hoxie*, 65 S.W.3d at 148 n.3.

court distinguished *George A. Fuller Co. v. Carpet Service Inc.*,[73] where a petition itself was held not to be the basis for a usury claim, since the petition is addressed to the court and not a demand to the other party, whereas in the subject case, there was a cover letter with an attached petition, which taken as a whole was a demand directly against the debtor.

With respect to the account receivable usury claim, the court found sufficient evidence that a rate was never communicated by Hoxie to Baker. Despite Hoxie's testimony[74] that its standard practice was to charge 18% per annum on tardy accounts, Baker testified that he was never billed for such interest and received no statement from Hoxie showing such charges. Without an express and positive demand or communication of such interest charge, there could not legally be a demand for usurious interest. Furthermore, the court concluded that testimony given at trial cannot constitute a charge of interest. Also on appeal was the propriety of awarding attorney's fees in connection with the usury award. The court found two statutes authorizing the award of attorney's fees. The first is under the usury provisions of the Finance Code, which authorizes the award of reasonable attorney's fees set by the court for a person found liable of usury.[75] Secondly, the court concluded that the declaratory judgment relief statute permits recovery of reasonable and necessary attorney's fees as are equitable and just.[76] While Baker's attorney failed to segregate the attorney's fees among the multiple causes of action, the Court concluded that Hoxie waived any objection by failing to raise the objection.

In *Kaplan v. Tiffany Development Corporation*,[77] the court was faced with a usury claim involving not only interest payable in cash on a note, but also the conveyance of a five percent interest in property. Tiffany Development Corporation and its sole shareholder, Leonard Garner, borrowed $220,000 from Kaplan, evidenced by a promissory note bearing fifteen percent interest and containing a usury savings clause that is recited in full in the opinion.[78] As part of the loan transaction, Garner was required to convey a five percent interest in the property to a designated corporation, which was subject to a redemption agreement allowing redemption for an amount equal to five percent of the net cash proceeds from the sale of the property and five percent of any equity or participation interest relating thereto. Ultimately, the redemption agreement expired, and the note was increased and extended. Eventually the note went into default, was accelerated, and foreclosure proceedings were

73. George A. Fuller Co. v. Carpet Servs., Inc., 823 S.W.2d 603 (Tex. 1992).

74. Hoxie's president testified at trial about its accounting practice of automatically charging 18% per annum on tardy accounts. *Hoxie*, 65 S.W.3d at 149.

75. TEX. FIN. CODE ANN. § 305.005 (Vernon Supp. 2003).

76. TEX CIV. PRAC. & REM. CODE § 37.009 (Vernon 1997).

77. Kaplan v. Tiffany Dev. Corp., 69 S.W.3d 212 (Tex. App.—Corpus Christi 2001, no pet.).

78. *Id.* at 215.

commenced. The debtors obtained a temporary injunction and ultimately an order voiding a subsequent foreclosure sale. The sufficiency of the temporary injunction was the issue on appeal. In considering the merits of the temporary injunction, the court addressed the substantive claim of usury and whether a sufficient showing was made in connection with the temporary injunction. The value of property paid, as well as money paid, on a debt is considered interest and is calculated in connection with a usury claim.[79] The appellate court concluded that the debtors produced evidence as to the maximum allowable interest under Texas law,[80] and that the value of the five percent interest in the property was worth at least $50,000. Together with the stated interest rate, the value produced an effective interest rate of 37.54% under the original note and 45.88% under the modified note. The savings clause was held ineffective in this case since the explicit terms of the note and redemption agreement constituted a usurious contract.

El Paso Refining, Inc. v. Scurlock Permian Corp.[81] considered the burden of proof necessary in a usury claim and whether a guarantor had standing to assert a usury claim. This case arose out of the financial collapse of the El Paso Refinery, owned by a limited partnership, El Paso Refinery L.P. The limited partnership entered into a crude oil purchase contract with Scurlock Petroleum. The contract was guaranteed by El Paso Refining, Inc. ("EPRI"), the general partner of El Paso Refinery L.P. The guaranty contained a usury savings clause and a single reference to EPRI as a primary obligor, but otherwise waived any defenses, including usury, that the limited partnership could have asserted against Scurlock Petroleum. After the refinery defaulted on payments under the crude oil contract, Scurlock Petroleum began charging a risk premium and sent pricing amendment letters to EPRI, none that were ever agreed to by the limited partnership or EPRI. As the liquidity crisis continued, the refinery filed for bankruptcy and brought suit against Scurlock Petroleum for usury and other claims. The suit by the refinery was settled with a release of liability and dismissal with prejudice. Subsequently, EPRI filed for bankruptcy and made a usury claim against Scurlock Petroleum. The basis for this suit related to the form of jury charges presented by the court to the jury. The usury claim was submitted in a single broad form question that set forth the burden of proof as a "clear and convincing evidence" measure. In reviewing this standard, the court noted that this issue had not been addressed for eighty years and noted an apparent old line of cases supporting the clear and convincing evidence standard.[82] These cases were reviewed and dismissed, holding that the preponder-

79. *Id.* at 219.

80. The maximum lawful interest rate was 18% at such time.

81. El Paso Ref., Inc. v. Scurlock Permian Corp., 77 S.W.3d 374 (Tex. App.—El Paso 2002, pet. denied).

82. *Id.* at 380. *See also* Great S. Life Ins. Co. v. Williams, 105 S.W.2d 277 (Tex. Civ. App.—Amarillo 1937, no writ); Rinyu v. Teal, 593 S.W.2d 759 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd. n.r.e.).

ance of the evidence standard is the better view, citing the penal nature of the usury statute that requires strict construction thereof, and the silence within the usury statute regarding burden of proof suggesting a preponderance of the evidence theory.

The court also addressed the standing of EPRI as a guarantor to raise a usury issue. EPRI argued that it has standing to raise usury since it was an obligor, relying on the single reference to it being a primary obligor as provided in the guaranty. In reviewing the guaranty as a whole, the court noted that the waiver by EPRI of the usury statute and other provisions clearly reflected a status of EPRI as a guarantor and not an obligor within the meaning of the usury statutes. Furthermore, the court concluded that the sending of a demand letter to EPRI did not transform EPRI into an obligor for purposes of that statute. Without standing as an obligor, EPRI's standing to pursue a usury claim as a guarantor was rejected.

Lairsen v. Slutzky[83] involved a usury claim based upon a demand letter. This dispute arose out of a Lake Travis subdivision restrictive covenant that Lairsen allegedly breached by building a two story house. The parties settled this dispute by Lairsen agreeing to acquire land owned by Longitudinal Trust, for which Slutzky was the trustee, with the trust providing vendor financing. The agreement provided for interest only payments until maturity and limited personal liability of Lairsen to the top twenty-five percent of the declining balance of the note. Lairsen failed to make any payments on the note, and it was ultimately accelerated and foreclosure occurred under the deed of trust. After the foreclosure sale, the trust sent a demand letter to Lairsen demanding payment of the entire balance of the deficiency on the note along with accrued interest on the note, cost of collections, late charges, and attorney's fees as provided in the note. Lairsen's usury claim was based on the fact that the letter demanded payment of the entire deficiency.[84] The court concluded that this demand for the deficiency amount was not a usurious demand because Lairsen never complained that the note was usurious and because the demand letter for the deficiency amount, together with accrued interest and other costs, was limited "as provided for [in the note]."[85] Since the demand was limited to the terms of the note and no complaint was alleged that the note was usurious, the court concluded that the demand letter could not represent a usurious charge, clearly noting that no specific dollar amount was recited in the demand letter.[86]

The court addressed the sufficiency of the creditor's actions in notifying

83. Lairsen v. Slutzky, 80 S.W.3d 121 (Tex. App.—Austin 2002, pet. denied).

84. The foreclosure sale was for a price of $420,000, while the original principal balance of the note was $598,000, which amounted to a $178,000 deficiency.

85. *Id.* at 127.

86. The demand letter in fact directed the debtor to contact the creditor's attorney to obtain the exact dollar amount, which the debtor never did. *Lairsen*, 80 S.W.3d at 127. Use of such generic terminology may be appropriate drafting technique for demand letters, however, it would not protect against usurious demands made upon subsequent full disclosure of a usurious amount requested.

a debtor of and curing a usury violation in *Pagel v. Whatley*.[87] Whatley, a crop duster, sued Pagel, a farmer, for nonpayment of an open account for services rendered in crop dusting over a number of years. After a few years of performing crop dusting services, Pagel approached Whatley to help finance Pagel through the season. There was an agreement that interest could be charged, but the exact amount was never agreed on, nor was it ever reduced to writing. Whatley's standard procedure when customers agreed to interest was to charge eighteen percent.[88] After numerous verbal requests for payment, Whatley ultimately filed a lawsuit for the principal amount of the open account.[89] Attached to the original petition was a statement signed by Whatley reading as follows: "I, RICHARD WHATLEY, hereby certify that I was fully and completely informed by CHARLES HOOD of the possibility and consequences of a usury violation in regard to collection work he is doing for me, and told him to proceed."[90]

The trial court ruled in favor of Whatley and an appeal was taken. The primary issue considered on appeal was the sufficiency of such statement attached to the original petition and whether the statement complied with the statutory procedures for curing a usury violation.[91] Pagel ultimately counterclaimed for usury fifteen months after receiving the original petition. The court concluded that the statement attached to the petition was sufficient to satisfy the notice requirements under Texas Finance Code Annotated section 305.103(a)(2),[92] reasoning that this statement gave actual notice of the usury claim to Pagel (as evidenced by Pagel's subsequent filing of a usury defense claim), and Pagel had made no claim for usury violation prior to a letter from Pagel's attorney alleging the same, which was seven months after filing of the lawsuit.[93] On a motion for rehearing *in banc*, Justice Dorsett dissented urging the granting of the motion for rehearing on the basis that such statement did not satisfy the statutory requirements. Specifically, Justice Dorsett reasoned that the specific language of section 305.103(a)(2) requires the creditor to give written notice to the obligor of the obligation. Whatley's statement only advised of a possible usury violation and the consequences of it, and Justice Dorsett did not believe that such general and vague language satis-

87. Pagel v. Whatley, 82 S.W.3d 571 (Tex. App.—Corpus Christi 2002, pet. denied).

88. Whatley testified that his computer had an 18% service charge that could be charged to any customer's claim and that it was so charged in *Pagel*. *Id.* at 572.

89. The invoice and ledger sheets attached to the petition reflected seven credits for payments, all of which were applied to principal and no interest charges were reflected on the ledger.

90. *Id.* at 573.

91. TEX. FIN. CODE ANN. § 305.103(a) (Vernon 2003) provides that a creditor is not liable for usury violations if (i) within sixty days after the creditor discovers the violation, the creditor corrects the violation, and (ii) the creditor gives written notice to the obligor of the violation before the obligor gives written notice of the violation to the creditor or files an action alleging the violation.

92. TEX. FIN. CODE ANN. § 305.103(a)(2) (Vernon Supp. 2003).

93. The Court noted that Pagel did not raise any issues concerning the sixty day period requirement under TEX. FIN. CODE ANN. § 305.103(a)(1).

fied the specific requirements of the statute.[94]

V. DEBTOR/CREDITOR

In *Duran v. Henderson*,[95] the court was faced with a case of first impression of construing the Texas Uniform Fraudulent Transfer Act ("TUFTA")[96] as to whether the extinguishment provisions of the TUFTA were a statute of repose or a statute of limitations. This was the third of three suits between Duran and the defendants. The first suit ended in a judgment awarding a one-half interest in the net proceeds of a $300,000 note receivable. The second suit related to the illegal conversion of the net proceeds of such note receivable. The third and current suit related to conveyances of property alleged to be fraudulent conveyances. The trial court entered judgment for the Hendersons, and granted a lien for foreclosure of the conveyed property. On appeal, the court reversed this decision. In construing TUFTA, Duran complained that the trial court lacked subject matter jurisdiction since the TUFTA claim was extinguished[97] before the suit was filed. In other words, Duran alleged that the exclusionary period was one of a statute of repose rather than a statute of limitations.[98] In determining whether this provision was a substantive law or procedural remedy (which could be waived), the court concluded that no Texas court had considered this particular issue[99] and referred to the intent of the drafters of the Uniform Fraudulent Transfer Act.[100] The court concluded the drafters' intent was that the extinguishment provisions be enforced as a statute of repose and not of limitations.[101] Consequently, the court concluded that TUFTA's extinguishment provisions operated as a substantive statute of repose and not as a procedural statute of limitations.

This conclusion was not dispositive due to the complexity of the timings of the various conveyances. The first conveyance from Duran to the Duran Family Trust consisted of 165 acres (excluding a one acre tract and house retained as his homestead), which occurred on November 28, 1995. The second conveyance was of the one acre tract and home on July 10,

94. Justice Dorsett would look to the plain and common meaning of statutory words in order to construe a statute and give effect to the Legislature's intent. Liberty Mut. Ins. Co. v. Harrison Contractors, Inc., 966 S.W.2d 482, 484 (Tex. 1998).

95. Duran v. Henderson, 71 S.W.3d 833 (Tex. App.—Texarkana 2002, pet. denied).

96. TEX. BUS. & COM. CODE ANN. § 24.001-24.005 (Vernon 2002).

97. TUFTA provides that a fraudulent conveyance is a transfer by debtor with the intent to hinder, delay or defraud his creditors by placing the debtor's property beyond the creditor's reach. The statute provides that a violation is extinguished if it is not brought within four years of the transfer sought to be voided or, if later, within one year of the time when the transfer was or could reasonably have been discovered by the claimant. TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon Supp. 2002).

98. A statute of repose creates a substantive right while a statute of limitations is a procedural devise. *Duran*, 71 S.W.3d at 837.

99. *Id.* at 838.

100. UNIF. FRAUDULENT TRANSFERS ACT, 7A-2 U.L.A. 266, 267 Historical Notes (1999).

101. *Duran*, 71 S.W.3d at 838.

1996 to his daughter, reserving a life estate for himself. The existence of these conveyances were not known to the Hendersons until they discovered them during depositions for the second suit in October 1999. The original petition for the third suit was filed April 27, 2000. Consequently, the third suit petition was filed more than four years after the first conveyance, less than four years after the second conveyance, and less than one year after the Hendersons became aware of the conveyances. Duran argued that since each conveyance was duly and properly recorded in the Real Property Records of the county clerk, constructive knowledge of the conveyances should be imputed to the Hendersons thus denying their ability to rely on limitations calculated from one year from knowledge of the conveyances.[102] The court looked to discovery rules applicable to general fraud claims (despite the fact that these rules are in the nature of a statute of limitations rather than a statute of repose), including jurisprudence applicable to this point. Under such jurisprudence, what constitutes reasonable diligence to discover fraud is a question of fact for the jury; the registration of a conveyance in the public records is merely one factor to be considered.[103] There was not sufficient evidence to impute knowledge to the Hendersons by reason of the constructive notice of the registration statutes because the Hendersons' knowledge of the county in which Duran owned property, that the note receivable was not in any way related to the conveyed real estate, and such deeds were not in the Hendersons' chain of title, were not sufficient to create a presumption of constructive knowledge.

Duran also claims that he was not a debtor of the Hendersons until the second suit judgment was rendered on January 19, 2000. The definition of "claim" under TUFTA means a right to payment or property, whether or not the right is reduced to judgment.[104] The first suit did not make Duran a debtor of the Hendersons because it granted to the Hendersons a one-half interest in the note receivable proceeds (being an asset and not a debt). However, when Duran was paid the full value of the note, he became liable to the Hendersons for reimbursement of their one-half share and, at such time, he would have been a debtor of the Hendersons.[105] The note receivable had a maturity date of December 1996, but was prepaid in August of 1995. The court concluded, without much further discussion, that the prepayment in August 1995 coupled with the judgment on the second suit was legally sufficient evidence to find Duran was a debtor of Henderson at the time of the first conveyance in November 1995 because TUFTA section 24.005(a)(1) relates to a transfer made by a debtor whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation incurred.

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102. The effect of this would be that the first conveyance of 165 acres was not a fraudulent conveyance since it would have been outside the statute of repose time period.

103. *Duran*, 71 S.W.3d at 839.

104. TEX. BUS. & COM. CODE ANN. § 24.002(3) (Vernon 2002).

105. *Duran*, 71 S.W.3d at 840-41.

The Hendersons next challenged Duran's ability to claim the full 165 acre tract as homestead. This issue revolves around whether Duran was a single person or a family for homestead purposes.[106] The testimony in the case reflected that Duran's daughter and grandson moved in with him in 1994, and Duran's social security income of $800 together with cattle lease income was the primary means of support for Duran and his adult daughter and grandson. Because there was sufficient evidence to find a legal and moral obligation to support at least one family member and a corresponding dependence by the other family member for such support, the necessary familial relationship was adequately demonstrated and the right to claim a homestead of up to 200 acres.[107] The Hendersons further claimed that the character of the homestead property should have been lost when it was transferred from Duran to the family trust. This contention was rejected because TUFTA applies to transfers of "assets," which is designed to explicitly exclude property that is exempt under nonbankruptcy law.[108]

Roebuck v. Horn[109] considered the sufficiency of a turnover order. Horn held a $76,000 judgment against Roebuck and, rather than attempt execution under the judgment, Horn sought a turnover order. The turnover order hearing presented evidence of Roebuck's nonexempt property consisting of $1,200 cash in a bank account, a pickup truck, motorcycles, twenty-five percent interest in his law firm, and an undisclosed interest in a leasing company from which his law firm leased its offices. The turnover order rendered at trial did not identify specific property, but used broad categories such as books, stocks, cash, other vehicles, and real property. The issue on appeal was whether such broad description met the standards for a turnover order. The court concluded that a reference to specific assets is required in a turnover order, and the reference to broad categories of assets as contained in the subject turnover order was insufficient.[110] Also, Roebuck contended that the order required turnover of assets jointly owned by Roebuck and third parties. The appellate court found this was also an abuse of the trial court discretion since none of the third parties were parties to the subject lawsuit.[111]

The case of *Blanche v. First Nationwide Mortgage Corp.*[112] involved a lender liability suit alleging negligence, wrongful debt collection practices, conversion, mental anguish, intentional infliction of emotional distress, invasion of privacy, and defamation. These causes of action arose

106. A rural homestead may consist of up to 200 acres for a family but only 100 acres for a single adult. TEX. PROP. CODE ANN. § 41.002(b) (Vernon 2000).

