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CASE LAW UPDATE

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ACADEMIC APPOINTMENTS, AND PROFESSIONAL ACTIVITIES

Past Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas
Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2010-2011
Vice Chair, Real Estate, Probate & Trust Law Section, State Bar of Texas 2009-2010
Treasurer, Real Estate, Probate & Trust Law Section, State Bar of Texas 2008-2009
Council Member, Real Estate, Probate & Trust Section, State Bar of Texas 2003-2007
Adjunct Professor of Law, Southern Methodist University School of Law / Real Estate Transactions - 1986 to 1995 and 2014
Member, State Bar Standing Committee on Real Estate Forms
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LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Course Director for the State Bar of Texas, Advanced Real Estate Law Course and for the University of Texas at Austin - Mortgage Lending Institute
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
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Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course – 2007 and 2008
Author of "Annual Survey of Texas Law -- Real Estate," 51 SMU L. Rev. 1321 (1998) and 52 SMU L. Rev. 1393 (1999)

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 462 S.W.3d and Supreme Court opinions released through November 6, 2015.

The Texas Property Code and the other various Texas Codes are referred to by their respective names. The references to various statutes and codes used throughout this presentation are based upon the cases in which they arise. You should refer to the case, rather than to my summary, and to the statute or code in question, to determine whether there have been any amendments that might affect the outcome of any issue.

A number of other terms, such as Bankruptcy Code, UCC, DTPA, and the like, should have a meaning that is intuitively understood by the reader, but, in any case, again refer to the statutes or cases as presented in the cases in which they arise.

This and past Case Law Updates are available at our website cwrwlaw.com.

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PART I
MORTGAGES AND FORECLOSURES

PlainsCapital Bank* v. *Martin, 459 S.W.3d (Tex. 2015). Martin defaulted and PlainsCapital foreclosed on the deed of trust securing his loan. The bank was the highest bidder at the foreclosure sale and bought the property for less than the secured debt. Martin sued the bank, asserting, in part, that the property's fair market value on the date of foreclosure was in excess of the foreclosure sales price and Texas Property Code § 51.003 required the bank to offset the excess against his debt. The trial court determined that § 51.003 did not apply and rendered judgment for the bank on its counterclaim for damages and attorney's fees. The court of appeals reversed and remanded to the trial court. It held that (1) § 51.003 applied, and (2) the term "fair market value" as used in § 51.003 is the historical willing-seller/willing-buyer definition of fair market value.

PlainsCapital argued that the language of § 51.003(a) limits § 51.003's application to cases in which "the" deficiency sought from the borrower is the precise difference between the foreclosure sale price and the outstanding secured obligations. That being so, the Bank reasoned, the statute is inapplicable to its claim against Martin because the bank was not seeking a deficiency based on "the" foreclosure sale price; rather, it was seeking a deficiency based on the price for which it subsequently sold the property.

Section 51.003, enacted in 1991, adds balance to the mortgagor-mortgagee relationship regarding deficiency judgments. It does so by circumscribing mortgagees' rights to seek deficiency judgments and specifying rights that borrowers have regarding alleged deficiencies. Section 51.003 substantively provides that when realty is foreclosed on pursuant to a contract lien and the foreclosure sales price is less than the debt secured, a suit brought against the borrower for "the unpaid balance of the indebtedness secured by the real property" is a suit for a deficiency judgment. The borrower in such a suit may request that the trial court make a finding as to the fair market value of the realty as of the date of the foreclosure sale. If the trial court finds the fair market value to be in excess of the foreclosure sales price, then the borrower is entitled to an offset against the deficiency in the amount of the excess.

PlainsCapital parses the language of § 51.003(a) and argues that the Legislature's use of the word "the" when referencing deficiency as opposed to "a" deficiency or "any" deficiency limits the application of § 51.003 to deficiencies calculated using the precise foreclosure sales price. The Bank reasons that use of "the" in the statute makes the section inapplicable to situations such as this where deficiencies are calculated using amounts that vary to some degree from the foreclosure sales price. The Supreme Court disagreed.

Read as a whole and in context with the remainder of § 51.003, § 51.003(a) provides that whenever a borrower is sued after real property is sold at a foreclosure sale as permitted by and described in § 51.002, and judgment is sought against the borrower because the foreclosure sales price is less than the amount owed, then (1) the suit is for a "deficiency judgment," (2) the suit must be brought within two years of the foreclosure sale, and (3) the suit is governed by § 51.003. But how the amount of the deficiency is calculated is not prescribed by § 51.003(a); rather it is prescribed by § 51.003(b) and (c). Section 51.003(b) affords a borrower the right to request the trial court to determine the fair market value of the property and sets forth how such is to be calculated. Section 51.003(c) prescribes how the amount of the deficiency judgment is to be determined. Under § 51.003(c), if the trial court is not requested to determine the property's fair market value, or if such a request is made but no competent evidence of fair market value is presented, then the foreclosure sales price must be used to

calculate the deficiency for purposes of a judgment.

PlainsCapital's proposed interpretation requires reading one word—"the"—out of context from the remainder of § 51.003. It would allow lenders to bypass the carefully crafted deficiency judgment statute with its two-year limitations period and other protections for borrowers and creditors by simply suing the borrower for some amount other than the difference between the amount of the secured debt and the exact foreclosure sales price. The word "the" in the statute referencing a deficiency cannot bear the burden the bank seeks to place on it. PlainsCapital's claim against Martin falls within the provisions of § 51.003.

PlainsCapital contends that even if § 51.003 applies to its claim, the court of appeals erred because it equated "fair market value" as that term is used in § 51.003 with the historic measure of fair market value, which is "the price the property will bring when offered for sale by one who desires to sell, but is not obliged to sell, and is bought by one who desires to buy, but is under no necessity of buying."

When a statute uses a word or phrase without defining it, the court presumes the Legislature intended the common meaning of the word or phrase to apply. And when a statute provides a definition for or uses a word or phrase in a particular manner, then courts must apply that definition or manner of use when interpreting the statute.

The Legislature used the phrase "fair market value" in § 51.003 without defining it, so the court would ordinarily presume the common meaning of the term applies, as did the court of appeals. However, the statute enumerates categories of evidence and clearly specifies that they may be considered by trial courts in determining fair market value. For example, § 51.003(b)(5) specifies that a trial court, when calculating the fair market value as of the date of the foreclosure sale, may consider evidence of "the necessity and amount of any discount to be applied to the future sales price." This factor is forward looking, allowing the trial court to consider the price for which the lender eventually sells the property and to apply a discount, if appropriate, to determine a value as of the foreclosure sale date.

It may seem odd to make the price for which the property sold after foreclosure an integral component of competent evidence of the property's fair market value on the foreclosure sale date, but that is clearly what the Legislature intended. If it were not, then the relevant part of § 51.003(b)(5) would be nonsensical because an unknown fair market value, which is the value being sought, cannot mathematically be determined by applying a discount to an unknown future sales price, nor could either a prospective buyer or the seller know what the future sales price will be in order to factor it into their decision to buy or sell, regardless of whether a discount factor is applied. And the courts do not attribute to the Legislature an intent to enact nonsensical statutes.

Further, if the court were to rule the future sales price competent evidence, but only upon a showing of comparable market conditions between the foreclosure sale and the future sale, it would be adding words to § 51.003. The court refused to do that in the absence of clear legislative intent to reach a different result from that reached by applying the plain language of the statute, or to prevent the statute from yielding an absurd or nonsensical result.

Therefore, the enumerated factors in § 51.003(b) will support a fair market value finding under the statute even though that type of evidence might not otherwise be competent in the common or historical fair market value construct. That being so, the term "fair market value" in § 51.003 does not equate precisely to the common, or historical, definition. Rather, it means the historical definition as modified by evidence § 51.003(b) authorizes the trial court to consider in its discretion, to the extent such

evidence is not subsumed in the historical definition.

Marhaba Partners Limited Partnership* v. *Kindron Holdings, LLC, 457 S.W.3d 208 (Tex.App.-Houston [14th Dist.] 2015, pet. pending). Marhaba borrowed a loan from City Bank. It gave City Bank a deed of trust covering real property and also gave City Bank an assignment of its right to a reimbursement from the MUD district. After Marhaba defaulted, City Bank foreclosed on the real property for less than balance due, then sold the loan to Kindron, assigning it the notes and other loan documents, including the assignment of the MUD reimbursement.

Kindron notified Marhaba that it was going to conduct a UCC sale of the MUD reimbursement assignment and would apply the proceeds to the deficiency. Marhaba responded by claiming that the indebtedness had been discharged by the foreclosure sale. Kindron proceeded anyway and, at the UCC sale, sold the MUD reimbursement assignment to itself. It then brought a declaratory judgment action to have the court determine that it was entitled to foreclose on the MUD assignment.

Marhaba claimed that Property Code § 51.003 applied to the real property foreclosure sale, that the real property had a fair market value in excess of the debt, and that the debt was discharged, extinguishing the security interest in the MUD receivable.

Section 51.003 provides borrowers and guarantors with a mechanism to adjust foreclosure sales prices upward. The legislature created this mechanism in recognition that post-foreclosure deficiencies artificially can be inflated because the nonjudicial foreclosure sale often does not directly represent what a buyer might pay in the market. When the lender is the sole bidder, it has little incentive to bid high. Section 51.003 applies to any action brought to recover the deficiency.

Marhaba argues that section 51.003(a) applies here because Kindron's declaratory judgment is an action brought to recover the deficiency. Marhaba argues that a deficiency resulted from the property foreclosure sale because the sale proceeds did not fully pay the loan balance. Marhaba further asserts that, because a deficiency resulted, section 51.003 applies to Kindron's subsequent suit to collect the deficiency via the declaratory judgment action.

Section 51.003 does not explicitly address how courts should address deficiencies when multiple sources of collateral secure the same loan. The statute does not state whether the existence of a deficiency within the meaning of § 51.003 should be determined after each foreclosure sale or after all sales. Additionally, the statute does not state whether § 51.003 applies to situations involving mixed collateral encompassing real estate and personal property.

When a loan is secured by a single piece of real estate collateral, a deficiency judgment will impose personal liability upon the debtor for the unpaid amount of a debt after the foreclosure sale. In cases involving multiple sources of collateral, personal liability may not be at issue; the lender may be able to collect through a series of non-judicial foreclosure sales. In cases where multiple pieces of collateral are foreclosed upon in a series of non-judicial proceedings, the foreclosure sale price for each piece of collateral, not the collateral's fair market value, is applied to the loan balance after each sale. Moreover, § 51.003 does not apply to prevent the sales or to require the lender to offset the debt in the manner stated in § 51.003 before proceeding with additional sales.

The inapplicability of the fair market value offset mechanism in cases involving serial foreclosure on multiple sources of collateral suggests that a deficiency under § 51.003 should be calculated (1) after all

collateral has been sold; or (2) when the lender seeks to impose personal liability against the debtor through judicial action.

Saravia* v. *Benson, 433 S.W.3d 658 (Tex.App.-Houston [14th Dist.] 2014, no pet.). This case is also discussed under Deeds and Conveyances. Benson sold some property to Halco Waste Container, taking back a note and deed of trust. The deed of trust had a due-on-sale clause. It also contained a clause permitting assumption of the debt with Benson's consent.

Halco leased part of the property to Saravia, then defaulted on the loan. Benson began the foreclosure process. A few months later, Halco sold the property to Gandy, who assumed the debt. Six days later, Gandy filed bankruptcy. While Gandy's bankruptcy case was pending, Benson foreclosed and acquired the property at the foreclosure sale.

Benson and Saravia then entered into an earnest money contract for Saravia to purchase the property. About a month later, Gandy sued Benson for wrongful foreclosure and filed a lis pendens. Notwithstanding that, Benson and Saravia closed. Saravia didn't know about the lawsuit.

When Saravia tried to get a loan, he discovered the lawsuit. He then intervened in the Gandy/Benson lawsuit. The trial court in that suit found that both of Benson's foreclosures were wrongful, the first because it occurred during the bankruptcy automatic stay and the second because of irregularities in the foreclosure notice. In addition, the trial court found that Gandy had tendered payment of the debt.

The court of appeals reviewed the trial court's setting aside of the foreclosure sale "with a presumption that all prerequisites to the sale have been performed." The presumption is not conclusive and may be rebutted.

Tender of the sum owed on a mortgage debt is a condition precedent to the mortgagor's recovery of title from a mortgagee who is in possession and claims title under a void foreclosure sale. A tender is an unconditional offer by a debtor to pay another a sum not less in amount than that due on a specified debt or obligation. A valid and legal tender of money consists of the actual production of the funds. A debtor must relinquish possession of the funds for a sufficient time and under such circumstances as to enable a creditor, without special effort on his part, to acquire possession. The party asserting valid tender bears the burden of proving it.

Gandy proffered no evidence that he made a valid tender before Benson foreclosed on the lien. Gandy instead contended that Benson refused to provide a payoff amount prior to this suit. A refusal to provide a payoff amount is not evidence of Benson's unwillingness to accept actual tender of the amount owed on the note. Because Gandy did not show that he had tendered payment to Benson, the trial court erred in finding that Gandy had defeated the presumption of regularity of the foreclosure and sale.

Gandy also contended, and the trial court found, that the foreclosures were wrongful because Benson did not comport with required notices of foreclosure, and because any foreclosure proceeding was automatically stayed pending his bankruptcy. Saravia first responds that the property was never part of Gandy's bankruptcy estate, in light of the deed of trust's due--on--sale clause, and thus the bankruptcy was no impediment to foreclosure. Due--on--sale clauses are valid and enforceable in Texas. A due--on--sale clause, however, does not impede the transfer of title; rather, it provides that a sale of the property accelerates the debt, so that any outstanding amount is due and owing at the time of the sale.

Under the federal bankruptcy code, an

automatic stay bars a creditor from foreclosing on a debtor's property while the debtor's bankruptcy proceeding is pending. A creditor, however, may ask the bankruptcy court to lift the automatic stay by demonstrating that cause exists. While a due--on--sale clause provides a basis for foreclosing a lien when the property is transferred to a bankrupt debtor without tender and a basis for lifting a bankruptcy stay, nothing in this record shows that Benson sought to lift the automatic stay to allow the foreclosure to proceed. Because the bankruptcy court had not lifted the automatic stay, some evidence supports the trial court's finding that Benson's first attempted foreclosure was invalid.

Gandy's objections to the second foreclosure and sale, however, lack merit.

Gandy first disputed the place of sale. Property Code § 51.002(a) provides that the commissioners court shall designate the area at the courthouse where foreclosure sales are to take place and shall record the designation in the real property records of the county. The foreclosure sale must occur in the designated area. The Harris County Commissioners Court has designated the Family Law Center as the area for foreclosure sales. The evidence showed that the foreclosure sale was conducted there.

Second, Gandy disputed that he received proper notice of the second sale. A creditor must give notice of foreclosure by mailing each debtor who, according to the records of the mortgage servicer of the debt, is obligated to pay the debt. To establish a violation of the statute, a debtor must show that the mortgage servicer held in its records the most recent address of the debtor and failed to mail a notice by certified mail to that address. The court held that Benson had sent notice to the address of the property, Halco's last known address.

Gandy argues that he was entitled to notice in his individual capacity because he had assumed from Halco the debt that the lien secured. The loan documents here provided that the loan could be assumed only with Benson's consent, which was not sought or obtained. Gandy was not entitled to notice in his individual capacity because Benson did not consent to his assumption of the debt.

Third, the trial court found that no evidence indicated that the sale occurred within three hours after the earliest time stated in the notice. Property Code § 51.002(c) provides that the sale must begin at the time stated in the notice of sale or not later than three hours after that time. Here, the notice provided that the sale would take place between 10 a.m. and 4 p.m. It actually occurred at 10 a.m., so Benson did satisfy the timing requirement of the Property Code.

General Metal Fabricating Corporation* v. *Stergiou, 438 S.W.3d 737 (Tex.App.-Houston [1st Dist.] 2014, pet. denied). A Rule 11 settlement provided, in part, that GMF would pay Stergiou $300,000 for return of some stock. The payment would be evidenced by an installment note which, in turn, would be secured by a first lien Deed of Trust covering real property owned by GMF and described in the Rule 11 agreement as being the "White Buildings and the empty lot" and excluded the "four lots the 'Blue Building' resides upon and the 'Blue Building'." The agreement was read into the record, but not documented at the time. When it came time to document the loan, various issues came up, among them was whether the statute of frauds barred enforcement of the Rule 11 agreement.

Stergiou argues that the Rule 11 agreement is not enforceable because it does not sufficiently describe the real property offered as security. This argument rests on the premise that the Rule 11 agreement is a contract for the sale of real estate and thus subject to the statute of frauds, and that the description of the property covered by the agreement is insufficient. The court held

that the Rule 11 agreement, together with the writings referenced by it, was sufficient to satisfy the statute of frauds.

The statute of frauds does not require that a complete description of the land to be conveyed appear in a single document. A property description is sufficient if the writing furnishes within itself, or by reference to some other existing writing, the means or data by which the particular land to be conveyed may be identified with reasonable certainty. The description of the land may be obtained from documents that are prepared in the course of the transaction, even if those documents are prepared after the parties' contract for sale. GMF's summary judgment evidence included affidavit testimony that GMF owned three tracts of land, which were commonly referred to as the "Blue Building," the "White Buildings," and the "empty lot." Stergiou's attorney drafted the Rule 11 agreement using those same terms. Although the Rule 11 agreement describes the property to be secured by the deed of trust only as the "White Buildings" and "empty lot," but not "the four lots the 'Blue Building' resides upon and the 'Blue Building,'" the various deeds of trust and the security agreements circulated as drafts between the parties contain sufficient legal descriptions of those properties.

These same legal descriptions appear in the drafts prepared by Stergiou and in the drafts prepared by GMF. Thus, there was no dispute between the parties regarding the identification of the real estate, so the statute of frauds did not bar enforcement of the Rule 11 agreement.

Morlock, L.L.C.* v. *Bank of New York, 448 S.W.3d 514 (Tex.App.-Houston [1st Dist.] 2014, pet. denied). Morlock acquired a house pursuant to an HOA foreclosure. By its terms, the HOA lien was inferior to a purchase money mortgage, and at the time of the foreclosure the house was encumbered by one. The first lien was originally made by MILA, which in turn assigned the lien to BONY.

After Morlock bought at the HOA foreclosure, BONY posted foreclosure notices. Morlock sued to stop the foreclosure. It claimed that BONY did not have an interest in the property because BONY was not the owner or holder of the note and that the person who executed the assignment from MILA to BONY was not authorized to do so.

Notably, this case does not concern an accusation of forgery. Morlock did not allege that the person who signed the document purported to act as someone else. For example, it did not charge that someone signed the name of a MILA executive without that executive's approval.

A plaintiff who is not a party to an assignment lacks standing to challenge the assignment on grounds which render it merely voidable at the election of one of the parties. Deeds procured by fraud are voidable only, not void, at the election of the grantor. When someone without authorization signs a conveyance on behalf of a grantor corporation, the cause of action for fraud to set aside the assignment belongs to the grantor. A third party lacks standing to challenge this voidable defect in the assignment. Accordingly, the court held that, as a nonparty to the transaction, Morlock lacks standing to claim that the assignment from MILA to Countrywide was executed without authorization.

In a supplemental opinion, the court addressed the different conclusion about standing in ***Morlock, L.L.C.* v. *Nationstar Mortgage, L.L.C.***, 447 S.W.3d 42 (Tex.App.-Houston [14th Dist.] 2014, pet. denied). The Fourteenth Court of Appeals, in a decision issued twelve days before this one and with apparently similar facts, held that Morlock had standing to challenge a different assignment, precisely because it sought to invalidate the assignment as a cloud on its title. In Nationstar, the Fourteenth Court analyzed the standing

question using the rubric, whether there existed a "real controversy" between the parties that would "actually be determined by the judicial declaration sought." In contrast, this court's opinion did not address that specific issue or question Morlock's "standing" in that particular sense. Rather, this court's decision was based on a different rule of law, established by ***Nobles* v. *Marcus***, 533 S.W.2d 923 (Tex. 1976). In Nobles, the Supreme Court of Texas explained that deeds procured by fraud are voidable only, not void, at the election of the grantor. The effect of the Nobles rule in this appeal is that to the extent Morlock is aggrieved by a fraudulent assignment from the grantor to the grantee, the substantive law does not provide a stranger to the transaction (such as Morlock) any cause of action to challenge that fraudulent assignment. Even assuming the truth of Morlock's allegations, the assignment is not void. It is voidable only, at the election of the MILA, the grantor. It is not voidable by Morlock.

Morlock also argues that the summary-judgment evidence fails to establish that BONY is the owner and holder of the note and the deed of trust. BONY argues in response that whether it is the owner or holder of the note is irrelevant to its interest in the real property at issue and its right to foreclose, both of which are established by the deed of trust.

BONY attached to its motion for summary judgment a copy of the recorded deed of trust to MILA, a copy of the recorded assignment of deed of trust from MILA to Countrywide, and a copy of the recorded assignment of deed of trust from Countrywide to BONY. BONY thus established that it is the owner of the deed of trust. Neither BONY nor Morlock introduced a copy of the note into the record.

It is so well settled as not to be controverted that the right to recover a personal judgment for a debt secured by a lien on land and the right to have a foreclosure of lien are severable. Consequently, a deed of trust may be enforced by the mortgagee, regardless of whether the mortgagee also holds the note. This conclusion follows both from the principle that the note and deed of trust are severable and the fact that the provisions of the Texas Property Code governing nonjudicial foreclosure do not require possession or production of the original note. Property Code § 51.002(a) defines a "mortgagee" as the "grantee" or "beneficiary" of a "security instrument" or as "the last person to whom the security interest has been assigned of record." Although a mortgagee must give notice and follow other specified procedures, there is no requirement that the mortgagee possess or produce the note that the deed of trust secures in order to conduct a nonjudicial foreclose. Since BONY proved that it is the owner of the deed of trust, it established its interest in the property and right to foreclose as a matter of law regardless of whether it was also a holder or the owner of the note.

Morlock, L.L.C.* v. *Nationstar Mortgage, L.L.C., 447 S.W.3d 42 (Tex.App.-Houston [14th Dist.] 2014, pet. denied). Morlock asserts that there is no evidence that Nationstar is the owner and holder of the Note and therefore Nationstar has no right to enforce the Deed of Trust. Morlock asserts that the assignment documents regarding the Deed of Trust do not effect a transfer of the Note to Nationstar. Morlock argues that there is no evidence that Nationstar is the owner or holder of the Note and suggests that Nationstar may not enforce the Deed of Trust unless Nationstar is owner and holder of the Note.

Nationstar argues that Morlock lacks standing to contest the validity of the assignment because a person who is not a party or third-party beneficiary of an assignment lacks standing to contest the validity of the assignment. The issue of standing focuses on whether a party has a

sufficient relationship with the lawsuit so as to have a "justiciable interest" in its outcome. A plaintiff has standing when it is personally aggrieved. The standing doctrine requires that there be a real controversy between the parties that actually will be determined by the judicial declaration sought. Regardless of whether Morlock's arguments regarding the Note and Deed of Trust have merit, Morlock advances these arguments in support of its suit seeking to remove the Deed of Trust as an allegedly invalid instrument that purportedly is a cloud on Morlock's title to the Property. Thus the court concluded that Morlock has standing to bring this suit and to advance these arguments.

