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LETTER of the LAW

by JUDON FAMBROUGH

Securing Valid Signatures

On October 1, 2000, a new federal law went into effect giving electronic signatures the same legal significance as those executed with pen or pencil. Many people mistakenly imagine that digital signatures will be electronic versions of their handwritten signatures. In reality, digital signatures are data that verify the identity of the sender and ensure the document has not been opened or altered by an unauthorized recipient.

For the time being, digital signature technology resides on an individual's computer or on a "smart card," a credit-card size ID that can be scanned into a computer. What form digital signatures will take in the future is still being determined. Eventually, digital signatures may be the computer-scanned image of a person's retina, fingerprints or face, matched with a numeric code maintained by an e-commerce security company.

In the meantime, real estate professionals continue to do business the old-fashioned way, securing handwritten signatures on paper contracts. However, sooner or later, real estate practitioners encounter situations in which acquisition of a signature is a problem. Knowing what to do in such circumstances may speed up or even save a transaction.

The following rules for acquiring signatures in special circumstances were presented by Austin attorney James Noble Johnson at the 22nd Annual Advanced Real Estate Seminar.

Blind or Illiterate but Able to Sign

Persons who are either blind or illiterate have one thing in common: they cannot read. Consequently, the same technique is used in either case to familiarize them with the contents of a document before having them sign. Someone with no conflict of interest should read the document clearly, accurately and completely to the individual. The blind or illiterate person then signs.

Afterward, the reader should execute an affidavit before a notary. It should contain the following language:

"I have no known current or potential conflict of interest with (name of party) regarding the execution of this document. Prior to its execution, I correctly, clearly and completely read the entire contents of the instrument to (name of party), who indicated to me that he or she understood the contents thereof."

The affidavit should be attached to the contract for future verification.

Cannot Sign but Able to Make Mark

Many real estate professionals mistakenly believe that special rules apply to persons who cannot sign their names but can make a mark. In truth, all signatures are individualized marks. Many highly stylized signatures, notably those of doctors, contain no distinguishable alphabetical letters.

Some attorneys prefer to indicate the use of a mark in the following manner:

"HIS OR HER _____MARK"
(Name of party)

No witnesses are required, but having them serves as verification. The addition of an inked thumbprint reduces the risk of forgery.

If a blind or illiterate person affixes his or her mark to a document, a qualified reader should first read the document to the individual clearly, accurately and completely. The reader should also execute and attach an affidavit as indicated earlier.

Cannot Read or Write English but Literate and Able to Sign

Texas law requires all recorded instruments relating to real property to be written in English (Texas Property Code, Section 11.002). Consequently, valid sales contracts can be written in another language but not the resulting recorded deeds.

Assume a contract is written in English. If one or more of the parties to the transaction cannot read and write English, the real estate professional must secure the services of an interpreter. The interpreter should clearly, accurately and completely translate the contract in the party's native language before the party is asked to sign.

Afterward, the interpreter should execute an affidavit containing the following language:

"I have no conflict of interest with (name of person). I am well versed in and competent to read and speak both (language understood by the party) and English. At the request of (name of person), I made a true, complete and accurate translation of all the contents of (type of document) in a language that he or she understands using my best skill and judgment. (Name of person) indicated to me that (he or she) understood the contents

UPDATE Watch and Wait UPDATE

A case being closely watched by home builders and mortgage lenders is *Spradlin v. Jim Walters Homes, Inc.* The Texas Supreme Court heard it in December 2000. The issue focuses on a portion of the 1997 constitutional amendment regarding home improvement loans.

Lenders contend the portion of the amendment permitting loans for repairs and renovations applies only to existing homes, not to new ones. Spradlin, who received a loan to build on his one-acre homesite, feels the opposite. The grammatical construction of the amendment is unclear. At stake is the validity of loans made since 1997 that do not comply with the constitutional requirements. The liens may be unenforceable.

of the instrument as translated before signing."

Again, the interpreter should execute the affidavit before a notary and attach it to the contract. If the translation is written, both the English and translated versions should be attached.

