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Real Property

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REAL PROPERTY

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This article covers cases from Volumes 404 through 464 of the South Western Reporter (Third Edition) and federal cases during the same period that the authors believe are noteworthy to the jurisprudence on the applicable subject.

I. INTRODUCTION

Texas courts continue to see significant challenges to foreclosures from the national single-family mortgage/foreclosure meltdown, including the "show me the note" defense and standing to challenge assignments of deeds of trust. Unfortunately, there is still no consistent message in these cases.

In what seems to be a trend, a number of courts are making incorrect holdings (on assignability of receivables from municipal utility districts) and statements in dicta (the UCC does not govern notes secured by realty). Also, a surprise awaits in a case addressing limitation after a restraining order and temporary injunction.

As in previous years, many cases during the Survey period provide drafting lessons for the practitioner. In one case, the parties relied on industry vernacular to define the remedies available under a purchase and sale contract, but there appeared to be no consensus between the parties, or in the industry at large, on the meaning of the terms used which left the resolution of the matter to the jury. In another case of note, which focused on the difference between a covenant and a condition precedent in a purchase and sale contract, both the majority and dissent relied on the same cases to come to completely different conclusions regarding whether the clause at issue was a covenant or condition precedent. Regardless of whether you are more persuaded by the analysis of

the majority or dissent, laid out in more detail below, the message from the case is clear to all practitioners: careful word choice and clear drafting are essential to achieving your intended result.

Also of note, during the Survey period was an issue rarely dealt with by practitioners, the statute of frauds, but which played a key role in the outcome of cases involving the lease of mineral interests, the exercise of options to extend a lease, and the sale of foreclosed assets by a bank.

The most notable decisions during the Survey period came via the Texas Supreme Court. The Texas Supreme Court announced significant decisions in the area of roads via easements by necessity, trespass requirements, and application of premises liability statutory limitations.

II. MORTGAGES, LIENS AND FORECLOSURES

A. National Mortgage Settlement

Duque v. Wells Fargo, N.A. interprets certain provisions of the "National Mortgage Settlement."[1] Duque defaulted on her home mortgage loan, and Wells Fargo foreclosed. On motion for summary judgment, Duque alleged Wells Fargo violated the consent judgment (the National Mortgage Settlement) in *United States v. Bank of America Corp.*, which contained the National Mortgage Settlement in connection with various government suits against large home mortgage lenders.[2] Wells Fargo alleged that Duque had no standing to sue under the National Mortgage Settlement, because she was neither a party nor a third party beneficiary. Duque, however, claims to be a third party beneficiary based on a provision that provides "borrowers are third party beneficiaries under [designated paragraphs]."[3] A third party beneficiary status is only conferred if the parties to the contract specified such intention; "[i]ncidental benefits that may flow from a contract . . . do not confer the right to enforce the contract" as a third party beneficiary.[4] The First Houston Court of Appeals reasoned that although such provisions may have made Duque, as a borrower, a third party beneficiary in connection with loan modification agreements, it did not make Duque a third party beneficiary to the National Mortgage Settlement.[5]

B. Standing to Challenge Assignment of Mortgage

In a continuation of the legal meltdown in the wake of the single-family mortgage debacle, Texas courts continue to see cases relating to the "show me the note" defense and standing to challenge assignments of a

1. Duque v. Wells Fargo, N.A., 462 S.W.3d 542, 546 (Tex. App.—Houston [1st Dist.] 2015, no pet.).

2. *See* United States v. Bank of Am. Corp., 922 F. Supp. 2d 1, 3 (D.D.C. 2013).

3. *Duque*, 462 S.W.3d at 547. The first recited paragraph deals with lenders' obligations to accept and process pending loan mortgage requests; the second provision relates to a servicer's obligation to honor trial or permanent loan modifications. *Id.* at 544–45.

4. *Id.* at 547 (quoting S. Tex. Water Auth. v. Lomas, 223 S.W.3d 304, 306 (Tex. 2007)).

5. *Id.* at 550.

deed of trust. In this Survey period, Texas courts addressed two conflicting cases on the standing issue, each with the same plaintiff party.

In *Morlock, L.L.C. v. Nationstar Mortgage, L.L.C.* (Morlock I), Morlock purchased a property pursuant to a homeowner association lien foreclosure and then challenged Nationstar Mortgage's, the first lien deed of trust holder, right to foreclose.[6] The original deed of trust was given to Mortgage Electronic Registration Systems (MERS), for the benefit of First Coastal Mortgage, to whom a promissory note was payable. MERS assigned the deed of trust to Nationstar Mortgage, who initiated the foreclosure sale. On appeal from a denial of the summary judgment motion to enjoin the foreclosure, Morlock alleged "Nationstar [was] not the owner and holder of the [n]ote" and should not be allowed to foreclose[7]; Nationstar countered that Morlock had no standing to challenge the validity of the purported deed of trust assignments. The Fourteenth Houston Court of Appeals concluded that the issue of standing depends on whether a party has a justiciable interest in its outcome and that Morlock had standing to challenge the assignments.[8] Further, the court of appeals drove another stake into the heart of the "show me the note" defense, pointing out that the Texas Property Code does not require, as a condition to foreclosure, that the foreclosing party prove it is the holder or owner of the note, which is secured by the deed of trust.[9]

In the sister case, *Morlock, L.L.C. v. Bank of New York* (Morlock II), Morlock acquired title to property as the purchaser at a foreclosure sale by an owners' association.[10] After such acquisition, the first lienholder, Bank of New York, asserted defaults and attempted to foreclose; Morlock brought suit for wrongful foreclosure. The original deed of trust was executed by Sandesara to Mortgage Investment Lending Associates, which assigned the deed of trust to Countrywide Document Custody Services, which ultimately assigned the deed of trust to the Bank of New York; each of those assignments was duly recorded in the public records. Morlock alleged that Bank of New York was not the owner and holder of the note since the deed of trust assignments were not accompanied by an

6. Morlock, L.L.C. v. Nationstar Mortg., L.L.C., 447 S.W.3d 42, 43–44 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).

7. *Id.* at 45.

8. *Id.* at 45–46 (citing Austin Nursing Ctr., Inc. v. Lovato, 171 S.W.3d 845, 848 (Tex. 2005) (plaintiff was an aggrieved party); Goswami v. Metro. Sav. and Loan Ass'n., 751 S.W.2d 487, 489 (Tex. 1988) (third party with a property interest affected by a foreclosure sale had standing); Am. Sav. & Loan Ass'n. of Hous. v. Musick, 531 S.W.2d 581, 584–86 (Tex. 1975) (a party whose property interest is affected has standing to challenge a foreclosure sale); Henry v. Mr. M. Convenient Stores, Inc., 543 S.W.2d 393, 396 (Tex. Civ. App.—Houston [14th Dist.] 1976, writ ref'd n.r.e.) (holder with equitable interest in real property had standing to challenge a deed of trust in a suit to remove cloud on title); and Florey v. Estate of McConnell, 212 S.W.3d 439, 443–44 (Tex. App.—Austin 2006, pet. denied) (joint owner of real property had standing to assert invalidity of deed of trust to which it was not a party)).

9. TEX. PROP. CODE ANN. § 51.0001(4) (West 2015).

10. Morlock, L.L.C. v. Bank of N.Y.C., 448 S.W.3d 514, 516 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

assignment of the note.[11] In defense, Bank of New York alleged that Morlock had no standing to challenge the assignment from Mortgage Investment to Countrywide and from Countrywide to Bank of New York. The First Houston Court of Appeals cited numerous Texas cases for the proposition that "[a] plaintiff who is not a party to an assignment lacks standing to challenge the assignment on grounds that render it merely voidable at the election of one of the parties."[12] Texas cases have held that deeds obtained via fraud are not facially void, but rather voidable at the grantor's election.[13] This court of appeals relied upon *Nobles v. Marcus*, which distinguished challenges based upon fraud (a voidable conveyance) and forgery (a void conveyance).[14] Morlock did not allege a forgery in the instrument, so the court of appeals concluded that, absent forgery, there was no standing to allege fraud because Morlock was not a party to the conveyancing document.[15] The court of appeals distinguished cases relied upon by Morlock as being inapplicable, noting that one case involved a voidable defect due to a lack of authority to enter an assignment on behalf of the corporate principal,[16] and in the other, the court did not consider standing to challenge.[17]

So, in Morlock I, standing to challenge the assignments was allowed based on a theory of justiciable interest in the property, but in Morlock II, standing was denied on the basis of the assignment being only a voidable, as opposed to void, conveyance. Confusion still reigns among Texas courts on the standing issue.

Another of the cases on standing to challenge an assignment of a deed of trust is *Vazquez v. Deutsche Bank National Trust Co.*[18] Vazquez challenged the validity of an assignment of a deed of trust from the original mortgagee to Deutsche Bank. Deposition evidence presented by Vazquez revealed a claim of forgery that would make the instrument void and would give standing to challenge the assignment to which Vazquez was not a party.[19] The deposition testimony, by the party who purportedly signed the assignment of the deed of trust, was to the effect that the signature was an electronic signature. He claimed that he did not directly authorize it, did not know any of the parties who affixed his electronic signature to the document, and was unaware that the document was executed. Deutsche Bank filed a motion for summary judgment and presented no evidence, believing that Vazquez's petition was insufficient to support a summary judgment claim. However, Deutsche Bank was

11. *Id.*
12. *Id.* at 517.
13. *See, e.g.*, Nobles v. Marcus, 533 S.W.2d 923, 926 (Tex. 1976).
14. *Morlock, L.L.C.*, 448 S.W.3d at 517; *see Nobles*, 533 S.W.2d at 926–27.
15. *Morlock, L.L.C.*, 448 S.W.3d at 517.
16. *Id.* (distinguishing Reinagel v. Deutsche Bank Nat'l Tr. Co., 735 F.3d 220, 226 (5th Cir. 2013)).
17. *Id.* (distinguishing Reeves v. Wells Fargo Home Mortg., 544 F. App'x 564, 568 (5th Cir. 2013) (per curiam), *cert. denied*, 134 S. Ct. 2668 (2014)).
18. 441 S.W.3d 783, 785–86 (Tex. App.—Houston [1st Dist.] 2014, no pet.).
19. *Id.* at 789.

mistaken, and the First Houston Court of Appeals determined that Vazquez presented sufficient evidence to show a void instrument, which entitled her standing to challenge the assignment.[20] In rendering this opinion, the court of appeals cited and relied upon the recent U.S. Court of Appeals for the Fifth Circuit decision in *Reinagel v. Deutsche Bank National Trust Co.*[21] This is an important reminder to practitioners as to what evidence is needed to raise a forgery issue and to carefully consider the existing evidence when filing summary judgment motions.

C. Deficiencies; MUD Receivables

In *Marhaba Partners v. Kindron Holdings*, the Fourteenth Houston Court of Appeals addressed deficiency judgments in a multiple foreclosure scenario.[22] Marhaba obtained a land development loan pledging as collateral the subject property pursuant to a deed of trust and the receivables from a bond sale by a municipal utility district (MUD Receivables), pursuant to an Assignment of Right to Reimbursement. The development lender, City Bank, after a default by Marhaba, foreclosed on the deed of trust and acquired title to the property.[23] Subsequent to such real estate foreclosure, City Bank sold its remaining interest in the development loan to Kindron Holdings, which included the existing unsatisfied liability under the note and the MUD Receivables. After the foreclosure sale and credit bid, the deficiency remaining was approximately $2 million. Kindron subsequently foreclosed on the MUD Receivables and purchased them at the sale for a credit bid of $300,000, leaving a $1.7 million deficiency. Kindron filed a declaratory action to declare that it was the owner of the MUD Receivables.[24] Marhaba alleged that this was a suit on a deficiency, but Kindron alleged that the action was merely to confirm its realization on collateral. Marhaba's attempt to introduce evidence as to the fair market value of the foreclosed real estate was disallowed by the trial court and affirmed by the court of appeals, concluding that the subject action was not an action to recover a deficiency, but rather an action to confirm a nonjudicial foreclosure sale.[25] The court of appeals concluded that calculation of a deficiency is made only after all collateral had been disposed of and is not to be determined after each collateral item is foreclosed.[26]

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20. *Id.* at 790.

21. *Id.* at 787; *see Reinagel*, 735 F.3d 220.

22. Marhaba Partners Ltd. P'ship v. Kindron Holdings, LLC, 457 S.W.3d 208, 215–16 (Tex. App.—Houston [14th Dist.] 2015, pet. denied).

23. *Id.* at 211.

24. The court of appeals noted that the municipal utility district had refused to acknowledged Kindron's purchase of the MUD Receivables. *Id.* at 212 n.5.

25. *Id.* at 216.

26. *Id.* at 215–16 (citing Branch Banking & Tr. Co. v. TCI Luna Ventures, LLC, No. 05-12-00653-CV, 2013 WL 1456651, at *5 (Tex. App.—Dallas Apr. 9, 2013, no pet.) (where twelve properties secured a loan and a deficiency could not be asserted after five properties were foreclosed in an effort to enjoin the sixth foreclosure); Comiskey v. FH Partners, LLC, 373 S.W.3d 620 (Tex. App.—Houston [14th Dist.] 2012, pet. denied) (a lender with

In dicta, the court of appeals raised an issue as to the assignability of municipal bond proceeds, even though the parties had not raised the issue.[27] The authors believe that this is unfortunate dicta. The basis of the court of appeals's concern was whether municipal bond proceeds can be used as collateral only if the funds paid construction costs for infrastructure improvements, citing *Cameron County Savings Association v. Cornett Construction Co.*[28] Unsurprisingly, the court of appeals found conflicting authority in *Southern Surety Co. of New York v. First State Bank of Marquez*,[29] where a subcontractor on a state highway department job was allowed to assign the right to receive funds as collateral for a loan to the subcontractor, and in *J.W.D., Inc. v. Federal Insurance Co.*,[30] where an assignee of a laborer's claim for wages was not prohibited from filing and pursuing a claim against a payment bond merely because the assignee was not the person who actually furnished the labor.[31] In the experience of this author, the court of appeals's concern does not fit current practice. Normally, the developer builds the infrastructure improvements with funds from a development loan for which the MUD Receivables are pledged as additional collateral. Either before or at the closing of the development loan, the municipal utility district issues bonds for reimbursement of the infrastructure improvements, and the receivables are only used to reimburse the developer for actual infrastructure construction costs incurred.

D. Home Equity Loans

Hill v. Sword provides guidance on whether a refinancing constituted a new extension of credit or was the refinance of an existing home equity lien.[32] In 2004, Hill executed a $60,000 note and deed of trust in favor of Sword secured by a 126-acre tract of land. In 2006, Hill gave a new $200,000 note and deed of trust to Sword. Eventually, Hill defaulted, and Sword filed a declaratory judgment action in which there was an agreed judgment in 2011 that deemed the 2004 and 2006 deeds of trust to be valid and enforceable and provided for a $327,000 award.[33] At that time, a new note was executed in the amount of the judgment award and secured by a new deed of trust. Hill later claimed that the 126-acre tract was his family homestead and that the 2011 deed of trust did not meet the constitutional requirements to establish a valid lien on a homestead. As the Tyler Court of Appeals noted, homesteads in Texas are subject to

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two properties as security was not required to credit the fair market value of the first foreclosure before foreclosing on the second property)).

27. *Id.* at 218 n.11.

28. *Id.*; Cameron Cty. Savings Ass'n v. Cornett Constr. Co., 712 S.W.2d 580 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.).

