CASE LAW UPDATE

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The case selection for this episode of Case Law Update, like all of them in the past, is very arbitrary. If a case is not mentioned, it is completely the author's fault. Cases are included through 550 S.W.3d and Supreme Court opinions released through January 4, 2018.

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

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

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PART I
MORTGAGES AND FORECLOSURES

Hinton* v. *Nationstar Mortgage LLC, 533 S.W.3d 44 (Tex. App.—San Antonio 2017, no pet.). The Hintons borrowed a loan to refinance their house. The original lender was TBW. TBW assigned its interest in the loan to Cenlar, and Cenlar later sold its interest in the loan to Ocwen.

The Hintons defaulted. In January 2010, Ocwen sent them a notice of intention to accelerate. The Hintons didn't cure their default, and Ocwen accelerated in May, 2010 and sought a judicial foreclosure in June 2010. After filing the foreclosure suit, Ocwen assigned the loan to Nationstar, and in March, 2014, Nationstar rescinded the acceleration of the debt.

Nationstar then promptly accelerated the debt again and sought to intervene in Ocwen's suit. Nationstar claimed to be the current servicer of the loan, with the authority to foreclose.

The Hintons claimed that Nationstar lacked standing and capacity to intervene in the suit. They claimed that when Nationstar intervened, the right to enforce the note belonged to someone else. They also claimed that Nationstar couldn't seek a judicial foreclosure because it wasn't a holder in due course of their note.

For a trial court to have subject matter jurisdiction, the plaintiff must have standing at the time it files suit. Generally, a plaintiff has standing when it is personally aggrieved. When, as here, the plaintiff's lack of standing is raised for the first time on appeal, the court must construe the petition in favor of the party, and if necessary, review the entire record to determine if any evidence supports standing.

Nationstar argues it had standing when it filed its original petition in intervention on May 1, 2014, because it received the right to enforce the note and security instrument through an assignment before intervening. The evidence showed that Nationstar was the assignee of the loan as of September, 2013, well before it intervened in the lawsuit. So the court found it had standing to intervene.

The Hintons also claimed that Nationstar lacked standing because it was not a holder in due course. However, standing to sue can be predicated upon either statutory or common-law authority. Because the court had already held that Nationstar had standing under common-law authority, it need not determine whether it had standing under statutory authority.

The Hintons then claimed that limitations barred Nationstar from intervening. They argued that Nationstar did not record the transfer of lien until July, 2014, two months after limitations had run. The applicable limitations statute required suit to be brought within four years after accrual of the cause of action. When, as here, a note contains an optional debt-acceleration clause, a cause of action for judicial foreclosure accrues when the note holder actually exercises its option to accelerate. It is undisputed that after the Hintons went into default, Ocwen exercised its option to accelerate the debt on May 2, 2010. It is also undisputed that Nationstar filed its original petition in intervention on May 1, 2014, within four years of Ocwen's acceleration.

The Hintons' arguments suggest Nationstar did not effectively bring suit for limitations purposes until July 1, 2014, when Nationstar recorded the transfer of the lien. The Hintons consequently assume Nationstar could have brought suit within the four-year limitations period only if Nationstar's March 27, 2014 rescission of Ocwen's acceleration was effective. As previously noted, Nationstar was assigned TBW's rights under the note and security instrument on September 17, 2013, before Nationstar intervened. Moreover, it is undisputed that Ocwen accelerated the debt

on May 2, 2010, and Nationstar filed its original petition in intervention on May 1, 2014. Because Nationstar's May 1, 2014 filing was not later than four years after Ocwen's May 2, 2010 acceleration of the debt, the statute of limitations did not bar Nationstar's suit for foreclosure, regardless of whether Nationstar's rescission of Ocwen's acceleration was effective.

Edwards* v. *Federal National Mortgage Association, 545 S.W.3d 169 (Tex.App.—El Paso 2017, pet. denied). To quote the opening paragraph of this case: "Like some cases of this type, the relatively straightforward contract issues blur because of the inaccuracies in mass produced loan documents and foreclosure paperwork."

James inherited a house from his mother. Sometime after her death, Bank of America, successor to Countrywide Home Loans Servicing LP, filed suit to foreclose. The suit claimed that a home equity loan secured by the house was in arrears.

The loan documents were all over the place. The Note is dated March 15, 2007, in the amount of $156,500, and refers to a Deed of Trust of the same date.

The Deed of Trust is dated March 6, 2007 on the first page, but was signed on March 15, 2007. The Deed of Trust refers to a Note dated March 6, 2007, in the amount of $158,400. The Deed of Trust further describes the note as a renewal and extension of a previous 2003 note, but expressly disclaims that the note is a home equity loan. An affidavit presented by Fannie Mae, however, referred to a Home Equity Note signed on or about March 15, 2005 in the amount of $156,500.

James pointed out all of these discrepancies and concluded that the Note referred to in the Deed of Trust couldn't be the same note attached to Fannie Mae's motion for summary judgment. He claimed that Fannie Mae hadn't produced the note tied to its Deed of Trust and therefore, the Deed of Trust is unenforceable.

The question before the court is whether the discrepancies create a genuine issue of material fact as to the existence of another note. In response to that argument, Fannie Mae contends these discrepancies are nothing more than typographical errors.

As long as scriveners have plied their trade, there have undoubtedly been typographical errors. While sometimes nothing more a mere annoyance, occasionally those errors have blossomed into legal disputes. Typographical errors have also reared their ugly head in the legal description of property— a potentially dangerous occurrence given that a party cannot foreclose a lien when the deed does not describe the land conveyed. Yet a debtor cannot forestall foreclosure based on a "trivial" discrepancy that "deceived no one." Similarly, discrepancies between a judgment and abstract of the judgment of a minor nature, including a date off by a few days, do not affect a judgment lien.

The date discrepancy between the Note and Deed of Trust similarly falls into this immaterial category. The documents contain enough other connections that we can say they unquestionably reference each other. The maker and borrower referred to in both documents is the same. The final installment payment date referred to in both documents is also the same. The documents were both executed at the same time. And both documents reference the exact same piece of property.

The complaint regarding the erroneous date of the promissory note in the assumption clause unquestionably has reference to the original promissory note. If the instrument containing the reference has enough information to enable one, by pursuing an inquiry based upon the information contained therein, to identify the particular properly to the exclusion of all others, the reference and description are sufficient.

Moreover, documents executed by the same parties on the same date which refer to the same real property, and refer to each other, are generally construed together. Both the Note and Deed of Trust were executed on March 15, 2007, and each identify the same parties, the same real property, and the same final payment date for the loan. Therefore, the court concluded the discrepancy in date does not create a genuine issue of material fact as to the existence of a second note.

PART II
HOME EQUITY LENDING

Morris* v. *Deutsche Bank National Trust Company, 528 S.W.3d 187 (Tex.App.—Houston [14th Dist.] 2017, no pet.). Non-compliant home equity loans are void, not merely voidable, and therefore, the statutes of limitations do not apply.

Worthing* v. *Deutsche Bank National Trust Company, 545 S.W.3d 127 (Tex.App.—El Paso 2017, no pet.). The Worthings refinanced their home through Argent, executing a home equity note and security instrument in favor of Argent. The note was endorsed several times, and servicing was also changed several times.

The Worthings stopped making payments. The loan was accelerated and Deutsche Bank filed for a judicial foreclosure, which the trial court granted permission for. Two years later, Deutsche Bank appointed a substitute trustee and sold the property at the foreclosure sale. The Worthings, who were still living in the house, sued, claiming that Argent did not qualify as one of the designated type of lenders allowed to make a home equity loan in Texas. Consequently, the Worthings assert that Argent automatically forfeited all principal and interest under the Note, and the ensuing foreclosure was invalid.

The Worthings claim that because Argent was an unlicensed lender at the time the loan was made, the loan was void at its inception and Argent (and any subsequent holder or assignee of the Note) could not foreclose on the property. Because this was a home equity loan involving homestead property, the loan must have conformed to the requirements for such loans as set out in the Texas Constitution.

Constitution art. XVI, § 50 provides that no mortgage, trust deed, or other lien on the homestead shall ever be valid unless it secures a “debt described by this section." One of the constitution's requirements is that only certain entities can make home equity loans. Argent was apparently not such an entity at the time of the loan because it lacked a proper license.

However, when the loan was made in August, 2003, the constitution gave leeway to cure defects. At the time the loan was made, § 50(a)(6)(Q)(x) provided for forfeiture of principal and interest if the lender fails to comply with the requirements within a reasonable time after being notified by the borrower of a defect in the loan. This was substantially changed in September, 2003 and the cure wording for an unlicensed lender was completely removed and replaced with this: [T]he lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if the extension of credit is made by a person other than a person described under Paragraph (P) of this subdivision . . .”

Argent obtained a license in December, 2003. Thus, it cured the problem before the Worthings complained, but after the adoption of the 2003 amendment. The question addressed by the court was whether the 2003 amendment, which eliminates the cure option, apply retroactively. The court held that it does not.

The general rule is that constitutional amendments and statutes operate prospectively unless they expressly provide otherwise. Absent clear intent, retroactive

application is disfavored and should occur only where the public policy is so clearly and broadly stated as to be unmistakable. There is a presumption that parties to a contract know and take into consideration the law in effect at the time of contract. Accordingly, courts should be reluctant to change the rights and obligations of parties by retroactively applying a change in the original law.

Kyle* v. *Strasburger, 522 S.W.3d 461 (Tex. 2017). The home equity loan closed in 2004. Wendy claimed that her then-husband, Mark, forged her signature on the closing documents without her consent to obtain the $1.1 million home-equity, secured by a deed of trust on the couple's homestead. She also alleges that she was induced by various misrepresentations regarding the loan's purported validity, and the commencement of foreclosure proceedings, into agreeing to convey her interest in the property to Mark in their divorce. Wendy sued Mark and the lender, seeking forfeiture of principal and interest paid on the loan under Texas Constitution Article XVI, section 50(a)(6)(Q)(xi). The trial court ruled in favor of Mark and the lender. The Court of Appeals affirmed, holding that the defect in the loan (i.e., Wendy's failure to join) was curable under section 50(a)(6)(Q)(xi), that the loan was thus "voidable" not "void," and that limitations on Wendy's cause of action had run.

After the Court of Appeals issued its opinion and judgment, the Supreme Court issued its opinions in ***Garofolo* v. *Ocwen Loan Servicing, L.L.C.***, 497 SW 3d 474 (Tex. 2016) and ***Wood* v. *HBC Bank USA, N.A***, 504 S.W.3d 542 (Tex. 2016). ***Wood*** held that a non-compliant home equity loan is void, not voidable, and that the four-year statute of limitations does not apply, so here, the court held that limitations had not run. ***Garofolo*** held that section 50(a), which limits the types of loans that may be secured by a homestead and places particularly strict parameters on foreclosure-eligible home-equity loans, does not create substantive rights beyond a defense to foreclosure of a lien securing a constitutionally noncompliant loan.

Section 50(a)(6) of the Texas Constitution requires that home-equity loans contain certain enumerated terms and conditions, including a provision mandating that the lender forfeit all principal and interest for uncured failures to comply with its loan obligations. Those terms and conditions are not constitutional rights unto themselves, nor is the forfeiture remedy a constitutional remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible. In other words, the absence of constitutionally mandated terms and conditions in a home-equity loan can act as a shield to foreclosure, but a lender's uncured failure to comply with its loan obligations does not give rise to a constitutional cause of action. It can, however, give rise to a breach-of-contract claim.

PART III
PROMISSORY NOTES, LOAN AGREEMENTS, LOAN COMMITMENTS

Great Northern Energy, Inc.* v. *Circle Ridge Production, Inc., 528 S.W.3d 644 (Tex. App.—Texarkana 2017, pet. denied). If an instrument is payable to two or more persons alternatively, it is payable to any of them and may be negotiated, discharged, or enforced by any or all of them in possession of the instrument. If an instrument is payable to two or more persons not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them.

The negotiability of an instrument is a question of law. Chapter 3 of the Business and Commerce Code applies only to negotiable instruments.

"Negotiable instrument" means an unconditional promise or order to pay a

fixed amount of money, if it does not state any other undertaking or instruction by the person promising or ordering payment to do any act in addition to the payment of money, but the promise or order may contain:

(A) an undertaking or power to give, maintain, or protect collateral to secure payment;

(B) an authorization or power to the holder to confess judgment or realize on or dispose of collateral; or

(C) a waiver of the benefit of any law intended for the advantage or protection of an obligor.

A promissory note is not a negotiable instrument if the rights and obligations of the parties with respect to the note are stated in another agreement. The rationale is that the holder of a negotiable instrument should not be required to examine another document to determine rights with respect to payment.

In this case the note incorporated a deed of trust by reference for all purposes as if fully set forth in the note. Because the promissory note contains the incorporation of the deed of trust, it cannot be a negotiable instrument.

PART IV
GUARANTIES

Norris* v. *Texas Development Company, 547 S.W.3d 656 (Tex.App.—Houston [14th Dist.] 2018, no pet.). To prevail on summary judgment on a claim for breach of a guaranty, the plaintiff must establish (1) the existence and ownership of the guaranty, (2) the terms of the underlying contract, (3) the occurrence of the condition on which liability is based, and (4) the guarantor's failure or refusal to perform the promise.

Norris signed a guaranty agreement guaranteeing ARC Designs deferred rental payments to TDC, in the amount of $337,944, to be paid in twelve monthly installments. When ARC Designs defaulted in making the payments, TDC demanded Norris pay the amounts owing under the Guaranty. And, when Norris failed to pay, TDC brought suit against ARC Designs to recover the rental payments and against Norris to recover on the Guaranty. The trial court granted summary judgment against ARC Designs for the unpaid rent and against Norris on his guaranty.

Norris claims that the trial court erred in granting the summary judgment because Norris and Texas Development Company never formed a valid contract. According to Norris, after he signed the Guaranty, TDC made a counteroffer. Norris contends that the Guaranty is not binding because it was part of the counteroffer and became void as a matter of law upon the making of the counteroffer. According to Norris, because there was no deferred-base-rent agreement between TDC and ARC Designs, there was nothing for Norris to guarantee.

The Guaranty states that Norris "hereby guarantees ... the payment of the deferred base rent described in the Deferred Base Rent Agreement attached hereto." The Guaranty states that by signing the document, Norris guaranteed the payment of the deferred base rent described in the attached "Deferred Base Rent Agreement." Norris then delivered the Guaranty to TDC. Norris does not deny signing the Guaranty or sending the Guaranty to TDC, but he asserts that the Guaranty became void when TDC rejected the proposed deferred-base-rent agreement attached to the Guaranty.

The Guaranty states that it is an "irrevocable, absolute, complete, and continuing guaranty of payment and not a guaranty of collection." Although the Guaranty was attached to the agreement, the Guaranty contains its own terms and is not part of the deferred-base-rent agreement under negotiation. Nothing in the Guaranty makes Norris's guaranty obligation

contingent on the acceptance and validity of the Deferred Base Rent Agreement.

The Guaranty states, "FOR VALUE RECEIVED, and in consideration for, and as an inducement to THE TEXAS DEVELOPMENT COMPANY to enter into the attached Deferred Base Rent Agreement, Josh Norris hereby guarantees ..." but this reference to the guaranty as being to induce Texas Development Company to enter into the "Deferred Base Rent Agreement" is insufficient to invalidate the Guaranty for lack of consideration. (holding guaranty agreement did not fail for lack of consideration because agreement stated "for value received"). The Guaranty is complete. TDC owned the Guaranty, and nothing in the Guaranty stated that the Guaranty would become void if the parties did not enter into a deferred-base-rent agreement.

