

2018

Oil, Gas, and Mineral Law

John F. Brown

Brown & Fortunato, P.C., rbrown@bf-law.com

Follow this and additional works at: <https://scholar.smu.edu/smuatxs>

 Part of the [Oil, Gas, and Mineral Law Commons](#), and the [State and Local Government Law Commons](#)

Recommended Citation

John F. Brown, *Oil, Gas, and Mineral Law*, 4 SMU Ann. Tex. Surv. 267 (2018)
<https://scholar.smu.edu/smuatxs/vol4/iss1/12>

This Article is brought to you for free and open access by the Law Journals at SMU Scholar. It has been accepted for inclusion in SMU Annual Texas Survey by an authorized administrator of SMU Scholar. For more information, please visit <http://digitalrepository.smu.edu>.

OIL, GAS, AND MINERAL LAW

Richard F. Brown*

TABLE OF CONTENTS

I. INTRODUCTION	267
II. TITLE AND CONVEYANCING ISSUES	268
A. <i>LIGHTNING OIL CO. v. ANADARKO E&P ONSHORE, LLC</i>	268
B. <i>XTO ENERGY INC. v. GOODWIN</i>	270
C. <i>VIRTEX OPERATING CO., INC. v. BAUERLE</i>	274
D. <i>WENSKE v. EALY</i>	277
III. LEASE AND LEASING ISSUES	280
A. <i>BP AMERICA PRODUCTION CO. v. LADDEX, LTD.</i>	280
B. <i>BP AMERICA PRODUCTION CO. v. RED DEER RESOURCES, LLC</i>	282
C. <i>TEXAS OUTFITTERS LTD., LLC v. NICHOLSON</i>	284
IV. INDUSTRY CONTRACTS	286
A. <i>CARRIZO OIL & GAS, INC. v. BARROW-SHAVER RESOURCES CO.</i>	286
B. <i>SAMSON EXPLORATION, LLC v. T.S. REED PROPERTIES, INC.</i>	288
V. LITIGATION ISSUES	291
A. <i>CRAWFORD v. XTO ENERGY, INC.</i>	291
B. <i>PIERCE v. BLALACK</i>	293
C. <i>EXXONMOBIL CORP. v. LAZY R RANCH, LP</i>	296
D. <i>CASH v. KING</i>	297
VI. REGULATION ISSUES	299
A. <i>RING ENERGY v. TREY RESOURCES, INC.</i>	299
B. <i>FOREST OIL CORP. v. EL RUCIO LAND & CATTLE CO., INC.</i>	300
C. <i>ETC MARKETING, LTD. v. HARRIS COUNTY APPRAISAL DISTRICT</i>	302
VII. CONCLUSION	304

I. INTRODUCTION

This article focuses on the interpretations of and changes relating to oil, gas, and mineral law in Texas from December 1, 2016, through November 30, 2017. The cases examined include decisions of state and federal courts

* Attorney at Law, Brown & Fortunato, P.C., Amarillo, Texas (www.bf-law.com).

in the State of Texas and the Fifth Circuit Court of Appeals.¹

II. TITLE AND CONVEYANCING ISSUES²

A. *LIGHTNING OIL CO. v. ANADARKO E&P ONSHORE, LLC*

*Lightning Oil Co. v. Anadarko E&P Onshore, LLC*³ held that the surface owner has the right to locate a well on the surface and to drill through the earth beneath the surface to an adjacent tract when the mineral estate and surface estate have been severed. The fee owner severed the surface and mineral estate in the Briscoe Ranch. Lightning Oil Co. (Lightning), as lessee, acquired from the mineral owner a lease for oil and gas under the Briscoe Ranch. Anadarko E & P Onshore, LLC (Anadarko) entered into a Surface Use and Subsurface Easement Agreement with Briscoe Ranch to site wells on the Briscoe Ranch and to drill through the earth under the Briscoe Ranch to open wells that bottomed on Anadarko's adjacent leasehold acreage. Lightning sued Anadarko for trespass and tortious interference with Lightning's lease.⁴

. . . Lightning's claims for both trespass and tortious interference with contract turn on whether a lessee's rights in the mineral estate include the right to preclude a surface owner or an adjacent lessee's activities that are not intended to capture the lessee's minerals, but rather are intended only to traverse, or bore through, the formations in which the lessee's minerals are located.⁵

1. This article is devoted exclusively to Texas law. Cases involving questions of oil, gas, and mineral law decided by courts sitting in Texas but applying laws of other states are not included. Page limitations of this publication required the omission of some cases of interest. The facts in the cases are sometimes simplified to focus on the legal principles.

2. Other cases dealing with title and conveyancing issues include the following: *Webb v. Martinez*, No. 04-16-00042-CV, 2016 WL 7234044 (Tex. App.—San Antonio Dec. 14, 2016, no. pet.) (mem. op.) (limitations on deed reformation); *Whitfield v. Ondrej*, No. 04-15-00052-CV, 2016 WL 7383823 (Tex. App.—San Antonio Dec. 21, 2016, no. pet.) (mem. op.) (limitations on deed reformation); *Tanya L. McCabe Trust v. Ranger Energy LLC*, 531 S.W.3d 783 (Tex. App.—Houston [1st Dist.] 2016, pet. denied) (correction—instrument statute); *BNSF Ry. Co. v. Chevron Midcontinent, L.P.*, 528 S.W.3d 124 (Tex. App.—El Paso 2017, no. pet.) (railroad right-of-way or fee); *Reed v. Maltzberger/Storey Ranch, LLC*, 534 S.W.3d 51 (Tex. App.—San Antonio 2017, pet. denied) (mineral/royalty distinction); *Davis v. Mueller*, 528 S.W.3d 97 (Tex. 2017) (general granting clause); *Cabot Oil & Gas Corp. v. Newfield Expl. Mid-Continent, Inc.*, No. 07-16-00125-CV, 2017 WL 2622773 (Tex. App.—Amarillo June 13, 2017, no pet.) (mem. op.) (statute of frauds and proration unit); *Jarzombek v. Ramsey*, 534 S.W.3d 534 (Tex. App.—San Antonio 2017, pet. denied) (statute of limitations on deed reformation); *Boothe v. Green*, 534 S.W.3d 93 (Tex. App.—Corpus Christi June 22, 2017, pet. filed) (partial redemption pro tanto); *In re Houston Bluebonnet, L.L.C.*, No. 16-34850, 2017 WL 4117331 (Bankr. S.D. Tex. Sept. 15, 2017) (reservation of net proceeds interest); *Hahn v. Gips*, No. 13-16-00336-CV, 2017 WL 4837877 (Tex. App.—Corpus Christi Oct. 26, 2017, pet. filed) (mem. op.) (partition deeds); *Dragon v. Trial*, No. 04-16-00758-CV, 2017 WL 5162180 (Tex. App.—San Antonio Nov. 8, 2017, pet. superseded on rehearing, 2018 WL 771908) (mem. op.) (estoppel by deed); *Bradley v. Shaffer*, 535 S.W.3d 242 (Tex. App.—Eastland Nov. 30, 2017, no pet.) (rule against perpetuities and spendthrift clause).

3. 520 S.W.3d 39 (Tex. 2017).

4. *Id.* at 43.

5. *Id.* at 46.

The Texas Supreme Court recognized that every unauthorized entry upon land of another is a trespass, but noted that ownership of property does not necessarily include the right to exclude every invasion or interference.⁶ “[P]roperty does not refer to a thing but rather to the rights between a person and a thing.”⁷ “Consequently, a trespass is not just an unauthorized interference with physical property, but also is an unauthorized interference with one of the rights the property owner holds.”⁸

The supreme court then analyzed the relationship between the surface estate and the mineral estate. The surface overlying a leased mineral estate is the surface owner’s property, and those ownership rights include the geological structures beneath the surface.⁹ “Although the surface owner retains ownership and control of the subsurface materials, a mineral lessee owns a property interest—a determinable fee—in the oil and gas in place in the subsurface materials.”¹⁰ Lightning pointed out that, in this case, Anadarko would clearly extract some of Lightning’s minerals (from the wellbore) and put permanent structures in place (surface locations and casing) that could interfere with Lightning’s dominant mineral estate and its exclusive right to produce the minerals.¹¹

The materials extracted from the wellbore would include about a dump-truck load of material (and inevitably some oil and gas) out of the producing Escondido formation, which is about 200–875 feet thick.¹² The court applied a balancing test¹³ and held, on the basis of public policy, that the loss Lightning would face was not a sufficient injury to support a claim for trespass.¹⁴ The supreme court relied upon “the longstanding policy of this state to encourage maximum recovery of minerals and to minimize waste.”¹⁵ It is unclear from the opinion whether there was some evidence in the case of the efficacy of horizontal drilling originating on off-site surface locations, or if the court simply relied upon secondary sources to reach that conclusion.¹⁶

To resolve Lightning’s claim of interference, the supreme court first reviewed the nature of the mineral estate. There are five “rights,” and the one at issue here is the right to develop.¹⁷

[T]he rights conveyed by a mineral lease generally encompass the rights to explore, obtain, produce, and possess the minerals subject

6. *Id.*

7. *Id.* at 49 (quoting *Evanston Ins. Co. v. Legacy of Life, Inc.*, 370 S.W.3d 372, 382–83 (Tex. 2012)).

8. *Id.*

9. *Id.* at 46 (citing *Humble Oil & Ref. Co. v. L. & G. Oil Co.*, 259 S.W.2d 933, 934–38 (Tex. Civ. App.—Austin 1953, writ ref’d n.r.e.)).

10. *Id.* at 47 (citing *Brown v. Humble Oil & Ref. Co.*, 83 S.W.2d 935, 940 (Tex. 1935)).

11. *Id.*

12. *Id.* at 47 n.2.

