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Real Property

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This article covers cases from 143 S.W.3d through 170 S.W.3d, which the authors believed were noteworthy by adding to the jurisprudence on real property. The authors acknowledge the assistance of the following attorneys for their initial review and drafting of portions of this article: Michael P. Aguilar, Jeanne M. Caruselle, Lorin Combs, Adam Darowski, Rusty A. Fleming, Ryan J. Harris, Benjamin F. S. Herd, Kathryn S. Kildebeck, Joshua Lebar, Jeffrey W. Matthews, Robert A. McNiel, David S. Morris, Christopher T. Nixon, Brooke J. Reid, James R. Schnurr, Tracey R. Scoggin, Michelle L. Simpkins, Lisa A. Smith, David F. Staas, Douglas W. Sweet, Raegan R. J. Watchman, Jason T. Whitcomb, and Carrie M. Winkler.

I. MORTGAGES, LIENS, AND FORECLOSURES

IN *Apex Financial Corp. v. Garza*,[1] the court determined whether a grantee under an unrecorded quitclaim deed or a purchaser at a subsequent sheriff's sale had superior interest in a piece of property located in Dallas, Texas. On July 23, 1997, Garza received a quitclaim deed to the property, which remained unrecorded until April 10, 2000. On November 30, 1999, Verizon obtained a money judgment against the grantor of Garza's quitclaim deed. Since the quitclaim deed was not recorded, this grantor appeared as the record owner of the property. Verizon had a writ of execution issued. A sheriff's sale of the property took place on April 4, 2000, and Apex was the highest bidder. Apex paid valuable consideration and received a sheriff's deed to the property. Apex then evicted Garza from the property.

Garza filed a declaratory judgment against Apex to determine the rights and interests of the parties to the property. Apex also filed a third-party action against Verizon, seeking a declaratory judgment that if the sheriff's sale was set aside, Apex would be reimbursed for the purchase price and other costs relating to the sheriff's sale. At the non-jury trial, the court found that Garza had superior rights to the property and that Apex had no action against Verizon. Apex appealed, arguing that the evidence was insufficient at trial to support the trial court's judgment.

Apex first claimed that it had superior title to the property since it was a bona fide purchaser with no notice of Garza's claim of ownership under the unrecorded quitclaim deed. Generally, an unrecorded conveyance is void as to a subsequent purchaser for value without notice of the claim of ownership.[2] However, notice of a claim may be actual or constructive.[3] The court stated that "a purchaser has the duty to ascertain the rights of a third-party possessor where the possession is visible, open, exclusive and unequivocal."[4] Sufficient evidence was presented at the trial court that

1. 155 S.W.3d 230 (Tex. App.—Dallas 2004, pet. denied).
2. *Id.* at 234.
3. *Id.*
4. *Id.*

Garza openly used the property for his trucking business on a daily basis; such evidence included Garza business signs on the trucks, parking of business trucks on the property, working on and washing of trucks on the property, the existence of only a single building used by Garza as an office, and Garza employees on site. The court therefore concluded that Garza's use of the property was visible, open, and exclusive.[5] On the issue of whether Garza's use was unequivocal, the court, distinguishing a Texas Supreme Court case involving occupancy of a multi-family rental property,[6] found that, since this property was not a multi-unit rental property and no assurances of ownership were made to Apex, Garza's use of the property was unequivocal. Thus, there was sufficient evidence to support the finding that Apex had constructive notice of Garza's claim to the property.[7]

Next, Apex argued that the sheriff's deed was valid and vested superior title to the property. Under Texas law, a purchaser at a sheriff's sale only receives whatever title, interest, or claims the judgment debtor had at the time of the sale.[8] In this case, since the judgment debtor had already deeded his interest to Garza before the sale, Apex's sheriff's deed conveyed no interest to the property. The court distinguished cases granting reimbursement when the sheriff's deed was set aside. In this matter, the sheriff's deed was not set aside, and it was a valid quitclaim with no warranty of title; therefore, Apex was not entitled to any reimbursement from Verizon.[9]

In *Segal v. Emmes Capital, L.L.C.*,[10] the main issue addressed by the court was whether a deed of trust that encumbered three pieces of real estate in three different counties could be foreclosed on at one sale held in one of the counties. The Fogartys and Segals, as owners of a Texas limited partnership, executed a promissory note and a deed of trust that encumbered the three tracts in favor of Emmes. The note matured in 1998, and the borrower defaulted. That spring, the borrower filed for Chapter 11 bankruptcy. When the borrower failed to follow the terms of the agreed order of the bankruptcy court, the automatic stay was lifted. As none of the properties overlapped into adjoining counties, the trustee of the foreclosure sale posted notices of the sale for each tract in all three counties. Emmes foreclosed on the three properties at a single non-judicial foreclosure sale conducted in Harris County. Emmes was the highest bidder for all three properties, but a deficiency remained. Emmes filed deficiency claims against the Fogartys and Segals, as guarantors. In response to the deficiency claims, the Fogartys and Segals counterclaimed, arguing that Emmes improperly sold all three parcels of property at a

5. *Id.* at 235.
6. Madison v. Gordon, 39 S.W.3d 604, 605 (Tex. 2001) (per curiam).
7. *Garza*, 155 S.W.3d at 235-36.
8. *Id.*
9. *Id.*
10. 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd). *See* discussion *infra* Section III on guaranties.

single foreclosure sale. Specifically, the Fogartys and Segals claimed that the sale's location chilled the bidding process for the tracts located in Polk County and Montgomery County.[11]

The court conducted an in-depth analysis of Texas Property Code section 51.002(a). The applicable portion of the statute reads: "a sale of real property under a power of sale conferred by a deed of trust or other contract lien . . . must take place at the county courthouse in a county in which the land is located or if the property is located in more than one county, the sale may be made at the courthouse in any county in which the property is located."[12] The Fogartys and Segals interpreted this provision to mean that if a deed of trust covers several non-contiguous pieces of property, each of which lies in only one county, and none of which lies in the same county, then the trustee must sell each piece of property in the county where it lies. In that case, the trustee's sale would have violated this section of the Texas Property Code. In contrast, Emmes construed the statute to mean that if a deed of trust covers several non-contiguous pieces of property, each of which lies in only one county and none of which lies in the same county, the trustee may sell all pieces of property in any of the counties where any of the properties lie. In that case, the foreclosure sale would have complied with this section of the Texas Property Code.[13]

The court first examined the plain language of section 51.002(a), specifically the phrases "real property," "land," and "property." Since the plain language of this section could support two reasonable interpretations, the court determined that the statute's plain language was ambiguous.[14] The court also determined that none of the Code Construction Act's[15] factors assisted in resolving this section's ambiguity. Since there were beneficial and detrimental consequences to both parties' interpretations, the court turned to the legislative history to determine which interpretation was correct. There have been two versions of this statute. The first version, adopted in 1889, stated that sales of real property under a deed of trust must be conducted in the county where the property is located. However, if the property is located in more than one county, the sale may occur in any county where the property is located, as long as notice of the sale is given in each county.[16] In 1915, the language was amended to read that if a property was located in more than one county and notices of the sale were posted in all such counties, "such sale will be made of such real estate in that one of said counties in which the greater portion of the real estate may be situated; if equal quantities of said land to be sold lie in different counties, said notice shall designate in which of

11. *Id.* at 271.
12. TEX. PROP. CODE ANN. § 51.002(a) (Vernon 1995).
13. *Segal*, 155 S.W.3d at 285-86.
14. *Id.* at 287.
15. TEX. GOV'T CODE ANN. § 311.023 (Vernon 1998).
16. *Segal*, 155 S.W.3d at 286-94.

said counties the sale is to be made."[17]

The Fogartys and Segals claimed that the language in the two versions is materially different and that by abandoning the previous version, the legislature intended to reject Emmes' position that if land is located in multiple counties, a single sale can take place in one of the counties. The court disagreed, finding that this former language was equally ambiguous. The former versions also used the ambiguous phrases "real estate" and "land," and the ambiguity of such language does not reject Emmes' interpretation of the statute.[18] After this in-depth review of the legislative history of this section of the Texas Property Code, the ambiguity concerning the proper county of sale was not resolved.

The court next relied on the doctrine of legislative acceptance to resolve the ambiguity. This doctrine states that the legislature intends the statute to have the meaning ascribed by the courts if an ambiguous statute has been reenacted by the legislature. In *Bateman v. Carter-Jones Drilling Co.*,[19] which supports the Emmes' interpretation of the section and was the only case on point,[20] the court considered the language of a predecessor statute to section 51.002(a) and upheld the validity of a Rusk County foreclosure sale of a non-contiguous property located in Gregg County, which was sold with other Rusk County tracts encumbered by the deed of trust. The *Bateman* court stated that

> [s]urely the Legislature, when they [sic] made the provision for the sale of land where the greater portion thereof is situated and if in equal quantities the notice shall designate in which of said counties the sale is to be made, did not anticipate that land could be situated in a half-dozen or more counties and likely to be contiguous, one tract to the other, making a complete chain back to the county in which the sale was to be held.[21]

The *Segal* court held that the *Bateman* holding was still relevant since there had been no material changes to this section of the Texas Property Code since the time of the decision. Based on this precedent, the court held that the trustee properly conducted the sales of all tracts of land under the deed of trust in Harris County.

In *Associates Home Equity Services Co. v. Hunt*,[22] the court addressed whether property owners who exercised their right of redemption after a tax sale restored their title as it existed before the tax sale. The Hunts signed a promissory note and deed of trust payable to Associates Home Equity Services. After the Hunts failed to pay property taxes, the Tomball Independent School District obtained a judgment against the

17. Act of March 10, 1915, 34th Leg., R.S., ch. 43, § 1, 1915 Tex. Gen. Laws 84, *amended by* Act of May 28, 1915, 34th Leg., 1st C.S., ch. 15, § 2, 1915 Tex. Gen. Laws 2, 32-33.

18. *Segal*, 155 S.W.3d at 291-92.

19. 290 S.W.2d 366 (Tex. Civ. App.—Texarkana 1956, writ ref'd n.r.e.).

20. *Segal*, 155 S.W.3d at 294.

21. *Bateman*, 290 S.W.2d at 370.

22. 151 S.W.3d 559 (Tex. App.—Beaumont 2004, no pet. h.).

Hunts, and the property was sold at a tax sale to satisfy the school district's tax liens. After a third party purchased the property at the sale, the Hunts redeemed the property in accordance with section 34.21(c) of the Texas Tax Code. Associates then posted the property for foreclosure sale under the deed of trust. The trial court enjoined Associates from foreclosing on the property and Associates appealed.[23]

The issue on appeal was whether the foreclosure of the tax lien, since it was superior to Associates' mortgage lien, extinguished the deed of trust lien, or if the redemption after the tax-lien foreclosure reinstated the title to its previous state encumbered by the lien of the deed of trust. Relying on precedent, the court found that redemption does not give new title. The court stated that, as a general principle, an owner who does not pay taxes should not be allowed to strengthen his title at a tax sale. However, since the Hunts exercised the right of redemption within the time period permitted by the statute, their prior title to the property was restored. The court distinguished between the foreclosure of a senior lien extinguishing a junior lien and the effect of redemption of an existing lien. When the Hunts redeemed the property, they restored title to what it was before the tax sale—without the tax lien but with the deed of trust lien remaining valid against the property. Therefore, Associates had the right to proceed with the foreclosure sale.[24]

Justice Burgess authored a dissenting opinion, claiming that the majority created an exception to the long-standing rule that a superior lien extinguishes an inferior lien.[25] Justice Burgess noted that in *Murphee Property Holdings, Ltd. v. Sunbelt Savings Association of Texas*, redemption was a factor in the court's opinion, although it was not the primary issue.[26] Under that interpretation, the tax lien foreclosure would extinguish the contractual deed of trust lien.[27] Without listing the particulars he envisioned, Justice Burgess suggested that mischief could be created by the majority's ruling.[28]

In *Adams v. First National Bank of Bells/Savoy*,[29] the court addressed several issues involving due-on-sale clause defaults and wrongful foreclosure. Adams obtained a loan secured by a deed of trust to finance her plans to renovate a building that she owned in Sherman, Texas. A year later, she obtained a second personal loan from the bank. Subsequently, to improve the credit-worthiness of Adams' wholly-owned company, she transferred ownership of the property to the company without the lienholder's consent. The warranty deed from Adams to the company was placed in a drawer and never recorded. Subsequently, the bank dis-

23. *Id.* at 560-61.
24. *Id.* at 561-62.
25. *Id.* at 562-64.
26. 817 S.W.2d 850 (Tex. App.—Houston [1st Dist.] 1991, no writ).
27. *Hunt*, 155 S.W.3d at 563.
28. *Id.*
29. 154 S.W.3d 859 (Tex. App.—Dallas 2005, no pet. h.). *See* discussion *infra* Section II on notes.

covered that the property was listed as an asset on both Adams' personal financial statement and the company's financial statement. After Adams confirmed she had transferred the property to the company, the bank gave notice of default both for conveying the property and for failing to complete the remodeling. The bank accelerated the debt and demanded payment without providing Adams notice of acceleration. The property was then posted for foreclosure. Adams attempted to rescind the deed to her company and began paying regular monthly payments on the note. The bank rejected these partial payments. On September 5, 2000, the bank foreclosed on the property.[30]

The foreclosure deeds recited that "default has occurred in the payment of the Obligations [sic] when due" and that "written notice of default and of the opportunity to cure the default to avoid acceleration of the maturity of the Note was served on behalf of the Beneficiary by certified mail."[31] In addition, the substitute trustee filed affidavits stating that Adams "had a period of not less than twenty days to cure the default before the entire debt secured by the Deed of Trust became due and notice of the proposed foreclosure sale was given."[32] After Adams sued the bank for wrongful foreclosure, the substitute trustee filed corrective foreclosure-sale deeds, stating that the bank had requested the enforcement of the deeds of trust because a violation of the terms and conditions of the note and deed of trust had occurred. The trustee also corrected the affidavit, which included language that Adams had been given notice and opportunity to cure the default. After the trial court granted the bank's motion for summary judgment, Adams appealed based on the fact that foreclosure had occurred under the incorrect recitations in the original deed and affidavit, which affected the summary-judgment ruling on the estoppel and waiver issue (although not on her wrongful-foreclosure claim).[33] However, since Adams did not provide sufficient evidence or authority on this point, the appellate court concluded that it did not raise a genuine issue of fact.[34]

Adams also argued that she rescinded the deed transferring title to the company, and therefore, there was no default at the time of the foreclosure. The court agreed with the bank that such attempted rescission was too late, especially considering that Adams had waived the right to cure such a default.[35] The court also rejected Adam's contention that the bank knew of such transfer, remained silent, and hence, had waived such breach. Because of Adam's failure to sufficiently brief the issue, the court did not reach the merits of this position.[36]

30. 154 S.W.3d at 864-65.
31. *Id.* at 866.
32. *Id.*
33. *Id.* at 871.
34. *Id.* at 872.
35. *Id.*
36. *Id.* at 873.

In *National Enterprise, Inc. v. E.N.E. Properties*,[37] the court addressed the issue of whether an assignee of a note and deed of trust from the FDIC could assert a six-year statute of limitations for an action to collect a deficiency after foreclosure. After the Resolution Trust Corporation ("RTC") assigned its interest in a note and deed of trust to National Enterprise, National Enterprise foreclosed on the property. Four-and-a-half years later, National Enterprise brought a deficiency action against E.N.E. National Enterprise claimed that, as successor to the RTC, it was entitled to the RTC's special six-year limitation period, rather than the standard two-year period. The court looked at prior Texas Supreme Court authority dealing with FDIC assignee rights,[38] and discovered that those cases based their decisions on whether the FDIC or the assignee held the note and deed of trust at the time of accrual of the subject action. The deficiency claim in the *National Enterprise* case accrued upon foreclosure, and National Enterprise held the note and deed of trust at the time of the foreclosure. Thus, the court concluded that National Enterprise was not entitled to the benefit of the RTC's six-year limitation period.[39]

In *Nelson v. Regions Mortgage, Inc.*,[40] the court reviewed the claims of a purchaser who wanted rescission of an agreement to purchase a note secured by a deed of trust. Nelson offered to purchase the note and deed of trust from Regions when Nelson's son defaulted under these agreements. By doing so, Nelson prevented the foreclosure of his son's home. Even though Nelson delivered payment to the bank, the original note and deed of trust were never delivered to him. Nelson never foreclosed on the note and deed of trust. Four years after the note was originally accelerated by Regions, Nelson brought this action. The trial court granted Region's motions for summary judgment.[41]

On appeal, Nelson claimed that summary judgment should not have been granted against his rescission claims because he did not receive the original note and deed of trust and therefore could not enforce the note as an owner. The court agreed that Nelson was not a holder of the note under the law of negotiable instruments. However, the court stated that "even if a person is not the holder of a note, he may still be able to prove that he is the owner and entitled to enforce the note, foreclose on collateral and obtain a deficiency judgment under common law principles of assignment."[42] Relying on these principles of assignment and agency, instead of the law of negotiable instruments, the court refused to conclude that Nelson could not have enforced the note. Furthermore, since Nelson chose not to enforce the note, the court refused to speculate as to

37. 167 S.W.3d 39 (Tex. App.—Waco 2005, no pet.).
38. *See* Jackson v. Thweatt, 883 S.W.2d 171 (Tex. 1994) *and* Holy Cross Church of God in Christ v. Wolf, 44 S.W.3d 562 (Tex. 2001).
39. *Nat'l Enter.*, 167 S.W.3d at 43.
40. 170 S.W.3d 858 (Tex. App.—Dallas 2005, no pet. h.).
41. *Id.* at 860-61.
42. *Id.* at 864.

whether any injury occurred to Nelson.[43] Without injury, there was no credible claim for rescission, and the court affirmed the summary judgment against Nelson.

