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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 489 S.W.3d and Supreme Court opinions released through November 10, 2016.

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

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

This and past Case Law Updates are available at our website cwrwlaw.com.
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PART I
MORTGAGES AND FORECLOSURES

*Bauder v. Alegria*, 480 S.W.3d 92 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Property Code § 51.002(b) requires that a notice of foreclosure be served by certified mail addressed to the debtor’s last known address. If the property is a borrower’s residence, the notice must be sent to the borrower’s residence address. Property Code § 51.002(d). Here, the notice address for the borrower in the loan documents was 704 Roosevelt Street. Several default or payment reminders were sent to that address. In May of 2013, the lender sent a Notice to Cure to the Roosevelt address. Before sending it, he sent the borrower a text message stating that he’d heard she sold the Roosevelt property and also stating that he assumed that her address at 1825 Neuman Street was her primary residence. There were also text messages for an extended period from the borrower for the lender to pick up payments at the Neuman address. A month later, the lender sent a Foreclosure Notice to the Roosevelt address, but none was sent to the Neuman address. The trustee foreclosed.

The borrower sued to set aside the foreclosure, claiming that she did not receive proper notice. The trial court set the foreclosure aside, finding that the lender had reasonable notice of her change of address and that notice was sent to the wrong address.

The lender argued that, because the Roosevelt address was shown in the deed of trust, the borrower was required to give written notice of a change of address. The deed of trust was silent as to the obligation to give a notice of change of address.

The court held, based upon the texting back and forth regarding the Neuman address, that the last known address of borrower as shown by the lender’s records was the Neuman address.

*Lamell v. OneWest Bank*, FSB, 485 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Lamell refinanced his home. After borrowing it, servicing was transferred to IndyMae, a division of OneWest.

Lamell protested the property tax on his home. He did not pay the contested portion of the taxes, but OneWest advanced the funds to pay these and increased Lamell’s payments to cover the costs. Lamell sued HCAD and the Harris County Tax Assessor-Collector. He stopped paying on his mortgage and when OneWest threatened foreclosure, he added OneWest to the lawsuit.

Among other things, Lamell challenged the assignment of his loan to OneWest and the securitization of the loan. The court held that Lamell had standing to make the challenges. A homeowner's interest in the title to his property gives the homeowner a sufficient justiciable interest to advance arguments challenging the deed of trust.

Lamell asserts that the deed of trust is void because it was securitized in the mortgage-backed trust in violation of the terms of the Pooling and Servicing Agreement that governs the trust. In particular, Lamell asserts that the deed of trust is void because it was not assigned to the trust before the trust's start-up date and because there is no evidence that the deed of trust was transferred into the trust by the depositor. Even presuming for the sake of argument that the deed of trust was placed into the trust in violation of trust's terms, Lamell has not cited and the court did not find any authority holding that the breach of the securitization agreement renders the deed of trust void. Therefore, Lamell's argument that the deed of trust is void does not show that the trial court erred in granting summary judgment as to his fraud claim.

Lamell also asserts that OneWest, as the servicer of the mortgage, cannot foreclose because OneWest did not prove its status as
owner and holder of the note. However, among other things, the court held that it need not address Lamell's other complaints regarding the note because OneWest did not need to be the owner or holder of the note to foreclose since OneWest was acting on behalf of the CSMC Trust, which held the deed of trust. Non-judicial sales of real property under contract liens are governed by Chapter 51 of the Texas Property Code. Under Section 51.0025, a mortgagee or a mortgage service provider may conduct foreclosure proceedings without proving its status as the owner and holder of the note.

Calvillo v. Carrington Mortgage Services, 487 S.W.3d 626 (Tex.App.-El Paso 2015, pet. denied). On December 9, the law firm retained by Carrington sent the Calvillos a notice of acceleration and a foreclosure notice. The notice was posted and filed around December 12. The notice said that one or more of the substitute trustees named in it would conduct the foreclosure sale. The notice letter was not picked up by the Calvillos.

On December 21, an appointment of substitute trustees was executed which authorized the persons named in the foreclosure notice to act as substitute trustees. The foreclosure was held January 3 of the following year.

After the foreclosure, the Calvillos sued, among other things that the required 21-day notice of foreclosure had not been given. They didn’t dispute that the notice letter was dated December 9, but claimed it was untimely because the substitute trustees named in it were not appointed until December 21, which was only 12 days before the foreclosure.

Although, as a general rule, a substitute trustee has no power to act prior to his appointment, it has long been settled in Texas that when a substitute trustee signs and posts a notice prior to the substitute trustee's appointment, the subsequent post-appointment acts of the substitute trustee have the effect of ratifying and affirming his pre-appointment acts. Here, the instrument appointing the substitute trustees, which was executed on December 21, was designated to be effective as of December 12. Consequently, the substitute trustee's actions in issuing the notices of foreclosure were ratified by the subsequent appointment, and thus the notices of foreclosure sale were timely. Accordingly, the trial court did not err in granting a directed verdict.

PART II
HOME EQUITY LENDING

Garofolo v. Ocwen Loan Servicing, L.L.C., No. 15-0437 (Tex. May 20, 2016). Garofolo borrowed a home equity loan. After Ocwen became the holder, Garofolo paid off the loan. A release of lien was recorded by Ocwen, but Garofolo did not receive a release of lien in recordable form as required by her loan documents. She notified Ocwen, but still didn't get the release. After sixty days, Garofolo sued for violations of the home equity lending provisions of the Texas Constitution, seeking forfeiture of all principal and interest paid on the loan.

Both the release-of-lien and forfeiture provisions of Garofolo's loan are among the terms and conditions the Texas Constitution requires of foreclosure-eligible home-equity loans. Garofolo therefore argues that Ocwen's failure to deliver the release of lien amounted to a constitutional violation for which a constitutional forfeiture remedy is appropriate. And because the release-of-lien and forfeiture provisions were incorporated into Garofolo's loan, she alternatively argues forfeiture is a remedy available through her breach-of-contract action. Because her constitutional claim "raises an important issue of Texas constitutional law as to which there is no controlling Texas Supreme Court authority, and the authority from the intermediate state appellate courts provides insufficient guidance," the Supreme Court accepted the following two certified
questions from the Fifth Circuit:

“(1) Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

“(2) If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?"

Section 50(a) does not constitutionally guarantee a lender's post-origination performance of a loan's terms and conditions. From a constitutional perspective, compliance is measured by the loan as it exists at origination and whether it includes the terms and conditions required to be foreclosure-eligible. Nothing in Section 50 suggests that a loan's compliance is to be determined at any time other than when it is made.

A lender that includes the terms and conditions in the loan at origination but subsequently fails to honor them might have broken its word, but it has not violated the constitution. This is not to say the constitution is unconcerned with a lender's post-origination performance of the loan's terms and conditions. On the contrary, the constitution prescribes a harsh remedy through forfeiture, a remedy previously called “Draconian.”

If Ocwen sought to foreclose on Garofolo's homestead after she became delinquent in her payments, she could stand on the constitutional right to freedom from forced sale if her loan failed to include the release-of-lien requirement or forfeiture remedy. But that did not happen. Garofolo made timely payments and satisfied the balance in full. Ocwen never sought to foreclose, and there is no constitutional violation or remedy for failure to deliver a release of lien. Section 50(a) simply has no applicability outside foreclosure.

In bringing a breach-of-contract claim, Garofolo has pleaded an appropriate cause of action for relief from a lender's post-origination failure to honor the terms and conditions, constitutionally mandated or not, of a home-equity loan. Her loan incorporates both constitutional provisions at issue in this case: the requirement to deliver a release of lien and the forfeiture remedy. Garofolo acknowledges she has not suffered any damages from Ocwen's failure to deliver the release but argues she need not suffer any to access a contracted-for forfeiture remedy that is not contingent on proof of actual damages.

Section 50(a)(6)(Q)(x) provides for forfeiture of principal and interest if the lender fails to comply with its obligations under the extension of credit and fails to correct the failure within 60 days after notice from the borrower and provides six corrective measures the lender can undertake. Ocwen forfeiture is simply inapplicable here because none of the six corrective measures addresses the failure to deliver a release of lien. Garofolo, though, argues that this sixth and final of the measures could have been done. That would be to refund her $1,000 and offer to refinance her loan. But, noted the court, there was nothing to refinance—Garofolo had already paid off her loan—and a $1,000 payment would not buy her a document only Ocwen can provide.
The terms and conditions required to be included in a foreclosure-eligible home-equity loan are not substantive constitutional rights, nor does a constitutional forfeiture remedy exist to enforce them. The constitution guarantees freedom from forced sale of a homestead to satisfy the debt on a home-equity loan that does not include the required terms and provisions—nothing more. Ocwen therefore did not violate the constitution through its post-origination failure to deliver a release of lien to Garofolo. A borrower may seek forfeiture through a breach-of-contract claim when the constitutional forfeiture provision is incorporated into the terms of a home-equity loan, but forfeiture is available only if one of the six specific constitutional corrective measures would actually correct the lender's failure to comply with its obligations under the terms of the loan, and the lender nonetheless fails to timely perform the corrective measure following proper notice from the borrower. If performance of none of the corrective measures would actually correct the underlying deficiency, forfeiture is unavailable to remedy a lender's failure to comply with the loan obligation at issue. Accordingly, the court answered "no" to both certified questions.

The Texas Constitution allows a home-equity lender to foreclose on a homestead only if the underlying loan includes specific terms and conditions. Among them is a requirement that a lender deliver a release of lien to the borrower after a loan is paid off. Another is that lenders that fail to meet their loan obligations may forfeit all principal and interest payments received from the borrower.

Wood v. HSBC Bank USA, N.A., No.14-0714 (Tex. May 20, 2016). The Woods borrowed a home equity loan. Nearly 8 years later, the Woods notified the note holder that the loan did not comply with the Texas constitution in several respects, including that the closing fees exceeded 3% of the loan amount. The Woods sued the lender, seeking to quiet title and asserting claims for constitutional violations, breach of contract, fraud, and a declaratory judgment that the lien securing the home-equity loan is void, that all principal and interest paid must be forfeited, and that the Woods have no further obligation to pay.

The Woods moved for summary judgment, arguing that the lien is void because the evidence shows as a matter of law that the closing fees exceeded 3% and the Lenders did not cure after proper notice. The Lenders also moved for summary judgment on traditional and no-evidence grounds, asserting in pertinent part that the lien is voidable, not void, and that the statute of limitations barred all claims. The trial court granted summary judgment in favor of the lender.

On appeal, the only issue raised by the Woods was whether their claims based on constitutional noncompliance, including claims to quiet title and for forfeiture, are subject to a statute of limitations. The court of appeals affirmed, holding that liens securing constitutionally noncompliant home-equity loans are voidable and that the residual four-year statute of limitations applied to the Woods' claims, accruing from the date of closing.

A lien securing a constitutionally noncompliant home-equity loan is not valid before the defect is cured. The Supreme Court therefore conclude that no statute of limitations applies to an action to quiet title on an invalid home-equity lien.

Under the common law, a void act is one which is entirely null, not binding on either party, and not susceptible of ratification. When an instrument is void, a quiet-title action can be brought at any time to set it aside. However, when an instrument is voidable, a four-year statute of limitations applies to actions to cancel it.

A plain reading of the Constitution necessitates a finding that liens securing
noncompliant home-equity loans are not valid before the defect is cured. Holding otherwise would contravene section 50(c)'s plain language. Section 50(c) dictates that no lien on a homestead "shall ever be valid" unless it secures a debt that meets section 50(a)(6)'s requirements. Such a lien is made valid by the lender's compliance with a Section 50(a)(6)'s cure provisions. Here, the lender chose not to cure after being given notice, but the starting point is the same: the lien is not valid until the defect in the underlying noncompliant loan is cured.

In any event, the text of the Constitution and our decision in Doody do not support a holding that liens securing constitutionally noncompliant home-equity loans are merely voidable. A voidable lien is presumed valid unless later invalidated, while Section 50 contemplates the exact opposite: noncompliant liens are invalid until made valid. Holding otherwise would essentially permit lenders to ignore the Constitution and foreclose on the homesteads of unwitting borrowers who do not realize that their home-equity loans violate the Constitution.

The Woods did not fare as well in their claim for forfeiture. Relying on Garofolo, which held that section 50(a) does not create substantive rights beyond a defense to a foreclosure action on a home-equity lien securing a constitutionally noncompliant loan and that forfeiture is not a constitutional remedy.

Steptoe v. JPMorgan Chase Bank, N.A., 464 S.W.3d 429 (Tex.App.-Houston [1st Dist.] 2015, no pet.). Steptoe defaulted on his home equity loan. The Bank filed suit seeking an expedited non-judicial foreclosure of its lien. The suit was dismissed by the Bank when it determined its notice of default was deficient. Steptoe then filed suit alleging that the home equity loan violated the constitution. The action was removed to federal court, which entered a take-nothing judgment in favor of the Bank.

The Bank then filed another suit for an expedited foreclosure. Steptoe claimed that the Bank had waived its right to foreclose because it had failed to counterclaim for foreclosure in the federal suit. The court ruled in favor of the Bank.

On appeal, Steptoe continues to assert that the compulsory counterclaim rule bars the Bank’s foreclosure claim in this suit because Bank failed to pursue foreclosure as a counterclaim.

When, as in this case, the security instrument in a home-equity loan contains a power of sale provision, the lender has a choice of remedies. Under these circumstances, the lender may choose to file a claim for judicial foreclosure, but Rule of Civil Procedure 736 furnishes another remedy to the lender. This Rule provides the procedure for obtaining a court order to allow foreclosure of a lien containing a power of sale in the security instrument, including a lien securing a home equity loan. Thus, a home-equity lender, who has contracted for the right of non-judicial foreclosure under a power of sale provision, may choose to pursue the special procedure found in Rule 736 to obtain an order allowing it to proceed with a non-judicial foreclosure under the Property Code.

Rule 736 does not contemplate an ordinary lawsuit. As its name suggests, Rule 736 provides a faster, more streamlined alternative to judicial foreclosure. A lender initiates the "proceeding" by filing an "application," not an original petition, and the borrower may file a "response," not an original answer. Only one issue may be decided under rule 736: i.e., the right of the applicant to obtain an order to proceed with foreclosure under the security instrument and the Property Code. The rule contemplates a single hearing at which the district court must determine whether the applicant has satisfied its burden to prove the grounds for the granting of the order sought in the application; there is no provision for any other determination to be
made by a factfinder. Although not expressly addressed by Rule 736, it is evident that a Rule 736 proceeding cannot be brought as a counterclaim in a borrower's suit against the lender.

Were the court to hold otherwise, it would necessarily be requiring a lender to assert a counterclaim to preserve its foreclosure rights. This would result in the impairment of the lender's right to pursue one its remedies, namely a Rule 736 proceeding. To abridge a creditor's remedy, particularly one specifically crafted to provide a remedy under a special set of circumstances, would curtail a debtor's ability to control what remedy a creditor may pursue.

PART III
PROMISSORY NOTES,
LOAN COMMITMENTS,
LOAN AGREEMENTS

Schuhardt Consulting Profit Sharing Plan v. Double Knobs Mountain Ranch, Inc., 468 S.W.3d 557 (Tex.App.-San Antonio 2014, pet. denied). Chacon sold a ranch to Double Knobs, taking back a note and deed of trust. A few years later, Schuhardt bought the note and lien. Payments on the note were due on the first of the month. Double Knobs typically paid before the late payment charge was due, on the 10th of the month. Schuhardt sent Double Knobs a letter telling it that, although Chacon had been accepting late payments, Schuhardt wasn’t going to.

When the October payment was not received on the first, Schuhardt sent a default notice to Double Knobs and notified it that it was accelerating the balance of the note. Double Knobs tendered the October payment only, which was rejected by Schuhardt. The property was posted for foreclosure. Double Knobs sought a TRO, temporary injunction, and declaratory judgment. Double Knobs also brought claims of inequitable conduct, breach of contract, and tort.

Double Knobs’s primary complaint was that the note had been wrongfully accelerated. Schuhardt argues the note clearly provides payment is due on or before the first of the month. Because Double Knobs did not pay on October 1, it was in default. Double Knobs contends the note provided payment was due on the first of the month, but was not late until the tenth of the month. Therefore, by tendering payment before the payment was late under the note, Double Knobs could not have been in default.

Here, the term default is not defined in the note. So, the court looked to its generally accepted meaning. “Default” is defined by Black's Law Dictionary as “the omission or failure to perform a legal or contractual duty.” Default may consist of the failure to make a payment on the loan within a specified period or may be the breach of a covenant, representation, or warranty or the occurrence or nonoccurrence of some event.

The Business and Commerce Code, however, does not define the events constituting default on a loan. Instead, a determination of the circumstances giving rise to a default is generally left to the agreement of the parties. If no agreement exists, the parties' course of conduct must be analyzed to determine if an implied agreement exists before a default is declared or payment is demanded.

An implied agreement may arise from the regular course of conduct between the parties and the facts show that the minds of the parties met on the terms of the contract without any legally expressed agreement thereto. An implied agreement may also arise from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract.

Here, the parties agree that Double Knobs did not tender payment by the first of
the month. Double Knobs, however, argues that because the terms of the Note specifically provided that payments made after the first of the month, but before the tenth of the month, were not subject to a late payment, Double Knobs's payment on the fifth of the month was not late and Double Knobs was not in default. In support of its argument, Double Knobs points to its history of payments to Chacon. For almost two years, Chacon accepted twenty-two out of twenty-four payments made after the first, but before the tenth of the month. Double Knobs argues this course of conduct established its payment was not late if paid before the tenth of the month. Double Knobs thus argues that its September 2012 and October 2012 payments were timely and did not constitute a breach.

Double Knobs and Chacon's conduct created an implied agreement, or at least an understanding, that the terms of the Note provided for payment by Double Knobs prior to the tenth day of the month. Although a party who previously allowed late payments can demand strict compliance in the future, the secured party must allow the debtor a reasonable time to comply with the new demands after actual receipt of notice from the secured party.

Schuhardt, on the other hand, claims any course of conduct between Double Knobs and Chacon is irrelevant; as the owner of the note, the only relevant parties and relationships are Schuhardt and Double Knobs. As such, Schuhardt contends there was no course of dealing between Schuhardt and Double Knobs. Moreover, even if a prior relationship existed, Schuhardt contends its letter to Double Knobs repudiated any previous conduct authorizing later payments.

Schuhardt's contention it provided Double Knobs with notice of its intent to demand strict compliance with the Note is disingenuous at best. The record shows Schuhardt took affirmative steps to mislead Double Knobs as to the true owner of the property. It acted in such a way to preclude Double Knobs from discovering the note had been sold. Prior to Schuhardt's October 3rd letter, Double Knobs had no basis to question the identity of the holder of the Note or any changes to the parties' accepted payment practices.

Based on the information available, Double Knobs reasonably relied on its previous relationship with Chacon. The court concluded Double Knobs's October 5th payment was timely based on its previous course of conduct with Chacon.

Schuhardt argues Double Knobs's own actions resulted in foreclosure. When Double Knobs did not timely pay, Schuhardt informed Double Knobs that no late payments would be accepted. Schuhardt, therefore, avers that, when Double Knobs failed to make its October payment on October 1st, Schuhardt was entitled to accelerate.

Texas courts disfavor acceleration because it imposes a severe burden on the mortgagor. Acceleration is a harsh remedy with draconian consequences for the debtor and Texas courts look with disfavor upon the exercise of this power because great inequity may result. Because acceleration is viewed as such a harsh remedy, any ambiguous clause providing for acceleration is construed against acceleration.

The holder of a note must ordinarily give notice to the maker of the holder's intent to accelerate the time for payment as well as notice of acceleration. The maker, however, may waive his right to notice of intent to accelerate and notice of acceleration. Unless the right to notice of intent to accelerate is waived by the debtor, the mortgagor must give the mortgagor clear and unequivocal notice of its intent to accelerate. Here, the note expressly waived notice of intent to accelerate, but the deed of trust did not. When read together, the note and the deed of trust at issue create a reasonable doubt as to whether the parties
clearly and unequivocally intended to waive notice of default and time to cure, which amounts to notice of intent to accelerate. Accordingly, the court concluded that Schuhardt was required to provide Double Knobs with notice of intent to accelerate and an opportunity to cure.

In re Estate of Curtis, 465 S.W.3d 357 (Tex.App.-Texarkana 2015, no pet.). Although a debt is barred by limitations, limitations can be avoided if the party to be charged acknowledges the debt in writing. Civil Practice and Remedies Code § 16.065 of the Texas provides that an acknowledgment of the justness of a claim that appears to be barred by limitations is not admissible in evidence to defeat the law of limitations if made after the time that the claim is due unless the acknowledgment is in writing and is signed by the party to be charged. An acknowledgement of a debt under this statute creates a new obligation. If an agreement meets these acknowledgment requirements, a party may sue for breach of that agreement.

PART IV
GUARANTIES

Abel v. Alexander Oil Company, 474 S.W.3d 795 (Tex.App.-Houston [14th Dist.] 2014, no pet.). The Steeles operated a sole proprietor trucking business. They bought fuel from Alexander Oil on an open account. The credit application named the company as “John Steele” and noted its entity form as “sole proprietorship.” Abel signed a personal guaranty of the trucking company’s account. The guaranty guarantied “full and prompt payment to Alexander Oil Company of all amounts due by Company to Alexander Oil Company.”

A few years later, Shannon Steele formed an LLC and did what she could to have all of John Steele Trucking’s assets transferred to the LLC. From that point on, the LLC bought fuel from Alexander Oil, without informing Alexander. After formation of the LLC, John Steele Trucking owed nothing on its account with Alexander Oil.

The LLC then began having financial problems. It ended up owing Alexander Oil a bunch of money that the LLC couldn’t pay. The Steeles were asked to sign a guaranty of the LLC’s account, and did so, but Abel was not asked to do so. Eventually, Alexander Oil sought payment of the debt from Abel. Abel refused to pay and Alexander Oil sued her. Abel claims that a legal principle bars recovery against her because she cannot be held liable under her guaranty of John's sole proprietorship for any debts actually incurred by another legal entity.

A guaranty agreement creates a secondary obligation whereby the guarantor promises to be responsible for the debt of another and may be called upon to perform if the primary obligor fails to perform. To recover under a guaranty contract, a party must show proof of (1) the existence and ownership of the guaranty contract; (2) the terms of the underlying contract by the holder; (3) the occurrence of the conditions upon which liability is based; and (4) the failure or refusal to perform the promise by the guarantor.

According to the rule of strictissimi juris, a guarantor may require that the terms of his guaranty be strictly followed, and that the agreement not be extended beyond its precise terms by construction or implication.

The trial court had instructed the jury that a representative of a limited liability company is personally liable for the obligations of the limited liability company unless the representative satisfies his duty to disclose both (1) he is acting in a representative capacity; and (2) the true identity of the company. Thus, in buying fuel under the John Steele Trucking account could impose liability on the Steeles because they didn’t disclose their capacities as representatives of the LLC.
Here Abel did not guaranty the obligations of the Steeles personally. The trial court’s judgment established that the judgment against John Steele included only amounts for which he was liable as an agent for the LLC. Abel’s guaranty made her liable only for the obligations of John Steele, sole proprietorship.

PART V
LEASES

Philadelphia Indemnity Insurance Company v. White, No. 14-0086 (Tex. May 13, 2016). White’s clothes dryer in her apartment caught fire and destroyed her apartment and belongings as well as several adjacent apartments. She had signed the TAA lease which said the tenant was obligated to pay for any damage for any cause not due to the landlord’s negligence or fault. Despite a jury finding that White was not negligent, the landlord took the position that she was still contractually liable pursuant to the TAA lease provision. White argued that the provision violated public policy because it makes a tenant liable for damage to the entire apartment project for accidental losses, acts of God, criminal acts of another or something unassociated with the tenant or the apartment complex. The court of appeals agreed, holding that the broad imposition of liability on a tenant for damage not caused by the landlord is void because it violates public policy as expressed in the Property Code.

As a general rule, parties in Texas may contract as they wish so long as the agreement reached does not violate positive law or offend public policy. In the residential-leasing context, the Legislature has limited the freedom of landlord and tenant to contractually allocate responsibility for repairs materially affecting health and safety but, importantly, has decided as a matter of public policy not to impose a categorical prohibition on such contracts.

The court’s initial inquiry is whether the lease provision clearly and unambiguously shifts responsibility to White for the damages at issue. A contract is ambiguous if it is subject to two or more reasonable interpretations. But when a contract provision is worded so that it can be assigned a definite meaning, no ambiguity exists, and the court will construe the contract as a matter of law.

Although the language in the reimbursement provision is clear and definite, White points to an apparent redundancy she contends creates ambiguity as to the provision’s actual scope. White finds equivocality in the juxtaposition of a clause imposing broad, nonspecific liability with a clause that identifies specific categories of losses for which the tenant is liable without regard to fault or causation. On one hand, the Reimbursement Provision distinctly imposes responsibility for (1) damage to doors, windows, or screens, (2) damage from windows or doors left open, and (3) damage from wastewater stoppages caused by improper objects, unless the damage or wastewater stoppage is due to the landlord’s negligence. On the other hand, the provision includes “catchall” language capturing losses resulting from any cause not due to the landlord’s negligence or fault. White thus questions why the contract singles out specific losses for reimbursement absent landlord fault if the catchall language makes the tenant responsible for all loss in the same circumstances. White also points out that specific losses are emphasized by language that is both bolded and underlined, while the ostensibly broader catchall language—which would subsume the specific losses—is less conspicuously presented. White discerns ambiguity in the catchall language’s meaning, arguing it potentially imposes significant liability on tenants while receiving relatively obscure treatment in relation to a more specific subclass of repairs.

The court was unable to discern the conflict White proposed, and held that White is contractually obligated to reimburse the landlord for all damage not
due to the landlord’s negligence or fault. It therefore agreed with the court of appeals that the Reimbursement Provision is unambiguous. It then turned to the real issue: whether the Property Code precludes judicial enforcement of the reimbursement provision.

The court held that a contract capable of being performed in harmony with the laws and statutes of this State is not per se void as against public policy. Unless an agreement cannot be performed without violating the law or public policy, the party seeking to avoid enforcement must establish its invalidity under the particular circumstances. White failed to do so in this case.

The Property Code’s restrictions on contractually shifting the landlord’s repair obligations do not apply if a landlord has no duty to repair in the first instance. Landlords have no obligation to repair premises conditions that are tenant-caused and therefore are not restrained from contracting with tenants for reimbursement of associated repair costs. White failed to obtain a finding that she did not cause the damages at issue; the jury’s failure to find in response to a negligence submission is not a substitute for the essential fact finding; and the record does not conclusively establish that fact. Accordingly, White failed to establish the factual predicate to contractual invalidity in this case. Thus, the court reversed the court of appeals’ judgment to the extent it invalidates the reimbursement provision on public policy grounds.

Pointe West Center, LLC v. It’s Alive, Inc., 476 S.W.3d 141 (Tex.App.-Houston [1st Dist.] 2015, pet. denied). It’s Alive leased space in the landlord’s shopping center and opened a restaurant called Frank-N-Stein. The lease term expired. It claimed to have the landlord’s permission.

When vacating the premises, It’s Alive did some damage. The landlord discovered the damage after It’s Alive vacated. The landlord repaired the damage and filed suit against It’s Alive.

At trial, photographs admitted into evidence showed, among other things, mold on a wall from a water leak, multiple holes in the drywall, damaged ceiling tiles, damage to the bar on the premises, damage to booth platforms, and exposed wires hanging from the ceiling. There was also evidence that It's Alive left drains to both the bar and sink clogged, and ripped A/C thermostats out of the walls.

The landlord’s representative at trial testified that he did not know the details of the purchases made, how the items were applied, or the specific work done by the people who did repairs. He testified that much of the work done on the premises was done by in-house contractors that didn't necessarily even work for just the shopping center. He acknowledged that some of the time reported in the timesheets could not have included work for repairs on the premises in question. No testimony was presented, however, to show what amount of the time reported on each of the timesheets was attributable to It's Alive's space. He also admitted that the entire amount paid would not be attributable to work performed to repair It's Alive's space.

Another matter in dispute during trial concerned whether the landlord had agreed to let It's Alive remain on the premises after the expiration of the lease at the original monthly-rent rate. It's Alive claimed that the landlord had agreed to this, waiving the application of the hold-over penalties under the lease. The landlord’s representative testified he could not recall whether he agreed to allow It's Alive to stay in the space.

The jury determined that It's Alive had breached the lease agreement. It awarded
$15,000 for the cost to repair the premises and $0 for the holdover penalty.

The landlord sought $57,373 in damages. The jury awarded $15,000. It's Alive argues that the evidence is legally insufficient to support the jury's award. Specifically, It's Alive argues that the evidence is insufficient to establish how much the landlord actually spent on repairing the damage caused by It's Alive or to show that those expenditures were actually reasonable and necessary.

To recover costs incurred for remedial damages flowing from a breach of contract, the plaintiff must establish that the repairs were reasonable and necessary. To establish that, the plaintiff must show more than simply the nature of the injuries, the character of and need for the services rendered, and the amounts charged therefor. Likewise, proof of amounts charged or paid does not prove that the amounts were reasonable.

The landlord presented ample evidence of the injury caused as It's Alive vacated the premises. The same cannot be said for the landlord’s proof of damages. Its only witness for damages admitted that the checks, receipts, and timesheets included costs that were not incurred in repairing It's Alive's space. The landlord's evidence failed to establish the actual costs of repair. While the record indicates that at least some of the costs admitted into evidence were related to the repair of It's Alive's premises, the jury could only speculate about what portion of the damages evidence actually pertained to that space. Because there was no proof of the actual amount of damages, there was no proof that the damages presented were reasonable or necessary.

When liability is contested, courts may not grant a new trial on unliquidated damages solely. Instead, it must remand for a new trial on both liability and damages. Because It's Alive disputes liability, and the cost of repairs constitute unliquidated damages, the court remanded for a new trial on both liability and damages.

The second issue involved the application of the holdover provision. It’s Alive had remained on the premises after the lease term ended. It's Alive argues that it did not breach the holdover provision because the parties agreed to modify it. Specifically, It's Alive argues that the parties agreed that it could remain on the premises after the lease expired at its original monthly base-rent rate. The landlord responds that the lease contained a provision requiring all amendments to the lease to be in writing. It is undisputed that there was no written agreement to allow It's Alive to alter the hold-over provision of the lease or in any other way allow It's Alive to remain on the premises at the monthly base-rent rate after the lease expired. This was not dispositive, however.

A written contract not required by law to be in writing, may be modified by a subsequent oral agreement even though it provides it can be modified only by a written agreement. Proof that a contract provision requires modifications to be in writing does not establish as a matter of law that the parties did not modify the contract orally. A lease of real estate for a term longer than one year is subject to the statute of frauds and is required by law to be in writing. Once the main lease expired, the agreement--either under the holdover provision of the lease or the oral agreement--was on an agreed month-to-month basis for an indefinite period. This is referred to as a tenancy at will.

Because the agreement to stay beyond the duration of the main lease is a tenancy at will--and, accordingly, not subject to the statute of frauds--any oral agreement by the parties concerning the tenancy at will was not a contract required by law to be in writing. There is some evidence in the record to support an implied determination by the jury that the landlord agreed to allow It's Alive to remain on the premises at the
monthly base-rent rate in exchange for It's Alive looking for prospective tenants to take over the existing business and presenting them to the landlord. Because there is some evidence to support an oral modification of the contract, the lease provision requiring all modifications to be in writing is not an absolute bar to recovery.

Wood v. Kennedy, 473 S.W.3d 329 (Tex.App.-Houston [14th Dist.] 2014, no pet.). Wood rented space from the father under an oral agreement. He agreed to pay $250 a month and said that he had been given an option to purchase the property. The father died, and his daughter Marti became the guardian of the estate. She hadn’t known about the rental agreement.

Marti was driving by the premises and notices people moving things in and out of it. She asked Wood about it and he confirmed that he was using the premises. She asked if he had any paperwork and he answered no. She then told him he had 10 days to move out. She later sent a certified letter instructing him to vacate within 30 days. The letter was returned. After the 30 days expired Marti brought a forcible detainer action. Wood did not appear and a default judgment was rendered, ordering him to leave the premises and awarding $7,700 in damages.

Turns out the justice court lacked jurisdiction and the case was sent to the probate court. There, the probate court issued a writ of possession and awarded $6,250 in unpaid rent, plus costs and attorneys’ fees.

Wood asserts that regardless of whether a contract or quantum meruit measure of damages applies, the probate court had no evidentiary basis to support the damages it awarded. Because the proper measure of damages in an action for unpaid rent depends on the nature of an individual's tenancy, the court began by examining Wood's tenancy as a foundation for its review of the probate court's award.

A tenant who continues to occupy leased premises after expiration or termination of the lease is a holdover tenant. The status and rights of a holdover tenant differ depending on whether the tenant becomes a “tenant at will” or a “tenant at sufferance.” A tenant at will retains possession of the premises with the landlord's consent. By contrast, a tenant who remains in possession without the landlord's consent occupies “wrongfully” and is said to have a tenancy at sufferance. The parties' conduct determines whether the holdover tenant becomes a tenant at will or a tenant at sufferance.

If the holdover tenant continues to pay rent, and the landlord knows of the tenant's possession and continues to accept rent without objection, the tenant is a tenant at will and the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary. The prior lease terms do not control in a tenancy at sufferance, however, because there is no new agreement. In such cases, the proper measure of damages is the reasonable rental value of the property during the holdover period.

At all times relevant to this dispute, Wood has asserted that under the terms of his oral lease, he is liable for only $250 per month in unpaid rent. Because the probate court awarded $6,250 in damages—an amount that exceeded a rental rate of $250 per month—the court implied a finding that Wood was a tenant at sufferance. The record supports such a finding. Thus, Marti did not consent to Wood's occupancy. Furthermore, Wood admitted he had not paid rent. Accordingly, the court examined whether the evidence is legally sufficient to support the probate court's finding that the reasonable rental value of the property during the ten-month holdover period was $6,250.

The rental value of a property must be established with reasonable certainty.
this case, the only evidence offered to support a reasonable rental value greater than $250 per month was the testimony of the owners of the property. Their testimony was admissible under the Property Owner Rule, an evidentiary rule addressing when a non-expert landowner is qualified to testify about the land's value. The Property Owner Rule creates a rebuttable presumption that a landowner is personally familiar with his property and knows its fair market value, and thus is qualified to express an opinion about that value.

But, a qualified owner's testimony does not necessarily provide relevant evidence of value that can support a judgment. Rather, courts insist that the testimony meet the same requirements as any other opinion evidence. For example, an owner's testimony is not relevant if it refers to intrinsic or some other value of the property rather than to market value. In addition, an owner's valuation testimony is not relevant if it is conclusory or speculative. Thus, an owner may not simply echo the phrase “market value” and state a number to substantiate his valuation; he must provide the factual basis on which his opinion rests. Here, the court looked at the testimony and concluded that it was legally insufficient to support the award.

That holding does not end matters, however, because the record provides sufficient evidence to prove a lesser, ascertainable amount of damages with reasonable certainty. Wood did not contest liability or possession in the probate court, and he admitted that he had not paid rent for ten months. Under the terms of his agreement with the father, Wood was supposed to pay $250 per month. Given the probate court's implied finding that Wood was a tenant at sufferance, the prior lease does not govern. Nonetheless, the prior lease's terms can provide evidence of the property's fair market value. There was evidence that the father had accepted Wood's offer to lease the property for $250 per month. Because this evidence demonstrates the price offered by the lessee and accepted by the lessor, it is sufficient evidence of the fair rental value of the property during the holdover period.

In sum, the record contains legally sufficient evidence to support a finding that the reasonable rental value of the subject property during the ten-month holdover period was at least $2,500, but legally insufficient evidence to support the trial court's award of $6,250. Accordingly, the court suggested a remittitur of $3,750, resulting in an award of $2,500 in damages if accepted.

Mohammed v. D. 1050 Rankin, Inc., 464 S.W.3d 737 (Tex.App.-Houston [1st Dist.] 2014, no pet.). Mohammed leased a convenience store which Rankin later purchased. The lease contained an option to extend for two additional terms. The first option increased the rent from the initial rate of $1,800 per month to $2,000 per month. The second option was at market rent.

When the initial term expired, Mohammed continued to pay $1,800 per month and continue to operate the premises for another eight years until Rankin notified him that it was terminating the lease in thirty days. Mohammed refused to leave.

The county court held that Mohammed was a month-to-month tenant after the end of the initial terms and that Mohammed had breached the lease when he failed to move out after Rankin’s notice. Mohammed challenges these findings and conclusions, arguing that he rightfully possesses the leased premises pursuant to either of the two options to extend the lease contained in the lease agreement.

A party to an option contract may enforce that option by strict compliance with the terms of the option. A failure to exercise an option according to its terms, including untimely or defective acceptance, is simply ineffectual, and legally amounts to nothing more than a rejection. Under the statute of
frauds, material modifications to a lease agreement must be in writing and signed by the party against whom the modification is to be enforced.

A person who refuses to surrender possession of real property on demand commits a forcible detainer if the person is a tenant at will or by sufferance. A tenant who occupies leased property after termination of its lease is a holdover tenant. A holdover tenant's rights differ depending on whether the tenant becomes a tenant at will or a tenant at sufferance. A tenant at will is a holdover tenant who holds possession with the landlord's consent but without fixed terms. A tenant at sufferance is a tenant who has been in lawful possession of property and wrongfully remains as a holdover after the tenant's interest has expired.

Tenants at will have lawful possession, but without a fixed term, and the landlord can deny possession at any time. If the tenant remains in possession and continues to pay rent with the landlord's consent, the terms of the prior lease will continue to govern the new arrangement absent an agreement to the contrary.

The county court found that the parties never exercised either renewal option in accord with their lease agreement. Mohammed continued to pay rent at a rate of $1,800 a month after the initial lease term ended. Though Mohammed argued that he had provided written notice to Rankin to exercise both options, Rankin disputed that it ever received notice, and neither party asserted that a signed writing by both parties acknowledged the exercise of either option at $1,800 a month. Because the rental amount that Mohammed paid varied from that required in the first option, and the second required mutual agreement to the rent amount upon its exercise, proper execution of either option would require a signed writing memorializing the rental amount.

Because the parties never agreed in writing to modify the rent amount—in particular to adjust the rent owed—Mohammed never properly exercised either option to renew.

Espinoza v. Lopez, 468 S.W.3d 692 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Espinoza and Sanchez began searching for a home to purchase and Lopez showed them the Property. Espinoza and Sanchez contend that they entered into an oral agreement with Lopez to purchase the Property for $70,000. Espinoza and Sanchez tendered a check to Lopez for a down payment in the amount of $1,000. The memo line of the check stated, “Down Payment for house!” Espinoza and Sanchez alleged that they orally agreed with Lopez to pay $620.19 per month for fifteen years plus seven percent interest. Espinoza and Sanchez took possession of the Property in March and began making monthly payments. The parties dispute whether the transaction was an oral agreement to purchase or a landlord-tenant arrangement.

Lopez filed a forcible detainer action against Espinoza and Sanchez. They, in turn, filed a motion to dismiss for lack of jurisdiction, alleging that the justice court lacked jurisdiction to hear Lopez's forcible detainer action because the case involved title to the Property.

An action for forcible detainer is a summary, speedy, and inexpensive remedy for the determination of who is entitled to the possession of premises. The only issue to be resolved in a forcible detainer action is the right to actual and immediate possession of the property; the merits of title are not adjudicated. When there are issues concerning both title and possession, the issues may be litigated in separate proceedings in different courts with appropriate jurisdiction. However, when a forcible detainer action presents a genuine issue of title so intertwined with the issue of possession that a trial court would be required to determine title before awarding
possession, then a justice court lacks jurisdiction to resolve the matter.

Espinoza and Sanchez contended that they were purchasing the Property from Lopez, not renting it. In support of their contention, Espinoza and Sanchez argue that they entered into an oral agreement with Lopez to purchase the Property and that they have a claim for equitable title under the doctrine of partial performance. In response, Lopez argues that the title issue is moot because the possession issue is moot and, in the alternative, Espinoza and Sanchez cannot show they have equitable title because they have not paid the full purchase price for the Property.

Generally, a contract for the sale of real estate is unenforceable unless it is in writing and signed by the person charged with the promise. Partial performance, however, will operate to exempt an oral contract for the sale or transfer of real property from the statute of frauds. Under the doctrine of partial performance, an oral contract for the purchase of real property is sufficiently corroborated and enforceable if the purchaser: (i) pays consideration; (ii) takes possession of the property, and (iii) makes permanent and valuable improvements on the property with the consent of the seller, or, without such improvements, other facts are shown that would make the transaction a fraud on the purchaser if the oral contract was not enforced.

Espinoza and Sanchez contend that they have raised a genuine issue of material fact with respect to each element. Espinoza and Sanchez took possession of the Property and began making monthly payments in the amount of $620.19. The memo line for the checks stated, “House Payment” or “payment for house we’re buying.” They also paid taxes on the house. While living in the Property, Espinoza and Sanchez planted trees, changed fixtures, replaced the carpet, repaired holes in the walls, painted, and installed blacktop on some of the gravel driveway. When they asked Lopez for help in getting their children in school, Lopez’s wife sent a letter stating that Espinoza and Sanchez were living in the house and further stating “I am selling the property to them.”

Based on this record, the court held that the right to possession cannot be determined without first resolving issues regarding title to the Property.

In re Lippian, 477 S.W.3d 880 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Quang Tran obtained an eviction from the justice court against Lippian. Lippian perfected her appeal by filing a statement of inability to pay, which was not contested. The following day, Lippian filed a bond, which which is another means by which an appeal of an eviction judgment may be perfected.

Rule 520.9(c)(5)(B) of the Rules of Civil Procedure requires payment of rent during the appeal perfected by a statement of inability to pay. Lippian did not pay the required rent, so Quang Tran sought and obtained an order of immediate possession. Lippian then filed a motion for a writ of mandamus, asking the court to compel the county court to vacate the order.

Lippian argues that she withdrew her statement of inability to pay by filing her bond. However, an appeal can be perfected only once, by filing either a cost bond or an affidavit of indigence. When, as here, the statement of inability to pay is not contested, the appeal is perfected by the statement of inability to pay, not the later filed bond. Therefore, the trial court did not abuse its discretion in enforcing the requirements of Rule 510.9(c)(5)(B) through its order of immediate possession.

Goodman-Delaney v. Grantham, 484 S.W.3d 171 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Mary owned a home in Houston when she married James. In addition to James, Mary had five children, including Grantham. Mary died intestate. James continued to live at the house
following Mary’s death and later married Rhonda. James dies in 2014. Grantham served a notice to vacate on Rhonda and subsequently file for eviction, which the justice court granted.

On appeal to the county court, Grantham admitted she did not have a landlord-tenant relationship with Rhonda. The county court also ruled in favor of Grantham.

A justice court has subject matter jurisdiction over forcible detainers, but the justice court and the county court at law on appeal lack jurisdiction to resolve title issues. The forcible detainer process is supposed to be a summary, speedy, and inexpensive proceeding to determine who has the right to immediate possession of property. Thus, a forcible detainer only addresses who has the right to possess the property, not who has title to it.

A forcible detainer action is dependent on proof of a landlord-tenant relationship. Without a landlord-tenant relationship, a justice court cannot determine the issue of immediate possession without first determining who has title to the property.

Here, Grantham conceded that she did not have a landlord-tenant relationship with Rhonda. Rhonda entered the property legally when she married James. Grantham alleges she obtained title to the property in part through inheritance and in part by deed from her siblings. Accordingly, the justice court had to determine whether Grantham had title to the property before it could determine whether Grantham had a superior right to possess the property over Rhonda. The justice court, and the county court at law on appeal, did not have jurisdiction to make such a determination.

PART VI
DEEDS AND CONVEYANCES

Orca Assets, G.P., L.L.C. v. Burlington Resources Oil and Gas Company, L.P., 464 S.W.3d 403 (Tex.App.-Corpus Christi 2015, pet. denied). This is a dispute over competing oil and gas leases. The Trust owns tens of thousands of acres of mineral interests in south Texas. The Trust leased the mineral rights in 15 tracts to GeoSouthern, which was ultimately assigned in part to Burlington. A Memorandum of Oil and Gas Lease was recorded. Before it was recorded, the Trust and Orca executed a Letter of Intent to lease the minerals in 15 tracts, 10 of which were those previously leased to GeoSouthern.

The LOI stated that Orca had searched the records and determined that the Trust is the owner of the mineral estates free of any recorded leases. It also stated that it was made without warranties of any kind. The LOI was signed and Orca made an $84,000 earnest money deposit.

Orca executed leases on the subject properties as contemplated in the LOI. Despite the fact that the LOI provided for a thirty-day period during which it could re-examine its title work, Orca did not check the real property records before signing the lease to determine if the properties were subject to other leases. Upon signing the lease with the Trust, Orca paid over $3 million and memoranda were recorded.

Burlington filed this suit to quiet title. The trial court ruled in favor of Burlington. Orca appealed. Orca claimed it was a BFP of the properties leased from the Trust.

The longstanding general rule in Texas is that earlier title emanating from a common source is the better title and is given prevailing effect. However, status as a bona fide purchaser is an affirmative defense to a title dispute. To qualify as a bona fide purchaser, one must acquire property in good faith, for value, and without notice of any third-party claim or interest. Notice may be constructive or actual; actual notice rests on personal information or knowledge, whereas constructive notice is notice the law imputes to a person not having personal information.
or knowledge. The bona fide purchaser doctrine is codified in Property Code § 13.001 which states that a conveyance of real property is void as to a creditor or to a subsequent purchaser for a valuable consideration without notice unless the instrument has been acknowledged, sworn to, or proved and filed for record and that an instrument that is properly recorded in the proper county is notice to all persons of the existence of the instrument; and subject to inspection by the public.

The parties do not seem to dispute that Orca paid valuable consideration for the rights conferred in the LOI, nor do they dispute that Orca lacked actual or constructive notice of the GeoSouthern lease as of the date the Letter of Intent was executed. The dispute instead centers on whether the LOI constitutes an acquisition of property such that the bona fide purchaser defense would apply.

Orca produced evidence including the LOI, which it claims constituted a conveyance of equitable title to the subject properties. Burlington disagrees with Orca that the LOI conveyed any sort of property interest, and they further argue that the language of the LOI precludes Orca from claiming BFP status.

The court agreed with Burlington. Even assuming, but not deciding, that the Letter of Intent conveyed an equitable interest in the subject properties to Orca, that instrument explicitly stated that no warranty of title would be provided in any lease eventually executed pursuant thereto. In that regard, to the extent the Letter of Intent conveyed any interest in the subject properties, it was equivalent to a quitclaim deed under which the purchaser agrees to acquire whatever interests are actually owned by the seller. A quitclaim deed is a deed that conveys a grantor's complete interest or claim in certain real property but that neither warrants nor professes that the title is valid. And, courts have long held that a party acquiring property under a quitclaim deed is not eligible to claim bona fide purchaser status because it is charged with notice of title defects as a matter of law.

Mueller v. Davis, 485 S.W.3d 622 (Tex.App.-Texarkana 2016, pet. pending). In September 1991, Virginia executed a mineral and royalty deed to Davis. Shortly thereafter, Mills also executed a mineral and royalty deed to Davis. Neither of Davis' deeds contains a metes and bounds description or a reference to a volume and page of the Harrison County deed records. Rather, each deed states that the grantor is conveying “[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows . . . .” Each deed then lists certain parcels identifying a specific number of acres contained within what appear to be oil and gas production units.

The adequacy of a property description in any instrument transferring an interest in real property is a question of law within the purview of the Statute of Frauds. To satisfy the Statute of Frauds, a contract must furnish within itself, or by reference to some other existing writing, the means or data by which the property to be conveyed may be identified with reasonable certainty. The instrument's property description need not be mathematically certain, but only “reasonably certain” so as to enable a person familiar with the area to identify the property to be conveyed to the exclusion of other property.

The legal description in the conveyance must not only furnish enough information to locate the general area, as in identifying it by tract, survey and county, it must also contain information regarding the size, shape, and boundaries of the interest conveyed. If the contract does not sufficiently describe the real property interest to be conveyed, the conveyance is void under the Statute of Frauds. However, a deed should not be declared void for uncertainty if it is possible, by any reasonable rules of construction, to ascertain
from the description, aided by extrinsic evidence, what property the parties intended to convey.

In this case, the grantors of both deeds purported to convey to Davis: “all of [their] interest[s] in and to all oil, gas, and other minerals in, on, and under . . . the following lands (the "Lands") . . . situated in the County of Harrison, State of Texas, to-wit: All of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas described as follows: 1) 704.00 acres out of the G. W. PETTY, ET AL, A-582, ET AL, known as the “AMOCO PRODUCING COMPANY -- JOHN HARRISON JR 'B'.”

The court held that these descriptions were insufficient as a matter of law to identify the property being conveyed. Yet, the Davis deeds also contain the following paragraph:

“The ‘Lands’ subject to this deed also include all strips, gores, roadways, water bottoms and other lands adjacent to or contiguous with the lands specifically described above and owned or claimed by Grantors. If the description above proves incorrect in any respect or does not include these adjacent or contiguous lands, Grantor shall, without additional consideration, execute, acknowledge, and deliver to Grantee, its successors and assigns, such instruments as are useful or necessary to correct the description and evidence such correction in the appropriate public records. Grantor hereby conveys to Grantee all of the mineral, royalty, and overriding royalty interest owned by Grantor in Harrison County, whether or not same is herein above correctly described.”

The first two sentences of this paragraph constitute what is defined as a Mother Hubbard Clause. The general purpose of a Mother Hubbard Clause is to prevent the leaving of small unleased pieces or strips of land which may exist without the knowledge of one or both of the parties by reason of incorrect surveying, careless location of fences, or other mistake. Such “catch-all” provisions are not effective in conveying significant property interests that are not adequately described in the deed or clearly contemplated by the language of the conveyance.

The parties dispute whether the third sentence should be read together with the Mother Hubbard Clause or independently. Mueller contends that the last sentence should be read as part of the Mother Hubbard Clause to which it is attached and, therefore, cannot convey any significant property interest. Mueller concludes that because the specific descriptions in the Davis deeds are insufficient to identify the property being conveyed and because those deficiencies cannot be saved by the Mother Hubbard Clause, the Davis deeds are insufficient to convey any mineral interests and are void as a matter of law under the Statute of Frauds.

Davis denies that the last sentence is part of the Mother Hubbard Clause, but contends instead, that it is an independent, valid, county-wide general description of the property being conveyed by his deeds. Davis points to well-settled Texas law holding that a deed purporting to convey all property owned by the grantor in a named state or county is a sufficient description to effect a conveyance. Accordingly, Davis argues that the last sentence should be read independently from the Mother Hubbard Clause and that, when read in that manner, the deeds conveyed to him all of Virginia’s and Mills’ interests in Harrison County.

The court held that the deeds were ambiguous. The sentence in dispute says that the grantor conveys all of the mineral, royalty, and overriding royalty interest owned by the grantor in Harrison County, whether or not it was correctly described in the deed. If, as Davis asserts, the parties intended that sentence to operate independent of the Mother Hubbard Clause and constitute a county-wide conveyance of...
all of Virginia’s and Mills’ mineral and royalty interests in Harrison County, then the deeds conveyed to Davis everything Cope and Mills owned in Harrison County. On the other hand, if, as Mueller asserts, the parties intended the sentence to be a part of and to modify the Mother Hubbard Clause, then it does not cure the insufficient specific grants, and the deeds convey nothing to Davis. Accordingly, the court said, a jury should hear evidence and determine the parties’ intent.

**West 17th Resources, LLC v. Pawelek,** 482 S.W.3d 690 (Tex.App.-San Antonio 2015, pet. denied). The property was owned by several members of the Mika family. Thomas and Pamela didn’t own any of it. Their mother, Irene, owned an undivided 1/6 individually and another undivided 1/10 as trustee under her late husband’s will. The will provided that, on Irene’s death, Thomas and Pamela have title to the trust property. The will also provided that Irene could sell the property if needed for her support.

In 1994, Irene and the other owners of the property executed a deed conveying the property to the Paweleks. The deed’s wording conveyed “all” of the described property. Irene signed the deed with only her own name and did not designate whether she was signing individually or as trustee. A dispute arose as to whether Irene had conveyed the trust’s interest in the land. Thomas and Pamela argued the 1994 deed did not convey the trust’s 1/10 interest because Irene did not explicitly sign “as trustee.” The Paweleks argued that the deed, by its express terms, conveyed “all” of the subject property. Alternatively, the Paweleks argued the recitals in the deed estopped Appellants from positing that the deed did not convey “all” of the subject property (“estoppel by deed”).

The Paweleks argue the issue of whether the 1994 deed conveyed all of the subject property is an issue of deed construction. The court agreed. Neither side contends the 1994 deed is ambiguous, and the court will construe an unambiguous deed as a matter of law. The court’s primary duty when construing an unambiguous deed is to ascertain the parties’ true intent. To determine a grantor's intent when conveying real property by deed, courts analyze the four corners of the deed using rules of interpretation and construction. The court discerns a grantor's intent from the plain language of the deed without reference to technicalities or arbitrary rules. All parts of a written instrument must be harmonized and given effect if possible. When courts construe deeds, there is a presumption favoring grantees over the grantor.

The granting clause of the 1994 deed conveys “all” 290.69 acres of the subject property subject only to a utility easement. The only part of the 1994 deed that Thomas and Pamela argue supports Irene's intent not to convey the trust's undivided 1/10 interest is her failure to specify any capacity when signing the deed. Such an implied reservation is disfavored. Construing Irene's failure to specify her capacity as an implied intent to reserve the 1/10's interest would also conflict with the deed's plain, unambiguous language. By the plain, unambiguous language of the granting clause, Irene and the other grantors intended to convey “all” of the subject property, subject only to a utility easement. The court held that the 1994 deed conveyed “all” of the subject property, including the 1/10 interest Irene held as trustee, to the Paweleks, subject only to the utility easement specified in the deed.

**York v. Boatman,** 487 S.W.3d 635 (Tex.App.-Texarkana 2016, no pet.). The Smiths conveyed a life estate in four acres of their property to York and her husband, with the remainder to vest in York’s daughter Gwendolyn. The Smiths died, and York and her sister partitioned the Smith’s property, with York being conveyed a fee simple estate in 150+ acres that included the four acres earlier conveyed to York and her daughter.
About 10 years later, in 1995, York conveyed the 150+ acres to her daughter Gwendolyn as her separate property. The deed was subject to all outstanding matters.

Later, in 2003, Gwendolyn executed a gift deed conveying the 150+ acres back to York, but per her instructions, the gift deed was held by her lawyer and was never delivered or recorded. York's attorney demanded that Garrett release and forward the gift deed to him. After learning of York's demand, Gwendolyn requested, by letter, that her lawyer return the deed to her, and when he refused to do so, she filed a rescission of the gift deed in the deed records of Hopkins County. In Gwendolyn's lawyer submitted the gift deed into the registry of the court and filed an interpleader action, naming York and Gwendolyn as defendants. Four months later, Gwendolyn filed a pro se answer, requesting that the gift deed be returned to her. In March 2006, the trial court dismissed the interpleader for lack of prosecution and about five months later, ordered that the gift deed be released to Gwendolyn.

Gwendolyn died leaving a will naming her son Todd as her sole beneficiary. In probate, all of the 150+ acres was conveyed to Todd. York filed suit against Todd. The trial court held in favor of Todd as the owner of the 150+ acres subject to the life estate in favor of York.

The first question on appeal was whether the 1995 deed from York to Gwendolyn was void. York first argues that the 1995 deed was void or invalid because it was not a gift "in praesenti" a gift of a present interest, as it failed to exclude or reserve the four-acre life estate from the 1967 deed or the homestead rights of Henry. Nevertheless, a gift by deed does not require proof that the gift was in praesenti. When conveyed by deed, an estate in realty may be made to commence in the future. A gift may generally not be made to take effect in the future since a mere promise to give is unenforceable without consideration.

However, by virtue of statutory authority an estate in realty may be made to commence in futuro by deed.

Yet, even if transfer of a present interest were required, there is no indication in the 1995 deed that York did not immediately convey all of her present rights and title in the 150+ acres or that any part of the conveyance was to take place in the future. The 1995 deed purports to convey York's rights and title in the 150+ acres to Gwendolyn. At the time of the 1995 deed, York owned the 150+ acres subject to the four-acre life estate and homestead rights of her husband. Thus, on its face, the deed purports to grant all of York's interest in the property to Gwendolyn.

York argues, however, that that conveyance is invalid because the deed fails to reserve her husband’s rights in the property. Nevertheless, said the court, one spouse's conveyance of her separate property family homestead, without the joinder of the other spouse, is not void as to the conveying spouse. It is, however, inoperative against the continuing homestead claim of the nonjoining spouse. Moreover, a homestead right is analogous to a life tenancy, with the holder of the homestead right possessing the rights similar to those of a life tenant for so long as the property retains its homestead character. Accordingly, even though the deed does not specifically reserve the husband's homestead and life estate rights, the conveyance was made subject to those rights as a matter of law, and the failure of the deed to specifically reserve those rights does not render it void as to York.

York's second argument was that the 1995 deed is invalid because the evidence is insufficient to establish that the 1995 deed was a gift. The trial court's conclusion that Todd was the fee simple owner of the 150+ acres was based on an implied finding that the 1995 deed was a gift from York to Gwendolyn. York argues that the 1995 deed was not a valid gift of the property because...
she lacked the requisite donative intent and because no actual delivery and acceptance occurred. Specifically, she argues that she and Gwendolyn agreed to transfer the property to Gwendolyn in order to protect it from seizure by the government to satisfy her husband's nursing home costs and then transfer it back to York upon his death.

A gift of realty can be made either by deed, as is alleged in this case, or by parol gift. The elements of a valid gift by deed are: (1) donative intent, (2) delivery of the property, and (3) acceptance of the property. The owner must release all dominion and control over the gifted property. Generally, the party claiming the gift has the burden of establishing the elements of gift, but because the 1995 deed purports to convey the property at issue from York to Gwendolyn it is presumed that York intended the conveyance to be a gift. To rebut this presumption, York had to prove a lack of donative intent by clear and convincing evidence at the trial court level. The court examined the evidence and determined that trial courts determination that the 1995 deed was a gift was not against the great weight and preponderance of the evidence.

PART VII
VENDOR AND PURCHASER

Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc., 469 S.W.3d 280 (Tex.App.-San Antonio 2015, no pet.). A joint operating agreement governed the exploration, development, and operation of mineral interests within the “Contract Area.” The Contract Area is defined as “all of the lands, oil and gas leasehold interests, and oil and gas interests intended to be developed and operated” under the agreement as described in Exhibit A attached to the joint operating agreement. Exhibit A attached 8 maps. Each map shows an area outlined with hash marks, as well as smaller areas identified by dots both inside and outside the hash-marked area.

Anderson sued DOTEPI seeking, among other things, to enforce a right to purchase mineral interests within the Contract Area.

The Statute of Frauds, Business & Commerce Code § 26.01(a), (b)(4) requires that contracts for the sale of real property be in writing and signed by the person to be charged. Oil and gas interests constitute real property; therefore, an agreement for the transfer or assignment of a mineral interest must comply with the Statute of Frauds. To satisfy the Statute of Frauds, a contract must furnish within itself, or by reference to some other existing writing, the means or data by which the property to be conveyed may be identified with reasonable certainty. Even if the record is clear that the parties to the contract knew and understood what property was intended to be conveyed, the knowledge and intent of the parties will not make the contract valid. If the contract does not sufficiently describe the real property interest to be conveyed, the conveyance is void under the Statute of Frauds and will not support an action for specific performance or breach of contract.

The sufficiency of a legal description in any instrument transferring a property interest is a question of law subject to de novo review. The contract's property description need not be mathematically certain, but only “reasonably certain” so as to enable a person familiar with the area to identify the property to be conveyed to the exclusion of other property. The purpose of the written description is not to identify the land, but to provide a means of identification. The property description must furnish enough information to locate the general area as in identifying it by tract survey and county, as well as to determine the size, shape, and boundaries of the property. When the language in the contract furnishes a “key or nucleus” description of the property, extrinsic evidence may then be used merely as an aid to identify the property with reasonable certainty from the data contained in the contract, not to supply a missing description.
Here, viewing the JOA and its Exhibit A maps along with the incorporated Letter Agreement and its attached Schedule A, the court concluded that the JOA contains enough information to provide at least a nucleus description of the Contract Area with respect to its physical location and its size, shape, and boundaries.

**Marx v. FDP, LP**, 474 S.W.3d 368 (Tex.App.-San Antonio 2015, no pet.). The Marxes, as sellers, and FDP, as buyer, entered into a Farm and Ranch Contract. Exhibit A contained field notes for a 326.047-acre tract and a 186.152-acre tract. The Marxes agreed to supply FDP with a new survey. In the Special Provisions of the Contract, the Marxes and FDP agreed to some details “to be worked out before closing,” including surveying out 21 acres that would be retained by the Marxes and giving FDP a right-of-first-refusal to buy those 21 acres. The purchase price was payable in cash and with seller financing.

The Marxes subsequently refused to sell to FDP. FDP sued for specific performance and damages. They entered into a mediated settlement agreement which contained the following terms: (i) FDP agreed to purchase approximately 421 acres from the Marxes for $5,000.00 per acre—“Closing per existing EMK--October 1, 2013;” (ii) the Marxes agreed to retain the Homestead Property for no longer than eight years after closing; (iii) the parties were to mutually agree on the Homestead Property, not to exceed one hundred acres; (iv) if the parties could not agree on what constituted the Homestead, the issue would be submitted to arbitration; (v) FDP maintained exclusive option to purchase the Homestead Property; and (vi) all claims and causes of action between the parties, except for the undertakings in the MSA, were mutually released. The agreement was filed with the district court as a Rule 11 agreement.

FDP filed a motion to enforce the agreement. The Marxes answered raising several affirmative defenses, including (1) ambiguity, (2) failure of conditions precedent, (3) fraud, (4) the Marxes' impossibility of performance, (5) lack of mutuality, (6) mutual mistake, and (7) lack of consideration. The Marxes' pleading contended the MSA left essential elements of the contract for future negotiation and agreement. These uncertain terms included the size, location and boundaries of the land to be sold; the identity of the buyer, the manner in which the sale price is to be paid; the portion of the sale price which is to be paid in cash; and the portion of the sales price which is to be owner financed. With these terms being uncertain, the Marxes claimed that performance was impossible and they “rescinded” their agreement to the settlement agreement.

The trial court ordered the parties back to mediation, which was unsuccessful. The court then ordered arbitration to determine the boundaries of the 100-acre and 421-tract. The arbitrator picked the boundaries and the arbitration award was confirmed by the court. FDP then moved for summary judgment for specific performance, which was granted by the trial court.

Specific performance is an equitable remedy that may be awarded, at the trial court's discretion, for a breach of contract. When the recovery of monetary damages is inadequate to compensate the complainant, the transgressor is compelled to perform the promise of its contract. Specific performance is not a separate cause of action, but rather it is an equitable remedy 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 Marxes argued that specific
performance was not available because there was no meeting of the minds on the method of financing. They contend the contract is unenforceable because the mediated settlement agreement changed the sale price and it lacks a method of financing the new price. The Marxes argue the method of financing was a material or essential term in the real estate transaction, and because the mediated settlement agreement’s new sale price was indefinite, there was no meeting of the minds. In other words, the mediated settlement agreement failed to address the financing associated with the additional acres and the increased price from the original Seller Financing Addendum contained in the Farm and Ranch Contract. Unfortunately for the Marxes, this claim was not preserved on appeal, so it was held to be waived.

They argued ambiguity and indefiniteness as well. A contract is ambiguous if the contract language is susceptible to two or more reasonable interpretations. A contract is not ambiguous if it is so worded that it can be given a definite or certain legal meaning. A contract is not ambiguous simply because the parties disagree over its meaning. Rather, if a written contract is so worded that it can be given a definite or certain legal meaning, then it is not ambiguous. Thus, if an ambiguity is present, the trier of fact resolves the ambiguity, and the contract is enforceable once the ambiguous language is resolved.

Unlike the trial court’s obligation to resolve any ambiguity necessary to enforce a contract, indefiniteness in a contract makes the contract unenforceable. Provisions that are too indefinite and uncertain to reflect a meeting of the minds of the parties, cannot constitute an enforceable contract. An indefinite contract results when a material or essential term, a term a party would reasonably regard as a vitally important element of their bargain, is missing at the time the contract was formed.

Specifically, the Marxes argued that the MSA creates a patent ambiguity, a contraction, which renders the new agreement incapable of performance. That section provides, first, that the number of acres being sold by Sellers to Buyer is changed to 421 acres, more or less. Second, it provides that the price per acre is being changed to $5,000. The Marxes further argued the settlement agreement was ambiguous because the Farm and Ranch Contract and the Seller Financing Addendum each contain other numbers which were not changed by the settlement agreement. But, again, the Marxes had raised ambiguity, but not that the settlement agreement was indefinite with respect to FDP’s payment obligations. By failing to raise the question of indefiniteness before the trial court, the Marxes waived this issue on appeal.

_Cohen v. Sandcastle Homes, Inc._, 469 S.W.3d 173 (Tex.App.-Houston [1st Dist.] 2015, pet. pending). A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice to the world of its contents. Property Code § 13.004(b) expressly provides that a properly filed notice of lis pendens prevents a purchaser for value from acquiring property free and clear of the encumbrance referenced in the lis pendens. A notice of lis pendens may be expunged, however, if certain procedures are followed and the trial court determines that the party filing the notice either has not pleaded a real-property claim or demonstrated the probable validity of the claim. If an order expunging a notice is properly recorded, there are statutory limitations on the ability of a party to charge a purchaser with notice based upon the notice of lis pendens.

Here, the parties disagree about how the trial court’s expungement of the notices of lis pendens impacted Sandcastle’s and NewBiss’s ability to establish bona-fide purchaser status. The notice of lis pendens on Tract I was expunged after Sandcastle’s purchase; the notice of lis pendens was
expunged on Tract II before NewBiss's purchase. Cohen asserts that, in both cases, the purchasers were not entitled to bona-fide purchaser protection because they otherwise had notice of his lawsuit. The court disagreed.

In Texas, prior to 2009, if a party pleaded a real-property claim, it could effectively encumber a property with a lis pendens notice until the underlying proceedings concluded without regard for the merits of the underlying claim. This approach had been criticized because it allowed real-property interests to be significantly burdened with no evidentiary support and with no showing that the notice of lis pendens was filed in good faith. Recognizing that a lis pendens notice produces a cloud on title which may devastate the marketability of the encumbered property, some states enacted statutes requiring a trial court to determine, in a hearing on discharge, that the claim is probably valid, or that the proponent is likely to prevail in the action.

In 2009, the Texas Legislature similarly amended section 12.0071 of the Texas Property Code to require a trial court to order the notice of lis pendens expunged if the court determines that the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim. Probable validity is not defined in the statute, but other jurisdictions have defined this phrase in the lis pendens expungement context to mean where it is more likely than not that the plaintiff will obtain a judgment against the defendant on that claim.

Cohen argued that expungement extinguishes only (1) constructive notice caused by the filing of the notice of lis pendens, and (2) actual notice derived by reading the notice of lis pendens. Thus, under Cohen's interpretation, if a party learns of a lis pendens or the underlying lawsuit other than by reading the actual lis pendens notice, the party has “actual notice” of that claim, defeating bona-fide purchaser status regardless of whether the lis pendens is expunged.

Sandcastle and NewBiss argue that Cohen's interpretation eliminates the benefit of--and is contrary to the purpose of--the expungement statute because it allows a party to burden title to property even when that party cannot meet the threshold requirement of adequately pleading and establishing the probable validity of an alleged real-property claim. The court agreed.

A notice of lis pendens is designed to put persons who might acquire the property on notice that there is a potential claim to the property. Section 12.0071 uses the word expunge. “Expunge" means to erase or destroy, to declare null and outside the record, so that it is noted in the original record as expunged, and redacted from all future copies. Once a notice of expungement has been properly filed, the notice of lis pendens and any information derived from the notice does not amount to constructive, actual, or inquiry notice about the underlying lawsuit, and is not enforceable against a purchaser or lender regardless of whether the purchaser or lender knew of the lis pendens action.

Cohen argues the concepts of actual and constructive notice are different and that expungement of a notice of lis pendens can operate only to extinguish constructive notice, but not actual notice (except the actual notice that comes from physically reading a lis pendens notice). The court rejected that argument because the plain language of section 12.0071 shows that--for purposes of establishing bona fide purchaser status--expungement of a lis pendens notice extinguishes both actual and constructive notice.

What is less clear, however, is exactly what expungement extinguishes actual and constructive notice of. The statute states that expungement extinguishes “notice of lis
pendens and any information derived from the notice.” Resolution of this appeal turns on what “any information derived from” means. Cohen advances a narrow interpretation of this provision, insisting that expungement of a lis pendens should have no effect on any actual notice unless the purchaser gained the actual notice from reading the notice of lis pendens. Under this interpretation, whether an expungement can remove the cloud of a lis pendens does not turn on whether the party encumbering the real property can demonstrate a probable right of recovery on an underlying real-property claim, but instead on details about exactly how the purchaser seeking to rely on an expungement learns of the underlying claim.

For example, under Cohen's interpretation, if a potential purchaser first learns of a lawsuit involving a claim to real property by reading a properly filed notice of lis pendens in the real property records, then the potential seller's successfully moving to expunge that lis pendens--either before or after the purchaser came across the lis pendens notice--would restore that purchaser's ability to take the property as a bona-fide-purchaser. The result would be different, however, if the day before inspecting the real property records, that same potential purchaser was told by a real estate agent showing the property that there is a lawsuit where someone was claiming an interest in the property and filed a lis pendens. Under Cohen's interpretation, the buyer told about the suit by the realtor could never take the property as a bona-fide purchaser, despite a trial court finding that the proponent of the notice of lis pendens can demonstrate a probable right of recovery on an underlying real-property claim from cases in which the proponent cannot; nothing indicates that the legislature intended the determination of whether title to a property is encumbered to turn instead on whether each potential buyer learns of an underlying claim that is the subject of a lis pendens notice by literally reading the notice or by some other means.

The court concluded that the more reasonable interpretation intended by the legislature is that a lawsuit identified in a notice of lis pendens does not preclude subsequent purchasers from proving bona-fide purchaser status if the trial court has expunged that lis pendens following a determination that the proponent has not shown the probable validity of the real-property claim.

There was a strong dissent. It pointed out, among other things, that the procedural standard for expunging a notice of lis pendens is much lower than the standard that would apply to defeat the underlying claim on the merits. A notice of lis pendens can be expunged based on the nonmovant's inability--without any right to ordinary discovery--to establish the probable validity of the real property claim. The party seeking expungement has no burden of proof. The expungement of a notice of lis pendens under such circumstances is far from a judicial determination that the claimant could not have ultimately prevailed on the merits of his claim with the benefit of discovery. Yet the court's holding has the effect of imbuing an expungement of a notice of lis pendens with the claim-preclusive effect of a full-blown adverse judgment on the merits. As such, Cohen would have been in a better position today into, and turned on, whether a purchaser physically read the lis pendens or was told about the lis pendens or the underlying lawsuit by another person. Read as a whole, the lis pendens and expungement scheme is designed to differentiate cases in which the proponent of the notice of lis pendens can demonstrate a probable right of recovery on an underlying real-property claim from cases in which the proponent cannot; nothing indicates that the legislature intended the determination of whether title to a property is encumbered to turn instead on whether each potential buyer learns of an underlying claim that is the subject of a lis pendens notice by literally reading the notice or by some other means.
had he never availed himself of the recording act's protections by recording the notice of his lis pendens

Arbor Windsor Court, Ltd. v. Weekley Homes, LP, 463 S.W.3d 131 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). Arbor and Weekley entered into a lot purchase contract pursuant to which Arbor would develop lots and Weekley would purchase them according to a schedule. The Agreement required each party to give the other fifteen days’ notice of default and the opportunity to cure. Weekley failed to purchase most of the lots, which caused Arbor to default on its loan. The lender foreclosed, and Weekely bought the property at the foreclosure sale.

Arbor sued Weekley for breach of contract for failing to purchase lots according to the schedule. At trial, the jury found that Arbor had failed to send the required 15-day notice of default to Weekley. The trial court entered a take-nothing judgment in favor of Weekley. On appeal, Arbor argued that the finding of its failure to provide the notice of default does not support the judgment in favor of Weekley. In other words, Arbor argued that the notice requirement was a covenant, not a condition precedent.

The court resolved whether a contractual provision is a covenant or a condition precedent by examining the entire contract to determine the parties' intent. A condition precedent must either be met or excused before the other party's obligation may be enforced. As part of that contract review, the court applied additional common law principles that reflect Texas public policy disfavoring conditions precedent. For example, in construing a contract, forfeiture by finding a condition precedent is to be avoided when another reasonable reading of the contract is possible. Thus, if the language of the contract is susceptible to a non-condition precedent interpretation, the court accepts that construction and construes the language as a mere covenant.

Neither party argues that the notice provision of the Agreement is ambiguous. As such, neither party undertakes in any way to set forth two reasonable but competing interpretations of the provision. Instead, Arbor points to (a) the parties' use of the word "covenant" and (b) the absurd result that would flow from reading the provision as a condition precedent. And, Weekley points to the parties' use of the term "prior to" and argues that this phrase constitutes conditional language that is completely without meaning unless it creates a condition precedent.

To glean the parties' intent to create a condition precedent, the court looks for conditional language such as "if," "provided that," or "on condition that." Our task is to construe the entire agreement, and that task is not altered by the parties' use of "magic words" in the contract or the absence of such words.

In addition, the conditional language must connect the condition precedent to the conditioned obligation. In other words, the mere existence of conditional language within a contract does not suggest that all obligations of one party are conditions precedent to the performance by the other party.

Turning to Arbor's argument regarding construction, the court acknowledged the appeal of Arbor's first argument that the parties chose the words "covenant and agree" as the introductory phrase to the contested provision. However, a single word or provision cannot be given controlling effect. The words "covenant and agree" do not always signal that a provision is purely a covenant. Nor do those words foreclose review of the remainder of the contract. Although the court must resist any interpretation that results in forfeiture, it must nonetheless construe the entire provision to have meaning. Therefore, the parties' use of the words "covenant and agree" is not dispositive of the construction.
The court was persuaded by Weekley’s argument that the provision, as a whole and as written, contains explicit conditional language—"prior to"—that will have no meaning if construed as no more than a mere covenant. The sentence does not contain the oft-cited traditional conditioning language: "if," "provided that," or "on condition that." But, again, the court is not looking for magic words. Texas courts have found other words and phrases to be conditional language.

Ultimately, the court held that to construe the provision as either a covenant or an ambiguous provision in an effort to give meaning to this single phrase—"covenant and agree"—out of context would ignore the remaining language and eviscerate the only reasonable meaning of the paragraph. Having examined the contract as a whole, the court concluded that it was compelled to construe the provision as a condition precedent by language that may be construed in no other way.

**KIT Projects, LLC v. PLT Partnership,** 479 S.W.3d 519 (Tex.App.-Houston [14th Dist.] 2015, no pet.). The Buyer and Seller had a contract for the sale of some real estate. The Buyer asked the Seller for an extension of the closing date. In consideration for the extension, the Buyer agreed to pay a $10,000 extension fee. It was to be non-refundable and not applicable to the purchase price. When the Buyer delivered the check for the extension fee it was returned because funds hadn’t yet been deposited in the Buyer’s account to cover it. Buyer sent an email promising to make good on the check in a few days. The Buyer signed the extension and sent another check, but it also bounced. About a week later the Buyer obtained a cashier’s check for the extension fee, but never delivered it. The Seller then informed the Buyer that the deal was off.

The Buyer asserts the consideration for the amendment was the Buyer’s promise to pay the $10,000 extension fee. The Seller asserts that the consideration for the amendment was either the payment of the $10,000 fee or the valid tender of the $10,000 fee. Essentially, the Seller equates a promise to pay with making payment. The Buyer asserts a promise to pay is not the same as making payment. Though the Seller does not expressly argue that the Buyer's payment of the $10,000 fee was a condition precedent to the Seller's obligation to extend the closing, parts of the Seller's argument seem to suggest that the Seller is asserting the non-occurrence of the payment was an unsatisfied condition to the extension of the closing date.

The words the parties chose are the best indicators of an intent to create a condition precedent. To make performance specifically conditional, a term such as “if,” “provided that,” “on condition that,” or some similar phrase of conditional language normally must be included. If no such language is used, the terms typically will be construed as a covenant, to prevent a forfeiture. Though there is no per se requirement that such phrases be utilized, their absence is probative of the parties’ intention that a promise be made, rather than a condition imposed. In construing a contract, courts seek to avoid forfeiture and so when another reasonable reading of the contract is possible, courts will steer clear of finding a condition precedent. When the intent of the parties is doubtful, courts will interpret the agreement as creating a covenant rather than a condition. Because conditions tend to be harsh in operation, conditions are not favored in the law.

The text of the amendment does not point to a condition. There is no language in which the parties state that the closing date will be extended “if,” “provided that,” or “on condition that,” the Buyer pays the extension fee. Rather, the parties state that they amend their agreement to change the closing date. This phraseology typifies covenant language, not condition-precedent language. The parties state that in
consideration for this extension the Buyer “agrees to pay” the extension fee. After considering the amendment instrument under the applicable legal standard, the court concluded that, under the unambiguous language of that instrument, payment of the $10,000 is not a condition precedent to the extension of the closing date.

The Seller argued that, because the $10,000 was not paid, there was no consideration for the extension. The court held that under the clear wording of the amendment instrument, the consideration for the extension of the closing date was the Buyer’s agreement to pay the $10,000 extension fee rather than the Buyer's payment of the extension fee or the Buyer's valid tender of the fee.

The Seller also argued that there was a failure of consideration so there was never a binding agreement to extend. This argument raises a legal issue regarding the effect of an alleged failure of consideration. Though courts have described the “failure of consideration” affirmative defense in various ways, courts agree that this defense is distinct from “lack of consideration.” A “failure of consideration” does not mean that there never was any binding amendment. Instead, the failure-of-consideration defense comes into play when a party does not receive the promised performance under a binding contract. Therefore, to the extent that the trial court granted summary judgment based on a conclusion that the amendment was never binding on the parties due to a failure of consideration, the trial court erred.

**Rancho Esperanza, Ltd. v. Marathon Oil Company**, 488 S.W.3d 354 (Tex.App.-El Paso 2015, no pet.). It is a well-established rule in Texas that a cause of action for injury to land is a personal right that belongs to the person who owns the property at the time of the injury, and the right to sue does not pass to a subsequent purchaser of the property unless there is an express assignment of the cause of action. A subsequent landowner may assert a cause of action for pre-existing injuries only if there is an express assignment of the cause of action.

**PART VIII
EASEMENTS**

**Staley Family Partnership, Ltd. v. Stiles**, 483 S.W.3d 545 (Tex. 2016). Two tracts of land are involved – the Stiles Tract and the Staley Tract. Both properties were once part of a single tract the State granted to Thompson Helms in 1853. In 1866, after Helms and his wife died, a probate court partitioned the tract among their six children. Three children received tracts relevant to this suit. The three properties were generally rectangular in shape; their long axes ran in an east-west direction, and they were "stacked" from north to south. Axia Ann Helms received the northernmost tract; James Helms, the tract immediately to the south of hers; and Frances Helms, the tract immediately to the south of James's. Except for the Staley Tract in the northwest corner of his portion, Frances conveyed his land to James in the 1870s, with the last conveyance being in 1876.