Physically Challenged and Unable to Sign

In 1997, a statutory method for executing documents on behalf of persons physically unable to sign was added to the Texas Government Code (Section 406.0165). A notary and a disinterested third party are needed. Under the direct instruction of the handicapped person, the notary signs the party's name in the presence of the disinterested witness. The notary then indicates that he or she knows the witness personally or must verify the person's identity through a driver's license or other form of photo identification.

If a notary is not available, Texas case law recognizes another method. Only one disinterested third party is needed, but two may be used, one to sign and one to serve as a witness. The physically challenged person verbally authorizes the third party to sign the document. The third party signs the physically challenged person's name, not his or her own.

Some attorneys recommend that the disinterested third party then execute an affidavit containing the following language:

"At the request of (name of person), I signed (his or her) name to (type of document) as his or her instrumentality and not as an agent. This request and subsequent execution was witnessed by (name of witness)."

The reference to a witness is made when two disinterested parties are used.

Absent Notary and Signature Must be Notarized

When a signature must be notarized immediately, and no notary is available, real estate professionals may resort to Texas Civil Practice and Remedies Code, which describes a little-known solution to the problem (Section 121.009). Two competent disinterested witnesses, preferably ones residing in the area are needed.

The party in need of a notary signs the document in the witnesses' presence and then asks the two witnesses to sign below the party's name. If the party has already signed the document, the party acknowledges this fact in the witnesses' presence and asks them to sign below the party's name. Nothing else is required of the signing party. However, one of the witnesses must later appear before a notary and swear that one of the two described procedures was followed. The notary certifies the testimony and signs and officially seals the document.

The notary must personally know the individual who signs the document as a witness or must verify the person's identity through a driver's license or other form of photo identification. The Texas Civil Practices and Remedies Code prescribes the required language for the notary to use in this situation (Section 121.010).

Case Notes and Comments

Earning a Commission

The Houston Court of Appeals decided a rather interesting case, *H.E.Y. Trust v. Popcorn Express Co., Inc. No. 14-99-00279-CV*, on August 17, 2000. The decision involved two important points for Texas real estate licensees.

In this case, H.E.Y. (Trust) and Popcorn Express Co. (Popcorn) entered into a brokerage agreement. The Trust agreed to negotiate a contract on Popcorn's behalf with the City of Houston, giving Popcorn a food and beverage concession at Houston's Intercontinental Airport. In return, the Trust would receive 5 percent of the annual gross receipts.

The Trust successfully negotiated the contract. Popcorn honored the agreement for two years then refused to pay because the Trust did not hold a valid real estate license. The trial court ruled in favor of Popcorn, and the Trust appealed. The appellate court reversed the decision and remanded the case.

To understand the decision, practitioners need to understand the difference between a lease and a license. The two are easily confused. For instance, is the Texas hunting lease a misnomer?

The answer is *yes*. The Texas hunting lease is actually a license. A lease grants exclusive possession or control of the land to another for a specific period. A license, on the other hand, grants permission to do certain tasks on the property that would not otherwise be allowed. Because a Texas hunting lease does not grant the hunter exclusive possession or control of the property, it is characterized legally as a license.

The first issue in the *Popcorn* case was whether the concession agreement negotiated with the City of Houston was a lease or a license. A license does not convey an interest in land and is not covered by the Texas Real Estate Licensing Act. A real estate license is not required to receive a commission for such a transaction. The Houston appellate court held it was a license. The contract did not grant Popcorn exclusive control of the premises, only the use of the premises for the sale of popcorn and beverages. The contract was similar to the contractual rights granted owners of coin-operated vending machines. (See *B&B Vending Co. v. Ducharme, 349 S.W.2d 630 [1961.])* Consequently, Popcorn had no legal basis for withholding the agreed commission.

The appellate court next addressed whether the Trust needed to have a real estate license to receive a commission. According to the Texas Real Estate Licensing Act, only a "person" may acquire a real estate license from the Texas Real Estate Commission. A person is broadly defined by a 1997 amendment as an "individual or any other entity, including but not limited to a governmental body, limited liability company, limited liability partnership, partnership or corporation, foreign or domestic." However, the definition of a "person" at the time the contract was entered included only "an individual or a corporation, foreign or domestic."

