CURRENT CASE LAW UPDATE

TEXAS REAL ESTATE AND REAL ESTATE FINANCE

Presented by

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The case selection for this Recent Case Update is very arbitrary. If a case is not mentioned, it is completely the author's fault.

The outline goes through 1998 advance sheet number 50, 975 S.W.2d 85. It also includes Texas Supreme Court cases through 42 Tex. Sup. Ct. J. number 3, and a smattering of cases from the federal courts.

In an effort to streamline the case discussions, various statutory and other references have been reduced to a more convenient shorthand. The following is an index of the more commonly used abbreviations.

"Bankruptcy Code" -- The Federal Bankruptcy Code, 11 U.S.C.A. §§ 101 et seq.

"DTPA" – The Texas Deceptive Trade Practices Act, Texas Business and Commerce Code, Chapter 17.

"UCC" -- The Texas Uniform Commercial Code, Texas Business and Commerce Code, Chapters 1 through 9.

The Texas Property Code is referred to as the "TPC," 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.

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PART I
MORTGAGES AND FORECLOSURES

- ***Cadle Company* v. *Butler***, 951 S.W.2d 901 (Tex.App.–Corpus Christi 1998, no writ). In November 1987, the Weaklys signed a note in favor of Butler secured by a deed of trust. The note matured in November 1988, but, contrary to the common practice in Texas, the maturity date of the note was not shown in the deed of trust. There were a number of oral extensions of the maturity date, but no written extension signed by both parties was entered into until October, 1993.

Cadle obtained a judgment against the Weaklys in March of 1993, and abstracted it in May of that year.

In the battle of the liens which ensued, Cadle argued that limitations on the Butler lien had expired before the Cadle judgment lien had attached and that subsequent attempts to extend it were ineffective as to it. Butler argued that, since the deed of trust contained no maturity date, limitations on the deed of trust was determined only by the underlying note, whose maturity was extended by oral agreements.

The Court held that the note and deed of trust were to be construed as one agreement. Sections 16.036 and 16.037 of the Texas Civil Practice and Remedies Code requires extensions of lien debts to be signed by both parties to the transaction and recorded in order to suspend the running of limitations. If a BFP acquires his interest in the property when no renewal or extension agreements are recorded and the lien debt appears to be four years past due, the lien debt is void as to the BFP. Where there is no recorded, properly executed extension agreement, the maturity date stated in the original instrument is conclusive evidence of the maturity date of the debt.

Butler argued that Cadle could have acquired notice of the oral extensions of the debt and lien. In essence, if Butler had inquired about the maturity set out in the original note, he would have learned about the extensions of that maturity. Basically, his argument was that the ability to discover the existence of an oral extension is sufficient to satisfy the notice requirements of the § 16.036 of the Texas Civil Practice and Remedies code. The Court, in a lengthy analysis, disagreed. The purpose of the statute of limitations would be totally defeated if lienholders could assert an outstanding interest in real property against all third parties by refusing to record extension or renewal agreements and then claiming parol extension agreements had been made. The purpose of requiring recording of renewals and extensions is to protect BFPs against the evils of secret liens and the subsequent frauds.

- ***Swedlund* v. *Banner***, 970 S.W.2d 107 (Tex.App.–Corpus Christi 1998, writ denied). John and Maureen borrowed $30,000 from the Bank, secured by a deed of trust on their residence. They were unable to pay at maturity, so the Bank extended it for two years, at which time they were again unable to pay. To prevent foreclosure, Banner bought the note and liens from the Bank. On the same day that the liens were transferred to Banner, John and Maureen signed a second note for around $26,000, payable in 48 monthly installments. This second note did not refer to the liens at all, although it was clear that this note was a renewal of the Bank's note. They defaulted on this note as well. Banner then presented them with two additional notes, one for the balance of the second note and one more for some other funds advanced to John and Maureen. John signed them; Maureen did not.

Ultimately Banner sued John and Maureen, seeking a declaratory judgment establishing the balance due on the note and the existence of the lien securing the note. Maureen counterclaimed, asking the court to declare that no lien existed, and also contending that, in the absence of a written agreement extending the lien, Banner's claims were barred by limitations. Banner filed a response and a motion for summary judgment, claiming that the documents which were executed in connection with Banner's acquisition of the Bank's note and lien evidenced the parties' intent that the security interest held by the Bank was transferred to Banner to secure payment of the second note. In addition, they claimed that limitations did not bar recovery because, pursuant to Texas Civil Practice & Remedies Code § 16.035(e), limitations on an installment note does not commence until the date of the last installment. The trial court granted Banner's motion for summary judgment, and entered judgment against John and Maureen.

The deed of trust assigned to Banner provided that it was security for the first note. It also contained a provision stating that: "All or any of the notes or other indebtedness hereby secured may be from time to time renewed or extended by the holder or holders thereof, and in any such case all the provisions of this deed of trust and the lien hereof, shall remain in full force and effect as if said note or notes or other indebtedness had originally been made to mature at such extended time or times."

Maureen contended that, even though the second note was in the entire amount due on the first note, the parties did not agree to extend the first note. The Court held that, even though her contention was disputed by the affidavit of Banner, it didn't really matter. The deed of trust covenant regarding extensions was sufficient to extend the lien.

The Court further held that limitations did not run until four years after the date of the last installment on the second note.

The Court did not discuss the application of the Texas Civil Practice & Remedies Code to its two holdings. Perhaps it should have. Section 16.035 says that foreclosure of a lien must occur not later than four years after the day the cause of action accrues. For the first note, that date was March 26, 1983. Banner didn't file suit until October 23, 1990. Section 16.036 of the

Texas Civil Practice & Remedies Code seems to require compliance with it in order to extend limitations to cover the second note. Section 16.036 states that the parties liable on a lien debt can suspend the running of the statute of limitations only by a written extension agreement as provided in that section. The second note does not appear to have qualified as such an extension agreement, and, the way I see it, limitations had long since expired by the time this lawsuit was brought.

• ***Walton* v. *First National Bank of Trenton***, 956 S.W.2d 647 (Tex.App.–Texarkana 1997, writ denied). The Bank had a note secured by a vendor's lien and deed of trust. The maker of the note died. At first, the bank proceeded to make the claim on its note through the probate court (and there is plenty of discussion about these procedures in the case, if you are interested). After first seeking the district court's confirmation of the probate claim, which was opposed by the administrator of the estate, the Bank filed a trespass to try title action based on the vendor's lien and superior title.

Superior title is held by the vendor where an express vendor's lien is retained to secure unpaid purchase money, and the purchaser has only an equitable right to acquire title by carrying out the agreement. A vendor's lien is different from a regular mortgage. For one thing, a claim based on a mortgage is subordinate to the administration of an estate, but a claim based on a vendor's lien is not because the vendor retains superior title to the property and the purchaser's death cannot transform his title into something different from what he had before.

The vendor has a choice of remedies on the purchaser's default. He may sue for his money, he may rescind the contract and take possession, or he may sue to recover title and possession. The remedy of rescission is independent of the remedies to enforce payment. Thus, the Bank could sue for the land rather than the money and could bring that suit in district court rather than the probate court.

• ***Dayton Reavis Corporation* v. *Rampart Capital Corporation,*** 968 S.W.2d 529 (Tex.App.–Waco 1998, writ dism'd w.o.j.). Rampart owned a note signed by CHOC. It believed it held deeds of trust to secure the note covering land owned by Dayton. Rampart posted the property for foreclosure, at which time CHOC and Dayton obtained an injunction stopping the foreclosure. Rampart then sought the appointment of a receiver, which was granted by the trail court.

Dayton claimed on appeal that the receivership order should not have been entered. It claimed the receivership and the injunction against foreclosure were mutually exclusive remedies. It relied on ***Jackson v. The Praetorians***, 80 S.W.2d 322 (Tex.Civ.App.–Dallas 1935, no writ), which had held that an injunction which prevented the sale of the real estate and (according to that court) protected the owner's undisturbed possession of the property. The Court distinguished the injunction in this case. Here, the only thing enjoined by the Court was the foreclosure sale, and that was for the purpose of resolving certain issues before a sale to occur. There was nothing exclusive about these two remedies. Each remedy recognized the existence of the dispute and each was designed to preserve the status quo pending a trial.

- ***Katy Personal Storage, Inc.* v. *First State Bank***, 968 S.W.2d 579 (Tex.App.–Houston [14th Dist.] 1998, no writ). The Bank's foreclosure and recording of its trustee's deed immediately after denial of the trial court's denial of an injunction to stop the foreclosure made the appeal of that denial moot.

- ***Blount* v. *Dutton***, 967 S.W.2d 955 (Tex.App.–Beaumont 1998, no writ). The Duttons owned some land. Colson, a constable conducting a constable's sale of the property, struck it off to Blount. Blount, in fact, was a deputy constable, although was not handling the sale of the property. Texas Civil Practice & Remedies Code § 34.048 states: "If any officer or his deputy making sale of property on execution, shall directly or indirectly purchase same, the sale shall be void." Before codification, the provision read, "If any officer making sale of property on execution, or his deputy, shall . . ."

The Duttons sued to set aside the sales. Blount argued that the statute should be read literally to include only the officer or deputy actually conducting the sale.

The Court held that the codification of the prohibition into the Civil Practice & Remedies Code should not change the substance of the prior law. A mere change in phraseology in the revision of a statute should not work a change in the law previously declared unless in indisputably appears that such was the intent of the legislature. That appearance did not exist here, so the Court held that the statute meant to void any sales where the property was purchased by any deputy of the constable.

- ***Vogel* v. *The Travelers Indemnity Company***, 966 S.W.2d 748 (Tex.App.–San Antonio 1998, no writ history to date). When a proposed renewal of the loan fell through (mainly because the Vogels couldn't satisfy a number of conditions to closing), Travelers began foreclosure proceedings. These were temporarily derailed by a TRO granted by a State court. Travelers had the matter removed to the Federal courts, where the Vogels were unable to obtain an injunction to prevent the foreclosure. The foreclosure proceeded. The Federal court then dismissed the injunction proceedings as moot.

The Vogels tried to negotiate a repurchase of the property but were unable to complete that transaction either. Eventually, they sued Travelers for wrongful foreclosure. Summary judgment was granted to Travelers, although the grounds for summary judgment were not clearly set out.

Among other reasons for complaining about the summary judgment, the Vogels contended that summary judgment on Travelers' affirmative defense of res judicata was improper. Res judicata is applicable only where there is a prior final judgment on the merits by a court of competent jurisdiction, identity of parties or those in privity with them, and a second action based on the same claims as were raised or could have been raised in the first action. Determining what constitutes the subject matter of a suit requires an examination of the factual background of the claim in the prior litigation. Texas has adopted the "transactional" approach to res judicata. In determining whether claims arise out of the same subject matter and thereby constitute a single "transaction" the court considers (i) their relatedness in time, space, origin, or motivation, (2) whether the claims form a convenient trial unity, and (3) whether their treatment as a trial unit conforms to the parties' expectations or business understanding or usage.

Here, the Court found that the Vogels' claims in this lawsuit were not previously litigated in the injunction action and there was no final judgment on the merits in that case. In addition, the claim asserted in the injunction action and this action were not related in time, space, origin or motivation. Seeking an injunction before foreclosure and seeking recovery based on wrongful foreclosure are two different things, sought at two distinct periods of time in relation to the foreclosure. Furthermore, treating the claims as a trial unit would not conform to the Vogels' expectations. Res judicata did not apply, and summary judgment based on res judicata was improper and other grounds for the summary judgment would have to be found.

The Vogels argued that Travelers had breached its duty of good faith and fair dealing under the Note. It based its argument on UCC obligation of good faith, which, argued the Vogels, had been chosen by the parties when they stated that it was a security agreement governed by the UCC.

Because the deed of trust is a mortgage, it is not subject to interpretation under the UCC. The deed of trust merely recited that it was to be construed as a security agreement under the UCC only with respect to goods that are fixtures. Travelers did not owe a UCC duty of good faith with respect to a real property foreclosure. Furthermore, there is no common law duty of good faith and fair dealing that ordinarily exists between mortgagor and mortgagee. That duty exists only where there is a "special relationship" between the parties marked by a shared trust or an imbalance in bargaining power. Travelers was entitled to summary judgment on this issue.

The claims of fraud and promissory estoppel relating to the failed repurchase and refinance failed on factual grounds.

The Vogels final argument was that the foreclosure was wrongful because Travelers failed to comply with the terms of the note and deed of trust and because of Travelers' breach of the duty of good faith. The duty of good faith argument was DOA here, of course. The Vogels admitted that the foreclosure complied with the statutory foreclosure requirements, and without an additional duty, there was no wrongful foreclosure.

- ***Sanders* v. *Shelton***, 970 S.W.2d 721 (Tex.App.–Austin 1998, writ pending). The substitute trustee gave notice that he would conduct a foreclosure sale between the hours of ten o'clock and four o'clock, but didn't specify the exact hour. Just before ten a.m., the debtor sold the property to Sanders and Fisher, purportedly free of liens. Sanders and Fisher then hung around the courthouse until four, but never located the sale. The trustee sold it at about eleven on the east steps of the Courthouse.

Sanders and Fisher sued to set aside the sale, alleging it was void for a number of reasons. Among those, they claimed that the notice of sale failed to state exactly when the sale was going to begin.

TPC § 51.002 provides that the foreclosure notice must state the earliest time at which the sale will occur and that the sale must be held within three hours of that time. The Court held that this notice complied with the statute. The notice makes it perfectly clear that the sale would begin no earlier than ten a.m. No more is required. The statute does not require the notice to state that the sale will conclude within three hours of the earliest stated time; it just requires that the sale actually be completed by then.

- ***Milliorn* v. *Finance Plus, Inc.***, 973 S.W.2d 690 (Tex.App.–Eastland 1998, writ denied). Milliorn executed a series of notes to the Bank, including a $38,000 note and a $320,000 note. The $320,000 note was secured by an assignment of another note and the liens securing it. The notes were cross collateralized. The Bank ultimately failed and the notes were sold to Finance Plus. Finance Plus foreclosed on the collateral specifically securing the $320,000 note. Its notice of foreclosure referred to the $320,000 note and the collateral securing it. However, it appears that the notice of foreclosure was not posted at the courthouse door. The trial court held that this failure to post the notice was sufficient evidence that the foreclosure was not conducted in a commercially reasonable manner. It barred recovery on the $320,000 note, but entered judgment in favor of Finance Plus on the $38,000 note.

Milliorn claimed the unreasonable foreclosure should bar recovery on both notes because they were cross collateralized. The Court of Appeals held that cross-collateralization did not magically transform the two notes into one, and upheld the trial court's judgment on the $38,000 note.

