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REAL PROPERTY

by

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THE Texas Supreme Court's 1989 decision in Summers v. Consolidated Capital Special Trust1 is a marvelous specimen of a creature thought to have become extinct: a high court opinion whose method is to honor rather than dismiss the intention of contracting adults. Although this unicorn must for the while mingle with the grotesque and ponderous beasts that in recent years have trampled underfoot vast prairies of the common law, one hopes that in the coming decade the lone creature will attract equally noble company, so that the menagerie of miscreants begotten in the 1980's may be supplanted by legal animals that are easier to recognize and slower to mutate.

Besides Summers, there were other reasons why 1989 was momentous. The war over mortgage foreclosures, whose hostages include the private sale remedy, saw some crucial battles which promise to set the tone of campaigns to follow.2 Eviction procedures survived a constitutional siege.3 Another arrow was added to the quiver of constructive eviction.4 The rights of condominium associations received reinforcement.5 Ramparts were erected against landlords' withholding consent to lease assignments.6 Title company defenses suffered yet another incursion from liability in negligence.7 And in virtually all areas of real estate law, the statutory lines were shored up with

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6. B.M.B. Corp. v. McMahan's Valley Stores, 869 F.2d 865 (5th Cir. 1989).
In 

This article reviews these and other developments during the Survey period.

I. Mortgages

A. Wraparound Mortgages

In 

the Texas Supreme Court settled the issue of how to calculate the deficiency or surplus after foreclosure of a wraparound mortgage. The court held that, absent an express agreement to the contrary, the law will imply a covenant requiring the trustee first to apply sales proceeds toward the pre-existing (that is, "wrapped") debt before making any distribution to the mortgagor. In 

a fifth lien wraparound mortgagee had foreclosed and applied a portion of its successful bid price against the fourth lien wraparound mortgage note, which was then due. The maker of the fifth lien note sued for excess proceeds, arguing that the court should have credited it with the amount paid to the fourth lienholder. The appeals court had reversed a trial court judgment for the foreclosing lender, and had instead held that the maker of the fifth lien note was entitled to the amount by which the foreclosure purchase price exceeded the outstanding balance of the fifth lien note.

The Texas Supreme Court rejected the approach adopted by the appeals court, finding that such an approach would enable a debtor to obtain a windfall profit, escape any deficiency obligation, and still leave its lender saddled with a mortgage debt. The high court found that the appeals court had confused the debtor's obligation to pay the wrapped notes with its obligation to pay the property's contract purchase price. According to the high court, the fact that the debtor had no personal liability on the wrapped notes did not diminish its obligation to the holder of the wraparound note for the entire balance of that note.

In announcing that Texas law would hereafter imply a covenant requiring the trustee to apply proceeds to the satisfaction of wrapped debt before making any distribution to the mortgagor, the court noted that Texas law per-

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10. Id. at 475.
11. Id. at 474.
14. Id. at 474.
15. Id.
16. Id.
17. Id. at 475.
mitted the insertion of such implied covenants into contracts if necessary to give effect to the actual intentions of the parties.\(^{18}\) The court noted also that it was adopting the identical approach taken by other courts that had considered the question.\(^{19}\)

Three dissenters claimed that the majority had done violence to the parties' intention because the deed of trust did not expressly authorize the trustee to apply the foreclosure proceeds to senior lien debt.\(^{20}\) Had the dissenters simply argued that the lender, having inartfully drafted its loan documents, must now live with the consequences of a constricted reading, the dissenting opinion might have some of the persuasiveness of the appeals court opinion. However, the dissenters' contention that the lender intended that it would be placed in the position of having to remit some of the lender's own foreclosure bid to the borrower and yet remain burdened with a huge mortgage debt seems, quite simply, untenable.

The holding in *Summers* determined the outcome in *Lee v. Key West Towers, Inc.*\(^ {21}\) In *Lee* the holders of two wraparound notes had brought suit against the makers of those notes after a default by the property owner triggered a series of other defaults under the wrapped notes and resulted in foreclosure. The trial court had held, and the appeals court had agreed, that to calculate the deficiency, one shall subtract the unpaid balances of the wrapped notes from the outstanding balance of the wrap note.\(^ {22}\) By reason of the implied covenant recognized in *Summers*, the Texas Supreme Court reversed the judgment of the appeals court\(^ {23}\) and held that each maker was liable to its lender for the entire amount of the wraparound note less the amount bid at foreclosure.\(^ {24}\)

### B. Foreclosures and Deficiency Judgments

A war is underway over the adequacy of foreclosure sales prices. Three Survey cases, *Charter National Bank—Houston v. Stevens*,\(^ {25}\) *Olney Savings and Loan Association v. Farmers Market of Odessa, Inc.*,\(^ {26}\) and *Savers Federal Savings & Loan Association v. Reetz*,\(^ {27}\) contain salvos from both sides of the battlefield, and promise to furnish some of the ammunition for coming clashes.

*Charter* is yet another well-researched and carefully written opinion from

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\(^{18}\) *Id.* (citing Danciger Oil & Ref. Co. v. Powell, 137 Tex. 484, 490, 154 S.W.2d 632, 635 (1941)).

\(^{19}\) *Id.* (citing J.M. Realty Inv. Corp. v. Stern, 296 So.2d 588 (Fla. Dist. Ct. App. 1974); Armsey v. Channel Assoc., Inc., 184 Cal. App. 3d 833, 229 Cal. Rptr. 509 (1986)).

\(^{20}\) *Id.* at 476 (Mauzy, J., dissenting).


\(^{22}\) *Id.* at 478.

\(^{23}\) *Id.* at 474.

\(^{24}\) *Id.* at 478.


\(^{27}\) 888 F.2d 1497 (5th Cir. 1989).
the Fourteenth Court of Appeals. Charter exhaustively reviews Texas wrongful foreclosure law and makes new law by holding that under some circumstances a mortgagor need not prove that the foreclosure sales price was grossly inadequate to prevail in a wrongful foreclosure action.28 For those reasons, the case will likely become a seminal starting point in the analysis of many wrongful foreclosure claims.

In Charter the tenant in a Houston commercial building that was posted for foreclosure began phoning the lender about a week before the foreclosure date to express an interest in bidding on the property. Because the lender had, since first posting the property, thrice passed the foreclosure sale, the tenant asked whether the sale would indeed transpire on the following Tuesday. Each time the bank responded that it was uncertain whether the sale would take place, but promised that it would notify the tenant if the sale were to go forward. The tenant's final such inquiry took place at 5 p.m. on the Monday before the sale; the tenant's Dallas attorney, who had arranged $400,000 of interim financing to enable the tenant to bid, was in Houston and was prepared to stay over for the next day's sale. At the time of the call, however, the lender's representative had reportedly left work for the day.

Although the lender failed to notify the tenant, the sale took place on the following day. The lender, the sale's only bidder, acquired the property for $355,000 and shortly thereafter acquired casualty insurance coverage of $425,000. The tenant again offered to buy the property, this time at the lender's purchase price. The lender refused, offering instead to sell for $420,000. Some months later, the lender sold the property for $385,000; the purchaser took subject to a lis pendens filed in the interim by the tenant. Later, the mortgagor intervened in the tenant's suit, alleging wrongful foreclosure and seeking damages. The trial court awarded nothing to the tenant29 because of the jury's finding that the lender's promises to the tenant were not made with the intent that the tenant would rely on them.30 The trial court rendered judgment for the mortgagor,31 however, and awarded actual damages based on the difference between the outstanding indebtedness of approximately $375,000 and the property's $430,000 fair market value as determined by the jury.32

On appeal, the lender argued that the trial court erred in not instructing the jury that in order to sustain the mortgagor's claim, it had to find that the foreclosure sales price was grossly inadequate.33 The appeals court meticulously worked its way back through more than a century of wrongful fore-

29. Id. at 5.
30. Id.
31. Id.
32. Id.
33. Id. at 6. The lender urged that, by reason of American Savings and Loan Association of Houston v. Musick, 531 S.W.2d 581 (Tex. 1975), three elements must be found to sustain a wrongful foreclosure claim: (1) a defect in the foreclosure proceedings, (2) a grossly inadequate selling price, and (3) a causal connection between the defect and the grossly inadequate price. Id.
closure law. The court concluded that the law never intended the grossly inadequate sales price requirement to apply in a situation where (1) the bidding at a non-judicial foreclosure sale is deliberately chilled by the affirmative acts of a mortgagee and (2) the injured mortgagor elects recovery of damages rather than a setting aside of the sale.

The appeals court in Charter agreed that the stricter traditional test, which requires showing that a procedural defect caused a grossly inadequate sales price, is appropriate in actions to set aside foreclosure sales. Otherwise, it noted, the risk of rescission would drive down the bid prices. The court stated, however, that a defaulting mortgagor has a right to an orderly disposition of his pledged property, and added, in a somewhat hyperbolic flourish, that sound policy reasons favor the deterrence of acts "calculated to injure a helpless mortgagor and unjustly enrich a machiavellian mortgagee."

Olney arose out of a 1983 real estate loan transaction wherein the lender relied on a title company to prepare loan documents, including a guaranty of the corporate borrower's debt by the borrower's shareholders. The title company botched the job, indicating in the written guaranties that the corporation was guaranteeing the shareholders' debts rather than vice versa. When the borrower defaulted in 1987, the lender foreclosed, buying the property at foreclosure for $150,000 and then selling the same property for $200,000 eight days later. At the time of the foreclosure, the lender discovered the mistaken guaranties, altered them to reflect that the shareholders were the guarantors of the borrower's debt, and sued the guarantors for the deficiency basing its deficiency calculation on the $150,000 foreclosure price.

The guarantors claimed that the lender had wrongfully altered the guaranties, damaged their credit and reputation, and caused them anguish. The jury agreed and awarded each of them damages. The appeals court reversed and remanded, holding that the trial court erred in not submitting to the jury the lender's claim that the original guaranties resulted from a clear mistake and should be reformed. The appeals court noted that if the lender prevailed on its reformation claim, then the guarantors' action for

34. Id. at 6-13 (discussing University Sav. Assoc. v. Springwoods Shopping Center, 644 S.W.2d 705 (Tex. 1982); American Sav. & Loan Assoc. of Houston v. Muciek, 531 S.W.2d 581 (Tex. 1975); Tarrant Sav. Ass'n v. Lucky Homes, Inc., 390 S.W.2d 473 (Tex. 1965); Slaughter v. Qualls, 139 Tex. 340, 162 S.W.2d 671 (1942); McKennon v. McGown, 11 S.W. 532 (1889); Allen v. Pierson, 60 Tex. 604 (1884); Sparkman v. McWhirter, 263 S.W.2d 832 (Tex. Civ. App.—Dallas 1953, writ ref'd).
36. The mortgagor must elect either to seek to set the sale aside or to seek recovery of damages. Id. at 14; see Owens v. Grimes, 539 S.W.2d 387, 390 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
37. No. A14-88-00421-CV at 12 (citing Allen v. Pierson, 60 Tex. 604, 607 (1884)).
38. Id. at 13 (citing G.S. NELSON, REAL ESTATE FINANCE LAW 558 (2d ed. 1985)). In recognizing such a right, the appeals court cited no Texas authority.
39. Id. at 14.
40. 764 S.W.2d at 870.
41. Id.
42. Id. at 871-72.
damages would be dealt a fatal blow.43

The crucial disputed issue was whether the law required the lender to prove that its bid price at foreclosure was fair and reasonable. The appeals court's opinion noted that the lender's pleadings stipulated that the foreclosure sales price was fair and reasonable, and thereby the lender assumed the burden of proving that fact.44 Moreover, the court stated that the evidence about the property's value, which included an appraisal prepared for the lender shortly before the foreclosure sale, was relevant to the issues of the lender's alleged bad faith, fraud, and intentional infliction of mental anguish on the guarantors.45 The cases cited by the majority to support its position, Lee v. Sabine Bank46 and Heller and Company v. O/S Sonny V.,47 did not involve foreclosures on real property, but rather non-judicial sales of personalty to which courts have customarily applied a fair and reasonable standard.48

A concurring opinion took issue with the majority's view of the valuation evidence.49 It noted that the borrower never attacked the validity of the foreclosure sale, and stated that absent such an attack, a court should presume that the price paid at foreclosure was fair and reasonable.50 "Neither the lender nor the debtor should be required or permitted to wait until the property is sold by the lender, whether it be one week or one year later to determine if a deficiency exists or whether the debtor may be entitled to a credit."51 The concurring judge also doubted whether, absent some showing of an irregularity, a court could ever set aside a foreclosure sale for inadequacy of consideration.52

In Savers Federal the guarantors of a mortgage note asserted that the bank's foreclosure bids on two properties were inadequate, and that therefore no deficiency existed under the note. The Fifth Circuit first disposed of the guarantors' claim that procedural irregularities had tainted the foreclosure sale by holding that the claim was never raised until after the trial court's judgment in favor of the bank.53 The court then confronted the crucial issue of whether the inadequacy of consideration at a regularly conducted nonjudicial foreclosure sale makes the foreclosure invalid. It determined that under long-established Texas law, a foreclosure is invalid only if there exist both a procedural irregularity and a grossly inadequate sales price, and observed that this rule applies equally whether the lienholder

43. Id. at 872.
44. Id. at 871.
45. Id.
46. 708 S.W.2d 582 (Tex. App.—Beaumont 1986, writ ref’d n.r.e.).
47. 595 F.2d 968 (5th Cir. 1979).
48. 708 S.W.2d at 585.
49. 764 S.W.2d at 873 (Osborn, C.J., concurring).
50. Id.
51. Id. at 873.
52. Id. (citing American Sav. & Loan Ass'n of Houston v. Musick, 531 S.W.2d 581 (Tex. 1975)).
53. 888 F.2d at 1500.
or a third party is the purchaser at foreclosure.\textsuperscript{54}

The circuit judges distinguished \textit{Lee v. Sabine Bank}\textsuperscript{55} as a personal property case, and noted that the Fifth Circuit decisions relied on by the \textit{Lee} court arose out of federal statutory law concerning deficiency judgments on ship mortgages.\textsuperscript{56} The judges concluded that \textit{Lee} says "absolutely nothing" about Texas law respecting deficiency judgments following real estate foreclosures.\textsuperscript{57} The court labelled as "purest dicta" the suggestion in \textit{Lee} that the \textit{Lee} holding need not be restricted to ships, and said that the dicta was all the more unpersuasive for failing to cite a single pertinent Texas case. The circuit judges were similarly unimpressed with \textit{Lee's} immediate progeny, \textit{Halter v. Allied Merchants Bank}.\textsuperscript{58} They pointed out that the language in \textit{Halter} suggesting that a regularly conducted foreclosure might be invalid if the lienholder or its surrogate was the purchaser was also mere dicta since there was no evidence in \textit{Halter} that the lienholder was the purchaser. Moreover, the only authority cited by the Beaumont appeals court in \textit{Halter} was that court's holding in \textit{Lee}.

The Fifth Circuit similarly took aim at \textit{Olney Savings & Loan Association v. Farmers Market of Odessa, Inc.}\textsuperscript{59} discussed earlier. The circuit judges found that the majority opinion in \textit{Olney} was undergirded only with ship mortgage cases and the unsupported dicta from \textit{Lee and Halter}, and that it failed to grapple with well-established Texas Supreme Court cases to the contrary.\textsuperscript{60} The circuit judges fortified their conclusion by reviewing the statutory scheme that for the past century has governed nonjudicial foreclosure sales. They pointed out that since the controlling Texas Supreme Court cases were handed down, the Texas legislature has thrice amended the statutory scheme in ways designed to enhance the fairness of foreclosure sales.\textsuperscript{61} This circumstance justifies the conclusion that the legislature viewed the controlling Texas Supreme Court cases as appropriate components of a proper scheme for regulating real estate nonjudicial foreclosures.\textsuperscript{62}

At the time \textit{Savers Federal} was argued, \textit{Charter} had not been decided. It seems likely, though, that the court in \textit{Savers Federal} would have sought to confine the \textit{Charter} holding within that case's idiosyncratic facts. Your authors expect that the debate outlined in \textit{Charter, Olney, and Savers Federal} will continue until either the legislature or the Texas Supreme Court again makes some definitive pronouncement on the subject.

\textsuperscript{54} Id. at 1503 (citing, e.g., Tarrant Savings Ass’n v. Lucky Homes, Ind., 390 S.W.2d 473, 475 (Tex. 1965); American Savings & Loan Ass’n v. Musick, 531 S.W.2d 581, 587 (Tex. 1975)).