29. 54 S.W.2d 888, 890 (Tex. Civ. App.—Waco 1932, writ ref'd).

30. 806 S.W.2d 327 (Tex. App.—Austin 1991, no writ).

31. *Marhaba Partners Ltd. P'ship*, 457 S.W.3d at 218 n.11.

32. *See generally* Hill v. Sword, 454 S.W.3d 698 (Tex. App.—Tyler 2015, pet. denied).

33. *Id.* at 700.

strict protection from forced sales with very few exceptions,[34] one of which is a home equity loan, which evidences a new extension of credit under Texas constitution § 50(a)(6),[35] and the other is a refinance of an existing homestead lien under Texas constitution § 50(a)(4)[36] and related statutory provisions in Texas Property Code.[37] To determine the difference between a new extension of credit and a refinance of existing credit, the court of appeals noted these factors: first, whether there was a satisfaction and replacement of the original note, and second, whether there was advancement of new funds.[38] The current note was not the result of a foreclosure, distinguishable from *Krauss v. West*;[39] rather, it was a declaratory judgment action that the deeds of trust were enforceable.[40] Consequently, the 2004 and 2006 deeds of trust were not paid and satisfied. The capitalization of attorneys' fees into the 2011 documents did not constitute new credit because the underlying note provided that the cost of collections and enforcement, including reasonable attorneys' fees, were to be added to the amount due; hence, the award of attorney fees did not constitute new extension of credit.[41]

The final contention of Hill was that new non-monetary obligations were incorporated into the 2011 documents and that such constituted a new extension of credit.[42] These new non-monetary items were not deemed extensions of credit by the court of appeals.[43] The court of appeals paid particular attention on the cross-default provision whereby a default under any other loan agreement with Sword would constitute a default under the 2011 documents.[44] The court of appeals concluded that such provision did not create a new extension of credit, noting that the provision did not describe any other debt and that the 2006 deed of trust provided that it secured any debt subsequently owing from Hill to Sword.[45] The court of appeals, however, discussed the cross-default provision as if it was a cross-collateralization provision, which would not be a proper characterization.[46] Such clause does not offer any additional col-

34. *Id.* at 702.
35. TEX. CONST. art. XVI, § 50(a)(6).
36. *Id.* § 50(a)(4).
37. TEX. PROP. CODE ANN. § 41.001(b)(5) (West 2015).
38. *Hill*, 454 S.W.3d at 702.
39. 123 S.W.2d 946 (Tex. Civ. App.—El Paso 1938, writ dism'd judgm't cor.)
40. *Hill*, 454 S.W.3d at 702–03.
41. *Id.* at 703.
42. Such non-monetary obligations included: (1) notice of hazardous materials spills; (2) compliance with environmental laws; (3) certification of no prior hazardous spills; (4) defaults under other agreements with Sword; (5) rights of inspection; (6) waiver of marshalling; (7) waiver of release of obligations; (8) waiver of deficiency defenses; (9) grant of a new security interest in farm equipment; (10) recitation that the deed of trust constituted a fixture filing; (11) the provision for realty and personalty be sold as a whole; (12) rights of a secured party under Article 9 of the UCC; (13) rights as to new collateral; and (14) restrictions on mining. *Id.* at 703–04.
43. *Id.* at 704.
44. *Id.*
45. *Id.*
46. *See id.*

lateral, nor does it require the existing note to secure other indebtedness; rather, it is merely a default under the 2011 documents if Hill defaults in other documents between it and Sword. Consequently, this case should not be cited for the proposition that such a provision constitutes a cross-collateralization, which might be an extension of new credit under the Texas home equity rules.

E. Forcible Detainer Action after Foreclosure

In a case of first impression, the Fourteenth Houston Court of Appeals in *Yarbrough v. Household Finance Corp. III* addressed the jurisdiction of a justice court in a forcible detainer action under an allegation of a forged deed of trust.[47] After a nonjudicial foreclosure sale, Household Finance brought a forcible detainer action against Yarbrough, who pled forgery of the original deed of trust upon which the foreclosure sale was based. Such allegation was supported by an affidavit of Yarbrough that Yarbrough did not sign the deed of trust and that it was a forgery.[48] Yarbrough appealed the summary judgment based on the lack of jurisdiction of the justice court to address that issue. The court of appeals noted that forcible detainer actions are only applicable to resolve the right for immediate possession of the property when the merits of title are not in controversy.[49] Raising the issue of forgery presents "a genuine issue of title so intertwined with the issue of possession as to preclude jurisdiction in the justice court."[50] In support of its holdings, the court of appeals itemized issues involved in the propriety of a foreclosure sale, which did not constitute intertwined title issues and would not affect the jurisdictional authority of a justice court, and issues in which title was so intertwined with possession issues negating the jurisdiction of a justice court to a forcible detainer action.[51]

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47. Yarbrough v. Household Fin. Corp. III, 455 S.W.3d 277, 278 (Tex. App.—Houston [14th Dist.] 2015, no pet.).

48. *Id.* at 279.

49. *Id.* at 280 (citing Salaymeh v. Plaza Centro, LLC, 264 S.W.3d 431, 435 (Tex. App.—Houston [14th Dist.] 2008, no pet.)).

50. *Id.* at 283.

51. *Id.* at 281–82. There was no intertwined title dispute in any of the following: (1) allegation of a foreclosure sale conducted improperly; (2) allegations that conditions precedent to a foreclosure sale were not satisfied; (3) allegations that certain breach conditions excused note payment; (4) allegation that the underlying note was usurious and whether acceleration was proper; (5) allegation of invalid assignments and other improprieties relating to the foreclosure process; (6) defects regarding the bank's authority for a foreclosure sale; (7) violations of the Fair Debt Collection Practices Act; and (8) lack of proper notice of the foreclosure or proper opportunity to cure a default. *Id.* However, there was an intertwined relationship in the following circumstances: (1) the deed of trust provided no tenancy relationship after foreclosure; (2) a contract of deed was disputed as to whether the defendant was a purchaser or a tenant at will; (3) the disputed enforceability of a contract creating a lien; (4) questions under a rental agreement as to holdover tenancy or adverse possession; (5) a dispute as to whether a landlord/tenant or buyer/seller relationship existed; and (6) a substitute trustee's deed alleged to be void. *Id.* at 282.

F. Statute of Limitations

Landers v. Nationstar Mortgage LLC involves a unique twist on the statute of limitations in a foreclosure action.[52] Landers obtained a home loan from Nationstar and defaulted, whereupon Nationstar accelerated the debt. Landers brought suit to enjoin the foreclosure, and a temporary restraining order was entered against Nationstar. Subsequently (being nearly four years after the acceleration), the trial court entered an agreed temporary injunction. Neither the "temporary restraining order nor the agreed temporary injunction prohibited Nationstar from filing a suit for judicial foreclosure" or from initiating a suit on the debt, they merely restrained a nonjudicial foreclosure sale.[53] Nationstar ultimately filed an action for judicial foreclosure four years after the acceleration of the debt. Landers challenged this action as in violation of the statute of limitations, and the Tyler Court of Appeals agreed that the limitation period was not tolled by the temporary restraining order or temporary injunction as to a suit on the debt or a judicial foreclosure.[54] Consequently, practitioners should take note from this case that orders relating to injunctions on foreclosure sales should include a restraint against a nonjudicial foreclosure, a judicial foreclosure, and an action on the debt, or appropriate actions should be commenced within the statute of limitations period for any of those events not covered by the restraining order or injunction.

III. DEBTOR/CREDITOR

A. Refusal of Tender

A wrongful refusal of tender of payment was addressed in *U.S. Bank, N.A. v. Smith (In re Smith)*.[55] In this case, Smith executed a first lien note and deed of trust upon the purchase of real property but later refinanced the property executing a Texas home equity note and deed of trust. The first lienholder delivered a payoff quote to the title company for the subsequent home equity refinancing. After the date of the payoff quote, but prior to the refinance closing, Smith made a monthly mortgage payment to the first lienholder.[56] The title company wired the first lienholder $72,000.08 for payoff of the first lien, which sums were rejected and returned.[57] A common law tender in Texas is accomplished by "payment of the underlying [debt], . . . other tender of the amount of the mortgage debt, or . . . any other satisfaction of the note which the lien has been

52. *See generally* Landers v. Nationstar Mortg., LLC, 461 S.W.3d 923 (Tex. App.—Tyler 2015, pet. denied).

53. *Id.* at 924, 926.

54. *Id.* at 926.

55. 524 B.R. 125 (Bankr. S.D. Tex. 2015).

56. The payoff demand was dated March 12, 2007, in the amount of $71,504.66 with a per diem rate and a late charge and wire fee quoted. *Id.* at 130.

57. The case does not specify what funds were actually due at the refinance closing, but the court acknowledged that it was sufficient to extinguish the first lien debt at the time of the payment. *Id.* at 135–36.

given to secure."[58] Because the tendered payment was sufficient to discharge the existing lienholder's debt, such tender discharged the first deed of trust lien.[59]

Despite a correct application of the tender rule, this U.S. Bankruptcy Court for the Southern District of Texas incorrectly determined that the Uniform Commercial Code (UCC) was not applicable to interpreting a promissory note secured by real estate.[60] The bankruptcy court stated that "comments to section three of the UCC make it clear that a note secured solely by real estate is not governed by the UCC."[61] Such statement, in this author's opinion, runs contrary to long established and well settled principles of Texas law, used daily in commercial real estate transactions. The context of the applicable comment to § 3.104 of the UCC deals mainly with whether a document is a negotiable instrument and why the use of words "to order of" or "to bearer" make the instrument clearly a negotiable instrument within the purview of the UCC. The section quoted by the bankruptcy court deals with contracts that may contain promises to pay money, such as a purchase and sale agreement of real estate.[62] Consequently, the bankruptcy court wrongfully relies on language dealing with contracts that contain a promise to pay as opposed to a formal promissory note containing "pay to the order of." The bankruptcy cites a number of cases in support of its position[63]: the first being *Horton v. M&T Bank*, which held that the UCC duty of good faith and fair dealing does not apply to a note secured by real property[64]—different from holding that a promissory note secured by real property is not a negotiable instrument under the UCC—and the second, *Clapp v. Wells Fargo, N.A.*, for the proposition that a mortgage note is not within the UCC because it relates to a deed of trust with a lien on real property.[65] Further, the bankruptcy court discussed a case specifying that "a [UCC] § 3.603 analysis should be applied to [a] promissory note secured by real property"[66]; however, the bankruptcy court rejected that theory.[67] The

58. *In re* Harwood, 404 B.R. 366, 401 (Bankr. E.D. Tex. 2009) (citing Lillienstern v. First Nat'l Bank, 288 S.W. 477, 478–79 (Tex. Civ. App.—Texarkana 1926, no writ)).

59. *In re Smith*, 524 B.R. at 136.

60. *Id.* at 134–35.

61. *Id.* at 134.

62. TEX. BUS. & COM. CODE ANN. § 3.104, cmt. 2 (West 2015) (providing, in relevant part, as follows: "Article 3 is not meant to apply to *contracts* for the sale of goods or services or the sale or lease of real property or similar writings that can contain a promise to pay money. The use of words of negotiability in such *contracts* would be an aberration. Absence of the words precludes any arguments that such contracts might be negotiable instruments.") (emphasis added).

63. *See In re Smith*, 524 B.R. at 134–35.

64. Horton v. M&T Bank, No. 4: 13-CV-525-A, 2013 U.S. Dist. LEXIS 166772, at *10–12 (N.D. Tex. Nov. 22, 2013).

65. Clapp v. Wells Fargo, N.A., No. 4: 13-CV-035-A, 2014 U.S. Dist. LEXIS 58729, at *10 (N.D. Tex. Apr. 28, 2014) (quoting Vogel v. Travelers Indem. Co., 966 S.W.2d 748, 753 (Tex. App.—San Antonio 1998, no pet.)).

66. *In re Smith*, 524 B.R. at 135.

67. *Id.* (discussing Rabo Agrifinance Inc. v. Terra XXI Ltd., 257 F. App'x 732, 735 (5th Cir. 2007)).

bankruptcy court continued its spurious reasoning by distinguishing two cases dealing with refusal of a tender of payment where the collateral was not real property secured by a deed of trust.[68] This bankruptcy court is wrong in its holding that a promissory note securing property covered by a deed of trust is not governed by the Texas Uniform Commercial Code, and practitioners can only hope that other courts do not follow such reasoning.

B. Attorneys' Fees

In what may be a case of first impression, the Fourteenth Houston Court of Appeals in *Murphy v. Wells Fargo Bank, N.A.*, considered whether the Texas constitution provisions for a home equity loan preclude the award of attorneys' fees under the Texas Declaratory Judgment Act.[69] Murphy obtained a home equity loan from Wells Fargo, and after defaulting on the loan within one year, brought a declaratory action against Wells Fargo alleging an oral promise to refinance the loan at a lesser interest rate if Murphy had performed under the loan for at least two years. Murphy lost the case, and Wells Fargo was awarded over $100,000 in legal fees, to which Murphy takes issue. The court majority, following Murphy's allegations, determined that the requirements for a home equity loan under the Texas constitution[70] requires, as one of its conditions for the foreclosure of a home equity loan against a homestead, that the debtor cannot have personal liability for the debt. The home equity loan documents included appropriate provisions in the note, loan agreement, and deed of trust that the debtors had no personal liability. Consequently, the court of appeals held that "[t]he nonrecourse status of the loan, established by the Texas [c]onstitution and the plain meaning of the loan documents, mandates that [Murphy is] not personally liable for the attorneys' fees Wells Fargo incurred prosecuting this litigation."[71] Justice Frost, however, issued a well-reasoned dissenting opinion, noting that the Texas Declaratory Judgment Act, which preceded the adoption of the subject provision of the Texas constitution, is a separate statutory provision providing for the award of attorneys' fees, and that such constitutional provision did not invalidate the attorneys' fees provisions of the Texas Declaratory Judgment Act.[72] Furthermore, the dissent reasons that the equity home loan provisions of the Texas constitution address the forfeiture or foreclosure of the homestead property; the home equity loan documents in this case complied with such provisions so that the lender would be entitled to exercise foreclosure remedies against the home-

68. *Id.* at 135–36 (distinguishing Lillienstern v. First Nat'l Bank, 288 S.W. 477 (Tex. Civ. App.—Texarkana 1926, no writ); Sanders v. Blakney, 294 S.W. 238 (Tex. Civ. App.—Eastland 1927, no writ)).

69. Murphy v. Wells Fargo Bank, N.A., 455 S.W.3d 621 (Tex. App.—Houston [14th Dist.] 2013) (mem. op.), *rev'd in part*, 458 S.W.3d 912 (Tex. 2015).

70. Tex. Const. art. XVI, § 50(a)(6)(C).

71. *Murphy*, 455 S.W.3d. at 630.