- ***Advantage Group Investment, Inc.* v. *Pacific Southwest Bank, F.S.B.***, 972 S.W.2d 866 (Tex.App.–Corpus Christi 1998, writ pending). In the mid-eighties, AGI borrowed a couple of loans from Charter Savings. After defaulting on the notes, this lawsuit was instituted by AGI. After the lawsuit began, AGI and Charter entered into an Interim Agreement pursuant to which AGI agreed not to seek a TRO to stop a foreclosure and Charter agreed not to foreclose without giving 30 days notice.

Charter failed, and FSLIC (remember them) sold its assets to Pacific. Pacific foreclosed on the real property securing the loans, but gave only the statutory 21-day notice, rather than the thirty days required by the Interim Agreement.

Pacific was not a party to the Interim Agreement. Furthermore, when it took over the assets of Charter, Pacific specifically disclaimed the assumption of any of Charter's liabilities or obligations. The Court held that Pacific had not "stepped into the shoes" of Charter with respect to the Interim Agreement.

Furthermore, the ***D'Oench, Duhme*** doctrine and 12 U.S.C. § 1823(e) exempt Pacific from the notice obligation under the Interim Agreement. ***D'Oench, Duhme*** protects FSLIC from secret agreements not reflected in the documents of a failed bank. As codified, the agreements need not even be secret. The Interim Agreement was covered by the doctrine. In addition, the Court held that the Interim Agreement did "defeat or diminish" an interest in the assets in question. Also, the Court held that the Interim Agreement was not, as argued by AGI, a part of the loan documents, but was a collateral and separate agreement, executed at a different time and as a compromise between Charter and AGI.

PART II
PROMISSORY NOTES,
LOAN COMMITMENTS
AND LOAN AGREEMENTS

- ***Cox* v. *Lehrman***, 949 S.W.2d 527 (Tex.App-Houston [14th Dist.] 1997, no writ). Cox was a divorce lawyer, who engaged Lehrman, a psychologist, to testify in his client's behalf. After the client signed a promissory note to pay for Lehrman's services, Cox sent a letter which said, "If after reasonable attempts Mrs. Egan is unable or refuses, I will pay your bills for court appearances." The client didn't pay, so Lehrman sought payment from Cox based upon the guaranty letter.

The law recognizes two types of guaranties: guaranties of payment and guaranties of collection. A guaranty of collection is an undertaking of the guarantor to pay if the debt cannot be collected from the primary obligor by the use of reasonable diligence. With such a guaranty, the principal debtor must be joined in the suit unless excused pursuant to the Texas Civil Practices and Remedies Code. A guaranty of payment is an obligation to pay the debt when due if the debtor does not. There is no condition precedent to enforcing a guaranty of payment other than a default by the principal obligor. A guarantor of payment is primarily liable and waives any requirement that the holder of the note take action against the maker. He is akin to a co-maker of the note. A lender may bring an action against a payment guarantor without joining the principal obligor.

Cox argued that Lehrman failed to fulfill the "reasonable attempts" condition precedent by failing to sue the principal obligor. The Court found no cases establishing what "reasonable attempts" at debt collection were. However, relying on Rule 31 of the Texas Rules of Civil Procedure, and Section 17.001 of the Texas Civil Practice and Remedies Code, the Court found that it was necessary in the case of a collection guaranty to join the principal obligor as a condition precedent to the action against the guarantor. Thus, Rule 31 and Section 17.001 established the "reasonable attempts" requirements, which Lehrman had failed to satisfy.

- ***Boland* v. *Mundaca Investment Corporation***, 978 S.W.2d 146 (Tex.App.–Austin 1998, no writ history to date). The Bolands executed a promissory note in the amount of $100,000 to buy 35 acres in Comal County. The property was collateral for the loan. Mundaca acquired the note, and, after several defaults by the Bolands, foreclosed on the land, selling it at foreclosure for $44,000. About eight months later, Mundaca's lawyer sent a letter to the Bolands demanding payment of a deficiency in the amount of $13,000. In fact, that number was a mistake, the actual deficiency amount being well over $40,000. The Bolands jumped all over the mistake, sending in the $13,000 with all sorts of notations about this being "full settlement" of claims, etc. The check was endorsed and cashed. Then Mundaca discovered its mistake and sought to collect the remaining balance of the deficiency. In the lawsuit, the Bolands argued accord and satisfaction.

To prevail on the defense of accord and satisfaction, a party must prove the existence of a new contract, express or implied, whereby the parties agree to discharge the existing obligation by payment of a lesser amount. The Court held that the language on the check, with its clear and unequivocal offer of an accord, and the subsequent cashing of the check constituting acceptance of the accord, was sufficient.

Mundaca's only defense to accord and satisfaction was its unilateral mistake. To succeed on that theory, Mundaca needed to show that the mistake was of so great a consequence that enforcement would be unconscionable, that the mistake related to a material aspect of the contract, that it was made despite the exercise of ordinary care, and that the parties can be placed in status quo in an equity sense. Here, Mundaca provided no evidence of ordinary care in coming up with the number given to the Bolands, so Mundaca's defense failed.

What the Court does not discuss, and what, to my mind makes this case wrong, is the issue of consideration. In order for accord and satisfaction to exist, there must be consideration, just like any other contract. It has long been held that payment of less than the full amount of an undisputed debt cannot be consideration for accord and satisfaction. The Court did not cite, and apparently did not look at American National Insurance Co. v. Gifford-Hill & Co., Inc., 673 S.W.2d 915 (Tex.App.–Dallas 1984, writ ref'd n.r.e), where the Dallas Court of Appeals noted that "when the true amount of the debt is not in dispute, relief may be granted for a unilateral mistake of the creditor in accepting an underpayment or of the debtor in making overpayment." 673 S.W.2d at 922. In addition, the Court recognized that knowledge by one party that the other is acting under a mistake of fact is equivalent to a mutual mistake.

- ***Star Food Processing, Inc.* v. *Killian***, 954 S.W.2d 124 (Tex.App.-San Antonio 1997, writ denied). Star signed a note to Killian which contained a waiver of all "notices, demands for payment, presentations for payment, notices of intention to accelerate the maturity, protest and notice of protest." After a default, Killian spoke to her attorney about accelerating the debt. The attorney faxed a notice of acceleration and demanded payment in full. In fact, two hours before the fax notice of acceleration, Star had placed the late payment in the mail. Star kept sending regular payments, but each one was returned because it wasn't payment in full.

Based upon ***Shumway*** **v.** ***Horizon Credit Corp.***, 801 S.W.2d 890 (Tex. 1991) which requires express waivers of notices of intention to accelerate and notice of acceleration, the Court held that Star had not waived notice of acceleration. The jury in the trial court had found that payment was made before notice of acceleration. The trial court disregarded the jury's finding and entered judgment in favor of Killian that the note was properly accelerated. This Court reversed the trial court, holding that the note had not been properly accelerated because payment had been made before acceleration.

Killian then argued that Star had failed to plead and prove payment as an affirmative defense. The Court said that the affirmative defense of payment was inapplicable. This case involves the question of whether the note was properly accelerated, and does not involves questions about the amount of the debt.

- ***C&A Investments, Inc.*** **v.** ***Bonnet Resources Corp.***, 959 S.W.2d 258 (Tex.App.–Dallas 1998, writ denied). C&A contracted to purchase some loans from Bank One. Bonnet was Bank one's agent. The bid documents contained extensive disclaimers about the quality of the loans, specifically stating that statements in the schedule of loans about whether the loan in question was current were not reliable. There were other documents that also contained disclaimers about the quality of the loans and statements to the effect that C&A would rely on its own investigations.

The loan that became troublesome was identified as Loan E. Several times before the scheduled closing date for the loan, statements were made by a Bonnet officer that the loan was current. That wasn't true, and the fact that it wasn't current was subsequently made known to C&A before the closing. C&A then told Bonnet it would not purchase Loan E, and demanded the return of its earnest money. Bonnet refused. C&A sued Bonnet for breach of contract and fraud.

As to the breach of contract claim, Bonnet argued that the disclaimers in the bid documents and the other documents precluded any statements about the loan in the bid documents themselves from being enforceable representations. The Court agreed. From the documents, the Court concluded that the statements about the loan made in the bid documents and other documents between the parties were not a part of the contract and could not be relied upon.

C&A claimed that the repeated assertions by the Bonnet officer that Loan E was performing were relied upon by it when C&A entered into the agreement to buy the loan. Absent these representations, C&A would not have entered into the contract to buy Loan E. Bonnet contended that C&A, in its purchase agreement, agreed to buy the loans "as is" and "with all faults," and that C&A had been warned that the information about the loan was faulty and could not be relied upon. The Court agreed with Bonnet. The Court reviewed all of the wording everywhere about disclaimers and as-is and so on and concluded that C&A could not justifiably relied upon any statements about the quality of Loan E.

- ***Geary* v. *Texas Commerce Bank, National Association***, 967 S.W.2d 836 (Tex. 1998). Corey and Incorsel (wholly owned by Corey) co-signed a promissory note to TCB. Corey died and Geary became the independent executor of his estate. Geary placed Incorsel into a chapter 11 bankruptcy, emerging a year later under a confirmed plan. As part of the reorganization, TCB received a partial payment on the note and promised to assert no future claims against Incorsel. In addition, the plan settled any obligation of Incorsel alone and any obligation of Incorsel "and any other person" to any entity. TCB did not object to or appeal from the entry of the plan.

TCB sued Geary, as executor for Corey, for the balance of the note. Geary moved for summary judgment on the grounds that the bankruptcy plan ended Corey's obligations on the note and was res judicata on TCB's claim.

In a *per curiam* opinion, the Supreme Court agreed and held that the bankruptcy plan was res judicata. As executor of the co-obligor's estate, Geary represented the estate's interest in bankruptcy. The bankruptcy reorganization plan addressed those interests by purporting to release the estate's shared debt with Incorsel. Geary was therefore a party to the bankruptcy and can assert res judicata because the bankruptcy proceeding affecting his liabilities as executor. Geary is entitled to rely on the bankruptcy order releasing the estate's shared debt.

- ***Commercial Services of Perry, Inc.* v. *Woolridge***, 968 S.W.2d 560 (Tex.App.–Fort Worth 1998, no writ1995). Commercial Services bought a note Woolridge had given to Fort Worth State Bank. The note was to bear interest at 13.25% per annum initially and then fluctuate based on the prime rate of Fort Worth State Bank. The Bank was closed and taken over by the FDIC. Commercial Services sued Woolridge to collect on the note. It appeared that Commercial Services charged Woolridge interest at the 13.25% rate throughout the term of its ownership of the note.

In order to collect on a promissory note, the holder or payee must establish that: (1) there is a note, (2) it is the legal owner and holder of the note; (3) the defendant is the maker of the note, and (4) a certain balance is due and owing on the note.

Where a note provides for a variable rate tied to a no-longer published prime rate of a defunct institution, the trier of fact should apply a reasonable rate of interest if evidence of a reasonable rate of interest is shown in the record. Here, the Court held that there was no evidence of a reasonable rate. Commercial Services attempted to get Woolridge's expert to testify that charging 13.25% was reasonable, but failed to do any more than make their case worse by letting the expert testify that the interest rate being charged was two and a half times the lowest rate he remembered.

Commercial Services then tried to argue that UCC § 3.112(b) allowed it to apply the judgment rate of interest to the note. Section 3.112(b) says: "If an instrument provides for interest but the amount of interest payable cannot be ascertained from the description, interest is payable at the judgment rate . . ." The Court held this was inapplicable to the case at hand. It applies where the note is silent as to how to calculate interest, not where there is a failure to prove a reasonable substitute rate. To hold otherwise, the Court said, would be to reward Commercial Services for failing to prove its case.

PART III
GUARANTIES

- ***Flo Trend Systems, Inc.* v. *Allwaste, Inc.***, 948 S.W.2d 4 (Tex.App.–Houston [14th Dist.] 1998, no writ). Flo Trend contracted with STRS for Flo Trend to do some environmental remediation services. Allwaste had an agreement with STRS for financing this particular job. When STRS finished the job it had lost money. Allwaste sued STRS on some notes it held for the financing of the job. It also sued Flo Trend, seeking a declaratory judgment that Flo Trend was not a third party beneficiary of the financing agreements. Flo Trend counterclaimed, alleging among other things that Allwaste had negligently misrepresented to it that payments for Flo Trend's work would be paid by Allwaste. Allwaste moved for a directed verdict as to the negligent misrepresentation claim on the grounds that Flo Trend was merely trying to enforce an otherwise unenforceable oral guaranty by couching the claim as a tort rather than a suit on the contract.

Section 26.01 of the Texas Business and Commerce Code requires a promise by one person to discharge the debts of another to be in writing. There are exceptions to this statute of frauds, but none were available here. Thus § 26.01 applied to bar enforcement of the guaranty. The Court noted that in ***Weakly* v. *East***, 900 S.W.2d 755 (Tex.App.–Corpus Christi 1998, writ denied), a similar attempt to avoid the statute of frauds in conveyance transactions was not allowed to succeed. The court in ***Weakly*** held that the claim for negligent misrepresentation had as its nucleus an unenforceable promise to buy real property. It further held that all of the claims of negligent misrepresentation were barred because they required proof of an alleged oral agreement which was barred by the statute of frauds. The same rule applies as to guaranties.

- ***Ashcraft* v. *Lookadoo***, 952 S.W.2d 907 (Tex.App.–Dallas 1998, writ denied *per curiam*). Ashcraft purchased a note deficiency from the RTC. The documentation of the assignment stated that what was being assigned was the note deficiency and any supporting documents located in the asset file. The loan in question was guaranties by Lookadoo, but the guaranty was not in the file and was not expressly assigned to Ashcraft.

According to Ashcraft, the assignment of the note itself automatically operates as an assignment of any separate guaranties that secure the note, regardless of whether the parties knew about the guaranties at the time of the assignment. No Texas court has dealt with the issue before, and this Court did not buy the argument at all. Its interpretation of the contract was that the only things assigned were the items directly expressed, the note deficiency and the file contents.

PART IV
USURY

- ***Coastal Cement Sand Inc.* v. *First Interstate Credit Alliance, Inc.***, 956 S.W.2d 562 (Tex.App.–Houston [14th Dist.] 1998, writ denied). For several years, Coastal borrowed from Orix, executing, in all, fifteen promissory notes. Each of the notes was a preprinted form with certain empty blanks. For each of the notes, the total sum was broken down into fixed, equal principal installments and one balloon payment. The pre-computed interest was included in the stated face amount of each note so that an equal monthly payment schedule could be prepared. Each note contained the following provision:

  "... with interest from the date hereof payable on the unpaid amount at the maturity of each installment, until maturity at the rate of -0-% per annum and after maturity at the highest legal contract rate, and if placed in the hands of an attorney for collection, a reasonable sum as attorneys' fees. Upon non-payment of any installment or interest when due, all remaining installments shall, at the option of the holder and without notice or demand, become immediately due and payable together with interest, collection charges and attorneys' fees. "

One of the loans was repaid, and the others renewed and extended more than once. Despite the presence of the acceleration clause in the notes, Orix never accelerated the notes and never collected usurious interest. Nonetheless, Coastal sued Orix alleging that it had contracted for usurious interest. The basis of the "contracting for" claim was that the contingency of acceleration might allow Orix to collect usurious interest if the notes were accelerated.

