RECENT DEVELOPMENTS IN REAL ESTATE LAW
General Practice, Solo & Small Firm Section Program

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Thursday, June 10, 2010
11:00 a.m. – 11:30 a.m.
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LAW RELATED PUBLICATIONS AND PRESENTATIONS:

Author *Weatherbie’s Texas Real Estate Law Digest* (James Publishing, 1999)
Course Director for the State Bar of Texas, Advanced Real Estate Law Course – 1995
Course Director for the University of Texas at Austin - Mortgage Lending Institute – 2002 and 2007
Author/Speaker for the State Bar of Texas, Advanced Real Estate Law Course - 1987 to present
Author/Speaker for the University of Texas at Austin - Mortgage Lending Institute - 1992 to present
Author/Speaker for Texas Land Title Institute - 1992 to present
Author/Speaker for Southern Methodist University - Leases in Depth - 1992 to 2000
Author/Speaker for Southern Methodist University - Transactions in Depth - 1992 to 2000
Author/Speaker for the State Bar of Texas, Advanced Real Estate Drafting Course
Author/Speaker for the State Bar of Texas, Residential Real Estate Construction Law Course
Panel Member for State Bar of Texas, Advanced Real Estate Transactions Course – 1997
Panel Member for State Bar of Texas, Advanced Real Estate Strategies Course – 2007
Author of “Annual Survey of Texas Law -- Real Estate,” 51 SMU L. Rev. 1321 (1998) and 52 SMU  
L. Rev. 1393 (1999)
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 296 S.W.3d 321.

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


“Prudential” – Prudential Insurance Co. of America v. Jefferson Associates, 896 S.W.2d 156 (Tex.1995), the leading case regarding “as-is” provisions in Texas.

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.

This and past Case Law Updates are available at our website cwrwlaw.com.
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CASE LAW UPDATE  
DRAFTING LESSONS FROM RECENT REAL ESTATE CASES

PART I  
MORTGAGES AND FORECLOSURES


The substitute trustees posted notice of sale. In various parts, the notice referred both to the note and the recorded deed of trust, including a statement that “Notice is hereby given of Holder's election to proceed against and sell both the real property and any personal property described in the Deed of Trust.” However, the notice's property description referred to Exhibit A, the only exhibit, which in turn described only one of the two properties. La Salle was the only bidder at the foreclosure sale. It bid its entire debt.

After the foreclosure sale, the substitute trustees issued a substitute trustees deed to LaSalle, which LaSalle immediately recorded. The substitute trustee’s deed conveyed the “Property” to LaSalle. “Property” was defined in the deed as the real property described in Exhibit A to the deed, which, again, described only one of the two tracts.

Myrad took the position that the sale covered only the one tract and, because LaSalle had bid its entire debt for the one tract, Myrad then owned the other tract free and clear. It sued LaSalle to enjoin it from filing a correction deed, but the trial court dissolved its initial restraining order and LaSalle filed a correction deed which described both tracts. Myrad then sought to quiet title and sought a declaration that LaSalle owns only the one tract described in the initial deed. LaSalle in turn sought a declaration that it now holds title to both properties, or in the alternative, LaSalle and the substitute trustees sought rescission of the conveyance from the substitute trustees to LaSalle.

Rather than requiring that erroneous deeds be reformed or rescinded by judicial proceedings, the courts have long allowed agreeable parties to use correction deeds in limited circumstances. For instance, a correction deed may be used to correct a defective description of a single property when a deed recites inaccurate metes and bounds. Similarly, a correction deed may be used to correct a defective description of a grantor's capacity.

However, using a correction deed to convey an additional, separate parcel of land is beyond the appropriate scope of a correction deed. Preserving the narrow circumstances for acceptable use of a correction deed is important because a proper correction deed may relate back to the date of the deed it corrects. To allow correction deeds to convey additional, separate properties not described in the original deed would introduce unwarranted and unnecessary confusion, distrust, and expense into the Texas real property records system. For example, it could require those who must rely on such records to look beyond the deed and research the circumstances of ownership to make sure that no conveyance mistake such as that before us in this case was made, undermining the entire purpose of record notice. Thus, the Supreme Court held that LaSalle's correction deed purporting to convey both properties was void as a matter of law.

Having not succeeded in confirming the correction deed, LaSalle then sought to rescind the conveyance from the substitute trustees because of mistake in the original deed. When mistake is alleged, the court may consider extrinsic evidence of intent in determining whether to enforce a deed. Rescission is an available equitable remedy if mutual mistake is shown.

The lower courts did not reach the rescission claim. However, the trial court granted, and the court of appeals affirmed, LaSalle's claim that the correction deed vested title to both parcels. The use of a correction deed to reform a mistaken deed necessarily implies a mutual mistake in the underlying instrument running contrary to the grantor's and grantee's intent. Thus, a fact-finding supporting a decision to enforce a correction deed would be identical to the finding required for equitable rescission. The correction deed at issue made a single change: the description of two properties instead of one. Thus, in entering and affirming judgment enforcing the correction deed, the trial court and court of appeals necessarily found that a mistake existed in the substitute trustees' deed, the intent of LaSalle and the substitute trustees being to convey both properties covered by the deed of trust. Because of the trial court's implied finding of mutual mistake, supported by all of the evidence, equitable rescission is an available remedy.

The court noted that it was “not blind” to the equities of the situation. LaSalle was entitled to be made whole as holder of the note from Myrad, and in trying to acquire two properties LaSalle received only one by mistake. Although the court cannot enforce the correction deed, it recognized that enforcement of the original substitute trustees’ deed would result in one of
two things happening. Should LaSalle remain able to foreclose on the omitted property under the note after accounting for its payment, requiring someone to pay a second time for that property will entitle Myrad to a windfall from any surplus beyond what Myrad owes on the note. Likewise, if the terms of the note are satisfied, Myrad will stand as owner of the omitted property free from encumbrance despite its default. Myrad has never disputed this, and indeed argues for just such a result. The Supreme Courth concluded that Myrad will be unjustly enriched if the mistaken deed to LaSalle is enforced.

The court did not need not reach the question of whether notice was adequate, then, or chilled potential bidding, because rescission of the deed is proper regardless. And, a fresh foreclosure sale would address Myrad's concerns about adequate notice to the public.

Morrison v. Christie, 266 S.W.3d 89 (Tex.App.—Ft. Worth 2008, no pet.). When the Morrisons defaulted on their mortgage loan from Christie, they executed a “conveyance in lieu of (or in addition to) foreclosure” to Christie, basically a deed in lieu of foreclosure. The deed states that the conveyance was in consideration of Christie applying the net proceeds from the property's sale to the unpaid balance of the note and of the Morrisons agreeing to be liable for any deficiency after the sale. Christie sold the property to a third party, with the net proceeds applied to the note. He then sued the Morrisons for the deficiency.

The Morrisons argued that a conveyance of real property with the promise of the grantee to sell the property and satisfy an existing debt with the proceeds is generally held to be a transaction in the nature of a mortgage and, since Christie had failed to comply with Property Code §§ 51.002 and 51.003 in acquiring the property, he had failed to prove all of the elements needed to establish a deficiency on the note.

A deed-in-lieu of foreclosure is not a specific type of deed, such as a special warranty deed or a quitclaim deed; there is no such deed as a deed-in-lieu of foreclosure. But a deed given in satisfaction of a debt may serve as a convenient, efficient transfer of title upon default of a debt. No specific statutory scheme governs the format of this type of transaction, although the Texas Legislature provides some protections against undisclosed liens or encumbrances on the property to a holder of a debt secured by a deed of trust who accepts such a conveyance as payment.

The plain language of the deed evidenced an agreement that the borrower would convey the property to the lender in exchange for the lender agreeing to not move forward with foreclosure of the property and to apply to the debt the net proceeds from the sale of the property. The evidence establishes that the property served as security for a debt before the deed-in-lieu conveyance and that the deed-in-lieu conveyance was intended as payment on that debt and not to secure it.