\textsuperscript{55} 708 S.W.2d 582 (Tex. App.—Beaumont 1986, writ ref’d n.r.e.).

\textsuperscript{56} 888 S.W.2d at 1503.

\textsuperscript{57} Id.

\textsuperscript{58} 751 S.W.2d 286 (Tex. App.—Beaumont 1988, writ denied).

\textsuperscript{59} 764 S.W.2d 869 (Tex. App.—El Paso 1989, writ pending application).

\textsuperscript{60} Id. at 1506.

\textsuperscript{61} Id. at 1507.

\textsuperscript{62} Id. (citing Coastal Industrial Water Authority v. Trinity Portland Cement, 563 S.W.2d 916, 918 (Tex. 1978); Kennedy v. Hyde, 682 S.W.2d 525, 529 (Tex. 1984)).
In *Federal Savings & Loan Insurance Corp. v. Kerr* the FSLIC had asserted that its status as receiver for an insolvent savings and loan association which held a junior lien on certain property meant that the FSLIC's approval was required before the senior lienholder could foreclose. Much to the relief of solvent lienholders all over the country, the Fifth Circuit disagreed. The FSLIC based its contention on two federal statutes: the first prohibits a court from taking any action that affects the powers or functions of a receiver and the second empowers the FSLIC to release claims in favor of the insolvent thrift for whom the FSLIC is acting as receiver. The appellate court found both statutes inapplicable; the first because no court involvement occurs in a non-judicial foreclosure sale and the second because neither the senior lienholder nor the FSLIC had any claim against the other. The Fifth Circuit noted that to hold otherwise would impose a tremendous burden on the senior lienholder by, in effect, forcing that lienholder to share the FSLIC's risky junior position.

One of the stranger foreclosure cases from this Survey, *Diversified, Inc. v. Gibraltar Savings Association*, arose when a lender failed to advise the trustee that the mortgagors had cured the default on the eve of foreclosure. Two days after the foreclosure sale the trustee explained the mistake to the purchaser, who evidently was in the business of buying and selling foreclosed properties. Several weeks thereafter, the law firm for whom the trustee worked attempted to return the purchaser's cashier's check and requested a reconveyance to clear title.

The explanations did not mollify the purchaser. It initiated legal proceedings to evict the mortgagors from the property, prompting a suit by the lender and the mortgagors for cancellation of the trustee's deed. Eventually, the purchaser conveyed its interest in the property to the mortgagors in exchange for any causes of action the mortgagors might have arising out of the wrongful foreclosure, and sued the lender, the trustee, and the trustee's law firm for breach of contract, breach of warranty, common law fraud, statutory fraud, negligence, negligent misrepresentation, wrongful foreclosure, and Deceptive Trade Practices Act ("DTPA") violations.

The appeals court affirmed the trial court's summary judgment against the purchaser on all claims except those arising under the DTPA. The court found that there existed no intent to defraud, no duty of the lender or trustee

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63. 859 F.2d 1226 (5th Cir. 1988).
64. *Id.* at 1227-28.
67. 859 F.2d at 1228.
68. *Id.*
69. *Id.*
70. 762 S.W.2d 620 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
71. *See* Diversified, Inc. v. Walker, 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref’d n.r.e.).
72. TEX. BUS. & COM. CODE ANN. § 27.01 (Vernon 1987).
73. TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (12), (14), (19), (23) (Vernon 1987).
74. 762 S.W. 2d at 621.
to the purchaser, and no basis in the law for warranty claims. The appeals court also affirmed the dismissal of the wrongful foreclosure claim. The court noted that the purchaser was claiming under the mortgagors, who had already elected the remedy of voiding the sale and, therefore, had no damages claim. The appeals court, however, remanded on the DTPA claims, noting that most of those claims would not require the purchaser to prove any knowledge or intent to deceive on the part of the lender, trustee, or law firm.

This year's Survey of mortgage cases is not without its comic relief, thanks in large part to Smith v. United States National Bank of Galveston, Hunt v. Jefferson Savings & Loan Association, and Martin v. Uvalde Savings and Loan Association. In Smith a lender holding a second lien note had decided to protect its junior position by acquiring the first lien note and the mortgage and guaranty that secured that note. The lender subsequently foreclosed on the second lien, then sued the guarantor after a default on the first lien note.

On appeal, the borrower made the rather ingenious claim that once the lender owned both the first and second liens, those liens merged, and foreclosure under the second lien therefore had the effect of discharging the first note and guaranty. The appeals court refused to take the bait; it said that even had the borrower not waived such a defense by failing to include it in the pleadings, the borrower's theory would still be defective. It is well established that merger depends largely upon the intent of the party holding the liens. In this case ample evidence existed that the bank had not intended merger, but rather acquired the first lien to protect its second lien.

In Hunt a mortgagor whose properties had been foreclosed challenged the lender's attempt to collect deficiency balances by claiming that the law required the lender to bid at foreclosure no less than the amounts of casualty insurance coverage required for the properties by the loan documents. The appeals court affirmed the trial court's summary judgment. The court noted that the mortgagor had cited no authority to support his novel proposition, and agreed with the lender that the levels of insurance coverage spoke to replacement value rather than market value. The appeals court

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75. Id. at 622 (relying on Diversified, Inc. v. Walker, 702 S.W.2d 717 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.).
76. Id. at 623
77. Id. (citing Owens v. Grimes, 539 S.W.2d 387, 390 (Tex. Civ. App.—Tyler 1976, writ ref'd n.r.e.).
78. Id.
79. Id.
80. Id. The purchaser's claims under the DTPA were based on TEX. BUS. & COM. CODE ANN. § 17.46(b)(5), (12), (14), (19), (23) (Vernon 1987).
82. 773 S.W.2d 808 (Tex. App.—San Antonio 1989, n.w.h.).
83. 767 S.W.2d at 823.
84. Id.
85. Id.
86. 756 S.W.2d at 763.
87. Id. at 764-65.
88. Id.
also rejected the mortgagor's claimed credit against the deficiencies in an amount equal to private mortgage proceeds received by the lender. The court held that the mortgagor had no contractual right to any such offset, and the law required none.

_Martin_ takes this Survey's prize for borrower bravado. In _Martin_ the borrowers, who were in default under their mortgage note and were facing foreclosure, executed and recorded a warranty deed, purporting therein to convey the property to the lender in full satisfaction of the mortgage debt. The lender proceeded with the foreclosure, sued for the deficiency, and was granted summary judgment.

On appeal, the borrowers cited extensive authority for the proposition that the execution and delivery of a deed gives rise to a rebuttable presumption that the grantee has accepted the conveyance. The appeals court agreed, but distinguished the cases cited by the borrowers as instances in which the deed was delivered to and recorded by the grantee, not the grantor, and noted that in this case no evidence of acceptance of the deed by the lender existed. Since it is well-settled that a deed is not effective absent delivery and delivery does not occur absent either express or implied acceptance, the borrowers' purported conveyance was ineffective.

_First Texas Service Corporation v. McDonald_ suggests that trustees conducting foreclosure sales might want to bring a good book to read. In _First Texas_ the party who was the high bidder asked the trustee to give him time to obtain a $16,000 cashier's check. Evidence existed that the trustee agreed he would wait 45 minutes, that the high bidder and his broker departed immediately, that the trustee sold the property to another party only 40 minutes later, and that the high bidder returned within the agreed upon 45-minute interval, check in hand, only minutes after the trustee and the other party completed the sale.

In affirming the trial court's decision to set aside the sale, the appeals court relied on the Texas Supreme Court's decision in _First Federal Savings_.
& Loan Association of Dallas v. Sharp,\(^{100}\) which stated that a trustee has a duty to allow a bidder a reasonable time to produce his funds.\(^{101}\) The appeals court held that how much time is reasonable depends on the facts of each case.\(^{102}\) The court observed that in this case the trustee himself indicated that 45 minutes was reasonable by agreeing to wait that long.\(^{103}\) The appeals court, in a rather unpersuasive passage, rejected the trustee's assertion that any oral agreement to wait 45 minutes would have violated the statute of frauds.\(^{104}\) The court said that the dispute did not involve a contract to sell land, but rather whether the trustee waited a reasonable period of time.\(^{105}\)

Several other Survey cases saw courts affirm settled principles of foreclosure law.\(^{106}\) In Shearer v. Allied Live Oak Bank\(^{107}\) the appeals court rejected the mortgagor's contention that an invalid foreclosure had the effect of extinguishing the debt and lien.\(^{108}\) The court held instead that because the foreclosure sale had been declared void for lack of notice to the debtors, both the debt and the lien were revived and remained outstanding.\(^{109}\) In Newman v. Woodhaven National Bank, Inc.\(^{110}\) the appeals court confirmed that the 21-day notice period found in Section 51.002(b) of the Texas Property Code\(^{111}\) includes the day of service, but excludes the day of the foreclosure sale.\(^{112}\)

In Rosa de Saron Church v. Rodriguez\(^{113}\) the church claimed that its good faith tender of approximately $12,000 prior to foreclosure rendered the foreclosure sale invalid, even though the outstanding debt (including principal, interest, and attorneys' fees) was approximately $18,000. In support of its argument, the church noted that the foreclosure notice did not specify the amount due and that the noteholder gave no reason for rejecting the tender.

The appeals court affirmed the trial court's rejection of the church's

\(^{100}\) 359 S.W.2d 902 (Tex. 1962).

\(^{101}\) Id. at 903.

\(^{102}\) 762 S.W.2d at 938.

\(^{103}\) Id.

\(^{104}\) TEx. BUS. & COM. CODE ANN. § 26.01(a), (b)(4) (Vernon 1987) (stipulating that contract for sale of real estate not enforceable unless in writing and signed).

\(^{105}\) 762 S.W.2d at 941. Perhaps a better answer might have been that the statute of frauds will not be applied to non-judicial foreclosure sales, since such sales must take place within a 3-hour window once a month. Or perhaps prudent trustees will make a practice of memorializing agreements to wait for funds, thereby allowing the trustees either to proceed with the sale or to sue the promisor in contract if the agreed time is exceeded.

\(^{106}\) See cases cited infra notes 73, 75, 78.

\(^{107}\) 758 S.W.2d 940 (Tex. App.—Corpus Christi 1988, writ denied).

\(^{108}\) Id. at 942-43.

\(^{109}\) Id.

\(^{110}\) 762 S.W.2d 374 (Tex. App.—Fort Worth 1988, no writ).

\(^{111}\) TEx. PROP. CODE ANN. § 51.002(b) (Vernon Supp 1990).

\(^{112}\) 762 S.W.2d at 376 (citing Valley v. Patterson, 614 S.W.2d 867, 871 (Tex. Civ. App.—Corpus Christi 1981, no writ); Hausmann v. Texas Sav. & Loan Ass'n, 585 S.W.2d 796, 801 (Tex. Civ. App.—El Paso 1979, writ ref'd n.r.e.; TEx. PROP. CODE ANN. § 51.002(b) (Vernon Supp. 1990) (codified TEx. REV. CIVIL STAT. ANN. art. 310 (repealed 1984) (contained similar language requiring at least twenty-one days notice preceding the date of sale)).

\(^{113}\) 767 S.W.2d 898 (Tex. App.—Corpus Christi 1989, n.w.h.).
The court applied the general rule that a property owner seeking to prevent a foreclosure sale must tender the full amount then due. The court noted that the amount of the indebtedness was readily ascertainable from the loan documents, that no law required the noteholder to indicate the amount due in the foreclosure notice, and that the church had never asked the noteholder to provide a payoff amount.

C. Temporary Injunctions

Southwestern Savings & Loan Association v. Mullaney Construction Company affirmed the well-established but often-ignored principle that the absence of an adequate remedy of law is essential to obtaining injunctive relief. The trial court in Southwestern Savings had enjoined a foreclosure based on the developer's contentions that the lender had made oral misrepresentations and that the developer would suffer loss of profits and interruption of business if the foreclosure went forward. In dissolving the injunction, the appeals court refused to follow Home Savings of America, F.A. v. Van Cleave Development Company and Guardian Savings and Loan Association v. Williams, wherein San Antonio and Houston courts of appeals had upheld temporary injunctions enjoining foreclosures under similar circumstances. The Southwestern Savings court said that the fact that a motion for a temporary injunction involves real estate is not dispositive of whether an adequate remedy at law exists. In this case, the court said, the builder would have adequate remedies at law if he ultimately proved the foreclosure to be wrongful.

The San Antonio Court of Appeals took the opposite approach in Metropolitan Life Insurance Company v. La Mansion Hotels & Resorts, Ltd. In that case, the appeals court affirmed the granting of a temporary injunction to block a foreclosure sale of hotel properties. The court indicated that the uniqueness of every piece of real property tends to establish the

114. Id. at 902.
115. Id. (citing American Century Mortgage Investors v. Regional Center, Ltd., 529 S.W.2d 578, 584 (Tex. Civ. App.—Dallas 1975, writ ref'd n.r.e.)).
116. 767 S.W.2d at 901-02. The court did not, however, rule out further appeal by the church to a Higher Authority.
117. 771 S.W.2d 205 (Tex. App.—El Paso 1989, n.w.h.).
118. Id. at 206.
119. Id.
120. 737 S.W. 2d 58 (Tex. App.—San Antonio 1987, no writ).
121. 731 S.W.2d 107 (Tex. App.—Houston [1st Dist.] 1987, no writ).
122. In Home Savings a court granted a developer a temporary injunction preventing a foreclosure based on the court's finding, among other things, that the foreclosure could result in irreparable damage to the developer's credit rating and damage the development of which the property to be foreclosed upon was a part. 737 S.W.2d at 59. Similarly, in Guardian Savings a court enjoined a lender from foreclosing based on testimony from the developer that the foreclosure would ruin its reputation, prevent him from borrowing at other financial institutions, and significantly impair his business as a developer. 731 S.W.2d at 108-09.
123. 771 S.W.2d at 207.
124. Id.
125. 762 S.W.2d 646 (Tex. App.—San Antonio 1988, writ dism'd as moot).
126. Id. at 652.
probability of irreparable injury.\textsuperscript{127} The court additionally found ample evidence of the inequitable conduct by the lender.\textsuperscript{128} This included the lender’s conspiracy with a hotel company (which was wholly owned by the lender during most relevant times) regarding arrangements for owning and managing the distressed properties following foreclosure and the lender’s rejection of the borrower’s proposal to bring in an additional investor who would contribute enough cash to bring the note current.\textsuperscript{129}

The appeals court’s opinion in \textit{Metropolitan} certainly paints a lurid picture of a scheming and duplicitous lender. But reading between the lines, one comes away with an unsettled feeling about the case’s outcome. The borrower had been experiencing financial difficulties for more than a year and was three months in arrears on its note before the lender began discussions with the third party hotel company. The court does not explain what is so conniving about a lender making contingency arrangements to manage large properties whose mortgages are in default, nor does it explain what is so unnatural about a lender making those arrangements with a management company that it owns. As for the white knight investor that the lender purportedly shunned, the opinion indicates that the borrower and lender actually spent more than a year discussing the investment proposal.\textsuperscript{130}

Moreover, the court makes new law in Texas by holding that a parent and its wholly owned subsidiary can be parties to a common law civil conspiracy.\textsuperscript{131} The court, however, suggests no common sense reason why this should be so. Finally, although the court twice insists that the borrower has a large equity in the property,\textsuperscript{132} the borrower’s inability to meet debt service (at the time the court granted the injunction, the past due interest amounted to $1,300,000\textsuperscript{133}) seems to belie the court’s view.

\textbf{D. Lien Priorities}

The next time someone claims that government intervention is needed to assure a uniform and rational approach to a difficult problem, refer him to \textit{Federal Deposit Insurance Corp. v. RepublicBank, Lubbock, N.A.}\textsuperscript{134} In that case, the FDIC, acting on behalf of the insolvent Texas Bank and Trust Company, contended that Texas Bank’s mortgage on a particular building should prime RepublicBank’s mortgage on the identical building because the county clerk stamped the Texas Bank mortgage one minute earlier. The FDIC made that argument despite express language in the Texas Bank mortgage reciting that it was subordinate and despite a recorded subordina-

\textsuperscript{127} Id. (citing Home Sav. of Am., F.A. v. Van Cleave Dev. Co., 737 S.W.2d 58, 59 (Tex. App.—San Antonio 1987, no writ)).

\textsuperscript{128} Id. at 652-53.

\textsuperscript{129} Id.

\textsuperscript{130} Id. at 649-50.

\textsuperscript{131} Id. at 651-52.

\textsuperscript{132} Id. at 649, 652.