13. *Id.* (citing *Humble Oil & Ref. Co. v. West*, 508 S.W.2d 812, 816 (Tex. 1974)).

14. *Id.* at 51.

15. *Id.* (citing TEX. CONST. art. XVI § 59(a); TEX. NAT. RES. CODE § 85.045 (West 2011); *West*, 508 S.W.2d at 816)).

16. *Id.*

17. *Id.* at 49.

to the lease; they do not include the right to possess the specific place or space where the minerals are located. Thus, an unauthorized interference with the *place* where the minerals are located constitutes a trespass as to the mineral estate only if the interference infringes on the mineral lessee's ability to exercise its rights.¹⁸

The supreme court held that Lightning's claims of interference were mere speculation. Whatever future development might occur would be governed by the rules and regulations of the Railroad Commission and would be further limited by Anadarko's rights being no greater than those of the surface owner.¹⁹ The supreme court specifically pointed to the accommodation doctrine and its belief that the doctrine has a broad application.²⁰

The supreme court expanded on the accommodation doctrine after first noting that "because Anadarko is the surface owner's assignee, its activities are a surface use for accommodation doctrine purposes."²¹ "Lightning's argument is essentially that it should have the right to prevent any surface or subsurface use that might later interfere with its plans. Such a decision would render the mineral estate absolutely dominant and significantly alter the balance achieved through the flexible nature of the accommodation doctrine."²² This obviously extends the accommodation doctrine beneath the surface and reaches uses other than use of the surface.

The supreme court expressly based its opinion on the respective rights of the surface estate and the mineral estate.²³ It should be noted that this case involved the rights that follow a severed surface estate, which does not address the additional complexity of a lessor/lessee relationship. That is, many lease forms grant the "exclusive" right to drill, and that provision—or other express or implied covenants in the lease—may further restrict the rights of the surface owner who is also a lessor.

The significance of the case is the holding that the surface owner has the right to locate a well on the surface and to drill through the earth beneath the surface to an adjacent tract when the mineral estate and surface estate have been severed.

B. *XTO ENERGY INC. v. GOODWIN*

*XTO Energy Inc. v. Goodwin*²⁴ held that there is no depth limitation on a cause of action for a subsurface trespass. Goodwin owned at least some of the minerals in three small tracts that were included in a lease

18. *Id.*

19. *Id.* at 49–50.

20. *Id.* (citing *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 63 (Tex. 2016)).

21. *Id.* at 52.

22. *Id.* (citing *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 623 (Tex. 1971)).

23. *Id.*

24. No. 12-16-00068-CV, 2017 WL 4675136 (Tex. App.—Tyler Oct. 18, 2017, pet. filed).

eventually acquired by XTO. The opinion does not discuss Goodwin's surface rights, but apparently Goodwin owned at least some surface rights. There was an underpayment of bonus on the lease, and at all relevant times Goodwin contended the lease was void. XTO acknowledged a mistake in payment of bonus, but XTO disagreed that the lease was void. In 2010, XTO formed the "North Unit," purported to pool Goodwin's lease, and completed a unit well. In 2012, Goodwin began receiving royalties on the North Unit, which Goodwin kept. At about the same time, XTO formed the "South Unit," including lands adjacent to and immediately south of the North Unit. Goodwin's land was right on the south boundary of the North Unit. XTO drilled the vertical leg of its horizontal well on the South Unit very close to the boundary line between the units. On April 25, 2012, the South Unit well bit was within 60 feet of the boundary. On May 5, the path of the wellbore had entered Goodwin's tract at a depth of 10,000 feet and bored 126 feet through Goodwin's tract. On May 8, about halfway through the ultimate total trespass path and after casing had been set, XTO decided to just keep going. The well exited Goodwin's tract at a depth of 13,200 feet after trespassing for 2,900 linear feet.²⁵

Goodwin refused to grant a subsurface easement to XTO. XTO suspended Goodwin's royalties on the North Unit, alleging Goodwin had been overpaid.²⁶ The well was drilled to total depth and perforated—but never produced—while XTO awaited the outcome of the dispute.²⁷

During the subsequent litigation, Goodwin obtained a partial summary judgment that voided the lease for underpayment of lease bonus.²⁸ The Tyler Court of Appeals did not review the trial court's ruling on the lease.²⁹ Therefore, for purposes of all the other issues in the opinion, Goodwin was effectively released. After obtaining the partial summary judgment voiding the lease, Goodwin tried the case to a jury on trespass, bad faith trespass, conversion, fraud, and bad faith pooling. The jury found for Goodwin on all claims, but also found that XTO did not act with malice or commit fraud. Goodwin accepted the damages awarded for trespass and bad faith pooling, totaling over \$2,000,000.³⁰ There was also a directed verdict that Goodwin was not obligated to repay XTO the \$386,000 in royalties Goodwin received and retained for production attributable to the North Unit.³¹

XTO contended that "Goodwin did not have a legally protected ownership interest in the subsurface two miles below the surface of his property sufficient to support a trespass cause of action."³² Relying on *Coastal*

25. *Id.* at *1.

26. *Id.* at *2.

27. *Id.* at *6.

28. *Id.* at *2.

29. *Id.* at *13 n.9.

30. *Id.* at *2.

31. *Id.* at *11.

32. *Id.* at *2.

v. *Garza*,³³ XTO argued that a deep subsurface intrusion alone will not support a trespass claim.³⁴ One of the issues in *Coastal v. Garza* was whether “the incursion of hydraulic fracturing fluid and proppants into another’s land two miles below the surface constitutes an actionable trespass.”³⁵ The Texas Supreme Court in *Garza* did not decide that issue, but recited in dicta that the *ad coelom et ad infernos* doctrine (ownership in land extends to the sky above and down to the center of the earth) “has no place in the modern world.”³⁶ In *Environmental Processing v. FPL Farming*,³⁷ one issue before the Texas Supreme Court was whether the subsurface migration of wastewater onto an adjacent property would support a cause of action for deep subsurface trespass. Again the supreme court decided the case on other grounds and did not comment on the *ad coelom* statement in *Garza*.³⁸ The court of appeals also cited *Lightning v. Anadarko*³⁹ and *Humble v. West*⁴⁰ for the holdings that the surface owner owns and controls the non-mineral subsurface and is allowed to permit drilling through the mineral estate to access production on another tract.⁴¹ None of these supreme court cases actually impose a depth limitation on actionable subsurface trespass.⁴² Thus, the court of appeals rejected XTO’s arguments, holding that “[r]egardless of the depth that XTO’s wellbore entered or exited Goodwin’s subsurface, the approximately 2,900 linear feet the cased wellbore intruded into Goodwin’s property constitutes an actionable trespass.”⁴³

Goodwin then lost his cause of action for subsurface trespass by failing to prove damages. XTO argued generally that Goodwin’s damage model was focused more on the value of the well to XTO rather than the traditional damage model for permanent injury to land.⁴⁴ However, the court of appeals focused more on Goodwin’s expert testimony and held that there was no evidence on damages because the basis of the expert’s opinion was too unreliable.⁴⁵ The expert’s damage model was: (Trespass Feet/Wellbore Feet) x Value of Well = Damages. For the value of the well, the expert used XTO’s valuation forecast in its Securities and Exchange Commission filing. There was no evidence on how XTO arrived at its forecast, so the court found the valuation unreliable.⁴⁶ Further, there was no evidence of actual production from the well, and XTO does not have

33. 268 S.W.3d 1 (Tex. 2008).

34. *Goodwin*, 2017 WL 4675136, at *3.

35. *Id.*

36. *Id.* (quoting *Garza*, 268 S.W.3d at 11).

37. 457 S.W.3d 414, 416 (Tex. 2015).

38. *Goodwin*, 2007 WL 4675136, at *3.

39. 520 S.W.3d 39 (Tex. 2017).

40. 508 S.W.2d 812 (Tex. 1974).

41. *Goodwin*, 2017 WL 4675136, at *3–4 (citing *Lightning*, 520 S.W.3d at 46; *West* 508 S.W.2d at 815)).

42. *Id.* at *4.

43. *Id.*

44. *Id.*

45. *Id.* at *7.

46. *Id.* at *6.

the legal right to transport production through the wellbore without obtaining an easement from Goodwin (apparently Goodwin owns the surface).⁴⁷ Therefore, the well had *no* value.⁴⁸

After losing his trespass claim, Goodwin also lost on bad faith pooling. The court of appeals held that the implied duty to pool in good faith originates with the lease, and if there is no lease, there is no duty.⁴⁹ “Bad faith pooling is the failure of a lessee to act fairly and in good faith as to a lessor.”⁵⁰ “To be liable for bad faith pooling, an operator must have the contractual authority to pool before it can breach the implied duty of fairness and good faith as to non-producing tracts in the exercise of its pooling powers.”⁵¹ Goodwin argued *Wagner & Brown v. Sheppard*⁵² (which held a pooled unit did not expire when a *lease* in the pool expired because the *lands* were pooled) was controlling.⁵³ The court found *Wagner & Brown* did not apply because the lease in that case was in effect at the time the operator created the unit whereas here there was never a valid lease.⁵⁴

XTO counterclaimed to recover \$386,000 it paid to Goodwin as unit royalties on the North Unit.⁵⁵ The producing well was a unit well, not a lease well. Given that Goodwin sought to declare the lease void and that the lease was declared void by the court, XTO contended that Goodwin was contractually bound by implied covenants in the lease and contractual provisions in the division order to return the royalties, or alternatively, Goodwin was equitably bound to return the royalties as money had and received to prevent Goodwin from being unjustly enriched.⁵⁶ There was no evidence as to who would receive the benefit of reimbursement of the royalties Goodwin received, so the court simply presumed XTO would receive the benefit.⁵⁷ The court then relied upon *Gavenda v. Strata* on division orders, which it says holds that operators cannot rely upon division orders to profit from their own errors in preparing division orders.⁵⁸ This is probably a fundamental misunderstanding of *Gavenda*. *Gavenda* holds that the underpaid owner who signed a division order must seek recovery against the overpaid owner, not the operator; but if the overpaid owner is the operator, the division order will not protect the operator from accounting to the underpaid owner for the operator’s share of the overpayment. Goodwin was not an underpaid owner.