However, on the merits, Morlock was not so fortunate.

Morlock's allegation that Nationstar is not the owner or holder of the Note is irrelevant with respect to Nationstar's right to enforce the Deed of Trust through non-judicial foreclosure under Texas law. Non-judicial foreclosure sales of real property under contract liens are governed by Chapter 51 of the Texas Property Code. The "mortgagee" is defined as (A) the grantee, beneficiary, owner, or holder of a security instrument; (B) a book entry system; or (C) if the security interest has been assigned of record, the last person to whom the security interest has been assigned of record. No provision in Chapter 51 of the Texas Property Code requires a foreclosing party to prove its status as "holder" or "owner" of the Note or the original of the Note prior to foreclosure. Nationstar may enforce the Deed of Trust even if it is not the owner and holder of the Note or of the original of the Note.

Based upon the assignment of the Deed of Trust from MERS, Nationstar is entitled to enforce the Deed of Trust, and because Nationstar is a mortgagee as defined in Property Code § 51.0001(4), Nationstar may conduct foreclosure proceedings under the Deed of Trust.

Vasquez. **v.** ***Deutsche Bank National Trust Company, N.A.***, 441 S.W.3d 783 (Tex.App.-Houston [1st Dist.] 2014, no pet.). The law is settled that the obligors of a claim may defend the suit brought thereon on any ground which renders the assignment void, but may not defend on any ground which renders the assignment voidable only. If foreclosure on a home is initiated by a person or entity whose right to foreclose is contingent upon the validity of an assignment, the homeowner has standing to attack the assignment and thereby seek to stop or reverse the foreclosure. Such a homeowner is "personally aggrieved" because she is at risk of losing her house, and the allegation of such an injury is sufficiently "concrete and particularized" to confer standing to sue.

Landers **v.** ***Nationstar Mortgage, LLC***, 461 S.W.3d 923 (Tex.App.-Tyler 2015, pet. pending). Aurora accelerated the Landerses' mortgage loan in November 2009. The Landerses then sued Aurora alleging fraud. They first obtained a TRO and later an agreed temporary injunction which enjoined Aurora from "conducting a foreclosure sale" while the fraud action was pending. In the meantime, Nationstar obtained the loan from Aurora. Judgment in the fraud suit was entered in Nationstar's favor and in December 2013, Nationstar filed suit for a judicial foreclosure.

The Landerses claimed that Nationstar's suit for judicial foreclosure was barred by limitations. Nationstar asserted that its suit was timely because limitations was tolled by the temporary restraining order and the temporary injunction. The trial court rendered summary judgment in favor of Nationstar.

Generally, if a note payable in installments is secured by a lien on real property, limitations for enforcement of the lien does not begin to run until the maturity date of the last installment. Civil Practice & Remedies Code § 16.035(e). If a note or

deed of trust secured by real property contains an optional acceleration clause, the cause of action for enforcement accrues when the holder exercises its option to accelerate. When the four year limitations period expires, the real property lien and the power of sale to enforce the lien become void.

The court held that neither of the statutory tolling events has occurred here. Nationstar argued there is a general equitable rule that, where a person is prevented from exercising his legal remedy by the pendency of legal proceedings, the time in which he is thus prevented should not be counted against him in determining whether limitations have barred his right. Under this rule, it has been held that the statute of limitations for nonjudicial foreclosure was tolled during the time the lender was restrained by the trial court's injunction from exercising the power of sale in the deeds of trust. However, in those earlier cases, the courts held that an injunction restraining a sale under the deed of trust did not prevent a suit to recover on the debt and to foreclose the liens through the court.

In this case, the injunctions prevented Nationstar from "conducting a foreclosure sale or otherwise dispossessing [the Landerses] of their interest" in the subject property and then from "conducting a foreclosure sale" of the subject property. Neither injunction restrained Nationstar from filing suit for judicial foreclosure of its lien. Therefore, the limitations period for such a suit was not tolled, and it expired prior to the filing of Nationstar's suit.

Nationstar contends that even if the limitations period expired prior to the filing of its suit, quasi-estoppel prevents the Landerses from asserting their statute of limitations defense. Quasi-estoppel precludes a party, with knowledge of the facts, from taking a position inconsistent with its former position to the disadvantage or injury of another. Nationstar argues that the Landerses' current position that Nationstar could have filed its suit for judicial foreclosure during the periods of injunction is inconsistent with their previous position that the Landerses were entitled to injunctions against nonjudicial foreclosure. However, judicial foreclosure and nonjudicial foreclosure are distinct procedures, and injunction against one does not preclude proceeding under the other. . Therefore, the Landerses' positions are not inconsistent, and, further, did not disadvantage or injure Nationstar. Consequently, quasi-estoppel does not apply.

In re *Nguyen*, 456 S.W.3d 673 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Pursuant to Texas Government Code § 51.903, a person who is the purported debtor or obligor who owns real property and who has reason to believe that the document purporting to create a lien or a claim against the real property previously filed is fraudulent file a motion, verified by affidavit that contains, at a minimum the information in the suggested form. A district judge may rule upon the motion ex parte after reviewing only the documentation or instrument attached to the motion, without testimonial evidence and without notice of any kind.

A document is presumed to be fraudulent if it purport to create a lien or assert a claim against real property and (i) is not a document or instrument provided for by the constitution or laws of Texas or the United States, (ii) is not created with the express or implied consent of the property owner or obligor, and (iii) is not an equitable, constructive, or other lien created by a court. Under this statutory scheme, the court may presume the document is fraudulent under this section if the court makes one positive and three negative findings about the subject document.

In other words, under this statute, the court first must affirmatively find that the document purports to create a lien or claim

against real or personal property. Additionally, to find the subject document fraudulent, the court must determine that it is not (i) a document or instrument provided for by state or federal law or constitutional provision; (ii) a document or instrument created by implied or express consent or agreement of the obligor, debtor, or the owner of the real or personal property; or (iii) a document or instrument imposed by a court as an equitable, constructive, or other lien.

Nguyen's issue on appeal was that the deed of trust in question was not created by his consent or agreement, thus he claimed he had properly challenged the legitimacy of the document. What this amounted to was merely an allegation of forgery, which is inappropriate in a § 51.903 challenge. The limited nature of the court's section 51.903 review makes sense because, as explained above, such proceedings are conducted ex parte, without any testimonial evidence, and without notice of any kind.

PART II
HOME EQUITY LENDING

Wells Fargo Bank, N.A. **v.** ***Murphy***, No. 13-0236 (Tex. February 6, 2015). In a lengthy dipute between the Bank and the Murphys regarding a home equity loan each party sought a declaratory judgment as to the terms of the loan. The Bank prevailed and sought its attorneys' fees under the Declaratory Judgment Act. The Murphys argued that the non-recourse requirements of the Constitutional provisions for home equity loans meant that the Bank could not have a personal judgment for attorneys' fees.

Here, the note and security instrument both mirror the constitutional provision's language by stating the "Note is given without personal liability against each owner." No one disputes that "without personal liability against each owner" limits the sources of funds from which Wells Fargo may seek payment of the loan. Courts have traditionally described nonrecourse loans with such language. Given this historical context and the parties' own definition, in the event of default, Wells Fargo could seek payment of the home equity loan only from the collateral, and could not seek a deficiency judgment against the Murphys personally.

The parties propose differing interpretations of the meaning of "extension of credit." The Bank argues that a lender can recover fees or costs for defending against a borrower's separate and original proceeding challenging the foreclosure because those fees were not incurred pursuing a judgment against the borrower based upon the "extension of credit" as that term is used in the Constitution. Ultimately, according to the Bank, the Constitution does not prohibit the recovery of attorney's fees in such a separate and original proceeding if that recovery is otherwise authorized by law.

The Murphys contend that their separate and original lawsuit merely contested their alleged default, and they implicitly argue for a more expansive definition of "extension of credit."

The court has defined "extension of credit," to consist of "all the terms of the loan transaction." The parties' loan agreement contains several terms regarding the Bank's recovery of its attorney's fees and other costs. If the attorney's fee award falls within one of these terms, it necessarily falls within the extension of credit's scope and must be without recourse for personal liability. The note states that "the Note Holder will have the right to be paid back by [the Borrowers] for all of its costs and expenses in enforcing this Note to the extent not prohibited by applicable law"

Here, the Bank was awarded its attorney's fees for defending against the Murphys' separate and original declaratory judgment action. The Bank might have incurred costs and expenses in enforcing the

Note, which would be subject to the non-recourse rules. However, the Bank is not enforcing the note but is rather defending against the Murphys' separate and original declaratory judgment action. Further, the Bank might have incurred its attorney's fees because the Murphys failed to perform the covenants and agreements contained in the Security Instrument, again, subject to the non-recourse rules. However, the Bank is defending against the Murphys' separate and original declaratory judgment action, rather than protecting itself against the Murphys' breach of covenants or agreements contained in the security instrument. Finally, the Bank might have incurred its attorney's fees because there is a legal proceeding that might significantly affect its interest in the Property. While there was a legal proceeding, it was not a legal proceeding of the kind contemplated by the security instrument, which addresses those proceedings in bankruptcy, probate, for condemnation or forfeiture, for enforcement of a lien which may attain priority over the security instrument or to enforce laws or regulations. These enumerated legal proceedings have two primary similarities: none of the covered proceedings are brought by the borrower directly against the lender, and none of the covered proceedings contest the merits of the underlying loan. The Murphys' separate and original declaratory judgment action does both, and therefore falls outside of this term's scope.

Having initiated a separate and original proceeding, and having provided a mechanism for the Bank to both incur and recover its attorney's fees, there is no basis for the Murphys to hide behind the nonrecourse status of their home-equity loan.

In re *One West Bank, FSB*, 430 S.W.3d 573 (Tex.App.-Corpus Christi 2014, pet. denied). Under article XVI, section 50(a)(6)(D) of the Texas Constitution, the homestead of a family or of a single adult person is protected from forced sale for the payment of all debts except, for instance, when an extension of credit is secured by a lien that may be foreclosed upon only by a court order. Under Texas Rule of Civil Procedure 735.1, a party seeking to foreclose a lien for a home equity loan, reverse mortgage, or home equity line of credit may file an application for an expedited order allowing the foreclosure of a lien under Rule 736.

Rule 736, as referenced in Rule 735, sets forth the procedures and requirements for seeking an expedited foreclosure. A party may seek a court order permitting the foreclosure of a lien by filing a verified application in the district court in any county where all or any part of the real property encumbered by the lien is located or in a probate court with jurisdiction over proceedings involving the property. The only issue to be determined in a Rule 736 proceeding is the right of the applicant to obtain an order to proceed with foreclosure under the applicable law and the terms of the loan agreement, contract, or lien sought to be foreclosed. A respondent may file a response to the application, but the response may not raise any independent claims for relief, and no discovery is permitted. The court must issue an order granting the application if the petitioner establishes the basis for the foreclosure; otherwise, the court must deny the application. An order issued pursuant to Rule 736 is without prejudice and has no res judicata, collateral estoppel, estoppel by judgment, or other effect in any other judicial proceeding.

Here, the trial court denied the bank's application with prejudice. The court of appeals held that the trial court abused its discretion in denying the bank's application.

In re *Estate Of Hardesty*, 449 S.W.3d 895 (Tex.App.-Texarkana 2014, no pet.). In 2004, Carolyn borrowed a $500,000 home equity loan. Hardesty, her son, helped her in getting the loan, but wasn't a party to the transaction. Carolyn executed a sworn fair market value agreement, indicating the property securing the loan was valued at

$625,000.00. Carolyn died a few years after borrowing the loan. In her will, she devised the house to Hardesty.

After Carolyn's death, Hardesty got the Lender to agree that he could pay the house payments until he could get clear title to the property. After doing that, Hardesty was to repay taxes that the Lender had paid in the interim. Hardesty made payments on the loan for more than two years. He obtained title in 2012 by way of a deed from the executor of Carolyn's estate.

In 2010, the Lender initiated foreclosure proceedings by filing an application for foreclosure. Carolyn's estate allowed the claim. The trial court issued an order for foreclosure and the Lender posted the property. Shortly thereafter, Hardesty notified the Lender that he believed the home equity loan and deed of trust violated the Texas Constitution and invited them to cure the defect within the time allowed by law. No action was taken to cure the alleged defect. On the scheduled foreclosure date, Hardesty got a TRO stopping the foreclosure. The TRO was obtained in conjunction with a lawsuit claiming that the home equity loan violated the 80% LTV limits set in Article XVI, § 50(a)(6)(Q)(x) of the Constitution.

The Lender attacked Hardesty's standing and pled limitations. The case was then transferred to the Probate Court.

Standing is a constitutional prerequisite to maintaining suit. A party generally has standing to bring suit where a controversy exists between the parties that will be actually determined by the judicial declaration sought.

As a general rule, only the mortgagor or a party who is in privity with the mortgagor has standing to contest the validity of a foreclosure sale pursuant to the mortgagor's deed of trust. An exception to this general rule exists when a third party has a legal or equitable interest in the property that will be affected by the sale. In that instance, the third party has standing to challenge the sale to the extent that his rights will be affected by the sale. Here, Hardesty had obtained title to the property and paid around $100,000 in house payments. That was enough of an interest in the property to give him standing.

As to the limitations arguments made by the Lender, the claim was that the residual four-year limitations period in Civil Practice & Remedies Code § 16.051 commenced on the date of closing, back in 2004. Hardesty contends that a lien made in violation of the Texas Constitution is void, not voidable, and thus is not subject to any limitations period. Alternatively, Hardesty contends that even if his claim is subject to limitations, the limitations period did not commence until Hardesty provided the holders of the note and lien with the sixty-day notice to cure prescribed by Article XVI, § 50(a)(6)(Q)(x) of the Constitution. The essence of Hardy's argument is that the Constitutional provision renders a non-compliant home equity loan "void but curable." Consequently, if the lien is void ab initio, a statute of limitations does not apply. Under this reasoning, the void lien constitutes a cloud on the title and can be removed in an equitable action without a limitations period.

Wood* v. *HSBC Bank USA, N.A., 439 S.W.3d 585 (Tex.App.-Houston [14th Dist.] 2014, pet. pending). The fundamental question in this case is whether a home-equity lien that violates section 50(a)(6) of the Texas Constitution is void or voidable. A void act is one entirely null within itself, not binding on either party, and which is not susceptible of ratification or confirmation. A voidable act is binding until disaffirmed, and may be made finally valid by failure within proper time to have it annulled, or by subsequent ratification or confirmation.

Keeping this distinction in mind, if a noncompliant home-equity lien is void from the start, then the lien would not be susceptible to correction, ratification,

confirmation, disaffirmation, or even cure. While this may have been the case prior to the 1997 constitutional amendment that added the section 50(a)(6)(Q)(x) cure provisions, it is not the case now. The 1997 home-equity loan amendment affords lenders the means to correct mistakes in order to validate a noncompliant home-equity lien. The section 50(a)(6)(Q)(x) cure provisions place noncompliant home-equity liens on the voidable side of the void-voidable scale.

Accordingly, the court held that because a cure provision exists in the Texas Constitution, homestead liens that do not comply with the constitutional requirements are voidable.

Having determined that noncompliant home-equity liens are voidable, and because such liens are subject to limitations, the court held that the four-year statute of limitations in Civil Practice & Remedies Code § 16.051 applies. Every action for which there is no express limitations period, except an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.

Anticipating the possibility that section 16.051 would apply to their constitutional claims, the borrowers assert that section 16.051 does not apply to their declaratory judgment action to cancel the home equity lien because it constitutes an action for the recovery of real property. An action for the recovery of real property is one that would support a trespass to try title suit without first invoking the equitable powers of the court to cancel a deed. A trespass to try title suit is the method of determining title to lands, tenements, or other real property. It is generally used to clear problems in chains of title or to recover possession of land unlawfully withheld from a rightful owner. A declaratory judgment action, on the other hand, provides an efficient procedural method for seeking a declaration of rights regarding the construction or validity of deeds by those whose rights are affected by such instruments.

The borrowers' claim for forfeiture of principal and interest is an action to recover money damages. As such, it is not an action for the recovery of real property. Nor is the borrowers' declaratory judgment action to void the home-equity lien--which does not implicate any of the issues resolved by a trespass to try title suit--an action for the recovery of real property.

Citing the general principle that the legal and equitable estates in real property are severed when a mortgagor executes a deed of trust, the borrowers contend that the suit to invalidate the home-equity lien is an action to recover "equitable title." Therefore, it is an action to recover real property.

The court rejected this argument. Here, the borrowers are not attempting to impose a constructive trust on the home-equity lien and do not allege that the lender has acquired legal title through wrongdoing. To the contrary, the borrowers have merely asserted a cause of action to cancel their home-equity lien, which will not support an action in trespass to try title and which requires the equitable powers of the court to determine. Because the borrowers' declaratory judgment action to cancel their home-equity lien would not support a trespass to try title action and requires the equitable powers of the court to cancel their lien, their declaratory judgment action to cancel the home-equity lien is not an action to recover real property

Santiago* v. *Novastar Mortgage, Inc., 443 S.W.3d 462 (Tex.App.-Dallas 2014, pet. denied). The Santiagos obtained a home equity loan from Novastar. When their payments doubled after six years, the Santiagos defaulted. They sued Novastar seven years after the initial closing.

Among their claims were that two documents signed at closing contained blanks, which is prohibited by § 50(a)(6)(Q)

of the Constitution. Luis Santiago testified that the copies of the Certificate and the Election he received in the course of this litigation bore a date of May 19, 2004, while the copies he received at closing did not bear a date. Instead, the copies he received had a blank for the date to be filled in. The Certificate and the Election, however, were documents regarding the three-day period during which the Santiagos could rescind the loan without penalty, and should have remained blank until the three-day period had elapsed. In fact, each document bore a warning in all-capital letters instructing borrowers not to sign until three business days had elapsed from the closing. Thus, there was no violation of section 50(a)(6)(Q)(iii) regarding the blanks on the Certificate and on the Election at the time of closing.

Second, the Santiagos argue that they raised a fact issue that their signatures on the Affidavit were forged. The residual four-year statute of limitations applies to claims that a lender violated constitutional provisions governing home equity loans. A claim accrues "when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. In the context of a home equity loan, a legal injury occurred when a lender made a loan in excess of the amount allowed by law. The Santiagos argued that the statute of limitations was tolled because of the discovery rule. Neither the Texas Supreme Court nor any Courts of Appeals have decided the question.

Insofar as the period of limitations exists to preserve evidence and create settled expectations, it would essentially be nullified by allowing parties to wait many years to demand cure. The legal injury here occurred when the borrowers created the lien, and there was nothing that made the injury undiscoverable.

For the discovery rule to apply, the nature of the injury must be inherently undiscoverable and the evidence of the injury must be objectively verifiable. "Inherently undiscoverable" does not mean merely that a particular plaintiff did not discover his injury within the prescribed period of limitations. Discovery of a particular injury is dependent not solely on the nature of the injury but on the circumstances in which it occurred and the plaintiff's diligence as well. An injury is "inherently undiscoverable" if "it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence."

The nature of the injury alleged by the Santiagos is that they did not receive a copy of the Affidavit as required by subsection (v) of Article XVI, section 50(a)(6)(Q) of the Texas Constitution, and therefore were unaware that they could be liable personally on the entire loan in the event of any fraud on their part. They allege that a copy of the Affidavit was not provided to them, and instead was filed of record bearing forgeries of their signatures. They argue that no diligence was required of them to discover their injury because they had no reason or obligation to search the deed records after their loan was closed.

There is no dispute that the allegedly forged Affidavit was a matter of public record upon its filing on May 25, 2004, or that the alleged constitutional violation was apparent from a review of those records. Luis Santiago discovered the alleged violation when he reviewed the records in 2010. In some circumstances, a party may have constructive notice of matters filed in the public record. Even when a party does not have constructive notice of matters filed in the public record, however, a cause of action for failure to provide that information is not inherently undiscoverable.

The court concluded the Santiagos' injury was not by nature unlikely to be discovered within the prescribed limitations period despite due diligence. The Affidavit was a matter of public record. As the

Santiagos themselves point out, the Affidavit was specifically referenced in the security instrument and other documents they signed at closing. Although as the Santiagos argue, they may not have had any obligation to perform periodic random searches of recorded instruments associated with their property, they did have an obligation to protect themselves by reading what they sign and disclosing any discrepancies to the lender.

Bank of New York Mellon* v. *Daryapayma, 457 S.W.3d 618 (Tex.App.-Dallas 2015, no pet.). On June 29, 2004, the Daryapaymas bought the house at 4561 Royal Lane and designated it their homestead. To finance the purchase, they took out two loans: a first lien in the amount of $650,000 and a second lien of $85,000. Two years later, the Daryapaymas borrowed a home equity loan to pay off the earlier two loans. BONY acquired the loan from the original lender.

When the Daryapaymas defaulted on the home equity loan, BONY filed an application for a home equity loan foreclosure. In May 2011, the trial court granted the order and authorized foreclosure of the lien. The property was purchased at a nonjudicial foreclosure sale, and BONY filed a petition for forcible detainer. While the forcible detainer was pending the Daryapaymas file this suit, claiming that BONY had violated the Constitutional provisions regarding home equity loans, namely that the amount of the loan was greater than 80% of the value of the home. The Daryapaymas got to their determination by adding together the amount of the first and second lien loans and the amount of the home equity loan. The trial court granted summary judgment. When BONY filed a counterclaim for equitable subrogation, the Daryapaymas filed another motion for summary judgment, which the trial court granted.

The Court of Appeals reversed the trial court. Because the parties agreed the home equity loan was made, in large part, to pay off the existing mortgages, the loan documents reflect this agreement, and the existing mortgages were paid off, the balances of those existing mortgages should not be included when determining whether the amount of the home equity loan exceeds eighty percent of the fair market value of the homestead. In other words, in this case the " aggregate total of the outstanding principal balances of all other indebtedness secured by valid encumbrances" against the Daryapaymas' homestead was zero because the home equity loan paid those debts in full. Because the $937,500 home equity loan did not exceed eighty percent of the fair market value of the Daryapaymas' homestead, the loan did not violate the Texas Constitution.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

Charles R. Tips Family Trust v. PB Commercial LLC, 459 S.W.3d 147 (Tex.App.-Houston [1st Dist.] 2015, no pet.). The loan amount shown in all of the loan documents contained a very unfortunate typo. It was shown as: “ONE MILLION SEVEN THOUSAND AND NO/100 ($1,700,000.00) DOLLARS." Before the note matured, the Trust made payments of $595,586. After the Trust quit paying, the lender foreclosed, bidding $874,125. In ensuing litigation, the Trust argued that the words describing the loan amount controlled and that, after the application of the foreclosure bid, the note was paid in full. The trial court ruled in favor of the lender, granting it judgment for the deficiency.

This appeal presents one issue: whether the amount of the loan must be determined from the printed words in the note or from the entire context of the transaction, including evidence of the amount of money that Patriot Bank actually made available to the borrowers.

If a written instrument is worded in such a way that it can be given a definite or certain legal meaning, then the contract may be construed as a matter of law. An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. Whether a contract is ambiguous is a question of law, which we review de novo.

A simple lack of clarity or disagreement between parties does not render a term ambiguous. An ambiguity arises only after the application of established rules of construction leaves an agreement susceptible to more than one meaning.