The Guaranty states that the amount guaranteed is $337,944.00 and the Guaranty provides that the $337,944.00 is to be paid in twelve monthly installments of $28,162.00 per month for the months of January through December 2016. The Guaranty further provides that in the event that the actual amount of deferred base rent is less than $337,944.00, then the agreement shall be adjusted accordingly. The Guaranty identifies the amount guaranteed and the terms of payment. The Guaranty is not conditioned upon the parties' acceptance of the specifics of the "Deferred Base Rent Agreement."

PART V
LEASES

Wasson Interests, Ltd.* v. *City of Jacksonville, No. 17-0198 (Tex., October 5, 2018). The City built Lake Jacksonville in the late 1950s. Over the next several decades, the City developed the surrounding area and began leasing lakefront lots to private parties. In 1996, the Wassons entered into long-term leases of City-owned lakefront lots and constructed a seven-bedroom house. The lease agreements incorporated the City's Rules & Regulations Governing Lake Jacksonville by reference. Those rules provide that all lots outside the City's corporate limits—which include the Wassons' lots—"shall be restricted to residential purposes only," and that no lot may be used to operate a "business or commercial enterprise." The rules also provide that breach of "any of the regulations . . . shall be grounds for cancellation of the lessee's lease."

The Wassons initially lived on the property but later moved and assigned the leases to Wasson Interests, Ltd. Planning to use the property as a bed-and-breakfast and event center, they sought several variances from the Lake Jacksonville Advisory Board and the City Council, although it believed the variances were unnecessary. The Board denied the requests. The Wassons did it anyway, advertising and renting the property for short lease terms. The City decided these uses violated the leases and terminated them.

The City initially sought to evict the Wassons, but the parties worked out a reinstatement and permitted Wasson to rent the property to single families and small groups for short periods of time and only for "residential purposes." Later, the City again terminated the leases, claiming that the Wassons had been using sham leases to circumvent the reinstatement. Wasson sued. The City claimed that governmental immunity barred the Wassons' claim. The trial court and the court of appeals agreed.

Municipal corporations exercise their broad powers through two different roles; proprietary and governmental. This dichotomy recognizes that sovereign immunity protects governmental units from suits based on its performance of a governmental function but not a proprietary function. In an earlier version of this case, the Supreme Court held that the governmental/proprietary dichotomy applies to breach-of-contract claims. ***Wasson Interests, Ltd.* v. *City of Jacksonville*** (Wasson I), 489 S.W.3d 427, 439 (Tex.

2016). After ***Wasson I***, on remand the court of appeals held that the Wassons' claims arose from the City's performance of a governmental function. The Supreme Court in this case held otherwise.

The distinction between a municipality's governmental and proprietary functions seems plain enough, but the rub comes when it is sought to apply the test to a given state of facts. Generally, governmental functions consist of a municipality's activities in the performance of purely governmental matters solely for the public benefit. Historically, governmental functions have consisted of activities normally performed by governmental units such as police and fire protection. Acts done as a branch of the state—such as when a city exercises powers conferred on it for purposes essentially public—are protected by immunity.

Proprietary functions, by contrast, are those performed by a city, in its discretion, primarily for the benefit of those within the corporate limits of the municipality, and not as an arm of the government. These are usually activities that can be, and often are, provided by private persons. Acts that are proprietary in nature, therefore, are not done as a branch of the state, and thus do not implicate the state's immunity for the simple reason that they are not performed under the authority, or for the benefit, of the sovereign.

Article XI, § 13 of the Texas Constitution authorizes the Legislature to define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law. Exercising that authority, the Legislature, in the Tort Claims Act, has defined and enumerated governmental and proprietary functions for the purposes of determining whether immunity applies to tort claims against a municipality. Civil Practice & Remedies Code § 101.0215.

The Act enumerates thirty-six governmental functions, ranging from police and fire protection and control to animal control. Conversely, the Act defines proprietary functions as those that a municipality may, in its discretion, perform in the interest of the inhabitants of the municipality.

The City asserts that immunity applies because all of its activities constituted governmental functions, including its creation of Lake Jacksonville as a water supply, its decision to lease the property surrounding the lake, its adoption of ordinances and rules governing use of the leased property, and its attempt to enforce those rules against Wasson.

The Wassons, however, argue the only relevant activity is the City's decision to lease the property.

The court agreed with the Wassons. It held that, to determine whether governmental immunity applies to a breach-of-contract claim against a municipality, the proper inquiry is whether the municipality was engaged in a governmental or proprietary function when it entered the contract, not when it allegedly breached that contract. Stated differently, the focus belongs on the nature of the contract, not the nature of the breach. If a municipality contracts in its proprietary capacity but later breaches that contract for governmental reasons, immunity does not apply. Conversely, if a municipality contracts in its governmental capacity but breaches that contract for proprietary reasons, immunity does apply. This approach is most consistent with the purposes of both immunity and the governmental/proprietary dichotomy, and it provides clarity and certainty regarding the contracting parties' rights and liabilities.

It went on to hold that the City acted in its proprietary capacity when it leased the property to the Wassons. In reaching that decision, the court considered whether (1)

the City's act of entering into the leases was mandatory or discretionary, (2) the leases were intended to benefit the general public or the City's residents, (3) the City was acting on the State's behalf or its own behalf when it entered the leases, and (4) the City's act of entering into the leases was sufficiently related to a governmental function to render the act governmental even if it would otherwise have been proprietary.

The court held that the City's entering into the leases was discretionary, that the benefit of the leases was for the residents of the City, not the public at large, that the City was acting on its own behalf, not on behalf of the State, and the act of entering into the leases was not sufficiently related to a governmental function to overcome the proprietary nature of the action.

City of El Paso* v. *Viel, 523 S.W.3d 876 (Tex. App.—El Paso 2017, no pet.). Viel was injured when an overhead door at a cargo warehouse space leased by the City, as the landlord, fell on his head. He sued the City. The City claimed that sovereign immunity barred the action.

As a political subdivision of the State of Texas, the City is generally protected by governmental immunity from lawsuits for money damages unless immunity has been clearly and unambiguously waived by statute. Governmental immunity from suit defeats a trial court's subject matter jurisdiction and thus it is properly asserted in a plea to the jurisdiction.

The threshold question in determining whether governmental immunity applies is whether the City engaged in a governmental or proprietary function in leasing the cargo warehouse where Viel allegedly sustained his injuries. Whether the City engaged in a proprietary or governmental function is a question of law reviewed de novo.

The Texas Tort Claims Act (Civil Practice and Remedies Code § 101.0215) provides that a city is not protected by immunity when performing proprietary functions as compared to governmental functions. Also, the Texas Constitution authorizes the Legislature to define for all purposes those functions of a municipality that are to be considered governmental and those that are proprietary, including reclassifying a function's classification assigned under prior statute or common law. Based on this grant of authority, governmental functions include airport activities, broadly described as "planning, acquisition, establishment, construction, improvement, equipping, maintenance, operation, regulation, protection, and policing of an airport or air navigation facility under this chapter, including the acquisition or elimination of an airport hazard"

There was no argument that the cargo warehouse was located appurtenant to the airport. Viel claimed, though, that the City used its cargo warehouse to generate revenue from non-public activities thereby engaging in a function that is construed as proprietary, not governmental. The court disagreed. The lease agreement narrowly restricts the City's tenant's use of the leased premises to "Aviation Related Operations only." The lease allows the tenant to access roadways of the airport property and provides that the tenant's employees' may enter onto the premises labeled the "restricted area of the Airport," if employees first receive security clearance from the City. The City retains the right to come onto the leased premises to address any obstructions or interference to air navigation and to eliminate any use of the premises that would constitute an "airport hazard." The court held there was sufficient evidence to show that the cargo warehouse constituted a governmental function.

Range* v. *Calvary Christian Fellowship, 530 S.W.3d 818 (Tex. App.—Houston [14th Dist.] 2017, pet. pending). The lease contained three provisions dealt with in this case. First, it gave Reliant a first right of refusal if Calvary decided to sell the property. The purchase right was on terms

specified in the lease. Second, it gave Reliant a first right of refusal to lease the additional space on the same terms on which it leased the original space, except for the length of the term. And third, the lease provided for attorneys' fees to be paid by the losing party in any litigation related to transactions described in the lease.

At some point, Sam Range (erroneously thought by Calvary to be the owner of Reliant) began negotiating to buy the building. He discussed on terms with Calvary that differed from the terms provided for in the lease. The lease provided that, if Calvary decided to sell the building, Reliant could buy it for $1,200,000 with 20% down with 5% interest with a 30 year amortization with a 5 year balloon. The terms described in an email between Reliant and Calvary provided for the same purchase price, 30-year amortization and 5-year balloon, but changed the interest rate to 6% and did not include the 20% down payment. Calvary had its lawyer draft a contract, which Reliant sent back with a number of changes. Calvary did not accept the changes and negotiations ended.

Once the purchase fell through, the parties began discussing expansion of Reliant's space. The lease provided that Reliant's ROFR was to be on the same terms as the existing lease, but Reliant asked that the new space be separately metered. When Calvary declined to do so, the expansion negotiations ended.

Reliant sued Calvary, claiming, among other things, that Calvary had breached the agreement to sell the building as described in the email. Reliant argued that the email is a contract and its enforceability is a question of law. It further argued that the evidence conclusively establishes that the email was a binding offer, which was accepted. Reliant claimed to be entitled either to specific performance of Calvary's promise to sell the property on the terms stated in the email or to an award of damages for breach of that promise. At trial, the jury found that the email was not a contract.

When parties anticipate signing a formal contract, the question of whether they intended to bind themselves before the formal contract is executed is usually a question of fact. The face of the email shows that Calvary intended there to be a later formal contract, because its officer stated in the email, "I will have the contract drawn up and get it to you as quickly as possible." Thus, whether Calvary intended the email to be binding in advance of the contract is a question of fact. It therefore was appropriate for the trial court to submit that issue to the jury. The court reviewed the evidence and ultimately held that it supported the jury's finding.

Reliant also claimed that Calvary breached the lease by failing to lease it the additional space. The lease provided that the lease of the additional space would be on the same terms as the original lease. The proposed amendment to the lease adding the additional space, drafted by Reliant's lawyer, required the space be separately metered. But, Calvary was required only to offer the additional space on the same terms as those stated in the existing lease; it was not required to place the additional space in the same condition as the originally leased space. Thus, Calvary did not breach the lease by refusing to agree to have the additional space separately metered.

Schneider* v. *Whatley, 535 S.W.3d 236 (Tex.App.—El Paso 2017, no pet.). Property Code §§ 92.103 provide that a landlord is required to refund a security deposit to the tenant on or before the 30th day after the date the tenant surrenders the premises, provided the tenant has given the landlord a written statement of their forwarding address for purposes of refunding the security deposit. With limited exceptions, if the landlord retains any part of the security deposit, she must give the tenant a written description and an itemized list of all deductions along with the balance of the

deposit. When a tenant brings a cause of action to recover a wrongfully held security deposit, the landlord has the burden of proving that the retention of any portion of the security deposit was reasonable. When there are no permanent damages to the premises, the landlord is entitled to the reasonable cost of repairs as the proper measure of damages if she waits until after the term of the lease has expired to seek damages. However, the landlord is not permitted to retain any portion of a security deposit to cover normal wear and tear. Wear and tear is defined as deterioration that results from the intended use of a dwelling including breakage or malfunction due to age or deteriorated condition, but does not include deterioration that results from negligence, carelessness, accident, or abuse of the premises.

The Property Code further provides that a landlord who in bad faith retains a security deposit in violation of this subchapter is liable for an amount equal to the sum of $100, three times the portion of the deposit wrongfully withheld, and the tenant's reasonable attorney's fees. A landlord is is presumed to have acted in bad faith if she fails either to return a security deposit or to provide a written description and itemization of deductions on or before the 30th day after the date a tenant surrenders possession.

Most cases brought for bad-faith retention involve circumstances in which a presumption of bad faith exists. The statutory presumption of bad faith does not apply here because the evidence established that the landlord provided a written description and itemization of deductions to the tenant on or before the 30th day after the date they surrendered possession of the house. Because no presumption of bad faith exists, it is an element of the cause of action that the tenant was required to establish at trial.

A residential landlord acts in bad faith if she either "acts in dishonest disregard of the tenant's rights or intends to deprive the tenant of a lawfully due refund. A landlord's mere intentional retention of the security deposit beyond the thirty day statutory period does not establish the landlord's dishonest intent to deprive the tenant of the deposit.

In its findings of fact, the trial court found that the landlord could properly deduct from the security deposit for repair to the roof, to remove television cables, for repairs to the kitchen, and for repairs to the office, thus implicitly finding these expenses to be reasonable. The trial court also found that the landlord had wrongfully withheld the balance of the security deposit. Among its conclusions of law, the trial court declared that the tenant had performed all conditions of the lease and had performed all requirements necessary to be entitled to a refund of the security deposit, including efforts to clean, repair, and restore the property to the same or better condition.

As fact finder, the trial court was permitted to consider all the facts and surrounding circumstances in connection with the testimony of each witness, and to accept or reject all or any part of the testimony. This evidence, in part or in whole, supports a determination that the landlord acted in dishonest disregard of the tenant’s rights or intended to deprive the tenant of a lawfully due refund, and therefore supports the deemed finding of bad faith.

Green* v. *Grocers Supply Co., Inc., 533 S.W.3d 376 (Tex.App.—Houston [14th Dist.] 2015, no pet.). The lease agreement required Green to maintain general liability insurance and obtain a certificate of insurance showing Grocers Supply to be an insured party in addition to Green. Green also was required to provide the certificate of such insurance to Grocers Supply. Grocers Supply sent Green a letter on July 16, 2013 requesting a certificate of insurance in compliance with the lease agreement. The lease provided that if Green failed to comply with any covenant or

provision in the lease within 30 days, Green would be in default. Grocers Supply sent a notice demanding a certificate be delivered within 15 days.

Green sent a certificate that did not show Grocers supply as an additional insured. He also became delinquent in paying rent. After being locked out of the premises, Green sent a corrected certificate of insurance and got back into the premises, but shortly after that, Grocers Supply sent Green a notice to vacate and began an eviction proceeding.

Green claimed that Grocers Supply should have given him 30 days instead of 15 days to comply and also claimed that he had cured any default. However, the county court held that Green did not provide a certificate that complied with the lease within the 30 day period. The court agreed with the county court. Under the plain language of the lease agreement as expressed in the county court's findings, if Green failed to comply with any provision of the lease agreement and did not cure such failure within 30 days of receiving notice, he would be in default of the lease, and Grocers Supply could terminate the lease.

PART VI
EVICTIONS

Paselk* v. *Bayview Loan Servicing, LLC, 528 S.W.3d 790 (Tex. App.—Texarkana 2017, no pet.). To prevail on its forcible detainer action, Bayview was required to prove that (1) it owned the Property by virtue of the substitute trustee's deed, (2) Paselk became a tenant at sufferance when the Property was sold under the terms of the deed of trust, (3) it gave Paselk and the other occupants notice to vacate the premises, and (4) Paselk and the other occupants refused to vacate the premises. Paselk's pro se brief does not appear to argue that Bayview failed to meet its burden. Instead, Paselk relies on arguments affecting title. Specifically, Paselk attempts to challenge the propriety of the underlying foreclosure.

In a suit for forcible entry and detainer, the right to actual possession of property, not title, is the sole issue for the court to decide. The right to immediately possess real property is not necessarily contingent on proving full title, and the Texas legislature has specifically bifurcated the questions of possession and title and placed jurisdiction for adjudicating those issues in separate courts.

