THE YEAR OF LIVING WITH REAL ESTATE: SOME GENERAL OBSERVATIONS FROM A YEAR OF REAL ESTATE CASES DECIDED BY A TEXAS COURT OF APPEALS

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About thirty years ago, when the Earth was still warm and I was a young lawyer, I handled a matter that involved the duties of a trustee under a deed of trust. Owing to multiple property flips, deeds of trust to secure assumptions, where my client stood in the order of various purchasers, and really smart lawyers, I was in the position of arguing that a trustee had a duty to not generate too high a price at the trustee's sale. I know—sounds odd. But in working on the case, I had the opportunity to look at various boiler plate clauses in deeds of trust—you know, the ones providing for waiver of notice of default, waiver of notice of intent to accelerate, and the like—and to track down the cases which not only first enforced such clauses, but the earlier cases which held that, without such waiver clauses, the pertinent notices had to be given. And that is when I realized how adaptive real estate lawyers have been and how the clauses in documents we now take for granted come into existence—some courts somewhere said they were necessary.

So when the Real Estate Section of the Tarrant County Bar asked me to give them an update on opinions in real estate cases handed down by the Fort Worth Court of Appeals this last year, I decided to use those cases to make suggestions about drafting documents, and advising clients, in transactions involving real estate. Nobody fell asleep or walked out during the speech, and I did not throw up or cuss out loud in giving it, so I guess the speech was what you call a win-win. Enough so that I asked Gerry Beyer if he would like a paper that followed that same theme. I caught him in a weak moment, and what you read now is the result.

For lots of reasons—including the fact that the holdings of the Fort Worth Court may not bind you in your practice—this article does not even start to deal with all the legal issues in cases decided by the Fort Worth Court in fiscal year ending 2014. There were at least forty-five such cases that more or less related to real estate (not counting oil and gas cases), and collectively they dealt with hundreds of issues. But what follows are some suggestions you might want to consider, based on those cases (and a few others), in drafting documents to put your clients' deals together—and in advising your clients if that deal goes awry.

1. First, the big picture, based on the court's docket: make your documents clean, simple, direct, and self-explanatory.

You document the story of your client's transaction. The late Melvin Cohn was a Houston real estate lawyer; he was my law school roommate's father and, to my good fortune, one of my first mentors. Melvin once told Miles and me that he always volunteered to draft the documents for all of his clients' deals, because that put him in the driver's seat. That is where you should be.

And once in the driver's seat, you should make your documents clean, simple, direct, and self-explanatory. For starters, by providing clean guidance to the parties, you will keep your clients out of the

courthouse. Those trips to the halls of justice are expensive and time-consuming[1]—and doing the lawsuit tango long enough can suck the profit margin out of many deals.

But beyond guiding the parties to the transaction, and hopefully keeping them out of the courthouse, there is another reason you want clean, simple, self-explanatory documents: should the deal go awry, such documents make it more likely the courts of appeals will see the transaction the way you envisioned it. Here are at least two reasons that is true:

1) your decision makers in the courts of appeals—the justices, with the help of their staff attorneys and briefing clerks (if they still have them)—are, in my experience, uniformly bright, diligent, and conscientious. But most of them are not, in my experience, real estate specialists. In fact, few of them are. That does not mean they will not try to get your case right—they are about to issue an opinion with their names on it for the entire world to see for the rest of human existence. But they cannot read your mind, and they may not know the assumptions you made in drafting the documents or the parties made in structuring the deal. To the extent your documents depend on unwritten assumptions, you run the risk that the courts do not know about those assumptions and hence, will interpret your documents in a way different than what you had in mind. So. Spell. It. Out.

2) Your decision makers in the courts of appeals have to deal with a never ending "avalanche of cases"[2] and have a limited number of hours to deal with that avalanche. For example, the Fort Worth Court disposed of roughly 1,100 cases in FYE 2014, more or less evenly split between its civil and criminal docket, in addition to about a hundred mandamus proceedings. These cases involve hundreds if not thousands of wide-ranging issues. While the justices decidedly want to get every one of these cases exactly right, there are only so many hours in the day, and the justices have to keep the docket moving. If you draft your documents so that those documents clearly show how your transaction is supposed to work, it will make it more likely that the courts will see the transaction your way, should the transaction end up in a court. The harder you make it for a court of appeals to tease out what the documents intended, you increase the likelihood that the avalanche of cases will force the court to interpret your documents in a manner with fewer niceties than you intended and then move on. And with the supreme court a court of discretionary jurisdiction, and with it deciding only around 10% of the cases presented to it on the merits, the decision you get out of the court of appeals will likely be the decision you will live with.

So, for reasons which keep your clients out of court in the first place, and which make it easier for the court of appeals to make a decision which you intended should things go awry, draft clean, simple, direct, and self-explanatory documents.

2. Any court of appeals will protect its jurisdiction—trying to bulldoze your way to a win based on what the trial court did may just be counterproductive and unnecessarily expensive.