107. *Duran*, 71 S.W.3d at 842.

108. TEX. BUS. & COM. CODE ANN. §§ 24.002(2)(12), 24.002(12), & 24.005. (Vernon 2002).

109. Roebuck v. Horn, 74 S.W.3d 160 (Tex. App.—Beaumont 2002, no pet.).

110. *Id.* at 163 (citing Burns v. Miller, Hiersche, Martens & Hayward, P.C., 98 S.W.2d 317, 324 (Tex. App.—Dallas 1997, no writ)).

111. *Id.* at 164.

112. Blanche v. First Nationwide Mortgage Corp., 74 S.W.3d 444 (Tex. App.—Dallas 2002, no pet.).

out of the Blanches' purchase of a house from the Hewitts and the assumption of the mortgage in favor of First Nationwide. Five years after the purchase of the house, the United States asserted a tax lien against the property previously owned by the Hewitts. Additionally, the federal district court ultimately issued an opinion stating the transfer of the property from the Hewitts to the Blanches was invalid, and the house could be used to satisfy the Hewitts' tax liability. The Blanches notified their mortgagee, First Nationwide, of this order; however, First Nationwide continued to treat the Blanches as the owners of the house and obligors under the debt. When the Blanches stopped making their mortgage payments, First Nationwide reported the delinquency to various credit agencies and proceeded with foreclosure of its lien against the property by the posting of a foreclosure notice. After addressing certain procedural issues, the court addressed the sufficiency of evidence on the Blanches' causes of action. As to negligence, the Blanches' evidence of damages arising from subsequent denials for loans and the payment of higher interest rates on subsequent debts were not determined to be appropriate measures of damages for a simple negligence action.[113] As for elements regarding the mental anguish and emotional distress claims, there was no evidence of the necessary intent, malice, bodily injury, or special relationship,[114] and the evidence did not reveal actions of such a shocking and disturbing nature that mental anguish was a highly forseeable result. Unfair debt collection practices were alleged in general and under the Texas Debt Collection Practices Act[115] and the Federal Fair Debt Collection Practices Act.[116] Since the only debt collection action undertaken by First Nationwide was the foreclosure posting against the property, the action was not considered unfair or a prohibited debt collection practice. Although conversion of the Blanches' escrow account was alleged, the debtor made a demand for return of the escrow funds and the evidence did not reflect that First Nationwide refused the request. Finally, the sufficiency of the evidence for the infliction of emotional distress claims was addressed. Elements of this claim include extreme and outrageous conduct and severe emotional distress, neither of which were proven. The court noted that severe emotional distress requires a showing of distress so severe that no reasonable person could be expected to endure it without undergoing unreasonable suffering.[117] The fact that Blanche had to explain his bad credit reports to creditors and his employer were not sufficient to satisfy this standard.[118] With respect to invasion of privacy, the only evidence of publications related to the statement made to credit bu-

113. *Id.* at 453.

114. The mortgagor and mortgagee relationship is not a special relationship for purposes of these causes of action. *Id*; *see also* Cole v. Hall, 864 S.W.2d 563, 568 (Tex. App.—Dallas 1993, writ dism'd w.o.j.).

115. TEX. FIN. CODE ANN. §§ 392.301-392.306 (Vernon 1998).

116. 15 U.S.C. § 1692 (2000).

117. Escalante v. Koerner, 28 S.W.3d 641, 646 (Tex. App.—Corpus Christi 2000, pet. denied).

118. *Id.* at 454.

reaus and the inclusion of the Blanches' name on posted foreclosure notices. One form of invasion of privacy deals with public disclosure of private facts.[119] The disclosure of information concerning First Nationwide's credit history with the Blanches did not amount to publication of private facts, but rather the status of the financial transaction between the parties, which is a common action by creditors. Therefore, there could be no invasion of privacy under the public disclosure of private facts. As to the foreclosure notice, the court concluded that such an action would fall under defamation rather than invasion of privacy.[120] The second form of invasion of privacy is an invasion by intrusion into a person's solitude.[121] The crux of this claim is to show a prying into the private domain of another.[122] In this case, the only publicized information came from First Nationwide's own records or other public documentation. Therefore, there was no invasion of privacy by intrusion into another's solitude.

Finally, with respect to defamation, the court concluded that there was sufficient information for a defamation hearing. First Nationwide's defense rested on the Federal Fair Credit Reporting Act, which provides that a consumer cause of action for defamation, invasion of privacy, or negligence regarding the reporting of information by consumer reporting agencies and users of information and furnishers of information should be denied "except as to false information furnished with malice or willful intent."[123] Because the Blanches presented evidence that they had informed First Nationwide by letter of the federal district court order holding them no longer the owners of the property and that, despite such knowledge, First Nationwide continued to report to credit bureaus of the delinquent mortgage payments, the court held that such evidence was sufficient to raise a factual issue with respect to the malice or willful intent aspects under the Federal Fair Credit Reporting Act.

Bohls v. Oakes[124] is another case alleging violation of the Texas Deceptive Trade Practices Act.[125] The Oakes entered into an agreement with Voges to build them a house. Construction financing for the house was obtained by Voges from a prior customer, Lewis David Bohls. Various construction issues occurred, and the Oakes sued Voges and Bohls for various breaches and DTPA violations. Disputes between Voges and Oakes were ultimately settled leaving the court to consider only the DTPA claims and defenses. Bohls challenged numerous aspects of the evidence, particularly including that neither Charles nor Michelle Oakes was a consumer under the DTPA.[126] Bohls' contention that the Oakes

119. *Id.*
120. *Id.* at 455.
121. *Id.*
122. *See* Clayton v. Richards, 47 S.W.3d 149, 153 (Tex. App.—Texarkana 2001, pet. denied).
123. 15 U.S.C. § 1681h(e) (2000).
124. Bohls v. Oakes, 75 S.W.3d 473 (Tex. App.—San Antonio 2002, pet. denied).
125. TEX. BUS. & COM. CODE ANN. § 17.46(a) (Vernon 2002).
126. Being a consumer is a necessary element to a DTPA cause of action. *Bohls*, 75 S.W.3d at 478.

were not consumers rested on the fact that there was no legal relationship or written agreement between Bohls and the Oakes, that no transfer of goods or services existed, and that there was no evidence of a purchase or payment for services. As to Charles Oakes, the court, citing *Sears Roebuck & Co. v. Wilson*,[127] reiterated that it was not necessary for there to have been a written agreement or actual purchase for Charles to become a consumer. The DTPA requires only that a person seek goods or services in order to become a consumer. As for Michelle, she was a consumer under the DTPA by virtue of her being married to Charles and her intent to occupy the home after it was built. Since no written contract or privity between parties is necessary, the consumer may be one who merely will benefit from the transaction, where such transaction was specifically required by or intended to benefit such third party.[128]

Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd.[129] is a fraudulent transfer case. In this case, Mr. Charles Thorp was the owner of both Telephone Equipment Network (TEN) and Southwest Communications, Inc. (Southwest). Southwest entered into a space lease with Westchase, but Southwest failed to perform.[130] Prior to the lease transaction, Southwest had obtained a line of credit with Sterling Bank evidenced by three promissory notes. Westchase ultimately sued Southwest for breach of contract and thereafter Charles Thorp, president of TEN, acquired the three notes from Sterling Bank for their outstanding balance of $59,409.57, together with the security interest held by Sterling Bank in all of Southwest's assets.[131] Charles Thorp gave TEN the money to purchase the notes from Sterling Bank and testified at trial that TEN's only purpose was to hold such assets. TEN ultimately filed amended financing statements reflecting the transfer of the security interest in Southwest's assets. It also advised Westchase of TEN's intent to foreclose on such security interest and sell all of Southwest's property.[132] Westchase brought suit against TEN and Southwest alleging violation of TUFTA. The trial court granted a temporary injunction prohibiting TEN from foreclosing on Southwest's assets. Under TUFTA, a transfer is fraudulent if, as to a creditor, the debtor made the transfer "with actual intent to hinder, delay, or defraud any creditor of the debtor."[133] TEN argued that

127. Sears Roebuck & Co. v. Wilson, 963 S.W.2d 166, 170 (Tex. App.—Fort Worth 1998, no pet.).

128. *Bohls*, 75 S.W.3d at 479.

129. Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

130. In fact, Southwest never took occupancy of the leased space due to an alleged dispute between landlord and tenant relating to the office's floor plans. *Id.* at 604.

131. Southwest's assets included inventory, equipment and accounts receivable which had a book value of approximately $250,000.00. *Id.* at 605.

132. Thorp testified at trial that, while he had personal liability as a guarantor on the Southwest debt, he thought it was unlikely that he would cause TEN to sue himself to collect on such notes. *Id.* at 605.

133. TEX. BUS. & COM. CODE ANN. § 24.005(a)(1) (Vernon 2002). The TUFTA lists 11 non—exhaustive badges of fraud to assist in determining the requisite fraudulent intent, which are: (1) transfer to an insider, (2) debtor retains possession or control of assets,

Southwest's assets were not subject to an injunction since there was a valid lien against those assets held by TEN. This argument fails if the judicial lien, which would be obtained by Westchase under the breach of contract suit, takes priority over TEN's security interest in Southwest's property. Since the security interest in favor of TEN was an integral part of the alleged fraudulent transfer, the effectiveness of such lien as to Westchase's lien was reviewed.[134] The court proceeded through the list of badges of fraud finding that TEN was an insider considering the common ownership and management of TEN and Southwest and the shared business address. The court also found that TEN attempted to conceal the transfer based on the timing of filing of the financing statement amendment and notice of sale. It was also discovered that Southwest had been sued for breach of contract prior to acquisition of the security interest from Sterling Bank, that the foreclosure intended by TEN would cover all of Southwest's assets, that there was not reasonably equivalent value between the assets transferred, and the consideration received, as well as other significant facts, suggested an intent to defraud. As its second point of error, TEN contended that such a temporary injunction would amount to an illegal prejudgment attachment.[135] However, under TUFTA, an injunction is specifically permitted against further disposition of the transferred asset or other property.[136] The court dismissed the *Harper* and *Lane* cases since they did not involve claims brought under TUFTA and concluded that the assets of Southwest were clearly covered under TUFTA. The appellate court also concluded that the irreparable injury test for granting an injunction was clearly met inasmuch as Southwest would have been rendered insolvent after TEN's foreclosure on all of Southwest's assets, for which there was no adequate remedy at law.[137] Finally, TEN argued that it was not a transferee of Southwest's assets since it had not consummated the foreclosure and could not be subject to a TUFTA injunction. The court summarily dismissed this position, finding TEN to be a transferee when it became a lienholder of Southwest's assets.[138]

A fraudulent transfer claim was denied in *Patel v. Kuciemba*.[139] The debtor, DAS Investment Corporation, conveyed property covered by a note and deed of trust lien in favor of two separate creditors after the

(3) the transfer is concealed, (4) the transfer was made after the debtor had been sued or threatened with suit, (5) the transfer was of substantially all of the debtor's assets, (6) the debtor absconded, (7) the debtor removed or concealed assets, (8) whether the consideration received was reasonably equivalent to the asset value transferred, (9) whether the debtor was insolvent or became insolvent, (10) if the transfer occurred shortly before or after substantial debt was incurred, and (11) if essential assets of the business were transferred to an insider. TEX. BUS. & COM. CODE ANN. § 24.005(b)(1)-(11).

134. *TA/Westchase*, 80 S.W.3d at 608.

135. *Id.* at 610 (citing Harper v. Powell, 821 S.W.2d 456 (Tex. App.—Corpus Christi 1992, no writ)).

136. TEX. BUS. & COM. CODE ANN. § 24.008(a)(3) (Vernon 2002).

137. *TA/Westchase*, 80 S.W.3d at 611.

138. *Id.*

139. Patel v. Kuciemba, 82 S.W.3d 589 (Tex. App.—Corpus Christi 2002, pet. denied).

time the deed of trust was posted for foreclosure. However, the deed of trust note was paid in full by the transferring debtor prior to the foreclosure sale. Even though the transfer was made to an insider of the debtor for an amount substantially less than the market value of the property, the court concluded there could be no fraudulent transfer since the one creditor having other claims against the debtor approved, consented to, and accepted the full payment of the deed of trust note.[140] Consider this result in contrast to that in *Telephone Equipment*, *supra*. The court in *Kuciemba* supported its opinion under the Texas Uniform Fraudulent Transfer Act provision, which provides that if a transfer is voidable, the creditor may recover judgment only for the lesser of the value of the asset transferred or the creditor's claim.[141]

VI. VENDOR/PURCHASER

In *Skelton v. Washington Mutual*,[142] the bank sought to foreclose on its purchase money lien and deed of trust after Mr. Skelton, the owner and maker, died. Mr. Skelton had purchased the home while married, but Mrs. Skelton did not execute the loan documents nor was her name on the warranty deed with the vendor's lien. Mrs. Skelton argued that her homestead interest in the property was protected from foreclosure under the homestead provisions of the Texas Constitution[143] and the Texas Family Code.[144] The homestead provisions under the Texas Constitution are also covered by the homestead lien provisions under the Texas Property Code, which provides that homestead liens are available only for purchase money, taxes, and work and materials used for improvements.[145] The court concluded that the purchase money financing, although not executed by the spouse, was effective by reason of its nature as purchase money financing, contrasting the requirement for execution of documentation by both spouses with respect to liens for labor and materials for improvement of a homestead pursuant to Texas Property Code section 53.254. Ms. Skelton also argued that section 5.001 of the Texas Family Code, which limits conveyances of homesteads without joinder of both spouses, preempted the lien of Washington Mutual. The court again determined that, while execution of evidence by both spouses would be good practice, it was not necessary in the case of the purchase money financing where a lender held both the superior title and vendor's lien on the homestead property, and where the homestead interest and liens were created simultaneously.

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140. *Id.* at 599.
141. TEX. BUS. & COM. CODE ANN. § 24.009(b) (Vernon 2002).
142. Skelton v. Wash. Mut. Bank, 61 S.W.3d 56 (Tex. App.—Amarillo 2001, no pet.).
143. *Id.* at 60 (citing TEX. CONST. art. XVI, § 50 (1876, amended 1973, 1995, and 1999), which provides, in relevant part, that "No mortgage, trust deed, or other lien on the homestead shall ever be valid, except for the purchase money therefore, or improvements made thereon . . .").
144. TEX. FAM. CODE ANN. § 5.001 (Vernon 1998).
145. TEX. PROP. CODE ANN. § 41.001(b) (Vernon 2000).

The propriety of the use of a *lis pendens*[146] was considered in *Mangione v. Jaffe*.[147] Mangione, sued the partners of a partnership that owned a shopping mall for breach of the sales agreements and filed a *lis pendens* against the property. The subject matter of each sales agreement was the partners' interest in the partnership, not their ownership of the mall. Mangione plead to enforce the contract and to impose a constructive trust upon title to the property to secure his claimed interests. Mangione did not allege actual or constructive fraud, which is an essential element for imposing a constructive trust; therefore, the court determined that Mangione's pleadings only asserted a breach of contract cause of action. Mangione was entitled only to specific performance of the sales agreements or damages for breach of those agreements. Thus, the *lis pendens* was properly cancelled.

The distinction between an option contract and a contract of sale was determinative in *Chambers County v. TSP Development, Ltd.*[148] A real estate developer entered into a contract to purchase real estate within Chambers County and submitted an application to the Texas National Resources Conservation Commission requesting a permit to dispose of solid waste on the land. Chambers County passed two ordinances prohibiting the disposal of solid waste in certain areas of the county, which covered the land subject to the developer's existing contract. TSP sought a declaratory judgment against such ordinances pursuant to the Private Real Property Rights Preservation Act and the Uniform Declaratory Judgment Act.[149] Under the Private Real Property Rights Preservation Act, owners are allowed to file lawsuits against a political subdivision to determine whether a taking has occurred. The Act defines owner as a person with "legal or equitable title to affected private real property at the time a taking occurs."[150] A contract for sale conveys equitable title,[151] while an option contract conveys only an interest in the property and no equitable title passes at the time of execution of an option contract.[152] In distinguishing between the two forms of contracts, an option contract is indicated by the requirement that the seller accept a stipulated sum as liquidated damages in lieu of the purchaser's further liability.[153] Also indicative of an option contract is whether additional deposits will be required, whether varying prices are set forth based upon the time of

146. TEX. PROP. CODE ANN. § 12.007(a) (Vernon 1984), which allows the filing of a *lis pendens* during the pendency of an action involving title to real property, establishment of an interest in real property or enforcement of an encumbrance against real property.