The Staley Tract is landlocked amidst the Stiles Tract. The Staley Family Partnership acquired the Staley tract, then sued for a declaratory judgment that an easement runs across the Stiles tract to the county road, either by necessity, estoppel, or implication. The trial court ruled that there was no easement.

Staley appealed, claiming only an easement by necessity. The court of appeals upheld the trial court’s judgment. The court of appeals held that an essential element of an easement by necessity is that, at the time the alleged dominant property was severed from the alleged servient property, the
easement was necessary for the landlocked dominant property to have roadway access to a public road. It held that there was no evidence of necessity at the time of severance.

Staley argues that it proved, and Stiles does not dispute, that the Staley and Stiles Tracts were part of the Thompson Helms Tract until they were partitioned in 1866; Honey Creek and its tributary forming the western, southern, and eastern borders of the Staley Tract are impassable by vehicles and have been in the same condition at all times relevant to this matter; and the only possible overland access to the Staley Tract has been and is to the north through the Stiles tract. Staley says that is all it was required to prove. It is not, said the court.

Establishing the “necessity” part of an easement by necessity requires, in part, proof that at the time the dominant and servient estates were severed, the necessity arose for an easement across the servient estate in order that the dominant estate could in some manner gain access to a public road. But a right of way that does not result in access to a public roadway is not, under long-standing precedent, necessary because it does not facilitate use of the landlocked property.

Because Staley did not prove that a public roadway existed at severance where the county road now exists, Staley could not have an easement by necessity.

Union Pacific Railroad Company v. Seber, 477 S.W.3d 424 (Tex.App.-Houston [14th Dist.] 2015, no pet.). The Sebers sued Union Pacific claiming the railroad had wrongfully removed the Sebers' private railroad crossing. The Sebers claimed a right to use the crossing pursuant to an implied easement by prior use. The trial court granted summary judgment in favor of the Sebers, declaring that the Sebers have a right to use the crossing and ordering Union Pacific to reinstall the crossing.

The Texas Supreme Court decided Hamrick v. Ward, 446 S.W.3d 377 (Tex. 2014), “to provide clarity in an area of property law that ha[d] lacked clarity for some time: implied easements.” In Hamrick the Supreme Court held that the easement-by-necessity doctrine -- and not the easement-by-prior-use doctrine -- must apply to claims of landowners asserting implied easements for roadway access to their landlocked, previously unified parcel.

The court held that the trial court erred in granting summary judgment in favor of the Sebers on their pleaded theory of easement by prior use. To prevail on a traditional motion for summary judgment, the movant must show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. The court held that the Sebers are not entitled to summary judgment on their pleaded easement by prior use claim because the Sebers cannot prevail on this claim as a matter of law. The court remanded the case to allow the Sebers to plead easement by necessity.

Trant v. Brazos Valley Solid Waste Management Agency, Inc., 478 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). This case is also discussed in Easements. The Trants entered into an Option Contract with the Cities of Bryan and College Station, pursuant to which the Cities obtained the right to purchase approximately 382 acres of land in Grimes County from them. The Option Contract stated that the Cities contemplated using the property as a Landfill. The Cities later purchased the property and the deed conveying the property to the Cities incorporated the “Terms, Conditions, and Representations” in the Option Contract.

The Cities formed the Waste Management Agency, a governmental entity that currently operates a landfill on the property. The Trants learned that the Cities had decided to put a firing range on a portion of the property near their land. The
Trants sent a letter to the Cities and the Agency, contending that the property could be used only as a landfill. Counsel for the Agency responded by letter that while the Option Contract contemplated an intended use of the property as a landfill, the contract did not restrict the Cities' use of the property to such purpose.

The Trants filed suit against the Agency. The Agency filed a plea to the jurisdiction, asking the trial court to dismiss the suit on the basis that governmental immunity bars the Trants' claims. The Trants responded that (1) the Agency is not immune from suit to enforce the Option Contract, which the Trants construe as a condemnation settlement agreement, or from their claim to enforce land use restrictions; and (2) the Agency's immunity has been waived under Chapter 271 of the Local Government Code. The trial court granted the Agency's plea and dismissed the Trants' claims for want of jurisdiction.

The Agency describes itself as a local governmental non-profit corporation wholly owned by the Cities and a "governmental unit" as defined in Chapter 101 of the Civil Practice and Remedies Code. Local governmental entities enjoy governmental immunity from suit, unless immunity is expressly waived. Governmental immunity includes both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. A governmental entity that enters into a contract necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit.

The Trants argued that the Agency is not immune from an action to enforce restrictive use covenants in the General Warranty Deed or Easement Agreement. The court did not get to the immunity issue because it found that the Trants had not raised a material issue of fact regarding the existence of any restrictive use covenant in the General Warranty Deed or Easement Agreement that the Agency may have violated.

When a restrictive covenant may reasonably be interpreted in more than one way, the court will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing the restrictive clause against the party seeking to enforce it. The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction. The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable.

The Trants argue that the deed includes a restrictive use covenant allowing the land to be used only as a landfill. The deed incorporates the "Terms, Conditions, and Representations" in the Option Contract. The Option Contract states that the Cities "contemplate using the Property as a . . . Municipal Sanitary Landfill." However, nothing in the language of the deed or Option Contract indicates that the Trants retained a possessory interest in the property contingent on the Cities' using it as a landfill. The Option Contract and the deed do not include a restrictive use covenant. The only language referencing any use of the property, discussed above, merely reflects how the Cities anticipated using the property—the Cities did not agree to use the property only as a landfill.

*North Texas Municipal Water District v. Ball*, 466 S.W.3d 314 (Tex.App.-Dallas 2015, no pet.). The rules of contract construction and interpretation apply to easement agreements. Unless the agreement is ambiguous, and no such claim is made in this case, the court interprets its provisions as a matter of law. Whether a structure is "permanent" is necessarily a fact-specific inquiry that will depend on such factors as the nature of the structure and its location on the restricted area.
Any structure can be removed from land, so that isn’t the determining factor in determining permanence. A structure which is designed as a continuous fixture is permanent as a matter of law.

Lewis owned a twenty-one acre tract of land in Collin County, across which the District wished to install a water pipeline. Lewis conveyed a thirty-foot-wide permanent Easement to the District. The District received the right to construct, operate, and maintain water pipelines within the Easement's boundaries; Lewis retained the right to use the land making up the Easement except for the purposes of erecting buildings or permanent structures” on the land. The District agreed to pay for damage caused to fences and crops while performing its functions on the Easement.

Over the years, Lewis's tract was subdivided. In 2013, the Tissings owned a subdivided piece of the Lewis property, a two-and-one-half acre tract facing Stinson Road. The Easement and its pipeline run across the width of the Tissings' property, parallel to Stinson Road.

The Tissings began to erect a structure across the front of their property, and within the Easement boundaries. The District learned of the construction in April 2013 and contacted the Tissings to demand that the construction stop and the portion of the structure already built be removed from the Easement. When the Tissings refused to stop construction, the District filed suit. The District sought a declaration that it held a valid existing Easement across the Tissings' property, parallel to Stinson Road.

The structure being constructed by the Tissings was built by anchoring galvanized steel poles into holes with concrete, building a base with concrete blocks that encased the poles and created a wall across the front of the property, facing the wall with flagstone on both sides, and topping this base with a wood privacy fence.

The District's fundamental position is that the structure is "permanent" within the meaning of the Easement, so the Tissings had no right to erect it over the Easement's right-of-way. The Tissings contend the structure is not permanent in nature. But they also argue that--even if the structure is permanent within the meaning of the Easement--it is a fence, and the Easement contemplates an exception for fences when it states the District will pay for any damage it does to fences while working on the Easement.

The Tissings argue that the court’s inquiry into the permanent nature of the structure is asking the wrong question. They contend the Easement intends fences to be an exception to the prohibition against erecting permanent structures. According to the Tissings, the plain language of the Easement contemplates the presence of fences within its boundaries. However, the language relied upon by the Tissings speaks only to this remedy of compensation for damage, not to any additional rights reserved by the original landowner. It is true the court avoids burdening the servient estate when possible. But it is not reasonable to create an exception to an express prohibition within an easement agreement--here, construction of a permanent structure--when that exception, by its very nature, would significantly interfere with the easement holder's ability to carry out the purposes specifically granted to it by the Easement. The Tissings' interpretation of the Easement's reference to fences gives that provision control over not only the permanent-structure prohibition,
but also the essential purpose of the Easement. The court would not give a single provision, taken alone, controlling effect in this Easement. It must consider all provisions with reference to the purpose of the whole instrument.

The court held that the structure was a permanent structure and that the Easement’s prohibition contains no exception for fences.

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

Gipson-Jelks v. Gipson, 468 S.W.3d 600 (Tex.App.-Houston [14th Dist.] 2015). Mae and her mother Beulah bought a house in 1974, each taking a one-half interest in the house. Mae’s sister Rose moved into the house and lived with Beulah. Beulah died, but Rose stayed in the house. Mae tried to evict Rose on the grounds that Mae was the sole owner of the house because Beulah had deeded her half interest in the house to Mae in a 2008 deed. Rose claimed that Beulah lacked capacity to execute the deed.

Mae filed a petition in which she asserted she held title to the house and sought a judgment declaring that Mae is the sole owner of the house, and a writ of possession. Rose filed a general denial. After a bench trial, the trial court signed findings of fact and conclusions of law followed by a judgment declaring Mae the sole and exclusive owner of the house and granting her immediate and exclusive possession of this property. The trial court ordered Rose to vacate the house immediately.

Rose argues that the evidence is legally insufficient to prove Mae holds title to the house. In particular, Rose argues that Mae did not prove a certified copy of a deed showing a chain of title emanating from and under a common source. To prove a common source, Rose argues, Mae needed to place into evidence a certified copy of the 1974 deed to Mae and Beulah.

Mae and Rose both agree that the 1974 deed granted a one-half interest in the property to Mae and a one-half interest in the property to Beulah. Both parties assert that they have a claim to the house because they have a claim to Beulah's one-half interest in the property. Because Beulah's one-half interest in the property is the common-source of their competing claims, Mae needed to prove only that she had a superior title to Beulah's one-half interest.

The trial evidence contains a 2008, notarized general warranty deed conveying Beulah's one-half interest in the house to Mae. In addition to the warranty deed, Mae testified that her mother wanted to deed the property to her. Mae's granddaughter and the notary both testified that they were present when Beulah signed the deed. Mae's granddaughter stated that Beulah signed the deed of her own free will. The court concluded that the record contains sufficient evidence to enable a reasonable factfinder to determine that Mae had superior title from a common source.

Nac Tex Hotel Co., Inc. v. Greak, 481 S.W.3d 327 (Tex.App.-Tyler 2015, no pet.). The DeWitts leased a building to operate a KFC franchise, and later purchased the building and the land it stood on. The landlord/seller also granted the DeWitts an access easement allowing access to Chestnut Street. Sometime in the early 1980s, the DeWitts added a drive-through, paved the parking lot, and built a bridge over a triangular shaped piece of property between the KFC land and the easement area. The triangle was owned by Temple. The DeWitts used the triangle for access and employee parking, landscaping it and otherwise maintaining it.

In 1988, the DeWitts sold the business and its real estate to a Corporation owned by their daughter. The daughter continued to use the triangle as if she owned it.
never discussed the triangle with Temple because she didn’t think there was anything to discuss. She further stated, “I wouldn’t never [sic] intentionally take anything from that man.”

In 2007, Temple sold his property to a Partnership controlled by Greak. In 2009, Greak contacted the daughter and told her that her employees were parking on his property. They were actually parking on the easement area. However, by 2012, the use of the triangle became an issue. When the parties could not reach an agreement on the Corporation's use of the triangle, the Corporation filed a trespass to try title action against the Partnership alleging that it had acquired title to the triangle by adverse possession. The Partnership filed an answer stating that it was not guilty as to the trespass to try title claim, making a general denial, and seeking attorney's fees pursuant to Section 16.034 of the Texas Civil Practice and Remedies Code. The trial court ruled in favor of Greak’s Partnership. The Corporation appealed.

Adverse possession means an actual and visible appropriation of real property, commenced and continued under a claim of right that is inconsistent with and hostile to the claim of another person. To prevail on a claim of adverse possession, a claimant must establish, by a preponderance of the evidence, (1) the actual and visible possession of the disputed property; (2) that is adverse and hostile to the claim of the owner of record title; (3) that is open and notorious; (4) that is peaceable; (5) that is exclusive; and (6) that involves continuous cultivation, use, or enjoyment throughout the statutory period. To satisfy a limitations period, peaceful and adverse possession does not need to continue in the same person or entity, but there must be privity of estate between each holder and his successor.

To prevail pursuant to the ten-year statute, a person must bring suit not later than ten years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who cultivates, uses, or enjoys the property.

Of the six above-named elements required to prove adverse possession, a discussion of the element of hostile intent is dispositive here. The test for hostility is whether the acts performed by the claimant on the land and the use made of the land were of such a nature and character as to reasonably notify the true owner of the land that a hostile claim was being asserted to the property. Mere occupancy of land without any intention to appropriate it will not support the statute of limitations. No matter how exclusive and hostile to the true owner the possession may be in appearance, it cannot be adverse unless accompanied by intent on the part of the occupant to make it so. There must be an intention to claim the property as one's own to the exclusion of all others.

The Corporation argues that when a claimant believes that it owns the land, it is not required to prove an intention to remove the legal owner or even know if someone else owns the land.

Here, the daughter testified that she thought she owned the property. She then created a fact issue when she testified that she would "never intentionally take anything" from the record owner of the property. Where the evidence in an adverse possession case is conflicting, its weight is a question of fact for the court or jury. Other evidence showed that, while the Corporation made some improvements to the disputed area, it was not included in the Corporation's deed, and the Corporation made no attempt to keep anyone off that property. In short, the evidence supports a finding of no hostile intent.

PART X
CONSTRUCTION
AND MECHANICS’ LIENS
Liverman v. State of Texas, 470 S.W.3d 831 (Tex.Crim.App. 2015). The Livermans filed mechanic’s lien affidavits on Katheryn’s house. As a result of these filings, the State charged the Livermans with securing the execution of documents by deception. The indictments alleged that the Livermans caused the county clerk, to sign or execute the mechanic's lien affidavits. They were convicted, fined, and placed on community supervision.

The statute under which appellants were charged—Penal Code § 32.46(a)(1)—provides:

“(a) A person commits an offense if, with intent to defraud or harm any person, he, by deception: (1) causes another to sign or execute any document affecting property or service or the pecuniary interest of any person.”

The court of appeals reversed the convictions and rendered judgments of acquittal. The court of appeals held that the evidence was legally insufficient to support the convictions because the conduct of the court clerk filing and recording the mechanic's lien affidavit in each case was not the signing or executing of a document as contemplated by Penal Code § 32.46(a)(1).

On discretionary review, the State contends that a clerk's actions of filing and recording a lien equate to “signing or executing” under Penal Code § 32.46(a)(1) and that the legislature intended to criminalize such activity under that provision. The State argues that “execute” must mean something different or broader than “sign” because “execute” was included in the statute for a reason.

“Execute” means to perform or complete (a contract or duty), to change (as a legal interest) from one form to another, to make (a legal document) valid by signing, or to bring (a legal document) into its final, legally enforceable form.” This formulation involves several definitions and that the term “execute” does not mean only “sign.”

To perfect a mechanic's lien under Chapter 53, Subchapter C, of the Property Code, a person must comply with certain requirements. One of those requirements is that the person file a mechanic's lien affidavit with the county clerk. A mechanic's lien affidavit has no legal effect until it is filed. When it is filed, the affidavit has the legal effect of contributing to the perfection of the mechanic's lien under the Property Code. So the mechanic's lien affidavit is executed when it is filed.

It is not enough, however, to conclude that filing a mechanic's lien affidavit constitutes the execution of that affidavit. Under § 32.46(a)(1), the defendant must cause “another” to execute the document. The issue, then, is who executes the mechanic's lien affidavit when it is filed.

The Property Code imposes upon the person “claiming” the lien the obligation to “file” the affidavit. Clearly, then, the person claiming the lien “executes” the affidavit when he files it. Does the county clerk also “execute” the affidavit by filing and recording it, as the State contends? The court concludes that the answer to that question is no. The Property Code requires the county clerk to record and index any mechanic's lien affidavit that is filed, but it also provides that the failure of the county clerk to properly record or index a filed affidavit does not invalidate the lien. This provision is similar to the general rule applicable to the filing of deeds that a deed is effective against subsequent purchasers upon filing, even if the county clerk neglects to record it. Therefore, the mechanic's lien affidavit becomes legally effective upon filing, and the subsequent recording or indexing by the clerk does not in any way alter the legal effect of the filing.

The remaining question, then, is whether the county clerk's acceptance of the document at the time of filing constitutes execution of the document by the clerk.
court concludes that it does not. The Property Code characterizes the filing in question as the person claiming the lien filing the affidavit with the county clerk. This language in the Property Code describes the county clerk as a mere recipient of the filing; the clerk need not have any active involvement in that occurrence. For many courts, electronic filing is now possible, and in those situations the entire transaction of receiving and acknowledging the filing may be handled by machine. The court concluded that it is the filing person, not the clerk, who brings the mechanic's lien affidavit into its final, legally enforceable form. Because the county clerk does not execute the mechanic's lien affidavit when the affidavit is filed, the appellants did not cause “another” to “execute” the documents at issue in the present case. Consequently, the court agreed with the court of appeals that the evidence is legally insufficient to support the conviction, and the court affirmed its judgment.

Guniganti v. C & S Components Company, Ltd., 467 S.W.3d 661 (Tex.App.-Houston [14th Dist.] 2015, no pet.). Guniganti created the 1999 Trust, naming his brother-in-law as Trustee. Guniganti later founded Triple PG for the purpose of operating a sand processing plant on the property. An employee of Triple PG asked C&S for a quote for sand plant components, and ultimately Triple PG and C&S entered into a contract for the components. Disputes arose, the parties met and also e-mailed each other, which resulted in a reduction of the contract price. C&S wasn’t paid all it thought was due and demanded payment, but the demands went unanswered so C&S sued.

C&S filed an affidavit in support of a constitutional lien against the property. The 1999 Trust filed a counterclaim seeking to establish that C&S had no right to a constitutional lien against the property and to have the lien declared invalid on that basis.

A constitutional lien requires the lienholder to be in privity of contract with the landowner. It is undisputed that C&S did not have a contract with the 1999 Trust. The trial court submitted questions to the jury asking whether Guniganti or Triple PG effectively control the 1999 Trust through ownership of voting stock, interlocking directorships, or otherwise. The jury answered no. However, even though the jury had found no privity between C&S and the 1999 Trust, the trial court did not declare the lien invalid or order it discharged.

C&S suggests that this issue is moot because (1) the judgment contains a Mother Hubbard clause, declaring that all relief not expressly granted therein is denied, and (2) C&S itself filed a release with the County Clerk's office. The court did not agree. The 1999 Trust had also requested a declaratory judgment that it was not a party to any contract with C&S, C&S's lien was invalid, and the property in question belongs solely to the 1999 trust and not Triple PG or Guniganti. These declaratory judgment requests were, in effect, mirror image counterclaims of C&S's claims regarding the lien. Thus, denying all relief not granted did not indicate the lien was invalid or discharged; in fact, the Mother Hubbard clause denied relief to both sides on the issue of the lien's validity as well as C&S's entitlement to a lien on the 1999 Trust's property, leaving these issues—although fully tried and disposed of by the judgment—unanswered. The 1999 Trust was legally entitled to relief it did not receive in the judgment; the judgment itself, therefore, did not moot the issue.

C&S further suggests that this appellate issue became moot when C&S filed a release during the pendency of the appeal and asked the court to take judicial notice of
the release and to determine that it discharged the lien. The court noted, however, that the release of the lien did not prevent C&S from refiling in the future and C&S steadfastly declined to stipulate or even acknowledge that it would not attempt to refile its lien. So, despite the release, a live controversy still exists between the parties. Release of the lien did not extinguish C&S's request for a declaration that it was in privity with the 1999 Trust or the 1999 Trust's request for declarations that it was not a party to any contract with C&S and the property in question belongs solely to the trust. These issues were resolved on the merits at trial and should have been resolved in the judgment. Accordingly, the court reformed the judgment to state that no privity of contract existed between C&S and the 1999 Trust and therefore C&S was not entitled to a lien against the 1999 Trust's property.

The court then looked at whether the trial court should have found the lien to be fraudulent. A lien is fraudulent if the person who files it has actual knowledge that the lien was not valid at the time it was filed. While the jury effectively declined to find that C&S was in privity with the 1999 Trust, it also declined to find that the lien was fraudulent.

The 1999 Trust asked the jury to determine whether C&S file its lien with knowledge that the lien was a fraudulent lien or claim against the 1999 Trust’s property, with the intent that the lien be given the same legal effect as a valid lien, and with intent to cause financial injury. The jury answered no.

Even though the jury declined to find that a preponderance of the evidence established Triple PG or Guniganti effectively controlled the 1999 Trust, there is significant evidence of a close, interconnected relationship between Guniganti, Triple PG, and the 1999 Trust. Moreover, it is clear that C&S dealt exclusively with Guniganti and other Triple PG representatives, even though the sand processing plant in question was to be built on property owned by the 1999 Trust. The jury may therefore have reasonably concluded that the evidence did not show, more likely than not, that C&S was not in privity with the 1999 Trust and thus that the lien was fraudulent at the time it was filed. In other words, the evidence supported the conclusion that because of its dealings with Triple PG and Guniganti and their apparently close, interconnected relationship with the 1999 Trust, C&S believed that it was also dealing with the 1999 Trust and did not realize he could not take a valid constitutional lien on the trust's property when he filed for the lien. The jury's refusal to find that C&S filed a fraudulent lien was therefore not so contrary to the overwhelming weight of the evidence so as to be clearly wrong and manifestly unjust.

Moore v. Brenham Ready Mix, Inc., 463 S.W.3d 109 (Tex.App.-Houston [1st Dist.] 2015, no pet.). A subcontractor, or, as in this case, a supplier to a subcontractor, is a derivative claimant and, unlike a general contractor, has no constitutional, common law, or contractual lien on the owner's property. As a result, a subcontractor's lien rights are totally dependent on compliance with the statutes authorizing the lien. The Texas Supreme Court has recognized, however, that substantial compliance with the statutes is sufficient to perfect a lien.

Property Code § 53.056 sets out the notice requirement for lien claimants who are not general contractors. This section provides that if the lien claim arises, as here, from a debt incurred by a subcontractor, the claimant must give the original contractor written notice of the unpaid balance not later than the fifteenth day of the second month following each month in which all or part of the claimant's material was delivered. The claimant must then give the same notice to the owner or reputed owner of the property and the original contractor not later than the fifteenth day of the third month following each month in which all or part of the
claimant's material was delivered. Section 53.056(f) provides that copy of the statement or billing in the usual and customary form is sufficient as notice under this section.

For the concrete that Brenham delivered to the worksite in July 2007, Brenham was required to give written notice of the claim to the original contractor, Stability Homes, by September 15, 2007, which was the fifteenth day of the second month following the month in which Brenham delivered part of its materials. Brenham did not present any specific testimony or other evidence that the project manager, on behalf of either L&F or Stability Homes, the two original contractors on the project, received written notice of Brenham’s lien claim for the concrete delivered in July 2007, either in the form of an unpaid invoice or otherwise, by September 15, 2007. Even if the project manager had actual notice by September 15, 2007, that Brenham had not been paid courts have held that liberal construction the materialman's liens statute does not save the materialman's lien from his failure to provide timely written notice.

For the concrete that Brenham delivered to the worksite in September 2007, Brenham was required to give written notice of the claim to Stability Homes, the general contractor, by November 15, 2007, which was the fifteenth day of the second month following the month in which Brenham delivered part of its materials. It is undisputed that Brenham sent a written notice dated November 21, 2007, to Mott, Stability Homes, and Art DePue concerning its claim. Brenham contends that it satisfied the statutory notice requirement because the project manager testified that he received and approved invoices for the project and that Brenham showed him documents about the unpaid invoices in September, October, and early November.

As stated above with respect to the July deliveries, the project manager testified that he did not receive invoices from Brenham until the November 21 notice letter. Even if the project manager’s testimony supports an argument that Stability Homes had actual notice that Brenham had not been paid for its September 2007 deliveries, actual notice of an unpaid claim does not satisfy the statutory notice requirements of § 53.056.

The court held that Brenham had not substantially complied with the statutory notice requirements.

The homeowners also claimed that the trial court had erred in enforcing the full amount of Brenham’s fill-dirt lien which covered all thirty-seven lots in the project. They argue that the extent of Brenham’s lien on their individually-owned lots is limited by the proportionate share of the entire property represented by their lots as defined on the recorded subdivision plats and that the total amount of the lien against the entire property cannot be applied to each lot sold individually. Instead, the trial court can only apply the value of the proportion of the materials used on each lot in relation to the total value of the lien on the entire property.

Brenham contends that because it delivered materials to the project pursuant to a single contract with the contractor, the contract did not designate which materials were to be used on which lot, and it was not paid by the lot, the lien may extend to more than one lot and the aggregate amount of the lien may be applied to each lot. The individual homeowners respond that the amount of actual materials used on the entire property is immaterial. It is the proportionate share of the value of the lien that is at issue, not the proportionate value of the actual amount of materials used. The court agreed with the individual homeowners.

In is clear from case law that a materialman's lien attaches to the entire contiguous property, or tract, on which the owner contracted to have the materials used. But the cases do not address the issue presented by this case: the enforcement of
the value of a lien that attached to undivided property against subsequent purchasers of a specified portion of the tract, here the subsequent owners of individual lots in a subdivision platted into individual lots prior to the delivery of the materials but sold after the material had been supplied to the entire undivided property.

Brenham contends that because the lots in Phase Three were contiguous, because it delivered the materials to the project pursuant to a single contract, and because the contract did not specify the amount of materials to be used on each specific lot, the entire amount of the fill-dirt lien can be enforced against any given individual lot. The court agreed that the lien attached to all the properties. But the issue is not whether the lien could be placed on the entire property to which materials were supplied when all the lots were contiguous and the property was owned by a single owner. The issue is whether the lien may be enforced in its entirety against the subsequent purchasers of individual lots of the property.

It is undisputed that the materials delivered by Brenham to the project were not solely applied to one particular lot in the project; instead, the materials were applied to each of the thirty-seven lots. The court therefore concluded, under the particular facts of this case, that Brenham may not enforce the full value of its fill-dirt lien against any individually-owned lot but may instead only enforce its fill-dirt lien to the proportion the individual improved lot bears to the entire tract. Were the court to hold otherwise, a cascade of absurd and unreasonable results would follow in violation of the rules of statutory construction and the case law applying those rules.

For one thing, the purchaser of an individual unit in a multi-million-dollar complex of condominiums or a mixed-use development or a subdivision could—as here—be held liable for the entire value of a debt incurred by someone else for the benefit not simply of the individual property purchased but for all contiguous property in the project benefitted by the original owner's contract with a materialman. The result could be—as it is here—the court-ordered enforcement of the entire value of the lien against an individual lot owner for many times the value of the labor and materials proportionately supplied to the property purchased by that individual lot owner. And the result could well be—again, as it is here—the court-ordered sale of the individual lot owner's property to satisfy a debt incurred by another on a much larger piece of property than that owned by the person against whom the debt is enforced. Such a result also allows for multiple recoveries of the same total value of the lien against multiple individual property owners, violating the one-satisfaction rule.

PART XI
CONDEMNATION

State of Texas v. Treeline Partners, Ltd., 476 S.W.3d 572 (Tex.App.-Houston [14th Dist.] 2015, pet. pending). The State contends that the trial court erred in cutting off four lines of questioning in voir dire: whether potential jurors believe that (1) the government's right to take private property is too great a power, (2) landowners should be paid more than market value for condemned property, (3) landowners should be compensated for sentimental value, and (4) the State lowballs its fair-market-value appraisals.

The first of these was duplicative of many other questions regarding the State's right to take private property. The next two lines of inquiry present closer questions, not only because of the dearth of case law on these types of inquiry, but also because the record of voir dire shows that Treeline's counsel already had strongly implied to the jury that Treeline's property had sentimental value for which the State's offer was inadequate.

The last line of inquiry, however, does
not present a close question. The trial court refused to allow the State's attorney to ask potential jurors “whether anybody believes that the State lowballs,” and told the attorney that if she asked the question, then the trial court probably would hold her in contempt. When the attorney sought clarification about what she was not allowed to ask, the trial court not only refused to do so, but expanded the threat of contempt.

In attempting to ask potential jurors whether they believe that the State “lowballs,” the State's attorney properly inquired about whether the venire members held a preexisting bias or prejudice that the State underestimates property values. This inquiry goes to whether the prospective jurors could impartially judge the credibility of the State's witnesses regarding value.

Because the State was denied the opportunity to intelligently exercise its peremptory strikes and to discover whether any prospective juror was subject to a challenge for cause based on a preconception that the State underestimates property values, the court concluded that the State was denied the right to trial by a fair and impartial jury. This constitutes harmful error.

**Enbridge G & P (East Texas) L.P. v. Samford**, 470 S.W.3d 848 (Tex.App.-Tyler 2015, no pet.). Compensation for land taken by eminent domain is measured by the market value of the land at the time of the taking. “Market value” is defined as the price that the property would bring when it is offered for sale by one who desires but is not obligated to sell and is bought by one who is under no necessity of buying. The three traditional approaches to the determination of market value are the comparable sales method, the cost method, and the income method. The fact finder is entitled to consider every factor that would affect the price for which a willing buyer and seller would exchange for the property. However, the fact of condemnation must be excluded. Fair market value must, by definition, be computed as if there were no proceedings in condemnation to eliminate that market. Testimony of a witness who uses an unauthorized and improper valuation method should be excluded.

When only a part of the tract is taken, the “just compensation” to which the owner is entitled consists of two elements: (1) the market value of the part taken, and (2) the diminution in value of the remainder due to the taking and construction of the improvement for which it was taken. In the case of a partial taking, the part taken for the easement is to be considered as severed land,” but is to be valued as a proportionate part of the parent tract or economic unit to which it belongs. However, where the part taken is a self-sufficient economic unit, its value should be determined by considering the part taken alone, and not as a portion of the entire tract of which it was a part.

Ordinarily, a landowner has a right to claim consequential or severance damages to the entire remainder of the parent tract provided it is contiguous to the part taken and there is unity of use. But he is not compelled to do so. Where a substantial portion of the remainder is suitable to some higher or better use, such as a commercial or industrial use, and the other part of the remainder is not suitable for the same purpose, the landowner is permitted to claim remainder damages to only that portion of the remainder suitable for the higher use. The new economic unit created from the parent tract thus becomes the appropriate unit from which to determine the market value of the severed tract.

When, as in the instant case, an easement is taken for a pipeline, a power line, or similar purposes, the owner is left with some beneficial use of the part taken. In such a case, the damages for condemnation will be, as a matter of law, less than the full value of the fee. Therefore, the proper measure of damages is the difference in value of the part taken (the easement strip), considered as severed land,
before the taking, and the value of the same tract considered as severed land after the taking (now burdened by the easement).

When a partial taking occurs, as is the case with an easement, the landowner is entitled to any diminution in the fair market value of the remainder of the tract lying outside the part taken. The parties have the right to introduce evidence of everything that would tend to affect the value of the land, in the estimation of a proposed purchaser, or that would tend to make it more or less valuable to the present owner.

Here, the landowners called on Hoyt to provide expert opinion on market values. Hoyt was a lawyer and the County Attorney of San Augustine County. Based his opinion on the numerous occasions he had negotiated sales of pipeline easements “before it got into litigation,” and his conversations with hundreds of landowners. He rejected the traditional market value approach because “that standard manner of valuation is not true, and not accurate, because that's not what actually happens out here in the real world in the industry.”

The jury issues in a partial taking for a pipeline easement are the diminution in the fair market value of the part taken considered as severed land, and the diminution, if any, in the fair market value of the remainder because of the taking. Neither Hoyt's report nor his testimony spoke to the separate issues the jury was required to answer. He did not attempt to value the part taken as severed land nor did he separately assess the diminution in the market value of the remainder. Hoyt, instead, combined the value of the part taken and the consequential damages to the remainder and expressed his opinion of total damages, including both elements of recovery, at $850.00 per linear rod for all of the tracts. The distortion and unreliability inherent in Hoyt's per linear rod approach is obvious. Almost always a pipeline will cross tracts of varying sizes and shapes. A pipeline may traverse a large tract for a short distance while requiring a greater distance to cross a smaller one. Therefore, there is generally little or no relation between the length of the pipeline easements and the size and value of the remainders created.

Hoyt's report and testimony could not have assisted the jurors in addressing the issues they were charged to resolve. But their verdict shows that his per rod approach served to confuse them. The objective of the judicial process in condemnation is to make the landowner whole and to award him only what he could have obtained for his land in the free market. Hoyt's method was not designed to achieve this objective. His report and testimony were neither relevant nor reliable and were therefore inadmissible.

City of Justin v. Rimrock Enterprises, Inc., 466 S.W.3d 269 (Tex.App.-Fort Worth 2015, pet. denied). Colorado Avenue runs north and south along the eastern side of Rimrock’s property. Colorado Avenue appeared on the City’s original town plat, but wasn’t a street at that time – it was a dirt trail “but cars could use it if it had not rained.” An earlier owner of the property covered the road with gravel to help make it passable. He also built a fence around the property, but the fence did not extend to the eastern portion of the property that Colorado Avenue crossed. The public has used the property for decades.

As part of an effort to improve the quality of the roads located in the City's industrial park, the City constructed concrete roads over the existing dirt or gravel roads, including Colorado Avenue. Rimrock sued the City for inversely condemning the part of the property where Colorado Avenue crosses it.

The City pleaded, among other things, that Rimrock's inverse condemnation claim was barred by limitations and that no taking had occurred because the portion of Colorado Avenue that crossed Rimrock's property was impliedly dedicated to the public before Rimrock purchased the
property.

The jury was not asked to determine when Rimrock’s cause of action accrued. When the jury is not asked to determine when the cause of action accrued for purposes of supporting a limitations defense, the defense is waived unless the date was conclusively established by the evidence. There is no statutory provision specifically providing a limitations period for inverse condemnation actions. However, Texas courts agree that a plaintiff’s claim for inverse condemnation is barred after the expiration of the ten-year period of limitations to acquire land by adverse possession. For cases of adverse possession, a cause of action accrues and limitations begins to run when entry upon the land is made.

The City claimed that the public used Colorado Avenue as early as the 1930s, but this is no evidence for purposes of the accrual inquiry because it is not evidence that the City --the governmental defendant in this case--entered the land. Nonetheless, the City points to evidence that it entered the land, and even maintained it, well before Rimrock purchased the property in 1994. Rimrock claimed that the City did no maintence before it constructed the concrete road. Because the record contains conflicting evidence regarding when Rimrock’s inverse condemnation claim accrued, the City did not conclusively establish its limitations affirmative defense.

The jury found that 7,095 feet of Colorado Avenue had been impliedly dedicated and that the remainder was inversely condemned. The City claimed that the entire street had been impliedly dedicated. Rimrock claimed the trail had been no wider than 12 or 15 feet. The City, relying of State of Texas v. NICO-WF1, L.L.C., 384 S.W.3d 818 (Tex. 2012) argued that the entire width had been dedicated because land dedicated as a street includes the whole width of the public right of way, including sidewalks and parkways, which are a part of the street itself, and pavement, shoulders, gutters, curbs, and other areas within the street lines. However, NICO involved an express dedication with clearly defined boundaries and a lower court ruling that misapplied the law in determining the extent of those undisputed boundaries. In this case, there was an implied dedication of an unspecified size and jury questions inquiring about the extent of the dedication.

The City claimed bore the burden of proof on its implied dedication claim. A party challenging the legal sufficiency of an adverse finding on an issue on which the party had the burden of proof at trial must demonstrate on appeal that the evidence conclusively established, as a matter of law, all vital facts in support of the issue.

Sloan Creek II, L.L.C. v. North Texas Tollway Authority, 472 S.W.3d 906 (Tex.App.-Dallas 2015, pet. pending). Sloan Creek lies south of the center of the interchange of SH 121 and U.S. 75 on the east side of U.S. 75. The creek generally runs towards the southeast then more easterly across the southern edge of approximately 219 acres owned by Sloan Creek II. Before 2008, the surrounding watershed drained rainwater into Sloan Creek, including drainage from the interchange of SH 121 and U.S. 75. Expanding SH 121, changing it into a tollway, and constructing a new interchange of SH 121 and U.S. 75 was part of section 4 of the Sam Rayburn Tollway project of the Texas Department of Transportation.

TxDOT awarded the Tollway project to the North Texas Tollway Authority. The project was designed by, and the construction overseen by, engineering firms under contract with NTTA. The Tollway improvement design included additional acres of roadway surface and a drainage system that were designed to discharge rainwater runoff into Sloan Creek.

Third, Sloan Creek II argues the erosion of the banks of Sloan Creek was foreseeable to NTTA and TxDOT from the designed
discharge into Sloan Creek so they should have known the erosion would result, which is sufficient to raise a fact issue regarding the knowledge component of NTTA's and TxDOT's intent.

First, Sloan Creek II argues mere designed discharge of rainwater runoff onto Sloan Creek II's land was by itself a taking. An owner of the bed of a watercourse is not entitled to compensation for a governmental entity's use of that watercourse to transport water across the property for a public purpose. When a governmental entity does not damage downstream properties, it is not a taking or damage for a governmental entity to significantly increase discharge into a watercourse. But a governmental entity's discharge of water into a watercourse that floods downstream owners can give rise to a takings or damages claim under the Texas Constitution. Discharge of water that unnaturally erodes a substantial amount of a downstream owner's land can also be a taking or damage.

Sloan Creek II has not cited any authority supporting its argument that mere use of a watercourse by a governmental entity to transport water across a creek bed is by itself a taking or damage. There is no dispute Sloan Creek has been a watercourse at least since 1872 when it was depicted as a watercourse on a map. There is also no dispute that Sloan Creek has not flooded since the Tollway improvements and Sloan Creek II does not contend that flooding caused its damage. Accordingly, the court concludes NTTA's and TxDOT's designed discharge of rainwater runoff into Sloan Creek is not “by itself” a taking or damage under the Texas Constitution.

Second, Sloan Creek II argues all it had to prove was that the design intentionally provided for discharge of rainwater into Sloan Creek and that the erosion to the banks of Sloan Creek resulted from that intended design. The court disagreed. When a governmental entity physically damages private property in order to confer a public benefit, that entity may be liable under the Texas Constitution if it (1) knows that a specific act is causing identifiable harm or (2) knows that the specific property damage is substantially certain to result from an authorized government action -- that is, that the damage is “necessarily an incident to, or necessarily a consequential result of the government's action.” Because the entity’s knowledge is a necessary component of the entity’s intent, Sloan Creek II failed to meet the test.

Third, Sloan Creek II argues the erosion of the banks of Sloan Creek was foreseeable to NTTA and TxDOT from the designed discharge into Sloan Creek so they should have known the erosion would result, which is sufficient to raise a fact issue regarding the knowledge component of NTTA's and TxDOT's intent. Again, the court disagreed. For a governmental entity to be culpable for a taking or damage under article I, section 17 there must be evidence of objective indicia that the governmental entity whose conduct is under scrutiny knew its conduct was causing the damages complained of or knew the specific property damage was substantially certain to result from its conduct.

**PART XII**

**LAND USE PLANNING, ZONING, AND RESTRICTIONS**

*Trant v. Brazos Valley Solid Waste Management Agency, Inc.*, 478 S.W.3d 53 (Tex.App.-Houston [14th Dist.] 2015, pet. denied). This case is also discussed in Easements. The Trants entered into an Option Contract with the Cities of Bryan and College Station, pursuant to which the Cities obtained the right to purchase approximately 382 acres of land in Grimes County from them. The Option Contract stated that the Cities contemplated using the property as a Landfill. The Cities later purchased the property and the deed conveying the property to the Cities incorporated the “Terms, Conditions, and Representations” in the Option Contract.
The Cities formed the Waste Management Agency, a governmental entity that currently operates a landfill on the property. The Trants learned that the Cities had decided to put a firing range on a portion of the property near their land. The Trants sent a letter to the Cities and the Agency, contending that the property could be used only as a landfill. Counsel for the Agency responded by letter that while the Option Contract contemplated an intended use of the property as a landfill, the contract did not restrict the Cities' use of the property to such purpose.

The Trants filed suit against the Agency. The Agency filed a plea to the jurisdiction, asking the trial court to dismiss the suit on the basis that governmental immunity bars the Trants' claims. The Trants responded that (1) the Agency is not immune from suit to enforce the Option Contract, which the Trants construe as a condemnation settlement agreement, or from their claim to enforce land use restrictions; and (2) the Agency's immunity has been waived under Chapter 271 of the Local Government Code. The trial court granted the Agency's plea and dismissed the Trants' claims for want of jurisdiction.

The Agency describes itself as a local governmental non-profit corporation wholly owned by the Cities and a "governmental unit" as defined in Chapter 101 of the Civil Practice and Remedies Code. Local governmental entities enjoy governmental immunity from suit, unless immunity is expressly waived. Governmental immunity includes both immunity from liability, which bars enforcement of a judgment against a governmental entity, and immunity from suit, which bars suit against the entity altogether. A governmental entity that enters into a contract necessarily waives immunity from liability, voluntarily binding itself like any other party to the terms of agreement, but it does not waive immunity from suit.

The Trants argued that the Agency is not immune from an action to enforce restrictive use covenants in the General Warranty Deed and Easement Agreement. The court did not get to the immunity issue because it found that the Trants had not raised a material issue of fact regarding the existence of any restrictive use covenant in the General Warranty Deed or Easement Agreement that the Agency may have violated.

When a restrictive covenant may reasonably be interpreted in more than one way, the court will resolve all doubts in favor of the free and unrestricted use of the property, strictly construing the restrictive clause against the party seeking to enforce it. The words used in the restriction, and the restriction as a whole, may not be enlarged, extended, stretched, or changed by construction. The party seeking to enforce a restrictive covenant has the burden of showing that the restriction is valid and enforceable.

The Trants argue that the deed includes a restrictive use covenant allowing the land to be used only as a landfill. The deed incorporates the "Terms, Conditions, and Representations" in the Option Contract. The Option Contract states that the Cities "contemplate using the Property as a . . . Municipal Sanitary Landfill." However, nothing in the language of the deed or Option Contract indicates that the Trants retained a possessory interest in the property contingent on the Cities' using it as a landfill. The Option Contract and the deed do not include a restrictive use covenant. The only language referencing any use of the property, discussed above, merely reflects how the Cities anticipated using the property--the Cities did not agree to use the property only as a landfill.

PART XIII
MISCELLANEOUS

SW 3d 649 (Tex. 2016). “Nearly a century ago, a Texas attorney argued that the rule at issue in this case made it "cheaper to kill a mare in Texas than it is to cripple her." No American Pharoah herself, this one-eyed, underfed mare lived a simple life. One night, however, she was caught roaming the city streets in search of food and was placed in the city pound. Her owner failed to pay her board bill. Thus, the city marshal hired a man known as Panhandle Pete to put her out of her misery. As the court of appeals then put it, "when Panhandle Pete's pistol popped, she petered, for which the poundkeeper paid Pete a pair of pesos." Her owner protested her death and sued for damages, including $350 for the loss of her services in his occupation of hauling. The court rejected that claim, holding that although "[d]amages occasioned by the loss of the use and hire of an animal are recoverable where the animal is injured," "no such damages are recoverable for the total loss or death of an animal." Rather, "[t]he measure of damages in the case of a wrongful killing of an animal is its market value, if it has one, and if not, then its actual or intrinsic value, with interest." That rule, the owner's attorney responded, makes it "cheaper to kill a mare in Texas than it is to cripple her."

This case places a modern twist on that rule and addresses whether it should be cheaper to totally destroy a truck than it is to partially destroy it. J&D Towing lost its only tow truck when a negligent motorist collided with the truck and rendered it a total loss. The question presented is simply put: In addition to recovering the fair market value of the truck immediately before the accident, may J&D recover loss-of-use damages, such as lost profits?

Tracing case law regarding damage or destruction of personal property from the days of slavery through Panhandle Pete to the present, the court ultimately held that loss of use damages are recoverable in a total destruction case.
26th ANNUAL ROBERT C. SNEED
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FEDERAL ISSUES UPDATE – FinCEN, HMDA AND FIRPTA

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Ginny Abiassi is Vice President - Regional Underwriting Counsel for North American Title Insurance Company. Her main responsibility is to make underwriting decisions pertinent to the writing of title insurance on residential and commercial properties in Texas and other states. Along with her underwriting responsibilities, she provides legal counsel and advice to local, state and regional managers regarding leasing, marketing, regulatory, employment and administrative matters as well as advising on claims and escrow matters.

Prior to joining North American, Abiassi spent three years in the oil and gas business working on a variety of contractual matters as well as insurance coverage and land ownership issues. During her many years at Stewart Title she served both as the Director of Marketing and Communications and Counsel during which time she was responsible for Stewart’s marketing on a world-wide basis and as Sr. Underwriting Counsel in the National Legal Department. Although the majority of Abiassi’s over 25 years in the title industry has been spent closing and underwriting real estate transactions and handling claims, while at Stewart, she also co-developed Virtual Underwriter, Stewart’s award-winning underwriting software and well as several other web sites that have been used extensively in the real estate industry.

Abiassi holds a Bachelor of Science from Texas Tech University and Juris Doctor from South Texas College of Law. She has been a frequent lecturer on real estate subjects for the State Bar, Mortgage Lending Institute, Mortgage Banker’s Association, Practicing Law Institute and other various groups throughout the country.

She is a past director of the Texas Land Title Association and has had many articles published in the area of real estate law. Abiassi is a member of the American Bar Association, State Bar of Texas and Houston Bar Association and a member of several real estate sections for both the State Bar and American Bar Associations. She also is a past director of the Real Estate section of the Houston Bar Association.
FEDERAL ISSUES UPDATE – FinCEN, HMDA, FIRPTA

There are several issues that have arisen at the federal level that affect the real estate industry, especially those of us that deal with land titles on a consistent basis. The goal of this paper is to examine those issues in detail so that real estate personnel can pinpoint the issue and know how to handle the issue or, at the least, have enough information to begin the process.

Foreign Investment in Real Property Tax Act of 1980 (FIRPTA)

The Foreign Investment in Real Property Tax Act of 1980 (26 U.S.C.A §1445) (FIRPTA) was passed to impose federal taxes and return filing obligations on non-U.S. investors who owned interests in U.S. property. Property covered by the act include all types of property – both commercial and residential as well as stock in real estate investment trusts (REIT) and other U.S. real property holding corporations. To accomplish its goal, FIRPTA required purchasers of real estate from a foreign seller to withhold ten (10%) percent of the “amount realized” otherwise known as the “gross sales price” and remit it to the Internal Revenue Service (IRS) unless certain exemptions applied. While the common perception is that FIRPTA was passed in response to Japanese investors purchasing U.S. trophy properties such as Rockefeller Center and Pebble Beach, these properties were bought long after the passage and enactment of FIRPTA. In actuality, FIRPTA was passed in 1980 to restrict, or at least slow down, the sale of U.S. farmland to foreign investors. Under FIRPTA, the foreign sellers would have to pay ten (10%) percent of the amount realized/gross sales proceeds as well as additional federal, state and local taxes. This would sometimes increase the taxes to fifty (50%) percent or sixty (60%) percent of the total sales proceeds.

Until the passage of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), FIRPTA made it difficult for non-U.S. investors to invest in U.S. real estate. This is because of the tax impediments that were contained in the original FIRPTA legislation. Under the PATH Act, a non-U.S investor may now own up to ten (10%) percent of the stock in a U.S. publicly traded REIT. This is double the amount that was previously allowed under FIRPTA. In addition, certain foreign pension funds are now allowed to invest in REITs without being subjected to FIRPTA. Of course, these tax changes came with a price. In order to pay for these two provisions, Congress increased the FIRPTA withholding rate from ten (10%) percent to fifteen (15%) percent effective February 16, 2016. This increase directly affects the buying and selling of real estate – thus, it affects buyers, sellers, their individual real estate agents and the title company who is closing the transaction.

First, let’s consider who is a foreign person. A foreign person is basically a non-resident alien. This means they are not U.S. citizens, U.S. nationals or holders of a green card. Although they may have a social security number, this does not mean that they still are not considered a foreign person. Entities that are considered foreign persons include foreign corporations who
have not elected to be treated as U.S. corporations, foreign trusts and partnerships, and disregarded entities such as sole member LLCs if they haven’t elected to be treated as U.S. entities.

Prior to the enactment of the PATH Act, FIRPTA required that the purchaser (transferee) withhold ten (10%) percent of the amount realized and remit it to the IRS if the seller (transferor) was considered a foreign person. Under the PATH Act, that threshold has been raised to fifteen (15%) percent with the following guidelines:

1. If the amount realized is $300,000 or less and the purchaser/transferee intends to use the property as a residence, no monies need be withheld or remitted to the IRS.
2. If the amount realized exceeds $300,000 but does not exceed $1,000,000 and the purchaser/transferee intends to use the property as a residence, then the withholding rate is ten (10%) percent on the amount realized.
3. If the amount realized exceeds $1,000,000, the withholding rate is fifteen (15%) percent on the entire amount, regardless of use by the purchaser/transferee.
4. When property is being acquired by a purchaser/transferee not for use as a residence, the withholding rate is always fifteen (15%) percent of the amount realized.

For a property to be defined as a residence, the purchaser/transferee or a member of their family must reside at the property for at least fifty (50%) percent of the number of days the property is occupied by any person during the first two 12 month periods following the date of the closing. If the purchaser/transferee fails to meet the occupancy requirements, they may become liable for the difference between what was actually withheld, if any, and the amount that should have been withheld plus any interest accrued and penalties. The responsibility and liability to the IRS with respect to any FIRPTA withholding belongs to the purchaser/transferee, not the seller/transferor or the title company. Therefore, it is the purchaser’s decision to elect to take an exemption or a reduced rate. If the purchaser/transferee opts to take the exemption or reduced rate, the purchaser/transferee must make an affirmative election to do so. Therefore, if FIRPTA applies but the purchaser/transferee is acquiring the property to use as a residence, the title company should require specific written instructions from the purchaser/transferee to either waive the withholding or withhold at the reduced rate. An example of a purchaser/transferee’s direction to the title company is attached as Exhibit A.

While this entire process can seem daunting, FIRPTA does provide some protection for purchasers/transferees and/or their agents if they rely upon a seller/transferor certification that he/she is not a foreign person. A signed affidavit should be obtained during every sale transaction from the seller/transferor stating that they are not a foreign person. An example of a “Seller’s Affidavit of NonForeign Status” is attached as Exhibit B. Please note that nonforeign certifications are not effective if the parties to the transaction have actual knowledge that would lead them to believe that the affidavits given are false.
Another way that foreign persons may lessen or eradicate the FIRPTA withholding is by applying for and receiving a Withholding Certificate from the IRS prior to closing. The form used to apply for the Withholding Certificate is the 8288-B (copy of and instructions for attached as Exhibit C). Oftentimes it takes 6 months or longer to get this accomplished. If closing is to occur prior to the time the Withholding Certificate is received, the title company may, if agreed to prior to closing, withhold and escrow the monies that would otherwise be paid to the IRS because of FIRPTA.

It is becoming quite common for title companies to assist their purchaser/transferee in situations where they are acquiring property from a seller who is a foreign person. The purchaser and seller’s first step should be to add an addendum to the sales contract which directs the title company to collect and forward the FIRPTA withholding to the IRS along with IRS forms 8288 and 8288-A. A copy of both the 8288 and 8288-A form along with their instructions are attached as Exhibit D and Exhibit E. These completed forms, along with the required withholding are due to the IRS no later than 20 days after closing.

**IRS to Invalidate Unused ITINs Unless Renewed**

The IRS has announced that it is requiring individuals with inactive or old individual taxpayer identification numbers (ITINs) to renew their ITINs. The following are IRS guidelines to assist with compliance:

1. If the individual ITIN has not been used for three consecutive years, it will be considered inactive and be renewed.
2. If the ITIN was issued prior to 2013, it must be renewed.
3. ITINs that do not fall under either category will remain effective indefinitely.

An ITIN can be renewed by filing Form W-7 (copy and instructions attached as Exhibit F) with the individual’s tax return or in a separate filing. The renewal procedures and the effect of the PATH Act on ITINs are further explained in IRS Notice 2016-48, a copy of which is attached as Exhibit G.

The IRS requires every individual who files a United States income tax return to have a tax identification number. This number can be a Social Security Number or an ITIN. Individuals with a Social Security Number cannot apply for an ITIN.

**FinCEN Geographical Targeting Order in Texas, Florida, New York and California**

The Director of the Financial Crimes Enforcement Network (FinCEN), U.S. Department of the Treasury issued a Geographic Targeting Order (GTO) to all licensed title insurers in the states of Texas, Florida, New York and California on July 22, 2016. A copy of the GTO is attached as Exhibit H. The GTO requires all title underwriters, their subsidiaries and agents to collect and report information regarding certain residential real estate transactions. These new reporting
requirements will apply to Covered Transactions (as defined below) occurring between August 28, 2016 and February 23, 2017 in which any title insurance policy is issued.

CAVEAT: The GTO states that the title insurer, its agents, officers, directors and employees may be liable, without limitation, for civil or criminal penalties for violating any of the terms of the Order.

What is a Covered Transaction?

The GTO defines a “Covered Transaction” as one in which:

1. A legal entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction, defined in the GTO as:
   a. Corporation
   b. Limited liability company
   c. Partnership
   d. Other similar business entity
2. Purchases residential real property, defined by FinCEN as real property (including condominium and cooperative units) designed principally for the occupancy of from one to four families, located in the following counties:
   a. Texas – County of Bexar - $500,000
   b. Florida – Counties of Miami-Dade, Broward and Palm Beach - $1,000,000
   c. California – counties of San Diego, Los Angeles, San Francisco, San Mateo and Santa Clara - $2,000,000
   d. New York – The New York City Boroughs of Manhattan ($3,000,000), Brooklyn, Queens, Bronx and Staten Island – ($1,500,000)
3. For a total purchase price in excess of the amounts listed above in subsection 2
4. Such purchase is made without a bank loan or other similar form of external financing, and
5. Such purchase is made, at least in part, using currency or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check or a money order in any form.

The counties listed above shall be collectively referred to hereafter as the Affected Counties.

Information to be Collected

The GTO requires that certain information be provided on IRS Form 8300 for a Covered Transaction. The information includes all of the following:

1. Identity of the individual primarily responsible for representing the Legal Entity;
2. A description of the identification (driver’s license, passport or other similar identifying document) obtained from the individual primarily responsible for representing the Purchaser with a copy retained in the file;
3. Identity of the Purchaser and any Beneficial Owner(s) of the Purchasers;
4. A description of the type of identification, driver’s license, passport or other similar identifying document, obtained from the Beneficial Owner with a copy retained in the file;
5. Date of closing of the Covered Transaction;
6. Total amount transferred in the form of a Monetary Instrument;
7. Total purchase price of the Covered Transaction; and
8. Address of the real property involved in the Covered Transaction.

The “Beneficial Owner” is each individual who, directly or indirectly, own 25% or more of the equity interests of the purchaser. However, if the purchaser involved in the Covered Transaction is a limited liability company (LLC), the Covered Business (the insurer and its agents and affiliates) must provide the name, address, and taxpayer identification number of all members of the LLC, regardless of percentage ownership interest or control, to the extent not otherwise provided on the Form 8300. It is strongly suggested that title agents should communicate this requirement very early in the closing timeline to insure that all LLC members make the application for the taxpayer ID number, if they do not already possess one.

**Common Underwriting Requirements**

All of the title insurers, their subsidiaries, and their policy issuing agents are required to comply with the GTO beginning August 28, 2016 and ending February 23, 2017. Therefore, unless policy issuing agents possess the information necessary to comply with the terms of the GTO prior to closing the transaction, they will be prohibited from issuing a title insurance policy on a Covered Transaction.

It all starts with the Commitment for Title Insurance (Commitment). Most, if not all, title insurers are requiring that all Commitments issued on property in one of the Affected Counties involving residential property for the threshold amounts (or more) contain a Schedule C requirement detailing what must be done if the property to be insured is affected by the GTO. Examples of the requirements for Schedule C of the Commitment made by North American Title Insurance Company in these situations are attached as Exhibit I. Most title agents in the Affected Counties are also required by their title insurers to complete a Geographic Targeting Order Questionnaire on each file closed, even if the property is not a Covered Transaction. An example of said questionnaire is attached as Exhibit J. It is suggested that title agents retain a copy of this questionnaire in their closing file.

Completion of the Form 8300 must be done in accordance with the instructions included in the GTO despite instructions to the contrary that might be found on the Form 8300 itself. The following instructions may be of assistance to title agents in completing the Form 8300:

1. Part I – Information about the identity of the individual primarily responsible for representing the purchaser. A copy of this individual’s driver’s license, passport, or other similar identifying documentation must be obtained. This documentation should be described in Field 14.
2. Part II – Information about the identity of the purchaser. Field 15 will allow reporting of multiple parties. Title agents must also identify the Beneficial Owners of the purchaser and obtain a copy of these individuals’ driver’s licenses, passports, or other similar identifying documentation. This documentation should be described in Field 27.

3. Part III – Information about Covered Transactions. Insert date of closing in Field 28. List the total amount transferred using Monetary Instrument into Field 29. The total purchase price of the Covered Transaction is listed in Field 31 and the address of the real property goes into Field 34.

4. Part IV – Information about the Covered Business – The title agent should fully complete this and all other parts of the Form 8300.

5. Comments Section – Include the term “REGTO” as a unique identifier for the GTO. If the purchaser is an LLC, include the name, address and taxpayer ID for all members of the LLC. Title agents also include the title insurer’s name in this section.

A copy of an example Form 8300 with additional instructions is attached as Exhibit K.

The Bank Secrecy Act E-Filing System must be used by title agents to report all Covered Transactions. This filing must be done within 30 days of the closing of a Covered Transaction. The vast majority of title insurers are requiring their title agents to send them a copy of the filed Form 8300 along with a copy of the Bank Secrecy Act E-Filing system acknowledgment for the filing. Suffice it to say, the title agent who is involved in a Covered Transaction must make themselves aware of the requirements made by their individual title insurers.

As for record retention, all records relating to compliance with the GTO must be retained for a period of 5 years from the last day that this GTO is effective. This includes any renewals of the GTO. These records need to be readily accessible in a reasonable period of time. And of course these records need to be available to FinCEN or any other appropriate law enforcement or regulatory agency upon request.

While this GTO only affects Bexar County in Texas, as well as other counties in California, Florida and New York, it is quite possible that it will be expanded in the future. It is important that all persons who deal in real estate in any aspect become familiar with these guidelines and stay tuned for future announcements. Meanwhile, as an additional tool for all persons who are interested in or affected by the FinCEN GTO order, there are Frequently Asked Questions and Answers that are attached to this paper for your perusal. See Exhibit L. These questions and answers have been collected from the American Land Title Association, FinCEN and from title agent inquiries.
Statutory Trusts Imposed by the Perishable Agricultural Commodities Act (PACA) and by the Packers and Stockyards Act (PSA)

PACA (7 U.S.C. §§499a, et seq.) and PSA (7 U.S.C. §§181, et seq.) (the Statutes) are federal laws that contain provisions that create a trust (Trust). The Trust functions analogous to a hidden (unrecorded), super priority lien that attaches to the proceeds and receivables generated by the sale of commodities for the benefit of unpaid producers/suppliers of these commodities. Proceeds can include land and buildings bought with the trust funds derived from the sale of these commodities or the products derived therefrom. The Trust is automatic and continues in favor of the commodity supplier/producer and all downstream producers in the stream of commerce from the moment the commodities are first delivered to a dealer or other reseller until payment has been made.

Since no documents are recorded in the local land records to create or disclose the existence of the Trust, a real property purchaser can take title subject to the Trust and/or a mortgage or deed of trust securing a loan may also attach to the real property subordinate to the Trust. Either scenario would likely give rise to a claim under a title policy which would otherwise be preventable by the inclusion of the appropriate exception.

PACA applies to perishable agricultural commodities in the form of fresh fruits and fresh vegetables of every kind and character, including frozen versions and versions packed in ice. PACA risk in a transaction can be identified by knowledge of the use of the property and/or the business in which a party is engaged such as:

1. Food and produce wholesalers, produce storage, grocery wholesalers, food service firms, produce dealers, food distribution facilities;
2. Food processing facilities, produce packaging facilities, canners;
3. Supermarkets and grocery stores; and
4. Restaurants, hotels with food service, assisted living facilities, wineries, distilleries, and breweries

PSA applies to the sale of poultry, poultry products, livestock and meat products. PSA risk in a transaction can be identified by knowledge of the use of the property or the business in which a party is engaged, such as:

1. Poultry farms;
2. Livestock or swine farms/producers;
3. Meatpacking/poultry packing facilities; and
4. Supermarkets and grocery stores.

Sometimes the name of a company involved in the real estate transaction may suggest that PACA or PSA applies. For example, if the name contains the word food, grower, produce, packing, distributor, processor, farm, ranch, feedlot, or any variation thereof, you should be alerted to the possibility that PACA or PSA applies.
If the transaction involves a party whose assets may be subject to a PACA or PSA Trust, the title insurer should be contacted for further discussion. If the PACA/PSA risk is present, the following Schedule B Exception or something quite similar may be required in Schedule B of any title insurance policy issued in the transaction:

Any claim that the Title is subject to a trust or lien created under the Perishable Agricultural Commodities Act (7 U.S.C. §§499a, et.seq), the Packers and Stockyards Act (7 U.S.C. §§181, et. Seq.) or under similar federal or state laws.

**Home Mortgage Disclosure Act (HMDA)**

The HMDA was passed by Congress in 1975 and was implemented by Regulation C. This legislation requires many financial institutions to maintain, report, and publicly disclose information about mortgages. In 2011, HMDA rulemaking authority was transferred via the Dodd-Frank Act to the CFPB. The public data that is collected from these financial institutions is important because it helps show whether or not lenders are serving the needs of their communities. Additionally, it may show lending patterns that could be discriminatory. The CFPB is taking steps to improve data collected under the HMDA and is warning dozens of mortgage bankers and mortgage brokers that they may not be in compliance with HMDA. According to the CFPB, approximately 44 firms have been identified and contacted by the CFPB for possible lack of compliance. These firms have been asked to evaluate whether or not they are subject to HMDA and advise the CFPB of the steps they are taking to comply or to explain why they feel that they are not subject to the HMDA.

The aforementioned changes in Federal laws and regulations are important to note. Please keep these in mind as you continue your work in the land title industry.
To: Title Company

Re: ("Property")

FIRPTA- WITHHOLDING AUTHORIZATION AND INSTRUCTION

Section 1445 of the Internal Revenue Code as amended ("Section 1445"), the Foreign Investment in Real Property Tax Act ("FIRPTA"), requires foreign persons to pay income tax on the gains they make from selling U.S. real estate. Unless an exemption applies, the buyer must deduct and withhold from the seller’s proceeds a percentage of the gross sales price, as prescribed by law, and transmit that sum to the Internal Revenue Service along with Form 8288, “U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests”, to be applied toward the seller’s tax liability.

Title Company is not qualified to advise you on this important and intricate tax matter. Due to the complexity of the law and the IRS regulations, the possibility of changes in the law or IRS regulations, and the nature of your particular real estate transaction, this form may not be adequate to satisfy your tax requirements. You should consult with your attorney or accountant to make sure that your liabilities are satisfied. The parties to this transaction are not acting on or relying on any statements made or omitted by the escrow officer, title officer, or other closing officer with respect to tax reporting or withholding requirements. This document is not intended and should not be construed as tax or legal advice.

One of the following selections must be completed and signed for all transactions involving a foreign seller.

Option A.

We elect to deal with the applicability or non-applicability of Section 1445 outside of the closing, and therefore instruct North American Title Company that it should not be involved with the application of Section 1445 to this transaction.

In furtherance of that election, North American Title Company will not be liable for any loss or damage resulting from the application of Section 1445 to this transaction. It is also understood that North American Title Company may take any action it believes the law requires it to take with respect to this transaction.

Option B.

Sales Price is $300,000.00 or less and Buyer intends to occupy the property as their residence (as provided in the current regulations). NO FUNDS need to be withheld or remitted to the IRS.

Option C.

We elect to have the following amount deducted from seller's proceeds and submitted to the Internal Revenue Service:

FIRPTA – Notice and Instruction
Sales Price is $300,000.00 or less and Buyer does not intend to occupy the property as their residence, you are to withhold at a rate of 15% on the full consideration. With a tax due statement from the IRS, this amount may be reduced.

Sales Price exceeds $300,000.00 but does not exceed $1,000,000.00, and the Buyer intends to occupy the property as their residence (as provided in the current regulations), you are to withhold at a rate of 10% on the full consideration.

Sales Price exceeds $300,000.00 but does not exceed $1,000,000.00 and the Buyer does not intend to occupy the property as their residence (as provided in the current regulations) you are to withhold at a rate of 15% on the full consideration.

Sales Price exceeds $1,000,000.00, you are to withhold at a rate of 15% on the full consideration. The exemption for personal use as a residence does not apply in this scenario.

We, the undersigned, irrevocably authorize and instruct North American Title Company to deduct said amount from proceeds due to the seller at the closing and to remit said amount along with Forms 8288 and 8288-A (copy A and B) to the Internal Revenue Service to be applied toward the seller’s tax liability. Funds will be submitted immediately after the closing.

By executing this Withholding Authorization and Instruction, you release North American Title Company from any and all liability, obligation and/or responsibility with respect to (a) claims arising from the withholding of funds pursuant to Section 1445; (b) advising the parties as to the requirements of such Section; (c) determining whether the transferor is a foreign person under such Section; and (d) making any inquiry concerning compliance with such Section by any party to the transaction.

This form must be signed and returned by each named buyer and seller, or by an authorized agent for each named buyer and seller.

Date: ____________________________ Date: ____________________________

Seller Name(s): ____________________________ Buyer Name(s): ____________________________
SELLER'S AFFIDAVIT OF NONFOREIGN STATUS

Section 1445 of the Internal Revenue Code provides that a transferee (Buyer) of a U.S. real property interest must withhold tax if the transferor (Seller) is a foreign person. To inform the transferee that withholding of tax is not required upon the disposition of a U.S. real property interest located at 2010 Mountain Forest, Spring Branch, TX 78070 by Lucile Moren. I/WE hereby certify the following (if an entity transferor, or on behalf of transferor):

INDIVIDUAL TRANSFEROR(S):

I AM:

☐ U.S. Citizen. My U.S. Taxpayer Identify Number (Social Security Number) is: ______________________________

☐ Permanent Resident Alien ID No.: ______________________________

☐ Foreign Person (Non Resident Alien)

My home address is: __________________________________________________________

CORPORATE, PARTNERSHIP, TRUST OR ESTATE TRANSFEROR(S):

☐ ________________________________________________ is not a Foreign Corporation, Foreign Partnership, Foreign Trust, or Foreign Estate as those terms are defined in the Internal Revenue Code and Income Tax Regulations.

☐ ________________________________________________ is not a disregarded entity, as designated in §1.1445-2(b)(2)(iii) of the IRS regulations.

U.S. Employer's Identification Number is ____________________________.

Office address is: __________________________________________________________

Transferor(s) understands that this Certification may be disclosed to the Internal Revenue Service by transferee and that any false statement I/WE have made here (or, for entity transferor, contained herein) could be punished by fine, imprisonment or both.

Under penalties of perjury, I/WE declare that I/WE have examined this Certification and to the best of my/our knowledge and belief it is true, correct and complete (and, for entity transferor, I/WE further declare that I/WE have authority to sign this document on behalf of ____________________________).

Dated: ____________________________

Lucile G. Moren by Howard S. Toland as Attorney in Fact

NOTICE TO TRANSFEROR AND TRANSFEREE: An Affidavit should be signed by EACH INDIVIDUAL or ENTITY TRANSFEROR to whom or to which it applies. Before you sign, any questions relating to the legal sufficiency of this form, or to whether it applies to a particular transaction, or to the definition of any of the terms used, should be referred to a Certified Public Accountant, attorney, or other professional tax advisor, or to the Internal Revenue Service.
Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests

1. Name of transferor (attach additional sheets if more than one transferor)
   Identification number
   Street address, apt. or suite no., or rural route. Do not use a P.O. box.
   City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.

2. Name of transferee (attach additional sheets if more than one transferee)
   Identification number
   Street address, apt. or suite no., or rural route. Do not use a P.O. box.
   City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.

3. Applicant is:
   Transferor ☐ Transferee ☐
   Identification number
   Name of withholding agent (see instructions)
   Identification number
   Name of estate, trust, or entity (if applicable)
   Identification number

4. Address where you want withholding certificate sent (street address, apt. or suite no., P.O. box, or rural route number)
   Phone number (optional)
   City, state or province, and country (if not U.S.). Include ZIP code or postal code where appropriate.

5. Description of U.S. real property transaction:
   Date of transfer (month, day, year) (see inst.)
   Contract price
   Type of interest transferred:
   Real property ☐ Associated personal property ☐
   Domestic U.S. real property holding corporation ☐
   Use of property at time of sale:
   Rental or commercial ☐ Personal ☐ Other (attach explanation) ☐
   Adjusted basis
   Location and general description of property (for a real property interest), description (for associated personal property), or the class or type and amount of the interest (for an interest in a U.S. real property holding corporation). See instructions.

6. For the 3 preceding tax years:
   (1) Were U.S. income tax returns filed relating to the U.S. real property interest? ☐ Yes ☐ No
      If “Yes,” and where were those returns filed? ►
   (2) Were U.S. income taxes paid relating to the U.S. real property interest? ☐ Yes ☐ No
      If “Yes,” enter the amount of tax paid for each year ►

7. Check the box to indicate the reason a withholding certificate should be issued. See the instructions for information that must be attached to Form 8288-B.
   ☐ The transferor is exempt from U.S. tax or nonrecognition treatment applies.
   ☐ The transferor’s maximum tax liability is less than the tax required to be withheld.
   ☐ The special installment sales rules described in section 7 of Rev. Proc. 2000-35 allow reduced withholding.

8. Does the transferor have any unsatisfied withholding liability under section 1445? ☐ Yes ☐ No
   See the instructions for information required to be attached.

9. Is this application for a withholding certificate made under section 1445(e)? ☐ Yes ☐ No
   If “Yes,” check the applicable box in a and the applicable box in b below.
   Type of transaction:
   1445(e)(1) ☐ 1445(e)(2) ☐ 1445(e)(3) ☐ 1445(e)(5) ☐ 1445(e)(6) ☐
   Applicant is:
   Taxpayer ☐ Other person required to withhold. Specify your title (e.g., trustee) ►

Under penalties of perjury, I declare that I have examined this application and accompanying attachments, and, to the best of my knowledge and belief, they are true, correct, and complete.

Signature
Title (if applicable)
Date

For Privacy Act and Paperwork Reduction Act Notice, see the instructions.
Section references are to the Internal Revenue Code unless otherwise noted.

**Future Developments**

For the latest information about developments related to Form 8288 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/form8288.

**General Instructions**

**Purpose of form.** Use Form 8288-B to apply for a withholding certificate to reduce or eliminate withholding on dispositions of U.S. real property interests by foreign persons, but only if the application is based on:

1. A claim that the transferor is entitled to nonrecognition treatment or is exempt from tax.
2. A claim solely on a calculation that shows the transferor's maximum tax liability is less than the tax otherwise required to be withheld, or
3. A claim that the special installment sales rules described in section 7 of Rev. Proc. 2000-35 allowed reduced withholding.

Do not use this form for applications:
- Based on an agreement for the payment of tax with conforming security,
- For blanket withholding certificates under Rev. Proc. 2000-35, or
- Other than the three types described above.


**Who can apply for a withholding certificate.** Either the transferee or the transferor (or other authorized person) can file this application.

**Withholding certificate.** The IRS can issue a withholding certificate to reduce or eliminate withholding under section 1445. A certificate issued before the transfer notifies the transferee that reduced withholding or no withholding is required. A certificate issued after the transfer may authorize an early or a normal refund. If, on the date of transfer, an application for a withholding certificate is or has been submitted to the IRS, the applicable withholding is not required to be paid over to the IRS until the 20th day after the day that the IRS mails the withholding certificate or notice of denial. A transferor that applies for a withholding certificate must notify the transferee in writing that the certificate has been applied for on the day of or prior to the transfer.

The IRS will normally act on an application within 90 days of receipt of all information necessary to make a proper determination. The IRS will determine whether withholding should be reduced or eliminated or whether a withholding certificate should not be issued.

**Identification number.** The U.S. taxpayer identification number (TIN) of all parties to the transaction must be on the application for a withholding certificate. For U.S. individuals, the TIN is a social security number (SSN). For all other entities, it is an employer identification number (EIN). If you do not have an EIN, you can apply for one online at www.irs.gov/smallbiz or by telephone at 1-800-829-4933. Also, you can file Form SS-4, Application for Employer Identification Number, by fax or mail.

If you are a nonresident alien individual who is required to have a TIN, but is not eligible to obtain an SSN, you must apply for an IRS individual taxpayer identification number (ITIN). If you do not have a TIN and are eligible for an ITIN, you can apply for an ITIN by attaching the completed Form 8288-B to a completed Form W-7 and forwarding the package to the IRS at the address given in the Form W-7 instructions. Get Form W-7, Application for IRS Individual Taxpayer Identification Number, for more information.

Any withholding certificate issued by the IRS applies only for the limited purpose of determining the withholding obligation under section 1445 and does not apply to any substantive issue that may arise in connection with the transfer. The acceptance by the IRS of any evidence submitted in connection with this application is not binding on the IRS for any purpose other than issuing the withholding certificate. The information submitted in support of the application may be subject to verification by the IRS prior to issuance of a withholding certificate.

If you receive a withholding certificate from the IRS and withholding is still required, a copy of the withholding certificate must be attached to Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests.

**Installment sales.** A transferee is required to withhold on the full sales price regardless of the amount of the payment. However, if the transferor is not a dealer and will report gain under the installment method under section 453, a withholding certificate allowing reduced withholding may be obtained. Any withholding certificate based on the installment sale method will provide for payment of interest on the deferred tax liability under section 453A(c) when applicable.

For installment sales subject to withholding under section 1445(a) or (e), the IRS will consider applications for a withholding certificate based on the transferor’s or entity’s or fiduciary's agreement to all of the following:

1. Withhold and pay over 15% or lower amount determined by the IRS (or the amount the IRS determines to be appropriate under section 1445(e)) of the down payment. The amount of the down payment includes any liabilities of the transferor (entity in the case of section 1445(e)) assumed by the transferee, or liabilities to which the U.S. real property interest was subject immediately before and after the transfer.

2. Withhold 15% or lower amount determined by the IRS (or the amount the IRS determines to be appropriate under section 1445(e)) of each subsequent payment and the interest on the deferred tax liability.

3. Use Forms 8288 and 8288-A (relating to withholding on dispositions by foreign persons of U.S. real property interests) to pay over all amounts withheld. The identification number of the transferor (or interest holder subject to withholding under section 1445(e)) must be included on Forms 8288 and 8288-A.

4. Notify the IRS before the disposition or encumbrance of the U.S. real property interest (of the installment obligation under section 1445(e)), and when it occurs, pay over the remaining amount to be withheld.

5. Continue to withhold under a reduced withholding certificate until an amended certificate is issued, even if the transferee pledges the installment obligation in exchange for all or part of the proceeds due on the obligation and includes in gross income under section 453A(d) the net proceeds of the secured indebtedness.

**Where to send applications for a withholding certificate.** Form 8288-B and other applications for a withholding certificate must be sent to Internal Revenue Service, P.O. Box 409101, Ogden, UT 84409.

**Specific Instructions**

Complete all information for each line. An application that is not substantially complete when submitted will be rejected. For example, an application without a specific or estimated date of transfer will not be considered to be substantially complete.

**Line 1.** Enter the name, street address, and identification number of the transferor. If there are multiple transferees, attach additional sheets giving the required information about each one. For a transaction under section 1445(e), enter the required information for each foreign person for whom you are requesting reduced withholding.

**Line 2.** Enter the name, street address, and identification number of the transferee. If there are multiple transferees, attach additional sheets giving the required information about each one.

**Line 4a.** The withholding agent will normally be the buyer or other transferee as described in section 1445(d)(4). For distributions under section 1445(e), the withholding agent also includes a trustee, executor, or other authorized person.

**Line 4b.** If you are not applying for this withholding certificate in your personal capacity, enter your SSN or ITIN (see Identification number on this page for more information).
Line 4c. If you are acting on behalf of an estate or trust, or are signing as an authorized person for an entity other than an individual (for example, a corporation, qualified investment entity, or partnership), enter the name of the estate, trust, or entity.

Line 4d. Enter the EIN of the estate, trust, or entity.

Line 5. Enter the address you want the IRS to use for purposes of returning the withholding certificate.

Line 6a. Enter the year as a four-digit number (for example, "2013").

Line 6c. “Associated personal property” means property (for example, furniture) sold with a building. See Regulations section 1.897-1.

Line 6d. Check “Other” if the property was used for both personal and rental use and attach an explanation.

Line 6f. Enter the address and description of the property (for example, “10-story, 100-unit luxury apartment building”). For a real estate holding corporation interest transferred, enter the class or type and amount of the interest (for example, “10,000 shares Class A Preferred Stock XYZ Corporation”). You may attach additional sheets. Be sure to include your name and TIN on each sheet you attach.

Line 6g. A U.S. income tax return includes Forms 1040NR, and 1120-F.

Line 7a. If you checked 7a, attach:
1. A brief description of the transfer,
2. A summary of the law,
3. Facts supporting the claim of exemption or nonrecognition,
4. Evidence that the transferee has no unsatisfied withholding liability, and
5. The most recent assessed value for state or local property tax purposes of the interest to be transferred, or other estimate of its fair market value. You need not submit supporting evidence of the value of the property.

A nonresident alien or foreign corporation must also attach a statement of the adjusted basis of the property immediately before the distribution or transfer.

Line 7b. If you checked 7b, attach a calculation of the maximum tax that can be imposed on the disposition. You must also include a statement signed by the transferee under penalties of perjury that the calculation and all supporting evidence is true and correct to the best knowledge of the transferee.

The calculation of the maximum tax that can be imposed must include:
1. Evidence of the amount to be realized by the transferee, such as a copy of the signed contract of transfer;
2. Evidence of the adjusted basis of the property, such as closing statements, invoices for improvements, and depreciation schedules, or if no depreciation schedules are submitted, a statement of the nature of the use of the property and why depreciation was not allowed;
3. Amounts to be recaptured for depreciation, investment credit, or other items subject to recapture;
4. The maximum capital gain and/or ordinary income tax rates applicable to the transfer;
5. The tentative tax owed; and
6. Evidence showing the amount of any increase or reduction of tax to which the transferee is subject, including any reduction to which the transferor is entitled under a U.S. income tax treaty.

If you have a net operating loss, see Rev. Proc. 2000-35, section 4.06, for special rules about the maximum tax calculation.

If the purchase price includes personal property not subject to tax under section 897, for the calculation of maximum tax, the transferee must also include a statement listing each such item of personal property transferred and the fair market value attributable to each item. The fair market value claimed should be supported by an independent appraisal or other similar documentation.

Line 7c. If you checked 7c, see Installment sales, earlier.

Line 8. You must provide a calculation of the transferee’s unsatisfied withholding liability or evidence that it does not exist. This liability is the amount of any tax the transferee was required to, but did not, withhold and pay over under section 1445 when the U.S. real property interest now being transferred was acquired, or upon a prior acquisition. The transferee’s unsatisfied withholding liability is included in the calculation of maximum tax liability so that it can be satisfied by the withholding on the current transfer.