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[1] *See* City of Justin, Texas, v. Rimrock Enterprises, Inc., Case No. 02-13-00461-CV, yet to be decided by the Fort Worth Court (involving $169,622 in attorney's fees and expenses on UDJA claims in over four years of litigation and seven days of trial). And it is not unusual for a lawsuit to take three or four years from the time of filing in the trial court until a decision by a court of appeals.

[2] Comments of Scott Brister, former Justice of the Supreme Court of Texas, at State Bar of Texas CLE Practice Before the Supreme Court 2009, *Suggestions About Oral Argument*.

Sometimes (perhaps most times), your value as the real estate lawyer goes beyond drafting the documents. Sometimes you need to be the one who reminds everyone to keep their eyes on the ball and point out that some strategies and tactics will result in costs that adversely affect the success of the deal while not really advancing the ball. While everyone always looks for leverage in terms of trying to get nonproductive real estate back in a productive mode, some strategies and tactics really probably will not work out that well. For example, your client may want to demolish the apartment buildings made the subject of the lawsuit, especially since the trial court gave your client possession of the same. But a court of appeals can issue an injunction to preserve its own jurisdiction over the subject matter of an appeal—and your client's threat to demolish the apartments, and thereby mooting the issue, might be just what the court of appeals needs to enjoin that demolition. *In re 1707 N.Y., Ave., LLC*, No. 02-14-00258-CV, 2014 Tex. App. LEXIS 11001, *3-4 (Tex. App.—Fort Worth Oct. 2, 2014, no pet.) (mem. op.). So not only has your client needlessly spent money defending against that injunction action, it has gotten off on the wrong foot with the court of appeals that will decide whether the trial court got it right on the underlying lawsuit. Do not be afraid to ask everyone to consider where a given strategy or tactic will leave your side in terms of costs and results.

3. Check with the trial lawyers before you draft a venue/jurisdiction selection clause—and figure out a way to coordinate with the lawyers of other parties in the deal on choice of venue/forum selection clauses.

Lots of folks put forum election or venue selection clauses in their documents—i.e., clauses which say that "any proceeding arising out of or relating to this Agreement shall be brought in X County" or "in Y state." What if you have a transaction involving real estate, other assets (or stock or partnership shares) and several somebodies in the transaction, and multiple lenders, all of which have documents with clauses that designate disparate mandatory venues or jurisdictions? And what if the transaction involves $1 million, and therefore triggers the major transaction venue/jurisdiction provisions of Tex. Civ. Prac. & Rem. Code § 15.020, which "overrides other venue provisions and required the trial court to enforce the venue agreements"? *See In re Fisher*, 433 S.W.3d 523 (Tex. 2014). Though it did not involve real estate, *Fisher* will help you visualize the problems involved in a multiparty, multidocument, multivenue/jurisdiction clause situation. To see how this might come up in a transaction involving real estate, *see In re Togs Energy, Inc.*, No. 05-09-01018-CV, 2009 Tex. App. LEXIS 7949 (Tex. App.—Dallas Oct. 13, 2009) (mem. op.). These fights over forums and venues can cost tens, if not hundreds, of thousands of dollars, and involve years of litigation before you even get to the merits of the case. *Id.* The more venues or jurisdictions the various documents champion, the more difficult it makes it for the courts to decide the venue/jurisdiction question.

One other thing you need to consider before starting the discussions with other parties to the transaction about forum and venue selection clauses—before you twist off and pick a forum or venue, spend some time with your trial lawyers and your client, and make sure the forum or venue you pick makes sense from your client's standpoint, or at least does not put your opponent in a very, very comfortable briar patch. These decisions sometimes involve local politics, comparative jury pools, the strength of various local judges, convenience to the witnesses, and a host of other dynamics, including trying to predict whether your client might be a plaintiff or defendant or both.

Trying to address all the dynamics of forum and venue selection clauses in real estate deals is beyond the scope of this paper, though the topic probably bears addressing in a paper for real estate lawyers. Just realize that forum and venue selection clauses are not an off-the-top-of-your-head decision.

4. How many nightmares can you have over a plain vanilla sale of a residence?

More than you think. Consider: the earnest money contract required the Sellers to provide a General Warranty Deed. The ensuing title commitment reflected an exception—the Sellers had given an oil and gas lease on their residential lot (that happens often in shale oil and gas territories—for years during the Barnett Shale boom, I could not drive the twelve miles from my house in Arlington to my office in downtown Fort Worth without passing two or three (or more) active drilling rigs). At closing, the Sellers transferred the mineral rights to the Buyers and also gave a General Warranty Deed; the Buyers paid the whole purchase price and (despite objecting about wanting the lease signing bonus and the amounts paid under the lease) allowed the title agent to disburse the full purchase price to the Seller's benefit. The result? The court of appeals held that by delivering a General Warranty Deed without reservation, the existence of the mineral deed meant that the Sellers "were in immediate breach of the covenant of seizen," i.e., "the covenant of good right to convey . . . [which is] read into every [nonquitclaim] conveyance of land" unless qualified. *Lykken v. Kindsvater*, No. 02-13-00214-CV, 2014 Tex. App. LEXIS 12143, *9-10 (Tex. App.—Fort Worth Nov. 6, 2014, no pet. h.). Remember to make sure your documents take into consideration *and articulate* the realities on the ground—do not allow your clients to promise to give what they cannot.