II. NOTES, LOAN COMMITMENTS, AND LOAN AGREEMENTS

The issue in *First National Acceptance Co. v. Dixon*[44] was whether the purchaser of certain payments on a real estate lien note was a holder in due course entitled to enforce the note. Dixon executed a real estate lien note payable to the order of Bramble. Bramble and First National Acceptance Co. executed a purchase agreement whereby First National bought certain monthly installments under the note and the sole power to enforce the note and foreclose the property upon default. Upon execution of the purchase agreement, Bramble executed an endorsement to the real estate lien note purporting to convey the entire note to First National. The endorsement read, "Pay without recourse to the order of First National Acceptance Company." Thereafter, a default occurred under the note and First National foreclosed on the property. Dixon sued First National for wrongful foreclosure, alleging that the note was unenforceable for lack of consideration. Unbeknownst to First National, the loan from Bramble to Dixon was a sham because no consideration existed for the real estate lien note. The trial court set aside the foreclosure sale and voided the note and lien, holding that the note was unenforceable due to lack of consideration. Further, the court held that First National was a mere partial assignee of the note and, thus, was not a holder in due course entitled to enforcement thereof.[45]

The court of appeals reversed, holding that First National is a holder in due course and not a mere partial assignee of the note. The court determined that the endorsement transferred the entire note to First National; Bramble only had a contingent future interest in the remaining payments due. The court rejected Dixon's argument that the purchase agreement modified the real estate lien-note endorsement. Rather, the court determined that Dixon's only basis for denying First National holder-in-due-course status was section 3.203(d) of the Texas Business and Commerce Code,[46] but that such section was inapplicable since the entirety of the note was transferred to First National.[47]

The primary issue presented in *Suttles v. Thomas Bearden Co.*,[48] was whether the representative of a company was personally liable on a

43. *Id.* at 864-65.
44. 154 S.W.3d 218 (Tex. App.—Beaumont 2004, pet. denied).
45. *Id.* at 219-20.
46. "If a transferor purports to transfer less than the entire instrument, negotiation of the instrument does not occur. The transferee obtains no rights under this chapter and has only the rights of a partial assignee." TEX. BUS. & COM. CODE ANN. § 3.203(d) (Vernon 2002).
47. *First Nat'l*, 154 S.W.3d at 225.
48. 152 S.W.3d 607 (Tex. App.—Houston [1st Dist.] 2004, no pet. h.).

promissory note given the manner in which it was signed. Suttles, the President of TS-Clare, Inc., executed a promissory note for the benefit of Thomas Bearden Co. ("TBC"). Suttles signed the promissory note twice. His first signature appeared as follows:

Gessner Partners Ltd.
TS-Clare, Inc., General Partner
Tracy Suttles, President
/s/ Tracy Suttles
Borrower

His second signature appeared at the bottom of the promissory note below a handwritten amendment that the parties added concerning the accrual of interest under the note. This signature appeared as follows:

/s/ Tracy Suttles

A default occurred under the note, and TBC sued Suttles and TS, among other parties, requesting partial summary judgment on its claims against Suttles and TS. The trial court granted that request.[49]

On appeal, Suttles and TS contended that Suttles should be shielded from personal liability on the promissory note under subsection 3.402(b)(1) of the Texas Business and Commerce Code[50] given that Suttles signed the note solely in his representative capacity as president of TS. TBC argued that Suttles was personally liable on the note because the note failed to identify a "represented person" as required by Texas Business and Commerce Code section 3.402(b)(1) in two respects. First, TS was not "identified" in the promissory note, and second, the promissory note was ambiguous with respect to whether Suttles signed solely in his representative capacity. The court rejected their first argument, holding that the identification of TS in the signature block of the promissory note was sufficient identification of the represented person under Texas Business and Commerce Code section 3.402(b)(1).[51] Suttles signed the note in his representative capacity and was not personally liable under the note.

The court also rejected the three ambiguities identified by TBC in support of its argument that the promissory note was ambiguous with respect to Suttles' capacity. First, the court rejected the argument that the "joint and several" provisions of the promissory note created ambiguity as to Suttles' signing capacity since Texas Business and Commerce Code section 3.402(b)(1) requires the court to look only to the "form of signature" in determining a person's representative capacity.[52] Second, the court rejected TBC's argument that the signature block was ambiguous since it

49. *Id.* at 610.

50. This provides that a representative is not liable on the instrument he signs "[i]f the form of the signature shows unambiguously that the signature is made on behalf of the represented person who is identified in the instrument." TEX. BUS. & COM. CODE ANN. § 3.402(b)(1) (Vernon 2002).

51. *Suttles*, 152 S.W.3d at 612. The Court also concluded that identification of the principal does not have to occur in the body of the note. *Id.*

52. *Id.* at 612-13.

did not include the name of the principal and the preposition "by" before his signature, explaining that no such preposition is required to show Suttles' capacity to sign for TS.[53] Finally, the court rejected the argument that Suttles intended to be personally liable under the promissory note because there was no indication of representative capacity in the handwritten amendment at the bottom of the note. The court concluded that such signature was intended merely to indicate that the handwritten amendment was authorized by TS; it was not intended to be an agreement by Suttles to accept personal liability on the promissory note.[54]

Novation of the limitations period for a note was addressed in *Doncaster v. Hernaiz*.[55] Hernaiz brought an action against Doncaster, a bank representative, to recover the balance of two 1994 loans to a third party, which Doncaster had initiated on Hernaiz's behalf. Because the loans were not repaid to Hernaiz, in 1998, Doncaster signed a document entitled "Carta de Compromiso," in which Doncaster promised to pay the balance of the two 1994 loans to Hernaiz. In 2002, the loans were still not repaid to Hernaiz, and Hernaiz sued Doncaster on the note and prevailed in district court.[56]

On appeal, Doncaster presented several affirmative defenses, only one of which required noteworthy discussion by the court. Doncaster argued that because the loans that form the basis of the lawsuit were issued in 1994, with a limitations date of April 30, 1998, Hernaiz's claim was barred by the four-year statute of limitations. The court of appeals determined that the 1998 Carta de Compromiso served as an acknowledgment of the old debt under section 16.065 of the Texas Civil Practices and Remedies Code.[57] The court explained that this acknowledgment created a new promise to pay an old debt, thereby restarting the four-year limitation period as the date the underlying debt became due.[58] Since the date of the acknowledgment was February 12, 1998, the limitation period extended to April 30, 2002. Therefore, the suit was timely filed on March 13, 2002, before the end of the limitation period.

In *FFP Marketing Co. v. Long Lane Master Trust IV*,[59] the court faced the issues of (i) whether certain promissory notes were negotiable instruments and (ii) whether the amount due on certain promissory notes was adequately established. FFP Operating Partners, L.P. executed thirty-one promissory notes in favor of Franchise Mortgage Acceptance Company ("FMAC") and two promissory notes in favor of MTGLQ Investors, L.P. Each of the promissory notes was guaranteed by FFP

53. *Id.* at 613.
54. *Id.* at 614.
55. 161 S.W.3d 594 (Tex. App.—San Antonio 2005, no pet. h.).
56. *Id.* at 599-600.
57. "An acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible . . . to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and signed by the party to be charged." TEX. CIV. PRAC. & REM. CODE ANN. § 16.065 (Vernon 1997).
58. *Doncaster*, 161 S.W.3d at 605.
59. 169 S.W.3d 402 (Tex. App.—Fort Worth 2005, no pet. h.).

Marketing Company, Inc. Thereafter, Bay View Franchise Mortgage Acceptance Company became the successor in interest to FMAC with respect to the notes, guaranties, and associated loan documents and, later, assigned all of its interests in the respective notes and associated documents to Long Lane Master Trust IV (LLMT) and MTGLQ (hereinafter collectively referred to as "the appellees"). FFP Operating defaulted under the notes, and FFP Marketing did not answer the demand under the guaranties; therefore, the appellees filed a combined motion for summary judgment against FFP Operating and FFP Marketing.[60] The trial court granted the appellees' motion, and FFP Marketing appealed.[61]

The first issue that the court of appeals addressed was whether the thirty-three promissory notes were negotiable instruments. FFP Marketing contended that the trial court erred in granting summary judgment because a question of fact existed as to the ownership of the promissory notes and guaranties. The appellees replied that the notes and guaranties were negotiable instruments, that Texas law only requires that they establish that they are holders of the promissory notes and guaranties, and that they established such status. The court stated that a negotiable instrument "is a written unconditional promise to pay a *sum certain* in money, upon demand or at a definite time, and is payable to order or to bearer."[62] The promissory notes defined the maker's liability as including "obligations" set forth in other loan documents. Therefore, since the extent of the maker's liability could not be determined from the face of the note, the promissory notes did not satisfy the sum certain requirement of a negotiable instrument.[63] Further, the court stated that the promissory notes did not contain an unconditional promise because they incorporated by reference the "terms" of other documents, requiring a review of the other documents to ascertain whether any conditions were placed on payment of the notes.[64] Given these facts, the court held that the promissory notes were not negotiable instruments.

Because the endorsement of a non-negotiable instrument does not create a presumption of ownership in the transferee, the transferee must provide proof of legal ownership thereof.[65] The summary-judgment proof offered by appellees consisted of a loan-servicer's officer affidavit, with attached copies of the note, guaranties, and related loan and assignment documents. The attached documents purported to establish a chain of *legal* ownership of the notes to the appellees; however, the body of the affidavit stated that the appellees were the "holder and *beneficial* owner" of the notes, guaranties, and other documents.[66] This created an internal

60. Before the trial court ruled, FFP Operating filed bankruptcy and was non-suited from the case.

61. *FFP Marketing Co.*, 169 S.W.3d at 405-06.

62. *Id.* at 407 (emphasis added).

63. *Id.* at 408.

64. *Id.*

65. *Id.* at 409.

66. *Id.* at 410.

inconsistency in the affidavit, and the court concluded that it was insufficient to prove legal ownership of the documents.

Second, the court of appeals addressed the issue of whether the amount due on the promissory notes was established as a matter of law. The court explained that, while detailed proof of the promissory note's balance is not required, summary-judgment evidence must establish the applicable rate of interest on a note as a matter of law.[67] In this case, each note provided for interest at the lesser of either the interest rate specified in the note or at the highest rate allowed by Connecticut law, and, upon default, the note provided for interest at the lesser of five percent over the note rate or the highest rate allowed by Connecticut law. Because the highest rate allowed by Connecticut law was not presented in the summary-judgment evidence, the evidence was insufficient to prove the applicable rate of interest for each note as a matter of law. Furthermore, because the numerous notes contained varying principal balances and interest rates, an affidavit setting forth an aggregate total balance due under all of the notes created ambiguity sufficient to preclude summary judgment.[68]

The scope of a waiver-of-notice provision in a note is addressed in *Adams v. First National Bank of Bells/Savoy*.[69] First National Bank of Bells/Savoy accelerated the maturity of a real estate lien note executed by Adams and thereafter foreclosed the real estate because of Adams' violation of the due-on-sale clause set forth in the deed of trust. The real estate lien note contained a clear waiver of notice of intention to accelerate the note's maturity and notice of acceleration. Adams brought an action against First National for wrongful foreclosure, among other claims. The district court awarded summary judgment in favor of First National, and Adams appealed.

On appeal, Adams argued, inter alia, that she did not waive the right to notice of intent to accelerate maturity and the right to an opportunity to cure the alleged due-on-sale clause violation because the waiver clause and the due-on-sale clause were not in the same paragraph. The court concluded that because the waiver clause of the real estate lien note refers to a default "in the performance of any obligation" and that the note and deed of trust must be construed together, the waiver applies to a default in the performance of any obligation set forth in the loan documents, including the due-on-sale clause. Thus, the court held that Adams waived such rights.[70]

67. *Id.* at 411.
68. *Id.* at 412-13.
69. 154 S.W.3d 859 (Tex. App.—Dallas 2005, no pet. h.). *See* discussion *supra* Section I on mortgages.
70. *Id.* at 868.

III. GUARANTIES

In *First Union National Bank v. Richmont Capital Partners I, L.P.*,[71] First Union made a number of loans to Marketing Specialist Corporation that were secured by a first lien in many of Marketing Specialists' assets. Marketing Specialist and Chase Manhattan Bank subsequently entered into a Credit Agreement under which Chase made a $50-million revolving-credit facility to Marketing Specialist. In connection with the Chase loan, Richmont, a private venture capitalist, guaranteed up to $10 million of the Chase loan.[72]

First Union and Chase then entered into an Intercreditor Agreement, which set forth the parties' priority of rights in Marketing Specialist's collateral and in repayment of the loans. A few months later, Chase agreed to increase the amount under the revolving credit facility to $60 million, consisting of two tranches: Tranche A, which consisted of $41 million, and Tranche B, which consisted of $19 million. At the same time, MS Acquisition, a subsidiary of Richmont, entered into a Master Participation Agreement with Chase under which, among other things, MS purchased a 100% participation interest in Tranche B in return for any amounts paid to Chase on the Tranche B portion of the loan. In connection with these transactions, Richmont executed a consent, which expanded the terms of its original guaranty to cover the increased Chase credit facility but kept its liability limited to $10 million. Finally, Marketing Specialist, Chase, First Union, MS, and Richmont entered into an Amended Intercreditor Agreement, under which Chase and First Union agreed that they would not accept a security interest in any "additional collateral" of Marketing Specialist unless each lender was granted a perfected security interest in the "additional collateral."[73]

Ultimately, Marketing Specialist filed for bankruptcy, which prompted Chase to file suit against Richmont for payment under the guaranty. First Union intervened, claiming that: (i) it was entitled to a right of payment under the guaranty by enforcement of its security interest in the "additional collateral," (ii) it was an intended third-party beneficiary of the guaranty, and (iii) Richmont was unjustly enriched by failing to pay MS under the guaranty. Richmont and Chase settled out of court, and First Union appealed the trial court's grant of summary judgment in favor of Richmont.[74]

On appeal, the court dismissed First Union's claim that it had a security interest in the guaranty based on the Amended Intercreditor Argument. In examining the Agreement, the court determined that the term "additional collateral" was not defined in any of the transaction documents, and neither party claimed that the term was ambiguous.[75] Because the

71. 168 S.W.3d 917 (Tex. App.—Dallas 2005, no pet. h.).
72. *Id.* at 922.
73. *Id.*
74. *Id.*
75. *Id.* at 925.

contract was unambiguous, it had to be construed as a matter of law by its four corners.[76] In concluding that the guaranty was not additional collateral as contemplated by the Amended Intercreditor Agreement, the court held that: (i) the dictionary definition of collateral refers to things like "stocks or bonds" to secure or guarantee an obligation and would not encompass a guaranty agreement,[77] (ii) the list of property subject to a security interest under section 9.102(a)(12) of the Texas Uniform Commercial Code does not include guaranties,[78] (iii) the guaranty was security and not collateral,[79] and (iv) the Amended Intercreditor Agreement related to "additional collateral" that was the property of the borrower, and the guaranty was not property of Marketing Specialist.[80] The other points are not noteworthy.

The next two cases involve significant aspects of the Texas anti-deficiency statute for guarantors.

A case of first impression involving the effectiveness of a guarantor's waiver of valuation rights under the Texas anti-deficiency statute is addressed in *Segal v. Emmes Capital, L.L.C.*[81] Emmes loaned $6.85 million to a borrower. The loan was secured by three tracts of real property and by the guaranties of the Fogartys and the Segals. The borrower subsequently filed for bankruptcy, and Emmes sued the guarantors under the terms of the guaranties. In the interim, the bankruptcy court issued an order modifying the automatic stay, providing that if the borrower failed to pay the outstanding balance of the loan to Emmes within a particular time period, the stay would be lifted and Emmes could foreclose on the property. When the borrower failed to pay the debt in full, Emmes conducted a non-judicial foreclosure on the property and made the highest bid at the foreclosure sale. The guarantors counterclaimed, asserting that the properties were sold for less than fair market value and seeking a determination of the property's value to offset against a deficiency judgment. The court first addressed the claim that New York's deficiency law[82] barred recovery. The court denied this claim, finding such law to be a procedural bar under existing New York authority. The court thus concluded that the waiver of "any defenses" contained in the bankruptcy court order precluded the use of such defensive deficiency-claim bar.[83] The court then considered whether the guarantors had waived their rights to a fair market valuation. Emmes claimed that the guarantors had waived their rights in the guaranty for a fair market valuation as provided

76. *Id.*
77. *Id.* at 927.
78. *Id.*
79. *Id.* at 927-28 (relying on Preston Ridge Fin. Servs. Corp. v. Tyler, 796 S.W.2d 772 (Tex. App.—Dallas 1990, writ denied)).
80. *Id.* at 928.
81. 155 S.W.3d 267 (Tex. App.—Houston [1st Dist.] 2004, pet. dism'd). *See* discussion *supra* Section I on mortgages.
82. New York law is applicable because the suits on the guaranties were filed in New York.
83. *Segal*, 155 S.W.3d at 276-77.

in section 51.005 of the Texas Property Code. The guarantors, on the other hand, asserted that the waiver of section 51.005 in the guaranty was invalid because it violated public policy and waived rights that had not yet come into existence.[84]

The guaranties contained a specific written waiver of defenses based on sections 51.003, 51.004, and 51.005 of the Texas Property Code.[85] In addressing the guarantors' claim that waiver was against public policy, the court discussed the legislative intent of section 51.005(b) of the Texas Property Code.[86] The court determined that the legislature had intended for this provision to be waivable for three reasons. First, the guarantor cited no authority that such a waiver was contrary to a fundamental policy of Texas jurisprudence.[87] Secondly, the court pointed to related statutory provisions that prohibited waiver. For instance, in section 51.002 of the Texas Property Code, the statutory provision dealing with a required 21-day notice to cure a default as a condition to a foreclosure notice, the statutory language begins with "[n]otwithstanding any agreement to the contrary,"[88] which the court explained indicates that a waiver would not be legal. Further, the court found evidence in the legislative history that section 51.002 could not be waived.[89] Neither the language nor the legislative history supported the conclusion that section 51.005 could not be waived.[90] Finally, the court noted that there were at least eleven other instances within the Texas Property Code in which the legislature stated that waivers were void or voidable, but that such statements do not appear with respect to section 51.005.[91] Therefore, the court concluded that such provision was waivable.

The guarantors also contested the ripeness of the waiver. The court distinguished the cases that the guarantors cited, noting that (i) waivers of procedural bars are more limited than those of substantive rights, and (ii) cases of implied waiver, rather than express or contractual waiver, require that the right to be waived must exist contemporaneously with the waiver. As the subject waiver was an express contractual waiver, the court granted summary judgment in favor of Emmes.[92]

Mays v. Bank One, N.A.[93] also involved a deficiency judgment after a non-judicial foreclosure. The borrower executed a note in favor of Bank One, which was secured by a second lien on real property and a guaranty

84. *Id.* at 272.

85. *Id.* at 278. The exact waiver language states: "To the maximum extent permitted by applicable law, [appellants] hereby waive all rights, remedies, claims and defenses based upon or related to Sections 51.003, 51.004 and 51.005 of the Texas Property Code, to the extent the same pertain or may pertain to any enforcement of this Guaranty."

86. TEX. PROP. CODE ANN. § 51.005 (Vernon 1995).

87. *Id.*

88. TEX. PROP. CODE ANN. § 51.002(d) (Vernon 1995).

89. HOUSE COMM. ON BUS. & COM., BILL ANALYSIS, Tex. H.B. 1504, 70th Leg., R.S. (1987).

90. *Segal*, 155 S.W.3d at 279.

91. *Id.*

92. *Id.* at 281-82.