47. *Id.*

48. *Id.* at *7.

49. *Id.* at *8.

50. *Id.* (citing Pipe Line Co. v. Tichacek, 997 S.W.2d 166, 170 (Tex. 1999)).

51. *Id.*

52. 282 S.W.3d 419 (Tex. 2008).

53. *Goodwin*, 2017 WL 4675136, at *8.

54. *Id.*

55. *Id.* at *11.

56. *Id.* at *12.

57. *Id.*

58. *Id.* at *11–12 (citing *Gavenda v. Strata Energy, Inc.*, 705 S.W.2d 690, 692 (Tex. 1986)).

The court then conceded that when the lease was voided, Goodwin was not entitled to royalties on the North Unit, and therefore Goodwin “has been unjustly enriched by the receipt of the royalties from that [North Unit well].”⁵⁹ This would seem to justify an equitable recovery by XTO under XTO’s theory of money had and received. However, the court affirmed the windfall to Goodwin based on the defense of voluntary payment. “Money voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered merely because the party at the time of the payment was ignorant of or mistook the law as to his liability.”⁶⁰ The voluntary payment rule upholds the public policy in favor of “protecting the finality of payments,” and the court here relied upon that rule to deny XTO’s counterclaim.⁶¹

The significance of this case is the holding that there is no depth limitation on the surface owner’s rights in the subsurface. The holding as to division orders and payments appears to misinterpret precedent and too severe by limiting the efficacy of division orders through the application of the voluntary payment rule.

C. *VIRTEX OPERATING CO., INC. v. BAUERLE*

*VirTex Operating Co. v. Bauerle*⁶² held that an oil and gas lessee could not install overhead power lines to producing wells under the accommodation doctrine. Bauerle owned the surface estate of an 8,500-acre ranch upon which it ran a commercial hunting business and cattle operation. VirTex acquired an oil and gas lease on the ranch covering about 3,000 acres and drilled nine oil wells. The pump jacks were running on temporary portable generators.⁶³ VirTex proposed drilling forty-five more wells.⁶⁴ VirTex asked Bauerle to grant to VirTex an easement for VirTex to install a gridwork of overhead power lines on the lease to reach the existing and proposed wells. Bauerle refused, insisting that such overhead power lines would substantially impair the airspace of the property, which included use of helicopters for game management and other operations. Hunting leases were the main source of income for the ranch, and the lessee hunters used helicopters for extreme flying, five feet off the ground, to herd the deer into areas where they could be captured with a net gun. Bauerle asked VirTex to halt construction plans, and VirTex agreed. Bauerle then filed a declaratory judgment action against VirTex, seeking judgment that the proposed use would substantially impair

59. *Id.* at *13.

60. *Id.* at *11 (citing *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 768 (Tex. 2005)).

61. *Id.*

62. No. 04-16-00549-CV, 2017 WL 5162546 (Tex. App.—San Antonio Nov. 8, 2017, pet. filed) (mem. op.).

63. *Id.* at *2.

64. *Id.* at *8.

Bauerle's pre-existing use of the surface and the airspace.⁶⁵

The issue was whether the accommodation doctrine prevented VirTex from installing the overhead power lines. Under the accommodation doctrine, if the mineral owner or lessee has only one method for developing and producing minerals, then that method may be used regardless of whether it precludes or substantially impairs the surface estate owner's existing use of the surface.⁶⁶ However, if the mineral owner has reasonable alternative uses of the surface, one of which permits the surface estate owner to continue to use the surface in the manner intended, then the mineral owner must use the alternative method.⁶⁷ The mineral owner's absolute right to use the surface is preserved if there is only one way to produce the minerals.⁶⁸ The accommodation doctrine and the burden of proof is now defined as follows:

[T]he surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use.⁶⁹

In this case, under the first prong of the accommodation doctrine, the San Antonio Court of Appeals examined whether the proposed power line grid would completely preclude or substantially impair leasing to helicopter hunters.⁷⁰ It held that it would.⁷¹ The court found the testimony of the lessee hunter helicopter pilots to be sufficient evidence that the installation of the power lines would create "a very dangerous situation," and that the testimony was legally and factually sufficient to prove the power lines would substantially impair the existing use of helicopters over the airspace of the property.⁷² Further, the court held that the impairment need not actually be in place (no overhead lines were in place) for the impairment to be considered under the accommodation doctrine.⁷³

The second prong of the accommodation doctrine requires an inquiry as to whether any reasonable alternative method exists for Bauerle to continue its existing surface use. The court of appeals found that there

65. *Id.* at *1–2.

66. *Id.* at *4 (quoting *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248–49 (Tex. 2013)).

67. *Id.* (citing *Merriman*, 407 S.W.3d at 248–49).

68. *Id.* (citing *Tex. Genco, L.P. v. Valence Operating Co.*, 187 S.W.3d 121, 121–23 (Tex. App.—Waco 2006, pet. denied)).

69. *Id.* (quoting *Coyote Lake Ranch, LLC v. City of Lubbock*, 498 S.W.3d 53, 62–63 (Tex. 2016)).

70. *Id.* at *5.

71. *Id.* at *7.

72. *Id.* at *5.

73. *Id.* at *6.

was not.⁷⁴ Testimony produced by Bauerle established that the proposed alternatives to helicopters were so inconvenient, expensive, and inadequate so as to make any proposed alternative method (e.g., use of four-wheelers) unreasonable.⁷⁵ In summary, the lessee helicopter hunters testified that installing power lines would make it unsafe to fly, and if they could not fly, they would not lease.⁷⁶ VirTex argued the evidence merely showed other leases would be less economically beneficial to the surface owner. VirTex's argument relied on *Merriman v. XTO Energy Inc.*,⁷⁷ which held that the surface owner could be required to use other corrals and pens to conduct its cattle operations, even though it would be more expensive and inconvenient for the surface owner. The court of appeals in *VirTex* rejected a similar argument by the mineral owner because the helicopter hunters had no reasonable alternative.⁷⁸

The court then turned to whether Bauerle had proven that an alternative, reasonable, customary, and industry-accepted method was available to VirTex to recover the minerals.⁷⁹ The court concluded there was an alternative for VirTex. VirTex presented some evidence that use of natural gas would require an easement across an adjoining tract and that there was no evidence that the easement could be obtained, that gas would cost \$200–\$300 more per well per month, and that burying electric powerlines would be even more expensive.⁸⁰ The court ruled there was “more than a mere scintilla of evidence” that burying the power lines or using natural gas were reasonable, industry-accepted alternative methods that VirTex could use, and that while the available alternative may not be the preferred or most economical method, under the accommodation doctrine, it need only be shown to be a reasonable and industry-accepted alternative.⁸¹

The opinion seems to assume that the “reasonable” industry alternative is a technology question, without any consideration of economics. There is nothing in the opinion aggregating, comparing, or weighing the relative economic consequences for the surface owner and the mineral owner. The accommodation doctrine is not yet fully developed. Is the surface “use” generic or specific? What weight should be given to “first” use? Should there be a cost/benefit balancing test? Moving away from dominant mineral estate to accommodation inevitably means more fact questions.

There was also a procedural point of some significance. VirTex contended that the awarding of attorney's fees to Bauerle under the Uniform

74. *Id.* at *8.

75. *Id.*

76. *Id.* at *7.

77. *Id.* at *8 (citing *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249–50 (Tex. 2013)).

78. *Id.* at *7–8.

79. *Id.* at *8.

80. *Id.* at *9–10.

81. *Id.* at *10.

Declaratory Judgments Act (UDJA) was in error. Under Section 37.009 of the Texas Civil Practice & Remedies Code, “a court may award costs and reasonable and necessary attorney’s fees in a proceeding brought under the UDJA.”⁸² However, a party cannot use the UDJA as a vehicle to obtain otherwise impermissible attorney’s fees.⁸³ VirTex argued that Bauerle’s request for relief was effectively injunctive—as opposed to declaratory—and thus outside the scope of the UDJA. In support, it argued that every other accommodation doctrine case was a case of injunctive relief. However, the court held that, in this case, Bauerle properly requested declaratory relief instead of injunctive relief because VirTex had already voluntarily ceased installation of the power lines. Bauerle correctly sought a declaratory judgment action because there was “an active dispute with regard to their rights and obligations” and there was nothing in the record to suggest Bauerle sought a declaration solely for the purpose of recovering its attorney’s fees.⁸⁴

The significance of the case is limited because it is essentially an evidence case, and perhaps that is why it is a memorandum opinion. It focuses on whether the lessee helicopter hunters have an alternative use, rather than on whether the land can be leased to others for hunting, which could be merely inconvenient or less economically beneficial to the surface owner than the existing *method* of use.⁸⁵ That is, was the “existing use” a hunting lease, or a helicopter hunting lease?