\textsuperscript{133} Id. at 653. Despite that amount, the appeals court held that a borrower’s bond of only $400,000 was sufficient. Id.

\textsuperscript{134} 883 F.2d 427 (5th Cir. 1989).
tion agreement executed by Texas Bank in favor of RepublicBank. The FDIC based its claim on a federal statute prohibiting agreements that tend to diminish the FDIC's interest in any asset and that are not recorded in the official bank records.\textsuperscript{135}

The Fifth Circuit quickly disposed of the patently inane argument by noting that the FDIC had no interest for the other party to defeat since the only interest of Texas Bank was as a junior lienholder.\textsuperscript{136} The court also noted that the first and second mortgages and the subordination agreement, all recorded documents, were part and parcel of the same transaction\textsuperscript{137} and not likely to mislead banking authorities — the evil that the federal statute was designed to attack.\textsuperscript{138} The court did not chide the FDIC for wasting time and money, although it might easily have done so in view of the frivolity of the FDIC's argument and in view of the fact that even while the case was pending, RepublicBank became the indirect beneficiary of a massive federal bailout. One hopes the taxpayers enjoyed the spectacle of the Federal dog chasing its own tail.

\textit{City of Amarillo v. Ray Berney Enterprises, Inc.}\textsuperscript{139} considered whether foreclosure under a 1977 mortgage extinguished Amarillo hotel occupancy tax liens which the city imposed after the mortgage lien attached. The trial court had granted the mortgagee's motion for summary judgment on the ground that the provision in the 1981 tax ordinance\textsuperscript{140} stating that the occupancy tax is a prior and superior lien on all hotel property violates the Texas Constitution's prohibition on laws which are retroactive or which impair the obligation of contracts.\textsuperscript{141} The appeals court reversed,\textsuperscript{142} holding that the tax ordinance was not a retroactive law because Amarillo's general power to levy the tax existed before the mortgage was executed\textsuperscript{143} and had not impaired the mortgagee's contractual right to enforce the mortgage lien be-

\textsuperscript{135} Id. at 429 n.1; 12 U.S.C. § 1823(e) (1989).
\textsuperscript{136} 883 F.2d at 429.
\textsuperscript{137} Id.
\textsuperscript{138} Id.
\textsuperscript{139} 764 S.W. 2d 861 (Tex. App.—Amarillo 1989, no writ).
\textsuperscript{140} On December 8, 1981 Amarillo passed an ordinance, then designated as Sections 22-21 through 22-27 of its municipal code, imposing a seven percent (7%) tax on the consideration paid by an occupant of any room or space furnished by a hotel. \textit{Id.} at 862, Section 22-26 empowered the city tax assessor-collector to make assessments for any delinquent taxes which would be a prior and superior lien on all hotel property. \textit{Id.} The authorization for the ordinance was Article 1259j-4.1, Texas Revised Civil Statutes Annotated, which has since been repealed and reenacted as §§ 351.002(a), 351.003(a), and 351.004 of the Texas Tax Code. \textit{Id.; Tex. Tax Code Ann. §§ 351.002(a), 351.003(a), 351.004} (Vernon Supp. 1990) (reenacted Act of June 19, 1983, ch. 944, § 1, 1983 Tex. Gen. Laws 5195, 5195, \textit{repealed by Act of May 27, 1987, ch. 191, § 12, 1987 Tex. Gen. Laws 1410, 1466}).
\textsuperscript{141} \textit{Tex. Const.} art. I, § 16.
\textsuperscript{142} 764 S.W.2d at 861.
\textsuperscript{143} Id. at 864. The court cited \textit{State v. Wynne}, 134 Tex. 455, 463-64, 133 S.W. 2d 951, 956 (1939), \textit{appeal dismissed}, 310 U.S. 610 (1940), \textit{reh'g denied}, 310 U.S. 659 (1940) and \textit{State v. Bank of Mineral Wells}, 251 S.W. 1107, 1113 (Tex. Civ. App.—Dallas 1923, writ ref'd) for the general rule that any private contractual rights are subject to the constitutionally granted general power of a municipality to levy and collect taxes for governmental purposes. 764 S.W.2d at 864.
cause the mortgagee remained free to — and did — foreclose its lien.144

E. Recent Legislation

The 71st legislature amended Article 21.48A of the Texas Insurance Code to permit a lender to cancel a policy of insurance on foreclosed property and retain any unearned premium, whose amount must be credited to any deficiency owed by the borrower.145

II. LANDLORD AND TENANT

A. Warranty of Suitability and Constructive Eviction

Contrary to our prognostications in last year’s Survey, the warranty of suitability invented by the Texas Supreme Court in Davidow v. Inwood North Professional Group—Phase I146 does not appear to have supplanted the cause of action for breach of the covenant of quiet enjoyment. Rather, courts have thus far given the new warranty a narrow reading.147 One Texas appellate court held that the warranty applies only to latent physical or structural defects148 and thus could not sustain a claim that the landlord had furnished inadequate parking for the tenant’s restaurant operations.149 In addition, a Fifth Circuit case held that the tenant’s agreement to be responsible for certain repairs made the warranty inapplicable to any defects later necessitating such repairs.150

Meanwhile, the cause of action for breach of the covenant of quiet enjoyment, which allows a tenant who proves constructive eviction to terminate its lease, hardly seems ready to wither and dwindle. In fact, Fidelity Mutual Life Insurance Company v. Kaminsky151 gave a fresh injection of vitality to the constructive eviction doctrine. This case involved a doctor’s claim that his landlord’s failure to deal forcefully with anti-abortion protestors amounted to a constructive eviction. The protestors gathered at the prem-

144. Id. The court quoted the holding in Langever v. Miller, 124 Tex. 80, 94, 76 S.W. 2d 1025, 1032-33 (1934) (quoting Dallas County Levee Improvement Dist. No. 6 v. Rugel, 36 S.W. 2d 188, 189 (Tex. Comm'n App. 1931)) for what is meant by the obligation of contracts in the constitutional prohibition in Article I, § 16 against impairing the obligation of contracts: “[b]y the obligation of a contract is meant the means, which at the time of its creation the law afforded for its enforcement.” Id.

145. TEX. INS. CODE ANN. art. 21.48A, § 3A (Vernon Supp.).

146. 747 S.W.2d 373 (Tex. 1988).

147. Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. App.—Dallas 1989, n.w.h.);

148. Id. at 871.

149. Id. at 870-71. The Coleman court also held that the facility alleged to be defective must be within the leased premises, and hence could not include a parking area to which the tenant had only non-exclusive rights. Id. The court left open the possibility that the implied warranty of suitability could include a warranty of adequate parking facilities where the lease did not address parking. Id. It is unclear from the opinion whether the implied warranty of suitability would cover only physical or structural defects in the parking facility, or would also include an obligation on the landlord’s part to supply an adequate amount of parking.


151. 768 S.W.2d 818 (Tex. App.—Houston [14th Dist.] 1989, n.w.h.).
ises chiefly on Saturdays to sing and chant in the building’s parking lot, lobby, and atrium. They distributed literature to patients, attempted to discourage the patients from entering the building, and accused the tenant of killing babies. On occasion, the protestors occupied the building’s stairs and blocked the door to the doctor’s offices.

Although the lease required the landlord to provide security guards, none were present. The landlord’s only response to the protestors was to print notices advising that trespassers failing to leave upon request risked criminal prosecution. The landlord never distributed those notices, however, and the Harris County deputy sheriffs summoned by the tenant refused to ask the protestors to leave absent a directive from the landlord. After enduring six months of protests, the tenant abandoned the premises. In response to the landlord’s claim for future rentals, the jury found that the landlord had constructively evicted the tenant.152

The four elements of a constructive eviction in Texas have traditionally been (1) the landlord’s intention that the tenant no longer use and enjoy the premises, (2) a material act by the landlord which substantially interferes with the tenant’s use of the premises, (3) a permanent deprivation of such use which results from such act or omission, and (4) abandonment by the tenant within a reasonable time thereafter.153 The case law makes clear that these elements contain some ingredient of fiction.154 In fact, the first element is virtually a complete fiction. The landlord never actually intends that the tenant should no longer use the premises; rather, the landlord’s intent is said to be inferable from all the circumstances.155 Likewise, the requirement that the deprivation be material and permanent has a great deal of slack in its joints; courts have held that trash bins and delivery trucks which obstruct the entrance to a tenant’s premises amount to a material and permanent deprivation,156 as has failure to repair a heating and air conditioning system.157 Indeed, in Fidelity Mutual, the landlord contended that the tenant failed to show a material or permanent deprivation since no patient was ever harmed and the doctor failed to show that he ever lost patients because of the protests. The appeals court responded by admitting that whether any material and permanent deprivation has occurred is sometimes a question of degree.158

Fidelity Mutual is remarkable because in that case the landlord committed

152. Id. at 820.
154. See cases cited infra notes 113-22.
155. See, Downtown Realty, Inc. v. 509 Tremont Bldg., Inc., 748 S.W.2d 309, 311 (Tex. App.—Houston [14th Dist.] 1988, n.w.h.) (citing Metroplex Glass, 646 S.W.2d at 265).
157. 748 S.W.2d at 312.
158. 768 S.W.2d at 823.
no act; rather, the tenant's deprivation resulted from the deeds of third parties who were acting without the landlord's authority or permission. Case law is well-settled supporting the proposition that a tenant cannot complain that the landlord has breached a covenant of quiet enjoyment under such circumstances. The appeals court said that, notwithstanding the traditional formulation of the elements of constructive eviction, case law indicates that the landlord's omissions, as well as his acts, can form the basis of a constructive eviction. Ample evidence existed that the landlord failed to take any meaningful step to expel the anti-abortion protestors from the premises. In the court's view, this omission by the landlord amounted to permitting the protestors to remain. The court emphasized that the protestors' lawyer had advised them to remain in the building unless the landlord instructed them to leave, and that the sheriff was unable to act without such an instruction, but that the landlord had never given any such instruction.

Notwithstanding the court's finely drawn distinctions, Fidelity Mutual represents an overruling of prior case law. The result is not necessarily unwise or undesirable, especially because alleviating the interference caused by the protestors appeared to be beyond the tenant's power but well within that of the landlord. The traditional formulation of constructive eviction, however, particularly after Fidelity Mutual, bears so little relationship to the case law, and would appear to be so confusing to a jury, that perhaps a restatement is in order. Your authors humbly offer the following definition for discussion, and suggest that it better describes the elements of constructive eviction than the existing formulation: constructive eviction consists in (1) a substantial interference with the tenant's use of the premises which is either caused by the landlord or within the landlord's reasonable power to alleviate, (2) the absence of any lease provision indicating that the tenant has assumed the risk of such an interference, (3) the landlord's failure substantially to alleviate such interference within a reasonable period after receiving notice thereof from the tenant, and (4) the tenant's abandonment of the premises within a reasonable time after the landlord's failure.

In another constructive eviction decision, Coleman v. Rotana, the tenant claimed constructive eviction by reason of the landlord's alleged failure to ensure the peaceful and safe enjoyment of the leased premises. The court found that the landlord had failed to take reasonable steps to prevent the anti-abortion protestors from entering the premises, and that the tenant was thus entitled to seek relief. The case highlights the importance of landlord's duty to maintain the leased premises in a habitable condition and to prevent interference with the tenant's quiet enjoyment.

160. 768 S.W.2d at 823 (citing Steinberg v. Medical Equip. Rental Servs., Inc., 505 S.W.2d at 697 (landlord's failure to cause third parties to stop placing trash bins and parking trucks near entrance to premises held tantamount to act by landlord)).
161. Id. at 822.
162. Id.
163. Id. at 821.
164. Id. But see Right to Life Advocates, Inc. v. Aaron Women's Clinic, 737 S.W.2d 564 (Tex. App.—Houston [14th Dist.] 1987, writ denied) cert. denied, 109 S.Ct. 71, 102 L.Ed.2d 47 (1988) (tenant had right to seek injunctive relief against anti-abortion protestors who were picketing in building's parking lot and on its sidewalks though the parking lot and sidewalk were not part of leased premises).
165. Coleman v. Rotana, Inc., 778 S.W.2d 867 (Tex. App.—Dallas 1989, n.w.h.).
to provide adequate parking. The tenant appealed the trial court's refusal to submit the issue to the jury.\textsuperscript{166} The appeals court concluded that the tenant had presented some evidence on each of the first three elements of constructive eviction.\textsuperscript{167} It noted, however, that while the tenant had experienced parking shortages from the day it opened its doors, the tenant did not abandon the premises until 20 months later.\textsuperscript{168} The court held that, as a matter of law, a 20-month delay is too long to sustain a constructive eviction claim.\textsuperscript{169}

B. Construction and Interpretation

Case law well establishes the principle that a landlord may withhold its consent to a tenant's requested assignment or sublease.\textsuperscript{170} That principle has survived numerous assaults, including a recent attempt to impose a standard of reasonableness,\textsuperscript{171} and is enshrined in section 91.005 of the Texas Property Code.\textsuperscript{172} Much less certain has been the question of what circumstances justify a landlord's refusal to consent when the landlord has agreed to act reasonably. The first definitive answer came in \textit{B.M.B. Corporation v. McMahan's Valley Stores}.\textsuperscript{173} Tenants are likely to applaud the result.

\textit{B.M.B.} involved a furniture store lease that required the tenant to pay both fixed rent and percentage rent based on the tenant's sales proceeds above a threshold level. The lease prohibited any assignment or subletting without the landlord's consent, which the landlord was not to unreasonably withhold. The landlord consented to one assignment in 1965, another in 1984, and a third in 1985. Soon after the third assignment, sales dropped below the percentage rent threshold. The landlord sued for fraud in the inducement, claiming that during the course of negotiations leading to the landlord's consent to the 1985 assignment the assignee had made oral guarantees concerning the sales volume. The landlord also claimed that the tenant had breached an implied lease covenant to sell only quality furniture and to maximize percentage rental.

After the jury found in favor of the landlord and awarded damages,\textsuperscript{174} the

\begin{itemize}
  \item \textsuperscript{166} \textit{Id.} at 868-69.
  \item \textsuperscript{167} \textit{Id.} at 872.
  \item \textsuperscript{168} \textit{Id.} The court also said no evidence existed that the parking problem prompted the abandonment. \textit{Id.} It noted that, during the 20-month interval, the tenant had changed its restaurant from a first class restaurant to a Mexican food restaurant, and that the abandonment of the premises followed hard on the heels of a breakdown in negotiations between the landlord and tenant regarding assignment of the lease. \textit{Id.}
  \item \textsuperscript{169} \textit{Id.} Compare Downtown Realty, Inc. v. 509 Tremont Bldg., Inc., 748 S.W.2d 309, 311 (Tex. App.—Houston [14th Dist.] 1988, n.w.h.) (ten months not too long); Richker v. Georgandis, 323 S.W.2d 90, 96-97 (Tex. Civ. App.—Houston [1st Dist.] 1959, writ ref'd n.r.e.) (ten months not too long).
  \item \textsuperscript{170} See infra note 128 and accompanying text.
  \item \textsuperscript{171} Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App.—San Antonio 1987, writ denied).
  \item \textsuperscript{172} \textsc{Tex. Prop. Code Ann.} \S 91.005 (Vernon 1984).
  \item \textsuperscript{173} 869 F.2d 865 (5th Cir. 1989).
  \item \textsuperscript{174} \textit{Id.} at 867.
\end{itemize}
trial court entered a judgment n.o.v. for the tenant, finding that the tenant had not improperly induced the landlord's consent and that no language in the lease supported the contention that the tenant must sell only quality furniture. In affirming the judgment n.o.v., the Fifth Circuit agreed with the trial court's findings. The appellate panel then proceeded to answer a question that was both hypothetical and unnecessary to the case' s disposition: whether it would have been legal for the landlord to have withheld its consent to the 1985 assignment.

The Fifth Circuit determined that the Texas Supreme Court had never squarely addressed what constitutes a reasonable refusal to consent to an assignment. After reviewing the relevant authority, the circuit judges summarized the applicable law with the proposition that one determines the reasonableness of a landlord's refusal to consent by reference to the terms and conditions of the original lease. The appellate panel said that because the lease did not obligate the tenant to maximize the percentage rent, the landlord in B.M.B. could not lawfully have conditioned its consent on the assignee's guarantee of a certain level of percentage rentals.