147. Mangione v. Jaffe, 61 S.W.3d 591 (Tex. App.—San Antonio 2001, pet. dism'd).

148. Chambers County v. TSP Dev., Ltd., 63 S.W.3d 835 (Tex. App.—Houston 2001, pet. denied).

149. TEX. GOV'T CODE ANN. § 2007.001-.045 (Vernon 2000); TEX. CIV. PRAC. & REM. CODE ANN. § 37.001-.011 (Vernon 1997).

150. TEX. GOV'T CODE ANN. § 2007.002(2) (Vernon 2000).

151. Lefevere v. Sears, 629 S.W.2d 768, 770 (Tex. Civ. App.—El Paso 1981, no writ).

152. Hitchcock Props., Inc. v. Levering, 776 S.W.2d 236, 238 (Tex. App.—Houston [1st Dist.] 1989, writ denied).

153. Cadle Co. v. Harvey, 46 S.W.3d 282, 286 (Tex. App.—Fort Worth 2001, pet. denied).

actual sale, whether alternative boundaries provided for the subject property, and whether of a "time is of the essence" provision is included.[154] The court found the subject contract to be an option contract because the contract did not impose a mandatory obligation upon the seller to accept a sum stipulated as liquidated damages in lieu of the purchaser's further liability; the seller's sole remedy was the right to keep the deposit and cancel the contract. Therefore, TSP did not have standing to sue under the Private Real Property Rights Preservation Act.

The case of *Aguilar v. Weber*[155] involved a contract for deed and promissory note. The Aguilars, as buyers, and Weber, as seller, contracted for the purchase of residential property in Waco, Texas for the purchase price of $52,000 with a $1,900 down payment. The contract provided that if the Aguilars made timely monthly payments for a period of three to six months, the Webers would execute a warranty deed conveying the property to the Aguilars. The contract also provided that all money would be forfeited to Weber in the event of a default by the Aguilars. Weber alleged that the Aguilars breached the contract by their failure to make payments, pay taxes, and provide insurance, as required by the contract. Weber sued for forcible entry and detainer. The Aguilars countersued to dispute the amount owed and for failure to execute a warranty deed after timely payments had been made for the requisite three to six months under the contract. The appellate court noted that the contract did not set forth a provision creating a landlord/tenant relationship in the event of default on the contract for deed.[156] Thus, the forcible entry and detainer action failed because it could not be based on a landlord/tenant relationship. The appellate court ruled that a title dispute, other than that of a landlord/tenant relationship, exceeded the jurisdiction of the justice court and dismissed the case.

FCLT Loans v. United Commerce Center, Inc.[157] considered whether a closing statement was an amendment of an existing contract of sale. A dispute arose over the proration of property taxes even though the proration of ad valorem taxes was addressed in the sales contact.[158] The proration of taxes was actually based on the previous year's ad valorem taxes (since the current year's taxes were not yet available), and amounted to a credit against the purchase price of more than the current year's taxes. The closing statement contained typical language that prorations were based on figures for the preceding years, and in the event of any change for the current year, all necessary adjustments must be made directly be-

154. *Chambers County*, 63 S.W.3d at 840.

155. Aguilar v. Weber, 72 S.W.3d 729 (Tex. App.—Waco 2002, no pet.).

156. A prudent draftsman should include a provision establishing a landlord/tenant relationship upon default in contracts for deed as a necessary element on a forcible detainer and eviction case.

157. FCLT Loans v. United Commerce Ctr., Inc., 76 S.W.3d 58 (Tex. App.—Eastland 2002, no pet.).

158. *Id.* at 59. The contract provided that "all current ad valorem taxes . . . shall be prorated between Seller and Buyer as of the Closing Date" and that the contract "shall not be modified or amended except in writing executed by the Buyer and Seller." *Id.* at 59, 60.

tween the buyer and seller. FCLT argued that the closing statement modified the sales contract and required the purchaser and seller to make adjustments if the proration of taxes proved to be inaccurate. The appellate court held that a closing statement is a release of the title company for distribution of funds and not an amendment of the contract of sale. Furthermore, for a modification of an existing contract to be enforceable, the modification must be based upon sufficient new consideration, which was not present.

A typical "time is of the essence" clause was considered in *17090 Parkway, Ltd. v. McDavid.*[159] The prospective purchaser of a building, McDavid, brought an action against Parkway, the seller, seeking specific performance of a contract for the sale of a building. The contract provided that "time was of the essence" and set March 31, 1997 as the closing date. Parkway wanted to close quickly to take advantage of a tax-deferred exchange; however, Parkway was unable to timely deliver a tenant estoppel required under the contract. As a result, the parties orally extended the contract and later executed a written amendment of extension allowing for a further extension to April 30, 1997 upon payment of an additional $51,000 in earnest money. Despite this requirement, Parkway accepted only a $25,000 payment. The parties again orally agreed to further extend the closing date to May 30, 1997 for an additional $75,000 earnest money deposit. The $75,000 deposit check was deposited, but the written amendment to such effect was never executed. On May 13, 1997 Parkway sent a letter to McDavid asserting that the contract had expired. McDavid sued for specific performance, which the trial court granted. On appeal, Parkway claimed that McDavid was not entitled to specific performance because he failed to appear at closing and failed to pay the purchase price in a timely manner. McDavid claimed that Parkway had waived the time is of the essence clause. The appellate court found that a waiver of the time of the essence provision had occurred due to the course of dealings, including the numerous written and oral extensions, acceptance of less earnest money than required by the contract amendments, preparation of formal amendments by the parties' attorneys, the depositing of the $75,000 extension deposit, the seller's testimony that he was aware of the loss of the tax-deferred exchange by reason of the extensions, and the seller's continued desire to sell because of the attractive sales price.

Additionally, the *McDavid* case considered whether a tender of performance was necessary by McDavid. In general, the long standing rule is that where one party openly refuses to perform on a contract, the other party need not tender performance before bringing suit.[160] But where tender of performance is excused, the complaining party must plead and

159. 17090 Pkwy., Ltd. v. McDavid, 80 S.W.3d 252 (Tex. App.—Dallas 2002, pet. denied).

160. Regester v. Lang, 49 S.W.2d 715 (Tex. Comm'n App. 1932, holding approved).

prove that it was ready, willing and able to perform.[161] The court considered cases presented by Parkway, but found them distinguishable from the subject case. The jury findings in the subject case were that Parkway openly refused to perform its part of the contract and that McDavid was ready, willing and able to perform; therefore, the actual tender by McDavid was excused under these circumstances.

In *Marshall v. Kusch*,[162] Kusch sued a predecessor in title for violations of the DTPA and for fraud resulting from an alleged failure to disclose anthrax on ranch land. The case began when Marshall purchased 6,828.20 acres near Uvalde, Texas in 1981. In 1987, there was an anthrax outbreak on the Marshall ranch that killed livestock. In 1991, Marshall decided to sell the ranch and told Greg Tom, a real estate broker, that there was no anthrax on the property. In August 1996, Marshall sold the ranch to Gilmore-Barclay, Ltd. with owner financing. In April 1997, Gilmore-Barclay sold the ranch to Kusch who assumed the note, without any disclosure of the anthrax outbreak. In 1997, another anthrax outbreak occurred. As to Kusch's allegations of fraud based on affirmative misrepresentation, the court found that the evidence did not support the elements of fraud. Despite the fact that Marshall had advised Greg Tom, that there was no anthrax, and despite the fact that Greg Tom discussed with the buyer's real estate broker, Maurice Chambers, that there was no anthrax on the property, the evidence and the testimony of Kusch proved that such misrepresentations were never communicated to Kusch. Further, Kusch did not rely on any such misrepresentation in his acquisition of the property. Consequently, an essential element of a fraud cause of action was missing. Next, Kusch asserted fraud by omission on the part of Marshall. Under Texas law, "a seller of real estate is under a duty to disclose material facts that would not be discoverable by the exercise of ordinary care and diligence on the part of the purchaser, or which a reasonable investigation and inquiry would not uncover."[163] The appellate court held that Marshall owed no duty to Kusch to disclose the anthrax since there was an intervening purchaser, Gilmore-Barclay. Since there was no duty to disclose, there could be no fraud. Kusch also made claims under the DTPA, and Marshall defended on the basis that there was no deceptive act committed in connection with the subject transaction. Two exceptions allow a connection to the subject transaction: (a) if a representation reaches the consumer, or (b) if a benefit from the second transaction inures to the initial seller.[164] The subject property was encumbered by the purchase money financing retained by Marshall in connection with the sale to Gilmore-Barclay, and Kusch alleged that such an existing lien represented a benefit to Marshall and came within the exception for determining a connection with the actionable deceptive act. The appellate

161. Chessher v. McNabb, 619 S.W.2d 420 (Tex. Civ. App.—Houston [14th Dist.] 1981, no writ).
162. Marshall v. Kusch, 84 S.W.3d 781 (Tex. App.—Dallas 2002, pet. denied).
163. Smith v. Nat'l Resort Cmtys., Inc., 585 S.W.2d 655, 658 (Tex. 1979).
164. *See* Amstadt v. U.S. Brass Corp., 919 S.W.2d 644, 649 (Tex. 1996).

court, however, refused to follow Kusch's suggestion, finding that Marshall had already completed his sales transaction, and there was no benefit to Marshall or Kusch acquiring the ranch.

VII. DECEPTIVE TRADE PRACTICES ACT

Bohls v. Oakes[165] examined whether homeowners were consumers under the DTPA in a suit against their construction lender. Charles and Michelle Oakes purchased a lot and hired Vogel to build a home. Construction financing was provided by Bohls. Construction did not go well,[166] and the Oakeses refused to pay for overages on fixed cost items after changes were made. The Oakeses sued both the builder, Vogel, and the lender, Bohls, for DTPA violations and other causes of action.

Among other issues, the appellate court examined whether the Oakeses were both consumers under the DTPA. The court stated that to qualify as a consumer under the DTPA, the claimant must seek or acquire goods or services by purchase or lease, and the goods or services purchased or leased must form the basis of the complaint. The appellate court held that Mr. Oakes qualified as a consumer under the DTPA since he had sought Bohls's lending services and that Ms. Oakes qualified as a consumer under the DTPA because she was a third-party beneficiary who would have benefited by living in the constructed house.

In *Raymond v. Rahme*,[167] an owner was not entitled to recover under the DTPA because the record did not support a finding that the subcontractor made implied warranties or breached an express warranty. In response to the subcontractor's suit for amounts owing on work performed, the owner counterclaimed for violations of the Deceptive Trade Practices Act and other claims. The appellate court held that the DTPA does not create a warranty. To recover under the DTPA, a complaining party must show a breach of an express or implied warranty recognized in the common law or in a statute.

The case of *Nast v. State Farm Fire & Casualty Co.*[168] deals with the appeal of a lawsuit by the insureds against their insurer and their insurance agent, Daniel Clark, for violation of the DTPA and other actions. Clark told Roy and Billie Nast that they were ineligible for the Federal Emergency Management Agency's national flood insurance program insurance. The appellate court overruled the trial court on its granting of summary judgment as to the Nasts' DTPA claim. The court held that Clark's statements to the Nasts were fact questions and not statements requiring specialized professional knowledge or training as an insurance agent. The court also determined that Clark's alleged misrepresentation

165. Bohls v. Oakes, 75 S.W.3d 473 (Tex. App.—San Antonio 2002, pet. denied). For a more complete discussion of the facts, *see supra* Part V.

166. In fact, the original certificate of occupancy was revoked for construction defects.

167. Raymond v. Rahme, 78 S.W.3d 552 (Tex. App.—Austin 2002, no pet.).

168. Nast v. State Farm Fire & Cas. Co., 82 S.W.3d 114 (Tex. App.—San Antonio 2002, no pet.).

did not constitute a breach of the implied warranty under the DTPA for failing to furnish insurance services in a good and workmanlike manner because there was no relation to the repair or modification of existing tangible goods or property.

VIII. LEASES

In *Churchill Forge, Inc. v Brown*,[169] with three Justices dissenting, the Texas Supreme Court reversed a lower court ruling that a residential lease provision requiring a tenant to reimburse a commercial landlord for loss, damage, or cost of repairs caused by any guest or occupant of the residence is unenforceable and remanded the case to the trial court for further consideration. In 1995, Joann Brown co-signed a lease with her adult son, Carl Brown. Joann never lived in the apartment. The following year "a fire which allegedly originated in Carl's apartment caused damage to the apartment complex."[170] "Churchill Forge, Inc., owner of the [apartment complex], sued [Joann] for breach of lease based on the following reimbursement clause in the lease:"[171]

> REIMBURSEMENT: You must promptly reimburse us for loss, damage, or cost of repairs or service caused anywhere in the apartment community by your or any guest's or occupant's improper use or negligence. . . .

The trial court granted summary judgment in favor of Joann, and the appellate court affirmed that judgment on grounds that the lease provision was unenforceable. The court concluded that seeking reimbursement for repairs caused by fire damage is a condition covered by the Texas Property Code, and the lease provision that attempted to shift the obligation to the tenant did not satisfy all of the statutory requirements.[172] As a result, the lease provision was unenforceable.

The Texas Supreme Court, in dicta, observed that competent parties in Texas "shall have the utmost liberty of contracting."[173] The court then went on to reverse the opinion of the lower courts, holding that the applicable statutory provision does not impose a duty on landlords to repair or pay to repair tenant-caused damages. Therefore, the damage would not

169. Churchill Forge, Inc. v. Brown, 61 S.W.3d 368 (Tex. 2001).

170. Churchill Forge, Inc. v. Brown, 60 S.W. 3d 118, 119 (Tex. App.—Austin 2001), *rev'd and remanded*, 61 S.W.3d 368 (Tex. 2001).

171. *Id.*

172. TEX. PROP. CODE ANN. § 92.006(e) (Vernon 1995), which provides that landlord and tenant may agree for the tenant to make leasehold repairs, at the tenant's expense, only if all of the following conditions are met: (1) at lease commencement, the landlord only owns one rental dwelling, (2) at lease commencement, the dwelling is free from any condition which would have a material physical health or safety effect on an ordinary tenant, (3) at lease commencement, the landlord has no reason to believe a condition described in clause (2) above is likely to occur during the lease term, and (4) the lease is in writing, with the repair provisions underlined, in bold print or in a separate written addendum, the provision is specific and clear, and the agreement is made knowingly, voluntarily and for consideration.

173. *Churchill Forge, Inc.*, 61 S.W.3d 368 at 370.

be a condition "covered by Subchapter B" to which subsection (e) requirements would apply.[174]

The issue of premises liability was before three different courts of appeal during the Survey period.[175] In each instance, the court held in favor of the landlords. In *Todd v. Pin Oak Green*,[176] a widow brought a negligence action against an apartment complex owner after her husband was killed by residents occupying the upstairs apartment. The Todds had the misfortune of living in a complex where their neighbors frequently liked to party all night with loud music. Mr. Todd was a pharmacy student, and Mrs. Todd was a school teacher. When they complained to the guard employed by the company providing security for the complex, they were told to knock on their neighbor's door and attempt to resolve the complaint. If this failed, the guard would call the police. They tried this method with their downstairs neighbors without success. Two months later they were disturbed by their upstairs neighbors - two male deputy constables who had returned to their apartment around 3:00 a.m. with a stripper from a local club. Mrs. Todd went to their apartment around 4:00 a.m. and asked them to stop the noise. They agreed to do so, but did not. The following morning, Mr. Todd went to their apartment where he was shot and killed. There were no witnesses to the confrontation. Mrs. Todd sued on grounds that the apartment owner and the security company were negligent in advising the Todds to approach the neighbors and attempt to resolve the problem themselves. The trial court rendered a take nothing judgment in favor of the landlord, and Mrs. Todd appealed. The appellate court upheld the summary judgment on grounds that there was no basis for the landlord to have foreseen a dangerous situation would be caused by any affirmative acts alleged by the Todds.

In *Palermo v. Bolivar Yacht Basin*,[177] the plaintiff Mr. Bernard was injured when he stepped from his boat onto the dock owned by Bolivar. Under the terms of the lease, the Bernards were solely responsible for the repair and maintenance of the leased premises, including the dock. In upholding the summary judgment in favor of Bolivar, the court ruled that Bolivar was an out-of-possession landlord that had relinquished control over all of the leased premises to its tenant and could not be held liable.

In *American Industries Life Ins. Co. v. Ruvalcaba*,[178] the wife and child of an employee of one of the tenants in the office building owned by American Industries came to the building to take the husband/father to lunch. As they were leaving the tenant's second floor premises, the child fell through an open handrail on the stairs and was seriously injured. The

174. *Id.* at 371.

175. Todd v. Pin Oak Green, 75 S.W. 3d 658 (Tex. App.—Texarkana 2002, no pet.); Palermo v. Bolivar Yacht Basin, Inc., 84 S.W. 3d 746 (Tex. App.—Houston [1st Dist.] 2002, no pet.); Am. Indus. Life Ins. Co. v. Ruvalcaba, 64 S.W. 3d 126 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

176. *Pin Oak Green*, 75 S.W.3d at 658.

177. *Palermo*, 84 S.W. 3d at 746.

178. *Ruvalcaba*, 64 S.W.3d at 126.

handrail did not comply with the then current Building Code for the City of Houston. The trial court entered a judgment for plaintiffs in the amount of $8,384,657.52. The appellate court reversed the trial court and rendered a take-nothing judgment. The court based its opinion on the fact that the owner owed no duty to the child because the child did not fit the definition of an invitee or a licensee of the owner. The court also rejected plaintiffs' argument that the child should be treated as an invitee because he was a visitor to a public building. While acknowledging that the Texas Supreme Court has adopted a similar concept by extending invitee status to members of the public who are invited into a store that sells goods and that is open to members of the public, the court stated that there was no evidence in the record that American Industries invited the general public into the building for the purpose of transacting business.

The jurisdictional limitations of the justice courts and the county court were at issue in three cases.[179] In *Dormady v. Dinero Land & Cattle Co.*,[180] the occupiers of a piece of property appealed a county court judgment awarding possession and damages to the purchaser of the property at a foreclosure sale. They claimed that the purchaser had no standing to bring a forcible detainer suit because the foreclosure sale was brought wrongfully. The San Antonio Court of Appeals affirmed the judgment on grounds that a plaintiff in a forcible detainer action does not have to prove title.[181] In this case, the purchaser had satisfied the requirements of the forcible detainer action because the deed of trust established a landlord-tenant relationship, the purchaser presented sufficient evidence to demonstrate a superior right to immediate possession, and the justice court was the proper forum for a forcible detainer action. The court further held that the issue of irregularities in the foreclosure sale was a question of title that would have to be determined in the district court.