Thus, for purposes of this suit, the trust was not licensed but neither was it required to be, nor did the statute provide any means by which it could obtain a license. However, Vernon Young, the person through whom the trust operated, did have a real estate license. It is not clear if the present definition of a "person" includes trusts.

Oil and Gas Law Cases

The recent upswing in oil and gas prices caused a resurgence of oil and gas exploration and production. The resurgence, in turn, has spurred some interesting cases.

The first case, *Browning Oil Co., Inc. v. Luecke, No. 03-98-00638-CV, 9/21/2000*, involved a lease provision requiring the oil company to use 80 acres in a production unit if it drilled on Luecke's land. Production units permitted by the Railroad Commission for horizontal wells in the area were much larger. The oil company drilled a horizontal well on Luecke's property but created the larger production unit permitted by the commission, not the smaller size required by the lease.

The Lueckes sued the oil company for violating the lease provisions. The trial court dissolved the production unit created by the company and awarded the plaintiff damages. The oil company appealed.

The appellate court reversed the decision and remanded the case. The reasoning was based on public policy.

The court recognized, "The immense benefits that have accompanied the advent of horizontal drilling, including the reduction of waste and the more efficient recovery of hydrocarbons. The lessee's failure to comply with applicable pooling provisions could result in the curtailment of horizontal drilling. The court declines to apply legal principles appropriate to vertical wells that are so blatantly inappropriate to horizontal wells and would discourage the use of this promising technology. The better remedy is to allow the offended lessors to recover royalties as specified in the lease, compelling a determination of what production can be attributed to their tracts with reasonable probability as pronounced in *Ortiz Oil Co. v. Luttes, 141 S.W.2d 1050.* The Leuckes are entitled to the royalties for which they contracted, no more and no less, the court determines."

In summary, the Lueckes can get damages but may not dissolve the production unit as ordered by the trial court. Had the well been a vertical one with no overriding public policy behind it, the judgment of the trial court probably would have stood.

The second case, *Coastal Oil and Gas Corp. v. Roberts, No. 13-98-652-CV, 8/31/2000,* involved the use of division orders.

Once production is established, an oil company hires an attorney to render what is known as a division order title opinion. The opinion, based on the deed records, calculates each owner's share of the well's production to the seventh decimal.

The purchaser of production then takes the decimal figure, inserts it in a division order and sends it to each person to sign. By signing the division order (sometimes referred to as a sales contract), the person consents to the purchase of his or her described share of the production.

Sometimes, the terms of sale included in the division orders contradict the lease provisions. If the individuals (primarily royalty owners) sign the division orders, case law holds that the division orders supplant or amend the lease terms. But, do royalty owners have to sign the division order as a condition to receive royalties?

The answer depends on the type of division order submitted. No standard division order forms existed until 1983, when the Texas Legislature promulgated one in Section 91.402(d) of the Texas Natural Resources Code. The form contained ten separate parts.

The statute creating the form provides that:

- a royalty owner does not have to sign a division order as a condition for royalty payments if it in any way deviates from the prescribed statutory form, and
- if the division order complies with the statutory form, the royalty owner does not alter or amend the lease by signing it.

In the Roberts case, the lease provided that it would terminate if Coastal unreasonably or wrongfully withheld royalty payments after Roberts sent notice and demand. The notice and demand were given. Coastal did not pay. Roberts sued to terminate the lease. The trial rendered a summary judgment in Roberts' favor. Coastal appealed, arguing that royalty payments were being properly withheld because Roberts would not sign the division order.

The appellate court upheld the summary judgment terminating the lease. The division order did not comply with Section 91.402(d). Consequently, Coastal could not refuse to pay on this basis. Withholding royalties was unreasonable and wrongful.

The court ruled the promulgated division order form applies only to oil production, not gas. While the statutory language describing the division order in Section 91.402 speaks of the "proceeds from the sale of oil and gas production," the wording of the prescribed division order refers only to "oil to be sold" and "for oil runs." The prescribed form never mentions "gas" or the "sale of gas," an interesting oversight by Texas legislators. (For more information on division orders, see *Minerals, Surface Rights and Royalty Payments,* Real Estate Center report 840.)