Evidence that there is no unsatisfied withholding liability includes any of the following:
1. Evidence that the transferee acquired the subject or prior real property interest before 1985;
2. A copy of Form 8288 filed and proof of payment;
3. A copy of a withholding certificate issued by the IRS plus a copy of Form 8288 and proof of payment of any amount required by that certificate;
4. A copy of the nonforeign certificate furnished by the person from whom the U.S. real property interest was acquired (the certificate must be executed at the time of acquisition); and
5. Evidence that the transferee purchased the subject or prior real property interest for $300,000 or less and a statement, signed by the transferee under penalties of perjury, that the transferee purchased the property for use as a residence within the meaning of Regulations section 1.1445-2(d)(1);

Evidence that the person from whom the transferee acquired the subject or prior U.S. real property interest fully paid any tax imposed on that transaction under section 897;

A copy of a notice of nonrecognition treatment provided to the transferee under Regulations section 1.1445-2(d)(2) by the person from whom the transferee acquired the subject or prior U.S. real property interest; or

A statement, signed by the transferee under penalties of perjury, explaining why the transferee was not required to withhold under section 1445(a) with regard to the transferor’s acquisition of the subject or prior real property interest.

Line 9a. If the transaction is subject to withholding under section 1445(e), check the box to indicate which provision of section 1445(e) applies.

Line 9b. Indicate whether the applicant is the taxpayer or the person required to withhold, and in what capacity that person is required to withhold.

Signature. The application must be signed by an individual, a responsible corporate officer, a general partner of a partnership, or a trustee, executor, or other fiduciary of a trust or estate. The application may also be signed by an authorized agent with a power of attorney. Form 2848, Power of Attorney and Declaration of Representative, can be used for this purpose.

Privacy Act and Paperwork Reduction Act Notice. We ask for this information on this form to carry out the Internal Revenue laws of the United States. Section 1445 generally imposes a withholding obligation on the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. Section 1445 also imposes a withholding obligation on certain foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. This form is used to apply for a withholding certificate to reduce or eliminate withholding on dispositions of U.S. real property interests by foreign persons if certain conditions apply.

You are required to provide this information. Section 6109 requires you to provide your identification number. We need this information to ensure that you are complying with the Internal Revenue laws and to allow us to figure and collect the right amount of tax. Failure to provide this information in a timely manner, or providing false information, may subject you to penalties. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and to U.S. commonwealths and possessions for use in the administration of their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.
You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

- **Recordkeeping**: 2 hr., 4 min.
- **Learning about the law or the form**: 2 hr., 7 min.
- **Preparing the form**: 1 hr., 7 min.
- **Copying, assembling, and sending the form to the IRS**: 20 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can send your comments to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAS:MP:TTP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send this form to this office. Instead, see Where to send applications for a withholding certificate, earlier.
**Exhibit D**

**Form 8288**

**U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests**


Complete Part I or Part II. Also complete and attach Copies A and B of Form(s) 8288-A. (Attach additional sheets if you need more space.)

### Part I: To Be Completed by the Buyer or Other Transferee Required To Withhold Under Section 1445(a)

1. **Name of buyer or other transferee responsible for withholding (see instructions)**
   - Identifying number

2. **Street address, apt. or suite no., or rural route. Do not use a P.O. box.**

3. **City or town, province or state, country, and ZIP or foreign postal code**

4. **Phone number (optional)**

5. **Description and location of property acquired**

6. **Date of transfer**

7. **Number of Forms 8288-A attached**

8. **Amount realized on the transfer**

### Part II: To Be Completed by an Entity Subject to the Provisions of Section 1445(e)

1. **Name of entity or fiduciary responsible for withholding (see instructions)**
   - Identifying number

2. **Street address, apt. or suite no., or rural route. Do not use a P.O. box.**

3. **City or town, province or state, country, and ZIP or foreign postal code**

4. **Phone number (optional)**

5. **Description of U.S. real property interest transferred or distributed**

6. **Date of transfer**

7. **Number of Forms 8288-A attached**

### Instructions

Under penalties of perjury, I declare that I have examined this return, including accompanying schedules and statements, and to the best of my knowledge and belief, it is true, correct, and complete. Declaration of preparer (other than taxpayer) is based on all information of which preparer has any knowledge.

**Signature of withholding agent, partner, fiduciary, or corporate officer (if applicable)**

**Date**

**Paid Preparer Use Only**

**Preparer's signature**

**Title (if applicable)**

**Date**

**Check self-employed**

**PTIN**

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Cat. No. 62288A

Form 8288 (Rev. 2-2018)
Instructions for Form 8288
(Rev. February 2016)
U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests

Section references are to the Internal Revenue Code unless otherwise noted.

What's New
The Protecting Americans from Tax Hikes (PATH) Act of 2015, Public Law 114-113, Division Q
The PATH Act sections listed below amend or repeal provisions of the Internal Revenue Code of 1986, except as otherwise expressly provided.

- **Section 133**, extension of RIC qualified investment entity treatment under FIRPTA. The provision permanently extends the treatment of regulated investment companies (RICs) as qualified investment entities for purposes of the Foreign Investment in Real Property Tax Act (FIRPTA). See [Qualified investment entity under Definitions, later.](#)

- **Section 322**, exception from FIRPTA for certain stock of REITs. This section amends section 897 adding new subsection (k) which contains special rules related to real estate investment trusts (REITs), and amends section 897(h)(4).

- **Section 323**, exception for interests held by foreign retirement or pension funds. This section amends section 897 by adding new subsection (l). See [Transferor is a qualified foreign pension fund or any entity held in its entirety by a qualified foreign pension fund, later, for more information.](#)

- **Section 324**, increase in rate of withholding of tax on dispositions of United States real property interests. The provision provides that the rate of withholding on dispositions of United States real property interests is increased to 15%. The increased rate of withholding, however, does not apply to the sale of a personal residence where the amount realized is $1 million or less. The provision is effective for dispositions after February 16, 2016.

- **Section 325**, interests in RICs and REITs not excluded from definition of United States real property interests. The provision amends section 897(c)(1)(B) by adding a new requirement for stock of a corporation to qualify for the exclusion. The new requirement provides that in order for the exclusion to apply, if neither the corporation nor any predecessor of such corporation was a RIC or REIT at any time during the shorter of (a) the period after June 18, 1980, during which the taxpayer held such stock, or (b) the 5 year period ending on the date of the disposition of the stock. The provision applies to dispositions on or after the date of enactment.

Future developments. The IRS has created a page on IRS.gov for information about Form 8288 and its instructions at [www.irs.gov/form8288.](http://www.irs.gov/form8288) Information about any future developments affecting Form 8288 (such as legislation enacted after we release it) will be posted on that page.

General Instructions

Purpose of Form
A withholding obligation under section 1445 is generally imposed on the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. The withholding obligation also applies to foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. This withholding serves to collect U.S. tax that may be owed by the foreign person. Use Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests, to report and transmit the amount withheld.

**TIP**
You are not required to withhold if any of the exceptions apply. See [Exceptions, later.](#)

Who Must File
A buyer or other transferee of a U.S. real property interest, and a corporation, qualified investment entity, or fiduciary that is required to withhold tax, must file Form 8288 to report and transmit the amount withheld. If two or more persons are joint transferees, each is obligated to withhold. However, the obligation of each will be met if one of the joint transferees withholds and transmits the required amount to the IRS.

Do not use Forms 8288 and 8288-A for the following distributions.

1. A distribution of effectively connected income by a publicly traded partnership is subject to the withholding requirements of section 1446.

2. A distribution with respect to gains from the disposition of a U.S. real property interest from a trust that is regularly traded on an established securities market is subject to section 1445, but is not reported on Forms 8288 and 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.

3. A dividend distribution by a qualified investment entity to a nonresident alien or a foreign corporation that is attributable to gains from sales or exchanges by the qualified investment entity of U.S. real property interests is not subject to withholding under section 1445 as a gain from the sale or exchange of a U.S. real property interest if:
   a. The distribution is on stock regularly traded on a securities market in the United States, and
   b. The alien or corporation did not own more than 10% (for dispositions and distributions before December 17, 2015, did not own more than 5% of such stock in case of a real estate investment trust (REIT)) of that stock at any time during the 1-year period ending on the date of the distribution.

Use Form 1042, Annual Withholding Tax Return for U.S. Source Income of Foreign Persons, and Form 1042-S, Foreign Person's U.S. Source Income Subject to Withholding, to report and pay over the withheld amounts.

Amount To Withhold
Generally, you must withhold 15% of the amount realized on the disposition by the transferor (see [Definitions, later.](#)). However, for dispositions prior to February 17, 2016, withhold 10% of the amount realized on the disposition by the transferor.

For information about:
- Withholding at 35%, see [Entities Subject to Section 1445(e), later.](#)
Where To File
Send Form 8288 with the amount withheld, and copies A and B of Form(s) 8288-A to:

Ogden Service Center
P.O. Box 409101
Ogden, UT 84409.

Forms 8288-A Must Be Attached
Anyone who completes Form 8288 must also complete a Form 8288-A for each person subject to withholding. Copies A and B of Form 8288-A must be attached to Form 8288. Copy C is for your records. Multiple Forms 8288-A related to a transaction can be filed with one Form 8288. You are not required to furnish a copy of Form 8288 or 8288-A directly to the transferee.

The IRS will stamp Copy B of each Form 8288-A and will forward the stamped copy to the foreign person subject to withholding at the address shown on Form 8288-A. To receive credit for the withheld amount, the transferee generally must attach the stamped Copy B of Form 8288-A to a U.S. income tax return (for example, Form 1040NR, U.S. Nonresident Alien Income Tax Return, or 1120-F, U.S. Income Tax Return of a Foreign Corporation) or application for early refund filed with the IRS.

Transferor’s TIN missing. If you do not have the transferee’s taxpayer identification number (TIN), you still must file Forms 8288 and 8288-A. A stamped copy of Form 8288-A will not be provided to the transferee if the transferor’s TIN is not included on that form. The IRS will send a letter to the transferee requesting the TIN and providing instructions for how to get a TIN. When the transferee provides the IRS with a TIN, the IRS will provide the transferor with a stamped Copy B of Form 8288-A.

Penalties
Under section 6651, penalties apply for failure to file Form 8288 when due and for failure to pay the withholding when due. In addition, if you are required to but do not withhold tax under section 1445, the tax, including interest, may be collected from you. Under section 7202, you may be subject to a penalty of up to $10,000 for willful failure to collect and pay over the tax. Corporate officers or other responsible persons may be subject to a penalty under section 6672 equal to the amount that should have been withheld and paid over to the IRS.

Definitions
Transferee. Any person, foreign or domestic, that acquires a U.S. real property interest by purchase, exchange, gift, or any other transfer.

Transferor. For purposes of this withholding, this means any foreign person that disposes of a U.S. real property interest by sale, exchange, gift, or any other disposition. A disregarded entity cannot be the transferor for purposes of section 1445. Instead, the person considered as owning the assets of the disregarded entity for federal tax purposes is regarded as the transferor. A disregarded entity for these purposes means any entity that is disregarded as an entity separate from its owner under Regulations section 301.7701-3, a qualified real estate investment trust subsidiary as defined in section 856(i), or a qualified subchapter S subsidiary under section 1361(b)(3)(B).

Qualified substitute. For this purpose, a qualified substitute is (a) the person (including any attorney or title company) responsible for closing the transaction, other than the transferor’s agent, and (b) the transferee’s agent.

Withholding agent. For purposes of this return, this means the buyer or other transferee who acquires a U.S. real property interest from a foreign person.

Foreign person. A nonresident alien individual, a foreign corporation that does not have a valid election under section 897(i) to be treated as a domestic corporation, a foreign partnership, a foreign trust, or a foreign estate. A resident alien individual is not a foreign person.

A qualified foreign pension fund or any entity wholly owned by such fund that disposes U.S. real property interest or receives a distribution from a REIT is not a foreign person. See sections 897(l) and 1445(f)(3) for more information.

U.S. real property interest. Any interest, other than an interest solely as a creditor, in:

1. Real property located in the United States or the U.S. Virgin Islands.
2. Certain personal property associated with the use of real property.
3. A domestic corporation, unless it is shown that the corporation was not a U.S. real property holding corporation during the previous 5 years (or during the period in which the transferee held the interest, if shorter).
A U.S. real property interest does not include:

1. An interest in a domestically controlled qualified investment entity.

2. An interest in a REIT that is held by a qualified shareholder. For the definition of a qualified shareholder see section 897(k)(3). But see section 897(k)(2)(B) for the cut-back rule if the qualified shareholder has one or more applicable investors.

3. An interest in a corporation that:
   • Did not hold any U.S. real property interest as of the date the interest in such corporation is disposed.
   • Has disposed of all its U.S. real property interests in transactions in which the full amount of any gain was recognized as provided in section 897(c)(1)(B), and
   • Neither such corporation nor any predecessor of such corporation was a REIT or a RIC at any time during the shorter of the previous 5 years or the period in which the transferor held the interest.

4. An interest in certain publicly traded corporations, partnerships, and trusts.

See Regulations sections 1.897-1 and 1.897-2 for more information. Also see Transferred property that is not a U.S. real property interest, later.

Qualified investment entity (QIE). A QIE is:
• Any REIT, and
• Any RIC which is a United States real property holding corporation or which would be a United States real property holding corporation.

In determining if a RIC is a U.S. real property holding corporation, the RIC is required to include as U.S. real property interests its holdings of stock in a RIC or REIT that is a U.S. real property holding company, even if such stock is regularly traded and the RIC did not own more than 10% of such stock in the case of a REIT (5% for dispositions before December 17, 2015) or 5% of such stock in case of a RIC, and even if such stock is domestically controlled.

For more information, see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.

Domestically controlled qualified investment entity. A QIE is domestically controlled if at all times during the testing period less than 50% in value of its stock was held, directly or indirectly, by foreign persons. The testing period is the shorter of:
• The 5-year period ending on the date of the disposition (or distribution), or
• The period during which the entity was in existence.

For purpose of determining whether a QIE is domestically controlled, the following rules will apply beginning on December 18, 2015.

1. A person holding less than 5% of any class of stock of a QIE which is regularly traded on an established securities market in the United States at all times during the testing period will be treated as a U.S. person unless the QIE has actual knowledge that such person is not a U.S. person.

2. Any stock in a QIE that is held by another QIE will be treated as held by a foreign person if:
   • Any class of stock of such other QIE is regularly traded on an established securities market, or
   • Such other QIE is a RIC that issues certain redeemable securities.

Notwithstanding the above, the stock of the QIE will be treated as held by a U.S. person if such other QIE is domestically controlled.

3. Stock in a QIE that is held by any other QIE not described above will be treated as held by a U.S. person in proportion to the stock ownership of such other QIE which is (or is treated as) held by a U.S. person.

Amount realized. The sum of the cash paid or to be paid (not including interest or original issue discount), the fair market value of other property transferred or to be transferred, and the amount of any liability assumed by the transferee or to which the U.S. real property interest is subject immediately before and after the transfer. Generally, the amount realized for purposes of this withholding is the sales or contract price.

Date of transfer. The first date on which consideration is paid or a liability is assumed by the transferee. However, for purposes of sections 1445(e)(2), (3), and (4), and Regulations sections 1.1445-5(c)(1)(iii) and 1.1445-5(c)(3), the date of transfer is the date of distribution that creates the obligation to withhold. Payment of consideration does not include the payment before passage of legal or equitable title of earnest money (other than pursuant to an initial purchase contract), a good-faith deposit, or any similar amount primarily intended to bind the parties to the contract and subject to forfeiture. A payment that is not forfeitable may also be considered earnest money, a good-faith deposit, or a similar sum.

Exceptions

Purchase of residence for $1,000,000 or less. Withholding is required at a reduced rate of 10% in the case of a disposition of:
• A property which is acquired by the transferee for use by the transferee as a residence, and
• The amount realized for such property does not exceed $1,000,000. But see Purchase of residence for $300,000 or less immediately following. You are not required to withhold if any of the following applies.

Purchase of residence for $300,000 or less. One or more individuals acquire U.S. real property for use as a residence and the amount realized (in most cases the sales price) is not more than $300,000. A U.S. real property interest is acquired for use as a residence if you or a member of your family has definite plans to reside in the property for at least 50% of the number of days the property will be vacant in making this determination. No form or other document is required to be filed with the IRS for this exception; however, if you do not in fact use the property as a residence, the withholding tax may be collected from you.

This exception applies whether or not the transferor (seller) is an individual, partnership, trust, corporation, or other transferor. However, this exception does not apply if the actual transferee (buyer) is not an individual, even if the property is acquired for an individual.

Transferee not a foreign person. You receive a certification of nonforeign status from the transferor, signed under penalties of perjury, stating that the transferor is not a foreign person and containing the transferor's name, address, and identification number (social security number (SSN) or employer identification number (EIN)). The transferee can give the certification to a qualified substitute (defined on this page). The qualified substitute gives you a statement, under penalties of perjury, that the certification is in the qualified substitute's possession. If you receive a certification (or statement), the withholding tax cannot be collected from you unless you knew that the certification (or statement) was false or
you received a notice from your agent, the transferor’s agent, or the qualified substitute that it was false. The certification must be signed by the individual, a responsible officer of a corporation, a general partner of a partnership, or the trustee, executor, or fiduciary of a trust or estate.

A disregarded entity may not certify that it is the transferor for U.S. tax purposes. Rather, the owner of the disregarded entity is treated as the transferor of the property and must provide the certificate of nonforeign status to avoid withholding under section 1445.

A foreign corporation electing to be treated as a domestic corporation under section 897(i) must attach to the certification a copy of the acknowledgment of the election received from the IRS. The acknowledgment must state that the information required by Regulations section 1.897-3 has been determined to be complete. If the acknowledgment is not attached, you may not rely on the certification. Keep any certification of nonforeign status you receive in your records for 5 years after the year of transfer.

You may also use other means to determine that the transferor is not a foreign person. But if you do, and it is later determined that the transferor is a foreign person, the withholding tax may be collected from you.

Late notice of false certification. If, after the date of transfer, you receive a notice from your agent, the transferor’s agent, or the qualified substitute that the certification of nonforeign status is false, you do not have to withhold on consideration paid before you received the notice. However, you must withhold the full 15% of the amount realized from any consideration that remains to be paid, if possible. You must do this by withholding and paying over the entire amount of each successive payment of consideration until the full 15% has been withheld and paid to the IRS. These amounts must be reported and transmitted to the IRS by the 20th day following the date of each payment.

Transferred property that is not a U.S. real property interest. You acquire an interest in property that is not a U.S. real property interest (defined under U.S. real property interest, earlier). A U.S. real property interest includes certain interests in U.S. corporations, as well as direct interests in real property and certain associated personal property.

No withholding is required on the acquisition of an interest in a domestic corporation if (a) any class of stock of the corporation is regularly traded on an established securities market, or (b) the transferee receives a statement issued by the corporation that the interest is not a U.S. real property interest, unless you know that the statement is false or you receive a notice from your agent or the transferor’s agent that the statement is false. A corporation’s statement may be relied on only if it is dated not more than 30 days before the date of transfer.

Late notice of false statement. If, after the date of transfer, you receive a notice that the statement is false, see Late notice of false statement, earlier.

Generally, no withholding is required on the acquisition of an interest in a foreign corporation. However, withholding may be required if the foreign corporation has made the election under section 897(i) to be treated as a domestic corporation.

Transferor’s nonrecognition of gain or loss. You may receive a notice from the transferor signed under penalties of perjury stating that the transferor is not required to recognize gain or loss on the transfer because of a nonrecognition provision of the Internal Revenue Code (see Temporary Regulations section 1.897-6T(a)(2)) or a provision in a U.S. tax treaty. You may rely on the transferor’s notice unless (a) only part of the gain qualifies for nonrecognition or (b) you know or have reason to know that the transferor is not entitled to the claimed nonrecognition treatment.

No particular form is required for this notice. By the 20th day after the date of transfer, you must send a copy of the notice of nonrecognition (with a cover letter giving your name, address, and identification number) to:

Ogden Service Center
P.O. Box 409101
Ogden, UT 84409.

See Regulations section 1.1445-2(d)(2) for more information on the transferor’s notice of nonrecognition.

Note. A notice of nonrecognition cannot be used for the exclusion from income under section 121, like-kind exchanges that do not qualify for nonrecognition treatment in their entirety, and deferred like-kind exchanges that have not been completed when it is time to file Form 8288. In these cases, a withholding certificate issued by the IRS, as described next, must be obtained.

Withholding certificate issued by the IRS. A withholding certificate may be issued by the IRS to reduce or eliminate withholding on dispositions of U.S. real property interests by foreign persons. Either a transferee or transferor may apply for the certificate. The certificate may be issued if:

• Reduced withholding is appropriate because the 10%, 15%, or 35% amount exceeds the transferor’s maximum tax liability,
• The transferor is exempt from U.S. tax or nonrecognition provisions apply, or
• The transferee or transferor enters into an agreement with the IRS for the payment of the tax.


If you receive a withholding certificate from the IRS that excuses withholding, you are not required to file Form 8288. However, you can receive a withholding certificate that reduces (rather than eliminates) withholding, there is no exception to withholding, and you are required to file Form 8288. Attach a copy of the withholding certificate to Form 8288. See When To File, earlier, for more information.

No consideration paid. The amount realized by the transferor is zero (for example, the property is transferred as a gift and the recipient does not assume any liabilities or furnish any other consideration to the transferor).

Options to acquire U.S. real property interests. No withholding is required with respect to any amount realized by the grantor on the grant or lapse of an option to acquire a U.S. real property interest. However, withholding is required on the sale, exchange, or exercise of an option.

Property acquired by a government unit. The property is acquired by the United States, a U.S. state or
If you (or the substitute) receive a notice of false certification or statement from your agent, the transferor’s agent, or qualified substitute, you must withhold tax as if you had not received a certification or statement. See Late notice of false certification, earlier.

An “agent” is any person who represents the transferor or transferee in any negotiation with another person (or another person’s agent) relating to the transaction or in settling the transaction. For purposes of section 1445(e), a transferor’s or transferee’s agent is any person who represents or advises an entity, a holder of an interest in an entity, or a fiduciary with respect to the planning, arrangement, or completion of a transaction described in sections 1445(e)(1) through (4).

A person is not treated as an agent if the person only performs one or more of the following acts in connection with the transaction:
1. Receiving and disbursing any part of the consideration.
2. Recording any document.
3. Typing, copying, and other clerical tasks.
4. Obtaining title insurance reports and reports concerning the condition of the property.
5. Transmitting documents between the parties.
6. Functioning exclusively in his or her capacity as a representative of a condominium association or cooperative housing corporation. This exemption includes the board of directors, the committee, or other governing body.

The completed certification or notice attached to the explanation must be sent to:
Ogden Service Center
P.O. Box 409101
Ogden, UT 84409.


Liability of Agents
If you (or the qualified substitute) received: (a) a transferor’s certification of nonforeign status or (b) a corporation’s statement that an interest is not a U.S. real property interest, and the transferee’s or transferor’s agent, or the substitute, knows the document is false, the agent (or substitute) must notify you. If notification is not provided, the agent (or substitute) will be liable for the tax that should have been withheld, but only to the extent of the agent’s (or substitute’s) compensation from the transaction.

Section 1445(e)(1) Transactions

Partnerships. A domestic partnership that is not publicly traded must withhold tax under section 1446 on effectively connected income allocated to its foreign partners and must file Form 8804, Annual Return for Partnership Withholding Tax (Section 1446), and Form 8805, Foreign Partner’s Information Statement of Section 1446 Withholding Tax. A publicly traded partnership or nominee generally must withhold tax under section 1446 on distributions to its foreign partners and must file Forms 1042 and 1042-S. Because a domestic partnership that disposes of a U.S. real property interest is required to withhold under section 1446, it is not required to withhold under section 1445(e)(1).

Trusts and estates. If a domestic trust or estate disposes of a U.S. real property interest, the amount of gain realized must be paid into a separate “U.S. real property interest account.” For these purposes, a domestic trust is one that does not make the “large trust election” (explained below), is not a qualified investment entity, and is not publicly traded. The fiduciary must withhold 35% of the amount distributed to a foreign person from the account during the tax year of the trust or estate in which the disposition occurred. The withholding must be paid over to the IRS within 20 days of the date of distribution. Special rules apply to grantor trusts. See Regulations section 1.1445-5 for more information and how to compute the amount subject to withholding.

Large trust election. Trusts with more than 100 beneficiaries may make an election to withhold upon distribution rather than at the time of transfer. The amount to be withheld from each distribution is 35% of the amount
attributable to the foreign beneficiary’s proportionate share of the current balance of the trust’s section 1445(e)(1) account. This election does not apply to any qualified investment entity or to any publicly traded trust. Special rules apply to large trusts that make recurring sales of growing crops and timber.

A trust’s section 1445(e)(1) account is the total net gain realized by the trust on all section 1445(e)(1) transactions after the date of the election, minus the total of all distributions made by the trust after the date of the election from such total net gain. See Regulations section 1.1445-5(c)(3) for more information.

Section 1445(e)(2) Transactions
A foreign corporation that distributes a U.S. real property interest must generally withhold 35% of the gain recognized by the corporation. No withholding or reduced withholding is required if the corporation receives a withholding certificate from the IRS.

Section 1445(e)(3) Transactions
Generally, a domestic corporation that distributes any property to a foreign person that holds an interest in the corporation must withhold 15% (10% for distributions before February 17, 2016) of the fair market value of the property distributed if:

- The foreign person’s interest in the corporation is a U.S. real property interest under section 897, and
- The property is distributed in redemption of stock under section 302, in liquidation of the corporation under sections 331 through 341, or with respect to stock under section 301 that is not made out of the earnings and profits of the corporation.

No withholding or reduced withholding is required if the corporation receives a withholding certificate from the IRS.

Section 1445(e)(4) Transactions
No withholding is required under section 1445(e)(4), relating to certain taxable distributions by domestic or foreign partnerships, trusts, and estates, until the effective date of a Treasury Decision under section 897(e)(2)(B)(ii) and (g).

Section 1445(e)(5) Transactions
The transferee of a partnership interest must withhold 15% (10% for dispositions before February 17, 2016) of the amount realized on the disposition by a foreign partner of an interest in a domestic or foreign partnership in which at least 50% of the value of the gross assets consists of U.S. real property interests and at least 90% of the value of the gross assets consists of U.S. real property interests plus any cash or cash equivalents. However, no withholding is required under section 1445(e)(5) for dispositions of interests in other partnerships, trusts, or estates until the effective date of a Treasury Decision under section 897(g). No withholding is required if, no earlier than 30 days before the transfer, the transferee receives a statement signed by a general partner under penalties of perjury that at least 50% of the value of the gross assets of the partnership does not consist of U.S. real property interests or that at least 90% of the value of the gross assets does not consist of U.S. real property interests plus cash or cash equivalents. The transferee may rely on the statement unless the transferee knows it is false or the transferee receives a false statement notice pursuant to Regulations section 1.1445-4.

Section 1445(e)(6) Transactions
A qualified investment entity must withhold 35% of a distribution to a nonresident alien or a foreign corporation that is treated as gain realized from the sale or exchange of a U.S. real property interest. No withholding under section 1445 is required on a distribution to a nonresident alien or foreign corporation if the distribution is on stock regularly traded on a securities market in the United States and the alien or corporation did not own more than 10% (for distributions before December 17, 2015, did not own more than 5% of such stock in case of a REIT) of that stock at any time during the 1-year period ending on the date of distribution.

A distribution made after December 17, 2015, by a REIT generally is not treated as gain from the sale or exchange of a U.S. real property interest if the shareholder is a qualified shareholder (as described in section 897(k)(3)).

Specific Instructions

Complete only Part I or Part II.

Example 1. B, a corporation, purchases a U.S. real property interest from F, a foreign person. On settlement day, the settlement agent pays off existing loans, withholds 15% of the amount realized on the sale (after February 16, 2016), and disburses the remaining amount to F. B, not the agent, must complete Part I of Form 8288 and Form 8288-A.

Example 2. C, a domestic corporation, distributes property (after February 16, 2016) to F, a foreign shareholder whose interest in C is a U.S. real property interest. The distribution is in redemption of C’s stock (section 1445(e)(3) transaction). C must withhold 15% of the fair market value of the property distributed to F. C must complete Part II of Form 8288 and Form 8288-A.

Lines 1. In Part I, enter the name, address, and identifying number of the buyer or other transferee responsible for withholding under section 1445(a). Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual buyer or transferee.

In Part II, enter the name, address, and identifying number of the entity or fiduciary responsible for withholding under section 1445(e). Do not enter the name, address, and identifying number of a title company, mortgage company, etc. unless it happens to be the actual entity responsible for withholding under section 1445(e).

The IRS will contact the person or entity listed on line 1 to resolve any problems that may arise concerning withholding and/or penalties.

Name and address. If you are a fiduciary, list your name and the name of the trust or estate. Enter the home address of an individual or the office address of an entity.

Identifying number. For a U.S. individual, the identifying number is a social security number (SSN). For any entity other than an individual (for example, corporation, qualified investment entity, estate, or trust), the identifying number is an employer identification number (EIN). If you do not have an EIN, you can apply for one online at www.irs.gov/smallbiz or by telephone at 1-800-829-4933. Also, you can file Form SS-4, Application for Employer Identification Number, by fax or mail.
For a nonresident alien individual who is not eligible for an SSN, the identifying number is an IRS individual taxpayer identification number (ITIN). If the individual does not already have an ITIN, he or she should complete Forms 8288 and 8288-A and mail the forms along with any payment to the address shown under Where To File, earlier. In a separate package mail a completed Form W-7, Application for IRS Individual Taxpayer Identification Number, with supporting documentation and a copy of Forms 8288 and 8288-A to the IRS at the address given in the Form W-7 instructions.

Lines 2. Enter the location and a description of the property, including any substantial improvements (for example, "12-unit apartment building"). In the case of interests in a corporation that constitute a U.S. real property interest, enter the class or type and amount of the interest (for example, "10,000 shares Class A Preferred Stock XYZ Corporation").

Line 4. Enter the number of Forms 8288-A attached to Form 8288. Copies A and B of each Form 8288-A should be counted as one form.

Line 6b. Reduced rate on purchase of residence after February 16, 2016, for $1,000,000 or less. When a property is acquired by the transferee for use by the transferee as a residence and the amount realized by the foreign transferor is more than $300,000, but does not exceed $1,000,000, the transferee generally must withhold 10% of the amount realized by a foreign person.

Part II, line 3. If you are a qualified investment entity, domestic trust or estate, or you make the large trust election, enter the date of distribution for the date of transfer.

Paid Preparer
Generally, anyone you pay to prepare Form 8288 must sign it and include their Preparer Tax Identification Number (PTIN) in the space provided.

Privacy Act and Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. Section 1445 generally imposes a withholding obligation on the buyer or other transferee (withholding agent) when a U.S. real property interest is acquired from a foreign person. Section 1445 also imposes a withholding obligation on certain foreign and domestic corporations, qualified investment entities, and the fiduciary of certain trusts and estates. This form is used to report and transmit the amount withheld.

You are required to provide this information. Section 6109 requires you to provide your identification number. We need this information to ensure that you are complying with the Internal Revenue laws and to allow us to figure and collect the right amount of tax. Failure to provide this information in a timely manner, or providing false information, may subject you to penalties. Routine uses of this information include giving it to the Department of Justice for civil and criminal litigation, and to cities, states, the District of Columbia, and U.S. commonwealths and possessions for administration of their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file these forms will vary depending on individual circumstances. The estimated average times are:

<table>
<thead>
<tr>
<th>Form 8288</th>
<th>Form 8288-A</th>
</tr>
</thead>
<tbody>
<tr>
<td>Recordkeeping</td>
<td>6 hr., 13 min. 2 hr., 52 min.</td>
</tr>
<tr>
<td>Learning about the law or the form</td>
<td>5 hr., 13 min. 30 min.</td>
</tr>
<tr>
<td>Preparing and sending the form to the IRS</td>
<td>6 hr., 46 min. 34 min.</td>
</tr>
</tbody>
</table>

If you have comments concerning the accuracy of these time estimates or suggestions for making these forms simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Forms and Publications, SE:W:CAR:MP:TFP, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224. Do not send the forms to this address. Instead, see Where To File, earlier.
<table>
<thead>
<tr>
<th>Withholding agent's name, street address, city, state, and ZIP code</th>
<th>Date of transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Federal income tax withheld</td>
<td>4 Gain recognized by foreign corporation</td>
</tr>
<tr>
<td>Withholding agent's Federal identification number</td>
<td>Identification number of foreign person subject to withholding (see instructions)</td>
</tr>
<tr>
<td>Name of person subject to withholding</td>
<td>Description of property transferred</td>
</tr>
<tr>
<td>Foreign address (number, street, and apt. or suite no.)</td>
<td>Person subject to withholding is:</td>
</tr>
<tr>
<td>City, province or state, postal code, and country (not U.S.)</td>
<td>Code</td>
</tr>
<tr>
<td>Mailing address of person subject to withholding (if different)</td>
<td></td>
</tr>
</tbody>
</table>

Copy A
For Internal Revenue Service Center
For Privacy Act and Paperwork Reduction Act Notice, see the Instructions for Form 8288.

Form 8288-A (Rev. 2-2016) Cat. No. 62261L Attach Copies A and B to Form 8288 Department of the Treasury - Internal Revenue Service
<table>
<thead>
<tr>
<th>Withholding agent's name, street address, city, state, and ZIP code</th>
<th>Date of transfer</th>
<th>Federal income tax withheld</th>
</tr>
</thead>
<tbody>
<tr>
<td>Withholding agent's Federal identification number</td>
<td>Identification number of foreign person subject to withholding (see instructions)</td>
<td>Amount realized</td>
</tr>
<tr>
<td>Name of person subject to withholding</td>
<td>Description of property transferred</td>
<td></td>
</tr>
<tr>
<td>Foreign address (number, street, and apt. or suite no.)</td>
<td>Person subject to withholding is:</td>
<td>An Individual</td>
</tr>
<tr>
<td>City, province or state, postal code, and country (not U.S.)</td>
<td>Country code</td>
<td>Mailing address of person subject to withholding (if different)</td>
</tr>
</tbody>
</table>

Form 8288-A (Rev. 2-2016)
Instructions for the Person Subject to Withholding

Generally, if you are a foreign person that disposes of real property located in the United States as seller or transferor, the buyer or other transferee must withhold 15% of the amount realized. Certain foreign interest holders that are beneficiaries or shareholders are subject to federal income tax withholding at a rate of 35%.

You must file a U.S. tax return (Form 1040NR, 1041, 1065, 1065-B, or 1120-F) to report the sale or other disposition as effectively connected with the conduct of a trade or business in the United States. To receive credit for any federal income tax withheld shown in box 2, attach Form 8288-A to your tax return, unless you make a request for early refund. Foreign partnerships, other than publicly traded partnerships, should report the withholding on Form 8804, Annual Return for Partnership Withholding Tax (Section 1446), and attach Form 8288-A. Publicly traded partnerships, and nominees of such partnerships, should use Forms 1042 and 1042-S to report the withholding. See Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities, and Pub. 519, U.S. Tax Guide for Aliens, for more information.

If the amount shown in box 2 is greater than your maximum tax liability, you may apply for an early refund. However, you must still file your tax return when due. To apply for an early refund, you must first get a withholding certificate. No particular form is required for an application for early refund, but it must include the following information in separate paragraphs numbered as shown below:

1. Your name, address, and U.S. taxpayer identification number;
2. The amount required to be withheld as stated in the withholding certificate issued by the IRS;
3. The amount withheld shown in box 2 (attach a copy of this Form 8288-A); and
4. The amount to be refunded.

Send your application for a withholding certificate and/or application for early refund to Ogden Service Center, P.O. Box 409101, Ogden, UT 84409.

See Pub. 515 and Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests, for information about withholding certificates.
<table>
<thead>
<tr>
<th>Withholding agent’s name, street address, city, state, and ZIP code</th>
<th>1 Date of transfer</th>
</tr>
</thead>
<tbody>
<tr>
<td>2 Federal income tax withheld</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Withholding agent’s Federal identification number</th>
<th>Identification number of foreign person subject to withholding (see instructions)</th>
<th>3 Amount realized</th>
<th>4 Gain recognized by foreign corporation</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Name of person subject to withholding</th>
<th>5 Description of property transferred</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>Foreign address (number, street, and apt. or suite no.)</th>
<th>6 Person subject to withholding is:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>A corporation</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>City, province or state, postal code, and country (not U.S.)</th>
<th>7 Country code</th>
<th>Mailing address of person subject to withholding (if different)</th>
</tr>
</thead>
</table>

Form 8288-A (Rev. 2-2016) Keep for your records Department of the Treasury - Internal Revenue Service
Instructions for the Withholding Agent

Prepare Form 8288-A for each foreign person subject to withholding. Attach Copies A and B to Form 8288, U.S. Witholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests. Copy B will be stamped by the IRS and sent to the person subject to withholding if the form is complete, including the transferor’s identification number. Retain Copy C for your records. You do not have to give a copy of this form to the person subject to withholding.

Identification number. A U.S. taxpayer identification number (TIN) is a social security number (SSN), employer identification number (EIN), or IRS individual taxpayer identification number (ITIN). For more information, see Forms 8288-A Must Be Attached and Identifying number in the Instructions for Form 8288.

Address. You must enter the foreign home address (for an individual) or the foreign office address (for other than an individual) of the person subject to withholding. You may enter a separate mailing address in the space provided. If provided, the IRS will use the separate mailing address to forward Copy B to the person subject to withholding.

Note: The home or office address of the person subject to withholding must be an address outside the United States. If the person does not have an address outside the United States, enter the country of residence of the foreign person in this section and provide a complete mailing address.

Box 1. Enter the date of transfer. However, enter the date of distribution if you withheld under section 1445(e)(2), (e)(3), or (e)(6) or if you made the large trust election to withhold at the date of distribution.

Box 2. Enter the federal income tax you withheld for the foreign person whose name appears on this form.

Box 3. Enter the amount realized by the foreign person whose name appears on this form.

Box 4. Complete only if you are a foreign corporation required to withhold under section 1445(e)(2).

Box 6. Check the applicable box to indicate whether the foreign person subject to withholding is an individual or a corporation. If “other,” specify whether the person is a partnership, trust, or estate.

Box 7. Enter the applicable two-letter code from the list at www.irs.gov/countrycodes for the foreign home address or foreign office address of the person subject to withholding.

See the Instructions for Form 8288 for more information.
**Application for IRS Individual Taxpayer Identification Number**

An IRS individual taxpayer identification number (ITIN) is for federal tax purposes only.

**Before you begin:**
- Don't submit this form if you have, or are eligible to get, a U.S. social security number (SSN).
- Getting an ITIN doesn't change your immigration status or your right to work in the United States and doesn't make you eligible for the earned income credit.

Reason you're submitting Form W-7. Read the instructions for the box you check. Caution: If you check box b, c, d, e, f, or g, you must file a U.S. federal tax return with Form W-7 unless you meet one of the exceptions (see instructions).

<table>
<thead>
<tr>
<th>Application Type (Check one box):</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ ] Apply for a New ITIN</td>
</tr>
<tr>
<td>[ ] Renew an Existing ITIN</td>
</tr>
</tbody>
</table>

Additional information for a and f. Enter treaty country and treaty article number.

<table>
<thead>
<tr>
<th>Name (see instructions)</th>
<th>1a First name</th>
<th>Middle name</th>
<th>Last name</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name at birth if different</td>
<td>1b First name</td>
<td>Middle name</td>
<td>Last name</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Applicant's mailing address</th>
<th>2 Street address, apartment number, or rural route number. If you have a P.O. box, see separate instructions.</th>
</tr>
</thead>
<tbody>
<tr>
<td>City or town, state or province, and country. Include ZIP code or postal code where appropriate.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Foreign (non-U.S.) address (if different from above) (see instructions)</th>
<th>3 Street address, apartment number, or rural route number. Don't use a P.O. box number.</th>
</tr>
</thead>
<tbody>
<tr>
<td>City or town, state or province, and country. Include ZIP code or postal code where appropriate.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Birth information</th>
<th>4 Date of birth (month / day / year)</th>
<th>Country of birth</th>
<th>City and state or province (optional)</th>
<th>5 [ ] Male</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ ] Female</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Other information</th>
<th>6a Country(ies) of citizenship</th>
<th>6b Foreign tax I.D. number (if any)</th>
<th>6c Type of U.S. visa (if any), number, and expiration date</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ ] USCIS documentation</td>
<td>[ ] Passport</td>
<td>[ ] Driver's license/State I.D.</td>
<td></td>
</tr>
<tr>
<td>Issued by:</td>
<td>No.:</td>
<td>Exp. date:</td>
<td>/</td>
</tr>
<tr>
<td>Date of entry into the United States (MM/DD/YYYY):</td>
<td>/</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>6d Identification document(s) submitted (see instructions)</th>
<th>6f Have you previously received an ITIN or an Internal Revenue Service Number (IRSN)?</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ ] USCIS documentation</td>
<td>[ ] No/Don't know. Skip line 6f.</td>
</tr>
<tr>
<td>[ ] Passport</td>
<td>[ ] Yes. Complete line 6f. If more than one, list on a sheet and attach to this form (see instructions).</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name and under which it was issued</th>
<th>First name</th>
<th>Middle name</th>
<th>Last name</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>6g Name of college/university or company (see instructions)</th>
<th>City and state</th>
<th>Length of stay</th>
</tr>
</thead>
</table>

**Sign Here**

Under penalties of perjury, I (applicant/delegate/acceptance agent) declare that I have examined this application, including accompanying documentation and statements, and to the best of my knowledge and belief, it is true, correct, and complete. I authorize the IRS to share information with my acceptance agent in order to perfect this Form W-7, Application for IRS Individual Taxpayer Identification Number.

**Signature of applicant (if delegate, see instructions)**

**Date (month / day / year)**

**Phone number**

<table>
<thead>
<tr>
<th>Name of delegate, if applicable (type or print)</th>
<th>Delegate's relationship to applicant</th>
</tr>
</thead>
<tbody>
<tr>
<td>[ ] Parent</td>
<td>[ ] Court-appointed guardian</td>
</tr>
<tr>
<td>[ ] Power of Attorney</td>
<td></td>
</tr>
</tbody>
</table>

**Acceptance Agent's Use ONLY**

<table>
<thead>
<tr>
<th>Signature</th>
<th>Date (month / day / year)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Phone</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Name and title (type or print)</th>
<th>Name and title (type or print)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Name and title (type or print)</td>
<td>Name and title (type or print)</td>
</tr>
</tbody>
</table>

**For Paperwork Reduction Act Notice, see separate instructions.**

Cat. No. 10229L
Instructions for Form W-7
(Rrev. September 2016)
Application for IRS Individual Taxpayer Identification Number

Section references are to the Internal Revenue Code unless otherwise noted.

Future Developments
For the latest information about developments related to Form W-7 and its instructions, such as legislation enacted after they were published, go to www.irs.gov/w7.

What’s New
The Internal Revenue Service (IRS) is taking steps to strengthen and protect the integrity of the process for issuing the individual taxpayer identification number (ITIN).

Expiration and renewal of ITINs. ITINs that haven’t been included on a U.S. federal tax return at least once in the last three consecutive tax years will expire. In addition, ITINs that were assigned before 2013 will expire according to an annual schedule based on the middle digits of the ITIN. The middle digits refer to the fourth and fifth positions of the ITIN. For example, the middle digits for 9xx-78-xxxx are “78.” Expired ITINs must be renewed in order to avoid delays in processing your tax return. For more information, see When To Apply, later, or visit www.irs.gov/itin.

ITINs not used in the last three consecutive tax years. If your ITIN wasn’t included on a U.S. federal tax return at least once for tax years 2013, 2014, or 2015, your ITIN will expire on December 31, 2016. You need to take action to renew it if it’ll be included on a U.S. federal tax return. See When To Apply, later, for more information.

ITINs with the middle digits “78” and “79.” If your ITIN’s middle digits (the fourth and fifth positions) are “78” or “79,” your ITIN will remain in effect until January 1, 2017. You need to take action to renew it if it’ll be included on a U.S. federal tax return. See When To Apply, later, for more information.

The passport is no longer a stand-alone document for certain dependent s if no date of entry into the United States is present. Effective October 1, 2016, a passport that doesn’t have a date of entry will no longer be accepted as a stand-alone identification document for certain dependents. See Proof of U.S. residency for applicants who are dependents under Supporting Documentation Requirements, later, for more information.

Certified Acceptance Agents (CAA) can now verify certain documentation for dependents. Certified Acceptance Agents (CAA) can now verify documentation for dependents. This documentation is limited to passports and birth certificates only. See Certified Acceptance Agent (CAA) under Where To Apply, later, for more information.

General Instructions
Purpose of Form
Use Form W-7 for the following purposes.

• To apply for an ITIN. An ITIN is a nine-digit number issued by the IRS to individuals who are required for federal tax purposes to have a U.S. taxpayer identification number but who don’t have and aren’t eligible to get a social security number (SSN).
• To renew an ITIN. An ITIN only needs to be renewed if it will be included on a U.S. federal tax return and it is expiring or has expired. See How To Apply, later, for more information on how to renew your ITIN.

IF your ITIN is only used on information returns filed with the IRS by third parties, you don’t have to renew your ITIN, even if the ITIN has expired for purposes of filing a U.S. federal tax return. However, in the future, if you file an income tax return, you will need to renew your ITIN at that time.

The ITIN is for federal tax purposes only. An ITIN doesn’t entitle you to social security benefits and doesn’t change your immigration status or your right to work in the United States. Also, individuals filing tax returns using an ITIN aren’t eligible for the earned income credit (EIC).

Social security numbers. Don’t complete Form W-7 if you have an SSN or if you’re eligible to get an SSN. You’re eligible for an SSN if you’re a U.S. citizen or if you have been admitted by the United States for permanent residence or U.S. employment.

To get an SSN, see Form SS-5, Application for a Social Security Card. To get Form SS-5 or to find out if you’re eligible to get an SSN, go to www.socialsecurity.gov or contact a Social Security Administration (SSA) office.

If you have an application for an SSN pending, don’t file Form W-7. Complete Form W-7 only if the SSA notifies you that you’re ineligible for an SSN.

If the SSA will not issue you an SSN, you must get a letter of denial and attach it to your Form W-7. This applies whether you’re attaching Form W-7 to your U.S. federal tax return or not. However, students, professors, and researchers, see information for box 1, later.

Who Must Complete this Form
The following individuals must complete Form W-7.

1. Any individual who isn’t eligible to get an SSN but who must furnish a taxpayer identification number must apply for an ITIN on Form W-7. Examples include the following:
   • A nonresident alien individual claiming reduced withholding under an applicable income tax treaty for which an ITIN is required (see Regulations section 1.1441-1(e)(4)(vii)(A)). Also see Pub. 515, Withholding of Tax on Nonresident Aliens and Foreign Entities.
   • A nonresident alien individual not eligible for an SSN who is required to file a U.S. federal tax return or who is filing a U.S. federal tax return only to claim a refund.
   • A nonresident alien individual not eligible for an SSN who elects to file a joint U.S. federal tax return with a spouse who is a U.S. citizen or resident alien.
   • A U.S. resident alien (based on the substantial presence test) who files a U.S. federal tax return but who isn’t eligible for an SSN. For information about the substantial presence test, see Pub. 519, U.S. Tax Guide for Aliens.
   • An alien spouse claimed as an exemption on a U.S. federal tax return who isn’t eligible to get an SSN.
   • An alien individual eligible to be claimed as a dependent on a U.S. federal tax return but who isn’t eligible to get an SSN. To determine if an alien individual is eligible to be claimed as a dependent on a U.S. federal tax return, see Pub. 501, Exemptions, Standard Deduction, and Filing Information, and Pub. 519.
• A nonresident alien student, professor, or researcher who is required to file a U.S. federal tax return but who isn’t eligible for an SSN, or who is claiming an exception to the tax return filing requirement.
• A dependent/spouse of a nonresident alien U.S. visa holder, who isn’t eligible for an SSN.

2. Persons who must renew their ITIN to file a U.S. federal tax return. See To renew your ITIN under How To Apply, and Do You Need To Renew Your ITIN, later.

Caution! Only file Form W-7 if your ITIN needs to be renewed. See Pub. 1915, Understanding Your IRS Individual Taxpayer Identification Number (ITIN), for more information.

Additional Information
For more information, visit www.irs.gov and enter “ITIN” in the search box.

Publications. See Pubs. 501, 515, 519, and 1915 for more information.

You can visit www.irs.gov/formspubs to download these publications as well as other forms at no cost. Otherwise, you can go to www.irs.gov/orders to order current and prior-year forms and instructions. Your order should arrive within 10 business days.

You can also call 1-800-TAX-FORM (1-800-829-3676) if you’re in the United States to order forms and publications. If you have a foreign address, write to:

Internal Revenue Service
1201 N. Mitsubishi Motorway
Bloomington, IL 61705-6613

Telephone help. If, after reading these instructions and our free publications, you’re not sure how to complete your application or have additional questions, call 1-800-829-1040 if you’re in the United States. If you’re outside the United States, call 267-941-1000 (not a toll-free number) for assistance.

Supporting Documentation Requirements
The documentation you provide must meet the following requirements.

1. You must submit documentation to establish your identity and your connection to a foreign country ("foreign status"). Applicants claimed as dependents must also prove U.S. residency unless the applicant is from Mexico or Canada or the applicant is a dependent of U.S. military personnel stationed overseas.

2. You must submit original documents, or certified copies of these documents from the issuing agency, that support the information provided on Form W-7. A certified document is one that the original issuing agency provides and certifies as an exact copy of the original document and contains an official stamped seal from the agency. You may be able to request a certified copy of documents at an embassy or consulate. However, services may vary between countries, so it is recommended that you contact the appropriate consulate or embassy for specific information.

TIP
Original documents you submit will be returned to you at the mailing address shown on your Form W-7. You don’t need to provide a return envelope. Applicants are permitted to include a prepaid Express Mail or courier envelope for faster return delivery of their documents. The IRS will then return the documents in the envelope provided by the applicant. If your original documents aren’t returned within 60 days, you can call the IRS (see Telephone help, earlier). If you will need your documents for any purpose within 60 days of submitting your ITIN application, you may wish to apply in person at an IRS Taxpayer Assistance Center or CAA. See Where To Apply, later.

3. The documentation you provide must be current (that is, not expired).

There are 13 acceptable documents as shown in the table below. At least one document must contain your photograph, unless you’re a dependent under age 14 (under age 18 if a student). Also, you may later be required to provide a certified translation of foreign-language documents.

<table>
<thead>
<tr>
<th>Supporting Documentation</th>
<th>Can be used to establish:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Passenger (the only stand-alone document)*</td>
<td>x x</td>
</tr>
<tr>
<td>U.S. Citizenship and Immigration Services (USCIS) photo identification</td>
<td>x x</td>
</tr>
<tr>
<td>Visa issued by the U.S. Department of State</td>
<td>x x</td>
</tr>
<tr>
<td>U.S. driver’s license</td>
<td>x</td>
</tr>
<tr>
<td>U.S. military identification card</td>
<td>x</td>
</tr>
<tr>
<td>Foreign driver’s license</td>
<td>x</td>
</tr>
<tr>
<td>Foreign military identification card</td>
<td>x x</td>
</tr>
<tr>
<td>National identification card (must contain name, photograph, address, date of birth, and expiration date)</td>
<td>x x</td>
</tr>
<tr>
<td>U.S. state identification card</td>
<td>x</td>
</tr>
<tr>
<td>Foreign voter’s registration card</td>
<td>x x</td>
</tr>
<tr>
<td>Civil birth certificate</td>
<td>x** x</td>
</tr>
<tr>
<td>Medical records (valid only for dependents under age 6)</td>
<td>x** x</td>
</tr>
<tr>
<td>School records (valid only for dependents under age 18 if a student)</td>
<td>x x</td>
</tr>
</tbody>
</table>

* Applicants claimed as a dependent who need to prove U.S. residency must provide additional documentation if the passport does not have a date of entry into the United States. See Proof of U.S. Residency for Applicants Who Are Dependents, below.
** May be used to establish foreign status only if documents are foreign.

If you submit an original passport or a certified copy from the issuing agency, you do not need to submit any other documents from the table.

Proof of U.S. residency for applicants who are dependents. Applicants claimed as dependents must also prove U.S. residency unless the applicant is from Mexico or Canada or the applicant is a dependent of U.S. military personnel stationed overseas. Effective October 1, 2016, a passport that doesn’t have a date of entry will no longer be accepted as a stand-alone identification document for dependents, unless the dependents are from Mexico, Canada, or dependents of U.S. military personnel stationed overseas. Applicants will be required to submit (along with the supporting documentation listed above):

- If under 6 years of age: A U.S. medical record that lists the applicant’s name and U.S. address.

-2- Instructions for Form W-7 (Rev. September 2016)
2. Your original tax return(s) for which the ITIN is needed. Attach Form W-7 to the front of your tax return. If you’re applying for more than one ITIN for the same tax return (such as for a spouse or dependent(s)), attach all Forms W-7 to the same tax return. Leave the area of the SSN blank on the tax return for each person who is applying for an ITIN. After your Form W-7 has been processed, the IRS will assign an ITIN to the return and process the return.

There are exceptions to the requirement to include a U.S. federal tax return. If you claim one of these exceptions, you must submit the documentation required instead of a tax return. See Exceptions Tables, later.

3. Original documents, or certified copies of these documents from the issuing agency, required to support the information provided on Form W-7. The required supporting documentation must be consistent with the applicant’s information provided on Form W-7. For example, the name, date of birth, and country(ies) of citizenship shown in the documentation must be the same as on Form W-7, lines 1a, 4, and 6a. See Supporting Documentation Requirements, earlier, for a list of the documents that can be submitted along with your application package.

To renew your ITIN. If your ITIN is expiring or has expired and the ITIN will be included on a U.S. federal tax return, follow the guidelines below to submit your renewal application. Applications for renewal may be filed as early as October 1, 2016. If your ITIN will not be included on a U.S. federal tax return, you don’t need to renew your ITIN at this time.

If you don’t renew the expired ITIN and you file a U.S. federal tax return with the expired ITIN, there may be a delay in processing your tax return.

Include the following in your renewal application package.

1. Your completed Form W-7.

2. Original documentation, or certified copies of the documentation from the issuing agency, required to support the information provided on Form W-7. The required supporting documentation must be consistent with the applicant’s information provided on Form W-7. For example, the name, date of birth, and country(ies) of citizenship shown in the documentation must be the same as on Form W-7, lines 1a, 4, and 6a. See Supporting Documentation Requirements, earlier, for a list of documentation that can be submitted along with your renewal package.

All family members listed on a tax return may renew their ITINs at the same time.

Certified copies. You can submit copies of original documents if you do any of the following.

- Have the copies certified by the issuing agency.
- Have the officers at U.S. Embassies and Consulates overseas provide certification and authentication services. Contact the Consular Section, American Citizens Services of the U.S. Embassy or Consulate in advance to determine the hours of operation for these services.

Deceased taxpayers. When requesting an ITIN for a deceased taxpayer, the deceased must meet all of the requirements established to get an ITIN. Also, you must write “Deceased” across the top of Form W-7 and include the documentation shown in the following chart.
**IF you're:**

<table>
<thead>
<tr>
<th>THEN you must include:</th>
</tr>
</thead>
<tbody>
<tr>
<td>The surviving spouse filing an original or amended joint return with your deceased spouse</td>
</tr>
<tr>
<td>• Form W-7,</td>
</tr>
<tr>
<td>• A U.S. individual income tax return, and</td>
</tr>
<tr>
<td>• Documentation substantiating the identity and foreign status of the deceased.</td>
</tr>
<tr>
<td>The court-appointed executor or administrator of the deceased's estate filing an original tax return on behalf of the deceased</td>
</tr>
<tr>
<td>• Form W-7,</td>
</tr>
<tr>
<td>• A U.S. individual income tax return,</td>
</tr>
<tr>
<td>• Documentation substantiating the identity and foreign status of the deceased*, and</td>
</tr>
<tr>
<td>• A court certificate showing your appointment.</td>
</tr>
<tr>
<td>Neither the surviving spouse nor the court-appointed executor or administrator of the deceased's estate</td>
</tr>
<tr>
<td>• Form W-7,</td>
</tr>
<tr>
<td>• A U.S. individual income tax return,</td>
</tr>
<tr>
<td>• Documentation substantiating the identity and foreign status of the deceased*,</td>
</tr>
<tr>
<td>• Form 1310 (if a refund is due), and</td>
</tr>
<tr>
<td>• A copy of the certificate of death.</td>
</tr>
</tbody>
</table>

* If the Form W-7 is for a deceased individual under 18 years of age, one of the documents proving identity, foreign status, and/or U.S. residency must be a birth certificate, unless a passport is submitted.

**ITIN not needed for Forms 4868, 1040-ES, or 1040-ES (NR).** If you're filing an application for an extension of time to file using Form 4868, or making an estimated tax payment using Form 1040-ES or Form 1040-ES (NR), don't file Form W-7 with those forms. Enter "ITIN TO BE REQUESTED" wherever your SSN or ITIN is requested. An ITIN will be issued only after you file a tax return and meet all other requirements.

If you attached your tax return to your Form W-7, leave the area of the SSN blank on the tax return for each person who is applying for an ITIN.

**When To Apply**

**To receive an ITIN for the first time.** If you're applying for a new ITIN, complete and attach Form W-7 to your tax return when you file the tax return for which the ITIN is needed. If you're unable to file your tax return by the due date, you must file an application for an extension of time to file. Failure to timely file the tax return with a complete Form W-7 and required documentation may result in the denial of refundable credits, such as the Child Tax Credit and the American Opportunity Tax Credit. See Where To Apply, later. Don't file your tax return without Form W-7.

If you meet one of the exceptions described in Exceptions Tables at the end of these instructions, you may complete and submit Form W-7 at any time.

You can electronically file (e-file) a return using an ITIN in the calendar year the ITIN is assigned. If you need to file multiple year returns, you can attach them all to your Form W-7 and submit them to the IRS. Once your ITIN is assigned, you can e-file returns in the following years. For example, if you apply for and receive an ITIN in 2017, you may not e-file any tax return using that ITIN (including prior year returns) until 2018.

**To renew your ITIN.** If you're renewing an existing ITIN, you may submit your Form W-7 renewal application (without filing a tax return) as early as October 1, 2016. If you don't renew your expired ITIN and you file a U.S. federal tax return with the expired ITIN, there may be a delay in processing your tax return.

**Where To Apply**

By mail. Mail Form W-7, your tax return, if applicable (or other documents required by an exception), and the documentation described under Supporting Documentation Requirements, earlier, to:

Internal Revenue Service
ITIN Operation
P.O. Box 149342
Austin, TX 78714-9342

If you mail your application, don't use the mailing address in the instructions for your tax return.

By private delivery services. If you use a private delivery service, submit your Form W-7, your tax return, if applicable (or other documents required by an exception), and the documentation described under Supporting Documentation Requirements, earlier, to:

Internal Revenue Service
ITIN Operation
3651 S. Interregional, Hwy 35
Mail Stop 6090-AUSC
Austin, TX 78741-0000

**In person.** Designated IRS Taxpayer Assistance Centers (TACs) can verify original documentation and certified copies of the documentation from the issuing agency for primary and secondary applicants and their dependents. For dependents, TACs can verify passports, national identification cards, and birth certificates. These documents will be returned to you immediately. Service at TACs is by appointment only. Appointments can be scheduled by calling 1-844-545-5640. See www.irs.gov/uac/tac-locations-where-in-person-document-verification-is-provided for a list of designated TACs that offer ITIN document authentication service. TACs that don't offer ITIN document authentication service will mail the original documents, Form W-7, and tax return to the IRS Austin Service Center for processing.

**Through an acceptance agent.** You can also apply through one of the two types of acceptance agents authorized by the IRS.
1. Acceptance Agent (AA).
2. Certified Acceptance Agent (CAA).

**Acceptance Agent (AA).** An Acceptance Agent (AA) can help you complete and file Form W-7. To get a list of agents, visit IRS.gov and enter "acceptance agent program" in the search box. An AA will need to submit original documentation or certified copies of the documentation from the issuing agency to the IRS for all applicants.

**Certified Acceptance Agent (CAA).** A Certified Acceptance Agent (CAA) can verify original documentation and certified copies of the documentation from the issuing agency for primary and secondary applicants and their dependents. For dependents, CAA can only verify passports and birth certificates. The CAA will return the documentation immediately after reviewing its authenticity.

**Processing times.** Allow 7 weeks for the IRS to notify you of your ITIN application status (9 to 11 weeks if you submit the application during peak processing periods (January 15 through April 30) or if you're filing from overseas). If you haven't received your ITIN or correspondence at the end of that time, you can call the IRS to find out the status of your application (see Telephone help, earlier).
Do You Need To Renew Your ITIN?

Follow the steps below to see if you need to renew your ITIN:

Do you have an SSN or are you eligible for an SSN?
- Yes: You don't need to renew your ITIN. Contact the IRS to provide your previously assigned ITIN and your SSN. See Additional Information for more information on how to contact the IRS.
- No:
  - Yes: You don't need to renew your ITIN. However, in the future, if you need to use the ITIN to file a U.S. federal tax return (including as a dependent), you will need to renew the ITIN at that time.
  - No:
    - Yes: You don't need to renew your ITIN. However, in the future, if you will file a U.S. federal tax return using the ITIN (including for a dependent), you will need to renew the ITIN at that time.
    - No: Have you filed a U.S. federal tax return using the ITIN (or was the ITIN used for a dependent) for tax year 2013, 2014, or 2015?
      - Yes: You don't need to renew your ITIN. See How To Apply or visit IRS.gov and enter "ITIN" in the search box for more information.
      - No: Are the middle digits of your ITIN "78" or "79"?
        - Yes: You need to renew your ITIN. If you don't renew your ITIN, there may be delays in processing any future U.S. federal tax returns that you file. See How To Apply for more information on what steps you need to take to submit an application for an ITIN renewal.
        - No: You don't need to renew your ITIN. Contact the IRS to provide your previously assigned ITIN and your SSN. See Additional Information for more information on how to contact the IRS.
Specific Instructions

If you’re completing this form for someone else, answer the questions as they apply to that individual.

Application Type

Check the applicable box to indicate if you’re:

1. a first-time applicant applying for a new ITIN, or
2. seeking to renew an ITIN that you already have.

If you check Renew an Existing ITIN, you must answer the question on line 6e and include your ITIN information on line 6f. See the instructions for lines 6e and 6f for more information.

Reason You’re Submitting Form W-7

You must check the box to indicate the reason you’re completing Form W-7 even if you’re applying to renew your ITIN. If more than one box applies to you, check the box that best explains your reason for submitting Form W-7. A selection must be made in this section.

Note: If you check box a or f, then box h may also be checked. If applicable, you also must enter the treaty country and treaty article. For more information on treaties, see Pub. 901, U.S. Tax Treaties.

a. Nonresident alien required to get an ITIN to claim tax treaty benefit. Certain nonresident aliens must get an ITIN to claim certain tax treaty benefits even if they don’t have to file a U.S. federal tax return. If you check this box to claim the benefits of a U.S. income tax treaty with a foreign country, also check box h. On the dotted line next to box h, enter the appropriate designation for Exception 1 or 2, whichever applies (see Exception 1 and Exception 2, later). Identify the exception by its number, alpha subsection, and category under which you’re applying (for example, enter “Exception 1d-Pension Income” or “Exception 2d-Gambling Winnings”). Also, enter the name of the treaty country and treaty article number in the appropriate entry spaces below box h and attach the documents required under whichever exception applies. For more details on tax treaties, see Pub. 901.

b. Nonresident alien filing a U.S. federal tax return. This category includes:

- A nonresident alien who must file a U.S. federal tax return to report income effectively or not effectively connected with the conduct of a trade or business in the United States, and
- A nonresident alien who is filing a U.S. federal tax return only to get a refund.

c. U.S. resident alien (based on days present in the United States) filing a U.S. federal tax return. A foreign individual living in the United States who doesn’t have permission to work from the USCIS, and is thusineligible for an SSN, may still be required to file a U.S. federal tax return. These individuals must check this box.

d. Dependent of U.S. citizen/resident alien. This is an individual who can be claimed as a dependent on a U.S. federal tax return and isn’t eligible to get an SSN. Dependents of U.S. military personnel can submit original documents, certified copies or notarized copies of identification documents. A copy of the servicemember’s U.S. military ID will be required or the applicant must be applying from an overseas APO/FPO address. A copy of the servicemember’s U.S. military ID is required to be included with the application if the documents are notarized. If you’re applying for an ITIN under this category, you must provide the full name and SSN or ITIN of the U.S. citizen/resident alien. Enter the information in the space provided.

e. Spouse of U.S. citizen/resident alien. This category includes:

- A resident or nonresident alien spouse who isn’t filing a U.S. federal tax return (including a joint return) and who isn’t eligible to get an SSN but who, as a spouse, is claimed as an exemption; and
- A resident or nonresident alien electing to file a U.S. federal tax return jointly with a spouse who is a U.S. citizen or resident alien.

Spouses of U.S. military personnel can submit original documents, certified copies or notarized copies of identification documents. A copy of the servicemember’s U.S. military ID will be required or the applicant must be applying from an overseas APO/FPO address. A copy of the servicemember’s U.S. military ID is required to be included with the application if the documents are notarized. If you’re applying for an ITIN under this category, you must provide the full name and SSN or ITIN of the U.S. citizen/resident alien. Enter the information in the space provided.

f. Nonresident alien student, professor, or researcher filing a U.S. federal tax return or claiming an exception. This is an individual who has not abandoned his or her residence in a foreign country and who is a bona fide student, professor, or researcher coming temporarily to the United States solely to attend classes at a recognized institution of education, to teach, or to perform research.

If you check this box, you must complete lines 6c and 6g and provide your passport with a valid U.S. visa. If you’re present in the United States on a work-related visa (F-1, J-1, or M-1), but will not be employed (that is, your presence in the United States is study-related), you can choose to attach a letter from the Designated School Official (DSO) or Responsible Officer (RO) instead of applying with the SSA for an SSN. The letter must clearly state that you will not be securing employment while in the United States and your presence here is solely study-related. This letter can be submitted instead of a Social Security denial letter if you’re filing a tax return with this Form W-7 or claiming Exception 2 (explained later).

Nonresident alien students and exchange visitors, their spouses, and dependents under the Student Exchange Visitors Program (SEVP) claiming Exception 2 (no tax return attached) can have their original ID certified by an SEVP-approved institution, rather than mailing originals to the IRS. These are individuals admitted to the U.S. under an F, J, or M visa who receive taxable scholarships, fellowships, or other grants. See www.irs.gov for the procedures.

If you check this box to claim an exception under the benefits of a U.S. income tax treaty with a foreign country, also check box h. On the dotted line next to box h, enter the appropriate designation for Exception 2, explained later. Identify the exception by its number, alpha subsection, and category under which you’re applying (for example, enter “Exception 2b-Scholarship Income and claiming tax treaty benefits” or “Exception 2c-Scholarship Income”). Also, enter the name of the treaty country and the treaty article number in the appropriate entry spaces below box h (if applicable) and attach the documents required under Exception 2.

g. Dependent/spouse of a nonresident alien holding a U.S. visa. This is an individual who can be claimed as a dependent or a spouse on a U.S. federal tax return, who is unable, or not
eligible, to get an SSN, and who has entered the United States with a nonresident alien who holds a U.S. visa. If you apply for an ITIN under this category, remember to attach a copy of your visa to your Form W-7.

h. Other. If the reason for your ITIN request isn’t described in boxes a through g, check this box. Describe in detail your reason for requesting an ITIN and attach supporting documents.

Frequently, third parties (such as banks and other financial institutions) that are subject to information reporting and withholding requirements will request an ITIN from you to enable them to file information returns required by law. If you’re requesting an ITIN for this reason, you may be able to claim one of the exceptions described later. Enter on the dotted line next to box h the exception that applies to you. Identify the exception by its number, alpha subsection (if applicable), and category under which you’re applying (for example, enter “Exception 1a-Partnership Income” or “Exception 3-Mortgage Interest”). Examples of completed Forms W-7 can be found in Pub. 1915. You will not need to attach a tax return to your Form W-7.

Exception 1. Passive income—third-party withholding or tax treaty benefits. This exception may apply if you’re the recipient of partnership income, interest income, annuity income, rental income, or other passive income that is subject to third-party withholding or covered by tax treaty benefits. See Exceptions Tables, later, for more details on Exception 1.

Information returns applicable to Exception 1 may include the following:
- Form 1042-S, Foreign Person’s U.S. Source Income Subject to Withholding.
- Form 1099-INT, Interest Income.
- Form 1099-MISC, Miscellaneous Income.
- Form 8805, Foreign Partner’s Information Statement of Section 1446 Withholding Tax.
- Schedule K-1 (Form 1065), Partner’s Share of Income, Deductions, Credits, etc.

Applicants receiving compensation for personal services performed in the United States, or issued a U.S. visa that is valid for employment, should first apply for an SSN with the SSA. Unless you’re denied an SSN by the SSA and attach the denial letter to your Form W-7, you aren’t eligible for an ITIN.

If you’re required to file a tax return, then you aren’t eligible for Exception 1.

Exception 2. Other income. This exception may apply if:
1. You’re claiming the benefits of a U.S. income tax treaty with a foreign country and you receive any of the following:
   a. Wages, salary, compensation, and honoraria payments;
   b. Scholarships, fellowships, and grants; and/or
   c. Gambling income; or
2. You’re receiving taxable scholarship, fellowship, or grant income, but not claiming the benefits of an income tax treaty.

See Exceptions Tables, later, for more details on Exception 2. Information returns applicable to Exception 2 may include Form 1042-S.

Exception 3. Mortgage interest—third-party reporting. This exception may apply if you have a home mortgage loan on real property you own in the United States that is subject to third-party reporting of mortgage interest. See Exceptions Tables, later, for more details on Exception 3. Information returns applicable to Exception 3 may include Form 1098, Mortgage Interest Statement.

Exception 4. Dispositions by a foreign person of U.S. real property interest—third-party withholding. This exception may apply if you’re a party to a disposition of a U.S. real property interest by a foreign person, which is generally subject to withholding by the transferee or buyer (withholding agent). See Exceptions Tables, later, for more details on Exception 4.

Information returns applicable to Exception 4 may include the following:
- Form 8288, U.S. Withholding Tax Return for Dispositions by Foreign Persons of U.S. Real Property Interests.
- Form 8288-A, Statement of Withholding on Dispositions by Foreign Persons of U.S. Real Property Interests.
- Form 8288-B, Application for Withholding Certificate for Dispositions by Foreign Persons of U.S. Real Property Interests.

Exception 5. Treasury Decision (TD) 9363. This exception may apply if you have an IRS reporting requirement under TD 9363 and are submitting Form W-7 with Form 13350, Registration for e-services. See Exceptions Tables, later, for more details on Exception 5.

Line Instructions

Enter “N/A” (not applicable) on all sections of each line that don’t apply to you. Don’t leave any section blank. For example, line 4 should have three separate entries.

Line 1a. Enter your legal name on line 1a as it appears on your identifying documents. This entry should reflect your name as it will appear on a U.S. federal tax return.

Your ITIN will be established using this name. If you don’t use this name on the U.S. federal tax return, the processing of the U.S. federal tax return may be delayed.

Line 1b. Enter your name as it appears on your birth certificate if it’s different from your entry on line 1a.

Line 2. Enter your complete mailing address on line 2. This is the address the IRS will use to return your original documents and send written notification of your ITIN application status.

The IRS will not use the address you enter to update its records for other purposes unless you include a U.S. federal tax return with your Form W-7. If you are not including a U.S. federal tax return with your Form W-7 and you changed your home mailing address since you filed your last U.S. federal tax return, also file Form 8822, Change of Address, with the IRS at the address listed in the Form 8822 instructions.

Note: If the U.S. Postal Service will not deliver mail to your physical location, enter the U.S. Postal Service’s post office box number for your mailing address. Contact your local U.S. Post Office for more information. Don’t use a post office box owned and operated by a private firm or company.

Line 3. Enter your complete foreign (non-U.S.) address in the country where you permanently or normally reside if it’s different from the address on line 2. If the foreign address on line 3 is the same as the mailing address on line 2, enter “SAME” on line 3. If you no longer have a permanent residence due to your relocation to the United States, enter only the foreign country where you last resided on line 3. If you’re claiming a benefit under an income tax treaty with the United States, the income tax treaty country must be the same as the country listed on line 3.

Don’t use a post office box or an “in care of” c/o address instead of a street address on line 2 if you’re entering just a “country” name on line 3. If you do, your application may be rejected.

Line 4. Enter your date of birth in MM/DD/YYYY format, where MM = 1 to 12 and DD = 1 to 31. To be eligible for an ITIN, your birth country must be recognized as a foreign country by the U.S. Department of State.
Line 6a. Enter the country or countries (in the case of dual citizenship) in which you’re a citizen. Enter the complete country name; don’t abbreviate.

Line 6b. If your country of residence for tax purposes has issued you a tax identification number, enter that number on line 6b. For example, if you’re a resident of Canada, enter your Canadian Social Security number.

Line 6c. Enter only U.S. nonimmigrant visa information. Include the USCIS classification, number of the U.S. visa, and the expiration date in month/day/year format. For example, if you have an F-1/F-2 visa with the number 123456 that has an expiration date of December 31, 2018, enter “F-1/F-2,” “123456,” and “12/31/2018” in the entry space. Individuals in possession of an I-20/I-94 document should attach a copy to their Form W-7.

Line 6d. Check the box indicating the type of document(s) you’re submitting to prove your identity and foreign status, if required, U.S. residency. You must submit documents as explained under Supporting Documentation Requirements, earlier. Enter the name of the state or country or other issue, the identification number (if any) appearing on the document(s), the expiration date, and the date on which you entered the United States. Dates must be entered in the month/day/year format.

Note: If you’re submitting a passport, or a certified copy of a passport from the issuing agency, no other documentation is required to prove your identity and foreign status. Ensure any visa information shown on the passport is entered on line 6c and the pages of the passport showing the U.S. visa (if a visa is required for your Form W-7) are included with your Form W-7. Effective October 1, 2016, a passport that doesn’t have a date of entry will no longer be accepted as a stand-alone identification document for dependents, unless the dependents are from Mexico, Canada, or dependents of U.S. military personnel stationed overseas.

If you’re submitting more than one document, enter only the information for the first document on this line. Attach a separate sheet showing the required information for the additional document(s). On the separate sheet, be sure to write your name and “Form W-7” at the top.

The “Date of entry into the United States” must contain the complete date on which you entered the country for the purpose for which you’re requesting an ITIN (if applicable). If you’ve never entered the United States, enter “Never entered the United States” on this line. A passport without an entry date does not prove U.S. residency and may not be used as a stand-alone document for certain dependents. See Supporting Documentation Requirements, earlier.

Example. You entered the United States on August 1, 2016, to work for Company X. You want to file a return for the income you earned in the United States in 2016. You aren’t eligible to get a social security number. You file Form W-7 with your 2016 return. Enter “08/01/2016” on line 6d of Form W-7.

Line 6e. If you ever received an ITIN and/or an Internal Revenue Service Number (IRSN), check the “Yes” box and complete line 6f. If you never had an ITIN or an IRSN, or if you don’t know your ITIN or IRSN, check the No/Don’t know box.

An IRSN is a nine-digit number issued by the IRS to persons who file a return or make a payment without providing a TIN. You would’ve been issued this number if you filed a U.S. federal tax return and didn’t have an SSN. This IRSN will appear on any correspondence the IRS sent you concerning that return.

If you’re submitting Form W-7 to renew your ITIN, you must include your previously assigned ITIN on line 6f to avoid delays in processing your Form W-7.

Line 6f. If you have both an ITIN and/or an IRSN, list them in the space(s) provided. Identify your first, middle, and last name under which the ITIN and/or IRSN was issued. If you were issued more than one IRSN, attach a separate sheet listing all the IRSNs you received. On the separate sheet, be sure to write your name and “Form W-7” at the top.

If you’re submitting Form W-7 to renew your ITIN, the name under which you applied for your ITIN must be included on line 6f to avoid delays in processing your Form W-7.

Note: If you’re renewing your ITIN and your legal name has changed since the original assignment of your ITIN, you’ll need to submit documentation to support your legal name change, such as your marriage certificate or a court order, which may include a divorce decree. Attach supporting documentation to Form W-7.

Line 6g. If you checked reason #1, you must enter the name of the educational institution and the city and state in which it is located. You also must enter your length of stay in the United States.

If you’re temporarily in the United States for business purposes, you must enter the name of the company with whom you’re conducting your business and the city and state in which it is located. You also must enter your length of stay in the United States.

Signature

Who Can Sign Form W-7

Generally, the applicant is required to sign Form W-7. The following are exceptions to this requirement.

Applicant is a dependent under 18 years of age. If the applicant is a dependent under 18 years of age, his or her parent or court-appointed guardian can sign if the child cannot. The parent or court-appointed guardian must type or print his or her name in the space provided and check the appropriate box that indicates his or her relationship to the applicant. If the individual is signing as a court-appointed guardian, a copy of the court-appointment papers showing the legal guardianship must be attached.

Adults, other than a parent or court-appointed guardian, can sign Form W-7 only if a Form 2848, Power of Attorney and Declaration of Representative, has been signed by a parent or court-appointed guardian authorizing the individual to sign for the applicant.

Applicant is a dependent 18 years of age or older. If the applicant is 18 years of age or older, the applicant can sign or can appoint his or her parent, a court-appointed guardian, or another individual to sign. The person signing, if other than the applicant, must type or print his or her name in the space provided, check the appropriate box that indicates his or her relationship to the applicant, and attach a Form 2848.

Applicant can’t sign their name. If an applicant can’t sign their name, then they must sign their mark (for example, an “X” or a thumbprint) in the presence of a witness. The witness’s signature is also required and must be identified as that of a witness.

Note: All Powers of Attorney (POA) submitted to the IRS must be in English. Any POAs received in a foreign language will be considered invalid unless accompanied by a certified English translation. The POA must clearly state the purpose for which it is intended under the “Acts authorized” section. For more information, go to IRS.gov.
Acceptance Agent’s Use ONLY
Enter the 8-digit office code that was issued to you by the ITIN Program Office.

Paperwork Reduction Act Notice. We ask for the information on this form to carry out the Internal Revenue laws of the United States. You are required to give us the information. We need it to ensure that you are complying with these laws and to allow us to figure and collect the right amount of tax.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by Internal Revenue Code section 6103.

The average time and expenses required to complete and file this form will vary depending on individual circumstances. For the estimated averages, see the instructions for your income tax return.

If you have suggestions for making this form simpler, we would be happy to hear from you. See the instructions for your income tax return.

