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No Description, No Contract

By Judon Fambrough

Can a valid sales contract be written without a legal description attached or included? What if the parties agree to supply the description after the contract is executed? Is such a sales contract enforceable?

An enforceable contract for the sale of real property must be in writing and signed by the person charged with the promise (Statute of Frauds, Texas Business & Commerce Code Section 26.01). With sales contracts, both the buyer and seller must sign because the buyer promises to buy and the seller promises to sell at a stated price.

Noticeably absent from the statute is the requirement of a legal description. The Texas Supreme Court ruled, however, that the sales contract must contain or at least reference an existing document that describes the land with reasonable certainty (*Morrow v. Shotwell*, 477 S.W.2d 538 [Tex. 1942]).

Cases abound regarding what meets the “reasonable certainty” test. For example, suppose the description states “my land in Brazos County, Texas.” Does this meet the test? According to the Texas Supreme Court, it does if the evidence reveals the seller owns only one tract in the county (*Kmiec v. Reagan*, 556 S.W.2d 567 [Tex. 1997]).

One case expanded on the test when referencing other documents for the legal

description (*Jones v. Kelley*, 614 S.W.2d 95 [Tex. 1981]). The high court ruled that the description may be obtained from other documents (not document) prepared in the “course of the transaction” even though the documents are prepared **after** the contract is entered.

In *Jones*, the high court approved the reading of four instruments together to satisfy the legal description for the statute of frauds. This was allowed because the instruments were executed at the same time, for the same purpose and “in the course of the same transaction.” Texas courts have even construed different contracts and instruments as one even though they were between different parties (*Miles v. Martin*, 321 S.W.2d 62).

On April 20, 2001, the Dallas Court of Appeals faced a similar problem regarding the application of the “course of the transaction” test. The sellers agreed to sell, and the buyers agreed to purchase a single-family tract along a proposed golf course. Neither the tract nor the golf course had been surveyed or platted. The description was to be supplied later.

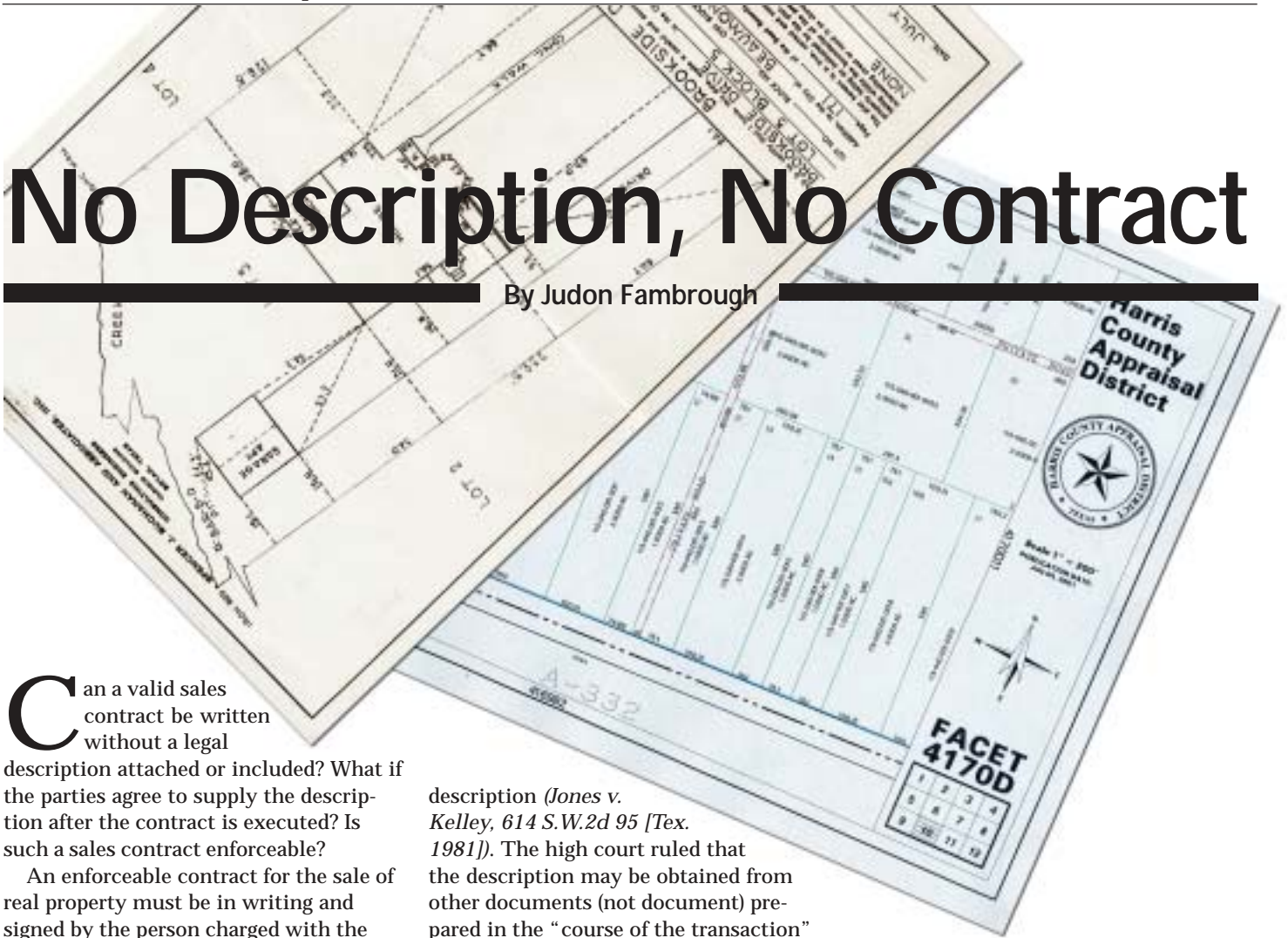
The seller decided not to close, and the buyer sued for specific performance. The