The borrowers argued that under Property Code section 51.003, they have a right to contest the amount of deficiency and a right to a credit of the full fair market value of the property. That section applies to a deficiency judgment action brought after property is sold at a foreclosure sale under section 51.002; section 51.002 by its own terms applies to the “sale of real property under a power of sale conferred by a deed of trust or other contract lien.” Because the sale of the real property in this case was not a sale under a power of sale in a deed of trust or other contract lien and was therefore not a foreclosure sale under section 51.002, this section does not apply.

PART II
ASSIGNMENTS OF RENTS

In re Amaravathi Limited Partnership, 416 B.R. 618 (Bankr. S.D. Tex. 2009). The properties involved are high-end apartments that generate a lot of rents that are the primary source of the debtors’ income. Acquision of the properties were financed by the lender and secured by deeds of trust, assignments of rents and leases, and cash management agreements typical in securitized loan transactions. After borrowing the loan, the debtors collected the rents and deposited them into a lockbox pursuant to the cash management agreement. The lender would deduct the debt service and make the remainder available to the debtor. When the properties stopped generating enough cash to pay the operating expenses and debt service, the debtor stopped making deposits into the lockbox, which was a default under the various loan agreements.

The debtor filed this Chapter 11 bankruptcy and promptly moved to use the rents as cash collateral. The lender opposed the motion. The single issue litigated by the parties was whether the assignment of rents removed the post-petition rents from the property of the estate.

The lender argued that, since the assignment of rents was “absolute” under Texas law, the debtors had no further interest in the rents. Without an interest in the rents, the rents could not become property of the estate under Bankruptcy Code § 541(a)(1). The debtors argued on the other hand, that the assignment was merely a “collateral” assignment and that the future rents remained property of the estate under § 541(a)(1).

The United States Supreme Court has held that bankruptcy courts should generally look to state law to
determine property rights in the assets of a bankruptcy estate. There are two exceptions to this general rule. First, there is an exception if Congress modifies state law through legislation enacted under Congress's authority to establish uniform laws on the subject of bankruptcies throughout the United States. Second, state property law must relent if some federal interest requires a different result.

In an extensive discussion of bankruptcy law, the court concluded that under the unambiguous language of Bankruptcy Code § 541(a)(6), the rents that come from property of the estate are themselves property of the estate.

The court went further to say that the lender's state law arguments also fail. The lender claims that the parties agreed to an “absolute” assignment of rents that automatically transferred full title in the rents to the lender. Alternatively, the lender argues that, if the court finds the assignment was “collateral” and not “absolute,” complete title to the rents transferred when the receiver took possession of the Properties. Regardless of whether the assignment was “absolute” from its initiation or “activated” by the appointment of a receiver, the thrust of the lender's argument is that debtors lack any interest in rents sufficient to bring the rents into the estate under Texas law.

Assignments of rents are interests in real property and are created and defined according to the law of the state where the property is located. The two leading cases involving assignments of rent in Texas are Taylor v. Brennan, 621 S.W.2d 592 (Tex.1981) and FDIC v. International Property Management, Inc., 929 F.2d 1033 (5th Cir.1991). Neither case directly addresses bankruptcy law or the issue presently before this court; nevertheless, their holdings and dicta provide the legal framework for resolving this case.

In Taylor, the Texas Supreme Court discussed “absolute” and “collateral” assignments of rents. A “collateral” assignment of rents occurs when the debtor pledges the property's rents to the mortgage lender as additional security for a loan. In the event of default, the lender may assert rights not only to the property subject to the mortgage but also to the rents generated by the mortgage property. An important caveat with “collateral” assignments is that the lender must take some affirmative action to “activate” its rights to the rents. In dicta, the Texas Supreme Court explained how an “absolute” assignment of rents differs from a “collateral” assignment. The key difference is that “an absolute assignment operates to transfer the right to rentals automatically upon the happening of a specified condition, such as default.”. Thus, unlike a “collateral” assignment—which forces the mortgagee to take additional steps to “activate” its “right” to collect rents-the “absolute” assignment permits the mortgagee to assert “rights” to all the rents immediately once a specified condition (usually default) occurs.

The law governing “absolute” assignments was later explained in greater detail by the Fifth Circuit when interpreting and clarifying the dicta from Taylor. In International Property, the Fifth Circuit found that the mortgage documents demonstrated the parties' intent to create an “absolute” assignment and, therefore, the FDIC had the right to collect the rents immediately upon default. In International Property, the Fifth Circuit recognized that, given the nature of these arrangements, the term “absolute” assignment is, essentially, a misnomer:

“The concept of a present transfer of title to rents contingent upon default, as opposed to a security interest in the rents, is essentially a legal fiction. Whatever terminology the court uses, ... mortgagees employ such assignments to secure the debt, and all such assignments would be considered security interests under the Uniform Commercial Code, which treats all transfers intended to secure a debt as security interests despite their form.”

The bankruptcy court also quoted In re Foundry of Barrington Partnership, 129 B.R. 550, 557 (Bankr.N.D.Ill.1991) (“[The lender] can call this arrangement an ‘absolute assignment’ or, more appropriately, ‘Mickey Mouse.’ It's still a lien ...”). The Fifth Circuit solidified this point by referring to “absolute” assignments as “contingent present assignments” on four different occasions in its opinion. The phrase “contingent present assignment” more accurately reflects the true substance of “absolute” assignments.

The finding that there is nothing “absolute” about “absolute” assignments directly influenced the Fifth Circuit's clarification of Taylor's statement, in dicta, that an “absolute” assignment “passes title to the rents” to the lender. Furthermore, any doubt concerning International Properties' legal conclusion that “absolute” assignments do not grant full title to the mortgagee is put to rest upon review of the general characteristics of an “absolute” assignment of rents transaction. Several characteristics of these transactions, which are also present in this case, indicate that complete title simply cannot transfer to the lender. The most obvious interest that a debtor retains following an “absolute” assignment is the debtor's ability to insist that the rents be properly applied to the debtor's obligation to the lender. The
second characteristic demonstrating that equitable title remains with the debtor is that, although the borrower may be required to apply rents to pay for operation and maintenance of the property and to pay debt service, the borrower’s use of excess rents is not restricted. Third, generally an absolute assignment of rents is given in connection with (and only because of) the related mortgage loan.

The bankruptcy court also noted that, as mentioned in Taylor, a pro tanto payment must be made to create a “true” assignment. A pro tanto payment is a credit to the debt of the present value of the future rental stream. Thus, if the future rental stream was worth $10,000,000 at the time the loan documents were executed, the lender was required to reduce the debt by $10,000,000 in order to effect a “true” assignment of title. No pro tanto payment occurred in this case. The lender’s failure to credit the present value of the rents is an indication that the parties did not treat the assignment as one of both a legal and an equitable interest.

Finally, the “absolute” assignment of rents does not transfer complete title because such assignments “terminate upon payment in full of the debt.

PART III
PROMISSORY NOTES, LOAN COMMITMENTS, LOAN AGREEMENTS

U.S. Bank, National Association v. American Realty Trust, Inc., 275 S.W.3d 647 (Tex.App.—Dallas 2009, no pet.). The note and guaranty were generally non-recourse except for certain exceptions or “carve-outs” under which Borrower and Guarantor could be personally liable. One of the carve-outs in the guaranty made the Guarantor personally liable for and guarantees payment to lender for “Waste committed on the Property” and “fraud or material misrepresentation.”

The Property was a 196-unit, full-service Holiday Inn located near the Kansas City International Airport. The Holiday Inn franchise was set to expire. To relicense the hotel, Borrower was required by Holiday Inn to complete an application and obtain a Property Improvement Plan inspection, which would include all the necessary improvements to the property before a new franchise license could be issued. The PIP was and the estimated costs of improvements was approximately $1.8 million. Although there was some dispute as to who decided not to pursue the relicensing, ultimately the Borrower did not renew with Holiday Inn and, instead, entered into a new franchise with Clarion.