Texas law anticipates internal contradictions in both negotiable and non-negotiable instruments and provides for the resolution of such contradictions. Under UCC § 3.114, which governs negotiable instruments such as the Note, if an instrument contains contradictory terms, typewritten terms prevail over printed terms, handwritten terms prevail over both, and words prevail over numbers.

The note, guaranty, and other loan documents each describe the original amount of the loan obligation as "ONE MILLION SEVEN THOUSAND AND NO/100 ($1,700,000.00) DOLLARS." The phrase "one million seven thousand and no/100 dollars" has a plain, unambiguous meaning, namely the sum of $1,007,000.00. Thus, the words and the numerals in the loan agreements are in conflict, differing by $693,000. This impact is magnified by the fact that the actual amount of the loan affects the application of payments, resulting in different sums of interest due in each scenario.

The rule that the written words control over numerals applies to all of the documents at issue in this dispute, both negotiable and non-negotiable instruments. It does not matter that the discrepancy between the words and numbers here is a large one. Neither § 3.114 nor Texas case law makes a distinction on the basis of the size of the obligation or the significance of the conflict in terms.

The lender argues that this case presents a unique circumstance in that the omission of a single word transforms "one million seven hundred thousand" into "one million seven thousand." If the former phrase were modified in any other way, according to the lender, we would be faced with either an ambiguous term or an unambiguous but absurd one. For example, the lender claims, a scenario in which a scrivener's error rendered the phrase as "one seven hundred thousand," omitting the word "million." The lender argues that such an amount would be ambiguous, and the court would have to refer to the numerals and extrinsic evidence to resolve the ambiguity. But this hypothetical scenario has no bearing on this case because there is no ambiguity in the text here. Indeed, one could not even say that the terms contradict each other within the meaning of § 3.114, as the meaning of one of the potentially conflicting terms would be ambiguous.

Alternatively, the lender suggests a scenario in which another scrivener's error replaced "million" with "billion," resulting in "one billion seven hundred thousand." This, claims the lender, would result in the borrowers clamoring for relief and asking this court to consider evidence extrinsic to the contract. That may be, and the possibility of such an error demands careful review of proposed written agreements. But that is no basis upon which we may disregard well-settled and binding statutory and case law. On the appellate record, the only issue is what the terms of the written agreements mean as a matter of law. Neither party sought an equitable reformation of the loan in the trial court, so no issue of equitable relief has been presented in this appeal. The scenario proposed by the lender thus has no bearing on how the court must

apply the law to the record before it.

Here, the words "one million seven thousand" control over the numerals "$1,700,000" to set the amount of the promissory note and guaranty obligations

Alphaville Ventures, Inc. **v.** ***First Bank***, 429 S.W.3d 150 (Tex.App.-Houston [14th Dist.] 2014, no pet.). Under the promissory note at issue, SBLS was the original lender, and 5M Corp dba Arby's was the original borrower. Via an "Allonge to Promissory Note," 5M Corp dba Arby's assigned all its liabilities and obligations under the note to Alphaville. In conjunction with that assignment, Bizman, the president of Alphaville, signed a guarantee of Alphaville's obligations under the note, and Alphaville granted SBLS a security interest in certain equipment. Alphaville subsequently defaulted on the Note. First Bank filed suit, alleging the note and guarantee had been assigned from SBLS to First Bank and seeking the amount due.

First Bank claimed to have acquired the Note pursuant to a Loan Purchase and Sale Agreement. The summary judgment documentary evidence included only the PSA. The relevant portion of the PSA provided that SBLS would assign the loans it covered (including the Note) by executing endorsements of the Note and a Bill of Sale. The Note had not been endorsed, although a Bill of Sale was introduced into evidence. The Bill of Sale purported to assign SBLS's interest in the "personal property" listed on its Schedule B, which is entitled "Assets Conveyed to First Bank;" however, it was not clear to the court what "personal property" was actually covered by the Bill of Sale. The court said that the PSA did not contemplate that a Bill of Sale would be utilized to transfer all instruments governing the loans subject to the PSA, including appellants' note and guarantee. The Bill of Sale used a broader term by referring to the sale and delivery of "Assets" listed on Schedule B, but "Assets" is not defined in the Bill of Sale.

The court agreed that the documentary evidence does not establish First Bank is owner and holder of the note and guarantee. There is no documentary proof of the endorsements required to transfer the note and guarantee.

Ward **v.** ***Stanford***, 443 S.W.3d 334 (Tex.App.-Dallas 2014, pet. pending). The limitations period applicable to the Trustees' claims against Travis Ward on the Renewal Note depends on whether the Renewal Note was negotiable. If it was, the Trustees had six years to sue Travis Ward for failure to pay. If the Renewal Note was not negotiable, the Trustees had only four years to bring suit. The negotiability of an instrument is a question of law.

A promissory note is a negotiable instrument if it is a written unconditional promise to pay a sum certain in money, upon demand or at a definite time, and is payable to order or to bearer. A note is non-negotiable, however, if another instrument must be examined to determine the rights and obligations under the note.

The Renewal Note, dated February 1, 1996, was signed by Travis Ward individually and on behalf of Ward Energy, Inc. It was in the principal amount of $2,000,000, and payable to the Trustees on or before January 31, 2000. The Renewal Note included the following provision: "Maker acknowledges and agrees that this Note is given in renewal and extension of, and amends and wholly restates, that certain note, dated December 27, 1985, in the original maximum stated principal amount of ONE MILLION TWO HUNDRED THOUSAND AND NO/100S DOLLARS ($1,200,000.00) as heretofore amended. All liens and security interests securing such note, if any, are hereby preserved, renewed, and extended for the benefit of Payee and its successors and assigns."

Thus the Renewal Note contains a written, unconditional promise to pay a

specific sum to the Trustees on or before a specific date. Nevertheless, appellees argue the Renewal Note is not negotiable because it "amends and restates" rather than supersedes the 1985 note. The court disagreed. The paragraph of the Renewal Note quoted above provides that it "amends and wholly restates" the 1985 note, so reference to the 1985 note is not necessary to determine either the date or amount due, whether the obligation to pay is conditional, or the liability for attorneys' fees.

Even if the statute of limitations for enforcing the Renewal Note was six years, the statute would begin to run on the accelerated due date, not the due date or dates stated in the note. The Renewal Note allowed for acceleration at the option of the holder. The holder's attorney sent a letter which gave the maker written notice of default and stated that if it wasn't cured, the holder would pursue its legal rights, including accelerating the note. The maker pointed out that the note waived notice of acceleration and thus claimed the letter was enough to accelerate the note. The court held that material fact questions existed regarding acceleration.

Roth* v. *JPMorgan Chase Bank, N.A., 439 S.W.3d 508 (Tex.App.-El Paso 2014, no pet). A plaintiff who sues for recovery on a promissory note does not have to prove all essential elements for a breach of contract but rather need only establish the note in question, that the defendant signed it, that the plaintiff was the legal owner and holder thereof, and that a certain balance is due and owing on the note. In his answer, Roth did not file a verified denial of his execution of any written instrument on which the Bank's pleadings were founded, or a verified denial of the genuineness of the endorsement of the notes. In the absence of such sworn pleas, the instruments are received in evidence as fully proved. By these failures, Roth has conclusively admitted the validity of the notes and that he signed the agreements, and has waived any evidentiary objection to them.

PART IV
GUARANTIES

Myers* v. *Hall Columbus Lender, LLC, 437 S.W.3d 632 (Tex.App.-Dallas 2014, no pet.). A modification of Myers's guaranty included a provision that made him liable for fraud or intentional or material misrepresentation by the Borrower or Guarantor related to the Project or to the Loan Documents or the transactions contemplated thereby . . . ." The Borrower had been sued for fraud and the claim was pending.

The lender took the position that the Guarantor was liable to it on account of the allegations of fraud; however, the court held that liability depended upon the occurrence of fraud, not the allegation of fraud.

PART V
LEASES

Lubbock County Water Control and Improvement District* v. *Church & Akin*, *L.L.C., 442 S.W.3d 297 (Tex. 2014). The District operates Buffalo Springs Lake. Church & Akin leased a marina from the District for an initial 3-year term. The lease contained an extension option for an additional 3 years, which Church & Akin exercised. Six months into the renewal term, the District terminated the lease. Church & Akin sued, claiming the District had no right to terminate the lease. The District claimed governmental immunity and also claimed that various statutory waivers of immunity did not apply, specifically including Local Governmental Code chapter 271.

The District is a local governmental entity under Local Governmental Code § 271.151(3)(C). Local governmental entities enjoy governmental immunity, unless it is expressly waived. This includes both immunity from liability and immunity from suit. A governmental entity that enters into a contract necessarily waives immunity from

liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit. Unlike immunity from liability, immunity from suit deprives the courts of jurisdiction and thus completely bars the plaintiff's claim.

Church & Akin contends that the Legislature has waived the District's immunity against this suit through Local Government Code § 271.152 which provides a limited waiver of immunity for local governmental entities that enter into certain contracts. This waiver applies only to contracts that are in writing, are properly executed, and state the essential terms of the agreement for providing goods or services to the local governmental entity. The principal dispute in this appeal is whether the parties' contract includes an "agreement for providing goods or services" to the District.

The Water District contends that the parties' contract is a lease of real property, not an agreement to provide goods or services. The court agreed with Church & Akin, however, that courts must look beyond the title of a written contract to determine whether it satisfies chapter 271's waiver requirements. The statute does not require a written contract that is an agreement for providing goods or services; rather, it requires a "written contract stating the essential terms of the agreement for providing goods or services." Although the contract at issue in this case is a lease of real property, a contractual relationship can include both the granting of a property interest and an agreement to provide goods or services.

The court also agreed with Church & Akin that the agreement to provide services to the governmental entity "need not be the primary purpose of the agreement."

Church & Akin contends that it agreed in the lease's "use" provision to provide a service to the Water District by operating the marina. The District argues that the "use" provision of the lease did not obligate Church & Akin to operate a marina on the leased premises; it merely prohibited Church & Akin from using the premises for any other purpose, at least without first obtaining the District's consent. The Supreme Court has previously recognized the important difference between an agreement that restricts the use of property to a specific purpose and one that requires the use of property for a specific purpose: "a provision in a lease that the premises are to be used only for a certain prescribed purpose imports no obligation on the part of the lessee to use or continue to use the premises for that purpose; such a provision is a covenant against a noncomplying use, not a covenant to use. Thus, although both parties may have contemplated that Church & Akin would operate a marina, the language of the contract did not require it to do so, and thus Church & Akin did not contractually agree to do so. When a party has no right under a contract to receive services, the mere fact that it may receive services as a result of the contract is insufficient to invoke chapter 271's waiver of immunity. At best, such services are only an "indirect" and "attenuated" benefit under the contract.

Moreover, even if the lease were construed to include a contractual agreement to use the property as a marina, Church & Akin's provision of marina services to the District's constituents would not constitute the provision of such services to the District itself.

Federal Home Loan Mortgage Corporation* v. *Pham, 449 S.W.3d 230 (Tex.App.-Houston [14th Dist.] 2014, no pet.). Freddie Mac brought a forcible detainer action against Pham, Block, and Crawford, who occupied a house that Freddie had acquired by foreclosure. The Justice Court rendered judgment in favor of Freddie Mac and Crawford appealed to the county court. As part of that appeal, Crawford asserted the affirmative defense that Freddie Mac's suit was barred by res judicata. Her claim was that this was the third identical forcible detainer lawsuit

concerning the property.

In response, Freddie Mac argues that a new and independent cause of action for forcible detainer accrues every time a new notice to vacate and demand for possession is sent and the occupant fails to vacate.

A forcible detainer action is the procedure used to determine the right to immediate possession of real property if there is no unlawful entry. The only issue in an action for forcible detainer is the right to actual possession; the merits of title are not adjudicated. Under Property Code § 24.002(a)(2), a person who refuses to surrender possession of real property on demand commits a forcible detainer if the person is a tenant by sufferance, including an occupant at the time of foreclosure of a lien superior to the tenant's lease.

The doctrine of res judicata precludes re-litigation of claims that have been finally adjudicated or that arise out of the same subject matter and that could have been litigated in the prior action. Res judicata requires proof of the following elements: (1) a final judgment on the merits by a court of competent jurisdiction; (2) identity of parties or those in privity with them; and (3) a second action based on the same claims that were raised or could have been raised in the first action.

It is undisputed that the three forcible detainer actions Freddie Mac filed involve the same parties and the same property. The only element in dispute is whether this case is a third action based on the same claims as the two earlier forcible detainer actions brought by Freddie Mac. Freddie Mac argues that every time a notice to vacate and demand for possession is sent, and the occupant of the property fails to vacate, a new and independent cause of action for forcible detainer accrues.

A forcible detainer action is a special proceeding designed to be a speedy, simple, and inexpensive means to obtain immediate possession of property. Consistent with this purpose, our courts have repeatedly recognized that a judgment of possession in a forcible detainer action is a determination only of the right to immediate possession and does not determine the ultimate rights of the parties to any other issue in controversy relating to the property at issue. Accordingly, no issue in a forcible detainer action other than the right of immediate possession has preclusive effect in a subsequent suit between the parties.

The Property Code provides that a forcible detainer is committed when a person refuses to surrender possession of real property on demand if a proper demand for possession is made in writing by a person entitled to possession of the property. Necessarily, then, a judgment awarding possession on a particular date does not implicate a party's possessory right when, at a later date, another forcible detainer is committed.

Therefore, considering the limited nature of a forcible detainer action and the statutory language of the Property Code, the court concluded that a new and independent cause of action for forcible detainer arises each time a person refuses to surrender possession of real property after a person entitled to possession of the property delivers a proper written notice to vacate. Accordingly, res judicata would not bar a second suit based on the commission of a subsequent forcible detainer.

Olley* v. *HVM, L.L.C., 449 S.W.3d 572 (Tex.App.-Houston [14th Dist.] 2014, pet. denied). Olley checked into the hotel in May 2012 and stayed there with his wife and child. He stopped making payments as of April 23, 2013. On April 25, the hotel served Olley "and all other occupants" with a termination notice requiring them to vacate the hotel by May 2. When they failed to do so, the hotel served Olley with a notice to vacate and subsequently filed a forcible detainer lawsuit in justice court. The justice court awarded possession of the hotel room

and money damages to the hotel. Olley appealed, and the county court at law conducted a de novo trial. The trial court awarded possession of the hotel room and monetary damages to the hotel. The hotel moved for a temporary restraining order to restrain Olley from returning to the hotel based upon his aggressive behavior in the courtroom. The trial court granted the TRO and ordered the writ of possession to issue immediately. A deputy constable executed the writ of possession and the Olleys were escorted off the premises.

Olley complains that the trial court erred in awarding possession of the premises to the hotel and issuing the TRO. The court dismissed the appeal. Because Olley no longer lives in the hotel room and does not have an arguable right to current possession, this appeal is moot.

An action for forcible detainer is intended to be a speedy, simple, and inexpensive means to obtain immediate possession of property. Judgment of possession in a forcible detainer action is not intended to be a final determination of whether the eviction is wrongful; rather, it is a determination of the right to immediate possession. An appeal in a forcible detainer action becomes moot when the appellant ceases to have actual possession of the property, unless the appellant has a potentially meritorious claim of right to current, actual possession.

A guest in a hotel is a mere licensee, not a tenant. The general rule is that a tenant is vested with an estate in the property while a hotel guest is not. Accordingly, no landlord-tenant relationship exists between a hotel and its guest. In a footnote, the court noted that some other courts of appeal have held that, without a landlord-tenant relationship, a justice court has no jurisdiction to enter judgment in a forcible detainer action. This court, however, has held that the relationship is not jurisdictional but is just one of the elements required by Property Code §24.002 to support a forcible detainer action. This issue was not raised or argued by Ollie.

Olley claimed he was not a mere licensee, but was a permanent resident of the hotel, thus having a right to possession, Tax Code §156.101. That section, an exception to imposition of the hotel occupancy tax, says that the state will not impose an occupancy tax on a person who has the right to use or possess a room in a hotel for at least 30 consecutive days, so long as there is no interruption of payment for the period. The court said this made no difference. The statute addresses neither Olley's current right to use or possess the hotel room nor the relationship between Olley and the hotel.

Olley also claimed that his registration card was a contract allowing him to stay in the hotel room. Although the registration card included an "arrival date" and a "departure date," it did not include language indicating that Olley was a tenant or otherwise had a right to possess the hotel room during those dates or currently has such a right. It merely included the rates for the room during that timeframe, noted that the reserved rate was guaranteed for only 60 days from check-in, and informed Olley that advance notice was required to extend his stay, subject to availability. The court held that the registration card did not establish a potentially meritorious claim of right to possession by Olley.

Olley also argues that he has a right to possess the room because he offered to pay after he fell behind on payments. He contends the hotel rejected his offer. He cited Property Code § 92.019, which precludes a landlord from charging a late fee for failing to pay rent except under certain circumstances. The court held that § 92.019 is inapplicable. Nothing in § 92.019 grants Olley current, actual possession of the hotel room. An innkeeper has no duty to keep a guest indefinitely.

In the end, all of Olley's arguments were rejected and the case dismissed as moot.

Tenet Health Systems Hospitals Dallas, Inc.* v. *North Texas Hospital Physicians Group, P.A., 438 S.W.3d 190 (Tex.App.-Dallas 2014, no pet.). The Hospital obtained a judgment against MG, which was the tenant under a lease with the Landlord. Yates owned MG and also guarantied the lease. Before the judgment, MG subleased the premises to New Co., also owned by Yates. New Co. and MG did not obtain the Landlord's consent to the sublease, which was required by the lease.

The Hospital filed an application for a writ of garnishment against New Co. as the garnishee. The application asserted that New Co. was indebted to MG because it owed rent under the sublease. New Co. denied that it owed rent to MG, claiming that, since they didn't obtain the Landlord's consent to the sublease, the sublease was unenforceable. It also argued that the Landlord had a superior right to the rents under the sublease.

The only real issue in a garnishment action is whether the garnishee is indebted to the judgment debtor, or has in its possession effects belonging to the debtor, at the time of service of the writ on the garnishee, and at the time the garnishee files its answer. The crux of the issue in this appeal is whether New Co., the garnishee, was indebted to MG, the judgment debtor, at the time the writ was served.

It is undisputed that the Lease prohibits "any transfer" without the Landlord's consent, and it is also undisputed that the Landlord did not consent to the Sublease. The question is whether the absence of such consent renders the sublease void and forecloses a conclusion that New Co. was obligated to pay rent to MG. The prohibition against subleasing without a landlord's consent arises by statute and may also be included in the lease itself. It is well-established, however, that this limitation is for the benefit of the landlord, and an assignment of a lease in violation of this limitation does not invalidate the lease, nor relieve the lessee from the obligations imposed by such lease or the assignee who assumes them.

The effect of a subleasing of a leased premises, without the consent of the lessor, is to give to the lessor the right to forfeit the lease. It does not have the effect of nullifying the lease ipso facto. The sublease may become valid and binding by either the agreement, acquiescence or ratification of the lessor. Because any objection to a sublease belongs to the landlord, courts have rejected sublessees' attempts to invoke this prohibition to their advantage.

Applying these principles here, the court held that New Co. cannot enter into the sublease, enjoy occupancy of the premises, and then complain that the sublease is unenforceable. The fact that the Landlord did not consent to the sublease is of no consequence to the inquiry here.

Having determined that the Sublease is not void, the court then considered whether the Sublease created an indebtedness from New Co. to MG.

New Co. insists no indebtedness to MG arises under the sublease because the sublease does not specify the party entitled to receive New Co.'s rental payment, and New Co. paid its rent to Landlord. But New Co. provides no authority for the proposition that its payments to Landlord somehow nullify its obligation to MG under the sublease.

The Landlord is not a party to the sublease and has no rights or obligations under the sublease. The sublease is only between New Co. and MG, and evidences no intent to benefit any other parties. Thus, the only party to whom New Co. is obligated under the Sublease is MG. Consequently, the summary judgment evidence establishes that New Co. was indebted to MG at the time the writ of garnishment was served. The writ of

garnishment was broad enough to capture this debt.

Yarbrough* v. *Household Finance Corporation III, 455 S.W.3d 277 (Tex.App.-Houston [14th Dist.] 2015, no pet.). After foreclosing on a lien, HFC filed a forcible detainer action against the Yarbroughs. The justice court awarded possession to HFC.

The Yarbroughs filed a plea to the jurisdiction and an amended plea alleging that the foreclosure sale was void because the deed of trust was forged and void. The county court denied the pleas, and the Yarbroughs amended their answer to assert an affirmative defense of forgery. Ultimately, the county court granted final judgment to HFC.

The Yarbroughs contend the justice and county courts lacked jurisdiction in this forcible detainer action because there was a genuine issue regarding title intertwined with the issue of possession. The title issue concerns whether a tenancy was created by the deed of trust and associated foreclosure sale when the deed of trust was allegedly void due to forgery. HFC contends the deed of trust creates a tenancy at sufferance, which generally supports jurisdiction in a forcible detainer action, but HFC does not address the merits of the Yarbroughs' forgery argument.

A forcible detainer action requires proof of a landlord-tenant relationship. Although such a relationship is not a prerequisite to jurisdiction, the lack of such a relationship indicates that the case may present a title issue. A deed of trust may include a tenancy-at-sufferance clause that creates a landlord-tenant relationship when the property is foreclosed. Under these circumstances, a defendant's complaints about defects in the foreclosure process generally do not require a justice court to resolve a title dispute before determining the right to immediate possession, and the justice court has jurisdiction.

The Yarbroughs argue that a forged deed of trust cannot establish a tenancy-at-sufferance relationship between the Yarbroughs and HFC. This case, therefore, is more akin to those in which the parties disputed the existence of a landlord-tenant relationship.

Because the Yarbroughs contend the deed of trust and resulting substitute trustee's deed are void due to forgery, they have raised a genuine issue of title so intertwined with the issue of possession as to preclude jurisdiction in the justice court. A prerequisite to determining the immediate right to possession will be resolution of the Yarbroughs' title dispute concerning forgery of the deed of trust. Accordingly, the justice and county courts lacked jurisdiction.

Hernandez* v. *Gallardo, 458 S.W.3d 544 (Tex.App.-El Paso 2014, pet. denied). Gallardo bought Edith's home at a foreclosure sale in 2005. Edith claimed to have made an agreement with Gallardo that she could stay in the house and buy it back later when her credit improved. Hernandez moved in with Edith in 2006. Later on in 2006 the house was damaged by a flood, and Edith and Gallardo argued about the need for repairs.

Edith and Gallardo signed up a lease in 2008. Hernandez was not included as an authorized occupant. Rent was due for August, but didn't get paid. Gallardo then had Edith and Hernandez evicted. They then filed suit alleging breach of contract by failing to perform certain repairs as required by Chapter 92 of the Texas Property Code, by failing to install operable security devices, by improperly terminating the lease, and by committing retaliatory eviction. The four elements of a breach of contract claim are: (1) the existence of a valid contract; (2) performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages to the plaintiff resulting from that breach.

As to the claim regarding repairs, Texas Property Code. Section 92.052(a) provides, in pertinent part, that a landlord must make a diligent effort to repair or remedy a condition (i) if a tenant specifies a condition in a written notice, (ii) tenant is not in default in paying rent when the notice is given, and (iii) the condition materially affects the physical health or safety of an ordinary tenant or arises from the landlord's failure to provide hot water. Here, Edith and Gallardo failed to provide any evidence that they had sent the required notice, that they weren't in payment default, and that the condition affected their health or safety.

