

# Correction Instruments and Pref Rights

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In 2003, the Cook family sold the surface of the W/2 of Section 85 in Hansford County, Texas, along with some other properties, to the Archer Trusts. At the same time the Cooks granted the Archer Trusts a right of first refusal (“ROFR”) to purchase the minerals under the same W/2, as well as minerals under other tracts. Later that same year, the Archer Trusts noticed that the description for the W/2 in the ROFR referenced the wrong county (all the other properties were in Ochiltree County and the W/2 was erroneously described as being in Ochiltree County). The Archer Trusts prepared a correction instrument and sent it to the Cooks. Only two of the eleven original Cook grantors signed the correction, which was then filed of record.

In 2007, two of the Cook grantors (the Farbers) sold their minerals under the W/2 to Tregellas. No notice was provided to the Archer Trusts. In 2012 the heirs of another Cook grantor (Smith) agreed to sell their minerals under the W/2 to Tregellas by accepting a cash payment and executing a deed of trust to Tregellas to secure a note equal to the cash payment, payable in 90 days. Tregellas foreclosed under the deed of trust and thereby acquired the minerals. No notice was provided to the Archer Trusts.

When a grantor sells property in breach of a ROFR there is created in the holder an enforceable option to acquire the property according to the terms of sale. A suit for specific performance of a contract for the conveyance of real property, however, must be brought no later than four years after the cause of action accrues.

This Amarillo Court of Appeals case, decided on August 26, 2016, is interesting because (i) it is one of the first cases applying the “Correction Instruments” legislation passed by the Texas Legislature in 2011 and it applied to a correction instrument recorded before the statute’s effective date, (ii) it disavows application of the discovery rule to a limitations defense for failing to notify under the ROFR and puts the obligee on notice of instruments filed of record subsequent to the creation of the ROFR, and (iii) niftily sidesteps a question of whether a foreclosure under a deed of trust when there was no apparent attempt to pay the deed of trust, can avoid the ROFR.

## *Correction Instruments.*

The 2011 additions to the Texas Property Code (§§5.027 thru 5.031) now guide Correction Instrument. §5.028 deals with “Nonmaterial Corrections,” being legal description corrections such as distance, angle, direction, lot or block references, section numbers, township names, county or state names, range or meridian corrections and corrections and clarifications to a party’s name, to be made by a party other than a party to the original document. The additions cover other corrections and provide a means to make material corrections. In the “caution” to Title Standard 2.20, the Texas Title Standards Board said:

“an examiner should not rely on a purported correction instrument that makes a material correction to an earlier instrument, unless all who could be adversely affected by the correction ... have joined in its execution... Because of the difficulty in determining the materiality of a correction, absent a judicial resolution, the examiner should exercise caution in relying on a correction instrument in which not all affected persons have joined.”

Notably, and as was the case here, the Corrections statute also applies to a correction instrument recorded *before* September 1, 2011, unless a court determines the correction instrument “does not substantially comply” with the statute. For correction instruments filed after that date, the substantial compliance test is eliminated and strict compliance may be required.

All correction instruments are subject to §13.001 of the Property Code, which makes one wonder how an instrument outside the chain time-wise and filed by a person not in the chain at all can prevail, but this issue was not addressed in the Tregellas case.

In applying the Nonmaterial Corrections statute to the Archer Trust's attempted correction of a county name in the original recorded deed's property description, the court held that correction instrument, even though signed by only two of the original eleven Cook grantors "met the essential requirements of Section 5.028 ... [T]o the extent to which the trustees deviated from those requirements, we find the deviations do not seriously hinder the legislature's purpose." The referenced deviations were (i) the correction instrument was only filed in Hansford County instead of "in each county in which the original instrument ... is recorded ..." See §5.028(d)(1); and (ii) the correction instrument did not "disclose ... the basis for the person's personal knowledge of the facts ...." See TEX. PROP. CODE §5.028(c). The latter failure was excused because the two signing parties were parties to the original instrument and "the instrument's identification of the Tidwell's as among the signers of the original ROFR permits a reasonable inference of their knowledge of the county in which their property was located."

#### *Limitations and the Farber Document.*

Concluding that the Farbers first manifested an intention to sell the minerals not later than the date they closed on their sale to Tregellas the limitations period began to run at that time unless tolled. The court did not want the claim to linger for many years as that uncertainty "is inconsistent with the purpose of the statute of limitation." As to the application of the discovery rule, the Archer Trusts said that the discovery rule delayed the accrual date of their cause of action and that the trustees did not know of the Farbers' sale until they received actual notice – while the deed was a matter of public record, "they had no duty to examine the public record." Rejecting this argument, the court concluded that "[o]nce properly recorded in the proper county, the instrument is subject to inspection by the public, and notice to all persons of its existence." Hence, the discovery rule had no application and the Archer Trusts' claim with respect to the Farbers' interest was barred by the 4-year statute of limitations.

#### *The Smith Document.*

Although Tregellas had set up the purchase of the minerals from Smith as a Deed of Trust, and the Texas Supreme Court has previously held that the holder of a right of first refusal was not entitled to exercise the right at the time of a foreclosure sale under a deed of trust, the trustees argued that the deed of trust was a subterfuge or device to avoid the ROFR. The trial court had found "subterfuge and device." Ignoring that issue as a basis to impose specific performance, the Court of Appeals' focused on the testimony of the Smith heirs that they had not wavered in their willingness to sell their mineral interest to Tregellas and those facts obligated them to notify the Archer Trusts of their intention; therefore they had breached their obligation under the ROFR, supporting a remedy of specific performance regardless of their subsequent execution of a deed of trust.

For more detailed information, please see

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