Orix argued that the notes do not expressly allow any contingency for collecting usurious interest. The contract requires the borrower to repay the loan at 0% interest and after maturity at the highest lawful rate. It read that to mean that if the loans were matured they could never bear interest at higher than the lawful rate. According to Orix, this meant that excess pre-computed interest was simply to be abated.

The Court was not persuaded by that argument. The wording of the phrase is unclear. It could be interpreted as meaning that the installment amounts plus 0% interest would be due (which would result in usury) or that the installment amounts plus the highest lawful rate would be do (which, since the installments already included interest would result in even more usury). The Court also noted there was nothing in the wording to indicate that excess interest would be rebated.

Where the term "installment" refers to a total that includes principal and unearned interest, an acceleration of all installments raises the possibility the note is usurious on its face. Orix tried to argue that the term referred only to the principal portion of the installments, but had no authority or decent argument to back up that position.

Finally, Orix tried to have the Court construe the savings clauses in ancillary documents as preventing usury in this case, but the Court refused to allow acceleration clauses in other documents to determine the terms of the acceleration clauses in the notes. Courts should be reluctant to hold that acceleration of maturity provisions which clearly call for the collection of unearned interest are vitiated by mere intimations of contrary intent found elsewhere in the contract.

In concluding its holding that Orix had contracted for usurious interest, the Court cited an old admonition to draftsmen:

> "In literally scores of cases, the courts of this state have been called upon to decide whether a contract is usurious because it contains an acceleration provision which allows the collection of unearned interest or finance charges. In view of this, we fail to understand why acceleration clauses are drafted which do not include a sentence expressly disavowing any intention to collect excessive unearned interest or finance charges in the event the obligation is accelerated. To leave the matter open to doubt is to invite litigation and risk the harsh penalties of article 5069. To settle the matter clearly in the contract between the parties is a service to the creditor, the debtor, and the taxpayers of this state." ***Jim Walters Homes, Inc.* v. *Schuenemann***, 668 S.W.2d 324, 333 n. 6 (citation omitted).

- ***Pentico* v. *Mad-Wyler, Inc***. 964 S.W.2d 708 (Tex.App.–Corpus Christi 1998, no writ). Mad-Wyler borrower $100,000 from Pentico, secured by a deed of trust and guaranteed by Madsen and Brough. The note bore interest at ten percent per annum before default and at twelve percent on past due amounts. For the first nine months, the note was payable $1,000 monthly, applicable to principal, and thereafter at $2,000 per month, including both principal and interest. The note was due and payable in a bit less than four years.

For the first fourteen months, only one payment was made on time. Typically, most payments were about a week or more late. Beginning nine months into the loan, payments were not made in full, either. Pentico sent Mad-Wyler an amortization schedule and a demand letter, asking for payments to be brought current. Unfortunately for Pentico, the amortization schedule grossly miscalculated the late payments. Mad-Wyler sued for usury. After the lawsuit, Pentico fixed the amortization schedule. Both parties moved for summary judgment. Mad-Wyler's motion was granted.

Pentico's first defense against usury was that the mistaken charges were the result of "accidental and bona fide error." Pentico lost on this one. "Merely brushing the miscalculation aside as 'erroneous' and presenting arguments based on the correct figure does not establish that the issue is settled as a matter of law. There needs to be evidence of the accident or error, and that wasn't here.

Pentico then argued that the "spreading doctrine" covered the late charges and other interest, and had to be applied before finding usury. A finding of usury requires (i) a loan, (ii) an absolute obligation to repay principal, and (iii) the exaction of a greater compensation than allowed by law. Usury statutes are penal in nature and must be strictly construed. The purpose of the usury statute is to penalize those who intentionally charge legally excessive interest.

Here, the note contained a savings clause which reflected, according to the Court, an intent by the parties to comply with the usury laws and indicates that the spreading of interest should be used to avoid a charge of usury. Interestingly, there is no mention of spreading in the savings clause. Unless, said the Court, the contract is usurious on its face, the savings clause must be given effect and enforced to avoid violation of the usury laws.

Mad-Wyler argued that the spreading doctrine was inapplicable for several reasons. One of those reasons had to do with an alleged misidentification of the note in the deed of trust. This was rejected by the Court. Their other argument was that spreading could not be applied using the full note term until the loan was paid in full. The Court didn't like this one either, citing a number of cases where the doctrine was applied right in the middle of the term for the full term. Only if the loan is actually paid off before maturity do we spread over a shorter term. Finally, spreading may be applicable even if the note is usurious on its face.

An issue was raised by Pentico as to whether the late charges made on this note were or were not interest. The Court held they were, and that they needed to be added to the agreed upon interest to determine whether there was usury. Mad-Wyler argued that the spreading statute should not be applied to late charges. It based this argument on ***Fisher* v. *Westinghouse Credit Corporation***, 760 S.W.2d 802 (Tex.App.–Dallas 1988, no writ)(opinion by now Justice Enoch of the Supreme Court). In that case, for some bizarre reason, the Dallas Court of Appeals held that a late fee which is computed as interest on past due interest, accruing daily and not a one-time charge, is to be tested for usury separate from any underlying contract. The Court did us a favor stating: "After reading the cases cited in support of this unique proposition, and noting that no other courts of appeal have adopted it, we decline to follow *Fischer*. 964 S.W.2d at 716.

In looking at the various summary judgment issues raised by Pentico (the lender), the Court pondered same other deep issues. The first was an argument by Mad-Wyler that the compounding of interest, i.e., charging interest on interest, is *per se* usurious. "Appellees cite no authority to support this tortured definition." Indeed, compounding is allowed, subject to the overall usury limits.

The final bizarre argument dealt with by the Court was that Pentico had charged late payment interest in a so-called interest free period. The argument made by Mad-Wyler went something like this. The borrower was authorized to make payments by mail and that depositing the check into a mailbox, properly addressed and all the stamps properly licked constituted payment. Thus, the date the check went into the mail was the date it was considered paid, not the date received. Here, even if we presume authorization to make payment by mail, there was no evidence of when the checks were actually put into the mail, thus there was no evidence of an "interest free period."

PART V
LENDER LIABILITY

• ***First American Title Insurance Co. of Texas* v. *Willard***, 949 S.W.2d 342 (Tex.App.–Tyler 1997, writ denied). Willard wanted to build a house. He got financing from the Bank. In connection with the construction loan, the Bank got an interim construction binder from First American, issued through Pearson Abstract. Because of a search error, the binder failed to note the presence of a Lone Star Gas easement. When the house was about half finished, it was learned that the gas lines went directly underneath the house. The Bank ceased funding the loan and construction stopped while people tried to figure out what to do.

At the Bank's request, First American honored its obligations under the binder and issued a policy, taking no exception for the easement. The Bank then resumed funding the loan and the house was completed, with the gas line still in place. The house was finished and refinanced with the gas line still in place. At some point both Willard and Lone Star sued the Bank and First American.

One of the issues raised by Lone Star was that the Bank had engaged in a trespass over the easement by renewing its funding and allowing the house to be completed. The Bank's trespass, argued Lone Star, was not direct, but consisted of aiding and abetting Willard in his trespass. The Court held that the Bank was liable. Even though the Bank didn't own the property and did not have the authority to order the removal of the easement or the destruction of the house, it did have power over dealing with the problem. Instead of exercising an option that would have resulted in eliminating the trespass, the Bank got an indemnity from Willard and a title policy, and allowed the trespass to continue. Thus, the Court held there was sufficient evidence that the Bank's decision not to require the elimination of the encroachment but rather to complete the house and continue the trespass was the Bank's intentional decision that aided and assisted Willard's trespass on the easement.

PART VI
VENDOR AND PURCHASER

• ***Kessler* v. *Fanning***, 953 S.W.2d 515, (Tex.App.-Fort Worth 1997, no writ). In connection with buying a house, the Fannings received the required Property Condition Disclosure Statement. With respect to the questions on the statement about improper drainage or previous structure repairs, the sellers had answered "no." There appear to have been no other statements about drainage or structure made by the sellers. The Fannings had the house inspected and detected no drainage problems during the inspection, even though it was raining at the time.

After moving into the house, the Fannings noticed some real drainage problems. They sued the sellers, alleging DTPA violations.

The first question on appeal was whether any statement by the sellers was the producing cause of the Fannings' injury. In order to recover under the DTPA, the consumer must prove that the deceptive act was the producing cause of damages. The Fannings testified that, if they had known of the drainage problem, they would not have bought the house. The sellers claimed that the inspection of the property by the Fannings was an intervening factor that broke the causal connection. The Court held in favor of the Fannings as to the issue of producing cause. The possibility of an independent investigation that might have uncovered fraud does not preclude recovery of damages for fraudulent misrepresentations.

The second question was whether the statutorily required disclosure statement contained misrepresentations of fact or was merely a statement of opinion. The form stated that it was "not a substitute for inspections or warranties" and that it contained "representations made by the owner(s) based on owner's knowledge." The sellers claimed that these statements showed that the disclosures were merely statements of opinion or mere puffing, and not actionable misrepresentations. Whether a statement is opnion or not depends on (i) the specificity versus vagueness of the statement, (ii) the comparative knowledge of the parties, and (iii) whether the representation pertains to a past versus a future condition. The Court held that the disclosure statement was not vague, was not based on equivalent knowledge by the parties, and pertained to past as opposed to future conditions. Thus, it did amount to a misrepresentation, rather than merely a statement of opinion.

- ***Pairett* v. *Gutierrez***, 969 S.W.2d 512 (Tex.App.–Austin 1998, writ denied). In connection with the sale of their residence, the sellers delivered a Property Condition Disclosure Statement which contained a representation that the Seller was not aware of any "defects/malfunctions" in the foundation. The buyer had the right to have an inspection, but did not have the foundation inspected. The contract contained a provision that the buyer accepts the property as-is. When foundation defects were later discovered, the buyer sued.

Under the DTPA, a seller has no duty to disclose defects of which the seller is unaware. However, a seller is required to disclose those material facts which would not be discoverable by the buyer in the exercise of ordinary care and due diligence. To obtain summary judgment in this case, the seller would have to show conclusively that (i) they had no knowledge of the defect and

(2) the defect was discoverable by the buyers in the exercise of ordinary care. Here, the sellers presented only their own affidavits stating that they had no knowledge of the defects. These affidavits were contradicted by other evidence raised by the buyer. Thus, there were material fact questions precluding summary judgment.

The sellers did not prevail on the "as-is" issues either. The provision stated that the buyer accepted the property in its present condition subject only to repairs required after inspection, and further went on to say that failure to require repairs was a waiver of repair rights. The Court, relying on ***Smith* v. *Levine***, 911 S.W.2d 427 (Tex.App.–San Antonio 1995, writ denied), held that this particular "as-is" clause was silent on the issue whether the representations made in the Property Condition Disclosure Statement could be relied upon. In addition, the Court noted that the contract did not contain the phrase "as-is" in relation to the foundation and the overall condition of the house. Thus, the contract did not negate reliance on the seller's misrepresentations.

- ***Erwin* v. *Smiley***, 975 S.W.2d 335 (Tex.App.–Eastland 1998, writ denied). In this case, an as-is provision worked to save the seller. Relying on the reasoning in ***Prudential***, the Court held that the causal link was broken by the as-is provision. Noting there are circumstances that will rended an as-is provision unenforceable, the Court said that none of those circumstances was argued here. In addition, the Court found the parties were in relatively equal bargaining positions, that the as-is provision was freely negotiated, and that the buyer was aware of the as-is provision and had even consulted his lawyer about it.

- ***Elizondo v. Gomez***, 957 S.W.2d 862 (Tex.App.–San Antonio 1997, writ denied).

Elizondo claimed that Gomez agreed to sell him part of her property for $75,000. He paid $5,000 down and the parties wrote a receipt on a restaurant "guest check" that read:

> "I Jesse Elizondo have paid Mr. & Mrs. Leo Gomez $5000.00 for the Real Estate property located on 1105 Ferndale city of San Antonio, Tex."

No deed was ever delivered to Elizondo. He sued for specific performance, claiming that the guest check receipt was a quasi-deed establishing his right to the property as a matter of law.

In order to satisfy the statute of frauds for the sale of property, an agreement must be in writing, must be signed by the person charged with the agreement or someone authorized by him, and must adequately describe the property. Here, the alleged "quasi-deed" did not satisfy the statute of frauds. First, the property description was wholly inadequate. The property consisted of three lots, each with different addresses, and the document referred to only one address. Second, the document doesn't set out the entire purchase price.

Partial performance may remove an oral contract from the statute of frauds. The three requirements to remove the contract from the statute of frauds are (i) payment of the consideration, (ii) possession by the purchaser, and (iii) the making of valuable improvements with the seller's permission, or some other facts that would make the transaction a fraud on the purchaser if it were not enforced. Here, Elizondo paid the down payment and made monthly mortgage payments for four months, until interfered with by Gomez. Elizondo also moved into the property. Thus, the court found that the case fell within the equitable doctrine of partial performance and made the oral contract enforceable. There was no mention of the making of valuable improvements or the presence of other facts making the seller's actions fraudulent.

- ***Graves* v. *Diehl***, 958 S.W.2d 468 (Tex.App.–Houston [14th Dist.] 1998, no writ). The Graves and the Diehls live across the road from each other in rural Santa Fe, Texas. At some point, the Diehl's built an unpaved airstrip on their property, which Diehl and some of his friend use. The Graves sued the Diehls, claiming the airstrip was a nuisance because of excessive noise and dangerous conditions.

The Diehls claimed that the Graves had no ownership interest in their property because they were buying the property pursuant to a contract for deed, which does not transfer any property rights.

The Court held that the Graves had sufficient interest in the property to maintain a nuisance action.

- ***Salinas* v. *Beaudrie***, 960 S.W.2d 314 (Tex.App.–Corpus Christi 1998, no writ). The purchasers were not very fluent in English. They entered into two contracts for deed with the seller, which were written in English. The contract stated that the property was not subdivided and that the purchaser was responsible for complying with all applicable subdivision regulations. Because the property wasn't subdivided, the purchasers could not get a building permit.

The purchaser's defaulted on the payments due under the contracts and the seller sought to retake possession. The purchaser's sued. Among the issues at trial were whether the contracts were required to have been written in Spanish and whether, because of the purchaser's lack of fluency in English, the seller had a duty of good faith and fair dealing that somehow relieved the purchaser's from the obligation to read and understand the contract.

Texas Property Code § 5.093 requires certain purchase contracts to be written in Spanish if the negotiations leading to the contract were conducted primarily in Spanish. Unfortunately for the purchasers, this requirement was not effective until two years after they entered into their contracts.