72. *Id.* at 639 (Frost, J., dissenting).

stead.[73] The cases cited by the majority are refuted by Justice Frost, pointing out that *Fein*[74] did not address attorneys' fees in the context of a declaratory judgment action,[75] and distinguishing *In re Mullin*,[76] since no party sought attorneys' fees in a declaratory judgment action.[77]

During this Survey period, the court of appeals's decision was appealed and heard by the Texas Supreme Court in *Wells Fargo Bank, N.A. v. Murphy*.[78] The supreme court noted that it was without dispute that the home equity loan documents limited the source of funds from which Wells Fargo could seek payment of the loan.[79] While the supreme court attempted to look at non-constitutional grounds to resolve the dispute, the definition of extension of credit referred specifically to that term as used in § 50(a)(6) of the Texas constitution; therefore, the supreme court had to consider the constitutional definition in order to interpret the home equity loan documents.[80] "Extension of credit" had been previously defined "to consist of 'all terms of the loan transaction,'" which would include any provisions relating to "payment of principal, interest, taxes, insurance and . . . related expenses."[81] Therefore, the supreme court concluded that, if the terms of the home equity loan documents covered the attorneys' fees awarded under the declaratory judgment action, such fees would fall within the nonrecourse provisions of the Texas constitution for home equity loans.[82] In this case, the supreme court identified a number of relevant provisions, including an obligation for attorneys' fees to enforce the note, paying off any liens with priority, appearing in court, and protecting its interest in the property and rights under the deed of trust.[83] The awarded attorneys' fees, however, were not involved in the enforcement of the note or covenants and agreements in the home equity loan documents; Wells Fargo was merely defending itself in the original declaratory action brought by Murphy.[84] Hence, the supreme court concluded that the nature of this legal proceeding was not the kind contemplated in the home equity documents; the actions were not contesting the underlying loan but a declaratory action relating to nonperformance of an oral contract, allegations of common law fraud and Deceptive Trade Practice Act violations.[85] Consequently, Wells Fargo was entitled to a recovery and a personal judgment for its attorneys' fees

73. *Id.* at 639–40.
74. Fein v. R.P.H., Inc., 68 S.W.3d 260 (Tex. App.—Houston [14th Dist.] 2002, pet. denied).
75. *Murphy*, 455 S.W.3d. at 639 (Frost, J., dissenting).
76. 433 B.R. 1, 17 (Bankr. S.D. Tex. 2010).
77. *Murphy*, 455 S.W.3d. at 639 (Frost, J., dissenting).
78. 458 S.W.3d 912 (Tex. 2015).
79. *Id.* at 917.
80. *Id.* at 918
81. *Id.* (citing Sims v. Carrington Mortg. Servs., L.L.C., 440 S.W. 3d 10, 16 (Tex. 2014)).
82. *Id.*
83. *Id.*
84. *Id.* at 918–19.
85. *Id.* at 919.

since these fees arose out of a declaratory judgment action that was not part of the contractual arrangements in the home equity loan documents.[86]

C. Garnishment

Inwood Nat. Bank v. Wells Fargo Bank involved a garnishment action and addressed the issue of what constitutes an advance under the applicable Texas Uniform Commercial Code provision.[87] The garnishee, Paschall, originally concluded a loan transaction with Inwood in 2000, which was extended and renewed numerous times before the garnishment action by Wells Fargo. After the judgment creditor, Wells Fargo, filed the garnishment action, Inwood and Paschall entered into a new promissory note that stated it was in renewal and extension, but not in novation, of the prior note. Wells Fargo alleged that such action constituted an advance under the applicable Texas UCC provision,[88] thus relying on the exception to priority of a prior lienholder if advances were made by such lienholder more than 45 days after such lienholder obtained knowledge of the prior existing lien (i.e., Wells Fargo's judgment lien).[89]

The term "advance" is not defined in the UCC; consequently, the Dallas Court of Appeals looked at the common meaning of the word.[90] Apparently, the court of appeals could find no applicable Texas cases but cited Black's Law Dictionary, defining advance as "the furnishing of money or goods before any consideration is received in return."[91] Additionally, a definition from a New York case defined advances as "sums put at the disposal of the borrower."[92] Even though the 2012 renewal note was executed after the garnishment action, Inwood never advanced any additional sums under the renewal note after the date of the garnishment action and, furthermore, caused no greater burden to be placed on the collateral than that existing prior to the garnishment.[93] The court of appeals dismissed Wells Fargo's assertion that the execution of the renewal note constituted an extension of credit to Paschall.[94] Longstanding Texas law provides that a renewal note does not extinguish the old note

86. *Id.*

87. Inwood Nat'l Bank v. Wells Fargo Bank, N.A., 463 S.W.3d 228, 234 (Tex. App.—Dallas, 2015, no pet.).

88. *Id.* at 236.

89. Section 9.323(b) of the Texas Business and Commerce Code reads, in relevant part, as follows:

> [A] security interest is subordinate to the rights of a . . . lien creditor to the extent that the security interest secures an advance made more than 45 days after the person becomes a lien creditor unless the advance is made: (1) without knowledge of the lien, or (2) pursuant to a commitment entered into without knowledge of the lien.

Tex. Bus. & Com. Code Ann. § 9.323(b) (West 2015).

90. *Inwood Nat'l Bank*, 463 S.W.3d at 236.

91. *Id.* (quoting *Advance*, Black's Law Dictionary (10th ed. 2010)).

92. *Id.* (quoting Dick Warner Cargo Handling Corp. v. Aetna Bus. Credit, Inc., 746 F.2d 126, 130 (2d Cir. 1984)).

93. *Id.*

94. *Id.* at 239.

unless so intended, there was no new debt, there were no additional advances under the 2012 note, and the collateral was subject to the same burden as before.[95] Therefore, the court of appeals concluded that Inwood had priority over Wells Fargo's garnishment claims.[96]

As an alternative position, Wells Fargo Bank asserted that the term "advance" could be broadly interpreted to include things other than money. Wells Fargo Bank offered no Texas cases but offered an Oregon case pursuant to which a law firm obtained a security interest in the judgment debtor's assets pursuant to a commitment with the judgment debtor predating the lien created by the garnishment.[97] The court of appeals concluded that such lien was one of the exceptions under the UCC for preexisting commitments; therefore, Wells Fargo Bank's reliance on this case was not justified.[98] The court of appeals, however, went on to state that Wells Fargo Bank has identified no other value that could constitute an advance.[99] This leaves open a possible argument in future cases, and practitioners should take note of this opening.

D. Words or Numerals

In a "back to the basics" case, *Charles R. Tips Family Trust v. PB Commercial* reminds practitioners of the basic rule that written words prevail over written numerals.[100] In this case, the loan amount referred to in all of the loan documents (note, deed of trust, loan agreement and guaranty) was written "One Million Seven Thousand and No/100 ($1,700,000.00) Dollars."[101] As a matter of law, the UCC specifies that written words prevail over written numerals; consequently, the First Houston Court of Appeals concluded there was no ambiguity after applying all applicable rules of construction.[102] Because the contract was not ambiguous as so construed, parol evidence was not admissible; therefore, the correct amount of the debt was One Million Seven Thousand Dollars, as written in words, not in numerals.[103] An important practice point for practitioners was highlighted by the court of appeals when it specified that "[n]either party sought an equitable reformation of the loan documents in the trial court" and no issue of equitable relief was raised on appeal.[104]

95. *Id.* at 238–39.
96. *Id.*
97. *See* Boers v. Payline Sys., Inc., 928 P.2d 1010, 1013 (Or. Ct. App. 1996).
98. *Inwood Nat'l Bank*, 463 S.W.3d at 239.
99. *Id.*
100. Charles R. Tips Family Tr. v. PB Commercial LLC, 459 S.W.3d 147, 154 (Tex. App.—Houston [1st Dist.] 2015, no pet.).
101. *Id.* (original capitalization removed).
102. *Id.* at 154–55.
103. *Id.* at 155.
104. *Id.*

IV. GUARANTIES/INDEMNITIES

A. WAIVERS

In *Vince Poscente International, Inc. v. Compass Bank*, Poscente alleged that a "guarant[y] [was] unenforceable because [it] contain[ed] [a] homestead waiver provision[ ] that contravene Texas law."[105] The waiver provision read: "Each guarantor waives all rights of redemption, homestead, and other rights or exemptions of every kind, whether arising under common law or statute."[106] In addition to the contractual homestead waiver, the contract contained a relatively typical severability provision.[107] The Dallas Court of Appeals concluded that a waiver of homestead provision in a guaranty was not an essential purpose; the essential purpose was to secure the debt.[108] The court of appeals distinguished *Rogers v. Wolfson*[109] since it did not contain a severability provision.[110] Consequently, because the unenforceable waiver of homestead clause was not a material aspect of the guaranty and the guaranty did contain a severability provision, the court of appeals concluded that "the homestead waiver provision was severable" without otherwise affecting the enforceability of the guaranty.[111] This case presents a practical lesson why a standard boilerplate severability provision should be included in virtually every contract.

B. INTERPRETATION

Issues on an indemnification provision were raised in *ConocoPhillips Co. v. Noble Energy, Inc.*[112] This case looks at the effectiveness of an indemnity provision through various assignments and a bankruptcy. A predecessor to ConocoPhillips and Noble entered into an exchange agreement exchanging various oil and gas interests between the two parties which contained an indemnification by each to the other arising out of any claims for hazardous materials whether or not attributable to the assignor's actions and whether "'prior to, during, or after the period of' the assignor's ownership."[113] Similar language was contained in the assignment and bill of sale executed pursuant to the exchange agreement. Eventually, the counterparty to ConocoPhillips filed for Chapter 11 bankruptcy, and its assets were purchased out of bankruptcy by an addi-

105. Vince Poscente Int'l, Inc. v. Compass Bank, 460 S.W.3d 211, 217 (Tex. App.—Dallas 2015, no pet.).
106. *Id.*
107. The severability provision read, in relevant part, as follows: "If any of the provisions of this Guaranty . . . shall, to any extent, be invalid or unenforceable, the remainder of the provisions of this Guaranty . . . shall not be affected thereby, and every provision of this Guaranty shall be valid and enforceable to the fullest extent permitted by law." *Id.* at 217–18.
108. *Id.* at 219.
109. 763 S.W.2d 922 (Tex. App.—Dallas 1989, writ denied).
110. *Vince Poscente Int'l, Inc.*, 460 S.W.3d at 218–19.
111. *Id.* at 219.
112. 462 S.W.3d 255 (Tex. App.—Houston [14th Dist.] 2015, pet. granted).
113. *Id.* at 259.

tional party. The asset purchase and sale agreement and the bankruptcy plan both contained language that the purchaser agreed to purchase all assets of the bankruptcy estate but agreed only to assume liabilities listed on a specific list, which included performing obligations under any executory contract expressly assumed. An environmental claim arose, and ConocoPhillips tendered defense and indemnification to Noble as the successor under the exchange agreement indemnification pursuant to the asset purchase agreement and a merger.[114]

Resolution of this case revolved around the interpretation of a specific provision in the asset purchase and sale agreement, whereby the purchaser agreed to all contracts "in any way associated with the Assets, including but not limited to, those Material Contracts (as defined hereafter)";[115] however, the exchange agreement was not listed as an excluded asset.[116] Noble's interest ran through the bankruptcy proceedings, so the Fourteenth Houston Court of Appeals looked to determine whether the indemnity provisions of the exchange agreement were an executory contract under the bankruptcy code.[117] The indemnity provision was a two-way indemnity, and, despite the fact that it was contingent, it was of a material nature, so it met the appropriate conditions to be an executory contract.[118] While the law in this case is not striking in any sense, it is a good example of the need for specificity in drafting contracts, since the specific inclusion of the exchange agreement would have eliminated the disputes raised in this case.

V. PURCHASER/SELLER

A. Remedies; Contract Interpretation

In *Internacional Realty, Inc., v. 2005 RP West, Ltd.*, the First Houston Court of Appeals addressed the meaning of a "put remedy" under a purchase contract.[119] Under the agreement at issue, the seller had three "sole and exclusive remedies": "(i) terminate this Agreement and thereupon shall be entitled to the Earnest Money as liquidated damages (and not as a penalty), or (ii) put the Property to Purchaser and sue Purchaser for the Purchase Price, or (iii) pursue the remedy of specific performance of Purchaser's obligations under the Agreement."[120] The agreement went on to provide that if the seller "put" the property to the purchaser, the seller would be entitled to the following:

> [A]ll rights of offset against Purchaser . . . to which Seller . . . may be entitled at law or equity including the Earnest Money and any sums

114. *Id.* at 261.
115. *Id.* at 266. While the court did not specify whether the exchange agreement was in the list of "material contracts," one would assume it was not.
116. *Id.* at 266–67.
117. *Id.* at 271.
118. *Id.* at 275.
119. Internacional Realty, Inc. v. 2005 RP West, Ltd., 449 S.W.3d 512, 523 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).
120. *Id.*

> owed by Seller to Purchaser in respect of such construction financing or otherwise, such right of offset to be applicable against any such debt and assertable against any subsequent holder thereof.[121]

After the purchaser failed to comply with its obligations under the purchase contract, and after numerous extensions and amendments, the seller ultimately sold the property to a third party at a loss and sued the purchaser for the difference.[122] The purchaser argued that the "put remedy" required the seller to transfer the property to the purchaser and sue to recover the purchase price, essentially making the put remedy identical to the "specific performance remedy."[123] The seller argued that the put remedy allowed them to sell the property to a third party and sue the purchaser "for the difference between the contract price" and the sum of the earnest money and the third-party sales price.[124] At trial, the jury found that the seller elected the put remedy, accepted seller's interpretation of that remedy, and awarded the seller $4 million in damages.[125] The purchaser appealed, and the court of appeals affirmed the trial court's decision that the ambiguity of the put remedy was a question of fact to be decided by the jury and that the interpretation given by the jury was not an "unreasonable interpretation as a matter of law."[126] The court of appeals had previously noted that "our legal research has not revealed any published opinion in any United States jurisdiction construing this language."[127] Although this case does not break any new ground in legal jurisprudence, it is an important reminder for all practitioners regarding the importance of clear and concise legal drafting. Furthermore, practitioners should either avoid the use of industry vernacular, which is often subject to many different, and sometimes conflicting, interpretations, or ensure that the meaning behind such terms are clearly defined within the body of the contract.

B. Warranty of Title; Recovery of Attorneys' Fees

Stumhoffer v. Perales presents another important reminder to the practitioner with respect to the recovery of attorney fees for defending title under a General Warranty Deed.[128] Perales purchased the property in question from Stumhoffer and later was sued by a neighboring landowner who claimed to own by adverse possession a seven-foot strip of land along the edge of the property, or alternatively, claimed an easement on the property.[129] While the suit with the neighbor was ongoing, Perales sued Stumhoffer for attorney's fees incurred defending the suit and the

121. *Id.*
122. *Id.* at 520.
123. *Id.* at 522.
124. *Id.*
125. *Id.* at 520.
126. *Id.* at 526.
127. *Id.* at 522.
128. *See generally* Stumhoffer v. Perales, 459 S.W.3d 158 (Tex. App.—Houston [1st Dist.] 2015, pet. denied).
129. *Id.* at 160.

fair market value of the property (if any) that may be lost under the suit.[130] Perales later prevailed in the suit with the neighbor but continued to assert that Stumhoffer owned him for the attorney's fees incurred in defending the suit.[131] Unfortunately, the Fourteenth Houston Court of Appeals did not agree with Perales's position and cited multiple cases supporting their conclusion that, because Perales had prevailed in the case with the neighbor, there was no failure of title and, without failure of title, there is no obligation to indemnify.[132] The *Stumhoffer* court went on to reiterate that, even if there had been a failure of title, Perales would not have been entitled to attorney's fees but only to damages incurred as a result of the "portion of the conveyance that was subject to failure of title."[133] The court of appeals concluded with an important reminder for all practitioners that the general rule in Texas is that attorney's fees incurred in prior litigation are generally not recoverable as damages unless there is an agreement between the parties that specifically provides for such a recovery.[134]

C. Conditions Precedent vs. Covenants

In *Arbor Windsor Court, Ltd. v. Weekley Homes, LP*, the Fourteenth Houston Court of Appeals reminds practitioners of the importance of clearly distinguishing between conditions precedent and covenants when drafting legal contracts and that, although helpful, using "magic words" alone is not sufficient to ensure your intended result.[135] As both the majority and dissenting opinions explained in great detail, as a general rule, the courts in Texas disfavor conditions precedent.[136] If the language is vague or unclear, the courts will try to find an interpretation that does not result in the clause being a condition precedent.[137] The *Arbor Windsor Court* case is noteworthy because, despite the fact that: (i) the parties used the "magic words" usually only found in a covenant; (ii) the general aversion of Texas courts to condition precedents; and (iii) the absence of "magic words" that usually appear in a condition precedent,[138] the majority of the court of appeals found that there was no option but to interpret

130. *Id.*

131. *Id.* at 164.