93. 150 S.W.3d 897 (Tex. App.—Dallas 2004, no pet. h.).

executed by Mays. Bank of America held a first lien on the real property. The borrower defaulted on both the Bank of America loan and the Bank One loan, and Bank of America sold the property at a non-judicial foreclosure sale at 40% of its fair market value. The proceeds of the foreclosure sale satisfied the Bank of America loan, and Bank One brought suit against Mays on the guaranty. Mays asserted that he was entitled to a determination of fair market value of the property in accordance with section 51.005 of the Texas Property Code. The court determined that under section 51.005(c), the calculation of a deficiency only applied to debt secured by a lien that was not extinguished at a foreclosure sale.[94] Since the second lien was extinguished by the foreclosure of the first lien, Mays was not entitled to an offset based on the fair market value of the property.

First Commerce Bank v. J.V.3, Inc.[95] involved guaranties that were executed several months after a loan was renewed. The guarantors argued that the guaranty agreements were not supported by consideration and were thus invalid. According to the court, a promise to guaranty the debt of another that arises after the indebtedness has been created must be supported by new consideration.[96] In this case, the guaranties had been executed more than four months after the loan had been made, there had been no prior agreements contemplating that the guarantors would guaranty the loan, the debt was amply secured without the guaranties, there was no evidence to infer that the guarantors even knew of the debt, the guarantors were not principals in the debtor, and there seemed to be no other compelling reason for requiring the debtors to guaranty the debt.[97] Since there was no consideration, the guaranty agreement was invalid.

Byrd v. Estate of H.G. Nelms[98] involved a co-guarantor who purchased the guaranteed debt and his partners' guaranty and then sued his former partners for breach of the guaranty. The holder of the guaranty asserted that each of the guarantors were jointly and severally liable for the debt, as was set forth in the guaranty agreement. The remaining guarantor, on the other hand, argued that it was only liable for its proportionate share of the debt.[99] The court reviewed Texas case law and, failing to find precedent in Texas, examined the case law of other jurisdictions and various other authorities. Upon such review, the court determined that the holder's right to sue on the note and guaranty as a purchaser or assignee of the guaranty was limited to the contributive share of the other co-guarantors.[100]

94. *Id.* at 900.
95. 165 S.W.3d 366 (Tex. App.—Corpus Christi 2004, pet. filed).
96. *Id.* at 369.
97. *Id.*
98. 154 S.W.3d 149 (Tex. App.—Waco 2004, pet. denied).
99. *Id.* at 162, 163.
100. *Id.* at 165.

IV. USURY

The proper party to assert usury claims against a transferee of a tax lien was addressed in *Weisfeld v. Texas Land Finance Co. II*.[101] Texas Land Finance Company II paid delinquent property taxes for the year 2000 and property taxes (that were not delinquent) for the year 2001 on behalf of the property owner Teleamerica Spanish Network, LLC. In connection with the payment of those property taxes, the Dallas County Tax Assessor-Collector assigned its tax liens covering the property to Texas Land, as provided under section 32.06 of the Texas Tax Code.[102] Thereafter, Teleamerica, as maker, executed a real estate lien note, in the amount of the total sum paid by Texas Land to the tax assessor. After Teleamerica defaulted under the note, Texas Land filed suit against Teleamerica seeking to recover all amounts due under the note.[103]

In March 2003, the appellants purchased the property at the tax lien foreclosure sale. Texas Land subsequently added the appellants as defendants to its lawsuit, seeking the repayment of the note. The appellants responded by alleging usury. Texas Land filed a plea in abatement arguing that the purchasers lacked standing to assert a usury defense.[104]

Texas Land argued that the appellants were not "obligors" authorized to recover penalties under Chapter 349 of the Texas Finance Code. The appellants countered that they possessed standing to assert Texas Land's usury claims based on section 32.065(e) of the Texas Tax Code.[105] Further, the appellants claimed that the statutory language of section 32.065(c) did not limit remedies to the "obligor." However, the court concluded that because section 32.065(e) specifically referenced a statute[106] that limits a lender's liability to an "obligor," the legislature intended liability under section 32.065(e) to attach only to obligors.[107]

The most important development regarding usury during the Survey period comes from House Bill 955, enacted by the 79th Texas Legislature during its regular session.[108] This bill made significant changes to the Texas Finance Code for both commercial and consumer lending transactions.[109] The below discussion addresses only those that have a significant relation to commercial real estate transactions.

First, "interest" in section 301.002(4) of the Texas Finance Code has been revised to exclude from its definition any compensation or other

101. 162 S.W.3d 379 (Tex. App.—Dallas 2005, no pet. h.).
102. *See* TEX. TAX CODE ANN. § 32.06 (Vernon Supp. 2005).
103. *Weisfield*, 162 S.W.3d at 380.
104. *Id.*
105. Section 32.065(e) of the Texas Tax Code reads: "If in a contract under this section a person contracts for, charges, or receives a rate or amount of interest that exceeds the rate or amount allowed by this section, the amount of the penalty for which the person is obligated is determined in the manner provided by Chapter 349, Finance Code." *See* TEX. TAX CODE ANN. § 32.065(e) (Vernon Supp. 2005).
106. TEX. FIN. CODE ANN. § 349.001(a) and (b) (Vernon Supp. 2005).
107. *Weisfeld*, 162 S.W.3d at 382.
108. Tex. S.B. 1, 79th Leg., R.S. (2005).
109. *See generally* TEX. FIN. CODE ANN. tit. 4 (Vernon 2006).

amounts determined or stated by the Finance Code or other applicable law not to constitute interest or any amounts that are permitted to be contracted for, charged, or received in addition to what otherwise constitutes interest in connection with an extension of credit.[110] The existence of this "loophole" in the general definition of interest allows for the exclusions of certain matters discussed later.

The most significant change is the absolute increase of the interest rate cap on business, commercial, investment, or similar purpose loans to a minimum ceiling of 28% per year.[111] Another significant aspect of the usury-law revisions is the change in the penalty for usury on commercial loan transactions. New section 3.05.001(a-1) of the Finance Code changes the penalty in a commercial transaction for contracting or receiving[112] a usurious rate of interest to an amount equal to three times the amount by which the total amount of interest contracted for or received exceeds the amount of interest allowed by applicable law.[113]

In addition to the penalty revisions, additional safeguards and protections are afforded to a creditor charging usurious interest. First, the statutory scheme was expanded to include a creditor that not only charged or contracted for usurious interest, but has received usurious interest.[114] Second, before an obligor can file suit seeking penalties for a usurious transaction, notice of the usury violation must be given to the creditor at least sixty-one days before filing the suit for usury.[115] Additionally, a new provision requires a debtor filing a counterclaim alleging usury to give notice of the alleged usury violation to the creditor; the pending action is then abated for sixty days, during which the creditor may correct the usury violation, including the payment of reasonable attorney's fees of the debtor in connection with the alleged violation. Upon the correction of such usury violation, the creditor is no longer liable for such usury violation.[116]

House Bill 955 provided further lender usury protections by specifically providing that interest does not include prepayment premiums, make hold premiums, or similar fees or charges on a loan that are payable in the event of a voluntary prepayment, involuntary prepayment, acceleration of maturity, or other cause that involves premature termination of the loan.[117]

The 79th Legislature also provided a specific provision concerning the rule in *Alamo Lumber*,[118] which will come as a relief to many practition-

110. *See* TEX. FIN. CODE ANN. § 301.002(4) (Vernon 2006).
111. TEX. FIN. CODE ANN. § 303.009(c) (Vernon 2006). Note that the 24% ceiling on loans of less than $250,000 was eliminated.
112. The new statutory language does not include the concept of "charging." *See* TEX. FIN. CODE ANN. § 305.001(a-1) (Vernon 2006).
113. TEX. FIN. CODE ANN. § 305.001(a-1) (Vernon 2006).
114. TEX. FIN. CODE ANN. § 305.006(b) (Vernon 2006).
115. *Id.*
116. TEX. FIN. CODE ANN. § 305.006(d) (Vernon 2006).
117. TEX. FIN. CODE ANN. § 306.005 (Vernon 2006).
118. Alamo Lumber Co. v. Gold, 661 S.W.2d 926 (Tex. 1983).

ers who have had to grapple with the application of such rule in practice. A new section 306.007 to the Texas Finance Code provides that, with respect to a commercial loan, an obligor may be required by the creditor to assume, pay, or provide a guarantee of a third person's existing or future obligations as a condition to such obligor's own use, forbearance, or detention of money without some constituting interest with respect to such obligor's loan.[119]

There were a number of provisions in House Bill 955 that would have exempted commercial loan transactions from any usury considerations; however, these provisions were expressly contingent upon an effective constitutional amendment authorizing the same.[120] However, such constitutional amendment was not passed during the November 8, 2005 constitutional-amendment election; hence, such provisions did not become effective.

V. DEBTOR/CREDITOR

In *Hawthorne v. Countrywide Home Loans, Inc.*,[121] Hawthorne refinanced his mortgage loan through Mission Mortgage of Texas, Inc., which was identified as the lender on the various loan documents. This included the mortgagor's affidavit, which granted the lender authority to furnish information contained in the insurance policy to anyone that the lender deemed advisable for quoting rates and complying with the deed of trust. Although Countrywide Home Loans was not mentioned in any of the closing documents, Mission transferred the servicing rights for the loan to Countrywide at the time of closing, and Hawthorne signed a notice in which Hawthorne recognized that Countrywide would be the new servicer of the loan. After Countrywide sent homeowner-insurance solicitation letters to Hawthorne's wife, Hawthorne filed suit against Countrywide, alleging violations of provisions of the Texas Insurance Code restricting solicitation of business.[122]

The court determined that, as Mission was identified as the lender in the note and deed of trust, and Countrywide was identified as the servicer in the notice signed at closing, the intention of the parties with respect to the identity of the lender was ambiguous, and the court could therefore turn to additional evidence. The court noted that the affidavit signed by Hawthorne granted permission to "the Lender" to share insurance information and that Hawthorne knew at the time of closing that Countrywide had bought the loan and was the lender.[123] In light of this and additional information, the court determined that Countrywide was included as a lender for purposes of the affidavit, and Hawthorne therefore furnished specific written authority, as required under article 21.48A of the Texas

119. TEX. FIN. CODE ANN. § 306.007 (Vernon 2006).
120. *See* Tex. H.B. 955, 79th Leg., R.S., 2005 Tex. Gen. Laws 3438, § 8.02.
121. 150 S.W.3d 574 (Tex. App.—Austin 2004, no pet. h.).
122. TEX. INS. CODE ANN. art. 21.48A, § 2(c) (West Supp. 2004).
123. *Hawthorne*, 150 S.W.3d at 576.

Insurance Code, for Countrywide to share Hawthorne's insurance information.

Jurisdictional issues involving a lender were discussed in *Bryant v. Roblee*.[124] Bryant, a Texas resident, brought suit against various parties for mishandling investments. First Republic Bank, a defendant, filed a special appearance, asserting that it was not amenable to process issued by Texas courts. The court analyzed the requirements for a court to exercise general jurisdiction over a defendant based on the defendant's "continuous and systematic" contacts with such state. The court stated that it was the quality and nature of contacts with Texas that would control.[125] The court thus addressed the number and types of contacts: offices or branches in Texas (First Republic had none), employees in Texas (First Republic had none), agent for service of process (First Republic had no such agent), loans to Texas residents (First Republic had made thirty-seven loans in Texas during the last five years compared to 12,000 loans overall), solicitation of business in Texas (First Republic did not solicit business in Texas), the principal amount of all Texas loans (First Republic had $17,218,178 in loan principal on Texas loans), deed of trust liens on Texas property (First Republic had eleven), and direct advertising in Texas (First Republic only advertised in Texas in national publications and with website access from Texas).[126] The court also determined as insufficient to establish general jurisdiction over a nonresident the following matters: ownership of Texas property, contracting with a Texas resident, correspondence with a Texas resident, ownership of loans secured by Texas property, and the exercise of foreclosure or other remedies to protect its rights.[127] The court concluded that such evidence was not sufficient to show continuous and systematic contacts between First Republic Bank and Texas so as to permit Texas courts to exercise general jurisdiction over the bank.

VI. PURCHASER/SELLER

In *Eight, Ltd. v. Joppich*[128] the Texas Supreme Court, in a case of first impression, ruled that nonpayment of nominal consideration recited in an option contract does not preclude enforcement of a written option agreement. In rendering this decision, the court adopted section 87(1)(a) of the Restatement (Second) of Contracts into the common law of Texas ("'An offer is binding as an option contract' if the offer 'is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time'").[129]

124. 153 S.W.3d 626 (Tex. App.—Amarillo 2004, no pet. h.).
125. *Id.* at 631.
126. *Id.* at 630.
127. *Id.* at 630-31.
128. 154 S.W.3d 101 (Tex. 2004).
129. *Id.* at 106 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 87(1)(a) (1981)).

In 1997, Joppich purchased an undeveloped tract of land from a developer. In connection with the transaction, Joppich and the developer executed an "Option Agreement," which stipulated that if Joppich did not commence construction of a private residence on the undeveloped tract within 18 months after the closing, the developer had the right to purchase the property back by paying 90% of the original sale price.[130] The Option Agreement had a term of 5 years from the date of recording and a consideration of "the sum of Ten and No/100 ($10.00) Dollars ('Option Fee') paid in cash."[131] Two years passed, and construction of a residence at the property had not commenced. In September 1999, the developer sent Joppich a notice, indicating that he was exercising his option to buy back the property in accordance with the terms of the Option Agreement. Joppich filed suit against the developer, claiming that the Option Agreement was unenforceable for lack of consideration, or failure of consideration, because the $10.00 was never paid. The trial court ruled that the Option Agreement was enforceable, though the stated consideration was not paid. The court of appeals reversed the trial court's ruling.[132]

The Texas Supreme Court affirmed the trial court's ruling. In rendering its decision, the supreme court noted that, while reciting nominal consideration in an option agreement performs a formal function, the ceremonial delivery of the recited nominal consideration is an "inconsequential formality."[133] The court also noted that when parties enter into option contracts, even though supported by unpaid nominal consideration, the parties expect the contract to be a binding commitment.[134] In adopting this view on unpaid nominal consideration, the Texas Supreme Court adopted the minority position of state supreme courts that have addressed the issue.[135]

In *Brown v. De La Cruz*,[136] the Texas Supreme Court considered whether a statutory fine imposed by the Texas Property Code against a vendor under a contract for deed could be claimed by the purchaser if the vendor failed to record a deed of conveyance for certain residential property within 30 days after final payment. From 1995 through 2001, the Texas Property Code stipulated that a seller's failure to meet the recording deadline would subject the seller to a penalty of up to $500 a day.[137] In 2001, the Texas Property Code was amended to clarify that the $500-a-day penalty is payable to the purchaser as liquidated damages. The court noted that, while the 2001 amendment created a private cause of action

130. *Id.* at 103.
131. *Id.*
132. *Id.*
133. *Id.* at 108-09 (quoting RESTATEMENT (SECOND) OF CONTRACTS § 87(1) cmt. c (1981)).
134. *Id.* at 100.
135. *Id.*
136. 156 S.W.3d 560 (Tex. 2004).
137. *Id.* at 561 (referring to TEX. PROP. CODE ANN. § 5.079(a) (Vernon 2004) (amended 2001)).

for purchasers, there was still an unsettled question as to whether the statute created such a private cause of action before the 2001 amendment.[138]

In *Brown*, a purchaser agreed to buy property from a seller in 1984. Final payment for the property was made in 1997 (before the 2001 amendment). Due to confusion as to who would be listed on the deed (the purchaser had remarried in the intervening years), the deed was not recorded within 30 days of the final payment as the statute required. Four years passed, and the deed was still not recorded.[139] In 2001, the purchaser, alleging no actual damages, brought suit against the seller seeking $664,500 in damages (the daily statutory penalty over a four-year period). The seller contended that the Texas Property Code did not grant the purchaser a private cause of action, and the trial court agreed. The court of appeals reversed.[140]

The Texas Supreme Court agreed with the trial court, and ruled against the purchaser.[141] In rendering its judgment, the Texas Supreme Court noted that while the statute did contain a specific monetary penalty, before 2001, the statute was silent with regard to who could collect it. In so holding, the Texas Supreme Court followed prior precedents, which held that those who seek to collect a statutory penalty must be specifically authorized by the statute to do so.[142] The court also noted that "virtually all other statutes which imposed a daily penalty in 1995, when section 5.102 was enacted, only authorized collection by the Attorney General or some other governmental entity or representation."[143]

Lewis v. Foxworth[144] concerned a dispute over which party was entitled to contractual earnest money when a purchase transaction failed to close. In 2002, the purchaser and seller entered into a contract for the conveyance of 450 acres of land. The purchaser deposited $50,000 of earnest money with a title company, which the seller would be entitled to claim if the transaction failed to close due to a default by the purchaser. The purchase contract contained a provision indicating that the seller could remove items of personal property from the property, but the fixtures would remain intact. The seller removed some of its personal property, but other items remained.[145] The scheduled closing date passed. After an extension period lapsed, the seller notified the purchaser that the contract was terminated and that the seller would be claiming the earnest money as its sole remedy. The title company would not deliver the earnest money to the seller though, and the seller filed suit.[146] The trial

138. *Id.* at 562 (referring to TEX. PROP. CODE ANN. § 5.079(b) (Vernon 2004) (amended 2001)).
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.* at 564.
143. *Id.*
144. 170 S.W.3d 900 (Tex. App.—Dallas 2005, no pet. h.).
145. *Id.* at 901.
146. *Id.* at 902.

court ruled in favor of the seller, and the court of appeals affirmed the trial court's ruling.