As to the duty to read the contract, the Court held for the seller. Here, the record did not indicate that the transaction was not bargained for at arms length or that the seller engaged in any false representations or active trickery. The fact that the purchasers may not be fluent in English did not of itself create such a confidential relationship as to relieve them from the obligation to read the contract documents. In fact, there was evidence that the contracts were translated for the benefit of the purchaser by a paralegal in the seller's attorney's office.

- ***Abraham Investment Company* v. *Payne Ranch, Inc.***, 968 S.W.2d 518 (Tex.App.–Amarillo 1998, writ pending). Payne owned a ranch in West Texas. At one point it granted Campbell a right of first refusal to purchase the ranch on the same terms offered to a third party. AIC entered into a contract with Payne to purchase the property for cash. The contract was subject to the right of first refusal in favor of Campbell. Notice was sent to Campbell, who expressed is desire to purchase the property. In the course of discussing the purchase, Campbell and the seller agreed that Campbell could purchase the property for a cash down payment and a note for the balance. He did so. AIC was not pleased and sued Campbell and Payne.

A right of first refusal is a right granted to a party giving it the first opportunity to purchase when the owner decides to sell. Once the owner conveys the terms of the off to the holder of the right of first refusal, the rightholder has the power to accept or reject the offer. Thus, at the moment that notice is sent to the rightholder, the right of first refusal ripens into an option. The terms of that option are formed by the provisions granting the right and by the notice of intent to sell. Once the property owner has given his notice of intent to sell, he cannot change the terms of that offer as long as the option is binding upon the property owner.

Thus, Campbell's acceptance of the offer, or exercise of the option created by the notice of offer, was improper and not a valid exercise of his right of first refusal.

AIC was seeking specific performance of its contract with Payne. A purchaser is entitled to specific performance of a contract of sale of land when the contract is valid and enforceable. If the seller breaches a contract for the sale of land and subsequently sells the land to another purchaser who has knowledge of the previous contract, then the subsequent purchaser stands in the shoes of the original seller when specific performance is sought and may be compelled to convey title to the first purchaser.

Because Campbell had not properly exercised his right of first refusal, his purchase was not by virtue of it, and he was merely a subsequent purchaser with knowledge of the AIC contract. Consequently, AIC was entitled to specific performance of the contract.

PART VII
DTPA

- ***Arthur Andersen & Co.* v. *Perry Equipment Corporation***, 945 S.W.2d 812 (Tex. 1997). When PECO wanted to buy all of the stock of Maloney, it required Maloney to provide it a set of audited financial statements. Maloney hired Arthur Andersen, which conducted an audit and gave Maloney a clean bill of health. PECO then bought the Maloney stock, but soon found out that Maloney was in terrible shape. Ultimately, PECO wrote off the entire investment. It sued Arthur Anderson, alleging, among other things, DTPA violations.

  Arthur Andersen claimed that PECO was not a "consumer," the threshold status for bringing a DTPA claim. A consumer is one who seeks or acquires goods or services by purchase or lease. Without elaborating on the fact that Maloney, not PECO, had hired Arthur Andersen, the Court held that, because it was a condition of the sale that Maloney provide financial statements and because Maloney hired Arthur Andersen, that was enough to make PECO a consumer as to Arthur Andersen.

The next question was whether the transaction involved the acquisition of goods and services. Arthur Andersen argued that the transaction was for the sale of stock, which is not a good. Furthermore, services are defined by the DTPA as services furnished in connection with the sale or repair of goods. The Court held that the transaction was, nonetheless, the purchase of services. Arthur Andersen's audit was not merely incidental to the sale of Maloney to PECO, it was required by PECO and was central to PECO's decision to buy Maloney.

- ***First National Bank of Durant* v. *Trans Terra Corp. International***, 142 F.3d 802 (5th Cir. 1998). The same negligent misrepresentation cause of action was applied to allow a lender to sue borrower's lawyer.

- ***Brown* v. *Bank of Galveston, N.A.***, 963 S.W.2d 511 (Tex. 1998). Vincent married Hyacinth in Jamaica, then moved back to Galveston, leaving her behind. In Galveston, he contracted with the builder to build a house. The Bank financed the house. Problems arose with the builder, so he walked off the job. The Bank, which was monitoring progress on the house, sent letters to the builder, itemizing deficiencies, and so on.

Vincent later sued the Bank, alleging that DTPA violations. Assuming, without deciding, that Vincent was a consumer, the Court held that Vincent had failed to prove the Bank was the producing cause of any injury. Producing cause requires a person to be a substantial factor in producing injuries. The periodic inspections of the property and the sending of letters to try to settle disputes could not logically be considered a cause of damages. The failure of the Bank to pay subcontractors was not a cause, either, because the duty to pay them was the builder's, not the Bank's.

Vincent also argued that the Bank was representing it had more rights that it actually did by insisting on payment in full before the house was finished. The note provided the Bank several options to enforce the obligations. There is no DTPA violation for beginning foreclosure when the document permits the Bank to complete the construction.

- ***Kinnard* v. *Circle K Stores, Inc.***, 966 S.W.2d 613 (Tex.App.–San Antonio 1998, no writ). Kinnard bought tickets at the Circle K for the January 2, 1993 lotto drawing. According to Kinnard, the clerk mishandles one of the tickets Kinnard intended to buy and the intended numbers did not get registered with the lottery commission. Unfortunately, it was that ticket that had all six winning numbers. Kinnard said she failed to check her tickets on the way out of the store because the place was crowded.

Kinnard then sued Circle K for negligence and violation of the DTPA. The trial court granted summary judgment for Circle K.

The Court of Appeals upheld the summary judgment. The lottery rules place the "exclusive responsibility" for checking the accuracy of lottery numbers with the person buying the ticket. The plane meaning of "exclusive responsibility" bars recovery for negligence, as do the mechanics of the lottery, which is intended to create an efficient way of filling the public till. The lottery purchaser is in a much better position to be able to verify lotto numbers than a harried clerk. "And it is difficult to believe the Texas Lottery Commission would expect the retailer to insure against a multimillion dollar miscue when the retailer's profit margin on a ticket is five cents on the dollar." The most compelling reason for rejecting the claim is that allocating responsibility in this manner "discourages temptation."

The DTPA claim failed as well. To prevail on a DTPA claim, Kinnard would have to be a "consumer." This means they must show that they sought to acquire goods or services by lease or purchase. A lottery ticket is an intangible. It is neither a good nor a service.

The dissent pointed out that the cases exonerating lottery ticket sales people all involve authorized sellers. Here, the clerk who sold the ticket was, in fact, a person who had never been trained to sell the tickets and who was, in fact, selling them in violation of the law. In light of this, the dissent concludes, the Court should not be bound by cases involving authorized sales.

PART VIII
LEASES

- ***Austin Hill Country Realty, Inc.* v. *Palisades Plaza, Inc.***, 948 S.W.2d 293 (Tex. 1997). In a unanimous decision, with the opinion written by Justice Rose Spector, the Texas Supreme Court announced that "We hold today that a landlord has a duty to make reasonable efforts to mitigate damages." 948 S.W.2d at 294.

The traditional common law rule is that landlords have no duty to mitigate. This rule stems from the concept that a lease is an estate in real property, owned by the tenant during the term of the lease. As long as the tenant has the *right* to possess the estate, the tenant has the obligation to pay the rent. The landlord has no duty, should the tenant abandon the premises, to mitigate. Texas has always followed this rule. In fact, the opinion of the Court of Appeals said: "Last time I checked the law, it was that a landlord doesn't have any obligation to try to fill the space."

The Supreme Court noted that forty-two states now have imposed an obligation to mitigate on the landlord. Only six states have explicitly held otherwise. Those requiring mitigation have recognized that leases have changed from their nature as primarily real property to their current status as commercial contracts. Recognizing leases as primarily commercial contracts allows the court to impose the same rules to leases that otherwise apply to commercial contracts. Further, mitigation discourages economic waste and encourages productive use of the property.

Thus, the Court said, "We therefore recognize that a landlord has a duty to make reasonable efforts to mitigate damages when the tenant breaches the lease and abandons the property, unless the commercial landlord and tenant contract otherwise." 948 S.W.2d at 299.

The Court then considers the practical application of the duty to mitigate. It establishes the level of responsibility of the landlord as requiring the landlord to use objectively reasonable efforts to fill the premises when the tenant vacates in breach of the lease. This is, furthermore, not an absolute duty, and it doesn't give the tenant a cause of action against the landlord for failure to mitigate. Failure to use reasonable efforts to mitigate merely bars recovery of damages to the extent that damages reasonably could have been avoided. In addition, the tenant bears the burden of proving failure to mitigate.

Finally, the Court considers the situations in which the duty actually exists. In Texas, a landlord has typically had four causes of action on breach of a lease. First, the landlord could maintain the lease and sue for rents. Second, the landlord can treat the breach as an anticipatory breach, repossess and sue for the present value of rentals reduced by the reasonable market value of the property for the remainder of the term. Third, the landlord could treat the breach as an anticipatory breach, repossess, relet the property, and sue the tenant for the difference between the contractual rent and the amount received from the new tenant. Fourth, the landlord could treat the breach as a forfeiture of the lease and relieve the tenant of its future obligation to pay rents.

The Court said the landlord must have a duty to mitigate when it treats the lease as an anticipatory repudiation because that is basically a contractual action. The Court then tackled the troubling problem of treating the lease as still in effect and suing for rents. To require the landlord to mitigate in that instance would force the landlord to reenter the premises and thereby risk terminating the lease or accepting the tenant's surrender. The Court held, in those situations, that mitigation is required only if (i) the landlord actually reenters, or (ii) the lease allows the landlord to reenter the premises without accepting surrender, forfeiting the lease, or being construed as evicting the tenant.

- ***Cash America International, Inc.* v. *Hampton Place, Inc.***, 955 S.W.2d 459 (Tex.App.-Ft. Worth 1997, writ denied). The landlord sued the tenant for anticipatory breach of the lease, seeking the traditional measure of damages, i.e., the difference between the current value of the income stream and the fair market value of the premises for the remainder of the term. The tenant sought jury instructions on mitigation of damages, but the trial court did not submit them.

On appeal, the Court held noted the recent Austin Hill County case, holding that the Supreme Court's opinion required the instructions on mitigation to be submitted to the jury. The landlord argued that, because the trial court deducted the present rental value of the premises for the remainder of the term, the tenant had already received credit for any damages incurred by the landlord's failure to mitigate. The Court held that the jury was required to reduce damages not only by the reasonable cash market value of the premises but by the amount that could have been avoided by mitigation. "This additional instruction permits the jury to weigh evidence of the amount of money, if any, lost by the landlord's failure to exercise reasonable care in maintaining and managing the property, which would reduce the cash market value of the lease and thus reduce the damages owed the landlord." 955 S.W.2d at 463.

• ***Marroquin* v. *D&N Funding***, 943 S.W.2d 112 (Tex.App.-Corpus Christi 1997, no writ). The Marroquins lived in a house they had previously owned. In order to "borrow" money against their homestead, they engaged in a few transactions to sell and refinance the house. After the last sale and refinancing, they continued to live in the house, but a default on the loan caused a foreclosure. After the foreclosure, Mrs. Marroquin filed bankruptcy. Without knowing about the bankruptcy, the lender filed an FED action to evict the Marroquins. The Marroquins sought and obtained a TRO against the FED proceeding, initially not informing the District Court of the pending bankruptcy. At the temporary injunction hearing, the Marroquins informed the District Court there was a bankruptcy. The court heard the case anyway and denied the temporary injunction. The Marroquins appealed the denial.

A temporary injunction will not be granted where there is an adequate remedy at law. Here, the Marroquins could have informed the justice court that there was a bankruptcy pending, invoking the automatic stay. That would have been just as good a remedy as an injunction since the automatic stay would have prohibited the issuance of an eviction order. Since the bankruptcy stay afforded the same protection as an injunction, the Marroquins had an adequate remedy at law.

• ***Carlson's Hill Country Beverage, L.C.* v. *Westinghouse Road Joint Venture***, 957 S.W.2d 951 (Tex.App.-Austin 1997, no writ). In a de novo appeal of a forcible detainer action, the county court found that the tenant failed to maintain insurance, failed to pay rent, and failed to cure the breaches within the permitted time period. It awarded possession to the landlord and awarded $14,000 for rent, $5,267.50 in prorated taxes, $20 for a returned check fee, and $14,200 in attorneys fees.

The tenant argued that the county court exceeded its jurisdiction in awarding these amounts because the appellate jurisdiction of the county court is confined to the jurisdictional limits of the justice court.

A justice court has original exclusive jurisdiction of a detainer action, the subject of which is limited to issues of possession. A claim for unpaid rent can be joined, subject to the jurisdictional limits of the justice court (in this case $5,000). An appeal from the justice court is available by way of a de novo action in the county court. Rule 752 of the Texas Rules of Civil Procedure permits damage claims related to maintaining or obtaining possession of the premises during pendency of the appeal. Such damages include rents accruing during the pendency of the appeal and reasonable attorneys fees in the justice court and the county court. Only the prevailing party in the county court is entitled to recover damages.

The Court of Appeals held that this meant, first, that the landlord is restricted to the jurisdictional limits of the justice court for rentals accruing before judgment in the justice court, and, second, that the landlord was restricted by Rule 752 as to other damages. In order to recover under Rule 752, the landlord must be the prevailing party and the damages must be related to maintaining or defending possession of the premises during pendency of the appeal. This meant that the landlord could recover only (i) up to $5,000 as unpaid rent accruing before the judgment in the justice court, (ii) lost rentals for the period of the appeal, (iii) lost property taxes for the period of the appeal, and (iv) attorneys fees accrued in the justice court and the county court, not limited by jurisdictional limits of the justice court.

- ***Highlands Management Company, Inc. v. First Interstate Bank of Texas, N.A.***, 956 S.W.2d 749 (Tex.App.-Houston [14th Dist. 1997], no writ). First Interstate sold some property to Highlands. The deed included a restrictive covenant prohibiting Highland from using its property for certain endeavors, including sexually oriented businesses. At the time of the transaction, Highland told First Interstate that it intended to use the property as a barbecue restaurant; however, it later came to light that Highland intended to lease the property to provide excess parking for the adjacent landowner, the operator a "The Country Club," a "gentlemen's cabaret."

First Interstate sued to enforce the restrictive covenant. Highland claimed that it was not violating the covenant. It was leasing the property as a parking lot and the sexually oriented business was on the neighboring property not on the property being leased. The Court held that the parking lot was an integral part of the prohibited business. In fact, the gentlemen's cabaret would not be allowed to operate without the parking located on the restricted tract.

- ***McCartney* v. *California Mortgage Service***, 951 S.W.2d 549 (Tex.App.–El Paso 1997, no writ). It was not an abuse of discretion for the county court to require a $19,000 supersedeas bond for an appeal of a writ of possession, where the occupants had maintained possession of the premises for four years without making any mortgage or rental payments to the owner and there was evidence that the owner would incur liability for property taxes, insurance, and costs of repairs, and would lose valuable rights to sell the property.