### Exceptions Tables

#### Exception #1

<table>
<thead>
<tr>
<th>Third-Party Withholding on Passive Income</th>
<th>Persons who are eligible to claim Exception 1 include:</th>
<th>Documentation you must submit if you’re eligible to claim Exception 1:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>1(a) Individuals who are partners of a U.S. or foreign partnership that invests in the United States and that owns assets that generate income subject to IRS information reporting and federal tax withholding requirements; or</td>
<td>1(a) A copy of the portion of the partnership or LLC agreement displaying the partnership’s employer identification number and showing that you’re a partner in the partnership that is conducting business in the United States.</td>
</tr>
<tr>
<td></td>
<td>1(b) Individuals who have opened an interest-bearing bank deposit account that generates income that is effectively connected with their U.S. trade or business and is subject to IRS information reporting and/or federal tax withholding; or</td>
<td>1(b) A signed letter from the bank on its official letterhead, displaying your name and stating that you’ve opened a business account that is subject to IRS information reporting and/or federal tax withholding on the interest generated during the current tax year.</td>
</tr>
<tr>
<td></td>
<td>1(c) Individuals who are “resident aliens” for tax purposes and have opened an interest-bearing bank deposit account that generates income subject to IRS information reporting and/or federal tax withholding; or</td>
<td>1(c) A signed letter from the bank on its official letterhead, displaying your name and stating that you’ve opened an individual deposit account that is subject to IRS information reporting and/or federal tax withholding on the interest generated during the current tax year.</td>
</tr>
<tr>
<td></td>
<td>1(d) Individuals who are receiving distributions during the current tax year of income such as pensions, annuities, rental income, royalties, dividends, etc., and are required to provide an ITIN to the withholding agent (for example, an investment company, insurance company, or financial institution, etc.) for the purposes of tax withholding and/or reporting requirements.</td>
<td>1(d) A signed letter or document from the withholding agent, on official letterhead, showing your name and verifying that an ITIN is required to make distributions to you during the current tax year that are subject to IRS information reporting and/or federal tax withholding. Self-generated income statements will only be accepted with a copy of the contract or a letter with a postmarked envelope addressed from the withholding agent.</td>
</tr>
</tbody>
</table>

#### Exception #2

<table>
<thead>
<tr>
<th>2(a), Wages, Salary, Compensation, and Honoraria Payments</th>
<th>Persons who are eligible to claim Exception 2(a) include:</th>
<th>Documentation you must submit if you’re eligible to claim Exception 2(a):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claiming the benefits of a tax treaty</td>
<td>Individuals claiming the benefits of a tax treaty who: • Are either exempt or subject to a reduced rate of withholding of tax on their wages, salary, compensation, and honoraria payments; and • Will be submitting Form 8233 to the payer of the income.</td>
<td>• A letter of employment from the payer of the income, or • A copy of the employment contract, or • A letter requesting your presence for a speaking engagement, etc.; along with: • Evidence (information) on the Form W-7 that you’re entitled to claim the benefits of a tax treaty, and • A copy of the completed withholding agent’s portion of Form 8233 attached to the Form W-7.</td>
</tr>
</tbody>
</table>
## Exceptions Tables (continued)

### Exception #2 (continued)

**Note:** Federal tax withholding and/or information reporting must take place within the current tax year.

<table>
<thead>
<tr>
<th>2(b), Scholarships, Fellowships, and Grants</th>
<th>Persons who are eligible to claim Exception 2(b) include:</th>
<th>Documentation you must submit if you're eligible to claim Exception 2(b):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Claiming the benefits of a tax treaty</td>
<td>Individuals claiming the benefits of a tax treaty who:</td>
<td>• A letter or official notification from the college or university awarding the noncompensatory scholarship, fellowship, or grant;</td>
</tr>
<tr>
<td></td>
<td>• Are either exempt from or subject to a reduced rate of tax on their income from scholarships, fellowships, or grants (that is, foreign students, scholars, professors, researchers, foreign visitors, or any other individual);</td>
<td>• A copy of a contract with a college, university, or educational institution;</td>
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<tr>
<td></td>
<td>and</td>
<td>along with:</td>
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<td></td>
<td>• Will be submitting Form W-6BEN to the withholding agent.</td>
<td>• A copy of your passport showing the valid visa issued by the U.S. Department of State,</td>
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<tr>
<td></td>
<td></td>
<td>• Evidence (information) on the Form W-7 that you're entitled to claim the benefits of a tax treaty,</td>
</tr>
<tr>
<td></td>
<td><strong>Note:</strong> Student and Exchange Visitor Program (SEVP)-approved institutions for nonresident alien students and exchange visitors and their spouses and dependents classified under section 101(a)(15)(F), (M), or (J) of the Immigration and Nationality Act (8 U.S.C. 1101(a) (15)(F), (M), or (J)): A certification letter is required for each Form W-7 application: primary, associated secondary (spouse), and dependent(s).¹</td>
<td>• A copy of the Form W-8BEN that was submitted to the withholding agent, and</td>
</tr>
<tr>
<td></td>
<td>¹ The certification letter from an SEVP-approved institution serves as a substitute for submission of original supporting identification documents with Form W-7. The certification letter must:</td>
<td>• A letter from the Social Security Administration stating that you're ineligible to receive a social security number (SSN).</td>
</tr>
<tr>
<td></td>
<td>• Be on original, official college, university, or institution letterhead with a verifiable address;</td>
<td>² If you're a student on an F-1, J-1, or M-1 visa who won't be working while studying in the United States, you won't have to apply for an SSN. You will be permitted to provide a letter from the Designated School Official (DSO) or Responsible Officer (RO) stating that you won't be securing employment in the United States or receiving any type of income from personal services.</td>
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<tr>
<td></td>
<td>• Provide the applicant's full name and Student Exchange Visitor's Information System (SEVIS) number;</td>
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<td></td>
<td>• Certify that the student presented an unexpired passport, visa, or other identification documents for review;</td>
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<td></td>
<td>• List the identification documents provided to verify identity and foreign status;</td>
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<tr>
<td></td>
<td>• Be signed and dated by a SEVIS official: Principal Designated School Official (PDSO), Designated School Official (DSO), Responsible Officer (RO), or Alternate Responsible Officer (ARO) of a certified school exchange program with a verifiable contact telephone number;</td>
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<td></td>
<td>• Attach copies of documents used to verify the applicant's identity and foreign status from the approved list of documents presented in the Form W-7 instructions (passport must include copy of valid visa issued by the U.S. Department of State);</td>
<td></td>
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<tr>
<td></td>
<td>• Attach a copy of DS-2019, Certificate of Eligibility for Exchange Visitor Status (J-1) Status and/or a copy of the I-20, Certificate of Eligibility for Nonimmigrant Student Status;</td>
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<tr>
<td></td>
<td>• Attach a copy of the Form W-8BEN submitted to the withholding agent;</td>
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<tr>
<td></td>
<td>• Form W-7 must include the treaty country and article number that supports claiming a tax treaty benefit; and</td>
<td></td>
</tr>
<tr>
<td></td>
<td>• Include a letter from the DSO or RO stating that the applicant won't be securing employment in the U.S. or receiving any type of income from personal services.</td>
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</tbody>
</table>
## Exceptions Tables (continued)

### Exception #2 (continued)

**Note:** Federal tax withholding and/or information reporting must take place within the current tax year.

<table>
<thead>
<tr>
<th>2(c). Scholarships, Fellowships, and Grants</th>
<th>Persons who are eligible to claim Exception 2(c) include:</th>
<th>Documentation you must submit if you’re eligible to claim Exception 2(c):</th>
</tr>
</thead>
</table>
| Not claiming benefits of a tax treaty      | Individuals receiving noncompensatory income from scholarships, fellowships, or grants (that is, foreign students, scholars, professors, researchers, or any other individual) that is subject to IRS information reporting and/or withholding requirements during the current year. | • A letter or official notification from the educational institution (that is, college or university) awarding the noncompensatory scholarship, fellowship, or grant; or  
  • A copy of a contract with a college, university, or educational institution;  
  • A copy of your passport showing the valid visa issued by the U.S. Department of State,  
  • A letter from the DSO or RO stating that you’re receiving noncompensatory income from scholarships, fellowships, or grants that is subject to IRS information reporting and/or federal tax withholding requirements during the current year (this letter must be attached to your Form W-7 or your application for an ITIN will be denied), and  
  • A letter from the Social Security Administration stating that you’re ineligible to receive a social security number (SSN). |

3 If you’re a student on an F-1, J-1, or M-1 visa who won’t be working while studying in the United States, you won’t have to apply for an SSN. You will be permitted to provide a letter from the DSO or RO stating that you won’t be securing employment in the United States or receiving any type of income from personal services.
<table>
<thead>
<tr>
<th>Exception #2 (continued)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Note:</strong> Federal tax withholding and/or information reporting must take place within the current tax year.</td>
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</table>

<table>
<thead>
<tr>
<th>2(d), Gambling Income</th>
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</thead>
<tbody>
<tr>
<td><strong>Claiming the benefits of a tax treaty</strong></td>
</tr>
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</table>

<table>
<thead>
<tr>
<th>Persons who are eligible to claim Exception 2(d) include:</th>
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</thead>
<tbody>
<tr>
<td>Nonresident aliens visiting the United States who:</td>
</tr>
<tr>
<td>- Have gambling winnings,</td>
</tr>
<tr>
<td>- Are claiming the benefits of a tax treaty for an exempt or reduced rate of federal tax withholding on that income, and</td>
</tr>
<tr>
<td>- Will be utilizing the services of a gaming official as an IRS ITIN Acceptance Agent.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Documentation you must submit if you're eligible to claim Exception 2(d):</th>
</tr>
</thead>
<tbody>
<tr>
<td>Your Form W-7, which must be submitted through the services of an appropriate gaming official serving as an IRS ITIN Acceptance Agent to apply for an ITIN under Exception 2(d).</td>
</tr>
</tbody>
</table>

**Note:** If you don't secure the services of a gaming official, you may still file Form 1040NR at the end of the tax year with a Form W-7, attaching a copy of Form 1042-S displaying the amount of tax withheld. Your Form 1040NR return also should display the tax treaty article number and country under which you're claiming the treaty benefits.

<table>
<thead>
<tr>
<th>Exception #3</th>
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<tbody>
<tr>
<td><strong>Note:</strong> Federal tax withholding and/or information reporting must take place within the current tax year.</td>
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<thead>
<tr>
<th>Third-Party Reporting of Mortgage Interest</th>
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<table>
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<tr>
<th>Persons who are eligible to claim Exception 3 include:</th>
</tr>
</thead>
<tbody>
<tr>
<td>Individuals with a home mortgage loan on real property located in the United States.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Documentation you must submit if you're eligible to claim Exception 3:</th>
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</thead>
<tbody>
<tr>
<td>• A copy of a contract of sale indicating mortgage used for purchase of a home.</td>
</tr>
</tbody>
</table>

<table>
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<tr>
<th>Exception #4</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Note:</strong> Federal tax withholding and/or information reporting must take place within the current tax year.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Third-Party Withholding—Disposition by a Foreign Person of U.S. Real Property Interest</th>
</tr>
</thead>
</table>

| A withholding obligation generally is imposed on a buyer or other transferee (withholding agent) when the buyer acquires a U.S. real property interest from a foreign person. In some instances, the foreign person may apply for a withholding certificate to reduce or eliminate withholding on the disposition of real property. |

If you're eligible to claim Exception 4, you must submit:
• A completed Form 8288, or Form 8288-A, and/or Form 8288-B; and
• A copy of the real estate sales contract.

**Note:** For the seller of the property, copies of the sales contract, and copies of Forms 8288 and 8288-A submitted by the buyer need to be attached to Form W-7.

<table>
<thead>
<tr>
<th>Exception #5</th>
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<tbody>
<tr>
<td><strong>Note:</strong> Federal tax withholding and/or information reporting must take place within the current tax year.</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th>Reporting Obligations under TD 9363</th>
</tr>
</thead>
</table>

| If you're eligible to claim Exception 5, you must submit Form W-7 and Form 13350 along with a letter from your employer on corporate letterhead stating you have been designated as the person responsible for ensuring compliance with IRS information reporting requirements. |
PART IV - Items of General Interest

Implementation of PATH Act ITIN Provisions

Notice 2016-48

Section 203 of the Protecting Americans from Tax Hikes Act of 2015 (PATH Act), Pub. L. 114-113, div. Q, enacted on December 18, 2015, modified section 6109 of the Internal Revenue Code, and in so doing, made significant changes to the Individual Taxpayer Identification Number (ITIN) program. This notice explains those changes, how the Internal Revenue Service (IRS) will implement the changes, and the potential consequences to taxpayers who do not renew an ITIN when required by the PATH Act. Finally, this notice requests comments regarding the ITIN program and Certified Acceptance Agents (CAAs).

BACKGROUND

Section 6109 permits the IRS to issue identifying numbers for tax purposes (taxpayer identification numbers) and to request information to issue such numbers. Generally, an individual’s taxpayer identification number is a social security number (SSN); however, some individuals are ineligible to receive an SSN but still need a taxpayer identification number for U.S. tax purposes.

An ITIN is a nine-digit tax processing number issued by the IRS that is formatted like an SSN, NNN-NN-NNNN. Each ITIN begins with the number 9 and has fourth and fifth digit ranges from 50-65, 70-88, 90-92, and 94-99. The IRS issues ITINs to individuals who are required to have a U.S. taxpayer identification number for U.S. tax
purposes but who do not have, and are not eligible to obtain, an SSN from the Social Security Administration (SSA). The PATH Act made changes to the ITIN program.

**ITIN Application Process**

The basic process for applying for an ITIN will not change as a result of the PATH Act. Individuals apply for an ITIN by submitting Form W-7, *Application for IRS Individual Taxpayer Identification Number*, (Form W-7SP for the Spanish language version). Most taxpayers must submit their Form W-7 with the tax return for which the ITIN is needed. Both domestic and foreign applicants may submit their Form W-7, tax return, and the required documentation by mail to the ITIN Operation Unit in Austin, Texas. Original documents or certified copies of documents from the issuing agency are the only acceptable documentation, except for a few very limited exceptions.

Under the PATH Act, in-person applications may be submitted to an employee of the IRS authorized to review and accept applications or to a community-based certified acceptance agent approved by the IRS. Individuals who apply in person, other than dependents, will receive their documentation back once the in-person application is completed. Currently, all IRS employees authorized to review and accept applications are located in the United States. The IRS is reviewing the new law and considering how to implement the new provision for community-based certified acceptance agents. Until further guidance is issued, all applicants may continue to submit their application package (*i.e.*, Form W-7 and supporting documentation) to CAAs for review under existing procedures (see [https://www.irs.gov/individuals/acceptance-agent-program](https://www.irs.gov/individuals/acceptance-agent-program)). Applicants may also submit their application packet in person at an IRS Taxpayer Assistance Center. Not all locations provide this service and many do so only by
appointment. Taxpayers should first check https://www.irs.gov/uac/tac-locations-where-in-person-document-verification-is-provided to find a location that has employees authorized to review and accept applications, and if applicable, make an appointment before visiting.

See the Instructions for Form W-7 and https://www.irs.gov/individuals/additional-itin-information for more detailed information regarding the application process for an ITIN.

**Certain ITINs will need to be renewed beginning in 2017**

Prior to the PATH Act, a taxpayer applied for and received an ITIN only once. The ITIN remained in effect unless the taxpayer applied for and received an SSN. On June 30, 2014, the IRS announced in News Release IR 2014-76 that it would deactivate ITINs that had not been used on a tax return in five consecutive years. That deactivation process had not yet begun at the time the PATH Act was enacted and, as a result of the PATH Act, is now obsolete. Under the PATH Act, certain ITINs will no longer be in effect unless they are renewed.

Under the PATH Act, any ITIN that is not used on a federal tax return for three consecutive tax years, either as the ITIN of an individual who files the return or as the ITIN of a dependent included on a return, will expire on December 31 of the third consecutive tax year of nonuse. For example, an individual applied for and received an ITIN in 2015 that is used in 2015 on the individual’s 2014 federal income tax return. If the individual does not file or is not claimed as a dependent on a tax return in 2016, 2017, and 2018, the ITIN will expire on December 31, 2018. This rule applies to all ITINs regardless of when the ITIN was issued.
For ITINs issued before 2013, the PATH Act provides that ITINs will no longer be in effect according to the following schedule, unless the ITIN has already expired due to nonuse for three consecutive years as described above:

- ITINs issued before 2008 will remain in effect until January 1, 2017.
- ITINs issued in 2008 will remain in effect until January 1, 2018.
- ITINs issued in 2009 or 2010 will remain in effect until January 1, 2019.
- ITINs issued in 2011 or 2012 will remain in effect until January 1, 2020.

HOW TO RENEW AN ITIN

ITINs that have not been used in the last three consecutive years

ITINs that have expired due to nonuse in the last three consecutive years, as described above, may be renewed anytime starting October 1, 2016 by submitting a Form W-7 and required documentation. These individuals may renew their ITIN without having to attach a tax return to the Form W-7. Filers should use the most recent revision of the Form W-7 and check the box that says “renewal.” Filers should follow the instructions on the Form W-7 and include all the information and documentation required by the instructions except for the requirement to attach Form W-7 to a tax return. Alternatively, individuals may choose to wait to submit their Form W-7 with their tax return. Once the Form W-7 renewal application is approved, the individual’s ITIN will again be effective, and the individual can continue to use the same ITIN. The applicant will receive a letter from the IRS stating that the application has been approved. Once renewed, an ITIN will remain in effect unless it is not used on a tax return for three consecutive years.
ITINs issued prior to January 1, 2013 and currently in use

ITINs issued prior to January 1, 2013 that have been used on a tax return in the last three consecutive years are set to expire based on a multi-year schedule. Under the PATH Act, this schedule is based on the date that an ITIN was issued. However, many ITIN holders may not know when their ITIN was issued and previously had no reason to keep a record of the date an ITIN was issued. To simplify the renewal process and allow for the effective administration of the program, the IRS will administer the renewal of ITINs on a schedule that is different from the schedule in the PATH Act. The IRS will renew ITINs based upon the fourth and fifth digits (middle digits) in the ITIN. ITINs that contain the middle digits of 78 or 79 will no longer be in effect beginning January 1, 2017. The expiration and renewal schedules for ITINs with middle digits other than 78 or 79 will be announced in future guidance.

Beginning this summer, the IRS will send a Letter 5821 to individuals holding ITINs with the middle digits of 78 or 79 if the ITIN was used for a taxpayer or a dependent on a U.S. income tax return in any of the last three consecutive tax years informing them that they may submit a Form W-7 with original or certified documents to renew their ITINs. The Letter 5821 will be sent to the address used on the most recent income tax return on which the ITIN appears or the most recently updated address for the taxpayer who filed the tax return provided to the IRS by the taxpayer or the U.S. Postal Service.

An individual with an ITIN that contains the middle digits of 78 or 79 who is sent a Letter 5821 may submit a Form W-7 and required documentation to renew their ITIN
starting October 1, 2016. These individuals may renew their ITIN without having to attach Form W-7 to a tax return. Filers should use the most recent revision of Form W-7 and check the box that says “renewal.” To expedite processing, filers should include a copy of Letter 5821. Filers should follow the Instructions for Form W-7 and Letter 5821 and include all the information and documentation required by the instructions except for the requirement to attach Form W-7 to a tax return. The IRS anticipates that for applications mailed to the IRS under this process, documents will be returned to the applicant within 60 days from the date the application was received. Alternatively, individuals who are sent a Letter 5821 may choose to wait to submit their Form W-7 with their tax return. Once a Form W-7 renewal application is approved, the individual’s ITIN will again be effective, and the individual can continue to use the same ITIN.

To reduce the burden on taxpayers, the IRS will accept Forms W-7 from each member of a family in a single family submission starting October 1, 2016, if at least one of the family members is required to renew an ITIN because the middle digits are 78 or 79 and that family member received a Letter 5821. For this purpose, family members include the filer, the filer’s spouse, and any dependents claimed on the filer’s return.

ITINs with middle digits other than 78 or 79 that have been in use within the last three consecutive tax years should not be renewed and require no immediate action from the ITIN holder. The IRS will accept, and individuals should continue to file, tax returns using these existing ITINs. The IRS will provide information about the expiration schedule and renewal process for the remaining ITINs issued before 2013 in future guidance and expects the expiration and renewal process for the remaining ITINs to be completed over multiple years.
WHAT MAY HAPPEN IF AN ITIN IS NOT RENEWED

Once renewed, an ITIN will remain in effect unless it is not used on a tax return for three consecutive years. The issuance date of a renewed ITIN is the date the ITIN was originally issued, not the renewal date. Some individuals may not be aware that their ITIN has expired or that they must renew an expired ITIN. Returns filed by these individuals will be accepted by the IRS; however, there may be a delay in processing these returns, and certain credits, such as the Child Tax Credit and the American Opportunity Tax Credit, may not be allowed unless the ITIN is renewed. This could result in a reduced refund or additional penalties and interest. The IRS will notify these filers about the delay and any reduction in refunds and credits claimed and will inform them about the need to file Form W-7 to renew their ITIN.

HOLDERS OF EXPIRED ITINS WHO HAVE OR BECOME ELIGIBLE FOR AN SSN

An individual with an expired ITIN who has or becomes eligible for an SSN should not renew the ITIN. Instead, those individuals who already have an SSN should write a letter to the IRS or visit a local IRS office explaining that they now have an SSN and that they want all their tax records combined under their SSN. Details about what to include with the letter and where to mail it can be found at www.irs.gov/Individuals/Additional-ITIN-Information. Those individuals who are eligible to obtain an SSN should obtain one from the SSA and then follow the instructions above. Visit the SSA website at www.ssa.gov, for information on how to apply for an SSN.
USE OF AN ITIN SOLELY ON AN INFORMATION RETURN

An individual whose expired ITIN is used only on information returns filed and furnished by third parties, such as Forms 1099, is not required to renew the ITIN. ITINs may continue to be used for information return purposes regardless of whether they have expired for individual income tax return filing purposes. If the individual is later required to file a tax return, however, the individual’s ITIN will have to be renewed at that time. Additionally, the third parties who file and furnish information returns with an expired payee ITIN will not be subject to information return penalties under sections 6721 or 6722 solely because the ITIN is expired.

REQUEST FOR COMMENTS

Further guidance on other issues regarding the ITIN program will be forthcoming. The Treasury Department and the IRS request comments and recommendations regarding the ITIN program. Specifically, the Treasury Department and the IRS request comments on the following issues:

1. The eligibility requirements that should be established for organizations or individuals applying to be community-based certified acceptance agents and ways to increase the number of community-based certified acceptance agents in a manner that will minimize the risk of fraud and non-compliance.

2. Additional guidance that would be beneficial in administering the implementation of section 203 of the PATH Act.

How to Submit Comments

Taxpayers may mail comments to:
Internal Revenue Service
Room 5203
P.O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

or hand deliver comments Monday through Friday between the hours of 8 a.m. and
4 p.m. to:

Courier's Desk
Internal Revenue Service
1111 Constitution Ave., N.W.
Washington, D.C. 20224

Alternatively, taxpayers may submit comments electronically via the Federal
erulemaking Portal at www.regulations.gov (type IRS-2016-0032 in the search field on
the regulations.gov homepage to find this notice and submit comments). All comments
submitted by the public in response to this notice will be available for public inspection
and copying in their entirety.

DRAFTING INFORMATION

The principal author of this announcement is Michael Hara of the Office of the
Associate Chief Counsel (Procedure and Administration). For further information about
this notice, call 1-800-908-9982.
GEOPHIGraphic TARGETING ORDER

The Director of the Financial Crimes Enforcement Network ("FinCEN"), U.S. Department of the Treasury, hereby issues a Geographic Targeting Order ("Order") requiring North American Title Insurance Company to collect and report information about the persons involved in certain residential real estate transactions, as further described in this Order.

I. AUTHORITY

The Director of FinCEN may issue an order that imposes certain additional recordkeeping and reporting requirements on one or more domestic financial institutions or nonfinancial trades or businesses in a geographic area. See 31 U.S.C. § 5326(a); 31 CFR § 1010.370; and Treasury Order 180-01. Pursuant to this authority, the Director of FinCEN hereby finds that reasonable grounds exist for concluding that the additional recordkeeping and reporting requirements described below are necessary to carry out the purposes of the Bank Secrecy Act and prevent evasions thereof.¹

II. ADDITIONAL RECORDKEEPING AND REPORTING REQUIREMENTS

A. Business and Transactions Covered by this Order

1. For purposes of this Order, the "Covered Business" means North American Title Insurance Company and any of its subsidiaries and agents.

2. For purposes of this Order, a "Covered Transaction" means a transaction in which:

   i. A Legal Entity (as defined in Section III.A of this Order);

   ii. Purchases residential real property:

       1. For a total purchase price of $500,000 or more in the Texas county of Bexar;

       2. For a total purchase price of $1,000,000 or more in the Florida county of Miami-Dade, Broward, or Palm Beach;

       3. For a total purchase price of $1,500,000 or more in the Borough of Brooklyn, Queens, Bronx, or Staten Island in New York City, New York;


www.fincen.gov
4. For a total purchase price of $2,000,000 or more in the California county of San Diego, Los Angeles, San Francisco, San Mateo, or Santa Clara; or

5. For a total purchase price of $3,000,000 or more in the Borough of Manhattan in New York City, New York; and

iii. Such purchase is made without a bank loan or other similar form of external financing; and

iv. Such purchase is made, at least in part, using currency or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check, or a money order in any form.

B. Reports Required to be Filed by the Covered Business

1. If the Covered Business is involved in a Covered Transaction, then the Covered Business shall report the Covered Transaction to FinCEN by filing a FinCEN Form 8300 within 30 days of the closing of the Covered Transaction. Each FinCEN Form 8300 filed pursuant to this Order must be: (i) completed in accordance with the terms of this Order and the FinCEN Form 8300 instructions (when such terms conflict, the terms of this Order apply), and (ii) e-filed through the Bank Secrecy Act E-filing system.\(^2\)

2. A Form 8300 filed pursuant to this Order shall contain the following information about the Covered Transaction:

i. Part I shall contain information about the identity of the individual primarily responsible for representing the Purchaser (as defined in Section III.A of this Order). The Covered Business must obtain and record a copy of this individual’s driver’s license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 14 of the form.

ii. Part II shall contain information about the identity of the Purchaser. The Covered Business should select Field 15 on the FinCEN Form 8300, which will enable reporting of multiple parties under Part II of the form.

iii. Part II shall also contain information about the identity of the Beneficial Owner(s) (as defined in Section III.A of this Order) of the Purchaser. The Covered Business must obtain and record a copy of the Beneficial Owner’s driver’s license, passport, or other similar identifying documentation. A description of such documentation must be provided in Field 27 of the form.

iv. Part III shall contain information about the Covered Transaction as follows:

\(^2\) For more information on E-filing, go to this Website: [http://bsafiling.fincen.treas.gov/main.html](http://bsafiling.fincen.treas.gov/main.html) and do the following: (a) review “Getting Started”; (b) fill out a Supervisory User Application Form; (c) assign the supervisory user to represent your business; (d) obtain a digital certificate; and (e) register on the system.
1. Field 28: Date of closing of the Covered Transaction.
2. Field 29: Total amount transferred in the form of payment specified in Section II.A.2.iv of this Order.
3. Field 31: Total purchase price of the Covered Transaction.
4. Field 34: Address of real property involved in the Covered Transaction.

v. Part IV shall contain information about the Covered Business.

vi. The Comments section to the Form 8300 shall contain the following information:
1. The term “REGTO” as a unique identifier for this Order.
2. If the purchaser involved in the Covered Transaction is a limited liability company, then the Covered Business must provide the name, address, and taxpayer identification number of all its members.
3. If a Form 8300 is being filed by an agent of the Covered Business named in this Order, then the agent shall include the name of such Covered Business.

III. GENERAL PROVISIONS

A. Additional Definitions

1. For purposes of this Order:
   
i. “Beneficial Owner” means each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser.
   
   ii. “Legal Entity” means a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction.
   
   iii. “Purchaser” means the Legal Entity that is purchasing residential real property as part of a Covered Transaction.

2. All terms used but not otherwise defined herein have the meaning set forth in Chapter X of Title 31 of the United States Code of Federal Regulations.

B. Order Period

The terms of this Order are effective beginning on August 28, 2016 and ending on February 23, 2017 (except as otherwise provided in Section III.C of this Order).

C. Retention of Records

The Covered Business must: (1) retain all records relating to compliance with this Order for a period of five years from the last day that this Order is effective (including any renewals of this Order); (2) store such records in a manner accessible within a reasonable period of time; and
(3) make such records available to FinCEN or any other appropriate law enforcement or regulatory agency, upon request.

D. **No Effect on Other Provisions of the Bank Secrecy Act**

Nothing in this Order modifies or otherwise affects any provision of the regulations implementing the Bank Secrecy Act to the extent not expressly stated herein.

E. **Compliance**

The Covered Business must supervise, and is responsible for, compliance by each of its officers, directors, employees, and agents with the terms of this Order. The Covered Business must transmit this Order to each of its agents. The Covered Business must also transmit this Order to its Chief Executive Officer or other similarly acting manager.

F. **Penalties for Noncompliance**

The Covered Business and any of its officers, directors, employees, and agents may be liable, without limitation, for civil or criminal penalties for violating any of the terms of this Order.

G. **Validity of Order**

Any judicial determination that any provision of this Order is invalid does not affect the validity of any other provision of this Order, and each other provision must thereafter remain in full force and effect. A copy of this Order carries the full force and effect of an original signed Order.

H. **Paperwork Reduction Act**

The collection of information subject to the Paperwork Reduction Act contained in this Order has been approved by the Office of Management and Budget ("OMB") and assigned OMB Control Number 1506-0056.

I. **Questions**

All questions about the Order must be addressed to the FinCEN Resource Center at (800) 767-2825 (Monday through Friday, 8:00 a.m. - 6:00 p.m. EST).

Dated: July 22, 2016

[Signature]

Jamal El-Hindi  
Acting Director  
Financial Crimes Enforcement Network  
U.S. Department of the Treasury
Geographic Targeting Order Covering Title Insurance Companies
Major Metropolitan Areas and Monetary Thresholds

<table>
<thead>
<tr>
<th>Jurisdiction</th>
<th>Price Threshold</th>
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<tr>
<td><strong>New York</strong></td>
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<tr>
<td>The Borough of Manhattan</td>
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<td>The Borough of Brooklyn</td>
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<td>The Borough of Bronx</td>
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<td>The Borough of Staten Island</td>
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<td><strong>Florida</strong></td>
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<td>Broward County</td>
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<td>Palm Beach County</td>
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<td><strong>California</strong></td>
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<tr>
<td><strong>Texas</strong></td>
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<tr>
<td>Bexar County</td>
<td>$500,000</td>
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</table>

www.fincen.gov
Required Clauses for all NATIC Commitments in Bexar County, TX

**FinCEN Clause** - This transaction may be subject to the FinCEN Geographic Targeting Order affecting residential sale transactions. This issuing agent must be provided with information prior to closing sufficient to determine if IRS/FinCEN Form 8300 must be completed and filed and must be provided information sufficient to meet the records retention requirements of the FinCEN Geographic Targeting Order. This transaction will not be insured, and this issuing agent and/or its underwriter will not be involved in a Covered Transaction (as defined by the FinCEN Geographic Targeting Order) until this information is submitted and reviewed by the issuing agent.

OR

**FinCEN Expanded Clause – (NATIC preferred clause)**
If (i) the purchase price for the interest in the residential real property exceeds $500,000 in Bexar County, TX;
(ii) the purchase is made without a loan from an institutional lender, and
(iii) the purchaser is a corporation, limited liability company, partnership or similar business entity, then, either:

A. The Company must be furnished with a written statement from purchaser’s counsel or the settlement agent, certifying that none of the purchase price was funded through the use of currency, cashier’s check(s), certified check(s), traveler’s check(s), business check(s), personal check(s) or money order(s), or

B. The Company must be furnished the following items within five (5) days of the closing/settlement of the transaction:
   1. Signed copy of the NATIC FinCEN Geographic Targeting Order Questionnaire;
   2. Copy of the Form 8300 with Parts I, II, III and IV completed; and
Covered Transaction Determination
(A transaction is a “covered transaction” only if all 6 questions contain at least one “Yes” answer.)

1. Is the subject property located in one of the following U.S. counties?
   a. ☐ Miami-Dade, Broward or Palm Beach County, FL;
   b. ☐ Bexar County, TX; or
   c. ☐ San Diego, Los Angeles, San Francisco, San Mateo or Santa Clara County, CA
   YES ______ NO ______ (Check box for county)
   If NO, STOP – DO NOT SUBMIT QUESTIONNAIRE; IF YES, continue to next question.

2. Does the total purchase price exceed:
   a. ☐ $1,000,000 in Miami-Dade, Broward or Palm Beach County, FL;
   b. ☐ $500,000 in Bexar County, TX; or
   c. ☐ $2,000,000 in San Diego, Los Angeles, San Francisco, San Mateo or Santa Clara County, CA
   YES ______ NO ______ (Check box for purchase price/county)
   If NO, STOP – DO NOT SUBMIT QUESTIONNAIRE; IF YES, continue to next question.

3. Is the subject property residential property?
   (Residential property is defined as real property, including individual units of condominiums and cooperatives, designed principally for the occupancy of from one to four families.)
   YES ______ NO ______
   If NO, STOP – DO NOT SUBMIT QUESTIONNAIRE; IF YES, continue to next question.

4. Is the purchaser a corporation, limited liability company, partnership or similar business entity, whether formed under the laws of a state, or the United States or a foreign jurisdiction?
   YES ______ NO ______
   If NO, STOP – DO NOT SUBMIT QUESTIONNAIRE; IF YES, continue to next question.

5. Is the purchase made without a loan from an institutional lender?
   YES ______ NO ______
   If NO, STOP – DO NOT SUBMIT QUESTIONNAIRE; IF YES, continue to next question.

6. Was any part of the purchase price, including the earnest money deposit, paid through the use of any one of the following?
   a. Currency; YES ______ NO ______
   b. Cashier’s Check; YES ______ NO ______
   c. Certified check; YES ______ NO ______
   d. Traveler’s check; YES ______ NO ______
   e. Personal check; YES ______ NO ______
   f. Business check; YES ______ NO ______
   g. Money Order in any form YES ______ NO ______

   NOTE: Payments from the purchaser to a party representing the purchaser or seller (i.e. attorney, real estate agent) or directly to the seller using one of the listed forms of payment require a YES answer.
   If NO, DO NOT SUBMIT QUESTIONNAIRE.
   If YES and each of the preceding questions was answered YES, SUBMIT QUESTIONNAIRE.

☐ FinCEN Form 8300 Submission Required – If questions 1 to 6 above ALL contain at least one “Yes,” then fully complete Form 8300 and submit to FinCEN via the Bank Secrecy Act E-filing system. Additionally, to evidence compliance to NATIC, send the following to NATIC within 5 business days of closing:
(a) Completed NATIC Geographical Targeting Order Questionnaire;
(b) A copy of Form 8300 with Parts I, II, III and IV completed; and
(c) A copy of the Bank Secrecy Act E-Filing System acknowledgment for the filing.

Send the required documents to North American Title Insurance Company by secure e-mail to: FinCENCert@natic.com; or by U.S.P.S. to North American Title Insurance Company, Attn: FinCEN Certification Team, 760 N.W. 107 Avenue, Suite 401, Miami, FL 33172.

For more information on E-filing, go to this Website: http://bsaefiling.fincen.treas.gov/main.html and do the following: a. Review “Getting Started”; b. Fill out a Supervisory User Application Form; c. Assign the supervisory user to represent your business; d. Obtain a digital certificate; and e. Register in the system.

You must provide to the purchasing entity’s beneficial owner(s) the annual statement required by 26 C.F.R. § 1.6050l-1 on or before January 31 of the year following the calendar year in which the transaction closed.

☐ No Form 8300 Submission Required – If questions 1 to 6 above DO NOT ALL contain at least one “Yes” answer, then Form 8300 need not be submitted to FinCEN and this Questionnaire need not be submitted to NATIC. It is recommended that a copy of this Questionnaire be retained in your file.

Agent Certification
I declare that to the best of my knowledge the information I have furnished is true, correct, and complete.

<table>
<thead>
<tr>
<th>Name of Agent</th>
<th>NATIC Agent No.</th>
<th>Agent File No.</th>
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Report of Cash Payments Over $10,000
Received in a Trade or Business

Part I
Identity of Individual From Whom the Cash Was Received

1. Check appropriate box(es) if:
   a. Amends prior report;
   b. Suspicious transaction.

2. If more than one individual is involved, check here and see instructions.

3. Last Name:

4. First Name:

5. M.I.:

6. Taxpayer identification number:

7. Address (number, street, and apt. or suite no.):

8. Date of birth:

   (see instructions)

9. City:

10. State:

11. ZIP code:

12. Country (if not U.S.):

13. Occupation, profession, or business:

14. Identifying document (ID) number:

   a. Describe ID:

   b. Issued by:

   c. Number:

15. If this transaction was conducted on behalf of more than one person, check here and see instructions.

16. Individual’s last name or organization’s name:

17. First Name:

18. M.I.:

19. Taxpayer identification number:

20. Doing business as (DBA) name (see instructions):

21. Address (number, street, and apt. or suite no.):

22. Occupation, profession, or business:

23. City:

24. State:

25. ZIP code:


27. Alien identification (ID) number:

   a. Describe ID:

   b. Issued by:

   c. Number:

Part II
Person on Whose Behalf This Transaction Was Conducted

28. Date cash received:

29. Total cash received:

30. If cash was received in more than one payment, check here.

31. Total price if different from Item 29:

32. Amount of cash received (in U.S. dollar equivalent) (must equal Item 29) (see instructions):

   a. U.S. currency:

   b. Foreign currency:

   c. Cashier’s check(s):

   d. Money order(s):

   e. Bank draft(s):

   f. Traveler’s check(s):

33. Type of transaction:

   a. Personal property purchased

   b. Real property purchased

   c. Personal services provided

   d. Business services provided

   e. Intangible property purchased

34. Specific description of property or service shown in 33. Give serial or registration number, address, docket number, etc.:

Address of real property involved in Covered Transaction:

35. Name of business that received cash:

36. Employer identification number:

37. Address (number, street, and apt. or suite no.):

38. City:

39. State:

40. ZIP code:

41. Nature of your business:

42. Under penalties of perjury, I declare that to the best of my knowledge the information I have furnished above is true, correct, and complete.

Signature:

Authorized official:

Title:

Date of signature:

Type or print name of contact person:

Representative of Covered Business:

Contact telephone number:

Phone Number of Covered Business:

IRS Form 8300 (Rev. 8-2014)
Cat. No. 62133S
FinCEN Form 8300 (Rev. 8-2014)
### Part I  Continued—Complete if box 2 on page 1 is checked

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<td>Country (if not U.S.)</td>
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### Part II  Continued—Complete if box 15 on page 1 is checked

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<td>Individual’s last name or organization’s name</td>
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<td>First name</td>
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<td>Taxpayer identification number</td>
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<td>Doing business as (DBA) name (see instructions)</td>
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<td>27</td>
<td>Alien identification (ID)</td>
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<td>Driver’s License</td>
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Comment: Please use the lines provided below to comment on or clarify any information you entered on any line in Parts I, II, III, and IV

REGTO (this acronym is used to identify the targeting order)
In order to assist our NATIC policy-issuing agents, we have assembled these Frequently Asked Questions. Several of the questions were provided by the U.S. Treasury Department’s Financial Crimes Enforcement Network (FinCEN) and by the American Land Title Association (ALTA) following the issuance of the FinCEN Geographical Targeting Order (GTO) dated January 13, 2016. We note those valuable contributions below but have updated the responses to reflect the expanded requirements included in the July 22, 2016, GTO.

1. What is FinCEN?

Established in 1990, FinCEN is a bureau of the U.S. Department of the Treasury. Its mission is “to safeguard the financial system from illicit use and combat money laundering and promote national security through the collection, analysis, and dissemination of financial intelligence and strategic use of financial authorities.” FinCEN fulfills its mission by receiving and maintaining financial transactions data, analyzing and disseminating that data for law enforcement purposes, and building global cooperation with counterpart organizations in other countries and with international bodies. FinCEN’s authority comes from the Currency and Financial Transactions Reporting Act of 1970, as amended by Title III of the USA PATRIOT Act of 2001 and other legislation. This legislative framework is commonly referred to as the Bank Secrecy Act (BSA). (ALTA FAQs)

2. What is the Bank Secrecy Act?

The Bank Secrecy Act (BSA) is the primary U.S. anti-money laundering (AML) law and tool for detecting, deterring and disrupting terrorist financing networks. The BSA authorizes the Secretary of the Treasury to issue regulations requiring banks and other financial institutions to take a number of precautions against financial crime, including the establishment of anti-money laundering programs and the filing of reports that have been determined to have a high degree of usefulness in criminal, tax, and regulatory investigations and proceedings, and certain intelligence and counter-terrorism matters. See 31 U.S.C. 310. (ALTA FAQs)

3. What is money laundering?

Money laundering is the process of disguising financial assets produced through illegal activity. Through money laundering, the monetary proceeds derived from criminal activity are transformed into funds with an apparently legal source.
4. What is a Geographic Targeting Order (GTO)?

Under the BSA, the director of FinCEN can issue orders imposing additional recordkeeping and reporting requirements on domestic financial institutions or non-financial trades or businesses in a specific geographic area for transactions involving certain amounts of United States currency or monetary instruments. These orders can be in effect for up to 180 days. See 31 U.S.C. § 5326(a); 31 C.F.R. § 1010.370.

5. How is a GTO different from cash transaction reporting?

Under the internal revenue code, a business does not need to report a cash transaction or multiple related transactions unless more than $10,000 in currency is received. Under a GTO, FinCEN can lower this threshold for certain Covered Business and certain Covered Transactions. Both cash transaction reporting and GTO reporting are made to the government using versions of the IRS form 8300. (ALTA FAQs)

6. Can a GTO be renewed after the initial 180-day period?

Yes. GTOs can be renewed by the director of FinCEN following a finding that the circumstances justifying the original GTO continue to exist. (ALTA FAQs)

7. What are the effective dates of the GTO?

The most recently issued GTO goes into effect on August 28, 2016, and ends on February 2, 2017. (ALTA FAQs as revised by NATIC)

8. Who is subject to the GTO?

All title insurance companies licensed in any of the states of New York, Texas, Florida and California, including any subsidiaries or agents of the title insurance company (Covered Business), are subject to the requirements of the GTO. (ALTA FAQs as revised by NATIC)

9. What types of transactions must the Covered Business report?

A Covered Business must report any transaction that involves each of the following elements:

1. The buyer must be a Legal Entity, defined under the GTO as a corporation, limited liability company, partnership or other similar business entity, whether formed under the laws of a state or of the United States or a foreign jurisdiction;

2. Residential real property located in:

   Texas – County of Bexar;
   Florida – Counties of Miami-Dade, Broward and Palm Beach;
   California – Counties of San Diego, Los Angeles, San Francisco, San Mateo and Santa Clara; and
New York – The New York City Boroughs of Manhattan, Brooklyn, Queens, Bronx and Staten Island.

3. For a purchase price of more than:

- Texas – County of Bexar - $500,000;
- Florida – Counties of Miami-Dade, Broward and Palm Beach - $1,000,000;
- California – Counties of San Diego, Los Angeles, San Francisco, San Mateo and Santa Clara – $2,000,000; and
- New York – The New York City Boroughs of Manhattan ($3,000,000), Brooklyn, Queens, Bronx and Staten Island ($1,500,000)

4. Without a loan or similar form of external financing from a financial institution; and

5. Any portion of the purchase price is paid using currency, cashier’s check, certified check, traveler’s check, personal check, business check or money order. (ALTA FAQs, modified by NATIC)

10. How long does a Covered Business have to report a Covered Transaction to FinCEN?

Under the terms of the GTO, a Covered Business must report a Covered Transaction to FinCEN within 30 days of the closing of the Covered Transaction. (ALTA FAQs). NATIC agents are required to report the Covered Transaction within 5 days of the closing to FinCEN as well as to NATIC, as underwriter.

11. How long is a Covered Business required to retain Covered Transaction records?

All records related to compliance with the GTO must be retained for a period of 5 years from the last day the GTO is effective. Under the terms of the newest GTO affecting NATIC agents, a Covered Business would be required to retain such records until February 23, 2022. However, should the GTO be renewed, all records related to compliance with the GTO must retained for 5 years from the last day the GTO is effective pursuant to all renewals of the GTO. (ALTA FAQs as modified by NATIC)

12. What does the term “residential real property” mean?

For purposes of the GTO, “residential real property” means real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of one to four families. (FinCEN FAQs)

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1 The information regarding New York transactions is provided as a courtesy for NATIC agents, although NATIC is not currently licensed as a title insurer in the state of New York.
13. To what extent must a Covered Business verify information about the Beneficial Owner of a Purchaser?

The GTO requires a Covered Business to collect and report certain identifying information about the Beneficial Owner(s) of the Purchaser in a Covered Transaction. For purposes of the GTO, a “Beneficial Owner” means each individual who, directly or indirectly, owns 25% or more of the equity interests of the Purchaser. The GTOs provide that the Covered Business must obtain and record a copy of the Beneficial Owner’s driver’s license, passport, or other similar identifying documentation. The Covered Business may reasonably rely on the information provided to it by third parties involved in the Covered Transaction, including the Purchaser or its representatives, in determining whether the individual identified as a Beneficial Owner is in fact a Beneficial Owner. (FinCEN FAQs)

14. Who is considered a Covered Business’s “agents” for purposes of the GTO?

A Covered Business’s “agents” refers to people or entities that are authorized by the Covered Business, usually through a contractual relationship, to act on its behalf to provide title insurance underwritten by the Covered Business (or its subsidiaries). FinCEN notes that the recordkeeping and reporting requirements under the GTO are triggered only when a Covered Business (or its subsidiaries or agents) is involved in a Covered Transaction by providing title insurance underwritten by that Covered Business (or its subsidiaries) in connection with the Covered Transaction.

FinCEN also recognizes that a person or entity may be an independent agent of a Covered Business, and thus may act on behalf of multiple title insurance companies. A Covered Business is responsible for the recordkeeping and reporting requirements under the GTO only when such agents are acting on its behalf in connection with a Covered Transaction. (FinCEN FAQs)

15. What methods of payment are covered under Section II.A.2.iv of the GTO?

Section II.A.2 of the GTO, which lists one of the four criteria that trigger a Covered Transaction, provides: “Such purchase is made, at least in part, using currency or a cashier’s check, a certified check, a traveler’s check, a personal check, a business check, or a money order in any form.” Accordingly, payment of at least part of the purchase price using one of these methods, such as a cashier’s check (sometimes referred to as a “bank check,” “official check,” or “treasurer’s check”), a certified check, a personal or business check, including a real estate agent or attorney check, triggers a Covered Transaction, assuming the other three criteria listed in Section II.A.2 are met. A method of payment not specifically enumerated in Section II.A.2 (e.g., a wire transfer) would not, in and of itself, qualify as a Covered Transaction. With respect to information required to be reported in Field 29 of the Form 8300, the Covered Business should include the total amount of the purchase price that was paid using the methods of payment specified in Section II.A.2.iv of the GTO. (FinCEN FAQs, updated by NATIC)
16. Is there a *de minimis* exception regarding the methods of payment covered under Section II.A.2.iv of the GTO?

No. If any part of the purchase price was made using a method of payment specified in Section II.A.2.iv of the GTO, then the transaction is considered a Covered Transaction (assuming the other three criteria listed in Section II.A.2 are met). FinCEN expects a Covered Business to take reasonable steps to determine whether any part of the purchase price was made using a method of payment specified in Section II.A.2.iv of the GTOs. FinCEN recognizes that in some instances a small percentage of the purchase price of a residential real estate transaction may be held by a third party, such as a real estate agent holding an earnest money deposit. A Covered Business may reasonably rely on information provided to it by such third parties. (FinCEN FAQs, updated by NATIC)

17. Who is the “individual primarily responsible for representing the Purchaser”?

The “individual primarily responsible for representing the Purchaser” means the individual authorized by the entity to enter legally binding contracts on behalf of the entity. (FinCEN FAQs)

18. How long must a Covered Business retain records relating to compliance with the GTO?

Consistent with the general recordkeeping provisions of the regulations promulgated under the Bank Secrecy Act, a Covered Business must retain all records relating to compliance with the GTO for at least five years from the last day that the GTO is effective (including any renewals thereof). (FinCEN FAQs)

19. If a Purchaser brings multiple transactions to us during the period of the GTOs, for example multiple condo units which are separate transactions each closing at a separate time or separate date, but each individually falls under the reporting threshold, are we required to report each unit sale if we know about the proposed series purchases?

Each transaction should be evaluated separately as to whether it is a Covered Transaction. The GTO does not require reporting of a series of transactions. However, if a Covered Business believes that transactions are being structured in such a way to avoid a reporting requirement, FinCEN reminds Covered Businesses that the Form 8300 may be filed voluntarily to report suspicious transactions. (FinCEN FAQs)

20. An LLC may have many members. Do the GTOs require photo IDs on every member of the LLC?

Sections II.B.2.i. and II.B.2.iii of the GTO provides that the Covered Business must obtain a copy of a driver’s license, passport, or other similar identifying documentation only from (i) the individual primarily responsible for representing the Purchaser, and (ii) each Beneficial Owner of the Purchaser (*i.e.*, each individual who, directly or indirectly,
owns 25% or more of the equity interests of the Purchaser). Section II.B.2.vi.2 provides that a Covered Business must include in the Comments section to the Form 8300 the name, address, and taxpayer identification number of all the members of a limited liability that is a Purchaser in a Covered Transaction. Section II.B.2.vi.2 does not, however, require the collection or retention of identifying documentation. (ALTA FAQs)

21. If the total purchase price for the real estate is paid using a non-reportable method, i.e., wire transfer, but incidental charges and fees such as attorneys’ fees, inspection fees, survey fees, settlement service fees are paid using currency, is the transaction reportable?

Section II.A.2.iv of the GTO provides that payment of at least part of the purchase price using one of the listed methods, such as currency, a cashier’s check (sometimes referred to as a “bank check,” “official check,” or “treasurer’s check”) or a certified check, a personal check or a business check, triggers a Covered Transaction, assuming the other four criteria listed in Section II.A.2 are met. Payments for ancillary settlement charges or services (e.g., attorneys’ fees, inspection fees, survey fees, etc.) are not considered part of the purchase price. (ALTA FAQs as modified by NATIC)

22. Will the GTO stop real estate transactions from closing?

The GTO is not intended to prevent real estate closings from taking place. The GTO is meant to allow the Treasury to collect information about these transactions. (ALTA FAQs)

23. What information must a Covered Business report about a Covered Transaction?

A Covered Business must report a Covered Transaction to FinCEN using Form 8300, and include the following information:

- Identity of the individual primarily responsible for representing the Legal Entity;
- A description of the identification (driver’s license, passport or other similar identifying document) obtained from the individual primarily responsible for representing the purchaser with a copy retained in the file;
- Identity of the purchaser and any Beneficial Owner(s) of the purchaser;
- A description of the type of identification, driver’s license, passport or other similar identifying document, obtained from the Beneficial Owner with a copy retained in the file;
- Date of closing of the Covered Transaction;
- Total amount transferred in the form of a Monetary Instrument;
- Total purchase price of the Covered Transaction;
- Address of the real property involved in the Covered Transaction; and
- The term “REGTO” as a unique identifier for the GTO.

(ALTA FAQs as modified by NATIC)
24. Does the GTO define who is a Beneficial Owner?

A Beneficial Owner is an individual who directly or indirectly owns 25% or more of the equity interest in the Legal Entity. (ALTA FAQs)

25. What if the Legal Entity purchasing the real property is owned by another Legal Entity?

If the purchasing Legal Entity is owned by another Legal Entity, the GTO requires the reporting of information about the Beneficial Owners of any and all of the related Legal Entities. (ALTA FAQs)

26. What are the penalties for violating the GTO?

Violation of the GTO may subject a Covered Business to the following criminal and civil penalties:

**Criminal Penalties**

<table>
<thead>
<tr>
<th>Type of Violation</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willful violation</td>
<td>Up to $250,000 fine and 5 years in prison</td>
</tr>
<tr>
<td>Willful violation while violating another law of the United States</td>
<td>Up to $500,000 fine and 10 years in prison</td>
</tr>
<tr>
<td>Structuring or assisting in structuring a transaction to avoid the currency transaction reporting</td>
<td>Fine and up to five years in prison</td>
</tr>
</tbody>
</table>

**Civil Penalties**

<table>
<thead>
<tr>
<th>Type of Violation</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Willful violation (a separate violation occurs for each day the violation continues and each location a violation occurs)</td>
<td>Greater of the amount involved (up to $100,000) or $25,000</td>
</tr>
<tr>
<td>Failure to file a report, material misstatement or omission</td>
<td>Not to exceed the amount involved in the transaction</td>
</tr>
<tr>
<td>Structuring or assisting in structuring a transaction to avoid the currency transaction reporting</td>
<td>Not to exceed the amount involved in the transaction</td>
</tr>
<tr>
<td>Negligence</td>
<td>Not to exceed $500 or $50,000 if a pattern of negligence is found</td>
</tr>
</tbody>
</table>

(ALTA FAQs)
27. Can penalties be assessed against a Covered Business’ individual employees or agents?

Yes. Both civil and criminal penalties may be levied against a partner, director, officer, agent or employee of the Covered Business. (ALTA FAQs)

28. How long after a violation can the government assess a penalty?

Penalties can be assessed any time within 6 years from the date of the Covered Transaction. Civil actions may be commenced within 2 years of the date of the penalty or criminal conviction. (ALTA FAQs)

29. Does private or seller financing qualify as “without a bank loan” under the GTO reporting requirements?

Yes, the reporting exclusion is only triggered by loans financed by a financial institution that is required to have an anti-money laundering policy. If financing is provided by a private lender, seller or other business that does not have a federal requirement to maintain an anti-money laundering policy, then the transaction is reportable. (ALTA FAQs)

30. Are the reporting requirements triggered when the purchase price is paid entirely through a wire transfer?

No. If a purchase of real property is made entirely by a wire transfer, this would not fall within the definition of a Covered Transaction and the reporting requirements of the GTO would not apply. (ALTA FAQs as modified by NATIC)

31. What if only a de minimis amount of currency is used in the purchase payment?

If any amount of the purchase, including a de minimis amount, is funded by using currency or any one of the types of payment listed in the GTO, then it would be considered a Covered Transaction subject to the reporting requirements of the GTO. (ALTA FAQs)

32. What if the purchase price is paid for using a wire transfer, but a settlement service is paid using currency?

The GTO’s reporting requirements are only triggered when the purchase of the real property is funded by one of the forms of payment covered in the GTO, which includes currency, certified checks, cashier’s checks, personal or business checks and money orders, but not wire transfers. The GTO does not cover how the payment of a settlement service is funded. (ALTA FAQs as modified by NATIC)

33. Is a title insurance agent, settlement attorney or real estate agent required to report Covered Transactions to FinCEN?
No. The GTO only applies to the title insurance companies, and its subsidiaries and agents that received the GTO from FinCEN. It does not apply to businesses involved in the Covered Transactions that are not agents of the Covered Business, such as attorneys or real estate agents. While the definition of a Covered Business includes the insurer’s agents, only one report is required for each Covered Transaction. Depending on the policy and procedures of the covered insurer, the report can be filed by either the insurer or their agent. NATIC requires that its agents report the transactions to FinCEN by filing the Form 8300. (ALTA FAQs as modified by NATIC)

34. If the Covered Business just insured the transaction but was not involved in the closing, does it need to report the transaction?

Yes. A Covered Business must report the transaction whenever it, or its subsidiaries or agents, are involved in the Covered Transaction. This includes when they only provide title insurance and not settlement services in the transactions. (ALTA FAQs)

35. Can a Covered Business rely on information provided by real estate attorneys or agents when reporting?

Yes. For purposes of completing the FinCEN Form 8300, in addition to collecting information directly from the Purchaser or the Beneficial Owner(s), a Covered Business may collect information regarding the Purchaser of Beneficial Owner(s), when made available by from the real estate agent or attorney involved in the Covered Transaction. (ALTA FAQs)

36. Can an attorney withhold client information from the title insurance company under a claim of privilege?

Information necessary for completing a form 8300, Suspicious Activity Report or other Bank Secrecy Act reporting requirement cannot be withheld from the government due to attorney-client privilege. See United States v. Goldberger & Dublin, P.C., 935 F.2d 501 (2nd Cir. 1991), holding that absent special circumstances, attorneys were required to disclose client information on Forms 8300. See also United States v. Leventhal, 961 F.2d 936 (11th Cir. 1992), holding that state bar ethical rules do not constitute a "special circumstance" that would protect clients' names and fee arrangements from disclosure. (ALTA FAQs)

(Revised August 9, 2016)
THE CONSUMER FINANCIAL PROTECTION BUREAU AND RESPA

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December 8 - 9, 2016
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Texas State Board of Dental Examiners – General Counsel (1991 – 1994)
United State Congressman Mac Sweeney – Legislative Director and District Representative (1986 – 1988)

Admissions
State Bar of Texas
Admitted to practice in: United States District Court, Western District of Texas;
United States District Court, Southern District of Texas;
United States District Court, Northern District of Texas; and,
United States Court of Appeals for the Fifth Circuit.

Papers and Presentations
Author and Speaker for the National Rifle Association’s 16th Annual National Forearms Law Seminar (2013)
Author and Speaker for State Bar of Texas, “What Every Texas Lawyer Needs to Know About Firearms Law” Seminar (2014);
“Advising and Representing Federal Firearms Licensees”
Author and Speaker, Texas Land Title Association, 24th Annual Robert C. Sneed Texas Land Title Institute (2104), “When TDI Comes Knocking: Rights and Obligation of Licensees in Investigations by TDI
Chapter Author for State Bar of Texas of Texas Book, Texas Perspectives on Firearms Law, Chapter 4, “Advising and Representing Federal Firearms Licensees” (2015)
Author and Speaker for State Bar of Texas, “What Every Texas Lawyer Needs to Know About Firearms Law” Seminar (2015);
“Non- Federal Firearms Licensees and Federal Firearms Law, Regulation, and the ATF”
Author and Speaker for State Bar of Texas, “What Every Texas Lawyer Needs to Know About Firearms Law” Seminar (2016);
“The Business of Firearms”
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V. CONCLUSION
I. INTRODUCTION

Prior to the formation of the Consumer Financial Protection Bureau ("CFPB") in 2011, the Real Estate Settlement Procedures Act ("RESPA")\(^1\) was implemented and enforced by the Department of Housing and Urban Development ("HUD"). The title industry is mainly affected by the provisions of RESPA and its implementing regulation, Regulation X,\(^2\) pertaining to prohibitions on payments for referral of business incident to real estate transaction settlements, including the business of title insurance and providing settlement services. While it was exercising jurisdiction, HUD interpreted and enforced RESPA in what, in retrospect, appears to be a fairly practical and relatively narrow manner. Then, in 2011, pursuant to the Dodd-Frank Act\(^3\), the responsibility for implementing and enforcing RESPA was transferred from HUD to the CFPB. The CFPB, in a number of noteworthy administrative enforcement actions, began interpreting RESPA and Regulation X as prohibiting previously accepted business practices and imposing some spectacular fines. Because of the CFPB’s stringent interpretations, harsh penalties, and lack of checks on its authority, businesses in the title industry need to be aware of the CFPB’s positions and actions concerning what constitutes prohibited referral fees, including referrals to or from affiliated businesses.

II. THE CFPB’S STRUCTURE AND PROCEDURE

Congress established the CFPB as an “independent bureau”, by the Dodd-Frank Act of 2010 ("Act").\(^4\)

A. Congress Provided the CFPB With an Unusual Degree of Independence.

Two aspects of the Act that provided the CFPB with its independent character were: 1)

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\(^1\) 12 U.S.C. §§ 2601 et seq.
\(^2\) 12 C.F.R §§ 1024.1, et seq.
\(^3\) Pub.L. 111–203
\(^4\) 12 U.S.C. § 5491
that its director served a five year term and could continue to serve after the expiration of the term until a successor was appointed and confirmed by the Senate; and 2) that the President could only remove the director for cause ("The President may remove the Director for inefficiency, neglect of duty, or malfeasance in office."). Not only did the Act make the CFPB independent of presidential oversight, it also provided for independence from congressional oversight by providing that it be funded by direct transfer from the Federal Reserve system "the amount determined by the [CFPB's] Director to be reasonably necessary to carry out the authorities of the [CFPB]") subject only to a cap of 12 percent "of the total operating expenses of the Federal Reserve System . . ." This funding mechanism removed the CFPB from the annual appropriation process by Congress, thereby exempting the CFPB from another typical avenue of congressional control of federal agencies.

B. The Court of Appeals finds that the CFPB’s Structure is Unconstitutional.

The Dodd-Frank Act’s grant of job security to the Director of the CFPB and the ability of the Director to determine the amount of money the CFPB has to operate without the necessity of a congressional appropriation, provided the CFPB and its director with unusual power and independence, so independent that the Court of Appeals for the D.C. Circuit recently ruled that structure unconstitutional in PHH Corp. v. Consumer Financial Protection Bureau. But the Court of Appeals’ only remedy in that regard was to order that the President could “supervise and direct” the CFPB Director and could “remove the Director at will”. Despite the Court of Appeals’ decision in PHH Corp. (and subject to it potentially being overturned or modified as a result of en

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5 12 U.S.C. § 5491(c)(1-3).
7 PHH Corp. v. Consumer Financial Protection Bureau, ___ F.3d ___ (D.C. Cir. 2016); 2016 WL 5898801 at *26, n. 16.
banc review or appeal to the Supreme Court), the CFPB and its Director still exercise an unusual amount of power, in part due to the procedures available to the CFPB and its director in enforcement matters.

C. Regardless of Its Structure, the CFPB has Very Strong Enforcement Powers.

The CFPB has broad investigatory powers including issuing subpoenas for production of documents and tangible items and giving oral testimony and also to issue civil investigative demands for production of documents and tangible items, answering written questions or making written reports, and giving oral testimony.\(^{10}\) If the CFPB decides to take action, it can: issue a consent order (with the agreement of the respondent);\(^ {11}\) initiate an administrative enforcement proceeding before an administrative law judge ("ALJ");\(^ {12}\) or file suit in federal district court.\(^ {13}\) Remedies available to the CFPB for violation of any Federal consumer law by a respondent, in both administrative proceedings and in district court include requiring a respondent to pay:

- refunds;
- restitution;
- disgorgement of money obtained by the respondent;
- damages and other monetary relief; and
- civil penalties of:
  - $5,000 per day of any violation;
  - $25,000 per day of a reckless violation; and
  - $1,000,000 per day of knowing violation.\(^ {14}\)

\(^{10}\) 12 U.S.C. § 5562 (b) and (c).
\(^{11}\) See, e.g. – Consent Order, In the Matter of Wells Fargo Bank, N.A., Administrative Proceeding 2016-CFPB-0015;
– Consent Order, In the Matter of Lighthouse Title, Inc., Administrative Proceeding 2014-CFPB-0015
\(^{12}\) administrative law judge ("ALJ").
\(^{13}\) 12 U.S.C. § 5564.
Another aspect of administrative procedure before the CFPB that will seem unusual to Texas lawyers is that while an ALJ makes an initial recommended decision as with most other state and federal administrative actions, there are few limitations on how the Director may modify the recommendation if there is an appeal.¹⁵ Not only may a respondent appeal and ask the Director to modify the recommendation but the CFPB may appeal its own director to substantially modify the recommendation in making a decision.¹⁶ This further concentration of power in the CFPB and in the single person of its director has had dramatic effects, as illustrated by the PHH Corp. case, as discussed further below.

III. The CFPB and RESPA

The CFPB has exercised some of its resources and powers interpreting and enforcing RESPA. With regard to RESPA and the title industry, CFPB actions have been focused on enforcing two well-known prohibitions and construing two exceptions to those prohibitions.

A. The Referral Fee Prohibition

The first prohibition is the prohibition in Section 8 of RESPA on the payments for referrals (hereafter “Referral Fee Prohibition”):

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.¹⁷

RESPA’s Referral Fee Prohibition is echoed, with additional detail, in Regulation X:

No referral fees. No person shall give and no person shall accept any fee, kickback or other thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or part of a settlement service involving a federally related mortgage loan shall be referred to any person. Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of

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¹⁵ 12 C.F.R. §§ 1081.400 and 1081.402.
¹⁶ 12 C.F.R. §§ 1081.400(b) and 1081.402 – 1081.405.
any other company for the referral of settlement service business.\textsuperscript{18}

B. The Fee Splitting Prohibition

The second prohibition is also from Section 8 of RESPA, the prohibition on the splitting of any charges for any real estate settlement services, including title insurance premiums or other settlement related charges, “other than for services actually performed” (hereafter the “Fee Splitting Prohibition”):

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.\textsuperscript{19}

As with the Referral Fee Prohibition, the Fee Splitting Prohibition is re-expressed, in augmented terms, in Regulation X:

No split of charges except for actual services performed. No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed. A charge by a person for which no or nominal services are performed or for which duplicative fees are charged is an unearned fee and violates this section. The source of the payment does not determine whether or not a service is compensable. Nor may the prohibitions of this part be avoided by creating an arrangement wherein the purchaser of services splits the fee.\textsuperscript{20}

C. The Bona Fide Compensation Exception and the Affiliate Business Arrangement Exception

The Referral Fee Prohibition and the Fee Splitting Prohibition, especially as expanded in Regulation X, are very broad and without limitations would have outlawed an incredibly wide swath of business activity falling outside of the policy aims of RESPA.

To avoid going too far with the RESPA’s prohibitions, Congress enacted five exceptions

\textsuperscript{18} 12 C.F.R §§ 1024.14(b).
\textsuperscript{19} 12 U.S.C. § 2607(b).
\textsuperscript{20} 12 C.F.R §§ 1024.14(c).
to both the Referral Fee Prohibition and the Fee Splitting Prohibition. Two of the exceptions have been prominently at issue in CFPB actions – (1) the exception for payment for bona fide compensation for goods and services actually received (hereafter the “Bona Fide Compensation Exception”) and (2) the exception for affiliated business arrangements (“ABAs”) subject to various disclosure requirements (hereafter the “ABA Exception”):

Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed, [or] . . . (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred (i) in the case of a face-to-face referral or a referral made in writing or by electronic media, at or before the time of the referral (and compliance with this requirement in such case may be evidenced by a notation in a written, electronic, or similar system of records maintained in the regular course of business); (ii) in the case of a referral made by telephone, within 3 business days after the referral by telephone, (and in such case an abbreviated verbal disclosure of the existence of the arrangement and the fact that a written disclosure will be provided within 3 business days shall be made to the person being referred during the telephone referral); or (iii) in the case of a referral by a lender (including a referral by a lender to an affiliated lender), at the time the estimates required under section 2604(c) of this title are provided (notwithstanding clause (i) or (ii)); and any required written receipt of such disclosure (without regard to the manner of the disclosure under clause (i), (ii), or (iii)) may be obtained at the closing or settlement (except that a person making a face-to-face referral who provides the written disclosure at or before the time of the referral shall attempt to obtain any required written receipt of such disclosure at such time and if the person being referred chooses not to acknowledge the receipt of the disclosure at that time, that fact shall be noted in the written, electronic, or similar system of records maintained in the regular course of business by the person making the referral), (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship . . . .

As with the prohibitions, the exceptions were also set out, with additional strictures, in Regulation X:

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(g) Fees, salaries, compensation, or other payments.

(1) Section 8 of RESPA permits:

*  *  *  *

(iv) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed;

*  *  *  *

(vii) An employer's payment to its own employees for any referral activities.\(^\text{23}\)

*  *  *  *

(b) Violation and exemption. An affiliated business arrangement is not a violation of section 8 of RESPA (12 U.S.C. 2607) and of § 1024.14 if the conditions set forth in this section are satisfied. Paragraph (b)(1) of this section shall not apply to the extent it is inconsistent with section 8(c)(4)(A) of RESPA (12 U.S.C. 2607(c)(4)(A)).

(1) The person making each referral has provided to each person whose business is referred a written disclosure, in the format of the Affiliated Business Arrangement Disclosure Statement set forth in appendix D of this part, of the nature of the relationship (explaining the ownership and financial interest) between the provider of settlement services (or business incident thereto) and the person making the referral and of an estimated charge or range of charges generally made by such provider (which describes the charge using the same terminology, as far as practical, as section L of the HUD-1 settlement statement). The disclosures must be provided on a separate piece of paper no later than the time of each referral . . . .

(2) No person making a referral has required (as defined in § 1024.2, “required use”) any person to use any particular provider of settlement services or business incident thereto, except if such person is a lender, for requiring a buyer, borrower or seller to pay for the services of an attorney, credit reporting agency, or real estate appraiser chosen by the lender to represent the lender's interest in a real estate transaction, or except if such person is an attorney or law firm for arranging for issuance of a title insurance policy for a client, directly as agent or through a separate corporate title insurance agency that may be operated as an adjunct to the law practice of the attorney or law firm, as part of representation of that client in a real estate transaction.

(3) The only thing of value that is received from the arrangement other than

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\(^{23}\) 12 C.F.R §§ 1024.14(g)(1).
payments listed in § 1024.14(g) is a return on an ownership interest or franchise relationship.

*   *   *

(iii) Neither the mere labeling of a thing of value, nor the fact that it may be calculated pursuant to a corporate or partnership organizational document or a franchise agreement, will determine whether it is a bona fide return on an ownership interest or franchise relationship. Whether a thing of value is such a return will be determined by analyzing facts and circumstances on a case by case basis. 24

IV. The CFPB has Sought to Aggressively Interpret and Apply RESPA’s Prohibitions and Exceptions Against the Title Industry.

In its enforcement actions, the CFPB has sought to significantly narrow the scope and applicability of both the Bona Fide Compensation Exception and the ABA Exception thereby giving very broad effect to the prohibitions. CFPB’s aim to limit the exceptions coupled with the CFPB’s structure and enforcement procedure has resulted in some significant cases affecting the title industry. There have been at least four cases in which decisions have been rendered and one case still pending in federal district court of particular import to the title industry.

A. In the Matter of Stonebridge Title Services, Inc.

The first consent order issued by the CFPB directly involving a member of the title industry was signed by the director on June 12, 2014, concerning a New Jersey title insurance agency, Stonebridge Title Series, Inc. (“Stonebridge”). 25 Stonebridge had engaged more than 20 salespeople to obtain title insurance business. 26 The salespeople solicited title insurance on behalf of Stonebridge, primarily from law firms. 27 Stonebridge paid the salespeople commissions of up to

24 12 C.F.R §§ 1024.15(a)-(b).
26 Stonebridge Consent Order, para. 7; see also CFPB Press Release, “CFPB Takes Action Against Illegal Mortgage Referral (June 12, 2014).
27 Stonebridge Consent Order, paras. 8 - 9.
40% of the title insurance premiums it collected. Stonebridge treated the salespeople as employees for tax purposes, issuing W-2s for their earnings. However, according to the CFPB, Stonebridge did not have a right of control over the manner and means that salespeople’s performance of their duties and, therefore, the salespeople were really independent contractors rather than employees.

Based on those facts, the CFPB concluded that Stonebridge’s payments to the salespeople did not fall within the exception to RESPA’s Referral Fee Prohibition and also RESPA’s Fee Splitting Prohibition. The CFPB fined Stonebridge Title Services $30,000 for the violations.

The CFPB’s conclusion that a title agent paying commissions to outside sales people violates RESPA’s fee splitting prohibition is not particularly surprising, though there may be room for honest disagreement. However, the CFPB’s conclusion that the payments to outside salespeople violates RESPA’s referral fee prohibition raises some important questions.

There is no indication in the Stonebridge Consent Order that the CFPB’s conclusion that the payments to outside salespeople violates RESPA’s referral fee prohibition turned on the fact that the salespeople were paid commissions as opposed to some other manner not contingent on whether Stonebridge actually received any title insurance business as a result of the salespeople work. The Stonebridge Consent Order appears to contemplate that the salespeople were actually functioning as salespeople and not making mere referrals. The Stonebridge Consent Order offers no indication of the distinction, if any, between presumably permissible payments for advertising and other marketing efforts to outside persons or companies, and the sales efforts of the

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28 Stonebridge Consent Order, paras. 9 -10.
29 Stonebridge Consent Order, para. 17.
30 Stonebridge Consent Order, para. 17.
31 Stonebridge Consent Order, para. 16.
32 Stonebridge Consent Order, para. 21.
33 Stonebridge Consent Order, paras. 8 -9.
salespeople in the Stonebridge case. While Regulation X does indicate that payments to non-employees for referrals are generally not permitted under most circumstances,\(^{34}\) it seems unlikely that “referrals” in this context would include all advertising or marketing efforts by a non-employee. For instance, if a title insurance agent paid for production and publication of a commercial or other advertisement in which a celebrity endorsed the agent and urged that others do business with the agent, then that would seem to fall within the RESPA exception for payments for services actually preformed.\(^{35}\) The legal distinction between a paid advertising endorsement of that sort and the marketing efforts of salespeople is unclear – would the CFPB take the position that a paid advertising endorsement is a violation of RESPA’s referral fee prohibition? The Stonebridge Consent Order provides no guidance in this regard.

The Stonebridge Consent Order is noteworthy in one other respect. It is by a significant amount the smallest penalty imposed by the CFPB, only $30,000.\(^{36}\) In determining the amount of the fine, the CFPB explicitly took into account Stonebridge Title’s and its principals’ ability to pay the fine and remain in business.\(^{37}\) As will be seen in examining the fines imposed in the cases described below, the CFPB has not subsequently been so merciful. It is unknown why the various cases have been dealt with differently in this regard.

**B. In the Matter of Lighthouse Title, Inc.**

On September 25, 2014, the Director of the CFPB signed a consent order in an administrative proceeding before the CFPB against a Michigan title insurance agency, Lighthouse Ti-

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\(^{34}\) “Any referral of a settlement service is not a compensable service, except as set forth in § 1024.14(g)(1). A company may not pay any other company or the employees of any other company for the referral of settlement service business.” 12 C.F.R. 1024.14(b).

\(^{35}\) “Section 8 of RESPA permits: . . . (iv) A payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed; . . .” 12 C.F.R. 1024.14(g)(1)(iv).

\(^{36}\) Stonebridge Consent Order, para. 21.

\(^{37}\) Stonebridge Consent Order, para. 18.
lle.\textsuperscript{38} Lighthouse Title had entered into Marketing Service Agreements ("MSAs") with other companies, including real estate brokers. Presumably, Lighthouse Title was attempting to establish an arrangement that would fall within one of the exceptions to RESPA's general prohibition on the payment or receipt of referral fees, that is the exception that states that "Nothing in this [RESPA section prohibiting payments for referrals] shall be construed as prohibiting . . . (2) the payment of a bona fide salary or compensation or other payment for . . . services actually performed . . .").\textsuperscript{39} However, the CFPB was not going to allow it. In its order, the CFPB seems to take the position that "referrals" are not marketing or advertising services and quotes Section 1024.14(b) of Regulation X: "A Company may not pay any other company or the employees of any other company for the referral of settlement business."\textsuperscript{40} Though the MSAs apparently called for marketing and advertising services to be performed, they were entered into with the understanding that the party to perform those services would refer title insurance business to Lighthouse Title.\textsuperscript{41}

Instead of merely determining that the MSAs were shams that did not actually fall within any exception to RESPA's prohibition of payment for referrals, the CFPB also faulted Lighthouse Title in two other regards. First, the CFPB cited Lighthouse Title for not paying fair market value for the marketing and advertising services called for in the MSAs.\textsuperscript{42} This is especially curious because the CFPB explicitly found that, at least in some instances, Lighthouse Title set the fees it paid pursuant to the MSA's "by considering how much competing title companies were willing to pay those same counterparties for marketing and advertising services."\textsuperscript{43}


\textsuperscript{39} 12 U.S.C. § 2607 (c); see also 12 C.F.R § 1024.14(g)(iv).

\textsuperscript{40} Lighthouse Consent Order, para. 10.

\textsuperscript{41} Lighthouse Consent Order, para. 12.

\textsuperscript{42} Lighthouse Consent Order, para. 23.

\textsuperscript{43} Lighthouse Consent Order, para. 17.
Second, the CFPB found that entering into “a contract” was a “thing of value” as that term is used in RESPA’s referral fee prohibition, “even if the fees paid under the contract are fair market value for the goods or services provided.” This is especially troubling because it appears to eviscerate the Bona Fide Compensation Exception of Section 2607(c) of RESPA, which Lighthouse Title apparently thought it was acting within. Under CFPB’s construction of RESPA, if a title insurance agent had a choice between entering into a contract with two other companies for bona fide services on equal terms at a fair market value for the services, it could not choose to contract with a company that referred it business over a company that did not refer business without violating RESPA.

The *Lighthouse Title* case demonstrates that the CFPB appears to draw a distinction between marketing and advertising on one hand and referrals on the other, but it does not provide any illumination as to what the distinctions might be. *Lighthouse Title* also indicates that the CFPB simply does not believe that any payments to outside companies for goods or services are ever permissible under RESPA if referrals factor in any way into the business arrangement for the goods or services. To emphasize its interpretation of RESPA and Regulation X, the CFPB fined Lighthouse Title $200,000.45

**C. Consumer Financial Protection Bureau and the Consumer Protection Division, Office of the Attorney General of Maryland v. Genuine Title, LLC, et al.**

In *Consumer Financial Protection Bureau and the Consumer Protection Division, Office of the Attorney General of Maryland v. Genuine Title, et al.*, the CFPB and the Maryland attorney general filed suit and obtained agreed judgments against a Maryland Title agency, two of its principals, and four loan officers (and some entities associated with each of the loan officers). It

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44 Lighthouse Consent Order, para. 20.
45 Lighthouse Consent Order, para. 29.
is obvious that the case was largely settled prior to filing. The complaint was filed on April 29, 2016 and motions to approve consent judgments against five of the defendants and related entities were filed the same day.

The CFPB’s allegations in the *Genuine Title* case were that Genuine Title, its owner/president, and its director of marketing were making payments for referrals in two distinct schemes. First, the CFPB alleged they were providing marketing services to loan officers in return for referrals. The CFPB claimed that marketing services included providing loan officers with marketing leads that Genuine Title had purchased and also paying for marketing letters to be printed, folded, stuffed, and mailed for loan officers. Second, the CFPB alleged that Genuine Title, its owner/president, and its director of marketing actually paid loan officers, including the four loan officers also named as defendants, $175 - $800 for each loan closing referred to Genuine Title. In order to try to conceal the payments, the CFPB pleaded that the payments were sometimes made to various entities the loan officers created, rather than making the payments directly to the individual loan officers.

*Genuine Title* does not raise novel legal questions as in *Stonebridge Title* and *Lighthouse Title*. It would be difficult to disagree that Genuine Title’s practices, at least as described by the CFPB, violated RESPA and Regulation X. Instead, the *Genuine Title* case is noteworthy for the penalties imposed. Genuine Title’s director of marketing was ordered to pay the CFPB $400,000 and was banned from the mortgage industry for five years. Against Genuine Title’s president/owner, the CFPB obtained judgment for $30,000 and the president/owner was also banned from the mortgage industry for five years. The four loan officers were ordered to pay to CFPB the sums of $30,000, $37,500, $65,000, and $75,000 respectively and each was banned from the mortgage industry for two years. Genuine Title, LLC, itself was required to turn over to the
Maryland attorney general all money in its operating accounts and escrow accounts beyond the amounts necessary for paying title claims and it was banned from the mortgage industry for five years. The total specified amount of monetary judgment against all of defendants came to $637,500.


The federal court of appeals for the D.C. Circuit recently handed the CFPB a sharp reversal in an enforcement action the CFPB had brought against New Jersey mortgage lender, PHH Corporation and four of its subsidiaries (collectively “PHH”). The court of appeals generally found the CFPB was guilty of major overreach, overturning a major enforcement action by the CFPB and held: 1) that the structure of the CFPB was unconstitutional; 2) rejecting a CFPB construction of RESPA that a payment of reasonable market value for services was not a bona fide payment for services falling within the exception to referral payment for goods and services actually furnished or performed; 3) even if the CFPB’s construction of RESPA had been correct, the CFPB violated PHH’s due process rights by retroactively enforcing new interpretation of RESPA against PHH; and 4) RESPA’s three year statute of limitations is applicable to administrative actions brought by the CFPB and that CFPB wrongly refused to apply RESPA’s statute of limitations in its administrative action against PHH. If these holdings are not overturned by a subsequent en banc review by the D.C. Circuit Court of Appeals or on appeal to the Supreme Court, they have great import and broad effects. To understand the effect of the holdings it is important to be familiar with the facts of the PHH case and how the CFPB attempted to apply the law.