Where the issue of the superior right of possession can be determined separately from title issues, the justice court has jurisdiction to decide the case. Here, the deed of trust specifically provided that Paselk would be considered a tenant at sufferance in the event of a foreclosure sale. Where foreclosure pursuant to a deed of trust establishes a landlord and tenant-at-sufferance relationship between the parties, the trial court has an independent basis to determine the issue of immediate possession without resolving the issue of title to the property.

Hernandez* v. *U.S. Bank Trust N.A., 527 S.W.3d 307 (Tex. App.—El Paso 2017, no pet.). The bank prevailed in its eviction action against Hernandez. Hernandez appealed to the County Court. The bank filed a motion for the trial court to require Hernandez to make use and occupancy payments into the registry of the court during the pendency of the case. Following a hearing, the trial court granted the motion and required Hernandez to pay $800 per month into the court's registry. Hernandez attempted to appeal the order, but the appeal was dismissed for lack of jurisdiction. The County Court held in favor of the bank. Hernandez wanted to appeal to the Court of Appeals and asked the County Court to determine the amount of the supersedeas bond. A hearing was held to set the amount of the supersedeas bond, which the court set at $1,480 per month. Hernandez then filed his notice of appeal, but did not deposit the amount of the supersedeas bond.

Hernandez asked the Court of Appeals to reduce the amount of the bond. The bank argued that Hernandez had failed to perfect his appeal because he had not posted the bond.

As a general rule, a judgment debtor is entitled to supersede the judgment while pursuing an appeal. When the judgment is for the recovery of an interest in real property, the trial court determines the type of security that the judgment debtor must post, and the amount of security must be at least the value of the property interest's rent or revenue. A trial judge is given broad discretion in determining the amount and type of security required. A trial court abuses its discretion when it renders an arbitrary and unreasonable decision lacking support in the facts or circumstances of the case, or when it acts in an arbitrary or unreasonable manner without reference to guiding rules or principles.

A final judgment of a County Court in an eviction suit may not be appealed on the issue of possession unless the premises in question are being used for residential purposes only. A judgment of a County Court may not under any circumstances be stayed pending appeal unless, within 10 days of the signing of the judgment, the appellant files a supersedeas bond in an amount set by the County Court. If a supersedeas bond in the amount set by the trial court is not filed within ten days after the judgment awarding possession is signed, the judgment may be enforced and a writ of possession may be executed evicting the defendant from the premises in question.

The trial court signed the final summary judgment on September 23. Under Property Code § 24.007, Hernandez was required to supersede the judgment no later than October 3. While Hernandez filed his motion to determine the supersedeas bond within that ten-day period, the trial court did not conduct the hearing or sign the order setting the supersedeas amount until October 7, 2016, fourteen days after the summary judgment was signed. There is no evidence in the record showing that Hernandez sought to have his motion heard earlier. In fact, at the hearing, the trial court raised the issue whether the supersedeas order was timely under Section 24.007, and Hernandez argued that he was only required to file his motion within the ten-day period. Hernandez did not make the first supersedeas payment until October 17, 2016. The court concluded that the trial court's supersedeas order, and Hernandez's payments under that order, are ineffective to stay the judgment.

In re *Invum Three. LLC*, 530 S.W.3d 748 (Tex.App.—Houston [14th Dist.] 2017, no pet.). Invum sought to evict Ricks. It obtained judgment in the Justice Court, which Ricks appealed to the County Court. Ricks failed to appear at the County Court hearing and judgment was granted to Invum. Invum obtained a writ of possession which it had posted at the property. The same day, Ricks filed a motion to stay the writ of possession or alternatively to recall the writ of possession, and filed a motion for new trial. The following day, the trial court held a hearing on the motion to recall the writ of possession, and signed an order staying the writ of possession. Invum filed this mandamus action, asking the court to require the trial judge to set aside his order.

To obtain mandamus relief, a relator generally must show both that the trial court clearly abused its discretion and that relator has no adequate remedy by appeal. A trial court clearly abuses its discretion if it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law or if it clearly fails to analyze the law correctly or apply the law correctly to the facts.

Here, Invum has no adequate remedy by appeal because the rules do not provide for a right to appeal an order staying the execution of a writ of possession.

Texas Rule of Civil Procedure 510.13, applicable here,[1] states: "The writ of possession, or execution, or both, will be issued by the clerk of the county court according to the judgment rendered, and the same will be executed by the sheriff or constable, as in other cases. The judgment of the county court may not be stayed unless within 10 days from the judgment the appellant files a supersedeas bond in an amount set by the county court pursuant to Section 24.007 of the Texas Property Code."

Consistent with Rule 510.13, a writ of possession was issued in accordance with the judgment rendered. Rule 510.13 prohibits a stay of the judgment in a forcible-entry-and-detainer action, absent the filing of a supersedeas bond within ten days of the judgment. Ricks did not file a supersedeas bond within ten days of the judgment or thereafter. Accordingly, the trial court's order staying the writ of possession, through which Relator seeks to execute the judgment granting it possession, violates Rule 510.13's unambiguous language, and therefore constitutes a clear abuse of discretion.

Praise Deliverance Church* v. *Jelinis, LLC, 536 S.W.3d 849 (Tex.App.—Houston [1st Dist.] 2017, pet. denied). The Church borrowed a construction loan but later defaulted. The lender foreclosed. Jelinis and HREAL bought at the foreclosure sale. After the sale, they sent eviction notices then filed in the justice court. The justice court ruled for the Church, noting on the Eviction Docket Sheet "Title Issue."

Jelinis and HREAL filed a bond and a notice of appeal to the county court. The county court awarded possession to Jelinis and HREAL. The Church appealed to the court of appeals, but failed to post a supersedeas bond. A writ of possession was executed and Jelinis and HREAL obtained possession of the property.

Both sides claimed the court lacked jurisdiction. Jelinis and HREAL claimed that the case was moot because the Church was no longer in possession and because Property Code § 24.007 prohibits appeal to the court of appeals except in residential evictions.

As to the lack of possession by the Church, the court noted that the Church had filed suits for wrongful foreclosure in both state and federal courts, but then apparently dismissed them without prejudice. The court said that it had no record that the title dispute relating to the property had been resolved definitively against the Church or that it would be barred by limitations.

A successful challenge to the county court's jurisdiction would result in vacating the order of possession. And, even though the Church still would lack possession, it could then bring its own eviction suit against Jelinis and HREAL. Accordingly, the court held that the Church's challenge to the jurisdiction of the trial courts was not moot merely because the church currently lacks possession and failed to post a bond.

Jelinis and HREAL also claimed that Property Code § 24.007 meant that the final judgment of the county court on the issue of possession could not be appealed to the court of appeals. But, said the court, the Church has challenged the trial courts' jurisdiction to enter judgment, thus the issue on appeal is not merely the merits of the disputed issues of possession, but on the issue of jurisdiction. So the court held that it had jurisdiction.

So the court looked at the issue of jurisdiction. First, it held that the justice court's docket notation "Title Issue" did not establish that the justice court made a jurisdictional determination. The docket sheet is not a part of the record – it is just a memorandum for the court's convenience. Second, even if the justice court determined that a title issue precluded its jurisdiction, the appeal to the county court for a trial de novo vacates and annuls the justice court's judgment. Because the county court could

make its own jurisdiction determination durin a de novo trial, the court concluded that the Church's jurisdictional challenge failed.

Reynoso* v. *Dibs US, Inc., 541 S.W.3d 331 (Tex.App.—Houston [14th Dist.] 2017, no pet.). After Reynosa defaulted on her loan, Wells Fargo foreclosed. Dibs bought the property at the foreclosure sale. When Reynoso failed to vacate the house, Dibs filed a forcible detainer action. The justice court ruled in favor of Dibs and Reynoso appealed. In her appeal to the county court, Reynoso filed a motion to dismiss, claiming, among other things, that the provision of her deed of trust that said she had no right to occupy the house after foreclosure violated her constitutional due-process rights (referred to by this court as the "Clause").

Reynoso asserted that, if the justice court did have jurisdiction, this jurisdiction violated substantive and procedural due process under the United States Constitution and substantive and procedural due course of law under the Texas Constitution because jurisdiction is based on the Clause, and (1) the Clause is an "unbargained for" provision that was not disclosed to Reynoso and to which Reynoso did not agree; (2) the Clause deprives Reynoso of her right to litigate possession in the district court, along with her wrongful-foreclosure and other claims; and (3) allowing Dibs to litigate possession and obtain possession of the Property from Reynoso before Reynoso's challenges to the validity of the foreclosure sale are resolved violates due process. She also claimed that Property Code § 24.002, governing forcible-detainer actions, does not provide for determination of issues relating to a homeowner's right to possession of the real property following foreclosure of a lien in the property in a meaningful manner or at a meaningful time.

A violation of substantive due process occurs when the government deprives individuals of constitutionally protected rights by an arbitrary use of power. A plaintiff challenging a statute or state action must shoulder the burden to prove a violation of substantive due process. Similarly, the court presumes a state actor acted in a constitutional manner. When neither a suspect classification nor a fundamental right is involved, the court will review statutes and actions of state actors under the deferential rational-basis test. Under this test, the claimant must prove that it is not at least "fairly debatable" that the statute or conduct rationally relates to a legitimate governmental interest.

The Fourteenth Amendment's Due Process Clause provides that an individual may not be deprived of certain substantive rights— life, liberty, and property— without constitutionally adequate procedures. Procedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property. If an individual is deprived of a vested property right, the government must afford an appropriate and meaningful opportunity to be heard to comport with procedural due process. Due process requires notice and an opportunity to be heard at a meaningful time and in a meaningful manner with respect to a decision affecting an individual's property rights.

Reynoso asserted that the Clause violates due process and contract law because it is an "unbargained for" provision that allegedly was not disclosed to her. Due process protections guaranteed by the Fourteenth Amendment do not extend to private conduct abridging individual rights. The Fourteenth Amendment prohibits only such action that fairly may be said to be that of the one of the states. Reynoso's execution of the Deed of Trust and her agreement to its terms does not involve state action, so the Clause, in and of itself, does not violate the Due Process Clause. The use of the provision by the justice court or the county court at law as a basis for jurisdiction over the forcible-detainer action, however, is

state action sufficient to trigger due process protections.

Even presuming that Reynoso did not read the Deed of Trust before placing her signature on it and that nobody pointed out the Clause to Reynoso or explained it to her, as Reynoso suggests on appeal, there is no question that Reynoso signed the Deed of Trust containing the Clause. The law presumes that a party who signs a contract knows its contents. When a party signs an instrument after having an opportunity to read it, the law presumes that the party knows and accepts all of the instrument's terms, even if the party chose not to read the instrument. One who signs an instrument without reading it can avoid this presumption under a narrow "trick or artifice" exception by showing that the signing party was prevented by a fraudulent trick or artifice from reading the instrument or having the instrument read to the signing party. Reynoso did not allege that a fraudulent trick or artifice prevented her from reading the Deed of Trust or from having the Deed of Trust read to her, nor did Reynoso present any evidence supporting such an allegation. Therefore, the court presumed that Reynoso knew and accepted all of the terms of the Deed of Trust, including the Clause. The court also declined to impose a conspicuousness requirement on provisions similar to the Clause.

Reynoso also asserted that the Clause violates her right to litigate possession in the district court, along with her wrongful-foreclosure and other claims. Reynoso claimed that justice courts should not have jurisdiction over forcible-detainer cases when the occupant has asserted a wrongful-foreclosure claim (or other claims) against the lender in district court and those claims are pending. She argued that Texas's statutory scheme allows successful bidders at foreclosure sales, like Dibs, to speedily litigate the right to possession and to eject the homeowner from the property following the foreclosure sale before the homeowner is able to fully litigate challenges to the validity of the foreclosure sale. Reynoso also suggests there should be a procedure to stay the eviction until the foreclosure challenge is resolved.

Reynoso argued that courts should apply strict scrutiny because property ownership is a fundamental right. The court disagreed. Shelter and the right to retain possession of one's home are not fundamental interests protected by the constitution. Since this case implicates neither a suspect classification nor fundamental rights, the court will review the governmental action enforcing the Clause and Property Code § 24.002 using the deferential rational-basis test. Under that test, the court held that the Texas Legislature had a rational basis for structuring a statutory scheme that would allow speedy litigation of the issue of possession of the property in a forcible-detainer action in the justice court, while providing that title, including issues as to the validity of the foreclosure sale, be litigated in district court.

Hernandez* v. *Hernandez, 547 S.W.3d 898 (Tex.App.—El Paso 2018, pet. denied). Alejandro filed an appeal from an eviction brought by the. Bank. He failed to file the required bond, and the Bank, so the Bank executed a writ of possession and took possession of the property on March 13. While the appeal was pending, on February 2, the Bank auctioned the property and Alberto was the winning bidder. The Bank and Alberto entered into a purchase contract which provided that the Bank would deed the property upon satisfaction of certain conditions, including Alberto putting the money into escrow with the title company by a certain date. The Bank prepared and signed a deed on February 17, and sent the deed to its lawyer to hold until closing. The sale transaction closed on March 16, when all of the conditions were satisfied. The deed was recorded on March 21.

On April 13, Alejandro filed an application for writ of reentry, alleging that

Alberto had unlawfully evicted him and locked him out of the property. The justice court denied the application, and the county court, finding that the property was not conveyed to Alberto until March 16, denied the writ as well. Alejandro argued that Alberto acquired the property on the date the deed was signed, which was February 17.

Under Property Code § 92.009, a tenant who has been locked out of leased premises in violation of § 92.0081, may file with the justice court a sworn complaint for reentry. Alejandro's complaint alleged that Alberto became the landlord when the deed was signed.

Conveyance by deed requires delivery of the deed. It has long been the law in Texas that delivery of a deed has two elements: (1) the grantor must place the deed within the control of the grantee (2) with the intention that the instrument become operative as a conveyance. The question of delivery of the deed is controlled by the intent of the grantor, and it is determined by examining all the facts and circumstances preceding, attending, and following the execution of the instrument.

The court of appeals found that the purchase agreement clearly articulated the Bank's intent with regard to the deed and its delivery. The Bank intended for title to the property to convey to Alberto only upon the complete satisfaction of all the closing requirements under the terms of the purchase agreement. The undisputed evidence shows that the closing took place on March 16, and that Alberto satisfied the closing requirements. It was only upon the satisfaction of the closing requirements that the title company released the executed deed for recording and delivery. Consequently, Alberto had no obligation under the Property Code to file a new FED action, to file a new notice to vacate, or to provide any other notice to Appellants prior to execution of the writ of possession on March 13.

PART VII

DEEDS AND CONVEYANCES

ConocoPhillips Company* v. *Koopmann, 547 S.W.3d 858 (Tex. 2018***).*** Strieber's deed conveyed to the Koopmanns fee-simple title to the tract, and reserved a fifteen-year, one-half non-participating royalty interest, which could be extended "as long thereafter as there is production in paying or commercial quantities" under an oil and gas lease. In the event there was no production after the fifteen-year term, the reservation included a savings clause. Thus, if on December 27, 2011, there was no production in paying quantities and the savings clause was not satisfied, the non-participating royalty interest would transfer to the Koopmanns. There was no production on December 27, 2011. Burlington, the lessee of the minerals, claimed that the Koopmanns' future interest in the royalty interest violates the Rule Against Perpetuities and is, therefore, void. According to Burlington, the "as long thereafter" language Strieber used in her reservation created in the Koopmanns a springing executory interest, which is not certain to vest, if at all, within the period required by the Rule: twenty-one years after the death of some life or lives in being at the time of the conveyance.

The Koopmanns characterize their future interest created by Strieber's deed as a "vested possibility of reverter," which vested at its creation for purposes of the Rule, and thus, is valid. There is a decided difference, according to the Koopmanns, between vesting in interest and vesting in possession, and if two constructions are possible, Texas courts favor the construction that saves the validity of an instrument.