132. *Id.* at 165.

133. *Id.*

134. *Id.* at 168; *see also* Martin-Simon v. Womack, 68 S.W.3d 793, 797 (Tex. App.—Houston [14th Dist.] 2001, pet. denied).

135. Arbor Windsor Court, Ltd. v. Weekley Homes, LP, 463 S.W.3d 131, 137 (Tex. App.—Houston [14th Dist.] 2015, pet. denied). Although courts generally look for the use of certain magic words such as "if," "provided that," or "on condition that," the use of such words alone is not dispositive. *Id.*

136. *Id.* at 136; *see also* Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990) (stating "[i]n construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible." *Id.*

137. *Arbor Windsor Court*, 463 S.W.3d at 136–37.

138. *Id.* at 137.

the clause at issue as a condition precedent.[139]

In *Arbor Windsor Court*, the developer of the subdivision lots eventually filed a counterclaim against a lot purchaser for breach of contract because the purchaser failed to purchase lots as provided in the contract.[140] Specifically, the parties used the following conflicting language in a clause: "Seller and purchaser covenant and agree, each with the other, to give fifteen (15) days' written notice of any default during which time same may be cured prior to exercise of any rights or remedies pursuant to this Agreement."[141] The phrase "covenant and agree" clearly contains the "magic words" of a covenant, while the phrase "prior to," without the "magic words" that are traditionally used in a condition precedent, certainly could be read as implying a condition precedent.[142] Distinguishing whether the drafters of the contract intended the clause to be a covenant or a condition precedent is important because if the clause is deemed to be a condition precedent, the condition must "be met or excused before the other party's obligation may be enforced,"[143] whereas if the clause is found to be only a covenant, the remedy for failure to perform is a claim for damages.[144] In *Arbor Windsor Court*, the court of appeals found that because the seller failed to provide the required fifteen-day notice to the purchaser, the condition precedent to seller's recovery had not occurred and the seller was not entitled to recover for breach of contract.[145]

In a well-argued dissent, Justice John Donovan strongly disagrees with the majority's position for several reasons. First, Justice Donovan construes the notice provision as a covenant and not a condition on its face because it does not include the traditional words, and "[i]n determining whether the language of a contract is a condition precedent, the words of the contract control."[146] Furthermore, although there is no requirement that certain phrases be utilized, "their absence is probative of the parties' intention."[147] Second, Justice Donovan argues that construing the notice provision as a condition creates a "result which is unreasonable and operates as forfeiture,"[148] which is generally abhorred by the courts and is "to be avoided when a reasonable [alternative] interpretation exists."[149] Interestingly, Justice Donovan relies on the same case as the majority, *Solar*, to support his position that the clause should be interpreted as a

139. *Id.* at 142.
140. *Id.* at 134.
141. *Id.* at 136.
142. *Id.* at 137–38 ("To glean the parties intent to create a condition precedent, we look for conditional language such as 'if,' 'provided that,' or 'on condition that.'").
143. *Id.* at 135.
144. *Id.* at 137 n.6 (citing Solar Applications Eng'g, Inc. v. T.A. Operating Corp., 327 S.W.3d 104, 108 (Tex. 2010) (citing Reinert v. Lawson, 113 S.W.2d 293, 294 (Tex. Civ. App.—Waco 1938, no writ))).
145. *Id.* at 142.
146. *Id.* at 145 (Donovan, J., dissenting) (citing Criswell v. European Crossroads Shopping Ctr., Ltd., 792 S.W.2d 945, 948 (Tex. 1990)).
147. *Id.*
148. *Id.* at 156.
149. *Id.*

covenant and not a condition.[150]

Further, Justice Donovan supports his dissent by including additional points from the procedural background that highlight why construing the clause as a condition precedent and not a covenant arguably causes an absurd result and a windfall to Weekley.[151] In his dissent, Justice Donovan states that the purchaser Weekley failed to purchase the lots pursuant to the contract, which resulted in the foreclosure of a loan that the seller, Arbor, had used to purchase the lots.[152] Arbor filed suit against the foreclosing bank, FETC, in an attempt to prevent the foreclosure, and Weekley (who had later purchased the lots at the foreclosure auction) intervened in Arbor's suit against FETC in an attempt to quiet title, at which point Arbor filed a counterclaim against Weekley.[153] In Justice Donovan's opinion, requiring Arbor to give Weekley fifteen (15) days' notice to cure, prior to being entitled to relief in a breach of contract suit, is absurd when (i) Arbor no longer owned the lots and, at that point, the remedies under the contract were no longer available;[154] (ii) there was no language prohibiting additional remedies not listed in the contract;[155] (iii) even if Weekley had been given notice there was no cure possible by Weekley;[156] and (iv) Weekley intervened in Arbor's suit against FETC which provoked Arbor's counterclaim against Weekley.[157] Arguably, the court of appeals, by interpreting the clause as a condition and not a cove-

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150. *Id.* at 146. In *Solar Applications Engineering, Inc. v. T.A. Operating Corp.*, Solar Applications Engineering was the general contractor, contracted by T.A. Operating Corporation, the owner, to build a truck stop. Solar Applications Eng'g, Inc. v. T.A. Operating Corp., 327 S.W. 3d 104, 105 (Tex. 2012). After the truck stop had been substantially completed, the parties disagreed over the remaining work to be performed and the attachment of liens to the property by Solar and certain subcontractors. *Id.* The owner terminated the contract and refused to pay Solar for the work performed. *Id.* Solar sued for breach of contract, and the owner countersued for delay and defective work. *Id.* The trial court awarded damages to Solar, and the owner appealed, claiming that Solar failed to provide a lien-release affidavit, which was a condition precedent to final payment under the contract. *Id.* The court of appeals agreed with the owner and reversed the trial court's judgment. *Id.* The Texas Supreme Court reversed the court of appeals and found that interpreting the applicable provision as a condition instead of a covenant would result in a "windfall" to the owner. *Id.* at 106, 110. The provision in question stated:

> The final Application for Payment shall be accompanied (except as previously delivered) by: (i) all documentation called for in the Contract Documents, including but not limited to the evidence of insurance; (ii) consent of the surety, if any, to final payment; and (ii) complete and legally effective releases or waivers (satisfactory to [owner]) of all Lien rights arising out of or Liens filed in Connection with the Work.

Id. at 109. Because the clause did not contain language "traditionally associated with a condition precedent" and interpreting the clause as a covenant and not a condition precedent avoided forfeiture, which is generally favored by the courts, the supreme court held that the language in question was a covenant and not a condition precedent. *Id.* at 109, 112.

151. *Arbor Windsor Court*, 463 S.W.3d at 148 (Donovan, J., dissenting).

152. *Id.* at 144.

153. *Id.*

154. *Id.* at 147.

155. *Id.* at 152.

156. *Id.* at 147. The contract provided for the following remedies: "termination of the Agreement and retainage of the earnest money; extending the time for performance as may be mutually agreed upon; or enforcing specific performance." *Id.* at 148.

157. *Id.* at 147.

nant, created an absurd result whereby Arbor was prevented from responding to Weekley's petition to intervene because of a contractual provision not intended to address the situation at hand, which, furthermore, resulted in a windfall for Weekley and forfeiture for Arbor. Regardless of whether you agree with the majority or the dissent of the court of appeals, the *Arbor Windsor Court* case is yet another important reminder for all practitioners on the importance of clear and precise drafting.

D. Oral Modifications; Statute of Frauds

In *Petrohawk Properties*, the Texarkana Court of Appeals addressed whether an oral "modification to an agreement subject to the statute of frauds" was enforceable if the modification was not material to the agreement.[158] The issue in *Petrohawk Properties* dealt with an agreement entered into between Petrohawk Properties, L.P., and several members of the Jones family at the height of the shale boom in 2008.[159] Despite the intense competition for minerals in the Haynesville Shale at the time, the Jones family was willing to enter into a lease at a below market rate on the condition that Petrohawk agreed to lease all of the family's unleased acreage in the Haynesville Shale, not to exceed 8,500 acres, provided they could provide defensible title. At the time, because of the strong interest in the Haynesville Shale, there was intense competition between oil and gas companies who were trying to acquire as much acreage as possible. At the same time, there was limited ability to access the land records at the county clerk's office, which resulted in lengthy title search delays.[160] The agreement called for the transaction to close on August 15, 2008, and $10 million was placed in Escrow by Petrohawk to be applied at closing to the purchase price.[161] If the family could not deliver properties without title defects that exceeded $10 million in value, or if the parties could not agree on a lease form, Petrohawk could terminate the agreement and "the escrow would be returned to Petrohawk."[162] If the family delivered conforming leases exceeding $10 million in value and a lease form was agreed upon but Petrohawk refused to close, the escrow would be forfeited as liquidated damages to the family.[163]

Unfortunately, because of the difficulties of performing the title review with the limited resources available, it soon became apparent that the title review would not be completed by the scheduled August 15, 2008 closing date.[164] "Petrohawk requested an extension of the closing to August 27 to allow more time to complete title work . . . with a second . . .

158. Petrohawk Properties L.P. v. Jones, 455 S.W.3d. 753, 763–64 (Tex. App.—Texarkana 2015, pet. dism'd).
159. *Id.* at 760.
160. *Id.* at 759.
161. *Id.* at 760–61.
162. *Id.* at 761.
163. *Id.*
164. *Id.* at 762.

closing [scheduled] on September 17."[165] Petrohawk and the family closed on approximately 2,200 mineral acres with a value of $51 million on August 27.[166] At the closing on August 27, the $10 million in the escrow was released and counted toward the purchase price. Because of additional difficulties verifying title, "the second closing [was] postponed until October 9, with a third, final closing [scheduled for] November 6."[167] On October 7, Petrohawk's attorney stated in an e-mail to the family's attorney:

> Due to unprecedented uncertainty in the capital markets, we are not in a position to close at this time. When we discussed the second closing we had no idea we would be faced with these extraordinary circumstances. We hope your clients understand and we would be happy to revisit this acreage when things get back nearer to normal.[168]

Petrohawk eventually took the position that the agreement had been concluded with the August 27 closing and that the family had until thirty days after the closing to cure any title defects and have additional properties included in the close. There was undisputed testimony that Petrohawk never notified the family of any title defects after the August 27 closing and that the delay was not due to any title defects but to the inability to review title because of the limitations at the County Clerk's office.[169] The family filed suit for breach of contract, seeking damages or specific performance, and at trial, they were awarded damages totaling $12,389,089.05. Petrohawk appealed, claiming, among other items, that the statute of frauds barred recovery under the terms of the modified agreement.[170]

Petrohawk contended that the oral modification deprived Petrohawk of the ability to walk away from the purchase for any reason and only be liable for $10 million in liquidated damages because once the first closing had occurred, the $10 million was applied to the purchase price and was no longer available, which was, therefore, a material modification of the original agreement.[171] The court of appeals disagreed and found that the $10 million was no longer available, not because of the oral modification, but because of Petrohawk's partial performance under the agreement and therefore, it was Petrohawk's partial performance, not the oral modification, that materially altered the contract.[172] The court of appeals held that "the oral modification to conduct multiple closings neither changed the obligations or rights of the parties under the Agreement nor substantially

165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 762–63.
169. *Id.* at 763.
170. *Id.*
171. *Id.* at 769.
172. *Id.* at 769–70.

altered the Agreement itself."[173] The conclusion of the *Petrohawk* court is noteworthy because, although many would argue the final holding was correct based on the equities, the final outcome, as a matter of law, is sure to be somewhat surprising to many practitioners. It, however, is a good reminder that, for the benefit of all parties, it is essential to ensure that all modifications to agreements are codified in writing.

E. Executory Contracts

In two different cases during the review period the courts examined what constitutes an executory contract and the obligations of sellers under such contracts.[174] These cases provide several important reminders to practitioners. The first reminder is that regardless of the terminology used by the parties, when parties enter into an agreement, or series of agreements, that collectively provide a buyer the right to immediate possession of the property with an option to purchase the property after some time, the courts will consider the totality of the circumstances and will likely consider such an arrangement to be an executory contract.[175] The second important practice tip arising from these cases is that executory contracts, unlike conventional contracts for sale, impose a number of statutory requirements on the seller, such as the obligation to provide annual accounting statements under § 5.077 of the Texas Property Code.[176] The requirements imposed on executory contracts by the Texas Property Code, if not closely adhered to, could be very costly to the seller. For example, the statutory penalty, under § 5.077 of the Texas Property Code, for those who fail to provide annual accounting statements is only $100 for each statement if the seller conducts less than two transactions in a twelve-month period.[177] However, as was the case in *Bryant*, any seller who conducts two or more executory transactions in a twelve-month period could be obligated to pay liquidated damages in the amount of $250 per day for each day after January 31st of the applicable year that the seller fails to provide the statement up to the fair market value of the property.[178]

Whether the penalties contained in § 5.077 are subject to proof of actual damages pursuant to § 41 of the Civil Practices and Remedies Code appears to be somewhat undecided at this point. The Texarkana Court of Appeals, in *Bryant*, did not specifically address the penalty issue, it simply overruled the lower courts finding that the contracts were not executory contracts and remanded the case for further proceedings.[179] However, in a 2005 case, *Flores v. Millennium Interests, Ltd.*, the Texas Supreme Court

173. *Id.* at 770.
174. *See* Bryant v. Cady, 445 S.W.3d 815, 817 (Tex. App.—Texarkana 2014, no pet.); Smith v. Davis, 462 S.W.3d 604 (Tex. App.—Tyler 2015, pet. denied).
175. *See Bryant*, 445 S.W.3d at 821.
176. *See id.* at 817 (citing Tex. Prop. Code Ann. § 5.077 (West 2015)).
177. Tex. Prop. Code Ann. § 5.077.
178. *Bryant*, 445 S.W.3d at 817 n.1.
179. *Id.* at 823.

held that although the annual statements provided were deficient, they were sufficient to substantially comply with the statute and, therefore, no penalties were awardable.[180] The supreme court, however, went on to clearly state that "the Legislature intended for the 'liquidated damages' of section 5.077(c) to be a penalty and did not intend that a purchaser prove actual damages as a predicate to their recovery."[181] As a result of the first two findings, the supreme court stated it was unnecessary to answer the third statement posed by the Fifth Circuit, which specifically asked if the definition of "exemplary damages" under Chapter 41 of the Texas Civil Practice and Remedies Code included the definition of "liquidated damages" pursuant to § 5.077 of the Texas Property Code and, therefore, whether any recovery under § 5.077 required a purchaser to comply with § 41.003, which effectively requires the establishment of actual damages for the recovery of exemplary damages.[182] Section 41.002 further provides that the provisions of Chapter 41 "prevail over all other laws to the extent of any conflict," with the exception of certain enumerated statues, which do not include § 5.077 of the Texas Property Code.[183]