The Waco Court of Appeals, in a similar fact situation, reached the opposite conclusion in *Aguilar v. Weber*.[182] Following termination of a contract for deed, the justice court, in a forcible detainer suit, entered judgment for the landlord and the tenants appealed. The county court affirmed the justice court judgment and awarded possession to the landlord. The tenant again appealed. On this appeal, the appellate court held that the lower court lacked jurisdiction because a forcible detainer action is predicated on the existence of landlord-tenant relationship; and the contract for deed did not contain language establishing that relationship.

The tenants in *Lopez v. Sulak*[183] also were removed from their property in a forcible detainer action. The tenants' claim to the property was

179. Aguilar v. Weber, 72 S.W.3d 729 (Tex. App.—Waco 2002, no pet.); Lopez v. Sulak, 76 S.W.3d 597 (Tex. App.—Corpus Christi 2002, no pet.); Dormady v. Dinero Land & Cattle Co., L.C., 61 S.W.3d 555 (Tex. App.—San Antonio 2001, pet. dism'd w.o.j.).

180. *Dormandy*, 61 S.W.3d at 555.

181. *Id.* at 556.

182. *Aguilar*, 72 S.W.3d 729.

183. *Sulak*, 76 S.W.3d at 597.

based on an oral agreement. Following the adverse judgment, the tenants brought an action against the landlord in the district court asserting, among other things, claims for trespass, conversion, breach of contract, fraud, and violation of the Deceptive Trade Practices and Consumer Protection Act. The district court entered a summary judgment in favor of the landlord on grounds that *res judicata* barred relitigation of the tenants' claims. The Corpus Christi Court of Appeals affirmed the district court's order on the trespass and conversion claims because they fell within the jurisdiction of the justice court. However, it reversed the order as to the remaining causes of action because the justice court had no jurisdiction to adjudicate those claims.

In *Synergy Center, Ltd. v Lone Star Franchising, Inc.*,[184] a commercial tenant brought an action against the landlord, claiming the acceleration clause in its lease was a penalty and void as a matter of law. The tenant asked for a temporary injunction to stop the landlord from declaring the tenant in default and from presenting the letter of credit the tenant had put up as a security deposit. The district court granted the tenant's request for a temporary injunction, and the landlord appealed. The appellate court held that the fact that there was a dispute between the parties regarding the enforceability of the acceleration provision in the lease could not bar Synergy from presenting the letter of credit to the bank for payment. Thus, the court dissolved the temporary injunction.

In *King's Court Racquetball v. Dawkins*,[185] the court held that the lease provided the tenant the right to "alter, reconstruct, rebuild and modify the premises without restriction" did not entitle the tenant to demolish the interior of the leased building and the leave the building in that demolished state.[186] The court also upheld the lower court's damage award in the amount of the costs to restore the premises to their prior condition. The tenant claimed that the correct measure of damages for waste was the difference in the value of the property before and after the waste. The court held, however, that the tenant breached its obligation to return the premises in good repair, and the measure of damages for this breach is the costs of repairing the building or returning it to the obligated condition.

In *Telephone Equipment Network, Inc. v. TA/Westchase Place, Ltd.*,[187] Telephone Equipment Network, Inc. (TEN) appealed a trial court's order granting a temporary injunction, which enjoined it from foreclosing on and disposing of property owned by a tenant of Westchase. The tenant and TEN were both wholly owned by Charles Tharp. The tenant entered into a lease for space in an office building owned by Westchase. It also

184. Synergy Ctr., Ltd v. Lone Star Franchising, Inc., 63 S.W.3d 561 (Tex. App.—Austin 2001, no pet.).

185. King's Court Racquetball v. Dawkins, 62 S.W.3d 229 (Tex. App.—Amarillo 2001, no pet.).

186. *Id.* at 231.

187. Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd., 80 S.W.3d 601 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

had a line of credit with Sterling Bank secured by all of its assets. Prior to the commencement date of the lease, the tenant sent a letter to Westchase stating that it was terminating its business relationship with Westchase and would not move into the leased office space. Westchase notified the tenant that its conduct was an anticipatory breach of the lease and that it would enforce its remedies under the lease if the tenant did not cure the default. Shortly thereafter, Tharp notified Sterling Bank that he, as president of TEN, would like to purchase the promissory notes signed by the tenant in favor of Sterling Bank for the combined outstanding balance of the notes of the tenant. Sterling Bank accepted the offer. Immediately following the acquisition of the notes by TEN, the tenant stopped making payments on the notes. Prior to the acquisition, the tenant had never been late on a payment. TEN declared the tenant to be in default under the notes and attempted to foreclose its security interest in the tenant's assets. Westchase filed suit against TEN seeking injunctive relief to prevent the sale. The trial court granted the temporary injunction and stated on the record that it believed TEN's security interest in the tenant's assets would be found to be fraudulent. The court of appeals upheld the trial court's order granting the temporary injunction, thereby allowing the landlord's interests in the tenant's property to take priority over the security interest of TEN.

IX. ADVERSE POSSESSION

The *Commander v. Winkler*[188] case addresses two issues regarding adverse possession. The court first addresses whether the adverse claimant had permission to use the property. The court then addresses whether the possession had been repudiated and the adverse claimant had thereafter asserted a hostile claim to the property.

Commander owned property adjacent to the subject property. In the 1960s, after discovering that Winkler had paid taxes on the subject property, Commander inquired as to Winkler's ownership. Winkler told Commander that she did not know anything about the property, that neither she nor her predecessors owned the property and that "as far as she was concerned [Commander] could do anything [he] wanted to do."[189] Commander thereafter made several uses of the property until the suit arose. In 1992, the Winklers attempted to sell the property to a Dr. Burch, but Burch backed out of the transaction after being confronted by Commander claiming the property as his own.

The court held that Commander's adverse possession claim failed because he had the landowner's acquiescence to use the property. By Winkler saying "as far as she was concerned [Commander] could do anything [he] wanted" to the property, Winkler acquiesced even though she made this comment after purportedly claiming no right to the property.[190] It

188. Commander v. Winkler, 67 S.W.3d 265 (Tex. App.—Tyler 2001, pet. denied).
189. *Id.* at 267.
190. *Id.*

could be deduced from Commander's affidavit that, at the time Commander heard this statement from Winkler, he did not interpret it as "acquiescence" or permission to use the property because he believed Winkler did not own the property. The court's holding implies that the permission to use the property is determined using an objective rather than a subjective standard. Even though Commander may not have thought he had the permission of the true landowner, he in fact did and could not claim an adverse right to the land until such permission had been repudiated and he had again asserted an adverse claim.

The court held that Commander's actual adverse period began to run in 1992 when the permission to use the property was repudiated. Winkler entered into negotiations with Burch to sell the land, which repudiated Winkler's acquiescence to Commander's use of the property. When Burch backed out of the deal based on Commander's claim that the property was his, Winkler was notified that Commander was making a claim adverse to her ownership. Because ten years had not passed since 1992, the court held that Commander did not adversely claim possession for a period of time sufficient to meet the ten-year statute.[191]

The *Treviño v. Treviño*[192] case involves a partition suit between two different sets of descendants claiming separate interests in a 805-acre ranch. The court clarified certain issues regarding partition suits. First, contrary to what some cases have stated, a plaintiff in a partition suit does not need to establish that he and the defendant acquired their title through a common source.[193] Instead, to compel partition, a plaintiff "need only establish that he owns an interest in the property and has a right to possession of a portion thereof."[194] In refuting a defense made by the defendants, the court affirmed that there is no statute of limitations on partitions.

The *Waste Disposal, Inc. v. Larson*[195] case addresses whether opinion testimony in a trespass case is sufficient proof of diminution in value. The current case law provides that "[a] property owner can provide opinion testimony . . . but the testimony must show that the diminution refers to market value rather than intrinsic value or some other value."[196] Market value is "the price that property would bring when offered for sale by one who desires, but is not obligated to sell, and is bought by one who is under no necessity to buy."[197] Intrinsic value, on the other hand, is "'an

191. If Commander had waited a few years to file his suit, he may have had a better outcome.

192. Treviño v. Treviño, 64 S.W.3d 166 (Tex. App.—San Antonio 2001, no pet.).

193. The common source doctrine relates to trespass to try title. *See* TEX. R. CIV. P. 798; Rackley v. May, 478 S.W.2d 219, 225 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.); Herbst v. Martinez, 307 S.W.2d 633, 634 (Tex. Civ. App.—San Antonio 1957, no writ).

194. *Treviño*, 64 S.W.3d at 171.

195. Waste Disposal, Inc. v. Larson, 74 S.W.3d 578 (Tex. App.—Corpus Christi 2002, pet. denied).

196. *Id.* at 583.

197. *Id.*

inherent value not established by market forces; it is a personal or sentimental value.'"[198] One of the landowners in the case testified that, as a result of Waste Disposal's alleged action, her property was not worth anything anymore, nobody would buy the place as is, and she would not want to sell the property to another person. In response to this testimony, Waste Disposal argued that such landowner's testimony did not establish market value because she just testified that "her property has no value."[199] The court, however, disagreed with Waste Disposal's argument, as their argument was based on case law set forth in DTPA claims. In the case of "negligence, trespass and nuisance" claims, the evidence of the landowner's testimony that such property has no value was "legally sufficient to establish a diminution in market value of [the landowner's] property."[200]

The *Surprise v. Dekock*[201] case addresses the issue of whether there is a cause of action in Texas for tortious interference with the use and enjoyment of land. The Surprises had purchased land they intended to keep as a long-term investment and for the use and benefit of their children. The Surprises claim that the adjacent landowners, the Dekocks, forced them to sell the property at less than fair-market value because the Dekocks interfered with the Surprises' rights to use the property, including interfering with hunting on the property, making personal threats, and using racial epithets, and due to Dekock's interfering with their right to sell their property by posting signs and calling prospective buyers. The Dekocks argued that the Surprises had no claim because no cause of action exist for tortious interference with the use and enjoyment of land.

The court, however, held that the Surprises did have a cause of action out of the well-settled law that "'any intentional invasion of, or interference with, property, property rights, personal rights, or personal liberties causing injury without just cause or excuse is an actionable tort.'"[202] The Dekock's actions of posting signs and calling prospective buyers gave rise to a claim for interference with the Surprises' right to dispose of property, and the Dekock's racially motivated conduct gave rise to a claim for interference with, or invasion of, the Surprises' property rights. The court specifically made no comment as to whether the Surprises could prove their causes of action, but expressly held that they the Surprises had sufficiently alleged causes of action under Texas law.

198. *Id.* (quoting Star Houston, Inc. v. Kundak, 843 S.W.2d 294, 298 (Tex. App.—Houston [14th Dist.] 1992, no writ)).
199. *Id.*
200. *Id.* at 583-84.
201. Surprise v. DeKock, 84 S.W.3d 378 (Tex. App.—Corpus Christi 2002, no pet.).
202. *Id.* at 380 (quoting King v. Acker, 725 S.W.2d 750, 754 (Tex. App.—Houston [1st Dist.] 1987, no writ).

X. DEEDS AND CONVEYANCES

The *Hatton v. Grigar*[203] case addressed whether a gravel road was a public road absent any express dedication. The gravel road extended from Highway 36 almost to the Brazos River. Hatton, who owned property just north of the highway and west of the road, claimed ownership of the gravel road. Grigar, whose property was immediately north of Hatton's property claimed a right to use the gravel road. The court upheld the trial court's finding that the road was indeed a public road, even though Hatton never publicly dedicated the road.

The court held there was sufficient evidence to establish that the gravel road had been conveyed to the public by implied dedication. To prove implied dedication, the evidence must show: (1) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (2) the landowner was competent to do so; (3) the public relied on the landowner's acts and will be served by the dedication; and (4) there was an offer and acceptance of the dedication.[204] The road, which was never maintained by the county, did not contain public facilities, did not lead to any public facilities, and was not allowed to be used by certain individuals, was found to be a public road by implied dedication, relying upon a long and continued use by the public.

The *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*[205] case involves a deed conveying an interest in granite, where the grantor owned the property in cotenancy with other parties. Wilderness Cove held title to the surface estate of the property in question, along with a one-half undivided interest in the granite. Cold Springs held title to a fractional interest in the other one-half of the granite. Wilderness Cove and Cold Springs sought declaratory relief to determine their respective rights in the property.[206]

In assessing the claims, the court made two important conclusions. First, while it has been held by the Texas Supreme Court that "building stone belongs to the surface estate as a matter of law," and thus would not be conveyed to the mineral estate holder, the court distinguishes the present case because here the deed conveyed an express interest in and to the granite.[207] Also, the court extends the ownership in place doctrine to the specific conveyance of minerals other than oil and gas, such as the granite in this case.[208] Applying this rationale, the court concluded that the conveyance of the granite created a severable mineral estate.

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203. Hatton v. Grigar, 66 S.W.3d 545 (Tex. App.—Houston [14th Dist.] 2002, no pet. h.).

204. *Id.* at 554. The court discusses each of these elements, with supporting authorities, in great detail, especially with respect to the theory of implied dedication.

205. Wilderness Cove, Ltd. v. Cold Spring Granite Co., 62 S.W.3d 844 (Tex. App.—Austin 2001, no pet.).

206. *Id.* at 845-46.

207. *Id.* at 848.

208. The "ownership in place" doctrine provides that a severance of oil and gas from the remainder of the estate creates a separate corporeal estate in the minerals.

XI. EASEMENTS

The *State v. Japage Partnership*[209] case addresses the issue of unity of ownership and the legal effect of an easement. The facts arise from a condemnation action, where the State condemned several acres of property adjacent to Willowbrook Mall in order to expand a portion of Highway 249 owned by Japage. The easement issue arose in the context of a dispute over the amount of Japage's condemnation award. In addition to a pad site Japage owned, Japage asserted it had certain easement rights of parking and access in surrounding property that was also the subject of the condemnation proceeding. Such easement rights arose under a Reciprocal Easement and Operating Agreement dated June 14, 1985 (REOA). The State initially asserted that Japage's property was excluded from the REOA and therefore Japage held no ownership interest in the parking and access rights. The State conceded this issue and argued on appeal that the language creating the easements in the REOA was not effective because the same person owned all of the property that was the subject of the REOA. Thus, the State argued that no easement between parcels can arise because of the unity of ownership.

Although the State first asserted this unity of ownership argument on appeal, the court addressed the merit of such claim anyway. The court found that an easement between two parcels owned by the same person can be created, but the easement will not take legal effect until one of the parcels is sold to another party.[210] Even though one person owned all of the property on the date of the REOA, and thus there was not a separation of ownership between the dominant and servient estates, Japage's interest in the easements became effective on the date Japage purchased the property.

In *Vinson v. Brown*[211] the court addressed several issues regarding the sufficiency of an easement's description, as well as the location of an easement. Brown acquired a piece of property within a subdivision on Lake Travis. In the deed granting title to Brown's predecessor (who acquired title from the developer), an easement was created granting the right to use "a park located about five hundred (500) feet East of Block No. One (1). . .and which park extends to a cove on the Lake and the boundaries of which park to be marked and established by [grantor]."[212] Vinson acquired the property known as the park area.

The court held that the description of the park is legally sufficient to satisfy the requirement that the easement be in writing, even though the description of the park area in the deed is vague. The court's rationale was that because the language providing the grantor the ability to choose the park's boundaries within a generally described area "furnished the

209. State v. Japage P'ship, 80 S.W.3d 618 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

210. *Id.* at 623.

211. Vinson v. Brown, 80 S.W.3d 221 (Tex. App.—Austin 2002, no pet.).

212. *Id.* at 225.

means to identify the property interest conveyed with reasonable certainty."[213] The court also held that the boundaries of the easement, which may be designated by the grantee in the event the grantor fails to establish the location, could be established by the grantee's historic use of the park area.

XII. RESTRICTIVE COVENANTS, CONDOMINIUMS, AND OWNERS' ASSOCIATIONS

The homeowners' association in *Mitchell v. Laflamme*[214] failed to properly maintain the common area of a subdivision and the exterior of each home as its declaration of covenants and restrictions required. When the association was sued by several individual homeowners, the association cited the Texas Non-Profit Corporation Act[215] and argued that a suit must be brought under the *ultra vires* provision of the Act by the owners on behalf of the association rather than individually. The court disagreed, stating that nothing in the law would lead to the conclusion that failure to maintain certain areas constitutes an *ultra vires* act by the association.[216]

As to damages to the common areas caused by the association's failure to maintain, the court concluded that because the association owned the common areas, recovery for damage thereto belongs to the association rather than individual owners. The court reversed the damages judgment pertaining to the common areas only and specifically stated that a homeowner does not have a personal property right in such common areas and a suit thereon must be brought on behalf of the homeowner's association.[217] Whether the owners could sue individually for damages sustained to the exterior of their homes, which they owned in fee simple, is a "more difficult issue."[218] The court reserved judgment as to such damages because the trial court awarded the damages in connection with the common area damages, rather than separately. The appellate court's holding regarding common area damages negated the need to address the damages to the exterior of the homes.

In *Aghili v. Banks*,[219] a homeowner who failed to pay his monthly assessments sued to set aside the foreclosure sale resulting from such failure because the homeowners' association allegedly failed to give proper notice of the sale. The Texas Uniform Condominium Act[220] allows a sale without additional notice to the homeowner because the association's filing of the declaration of record effectively gives notice and perfects the

213. *Id.* at 227.
214. Mitchell v. LaFlamme, 60 S.W.3d 123 (Tex. App.—Houston [14th Dist.] 2000, no pet.).
215. TEX REV. CIV. STAT. ANN. art. 1396-2.03 (Vernon 2003).
216. *Mitchell*, 60 S.W.3d at 128.
217. *See id.* at 129.
218. *Id.*
219. Aghili v. Banks, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
220. TEX. PROP. CODE. ANN. § 82.113(a) (Vernon 1995).

lien.[221] The court explained that no further recordation or notice is required unless the declaration specifically requires such notice.