The Texas Constitution prohibits perpetuities: "Perpetuities ... are contrary to the genius of free government, and shall never be allowed." Constitution, art. I § 26. The interpretative commentary states both that "perpetuity" as applied to property means an "everlasting property interest" and that, for purposes of this section, a

perpetuity is a restraint or restriction of the power of alienation beyond the period required by the Rule, and as such would not be constitutionally allowed.

To enforce this prohibition, the court has adopted the common law version of the Rule to govern conveyances of real property, which provides that no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance. The Rule requires that a challenged conveyance be viewed as of the date the instrument is executed, and the interest is void if by any possible contingency the grant or devise could violate the Rule. When an instrument is equally open to two constructions, the construction that renders it valid rather than void will be accepted, assuming that the grantor intended to create a legal instrument. The court has held that the typical oil and gas lease in Texas, which grants a lessee the right to explore and develop for a fixed term of years and as long thereafter as minerals are produced, creates in the lessee a fee simple determinable in the mineral estate that does not violate the Rule.

The word "vest" in regards to the Rule refers to an immediate, fixed right of present or future enjoyment of the interest. The Rule does not apply to present or future interests that vest at their creation. An executory interest is a future interest, held by a third person, that either cuts off another's interest or begins after the natural termination of a preceding estate. A springing executory interest is one that operates to end an interest left in the transferor. This interest does not vest at the execution of the deed, rather executory interests vest an estate in the holder of the interest upon the happening of a condition or event. Until such happening, they are non-vested future interests" and are subject to the Rule. In contrast, a possibility of reverter is a future interest held by the grantor and is not subject to the Rule because it vests at the moment of creation. A possibility of reverter is the grantor's right to fee ownership in the real property reverting to him if the condition terminating the determinable fee occurs. This interest is properly viewed as a claim to property that the grantor never gave away.

Under the common law Rule, with respect to the interest in question, the deed created in Strieber a fee simple subject to executory limitation and in the Koopmanns an executory interest. The Koopmanns received a future interest created in someone other than the grantor that would become possessory by the divesting of Strieber's prior freehold estate, i.e., an executory interest. Strieber's present interest would continue "as long thereafter as" there is production of minerals in paying or commercial quantities— an indeterminable length of time. Thus, at the time it was created, it was uncertain whether the Koopmanns' future interest would vest within the period required by the Rule. The Koopmanns' argument that their future right "vested in interest" immediately upon execution of the deed is simply not the law: springing executory interests do not vest, by definition, until the condition terminating the grantor's present possessory interest is met. Thus, because at the time of the grant the executory limitation on Strieber's interest— lack of production in paying quantities— might not happen within twenty-one years after the death of some life or lives in being, the Koopmanns' springing executory interest violated the Rule.

When an interest violates the Rule because it is uncertain to vest, if at all, within the required time period, the court has traditionally held that those provisions of the conveying instrument creating the interest are void. But the court was hesitant to apply the Rule to invalidate this future interest when, as the Koopmanns point out, such a holding would not serve the purpose of the Rule. This court strictly adheres to the rule of construction that an instrument equally open to two constructions should be construed as valid rather than void, and the Legislature has required courts to reform an

interest that violates the Rule to effect the ascertainable general intent of the creator of the interest. Property Code § 5.043(a).

The purpose of the Rule is to prevent landowners from using remote contingencies to preclude alienability of land for generations. But restraint on alienability and promoting the productivity of land is not at issue in the oil and gas context. The court said "We believe that defeasible term interests serve a useful social purpose, whether reserved or granted. The term interest, as compared with a perpetual interest, tends to remove title complications when the land is no longer productive of oil or gas. This simplification of title promotes alienability of land, which is one purpose served by the Rule [A]gainst Perpetuities. We believe, therefore, that the courts should simply exempt interests following granted or reserved defeasible term interests from the Rule, on the straight-forward basis that they serve social and commercial convenience and do not offend the policy of the Rule Against Perpetuities."

Carl M. Archer Trust No. Three* v. *Tregellas, No. 17-0093 (Tex. November 16, 2018). In June 2003, a warranty deed transferred the surface of certain property located in Hansford, County Texas to the Trustees. In a separate agreement entered into at the same time, the Trustees were granted a "Right of First Refusal" to purchase the minerals under the surface. The ROFR specifically provided that it was subordinate to mortgages and other encumbrances. Unfortunately, although the property description in the ROFR was otherwise correct, it contained the incorrect county, listing the county as Ochiltree instead of Hansford. The Archer Trustee's attorney prepared a correction and sent it to the grantors for signature but only two of the many grantors signed and returned the correction. The correction was filed of record in Hansford County in September 2004.

Two of the original grantors, the Farbers, sold their mineral interests on March 28, 2007 to the Tregellases. Before conveying the interests, the Farbers did not notify the Trustees of their intent to sell or of the terms of the deal, and they weren't told of the sale after the fact. The Trustees became aware of the sale in May 2011 and filed suit for specific performance of the ROFR on May 5, 2011.

The Tregellases argued that the Trustees' claim for specific performance of the ROFR was barred by the statute of limitations. The Trustees argued that the ROFR "ripened into" an option to purchase the conveyed interests on the same terms and conditions and that they had timely exercised the option by filing suit. They also argued that the Tregellases purchased the interest with actual or constructive notice of the ROFR and thus, stood in the shoes of the Farbers. They claimed also that the statute of limitations did not bar their claim because the discovery rule and the doctrine of fraudulent concealment tolled the limitations period.

The trial court rendered judgment for the Trustees and granted specific performance. It held that the Tregellases took the interests with knowledge of the ROFR and were not BFPs and that limitations did not bar the claim. The court of appeals reversed, holding that the cause of action accrued when the mineral interests were conveyed. It held that the discovery rule did not apply because the injury is of the type that generally is discoverable by the exercise of reasonable diligence.

A right of first refusal, also known as a preemptive or preferential right, empowers its holder with a preferential right to purchase the subject property on the same terms offered by or to a bona fide purchaser. Generally, a right of first refusal requires the grantor to notify the holder of his intent to sell and to first offer the property to the holder on the same terms and conditions offered by a third party. When the grantor

communicates those terms to the holder, the right ripens into an enforceable option. The holder may then elect to purchase the property according to the terms of the instrument granting the first-refusal right and the third party's offer, or decline to purchase it and allow the owner to sell to the third party.

A grantor's sale of the burdened property to a third party without first offering it to the rightholder on the same terms constitutes a breach of contract. When a right of first refusal relating to real property is breached, rightholders most frequently seek the remedy of specific performance. If the property has already been conveyed to a third party, however, the only remedy available from the grantor is money damages. Nevertheless, specific performance may still be available as a remedy against the third-party purchaser.

To that end, a person who purchases property with actual or constructive notice of a right of first refusal takes the property subject to that right. And courts are in agreement that such a purchaser stands in the shoes of the original seller when specific performance is sought and may be compelled to convey title to the holder of the right of first refusal. This accords with the longstanding jurisprudence regarding executory contracts for the sale of real property, which may be enforced by specific performance when a third party purchases the property with notice of the contract. Pursuant to the trial court's unchallenged findings, the Tregellases purchased the interest with notice of the ROFR and thus stand in the grantor's shoes with respect to the Trustees' request for specific performance. In the Supreme Court, the Tregellases' sole challenge to the trial court's judgment granting specific performance was that the Trustees' claim is barred by the statute of limitations as a matter of law.

The statute of limitations is an affirmative defense that serves to establish a point of repose and to terminate stale claims. The parties do not dispute that the Trustees' contract claim is governed by the four-year statute of limitations, meaning they were required to assert it within four years after the cause of action accrued.

As a general matter, a cause of action accrues and the statute of limitations begins to run when facts come into existence that authorize a party to seek a judicial remedy. Put differently, a cause of action accrues when a wrongful act causes some legal injury, even if the fact of injury is not discovered until later, and even if all resulting damages have not yet occurred. Texas courts consistently hold that a right of first refusal is breached when property is conveyed to a third party without notice to the rightholder. Applying these principles, the court of appeals in this case held that the Trustees' cause of action accrued when their bargained-for right of first refusal had been dishonored and the agreement breached.

The Supreme Court agreed with the court of appeals that the rules governing the accrual of causes of action point to the date of conveyance as the accrual date for limitations purposes. Again, the ROFR was breached when the Farbers conveyed their mineral interest without notifying the Trustees of the Tregellases' offer. At that point, the Trustees' preemptive right was impaired despite the fact that the Tregellases took the property subject to that right. This is because, even if the Trustees retained the right to purchase the mineral interest (albeit from the Tregellases rather than the Farbers), once they learned of the conveyance, they lost their right to purchase the interest at the time contemplated by the ROFR: before the property was sold to a third party.

In sum, when the Farbers sold the burdened mineral interest to the Tregellases in March 2007 without first giving the Trustees the opportunity to purchase it pursuant to the ROFR, a wrongful act caused a legal injury authorizing the

Trustees to seek a judicial remedy. Thus, the claim is time-barred unless the accrual date is otherwise deferred.

The discovery rule is a limited exception to the general rule that a cause of action accrues when a legal injury is incurred. When applicable, the rule defers accrual until the plaintiff knew or should have known of the facts giving rise to the cause of action. The discovery rule is applied when the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable. These two elements attempt to strike a balance between the policy underlying statutes of limitations (barring stale claims) and the objective of avoiding an unjust result (barring claims that could not be brought within the limitations period). The parties do not dispute that the injury here is objectively verifiable; in contention is discoverability.

An injury is inherently undiscoverable when it is unlikely to be discovered within the prescribed limitations period despite due diligence. The determination of whether an injury is inherently undiscoverable is made on a categorical basis rather than on the facts of the individual case. Here, therefore, the courts look not to whether the Trustees in particular could have discovered their injury with diligence, but whether the Trustees' injury was the type of injury that could be discovered through the exercise of reasonable diligence.

The court of appeals held that the Trustees' injury was not inherently undiscoverable. It noted that a conveyance of real property, including one made in violation of a right of first refusal, is likely to be reflected in a publicly recorded instrument and that knowledge of the conveyance may also be gleaned from other public sources like tax rolls and from commercial sources like abstractors. The court thus concluded that the holder of a first refusal right exercising reasonable diligence to protect its interest (as contracting parties must do) would have discovered the conveyance.

The Supreme Court has held that the discovery rule applies in certain circumstances even though the injury could have been gleaned from reviewing publicly available information. Courts have applied the discovery rule to a property owner's fraudulent-lien claims despite the lien's filing in the property records. Such an injury is nevertheless inherently undiscoverable where the property owner has no reason to believe that any adverse claim has been made on his property, and no reason to be checking regularly to see whether such a filing has been made. This is consistent with the well-settled principle that one who already owns the land is not required to search the records every morning in order to ascertain if something has happened that affects his interests or deprives him of his title.

A right of first refusal has been described as essentially a dormant option. The rightholder has no right to compel or prevent a sale per se; rather, as explained, he has the right to be offered the property at a fixed price or at a price offered by a bona fide purchaser if and when the owner decides to sell. Only when the grantor communicates her intention to sell and discloses the offer does the holder have a duty to act by electing to accept or reject the offer.

In light of the grantor's duty to provide notice of an offer, the corresponding absence of the rightholder's duty to act before receipt of said notice, and the fact that a purchaser takes property subject to a recorded first-refusal right, the court agrees with the Trustees that a rightholder who has been given no notice of the grantor's intent to sell or the existence of a third-party offer generally has no reason to believe that his interest may have been impaired. In turn, we cannot conclude that such a rightholder in the exercise of reasonable diligence would

continually monitor public records for evidence of such an impairment.

The court thus held that a grantor's conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor's intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder's cause of action until he knew or should have known of the injury.

Cochran Investments, Inc.* v. *Chicago Title Insurance Company, 550 S.W.3d 196 (Tex.App.--Houston [14th Dist.] 2018, pet. pending). England and Garza owned a duplex, subject to a deed of trust to EMC. England conveyed his interest in the duplex to Garza, but in a later involuntary bankruptcy, the conveyance was set aside as a fraudulent conveyance. EMC foreclosed and Cochran bought the duplex at the foreclosure sale.

Cochran sold property to Ayers and gave a special warranty deed. Chicago Title issued an owners title policy to Ayers. The trustee in the England bankruptcy sued EMC and Cochran, claiming that the foreclosure violated the bankruptcy automatic stay. Ayers was later added to the suit. At that point, Ayers filed a title insurance claim with Chicago Title, which assumed his defense. Chicago settled the suit with the trustee by paying some money, then sued Cochran to recover as subrogee of Ayers under the title policy. The trial court found in favor of Chicago Title and concluded that Chicago Title was subrogated to the rights of Ayers and that Cochran had breached the covenant of seisin implied in the special warranty deed.

On appeal, Cochran asserts that the deed conveying the duplex to Ayers did not imply the covenant of seisin.

A covenant is implied in a real property conveyance if it appears from the express terms of the contract that it was so clearly within the contemplation of the parties that they deemed it unnecessary to express it, and therefore they omitted to do so, or it must appear that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument. A covenant will not be implied simply to make a contract fair, wise, or just.

The implied covenant of seisin is an assurance to the grantee that the grantor actually owns the property being conveyed, in the quantity and quality which he purports to convey, and it is breached if the grantor does not own the estate that he undertakes to convey. The covenant of seisin operates in the present and is breached by the grantor at the time the instrument is made if he does not own the property that he undertakes to convey.

To determine whether a conveyance implies the covenant of seisin, courts analyze the conveyance's language. A deed implies the covenant of seisin if the grantor includes in the conveyance a representation or claim of ownership.

Here, the deed at issue does not represent or claim ownership on behalf of Cochran. The granting clause used the words "grant" and "convey," but the court held that the use of those words does not imply the covenant of seisin. Property Code section 5.023(a) delineates the two covenants implied by a conveyance's use of these words:

"(a) Unless the conveyance expressly provides otherwise, the use of "grant" or "convey" in a conveyance of an estate of inheritance or fee simple implies only that the grantor and the grantor's heirs covenant to the grantee and the grantee's heirs or assigns:

"1. that prior to the execution of the conveyance the grantor has not conveyed the estate or any interest in the estate to a person other than the grantee; and

"2. that at the time of the execution of the conveyance the estate is free from encumbrances."

Chicago Title does not allege that Cochran conveyed the duplex to a person other than Ayers or that the duplex was subject to encumbrances.

Because the deed that conveyed the duplex to Ayers does not represent or claim that Cochran is the owner of the property, it does not imply the covenant of seisin

BNSF Railway Company* v. *Chevron Midcontinent, L.P., 528 S.W.3d 124 (Tex. App.—El Paso 2017, no pet.). The deed in question conveyed property to the grantee "for a right of way," and included the right to use wood, water, stone, timber and other materials useful to construct and maintain a railway line. After oil was discovered under the railroad tracks, BNSF sued for trespass to try title, arguing that the deed granted to BNSF's predecessor gave the company not just a right of way easement, but the entire strip of land. The question for the court was whether the deed conveyed a fee estate in the tract or merely an easement.

While use of the phrase "right of way" in a railroad deed may answer the easement versus fee question conclusively in other states, it does not answer the question in Texas. The term "right of way" is not a legal term of art with a set definitive meaning when used in a deed, but rather may be used in two senses. Sometimes it is used to describe a right belonging to a party, a right of passage over any tract; and it is also used to describe that strip of land which railroad companies take upon which to construct their road-bed. Accordingly, use of the term "right of way:" in a deed or other document does not necessarily define or limit the estate conveyed.