In an unpersuasive portion of the opinion, the Fifth Circuit purported to distinguish cases from other jurisdictions holding that a landlord's objection to an assignment is commercially reasonable when the proposed assignee admits that it will be unable to generate gross sales sufficient to produce percentage rental equal to that consistently paid by the existing lessee. The court distinguished B.M.B. from those cases because in B.M.B. there was no indication that the tenant could not eventually generate percentage rental income equal to prior levels. One wonders how long the landlord must wait for the rental to achieve prior levels and whether the Fifth Circuit stands ready in the meantime to compensate the landlord for its lost income. The court seems to lose sight of the fact that a landlord who is faced with an assignment request must make an ex ante judgment; if the only basis for concluding that an assignee could not generate equivalent rentals is the assignee's failure to do so over some long period of time, then as a practical matter the landlord is precluded from ever objecting to a proposed assignment. The Fifth Circuit's opinion would be more consistent if it simply said

175. Id.
176. Id.
177. Id. at 868.
178. Id.
179. Id.
180. Id.
182. 869 F.2d at 869.
183. Id. at 868 & n.2 (citing John Hogan Enters., Inc. v. Kellogg, 187 Cal. App.3d 589, 231 Cal. Rptr. 711 (1986); Haack v. Great Atl. & Pac. Tea Co., 603 S.W.2d 645 (Mo. Ct. App. 1980). California courts have placed greater restrictions on landlords than have Texas courts as regards the right to withhold consent to a sublease or assignment. See Reynolds v. McCullough, 739 S.W.2d 424, 429 (Tex. App.—San Antonio 1987, writ denied).
184. Id.
that an expected drop in percentage rental can never constitute a reasonable basis for objecting to a sublease unless the lease obligates the tenant to maximize percentage rental.

It remains to be seen whether Texas courts will build on the Fifth Circuit’s analysis or whether B.M.B. instead will be quietly brushed into the deep dustbin of obiter dicta. In all events, landlords willing to constrain their discretion by a reasonableness standard would be prudent to stipulate in their leases the grounds upon which they can object to a proposed assignment.

In contrast to the sometimes unconstrained analysis in B.M.B., the Fifth Circuit’s opinion in Chapman & Cole v. Itel Container International B.V.185 is a model of methodical contract construction. In Chapman the tenant of a shipping container yard had specified that the yard’s surface would need to support a certain maximum equipment weight. The landlord constructed such a yard in accordance with a lease provision that required the landlord to deliver the facility at the lease’s commencement in a “turn-key” condition. The weight specified by the tenant proved grossly inadequate, however, causing the yard’s surface to crack. When the landlord insisted that repairs were the obligation of the tenant as provided in the lease, the tenant abandoned the premises, prompting the landlord’s suit.

In its appeal of the trial court’s judgment for the landlord,186 the tenant contended that the “turn-key” language obligated the landlord to construct a suitable facility and that the landlord bore all risks incident to that task. The appellate court acknowledged that turn-key language normally imports such a duty,187 but said that the trial court had correctly looked to the entire lease in disregarding the phrase’s normal meaning.188 The appellate court pointed out that the lease contained the tenant’s acceptance of the premises in their existing condition on the commencement date,189 included the tenant’s acknowledgement that the landlord made no representation as to the suitability of the premises for the conduct of tenant’s business,190 and set forth the tenant’s indemnity of the landlord for losses arising from conditions on the premises.191 In these circumstances, the tenant’s mistaken specification caused the problems, and the lease provisions served to qualify the turn-key provision by releasing the landlord from any possible liability for the tenant’s mistake.192

185. 865 F.2d 676 (5th Cir.), cert. denied, 110 S.Ct. 201, 107 L.Ed.2d 155 (1989).
186. Id. at 680.
188. Id. (citing Chapman v. Orange Rice Milling Co., 747 F.2d 981, 983 (5th Cir. 1984); Glassman Constr. Co. v. Maryland City Plaza, Inc., 371 F.Supp. 1154, 1158 (D. Md. 1974), aff’d, 530 F.2d 968 (4th Cir. 1975)).
189. 865 F.2d at 681.
190. Id.
191. Id. at 681-82.
192. Id. at 682 (citing Martin v. Vector Co., 498 F.2d 16, 25 (1st Cir. 1974); Mobile Hous. Env’ts v. Barton & Barton, 432 F. Supp. 1343, 1346 (D. Colo. 1977)).
Texas courts are split about whether commercial tenants are liable for injuries to their customers that occur outside the premises under their control.\textsuperscript{193} The Dallas Court of Appeals has adhered to the common law concept that the occupier of premises has no duty of care regarding conditions outside the premises that the occupier has not caused,\textsuperscript{194} while courts of appeal in Houston, San Antonio, and Waco have imposed liability.\textsuperscript{195} In \textit{Johnson v. Tom Thumb Stores, Inc.}\textsuperscript{196} the Dallas court held its ground, ruling that a grocery store was not liable for injuries sustained by a customer who slipped and fell in the shopping center's common area.\textsuperscript{197} The appeals court distinguished the Texas Supreme Court decision in \textit{Renfro Drug Company v. Lewis}\textsuperscript{198} as one in which the common area was part of an entranceway contiguous to the leased premises. The appeals court also noted that in \textit{Renfro}, the lease obligated the tenant to keep the entranceway open at all times,\textsuperscript{199} whereas in \textit{Johnson} the lease made the landlord responsible for maintaining the common area.\textsuperscript{200}

In \textit{Canteen Corporation v. Republic of Texas Properties, Inc.}\textsuperscript{201} a Texas appeals court held that a tenant's installation of food vending machines violated its lease. A lease clause required use of the premises as a restaurant. The court stated that a lease clause giving the tenant a right of first refusal on any installation of food vending machines in the building demonstrated that vending machine operation was a different type of use from that contemplated by restaurant use.\textsuperscript{202}

\section*{C. Residential Leases}

It was a banner year for the law of residential leases. Harris County's eviction procedures survived a challenge to their constitutionality.\textsuperscript{203} Texas district courts decided three cases arising under the residential leasing chapter of the Texas Property Code\textsuperscript{204} — an extraordinarily high number considering the cost of bringing such actions. In addition, the legislature amended the leasing provisions in the Texas Property Code to increase the remedies available to aggrieved tenants.\textsuperscript{205}

\begin{footnotes}
\item[193.] See infra notes 142-48 and accompanying text.
\item[196.] 771 S.W.2d 582 (Tex. App.—Dallas 1989, writ denied).
\item[197.] Id. at 585.
\item[198.] 149 Tex. 507, 235 S.W.2d 609 (1950).
\item[199.] 771 S.W.2d at 585.
\item[200.] 771 S.W.2d at 584-85.
\item[201.] 773 S.W.2d 398 (Tex. App.—Dallas 1989, n.w.h.).
\item[202.] Id. at 400.
\item[203.] See infra notes 151-66 and accompanying text.
\item[204.] TEX. PROP. CODE ANN. §§ 92.001-.301 (Vernon 1984 and Supp. 1990). See infra notes 167-82 and accompanying text.
\item[205.] TEX. PROP. CODE ANN. §§ 92.006-009, .055(c), .056-.0563, .057(b), .057(d), .058-.059, .301, 93.001-.003 (Vernon Supp. 1990). See infra notes 183-89 and accompanying text.
\end{footnotes}
The challenge to the eviction procedures came in *Merritt v. Harris County*,206 a class action which challenged a trial court holding that the procedures complied with the due process requirements of the state and federal constitutions.207 Evidence at trial established that Harris County constables would attempt to induce the tenant voluntarily to leave the premises before serving the writ of restitution. Before executing the writ, the constables would post a notice on the tenant's door advising the tenant to vacate within a specified time period. If the tenant failed to leave, the constable's office engaged a private moving and storage company to pack up the tenant's belongings and prepare an inventory of the property for attachment to the return of the writ or filing in the constable's office. If the tenant was present during the writ's execution, the constable's office allowed the tenant to take food, clothing, pets, and plants. The constable's office gave the tenant a business card that identified the private movers and advised the tenant where he could retrieve the property; if the tenant was not present, the constable's office posted the card on the door of the premises.208 The constable's office then placed the property in storage and the tenant could retrieve it by payment of the moving and storage costs. If not claimed within 30 days, the constable's office advertised the property was for sale and auctioned it.

The trial court had found that the sale procedure was defective because evicted tenants frequently did not have adequate recourse to contest the sale.209 Moreover, property was sometimes sold without any statutory basis or legal process.210 The trial court also had found that the constables and their deputies did not participate in the sales.211 On appeal, the class action tenants asserted that the restitution procedures did not afford the notice and hearing that are said to be requisites of due process. In particular, the tenants said that due process requires that a tenant be advised, prior to the forcible entry and detainer trial in the justice court, about the entire restitution procedure that can result from a judgment for the landlord.

The appeals court took issue with the contention that the tenants had no notice of the consequences attending an eviction.212 The court said that the judgments in the justice court constituted notice to the tenants that post-judgment proceedings would follow.213 Additionally, the court noted, before executing the writs of eviction the constables delivered notice to defaulting tenants advising them to vacate within a specified period.214 Citing the United States Supreme Court's opinion in *Mathews v. Eldridge*,215 the

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206. 775 S.W.2d 17 (Tex. App.—Houston [14th Dist.] 1989, writ denied).
207. *Id.* at 20.
208. The procedure followed by the Harris County constables appears to be consonant with, and in some ways accords the tenant more protections than, the procedures required by TEX. PROP. CODE ANN. § 24.0061 (Vernon Supp. 1990), which governs the issuance and execution of writs of possession.
209. 775 S.W.2d at 20.
210. *Id.* at 20-21.
211. *Id.*
212. *Id.* at 22.
213. *Id.* at 21.
214. *Id.*
appeals court said that assessing the adequacy of the restitution procedures requires weighing (1) the private interest affected by the constables' action, (2) the risk of an erroneous deprivation of such interest, (3) the probable value of any additional or substitute procedural safeguards, and (4) the state's interest, including the financial and administrative burdens that additional procedures would entail. The appeals court found that the procedures at issue adequately accommodated these competing interests. The appellate court agreed with the trial court that no constitutional purpose would be served by adding any notice or hearing requirements. Further, the appeals court held that the safe and reasonable storage of the tenants' property was more desirable than placing the belongings on the street and thereby risking theft, violation of city ordinances, and infringement on the neighborhood's quality of life.

The tenants next claimed that even if the constable properly seized the property, the tenants were nonetheless entitled to reclaim it by paying reasonable storage charges. Noting that the trial court had found that the fees charged by the private warehousemen were unreasonable, the tenants contended that Harris County and its constables were liable under 42 U.S.C. § 1983 because the constables were intimately involved with the warehousemen. The appeals court held that the requisite causal connection between the constables' acts and the constitutional deprivation of the tenant's property was lacking because the constables did not participate either in setting the storage charges or in the sales conducted by the warehousemen. The constables were merely executing writs of restitution, which are orders of the court.

Lastly, the tenants argued that the constables were the final policymaking authorities within their precincts regarding writs of restitution, that the practice of entrusting the goods with private warehousemen was part of that policy, and that Harris County was therefore liable for the constitutional infringements of the warehousemen. The appeals court disagreed, holding the execution of writs is a narrowly circumscribed duty that does not involve any policymaking. While the constables do have some limited discretion in some areas, said the appeals court, "they do not define the objectives of a writ of restitution nor do they prescribe the excessive storage charges levied

216. 775 S.W.2d at 21 (citing Mathews v. Eldridge, 424 U.S. at 335).
217. Id. at 22.
218. Id.
219. Id.
220. Id.
221. Id. at 23.
223. 775 S.W.2d at 23 (citing Lozano v. Smith, 718 F.2d 756 (5th Cir. 1983)). The court in Lozano stated that a causal connection exists when a constitutional deprivation results from implementation of a wrongful policy. 718 F.2d at 768.
224. 775 S.W.2d at 23-24.
225. Id.
226. Id. at 24 (citing Rhode v. Denson, 776 F.2d 107, 109-10 (5th Cir. 1985), cert. denied, 476 U.S. 1170 (1986)).
by the private warehousemen."227

*Waldon v. Williams,*228 one of a trio of Survey cases arising out of residential lease disputes, held that a trial court’s award of a rental reduction under Section 92.056(b)(2) of the Texas Property Code229 did not preclude an additional award under Section 92.056(b)(4)230 for actual damages prior to the entry of the order.231 The trial court had determined that the landlord’s failure to repair diminished the value of the premises by $110 per month232 and accordingly ordered a rental reduction in that amount until the repairs were completed.233 The trial court believed, however, that the statute precluded the court from additionally awarding damages for the 15 months during which the landlord had wrongfully failed to make the repair prior to entry of the order.234 The appeals court traced the history of Section 92.056,235 determined the tenant was damaged,236 calculated the actual damages based on the difference between contract rental and the rental value of the premises without the repair,237 and concluded that the trial court was obliged to award damages.238

Since *Waldon*, the legislature has recodified Section 92.056(b) as Section 92.0563(a).239 In addition, the legislature has deleted the language allowing the tenant one or more of the five specified remedies.240 The amended Section 92.056(b), however, allows the tenant to obtain the “judicial remedies” of Section 92.0563(a),241 thus it is probable that *Waldon* remains good law.

*Benser v. Johnson*242 vindicates the wisdom of Section 92.153(b)(1) of the Texas Property Code,243 which requires a landlord who is requested to do so by the tenant to install a window latch on each exterior window. In *Benser*, after the tenant complained that the window locks did not work, the landlord installed a defective “screw type” lock, which enabled an intruder to open the window, enter the apartment, and rape one of its occupants. In affirming a judgment against the landlord based on negligence,244 the ap-

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227. *Id.* at 25 (citing Rhode v. Denson, 776 F.2d at 109).
228. 760 S.W.2d 833 (Tex. App.—Austin 1988, n.w.h.).
231. 760 S.W.2d at 835.
232. *Id.* at 834.
233. *Id.*
234. *Id.*
235. *Id.* at 834-35.
236. *Id.* at 835.
237. *Id.*
238. *Id.*
240. *Id.*
242. 763 S.W.2d 793 (Tex. App.—Dallas 1988, writ denied).
244. 763 S.W.2d at 794.
peals court cited Sections 92.052(a)\textsuperscript{245} and 92.153(a)-(b)(1)\textsuperscript{246} of the Texas Property Code as constituting some evidence that the defective locks were a significant causative factor in bringing about the injury.\textsuperscript{247}

In the trio's third case, \textit{Reed v. Ford},\textsuperscript{248} the tenant had made a security deposit under a printed lease which required that, no fewer than 30 days before the end of the primary term, the tenant give notice of whether he intended to vacate or negotiate a renewal. The security deposit provision required that the tenant give the 30-day notice as a condition to recovering the deposit. The tenant neither gave notice of termination nor signed a renewal agreement. Instead, after expiration of the primary term, the tenant continued to make rental payments, the landlord duly accepted such rental payments, and the two parties discussed renewal. When those discussions broke down, the landlord announced that he considered the tenant to be a holdover pursuant to a lease provision requiring holdover rental at double the primary term rate and demanded that the tenant vacate within five days. The tenant did so and surrendered the premises in excellent condition. The landlord refused to return the security deposit, claiming that the tenant had forfeited it by failing to give the requisite 30-day notice prior to the end of the primary term and asserting that he was holding the deposit to offset holdover rentals.

The tenant brought suit, claiming that the landlord's retention was in bad faith and that the tenant was entitled to $100, three times the amount of his deposit, and attorneys' fees. The trial court directed a verdict for the landlord.\textsuperscript{249} The trial court held that the tenant had forfeited the deposit when it failed to give notice 30 days before the end of the primary term.\textsuperscript{250}

In reversing the trial court, the appeals court construed the lease as requiring only that the tenant give 30 days notice prior to termination in order to recover the deposit.\textsuperscript{251} The court noted that the landlord's demand for an immediate vacation had prevented the tenant from fulfilling the notice requirement and therefore deemed the requirement to have been met.\textsuperscript{252} The court found that sufficient evidence of the landlord's bad faith existed to require submitting the issue to a jury.\textsuperscript{253}

A number of the 1989 amendments to the Texas Property Code serve to expand the rights and remedies of aggrieved residential tenants. Besides the changes to Texas Property Code discussed elsewhere in this article,\textsuperscript{254} the

\begin{itemize}
\item 245. TEX. PROP. CODE ANN. § 92.052(a) (Vernon 1984).
\item 246. TEX. PROP. CODE ANN. § 92.153(a)-(b)(1) (Vernon 1984).
\item 247. 763 S.W.2d at 795-97.
\item 248. 760 S.W.2d 26 (Tex. App.—Dallas 1988, n.w.h.).
\item 249. Id. at 28.
\item 250. Id.
\item 251. Id. at 29 (citing Frank v. Kuhnreich, 546 S.W.2d 844, 848 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.) (construction resulting in forfeiture is to be avoided if there is a reasonable alternative construction available)).
\item 252. Id. (citing Sargent v. Highlite Broadcasting Co., 466 S.W.2d 866, 867 (Tex. Civ. App.—Austin 1971, no writ)).
\item 253. Id. at 30.
\item 254. See supra text accompanying notes 8, 150, 172-73.
\end{itemize}
Texas Legislature performed a major overhaul on Property Code provisions. The salient changes include an expansion of the tenant’s remedies in the event the landlord closes a rental unit after the tenant has given notice of a required repair; a more precise delineation of the steps that a tenant must take in order to hold a landlord liable for failure to repair; a more extensive list of remedies available to the tenant when the landlord is liable, and creation of a procedure whereby a landlord, by delivering a good-faith affidavit explaining why repairs cannot be timely completed despite diligent efforts to do so, can obtain up to a 30-day extension.