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PHH is a mortgage lender. In 1995, it began using captive reinsurance agreements. PHH would refer its borrowers to mortgage insurers. Those mortgage insurers would then purchase reinsurance from PHH’s subsidiary. The CFPB instituted an administrative action against PHH on January 29, 2014, asserting that the acceptance of mortgage reinsurance premiums by PHH’s subsidiary constituted a violation of the RESPA’s Referral Fee Prohibition. In response, PHH contended that any payments it received from the mortgage insurers were reasonable market value for reinsurance it actually provided, thus bringing them within the Bona Fide Compensation Exception. The CFPB countered with the contention that because the payments were made in connection with a tying arrangement, the payments were necessarily payments for referral and not bona fide compensation within the meaning of the Bona Fide Compensation Exception.

Alternatively, PHH took the position that its practices in the captive insurance arrangement were in line with previously announced HUD interpretations of the Bona Fide Compensation Exception as applied to captive insurance arrangements, and that the CFPB should not retroactively impose what was a new interpretation against them. In this regard, PHH cited a 1997 HUD letter, which had been widely circulated in the mortgage lending and mortgage insurance industry, interpreting the Bona Fide Compensation Exception to allow captive reinsurance arrangements as long as the reinsurance was actually provided and the amount of premiums did not exceed market value. CFPB took the position that it was not bound by the HUD letter, that PHH was not entitled to rely on the HUD letter, and also that the CFPB could retroactively apply

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47 PHH Corporation, 2016 WL 5898801 at *3.
48 PHH Corporation, 2016 WL 5898801 at *29.
49 PHH Corporation, 2016 WL 5898801 at *29.
52 PHH Corporation, 2016 WL 5898801 at *30.
53 PHH Corporation, 2016 WL 5898801 at *33.
an interpretation of an ambiguous statute.\textsuperscript{54}

PHH also asserted that the CFPB’s claims were barred by the three year statute of limitation set out in Section 2614 of RESPA.

At the Administrative Hearing, the ALJ found that PHH’s conduct violated the Referral Fee Prohibition and that it did not fall within the Bona Fide Compensation Exception.\textsuperscript{55} The ALJ recommended PHH be ordered to disgorge $6,442,399, and other non-monetary sanctions. Both PHH and CFPB’s Enforcement Counsel appealed the ALJ’s recommendation to the Director of the CFPB.\textsuperscript{56} On appeal to the CFPB Director, PHH asserted numerous arguments including those outlined above. CFPB’s Enforcement Counsel asked the Director to order that PHH be ordered to disgorge $493 million dollars in premium accepted from 1995 through 2015 or alternatively various smaller sums ranging from $121,719,499 - $256,500,000.\textsuperscript{57}

The Director of the CFPB issued his decision on June 4, 2015. In his decision, the Director noted that the PHH appeal was “the first appeal of an administrative enforcement proceeding before the Consumer Financial Protection Bureau.”\textsuperscript{58} The Director then rejected PHH’s arguments and increased the amount PHH was required to pay to $109,188,618.\textsuperscript{59}

Upon PHH’s appeal to the D.C. Court of Appeals, PHH not only reiterated its earlier positions concerning the Bona Fide Compensation Exception and RESPA’s statute of limitations, it added another claim that the very structure of the CFPB was unconstitutional because an inde-

\textsuperscript{54} PHH Corporation, 2016 WL 5898801 at * 35.
\textsuperscript{56} In the Matter of PHH Corporation, et al., Administrative Proceeding File No. 2014-CFPB-0002, Before the Consumer Financial Protection Bureau, Notice of Appeal (December 4, 2014) and Enforcement Counsel’s Notice of Appeal (December 10, 2014).
\textsuperscript{57} In the Matter of PHH Corporation, et al., Administrative Proceeding File No. 2014-CFPB-0002, Before the Consumer Financial Protection Bureau, Enforcement Counsel’s Opening Appeal Brief, pp. 16-22 (January 9, 2015).
ependent agency headed by a single director ran afoul of Article II of the constitution vesting the executive power solely in the President.⁶⁰ At the Court of Appeals, PHH won across the board.

First the Court of Appeals agreed that the structure of the CFPB was unconstitutional.⁶¹ By way of remedy, the Court of Appeals declined to strike down the entire enactment of the CFPB and instead required that going forward, the CFPB Director would be subject to supervision and direction of the President and could be removed from office at the will of the President at any time.⁶² Prior to the 2016 presidential election, this did not appear to afford PHH much relief and would not afford the CFPB’s other regulatees relief for another number of years. The 2016 presidential election results raise the possibility that PHH might receive some effective relief in this regard and that other regulatees might be benefited sooner as well. Even if a new president does not remove the current director, the current director may be inclined to exercise somewhat more restraint on remand.

With regard to whether PHH’s conduct fell within the Bona Fide Compensation Exception, the Court of Appeals reversed the CFPB’s interpretation saying “it was not a close call.”⁶³ In particular, the Court of Appeals held that if payment was made at reasonable market value for services actually provided, then such payments were not payments for referrals but bona fide compensation satisfying the exception:

We hold that Sections 8(a) and 8(c) of the Real Estate Settlement Procedures Act allow captive reinsurance arrangements so long as the mortgage insurance companies pay no more than reasonable market value to the reinsurers for services actually provided.⁶⁴

Along the way the Court of Appeals also specifically rejected the CFPB’s position that a pay-

⁶³ PHH Corporation, 2016 WL 5898801 at * 30.
⁶⁴ PHH Corporation, 2016 WL 5898801 at * 32.
ment made pursuant to a tying arrangement was not a bona fide compensation but instead a payment for referral:

A payment for a service pursuant to a tying arrangement does not make the payment any less bona fide, so long as the payment for the service reflects reasonable market value. A bona fide payment means a payment of reasonable market value.\(^{65}\)

While the Court of Appeals completely agreed with PHH on the interpretation of Bona Fide Compensation Exception,\(^{66}\) it did not otherwise render a decision for PHH, instead remanding the case back to the CFPB to determine whether or not PHH accepted more that reasonable market value in reinsurance premiums or not. But in reaching its holding, the Court of Appeals also set out, albeit in what may be dicta, that if payments were made in excess of reasonable market values, only the portions of payments above market value could be presumed to be payments for referral.\(^{67}\) Moreover, the Court of Appeals also held that the burden of proof concerning whether payments were in excess of reasonable market value rested with the CFPB, not with the regulator.\(^{68}\) This is especially important to PHH given ALJ’s earlier rulings and recommendation and also will be important to future respondents.

Even though it had already ruled that CFPB’s construction of the Bona Fide Compensation Exception was wrong, the Court of Appeals also held that the CFPB’s attempt to retroactively apply its new interpretation of that exception was barred by the Due Process Clause of the United States Constitution.\(^{69}\)

In sum, even if the CFPB’s new interpretation of Section 8 were a permissible interpretation of the statute, which it is not, the CFPB’s interpretation could not constitutionally be applied retroactively to PHH’s conduct that occurred before that new interpretation. On remand, to reiterate, the CFPB may determine wheth-

\(^{65}\) PHH Corporation, 2016 WL 5898801 at * 31.
\(^{66}\) PHH Corporation, 2016 WL 5898801 at * 32.
\(^{67}\) PHH Corporation, 2016 WL 5898801 at * 30, see also n. 27.
\(^{68}\) PHH Corporation, 2016 WL 5898801 at n. 27.
\(^{69}\) U.S. CONST. amend. XIV, § 1.
er the relevant mortgage insurers paid more than reasonable market value to the reinsurer Atrium, which is what the statute prescribes and what HUD’s longstanding pronouncements provided.\textsuperscript{70}

The Court of Appeals made clear that the CFPB may enforce any new interpretations of RESPA only prospectively and may not apply new interpretations to prior conduct.

Finally, the Court of Appeals also held that RESPA’s three year statute of limitations is applicable in administrative actions.\textsuperscript{71} The CFPB took the position that RESPA’s statute of limitations applied only in actions it brought in court. In rejecting the CFPB’s contention, the Court of Appeals characterized it as absurd.\textsuperscript{72}

While \textit{PHH Corporation} concerns mortgage lending and mortgage insurance rather than the title industry per se, its holdings apply to many potential practices in the title industry. It also represents a significant setback to the CFPB’s very aggressive interpretations of RESPA and enforcement practices. That being said, at the time of the writing of this paper, the Court of Appeals decision is not final. The CFPB has until at least November 20, 2016 to file a request for \textit{en banc} review at the Court of Appeals. The deadline to file a petition for certiorari to the Supreme Court is not until at least January 9, 2017 and may be extended. While the opinion in \textit{PHH Corporation} is strongly worded and appears well reasoned, great caution should be exercised in acting in reliance on that case until it becomes final.


\textit{Consumer Financial Protection Bureau v. Borders & Borders, PLC, et al.}, is a case currently pending in federal district court with potentially significant ramifications for the title industry.

Some of the significant facts are uncontested. Borders & Borders is a Kentucky law firm

\textsuperscript{70} \textit{PHH Corporation}, 2016 WL 5898801 at * 36.
\textsuperscript{71} \textit{PHH Corporation}, 2016 WL 5898801 at * 41.
\textsuperscript{72} \textit{PHH Corporation}, 2016 WL 5898801 at * 41.
that represents lenders, preparing conveyance and mortgage documents and conducting real estate closings. Borders & Borders established nine limited liability companies each of which was owned 50% by Borders & Borders and the other 50% was owned by one of nine different real estate professionals (hereafter, the “Title LLCs”). The Title LLCs each served as a title insurance agent. During the 2006 – 2011 period, Borders & Borders referred borrowers to the Title LLC’s for closings. Ultimately, the members of the Title LLCs, including the title professionals who each respectively owned a 50% interest in one of the Title LLCs, received profit distributions as returns on ownership interests.

The CFPB filed suit against Borders & Borders and its three principals (the “Borders Defendants”) in October 2013.\textsuperscript{73} The CFPB alleged that the Borders Defendants’ arrangement “for the Title LLCs to pay distributions couched as returns on ownership interests” to their title professional members violated RESPA’s Referral Fee Prohibition.\textsuperscript{74} Additionally, the CFPB alleged that the Borders Defendants’ arrangement with the LLCs did not fall within the ABA Exception “because the Title LLCs did not constitute \textit{bona fide} ‘providers of settlement services’ within the meaning of RESPA” and that “The payments they made to the Individual Defendants and the Joint Venture Partners did not constitute \textit{bona fide} returns on ownership interest.”\textsuperscript{75} Additionally, the CFPB also alleged the ABA Exception was inapplicable “because the [ABA] Disclosures provided to referred customers did not conform to 12 C.F.R. part 1024, Appendix D, represent a threat to the basic purpose of the disclosure, and were not provided at the time of referral.”\textsuperscript{76}

Shortly after CFPB’s Complaint against the Borders Defendants was filed, the Sixth Cir-

\textsuperscript{74} \textit{Borders} Complaint, para 29.
\textsuperscript{75} \textit{Borders} Complaint, para 30 (emphases added).
\textsuperscript{76} \textit{Borders} Complaint, para 30.
cuit Court of Appeals released its opinion in *Carter v. Welles Bowen Realty, Inc.* In *Carter*, defendants (Welles-Bowen Realty, Inc., et al.) had an ABA and referred buyers within the ABA arrangement. The plaintiffs and the federal government (the United States intervened on the appeal of the case in support of the plaintiffs) claimed that the defendants’ (Welles Bowen Realty, Inc., et al.) ABA arrangement did not fall within the ABA Exception because, according to the plaintiffs and the federal government, to qualify for the ABA exception, the provider of settlement services in the ABA arrangement must be a “bona fide provider of settlement services” and tried to apply a HUD policy statement setting out ten criteria to establish that the supposed provider of settlement services they were referred to was a mere sham. One of the problems for the plaintiffs and the federal government is that the ABA exception does not use the term “bona fide” at all let alone in reference to “provider of settlement services”. The Court of Appeals rejected the plaintiffs’ and federal government’s attempt to read the term “bona fide” into the ABA Exception. The Court of Appeals held that the HUD policy statement was not entitled to deference and that an ABA arrangement falls within the ABA Exception “so long as [the settlement services provider] provides some settlement services, and so long as the arrangement to which it belongs satisfies the criteria laid out in § 2607(c)(4).”

After the Sixth Circuit published its opinion in *Carter* and in light of that decision, the Borders defendants asked the CFPB to dismiss its lawsuit against them. The CFPB refused and

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78 *Carter*, 736 F.3d at 724.
79 *Carter*, 736 F.3d at 726-728.
81 *Carter*, 736 F.3d at 728.
82 *Carter*, 736 F.3d at 726-728
83 *Carter*, 736 F.3d at 727 (emphases added and punctuation omitted); see also, 736 F.3d at 727-728.
the Borders defendants then moved for judgment based on the pleadings and the \textit{Carter} case.\textsuperscript{85} The district court did not rule until February, 2015, denying the Borders defendants’ motion.\textsuperscript{86} In denying the motion, the district court found that the CFPB plead that the ABA Exception was not satisfied, reading the Complaint to allege the required disclosures were not always made, were not always in compliance with Regulation X, and potentially more significantly that the CFPB also alleged that, unlike in \textit{Carter}, the Title LLCs did not actually provide settlement services and also that the CFPB sufficiently alleged that the payment to the Title LLCs members were not actually returns on ownership interests such as to avoid judgment against the CFPB on the pleadings.\textsuperscript{87}

It is difficult to discern how the district court reads the \textit{Carter} case and how it may or may not apply in the \textit{Borders \\& Borders} case as it proceeds. Also, at the time the district court issued its order denying the Borders defendants’ motion to dismiss on the pleadings, the Sixth Circuit had not yet decided the \textit{PHH} case. Because the PHH case concerns the Bona Fide Compensation Exception rather than the ABA Exception (and is not yet final), it is unclear how the \textit{PHH} case may affect the district court’s future decisions in \textit{Borders \\& Borders}. The district court’s order leaves open the possibility that the Borders defendants may ultimately lose their case based solely on insufficiency or untimeliness of ABA disclosures to the customers. In any event, members of the title industry need to watch the \textit{Borders \\& Borders} case closely not only to see the result but the factual and legal bases for the result.

\textbf{IV. CONCLUSION}

The CFPB, due to its structure, its procedural options, and the remedies available to it has

\textsuperscript{85} Id.
the ability to profoundly affect the title industry. The CFPB has been aggressive in its efforts to broadly interpret and apply RESPA’s prohibitions and narrow its exceptions to those prohibitions. Also, the CFPB has sought to make examples of the members of the title industry it has targeted for enforcement actions. Given the CFPB’s powers and the significant risks posed to title industry members, it is understandable that some of those targets have entered into consent orders enhancing the CFPB’s regulatory goals. Targets for enforcement that have fought back have had some success in limiting the CFPB’s aggressive interpretations and tactics. Members of the title industry need to be aware of both the actions to date as well as follow further developments in CFPB enforcement actions in order to ensure compliance with RESPA as it is being enforced and minimize their own risk.
ALLEN HALBROOK
Sneed, Vine & Perry, P.C.
Austin, TX
United States Court of Appeals,
District of Columbia Circuit.

PHH Corporation, et al., Petitioners
V.
Consumer Financial Protection Bureau, Respondent

. . . the Director of the CFPB possesses more unilateral authority . . . than any other officer in any of the three branches of the U.S. Government, other than the President.

*   *   *

The CFPB’s concentration of enormous executive power in a single, unaccountable, unchecked Director . . . poses a far greater risk of arbitrary decisionmaking and abuse of power, and a far greater threat to individual liberty, than does a multi-member independent agency.

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REFERRAL FEE PROHIBITION
12 U.S.C. § 2607

(a) Business referrals

No person shall give and no person shall accept any fee, kickback, or thing of value pursuant to any agreement or understanding, oral or otherwise, that business incident to or a part of a real estate settlement service involving a federally related mortgage loan shall be referred to any person.
FEE SPLITTING PROHIBITION
12 U.S.C. § 2607

(b) Splitting charges

No person shall give and no person shall accept any portion, split, or percentage of any charge made or received for the rendering of a real estate settlement service in connection with a transaction involving a federally related mortgage loan other than for services actually performed.

BONA FIDE COMPENSATION EXCEPTION
12 U.S. C. § 2607

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting . . . (2) the payment to any person of a bona fide salary or compensation or other payment for goods or facilities actually furnished or for services actually performed . . . .
AFFILIATED BUSINESS ARRANGEMENT ("ABA") EXCEPTION
12 U.S.C. § 2607

(c) Fees, salaries, compensation, or other payments

Nothing in this section shall be construed as prohibiting . . . (4) affiliated business arrangements so long as (A) a disclosure is made of the existence of such an arrangement to the person being referred and, in connection with such referral, such person is provided a written estimate of the charge or range of charges generally made by the provider to which the person is referred . . . ; (B) such person is not required to use any particular provider of settlement services, and (C) the only thing of value that is received from the arrangement, other than the payments permitted under this subsection, is a return on the ownership interest or franchise relationship.

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CFPB Takes Action Against Illegal Mortgage Referrals
JUN 12, 2014

*Bureau Orders New Jersey Title Company to Pay $30,000 for Illegal Kickback Scheme*

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau ordered a New Jersey company, Stonebridge Title Services Inc., to pay $30,000 for paying illegal kickbacks for referrals.
CFPB Takes Action Against Mortgage Kickback Agreements
SEP 30, 2014

*Bureau Orders Michigan Title Insurance Agency to Pay $200,000*

WASHINGTON, D.C. - Today, the Consumer Financial Protection Bureau (CFPB) ordered Lighthouse Title, a Michigan title insurance agency, to pay $200,000 for illegal quid pro quo referral agreements.

CFPB Director Cordray Issues Decision in PHH Administrative Enforcement Action
JUN 04, 2015

WASHINGTON, D.C. - Today Consumer Financial Protection Bureau (CFPB) Director Richard Cordray issued a decision in the first appeal of a Bureau administrative enforcement proceeding. The Director’s decision concludes that PHH Corp., a mortgage lender, illegally referred consumers to mortgage insurers in exchange for kickbacks. He also issued a final order that prohibits PHH from violating the law and requires it to pay $109 million to the Bureau.
CFPB Files Suit Against Borders & Borders, PLC for Paying Illegal Real Estate Kickbacks

OCT 24, 2013

*Company Funneled Kickbacks Through Network of Shell Companies*

WASHINGTON, D.C. – The Consumer Financial Protection Bureau today filed a lawsuit in federal district court against a Kentucky law firm, Borders & Borders, PLC, and its principals, for illegally paying kickbacks for real estate settlement referrals through a network of shell companies.
Cyber Security

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Ashley Cook received her Bachelor of Arts and Juris Doctor from Southern Methodist University. Ashley is an experienced attorney, having been in practice for ten years. Her focus has been on representing title insurance agents and underwriters as well as real estate brokers. In 2014, Cook founded ZOCCAM, a technology startup that facilitates secure payments and communication between the parties in a real estate transaction.

Cook, is a frequent radio and television guest speaker on the topic of Cyber Security. She also teaches mandatory continuing education classes realtors and continuing legal education for lawyers.

Ashley serves on the board of the University Park Fire Department Pension Board and is a member of the Texas Land Title Association, American Land Title Association, Dallas Bar Association, and the Hyer Preschool Association.

Ashley lives in Dallas, Texas with her husband JR, and children Jack and Taylor. For more information visit [www.zoccam.com](http://www.zoccam.com) or connect with her on LinkedIn.
Introduction

Cyber security and protecting the Confidential Information and Non-Public Personal Information of the buyer has long been a high priority for our industry.¹ However, despite significant financial resources spent on increasing the integrity of corporate IT infrastructures we continue to experience significant losses due to security breaches. Security is only as good as the weakest link; without security, privacy cannot exist.

There is much media and government focus on confidentiality and the protection of the consumers Non-Public Personal Information (NPI), but almost all losses of customer information is caused by a breach in integrity. Integrity, or maintaining the accuracy and consistency of systems and data over the entire life cycle of the transaction is a pre-requisite for ensuring confidentiality. A loss of integrity is what leads to data breaches, whether introduced by malware, viruses or malicious insiders. Without integrity, encryption is useless and brings a false sense of security that leads to millions, perhaps billions of dollars of losses. Unfortunately, during the life of a real estate transaction, there are factors outside of our control that make this task difficult.

The risk of loss in the real estate industry is escalated by long sales cycles, the transmission of money and parties involved. Communication between the parties is conducted over a period of 30 to 45 days, often times on cell phones and laptop or other mobile devices. This practice of BYOD, or bring your device, creates vulnerabilities due to a lack of control. Most communication is conducted via Wi-Fi and often contains wiring instructions for substantial financial transactions. This combination makes our industry attractive, susceptible and lucrative for cyber criminals. There is no single security protocol that can be implemented by the title company or lender that will prevent cyber security losses.

Regardless of how much money, expertise or effort the title companies dedicate to cyber security, we will continue to suffer from losses. Employees, Realtors and buyers who thoughtlessly download applications from unauthorized locations, click on emails or utilize Wi-Fi create significant vulnerabilities. However, these threats can be minimized through education.

¹ Title V, Subtitle A of the Gramm-Leach Bliley Act governs the treatment of nonpublic personal information. The Dodd-Frank Act granted rule-making authority for most of Subtitle A of Title V to the Consumer Financial Protection Bureau, and with respect to entities under its jurisdiction, granted authority to CGPB to supervise and enforce compliance with the statute. See Dodd-Frank Act §§1002(12)(J), 1024(b)-(c), and 1025(b)-(c); 12 U.S.C. §§5481 (12)(J), 5514(b)-(c).
and changes in protocols. Informed parties who exercise a sensible level of caution can significantly assist in managing cybersecurity risks. Recognizing where our vulnerabilities exist and how they are exposed is crucial to minimizing loss.

Malware

Nefarious software allows criminals the opportunity to easily infect devices with malware by presenting seemingly innocuous advertising, intriguing pictures, free games, or correspondence that drives behavior through fear. Malware is hostile or intrusive software, including viruses, worms, trojan horses, smsbots, ransomware, adware and spyware. Cyber criminals use social engineering and take advantage of user gullibility to install the malicious software. Users are typically tricked by some form of social engineering into loading malware onto their device. While malware cannot be extinguished, it can be prevented or minimized by recognizing what it is and how it is installed.

Trojan Horses

Trojan Horses are often disguised as software that serves a legitimate purpose. Often they are delivered through a funny picture or free game. For example, the victim receives a text message that has an attachment disguised as a picture sent from a friend prompting the user to open the attachment. Once the link is clicked, the malware is installed on the device and acquires privileges. From there it spreads through the contacts and sends text messages to their contacts prompting them to do the same thing. Alternatively, a free game pops up on your phone. Upon installation, an SMSBot sends hundred of text messages from the phone to a paid number that charges the phone carrier. Terrorist groups can utilize this type of malware to fund their activities.

Ransomware

Ransomware is another method of terrorist funding. These attacks are initiated by downloading malware which encrypts the user’s files. These attacks are carried out by exploit
kits, which are hacking toolkits cybercriminals purchase. Once installed, the criminal gives a number to call or contacts the user to demand payment in money, bit coins or gift cards.

Fake Antivirus

Another method of installing malware is through a Fake Antivirus notification. A message pops up on the computer from what appears to be a legitimate company telling the victim that the computer is infected. Out of fear, the user clicks the notification to get rid of the virus, which actually installs malware on the computer. Other methods include solicitation of free antivirus software that is actually rogue software that upon installation infects the computer.

Spoofing and Phishing

Cybercriminals are also able to breach security by obtaining login credentials through spoofed emails and websites. Phishing, a digital form of social engineering, is utilized to obtain this information. Email spoofing is a tactic used in phishing because people are more likely to open an email when they think it has been sent by a legitimate source. Spoofed emails include the following messages:

“We suspect an unauthorized transaction on your account. To ensure that your account is not compromised, please click the link below and confirm your identity.”

“During the regular verification of accounts, we could not verify your information. Please click here to update and verify your information.”

Email spoofing is the forgery of an email header so that the message appears to have originated from someone or somewhere other than the actual source. In the real estate industry, cyber criminals are spoofing legitimate title company or broker addresses after compromising the real estate agent’s account to obtain information on the transaction. From there the cyber criminals monitor the transaction, deleting and intercepting legitimate emails containing wiring instructions and then sending a spoofed email to deliver the wired funds at closing to their own account.
Online Advertising and the importance of HTTPS

In 2013, online advertising in the United States surpassed that of broadcast television advertising with $42.8 billion spent on reaching consumers online. With the increase in mobile adoption, the importance and complexity of digital advertising will continue to increase. Many consumers don’t recognize that a visit to a legitimate website may trigger user interaction with hundreds of other web servers. Many of these interactions are frequent avenues for cybercriminals seeking to infect the consumer’s computer with advertisement-based malware or “malvertising.” The collection of data that facilitates online advertising allows cybercriminals to target their activities against vulnerable users.

The mechanics behind online advertising cause mainstream websites to unwittingly host malicious advertising, in part because the websites have no direct relationship with the entities that advertise on their sites. Host websites sell advertising space through an intermediary ad platform like Yahoo, Google or Microsoft. These companies manage the “real estate” on the host websites. Therefore, the server that hosts the website is not the server that delivers the advertisements that run on the website. Yahoo, Google and Microsoft gather data on Internet users for purposes of individually targeting online advertisements. These companies then direct an Internet user’s browser to display an advertisement from a server controlled by neither the ad network nor the original host website.

When a user visits a website that uses an ad network, the host website instructs the user’s browser to contact the ad network. The ad network in turn retrieves whatever user cookie identifiers it can. Using those identifiers the ad network accesses its own data base to see what other information about the user’s history it has in order to identify the user’s interests and demographic information. The ad network then decides what advertisement would be best to

2 See Online Advertising and Hidden Hazards to Consumer Security and Data Privacy, May 15, 2014 Hearing, United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs.


5 See Online Advertising and Hidden Hazards to Consumer Security and Data Privacy, May 15, 2014, Hearing, United States Senate Permanent Subcommittee on Investigations Committee on Homeland Security and Governmental Affairs.
serve that particular user. It is commonly not the ad network that delivers the content; instead the ad network instructs the user’s network to contact a server designated by the actual advertiser. This practice represents another potential vulnerability within the advertising delivery process. Online ads can deliver files and whole programs to a user even if the advertisement itself appears to be just an image.

The file that is delivered can be altered after the initial quality control check allowing for safe ads to be turned into a vehicle for malware. Malvertising is escalated during holidays because of online shopping. When law enforcement raids cyber-criminal offices in Russia and other foreign countries, they find calendars extensively marked for holidays and three day weekends.6

There have been several legislative proposals to strengthen Internet privacy, but none have been enacted. Furthermore, the FTC has yet to bring a case related to malware transmitted through advertisements.

A majority of the world’s most popular websites don’t utilize HTTPS. The reason? Advertising. HTTP is unencrypted and allows for eavesdropping between the user and the web browser. Advertisers push for increasingly invasive tracking measures that grow their profits while undermining internet security. HTTPS adds an extra layer of security to the Hypertext Transfer Protocol (HTTP) that facilitates web communication. HTTPS is encrypted using Secure Socket Layer. If you are on a site that is using HTTP, the entire URL and page content is visible to anyone on the network between you and that site. In other words, it is not encrypted. With HTTPS, only the domain of the website is visible. Anyone on the network can tell what site you went to, but they cannot determine what you did on the site. For brokers that are using HTTP, the identification of buyers and sellers can be seen depending on the information exchanged between the user and the website. Only 21 out of the top 100 Google websites deploy HTTPS by default.7

Wi-Fi Vulnerabilities

6 Id.

7 Brian Barraet, Most Top Websites Still Don’t User a Basic Security Feature, (March 17, 2016), https://www.wired.com
One of the greatest security vulnerabilities is use of Wi-Fi. Wi-Fi is readily used by both customers and employees who bring their own devices to work. In the past, most people accessed the internet through a stationary PC, but today, employees and customers rely heavily on wireless networks. Employees carry multiple devices and each Wireless Local Area Network (WLAN) that a user logs onto for Wi-Fi access bears the risk of connecting to a system that is not secure. Additionally, Wi-Fi is not encrypted from the device to the router leaving all communications vulnerable to an eavesdropper. Implementation of VPN -- a Virtual Private Network -- can assist in increasing security on employee devices that connect to the corporate Wi-Fi network. Virtual Private Networks encrypt the communication preventing eavesdropping on the wireless network.

Even when implementing a VPN policy, the risk still exists of rogue access points when utilizing Wi-Fi in the office. A rogue access point is a wireless access point installed on a secure network without the knowledge of the system administrator. Rogue wireless devices are an ongoing threat to corporate wireless networks. Unauthorized wireless devices may be hidden within or attached to a computer or other system component, or be attached directly to a network port or network device, such as a switch or router. It could be a mobile device attached to a USB that creates a wireless access point or an unknown wireless router attached to the network.

Often times, employees construct rogue access points to more easily connect mobile devices, iPads or laptops to the corporate network without any thought of security (i.e., they don’t enable security settings on the device). When this happens, system administrators have zero visibility into the security of that wireless environment, leaving the door open for attackers to use that access point to intercept network traffic.

Rogue access points are often set up by an attacker for the purpose of sniffing wireless network traffic in an effort to gain unauthorized access to the network. This leaves your network susceptible to an attack by anyone who has a wireless connection and is within close enough proximity to see it. Rogue access points allow hackers to conduct “Man-in-the-Middle” (MITM) attacks by setting up what is known as an Evil Twin.

Evil Twins are rogue wireless access points configured to look identical to a company’s true secure wireless network thereby getting users to connect to the spoofed network. Once the user connects to the Evil Twin, all internet traffic is routed through the attacker’s fake access point. The attacker then manipulates the traffic with an SSL strip which forces the user to use
HTTP. This allows the attacker to capture any user names or passwords the victim enters. It also allows the attacker to see any and all online activities. In other words, the attacker is now between the victim and the internet and is able to see and intercept any all communications.

Ultimately, hacking into wireless networks is relatively easy when compared to wired networks. There are several tools, techniques and software that are available to facilitate the cracking of wireless networks, even high secured networks.

Therefore, if a realtor or broker does not protect access points then all communication from the title company is susceptible to a MITM attack. Many brokers utilize weak passwords for WiFi. Commonly, they use the name of the Wi-Fi identifier as the Password, i.e. “Broker A” is the name of the Wi-Fi connection and “Broker A” is the password. With so much focus on lenders and title companies, many brokers and their realtors who are independent contractors are unaware of the security implications. While access points to at the title company are under the protection of organization-wide security policies, routers in the Broker’s office are less likely to be appropriately configured providing opportunities for attacks. Open Wi-Fi networks do not encrypt data packets over wireless channels. Such is the case at hotels and convention centers, where hackers target executives. Anyone with a packet capture utility can read unencrypted HTTP email and FTP traffic.

Once an attacker has placed themselves in the middle it is then easy for them to send spoofed emails to the buyer with wiring instructions. Unlike most purchases that occur within a short period of time, a real estate purchase takes no less than 30 days with email communication going back and forth between multiple parties. Through various methods, attackers are given ample opportunities to insert spoofed emails during the course of the transaction. There are very few requirements as to Wi-Fi security protocols or website SSL, which is the key to preventing these attacks. Encrypted email is not a solution; even when sending encrypted email, there is no way to ensure the integrity of its contents once it reaches the recipient.

There are ways to increase security, but it is imperative that we recognize the weaknesses in the process. Despite spending millions of dollars on increasing the IT infrastructure of banks and title companies, we are seeing a consistent increase in losses from cyber security deficiencies. With little control over the parties to the transaction, i.e. the realtor and buyer, communications between the parties will continue to be vulnerable to attacks. Unlike in the
healthcare industry, our industry provides the opportunity for theft of data and money. Our consumers are suffering less from stolen personal information and more from loss of funds.

In conclusion, there is no fool proof way to stop cyber theft, but taking some basic steps will go a long way in reducing industry loss:

1. Educate consumers, employees and Realtors about Malware.
2. Restrict online access to websites that utilize HTTPS.
3. Enforce policies and procedures that prevent employees from shopping and surfing the internet at work.
4. Require use of VPN on any employee devices that access company email or company Wi-Fi.
5. Turn off all USB drive capabilities on company computers.
6. Your company name should not be the name of your Wi-Fi connection.
7. Change the password to the corporate and guest Wi-Fi connection often.
Introduction

- Cyber Crime is on the rise in our industry.
HOW ARE WE BEING ATTACKED?

**Malware** - a variety of forms of hostile or intrusive software, including viruses, worms, Trojan Horses, ransomware, adware, scareware, spyware, etc.

**Phishing** - a digital form of social engineering that uses authentic-looking, but fake emails to request information from users or direct them to a fake website that requests information.

**Spoofing** - Creating a fraudulent website to mimic an actual, well-known website run by another party. Email spoofing occurs when the sender address and other parts of the email header are altered to appear as though the email originated from a different source.

**Wi-Fi vulnerabilities** - Evil Twins, Rogue access points, man in the middle attacks.

 Spyware

![Spyware Image]
Spoofed Email

Social networking spam and virus messages are currently second only to online pharmacy spam, with the latest campaigns spoofing LinkedIn notification emails. Most are arriving with subjects of either:

Subject: LinkedIn Messages
Subject: Join my network on LinkedIn

The body of the messages themselves are fairly accurate spoofs of actual LinkedIn communications.

Legitimate Linkedin Request

2016 TEXAS LAND TITLE INSTITUTE
Phishing

**iTunes**

Dear iTunes Customer,

Your iTunes account has been frozen because we are unable to validate your account information. Once you have updated your account records, we will try again to validate your information and your account suspension will be lifted. This will help protect your account in the future. This process does not take more than 3 minutes. To proceed to confirm your account details please click on the link below and follow the instructions.

**See Steps Below**

If you need help, click the Help link located in the upper right-hand corner of the iTunes interface.

Sincerely,

Apple Inc.

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Phishing

**Important Message**

Wells Fargo Online <alerts@notify.wellsfargo.com>  

Wed, Jun 17, 2015 at 11:25 PM

Wells Fargo Online Banking is investigating an e-mail phishing scam that attempts to collect sensitive personal information. The email mimics communication members currently receive from Wells Fargo. Remember, we do not ask for personal or account information in an e-mail.

Due to system maintenance, all account holders are required to update their information.

Sincerely,

Wells Fargo Customer Service

[wellsfargo.com | Update Your Account Here]

Please do not reply to this email directly. To ensure a prompt and secure response, sign on to email us.

0234CAFE5DE80B3E05ADD2D3B0844
**Ranswomare**

**Beware: Free Games or Funny Pictures**

Scenario 1: You receive a text message that has a funny picture or free game. The picture or game contains an SMSBot that sends hundreds of thousands of SMS messages from your phone and charges your carrier.

Scenario 2: The picture or game is malware and once installed acquires privileges and spreads through your contacts and sends messages to your contacts prompting them to do the same thing.
Wi-Fi Vulnerabilities

Rogue Access Points

Evil Twins

Man in the Middle

Encryption cannot prevent MITM. (Encryption doesn’t hide the sender’s information.)

Secure Title Co. Email to Realtor

Title Co’s computer thinks it’s talking to Buyer and Realtor’s Computer

Network traffic diverted through attacker

Man in the Middle Attacker
Education is Key. We are only as strong as our weakest link.
Keep Operating Systems up to date.
Implement BYOD policies including VPN.
Disconnect USB capabilities.
Restrict access to HTTP websites on corporate networks.
Turn off computers at night.
Google yourself to see what information is on the public domain.
Utilize complex passwords and change them often.
Delete emails containing sensitive information.
Refrain from clicking on any links without first checking the source.
Don't download free software of games.
Limit access to your devices by children.
Engage the Buyer throughout the transaction.
Gun Laws and the Workplace

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Texas Land Title Institute  
December 9, 2016
Lynn Stillman
North American Title Company

Lynn Stillman is the Texas General Counsel for North American Title Company. She supports the North American Title branches throughout the state with effective legal counsel, ensuring their transactions close seamlessly and with the least amount of risk for all parties involved.

Lynn has ten years’ experience in the Texas title industry. Before joining North American Title Company, she served as Senior Vice President and Corporate Counsel for two independent title agencies in the Dallas area. Lynn has experience in handling regulatory, compliance and corporate matters, as well as closing, staffing, training, business development and administration.

Lynn is an alumni of the 2015 TLTA Leadership Academy, member of the TLTA Regulatory and TLTA Institute committees and the MetroTex Forms and Contracts committee. As a TREC and TDI-certified instructor, Lynn enjoys creating and teaching classes to help educate the title and real estate communities.

Lynn earned her Bachelor of Arts from Michigan State University and her Juris Doctorate, Cum Laude, from Michigan State University College of Law. She was admitted to the State Bar of Texas in 2006. As a resident of Dallas County, Lynn enjoys spending time with her husband, Daniel, daughters, Isabel and Rory and dog, Quincy.
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EXHIBIT B: §30.07 Open Carry Signage
Gun Laws and the Workplace

This paper is intended as an informative discussion and resource about Texas’ open carry law and concealed handgun laws and how the application of such laws can affect the workplace for title professionals, their employees and customers. This paper will discuss the applicable laws regarding handguns in the workplace in addition to who can obtain a license to carry a handgun, and specific requirements of business owners choosing to prohibit employees and customers from carrying a handgun on the business’ property. THIS PAPER IS NOT A DEFINITIVE EXPLANATION OF THE LAW AND SHOULD NOT BE CONSTRUED OR RELIED UPON AS LEGAL ADVICE.

I. The New Open Carry Law

During the 84th Texas Legislature, the Texas House and Texas Senate passed House Bill 910, otherwise known as the “Open Carry Law”. Signed by Governor Greg Abbott, and effective on January 1, 2016, the Texas Open Carry Law authorizes individuals that have an active state-issued license to carry, or that currently hold a concealed handgun license, to openly carry a handgun in plain view in a public place as long as the handgun is carried in a shoulder or belt holster. HB 910 eliminated the distinction between concealed carry license and open carry license. The “Concealed Handgun License” (CHL), which was permitted since 2011, is now called a License to Carry” (LTC). A LTC is now required to carry a handgun, openly or concealed, in any place not expressly prohibited by law. A “handgun” is defined as a subset of a firearm and means any firearm that is designed, made, or adapted to be fired with one hand.1 Existing CHL holders may continue to carry with a valid license, while new applicants will be required to complete training on the use of restraint holders and methods to ensure the secure carry of openly carried handguns.2 Unconcealed handguns, loaded or unloaded, must be carried in a shoulder or belt holster.3 The Texas Department of Public Safety describes a well restrained handgun (1) will generally not fall from the holster during movement or activity of the person; (2) is not easily removed by someone other than the person carrying the handgun; and (3) is still readily available by the person carrying the handgun.4

Texas gun laws regarding who can carry and where handguns can be carried have not changed, but the new laws do provide private business owners and property owners the authority, subject to certain requirements, to restrict handguns on their private property or on the business’ premises, where handguns would be otherwise permitted under Texas Penal Code §30.06 and §30.07.

1 Texas Penal Code §46.01(a)(5)
2 Texas Government Code §411.188
3 Texas Penal Code §46
4 www.txdps.state.tx.us
II. Who Can Carry a Handgun and Where

Texas protects the right to bear arms under Article I, Section 23 of the Texas Constitution, but the Texas Legislature has created laws to set restrictions on who can carry a handgun and where guns can be carried.\(^5\) Texas law requires an individual to hold a LTC in order to legally carry a handgun, either in a concealed manner or partially or wholly visible manner in a shoulder or belt holster. A valid LTC will be issued by the Texas Department of Public Safety (DPS) to a person that meets the requirements of Texas Government Code §411.172.\(^6\) As one would expect, peace officers, certain security guards commissioned by the Texas Board of Private Investigators and Private Security Agencies, members of the armed forces, corrections officers, and officers of a court are exempt in certain circumstances.\(^7\) A handgun license initially lasts for four (4) years, expiring on the birthdate of the license holder. Thereafter, a renewed licensed expires five (5) years after the date that the previous license expired, also on the birthdate of the license holder.\(^8\)

While a LTC is required to openly or conceal carry in most public places in Texas, there are State and Federal laws that still restrict a license holder from carrying a handgun in certain places or situations. For example, handguns are statutorily not permitted at schools, sporting events, bars, voting locations, correctional facilities and secure areas of airports.\(^9\) There are other times when carrying a handgun is permitted under the authority of Subchapter H, Chapter 411, Government Code, but a situation will cause the carrying to be prohibited. For example, if a license holder is intoxicated,

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\(^5\) Article I, Section 23, TX Constitution: Every citizen shall have the right to keep and bear arms in the lawful defense of himself or the State; but the Legislature shall have power, by law, to regulate the wearing of arms, with a view to prevent crime.

\(^6\) Texas Government Code §411.172 details the eligibility requirements as follows: (1) is a legal resident of this state for the six-month period preceding the date of application under this subchapter or is otherwise eligible for a license under Section 411.173(a); (2) is at least 21 years of age; (3) has not been convicted of a felony; (4) is not charged with the commission of a Class A or Class B misdemeanor or equivalent offense, or of an offense under Section 42.01, Penal Code, or equivalent offense, or of a felony under an information or indictment; (5) is not a fugitive from justice for a felony or a Class A or Class B misdemeanor or equivalent offense; (6) is not a chemically dependent person; (7) is not incapable of exercising sound judgment with respect to the proper use and storage of a handgun; (8) has not, in the five years preceding the date of application, been convicted of a Class A or Class B misdemeanor or equivalent offense or of an offense under Section 42.01, Penal Code, or equivalent offense; (9) is fully qualified under applicable federal and state law to purchase a handgun; (10) has not been finally determined to be delinquent in making a child support payment administered or collected by the attorney general; (11) has not been finally determined to be delinquent in the payment of a tax or other money collected by the comptroller, the tax collector of a political subdivision of the state, or any agency or subdivision of the state; (12) is not currently restricted under a court protective order or subject to a restraining order affecting the spousal relationship, other than a restraining order solely affecting property interests; (13) has not, in the 10 years preceding the date of application, been adjudicated as having engaged in delinquent conduct violating a penal law of the grade of felony; and (14) has not made any material misrepresentation, or failed to disclose any material fact, in an application submitted pursuant to Section 411.174.

\(^7\) Texas Penal Code §46.03(b)&(h) and §46.15

\(^8\) Texas Government Code §411.183(a) & (b)

\(^9\) Texas Penal Code §46.035
it doesn’t matter if the handgun is holstered openly or concealed, it’s still illegal and prohibited. And not smart!

III. Statutory Notice to Prohibit Handguns
Notwithstanding the statutory requirements and prohibitions discussed above, Texas’ new gun laws give private property owners and business owners the right to restrict both open carry and/or concealed carry on their premises, with penal consequences to violators. Statutory notice requirements of the private property owner or business owner is a primary focal point of the new gun laws under Texas Penal Code §30.06 – Trespass by Holder of License to Carry Concealed Handgun and Texas Penal Code §30.07 – Trespass to Licensed Holder with an Openly Carried Handgun. As such, private businesses, like title companies, have to decide whether to prohibit handguns on their premises. If a property owner or business owner wants to prohibit the carrying of open carry and/or concealed carry handguns, or both, the owner must post the appropriate statutory notices required under Texas Penal Code §30.06 and §30.07.

Concealed Carry
HB 910 modified the existing Texas Penal Code §30.06 to prohibit a license holder from carrying a concealed handgun if they receive proper notice by the landowner. Specifically, §30.06 says:

A license holder commits an offense if the license holder: (1) carries a concealed handgun under the authority of Subchapter H, Chapter 411, Government Code, on property of another without effective consent; and (2) received notice that entry on the property by a license holder with a concealed handgun was forbidden.

A person receives notice when the owner or “someone with apparent authority to act for the owner” provides either oral or written notice to the person that concealed carry is prohibited on the premises. Property owners and business owners must decide what method they are going to use to provide notice. Nothing in the statute prevents an owner from deciding not to post written notice and instead choosing to verbally notify anyone that is carrying a handgun. For example, an owner may choose to have the receptionist verbally notify or hand-deliver a note card to each guest entering the premises instructing them that concealed carry is not permitted.

If an owner chooses to post written notice, the owner must meet the statutory requirements in order for the notice to be legally effective. Keep in mind, any previously used written communication prohibiting concealed carry used will need to

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10 Texas Penal Code §46.035(d)
11 Texas Penal Code §30.06(a)
12 Texas Penal Code §30.06(b)
13 Texas Penal Code §30.06(c)(3)
be updated with the new required language under §30.06, which allows written communication in the form of a card or other document or to post a sign.\textsuperscript{14} The card, document or sign, at minimum, must state the following verbatim:

"Pursuant to Section 30.06, Penal Code (trespass by license holder with a concealed handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a concealed handgun."\textsuperscript{15}

If a sign is used to provide notice, then that sign must be (1) written in both English and Spanish; (2) appear in contrasting colors with block letters at least one inch in height; and (3) be displayed in a conspicuous manner clearly visible to the public.\textsuperscript{16} Contrasting is not well defined within the statute, however it is typically black writing on a white background or white writing on black background. Some businesses are choosing to have the sign etched in glass. Specifics on what satisfies compliance with the contrasting colors requirement may be an issue for courts or the legislature to determine in the future. You may preface the sign with “Weapons of Any Kind Are Prohibited” or “All Weapons Are Prohibited on These Premises”, but it must also include the required statutory language above. An example of the §30.06 sign is attached as Exhibit A.

In a busy office like most title companies, posting a sign at the entrance of the premises and visible to the public would be more practical than attempting to ascertain that an individual is carrying a concealed handgun and notifying them verbally or with a card.

\textbf{Open Carry}

The statutory language and notice requirements for the new §30.07 are almost identical to §30.06. Under Texas Penal Code §30.07, a property owner or “someone with apparent authority to act for the owner” should provide either oral or written notice that open carry is forbidden on the premises.\textsuperscript{17} The business owner or property owner is free to choose between providing verbal or written notice. As with the notice regarding concealed carry, written notice for prohibiting open carry is recommended. The card, document or sign, at minimum, must state the following verbatim:

"Pursuant to Section 30.07, Penal Code (trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly."\textsuperscript{18}

\textsuperscript{14} Texas Penal Code §30.06(c)(3)  
\textsuperscript{15} Texas Penal Code §30.06(c)(3)(A)  
\textsuperscript{16} Texas Penal Code §30.06(c)(3)(B)  
\textsuperscript{17} Texas Penal Code §30.07(b)  
\textsuperscript{18} Texas Penal Code §30.07(c)(3)(A)
If a sign is being used to provide notice, then that sign must be (1) written in both English and Spanish; (2) appear in contrasting colors with block letters at least one inch in height; and (3) displayed in a conspicuous manner clearly visible to the public at each entrance to the property. This is notably different than the required notice for concealed handguns. §30.07 (Open Carry) requires the sign to be posted at each entrance to the property, which is vastly different than §30.06 (Concealed Carry) which requires the notice to be clearly visible to the public. When prohibiting open carry, the required signage must be presented at every single entrance, not just visible to the public as is the case for prohibiting concealed carry on the premises. An example of the §30.07 sign is attached as Exhibit B.

**Property Owner’s Decisions vs. Business Owner’s Decision**

It is important to note in some cases, a private business owner’s decision to permit concealed or open carry of handguns on the premises may be overruled by the property owner’s prohibition. If the business owner does not own the building or property, it is advisable to review your office lease or speak with your building owner. If the building owner chooses to prohibit handguns and the building has the proper signage posted, then the property owner’s rights to prohibit handguns would trump the private business owner’s rights to permit it.

**IV. Special Concerns for Employees**

While business owners have to decide whether to permit visitors, vendors, guests and other third parties to openly carry handguns on company premises, employers must also decide whether to allow employees with a LTC to openly carry or concealed carry on company premises. HB 910 does not prevent an employer from prohibiting its employees from carrying handguns on the premises of the business. Employers have several additional considerations before deciding whether they will permit or prohibit employees from bringing guns to work. This is not an all or nothing decision. An employer may allow employees to openly carry holstered handguns on the business’ premises, but prohibit visitors from carrying any handguns. Alternatively, an employer may allow employees and visitors to carry concealed handguns on its premises, but prohibit open carry altogether. Employers will have to contemplate a balance between ensuring a safe workplace for all employees and staying within the parameters of the law. When deciding whether to prohibit its employees from carrying guns in the workplace, the employer should consider not only the nature of its business and the circumstances of its employees and customers, but also ensure that its policies do not violate any leases, insurance policies or other contracts or agreements.

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19 Texas Penal Code §30.07(c)(3)(B)
20 Texas Penal Code §30.07(c)(3)(B)(iii) – emphasis added
21 Government Code §411.203
Guns in Employee’s Cars
The definition of premises is the crucial element in making sure an employer is staying within the confines of the Texas Labor Code. “Premises” is defined as the building or portion of a building and does not include an employee’s locked, privately owned motor vehicle in a parking lot, parking garage, or other parking area the employer provides for employees.\textsuperscript{22} Texas Labor Code §52.061 does not allow a private employer to prohibit its employees, who hold a license to carry a handgun, from keeping it in a locked, privately owned vehicle in a parking lot, parking garage, or other parking area the employer provides for its employees.\textsuperscript{23} As such, if an employer decides to prohibit handguns on the premises, its employees may still carry and store a handgun in their privately owned vehicle. Even without a LTC, a person may still carry a handgun in their car as long as it is concealed. A person with a LTC may store their handgun in their car, either concealed or visible. However, if it is visible it must be in either a belt or shoulder holster.

Guns on Business Premises
Texas Labor Code specifically states that §52.061 does not prohibit an employer from prohibiting an employee who holds a license to carry a handgun under Subchapter H, Chapter 411, Government Code, or who otherwise lawfully possesses a firearm, from possessing a firearm the employee is otherwise authorized by law to possess on the premises of the employer’s business.\textsuperscript{24} As such, the decision is ultimately the employers.

Whether an employer owns the property or not is something to consider because the employers rights might be limited by the property owners rights. Overall, Texas law allows the employer to set the rules for its workplace. If the employer owns the property then they can decide whether to permit or prohibit the carrying of weapons by their employees on the premises and if they wish to allow any exceptions. For example, an employer can decide to prohibit employees from carrying handguns, but make an exception for security guards or an employee with military/law enforcement background. Some employers may make exceptions for certain employees that have been trained to assist with an active shooter or other threats of violence in the workplace. If any exceptions will be allowed, they should be clearly stated with the employer’s gun policy.

If the employer does not own the property, they can still prohibit their employees from carrying handguns on the premises, but if they wish to permit the carrying of handguns, they will need to make sure that decision does not conflict with the property owner’s prohibition. The same rules apply for when a business owner does not own the property. The employer’s right to permit guns in the workplace are overruled by the property

\begin{flushleft}
\textsuperscript{22} Texas Penal Code §46.035(f)(3)  \\
\textsuperscript{23} Texas Labor Code §52.061  \\
\textsuperscript{24} Texas Labor Code §52.062(b)
\end{flushleft}
owner’s right to prohibit them on the premises. If an employee comes to work with a handgun because their employer allows it, the employee could be charged with trespassing by the building owner under Texas Penal Code §30.06 and/or §30.07.

Best practice suggests that revising company policies, obtaining written employee acknowledgment and posting ample and appropriate signage, no matter how redundant, is the best way to comply with Texas gun laws.

V. Liability Considerations

Texas Penal Code §30.06 and §30.07 does not impose any affirmative duty on a business owner to enforce prohibition on concealed carry or open carry. However, if a business owner voluntarily undertakes to provide security measures for the benefit of its customers, Texas tort law says they must do so with reasonable care. Further, ‘if one undertakes to make…premises safe for others, he or she owes a duty to use due care to make the premises safe.’ As such, a business owner should implement security measures regarding weapons on the premises by adopting a clear policy regarding the enforcement of the prohibition of handguns. For example, the City of Dallas has encouraged citizens to call 911 only when a clear violation of HB 910. Violations can include removal of the gun from a secured holster, if the gun holder appears intoxicated or when the gun holder is obviously committing a crime or acting in a reckless or suspicious manner. It is recommended to update employee handbooks to make it clear to employees what is that is intended to be the rule and policy relating to handguns on business premises. Further, it is important to train employees of any new procedures or policies and have each employee provide written acceptance so all security measures that are put into place are understood by the employees and consistently followed. This is the case with all security measures, not just those concerning handguns.

Texas law limits certain liability exposure and duties of an employer. The 2011 concealed handgun law expressly granted employers immunity from civil actions arising from firearms and ammunition stored in an employee’s vehicle, the new law grants no such immunity to employers for civil actions arising from employees’ openly carried weapons. For example, if an openly carried handgun is not prohibited in the workplace and an employee’s gun is discharged injuring another employee, the employer may be held liable for damages. However, if a handgun stored in the employee’s car is discharged injuring another employee, then the employer will enjoy some protection from liability pursuant to Texas Labor Code §52.063, which states:

Except in cases of gross negligence, a public or private employer, or the employer’s principal, officer, director, employee, or agent, is not liable in a civil action for


27 www.dallascitynews.net/opencarry
personal injury, death, property damage, or any other damages resulting from or arising out of an occurrence involving a firearm or ammunition that the employer is required to allow on the employer’s property under this subchapter.28

This immunity from prosecution only extends to hand guns employers are required to allow on their property so its application is noteworthy, but very limited. It is also significant that an employer has no duty to: (1) patrol, inspect, or secure any parking area provided for employees or any privately owned motor vehicle located in a parking area; or, (2) investigate, confirm, or determine an employee’s compliance with laws related to the ownership or possession of a firearm or the transportation and storage of a firearm or ammunition.29

It is worth mentioning, that the new laws do not create a private cause of action for an employee against their employers. If an employee feels that their right to openly carry under the new laws is being infringed upon by their employer, their only recourse would be to report any alleged violation to the Attorney General’s Office.

The new gun laws leave many liability questions unanswered for private business owners and employers in Texas. Many issues – potentially involving significant legal exposure – have yet to play out and be resolved in the courts.

VI. The Gun Debate

The gun debate did not go away with the passage of HB 910. Title Companies are required to pick a side – either to permit or prohibit handguns on their premises. Because of the divided nature of the gun debate, there are advantages and disadvantages to prohibiting guns at your business and there will be customers and employees that either agree or disagree with your decision to prohibit handguns or not. Title companies are a relationship business and customers, whether they are real estate agents, lenders, buyers or sellers, will have an opinion as to what you decide. For example, some real estate agents will believe a title company’s prohibition of a real estate agent’s right to carry a handgun is a statement of whether the title company has a concern for realtor safety. Some real estate agents feel buying a home is a high stress situation as it is and do now want openly carried guns to make it more stressful. Employees will argue that they want to feel safe in the event of an active shooter situation, while other employees have said the mere sight of guns makes them feel unsafe and fearful of a common workplace dispute escalating to violence. Some individuals against carrying handguns will argue that there is no evidence that carrying a handgun deters crime and reduces violence. And others will claim that carrying a handgun is an extra layer of protection for them personally.

28 Texas Labor Code §52.063
29 Texas Labor Code §52.063
While most business owners would rather avoid taking a position on the gun debate, that may no longer be possible. At a minimum, business owners and property owners will have to decide whether to prohibit handguns on its premises.

VII. Conclusion
It is important to review current policies to ensure that they are in compliance with the new laws. To prevent misunderstandings and address security concerns, business owners and employers wishing to prohibit guns should make their policies clear and conspicuous to everyone who enters their property, including employees, visitors, and other third parties.
EXHIBIT A
Example of §30.06 Concealed Carry Signage

PROHIBITING CONCEALED HANDGUNS IN A BUSINESS OR OTHER ENTITY

“PURSUANT TO SECTION 30.06, PENAL CODE (TRESPASS BY LICENSE HOLDER WITH A CONCEALED HANDGUN), A PERSON LICENSED UNDER SUBCHAPTER H, CHAPTER 411, GOVERNMENT CODE (HANDGUN LICENSING LAW), MAY NOT ENTER THIS PROPERTY WITH A CONCEALED HANDGUN.”

“DE CONFORMIDAD CON LA SECCIÓN 30.06, DEL CÓDIGO PENAL (ENTRADA ILEGAL DE UN PORTADOR DE LICENCIA PARA PORTAR ARMAS DE FUEGO CORTAS, CON UN ARMA OCULTA), UNA PERSONA CON LICENCIA, AL AMPARO DEL SUBCAPÍTULO H, CAPÍTULO 411, DEL CÓDIGO DE GOBIERNO (LEY DE LICENCIAS PARA PORTAR ARMAS DE FUEGO CORTAS), NO PODRÁ INGRESAR A ESTA PROPIEDAD CON UN ARMA DE FUEGO CORTA OCULTA.”
EXHIBIT B

Example of §30.07 Open Carry Signage

PROHIBITING OPEN CARRY HANDGUNS IN A BUSINESS OR OTHER ENTITY

“Pursuant to Section 30.07, Penal Code (Trespass by license holder with an openly carried handgun), a person licensed under Subchapter H, Chapter 411, Government Code (handgun licensing law), may not enter this property with a handgun that is carried openly.”

“De conformidad con la Sección 30.07, del Código Penal (entrada ilegal de un portador de licencia para portar armas de fuego cortas, con un arma a la vista), una persona con licencia, al amparo del Sub-capítulo H, Capítulo 411, del Código de Gobierno (ley de licencias para portar armas de fuego cortas), no podrá ingresar a esta propiedad con una arma de fuego corta a la vista.”
TODD or LADYBIRD - WHY NOT?

LADYBIRD or TODD - WHICH ONE GOES HOME WITH YOU?

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Texas Land Title Institute
Friday, December 9, 2016
San Antonio, Texas

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EDUCATION

J.D. Degree (magna cum laude), St. Mary’s University School of Law, 1990
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PROFESSIONAL ACTIVITIES

Solo practitioner

Adjunct Professor of Law, St. Mary’s University School of Law (1998 to present)
Co-Chair, Long Term Care, Medicaid and Special Needs Trust Committee of the Real Property, Trusts & Estates Section of the American Bar Association (2010-2013)
Member, National Academy of Elder Law Attorneys (national and state chapters) (State Board of Directors, 2000 to 2006, 2009 through 2012, Texas Chapter President 2004-2005)
Member, Special Needs Alliance
Member of the College of the State Bar of Texas (1997 to present)
Member of the State Bar of Texas, San Antonio Bar Association; Texas Trial Lawyers Association and San Antonio Trial Lawyers Association

Planning Committee Chair, State Bar of Texas, Elder Law and Guardianship Course (2004)
Planning Committee Member, State Bar of Texas, Advanced Estate Planning Course (2008 & 2013)
Planning Committee Member, The University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference (1999 to present)

Co-Director, The University of Texas School of Law Special Needs Trust Conference (2005 to present)
Listed in Martindale-Hubbell Bar Register AV Preeminent (1999-2016)
Listed in Best Lawyers in America in Elder Law (2007-2016)
Listed in Scene in S.A San Antonio’s Best Lawyers in Trust and Estate Law (2008-2016)

Co-Author of Save My Home! Saving Your Home, Farm or Ranch from Medicaid Estate Recovery in Texas, Elder Law Trio Press, Houston, 2005.
Co-Author of Elder Law, Texas Practice Series Vol. 51, Thomson-Reuters (formerly West Publishing), 2008 to present.


Named in Best Lawyers’ 2016-17 and 2014-15 San Antonio Trusts and Estates “Lawyer of the Year.” (only a single lawyer in each practice area in each community is honored as Lawyer of the Year).

Law Office of Patricia Flora Sitchler named in Best Lawyers’ Best Law Firms 2016-17.

LAW-RELATED PUBLICATIONS AND PRESENTATIONS

Author, TODD or Ladybird - Why Not? Texas Land Title Institute, San Antonio, Texas, December 9, 2016.
Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability; 2015 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker’s Association, Dallas, Texas, July 2016.
Author, Powers of Attorney: Recent Developments, State Bar Advanced Elder Law Conference, Dallas, Texas, April 15, 2016.
Author, The SNT Process, National Structured Settlements Trade Association, Fall Educational Meeting,
Phoenix, Arizona, October 29, 2015.

Author, Creating the Trust: SSA Requirements to get a Self-Settled Trust Accepted and Funded- Doing it Right, Stetson University School of Law Basics of Special Needs Trusts, St. Petersburg, Florida, October 15, 2015.

Author, Powers of Attorney: Recent Developments, University of Texas School of Law Estate Planning, Guardianship and Elder Law Conference, Galveston, Texas August 6, 2015

Author, Elderly/Disability Issues and Medicaid, SSI and Social Security Disability, 2015 Graduate Texas Trust School, Wealth Management & Trust Division of the Texas Banker’s Association, Dallas, Texas, July 2015.


Numerous presentations 1996 though 2014.
LUADYBIRD OR T.DD - WHICH ONE GOES HOME WITH YOU?

The purpose of this presentation is to compare and contrast the Transfer on Death Deed adopted by the Texas legislature in 2015 with the Ladybird deed also known as a deed retaining a life estate with a power of appointment. These two deeds arose out of two separate purposes. The presentation will discuss those purposes and the potential use of each deed.

The Ladybird deed has been around since about 2005, the year that the Texas Health & Human Services Commission adopted rules implementing the 2003 Medicaid Estate Recovery statute. Ladybird Deed is the slang name for an Enhanced Life Estate Deed or a Deed retaining a life estate with a power of appointment. A Grantor transfers property to a grantee retaining a life estate along with the power to sell the property retaining the proceeds of the sale thus cutting off grantee’s right to the property.

The Transfer on Death Deed is statutory, passed by the 84th Legislature and was effective on September 1, 2015. In reviewing some of the estate planning legislation out of the 2015 legislature, there appears to be a mandate to provide a self-help means of transferring property at death. For example, Senate Bill 512 requires the creation of statutory Will forms while Senate Bill 462 ultimately enacted the Transfer on Death Deed that included a statutory form to transfer real property outside of probate.

PURPOSES:

The legislative history of SB 462 sets out the purpose for creating the statutory deed:

Nearly all probate matters require legal counsel, and many beneficiaries are unable to afford legal counsel. As a result, otherwise inheritable real property is now passed through intestacy to pay for the decedent’s estate. This problem can also lead to cloudy titles and complex unintended co-ownership structures that pose difficulties for owners, title companies, local governmental entities, and other real estate stakeholders. S.B. 462 creates a Transfer on Death Deed, which is a way for a real property owner to transfer real estate property while living, with or without a will. It will allow clean title to pass to the respective descendant or beneficiary without going through probate.

The Texas Legislature enacted portions of the Uniform Real Property Transfer on Death Act to set up a simple process for the non-probate transfer of real estate in Chapter 114 of the

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1. SB 462, 84th Legislature.

2. Texas Estates Code §111.052.
Thus, the primary purpose of a ToDD is for estate planning as stated in the legislative history to provide an individual with a simple and inexpensive way of passing real property at death. Of course, using a ToDD to pass real property outside of the probate process could also avoid Medicaid Estate Recovery, as discussed below.

While the Ladybird deed also passes assets outside of probate creating the same simple and inexpensive way of passing real property at death, the primary purpose of a Ladybird deed is to avoid Medicaid Estate Recovery. In order to understand the original purpose for executing a Ladybird deed, there needs to be a little background.

**MEDICAID ESTATE RECOVERY**

In 1987, the Texas Legislature buried an estate recovery law in a statute reorganizing a governmental department. The law allowed the State of Texas to place a lien on the home of a medicaid recipient in order to obtain reimbursement for state Medicaid expenditures made on behalf of the recipient. But, the law caused so much discord that it was repealed in the 1989 session as Senate Bill 1, effectively immediately.

In 1993, in the Omnibus Budget Reconciliation Act, Congress mandated that states recover certain Medicaid expenditures made for a recipient over the age of 55. After the 1987 fiasco, the Texas Legislature resisted implementation of estate recovery for ten years. In 2003, though, an amendment authorizing estate recovery was attached to a 2003 state bill that reorganized a governmental department but this bill implemented an unsecured creditor statute to try to avoid the fire storm created by the 1987 statute. House Bill 2292 was subsequently enacted into law, allowing the State of Texas to recover payments made on behalf of a person who receives Title XIX Medicaid benefits. The Medicaid federal laws are found in Title XIX of the Social Security Act. However, other Medicaid benefits are found in Title XX. Only Title XIX Medicaid is subject to Medicaid Estate Recovery. The 2003 state law effecting estate recovery was brief:

"SECTION 2.17. Subchapter B, Chapter 531, Government Code, is amended by adding Section 531.077 to read as follows: Sec. 531.077. RECOVERY OF MEDICAL ASSISTANCE. (a) The commissioner shall ensure that the state Medicaid program implements 42 U.S.C. Section 1396p(b)(1). (b) The Medicaid account is an account in the general revenue fund. Any funds recovered by implementing 42 U.S.C. Section 1396p(b)(1) shall be deposited in the Medicaid account. Money in the account may be appropriated only to fund long-term care, including community-based care and facility-based care.

A recent CNN article noted “[t]here’s a saying among Medicaid experts: When you’ve seen one Medicaid program, you’ve seen one Medicaid program. That’s because although there are

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federal standards, states have a great deal of leeway about how they manage their programs.”

The federal Medicaid law gave states broad latitude in determining how to implement Medicaid Estate Recovery. Medicaid Estate Recovery can be achieved through a creditor claim limited to the deceased recipient’s probate estate (the §1396p(b)(1) statute) or can be a lien placed on a deceased recipient’s estate prior to death (the §1396p(a) statute). The federal law in the noted section 42 U.S.C. §1396p(b)(1) is an unsecured creditor statute, requiring a state to recover expenditures from the estate of a deceased person who received Medicaid benefits—thus the name “estate recovery.” The alternative Medicaid lien statute found in 42 U.S.C. §1396p(a) was not adopted by the Texas Legislature, probably in part because of the voters’ negative reaction to the 1987 lien statute that had to be repealed.

The federal statute does not set out the rules for estate recovery—leaving the rule making to the Commissioner of the Texas Department of Health and Human Services ("HHSC") heading up the State Medicaid program. Federal law does set out basic requirements along with guidelines and options in the law and in Section 3810 of the Federal State Medicaid Manual. After studying the rules implemented in other states, the Texas Department of Health and Human Services ("HHSC") published the proposed framework of the rules on January 26, 2004 for discussion purposes and scheduled six (6) regional forums to take public comment on the proposed framework. On April 30, 2004, HHSC published the proposed rules. The rules had to be approved by the Center for Medicare and Medicaid Services ("CMS") prior to being effective. After much discussion with CMS, revisions to the rules were made and those revisions were published in the December 3, 2004 Texas Register and on February 8, 2005, the final revisions to the rules were published in the Texas Register. The rules are found in 1 Texas Administrative Code Chapter 378. The following are excerpts from the rules.

**PURPOSE:** The purpose of this chapter is to implement section 531.077, Government Code, consistent with applicable federal law at 42 U.S.C. §1396p(b)(1), which requires the Health and Human Services Commission, as the State Medicaid Agency, to operate a Medicaid Estate Recovery Program ("MERP") to recover the costs of Medicaid long-term care benefits received by certain Medicaid recipients. 1 T.A.C. §373.101

**ESTATE SUBJECT TO MERP:** (a) A Medicaid Estate Recovery claim may be filed against the estate of a deceased Medicaid recipient for covered Medicaid services if the recipient: (1) Was age 55 years or older at the time the services were received; and (2) Initially applied for covered Medicaid long-term care services on or after March 1, 2005, the effective date of these rules. 1 T.A.C. §373.105.

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WHAT MEDICAID PROGRAM BENEFITS ARE RECOVERABLE?

Remember, there is no generic “Medicaid.” Medicaid benefits are delivered through a specific program and there are more than 40 Medicaid program benefits in Texas. MERP is limited to the following program benefits:

(c) Covered Medicaid long-term care services include the following services provided to a recipient age 55 years or older under the State of Texas Medicaid plan under Title XIX of the Social Security Act (SSA): (1) Nursing facility services; (2) Intermediate Care Facilities for Individuals with Intellectual Disabilities (ICF-IID); (3) Home and Community-Based Services (§1915(c) of the SSA) and Community Attendant Services (§1929(b) of the SSA); and (4) Related costs of hospital and prescription drug services. 1 T.A.C. §373.103

WHAT IS THE ESTATE THAT IS SUBJECT TO MERP? The real and personal property of a decedent, both as such property originally existed and as from time to time changed in form by sale, reinvestment, or otherwise, and as augmented by any accretions and additions and substitutions that are included in the definition of the probate estate found in §3(l), Definitions and Use of Terms, Texas Probate Code now Texas Estates Code §22.012. 1 T.A.C. §373.105

Texas Estates Code §22.012 defines the “estate” as “a decedent’s property, as that property (1) exists originally and as the property changes in form by sale, reinvestment or otherwise; (2) is augmented by any accretions and other additions to the property, including any property to be distributed to the decedent’s representative by the trustee of a trust that terminates on the decedent’s death, and substitutions for the property; and (3) is diminished by any decreases in or distributions from the property.”

TRANSFERRING REAL PROPERTY USING A LADYBIRD DEED DOES NOT RESULT IN A MEDICAID DISQUALIFYING TRANSFER PENALTY. Transferring anything of value for the purpose of qualifying for Medicaid program benefits will disqualify an individual from receiving Medicaid assistance described as covered Medicaid long-term care services (see above).

But assets passing via a Lady bird deed do not pass anything of value during the life of the Medicaid recipient/Grantor and thus does not result in a disqualifying transfer penalty as noted in the Texas Health & Human Services handbook.

Enhanced Life Estate Deeds — A legal document (sometimes known as a Lady Bird Deed) in which one transfers property to their heirs while at the same time retaining a life estate with powers including the right to sell the property in their lifetime. Since the life estate holder retains the power to sell the property, its value as a resource is its full equity value. If you see a document that appears to transfer property to heirs while retaining a life estate with powers, contact the regional attorney to determine the value of any transfer. The full value of the
asset is treated as a countable resource to the individual, unless it is a resource that is otherwise excluded, such as a home to which the individual intends to return.  

**MERP is an unsecured creditor statute - it is not a lien statute.**

The acceptance of Medicaid medical assistance, as defined by Title XIX of the Social Security Act, including mandatory and optional payments under the Social Security Act, provides a basis for: A Class 7 probate claim, as defined in §322 of the Texas Probate Code [now Texas Estates Code §355.102], Classification of Claims against Estates of Decedents, in favor of the Medicaid Estate Recovery Program as an interested party in the estate of the deceased Medicaid recipient.  

1 T.A.C. §373.201

(a) The Medicaid Estate Recovery Program (MERP) may file or present a: Class 7 probate claim under §298, Claims Against Estates of Decedents, Texas Probate Code, against the estate of deceased Medicaid recipients in accordance with the priorities contained in §322, Classification of Claims against Estates of Decedents, Texas Probate Code.  

(b) A claim may be filed in accordance with applicable provisions of the Texas Probate Code, including §298 [now Texas Estates Code §355.060], Claims Against Estates of Decedents, which allows unsecured claims to be presented at any time before the estate is closed or within 4 months of receipt of notice from the estate administrator.

Thus, transferring real property outside of probate will not create a transfer penalty, raise fraudulent transfer issues and is not against public policy under Medicaid eligibility rules. No transfer penalty is assessed when property is transferred via a Ladybird deed (or ToDD) because the Grantor has full use and enjoyment of the property and has transferred nothing of value during life. Upon the Grantor's death, if the Grantor still owns the property, the subject property passes outside of probate avoiding Medicaid estate recovery.


6 The ToDD statute refers to the Grantor as the “Transferor.”
**LADYBIRD OR T O D D - W HICH ONE GOES HOME WITH YOU?**

<table>
<thead>
<tr>
<th><strong>Application of the new transfer on death statute</strong></th>
<th>ToDD</th>
<th>Ladybird</th>
</tr>
</thead>
<tbody>
<tr>
<td>Applies only to the statutory ToDD</td>
<td></td>
<td>Does not apply to Ladybird deed</td>
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<tr>
<td>Tex. Est. Code §114.004</td>
<td></td>
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<table>
<thead>
<tr>
<th><strong>Warranty of title that allows access to title insurance in the chain of title</strong></th>
<th>ToDD</th>
<th>Ladybird</th>
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</thead>
<tbody>
<tr>
<td>Not available because deed is limited to a deed without warranty regardless of the language in the deed, resulting in no access to title insurance in the chain of title.</td>
<td></td>
<td>Potentially available because there are no warranty limitations for a Ladybird deed.</td>
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<tr>
<td>Tex. Est. Code §114.103</td>
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</tbody>
</table>

<table>
<thead>
<tr>
<th><strong>Deed signed by an agent</strong></th>
<th>ToDD</th>
<th>Ladybird</th>
</tr>
</thead>
<tbody>
<tr>
<td>prohibited</td>
<td></td>
<td>allowed</td>
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<tr>
<td>Tex. Est. Code §114.054</td>
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<thead>
<tr>
<th><strong>Grantor/Transferor’s capacity to sign</strong></th>
<th>ToDD</th>
<th>Ladybird</th>
</tr>
</thead>
<tbody>
<tr>
<td>must rise to the level of the capacity needed to sign a contract(^7)</td>
<td></td>
<td>Capacity to sign a deed: “Grantor must have sufficient mental capacity at the time of its execution to understand his legal rights;... The term ‘mental capacity’ means that the grantor at the time of the execution of the deed must have had sufficient mind and memory to understand the nature and effect of his act.”(^8)</td>
</tr>
<tr>
<td>Tex. Est. Code §114.054</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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\(^7\) Historically courts have held that less mental capacity is required to enable a testator to make a will than for an individual to make a contract or deed. See, e.g., Burk v. Mata, 529 S.W.2d 591 (Tex. Civ. App.—San Antonio 1975, writ ref’d n.r.e.); Smith v. Welch, 285 S.W.2d 823 (Tex. Civ. App.—Texarkana 1955, writ ref’d n.r.e.); Rudersdorf v. Bowers, 112 S.W.2d 784 (Tex. Civ. App.—Galveston 1938, writ dism’d). So although the purpose of the Transfer on Death Deed is to provide a fill-in-the blank method of transferring property at death, the statute retained the higher capacity necessary to execute a deed.

\(^8\) *Jackson v. Henninger*, 482 S.W.2d 323, 324-325 (Tex. App.—Austin, 1972, no writ).
| Notice, delivery and acceptance of a deed | effective without notice or delivery or acceptance by the beneficiary during the transferor's life. If Grantee has no notice of the ToDD, Grantee may lose very valid government benefits upon the death of the transferor. An individual cannot disclaim in order to preserve eligibility for Medicaid program benefits and Supplemental Security Income (SSI). Tex. Est. Code §114.056 | “A conveyance of an estate of inheritance, a freehold, or an estate for more than one year, in land and tenements, must be in writing and must be subscribed and delivered by the conveyor or by the conveyor’s agent authorized in writing.” Texas Property Code §5.021 |
| Divorce revokes the deed | Yes Tex. Est. Code §114.057 | No |
| Homestead rights & ad valorem tax exemptions | does not affect Tex. Est. Code §114.101 | should not affect |
| Creditor’s rights and due on sale clause | does not affect Tex. Est. Code §114.101 | should not affect |
| Equitable rights in favor of grantee | None Tex. Est. Code §114.101 | None |
| Sale upon death of transferor | A title company may not immediately insure title in the sale of property obtained via a ToDD. Section 114.106(a) provides that "to the extent the transferor's estate is insufficient to satisfy a claim against the estate, expenses of administration, any estate tax owed by the estate or an allowance in lieu of exempt property...the personal representation may enforce that liability against real property transferred under a ToDD...." | no limitation |
transfer for Medicaid purposes should not be a disqualifying transfer no disqualifying transfer as recognized by HHSC.⁹

**Some Thoughts**

The purpose of a ToDD is to provide persons who cannot afford legal fees the ability to transfer property to transferees without the expense of probate. Such transfer occurs without notice and delivery. But it would not be unusual for the transferee to have a modest estate similar to the Transferor. If a transferee is disabled, needing or receiving government need-based benefits such as SSI, one of the various Medicaid program benefits, section 8 housing and/or Supplemental Nutrition Assistance (a.k.a. food stamps), the sudden receipt of real property at the death of a Transferor could disqualify the transferee with little or no chance to remedy the loss of benefits unless legal counsel is engaged. Even an astute attorney may not be able to resolve the loss of benefits. For example, disclaimer generally disqualifies an individual for many need-based government benefits. Also, it may be impossible to sell the real estate passed via a ToDD immediately after the Transferor’s death in order to maintain need-based government benefits if the sale requires title insurance due to Texas Estates Code §114.106(a). However, if estate planning is the only issue and government welfare benefits of the transferee are not at issue, then a statutory ToDD may be the answer. Hopefully, there will be sufficient education of our citizens so that the Grantor/Transferor can make an informed decision on the appropriate deed needed to avoid probate.

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⁹ HCFA Transmittal No. 64, November 1994, provides that the Ladybird Deed is not a transfer. 3258.9A
Owelty Transactions and Divorce in Texas

Texas Land Title Institute
December 8-9, 2016

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John H. Dorris is Senior Underwriting Counsel for First American Title Insurance Company in Houston. He has been with First American since June of 1996. His current duties include providing underwriting support for agents and direct operations throughout Texas.

This is John’s second stint with First American in Houston. From June 2002 until November 2005, John was State Counsel/Assistant Vice President for First American’s New Mexico operation. His duties there included claims handling for the state and providing underwriting support for agents and direct operations.

Prior to transferring to New Mexico, John was Underwriting Counsel/Assistant Vice President for First American’s Texas Operation. His duties included answering underwriting calls from agents within and outside of Texas, and assisting with claims. During this time, he also served as the Texas Coordinator for First American’s New York Commercial division.

Prior to joining the Texas underwriting staff, John was Division Counsel for First American’s Houston Division. Before joining First American, he was an Associate Attorney for Moore & Jones, a law firm in Hattiesburg Mississippi.

John received a Bachelor of Arts degree in Marketing from Mississippi State University and his Juris Doctorate from the University of Mississippi.

John may be reached at 800-347-7826 or by email at jdorris@firstam.com.
The Basics

Valid liens against homestead property in Texas:

1. Purchase money
2. Property taxes
3. An owelty of partition imposed against the entirety of the property by a court order or by a written agreement of the parties to the partition, including a debt of one spouse in favor of the other spouse resulting from a division or an award of a family homestead in a divorce proceeding;
4. Refinance of a valid lien, including Federal Tax Lien
5. Work or materials used to construct new improvements
6. Home Equity Loan
7. Reverse Mortgage
8. Properly converted manufactured home lien

Owelty Definitions:

- A payment made to the other party when it is impossible to partition land into units of exactly equal value.
- A lien created or a pecuniary sum paid by order of the court to effect an equitable partition of property (as in divorce) when such a partition in kind would be impossible, impracticable, or prejudicial to one of the parties. Meriam Webster
- Equality. This word is used in law in several compound phrases, as follows: 1. Owelty of partition is a sum of money paid by one of two coparceners or cotenants to the other, when a partition has been effected between them, but the land not being susceptible of division into exactly equal shares, such payment is required to make the portions respectively assigned to them of equal value. 2. In the feudal law, when there is lord, mesne, and tenant, and the tenant holds the mesne by the same service that the mesne holds over the lord above him, this was called “owelty of services.” Tomlins. 3. Owelty of exchange is a sum of money given, when two persons have exchanged BL.LAW DICT.(2D ED.)