As to the claim for failure to install security devices, Texas Property Code § 92.153 requires a landlord to equip a dwelling with certain security devices, including a doorknob lock or keyed dead bolt on each exterior door, without the necessity of a tenant request. In addition, § 92.158 provides that a landlord shall repair or replace a security device on request or notification by the tenant that the security device is inoperable or in need of repair or replacement. Section 92.158 provides specific remedies for the landlord's non-compliance. The tenant may install or rekey and deduct the cost from rent, file a suit to compel compliance, or terminate the lease. Here, Edith and Gallardo did not pursue any of these remedies, but sued Gallardo for damages instead.

Finally, as to the claim that Gallardo had improperly terminated the lease by retaliating against them in violation of Property Code § 92.331. That provision states, however, that a lease termination or eviction does not constitute retaliation where the tenant is delinquent in paying rent.

PART VI
DEEDS AND CONVEYANCES

Stribling* v. *Millican DPC Partners, LP, 458 S.W.3d 17 (Tex. 2015). When the metes-and-bounds description in a deed conflicts with another, more general, description in the deed, the metes-and-bounds description controls. In this boundary-dispute case, the court of appeals sided with the general description. But, because the metes-and-bounds description better indicates the parties' intent, and because the court of appeals' approach creates uncertainty in land title whenever a deed's general and specific descriptions differ, the Supreme Court reversed.

Cosgrove* v. *Cade, No. 14-0346 (Tex. June 26, 2015). In 2006, the Cades and Cosgrove executed a contract for the sale of the Cades' property. The property was subject to an oil, gas, and mineral lease between the Cades and Dale Resources. The sales contract stated that the Cades were to retain all mineral rights. The warranty deed, however, failed to include the mineral reservation. Nevertheless, mineral lessee kept sending royalties to the Cades. In 2010, Cosgrove woke up to the fact that they weren't getting the royalty checks. In 2011, the Cades filed a declaratory judgment action and sought reformation of the deed to include the mineral reservation.

The trial court ruled that the Cades' claims were time-barred and also denied their deed-reformation and breach-of-contract arguments. Both parties appealed. The court of appeals reversed the grant of summary judgment for Cosgrove, affirmed the denial of summary judgment for the Cades, and held that the discovery rule delayed the accrual of limitations for a deed-reformation claim because a mutual mistake in a deed is a type of injury for which the discovery rule is available.

There is generally a rebuttable presumption that a grantor has immediate knowledge of defects in a deed that result from mutual mistake. Application of the presumption means that the limitations period on a claim to reform an incorrect deed begins to run as soon as the deed is executed because the grantor has actual knowledge that the deed is incorrect.

A plainly evident omission on an unambiguous deed's face is not a type of injury for which the discovery rule is available. While certain circumstances may trigger a rebuttable presumption that a grantor has immediate knowledge of defects in a deed that result from mutual mistake; however, the Supreme Court has never decided a case involving a plain omission in an unambiguous deed. While prior cases reserved the possibility of recognizing a rebuttable presumption in plain-omission cases, but the court never explicitly endorsed it, and declined to do so now. At execution, the grantor is charged with immediate knowledge of an unambiguous deed's material terms.

Parties are charged as a matter of law with knowledge of an unambiguous deed's material omissions from the date of its execution, and the statute of limitations runs from that date. The Cades had actual knowledge of the deed's omission upon execution. They were charged, as a matter of law, with actual knowledge of what the deed included, and excluded, and limitations began to run from the date of execution. An injury involving a complete omission of mineral interests in an unambiguous deed is inherently discoverable. When a reservation of rights is completely omitted from a deed, the presumption of knowledge becomes irrebuttable because the alleged error is obvious. It is impossible to mistake whether the deed reserves rights when it in fact removes rights. In cases like these which involve an unambiguous deed, the conspicuousness of the mistake shatters any argument to the contrary.

While the Court has recognized that public records can impose an irrebuttable presumption of notice on a grantee to prevent application of the discovery rule, the court has not yet recognized circumstances where Property Code §13.002 imposes constructive notice on a grantor as well. The court did so in this case, to the extent that public records filed under § 13.002 establish as a matter of law a lack of diligence in the discovery of a mistaken omission in an unambiguous deed. The court did not impose an affirmative duty to search the public record; it said only that obvious omissions are not inherently undiscoverable.

Tipton* v. *Brock, 431 S.W.3d 673 (Tex.App.-El Paso 2014, pet. denied). In 1999, the Tiptons entered into a contract to buy some property. The contract provided that the seller, Brock, would retain the minerals. The title company prepared the deed and sent it around for review. It did not contain the mineral reservation in favor of the seller, but instead contained an exception for minerals previously reserved. Nobody complained and it was executed and recorded. In 2000, a "correction deed" was filed that included the mineral reservation in favor of Brock. The Tiptons claimed the correction deed was forged. In 2006, Brock sued the Tiptons for reformation of the deed based on mutual mistake. The Tiptons argued, among other things, that the lawsuit was barred by limitations.

A suit for reformation is subject to the four-year statute of limitations. In general, the statute of limitations begins to run when a particular cause of action accrues.

Ordinarily, a grantor is charged with knowledge of all defects in a deed, although the presumption of immediate knowledge is rebuttable under certain circumstances. The statute of limitations with regard to a reformation claim begins to run on the date the deed is executed. However, the Supreme Court of Texas recognizes two exceptions, the discovery rule and the doctrine of fraudulent concealment, which may extend the statute of limitations.

The discovery rule is a limited exception to the general principle that a statute of limitations begins to run when an injury occurs, regardless of when the plaintiff learns of the injury. The discovery rule defers accrual of a cause of action until the claimant knows or, by exercising reasonable due diligence, should know of the facts

giving rise to the claim. The discovery rule applies when the injury is both inherently undiscoverable and objectively verifiable. An injury is inherently undiscoverable if it is the type of injury that is not generally discoverable by the exercise of reasonable diligence. The requirement of inherent undiscoverability recognizes that the discovery rule exception should be permitted only in circumstances where it is difficult for the injured party to learn of the negligent act or omission. The court decides whether the nature of a plaintiff's injury is inherently undiscoverable, on a categorical basis rather than a case-specific basis.

The Tiptons argue that Brock failed to meet the two requirements of the discovery rule. They assert that the sales contract clearly states that the seller is to retain all mineral rights, that it is equally apparent that the 1999 deed does not contain any language reserving mineral rights, that Brock's testimony is that none of them read the 1999 deed before they executed the deed, and that whoever prepared the 2000 correction deed understood that the 1999 deed language did not reserve any of Brock's mineral rights. As such, the Tiptons contend that the 1999 deed is not ambiguous on its face and that Brock's failure to reserve any minerals was not inherently undiscoverable as a matter of law.

Trahan* v. *Mettlen, 428 S.W.3d 905 (Tex.App.-Texarkana 2014, no pet.). The Mettlens and the Trahans entered into a written contract memorializing the terms of their agreement regarding the sale and purchase of the Property. There is no mention of a reservation of mineral rights in that contract. The warranty deed transferring title to the Property from the Mettlens to the Trahans, however, is a different story. That deed recorded in Nacogdoches County, Texas on April 21, 2006, includes a clear reservation of mineral rights by the Mettlen.

Mr. Trahan testified that he was not given a copy of the deed when he purchased the property and that he first obtained a copy of the deed in September 2010. He acknowledged being present at the closing where the deed was executed but testified that he did not read the deed and that it was not physically delivered to him at that time. The Trahans contend that they were unaware of the reservation of mineral interests contained in the warranty deed until 2010, when they discovered oil and gas company vehicles on their property. They argue that the statute of limitations did not begin to run until that time.

In an effort to establish tolling of the applicable four-year limitations period, the Trahans rely heavily on the written contract, which states that the Trahans are purchasing the Property "with all rights, privileges and appurtenances pertaining thereto, including but not limited to: water rights, claims, permits, strips and gores, easements, and cooperative or association memberships . . . ." The Trahans contend that the omission of even a reference to a reservation of mineral rights by the Mettlens in the written sales contract, which is a memorialization of the parties' intentions, establishes that such a term was not a part of the bargained-for exchange. Consequently, the Trahans argue that, under the terms of the written agreement, they were entitled to a conveyance of the entirety of the ownership interest held by the Mettlens at the time the agreement was executed, including any mineral rights.

The Trahans testified via deposition that they believed they were purchasing both the surface and mineral interests in the Property and that they believed all such rights had been transferred to them through this transaction; however, they also admitted that the parties did not discuss ownership of mineral interests prior to executing the contract, including whether the Mettlens even owned any mineral interest that could be conveyed. Finally, the Trahans claim that the reservation of mineral rights was included in the warranty deed as the result of a mutual mistake and that, consequently,

they are entitled to reformation of the deed to reflect the parties' original agreement.

A mutual mistake occurs when contracting parties have a common intention, but, due to a mutually-held mistake regarding a material fact, the written contract does not accurately reflect that intention. The elements of mutual mistake are thus (1) a mistake of fact, (2) held mutually by the parties, and (3) which materially affects the agreed-upon exchange. The facts of this case do not establish the elements of mutual mistake in the traditional sense. However, the Supreme Court has held that unilateral mistake by one party and knowledge of that mistake by the other party, is equivalent to mutual mistake.

Here, the evidence is undisputed that the original contract to purchase the Property contained no reservation of mineral rights. Mrs. Mettlen testified that she called someone at the title company office and instructed them to include a reservation of mineral rights in the deed. The Trahans' testimony is that they did not know about Mrs. Mettlen's telephone call, that they were not aware of the reservation in the deed until 2010, and that the Mettlens never disclosed the reservation to them. Under these circumstances, the court will assume that this evidence is sufficient to establish the equivalent of a mutual mistake, that is, that the Trahans entered into the written real estate contract operating under a unilateral mistake regarding a material term of the agreement and that the Mettlens were aware of that mistake. Based on this assumption, reformation of the contract is a potentially appropriate remedy. However, whether that remedy has been invoked in a timely manner is actually the dispositive issue in this case.

There is no dispute that, under the applicable statute of limitations, the Trahans had four years from the date their cause of action accrued to file suit. Likewise, there is no dispute that this suit was filed more than four years after the deed was executed. The Trahans contend, however, that the statute of limitations was tolled under the facts of this case because they did not discover the facts giving rise to their cause of action until 2010, almost four years after the real estate transaction at issue was completed.

The first step in analyzing this issue is determining when the Trahans' cause of action accrued. Generally, purchasers of real property are immediately charged with knowledge of all defects in the deed conveying title to the purchased property, though this presumption of immediate knowledge is rebuttable.

If the mistake is plainly evident or clearly disclosed on the face of the deed, such as when the parties unquestionably agreed to a reservation of mineral interests by the seller but that reservation was omitted from the deed, all parties are chargeable with knowledge of the contents of the deed. The statute of limitations begins to run from either the date the deed was executed by the grantor or the date it was delivered to the grantee. On the other hand, if the mutual mistake is not plainly evident on the face of the deed, but, instead, relates to the legal effect of a material term of the parties' agreement, the statute of limitations begins to run when the mistake was, or in the exercise of diligence should have been, discovered.

Finally, the subsequent conduct of the parties may rebut the presumption that all parties are charged with immediate knowledge of the mistake. In that event, the discovery rule delays the accrual date or tolls the running of the statute of limitations until the mistake is, or in the exercise of reasonable diligence should have been, discovered.

The court assumed that the evidence establishes a unilateral mistake on the part of the Trahans coupled with inequitable conduct--the failure to disclose the reservation of mineral rights prior to or even at the closing--by the Mettlens. This is the equivalent of a mutual mistake and allows

the court to consider reformation. However, the statute of limitations must be complied with as well. The difficulty with the Trahans' position is that the deed unequivocally discloses the Mettlens' reservation of oil, gas and other minerals. The reservation is set out immediately after the property description and is clear and obvious. It does not require interpretation as to its legal effect. There is no evidence that, after the execution of the deed, the Mettlens misled the Trahans or lulled them into a false sense of security that the mineral rights were conveyed in the deed or that the Mettlens attempted to hinder the Trahans from reading the plain provisions of the deed. There was no claim that the reservation was ambiguous or could be interpreted in different ways--it is an express written reservation of all mineral rights. The alleged mistaken term is clearly evident and disclosed in the deed; the parties are charged with the knowledge of the terms. Consequently, the statute of limitations begins to run from the date of execution of the deed by the grantor and the date of delivery to the grantee. The discovery rule is inapplicable.

The Trahans further allege that the Mettlens fraudulently concealed from them the fact that their reservation of mineral rights was included in the deed. They further allege they had no knowledge of the reservation until mineral exploration began on their property. They contend that the Mettlens' fraudulent concealment invoked the discovery rule, which, in turn, tolled the running of the statute of limitations until they actually discovered the reservation. But the warranty deed conveying title to the Trahans contains a clear and unambiguous reservation of mineral rights. The discovery rule for fraudulent concealment tolls the running of the statute of limitations only until the plaintiff discovers the fraud or could have discovered the fraud through the exercise of reasonable diligence. There is no evidence to suggest that, following their execution of the deed, the Mettlens engaged in any conduct designed to mislead the Trahans or prevent them from reviewing the warranty deed. More importantly, however, even assuming that the evidence showed fraudulent concealment by the Mettlens, the Trahans could have immediately discovered such fraudulent conduct by the exercise of reasonable diligence (reading their deed). However, the record reflects that the Trahans, who were present when the warranty deed was executed, failed to discover this mineral reservation even though it is clearly disclosed in the deed. Consequently, whether the discovery rule applied under the theory of fraudulent concealment or not, it did not operate to toll the running of the statute of limitations on the Trahans' cause of action.

Griswold* v. *EOG Resources, Inc., 459 S.W.3d 713 (Tex.App.-Fort Worth 2015, no pet. history to date). Way back when, Allred conveyed a 74-acre tract to Barker, reserving half the minerals. Later, both Allred's and Baker's interests in the land and minerals were foreclosed on. The property ended up being acquired by Williams and Wellington.

In 1993, Williams and Wellington conveyed 31.25 out of the 74 acres to the Caswells. The deed included a "save-and-except" clause that read: "LESS, SAVE AND EXCEPT an undivided 1/2 of all oil, gas and other minerals found in, under[,] and that may be produced from the above described tract of land heretofore reserved by predecessors in title. . ." The Caswells then conveyed the 31.25-acre tract to the Griswolds. That deed contained the same save-and-except clause. This court is being asked to determine the meaning and effect of the save-and-except clauses.

A warranty deed will pass all of the estate owned by the grantor at the time of the conveyance unless there are reservations or exceptions that reduce the estate conveyed. Property " excepted" or " reserved" under a deed is never included in the grant and is something to be deducted from the thing granted, narrowing and

limiting what would otherwise pass by the general words of the grant. Reservations must be made by clear language, and courts do not favor reservations by implication. Exceptions must identify, with reasonable certainty, the property to be excepted from the larger conveyance. Deeds are to be most strongly construed against the grantor and in favor of the grantee. This rule applies to reservations and exceptions.

The Griswolds argue that the save-and-except clause attempts to except an interest previously reserved by predecessors in title when, in fact, the only interest previously reserved by a predecessor in title was extinguished by the earlier foreclosure, when the entire estate--both mineral and surface—merged. Because the deeds excepted from their conveyance something that didn't exist, so the exception was just a nullity.

EOG (the mineral lessee, who had been paying royalties on half the minerals to the Griswolds) argues that the save-and-except clause in the Caswell deed clearly expressed an intent to save and except half of the minerals in favor of the Caswells, and the fact that the reason stated in the deed for the exception--"heretofore reserved by predecessors in title" --was erroneous, false, or mistaken does not nullify the entire save-and-except clause or defeat the expressed intent to save and except a one-half mineral interest from the estate conveyed.

Exceptions and reservations are not strictly synonymous. An exception generally does not pass title itself; instead, it operates to prevent the excepted interest from passing at all. On the other hand, a reservation is made in favor of the grantor, wherein he reserves unto himself a royalty interest, mineral rights, or other rights. But a save-and-except clause may have the same legal effect as a reservation when the excepted interest remains with the grantor. Here, the language in the Caswell deed did not reserve the interest in the minerals -- it only excepted it from the grant. However, since the interest did not pass to the grantee and was not outstanding in another the legal effect of the language excepting it from the grant was to leave it in the grantor. Thus, while as the Griswolds contend, a save-and-except clause will not operate to pass title, it may be effective to fail to pass title, that is, to exempt a portion of the grantor's estate from passing to the grantee, leaving title with the grantor if the interest excepted is not outstanding in another.

The court held that the save-and-except clause in the Caswell deed and in the Griswold deed excepted a one-half interest in the oil, gas, and other minerals in plain and unambiguous language. The phrase at the end of the save-and-except clause--"heretofore reserved by predecessors in title" --was but a recital purporting to state why the exception was made. Although the chain of title conclusively negated the recited reason for the exception. Consequently, although the save-and-except clauses in the Caswell deed and the Griswold deed did not reserve an interest in the minerals but merely excepted a one-half mineral interest from the grant to the Caswells and, subsequently, the grant to the Griswolds, and because the excepted interest did not pass to the Caswells or to the Griswolds as grantees and was not outstanding in another at the time the Caswell Deed was executed, the legal effect of the save-and-except clause at issue was to leave the excepted one-half interest in the oil, gas, and other mineral interests in Williams and Wellington.

Union Pacific Railroad Company* v. *Ameriton Properties Incorporated, 448 S.W.3d 671 (Tex.App.-Houston [1st Dist.] 2014, pet. denied). Union Pacific's predecessor began a condemnation of a right-of-way back in the 1880s. Mary Lawrence settled the condemnation at that time by executing a deed. The deed described the parcel being conveyed, in part by saying it was the land being condemned for the right-of-way. Disputes about what the deed actually meant have gone on for

more than a century.

In this case, the dispute is whether the deed conveys only a right-of-way or conveys fee simple to the tract. The railroad has long since removed its tracks.

The construction of an unambiguous deed is a question of law for the court. The primary duty of a court when construing such a deed is to ascertain the intent of the parties from all of the language in the deed by a fundamental rule of construction known as the "four corners' rule."

The deed states that Mary has "granted, bargained, sold, released, and by these presents [does] give, grant, bargain, sell and release to [the Grantee] the following described tract or parcel of land," which is then described. The description includes the clarification, "Being the land condemned by the Commission to the use of said Railway Company for Right of Way in Case No. 706." The deed also reserved "the right to all timber upon the tract given for right of way . . ."

According to Ameriton, the use of the term "right of way" in these clauses indicates that the deed conveyed only a right of way across the land, not a fee interest in the land itself. Ameriton argues that the deed contains no indication that it conveyed any interest other than what was condemned, that is, a right to use the land.

On the contrary, said the court, the deed's only reference to the condemnation was in the context of describing the location of the land to be conveyed. That is, it merely states that the deed conveys the same land that was at issue in the condemnation proceeding, a statement that the court did not find particularly remarkable given that Mary executed the deed to settle a legal dispute. The deed contains no indication that the interest conveyed was limited to the interest that the railroad could have obtained through the condemnation proceeding.

Ameriton also argues that the interest conveyed by the deed was necessarily limited to that which the railroad could have obtained by condemnation. There was no evidence of any agreement between the parties that agreed to limit the grant like that. Ameriton claimed that the reference to the property as "given for right of way" in the clause relating to retention of timber rights supports its position that the entire grant was just for a right-of-way. The precise language is contained in a reservation of rights, not a granting or habendum clause, and states, at most, a reason or purpose for the grant, not a limitation on the interest conveyed. The court thus declined to read the phrase "given for right of way" in the clause reserving Mary's timber rights as prevailing over all other language in the deed purporting to convey "the following described tract or parcel of land."

Ameriton also argues that Mary accepted the condemnation award for a right of way across the property, rather than money paid as a purchase price, confirming that she conveyed only what the railroad could obtain through condemnation, that is, a right of way. Ameriton does not cite any evidence supporting this claim in the record. On the contrary, Mary was paid $437 for whatever rights she granted under the deed. Furthermore, any evidence contrary to the face of the deed would be parol and could only be introduced if the deed was ambiguous, which the court held, as a matter of law, it was not.

According to Property Code § 5.001, unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law, the deed conveys a fee estate. While this deed does not explicitly state that it conveys a fee title, it also lacks "express words" clearly indicating an intent to convey a lesser estate. Instead, it purports to convey "a tract of land," describing the grant in terms of land not in terms of the grantee's rights over the land. Further, Mary reserved

timber rights. If the deed conveyed only an easement, timber rights would not have been conveyed and there would be no need to reserve them. The reservation of timber rights implies that the deed conveyed an estate that would, but for the reservation, have included those rights. That is, the reservation implies that the deed conveyed a fee estate. The court held that the deed unambiguously granted an undivided, fee simple interest in the property.

Saravia* v. *Benson, 433 S.W.3d 658 (Tex.App.-Houston [14th Dist.] 2014, no pet.). This case is also discussed under Mortgages and Foreclosures. Benson sold some property to Halco Waste Container, taking back a note and deed of trust. The deed of trust had a due-on-sale clause. It also contained a clause permitting assumption of the debt with Benson's consent.

Halco leased part of the property to Saravia, then defaulted on the loan. Benson began the foreclosure process. A few months later, Halco sold the property to Gandy, who assumed the debt. Six days later, Gandy filed bankruptcy. While Gandy's bankruptcy case was pending, Benson foreclosed and acquired the property at the foreclosure sale.

Benson and Saravia then entered into an earnest money contract for Saravia to purchase the property. About a month later, Gandy sued Benson for wrongful foreclosure and filed a lis pendens. Notwithstanding that, Benson and Saravia closed. Saravia didn't know about the lawsuit. The trial court set aside both of the two foreclosures and also held that Saravia was not a bona fide purchaser.

The court of appeals held that the second foreclosure was proper. Because the foreclosure of the lien and sale of the property to Benson were proper, Benson's subsequent sale to Saravia was also proper. Gandy contends that Saravia lacks standing to challenge the trial court's determination of title, because Saravia purchased the property with constructive notice of Gandy's lis pendens and Saravia is not the holder of Halco's underlying debt. The court agreed with Gandy that Saravia took title to the property subject to Gandy's lis pendens, but disagreed that Saravia lacks standing to assert his claim to good title.

Status as a bona fide purchaser is an affirmative defense to a title dispute. A bona fide purchaser acquires real property in good faith, for value, and without notice of any third--party claim or interest. A properly filed lis pendens operates as constructive notice to the world of its contents. Gandy filed a lis pendens two days before Benson and Saravia closed the sale of the property. Saravia purchased the property at closing. Saravia thus is properly charged with constructive notice of the previously filed lis pendens. Because Saravia had constructive notice, Saravia is not a bona fide purchaser.

Saravia, however, has standing to establish proper title, even though he was not the holder of the note. To establish standing, a plaintiff must show that he is personally aggrieved and that his alleged injury is concrete and particularized, actual or imminent, not hypothetical. When a third party has a property interest, whether legal or equitable, that will be affected by a foreclosure sale, the third party has standing to challenge the sale to the extent that its rights will be affected by the sale. Concomitantly, a property owner whose title is challenged based on a faulty foreclosure has standing to defend his title.