Following the switch to Clarion, the occupancy and revenues declined. Borrower could not service the debt and eventually defaulted on the note, and the property was foreclosed. The Lender later learned Holiday Inn was in fact still interested in relicensing the hotel, and it was Borrower who decided not to reapply for a license. In their lawsuit, they argued the change from the Holiday Inn flag to Clarion was a breach of the note and guaranty under the “waste” and “fraud or material misrepresentation” carve-out provisions, which resulted in damages.

The Lender argued that the failure to relicense with Holiday Inn was waste, as contemplated by the carve-out guaranty. Specifically, the Lender contends waste, although not specifically defined by the guaranty, does not require actual, physical damage to the hotel because the terms of the guaranty, as intended by the parties, clearly encompass damage to intangible assets such as the franchise license.

The Guarantor responds that Lender failed to establish waste as a matter of law because waste has a specific common law meaning and requires actual, physical damage, which did not occur under these facts.

Although waste is not defined in the guaranty, the mortgage and security agreement, executed on the same date as part of the same transaction, expressly defined “property” to include physical assets such as land and improvements, and it also included certain contracts and intangibles. Construing these provisions together, the Lender asserts that Borrower was clearly required to keep the hotel operating as a Holiday Inn or as a comparable or better franchise, but failed to fulfill its obligations. By allowing the Holiday Inn franchise license to expire and failing to reapply, appellants claim Borrower committed waste on the property because the value of the franchise diminished when it became a Clarion.

After reviewing the relevant loan documents, the court first notes nothing within any of the documents specifically required Borrower to reapply for a franchise license with Holiday Inn. One of the covenants of the mortgagor simply states it agrees to “conduct and operate its business as presently conducted and operated,” which means Borrower must continue to use the property as a hotel, but not necessarily as a Holiday Inn. Although the documents contemplate all future franchise agreements entered into would become “property,” they do not include any potential franchise agreements, such as here, that never came into existence. As defined by the carve-out provision, for waste to have occurred, it must have been committed “on the property.” The court refuses to interpret the loan documents to mean waste can occur
on potential, future property, in this case a potential franchise license, that was never entered into.

The distinction is between breaching an existing contract and renewing or reapplying for a new contract. Had Borrower terminated its franchise license with Holiday Inn prior to September 24, 2002 and then changed to a Clarion, this could possibly be waste to the existing property. However, by failing to reapply for a Holiday Inn franchise license and instead re-flag as a Clarion after the Holiday Inn franchise license expired, Borrower did not commit any “waste” on the “property.”

The Lender then claimed damages for fraud or material misrepresentation. The trial court found Borrower had decided not to relicense when the franchise license expired. This representation was false because Borrower, not Holiday Inn, had decided to let the license expire. The trial court further found the change from a Holiday Inn to a Clarion resulted in significant diminution in value of the hotel. However, despite recognizing the loss in value because of the flag change, the trial court found these damages were not caused by Borrower's material misrepresentations.

The court of appeals agreed. As previously noted, the Lender had no property interest in any future franchise licensing agreements and did not specifically contract for the hotel to remain a Holiday Inn. Thus, regardless of any misrepresentations Borrower made regarding who decided not to reapply for a license, the misrepresentations could not have caused damages for something Borrower was not required to do, specifically, relicense as a Holiday Inn.

New Wave Technologies, Inc. v. Legacy Bank of Texas, 281 S.W.3d 99, 66 UCC Rep.Serv.2d 113 (Tex.App.-El Paso 2008, pet. denied). Checks were made payable to “Maxim Solutions Group/New Wave Techn.” The checks also had “Each Payee Must Endorse Exactly As Drawn” printed on the back. New Wave argues that the wording on the back of the check shows the maker's intent to make the checks jointly payable. However, the front of the check has the payees separated by a virgule, “/”. While no Texas court has addressed the use of virgule in between payees on negotiable instruments, courts around the nation have been uniform in their holdings. The courts have used the common meaning of a virgule, looking at previously decided cases in other jurisdictions and dictionary definitions, and have held unanimously that it means “or,” allowing for payment in the alternative. The court held that a virgule's common usage means “or” in alignment with the previous decisions of the courts of the many states. This does not resolve the issue, however, since the checks presented to Legacy include other language as well.

The statement on the back of the checks “Each Payee Must Endorse Exactly As Drawn” unequivocally states that each payee should endorse the check. New Wave argues that this shows that the checks are payable jointly. Obviously, the front and back of the checks are conflicting in their instructions. The use of the virgule indicates either payee can endorse while the backs of the checks require all payees to endorse. The printed instructions on the back of the check only increase the ambiguity of how the check is payable. The court found that the check, on its face, is

payee, Maxim, without any endorsement by the other payee, New Wave. The bank argues that the checks were not made payable alternatively, as a matter of law, but rather were made payable jointly. The initial determination of whom an instrument is payable to is determined by the intent of the issuer of the instrument. UCC § 3.110(a). When there are multiple payees listed, the Code provides:

“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 person not alternatively, it is payable to all of them and may be negotiated, discharged, or enforced only by all of them. If an instrument payable to two or more persons is ambiguous as to whether it is payable to the persons alternatively, the instrument is payable to the persons alternatively.”

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ambiguous as to whether it is payable to persons alternatively or jointly, and as such, the instruments are payable alternatively. In the case of ambiguity, persons dealing with the instrument should be able to rely on the endorsement of a single payee. No endorsement by New Wave was required for Legacy to deposit the checks since the checks were properly payable to either payee individually.

**Financial Freedom Senior Funding Corporation v. Horrocks**, 294 S.W.3d 749 (Tex.App.-Houston [14th Dist.] 2009, no pet.). Mullane borrowed a reverse mortgage a few months before she died. The notes evidencing the mortgage provided that borrower was required to pay the balance upon receipt of a notice from lender requiring payment in full as provided in paragraph 7 of the notes. Paragraph 7 provided that the lender could require immediate payment in full upon the borrower’s death or a disposition of the property.

Mullane died in March, 2003. In July, 2007, the lender sent a notice of loan maturity. The administrator of Mullane’s estate claimed that the statute of limitations had run on the lender’s right to foreclose.

The lender claimed that the notes were not demand notes and that the statute did not commence until it sent its notice of acceleration. Citing section 3.108(a)(2) of the Business & Commerce Code, the administrator argued that since the Notes state they are due upon receipt of a notice from appellant requiring payment in full and do not otherwise include a specific time for payment, they are demand notes and limitations began to run on the date they were signed. The court did not accept either interpretation of the notes.

While the notes do not list a specific maturity date, they do contain conditions which create a readily ascertainable time for payment – the borrower’s death or the disposition of the property. It thus held that the notes are payable at a definite time.

And while the court agreed that the notes were not demand notes, it did not agree that the cause of action accrued only when notice of acceleration was sent. The Notes at issue here do not provide for repayment through periodic installment payments with provision for acceleration of any outstanding payments in the event of default. Instead, the notes themselves provide that payment shall be made in full upon demand by appellant once specified conditions occurred. Because the entire debt would always be due upon demand, there was never any requirement that appellant accelerate the debt first. Because the notes are payable at a definite time, appellant's cause of action to enforce the lien accrued when one or more of the conditions listed in Paragraph 7 occurred.

**Burns v. Stanton**, 286 S.W.3d 657 (Tex.App.-Texarkana 2009, pet. pending). ISC executed a note payable to Stanton, which Burns guaranteed. The note was secured by a security agreement that included a provision making a change in the borrower’s entity type a default. At one point, ISC and Burns decided they would save on taxes if ISC was converted from a corporation to a limited partnership, so, without getting permission from the lender, a conversion was done. This was, as confirmed by the court, an event of default under the terms of the loan documents.

Stanton accelerated the debt. Burns and ISC claimed Stanton had failed to adequately give notice of his intention to accelerate the indebtedness, and that, therefore, acceleration was improper. Even with an event of default, an acceleration of maturity is improper unless there was either a proper notice of intent to accelerate maturity or a waiver of such a notice.

A negotiable instrument that is payable at a definite time may provide for the right of acceleration of the debt on default. Because acceleration of a debt is viewed as a harsh remedy, however, any such clause will be strictly construed. Texas law requires clear notice of intent to exercise acceleration rights, followed (if the debtor continues in default) by notice of actual acceleration.