Despite the holding of the supreme court in Flores, the Tyler Court of Appeals recently addressed executory contracts in *Smith v. Davis* and clearly held that Chapter 41 of the Civil Practices and Remedies Code is applicable to a claim for failure to provide the annual accounting statement and that liquidated damages under § 5.077(a) of the Texas Property Code can only be recovered when actual damages are incurred.[184] The Texas Supreme Court denied the petition to review *Smith,* leaving the issue unsettled at this point in time.[185]

VI. LEASES; LANDLORD/TENANT

A. Jurisdiction; Venue Selection

In the case *In re Group 1 Realty, Inc.*, the El Paso Court of Appeals clarified for practitioners any perceived conflict between the mandatory venue selection provision for major transactions found in § 15.020 of the Texas Civil Practice and Remedies Code and § 15.0115 of the Texas Civil Practice and Remedies Code that "mandates . . . a suit between a landlord and a tenant arising under a lease must be brought in the county in which the real property is located."[186]

The case involved a lease and sublease that contained an option to purchase the property in question.[187] Although the leases did not contain a venue selection clause, the purchase agreement, which qualified as a

180. Flores v. Millennium Interests, Ltd., 185 S.W.3d 427, 429 (Tex. 2005).
181. *Id.*
182. *Id.* at 434.
183. *Id.* at 439 (quoting Tex. Civ. Prac. & Rem.Code. Ann. § 41.002).
184. Smith v. Davis, 462 S.W.3d 604, 613 (Tex. App.—Tyler 2015, pet. denied).
185. *See id.*
186. *In re* Grp. 1 Realty, Inc., 441 S.W.3d 469, 472 (Tex. App.—El Paso 2014, no pet.) (citing Tex. Civ. Prac. & Rem. Code Ann. §15.020 (West 2015)).
187. *Id.* at 470–71.

major transaction pursuant to the terms of § 15.020 of the Texas Civil Practice and Remedies Code and was attached to the leases and incorporated therein, did contain such a clause.[188] The court of appeals correctly held that a venue selection clause satisfying the requirements of § 15.020 controls over all other venue selection clauses contained in Title 2 of the Civil Practice and Remedies Code.[189]

In *Mohammed v. D. 1050 W. Rankin, Inc.*, the First Houston Court of Appeals once again addressed the jurisdiction of the justice court and once again reiterated that "landlord-tenant disputes about possession fall squarely within the justice court's jurisdiction."[190] The court of appeals also addressed the perceived inconsistency between the Texas Supreme Court's new rules for justice court cases, which became effective on August 31, 2013, specifically, Rule 510, which governs evictions and provides for an appellate timetable of five days, and Rule 506, which governs justice cases in general and provides for an appellate timetable of twenty-one days.[191] The court of appeals held that the five-day time period outlined in Rule 510.9 applied, regardless of the fact that the judgment at issue was an amended judgment and was not specifically addressed by Rule 510.9.[192]

B. Forcible Detainer

As in previous years, a number of cases dealt with forcible detainer actions. In *Federal Home Loan Mortgage Corporation v. Pham*, Freddie Mac, the record owner, appealed the county court's decision that res judicata barred a third forcible detainer action against tenants at sufferance.[193] This case is notable because the Fourteenth Houston Court of Appeals agreed with Freddie Mac that res judicata did not automatically bar the action at hand because a "new and independent cause of action for forcible detainer arises each time a person refuses to surrender possession of real property after a person entitled to possession of the property delivers a proper written notice to vacate."[194] Although the court of appeals ultimately affirmed the county court's decision because Freddie Mac had failed to present appropriate evidence in its response to Pham's motion for summary judgment that a new, proper written notice to vacate had been delivered, this case should give lenders everywhere comfort that they will not be barred from bringing a forcible detainer action by res judicata.[195]

188. *Id.* at 471.
189. *Id.* at 473.
190. Mohammed v. D. 1050 W. Rankin, Inc., 464 S.W.3d 737, 741 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).
191. *Id.* at 742.
192. *Id.* at 743.
193. Fed. Home Loan Mortgage Corp. v. Pham, 449 S.W.3d 230, 232 (Tex. App.—Houston [14th Dist.] 2014, no pet.).
194. *Id.* at 235–36.
195. *See id.* at 235.

C. Statute of Frauds

The courts addressed the statute of frauds in a surprising number of cases during the review period. The First Houston Court of Appeals also addressed the issue in *Mohammed*. In this case, the tenant continued to pay the original lease amount of $1,800 a month for over seven years after the date the original lease expired.[196] The lease contained two five-year extension options.[197] The first extension option provided for monthly rent of $2,000 a month for two years and $2,200 a month for three years.[198] The second extension option provided for market rent on similar properties. The tenant argued that he had accepted the options and lawfully inhabited the premises. The court of appeals, however, reiterated that "[a] party to an option contract may enforce that option by strict compliance with the terms of the option."[199] Because there was nothing in writing produced at trial evidencing the landlord's intent to modify the rent payable under the option, the court of appeals correctly held that the tenant was simply a month-to-month tenant at will who had lawful possession "until [the landlord] notified him to vacate the premises."[200]

Courts also addressed the statute of frauds in *Rossman v. Bishop Colorado Retail Plaza, L.P.*[201] Rossman was a complicated case involving a lessor and the purchaser of a lessee's assets after foreclosure by a bank, which presents several very important practice pointers.[202] In *Rossman*, the Dallas Court of Appeals held that a bill of sale, signed only by the bank and not the purchaser, whereby the bank transferred the foreclosed assets to the purchaser that included the statement, "All leases including ground leases," did not provide sufficient information to satisfy the statute of frauds because there was no way for someone, even if they were familiar with the area, "to locate the [transferred] premises with any reasonable certainty."[203] The lessor then claimed that three exceptions to the statute of frauds existed (delivery and acceptance, equitable estoppel, and performance) because the purchaser then pledged the leases in question to a bank as collateral to secure a loan. Unfortunately for the lessor, the original security agreement, prior to the foreclosure, again failed to adequately identify the property and simply listed categories of property, one of which was "[a]ll leases, including ground leases."[204] The court of appeals held that this description alone "could not create a security interest in the [L]eases."[205]

196. *Mohammed*, 464 S.W.3d at 740.
197. *Id.*
198. *Id.*
199. *Id.* at 745.
200. *Id.* at 747.
201. 455 S.W.3d 797, 808 (Tex. App.—Dallas 2015, pet. denied).
202. *See id.* at 800.
203. *Id.* at 808.
204. *Id.* at 809.
205. *Id.*

In addition to ensuring that all contracts purporting to transfer an interest in real property contain legal descriptions sufficient to allow the property to be identified, the *Rossman* case contains an additional pointer for the practitioner: the importance of ensuring that a debtor has the rights to encumber the underlying collateral.[206] Because the leases in question prohibited the lessee from encumbering its interest in the leases, the *Rossman* court held that even if the description in the security instrument was sufficient to create a security interest, no security interest could attach and the leases could not have been transferred to the purchaser because the terms of the leases themselves prohibited such an action.[207]

D. Breach of Contract; Discharge of Obligation to Perform

Another case of interest to the practitioner is *Archer v. DDK Holdings LLC*.[208] In this case, the landlord under a master lease transferred the premises without giving the tenant notice of the intent to transfer the premises and the option to purchase the premises pursuant to the terms of the master lease.[209] The tenant alleged breach of contract. Unfortunately for the tenant, because the tenant had previously been notified by the landlord that they were in breach of the repair obligations under the lease and had failed to comply with the landlord's demand to perform the requested repairs, the Fourteenth Houston Court of Appeals found that, as result of the tenant's initial breach, the landlord's performance was excused and the landlord was not required to give the tenant the option to purchase the premises.[210] Although in this case it is unclear whether the favorable outcome for the landlord was mere luck or crafty counsel, the case represents an important reminder for all practitioners that, as the *Archer* court stated, "when one party materially breaches a contract, the other party to the contract is discharged or excused from further performance."[211]

VII. CONSTRUCTION MATTERS

A. Certificate of Merit Statute

In *Childress Engineering Services, Inc., v. Nationwide Mutual Insurance Company*, the Fort Worth Court of Appeals once again addressed the Certificate of Merit Statute and concluded, yet again, that a certificate of merit was not necessary for a breach of contract suit.[212] In the *Childress* case, Nationwide Insurance Company, as subrogee for Meritage Homes of Texas, sued Childress Engineering, alleging breach of contract for fail-

206. *Id.* at 810.
207. *Id.*
208. 463 S.W.3d 597 (Tex. App.—Houston [14th Dist.] 2015, no pet.).
209. *Id.* at 610.
210. *Id.* at 611.
211. *See id.* at 610.
212. Childress Eng'g Servs., Inc. v. Nationwide Mut. Ins. Co., 456 S.W.3d. 725, 730 (Tex. App.—Fort Worth 2015, no pet.).

ure to defend and indemnify Meritage Homes of Texas in a suit by a homebuyer who "sued for negligence, gross negligence, breach of contract, breach of warranty, violations of the Deceptive Trade Practices Act, fraud, fraud in the inducement, and fraud in a real estate transaction, based on an allegedly defective foundation" poured by Childress under a contract with Meritage.[213] The indemnification clause in question was an absolute obligation "REGARDLESS OF CAUSE OR ANY FAULT OR NEGLIGENCE OF [MERITAGE]," and the court of appeals found that the breach of contract claim was based solely on Childress's failure to "comply with a contractual obligation, not a specific act, error, or omission performed in its provision of engineering services."[214] As a result, Nationwide was not required to present a certificate of merit pursuant to the requirements of § 150.002 of the Texas Civil Practice and Remedies Code.[215]

B. Breach of Contract vs. Negligence

In *Chapman Custom Homes, Inc. v. Dallas Plumbing Company*, the landowner and general contractor sued the plumbing subcontractor, alleging that the subcontractor failed to install the hot water system properly, which resulted in water damage to the house.[216] The Dallas Court of Appeals affirmed the summary judgment in favor of the plumbing contractor because: (i) "the homeowner did not have a negligence claim because it 'did not allege violation of a [tort duty] independent of the contract'";[217] and (ii) "did not have a contract claim because [the homeowner] was not a party to the plumbing subcontract."[218] The basis of the court of appeals decision was the economic loss rule, which "generally precludes recovery in tort for economic losses resulting from a party's failure to perform under a contract when the harm consists only of the economic loss of a contractual expectancy."[219] The Texas Supreme Court relied on a 1947 case, *Montgomery Ward & Co. v. Scharrenbeck*, which involved a very similar fact pattern (a contractor had been hired to repair a water heater, and the work was performed so poorly that it ultimately caused the house to burn down) to reverse the court of appeals.[220] In *Montogomery Ward*, the Texas Supreme Court held that every contract carries with it a common law implied "duty to perform with care [and] skill."[221] In *Chapman Custom Homes, Inc.*, the supreme court found that

213. *Id.* at 726.
214. *Id.* at 729.
215. *Id.*
216. Chapman Custom Homes, Inc. v. Dall. Plumbing Co., 445 S.W.3d 716, 717 (Tex. 2014) (per curiam).
217. *Id.* (quoting Chapman Custom Homes, Inc. v. Dall. Plumbing Co., 446 S.W.3d 29, 35 (Tex. App.—Dallas 2013), *rev'd*, 445 S.W.3d 716 (Tex. 2014)).
218. *Id.*
219. *Id.* at 718.
220. *Id.* (citing Montgomery Ward & Co. v. Scharrenbeck, 204 S.W.2d 508, 510 (Tex. 1947)).
221. *Montogmery Ward*, 204 S.W.2d at 510.

the homeowner did have a negligence claim "[b]ecause the negligent performance of a contract that proximately injures a non-contracting party's property" is sufficient to support a negligence claim.[222] The supreme court went on to state that the economic loss rule "does not bar all tort claims arising out of a contractual setting."[223]

VIII. TITLE MATTERS

A. Adverse Possession/Title Disputes

In the area of adverse possession, the courts essentially reviewed long time requirements, though in odd circumstances. In *Wells v. Johnson*, the Amarillo Court of Appeals confirmed the prejudice in the courts against finding adverse possession as a result of casual fences and cattle grazing.[224] In this case, the statements by the claimants and the placement of a fence were not enough to meet the adversity and hostility requirements, and the grazing of the cattle was insufficient to support consistent and continuous possession.[225] Property needs to be designedly enclosed by a fence in connection with adverse possession, and an existing casual fence was insufficient for that purpose.[226] In addition, there was some evidence that the use was not continuous.[227] The repair and maintenance of the casual fence did not change a casual fence into a designed enclosure.[228] This property was bordered by the Red River, which is notorious for changing riverbeds and boundaries. Perhaps the giveaway in the opinion was when the court of appeals reversed and rendered the finding that the "mere grazing of livestock to show adverse use" was insufficient alone.[229]

Yet another case, *Kings River Trail Association, Inc. v. Pinehurst Trail Holdings, LLC*, identified another generally accepted point that joint use is not enough to establish adverse use under the limitations statute.[230] This was a case involving use by members of a property association of property dedicated for golf course use but which had not been developed. The association built and maintained trails, but there was no indication of an exclusion appropriation.[231] The First Houston Court of Appeals held that "[m]ere occupancy of land without any intent to appropriate it does not support adverse possession."[232]

Finally, in *Villarreal v. Guerra*, the San Antonio Court of Appeals visited the difficulty of establishing adverse possession in a co-tenancy situa-

222. *Chapman Custom Homes, Inc.*, 445 S.W.3d at 717.
223. *Id.* at 718.
224. Wells v. Johnson, 443 S.W.3d 479, 480–90 (Tex. App.—Amarillo 2014, pet. denied).
225. *Id.* at 495–96.
226. *Id.*
227. *Id.* at 496.
228. *Id.* at 490.
229. *Id.*
230. Kings River Trail Ass'n, Inc. v. Pinehurst Trail Holdings, L.L.C., 447 S.W.3d 439, 445 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).
231. *Id.*
232. *Id.*

tion.[233] In this case, the ten-year statute was satisfied, and the acts were sufficiently adverse, open, and hostile to establish adverse possession.[234] An interesting twist in the analysis was that possession of land following an oral gift was adverse, not permissive, because a gift of property violated the statute of frauds and was unenforceable.[235] This is a narrow analysis because it would have been as easy to find an oral gift failing as a deed to be permissive. In this case, the recipient of the gift did place a lock on the gate and gave no one else a key. Additionally, the property was enclosed by a natural barrier—thick thorny bushes. The recipient of the gift spent forty years improving the property, including creating ponds, clearing land, building a windmill and shed, and bringing utilities to an already existing house. The issue was precipitated when the tax office declined to accept tax payment from the recipient of the gift. One other useful point made by the court of appeals was that the term "hostile" did not require true adversity or hostility to one another, but that the claim of title be inconsistent with the rights of the true owner.[236] It took forty years of exclusive occupation and history of improvements to establish adverse possession.[237]