- ***A.V.A. Services, Inc.* v. *Parts Industries Corp.***, 949 S.W.2d 852 (Tex.App.–Beaumont 1998, no writ). AVA appealed from a County Court forcible detainer judgment. The Court of Appeals dismissed for want of jurisdiction.

Section 24.007 provides that a final judgment in a forcible detainer action may not be appealed on the issue of possession unless the premises in question are being used for residential purposes. AVA made several arguments. It contended that there was no landlord-tenant relationship and that Parts was an unregistered foreign corporation. The Court of Appeals had no jurisdiction as to those issues, since they both involved the issue of possession. The Court relied upon ***Academy Corp.* v. *Sunwest N.O.P., Inc.***, 853 S.W.2d 833 (Tex.App.–Houston [14th Dist.] 1993, writ denied).

In a concurring opinion well worth reading, Justice Burgess disagreed with the holding that there was no jurisdiction to determine the existence of the landlord-tenant relationship. According to him, forcible detainer exists only as to a person who is a holdover tenant, a tenant at will, or a tenant at sufferance. Without the existence of a landlord-tenant relationship, there can be no forcible detainer. Thus, the Court of Appeals should have jurisdiction to determine whether there was a basis upon which the County Court could determine possession. In showing his dislike of the Academy Corp. case, Burgess writes the following clever bit:

> "A displaced and disgruntled Chicago Cubs fan could file a forcible detainer action in the appropriate justice court in Harris County alleging he had a leasehold on the Astrodome from Harris County, the owner; as landlord he had sublet the Astrodome to a tenant, the Houston Astros Baseball Club and, for whatever reason, the Astros were a holdover tenant or a tenant at will or sufferance. The Astros would defend, alleging they were in direct privy with Harris County and thus a tenant of Harris County, not a tenant of the fan, therefore no landlord-tenant relationship, no jurisdiction. The justice court could, without evidence or against the evidence, render judgment for the fan. Confident justice would prevail, the Astros would appeal to one of the county courts at law of Harris County, once again asserting no landlord-tenant relationship, no jurisdiction. All those jurists, being avid Astro fans, would voluntarily recuse themselves and a visiting judge from Dallas, an avid Rangers fan, would hear the de novo appeal. This second court could, without evidence or against the evidence, render judgment for the Cub fan and issue a writ of execution ordering the Astros out. [Note: the Chicago fan has manipulated the time sequence so a four game series between Chicago and Houston, scheduled for the Dome, must now be moved to Wrigley Field]. A virtual army of three-piece, pin-stripe-suited lawyers delve into legal research with all the intenseness, vigor and resolve of an at bat by Jeff Bagwell, Astro slugger and first baseman. They expect to find a belt high, middle of the plate, fast ball,--i.e., although Section 24.007 precludes appellate review on the merits in a forcible detainer suit, the statute does not prevent a court of appeals from determining whether the county court had jurisdiction of the cause. Instead, they find a low and outside the strike zone, curve ball,--i.e., proof that a landlord-tenant relationship existed between the parties is just one of the elements required to support a forcible detainer action, but this proof is not jurisdictional; it is required to show who has the greater right of possession and the question of possession is not reviewable by a court of appeals (Academy Corp. v. Sunwest N.O.P., Inc.) To add insult to injury, this "curve ball" is out of the very court of appeals they must rely on for relief. However, unlike the great all-star hitter, they will not get an at bat, much less hit one out of the park. The scoreboard:
>
> ACADEMY CORP. 1

ASTROS 0

- ***Okpala* v. *Coleman***, 964 S.W.2d 698 (Tex.App.–Houston [14th Dist.] 1998, no writ). The Tenant's discovery requests and responses contained sufficient information to place in issue claims that were the basis of the Landlord's FED action and, thus, constituted an answer sufficient to prevent entry of a default judgment.

PART IX
ADVERSE POSSESSION

- ***Bell* v. *State Department of Highways and Public Transportation***, 945 S.W.2d 292 (Tex.App.–Houston [1st Dist.] 1998, writ denied). Bell brought a declaratory judgment action against the State for building a highway across his land. The trial court dismissed the case, holding that it was, in essence, a trespass to try title case and Bell did not have the consent of the State to bring such an action. Bell claimed that a declaratory judgment was appropriate because the State was claiming title based upon the adverse possession statutes, and the § 37.004(a), which provides a procedural remedy by way of declaratory judgment for those affected by statutes.

Unfortunately, Bell's reading of the declaratory judgment act was completely wrong. Section 37.004(a) allows declaratory judgment actions to be brought to decide the validity or construction of a statute. Bell was seeking to have the statutes construed or to invalidate them. Trespass to try title is the proper means of determining title to property in Texas, and no matter how Bell framed his arguments, he couldn't get past the fact that he was merely asking for a determination of title. And, unfortunately again, you can't bring a title lawsuit against the State without its consent.

- ***Green* v. *Parrack***, 974 S.W.2d 200 (Tex.App.–San Antonio 1998, no writ history to date). The Greens lived next door to Parrack. A fence separating their property had been in existence since 1969. Apparently, neither of the neighbors knew that the fence was not located on the property line. The discrepancy was discovered when the Greens built a new fence that didn't line up with the old one. At that time, in a prior lawsuit, Parrack sued the Greens claiming their new fence encroached on her property. The basis for the encroachment claim was Parrack's assertion of title to approximately eight inches of the Greens property along the common boundary by adverse possession. Parrack lost her lawsuit.

About three months later, even though she had lost her claim of ownership of the eight inch strip, Parrack tore down the old fence and built a new fence to replace the 1969 fence, expending a lot of time and money, and encroaching an additional thirteen and a half inches onto the Greens' property. This time the Greens sued to have Parrack's fence removed. The trial court held that Parrack was barred by res judicata from asserting the adverse possession claim, but went on to hold that "a good fence in south Texas makes good neighbors and Ms. Parrack built a good fence that would be expensive and difficult to remove," and refused recovery under the theory of *de minimus non curat lex*. The trial court also held that the Greens were barred by laches and unclean hands from complaining about the new fence.

The Court of Appeals upheld the finding of res judicata. The issue of ownership of the eight inch strip inside the original fence was fully adjudicated in the prior lawsuit.

Parrack's defense of laches was based upon the fact that the Greens stood and watched her complete her fence before they filed suit. It appears that they were somewhat intimidated by Parrack's boyfriend, who had made threats against them before. They delayed in taking action until over a year after the fence was built. Still, laches requires (i) an unreasonable delay in asserting a claim and (ii) a good faith and detrimental change of position because of the delay. Those requirements were not met here. The delay wasn't all that unreasonable and Parrack could not show any detrimental reliance on the delay. Furthermore, laches is not a defense to a claim of title.

Finally, the Court rejected the "good fences make good neighbors" and *de minimus* holdings of the trial court. There was no legal basis for the trial court's holding. The issue in this case is not the quality of the fence but the integrity of the Greens's property rights. The *de minimus* theory applies where the parties are haggling over a few pennies here and there. According to the Court, there is no comparison between cases invoking that theory and this one where the damages at issue consist of the loss of use of almost two feet of private property. Furthermore, the erroneous application of the *de minimus* doctrine here is exacerbated by the fact that Parrack built the new fence in blatant violation of the ruling in her prior lawsuit. She was aware that she had no title in the property she was building the fence on. Such disrespect for the law should not be rewarded through the use of an inapplicable legal doctrine.

• ***Amador* v. *Berrospe***, 961 S.W.2d 205 (Tex.App.–Houston [1st Dist.] 1998, writ denied). An adverse possession claim could not succeed where there was no evidence that one tenant in common had ousted the other from possession or repudiated title. Even though the tenant claiming adverse possession had maintained insurance and paid taxes on the property, these actions were not hostile to the other co-tenant.

PART X
DEEDS AND CONVEYANCES

- ***Sanchez* v. *Telles***, 960 S.W.2d 762 (Tex.App.–El Paso 1998, writ denied). Montoya pledged a parcel of property as collateral for two bail bonds for her son-in-law. At the time she signed the deed of trust, she did not claim the property as homestead, and there was never a designation of homestead recorded. The deed of trust contained wording that represented the property was not homestead and disclaimed any homestead in the property. When the son-in-law jumped bond, the bond was forfeited. After the bond forfeiture, Montoya signed a power of attorney in favor of her daughter. The daughter then sold the property to Sanchez, although, for some strange reason, neither Montoya's signature nor her daughters was on the deed, which was signed only by Sanchez.

Meanwhile, the bond agency foreclosed and the property was sold to Telles, who received a trustee's deed. After that, and after litigation had commenced in this matter, Montoya and her daughter gave Sanchez a correction deed which purported to correct the problem of not having the grantor sign the original deed.

Sanchez claimed to be unaffected by the deed of trust because he was a BFP. His claim was that he purchased the property without notice of the deed of trust. Unfortunately there was the pesky problem that his deed was signed by himself, not by the grantor. He tried to overcome this shortcoming by relying on the correction deed.

Ordinarily, a correction deed relates back the execution of the original. Here, however, the original deed did not contain the required signature of the grantor and should never have been recorded. The failure of the seller to sign the original deed rendered it void ab initio, thus, there was not a valid deed to correct.

• ***Templeton* v. *Dreiss***, 961 S.W.2d 645 (Tex.App.–San Antonio 1998, writ denied). A deed executed in 1933 sought to convey an "undivided interest" in a road. The road was not described in the deed, although attached to the deed and referenced in the deed was a survey which depicted the location of the road. The survey was not recorded with the deed. Years and years later, the Templetons claimed ownership of all of the road, alleging that the deed was void for uncertainty. The two bases on which it made its claim were the property description and the use of the phrase "undivided interest."

In order to validly describe property for purposes of the statute of frauds, a conveyance must, either within itself or by reference to some outside writing, provide the means to identify the land with reasonable certainty.

There was plenty of evidence that the road could be identified from the survey attached to the deed. The Templetons claimed, however, that the fact the deed was not recorded was fatal. The Court disagreed. It is not necessary that the map be recorded. Where the map is adequately referred to in the deed, it is usually to be considered part of the instrument and construed in connection with in.

The Court also did not agree that the phrase "an undivided interest" made the conveyance uncertain. The Templetons argued that the phrase did not contain the means of determining the extent of ownership of the road. However, the law allows uncertain descriptions to be made certain by intrinsic evidence when there is evidence in the deed which furnishes a key or a nucleus of a description that allows the extrinsic evidence to make the uncertain certain. It also does not require absolute mathematical certainty.

- ***Vasquez* v. *Vasquez***, 973 S.W.2d 330 (Tex.App.–Corpus Christi 1998, no writ). Before she died, Juanita executed a will naming Ignacio and Jose as her sole beneficiaries. About a year later, she signed a quitclaim deed covering her property to Brigido. The deed was given by Juanita to her attorney with instructions to tell no one about it until her death, at which time the lawyer was supposed to deliver the deed to Brigido. The lawyer did just that, sending the deed to Brigido right after Juanita died. Later, the will was probated and Ignacio, as executor, executed a special warranty deed of the same property to himself and Jose. As the Court so aptly put it "The question soon arose: who is the rightful owner of the property in question?"

It is elementary that a deed must be delivered to be effective. In determining whether a deed has been effectively delivered when placed in the control of a third party, the question is whether the grantor parted with all dominion and control over the instrument at the time she delivered it to the third party with the intent that it take effect as a conveyance at the very time of delivery. Here, there was no question that Juanita delivered the deed to the lawyer with instructions for later delivery to Brigido. There was no mention in her instructions of her power to recall the deed. When her attorney was asked whether the instructions included any discussion of the right to recall the deed, he responded "Well, no. I keep the deed, and then I'm not to tell anybody or file it or do anything until after they've spewed her ashes."

Ignacio and Juan claimed that Juanita had not surrender complete control of the instrument, as evidenced by her remaining on the property until her death. The Court held that, where a grantor delivers a deed to a third person with the intent to part with all control, yet retains possession, the legal effect of the delivery of the deed is to convey the fee while reserving a life estate in the grantor.

Ignacio and Juan also pointed to testimony from Juanita's lawyer that she had the power to reclaim the deed. Essentially, the lawyer said that, if Juanita had asked him to return the deed to her, he would have. The Court said Juanita did have the power to reclaim the deed, but that does not bear on the issue of her intent. The only evidence bearing on her intent was the actual delivery of the deed with the instruction to pass it on upon her death.

PART XI
EASEMENTS

- ***Murphy* v. *Fannin County Electric Cooperative, Inc.***, 957 S.W.2d 900 (Tex.App.–Texarkana 1997, no writ). The owners' property was subject to an easement in favor of the Electric Company. The easement specifically gave the Electric Company the right to cut and trim trees to keep them clear of power lines and to cut down dead, weak, leaning, or dangerous trees that are tall enough to strike the wires. A right of way crew for the Electric Company went a little bit overboard and over a period of three days cut down and poisoned 350 large trees on the owners' property.

An easement is a form of contract and is to be interpreted by the court as a matter of law. There was no ambiguity in the easement at all concerning poisoning – the Electric Company had no right to do so.

Also check out ***Parks* v. *DeWitt County Electric Cooperative, Inc.***, 962 S.W.2d 707 (Tex.App.–Corpus Christi 1998, writ granted). There, the easement was found to be ambiguous as to the electric company's right to cut down trees. The landowners argued that the ambiguity should be resolved strictly against the electric company, which drafted the easement, but the Court disagreed. Under that analysis, an ambiguous contract would never be interpreted by the trier of fact because it would always be interpreted against the maker of the instrument. Therefore, the ambiguity went back to the jury for a determination.

- ***Benedictine Sisters of the Good Shepherd* v. *Ellison***, 956 S.W.2d 629 (Tex.App.–San Antonio 1997, writ denied). The Sisters and Ellison owned adjoining tracts. Record title to the tracts originated from a 1925 partition decree. Texaco owned a substantial part of it as tenant in common with other owners, although it was never used by Texaco. The common tract was partitioned to various owners and Ellison purchased his tract in 1954 from entities other than Texaco. In 1993, Texaco gave the Sisters their tract, and the Sisters began planning to build a monastery on the land. They sued Ellison for an easement so they could access a farm to market road. At trial, they lost.

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) the existence of that necessity at the time of the severance of the two estates.

Ellison argued that there was no unity of ownership prior to severance. The Court stretched to disagree. The entire tract that was owned in common prior to partition and that common ownership was sufficient to satisfy the first requirement. The severance that occurred to allow the easement by necessity was the partition.

Ellison then argued that there were at least two other landowners from whom access could be obtained. Although that was theoretically true, the facts showed that the only access to a public road was across Ellison's land.

Finally, Ellison argued that the necessity did not exist before severance. The court held that it did. The public road was in existence at the time of the partition.

- ***Scott* v. *Cannon***, 959 S.W.2d 712 (Tex.App.–Austin 1998, writ denied). The Scotts and Cannons were neighbors for more than thirty years. The only access from the highway to the Scotts' property was a roadway crossing two pieces of property owned by the Cannons.