D. WENSKE v. EALY

*Wenske v. Ealy*⁸⁶ held that an outstanding non-participating royalty interest (NPRI) burdened Grantor and Grantee proportionately, because nothing within the four corners of the deed indicated the parties intended that the NPRI would burden only Grantee. Perhaps more importantly, the case strongly restates the Texas Supreme Court’s preference for finding intent without resorting to rules of construction. There was an outstanding 1/4th NPRI burden on the property. In the granting clause of the warranty deed, Grantor conveyed all of the property to Grantee “subject to the Reservations from Conveyance and the Exceptions to Conveyance and Warranty.”⁸⁷ The “Reservations from Conveyance” clause reserved 3/8ths of the minerals to Grantor. The “Exceptions to Conveyance and Warranty” clause expressly identified the outstanding NPRI.⁸⁸ Grantor contended that Grantor’s interest was not burdened by the NPRI. Grantee contended that the NPRI burdened Grantor and Grantee pro-

82. *Id.* at *11 (citing TEX. CIV. PRAC. & REM. CODE ANN. § 37.009 (West 2008)).

83. *Id.* (quoting Tanglewood Homes Ass’n v. Feldman, 436 S.W.3d 48, 69 (Tex. App.—Houston [14th Dist.] 2014, pet. denied)).

84. *Id.*

85. *See, e.g.,* Merriman v. XTO Energy, Inc., 407 S.W.3d 244 (Tex. 2013).

86. 521 S.W.3d 791 (Tex. 2017).

87. *Id.* at 793.

88. *Id.*

portionately.⁸⁹ The issue was whether the “Exceptions to Conveyance and Warranty” clause was merely a limitation on the warranty.⁹⁰

Grantor relied upon *Bass v. Harper*.⁹¹ In *Bass*, there was an outstanding 6/14ths interest, and Grantor conveyed 1/2 of the minerals (7/14ths), subject to the outstanding 6/14ths, which the court held resulted in 1/14th to Grantee.⁹² This case, like *Bass*, centered upon the effect to be given to a subject-to clause. While the supreme court in *Wenske* did not overrule *Bass*, it held that *Bass* is limited to the specific language in the deed at issue in *Bass*.⁹³ “The instrument in question does not relate the outstanding mineral royalty interests to the warranty. It could have done so, but it is tied specifically to the grant.”⁹⁴

The resolution of this case turned largely upon the meaning of the subject-to clause. The principal function of a subject-to clause in a deed is to protect a Grantor against a claim for breach of warranty when some mineral interest is already outstanding. Use of a subject-to clause to perform some other function is likely to introduce an element of ambiguity.⁹⁵ The supreme court cited to an 1880’s case from Pennsylvania as authority for its reasoning on intent. “We think ‘[t]he best construction is that which is made by viewing the subject of the contract as the mass of mankind would view it; for . . . it may be safely assumed that such was the aspect in which the parties themselves viewed it.’”⁹⁶ Perhaps the court could have cited William of Ockham’s razor: when presented with competing hypothetical answers to a problem, one should select the one that makes the fewest assumptions.⁹⁷ Apparently we need not examine the entire “mass of mankind,” because the supreme court also said “[t]he principles of oil-and-gas law inform our interpretation. Generally, ‘the conveyance of an interest in the minerals in place carries with it by operation of law the right to a corresponding interest in the royalty.’”⁹⁸ Giving the deed’s words their plain meaning, the supreme court could not “construe [the deed] to say the parties intended the [Grantee’s] interest to be the *sole* interest subject to the NPRI.”⁹⁹

The supreme court obviously intends this opinion to be important in articulating how intent is to be determined. The supreme court acknowledges the trend of its decisions to reject rigid, mechanical rules of deed construction, and to rely upon four-corners deed construction to ascertain

89. *Id.* at 793–94.

90. *Id.* at 797.

91. 441 S.W.2d 825 (Tex. 1969).

92. *Wenske*, 521 S.W.3d at 794.

93. *Id.* at 795.

94. *Id.* (quoting *Bass*, 441 S.W.2d at 827).

95. *Id.* at 796.

96. *Id.* at 797 (quoting *Dunham v. Kirkpatrick*, 101 Pa. 36, 43 (1882) (citation omitted)).

97. The razor is widely attributed to the Franciscan friar, William of Ockham, who lived in the 14th Century.

98. *Id.* (quoting *Woods v. Sims*, 273 S.W.2d 617, 621 (Tex. 1954)).

99. *Id.*

the intent of the parties. The supreme court repeatedly states that it rejects rules of construction, “magic words,” and giving primacy to particular clauses.¹⁰⁰ The supreme court also expressly stated that its decision in this case should not be construed as establishing a new default rule that conveyances subject to an outstanding NPRI will result in the NPRI being borne proportionately.¹⁰¹ The supreme court recited that its decision “does not vitiate the established background principles of oil-and-gas law nor does it open for debate the meaning of clearly defined terms in every deed dispute.”¹⁰² The supreme court suggested that “[g]oing forward, drafters of deeds should endeavor to plainly express the contracting parties’ intent within the four corners of the instrument they execute.”¹⁰³ The supreme court said “[t]he deed here is not a model of clarity. But read in its entirety, we see only one reasonable interpretation of its words.”¹⁰⁴

Nevertheless, this 5–4 decision prompted a strong dissent. The dissent contended the interest granted to [Grantee] was the only interest that was “subject to” the exception for [the NPRI] interest.¹⁰⁵ The interest conveyed was the only interest made “subject to” anything, and it was made subject to the NPRI, not 5/8ths of the NPRI.¹⁰⁶ The supreme court should not have used its “own intuition of what the parties probably meant—which of course will usually correspond to our own views of what the parties *should* have meant.”¹⁰⁷

The dissent also pushes back on abandoning all rules of interpretation. “[W]hen this court adopts a rule of interpretation, parties who draft agreements will reasonably rely on that rule when deciding how to express their intent. Our decisions can imbue words with ‘magic,’ and drafters rely on that talismanic power to create certainty in their instruments.”¹⁰⁸ The dissent then cited and discussed in detail *Duhig* and its progeny as authority for construing the deed for Grantor.¹⁰⁹ The dissent found *Bass* to be helpful, if not controlling.¹¹⁰

The significance of this case is the holding that, although the intent of the parties—rather than mechanical rules or “magic words”—governs an unambiguous conveyance, a subject-to clause is generally intended to limit the warranty and will not be construed to do more, unless clearly expressed in the deed. However, the supreme court should not use its

100. *Id.* at 792, 794, 795, 796, 797, 798.

101. *Id.* at 798.

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.* at 801 (Boyd, J., dissenting).

106. *Id.* at 803.

107. *Id.*

108. *Id.* at 803–04.

109. *Id.* at 807–16 (citing *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. 1940); *Benge v. Scharbauer*, 259 S.W.2d 166 (Tex. 1953); *Pich v. Lankford*, 302 S.W.2d 645 (1957); *Selman v. Bristow*, 406 S.W.2d 896 (Tex. 1966); *Bass v. Harper*, 441 S.W.2d 825 (Tex. 1969)).

110. *Id.* at 816.

“own intuition of what the parties probably meant—which of course will usually correspond to our own views of what the parties *should* have meant. . . .”

III. LEASE AND LEASING ISSUES¹¹¹

A. *BP AMERICA PRODUCTION CO. v. LADDEX, LTD.*

*BP America Production Co. v. Laddex, Ltd.*¹¹² held that the trial court erred in submitting a jury charge question that limited the jury’s consideration to a specific period of time in determining whether a mineral lease had ceased to produce in paying quantities. BP America Production Company (BP) was the lessee of a 1971 base lease in Roberts County, Texas. The only well on the lease produced steadily beyond the expiration of its five-year primary term until August 2005, when production slowed significantly for fifteen months. In November 2006, the well returned to pre-slowdown levels. In March 2007, the lessors signed a top lease with Laddex, Ltd. (Laddex). The top lease provided that it would vest upon the filing of releases by all existing lease owners or the entry of a final, non-appealable judgment of lease termination. Laddex then sued BP, seeking to terminate BP’s lease on the grounds that it had failed to produce in paying quantities in 2005 and 2006.¹¹³

In *Clifton v. Koontz*,¹¹⁴ the Texas Supreme Court set forth a two-prong test to determine if a well is producing in paying quantities: (1) whether the well pays a profit, even small, over operating expenses; and (2) if not, whether, under all the relevant circumstances a reasonably prudent operator would, for the purpose of making a profit and not merely for speculation, continue to operate the well as it had been operated.¹¹⁵ In *Laddex*, the jury charge posed two questions for each prong of the *Clifton v. Koontz* test, but the first question limited the jury’s consideration to the fifteen-month period of slowed production.¹¹⁶ The jury found that BP’s well failed to produce in paying quantities during the fifteen month pe-

111. Other cases dealing with lease and leasing issues include the following: *Richardson v. Mills*, 514 S.W.3d 406 (Tex. App.—Tyler 2017, pet. denied) (construction of a release of oil and gas lease); *Burlington Res. Oil & Gas Co. v. Texas Crude Energy, LLC*, 516 S.W.3d 638 (Tex. App.—Corpus Christi 2017, pet. granted) (post-production costs on overriding royalty); *ConocoPhillips Co. v. Ramirez*, 534 S.W.3d 490 (Tex. App.—San Antonio 2017, pet. filed) (conveyance and leasing of contingent remainder interests); *Mzyk v. Murphy Expl. & Prod. Co.-USA*, No. 04-15-00677-CV, 2017 WL 2797479 (Tex. App.—San Antonio June 28, 2017, no pet.) (mem. op.) (offset well obligation); *Hardin-Simmons Univ. v. Hunt Cimarron Ltd.*, No. 07-15-00303-CV, 2017 WL 3197920 (Tex. App.—Amarillo July 25, 2017, pet. filed) (mem. op.) (Pugh clause and retained acreage clause); *Spellmann v. Love*, 534 S.W.3d 685 (Tex. App.—Corpus Christi 2017, pet. denied) (termination of term NPRI); *Apache Deepwater, LLC v. Double Eagle Dev., LLC*, No. 08-16-00038-CV, 2017 WL 3614298 (Tex. App.—El Paso Aug. 23, 2017, pet. filed) (retained acreage clause).