seller defended on grounds that the sales contract lacked a legal description in violation of the statute of frauds.

The buyer countered that the subsequent description supplied by the survey and plat satisfied the statute of frauds according to the *Jones* decision. The buyer claimed the survey was permissible because it occurred in the course of the transaction even though after the sales contract was signed.

The appellate court disagreed with the buyer’s interpretation of *Jones*. Despite the language in *Jones*, the documents containing the legal description in the *Jones* case were not prepared **after** the contract was entered but **contemporaneously** with the contract as part of another transaction between the parties.

The appellate court concluded by stating “These cases (cited by the buyer) did not create an exception to the long-held rule that **subsequent** documents cannot be used to aid in supplying a



sufficient description. The agreement must furnish within itself or by reference to other identified writing then in existence the means or data by which the particular land to be conveyed may be identified with reasonable certainty" (*Ford Development Corp. v. Town & County Development at Stonebriar Inc.*, No. 05-98-01561-CV).

Is this decision in line with other case law regarding contracts? Yes.

Courts cannot make contracts for parties. An agreement to enter into negotiations (an *agreement to agree*) cannot be enforced because the courts have no way to determine what the negotiations may produce (*Central Tex. Micrographics v. Leal*, 908 SW 2d 292). Therefore, if an essential term or terms of a contract are left open for future

negotiations, no binding contract exists (*T.O. Stanley Boot Co. v. Bank of El Paso*, 847 SW 2d 218). Obviously, a legal description is an essential part of a sales contract according to the statute of frauds.

So what should real estate licensees do when they have a willing seller, a willing buyer and no legal description? The best course of action is to identify the tract with reasonable certainty using whatever tools are available. Street addresses will work in urban areas, and penciled boundary lines on plats should be sufficient for rural properties.

If no plat is available, outline the proposed boundary lines on a map downloaded from the web (find maps at terraserver.homeadvisor.msn.com). Marking on a downloaded map should be sufficient in light of *Pickett v. Bishop*,

223 SW 2d 222, in which the court held the contract must furnish within itself or by referencing some other extrinsic writing, the means or data to identify with reasonable certainty the land to be conveyed.

There are no guarantees of what constitutes *reasonable certainty*, short of an actual survey. However, real estate licensees should remember that a contract without reasonable identification of the property is unenforceable. Do the best you can with what resources you have available.

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