The Constitutional provision expressly allowing owelty liens against homestead property was passed in 1998. In 1989, a bankruptcy court had held that an owelty lien was not sufficient to place a lien on an entire interest when it is used to acquire another co-owners interest. In that case, the court held that the lender that re-financed the owelty lien only had an interest in the undivided interest that was acquired, not the undivided interest that was already owned by their borrower. When they foreclosed, therefore, they became co-tenants with their borrower.
Owelty Scenarios:

1. H and W acquire homestead while married. Divorce decree specifically states that it is awarding the homestead to one spouse, and imposing an owelty lien using language such as:

   Owelty of Partition

   The Court, having awarded the family homestead of the parties to Respondent, finds that it is necessary to impose an encumbrance for owelty of partition against the entirety of the property to secure the payment of the debt resulting from the award.

   IT IS ORDERED AND DECREED that an encumbrance for owelty of partition is imposed against the entirety of the homestead property described as follows: [description redacted] ANNEXATION, more commonly known as: [description redacted], San Antonio, Bexar County, Texas 78247

   The purpose of the encumbrance is to secure the payment of the debt of Respondent in favor of Petitioner of eighty-four thousand and no/100 dollars ($84,000), resulting from the award of the homestead in this divorce proceeding. The debt shall be payable as follows: $2000.00 per month beginning on September 1, 2015 payable in equal amounts on the 5th and 30th day of each month for 42 months.

   To further evidence the debt, Respondent is ORDERED to sign a note payable to Petitioner in the amount of the debt specified above and payable according to the terms specified above. Respondent is FURTHER ORDERED to sign a deed of trust to secure payment of the debt resulting from the owelty of partition.

   This debt is part of the division of community property between the parties and shall not constitute or be interpreted to be any form of spousal support, alimony, or child support.

   Is anything further needed?

2. H and W acquire homestead while married, subject to a purchase money lien. At the time of divorce, there is very little equity in the property, and W, just wanting to be done with the thing, is willing to let H have it, and receive no payment. She does not, however, want to remain on the note with H. The decree states that the property is vested in H, and W is divested, and contains a good legal description.

   What else is needed? Is an owelty deed and/or lien needed in this situation?
3. H and W acquire homestead while married. At the time of the divorce, it is worth $300k and is free and clear. W wants to keep the house, and H is willing to let her have it. W currently has no money to buy H’s $150k share, but expects to have the money in about two years. H is willing to wait that long for his money, but wants security for the obligation. Accordingly, the court awards the property to W, divests H, and grants H an owelty lien for $150k.

What is the problem here?

4. H and W acquire homestead while married. At the time of the divorce, the outstanding lien is paid down to 200k, and the property is worth 300k. H is to get the property in the divorce but can’t pay W her half of the equity. Also, W wants H to refinance and get her off the note. The decree vests H and divests W. It also grants an owelty lien to W in the amount of $50k.

What else is needed to get W her 50k and get her off the note?

5. W owns a house free and clear when she marries H, and they move into it as their homestead. During the marriage, H loans W $100k to start a business that promptly fails. As part of the divorce, W is willing to give H a note for the $100k. H also wants security for this, so the court grants him an owelty lien against W’s property to secure the note. The court confirms the property as W's, and orders W to execute an owelty deed of trust to H. Now, in order to get H his money, W goes to her local bank and applies for a refinance. Local bank approaches Home Town Title company and wants a policy.

Can we safely insure this loan? If so, how? If not, why not?

6. H and W acquire a house after the get married, paying $200k. Soon, they decide things aren’t working out, so they decide to divorce. Not having kids or a lot of assets to worry about, they decide to forgo a fancy lawyer and file for their own divorce, getting their documents from a website based in Kazakhstan. Needless to say, the decree, though somehow signed by the judge, is not very good or thorough. Among other things, it makes no provisions regarding the house. After the divorce is concluded, H decides he wants the house, and W is only too happy to sell her half to him for $100k.

Assuming H can’t pay cash for W’s half, how, if at all, can they accomplish this?
Bonus Non-Divorce Question

7. Bertha Sue died, and her only heirs were her sons, Larry, Moe and Curley. She only had one asset of any significance which was her modest house, worth $120k. At the time she died, she lived in the house with Larry, who took care of her. Larry wants to keep the house and buy out his brothers. Assuming Larry doesn’t have the funds to pay cash to his brothers, how can this be accomplished?

***Deeds attached as exhibits are by Chuck Jacobus and the State Bar of Texas.
DISPOSITION OF RESIDENCE HOMESTEAD. Husband and Wife own, as a part of their community estate, the following described real property that has heretofore been their marital homestead: __________ (insert legal), more commonly known as ______ (insert street address), and hereinafter referred to as the “Residence Homestead.”

The Court finds that this property cannot be divided in kind without significantly impairing the value of the resulting portions and that a just and right division can be made without compelling a sale of the property, if this Decree orders a partition of the Residence Homestead with an owelty award, properly secured, to equalize the shares. The Court further finds that, to the extent of the Residence Homestead, this Decree is a partition of the community property of the parties and that the creation of a secured indebtedness between the parties is necessary to accomplish a just and right division of their estate.

IT IS ORDERED that __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) shall own, possess, and enjoy the Residence Homestead as ____ (his/her) sole and separate property and ____ he/she is hereby awarded all of the community estate's interest in and to such property, both land and improvements, subject to the mortgage-secured indebtedness now encumbering the property, which __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) assumes and agrees to pay, and further subject to the lien or liens awarded to or ordered made in favor of __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) under the terms of this Decree. Likewise, __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) is hereby divested of all right, title, and interest in and to the Residence Homestead, except for the lien or liens awarded to or ordered made in favor of __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) under the terms of this Decree.

IT IS ORDERED that, to accomplish a just and right division between them, __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) shall recover from __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) the sum of __________ DOLLARS ($__________), to be paid by __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) for the purchase __________ (Husband/Wife or Petitioner/Respondent/or Name of Party)'s interest in the Residence Homestead. The award of this sum to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) is necessary for an adjustment of equities between the parties, in connection with the transfer to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) of full interest in the Residence Homestead. To enforce payment of this sum by __________ (Husband/Wife or Petitioner/Respondent/or Name of Party), an equitable judicial lien is hereby created and awarded to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party), which lien is in the nature of a vendor’s lien and encumbers the full fee simple title to the Residence homestead. This payment between the parties is part of the division of their community property estate and shall not constitute or be construed as any form of spousal support or alimony. Any third party who advances funds to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) for payment of this sum owed to __________ (Husband/Wife or Petitioner/Respondent/or Name of Party) shall, with or without formal assignment of
lien, be subrogated to the equitable judicial lien of this Decree.

The parties are ORDERED to execute the following documents not later than ____ (__) days from the date on which this Decree is entered: A Warranty Deed in owelty-of-partition form, executed by both ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party) and ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party), conveying the Residence Homestead to PETITIONER; a Real Estate Lien Note from PETITIONER to RESPONDENT, in the principal sum of $_____________ less any part of _________________ (Husband/Wife or Petitioner/Respondent/or Name of Party)’s award then or previously paid by _________________ (Husband/Wife or Petitioner/Respondent/or Name of Party); and a Deed of Trust from ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party) to ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party) as Beneficiary, encumbering the Residence Property and securing payment the Real Estate Lien Note given by ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party) to ________________ (Husband/Wife or Petitioner/Respondent/or Name of Party).”
OWELTY DEED
(Tenants in Common)
(To acquire 100% of the fee-Loan from Third Party Lender)

THE STATE OF TEXAS §
COUNTY OF *____________ §

WHEREAS, *_____________________, of the County of *_____________, State of Texas, hereinafter called "Grantor," and *____________________, of the County of *_____________, State of Texas, hereinafter called "Grantee," as tenants in common own that certain real property described on attached Exhibit "A," hereinafter called the "Property," and at this time desire to have a partition of the Property, and Grantee desires to take one hundred percent (100%) of the Property in fee simple but is unable to pay the full value of the undivided interest owned by Grantor, and Grantee has arranged to borrow the sum of *_____________ ($*_________) from *______________, hereinafter called "Lender," in order to acquire the Property in fee simple, which sum Lender is willing to advance, provided it is secured by an owelty of partition lien on the full fee simple title in the Property and a Deed of Trust lien is created by the Grantee on the Property; and

WHEREAS, the Property is not susceptible to partition in kind, and in order to acquire the full fee simple title in and to the Property, it will be necessary to fix a lien on the entirety of the Property in the sum of *___________ ($*_________), representing an owelty of partition, and the necessary adjustment between the parties to this Deed in order to carry out their purpose of partitioning the Property, and the said Grantee specifically acknowledges that said lien of owelty of partition is superior to Grantee's rights and use and occupancy of the Property as Grantee's homestead or otherwise, and as fully and completely as if said lien or owelty of partition were fixed and decreed by a court of competent jurisdiction in a partition suit between the parties of this Deed;

NOW, THEREFORE, Grantor in consideration of the premises and other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of Grantee's execution of a promissory note in the original principal sum of *_____________ ($*_________), dated *____________, payable to the order of *______________, and secured by a Deed of Trust on the herein real property, filed and recorded of record under Clerk's File Number *__________, and/or Volume *________, Page *______, of the Official Public Records of Real Property of *________________ County, Texas; and the further consideration of other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of the sum of *___________ ($*_________), as hereinafter provided, and for the purpose of effecting a partition of the Property, Grantor has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY unto the Grantee the Property.

FOR TEN DOLLARS ($10.00) and other good and valuable consideration, and the further consideration that Lender has at the request of and as a loan to Grantee advanced the sum of *___________ ($*_________), and to evidence said indebtedness, the Grantee has made and executed Grantee's certain promissory note of even date herewith, payable to the order of Lender as therein
specified, and to secure the payment of said note, Grantor has retained a valid and subsisting owelty lien on the entirety of the Property and by these presents does simultaneously convey, transfer, and assign to Lender said liens until said note, both principal and interest, and other charges therein stipulated have been fully paid according to the face, tenor, effect, and reading thereof, when this Deed shall become absolute. The payment of said note is additionally secured by an Owelty Deed of Trust of even date herewith from Grantee to *________________, TRUSTEE, which Owelty Deed of Trust is a cumulative remedy and security for the enforcement of the payment of said indebtedness.

TO HAVE AND TO HOLD the Property and premises, together with all the rights and appurtenances lawfully accompanying it by the Grantee, Grantee's heirs, executors, and administrators forever; and the Grantor does hereby bind Grantor, Grantor's heirs and assigns to WARRANT AND FOREVER DEFEND the title to the Property unto the Grantee, Grantee's heirs, executors, and administrators, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Grantee joins in the execution of this Deed for the purposes of accepting the delivery thereof and acknowledging to Lender's successors and/or assigns the validity of the Owelty Deed of Trust lien securing the payment of said $*_____________ on the entirety of the Property and the full fee simple owelty lien and the validity of the liens, rights, equities, and remedies of the title thereto, and does hereby expressly acknowledge that said liens are prior and superior to any right of use, occupancy, and homestead which Grantee may have, hold, or claim in and to the Property, and further state that Grantee knows that Lender would not advance such funds for Grantee's use and benefit except for the confidence and reliance Lender has upon the representations made and the facts stated in this Deed.

EXECUTED this *_____ day of *______________, *______.

GRANTEE:

*______________________________  GRANTOR:

*______________________________  *

*______________________________  *

GRANTEE'S ADDRESS:

*________________________________

THE STATE OF TEXAS §

COUNTY OF *__________ §

The foregoing instrument was acknowledged before me on this *_____ day of *______________, *______, by *______________________________.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
OWELTY DEED
(Divorce Decree)
(To acquire 100% of the fee-Loan from Third Party Lender)

THE STATE OF TEXAS

COUNTY OF *____________

KNOW ALL MEN BY THESE PRESENTS:

WHEREAS, by virtue of the Divorce Decree dated *________, rendered in Cause No. *________, in the *_____________ Judicial District Court, *_____________ County, Texas, *____________, hereinafter called "Grantor" and *_____________ hereinafter called "Grantee," and by virtue of said divorce, own as tenants in common that certain real property on attached Exhibit "A," hereinafter called the "Property," and at this time desire to have a partition of the Property, and Grantee desires to take one hundred percent (100%) of the Property in fee simple but is unable to pay the full value of the undivided interest owned by Grantor, and Grantee has arranged to borrow the sum of *_____________ ($*_________) from Third Party Lender, hereinafter called "Lender," in order to acquire the Property in fee simple, which sum Lender is willing to advance, provided it is secured by an owelty of partition lien on the full fee simple title in the Property and an Owelty Deed of Trust lien is created by the Grantee on the Property; and

WHEREAS, the Property is not susceptible to partition in kind, and in order to acquire the full fee simple title in and to the Property, it will be necessary to fix a lien on the entirety of the Property in the sum of *_____________ ($*_________), representing an owelty of partition, and the necessary adjustment between the parties to this Deed in order to carry out their purpose of partitioning the Property, and the said Grantee specifically acknowledges that said owelty of partition is superior to Grantee's rights and use and occupancy of the Property as Grantee's homestead or otherwise, and as fully and completely as if said lien or owelty of partition were fixed and decreed by a court of competent jurisdiction in a partition suit between the parties of this Deed;

NOW, THEREFORE, Grantor in consideration of the premises and pursuant to the above-referenced Divorce Decree, and Grantee's assumption of the unpaid principal and interest on that certain promissory note executed by *________________ and *______________ in the original principal sum of *_____________ ($*_________), dated *________, payable to the order of *_______________, and secured by a deed of trust on the herein real property, filed and recorded of record under Clerk's File Number *_______ and/or Volume *______, Page *______, of the Official Public Record of Real Property of *________________ County, Texas; and the further consideration of other good and valuable consideration to me in hand paid by the said Grantee, the receipt of which is hereby acknowledged, and the further consideration of the sum of *_____________ ($*_________), as hereinafter provided, and for the purpose of effecting a partition of the Property, Grantor has GRANTED, SOLD, and CONVEYED, and by these presents does GRANT, SELL, and CONVEY unto the Grantee the Property.

FOR TEN DOLLARS ($10.00) and other good and valuable consideration, and the further consideration that Lender has at the request of and as a loan to Grantee advanced the sum of *_____________ ($*_________), and to evidence said indebtedness, the Grantee has made and
executed Grantee's certain promissory note of even date herewith, payable to the order of Lender as therein specified, and to secure the payment of said note, Grantor has retained a valid and subsisting owelty lien on the entirety of the Property and by these presents simultaneously convey, transfer, and assign to Lender said liens until said note, both principal and interest, and other charges therein stipulated have been fully paid according to the face, tenor, effect, and reading thereof, when this Deed shall become absolute. The payment of said note is additionally secured by an Owelty Deed of Trust of even date herewith from Grantee to *_____________________, TRUSTEE, which Owelty Deed of Trust is a cumulative remedy and security for the enforcement of the payment of said indebtedness.

TO HAVE AND TO HOLD the above described Property and premises, together with all the rights and appurtenances lawfully accompanying it, by the Grantee, Grantee's heirs, executors, and administrators forever; and the Grantor does hereby bind Grantor, Grantor's heirs and assigns to WARRANT AND FOREVER DEFEND the title to the Property unto the Grantee, Grantee's heirs, executors, and administrators, against every person whomsoever lawfully claiming or to claim the same or any part thereof.

Grantee joins in the execution of this Deed for the purposes of accepting the delivery thereof and acknowledging to Lender, and Lender's successors and/or assigns the validity of the owelty lien and the validity of the liens, rights, equities, and remedies of the Owelty Deed of Trust lien securing the payment of said $*___________ on the entirety of the Property and the full fee simple title thereto, and does hereby expressly acknowledge that said liens are prior and superior to any right of use, occupancy, and homestead which Grantee may have, hold, or claim in and to the Property, and further state that Grantee knows that Lender would not advance such funds for Grantee's use and benefit except for the confidence and reliance Lender has upon the representations made and the facts stated in this Deed.

EXECUTED this the *_______ day of *____________________, *_________.

GRANTEE:      GRANTOR:

* ___________________________          * ___________________________

* ___________________________

GRANTEE'S ADDRESS:  

* ___________________________

THE STATE OF TEXAS  §

COUNTY OF *___________  §

The foregoing instrument was acknowledged before me on this *______ day of *____________________, *__________, by *____________________.

______________________________
NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS
Owelty of Partition Deed

Notice of confidentiality rights: If you are a natural person, you may remove or strike any or all of the following information from any instrument that transfers an interest in real property before it is filed for record in the public records: your Social Security number or your driver’s license number.

Date:

Grantor:

Grantor’s Mailing Address:

Grantee:

Grantee’s Mailing Address:

Consideration: [Cash and a/A] note of even date executed by Grantee and payable to the order of [name of third party or grantor] in the principal amount of [amount] DOLLARS ($[amount]). The note is secured by a first and superior vendor’s lien, an owelty lien, and superior title retained in this deed in favor of [name of third party or grantor] and by a first-lien deed of trust of even date from Grantee to [name], trustee.

Property (including any improvements): [Describe the entire property being partitioned.]

Property Portion Conveyed (including any improvements): [Describe the property being conveyed by this deed.]

Reservations from Conveyance:

Exceptions to Conveyance and Warranty:

Grantor, for the Consideration and subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Property, together with all and singular the rights and appurtenances thereto in any way belonging, to have and to hold it to Grantee and Grantee’s heirs, successors, and assigns forever. Grantor binds Grantor and Grantor’s heirs and successors to warrant and forever defend all and singular the Property to Grantee and Grantee’s heirs, successors, and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof, except as to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.

The vendor’s lien and owelty lien against, and superior title to, the Property are retained until the note described is fully paid according to its terms, at which time this deed becomes absolute.

[Name of third party], at Grantee’s request, has paid in cash to Grantor that portion of the purchase price of the Property Portion Conveyed that is evidenced by the note described. The vendor’s lien, owelty lien, and superior title to the Property are retained for the benefit of, and are transferred to, [name of third party] without recourse on Grantor.
Owelty Recitals

First. A divorce was granted terminating the marriage between Grantor and Grantee by divorce decree dated [date], rendered in Cause No. [number] in the [designation] Court of [county] County, Texas. An order partitioning the Property was entered [date] in the same cause and Court.

First. Grantor and Grantee have agreed to the transfer of ownership and owelty of partition effected by this deed by separate Owelty of Partition Agreement dated [date], between Grantor and Grantee, as cotenants of the Property.

Second. Grantor and Grantee, owning the Property as tenants in common, desire to effect a partition of the Property in order that Grantee own 100 percent of the Property in fee simple. [Include if applicable: Grantee has arranged to borrow the amount of $[amount] from [name of lender] (“Lender”), in order to acquire the Property Portion Conveyed in fee simple. Lender is willing to advance that amount provided that the indebtedness is secured by a first and superior vendor’s lien, owelty lien, superior title, and a deed-of-trust lien, all on the full fee simple title in and to 100 percent of the Property.]

Third. The Property is not susceptible to partition in kind and, for Grantee to acquire the full fee simple title in and to the Property Portion Conveyed, it is necessary to fix a lien on the entirety of the Property in the amount of $[amount]. The lien represents an owelty of partition and the necessary adjustment between the parties to carry out the purposes of the partition. Grantee acknowledges that the vendor’s lien, owelty lien or owelty of partition, and superior title are superior to Grantee’s rights to use and occupy the Property as Grantee’s homestead or otherwise as fully and completely as if the liens or owelty of partition were fixed and judicially decreed in a partition suit between Grantor and Grantee.

Grantee joins in the execution of this deed and binds Grantee’s heirs, successors, and assigns in acceptance of the delivery of the deed. Grantee stipulates to [Grantor and Grantor’s/Lender and Grantor and each of their respective] heirs, successors, and assigns the following: (1) the truth and correctness of the Recitals and the validity of the vendor’s lien, owelty lien, superior title, and deed-of-trust lien securing the payment of the indebtedness, on the entirety of the full fee simple title to the Property; (2) the vendor’s lien, owelty lien, superior title, and deed-of-trust lien are prior and superior to any right of use, occupancy, and homestead that Grantee may have or claim in and to the Property; [and] (3) the whole fee simple title to the Property is vested in Grantee under this deed [include if applicable: ; and (4) Lender has advanced funds to Grantee in reliance on the stipulations and representations made and the facts stated in this deed].

____________________________________
[Name of grantor]

____________________________________
[Name of grantee]
HOME EQUITY CURES

by

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Presented to

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Hyatt Hill County Resort & Spa
San Antonio, Texas
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Michael K. O'Neal

Michael K. O'Neal is a shareholder in the Dallas office of Winstead PC. His practice area focuses on the corporate and regulatory representation of financial institutions. He advises on matters including formations, acquisitions, investments, lending, enforcement and compliance. He also advises on consumer finance issues including home equity lending and other mortgage banking matters.

Mr. O'Neal was named Best Lawyers’ Lawyer of the Year, Financial Services Regulation Law, Dallas, Texas (2012 and 2016), in the Texas Lawyer "Go-To-Guide" for banking law (October 8, 2007), and to the 2008 BTI Client Service All-Star Team. He is on the Governing Committee of the Conference on Consumer Finance Law, served on the Commissioner's Council of the Texas Department of Banking, and is a Past President of the Texas Association of Bank Counsel. He graduated with distinction from the University of Nebraska School of Law in 1986.
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HOME EQUITY CURES¹

This paper is intended as an update of certain recent developments pertaining to cures of Texas home equity loans, including Texas home equity lines of credit ("HELOCs"). THIS PAPER IS NOT A DEFINITIVE EXPLANATION OF THE TEXAS HOME EQUITY LENDING LAW AND IT IS NOT INTENDED AND SHOULD NOT BE RELIED UPON AS LEGAL ADVICE REGARDING THE MEANING OF ANY PROVISION OF THE LAW. Accordingly, readers should consult with, and seek the advice of, their own counsel with respect to any individual situation that involves the material contained in this paper, the application of such material to their specific circumstances, or any questions relating to their own affairs that may be raised by such material.

I. SUPREME COURT OF TEXAS DECISIONS

The Supreme Court of Texas (the "Court") has issued opinions addressing Texas home equity loans and related issues in the following:

- **Stringer v. Cendant Mortgage Company**, 23 S.W.3d 353 (Tex. 2000), in which the Court concludes that a home equity lender may require the borrower to pay off debt that is not secured by the homestead with the loan proceeds and recognizes that Section 50(g)'s notice provisions do not independently establish rights or obligations for a home equity loan.

- **Doody v. Ameriquest Mortgage Company**, 49 S.W.3d 342 (Tex. 2001), in which the Court found that Section 50(a)(6)(Q)(x) is a cure provision that applies to all of Section 50(a) and, in addition to protecting the loan's principal and interest, operates as a cure provision that validates a lien securing an equity loan.

- **LaSalle Bank National Association v. White**, 246 S.W.3d 616 (Tex. 2007), in which the Court upheld the doctrine of equitable subrogation and in so doing stated "Invalidation of a contractual lien does not preclude equitable subrogation."³

- **Finance Commission of Texas v. Norwood**, 418 S.W.3d 566 (Tex. 2013), in which the Court concludes, among other things, (i) the interpretations of the Finance Commission of Texas and Credit Union Commission of Texas (collectively, the "Commissions") of Section 50 are subject to judicial review; (ii) the interpretation defining "interest" which is excluded from the three percent fee cap imposed by Section 50(a)(6)(e), 7 T.A.C. § 153.1(11), and related interpretations, 7 T.A.C. §§ 153.5(3), (4), (6), (8), (9), and (12), are invalid; and (iii) the Commissions' interpretations of Section 50(a)(6)(N),

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¹ The author acknowledges with thanks the contribution of his colleague, Ashley DeRon, to the preparation of this paper.

² TEX. CONST. art XVI, § 50(g).

³ 246 S.W.3d at 620.
requiring that a home equity loan is "closed only at the office of the lender, an attorney at law, or a title company," in 7 T.A.C. §§ 153.15(2) (i.e., permitting consent by mail or other delivery) and (3) (i.e., permitting a power of attorney to allow the attorney-in-fact to execute closing documents), contradict the purpose and text of the provision and are therefore invalid.

- **Sims v. Carrington Mortgage Services, LLC**, 440 S.W.3d 10 (Tex. 2014), in which the Court found that a restructuring of a home equity loan that involves the capitalization of past-due amounts owed under the terms of the initial loan and a lowering of the interest rate and the amount of installment payments, but does not involve the satisfaction or replacement of the original note, an advancement of new funds, or an increase in the obligations created by the original note, is not a new extension of credit that must meet the requirements of Section 50.

- **Wells Fargo Bank, N.A. v. Murphy**, 458 S.W.3d 912 (Tex. 2015), in which the Court held (i) the trial court had authority under the Uniform Declaratory Judgments Act ("UDJA") to award attorneys’ fees to the lender, and (ii) the attorney fees incurred were not part of the "extension of credit" to borrowers within the meaning of the constitutional homestead provision.

- **Garofolo v. Ocwen Loan Servicing, LLC**, No. 15-0437, 2016 Tex. LEXIS 391, 59 Tex. Sup. J. 920 (Tex. May 20, 2016), in which the Court addressed the following certified questions:

  1. Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

  2. If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?

The Court answered "no" to both. The Court held that Section 50(a)(6) sets out the terms and conditions a home equity loan must include to make the loan foreclosure-eligible, but it does not create a constitutional cause of action or
remedy for a lender's breach of those terms and conditions. The Court also held that a breach of those terms and conditions may give rise to a breach of contract claim for which forfeiture can sometimes be an appropriate remedy, but when forfeiture is unavailable, the borrower must show actual damages or seek some other remedy such as specific performance to maintain a suit.

- **Wood v. HSBC Bank USA, N.A.,** No. 14-0714, 2016 Tex. LEXIS 383, 59 Tex. Sup. J. 877 (Tex. May 20, 2016), in which the Court held that no statute of limitations applies to suits to quiet title based on alleged noncompliance with the terms and conditions for home-equity loans set forth in Section 50(a)(6).

Summarized below are the Court's most recent decisions – *Garofolo* and *Wood* – and their impact on home equity cures.

### A. Foreclosure-eligible; Terms and Conditions Required – *Garofolo v. Ocwen Loan Servicing, LLC*

The Fifth Circuit certified two questions to the Court pertaining to Section 50(a)(6)(Q)(vii), which provides that a Texas home equity loan is:

(6) an extension of credit that:

...  

(Q) is made on the condition that:

...  

(vii) within a reasonable time after termination and full payment of the extension of credit, the lender cancel and return the promissory note to the owner of the homestead and give the owner, in recordable form, a release of the lien securing the extension of credit or a copy of an endorsement and assignment of the lien to a lender that is refinancing the extension of credit.5

In the case, the home equity note was paid off. The borrower did not receive the cancelled note or the release of lien, and she notified the holder of the same. When the holder did not provide the note and release within 60 days, the borrower filed suit alleging the holder had violated Section 50(a)(6)(Q)(vi) and had failed to cure, and for breach of contract. The holder filed a motion to dismiss and argued the Texas Constitution is satisfied by including the requirement in

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5 TEX. CONST. art. XVI, § 50(a)(6)(Q)(vii).
7 *Id.* at *2-3.
8 *Id.* at *3.
the terms of the security instrument and the constitution does not require a lender or holder to cancel and return a note upon full payment. The security instrument provided that "[w]ithin a reasonable time after termination and full payment of the Extension of Credit, Lender shall cancel and return the Note to the owner of the Property and give the owner . . . a release of lien." The two certified questions were:

1. Does a lender or holder violate Article XVI, Section 50(a)(6)(Q)(vii) of the Texas Constitution, becoming liable for forfeiture of principal and interest, when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?10

2. If the answer to Question 1 is "no," then, in the absence of actual damages, does a lender or holder become liable for forfeiture of principal and interest under a breach of contract theory when the loan agreement incorporates the protections of Section 50(a)(6)(Q)(vii), but the lender or holder, although filing a release of lien in the deed records, fails to return the cancelled note and release of lien upon full payment of the note and within 60 days after the borrower informs the lender or holder of the failure to comply?11

The Court answered "no" to both and explained:

Our constitution lays out the terms and conditions a home-equity loan must include if the lender wishes to foreclose on a homestead following borrower default. It does not, however, create a constitutional cause of action or remedy for a lender's subsequent breach of these terms and conditions. A post-origination breach of those terms and conditions may give rise to a breach-of-contract claim for which forfeiture can sometimes be an appropriate remedy. But when forfeiture is unavailable, as in this case, the borrower must show actual damages or seek some other remedy such as specific performance to maintain her suit.12

In answering the first certified question, the Court introduces the term "foreclosure – eligible," a reference to a Texas home equity loan that includes the required terms and conditions. The Court explains the same as follows:

The relevance of those terms and conditions is therefore contingent on the fundamental guarantee of section 50(a) – that the homestead is protected from forced sale "except for [a home-equity loan] that" includes the terms outlined in

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9 Id.
10 Id. at *17.
11 Id. at *17-18.
12 Garofolo, 2016 Tex. LEXIS 391, at *2
13 Id. at *3.
section 50(a)(6)(A)-(P) and "is made on the condition that" it also include the provisions set forth in section 50(a)(6)(Q)(i)-(xi). Those terms and conditions are not constitution rights and obligations unto themselves. They only assure constitutional significance when their absence in a loan's terms is used as a shield from foreclosure.\(^\text{14}\)

The Court also states:

But just as the terms and conditions in section 50(a)(6) 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.\(^\text{15}\)

The Court further explains:

The constitution prohibits foreclosure when a home-equity loan fails to include a constitutionally mandated term or condition, but it does not address post-origination enforcement of a loan's provisions. Accordingly, we answer "no" to the first certified question.\(^\text{16}\)

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**Practice Tip-Decision's Impact.** The Court introduces the concept of "foreclosure-eligible home equity loans." The term refers to Texas home equity loans that include the specific constitutionally mandated terms and conditions. *See Tex. Const. art. XVI, §§ 50(a)(6)(A)-(P) and 50(a)(6)(Q)(i)-(xi).* Accordingly, lenders and their counsel should review their loan documents to insure the specific terms and provisions are included.\(^\text{17}\) Unfortunately, the Court does not provide any guidance on how to incorporate the same.

Thus, forfeiture is a remedy that may be accessed through a breach of contract cause of action. In addressing the second certified question regarding whether the borrower can seek forfeiture through her breach-of-contract claim absent actual damages, the Court said no.\(^\text{18}\) The Court notes:

Although the forfeiture remedy incorporated into Garofolo's loan might be applicable to a lender's failure to comply with some of her loan's terms, it does not apply to a failure to deliver a release of lien. Accordingly, Garofolo must show actual damages to maintain her breach-of-contract claim or seek some other remedy, such as specific performance.\(^\text{19}\)

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\(^\text{14}\) *Id.* at *9.*

\(^\text{15}\) *Id.* at *11.*

\(^\text{16}\) *Id.* at *12.*

\(^\text{17}\) In this context, LaserPro has issued a release dated November 14, 2016 in which certain modifications to the LaserPro Texas home equity documents are outlined in light of *Garofolo.*

\(^\text{18}\) *Id.*

\(^\text{19}\) *Id.* at *12-*13.
The Court explains:

The unquestionably harsh forfeiture penalty is triggered when, following adequate notice, a lender fails to correct the complained-of deficiency by performing one of six available corrective measures.20

In addressing the circumstances in which forfeiture is an available remedy, the Court states:

Accordingly, if a lender fails to meet its obligations under the loan, forfeiture is an available remedy only if one of the six corrective measures can actually correct the underlying problem and the lender nevertheless fails to timely perform the relevant corrective measure.21

The Court also addressed the applicability of the catch-all cure, Section 50(a)(6)(Q)(x)(f). The provision reads:

if the failure to comply cannot be cured under Subparagraphs (x)(a)-(e) of this paragraph, curing the failure to comply by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with this section or on terms on which the owner and the lender or holder otherwise agree that comply with this section.22

The Court states:

Undoubtedly, in the vast majority of cases this catch-all provision will present a fix that will actually correct the borrower's complaint when no other corrective measure would. But subparagraph (f) cannot apply to every deficiency not addressed by the other five corrective measures because the forfeiture provision still assumes performance will correct the underlying complaint. And even the catch-all provision assumes a loan still in existence. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x)(f) (a lender must offer to refinance "for the remaining term of the loan"). It further assumes a refinanced loan on different terms would repair the underlying deficiency. See id. ("[I]f the failure to comply cannot be cured under Subparagraphs (x)(a)-(3), cur[e] the failure to comply by a refund . . . and offer the owner the right to refinance . . . ." (emphasis added)). Here, offering to refinance a paid-off loan is ridiculously futile, and paying Garofolo $1,000 refund likewise does nothing to provide her with a release of lien. Accordingly, performance under subparagraph (f) does not actually correct Ocwen's failure to deliver Garofolo's release of lien by performance of one of the six corrective measures, and forfeiture is therefore an unavailable remedy under these facts. Again, we do not suggest Garofolo is without recourse. Her remedy simply lies elsewhere – for instance, in

20 Id. at *17-*18.
21 Id. at *21-*22.
a traditional breach-of-contract claim, in which a borrower seeks specific performance or other remedies contingent on a showing of actual damages.\textsuperscript{23}

The Court provides additional explanations in two footnotes. In footnote 9, the Court addresses whether the catch-all cure applies typically turns on the corrective capacity of the offer to refinance. The Court notes:

The $1,000-refund component of subparagraph (f) is best interpreted as a liquidated-damages provision inextricably tied to the offer to refinance. Accordingly, the determination of whether subparagraph (f) would actually correct the lender's failure to comply with its obligations under the loan typically will turn solely on the corrective capacity of the offer to refinance.\textsuperscript{24}

In footnote 10, the Court addresses forfeiture and states:

In \textit{Vincent v. Bank of America, N.A.}, the Dallas court of appeals held that "[a]s long as the Loan Agreement, as originally entered into by the parties, complies with the provisions of the constitution, forfeiture is not an appropriate remedy." 109 S.W.3d 856, 862 (Tex. App. – Dallas 2003, pet. denied). But as we clarify today, whether a loan complies with the constitution answers only the question of whether the lender may seek a forced sale of the homestead. A forfeiture remedy incorporated into the terms of a loan and enforced through a breach-of-contract action may, under circumstances not presented in this case, impose forfeiture in response to a lender's post-origination breach of the loan's terms.\textsuperscript{25}

\textbf{B. Statute of Limitations – \textit{Wood v. HSBC Bank USA, N.A.}}

In \textit{Wood v. HSBC Bank USA, N.A.},\textsuperscript{26} the Court found that liens securing constitutionally noncompliant home-equity loans are invalid until cured and thus not subject to any statute of limitations for suits to quiet title based on alleged noncompliance with the terms and conditions for home equity loans.\textsuperscript{27} Accordingly, borrowers are no longer barred by limitations from bringing a quiet title action based on noncompliance with Section 50(a)(6)'s requirements.

Section 50(a)(6) does not contain a specific statute of limitations period. A number of cases had held the limitation period for a constitutional claim under the home equity provisions is four years and the accrual date is the date the loan is made (\textit{i.e.}, the date the loan is closed). The cases are based upon Section 16.051 of the Texas Civil Practice and Remedies Code, which sets forth the residual limitations period and states, "[e]very action for which there is no express limitations

\textsuperscript{23} \textit{Id.} at *25-*26.
\textsuperscript{24} \textit{Id.} at *25 n. 9.
\textsuperscript{25} \textit{Id.} at *26 n. 10.
\textsuperscript{26} No. 14-0714, 2016 Tex. LEXIS 383, 59 Tex. Sup. J. 877 (Tex. May 20, 2016),
\textsuperscript{27} See generally \textit{id}.
period, except for an action for the recovery of real property, must be brought not later than four years after the day the cause of action accrues.\textsuperscript{28}

In \textit{Priester v. JPMorgan Chase Bank, N.A.},\textsuperscript{29} the Fifth Circuit concluded that a lien attendant to a home equity loan that violates the Texas Constitution is voidable rather than void and that any claim regarding the validity of the lien is subject to a four year limitations period pursuant to Texas Civil Practices and Remedies Code § 16.051 which commences on the date that the loan is closed. In so holding, the Fifth Circuit rejected and declined to follow the reasoning of the federal district courts in \textit{Smith v. JPMorgan Chase Bank},\textsuperscript{30} and \textit{Santos v. CitiMortgage, Inc.},\textsuperscript{31} which held a lien is void and not voidable.

In \textit{Wood}, the Court discusses \textit{Garofolo}, forfeiture, and a cause of action for breach of contract. The Court notes:

\begin{quote}
We also clarify that the forfeiture remedy [is not] a constitution remedy unto itself. Rather, it is just one of the terms and conditions a home-equity loan must include to be foreclosure-eligible. We explain that borrowers may access the forfeiture remedy through a breach-of-contract action based on the inclusion of these terms in their loan documents, as the Constitution requires to make the home-equity lien foreclosure-eligible.\textsuperscript{32}
\end{quote}

In this context, a breach-of-contract claim may serve as the basis for a borrower to recover attorney's fees pursuant to Tex. Civ. Prac. & Rem. Code § 38.001.

Essentially, a home equity loan is invalid unless it strictly complies with the Texas Constitution. In deciding that noncompliant liens are invalid until made valid, the Court explained "[h]olding otherwise would essentially permit lenders to ignore the Constitution and foreclose on the homesteads of unwitting borrowers who do not realize that their home-equity loans violate the Constitution."\textsuperscript{33}

\textbf{Practice Tip-Cure Procedures.} Lenders and holders also should review procedures for curing so corrective action is taken timely (\textit{i.e.}, within 60 days after the borrower's notification).

The Court also addressed curing a failure prior to a borrower's notice. The Court states: "Further, lenders are permitted, and indeed should be encouraged, to cure constitutional noncompliance on their own, without notice from the borrower, as the lender did in \textit{Doody}."\textsuperscript{34}

\begin{itemize}
\item \textsuperscript{28} \textit{TEX. CIV. PRAC. & REM. CODE ANN.} § 16.051 (West 2008).
\item \textsuperscript{29} 708 F.3d 667 (5th Cir. 2013), \textit{cert. denied}, 134 S. Ct. 196, 187 L. Ed. 256 (Oct. 7, 2013).
\item \textsuperscript{30} 825 F. Supp. 2d 859, 861 (S.D. Tex. 2011), \textit{abrogated by Priester}, 708 F.3d 667.
\item \textsuperscript{32} \textit{Wood}, 2016 Tex. LEXIS 383, at * 9 (internal citations omitted).
\item \textsuperscript{33} \textit{id.} at * 14.
\item \textsuperscript{34} \textit{id.} at *15.
\end{itemize}
The Court notes: "Lenders face no great burden to cure, even though it may require them to maintain thorough records on the loans they hold throughout the life of those loans."\(^{35}\)

**Practice Tip-Document Retention.** Lenders and holders should review their document retention policies so appropriate records are maintained.

The Court also explains "The forfeiture provision in section 50(a)(6)(Q)(x) does not create a constitutional cause of action to access that remedy and must be litigated in the context of the borrower's loan agreement."\(^{36}\)

The Court does not address various issues. For example, in connection with a traditional breach of contract claim seeking forfeiture pertaining to a violation or failure to take corrective action the Court did not expressly state:

- Whether the statute of limitations applies (a four year limitations period applies to a breach of contract claim), or
- If a four year limitation period applies, whether the cause of action accrues when the violation accrues (in most cases at the time of origination) or when a lender fails to take corrective action within 60 days after notification by the borrower.

**Feuerbacher v Wells Fargo Bank, N.A.**

After the Court’s rulings in *Wood* and *Garofolo*, the United States District Court for the Eastern District of Texas reaffirmed that quiet-title and breach-of-contract claims arising from alleged defects under Section 50(a)(6) accrue at loan origination. In *Feuerbacher v. Wells Fargo Bank, N.A.*,\(^{37}\) Alan L. Feuerbacher obtained a home-equity loan secured by a lien on his homestead, which was jointly owned with his wife, Billie.\(^{38}\) Billie did not apply for the loan and was not a borrower on the loan.\(^{39}\) She did, however, sign the security instrument, the home equity affidavit, an acknowledgement of fair market value, and various other documents.\(^{40}\) Billie later filed a voluntary petition for bankruptcy and, in documents filed with the bankruptcy court, swore under penalty of perjury that she made monthly payments on the loan in the four months preceding her filing and that she intended to retain the property.\(^{41}\) The bankruptcy court granted Billie a discharge.\(^{42}\) Years later, the Feuerbachers filed suit against their mortgagee, mortgage servicer, and a prior mortgagee alleging the lien on their homestead was invalid, as it did not comply with the requirements of Section 50(a)(6) when it was originally made.\(^{43}\) The defendants moved for

\(^{35}\) *Id.* at *18.

\(^{36}\) *Id.* at *21.


\(^{38}\) *Id.* at *1-*2.

\(^{39}\) *Id.* at *2.

\(^{40}\) *Id.*

\(^{41}\) *Id.* at *4.

\(^{42}\) *Id.*

\(^{43}\) *Id.* at *8.*
summary judgment, arguing that the Feuerbachers’ breach of contract claim was barred by limitations, and that the Feuerbachers’ breach of contract and quiet title claims were barred by judicial estoppel (as a result of representations made to the bankruptcy court).44

The court determined that, while a quiet title action under Section 50(a)(6) is not subject to limitations, it is subject to judicial estoppel and accrues on the date the loan is made.45 The court found that a breach of contract claim accrues at the time of the breach, and that the type of breaches complained of by the Feuerbachers are the type of breaches that occur at origination, as they could have been brought immediately after the loan originated.46 The court held that judicial estoppel applied to all of the Feuerbachers claims (except for claims under Section 392.202 of the TDCA), and that all claims failed as a matter of law because they accrued prior to the filing of the bankruptcy proceedings because Billie did not disclose her claims when she filed for bankruptcy, despite the fact that she had an affirmative duty to do so.47 As a result, The Feuerbachers were judicially estopped from taking the inconsistent position that such claims existed.48

II. CURES

In Doody,49 the Court found that Section 50(a)(6)(Q)(x) was a "cure provision" that permits lenders to cure failures to comply. In 2003, SJR 42 amended this section to provide guidelines regarding the timing and procedural requirements that lenders or holders must follow to cure violations.50

A. Cure Authority

60-Day Period to Cure. Section 50(a)(6)(Q)(x) is a detailed cure provision. As amended, Section 50(a)(6)(Q)(x) states:

except as provided by Subparagraph (xi) of this paragraph, the 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 lender or holder fails to comply with the lender's or holder's obligations under the extension of credit if the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply.

44 Id. at *8, *14.
45 Id. at *18-22.
46 Id. at *12-18.
47 Id. at *29.
48 Id.
49 49 S.W.3d 342 (Tex. 2001).
50 The amendment took effect on September 29, 2003.
Accordingly, the obligation to cure is triggered upon notice by the borrower\textsuperscript{51} of a lender's failure to comply. To correct a violation, the lender or holder must take one or more of the specific actions set out in subsections (Q)(x)(a)-(f), as applicable. An overview\textsuperscript{52} follows.

**Refund of Overcharges.** If the owner has paid an amount to the lender or holder that either exceeds the 3% fee cap [Subsection (a)(6)(E)], is a prohibited prepayment penalty [Subsection (a)(6)(G)], or unauthorized interest [Subsection (a)(6)(O)], the lender or holder must pay to the owner an amount of money equal to any such overcharge.\textsuperscript{53}

**Acknowledgment of Partial Lien Invalidity.** If the principal amount of the loan at closing exceeds the limitation under Subsection (a)(6)(B) of 80% of the fair market value of the homestead property (when added to the aggregate balances of all other valid encumbrances of record), the lender or holder must send the owner a written acknowledgment that the lien securing the equity loan is valid only in the amount and to the extent that the loan amount does not exceed the 80% loan-to-value limitation.\textsuperscript{54}

If the loan purports to be secured by any real or personal property other than the homestead property as additional collateral prohibited by Subsection (a)(6)(H), the lender or holder must send the owner a written acknowledgment that the loan is not secured by any impermissible property.\textsuperscript{55}

If the loan purports to be secured by any homestead property designated for agricultural use prohibited by Subsection (a)(6)(I), the lender or holder must send the owner a written acknowledgment that the loan is not secured by any impermissible agricultural property.\textsuperscript{56}

**Modification of Prohibited Terms.** If the home equity loan contains any other amount, percentage, term, or other provision prohibited by Section 50 (e.g., recourse, impermissible non-judicial foreclosure provision, impermissible acceleration provision; impermissible repayments), the lender or holder must (i) send the owner a written notice modifying the loan to conform to an amount, percentage, term, or other provision permitted by Section 50, and (ii) adjust the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by the Texas Constitution and is not subject to any other term or provision prohibited by Section 50.\textsuperscript{57}

**Delivery of Signed Documents.** If the lender has (i) failed to provide the owner a copy of all documents signed by the owner related to the equity loan at the time of closing as required by Subsection (Q)(v), or (ii) failed to obtain the required signatures of the owner and/or the lender on

\textsuperscript{51} TEX. CONST. art. XVI, § 50(a)(6)(Q)(x) uses the term "borrower". Subsections (x)(a)-(f) and (xi) use the terms "owner" and "borrower".

\textsuperscript{52} See Memorandum dated January 13, 2004 from Al Alsup, entitled "Home Equity Lending Update", which is available at www.loanlawyers.com.

\textsuperscript{53} TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(a).

\textsuperscript{54} TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(b).

\textsuperscript{55} Id.

\textsuperscript{56} Id.

\textsuperscript{57} TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(c).
the written acknowledgment of fair market value as required by Subsection (Q)(ix), the lender or holder must deliver the required documents to the owner.\(^{58}\)

**Acknowledgment of Abatement of Interest and Obligations.** If the lender has made an equity loan on a homestead property that already has an equity loan secured on the same property made under Subsection (a)(6) or a reverse mortgage secured on the same property made under Subsection (a)(7) in violation of Subsection (a)(6)(K), the lender or holder must send the owner a written acknowledgment that the accrual of interest and all of the owner's obligations under the loan are abated while any such prior (a)(6) or (a)(7) lien remains secured by the same homestead property.\(^{59}\)

**Payment of $1,000 Penalty and Offer of "No Cost" Refinancing.** If the lender when making an equity loan has failed to comply with any constitutional obligation that cannot be cured under any of the foregoing subsections (a)-(e),\(^{60}\) the lender or holder may cure the failure to comply by (i) a refund or credit to the owner of $1,000, and (ii) offering the owner the right to refinance the equity loan with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original equity loan, with any modifications in terms necessary for the loan to comply with Section 50, or on such terms as the lender or holder and the owner otherwise agree that comply with Section 50.\(^{61}\) Although the refinance of an equity loan before the first anniversary of the closing date of the loan is generally prohibited, Section 50(a)(6)(M)(iii) permits a refinancing made under the cure provisions of Section 50(a)(6)(Q)(x)(f).

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**Practice Tips – Section 50(a)(6)(Q)(x)(f) Cures.** Subsection (Q)(x)(f) is commonly known as the "catch all" cure provision. However, this provision, in light of *Garofolo*, may now become known as the provision formerly known as the "catch all." Some practice tips are:

- A lender or holder must refund or credit the $1,000 for a failure to comply, regardless of whether the owner accepts the offer to refinance.

- If a lender or holder can cure under Subsections (Q)(x)(a) – (Q)(x)(e), the lender or holder must cure under the applicable subsection rather than Subsection (Q)(x)(f), the catch-all cure provision.

- A lender or holder may want to include in a cure letter under the "catch-all" provision, Subsection (Q)(x)(f), a reasonable date by which the borrower must accept the offer to refinance.

- If neither the catch-all provision nor any of the other five specific cure provisions will actually correct the lender's failure to comply, the borrower's remedy is a traditional breach-of-contract claim for actual damages or specific performance.

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\(^{58}\) TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(d).

\(^{59}\) TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(e).

\(^{60}\) This may include failure to provide the 50(g) notice under TEX. CONST. art. XVI, § 50(a)(6)(M)(i), failure to provide the itemized fee disclosure under TEX. CONST. art. XVI, § 50(a)(6)(M)(ii), or an impermissible closing location under TEX. CONST. art. XVI, § 50(a)(6)(N).

\(^{61}\) TEX. CONST. art. XVI, § 50(a)(6)(Q)(x)(f).
**Incurable Violations.** Two violations are excepted from the cure provision pursuant to Subsection (Q)(xi). A lender or holder of an equity loan would expressly forfeit all principal and interest of the loan if either:

- the loan is made by a lender that is not authorized by Subsection (a)(6)(P) to make home equity loans, or
- the lien was not created under a written agreement with the consent of each owner and each owner's spouse, unless each owner and owner's spouse who did not initially consent subsequently consents.

A matrix summarizing the cure provisions is attached as Exhibit "A". Sample cure letters are attached as Exhibit "B".

**Practice Tip – Applicable Law.** Section 50(a)(6)(Q)(x) addresses curing failures to comply with obligations under the extension of credit established pursuant to the Texas Constitution. Certain failures to comply may also or only violate other laws -- Federal (e.g., Truth-in-Lending Act) or state (e.g., Chapter 342) -- or contractual terms. The ability to cure these other violations will depend upon the particular failure and other applicable law or document.

**B. Post Wood**62 and **Garofolo**63

The Court has explained:

- The forfeiture remedy set forth in Section 50(a)(6)(Q)(x) is not 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.
- Borrowers may access the forfeiture remedy through a breach-of-contract action.
- A breach-of-contract action may impose forfeiture if, following adequate notice by the borrower, a lender or holder fails to correct the alleged failure to comply by performing one of the six available corrective actions.
- Forfeiture is an available remedy only if one of the six corrective measures can actually correct the failure to comply and the lender nevertheless fails to perform the relevant corrective measure.
- Whether the catch-all provision, Section 50(a)(6)(Q)(x)(f), is effective depends on the corrective capacity of the offer to refinance.

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Forfeiture is not an available remedy if the six corrective actions cannot actually correct the failure.

Thus, the Court has changed how many viewed cures.

**C. Cure Interpretations**

The Commissions have issued cure interpretations which address various issues including counting the 60-day cure period, methods of notification, and methods of curing a violation. An overview follows.

**Adequate Notice of Failure to Comply.** An interpretation, 7 T.A.C. § 153.91, sets forth the minimum information necessary to constitute adequate notice from a borrower to a lender that the lender has failed to comply with its obligations under the loan. The interpretation provides:

(a) A borrower notifies a lender or holder of its alleged failure to comply with an obligation by taking responsible steps to notify the lender or holder of the alleged failure to comply. The notification must include a reasonable:

1. identification of the borrower;
2. identification of the loan; and
3. description of the alleged failure to comply.

(b) A borrower is not required to cite in the notification the section of the Constitution that the lender or holder allegedly violated.

Three commentators expressed that the interpretation should require the notice to be in writing. The Commissions disagreed and noted in the preamble that the Constitution does not require the notice to be in writing. The Commissions, however, did note the following: "If a borrower were to provide notice orally, the borrower would have the burden to prove when it was given, to whom, and the content of the notice.”

**Practice Tip – Oral Notification.** As noted, the Commissions have indicated that the rule does not limit a borrower to any specific method of delivery and, therefore, oral notification may suffice. Another interpretation, 7 T.A.C. § 153.93(a), expressly allows the borrower to notify the lender under Section 50(a)(6)(Q)(x), orally or in writing.

**Counting the 60-Day Cure Period.** The next interpretation, 7 T.A.C. § 153.92, establishes that the 60-day cure period starts on the day following the day notice is received and ends at

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64 7 T.A.C. §§ 153.91-153.96.
68 7 T.A.C. § 153.93(a).
midnight on the 60th day unless the 60th day is a Sunday or federal legal public holiday, then the deadline is midnight on the following day that is not a Sunday or federal legal public holiday.\textsuperscript{69} The interpretation states:

(a) For purposes of Section 50(a)(6)(Q)(x), the day after the lender or holder receives the borrower's notification is day one of the 60-day period. All calendar days thereafter are counted up to day 60. If day 60 is a Sunday or federal legal public holiday, the period is extended to include the next day that is not a Sunday or federal legal public holiday.

(b) If the borrower provides the lender or holder inadequate notice, the 60-day period does not begin to run.\textsuperscript{70}

Methods of Notification. Another interpretation, 7 T.A.C. § 153.93, establishes methods of service constituting a rebuttable presumption of service.\textsuperscript{71} The interpretation states:

(a) At closing, the lender or holder may make a reasonably conspicuous designation in writing of the location where the borrower may deliver a written or oral notice of a violation under 50(a)(6)(Q)(x). The designation may include a mailing address, physical address, and telephone number. In addition, the lender or holder may designate an email address or other point of contact for delivery of a notice.

(b) If the lender or holder chooses to change the designated delivery location as provided in subsection (a) of this section, the address change does not become effective until the lender or holder sends conspicuous written notice of the address change to the borrower.

(c) The borrower may always deliver written notice to the registered agent of the lender or holder even if the lender or holder has named a delivery location.

(d) If the lender or holder does not designate a location where the borrower may deliver a notice of violation, the borrower may deliver the notice to any physical address or mailing address of the lender or holder.

(e) Delivery of the notice by borrower to lender or holder's designated delivery location or registered agent by certified mail return receipt or other carrier delivery receipt, signed by the lender or holder, constitutes a rebuttable presumption of receipt by the lender or holder.

\textsuperscript{69} 7 T.A.C. § 153.92(a).
\textsuperscript{70} 7 T.A.C. § 153.92.
\textsuperscript{71} 7 T.A.C. § 153.93.
(f) If the borrower opts for a location or method of delivery other than set out in subsection (e), the borrower has the burden of proving that the location and method of delivery were reasonably calculated to put the lender or holder on notice of the default. 72

**Practice Tip – Delivery Designation.** Pursuant to the interpretation, 7 T.A.C. § 153.93(d), if the lender or holder does not designate a location for delivery, the borrower may deliver the notice to any location of the lender or holder. Accordingly, lenders should specifically designate a location for delivery. Nevertheless, a borrower is not required to send the notice to the lender's designated location. See 7 T.A.C. § 153.93(f).

In the preamble, the Commissions note that "One commenter suggested that the language in 153.93(a) be changed to make it mandatory that the borrower deliver notice to the lender's designated notice location." 73 The Commissions didn't adopt the comment and stated:

> The Commissions do not believe that this provision should be mandatory. The Constitution does not prohibit, nor does it expressly permit, the parties to contractually determine the terms for delivery of the notice. If the borrower chooses another method of delivery, then the borrower would assume the burden of proving adequate delivery of a notice of violation. 74

Thus, borrowers may ignore a designation and (1) give oral notice, and/or (2) notice to a different location. If they do, they will have to prove that the location and method of delivery were "reasonably calculated to put the lender or holder on notice of the default."

**Methods of Curing a Violation.** An interpretation, 7 T.A.C. § 153.94, is intended to provide guidance on actions a lender or holder must take to effect a cure and provides:

(a) The lender or holder may correct a failure to comply under Section 50(a)(6)(Q)(a)-(e), on or before the 60th day after the lender or holder receives the notice from an owner, if the lender or holder delivers required documents, notices, acknowledgements, or pays funds by:

1. placing in the mail, placing with other delivery carrier, or delivering in person the required documents, notices, acknowledgements, or funds;

2. crediting the amount to borrower's account; or

3. using any other delivery method that the borrower agrees to in writing after the lender or holder receives the notice.

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72 7 T.A.C. § 153.93.
(b) The lender or holder has the burden of proving compliance with this section.\textsuperscript{75}

In addressing this interpretation, one commentator expressed that as the borrower is not required to provide an address with the notice, the lender should only be required to provide the cure to the last known address of the borrower and the lender should only be required to deliver the response to a notice to one borrower. The Commissions declined to make the suggested changes and provided the following reasoning:

The Commissions believe the lender should act reasonably and use best efforts to communicate to the appropriate location of the borrower and with the appropriate number of borrowers, so that the borrower or borrowers, if more than one, have the best opportunity to receive information related to a potential violation of their home equity loan.\textsuperscript{76}

In the preamble, the Commissions also note "Section 153.94(a)(3) precludes the closing documents from dictating the method of delivery of cure documents or payments."\textsuperscript{77}

Cured Failure. An interpretation, 7 T.A.C. § 153.95, clarifies the following:

(a) If the lender or holder timely corrects a violation of Section 50(a)(6)(Q)(x) as provided in Section 50(a)(6)(Q)(x), then the failure does not invalidate the lien.

(b) A lender or holder who complies with Section 50(a)(6)(Q)(x) to cure Section 50(a)(6)(Q)(x) before receiving notice of the violation from the borrower receives the same protection as if the lender had timely cured after receiving notice.

(c) A borrower's refusal to cooperate fully with an offer that complies with Section 50(a)(6)(Q)(x) to modify or refinance an equity loan does not invalidate the lender's protection for correcting a failure to comply.\textsuperscript{78}

\textsuperscript{75} 7 T.A.C. § 153.94.
\textsuperscript{76} 29 Tex. Reg. 10258 (Nov. 5, 2004).
\textsuperscript{77} 29 Tex. Reg. 10258 (Nov. 5, 2004). In the preamble, the Commissions state "Under the proposed interpretation, the methods permitted in § 153.94(a)(1) and § 153.94(a)(2) are the only reasonable methods permitted without an agreement of the parties reached after the notice of violation is given." 29 Tex. Reg. 10258 (Nov. 5, 2004).
\textsuperscript{78} 7 T.A.C. § 153.95.
**Practice Tip – Curing a Failure Prior to Notice.** A lender or holder may cure a failure prior to notice by a borrower. In the preamble, the Commissions state:

The Commissions believe that a lender or holder may use the cure provisions for violations they discover prior to being notified by the borrower. The lender or holder may offer to cure a violation they discover in the absence of a notice from a borrower. This offer to cure, in the absence of notice, does not begin the 60-day cure time period. The Commissions have added § 153.95(b) to address this.\(^{79}\)

In *Wood*, the Court also addressed curing a failure prior to a borrower's notice and states: "Further, lenders are permitted, and indeed should be encouraged, to cure constitutional noncompliance on their own, without notice from the borrower, as the lender did in *Doody*."\(^{80}\)

**Correcting Failures Under Section 50(a)(6)(Q)(x)(f).** An interpretation, 7 T.A.C. § 153.96, provides guidance on subsection (Q)(x)(f), which is commonly known as the "catch all" provision. The interpretation sets forth guidance regarding actions a lender or holder must take during the cure period when the lender or holder cannot cure the failure under subsections (Q)(x)(a)-(e). The interpretation provides:

(a) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f), on or before the 60th day after the lender or holder receives the notice from the borrower the lender or holder may:

1. refund or credit the $1,000 to the account of the borrower; and
2. make an offer to modify or an offer to refinance the extension of credit on the terms provided in Section 50(a)(6)(Q)(x)(f) by placing the offer in the mail, other delivery carrier, or delivering the offer in person to the owner.

(b) To correct a failure to comply under Section 50(a)(6)(Q)(x)(f):

1. the lender or holder has the option to either refund or credit $1,000; and
2. the lender or holder and borrower may:
   
   (A) modify the equity loan without completing the requirements of a refinance; or
   
   (B) refinance with an extension of credit that complies with Section 50(a)(6).

(c) The lender or holder has the burden of proving compliance with this section.

\(^{79}\) 29 Tex. Reg. 10258-10259 (Nov. 5, 2004).

\(^{80}\) *Wood*, 2016 Tex. LEXIS 383, at * 15.
(d) After the borrower accepts an offer to modify or refinance, the lender must make a good faith attempt to modify or refinance within a reasonable time not to exceed 90 days.81

D. Judicial Decisions Regarding Cures

Cure Authority. In Doody v. Ameriquest Mortgage Co.,82 the Court found that Section 50(a)(6)(Q)(x) is a cure provision that applies to all of Section 50(a) and, in addition to protecting the loan's principal and interest, operates as a cure provision that validates a lien securing an equity loan. The Court concluded:

We conclude that under the Texas Constitution, if a lender charges closing costs in excess of three percent, but refunds the overcharge within a reasonable time, bringing the costs within the range allowed by section 50(a)(6)(E), that cure also validates the lien under section 50(c). We reach this conclusion because we hold that section 50(a)(6)(Q)(x)'s cure provision applies to all the lender's obligations under the extension of credit. Upon the cure, the lender has established the terms and conditions the lender must satisfy to make a lien valid under section 50(c). Accordingly, the lien meets section 50(c)'s requirement that it is a lien that secures a debt described by this section.83

The applicability of the cure provision and the effectiveness of a lender's cure efforts were at issue in Adams v. Ameriquest Mortgage Co.84 The facts follow. Larry and Tina Adams (the "Debtors") purchased their home in 1994 and granted a purchase money lien for a portion of the purchase price.85 In 2000, the Debtors refinanced their 1994 note with a home equity loan.86 On December 19, 2002, the Debtors refinanced the 2000 loan with a loan from Ameriquest Mortgage Co. ("Ameriquest").87 The 2002 loan was not handled as a home equity loan as contemplated by Section 50(f) of the Texas Constitution.88 The Debtors argued that the 2002 loan is not a home equity loan as defined by Section 50(a)(6) and, therefore, the lien granted is invalid as an improper attempt to refinance a prior equity loan.89 Ameriquest contended that it saved its lien by curing the various defects in the 2002 loan that prevent it from being characterized as a home equity loan.90 In granting Ameriquest's summary judgment, the court found the following:

81 7 T.A.C. § 153.96.
82 49 S.W.3d 342 (Tex. 2001).
83 Id. at 347.
85 Id. at 551.
86 Id.
87 Id.
88 Id.
89 Id. at 552.
90 Id.
• The cure provision is applicable to a refinance of a prior home equity loan under Section 50(f).\footnote{Id. at 553.}

• A lender is not limited in its cure power to only defects that the lender may unilaterally cure and a borrower may not refuse to comply with a reasonable offer to cure by the lender;\footnote{Id. at 557.}

• Section 50(a)(6)(Q)(x) is applicable to cure "non-curable" defects (e.g., twelve-day waiting period) through a reasonable offer to redo the transaction by the lender;\footnote{Id. at 558.}

• Ameriquest received notice of the defective loan on the date recited in the certificate of service accompanying the adversary complaint and acted within a "reasonable time" given the circumstances of the case;\footnote{Id. at 559.} and

• Ameriquest met its burden under the cure provision by its reasonable offer to cure.\footnote{Id. at 560.}

The Court also addressed which version of the Texas Constitution applies. The Court stated: "Section 50 of article XVI of the Texas Constitution was amended in 2003. The parties submit that the version of Section 50 prior to the amendment controls. The court agrees. 'The laws existing at the time a contract is made becomes a part of the contract and govern the transaction.' \textit{Wessely Energy Corp. v. Jennings}, 736 S.W.2d 624, 626, (Tex. 1987)."\footnote{Id. at n.1.}

In this context, the Court stated:

Under this forfeiture provision, a lender's failure to comply results in the lender having to not only forfeit the right to collect any future payments called for under the note, but also having to disgorge any amounts already paid under the note.\footnote{Id. at 553.}

The Court also held that the filing of an adversary proceeding containing detailed allegations of the defects in the loan was sufficient notice to start the running of the 60-day window to cure.\footnote{Id. at 558.}

In \textit{Chambers v. First United Bank and Trust Co. (In re Chambers)},\footnote{419 B.R. 652 (Bankr. E.D. Tex. 2009).} the plaintiffs alleged numerous violations of the Texas Constitution with respect to a home equity loan. The

\begin{footnotesize}
\footnote{Id. at 553.}
\footnote{Id. at 557.}
\footnote{Id. at 558.}
\footnote{Id. at 559.}
\footnote{Id. at 560.}
\footnote{Id. at n.1.}
\footnote{Id. at 553.}
\footnote{Id. at 558.}
\footnote{419 B.R. 652 (Bankr. E.D. Tex. 2009).}
\end{footnotesize}
memorandum opinion reflects the defendant sent a cure letter pursuant to, among other, the catch-all provision, Section 50(a)(6)(Q)(x)(f), as follows:

On February 1, 2006, within 60 days of receiving the Chambers' petition, the Defendant sent a letter to the Chambers addressing their allegations, attaching copies of the loan documents, and offering to cure the alleged defects in 2004 loan documents by providing a $1,000 credit to the loan for each violation and offering to refinance the loan on the same terms. The Defendant instructed the Chambers to contact the author of the letter, Royce Coleman, on or before March 8, 2006, if they desired to refinance their loan.100

The plaintiffs asserted that Section 50(a)(6)(Q)(x)(f) is not the appropriate cure for the alleged violations. Apparently, the plaintiffs were arguing that the alleged defects were incurable since other cure provisions generally did not apply. The court noted:

- The Texas Supreme Court's language in Doody regarding the cure provision was unambiguous and unqualified – "section 50(a)(6)(Q)(x) is a cure provision that applies to all of section 50(a) . . . and also operates as a cure provision that validates a lien securing a section 50(a)(6) extension of credit." Doody 49 S.W. 3d at 345-346.101

- Moreover, if a lender makes an offer to modify or refinance an equity loan that complies with § 50(a)(6)(Q)(x)(f), "a borrower's refusal to cooperate fully . . . does not invalidate the lender's protection for correcting a failure to comply." 7 Tex. Admin. Code § 153.95 (effective November 11, 2004). The Court, therefore, concludes that the Defendant's offer to cure the alleged violations of the Texas Constitution in connection with the 2004 home equity loan complied with § 50(a)(6)(Q)(x) and that the Chambers' failure to cooperate with the Defendant did not invalidate the Defendant's attempted cure.102

The court remanded the case to state court for resolution of additional issues.

Adequate Notice of Failure to Comply. In Curry v. Bank of America, N.A.,103 the borrowers brought an action against Bank of America claiming that their home equity loan was void for failure to comply with the Texas Constitution because the loan was closed at the borrowers' place of business and all loan closing documents were not delivered to the borrowers. Prior to bringing the action, the borrowers sent a series of letters to the bank to notify it that the loan was constitutionally defective and to give the bank an opportunity to cure the defects.104 The letters contained a "preliminary determination" that the loan was invalid but did not contain specific facts or details in support of the determination.105 Noting that the borrowers had the burden of proving

100 Id. at 664.
101 Id. at 678.
102 Id. at 679.
104 Id. at 348.
105 Id.
that they properly notified the bank of the constitutional defects, the court concluded that the borrowers failed to meet this burden because the notice contained only general allegations. The court held:

Although the home equity loan provisions are silent as to the extent of notice the borrower must give, we conclude the [borrowers] needed to do more than make a general allegation and had to describe how the loan is non-compliant. . . . To determine how to cure its non-compliance, the lender must be aware of what that non-compliance is. 106

In Puig v. Citibank, N.A.,107 the United States District Court for the Northern District of Texas found that the filing and service of a petition or complaint which provides the required information constitutes sufficient notice by the borrowers of alleged constitutional defects.

Cures — Amendments Not Retroactive. In Fix v. Flagstar Bank, FSB,108 the borrowers obtained a home equity loan and later refinanced the loan with a conventional loan. The second loan violated provisions of the Texas Constitution because: (1) it was executed within less than one year's time after the first loan was executed,109 and (2) it was in the form of a conventional loan, with provisions allowing for personal liability against the borrowers and nonjudicial foreclosure.110 The borrowers sent notice to the bank that the loan was constitutionally defective.111 Twenty-one days after receiving notice, the bank offered to cure the violations via a new home equity loan at a better rate at no cost to the borrowers and to pay the borrowers $1,000.112 The borrowers refused the offer and subsequently brought suit to compel forfeiture.113 The primary issue in the case was whether the 2003 amendments to the Texas Constitution applied retroactively. The 2003 amendments added specific ways by which a lender could cure constitutional violations and changed the time period to cure from "a reasonable time" to a sixty-day time period.114 After examining the literal language of the amendment and the legislative history, the court concluded that the 2003 amendments are not retroactive.115 Thus, the provisions prior to the 2003 amendments, which did not set forth specific cure provisions, would apply. Under the prior version, the court held that the bank's offer to cure occurred within a reasonable time period and was sufficient to cure the defects in the second loan.116


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106 Id. at 353.
110 See TEX. CONST. art. XVI, § 50(a)(6)(C) and (D).
111 242 S.W.3d at 152.
112 Id. at 152-153.
113 Id. at 153.
114 Id. at 155.
115 Id. at 157.
116 Id. at 158.
Disclosure and Loan Agreement. After the parties disputed how payments were being allocated between principal and interest, the borrowers sued the bank. The trial court denied class certification. After a trial, judgment was entered for the borrowers granting them injunctive and declaratory relief, but refusing to declare the forfeiture requested. Most importantly, on appeal, it was held that no forfeiture is caused by a mere breach of contract not related to the specific duties mandated of a home equity loan under the Texas Constitution.

Contractual Cure. In *Foster v. Bank One Texas N.A.*, the borrower argued that the lien on his residence was invalid under Section 50(a)(6)(H) because it encumbered real property in excess of the permissible amount and granted Bank One a security interest in personal property. At the time the promissory note and lien for the loan were executed, homestead property was limited to one acre. The borrower's home was situated on 1.75 acres. Although this encumbrance would constitute a violation of Section 50(a)(6)(H), the loan documents provided that "notwithstanding any provision of this Homestead Lien Contract to the contrary in no event shall this Homestead Lien Contract require or permit any action which would be prohibited by Section 50(a)(6), Art. XVI, Texas Constitution, and all provisions of this Homestead Lien Contract shall be modified to fully comply with Section 50(a)(6), Art. XVI, Texas Constitution." The Fifth Circuit held that, to the extent the lien encumbered property in violation of Section 50(a)(6)(H), any defect was automatically cured by the terms of the loan documents.

Court Determined Equity Loan. In *Cadengo v. Consolidated Fund Management (In re Cadengo)*, the court found a loan that was not documented as a home equity loan was a home equity loan. The court made, among others, the following findings:

- the debtor held equitable title to the property pursuant to her parents' divorce decree, and that this title, coupled with possession is sufficient to establish a homestead under Texas law;
- the defendants may not rely upon a homestead waiver executed by the debtor because they had actual knowledge of her use and possession of the property.

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118 *Id.* at 861.
119 *Id.*
120 *Id.*
121 *Id.*
122 *Id.* at 862; *see also*, *Galvan v. Centex Home Equity Co., L.L.C.*, No. 04-06-00820-CV, 2008 WL 441773 at *5 (Tex. App.—San Antonio, Feb. 20, 2008, no pet.) (mem. op.).
123 No. 02-50686, 2002 U.S. App. LEXIS 28901 (5th Cir. Nov. 27, 2002).
124 *Id.* at *12.
125 *Id.*
126 *Id.*
128 *Id.* at 694.
129 *Id.* at 695.
• the substance of the transaction was a home equity loan invoking the protections of the Texas Constitution;\textsuperscript{130}

• the 60-day window to cure began on the date of the filing of the complaint and had expired;\textsuperscript{131} and

• the transaction violated several sections of the Texas Constitution and, therefore, the defendants were required to forfeit the entire principal and interest of the loan.\textsuperscript{132}

E. Fannie Mae Servicing Guide

In Servicing Guide Announcement SVC-2011-18,\textsuperscript{133} Fannie Mae addresses, among other things, modifying Texas home equity loans and reminds servicers as follows:

If the servicer receives a notice from the borrower pursuant to Texas Section 50(a)(6) that a modification fails to comply with the Texas Section 50(a)(6) requirements, the servicer must immediately, but no later than seven business days after receipt, provide the borrower notice to Fannie Mae and collaborate with Fannie Mae on the appropriate response, including any cure that may be necessary, within the sixty-day time frame provided by the requirements of Texas Section 50(a)(6).

III. OTHER DEVELOPMENTS

A. Texas Home Equity Interpretations Amendments

The Finance Commission of Texas and Texas Credit Union Commission (collectively, the "Commissions") have recently adopted amendments to the Texas home equity interpretations. The adoptions appeared in the November 18, 2016 edition of the Texas Register. The amendments took effect on November 24, 2016. The adopted amendments were unchanged from those appearing in the July 22, 2016 edition of the Texas Register, a copy of which is attached as Exhibit "C".

B. Texas Legislation

The 85th Texas Legislature convenes on January 10, 2017. The Texas Bankers Association has adopted its 2017 legislative agenda, which includes home equity lending as follows:

The TBA Board of Directors directs staff to pursue legislation that improves existing home equity law by excluding charges from the 3% fee cap that are not

\textsuperscript{130} Id. at 696-691.
\textsuperscript{131} Id. at 698.
\textsuperscript{132} Id. at 685 and 699.
generated by the lender and by allowing for the seasoned refinance of a home equity loan.

The Texas Mortgage Bankers Association has adopted the following:

**Support Home Equity Reform.** Possible amendments include.

**A. 3% Fee Cap.** Revise the 3% fee cap to apply only to fees imposed by the creditor and to exclude certain the third party fees such as attorney fees, title insurance premiums, survey costs, and appraisal fees.

**B. Refi of "Seasoned" Home Equity Loan.** Under the "once a home equity loan, always a home equity loan" rule coupled with the prohibition on more than one home equity loan at a time, consumers are inhibited from refinancing to take advantage of lower interest rates or to access additional capital at a time of need. Once a home equity loan has been on the books for at least one year, we would suggest that the homeowner should be able to refinance that loan as a conventional, non-home equity loan. This would reduce the cost to the consumer while making the transaction more attractive to the lender and thus more accessible.

**C. Additional HE after One Year.** In the event a homeowner's equity is sufficient under the 80% loan to value rule, a homeowner should also have the option of one additional home equity loan. If interest rates have increased after the first home equity loan was taken out, the consumer should not be required to refinance the entire balance at the higher rate in order to access their equity. By limiting this option to one additional loan closed at least one year after the closing of the existing home equity loan, we would avoid the "stacking" scenarios found in other states. The total of all loans against the homestead could still not exceed 80%.

**C. Fannie Mae Selling Guide Updates**

Fannie Mae has issued Selling Guide Announcement SEL-2106-03 (March 29, 2016), which includes the following updates:

**Updates to Texas Section 50(a)(6) Loans**

**Removal of Special Lender Approval for Selling and Servicing Texas Section 50(a)(6) Loans**

A Texas Section 50(a)(6) mortgage is a mortgage originated under the provisions of Section 50(a)(6) of the Texas Constitution, which allows a borrower to take equity out of a homestead property under certain conditions. Fannie Mae's current policy requires that sellers and servicers obtain special approval to sell and/or service these loans.

134 The announcement is available at https://www.fanniemae.com/content/announcement/sel1603.pdf.
With this update, Fannie Mae is eliminating the special lender approval requirement. Therefore, unless otherwise notified in writing, all lenders are eligible to sell and/or service Texas Section 50(a)(6) mortgage loans. However, lenders are reminded that they must be able to make the certifications and comply with the requirements contained in the Selling and Servicing Guides specific to Texas Section 50(a)(6) mortgages, as well as meet the eligibility criteria specified in the Texas Constitution. Any lender that intends to sell Texas Section 50(a)(6) mortgage loans originated by a third-party originator is also responsible for ensuring that the originating lender qualifies as an "authorized lender" under the Texas Constitution.

Because certain cures under the Texas law will result in outcomes that would continue to be considered to be unacceptable to Fannie Mae even after curing the deficiency in accordance with Texas law, the Guide is being updated to clarify that certain outcomes may result in repurchase.

The DU message indicating that Section 50(a)(6) loans may be delivered to Fannie Mae only with specific lender approval will be updated in a future release and may be disregarded until that time. All other provisions contained in the DU message related to Texas Section 50(a)(6) mortgages continue to apply.

**Effective Date**

This policy change is effective May 1, 2016 for whole loans purchased by or loans included in an MBS Pool with issue dates on or after May 1, 2016.

**Power of Attorney for Texas Section 50(a)(6) Loans**

Currently, the Selling Guide does not permit a power of attorney in connection with a Texas Section 50(a)(6) mortgage loan. Fannie Mae has removed this restriction from the Selling Guide and instead will rely on the lenders' standard representations and warranties that the loans were originated in accordance with applicable law.

Lenders are reminded that Fannie Mae's classification of mortgage transactions as "cash-out refinance" or "limited cash-out refinance" may differ from the way mortgages are classified under Texas law for purposes of compliance. The Selling Guide continues to not permit a power of attorney to sign the note or security instrument on cash-out refinance transactions.

**Effective Date**

This policy change is effective immediately.\(^{135}\)

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\(^{135}\) FANNIE MAE, SELLING GUIDE ANNOUNCEMENT SEL-2016-03 (March 29, 2016).
## EXHIBITS

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**Disclaimer:** This information was compiled as of November 16, 2016. Please be certain to verify and update. This information is provided for general information purposes only and is not intended as a substitute for obtaining legal advice.
Exhibit "A"

Cure Matrix

**Forfeiture Trigger:** If the lender or holder fails to comply with the lender's or holder's obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender's failure to comply. See Tex. Const. art. XVI, § 50(a)(6)(Q)(x).

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<td>Send written acknowledgment limiting to authorized percentage.</td>
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<td>(a)(6)(Q)(x)(b)</td>
<td>Additional real or personal property taken – (a)(6)(H)</td>
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<td>Send written acknowledgment that loan is not secured by impermissible property.</td>
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<tr>
<td>(a)(6)(Q)(x)(c)</td>
<td>Other – may include: recourse – (a)(6)(C); impermissible non-judicial foreclosure provision – (a)(6)(D); impermissible type of open-end credit – (a)(6)(F); impermissible acceleration provision – (a)(6)(J); impermissible repayments – (a)(6)(L); impermissible provision – (a)(6)(Q)(i), (ii), (iv); security instrument disclosure missing – (a)(6)(Q)(vi)</td>
<td>Send the owner a written notice modifying any other amount, percentage, term, or other provision prohibited by Section 50(a)(6) to a permitted amount, percentage, term, or other provision and adjust the account of the borrower to ensure that the borrower is not required to pay more than an amount permitted by Section 50(a)(6) and is not subject to any other term or provision prohibited by Section 50(a)(6).</td>
</tr>
<tr>
<td>(a)(6)(Q)(x)(d)</td>
<td>Failure to provide copies of final loan application and all executed documents signed by owner at closing – (a)(6)(Q)(v)</td>
<td>Deliver the required documents to the borrower.</td>
</tr>
<tr>
<td>Section</td>
<td>Violation</td>
<td>Cure</td>
</tr>
<tr>
<td>---------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>(a)(6)(Q)(x)(d)</td>
<td>Failure to have appropriate signatures on FMV acknowledgment – (a)(6)(Q)(ix)</td>
<td>Obtain appropriate signatures.</td>
</tr>
<tr>
<td>(a)(6)(Q)(x)(e)</td>
<td>Another home equity loan or reverse mortgage secured by homestead – (a)(6)(K)</td>
<td>Send the owner a written acknowledgment that the accrual of interest and all of the owner's obligations under the extension of credit are abated while any prior lien prohibited under Paragraph (K) remains secured by the homestead.</td>
</tr>
<tr>
<td>(a)(6)(Q)(x)(f)</td>
<td>Violation not covered in (x)(a)-(e) – may include: failure to provide 50(g) notice – (a)(6)(M)(i); untimely or failure to provide loan application, if not previously provided, or itemized fee disclosure at least one business day prior to closing – (a)(6)(M)(ii); closed prior to one year of another HE loan – (a)(6)(M)(iii); impermissible closing location – (a)(6)(N); blanks – (a)(6)(Q)(iii)</td>
<td>If the failure to comply cannot be cured under Subparagraphs (x)(a)-(e), curing the failure to comply by a refund or credit to the owner of $1,000 and offering the owner the right to refinance the extension of credit with the lender or holder for the remaining term of the loan at no cost to the owner on the same terms, including interest, as the original extension of credit with any modifications necessary to comply with Section 50(a)(6) or on terms on which the owner and the lender or holder otherwise agree that comply with Section 50(a)(6).</td>
</tr>
</tbody>
</table>

**Incurable Violations:** The lender or any holder of the note for the extension of credit shall forfeit all principal and interest of the extension of credit if:

(A) the extension of credit is made by a person other than a person described under Paragraph (P) of Section 50(a)(6), or

(B) if the lien was not created under a written agreement with the consent of each owner and each owner's spouse [see Section (a)(6)(A)], unless each owner and each owner's spouse who did not initially consent subsequently consents.

