

**PRESENTED AT**

58<sup>th</sup> Annual William W. Gibson  
Mortgage Lending Institute

September 12 – 13, 2024  
Austin, Texas

**Case Law Update**

**Amanda Grainger**  
**J. Richard White**

Author Contact Information:  
Amanda Grainger and J. Richard White  
Winstead PC  
Dallas, Texas

[agrainger@winstead.com](mailto:agrainger@winstead.com)

214.745.5174

[jrwhite@winstead.com](mailto:jrwhite@winstead.com)

214.745.5126

## 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 666 S.W.3d through 688 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

	<b>Page</b>
I. MORTGAGES/FORECLOSURES/LIENS. ....	3
1. Foreclosure – County Court Jurisdiction. ....	3
2. Foreclosure – Credits to Judgment Lien. ....	4
3. Foreclosure – Lease Termination.....	4
4. Foreclosure – Prerequisites for Mechanic's Lien. ....	5
5. Foreclosure – Due Process; Notice. ....	6
6. Foreclosure – Responsibility for Taxes. ....	7
7. Equitable Subrogation Rights and Limitations. ....	7
II. DEBTOR/CREDITOR/GUARANTIES/INDEMNITIES .....	8
1. Simultaneous Rescission and Acceleration. ....	8
2. Fraudulent Conveyance – "Creditor". ....	10
3. Fraudulent Conveyance Transferee. ....	11
4. Bankruptcy – Real Property Sale Proceeds. ....	12
5. Bankruptcy Contempt Order. ....	14
6. Bankruptcy – Good Faith Purchaser. ....	15
7. Settlement Credit. ....	16
8. Prejudgment Interest. ....	18
9. Holder of Note. ....	19
10. Late Charges - Compounding. ....	20
III. LANDLORD–TENANT RELATIONSHIP/LEASES .....	21
1. Eviction .....	21
2. Required Lease Terms .....	21
3. Utility Charges .....	22

IV.	PURCHASER/SELLER .....	22
1.	Contract Interpretation .....	22
2.	Escrow Agreements/Risk of Loss .....	25
3.	Texas Citizens Participation Act.....	26
4.	Mandatory Arbitration .....	27
V.	CONSTRUCTION MATTERS .....	29
1.	Validity of Contract .....	29
2.	Waiver of Immunity .....	30
3.	Waiver of Certificate of Merit. ....	30
VI.	TITLE/CONVEYANCES/RESTRICTIONS / ASSOCIATIONS .....	31
1.	Uniform Condominium Act .....	31
2.	Restrictive Covenants .....	32
3.	Easements .....	32
4.	Violation of Restrictive Covenants .....	35
5.	Force Majeure .....	37
6.	Violation of Texas Water Code .....	37
7.	Conveyances .....	38
8.	Adverse Possession/Quiet Title/Trespass-To-Try-Title. ....	41
9.	Deed Restrictions/Use.....	44
VII.	MISCELLANEOUS .....	45
1.	Premises Liability. ....	45
A.	Sovereign Immunity.....	45
B.	Invitee Status.....	45
C.	Necessary Use Exception.....	46
D.	Off Premises Liability or Injury.....	46
E.	Adjacent Premises.....	47
F.	Healthcare Liability Claim.....	48
G.	Improvements. ....	48
H.	Dangerous Conditions.....	49
2.	Business Organizations.....	50
A.	Statute of Frauds .....	50
B.	Agent Liability for Fraudulent and Tortious Acts .....	50
C.	Piercing the Corporate Veil .....	52
D.	Receivership Scope.....	53
E.	Resolution Interpretation. ....	54
F.	Citizenship of Entity. ....	55
3.	Insurance.....	55
A.	Incorporation of Contract; Umbrella Policy. ....	55
B.	Texas Windstorm Insurance Association.....	56
C.	Waiver of Appraisal.....	57
4.	Governmental Matters. ....	57
A.	Zoning / Platting. ....	57