Although there is an existing unpaved access to the Scotts' property from another public road, the access to the other highway has been the main access to the Scotts' property for years. The Cannons had never dedicated or granted an easement to use the road access. The Scotts did not obtain their property as a severance from the Cannon property.

In 1996, Sprint asked the Cannons for the right to put a communications tower on their land. The Cannons refused, so Sprint went to the Scotts, who granted permission to put the tower on their land and told Sprint they could use the access road across the Cannons' property. The Cannons objected, claiming that the road was private and that the Scotts did not have authority to grant permission for its use. The Cannons then had their lawyer send a letter to the Scotts terminating permission to use the road.

The Scotts sued, seeking an injunction and a declaratory judgment to confirm their right to use the access way. They claimed the road was a public road by implied dedication and, alternatively, they had acquired an easement by estoppel, necessity, or prescription. The Cannons counterclaimed seeking a determination that the road was private and also seeking an injunction.

A person can prove an implied dedication if it is shown that (i) the acts of the landowner induced the belief that the landowner intended to dedicate the road to public use; (ii) the landowner owned the land in fee simple and was competent to dedicate the road; (iii) the public relied on these acts and will be served by the dedication; and (iv) there was an offer and acceptance of the dedication.

Here, the Court found there was not an implied dedication of the road. First, there were never any public funds expended in connection with the road. All maintenance was paid for by the Cannons and the Scotts. Second, the evidence of denotive intent was merely that the public used the road, and that was insufficient as a matter of law. Third, the Cannons had made it clear for years that the road was a private road. Finally, the only use for the road was to access the Cannons' and Scotts' property – the public did not need to use this road.

The Court also found there was no easement by estoppel. An easement by estoppel is created where a landowner makes representations about the existence of an easement that are acted on by the easement claimant. None of the elements of easement by estoppel exist in this case. First, the Court noted that the cases seem to require the existence of a vendor/purchaser relationship to create such an easement. In addition, none of the representations regarding the roadway made by the Cannons would lead the Scotts to believe they were being given an easement.

The claim of easement by necessity died because the Scotts could not prove the element of unity of ownership and they could not prove the easement was absolutely necessary. The two parties bought their tracts independently from separate sellers. Plus, there was access across other property.

The Scotts succeeded in showing an easement by prescription. An easement by prescription rests on the claimants actions under a color of right. To obtain a prescriptive easement, one must use someone else's land in a manner that is open, notorious, continuous, exclusive, and adverse for a period of ten years or two more.

One element of a prescriptive easement is exclusivity. The Cannon's argued that because they used the road jointly with the Scotts, the Scotts' use could not be exclusive and thus can't be adverse. Exclusivity, however, is just one way of showing that a claim is adverse. It is not the only way. It is usually invoked to show that, since the claimant was not excluding the owner, the owner must somehow be permitting the use. In this case there was other evidence of adverseness.

In 1972, the Cannons told the Scotts that the road was private, yet they continued to use it. Because no action was taken to stop the Scotts from using the road after the Cannons made clear that their use violated the private nature of the road, the Court held there was an easement by prescription.

But, unfortunately for the Scotts, the prescriptive use of the road was just for the residence, and they had not obtained an easement that would allow the commercial use of the road by Sprint.

PART XII
RESTRICTIVE COVENANTS AND CONDOMINIUMS

- ***Pilarcik* v. *Emmons***, 966 S.W.2d 474 (Tex. 1998). Restrictive covenants in the subdivision prohibited composition roofs, unless another material was permitted by the Architectural Control Committee. The original subdivision restrictive covenants provided for an ACC, which had specific authority to approve construction plans, etc. All of the original members were officers and employees of Dallas Federal Savings and Loan. The ACC was long since dormant when the Pilarciks bought their house in 1992. Procedures were set out in the covenants for obtaining consent from the ACC, including a provision that, if no response was received within thirty days, consent was deemed given.

At a homeowners association meeting, there was a big flap about the Pilarciks' intention to roof with composition materials. They were told that the shingles were prohibited. After the meeting, the Pilarciks sent letters to the original ACC members requesting permission to use the materials. The letters were sent to the 14 year-old addresses of the members, and all of the letters were returned as undeliverable. Later, the Pilarciks located two of the members of the ACC who had not resigned and got them to sign a waiver of the composition roof restriction.

The Pilarciks then started their roofing job and this lawsuit ensued. The Court of Appeals held in favor of the other owners. The Supreme Court reversed.

The restrictions contained three provisions regarding roofs. In the first, the restrictions stated that roofs of composition type shingles will not be permitted. In the second, the restrictions stated that all roofs must be wood shingle unless an alternate roofing material is approved by the ACC. In the third, the restrictions provided that the ACC would have the right to waive any restriction insofar as it related to type of roof. The Court held that the restrictions were not ambiguous and that they clearly gave the ACC the power to allow an owner to use composition roofs.

The Court went on to hold that the restrictions had effectively been waived. All of the old ACC members had resigned, except the two who had signed off on the roof. The restrictions provided that the ACC members remaining had the authority to waive restrictions. And, even though the Pilarciks did not comply with all of the procedures for obtaining ACC approval, the fact that they actually did get the approval made those procedures irrelevant.

- ***Sunday Canyon Property Owners Association* v. *Annett***, 978 S.W.2d 654 (Tex.App.–Amarillo 1998, no writ history to date). The Sunday Canyon subdivision was platted and was subject to restrictive covenants. The covenants included a provision stating that they were binding on each owner of the lots for a term of ten years, and were automatically extended for additional periods of ten years "unless terminated or changed by a recorded vote by a majority of the then owners of the lots in this addition." An additional provision reiterated the right to amend, stating it could be done on the vote of 51% of the owners and was valid only when the amendment was recorded.

The Annetts bought two lots in the subdivision. Subsequently, a majority of owners adopted changes to the restrictions which created an owners association and set out provisions for assessments and assessment liens. The Annetts complained that the modification of the restrictions was invalid, arguing that the provision for adopting modification was unenforceable as to voting procedures and purposes. The trial court found that modification procedures were enforceable, but that the creation of the owners association and the provision for assessments and liens exceeded the original purposes of the right to amend contemplated by the original restrictions.

The Court of Appeals held that the creation of the association and the provision for assessments and liens were valid. Property owners have the right to contract with relation to their property as they see fit, in absence of contraventions of public policy or positive law. The plat and dedication by which the original restrictions were created also created the right to change those restrictions by the written consent of a majority. The majority vote to add these additional provisions did not destroy the dedication but made changes in exact accordance with it to further the purpose of the restrictions.

- ***Malmgren* v. *Inverness Forest Residents Civic Club, Inc.***, 1998 WL 767700 (Tex.App.–Houston [1st Dist.] 1998). In 1991, Malmgren bought a Vietnamese pot-bellied pig, brought it home, and named it Whoopi. Malmgren kept the pig as a pet, in his house. According to the Court, Malmgren had no intention of eating, breeding, or selling her. In 1991, on Thanksgiving, to be exact, Whoopi was shown to the neighbors, including the block captain, who, in testimony, remembered watching Malmgren feed Whoopi some watermelon way back in 1991. No attempt was ever made to hide Whoopi from the neighbors. Like other pets in this neighborhood, Whoopi is well kept, on a glassed-in, heated and air conditioned patio or in the fenced back yard. Whoopi likes to go play with the dog in the front yard sometimes.

Inverness Forest is a subdivision outside of Houston, which is subject to many restrictive covenants. One of the restrictions prohibits the keeping of "hogs" and other livestock.

In 1995, the owners association brought a lawsuit to bar Whoopi from the subdivision. They failed. It had been more than four years since the association discovered, via the block captain, that Whoopi was there. Limitations had run. Pure and simple.

• ***Munson* v. *Milton***, 948 S.W.2d 813 (Tex.App.–San Antonio 1998, writ denied). Property in the subdivision was restricted as follows:

> "All tracts within the Chisum's subdivision shall be used solely for residential, camping or picnicing purposes and shall never be used for business purposes. Motel, tourist courts, and trailer parks shall be deemed to be a business use."

The Munsuns had a house in the subdivision which they rented out to vacationers as a bed and breakfast, for short periods of time, usually no more than five days at a time. The neighbors sued and obtained a temporary injunction prohibiting this use of the property.

In attacking the temporary injunction, the Munsons first argued that the trial court had failed to find an irreparable injury. The Court of Appeals held that, when seeking a temporary injunction, the applicant need not show irreparable injury. Instead, the applicant is required only to show that the defendant intends to do an act that would violate the restrictive covenant.

The Munsons then argued that the plaintiffs had failed to show that the use of the property violated the restriction. The Court examined the meaning of the term "residence" and found that it requires both physical presence and an intention to remain. If a person comes to a place temporarily, without any intention of making that place his or her home, that place is not considered the person's residence. The Court noted the distinction in the Texas Property Code between residences and transient housing (such as hotels, motels, inns, etc.). The Court noted the distinction made in the restriction itself between personal and business uses. Ultimately, the Court held that there was a probably violation of the restriction, although it restricted the injunction to prohibit only non-residential renting of the property.

The Munsons final argument was that the injunction constituted an unreasonable restraint on alienation of their property. The Court held that it did not. As modified, the injunction imposes a reasonable restraint.

In his dissent, Justice Duncan thought the restriction did not prohibit the Munson's use of the property. At the very least, he would have found it ambiguous and resolved the interpretation in favor of the free use of the property.

- ***Tien Tao Association, Inc.* v. *Kingsbridge Park Community Association, Inc.***, 953 S.W.2d 525 (Tex.App.–Houston [1st Dist.] 1998, no writ).Tien Tao is a non-profit religious organization. Two members of the church bought houses in Kingsbridge and subsequently conveyed them to the church. Kingsbridge is subject to restrictive covenants, usually enforced by the Architectural Control Committee. After acquiring the houses, the church made several changes to their exteriors, without seeking permission from the ACC for the changes. In addition, the houses were used by visitors and worshipers, which seemed to increase the traffic in the neighborhood. The ACC began an inspection process and sent a series of letters to the church requesting compliance with the restrictions. The church complied with some requests, but for the most part objected to the authority of the ACC to enforce the restrictions. Ultimately this lawsuit was filed. A permanent injunction was issued requiring the church to comply with the restrictions.

The church first argued that the restrictions governed the architectural structure of the properties but not their use. The Court reviewed the restrictions and found enough references to the use restriction to hold that they restricted use as well as structure.

The church then argued that it had no notice of the guidelines by which the ACC administered the restrictive covenants. The church admitted having a copy of the restrictions. The restrictions gave the ACC authority to promulgate guidelines. Having made clear that there was an ACC and that the ACC was authorized to establish building standards, the restrictions had provided adequate notice to the church to go and ask the ACC about the guidelines.

The church then argued public policy reasons for not enforcing the restrictions. It contended that the federal Fair Housing Act makes it unlawful to deny or make available a dwelling to any person because of religion. The Court did not think the enforcement of restrictive covenants here were abridging freedom of worship. The repercussions of the church's actions were identical to what would have happened as a result of any nonresidential use. The high traffic, noise, and eyesores on the property created a nuisance, and just because the nuisance resulted from a religious gathering does not exclude it from coverage by the restrictions. The restrictions may have an impact on how the worshipers worship, but that does not equate to religious discrimination.

Finally, the church argued that the restrictions violated constitutional rights of freedom of religion, freedom of speech and freedom of association. Unfortunately, the church did not plead these constitutional defenses, but claimed the burden of proving constitutionality was on the homeowners association. It is not their burden, so this argument failed.

- ***Cox* v. *Melson-Fulsom***, 956 S.W.2d 791 (Tex.App.–Austin 1997, no writ). Fulsom and Cox both owned lake lots in the same subdivision. The lots are restricted, including a prohibition against trailer houses. After Cox bought her lot, she moved a travel trailer onto it and left it there. It was mostly just parked there, but it was hooked up to the electricity and had food and blankets so a person could spend the night in it. The trial court found that the trailer fit the definition of trailer house in the restrictions and granted an injunction.

The definition of a trailer is well settled in Texas. Cox's vehicle, which has wheels, a hitch, and a living area, fits within the plain meaning of the term. Cox claimed that, even if it is a trailer, it is not a "trailer house." The Court noted that Cox was using the trailer as a house, and that was enough to make it a trailer house.

- ***Northwest Park Homeowners Association, Inc.* v. *Brundrett***, 970 S.W.2d 700 (Tex.App.–Amarillo 1998, no writ). A suit for assessments under a subdivision declaration is not a suit on an open account which is entitled to the benefits of Rule 185 of the Texas Rule of Civil Procedures.

- ***Dickerson* v. *Deparbieres***, 964 S.W.2d 680 (Tex.App.–Houston [14th Dist.] 1998, no writ). Palm Gardens condos were formed in 1977 pursuant to a declaration that gave the Owner's Association a lien for unpaid assessments and provided that the lien could be foreclosed in the same manner as a foreclosure of a mortgage or deed of trust. The declaration did not name a trustee or set out any procedures for foreclosing. About ten years later, the Association amended its by-laws to authorize appointment of a trustee to conduct the sale.

After that, the Association's board of directors proposed an access gate system for security reasons. Each owner would have access to his parking space through an electronically controlled gate. The system was approved by the necessary majority and the Association went forward to implement it. Dickerson didn't like the idea, refused to allow the installation of a gate on her parking space and refused to pay the additional assessment for the system. She was charged late fees and, subsequently, the Association refused to accept partial payments of assessments from her.

Around this same time, the Association changed the parking rules to prohibit parking more than one car in a space. Dickerson had been parking two, so, under the rules, the Association had one of the cars towed and then placed a concrete block in her parking space to prevent her from parking in the part of her space intended, according to the Association, for bikes.

The Association filed a notice of lien in the County records, posted her unit for foreclosure, and conducted a foreclosure sale on the first Tuesday of the month. Dickerson sought and obtained a TRO on the day after the foreclosure sale, and subsequently obtained a temporary injunction, after which the Association rescinded its sale. The Association counterclaimed in the injunction action for a declaratory judgment that everything it had done was okay.

Dickerson argued that the Association could not exercise a power of sale because the declaration did not include a power of sale or set forth the procedures for conducting a sale. She also argued that the attempt to rectify this shortcoming by amending the by-laws was ineffective. She did not contend that the by-law provision lacked the language needed to provide the power of sale, so the only thing the Court had to decide was whether having the wording set out in the by-laws was sufficient. The Court held that the by-laws were enough. Although all of the condominium statutes since 1963 have specified what must be in a declaration, none of them have required the declaration to state whether a power of sale exists and none have prohibited the by-laws from including these provisions. Dickerson did not prove that the declaration had to have power of sale language, so the by-laws were enough and non-judicial foreclosure was allowed.