Texas lawmakers also amended the Texas Property Code to stipulate that the only defenses to non-payment of rent that a tenant may assert in an eviction suit are unlawful retaliation by the landlord pursuant to Section 92.057, lawful rent deduction pursuant to Section 92.0561 by reason of a landlord’s failure to make required repairs, and lawful rent deduction pursuant to Section 92.301 by reason of an interruption of utilities. The amendment says that no other judicial action under the residential tenancies subchapter may be joined with or asserted as a defense or crossclaim in an eviction suit. An amendment to Section 24.005 of the Texas Property Code stipulates that the purchaser at a foreclosure sale wishing to terminate the tenancy of a residential tenant whose lease is inferior to the foreclosed lien must give the tenant at least 30 days' written notice to vacate following the foreclosure.

Section 92.006(f) permits a landlord and tenant to agree that, except in instances of the landlord’s negligence, the tenant is liable for damages from wastewater stoppages caused by foreign or improper objects in lines that exclusively serve the tenant’s dwelling, (2) damage to doors, windows, or screens, and (3) damage resulting from windows or doors left open. These exclusions seem highly sensible. Indeed, it is hard to imagine why landlords (and, by extension, other tenants) should subsidize a tenant’s negligence in such instances.

Unfortunately, the Texas legislature added conditions to such an agreement. It decreed that the agreement must be underlined or printed in boldface, must be “specific and clear,” and must be “made knowingly, voluntarily, and for consideration.” These additional conditions are reflective of an intensifying move away from the view that individuals are at liberty to make voluntary agreements and toward the view that the law

264. Id.
should treat contracting adults as wards of the court. The conditions to Section 92.006(f) are a festering carbuncle on the otherwise smooth cheek of the Property Code. If legislation of this type continues to be fashionable, written agreements will come to resemble pharmaceutical labels, and contract disputes will less and less involve determining what the parties meant, and will more and more involve discovering ways to loose the parties from their express undertakings because one of them forgot to say "Mother, may I?".

D. Commercial Leases

The Texas legislature overruled two lockout cases from last year's Survey by creating Chapter 93 of the Texas Property Code to govern commercial tenancies. Included in the new chapter are provisions governing interruption of utilities, removal of a tenant's property, and lock-outs. Section 93.001 makes clear that the new chapter applies only to commercial rental property, which is defined as all rental property not covered by Chapter 92. Section 93.002, entitled " Interruption of Utilities, Removal of Property, and Exclusion of Commercial Tenant," is the analogue of Section 92.008 governing residential tenancies. The two provisions proscribe the identical behavior: cutting off utilities, removing property absent a tenant's abandonment, and lock-outs. The commercial lease provision additionally creates a presumption that the tenant has abandoned the premises when the tenant begins to move its business property off site, and allows the landlord to remove, store, and eventually sell abandoned property. Both statutes require the landlord to place a notice on the tenant's front door.
advising of where a new key can be obtained.\textsuperscript{275}

Can a statute be construed to permit certain behavior if the statute does not expressly proscribe that behavior? An interesting difference between the two lock-out statutes may soon cause courts to confront that question. The residential statute requires that the landlord provide a new key to the tenant "at any hour, regardless of whether or not the tenant pays any of the delinquent rent."\textsuperscript{276} The commercial statute, by contrast, states that a new key need be provided "only during the tenant's regular business hours,"\textsuperscript{277} but does not indicate whether the landlord must furnish a new key to a tenant whose rent is delinquent.

Another important difference between the residential and commercial versions exists. A tenant cannot waive the protections of the residential lock-out statute.\textsuperscript{278} On the other hand, the commercial statute is invalid to the extent of any conflict with the provisions of the lease.\textsuperscript{279}

\textbf{E. Landlord's Rights and Remedies}

In \textit{Marynick v. Bockelmann}\textsuperscript{280} a husband and wife were the tenants under a lease that provided for year-to-year holdover terms with rent at the primary term rate. Shortly before the end of the initial term, the tenants separated and the wife moved out. The husband abandoned the premises during the second holdover term, prompting the landlord's suit for past due rent and repairs to the premises.

The appeals court reversed the trial court's finding that the wife was not liable under the lease.\textsuperscript{281} It noted that the only case on point\textsuperscript{282} held that where two tenants hold jointly and only one occupies after the expiration of the initial term, both remain liable unless the one not in actual possession gives notice to the landlord advising that he has vacated.\textsuperscript{283} The appeals court said it did not matter that the landlord knew the couple was separated;\textsuperscript{284} the wife continued to have rights under the lease and needed to take some affirmative act as regarded the landlord to terminate her liability.\textsuperscript{285} One judge dissented, noting that the case relied on by the majority held only that the holdover of one of two joint tenants will be presumed to be the holdover of both, but that the presumption was rebuttable.\textsuperscript{286}

Other Survey cases illustrated solid but undramatic instances of constru-

\begin{footnotesize}
\textsuperscript{280} 773 S.W.2d 665 (Tex. App.—Dallas 1989, writ granted).
\textsuperscript{281} \textit{Id.} at 667.
\textsuperscript{282} \textit{Fronty v. Wood, 20 S.C.L. (2 Hill) 367 (1834).}
\textsuperscript{283} \textit{Id.} at 367.
\textsuperscript{284} 773 S.W.2d at 669.
\textsuperscript{285} \textit{Id.} at 669-70.
\textsuperscript{286} \textit{Id.} at 674 (Ovard, J., dissenting) (citing \textit{Fronty v. Wood, 20 S.C.L. (2 Hill) 367, 367 (1834)})
\end{footnotesize}
ing leases and applying settled law. In *Dyer v. Weedon*287 the appeals court chided the trial court for granting an injunction in favor of a bankrupt landlord seeking to oust a tenant.288 Noting that the landlord's bankruptcy petition had the effect of invoking an automatic stay against continuation of legal proceedings against the debtor,289 the court held that the overwhelming weight of authority supported the proposition that the debtor is similarly disabled from asserting claims or counterclaims.290

*Miller v. Vineyard*291 required the appeals court to determine the legal significance of several statements made by a landlord to a tenant who had abandoned the premises and stopped paying rent. The court determined that the landlord's statement that the lease was terminated until he got paid was not sufficient to rescind the lease and thereby cut off any further liability of the tenant.292 "[A] layman's loose usage of a word with possible legal significance is not conclusive evidence of his intent."293 However, according to the court, the following colloquy between the narrator landlord (Jerry) and the tenant (Jack) was not sufficient to constitute a demand for payment by the landlord that would allow the landlord to recover attorneys' fees:

And at that time I asked him, I says, "Jack, what is going on?" And he said, "Jerry, [sic] I lost my ass out there and closed it down." And I said, "Well, Jack, I don't even have the keys to the place, nothing, you know."294

Ernest Hemingway could not more succinctly have captured the dispirited state of the Texas real estate market at decade's end.

In *Chapman & Cole v. Itel Container International B.V.*295 the appeals court affirmed a trial court holding that a landlord's failure to credit the tenant with either the fair market value of the unexpired lease term or the amount of payments received from subsequent tenants precludes the landlord from claiming any future rent.296 Finally, in *Downwind Aviation, Inc. v. Orange County*,297 the appeals court affirmed a trial court holding that a tenant's failure to furnish a certificate naming the landlord as an additional insured on a liability policy constituted an event of default under a lease containing such a requirement.298

287. 769 S.W.2d 711 (Tex. App.—Waco 1989, n.w.h.).
288. Id. at 713.
289. Id. (noting automatic stay of 11 U.S.C. § 362(a) (1989)).
290. 769 S.W.2d at 713-14 (discussing Association of St. Croix Condominium Owners v. St. Croix Hotel Corp., 682 F.2d 446, 448-49 (3d Cir. 1982); Howard v. Howard, 670 S.W.2d 737, 739-40 (Tex. App.—San Antonio 1984, no writ); In re Critical Fork Coal Corp., 18 Bankr. 422, 423 (Bankr. W.D. Va. 1982)).
291. 765 S.W.2d 865 (Tex. App.—Austin 1989, writ denied).
292. Id. at 868.
293. Id.
294. Id. at 870.
296. Id. at 687-89.
297. 761 S.W.2d 455 (Tex. App.—Beaumont 1988, writ denied).
298. Id. at 459.
III. TITLE AND CONVEYANCING

A. Generally

The Texas Supreme Court’s decision in Ojeda de Toca v. Wise,299 which held that a buyer of real property may sue under the DTPA for failure to disclose information even when the undisclosed information is the subject of a recorded instrument, began to bite this year in ECC Parkway Joint Venture v. Baldwin.300 In ECC a land buyer discovered a prior deed restriction, allegedly undisclosed by the seller, the seller’s real estate broker, and the title company, limiting building heights to 30 feet. The buyer sued everyone involved, and a welter of cross-claims and counterclaims resulted.

In an opinion of admirable clarity, the court of appeals made a number of holdings that may come to alter the way in which lawyers draft purchase and sale agreements. First, citing Ojeda de Toca, the court held that the buyer’s constructive knowledge of the height restriction from the deed records was no defense to the seller’s fraud and DTPA claims against the seller and its broker.301 Taking Ojeda de Toca one step further, the court found no reason why Ojeda de Toca should not also allow the buyer’s claims for negligent misrepresentation and breach of fiduciary duty.302

Second, the court was called upon to interpret Dallas Joint Stock Land Bank v. Harrison,303 a case in which the seller represented that a certain mineral lease covered only 100 acres of the 440-acre subject tract, furnished the buyer with an abstract of title, agreed that the buyer could object to any title defects discovered therein, and stipulated that the seller would be required to warrant title only to those minerals it actually owned. When the buyer discovered after closing that the mineral lease in question covered the entire 440-acre tract, he sued for fraud. The Texas Supreme Court rejected the claim, holding that because the abstract disclosed the lease, and the lease quite clearly indicated that it covered the entire tract, the seller was exonerated from liability.304

The seller in ECC, noting that he had furnished a title commitment to his buyer and given him an opportunity to object to the state of title, argued that Dallas Joint Stock stands for the proposition that a real estate buyer who contracts to look solely to certain title information cannot later complain to the seller about title problems. The court disagreed, noting that Dallas Joint Stock differed from ECC in several crucial respects.305 First, in Dallas Joint Stock the title abstract listed the mineral lease and the buyer could thereby have determined what property the lease covered.306 In ECC, on the other hand, the height restriction was absent from the title policy and the buyer

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299. 748 S.W.2d 449 (Tex. 1988), discussed in Fossi & Weller, 1989 Annual Survey, supra note 11 at 274-75).
300. 765 S.W.2d 504 (Tex. App.—Dallas 1989, writ denied).
301. Id. at 509.
302. Id.
303. 138 Tex. 84, 156 S.W.2d 963 (1941).
304. Id. at 966.
305. 765 S.W.2d at 510-11.
306. Id.
had no means of discovering it from the policy.\textsuperscript{307} In addition to this, the appeals court in \textit{ECC} held that the doctrine of merger\textsuperscript{308} did not bar the claims against the seller because the doctrine is inapplicable in instances of fraud, accident, or mistake in the transactions leading up to the deed.\textsuperscript{309} Finally, in remanding the case for further findings on a host of fact issues, the appellate court held that the trial court properly dismissed the indemnity and contribution claims by the seller and the broker against the two title companies involved (both of which had already settled with the buyer).\textsuperscript{310} A title company's duty, the court said, is not to advise as to the state of title, but merely to insure against any loss suffered by the insured party by reason of title defects.\textsuperscript{311} Because, as a general matter, no action for contribution or indemnity lies against a party who has no liability to the injured party, the court allowed no such action against the title companies in this case.\textsuperscript{312}

\subsection*{B. Reformation}

In \textit{Hamberlin v. Longview Bank \\& Trust Co.}\textsuperscript{313} the buyer accepted a deed despite his noticing that the deed's property description included four lots in addition to the one he had contracted to purchase. The seller subsequently sued to reform the deed by excluding the extra lots. The appeals court ultimately affirmed the trial court's holding that the inclusion of the additional lots, coupled with the buyer's knowledge of the mistake, entitled the seller to reformation.\textsuperscript{314} The court refused to allow reformation in \textit{Lathem v. Richey}\textsuperscript{315} because the party seeking the relief had waited too long. In \textit{Lathem} the grantor under a deed filed suit more than four years after the conveyance, claiming that by reason of mutual mistake the deed failed to reserve a mineral interest. Later, the grantor amended his petition to allege the grantee's unilateral mistake and fraud. In affirming a summary judgment in favor of the

\begin{thebibliography}{10}
\bibitem{307} \textit{Id.}
\bibitem{308} The doctrine of merger has been summarized as follows:  
\begin{quote}
When a deed is delivered and accepted as performance of a contract to convey, the contract is merged in the deed. Though the terms of the deed may vary from those contained in the contract, still the deed must be looked to alone to determine the rights of the parties. No rule of law is better settled than that where a deed has been executed and accepted as performance of an executory contract to convey real estate, the contract is functus officio and the rights of the parties rest thereon solely in the deed.
\end{quote}
\bibitem{309} 765 S.W.2d at 512 (citing \textit{Commercial Bank, Unincorporated v. Satterwhite}, 413 S.W.2d 905, 909 (Tex. 1967)).
\bibitem{310} \textit{Id.} at 513.
\bibitem{311} \textit{Id.} (citing, \textit{inter alia}, \textit{Prendergast v. Southern Title Guar. Co.}, 454 S.W.2d 803 (Tex. Civ. App.--Houston [14th Dist.] 1970, writ ref'd n.r.e.)).
\bibitem{312} \textit{Id.} (citing, \textit{inter alia}, \textit{Hunter v. Fort Worth Capital Corp.}, 620 S.W.2d 547, 553 (Tex. 1981)).
\bibitem{313} 770 S.W.2d 12 (Tex. App.--Texarkana 1989, writ denied).
\bibitem{314} \textit{Id.} at 14 (citing, \textit{inter alia}, \textit{Ace Drug Marts, Inc. v. Sterling}, 502 S.W.2d 935 (Tex. Civ. App.--Corpus Christi 1973, writ ref'd n.r.e.)).
\bibitem{315} 772 S.W.2d 249 (Tex. App.--Dallas 1989, writ denied).
\end{thebibliography}
grantee, the appeals court agreed with the grantor that the four-year statute of limitations does not commence to run until the mistake or fraud is discovered or should have been discovered.\(^{316}\) The court observed, however, that where the grantor seeks reformation, he is presumed to have knowledge of the contents of his deed from the date of its execution.\(^{317}\) The presumption is rebuttable, but none of the excusing circumstances was present here, where the grantor’s attorney prepared the deed and the grantor read the deed, albeit hurriedly, before signing it.\(^{318}\)

C. Title Insurance

\emph{Stewart Title Guaranty Co. v. Cheatham}\(^{319}\) arose when the contract purchaser of an apartment complex backed out of the deal upon discovering a storm sewer easement which was not reflected in the original owner’s title policy. The owner sued the title company under the DTPA, basing its claim on the policy’s preamble stating that the insurer “for value does hereby guarantee . . . [that] the Insured has good and indefeasible title” to the property.\(^{320}\) The appeals court, however, construed this language in light of the entire policy, and held (as did the appeals court in the \emph{ECC} case discussed earlier) that the title policy was a contract of indemnity and not of guaranty.\(^{321}\) Accordingly, absent special circumstances, the policy did not obligate the title company to examine for title defects, but merely obligated it to indemnify against losses suffered by reason of such defects.\(^{322}\) The court warned, however, that an insurer’s failure to fulfill its indemnity obligation under the terms of the agreement would constitute an actionable breach of the insurer’s contractual undertaking.\(^{323}\)

A court did find that the special circumstances absent from \emph{Cheatham} were present in \emph{Stewart Title Guaranty Co. v. Sterling}.\(^{324}\) In \emph{Sterling} a contract buyer noticed from a survey that persons other than the seller owned three of the lots he was to purchase. Concerned that failure to acquire the lots would jeopardize his development plan, the buyer called the title company’s attention to the matter, but the title company assured him that he would receive title to those three lots as part of his purchase. In fact, though, recorded warranty deeds reflected that parties other than the seller were the owners of the lots in question.