B.	Condemnation .....	57
(1)	Foreclosure Overage. ....	57
(2)	Governmental Immunity v. Eminent Domain. ....	58
(3)	Commissioner Awards – Objections. ....	59
(4)	Inverse Condemnation – Federal vs. State.....	59
(5)	Inverse Condemnation – Standing .....	60
(6)	Inverse Condemnation – Access.....	60
(7)	Inverse Condemnation – Intent.....	61
C.	Taxes.....	62
(1)	Charitable Entity Tax Exemption. ....	62
(2)	Dual Rights for Property Valuations Contest. ....	62
(3)	Tax Exemption for Disabled Veterans.....	63
D.	Governmental Immunity.....	63
(1)	Sewer Service Contracts .....	63
(2)	Economic Development Agreements .....	64
(3)	Alternative Dispute Resolution.....	66
5.	Other.....	66
A.	Water District Contract.....	66
B.	Nuisance.....	67

I. MORTGAGES/FORECLOSURES/LIENS.

1. Foreclosure – County Court Jurisdiction.

Ditech Servicing, LLC v. Perez, 669 S.W.3d 188 (Tex. 2023) involved the jurisdiction of a Hidalgo County court at law under a specific state statute. Ditech held a deed of trust lien on property owned by Perez. In a suit seeking foreclosure filed in Hidalgo County Court at Law Number 4, Perez challenged the county court's subject matter jurisdiction based on Tex. Gov't. Code §26.043(2), (8). The trial court overruled Perez' jurisdictional challenge and the court of appeals vacated the trial court's judgment and dismissed the case for want of jurisdiction. On review by the Texas Supreme Court, it noted the two classes of county courts: one being a constitutional county court, under Tex. Const. art. V §1, and the other being a statutory county court at law, which for Hidalgo County was pursuant to Tex. Gov't. Code §15.1102. Normally, constitutional county courts have a jurisdictional limit for civil cases between \$500 and \$250,000; however, this specific Hidalgo County statute granted expanded jurisdiction to include "civil cases in which the matter in controversy does not exceed \$750,000." Tex. Gov't. Code §25.1102(a)(2). Therefore, the critical issue for the supreme court was whether the general statute for county courts, which divest jurisdiction over suits for enforcement of a lien on land or for recovery of land, was preempted by the specific jurisdictional grant in the Hidalgo County jurisdictional statute. The supreme court held that the specific Hidalgo County jurisdictional statute granted jurisdiction in this foreclosure case, which involved a controversy of less than \$750,000, stating "the county-specific jurisdictional statutes are "independent and cumulative" of jurisdiction conferred by Section 25.0003." This determination was based on numerous factors. First, the Hidalgo County statute had no limiting language for real property interests as was contained in other county specific statutes. Second, the concurrent jurisdiction with district courts only contained a limitation on the amount in controversy, not the type of suit (i.e., suits relating to real property interests). Even

though most county specific statutes contained limitations on cases involving title to real property, the lack of such exclusion in the Hidalgo County statute meant it had no such limitation. Third, there did not need to be a specific grant of jurisdiction over real property cases, contrasting the grant for family law cases in another section of the statute, because such specific grant only removed the amount in controversy and did not limit the scope of type of cases. Fourth, the county specific jurisdictional statutes are "independent and cumulative of the jurisdiction" otherwise granted. Fifth, the legislature had provided guidance on conflicts between the jurisdictional statutes, requiring that the specific provision controls over the general.

## 2. Foreclosure – Credits to Judgment Lien.

Hibernia Energy III, LLC v. Ferae Naturae, LLC, 668 S.W.3d 745 (Tex.App-El Paso 2022, no pet.) involved the foreclosure of a judgment lien and the amount of credits applicable against such judgment lien. Although factually complex, the essence was that Ferae Naturae held a \$15,000,000 judgment lien (abstracted in numerous counties) and sought foreclosure, but Hibernia sought credit against such judgment lien in amounts which would have extinguished the judgment lien. Prior to the foreclosure sale, there were partial assignments of the judgment lien from the original creditor to third party assignees who paid over \$20,000,000.00 for the right to the judgment lien in Upton County, Texas. A portion of the judgment lien was assigned to Ferae Naturae; that assignment covered properties in Reagan County, Texas.