112. 513 S.W.3d 476 (Tex. 2017).

113. *Id.* at 478.

114. 325 S.W.2d 684 (1959).

115. *Id.* at 691.

116. *Laddex*, 513 S.W.3d at 482–83 (The jury was asked “From August 1, 2005 to October 31, 2006, did the Mahler D-2 Well fail to produce in paying quantities?”).

riod and that a reasonably prudent operator would not have continued to operate the well as it had been operated before.¹¹⁷ Based on these findings, the trial court entered judgment for Laddex, declaring BP's lease terminated.¹¹⁸ The issues were whether Laddex had standing to sue and whether the charge was properly submitted.¹¹⁹

BP's standing argument was based on BP's contention that Laddex's top lease was void as a perpetuity, which deprived Laddex of standing to bring the lawsuit and the trial court of subject matter jurisdiction.¹²⁰ The rule provides that "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance," and "it is void if by any possible contingency the grant or devise could violate the Rule."¹²¹ The Laddex top lease stated: "This Lease is intended to and does include and vest in Lessee any and all remainder and reversionary interest and after-acquired title of Lessor in the Leased Premises upon expiration of any prior oil, gas or mineral lease"¹²² BP argued that this language delayed the vesting of a reversionary interest in Laddex until the date the BP lease expired, which could fall beyond the time allowed by the rule against perpetuities. Conversely, Laddex argued that the language presently vested in Laddex the lessor's possibility of reverter.¹²³

Noting that the Laddex top lease "is not a model of clarity,"¹²⁴ the Texas Supreme Court concluded that the interpretations of both sides were plausible.¹²⁵ Because both interpretations were plausible, the supreme court accepted Laddex's interpretation, invoking the rule of construction that "where an instrument is equally open to two constructions, the one will be accepted which renders it valid rather than void, it being assumed that a Grantor would intend to create a legal instrument rather than one which is illegal."¹²⁶

The supreme court then turned to the production in paying quantities issue and the jury charge's limitation of time to the fifteen months of slowed production. The supreme court noted that in *Clifton*, it emphasized that "there can be no limit as to the time, whether it be days, weeks, or months, to be taken into consideration in determining the question of whether paying production from the lease has ceased."¹²⁷ Thus, the supreme court held that, while the parties may argue time in relation to production in paying quantities, "the *charge* may not ask or instruct the

117. *Id.* at 483–84.

118. *Id.* at 484.

119. *Id.* at 479.

120. *Id.*

121. *Id.* at 479–80 (quoting *Peveto v. Starkey*, 645 S.W.2d 770, 772 (Tex. 1982)).

122. *Id.* at 481.

123. *Id.*

124. *Id.*

125. *Id.* at 482.

126. *Id.* (quoting *Kelly v. Womack*, 268 S.W.2d 903, 906 (Tex. 1954)).

127. *Id.* (quoting *Clifton v. Koontz*, 325 S.W.2d 684, 690 (1959)).

jury about a specific period without unduly influencing the jury.”¹²⁸ Therefore, the supreme court held that the jury charge did not permit the jury to act as fact-finder.¹²⁹ Because both BP and Laddex presented evidence about the well’s production and profitability that could have supported a verdict in either BP’s or Laddex’s favor, remand was appropriate.¹³⁰

This case confirms that although the parties are free to present evidence and argue what is a reasonable period of time for determining production in paying quantities, the trial court cannot define that period of time in the charge without unduly influencing the jury.

B. *BP AMERICA PRODUCTION CO. v. RED DEER RESOURCES, LLC*

*BP America Production Co. v. Red Deer Resources, LLC*¹³¹ held that the critical date for determining whether a well was capable of producing in paying quantities under a shut-in royalty clause was the last day gas was sold or used. BP owned an oil and gas lease in the secondary term held by a single, sporadically producing, marginal gas well. Red Deer top leased BP. June 4 was the last day gas was sold or used. On June 12, BP shut in the well. On June 13, BP sent notice to the lessors that it was invoking the shut-in royalty clause, enclosing shut-in royalty checks, and designating June 13 as the beginning of the shut-in period.¹³² The shut-in royalty clause provided:

Where gas from any well or wells capable of producing gas . . . is not sold or used during or after the primary term and this lease is not otherwise maintained in effect, lessee may pay or tender as shut-in royalty . . . , payable annually on or before the end of each twelve month period during which such gas is not sold or used and this lease is not otherwise maintained in force, and if such shut-in royalty is so paid or tendered and while lessee’s right to pay or tender same is accruing, it shall be considered that gas is being produced in paying quantities, and this lease shall remain in force during each twelve-month period for which shut-in royalty is so paid or tendered.”¹³³

Red Deer sued BP for lease termination. The question submitted to the jury was as follows: “Was the Vera Murray #11 well incapable of producing in paying quantities when it was shut-in on June 13, 2012?”¹³⁴ The jury answered “yes” and judgment was entered terminating BP’s lease.¹³⁵

It was undisputed that the sixty-day cessation-of-production clause did not apply. Therefore, the shut-in royalty clause was the only savings

128. *Id.* at 486.

129. *Id.*

130. *Id.* at 486–87.

131. 526 S.W.3d 389 (Tex. 2017).

132. *Id.* at 392.

133. *Id.*

134. *Id.* at 393.

135. *Id.*

clause that applied.¹³⁶ The principal issue on appeal was to determine the correct date to be used when determining whether or not the gas well was capable of producing in paying quantities.¹³⁷ This specific shut-in royalty clause required that the well be “capable of producing gas”¹³⁸ and “[i]n many cases, [complying with the terms of the lease] means ‘it must be capable of producing gas in paying quantities at the time it is shut-in.’”¹³⁹ BP and Red Deer disputed the proper measuring date, but both appeared to be focused on defining when the well was shut-in. The Texas Supreme Court held that the critical measuring date was not the shut-in date, but, as the plain language of the lease specified, the last date gas was “sold or used.”¹⁴⁰

That date was June 4, but the charge as submitted inquired as to June 13—the day after the day the well was shut-in. Thus, Red Deer failed to obtain a finding that the well was incapable of production in paying quantities on June 4.¹⁴¹ “Thus, Red Deer never obtained a finding that the lease failed to produce in paying quantities before constructive production took effect.”¹⁴² The jury’s answer to the question submitted could not support a judgment terminating BP’s lease.¹⁴³

BP did not preserve error by adequately raising this issue during the charge conference, but preserved error on immateriality in post-verdict motions. The supreme court held that the jury’s answer to the question was immaterial and “[a] party need not object to an immaterial question that should not have been submitted or cannot support a judgment to preserve error.”¹⁴⁴

The shut-in royalty clause considered in the *Tracker* case was almost identical to the clause considered in this case, and the supreme court cited *Tracker* with approval several times.¹⁴⁵ However, *Tracker* concluded that the measuring date was the time the well was shut-in. The supreme court held that *Tracker* was distinguishable, but it appears that, on this point, *Tracker* was virtually overruled.¹⁴⁶ The definition of the phrase “capable of production in paying quantities” laid out in *Tracker* was adopted in *Anadarko Petroleum Corp. v. Thompson*¹⁴⁷ in the context of the habendum clause, and thus the supreme court in *Anadarko* did not need to determine the measuring date in the shut-in context.¹⁴⁸

136. *Id.* at 392.

137. *Id.* at 397.

138. *Id.* at 392.

139. *Id.* at 395 (quoting *Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc.*, 861 S.W.2d 427, 432–33 (Tex. App.—Amarillo, 1993, no writ)).

140. *Id.* at 397–98.

141. *Id.* at 398.

142. *Id.* at 401.

143. *Id.*

144. *Id.* at 402.

145. *See Hydrocarbon Mgmt., Inc. v. Tracker Expl., Inc.*, 861 S.W.2d 427, 431 (Tex. App.—Amarillo 1993, no writ).

146. *Red Deer Res.*, 526 S.W.3d at 398–401.

147. 94 S.W.3d 550, 558 (Tex. 2002).

148. *Red Deer Res.*, 526 S.W.3d at 398.

The *Anadarko* case, in addressing production in paying quantities, describes the applicable test as whether the well will begin flowing, without additional equipment or repair, when it is turned “on.”¹⁴⁹ In *Red Deer Resources*, the supreme court adds “[t]his determination of course, must be made over a reasonable period of time under the circumstances.”¹⁵⁰ This appears to be an intentional expansion of the relevant time from a mere moment to a reasonable period of time, because the supreme court cited to the same cases and the same pages previously cited one page earlier in the opinion for the concept that profitability is to be measured over a reasonable period of time.¹⁵¹ The supreme court was considering *Laddex* at the same time it was deciding this case, which suggests that the question or the accompanying instructions in this case should have made reference to a reasonable period of time for determining the profitability element of production in paying quantities.

Finally, the supreme court considered the import of a retroactive shut-in royalty clause and appears to have given it the same effect as the industry would probably expect.¹⁵² Once the measuring date is correctly determined, a one-year clock begins to run and, if a shut-in is tendered during that one-year window, the lease will be preserved.¹⁵³ “A retroactive shut-in clause, like the one here, allows the producer to shut in a well up to twelve months after production has ceased, with constructive production relating back to the date the last gas was sold or used.”¹⁵⁴

The case is a contract construction case, but it is significant because it construes a very common form of shut-in royalty clause. It reviews the special issue to be submitted, and the opinion seems to suggest that production in paying quantities does not mean literally on the measuring date, but may be further qualified by a reasonable period of time under the circumstances. That is, profitability may not turn on the exact minute a well is shut-in or on the last gas actually sold, but by reference to a reasonable period of time.