Dickerson then argued that she should not have been ordered to pay the assessment for the security gate because the Association did not obtain her consent for it before construction. The declaration provided that no alterations of common areas could be made without 75% owner approval and with the consent of any owner whose rights are interfered with. The declaration also required the consent of mortgagees, prohibited changing the pro rata interest or obligations of any unit for the purpose of levying assessments, and prohibited alteration of limited common elements without consent of all owners. Based on these provisions, Dickerson argued that the gate system interfered with her rights to the limited common element, the parking space, that the gate system was an alteration of a limited common element done without the consent of all owners.

The Court first dispensed with Dickerson's claim that the gate system violated the prohibition against changing the pro rata interest or obligations of an owner. It read that provision to prohibit changing the percentage interest of an owner. Here, although the new assessments changed the dollar amount of the obligation, it did not change the pro rata character of the assessment.

The Court then held that the gate system did not alter the parking limited common element. This was not pled at trial, so out the window with it.

Finally, the Court dispensed with Dickerson's argument that the gate system interfered with her rights without her consent. The Court noted her admission that she still had control over and access to the gate for her parking space. The Court also noted that the system was put in place to protect all of the owners from incidents that Dickerson acknowledged to have existed.

Dickerson's claims regarding the parking restriction were also tossed out by the Court. She argued that the Association had wrongfully seized her parking space. The rules for parking spaces clearly prohibited parking two cars and clearly designated bike storage areas. She repeatedly violated these rules. To the extent the rules were properly adopted, Dickerson had not proven that the Association's actions interfered with her ability to park in accordance with them. And Dickerson did not allege that the rules were improperly adopted.

Finally, Dickerson complained about the award of over $30,000 for attorneys' fees. This was, after all, a law suit over a $3,200 claim. Unfortunately for her, she did not assert that the attorney's rates were unreasonable or point out any work that was unnecessary.

PART XIII
HOMESTEADS

- ***Sanchez* v. *Telles***, 960 S.W.2d 762 (Tex.App.–El Paso 1998, writ denied). Montoya pledged a parcel of property as collateral for two bail bonds for her son-in-law. At the time she signed the deed of trust, she did not claim the property as homestead, and there was never a designation of homestead recorded. The deed of trust contained wording that represented the property was not homestead and disclaimed any homestead in the property. When the son-in-law jumped bond, the bond was forfeited. After the bond forfeiture, Montoya signed a power of attorney in favor of her daughter. The daughter then sold the property to Sanchez, although, for some strange reason, neither Montoya's signature nor her daughters was on the deed, which was signed only by Sanchez.

Meanwhile, the bond agency foreclosed and the property was sold to Telles, who received a trustee's deed. In subsequent litigation, Montoya claimed that the property was her homestead at the time the deed of trust was executed. To establish a homestead, a person must show a combination of both overt acts of homestead usage and the intention on the part of the owner to claim a homestead. Here, the evidence of homestead in front of the Court was merely an affidavit that Montoya lived in the house for eight years. Unfortunately for her, there was no other evidence that the property was her homestead, and she had signed an affidavit that clearly said it was not her homestead.

- ***Brown* v. *Bank of Galveston, N.A.***, 963 S.W.2d 511 (Tex. 1998). Vincent married Hyacinth in Jamaica, then moved back to Galveston, leaving her behind. In Galveston, he contracted with the builder to build a house. All of the documents listed Vincent as a single man. The mechanics' lien contract and note were assigned to the Bank. After disputes arose with the Bank, Vincent claimed the mechanics' lien was not valid. First, he claimed, the contract was not signed by his wife, which was true. Unfortunately, Vincent had not asked for a jury finding as to his wife's homestead rights, so, unless those rights were conclusively established otherwise, Vincent would lose on that issue. The Court found that the statements in the loan documents to the effect that Vincent was a single man were sufficient to raise a fact question and the prevent the issue of Hyacinth's homestead from being conclusively proven.

  Second, Vincent claimed that work had commenced and materials had been delivered before the contract was signed. The mechanics' lien contract recited that no work had been done and no materials had been delivered. The Bank relied upon that statement in advancing funds, and that estopped Vincent from later contesting the validity of the lien.

- ***McKee* v. *Smith***, 965 S.W.2d 52 (Tex.App.–Fort Worth 1998, writ denied). The Court followed the Fifth Circuit's holding in **In Re *John Taylor Co.***, 935 F.2d 75 (5th Cir. 1991) in holding that the business homestead exemption applies to real property titled to a family member but leased to a corporation wholly owned by a family member.

PART XIV
BROKERS

- ***Blackstone* v. *Thalman***, 949 S.W.2d 470 (Tex.App.–Houston [14th Dist.] 1997, no writ). Blackstone signed an exclusive listing agreement with Thalman to sell his house. The agreement provided that Thalman would attempt to sell the house at a set price, and her 6% commission would be due when she procured a buyer ready, willing, and able to purchase the property at the price and terms stated in the agreement or at any other price and terms acceptable to the seller. Thalman located a potential buyer, and negotiations started, with various offers being made, refined, and rejected by the seller. The final offer was at the requested purchase price, but was subject to obtaining a satisfactory appraisal at that price, and provided for an extended period of possession by Blackstone after the closing. The offer was not accepted by Blackstone.

Two years or so later, Thalman sent Blackstone a demand letter requesting her 6%. When he refused to pay, Thalman sued him. The trial court found that Thalman had located a buyer who was ready, willing, and able to buy the house on the terms set out in the listing agreement.

The Court of Appeals reversed. The listing agreement provided that the proposed buyer must offer to buy at the price and terms stated in the agreement or on other terms acceptable to the seller. Here, the Court said, it was undisputed that the buyer did not offer to purchase the house on the same terms set forth in the listing agreement. The buyer added a requirement that the seller provide an appraisal and the seller insisted on remaining in the house for 90 days after closing. Neither of those provisions were in the listing agreement. "As such, the parties were attempting to negotiate a contract distinctly different from the one envisioned in the listing agreement." 949 S.W.2d at 472-3.

Even though the seller agreed during negotiations that he would provide the appraisal, the buyer didn't agree to the seller's continued possession of the property. The compromises during negotiations were nothing more than counteroffers, which are rejections of offers, not acceptances. A compromise during negotiations is simply not an agreement.

Moreover, public policy favors commercial transactions. Once a prospective buyer has rejected an offer of sale on certain terms, the parties should be encouraged to negotiate a contract under alternative terms. "Without this freedom to negotiate, sellers will be reluctant to make counteroffers, sales will diminish, commerce will suffer, and real estate agents will earn fewer commissions." 949 S.W.2d at 473. (I am certain those words made Thalman feel a whole lot better). Thus, the court held, as a matter of law, that the phrase "at any other price and terms acceptable to Owner," does not include proposed terms conditionally "agreed to" by the owner during negotiations but never "accepted" in a formal contract. "Rather, we believe the only reasonable interpretation of this phrase, consistent with the law of contracts, is that it refers to modifications of the listing agreement that may occur with the consent of the seller and his real estate agent.

PART XV
TITLE INSURANCE

- ***First American Title Insurance Co. of Texas* v. *Willard***, 949 S.W.2d 342 (Tex.App.–Tyler 1997, no writ). Willard wanted to build a house. He got financing from the Bank. In connection with the construction loan, the Bank got an interim construction binder from First American, issued through Pearson Abstract. Because of a search error, the binder failed to note the presence of a Lone Star Gas easement. When the house was about half finished, it was learned that the gas lines went directly underneath the house. The Bank ceased funding the loan and construction stopped while people tried to figure out what to do.

At the Bank's request, First American honored its obligations under the binder and issued a policy, taking no exception for the easement. The Bank then resumed funding the loan and the house was completed, with the gas line still in place. The house was finished and refinanced with the gas line still in place. At some point both Willard and Lone Star sued the Bank and First American.

The first claims of Willard and Lone Star was that First American was liable under § 21.21 of the Texas Insurance Code, which prohibits unfair claims settlement. Although § 21.21 does not provide a third party a direct cause of action against an insurer for an unfair settlement practice, both Lone Star and Willard thought that rule did not apply to them. Lone Star argued that First American had admitted liability to it; however, the Court held that the only liability First American had admitted was liability to the Bank under its policy, and Lone Star was not allowed to benefit from that admission. Willard argued that § 21.21 provided him a cause of action because he had paid the premium for the policy and because he would directly benefit from the payment of the claim by the insurer.

The Court held that merely paying the premium did not inject the borrower into the title insurance contract as a party. In addition, the mere fact that a third party would benefit from the performance of a contract does not put the third party into a contractual relationship with the parties. Willard could have bought a title policy to protect his interests, but didn't.

Lone Star then raised the issue of aiding and abetting the trespass on its easement. A mortgagee title policy imposes only the duty to indemnify the insured. Lone Star argued that First American had aided the trespass by honoring its obligations under the interim binder without excepting to the easement, thus allowing the Bank to continue funding and the house to be finished. The Court held that First American was required to honor the obligations under the binder and was not liable for aiding a trespass and it had no authority or ability to eliminate the trespass. (The Bank did not fare so well. See the discussion under Lender Liability).

The amount of damages First American was liable for under the policy was then scrutinized by the Court. The trial court had awarded $16,000 to Lone Star, which was roughly the amount needed to move the pipeline. The Court of Appeals looked at whether that amount was the amount of loss sustained by the Bank. The Court noted that the presence of an eight inch high pressure gas pipeline under the Willard house materially depreciates the value of the property, thus the value of the Bank's collateral. First American was entitled to indemnification from the Title Company for that loss of value.

PART XVI
CONSTRUCTION CONTRACTS, MECHANICS' LIENS, AND CONSTRUCTION ISSUES

- ***Tips* v. *Hartland Developers, Inc.***, 961 S.W.2d 618 (Tex.App.–San Antonio 1998, no writ). Tips and Hartland entered into an agreement under which Hartland would construct an airplane hangar. At some point Hartland quit working. Hartland claimed it had not been paid; Tips claimed that Hartland's work was defective, primarily because Hartland had not built an access ramp, had not completed the electrical work, and had failed to comply with the San Antonio fire code requirements. As a result, Tips was unable to get a certificate of occupancy. The trial court found that bringing the project into compliance with the fire code was not contemplated by the parties' agreement.

Tips argued that the trial court should have found there were implied covenants in the construction contract which require a builder to deliver a building that complies with relevant building codes and regulations.

This is a case of first impression. There have been no Texas cases determining whether there is an implied covenant of the type described by Tips.

Texas courts are supposed to be reluctant to identify implied covenants. Such covenants are to be implied only when there is a satisfactory basis in the express contracts of the parties which makes it necessary to imply certain duties and obligations in order to effect the purposes of the parties. It must appear that the implied covenant was so clearly in the contemplation of the parties that they deemed it unnecessary to express it.

Every contract incorporates existing law, and a party's obligations under a contract are measured by the standard of those laws. The existing fire codes require newly constructed buildings to meet certain standards, although they do not state whether the burden for compliance rests on the owner or the builder. This Court thought there was ample case law to suggest they should rest with the builder, unless there is a contrary agreement.

The Court noted other implied covenants applicable to builders. There is an implied covenant to perform the contract with care, skill, and reasonable experience. There is an implied covenant to deliver a building that is habitable. The reason for these implied covenants is that builders are in the business of constructing buildings free of defects, buyers are not in a position to discern defects, buyers cannot normally rely on their own judgment in such matters, buyers rely on builders to construct in a good and workmanlike manner, and the builder is the only one who knows the manner in which the building was built.

Thus, the Court holds that a cause of action is available to plaintiffs for breach of contract where a contractor has failed to comply with building codes relevant to the intended use of the structure.

- ***National Environmental Service Company, Inc.* v. *Homeplace Homes, Inc.***, 961 S.W.2d 632 (Tex.App.–San Antonio 1998, no writ). Texas Property Code § 28.003, which requires payments to contractors and subcontractors, provides that the owner is required to pay interest on overdue payments. It does not state who is entitled to receive interest on an overdue amount. This Court held that only the contractor, not a subcontractor, is entitled to interest. Chapter 28 expressly requires an owner to pay a contractor. In turn, the contractor is obligated to pay the subcontractor. Read as a whole, chapter 28 does not require the owner to pay anything, principal or interest, to a subcontractor.

- ***Hadnot* v. *Wenco Distributors***, 961 S.W.2d 232 (Tex.App.–Houston [1st Dist.] 1998, no writ). Texas Property Code § 53.084(b) says: "If the owner has received the notices required by Subchapter C [notices of mechanics' lien affidavits and funds trapping notices], and if the claim has been reduced to final judgment" the owner is liable and the owner's property subject to claims for any money paid to the contractor after receiving those notices. The Hadnots built a house and paid off the contractor, not keeping the retainage they were supposed to keep. Several mechanics' liens were filed by subcontractors.

The Hadnots claimed that § 53.084(b) requires the subcontractors to obtain a judgment against the contractor before they could find the Hadnots liable. This is a very generous, and quite erroneous, reading of § 53.084(b) and the mechanics' lien statutes in general. Section 53.084(b) relates to the establishment and foreclosure of the lien. A mechanics' lien is not created by agreement of the parties and is not self-enforcing. It can only be established by judicial order and can only be foreclosed by judicial order. Therefore, a final judgment is necessary before the subcontractors can get to the owner. The "final judgment" referred to is the final judgment against the owner.

- ***Wiggins* v. *Overstreet***, 962 S.W.2d 198 (Tex.App.–Houston [14th Dist.] 1998, writ denied). Wiggins sued Steve for construction defects in a townhome he sold her, alleging that Steve was the builder/owner of the townhome and was liable for breach of the implied covenant of good workmanship and habitability. Steve claimed he didn't build the townhome.

A builder gives implied covenants of good workmanship and habitability. A seller of a used building does not. Here, Steve was an employee of the builder when the townhome was built. The builder was a corporation owned by Steve's dad. The only actions Steve took were as an employee of the actual builder. Various statements made by Steve that he had built the townhome were not conclusive proof of liability. The statements that he had "built" the townhome could have meant that he had it built by the contractor.

- ***Richardson* v. *Mid-Cities Drywall, Inc.***, 968 S.W.2d 512 (Tex.App.–Texarkana 1998, no writ history to date). Mid-Cities filed a mechanics' lien affidavit against Richardson's property for materials and labor it had provided but didn't get paid for. The lien affidavit did not contain the business address of Mid-Cities within the sworn portion of the affidavit, as required by TPC § 53.054. The address was in the "after recording return to" part of the back of the document.

The general rule is that the mechanics' lien statutes will be liberally construed for the purpose of protecting mechanics and materialmen. Substantial compliance is required, not strict compliance. Because the affidavit contained everything else required by the statute and because the address on the document provided the means for contacting the claimant, the Court held this affidavit substantially complied with the statute.

