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Claims to reform don't necessarily accrue on recording

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As a litigator frequently involved in real estate disputes, I often see claims to reform deeds and other recorded instruments based on mutual mistake. In these cases, I continue to be surprised by a persistent misunderstanding that the statute of limitations clock for reformation always starts to run upon recording based on the idea that recording is notice. Massachusetts law has never been so harsh to would-be reformers, nor should it be.

In the commonwealth, reformation claims are contractual and, therefore, must be brought within six years of their accrual. See G.L.c. 260, §2; *Stoneham Five Cents Sav. Bank v. Johnson*, 295 Mass. 390, 395-96 (1936); *CBK Brook House I, L.P. v. Berlin*, 2004 WL 870122, at *20 (Mass. Land Ct. 2004); *Meng v. Yan*, 2000 WL 1511555, at *2 (Mass. Super. Ct. Sept. 14, 2000).

The question becomes when does that accrual clock start to run. The answer is not necessarily upon recording.

Rather, the Supreme Judicial Court has long held such a claim does not accrue "until the mistake has been or ought to have been discovered." *Johnson*, 295 Mass. at 396 (citing cases). Tolling the statute of limitations period until meaningful notice of a problem exists is premised on the idea that these are no-fault situations making judicial protection appropriate. See "Developments in the Law Statute of Limitations," 63 Harv. L. Rev. 1177, 1213-14 (1950).

Misunderstanding vs. reality

The existing misunderstanding is to treat the "ought to have been discovered" language as, essentially, the equivalent of the discovery rule applicable to damages claims. They are not the same.

For example, the discovery rule can only apply if someone's harm is inherently unknowable. By contrast, a flawed instrument's recording could render its mistake entirely knowable. After all, recording is intended to be notice to the world under G.L.c. 183, §4.

The SJC, however, has never pronounced that a mistake "ought to have been discovered" simply because it is recorded. More importantly, several Massachusetts cases have found reformation claims to be timely well past six years after a flawed instrument's recording. See, e.g., *Buk Lhu v. Dignoti*, 431 Mass. 292, 293-98 (2000) (affirming reformation of 1980s deeds in action filed in late 1990s); *American Oil Co. v. Cherubini*, 351 Mass. 581, 588 (1967) (rejecting argument that reformation of 1951 lease was time-barred in 1961 action); *Franz v. Franz*, 308 Mass. 262, 265-67 (1941) (ordering reformation of 1926 deed in action commenced no earlier than 1939); *McGovern v. McGovern*, 77 Mass. App. Ct. 688, 699-702 (2010) (reforming 1986 deed in action filed in 2005).

This misunderstanding is consequential, particularly in circumstances where the parties, and perhaps their successors, have proceeded following a real estate transaction as if everything were drawn up and executed perfectly. Mistakes happen, including scrivener's errors and other blunders that form the stuff of reformation. Massachusetts has never required landowners to run into court for reformation if they are enjoying their property rights — even those that were imperfectly conveyed — without first encountering an interruption or objection from another party.

In these "nobody-realizes" situations, record notice has never meant that even an obvious mistake "ought to have been discovered" by a would-be reformer. As explained by the SJC, "the defendant will typically be hard put to offer persuasive resistance to the postponement of the running of the statute, when the effect is merely to enable the court to restore the transaction by means of a reformation to its true basis, on which the defendant and [the] plaintiff were both agreed." *City of New Bedford v. Lloyd Inv. Assocs., Inc.*, 363 Mass. 112, 121 (1973).

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Simply stated, the SJC has long required more meaningful notice of a problem than mere recording at the registry. For example, in *Cherubini*, the lessee was permitted to reform a property description in a recorded 1951 lease even though suit was not filed until 1961. The lessee only discovered the mistake after exercising its purchase option 10 years into its lease.

The SJC rejected the lessor's statute of limitations defense because the "first occasion which the [lessee] would have had to check the sufficiency of the description of the land was its search of the title subsequent to the exercise of its option to purchase." *Cherubini*, 351 Mass. at 588.

Cherubini illustrates that record notice does not equate to accrual of a reformation claim based on mistake in these nobody-realizes situations. Any suggestion that the clock always starts to run upon recording is fundamentally incorrect.

After all, "when a plaintiff knew or should have known of his cause of action is one of fact which in most instances will be decided by the trier of fact." *Riley v. Presnell*, 409 Mass. 239, 240 (1991). More importantly, finding a reformation claim time-barred in a nobody-realizes situation leads to an inherently inequitable result on a claim with its roots in equity.

A New York state of mind?

It is conceivable more is expected of those holding property rights today. An argument might be made that cases such as *Johnson* or *Cherubini* are outdated and parties should not get the benefit of additional time to correct mistakes that are apparent from the registry (and, nowadays, the online registry).

However, this approach would be devastating to the nobody-realizes reformers who likely acquired property rights from their predecessors well past a six-year window for a necessary reformation claim and have enjoyed them since then without interruption or objection. Such an interpretation would appear to require all landowners in the commonwealth to re-run title searches on their property and would flood the courts with claims brought out of an abundance of caution, even on matters that may appear relatively trivial or where no controversy even exists.

New York's *Hart* exception presents an interesting carve-out to protect the nobody-realizes landowners if this harsher view were to take hold. See *Hart v. Blabey*, 39 N.E.2d 230, 232 (N.Y. 1942). The exception provides that "'as to one who is in possession of the real property under an instrument of title, the statute never begins to run against his right to reform that instrument until he has notice of a claim adverse to his under the instrument, or until his possession is otherwise disturbed.'" *Wilshire Credit Corp. v. Ghostlaw*, 300 A.D.2d 971, 973 (N.Y. App. Div. 2002) (quoting *Hart*, 39 N.E.2d at 232).

This "well recognized exception" has been widely applied in New York to protect nobody-realizes landowners seeking reformation well after the limitations clock would otherwise have run. *TEG N.Y. LLC v. Ardenwood Estates, Inc.*, 2004 WL 626802, at *5 (E.D. N.Y. March 30, 2004) (invoking exception to find limitations period to reform 1993 instrument did not start to run until 2002) (internal quotations omitted).

More importantly, this carve-out would be consistent with the public policy behind the longstanding (but misunderstood) meaningful-notice accrual for these claims in Massachusetts. Its rationale is consistent with the no-fault logic pronounced by the SJC in *City of New Bedford*. See *Schlotthauer v. Sanders*, 153 A.D.2d 731, 732 (N.Y. App. Div. 1989) ("a Statute of Limitations is ... designed to put an end to stale claims, and was never intended to compel resort to legal remedies by one who is in complete enjoyment of all he claims.").

The carve-out would also appropriately treat the "ought to have been discovered" question as one of fact as opposed to treating nobody-realizes landowners as on notice simply because of a flawed instrument's recording many years or even decades earlier.

The commonwealth has always protected landowners that are quietly enjoying property rights based on flawed instruments without any interruption or objection. It should continue to do so.

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