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Reply to:

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Atty. David A. Hoines
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Re: ***Mutual Mistake Memo***

Dear David:

Per your telephone request, I have prepared this memo addressing the mutual mistake issues arising from the following fact pattern:

> Buyer and Seller agree that Seller would sell his healthy cow to Buyer for an agreed-upon price. Unbeknownst to either party, however, the cow is pregnant at the time of sale. Once the calf is delivered, Seller sues Buyer for the return of the calf because Buyer only contracted to purchase the cow, and retention of the calf would produce a windfall for the Buyer. On these facts, under Virginia law, which party is entitled to the calf?

"In general, where a mutual mistake is made by both parties in a matter which is the cause or subject matter of the contract, and no fraud is imputable to either party, the mistake is good ground in equity for rescinding the agreement, even after it has been fully executed." **Seaboard Ice Co. v. Lee, 99 S.E.2d 721, 727 (Va. 1957)**. It is clear, however, that not all mutual mistakes will entitle the claimant to relief. In this regard, a contracting party bears the risk of mistake when:

(a) the risk is allocated to him by agreement of the parties;

(b) *he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient*, or

(c) the risk is allocated to him by the Court on the grant that it is reasonable in the circumstances to do so.

Hall v. Hessick, ___ S.E. 2d ___, 1993 WL 946113 (Va. Cir. Ct. 1993)(quoting Restatement of Contracts 2d, Section 154)(emphasis added).

Accordingly, under the "limited knowledge" exception, if a contracting party treats his/her limited knowledge of a particular aspect of the contract as sufficient and foregoes the opportunity to gain additional knowledge, that party may not thereafter seek relief from the agreement under a mutual mistake theory. **Cf. Corbett v. Bonney, 121 S.E.2d 476, 481 (Va. App. 1961)**("[m]istakes as to matters which the contracting parties had in mind as possibilities and as to the existence of which they took the risk are not such mistakes of fact as to entitle either party to relief")**.**

In your fact pattern, both parties believed the cow was healthy, and thus capable of reproduction. It also appears that neither party tested the animal to see if the she was in fact pregnant. *Despite the parties' limited knowledge as to this subject, the Seller completed the transaction, thus foregoing the opportunity to gain additional knowledge as to this issue*. In other words, Seller assumed the risk of mistake as to whether or not the cow was pregnant because "he ha[d] only limited knowledge with respect to the facts to which the mistake relates but treat[ed] his limited knowledge as sufficient" by completing the contractual agreement. **Hall v. Hessick, supra.**

For these reasons, I believe the buyer is entitled to keep the calf.

Atty. Michael A. Dibble