IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 91-5798

JACK B. WHITE AND KAREN WHITE

Plaintiffs-Appellants,

versus

RESOLUTION TRUST CORPORATION, AS RECEIVER
SAN ANTONIO SAVINGS ASSOCIATION, F.A.

Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas
(SA 89 CA 451)

(March 11, 1993)

Before KING, JOHNSON, and DUHÉ, Circuit Judges.

JOHNSON, Circuit Judge:[*]

Jack and Karen White brought suit seeking a declaratory judgment that a deed of trust executed in favor of San Antonio Savings and Loan was invalid under Texas homestead law. The trial court held as a matter of law[1] that the property was

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[*]Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide cases on the basis of well-settled principles of law imposes needless expense on the public and burdens the legal profession." Pursuant to that rule, the Court has determined that this opinion should not be published.

[1] A jury was impaneled to try this case and did indeed hear all of the testimony. When the evidence was concluded, however, the trial judge entered judgment as a matter of law and dismissed the jury. The trial court made no written findings of fact or conclusions of law and produced no written opinion.

White's homestead and that White was only entitled to a one-acre urban homestead.[2] The trial court also held as a matter of law that the RTC, as receiver of the failed savings and loan, could foreclose the lien on the rest of the property. White and the RTC both appeal the judgment of the trial court. White argues that the trial court erred in determining that his homestead was urban as a matter of law. The RTC argues that under the *D'Oench, Duhme* doctrine, the trial court erred in allowing White to introduce evidence on his homestead claim. The RTC also argues that White should have been estopped from denying the disclaimer of homestead contained in the deed of trust.

This Court rejects both of the arguments raised by the RTC. However, we agree with White that the trial court based its determination of the character of White's homestead upon an incorrect understanding of Texas homestead law. Accordingly, we must remand the case for a re-determination of the character of White's homestead consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

[2] Under Texas law, a homestead is either urban or rural. If the land is used as "an urban home or as a place to exercise a calling or business in the same urban area," then a debtor is entitled to claim up to one acre of land as an urban homestead. TEX. PROP. CODE § 41.002(a). On the other hand, if a debtor uses land "for the purposes of a rural home," the debtor can claim up to 200 acres of the land as a rural family homestead (100 acres for a single adult debtor). TEX. PROP. CODE § 41.002(b). But whether the homestead is urban or rural, the land is completely protected from forced sale "except for the purchase money thereof, or a part of such purchase money, the taxes due thereon, or for work and material used in constructing improvements thereon." TEX. CONST. art. XVI, § 50.

In 1972, Jack White purchased a 25-acre parcel of land from his mother.[3] This land was part of a 91-acre tract acquired by White's parents in 1945 for use as a family home. White moved his family into the house located on the 25-acre parcel, and they have resided there continuously since that time.[4] Although the entire tract of land was annexed into the city of San Antonio in 1953, White presented evidence at trial that the property remained rural in nature. The property is served by the San Antonio electrical utility and by municipal fire and police protection. However, the property is not served by city trash collection, or by gas, water, or sewer utilities--though evidence was presented that White could have connected to some of these other municipal utilities if he had so desired.

In the early 1980s, White had some business difficulties and was forced to borrow a substantial amount of money from the San Antonio Savings Association (the Bank). By 1986, White owed the Bank over $1.7 million. At that time the Bank, evidently concerned about the size of White's debt, demanded additional collateral. On April 23, 1986, White purchased the rest of the

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[3] White and his mother signed a contract in 1972 which provided that White would purchase the 25-acre parcel for $81,000 ($11,000 in cash plus a note for $70,000). The transfer of title, however, was not officially recorded in the deed records of Bexar County until 1986.

[4] As a part of the 1972 contract between White and his mother, White agreed to lease the remainder of the property for a period of ten years. The contract was never extended, but White continued to make rent payments. White testified that he was also given a purchase option for the entirety of the property, but that option was never put in writing.