On appeal, the purchaser argued that since the seller did not remove some items of personal property, the purchaser was excused from performing under the contract.[147] The court of appeals noted, however, that the contract did not specifically require the seller to remove *all* items of personal property. Therefore, in removing the items it wanted to keep, the seller had performed its obligations under that provision and was entitled to keep the earnest money.[148]

Aguiar v. Segal[149] involved the issue of whether a purchaser could compel specific performance under a purchase contract. A purchaser and seller entered into five separate earnest-money contracts for the sale of five multi-family residential properties. The conveyances were scheduled to close on July 15, 2003.[150] Due to delay in the lender's receipt of appraisal results, the purchaser was granted a 15-day extension of the scheduled closing dates under a financing provision in the contract. The appraisal results were, however, still not ready 15-days later on July 30.[151] The seller orally agreed with the purchaser's broker to extend the closing deadline for one week. When the August 6 deadline passed, the lender was still not ready to finance the acquisition, and the seller terminated the contracts. The appraisal results were received on August 25, and the purchaser filed suit against the seller to compel specific performance. Under the terms of the contracts, the purchaser could enforce specific performance if the seller defaulted under the contracts.[152] Surprisingly, the trial court ruled in favor of the purchaser and ordered the seller to convey the properties to the purchaser. The trial court found that by granting the one-week oral extension, the seller had created a course of dealing whereby the seller would be flexible in waiting for the purchaser to obtain the financing. The court of appeals sternly overruled the trial court's decision, noting that support for the trial court's findings was "so weak that the findings are clearly wrong and manifestly unjust."[153] The court of appeals held that, since the contracts contained a "time is of the essence" clause and the seller only verbally agreed to a one-week extension, the seller was entitled to terminate the contracts on August 6 and to claim the earnest money in accordance with the terms of the contracts.[154]

In *Bookout v. Bookout*,[155] the court of appeals upheld the validity of an unexecuted purchase contract. In 1994, two brothers created, but did not execute, a document entitled "Contract for Deed" that detailed the

147. *Id.*
148. *Id.* at 903-04.
149. 167 S.W.3d. 443 (Tex. App.—Houston 2005, pet. denied).
150. *Id.* at 445-46.
151. *Id.* at 447.
152. *Id.* at 446.
153. *Id.* at 453.
154. *Id.* at 445, 456.
155. 165 S.W.3d 904, 912 (Tex. App.—Texarkana 2005, no pet. h.).

terms by which one brother (Cris) could purchase the real and personal property owned by the other brother (Dan). This property was the chiropractic clinic where they both worked. Though the contract was not signed, Cris began performing under the terms of the contract for seven years (making $3,000 monthly payments to Dan and his wife). In 2001, the brothers had a falling-out, and Cris was fired as an employee at the clinic. At trial, a jury found that a valid contract existed, even though the contract was never signed.[156]

The court of appeals affirmed the trial court's ruling.[157] It noted that a valid contract for the purchase or sale of real property, to satisfy the statute of frauds, must be in writing and signed by the parties bound thereby, unless an exception to the statute of frauds exists.[158] Partial performance of the terms of the contract is a recognized exception to the statute of frauds. Actions relied on to prove partial performance must be actions that could have been done with no other intent than to fulfill the terms of the contract. The court of appeals noted that the monthly payments over a seven-year period (and acceptance of the payments by Dan) in accordance with the terms of the contract were enough to create an exception to the statute of frauds and enough to create a valid (though unexecuted) contract.[159]

VII. LEASES; LANDLORD/TENANT

There were several notable cases relating to landlord-tenant disputes decided during the Survey period. Specifically, Texas courts decided issues concerning premises liability, the implied warranty of suitability, unconscionability, and a government units' liability when acting as landlord.

The Texas Supreme Court, in *Western Investments, Inc. v. Urena*,[160] reviewed the elements for establishing premises liability for landlords. A ten-year-old boy was sexually assaulted by another tenant in an apartment complex in Houston. The mother sued the landlord for, among other claims, negligence and premises liability. The trial court granted summary judgment in the landlord's favor. The court of appeals reversed and remanded the negligence and premises-liability claims. Citing to a series of violent crimes over a two-year period at the apartment complex, the appellate court found that an issue of fact remained as to whether the sexual assault was foreseeable and thus whether the landlord had a legal duty to provide its tenants protection from third-party crimes.[161] The appellate court also held that the plaintiff had presented sufficient evidence to demonstrate that the landlord had breached its duty to the boy.[162] In

156. *Id.* at 906.
157. *Id.* at 907.
158. *Id.* at 907-08 (citing TEX. BUS. & COM. CODE ANN. § 26.01 (Vernon 2002)).
159. *Id.* at 911.
160. 162 S.W.3d 547 (Tex. 2005).
161. *Id.* at 549 (citing Urena v. W. Invs., Inc., 122 S.W.3d 249, 257 (Tex. App.—Houston [1st Dist.] 2003, pet. granted)).
162. *Id.* (citing *Urena*, 122 S.W.3d at 256).

particular, the appellate court pointed to the following facts: 1) the landlord had not replaced its security company at the time of the attack; 2) the apartment manager testified that she did not review police reports of criminal activity in the area, as recommended in the Texas Apartment Association handbook; and 3) a number of tenant identification files, which typically included copies of drivers licenses and social security cards, were incomplete. The landlord appealed.[163]

While the Texas Supreme Court acknowledged that the two claims involved distinct duty analyses, it concluded that both causes of action depended on demonstrating that the landlord's act or failure to act was the proximate cause of the harm.[164] The court, therefore, chose to analyze both the negligence and the premises-liability claims together.[165]

The Texas Supreme Court found that, even if the landlord had a duty to provide security guards, obtain the police reports on calls relating to criminal activity in the area, and to investigate its tenants, the plaintiff had failed to show how breaching those duties caused the sexual attack on the young boy.[166] The court pointed to the two elements of proximate cause: cause in fact and foreseeability.[167] The court found that, even if the landlord had provided security for the premises, that would not necessarily have prevented the crime: the assailant was a resident of the apartment complex, and the security would not have prevented him from moving about the complex or interacting with the other residents.[168] Similarly, even if the manager had reviewed the police reports, there was nothing in the reports that would have alerted the landlord that the assailant was a pedophile.[169] Finally, the court found that landlord's incomplete tenant files did not cause the crime at issue. The record was complete with respect to the tenant that attacked the boy. Furthermore, the attacker's record contained only a driving infraction, and thus disclosed nothing that would have indicated that the attacker was likely to commit such a violent crime.[170]

Gym-N-I Playgrounds, Inc. v. Snider[171] involved an analysis of an "as-is" clause and the implied warranty of suitability. Ron Snider owned the Gym-N-I business, including a manufacturing company and the building in which the company was located. Patrick Finn and Bonnie Caddell had worked in the building at Gym-N-I for several years. Both Finn and Caddell knew that the building size was slightly over the square-footage

163. *Id.* at 549-50.
164. *Id.* at 550. The court described premises liability as "a special form of negligence where the duty owed to the plaintiff depends upon the status of the plaintiff at the time the incident occurred." *Id.* (citing M.O. Dental Lab v. Rape, 139 S.W.3d 671, 675 (Tex. 2004); Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295-96 (Tex. 1983)).
165. *Id.*
166. *Id.* at 551.
167. *Id.*
168. *Id.*
169. *Id.* at 551-52.
170. *Id.* at 552.
171. 158 S.W.3d 78 (Tex. App.—Austin 2005, pet. filed).

threshold for requiring a sprinkler system. They were also aware that the fire marshal had recommended that Snider install a sprinkler system and that Snider had neglected to do so. In 1993, Finn and Caddell bought the Gym-N-I business from Snider, entering into a commercial lease of the building with Snider.[172] The lease contained both an "as-is" clause and a renewal option. The term of the lease expired in 1996, but Gym-N-I continued to pay, and Snider continued to accept, rent payments for the next four years. The only provision in the lease covering a continuation beyond the initial term was the holdover clause. In 2000, "a fire completely destroyed the building and its contents."[173] Gym-N-I sued Snider, claiming, in addition to other claims, breach of the implied warranty of suitability. The trial court granted partial summary judgment in favor of Snider, which was then merged into a final judgment. The court of appeals affirmed the lower court's decision.[174]

Gym-N-I argued two issues on appeal. First Gym-N-I argued that the "as-is" clause did not apply during the holdover period. The court of appeals disagreed, referring to the language in the holdover clause stating that "[a]ny holding over . . . shall constitute a lease from month-to-month, *under the terms and conditions of this lease.*"[175] The court found that the plain meaning of this language was to incorporate all of the original lease's terms and conditions to govern the holdover period, excepting the terms relating to the lease's duration.[176]

Gym-N-I, in the alternative, asserted that the "as-is" clause was unenforceable. The appellate court referred to *Prudential Insurance Co. of America v. Jefferson Associates, Ltd.*[177] as the authority for the five-factor test of enforceability of "as-is" clauses: 1) the parties' sophistication; 2) terms of the "as-is" agreement; 3) whether the "as-is" agreement was freely negotiated; 4) whether the agreement was an arms-length transaction; and 5) whether there was a misrepresentation or concealing of a known fact.[178] Gym-N-I first argued that *Prudential* should only apply to sales of commercial property, not leases.[179] The appellate court found, however, that as there is "no meaningful distinction between sales contracts and leases for purposes of determining enforceability;" the same test for enforceability could apply in the lease context as well.[180] In applying the *Prudential* test, the appellate court found that Finn and Caddell were familiar with the business, knew about the fire marshal's

172. *Id.*
173. *Id.* at 82.
174. *Id.* at 83.
175. *Id.* at 84.
176. *Id.* (referring to Gulf Ins. Co. v. Burns Motors, Inc., 22 S.W.3d 417, 424 (Tex. 2000)).
177. *Id.* at 85 (citing Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 161 (Tex. 1995)).
178. *Id.* (citing Procter III v. RMC Capital Corp., 47 S.W.3d 828, 833 (Tex. App.—Beaumont 2001, no pet.)). The *Gym-N-I* court described the *Procter* case as "distilling *Prudential* into [a] five-factor test." *Id.*
179. *Id.* at 85.
180. *Id.*

recommendation to install a sprinkler system, knew that Snider had not installed the system, and understood the "as-is" clause. Further, Finn and Caddell admitted that there was no fraud or misrepresentation involved in the lease negotiation.[181] The appellate court also found that the trial court properly granted summary judgment against Finn and Caddell with respect to their negligence, breach of warranty, and fraud claims because the valid "as-is" clause negated the causation element of all claims associated with the physical condition of the property.[182]

In its second claim, Gym-N-I argued that the trial court wrongly found that Gym-N-I waived its implied warranty of suitability, because "only an express agreement that the tenant will repair certain defects can waive that warranty."[183] The appellate court disagreed, however, with Gym-N-I's reading of precedent, stating that, while the Texas Supreme Court did state that a tenant may waive the warranty by agreeing to repair certain defects, the Texas Supreme Court did not indicate that such was the only means by which to waive the warranty.[184] Rather, the waiver test was actually a multi-factor analysis, which was dependent on the particulars of each case.[185] The court of appeals found that the "as-is" clause effectively waived the implied warranty of suitability, as it specifically mentioned that Snider made no warranties, including the implied warranty of suitability.[186]

Ski River Development, Inc. v. McCalla[187] involved the enforceability of an option to purchase in a lease and the effect of claims of unconscionability with respect thereto. Arthur William Glazier originally owned the 380 acres of land. He entered into a 99-year lease with Walter and Mary Baker in 1992. In that same lease, the Bakers subleased part of the property to the McCallas. The sublease contained an option to purchase, whereby the McCallas had the right to purchase the property at market value if the Bakers ever gained ownership rights thereto and elected to sell. A year later, Glazier died and the Bakers gained ownership rights. In June of 1994, Mary Baker signed a listing agreement with Glenna Calahan to sell the entire property at a price of $2500 per acre. The McCallas took months to evaluate the market value of the property before notifying Calahan in October of 1994 that, while they were still interested in the property, they recommended that the Bakers try to sell the property to someone else at the Bakers' $2500-per-acre asking price. The McCallas did reserve the right, however, to review any contract that the Bakers received. The Bakers then began conferring with the Davises, who were interested in buying the property. On February 12, 1996, the

181. *Id.* at 86.
182. *Id.* (finding that "Gym-N-I's agreement to accept the premises 'as-is' effectively supersedes any fault of Snider's").
183. *Id.*
184. *Id.* at 87 (citing Davidow v. Inwood N. Prof'l Group-Phase I, 747 S.W.2d 373, 377 (Tex. 1988)).
185. *Id.* at 87-88 (citing *Davidow*, 747 S.W.2d at 377).
186. *Id.* at 88.
187. 167 S.W.3d 121 (Tex. App.—Waco 2005, pet. denied).

Davises entered into a 99-year lease with the Bakers. In March 1996, the Davises and the Bakers signed a first amendment to their lease, which assigned the lease from the Davises to Ski River. A month later, in April of 1996, the McCallas made an offer to purchase the entire property at $1200 per acre, threatening to file suit. Mary Baker died a few days after that. In August of 1996, the Davises and Walter Baker signed a second amendment to the lease, whereby Walter Baker agreed to receive prior approval from the Davises before selling any of the property's mineral rights. The second amendment also granted to the Davises a right of first refusal if Walter Baker ever tried to sell the property. The McCallas filed suit against Walter Baker, the Davises, and Ski River in September 1996. The trial court entered a declaratory judgment that the McCallas had properly exercised their option to purchase and that the 99-year lease, as amended, between the Davises and the Bakers was void and unenforceable.[188] The court of appeals held that the option to purchase was void for indefiniteness, reversing the trial court. In addition, the appellate court upheld the trial court's decision to enter a declaratory judgment that the Davis-Baker lease was unconscionable and thus unenforceable, but overruled the trial court's finding that the lease was also void as a result of such unconscionability.[189]

The Davises and Ski River raised several issues on appeal. Their first issue, relating to landlord-tenant law, concerned whether or not the McCallas' first option to purchase was void and unenforceable and/or waived.[190] Specifically, Ski River argued that the clause was void for indefiniteness and, in the alternative, that the McCallas never exercised the provision or waived their rights.[191] The appellate court agreed, citing the Texas rule that "[w]here the parties intended to make an agreement and there is a certain basis for granting a remedy, courts should find the contract terms definite enough to provide a remedy."[192] Although the appellate court found that the clause clearly required that the Bakers acquire legal ownership before the McCallas could exercise this option, the appellate court also found that the clause left all other terms open to future negotiation.[193] The appellate court found that the clause suffered from a lack of definition for "Property" and additional ambiguities such as (i) whether signing a listing agreement constituted an "election to sell," (ii) whether an offer from a third party was required before the McCallas could exercise their right to purchase, (iii) how the property's market value was to be determined, and (iv) how long the McCallas had to exercise its option.[194] The appellate court found that such a provision, which left material terms to be agreed upon later, was not definite or specific

188. *Id.* at 129-31.
189. *Id.*
190. *Id.* at 132.
191. *Id.* at 133.
192. *Id.* (citing RESTATEMENT (SECOND) OF CONTRACTS § 33(2) (1981)).
193. *Id* at 134.
194. *Id.*

enough to be enforceable.[195]

The court of appeals then addressed whether the Davis-Baker lease was unconscionable and therefore unenforceable. The appellate court stated that the analysis for determining unconscionability is two-fold, namely 1) procedural unconscionability and 2) substantive unconscionability.[196] For both types of analyses, a court must examine the totality of the circumstances, assessing whether the parties had any available alternatives, the parties' respective bargaining power, whether the contract was illegal, and whether it was oppressive or unreasonable.[197] In order to find either substantive or procedural unconscionability, the court must conclude that the grounds for abuse are sufficiently shocking or gross to compel a court to intercede.[198] The court relied on over 19 pieces of evidence to support a finding of procedural unconscionability in the formation of the Davis-Baker lease, including the facts that: the Davises were aware of the Bakers' desperate need for money at the time of execution; the Bakers did not see the final draft of the lease until the day they signed; Walter Baker's testimony that he and his wife Mary felt as though they could not change any lease terms before signing; the Bakers did not have a lawyer review the lease; the Bakers did not understand the legal language, such as "severability" and "possessory rights;" and the Davises never provided a copy of their business plan for the property to the Bakers, which would have shown improvements that would have increased the property taxes that the Bakers were responsible for under the lease.[199]

The appellate court similarly found ample evidence to support a finding of substantive unconscionability. The appellate court pointed to several lease terms, including: the Bakers were required to pay all real estate taxes for the 99-year term; the Davises paid $3000 in monthly rent for the first 12-1/2 years, after which they would only pay $75 per month, which was less than the estimated taxes per month; all current sublease income would be assigned to the Davises; the lease took away all of the Davises' possessory rights, except the right to maintain a small store on the property; and the lease's release clause prevented the Bakers from selling the land while the lease was in effect.[200] The appellate court found that the evidence of procedural and substantive unconscionability in the lease also supported a determination that the first and second amendments were unconscionable.[201]

Brenham Housing Authority v. Davies[202] concerned the liability of a housing authority, in its capacity as landlord under a lease, for premises

195. *Id.*
196. *Id.* at 136.
197. *Id.*
198. *Id.*
199. *Id.* at 137-38.
200. *Id.* at 138-39.
201. *Id.* at 139.
202. 158 S.W.3d 53 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

defects. Margaret Davies first became a tenant of Northside Terrace Apartments in 1997. Northside Apartments was owned by Northside Terrace, Ltd. and managed by the Housing Authority of the City of Brenham, Texas a/k/a Brenham Housing Authority ("BHA"). During her tenancy, Davies became mentally and physically ill. She later discovered that her hot-water heater was emitting carbon monoxide fumes into her apartment, thus causing her ailments. She was diagnosed with Chronic Carbon Monoxide Poisoning shortly after replacing the hot-water heater. She filed suit against BHA and other defendants, alleging, among other claims, negligence under a premises-defects theory. BHA filed a plea to the jurisdiction, asserting that it had not waived the immunity-from-premises-defects claims for governmental units, as provided under the Texas Tort Claims Act ("TTCA"). The trial court entered an order denying the pleas to jurisdiction, and BHA filed an interlocutory appeal.[203]

The court of appeals held that Ms. Davies' pleadings failed to establish that BHA's immunity had been waived and therefore reversed the trial court's order, granting the plea to the jurisdiction. The court of appeals stated that, unless such immunity had been waived, the trial court lacked jurisdiction and was without authority to hear the case.[204] The provision of the TTCA that BHA relied on to establish its immunity stated that a governmental unit's duty of care is limited to the duty that a private person owes to a licensee, unless the claimant "pays for use of the premises."[205] BHA first claimed that Davies had not met the burden of pleading for a licensee—that Davies had failed to plead that BHA had actual knowledge of the purported defect.[206] BHA also argued that Davies did not fall into the exception to local government immunity under section 101.022(a) of the TTCA, for claimants that "pay for the use of the premises," because Davies had paid for exclusive and permanent occupancy of the apartment while section 101.022(a) only contemplated payment for temporary use of a facility.[207] While the appellate court agreed that Ms. Davies had not alleged, as required, that BHA had actual knowledge of the defect,[208] it disagreed that the plain language of the TTCA could be read to limit the exception to payment for temporary use. Therefore, the court found that section 101.022(a) did not limit BHA's liability to the licensee standard of care.[209]

Ms. Davies argued that she should be accorded the status of an invitee under the TTCA because she paid rent to BHA and that BHA was thus under the duty of care owed to an invitee. Ms. Davies relied on *Thompson v. City of Corsicana Housing Authority*,[210] which held that, because a

203. *Id.* at 56.
204. *Id.* at 57.
205. *Id.* (citing TEX. CIV. PRAC. & REM. CODE ANN. § 101.022(a) (Vernon 1997)).
206. *Id.*
207. *Id.* at 57-56.
208. *Id.* at 57.
209. *Id.* at 58.
210. *Id.* (citing 57 S.W.3d 547 (Tex. App.—Waco 2001, no pet.)).