Exhibit "B"

Sample Cure Letters
Dear ______________:

On ____________, 200__, you received a loan (the "Loan") from _______________ (the "Bank") which is secured by a lien on your homestead. The Loan is an extension of credit defined by Article XVI, § 50(a)(6) of the Texas Constitution commonly known as a home equity loan.

Article XVI, § 50(a)(6)(E) of the Texas Constitution requires that an equity loan "does not require the owner or the owner’s spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit." Our records reflect that you paid more than three percent in fees. Pursuant to Article XVI, § 50(a)(6)(Q)(x)(a), the Bank hereby cures the same by providing you with a refund of the overcharge.

We apologize for this error and any inconvenience. Please contact us should you have any questions regarding this matter. We value your business and hope you will continue to think of us when you have financial needs.

Sincerely,

____________________________

Certified Mail; Return Receipt Requested
Dear ________________:

On ________________, you received a loan (the "Loan") from _____________ (the "Bank") which is secured by a lien on your principal residence. The Loan is an extension of credit defined by Article XVI, Section 50(a)(6) of the Texas Constitution which is commonly known as a home equity loan.

Article XVI, Section 50(a)(6)(N) requires that an equity loan is closed only at the office of the lender, an attorney at law, or a title company. Your Loan was not closed at such a location. Pursuant to Article XVI, Section 50(a)(6)(Q)(x)(f) of the Texas Constitution, the Bank hereby cures the failure to comply by providing a $1,000.00 credit to the principal balance of your Loan and offering to refinance the Loan for the remaining term of the Loan at no cost to you on the same terms as the original Loan, including interest, with any modifications necessary to comply with Article XVI, Section 50(a)(6). The Bank will credit $1,000.00 to your Loan balance regardless of whether you elect to refinance.

If you elect to refinance the Loan, you may begin the process by contacting me at ________________ and must do so on or before ________________, 2016. If we do not hear from you by the date indicated, we will assume you have declined our offer and elected not to refinance.

We apologize for this error and any inconvenience. Please contact us should you have any questions regarding this matter. We value your business and hope you will continue to think of us when you have financial needs.

Sincerely,


2016 Texas Land Title Institute – Home Equity Cures
PART 8. JOINT FINANCIAL REGULATORY AGENCIES

CHAPTER 153. HOME EQUITY LENDING

7 TAC §§153.5, 153.8, 153.13, 153.14, 153.17

The Finance Commission of Texas and the Texas Credit Union Commission ("commissions") propose amendments to the following home equity lending interpretations: §153.5, concerning Three percent fee limitation: §50(a)(6)(E); §153.8, concerning Security of the Equity Loan; §153.13, concerning Preclosing Disclosures; §153.14, concerning One Year Prohibition; and §153.17, concerning Authorized Lenders.

The amendments apply the administrative interpretation of the home equity lending provisions of Article XVI, Section 50 of the Texas Constitution ("Section 50") allowed by Section 50(u) and Texas Finance Code, §11.308 and §15.413.

In general, the purpose of the amendments to Chapter 153 is to implement changes resulting from the commissions' review of this chapter under Texas Government Code, §2001.039. The notice of intention to review 7 TAC, Chapter 153 was published in the Texas Register on February 26, 2016. (41 TexReg 1503). The Texas Department of Banking, the Texas Department of Savings and Mortgage Lending, the Office of Consumer Credit Commissioner, and the Texas Credit Union Department ("agencies") received one comment on the notice of intention to review. The comment was submitted by Black, Mann & Graham, L.L.P.

The agencies prepared an initial draft of amendments with technical corrections and updates to Chapter 153. The agencies distributed the initial draft to home equity stakeholders for precomments, in order to prepare an informed and well-balanced proposal for the commissions. The agencies received written precomments from several stakeholders. The agencies have incorporated suggestions offered by stakeholders into the proposed amendments. The agencies believe that this early participation of stakeholders has greatly benefited the resulting proposal.

The individual purposes of the proposed amendments to each rule are provided in the following paragraphs.

The purpose of the amendments to §153.5 is to use terminology that is consistent with other interpretations. In paragraphs (3)(B) and (7), the amendments add "equity" before "loan" to ensure that the provisions use the term "equity loan," which is defined in §153.1(7).

The purpose of the amendment to §153.8(5) is to make a technical correction in a citation to Section 50(a)(6)(H). In the comment on the notice of intention to review, the commenter notes that
this section currently contains an incorrect reference to "Section 50(a)(H)." In response to this comment, the amendment corrects the provision to cite Section 50(a)(6)(H).

The purpose of the proposed amendments to §153.13 is to specify how lenders can comply with the preclosing disclosure requirement in Section 50(a)(6)(M)(ii), and to include updated citations to federal rules. Under Section 50(a)(6)(M)(ii), a home equity loan may not be closed before "one business day after the date that the owner of the homestead receives . . . a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing." Currently, §153.13(3) explains that lenders may comply with this requirement by providing a properly completed HUD-1 form from the U.S. Department of Housing and Urban Development. The Consumer Financial Protection Bureau (CFPB) recently adopted a closing disclosure that integrates and replaces the HUD-1 form. The CFPB's rules containing the requirements for the integrated closing disclosure are located at Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38. The requirement to provide the closing disclosure went into effect on October 3, 2015. The requirement generally applies to closed-end residential mortgage loans for which the lender or servicer received a loan application on or after that date. For loans where the application was received before October 3, the HUD-1 form (rather than the CFPB closing disclosure) was the appropriate form for lenders to use. The closing disclosure requirement does not apply to home equity lines of credit, which require separate account-opening disclosures under a different section of Regulation Z, 12 C.F.R. §1026.6(a).

In the comment on the notice of intention to review, the commenter recommends replacing the reference to the HUD-1 form in §153.13(3) with a reference to the CFPB's closing disclosure. Based on this recommendation and the federal rules discussed above, the proposed amendments to §153.13(3) delete the reference to the HUD-1 form, and add new references to the disclosures currently required under Regulation Z: the closing disclosure (for closed-end equity loans) and the account-opening disclosures (for home equity lines of credit). When these disclosures are properly completed, they provide borrowers with a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing, in accordance with Section 50(a)(6)(M)(ii).

The purpose of the amendment to §153.14(2)(A) is to update a citation to federal law. Currently, this provision cites the Soldiers' and Sailors' Civil Relief Act. In 2003, the Servicemembers Civil Relief Act replaced the former Soldiers' and Sailors' Civil Relief Act. The amendment to §153.14(2)(A) replaces a citation to the previous law with a citation to the current law.

The purpose of the amendments to §153.17 is to specify who is authorized to make a home equity loan, in light of recent changes in federal policy and amendments to the licensing provisions of Texas Finance Code, Chapters 156 and 342. Section 50(a)(6)(P) lists the types of lenders that are authorized to make home equity loans, including "a person approved as a mortgagee by the United States government to make federally insured loans," "a person licensed to make regulated loans, as provided by statute of this state," and "a person regulated by this state as a mortgage broker."

In §153.17(2), a proposed amendment removes a reference to "Approved correspondents" and replaces it with "Loan correspondents." In 2010, the Department of Housing and Urban Development ended its program of approving loan correspondents, as described in mortgagee letter 2010-20. As amended by the proposed amendments, §153.17(2) explains that loan correspondents
to an approved mortgagee are not authorized lenders unless they qualify under another provision of Section 50(a)(6)(P). In addition, in the comment on the notice of intention to review, the commenter recommends correcting a reference in §153.17(2) to "another section of (a)(6)(P)." In response to this recommendation, a proposed amendment replaces this phrase with "another provision of Section 50(a)(6)(P)."

Proposed new §153.17(3) explains that a person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi). Until 2011, Chapter 156 of the Texas Finance Code described the licensing requirements for mortgage brokers. In 2011, the chapter was amended to replace the term "mortgage broker" with the terms "residential mortgage loan company" and "residential mortgage loan originator." In 2011, the Texas Department of Savings and Mortgage Lending published a "Home Equity Terminology Advisory Bulletin," explaining that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution. In the comment on the notice of intention to review, the commenter recommends an amendment to §153.17 describing this interpretation. In response to this comment, proposed new §153.17(3) explains that a person licensed under Chapter 156 is a mortgage broker for purposes of the constitution.

Proposed new §153.17(4) replaces current paragraphs (3) and (4), and explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution. Current §153.17(3) explains that a nondepository lender must hold a license under Chapter 342 to make, transact, or negotiate a secondary mortgage loan. Current §153.17(4) explains that if a person does not meet the definition of Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans. In 2007, Texas Finance Code, §342.051 was amended to include an exemption for a person licensed under Chapter 156. In a precomment, one stakeholder recommends deleting current paragraph (3), because the paragraph does not acknowledge the exemption for Chapter 156 licensees, and because current paragraph (1) already explains that lenders must comply with statutory licensing requirements. In response to this precomment, the proposal replaces paragraphs (3) and (4) with a new paragraph (4). The new paragraph explains that a Chapter 342 licensee is a regulated lender for purposes of the constitution, and that if a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), the person must obtain a Chapter 342 license to be authorized to make home equity loans.

Harold Feeney, Credit Union Commissioner, on behalf of the Texas Credit Union Commission and Leslie L. Pettijohn, Consumer Credit Commissioner, on behalf of the Finance Commission of Texas have determined that for the first five-year period the amendments are in effect there will be no fiscal implications for state or local government as a result of administering the interpretations.

Commissioner Feeney and Commissioner Pettijohn have also determined that for each year of the first five years the proposed amendments are in effect, the public benefits anticipated as a result of the amendments will be to create standards and guidelines for both lenders and borrowers, fostering a stable environment for the extension of home equity loans.

There is no anticipated cost to persons who are required to comply with the amendments as proposed. Regulation Z currently requires lenders to provide the disclosures described in the proposed amendments to §153.13. Any costs of complying with the proposed amendments are
imposed by the constitution and federal law, and are not imposed by the proposed amendments. There will be no adverse economic effect on small or micro-businesses. There will be no effect on individuals required to comply with the amendments as proposed.

Comments on the proposed amendments may be submitted in writing to Laurie Hobbs, Assistant General Counsel, Office of Consumer Credit Commissioner, 2601 North Lamar Boulevard, Austin, Texas 78705-4207 or by email to laurie.hobbs@occc.texas.gov. To be considered, a written comment must be received on or before 5:00 p.m. central time on the 31st day after the date the proposed amendments are published in the Texas Register. At the conclusion of the 31st day after the proposed amendments are published in the Texas Register, no further written comments will be considered or accepted by the commissions.

The amendments are proposed under Article XVI, Section 50(u) of the Texas Constitution and Texas Finance Code, §11.308 and §15.413, which authorize the commissions to adopt interpretations of Article XVI, Section 50(a)(5) - (7), (e) - (p), (t), and (u) of the Texas Constitution. The constitutional provisions affected by the proposed amendments are contained in Article XVI, Section 50 of the Texas Constitution.

§153.5. Three percent fee limitation: Section 50(a)(6)(E).

An equity loan must not require the owner or the owner's spouse to pay, in addition to any interest, fees to any person that are necessary to originate, evaluate, maintain, record, insure, or service the extension of credit that exceed, in the aggregate, three percent of the original principal amount of the extension of credit.

(1) - (2) (No change.)

(3) Charges that are Interest. Charges an owner or an owner's spouse is required to pay that constitute interest under §153.1(11) of this title (relating to Definitions) are not fees subject to the three percent limitation.

(A) (No change.)

(B) Legitimate discount points are interest and are not subject to the three percent limitation. Discount points are legitimate if the discount points truly correspond to a reduced interest rate and are not necessary to originate, evaluate, maintain, record, insure, or service the equity loan. A lender may rely on an established system of verifiable procedures to evidence that the discount points it offers are legitimate. This system may include documentation of options that the owner is offered in the course of negotiation, including a contract rate without discount points and a lower contract rate based on discount points.

(4) - (6) (No change.)

(7) Charges Paid to Third Parties. Charges an owner or an owner's spouse is required to pay to third parties for separate and additional consideration for activities relating to originating an equity loan are fees subject to the three percent limitation. Charges those third parties absorb, and do not charge an owner or an owner's spouse that the owner or owner's spouse might otherwise be required to pay are unrestricted and not fees subject to the three percent limitation. Examples of
these charges include attorneys' fees for document preparation and mortgage brokers' fees to the extent authorized by applicable law.

(8) - (16) (No change.)


An equity loan must not be secured by any additional real or personal property other than the homestead. The definition of "homestead" is located at Section 51 of Article XVI, Texas Constitution, and Chapter 41 of the Texas Property Code.

(1) - (4) (No change.)

(5) Any equity loan on an urban homestead that is secured by more than ten acres is secured by additional real property in violation of Section 50(a)(6)(H) [(50)(a)(H)].


An equity loan may not be closed before one business day after the date that the owner of the homestead receives a copy of the loan application, if not previously provided, and a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing. If a bona fide emergency or another good cause exists and the lender obtains the written consent of the owner, the lender may provide the preclosing disclosure to the owner or the lender may modify the previously provided preclosing disclosure on the date of closing.

(1) - (2) (No change.)

(3) The lender must deliver to the owner a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing.

(A) For a closed-end equity loan, the lender may satisfy this requirement by delivering a properly completed closing disclosure under Regulation Z, 12 C.F.R. §1026.19(f) and §1026.38.

(B) For a home equity line of credit, the lender may satisfy this requirement by delivering properly completed account-opening disclosures under Regulation Z, 12 C.F.R. §1026.6(a).

[(3) A lender may satisfy the disclosure requirement of providing a final itemized disclosure of the actual fees, points, interest, costs, and charges that will be charged at closing by delivery to the borrower of a properly completed Department of Housing and Urban Development (HUD) disclosure Form HUD-1 or HUD-1A.]

(4) - (7) (No change.)


An equity loan may not be closed before the first anniversary of the closing date of any other equity loan secured by the same homestead property.

(1) (No change.)
(2) Section 50(a)(6)(M)(iii) does not prohibit modification of an equity loan before one year has elapsed since the loan's closing date. A modification of a home equity loan occurs when one or more terms of an existing equity loan is modified, but the note is not satisfied and replaced. A home equity loan and a subsequent modification will be considered a single transaction. The home equity requirements of Section 50(a)(6) will be applied to the original loan and the subsequent modification as a single transaction.

(A) A modification of an equity loan must be agreed to in writing by the borrower and lender, unless otherwise required by law. An example of a modification that is not required to be in writing is the modification required under the Servicemembers Civil Relief Act, 50 U.S.C. app. §§501-597b [Soldiers' and Sailors' Civil Relief Act].

(B) - (D) (No change.)


An equity loan must be made by one of the following that has not been found by a federal regulatory agency to have engaged in the practice of refusing to make loans because the applicants for the loans reside or the property proposed to secure the loans is located in a certain area: a bank, savings and loan association, savings bank, or credit union doing business under the laws of this state or the United States; a federally chartered lending instrumentality or a person approved as a mortgagee by the United States government to make federally insured loans; a person licensed to make regulated loans, as provided by statute of this state; a person who sold the homestead property to the current owner and who provided all or part of the financing for the purchase; a person who is related to the homestead owner within the second degree of affinity and consanguinity; or a person regulated by this state as a mortgage broker.

(1) An authorized lender under Texas Finance Code, Chapter 341[, Texas Finance Code,] must meet both constitutional and statutory qualifications to make an equity loan.

(2) A HUD-approved mortgagee is a person approved as a mortgagee by the United States government to make federally insured loans for purposes of Section 50(a)(6)(P)(ii). Loan Approved correspondents to a HUD-approved mortgagee are not authorized lenders of equity loans unless qualifying under another provision of Section 50(a)(6)(P) [section of (a)(6)(P)].

(3) A person who is licensed under Texas Finance Code, Chapter 156 is a person regulated by this state as a mortgage broker for purposes of Section 50(a)(6)(P)(vi).

(4) A person who is licensed under Texas Finance Code, Chapter 342 is a person licensed to make regulated loans for purposes of Section 50(a)(6)(P)(iii). If a person is not described by Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), then the person must obtain a license under Texas Finance Code, Chapter 342 in order to be authorized to make an equity loan under Section 50(a)(6)(P)(iii).

[3] A non-depository lender or broker that makes, negotiates, arranges, or transacts a secondary mortgage loan that is governed by Chapter 342, Texas Finance Code, must comply with the licensing provisions of Chapter 342, Texas Finance Code.]

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[(4) A lender who does not meet the definition of Section 50(a)(6)(P)(i), (ii), (iv), (v), or (vi), must obtain a regulated loan license under Chapter 342 of the Texas Finance Code to meet the provisions of subsection (iii).]

The agency certifies that legal counsel has reviewed the proposal and found it to be within the state agency's legal authority to adopt.

Filed with the Office of the Secretary of State on July 8, 2016.

TRD-201603431

Leslie L. Pettijohn

Consumer Credit Commissioner

Joint Financial Regulatory Agencies

Earliest possible date of adoption: August 21, 2016

For further information, please call: (512) 936-7621
HOME EQUITY CURES
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- Paper is:
  - Intended as a resource
  - Includes practice tips, developments, a cure matrix, sample cure letters
  - Not definitive explanation; need to consult with your own counsel
Topics

- Supreme Court of Texas Decisions
- Cures
- Other Developments

Supreme Court of Texas

- *Garofolo v. Ocwen Loan Servicing*
  - "foreclosure-eligible" home equity loans
  - terms and conditions required in loan documents
  - forfeiture is a term and condition that home equity loan must include
Supreme Court of Texas

Wood v. HSBC Bank USA, N.A.

- Liens securing constitutionally noncompliant home-equity loans are invalid until cured
- Not subject to any statute of limitations for suits to quiet title based on alleged noncompliance with Section 50(a)(6)

The Court did not address various issues. In connection with a traditional breach of contract claim seeking forfeiture, the Court did not expressly state:

- Whether a statute of limitations applies (a four year limitations period applies to a breach of contract claim), or
- If a four year limitation period applies, whether the cause of action accrues when the violation accrues (in most cases at the time of origination) or when a lender fails to take corrective action within 60 days after the borrower’s notification.
Cures

- Cure Authority
- Section 50(a)(6)(Q)(x)
- Doody

Section 50(a)(6)(Q)(x) states:
except as provided by Subparagraph (xi) of this paragraph, the 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 lender or holder fails to comply with the lender’s or holder’s obligations under the extension of credit and fails to correct the failure to comply not later than the 60th day after the date the lender or holder is notified by the borrower of the lender’s failure comply.
- Cures
  - Specific cures: Subparagraphs (Q)(x)(a)-(e)
  - Subparagraph (Q)(x)(f) – Commonly known (or formerly known) as the “catch-all”

- Cures
  Excepted from cure authority, Subparagraph (Q)(xi)
  - unauthorized lender
  - made without consent of each owner and each owner's spouse, unless subsequently consents
Forfeiture

- The forfeiture remedy set forth in Section 50(a)(6)(Q)(x) is not 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.
- Borrowers may access the forfeiture remedy through a breach-of-contract action.

Forfeiture

- A breach-of-contract action may impose forfeiture if, following adequate notice by the borrower, a lender or holder fails to correct the alleged failure to comply by performing one of the six available corrective actions.
Forfeiture

□ Forfeiture is an available remedy only if one of the six corrective measures can actually correct the failure to comply and the lender nevertheless fails to perform the relevant corrective measure.

□ Whether the provision (formerly known as the “catch all”), Section 50(a)(6)(Q)(x)(f), is effective depends on the corrective capacity of the offer to refinance.

Forfeiture

□ Forfeiture is not an available remedy if the six corrective actions cannot actually correct the failure.

□ Technical legal term if fail to take applicable corrective measure.
Cure Interpretations – 7 T.A.C. §§ 153.91-96

- Adequate Notice of Failure to Comply - § 153.91
- Counting the 60-Day Cure Period - § 153.92
- Methods of Notification - § 153.93

Cure Interpretations

- Methods of Curing a Violation [(a)-(e)] - §153.94
- Cured Failure - § 153.95
- Correcting Failures under Section 50(a)(6)(Q)(x)(f) (formerly known as the catch all) - § 153.96
Judicial Decisions Regarding Cures

- Cure Authority
- Adequate Notice of Failure to Cure
- Cures – Amendments Not Retroactive

Judicial Decisions Regarding Cures

- Contractual Breach v. Constitutional Violation
- Contractual Cure
■ Fannie Mae Servicing Guide
  □ Notification to Fannie Mae of notice from borrower of a failure to comply in connection with modification

■ Other Developments
  □ Interpretations Amendments
  □ Texas Legislation
  □ Fannie Mae Selling Guide Updates
We have covered much!

Thank you for your attention.
Who Helps Those Who Can’t Help Themselves?
THE ROLE OF THE TITLE AGENT IN RECOGNIZING, PREVENTING AND REPORTING ELDER FINANCIAL EXPLOITATION

2016 Texas Land Title Institute

David M. Hays
Vice President
Underwriting & Claims Counsel
First National Title Insurance Company
Biography

David Hays is a 1994 graduate of Texas Tech University, obtained his Juris Doctorate from Texas Wesleyan School of Law in 2004 evening program while working in the title industry. David has served as an abstractor, examiner, escrow, fee attorney, underwriter and general counsel over his 20 plus years in the real estate and title insurance industries. David is a volunteer speaker for the Texas Land Title Association and serves on the TLTA Legislative and Institute committees. In addition, David is a regular speaker and presenter for continuing education classes throughout the state and is a native resident of the Dallas-Fort Worth Metroplex. David, his wife Michelle and his two daughters Olivia and Bella reside in Colleyville.
WHO HELPS THOSE WHO CAN’T HELP THEMSELVES?
THE ROLE OF THE TITLE AGENT IN RECOGNIZING, PREVENTING AND REPORTING ELDER FINANCIAL EXPLOITATION

“It’s the ultimate betrayal to win the trust of a vulnerable adult and then steal their money or misuse their property.” -- Beth Engelking, DFPS

Who helps those who can’t help themselves? While Texas, and the country for that matter, spend enormous amounts of time, energy and resources focusing on the protection of our children who cannot protect themselves, it seems we spend far less time and resources protecting the elderly who, likewise, by reason of various cognitive impairments, cannot help themselves. Elder abuse, and more specifically elder financial exploitation, is a growing problem in the U.S. Elder financial exploitation has been called the “Crime of the Twenty-First Century”.1 Many elderly adults have significant savings and wealth, and even those elderly who may not have significant liquid assets, often times own a home with no mortgage making them a prime candidate for financial exploitation. It is for these reasons both federal and state governments have passed stronger laws related to the protection of our elder Americans, creating harsh penalties for individuals committing these acts of abuse and placing more stringent reporting requirements for persons who have knowledge or suspect such abuse is occurring. Additionally, the Consumer Financial Protection Bureau has recommended standard operating procedures for lenders and banks aimed at identifying and preventing elder financial exploitation. Texas title agents need to follow suit in educating their employees on signs of abuse and establishing internal procedures on what action to take when such abuse is known or suspected to exist.

INSIDE THE NUMBERS

In Texas we define an elderly person as a person age 65 or older.2 Elder Financial Exploitation is defined as the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person's social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.3 This abuse frequently occurs without the explicit knowledge or consent of a senior or disabled adult, depriving him/her of vital financial resources for his/her personal needs.4

While the U.S. has no formal accounting measure for tracking elder financial exploitation, a number of independent studies indicate that 20% of older Americans have suffered some form of financial exploitation—a number that is likely conservative as a result of cases that go unreported by victims especially when the abuse is at the hand of friends or family members.5 A MetLife Mature Market study estimates 51% of all elder financial exploitation is committed by

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4 Id. at The MetLife Study of Elder Financial Abuse
5 Ashley Jaconetti, Vindicating Vulnerable Victims: Illinois’ Efforts to Prevent Elder Financial Exploitation, Public Interest Law Reporter, Vol. 17, Issue 2, Article 9 (Spring 2012) 131. Ashley Jaconetti stating that “AARP’s Associate State Director of Advocacy and Outreach Ryan Gruenenfelder explained that elderly persons that are victimized by family or friends are often hesitant to report the financial abuse, whether out of love for the person committing the crime or dependence on him or her for care.”
strangers. However, the more important statistic in this study indicates that it is possible in excess of 34% of elder financial exploitation is committed by a family member, family friend, or an acquaintance. In a March 2016 report, the CFPB estimated that losses from elder financial exploitation may range from $2.9 billion to a potential $36 billion.

What has caused this relative rapid ascent in the reported occurrences of financial exploitation? One of the major factors contributing to the rise in reported elder financial exploitation is simply the raw numbers. Americans are living longer than ever before. The number of centenarians in 2014 is up 43% from the year 2000. We now have 72 thousand Americans age 100 or older. According to a 2015 U.S. News & World Report, the Baby Boom generation (made up of those persons born between 1946 and 1964) represent 76 million individuals. Drilling down further, Texas is out pacing the nation with respect to the growth of its elderly population. As of 2014, Texas stands third behind only California and Florida for the state with the greatest number of Baby Boomers age 65 or older. Over three million Texans are age 65 and older. More importantly, the Baby Boom generation (ages 52-70) controls a significant amount of wealth holding 70% of all disposable income in the U.S. Combine these numbers with the fact that, statistically speaking, Generation X (1961-1979) and Generation Y (1980-1995) Americans are not as well off as their parents and you have a prime recipe for financial exploitation.

**Diminished Capacity**

With increased awareness of elder financial exploitation comes increased responsibilities and demands for financial institutions and settlement agents to do their part in identifying possible elder financial exploitation, preventing such exploitation and reporting apparent abuse.

Title agents, being on the front lines, are in a unique position, working aside our financial institutions, to combat this abuse. Title agents engage face-to-face with clients. This face-to-face interaction between the title agent and the client opens the door for the title agent to identify potential abuse.

The first step in preventing elder financial exploitation in the closing transaction is a basic understanding of the mental aspect of elder abuse and identifying the indicators that, and circumstances under which, such abuse may occur in the closing transaction. Generally speaking, elder Americans have an increased vulnerability compared to their younger counterparts. This vulnerability combined with a concentration of wealth makes the elderly a prime target for financial exploitation. In 2012, a University of California study of 119 adults ages
50 to 80, with an average age of 68, resulted in the following: The elder adults were shown 30 facial photographs each with a facial expressions that were considered trustworthy, untrustworthy or neutral. The same photos were shown to younger adults with an average age of 23. All ages viewed the trustworthy and neutral faces the same. However, the older subjects tended to view the untrustworthy faces as being more trustworthy than did the younger subjects. According to Shelly Taylor, of the Social and Neuroscience Laboratory at the University of California, “They missed facial cues that were pretty easily distinguished.”

According to similar study at UCLA, the brain activity of young and older subjects was mapped while viewing untrustworthy facial expressions. In comparing the activity of the anterior insula, researchers found that the anterior insula of the older subjects lit up much more weakly than that of the younger subjects, again reinforcing the thought that, generally, as we age our cognitive ability to differentiate between someone who is trustworthy and someone who is not begins to diminish.

Title agents would be wise, and to a large extent, will be directed by the big three banks to implement training designed to educate their employees on the signs of elder financial exploitation. While there is no single identifying act signifying the occurrence of financial abuse, there are, in varying degrees, facts and circumstances that may give rise to increased scrutiny and further investigation by the escrow officer.

The Controlling Adult Child

A common scenario presents itself when an adult child is highly involved in, and controlling, the closing transaction while not a vested owner on the deed. A title agent may find that the elderly parent (often times a surviving spouse) is either not present or if present rarely speaks during encounters leading up to closing. This should raise a red flag for the title agent leading to further investigation. Title agents must understand who their client is. In this scenario the elder adult vested in title is the client. The title agent must attempt to speak with the elder parent alone and without interference from the adult child. Conversation, absent of the adult child, allows the title agent to identify potential concerns. First, does the elder parent want to consummate the proposed transaction? For instance, if the proposed transaction is a reverse mortgage, the title agent must ask the elder parent if it is actually their own desire to obtain the reverse mortgage. The title agent should engage in a series of questions that go beyond the surface in order to determine if the transaction seems to make common sense for the elder adult. Does it really make sense for an elder adult to acquire a reverse mortgage when their house is paid for and they seem to have sufficient income for discretionary and static expenses? Oftentimes undue influence by an adult child causes an elderly parent to engage in a transaction they would not

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18 Eric Alder, Exploitation of elderly woman by boyfriend is another chapter in an increasingly common story, The Kansas City Star, September 13, 2014.
19 Id.
20 Id.
21 Id.
22 Wells Fargo, Bank of America, JP Morgan Chase
23 See, In re Estate of Woods, 542 S.W.2d 845, 847 (Tex. 1976); Rothermel v. Duncan, 369 S.W.2d 917, 922 (Tex. 1963). (“Undue influence requires (1) the existence and exertion of an influence, (2) the effective operation of such influence so as to subvert or overpower the mind of the maker of the document at the time of execution of the document, and (3) the execution of the document, which the maker thereof would not have executed but for such influence.”).
otherwise wish to engage. In speaking alone with the elder parent, the title agent can begin to gage whether the driving force behind the proposed transaction is the adult child or whether it is in fact the desire of the elder parent to pursue the transaction. If the title agent believes it is the former, consideration should be given to declining to close the transaction.

The Power of Attorney

Often, the road leading to financial exploitation unfortunately begins by simply trying to make life easier for those who eventually commit the abuse. For many elders, a power of attorney is a useful tool because of “its simplicity, convenience and flexibility.” These same features make it an effective tool for financial exploitation. Consider the following:

Elizabeth, 87 years-young, asked her son to move her to an upscale living facility. When her son informed her that she couldn’t afford such a facility, Elizabeth told a friend of her son’s response because she knew something was amiss. There was no doubt in Elizabeth’s mind that she had the money. A few years earlier, Elizabeth had executed a durable power of attorney naming her son as agent. An investigation by the state’s adult protective services revealed that Elizabeth’s son transferred in excess of $200,000.00 from her bank accounts into his personal accounts. Molly met a similar fate when, after falling ill, granted a durable power of attorney to her sister who proceeded to make cash withdraws from Molly’s account and gamble away $50,000.00.

Finally, Wesley, an eighty-five-year-old widower, lost $500,000 when he was befriended by Michael, a former sheriff’s deputy, who persuaded Wesley to execute a financial power of attorney in favor of himself, which he used to transfer money out of Wesley’s bank accounts.

While these examples all involve the misappropriation of cash assets, we see similar breaches in fiduciary duty in the title industry. One common example occurs when adult children attempt to use a power of attorney granted to them by an elderly surviving parent to apply for and obtain a reverse mortgage or to sale a home. This is a similar situation to the “controlling” adult child previously discussed. The distinction between the two is that in the controlling adult child situation, the adult vested in title is the client and ultimately is the only individual who can execute closing documents at the title agency. If the title agent determines or has concerns that the elder parent does not want to close the transaction, the title agent need only communicate the title agency’s refusal.

24 See Holden v. Holden 56 S.W.3d 642 Tex. App., Tyler, Susan Jackson Holden and Terry Holden, Appellants v. Charles Lyle Holden, as he Independent Executor of the Estate of Rosie Eunice Holden, Deceased, Appellee NO. 12–13–00165–CV Opinion delivered January 21, 2015 where appellant was found to have exerted influence over elderly family member suffering from A.L.S. by procuring the assignment of an oil and gas royalty interest.
26 See id. at 166.
28 See id. at 166.
30 Id.
31 Id.
32 Id.
33 Rhein, supra, at 168.
34 See Generally, Tex. Estates Code § 752.051 “ A fiduciary duty generally includes the duty to: (1) act in good faith; (2) do nothing beyond the authority granted in this power of attorney; (3) act loyally for the principal’s benefit; (4) avoid conflicts that would impair your ability to act in the principal’s best interest.”
to close the transaction to elder parent—the controlling adult child has no legal authority to act. However, when the adult child attempts to act under a valid power of attorney, the situation becomes a bit more clouded. By definition a properly drafted power of attorney may empower or authorize an individual (the “attorney-in-fact”) to act on behalf, and in place of, the principal who executed the power of attorney. The power of attorney may even specifically provide for the attorney-in-fact to “…sell, exchange, convey with or without covenants, quitclaim, release, surrender, mortgage, encumber…” the real property. This empowerment may leave the title agent with a feeling that they are required to accept the power of attorney and allow the adult child to close the transaction. It is important that the title agent keep in mind that there exists no legal authority that requires a title company to accept a power of attorney. Additionally, title agencies retain the right to decline a transaction for which it deems the risk of claim to high as to assume potential liability.

Title agents who encounter a family member or friend acting as attorney-in-fact under a power of attorney attempting to close a reverse mortgage for an elder should be looking for signs of elder exploitation and take action to further investigate the nature of the transition. Many, if not all underwriters, generally refuse to insure a reverse mortgage transaction under a power of attorney when the agent under the power of attorney is someone other than a borrower’s spouse. In the event an underwriter approves the use of a power of attorney in such a transaction, the title agent should take a similar approach as would be taken in the controlling adult child scenario. In cases where the elder principal maintains full mental capacity, the title agent should request to speak with the principal, absent of the attorney-in-fact in order to assess the understanding and desires of the elder and to ratify the use of the power of attorney by the attorney in fact for purposes of closing the transaction. Assessing the likelihood of elder abuse becomes even more difficult when the elder is incapacitated. In these instances, the title agent may consider taking steps to identify whether the elder has other children other than the child acting as agent. If so, the title agent should consider making contact with these children in an effort to determine whether or not they object to the proposed transaction. In either scenario the title agent should again use a common sense approach to assessing whether the proposed transaction makes financial sense for the elder or whether it appears that the true beneficiary of the proceeds will be the adult child.

On a personal note, I have refused to close reverse mortgage transactions when it appeared the elder was pressured into the transaction by a family member or friend. One such instance occurred when the young adult son of an elder mother was acting under a power of attorney due to his mother’s physical incapacities. Prior to closing, I visited the elder mother at her home with the son present, as I had preexisting concerns regarding her desire to close the transaction. At the home, it appeared clear to me that the young adult son and

35 Tex. Estates Code § 752.001  
36 Tex. Estates Code § 752.102  
37 See Generally, Arron Day, Texas Land Title Association 2015 Legislative Report, ttp://www.tlta.com/government_affairs/documents/2015_Legislative_Report_final.pdf “The Real Estate, Probate and Trust Law (REPTL) Section of the State Bar of Texas brought a comprehensive Power of Attorney bill this session that among other things would have forced title companies to accept all durable POAs. There were many other issues with the bill. After extensive negotiation, objectionable elements of the bill were removed.”
attorney-in-fact under the power of attorney was living at home, was unemployed, and circumstances in the home indicated evidence of drug use. Further, the son talked over and cut off his mother when she attempted to respond to my questions, in some cases not allowing his mother to respond at all to the questions posed. The conversation ended when the son stormed out of the house as a result my request that he allow his mother to answer my questions. Within a few minutes of discussing the proposed transaction without the presence of the son, the mother confessed that it was at his insistence that she apply for the reverse mortgage.

While this is an extreme case, often times it may be less apparent that financial abuse is occurring under the cloak of a power of attorney. A feeling of entitlement may arise in a family member or friend acting as an attorney-in-fact under a power of attorney. In most instances the attorney-in-fact is receiving no financial compensation for their time and effort in handling the proposed transaction creating this feeling of entitlement resulting in the attorney-in-fact feeling as though he/she has the right to help himself/herself by appropriating a portion of the elder’s property by abusing his/her fiduciary responsibility to the principal. Even a small benefit, for instance an attorney-in-fact attempting to submit an invoice for a few hundred dollars—absent authority for such compensation set out in the language of the power of attorney itself—is a breach of that agent’s fiduciary duty to the principal and is considered financial exploitation of the elder principal.

Whether it is a reverse mortgage, home equity loan, refinance or straight sale transaction, title agents should proceed cautiously and with extreme diligence investigating red flags when a power of attorney, authorized by an elder, is being used to close a transaction and not be hesitant to delay or refuse a closing where abuse appears present.

**Transfer on Death Deed**

Effective September 1, 2015, the Texas Estates Code was amended to include a new statutory provision allowing for the execution of a Transfer on Death Deed. Chapter 114 is referred to as the Texas Real Property Transfer on Death Act. This new statutory provision was created to allow an individual (the “Transferee”) the ability to transfer his/her interest in real property to one or more beneficiaries effective at the transferee’s death by a Transfer on Death Deed. While intended to simplify the posthumous distribution of real property by allowing the real estate to pass without the need to open an administration on the decedent’s estate, much like the power of attorney, the transfer on death deed also provides a new avenue for those family and friends looking to exploit the elder property owner. Additionally, the mechanics of the Transfer on Death Deed may allow an unscrupulous family member or friend to fly under the radar when a contract to sell the real property arrives at the office of the title agency. While filed of record prior to the transferor’s death, a beneficiary’s interest under a transfer on death deed does not vest until the transferor dies—this assuming the transferor has not filed an instrument in the real property records

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39 Id.
41 Id. at § 114.001.
42 Id. at § 114.051.
revoking the transfer, the property has not previously been transferred, or that the transfer has not been extinguished by a subsequent divorce between transferor and transferee.\textsuperscript{43} Title agents will likely only encounter Transfer on Death Deed posthumously, when the beneficiary subsequently attempts to sell the property.

What can a title agent do to be certain that the beneficiary has not financially exploited an elder transferor? As is the case with a power of attorney, the title agent must engage in investigative activity in an attempt to verify that the Transfer on Death Deed was intentionally executed by the elder (now deceased) transferor and not procured by undue influence or executed by an elder who lacked mental capacity. Title agents should be aware that a transfer on death deed may not be created by use of a power of attorney.\textsuperscript{44} In an attempt to identify possible financial exploitation, title agents presented with a vesting by transfer on death deed would be wise to inquire whether the decedent died leaving a will in order to ascertain whether there is a conflict between those devisees who take under the will and the transferee under the Transfer on Death Deed. In the event of a conflict, title agents might consider joining devisees under the will or otherwise confirming that they do not object to the proposed transaction rather than risk a complaint post-closing.\textsuperscript{45} In cases where the transferor under the Transfer on Death Deed died intestate, consideration should be given to obtaining affidavits of heirship—again to ascertain whether a conflict exists between the transferor’s heirs at law and the transferee under the Transfer on Death Deed—the best practice again being an attempt to reconcile any conflicts by possible joinder or consent affidavits.

**Duty to Report**

Does the title agent have a duty to report suspected elder financial exploitation? One could argue that we have a moral obligation to report any suspected elder financial exploitation to the proper authority. However, the short answer to the question is a resounding yes. Chapter 48 of the Texas Human Resources Code requires any person having cause to believe that an elderly person is subject to financial exploitation to report such activity to the Texas Department of Family and Protective Services.\textsuperscript{46} The failure to report potential elder abuse is a Class A misdemeanor.\textsuperscript{47} Additionally, the March 2015 report issued by the Consumer Financial Protection Bureau, entitled “Recommendations and Report for Financial Institutions on Preventing and Responding to Elder Financial Exploitation,” makes it crystal clear that responsibility of preventing and responding to such financial abuse is placed squarely on the institutional lenders. And, as was the case with TRID, the collateral effects of the responsibilities placed on these lenders falls at the feet of the title agent.

**The Red Flags of Elder Abuse**

Identifying the Red Flags of elder financial exploitation will assist the title agent in recognizing and reacting to suspected abuse. Title agents should be aware of the following red

\textsuperscript{43} Id. at § 114.103 and § 114.057.

\textsuperscript{44} Id. at § 114.054.

\textsuperscript{45} See Tex. Estates Code § 114.057 (While a will does not revoke or supersede a transfer on death deed, the best title insurance practice is to identify whether there exist any potential heirs to the transferor who might later allege undue influence or mental incapacity of the transferor and request that those individuals join in the transaction or provide some type of written confirmation that they do not object to the sale.)

\textsuperscript{46} Tex. Human Resources Code § 48.051

\textsuperscript{47} Id. at § 48.052
flags, and investigate further if one or more red flags appear present in a proposed transaction:

- Advanced Age
- Victim is typically a single, Caucasian woman but can be any elder.
- Controlling adult child involved
- Adult child living with parent
- POAs recently executed
- Use of a POA without title agent speaking to the principal other than by phone
- Deeds into Trusts where adult child is the trustee recently filed of record
- Uninsured deeds filed recently filed in the chain of title. E.g. Adult child is vested by gift deed from parent recorded within months of proposed sale transaction by adult child. Title agent should ratify the validity of the deed with the elder parent.
- Elder borrower who does not appear to understand the specific terms of the transaction
- Does the transaction seem to make sense for the elder?
- Suspicion of drug or alcohol use by adult child or family member living with the elder parent.

**CFPB Mandate**

The Consumer Financial Protection Bureau (CFPB) is a federal agency created in 2011 and authorized by the Dodd-Frank Wall Street Reform and Consumer Protection Act. It is responsible for consumer protection in the financial sector including the regulation of banks, credit unions, and mortgage service operations. While the CFPB does not have direct authority over title agencies, the rules and regulations it imposes on financial institutions collaterally affect all title agents. In 2011, the CFPB, recognizing the need to protect older Americans from financial exploitation established, the Office of Financial Protection for Older Americans. In March of 2016, through the Office of Financial Protection for Older Americans, the CFPB issued an advisory report with recommendations on recognizing, preventing and responding to financial exploitation. These recommendations include:

1) Develop, implement and maintain internal protocols and procedures for protecting account holders from elder financial exploitation.
2) Train management and staff to prevent, detect, and respond to elder financial exploitation.
3) Detect elder financial exploitation by harnessing technology.
4) Report all cases of suspected exploitation to relevant federal, state and local authorities.

While these recommendations are not directed at title agents, agents would do well to implement similar procedures in an attempt limit liability as it relates to the insured as well as the lenders they serve.

**Conclusion**

“It is everyone’s business to protect those who are elderly or have disabilities from financial exploitation.” With a large

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48 https://www.ncbi.nlm.nih.gov/books/NBK988784/
50 Id.
52 Id.
53 Id.
54 http://www.dfps.state.tx.us/Everyones_Business/
concentration of wealth being held by the Baby Boomer generation, the increasing longevity of life and the fact that many children born to Baby Boomers are likely to be less successful in a monetary sense than their parents, elder financial exploitation will continue to rise. It is incumbent on title agents to educate their employees on the subtle signs of diminished capacity and various circumstances in which elder financial exploitation is likely to occur within the context of a closing transaction. Agents should advise their employees what action to take if the employee suspects the existence of such abuse and make certain such abuse is immediately reported.

“It's the ultimate betrayal to win the trust of a vulnerable adult and then steal their money or misuse their property.” DFPS
OBJECTIVES

- Statistical data related to the elder population
- Define and elder financial exploitation rate of occurrence
- Identifying indicators and circumstances that may give rise to financial exploitation
- Reporting requirements
- CFPB
- General Scenarios, Best Practices & Case Studies

INSIDE THE NUMBERS

- 76 Million Baby Boomers (1945-1964)
- Baby Boomers control 70% of U.S. Wealth
- Texas is out pacing the nation in growth of Elderly population
- Over 3 million Texans are age 65 or older
- Gen X and Gen Y Americans, on the whole have significantly less wealth than their parents.
- Over 20% of adults over age 70 have some form of dementia
- Over 70% of adults over age 85 have some form of dementia

**What is Elder Financial Abuse and Exploitation?**

- Texas defines an elderly person as a person age 65 or older
- Texas Human Resource Code:

  Elder Financial Exploitation is defined as the illegal or improper act or process of a caretaker, family member, or other individual who has an ongoing relationship with an elderly person or person with a disability that involves using, or attempting to use, the resources of the elderly person or person with a disability, including the person’s social security number or other identifying information, for monetary or personal benefit, profit, or gain without the informed consent of the person.

- National Center on Elder Abuse:

  The illegal or improper use of a vulnerable adult's funds, property, or assets.

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**Studies** indicate that over 20% of older Americans have suffered some form of financial exploitation.

34% of elder financial exploitation is committed by family member, friend or acquaintance.

Estimated losses due to elder financial exploitation range from $2.9 billion to in excess of $36 billion—presumption that a large number of cases go unreported.
THE MENTAL ASPECT

- Generally, elder Americans have an increased vulnerability due to decreased cognitive ability over time.
- University of California study indicates that elder Americans tend to be more trustworthy of individuals who younger Americans would not deem trustworthy—sign of decreased cognitive ability.
- Concentration of wealth in elder Americans + increased equity + longer life spans = prime candidates for financial exploitation.

RED FLAGS IN THE CLOSING TRANSACTION

Who is the victim?
Can be anyone however, various studies indicate the typical elder abuse victim is likely:

- A Caucasian female
- In her mid to late 70's
- Lives alone or in an assisted living facility
- Generally has a lack of familiarity with financial matters

**DUTY TO REPORT**

- Moral obligation
- Lender mandate
- Texas requires residents to report known or suspected elder abuse
- Class A misdemeanor for failure to report (1yr in county jail and/or up to $4,000.00 fine)

**CFPB MANDATE**

- Regulates financial sector
- Goal to protect consumers
- Collateral affect on title industry
- Strongly recommends that lenders develop protocols and procedures aimed at preventing elder abuse; training of employees to recognize and detect elder abuse; and require employees to report known or suspected elder abuse
- Clarified that reporting does not violate privacy laws established by Graham Leach Bliley Act
- Lender will expect the same from title agents
- Wells Fargo has already

COMMON SCENARIOS, BEST PRACTICES & CASE STUDIES

SCENARIO ONE: THE CONTROLLING ADULT CHILD

- Elder parent is the only one on title
- Adult child is always present at any encounters with the elder parent
- “I am helping my mom/dad with the loan/sale”
- Elder parent rarely speaks or answers questions in encounters leading up to closing—Adult child does all talking.
- Adult child interferes with attempts to speak to elder parent directly or alone.

Best Practice:

- Ask to speak to elder parent alone absent of the adult child
- Engage the parent in conversation and questions about the details of the transaction
- Ask the parent if they want the loan or want to sell the house
- Ask yourself, does this transaction make sense for the elder parent
- Who is the client? Remember, the elder parent is the client. Title agent must keep this front of mind.

SCENARIO TWO: THE POWER OF ATTORNEY

- The attributes that draw elder’s to use a POA unfortunately make it an effective tool for financial exploitation.
- Adult child (Agent under POA for elder parent) intends to use the POA to close a reverse mortgage, HEL, or to sell the home.
- You recognize or have actual knowledge of signs of a dependent adult child (i.e. no job, no family, lives with parent, possible drug and/or alcohol abuse)

Best Practice:
- Keep in mind that you are not required to accept a POA
- Title agents are free to decline a transaction due to subjective excess liability
- Attempt to speak to the elder adult.
- Engage elder in conversation and communication regarding the transaction.
- Do not be afraid to “Just say no.”


SCENARIO THREE: THE TRANSFER ON DEATH DEED

- Effective September 1, 2015
- Allows homeowner to name a beneficiary to which the property will transfer upon death—recorded while alive but vests at death of transferor
- Ease of transfer & avoidance of administration
- Title agent will encounter the deed after the transferor’s death when presented with a transaction for the transferee’s benefit—sale, refi, HEL, etc.
- Can’t ask the transferor
- Was transferor under undue influence of transferee?
- Did the transferor lack capacity?
- Who can complain?

Best Practice:
- Identify possible “other” heirs;
- If conflict exists between transferee and other heirs who would otherwise have inherited consider joinder or consent to reconcile conflict.
**CASE STUDY NO. 1: “WHAT, A REVERSE MORTGAGE?”**

**Facts:**
- 80 year old man has resided in his home for 45 years.
- As is common, house paid off
- Adult son lives in house with dad
- Siblings claim father lacked the mental capacity to understand the nature of the loan and loan terms, seeking to void the reverse mortgage
- Lender files suit demanding policy limits.

**Red Flags:**
- Advanced age of the proposed borrower
- Son living at home
- No current mortgage
- How much conversation did e/o have with dad?
CASE STUDY NO. 2: “THE INVESTOR”

Facts:

- 80 year old widowed homeowner
- Lived in the home over 50 years, no children or siblings
- Widower conveys to investor by uninsured deed for nominal or less than fair market value.
- Investor then flips the property to buyer who obtains OTP
- Siblings claim father lacked the mental capacity to understand the nature of the loan and loan terms, seeking to void the reverse mortgage
- Conservator challenged the conveyance as void alleging that widower lacked mental capacity and did not understand that title was being conveyed.
- New owner files claim for policy limit alleging complete failure of title.

Red Flags:

- Advanced age of widower
- Recent conveyance by uninsured deed
- Failure to pay full market value
- Title agent should always attempt to ratify an uninsured deed filed within a short time before closing.

CASE STUDY NO. 3: “THE BAD DAUGHTER”

Facts:
- Elder mom owns property free and clear (1967 purchase)
- Mom has dementia
- “Good Daughter” files for conservatorship
- While conservatorship pending, “Bad Daughter” has mom execute a gift deed conveying the home to Realty Company.
- One month later, Realty Company conveys to new owner who purchased via loan (OTP and LTP issued)
- New owner wants to sell.
- Good Daughter has filed suit to set aside the conveyance

Red Flags:

FINAL WORD

- Elder financial exploitation will continue to be a growing concern due to aging population with concentrated wealth.

- Title agents should be implementing policies to educate their employees on identifying the signs of potential abuse and training them on what action to take when they know or suspect such abuse is occurring.

- “DON’T MISS THE FOREST FOR THE TREES” often times your gut instinct is the most reliable tool!

2016 TEXAS LAND TITLE INSTITUTE
LIS PENDENS –
What Can You Do About It?

2016 Texas Land Title Institute

PRESENTED BY:
Richard Melamed
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Houston
Richard Melamed is a native Houstonian who has practiced law in Harris and surrounding counties for 35 years. His practice includes representation of clients in real estate and business transactions, defending clients in real estate disputes, and clearing title issues in courts around the state. He has been very active in recent years in cases involving mortgage fraud, title issues and property ownership rights.

Mr. Melamed has been actively involved in the title industry for his entire career. He began as a law clerk in the 1970’s learning to examine title in the abstract plant and underwrite curative measures to make the titles insurable. He worked as a title officer for Stewart Title Company in the early 1980’s, generally making title underwriting requirements and facilitating closings when legal or title issues would arise. He continued in the title business as a commercial closer and title counsel, and as a fee attorney. He is a regular speaker and presenter at seminars sponsored by the Texas Land Title Association, presented to examiners and escrow officers for compliance with their mandatory continuing education requirements and licensure.

Mr. Melamed is a certified, credentialed mediator specializing in real estate and business disputes. He has successfully mediated over 500 cases, with a high percentage rate of settlements. He also acts as a consulting and testifying expert in cases involving real estate and business issues.

- Board Certified in Residential, Commercial, and Farm & Ranch Real Estate by the Texas Board of Legal Specialization
- A-V Rated by Martindale-Hubbell
- Listed in the Bar Registry of Preeminent Lawyers
- Recognized by Super Lawyers magazine for over 10 consecutive years as one of the Top 100 lawyers in the Houston Region
- Named in the Super Lawyer’s 2011 Business Addition as the only solo practitioner in Texas to be listed under the “Top Law Firms in Construction & Real Estate”
- Listed in Who’s Who in American Law;
- Recognized by Inside Houston and H Magazines as one of the Best Real Estate Lawyers in Houston
- Member, State Bar of Texas Real Estate Forms Committee
- Member, State Bar of Texas Real Estate, Probate and Trust Council
- Section Representative- State Bar Board of Directors
- Fellow -Texas Bar Foundation
Lis Pendens - What Can You Do About It?

1. What is It?

Generally, the lis pendens doctrine states that a court which has acquired jurisdiction of a cause of action is entitled to proceed to the final exercise of that jurisdiction without the interference of anyone with the subject matter or res before the court. See, 37 Tex.Jur.2d, Lis Pendens, § 1 (1962); Olds, Lis Pendens, Houston Law Rev. 221 (1966). Under this doctrine, one acquiring an interest in the property involved in a lawsuit takes the interest subject to the parties' rights as finally determined by the court. 5 G. Thompson, Commentaries on the Modern Law of Real Property § 4508, at 391 (1924 & Supp.1958); 5 H. Tiffany, the Law of Real Property § 1294, at 82 (1939 & Supp.1979). Mr. Justice Joseph Story expressed the rule and rationale of lis pendens as follows:

[H]e who purchases during the pendency of a suit, is held bound by the decree that may be made against the person from whom he derives title .... [I]t is a rule founded upon a great public policy; for, otherwise, alienations made during a suit might defeat its whole purpose, and there would be no end to litigation. And hence arises the maxim, Pendente lite, nihil innovetur; the effect of which is not to annul the conveyance, but only to render it subservient to the rights of the parties in the litigation. As to the rights of the parties, the conveyance is treated as if it never had any existence; and it does not vary them. 1 J. Story, Equity Jurisprudence § 406 (6th ed. 1853) (footnotes omitted). TEXAS WATER RIGHTS COMMISSION et al., Petitioners v. CROW IRON WORKS et al., Respondents. 582 S.W.2d 768 (1979) Supreme Court of Texas. May 30, 1979.

Texas courts follow the lis pendens rule. Hartel v. Dishman, 135 Tex. 600, 145 S.W.2d 865 (1940); Rio Bravo Oil Co. v. Hebert, 130 Tex. 1, 106 S.W.2d 242 (1937).

"During the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property," a party seeking affirmative relief may file a lis pendens in the real property records of the county where the property is located. TEX. PROP. CODE ANN. § 12.007(a) (Vernon Supp. 2010).

A properly filed lis pendens is not itself a lien, but rather it operates as constructive notice "to the world of its contents." See TEX. PROP.CODE ANN. § 13.004(a) (Vernon 2003); see also B & T Distrib., Inc. v. White, 325 S.W.3d 786, 789 (Tex. App.-El Paso 2010, no pet.) ("The purpose of a notice of lis pendens is to put those interested in a particular tract of land on inquiry about the facts and the issues involved in the suit and to put prospective buyers on notice that they acquire any interest subject to the outcome of the pending litigation.").

Under Texas law, a lis pendens does not prevent a sale of the property; it merely places a purchaser on notice that a person other than the title holder claims an interest in the property. Group Purchases, Inc. v. Lance Inv., Inc., 685 S.W.2d 729, 731 (Tex. App.-Dallas 1985, writ ref'd n.r.e.).

A lis pendens notice operates during the pendency of the lawsuit and terminates with the judgment, in the absence of appeal. *Berg v. Wilson*, 353 S.W.3d 166, 180 (Tex. App.-Texarkana 2011, pet. denied); see also *Hartel v. Dishman*, 135 Tex. 600, 145 S.W.2d 865, 869 (1940); Collins, 297 S.W.3d at 418.

The notice must contain certain information, including the style and cause number of the proceedings, the court where it is pending, the names of the parties, identification of the kind of proceedings, and a description of the property affected. TEX. PROP.CODE ANN. § 12.007(b).

2. Purpose

The purpose of a lis pendens is to put parties interested in a particular tract of land on notice as to the facts and issues involved in a suit or action concerning that particular tract. *In re Jamail*, 156 S.W.3d 104, 108 (Tex. App.-Austin 2004, orig. proceeding); *In re Collins*, 172 S.W.3d 287, 292-93 (Tex. App.-Fort Worth 2005, orig. proceeding); *Garza v. Pope*, 949 S.W.2d 7, 8 (Tex. App.-San Antonio 1997, no writ). The purpose of a lis pendens is to provide notice of the pendency of an action involving real estate. *Kropp v. Prather*, 526 S.W.2d 283, 287 (Tex.Civ.App.—Tyler 1975, writ ref'd n.r. e.). A lis pendens has no existence separate and apart from the litigation of which it gives notice.

Status as a bona fide purchaser is an affirmative defense to a title dispute. *Madison v. Gordon*, 39 S.W.3d 604, 606 (Tex. 2001). A bona fide purchaser acquires real property in good faith, for value, and without notice of any third-party claim or interest. *Id.* Notice may be constructive or actual. *Id.* Constructive notice is notice the law imputes to a person not having personal information or knowledge. *Id.* (citing *Flack v. First Nat'l Bank of Dalhart*, 226 S.W.2d 628, 632 (Tex. 1950)).

A properly filed lis pendens operates as constructive notice "to the world of its contents." *In re Cohen*, 340 S.W.3d 889, 892 (Tex. App.-Houston [1st Dist.] 2011, orig. proceeding) (quoting TEX. PROP. CODE ANN. § 13.004(a) (West 2004)); see also *B & T Distrib., Inc. v. White*, 325 S.W.3d 786, 789 (Tex. App.-El Paso 2010, no pet.) ("The purpose of a notice of lis pendens is . . . to put prospective buyers on notice that they acquire any interest subject to the outcome of the pending litigation."). A purchaser of land is charged with information contained in instruments of record that are in the chain of title at the time he purchases the property. *Cadle Co. v. Caamano*, 930 S.W.2d 917, 920 (Tex. App.-Houston [14th Dist.] 1996, no pet.).

Generally speaking, the purpose of lis pendens notice is twofold: (1) to protect the filing party's alleged rights to the property that is in dispute in the lawsuit, and (2) to put those interested in the property on notice of the lawsuit. *David Powers Homes, Inc. v. M.L. Rendleman Co., Inc.*, 355 S.W.3d 327, 336 (Tex. App.-Houston [1st Dist.] 2011, no pet.).
3. Standing to File / Contents of Notice

In order to file a Notice of Lis Pendens, it must be filed by a party to the action, who is seeking affirmative relief of establishing an interest in real property, or the enforcement of an encumbrance against real property.

*Texas Property Code Sec. 12.007. LIS PENDENS.* (a) After the plaintiff's statement in an eminent domain proceeding is filed or during the pendency of an action involving title to real property, the establishment of an interest in real property, or the enforcement of an encumbrance against real property, a party to the action who is seeking affirmative relief may file for record with the county clerk of each county where a part of the property is located a notice that the action is pending.

(b) The party filing a lis pendens or the party's agent or attorney shall sign the lis pendens, which must state:

1. the style and number, if any, of the proceeding;
2. the court in which the proceeding is pending;
3. the names of the parties;
4. the kind of proceeding; and
5. a description of the property affected.

(c) The county clerk shall record the notice in a lis pendens record. The clerk shall index the record in a direct and reverse index under the name of each party to the proceeding.

(d) Not later than the third day after the date a person files a notice for record under this section, the person must serve a copy of the notice on each party to the action who has an interest in the real property affected by the notice.


4. Expungement

In 2009, the Legislature enacted §12.0071 which allows a party to challenge a notice of lis pendens by filing an application to have the lis pendens expunged, as well as filing evidence, including declarations, with its motion to expunge. See TEX. PROP. CODE ANN. § 12.0071 (West Supp. 2012). At the hearing on the motion, the court may permit evidence in the form of oral testimony. See id. § 12.0071(b)(1). The court must then "rule on the motion for expunction based on the affidavits and counter affidavits on file and on any other proof the court allows." Id. § 12.0071(e). After considering the evidence, "the court shall order the notice of lis pendens
expunged if the court determines that ... the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim." *Id.* § 12.0071(c)(2).

Section 12.0071 marks a significant change in the legal standard by which parties can seek expunction of notices of lis pendens. § 12.0071(c); *Ortiz*, 401 S.W.3d 867, 903-05 (Frost, J., dissenting). Before enactment of the statute, a party seeking cancellation or expunction of a lis pendens notice had to show that the party filing the notice (the claimant) did not have pending claims that fell into one of the categories of claims contained in section 12.007(a). This inquiry focused on the nature of the claims asserted rather than the merits or likelihood that the claims would be prosecuted successfully. See * TEX. PROP. CODE ANN. § 12.007(a); *In re Collins*, 172 S.W.3d 287, 293-94 (Tex. App.-Fort Worth 2005, orig. proceeding). In enacting the new statute, the Legislature made a fundamental change by including language that requires consideration of the merits of the claim that forms the basis of the lis pendens. See * TEX. PROP. CODE ANN. § 12.0071(c)(2); *Ortiz*, 401 S.W.3d 867, 905 (Frost, J., dissenting).

§12.0071(c)(2) mandates that the trial court *must* grant a motion for expunction of a lis pendens notice if it determines that "the claimant fails to establish by a preponderance of the evidence the probable validity of its real property claim." *TEX. PROP. CODE ANN. § 12.0071(c)(2).*

§ 12.0071(c)(3) provides as follows: "The court shall order the notice of lis pendens expunged if the court determines that... (3) the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d)." *TEX. PROP. CODE ANN. § 12.0071(c)(3).*

§ 12.0071 allows a party to file a motion requesting the trial court expunge a notice lis pendens, but the statute requires that the motion be served on each affected person on or before the 20th day before a hearing on the matter. A trial court cannot expunge a notice of lis pendens sua sponte, and without proper notice to each affected party.

*Texas Property Code Sec. 12.0071. MOTION TO EXPUNGE LIS PENDENS. (a) A party to an action in connection with which a notice of lis pendens has been filed may:

(1) apply to the court to expunge the notice; and

(2) file evidence, including declarations, with the motion to expunge the notice.

(b) The court may:

(1) permit evidence on the motion to be received in the form of oral testimony; and

(2) make any orders the court considers just to provide for discovery by a party affected by the motion.
(c) The court shall order the notice of lis pendens expunged if the court determines that:

(1) the pleading on which the notice is based does not contain a real property claim;

(2) the claimant fails to establish by a preponderance of the evidence the probable validity of the real property claim; or

(3) the person who filed the notice for record did not serve a copy of the notice on each party entitled to a copy under Section 12.007(d).

(d) Notice of a motion to expunge under Subsection (a) must be served on each affected party on or before the 20th day before the date of the hearing on the motion.

(e) The court shall rule on the motion for expunction based on the affidavits and counteraffidavits on file and on any other proof the court allows.

(f) After a certified copy of an order expunging a notice of lis pendens has been recorded, the notice of lis pendens and any information derived from the notice:

(1) does not:

(A) constitute constructive or actual notice of any matter contained in the notice or of any matter relating to the proceeding;

(B) create any duty of inquiry in a person with respect to the property described in the notice; or

(C) affect the validity of a conveyance to a purchaser for value or of a mortgage to a lender for value; and

(2) is not enforceable against a purchaser or lender described by Subdivision (1)(C), regardless of whether the purchaser or lender knew of the lis pendens action.

(g) The court in its discretion may require that the party prevailing in the expunction hearing submit an undertaking to the court in an amount determined by the court.

Added by Acts 2009, 81st Leg., R.S., Ch. 297 (H.B. 396), Sec. 2, eff. September 1, 2009.

Legal definitions:
Expunge: To destroy; blot out; obliterate; erase; efface designedly; strike out wholly. The act of physically destroying information—including criminal records—in files, computers, or other depositories.

Cancel: v. to cross out, annul, destroy, void and/or rescind a document. Cancelling can be done in several ways: tear up the document or mark on its face that it is cancelled, void, or ended if the debt for which it stood has been paid. It is important that the document (like a promissory note) itself become no longer operative either by destruction or marking, so that it cannot be used again.

5. Cancellation

Sec. 12.008. CANCELLATION OF LIS PENDENS. (a) On the motion of a party or other person interested in the result of or in property affected by a proceeding in which a lis pendens has been recorded and after notice to each affected party, the court hearing the action may cancel the lis pendens at any time during the proceeding, whether in term time or vacation, if the court determines that the party seeking affirmative relief can be adequately protected by the deposit of money into court or by the giving of an undertaking.

(b) If the cancellation of a lis pendens is conditioned on the payment of money, the court may order the cancellation when the party seeking the cancellation pays into the court an amount equal to the total of:

(1) the judgment sought;

(2) the interest the court considers likely to accrue during the proceeding; and

(3) costs.

(c) If the cancellation of a lis pendens is conditioned on the giving of an undertaking, the court may order the cancellation when the party seeking the cancellation gives a guarantee of payment of a judgment, plus interest and costs, in favor of the party who recorded the lis pendens. The guarantee must equal twice the amount of the judgment sought and have two sufficient sureties approved by the court. Not less than two days before the day the guarantee is submitted to the court for approval, the party seeking the cancellation shall serve the attorney for the party who recorded the lis pendens a copy of the guarantee and notice of its submission to the court.


6. Direct Interest vs. Collateral Interest

Prior to the enactment of §12.0071 in 2009, a party could similarly obtain cancelation of a lis pendens by establishing that the suit upon which the lis pendens is based involved a collateral, rather than direct, interest in real property. E.g., In re Collins, 172 S.W.3d 287, 293 (Tex. App.-
Fort Worth 2005, orig. proceeding). This is because "the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit." *Id.* If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, it is not "an action involving: (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property" as required by §12.0071 to render a notice of lis pendens to be proper. *Flores v. Haberman*, 915 S.W.2d 477, 478 (Tex.1995) (orig. proceeding).

Before §12.0071 was enacted, there was a split in authority about whether the classification of a claim as direct or collateral should be made solely by reference to the pleadings or by examining the evidence. *As illustrated in Collins*, 172 S.W.3d at 293-94 (the courts in Houston and Austin relied on the pleadings, while the courts in Beaumont and Tyler took an approach that included adducing evidence, while the courts in Dallas have taken both approaches).

§12.0071 resolves that split, expressly providing avenues for both by allowing expungement based on the (1) failure to adequate plead "a real property claim," or (2) failure to demonstrate by a preponderance of the evidence "the probable validity of the real property claim." TEX. PROP.CODE ANN. § 12.0071(c).

Because the trial court specifically limited its consideration to the pleadings, our review is limited to whether "the pleading on which the notice is based does not contain a real property claim" under section 12.0071(c)(1).

7. Looking to the Pleadings vs. Adducing the Evidence

"In this original proceeding challenging the trial court's grant of a motion to void a lis pendens, the primary issue we must resolve is whether, in deciding the motion, the trial court was required to look solely to the pleadings of the party who filed the notice of lis pendens to determine whether the party is claiming a direct or collateral interest in the real property at issue, or whether the trial court could look beyond the pleadings and consider evidence relevant to the question of whether the party's alleged property interest is direct or collateral. Because we hold that the trial court could consider such evidence and was, in fact, required to do so in this case, but that the trial court should have denied the motion because the evidence raises a fact issue regarding the nature of the alleged property interest, we conditionally grant the writ of mandamus". *In re Burk COLLINS, Fountain Mall, Inc., and Mall Group, Ltd., Relators* 172 S.W.3d 287 (2005) Court of Appeals of Texas, Fort Worth. August 26, 2005.

To satisfy § 12.007, the suit on which the lis pendens is based must claim a direct interest in real property rather than a collateral interest. *In re Collins*, 172 S.W.3d 287, 293 (Tex. App.-Fort Worth 2005, no pet.). In other words, the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, the interest is merely collateral and will not support a lis pendens. *Flores v. Haberman*, 915 S.W.2d 477, 478 (Tex.1995).
Direct vs Collateral Interest

A party may file a lis pendens during the pendency of an action involving: 1) title to real property, 2) the establishment of an interest in real property, or 3) the enforcement of an encumbrance against real property. Tex. Prop. Code § 12.007(a). In the present case, the plaintiffs seek a constructive trust in the purchased properties only to satisfy the judgment they seek against Flores. As such, the interest is no more than a collateral interest in the property. Moss v. Tennant, 722 S.W.2d 762, 763 (Tex. App.-Houston [14th Dist.] 1986, orig. proceeding). Therefore the notices of lis pendens are improper.

In 54 C.J.S. Lis Pendens § 9, p. 577, the following statement appears:

"At common law and under statutory provisions as to lis pendens not altering the common law in this respect, lis pendens may not be predicated on an action or suit seeking merely to recover a personal or money judgment unless and until a valid judgment has been secured and made a lien against the property. It does not apply to an action of trespass, or a suit for an accounting, or to any other action or suit which does not directly affect property. The doctrine of lis pendens applies to all suits or actions which directly affect real property * *"

Neyland v. Brammer, 146 S.W.2d 261 (Tex. Civ.App., 1940. wr. dism. judgment correct) and Bowen v. Kirkland, 17 Tex.Civ.App. 346, 44 S.W. 189 (1897, wr. den.) are two cases often cited for the proposition that "[w]here a collateral question only is involved which might ultimately affect the title of the parties to the property, lis pendens does not apply."

If a notice of lis pendens satisfies the requirements of section 12.007, the trial court may not cancel it except as provided in section 12.008.[15] The trial court in this case did not cancel the lis pendens in accordance with section 12.008; therefore, if the lis pendens complies with section 12.007, the trial court's order granting Tex Mall's motion is improper.

To satisfy section 12.007, the suit on which the lis pendens is based must claim a direct interest in real property, not a collateral one.[16] In other words, the property against which the lis pendens is filed must be the subject matter of the underlying lawsuit. If the suit seeks a property interest only to secure the recovery of damages or other relief that the plaintiff may be awarded, the interest is merely collateral and will not support a lis pendens.

The parties disagree over what a trial court may consider in determining whether a suit involves a claim to a direct interest in property and, therefore, complies with section 12.007. The Collins parties assert that the trial court must limit its review to the pleadings of the party who filed the lis pendens. Tex Mall, on the other hand, contends that the trial court may look beyond the pleadings and consider evidence relevant to the question of whether the party's alleged interest in the property is direct or collateral.

In resolving this issue, we find the supreme court's analysis in cases involving pleas to the jurisdiction instructive. The supreme court has held that when a plea to the jurisdiction
challenges the pleadings, the trial court looks to the pleadings to determine if facts have been alleged that affirmatively demonstrate the court's jurisdiction to hear the case.\[22\] If, however, a plea to the jurisdiction challenges the existence of jurisdictional facts, the trial court considers relevant evidence submitted by the parties to resolve the jurisdictional issues raised.\[23\] The trial court must not weigh the merits of the plaintiff's claims, but must confine itself to the evidence relevant to the jurisdictional issue.\[24\]

Applying these principles to the determination of a motion seeking the removal of a lis pendens, we hold that when the motion challenges the pleadings supporting the lis pendens, the trial court should examine the pleadings to determine whether the pleader has alleged facts that affirmatively demonstrate that the lis pendens is proper. If, however, a motion seeking the removal of a lis pendens challenges the existence of facts supporting the pleader's alleged interest in the property, the trial court should consider evidence relevant to the question of whether the alleged property interest is direct or collateral. In so doing, the trial court must not decide the merits of the parties' claims, but must confine itself to the evidence relevant to the issue of whether the alleged property interest is direct or collateral.

If the evidence raises an issue of fact regarding whether the alleged property interest is a direct interest, the motion should be denied and the issue must be resolved by the fact finder. If, however, the relevant evidence is undisputed, or fails to raise a fact question concerning the true nature of the alleged property interest, the trial court should rule on the validity of the lis pendens as a matter of law. We believe this rule strikes the necessary balance between protecting the plaintiff's asserted interest in the property, on the one hand, and protecting the property owner from the adverse effects of a lis pendens that is based on a sham pleading,\[29\] on the other, without depriving the parties of the right to present the merits of their case at trial.

In its first issue, Countrywide claims that Howard's notice of lis pendens was invalid because Howard's underlying suit sought only a constructive trust in the real property and as such sought only a collateral interest in the real estate and cannot pass muster under Flores. Although the supreme court in Flores held that a claim for a "collateral interest" in real property does not authorize the filing of a notice of lis pendens, the court did not hold that the filing of a notice of lis pendens in connection with a lawsuit seeking a constructive trust on real property is per se unauthorized. 915 S.W.2d at 478. Rather, the court held that the interest asserted in Flores was collateral because "the plaintiffs seek a constructive trust in the purchased properties only to satisfy the judgment they seek." Id.

In actions seeking the imposition of a constructive trust on real property, the question whether an interest sought is collateral or direct is often a close one. Typically, in a conversion suit, the claimant alleges that the proceeds of the converted property were used to purchase real estate and then seeks a constructive trust on that real property. In these cases, the courts have found that imposing a constructive trust on the real estate to satisfy the judgment against the adversary is asserting only a collateral interest in the real property and that a lis pendens is improper. Id.; In re Wolf, 65 S.W.3d 804, 806 (Tex. App.-Beaumont 2002, orig. proceeding). In contrast, where the constructive trust is sought to restore to the aggrieved party the actual property that was misappropriated, the action is seeking to establish an interest in the property itself, so that a lis
To determine whether Howard's filing of a notice of lis pendens was proper, we must examine what the nexus is between the underlying suit against McLain and the property in question. Here, the crux of the claim against McLain is that she illegally obtained corporate funds and used those funds to buy real property. This is not a case where the corporation owned certain real property and McLain tricked or deceived the company into transferring the real property to her. In this case, Howard sought a constructive trust on McLain's real property to secure payment of a judgment. Thus, there is an insufficient nexus between the subject matter of the claim and the real property to authorize the filing of a notice of lis pendens. Flores, 915 S.W.2d at 478; In re Wolf, 65 S.W.3d at 806; Moss v. Tennant, 722 S.W.2d 762, 763 (Tex.App.-Houston [14th Dist.] 1986, orig. proceeding).

Howard argues that First National Petroleum Corp. v. Lloyd and Teve Holdings Ltd. v. Jackson, 763 S.W.2d 905 (Tex.App.-Houston [1st Dist.] 1988, no writ), support his assertion that his allegations against McLain are sufficient to support the filing of a notice of lis pendens. We disagree. Jackson was decided before Flores, the controlling supreme court precedent, and Lloyd is distinguishable. In Lloyd, the intervenor alleged that one of the defendants 7*7 fraudulently induced it to convey real property and sought "rescission of the parties' agreement and restitution of [the property]." 908 S.W.2d at 24-25. Unlike Howard, the intervenor in Lloyd sought a direct interest in the property because the subject matter of its suit concerned the property.

Because Howard alleged that McLain used funds that were illegally obtained from Tesher to purchase real property in Tyler and that Howard should thus be awarded a constructive trust on the property, Howard asserted only a collateral interest in the property, which was insufficient to authorize his filing of a notice of lis pendens. Consequently, the notice of lis pendens did not impart constructive notice of Howard's claim to Countrywide. Accordingly, we sustain Countrywide's first issue, reverse the trial court's summary judgment in favor of Howard, and render judgment that Countrywide's lien on the Tyler property has priority over any rights in the property that Howard may have acquired in his suit against McLain.

The lis pendens statute gives litigants a method to constructively notify anyone taking an interest in real property that a claim is being litigated against the property. In re Collins, 172 S.W.3d 287, 292 (Tex.App.-Fort Worth, 2005, orig. proceeding). A party may file a lis pendens during the pendency of an action involving (1) title to real property, (2) the establishment of an interest in real property, or (3) the enforcement of an encumbrance against real property. TEX. PROP.CODE ANN. § 12.007(a). The suit on which the lis pendens is based must claim a direct interest in the real property, not a collateral one. See In re Fitzmaurice, 141 S.W.3d 802, 805 (Tex.App.-Beaumont 2004, orig. proceeding).

8. Remedies for Incorrect Outcome - Not appeal

It is well settled that mandamus is the appropriate remedy when issues arise concerning the propriety of a notice of lis pendens. In this case, the trial court's order voiding the Collins parties'
lis pendens renders them unable to protect their alleged interest in the Mall property during the pendency of their third-party lawsuit. The trial court's order is not conditioned on Tex Mall's payment of a monetary deposit or the giving of an undertaking to protect the Collins parties, and given Tex Mall's plans to develop the Mall property, an appeal of the lis pendens ruling following trial on the merits of the third-party claims would be wholly inadequate. Accordingly, we hold that the Collins parties lack an adequate remedy by appeal.

Countrywide Home Loans, Inc. appeals a summary judgment rendered in favor of James A. Howard, as receiver for Tesher Corp. The trial court found that Howard's rights in a piece of real property have priority over Countrywide's lien on the same property because Howard had filed a notice of lis pendens before Countrywide filed its lien, which provided constructive notice to Countrywide of Howard's interest in the property. Countrywide argues that Howard's notice of lis pendens was improper and should be given no legal effect because Howard sought only a constructive trust on the property, which is a collateral interest in the property. Countrywide urges that in holding that Howard's rights have priority, the trial court necessarily decided that Howard's filing of the lis pendens was proper. Countrywide also complains that the trial court abused its discretion by awarding attorney's fees to Howard. Because we agree that the interest claimed by Howard was merely collateral and not a direct interest in the property, the lis pendens was improper and we will reverse the trial court's judgment.

Constructive Trust

What is a "constructive trust"? It is not a trust at all, but rather is an equitable remedy created by our legal system to prevent unjust enrichment, and its purpose is to right wrongs that cannot be addressed under other legal theories. Medford v. Medford, 68 S.W.3d 242, 248 (Tex.App.-Fort Worth 2002, no pet.); Ellisor v. Ellisor, 630 S.W.2d 746, 748 (Tex.App.-Houston [1st Dist.] 1982, no writ).

Shortly after filing the lawsuit against McLain, on September 5, 2003, Howard filed a notice of lis pendens in the real-property records of Smith County, where the Tyler property was located, stating that he had filed an action that "ultimately seeks title to the property via a constructive trust." On September 25, 2003, McLain borrowed $100,000 from Aames Funding Corporation using the Tyler property as collateral. A week later, Aames assigned the loan to Countrywide. Neither Aames nor Countrywide searched the Smith County real-property records; neither had actual notice of Howard's claim against the property.

On June 28, 2005, Countrywide intervened in Howard's suit against McLain, requesting a declaratory judgment that its lien on the Tyler property securing the $100,000 loan to McLain has priority over any rights that Howard may acquire in the property. Countrywide argued that because the claims made by Howard did not authorize the filing of a notice of lis pendens, the notice of lis pendens did not provide constructive notice to Countrywide of Howard's claim against the property. Howard also requested a declaratory judgment that his rights in the property have priority over Countrywide's lien. Both parties filed summary-judgment motions. The trial court granted Howard's motion and denied Countrywide's. This appeal followed.
Pleadings to be Considered

Before turning to the merits, we must resolve a dispute between the parties concerning what evidence may be considered when determining whether Howard's notice of lis pendens was properly filed.[2] 5*5 Countrywide asserts that only Howard's original petition, which was the pleading on file at the time the loan was made to McLain, may properly be considered. Howard, on the other hand, argues that his amended petition, which was filed after Aames had loaned the money to McLain, after the loan had been assigned to Countrywide, and after Countrywide intervened in Howard's suit against McLain, may be considered.[3]

We agree with Countrywide—the validity of a filing of a notice of lis pendens is judged by the pleadings on file at the time the transaction with respect to the property occurred. Letcher v. Reese, 24 Tex.Civ.App. 537, 540, 60 S.W. 256, 257 (Fort Worth 1900, no writ) ("Unless the suit as made by the pleadings on file at the time the Reeses bought was of such a nature as to authorize the court to declare and foreclose a lien on the lots, no amendment changing the nature of the case would affect a purchaser who took title before such amendment was filed."); Mansur & Tebbetts Implement Co. v. Beer, 19 Tex.Civ.App. 311, 313, 45 S.W. 972, 973 (San Antonio 1898, writ ref'd) ("The suit pending at the time of the transfer of the notes is the one that must serve as a basis for the rule of lis pendens and not matters raised by subsequent amendments or suits.").