Disclosures and Intervening Causes

Sellers are required to disclose facts about property that will influence the buyers' decision to purchase. (See "Disclosures: Court Defines Broker's Duty," Real Estate Center publication 681.) This is an important element of every land transaction. The sellers' attempt to sell property "as is" does not relieve them of this obligation. (See "Selling Property 'As Is'," Real Estate Center publication 1303.) However, sellers may lessen their liability by having the buyers agree to rely solely on their inspection of the property as the basis for their purchase.

Although the sellers did not negotiate such a reliance provision with the buyers in *Bartlett v. Schmidt, No. 13-98-295-CV, 8/31/2000,* the Corpus Christi Court of Appeals found that the title insurance policy intervened and relieved the sellers of their duty to disclose a deed restriction.

Bartlett sold restricted residential property to Schmidt, who wanted to use it for commercial reasons. Although the seller knew the buyer's intended use was prohibited, he did not disclose this fact. However, the buyer purchased a title policy that erroneously showed no restrictions on the property. When Schmidt learned of the restriction, he successfully sued the seller under the Deceptive Trade Practices Act (DTPA) for nondisclosure. The seller appealed.

The appellate court reversed and remanded the case. The facts revealed that Schmidt did not rely on the buyer's representations or lack thereof. Schmidt asked several other parties to review the documents to make sure no restrictions existed. Here, the court felt that these facts were similar to *First Title Co. of Waco v. Garrett, 860, S.W. 2nd 74* in which the buyers relied on the title commitment in making the decision to purchase.

When buyers rely primarily on third parties to help them decide about buying land, the seller's representations or nondisclosures may not be considered the producing cause of a DTPA claim. Here, Bartlett's silence did not cause Schmidt to enter into the transaction.

The Texas Supreme Court addressed the issue of whether sellers are required to disclose facts contained in the public records in *Ojeda de Toca v. Wise and Wise Developments, Inc., 748 S.W. 2d 449 (Tex. 1988).* The seller failed to

UPDATE Premise Liability UPDATE

Several cases decided by the Texas appellate courts have added to the body of knowledge regarding premise liability and constructive knowledge of a premise defect. The last *Letter of the Law* pointed out that the landowner must have actual or constructive knowledge of a premise defect to be held liable. Constructive knowledge can be established in one of the three ways:

- the owner or employee caused the harmful condition,
- the owner or employee saw or was told of the harmful condition prior to the injury or
- the harmful condition was present for so long that it should have been discovered by the exercise of reasonable care.

The recent case of *Wal-Mart Stores, Inc. v. Reese, No. 10-98-1767-CV, 10/18/2000,* added a fourth way.

- The dangerous condition was in sufficient proximity to an employee of the defendant that it should have been discovered and removed in the exercise of ordinary care.

In this case, no evidence was presented regarding the length of time the spill was on the floor. However, the evidence revealed the spill was in the proximity of an employee who evidently walked past it.

disclose that the house was posted for demolition at the time of sale. The buyer sued both the seller and the title company. The title company settled out of court, but Wise felt that the information provided in the public records relieved him of the obligation to disclose. The high court held that constructive notice imparted under the recording statutes is not a defense to the DTPA.

Liability of Title Company's Failure to Record Deed

Closings generally occur in the office of the title company issuing the title policy. After closing, the title company immediately records the deeds and other instruments affecting title. A recording fee is part of the closing costs. But what if the title company fails to record the deed? Is there any liability under the title policy? This occurred in *Chicago Title Insurance v. Alford,* Eastland Court of Appeals, *3 S.W. 3rd 164, Eastland Court of Appeals (1999)*.

The plaintiffs purchased a home on October 20, 1978, in Eastland from the Homestead Construction Company. The plaintiffs borrowed money from Cram Mortgage. The recorded deed of trust referenced a deed from the seller to the buyers, but that deed itself was never recorded.

In 1988, the plaintiffs attempted to sell the house. It was then learned that the deed from Homestead Construction Company had not been recorded. A replacement deed from Homestead was secured and recorded June 14, 1988.

However, between 1978 and 1988, abstracts of judgments, federal tax liens and mechanic's liens were filed of record against the seller. The plaintiffs could not convey clear title.

The plaintiffs sued the title and abstract company for negligence, breach of the title policy and a breach of the Deceptive Trade Practices Act. The trial court awarded damages to the plaintiffs. The appellate court reversed the trial court's judgment.