B. Deeds and Conveyances

The Texas Supreme Court weighed in on deed interpretation in *Stribling v. Millican DPC Partners, LP*.[238] The case was a boundary dispute and included questions of adverse possession, but the supreme court did not reach the adverse possession issue because of its handling of the deed interpretation.[239] In particular, the dispute was over a 34.28 acre tract. A 1945 deed in the chain of title conveyed 202 acres, which were described by metes and bounds, and which included the 34.28 acres in question.[240] A 1973 deed of a significantly larger tract included a parcel referenced as a 202-acre tract out of the Thomas Henry survey and described in the 1945 deed. That is, the general description in the 1973 deed included the entire 202 acres, including the 34.28 acres. The 1973 metes and bounds description, however, did not contain the 34.28 acres, and therefore, the specific description was inconsistent with the general description. There was additionally an indication that the metes and bounds area was 1,167 acres, which was described by the metes and bounds in the 1973 deed.[241] Interestingly, neither party contended the deed was ambiguous thereby giving the supreme court license to construe the deed as a matter of

233. Villareal v. Guerra, 446 S.W.3d 404, 410 (Tex. App.—San Antonio 2014, pet. denied).
234. *Id.* at 414.
235. *See id.* at 411.
236. *Id.* at 413.
237. *Id.* at 408.
238. 458 S.W.3d 17 (Tex. 2015).
239. *Id.* at 18.
240. *Id.* at 19.
241. *Id.* at 20.

law.[242] In so finding, the supreme court pronounced the following general principles: (1) "[A]ll parts of a written instrument must be harmonized and given effect, if possible, but, in case of a conflict, more specific provisions will control over general expressions"; (2) when the specific description is clear, there is "no necessity for invoking the aid of the general description"; (3) "[m]ere inconsistencies between the metes and bounds and the general description do not themselves render the metes and bounds doubtful"; and (4) "a reference to a prior deed does not prevail over a clearly contrary metes-and-bounds description."[243]

Pointing out the importance of specific detailed language in a deed, the Eastland Court of Appeals in *Butler v. Horton*, reviewed the four corners of a deed to determine the actual intent of the parties, disregarding any arbitrary rules.[244] The deed in question reserved to the grantor one-half of the usual one-eighth royalty. Further, it stated that the "heirs and assigns, shall be entitled to one-half of any bonus payments or delay rentals," and the grantor "shall be entitled, free of cost, to one-half of the royalty on said minerals, as provided."[245] The court of appeals felt that this was a reservation for a fraction of a royalty rather than a fractional royalty.[246]

> A "fraction of royalty" provision provides for a fractional share of the royalty that is provided in a lease; the interest is not fixed, but rather floats in accordance with the amount of royalty provided in the lease. A "fractional royalty" interest, on the other hand, remains fixed regardless of the amount of royalty provided for in a future lease.[247]

In this case, the court of appeals found that the noted language intended to reserve a fraction of the royalty and not a specific amount.[248]

In *Cole v. McWillie*, dealing with capacity and voidable versus void, the Eastland Court of Appeals found that a lack of authority under a power of attorney resulted in a deed that was only voidable and must be set aside within the time provided by the statute of limitations.[249] A voidable deed is effective and valid but voidable at the election of the principal.[250] In this case, a principal had executed a power of attorney at the point in time when she was competent, but later became incompetent prior to the time of the execution of the deed. The power of attorney was not durable, and the principal had died in 1986. An important fact in this case was that

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242. *Id.*
243. *Id.* at 20, 22–23 (quoting U.S. Enters., Inc. v. Dauley, 535 S.W.2d 623, 630–31 (Tex. 1976), and Cullers v. Platt, 16 S.W. 1003, 1005 (Tex. 1891)).
244. Butler v. Horton, 447 S.W.3d 514, 517 (Tex. App.—Eastland 2014, no pet.).
245. *Id.* at 516–17.
246. *Id.* at 515.
247. *Id.* at 517–18 (citing Moore v. Noble Energy, Inc. 374 S.W. 3d 644, 647–48 (Tex. App.—Amarillo 2012, no pet.)).
248. *Id.* at 515.
249. Cole v. McWillie, 464 S.W.3d 896, 898, 904 (Tex. App.—Eastland 2015, pet. denied).
250. *Id.* at 902.

the power of attorney was effective when originally executed, and the lack of capacity arose thereafter.[251] The court of appeals found that the power of attorney did not "automatically terminate[ ] upon the disability of the principal."[252] While a durable power of attorney allows continued authority to execute the contract or deed by the agent, the lack thereof did not provide for immediate termination upon incapacity of a principal.[253] Interestingly, the court of appeals distinguished the death of a principal from an incapacity.[254] "[T]he benefited party can secure the advantage of a good bargain by ratifying the contract or he can relieve himself of a bad bargain by electing to disavow the agreement."[255] The court of appeals also applied a standard statute of limitations that seems somewhat inconsistent with the issue of incapacity, which would typically toll limitations.[256] In this case, it probably was not relevant because the principal had died and more than four years had passed since the death. Also, procedural defects in asserting the avoidance of limitations may have prevented the court from fully considering the incapacity issue.

In another deed interpretation case, *Union Railroad Company v. Ameriton Properties Inc.*, the First Houston Court of Appeals held that the term "right-of-way" as used in a deed "[did] not necessarily define or limit the estate conveyed."[257] In fact, the term "right-of-way" often has two different uses: sometimes used to describe a right belonging to a party or a right of passage over a tract; at other times used to describe a strip of land that the railroad company takes to construct a roadway.[258] In this case, Union Pacific laid tracks within the fifty-foot wide strip of land but subsequently removed the tracts and no longer used the property for railroad purposes. In the deed itself, the grantor reserved the right to cut timber upon the tract given for the right of way. Using the four corners rule and seeking to determine the intent of the parties, the court of appeals focused on the reservation of timber rights as unnecessary to be conveyed if only an easement or right of way.[259] The court of appeals found that the deed conveyed a fee simple estate.[260]

In this case, one of the issues arose because the deed was apparently provided "during a condemnation proceeding and the seller hoped to benefit from the presence of [the] railway."[261] Accordingly, the deed could only convey a right-of-way easement.[262] In an odd twist, though, the granting language of the right of way deed, which the court of appeals

251. *Id.* at 898.
252. *Id.* at 901.
253. *Id.*
254. *Id.* at 901–02.
255. *Id.* at 902.
256. *See id.* at 903.
257. Union R.R. Co. v. Ameriton Properties Inc., 448 S.W.3d 671, 679 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).
258. *Id.*
259. *Id.* at 684–85.
260. *Id.*
261. *Id.* at 686.
262. *Id.* at 680.

found to grant a fee simple, also had a condition that the railroad—on or before the first day of January 18, 1981—must build a railway and run cars to the Texas and New Orleans railroad depot. In such case, the deed of conveyance would be absolute. Because the railroad failed to put on evidence that that had occurred, the court of appeals found that even though the deed was intended to convey fee simple, there was no evidence that the conditions had been fulfilled, and therefore, the property had not vested in the railroad.[263] Thus, the case turned not on a fee simple versus easement but on a condition.

C. Easements

The Texas Supreme Court brought its wisdom to bear in an extremely important decision regarding easements, *Hamrick v. Ward*.[264] In this decision, the supreme court held that implied easements fell within only two categories: necessity and prior use.[265] For an owner to claim a roadway easement to a landlocked property, one that was previously unified with a larger parcel, that landowner must pursue a necessity easement.[266] While prior use easements may be appropriate for improvements to a landlocked property, such as utility lines, in order to establish an implied easement for roadway access, a necessity easement is required.[267] Thus, there is a higher burden, and an easement by necessity requires: "(1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the claimed access is a necessity and not a mere convenience; and (3) the necessity existed at the time the two estates were severed."[268]

To the contrary, a prior use easement only requires the following:

> (1) unity of ownership of the alleged dominant and servient estates prior to severance; (2) the use of the claimed easement was open and apparent at the time of severance; (3) the use was continuous, so the parties must have intended that its use pass by grant; and (4) the use must be necessary to the use of the dominant estate.[269]

This is a lesser standard and allows the court to look into the circumstances and the obvious intent of the parties from the transaction. Because a roadway is deemed to be a much more significant intrusion, it must meet the higher standard.[270] In this case, the Wards asserted their right using the prior use doctrine, and the trial court awarded them an implied easement. The supreme court, after review of the law and its holding regarding easement by necessity, remanded the case to permit

263. *Id.* at 687.
264. 446 S.W.3d 377, 377 (Tex. 2013).
265. *Id.* at 379.
266. *Id.*
267. *Id.*
268. *Id.* at 382.
269. *Id.* at 383.
270. *Id.* at 384.

the Wards to pursue a theory of easement by necessity.[271] Rather than punishing the Wards for failure to use the correct theory, the supreme court determined that, because of the clarification of the law, it had the authority and power to remand for a new trial in the interest of justice, consistent with the holding of the court.[272] In particular, the supreme court effectively overruled prior case law established by *Bickler v. Bickler*.[273]

Also, in an interesting twist on an easement by necessity, the El Paso Court of Appeals found that a license from a third party to cross other land did not undermine an easement by necessity.[274]

D. Restrictive Covenants, Condominiums and Owners Association

Two courts of appeals decisions dealt with Chapter 209 of the Texas Property Code and Property Associations, now often called common interest communities. In *Storck v. Tres Lagos Property Owners Association, Inc.*, the Texarkana Court of Appeals held that a provision in the homeowners' association bylaws was ineffective to the extent that it disqualified a property owner from voting in a property owners' association election of board members or on any other matter concerning rights or responsibilities of the owner.[275] Thus, the bylaws provided that if the homeowner was behind in dues, that homeowner lost their right to vote. However, Texas Property Code §§ 209.002(4) and 209.0059(a) statutorily provide that such a provision is ineffective.[276]

In *Park v. Escalera Ranch Owners' Association, Inc.*, the Austin Court of Appeals acknowledged that a suit against a homeowner requires that notice first be given to the owner.[277] This is a mandatory provision under the Texas Property Code § 209.006(a).[278] The provision, however, is not jurisdictional, and the appropriate response for a homeowner would have been a plea in abatement.[279] If the abatement is not requested, the homeowner has waived the mandatory non-jurisdictional statutory requirement.[280] The lesson here, for any attorney representing a homeowner that has been sued without notice and that desires to address the alleged infraction, is to file a plea in abatement. In this case, the infraction involved installation of unapproved windows.

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271. *Id.* at 385.
272. *Id.*
273. *Id.* at 377 (citing Bickler v. Bickler, 403 S.W.2d 354 (Tex. 1966)).
274. Jentsch v. Lake Road Welding Co., 450 S.W.3d 597, 601 (Tex. App.—El Paso 2014, no pet.).
275. Stork v. Tres Lagos Prop. Owners Ass'n, Inc., 442 S.W.3d 730, 731 (Tex. App.—Texarkana 2014, pet. denied).
276. *Id.* at 236.
277. Park v. Escalera Ranch Owners' Ass'n, Inc., 457 S.W.3d 571, 576 (Tex. App.—Austin 2015, no pet.).
278. *Id.* at 583.
279. *Id.* at 590.
280. *Id.*

E. Homestead

In connection with homestead issues, most of the cases during the Survey period dealt with home equity loans. In particular, parties continued to challenge home equity loans for various violations of the Constitution, and, as lending practices have tightened, new claims have become less successful. For example, in *Santiago v. NovaStar Mortgage, Inc.*, the Dallas Court of Appeals addressed the issue of whether or not the discovery rule might toll a four-year statute of limitations.[281] The court noted that the injury arising from an alleged constitutional violation accrues at the point of the closing of the loan. In this case, there was an alleged forged affidavit that had been recorded. The court of appeals found that (i) "[t]he affidavit was a matter of public record"; (ii) the forgery was not inherently undiscoverable; and (iii) the limitations ran from the date of the closing.[282]

In *The Bank of New York Mellon v. Daryapayma*, the borrower raised a creative argument that a mortgage that was being paid off in the context of a home equity loan refinance should be added to the amount of the home equity loan for purposes of determining the 80% market value limitation.[283] This is a nonsensical argument and can be easily eliminated from consideration by a simple reading of the constitutional language. However, by some means, the borrower had prevailed at the trial court level. The Dallas Court of Appeals took care of matters and reversed the trial court decision.[284]

Also, in *Rivera v. Hernandez*, the El Paso Court of Appeals noted that a homestead interest did not change separate property into community property.[285] A homestead interest is an intangible interest that may exist in separate or community property.[286] This is a rather straightforward concept in Texas law, but many lenders require both borrowers to be in record title. If the property is one spouse's separate property, and both husband and wife may be borrowers, then both may be required to execute a deed of trust due to the homestead interest and requirements of the Family Code.[287] This does not change the characterization of the property.[288] It is specifically permissible and appropriate under Texas law. Yet, lenders continue to require borrowers to place their spouse in title, sometimes negatively affecting or otherwise altering characteriza-

281. Santiago v. NovaStar Mortgage, Inc., 443 S.W.3d 462, 469 (Tex. App.—Dallas 2014), *overruled in part by* Wood v. HSBC Bank USA, N.A., 59 Tex. Sup. Ct. J. 877 (Tex. 2016).

282. *Id.* at 473.

283. Bank of N.Y. Mellon v. Daryapayma, 457 S.W.3d 618, 620–21 (Tex. App.—Dallas 2015, pet. denied).

284. *Id.* at 619.

285. Rivera v. Hernandez, 441 S.W.3d 413, 420 (Tex. App.—El Paso 2014, pet. denied).

286. *Id.* (citing Denmon v. Atlas Leasing, L.L.C., 285 S.W.3d 591, 595 (Tex. App.—Dallas 2009, no pet.)).

287. *See id.* (citing Leighton v. Leighton, 921 S.W.2d 365, 367 (Tex. App.—Houston [1st Dist.] 1996, no writ.); *see also* Tex. Fam. Code Ann. § 5.001 (West 2015).

288. *Rivera*, 441 S.W.3d at 420.

tion of property in cases where property is separate. This is simply an incorrect and inappropriate practice by the lending community.

Finally, *Wassmer v. Hopper* recognized that a surviving spouse, even though not receiving homestead property upon the death of her husband due to the laws of intestacy, still had a surviving spouse homestead interest in the property and may remain in and occupy that property until she moves or dies.[289] An independent administrator and the step children were not entitled to partition or to otherwise cause a transfer of the property interest, but rather were subject to the widow's exclusive right of use and possession when she "elected to maintain the home as her constitutional homestead."[290]

F. Title Insurance

There were three title insurance related cases during the Survey period, though essentially addressing the duties of the escrow agent. As is a common practice in Texas, a title company or escrow agent closes the real estate transaction and is an agent for the issuance of title insurance by a title insurance underwriter. Separate from claims that an insured may have under the title insurance policy, sometimes there are claims brought directly against the escrow agent in connection with a real estate closing. In *Dailey v. Thorpe*, the First Houston Court of Appeals limited "[a]n escrow officer's fiduciary duties to the parties to [the] real estate transaction."[291] In this case, the closed real estate transaction was a seller-financed real estate sale that subsequently defaulted. Because the sellers did not receive full payment from the purchasers, and the event occurred after closing, the seller alleged a breach of fiduciary duty on the part of the escrow agent. The facts were somewhat specific in this case as the escrow officer was the niece of the purchaser. Many title companies do not let escrow officers close transactions for relatives because of the difficulties that may arise like this. It, however, is not a prohibited act.