On December 7, 2006, Stanton's attorneys sent a letter to ISC and Burns advising that default had occurred and that "Stanton will take all applicable enforcement action" against ISC and Burns.

To encourage the Bank to finance ISC's operations, Stanton had entered into a Subordination Agreement with the Bank, and that Agreement had been acknowledged by ISC and Burns. That Agreement specifically contained a definition of "Enforcement Action" as meaning “to initiate or to participate with others in any suit, action or proceeding against Borrower or any Guarantor to enforce payment or to collect all or any part of the Subordinated Indebtedness ... or the Senior Indebtedness ... or to accelerate the Subordinated Indebtedness ... or to accelerate the Senior Indebtedness (in the case of Creditor) or the Senior Indebtedness (in the case of the Bank).” Therefore, when Stanton gave notice of default and that he intended to take “all applicable enforcement actions,” that notice necessarily included the required notice of intent to accelerate the maturity of the ISC and Burns obligations to Stanton.
PART IV
GUARANTIES

James Clark, Inc. v. Vitro America, Inc., 269 S.W.3d 681 (Tex.App.—Beaumont 2008, no pet.). Both the credit agreement and the individual personal guaranty appear on a one-page pre-printed form. The top half of the page contains the terms of the agreement to extend credit to Clarks' Glass & Mirror for purchases from VVP America, Inc. The bottom half of the page contains an individual personal guaranty signed by Becky Clark. Mistakenly, the blank that was supposed to show the name of the primary obligor instead showed the name of the party extending credit. When she was sued on the guaranty, Becky argued that the guaranty does not state that Becky guaranteed the payment of an obligation owed by Clark Inc., but said she guaranteed obligations owed by the party extending credit.

Nonsense, said the court. In this case, there was certainly a mistake made in reducing the parties' agreement to writing. Of the two possible constructions of the contract, however, only one is reasonable. The single-page document reveals that the merchant agreed to sell merchandise to Becky's company on credit and that Becky agreed to guarantee payment. Read literally and without reference to its context, the payment Becky agreed to guarantee was a payment by one merchant entity to another. From the face of the document such a result is nonsensical.

The document shows that one party-the merchant (itself and through related entities)—was extending credit to one party only—Clark Inc. (itself or through an assumed name)—and one party-Becky—personally guaranteed payment of any debts that arose pursuant to the transactions under the credit agreement. Because the party mistakenly shown in the blank is a party extending credit, not a party receiving credit under the agreement, there is no reasonable interpretation of the contract under which ACI Distribution would be making a payment for Becky to guarantee. Because the only reasonable interpretation of the contract is that Becky guaranteed payment of debts incurred by Clark Inc. under the agreement, the trial court did not err in so construing the contract as a matter of law.

PART V
DEEDS AND CONVEYANCE DOCUMENTS

Gaut v. Daniel, 293 S.W.3d 764 (Tex.App.—San Antonio 2009, pet. denied). To be sufficient, a writing conveying title must provide within itself, or by reference to some other existing writing in existence at the time of the deed, the means or information by which the land being conveyed can be identified with reasonable certainty. This has been termed the “nucleus of description” theory. Under this theory, if the deed contains a “nucleus of description,” parol evidence may be introduced to explain the descriptive words in order to locate the land.

Extrinsic evidence may be used only for the purpose of identifying the property with reasonable certainty from the data contained in the contract, not for the purpose of supplying the location or description of the property.

The deed in question first generally references the Duval County surveys out of which the 28 acres can be found. None of these surveys are part of the record. The deed also notes the 28 acres as being out of a called 399.5 acre tract designated as Share No. 6, as set aside to Alice L. Garcia. It then references several surveys of the partitioned land from which the 399.5 acre tract was taken. Following that was a metes and bounds description which, among other things, failed to identify the specific tract that was its point of commencement, contained no means within the deed to locate the tract, and included no reference within the deed to any existing extrinsic writing which might assist in determining the location. A surveyor was able to plot the boundaries, but only in reliance upon external evidence that was not part of the record. The court thus held that the property description was insufficient.

PART VI
LEASES

Prudential Insurance Company of America v. Italian Cowboy Partners, Ltd., 270 S.W.3d 192 (Tex.App.—Dallas 2008, pet. pending). The Secchis wanted to expand their restaurant business. In late 1999 and early 2000, with the help of their real estate broker, the Secchis began to look for additional restaurant property. Hudson's Grill was a restaurant located in a building at Keystone Park Shopping Center. Keystone Park, as well as the Hudson's Grill building, was owned by Prudential. The Secchis' broker told them that Hudson's Grill was probably going to close and that the restaurant site might be coming up for lease. The Secchis met with the property manager and discussed the Hudson's Grill building. They entered into a letter of intent to lease the property and began negotiating the lease. Negotiations continued for about five months. At least seven different drafts of the lease were circulated. During this period of time, the Secchis visited the site on several occasions.

After the parties executed the lease, Italian Cowboy began remodeling the property. While it was
remodeling the building, several different persons told Italian Cowboy that there had been a sewer gas odor problem in the restaurant when it was operated by Hudson's Grill. One of the owners also personally noticed the odor. He told the property manager about it about the problem but continued to remodel. After Italian Cowboy was operational and opened for business, the sewer gas odor problem continued. Although Prudential attempted to solve the problem, the transient sewer gas odor remained the same. Eventually, the restaurant closed. Italian Cowboy then sued Prudential.

The first claims dealt with by the Court of Appeals were Italian Cowboys' common-law fraud claim, the statutory fraud claim, and the negligent misrepresentation claim. The trial court found that the property manager made the following statements to Italian Cowboy during lease negotiations: (a) The tenant was lucky to be able to lease the premises because the building on the premises was practically new and was problem-free; (b) No problems had been experienced with the Premises by the prior tenant; (c) The building on the Premises was a perfect restaurant site and that the tenant could get into the building as a restaurant site for next to nothing; and (d) given the property manager's superior and special knowledge, these matters were represented as facts, not opinions.

The trial court also found that the statements were false; that the property manager and Prudential knew that they were false; and that they intended for the tenant to rely upon them. Further, the trial court found that the Tenant relied on the statements and would not have entered the lease and executed the guaranty if the representations had not been made.

Prudential and the property manager argue that common-law fraud, statutory fraud, and negligent misrepresentation all have the common element of reliance and that the tenant disclaimed any reliance on representations not contained in the lease. The lease contained a statement that there were no representations not set out in the lease and also contained a merger clause.

Relying on Schlumberger Tech. Corp. v. Swanson, 959 S.W.2d 171 (Tex.1997), the court noted that the following elements will foreclose a claim of fraudulent inducement: (1) the parties were attempting to end a situation in which they had become embroiled in a dispute over the value and feasibility of the subject project, (2) highly competent and able legal counsel were involved in negotiating the release, (3) the parties were negotiating at arm's length, and (4) the parties were knowledgeable and sophisticated in business. Here, the parties were represented by counsel as well as real estate brokers both before and during the negotiations leading up to the signing of the lease and guaranty. The record also reveals that the parties to this arm's length transaction were sophisticated in dealings involving the leasing and the operation of restaurant properties, that several drafts of the lease were circulated, and that various changes were negotiated and made to both the lease and the guaranty.

When sophisticated business parties who have fully negotiated a contract and who have been represented by attorneys or other professionals in the field are dealing at arm's length, they should be able to enter a contract in which they effectively disclaim reliance, or in which they agree that there are no representations outside of the written contract, or in which they otherwise provide for merger. Such a rule will result in agreements with predictable results and liability limitations that are well-defined. In this negotiated, redrafted lease agreement the disclaimer and merger clauses must be considered to be a part of that negotiated agreement and not simply boilerplate as found by the trial court. Under such circumstances, sophisticated parties who are represented by counsel and other professionals certainly can bargain to have the details of any representations upon which they are relying inserted into the contract, rather than agreeing that there are none.