Saravia further contends that Benson is liable for breach of the general warranty deed. A warranty of title is a contract on the part of the grantor to pay damages in the event of failure of title. The purpose of a general warranty deed is to indemnify the purchaser against the loss or injury he may sustain by a failure or defect in the vendor's title. The grantor warrants that he will restore the purchase price to the grantee if

the land is entirely lost.

Benson conveyed the property to Saravia by a general warranty deed. Benson warranted that the property was not subject to any debts or liens. In consideration for the property, Saravia paid $60,000 plus $13,421.72 in delinquent property taxes. Saravia also has undertaken the expense of defending his title. Because it concluded that Saravia has title to the property pursuant to a general warranty deed, the court remanded to the trial court his claims against Benson for breach of that deed.

Teal Trading and Development, LP* v. *Champee Springs Ranches Property Owners Association, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. denied). This case is also discussed in Land Use Planning and Restrictions.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made “subject to” the CCRs.

At one point, Teal Trading’s predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

The doctrine of estoppel by deed precludes parties to a deed from denying the truth of any material fact asserted in the deed. Estoppel by deed is founded upon the theory that the parties have contracted upon the basis of the recited facts. Thus, although estoppel by deed figuratively closes the mouths of the parties to a deed and their privies from challenging the truth of the recited facts in a deed, it does not validate something that is otherwise invalid and cannot bind or benefit strangers to the deed.

The court held that, because the CCRs were neither a conveyance or a lease, it could not be an effective or enforceable reservation. In addition, each subsequent deed's recitation that the conveyance is subject to the Declaration is not a clear intention to reserve or except an interest from the conveyance" of that deed. Champee Springs takes the position that, when a grantee takes property "subject to" certain deed restrictions of record, the grantee has acknowledged the validity and enforceability of the restrictions, and thus is estopped by deed from denying their validity and enforceability. The court disagreed. Those words mean "subordinate to," "subservient to," or "limited by." They are words of qualification and not of contract. They are notice to and an acknowledgment that such restrictions are of record, but they are not in fact an acknowledgment of the validity of the restrictions.

In fact, a “subject to" clause may simply protect a grantor on its warranty. When property is conveyed by warranty deeds, it is

in the interest of the grantors that the conveyance be made subject to every restriction or encumbrance which not only does apply to such property but also may apply. The inclusion of restrictions in the "subject to" clause may thus express a wise precaution on the part of the grantor. It would indeed be foolhardy for a grantor who is delivering a warranty deed to fail to refer to a restriction which may at some time in the future be held to apply to his property, merely to avoid the criticism of excess wordiness. Thus, it is not unusual for conveyances to be made subject to all recorded covenants, easements and restrictions, without specific enumeration, and it would be inappropriate, to say the least, to infer restrictions because it may subsequently turn out that none then applied to the property.

Having recognized that the meaning of a "subject to" clause is somewhat contextual, the court examined the "subject to" clauses contained in Teal Trading's chain of title. The clauses in some of the deeds in the chain stated they were subject to exceptions listed on an attached exhibit, to the extent they were valid and existing and affect the property.

Because none of the deeds within the chain of title from Cop to Teal Trading acknowledge the validity and enforceability of the non-access restriction, Champee Springs did not show as a matter of law that Teal Trading is estopped by deed from challenging the non-access restriction's validity and enforceability. The trial court erred by granting Champee Springs's motion for summary judgment.

PART VII
VENDOR AND PURCHASER

Winston Acquisition Corp. **v.** ***Blue Valley Apartments, Inc.,*** 436 S.W.3d 423 (Tex.App.-Dallas 2014, no pet.). Winston and Blue Valley entered into a contract for Winston to buy the apartments. The contract included a free look and inspection period. It also provided a list of due diligence items to be provided by the seller, which included an EPA lead-based paint disclosure. An exhibit said that Winston had received the disclosure, but it had not, in fact, been delivered. The seller, Blue Valley delivered an earlier Phase I to Winston that disclosed that lead-based paint had been used during the initial construction of the apartments and recommended an O&M plan for the property.

The contract provided that Winston could notify Blue Valley of its disapproval of inspection matters. The only notice given by Winston had to do with the title commitment. When Winston wanted to extend the closing date without paying a required extension fee, Blue Valley refused. Winston then sent a letter stating that it was rescinding and revoking the contract because Blue Valley had failed to provide the EPA Pamphlet. Blue Valley responded, saying that Winston couldn't complain about not getting the EPA Pamphlet because it hadn't raised that during the inspection period.

Each party filed suit separately. The suits were consolidated and the trial court entered judgment in favor of Blue Valley.

The parties devoted considerable argument to the merits of whether Blue Valley was or was not required to provide the EPA Pamphlet in conjunction with exhibit I, and whether the EPA Pamphlet was or was not material to the contract. But the court said it need not reach these issues, nor did it need to consider whether Blue Valley's failure to provide the EPA Pamphlet was excused. The contract specified the time period in which Winston was to object to any deficiencies, and further specified the date the contract was to close. The record reflects that Winston failed to comply with both provisions.

Having waived its right to complain about the lack of an EPA Pamphlet, Winston was obligated to close on December 15,

2010. Winston failed to do so. Therefore, the trial court did not err in concluding Winston breached the Contract by failing to close at the appointed time.

Bryant* v. *Cady, 445 S.W.3d 815 (Tex.App.-Texarkana 2014, no pet.). Certain executory contracts for conveyance of Texas real estate that is used or is to be used as the purchaser's residence or the residence of certain relatives of the purchaser are statutorily regulated. Sellers under covered contracts must, among other things, provide to the purchaser, during January of each year during the contract's term, an annual accounting statement with specified contents or pay liquidated damages and reasonable attorney fees. Bryant, Barfield and Everett sued Cady claiming to be purchasers under covered executory contracts and alleging that Cady failed to give them the required annual accounting statement regarding their respective transactions with him. In none of these three transactions was any annual statement furnished; in each case, the dispute is whether the contract is an executory contract under the statute.

The transactions in question involved three documents, a lease, a sale agreement, and a receipt. The three transactions were structured essentially the same way, each involving a ten-year term lease of residential real estate followed by a discounted sale of the respective property to the lessee.

The three plaintiffs filed a joint declaratory judgment action, alleging that the documents signed by the parties amounted to executory contracts and that Cady had failed to provide them with the required annual accounting statements. Cady argued that the sale agreements were not executory contracts because they lacked consideration and acceptance and were, therefore, unenforceable unilateral contracts. He also claimed that the sale agreements were not options to purchase and that the documents were typical real estate contracts rather than executory contracts. The trial court ruled in favor of Cady. The court of appeals reversed, holding that the contracts were supported by considerations and that the contracts were executory contracts.

Consideration is a fundamental element of every valid contract. Consideration is a present exchange bargained for in return for a promise and consists of benefits and detriments to the contracting parties. . For consideration to exist, there must be either a benefit to the promisor or a detriment to the promisee. A promisor "benefits" when the promisor acquires a legal right to which the promisor would not otherwise be entitled in exchange for a promise. A promisee suffers a legal "detriment" when, in return for a promise, the promisee surrenders a legal right that the promisee otherwise would have been entitled to exercise. Lack of consideration occurs when the contract, at its inception, does not impose obligations on both parties.

Here, the leases call for a $1,000.00 security deposit, and the receipts acknowledge the receipt of those amounts. Cady contends that the $1,000.00 noted in the receipts is nothing more than the security deposit required under the leases and that the plaintiffs are not obligated to do anything under the agreements to sell. The court disagreed. While the receipts mention rent several times, they reference neither the lease nor a security deposit. The receipts plainly state that Cady's receipt of the $1,000.00 from the plaintiffs obligates and binds "all parties" to the "agreements" or "paperwork" signed on that date. Here, it is undisputed that the leases were signed on the same date as their respective agreements to sell. The receipts also state that failure to make the first month's rent payments on time means "all agreements are null and void." So, the transactions were supported by consideration.

Cady then argued that the documents were not executory contracts because the agreements to sell were not options to purchase. For purposes of the annual

accounting requirement, the Texas Property Code provides that an option to purchase real property that includes or is combined or executed concurrently with a residential lease agreement, together with the lease is considered an executory contract for conveyance of real property. Property Code § 5.062(a)(2).

It is undisputed that the leases, being signed on the same day, were executed concurrently with the agreements to sell. An option contract has two components, (1) an underlying contract that is not binding until accepted and (2) a covenant to hold open to the optionee the opportunity to accept.

The three agreements to sell are substantially similar. The agreements state that Cady, "agrees to sell" a specific property to the buyer. The agreements mandate closing dates shortly after the expiration of each lease. By the unambiguous terms of the agreement, as long as the paintiffs live on the property for the ten years of the lease and make timely rental payments, Cady is obligated to sell them the property. By their actions, any of the three plaintiffs may elect or decline to purchase the property. If they live on the property for the ten-year lease period and timely pay all their rental payments, they have elected to purchase the property and, like Cady, are bound to the purchase/sale. However, if any of the Appellants choose not to purchase the property, they need only move from the property at any time, thereby rendering the sale agreement "null and void." Both Cady and the plaintiffs are bound to the agreements, but only the plaintiffs have the option to decline the purchase.

The court held that the agreements are, in effect, options to purchase, and given that they were executed concurrently with residential leases, are executory contracts within the meaning of the statute.

Lauret* v. *Meritage Homes of Texas, LLC, 455 S.W.3d 695 (Tex.App.-Austin 2014, no pet.). Lauret contracted to have Meritage build a new home in Lakeway. Lauret said he made it clear from the beginning that the "main thing" he wanted was a view of Lake Travis. Meritage's salesmen repeatedly assured him that he would because of a 25 foot setback on each neighboring lot.

Before construction started on Lauret's home, however, Meritage informed Lauret that a neighbor was going to build a pool and pool house that would partially obstruct the view of the lake. According to Meritage, the neighbor had deceived the architectural control committee into giving the neighbor a waiver of the setback. The AAC later revoked the waiver, but told the neighbor he could re-submit plans that obstructed Lauret's view a bit less.

Lauret said he wouldn't have bought his lot if he knew the setback could be waived. Turns out, the setback was shown to perspective buyers, but wasn't actually on the subdivision plat.

Lauret tried to sell, but due to a decline in the local housing market, the value of his property had declined significantly. Lauret sued Meritage, asserting that there was a mutual mistake as to the contract and also asserting DTPA violations. The jury found in Lauret's favor, but also found he was contributorily negligent for 49% of his injury. Lauret elected to "restore" his original purchase price in exchange for returning the property. The trial court held that Lauret had failed to prove that he did not have an adequate remedy at law, and therefore held that Lauret was not entitled to restoration of his purchase price.

On appeal, Lauret argued that, although common law requires proof that monetary damages are inadequate before granting rescission, there is no such requirement in the DTPA. Whether restoration under the DTPA encompasses the common-law elements of rescission is an issue of statutory construction and therefore a

question of law that the court reviewed de novo.

The DTPA did not codify the common law, and one of its primary purposes is to provide consumers a cause of action for deceptive trade practices without the burden of proof and numerous defenses encountered in a common law fraud or breach of warranty suit. Under the DTPA's election-of-remedies provision, each consumer who prevails in his DTPA claim may obtain his choice of the following remedies: (i) damages; (ii) injunctive relief; (iii) "orders necessary to restore any party to the suit any money or property, real or personal, which may have been acquired in violation of this subchapter;" and (iv) any other relief the court deems proper. Business & Commerce Code § 17.50(b).

It cannot be doubted that the Legislature intended "may" in the election-of-remedies provision to indicate that the consumer has several remedies from which to choose and that the court is to grant the consumer that relief which the consumer proves a right to receive. Thus, if Lauret established that he was entitled to restoration of his purchase in exchange for returning his property to Meritage Homes, the trial court was required to honor his election of that remedy. Restoration necessarily involves each party restoring property received from the other and is generally limited to cases in which counter-restitution by the claimant will restore the defendant to the status quo ante. The Supreme Court has noted that restoration is similar to the common law remedy of rescission, and like rescission, restoration is appropriate when mutual restitution can restore both parties to their original position. ***Cruz* v. *Andrews Restoration, Inc.***, 364 S.W.3d 817, 825 (Tex. 2012). However, the court was careful to note that the mere fact that restoration is similar to rescission does not compel the wholesale adoption of all of the common law rescission requirements. DTPA restoration is an independent ground of recovery, requiring only that the consumer choose that remedy subject to the defendant's right to plead and prove an offset, but not incorporating common law predicates.

Similarly in this case, the court concluded that requiring a party to prove that he lacks an adequate remedy at law is inconsistent with DTPA restoration. Under the common law, rescission and specific performance are equitable remedies used as substitutes for monetary damages when such damages would be inadequate. Because equitable remedies are generally disfavored under the common law, a party seeking rescission is required to prove that legal remedies--i.e., monetary damages--would not adequately compensate him for his injuries.

Although DTPA restoration is also an equitable remedy, the DTPA's election-of-remedies provision affords a prevailing consumer the right to choose his remedy, and a trial court must honor a consumer's choice of restoration if restoration with an appropriate offset can adequately return the parties to their prior positions. Thus, unlike common-law rescission, restoration under the DTPA is not limited to instances when monetary damages would be inadequate. To read such a requirement into the DTPA would change the language of the election-of-remedies provision to state that a consumer may choose an injunction or restoration only if the consumer first proves that economic damages are inadequate. Thus, the court held that Lauret was not required to prove that he lacked an adequate remedy at law in order to be entitled to restoration under the DTPA.

Smith* v. *Davis, 462 S.W.3d 604 (Tex.App.-Tyler 2015, pet. denied). The Davises, as purchasers, and Smith executed a contract pursuant to which Smith agreed to sell Lot 7 to the Davises for $65,100, with payments over a 360 month period. Two years after signing the contract, the Davises requested that Smith give them a deed to Lot 7. Smith sent instead a vendor's lien note

and deed of trust. In response, the Davises' lawyer sent a letter demanding the deed and also demanding liquidated damages of $273,750 because Smith had failed to provide the Annual Accounting Statement required by Property Code § 5.077.

When Smith didn't meet their demands, the Davises filed suit alleging various statutory violations based on the contract to convey Lot 7. Eventually, the case was tried to a jury. The jury made findings in favor of the Davises based on statutory fraud in a real estate transaction under Business & Commerce Code § 27.01, and failure to provide annual statements under Property Code § 5.077, as well as various other violations of the Property Code. Smith appealed and the court reversed and remanded. On remand, the Davises elected relief for Smith's failure to provide the Annual Accounting Statement. Again, the trial court awarded damages to the Davises. It also alternatively awarded damages for other violations in case the damages for the Annual Accounting Statement were reversed on appeal.

On appeal, Smith claims that the executory contract violates Property Code § 5.072 in two respects. Smith contends that a portion of the contract is oral because the parties orally agreed to convert the contract to a more traditional real estate transaction after a set time period and that his wife, Nancy would sign the necessary documents at a future time. Consequently, their argument continues, the contract is not subject to the restrictions on executory contracts because part of the agreement is oral. Second, they contend that Nancy is not bound by the agreement because neither she nor her authorized representative signed the contract.

Smith is correct that § 5.072 prohibits oral agreements occurring prior to or contemporaneously with the execution of the contract. But the statute also states that the rights and obligations of the parties to a contract are determined solely from the written contract, and any prior oral agreements between the parties are superseded by and merged into the contract.

Smith is also correct that to be bound by an executory contract, the party or his authorized representative must have signed the contract. However, the Smiths argue that Nancy is not bound by the contract because the contract lacks her signature. The trial court's judgment is not against Nancy. The trial court's judgment is against Rex. Smith has provided arguments as to why Nancy should not have had a judgment rendered against her, but there is no such judgment.

Smith also contends that the trial court was required to apply Civil Practice & Remedies Code Chapter 41 in awarding damages under Property Code § 5.077 but failed to do so. When Chapter 41 applies to a cause of action, it limits the amount of exemplary damages a claimant may recover. Moreover, when Chapter 41 applies, a claimant seeking exemplary damages ordinarily must prove by clear and convincing evidence that the damages resulted from fraud, malice, or gross negligence. Alternatively, the claimant may recover exemplary damages if a statute establishes a cause of action authorizing exemplary damages under specified circumstances, provided that the claimant proves the required circumstances under the statute by clear and convincing evidence. Generally speaking, exemplary damages may be awarded under Chapter 41 only if damages other than nominal damages are awarded.

Smith argues that Chapter 41 applies to the Davises' claim under the current version of Property § 5.077, and that the Davises failed to prove by clear and convincing evidence that they suffered actual damages. Chapter 41, by its own terms, clearly and unambiguously applies to any action in which a claimant seeks damages. Moreover, it establishes the maximum exemplary damage award, even when damages are

awarded under another law, unless the other law establishes a lower maximum amount of damages for a particular claim. Under Chapter 41, exemplary damages means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Damages awarded under Section 5.077 are penal in nature.

Chapter 41 requires proof of actual damages as a predicate to exemplary damages. Section 5.077 does not require proof of actual damages as a predicate to a recovery of liquidated damages. Chapter 41 prevails over all other law to the extent of any conflict. Such provisions mean what they say and are to be given effect. The legislature expressed its intent that Chapter 41 controls here, and we are not free to disregard the clear and unambiguous language expressed in the statute.

The court held that Section 5.077 is subject to Chapter 41, and that a claimant must prove more than nominal damages as a predicate to recovery of liquidated damages under Section 5.077.

Finally, Smith argued that the Davises weren't entitled to cancellation and rescission of the Lot 7 contract because they failed to present evidence as to the amount of rent they should have paid in restitution to offset the remedy. The Davises were entitled to cancellation and restitution because Smith had failed to provide the statutory notice of final agreement required bv Property Code § 5.072(d). Smith did not plead offset, so the court held he had waived it.

PART VIII
EASEMENTS

Staley Family Partnership, Ltd.* v. *Stiles, 435 S.W.3d 851 (Tex.App.-Dallas 2014, pet. granted). An easement by necessity is established with proof of (1) unity of ownership of the dominant and servient estates prior to severance, (2) necessity of a roadway, and (3) existence of the necessity at the time of the severance of the two estates. Whether these requirements have been met is determined at the time of severance of the alleged dominant and servient estates.

Necessity at the time of severance is an essential element of an easement by necessity. Staley bore the burden of proving not only unity of ownership and present necessity, but also "'historical necessity,'" i.e., an easement was necessary at the time of the severance.

Staley's problem in this case was that the severance occurred in 1866. That was a long time ago, and the maps available to Staley were not very good. The court said there was no credible evidence in the record that a public road was in existence and being used in 1866 at the northern boundary of what is now the Stiles Tract.

Jentsch* v. *Lake Road Welding, 450 S.W.3d 597 (Tex.App.-El Paso 2014, no pet.). The jurisprudence regarding access to landlocked parcels spans many decades. It is well settled that where there is conveyed a tract of land which is surrounded by the grantor's land, or by his and that of third persons, and to which the grantee can only have access to or egress from through lands other than that conveyed, the grantee has a right of way by necessity over the remaining lands of the grantor. Similarly, where a vendor retains a tract of land which is surrounded partly by the tract conveyed and partly by the lands of a stranger there is an implied reservation of a right of way by necessity over the land conveyed, where grantor has no other way out. A party claiming a roadway easement to a landlocked, previously unified parcel must pursue a necessity easement theory.

In this case, Oswald owned 500 or so acres in Archer County, which he sold off to multiple buyers. After these sales, Oswald retained three tracts. Tract 1 fronted State Highway 79, FM 1954, and Parker road. Tract 2 abutted SH 79 and Parker Road and

bordered Tract 1. The northern property line of Tract 3 abutted Tract 2, but was otherwise surrounded by properties sold before Oswald's death. Among those, were two tracts sold to the Morgans, which bordered Tract 3, and, among other tracts sold to McClendon, a 2.41 acre parcel that had no highway access but bridged two other parcels owned by McClendon that bordered SH79 and Parker Road.

Before the sale of the 2.41 acre tract, Oswald had been able to travel from Tract 3 to Tract 2, but the sale of this "bridging" parcel terminated that access. After trying some other fixes, McClendon and Oswald executed a written easement agreement granting Oswald access across McClendon's property adjacent to a 5-acre tract owned by Oswald. By its terms, the easement would continue only so long as Oswald owned the 5-acre tract.

Lawsuits ensued to determine whether Jentsch had an easement by necessity across the McClendon tract, now owned by Lake Road Welding. The court held that Jentsch had met the tests for easement by necessity. The argument was made by Lake Road Welding that the written easement agreement meant that the easement by necessity was not available to Jentsch. The court held that the existence of the written easement does not adversely affect the determination that an easement exists by necessity. The easement agreement granted Oswald a mere convenient means of ingress and egress to Tract 3, which expired when Oswald, or his estate, no longer owned Tract 3. However, held the court, a mere license to use a way across the land of any surrounding landowners does not operate to negate the existence of a way of necessity over a grantee's land.

PART IX
ADVERSE POSSESSION, TRESPASS TO TRY TITLE, AND QUIET TITLE ACTIONS

Fair* v. *Arp Club Lake, Inc., 437 S.W.3d 619 (Tex.App.-Tyler 2014, no pet.). The heart of this appeal involves a dispute over entitlement to exclusive possession of an 84.3 acre tract that includes the Fairs' 36.24 acre tract. In 1936, the owners of the 84.3 acres signed a "Contract and Agreement" (the lease) providing that they "demised and leased" the land to three named individuals for ninety-nine years. The lease was not recorded in the Smith County deed records until 1941.

ACL was incorporated in 1945 and as of trial had 38 shareholders. ACL is currently in possession of the 36.24 acre tract. There is no written agreement between the Fairs and ACL. In 2010, the Fairs recorded an instrument purporting to give them fee simple title to the tract. Later that year, when the Fairs attempted to take possession of the tract, ACL denied them access. The Fairs then sued to quiet title. The trial court granted summary judgment in favor of ACL and dismissed the Fairs' claims. The Fairs appealed.

The Fairs had sought relief under both the trespass to try title statute and the declaratory judgments act. ACL argued that the Fairs could not pursue declaratory judgment. A trespass to try title action is the method of determining title to lands, tenements, or other real property. Property Code § 22.001. This statute is typically used to clear problems in chains of title or to recover possession of land unlawfully withheld from the rightful owner. In a trespass to try title action, the prevailing party's remedy is title to, and possession of, the real property interest at issue.

The declaratory judgment act provides that "A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights,

status, or other legal relations thereunder." Civil Practice & Remedies Code § 37.004(a). If resolution of a dispute does not require a determination of which party held title at a particular time, the dispute can properly be raised in a declaratory judgment action; in other words, if the determination only prospectively implicates title, then the dispute does not have to be brought as a trespass to try title action. However, the declaratory judgment act cannot be invoked when it would interfere with some other exclusive remedy.

The Fairs then argued that ACL was not entitled to summary judgment on its affirmative defenses of equitable estoppel, waiver, laches, and limitations. The court agreed, holding that ACL had not met its burden of proof that it met all of the elements of each defense.

Finally, ACL asserted that, pursuant to the presumed grant doctrine, the court should presume the original lessees assigned their rights under the 1936 lease to ACL, despite the absence of a recorded assignment. The Fairs disagreed. For purposes of this discussion, the court assumed that the original Contract and Agreement is a lease.