91-acre tract from his mother[5] and offered it as collateral for the loan. The deed transferring the entire tract to White recited that the loan by the Bank was in partial payment of the purchase money for the property. This recital was plainly untrue because White had borrowed the money long before he purchased the remaining property. On May 31, 1987, the loan was renewed and increased to $2 million. White executed a new note in that amount and gave the Bank a deed of trust covering the entire tract of land--this deed of trust also recited that the loan by the Bank had been used in partial payment of the purchase price for the entire tract. In the new deed of trust, White furthermore expressly disclaimed the property as homestead and recited that he owned other property in Bexar County that he claimed as his homestead.

After White defaulted on the loan, he sued the Bank seeking a declaratory judgment that the lien on the property was void under Texas homestead law. The Bank was subsequently declared insolvent, and the RTC was substituted as defendant. At trial,[6]

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[5] White's mother gave him a general warranty deed purporting to transfer the entire tract--including the parcel covered by the 1972 contract.

[6] This case originally proceeded to trial in 1990 before District Court Judge Emilio Garza. In that trial, the district court found that White's homestead defense was barred by the *D'Oench, Duhme* doctrine. Based on that doctrine, the district court granted the RTC's motion for a directed verdict and held that the entire tract was subject to judicial foreclosure. Before final judgment was entered, however, this Court handed down a decision in *Patterson v. FDIC*, 918 F.2d 540 (5th Cir. 1991), and the district court ordered a new trial *sua sponte*.

Before a second trial could be held, however, Judge Garza assumed his position on this Court. To avoid further delay, the

White was permitted to testify, over the RTC's objections, that the loan was not used to purchase the property and that the homestead disclaimer was false. The trial court also admitted Bank records showing that the lien was taken to secure a pre-existing debt. After this evidence was introduced, the trial court determined that White's homestead claim was not barred by federal or state law. The trial court also determined that, as a matter of law, White was limited to a one-acre urban homestead. The trial court therefore determined that the RTC could foreclose on all but one acre of White's property.

Both parties now appeal the judgment of the trial court. White argues that the trial court erred in determining as a matter of law that White was limited to an urban homestead consisting of one acre of property. The RTC argues, first, that the *D'Oench, Duhme* doctrine bars White from introducing extraneous evidence contradicting his express representation in the deed of trust that the loan was for purchase money. As a result, the RTC contends that the trial court should have held that the lien in question was a valid purchase-money lien, superior to any claim of homestead rights. Second, the RTC argues that White was estopped from making any homestead claim by virtue of the disclaimer of homestead contained in the deed of trust. We address each of these arguments in turn.

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parties consented to try the case before a United States magistrate judge.

DISCUSSION

1. Urban or Rural Homestead?

White argues that the magistrate judge erred in holding that the property in question was urban homestead as a matter of law. Historically, Texas courts have regarded the question of whether a homestead is rural or urban as a question of fact. *See Fajkus v. First Nat'l Bank*, 735 S.W.2d 882, 885 (Tex. App.--Austin 1987, writ denied). Findings of fact are ordinarily reviewed by this Court under the "clearly erroneous" standard. *In re Niland*, 825 F.2d 801, 806 (5th Cir. 1987). Where factual findings are based upon an improper legal standard, however, the findings lose the insulation of the clearly erroneous rule, *In re Missionary Baptist Found.*, 712 F.2d 206, 209 (5th Cir. 1983), and we review the legal interpretation *de novo*.

In this case, the trial court concluded that the enactment of section 41.002(c) of the Texas Property Code[7] displaced the

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[7] Section 41.002, "Definition of Homestead," provides:

> (a) If used for the purposes of an urban home or as a place to exercise a calling or business in the same urban area, the homestead of a family or a single, adult person, not otherwise entitled to a homestead, shall consist of not more than one acre of land which may be in one or more lots, together with any improvements thereon.
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> (b) If used for the purposes of a rural home, the homestead shall consist of:
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> > (1) for a family, not more than 200 acres, which may be in one or more parcels, with the improvements thereon; or
> >
> > (2) for a single, adult person, not otherwise entitled to a homestead, not more than 100 acres, which may be in one or more parcels, with the improvements thereon.

traditional analysis used to determine whether a homestead is urban or rural. As a result, the trial court held that there was only one dispositive question, and that question was whether municipal utilities were accessible and available to the property. Although White's property was not actually served by most city utilities, evidence was presented that White could have connected to all of the utilities if he had so desired. Because municipal utilities were "accessible" to White's property, the trial court concluded that the property was urban homestead as a matter of law.

