

TRAPS FOR THE UNWARY (OR THINGS YOU DON'T WANT TO LEARN THE HARD WAY)

PREPARED BY

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**TRAPS FOR THE UNWARY
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1. ATTEMPTS TO LIMIT STATUTE OF LIMITATIONS BY AGREEMENT. Section 16.070(a) of the Texas Civil Practice & Remedies Code provides that:

. . . a person may not enter into stipulation, contract or agreement that purports to limit the time in which to bring a suit on the stipulation, contract, or agreement to a period shorter than two (2) years. A stipulation, contract or agreement that establishes a limitation period that is shorter than two (2) years is void in this state.

The only exception to this rule is an agreement or contract regarding the sale or purchase of a business entity if a party to that contract pays or receives remuneration of not less than \$500,000.00.

There are very few Annotations to this statute except for some in the area of insurance contracts. As a result, one should be careful not to inadvertently violate this statute (and thus extend a limitations period to four (4) years or possibly more) by including provisions in a contract which purport to limit the time period to bringing suit on a matter to less than two (2) years.

For example:

- Are provisions in a lease which purport to limit the time period within which a tenant must bring on action against the landlord to six (6) months after the event giving rights to the tenant's claim, enforceable?
- Is a provision in a purchase and sale agreement which provides that any action for specific performance against the seller must be brought by the buyer within no more than one (1) year after the alleged breach by the seller, enforceable?
- Are provisions purporting to limit the survival of representations or warranties set forth in a purchase and sale agreement to one (1) year after closing, enforceable? – could one provide that the representations and warranties terminate after one (1) year if the buyer has not raised a claim and notified the seller of same within one (1) year so long as the buyer is given the right to bring a lawsuit for up to two (2) years if the buyer timely raises the claim within the one (1) year period?

Caveat – In delivering enforceability opinions, be careful to include either a general or specific qualification or exception in the opinion to address this statute.

2. STANDING TO SUE FOR PAST INJURIES TO LAND.

A number of Texas courts have recently held that:

A landowner does not have standing to pursue a cause of action when he or she acquired the property after the injury occurred, the deed contains no assignment of the cause of action, and there is no evidence of a new injury since the current landowner has owned the property. Cook has failed to present any evidence he has sustained a new injury since he acquired the property. *Cook vs. Exxon*, 145 S.W.3d 776 (Tex. App. – Texarkana 2004)

In *Cook*, a landowner brought suit against Exxon for damages caused to his land as a result of oilfield equipment having been left on the land in connection with drilling operations conducted by Exxon under a mineral lease with a predecessor in interest to the current landowner. Similar facts were alleged in *Exxon Corp. vs. Pluff*, 94 S.W.3d 22 (Tex. App. – Tyler 2002, pet. denied).

In *Senn vs. Texaco, Inc.*, 55 S.W.3d 22 (Tex. App. – Eastland 2001 – pet. denied), the court reached a similar result where the landowners alleged that prior drilling activities contaminated the aquifer underlying the land. The court indicated that the landowner could have protected itself by

- bargaining for an assignment of the prior owner’s possible causes of action for damages to the land occurring prior to the purchase;
- insisting on warranties from the seller regarding the condition of the land; or
- performing a more thorough inspection.

As a result, I recommend including an express conveyance of these rights in the deed. The following are several examples of language which has been inserted in deeds in recent transactions on which I have worked to describe incidental property rights conveyed by the deed:

- *All rights of Grantor to bring a cause of action or to seek damages or other relief against any third parties who may have injured or damaged the Land or any improvements thereon prior to the date hereof.*
- *All rights of Grantor to bring a cause of action or to seek damages or other relief (excluding Grantor’s rights of indemnity or contribution) against any third parties who may have injured or damaged the Land or any improvements thereon prior to the date hereof.*
- *Without recourse on Grantor, any rights of Grantor to bring a cause of action or to seek damages or other relief against third parties who may have physically injured or physically damaged the Premises prior to the effective date hereof (save and except any claims for contribution that Grantor may have against any such third parties); provided, however, that the Grantee agrees that if Grantee asserts any such rights to seek damages or claims against said third parties, Grantee shall indemnify, defend and*

hold Grantor harmless from and against any liability, claims, cross claims or actions resulting therefrom, including without limitation reasonable legal fees and costs the Grantor may incur as a result of such assertion by Grantee; further provided, however, that the foregoing indemnification, defense and hold harmless provisions shall not apply to the extent a determination is made that the Grantor actually caused or contributed to the circumstances giving rise to any such liability, claims, cross claims or actions.