The court held that the deed conveyed only a surface easement, based on the following factors: (i) the opening recitals recognized a benefit to the grantor of having a railroad crossing over the described property; (ii) the phrase "right of way" appears in front of the words "that strip of land" which limits the nature of any subsequently described conveyance; (iii) the clauses describing the conveyance reference a line traced by surveyors for the right of way that went over, through and across various tracts of land. The words "over, through and across" suggest that the conveyance was intended to be an easement; and (iv) the provision allowing the use of timber, etc., to construct a railway line would not be necessary in the conveyance of a fee simple estate because those rights would pass with the fee.

ConocoPhillips Company* v. *Ramirez, 534 S.W.3d 490 (Tex. App.—San Antonio 2017, no pet.). In her will, Leonor conveyed a life estate in "all of my right, title, and interest in and to Ranch Las Piedras" to her son. The question in this suit was whether that conveyed all of the property, including the mineral interests, or just the surface.

ConocoPhillips claimed that the devise was of just the surface, based upon the "surface-only" will construction theory. The plaintiffs argued that everything, including minerals, were conveyed.

Leonor's will did not define or describe "Ranch Las Piedras." It argued that the court should look to extrinsic evidence to determine whether or not that included the mineral estate. The court disagreed, holding that the will plainly conveyed a life estate in "all of my right, title, and interest" in the Ranch. There is no need to go outside the four corners of the will. The phrase "all my interest" is plain and clear.

There was no express reservation of the mineral estate from the devise. Generally, absent an express reservation, a conveyance of land includes both the surface and the underlying minerals.

Jarzombek* v. *Ramsey, 534 S.W.3d 534 (Tex. App.—San Antonio 2017, pet. denied). The contract provided that the Sellers would retain 1/2 the mineral and royalty interest for 20 years and for as long after that that there was production. At the closing, the Sellers signed a deed (prepared by their lawyer) reserving an undivided 1/32 royalty interest for the same 20-year plus period. The closing was in 2006. In 2013, the Sellers sued to reform the deed. The Purchaser raised limitations as a defense. The Sellers claimed that the discovery rule tolled the statute of limitations.

In ***Cosgrove* v. *Cade***, 468 S.W.3d 32 (Tex. 2015), the Supreme Court held that a grantor is charged with immediate knowledge of an unambiguous deed's terms and that the discovery rule did not apply.

Here, the court applied ***Cosgrove*** to hold that the mistake in the deed was plainly evident on its face, so limitations began to run on the date the deed was executed.

The Sellers tried, in vain, to distinguish ***Cosgrove***. First, they claimed that the ***Cosgrove*** deed omitted any reference to minerals, while here the deed included an erroneous reservation. The court was not persuaded by this distinction without much of a difference. Second, they claimed that deed conveyed two tracts of land and the mineral reservation was correct as to one of them. That made no difference to the court, since the mistake as to the second tract was plain and conspicuous on its face, and knowing that the reservation was different for each tract made the mistake even more conspicuous.

Finally, the Sellers argued that the distinction between minerals and royalties is not obvious to an ordinary person. The court noted that the contract made reference to the distinction by including both minerals and royalties in the reservation, and that showed the Sellers' awareness of it. In addition, even if the Sellers were not aware of the distinction between minerals and royalties, the difference between 1/32 and 1/2 is unmistakable.

Knopf* v. *Gray, 545 S.W.3d 542 (Tex. 2018). Vada's will named Bobby as executor and made a few specific bequests. At the end, Vada said, "NOW BOBBY, I leave the rest to you, everything, certificates of deposit, land, cattle and machinery. Understand the land is not to be sold but passed on down to your children, ANNETTE KNOPF, ALLISON KILWAY, AND STANLEY GRAY, TAKE CARE OF IT AND TRY TO BE HAPPY."

Bobby individually and as executor transferred portions of the land to Polasek Farms. Bobby's children sued Bobby, seeking a declaratory judgment that the will gave Bobby only a life estate in the land so that he could not convey fee simple title to Polasek Farms. The trial court ruled that the will contained a disabling restraint, which is void as a matter of law, that Bobby had fee simple title to the land, and that the children did not receive any interest in the land. The court of appeals agreed.

An estate in land that is conveyed or devised is a fee simple unless the estate is limited by express words or unless a lesser estate is conveyed or devised by construction or operation of law, but the law does not require any specific words or formalities to create a life estate. With respect to the creation of a life estate, no particular words are needed to create a life estate, but the words used must clearly express the testator's intent to create a life estate. A life estate is generally defined as an "estate held only for the duration of a specified person's life. Thus, a will creates a life estate "where the language of the instrument manifests an intention on the part of the grantor or testator to pass to a grantee or devisee a right to possess, use, or enjoy property during the period of the grantee's life.

Beginning with the contested provision itself, the parties focus largely on the

meaning of the specific phrase "passed on down." However, this line of semantic argument misses the analytical forest for the trees. The provision's meaning depends on its overall intent, so narrow concentration on the possible meanings of three words is a diversion. One need only read the provision as a whole to see a layperson's clearly expressed intent to create what the law calls a life estate. Reading all three clauses together, Allen grants the land to Bobby subject to the limitations that he not sell it, that he take care of it, and that it be passed down to his children This represents the essence of a life estate; a life tenant's interest in the property is limited by the general requirement that he preserve the remainder interest unless otherwise authorized in the will.

Lance* v. *Robinson, 543 S.W.3d 723 (Tex. 2018). This case opens with one of the best paragraphs I've seen in years. "So stupendous is the conception, so vast the scale of actual accomplishment in the construction of the Medina Dam Project that thousands of its nearest neighbors have positively no conception of the immensity of this undertaking. Yet, by a strange twist of Fate's perversity, this everlasting monument to man's mastery over the greatest forces of nature has achieved a deserved fame in the four corners of the earth, until not only the kings of finance, but royalty itself has leaned forward from its gilded throne and hearkened to the resistless lure of this giant among enterprises." The footnote to the paragraph leads you to a 1920s sightseeing brochure, http://www.edwardsaquifer.net/medina.html.

In this case, three families (all referred to as the "Robinsons") who own lots on a peninsula at Medina Lake filed suit after their new neighbors denied them access to an open-space area the community has long considered public space for recreation and access to the lake. The new neighbors claim they own the open-space area and that the community members have no easements or other rights to use it. The plaintiffs contend that a local water district owns the land, and alternatively, that they have an easement right to use it regardless of who owns it. The trial court and court of appeals agreed with the plaintiffs.

The land at issue in this case is on a narrow peninsula at Medina Lake known as Redus Point, which was originally part of the 728 acres partitioned to Mathilda Spettle Redus. The Robinsons own lots 1, 2, and 3. The peninsula generally runs from north to south, and the lots sit along the western edge, atop an incline or cliff as high as fifty feet above the water when the lake is full. Although it is possible to access the water below the cliff from these lots, the steep, rocky incline makes it difficult and at least to some degree, unsafe. Because of this, the Robinsons and other Redus Point lot owners have regularly accessed the water along the peninsula's gently sloping eastern side. Since at least the 1970s, the Robinsons and other lot owners have constructed improvements in this open space, including walkways, a dock, a boat ramp, and a deck. Although the open space has long been surrounded by a low post-and-cable fence, the community members have freely used the open space as a place for recreation and easy access to the water.

The Lances purchased lot 8 on Redus Point, which is across the road from the open-space area. Within a few months, they began replacing existing the old fences around the area with new fences and posting No Trespassing signs. The Lances sent a letter to the Robinsons asking them to remove a wood deck from "out property." When the Robinsons objected, the Lances pulled out the deeds to their lot which they claimed to include the open-space area. The Robinsons sued. The trial court ruled the Lances deeds did not convey any ownership in the disputed area because their grantors had no interest in that area to convey. It also held that the land was owned by the water district and that the Robinsons and the Lances had easements to use the disputed area. After the Lances filed a motion for

rehearing, the trial court struck through the ruling that the water district owned the land. The final order from the trial court held that the Lances did not own the land but didn't say who did own it. The court of appeals affirmed.

The Lances argued that the Robinsons' suit, which was a declaratory judgment action, was the wrong vehicle to determine title to the disputed area. They argued that the proper action was trespass to try title and that the Robinsons had to plead and prove claims for trespass to try title.

The Texas Property Code states that a "trespass to try title action is the method of determining title to lands, tenements, or other real property." Property Code § 22.001(a). To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned. The trespass-to-try-title statute, however, only applies when the claimant is seeking to establish or obtain the claimant's ownership or possessory right in the land at issue. The trespass-to-try-title statute does not apply to a claimant who seeks to establish an easement, because such a claimant does not have such a possessory right. An easement is a nonpossessory interest that authorizes its holder to use the property for only particular purposes. The court held that the Robinsons were not required to file a trespass-to-try title action to assert their alleged easement.

The trial court had held that the Lances' deed constituted a cloud on the Robinsons' easement rights. Among their arguments was that a party can't sue to quiet title by removing a cloud on title unless the party owns the allegedly clouded title. Because the Robinsons don't claim ownership of the disputed area, the Lances argued that the weren't entitled to any declaration quieting title.

A suit to quiet title and a trespass-to-try-title claim are both actions to recover possession of land unlawfully withheld, though a quiet-title suit is an equitable remedy whereas a trespass-to-try-title suit is a legal remedy afforded by statute. The plaintiff in a quiet-title suit must prove, as a matter of law, that he has a right of ownership and that the adverse claim is a cloud on the title that equity will remove.

The court noted that most of the decisions supported the Lances contention that quiet title is available only to those who claim ownership of the property in question. But the court declined to decide the issue here. If the trial court properly declared that the Lances deed conveyed no ownership interest to the Lances or that the Robinsons enjoy an easement over the disputed area regardless of who owns it, the declaration that the Lances created an invalid cloud and burden on the easement is irrelevant.

Tanya L. McCabe Trust* v. *Ranger Energy LLC, 531 S.W.3d 783 (Tex.App.—Houston [1st Dist.] 2016, pet. denied), construed the relatively new "correction instruments" statutes pursuant to Property Code §§ 5.027, 5.028, 5.029 and 5.030. The issue addressed was whether the addition of new property in a corrected deed of trust constitutes a non-material or material correction. This case, involving the same court, the same parties, the same facts, and the same lawyers, is, unsurprisingly similar (i.e., identical) to ***Tanya L. McCabe Trust* v. *Ranger Energy LLC***, 508 S.W.3d 828 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) reported by me last year.

The Trust obtained a conveyance of overriding royalty interests of various percentages in various different assignments in 2011, some excluding and some including the disputed McShane Fee and Bruce Lease; however, a correction instrument in November 2011 included these disputed tracts. The prior owner, Mark III, of the overriding royalty interests had obtained

same from a third party, Tomco, in 2008. The assignment of overriding royalty interests to the Trust included eight different properties including the disputed McShane fee and the Brice lease, as well as six other properties. The assignment from Tomco to Mark III included only six properties, excluding the McShane and Brice properties. Mark III, obtained a mortgage in late 2008 from Peoples Bank, which covered only the original six properties, omitting McShane and Brice. Ultimately when these errors were discovered, Tomco and Mark III executed a correction assignment in December, 2011, which was after the conveyances to the Trust. Mark III defaulted on the Peoples Bank loan and entered into a 2012 settlement agreement with a renewal deed of trust containing only the six properties, omitting McShane and Brice; however, the error was eventually discovered by Peoples Bank and a corrected deed of trust was filed by Peoples Bank in January, 2013. Thereafter, Mark III defaulted and Peoples Bank foreclosed under its corrected deed of trust claiming that such foreclosure wiped out the Trust's overriding royalty interests, to which the Trust objected and brought suit.

At issue was the effect of the various correction instruments on the state of title concerning the overriding royalty interests of the Trust. The correction instruments statutes divide correction instruments into those dealing with non-material corrections and material corrections. The court majority concluded the correction instruments were material based on Property Code § 5.029(a), providing in relevant part, that a material correction includes one where the correction adds “land to a conveyance that correctly conveys other land.” Property Code § 5.029(a)(1)(C). By contrast, a non-material correction includes, the correction of “a legal description prepared in connection with the preparation of the original instrument but inadvertently omitted from the original instrument”. Property Code § 5.028(a)(1). As to a material correction, the statute requires the corrected instrument to be executed by each party; in the subject case, Peoples Bank had independently made the correction, filed it and provided a copy and notice to the debtor. Therefore, the Trust alleged the correction instrument was invalid and not effective since it did not comply with the statutory requirement. The court found the correction instrument invalid.

Further, such statutes provide that the correction instrument replaces and is a substitute of the original instrument and may be relied upon by a bona fide purchaser, but the correction instrument is subject to the interests of an intervening creditor or subsequent purchaser for valuable consideration without notice acquired after the date of the original instrument but prior to the date of the correction instrument. Property Code § 5.030(b), (c). Since the court determined that the correction instrument was invalid, it did not reach the test of whether the Trust was a bona fide purchaser. Consequently, the overriding royalty interests of the Trust was deemed not to have been extinguished by the Peoples Bank foreclosure.

There was a strongly worded dissenting opinion by Justice Evelyn Keyes, who viewed the correction instruments as being non-material, as opposed to material. Justice Keyes' basic premise was that the addition of the McShane and Brice properties was immaterial and could have been corrected by a knowledgeable person under the statute (in lieu of both parties signing the correction deed of trust), based on the rationale that because the original conveyance of the properties contained all eight properties (including McShane and Brice), the omission of the McShane and Brice properties in the subsequent mortgages was a clerical error; apparently, the Justice does not consider it feasible that not all of the properties would be mortgaged. Continuing that reasoning, Justice Keyes thought the assignee should have known the deed of trust should have included all of the property acquired by the

assignee (Trust). By the same token, Justice Keyes finds that the Trust could not be a bona fide purchaser since it could not prove that it had no notice that it's overriding royalty interests in McShane and Brice should have been included in the original deed of trust to Peoples Bank; somehow ignoring the fact that record title, as reflected the original deed of trust, did not include those two properties.

PART VIII
VENDOR AND PURCHASER

Sommers* v. *Sandcastle Homes, Inc., 521 S.W.3d 749 (Tex. 2017). **[Note: This case has been practically overruled by the 2017 amendments to Property Code § 12.071.]** Pending the outcome of an action involving proper title to, establishing an interest in, or enforcing an encumbrance against real property, the party seeking relief may file a notice of lis pendens in the county's real-property records. A notice of lis pendens broadcasts to the world the existence of ongoing litigation regarding ownership of the property. When the notice is properly filed, even a subsequent purchaser for value does not take the property free and clear.

A lis pendens functions to provide constructive notice, avoid undue alienation of property, and facilitate an end to litigation. Through the years, the courts of appeals have held the same. The latter two purposes are particularly implicated when the court addresses the ability to expunge a notice of lis pendens.

The trial court may expunge a notice of lis pendens if (1) the pleading on which the original order rests does not include a real-property claim; (2) the claimant does not appropriately establish the probable validity of his real-property claim; or (3) the claimant fails to serve a copy of the record notice on all entitled to receive it. Tex. Prop. Code § 12.0071(c)(1)-(3). Here, Sandcastle obtained the first expunction order because the trial court found Cohen's pleadings did not include a real-property claim, while the second order was based on Cohen's inability to establish the probable validity of his claim.

This case involves one basic question: When a notice of lis pendens is expunged, is all notice--no matter the sort and no matter its source--extinguished with the expunction order?

The court of appeals had rejected what it saw as a narrow view of the statute and instead advanced a bright-line rule that the expunction of notice includes any notice of the claims involved in the underlying suit covered by the lis pendens. But the Supreme Court said that the court of appeals reads the plain text of the statute too broadly. The statute simply doesn't address the circumstance of a purchaser who receives notice of a third-party claim by some means other than a recorded notice of lis pendens.