The court next dealt with Italian Cowboy’s claim of breach of the implied warranty of suitability. Here, there is no express waiver of the implied warranty of suitability. Rather, the parties rely upon the placement of repair responsibilities in support of their respective positions. Prudential and the property manager argue that the cause of the sewer odor problem was related to plumbing, ventilating, air conditioning, or some other mechanical installation. Prudential argues that, in accordance with the terms of the lease, the Tenant was required to make all repairs “foreseen or unforeseen” to the plumbing, ventilating, air conditioning, and “any other mechanical installations or equipment serving the Premises or located therein.” In its arguments, the tenant contends that Prudential and the property manager ignore findings of fact regarding problems with a grease trap that contributed to the sewer gas odor problem. They also argue that, because the grease trap was located in the “Common Area,” Prudential was obligated to repair it.

The court held as a matter of law that the lease placed the burden upon the Tenant to make any needed repairs, foreseen or unforeseen, to plumbing, heating, ventilating, air conditioning, and mechanical installations or equipment serving the premises. It went on to note that the subsequent tenant managed the odor problem by altering some of the ventilation pipes. The court also noted that, even if the grease trap,
located in the common area, was implicated in the problem, the implied warranty of suitability applies only to the premises, and does not apply to the common area.

The third claim made by the tenant was that the odor problem constituted a constructive eviction and breach of the covenant of quiet enjoyment. The court held that, for an act to constitute a breach of the covenant of quiet enjoyment, it must occur during the lease term. Here, the misrepresentations were all made before the lease began, so they could not be the basis of a constructive eviction claim.

**Garza v. CTX Mortgage Company, LLC, 285 S.W.3d 919 (Tex.App.-Dallas 2009, no pet.).** In a lawsuit related to a mortgage loan transaction, the Garzas alleged claims for breach of oral and written contract, fraud, fraud in the inducement, fraud in a real estate transaction, breach of fiduciary duty, conversion, negligence, gross negligence, nine separate violations of the Texas DTPA, negligent misrepresentation, misapplication of trust funds, breach of a trust relationship, and breach of the common law duty of care.

CTX argued that it had no liability to Garza for misrepresentation claims because those claims were precluded by the terms of the contract and CTX claimed, the entire relationship of the parties was established by the contract. The contract provision said: “Complete Agreement; Amendment. No party has made any promise or representation to any other that is not in the Loan Documents. The Loan Documents contain the complete agreement of the parties. This Loan Agreement may not be amended and no provision of it may be waived except by a writing signed by Lender.” CTX Mortgage contended that this clause “precludes and eliminates any prior or contemporaneous agreements which are inconsistent with the integrated agreement.”

The court agreed that a party’s disclaimer of reliance on representations, if the intent is clear and specific, can defeat claims for fraud, fraudulent inducement, and negligent misrepresentation, because reliance is a necessary element of each of those claims. However, the Texas Supreme Court in **Forest Oil Corp. v. McAllen, 268 S.W.3d 51, 56 (Tex.2008)** and **Schlumberger** expressly declined to adopt a per se rule that a disclaimer of reliance automatically precludes a fraudulent-inducement claim. The court enunciated factors which it considered important in making that determination: whether the contract was negotiated or boilerplate, whether the complaining party was represented by counsel, whether the parties dealt with each other at arms length, whether the parties were knowledgeable in business matters, and whether the release language was clear.

Based on this record, the court could not conclude that the Garzas disclaimed reliance on CTX’s alleged representations as a matter of law. Consequently, it concluded that summary judgment in favor of CTX Mortgage on the Garzas’ claims for fraud, fraudulent inducement, and negligent misrepresentation was improper.


Luccia exercised the option and the parties entered into a purchase contract; however, Luccia defaulted and failed to purchase the property. Ross kept the earnest money and Luccia continued as tenant of the property, paying rent.

Sometime later, Luccia again sought to purchase the property pursuant to the terms of the option. Ross declined to sell the property to Luccia, contending that a “new contract with new terms” would be necessary. Luccia responded to Ross’s refusal to sell by filing this suit for breach of contract, seeking the remedy of specific performance or, alternatively, damages. Ross counterclaimed seeking a declaration that Luccia had no right to exercise the option and also seeking damages for Luccia’s breach of contract for failing to meet the terms of the original Lease Agreement.

The parties dispute whether the option to purchase in the lease allowed Luccia more than one attempt to close the sale. In other words, the parties disagree whether the first Purchase Contract was the only time that the option to purchase could be exercised, or whether Luccia could again exercise the option to purchase during the period of time after the failed closing and the end of the lease.

Luccia contends that because the lease does not specify an exact time for the exercise of the option, it may be exercised at any time during the lease term, even though he defaulted on the first purchase contract. The court agreed because the plain terms of the agreement do not limit the number of times that Luccia can exercise the option to purchase the property, other than to require that the options be exercised during the term of the lease. The plain language of the lease agreement does not provide that the option offers a one-time-only chance to Luccia. The option expressly states “Anytime with credit on rents prorated.” The reference to the rents indicates the option was tied to the lease term. Unless the option contains provisions to the contrary, all that is required of the optionee is that he notify the optionor, prior to the expiration of the
option, of his decision to exercise the option. The Optionee thereafter has a reasonable time within which to complete the deal.

PART VII
VENDOR AND PURCHASER


When Mikey’s Houses made a jury demand, Bank of America moved to enforce the jury waiver. The trial court agreed that the waiver should be enforced and issued an enforcement order. Mikey’s Houses then filed an interlocutory appeal seeking to reverse the trial court’s enforcement order. The court of appeals reversed, holding that Bank of America did not meet its burden of producing prima facie evidence that the representatives of Mikey’s Houses knowingly and voluntarily waived their constitutional right to a jury trial. 232 S.W.3d at 147.

The court of appeals imposed this burden on Bank of America by inferring a presumption against contractual jury waiver from In re Prudential, 148 S.W.3d 124 (Tex.2004) where the Supreme Court cited to Brady v. United States, 397 U.S. 742, 748, 90 S.Ct. 1463, 1467, 25 L.Ed.2d 747 (1970), to recognize that the right to a trial by jury is a constitutional right. The Supreme Court said the court of appeals was wrong for two reasons: First, a presumption against waiver would incorrectly place the initial burden of establishing a knowing and voluntary execution on Bank of America, which is contrary to the rule that a conspicuous provision is prima facie evidence of a knowing and voluntary waiver and shifts the burden to the opposing party to rebut it. Second, a presumption against waiver would create an unnecessary distinction between arbitration and jury waiver clauses, even though the Supreme Court has previously said the rule should be the same for all similar dispute resolution agreements.

In holding that the waiver in this case was conspicuous, the court noted that the addendum which contained the waiver is only two pages long, and each of its twenty provisions are set apart by one line and numbered individually. Five of the twenty provisions included bolded introductory captions similar to the waiver provision in Prudential, and the “Waiver of Trial By Jury” caption is one of the five. Furthermore, the introductory caption is hand-underlined, as is the word “waiver” and the words “trial by jury” within the provision. This bolded, underlined, and captioned waiver provision is no less conspicuous than those contractual waivers the court has previously upheld in both and therefore serves as prima facie evidence that the representatives of Mikey’s Houses knowingly and voluntarily waived their constitutional right to trial by jury.

DiGiuseppe v. Lawler, 269 S.W.3d 588, 52 Tex. Sup. Ct. J. 29 (Tex. 2008). The purchase contract limited the remedies available to the parties in the event of a breach. In the event DiGiuseppe failed to close, Lawler’s “sole and exclusive” remedy was to retain the earnest money as liquidated damages, and he expressly waived any right to claim any other damages or specific performance from DiGiuseppe. In the event Lawler defaulted in performing his obligations under the contract for any reason other than DiGiuseppe’s default or a proper termination of the contract under its provisions, DiGiuseppe could choose between two remedies: (1) terminate the contract and receive a full and immediate refund of the earnest money, or (2) “seek to enforce” specific performance of the contract. DiGiuseppe also expressly waived any right to claim damages.