plaintiff had paid the housing authority monthly rent for occupancy of the apartment, she was entitled to the status of an invitee. The appellate court distinguished this case from the *Thompson* case on the grounds that *Thompson* relied on cases in which the plaintiff had paid a fee for entry onto the premises.[211] Ms. Davies' right of possession, however, was not based on permission or an invitation; rather, her rights derived from a lease that gave her the legal status of a tenant.[212] The appellate court therefore found that *Thompson* did not apply in the instant case.[213] Furthermore, the appellate court found that the duty of a landlord to a tenant for dangerous conditions inside the leased premises is narrower than the duty that a landlord owes to an invitee.[214] The court stated that interpreting section 101.022(a) to mean that a housing authority owes the invitee duty of care to every tenant would place a greater duty of care on public landlords than on private ones.[215] Given that section 101.022(a) generally limits the state's liability for premises defects, the appellate court found that such an interpretation would be counter to legislative intent and impose a new duty upon the governmental entity.[216]

After reviewing each parties' analysis, the appellate court then stated that the invitee-licensee discussion was the improper framework for the facts at hand. Rather, if BHA owed a duty to Ms. Davies, it would arise from Ms. Davies' status as a tenant at the complex. The court acknowledged that BHA, as manager, was the lessor's agent.[217] Under Texas law, lessors retain liability over leased premises for the tenant's harm caused by defects if the landlord retains control over the premises.[218] Ms. Davies argued that BHA retained control over her leased premises due to a clause in the management agreement between BHA and Northside Terrace, Ltd., which gave BHA the responsibility for maintenance and repairs for the premises.[219] The appellate court disagreed, finding that a lessor's contractual right to enter the premises for repairs and maintenance was not a reservation of control over the premises.[220] Ms. Davies was alleging that the management agreement, not the lease between BHA and Davies, imposed liability on BHA for premises defects. However, even if she had alleged liability based on the lease, that allegation would have failed because section 392.006 of the Texas Local Government Code makes specific exception to the state's liability as a landlord

211. *Id.* at 58-59.
212. *Id.* at 59.
213. *Id.*
214. *Id.*
215. *Id.*
216. *Id.* (referring to Univ. of Tex. Med. Branch v. Davidson, 882 S.W.2d 83, 85 (Tex. App.—Houston [14th Dist.] 1994, no writ)).
217. *Id.* at 59.
218. *Id.* (citing Parker v. Highland Park, Inc., 565 S.W.2d 512, 515 (Tex. 1978); Brown v. Frontier Theatres, Inc., 369 S.W.2d 299, 303 (Tex. 1963)).
219. 158 S.W.3d at 60.
220. *Id.* (citing Shell Oil Co. v. Khan, 138 S.W.3d 288, 295-97 (Tex. 2004); De Leon v. Creely, 972 S.W.2d 808, 812-13 (Tex. App.—Corpus Christi 1998, no pet.)).

for any claims for personal injuries as set forth in a lease.[221]

VIII. TITLE MATTERS

A. ADVERSE POSSESSION

In Nichols v. Lightle,[222] the plaintiff brought suit to quiet title to the 420 acres that she purchased at a foreclosure sale. The Amarillo Court of Appeals held that a statement in the plaintiff's second amended petition disclaiming interest in any tracts of land owned by the defendant did not amount to an admission by the plaintiff that the 100-acre tract claimed by the defendant was not part of the 420 acres owned by the plaintiff. The court of appeals also held that the plaintiff did not have to present evidence showing whether the 420 acres included any part of the 100 acres claimed by the defendant. The court explained that such proof was irrelevant to her ability to conclusively prove that she obtained title to the 420 acres by trustee's deed.[223]

In *Sani v. Powell*,[224] a landowner brought a declaratory-judgment action, seeking to have the purchase of his property at a tax sale declared invalid. In defense, the purchasers of the property asserted that the landowner's action was barred by the statute of limitations. The Dallas Court of Appeals held that, in order to raise the statute of limitations defense to an action to clear title to property bought at a tax sale, a party must produce the same documentation required to prove a valid tax sale. Since the purchasers failed to introduce the decree of foreclosure and order of sale into evidence, they failed to carry the burden of proving a valid tax sale so as to be able to assert the statute-of-limitations defense. The court of appeals also restated that any suit involving a dispute over title to land is, in effect, an action in trespass to try title, whatever its form. Accordingly, since the declaratory-judgment action in this case was, in essence, a trespass-to-try title claim, the plaintiff was not entitled to recover attorney's fees.

In *Jordan v. Bustamante*,[225] another tax sale case, the Fourteenth District Court of Appeals held, among other things, that a disclaimer in a trespass-to-try-title action could be withdrawn by filing a motion to withdraw the disclaimer with the court. If the court grants the motion, then the disclaimer is withdrawn; the only way that the opposing party can challenge the withdrawal is by claiming that the court abused its discretion in granting the motion. The court of appeals also held that a tax sale is not void simply because the tax authority fails to join a government entity that has a lien against the property in the suit for delinquent taxes. Rather, the purchaser of the property just takes the property subject to

221. 158 S.W.3d at 60 (citing TEX. LOC. GOV'T CODE ANN. § 392.006).
222. 153 S.W.3d 563 (Tex. App.—Amarillo 2004, pet. denied).
223. *Id.* at 571.
224. 153 S.W.3d 736 (Tex. App.—Dallas 2005, pet. denied).
225. 158 S.W.3d 29 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). *See* discussion *infra* Section IX on ad valorem taxation.

the lien of the government entity. Finally, the court of appeals held that a plaintiff can affirmatively prove title in a trespass-to-try action by asserting and proving title by adverse possession.[226]

A number of cases continued to deal with *Martin v. Amerman*. In *Jones v. Smith*[227] and *Aguillera v. The John G. and Marie Stella Kenedy Memorial Foundation*,[228] the courts of appeals held that a statutory trespass-to-try-title action under Chapter 22 of the Texas Property Code is the exclusive method to determine a title dispute in Texas. As a result, the declaratory-judgment action in Jones and the action to remove a cloud on title in Aguillera were both treated as if they were trespass-to-try-title actions. Accordingly, neither plaintiff was entitled to recover attorney's fees. The court of appeals in Jones also held that, in a suit to establish the boundary between Jones and his neighbor's property, it was not necessary to fulfill all of the traditional requirements of a formal trespass-to-try-title action.

In *Turner v. Mullins*,[229] the Fort Worth Court of Appeals held that adverse-possession claimants must "wholly exclude" the owner of the disputed property in order to establish title through adverse possession. In this case, the defendants claimed adverse possession of property located in the middle of the Red River, but failed to prove to the court that they wholly excluded the plaintiffs from possession of the property. Evidence was presented indicating that the plaintiffs used the land over the years for hunting and swimming, and the defendants had never asked them to leave. As a result, the court held that the defendants did not prove as a matter of law that their possession of the disputed property was adverse or hostile to that of the plaintiffs or that the defendants wholly excluded the plaintiffs from the disputed property for any of the requisite limitations periods. Accordingly, the court upheld the trial court's finding that the defendants did not establish title to the disputed property through adverse possession.[230]

This case also provided a good analysis of accretion. The plaintiffs claimed that all of the property accreted to their land, which was located just south of the Red River in Texas. The defendants owned the land located just north of the Red River in Oklahoma. The court, however, held that, since the disputed property was once an island, the plaintiffs were required to prove that they owned the island before accretion to acquire title to the disputed property. The court explained that if an island is later joined with the mainland through accretion, the owner of the island is entitled to accretions to the island, just as the owner of the mainland is entitled to accretions to the mainland. Since there was no evidence presented establishing the plaintiffs' ownership of the island, the

226. *Id.* at 42-43.
227. 157 S.W.3d 517 (Tex. App.—Texarkana 2005, pet. denied).
228. 162 S.W.3d 689 (Tex. App.—Corpus Christi, pet. denied).
229. 162 S.W.3d 356 (Tex. App.—Fort Worth 2005, no pet. h.).
230. *Id.* at 366-69.

court held that the trial court erred in finding that all of the disputed land belonged to the plaintiffs. The case was then remanded to the trial court for a determination as to which party owned the island before accretion.[231]

Finally, in *B.W. Carr v. City of Cisco*, the Eastland Court of Appeals permitted the City of Cisco to assert title by limitations, even though, generally, title by limitations cannot be asserted against a municipality.[232]

B. Deeds and Conveyances

Quitclaims took the stage last year, with some odd twists. In *Geodyne Energy Income v. Newton Corp.*,[233] the Texas Supreme Court held that an assignment by quitclaim of an interest in an expired lease was not a misrepresentation, even if the assignment only resulted in the assumption of liabilities.

In 1987, Geodyne Energy Income assigned by quitclaim its interest in a certain oil well to Newton Corp. Three months after the conveyance, the lease operator informed Newton that the lease had expired and that Newton would be responsible for the costs of plugging the well. The lease operator sued both Geodyne and Newton for the cost to plug the well. Newton asserted that the Assignment and Bill of Sale conveying the lease was a misrepresentation by Geodyne of the validity of the lease.[234]

The court found that the Assignment was a quitclaim, as it did not state the nature or percentage interest that was being conveyed. Rather, the Assignment conveyed to Newton "all of [Geodyne's] right, title, and interest" in the lease.[235] The court further held that a quitclaim without a warranty of title cannot be a warranty or misrepresentation of title, as quitclaims "are commonly used to convey interests of an unknown extent or claims having a dubious basis."[236]

In *Gore Oil Co. v. Roosth*,[237] the court determined that the deed in question was ambiguous, as it contained two "subject to" clauses. The deed in question was a general warranty deed from Peyton McKnight to Eagle Investment Company and read in part as follows:

> Have, Granted, Sold and Conveyed, and by these presents do Grant, Sell and Convey unto the said Grantee all that certain tract or parcel of land situated in Knox County Texas, described as follows ("Property"), to wit:
>
> ***
>
> Grantor unto himself, his heirs and assigns, reserves free of all liens a full one-eighth (1/8) non-participating royalty interest in the Prop-

231. *Id.* at 360-64.
232. 161 S.W.3d 522 (Tex. App.—Eastland 2004, pet. denied).
233. 161 S.W.3d 482 (Tex. 2005).
234. *Id.* at 483-84.
235. *Id.* at 486.
236. *Id.*
237. 158 S.W.3d 596 (Tex. App.—Eastland 2005, no pet. h.).

> erty subject to any previously conveyed or reserved mineral interest as may appear of record in Knox County, Texas.
> This conveyance is made and accepted subject to all restrictions, reservations, covenants, conditions, rights-of-way and easements now outstanding and of record, if any, in Knox County, Texas, affecting the above described property.[238]

The court affirmed the trial court's ruling that the deed was ambiguous and that the intent of the parties to the deed was for McKnight to reserve a full 1/8 royalty interest irrespective of the fact that there existed outstanding mineral and royalty interests that had previously been conveyed or reserved. The court held that appellees were not estopped from claiming the 1/8 mineral interest under *Duhig v. Peavy-Moore Lumber Co.*[239] Further, the court held that an affidavit filed in the county clerk's office was sufficient evidence to support the trial court's ruling that McKnight intended to reserve a full 1/8 royalty interest unreduced by previous reservations.[240]

In *Brown v. De La Cruz*,[241] the Texas Supreme Court determined that Texas Property Code section 5.079(b) does not provide purchasers with a private cause of action for penalties if a seller of real property fails to record and transfer a deed within 30 days of final payment. However, a private cause of action for liquidated damages is available for violations occurring after amendment of the statute, effective September 1, 2001.[242]

C. EASEMENTS

In *Hubert v. Davis*,[243] the Tyler Court of Appeals addressed whether a provision in a subdivision declaration created an easement as a matter of law (rather than a restriction or covenant, which, by the terms of such declaration, were subject to expiration).[244] Paragraph 13 of the declaration:

> granted unto all owners of lots in said subdivision the free *use, liberty and privilege* of passage in and along, over and across all of Lot 9 . . . for free ingress and egress to said owners with boats, boat trailers and other vehicles . . . the right to temporarily park thereon boats, boat trailers, and other vehicles incident to the use of such property as a boat landing.[245]

The court emphasized the significance that the interest was "granted" to all owners, noting that "the word 'grant' is a word of present conveyance

238. *Id.* at 598.
239. 144 S.W.2d 878 (Tex. 1940).
240. *See also* Dixon v. Dewhurst, 169 S.W.3d 515 (Tex. App.—Texarkana 2005, no pet. h.) (extrinsic evidence was allowed to resolve a conflict and uncertainty between a senior and junior survey by the same surveyor).
241. 156 S.W.3d 560 (Tex. 2004). *See* discussion *infra* Section VI on purchaser/seller issues.
242. *Id.* at 565.
243. 170 S.W.3d 706 (Tex. App.—Tyler 2005, no pet. h.).
244. *Id.* at 711.
245. *Id.* at 708-709 (emphasis added).

indicating complete alienation."[246] The court held that it was reasonable for the trial court to interpret the language in paragraph 13 to unambiguously create an easement, despite the appellant's argument that such paragraph makes no use of the word "easement;" the court noted that no special form or words need to be used to create an easement.[247] The court further held that since the language used in paragraph 13 granted an easement, the provision in paragraph 14 of the declaration, which imposed a 25-year term on the restrictions and covenants set forth in the declaration, did not apply to the easement granted by Paragraph 13.[248]

Not surprisingly, a number of easement cases dealt with public roads. In *Reed v. Wright*,[249] the court followed the presumption that a road is public and the reasoning that a road is accepted as a road by reason of its use. Once a road becomes a public road, it remains so unless clearly abandoned. Likewise, in *Betts v. Reed*,[250] the Texarkana Court of Appeals found that a road had become a public road through the owner's implied dedication. This implied dedication arose in part because the public had used the road, and the county had maintained the road.

Finally, the El Paso Court of Appeals in *Murphy v. Long*[251] went so far as to infer dimensions for a road created by estoppel. The court held that the jury's findings were sufficient to establish a road easement by estoppel notwithstanding the absence of (a) a written but unsigned document or (b) a vendor-vendee relationship. The jury found that the Longs substantially relied on the Murphys' promise to provide a written easement across the Murphys' land and that such reliance was foreseeable by the Murphys.[252] The El Paso Court of Appeals noted that the rule developed in *"Moore" Burger*,[253] that a written agreement containing all of the essential elements must be in existence at the time of the promise to sign, had not been applied to a case involving an easement by estoppel. Even though the width of the road had not been agreed upon by the parties, the court pointed out, "dimensions which are reasonably sufficient" could be inferred for a grant of an easement if the grant provided the object for which the easement was granted.[254] The court declined to follow the Austin Court of Appeals, which held that the existence of a vendor-vendee relationship is necessary to establish an easement by estoppel.[255] Instead, the court stated that it did not interpret such cases as holding that

246. *Id.* at 711.
247. *Id.* at 712 (citing Maples v. Erck, 630 S.W.2d 491 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.)).
248. *Id.* at 707.
249. 155 S.W.3d 666 (Tex App.—Texarkana 2005, pet. denied).
250. 165 S.W.3d 862 (Tex. App.—Texarkana 2005, no pet. h.).
251. 170 S.W.3d 621 (Tex. App.—El Paso 2005, pet. denied).
252. *Id.* at 624.
253. *Id.* at 625 (citing 492 S.W.2d 934 (Tex.1972) and Nagle v. Nagle, 633 S.W.2d 796 (Tex. 1982)).
254. *Id.* (citing Crawford v. Tenn. Gas Transmission Co., 250 S.W.2d 237, 270 (Tex. Civ. App.—Beaumont 1952, writ ref'd) and 28 C.J.S. *Easements* § 77).
255. *Id.* at 627-28 (citing Scott v. Cannon, 959 S.W.2d 712, 721 (Tex. App.—Austin 1998, pet. denied)).

an easement by estoppel could never exist in the absence of a vendor-vendee relationship between the parties.[256] Accordingly, the El Paso and Austin courts may be split as to whether or not a vendor-vendee relationship is required to establish an easement by estoppel.

D. Restrictive Covenants, Condominiums, and Owners Associations

In *Sloan v. Owners Association of Westfield, Inc.*,[257] the San Antonio Court of Appeals affirmed the granting of a summary judgment in a foreclosure action, and in so doing, held that a homeowners association assessment lien could be foreclosed against a lot owner's homestead. The assessment that formed the basis of the lien examined in *Sloan* was attorney's fees due under a contingent-fee arrangement. The court of appeals, citing *Inwood North Homeowners' Association v. Harris*,[258] based its ruling on the fact that the subdivision's declaration provided for the contractual lien, which was in existence before the homestead right.

April Sound Management Corp. v. Concerned Property Owners for April Sound, Inc.[259] involved deed restrictions in a subdivision. The appellate court held that a suit for declaratory judgment regarding the right of a property-management company to enforce deed restrictions required the joinder of all lot owners and the property owners association as parties. The court based its holding on the principle that all persons who have or claim any interest that would be affected by a declaratory judgment should be made parties to the action for such judgment, so as to avoid a multiplicity of suits.

In *City of Heath v. Duncan*,[260] property owners brought an action to enjoin the city's proposed construction of a park and water tower on subdivision property because the construction violated existing deed restrictions. Following the rationale of *City of Houston v. McCarthy*,[261] the appellate court held that a deed restriction creates a compensable property interest for purposes of condemnation. Further, despite the fact that the property owners had withdrawn a condemnation award deposited by the city into the court registry, the court of appeals found that the property owners, as taxpayers, had additional standing to bring their claim for injunctive relief.

In *T.F.W. Management, Inc. v. Westwood Shores Property Owners Association*,[262] the Fourteenth District Court of Appeals of Houston reversed the granting of a temporary injunction to a homeowners association to prevent a country club from using certain lake water to irrigate its golf course. In reaching its ruling, the appellate court ex-

256. *Id.*
257. 167 S.W.3d 401 (Tex. App.—San Antonio 2005, no pet. h.).
258. *Id.* at 405 (citing 736 S.W.2d 632 (Tex. 1987)).
259. 153 S.W.3d 519 (Tex. App.—Amarillo 2004, no pet. h.).
260. 152 S.W.3d 147 (Tex. App.—Dallas 2004, pet. denied).
261. 464 S.W.2d 381 (Tex. Civ. App.—Houston [1st Dist.] 1971, writ ref'd n.r.e.).
262. 162 S.W.3d 564 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).

amined the intent of the country club and homeowners association in drafting their deed and assignment of water rights. Specifically, the court examined whether the country club was still obligated under the terms of the instrument to replenish lake water when the price of water had increased nearly tenfold over the course of four years. In holding that the country club was no longer obligated to provide the water, the appellate court ruled that the contract requirement that water be available under substantially similar terms to those at the time of the creation of the requirement (without "adjustments for inflation") was a condition precedent and not a covenant. Therefore, because of the increase in cost, which was found to exceed "inflation," the court held that the country club did not satisfy the condition precedent and thus was not obligated to replenish the water in the lake.[263]

In *Dynamic Public v. Unitec Industrial Center*,[264] the San Antonio Court of Appeals reversed a summary judgment regarding the alleged violation of a deed restriction involving permitted uses of property. In interpreting a restrictive covenant that incorporated a city ordinance's definition of "industrial purposes," the appellate court chose not to apply the expansive interpretation principle of *ejusdem generis* ("of the same kind"). Instead, in determining whether an adult book store with nude dancing constituted use for "industrial purposes," the court looked to the specific listing of industrial purposes in the city ordinance on which the restrictive covenant was based. Because additional functions defined as industrial purposes had been added to the ordinance over time, the court found that the purpose of the ordinance (and, thus, the deed restriction) was to create a specific, limiting definition, not an expansive one.