When he discovered that title to the three lots was defective, the buyer invoked the Texas Insurance Code\(^{325}\) and the DTPA in his suit against the

\(^{316}\) \textit{Id.} at 253.
\(^{317}\) \textit{Id.} (citing, e.g., \textit{Sullivan v. Barnett}, 471 S.W.2d 39, 45 (Tex. 1971)).
\(^{318}\) \textit{Id.} at 253-254.
\(^{319}\) 764 S.W.2d 315 (Tex. App.—Texarkana 1988, writ denied).
\(^{320}\) \textit{Id.} at 318.
\(^{321}\) \textit{Id.}
\(^{322}\) \textit{Id.} at 319.
\(^{323}\) \textit{Id.} at 319 n.3.
\(^{324}\) 772 S.W.2d 242 (Tex. App.—Houston [14th Dist.] 1989, writ requested).
\(^{325}\) The buyer brought its claim under \textit{TEX. INS. CODE ANN.} art. 21.21, § 16 (Vernon Supp. 1990). The buyer was allowed to incorporate therein the definitions of unfair claims settlement practice set forth in \textit{TEX. INS. CODE ANN.} art. 21.21-2 even though art. 21.21-2
title company. The title company had attempted to shield itself with the rights of parties in possession exception in the title policy, but was rebuffed at trial by reason of a State Board of Insurance Rule that prohibits the exclusion from title coverage of any defects that public records reveal. In affirming the trial court, the appeals court held that while Texas law usually obligates a title company to act only as an indemnitor of title and imposes no duty to discover title defects, a court can hold a title company liable in instances such as this where the title company misrepresents or fails to disclose material facts.

D. Perpetuities

In Randolph v. Terrell the appeals court affirmed the validity of a deed's option provision giving the grantors the right to repurchase the property at a price equal to the sum of the price paid by the grantees and the fair market value of improvements subsequently constructed thereon. The court found that the option was an indirect restraint on alienation and was, therefore, distinguishable from direct restraints on alienation. The court classified the option provision as "a promissory preemptory restraint on alienation" under the Restatement (Second) of Property (1981), and assessed its validity under the guidelines set forth in Sections 4.2(3)(a)-(f) of the Restatement. The Randolph court construed the option as granting to
the grantors a right to repurchase the property during their life if offered for sale by the grantees during their life. Because the option was limited to the lifetimes of the grantors and grantees, and because the sale involved a transfer between members of the same family of an undivided interest in property, the court held that the restraint was allowable.

E. Lis Pendens

Olbrich v. Touchy is, in essence, a case that addresses who has standing to file a lis pendens notice. In Olbrich landowners filed their subdivision plats in the county map records before the city council approved the subdivision. Owners of adjacent land brought suit claiming that the subdivision was invalid because the plats had been filed in violation of city ordinances and state statutes. The adjacent landowners also filed a notice of lis pendens under Section 12.007(a) of the Texas Property Code. In overturning the trial court's refusal to cancel the notice of lis pendens, the appeals court observed that for the notice to be valid, the statute required either that the adjacent landowners have an interest in the subdivision land or that the alleged violations of law constitute an encumbrance on that land. The court acknowledged that the requisite interest in the land could be less than title, but said that the interest must amount to more than mere third party concern. The appeals court also rejected the argument that the alleged violations of law amounted to an encumbrance. The court said that the purpose of the lis pendens notice is to advise interested parties of the pendency of a suit. Here, though, the statutory restrictions on the subdivision of property were sufficient to alert prospective purchasers of the violations, and thus made the lis pendens notice superfluous. The court pointed out that the adjacent landowners could properly have sought relief by means of a temporary restraining order.

In Gene Hill Equipment Co. v. Merriman the wife in a divorce proceeding filed a notice of lis pendens describing the affected property as "all . . . property owned by or recorded in the name of either of the parties to the divorce, which may be located in Travis County, Texas." The appeals court affirmed a summary judgment holding that the notice was a sufficient "description of the property affected" for purposes of Section 12.007(b)(5) of the Texas Property Code, and was adequate to put the transferee on notice that title to the land in question was in dispute.

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333. 768 S.W.2d at 738.
334. Id. at 740.
335. 780 S.W.2d 6 (Tex. App.—Houston [14th Dist.] 1989, no writ).
336. Id. at 7.
337. Id.
338. Id.
339. Id. at 8.
340. 771 S.W.2d 207 (Tex. App.—Austin 1989, no writ).
341. Id. at 208.
343. 771 S.W.2d at 209.
Khraish v. Hamed arose out of a trial court’s order that a notice of lis pendens be removed. The party filing the notice sought an interlocutory appeal, arguing that the trial court’s actions of not only cancelling the order but also prohibiting the refiling of other notices against the identical property were tantamount to a temporary injunction and thus properly the subject of an interlocutory appeal. The appeals court disagreed, holding that the notice was improperly filed because it was collateral to the underlying lawsuit. The order, therefore, did not contain elements of a temporary injunction. The court held, moreover, that in instances where a notice of lis pendens is invalid in the first instance, the property owner need not comply with the requirements of Section 12.008 of the Texas Property Code to obtain an order cancelling the notice.

In TEVE Holdings Ltd. v. Jackson the parties filing the lis pendens had prevailed in a lawsuit for fraud and DTPA violations, and obtained a constructive trust on condominiums purchased with proceeds derived from the fraud-feasor’s misconduct. After the filing of the lis pendens and the entry of the judgment in the underlying suit, TEVE acquired the condominiums from the fraud-feasor. Several months later, pursuant to a court order, the condominiums were sold at a sheriff’s sale and purchased by the judgment creditors. When those creditors sued to establish title to the condominiums, the trial court granted summary judgment in their favor.

Relying on Moss v. Tennant, TEVE argued on appeal that the lis pendens was inappropriate because the condominiums were collateral to the underlying DTPA case. The appeals court distinguished Moss as a case in which the plaintiff’s request for a constructive trust was essentially a prayer for a judgment lien and not an attempt to acquire an interest in property.

344. 762 S.W.2d 906 (Tex.App.—Dallas 1988, writ denied).
345. Id. at 907-09.
346. Id. at 907.
347. Id. at 909.
348. Id. It seems that, as a practical matter, the appellant obtained the interlocutory review he sought by forcing the appeals court to decide on the notice’s validity.
349. Id. TEX. PROP. CODE ANN. § 12.008 (Vernon 1984) requires, as a condition to cancelling a notice of lis pendens, that (a) the trial court find that the party who has filed the notice will be adequately protected by either a deposit with the court of an amount equal to the judgment sought plus interest and costs or delivery of a guaranty, supported by sureties, in twice the amount of the judgment sought, and (b) that the deposit or guaranty be delivered.
350. 763 S.W.2d 905 (Tex. App.—Houston [1st Dist.] 1988, no writ). For convenience the appellees, Jackson and Dowdy, are collectively called “Jackson”.
351. 722 S.W.2d 762 (Tex. App.—Houston [14th Dist.] 1986, no writ). In Moss the plaintiffs purchased a house from the defendants in May 1982. In August 1982, the defendants purchased another home. In 1983, the plaintiffs filed suit against the defendants alleging, among other things, fraud. In July 1985, the plaintiffs amended their petition alleging the defendants had purchased their home with the proceeds of their transaction with the plaintiffs and, therefore, the plaintiffs were an equitable owner of the defendants’ new home “to the extent it was purchased with the proceeds” of the previous sale. The court held the plaintiffs were not seeking to recover title to, or an interest in, the defendants’ new home, except as security for the recovery of damages that may be awarded to the plaintiffs; thus, the plaintiffs’ request for the imposition of a constructive trust was essentially a prayer for a judgment lien, and the notice of lis pendens was void. Id. at 763.
352. 763 S.W.2d at 908. Given the similarities between the facts of this case and Moss, the court’s distinction is suspect.
Since the judgment creditors sought an interest in the condominiums, the court concluded that the notice of lis pendens had been properly filed and that TEVE's interest in the condominiums was extinguished at the sheriff's sale.\footnote{353}

**F. Recent Legislation**

The 71st Legislature made a number of important changes affecting the manner in which one can convey real property in Texas. Several of these changes were merely facilitatory. For instance, an amendment to the Texas Property Code stipulates that a jurat will now work as well as an acknowledgment in making a document recordable.\footnote{354} An additional amendment states that a reference to the volume and page number or film code number of the Real Property Records for a particular county is as acceptable as a reference to the specific records, such as Deed Records or Deed of Trust Records, of the county in question, and is therefore sufficient to provide notice of the referenced instrument.\footnote{355} Finally, an amendment to the Texas Business Corporation Act provides that the signature of any corporate officer will be effective to convey a corporation’s realty.\footnote{356}

In a step that many will welcome, the lawmakers adopted the Uniform Federal Lien Registration Act, which Chapter 14 of the Texas Property Code codifies.\footnote{357} The Act’s provisions require the IRS to file federal tax lien notices affecting real property in the real estate records of the county where the property is located.\footnote{358} The IRS must file notices affecting personal property in the county clerk’s office of the county where the property’s owner resides if the owner is an individual, and in the Uniform Commercial Code records of the Secretary of State if the owner is a partnership or corporation.\footnote{359}

The Texas legislature also imposed additional notice requirements on sellers of realty.\footnote{360} The legislature amended the Texas Local Government Code to empower municipalities without zoning to require that realty sellers give purchasers written notice of deed restrictions, including notice of the municipality’s right to enforce the restrictions.\footnote{361} The notice, whose form is to be prescribed by each affected municipality, must be delivered at or before closing, signed by seller and purchaser, and recorded in the real property records.\footnote{362} Failure to comply will not affect a sale, but may result in liability to the municipality for a penalty of up to $500.\footnote{363} Since an executory con-

\footnotesize{
\begin{itemize}
  \item Id. at 909.
  \item Tex. Bus. Corp. Act Ann. art. 5.08 (Vernon Supp. 1990). Heretofore, a conveyance by a Texas corporation was effective only if executed by a president or vice president.
  \item Id. at § 14.002(b).
  \item Id. at § 14.002(c).
  \item Id.
  \item Id. at § 230.005(c).
  \item Id. at § 230.005(d)(3).
\end{itemize}
}
tract providing for more than six months between signing and closing is considered a conveyance for purposes of the statute, prudent sellers will want to give the required notice at the time they deliver the contract.364

The legislature revised the Texas Water Code to stipulate that a seller must give the notice required under Section 50.301 before a purchase and sale agreement is executed.365 Heretofore, that section of the code, which requires a seller of property located in a municipal utility district, flood control district, water district, or other special purpose district to give notice to a buyer identifying the district in which the property is located and specifying the tax rate and authorized bonded indebtedness, allowed the seller to give notice at or before the closing of the sale.366 The new legislation also increases somewhat the information required to be given in the notice.367 Failure to give the notice, which the seller must record in the real property records of the county in which the property is located, gives the purchaser the right to terminate the contract.368 The provision is inapplicable to conveyances by way of foreclosure, deed in lieu of foreclosure, or will or probate proceedings.369

IV. CONDOMINIUMS

A. Disputes Involving Assessments

As illustrated by two Survey cases, Texas courts continue to put teeth into provisions of the Texas Condominium Act370 that empower condominium associations. In San Antonio Villa Del Sol Homeowners Ass’n v. Miller371 a homeowner, disgruntled about a special assessment to defray the cost of replacing deteriorating gas lines, refused to pay the special assessment and then stopped paying his regular monthly assessments. At trial, the court found that the association had improperly imposed the special assessment and had acted improperly in cutting off utilities to the owner’s unit because of his non-payment.372

The appeals court disagreed.373 It found that the special assessment clearly fell within provisions of the condominium declaration authorizing special assessments for capital improvements necessary to preserve or maintain the integrity of the project’s common elements.374 The court also found that the association’s bylaws expressly permitted the association to take all actions necessary to abate conditions contrary to the intent and meaning of

364. Id. at § 230.005(g).
368. Id. at § 50.301(e)(1).
369. Id. at § 50.301(e)(2).
371. 761 S.W.2d 460 (Tex. App.—San Antonio 1988, no writ).
372. Id. at 461.
373. Id. at 463-65.
374. Id. at 463-64. The court’s statement as to reasonableness is interesting: “In fact, the Association’s actions comport in every way with reasonable behavior as set out in prior case law.” Id. at 464.
the bylaws.375 Thus, even though the declaration did not specifically authorize the association to disconnect utilities, the broad language of the bylaws supported the association's action.376 The court noted that each condominium owner relinquishes some degree of freedom of choice and subordinates some traditional ownership rights when joining in a condominium regime.377 In addition, the appellate court noted that the collective association is vested with considerable discretion in determining what expenses are necessary for the project's operation and maintenance.378

In Richard Gill Co. v. Jackson's Landing Owners' Ass'n379 a condominium developer was hoist on his own petard, and found liable by virtue of provisions in the condominium declaration that he himself had drafted.380 After the developer relinquished control of a condominium project to its independent owners' association, the association brought suit to collect maintenance assessments which it alleged the developer had failed to pay during the time he was a condominium owner. The developer asserted that he was not an owner liable for payment of the assessments pursuant to the terms of the declaration, that the statute of limitations barred certain of the claims, and that the claims against him should be offset against monies he had expended.

The appeals court noted that nothing in the declaration excluded the developer from being a condominium owner or excused him from liability for the assessments.381 The court said that the applicable four-year limitations period would have precluded recovery of certain of the assessments, but held that the statute of limitations was tolled because the developer had failed in his duty to keep proper books and records, and that the poor condition of the books had disabled the association from more quickly discovering the developer's misdeeds.382 Of special note is the court's express finding that the developer had a fiduciary relationship with the owners of the individual condominiums.383 As to the argument that certain expenditures should be offset against the claimed assessments, the court found the evidence sufficient to support the trial court's determination that the expenditures were costs of constructing and marketing the condominium project rather than payments for maintenance, repair, and replacement under the declaration.384

375. Id. at 464-65.
376. Id. at 465.
377. Id. at 464.
378. Id. (citing Pooser v. Lovett Square Townhome Owners Ass'n 702 S.W.2d 226, 231 (Tex. App.—Houston [1st Dist.] 1985, writ ref'd n.r.e.); Raymond v. Aquarius Condominium Owners Ass'n, 662 S.W.2d 82, 89 (Tex. App.—Corpus Christi 1983, no writ)).
379. 758 S.W.2d 921 (Tex. App.—Corpus Christi 1988, writ denied).
380. Id. at 924-25.
381. Id. at 924. The developer appeared to have drafted the declaration so as to name itself a condominium owner and to assess itself for its share of maintenance costs. The case does not, therefore, address the validity of condominium declarations that are drafted to provide that the developer is not obligated to pay assessments on its own units until such time as the independent owners' association takes over control of the project, a relatively customary practice.
382. Id. at 924-25.
383. Id. at 924.
384. Id. at 925.
B. New Legislation

For those developers who forgot to provide for termination in their condominium declarations, the Texas legislature has stepped into the breach to make certain things are not done amiss.385 The 1989 Legislature amended Section 81.110(a) of the Property Code to provide that, even if the declaration makes no provision for terminating the condominium regime, the owners in the regime may do so by a unanimous vote.386 If the declaration provides simply for termination “by agreement of the owners,” then a 67% vote will suffice.387 The amended section also makes clear that a declaration’s provision for termination by any voting percentage that is higher than 67% will be given effect.388

C. Books and Records

Burton v. Cravey389 arose out of a trial court’s order that the attorney for an owners’ association turn over to a group of dissident owners certain books and records. The appeals court upheld the trial court’s mandamus order, stating that all condominium owners are entitled to examine the accounts and supporting vouchers of a condominium regime by reason of provisions of both the Texas Condominium Act390 and the Texas Non-Profit Corporation Act.391 The court held further that the trial court had not abused its discretion in determining that certain records in the attorney’s files were part of the accounts and supporting records of the condominium association, and therefore subject to the statutory right of discovery granted to condominium owners and non-profit corporation members.392

V. MECHANIC’S AND OTHER LIENS

A. Cases

The contractor defaults, the contractor’s surety pays off mechanics and materialmen, and the surety then seeks to recover amounts due by the owner to the contractor. This scenario is, of course, commonplace in surety case law. In the typical instance the courts hold that, even though the surety has no contractual claim to the monies being held by the owner, the surety is all the same entitled to recover those monies under the equitable doctrine of subrogation. What happens, though, when the competing claimant to the owner’s funds is a lender with a duly perfected security interest?