The case was ultimately tried to a jury and the parties’ breach of contract claims were submitted on broadform questions inquiring as to whether either party failed to comply with the contract. The jury answered favorably to DiGiuseppe that Lawler had failed to comply with the contract and that DiGiuseppe had not failed to comply. Although disputed at trial, no question was requested by either party or submitted to the jury with respect to specific performance or whether DiGiuseppe was ready, willing, and able to perform under the contract at the time he alleged the transaction should have closed. The trial court rendered a takenothing judgment against Lawler and granted DiGiuseppe specific performance of the purchase contract.

The court of appeals reversed the trial court’s order granting specific performance, holding that DiGiuseppe had failed to conclusively establish, or to request and obtain a finding of fact on, an essential element of his claim for specific performance that he was ready, willing, and able to perform under the terms of the purchase contract.

DiGiuseppe claimed that the purchase contract provided for the remedy of specific performance in the event of a breach by Lawler regardless of whether
DiGiuseppe obtained a finding of fact that he was ready, willing, and able to perform. The court held that the remedy provision at issue does not entitle DiGiuseppe to obtain specific performance merely upon a showing of a breach or default by Lawler. The provision at issue limits the available remedies to either (1) terminating the contract and receiving a refund of earnest money, or (2) seeking to enforce specific performance. It does not in any way alter the requirements for obtaining specific performance in the event DiGiuseppe decides to seek such a remedy.

An essential element in obtaining the equitable remedy of specific performance is that the party seeking such relief must plead and prove he was ready, willing, and able to timely perform his obligations under the contract. It is also a general rule of equity jurisprudence in Texas that a party must show that he has complied with his obligations under the contract to be entitled to specific performance.

A corollary to this rule is that when a defendant refuses to perform or repudiates a contract, the plaintiff may be excused from actually tendering his or her performance to the repudiating party before filing suit for specific performance. In such a circumstance, a plaintiff seeking specific performance is excused from tendering performance presuit and may simply plead that performance would have been tendered but for the defendant's breach or repudiation. This exception to the general rule - that actual tender of performance is a prerequisite to obtaining specific performance - is grounded in the notion that actual presuit tender of performance should be excused when it would be a useless act, an idle ceremony, or wholly nugatory. However, even when presuit tender of performance is excused, a plaintiff is still obligated to plead and prove his readiness, willingness, and ability to perform at relevant times before specific performance may be awarded.

As an alternative basis for relief, DiGiuseppe argued that the omitted jury finding as to his readiness, willingness, and ability to perform may be deemed found in his favor pursuant to Texas Rule of Civil Procedure 279. His theory was that specific performance was at least partially submitted to the jury in the form of a question regarding his compliance with the contract, and Lawler failed to object to the omission of a “ready, willing, and able” question. The court disagreed and held that a deemed finding under Rule 279 is not available here.

**Besteman v. Pitcock**, 272 S.W.3d 777 (Tex.App.—Texarkana 2008, no pet.). Besteman and the Pitcocks entered into a lease for two years with an option for the Pitcocks to purchase at the termination of the lease agreement. A condition precedent in the leases agreement to the Pitcocks' right to purchase was stated as follows: “90 days before the 24 month lease period expires, Lessee will notify Lessor of Lessee's intent to purchase said property.” The agreement also contained a provision that required all notices to be in writing, and stating when notices given by different means would be deemed received. The final sentence says that notices “delivered otherwise” than by certified mail effective upon actual receipt.

The Pitcocks went into possession of the tract of land under the lease agreement and made timely payments of the lease installments. However, they failed to provide any written notice of their intention to exercise the option to purchase until some forty-nine days after the time specified in the contract. When the Pitcocks did send written notice by certified mail, it was not retrieved by the Bestemans and the notice was returned, undelivered.

Almost immediately after the notice was returned to them, the Pitcocks filed suit for specific performance, declaratory judgment, and breach of contract. In their petition, the Pitcocks alleged that they had provided unequivocal notice of their intention to exercise the option to purchase well before the required time and that they had, in reliance upon the option to purchase, invested substantial sums in improving the property. The Bestemans responded with a request for an award of reasonable rentals from the time of the termination of the two-year lease until the time of recovery of the property from the Pitcocks.

The Pitcocks maintain that although the contract states that all notices required under the agreement be in writing and delivered by certified mail, the paragraph concerning notices ends with the statement that “Notices delivered otherwise will be effective upon receipt.” The Pitcocks insist that since the contract permits notices to be delivered “otherwise,” that means that the notice could be delivered orally rather than in writing; in other words, the Pitcocks say that they effected notice by oral communication and that this was sufficient notice to invoke the option to purchase.

The Pitcocks also rely upon the equitable doctrine of disproportionate forfeiture (defined later) as a defense against the claims that they failed to conform to the ninety-day notice requirement.

It is a well-settled principle that strict compliance with the provisions of an option contract is required. Except in rare cases of equity, acceptance of an option must be unqualified, unambiguous, and strictly in accordance with the terms of the agreement. An option is unilateral. It imposes no liability on the optionee unless and until he exercises the option according to its terms. Acceptance of an option, unless excused on
equitable grounds, must be unqualified, unambiguous, and strictly in accordance with its terms. Any failure to exercise an option according to its terms, including an untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. Consequently, an acceptance that does not comply with the option's terms, unless it is accepted by the optionee or the optionor, binds neither the optionee nor the optionor.

The Bestemans maintain that written notice of the intent to exercise the option was required by the agreement. The Pitcocks seize on the final sentence of paragraph 18 and the use of the words “delivered otherwise” as permitting oral notice of the intent to exercise the option in lieu of a written notice. This interpretation would completely negate the first sentence of the paragraph, which plainly states that all notices “must be in writing.” Therefore, to give those words the meaning urged by the Pitcocks would violate one of the principal tenets of contract construction. It is plain that the “delivered otherwise” wording of the contract pertains to the manner of delivery of the notice which (as is stated in another part of the contract) “must be in writing.” To find otherwise, the writing requirement would mean nothing. Impliedly, the trial court determined that the contract was ambiguous; it is not.

Transcontinental Realty Investors, Inc. v. John T. Lupton Trust, 286 S.W.3d 635 (Tex.App.—Dallas 2009, no pet.). The original closing date under the contract between the Trust as seller and TCI as buyer was June 30, 2002. It was extended by written agreement several times. There was also an oral agreement to extend the closing date for two weeks. After the oral agreement to extend, the parties signed another written amendment to the contract, reinstating it and extending the closing yet again. This amendment required additional earnest money and if the additional earnest money was not deposited, the fourth amendment would be null and void. The earnest money got to the title company after the deadline and was rejected. The Trust sold the property to another buyer.

TCI claimed that, since the amendment was rendered void by its terms, the oral agreement was still in existence and should have allowed TCI to extend the closing date. The court disagreed. The oral agreement was the result of negotiations preceding the execution of the amendment and negotiations preceding a written contract should not displace the terms of the written contract. The parties’ execution of a written agreement, i.e., the amendment in this case, presumes that all prior negotiations and agreements related to the transaction have been merged into it. The written agreement will not be added to, varied, or contradicted by parol evidence. Therefore, the oral extension agreement merged into the written amendment.

PART VIII BROTHERS

ERA Realty Group, Inc. v. Advocates for Children and Families, Inc., 267 S.W.3d 114 (Tex.App.—Corpus Christi—Edinburg 2008, pet. denied). ERA’s brokerage agreement with Advocates contained the following provision:

“The parties agree that [ERA] will receive a commission calculated as follows: (1) 6.00% of the gross sales price if [Advocates] agrees to purchase property in the market area, and (2) if [Advocates] agrees to lease property in the market a fee equal to (check only one box) [ ] ___% of one month's rent or [ ] 6% of all rents to be paid over the term of the lease.” As to the lease provisions, neither box was checked but the number “6” was typed into the final blank space.

Advocates entered into a twelve year lease with College Church of Christ in Victoria County on July 8, 2005, without ERA’s participation. ERA subsequently learned of Advocates' lease and filed a breach of contract suit seeking its purported commission and attorney's fees. Advocates moved for traditional summary judgment on the grounds that the agreement between the parties did not create a duty for Advocates to pay ERA a commission when Advocates leased property. The rationale for Advocates' argument was that the terms of the agreement did not obligate Advocates to pay a commission to ERA on a lease because an appropriate box was not checked. ERA responded to Advocates' summary judgment motion by arguing that the contract evidenced an intent to pay ERA commission on a lease because the number “6” was typed into an appropriate blank, even though no box was checked.