In *Marcus v. Whispering Springs Homeowners Association, Inc.*,[265] the Dallas Court of Appeals reviewed the issuance of a temporary injunction to a homeowners association. The injunction had been sought by the homeowners association to prevent a lot owner from building a home based on plans that had not been submitted to the association's architectural control committee. At the temporary-injunction hearing, there was testimony that the plans for the construction were the same in all material ways as plans that had been submitted to the committee; however, there was also testimony to the contrary by a member of the committee. Affirming the grant of the injunction, the Dallas Court of Appeals held that a showing of imminent harm was not necessary to obtain an injunction in this case; rather, it was necessary only to show that the intended act would breach the covenant requiring submission of plans to the architectural control committee.

Voice of Cornerstone Church v. Pizza Property Partners[266] involved the construction of a church on land subject to a restrictive covenant requir-

263. *Id.* at 569.
264. 167 S.W.3d 341 (Tex. App.—San Antonio 2005, no pet. h.).
265. 153 S.W.3d 702 (Tex. App.—Dallas 2005, no pet. h.).
266. 160 S.W.3d 657 (Tex. App.—Austin 2005, no pet. h.).

ing commercial or light industrial use. The original grantor of the property brought the claim to enforce the covenant. Finding that the proposed church construction was in violation of the restrictive covenant, the court of appeals rejected the appellant church's argument that the enforcement of the restrictive covenant violated the church purchaser's state constitutional right to religious freedom and expression. The court noted that the restriction applied equally to the religious activities of all denominations and faiths. The appellate court also rejected arguments that the church activities were merely incidental to the commercial use of the property (repair shop and printing press that raised money for the church) and that the covenant in question did not specifically exclude church uses from appropriate uses.

E. HOMESTEAD

In *Harleaux v. Harleaux*, the court acknowledged the special protections afforded to the homestead under the Texas Constitution in holding that a trial court could not award the payment of attorney's fees from the proceeds of the sale of the homestead.[267]

IX. BROKERS

A couple of notable cases involving real estate brokers were decided during the reporting period of this Article.

In *American Garment Properties, Inc. v. CB Richard Ellis-El Paso, L.L.C.*,[268] the El Paso Court of Appeals considered whether a purported oral modification reducing a broker's commission from the amount specified by written agreement was subject to the statute of frauds provisions contained in section 20(b) of the Texas Real Estate License Act.[269] In this case, both a commission agreement and a real estate purchase agreement stated that the broker would receive a commission equal to 6% of the purchase price. The seller asserted that the commission had been reduced by mutual oral agreement. The seller argued that the statute of frauds should apply to the broker, but not to the public from whom the broker was attempting to collect a commission. The court of appeals rejected the seller's interpretation and held that the Real Estate License Act's statute-of-frauds provisions applied equally to oral modifications of commission agreements to the public and brokers. Therefore, the purported oral modification was held to be of no effect.

Declining to follow the Texarkana Court of Appeals,[270] the Fourteenth District Court of Appeals, in *Northborough Corporate Limited Partnership, L.L.P. v. Cushman & Wakefield of Texas, Inc.*,[271] held that section 1101.652(b)(12) of the Texas Occupations Code did not preclude a

267. 154 S.W.3d 925 (Tex. App.—Dallas 2005, no pet. h.).
268. 155 S.W.3d 431 (Tex. App.—El Paso 2004, no pet. h.).
269. *See* TEX. OCC. CODE § 1101.806(c) (Vernon 2004).
270. *See* Perl v. Patrizi, 20 S.W.3d 76 (Tex. App.—Texarkana 2000, pet. denied).
271. 162 S.W.3d 816 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).

broker from enforcing a commission agreement that did not contain a termination date. That statute allows the Texas Real Estate Commission to suspend or revoke a broker's license if the broker fails to specify a definite termination date in a commission agreement. Unlike the statute of frauds provisions, which explicitly impose requirements for the enforceability of a commission agreement, section 1101.652(b)(12) deals solely with the suspension or revocation of a broker's license. Because nothing in that section contains a mandate concerning a broker's ability to maintain an action, the Fourteenth District Court of Appeals held that a commission agreement lacking a termination date was enforceable.

X. CONSTRUCTION CONTRACTS, MECHANICS LIEN, AND CONSTRUCTION ISSUES

In *Tarrant County Hospital District v. GE Automation Services, Inc.*,[272] the court resolved the issue of whether the economic-loss rule is an affirmative defense for which a defendant bears the burden of proof. The economic-loss rule precludes recovery of economic losses in tort if the loss is the subject matter of a contract between the parties. If the injury is only the economic loss that comprises the subject of a contract itself, the action sounds in contract alone.

In this economic-loss case, the plaintiff hospital district filed suit against the defendant contractor for breach of warranty, products liability, negligence, and gross negligence related to the defendant's failure to provide and construct a safe and reliable power-supply system. The trial court granted the defendant's summary judgment that dismissed plaintiff's tort claims, as the damages alleged were damages from the economic loss to the subject of the contract between the parties. The appellate court affirmed. The court further held that the economic-loss rule is not an affirmative defense within the meaning of Texas Rule of Civil Procedure 94 but a court-adopted rule for interpreting whether a party is barred from seeking damages in an action for tort injuries resulting from a contract between the parties.[273]

In *Wesco Distribution, Inc. v. Westport Group, Inc.*,[274] the court analyzed whether a subcontractor's failure to tender payment to a material supplier substantially complied with the requisite notice provisions of the Texas Property Code to perfect a materialman's lien since the notice was mailed to the general contractor and returned. Wesco Distribution, Inc. was a material supplier to J&D Electric, a subcontractor for a project on which Westport Group, Inc. was the general contractor. On July 11, 2001, Wesco attempted to send notice to Westport of J&D's failure to pay for materials furnished. The post office returned the notice to Wesco for insufficient postage. On July 25, 2001, Wesco added postage and again mailed its notice. On July 19, 2001, Westport, having not received notice

272. 156 S.W.3d 885 (Tex. App.—Fort Worth 2005, no pet. h.).
273. *Id.* at 895-96.
274. 150 S.W.3d 553 (Tex. App.—Austin 2004, no pet. h.).

of Wesco's claim, made a payment to J&D.[275]

The court held that, even though the materialman's lien statute is liberally construed for the purpose of protecting laborers and materialmen, Wesco's attempt to properly mail the notice did not substantially comply with the statute. The court concluded that Wesco's notice did not satisfy the notice deadline mandated by the statute, and therefore, it did not perfect its mechanic's lien.[276]

In *Hassell Construction Co., Inc. v. Stature Commercial Co., Inc.*,[277] a general contractor sought to avoid liability for payment to a subcontractor under a provision in the subcontract, which stated that the subcontractor's payment from the general contractor was contingent upon payment to the general contractor by the owner. The court held that in order to avoid liability in this basis, the general contractor must specifically plead the relative language of the contract as an affirmative defense under Texas Rule of Civil Procedure 94.

In a case of first impression, the court in *Advanced Temporaries, Inc. v. Reliance Surety Co.*[278] analyzed whether a temporary-employment agency that provided employees to a subcontractor was entitled to the protections afforded laborers and materialmen under the mechanic's-lien statute. The Texas mechanic's-lien statute affords protection to those furnishing labor and materials in the construction of improvements to real property. Chapter 53 of the Texas Property Code defines "labor" as "labor used in the direct prosecution of the work."[279]

The factors to be considered in determining whether a temporary-employment agency furnished labor "in direct prosecution of the work" include: the temporary-employment agency's involvement in selecting and screening the workers for hire; the agency's use of its own criteria for hiring the workers; the agency's affirmative representations to the workers that it is their employer; the nature of documentation exchanged between the workers and the agency at the start of the working relationship; the agency's involvement in training, supervising, and disciplining the workers and otherwise retaining control over the workers or directing their behavior; whether the agency, rather than the contractor, determined which workers could be terminated; and whether the agency withheld workers rather than services on nonpayment by the contractor.[280]

The court held that Advanced Temporaries, Inc. furnished "labor in direct prosecution of the work" and therefore, was entitled to the protections under the mechanic's-lien statute, as it recruited carpenters and laborers to work on the project, qualified the workers by verifying legal documentation, hired all the workers as its own employees, and provided all workers compensation, unemployment insurance, and general-liability

275. *Id.* at 555.
276. *Id.* at 556-61.
277. 162 S.W.3d 664 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).
278. 165 S.W.3d 1 (Tex. App.—Corpus Christi 2004, pet. granted).
279. TEX. PROP. CODE § 53.001 et seq. (Vernon 1995).
280. *Advanced Temps.*, 165 S.W.3d at 6.

insurance. In addition, all workers hired by Advanced received paychecks from Advanced.[281]

In *Palladian Building Co., Inc. v. Nortex Foundation Designs, Inc.*, the court held that if suit is brought against a "design professional" under section 150 of the Texas Civil Practice and Remedies Code and the plaintiff fails to file the requisite affidavit of a third-party design professional, it is within the trial court's discretion whether to dismiss the case with or without prejudice.[282]

In *In re Kellogg Brown & Root, Inc.*,[283] the Texas Supreme Court addressed the issue of whether a non-signatory to an arbitration agreement can be compelled to arbitrate. In October of 1999, MacGregor (USA) entered into a contract with Ingalls Shipbuilding to build elevator trunks for cruise ships. Subsequently, MacGregor (USA) assigned the contract to MacGregor (FIN). MacGregor (FIN) subcontracted a portion of the work to Unidynamics. The subcontract between MacGregor (FIN) and Unidynamics (the "Fabrication Subcontract") contained an arbitration provision that stated any dispute arising from the contract "shall be settled by arbitration."[284] Unidynamics then entered into a second-tier subcontract with Kellogg Brown & Root ("KBR") under which KBR would furnish labor and materials in the construction of the elevator trunks. The subcontract between Unidynamics and KBR did not contain an arbitration provision.

In 2001, the buyer of the cruise ships declared bankruptcy. Thereafter, Ingalls directed MacGregor (FIN) to cease work. MacGregor (FIN) then directed Unidynamics and KBR to cease work under their respective subcontracts. KBR then sent invoices to Unidynamics for labor and materials furnished before the work stopped. Further, because KBR had not been paid, it asserted liens on the elevator trunk and other materials. A dispute arose between MacGregor (FIN) and Unidynamics as to who owed KBR for its labor and materials furnished in the construction of the elevator trunks.[285]

In May of 2002, MacGregor (FIN) asked that its dispute with Unidynamics be resolved through arbitration as set forth in the Fabrication Subcontract. Unidynamics and MacGregor commenced arbitration. As the arbitration proceeded, KBR filed suit in Harris County, Texas. MacGregor (FIN) filed a motion to abate the state-court action and a motion to compel KBR to pursue its claims in the ongoing arbitration. The trial court denied MacGregor's motions, but the court of appeals granted mandamus relief and ordered the trial court to enter an order compelling KBR to arbitrate its claims in the arbitration proceedings.[286]

281. *Id.*
282. 165 S.W.3d 430 (Tex. App.—Fort Worth 2005, no pet. h.).
283. 166 S.W.3d 732 (Tex. 2005).
284. *Id.* at 735.
285. *Id.*
286. *Id.* at 736.

The Texas Supreme Court analyzed whether KBR could be compelled to arbitrate its claims based on the federal doctrine of "direct benefits estoppel." The doctrine of direct-benefits estoppel recognizes that a party may be estopped from asserting that the lack of his signature precludes enforcement of the contract's arbitration clause if he has consistently maintained that other provisions of the same contract should be enforced to benefit him. The primary issue before the court was whether KBR could be compelled to bring its quantum meruit claim in arbitration.[287]

The court held that although a non-signatory's claim may relate to a contract containing an arbitration provision, that relationship does not in itself bind the non-signatory to the arbitration provision. The court further held that a non-signatory should be compelled to arbitrate only if it seeks, through the claim, to derive a direct benefit from the contract containing the arbitration provision. The court found that in its quantum meruit claim, KBR sought payment from MacGregor for services furnished under KBR's contract with Unidynamics, which did not contain an arbitration provision. Therefore, KBR's quantum meruit claim was not subject to arbitration.[288]

XI. AD VALOREM TAXATION

In *Henry v. Kaufman County Development District No. 1*,[289] a group of homeowners brought a declaratory-judgment action challenging the validity of special assessments levied by the county development district to pay for certain infrastructure improvements. The Austin Court of Appeals held, among other things, that the homeowners were not required to exhaust administrative remedies before asserting their declaratory-judgment action because the issue of whether assessments are validly levied under statutory authority is purely a question of law. Further, the County Development District Act, which created the county development district, did not incorporate the "procedures" or "remedies" provisions of the Texas Local Government Code. After determining that the homeowners' action was valid, the court of appeals ruled in favor of the homeowners, holding that the county development district lacked the statutory authority to levy special assessments. The court of appeals explained that the power to tax may only be exercised by a political subdivision if the power has been "expressly" conferred by constitution or legislation. The county development district argued that the County Development District Act gave it the power to levy special assessments because it gave county development districts the same powers as municipal management districts, and municipal management districts were given such power. The court, however, held that, since the Act did not *ex-*

287. *Id.* at 737.
288. *Id.* at 740-41.
289. 150 S.W.3d 498 (Tex. App.—Austin 2004, pet. granted).

pressly give county development districts the power to levy special assessments, the district was barred from doing so as a matter of law.

In *National Medical Financial Services, Inc. v. Irving Independent School District*,[290] the Dallas Court of Appeals held that, once the taxing authority, in a suit to collect a delinquent real-property tax, introduces its current tax roll or certified copies of the entries showing the property and the amount of tax and penalties imposed and interest accrued, such records establish a prima facie case that the taxes in question are due, delinquent, and unpaid. If such a case is made, it is assumed that the taxpayer owned the property on January 1 of the year for which the tax was imposed. The burden then shifts to the taxpayer to show, by introducing competent evidence, that he has paid the full amount of the taxes, penalties, and interest, or that there is some other defense that applies to his case.

In *City of Heath v. Duncan*,[291] owners of certain property in a subdivision brought an action seeking injunctive relief against the city for its proposed construction of a park and water tower in the subdivision. The city filed a motion to dismiss for want of jurisdiction, claiming that the property owners lacked standing. The Dallas Court of Appeals affirmed the lower court's ruling that the property owners had standing, holding that the property owners had "taxpayer standing" to challenge the city's expenditure of public funds to construct a water tower on property previously dedicated for a municipal park. Specifically, the property owners claimed that the expenditure was illegal in that the Texas Parks and Wildlife Code required notice and a public hearing before park land could be converted to another type of use. Thus, the court held that the property owners had standing to sue in equity to enjoin the illegal expenditure of public funds. According to the court, such a suit is a "long-established" exception to the requirement that a taxpayer establish a particularized injury in order to have standing to challenge government action.

In *Gilmer Independent School District v. Dorfman*, the Tyler Court of Appeals held that the Commissioner of Education is an indispensable party and, therefore, must be joined to any suit challenging the constitutionality of Chapters 41 and 42 of the Texas Education Code because he is the official with primary responsibility for Code enforcement.[292]

In *Jordan v. Bustamante*,[293] the Fourteenth District Court of Appeals held, among other things, that a tax sale is not void simply because the tax authority fails to join a government entity that has a lien against the property to the suit to prosecute the delinquent taxes. Rather, the purchaser of the property takes the property subject to the government entity's lien. The court of appeals also held that prior owners of lands sold

290. 150 S.W.3d 901 (Tex. App.—Dallas 2004, no pet. h.).
291. 152 S.W.3d 147 (Tex. App.—Dallas 2004, pet. denied).
292. 156 S.W.3d 586 (Tex. App.—Tyler 2003, no pet.).
293. 158 S.W.3d 29 (Tex. App.—Houston [14th Dist.] 2005, pet. denied). *See* discussion *supra* Section VIIIA in adverse possession.

at tax sales do not have standing to complain, in a trespass-to-try-title action with the purchaser of the lands, of any alleged injury to the State or the Internal Revenue Service due to the failure of the taxing unit to join them as parties to the suit to prosecute the delinquent taxes. Finally, the court of appeals held that a purchaser of lands at a tax sale is not required, in a trespass-to-try-title action with the prior owners of the lands, to introduce the tax judgment and order of sale in order to rely on the one-year statute of limitations that applies to actions challenging title to real estate conveyed in tax sales.

In *MAG-T, L.P. v. Travis Central Appraisal District*,[294] several taxpayers brought suit against the appraisal district, appraisal review board, and tax-assessor collector, seeking a declaratory judgment that the taxing authorities improperly increased taxes after the appraisal roll had already been certified. Since the taxing authorities have exclusive jurisdiction over tax disputes, the court of appeals held that the taxpayers were not excused from exhausting their administrative remedies before seeking judicial review of the complained-of activity. The court of appeals also held that the alleged defects in notice of the new taxes did not violate due process in such a way as to allow the taxpayers to avoid exhausting their administrative remedies before seeking judicial review. Finally, the court of appeals held that the taxpayers were not excused from exhausting their administrative remedies before seeking judicial review because the remedies offered by the Tax Code were "inadequate" or that the questions raised were "pure questions of law."

In Strayhorn v. Willow Creek Resources, Inc.,[295] the Austin Court of Appeals held that an informal review of a corporation's tax-refund claim was an "administrative proceeding" for purposes of a statute that tolled the statute of limitations for filing a refund claim.

