

PRESENTED AT
MORTGAGE LENDING AND SERVICING INSTITUTE

October 11-12, 2023
Austin, Texas

CASE LAW UPDATE

Amanda R. Grainger
J. Richard White

Amanda R. Grainger
J. Richard White
Winstead PC
Dallas, TX
214-745-5400

agrainger@winstead.com
jrwhite@winstead.com

CASE LAW UPDATE

J. RICHARD WHITE AND AMANDA R. GRAINGER
WINSTEAD PC
DALLAS, TEXAS

The case selection for this year's Case Law Update is the arbitrary choice of the authors, but with an emphasis on cases of first impression, novel issues, detailed opinions on elements of a cause or Texas Supreme Court cases. If a case is not mentioned, it is completely the authors' fault. Cases discussed range from 644 S.W.3d through 666 S.W.3d. 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 and to the statute or code in question to determine whether there have been any amendments that might affect the outcome of any issue.

TABLE OF CONTENTS

	Page
I. MORTGAGES/FORECLOSURES/LIENS.	3
1. Equitable Lien v. Judicial Lien.	3
2. Forcible Detainer Action.	4
3. Foreclosure - Collateral Attack.	5
4. Backdating of Document.	6
5. Qualifications as Substitute Trustee.	7
6. Foreclosure – Mailbox Rule; Deficiency Amount.	7
7. Foreclosure – County Court Jurisdiction.	8
8. Foreclosure-Credits to Judgment Lien.	9
9. Fraudulent Lien.	10
10. Statute of Limitations/Acceleration.	12
11. Equitable Subrogation.	12
II. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES.	13
1. Service on Financial Institutions.	13
2. Proceeds.	14
3. Foreign accounts; FBAR Reports.	17
4. Bankruptcy-Change to Plan of Reorganization.	18
5. Purchase Money Security Interest in Crops.	19
6. Fraudulent Conveyance Transferee.	19
7. Post Petition Real Property Sale Proceeds.	20
8. TUFTA; Independent Manager.	21
III. LANDLORD–TENANT RELATIONSHIP/LEASES.	23
1. Forcible Detainer.	23
2. Utility Charges.	23

IV.	PURCHASER/SELLER	24
1.	Escrow Agreements/Risk of Loss	24
2.	Statute of Frauds	25
3.	Damages.....	27
4.	Mandatory Arbitration	28
V.	CONSTRUCTION MATTERS	30
1.	Waiver of Immunity.....	30
2.	Inception of Mechanic’s Liens.....	30
3.	Consequential Damages.....	31
4.	Breach of Contract/Proficiency of Work	32
5.	Waiver of Certificate of Merit.	33
VI.	TITLE/CONVEYANCES/RESTRICTIONS / ASSOCIATIONS	34
1.	Violation of Texas Water Code	34
2.	Violation of the Texas Citizens Participation Act	34
3.	Adjudication of Water Rights	35
4.	Conveyances.	36
5.	Quiet Title/Trespass-To-Try-Title.	40
6.	Deed Restrictions/Use.....	43
7.	Tenant in Common/Reimbursement.....	45
VII.	MISCELLANEOUS	46
1.	Premises Liability.	46
A.	Dangerous Condition.	46
B.	Arbitration.....	47
C.	Sovereign Immunity.....	48
D.	Constructive Knowledge.....	49
E.	Open and Obvious Danger; Necessary Use Exception.....	50
F.	Invitee or Licensee Status.	51
2.	Business Organizations.....	52
A.	Indemnification and Reimbursement.....	52
3.	Insurance.....	53
A.	Prompt Payment Act.....	53
B.	Limit of Loss for Flood and Business Interruption.....	53
C.	Condominium Insurance – Waiver of Subrogation.	54
4.	Governmental Matters.	54
A.	Zoning / Platting.	54
(1)	Notice for Comprehensive Rezoning.....	54
B.	Condemnation.....	55
(1)	Inverse Condemnation – Water Shut-Off.	55
(2)	Continuing Violations for Injunction.....	56
(3)	Short Term Rentals.	56
(4)	Takings by Police Action.....	58
(5)	Foreclosure Overage.	58
(6)	Ordinance Prerequisites.	59

C.	Taxes.....	59
(1)	Section 1.111 Agreement.....	59
D.	Governmental Immunity.....	59
(1)	TxDOT Contractor Immunity.....	59
(2)	TTCA-Notice (Actual v. Formal).....	61

I. MORTGAGES/FORECLOSURES/LIENS.

1. Equitable Lien v. Judicial Lien.

In re Huth, 643 B.R. 177 (Bankr. W.D. Tex. 2022) involved a bankruptcy debtor’s attempted discharge of a purchase money equitable lien and an abstract of judgment lien. England bought property for Huth, to be his homestead. After paying the purchase price for the homestead property, England deeded the property to Huth, who acknowledged that he owed England the \$90,000 purchase price. England filed suit to establish her purchase money equitable lien on the property and abstracted the judgment. Huth later filed for Chapter 7 bankruptcy protection and claimed the property as exempt homestead. Huth asserted that his discharge voided both the purchase money equitable lien and the abstract of judgment lien.