Property Code section 12.0071(f) provides that a purchaser cannot be charged with record notice, actual or constructive, following a proper expungement. But the extent of that protection is expressly limited to "the notice of lis pendens" and "any information derived from the notice." By negative implication, expunction is given no effect with respect to the universe of other information, not included in the scope of section 12.0071(f), that is neither (a) the 'notice of lis pendens' itself nor (b) 'information derived from the notice' of lis pendens.

To the extent the recorded lis pendens puts a potential buyer on inquiry notice to look to the actual lawsuit before the notice's expunction, that buyer could claim protection under the statute. Any actual awareness obtained by review of the facts referred to in the lis pendens cannot be used to rebut that purchaser's status as a bona-fide purchaser or to continue to burden the property. But that does not mean the expunction statute can be read so far as to

eradicate notice arising independently of the recorded instrument expunged. We are confined by a statute's text as written.

Expunction of the lis pendens is a restoration of the chain of title free of the record notice of a potential claim of interest associated with the lis pendens. It is not an adjudication of a later purchaser's status as a bona-fide purchaser under any set of circumstances. Such an overbroad interpretation of the statute risks imbuing an expungement of a notice of lis pendens with the claim-preclusive effect of a full-blown adverse judgment on the merits. That means persons claiming an interest in property may be left in a worse position for having filed a lis pendens that is later expunged than had they not filed one. That result runs counter to longstanding Texas law encouraging the recording of real-property interests, including the filing of a lis pendens.

Ifiesimama* v. *Haile, 522 S.W.3d 675 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). The Ifiesimamas, who are husband and wife, decided to sell their home. Nothing in the record shows that Mrs. Ifiesimama had an interest in the property. Rather, the evidence shows that all documents relating to the property were in Mr. Ifiesimama's name and that Mrs. Ifiesimama waived any right she may have had to the property via a community property interest by signing such a waiver in the deed of trust when the Ifiesimamas mortgaged the property.

Haile and Alemu made an offer to purchase the property for $193,000. Mr. Ifiesimama signed the sales contract, which provided for specific performance or any other relief provided by law if Seller breached. The buyers obtained an appraisal that fell $14,000 shy of the purchase price. They sought an amendment of the contract to reduce the purchase price. Both Haile and Alemu signed a document amending the contract, and a signature appeared above the printed name of Tamuno Ifiesimama. Mr. Ifiesimama later argued, during the course of this litigation, that he never signed this document and that this signature was a forgery. Mrs. Ifiesimama's name was not listed on the amendment, and she did not sign this document.

Haile, Alemu, and Mr. Ifiesimama all attended the closing and signed numerous documents to finalize the transaction. Mr. Ifiesimama signed the documents both in his own name and as "attorney in fact" for his wife. However, he later revealed at the closing that he did not actually have power of attorney for his wife, and as a result, the title company refused to close the sale. Haile and Alemu therefore did not receive title to the property. Haile filed suit against both of the Ifiesimamas, seeking specific performance of the sales contract as well as injunctive relief prohibiting the Ifiesimamas from selling the property to another buyer.

The essential elements of a breach of contract claim are (1) the existence of a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained as a result of the breach. A breach of contract occurs when a party to the contract fails or refuses to do something that he has promised to do.

Specific performance is an equitable remedy that may be awarded upon a showing of breach of contract. Specific performance is not a separate cause of action but is instead an equitable remedy that is used as a substitute for monetary damages when such damages would not be adequate To be entitled to specific performance, the plaintiff must show that it has substantially performed its part of the contract, and that it is able to continue performing its part of the agreement. The plaintiff's burden of proving readiness, willingness and ability is a continuing one that extends to all times relevant to the contract and thereafter.

The Ifiesimamas argue that there was not a meeting of the minds to sell the property at the amended price of $179,000

and that neither of them signed the document purportedly amending the sales contract. They argue that the signature that appears above Mr. Ifiesimama's name on the amendment is fictitious, and they point out that this signature is different from his signature on the original sales contract. However, the Ifiesimamas offered no evidence at trial concerning the validity of the signature on the amendment. However, Mr. Ifiesimama went to the closing and signed a number of documents that provided circumstantial evidence that he had agreed to the price reduction in the amendment. The court thus held that factually sufficient evidence supports the trial court's findings that Mr. Ifiesimama breached the amended sales contract by failing to convey a general warranty deed and that Haile and Alemu are entitled to specific performance of the amended sales contract as a result.

Mrs. Ifiesimama had signed nothing. The Ifiesimamas argued that because the property was their community property, Mr. Ifiesimama lacked the authority to sell or encumber Mrs. Ifiesimama's interest in the property.

Family Code section 3.003 provides that property possessed by either spouse during marriage is presumed to be community property. Section 3.102(a) provides that during marriage, each spouse has the sole management, control, and disposition of the community property that the spouse would have owned if single. The Ifiesimamas purchased the property during their marriage. A deed of trust executed when they financed the purchase included a provision disclaiming any rights in the property. The Ifiesimamas did not introduce any evidence at trial indicating that Mrs. Ifiesimama had an interest in the property or that the property was subject to their joint management, control, or disposition.

The court concluded that Haile and Alemu presented evidence that the property was subject to Mr. Ifiesimama's sole management, control, and disposition and that they did not have notice that Mr. Ifiesimama lacked authority to sell the property on Mrs. Ifiesimama's behalf. It also concluded that the Ifiesimamas did not demonstrate that Mrs. Ifiesimama was a necessary party to the sales contract and that the contract was not valid without her signature. It therefore held that the trial court did not err in concluding that Haile and Alemu entered into a valid and enforceable contract with Mr. Ifiesimama.

Hogan* v. *Goldsmith, 533 S.W.3d 921 (Tex. App.—Eastland 2017, no pet.). Billie Bob Hogan and Goldsmith entered into a lease-purchase agreement for 836.05 acres of Billie Bob's real property in Callahan County. Pursuant to the agreement, Goldsmith was to make annual payments to Billie Bob for ten years in exchange for Goldsmith's right to use the property. The agreement also provided that Goldsmith had an option to purchase the property at any time during the term. In order to exercise this option, Goldsmith had to pay Billie Bob an amount in cash, minus any payments Goldsmith had made to Billie Bob during the term of the agreement.

Billie Bob died, at which point her son Michael inherited an undivided interest in the property and became the independent executor Billie Bob's estate. Goldsmith sent a written notice to Hogan in which Goldsmith stated that he was exercising the option under the agreement to purchase the property. Hogan agreed to convey the property's surface estate to Goldsmith, but not the mineral estate. Goldsmith believed that he was entitled to the surface estate and the mineral estate, and he filed suit against Hogan and requested specific performance, in which Goldsmith pled that he had performed all conditions precedent in the exercise of his option. Hogan then agreed to convey both the surface and mineral estates to Goldsmith and to proceed with the closing.

Hogan appeared for the closing, but Goldsmith, on his attorney's advice, did not

appear. A short while later, Hogan filed an answer to Goldsmith's specific performance suit, denying that Goldsmith had performed all conditions precedent in the exercise of his option. Goldsmith argued that he properly exercised the option to purchase the property and was ready, willing, and able to pay the purchase price, but that Hogan refused to close the sale of the property. Hogan filed a response to Goldsmith's motion, and argued, among other things, that Goldsmith did not have the funds available to close as a cash sale. The trial court granted Goldsmith's motion for partial summary judgment.

Hogan argued on appeal that the trial court erred when it granted Goldsmith summary judgment because Goldsmith was not ready, willing, and able to perform his obligation to exercise the option under the agreement. Specific performance is the remedy of requiring exact performance of a contract in the specific form in which it was made. A party who seeks specific performance must plead and prove (1) compliance with the contract, including tender of performance, unless excused by the defendant's breach or repudiation and (2) the readiness, willingness, and ability to perform at relevant times. Therefore, the analysis turned on whether Goldsmith pleaded and provided sufficient evidence to establish that he tendered performance or, if his performance was excused, whether he was ready, willing, and able to perform his obligations under the option to purchase for which an award for specific performance is appropriate.

Goldsmith argued on appeal that he pleaded that all conditions precedent had been performed by him to the exercise of the option and that Hogan did not specifically deny that Goldsmith failed in any particular concerning the exercise of the option to purchase or any tender of payment or that Goldsmith was not ready, willing, and able to conclude the purchase of the property in question.

A condition precedent may be either a condition to the formation of a contract or a condition to an obligation to perform under an existing contract. A condition precedent to an obligation to perform under a contract is an act or event that occurs subsequent to the formation of a contract and must occur before there is a right to immediate performance and there is a breach of contractual duty. A party that seeks to recover under a contract bears the burden to prove that all conditions precedent have been satisfied. The court construed Goldsmith's tender of cash as a condition precedent to Hogan's requirement to convey the property to Goldsmith. Goldsmith had to prove that he tendered performance— that he tried to provide cash to Hogan— in order to obtain specific performance. Even if Goldsmith was excused from performance under these circumstances, Goldsmith would still have to plead and prove that he was ready, willing, and able to perform.

In his pleadings, Goldsmith neither pleaded nor proved that he tendered a cash payment to Hogan. Goldsmith argued on appeal that his performance was excused because Hogan repudiated the contract when he failed to close within the contractually stipulated sixty-day period. Even if we assume, without deciding, that Goldsmith was excused from performance when Hogan did not close within sixty days of Goldsmith's exercise of the purchase option, Goldsmith would still be required to plead and prove that he was ready, willing, and able to pay Hogan the sum he owed Hogan in cash. However, Goldsmith never produced any evidence that he ever had the money he owed Hogan in cash to exercise the purchase option.

PART IX
EASEMENTS

Lindemann Properties, Ltd. **v.** ***Campbell***, 524 S.W.3d 873 (Tex. App.— Fort Worth 2017, pet. denied). Smith conveyed an easement to Campbell's father "for the installation of a radio-transmission

tower." The easement did not specify the tower's height or size, but stated that it was to be located in a 500 foot square area to be determined after installation of the tower. Some years later, Campbell began constructing a new tower. The original tower was left in place during construction of the new tower, so the new tower was not located in the exact place as the old tower. Lindemann owns the land where the towers were built. It sued seeking a declaration that the easement had terminated because Campbell had built a new tower and had abandoned the old tower and subsequently removed it.

An easement is a nonpossessory interest that authorizes a holder's use of property for only a particular purpose. A court will apply basic principles of contract construction and interpretation when considering an express easement's terms. A court will give the terms their plain and ordinary meaning when they are not expressly defined, and we read the terms of an easement as a whole to determine the parties' intentions and to carry out the purpose for which the easement was created.

Referring to the easement's use of the terms "a" and "said," Lindemann argues that by its plain terms, the easement only authorized the placement of a single tower on the Property--the original tower. The court agreed that the words "a" and "said" are singular, but the problem with Lindemann's construction is that it focuses exclusively on the meaning and effect of only those terms while completely disregarding the meaning and effect of other, potentially relevant terms. Lindemann's contention that the easement "automatically terminated upon removal or abandonment of the Original Tower" is similarly premised upon a reading of only part of the easement contract (the habendum clause). This erroneous approach patently conflicts with the well-established requirements that a court must examine contracts as a whole and assume that the parties intended for every clause to have some effect--indispensable rules that have been a component of contract-construction standards for decades.

If the facts of this case were that Campbell had removed the original tower and done nothing else, then Lindemann's simple argument that the easement terminated pursuant to the habendum clause would control the outcome. But the facts are not that clear-cut, nor is the analysis. Not only did Campbell remove the original tower--something the ingress/egress clause expressly permitted--he also constructed a replacement tower within the same fenced area that enclosed the original tower. The question then is whether the easement afforded Campbell the right to replace the original tower with the new tower.

The easement expressly grants the holder the right to maintain the tower. The question was whether the right to maintain includes the right to replace. The court held that, in this case, the term "maintaining" is broad enough to include the right to replace the tower when necessary.

Lindemann also claimed the easement terminated because the replacement tower exceeded the scope of the original easement and because Campbell operated both towers simultaneously for a brief period. The court held that Campbell did not exceed the scope of the easement.

Teal Trading and Development, LP* v. *Champee Springs Ranches Property Owners Association, 534 S.W.3d 558 (Tex. App.—San Antonio 2017, pet. pending). This appeal concerns the validity and enforceability of a property restriction—specifically a one-foot reserve strip as a Non-Access easement—that if valid precludes ingress and egress across the strip. This court previously reviewed this dispute, holding that neither side was entitled to summary judgment and remanding to the trial court for further proceedings. 432 S.W.3d 381 (Tex. App.—San Antonio 2014).

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

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

Champee Springs's petition sought a declaratory judgment that Teal Trading was bound by the non-access restriction and estopped to deny its force, validity, and effect, and because they were so bound, the restriction was enforceable against them. Teal Trading's petition-in-intervention denied that it was bound by the restriction, and it sought a declaratory judgment that the non-access restriction was void as an unreasonable restraint against alienation and that Champee Springs had waived the right to enforce the non-access restriction and was thus estopped from enforcing the restriction. On appeal the first time, this court held Champee Springs failed to establish as a matter of law that Teal Trading was estopped by deed from challenging the Non-Access Easement's validity and enforceability because none of the deeds within the chain of title from Cop to Teal Trading acknowledge the validity and enforceability of the non-access restriction.

On remand, Champee Springs amended its petition to seek a declaration that the non-access easement was valid and binding and is enforceable as a covenant running with the land. Teal Trading, on the other hand, sought a declaration that the easement was void, among other reasons, for being an unreasonable restraint on alienation. The trial court ruled that the non-access easement was valid and enforceable.

As to the claim that the non-access easement was an unreasonable restraint on alienation, Champee Springs asserted that there was no evidence that the easement (1) is the type of restraint prohibited by the supreme court, or (2) restrains the alienation of the Privilege Creek Tract, which is the only portion of Teal Trading's property burdened by the Non-Access Easement.

To constitute an unreasonable restraint on alienation, it is axiomatic that a restraint must first exist. Only then will the court determine whether the restraint is unreasonable. The Restatement of Property, which Texas has adopted, defines the types of restraints on alienation: (1) disabling restraint— attempt by an otherwise effective conveyance or contract to cause a later conveyance to be void; (2) promissory restraint— attempt to cause a later conveyance to impose contractual liability on the one who makes the later conveyance when such liability results from a breach of an agreement not to convey, and; (3) forfeiture restraint— attempt to terminate or subject to termination all or part of the property interest conveyed. To date, these are the only restraints on alienation recognized by the Texas courts.

Although in its brief Teal Trading recognizes the three categories, it does not argue, nor did it present any evidence, that the non-access easement falls within any of these categories. Teal Trading did not present any evidence the non-access easement prevents it from transferring or in any way conveying all or part of the property. The court also noted that, in its

review of the CCRs, the easement doesn't prohibit anyone from selling part of its property. Thus, on its face, the non-access easement is not as a matter of law a restraint on alienation.

The evidence presented by Teal Trading shows, at best, an indirect restraint on alienation, i.e., the non-access easement does not prevent Teal Trading from conveying any portion of the Privilege Creek Tract, but its existence may make potential buyers less eager due to inconvenience. Although indirect restraints are recognized, the Texas Supreme Court has held that before such restraints are stricken, they must bear some relationship to the evil which the rules governing undesirable restraints are designed to prevent. In addition, the supreme court has held we should not mechanically apply restraint on alienation rules to indirect restraints because it could inhibit the use of desirable contract provisions and unnecessarily limit the freedom to contract. Moreover, Teal Trading never asserted indirect restraint on alienation as a defense, nor did it present any evidence the creation of the non-access easement lacked a rational justification.