Though no Texas state court has considered the issue, this Court has recognized that section 41.002(c) "might not displace the traditional common law definition of 'homestead' in all cases." *In re Bradley*, 960 F.2d 502, 511 n.18 (5th Cir. 1992). Instead, we have held that section 41.002(c) is just one factor that a court should consider to determine whether a homestead is rural or urban. *United States v. Blakeman*, No. 91-1027, 1992 U.S. App. LEXIS 16325, *20-21 (5th Cir. July 21, 1992). There is no single formula for determining whether a homestead is rural or

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> (c) A homestead is considered to be rural if, at the time the designation is made, the property is not served by municipal utilities and fire and police protection.
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> (d) The definition of a homestead as provided in this section applies to all homesteads in this state whenever created.

TEX. PROP. CODE § 41.002. Subsection (c) became effective August 28, 1989.

urban, *In re Moody*, 77 B.R. 580, 591 (Bankr. S.D. Tex. 1987), but factors that should be considered include:

> (1) the location of the land with respect to the limits of the municipality; (2) the situs of the lot in question; (3) the existence of municipal utilities and services; (4) the use of the lot and adjacent property; and (5) the presence of platted streets, blocks, and the like.

Bradley, 960 F.2d at 511 n.18 (citing *Vistron Corp. v. Winstead*, 521 S.W.2d 754, 755 (Tex. Civ. App.--Eastland 1975, no writ)). Because the trial court improperly limited its consideration to the question of whether municipal utilities were "accessible" to the property, this case must be remanded for a full consideration of all of the other factors used by Texas courts to determine whether a homestead is rural or urban.[8]

2. D'Oench, Duhme *v. the Texas Homestead Exemption*

The RTC argues that White was barred by *D'Oench, Duhme* from offering evidence that the Bank's lien on the property in question was invalid under Texas homestead law. Specifically, the RTC contends that the trial court erred in admitting testimony and documents from the Bank's records that proved the loan from the Bank was not used as purchase money for the property.

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[8] Even if the trial court applied an incorrect legal standard, the RTC urges that the record is developed enough for this Court to apply the proper analysis and determine whether White's homestead was rural or urban. We disagree. This Court remains a court of error, and the fact-finding should be left to the trial court.

"*D'Oench, Duhme*" is a term sometimes used to refer to three related but distinct doctrines that serve to protect bank insurers. *See* W. Robert Gray, *Limitations on the FDIC's* D'Oench *Doctrine of Federal Common-Law Estoppel: Congressional Preemption and Authoritative Statutory Construction*, 31 S. TEX. L. REV. 245 (1990) (noting failure of courts to maintain distinction between common-law *D'Oench, Duhme*, section 1823(e), and holder in due course status). *See generally* Mark Simpson, Note, *Scaling Back FIRREA: Federal Judges Begin to Place Limits on RTC's Conservatorship Powers*, 25 GA. L. REV. 1375, 1406-13 (1991) (describing growth of *D'Oench, Duhme* doctrine). In *D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942), the Supreme Court first enunciated a federal common law rule of estoppel that precludes a borrower from asserting against the FDIC (or RTC) defenses based on secret or unrecorded "agreements" that alter the terms of the obligation. The doctrine has since been partially codified at 12 U.S.C. § 1823(e) which provides:

> No agreement which tends to diminish or defeat the interest of the [RTC] in any asset acquired by it under this section . . . either as security for a loan or by purchase or as receiver of any insured depository institution, shall be valid against the [RTC] unless such agreement--
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> (1) is in writing,
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> (2) was executed by the depository institution and any person claiming an adverse interest thereunder, including the obligor, contemporaneously with the acquisition of the asset by the depository institution,
> (3) was approved by the board of directors of the depository institution or its loan committee, which approval shall be reflected in the minutes of said board or committee, and

> (4) has been, continuously, from the time of its execution, an official record of the depository institution.