A title insurance policy is a contract to indemnify the purchaser for losses in the event of title failure. It is not a representation of the status of title. Here, there were no title defects on October 20, 1978. The defects occurred afterwards.

The case emphasizes the importance of buyers making sure the deed is recorded. Title companies evidently face no liability for failing to do so. Under current Texas law, the grantee's (buyer's) mailing address must be included in the deed as a condition for recording. If the buyers do not receive a mailed copy of the deed from the county clerk's office within a few weeks of closing, an investigation may be warranted.

UPDATE Private Real Property Rights Preservation Act of 1995 UPDATE

In 1995, Texas legislators passed the Private Real Property Rights Preservation Act. The statute requires the state government to reimburse landowners when their property values are reduced by 25 percent or more because of a statutory regulation. (See "Real Property Preservation," Real Estate Center publication 1165.) The act requires the government to publish and file a Takings Impact Assessment Report which discloses how a regulation will impact property values.

In Calhoun County, landowners contended the Calhoun County Navigation District violated this requirement in a condemnation action by not publishing and filing the report. The trial court sided with the navigation district by holding that no report was required. The landowners appealed.

The Corpus Christi Court of Appeals affirmed the trial court. The report does not apply in condemnation cases. *Henderson v. Calhoun Co. Navigation District, No. 13-99-343-CV, 9/28/00*.

Landowners have wondered if they could use the Private Real Property Rights Preservation Act found in Section 2007 of the Texas Government Code to combat the location of landfills. If landfills are acquired by condemnation, this case indicates the act cannot be used to recover reduced property values in the surrounding area.

Unpublished Opinions

In the past, *Letter of the Law* summarized numerous unpublished opinions. The text always cites Texas Rule of Appellate Procedure Section 47.7. This rule prohibits attorneys from citing them as authority. Chris Griesel, the Texas Supreme Court's rules attorney, reports that 21,596 — almost 84 percent of the 25,655 opinions issued by the appeals courts in the last two fiscal years — fell into this unpublished category. On October 20, 2000, the rules advisory committee recommended the elimination of unpublished opinions.

To many in the legal community, Rule 47 makes no sense. "It's become a big issue having cases available that you can't cite," stated Supreme Court Chief Justice Tom Phillips.

The purpose of Rule 47 was to prevent giving an unfair advantage to people who had more resources to find unpublished opinions. However, the rule also allows appellate judges to "write sloppy" without worrying about being cited. The high court is expected to look at changing the rule in 2001.

The following case is an unpublished title opinion that is important to landlords. It cannot be cited for precedents.

Storing Tenants' Unremoved Property

A problem many landlords face is what to do with tenants' unremoved property when the lease ends. The Texas Property Code outlines two procedures depending on the circumstances. If the tenant abandons the lease owing rent, the landlord may seize and sell the tenant's property under a landlord's lien as described in Sections 54.042 et seq.

The second method applies when the tenant refuses to vacate the premises. The landlord may evict the tenant under Sections 24.0062 et seq. and have the property removed and stored under a writ of possession.

The officer (sheriff or constable) executing the writ of possession may engage the services of a bonded or insured warehouseman to remove and store the tenant's property at no cost to the officer or landlord.

In exchange for this service, the warehouseman obtains a lien on the property. The officer cannot require the landlord to store the property. (See *Landlords' and Tenants' Guide,* Real Estate Center publication 866.)

The statute requires the officer to give the tenant notice either at the time the property is removed or mailed within 72 hours thereafter. The tenant must be told where the property is stored and how it may be redeemed. If the property is not redeemed within 30 days, the warehouseman may sell it to satisfy the lien.

In an unpublished opinion rendered by the Beaumont Court of Appeals on August 3, 2000, the court examined whether the officer was liable to the tenant for failing to provide the notice. The tenants sued the officer for not ensuring the notice was received. The trial court ruled in favor of the officer. This was affirmed on appeal.

Neither the officer nor the warehouseman incurred liability for failing to give the notice. *Ferguson v. Bennett, No. 09-99-036 CV.* Apparently, the statute creates a duty that has no resulting liability if breached.

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