5. Sometimes, you have to advise your clients that they will have to litigate to finality, despite the cost of litigation and how long litigation will take.

Sometimes you have to advise the client that it will need to push the issues, despite the cost and time involved in doing so. For example, you might run into that opponent which files an answer in your client's suit to quiet title, and in that answer your opponent disclaims any interest in the property in question. Your client may feel like the disclaimer brings the lawsuit to an end, and the opponent may take the position that the disclaimer removes the cloud on title, and no judgment to that effect is necessary. Do not be lulled into complacency—a "disclaimer . . . in [an] answer [does] not operate to automatically remove the cloud on title [under the facts of this case] . . . because it did not constitute a judgment that could be filed in the property records." *Kingman Holdings, LLC, v. Wells Fargo Bank, N.A.*, No. 02-14-00040-CV, 2014 Tex. App. LEXIS 11014, *4-5 (Tex. App.—Fort Worth Oct. 2, 2014, no pet. h.) (mem. op.). You need to make sure you know what it takes to finalize the dispute in your client's favor, and make sure that those things are put in place.

6. Draft your documents to take into account whatever there is in the water—or the beer.

The real world. That is where your clients' deals play out. And your clients' deals may play out amongst people who, unlike lawyers, do stuff other than go home and go to sleep after work. So you might want to get really specific with your client as to what kinds of things will impact your clients' deals, especially on deals involving partnership agreements, leases, or management agreements and the like. While the following case admittedly did not involve real estate documents, it does remind us that (in drafting lease or management agreements or the like) you might want to know if the property your clients will lease or manage will involve an enterprise which routinely, or even occasionally, is populated by bouncers, patrons, dancing, drinking, handcuffs, a dirt contractor who runs a "one-man show" which nets "around [$]280,000" a year, and a "fight [the details of which] vary widely from witness to witness," probably because "[t]he events happened quickly and, presumably, adrenaline, alcohol, and marijuana played a large part, which do not lead to exactitude." *See Cowboys Concert Hall-Arlington, Inc. v. Jones*, No. 02-12-00518-CV, 2014 Tex. App. LEXIS 4745, *8 (Tex. App.—Fort Worth May 1, 2014, pet. denied) (mem. op.). And you need to keep in mind that sometimes even a normally "rather sedate crowd" which

gathers at tailgate parties can uncharacteristically involve individuals who get out of control. *Stainbrook v. Tex. Christian Univ.*, No. 02-13-00433-CV, 2014 Tex. App. LEXIS 12151, *2 (Tex. App.—Fort Worth, Nov. 6, 2014, no pet. h.) (mem. op.). The law governing premises liability may protect your client from liability (*Id.*, at *15-16), but you need to draft your documents with an eye toward the real world dynamics your client will encounter (the costs of litigation, indemnity, the terminating of relationships if certain things happen), over and above the dynamics between the parties to the deal.

And you need to read the *Cowboys Concert Hall* case, just on general principles. Any old boy who keeps his dirt business going even though the injury to his left eye was so bad he occasionally "had to use his finger to open [it]" for a couple of years is a fellow not to trifle with. *Cowboys Concert Hall*, 2014 Tex. App. LEXIS 4745 at *57. But he is the kind of fellow you need to keep in mind in documenting deals involving real estate in Texas.

7. So, to wrap up . . .

. . ., as I mentioned earlier, this article does not begin to deal with all the real estate cases or issues decided by the Fort Worth Court during the fiscal year ending 2014, much less similar cases resolved by the other thirteen courts of appeals. If you would like to see my Fort Worth Court synopsis, e-mail me (shayes@stevehayeslaw.com) and I will send it to you. But I hope this paper has given you some things to think about which you can use to explain to your clients why they should do certain things, or refrain from doing others, in structuring and implementing their deals. And I hope it has given you some useful suggestions as to how to draft documents which tell the stories of your clients' deals. If you draft your documents in a clean, simple, self-explanatory way to deal with the real world your client will encounter, and remind everyone to keep one's eye on the ball, you have gone a long way toward doing your clients—and should things go awry, God forbid, the courts of appeals—a heckuva service. They will all appreciate you for it.

Author's Note: Steve Hayes has primarily a civil appellate practice in Fort Worth, where he has practiced for the last couple of decades. For the various organizations which have really watered down their competence requirements so that Steve could either attend them, join them, or participate in their leadership, see his web site. Steve publishes a monthly update on activity in the Fort Worth Court of Appeals and a biweekly error preservation update. E-mail him if you would like to receive the former; check him out on LinkedIn if you would like to receive the latter.