Teal Trading also claims the Non-Access Easement is a prohibition on use of the Privilege Creek Tract so as to render the easement void. In its no evidence motion for summary judgment, Champee Springs asserted there is no evidence the non-access easement so severely limits Teal Trading's use of the Privilege Creek Tract that it renders the tract valueless. Based on the structure of the argument in its brief, it appears Teal Trading is relying on the same evidence to raise a fact issue on prohibition on use as it did for unreasonable restraint on alienation.

As the court reasoned with regard to the unreasonable restraint on alienation defense, although the non-access easement may make property within the Privilege Creek Tract less attractive to potential buyers, it does not prohibit Teal Trading from using the property as intended. Thus, the portion of the trial court's summary judgment in favor of Champee Springs with regard to the affirmative defense of prohibition of use was proper.

Next, Teal Trading contends the trial court erred in granting Champee Springs's partial motion for summary judgment as to the affirmative defense of termination by merger. With regard to this affirmative defense, Teal Trading argues the non-access easement was extinguished when it became the owner of the land on both sides of the easement and the easement property. Champee Springs asserted there was no evidence that all of the burdened and benefitted properties subject to the Non-Access Easement came back into the ownership of a single entity, as required for termination by merger.

PART X
ADVERSE POSSESSION AND QUIET TITLE ACTIONS

Brown* v. *Snider Industries, LLP, 528 S.W.3d 620 (Tex. App.—Texarkana 2017, no pet.). Under Section 16.026 of the Civil Practice and Remedies Code, "[a] person must bring suit not later than 10 years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property." Civil Practice and Remedies Code § 16.026. The limitations period commences on the date the adverse possessor actually and visibly appropriates the claimed land.

However, the enclosed land exception, Section 16.031 of the Civil Practice and Remedies Code, provides that:

(a) A tract of land that is owned by one person and that is entirely surrounded by land owned, claimed, or fenced by another is not considered enclosed by a fence that encloses any part of the surrounding land.

(b) Possession of the interior tract by the owner or claimant of the surrounding land is not peaceable and adverse possession as described by Section 16.026 unless:

(1) the interior tract is separated from the surrounding land by a fence; or

(2) at least one-tenth of the interior tract is cultivated and used for agricultural purposes or is used for manufacturing purposes.

Here, Section 16.031 does not apply to the property in dispute, because the 8-acre tract at issue is not entirely surrounded by land owned, claimed, or fenced by another as required by the statute. Although Snider owns or claims the property to the tract's west, east, and south, Snider does not own or claim the property north of and abutting the 8-acre tract. Therefore, Section 16.031 does not apply to the exclusion of recovery under the ten-year statutory period.

Roberson* v. *Odom, 529 S.W.3d 498 (Tex. App.—Texarkana 2017, no pet.). The elements of a suit to quiet title are: (1) the plaintiff has an interest in a specific property; (2) title to the property is affected by the defendant's claim; and (3) the defendant's claim, although facially valid, is invalid or unenforceable. A suit to quiet title is an equitable proceeding, and the principle issue in such suit is the existence of a cloud on the title that equity will remove. The purpose of a suit to quiet title is to remove an encumbrance or defect from a plaintiff's title to the property.

On the other hand, a trespass to try title action is the method for determining title to lands, tenements, or other real property. To maintain an action of trespass to try title, the person bringing the suit must have title to the land sought to be recovered. Unlike a suit to quiet title, a trespass to try title is a purely statutory creation and embraces all character of litigation that affects the title to real estate.

Regardless of the form the action takes or the type of relief sought, when a plaintiff's pleadings and the evidence show that the dispute between the parties involves a question of title, the trespass to try title statute governs the substantive claims. Any suit that involves a dispute over the title to land is, in effect, an action in trespass to try title, whatever its form and regardless of whether legal or equitable relief is sought.

The only substantive issue in this case was whether title to the property belonged to Odom. Thus, the underlying nature of Odom's action as a trespass to try title is not altered by the fact that the parties and the trial court may have referred to it as a suit to quiet title. The reality in this suit is that it involves solely the issue of title. The court concluded, therefore, that the substance of Odom's claims was a trespass to try title action, rather than a suit to quiet title.

Here, Odom sought to recover judgment pursuant to the five-year statute of limitations, which has no requirement that the claimant be in good faith. There is no requirement (such as in one of the twenty-five-year statutes of limitations) that the claimant be in good faith. Because the doctrine of unclean hands does not apply in a suit such as this one, Clemons' defense is not applicable in this case and, thus, the trial court acted within its discretion when it struck that portion of Clemons' pleading.

Hardaway* v. *Nixon, 544 S.W.3d 402 (Tex.App.—San Antonio 2017, pet. pending). Adverse possession requires an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and is hostile to the claim of another person. The possession must be of such character as to indicate unmistakably an assertion of a claim of exclusive ownership in the occupant.

When the claim of adverse possession is between cotenants, as in this case, the burden of proof imposed on the adverse

possessor is more onerous. Cotenants are required to surmount a more stringent requirement because acts of ownership which, if done by a stranger, would per se be a disseizin are not necessarily such when cotenants share an undivided interest. In other words, the burden is more onerous because cotenants have rights to ownership and use of the property a stranger would not have. It is not unusual for one cotenant to have exclusive possession and make beneficial use of lands for rather longer periods of time and ordinarily such use is with the acquiescence of the other cotenants. Thus, a party claiming adverse possession as to a cotenant must not only prove his possession was adverse, but must also prove some sort of ouster— actual or constructive. In other words, a cotenant's possession of property is not adverse until the tenancy has been repudiated and notice of such repudiation brought home to the titleholder.

The supreme court has defined ouster, in the context of cotenancies, as unequivocal, unmistakable, and hostile acts the possessor took to disseize other cotenants. Ouster or repudiation may be constructive. With regard to constructive ouster, notice of such ouster or repudiation may be established when there has been: (1) long-continued possession under a claim of ownership and (2) nonassertion of claim by the titleholder.

Such notice may be constructive and will be presumed to have been brought home to the cotenant when the adverse occupancy and claim of title to the property is so long-continued, open, notorious, exclusive and inconsistent with the existence of title in others, except the occupant, that the law will raise the inference of notice to the cotenant or owner out of possession, or from which a jury might rightfully presume notice.

Pierce* v. *Blalack, 535 S.W.3d 35 (Tex. App.—-Texarkana 2017, no pet.). Felicia's trespass to try title suit against Debbie was dismissed with prejudice for failure to comply with court orders requiring her to amend her pleadings to join necessary parties. Rule 39(a) of the Rules of Civil Procedure require joinder of a party if "(1) (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest." If the party is not joined, the court must order that he be joined. Rule 39 applies to trespass to try title lawsuits. Further, the Declaratory Judgment Act also mandates the joinder of persons whose interests would be affected by the judgment.

Pierce asserted claims for declaratory relief, which, though inartfully pled, sought to set aside the deed by Hart to King and the subsequent judgment in favor of King, the predecessor in interest to all of the defendants, and to declare subsequent transactions by King void. And, while a declaratory judgment is not binding on and does not prejudice the rights of a person who is not a party to the proceeding, the trial court may refuse to render a declaratory judgment if it would not terminate the uncertainty or controversy giving rise to the proceeding.

Pierce's petitions sought title to realty in fee simple. Her twelfth amended petition identified 172 parties as defendants, including surface estate owners, mineral estate owners, royalty owners, lessees of the mineral estate, and working interest owners, but did not include entities holding approximately 104 pipeline easements on the property. With respect to these parties, the trial court determined that a judgment in favor of Plaintiff would adversely affect both those claiming an interest in the surface estate of the 366.7 acres in question, as well as those persons claiming under a 1930 oil and gas lease severing the mineral estate.

Though not binding on those not a party to this suit, a judgment in Pierce's favor would unsettle title reaching back almost 100 years, and would cast a cloud on the title for both surface owners and mineral owners. Surface owners will be hindered in their efforts to sell their property, and oil and gas producers will cease paying royalty owners for fear of exposure to multiple claims. To obtain a complete resolution of title, the remaining defendants would ultimately need to be brought into subsequent litigation, with a real possibility of inconsistent results creating further confusion of title.

PART XI
CONDEMNATION

State of Texas* v. *Luby's Fuddruckers Restaurants, LLC, 531 S.W.3d 810 (Tex. App.—Corpus Christi 2017, no pet.). The State condemned a strip of Luby's parking lot to widen US 290. The taking rendered Luby's incapable of operating in its current form, both because the available parking did not meet code and because it was inadequate to meet customer demand or to comply with restrictive covenants. The State agreed. The dispute in this case involved the amount of compensation. The special commissioners returned a condemnation award of $1,795,853, and both parties objected.

Before trial, the State moved to dismiss for want of jurisdiction. According to its motion, Luby's had asked for lost profits, and the State argued that no recovery for lost profits is allowed under state law.

Luby's presented evidence that this location had net profits of $40,000 per month. Luby's also presented evidence that it had begun preparation for the twelve-month process of demolition and construction, during which the cafeteria would be closed and unavailable to generate income. Luby's asked the jury to award $480,000 to compensate for lost profits during this process.

The State argued that in light of the main condemnation award, any award for lost profits was an impermissible double recovery. The State also argued that in partial takings cases, the general rule forbids any independent claim for lost profits. The State's argument is supported by a rule that when only a part of the land has been taken, evidence relating to lost profits is admissible, not as a separate item of damage, but as a means of demonstrating the taking's effect on the market value of the remaining land and improvements.

Luby's argued that another rule provides that recovery of lost profits is allowed when a taking causes material and substantial impairment of access to the property. Luby's contended that, since the cafeteria must be destroyed, that qualified as a substantial impairment of access. Luby's relied on ***State of Texas* v. *Whataburger***, 60 S.W.3d 256 (Tex.App.—Houston [14th Dist.] 2001, pet. denied), where Whataburger was awarded damages for lost profits in a similar case.

However, the court noted that the award of loss profits in ***Whataburger*** would not constitute a double recovery so long as the profitability of Whataburger's property was not a factor in arriving at its market value. The ***Whataburger*** court correctly observed that in general, the cost approach to compensation does not take account of the property's ability to generate profits in estimating the value of the property. This approach accounts for the cost of replacing the taken property. Since the experts for both parties relied exclusively on the cost approach, the court concluded that profitability was not reflected in the market-value award for the condemnation claim, and there was no double recovery.

Here, the State placed great emphasis on the sales comparison and income approaches, and took little account of the cost approach. As the ***Whataburger*** court recognized, the sales comparison and the income approach both take account of the

property's ability to generate profits. Under the income approach, the value of a property is a direct derivation of the property's ability to generate profit. And according to the ***Whataburger*** court, a property's ability to foster profit is an inherent factor in comparable sales approach because a willing buyer will normally pay more for a tract containing a profitable enterprise than for a similar tract containing an unprofitable enterprise. Thus, the ability of a business to make a profit is reflected in its market value.

City of Galveston **v.** ***Murphy***, 533 S.W.3d 355 (Tex.App.—Houston [14th Dist.] 2015, pet. denied). Galtex owned property subject to a mortgage in favor of Murphy. The property is a 14-unit apartment located in a Historical District zoned for single family dwellings. Under the zoning laws in Galveston, the property was grandfathered as a multifamily use.

Hurrican Ike hit Galveston and flooded the first floor of the building. Just after repairs commenced, the City advised Galtex that the property was unfit for human habitation and had been condemned. The tenants evacuated. Galtex and the City went back and forth on renovations and permits. Because the back and forth took so long, the City informed the owners that, because the property had been vacant for more than six months, they had lost their grandfather status and would be required to obtain a Specific Use Permit to continue as a multifamily use. The owners prepared and submitted an SUP application. Again, there was back and forth regarding the application. Ultimately, the City Council denied the SUP. Murphy foreclosed on the property.

The property owners sued the City, alleging that the SUP denial and its invocation of the six-month vacancy used to then require the SUP constituted an inverse condemnation.

When a governmental entity intentionally takes private property for public use without adequately compensating the landowner, the owner may recover damages for inverse condemnation. To assert inverse condemnation, a claimant must plead: (1) the governmental unit intentionally performed an act (2) that resulted in the taking, damaging, or destruction of the claimant's property (3) for public use. Takings can be classified as either physical or regulatory. While all property is held subject to the valid exercise of the police power, a regulatory action may, under some circumstances, constitute a taking requiring compensation.

Here, the Property Owners allege a regulatory taking that denied all economically beneficial or productive use of the property or, in the alternative, unreasonably interfered with the use and enjoyment of the property.

The court first held that the property owners claims were not ripe. Here, the complaint was that the City denied their SUP application as a means of impermissibly requiring a reduction in density. However, even presuming that one basis for denial of the SUP permit was a preference for a reduced number of units, the City Council expressly advanced distinct safety concerns related to the outstanding code violations on the property, as well as the still-outstanding engineer's letter. And although the property owners insist the parking requirement was only a subterfuge to achieve a reduction in density, the property owners never applied for a variance with the Zoning Board. The record therefore reflects that the property owners never isolated the essential question of density for the City's reconsideration. In other words, there was no reasonable degree of certainty that the City only would grant a SUP if the property owners agreed to remove some apartments.

Even after holding that the claims were not ripe, the court went on to consider whether the revocation of the property's permitted non-conforming use status was a

taking. The City claimed that the property owners waived their right to raise a takings claim by filing the SUP application and failing to pursue an appeal with the Zoning Board as to the non-conforming use. The court noted that the City informed the property owners of the loss of their non-conforming use status, but failed to inform them regarding any potential for appeal of the revocation, insisting that an SUP would be required. The court held that the City did not meet its burden to establish that its revocation decision was not final.

PART XII
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Tarr* v. *Timberwood Park Owners Association, No. 16-1005 (Tex. May 25, 2018). In a case that is of interest to many in the age of Airbnb, a homeowner entered into thirty-one short term rental arrangements which totaled 102 days over five months. The deed restrictions for the Timberwood Park Owners Association provided that homes should be "used solely for residential purposes." The HOA notified Tarr that renting out his home was a commercial use and a violation of the deed restrictions. Tarr filed a declaratory judgment action seeking a declaration that leasing the house was a residential purpose and there was no "durational" requirement in the deed restrictions. Tarr and the HOA both filed motions for Summary Judgment and the trial court granted the HOA's motion. The Court of Appeals affirmed, holding that short-term renters were not residents but "transients, and relying on Property Code § 202.003(a), which requires that "a restrictive covenant be liberally construed to give effect to its purpose and intent." The Supreme Court reversed.

The court first dealt with the conflict between the common law maxim that restrictive covenants are to be strictly construed and Property Code § 202.003(a) which requires certain covenants to be liberally construed. After more than seven pages of learned discussion on the matter, the court basically punted, stating "We have not yet deliberated section 202.003(a)'s effect, if any, on the construction principles we have long employed to interpret restrictive covenants. Nor do we reach that decision today. We don't have to reconcile any potential conflict between section 202.003(a) and the common-law principles—or whether those common-law standards can ever again be appropriately employed—because our conclusion today would be the same regardless of which interpretative standard prevails." The court held that the unambiguous covenants simply did not address the use on the property in this case. "No construction, no matter how liberal, can construe a property restriction into existence when the covenant is silent as to that limitation."

The HOA's arguments were, first, that the rentals violated the restriction that only "single family residences" could be constructed on the property, and, second, that the use violated the restriction that the property be used only for "residential purposes."

The HOA contended that, because Tarr often rented to groups that included members of more than one family, that such a use violated the single-family residence restriction. Its argument was based on reading two provisions together—the one that restricted what could be constructed on the property and one that restricted the use of the property. The court held that "to combine those provisions into one mega-restriction is a bit of a stretch." The court held that the single-family residence restriction merely limits the structure that can properly be erected upon Tarr's tract and not the activities that can permissibly take place in that structure.