In Interstate Apartment Enterprises, L.C. v. Wichita Appraisal District,[296] a taxpayer brought a declaratory-judgment action, seeking a declaration that the valuation for its apartment complex was void due to the appraisal district's failure to give notice of the valuation increase and the district's provision of misleading information regarding which remedy to pursue. The taxpayer also requested a refund, claiming that the taxes should have been assessed and levied based on a prior valuation. The trial court dismissed the action for lack of jurisdiction based on the taxpayer's failure to exhaust administrative remedies. On appeal, the Fort Worth Court of Appeals affirmed the dismissal order pertaining to jurisdiction over the lack-of-notice issue, but reversed the part of the dismissal order pertaining to jurisdiction over the overvaluation of the apartment complex. The court of appeals explained that the trial court had jurisdiction over the overvaluation claim because the taxpayer filed a motion to correct the appraisal roll. Accordingly, the trial court could decide

294. 161 S.W.3d 617 (Tex. App.—Austin, pet. denied).
295. 161 S.W.3d 716 (Tex. App.—Austin 2005, no pet. h.).
296. 164 S.W.3d 448 (Tex. App.—Fort Worth 2005, no pet. h.).

whether the appraisal review board properly denied the taxpayer's motion.

In Matagorda County Appraisal District v. Coastal Liquids Partners, L.P.,[297] the Texas Supreme Court held that some aspects of real property can be taxed separately even though all are part of the same surface tract. As a result, the appraisal district was allowed to value underground salt-dome caverns created to store liquid hydrocarbons separately from the value of the surface estate. The supreme court also held that the appraisal district's listing of the underground salt-dome hydrocarbon-storage caverns as "Improvements" or "Other" was not double taxation, despite the allegation that caverns did not fall within any of the six categories of real property. The supreme court reasoned that that Tax Code did not expressly require real property to fit into any of the six categories, and the caverns, which were man-made, could be treated like improvements, much like any above-ground storage facility.

In American Housing Foundation v. Brazos County Appraisal District,[298] a community housing-development organization controlled 100% of the general partner of the limited partnership, which owned low-income housing apartments. The Waco Court of Appeals held that the community housing-development organization was not entitled to a property-tax exemption under Texas Tax Code section 11.182 because the organization was not the "record owner" of the apartments, as the statute required.

XII. ENTITIES

In *Kenworthy v. Kenworthy Corporation*,[299] several limited partners of a limited partnership sued the sole general partner, seeking dissolution of the limited partnership. After the suit for dissolution had been pending for more than 120 days, the limited partners moved for, and the trial court granted, partial summary judgment on the ground that, under section 4.02(a)(5) of Article 6132a-1 of the Texas Revised Limited Partnership Act,[300] the general partner ceased to be the general partner upon the passage of more than 120 days without the dismissal of the lawsuit resulting in the dissolution of the limited partnership. Section 4.02(a)(5) of Article 6132a-1 of the Texas Revised Limited Partnership Act provides that "[a] person ceases to be a general partner of a limited partnership on the occurrence of any of the following events of withdrawal . . . (5) 120 days expire after the date of the commencement of a preceding against the general partner seeking reorganization, arrangement, composition, readjustment, liquidation, dissolution, or similar relief under any law if the proceeding has not been previously dismissed. . . ."[301] The appellate

297. 165 S.W.3d 329 (Tex. 2005).
298. 166 S.W.3d 885 (Tex. App.—Waco 2005, pet. filed).
299. 149 S.W.3d 296 (Tex. App.—Eastland 2004, pet. denied).
300. TEX. REV. CIV. STAT. ANN. art. 6132a-1, § 4.02(a)(5) (Vernon Supp. 2004-05).
301. *Id.*

court reversed the trial court's determination and held that section 4.02(a)(5) of Article 6132a-1 of the Texas Revised Limited Partnership Act did not apply to lawsuits against a general partner to dissolve the limited partnership, but rather only to actions against the general partner for the dissolution or reorganization of the general partner.

In *Apcar Investment Partners VI, Ltd. v. Gaus*,[302] Apcar, a commercial landlord, filed suit for breach of lease against its tenant, Smith & West, L.L.P., a Texas limited liability partnership, and Gaus and West, two of the partners of Smith & West, L.L.P., individually. The trial court granted summary judgment to Gaus and West on the ground that, as partners in a registered limited liability partnership, they were not individually liable for the partnership's obligations under the lease. The court of appeals, however, reversed the determination of the trial court, holding that the partners were individually liable because Smith & West, L.L.P. failed to comply with the statutory annual renewal requirements imposed by Article 6132b-3.08(a)(1) of the Texas Revised Partnership Act[303] and had entered into the lease three years after the partnership's status as a registered limited liability partnership expired. Relying on cases involving the statutory filing requirements for limited partnerships, Gaus and West argued that the limited liability partnership was not required to strictly comply with the statutory renewal requirements to maintain its status as a *registered* limited liability partnership and to protect the partners from individual liability. The court of appeals disagreed, stating that the Texas Revised Partnership Act clearly provides that a partner in a *registered* limited liability partnership is not individually liable for debts and obligation incurred while the partnership is a *registered* limited liability partnership and that registration expires after one year unless renewed before the expiration date. The court of appeals also noted that the statute does not contain a substantial-compliance provision or a grace period for filing for renewal. Because Smith & West, L.L.P. was not a registered limited liability partnership when it made and entered into the lease, Gaus and West were not protected from individual liability for the lease obligations.[304]

In *Emmett Properties, Inc. v. Halliburton Energy Services, Inc.*,[305] the court of appeals held that the reinstatement of a dissolved corporation to active status did not revive the corporation's claims that were extinguished under Article 7.12 of the Texas Business Corporation Act.[306] Emmett filed a lawsuit against Halliburton more than three years after Emmett had forfeited its corporate charter under the Texas Tax Code for delinquent franchise taxes. The Court of Appeals noted that Article 7.12 of the Texas Business Corporation Act provides that (i) an existing claim by a "dissolved corporation" is extinguished unless an action or proceed-

302. 161 S.W.3d 137 (Tex. App.—Eastland 2005, no pet. h.).
303. TEX. REV. CIV. STAT. ANN. art. 6132b-3.08(a)(1) (Vernon Supp. 2004-05).
304. *Id.* at 139-42.
305. 167 S.W.3d 365 (Tex. App.—Houston [14th Dist.] 2005, pet. denied).
306. TEX. BUS. CORP. ACT ANN. art 7.12, § C (Vernon 2003).

ing on the existing claims is brought within three years of dissolution, and (ii) a "dissolved corporation" includes a corporation whose charter is forfeited under the Texas Tax Code, unless the forfeiture has been set aside. The court of appeals rejected Emmett's argument that the subsequent reinstatement of its corporate charter and privileges, after payment of its delinquent taxes four and a half years after its forfeiture, revived the extinguished claims. The court noted that there is no statutory provision reversing the extinguishment of claims under Article 7.12 of the Texas Business Corporation Act. Further, the Texas Tax Code provides that a corporation's corporate privileges and charter are restored upon the payment of delinquent taxes, but does not provide that the corporation's extinguished claims are revived.[307]

In *Reagan v. Lyberger*,[308] the court of appeals affirmed the trial court determination that a partnership existed between Mike Anderson, a house contractor, and Mike Reagan, his accountant, with regard to the construction of the Lyberger's home. Citing the Texas Revised Partnership Act, the Dallas Court of Appeals noted that the factors indicating the creation of a partnership include: (1) receipt or right to receive a share of profits of the business; (2) expression of intent to be partners in the business; (3) participation or right to participate in control of the business; (4) sharing or agreeing to share losses of the business or liability for claims by third parties against the business; and (5) contributing or agreeing to contribute money or property to the business. Not all of these factors need to be present for a partnership to exist, and no one factor is dispositive. The appellate court found that because Lyberger had presented evidence that factors (2), (3), and (5) existed between Reagan and Anderson when their house was being built, the evidence was sufficient to support a jury's finding that Regan and Anderson were engaged in a partnership as to construction of the Lyberger's home.[309]

However, in *Tierra Sol Joint Venture v. City of El Paso*,[310] the El Paso Court of Appeals reversed the trial court determination that Robert Samuel was a partner in a joint venture. Citing a Texas Supreme Court case, the court of appeals stated that that there are four required elements of a partnership: (1) a community of interest in the venture; (2) an agreement to share profits; (3) an agreement to share losses; and (4) a mutual right of control or management of the enterprise. A finding of a partnership cannot be upheld if there is no evidence of any one of these elements.[311] The court of appeals found that because there was no evidence of an agreement to share profits or losses or of a mutual right of control or management of the enterprise, Samuel was not a partner in the joint venture.

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307. TEX. TAX CODE ANN. §§ 171.312-.313 (Vernon Supp. 2003).
308. 156 S.W.3d 925 (Tex. App.—Dallas 2005, no pet. h.).
309. *Id.* at 928.
310. 155 S.W.3d 503 (Tex. App.—El Paso 2004, pet. denied).
311. *Id.* at 507-08 (citing Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171, 176 (Tex. 1997).

XIII. INDEMNITIES

In *Oxy USA, Inc., v. Southwestern Energy*,[312] the court of appeals reversed the trial court's grant of summary judgment to Southwestern Energy Production Company, the indemnitor. Oxy USA and Southwestern Energy had entered into an oil-prospecting agreement for a particular tract of land known as the Bouré Project. Southwestern Energy subsequently entered into several contractual arrangements for the Bouré Project with third parties that were inconsistent with the Oxy USA agreement. In order to continue the oil-exploration agreement between Southwestern Energy and Oxy USA, Southwestern Energy agreed to honor only its agreement with Oxy USA with respect to the Bouré Project and to indemnify Oxy USA for claims by the third parties. Certain third parties sued Oxy USA, claiming tortious interference with a contract, conversion, and abuse of rights, and Oxy USA demanded that Southwestern Energy defend and indemnify Oxy USA under the indemnity agreement. Southwestern Energy originally agreed, but later refused, claiming that the indemnity agreement was unenforceable based on the fair-notice doctrine, public policy, and other claims. The court of appeals first upheld prior rulings that the fair-notice doctrine applies only to indemnities against future actions, not past actions. Interestingly, the court of appeals was reluctant to extend the fair-notice doctrine to cases in which the parties were large sophisticated companies with relatively equal bargaining power. The appellate court then found that the indemnity agreement did not violate public policy. Southwestern Energy argued that agreements relieving a party of financial responsibility for its actions would encourage behavior detrimental to society, and thus, such agreements were unenforceable as against public policy. The appellate court found that such arguments were inapplicable because the agreement pertained only to actions that occurred before the indemnity agreement and because the underlying rationale of the indemnity agreement was that the indemnitee would be held harmless from the misconduct of the indemnitor. The appellate court therefore held that the indemnity agreement was enforceable against Southwestern Energy and granted Oxy USA's summary-judgment motion.[313]

XIV. MISCELLANEOUS

A. NUISANCE/TRESPASS

In *Schneider National Carriers, Inc. v. Bates*,[314] a number of residents living near the Houston Ship Channel brought suit, complaining of a number of conditions created by industrial plants, including air contaminants, odors, lights, and noise. While the plaintiffs asserted a number of causes of action, the issue presented to the Texas Supreme Court was

312. 161 S.W.3d 277 (Tex. App.—Corpus Christi 2005, pet. filed).
313. *Id.* at 283-87.
314. 147 S.W.3d 264 (Tex. 2004).

whether the plaintiffs' nuisance claims were barred by the two-year statute of limitations.[315] Under Texas law, "[a] permanent nuisance claim accrues when injury *first* occurs or is discovered; a temporary nuisance claim accrues *anew* upon each injury."[316] Accordingly, the application of the statute of limitations to nuisance claims turns on whether the alleged activities are "permanent" or "temporary" nuisances.

A permanent nuisance involves "an activity of such character and existing under such circumstances that it will be presumed to continue indefinitely," and therefore, the injury from such activity "constantly and regularly recurs."[317] Conversely, a temporary nuisance is of "limited duration," and it is "uncertain if any future injury will occur, or if future injury is liable to occur only at long intervals."[318] While these definitions are seemingly straightforward, the Texas Supreme Court noted that a number of cases with similar facts have resulted in very different results,[319] theorizing that half of those cases must have been decided incorrectly because "they are simply unreconcilable."[320] The court undertook a lengthy discussion of the history of classifying a nuisance as either permanent or temporary and concluded that the distinction "should be applied using the same standard of reference that applies to the consequences flowing from it."[321] Therefore, a nuisance is permanent if the nuisance occurs several times in the years leading up to trial and is likely to continue, thereby providing enough evidence as to frequency and duration of the alleged activity as to allow jurors to reasonably evaluate the impact of such activity on the neighboring property values. Conversely, a nuisance is temporary only if it is so irregular or intermittent over the period leading up to trial that the future impact remains speculative and cannot be estimated with reasonable centrality.

When applying these definitions to the case at bar, the Texas Supreme Court noted that affidavits submitted in support of the plaintiffs' claims generally described nuisances that were "continuous," "ongoing," "regular," and "frequent."[322] Other characterizations of the alleged nuisances included adjectives such as "constantly" or "always."[323] While differences apparently existed regarding how often the conditions allegedly in-

315. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2005).
316. *Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 270 (emphasis in original).
317. *Id.* at 272.
318. *Id.*
319. *Compare* Kraft v. Langford, 565 S.W.2d 223 (Tex. 1978); City of Amarillo v. Ware, 40 S.W.2d 57 (Tex. 1931); Parsons v. Uvalde Elec. Light Co., 163 S.W. 1 (Tex. 1914); Rosenthal v. Taylor, B. & H. Ry. Co., 15 S.W. 268 (Tex. 1891); City of Lubbock v. Tice, 517 S.W.2d 428 (Tex. Civ. App.—Amarillo 1974, no writ); Meat Producers, Inc. v. McFarland, 476 S.W.2d 406 (Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.); Gulf Coast Sailboats, Inc. v. McGuire, 616 S.W.2d 385 (Tex. Civ. App.—Houston [14th Dist.] 1981, writ ref'd n.r.e.); Youngblood's Inc. v. Goebel, 404 S.W.2d 617 (Tex. Civ. App.—Waco 1966, writ ref'd n.r.e.).
320. *Schneider Nat'l Carriers, Inc.*, 147 S.W.3d at 274.
321. *Id.* at 280.
322. *Id.* at 290.
323. *Id.*

terfered with the plaintiffs' use and enjoyment of their respective properties, the nuisances consistently existed for many years beyond the two-year period preceding the suit, and none of the conditions were so sporadic or unpredictable that a jury would have to speculate as to their effect on the plaintiffs' property values. Accordingly, the court held that the nuisances alleged by the plaintiffs were permanent nuisances and, as a matter of law, barred by the statute of limitations.

B. Professional Responsibility

In *In re Cerberus Capital Management, L.P.*,[324] WSNet Holdings, Inc. hired a law firm to draft an asset purchase agreement for the purchase of certain assets of Classic Communications, Inc. The firm prepared the agreement, but WSNet instructed the firm that all work on the matter should cease. A year later, a WSNet shareholder instituted a shareholder derivative suit against the relators, alleging that the relators had usurped WSNet's corporate opportunity to purchase the assets of Classic Communications, Inc. The relators contacted the firm regarding representation. The firm asked WSNet if they would waive any potential conflict, and they agreed verbally and in writing. WSNet later filed bankruptcy, and the trustee sought to have the firm disqualified, claiming that the waiver letter signed by WSNet was ineffective because it did not fully disclose the conflict. The trial court ordered disqualification, and the firm sought a writ of mandamus. The Texas Supreme Court held that the conflict was fully and accurately described in the waiver letter, and the writ was therefore granted.

In *Industrial Clearinghouse, Inc. v. Jackson Walker, L.L.P.*,[325] Jackson Walker represented Coastal Plains, Inc. in a prior bankruptcy proceeding. While that case was pending, Industrial Clearinghouse, Inc. purchased several of Coastal's assets, including its causes of action against Browning Manufacturing, Coastal's biggest supplier. Industrial Clearinghouse pursued the Browning causes of action, but the claims were judicially estopped because Coastal never disclosed the Browning claims in its bankruptcy schedules. Industrial Clearinghouse then brought suit against Jackson Walker, alleging that Jackson Walker was (i) negligent in failing to disclose the Browning claims in bankruptcy court and (ii) negligent in assisting Industrial Clearinghouse in the purchase of the Browning claims. The trial court entered summary judgment in favor of Jackson Walker, and Industrial Clearinghouse appealed. Industrial Clearinghouse acknowledged that the bankruptcy estate initially owned the malpractice claims against Jackson Walker, but claimed that the malpractice claims were abandoned to them as Coastal's successor. They relied on section 554(c) of the Bankruptcy Code, which provides that any property scheduled under section 521(1) and not otherwise administered at the time of

324. 164 S.W.3d 379 (Tex. 2005).
325. 162 S.W.3d 384 (Tex. App.—Dallas 2005, pet. denied).

the closing of the case is automatically abandoned to the debtor.[326]

The court of appeals disagreed and affirmed the trial court judgment. The appellate court ruled that the only property required to be scheduled under section 521(1) is property owned by the debtor when the bankruptcy is filed.[327] The malpractice claims arose after the bankruptcy was filed, so they remained the property of the bankruptcy estate. In addition, Industrial Clearinghouse failed to show that Jackson Walker's actions were the proximate cause of Industrial Clearinghouse's failure to prevail on the Browning claims; therefore, Industrial Clearinghouse could not recover under its claim that Jackson Walker was negligent in assisting in the purchase of the Browning claims.

In *Greenberg Traurig of New York v. Moody*,[328] Greenberg Traurig agreed to represent Integrated Food Technologies Corporation ("IFT") in connection with general corporate affairs, an initial public offering, and other securities matters. Several investors were then persuaded to invest in IFT based on certain misrepresentations made by IFT's chief executive officer. IFT later filed for bankruptcy protection, and the investors sued Greenberg on claims of violations of Texas security laws, Texas statutory fraud, common-law fraud, and conspiracy. The trial court ruled in favor of IFT on all claims, and Greenberg appealed. The court of appeals held that it was incorrect for the trial court to apply Texas law to the investors' claims, and that, under the "most significant relationship test" contained in the Restatement (Second) of Conflicts of Laws,[329] New York law should have been applied. Under New York law, there is no private claim for statutory securities fraud, a Texas statutory fraud claim under section 27.01 of the Texas Business and Commerce Code was not applicable, and there can be no recovery for common-law fraud in the absence of a fiduciary relationship. Accordingly, those portions of the verdict were reversed, and the court rendered judgment that the investors take nothing. Although there was legally sufficient evidence to support the jury's finding of a conspiracy between Greenberg and IFT, the appellate court held that the trial court erred in submitting certain expert testimony and that the error was harmful. Thus, this portion of the verdict was accordingly reversed and remanded for new trial.