PART XVII
CONDEMNATION

- ***Mayhew* v. *Town of Sunnyvale***, 964 S.W.2d 922 (Tex. 1998). Over an extended period of time the Mayhews assemble a large piece of farmland, which by 1986 was entirely in the city limits of Sunnyvale. The Mayhews decided they would like to develop the farmland and met with the city to discuss their plans. They were told that the city's current zoning ordinances would not accommodate their plans. Later the city's ordinance changed and the Mayhews submitted another plan.

Two months later, the city passed a moratorium on planned developments. The processing continued on the Mayhews' plan but it was finally rejected by the city council. After their application was denied, the Mayhews did not appeal in accordance with the city's ordinances. Instead, they filed this lawsuit, alleging statutory and constitutional violations. At trial, the judge found that Sunnyvale had violated the Mayhews' constitutional rights to substantive due process and equal protection and had engaged in a taking without compensation by denying the Mayhews' proposal. The Court of Appeals held that the issue was not ripe for adjudication and reversed.

The Supreme Court first dealt with the issue of ripeness, holding that the issue was ripe.

As to the takings issues, the Court first noted that, as a general rule, the allocation of a general zoning law to a particular property constitutes a taking only if the ordinance does not substantially advance legitimate state interests or if it denies the owner all economically viable use of his land. The Court found that Sunnyvale did have a substantial interest in maintaining the character of the town and that its action in denying the Mayhews' planned development furthers those interests.

That does not end the inquiry, however. A compensable taking can also take place when a governmental agency imposes restrictions that either deny a landowner all economically viable use of his property or unreasonably interfere with the landowner's rights to use and enjoy the property. The Court held that the Mayhews were not entitled to relief under these two theories either. They had ranched their property for four decades in a town with a tiny population. Thus, they did not have the reasonable investment-backed expectation that they could pursue an extensive development that would more than quadruple the population of Sunnyvale.

The Court then rendered a take nothing judgment against the Mayhews because, as a matter of law, the Mayhews did not prevail on their just compensation claims or other claims.

- ***Trail Enterprises, Inc.* v. *City of Houston***, 957 S.W.2d 625 (Tex.App.–Houston [14th Dist.] 1997, writ denied). The statute of limitations applicable to inverse condemnation actions is the ten-year period of limitations to acquire land by adverse possession, Texas Civil Practice and Remedies Code § 16.026. Here, Trail claimed a Houston non-drilling ordinance was an inverse condemnation. The ordinance was passed in 1954, but the action was not brought until 1995. The date the ordinance is enacted is the date a cause of action commences for this type of inverse condemnation.

- ***City of Laredo* v. *R. Vela Exxon, Inc.***, 966 S.W.2d 673 (Tex.App.–San Antonio 1998, writ denied). In order to deal with the increased traffic flow and inspection time for trucks going into Mexico after NAFTA, the City re-routed traffic in a way that resulted in long lines of trucks blocking access to the Velas gas station. The Velas sued, alleging that the blocking of their gas station constituted a taking and a nuisance.

Although ***State of Texas* v. *Heal***, 917 S.W.2d 6 (Tex. 1996), held that it was possible under some circumstances for traffic itself to constitute a taking, under Article 1, § 17 of the

Texas Constitution, no compensable taking can occur where the government has not directly restricted the use of the landowner's property. A direct restriction is an actual physical or legal restriction on the property's use, such as blocking of access or denial of a permit for development. All impaired access cases where the landowner received compensation occurred where the city had created physical obstructions.

In this case, the City has not imposed an actual physical or legal restriction on the use of the gas station. Nor has the City undertaken any public improvement which tangentially affects the traffic flow. The only action taken by the City was its refusal to eliminate the street as a designated truck route and its rerouting of traffic from other designated truck routes. This is not the type of direct restriction which allows compensation.

The Court also refused to hold that the City's action constituted a nuisance. A municipality can be liable for creating a nuisance only for the non-negligent performance of a governmental function. This means there must be a level of culpabilility of gross negligence or higher. In this case, the only intentional act by the City was the designation of truck routes. While the diversion of trucks may have increased the traffic, it was the ever-increasing number of trucks that caused the problem, not the City's act.

- ***Texas Parks and Wildlife Department* v. *Callaway***, 971 S.W.2d 145 (Tex.App.–Austin 1998, no writ history to date). Callaway owns property on which Parks and Wildlife has an easement for a waterway pass. The Department decided to open the pass to the public, even though the easement stated that the pass would be closed to all water traffic except Department personnel. Callaway sued, alleging that opening the pass violated the easement and constituted a taking by inverse condemnation. The Department said that it decided to open the pass to the public because it considered the waters "public waters" and that it had no authority to restrict public access. It also claimed it did not intentionally take the easement.

An inverse condemnation occurs when the state or its agency physically takes or invades property, or when it unreasonably interferes with the owner's right to use and enjoy the property. The Department's first argument was that the action for inverse condemnation was an attempt to disguise a contract claim that would have been barred by sovereign immunity. Sovereign immunity protects the state from suit without its consent. Entering into a contract waives the state's immunity from liability, but not its immunity from suit. Inverse condemnation is an exception to sovereign immunity. Here, Callaway was trying to have the easement contract construed, but that was not his only claim. The existence of the contract did not end the inquiry.

In this case, the Department claimed it had taken nothing. It had merely made the decision that it had no right to bar the public from using the pass. Thus, since it was operating under a good faith belief that it was acting in an authorized way, the Department argued, it should not be subject to suit. However, the cases cited by the Department were all cases dealing with contract claims in the context of sovereign immunity. Here, the context is different. The Department was not merely refusing to perform under its contract, it was putting up signs inviting the public to use the easement area.

The Department fell back onto the "public waters" provisions of the Constitution. It argued that because it was required to take the actions prescribed by the Constitution, it has no constitutional duty to compensate when that results in a taking. The Court disagreed. Many, if not most, acts that end up causing an inverse condemnation can be traced to a legal mandate. To adopt the Department's argument would emasculate the takings provision of the Constitution.

- ***Butler* v. *State of Texas***, 973 S.W.2d 749 (Tex.App.–Austin, 1998, no writ history to date). This case includes an excellent discussion and application of the principles announced in ***State of Texas* v. *Schmidt***, 867 S.W.2d 769 (Tex. 1993).

PART XVIII
AD VALOREM TAXATION

- ***Rosewood Properties, Inc.* v. *Community Credit Union***, 944 S.W.2d 46 (Tex.App.–Eastland 1998, writ denied). Rosewood and CCU each owned an undivided one-half interest in some property. For the years 1986 and 1987, however, when CCU's interest was owned by the William Herbert Hunt Trust, Rosewood paid all of the ad valorem taxes on the property. The payments were made pursuant to an agreement with the Trust which included an assignment of the tax liens to Rosewood in accordance with the § 32.06 of the Texas Property Tax Code. Rosewood later sued CCU, to enforce its tax liens on the property.

At trial, CCU argued that, because Rosewood was jointly and severally liable for taxes on the property, the tax liens were extinguished by Rosewood's payment of the taxes. According to CCU, § 32.06 authorizes assignments of tax liens only when a person pays someone else's taxes. The trial court agreed.

The Eastland Court of Appeals reversed. Property taxes are owed by the person who owns the property. Here, Rosewood did not own the property against which it claimed the tax liens, it owned the other undivided one-half interest in the land and buildings.

PART XIX
ENTITIES

- ***Hughes* v. *St. David's Support Corporation***, 944 S.W.2d 423 (Tex.App.–Austin 1997, writ denied). The general partner of two partnerships failed to notify Hughes, an owner of a very small interest in those partnerships, of the sale of the assets of the partnerships. The general partner admitted at trial that the reason it didn't notify Hughes was because it was concerned that Hughes might muck up the sale. Hughes sued, alleging that the failure to notify it of the sale was a breach of the general partner's fiduciary duties.

It is well established that general partners have fiduciary duties to limited partners. Citing ***Crenshaw* v. *Swenson***, 611 S.W.2d 886 (Tex.App.–Houston [14th Dist.] 1980, writ denied), the Court said, "In a limited partnership, the general partner stands in the same fiduciary capacity to the limited partners as a trustee stands to the beneficiaries of a trust." 944 S.W.2d at 425-6. Thus, it was clear to the Court that there was a fiduciary duty owed to Hughes. (One could quibble with the Court's comparison of a general partner's duty to that of a trustee. Check out § 4.04(f) of the Texas Revised Partnership Act, applicable to limited partnerships as well, which states that a partner, in that capacity, is not a trustee and is not held to the same standards as a trustee.)

The general partner then contended that, even though it may have a fiduciary duty to Hughes, the duty wasn't violated by failing to notify Hughes, since Hughes owned an infinitesimal interest in the partnerships. The Court didn't care how small the interest was. Because Hughes owned some interest it was entitled to notice before the assets were sold. The Court was moved by the fact that Hughes was the only partner not informed of the sale.

• ***Hammerly Oaks, Inc.* v. *Edwards***, 958 S.W.2d 387 (Tex. 1997). Edwards was severely beaten by two men employed by an apartment complex. Among those he sued afterwards was the leasing agent. The trial court held that there was insufficient evidence that the leasing agent was a vice principal of the owner and that she was grossly negligent.

In Texas, in order to find a corporation liable for exemplary damages in a gross negligence case, the default for which the exemplary damages are sought must be the very act of the corporation itself, or, if it is the act of an agent, the agent must have been specifically authorized by the corporation to perform the act. A corporation's liability in punitive damages for its servants acts is on a different setting than respondeat superior.

The Court has adopted the term "vice principal" for the type of servant or agent whose acts can bring on exemplary damages. A vice principal is a corporate officer who has authority to employ, direct, and discharge servants of the master, who is engaged in the performance of nondelegable or absolute duties of the master, and those to whom the master has delegated the management of the corporation or a department or division. Corporate officer is a term used rather loosely, meaning anyone who represents the corporation in its corporate capacity.

The apartment manager was a vice principal of the owner. However, the leasing agent was not. She had no authority to hire or fire employees or to engage contractors. She did not hire the men who assaulted Edwards nor did she have the authority to terminate them. The most she did was consult with the assailant on which apartments to clean. Edwards' sole contention that the leasing agent was the principal was that she was the only representative of the owner on site when the assault happened. The Court refused to buy that argument.

PART XX
INDEMNITIES

- ***Green International, Inc.* v. *Solis***, 951 S.W.2d 384 (Tex.1997). A provision in a contract between a contractor and his subcontractor stated that the contractor would not be liable to the subcontractor for delays in the subcontractor's work caused by the neglect or default of the owner, contractor, or others. The provision was not made conspicuous, but was in the same typeface as the rest of the contract.

In ***Dresser Industries, Inc.* v. *Page Petroleum, Inc.***, 853 S.W.2d 505 (Tex. 1993), the Supreme Court held that certain contract provisions for relieving a party in advance for its own neglect must be unambiguous and must be conspicuous.

Here, though, the Court held that the ***Dresser*** rule does not apply to "no-damage-for-delay" clauses. This type of clause, according to the Court, does not involve the extraordinary shifting of risks of the type described in ***Dresser***. It is not an indemnity because it doesn't shift the risk for third party claims. It is not a release because it doesn't extinguish a claim or cause of action. It is merely a shift in the economic consequences of a delay.

- ***Polley* v. *Odom***, 957 S.W.2d 932 (Tex.App.–Waco 1997, no writ). A commercial lease contained the following provision:

> "(a) Risk of Loss. Except where due to the willful neglect of Lessor all risk of loss to personal property or loss to business resulting from any cause whatsoever shall be born exclusively by Lessee."

There was a fire in the premises caused by the landlord's negligence. The trial court held that the tenant's cause of action for negligence was barred by this exculpatory provision. On appeal, the tenant claimed that the express negligence doctrine applies to the exculpation clause, rendering the exculpation unenforceable, thus the Court should allow the negligence claim.

The express negligence doctrine arose in ***Ethyl Corp.* v. *Daniel Construction Co.***, 725 S.W.2d 705 (Tex. 1987). In a nutshell, it requires parties seeking to indemnify one against his own negligence must express that intent in specific terms. In other words, you have to come right out and say that you intend the indemnity to indemnify against your own negligence. The doctrine has been extended to releases from liability as well. Dresser Industries v. Page Petroleum, 853 S.W.2d 505 (Tex. 1993).

The Court noted that the risk of loss provision in the lease was not an indemnity, but that it was a release. The tenant is agreeing to assume all risk of property or business loss from any cause except willful neglect. The Court held that the risk of loss provision is subject to the express negligence rule.

Having determined that the rule applies, the Court went on to hold that this provision does not satisfy the rule. The provision does not state expressly that the landlord has no liability for his own negligence. The exclusion of negligence is implicit rather than explicit. That won't do. The express negligence doctrine is to be literally applied.

Something not pointed out by the Court, but significant from a drafting standpoint is that ***Dresser*** requires agreements subject to the express negligence rule to be conspicuous.

After the opinion in this case was published, the parties settled the case. The Waco Court of Appeals entered judgment in accordance with the settlement, but because the case addresses matters of public importance, the Court refused to withdraw the opinion or to redesignate it as an unpublished opinion.

PART XXI
MISCELLANEOUS

- ***Chubb Lloyds Insurance Company of Texas* v. *Kizer***, 943 S.W.2d 946 (Tex.App.–Fort Worth 1997, no writ). Kris and Terrie were husband and wife. They owned a house, which was insured by Chubb. The house burned down, and it looked an awful lot like it had been intentionally set by Kris. At least the jury thought so, although the jury also concluded that Terrie had nothing to do with the fire. Terrie sought to recover at least her community property interest in the house and its contents.

The Supreme Court has never determined whether an innocent spouse may recover a share of community property destroyed by a fire caused by the other spouse. Fort Worth took a stab at it and held that the innocent spouse cannot recover.

In ***Kulubis* v. *Texas Farm Bureau Underwriters Insurance Company***, 706 S.W.2d 953 (Tex. 1986), the Supreme Court did hold that an innocent spouse can collect insurance for destruction of her separate property. ***Kulubis*** expressly did not deal with community property issues. Only the Amarillo Court of Appeals has done that, in ***Travelers Cos.* v. *Wolfe***, 838 S.W.2d 708 (Tex.App.–Amarillo 1992, no writ). and, in that case, the property had been converted to separate property pursuant to a divorce. The Fifth Circuit has held that an innocent spouse cannot collect for destruction of community property.

> "We conclude that it would be a strange rule indeed that guaranteed to would-be arsonist a minimum of one-half of the insured value of his building – paid in cash and as community property – even where he [sic] found guilty of the act, so long as he arranged matters so that the insurance company could not prove that he had let his spouse in on his scheme." ***Norman* v. *State Farm Fire & Casualty Company***, 804 F.2d 1365, 1366 (5th Cir. 1986).

In other words, the house and the insurance policy are both community property. Any proceeds paid under the insurance policy for damage to the house, would likewise be community property, allowing the wrongdoer to share in the proceeds. Absent a severance of the community estate as tot he proceeds, Terrie could not receive proceeds in any way that did not benefit Kris. The Court held that the policy of not rewarding wrongdoers must be the overriding concern.