The doctrine of presumed lost deed or grant, which is also referred to as title by circumstantial evidence, has been described as a common law form of adverse possession. The purpose is to settle titles where the land was understood to belong to one who does not have a complete record title, but has claimed the land a long time. To establish title by this doctrine, the evidence must show (1) a long asserted and open claim, adverse to that of the apparent owner; (2) nonclaim of the apparent owner; and (3) acquiescence by the apparent owner in the adverse claim. The rule has been given the most liberal interpretation and application by our courts.

In the dozens of cases dealing with the doctrine of presumed lost deed, all involved disputes over title to real property. None involved solely disputes over possession of real property. ACL has cited no cases applying the presumed grant doctrine to a lease. However, assuming the presumed grant doctrine could apply to a lease of real property, ACL has failed to present evidence to establish the application of the doctrine here as a matter of law.

If the presumed grant doctrine applies to the 1936 lease, the named lessees would be in the position of "apparent owner." ACL and the Fairs both agree the lessees are not asserting rights to the 84.3 acres at this time. Thus, the second element of the presumed grant doctrine has been met. The evidence presented by ACL as to how long it had asserted its claim was insufficient to satisfy the first element. As to the third element, the court said that a party acquiesced in a claim when it can't be shown that the party knew about it. Here there was no evidence that the Fairs knew of the ACL claim of ownership.

Anderton* v. *Lane, 439 S.W.3d 514 (Tex.App.-El Paso 2014, pet. denied). Under Texas law, use of land for grazing cattle, fails to establish adverse possession as a matter of law, unless the fence used is a "designed enclosure" as opposed to "casual fences." Unless the claimant establishes he erected the fence with the purpose of enclosing the property at issue, the fence is a "casual fence" rather than a "designed enclosure."

Kings River Trail Association, Inc.* v. *Pinehurst Trail Holdings, LLC, 447 S.W.3d 439 (Tex.App.-Houston [14th Dist.] 2014, pet. denied). The property in question is located in two subdivisions that abut some nine-hole golf courses and some undeveloped land. Individual plaintiffs owned houses adjacent to the golf courses and the other undeveloped land. Pinehurst bought the property on which the golf courses were built, along with the undeveloped land.

Two POAs and some of the individual owner/members sued Pinehurst claiming title to the undeveloped land by adverse possession. The POAs asserted that they adversely possessed certain biking and hiking trails on the undeveloped acreage. The court presumed for the sake of argument that each of the POAs asserted that it had adversely possessed different parts of the trails in the undeveloped land. For there to be an adverse possession of a part of the trails by one of the POAs, the entity in question must have actually and visibly appropriated that part of the Trails and commenced and continued this appropriation under a claim of right that is inconsistent with and hostile to the claim of another person. Each of the POAs must have appropriated that part of the trails with the intent to claim that part of the undeveloped acreage as its own. Joint use is not enough, because the appropriation must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership by each of the POAs to the part of the trails in question. Mere occupancy of land without any intent to appropriate it does not support adverse possession.

The evidence showed that, while the POAs did maintain the trails, neither excluded Pinehurst or any predecessor in title from using any of the trails. Thus, the court concluded that the evidence does not raise a genuine issue of fact as to whether the POAs actually and visibly appropriated any portion of Pinehurst's property under a claim of right.

Villarreal* v. *Guerra, 446 S.W.3d 404 (Tex.App.-San Antonio 2014, pet. denied). Guerra approached Gonzalez in the late 1960s and asked him if he could lease the property to graze cattle. Gonzalez refused Guerra's request to lease the property and gave him the property instead. Gonzalez instructed Guerra to take the property and to let no one else on it. Thereafter, Guerra placed his cattle on the property and took over the property. Guerra told others, including family members, that the property belonged to him. In the early 1970s, Guerra erected a gate at the property's entrance and placed a lock on the gate. He did not provide Gonzalez, or anyone else for that matter, with a key to the gate. Guerra expressly stated that the purpose of placing the locked gate on the property was to keep others off the property. As the reviewing appellate court, our role is not to substitute our judgment for that of the trial court, even if the evidence would clearly support a different result. Based on the evidence presented, a reasonable factfinder could have concluded that Gonzalez had actual notice that Guerra was claiming the property by adverse possession.

The adverse possession standard that courts apply to cotenants differs from the standard that courts impose between strangers. In an adverse possession claim between cotenants, the proponent must prove ouster--unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants. Cotenants must surmount a more stringent requirement because acts of ownership which, if done by a stranger would per se be a disseizin, are not necessarily such when cotenants share an undivided interest. Similarly, in an adverse possession claim involving a landlord and a tenant, the proponent must show that the landlord-owner had notice of the hostile nature of the tenant's possession. Ultimately, the test for establishing adverse possession, both between strangers and cotenants, is whether the acts unmistakably assert a claim of "exclusive ownership" by the occupant.

Villarreal argues the trial court's judgment must be reversed because there was legally and factually insufficient evidence to support the trial court's findings that Guerra adversely possessed the property for the length of time required under the ten year or the twenty-five year adverse possession statutes. The ten year adverse possession statute provides that a person must bring suit no later than ten years after

the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. Civil Practice & Remedies Code § 16.026(a). The twenty-five year adverse possession statute provides that a person must bring suit not later that twenty-five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property. Civil Practice & Remedies Code § 16.027.

Here, the evidence showed that Guerra adversely possessed the property beginning in the late 1960s and continued to do so until Villarreal filed suit in 2009. Additionally, the evidence showed that Gonzalez, who owned an 8/11ths interest in the property when Guerra entered the property, never filed suit to recover his interest in the property. Gonzalez died in 1988. Thus, the evidence was legally and factually sufficient to support the trial court's finding that Guerra adversely possessed the property for the length of time required under the ten year adverse possession statute.

PART X
HOMESTEAD

Marincasiu* v. *Drilling, 441 S.W.3d 551 (Tex.App.-El Paso 2014, pet. denied). Greenlaw and his wife lived in the Southlake house. Drilling obtained a judgment against Greenlaw. The Greenlaws divorced in 2008 and Greenlaw was awarded the house. After the divorce, Drilling filed an abstract of judgment. Right after the abstract was filed, Greenlaw put the house up for sale. He apparently moved to Colorado for a significant period of time after the divorce. A few months later, Greenlaw sold the house to the Marincasius. Some time after the sale, Greenlaw died.

Drilling sued the Marincasius to foreclose his lien. The trial court entered judgment in favor of Drilling. The trial court found that Greenlaw could not claim homestead protection because he had resided in Colorado, not at the Southlake house, and there was no evidence that Greenlaw had used the house as his homestead.

Texas law is well settled that a properly abstracted, unsecured judgment lien cannot attach to a homestead as long as the property remains homestead. This protection extends to purchasers of a judgment debtor's homestead, who receive the property free and clear of any judgment lien. A subsequent purchaser of homestead property may assert the prior person's homestead protection against a prior lienholder so long as there is no gap between the time of homestead alienation and recordation of his title. However, where a judgment debtor's homestead protection elapses prior to sale, the judgment creditor's abstracted lien may attach to the property by operation of law and be enforced against future owners of the property.

The judgment debtor and his assignees bear the initial burden of establishing homestead. The Marincasius contend that Greenlaw's ownership of the property and claim for a homestead exemption to his 2000 ad valorem property tax account brings the Southlake house under the aegis of homestead protection and shifts the burden of disproving homestead to Drilling. The court agreed. The Greenlaw divorce decree also shows that the family court characterized the property as the "family homestead."

Drilling maintains that even if the 2000 Greenlaw's homestead property tax exemption, the Texas Property Code, the Greenlaw's joint ownership of the home, and the divorce decree naming the home as a homestead constitute sufficient evidence to trigger the homestead presumption, the Marincasius still bear the burden of affirmatively re-proving the existence of a homestead because Greenlaw and his ex-wife were childless and the homestead of a

family consisting only of husband and wife is terminated by divorce--irrespective of intention or occupancy. Since there was no family after the Greenlaws' divorce, Drilling contends, there can be no homestead exemption and his judgment lien attached as a matter of law.

But the court noted that the premise underlying the cases Drilling cites has not been good law for four decades. In 1973 the Texas Constitution was amended to extend the homestead protection to single adults. Thus, constitutional homestead protection is no longer conditioned upon the existence of a valid marriage or even a family.

The trial court held that Drilling met his burden and found that Greenlaw abandoned the Southlake Property prior to sale. Abandonment is a fact question reviewable for factual and legal sufficiency. To prove abandonment, the creditor must offer competent evidence that clearly, conclusively, and undeniably shows that the homestead claimant moved with the intention of not returning to the property. Drilling contends that Greenlaw's move to Colorado, when viewed in light of his divorce, his terminal cancer diagnosis, his "non-temporary" lease to the Marincasius, and his placement of the Southlake Property for sale, evinced Greenlaw's intent to permanently abandon the Southlake Property as his homestead. However, Drilling cites only to his own self-serving affidavit to show that Greenlaw moved to Colorado after his divorce, and Drilling failed to cite to any competent evidence in the record establishing that a lease ever existed or that Greenlaw suffered from terminal cancer at the time he moved to Colorado. The trial court never made specific findings that a lease existed or that Greenlaw died of cancer. The court held that Drilling's conclusory affidavit was not legally or factually sufficient evidence of abandonment of the homestead.

Hill* v. *Sword, 454 S.W.3d 698 (Tex.App.-Tyler 2015, pet. pending). In 2005, the Hills signed a $60,000 note and deed of trust in favor of Sword, granting Sword a lien on 126 acres they owned. In 2006, they signed a $200,000 note and a deed of trust on the same property. When the Hills failed to pay, Sword filed a suit seeking a declaratory judgment that his deed of trust liens were valid. In 2011, the parties entered into an agreed judgment that stated the 2004 and 2006 deed of trust liens were "valid, perfected, and enforceable" against the property. The judgment also awarded Sword $327,881.98 for the principal balance of the debt, all prejudgment interest, $7,500.00 in attorney's fees, and court costs, to bear interest at a rate of 6% per annum. The Hills then executed a promissory note and a third deed of trust explicitly to renew and extend the 2004 and 2006 notes and deed of trust liens. The note stated that its principal was the judgment amount of $327,881.98. It also provided new payment terms and an interest rate of 6%.

Later in 2011, Martha Hill filed a voluntary Chapter 7 bankruptcy. She claimed the 126 acre tract and related mineral interests as homestead. In February 2012, her discharge was granted. The Hills failed to pay the 2011 promissory note, and Sword sought an order from the bankruptcy court determining whether his foreclosure under the 2011 deed of trust would violate the court's discharge order. The court determined that foreclosure would not violate that order, and Sword posted the property for nonjudicial foreclosure.

The Hills then filed a suit seeking a declaration that the 2011 deed of trust lien was invalid. They filed a motion for summary judgment seeking determinations that the property constituted their homestead and that Sword had no valid or enforceable lien against it. The trial court granted judgment in favor of Sword.

The Hills appealed, claiming that the property was homestead and not subject to forced sale. The Hills have not challenged, either in their briefs or at oral argument, the

validity of the 2004 and 2006 deeds of trust, or that of the 2011 agreed judgment. Nor does Sword dispute that the property was the Hills' homestead at the time they executed the 2011 promissory note and deed of trust. Thus, the resolution of the dispute between the parties turns on whether the 2011 documents constitute a refinance of a valid lien on a homestead (as Sword contends) or an extension of credit (as the Hills urge).

The Hills first contend that the restructured debt constitutes a new extension of credit because the 2004 and 2006 notes were satisfied and replaced by the 2011 note. Satisfaction is the fulfillment of an obligation. If the earlier notes and judgment had been "paid" by the Hills, their obligation thereunder would have been "satisfied." However, here the judgment merely adjudicated the deeds of trust and the deed of trust liens valid and enforceable. The judgment was not paid or satisfied and replaced by the 2011 note.

The court concluded that the 2011 promissory note is a renewal and extension of the 2004 and 2006 notes, and does not satisfy and replace them such that the 2011 restructuring constitutes a new extension of credit. It further concluded that the restructuring of the Hills' loan through the 2011 promissory note and deed of trust was a refinance of a valid indebtedness secured by valid liens on the property. Therefore, even if the property constituted the Hills' homestead at the time of the restructuring, Sword is not constitutionally prohibited from foreclosing under the 2011 deed of trust.

PART XI
BROKERS

Virginia Oak Venture, LLC* v. *Fought, 448 S.W.3d 179 (Tex.App.-Texarkana 2014, no pet.). Fought was a real estate salesman who was hired by the seller to find a buyer for the apartment complex. He located Tang as a buyer and wooed her extensively. Fought not only located an attorney to create the LLC to act as the purchasing entity, he agreed to be personally named as Texas resident agent for service of process for the entity. Fought was extremely solicitous of Tang by acting as her chauffeur from the airport, personally taking her through each of the ten properties he was attempting to sell her, directing her to a particular lender, and preparing all the documents involved in the transaction. He also signed a document where he purported to be acting as her agent, although he claimed that was done by mistake.

Tang, via Virginia Oak Venture, bought the apartment complex. It turned out to have been a bad investment and she sued everyone in sight. Among her claims were that Fought had grossly misrepresented the occupancy levels of the property, the income and expenses of the property, that he supplied false information to be used by the appraiser and the lender, and hid from Tang, the appraiser, and the lender more accurate rent rolls, financial data, and most importantly, a sale of the property just ten months earlier at nearly half the price, all so that an inflated appraisal and inflated loan would result, and so Tang would rely on the information given them and on the loan and appraisal to close the purchase.

She also claimed that Fought was acting as her agent in connection with the purchase, citing all the things he did for her, as described above. The question went to the jury, which found that Fought was not acting as her agent.

Although there was some behavior on Fought's part that could be construed to support the conclusion that he was acting as her agent, it could likewise be construed to simply have been Fought helping Tang in order to "grease the wheels" of the deal. While one could believe that those activities, taken as a whole, might suggest the existence of a personal relationship, they may also be representative of a dedicated salesman “tracking the spoor of a very healthy commission.”

The jury also had evidence before it that Fought was not an agent of Tang, therefore, having no fiduciary duty to Tang. The burden of proof was on Tang to prove that Fought represented himself to be acting as her agent, and the jury refused to rule in her favor. Under a great weight and preponderance analysis, Tang is required to conclusively prove her position in order to prevail on appeal when the trier of fact ruled against her. Tang failed to provide the requisite conclusive evidence that Fought acted as her agent, and there is contrary evidence in the record. In such a circumstance, the court would not disturb the findings made by the trier of fact.

PART XII
TITLE INSURANCE AND ESCROW AGENTS

McGonagle* v. *Stewart Title Guaranty Company, 432 S.W.3d 535 (Tex.App.-Dallas 2014, pet. denied). The McGonagles' purchased a piece of property in downtown Granbury. The property was subject to a dedication instrument requiring the property owner to move a bungalow currently on-site to a location within the Historic Overlay and requiring the owner to obtain all necessary approvals through the City of Granbury prior to beginning any new construction. The dedication instrument said that it ran with the land.

Mr. McGonagle testified that he was aware of the dedication instrument before purchasing the property and that he tried to have it removed before closing on the purchase. McGonagle also stated he told the seller that he would not close on the purchase unless the dedication instrument was removed. According to McGonagle, the seller told him that he would "take care of" the dedication instrument and, shortly before the closing, the seller stated that the instrument had been "taken care of."

Despite these alleged representations by the seller, the sales contract signed by the McGonagles specifically stated that the Granbury Historical Society Agreement" was included in the purchase and would belong to the buyer. A copy of the dedication instrument was attached to the sales contract.

At the closing, the McGonagles also purchased a title insurance policy issued by Stewart Title. The policy contained several exclusions from coverage including defects, liens, encumbrances, adverse claims or other matters created, suffered, assumed or agreed to by the insured. Also excluded was the refusal of any person to purchase, lease or lend money on the estate or interest because of Unmarketable Title." Schedule B Item 1, Restrictions, was deleted. McGonagle interpreted the deletion of the first exception from coverage in Schedule B to mean that the dedication instrument had been removed and no longer applied to the property. McGonagle stated that he believed the deleted provision confirmed the seller's statement to him that the instrument had been "taken care of."

Sometime after purchasing the property, the McGonagles attempted to resell it. They allege they were unable to do so because the property was still subject to the dedication instrument. The McGonagles brought suit against the seller for misrepresentation. They then brought this separate suit against Stewart for breach of contract, negligence, gross negligence, and violations of the Texas Insurance Code and DTPA. Stewart filed motions for traditional summary judgment contending the McGonagles' claims failed as a matter of law because there was no coverage under the title policy for losses allegedly caused by the dedication instrument and neither company made any misrepresentations about the property or the title policy.

A title insurance policy is a contract of indemnity that imposes a duty on the insurance company to indemnify the insured against losses caused by defects in title. The alleged defect must involve a flaw in the

ownership rights of the property to trigger coverage. An irregularity that merely affects the value of the land, but not the ownership rights, is not a defect in title.

The McGonagles contend the dedication instrument falls within the scope of coverage because it is a covenant, creating an encumbrance, which affects title. The court disagreed. An encumbrance is a tax, assessment, or lien on real property. The dedication instrument neither involves nor creates a tax, assessment, or lien. Although a few cases have noted that it is possible for a covenant to cloud title, the covenant must pertain to the ownership interest. The McGonagles failed to show how any of the requirements set forth in the dedication instrument impact their fee simple ownership interest in the property.

The McGonagles argue at length that the dedication instrument affects their ability to sell the property and, therefore, amounts to a defect in title. The court again disagreed. The concept of title speaks to ownership of rights in property, not the condition or value of the property. The term "marketable title" goes to whether the property interest can be sold at all, not whether it will fetch a lesser price because of some condition limiting its use. In this case, although the dedication instrument imposes certain burdens on the land owners that may lessen the market value of the property, it does not vest any ownership interests in the property in any other party that would affect the McGonagles' title. Accordingly, the dedication instrument does not fall within the title policy's covered risks.

Even if the dedication instrument could be considered a defect in title, it is a defect that the McGonagles assumed when they signed the purchase contract and is, therefore, excluded from coverage under the terms of the title policy. The purchase contract specifically stated that the dedication instrument was included in the The title policy excludes all defects or other matters assumed or agreed to by the insured.

The McGonagles contend that the deletion of the first exception to coverage under Schedule B constituted a misrepresentation of both the state of the title to the property and the extent of coverage provided by the policy. The McGonagles rely heavily on the Texas Supreme Court opinion of ***First Title Co. of Waco* v. *Garrett***, 860 S.W.2d 74 (Tex. 1993). In Garrett, the Supreme Court held that a title company made an actionable, affirmative representation to its insured when it inserted the phrase "none of record" in the space provided for itemizing restrictive covenants of record rather than deleting the provision. The court concluded that the phrase "none of record" was clearly a representation that there were no restrictive covenants in the county deed records. The McGonagles attempt to equate the word "deleted" used in their policy with the phrase "none of record" used in the Garrett policy. The word "deleted," however, refers solely to the fact that the exception was deleted pursuant to the instructions in the standard form document and cannot be construed to mean anything else. It conveys no information about the existence or non-existence of restrictive covenants. Although the McGonagles may have assumed the provision was deleted because the dedication instrument had been removed, they point to no statements by Stewart that the exception was deleted for this reason. The deletion represents only that restrictive covenants of record affecting the title, if any, were not excepted from coverage.

The McGonagles next argue that the removal of the exception for restrictive covenants constituted an affirmative representation that the dedication instrument would be a covered risk. But the deleted provision makes no reference to any specific covenant and the exception only impacts restrictive covenants that otherwise fall within the scope of coverage. As discussed above, the dedication instrument at issue does not fall within the scope of coverage

because it does not affect the McGonagle's fee simple interest or, alternatively, because the “defect" was assumed. The removal of the exception cannot create coverage that is not otherwise provided by the policy. Neither can the removal of an exception from coverage mislead the insured that coverage exists when the remainder of the policy indicates otherwise.

The McGonagles suggest that Stewart was required to inform them that the dedication instrument was still attached to the property. The only duty of a title insurer is to indemnify the insured against losses caused by a defect in title. Although an insurer cannot misrepresent the state of the title or mislead the insured, it has no duty to point out any outstanding encumbrances.

Dailey* v. *Thorpe, 445 S.W.3d 785 (Tex.App.-Houston [1st Dist.] 2014, no pet.). The Daileys sold a house to their son and his wife. They took a $10,000 cash down payment and a note for $80,000. Thorpe served as the escrow officer – she was the niece of the son’s wife.

A year later, the Daileys sued to set aside the sale. They asserted claims of fraud against the son and daughter-in-law. They also sued Thorpe for breach of fiduciary duty and conspiracy to commit fraud. With respect to their breach of fiduciary duty claim, the Daileys alleged that the son and daughter-in-law had a fiduciary relationship with the Daileys and that they received no more than 10% of the proceeds from the $80,000 mortgage. The Daileys didn’t say what fiduciary duties were owed by Thorpe or how she breached them or even that the breach caused their damages. Evidently, what happened was that the son and daughter-in-law did make the payments required by their note and mortgage.

With regard to their conspiracy to commit fraud cause of action against Thorpe, the Daileys asserted that the defendants conspired to defraud them in mortgaging the property without consulting the Daileys.

To state a cause of action against Thorpe for breach of fiduciary duty in this context, the Daileys were required to allege and prove that: (1) a fiduciary relationship existed between themselves and Thorpe; (2) Thorpe breached her fiduciary duty to them; and (3) either that they were injured by the breach or that Thorpe benefited as a result of the breach. An escrow officer's fiduciary duties to the parties to a real estate transaction do not extend beyond matters in the closing process of that transaction.

The Daileys' pleading never alleged that Thorpe breached a fiduciary duty to them in her role as the escrow officer when she closed the underlying sale of the property. Rather, they claimed that they did not receive full payment of their mortgage from Frank and Terry--an event which, as Thorpe points out, could only have occurred after the closing. Thorpe was not an obligor under the promissory note and had no duty, fiduciary or otherwise, to ensure Frank and Terry made their monthly mortgage payments. Accordingly, there was no basis in law to support the Daileys' claims against Thorpe for breach of fiduciary duty as alleged in the petition. The trial court therefore properly granted the motion and dismissed the Daileys' cause of action for breach of fiduciary duty.

Civil conspiracy is a derivative action premised on an underlying tort. The elements of civil conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as a proximate result.

The crux of the Daileys' allegation of conspiracy to commit fraud is that Thorpe and the son and daughter-in-law agreed and conspired between them to defraud the Daileys in mortgaging the property which is the subject of this action without consulting the Daileys. The documents attached to the

pleadings, however, affirmatively disprove the Daileys' claim that they were not consulted about the mortgage in that they establish that the Daileys received $10,000 at closing as a down payment for the property. The exhibits also conclusively establish that the Daileys self-financed the remaining $70,000 of the purchase price through a loan to Frank and Terry secured by a deed of trust. The HUD-1 Settlement Statement, which the Daileys represented they carefully reviewed and confirmed was accurate to the best of their knowledge, also confirms the $70,000 balance as a seller-financed loan to Frank and Terry. As such, these attached documents conclusively prove that the Daileys were consulted on the loan. Indeed, they financed the mortgage to Frank and Terry. Accordingly, the conspiracy to defraud claim is without factual basis.

IQ Holdings, Inc.* v. *Stewart Title Guaranty Company, 451 S.W.3d 861 (Tex.App.-Houston [1st Dist.] 2014, no pet). Barnard agreed to sell the condo unit to IQ for $3 million. In the contract, Barnard agreed to provide IQ a resale certificate, a copy of the condo declaration, and the condo association's bylaws. IQ delivered $100,000 earnest money to Stewart Title Company, the escrow agent. The signature pages on the contract were somewhat messed up, with two pages for the buyer: one showing IQ as the buyer and another showing Gupta as the buyer.