The primary goal in interpreting a contract is to give effect to the written expression of the parties' intent. To determine the parties' intent, courts must consider the entire writing in an effort to harmonize all the provisions of the instrument. Parol evidence is not admissible to render a contract ambiguous; however, the contract may be read in light of the surrounding circumstances to determine whether an ambiguity exists.

Not every difference in the interpretation of a contract creates an ambiguity. The mere disagreement over the meaning of a particular provision in a contract
does not make it ambiguous. In order for an ambiguity to exist when the parties advance conflicting interpretations, both interpretations must be reasonable. If a contract is found ambiguous, it must be construed strictly against the author and in a manner so as to reach a reasonable result that is consistent with the intent of the parties.

The agreement, therefore, can be read in one of two ways: (1) as providing for a lease commission because the number “6” is typed, or (2) as making no provision for a lease commission because no box is checked. ERA argues that the number “6” is a specific provision that conflicts with the “general provision” reading “check only one box.” The court disagreed. What ERA considers a “general provision” is in fact an instruction that ERA did not follow. The omission of a check and the number “6” in the lease provision, are properly characterized as scrivener errors rather than what ERA terms “specific provisions.” Because an ambiguity exists and ERA completed the form, the court strictly construed the agreement against ERA.

**Duncan v. F-Star Management, L.L.C.** 281 S.W.3d 474 (Tex.App.-El Paso 2008, pet. denied). The broker’s letters identified the property in question only as “Operation Campus View, Socorro, Texas.” To comply with the Real Estate License Act’s requirements, a written commission agreement must provide a description of the real estate that would satisfy the statute of frauds. In other words, the agreement must furnish, either within itself or by reference to some other existing document, the means or data by which the real estate may be identified. A commission agreement does not have to contain a metes-and-bounds property description to be enforceable, but it must furnish the data to identify the property with reasonable certainty.

Parol evidence may be used to clarify or explain the agreement, but not to supply the agreement’s essential terms. For example, a contract for the sale of “my ranch of 2200 acres” satisfied the statute of frauds where extrinsic evidence showed that the grantor owned one ranch, which contained 2200 acres. However, a commission agreement for the sale or lease of an unidentified portion of a larger, identifiable tract is not sufficient.

The court held that the broker’s letter was not an enforceable commission agreement because it doesn’t sufficiently identify the property and doesn’t refer to another writing that does. The broker claimed that the description in the lease which resulted from the commission letter was sufficient, but the court noted that letter does not specifically refer to the lease.

The court also held that the description of property as Operation Campus View was not used to refer to a single tract of land; rather it was used to refer to a project of consolidating warehouse facilities. By itself, the term could not connote a specific tract of land with specific acreage.

**PART IX**

**EASEMENTS**

**Centerpoint Energy Houston Electric LLC v. Bluebonnet Drive, LTD.** 264 S.W.3d 381 (Tex.App.—Houston [1st Dist.] 2008, pet. pending). The express easement conveyed to CenterPoint, as HL&P’s successor, grants a right-of-way not only for “electric transmission and distributing lines consisting of variable numbers of wires,” but also for “all necessary and desirable appurtenances.” The easement then specifies that “necessary and desirable appurtenances” includes “towers or poles made of wood, metal or other materials, telephone and telegraph wires, props and guys.” The plain meaning of these terms conveys the right to install “appurtenances” as “additions” or “attachments” when “necessary and desirable.” The plain meaning of these terms further specifies that “telephone and telegraph wires” are among the appurtenances that may be installed when necessary and desirable.

No rights pass to the easement holder by implication except those that are “reasonably necessary” to enjoy the rights that the easement grants expressly. Accordingly, if the grant expressed in the easement cannot be construed to apply to a particular purpose, a use for that purpose is not allowed. The common law permits some flexibility in determining an easement holder’s rights because the manner, frequency, and intensity of use of an easement may change over time to accommodate technological development. Changes must, however, fall within the purposes for which the easement was created, as determined by the grant’s terms. Accordingly, an express easement encompasses only those technological developments for which the easement was granted.

The court held that the express terms of the CenterPoint easement encompassed installation and use of cellular transmission within the easement.

**PART X**

**CONDOMINIUMS AND OWNERS ASSOCIATIONS**

construction defects. Stanford moved to compel arbitration based on arbitration clauses contained in all of the deeds from the developer to the individual condo purchasers. The trial court held that the Owners Association was not subject to the arbitration provisions in the individual deeds, and refused to compel arbitration.

It is undisputed that there is an arbitration agreement between Stanford and 27 of the individual homeowners. The issue is whether the arbitration agreements can be enforced against the Association, a nonsignatory to the agreements. Courts have recognized six theories that may bind nonsignatories to arbitration agreements: (1) incorporation by reference, (2) assumption, (3) agency, (4) alter ego, (5) equitable estoppel, and (6) third-party beneficiary.

Stanford argues that the fifth theory for binding non-signatories-equitable estoppel-applies in this case. Specifically, Stanford argues that because the Association has filed suit based, in part, on the contractual terms found in the homeowners' earnest money contracts, it is estopped from denying the applicability of the arbitration provision in the same contract. The court agreed.

A litigant who sues based on a contract subjects him or herself to the contract's terms. When the nonsignatory asserts claims identical to the signatories' contract claims, all must be arbitrable. Additionally, claims must be brought on the contract and arbitrated if liability arises solely from the contract or must be determined by reference to it. If a nonsignatory pursues a claim based on the contract of another, and the contract contains an arbitration clause, then the nonsignatory must pursue all claims-tort and contract-in arbitration.

In this case, the Association alleged in its petition that Stanford failed to comply with the express and implied contractual duties which they owed to owners. The only contracts giving rise to any express or implied contractual duties in this case are the earnest money contracts between Stanford and the individual homeowners. The Association also alleged that Stanford breached express and/or implied warranties. The only express warranties are contained in the individual homeowners' earnest money contracts. Because the Association has filed suit seeking the benefits of the earnest money contracts, it cannot deny the applicability of the arbitration agreements in the same contracts.

In addition to the claims based directly “on the contracts” of the individual homeowners, the Association also included DTPA claims, fraud, and intentional or negligent misrepresentation claims, and negligent design, construction, and supervision claims. However, because the Association chose to allege contract claims that are subject to arbitration clauses, and because the arbitration clauses in this case are broad enough to cover both contract and tort claims, the Association must also arbitrate the intertwined tort claims.

PART XI
LAND USE PLANNING, ZONING, AND RESTRICTIONS

Ski Masters of Texas, LLC v. Heinemeier, 269 S.W.3d 662 (Tex.App.—San Antonio 2008, no pet.). In 1956, Carlson platted and subdivided a 6.76 acre property into ten tracts of land of varying acreages. The plat was not recorded. Between 1957 and 1972, Carlson sold the ten tracts of land to various people.

The first lot Carlson sold had a residential only restriction and contained the following provision: Grantor also, by this instrument subjects the remainder of the 6.76 acres of land with these same restrictions, conditions and options, whether embodied in future instruments of conveyance or not. The deeds by which Carlson conveyed seven of the remaining nine original tracts reference and incorporate the restrictions contained in the Fleming Deed. Although the incorporating language is not identical, each of the seven deeds reference the volume and page number of the Fleming Deed and contain language similar to the following: “It is expressly understood that this conveyance is subject to the same restrictions, conditions, options and exceptions set out and recorded in Volume 311, Page 208 of the Guadalupe County deed records [i.e., the Fleming Deed].” Carlson did not include such language in the deeds conveying tracts 2 and 4.

In June 2004, Ski Masters purchased property including portions of tracts 4 and 5, as well as a very small amount of adjacent land that was not included in the original 6.76 acre tract. The deed by which Ski Masters purchased this property states that the conveyance is subject to the restrictive covenants set out in the Fleming Deed. Moreover, Ski Master and its realtor were aware of the deed restrictions at the time of purchase.

