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LAW LETTER

Deeds

Drafting Mistakes and Deed Reformation

Deeds are not infallible. They are drafted by humans (generally attorneys) who make mistakes. Quite often, the mistakes (such as an error in the legal description) are cured cordially by executing and filing a correction deed. What happens if a cordial resolution is not possible? Can the courts order reformation of the deed?

Initially, two rules of law, the Statute of Frauds and the Doctrine of Merger, determine the outcome. The Statute of Frauds requires written contracts for enforceable real estate sales (Section 26.01, Texas Business and Commerce Code). The Doctrine of Merger holds that all prior agreements (earnest money contract in this instance) entered by the parties merge into the deed. After delivery and acceptance, the deed is regarded as the final expression (or sole repository) of all prior agreements. The following scenario illustrates these rules and exceptions.

A buyer and seller enter an earnest money contract for sale of land. The agreement provides that no minerals will be conveyed. At closing, the seller delivers a deed to the buyer, prepared by the title company's attorney, devoid of a mineral reservation.

Months later, the buyer is approached by an oil company wanting to lease the minerals. Apparently, the seller had owned all the minerals. According to Texas law, all minerals owned by the seller but not reserved in the deed are conveyed. The title company's

lawyer erred by omitting the reservation.

The title company, upon discovery of the error, pressures the buyer to execute a correction deed. The buyer refuses. Can the title company (or seller) get a court-ordered reformation?

The Doctrine of Merger appears to protect the buyer, but it has exceptions. An allegation of fraud or mistake opens the entire transaction to proof. Otherwise, the doctrine prohibits either party from introducing evidence of contradictory terms in the earnest money contract.

Not all mistakes are grounds for reformation. Broadly speaking, reformation may be ordered for a mutual mistake but not for a unilateral mistake unless induced by the other's fraud or misrepresentation.

A *mutual mistake* means both parties labor under the same misconception about the terms of the instrument. For instance, a mutual mistake occurs when the draftsman employed by both parties chooses the wrong words to express the agreement (*Hale v. Corbin*, 83 S.W. 2d 726) or fails to express the real agreement of the parties (*Hill v. Brockman*, 351 S.W. 2d 934). The facts in the *Hill* case parallel the opening scenario.

The buyer and seller mutually hire an attorney to draft a deed with no mineral reservation. The transaction fails, but the deed's format is used subsequently for the sale of the same land between

different parties. This time, however, the minerals are to be reserved.

For some reason, the next attorney, who works for the bank funding the transaction, fails to reserve the minerals. When the error is discovered, the sellers sue. The court orders reformation based on a mutual mistake caused by the scrivener (person drafting the document). The deed did not represent the real agreement of the parties.

Note. Clearly the first attorney worked for both parties. In the second instance, the attorney worked for the bank. Apparently, the court felt the second attorney was also an agent of both parties. The decision emphasized the mutual mistake, not agency.

The case of *Williams v. Hooks*, 333 S.W. 2d 184, also is noteworthy. Hooks agreed to sell a royalty interest in one well to the wives of Taylor and Williams. Taylor, an attorney, drafted the deed but mistakenly failed to limit the conveyance to one well. Instead, the deed covered three tracts of land owned by Hooks.

When the error is discovered, Hooks sues. The court orders reformation, relying not on a mutual mistake but rather on the drafting error. The court states, "A scrivener's failure to embody the agreement of the parties affords grounds for reformation."

While the court reached the right conclusion, the underlying facts reveal a strong case of error by the buyers' agents. Williams, the other buyer's husband, negotiated the transaction and dictated drafting instructions to Taylor for the royalty deed. In the eyes of the law, the two husbands were agents of the buyers. This

appears to be a unilateral mistake caused by the buyers' (or their agents') fraud or misrepresentation.

The distinction is important when compared to other cases, especially *Bryan v. Dallas Nat. Bank*, 135 S.W. 2d 249. It is similar because the husband of the buyer drafted the deed.

Clyde Else conveyed property to Mrs. Bryan, whose husband drafted the deed. The recited consideration included a \$3,465 promissory note payable to the seller and subject to a \$781 note payable to Martinez. When Bryan did not pay the \$781 note, Martinez foreclosed. Bryan contended that the inclusion of the \$781 promissory note in the deed was a mutual mistake. She asked for reformation.

At trial, Bryan's husband testified that two deeds were drafted. One included the reference to the \$781 note, the other did not. At closing, Bryan's husband inadvertently picked up the wrong deed for the parties to execute.

The court held that this was not a mutual or common mistake but a nonreformable unilateral one. The grantee's agent committed the mistake in drafting the instrument. Unilateral

mistakes can not be reformed unless caused by the other party's fraud or misrepresentation.

Hard and fast rules to cover all fact situations are difficult if not impossible. The courts reach reformation decisions by emphasizing or ignoring critical facts, perhaps to achieve equity.

For instance, in the *Bryan* case, the husband's preparation of the buyer's deed was an important unilateral mistake but totally ignored as a factor in the *Hooks*' royalty deed decision. Perhaps the courts are swayed by the following rules.

Rule 1. If an individual or an agent makes a *detrimental* mistake, the courts emphasize rules of agency. An incorrectable, nonreformable unilateral mistake will be found (as in the *Bryan* case). The party who drafted or prepared a faulty instrument can not obtain reformation against the other party who accepted and relied on its correctness (*Clack v. Wood*, 37 S.W. 188).

Rule 2. If an individual or an agent makes a *beneficial* mistake, the rules of agency are ignored. Reformation is granted for various reasons. The scrivener failed to embody the agreement of the

parties (*Hooks*). The scrivener's failure to embody the true agreement of the parties in a written instrument affords grounds for reformation for mutual mistake (*Cornish v. Yarbrough*, 558 S.W. 2d 28).

Rule 3. If the mistake is not caused by either party but by an attorney or agent representing both, the courts will find a reformable, mutual mistake (the *Hill* case.) Typically, a drafting mistake committed by an attorney working for the lender is deemed a mutual mistake.

How would the issue in the opening scenario be resolved? It could go either way. The courts could find a mutual mistake and order reformation because the deed did not embody the terms of the earnest money contract. On the other hand, the courts could find a unilateral mistake and deny reformation based on agency if the seller paid the title company for preparing the deed. Because the seller suffered a detriment, the first rule would apply.

Other legal basis exists for denying or granting deed reformation. This article analyzes the cases by focusing on the error of the scrivener.

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