Both section 1823(e) and the common-law *D'Oench* doctrine serve to bar the use of unrecorded agreements between the borrower and the bank as the basis for defenses or claims against the RTC. *Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990). There are differences between the two doctrines, however, courts often consider the two doctrines in tandem and look to the common law when construing the statute. *Beighley v. FDIC*, 868 F.2d 776, 784 (5th Cir. 1989). Although the exact relationship between section 1823(e) and the common-law doctrine remains unclear, *see RTC v. Murray*, 935 F.2d 89, 93 n.3 (5th Cir. 1991); *FSLIC v. Gordy*, 928 F.2d 1558, 1562 n.9 (11th Cir. 1991), it is well established--in this Circuit at least--that the two are more alike than different.[9]

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[9] It has been suggested that § 1823(e)

> *expands D'Oench, Duhme* in that it applies to any agreement, whether or not it was "secret," and regardless of the maker's participation in a scheme. At the same time, however, the statute is *narrower* than *D'Oench, Duhme* in that it applies only to agreements, and not to other defenses the borrower might raise.

RTC v. Wellington Dev. Group, 761 F.Supp. 731, 735 (D. Colo. 1991) (quoting Marsha Hymanson, Note, *Borrower Beware:* D'Oench, Duhme *and Section 1823 Overprotect the Insurer When Banks Fail*, 62 S. CAL. L. REV. 253, 271-72 (1988)); *see also Tuxedo Beach Club Corp. v. City Fed. Savs. Bank*, 749 F.Supp. 635, 642 (D.N.J. 1990); Hymanson, *supra*, at 300-02. This distinction, however, is not accepted in this Circuit. We have consistently held that both § 1823(e) and common-law *D'Oench* can apply to any oral agreement, whether secret or not, *see FDIC v. Hamilton*, 939 F.2d 1225, 1229-30 (5th Cir. 1991), and to completely innocent borrowers, *see Bowen v. FDIC*, 915 F.2d 1013, 1016 (5th Cir. 1990). Further, we have held that both doctrines are limited to

In addition to the more traditional *D'Oench* doctrine, some courts have granted the FDIC status as a holder in due course[10] and allowed the FDIC to take an instrument free from all personal defenses. *See Vernon v. RTC*, 907 F.2d 1101, 1106 (11th Cir. 1990); Hymanson, *supra* note 9, at 300-02. The RTC has been extended the same protection when it acquires a negotiable instrument as a subsequent holder from the FDIC. *RTC v. Oaks Apartments Joint Venture*, 966 F.2d 995, 1001 (5th Cir. 1992). Although the creation of federal holder in due course status has been criticized as unwarranted, *see* Hymanson, *supra* note 9, at 302-05, it is nonetheless the law in this Circuit.

These three related (and sometimes overlapping) doctrines--common-law *D'Oench, Duhme*, section 1823(e), and federal holder in due course status--are often collectively referred to as the *D'Oench, Duhme* doctrine. Due in large part to the national banking crisis that surfaced in the mid-1980s, the *D'Oench, Duhme*

"agreements" that are not part of the failed bank's records. *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975, 981 (5th Cir. 1992). On the other hand, we have also consistently noted that there is some difference between the common-law doctrine and the statute. For the purposes of this discussion it is thankfully unnecessary to fully explore those differences, whatever they may be.

[10] Many cases recognize *D'Oench, Duhme* and the federal holder in due course doctrine as separate, though related, doctrines. *See, e.g., FDIC v. Payne, 973 F.2d 403, 405-07 (5th Cir. 1992).* Other cases indicate that the scope of *D'Oench, Duhme* is sufficiently broad to include those rights normally afforded to a holder in due course. *See, e.g., In re CTS Truss, Inc.*, 868 F.2d 146, 150 (5th Cir. 1989). In practical terms it is immaterial whether the federal holder in due course doctrine is considered as a separate common-law doctrine or as a subset of the *D'Oench, Duhme* doctrine.

doctrine has been given a very expansive interpretation in recent years. Common-law *D'Oench* doctrine and section 1823(e) have expanded to bar the use of any unwritten agreement--whether or not the agreement was illegal or made with the intent to deceive banking authorities--as the basis of virtually any defense or claim against the FDIC. *Texas Refrigeration Supply, Inc. v. FDIC*, 953 F.2d 975, 980 (5th Cir. 1992). Additionally, the development of the federal holder in due course doctrine has allowed courts to protect the FDIC and the RTC from claims and defenses such as "state and common law fraud, violation of state or federal securities laws, and the affirmative defenses of waiver, estoppel, unjust enrichment, failure of consideration and usury." *Vernon*, 907 F.2d at 1106.