The condo declaration granted the owners' association a right of first refusal in connection with any prospective resale of a condo unit. The association delivered a letter before closing waiving the ROFR, The letter waived the right as to Gupta, but not as to IQ. The closer noticed this at closing, but didn't mention it to the parties.

About four years later, the association claimed that it had never waived its ROFR as to IQ. It did not challenge the sale to IQ but challenged a later conveyance of the property from IQ to Gupta.

IQ notified Stewart Title Guaranty of the suit with the association and demanded coverage for its title risks, attorneys' fees, and costs. Stewart Title Guaranty denied the claim for two reasons: (1) the title insurance coverage expressly excepted the restrictions set forth in the Declaration, including the right of first refusal; and (2) the Association challenged the February 2009 sale from IQ to the Guptas, not the October 2006 sale from Barnard to IQ covered by the policy. IQ sued, claiming, among other things that Stewart Title Guaranty breached the title insurance policy and that Stewart Title Company breached its fiduciary duties as escrow agent.

As to the breach of contract claim, the primary concern in interpreting a policy is to ascertain and to give effect to the parties' intentions as expressed in the document. Here, the cover page of the title insurance policy issued to IQ explains that the policy covers title risks "subject to the Exceptions (p. 4)." Under Schedule B on page 4, the policy excepts to the recorded condominium declaration and to its terms and conditions. IQ complained that the policy should have excepted specifically to the ROFR. The court disagreed. The policy's reference to the declaration effectively excepts all title risks arising from that instrument, including title risks arising from the Association's right of first refusal. Under Texas law and the condominium contract, IQ should have received from the seller a copy of the Declaration and the Association's waiver of its right of first refusal before closing; it had the right to terminate the sale contract if it did not.

Read together with the applicable law, the policy's exception has a definite legal meaning, putting the prospective buyer on notice that it excepts coverage for any right--of--first--refusal restriction. Stewart Title Guaranty had no independent obligation to recite the Declaration's restraints on sale in order to except them from insurance coverage.

IQ's claim against Stewart Title as its escrow agent and as Stewart Title Guaranty's title insurance agent is that Stewart Title owed it a duty to ensure that IQ received good title at closing; it claims that Stewart Title breached its fiduciary duty to IQ by failing to obtain a proper waiver of the right--of--first--refusal covenant on IQ's behalf. Whether a fiduciary duty exists is a question of law.

As Stewart Title Guaranty 's agent, Stewart Title owed no duty to IQ to obtain good title. A title insurance policy is an indemnity contract; the only duty it imposes is the duty to indemnify the insured against losses caused by defects in title which are not excepted by the policy. Stewart Title's title investigation inured to its principal's benefit, not to IQ. Although the insurer must examine the title (or have someone do so in its behalf), this investigation is done for the insurer's own information in order to determine whether or not it will commit itself to issue a policy. The investigation is not done for the benefit of the party insured. A title insurance company is not a title abstractor and owes no duty to examine a title or point out any outstanding encumbrances. Stewart Title did not assume an obligation beyond Stewart Title Guarant's contractual one as indemnitor in connection with its role as the agent for the title insurer.

A title insurance company assumes a fiduciary duty to both parties when it acts as an escrow agent in a transaction. These fiduciary duties consist of: (1) the duty of loyalty; (2) the duty to make full disclosure; and (3) the duty to exercise a high degree of care to conserve the money and pay it only to those persons entitled to receive it.

When acting as an escrow agent, however, the title company's authority is limited to the closing of the transaction; it does not extend to an investigation of title. Here, Witt, a Stewart Title employee, served as an escrow agent and oversaw the signing and recording of conveyance documents at closing. IQ and Barnard agreed that IQ would deposit $100,000 as earnest money with Witt as escrow agent. Witt complied with his escrow agent duties--IQ does not challenge that the earnest money was properly accounted for, and the transaction closed.

Finally, IQ complains that Stewart Title was negligent in failing to obtain good title for IQ and in failing to disclose the defect in the Association's waiver letter. IQ further contends that Stewart Title Guaraty is vicariously liable for Stewart Title's negligence, because Stewart Title was its insurance agent. In a negligence case, the threshold inquiry is whether the defendant owes a legal duty to the plaintiff. The court held that Stewart Title did not owe a legal duty to IQ to provide it with title coverage beyond the scope of the written policy or to disclose risks that the policy did not cover. Accordingly, it cannot be held liable under a negligence theory.

PART XIII
PARTNERSHIPS

American Star Energy and Minerals Corporation* v. *Stowers, 457 S.W.3d (Tex. 2015). American Star attempted to collect from a partnership after litigating a contract claim for over a decade and a half, only to find the partnership insolvent. When the creditor sought a judgment against the individual Partners, the trial court ruled the limitations period began when the underlying cause of action accrued. Because that period had passed, limitations precluded pursuit of the Partners' assets. The court of appeals affirmed. The Supreme Court reversed.

The Legislature unequivocally embraced the "entity" theory of partnership when it enacted the Texas Revised Partnership Act. A Texas partnership is "an entity distinct from its partners." Business Organizations Code § 152.056. Nonetheless, under the TRPA, a partner remains jointly and severally liable for all obligations of the

partnership. This personal liability, undoubtedly an "aggregate" theory feature, is a defining characteristic of the partnership form and distinguishes it from other entity types.

Through its scheme for enforcing that liability, however, the TRPA imposes even on this aggregate feature an entity aspect. A judgment against a partnership is not by itself a judgment against a partner," so a creditor must obtain a judgment against the partner individually. A creditor may attempt to do so in the suit against the partnership or in a separate suit. It may not, however, seek satisfaction of the judgment against a partner until a judgment is rendered against the partnership. On top of that, the TRPA generally requires time to collect the debt from the partnership first: the judgment against the partnership must go unsatisfied for ninety days before a creditor may proceed against a partner and his assets.

Despite the Legislature's efforts to define the relationship between a partner and the partnership and to control the circumstances under which a partner's liability may be enforced, it did not expressly dictate when a suit against a partner must be brought. The Partners argue that because American Star could have sued them in its original suit, this cause of action accrued and limitations on this suit began to run at the same time as on the suit against the partnership—at the breach of the underlying agreement. American Star, on the other hand, insists the Partners owed no obligation until the judgment against the partnership became final in 2009, and the limitations period began then.

Generally a cause of action accrues when facts come into existence that authorize a claimant to seek a judicial remedy, when a wrongful act causes some legal injury, or whenever one person may sue another. The statutes of limitations applicable here use the term "accrues" but do not specify when accrual occurs. The court is thus left to establish a rule of accrual for partner-liability suits, which must be founded on reason and justice. Reason requires consideration of the TRPA's overall scheme and the legislative intent expressed therein. Justice requires examination of the rule's policy implications and equity of its consequences.

In light of a partnership's status as a separate entity and the statutory prerequisites to proceeding against a partner, the court held that the cause of action against a partner does not accrue until a creditor can proceed against a partner's assets—that is, generally at the expiration of the ninety-day satisfaction period.

As a result of the partnership's statutorily confirmed status as a separate entity, a partnership's acts are only its own, not a partner's. The statutory prerequisites to enforcement make a partner's liability not only derivative of the partnership's liability, but contingent on it for all practical purposes. If a partnership obligates itself to pay a sum or perform a service under a contract, the individual partners, though liable for the obligation under the TRPA, cannot immediately be called on to pay or perform in lieu of the partnership. In either case, the claim must be litigated against the partnership so that its obligation is determined, reduced to damages, and fixed in a judgment. Considering the derivative and contingent nature of that liability, the only obligation for which a partner is really responsible is to make good on the judgment against the partnership, and generally only after the partnership fails to do so.

PART XIV
CONSTRUCTION AND MECHANICS' LIENS

Addison Urban Development Partners, LLC* v. *Alan Ritchey Materials Company, LC, 437 S.W.3d 597 (Tex.App.-Dallas 2014, no pet.). Ritchy filed a lien affidavit related to concrete sand. The affidavit claimed a lien for "concrete sand and related freight charges (including applicable fuel

charges). Addison claimed the contends the lien improperly included freight and fuel surcharges because these items are not "materials" under the Property Code. Property Code § 53.001 defines "material" as all or part of:

(A) the material, machinery, fixtures or tools incorporated into the work, consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption . . .

(C) power, water, fuel, and lubricants consumed or ordered and delivered for consumption in the direct prosecution of the work.

Ritchey asserts that the freight or delivery was factored into the price of the materials sold, and it was therefore entitled to the lien price of the "material ordered and delivered for consumption" and "fuel consumed" in connection with the Project. The court agreed.

Ritchey charged by the ton for the materials delivered to the Project. The invoices show the components of the final price -- material, freight, and fuel surcharge. These components comprise the total cost per ton. The final price of the materials is based on the weight of the material, not the delivery distance. The weight is multiplied by the estimated material and freight components of the delivered price of the material during the bid process. The fuel charge is expressed as a percentage, and calculated from the freight component of the delivered price. The fuel surcharge is acquired from an index and is based on the variable rate of diesel fuel from the time the bid is placed to the time the material is ordered.

Ritchey demonstrated that all three components (materials, freight, and fuel surcharge) are added together to arrive at the final invoiced price of the material. The price charged is calculated by multiplying the tons of material delivered by the component rates for that material and freight. An additional percentage is then applied to the freight portion to obtain the fuel surcharge. The material and freight components are broken out on the invoices so that customers can track the proper application of the fuel surcharge. Ritchey does not categorize the freight value as a shipping charge, nor is it based on mileage. This evidence establishes the components of that which was consumed in the direct prosecution of the work, or ordered and delivered for incorporation or consumption. Thus, the evidence shows that the component items of the final price were properly included in the lien price.

Crawford Services, Inc. **v.** ***Skillman International Firm, L.L.C.***, 444 S.W.3d 265 (Tex.App.-Dallas 2014, pet. dismissed). Property Code § 53.154 provides that a mechanic's lien may be foreclosed only on judgment of a court of competent jurisdiction foreclosing the lien and ordering the sale of the property subject to the lien. If a trial court determines that a mechanic's lienholder has a perfected statutory mechanic's lien and is entitled to recover damages for unpaid labor and materials, does the court have discretion to deny the lienholder a judgment of foreclosure and order of sale of the property subject to the lien? The trial court concluded that it did, "given the facts" of this case, and denied the lienholder's request for a judgment of foreclosure of the lien and order of sale of the property subject to the lien. The court of appeals reversed.

To enforce a mechanic's lien, the lienholder must file a lawsuit and obtain a judgment from a court of competent jurisdiction foreclosing its constitutional or statutory lien. To prevail on its claim, the lienholder must prove it performed the labor or furnished the materials and the debt is valid.

It is undisputed here that Crawford established a debt owed by Skillman and perfected its statutory mechanic's lien, but

the trial court denied Crawford's request for a judgment of foreclosure of the lien and order of sale of the property. The trial court interpreted the phrase "may be foreclosed" in section 53.154 as giving the court discretion to deny the request for a judgment of foreclosure and order of sale. The parties do not cite any authority interpreting section 53.154 in this context. Indeed, in every case reviewed by the court in which the trial court determined that the debt and mechanic's lien were valid, the court rendered a judgment of foreclosure and ordered the sale of the property subject to the lien.

Crawford argues on appeal that the statute does not give the court discretion to deny foreclosure of a perfected mechanic's lien. It contends that the word "may" must be understood as part of the phrase "may only" and when read in that context means that the only way to foreclose a mechanic's lien is through court order. It argues that this interpretation is consistent with the purpose of mechanic's lien laws, which is to secure payment for labor and materials provided to improve another's property.

Conversely, Skillman contends that "may" connotes discretion and that Crawford's interpretation of the statute changes the word "may" to "shall."

When examining the meaning of a word in a statute, the court must look to the context in which the word is used. The word "may" could mean the legislature granted a permission or power to trial courts, but it also could mean the legislature granted an entitlement to litigants. For example, in the context of an award of attorney's fees, statutes that state "the court 'may' award attorney's fees" have been interpreted to afford "the trial court a measure of discretion in deciding" whether to award attorney's fees. . And statutes that state "a party 'may recover' attorney's fees" have been interpreted to grant an entitlement to litigants to recover attorney's fees but not a grant of discretion to the trial court to deny an award of attorney's fees.

Section 53.154, however, is different because it is in the passive voice-"A mechanic's lien may be foreclosed" --and the subject of the sentence ("A mechanic's lien") is the receiver of the action ("may be foreclosed"), not the person performing the action. The passive voice usually includes a by prepositional phrase to show who is performing the action in the sentence. But when the by phrase is not stated, it can be understood from the context. There are two possible by -phrase scenarios in section 53.154: "by the trial court" and "by the lienholder."

If the actor in section 53.154 is the trial court, the statute would read, "A mechanic's lien may be foreclosed [by the trial court] only on judgment of a court of competent jurisdiction foreclosing . . . ." But if the trial court is the actor, it becomes unnecessary to say "on judgment of a court of competent jurisdiction foreclosing . . . ." This interpretation renders the entire last phrase beginning with "on judgment of a court" redundant and unnecessary. And by adopting this interpretation, the court would run afoul of the rule of statutory construction that each word and phrase has meaning. The court held that the legislature did not intend the implied actor in the statute to be the trial court.

If the actor in the statute is the lienholder, the statute would read, "A mechanic's lien may be foreclosed [by the lienholder] only on judgment of a court of competent jurisdiction foreclosing . . . ." If the lienholder is the actor, the last phrase of the statute beginning with "on judgment of a court" is not rendered unnecessary and redundant. And when the last phrase is examined with its modifier "only," the meaning becomes even clearer: the only way a lienholder may foreclose a mechanic's lien is through a judgment of a court of competent jurisdiction foreclosing the lien and ordering a sale of the property subject to the lien. This interpretation is consistent

with the legislature's purpose when it enacted the mechanic's lien statutes and complies with the mandate to construe mechanic's lien statutes liberally to accomplish that purpose.

Based on the record in this case, the court concluded that once the trial court determined that the lienholder had a valid debt and a perfected mechanic's lien, it did not have discretion under section 53.154 to deny a judgment of foreclosure and order of sale of the property subject to the lien.

Denco CS Corporation* v. *Body Bar, LLC, 445 S.W.3d 863 (Tex.App.-Texarkana 2014, no pet.). Body Bar wanted to open an upscale pilates studio and juice bar in Plano. It leased space from Regency. The lease required Body Bar to finish out the space and provided for a construction allowance for the improvements. Body Bar hired Denco to construct the work. After work had started, Regency sold the building to Bre Throne, which took subject to the lease.

Construction was delayed because the plans didn't satisfy city health ordinances. Body Bar refused to pay cost increases, claiming the construction contract did not obligate it for the payments. Denco took the steps it felt were necessary to perfect contractor's liens under both the statutory scheme and the Texas constitutional contractor's lien on the property it had improved. After Bre Throne found out about the lien filings, it refused to reimburse the allowance to Body Bar.

Denco's lien affidavit encumbered all of the lot on which the building stood. At the time that the liens were filed, the property was owned in fee by Bre Thorne. Texas law recognizes two types of mechanics' liens – a constitutional lien and a statutory lien. A constitutional lien requires a person to be in privity of contract with the property owner. The same privity of contract with the property owner is required to establish a statutory lien that encumbers the owner's property.

Smith's lien affidavit listed Bre Thorne as the owner of the property sought to be encumbered. Yet, there is no evidence in the record establishing that either Regency (who was the owner of the premises at the time the contract for improvements was entered) or Bre Thorne (the subsequent owner) contracted with Denco or that Body Bar was the agent of either at the time it entered into the contract for improvements or when Denco's additional charges supposedly accrued.

Where the contract for labor, materials or construction is not made with the owner or his duly-authorized agent, a lien may not be fixed on his property. Because there was no evidence that Denco was in privity of contract with the owner of the premises, it was not entitled to a constitutional lien against Bre Thorne's fee interest in the property. Thus, the affidavit laying claim to statutory and constitutional mechanic's liens--which were not limited to Body Bar's leasehold interest--did not validly encumber the property.

Pham* v. *Harris County Rentals, L.L.C., 455 S.W.3d 702 (Tex.App.-Houston [1st Dist.] 2014, no pet.). Pham entered into an oral contract with Neal d/b/a Unicom and also d/b/a Southern Construction Group to clear some land clearing. On the advice of this banker, Pham was to obtain a lien waiver whenever he paid Neal. The banker also advised Pham to keep statutory retainage. Pham got the waivers and kept the retainage. After Neal intimidated Pham, a final check was given to Neal with the notation "Final Payment with Southern Const." written in the memo section. That check was dated March 3.

Harris County Rentals was a subcontractor Neal had hired to lease and deliver equipment to the worksite. Harris County Rentals completed its portion of the job and invoiced Neal for a total amount of $8,226.33. After Neal failed to pay Harris County Rentals the full amount owed to it,

Harris County Rentals sent a notice of claim to Pham on March 19 and on April 27 it filed a lien affidavit and sent a notice to Neal and Pham.

A little less than a year later, Harris County Rentals sued Neal and Pham. Pham answered pro se. The trial court non-suited Neal and held Pham liable for around $5,000 and ordered foreclosure of the mechanic's lien.

Chapter 53 of the Property Code governs mechanic's and materialman's liens. A person who provides labor or materials to construct a building or improvement under a contract with the property owner, the owner's agent, or an original contractor is entitled to a lien against that property. A subcontractor is considered a derivative claimant and must rely on his statutory lien remedies. A subcontractor may seek recovery from "trapped" funds held by the property owner or funds "retained" by the owner. "Trapped" funds are funds not yet paid to the original contractor at the time the property owner receives notice that a subcontractor has not been paid; on receiving such notice, the owner may withhold those funds from the original contractor until the claim is paid or settled or until the time during which a subcontractor may file a lien affidavit has passed. "Retained" funds are funds withheld from the original contractor either under a contractual agreement or under Property Code § 53.101, which requires a property owner to retain ten percent of the contract price for thirty days after the project is completed.

In this case, Pham made final payment to the contractor, Neal, on March 3 and Harris County Rentals' notice of lien was not sent to Pham until April 27, 2010, so, as acknowledged by Pham's counsel at trial, "There's no funds trapped . . . we're strictly looking for the retainage."

With respect to Harris County Rentals' retainage claim, Pham argues that Harris County Rentals did not prove that it complied with Property Code § 53.103. Section 53.103 provides that to perfect a retainage lien, a person must (1) "send the notices required by this chapter in the time and manner required; "and (2) file an affidavit claiming a lien not later than the thirtieth day after the earlier of the date the work is completed, the original contract is terminated, or the original contractor abandons performance under the original contract. Pham argues that Harris County Rentals filed its affidavit on April 27, more than 30 days after the project was completed on February 23.

According to Harris County Rentals, however, it was not required to prove that it complied with section 53.103 because, pursuant to Texas Rule of Civil Procedure 54, it pleaded that all conditions precedent had been performed or had occurred. Rule 54 provides that, in pleading the performance or occurrence of conditions precedent, it is sufficient to aver generally that all conditions precedent have been performed or have occurred. When such performances or occurrences have been so pled, the party so pleading same is required to prove only those that are specifically denied by the opposite party.

Because Harris County Rentals pleaded that all conditions precedent had been performed or occurred, it was required to prove only the conditions precedent that Pham specifically denied. However, Pham did not specifically deny that Harris County Rentals had timely filed its affidavit, thereby perfecting its retainage lien. Pham's Original Answer was a pro se letter to the trial court, in which he asserted that he had paid Neal in full and argued that there had to be some way to protect consumers, and that the matter should be between Harris County Rentals and Neal. This denial, however, is not sufficient. By failing to specifically deny that Harris County Rentals failed to timely file its lien affidavit, Pham waived his right to complain of such failure on appeal.

PART XV
CONDEMNATION

Preston State Bank* v. *Willis, 443 S.W.3d 428 (Tex.App.-Dallas 2014, pet. denied). The Collin County Grand Jury subpoenaed documents from the Bank. The Bank contacted the District Attorney regarding the cost of producing the documents. The DA responded that the Bank was not entitled to recover its costs in response to a criminal grand jury subpoena. The Bank and the DA entered into an agreement that the Bank would produce the documents, but its compliance wouldn't act as a waiver of the right to complain that it hadn't been compensated for the cost of production.

The Bank sought a declaratory judgment that Texas Finance Code § 59.006(a)(3), which purports to exempt the government from payment of costs and fees incurred in producing private records in response to a government subpoena, is unconstitutional because it allows a taking of private property by the government for public use and without just or adequate compensation. The trial court refused to declare the statute unconstitutional. The State intervened.

When reviewing the constitutionality of a statute, a court begins with a presumption that it is constitutional. The party challenging a statute's constitutionality has the burden of proving that the statute fails to meet constitutional requirements. In challenging the constitutionality of a statute, a party may show that the statute is unconstitutional on its face or as applied to that party. To sustain a facial challenge, the party must show that the statute, by its terms, always operates unconstitutionally. To sustain an "as applied" challenge, the party must show that the statute is unconstitutional when applied to that particular person or set of facts. Whether particular facts are sufficient to allege a constitutional taking is a question of law.

The court first dealt with jurisdictional issues. The Declaratory Judgments Act waives governmental immunity against claims that a statute or ordinance is invalid. The Bank claims the Finance Code provision constitutes an uncompensated taking in violation of the state and federal Constitutions, so the court has jurisdiction. Various arguments to the contrary were raised by the State and rejected by the court.

The court then turned to the constitutionality of the Finance Code provision. To establish a takings claim under the Texas Constitution, the Bank must prove (1) the State intentionally performed certain acts, (2) that resulted in a "taking" of property; (3) for public use. Under the federal Constitution, the requirements are comparable.

Finance Code § 59.006 states in part that it is the exclusive method for compelled discovery of a financial institution's records. It also provides that it does not apply to a records request from a governmental agency arising out of a criminal investigation. The State argued that the wording of the statute means that the compensation obligation does not apply.

The Bank has a duty to comply with the subpoena. The question is whether it is entitled to be compensated. The United States Supreme Court has held that the Fifth Amendment does not require compensation. ***Hurtado* v. *United States***, 410 U.S. 578, 588-89, 93 S.Ct. 1157, 35 L.Ed.2d 508 (1973). The Fifth Amendment does not require that the Government pay for the performance of a public duty it is already owed. "[I]t is beyond dispute that there is in fact a public obligation to provide evidence, and that this obligation persists no matter how financially burdensome it may be." The sacrifice involved is part of the necessary contribution of the individual to the welfare of the public.

The trial court had held that a "taking" had occurred. This court overruled that

holding, but held that the trial court's ruling did not require reversal, since no compensation was awarded for the "taking."

State of Texas* v. *Clear Channel Outdoor, Inc., No. 13-0053 (Tex. May 24, 2015). A billboard may be a fixture to be valued with the land, and, while the advertising business income generated by a billboard should be reflected in the valuation of the land at its highest and best use, the loss of the business is not compensable and cannot be used to determine the value of the billboard structure

PART XVI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Teal Trading And Development, LP* v. *Champee Springs Ranches Property Owners Association, 432 S.W.3d 381 (Tex.App.-San Antonio 2014, pet. denied). This case is also discussed in Deeds and Conveyances.