Ski Master wanted to operate a ski school on the property. The other residents sued to enforce the restrictions and Ski Master sought a declaration that the property was not subject to any valid restrictions enforceable by the residents.

Ski Masters asserts that the residents do not have standing because there was no overall development plan for the 6.76 acre tract, and even if there was such a plan, it was abandoned. The residents respond that
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Evidence supports the trial court's findings that Carlson intended a "general plan or scheme" that the 6.76 acre tract be a residential subdivision and that this general plan or scheme has not been abandoned or waived.

A restrictive covenant is a contractual agreement between the seller and the purchaser of real property. In ordinary circumstances, a restrictive covenant is enforceable only by the contracting parties and those in direct privity of estate with the contracting parties.

Circumstances do exist, however, in which a restrictive covenant may be enforced by someone other than the grantor or grantee. For example, a property owner may subdivide property into lots and create a subdivision in which all property owners agree to the same or similar restrictive covenants designed to further the owner's general plan or scheme of development. Under these circumstances, each purchaser within the subdivision is assumed to benefit from the restrictions and each has the right to enforce the restrictions.

The standing of a property owner within a subdivision to enforce a restrictive covenant against another similarly situated property owner does not turn on whether the deed of the owner against whom enforcement is sought contains the restriction. If the deed of the property owner against whom enforcement of the restriction is sought contains the restriction, standing is based on an implied mutuality of covenants among the various purchasers within the subdivision.

If, on the other hand, the deed does not contain the restriction, standing is based on application of the doctrine of implied negative reciprocal easement. The doctrine of implied reciprocal negative easement applies when a developer sells a substantial number of lots within a subdivision by deeds containing the restrictive covenant, and the party against whom the restriction is sought to be enforced has notice of the restriction but the deed did not actually contain the restriction. The court held that the residents had standing.

Ski Masters argues that, as a matter of law, there was no scheme or plan, noting that (1) Carlson conveyed tracts 2 and 4 without the residential-only restriction, (2) the plat referenced in the restriction was never recorded, and (3) the ten original tracts have been re-subdivided in significant ways.

The argument that the existence of a general plan or scheme was negated by the conveyance of two tracts without the restriction at issue was raised and rejected in Hooper v. Lottman, 171 S.W. 270 (Tex.Civ.App.-El Paso 1914, no writ). The Hooper court noted that uniformity of restrictions and deviation from that uniformity are evidentiary matters only, and that "there may be departures from the usual restrictions in individual cases without destroying the integrity of the scheme of development as a whole.

Likewise, Carlson's failure to record the plat is not dispositive of the existence of a general scheme or plan. The parties seeking to enforce the restrictive covenant in that case, like the Residents here, did not rely exclusively on unrecorded plat, but presented other evidence to establish the existence of general plan or scheme.

Finally, Ski Master failed to provide any case-law support for his proposition that the re-subdivision of the property somehow affected the residential scheme.

PART XII
MISCELLANEOUS

Intercontinental Group Partnership v. KP Home Loan Star, L.P., 295 S.W.3d 650, 52 Tex. Sup. Ct. J. 1204 (Tex. 2009). A provision in the contract for attorneys' fees read as follows: “If either party named herein brings an action to enforce the terms of this Contract or to declare rights hereunder, the prevailing party in any such action, on trial or appeal, shall be entitled to his reasonable attorney's fees to be paid by losing party as fixed by the court.” “Prevailing party” was not defined.

KB sued Intercontinental for breach of contract, seeking damages, specific performance, injunctive relief, and attorneys’ fees. It did not sue for declaratory judgment. At trial, KP sought only lost profits damages for Intercontinental’s breach. The jury found that Intercontinental had breached the contract, but found $0 damages. Both parties then sought attorneys’ fees as the “prevailing party.”

Under the so-called American Rule, litigants' attorney's fees are recoverable only if authorized by statute or by a contract between the parties. Chapter 38 of the Texas Civil Practice and Remedies Code provides for attorneys’ fees in wording that is similar to the contract provision in this case. “A person may recover reasonable attorney's fees from an individual or corporation, in addition to the amount of a valid claim and costs, if the claim is for ... an oral or written contract.”

The Supreme Court has previously held that, before a party is entitled to fees under Chapter 38, the party must prevail on a cause of action for which attorneys’ fees are recoverable and must recover damages. If that rule is applied in this case, KB could not recover damages. However, the court said the rule and Chapter 38 are not controlling here. Parties are free to contract for a fee-recovery standard either looser or stricter than Chapter 38’s, and they have done so here. As KB points out, Chapter 38 permits recovery
of attorney's fees “in addition to the amount of a valid claim,” while nothing in the contract expressly requires that a party receive any “amount” of damages. The triggering event under the contract is that a party prevail in an action “to enforce the terms of this Contract or to declare rights hereunder....” The question remains, however: what does “prevailing party” mean under the contract?

It seems beyond serious dispute that KB achieved no genuine success on its contract claim. Whether a party prevails turns on whether the party prevails upon the court to award it something, either monetary or equitable. KB got nothing except a jury finding that Intercontinental violated the contract. It recovered no damages; it secured no declaratory or injunctive relief; it obtained no consent decree or settlement in its favor; it received nothing of value of any kind, certainly none of the relief sought in its petition. No misconduct was punished or deterred, no lessons taught. KB sought over $1 million in damages, but instead left the courthouse empty-handed: “That is not the stuff of which legal victories are made.” Nor did the outcome materially alter the legal relationship between KB Home and Intercontinental.

A zero on damages necessarily zeroes out “prevailing party” status for KB.

KB argues that it should nonetheless recover attorney's fees because it sued to “declare rights” under the contract and prevailed by obtaining a jury verdict that Intercontinental breached the contract. The court disagreed. Neither law nor logic favors a rule that bestows “prevailing party” status upon a plaintiff who requests $1 million for actual injury but pockets nothing except a jury finding of non-injurious breach; to prevail in a suit that seeks only actual damages-compensation for provable economic harm—there must be a showing that the plaintiff was actually harmed, not merely wronged.

If KB had brought its breach-of-contract case and obtained favorable answers on the same “failure to comply” questions, but the jury also found that an affirmative defense barred KB's claim, a take-nothing judgment in favor of Intercontinental would have been rendered. There would be no dispute that KB had not prevailed, despite jury findings that Intercontinental breached. No rational distinction exists between that scenario and the one before the court. In both, the end result is a take-nothing judgment with no meaningful judicial relief for KB. Its only “relief” in either case is the gratification that comes with persuading a jury that Intercontinental behaved badly. But vindication is not always victory. However satisfying as a matter of principle, “purely technical or de minimis” success affords no actual relief on the merits that would materially alter KB's relationship with Intercontinental. Accordingly, KB, while perhaps a “nominal winner” in convincing the jury that it was “wronged,” cannot be deemed a “prevailing party” in any non-Pyrrhic sense.

If KB “lost” by receiving no damages does that mean Intercontinental “won” by remitting no damages? The court could not reach this question if it was not properly presented, and it was not. Intercontinental neither preserved the issue nor presented any evidence (either before, during, or after trial) regarding its attorney's fees for defending KB's breach-of-contract claim. This failure waives any right to recovery.

The dissent accused the majority of ignoring the contract's language in order to reach an easy-to-apply answer.

“Nothing could be further from the truth,” said the majority in response. Since the contract leaves “prevailing party” undefined, the court must do its best to effectuate the parties' intent. The most sensible interpretation is that a plaintiff prevails by receiving tangible relief on the merits.

Despite what the dissent contends, the court is not saying a plaintiff must recover a money judgment in every breach-of-contract action. Quite the opposite. The dissent cites a variety of situations where the majority would agree the plaintiff would “prevail”: when the plaintiff obtains rescission of the contract, specific performance, an injunction, or a declaratory judgment. Today's decision is not grounded on the fact that KB received no money damages, but rather on the fact that KB received nothing at all.