Despite the generous interpretation given to the *D'Oench, Duhme* doctrine, however, it is not absolute. The mere incantation of the words "*D'Oench, Duhme*" does not act as a magic talisman to ensure victory for the RTC in all cases. Although the RTC's avoidance powers are indeed awesome, *Thigpen v. Sparks*, No. 91-1977, slip op. 2501, 2507 (5th Cir. Feb. 16, 1993), some claims and defenses fall outside the preclusive effects of the *D'Oench, Duhme* doctrine. As discussed below, this is one such case.

The RTC's specific complaint is that White was allowed to introduce evidence that the Bank's lien was not actually a purchase-money lien. In this Circuit, however, the preclusive effects of both section 1823(e) and the common-law *D'Oench*

doctrine are limited to evidence of unrecorded agreements between the borrower and the bank that are used as the basis for defenses or claims against the RTC. Stated more directly, the *D'Oench* doctrine only bars claims or defenses that are based on agreements. "[N]either section 1823(e) nor the *D'Oench, Duhme* doctrine prevents plaintiffs from asserting affirmative claims or defenses that *do not depend on agreements*." *Garrett v. Commonwealth Mortgage Corp. of America*, 938 F.2d 591, 595 (5th Cir. 1991) (emphasis added). While this Court has been willing to give the term "agreement" an expansive definition, we are not prepared to completely abandon *D'Oench*'s connection to some sort of agreement. Such a step would "loose *D'Oench* from its moorings" and would be "contrary to virtually all of the caselaw and the policies surrounding *D'Oench*." *In re NBW Commercial Paper Litig.*, No. 91-0626, 1992 U.S. Dist. LEXIS 2842, at *55 (D.D.C. March 11, 1992).

In fact, in *Patterson v. FDIC*, 918 F.2d 540, 545 (5th Cir. 1990), this Court has already held that a claim of homestead under Texas law was not barred by *D'Oench, Duhme* because the claim was not based upon "an agreement, scheme, or bank representation." In the present case, as in *Patterson*, it is clear that White's claim of homestead rights is based, not upon any outside agreement, but upon well-established Texas law. *Id.* at 544. Since White did not attempt to introduce evidence

pertaining to any outside "agreement," neither section 1823(e) nor the common-law *D'Oench* doctrine applies.[11]

Likewise, the federal holder in due course doctrine does not bar the evidence presented by White. Holder in due course status only defeats "personal" defenses to liability--defenses which

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[11] It its briefs before this Court, the RTC places great reliance on the case of *Buchanan v. FSLIC*, 935 F.2d 83 (5th Cir. 1991)--a case that the RTC suggests is contrary to *Patterson*. In *Buchanan*, however, the Court did not address the specific question of whether the Buchanan's defense was based on an "agreement." It is also important to point out that *Buchanan* could not be inconsistent with *Patterson*, as the RTC suggests. "In this circuit one panel may not overrule the decision, right or wrong, of a prior panel, in the absence of en banc reconsideration or superseding decision of the Supreme Court." *Pruitt v. Levi Strauss & Co.*, 932 F.2d 458, 465 (5th Cir. 1991) (citations and quotes omitted). *Patterson* is thus binding authority for this panel, just as it was for the *Buchanan* panel.

In the alternative, the RTC attempts to distinguish these two cases by pointing out that the borrower in *Buchanan* had "lent herself" to a scheme, while the borrower in *Patterson* was almost completely innocent. Since White allegedly signed a deed of trust containing misrepresentations, the RTC argues that this case should be controlled by *Buchanan*. We are unpersuaded by the RTC's attempts to distinguish *Patterson*. After all, the borrower in *Patterson* signed an incomplete deed of trust. 918 F.2d at 541. As a result, she was at least as culpable as a borrower who signs an incomplete note--a fact pattern in which D'Oench, Duhme can clearly apply. *See, e.g., FDIC v. Plato*, 981 F.2d 852 (5th Cir. 1993). Despite the equitable origins of the *D'Oench, Duhme*, the doctrine has expanded to the point that the culpability on the part of the borrower is no longer the only consideration. *See FDIC v. Hamilton*, 939 F.2d 1225, 1229 (5th Cir. 1991) (concluding that D'Oench applied even though equity favored the borrowers). In fact, this Court has held that *D'Oench, Duhme* no longer requires any level of culpability at all--neither an intent to decieve nor even recklessness or negligence. *Texas Refrigeration Supply*, 953 F.2d at 980 n.7. Instead, whenever <u>any</u> borrower attempts to introduce evidence of an unrecorded agreement as the basis of a claim or defense against the FDIC or RTC, that evidence is precluded by *D'Oench, Duhme*. However, where the borrower is not introducing evidence of any unrecorded agreement--as in this case--there is simply nothing for the doctrine to preclude.