C. *TEXAS OUTFITTERS LTD. v. NICHOLSON*

*Texas Outfitters Ltd. v. Nicholson*¹⁵⁵ held that the executive rights owner breached its duty of utmost good faith and fair dealing to the non-executive owner by refusing to lease. The Carter family (Carter) owned the surface and 50% of the mineral rights in the Derby Ranch in Frio County, Texas. In 2002, Texas Outfitters Limited, LLC (Texas Outfitters) purchased the surface, the executive rights to the Carter mineral estate, and a 4.16% royalty interest in the Derby Ranch for \$1.0 million. Carter

149. *Anadarko Petroleum*, 94 S.W.3d at 558.

150. *Red Deer Res.*, 526 S.W.3d at 395 (citing *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 487 (Tex. 2017); *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959)).

151. *Id.* at 394.

152. *See id.* at 398.

153. *Id.*

154. *Id.*

155. 534 S.W.3d 65 (Tex. App.—San Antonio 2017, pet. granted).

partially owner-financed the sale. In March 2010, Texas Outfitters rejected an offer to lease with a 22% royalty and a \$450 per-acre bonus. In June 2010, Texas Outfitters rejected an offer to lease with a 25% royalty and \$1,750 per-acre bonus. The owner of the other half of the mineral estate accepted that offer. According to Carter, the Texas Outfitters owner said “‘there would be no lease’ because he wanted to protect his hunting business, which he had developed into a deer breeding operation.”¹⁵⁶

According to Carter, Carter believed an agreement was then reached where Carter would forgive \$263,000 on the note if Texas Outfitters would execute the June 2010 mineral lease. According to Texas Outfitters, Carter tried to buy back their executive rights in exchange for forgiving part of the note, but Texas Outfitters wanted Carter to include surface protection provisions in the executive-rights deed, which Carter refused to do. After two more offers of settlement, including an offer by Texas Outfitters to sell back the ranch and mineral interests to Carter for \$4.2 million, negotiations failed.¹⁵⁷ Carter sued Texas Outfitters alleging it breached its duty of utmost good faith and fair dealing by refusing to lease. After Carter filed suit, Texas Outfitters received two more lease offers, and then Texas Outfitters sold the surface and executive rights to a third party for \$4.5 million.¹⁵⁸ “Following a bench trial, the trial court awarded \$867,654 in damages to the Carters.”¹⁵⁹ There is nothing in the opinion as to the calculation or amount of the damages (although it appears to equal the lost bonus on the June 2010 offer to lease), so the only issue on appeal was the sufficiency of the evidence on breach of duty.

The San Antonio Court of Appeals reviewed Texas jurisprudence regarding the executive owner’s duty to the non-executive. The executive’s duty of good faith and fair dealing does not require the executive to “grant priority to the non-executive’s interests.”¹⁶⁰ When executing a lease, the executive breaches its duty by “engag[ing] in acts of self-dealing that unfairly diminish[] the value of the non-executive interest.”¹⁶¹ Although an executive who refuses to lease generally will not exact a benefit for itself that it will not acquire for the non-executive, the executive can still breach its duty by refusing to lease.¹⁶² “An executive can breach its duty to lease ‘[i]f the refusal is arbitrary or motivated by self-interest to the non-executive’s detriment,’” even though the executive usually gets the same benefit as the non-executive.¹⁶³

The court of appeals held that the evidence supported the lower court’s finding that Texas Outfitters breached its duty to Carter by refusing to

156. *Id.* at 69.

157. *Id.* at 69–70.

158. *Id.* at 70.

159. *Id.*

160. *Id.* at 71 (quoting *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 81 (Tex. 2015)).

161. *Id.* (quoting *KCM Fin. LLC*, 457 S.W.3d at 82).

162. *Id.* (citing *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 491 (Tex. 2011)).

163. *Id.* (quoting *Lesley*, 352 S.W.3d at 491).

execute a lease to protect its pre-existing use of the surface.¹⁶⁴ The court rejected Texas Outfitters' argument that it merely sought reasonable surface protections by pointing out that all of the settlement proposals required Carter to convey a portion of their royalty interest, reduce the note by \$263,000, or accept deed restrictions that would have interfered with future leases.¹⁶⁵ Therefore, Texas Outfitters tried to protect its existing surface use with restrictions that would likely preclude a mineral lease. Further, the court was not persuaded by Texas Outfitters' argument that it refused the leases to obtain higher bonuses that would also benefit Carter. There was reasonable contrary evidence Texas Outfitters never planned to lease the minerals and its actual motive was to exact a benefit from Carter to Carter's detriment by diminishing Carter's royalty interest, exacting a \$263,000 reduction in the note, or by selling its mineral interests back to Carter.¹⁶⁶

The holding—that an executive rights owner can breach its duty of utmost good faith and fair dealing to the non-executive owner by refusing to lease the minerals if the evidence shows that the refusal was arbitrary or motivated by self-interest to the non-executive's detriment—follows recently established precedent. The significance of the case is that it provides an example of the facts that may support liability.

IV. INDUSTRY CONTRACTS¹⁶⁷

A. *CARRIZO OIL & GAS, INC. v. BARROW-SHAVER RESOURCES CO.*

*Carrizo Oil & Gas, Inc. v. Barrow-Shaver Resources Co.*¹⁶⁸ held that “express written consent” to assign under a farmout agreement meant “sole and absolute discretion” consent. Carrizo (Farmor) owned an oil and gas lease and entered into farmout negotiations with BSR (Farmee) to drill on the lease.¹⁶⁹ An initial draft agreement's consent-to-assign provision stated that Farmee could not assign its rights without Farmor's consent, which “shall not be unreasonably withheld.”¹⁷⁰ After four drafts of

164. *Id.* at 79.

165. *Id.* at 78.

166. *Id.*

167. Other cases dealing with industry contracts include the following: *Westport Oil & Gas Co., L.P. v. Mecom*, 514 S.W.3d 247 (Tex. App.—San Antonio 2016, no. pet.) (lease royalty clause and gas purchase agreement); *Talisman Energy USA, Inc. v. Matrix Petroleum, LLC*, No. 04-15-00791-CV, 2016 WL 7379254 (Tex. App.—San Antonio Dec. 21, 2016, no. pet.) (mem. op.) (joint operating agreement and consent to drill); *Chambers v. San Augustine Cty. Appraisal Dist.*, 514 S.W.3d 420 (Tex. App.—Tyler 2017, no. pet.) (pooling as a cross-conveyance); *Noble Energy, Inc. v. ConocoPhillips Co.*, 532 S.W.3d 771 (Tex. 2017) (executory contracts in bankruptcy); *Freeman v. Harleton Oil & Gas, Inc.*, 528 S.W.3d 708 (Tex. App.—Texarkana 2017, pet. filed) (recovery for overpayment under letter agreement); *Chieftain Expl. Co., Inc. v. Gastar Expl. Inc.*, No. 10-15-00037-CV, 2017 WL 3860357 (Tex. App.—Waco Aug. 30, 2017, pet. filed) (mem. op.) (pooling of NPRI); *Le-Norman Operating LLC v. Chalker Energy Partners III, LLC*, 547 S.W.3d 27 (Tex. App.—Houston [1st Dist.] 2017, pet. filed) (PSA, data room, and electronic transactions).

168. 516 S.W.3d 89 (Tex. App.—Tyler 2017, pet. filed).

169. *Id.* at 93.

170. *Id.*

the agreement, the final draft deleted this language and provided that it could not be assigned “without the express written consent of [Farmor].”¹⁷¹ This provision was clearly negotiated. Farmor’s representative said that Farmor’s legal counsel insisted on deleting “which shall not be unreasonably withheld,” but on three separate occasions Farmor’s representative said Farmor would, in fact, consent. Farmee spent \$22,000,000 drilling with no results, and then found a buyer for \$28,000,000. Farmor refused consent unless Farmee paid Farmor \$5,000,000. Farmee refused, lost the sale, and sued Farmor for \$28,000,000 based on breach of contract and fraud.¹⁷² At trial, Farmor contended that the evidence on the prior negotiations was admissible, that the contract was unambiguous, and that the court should rule for Farmor as a matter of law. The trial court held the prior negotiations were inadmissible, admitted Farmee’s expert testimony that under custom and practice in the industry “which shall not be unreasonably withheld” was implied in “without consent,” and submitted the case to a jury. Based on the verdict for Farmee, the court entered judgment for Farmee in the amount of \$28,000,000.¹⁷³

Whether Farmor breached the contract hinged on the level of discretion the agreement gave Farmor to withhold consent. Farmee argued that because there was no express qualifier on “consent,” the final agreement was silent as to the type of consent Farmor could exercise.¹⁷⁴ Farmee argued that Farmor breached the contract by unreasonably withholding consent, which contradicted industry custom requiring that consent be reasonably granted. Farmor contended that the prior drafts established unfettered discretion for Farmor to withhold consent.¹⁷⁵

The Tyler Court of Appeals stated that it “may consider the facts and circumstances surrounding a contract, including . . . objectively determinable factors that give context to the parties’ transaction.”¹⁷⁶ The court reasoned that negotiations resulting in the deletion of the “unreasonably withheld” language gave the agreement more context and were not barred from admissibility by the parol evidence rule.¹⁷⁷ “We hold that the consent-to-assignment provision of the farmout agreement was not silent when we are informed by its surrounding circumstances. The agreement gave [Farmor] an unqualified right to refuse [Farmee’s] proposed assignment.”¹⁷⁸ This also meant that the unambiguous provision should have been construed by the court as a matter of law.¹⁷⁹ The judgment was reversed and rendered that Farmee take nothing.¹⁸⁰

171. *Id.*

172. *Id.*

173. *Id.* at 94.

174. *Id.* at 96.

175. *Id.*

176. *Id.* at 95–96.

177. *Id.* at 96.

178. *Id.* at 97.

