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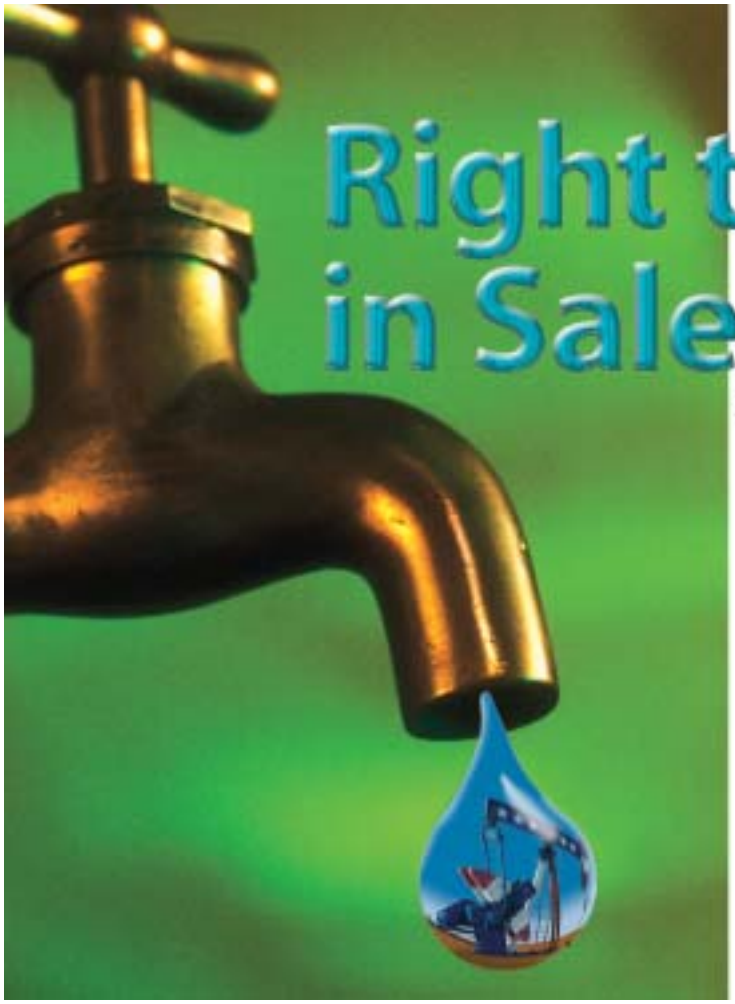

Right to Sue in Sales Contracts

By Judon Fambrough

A couple of new landowners received quite a surprise when the Eastland Court of Civil Appeals ruled that they could not sue oil and gas producers for contaminating an underground aquifer (*Senn v. Texaco, 55 SW3d 222, 8/16/01*). The decision may surprise Texas real estate brokers and real estate attorneys. Land sale contracts and deeds may need altering in the future to avoid similar problems.

The plaintiffs purchased a 23,000-acre ranch in 1997. Three thousand acres were in oil and gas production. Texaco and Exxon had leased the property since 1948. Most leases had been assigned to other oil companies, and most production had ceased before the 1997 purchase.

To protect themselves from possible lawsuits regarding the condition of the property, the sellers sold it "as-is." Both the contract and deed stated in all caps that the sale was "As is, where is, and with all faults, and without any representations or warranties whatsoever, express or implied, written or oral . . . . Grantee expressly revokes, releases, negates and excludes all representations and warranties, including, but not limited to . . . any environmental, geological, meteorological, structural, or other conditions or hazards . . . including, without limitations, concerning water in, on, under, or about the property."

After the purchase, the buyers discovered the contaminated groundwater and filed suit for damages. The trial court ruled they did not have the right to bring the lawsuit because the injury occurred before they owned the property. This ruling was upheld on appeal.

However, the Senns were not easily discouraged. They made a number of arguments on appeal. For instance, they argued the right to sue was conveyed to them in the mineral reservation that stated, "Nothing contained herein is intended to limit the right of the Grantee (the Senns), their heirs, successors or assigns to seek to recover whatever surface damages to which Grantee, or their heirs, successors or assigns may be entitled under Texas law in the event of the production or mining of any of the foregoing minerals and other substances."

The appellate court disagreed, saying the purported conveyance does not contain words of conveyance or assignment. The wording is in the reservation clause, not the granting clause. Second, the provision clearly applies to injuries occurring **after** the Senns purchased the land, not before.

The Senns also argued that the court should draw a distinction between permanent and temporary injuries to the land. However, the court ruled that the distinction is meaningless in this instance. All the alleged damages — temporary, permanent or both — occurred before the Senns' purchase.

However, the distinction cannot be overlooked. Had temporary injuries to the land been sustained during the time the Senns owned the property, a lawsuit could have been permitted.

The difference between permanent and temporary injuries to land depends on the frequency of the occurrence. Permanent injuries are constant and continuous, not occasional, intermittent or recurrent. They are presumed to continue indefinitely. Temporary injuries, on the other hand, are not continuous, but sporadic and contingent on some irregular force, such as rain.