Hibernia asserted that the prior judgment debtors and judgment creditors should be necessary parties to the suit, without which the foreclosure action would be invalid. The court determined, with respect to judgment debtors, that the foreclosure action was an "in rem" proceeding and only judgment debtors having a "current" interest in the property were necessary parties. As to the judgment creditors, the court determined that judgment creditors with only a past interest in the judgment lien are not necessary parties, relying upon Douglass v. Blount, 95 Tex. 369, 67 S.W. 484 (Tex. 1902), holding "when a party has assigned all its rights to a lien on a property, it is not a necessary party to a foreclosure suit". Furthermore, on all other aspects of its appeal, Hibernia was determined not to have presented sufficient evidence of any satisfaction of the judgment lien debt, and did not preserve their rights to complain on appeal; therefore, Hibernia failed to carry its burden.

## 3. Foreclosure – Lease Termination.

Heron Lakes 2005 HQ-7, LLC v. Cadence Bank Successor by Merger to BancorpSouth Bank, 681 F.Supp.3d 697 (S.D. Tex. 2023) involved a dispute as to whether a non-judicial foreclosure terminated a lease. Cadence Bank was the tenant under four leases; Heron Lakes was holder of the deed of trust on all four properties. Heron Lakes conducted a non-judicial foreclosure sale and Cadence Bank abandoned the property under 3 leases, claiming each lease was terminated by the foreclosure sale. Heron Lakes sued for breach of the lease agreements. Each lease contained three operative provisions:

Paragraph 13.01 SUBORDINATION. This Lease is and shall be subject and subordinate to any and all . . . mortgages which may now or hereafter encumber or affect the Project . . .; provided, however,

at the option of any [mortgagee], this Lease shall be superior to the . . . mortgage.

Paragraph 14.02 ATTORNMENT. In the event of the . . . enforcement by the trustee or the beneficiary under any mortgage or deed of trust of remedies provided by law or by such mortgage or deed of trust, Tenant will, upon request of any person or party succeeding to the interest of Landlord as a result of such termination or enforcement, automatically become the Tenant of such successor in interest.

Paragraph 17.20 SUCCESSORS. Subject to the limitations and conditions set forth elsewhere herein, this Lease shall bind and inure to the benefit of the respective . . . successors, and assigns of the parties hereto.

Cadence Bank argued that the subordination clause was the operative provision and Heron Lakes' failure to elect for the lease to be superior to the deed of trust terminated the lease on the foreclosure. The appellate court affirmed Cadence Bank's position, noting the general foreclosure rule of law set forth in Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 916 (Tex. 2013), which stated that "if the tenant remains in possession and continues to pay rent, and the landlord . . . accept[s] the rent without objection to the continued possession, the tenant is a tenant at will, and the terms of the prior lease will continue to govern the new arrangement." In reaching its conclusion, the court rejected Heron Lake's arguments that the bank's continued possession under one of the four leases affected the treatment of the remaining three leases which the bank had abandoned. This position was rejected by the court as not being relevant to the facts relating to the three abandoned leases. Further, the court rejected the request of Heron Lakes to offer evidence regarding negotiations of the lease and prior drafts, because those were irrelevant with respect to unambiguous clauses in the executed lease.

Whether a lease provides for it to be superior or subordinate to any deed of trust, upon election by the mortgagee, each lease must be carefully reviewed when conducting foreclosures to insure the desired results.

#### 4. Foreclosure – Prerequisites for Mechanic's Lien.

Valley Forge v. CK Constr., 677 S.W.3d 121 (Tex.App.—El Paso 2023, no pet.) discussed the prerequisites to the foreclosure of a mechanic's lien. CK Construction was hired to renovate and remodel a building in El Paso which was owned by Valley Forge. CK completed construction of the project and requested the final \$69,000 payment; however, Valley Forge tendered a check for only \$40,000 as a final payment. CK refused the check and sued for the \$69,000 it believed it was owed under the construction contract. The trial court granted CK's motion for summary judgment for \$69,000 and ordered a foreclosure sale. Valley Forge appealed and the appellate court reversed.

Valley Forge alleged that CK had failed to offer sufficient evidence of the amount due. CK did not attach the contract to its pleadings or summary judgment affidavits, and presented no

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

[2024 William W. Gibson, Jr. Mortgage Lending and Servicing eConference](#)

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