In *IQ Holdings, Inc. v. Stewart Title Guaranty Company*, the First Houston Court of Appeals found that the Schedule B exception in a title insurance policy for a condominium declaration was sufficient to except all title risks arising from that instrument, including a right of first refusal.[292] The court of appeals also restated the title insurance principle that the agent did not have a duty to obtain good title, nor did he or she have to conduct a title search for the benefit of the potentially insured.[293] Rather, such search was for the benefit of issuing title insurance and for

289. Wassmer v. Hopper, 463 S.W.3d 513, 530 (Tex. App.—El Paso 2014, no pet.).

290. *Id.* at 525, 530.

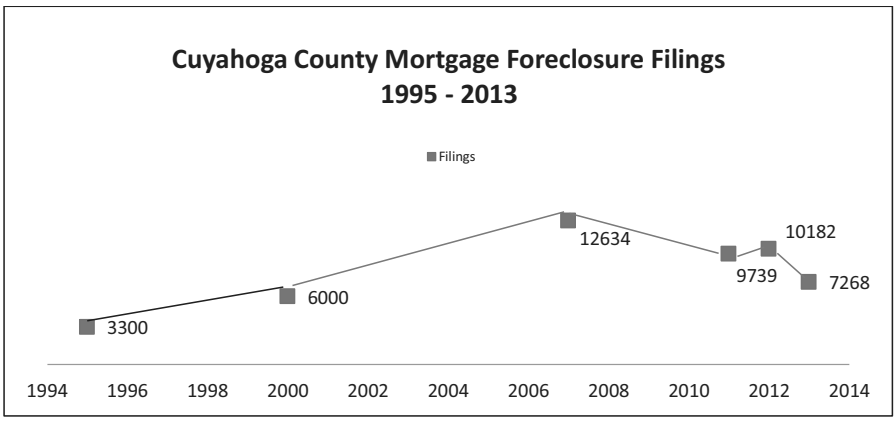
291. Dailey v. Thorpe, 445 S.W.3d 785, 789 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

292. IQ Holdings, Inc. v. Stewart Title Guar. Co., 451 S.W.3d 861, 873 (Tex. App.—Houston [1st Dist.] 2014, no pet.).

293. *Id.* at 871.

its own benefit in underwriting the transaction.[294] Of interest, the court of appeals also pointed out that it was the seller's duty, not the escrow agent's duty, to inform the prospective buyer of transfer restrictions imposed by the association.[295]

Finally, in *Flagstar Bank, FSB v. Walker*, the Dallas Court of Appeals addressed a very complicated multi-party scenario but ultimately found that no fiduciary duty existed between a title examining entity and a warehouse lender.[296] The diagram below illustrates the multiple parties, but essentially Flagstar was a warehouse lender to Excel.



Excel had an escrow relationship with LSD, and LSD subcontracted the title work to CTS. CTS was also an agent for First American Title Insurance Company and had generally solicited title and escrow work from a number of entities, including Flagstar.[297] CTS did issue a commitment on behalf of First American and, for an unknown reason, Flagstar wired funds directly to CTS. CTS kept a fee for examination and issuance of the title insurance and then transferred the funds to LSD for handling the closing. LSD failed to pay off the underlying liens.[298] Thus, obviously LSD did not have the funds to cover the loss, and Flagstar ultimately looked to CTS for recovery.

Flagstar failed on each liability theory, including fiduciary duty, bail-

294. *Id.* (citing Hahn v. Love, 394 S.W.3d 14, 35 (Tex. App.—Houston [1st Dist.] 2012, pet. denied)).
295. *Id.* at 873.
296. Flagstar Bank, FSB v. Walker, 451 S.W.3d 490, 504 (Tex. App.—Dallas 2014, no pet.).
297. *Id.* at 495.
298. *Id.* at 496.

ment, and negligence.[299] As a preliminary matter, the court of appeals did find that Flagstar, the warehouse lender, had standing to bring a claim but found no escrow agreement between Flagstar and CTS.[300] Part of the difficulty from Flagstar's position was significant subjective understandings and assumptions and a failure to provide specific instructions to CTS. While the scenario where the escrow agent and the title agent are separate entities is the exception rather than the rule in Texas, this does demonstrate the risk of an entity providing only title work when it also handles the lender funds. Either the lender funds should have gone through the escrow agent with a remitter to CTS or the relationship between Flagstar and CTS should have been specifically set out and established by agreement.[301] In the absence thereof, Flagstar was not entitled to presume that CTS had a fiduciary duty to it.[302]

G. *Lis Pendens*

In an interesting case out of the First Houston Court of Appeals, the court further complicated, and possibly confused, the issues of *lis pendens*. *Lis pendens* strictly create notice of a lawsuit that claims an interest in real property.[303] *Lis pendens* are often litigated in the context of a motion to cancel or expunge because of some failure to claim an interest in real property.[304] Notices of *lis pendens*, however, have uniformly been held as privileged documents, though often subject to abusive practices.[305] In *James v. Calkins*, the underlying lawsuit was a fraud claim.[306] The parties also asserted that the filing of the *lis pendens* constituted a fraudulent lien against the property pursuant to Chapter 12 of the Texas Civil Practice and Remedies Code. Chapter 12 defines a lien as "a claim in property for the payment of a debt and includes a security interest."[307] Literally, then, a *lis pendens* would not constitute a lien. In *James*, the court of appeals, however, specifically held that a *lis pendens* may form the basis of a fraudulent lien claim.[308] The court of appeals seemed very ready to consider a fraudulent *lis pendens* as a violation of the statute, but in this case, the evidence was insufficient to show that "[the plaintiff], or her lawyers, believe[d] that the lis pendens [was] fraudulent."[309] The plaintiffs asserted grounds that the filing of the *lis pendens* was an "exercise of the right of free speech, . . . [and a] right of association," but the

299. *Id.* at 498–506.
300. *Id.* at 497–98.
301. *See id.* at 499–504.
302. *See id.*
303. James v. Calkins, 446 S.W.3d 135, 150 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).
304. *See, e.g.*, *id.* at 140; David Powers Homes, Inc. v. M.L. Rendleman Co., 355 S.W.3d 327, 340 (Tex. App.—Houston [1st Dist.] 2011, no pet.).
305. *See, e.g.*, Prappas v. Meyerland Cmty. Improvement Ass'n, 795 S.W.2d 794, 797 (Tex. App.—Houston [14th Dist.] 1990, writ. denied).
306. *James*, 446 S.W.3d at 139–40.
307. TEX. CIV. PRAC. & REM. CODE § 12.001(3) (West 2015).
308. *James*, 446 S.W.3d at 150.
309. *Id.*

court of appeals did not reach those grounds in view of the evidentiary failure.[310] It does not appear that any of the parties raised the point of the *lis pendens* being a privileged document. The abusive use of lis *pendens* continues to be an area deserving of clarification and possible legislation.

IX. MISCELLANEOUS

A. Nuisance/Trespass

The Texas Supreme Court twice addressed trespass during the Survey period. First, it addressed the elements of trespass and, in a subsequent opinion, addressed the measure of damages. Both of these are issues which had been previously unaddressed by the supreme court. Accordingly, in *Environmental Processing Systems, L.C. v. FPL Farming, Ltd.*, the Texas Supreme Court, as a matter of first impression, held that a lack of consent was an element of the owner's trespass cause of action and that the owner thus had the burden of proof.[311] This specifically overruled a number of court of appeals opinions holding that consent was an affirmative defense. This was an interesting case in that it had been to the supreme court previously and then remanded to the appellate court. The trial court tried the case before a jury, and the trial court, based on the jury's verdict, found that there was not a trespass by FPL.[312]

By way of background, FPL was a rice farming entity that owned property next to a five-acre tract owned by Environmental Processing Systems (EPS) where EPS had constructed and operated a wastewater disposal facility. EPS had a permit to operate the injection wells but had significantly increased the depth and volume of the wells it was operating. FPL contended that the deep subsurface wastewater had migrated into the water table underneath FPL's property, damaging that water and thus trespassing against FPL. The jury did not find a trespass.[313] The jury charge to find trespass included an instruction that there must be an act "without the consent of [the plaintiffs]."[314]

The court of appeals affirmed a holding that FPL could not recover in tort as a matter of law because the Texas Commission on Environmental Quality (TCEQ) (formerly the Texas Natural Resource Conservation Commission (TNRCC)) had authorized the wells. The supreme court reversed the court of appeals holding that "a government-issued permit does not shield the permit holder from civil tort liability."[315] But the supreme court also "reserved the question of whether 'subsurface wastewater migration can constitute a trespass.'"[316] Thus, this important question had not been reached.

310. *Id.* at 146, 148–50.
311. Envtl. Processing Sys., L.C. v. FPL Farming, Ltd., 457 S.W.3d 414, 425 (Tex. 2015).
312. *Id.* at 416.
313. *Id.*
314. *Id.* at 421.
315. *Id.* at 418.
316. *Id.*

The court of appeals determined that there was a common law trespass case of action and that consent was an affirmative defense to a trespass action "on which EPS bore the burden of proof."[317] Accordingly, the jury charge would have been improper. In this opinion, the supreme court again addressed the common law trespass cause of action and found that the party alleging trespass must prove the unauthorized entry and that consent was not an affirmative defense.[318] In doing so, the supreme court was able to affirm the trial court decision without addressing the continuing question of whether a trespass cause of action exists for deep subsurface wastewater migration.

As indicated in another case, the Texas Supreme Court also noted an issue it had not had an opportunity to address—damages for trespass—and it found its opportunity in *Gilbert Wheeler, Inc. v. Enbridge Pipelines, L.P.*[319] Interestingly enough, the EPS case was argued January 7, 2014, but the opinion was not delivered until February 6, 2015, while the *Gilbert Wheeler* case was argued later, February 27, 2014, and an opinion delivered earlier, August 29, 2014. Thus, at the time of delivering the opinion for EPS, the supreme court had an opportunity to address damages in connection with a trespass, but the *Gilbert Wheeler* case does a good job of talking through the various elements of damages. In particular, the supreme court addressed the temporary versus permanent injury to real property distinction. Permanent injury was redefined by Justice Lehrmann as follows:

> An injury to real property is considered permanent if (a) it cannot be repaired, fixed, or restored, *or* (b) even though the injury can be repaired, fixed, or restored, it is substantially certain that the injury will repeatedly, continually, and regularly recur, such that future injury can be reasonably evaluated. Conversely, an injury to real property is considered temporary if (a) it can be repaired, fixed, or restored, *and* (b) any anticipated recurrence would be only occasional, irregular, intermittent, and not reasonably predictable, such that future injury could not be estimated with reasonable certainty. These definitions apply to cases in which entry onto real property is physical (as in a trespass) and to cases in which entry onto real property is not physical (as with a nuisance).[320]

The general rule of damages in real property cases "is the cost to restore or replace, plus loss of use for temporary injury, and loss in fair market value for permanent injury."[321] The general rule for the measure of damages has an exception for economic feasibility, which is when the cost to restore or replace "exceeds the diminution in the property's market value to such a disproportionately high degree that the repairs are no

317. *Id.*
318. *Id.* at 425.
319. 449 S.W.3d 474, 476 (Tex. 2014).
320. *Id.* at 480.
321. *Id.* at 481.

longer economically feasible."[322] This exception basically converts a temporary injury to a permanent injury, and damages are awarded for the loss in fair market value. But in cases involving real property injured by the destruction of trees, the loss in fair market value is not the measure because "even when . . . the value of the land has not declined [due to the destruction], [courts] have held that the injured party may nevertheless recover for the trees' intrinsic value."[323] Thus, in this case, although there was no loss to the fair market value of the land due to the clearing of trees, it was clear that restoration was possible, and the jury found that the cost to do so was $288,000.00.[324] Because remaining issues existed, this case was remanded to the appellate court to address the outstanding questions.

There were a number of appeals cases dealing with nuisance, mostly from a factually intensive perspective. Three cases were interesting only by reason of the matters the courts found to constitute a basis for a nuisance claim. In *Crosstex North Texas Pipeline, L.P. v. Gardiner*, negligent operation by a natural gas pipeline operator in operating a compressor station such that excessive noise and vibrations existed was a basis for a negligent nuisance claim.[325] After examination of the evidence, the Fort Worth Court of Appeals did find that the evidence was factually insufficient to support the jury's negligent nuisance finding, but, just the same, allowed such a claim based on the operation of a compressor station.[326] Justice Sue Walker filed a dissent, challenging the court of appeals' review of the evidence and substitution of its own opinion.[327] In *Kim v. State of Texas*, the First Houston Court of Appeals held that recurring criminal activity could constitute a nuisance.[328]

B. Deceptive Trade Practices Act

In *Lauret v. Meritage Homes of Texas, LLC*, the Austin Court of Appeals reviewed a decision by the trial court denying a recovery to home purchasers because they failed to show that they had no other remedy available when they sought restoration under the Deceptive Trade Practices Act.[329] The court of appeals largely followed the previous Texas Supreme Court case of *Cruz v. Andrews Restoration, Inc.* and found that the deceptive trade practices was not a codification of the common law and that restoration was a remedy provided by the DTPA, which a prevailing

322. *Id.*
323. *Id.* at 482.
324. *Id.* at 484.
325. Crosstex N. Tex. Pipeline, L.P. v. Gardiner, 451 S.W.3d 150, 175–76 (Tex. App.—Fort Worth 2014), *aff'd*, No. 15-0049, 2016 WL 3483165 (Tex. June 24, 2016).
326. *Id.*
327. *Id.* at 179.
328. Kim v. State of Texas, 451 S.W.3d 557, 563–64 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).
329. Lauret v. Meritage Homes of Tex., LLC, 455 S.W.3d 695, 699 (Tex. App.—Austin 2014, no pet.).

consumer could choose.[330] The court of appeals held that the trial court was required to honor that election by the consumer.[331] In this case, the plaintiff consumers purchased a home on Lake Travis with the representation that the view of the lake would not be blocked by other improvements. They also were shown a plat that included a twenty-five-foot setback, but it turned out that the setback line was not recorded or part of any ordinance. The architectural committee of the homeowners' association could and did waive the setback for an adjoining landowner. The jury found in favor of the plaintiff consumers, but "the trial court entered a take-nothing judgment in favor of Meritage Homes" because Lauret failed to show that there was no adequate remedy at law.[332] The court of appeals reversed this finding and, as noted, found that "requiring a party to prove that he lacks an adequate remedy at law is inconsistent with DPTA restoration."[333] The court of appeals concluded "that a consumer seeking restoration under the DPTA is not required to prove that he lacks an adequate remedy at law."[334]

Also, as a practice tip to plaintiff's counsel, Meritage Homes raised an issue that because the home was more than $500,000.00, it was excepted from the DPTA, unless the plaintiff demonstrated that the property was intended to be a residence. In this case, there was sufficient evidence to demonstrate that the property was intended to be a residence, but it appeared that the plaintiffs did not undertake specific steps to demonstrate the residential nature of the property.[335] The court of appeals reviewed the record and sustained the application of the DPTA because there was sufficient evidence to establish the property was purchased as a residence.[336] Better practice might dictate a clearer showing that the property was purchased as a residence.

In another case demonstrating the importance of accurate statements, *Jones v. Zearfoss*, the seller represented that a water penetration had been professionally corrected.[337] This was in fact true, in that a professional third party had been retained to correct the water penetration. Two years later mold contamination was discovered and possibly was due to an unsuccessful correction of the water penetration. The representation, however, was correct in that a professional third party had been retained to correct the water penetration and that was disclosed. "[A] seller has no duty to disclose facts he does not know."[338]

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330. *Id.* (citing Cruz v. Andrews Restoration, Inc., 364 S.W.3d 817, 825 (Tex. 2012)).