179. *Id.*

180. *Id.* at 98.

The opinion is silent as to whether “consent” could ever equal unqualified consent or sole and absolute discretion consent. Rather, it expressly turns on the parol evidence that this provision was not “silent,” but “informed by its surrounding circumstances.” The opinion is also silent as to whether the farmout agreement (which was only a few pages long) did, or did not, include an entirety clause.

The court of appeals then considered whether Farmor committed fraud by withholding consent after orally promising Farmee that it would not unreasonably withhold consent. One of the elements of fraud is justifiable reliance.¹⁸¹ The court held that Farmee’s “reliance is of no consequence in light of the unambiguous term in the written contract that directly contradicts the oral representation.”¹⁸² Farmee did not reasonably rely on Farmor’s promise because “[a] written contract vitiates any reliance on oral promises.”¹⁸³

The significance of the case is the holding that earlier drafts of a consent-to-assign provision are relevant to and admissible in determining the scope of the final version of the consent-to-assign provision included in the agreement. The case suggests that the word “consent” is not clear, and therefore custom in the industry and prior negotiations may supply the parties’ intent.

B. *SAMSON EXPLORATION, LLC v. T.S. REED PROPERTIES, INC.*

*Samson Exploration, LLC v. T.S. Reed Properties, Inc.*¹⁸⁴ held that an operator who formed two overlapping pooled units was obligated to pay royalties to all pooled royalty owners out of the working interest share of production in accordance with two separate contractual obligations. Greatly simplified and modified, this case involved two pooled units. Samson Exploration, LLC (Operator) was the operator for both units. Operator drilled the DuJay #2 Well on the DuJay Lease, which produced from a depth of 13,150 ft. to 13,176 ft. subsurface. Unit #2, as designated for the DuJay #2 Well, included the DuJay Lease below 12,400 ft.¹⁸⁵ Operator then drilled the DuJay #3 Well, also on the DuJay Lease, which produced from 12,197 ft. to 12,342 ft., and was therefore above Unit #2. Unit #3, as designated for the DuJay #3 Well, included the DuJay Lease and also the Reed Lease. Unit #3 was intended to cover the interval from 12,000 ft. down to 12,400 ft., but, by mistake, the unit designation included all depths below 12,000 ft. Thus, the DuJay #2 Well was included in both units. Operator never amended the unit designation for Unit #3 to correct the alleged error. Operator paid the full royalty share to DuJay and no royalties to Reed from the DuJay #2 Well. Reed contended that Reed was entitled to a pooled royalty interest in production from the

181. *Id.* at 97.

182. *Id.* at 98.

183. *Id.*

184. 521 S.W.3d 766 (Tex. 2017).

185. *Id.* at 771.

DuJay #2 Well.¹⁸⁶ Reed, who only owned half of the minerals in the tract covered by the Reed Lease, also contended that the proportionate reduction clause in the Reed Lease did not operate to proportionally reduce Reed's royalty.¹⁸⁷

Operator generally argued that (1) pooling effects a cross-conveyance of title; (2) a pooled unit is not valid unless title is cross-conveyed; and (3) title cannot be conveyed twice.¹⁸⁸

In Texas, the cross-conveyance theory originated as a theory of contractual intent in the context of joint or community leases. Though we have never expressly considered whether cross-conveyance of title may be contractually disclaimed, we have observed that mineral owners may "protect [] their estates by express stipulation." Under the law in Texas, pooling implicates both contract and property law—authority to pool emanates from contract but pooling agreements give rise to interests in realty. The cross-conveyance theory of title can be critical, even "outcome determinative" as to some issues, such as venue¹⁸⁹

The Texas Supreme Court chose to avoid discussing further the cross-conveyance theory of title in pooling, and held that there is "no impediment to enforcing [Operator's] obligations in this case under a contract theory even if the pooling designation failed to effect a conveyance of title."¹⁹⁰ The fact that there is an overlap did not excuse Operator from paying royalties as a matter of contract. The supreme court avoided the issue of cross-conveyance in pooling by focusing on the contract theory of pooling.¹⁹¹ The opinion seems to ignore Operator's argument. Other cases hold that the pooling clause is strictly construed and that an attempted pooling is void, if it is not accomplished in accordance with the pooling clause. DuJay's interest in Unit #2 royalties will apparently not be reduced, so what interest was pooled?

Operator asserted the contractual defense of quasi-estoppel, a doctrine which "applies when it would be unconscionable to allow a person to maintain a position inconsistent with one to which he acquiesced, or from which he accepted a benefit."¹⁹² Operator provided evidence that Reed accepted royalties that included only the DuJay Well #3 for years. However, "accepting an underpayment is not inconsistent with claiming an entitlement to more," and nothing suggested they "were accepting the royalty payments on the third well in lieu of royalty payments on both the second and the third."¹⁹³

186. *Id.* at 772.

187. *Id.* at 786.

188. *Id.* at 770, 775.

189. *Id.* at 777–78 (citations omitted).

190. *Id.* at 777 (citing TEX. PROP. CODE § 5.002 (West 2014); *Hoover v. Wukasch*, 254 S.W.2d 507 (Tex. 1953)).

191. *Id.* at 778.

192. *Id.* at 778 (citing *Lopez v. Munoz, Hockema & Reed, L.L.P.*, 22 S.W.3d 857, 864 (Tex. 2000)).

193. *Id.*

Operator asserted the contractual defense of a scrivener's error to reform the unit based on mutual mistake.¹⁹⁴ "Mutual mistake . . . requires evidence showing both parties were acting under the same misunderstanding regarding the same material fact."¹⁹⁵ However, the error of overlapping depths was solely the mistake of Operator and Reed played no role in that matter.¹⁹⁶

Reed argued the damages awarded for breach of contract were erroneously reduced based on the proportionate reduction clause in the Reed Lease.¹⁹⁷ The granting clause of the Reed Lease stated "Lessor . . . hereby leases exclusively to Lessee . . . all that certain land situated in Jefferson County, Texas, and described in Exhibit A hereto which land is herein sometimes referred to as 'the land,' 'said land,' or 'the leased premises.'"¹⁹⁸ Exhibit A to the Reed Lease described multiple tracts and the net mineral acres owned by Reed in the tract described, including the tract later included in Unit #3. The proportionate reduction clause in the Reed Lease authorized a reduction if the lease "covers a less interest in the oil and gas in all or any part of the leased premises than the entire undivided fee simple estate."¹⁹⁹ Reed argued the term "the leased premises" referred to Reed's net mineral acreage and not the tract described. Operator interpreted the lease to cover an undivided 50% interest in the minerals, while Reed interpreted the lease to cover an undivided 100% interest in the net mineral acres.²⁰⁰ "The dispositive question here is whether the Reed lease 'covers a less interest in the oil and gas in all or any part of the leased premises than the entire undivided fee simple estate.'"²⁰¹ The supreme court found that the purpose of Exhibit A was to "describe," which "is to outline its boundaries so that it may be located on the ground, and not to define the estate conveyed therein."²⁰² Based on the lease's use of "leased premises," the supreme court found the proportionate reduction clause was applied correctly and operated how it ordinarily operates.²⁰³

Operator claimed it had a right to receive reimbursement from the other Unit #2 royalty owners (DuJay) for its double payment of royalties, because paying double has the practical effect of enlarging Unit #2.²⁰⁴ The Beaumont Court of Appeals found that the voluntary payment rule prevented Operator from receiving reimbursement for its double payment, because "[m]oney voluntarily paid on a claim of right, with full

194. *Id.* at 779.

195. *Id.* (citing *Smith-Gilbard v. Perry*, 332 S.W.3d 709, 713 (Tex. App.—Dallas 2011, no pet.)).

196. *Id.*

197. *Id.* at 786.

198. *Id.* at 788.

199. *Id.* at 787.

200. *Id.* at 789.

201. *Id.* at 788.

202. *Id.* at 789 (quoting *Averyt v. Grande, Inc.*, 717 S.W.2d 891, 894 (Tex. 1986)).

203. *Id.* at 790–91.

204. *Id.* at 779.

knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant or mistook the law as to his liability.”²⁰⁵ Without further discussion of the voluntary payment rule, the Texas Supreme Court affirmed the holding because Operator created the overlapping units on its own, never amended the units, never alleged acts of fraud, and never alleged it was under duress or was compelled to pay royalties.²⁰⁶ In summary, the supreme court ignored whatever argument Operator was trying to make and just went with “you paid, you lose.”

Although the supreme court avoided directly considering the cross-conveyance theory of pooling, it clearly held that pooling liabilities may be based on contract, not title, and operators are free to obligate themselves to pay under royalty provisions that are inconsistent or increase the operator’s liability. Although division orders were not an issue in this case and perhaps Operator had no real theory for reimbursement, the continuing trend to allocate all payment risk to operators under the “voluntary payment rule” threatens to destroy the efficacy of division orders and the division order statute.

V. LITIGATION ISSUES²⁰⁷

A. *CRAWFORD v. XTO ENERGY, INC.*

*Crawford v. XTO Energy, Inc.*²⁰⁸ held that Rule 39 does not require joinder of interested parties if the only evidence of a dispute is a title opinion. Mary Ruth Crawford owned 146 acres of land in Tarrant County, Texas. In 1964, Mary Ruth conveyed 8.235 acres of the surface (Crawford Tract) reserving the oil and gas. In 1984, Mary Ruth conveyed property north and south of the Crawford Tract without reservation. Those tracts were eventually subdivided into forty-four lots adjacent to the Crawford Tract. In 2007, Mary Ruth granted an oil-and-gas lease with a pooling clause on the Crawford Tract to XTO Energy, Inc. In 2009, XTO pooled the Crawford lease with leases on the forty-four lots adjacent to the Crawford Tract and other lands and leases. Each of the adjoining pooled lot leases included a Mother Hubbard clause. In 2010, XTO commenced

205. *Id.* (citing *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 768 (Tex. 2005)).