In instances where the surety has satisfied the claims of mechanics and materialmen who have filed liens complying with Texas lien laws, the surety wins because the claims of the mechanics and materialmen are legally super-

386. Id.
387. Id.
388. Id.
389. 759 S.W.2d 160 (Tex. App.—Houston [1st Dist.] 1988, no writ).
391. TEX. REV. CIV. STAT. ANN. art. 1396 (Vernon Supp. 1990); 759 S.W.2d at 161.
392. 759 S.W.2d at 161–62.
rior to those of the lender. *Interfirst Bank Dallas, N.A. v. United States Fidelity and Guaranty Co.*,393 however, presented a harder case because most of the mechanics had failed to file liens. Even so, the Dallas court of appeals aligned itself with the overwhelming weight of authority from other jurisdictions394 by holding that the surety’s claim trumps the lender’s.395 In support of its decision, the appeals court noted that the traditional right of a surety to equitable subrogation survived enactment of Article 9 of the Texas Uniform Commercial Code396 and claimed that allowing the equitable claimant to prevail over the contractual claimant was consistent with equity’s goal of preventing injustice.397 Justice Burnett, in a careful and well-reasoned dissent, distinguished a number of the cases on which the majority relied, challenged the notion that an injustice had been avoided, and indicated that because the lender’s rights arose prior to those of the surety, the lender should prevail.398

*Gill Savings Association v. International Supply Co., Inc.*399 and *Occidental Nebraska Federal Savings Bank v. East End Glass Co.*,400 both highlight the liberality with which Texas courts view the enforcement of the Texas mechanics and materialmen’s lien statutes. In *Gill Savings*, the supplier of plumbing fixtures to an apartment project, being unpaid, brought suit and obtained judgment for foreclosure of its mechanic’s lien. The holder of the first lien mortgage against the project, who had since acquired the project through foreclosure, attacked the validity of the supplier’s lien. The holder claimed that the affidavit filed was invalid because it was signed by the attorney for the supplier, claimed an amount far in excess of the actual amount owed, and included charges for items incurred prior to the appropriate filing deadlines.

The appeals court held that the attorney’s signature was unobjectionable because the relevant statute does not require that the affidavit be made on the personal knowledge of the signatory.401 The court noted that the attorney had represented the supplier for many years and said that the attorney had the means to, and could have become informed about, the necessary facts.402 As to the excess claim (which was approximately $15,000 on a $75,000 claim), the court determined that the mere fact that the affidavit claimed more than the amount actually owed was not a disabling deficiency.403 Finally, on the question of whether the supplier had timely perfected the mechanic’s lien, the court relied upon procedural machinations to

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393. 774 S.W.2d 391 (Tex. App.—Dallas 1989, writ requested).
394. See cases cited id. at 398-99.
395. 774 S.W.2d at 398-399.
396. Id. at 398 (citing Center v. Schlager, 358 Mass. 789, 267 N.E.2d 492 (1971)).
397. Id. at 397.
398. Id. at 399-406 (Burnett, J. dissenting).
399. 759 S.W.2d 697 (Tex. App.—Dallas 1988, writ denied).
400. 773 S.W.2d 687 (Tex. App.—San Antonio 1989, no writ).
401. 759 S.W.2d at 699 (citing TEX. PROP. CODE ANN. § 53.054 (Vernon 1984 and Supp. 1990)).
402. Id. at 700.
403. Id. The relevant statute is TEX. PROP. CODE ANN. § 53.054 (Vernon 1984 and Supp. 1990).
uphold the supplier's claim. The court found that the Texas Rules of Civil Procedure made it incumbent upon the first lien holder to specifically deny that the supplier had given the requisite notices for a valid lien. Since the lien holder failed to do this, the supplier did not need to prove that it had given all requisite notices for perfection of its lien. The court reiterated the well worn rule that "the mechanics and materialman's lien statutes are to be liberally construed for the purpose of protecting laborers and materialmen."

In Occidental Nebraska, which involved the competing claims of a bank holding a contractual lien and a materialman claiming a statutory lien, the appeals court held that a materialman had substantially complied with the statutory notice requirements even though it sent its notice of the unpaid balance to the contractor rather than the owner. The court said that the contractor and owner were, as a practical matter, the same people since they were part of a "scheme of interlocking corporate shells," and that therefore the notice served its statutory purpose of giving the owner an opportunity to retain funds still under its control in order to avoid the statutory lien. The appeals court also held that materialman's removal of mirrors was permissible in light of evidence that no more than three mirrors in 50 were likely to break during the removal. The court said that such odds established as a matter of law that the mirrors could be removed without material injury either to the pre-existing improvements or to the mirrors removed.

In 2811 Associates, Ltd. v. Metroplex Lighting and Electric an electric supplier brought suit and obtained a default judgment ordering foreclosure of its mechanic's lien against certain property. The appeals court reversed, however, finding that the pleadings failed to state a cause of action because the claim arose under a contract not with the property owner, but rather with a tenant. The court cited the well-settled rule that a mechanic's lien arising under a contract with a lessee attaches only to the leasehold interest, not to the fee interest of the lessor.

The requisites of a bond to indemnify against liens were the subject of

404. Id. at 701.
405. Id.
406. Id. TEX. PROP. CODE ANN. § 53.056(b) (Vernon 1984) (repealed 1990) required certain notices to be given to a general contractor not later than the 36th day following the 10th day of the month following each month in which labor was performed and material delivered and requires similar notice to be given to the owner not later than the 90th day after the 10th day of the month following the month in which labor was performed or material delivered. These statutory time periods have been modified by recent legislation. See infra notes 25-29 and accompanying text. The court relied upon Rule 54 of the Texas Rules of Civil Procedure in this case. 759 S.W.2d at 701.
407. 759 S.W.2d at 701.
408. 773 S.W.2d at 688 n.2.
409. Id. at 688.
410. Id. at 689.
411. 765 S.W.2d 851 (Tex. App.—Dallas 1989, writ denied).
412. Id. at 852-53.
413. Id. at 853 (citing Diversified Mortgage Investors v. Lloyd D. Blalock Gen. Contractor, Inc., 576 S.W.2d 794, 805 (Tex. 1978)).
dispute in Sheldon Pollack Corp. v. Pioneer Concrete of Texas, Inc.\textsuperscript{414} In Sheldon an unpaid concrete supplier filed a mechanic's lien affidavit, causing the general contractor, as principal, to post a bond to indemnify against the lien.\textsuperscript{415} The indemnity bond generally complied with the Section 53.172 of the Texas Property Code, the relevant statute, but contained an additional clause conditioning the obligations of the principal upon the project owner timely making all payments under the general construction contract. The contractor appealed a judgment for the materialman, arguing that since the owner failed to pay under its contract, the general contractor was released from liability. The appeals court disagreed, finding that the additional bond provision went beyond what was specified in the statute and was therefore unenforceable.\textsuperscript{416}

\textbf{B. Recent Legislation}

The 71st Legislature made extensive modifications to the Texas mechanic's and materialmen's lien statutes.\textsuperscript{417} Some of the more salient changes include the addition of Section 53.021(c) to the Texas Property Code, extending mechanic's lien protection to an architect, engineer, or surveyor who prepares a plan or plot in connection with proposed construction or repair of improvements.\textsuperscript{418} The new statute allows a lien claim only if the plan or plat is prepared pursuant to a written recordable contract that contains a property description, the contract is recorded, and the plan or plat is used in performing construction.\textsuperscript{419} New legislation also has revised the time periods within which lien claims must be asserted and filed.\textsuperscript{420} The legislature has also made provision for filing affidavits of commencement of construction and completion of construction.\textsuperscript{421}

\textsuperscript{414} 765 S.W.2d 843 (Tex. App.—Dallas 1989, writ denied).
\textsuperscript{415} The bond was intended to be filed in compliance with the provisions of \textsc{Tex. Prop. Code Ann.} \S\S 53.171 and 53.172 (Vernon 1984). 765 S.W.2d at 845.
\textsuperscript{416} \textit{Id.} at 846 (citing \textsc{Tex. Prop. Code Ann.} \S 52.172 (Vernon 1984)). The contractor also argued that reversal would not harm the materialman, since it could pursue its lien against the project. The appeals court noted that this was incorrect as the filing of a bond under \S 53.171 of the Tex. Prop. Code has the effect of cutting off the right of a claimant to foreclose its lien if it does not bring an action within the 30th day after service of notice of the bond. \textit{Id.} (citing \textsc{Tex. Prop. Code Ann.} \S 53.171(c) (Vernon 1984)).
\textsuperscript{418} \textsc{Tex. Prop. Code Ann.} \S 53.021(c) (Vernon Supp. 1990).
\textsuperscript{419} \textit{Id}.
\textsuperscript{420} \textit{Id.} at \S 53.055-.058.
\textsuperscript{421} \textit{Id.} at \S 53.106, .124.
VI. Condemnation

The 71st Legislature enacted the Uniform Vendor and Purchaser Risk Act\textsuperscript{422} to allocate the risk of casualty and condemnation where the contracting parties to a real estate purchase agreement have failed to do so. The new statute provides that if, before the purchaser under a real estate contract either receives title to or takes possession of the subject property, all or any part of that property is destroyed or taken by eminent domain through no fault of the purchaser, then the seller may not enforce the contract, and the purchaser may recover any portion of the purchase price already paid.\textsuperscript{423} Conversely, the statute stipulates that if, before the casualty or condemnation occurs, title has passed or the purchaser has taken possession, then the purchaser's obligations under the contract remain in effect.\textsuperscript{424}

Several features of the new statute are worth special note. First, the statute contains no \textit{de minimis} exception. Presumably, if a $300 tool shed burned before the closing under a $3-million purchase contract, then the seller would be free to walk. Second, the statute refers only to property covered by a contract for the purchase and sale of real property, but does not indicate whether the destruction of personality that is also to be conveyed under such a contract would trigger the seller's avoidance rights. Third, it is not clear from the statute whether only the purchaser can cancel in the event of a casualty or condemnation, or whether the seller can do likewise. The statute's language, stating that if a casualty or condemnation occurs, then "the vendor may not enforce the contract,"\textsuperscript{425} suggests that cancellation is the option only of the purchaser, though the matter is far from clear. Clearly, contracting parties in substantial transactions will do well to make express provision for casualty and condemnation rather than relying on the statute.

Survey cases involving condemnation saw courts decline several invitations to become legislators at large, and instead contain themselves within tried and true channels of settled jurisprudence. In \textit{State v. Rogers}\textsuperscript{426} the appeals court refused to rule that a condemnee is entitled to any award for his business's good will or going concern value. Expressly rejecting the new age views served up by the condemnee,\textsuperscript{427} the court adhered to the rule first set forth in \textit{Herndon v. Housing Authority of City of Dallas},\textsuperscript{428} which states that such compensation is not allowed because good will depends hardly at all on the location of the business, and a great deal on the capital invested, economic conditions, and business skills of the owners.\textsuperscript{429} The \textit{Rogers} court declined to make a special exception for the condemnee's auto parts store despite the condemnee's claim that the business depended vitally on its

\begin{itemize}
\item \textsuperscript{422} \textit{Tex. Prop. Code Ann.} § 5.007 (Vernon Supp. 1990).
\item \textsuperscript{423} \textit{Id.} at § 5.007(b) (Vernon Supp. 1990).
\item \textsuperscript{424} \textit{Id.} at § 5.007(c).
\item \textsuperscript{425} \textit{Id.} at § 5.007(b).
\item \textsuperscript{426} 772 S.W.2d 559 (Tex. App.—Amarillo 1989, writ denied).
\item \textsuperscript{427} \textit{Id.} at 561.
\item \textsuperscript{428} 261 S.W.2d 221 (Tex. Civ. App.—Dallas 1953, writ ref’d).
\item \textsuperscript{429} 772 S.W.2d at 561.
\end{itemize}
"symbiotic relationship" with other neighborhood businesses.\textsuperscript{430} The Rogers court also refused the state's invitation to change the law so that the state would be awarded prejudgment interest on the excess amount that the state had paid into the registry of the court pursuant to Section 21.021(a)(1) of the Texas Property Code.\textsuperscript{431} Declining to make use of some adventurous language in a 1985 wrongful death case decided by the Texas Supreme Court,\textsuperscript{432} the court noted that by exercising the option to deposit money into the registry, the state received the right to immediate possession of the condemned property even though damage proceedings were still pending.\textsuperscript{433} This right, said the court, justified the long-standing rule that the state may not recover interest on any excess amount so deposited.\textsuperscript{434} Kilgore Junior College District v. Kettle Restaurants, Inc.\textsuperscript{435} affirmed the settled principle that a condemnee need not seek prejudgment interest in her pleadings to be entitled to recovery of such interest.\textsuperscript{436} Indeed, the court noted that the Texas Constitution guarantees the right to compensation for taken property.\textsuperscript{437} This entitles the condemnee to damages even if she enters no pleadings at all after filing an objection to the condemnation proceedings.\textsuperscript{438} Finally, a couple of survey cases dealt with the issue of damages available to a condemnee. First, in Smith v. City of Brenham, Texas\textsuperscript{439} the Fifth Circuit held that neighbors of land condemned for use as a landfill have no claim for damages until the condemned land is actually so used.\textsuperscript{440} Second, in Eppoleto v. Bournias\textsuperscript{441} the appeals court held that property owners have a right to a jury trial on the issue of expenses incurred and damages suffered during a temporary possession by a condemning authority.\textsuperscript{442}

\section*{VII. Brokers}

\textit{Henry S. Miller Co. v. Ulmer}\textsuperscript{443} involved a broker's right to a commission for a ten-year lease that allowed the tenant to terminate between the fifth and sixth years. The broker's agreement with the owner provided that the broker's commission of four percent of gross rentals would be payable one-half

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 563, \textit{TEX. PROP. CODE ANN.} § 21.021(a)(1) (Vernon 1984).
\item Cavnar v. Quality Control Parking, Inc., 696 S.W.2d 549 (Tex. 1985).
\item 772 S.W.2d at 563.
\item \textit{Id.} (citing Maddox v. Gulf, Colorado & Santa Fe Ry. Co., 293 S.W.2d 499, 507 (Tex. Civ. App.—Fort Worth 1956, writ ref'd n.r.e.)).
\item 768 S.W.2d 775 (Tex. App.—Tyler 1989, writ denied).
\item \textit{Id.} at 776-77.
\item \textit{TEX. CONST.} art. I, § 17.
\item 768 S.W.2d at 776 (citing Kennedy v. City of Dallas, 201 S.W.2d 840 (Tex. Civ. App.—Dallas 1947, writ ref'd n.r.e.)).
\item 865 F.2d 662 (5th Cir. 1989).
\item Id. at 663-64 (relying on Agins v. City of Tiburon, 447 U.S. 255, 263 n. 9 (1980), and distinguishing First English Evangelical Church v. County of Los Angeles, 482 U.S. 304 (1987)).
\item 764 S.W.2d 284 (Tex. App.—Waco 1988, no writ).
\item \textit{Id.} at 285-86.
\item 701 F. Supp. 598 (S.D. Tex. 1988).
\end{enumerate}
\end{footnotesize}
upon the signing of a lease approved by the owner and one-half upon occupancy. When the tenant signed and occupied, the owner refused to pay the full commission, and contended that the broker should be required to wait until the tenant's early termination right had expired.

The court, in an appealingly pithy opinion, disagreed.\textsuperscript{444} It noted that Texas law is well-settled that an owner owes its broker a commission even if a brokered lease ultimately yields the owner far less than the owner had anticipated.\textsuperscript{445} The court said that the owner could have insisted on a provision in the listing agreement that reduced the commission for leases with early termination rights, or it could have refused to approve the lease.\textsuperscript{446} Because it did neither, the plain language of the agreement entitled the broker to its full commission.\textsuperscript{447}

One might call \textit{Evans v. Prufrock Restaurants, Inc.}\textsuperscript{448} the case of the lucky broker. In \textit{Evans} the broker, acting at the buyer’s request, assembled a transaction whereby a chain of restaurants would change hands, but acted without ever procuring a written brokerage agreement as required by the Texas Real Estate License Act.\textsuperscript{449} Both the buyer and the seller dismissed the broker after he unsuccessfully attempted to obtain a brokerage agreement from the seller. The transaction took the form of a stock purchase, and the broker sued the acquired corporation for a finder’s fee.