The foreclosed homeowner argued that the declaration did in fact require additional notice, so the sale was improper. The court stated the rule of law that "[r]estrictions in such an instrument are treated as contracts between the parties. . .[and]. . .[t]hey are subject to the same general rules of contract interpretation."[222] Further, restrictive covenants must be liberally construed so as to give effect to their true purpose and intent. Because the language in the declaration was unambiguous, additional notice was not required, and the court did not set aside the foreclosure sale.

Another case during the Survey period also pinned its holding on the rule of law that restrictive covenants are to be construed liberally to give effect to their purpose. Even so, however, the court in *American Golf Corp. v. Colburn*[223] held that the imposition of minimum dining fees by a homeowners' association for eating privileges at the property country club, while allowable, may not be charged as mandatory dues under the association's declaration. Like the *Aghili* case above, the court noted that "like any contract, deed restrictions are unambiguous as a matter of law if [they] can be given a definite or certain legal meaning."[224] Because the declaration was both clear and limited as to what charges may be levied as dues, the minimum food and drink charge may be charged to clubhouse members, but may not be levied as dues under the declaration. Once imposed on those members who utilize the clubhouse for dining, the court pointed out, the collection of such fees through the declaration's lien mechanism is authorized.

In *Cottonwood Valley Homeowners Association v. Hudson*,[225] a homeowners' association appealed a lower court's ruling that it was not entitled to foreclose upon its lien that secured the association dues. In this case, the homeowner had failed to pay his monthly dues for some period of time, and the association had filed a notice of lien. While the trial court found for the association and entered a judgment in its favor, it did not specifically grant a remedy of foreclosure on the assessment lien. The association appealed the judgment requesting the appeals court grant foreclosure, which it did, stating that the trial court abused its discretion by not granting a foreclosure on the lien.

In *Ehler v. B.T. Suppenas Ltd.*,[226] a property owner brought suit to have certain deed restrictions set aside as unenforceable. The plaintiff

221. *Aghili*, 63 S.W.3d at 816.
222. *Id.*
223. Am. Golf Corp. v. Colburn, 65 S.W.3d 277 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).
224. *Id.* at 280 (citing Grain Dealers Mut. Ins. Co. v. McKee, 943 S.W.2d 455, 458 (Tex. 1997)).
225. Cottonwood Valley Homeowners Ass'n v. Hudson, 75 S.W.3d 601 (Tex. App.—Eastland 2002, no pet.).
226. Ehler v. B.T. Suppenas Ltd., 74 S.W.3d 515 (Tex. App.—Amarillo 2002, pet. denied).

owns land adjacent to the only area in a town that allows alcohol sales for off-premises consumption. The deed restrictions affecting the plaintiff's land prohibited such sales, so the plaintiff sought to have such restrictions removed because they amounted to a covenant not to compete and were unenforceable as an unreasonable restraint on trade. The court disagreed, refusing to parallel deed restrictions to covenants not to compete.[227] The court pointed out that section 15.50 of the Texas Business and Commerce Code, addressing covenants not to compete, specifies such criteria "almost exclusively in the context of employment contracts" and the statute does not govern the rights of owners of real estate. The court further stated that there is absolutely no precedent where Section 15.50 of the Business and Commerce Code has been applied to real property.[228]

The court buttressed its opinion by noting that the restriction does not prohibit all uses of the property, just one specific use. Additionally, the plaintiff did not have contractual privity with the party originally filing the deed restrictions. Finally, the court held that because this restriction touches and concerns the land, it runs with the land and affects all subsequent owners.

In *Bankler v. Vale*,[229] the appeals court affirmed the lower court's decision that a homeowners' association had improperly relied on a provision in its declaration, which allowed it to impose additional fees for emergency repairs that were not objectively emergency in nature. The court concluded that padding a reserve account for future emergencies does not qualify as an actual emergency, since a future contingent condition does not qualify as a sudden and unexpected event calling for immediate action. The very nature of planned future improvements cannot equate to an emergency. In addition, some of the funds from the reserve were to be spent on cosmetic capital improvements, which are not an emergency.

The court in *Brooks v. Northglen Association*[230] interpreted the provisions of Section 204.010 of the Texas Property Code, which allows a homeowners' association to retroactively increase association dues to the extent such dues were not increased in prior years. The language of the association's declaration states that such dues may be increased no more than ten percent per year without a vote. The association retroactively increased dues ten percent per year retroactively for sixteen prior years, which amounted to an increase from $120 to $550 per annum. The trial court found, and the appeals court agreed, that because the declaration did not specifically prohibit retroactive increases, the ten percent limit applied to each year, and the sixteen year retroactive increase was allowed. Because the restrictions did not specifically prohibit or authorize

227. *Id.* at 520-21.
228. *Id.* at 520.
229. Bankler v. Vale, 75 S.W.3d 29 (Tex. App.—San Antonio 2001, no pet.).
230. Brooks v. Northglen Ass'n, 76 S.W.3d 162 (Tex. App.—Texarkana 2002, pet. granted).

accumulation, the declaration's silence cannot be construed against accumulation.[231] Note that the court also used this reasoning to allow a late charge on assessments. The appeals court was not persuaded that the statute infringed upon the parties constitutional right to contract because it did not "directly contradict any contractual provision [in the restrictions] prohibiting the accumulation of assessments."[232]

Like *Aghili* and *American Golf*, the *Northglen* case may be cited for the proposition that restrictive covenants are subject to general rules of contract construction.[233] In addition, the court refused to allow section 204.005[234] of the Texas Property Code to be used as a tool to contradict the association's restrictions. Another portion of the restrictions affecting different lots prohibited raising dues more than ten percent per year without a two-thirds vote of owners. The court held, however, that the "language of Section 204.005 will not support an interpretation that would permit increasing maintenance fees in direct contravention of limitations specifically set out in the restrictions"[235] and this must be accomplished with a proper amendment.

The court did side with the individual lot owners, however, as it found that in spite of the rule of law allowing homeowners' associations to foreclose on a homestead for nonpayment of dues, the foreclosure of a homestead is *not* allowed for nonpayment of an assessment that is imposed solely through the authority of Chapter 204 of the Texas Property Code.[236] Such fees include those mentioned above that are allowed pursuant to Chapter 204, rather than contemplated in the restrictions themselves. Had the association amended the restrictions to include such fees, foreclosure of a homestead would be permitted because such fees would then arise by and through the declaration itself.[237]

In *Pinebrook Properties, Ltd. v. Brookhaven Lake Property Owners Ass'n*,[238] a property owners' association sued the owner of the land on which a lake existed seeking to, among other things, enjoin the owner from promulgating rules related to the use of the lake. The particular owner, as well as all association members, had the right to enjoy the use of the lake pursuant to the association's declaration. The lake owner's predecessor had recorded a document that granted the lot owners the right to use and enjoy the lake "subject at all times to reasonable regulation by [the lake owner] to insure the safety, sanitation and pleasure" of

231. *Id.* at 167.
232. *Id.* at 168.
233. *Id.*
234. TEX. PROP. CODE ANN. § 204.005 (Vernon 1995) grants an association the right to "extend, add to, or modify existing restrictions" via a process whereby a petition is circulated to all record owners of the subdivision.
235. *Brooks*, 76 S.W.3d at 174.
236. *Id.* at 175.
237. *Id.* at 176.
238. Pinebrook Props., Ltd., v. Brookhaven Lake Prop. Owners Ass'n, 77 S.W.3d 487 (Tex. App.—Texarkana 2002, pet. denied).

the association lot owners.[239]

The court acknowledged that the lake owner was not entitled to a full spectrum of rights with respect to the lake by virtue of its being the fee owner. Because the land is subject to restrictive covenants in favor of the lot owners, they retained an interest in and legal right to the lake. That notwithstanding, because the association could not point to any evidence that the lake owner had divested itself of its right to regulate the use of the lake, the right was expressly reserved to the lake owner, and individual lot owners' rights to the lake use, therefore, subject to such regulations.

In *T.F.W. Management, Inc. v. Westwood Shores Property Owners Ass'n*,[240] the court held that a property owners' association was not entitled to an accounting of maintenance charges assessed against the lot owners. The association was not entitled to an accounting because the successor owner had no express, implied, or fiduciary duty to provide the information. Since the association had no contractual right to an accounting, and no fiduciary duty existed between the parties, the court refused to imply such a duty on the owner.

XIII. HOMESTEADS

The Texas courts ruled on three cases dealing with relevant homestead law during this Survey period. In *Duran v. Henderson*,[241] the Texarkana Court of Appeals held that a debtor, his adult daughter, and his grandchild were a "family" for the purposes of the homestead designation, and the conveyance of homestead property to a family trust did not constitute a sham transaction that would nullify the property's homestead exemption from creditors. In this case, the plaintiffs, E.G. and Betty Henderson, obtained a judgment against one of the defendants, Charles Duran, which granted the plaintiffs a one-half interest in a note receivable worth $300,000.[242] Several years later, the obligor on the note prepaid the full amount to Duran. Despite this fact, Duran did not pay the Hendersons the one-half of the note's proceeds that they were due under the judgment. At approximately the same time, Duran conveyed title to a 165 acre parcel of land to the Duran Family Trust, reserving one acre and a house as his homestead. He later conveyed the one acre tract and the home to his adult daughter, reserving a life estate for himself. After Duran failed to pay the Hendersons the amount due, they filed suit against Duran, successfully alleging conversion. After discovering

239. *Id.* at 502.

240. T.F.W. Mgmt., Inc. v. Westwood Shores Prop. Owners Ass'n, 79 S.W.3d 712 (Tex. App.—Houston [14th Dist.] 2002, pet. filed).

241. Duran v. Henderson, 71 S.W.3d 833 (Tex. App.—Texarkana 2002, pet. denied). *See supra* Part I.

242. *Id.* at 836. The other defendants named in the suit that is the subject of this opinion were Charles Duran's daughter, Christie Jean Patterson, individually and as guardian of both the person and estate of Charles Duran, and Patresa Duran Gilbert, as Trustee of the Duran Family Trust.

Duran's two property transfers, the Hendersons filed the suit that is the subject of this case alleging the transfers violated the Texas Uniform Fraudulent Transfer Act (TUFTA)[243] and requested that the court set aside the conveyances, subject the properties to a lien, foreclose the lien, and have the property sold in satisfaction of the lien. The trial court found for the Hendersons and set aside the two conveyances, but ordered only part of the property sold.

On appeal, Duran argued *inter alia* that there was insufficient evidence for the Court's findings concerning Duran's debt owed to the Hendersons and his intent to defraud, delay, or hinder them. Duran additionally argued that he did not waive his homestead rights by transferring the 165 acre parcel to the trust and all of the property conveyed was homestead property and therefore not subject to the provisions of TUFTA. Although the parties did not dispute whether the parcels were "rural" or "urban" under the homestead laws, they did dispute whether Duran, his daughter, and his grandson constituted a family, and therefore whether Duran could claim 100 or 200 acres as his rural homestead.[244] The Court held that a "family" may include a parent and his adult child as long as the parent has an obligation to support the adult child and the child is dependent on the parent for support. In this case, a familial relationship had been adequately demonstrated because before Duran conveyed the property, he, his adult daughter, and his grandson all lived together on the premises and relied on his social security income as their sole means of support. The court found that the three were not merely living together and sharing expenses; instead, Duran had an apparent moral obligation to provide care for his daughter and grandson, and they depended upon Duran for such support. Because the three constituted a family, Duran was entitled to claim the entire 165 acres as his homestead when he made the conveyances.

After concluding that Duran could properly claim homestead rights on the entire property, the court held that TUFTA did not apply to property that is exempt under nonbankruptcy law. The holding validated Duran's right to transfer the property free of the claims of creditors. However, this right to transfer exempt property is limited. If the transfer was not made with the intent for title to vest in the grantee, but rather to give an apparent right "only for the purpose of protecting it against the claims of the original owner's creditors after he should cease to use it for the purpose that gave the exemption, it would be subject to seizure and sale."[245] This limitation applies only in a situation where the owner ceased using the property as a homestead. There was no evidence indicating that Duran's transfer of the property was a sham transaction, so the appellate court reversed the portion of the trial court's ruling that set the convey-

243. TEX. BUS. & COM. CODE ANN. ch. 24 (Vernon 2002).

244. TEX. PROP. CODE ANN. § 41.002(b) (Vernon 2000) (stating that a family may claim 200 acres as its rural homestead, whereas a single person may only claim 100 acres).

245. *Duran*, 71 S.W.3d at 843.

ances aside and ordered the property sold, and instead ruled that the Hendersons take nothing on their claims.

Estate of Montague v. National Loan Investors[246] was another case decided during this survey period dealing with homestead issues. In the 1970's, Montague acquired a tract of land known as Montague Ranch from his mother. By 1982, Montague had sold all but 73 acres of the Ranch. As part of the sale of the Ranch, he had acquired a house on Lake Amistad in Del Rio, Texas. Later, in 1984, in conjunction with the restructuring of his personal debt, Montague and his wife listed the Ranch as either their homestead or primary address on a loan office worksheet, a real estate checklist, and a disclosure statement. Montague effected the loan restructuring on July 18, 1984, and, along with his wife, executed a deed of trust on the Ranch. As a part of the transaction and at the bank's request, the Montagues also executed a homestead designation on August 16, 1984 which listed the Lake Amistad property as their homestead. The homestead designation also stated that the Montagues had abandoned their homestead at the Ranch, and that the couple disclaimed any homestead rights in the Ranch. The couple paid on the note until Montague's death on August 2, 1988. In 1997, Commercial Loan Services acquired the note and notified Montague's Estate, his wife, and his wife's son of its intent to foreclose. Rather than foreclosing, CLS sued the Estate. CLS subsequently transferred the note to National Loan Investors, which was substituted as plaintiff. The trial jury found that $296,151.31 was still due on the note, that the Montagues resided on the Ranch in August, 1984 with the intent of claiming it as their homestead, that they did not abandon their homestead claim on August 16, 1984, and that they were not estopped from claiming the Ranch as their homestead. The court, however, granted NLI's motion for judgement notwithstanding the verdict in regards to the estoppel issue, and entered judgement for NLI in the amount of $286,151,31.

On appeal, the court addressed the estoppel issue by stating that whether a claimant is estopped from claiming a homestead exemption due to a disclaimer depends on the circumstances. If a claimant only owns one piece of property that he occupies as a home, he is not estopped from claiming it as a homestead regardless of either oral or written declarations to the contrary. Thus, because the factual possession and use of the property at the time of the mortgage is so obvious that the lender is charged with notice of the homestead.[247] Similarly, if the claimant owns two pieces of property, but uses the only one suitable for use as a homestead, the creditor will be charged with notice of the homestead.[248] The court held that it is only in the situation where a claimant owns multiple tracts of land and each of them is suitable for use as a homestead that a

246. Estate of Montague v. Nat'l Loan Investors, L.P., 70 S.W.3d 242 (Tex. App.—San Antonio 2001, pet. denied).

247. *Id.* at 247.

248. *Id.*

claimant could be estopped by a disclaimer.[249] In that situation, a claimant could be estopped "where physical facts open to observation lead to a conclusion that the property . . . is not the homestead, the use of the property is not inconsistent with the claimant's representations that the property is disclaimed . . . and the representations were intended to be and were actually relied upon by the lender."[250] This type of ambiguous possession may allow a lender to successfully assert estoppel against a homestead claimant. The court concluded that physical facts open to observation showed that the Ranch was being used as a homestead. Therefore, more than a scintilla of evidence supported the jury's original finding that the Estate and Montague's wife were not estopped from claiming the exemption.

Concerning the abandonment issue, the court held that "[a]bandonment of a homestead requires both the cessation or discontinuance of use of the property as a homestead, coupled with the intent to permanently abandon the homestead," and "[t]he evidence relied on as establishing abandonment of a homestead must make it undeniably clear that there has been a total abandonment with an intention not to return and claim the exemption."[251] After citing the same evidence as in the estoppel argument to reject the abandonment, the court stated that the abandonment argument also failed for a second reason. Even assuming that the Montagues did in fact abandon their homestead on August 16, 1984, the lien could not be validated by the abandonment. This is because a mortgage or lien that is void as illegally levied against a homestead can not have effect even after the property is "no longer impressed with the homestead character."[252] Therefore, the trial court's judgment was reversed and rendered such that the Montagues were not estopped from claiming the Ranch as their homestead against the enforcement of NLI's Deed of Trust.

Skelton v. Washington Mutual Bank, F.A.[253] involved a purchase money lien on real property. Daphney and Rusty Skelton were married in 1984 and remained married until Rusty's death in June, 1998. In December, 1995, Rusty purchased a lot and house through a loan from Great Western Mortgage Corporation. Because of certain negative references in her credit history, Daphney was not involved in the purchase and did not sign any documents in connection with the purchase or the loan. Rusty executed the deed of trust to Great Western in his own name, reciting that he was a single man. Daphney later stated that she was unaware Rusty had taken title purporting to be single. Payments were made on

249. *Id.*

250. *Id.* (quoting First Interstate Bank of Bedford v. Bland, 810 S.W.2d 277, 285-86 (Tex. App.—Fort Worth 1991, no writ).

251. *Id.* at 248.

252. *Id.* at 248-49 (quoting Laster v. First Huntsville Props. Co., 826 S.W.2d 125, 130 (Tex. 1991)).