Cop owned a big chunk land in Kendall and Kerr Counties. He recorded a Declaration of Covenants, Conditions, and Restrictions. As part of the CCRs was a statement that the Declarant reserved a one-foot easement around the perimeter of the property for the purpose of precluding access to roadways by adjacent landowners. Cop then began selling lots out of the property. He sold a 600 acre parcel known as the Privilege Creek tract that ultimately ended up being owned by Teal Trading. All of the deeds in the chain of title from Cop to Teal Trading said, in one way or another, that the conveyance was made "subject to" the CCRs.

At one point, Teal Trading's predecessor began developing the Privilege Creek tract, and in the process connected to the roadways across the one-foot easement, in apparent violation of the CCRs. Champee Springs sued to enforce the restriction, then Teal Trading acquired the Privilege Creek tract and intervened in the lawsuit.

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction.

Teal Trading argues the non-access restriction is not a valid easement in fact or law because an easement is the right to use a servient estate by a dominant estate, and because Cop only purported to retain the right to prohibit use, there is no valid easement. That argument overlooks the well-established nature of negative reciprocal easements, restrictive covenants, or equitable servitudes restricting the use of property. A restrictive covenant is a negative covenant that limits permissible uses of land. A negative easement is a restrictive covenant. Teal Trading did not meet its summary judgment burden to show the restriction was not a valid easement.

Teal Trading then argues that, because Cop already owned the entire tract when he purported to create an easement, any purported easement would therefore merge into the fee simple estate. If any valid and enforceable negative reciprocal easement or restrictive covenant arose from the non-access restriction, it happened when Cop sold the first tract of the burdened property, not when he filed the Declaration. Termination by merger could only happen thereafter if all the burdened and benefitted properties came back into the ownership of a single entity. There is no evidence that such an event occurred in this case.

Teal Trading did not meet its summary

judgment burden to show the restriction, if it was a valid easement, was terminated by merger.

Teal Trading then argues the non-access restriction is void because it is against public policy. Texas law recognizes the right of parties to contract with relation to property as they see fit, provided they do not contravene public policy and their contracts are not otherwise illegal. Teal Trading contends that the subdivision regulations of Kerr County and Kendall County are a source of public policy and that the non-access restriction violates them. The court assumed that a property restriction created in violation of a county's subdivision regulations may be void as against public policy. But the court held that there was no violation of the subdivision regulations. Again, Teal Trading did not meet its summary judgment burden.

Teal Trading then argues the non-access restriction is void as an unreasonable restraint against alienation. The Texas Supreme Court has used the definitions from the First Restatement of Property to identify whether an instrument contains a restraint on alienation. Under the First Restatement, a restraint on alienatio is an attempt by an otherwise effective conveyance to cause a later conveyance: (i) to be void (a disabling restraint); (ii) to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey (a promissory restraint); or (iii) to terminate or subject to termination all or a part of the property interest conveyed (a forfeiture restraint).

Although Teal Trading identifies the three categories of restraints against alienation accepted by the Texas Supreme Court, it does not argue that the restriction falls within any of the categories. It simply states that the restriction entirely prohibits Teal Trading from selling a parcel of its property that straddles the imaginary line. The restriction does not purport to prohibit Teal from selling any part of the Privilege Creek Tract, and the court held that the restriction does not, on its face, fall within any of the recognized categories of restraints on alienation.

To the extent that the non-access restriction may operate as a restraint on alienation, it does so as an indirect restraint. Texas law does not favor declaring indirect restraints on alienation as unreasonable and against public policy. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on alienation.

Finally, Teal Trading argues that the non-access restriction is an unreasonable restraint on its use of the Privilege Creek tract. Restrictions that amount to a prohibition of the use of property are void. Of course, public policy also recognizes that parties may contract with regard to their property as they see fit. The restriction, if valid and enforceable, does not prohibit Teal Trading's use of the Privilege Creek tract, but only limits how it may use it. Teal Trading did not present evidence showing that the restriction so severely limited its use of the property that the property was rendered valueless. Teal Trading did not meet its summary judgment burden to show the restriction was an unreasonable restraint on use.

Park v. Escalera Ranch Owners' Association, 457 S.W.3d 571 (Tex.App.-Austin 2015, no pet.). Park purchased a lot in the subdivision on which he built a new home. His property, like the other lots in the subdivision, is subject to the recorded Declaration. The Declaration established the HOA to administer and enforce the provisions of the Declaration, including covenants and restrictions related to all construction in the subdivision. Each property owner in the subdivision is a member of the HOA. The Declaration also established a Master Design Committee, which created Master Design Guidelines "to create a harmonious residential community." Before any construction (either new or an

exterior addition or change) can begin on any lot in the subdivision, the Declaration requires that detailed plans and specifications be submitted to the Master Design Committee, which is declared to be the sole authority for determining whether proposed structures and landscape elements are in harmony of design with other existing structures and the overall development plan for the subdivision and for approving plans. A copy of the Master Design Guidelines were provided to Park when he purchased his lot.

Park submitted his preliminary plans and, after some negotiating between Park, his architect and the Committee, Park submitted revised plans which the Committee approved. When the house was constructed, Park installed windows that were different that those shown on the approved plans. The HOA notified Park that the windows didn't comply and asked him to fix the non-compliance. After a back-and-forth between the two sides, the HOA's attorney sent Park a letter demanding the fix and threatening to sue. The letter did not provide Park with the notice required by Property Cose § 209.007 that he was entitled to request a hearing under Property Code § 209.006 before the HOA was allowed to sue.

Park didn't comply with the letter and never requested additional time, but did offer to pay $5,000 if the Committee would allow the unapproved windows to remain in place. The offer was rejected. The HOA sued Park a little over a month after its first notification. Park answered pro se, and in addition to filing a general denial, he asserted as an affirmative defense that the Committee Guidelines are ambiguous and thus unenforceable. He also asserted counterclaims against the Association for breach of contract (based on the HOA's failure to seek alternative dispute resolution before filing suit), violation of owner's due process" (based on the HOA's failure to provide the notice and hearing required under Property Code Sections 209.006 and 209.007, and " racial and ethnic discrimination." Park sought damages in excess of $1 million. He later retained an attorney, adding a defense of unclean hands.

Almost a year after filing suit, the HOA sent a letter to Park which, in an attempt to cure the failure to include the §209.006 notice, gave Park 30 days after the date of this letter to request a presuit hearing.

The trial court ruled in favor of the HOA, denying all of Park's claims. He was ordered to fix all the windows. Park contends that the HOA's failure to provide presuit notice as required by Property Code § 209.006 deprived the trial court of jurisdiction over the suit. In support of this issue, he argues that (1) the plain language of Chapter 209 expressly requires notice, a hearing, a right to cure, and other "due process" before a property owners' association sues a property owner; (2) late notice does not cure a § 209.006 or 209.007 violation; (3) § 209.008(b) does not allow an exception from the mandate to offer notice and other "due process" merely because the property owners' association foregoes attorneys' fees; and (4) the HOA's late letter could not constitute effective notice.

Park and the HOA dispute whether § 209.006's notice requirement is jurisdictional--i.e., failure to comply negates the trial court's subject-matter jurisdiction over the Association's suit--or is mandatory but not jurisdictional. This is a question of first impression. Park asserts that the notice requirement is jurisdictional, and therefore, the HOA's failure to provide notice requires the trial court to dismiss its case. The HOA responds that the requirement is mandatory, but not jurisdictional, and that Park waived the requirement by failing to timely object and request an abatement. The HOA also contends that the notice it provided after filing suit operated to cure its failure to provide presuit notice.

The court began with the presumption that the Legislature did not intend to make

presuit notice under Section 209.006 jurisdictional. Only clear legislative intent to the contrary can overcome this presumption.

To determine whether the Legislature intended a jurisdictional bar, the court first examined the plain meaning of the statute, looking specifically for 'the presence or absence of specific consequences for noncompliance. It also considered the purpose of the statute and 'the consequences that result from each possible interpretation.

Section 209.006(a) states that a property owners' association "must" give notice before filing suit against an owner. The Code Construction Act, Government Code § 311.016(3), explains that "must" creates or recognizes a condition precedent,), and the Texas Supreme Court has stated that "must" generally has a mandatory effect, creating a duty or obligation.

In this case, although there are no statutory consequences for noncompliance specified in Chapter 209, the court also considered the purpose of Section 209.006's presuit-notice requirement. While statutory provisions that are included merely to promote the proper, orderly and prompt conduct of business, are not generally regarded as mandatory, courts generally construe a statutory provision as mandatory when the power or duty to which it relates is for the public good. The court concluded that § 209.006(a)'s purpose is similar to presuit-notice provisions found in other statutes: to discourage litigation and encourage settlements. It held that § 209.006's notice requirement is mandatory. It next considered whether it was also jurisdictional.

Nothing in the plain language of Chapter 209 indicates that the Legislature intended the notice requirement to be jurisdictional. Even mandatory dismissal language does not necessarily compel conclusion that statute is jurisdictional. Chapter 209's lack of a provision dictating dismissal for noncompliance is a circumstance weighing in favor of a nonjurisdictional interpretation.

In addition, the mere fact that the purpose of the notice requirement reflects a general concern by the Legislature to protect the rights of property owners vis-a-vis property owners' associations does not imply that the Legislature intended to deprive Texas trial courts of subject-matter jurisdiction when associations fail to provide the notice.

The final factor to be considered--the consequences of the alternative interpretations--suggests that the notice requirement is not jurisdictional.

Having considered all the factors, the court concluded that the Legislature did not intend to make notice under § 209.006 jurisdictional. The notice is mandatory, but not jurisdictional, therefore a complete lack of notice may be cured by a defendant's timely request for abatement to allow for provision of the notice.

Country Community Timberlake Village, LP* v. *HMW Special Utility District, 438 S.W.3d 661 (Tex.App.-Houston [1st Dist.) 2014, pet. denied). Country Community developed two residential subdivisions: Timberlake Village and the Small Tract. Each is subject to its own set of restrictive covenants. The Small Tract restrictions limited the use of the property in it to residential purposes. The restrictions also included some recitals that the purpose of the restrictions was to preserve the value of the property located within Timberlake Village.

HMW bought some property in the Small Tract for use as a utility site and constructed a small water plant there. Because this use would have violated the residential-only restrictions, HMV sought to condemn that restriction as it applied to the utility site. A large number of property owners within Timberlake Village

counterclaimed, seeking damages to their properties because of the loss of the residential-only restriction on the Small Tract.

HMW claimed that the Timberlake Village owners lacked standing. Standing is a prerequisite to subject-matter jurisdiction, and subject-matter jurisdiction is essential to a court's power to decide a case. Standing consists of some interest peculiar to the person individually and not as a member of the general public. In disputes over deed restrictions, a person has standing to enforce the restriction only upon showing that the restriction was intended to inure to his or her benefit. It is well settled that a restriction on a piece of property may not be enforced by one who owns land not subject to the restriction, absent privity of contract or a general plan or scheme of development applicable to the land that the plaintiff does own.

To establish the existence of a general plan or scheme of development, the party seeking to enforce deed restrictions must establish that (1) a common grantor (2) developed a tract of land (3) for sale in lots and (4) pursued a course of conduct which indicates that he intends to inaugurate a general scheme or plan of development (5) for the benefit of himself and the purchasers of the various lots, and (6) by numerous conveyances and (7) inserts in the deeds substantially uniform restrictions, conditions and covenants against the use of the property. This basically requires that each conveyance of a lot contain or carry adequate reference to the recorded restrictions, the burdening of each lot with the restrictions for the benefit of each other lot, and the right of each lot owner to enforce the restrictions against the other lots.

When the developer's actions satisfy all of these requirements, the grantees acquire by implication an equitable right, variously referred to as an implied reciprocal negative easement or an equitable servitude, to enforce similar restrictions against that part of the tract retained by the grantor or subsequently sold without the restrictions to a purchaser with actual or constructive notice of the restrictions and covenants. The most common test of the existence of a general building or neighborhood scheme is an intent that the protection of the restrictive covenant inure to the benefit of the purchasers of the lots in the TRACT.

Here, the Timberlake Village owners relied on the recitals in the Small Tract restrictions that said the purpose of the restrictions was to preserve the value of the property located within Timberlake Village. Recitals in a contract do not control the operative clauses of the contract unless the latter are ambiguous. Whenever possible, the recitals should be reconciled with the operative clauses and given effect, unless they cannot be so harmonized, in which case unambiguous operative clauses will prevail. In other words, recitals, especially when ambiguous, cannot control the clearly expressed stipulations of the parties; and where the recitals are broader than the contract stipulations, the former will not extend the latter.

The parties do not dispute Timberlake Village and the Small Tract are distinct pieces of property and that each is subject to certain deed restrictions, including a residential-use restriction. But different instruments impose the restrictions on each parcel, and the restrictions are substantively different in myriad ways. To establish the existence of a general plan or scheme applicable to both the Timberlake Village and the Small Tract the Timberlake Village homeowners bear the burden of showing, among other facts, that the developer developed a tract of land for sale in lots and by numerous conveyances inserted in the deeds substantially uniform restrictions, conditions and covenants against the use of the property. But the opposite happened. The developer did not develop “a tract of land,” but two. The restrictions on each subdivision were substantially different. the imposition of restrictions on only one piece

of property or one portion of a larger parcel is evidence of a general scheme covering only the restricted land.

Accordingly, the court held that the Small Tract was not part of a general plan or scheme of development such that would bring it within the exception to the general rule that requires privity of contract. Furthermore, despite the wording of the recitals, the operative provisions of the Small Tract restrictions make no mention of Timberlake Village. In other words, the Small Tract Declaration gives the owners of property in Timberlake Village no rights whatsoever. In addition, the Small Tract declaration confers the power to enforce the restrictions in the Small Tract Declaration only to owners of within the Small Tract.

Because the court held that the Timberlake Village owners lacked standing, their claims were dismissed.

Anderton* v. *City of Cedar Hill, 447 S.W.3d 84 (Tex.App.-Dallas 2014, no pet.). Lynch leased property from which he sold sand and stone. When the City issued a building permit, the property was zoned "C" for commercial. Although the City's permit describes the "use" of the property as "sand and gravel sales," Lynch's business also sold fill dirt, rock, sand, gravel, flagstone, plants, trees, and firewood. Lynch said he operated his business on both Lots 5 and 6 from 1985 through 2000 and kept material, including fill dirt, on Lot 5. In 1985, part of the property was rezoned to "SU," special use for mini-warehouse storage. In 2001, it was changed again to "LR," local retail.

Lynch sold his business to the Andertons. They also leased the same property that Lynch had leased and ultimately bought it. They expanded their operations at some point. The City then started questioning the use of the property. The Andertons sought a zoning change back to commercial, but it was turned down.

The Andertons thought their use was a legally nonconforming use and refused to terminate it. The City then issued citations for unlawful expansion of a nonconforming use.

A nonconforming use of land is a use that existed legally when the zoning restriction became effective and has continued to exist even though no longer in compliance with currently applicable restrictions. When determining whether there is a legal nonconforming use in a particular case, the proper focus is on the legislative enactments of the regulation body. The party claiming privilege to continue a nonconforming use, in this case the Andertons, bears the burden of proving its preexisting status.

The City ordinance here provides that a nonconforming use that was lawfully established prior to the effective date of amendatory regulations may continue to operate under the regulations under which it was established, but shall not be enlarged, increased, or extended to occupy a greater area of land than was occupied at the time the use became nonconforming. The court found many disputed fact issues and held that the trial court erred in granting summary judgment in favor of the City.

Town of Annetta South* v. *Seadrift Development, L.P., 446 S.W.3d 823 (Tex.App.-Fort Worth 2014, pet. pending). The Town denied Seadrift's preliminary subdivision plat for an approximately 106-acre tract. A large portion of Seadrift's platted subdivision was located in the ninety-five acres of the Town's ETJ. While Seadrift's proposed subdivision lots within the Town's boundaries were two acres in size, the lots in the Town's ETJ were not. At the time of Seadrift's plat application, the only Town ordinance provisions addressing density in the Town's ETJ were located in Town Ordinance 011. Ordinance 011 contains a provision requiring that all lots in the Town's ETJ be at least two acres in size.

The Town certified that the reason for

its denial of Seadrift's plat was that the density of the development is excessive. After receiving this certification, Seadrift filed suit against the Town seeking a declaratory judgment that Ordinance 011's provision requiring that all lots within the Town's ETJ must be at least two acres in size violates Local Government Code § 212.003(a)(4). Seadrift also sought a writ of mandamus to compel the Town to engage in the ministerial act of approving the subdivision plat.

A city's authority to regulate land development in its ETJ is wholly derived from a legislative grant of authority. A city is authorized to apply municipal ordinances governing plats and subdivisions of land to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly, and healthful development of the municipality to property within its ETJ. The municipality is also authorized to apply in its ETJ other city ordinances relating to access to public roads or the pumping, extraction, and use of groundwater by persons other than retail public utilities. But, unless otherwise authorized by state law, a municipality may not regulate a number of activities and uses within the municipality's ETJ, among which is that a city may not regulate the number of residential units that can be built per acre of land.

The Town argues that the minimum lot size regulates only how small a resulting lot can be. It does not expressly mandate the number of residential units that can be built on the resulting lots. A resulting two-acre lot can logically be the site for one or multiple duplexes, triplexes or apartment buildings and thus, can contain one, twenty, or more residential units.

The court didn't buy this argument. Ordinance 011 actually does control or regulate the number of residential units that can be built, which appears on its face to violate Local Government Code § 212.003(a)(4).

Garrett Operators, Inc.* v. *City of Houston, 461 S.W.3d 585 (Tex.App.-Houston [1st Dist.] 2015, pet. denied). Garrett holds a lease on a small parcel of land located in Houston, Texas. The only significant structure on this parcel of land is an advertising billboard. Garrett's owner, Cox, met with the City's Sign Administration to discuss plans to install an LED display on his billboard. The City told him that it was illegal in Houston for sign owners to use an LED display on a sign. Apparently the code didn't mention LED displays, but the City told him it was likely that it would change the Sign Code.

Garrett later had its lawyer send a letter to the City describing the LED installation and asserting that the Sign Code does not require a permit for the installation. The City responded by saying that, based on what it knew, the LED installation would be in direct violation of the City's Sign Code.

When Garrett attempted to install the sign, the City issued a stop order for the work. The basis for the order was that no permits were on file. Garrett filed suit. A few days after that, the City enacted an ordinance that explicitly prohibited off-premise electronic signs.

Among other issues in this appeal, Garrett argued that the pre-amendment Sign Code did not require it to obtain a permit to convert to an LED display. This required a determination as to whether the amendment of the Sign Code could be applied retroactively.

A retroactive law is one that extends to matters that occurred in the past. Article I, § 16 of the Texas Constitution prohibits retroactive laws; however, not all retroactive statutes are unconstitutional. There is a three-part test to determine whether a retroactive statute is unconstitutional. A court looks at (i) the nature and strength of the public interest served by the statute as evidenced by the Legislature's factual

findings; (ii) the nature of the prior right impaired by the statute; and (iii) the extent of the impairment.

The City argued that applying the amendment to Garrett does not create a retroactive law because Garrett does not have any vested right to convert his billboard to LED without a permit. Specifically, it is the City's position that, absent an application to the City, which Garrett admittedly did not submit until 2011, Garrett had no vested interest. Garrett responds, however, that no such application was required.

The "Sign Permits and Fees" portion of the Sign Code, provides that no one can erect, reconstruct, alter, relocate, or use a sign without a permit, subject to certain exceptions. The City's position was that Garrett's plan was to reconstruct or alter its billboard, thus requiring a permit to do so.

Garrett argued that the "Miscellaneous Sign Provisions" of the Sign Code applied. Those provisions include a provision that no sign permit is required for the change of electrical wiring or devices. Garrett claimed that all it was doing was changing electrical wiring and devices. The City said Garrett was going much further. It was not merely changing letters, symbols, and coy, but rather was reconstructing the existing sign by installing a new LED sign cabinet to create essentially a new sign.

While both sides disagree about whether the proposed changes require a permit from the City, the parties essentially agree on the details of the proposed upgrade. The upgrade, as described, would require the rewiring of the electrical portions of the sign, but also would require the removal of the rotating slats, which would then be replaced by LED panels that could be controlled and changed by computer.

The court agreed with the City that this type of extensive change to the sign is more than simply changing the "electrical wiring and devices" of the sign. Indeed, the summary judgment evidence shows that the electrical wiring component of the project had been completed when the City issued a stop order, and that that more work was necessary to complete the project. If the court were to accept Garrett's position that it was merely changing the electrical wiring and devices of the sign, the exception in the Sign Code would threaten to "swallow the rule" that requires permits for reconstructing and altering signs, for it is hard to imagine any extensive renovation to a sign that would not also involve changes to the electrical wiring. Thus the exception would become largely meaningless. Statutory language should not be read as pointless if it is reasonably susceptible of another construction.

Therefore, the court held that the proposed conversion from a tri-display billboard to a LED-display billboard was not merely a change to the "electrical wiring and devices," but was a reconstruction or alteration of the billboard requiring a permit from the City. Because Garrett was required to, but had not requested a permit from the City at the time it filed suit, it had no vested interest in converting its sign to LED without a permit. Because Garrett had no vested interest in converting its sign without a permit, the amendments to the Sign Code are not unconstitutionally retroactive when applied to it.

PART XVII
AD VALOREM TAXATION

Parker County Appraisal District* v. *Francis, 436 S.W.3d 845 (Tex.App.-Fort Worth 2014, no pet.). Francis owns three contiguous tracts of land in Parker County: a three-acre tract, a one-acre tract, and a nine-acre tract. A home in which Francis lives is located on the one-acre tract. The properties are contiguous, forming one thirteen-acre tract of property.

Prior to 2010, Francis had applied for and PCAD granted a valuation of the three-acre tract as open-space land for purposes of ad valorem taxes. In 2010 and 2011, Francis applied for the residence homestead exemption on the three-acre tract, which PCAD denied. Francis challenged the denial. The trial court ruled for Francis, applying the residence homestead exemption and the valuation based upon open-space land.

PCAD claimed that land may not be used as a residence homestead and also be used principally for agricultural use so as to qualify as open-space land. The court disagreed. Tax Code § 23.55(i) provides that a parcel of land qualifying for open-space land valuation does not undergo a change in use when it is claimed as part of a residence homestead. A parcel of land qualifying for open-space land valuation does not undergo a change in use when it is claimed as part of a residence homestead.

PCAD also asserts that Francis's construction of Tax Code § 23.55(i) thwarts legislative intent to impose a tax penalty upon landowners for taking property out of agricultural production. PCAD contends that the rollback tax is assessed when the landowner stops using the land for agricultural purposes in order to recapture the taxes the owner would have paid had the property been taxed at market value for each year covered by the rollback. The court agreed with PCAD; but here, Francis did not take his property out of agricultural production in 2010 or 2011. To the contrary, the stipulated facts and evidence before the trial court established that the three-acre tract qualified for the open-space land valuation throughout 2010 and 2011 because it was used principally for agricultural use. Moreover, the plain language of § 23.55(i) makes it clear that the legislative intent--at least with regard to having landowners obtain open-space land valuation of property that they subsequently may desire to claim as their residence homestead--was to encourage such landowners by specifically providing that for purposes of rollback taxes, the use of open-space land did not change solely because the landowner now claimed it as part of his residence homestead.