The trial court granted summary judgment to the corporation, holding that the sale of the restaurant chain was a real estate transaction.\textsuperscript{450} The appeals court noted that the question of whether a transaction was a sale of real estate (to which the Texas Real Estate License Act applies) or a sale of securities (to which it does not) was a question of fact that the trial judge must submit to a jury.\textsuperscript{451} Curiously, the appeals court did not remand for fact-finding on that question, but rather determined that the disputed transaction was a sale of securities, and hence not within the ambit of the statute.\textsuperscript{452} The appeals court remanded only for a determination of whether the broker was entitled to a finder’s fee.\textsuperscript{453}

\section*{VIII. Restrictive Covenants}

At issue in \textit{Bent Nail Developers, Inc. v. Brooks}\textsuperscript{454} were restrictive covenants designed to inhibit the purchaser of a tract of land from competing

\begin{flushright}
\textsuperscript{444} \textit{Id.} at 599-600.
\textsuperscript{446} \textit{Id.} at 599.
\textsuperscript{447} \textit{Id.} at 599-600.
\textsuperscript{448} 757 S.W.2d 804 (Tex. App.—Dallas 1988, writ denied).
\textsuperscript{450} 757 S.W.2d at 805.
\textsuperscript{451} \textit{Id.} at 805-806 (citing \textit{Hall v. Hard}, 160 Tex. 565, 335 S.W.2d 584 (1960).
\textsuperscript{452} \textit{Id.} at 805-806 (citing, \textit{inter alia}, \textit{Griffith v. Jones}, 518 S.W.2d 435, 436 (Tex. Civ. App.—Tyler, 1974, writ ref’d n.r.e.), for the proposition that a sale of stock is personalty, not real estate).
\textsuperscript{453} 757 S.W.2d at 806.
\textsuperscript{454} 758 S.W. 2d 692 (Tex. App.—Fort Worth 1988, writ denied).
\end{flushright}
with the seller, who retained other area tracts. The purchased land was zoned commercial, which precluded residential development, and was additionally subject to the seller’s restriction, of unlimited duration, that the land could be developed only for commercial uses. Three years after acquiring the property, the purchaser, having instituted proceedings seeking the rezoning of the property from commercial to residential, sought a declaratory judgment cancelling the deed restrictions. On appeal from a summary judgment in favor of the seller, the appeals court noted that the restrictions were defective because they contained no time limitation. The court stated that this defect is not fatal and that a court of equity will reform such covenants to restrain the purchaser from competing for a time that is reasonable under the circumstances. The court remanded because the issue of what constitutes a reasonable duration for a covenant is one of fact.

If the Bent Nail trial court feels bashful about reforming the covenant at issue, it can take heart, not only in the directive of the appeals court, but also in a 1989 amendment to Chapter 15 of the Texas Business & Commerce Code. The amendment authorizes courts to reform covenants not to compete by placing reasonable limits on a covenant's duration, geographical area, and the scope of activity restrained. The statute requires that, to be enforceable, the covenant must be ancillary to an otherwise enforceable agreement and must be either signed on the same date as that ancillary agreement or supported by independent valuable consideration.

Baldwin v. Barbon Corp. illustrates that, when it comes to restrictive covenants, the developer giveth and the developer taketh away. The restrictive covenants at issue in Baldwin originally covered a 534-acre tract and reserved to the developer the right to amend or alter the restrictions. Seventeen years after filing the covenants, and after having subdivided 59 acres of the tract into residential lots, the developer sought to exclude the remaining 475 acres from the coverage of the restrictions. One of the lot owners challenged the exclusion, claiming among other things that the power to amend or alter cannot comprehend the power to delete or remove. The appeals court upheld the trial court’s decision in favor of the developer. The appeals court cited Couch v. Southern Methodist University as authority for the proposition that an amendment that destroys the restrictions is permissible, so long as the restrictions empower the amending party to promulgate amendments.

455. Id. at 693.
456. Id. (citing Weatherford Oil Tool Co. v. Campbell, 161 Tex. 310, 313-14, 340 S.W. 2d 950, 952 (1960)).
457. 758 S.W.2d at 694.
459. Id.
460. Id. at § 15.50(1).
462. Id. at 686.
463. 10 S.W.2d 973, 974 (Tex. Comm'n App. 1928, judgm't adopted).
464. 773 S.W.2d at 685-86.
In *Candlelight Hills Civic Ass'n v. Goodwin* the homeowners' association had sought to acquire a recreational facility for the use of its members. A homeowner challenged the association, contending that the association had no power to use the association's funds for that purpose. The trial court agreed with the dissenting homeowner, but the appeals court reversed. It noted that the restrictions broadly empowered the association's trustees to expend funds to accomplish anything they regarded as necessary or desirable to maintaining good order in the subdivision and considered by them to be for the general benefit of the homeowners.

The appeals court also pointed to a provision in the association's organizational documents which defined the association's purpose as, among other things, promoting recreational activities within the subdivision and taking concerted action for the homeowners' welfare. Of overriding importance, in the court's view, was the 1987 amendment to the Texas Property Code that requires courts to construe restrictive covenants liberally to give effect to their purposes and intent. The appeals court noted that its decision hardly gave the association untrammelled discretion to spend at will; rather, the covenants at issue contained a host of limitations and restraints on the association's activities, including a requirement that a majority of the homeowners consent to the purchase.

Two other Survey cases, *Guajardo v. Neece* and *Gettysburg Homeowners Ass'n Inc. v. Olson*, illustrate the spacious discretion that is allowed the trial judge in deciding whether to grant injunctive relief in cases brought to enforce restrictive covenants. In *Guajardo* the appeals court affirmed the trial court's temporary injunction prohibiting the appellant from constructing a dog kennel, which had been challenged as a "noxious or offensive trade or activity" that might become "an annoyance or nuisance to the neighborhood," thereby contravening the covenants in question. In *Gettysburg* the appeals court affirmed the trial court's refusal to grant an injunction sought by a subdivision's architectural control committee to prevent a home builder from proceeding with construction of homes whose designs the committee had not approved. In both instances, the appeals courts noted that an appellate court can review the grant or denial of a temporary injunc-

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465. 763 S.W.2d 474 (Tex. App.—Houston [14th Dist.] 1988, writ denied).
466. Id. at 482.
467. Id. at 478.
468. Id. at 478-79.
469. Id. at 477; TEX. PROP. CODE ANN. § 202.003(a) (Vernon Supp. 1990).
470. 763 S.W.2d at 480-81.
471. 758 S.W.2d 696 (Tex. App.—Fort Worth 1988, no writ).
472. 768 S.W.2d 369 (Tex. App.—Houston [14th Dist.] 1989, no writ).
473. 758 S.W.2d at 690; 768 S.W.2d at 370-71.
474. 758 S.W.2d at 697. In what may be something of a setback for dog lovers, the court rejected the contention that Texas public policy in favor of caring for domesticated animals militated in favor of permitting construction and operation of the proposed kennel. Id. at 699. The court noted that the public policy, as explicated in *Georg v. Animal Defense League*, 231 S.W.2d 807, 811 (Tex. Civ. App.—San Antonio 1950, writ ref'd n.r.e.), contemplates institutions which contribute to the welfare only of "unattached and stray" (might a New Age court say "homeless") animals. Id.
475. 768 S.W.2d at 370.
tion only if the trial judge has clearly abused his discretion.476

IX. EASEMENT AND ROADS

*Lamar County Electric Cooperative Ass'n v. Bryant*477 involves some root and branch principles of correlative easement rights. A landowner and an electric cooperative stipulated at trial that the cooperative had an easement by prescription along one side of the landowner's property. When trees within the easement began to interfere with the cooperative's electrical lines, the cooperative cut down the trees, prompting the landowner's successful suit for the value of the trees and for punitive damages. The appeals court noted that while every easement carries with it the right to do whatever is necessary for its full enjoyment, an easement holder may not unreasonably interfere with the rights of the servient estate.478 The court found sufficient evidence to support the jury's determination that the cooperative could simply have trimmed the trees to secure the enjoyment of its easement, and that cutting down the trees without consulting the landowner was sufficient to justify a $7,500 punitive damage award.479

The City of Galveston's desire to secure a federal grant for roadway construction gave rise to *Farmer's Marine Copperworks, Inc v. City of Galveston.*480 In *Farmer's Marine* a warehouse owner had, for some 25 years, maintained two craneways which extended into a city street and railroad right-of-way. The craneways originally had been built to unload railroad cars, but after the railway tracks were removed, the owner used the craneways to unload trucks. In resisting the city's demand that he remove the structures, the owner argued that the railroad had consented to the encroachment and that the city was estopped from removing the structures because they were erected pursuant to a contract whereby the city had agreed to abandon a public alley and in reliance thereon the owner expanded its warehouse.

The court of appeals, in upholding the trial court's order that the owner remove structures, noted that because the street was a public street, the railroad held only a right-of-way or easement in gross.481 The court noted that easements in gross are generally personal to the grantee and are not assignable unless the easement contains an express assignment provision.482 The railroad's easement from the city, however, expressly prohibited any assignment without the city's consent, and therefore any permission granted by the railroad went beyond its powers.483 Finally, the court noted that the doc-

476. *Id.* at 371; 758 S.W.2d at 699.
477. 770 S.W.2d 921 (Tex. App.—Texarkana 1989, no writ).
479. 770 S.W.2d at 923-24.
480. 757 S.W.2d 148 (Tex. App.—Houston [1st Dist.] 1988, no writ).
481. *Id.* at 151.
482. *Id.* (citing Williams v. Humble Pipe Line Co., 417 S.W.2d 453 (Tex. Civ. App.—Houston 1967, no writ)).
483. 757 S.W.2d at 151-52.
trine of estoppel does not apply against a unit of government in the exercise of its governmental functions unless justice, honesty, or fair dealing requires such applicability. Although the city had approved the construction plans and the craneways had existed for twenty-five years, the court nonetheless held that the evidence was insufficient to justify reversal of the trial court.

X. Adverse Possession

Fish v. Bannister reiterated a few basic principles of adverse possession. First, a party may adversely possess land even if he is unaware that he does not have record title to the land. Second, the mere execution of leases and easements by the record owner does not interrupt the exclusive nature of an adverse claimant’s possession unless actions by the tenant or easement holder are sufficient to notify the adverse claimant that he has been ousted. And third, an adverse claimant who supports his claim by activities in addition to grazing need not designedly enclose the claimed land.

Bustamante v. Flores is an instance where an adverse possession claim under the ten-year statute failed because it was not commenced under a claim of right inconsistent with and hostile to the prior owner’s claim. Bustamante arose out of a 1962 oral installment contract for deed. All of the purchaser’s modest improvements to the lot were made before she stopped paying the required installments in 1964. When the heirs of the seller fenced the lot in 1985, the purchaser removed the fence, prompting a suit by the heirs in trespass to try title. The appeals court affirmed the trial court’s rejection of the purchaser’s claim under the ten-year statute. The court agreed that no adverse possession claim was ever properly commenced because the purchaser’s entry on the lot was with permission pursuant to an oral contract. Moreover, even had a claim been commenced, the claim would not have properly been continued because a 1964 payment of a purchase installment evidenced that the purchaser recognized the title of the seller.

484. Id. at 152 (citing City of Hutchins v. Prasifka, 450 S.W.2d 829 (Tex. 1970); City of Houston v. Lyons Realty, Ltd., 710 S.W.2d 625 (Tex. App.—Houston [1st Dist.] 1986, no writ)).
485. 757 S.W.2d at 152.
486. 759 S.W.2d 714 (Tex. App.—San Antonio 1988, no writ).
487. Id. at 718.
488. Id. at 717 (citing Sterling v. Tarvin, 456 S.W.2d 529 (Tex. Civ. App.—Fort Worth 1970, writ ref’d n.r.e.)).
489. Id. at 720. In Fish, the other activities included, inter alia, maintenance of an existing fence, construction of a new fence, construction of pipelines, receipt of payments for surface damage, and hunting.
490. 770 S.W.2d 934 (Tex. App.—San Antonio 1989, no writ).
491. TEX. PROP. CODE ANN. § 16.026(b) (Vernon 1986).
492. 770 S.W.2d 936-38.
493. Id. at 938.
494. Id.
495. Id. at 936, 938.
In Jones v. Harrison\textsuperscript{496} the appeals court affirmed that where a judgment creditor seeks to foreclose his judgment lien during the ten-year period allowed by Section 52.006 of the Texas Property Code,\textsuperscript{497} but after purchasers from the judgment creditor have adversely possessed the property pursuant to the three and five-year adverse possession statutes,\textsuperscript{498} the foreclosure is invalid because the lien has been extinguished.\textsuperscript{499} In addition, the 71st Legislature amended the ten-year adverse possession statute to make clear that an adverse possession claimant can establish the boundaries of his claim by registered deed as well as by some other registered memorandum of title.\textsuperscript{500}

XI. Homestead

Matter of Moody\textsuperscript{501} is yet another illustration of the principle that even the most unseemly activities of a homestead claimant will not jeopardize his homestead exemption. From 1964 through 1983, Moody engaged in several transactions by which he fraudulently conveyed portions of a 575-acre tract. The transactions included the following: (a) in 1977, Moody conveyed the tract to a wholly-owned corporation; (b) in early 1979, Moody designated 200 acres of the tract as his homestead; (c) later that year, he designated a 100-acre portion of the tract as his homestead, stating that the designation was to be effective if the former designation were found ineffective; (d) in 1980, Moody conveyed to a third party an undivided one-half interest in 10 acres out of the 100-acre portion, and a life estate in the remaining one-half interest of the 10-acres; (e) in 1982, although the 575-acre tract was still owned by Moody's corporation, Moody again conveyed that tract to his corporation, excluding only the 100 acres designated as homestead in 1979; (f) in early 1983, the corporation conveyed 200 acres of the tract to Moody (including most of the property described in his 1979 200-acre homestead designation); and (g) several weeks later, Moody designated that same 200-acre tract as his homestead and conveyed the tract to himself as trustee.

In the ensuing bankruptcy proceedings, it was undisputed that the conveyances were fraudulent, and the creditors sought to prove that Moody had either alienated or abandoned his homestead.\textsuperscript{502} They first contended that the 1977 and 1982 conveyances to the corporation were valid transfers which constituted alienations of the property. The Fifth Circuit, however, found that no consideration was given for the transfers, and that Moody had

\textsuperscript{496} 773 S.W.2d 759 (Tex. App.—San Antonio 1989, writ denied).
\textsuperscript{499} 773 S.W.2d at 760, (citing Shaw v. Ball, 23 S.W.2d 291 (Tex. Comm'n App. 1930, judgm't adopted)).
\textsuperscript{501} 862 F.2d 1194 (5th Cir. 1989).
\textsuperscript{502} Under Texas law, homestead rights may be lost only through death, abandonment, or alienation. 862 F.2d at 1198.
neither intended to nor succeeded in alienating his property.\textsuperscript{503}

The creditors next argued that Moody's various conveyances and his long absences amounted to an abandonment of the homestead. The Fifth Circuit held, however, that Moody never intended to pass title to the property, but intended only to shield the homestead from his creditors; therefore, the transfers were void, and a void transfer cannot constitute an abandonment of homestead rights.\textsuperscript{504} Further, the court said that Moody's absences did not constitute abandonment because no evidence existed that he acquired another homestead or that he never intended to return.\textsuperscript{505}

The creditors next claimed that Moody was entitled only to a 100-acre exemption. Moody argued that the constitutional provision stating a rural homestead "shall consist of not more than two hundred acres of land . . ."\textsuperscript{506} was inconsistent with, and controlled over, the Texas Property Code provision which limits the rural homestead exemption for a single, adult person to 100 acres.\textsuperscript{507} The Fifth Circuit stated that the statutory and constitutional provisions were not inconsistent.\textsuperscript{508} The Texas Constitution decrees that a homestead may not be larger than 200 acres, but does not prohibit the Texas legislature from establishing smaller limits.\textsuperscript{509}

\textsuperscript{503} Id. at 1198-99.
\textsuperscript{504} Id. at 1199 (citing Hughes v. Parmer, 164 S.W.2d 576, 577 (Tex. Civ. App.—Austin 1942, no writ)).
\textsuperscript{505} 862 F.2d at 1199.
\textsuperscript{506} Id. at 1200. (See Tex. Const. art. XVI, § 51 1845, amended 1983)).
\textsuperscript{508} 862 F.2d at 1201.
\textsuperscript{509} Id.