331. *Id.* at 700.

332. *Id.* at 697.

333. *Id.* at 700.

334. *Id.*

335. *Id.* at 702.

336. *Id.*

337. Jones v. Zearfoss, 456 S.W.3d 618, 622 (Tex. App.—San Antonio 2015, no pet.).

338. *Id.* at 625 (quoting Prudential Ins. Co. of Am. v. Jefferson Assocs., Ltd., 896 S.W.2d 156, 162 (Tex. 1995)).

C. Premises Liability

The Texas Supreme Court delved into the area of premises liability four times during the Survey period. In the first instance, the supreme court dealt with the recreational use statute, Texas Civil Practice and Remedies Code §§ 75.001 and 75.002, and Texas Government Code § 22.225. In *University of Texas at Arlington v. Williams*, the supreme court reviewed the recreational use statute, which in essence "protects landowners who open [their] property for public recreational purposes."[339] When it applies, it "immunizes the landowner or occupant from ordinary negligence claims associated with the property's recreational use by requiring the plaintiff to establish gross negligence" for liability and recovery.[340] The Williams family attended a high school soccer match on a soccer field at the University of Texas at Arlington (UTA). Sandra Williams leaned against a gate that had a broken latch but was secured with a chain and padlock. The gate unexpectedly opened, and she fell onto the field five feet below and injured one of her ribs and her left arm. UTA raised the recreational use statute as a defense, and the supreme court thus addressed the question of whether or not "recreation" included competitive sports and its spectators.[341] In particular, Subpart (L) of the list of recreational activities includes "any other activity associated with enjoying nature or the outdoors."[342] The supreme court had previously found in *City of Bellmead v. Torres* that a swing set and playground at a soccer complex fell within Subpart (L).[343] The supreme court indicated that this did not address the issue of a competitive sport at a sporting facility.[344] The policy behind the recreational use statute was "to encourage landowners to open private land for natural pursuits."[345] The majority of the court concluded that the statute did not include competitive sports and spectating as recreational activities.[346]

The decision was not without dispute as Justice Guzman filed a concurring opinion in which Justice Willett joined; Justice Boyd filed a concurring opinion; Justice Johnson filed an opinion concurring in part and dissenting in part, and in which Justice Brown joined. In the dissent, Justice Johnson found that the distinction between watching birds and watching children was unwarranted.[347] Justice Johnson also felt that the list of activities would include a mother watching her daughter's soccer game, and he disagreed with a distinction between competitive and noncompetitive aspects to activities.[348] Finally, Justice Johnson also dissented

339. Univ. of Tex. at Arlington v. Williams, 459 S.W.3d 48, 49, 51 (Tex. 2015).
340. *Id.* at 49.
341. *Id.*
342. *Id.* at 51.
343. *Id.* at 52 (citing City of Bellmead v. Torres, 89 S.W.3d 611, 615 (Tex. 2002)).
344. *Id.* at 54–55.
345. *Id.* at 54.
346. *Id.* at 57.
347. *Id.* at 63–64 (Johnson, J. dissenting).
348. *Id.* at 65.

as to the recreational use statute overriding "the Tort Claims Act to the extent of any conflict."[349] "The recreational use statute [would] preclude[ ] the Williamses' ordinary negligence claim against UTA," but it "would otherwise be allowed by the Tort Claims Act *if* the recreational use statute encompassed such a claim."[350] On the other hand, "a statutory waiver of immunity must be clear and unambiguous in order to be effective,"[351] and the recreational statute is at best unclear in this situation. Thus, Justice Johnson found that the recreational statute would apply to the Williams ordinary negligence claim but would remand for the consideration of the claim that UTA was grossly negligent.[352]

The Texas Supreme Court also addressed the issue of duty, which is a threshold question when it comes to premises liability. It actually did so in two cases. In the first, *Abutahoun v. Dow Chemical Company*, the Texas Supreme Court addressed Chapter 95 of the Texas Civil Practice and Remedies Code.[353] Chapter 95 establishes "limitations on a property owner's liability for [personal] injury, death, or property damage to . . . independent contractor[s]" and their employees.[354] The supreme court thoroughly reviewed the sections of Chapter 95, and in reading the provisions together, held that "Chapter 95 applies to a claim against a property owner for an independent contractor's personal injury, death, or property damage caused by negligence," noting that "[t]he Legislature did not distinguish between negligence claims based on contemporaneous activity or otherwise, and neither [should the court]."[355] Then, comparing § 95.002's wording of "condition or use" to the Texas Tort Claims Act, the supreme court concluded that Chapter 95 "appl[ied] to all negligence claims that arise from either a premises defect or the negligent activity of a property owner or its employees."[356] An independent contractor may have "the right to recover damages from a negligent property owner," but Chapter 95 is applicable.[357] If the plaintiff satisfied the evidentiary burdens of both prongs of § 95.003, it can and does have a "claim[ ] for damages caused by contemporaneous negligent acts of a property owner."[358] Unfortunately for the plaintiffs in this case, they apparently did not challenge the court of appeals conclusion that "the record [did] not support . . . liability as to [the property owner] pursuant to the requirements of Chapter 95."[359] Thus, the supreme court was unable to address those pos-

349. *Id.* at 67 (citing TEX. CIV. PRAC. & REM. CODE § 75.003(g) (West 2015)).
350. *Id.*
351. *Id.*
352. *Id.*
353. Abutahoun v. Dow Chem. Co., 463 S.W.3d 42, 43 (Tex. 2015).
354. *Id.* (citing TEX. CIV. PRAC. & REM. CODE § 95.001–.004).
355. *Id.* at 48.
356. *Id.* at 50–51.
357. *Id.* at 51.
358. *Id.* at 52.
359. *Id.* (quoting Dow Chem. Co. V. Abutahoun, 395 S.W.3d 335, 348 (Tex. App.—Dallas 2013), *opinion withdrawn by* No. 13-0175, 2014 Tex. LEXIS 1139 (Tex. Nov. 21, 2014)).

sible issues.[360]

In summary, Chapter 95 of the Texas Civil Practice and Remedies Code applies to independent contractor claims against property owners for damages caused by negligence when those claims arise from the condition or use of an improvement to real property where the independent contractor constructs, repairs, renovates, or modifies the improvement. "Chapter 95 limits property owner liability on claims for personal injury, death, or property damage caused by negligence, including claims concerning a property owner's own contemporaneous negligent activity." One might question whether a premises liability statute requiring knowledge and a failure to adequately warn was really intended to protect contemporaneous negligent activities of a property owner.

The Texas Supreme Court also addressed duty in *Graham Central Station, Inc. v. Pena*, in which a patron was allegedly assaulted by other patrons in an altercation outside the nightclub.[361] The plaintiff alleged that the corporation owned the nightclub and failed to provide adequate security. The supreme court's opinion did not deal with the security issue so much as who had the duty to protect the patron. The supreme court did note in its discussion of negligence that, generally, "a person [does not have a] legal duty to protect another from the criminal acts of a third person."[362] "However, 'one who controls . . . premises does have a duty . . . to protect invitees from criminal acts of third parties if he . . . has reason to know of an unreasonable and foreseeable risk of harm to the invitee.'"[363] In this case, the corporate defendant was not contesting that premise but disputed that it was the owner under this proposition of law. As it turns out, Pharr Entertainment Complex, L.L.C. owned the night club, and the president of GCS, the corporate defendant, also owned a minority interest in the LLC. There was no reasonable inference that GCS was somehow the owner of the nightclub or in control of the premises. The supreme court granted the petition for review, and, without hearing oral argument, reversed and rendered in favor of GCS.[364]

A number of appellate court cases also dealt with the owner or control issue. In *Rosa v. Mestena Operating, LLC*, a mineral leaseholder was potentially liable as a property owner exercising control,[365] and in *Oncor Electric Delivery Company, LLC v. Murillo*, an easement holder was a potentially responsible party.[366] And, following up on the Texas Supreme Court's *Graham Central Station* decision, in *Quick Trip Corporation v. Goodwin*, a convenience store owner was potentially responsible and had

360. *Id.*
361. Grand Cent. Station, Inc. v. Pena, 442 S.W.3d 261, 262 (Tex. 2014).
362. *Id.* at 263 (quoting Timerwalk Apartments v. Cain, 972 S.W.2d 749, 756 (Tex. 1998)).
363. *Id.* (quoting *Cain*, 972 S.W.2d at 756).
364. *Id.* at 265.
365. Rosa v. Mestena Operating, LLC, 461 S.W.3d 181, 187–88 (Tex. App.—San Antonio 2014, pet. denied).
366. Oncor Elec. Delivery Co., LLC v. Murillo, 449 S.W.3d 583, 595–96 (Tex. App.—Houston [1st Dist.] 2014, pet. denied).

a duty to protect against third party criminal acts where past criminal conduct had occurred at or near the premises.[367] The Fort Worth Court of Appeals examined "the proximity, recency, frequency, similarity, and publicity of that conduct to determine what similar future conduct was reasonably foreseeable."[368] In this case, the plaintiff did not carry the burden, and the criminal act against the plaintiff was not foreseeable. Because the convenience store then "had no duty as a matter of law, it could not be liable."[369]

The Texas Supreme Court also addressed the adequacy of warnings in *Henkel v. Norman*.[370] In this case, an individual delivering mail slipped on ice and sustained injuries. The homeowner had stated to the plaintiff: "[D]on't slip."[371] In view of the below-freezing weather and the fact that the pedestrian delivering the mail heard the warning, the supreme court found that this was not a general instruction but was sufficient to notify of the particular condition.[372] Similarly, in *Golden Corral Corp. v. Trigg*, a yellow sign with a warning on each of its four sides had been placed on the tile floor stating "Caution Wet Floor."[373] "[The plaintiff] testified that she [had] not see[n] the warning before she fell," but surveillance video showed the sign directly in front of her and even struck her as she slipped and fell.[374] Despite a jury's finding in favor of the plaintiff, the Beaumont Court of Appeals found that the warning was adequate and reasonably prudent under the circumstances and that the plaintiff's claim failed as a matter of law.[375]

Four other appellate cases dealt with the issue of whether or not the owner was aware of a condition. These cases, again, emphasize that one of the threshold questions is the existence and violation of a duty, which only arises in the event that the owner is aware of the condition.[376]

D. Water Rights

Probably the most significant case dealing with water rights during the Survey period was *Texas Commission on Environmental Quality v. Texas*

367. QuickTrip Corp. v. Goodwin, 449 S.W.3d 665, 674–75 (Tex. App.—Fort Worth 2014, pet. denied).

368. *Id.* at 671.

369. *Id.* at 677.

370. 441 S.W.3d 249 (Tex. 2014).

371. *Id.* at 251.

372. *Id.* at 252.

373. Golden Corral Corp. v. Trigg, 443 S.W.3d 515, 517 (Tex. App.—Beaumont 2014, no pet.).

374. *Id.*

375. *Id.* at 520.

376. *See* Pay & Save, Inc. v. Martinez, 452 S.W.3d 923 (Tex. App.—El Paso 2014, pet. denied) (cucumber peel); Del Toro v. Pay & Save, Inc., 444 S.W.3d 293 (Tex. App.—El Paso 2014, pet. denied) (puddle of water); Cohen v. Landry's Inc., 442 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2014, pet denied) (elevation change in sidewalk); E.I. Du Pont de Nemours & Co. v. Roye, 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied) (ground gave way).

Farm Bureau.[377] In that decision, the Corpus Christi Court of Appeals found that the TCEQ could not interpret the water code provision as allowing temporary suspension of water rights during a drought to reestablish priorities.[378] In this situation, the TCEQ temporarily suspended the right of a person holding a senior water right before junior water rights were suspended, based on public health concerns. The court of appeals found that this was not a reasonable interpretation and not entitled to deference.[379] In this case, the TCEQ had sought to suspend water rights of agricultural users before suspending junior water rights in urban areas. Recently, on February 19, 2016, the Texas Supreme Court declined to review the decision of the court of appeals.[380] TCEQ stated that prioritizing access for cities and power plants is essential for public health, safety, and welfare throughout the State during times of drought. Not only were agricultural users affected, but also Dow Chemical, which was one of the oldest users of water on the Brazos River using water to extract magnesium from sea water. This decision resulted in more careful monitoring of use and the likely appointment of more water masters to control fresh water usage.

X. CONCLUSION

Texas cases continue to address challenges to single-family foreclosures and continue to reach conflicting decisions on the standing to challenge assignments of deeds of trust without a corresponding assignment of the note (the "split note and mortgage" defense and the "show me the note" challenge). This is likely to continue until the Texas Supreme Court brings a conclusion to the discrepancies.

In a case of first impression, attorneys' fees may be awarded in a declaratory judgment action with recourse against the homestead mortgagor. Another case of first impression reminds the practitioner that a forged deed of trust creates title issues, removing jurisdiction from the justice courts in a forcible detainer action. Additionally, practitioners must now be mindful of the scope (or lack thereof) of injunction orders with regard to limitation periods in nonjudicial and judicial foreclosures, along with suits on the underlying debt.

Texas cases continue to bring drafting lessons to the real estate practitioner. Deeds need to specify the intention of the grant and need to be consistent when seeking to describe the conveyed real property, whether by general versus specific reference to a prior deed or otherwise. Common references such as "right-of-way" are traps for the unwary. Another important case dealt with roads to landlocked property—the Texas Su-

377. 460 S.W.3d 264 (Tex. App.—Corpus Christi 2015, pet. denied).

378. *Id.* at 272.

379. *Id.*

380. Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau, No. 15-0359, 2016 Tex. LEXIS 162 (Tex. Feb. 19, 2016) (denying petition for review).

preme Court made it clear that an easement by necessity theory was the only theory by which an implied easement could be created.

In another case that provided drafting lessons for the real estate practitioner, the use of the phrase "all leases including ground leases" in both a security instrument and a bill of sale proved to be problematic because it failed to provide sufficient information to satisfy the statute of frauds because it did not identify the premises to be transferred with "any reasonable certainty."[381] In several other cases, the courts addressed oral modifications, and despite the somewhat surprising conclusion in one particular case whereby the party relying on the oral modification ultimately prevailed, the cases present an important reminder to all real estate practitioners of the importance of codifying all modifications in writing to ensure that the intended results are upheld.

Several other cases of note reiterated, clarified, or expanded in issues covered in previous reviews: (i) the perceived conflict between the venue selection for major transactions found in § 15.020 of the Texas Civil Practice and Remedies Code and the provisions of § 15.0115, which mandates a suit between a landlord and tenant must be brought in the venue where the premises are located; (ii) the jurisdiction of the justice courts; (iii) what constitutes an executory contract; and (iv) the application of the Certificate of Merit Statute to breach of contract suits.

The Texas Supreme Court also spent a significant amount of time addressing trespass and premises liability. At least two cases announced rules of first impression dealing with the burden of proof and damages for trespass. In the context of premises liability, the supreme court provided a thorough analysis of Texas Civil Practices and Remedies Code Chapter 95 and adopted a broad application.

381. Rossman v. Bishop Colo. Retail Plaza, L.P., 455 S.W.3d 797, 808 (Tex. App.—Dallas 2015, pet. denied).