The court also held that the use did not violate the residential purposes restriction. The covenants in the Timberwood deeds fail to address leasing, use as a vacation home, short-term rentals, minimum-occupancy

durations, or the like. They do not require owner occupancy or occupancy by a tenant who uses the home as his domicile. Instead, the covenants merely require that the activities on the property comport with a "residential purpose" and not a "business purpose." The court declined to add restrictions to the Timberwood covenants by adopting an overly narrow reading of "residential." The court expressly disapproved of the cases that impose an intent or physical-presence requirement when the covenant's language includes no such specification and remains otherwise silent as to durational requirements. Affording these phrases their general meanings and interpreting the restrictions as a whole, the court held that so long as the occupants to whom Tarr rents his single-family residence use the home for a "residential purpose," no matter how short-lived, neither their on-property use nor Tarr's off-property use violates the restrictive covenants in the Timberwood deeds.

C.A.U.S.E.* v. *Village Green Homeowners Association, Inc., 531 S.W.3d 268 (Tex. App.—San Antonio 2017, no pet.). The restrictive covenants required each homeowner to collect and dispose of garbage and trash at its own expense. The residents all contracted with different disposal companies, so there wasn't a single day on which garbage collection occurred and trucks from different companies entered the subdivision on different days to collect trash and recycling. Because of that, the Board voted to select a single garbage collection company, and entered into a garbage collection contract. The homeowners were instructed to make arrangements with the service provider.

After the resolution was passed, members of the Board allegedly engaged in repeated harassment to prevent other waste disposal companies from fulfilling their contracts with other residents in the community. At one point, the Association altered the gate codes in order to prohibit other waste management/recycling companies from entering the subdivision. As a result, some of the homeowners' waste management services became difficult and irregular, and effectively ceased to exist. After that, C.A.U.S.E., an entity created for the purpose of doing so, sued the Association, making all sorts of claims, but essentially seeking a declaration that the Association lacked the legal authority to compel the homeowners to contract with a single provider.

A declaration containing restrictive covenants in a subdivision defines the rights and obligations of property ownership, and the mutual and reciprocal obligation undertaken by all purchasers in a subdivision creates an inherent property interest possessed by each purchaser. Restrictive covenants are subject to the general rules of contract construction. Property Code § 202.003 expressly states that a "restrictive covenant shall be liberally construed to give effect to its purposes and intent."

The court held that the meaning of the plain language of Paragraph 3.20, which said that "All refuse garbage and trash shall be collected or disposed of by Owner, at his expense" is clear and unambiguous. In light of the clear language in this case, the court concluded that individual homeowners are the ones who are to arrange for and pay for trash collection.

The Association claimed it has the authority to compel the residents to use one trash provider because the Declaration grants it the duty to operate, maintain, and manage the common areas of the subdivision, which includes the neighborhood streets. In support, it cited to provisions of the Declaration and other governing documents, including the Association's articles of incorporation and bylaws, allowing it to promote the health, safety, and welfare of the subdivision. The Association also pointed out that the Declaration permits the Association to make

contracts with third parties to provide services to the Association with respect to security and maintenance of the neighborhood. It asserted that in forcing residents to use a single trash collector, it is complying with its duty to manage and maintain the neighborhood streets. The court disagreed. It disagreed that these general provisions render the only covenant pertaining to trash collection superfluous. More specific provisions in a contract prevail over general mandates.

Twin Creeks Golf Group, L.P.* v. *Sunset Ridge Owners Association, Inc., 537 S.W.3d 535 (Tex.App.—Austin 2017). Twin Creeks filed a restrictive covenant which included a provision requiring all residential owners to acquire and maintain a "Community Membership" in the country club. A few years later, a condo declaration was filed for Sunset Ridge Condominiums. Operation of the country club was transferred to Twin Creeks Operating Co., and as a part of the transfer, an Amended and Restated Restrictive Covenant was filed that, in part, confirmed that the transfer of operations wouldn't affect the obligation of any owner to maintain membership in the country club.

Sunset Ridge sued Twin Creeks seeking a declaration that the amended restriction was invalid as to the condominium due to the failure to renew the covenant after the ninth anniversary pursuant to the Uniform Condominium Act, Property Code § 82.0675(a). Section 82.0675(a) dictates that a provision of a declaration or recorded contract that requires condominium owners to maintain a membership in a private club is not valid after the tenth anniversary of the date the provision is recorded or renewed unless it is renewed after the ninth anniversary of that date in the manner provided by the declaration or recorded contract. The trial court held that § 82.0675(a) applied and, since the restriction wasn't renewed after the ninth anniversary, any provision in the restriction requiring condo owners to maintain club membership was invalid.

Twin Creeks claimed that § 82.0675(a) applies only to condominiums and not to other types of property ownership, such as the single family residences also subject to the amended restriction. It further argued that § 82.0675(a) did not apply to restrictions that are applicable to both condo and other types of real property. Further, it argued that the single family residence owners have a property interest in the mutual and reciprocal obligation among all property owners in the Community to pay club dues and that application of § 82.0675 to the amended restriction would lead to an unjust and unreasonable result because the single family residence owners would have to pay increased dues while the condominium owners would continue to reap many of the benefits of the Community without paying club dues.

The court agreed that by its express language, § 82.0675 has effect on condominium owners; however, it contains no exception for membership requirements applicable to condominium owners that also apply to owners of other types of real property. If the legislature had intended to exempt club membership requirements applying to both condominiums and other types of real property from § 82.0675, it could have done so expressly. Further, the non-condominium owners' rights are not affected by the trial court's declaration that the club membership requirement is invalid as applied to the condominium owners, such that it renders the application of § 82.0675 to the condo owners unjust or unreasonable.

Here, the issue is the application of a statutory provision that, under certain circumstances, invalidates the requirement that condominium owners pay club membership dues, and Sunset Ridge did not seek a declaration as to the rights and interests of the non-condominium owners. Consequently, the non-condominium homeowners' property interests arising from the mutual restrictive covenants are not

implicated here. Further, § 82.0675(a) provides for the continuation of a membership requirement through renewal after the ninth anniversary in the manner provided in the declaration or recorded contract. Twin Creeks could have foreclosed the result it now seeks to avoid by renewing the membership provision after the ninth anniversary.

Vance* v. *Popkowski, 534 S.W.3d 474 (Tex. App.—Houston [1st Dist.] 2017, pet. denied). The Popkowskis bought a lot in Cypress Point Estates, a deed restricted subdivision in Harris County. The deed restrictions provided that lots were to be used only for single family residences and that no business could be conducted from any tract. The restrictions also contained a nonwaiver provision.

The Popkowskis were using their lot to operate a business called Modern System Concepts, hiring 18 to 20 employees at the site. The Popkowskis claimed the restrictions had been abandoned.

The Popkowskis admitted they were operating out of residential property, but it was not the only business operating in the subdivision. They described several other businesses they had witnessed in the neighborhood. Other witnesses also testified about various businesses operating in the subdivision. Vance argued that the nonwaiver provision in the restrictions prevented a waiver. At trial, the jury found that the restrictions had been abandoned.

Absent a nonwaiver provision, abandonment of a restrictive covenant can be found when lot owners acquiesce in substantial violations within a restricted area, and that acquiescence can amount to either an abandonment of the covenant or a waiver of the right to enforce it. To establish abandonment, a party must prove that the violations are so great as to lead the mind of the average man reasonably to conclude that the restrictions in question have been abandoned. This determination requires consideration of the number, nature, and severity of the then existing violations, any prior acts of enforcement of the restriction, and whether it is still possible to realize to a substantial degree the benefits intended through the covenant.

The court held that, by its plain language, this nonwaiver provision protects the property owners in the subdivision from claims that the deed restrictions had been abandoned or waived because of a failure to prosecute prior violations.

Given Texas's strong public policy favoring freedom of contract, there can be no doubt that, as a general proposition, nonwaiver provisions are binding and enforceable. Nonwaiver provisions have been enforced in the context of restrictive covenants. Despite the general enforceability of nonwaiver provisions and the self-evident purpose of such provisions, some Texas courts have found that the existence of a nonwaiver provision does not preclude a finding of abandonment or waiver of a specific restrictive covenant as a matter of law.

The purpose of the nonwaiver provision is to prevent claims of waiver and abandonment of restrictive covenants. If a party who had agreed to be bound by the restrictive covenants, including the nonwaiver provision, were able to avoid the provision by simply proving that a particular restrictive covenant had been abandoned or waived, then the nonwaiver provision would be rendered effectively meaningless.

In order to establish that an antiwaiver clause is not enforceable, the party asserting a waiver must show a clear intent to waive both the clause and the underlying contract provision. In this case, the jury specifically was asked only to determine whether the use restrictions had been abandoned. The jury answered yes to both questions, but it was never asked to determine whether the nonwaiver provision itself had been waived, either standing alone or as a consequence of

a complete abandonment of the entire set of restrictions so pervasive that the fundamental character of the neighborhood was destroyed.

Jury findings that specific deed restrictions have been abandoned, standing alone, are insufficient to overcome a nonwaiver provision and establish the affirmative defense of abandonment. In this case, the evidence did not establish conclusively, as a matter of law, that there was a waiver of the nonwaiver provision. Further, the jury did not make any findings with respect to the waiver of the nonwaiver provision.

PART XIII
TAXATION

Bosque Disposal Systems, LLC* v. *Parker County Appraisal District, No. 17-0146 (Tex. May 25, 2018). The plaintiffs are taxpayers who own land in Parker County. Each tract at issue in this case contains a saltwater disposal well, in which wastewater from oil and gas operations can be injected and permanently stored underground. When valuing these tracts for property tax purposes, PCAD assigned one appraised value to the wells (creating distinct appraisal accounts for "saltwater disposal facilities" apart from the existing appraisal accounts for the surface land) and another appraised value to the land itself. PCAD estimated the wells' market value based on the income generated from their commercial operation.

The taxpayers contend that separate appraisal of the wells and the land amounts to illegal double taxation of the wells as a matter of law. The trial court rendered summary judgment for the taxpayers, but the court of appeals reversed.

The parties do not dispute that the taxpayers own taxable land in the district. Nor do the parties dispute that the taxpayers' land contains functioning saltwater disposal wells that have significant market value. Importantly, the taxpayers do not claim that land containing a valuable saltwater disposal well has the same market value as a comparably sized tract of land with no such well on it. Instead, the taxpayers complain that PCAD appraised the wells as separate units of real property apart from the land. This, the taxpayers contend, violated the Tax Code's definition of "real property" and amounted to double taxation of the wells in violation of the Texas Constitution. According to the taxpayers, the wells themselves do not fit within any of the categories of "real property" listed in the Tax Code, and appraising the wells separately from the land effectively appraises (and taxes) the wells twice—once on the value of the land, and once on the separate value of the wells. The taxpayers rely heavily on the fact that the wells have never been severed from the surface land and remain part of the taxpayers' fee simple ownership of these properties.

PCAD responded that it appraised the surface land in one account based on comparable tracts of raw land, and it appraised the wells in another account based on the income method of appraisal. According to PCAD, its appraisal of the land did not take into account the value of the wells, and that the sum of the two appraisals approximates the market value of the entire property, wells and all. In the District's view, the Tax Code requires it to appraise these properties based on their market value, and splitting each property into two accounts—one for the land and one for the well—was one lawful way of estimating the properties' overall market value.

The court found nothing legally improper in PCAD's decision to separately assign and appraise the surface and the disposal wells. The Tax Code expressly contemplates that taxing districts may separately appraise "separately taxable estates or interests in real property." Tax Code § 25.02(a)(3). Generally, a tract of land and its improvements are appraised together and assigned a single value. But

appraisal districts are permitted to divide a tract and its improvements into separate components, each with its own tax account number, and appraise them individually.

Further, the Tax Code does not prohibit the use of different appraisal methods for different components of a property. In fact, the Code suggests otherwise, requiring the chief appraiser to consider each method and to select "the most appropriate method" when "determining the market value of property." Tax Code § 23.0101.

The taxpayers offered several objections to this result, but the court found none of them persuasive. The taxpayers contended that a separately appraisable "estate or interest" under the Tax Code arises only from "transfers, conveyances, and reservations." They argued that the "estate or interest" taxed here "simply does not exist" because it has not been severed from the surface land. But the court has held that different "aspects of real property can be taxed separately" and that "[t]his rule does not depend on whether each aspect is separately owned." ***Matagorda County Appraisal District* v. *Coastal Liquids Partners, L.P.***, 165 S.W.3d 329 at 332 (Tex. 2005).

The taxpayers also argued that the wells cannot be taxed because they are "intangible" and "permit dependent," and amount to nothing more than a "right to inject." Intangible property, such as a legal right, generally is not taxable. But any suggestion that the disposal wells are non-taxable intangibles ignores the wells' physical existence. The Tax Code defines "intangible personal property" as "a claim, interest (other than an interest in tangible property), right, or other thing that has value but cannot be seen, felt, weighed, measured, or otherwise perceived by the senses, although its existence may be evidenced by a document." Tax Code § 1.04(6). The injection facilities are hardly incorporeal; they consist of physical, underground rock and stored liquids, a well bore, down-hole tubing, and surface equipment. They are as tangible as any taxable mineral estate. The Code's definition of "intangible" does not describe these wells.

The taxpayers pointed out that they need a permit to operate the wells. But to accept that argument would have to ignore economic realities and a plain reading of the statute to conclude that the facilities at issue here, despite all their substantial physical aspects, are in reality intangibles because a permit may be required to operate them. By this reasoning a refinery would be a non-taxable intangible, as would valuable mineral estates, because permits are required to operate refineries and extract minerals.

PART XIV
CONSTRUCTION

Vast* v. *CTC Contractors, LLC, 526 S.W.3d 709 (Tex. App.—Houston [14th Dist.] 2017, no pet.). Vast claimed that the trial court erred in awarding CTC attorneys' fees under Civil Practice and Remedies Code § 38.001. Section 38.001 provides that "[a] person may recover reasonable attorney's fees from an individual or corporation . . . if that claim is for . . . an oral or written contract." Section 38.001 does not authorize the recovery of attorney's fees in a breach of contract action against a limited liability company.

Legislation was proposed to amend §38.001 to reflect that a person may recover reasonable attorneys' fees from "organizations," including limited liability companies, but the bill did not pass. See Tex. H.B. 744, 85th Leg., R.S. (2017).

Dudley Construction, Ltd.* v. *ACT Pipe and Supply, Inc., 545 S.W.3d 532 (Tex. 2018). Neither the trust-fund act (Property Code §§ 162.001-.003) nor Civil Practice & Remedies Code § 38.001 allow for attorneys' fees for a successful trust-fund-act claim. The Supreme Court said "Our reasoning is simple: neither statute says so." Section 38.001 makes attorneys' fees

recoverable for a variety of claims that might factually form the basis of a trust-fund-act claim - a "trustee" under the act might misapply trust funds at the expense of a beneficiary who has "rendered services," "performed labor," "furnished material," or who was a party to "an oral or written contract." But this does not merge the statutes for attorney's-fees purposes. Certainly, a pipe supplier might recover attorney's fees under section 38.001 for work performed, materials provided, or for breach of contract. But this does not open the door to attorney's fees for violations of separate statutory provisions simply because the claim is based on the same dispute or because the recovery sought is the same.

The trust-fund act is a stand-alone, comprehensive statutory scheme defining whether "construction payments" and "loan receipts" constitute trust funds, determining who are "beneficiaries" of trust funds, providing for when trust funds are "misapplied," and providing for penalties, The legislature could have provided for attorney's fees in this scheme. It did not. And neither would the court.