253. Skelton v. Wash. Mut. Bank, F.A., 61 S.W.3d 56 (Tex. App.—Amarillo 2001, no pet.).

the loan, using funds earned by both individuals, until April, 1997. After Rusty's death, the probate court granted the application of Washington Mutual Bank, F.A., as assignee of Great Western, to foreclose its lien on the property. Daphney asserted, *inter alia*, that the property was her homestead and, therefore, not subject to foreclosure. She cited section 5.001 of the Texas Property Code, which limits the conveyance of homesteads without the joinder of both spouses, to argue that her homestead claim was superior to Washington Mutual's deed of trust because she did not execute any document creating the lien. She further claimed that her homestead interest was superior to Washington Mutual's purchase money lien.

The court disagreed with Daphney on both counts, citing both Article XVI, section 50 of the Texas Constitution, and section 41.001(b) of the Texas Property Code as authority for the position that a purchase money interest may be attached to a homestead. The court further held that "an encumbrance existing against property cannot be affected by the subsequent impression of the homestead exemption on the land so as to avoid or destroy pre-existing rights."[254] In regards to Daphney's claim that the lien was unenforceable because she did not execute any documents to create it, the court concluded that a vendor's purchase lien is enforceable even without documentation.[255] Additionally, the lien could also be enforced without Daphney's execution of any documents because the homestead interest and the lien were created simultaneously.[256] Therefore, no interest was actually transferred after creation of the homestead interest in violation of section 5.001 of the Texas Property Code.

XIV. BROKERS

In *Hamlett v. Holcomb*,[257] a listing broker was sued for breach of fiduciary duty and tortious interference with contract. Laurie Hamlett engaged Evelyn Holcomb as her listing broker. Subsequently, a contract for the purchase of Ms. Hamlett's home was entered into with Ricardo Soto. The contract contained a typical financing contingency, allowing the purchaser to repudiate the contract if he was unable to obtain financing. During the pendency of the contract, Soto lost his job and his prospective lenders refused to provide the financing necessary to purchase the home. Accordingly, Soto repuditated the purchase contract. The agent, Holcomb, tried to persuade Hamlett to allow the repuditation without any compensation.[258] Apparently incensed by the broker's action, Hamlett sued the broker for tortious interference and breach of fiduciary duty. The court first reviewed the contract and determined that Soto had the

254. *Id.* at 60.
255. *Id.*
256. *Id.*
257. Hamlett v. Holcomb, 69 S.W.3d 816 (Tex. App.—Corpus Christi 2002, no pet.).
258. This case does not indicate the facts giving rise to this assertion; therefore, we are left to assume that a repudiation for failure to obtain appropriate financing may have given rise to a claim for the earnest money deposit or other liquidated damages.

contractual right to repudiate the contract and did not breach it. Therefore, because there had been no breach of contract, the basis of Hamlett's claim of breach of fiduciary duty and tortious intereference necessarily failed because a breach of contract is a condition precedent to maintaining such causes of action.[259]

In *N.T. Development, Inc. v. Petersen*,[260] a broker alleged malicious prosecution on behalf of the principal who notified the Texas Real Estate Commission of a violation of the Texas Real Estate Licensing Act committed by the broker. This suit arose out of the rescission of an existing development agreement. The defendant brokers, Petersen and DiGino, listed N.T.'s property for sale. DiGino admitted at the time, however, that she was only a sales agent, and not a real estate broker, and that her sponsoring broker, Williams & Williams, was unaware of the listing. Such actions violate the Texas Real Estate Licensing Act. In connection with other unpleasanties associated with the contract rescission, N.T. notified the Texas Real Estate Commission of Petersen's and DiGino's violation of the Texas Real Estate Licensing Act, and the defendants then countersued the plaintiffs for malicious prosecution.[261] When Williams & Williams learned of the violation, Petersen and DiGino were terminated. It was the actions of Williams & Williams that caused the injury to Petersen and DiGino and not any action on behalf of N.T.[262] Ordinary losses incident to defending a civil lawsuit (including inconvenience, embarrassment, discovery, expense or attorney's fees) do not amount to special damages and consequently, Petersen and DiGino could not sustain a malicious prosecution cause of action.

XV. TITLE INSURANCE

While there were no title insurance cases during the Survey period worthy of note, there were significant changes in the title insurance industry in Texas. In addition to the standard array of changes for administrative and rate rule updates in the *Basic Manual of Rules, Rates and Forms for the Writing of Title Insurance in the State of Texas* ("Texas Title Man-

259. *Hamlett*, 69 S.W.3d at 820 (citing Lopez v. Munoz, Hockema & Reed, L.L.P., 22 S.W.3d 857 (Tex. 2000), requiring a breach of contract as a condition to a claim for breach of fiduciary duty, and Ernst & Young, L.L.P. v. Pac. Mut. Life Ins. Co., 51 S.W.3d 573 (Tex. 2001), where the failure to prove fraud defeated conspiracy and aiding and abetting claims.

260. N.T. Dev., Inc. v. Petersen, 79 S.W.3d 230 (Tex. App.—Fort Worth 2002, pet. denied).

261. A cause of action for malicious prosecution requires seven factors: "(1) that a criminal prosecution was filed against the plaintiff; (2) the defendant caused the filing; (3) the prosecution terminated in the plaintiff's favor; (4) the plaintiff was innocent; (5) there was an absence of probable cause for the criminal proceedings; (6) the defendants mailiciously filed the criminal charge; and (7) damage to the plaintiff." *Petersen*, 79 S.W.3d at 234 (citing Richey v. Brookshire Grocery Co., 952 S.W.2d 515, 517 (Tex. 1997)).

262. The seventh requirement for malicious prosecution requires some special injury to the plaintiff, which is a physical interference with his person or property, such as arrest, attachment, injunction or sequestration. *Id.* (citing Texas Beef Cattle Co. v. Green, 921 S.W.2d 203, 208-09 (Tex. 1996)).

ual"), there were a number of endorsement forms added to the list of endorsements available for issuance in the State of Texas.

An endorsement commonly referred to as the First Loss Endorsement[263] is now available. The First Loss Endorsement provides assurances to the insured lender that any loss suffered in excess of 10% of the insured amount will cause liability under the title policy without the acceleration of the debt. This endorsement would be useful in situations where numerous properties secure large indebtedness, and the title failure on one of the properties would not be of such importance that the lender would desire an acceleration of all of the indebtedness. The First Loss Endorsement is not available for residential real property, and the premium for the issuance of this endorsement is $25.

Another endorsement now available in Texas is the Last Dollar Endorsement.[264] This endorsement provides that any payments made upon the insured indebtedness will not reduce the coverage under the specified mortgage, except to the extent that such payments on the insured indebtedness reduced the total amount thereof below the insured amount of the policy. This endorsement is useful in complex lending transactions involving a number of different properties, each with its own insured amount, securing a total indebtedness equal to the amount of insurance on all of the collateral property. This endorsement is also not available on residential real property, and the premium for the issuance is $25.

A Mortgagee Policy Aggregation Endorsement[265] is also now available in Texas. The purpose of this endorsement is to establish an aggregate title company liability equal to all of the indebtedness insured under multiple title policies. This endorsement would also be used in a complex transaction where a single loan is secured by multiple properties. This endorsement is available with respect to residential real property only, and the premium for this endorsement is $25.

A Planned Unit Development Endorsement[266] is now available for a planned unit developments in Texas. This endorsement insures against violations of restrictive covenants (other than environmental matters) and that restrictive covenants do not contain provisions that will cause a forfeiture or reversion of title. It also protects against the priority of any lien for charges and assessments from an owners' association having priority over the lien of the insured mortgage, protects against forced removal of existing structures due to encroachments on adjoining lands or easements, and protects against the failure of title by reason of a right of first refusal to purchase the property. This endorsement is available only for residential real property, and the premium for same is $25.

The Restrictions, Encroachments, Mineral Endorsements, commonly

263. TEXAS STATE BOARD OF INSURANCE, BASIC MANUAL OF RULES, RULES AND FORMS: FOR THE WRITING OF TITLE INSURANCE IN THE STATE OF TEXAS § II, Form T-14 (Hart Graphics 2002).

264. *Id.* at § II, Form T-15.

265. *Id.* at § II, Form T-16.

266. *Id.* at § II, Form T-17.

referred to as a comprehensive endorsement, is also now available.[267] This endorsement is available to a mortgagee to insure against covenants; conditions and restrictions that can divest, subordinate or extinguish the lien of the insured mortgage; violations of conditions; covenants and restrictions; the existence of certain easements, liens, charges and assessments; options and rights of first refusal with respect to the property; encroachments of improvements onto adjoining lands or easements; future violations that could result in a loss of priority or unenforceability of the insured mortgage; damage to improvements (including lawn, shrubbery and trees) resulting from encroachments or surface use rights; court order requiring removal of encroachments or any existing improvements due to violations of covenants, conditions and restrictions or building setback lines. The premium for this comprehensive endorsement is five percent of the basic rate for residential real property and ten percent of the basic rate on other forms of real property.

XVI. CONSTRUCTION CONTRACTS, MECHANIC'S LIENS AND CONSTRUCTION ISSUES

In *Holladay v. CW&A, Inc.*,[268] Holladay hired CW&A to provide asphalt and paving work for a number of projects. Holladay contended that the work was faulty and necessitated repairs by third parties. The subcontractor, CW&A, Inc., sued the general contractor, Tony Holladay d/b/a Holladay Construction Corp., for breach of contract for failing to pay money when due that had been received from the owner of the property. CW&A contended that the principals of Holladay Construction were liable under the Texas Construction Fund Act[269] for retention of trust funds. Holladay sought an offset or credit for the cost of repairs.

Under the Texas Construction Fund Act, a trustee of funds is liable for the misapplication of trust funds if he intentionally or knowingly or with the intent to defraud, directly or indirectly retains, uses, disburses, or otherwise diverts trust funds without first paying all current or past due obligations incurred by the trustee to the beneficiary of the trust funds. The court cited *Lively v. Carpet Services, Inc.*[270] in holding that a party who misapplies these trust funds is subject to civil penalty if the duty is breached under the Act and the plaintiffs are within the class of people the Act was designed to protect. The appellate court reviewed Holladay's various affirmative defenses under the Texas Construction Fund Act.[271] In the subject case, Holladay contended he was retaining funds

267. *Id.* at § II, Form T-19.

268. Holladay v. CW&A, Inc., 60 S.W.3d 243 (Tex. App.—Corpus Christi 2001, pet. denied).

269. TEX. PROP. CODE ANN. § 162.001 (Vernon 2003).

270. Lively v. Carpet Servs., Inc., 904 S.W.2d 868, 873 (Tex. App.—Houston [1st Dist.] 1995, writ denied).

271. TEX. PROP. CODE ANN. §162.031(b) (Vernon 1995), provides that it is an affirmative defense to prosecution for the withholding of trust funds if the trust funds "were used by the trustee to pay the trustee's actual expenses directly related to the construction or

for repair of faulty work and not to determine whether entitlement thereto was authorized. CW&A alleged that Holladay failed to prove the specific sums of money to repair the specific improvements. The court dismissed the rigors of such proof holding that the statute does not require such explicit level of proof tying particular expenditures to the particular improvements. On the other hand, the appellate court remanded for further consideration the subcontractor's assertion against the applicability of such affirmative defense, based upon factual issues relating to whether the subcontractor caused the problems necessitating the repairs, whether the owner inspected and accepted the work and made payments for same to the general contractor, and whether the subcontractor offered to complete the job and perform repairs at its own expense.

The case of *Dalton Contractors v. Bryan Autumn Woods*[272] involved an action to compel arbitration filed by a contractor to enforce the contractor's lien regarding construction of an apartment complex. Dalton Contractors, Inc., as the contractor, and Bryant Autumn Woods, Ltd., "Buddy" McGraw and Bill McGraw, contracted for the construction of an apartment complex. After a payment dispute, Dalton filed a lien. The owners sued to remove the lien and for damages for breach of contract. The construction contract contained an arbitration clause. The appellate court examined whether the trial court erred by denying Dalton's motion to compel arbitration. The analysis focused on whether a valid arbitration agreement existed and whether the claims fell within the scope of the parties' agreement. The court found that, where the validity of a contractor's lien arises out of or relates to a construction contract, the claim will be subject to arbitration under the contract. Thus, the case was remanded with instructions for the trial court to enter an order compelling arbitration.

In *Lee Lewis Construction v. Harrison*,[273] the Harrison family brought a wrongful death lawsuit against Lee Lewis Construction when Jimmy Harrison, who was an employee of a glass subcontractor and who was not using adequate fall protection devices, died after falling from the tenth floor of a construction site. Testimony revealed that the contractor assigned its job superintendent "the responsibility to routinely inspect the ninth and tenth floor addition to the south tower to see to it that the subcontractors and their employees properly utilized fall protection equipment."[274] Furthermore, the general contractor's superintendent personally approved the specific fall protection system being utilized by the glass subcontractor. This retention of the right to control fall protection systems on the jobsite created the general contractor's duty of care

repair of the improvement or have been retained by the trustee, after notice to the beneficiary, who has made a request for payment, as a result of the trustee's reasonable belief that the beneficiary is not entitled to such funds . . . ."

272. Dalton Contractors v. Bryan Autumn Woods, Ltd., 60 S.W.3d 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

273. Lee Lewis Constr., Inc. v. Harrison, 70 S.W.3d 778 (Tex. 2001).

274. *Id.* at 784.

to the worker. Because of the actual retention of such responsibility, the court did not believe it was necessary to address whether the contractor contractually retained the right to control fall protection systems.

In *Texas Natural Resource Conservation Commission v. IT-Davy*,[275] the Supreme Court of Texas examined whether the sovereign-immunity doctrine prevented IT-Davy, the general contractor doing the clean-up work on the Sikes Disposal Pits in Houston, from suing the TNRCC for breach of contract. The contract provided a fixed price for clean-up but with an adjusted consideration if the clean-up necessitated either an unexpectedly greater or lesser effort on behalf of the contractor. When the contractor alleged that conditions materially differed and suggested an additional $6,723,655 in extra costs, the TNRCC refused to pay such amount. The contractor sought to arbitrate the dispute as required in the contract's remedies provision, but TNRCC further denied this request. The contractor brought suit, and TNRCC filed a plea to the jurisdiction based on sovereign immunity. IT-Davy offered four exceptions to the sovereign immunity doctrine: waiver by conduct, waiver by contract, waiver by legislative consent pursuant to the Texas Water Code, and waiver under the Declaratory Judgment Act. Justice Baker, on behalf of the majority, concluded that waiver of the sovereign immunity was not available under any of those theories. As for waiver by conduct, IT-Davy asserted that it fully performed under the contract, did additional work at the TNRCC's express request, and was refused full payment from the TNRCC for such work. The majority of the Texas Supreme Court refused to consider such actions a waiver of sovereign immunity. The court held firm to its general rule that waiver of sovereign immunity is within the legislature's sole province, and can only be accomplished with a clear expression of such waiver.[276] The court referred to a footnote in *Federal Sign v. Texas Southern University*, 951 S.W.2d 401 (Tex. 1997) wherein the court opined that "the State may waive its immunity by conduct other than simply executing the contract . . . ."[277] Nevertheless, the language of the majority in *IT-Davy* refused to recognize any such exception as being legitimate. The court concluded that to allow "governmental entities to waive immunity by conduct that includes accepting benefits under a contract would be fundamentally inconsistent with our established jurisprudence and with the existing legislative scheme."[278] The court also rejected the waiver by contract claim asserted by IT-Davy, even though the contract specifically provided arbitration as a remedy in the event of a breach thereof. The court's position was that administrative agencies that cannot waive immunity from suit cannot accomplish such a waiver by contracting for a specific remedy provision. This is true notwithstanding that such administrative agencies have the right to contract, even though Texas

275. Tex. Natural Res. Conservation Comm'n v. IT-Davy, 74 S.W.3d 849 (Tex. 2002).
276. *Id.* at 857. *See* TEX. GOV'T CODE ANN. § 311.034 (Vernon 2003); Univ. of Tex. Med. Branch at Galveston v. York, 871 S.W.2d 175, 177 (Tex. 1994).
277. Fed. Sign v. Tex. S. Univ., 951 S.W.2d 401, 408 n.1 (Tex. 1997).
278. *IT-Davy*, 74 S.W.3d at 857.

Water Code section 5.229 allows the TNRCC's executive director the right to negotiate and execute contracts to carry out the powers, duties, and responsibilities of the agency. This provision does not provide the clear and unambiguous waiver necessary for the TNRCC to waive immunity from breach of contract. Turning to the alleged waiver in the Texas Water Code, the court concluded that the Texas Water Code did not provide a waiver of sovereign immunity for breach of contract suits, but that the applicable provisions thereof[279] related only to rights to bring actions for review of administrative actions of a regulatory nature. The contractor also alleged a waiver under the Declaratory Judgment Act, which the Court summarily dismissed on a similar basis to that of the alleged Texas Water Code waiver.

Notwithstanding the result in *IT-Davy*, Justice Hecht, joined by Chief Justice Phillips, Justice Owen and Justice Jefferson, presented a concurring opinion, and Justice Enoch issued a dissenting opinion. Justice Hecht and the other concurring justices took issue with the majority's opinion, which seemingly slammed the door on any possible waiver by conduct, pointing out the long held waiver of immunity by the State's action of filing a lawsuit.[280] However, Justice Enoch, in dissenting, claims both the majority and concurring opinion force contractors who have been wrongfully treated by the State to resort to the courts looking for the "magic key that will loosen sovereign immunity's lock and open the courthouse doors."[281] The conclusions that seem inevitable from this case, considering the concurring and dissenting opinions, are that parties must contract with the State at their own risk and that clear contractual provisions will not carry the day. Such parties may be forced to wander the courthouse halls searching for the magic key of waiver as implied in the concurring opinion and forceably asserted in the dissenting opinion.