Howard asks us to apply the relation-back doctrine to this situation, arguing that any after-filed pleading containing new legal theories that arise out of the same transaction or occurrence as those asserted in the original pleading should relate back to the date of the original filing, citing Lovato v. Austin Nursing Center, Inc., 113 S.W.3d 45 (Tex.App.-Austin 2003) (op. on reh'g), aff'd, 171 S.W.3d 845 (Tex.2005). In Lovato, this Court held that the relation-back doctrine applied to bar a defense of limitations against a survival action because of section 16.068 of the civil practice and remedies code and equitable principles. Id. at 54-55. Section 16.068 "is designed to protect litigants from loss of their claims by a plea of limitations." Id. at 54; see Tex. Civ. Prac. & Rem.Code Ann. § 16.068 (West 1997) ("If a filed pleading relates to a cause of action, cross action, counterclaim, or defense that is not subject to a plea of limitation when the pleading is filed, a subsequent amendment or supplement to the pleading that changes the facts or grounds of liability or defense is not subject to a plea of limitation unless the amendment or supplement is wholly based on a new, distinct, or different transaction or occurrence.").

The relation-back doctrine "originated as an equitable remedy" and "enables the court to arrive at conclusions that will effectuate justice." Lovato, 113 S.W.3d at 55. Extending the relation-back doctrine applicable in a limitations context to a lis pendens situation would not necessarily effectuate justice. To the contrary, inequitable results could occur, especially in light of the draconian nature of a lis pendens. A lis pendens has been called "the functional equivalent of an involuntary lien" because "it acts as a cloud on title." FDIC v. Walker, 815 F.Supp. 987, 990 (N.D. Tex. 6*6 1993). Such remedies should not be broadly construed.

Under Howard's interpretation, any party could hold a piece of real property hostage simply by filing a notice of lis pendens—no one would be able to determine the validity of the lis pendens
until after judgment was rendered because pretrial or trial amendments could retroactively validate the notice of lis pendens. We decline to extend the doctrine of relation-back to a lis pendens matter and will consider only Howard's original petition against McLain.

10. The Privileged Nature of Lis Pendens Filing.

Generally any communications, oral or written, uttered or published in the course of a judicial proceeding is absolutely privileged. A notice of lis pendens is part of judicial proceedings. A notice of lis pendens is as entitled to privilege as the pleadings filed in the suit. As a result an absolute privilege bars any suit arising from the filing of a notice of lis pendens.

The basis of the privilege is to allow litigants the utmost access to the judicial system to secure their rights and defend themselves without fear of being harassed by suits.

While a lis pendens is generally privileged, this does not mean that the underlying pleading supporting the lis pendens is absolutely privileged.

TEX. R. Civ. P. Rule 13 prescribes sanctions for pleadings which are groundless, brought in bad faith, or for the purposes of harassment.

As a result, claims arising out of bad faith filings are best directed to the motivation of the underlying suit to determine if it has any basis in fact or law or could be justified by a good faith argument for extension, modification, or reversal of existing law.

The absolute privilege for filing a notice of lis pendens extends to any theory upon which a suit complaining of the lis pendens might be brought including slander of title, tortuous interference with contract, or interference with business.

The privilege extends to both the party filing the notice and their counsel. A notice of lis pendens is privileged even if filed in connection with a suit not lawfully supporting the filing. Prappas v. Meyerland Community Improvement Association.

The filing of a notice of lis pendens is an absolute privilege." The privilege does not turn upon the presence or absence of good faith." In applying the privilege it is immaterial whether or not the filing was made with malice.

11. Conclusion (and Editorial Comment)

Lis pendens can be a powerful tool that can provide significant protection and leverage to the party seeking to establish an interest in a specific parcel of real estate. A lis pendens timely and properly filed can effectively halt very large real estate sales involving millions of dollars pending the outcome of litigation. Gary Powell, Real Estate Remedies: Lis Pendens, 32 Tex. St. Bar Sec. Litig. Rep. 70, 70 (2005).
At the same time, it is a remedy that is often abused. Notices of Lis Pendens are filed even when there is no supporting cause. Courts enter orders cancelling or expunging the Notice, and a new one is filed the next day. Reform is necessary to cut out the abuses and find a way to sanction or punish those who abuse the privilege.
VACATING STREETS AND
PUBLIC ACCESS EASEMENTS

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Title commitments frequently take exception to streets and other public access easements. When the parties to a transaction are "cleaning up" a title commitment for the sale of land, particularly with the intent for redevelopment, they often ask the title company to delete one or more of these items from the list of exceptions. Alternatively, as part of the development/redevelopment of land, owners will seek to terminate public roads and public access easements and private restrictions, then expect a later issuing title company to acknowledge the validity and effectiveness of the termination by omitting the item from a title commitment and policy. This paper discusses these issues and suggests proper processes.

Texas road law is more fully reviewed in the aptly titled Texas Law of Streets and Alleys by Kenneth L. Bennight, Jr. of San Antonio, Texas (hereinafter referred to as "Bennight"), available at www.amazon.com.

I. THE NATURE OF STREETS AND PUBLIC ACCESS EASEMENTS

A. What is a Public Street and Who Controls It?

A public street is a publicly owned right-of-way available to the general public for general access. Public streets are owned by the State of Texas, West v. City of Waco, 294 S.W. 832, 833-34 (Tex. 1927), but are controlled as followed:

- Cities control streets within their municipal limits. TEX. TRANSP. CODE §311.001-004. Home Rule cities have power to regulate streets. West, supra.
- Counties control all other roads. TEX. TRANSP. CODE §251.004.
- Texas Department of Transportation ("TXDOT") controls state and federal highways. Tex. Dept. of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 644 (Tex. 2004).
- Control of streets automatically shifts from the county to the city with annexation. TEX. LOC. GOVT CODE §43.036(b)(6).
- Urban and rural streets are legally the same. Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 323 (Tex. 1969).
- The government controls streets as trustee for the public without proprietary title or right to exclusive possession. City of Mission v. Popplewell, 294 S.W. 2d 712, 715 (Tex. 1956).
- The right to control streets includes the right to close them. Tex. Dept. of Transp. v. City of Sunset Valley, supra at 645.
- The State has a superior interest to other governmental entities relating to streets. Id.

B. How are Streets Created?

Streets are created in three ways:

1. by plat,
2. by separate instrument, and
3. by implication/custom.

A public street is created by the dedication of the street. Private real property is conveyed, but public streets are dedicated. The State gains ownership of a public street, whether it is in fee or easement as discussed below, through the dedication of the street.
By far, the most common street creation process is by plat. A plat which shows streets and public easements is an offer of dedication, which offer must be accepted by affirmative government action or use. Preston v. Navasota, 34 Tex. 684 (Tex. 1871). The dedication remains open thereafter. Id., Miller v. Cretien, 488 S.W. 2d 893, 895 (Tex. App. – Fort Worth, 1972 writ ref’d n.r.e.). The recorded plat is evidence of the street dedication and may be admitted into evidence. Id, at 894. If the plat is at least 30 years old it is admissible as an ancient instrument. Id. The abutting owners are charged with knowledge of the plat. Id. at 895. The platting process is discussed later in this paper. Another dedication process is by separate instrument, and is similar in form to a private real property conveyance, with similar requirements for the proper identification of the parties, the real property and the nature of the legal interest conveyed. The third dedication method is implication/custom. O’Connor v. Gragg, 339 S.W. 878, 881 (Tex. 1960). “Land may be appropriate to a public use if the landowners, by unequivocal acts or conduct, manifest a consent to such use and the public has acted in reference to and upon the faith of such acts. Id. Such acquiescence is presumed “when the origin of the user by the public and the ownership of the land at that time are shrouded in obscurity, and no evidence exists to show the intention of the owner in allowing the use. Id. at 882. No formality is required to initiate the public use. Id. Some streets are dedicated simply because they have been used by the public for an extended period and have been acknowledged through that use. Lindner v. Hill, 691 S.W.2d 590 (Tex. 1985). Section 281.003 of Texas Transportation Code requires dedications to counties with populations of 50,000 or less to be express and in writing.

Attempts to condition or limit dedications may be void as against public policy. Town of Palm Valley v. Johnson, 17 S.W. 3d 281, 287 (Tex. App. -- Corpus Christi writ. den. 87 S.W. 3d 110 (Tex. 2001)). If the condition or limitation is void, the dedication remains valid. Id. The intention of the dedicatory is determined at the time of dedication. Id. As a matter of law, a dedicator of a road by plat did not intend by the words “be used and maintained as “street”], an undeveloped strip at the end of a “dead-end” street not be dedicated with the remainder of the street. Id.

The offer of dedication in a plat is not revocable and may be accepted at any time. Preston v. Navasota, 34 Tex. 684 (Tex. 1871).

C. What is the Area of the Street?

The area covered by a public street should be shown on the recorded plat or dedicatory instrument. For implied roads, the determination is more complicated and beyond the scope of this article. The survey should locate the street right of way area and in a dedication by separate instrument, the survey describing the street right of way area should be described by metes and bounds.

D. What are Permitted Uses of Streets?

Streets are not just for vehicular access, but permit related appurtenances, such as:
- Public utilities: water, wastewater, gas, electric, telephone/telegraph, and cable television/internet,
- Curbs, gutters and sidewalks,
- Street signs and lights.
- Parking.

When a utility places its facilities in a street, its rights are subservient to the primary purpose of streets for travel and transportation, and related municipal regulation. City of San Antonio v. Bexar Metropolitan Water District, 309 S.W. 491, 493 (Tex. App. – San Antonio, 1958 writ ref’d). This rule applies even if
the utility established its facilities in the street prior to annexation. Id. The utility must relocate or deepen its facilities, at its cost, to accommodate street improvements. Id.

An encroachment into a street or its right of way is called a “purpresture”, and is subject to being removed if it interferes with public use and becomes a nuisance. Hill Farm, Inc. v. Hill County, 436 S.W.2d 320, 321 (Tex. 1969). “The easement in a city street is generally held to be quite comprehensive. It is not confined to the surface but extends to a depth that will enable the urban authority to do that which is done in every street, including the laying of sewer, gas and water lines. [citing numerous Texas and National cases]” Id. These same rights extend to rural roads. Id. at 323. Rights to the subsurface include “sewers, pipelines and other methods of transmission and communication which serve the public interest.” Id.

The fee owner retains the right “to use the subsurface in a manner that does not affect or impair enjoyment of the public easement.” Id.

For more discussion of permitted uses, see Bennight, Chapters 5 (Uses) and Chapter 9 (Parking).

E. Are Public Streets Easements or Fee?

Streets may be conveyed either as a right-of-way (i.e., an easement) or in fee, but the vast majority of conveyances are in the nature of an easement. When a public street right-of-way is dedicated, the public rights are in the nature of an easement. The underlying fee interest is not transferred by the public street right-of-way dedication. Lakeside Launches, Inc. v. Austin Yacht Club, Inc., 750 S.W.2d 868, 871 (Tex. App.—Austin, 1988, writ. denied), Hidalgo County v. Pate, 443 S.W.2d 80, 84 (Tex. Civ. App.—Corpus Christi, 1969, writ ref'd. n.r.e.). If the conveyance is in fee, title is held for the benefit of the State, even if conveyed to a city. Tex. Dept. of Transp. v. City of Sunset Valley, 146 S.W.3d 637, 644 (Tex. 2004).

When a conveyance transfers a "right-of-way," it conveys an easement rather than fee. Standury v. Wallace, 45 S.W.2d 198, 199 (Tex. Comm'n of App. 1932, judgment adopted). Where the grant is of the land itself, the fact that a later recital restricts the use to street purposes does not limit the grant to an easement, but the interest conveyed is fee restricted to a permitted use. Id. “In Texas, it is a settled rule of construction applicable to written instruments that where a granting clause in a deed conveys a right-of-way, the conveyance is construed as being a mere easement in the property and not a grant of a fee simple estate. The granting clause determines the interest conveyed, and unless there is a repugnancy, obscurity or ambiguity in that clause, it prevails over introductory statements or recitals in conflict therewith.” Hidalgo County v. Pate, 443 S.W.2d 80, 84 (Tex. Civ. App.—Corpus Christi, 1969, writ ref'd. n.r.e.).

For more discussion of whether an instrument conveys a fee versus an easement, see Bennight, Chapter 6.

The underlying fee interest in a dedicated public street right-of-way does not remain with the original owner once the adjacent land is conveyed, even if the conveyance cites to the public street as the boundary. The underlying fee interest is instead implicitly conveyed based upon the "strips and gores" doctrine, one-half to the owners of each side of the public street, which doctrine is discussed in greater detail below. Cantley v. Gulf Production Co., 143 S.W.2d 912, 915 (Tex. 1940). This rule applies whether or not the street has been improved or opened. Id. “It is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceased to be of use to him, unless such fee is clearly reserved.” Id. The fact that the legal description refers to platted lots or to field note description stopping at the street is not relevant. Id. This rule is based both upon the desire to grant practical effect to a grantor’s intention, and public policy. Id.
F. May Public Streets be Vacated?

A city may vacate a public street. TEX. TRANSP. CODE §311.007 (Home Rule Cities) and §300.008 (General Law Cities). The terms “abandon” and “abandonment” are sometimes used instead of “vacate” or “vacation,” but abandonment is a different method for streets to be terminated. However, the terms “close” or “closure” are not synonymous and should not be used. Closure relates to the operation of the street. Opening a street is simply making use of it. That use typically becomes the evidence of acceptance of a tendered dedication.

For general law cities, a petition must be signed by all owners of real property abutting the street or alley. TEX. TRANSP. CODE §311.008. Vacating a street in a general law city without such consent make the attempted vacation void. Town of Palm Valley v. Johnson, 17 S.W. 3d 281, 287 (Tex. App.--Corpus Christi, writ. den. 87 S.W. 3d 110 (Tex. 2001)). Abutting means “to touch along a border or with a projecting part, (land abuts on the road); to terminate at a point of contact; to border on; touch.” Id. at 186. An unplatted property in another city which is directly next to a platted street is abutting. Id. A city may not be enjoined from vacating a street, other than by an abutting owner or tenant where damages have not been determined and paid in a condemnation suit, or released. TEX. CIV. PRAC. & REM. CODE §65.015. Id. at 285-6. Caldwell v City of Denton, 556 S.W. 2d 107,108, (Tex. App. – Fort Worth 1977, writ ref’d n.r.e.). Where the party requesting injunctive relief does not own property abutting upon any portion of that party of a street which was closed, the case should be dismissed. Id. Non-abutting owners are treated as part of the general public, without actionable rights to challenge the vacation, even though they own property on the same street, another portion of which is being vacated. Id. “That there might have been difference in degree of injury suffered by plaintiffs from other constituting members of the public does not alter this rule. The consequence is that as to them exists mere damnum absque injuria. There being no remedial damages which might be recovered neither plaintiff can maintain a cause of action for damages.” Id. Further, these non-abutting owners may not bring a claim for declaratory judgment relating to the vacation, as they have no rights related thereto. Id. at 109. “No purpose would be served in obtaining a declaration upon a mere hypothetical question of law. In the “eyes of the law” there is not invasion or threatened invasion of either plaintiffs’ personal or property rights. Therefore, there is absence of the requisite litigious controversy essential to maintenance of a suit for declaratory judgment.” Id.

The statute of limitations to challenge an abandonment is two years (TEX. CIV. PRAC. & REM. CODE §16.005). A cause of action accrues when the order or ordinance is passed or adopted. If suit is not brought within the two year period, the party in possession received "complete title to the property by limitations and the right by city or county to revoke or rescind the order or ordinance is barred." TEX. CIV. PRAC. & REM. CODE §16.005(c).

Although a street is public, it can be vacated and placed in private ownership, so long as there is a generalized public benefit. City of San Antonio v. Olivares, 505 S.W.2d 526, 529 (Tex. 1974).

A commissioner's court may "discontinue, close, abandon, or vacate public roads or highways." TEX. LOC. GOV'T CODE § 81.028.

Vacating and the sale of a part of a street is allowed, even over the objection of one adjacent landowner, so long as the street abutting the objecting landowner is not sold. Jordon v. Landry's Seafood Rest., Inc., 89 S.W.3d 737, 743 (Tex. App.—Houston [1st Dist.] 2002, pet. denied). Restricting access to a street to pedestrians and emergency vehicles is not a street closure. Id.
Like all municipal ordinances, a vacation ordinance is preserved valid, and the burden is on the challenger. *Miller v. Cretien*, 488 S.W. 2d 893, 895 (Tex. App. – Fort Worth, 1972 writ ref’d n.r.e.). To invalidate the ordinance, “the ordinance must clearly appear to be arbitrary, unreasonable and an abuse of the police power.” *Id.*

G. What happens to the Street Area upon Vacation?

If the street is held as an easement, as in most cases (where created by plat or implication), then when the street is vacated, the fee title which is already vested in the abutting owners pursuant to the “strips and gores” doctrine, is no longer subject to the rights of the public. There is no grant of title from the public, but rather a release of rights encumbering the existing fee title. Thus, only evidence of the vacation is required in the chain of title, not a conveyance. Most street vacations are evidenced by a recorded certified copy of a City Council Ordinance vacating the street. The ordinance operates the same as a release of a private easement. On occasion, you see a city execute a Quitclaim, which is acceptable for recording, but the authorization ordinance should still be obtained.

If the street is held in fee, then the street area must be conveyed by instrument consistent in form and execution with a private fee conveyance. However, many cities will only convey by a deed without warranty. Like in any private fee conveyance, a Quitclaim is not desired. The conveyance documents actually transfer title from the government to the owner, as, prior to the vacation, the record owner is the government.

H. May Streets be Adversely Possessed?

Like other government property, streets may not be adversely possessed. *Miller v. Cretien*, 488 S.W. 2d 893, 896 (Tex. App. – Fort Worth, 1972 writ ref’d n.r.e.). “A person may not acquire through adverse possession any right or title to real property dedicated to public use.” *Tex. Civil Prac. & Rem. Code* §16.030(b).

I. May Streets be Abandoned?

Like an easement, a street may be abandoned, but it is very uncommon. Rules for abandonment of a street are set forth in *Town of Palm Valley v. Johnson*, 17 S.W. 3d 281, 288 (Tex. App. -- Corpus Christi, 2000 writ. den. 87 S.W. 3d 110 (Tex. 2001)):

- The use as a street must be either impossible, or so improbable as to be practically impossible,
- Mere delay in use as a street is not abandonment,
- Use of only a portion is not abandonment of the remainder.

J. How to Eliminate Platted but Unconstructed Streets?

Plats contain language offering to dedicate the public streets and easements shown. The act of plat approval does not mean the city is accepting the offered dedication. *Tex. Loc. Gov't Code* §212.011(a); *Stein v. Killough*, 53 S.W.3d 36, 42 (Tex. App.— San Antonio 2001, no pet.). Texas law is clear that a plat with dedicatory language is simply an offer of dedication. *Miller v. Elliot*, 94 S.W.3d 38, 45 (Tex. App.—Tyler 2002, pet. denied). Acceptance occurs upon either (i) express acceptance, or (ii) use by the public. *Id.; Chaney v. Camacho*, 2013 WL 6533123 at 2 (Tex. App. – San Antonio Dec. 11, 2013, pet. denied). The offer of dedication remains open until there is action to demonstrate rejection or abandonment by the government; mere passage of time alone is not sufficient. *Taylor*, 96 S.W.2d at 999.
The doctrine of partial acceptance will imply dedication of the entirety of a street if a significant portion is improved. *Town of Palm Valley, Texas v. Johnson*, 17 S.W.3d 281, 285 (Tex. App.—Corpus Christi 2000), writ den. 87 S.W.3d 110 (Tex. 2001) (affirming the result, but disagreeing with lower court's language regarding injunctions). The installation of any public utilities will be sufficient for many cities to assert acceptance of dedication, and that acceptance applies to the entire width of the right-of-way.

Where the tendered dedication is not accepted, no vacation is required, because the dedication is not completed. This is like offer and acceptance in a contract, and is similar to the idea that a land owner cannot convey land without the acceptance of the grantee. A replat replaces the prior plat and eliminates the former offered (not accepted) dedications, without the requirement for separate vacation process.

K. Are there Implied Private Rights in Streets?

General law cities may not vacate a street without the consent of abutting owners, but home rule cities and counties are not so limited. What if an abutting owner objects? What rights do they possess?

**TX. CIV. PRAC. AND REM. CODE SEC. 65.015** includes an “anti-injunction” provision applicable to vacating streets:

> “CLOSING OF STREETS. An injunction may not be granted to stay or prevent the governing body of an incorporated city from vacating, abandoning, or closing a street or alley except on the suit of a person: (1) who is the owner or lessee of real property abutting the part of the street or alley vacated, abandoned, or closed; and (2) whose damages have neither been ascertained and paid in a condemnation suit by the city nor released.

Independent of the right as a member of the public to access public streets, a recorded plat which depicts lots and streets implicitly grants a lot owner a private easement in the streets shown on the plat. *Dykes v. City of Houston*, 406 S.W.2d 176, 181 (Tex. 1966), *City of Houston v. Fox*, 444 S.W.2d 591, 592 (Tex. 1969), *City of San Antonio v. Olivares*, 505 S.W.2d 526, 530 (Tex. 1974). This implied private easement survives vacating of the street, and is in the nature of a "right of passage" to and from the platted lot. *Id.* The purpose of this implication is to protect lot owners if the dedicated street is not constructed, or is later vacated, thus depriving the lot owner of access. If the vacating of street "materially and substantially impairs access", even though there has not been a total deprivation of all reasonable access, a city may be guilty of a taking without compensation. *Id.* The question of whether a right of access is materially and substantially impaired is a question of law. *Id.* In *Olivares*, the Supreme Court held that a non-abutting property owner objecting to vacating of a street was not entitled to compensation due to a more circuitous route of access. *Also see, Milwee-Jackson Joint Venture v. Dallas Area Rapid Transit*, 550 S.W.3d 772 (Tex. App.—Dallas, 2001, no pet.) for a discussion of “materially and substantially impaired” in another condemnation damages case.

In *Dykes*, an abutting lot owner petitioned the city to open a street abutting his lot, which it declined to do. The street area was overgrown and impassible. Then, Mr. Dykes, claiming a private access right implied by reference to the recorded plat, opened a private accessway through the same area, which then connected 2 improved public streets. The city barricaded this accessway. The court upheld the right of an abutting lot owner to utilize the private access easement, implied by his purchase of a lot by reference to a duly approved and recorded plat, but expressly stated that its use is subject to municipal regulations, such as, but not limited to, signage clearly stating that the accessway is not a public street. *Dykes*, supra at 181. The city could not totally preclude the use of the access easement without compensating Mr. Dykes for the taking of his property right. *Id.* *Dykes* does not require the city to open a public street, but to
permit Mr. Dykes to use his private accessway, subject to reasonable regulation. *Id.* at 182. Only the city may determine if a street is to be opened. *Id.*

Where a non-abutting owner objects to vacating a street, yet retains other reasonable access to their property, that owner cannot obtain an injunction against vacating the street and cannot recover damages from the city unless it can prove "material and substantial impairment of access." The cases discussing the implied right of access should be interpreted consistent with those relating to public taking when streets are vacated. That is, so long as there is reasonable access, unless the access has been materially and substantially impaired, the lot owner's property access rights have not been abrogated. In *Olivares*, the court refused to find damages since the issue was not access, but inconvenience (i.e., “circuity of travel”). *Oliveres*, supra at 530. Although each lot owner has a private right of access implied by virtue of the existence of streets shown on the recorded plat, that is a generalized right, and not a specific express private easement in all streets shown on the plat. As the plat is replatted, and as streets or alleys may be vacated, so long as reasonable access is maintained and there is no material and substantial impairment to prior access, those landowners' access rights have not been affected.

As discussed above, the anti-injunction statute bars most challenges to the validity of a vacation, leaving the non-abutting owner with a claim for damages alone, but only if they can prove their access is “substantially and materially impaired”, which is a heavy burden.

**II. A DEEP DIVE INTO “STRIPS AND GORES”**

Under Texas law, it has long been settled that a deed that conveys land by a description abutting a right-of-way (easement) also conveys fee title to the center of the right-of-way by inference. *State v. Fuller*, 407 S.W.2d 215, 218 (Tex. 1966) (citing cases from the 1930s and 1940s). This applies to streets, railroad rights-of-ways and other narrow strips. This is called the “strips and gores” doctrine and it is based on the reasoning that a grantor does not intend to reserve fee interest in land that is small in comparison to the grant and of little or no use to him because it is encumbered by a right-of-way.

As the Texas Practice Series on Land Title and Title Examination explains, “[t]he doctrine of strips and gores is essentially a presumption that, when a grantor conveys all the land he owns adjacent to a narrow strip that thereby ceases to be useful to him, he also conveys the narrow strip unless he plainly and specifically reserves the strip for himself.” 4 Tex. Prac., Land Titles And Title Examination §22.12 (3d ed.).

*TX. TITLE EXAMINATION STANDARD 5.40 “Roads”* (see, *TX. PROP. CODE TITLE 2*) details the “strips and gores” doctrine and is set forth on Exhibit A attached.

Under the strips and gores doctrine, the fee interest under a right-of-way easement, once abandoned, reverts to the adjacent land owner, even if the deed to that land owner did not incorporate the strip, or even made specific reference to the strip in the legal description. *Right of Way Oil Co. v. Gladys City Oil, Gas & Mfg. Co.*, 157 S.W. 737 (Tex. 1913). The strips and gores doctrine is an equitable doctrine intended to preserve property rights of private fee owners and settle ownership of land in a logical and productive manner.

The doctrine's seminal case is *Cantley v. Gulf Production Co.*, 143 S.W.2d 912 (Tex. 1940), where the court stated:

> It is well known that separate ownership of long, narrow strips of land, distinct from the land adjoining on each side, is a fruitful source of litigation and disputes. To avoid this
source of contention, it is presumed that a grantor has no intention of reserving a fee in a narrow strip of land adjoining the land conveyed when it ceases to be of use to him, unless such fee is clearly reserved. The reason for the rule is obvious. Where it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him, the presumption is that the grantor intended to include such strip in such conveyance; unless it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip.

In view of the public policy of this State with reference to such strips of land, and the presumption that it was the intention of the grantors to convey such narrow strips to the grantees with the other land adjoining same, we do not think that it affects the rule, so far as the title to the strip is concerned, if the road was never used or if it was abandoned.

*Id.*, at 915.

In *Cantley*, a narrow strip of land was set apart as a road reservation between lots subdivided from a larger tract. The appellate court held that one of the lot owners had acquired the 30' strip, which was never actually used as a road, by 10-year limitation. The court held that the later conveyance of the lot, which description did not include the 30' tract, conveyed the tract along with the other land.

The *Cantley* court relied upon *Cox v. Campbell*, 143 S.W.2d 361 (Tex. 1940), where the court stated:

> [W]here a deed conveys by specific field notes land abutting on a street or public highway or railroad right of way, it conveys title to the property to the center of the street, public highway, or railroad right of way; and such rule is not overcome even though the field notes describing the land stop at the sideline of the street ... unless a contrary intention is expressed in plain and unequivocal terms.

The court in *Haynes v. McLean*, 276 S.W.2d 777 (Tex. 1955), ruled that one-half of 3 adjacent strips which separated two tracts of land was awarded to each of the adjacent land owners. The land had been conveyed by a common source. The three adjacent strips which separated the two tracts were rights-of-way for a (1) county road, (2) the Santa Fe Railroad, and (3) the Roscoe, Snyder and Pacific Railroad. In its decision, the court cited *Lewis v. East Texas Finance Co.*, 146 S.W.2d 977, 980, where that court stated:

An instrument of conveyance which conveys land definitely described in such instrument, and then excepts from such conveyance a road, railroad right-of-way, canal right-of-way, etc., as such, occupying a *mere easement* on, over, or across the land conveyed, conveys the fee to the entire tract, and the exception only operates to render the conveyance or grant *subject to the easement*.

In *Pebsworth v. Behringer*, 551 S.W.2d 501 (Tex. Civ. App. - Waco 1977, no writ), the court held that the northern half of a railroad right-of-way belonged to the adjacent property owner on the north side of the right-of-way, stating:

A deed to land abutting on a railroad right-of-way conveys title to the center of the right-of-way unless the contrary intention is expressed in the instrument.

*Pebsworth*, at 504.
The *Pebsworth* court applied the "strip and gore" doctrine in defendant's favor, despite the plaintiff's assertion that (1) the railroad right-of-way had been abandoned, (2) plaintiffs had taken possession of the premises, (3) improved and used it, and (4) paid taxes on the property. The doctrine is also discussed in the more recent cases of *Finklestien v. Carpenter*, 795 S.W.2d 897 (Tex. App. - Beaumont 1990, writ denied) and the *State of Texas v. Brazos River Harbor Navigation District*, 831 S.W.2d 539 (Tex. App. - Corpus Christi 1992, writ denied).

The court in *State v. Williams*, 335 S.W.2d 834 (Tex. 1960), stated that "when a conveyance is made of a piece of property abutting upon a public highway, it is natural to assume, in the absence of an express reservation to the contrary, that the grantor intended to convey the same with all of the beneficial rights enjoyed by him in its use." *State*, at 836. The court further stated that:

> [T]he established doctrine of the common law is, that a conveyance of land bounded on a public highway carries with it the fee to the center of the road as part and parcel of the grant. Such is the legal construction of the grant unless the inference that it was so intended is rebutted by the express terms of the grant.

*Id.* In the *State* case, the court stated that, because the respondents conveyed all the interest they owned in the land adjoining the highway, *and since the highway had ceased to be of any importance to them so far as rights of ownership was concerned*, the presumption was that they intended to include their interest in the highway as part of the conveyance.

When a road or street is dedicated to the public, the governmental entity exercising such jurisdiction over the street ordinarily acquires only an easement in the street. *Word of Faith World Outreach v. Oechsner*, 669 S.W.2d 364 (Tex. App. - Dallas 1984, no writ). If the dedication does not state otherwise, the abutting land owner owns the fee simple title to the center of the street, subject to the public easement. *Id.* The general rule in Texas is that, when lots abutting a public highway or street are sold, such a conveyance carries with it the fee title to the center of the road unless the inference that it was so intended is rebutted by the express terms of the grant. *Id.*

**III. A DEEPER DIVE INTO PLATTING**

**A. Platting Overview.**

Platting is the most common way that a public street is dedicated. This section goes into detail about when platting is required, the platting process and when a street dedicated by a plat is considered accepted.

Platting property is part of the development process. Although platting is a familiar term, even experienced lawyers, consultants and government officials (and certainly real estate developers and related professionals) frequently misunderstand its meaning. The problem lies in the origin of subdivision platting law. Subdivision platting law is based in public law, whereas most private sector lawyers and professionals spend their time primarily dealing with contract law. Subdivision platting law affects real estate, but its origins come from governmental law concepts premised on the right of the government to “promote the health, safety, morals, or general welfare...and the safe, orderly, and healthful development” (known as the "police power"). To further confuse the issue, subdivision platting law is significantly different from zoning law, another public law area affecting real estate. Many public sector lawyers confuse the two areas. When considering a zoning change, a city has broad discretion over the change; however, the rights of the city in the area of subdivision platting are significantly limited when
reviewing a subdivision plat. Zoning and Planning Commission appointees and City Council members often confuse the broad discretion in zoning with the narrow ministerial authority available in platting.


Subdivision controls are based on the land registration system. Registration is a *privilege* that local governmental entities have the power to grant or withhold based upon the compliance with reasonable conditions. The regulatory scheme depends on the approval and recordation of the plat. *Hoff*, 633 S.W.2d at 607-08. The regulation of subdivision development is based upon government's legitimate interest in promoting orderly, healthy development; insuring that subdivisions are constructed safely; and protecting future owners from inadequate police and fire protection, inadequate drainage, and unsanitary conditions. *Smith*, 687 S.W.2d at 302.

The initial compilation of platting law begins with TEX. LOC. GOV'T CODE Chapters 212 (cities) and 232 (counties); these Chapters authorize cities and counties to regulate the division of real property. TEX. LOC. GOV'T CODE §§ 232.001(a), 232.023(a). *See La Cour Du Roi, Inc. v. Montgomery County*, 698 S.W.2d 178, 186 (Tex. App. — Beaumont 1985, writ ref'd n.r.e.). Cities have broad authority to adopt rules governing plats. *Milestone Potranco Dev. v. City of San Antonio*, 298 S.W.3d 242, 244-45 (Tex. App. — San Antonio 2009, pet. denied). The Local Government Code is general, without extensive detail on procedures, but without more, can be relied upon by a local government as a basis to review and approve plats (as Houston did until 1982). Most cities have a subdivision ordinance (sometimes part of a comprehensive development code), which provides detailed platting regulation and procedures. Often, the local government will have uncodified rules and regulations adopted by the governing body establishing even more detailed requirements. Traditionally, municipal subdivision power is substantially broader than a county's. *Elgin Bank*, 906 S.W.2d at 123. Powers essentially equal to municipalities have recently been extended to "urban" and "border" counties in 2001, and the bracket limiting that broad authority was deleted in 2007.

For more in depth information on platting, see:
- "Subdivision Law and Growth Management," May 2016 update (West 2016) by Southwestern University Law Professor James A. Kushner [referred to herein as "Kushner"], is a national treatise, published by West Group, with a good representation of Texas cases.

**B. Platting Terms of Art.**

There are many terms of art in subdivision platting law. A clear understanding of these terms is necessary to practice in this area.

**Subdivision** (to subdivide, subdividing). The division of land without regard to the transfer of ownership. *City of Weslaco v. Carpenter*, 694 S.W.2d 601, 603 (Tex. App.—Corpus Christi 1985, writ
Platting (to plat). The process required by the government to obtain an approval of a subdivision of real property. TEX. LOC. GOV'T CODE Chapter 212 (Cities) or 232 (Counties).

Subdivision Plat (or Plat). The written depiction of the lots, blocks, and reserves created by the subdivision of real property, which must be recorded in the Official Public Records of Real Property of a county after it has received the requisite approvals. "[A] map of specific land showing the location and boundaries of individual parcels of land subdivided into lots, with streets, alleys and easements drawn to scale." Elgin Bank, 906 S.W.2d at 121 (citing BLACK'S LAW DICTIONARY p. 1151 – 6th Ed. 1990).

Replat. A new plat of all or a portion of a previously approved plat. Replats eliminate the prior plats as to the area replatted. Cities allow any owner to replat. TEX. LOC. GOV'T CODE § 212.014; TEX. LOC. GOV'T CODE § 232.009(b); Brunson v. Woolsey, 63 S.W.3d 583, 586 (Tex. App.—Fort Worth 2001, no pet.). County plats may also be cancelled under TEX. LOC. GOV'T CODE § 232.008 (which provides for partial cancellations, then a new plat approval). Urban counties (population of 1,500,000 or more) may adopt replatting regulations consistent with cities. TEX. LOC. GOV'T CODE § 232.0095.

Planning Commission. A governmental body, appointed by the city council, with authority (final in most cities) to approve subdivision plats. TEX. LOC. GOV'T CODE § 211.006. The planning commission may also act as the Zoning Commission for a city. TEX. LOC. GOV'T CODE § 211.007(a). A Planning and Zoning Commission is subject to the Texas Open Meeting Act, but a planning commission is not. TEX. LOC. GOV'T CODE § 211.0075. If there is no planning commission, then the city council approves subdivision plats. By ordinance, a city may require additional approval from the city council, but in larger cities the planning commission usually has final authority on subdivision plats. This is also true in most growing suburban cities because the city council does not want to be burdened with the additional responsibility. However, in many smaller towns, the city council retains final approval authority over subdivision plats in order to retain more control over the development process.

Dedication (to dedicate, dedicating). Dedication is the granting to the public the right to use areas shown on a plat, usually in accordance with dedicatory language in the plat certification signed by the owner. State v. NICO-WF1, 384 S.W.3d 818, 821 (Tex. 2012). In State v. NICO-WF1, the plat dedicated 100’ of street right-of-way, but restricted the area for vehicular travel to 70’. An adjacent owner, whose building encroached into the 100’ right-of-way, claimed that the plat limited the use of the street right-of-way to 70’ and therefore the encroachment did not interfere with the public purpose. The Texas Supreme Court rejected the 70’ limitation as being against public policy and thus void, saying that the condition was inconsistent with the grant. However, the underlying dedication remained in effect despite the void attempt to limit the dedication. Id. at 822.

The Texas Supreme Court listed the following rules for street dedications (which should also be applicable to other types of dedications):
- a dedication is “ordinarily” an easement held in trust for the public
- the dedication extends to the entire width of the dedicated area
- historic use or non-use is not relevant to the public’s rights
• the public has right to use as much of the surface and subsurface of a dedicated street as reasonably needed for street purposes, which include the pavement, shoulders, gutters, curbs, sidewalks, utilities and “other public purposes.”

• dedications may be reasonably limited but the limitation may not be “repugnant to the dedication or against public policy”

• examples of void conditions and reservations in dedicatory instruments include attempts to control utilities, future public improvements, future street use, and other restrictions or reservations “in derogation of the public right conveyed.” Id. at 822-3.

C. When is Platting Required?

A subdivision plat should be submitted to the applicable local government (city or county) whenever property is proposed to be subdivided, whether or not the conveyance will be by metes and bounds, unless the subdivision is within an exception in the Subdivision Act or the local subdivision ordinance. TEX. LOC. GOV’T CODE §§ 212.004 (cities) & 232.001 (counties); Op. Tex. Att’y Gen. No. JM-1100 (1989) (“Under Local Government Code section 232.001(a) a division of a tract of land outside the limits of a municipality into two or more parts—whether the division be to lay out a subdivision, addition, or suburban or building lots—is subject to the platting requirements of the subsection only if the division is also to lay out streets, alleys, squares, parks, or other parts of the tract intended to be dedicated to public use or for the use of purchasers or owners of lots fronting on or adjacent thereto, as provided in the subsection.”). The development of land triggers many subdivision regulations (see discussion of the term "subdivision" above).

D. Must Plats Meeting Requirements be Approved?

The discretion of a governmental authority approving a subdivision plat is limited. Once applicable rules are satisfied, the approval process is ministerial in nature. Local governments are not granted wide latitude. City of Round Rock v. Smith, 687 S.W.2d 300, 302 (Tex. 1985) (city); Commissioners Court of Grayson Cnty. v. Albin, 992 S.W.2d 597, 600 (Tex. App.—Texarkana 1999, pet. denied) (county). A city may only apply those rules adopted in accordance with § 212.002, which cities sometimes fail to follow. A city has broad discretion in the rules adopted, and the rules should be upheld upon challenge so long as there is a rational relationship between the rule and a legitimate governmental purpose relating to the subdivision of land. In Milestone Potranco Dev. v. City of San Antonio, 298 S.W.3d 242, 244-45 (Tex. App. – San Antonio 2009, pet. denied), the scope of platting regulation and related rules was broadly interpreted, including a tree preservation ordinance. Specifically, the court rejected a challenge that subdivision regulation should be limited to “basic infrastructure.” Id. In the court’s view, if a rule relates to development, is triggered by subdivision, and “promotes the orderly and healthy development of the community”, then it may be part of platting regulations, event in the ETJ. Id.

Governments may not add additional requirements or increase the limitations of their existing requirements as justification for denial of a plat. City of Stafford v. Gullo, 886 S.W.2d 524, 525 (Tex. App.—Houston [1st Dist.] 1994, no writ). The foregoing tenets should also apply to "urban" counties' exercising their broad discretion under TEX. LOC. GOV’T CODE § 232.101. If the County desires to regulate a particular matter as part of the platting process, it must properly adopt rules under TEX. LOC. GOV’T CODE § 232.101(a). This same analysis should apply to cities.

In Howeth Invs. Inc. v. City of Hedwig Village, 259 S.W.3d 877, 898-901 (Tex. App.—Houston [1st Dist.] 2008, pet. denied), the failure of a preliminary plat to be acknowledged and to locate the subdivision with respect to an original corner of the original survey of which the subdivided tract was a part, both statutory requirements, were an adequate basis for plat denial, citing Myers v. Zoning & Planning Comm’n of the City of West University Place, 521 S.W.2d 322 (Tex. App.—Houston [1st Dist.]

Vacating Streets and Public Access Easements, Restrictions
Therefore, applicants should not expect leeway from a court in the application of platting rules. The author's experience is that there are technical deficiencies with a significant percentage of approved and recorded plats, particularly with the requirement to tie the subdivision to an original corner of the original survey.

In Stolte v. Cnty. of Guadalupe, 2004 WL 2597443 (Tex. App. – San Antonio 2004, no pet.), the court overruled Guadalupe County's denial of a plat which meet all state and county requirements, even though the County felt the number of driveway cuts on a public road were excessive. A county lacks any "inherent authority" to reject a plat based on "public health and safety" and must base any denial on statute or property adopted county regulation. Id. at 3. A county could adopt rules dealing with access issues, but not having done so, the plat must be approved once the county determined that the applicable rules were satisfied, as the platting process becomes ministerial at that point. Id. at 4.

TEX. LOC. GOV'T CODE § 212.005 states:

"The municipal authority...must approve a plat or replat...that satisfies all applicable regulations."

Some city subdivision ordinances contain a similar requirement. The CITY OF HOUSTON CODE OF ORDINANCES §42-71(b) states, “(t)he commission shall approve each subdivision plat that complies with the provisions of this chapter and other applicable laws and requirements.”

TEX. LOC. GOV'T CODE § 212.010 states:

The government authority . . . shall approve a plat if:
1. It conforms to the general plan of the municipality and its current and future streets, alleys, parks, playgrounds and public utility facilities;
2. It conforms to the general plan for the extension of the municipality and its roads, streets, and public highways within the municipality and in its extraterritorial jurisdiction, taking into account access to an extension of sewer and water mains and the instrumentalities of public utilities;
3. . . . [applicable to Colonias only]; and
4. It conforms to any rules adopted under § 212.002.

TEX. LOC. GOV'T CODE § 212.002 states:

After a public hearing on the matter, the governing body of a municipality may adopt rules governing plats and subdivision of land within the municipality's jurisdiction to promote the health, safety, morals, or general welfare of the municipality and the safe, orderly and healthful development of the municipality.

TEX. LOC. GOV'T CODE § 232.002(a) states:

"The commissioners court ... must approve, by an order entered in the minutes of the court, a plat required by § 232.001. The commissioners court may refuse to approve the plat if it does not meet the requirements prescribed by or under this chapter...."

E. May “Exactions” be Required for Pat Approval?

Subdivision regulation is based on legitimate government interest in promoting orderly development, insuring safe neighborhoods, insuring adequate police and fire protection is possible, and insuring
adequate drainage. *City of Round Rock v. Smith*, 687 S.W.2d 300, 302 (Tex. 1985). The basis of subdivision controls is the land registration system. Registration is a privilege that local governmental entities have the power to grant or withhold based upon the compliance with conditions. The entire regulatory scheme depends on the approval and recordation of the plat. *Lacy v. Hoff*, 633 S.W.2d 605, 607-08 (Tex. App.—Houston [14th Dist.] 1982, writ ref'd n.r.e.). A subdivision ordinance may require dedication and construction of streets, alleys and utilities as part of orderly development and may be enforced through the platting approval process. *City of Corpus Christi v. Unitarian Church*, 436 S.W.2d 923, 930 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). These types of requirements are called "exactions." The imposition of those dedications to provide for infrastructure improvement as a condition precedent to plat approval is not a taking. *Crownhill Homes, Inc. v. City of San Antonio*, 433 S.W.2d 448, 460 (Tex. Civ. App.—Corpus Christi 1968, writ ref'd n.r.e.). However, a city may require dedications only if properly authorized by constitutional, statutory or charter authority. *City of Stafford v. Gullo*, 886 S.W.2d 524, 526 (Tex. App.—Houston [1st Dist.] 1994, no writ). In *Gullo*, the city required more right-of-way to be dedicated than provided in its subdivision ordinance, and therefore, the dedication was improper. *Id.* at 525.

Typical exactions:
- drainage easements and facilities
- street and alley rights of way and paving with curb and gutter
- water and wastewater easements and facilities (including lift stations)
- street lighting
- fire hydrants
- sidewalks
- street signage
- traffic control devices

Less typical exactions:
- park dedication (or fees in lieu thereof)
- school site dedications
- major public works facility dedication (e.g. water storage, waste treatment plant)
- public service facility dedication (fire or police station)

Counties may require only street and drainage easement dedications and construction, within specified limitations. TEX. LOC. GOV'T CODE § 232.003.

*City of College Station v. Turtle Rock Corp.*, 680 S.W.2d 802, 802 (Tex. 1984), upheld requiring park land to be dedicated as a condition to plat approval. The park land (and any other dedications required) must be "reasonably related" to the public needs created by the new development. In other words, the dedication requirement is related to the additional burden of public infrastructure, not to satisfy pre-existing problems which are not exacerbated by the new development. A payment in lieu of dedication is not a taking, so long as it is earmarked for parks to benefit the area in question. *Id.* Neither Houston nor Dallas require park dedication in the platting process; however, Dallas requires notice to the Director of Parks and Recreation if the plat incorporates land shown on the Long Range Physical Plan for Park and Recreational Facilities as potential parkland, in order to allow an opportunity for the City to negotiate acquisition. DALLAS, TX. CODE § 51A-8.508(a).

In addition to the dedication of right-of-way and easements, the requirement for a developer to construct streets and install infrastructure improvements (as well as the requirement for bonds to insure construction of those improvements) has been upheld as a condition to plat approval. *Crownhill Homes, Inc.*, 433 S.W.2d at 526. However, requiring a landowner to dedicate property for use as a right-of-way for a state...

F. Are Exactions Limited?

State and Federal law provide guidance on the limits on a city requiring exactions as part of the platting approval process. Generally, the required dedications and mandatory construction of public facilities must be related to the burdens on the city placed by the new development and its related population and business impact.

1. Federal Case Law. The U.S. Supreme Court has established a number of rules which limit government exactions:

Exactions must substantially further a legitimate state interest, and there must be a nexus between the exaction and the public need to be addressed. *Nollan v. California Coastal Corp.*, 483 U.S. 825 (1987). As a condition for a required permit to construct a new house, Nollan was required to grant an easement over his private beach in order to connect two public beaches separated by his property. Since there was no link between the public benefits of beach access and the public burden from construction of the new house, the requirement was rejected.

No regulation may deprive the owner of "all economically beneficial or productive use" of the property. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1004-05 (1992). Lucas was denied permission to build on a coastal lot in order to protect sand dunes. Only decks and other uninhabitable structures were allowed. This regulation was considered a taking requiring compensation. In effect, this regulation was so excessive that it became a condemnation. The Court provided an exception (not applicable here) where a use is a "nuisance" under state law. A nuisance use may be prohibited without compensation.

A city has the burden to demonstrate the exaction is justified by making an individualized determination that the nature and extent of the exaction is "roughly proportional" to the anticipated impact of the project. Thus, the city has the duty to produce evidence to support its exactions. *Dolan v. City of Tigard*, 512 U.S. 374, 375 (1994). A building permit for expansion of a business was conditioned on granting an easement over an adjacent creek for future storm drainage and a bike path. The city could not link the expansion to either flooding concerns or increased bike traffic; therefore, the exaction was a taking requiring compensation.

2. State Case Law. The Texas Supreme Court has addressed exactions and proper extent of land use regulation:

One project may not bear all the burden of a general community benefit. *City of Austin v. Teague*, 570 S.W.2d 389, 393 (Tex. 1978). Teague was denied a permit to re-channel a creek necessary to prepare land for development. The permit was denied due to public desire to preserve the scenic character of the area for the generalized benefit of the public and to prevent any development. Teague was held to have the right to recover damages since this benefit was for the general public.

Exactions must meet a two level test:

(1) A requirement must accomplish a legitimate government goal, which is substantially related to health, safety, and general welfare.

(2) The requirement must be reasonable, not arbitrary (with the burden of proving unreasonableness on the property owner).
Parkland dedication as part of residential development was upheld when a developer requested plat approval. *City of College Station v. Turtle Rock Corp.* 680 S.W.2d 802, 803 (Tex. 1984) (Providing neighborhood parks is a legitimate government goal, and the city imposed the dedication requirement only as a condition to a requested plat approval). There must be a reasonable connection between the impact of the development and the goals being addressed by the required exaction. The developer is not required to solve pre-existing deficiencies or provide for future, offsite development needs.

Regulation may not interfere with "reasonable investment backed expectations" established when property was purchased, such that the regulation eliminates all economic viable use. *Mayhew v. Town of Sunnyvale*, 964 S.W.2d 922, 924 (Tex. 1998). Zoning regulation with large minimum lots and the related denial of a proposed land development was broadly upheld. Legitimate government interests to justify land development regulation included:

- Protecting from the ill-effects of urbanization,
- Enhancing quality of life,
- Preserving aesthetics,
- Preserving historic agricultural uses,
- Controlling the rate and character of growth.

Since the land use regulations substantially advanced these interests in the face of increased density reasonably anticipated by the development, the regulations were upheld.

*Town of Flower Mound v. Stafford Estates Ltd. P’ship* is a significant city platting opinion applying *Dolan* to offsite exactions. 135 S.W.3d 620 (Tex. 2004). The Supreme Court affirmed the holding of the Court of Appeals, which summarized the case as follows:

In this development exaction case, the primary issue we must decide is whether the two-prong test articulated in *Dolan*, 512 U.S. at 375 applies to a municipality's requirement that a developer construct and pay for offsite public improvements as a condition to plat approval for subdivision development. We conclude that the *Dolan* test applies to the public improvements development exaction in this case and that the exaction does not satisfy the *Dolan* test.

We must also decide what is the proper measure of damages when a development exaction does not satisfy the *Dolan* test and whether a developer can recover attorney's fees and expert witness fees under United States Code §1988 if a state remedy adequately compensates the developer for any taking resulting from the development exaction. We hold that the proper measure of damages is the amount paid for the public improvements in excess of the amount roughly proportional to the consequences generated by the development minus any special benefits conferred on the development by the exaction. Applying this measure of damages, we hold that legally and factually sufficient evidence exists supporting the trial court's damages award. We also hold that the developer cannot recover § 1988 expert witness fees and attorney's fees if the state remedy provides adequate compensation because, in this circumstance, the developer's federal takings claim is not ripe. Accordingly, we will affirm the trial court's judgment in part and reverse and render in part.

In this case, the city's subdivision ordinance required offsite improvements to public facilities as a condition of plat approval. Specifically, a street bounding the proposed development was required to be completely reconstructed as a concrete street, notwithstanding that a recently installed asphalt street was in place. The benefits to the public from the new work were: (i) concrete over asphalt, and (ii) wider shoulders. There was no increase in traffic capacity. After receiving plat approval and installing the road, the developer sued to recover its costs, alleging an unconstitutional taking under the state and federal...
constitutions and a civil rights takings violation under § 1983 of the United States Code, as well as seeking attorney's fees and expenses under § 1988 of the United States Code. The court made a number of significant holdings:

- Reasonableness of conditions to plat approvals, including exactions, may be challenged after obtaining final plat approval and providing the exactions.

- *Dolan v. City of Tigard*, 512 U.S. 374 (1994) applies to *offsite* exactions, not just a requirement to dedicate real property.

- *Dolan* applies when a city makes an ad hoc "adjudicative" (case by case) decision, but is not applicable to a uniformly applied "legislative" action.

- *Dolan* applies to a state-taking claim. The court explains that *Dolan* is intended to "prevent opportunistic takings by the government simply because a land owner is seeking some type of land-related governmental approval", sometimes described as "regulatory leveraging."

- Burden of proof is on the government to prove the legitimacy of the exactions, but the landowner has the burden to prove its damages.

- Damages are the portion of the exaction other than that appropriately assessed to the landowner (applying the rough proportionality test). In this case, the developer paid 100% of the offsite road construction, but should only have been assessed 12.2%. Therefore, the developer recovered 87.8% of the cost.

- Attorney's fees/expenses were denied under USC § 1988. Since the landowner recovered under its state law takings claim, that complete recovery eliminated any §1983 claim, and therefore, no attorney's fees.

3. Texas Exaction Statute. If a city conditions plat approval on the developer bearing a portion of infrastructure costs, then that portion may not exceed "the amount required for infrastructure improvements that are roughly proportional to the proposed development as approved by a professional engineer…retained by the municipality." This is a statutory adoption of the *Dolan* test, as confirmed in *Flower Mound*, but requires application by a licensed Texas engineer. If the city requires too much contribution, the developer may sue within thirty days in either county or district court in the county where the property is located, and if successful, recover reasonable attorney’s fees and expert witness fees, both of which were denied in *Flower Mound*, despite the developer's victory in that case. TEX. LOC. GOV'T CODE §212.904. For additional information see the paper entitled "Platting and Proportionality: A Practical Look at Tex. Loc. Gov't Code Sec. 212.904" by Susan Alleman, David Z. Conoly and Reid C. Wilson presented at the UT 2010 Land Use Conference held in Austin, Texas on March 25-26, 2010.

G. How to Eliminate Platted, but Unconstructed Streets and Public Easements?

Plats contain language offering to dedicate the public streets and easements shown. The act of plat approval does not mean the city is accepting the offered dedication. TEX. LOC. GOV'T CODE § 212.011(a); *Stein v. Killough*, 53 S.W.3d 36, 42 (Tex. App.— San Antonio 2001, no pet.). Texas law is clear that a plat with dedicatory language is simply an offer of dedication. *Miller v. Elliot*, 94 S.W.3d 38, 45 (Tex. App.—Tyler 2002, pet. denied). Acceptance occurs upon either (i) express acceptance, or (ii) use by the public. *Id; Chaney v. Camacho*, 2013 WL 6533123 at 2 (Tex. App. – San Antonio Dec. 11, 2013, pet. denied). If the plat has not effectuated a dedication, the question of whether a dedication has occurred
Vacating Streets and Public Access Easements, Restrictions

is a matter of law to be interpreted by the court based on whether there has been a clear and unequivocal intention to dedicate. *Ives v. Karnes*, 452 S.W.2d 737, 741 (Tex. Civ. App.—Corpus Christi 1970, no writ). For example, dotted lines accompanied by the word "road" is not a clear dedication of a road. *Dallas v. Crow*, 326 S.W.2d 192, 196 (Tex. Civ. App.—Dallas 1959, writ ref'd n.r.e.). Delay in acceptance is not rejection of dedication. *McLennan County v. Taylor*, 96 S.W.2d 997, 999 (Tex. Civ. App.—Waco 1936, writ dism'd); *Bowen v. Ingram*, 896 S.W.2d 331 (Tex. App.—Amarillo 1995, no writ). However, the equitable doctrine of estoppel may apply to prevent denial of dedication, particularly where lots were sold by reference to the plat. *Crow*, 326 S.W.2d at 198; *Ives*, 452 S.W.2d at 741. Acceptance can occur by formal action or by public use. *Stein*, 53 S.W.3d at 42. The failure to assess the land for taxes is an indication of acceptance. *City of Waco v. Fenter*, 132 S.W.2d 636 (Tex. Civ. App.—Waco 1939, writ ref'd.). The offer of dedication remains open until there is action to demonstrate rejection or abandonment by the government; mere passage of time alone is not sufficient. *Taylor*, 96 S.W.2d at 999. When the use to which the land is dedicated is impossible or highly improbable, the dedication may be presumed abandoned. *Viscardi v. Pajestka*, 576 S.W.2d 16 (Tex. 1978). Land outside the ownership of the land owner cannot be dedicated by plat. *Crow*, 326 S.W.2d at 196. The doctrine of partial acceptance will imply dedication of the entirety of a street if a significant portion is improved. *Town of Palm Valley, Texas v. Johnson*, 17 S.W.3d 281, 285 (Tex. App.—Corpus Christi 2000), aff'd 87 S.W.3d 110 (Tex. 2001) (affirming the result, but disagreeing with lower court's language regarding injunctions). Sale of lots by reference to a plat reflecting streets to be dedicated makes the dedication irrevocable, even without acceptance by the government, as to the purchasers of lots. *Taylor*, 96 S.W.2d at 999.

When a street dedication is accepted, it creates an easement in favor of the public and the fee remains in the abutting landowner. *State v. Williams*, 161 Tex. 1, 335 S.W.2d 834, 836 (1960); *Humble Oil & Refinery Co. v. Blankenburg*, 149 Tex. 498, 235 S.W.2d 891, 893 (1951). The adjacent property owner owns fee to the center of the road, subject only to the easement in favor of the public to a right of passage. *City of San Antonio v. City of Boerne*, 111 S.W.3d 22 (Tex. 2003). A commissioner's court may "discontinue, close, abandon, or vacate public roads or highways." TEX. LOC. GOV'T CODE § 81.028.

Where the tendered dedication is not accepted, no vacation or abandonment is required, because the dedication is not completed. This is like offer and acceptance in a contract, and is similar to the idea that a land owner can’t convey land without the acceptance of the grantee.

A replat will replace the prior plat and eliminate the former offered (not accepted) dedications, without the requirement for separate vacation process. TEX. LOC. GOV'T CODE §212.014 & 232.009(b). However, if the former dedications were accepted, whether by writing, construction of the improvements, or use, a separate vacation action is required. TEX. LOC. GOV'T CODE § 253.001. The installation of any public utilities will be sufficient for many cities to assert acceptance of dedication.

H. What Private Property Rights accrue to Abutting Lots?

Anyone purchasing property within or adjacent to a platted subdivision has a private property right in dedicated streets shown on the plat. *Dykes v. City of Houston*, 406 S.W.2d 176, 180 (Tex. 1966). Denial of access to an abutting street is a taking. *Simi Inv. Co., Inc. v. Harris County, Texas*, 236 F.3d 240 (5th Cir. 2000); *State v. Meyer*, 403 S.W.2d 366 (Tex. 1966). In *State v. Delany*, 197 S.W.3d 297 (Tex. 2006) (per curiam) the court held "Texas has long recognized that property abutting a public road has an appurtenant easement of access guaranteeing ingress to and egress from the property....Under the Texas Constitution, a compensable taking has occurred if the State materially and substantially impairs access to such property....In Texas, easements of access do not guarantee access to any specific road absent a specific grant....[Owners] would be entitled to compensation if [the denial of access] substantially and materially impaired access to their property. That is a question of law that we review de
However that access may be limited so long as the allowed access is reasonable. City of Waco v. Texland Corp., 446 S.W.2d 1, 3 (Tex. 1969). In determining whether a taking for limitation of access occurs, all factors which affect access may be considered, including whether the allowed access is unsafe. City of Northborough Ctr., Inc., 987 S.W.2d 187, 193 (Tex. App. – Houston [14th Dist.] 1999, pet. denied). An owner of property not within the platted area, or immediately abutting a street shown on the plat, has no private property right since the right is inferred from the purchase of property based on the recorded plat. In general law cities, an abutting street may not be closed or vacated without consent of the adjoining property owners. Town of Palm Valley, Texas v. Johnson, 17 S.W.3d 281, 285 (Tex. App. – Corpus Christi 2000), writ den. 87 S.W.3d 110 (Tex. 2001) (applying Texas Transp. Code § 311.008). Under some circumstances, a city may be enjoined from closing the street. Id. at 111; Dykes, 406 S.W.2d at 182. However, only an abutting landowner may request an injunction. Tex. Civ. Prac. & Rem. Code § 65.015. Denial of access to a non-abutting portion of a specific street, where alternative access is available, is not a material and substantial impairment of the owner's property right, and thus, is probably not irreparable harm. City of Houston v. Fox, 444 S.W.2d 591, 592 (Tex. 1969); City of San Antonio v. Olivares, 505 S.W.2d 526, 530 (Tex. 1974). Fox and Olivares back away from the broader language of Dykes and interpret the right of a lot purchaser to streets in a platted subdivision to be a generalized access right. In both cases, the court held no damages accrued to the property owner. The opening of a dedicated street is subject to reasonable regulation. Dykes, 406 S.W.2d at 181. If a city acts unreasonably in refusing to open the street, it may be subject to mandamus. Id. at 182. However, some cities will require a one-foot reserve between platted streets and adjacent unplatted property to eliminate this right. See City of Houston Code of Ordinances § 42.192. Since the dedication stops short of the boundary, the adjacent property owner's property does not "abut" the street. See Johnson, 17 S.W.3d at 285 (setting out a definition of "abut"). A city may restrict public street access to pedestrians and emergency vehicles. Jordon, 89 S.W.3d at 739. Of course, a government can always exercise its condemnation power to acquire all or any portion of the property rights of an owner.

IV. THE VACATION PROCESS

The general rule is that public real property may be sold only for fair market value. Tex. Loc. Gov’t Code Section 272. However, there is an exception for vacating a street right-of-way. Tex. Loc. Gov’t Code Section 272.001(b). In practice, local governments “sell” their interest in a street, fee or easement, as if it were a separate piece of real property. The fair market value of the interest being vacated and “released” (if a right-of-way) or conveyed (if fee) is determined by a 3rd party appraiser. Appraisers usually consider that the government’s rights in a right-of-way are the functional equivalent of a fee, since the remaining rights held by the underlying fee owners are few. Also, in practice, there is not usually a discount for the unusual shape of the street, as most every vacation results in the former street area being joined to the adjacent privately owned property. Most governments either select the appraiser, or provide a list of approved appraisers. Generally, the fair market value determined by the appraisal process is final and non-negotiable. On occasion, if the appraisal becomes stale due to passage of time, an updated appraisal is permitted.

Below is the typical process one would follow for the abandonment or vacation of a street in a general law municipality, which satisfies Tex. Transp. Code § 311.008:

1. File an application with the municipality for the street vacation. The application should contain:
Vacating Streets and Public Access Easements, Restrictions

a. A petition for the street vacation signed by all of the abutting property owners (including any at the end of a dead-end street being abandoned);
b. Verification of ownership (all abutting vesting deeds);
c. A detailed sketch of the area requested to be vacated and all public infrastructure in that area;
d. Contact person for the abandonment; and
e. Fee

2. Obtain a survey of the street area to be abandoned with a metes and bounds descriptions. This description will be used as an exhibit to the municipal ordinance that finalizes the street vacation. The survey will show the separation of the street area to be vacated to the adjacent land owners.

3. Obtain a resolution of the city council/commissioners court approving the concept of the abandonment, subject to the determination of value. Conceptually, this is like a preliminary plat approval.

4. Obtain an appraisal to determine the fair market value of the street area to be vacated. The municipality will use this appraisal to define the amount to be paid for the vacation of the street. Typically, the undepreciated value of any public improvements to be removed or abandoned in place is added to the fair market value of the land for a total payment to be made by the private owner(s).

5. A public hearing will be held after municipality receives the completed application, final survey and appraisal where the ordinance to vacate the property will be heard and either approved or disapproved.

6. The municipality will normally require the applicant to pay all costs to relocate/reorient public infrastructure to accommodate the vacation, usually with a deposit required for the cost thereof.

7. If the ordinance to vacate is approved, a certified copy of the ordinance should be recorded to evidence the vacation. The petitioner may also request that a quitclaim deed be signed to provide additional evidence of title. Where the street is owned in fee, a deed to each adjacent owner should be signed and filed.

The vacation process can take the same amount of time as a replatting/rezoning.

The City of Houston has detailed directions and forms for street vacations at https://edocs.publicworks.houstontx.gov/engineering-and-construction/joint-referral-committee.html. See Exhibit B attached for the City of Houston Application form, Process Flowchart and "Offer Letter" form.

V. CHECKLIST FOR VACATING STREETS AND PUBLIC EASEMENTS

A. Platted Streets and Easements

When asked to eliminate from a title commitment or policy a street, alley or public easement shown on a recorded plat, confirm the following:

- A replat, valid and complete on its face, is recorded without showing the vacated item, after the date of the plat showing the item.
  - If item was not constructed, or otherwise accepted by the public, then the replat alone is acceptable
  - If the item exists or there is evidence of acceptance by the public, then in addition to the recorded replat, record a certified copy of a city ordinance vacating the area. An alternative is to record a Quitclaim, and keep a copy of the city ordinance in the closing files.

B. Streets and Easements Created by Separate Instrument
When asked to eliminate from a title commitment or policy a street, alley or public easement established by a separate instrument, whether granted in fee or easement (right of way), confirm the following:

- Record a separate instrument as follows:
  - For Street conveyed in fee- a deed in valid form conveying the area.
  - For Street conveyed in easement (right of way)- either a Quitclaim to the area or a certified copy of the ordinance vacating the area
  - For Public Easement- either a Release to the area or a certified copy of the ordinance releasing the easement
- Obtain a copy of the ordinance approving the separate instrument or the vacation

C. Street Created by Implied Dedication/Custom

When asked to eliminate from a title commitment or policy a street established by implied dedication or custom, confirm the following:

- Record either a Quitclaim to the area or a certified copy of the ordinance vacating the area
- Obtain a copy of the ordinance approving the vacation.

D. WARNING SIGNS:

- If an abutting owner objects to the vacation-
  - In a general law city- The vacation is not valid.
  - In other instances- The vacation may be valid, but the title company may want to except to any claims by the abutting owner to the vacated area. Example: “Claims of any owner of land abutting the street vacated by ___________ recorded at ___________ to such street or to the use thereof, including, but not limited to, an implied private right of access.”
- If an adjacent, but not abutting owner objects to the vacation-
  - The vacation may be valid, but the title company may want to except to any claims by the adjacent owner to the vacated area. Example: “Claims of any owner in ________ Addition (according to the map or plat recorded at __________) with a lot abutting the remaining portion of _________ Street, a portion of which was vacated by _________________ recorded at ____________________, to the vacated portion of such street or to the use thereof, including, but not limited to, an implied private right of access.”
- If, upon examination, the vacation or replat process appears flawed on its face, then the street or easement should remain as an exception, until the process is correctly completed.
- If a survey reflects a road connected to a public road, but no evidence of dedication of record, then the title company should investigate to see if there are indications that the road is a public road by implication or custom. If the road has a public signage, appears to be or is publicly maintained, is listed on any governmental map as a public road, is generally used by the public or has other indicia of public use for an extended period, then an exception should be taken to the street or road. If a public street or road, it should be vacated formally to be eliminated from the title exceptions. If there is question, then the local government (city if inside city limits, otherwise county) should issue a certificate of non-acceptance, a certified copy of which should be recorded.
TITLE EXAMINATION STANDARDS

Citations in the Comment: 3 Aloysius A. Leopold, Land Titles and Title Examination, ch. 6 (Texas Practice 3d ed. 2005).

History:
Adopted June 11, 2010; amended July 17, 2014.

The prior standard provided: “Although examiners do not determine actual water boundaries on the ground or the character of waters, the following general principles govern riparian and littoral boundaries along tidelands, lakes, and streams.

Riparian and littoral boundaries are governed by the applicable law in effect on the date of severance of title from the sovereign.

The boundary of a tract bounded by a non-navigable stream is generally located at the thread of the stream.

Title to the bed of tidelands and to natural navigable lakes is in the State.

Title to other streams is determined by the law in effect on the date of severance of title from the sovereign. State title to the bed of parts of some streams may be relinquished under the ‘Small Bill.’”

Standard 5.40. Roads

Although an examiner does not determine actual land boundaries on the ground, an examiner should consider the possible application of the “strip-and-gore” doctrine. Where applicable, the doctrine generally provides as follows: Unless the instrument expresses a contrary intent, in a conveyance where a road is a boundary of a tract, the conveyance of the tract presumptively conveys the grantor’s title to the center of the road and in some cases to the entire road.

Comment:
This standard applies the “strip-and-gore” doctrine in the context of roads. For purposes of this standard, “road” includes highways, streets, alleys, railroad rights-of-way, and other types of roads.

The strip-and-gore doctrine is a rule of construction that creates a rebuttable presumption that the grantor of a tract bordering a road intended to convey the grantor’s interest in the road—usually to the center of the road—even though apparently excluded or excepted by the terms of the conveyance unless the grantor expressed a clear and unequivocal intent to the contrary. Rio Bravo Oil Co. v. Weed, 50 S.W.2d 1080 (Tex. 1932). The doctrine is justified both as a matter of public policy, Carden v. Gulf Production Co., 145 S.W.2d 912 (Tex. 1940), and on the theory that a grantor is presumed to convey all appurtenant rights incident to the enjoyment of the tract conveyed. Reagan v. Marathon Oil Co., 50 S.W.3d 70 (Tex. App.—Waco 2001, no pet.).

The court in Reagan discusses the history of the application of the doctrine and applies it to severed minerals. The doctrine applies even though the calls contained in the metes and bounds description extend only to the edge of the road. Cox v. Campbell, 143 S.W.2d 384 (Tex. 1940) (applies the general rule, which the Supreme Court has previously affirmed as to highways and streams, to a railroad right of way).

Conveyances with phrases such as “save and except” or “not including the road” are not sufficient to overcome the presumption. Reagan v. Marathon Oil Co., 50 S.W.3d 70 (Tex. App.—Waco 2001, no pet.).

Under the strip-and-gore doctrine, a conveyance of a tract adjoining multiple, adjacent road easements will convey to the center of the easements in the same manner as if they constituted a single easement. Haines v. McLean, 270 S.W.2d 777 (Tex. 1955). The doctrine extends to a small tract, even though not a “strip,” where the tract is of no further benefit to the grantor. Alkav v. United Savings Ass’n, 672 S.W.2d 852 (Tex. App.—Corpus Christi 1984, writ ref’d n.r.e.). A reservation of minerals in the streets of a platted subdivision noted in a developer’s dedication plat will not overcome the presumption that the developer’s subsequent deed of a lot joining the street conveyed the minerals to the center of the street. Lackner v. Bybee, 159 S.W.2d 216 (Tex. Civ. App.—Galveston 1942, writ ref’d w.o.m.).

The doctrine may also apply to governmental entities. Jolin v. State, 146 S.W.2d 206 (Tex. Civ. App.—Austin 1940, writ ref’d) (general rule, that adjacent owners own minerals to the center of road easements, applies to patents). But see Town of Refugio v. Strauch, 29 S.W.2d 1041 (Tex. Comm’n App. 1930, judgm’t adopted) (title to minerals under streets described in a land grant in what were Mexican towns, lots, such as located in Gonzales, Refugio, Bastrop, Liberty, and Victoria, were vested in the town and not in the lot owners fronting the streets; the term “street” does not apply in its usual sense where the “street” is not in existence at the time of the conveyance of the property in question) and Mitchell v. Bass, 33 Tex. 259 (1870) (applying civil law and rejecting strip-and-gore doctrine where the land at issue had been granted by the Mexican government).

For application of the doctrine to streams see Comments to Standard 5.30.

Caution:
The presumption created by the strip-and-gore doctrine may not apply where the land within the easement is relatively “larger and perhaps more valuable” when compared to the adjoining tract specifically conveyed in the instrument. Angelo v. Biscamp, 441 S.W.2d 324, 527 (Tex. 1969).

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T. 2, App.
Standard 5.40

The presumption will not apply where no road, alley, or easement exists at the time of the grant, and the
property description excludes the narrow strip from the acreage being conveyed. Goldsmith v. Humble Oil & Ref'g Co., 199 S.W.2d 775 (Tex. 1947).

Nevertheless, the doctrine similarly applies where the roadway is located entirely within the grantor's
land, although along a boundary, and the grantor does not own land on the other side of the road. Thus,
where the conveyance contained a property description that referred to the edge of the road as the
boundary, the instrument was construed to convey the grantor's interest underlying the entire road.
Cantley v. Gulf Production Co., 143 S.W.2d 912 (Tex. 1940). Likewise, when a road is adjacent to
navigable waters, a deed describing the land bounded by a road conveys the fee of the entire tract
including the land underlying the marginal roadway. State v. Armis, 178 S.W.2d 563 (Tex. Civ. App.—San
Antonio, 1945, writ ref'd w.o.m.) (road was adjacent to Nueces Bay and lots were adjacent to the road).

Finally, although this standard is limited to roads, the doctrine has been applied to small strips or parcels
of land that do not comprise a road or easement. See, e.g., Alikas v. United Savings Ass'n, 672 S.W.2d 852,
857 (Tex. App.—Corpus Christi 1984, wrt ref'd n.r.e.) (applying the doctrine to a 2.1067-acre non-road
tract out of a 146.884-acre tract). In Alikas, the court stated that, for the doctrine to apply: (1) the tract
must be small in comparison to the land conveyed; (2) the tract must be adjacent to or surrounded by
the land conveyed; (3) title to the tract and the adjacent or surrounding tract must be in the same grantor
at the time of the conveyance; and (4) the tract, by itself, must be of no apparent benefit or importance to
the grantor at the time of the conveyance. Id. at 857. At least one court has cited the four principles of
Alikas in a road context. See Escondido Services, LLC v. VKM Holdings, LP, 321 S.W.3d 102 (Tex.
App.—Eastland 2010, no pet.).

Whether application of the strip-and-gore doctrine grants marketable title to a strip or a gore is
certain. See Standard 2.10 (discussing marketable title).

Source:
Citations in the Comment.
History:
Adopted June 24, 2011; amended July 17, 2014.

The prior standard provided: “Although examiners do not determine actual land boundaries on the
ground, an examiner should consider the possible application of the “strip-and-gore” doctrine. Where
applicable, the doctrine generally provides as follows: Unless the instrument expresses a contrary intent,
in a conveyance where a road is a boundary of a tract, the conveyance of the tract presumptively conveys
the grantor's title to the center of the road and in some cases to the entire road.”

Standard 5.50. Easements

An examiner should identify and note as an encumbrance all easements of record affecting
the title under examination. Certain title examinations may require the examiner to deter-
mine additional information about easements.

Comment:
Customarily, when conducting an examination of surface title, mineral title, or both an examiner does
not trace and determine ownership resulting from transfers of an easement or provide detailed
information concerning the easement unless such information is material to the transaction prompting
the title examination.

Unrecorded easements may encumber the property under examination. The existence of such eas-
ements can only be determined by a physical inspection of the property. An examiner typically does not
conduct an on-the-ground inspection of the property. If a physical inspection of the property is conducted
to determine the existence or location of easements, the client typically arranges it.

An examiner may be retained to examine easement title. In this circumstance, the examiner should
ascertain what information the client needs and conduct the examination accordingly.

An easement is a non-possessory right to use the property of another. The owner of the burdened
property is bound to permit certain acts by another, such as to pass over it (affirmative easement) or to
not do certain acts that would otherwise be lawful, such as constructing a building if it would interrupt
adopted). An easement is an interest in land, distinguishable from a license or permit that merely confers
a personal and generally revocable privilege to do some act on the land and is generally not assignable.
A license in land does not grant any interest in or title to the real property, and a license need not be in

An easement may be private or public. There are two types of easements: an easement in gross and an
easement appurtenant. An easement appurtenant attaches to and runs with the benefitted land. The
benefitted land is the dominant estate, and the land burdened by the easement is the servient estate.
Fokory v. Yulin, 189 S.W.2d 185 (Tex. Civ. App.—El Paso 1945, no writ). An easement is not presumed
to be in gross when it can fairly be construed to be appurtenant. Gusther v. Bannell, 301 S.W.2d 766, 768
(Tex. Civ. App.—Waco 1957, no writ). “Whether an easement is in gross or appurtenant must be
determined by the fair interpretation of the grant or reservation creating the easement, aided if
APPLICATION

ABANDONMENT AND SALE OF STREET OR ALLEY

Both the property owner (applicant) and the agent (if applicable) must sign this application where indicated. A signed original authorization letter may be substituted for the property owner’s (applicant’s) signature. Providing the requested information will ensure the timely review of your request.

1. Applicant’s Information: Your name, address, title, daytime telephone and facsimile numbers, and email address.

   Name: _____________________________________
   Address: ___________________________________

   Contact: ____________________________________
   Title: ______________________________________
   Telephone No.: _______________________________
   Facsimile No.: ________________________________
   Email Address: ______________________________

2. Agent (if applicable): Name, address, daytime telephone and facsimile numbers, and email address of any agent who will represent you in this matter. The agent will be the sole representative and contact for this request. (To be completed only if you are represented by an agent.)

   Name: _____________________________________
   Address: ___________________________________

   Contact: ____________________________________
   Telephone No.: _______________________________
   Facsimile No.: ________________________________
   Email Address: ______________________________

3. Key Map Location of area of your request (Example: 493X): ________________

5. Description and square footage of requested street or alley to be abandoned and sold
(Example: Water line easement, 20 feet wide by 200 feet long; total of 4,000 square feet):

6. Legal description and address of the property abutting the portion of the street or alley to be
abandoned and sold, by lot and block, including the name of the subdivision. If the property
is not located in a platted subdivision, provide the name of the survey and the abstract
number (Example: 123 First Street, Lot 5, Block 3, Western Heights Subdivision or Tracts
1A and 3C, Obedience Smith Survey, a-56):

7. Statement of intended use and details of the requested street or alley to be sold:

8. Is there a site plan if the property will be redeveloped? If so, please include a copy of the
site plan with this application.

9. What is the timeline for proposed redevelopment?

10. What is the timeline to vacate the property if the property is currently occupied?
11. Description and square footage of any property interest to be conveyed to the City by the applicant (Example: Sanitary sewer easement, from First Street to Second Street that is 10 feet wide by 50 feet long totaling 500 square feet):

12. Other abutting property owners (if applicable):
   Name: ________________________________
   Address: ______________________________
   Contact: ______________________________
   Title: ________________________________
   Telephone No.: ________________________
   Facsimile No.: ________________________
   Email Address: ________________________

Signatures

Applicant(s):
__________________________ Date: __________
__________________________ Date: __________
(Print Name)

Abutting Property Owners (if applicable):
__________________________ Date: __________
__________________________ Date: __________
(Print Name)

Agent:
__________________________ Date: __________
__________________________ Date: __________
(Print Name)
July 31, 2015

Mr. Samuel Jones
ABC Development, LLC.
555 Butterfly Road, Suite 100
Houston, Texas 77021

Subject: Abandonment and sale of Red Street, from Blue Street to Green Street, located in the Cottage Grove Fourth Section, out of the J Reinerman Survey, A-642. Parcel SY15-999

Dear Mr. Jones:

This letter is the City's offer to conclude the captioned transaction for a consideration of $465,864.00 subject to your completion of the outstanding transaction requirements and City Council approval.

Please provide the following required documents within fifteen days from the date of this letter:

1. A letter from ABC Development, LLC. accepting the City’s offer.

2. A cashier’s check payable to the City of Houston for the $462,764.00 balance of the consideration. We will hold these funds with your $3,100.00 nonrefundable deposit.

3. A letter of no objection from each of the privately owned utility companies for the street being abandoned and sold.

4. An original statement of ownership letter from an attorney at law. The letter must include a copy of the documents conveying title to the property owner.

5. Evidence the construction requirements required in Motion 2014-1047, items 3 and 4 (Attachment 1) has been completed to the City's satisfaction.

Should you not be able to accept the offer within the fifteen-day period and are unable to do so no later than thirty days from the date of this letter, this offer will be considered withdrawn and the file will be canceled without further communication. To pursue the transaction thereafter might require either: (1) you to initiate the process anew OR (2) an appraisal update. If, at the City’s sole discretion, the latter alternative is chosen, you will be required to submit a written request and an additional nonrefundable deposit equal to the cost of updating the appraisal. This additional nonrefundable deposit will not be applied toward the consideration. The City’s updated offer will be for the higher of the original appraised value or the updated appraised value.
Mr. Samuel Jones  
Parcel SY15-999  
July 31, 2015  
Page 2

Upon completion of the outstanding transaction requirements, we will request our Legal Department to prepare the conveyance instrument.

Attached for your information are copies of the approved field notes and Drawing No. 11347R (Attachment 2).

Should you have any questions, please contact Becky Ambridge, Senior Real Estate Analyst, Real Estate Branch-Land Disposition, at (832) 395-3121. All correspondence should reference the captioned parcel for prompt handling.

Sincerely,

Nancy P. Collins  
Senior Assistant Director – Real Estate  
Planning and Development Services Division  
Department of Public Works and Engineering

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2 Attachments:  
1. Motion No. 2014-1047  
2. Field notes and Drawing No. 11347R

c: Johnny Cash, High End Development, Inc.