3. “EXPANDING” RESTRICTIONS. There is a line of Texas cases which stands for the proposition that if a tract of property is subject to valid and enforceable use restrictions, then the restricted tract may not be used (even in a manner which is not specifically restricted) to enable adjacent unrestricted property to be used in a manner which would violate such use restrictions.

For example, in *H. E. Butt Grocery Company vs. Justice*, 484 S.W.2d 628 (Tex. App. – Waco 1972, writ ref’d n.r.e.), a tract was restricted from conducting a food store thereon. An owner of adjacent unrestricted property proposed to build a grocery store on such unrestricted property and then use the restricted tract as a parking lot to serve the adjacent grocery store. The court ruled that because the operation of a parking lot was “a necessary part” of the food store, the restricted tract could not be used for purposes of a parking lot to serve the adjacent food store.

See also Smith vs. Mobil Oil Corporation, 495 S.W.2d 628 (Tex. App. – Eastland 1973, no writ) wherein the court held that a tract which was restricted against use as a service station was prohibited from being used to provide a driveway and water line to an adjacent unrestricted tract which was to be used as a service station.

4. UNIFORM VENDOR AND PURCHASER RISK ACT. In the event of a casualty or condemnation taking of real property which is the subject of a pending purchase and sale agreement, Section 5.007 of the Texas Property Code imposes a statutory risk of loss allocation scheme upon sellers and purchasers of real property in Texas, as follows:

- (a) Any contract made in this state for the purchase and sale of real property shall be interpreted as including an agreement that the parties have the rights and duties prescribed by this section, unless the contract expressly provides otherwise.

- (b) If, when neither the legal title nor the possession of the subject matter of the contract has been transferred, all or a material part of the property is destroyed without fault of the purchaser or is taken by eminent domain, the vendor may not enforce the contract, and the purchaser is entitled to recover any portion of the contract price paid.

(c) If, when either the legal title or the possession of the subject matter of the contract has been transferred, all or any part of the property is destroyed without fault of the vendor or is taken by eminent domain, the purchaser is not relieved from duty to pay the contract price, nor is the purchaser entitled to recover any portion of the price already paid.

(d) This section shall be interpreted and construed to accomplish its general purpose to make uniform the law of those states that enact the Uniform Vendor and Purchaser Risk Act.

(e) This section may be cited as the Uniform Vendor and Purchaser Risk Act.

Since the parties to a real property purchase and sale contract often negotiate different and also more detailed risk allocation provisions than those set forth in Section 5.007, it may be prudent to add language to the purchase and sale agreement similar to the following:

The provisions of this Section [the risk allocation provisions of the contract] shall control, and be effective notwithstanding, the provisions of the Uniform Vendor and Purchaser Risk Act set forth in Section 5.007 of the Texas Property Code. The parties hereto elect not to include any of the provisions of such Uniform Vendor and Purchaser Risk Act in this contract.

5. USURY LAW CHANGES. In 2005, the Texas Legislature enacted amendments to the Texas Finance Code which would have exempted certain commercial loans from Texas usury laws. Section 306.001(5-a) of the Texas Finance Code was enacted to allow a usury exemption for commercial loans of:

- a. \$7 million or more if the commercial loan was secured primarily by real property; or
- b. \$500,000 or more if the commercial loan was not secured primarily with real property.

As I am sure most of you know, this amendment was contingent upon passage of a constitutional amendment authorizing the legislature to grant exemptions for commercial loans, and the constitutional amendment failed to pass. However, the Finance Code was amended in several other material respects, including the following:

- a. the rule of *Alamo Lumber vs. Gold*, 661 S.W.2d 926 (Tex. 1984) was overruled by the Legislature which added a provision to the Finance Code providing that, in respect of a commercial loan, a borrower may be required “to assume, pay or provide a guaranty of another person’s existing or future obligation as condition of the obligor’s own use, forbearance or detention of money,” and that will not constitute interest. Texas Finance Code §306.007;

- b. a statutory clarification that with respect to commercial loan prepayment premiums or make-whole premiums, whether payable in the event of a voluntary or involuntary prepayment, do not constitute interest. Texas Finance Code §306.005;
- c. statutory authorization for commercial lenders to charge a delinquency charge on the amount of an installment which is delinquent for not less than ten (10) days in an amount not to exceed five percent of the installment. Texas Finance Code §306.006;
- d. in respect of commercial loans, elimination of the forfeiture of principal penalty if interest is charged in excess of double the amount of interest allowed by law. Texas Finance Code §305.002.

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