In another waiver of sovereign immunity case, *Travis County v. Pelzel & Associates, Inc.*,[282] Pelzel & Associates, Inc. sued Travis County, alleging breach of contract for the improper withholding of payment under a construction contract. According to the contract's liquidated damages clause, Travis County could retain $250 for each calendar day Pelzel failed to substantially complete the building beyond the date set for completion and acceptance. Travis County withheld under the liquidated damages clause only $5,500 of the total contract price of $414,164.80. The Texas Supreme Court concluded that Travis County did not waive immunity from suit by invoking the contract's liquidated damages clause even if the propriety of that adjustment is disputed.

In *Raymond v. Rahme*,[283] a concrete subcontractor, Raymond, sued Rahme, the property owner, over a mechanic's lien filed after a dispute

279. TEX. WATER CODE ANN. §§ 5.351 and 5.352 allow suits by persons "affected by a [TNRCC] ruling, order, decision, or other act".

280. *IT-Davy*, 74 S.W.3d at 861 and cases cited therein.

281. *Id.* at 863.

282. Travis County v. Pelzel & Assocs., Inc., 77 S.W.3d 246 (Tex. 2002).

283. Raymond v. Rahme, 78 S.W.3d 552 (Tex. App.—Austin 2002, no pet.).

arose on construction projects to build gas stations on Rahme's properties. Rahme was not satisfied with the thickness of the concrete or the construction techniques used to support and reinforce the concrete. When the subcontractor was not paid on the work that started in September 1996 and ended in November 1996, the subcontractor wrote the owner a letter dated February 5, 1997 stating the amount the subcontractor was owed. Although an initial mechanic's lien affidavit was completed and signed on February 8, 1997, it was not filed, and a second mechanic's lien affidavit was signed and filed on April 4, 1997, with a copy being sent to the owner and general contractor with a demand for payment. While the Texas Property Code grants a subcontractor lien rights, such lien must be perfected in substantial compliance with the applicable statutory provisions.[284] Furthermore, the subcontractor must file the lien affidavit with the applicable county clerk no later than the fifteenth day of the fourth calendar month following the day on which the indebtedness accrued.[285] Because the debt accrued on November 30, 1996, the lien affidavit had to have been filed by March 15, 1997; therefore, the April 4, 1997 filing was not timely and, hence, was invalid.[286] Additionally, the court held that the notice letter to the owner was insufficient to meet the specific requirements of the statutory notice. The subject letter only indicated the amount unpaid and owing to the subcontractor and in the reference line reflected an intent to file a lien against the property. The court determined that this did not provide the necessary notice that the owner could be subjected to personal liability if funds were not appropriately withheld from the general contractor as required by the statutory retainage requirements.

XVII. CONDEMNATION

The most significant condemnation issue addressed during the survey year was in *Interstate Northborough Partnership v. State*.[287] The matter arose when the State pursued a condemnation suit to acquire .365 acres of INP's property as part of a project to widen I-45. Notably, the condemnation caused existing structures on INP's property to be much closer to the frontage road and expanded highway, and left the structures in violation of building setback ordinances and deed restrictions. The pri-

284. *See* TEX. PROP. CODE ANN. § 53.051 (Vernon 1995). The statutory lien right requires a subcontractor to give the property owner notice of the debt no later than the fifteenth day of the third month following each month in which the subcontractor worked or provided materials. TEX. PROP. CODE ANN. § 53.056(b) (Vernon 1995).

285. TEX. PROP. CODE ANN. § 53.052(a) (Vernon 1995). TEX. PROP. CODE ANN. § 53.053(c) (Vernon 1995) provides that indebtedness to a subcontractor accrues on the last day of the last month in which labor was performed or materials furnished.

286. Raymond alleged a later deadline under TEX. PROP. CODE ANN. § 53.053(e) (Vernon 1995), which allows the determination of the accrual of a claim to be the last day of the month when all work under the contract is completed; however, that section addresses only statutory retainage and not contractual retainage; consequently, it was held to be inapplicable to the subject claim. *Raymond*, 78 S.W.3d at 560 n.2.

287. Interstate Northborough P'ship v. State, 66 S.W.3d 213 (Tex. 2001).

mary issues addressed by the court were whether INP could recover damages for the increased proximity to the expanded highway, and whether those damages were special in nature. In a matter of first impression, the court held that increased proximity damages were attributable to the State's use of the condemned land, and the impact upon INP's property was unique such that they were special damages and not damages suffered by the community at large. The Texas Supreme Court relied heavily upon the fact that the highway relocation caused the existing buildings to violate city setback ordinances and deed restrictions, and further, that evidence revealed that the close proximity of the highway caused significant damage to the existing use of the property.

In another condemnation matter, *Guadalupe-Blanco River Authority v. Kraft*,[288] the Texas Supreme Court reversed the lower court's opinion and found that an expert appraiser's testimony on value should have been excluded. While the court noted that the comparable sales approach is a generally accepted appraisal technique, the expert appraiser's bald assurance that he was using a widely accepted approach was not sufficient to demonstrate that his opinion was reliable. Upon closer review of the expert's underlying data, it was revealed that the comparable sales he used were not comparable to the condemned property; therefore, the expert opinion was unreliable and inadmissible. The Houston Court of Appeals also found expert opinion testimony to be unreliable in *Southwestern Bell Telephone Co. v. Radler Pavilion Limited Partnership*.[289] The property owner's expert provided an opinion of value based upon what he believed to be a reasonably probable use of the property in the immediate future. The court disagreed, and found that the conceptual redevelopment considered by the appraiser was purely speculative and not the type of testimony admissible in a condemnation proceeding.

A number of cases touched upon the recovery of lost profits in condemnation proceedings. In *State v. Whataburger*,[290] the court considered the appropriateness of the award of lost profits arising from the State's denial of access to a business. In *Whataburger*, the court noted an important distinction between utilizing a comparable sales approach and a cost approach when determining the value of property in condemnation suits. Whenever the replacement cost method is utilized, lost profits are not considered, and therefore must be added to the award to adequately compensate a property owner. In *Whataburger*, the property owner was entitled to compensation because the building had to be razed and built in a different location on the tract due to the condemnation. Because the subject building was of a unique character, the replacement cost method of appraisal was appropriate. As such, Whataburger was entitled not

288. Guadalupe-Blanco River Auth. v. Kraft, 77 S.W.3d 805 (Tex. 2002).

289. Southwestern Bell Tel. Co. v. Radler Pavilion Ltd. P'ship, 77 S.W.3d 482 (Tex. App.—Houston [1st Dist.] 2002, pet. denied).

290. State v. Whataburger, 60 S.W.3d 256 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

only to the statutory condemnation award, but a separate award for lost profits.

In *State v. Dick*,[291] lost profits were held appropriate for the temporary impairment of access to the remainder tract. The court held that in addition to a statutory award for the physical property taken, the property owner was entitled to lost profits arising from the denial of access to a remainder tract, which he had operated as a used car lot. Further, in *Pinnacle Gas Treating, Inc. v. Read*,[292] an award of lost profits was affirmed at the appellate level when a planned chicken farm was delayed by the condemnation. Even though lost profits are generally not recoverable for speculative businesses, the court found that the property owners had presented sufficient evidence regarding the lost profits for the time period of the temporary construction easement. However, the Texas Supreme Court in a recent decision reversed the damages award and remanded the case for a decision on whether a first condemnation should have been dismissed.[293]

In *The City of Houston v. Precast Structures, Inc.*,[294] the court affirmed an award of damages to a property owner occasioned by a loss of access after the condemnation. In *Precast*, it was noted that the subject condemnation eliminated a preexisting access point for the property owner's business. After condemnation, the business would have to reconfigure its access to the property. The court held that impairment of a property owner's access rights constituted a compensable damage, and the property owner had proven damages by showing the amount necessary to restore the property to pre-condemnation conditions.

Several cases addressed the requirement of a bona fide pre-condemnation offer by the condemning authority as a jurisdictional prerequisite to condemnation. In *ExxonMobil Pipeline Co. v Bell*,[295] a condemning authority was not limited to negotiating for only a condemned property during its required good faith negotiations. It could also discuss negotiations for offers to buy more than the property it condemns. However, in *MidTexas Pipeline Co. v. Dernehl*,[296] the condemning authority failed to show that it had made the required offer of settlement, since its negotiations had included an offer to purchase rights which were not subject to condemnation. There was no evidence that the condemning authority ever made an offer that comprehended only the rights it sought in condemnation. Further, the evidence supported the trial court's finding that

291. State v. Dick, 69 S.W.3d 612 (Tex. App.—Tyler 2001, no pet.).

292. Pinnacle Gas Treating, Inc. v. Read, 69 S.W.3d 240 (Tex. App.—Waco 2002), *rev'd and remanded*, 46 TEX. SUP. C. J. 599, 2003 WL 1889476 (Apr. 17, 2003).

293. Pinnacle Gas Treating, Inc. v. Read, 46 TEX. SUP. C. J. 594, 2003 WL 1889476 (Apr. 17, 2003).

294. City of Houston v. Precast Structures, Inc., 60 S.W.3d 331 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

295. ExxonMobil Pipeline Co. v. Bell, 84 S.W.3d 800 (Tex. App.—Houston [1st Dist.] 2002, pet. filed).

296. MidTexas Pipeline Co. v. Dernehl, 71 S.W.3d 852 (Tex. App.—Texarkana 2002, pet. granted).

further negotiations would not have been futile. In *McKinney Independent School District v. Carlisle Grace, Ltd.*,[297] the fact that a second offer of compensation was made after the landowners rejected the first proposal was not evidence that the first offer was not made in good faith. Further, the court noted that the landowners desire to continue negotiations was not relevant to the issue of whether the condemnor had made a bona fide good faith offer as required prior to initiating condemnation proceedings.

Finally, in *State v. Bristol Hotel Asset Co.*,[298] the Texas Supreme Court ruled that a return of service filed with the Special Commissioners in an administrative condemnation proceeding may be used as evidence of proper service. While the lower court found that the executed return of service was inadmissible hearsay, the Texas Supreme Court held that the return of service in the administrative proceeding should be treated like those in judicial proceedings and that it was *prima facie* evidence of service.

XVIII. AD VALOREM TAXATION

Dallas Central Appraisal District v Wang[299] illustrates the impact that an erroneous private tax certificate can have on a purchaser of property. As purchasers, the Wangs obtained property that, unbeknownst to them, had previously been erroneously granted over-65 homestead exemption status. After the Wangs' purchase, the appraisal district discovered the improperly granted exemption and delivered the Wangs a statement for five years of back taxes, penalties, and interest.[300] While noting that this back-appraisal statute had questionable due process protections for purchasers such as the Wangs, the court upheld the mandatory back assessment. The purchasers were charged with the responsibility of investigating possible prior erroneously granted exemptions. Of importance, the court noted that the Wangs had obtained a tax certificate from a private company that indicated that the property was free from any outstanding taxes, but that certificate did not have the same effect as a tax certificate purchased from a taxing entity. If the title company had obtained a clear tax certificate from the relevant taxing entities, the Wangs would have been absolved of any liability for the erroneous exemptions.[301]

There is an apparent conflict between opinions recently issued by the Travis and Austin Courts of Appeals on the issue of valuing property owned by a governmental entity but not used for public purposes. In

297. McKinney Indep. Sch. Dist. v. Carlisle Grace, Ltd., 83 S.W.3d 205 (Tex. App.—Dallas 2002, no pet.).

298. State v. Bristol Hotel Asset Co., 65 S.W.3d 638 (Tex. 2002).

299. Dallas Cent. Appraisal Dist. v. Wang, 82 S.W.3d 697 (Tex. App.—Dallas 2002, pet. filed).

300. TEX. TAX CODE ANN. § 11.43(i) (Vernon 2002).

301. *Id.* § 31.08(b).

Gables Realty Limited Partnership v. Travis Central Appraisal District,[302] the Austin Court held that state-owned property subject to a long term lease for a private commercial purpose was not tax-exempt public property. While the Texas Tax Code does allow for taxation of a private leasehold interest if the underlying property is exempt public property, the *Gables* court noted that in the event that the underlying fee itself is no longer used for a public purpose, then the leasehold is subsumed in the fee estate and the entire property is taxable. Importantly, the Austin Court noted that the activities of the private lessee must be viewed when determining whether the underlying state-owned fee is eligible for exemption.[303]

In *Panola County Appraisal District v. Panola County Fresh Water Supply District No. 1*,[304] decided four months prior to issuance of the *Gables* opinion, the Texarkana Court of Appeals applied taxation principles to lakefront lots owned by a fresh water supply district, which were leased to individuals for terms between one and ninety-nine years. While the holding centered upon the standing of the water district to challenge the values attributed to the leasehold interests, the opinion clearly indicates that the underlying fee was tax exempt as public property and that only the leaseholds were subject to taxation. While the issue of the exempt status of the underlying fee was not squarely before the court, the court's rationale and ruling implicitly approved of the exemption of the water district's property even though it was clearly not being used for a public purpose. Based on a plain reading of the Texas Tax Code, which authorizes the public property exemption "if the property is used for public purposes" it is likely that the issue of the taxation of public property that is leased to private entities will be resolved in line with the *Gables* opinion.[305]

While only remotely related to real estate, the *Zapata County Appraisal District v. Coastal Oil and Gas*[306] case is worth note, as it established a mineral valuation that dramatically favored the property owner. In *Coastal*, the court agreed with the property owner that the taxable value of oil and gas should be based an the market or spot price and not on the contract price of the minerals. Thus, the taxpayer was entitled to a value that was a quarter of that proposed by the appraisal district. Finally, the Houston Court of Appeals affirmed its previous holding on uniform and equal valuation challenges in *Weingarten Realty Investors v.*

302. Gables Realty Ltd. P'ship v. Travis Cent. Appraisal Dist., 81 S.W.3d 869 (Tex. App.—Austin 2002, pet. denied).

303. *See* TEX. TAX CODE ANN. § 11.11(a) (Vernon 2001).

304. Panola County Appraisal Dist. v. Panola County Fresh Water Supply Dist., No. 1, 69 S.W.3d 278 (Tex. App.—Texarkana 2002, no pet.).

305. *See also* Wackenhut Corrections Corp. v. Bexar Appraisal Dist., No. 04-02-00365-CV (Tex. App.—San Antonio July 31, 2002, no pet.) (not designated for publication), 2002 WL 31662756 (upholding taxation of leasehold interest attributable to lease of former jail, but failing to address the issue of taxation of underlying fee owned by county).

306. Zapata County Appraisal Dist. v. Coastal Oil & Gas, 90 S.W.3d 847 (Tex. App.—San Antonio 2002, no pet.).

Harris County Appraisal District.[307] While the court severely criticized the techniques used by the appraiser, it confirmed that taxpayers are entitled to relief if they can show that other similarly situated properties are being valued on a more favorable basis for tax purposes. In this type of challenge, the actual market value of the property is not relevant.

XIX. ENTITIES

In *Texas Westheimer Corp. v. 5647 Westheimer Associates*,[308] a partnership sued the management company of the partnership's adult nightclub for fraud and breach of contract during the winding up of the partnership and after the corporate charters of the partner entities had been forfeited. Three individuals originally formed corporations to act as the only three partners of 5647 Westheimer Associates, the nightclub owners. After months of operating deficits at the nightclub, 5647 Westheimer Associates agreed to sell the club to Texas Westheimer Corporation, but the partnership retained the right to participate in profits from the club's operation. After several months of operation and several name changes at the club, the partnership raised questions about the accounting by the management company, which was operated by Texas Westheimer Corporation. Eventually, the partnership filed suit and the trial court found that, *inter alia*, Texas Westheimer Corporation had mismanaged the accounting and committed fraud, the court awarded the partnership $464,000 for its losses and $600,000 in exemplary damages. The defendant appealed the judgment.

The corporation argued that the partnership had no standing to bring suit because two of three corporations comprising the partnership had forfeited their rights to do business, and the third corporation was not duly registered as a foreign corporation in Texas. The basic tenet of law that the court relied to refute this argument is that a partnership is "an entity legally distinct from its partners."[309] The court stated that even if all of the corporate partners had forfeited their charter prior to the lawsuit, the partnership may have been dissolved, as a matter of fact, but that it continued to exist during its winding up period "until all preexisting matters were terminated."[310] As a result, the institution of the lawsuit was a part of the winding up process and was instituted properly.

Texas Westheimer Corporation's next point of appeal was that the judgment against it is incorrect as it does not factor in the losses that the nightclub suffered, for which the partnership allegedly obligated itself to share. The court noted, however, that the profit participation agreement

307. Weingarten Realty Investors v. Harris County Appraisal Dist., 93 S.W.3d 280 (Tex. App.—Houston [14th Dist.] 2002, no pet.).

308. Tex. Westheimer Corp v. 5647 Westheimer Assocs., 68 S.W.3d 15 (Tex. App.—Houston [1st Dist.] 2001, pet. denied).

309. *Id.* at 21.

310. *Id.* at 22.

was an agreement to participate in the profits only. The agreement contained no provision for loss sharing. As such, the judgment was correct.

In a case involving a worker's compensation claim for the injury of a sheetrock employee, the San Antonio Court of Appeals in *Ingalls v. Standard Gypsum, L.L.C.*,[311] held that a member of a limited liability company employer that also acts as the employer of the injured worker may not be sued as a third party when a claim is made under the Texas Worker's Compensation Act. In this particular case, one of the members of the employer limited liability company was the manager of the gypsum plant in which the injury occurred.

The court pointed to section 408.011(a) of the Texas Labor Code, which states that "recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance. . . against the *employer or an agent or employee of the employer for. . .a work related injury.*"[312] While an employee may not sue his employer for such injuries, the employee may sue a third party for damages incurred as a result of the injury.[313] The injured employee sued, among others, the manager of the limited liability company employer as a third party.