Another distinction is the ability of the court to stop (enjoin) the activity causing the injury. If an injury can be enjoined, it is temporary. If it cannot be stopped, it is permanent.

The number of lawsuits that may be filed is another difference. When injuries are deemed permanent, only one lawsuit is permitted. All the estimated past and future damages are recoverable in one lump sum. The lawsuit must be filed

within two years after discovery of the first actionable injury, not from the date when the extent of the damages are fully ascertainable.

For temporary injuries, successive lawsuits are permitted because only past damages are recoverable, not future. A lawsuit for temporary damages must be filed within two years after temporary damages are sustained, or they are barred by the statute of limitations.

The amount of recovery varies with the classification. Compensation for permanent injuries is measured by the difference in the value of the land before and after sustaining the damages. This is sometimes referred to as the diminution-in-value test. Recoveries for temporary injuries are measured by the amount of money needed to restore the land for the period covered by the lawsuit. As mentioned earlier, this period lasts for no more than two years, according to the Texas Civil Remedies and Practices Code (Section 16.003).

There is one exception to these rules. Courts will not permit the amount of restoration costs for temporary damages to drastically exceed the reduction in fair market value of the land. In a 1975 case, the jury found the restoration costs to be $45,000 and the decrease in market value to be $10,500. Here, the court held the proper measure of damages for temporary injuries was the $10,500 for diminution in fair market value of the land because of the variance (*Atlas Chemical Industries v. Anderson, 524 SW2d 681[Tex 1975]).*

The Senns argued that, although more than two years had passed from the time of the injuries, the discovery rule presents an exception that extends the two-year period. The Senns discovered the water contamination **after** purchasing the land. Consequently, they felt their lawsuit should not be barred because they sued within two years after discovery.

When an injury is inherently undiscoverable, the statute of limitations begins to run not from the time of the injury but from the time the plaintiff knows or, by exercising reasonable diligence, should know of the injury (discovery rule). However, for the court to take note of the discovery rule, the plaintiff must raise the issue in the pleadings or use it as a defense when the defendant claims an expiration of the statute of limitations.

An exception to the rule foiled the plaintiffs' argument. Only the aggrieved party may raise the issue when filing the lawsuit. Here, the aggrieved party was the prior owners, not the plaintiffs. The discovery rule cannot transfer the right to sue from one to another simply because the second owner discovered the injury. An assignment of the right in the deed is required.

***LANDOWNERS SHOULD** be aware that lawsuits for permanent damages to land must be filed within two years of discovery of the first damage.*

Finally, the Senns argued that the right to sue for injury to land is a right that runs with the land. It is not a personal right but rather belongs to and follows whoever owns the land.

A similar case involved a plaintiff who purchased ten acres in Rusk County in 1992 *(Exxon Corp. v. Pluff, 2001 WS 1163758, Tyler, 5/31/2002).* The property had been used for four or five drill sites between 1930 and 1984. It was littered with oilfield equipment, making it unfit for livestock or the use of farm machinery.

The new owner sued Exxon and others for surface damages. The plaintiff, Pluff, received the same response from the court as the Senns. The statute of limitations for the injuries expired somewhere around 1986, and he had no right to file the lawsuit because the right belonged to a prior owner.

On appeal, Pluff argued that the right to sue went with the land and belonged to him as the current owner. He distinguished his case from the Senns because the Senns purchased the land "as-is." In this case, the plaintiff's deed conveyed "all and singular the rights and appurtenances thereto in anywise belonging to the (sellers)." This language, he concluded, transferred any cause of action owned by the sellers to the buyer.

Here is how the court responded after pointing out the plaintiff cited no authority for the interpretation.

"However, even if we assume that Pluff's interpretation is correct, no evidence was introduced at trial to establish that the injury occurred during the time Pluff's grantors owned the property. Consequently, we cannot determine from the record whether Pluff's grantors ever owned the tort cause of action Pluff asserted."

In other words, even if the language assigned the right to sue, the plaintiff failed to prove that the injury occurred during the previous owners' tenure. The court then demanded that any assignment be clearly stated.

"To recover on an assigned cause of action, the party claiming the assigned rights must prove that the cause of action was in fact assigned" (*Texas Farmers Ins. v. Gerdes, 880 SW2d 215*).

These cases illustrate both the problem and the cure for purchasers. The problem is the new owners may not have owned the land when permanent or temporary injuries were sustained. The solution is for sellers to convey or assign all their rights to sue for any injuries to the property to the buyers. This should be stated in both the sales contract and repeated in the deed.

Neither the Texas Real Estate Forms Manual published by the State Bar of Texas nor the contract forms promulgated by the Texas Real Estate Commission contain such an assignment.

The appellate court summarized the options any potential buyer faces when purchasing property. The Senns could have avoided the problem by "bargaining for an assignment of the prior

owner's possible causes of action for injuries to the land that occurred before the purchase." Alternatively, " the Senns could have insisted that Fuller (the seller) give them warranties about the condition of the land and water in the deed." Or, "the Senns could have performed a better inspection of the land and water before they purchased the land."

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