render an instrument voidable rather than void. But even a holder in due course takes subject to "real" defenses that render an instrument utterly void. *Patterson*, 918 F.2d at 544. Under the Texas Constitution, no lien on a homestead can ever be valid, except where the lien is for (1) the purchase money for the property, (2) taxes due on the property, or (3) work or materials used in constructing improvements on the property. TEX. CONST. art. XVI, § 50. While the distinction between "void" and "voidable" may be difficult to draw in practice,[12] it is abundantly clear that under Texas law any attempt to place a lien upon a homestead--with these three exceptions--is utterly void. *See In re Howard*, 65 B.R. 498, 503 (Bankr. W.D. Tex. 1986) ("[T]he agreement which the FDIC seeks to enforce is void to the extent it provides for a lien on the homestead to secure obligations which are neither for purchase money, taxes nor improvements."). White's defense is thus a "real" defense and it is not defeated by the federal holder in due course doctrine.

In summary, the trial court did not err in allowing White to present evidence on his homestead claim. White's evidence is not "*Duhme*'d"[13] simply because none of the three variations on the

[12] Essentially, a void instrument is one that has no force or effect and is incapable of being enforced by law. A voidable instrument, on the other hand, is apparently valid, but it may be either avoided because of a defense or cured. *See Sikes v. Global Marine, Inc.*, 881 F.2d 176, 178 (5th Cir. 1989).

[13] This phrase is borrowed from the inimitable prose of the late Judge John R. Brown, *see Oaks Apartments*, 966 F.2d at 1001.

D'Oench, Duhme doctrine has any application to the facts of this case.

3. Estoppel

Having rejected the argument that *D'Oench, Duhme* controls the outcome of this case, we can readily dispose of the RTC's final argument. The RTC also argues that White should be estopped from claiming a homestead right in the property by virtue of his disclaimer contained in the bank lien. Texas law, however, only recognizes three situations in which a homeowner will be estopped from claiming homestead rights:

> 1. When the owners, not actually occupying the property, or so using it that its status is dubious at the time the mortgage is executed, represent that it is not their homestead;
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> 2. When the owners create a lien by entering into a simulated transaction which has all the outward appearance of a valid, unconditional sale, but which is in fact a mortgage; or
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> 3. When the owners represent that existing notes are valid mechanic's lien notes for improvements, secured by a mechanic's lien properly executed.

In re Smith, 966 F.2d 973, 976-77 (5th Cir. 1992). None of these situations applies here. The only exception that could conceivably apply is the simulated sale exception. Yet the evidence is uncontroverted that there was no simulated sale in this case--White actually purchased the property from his mother. Instead, what took place here was a simulated loan--documents recited that the loan was purchase money for the property when in fact the loans were made to White's business years before he

purchased the property. Since none of the recognized exceptions applies in this case, the magistrate judge did not err in refusing to hold that White was estopped from claiming his homestead rights.

Conclusion

For the reasons discussed above we hold that, in reaching the conclusion that White's property was urban homestead as a matter of law, the trial court erred by improperly limiting its consideration to the question of whether municipal utilities were accessible and available to the property. As for the issues raised by the RTC, however, we hold that the trial court did not err in either allowing White to present evidence on his claim of homestead or holding that White was not estopped from denying the disclaimer of homestead contained in the deed of trust. Accordingly, we remand this case for a re-determination of the status of White's homestead in light of all factors used by Texas courts to determine whether a homestead is rural or urban.