Because Temple-Inland, the manager of the plant, had the right to control the details of the injured employee's work, it argued that it should be considered a joint employer, rather than a third party. The court acknowledged that the Texas Supreme Court has recognized the joint employment doctrine in workers' compensation cases.[314] As an alternative ground for affirmance of the trial court's finding that the workers' compensation claim was the only allowable claim, Temple-Inland and the other members of Standard Gypsum, L.L.C. argued that by the very nature of their being members of Standard Gypsum, L.L.C., they should as a matter of law be considered employers of the limited liability company's employees.[315]

The court noted that this alternative claim was a matter of first impression for the court. In the end, however, the court granted immunity to Temple-Inland under the Workers' Compensation Act on the basis of it acting as the manager of the gypsum plant. The court, however, remanded to the trial court for further findings the issue of whether the limited liability company's other member enjoys immunity solely as a result of its being a member of the company.

The trial court in *Williams v. Adams*,[316] held the officers of a corpora-

311. Ingalls v. Standard Gypsum, L.L.C., 70 S.W.3d 252 (Tex. App.—San Antonio 2002, pet. denied).

312. *Id.* at 255 (emphasis added).

313. *Id.*

314. *Id.* at 256.

315. *Id.* at 258 (citing Lawler v. Dallas Statler-Hilton Joint Venture, 793 S.W.2d 27 (Tex. App.—Dallas 1990, writ denied), Sims v. Western Waste Indus., 918 S.W.2d 682 (Tex. App.—Beaumont 1996, writ denied), and Alice Leasing Corp. v. Castillo, 53 S.W.3d 433 (Tex. App.—San Antonio 2001, pet denied)).

316. Williams v. Adams, 74 S.W.3d 437 (Tex. App.—Corpus Christi 2002, pet. denied).

tion personally liable for a tort judgment against the corporation itself. The plaintiff was injured at a condominium project on South Padre Island and won a $987,000 judgment against Williams Construction Co., the builder of the project. Before collecting on the judgment, however, the corporation's charter was forfeited for failure to pay its franchise taxes. The plaintiff brought another suit against the two officers of the corporation seeking to hold them personally liable for the judgment.

The trial court incorrectly likened the tort judgment to franchise taxes and, citing section 171.255 of the Texas Tax Code, held the officers personally liable. The appellate court reversed the trial court's judgment in a matter of first impression by holding that such statute does *not* apply to unintentional torts and that officers of corporations whose charters are forfeited for failure to pay franchise taxes are not liable for a judgment against the corporation stemming from an unintentional tort. The court distinguished between these debts of a corporation that the officers would be deemed to have knowledge and control and those debts that are not within the control of the officers, such as tort judgments. The intent of the statute, when strictly construed, is to prevent the officers from "lay[ing] behind the log" and allowing them immunity from personal liability if such would be a perversion of the corporate existence.[317] The court reasoned that section 171.255 of the Texas Tax Code cannot reasonably be used to "impute personal liability to an officer or director of a corporation for corporate debt when the 'debt' at issue is a tort judgment based on negligence liability."[318]

While the holdings of the appeals court in *Landon v. S&H Marketing Group, Inc.*[319] will not be considered a watershed case in corporate law, it may be horn book material for Texas corporation law. Based upon myriad fraudulent actions of a president of affiliated corporations, the appeals court was presented with fodder for reciting the following "rules" suitable for citation in any law student's business enterprises class: officers and directors owe the strictest fiduciary duty to their corporation; such fiduciary duties of officers and directors include the duties of obedience, loyalty, and due care;[320] the duty of loyalty requires an officer to act in good faith putting the interest of the corporation above the interest of the officer; contracts between a corporation and its officers are voidable for unfairness and fraud; and a corporate fiduciary is under an obligation not to usurp corporate opportunities for personal gain.[321]

XX. INDEMNITIES

In *Lake Charles Harbor & Terminal District v. Board of Trustees of the*

317. *Id.* at 441.
318. *Id.* at 442.
319. Landon v. S&H Mktg. Group, Inc., 82 S.W.3d 666 (Tex. App.—Eastland 2002, no pet.).
320. *Id.* at 672 (citing Gearhart Indus., Inc. v. Smith Int'l, Inc., 741 F.2d 707, 709 (5th Cir. 1984)).
321. *Id.* at 672-73, 681-82.

Galveston Wharves,[322] the parties entered into an access agreement for the storage of cranes. The cranes were damaged due to rodent infestation. The access agreement contained an indemnity by the property owner in favor of the owner of the cranes for damages resulting from any misrepresentation or breach of warranty. The court narrowly construed this indemnity and held that because there was no representation or warranty regarding the condition of the premises, the indemnity did not provide protection for the owner of the cranes.

In *Estate of Frank M. Montague, Jr. v. National Loan Investors, L.P.*,[323] the holder of a note sued for collection and additionally claimed attorney's fees pursuant to a provision in the note that provided for "ten percent (10%) additional on the amount of principal and interest then owing, as attorney's fees."[324] The San Antonio Court of Appeals stated that "the Texas Supreme Court noted, 'Texas courts do not regard agreements to pay attorney's fees based on a percentage of the unpaid balance and interest of a promissory note as absolute promises to pay the contractual amount, but as contracts to indemnify the holder of the note for attorney's fees actually incurred in collecting the principal and interest of the note.'"[325] The court in *Montague* held that the provision providing for payment of attorney's fees was an indemnity, that the obligor may challenge the reasonableness of attorney's fees despite the contractual provision, and the holder is also able to prove that reasonable attorney's fees exceed the contractual percentage.

XXI. MISCELLANEOUS

A. ARBITRATION

Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd.[326] involved a contract relating to the construction of an apartment complex that contained an arbitration clause. A payment dispute arose and the contractor filed a lien on the property. The property owner asserted that the validity of the lien should be resolved pursuant to section 53.106(e) of the Texas Property Code rather than the arbitration clause. The appellate court held that "there is nothing [in the Texas Property Code] to indicate that the issue may not also be resolved by [arbitration]."[327] The court also held that arbitration must be compelled if there is a valid, enforceable arbitration agreement, and the claims asserted fall within the scope of the

322. Lake Charles Harbor & Terminal Dist. v. Bd. of Trustees of the Galveston Wharves, 62 S.W.3d 237 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

323. Estate of Montague v. Nat'l Loan Investors, 70 S.W.3d 242 (Tex. App.—San Antonio 2001, pet. denied).

324. *Id.* at 250.

325. *Id.* (citing F.R. Hernandez Const. & Supply Co. v. Nat'l Bank of Commerce, 578 S.W.2d 675, 676 (Tex. 1979)).

326. Dalton Contractors, Inc. v. Bryan Autumn Woods, Ltd., 60 S.W.3d 351 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

327. *Id.* at 354.

agreement.[328]

B. PROFESSIONAL RESPONSIBILITY

In *Aghili v. Banks*,[329] owners of condominium units brought an action against the condominium owners' association, its management company, the foreclosure sale buyer and the attorney who conducted the foreclosure sale seeking to set aside the non-judicial foreclosure of their units. The trial court granted summary judgment against the condominium owners. The condominium owners appealed claiming the summary judgment was inappropriate since it was based on an affidavit of John Banks, the attorney who conducted the foreclosure sale, was named as a defendant in the lawsuit by the condominium owners, and represented all defendants, including himself, in the lawsuit. The condominium owners objected to the appearance of Banks as the primary witness for the defendant's joint motion for summary judgment. Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct prohibits an attorney from appearing both as a witness and as counsel unless certain exceptions are met. When an attorney who represents a party is an affiant in support of a motion for summary judgment, he or she is a witness.[330] The court held that the trial court abused its discretion when it allowed Banks to appear as both a witness and counsel in this case, and reversed and remanded the defendant's motion for summary judgment to the trial court for further proceedings.

In re Roseland Oil & Gas, Inc.[331] involved an attorney who represented all defendants in a lawsuit concerning an oil and gas lease and later withdrew from representation of one of the defendants. The plaintiff filed a motion to disqualify the attorney from representing the remaining defendants. The trial court denied the motion and the plaintiff sought a writ of mandamus. Rule 1.09 of the Texas Disciplinary Rules of Professional Conduct provides in relevant part:

> [w]ithout prior consent, a lawyer who personally has formerly represented a client in a matter shall not thereafter represent another person in a matter adverse to the former client . . . (2) if the representation in reasonable probability will involve a violation of Rule 1.05; or (3) if it is the same or a substantially related matter.[332]

Rule 1.05 provides that it is impermissible for an attorney to "knowingly . . . [u]se confidential information of a former client to the disadvantage of the former client after the representation is concluded" or "[u]se privi-

328. *Id.* (citing Hearthshire Braeswood Plaza Ltd. P'ship v. Bill Kelly Co., 849 S.W.2d 380 (Tex. App.—Houston [14th Dist.] 1993, writ denied)).

329. Aghili v. Banks, 63 S.W.3d 812 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

330. *Id.* at 817 (citing Mauze v. Curry, 861 S.W.2d 869, 870 (Tex. 1993)).

331. *In re* Roseland Oil & Gas, Inc., 68 S.W.3d 784 (Tex. App.—Eastland 2001, no pet.).

332. *Id.* at 786-87.

leged information of the client for the advantage of [another]."[333] The court held that the attorney's continued representation of the remaining defendants was adverse since there was "a small, yet serious risk" of adversity,[334] and such representation violated Rule 1.09.

C. MINERALS

A case of first impression for the construction of a Granite Deed was presented in *Wilderness Cove, Ltd. v. Cold Spring Granite Co.*[335] This case arose from an 1890 grant by three of five cotenants in a 300 acre tract in Burnet County. The grant related to Texas red granite that was to be used to build the then new state capital building in Austin. The consideration for the granite was particularly high at that time considering the need for such red granite in the construction of the state capital building with a fair market value between $100,000 and $200,000, or between $15 and $30 per acre. Quarrying of the granite never occurred, Wilderness Cover acquired title of the entire surface estate to the 300 acres and one-half undivided interest in the granite. The remaining one-half interest in the granite was held by Cold Spring. When Wilderness Cove began to develop 30 acres of the property for residential and recreational use, Cold Spring sought a restraining order to prohibit drilling holes or placing explosive charges in the granite. Litigation ensued and the appellate court was faced with interpretation of the meaning of the Granite Deed.

The first issue was whether the Granite Deed granted a severable mineral estate of the granite *in situ*. While the court had to ascertain the intent of the parties, the ultimate question was whether granite could be regarded as a mineral for purposes of establishing a severable mineral estate. The court reviewed two lines of cases, one that granted or reserved minerals without specifying the exact mineral. The other line of cases granted or reserved a specific mineral substance. Under the generic grant or reservation line of cases, the court concluded that commercial value of the mineral or substance being discussed was a critical element in determining whether it represented a severable mineral estate or whether title resided with the surface estate owner.[336] The court cited *Schwarz v. State*,[337] in which the Texas legislature reserved coal and lignite under property when the surface estate was deeded away. The *Schwarz* court recognized that the presumed intent announced in earlier cases did not apply because they were rules for construing ambiguous and generic con-

333. *Id.* at 787 (alteration in original) (citations omitted).

334. *Id.* at 787 (citing Nat'l Med. Enters., Inc. v. Godbey, 924 S.W.2d 123, 132 (Tex. 1996)).

335. Wilderness Cove, Ltd. v. Cold Spring Granite Co., 62 S.W.3d 844 (Tex. App.—Austin 2001, no pet.).

336. *See* Moser v. U.S. Steel Corp., 676 S.W.2d 99 (Tex. 1984) (relating to reservations of "other minerals" in the context of uranimum ore); Heinatz v. Allen, 217 S.W.2d 994 (Tex. 1949) (dealing with a devise by will of "mineral rights" where a dispute arose as to the ability to quarry limestone); Hendler v. LeHigh Valley R.R. Co., 58 A. 486, 487 (Pa. 1904) (dealing with granite, limestone or other building material).

337. Schwarz v. State, 703 S.W.2d 187 (Tex. 1986).

veyances. Consequently, the court, recognizing Texas' adherence to the ownership in place doctrine, announced that the Granite Deed conveyed the *in situ* granite deposit as a severable mineral estate. Furthermore, the court concluded that as a mineral estate, it would be the dominant estate taking priority over the surface usage. The court rejected a contingent that the conveyance of an undivided interest in the granite somehow changed the character of the mineral estate as being dominant.

D. Letters of Credit

In *Synergy Center, Ltd. v. Lone Star Franchising, Inc.*,[338] a commercial tenant brought an action against its landlord seeking a temporary injunction to stop the landlord from presenting a letter of credit held as security for the tenant's obligations under the lease. The letter of credit was held to be a separate contract between the bank and the beneficiary independent of the underlying obligations.[339] The Texas Supreme Court has held that presentment of a letter of credit may not be enjoined unless there is evidence of fraud by the beneficiary.[340] The court in *Synergy* held that there was no evidence of fraud and, therefore, no justification for a temporary injunction preventing the landlord from presenting the letter of credit.

E. Lis Pendens

In the *In re Wolf*, case[341] Strategic Finance, Inc. purchased accounts receivable from First National Net, Inc. ("FNN"). Strategic alleged that FNN improperly diverted proceeds collected by FNN on receivables purchased by Strategic and that FNN used such diverted proceeds to purchase certain real property. Strategic filed a *lis pendens* on the real property. On appeal, the court stated that an adequate nexus must exist between a claim and a subject property.[342] The court held that use of the proceeds to purchase the real property did not constitute such adequate nexus and held that the trial court should grant the motion for an order canceling the *lis pendens*.

F. Annexation

Sunchase Capital Group, Inc. v. City of Crandall[343] involved a challenge to the City's annexation ordinances. The developer, Sunchase, planned to develop property in rural Kaufman County as a residential

338. Synergy Ctr., Ltd. v. Lone Star Franchising, Inc., 63 S.W.3d 561 (Tex. App.—Austin 2001, no pet.).

339. *Id.* at 565 (citing Philipp Bros., Inc. v. Oil Country Specialists, Ltd., 787 S.W.2d 38, 40 (Tex. 1990)).

340. *Id.*

341. *In re* Wolf, 65 S.W.3d 804 (Tex. App.—Beaumont 2002, no pet.).

342. *Id.* at 806 (citing Olbrich v. Touchy, 780 S.W.2d 6, 7 (Tex. App.—Houston [14th Dist.] 1989, no writ).

343. Sunchase Capital Group, Inc. v. City of Crandall, 69 S.W.3d 594 (Tex. App.—Tyler 2001, no pet.).

subdivision in accordance with the county's subdivision requirements. In preparation for such development, Sunchase purchased water pipe and incurred expenses for engineering services. Sunchase and other land owners petitioned the county judge to incorporate the town of Quail Country, which would include Sunchase's land. Subsequently, the City of Crandall passed three annexation ordinances that made Sunchase's land subject to the City's extraterritorial jurisdiction. Sunchase then sought a declaratory judgment that the annexation ordinances were void. A private party may only collaterally attack annexation ordinances as void where the party is directly affected and suffers some burden peculiar to himself.[344] Sunchase was held not to have standing to challenge the annexation ordinances as void because making Sunchase's property part of the extraterritorial jurisdiction of the City of Crandall was not a burden "any different, special or peculiar than those that ordinarily and indirectly result from the City's exercise of its powers of annexation."[345]

In *City of San Antonio v. City of Boerne*,[346] the City of San Antonio claimed that upon its application for annexation of land, it's extraterritorial jurisdiction was automatically extended over such land. However, the appellate court held that the extraterritorial jurisdiction of San Antonio was not reestablished until the annexation occurred.

G. Premises Liability

In *Bill's Dollar Store, Inc. v. Bean*,[347] the court stated that the duty of an owner or occupier of land to keep premises under his control in a safe condition is discharged by (i) warning of unreasonable risks of harm either known to the owner or which would be known to him by reasonable inspection, or (ii) by making the premises reasonably safe. "[I]f the evidence conclusively established that appellant adequately warned appellee of the condition, appellant cannot be found negligent as a mater of law."[348]

The court held that a warning was adequate to discharge the owner's duty if (i) an employee told a customer to watch for the wet spot as she walked out the door, (ii) the employee pointed out the wet area, (iii) other customers were able to avoid the wet area, (iv) the customer acknowledged that the cashier pointed out the wet area, and (v) the customer could see the floor was wet and knew that a freshly mopped floor could be potentially a slipping hazard. The court noted the abolishment of the no duty concept with regard to premises liability in *Parker v. High-*

344. *Id.* at 596 (citing City of West Lake Hills v. City of Austin, 466 S.W.2d 722 (Tex. 1971)).

345. *Id.* at 597.

346. City of San Antonio v. City of Boerne, 61 S.W.3d 571 (Tex. App.—San Antonio 2001, pet. granted).

347. Bill's Dollar Store, Inc. v. Bean, 77 S.W.3d 367 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).

348. *Id.* at 369 (citing State v. Williams, 940 S.W.2d 583, 584 (Tex. 1996)).

land Park, Inc.[349] However, *Parker* did not change the underlying obligation to establish a duty or a violation of duty.[350] In the dissenting opinion, Senior Justice Wittig stated that this "is the first published Texas case decided after adoption of comparative negligence to hold warning an invitee of dangerous conditions may discharge premises liability as a matter of law."[351]

349. Parker v. Highland Park, Inc., 565 S.W.2d 512 (Tex. 1978). *Parker* retained the necessary elements of (1) establishment of a duty and (2) proof of a violation of that duty, but abolished the additional element of proving the absence of the plaintiff's own subjective knowledge and appreciation of the danger.

350. *Bill's Dollar Store*, 77 S.W.3d at 370 (citing Dixon v. Van Waters & Rogers, 682 S.W.2d 533, 534 (Tex. 1984) and Middleton v. Harris Press & Shear, Inc., 796 F.2d 747, 751 (5th Cir. 1986)).

351. *Id.* at 371.