U.S. Bankruptcy Code Section 522(f)(1), allowed a debtor to avoid a lien to the extent that it impaired an exemption to which the debtor would have otherwise been entitled if such lien was a judicial lien. The issue before the court was whether these liens were judicial liens. Bankruptcy Code § 101(36) stated a judicial lien is one "*obtained* by a judgment, levy, sequestration, or other legal or equitable process or proceedings." Based on numerous prior opinions, this court held that an equitable lien that was in existence prior to entry of a judgment was such not such a judicial lien; and therefore not discharged. In In re Lodek, 61 B.R. 66 (Bankr. W.D. Tex. 1986), a constructive trust based upon wrongful taking of funds for homestead improvements was held to be an equitable lien. Also, in a matter virtually identical to the subject fact situation, the Texas Supreme Court found that "when no express lien is reserved in a deed and the purchase money is not paid, a lien nevertheless arises by implication...to secure payment of the purchase money." Furthermore, numerous bankruptcy courts have opined on the distinction between an equitable lien for purchase money which is not avoidable by a debtor as a judicial lien under such Bankruptcy Code provision.

On the other hand, the lien created by such abstract of judgment was a judicial lien for purposes of such Bankruptcy Code provision. It met the three elements for a judicial lien: (1) the abstract of judgment lien was obtained only by judgment, (2) the filing of the abstract of judgment fixed the lien on the subject property, and (3) the abstract of judgment lien impaired an exemption. Consequently, the court concluded that this abstract of judgment lien was voided by the bankruptcy discharge. The distinction for the purchase money equitable lien was it not a judicial lien and, therefore, was not voidable by the bankruptcy discharge.

Huth also alleged a discharge under Tex. Prop. Code § 52.042, which provided that the discharge, cancelation and release of the judgment lien and abstract of judgment lien were controlled by whether the debt or obligation evidenced by the judgment was discharged in bankruptcy. Further, the unpaid funds for the property were recognized as equitable liens against the homestead under the Texas Constitution and homestead statutes. The court concluded that under the Texas Property Code, bankruptcy discharge did not cancel or release the purchase money equitable lien, but did release the abstract of judgment lien.

2. Forcible Detainer Action.

Lua v. Capital Plus Fin., LLC, 646 S.W.3d 622 (Tex. App.—Dallas 2022, pet. denied) involved a challenge to a forcible-detainer action by the foreclosure purchaser at a non-judicial foreclosure sale. Lua executed a deed of trust in 2017 and later defaulted. A non-judicial foreclosure sale occurred in 2018; Capital Plus, as the holder of the debt, was the successful purchaser. A notice to vacate and demand for possession was made February 5, 2019. Capital Plus filed a petition for eviction in justice court, which was appealed by Lua to the county court. The county court received three (3) exhibits supporting Capital Plus's claim for possession: a trustee's deed, a notice to vacate, and the original deed of trust which contained a tenancy-at-sufferance provision.

In its defense, Lua plead a defective notice to vacate because the notice was given by Capital Plus's attorney rather than Capital Plus. The appellate court rejected this argument holding that the Texas Property Code does not forbid a business entity from using an agent to deliver demand for possession. Furthermore, in an eviction case, a business entity may "be represented by a property manager or other authorized agent" pursuant to Tex. R. Civ. P. 500.4(b)(2). The law firm demand letter stated it was representing Capital Plus, which satisfied the Texas Property Code and the Texas Rules of Civil Procedure requirements for a notice to vacate to be signed by the property owner. Lua also argued various defects in the foreclosure sale with the admission of certain evidence at trial. Lua's position was that the court lacked standing or jurisdiction because Capital Plus failed to submit an affidavit verifying certain requirements of the foreclosure sale, which made the foreclosure sale defective, resulting in the trustee deed being invalid, which meant Capital Plus lacked standing to prosecute its claim and, therefore, the trial court did not have proper jurisdiction. The court found such arguments to be non-persuasive because the sole issue in a forcible detainer action is the right to immediate possession of property, pursuant to Tex. R. Civ. P. 510.3(e); therefore, foreclosure defects did not relate to standing and were not at issue in a forcible detainer action. Mere allegations of foreclosure defects do not deprive a county court of jurisdiction in a forcible detainer action, unless the question of title is so intertwined with the right of possession that proper adjudication as to title must first be made.

Lua also claimed that the forcible detainer petition was not properly sworn; but this was also determined not to be jurisdictional. This claim arose because Capital Plus's attorney swore to the eviction proceedings on behalf of Capital Plus, which the court held satisfied the requirements of Rule 510.3. Then, as to the evidentiary challenges, the court stated: "it is sufficient that trustee's deed shows that Capital Plus purchased the subject

Find the full text of this and thousands of other resources from leading experts in dozens of legal practice areas in the [UT Law CLE eLibrary \(utcle.org/elibrary\)](https://utcle.org/elibrary)

Title search: Case Law Update

Also available as part of the eCourse

[2023 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

First appeared as part of the conference materials for the
57th Annual William W. Gibson, Jr. Mortgage Lending Institute session
"Case Law Update - Part I"