In *Oscar M. Telfair, III, P.C. v. Bridges*,[330] the law firm of Oscar M. Telfair, III, P.C. represented Merita and Marvin Bridges in connection with a personal-injury claim and another unrelated lawsuit. Telfair later sued the Bridges over a fee dispute in the unrelated matter, and the Bridges counterclaimed, alleging that Telfair misappropriated settlement funds obtained by Telfair on the Bridges' behalf in the personal-injury matter. The trial court awarded the Bridges damages and attorney's fees

326. 11 U.S.C. § 554(c).
327. *See* 4 COLLIER OF BANKRUPTCY ¶ 521.06[3][a] (15th rev. ed. 2002).
328. 161 S.W.3d 56 (Tex. App.—Houston [14th Dist.] 2004, no pet. h.).
329. *Id.* at 70 (citing RESTATEMENT (SECOND) OF CONFLICTS OF LAW § 6 (1971).
330. 161 S.W.3d 167 (Tex. App.—Eastland 2005, no pet. h.).

on the counterclaim, and Telfair appealed. The Eastland Court of Appeals reversed the award of attorney's fees because there was no legal basis for the awarding of attorney's fees. The general rule is that attorney's fees are not recoverable unless allowed by contract or statute.[331] There is a narrow equitable exception to the general rule, but it only applies when a wrongful act requires the claimant to incur attorney's fees in prior litigation involving a third party.[332] Since the Bridges were seeking attorney's fees in the original litigation with the party alleged to have committed the wrongful act, their claim for attorney's fees did not fall within the equitable exception. The court also held that the Bridges were not entitled to recover their attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code because they had brought a conversion claim, which is not a cause of action under the statute for which attorney's fees are recoverable.[333]

In *Wilborn v. GE Marquette Medical Systems, Inc.*,[334] and *Wilborn v. Life Ambulance Services, Inc.*,[335] the Estate of Edward Wilborn sued various defendants on claims arising out of Edward Wilborn's death. The Estate was represented by two attorneys, one of which withdrew before trial. The Estate filed a motion for continuance with respect to a motion for summary judgment hearing, contending that when the Estate's attorney withdrew, the trial court had to allow the Estate thirty days to find a new attorney. The trial court denied the motion, and the Estate appealed. Since the order allowing the withdrawal did not reference any time limit to retain new counsel, and inasmuch as the Estate was at no time unrepresented by counsel (since only one of their two attorneys withdrew from the case), the El Paso Court of Appeals held that the trial court did not abuse its discretion in denying the motion for continuance.

In *Law Offices of Windle Turley, P.C. v. French*,[336] the law of firm of Windle Turley sued certain former clients to recover attorney's fees incurred in connection with a medical-malpractice claim. The former clients filed various counterclaims and moved for sanctions. The trial court awarded the former clients the requested sanctions and contingent appellate attorney's fees (in the event that the former clients unsuccessfully appealed the final judgment). Windle Turley appealed, and the Dallas Court of Appeals affirmed the trial court's judgment. Windle Turley originally filed suit in the Tarrant County court. When it became apparent to Windle Turley that it was going to lose in that trial court, Windle Turley then filed the same claims in the Dallas County court. Since the trial court could have determined that Windle Turley filed suit in Dallas County merely to circumvent an imminent adverse ruling in Tarrant County (an improper purpose for filing suit), the appellate court held that

331. *Id.* at 170.
332. *Id.*
333. TEX. CIV. PRAC. & REM. CODE ANN. § 38.001 (Vernon 1997).
334. 163 S.W.3d 264 (Tex. App.—El Paso 2005, pet. denied).
335. 163 S.W.3d 271 (Tex. App.—El Paso 2005, pet. denied).
336. 164 S.W.3d 487 (Tex. App.—Dallas 2005, no pet. h.).

the sanctions were proper.[337] The court also held that the conditional attorney's fees were not a monetary penalty against Windle Turley for exercising its legal rights because the award of attorney's fees was conditioned on the former clients' failure to obtain relief.

In *Advantage Physical Therapy, Inc. v. Cruse*,[338] Cruse represented Diana Kinnebrew in a suit to recover damages arising from a car accident. During the suit's pendency, Cruse sent an unsolicited letter of protection to Advantage Physical Therapy, stating that fees owed by Kinnebrew would be protected out of any recovery made in the suit. Cruse obtained a final judgment in the suit awarding payment of his legal fees, but no money was paid to Advantage. Advantage then sued for breach of the letter of protection. The trial court entered a take-nothing judgment in Cruse's favor, and Advantage appealed. The court of appeals affirmed the trial court ruling, holding that Cruse's original letter was merely an offer that Advantage never accepted.[339] Since the offer was never accepted, no contract was formed, and the letter of protection was therefore unenforceable.

C. Minerals

In *Ridge Oil Company, Inc. v. Guinn Investments, Inc.*,[340] two lessees, Guinn Investments, Inc. and Ridge Oil Company, obtained certain oil and gas interests through assignments under a 1937 oil and gas lease covering two adjoining 160-acre tracts of land. The producing well on the Guinn tract was plugged and abandoned in 1950, but two producing wells on the Ridge tract sustained the 1937 lease as to both the Ridge tract and the Guinn tract.[341] Ridge attempted to terminate the 1937 lease by shutting down the two producing wells and entering into new leases with the mineral-interest owners solely on the Ridge tract.[342]

Guinn contended that the 1937 lease had not terminated as to its tract because the cessation of well production was temporary. The issue was therefore whether a temporary cessation of production existed under the facts of the case.[343] Guinn first claimed that a lessee cannot surrender or terminate a lease or destroy the rights of another partial assignee of the lessee's interest. However, the Texas Supreme Court held that Ridge did not owe any duty to Guinn to continue the 1937 lease in effect, reasoning that Ridge is not Guinn's lessor and that no action taken by Ridge with regard to the Ridge tract had any impact on Guinn's ability to commence or maintain operations on the Guinn tract. Guinn could have continued the 1937 lease by drilling a well and obtaining production or continuing operations until production was obtained. The fact that new leases were

337. *Id.* at 492.
338. 165 S.W.3d 21 (Tex. App.—Houston [14th Dist.] 2005, no pet. h.).
339. *Id.* at 25-26.
340. 148 S.W.3d 143 (Tex. 2004).
341. *Id.* at 147.
342. *Id.* at 148.
343. *Id.* at 149.

executed on the Ridge tract had no effect on Guinn's ability to conduct such operations.[344]

Second, Guinn contended that the 1937 lease had not terminated as to the Guinn tract because Guinn had begun operations on such tract before the lease expired and was prevented from continuing those operations by Ridge's conduct.[345] Therefore, a fact question existed as to whether "operations were being carried on" sufficient to sustain the lease. The Texas Supreme Court found that a 25-day period, after production under the 1937 lease permanently ceased, in which Guinn conducted no activities to obtain production, as a matter of law, did not satisfy the requirement.[346]

In *Mission Resources Inc. v. Garza Energy Trust*,[347] the issue was whether "fracing" (or hydraulic fracturing) as a secondary method used to increase the production from oil and gas wells constituted a subsurface trespass under Texas law.[348] The Corpus Christi Court of Appeals stated that it did constitute a trespass. The court relied on *Gregg v. Delhi-Taylor Oil Co.*,[349] which held that fracing can constitute a subsurface trespass. In so relying, the court stated its belief that the supreme court's decision in that case was not merely dictum.[350] The Court of Appeals rejected the finding of its sister court in Texarkana, in *Geo Viking, Inc. v. Tex-Lee Operating Co.*,[351] which reached the opposite conclusion, stating that *Gregg* holds precedential value and remains the law.[352]

D. Lis Pendens

In *In re Collins, Fountain Mall, Inc., and Mall Group, Ltd., Realtors*,[353] former partners in a partnership that owned a shopping mall ("Collins") brought action against other partners and a party affiliated with the other partners ("Kest Parties"), alleging fraud and breach of fiduciary duty in connection with foreclosure on a mall and seeking a declaration that Collins owned 50% of the mall. Collins argued that he let the lender foreclose upon a mall that he and the Kest Parties owned as a result of a side agreement between Collins and the Kest Parties, which stated that, in the event that the Kest Parties purchased the mall at the foreclosure sale, Collins would retain its 50% ownership interest in the mall through the new purchasing entity. When the mall was purchased at foreclosure by the Kest Parties and no ownership interest was granted to Collins, Collins brought action and filed a *lis pendens* against the mall property. The Kest Parties argued that no such agreement was made and that Collins had no

344. *Id.* at 155.
345. *Id.* at 149.
346. *Id.* at 160.
347. 166 S.W.3d 301 (Tex. App.—Corpus Christi 2005, pet. filed).
348. *Id.* at 309.
349. 162 Tex. 26, 344 S.W.2d 411 (1961).
350. *Mission Res.*, 166 S.W.3d at 310.
351. 817 S.W.2d 357 (Tex. App.—Texarkana 1991), *rev'd by* 839 S.W.2d 797 (1992).
352. *Mission Res.*, 166 S.W.3d at 311.
353. 172 S.W.3d 287 (Tex. App.—Fort Worth 2005, no pet. h.).

interest in the property. The trial court granted the Kest Parties' motion to void the *lis pendens*. Collins filed for a writ of mandamus, alleging that the trial court had to look solely at the pleadings of the party who filed the notice of *lis pendens* to determine whether the party is claiming a direct or collateral interest in the real property at issue. If there is a question of fact regarding the nature of the alleged property interest, the court may not dismiss a *lis pendens*.[354] The court of appeals agreed, holding that if the evidence raises an issue of fact regarding whether the alleged property interest is a direct interest, the motion to void the *lis pendens* should be denied, and the issue should be resolved by the fact finder; if, however, the relevant evidence is undisputed, or fails to raise a fact question concerning the true nature of the alleged property interest, the trial court should rule on the validity of the *lis pendens* as a matter of law. In this case, Collins undoubtedly claimed a direct interest in the mall property, and the Kest Parties' motion to void the *lis pendens* challenged the existence of facts supporting Collins' alleged direct interest in the mall property. Because there was a fact issue on whether Collins had a direct interest in the mall property, as alleged in his pleading, the appellate court held that the trial court abused its discretion by granting the Kest Parties' motion. Therefore, the writ of mandamus was granted.

E. Deceptive Trade Practices Act

In *Tribble & Stephens Co. v. RGM Constructors, L.P.*,[355] the Fourteenth District Court of Appeals in Houston addressed whether a DTPA claim based upon a subcontract could be brought if plaintiff's counsel reviewed and approved a form of that subcontract. Section 17.49(f) of the DTPA exempts claims based upon a written contract if, in negotiating, the plaintiff is represented by legal counsel who is not directly or indirectly identified, suggested, or selected by the defendant or its agent.[356] Based upon this exemption, RGM moved for and was granted summary judgment at the trial court. At trial, Tribble's attorney stipulated on the record that Tribble's previous counsel reviewed and approved the form contracts that were to be used for the project, including the form contract that was used to memorialize the RGM agreement.[357] However, the court of appeals found that, during the contract negotiations with RGM, Tribble's project manager asserted that he was not represented by counsel, and both parties stipulated that the form contract was amended before execution.[358] Based upon these facts, the court of appeals reversed and remanded, holding that the DTPA requires that counsel review something more than form contracts in order for section 17.49 to apply; otherwise, the term "negotiate" would have little or no

354. *See* Tex. Prop. Code Ann. § 12.007(a) (Vernon 2004); *In re Fitzmaurice*, 141 S.W.3d 802, 805 (Tex. App.—Beaumont 2004, orig. proceeding).
355. 154 S.W.3d 639, 640 (Tex. App.—Houston [14th Dist.] 2004, pet. denied).
356. Tex. Bus. & Com. Code Ann. § 17.49(f) (Vernon Supp. 2005).
357. *Tribble & Stephens Co.*, 154 S.W.2d at 660.
358. *Id.*

meaning. The court of appeals thus recognized that while most form contracts are reviewed and approved by attorneys in the abstract, such review does not extend to negotiations and contracts executed based upon the reviewed forms.[359]

In *Matheus v. Sasser*,[360] a homebuyer brought a DTPA action against a real estate agent for misrepresenting the amount of square feet contained in the home that he purchased. Matheus made an offer of $359,000 for what he believed was a 4,218 square foot home. The seller counter-offered and ultimately accepted Matheus's offer of $343,225.[361] An appraisal performed at the request of the mortgage company revealed that the house only contained 3,593 square feet; Matheus did not receive the appraisal until after the sale closing.[362] Despite being substantially smaller than originally thought, however, the house appraised for $347,000, nearly $4,000 more than the purchase price.[363] Thus, the Fort Worth Court of Appeals wrestled with what constituted the appropriate measure of damages, if any, in this case.

Past courts have held that if there are shortages in a home's actual square footage, then the proper measure of damages is the difference between the advertised and actual square footage multiplied by the price paid per square foot.[364] Yet, in this case, there was no evidence that Matheus calculated his offer based upon a price per square foot.[365] Furthermore, Matheus provided no evidence that the home was devalued as a result of the square-footage deficiency.[366] Indeed, the home actually had a higher fair market value at 3,593 square feet than Matheus had paid (while believing that he was purchasing a 4,218 square foot home).[367] As a result, the appellate court found that Matheus received property greater than the value he bargained for, even though it contained fewer square feet than originally thought.[368] The appellate court held that to give Matheus the difference between the square footage multiplied by the price paid per square foot would overcompensate him. The only remaining identifiable lost value was intrinsic value, which is not compensable under the DTPA.[369]

F. Premises Liability

The issue presented in *Sanmina-Sci Corp. v Ogburn*[370] was whether the

359. *Id.*
360. 164 S.W.3d 453 (Tex. App.—Fort Worth 2005, no pet. h.).
361. *Id.* at 457.
362. *Id.*
363. *Id.* at 461.
364. *Id.* at 460 (citing George D. Thomas Builder Inc. v. Timmons, 658 S.W.2d 194, 197 (Tex. App.—El Paso 1983, writ ref'd n.r.e.)).
365. *Id.* at 460-61.
366. *Id.* at 461.
367. *Id.*
368. *Id.*
369. *Id.*
370. 153 S.W.3d 639 (Tex. App.—Dallas 2004, pet. denied).

actual knowledge of a general "unreasonably dangerous condition" imputed constructive knowledge of a specific, related condition that actually caused harm. Ogburn was employed as a truck driver for a freight company and made frequent deliveries to a facility operated by Sanmina. Over the course of several weeks, a warehouse door at the facility was propped open with a pole or piece of wood to keep it from closing. Ogburn personally informed the facility supervisor of the hazardous condition of the door. While attempting to lift the faulty door on one such visit to the facility, a roller fell from the door and injured Ogburn. At trial, several employees of Sanmina acknowledged that they were aware that the door was in general need of repair; nonetheless, Sanmina contended that it did not know the specific problem with the door's rollers and therefore, could not have foreseen a roller falling from the door causing injury. The jury found both parties partially negligent, attributed 70% of the negligence to Sanmina, and awarded compensatory damages to Ogburn.[371]

On appeal, Sanmina contended that the judgment should be reversed because no evidence was presented at trial that Sanmina had actual or constructive knowledge that an unreasonably dangerous condition existed. The appeals court disagreed and upheld the lower court's judgment, citing long-held law that actual or constructive knowledge by a premises occupier of any condition that poses an unreasonable risk of harm to invitees creates a duty to take whatever action reasonably prudent under the circumstances to reduce or eliminate the unreasonable risk from the condition.[372] Additionally, an occupier of a premises has constructive knowledge of any dangerous condition that would be revealed by a reasonably careful inspection.[373] Furthermore, a condition poses an unreasonable risk of harm if there is sufficient probability that a reasonably prudent person could have foreseen a specific or similar harmful event as a likely occurrence.[374] Foreseeability for this purpose does not require anticipation of a specific harmful event,[375] but only that the general danger of a harmful event be foreseeable.[376]

The court held that because Sanmina had actual knowledge of the disrepair of the warehouse door, Sanmina had actual or constructive knowledge of an unreasonably dangerous condition that was the proximate cause of Ogburn's injuries even though Sanmina may not have foreseen the specific event that led to the injuries. Thus, the court upheld the lower court's ruling.[377]

371. *Id.* at 641.
372. Corbin v. Safeway Stores, Inc., 648 S.W.2d 292, 295 (Tex. 1983).
373. *See id.*
374. County of Cameron v. Brown, 80 S.W.3d 549, 556 (Tex. 2002).
375. Clark v. Waggoner, 452 S.W.2d 437, 440 (Tex. 1970).
376. Walker v. Harris, 924 S.W.2d 375, 377 (Tex. 1996).
377. *Ogburn*, 153 S.W.3d at 642.

G. ENVIRONMENTAL

In *Seaway Products Pipeline Co. v. Hanley*,[378] the Fort Worth Court of Appeals examined an issue of first impression, clarifying the definition of who may be responsible for solid waste under the Texas Solid Waste Disposal Act ("SWDA"). In this case, a gasoline pipeline owned and operated by Seaway Products Pipeline Company and located on land owned by Richard E. Bloomfield, Sr. ruptured while the land was being cleared for residential construction.[379]

Seaway claimed that Bloomfield was liable under the SWDA for Seaway's reasonable and necessary cost of removal and remediation actions in connection with the pipeline rupture.[380] In order for Seaway to maintain a valid claim against Bloomfield under the SWDA, however, Seaway had to present evidence that Bloomfield was a "person responsible for solid waste." The court of appeals found that the only evidence presented on this issue was that Bloomfield owned the land when the pipeline was ruptured.[381]

The SWDA states that a person is responsible for solid waste if the person is an owner of a "solid waste facility."[382] "Solid Waste Facility" includes all contiguous land, including structures and other improvements, used for "processing, storing, or disposing of solid waste."[383] The appellate court noted that, beyond looking at statutory definitions, no Texas court had "fully addressed who qualifies as a person responsible for solid waste" under the SWDA.[384] Thus, the appellate court would have to "determine and give effect to the intent of the legislature" by focusing on the statute's plain language, the consequences that would follow from various constructions of the statute, and the presumption that the legislature intended a "just and reasonable result" in enacting the statute.[385]

The court of appeals concluded that Bloomfield was not an owner and operator of a solid-waste facility simply by owning the land that the pipeline ran under. The appellate court noted that no evidence was presented that showed that Bloomfield used the land for processing, storing, or disposing of solid waste. The appellate court further stated that "it is unfathomable that the legislature intended every residential landowner in Texas who has a pipeline easement running underneath its property to be considered an owner and operator of a solid waste facility."[386]

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378. 153 S.W.3d 643 (Tex. App.—Fort Worth 2004, no pet. h.).
379. *Id.* at. 647.
380. *Id.* at 648.
381. *Id.* at 656.
382. TEX. HEALTH & SAFETY CODE ANN. § 631.271 (Vernon 2001).
383. *Id.* § 361.003.
384. *Seaway*, 153 S.W.3d at 656.
385. *Id.*
386. *Id.*