206. *Id.* at 780.

207. Other cases dealing with litigation issues include the following: *Radcliffe v. Tidal Petroleum, Inc.*, 521 S.W.3d 375 (Tex. App.—San Antonio 2017, pet. denied) (evidence in trespass to try title and bad faith trespass); *Great N. Energy, Inc. v. Circle Ridge Prod., Inc.*, 528 S.W.3d 644 (Tex. App.—Texarkana 2017, pet. denied) (trespass to try title); *Jenkins v. Jenkins*, 522 S.W.3d 771 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (trespass to try title); *Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605 (Tex. 2017) (limitations on claims for nuisance); *Boerschig v. Trans-Pecos Pipeline, L.L.C.*, 872 F.3d 701 (5th Cir. 2017) (pipeline condemnation and due process); *Fitzgerald v. Cadle Co.*, No. 12-16-00338-CV, 2017 WL 4675513 (Tex. App.—Tyler Oct. 18, 2017, no pet.) (mem. op.) (royalty from homestead exempt from turnover); *Hardaway v. Nixon*, 544 S.W.3d 402 (Tex. App.—San Antonio 2017, pet. filed) (constructive ouster).

208. 509 S.W.3d 906 (Tex. 2017).

production from a well on the pooled unit.²⁰⁹ XTO's title opinion assumed the common law strip-and-gore doctrine applied, and therefore the minerals in the Crawford Tract were owned by the adjoining lot owners. XTO never paid Crawford, but did pay the lot owners even though the record contained no evidence of conduct or statements by any of the adjacent lot owners indicating their position on ownership of the Crawford Tract. Crawford sued for breach of contract for XTO's failure to make royalty payments. "XTO filed a motion to abate and compel joinder of the forty-four adjacent landowners, arguing that the adjacent landowners have or claim an interest in the Crawford Tract."²¹⁰ The trial court granted the motion ordering joinder of the adjacent landowners and eventually dismissed the case when Crawford failed to join the missing parties.²¹¹

The issue in this case was whether Texas Rule of Civil Procedure 39 requires joinder of parties that have a potential claim of interest. The Texas Supreme Court did not rule on the effect of the strip-and-gore doctrine, limiting the opinion to the joinder issue.²¹²

Texas Rule of Civil Procedure 39(a)(2) states in part that:

A person who is subject to service of process shall be joined as a party in the action if . . . (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of this claimed interest.²¹³

The supreme court held that "the adjacent landowners are not necessary parties under Rule 39(a)(2) because they do not 'claim [] an interest relating to the subject of the action.'"²¹⁴ According to the court, there was no evidence that showed the adjacent landowners asserted ownership of or demanded a royalty interest in the Crawford Tract minerals.²¹⁵ Further, none of the language in any of the adjacent landowners' deeds or leases indicate a claim of interest in the Crawford Tract minerals.²¹⁶

The supreme court agreed that the adjacent landowners could claim that the strip-and-gore doctrine gives them an interest; however, only XTO has claimed that the adjacent owners have an interest.²¹⁷ The supreme court stated that the landowners had never either directly or indirectly claimed an interest; in order for the landowners to claim an

209. *Id.* at 908.

210. *Id.* at 909.

211. *Id.*

212. *Id.* at 912.

213. *Id.* at 911 (quoting TEX. R. CIV. P. 39(a)).

214. *Id.* at 912 (quoting TEX. R. CIV. P. 39(a)).

215. *Id.*

216. *Id.*

217. *Id.* at 913.

interest, they have to do “*something*,” but instead they did nothing.²¹⁸

The adjacent landowners did not claim an interest just because XTO was paying them the Crawford Tract royalties. XTO decided on its own to credit the royalties to the adjacent landowners, and there was no showing that the adjacent landowners knew that they were receiving the royalties.²¹⁹ Although Rule 39(a)(2) does require joinder of persons in whose absence complete relief cannot be accorded, the supreme court agreed with Crawford that the only dispute was limited to the parties to the lease—Crawford and XTO.²²⁰ Therefore, this case is distinguishable from the line of cases holding that joinder of nonparty lessors is required in lease title disputes.²²¹ The supreme court noted that XTO could protect itself from the risk of inconsistent obligations and future lawsuits by using Rule 37 to bring in the adjacent landowners.²²² Rule 37 allows the plaintiff or defendant to bring in proper parties to the suit.²²³

The limited significance of this case is that a title opinion is neither a claim nor a dispute requiring joinder under Texas Rule of Civil Procedure 39. The practical significance may be limited to determining which party will have to bear the cost and expense of joining the interested parties, which may turn on evidence of claims, or strategies for provoking claims.

B. *PIERCE V. BLALACK*

*Pierce v. Blalack*²²⁴ held that claims were correctly dismissed with prejudice under Rule 39(a) in trespass to try title when plaintiff failed to join necessary parties and further held that the claims could not be severed. The property at issue was a 366.7 acre tract in Gregg County, Texas (Tract). For over 100 years, title to the Tract was apparently clear. Husband owned the Tract in 1870 and bequeathed the Tract to Wife and Daughter. In 1917, Hart claimed to be the sole heir of Wife and Daughter. Hart conveyed fee simple title to King and, in 1921, King obtained a judgment which granted him possession of the Tract against Hart. In 1931, King also filed an affidavit claiming he had been in adverse possession of the Tract since 1918.²²⁵ Guttry claimed under King.²²⁶

Pierce believed Hart was not the sole heir of Wife and Daughter, and that Pierce was entitled to some portion of the surface and minerals in the Tract. On September 10, 2015, Pierce, as Plaintiff, sued Guttry in trespass to try title, to quiet title in her name, and for a declaration setting aside the conveyance unto King, King’s judgment, and King’s adverse possession claim (King’s title documents). The original petition included at-

218. *Id.*

219. *Id.*

220. *Id.* at 911 n.4.

221. *Id.* at 912–13.

222. *Id.* at 914.

223. *Id.* (citing TEX. R. CIV. P. 37).

224. 535 S.W.3d 35 (Tex. App.—Texarkana 2017, no. pet.).

225. *Id.* at 38.

226. *Id.*

tached documentation establishing that other unnamed persons and entities owned surface, mineral, and easement interests in the Tract. A hearing in October 2015 determined Guttry did *not* own an interest in the Tract and the trial court instructed Pierce “to amend her petition to include all necessary persons and entities who would be adversely affected by a determination of title.”²²⁷ On November 2, 2015, Pierce failed to include all necessary parties, and was given ninety days to amend. “The trial court specifically found that all persons currently claiming an interest under the various conveyances attached to Pierce’s petition would be adversely affected by a judgment in Pierce’s favor and, thus, were necessary parties under [Texas Rules of Civil Procedure] Rule 39(a).”²²⁸ Pierce filed her third through eighth amended petitions, but only included seven defendants who only owned the surface. Pierce sought to sever the surface and mineral estate claims, which was denied. She was given ninety more days to amend. Her tenth amended petition included 117 defendants and her twelfth included 172 defendants, but none were served.²²⁹ By September 2, 2016, Pierce had served only fifty-five defendants, and she knew of easement holders that she apparently did not attempt to name as parties. She filed a thirteenth amended petition, but again had only served the same fifty-five defendants. On October 13, 2016, the court dismissed Pierce’s claims with prejudice based on motions to dismiss filed by several defendants.²³⁰ The issues here were whether the court properly dismissed Pierce’s claims with prejudice under Rule 39(a) in trespass to try title when Pierce failed to join the necessary parties, and whether she was entitled to severance of the claims.

The Texarkana Court of Appeals found Rule 39(a) applies to trespass to try title lawsuits²³¹ and “is ‘broad’ and provides that a person who ‘claims an interest relating to the subject of the action’ must be joined if ‘disposition of the action in his absence, may . . . as a practical matter impair or impede his ability to protect that interest.’”²³² “Although Rule 39 provides for joinder in mandatory terms, ‘there is no arbitrary standard or precise formula for determining whether a particular person falls within its provision.’”²³³

“Further, the Declaratory Judgment Act also mandates the joinder of persons whose interests would be affected by the judgment.”²³⁴ Pierce sought declaratory relief by arguing that King’s title documents should be

227. *Id.* at 38–39.

228. *Id.* at 39.

229. *Id.*

230. *Id.* at 40.

231. *Id.* (citing *Longoria v. Exxon Mobil Corp.* (Longoria II), No. 04-15-00536-CV, 2016 WL 4013793, at *3 (Tex. App.—San Antonio July 27, 2016, pet. denied) (mem. op.); *Kodiak Res., Inc. v. Smith*, 361 S.W.3d 246, 248–49 (Tex. App.—Beaumont 2012, no pet.); *Rogers Nat. Bank of Jefferson v. Pewitt*, 231 S.W.2d 487, 489 (Tex. Civ. App.—Texarkana 1950, writ ref’d)).

232. *Id.* at 41–42 (quoting TEX. R. CIV. P. 39(a) (West)).

233. *Id.* at 41 (quoting *Brown v. Snider Indus., LLP*, 528 S.W.3d 620, 625 (Tex. App.—Texarkana 2017, pet. denied)).

234. *Id.* at 40 (citing *Kodiak*, 361 S.W.3d at 249).

set aside.²³⁵ “And, while a declaration is not binding on and does not prejudice the rights of a person who is not a party to the proceeding, the trial court may refuse to render a declaratory judgment if it ‘would not terminate the uncertainty or controversy giving rise to the proceeding.’”²³⁶

The court of appeals relied on *Longoria I*²³⁷ which upheld a Rule 39(a) ruling for dismissal *without* prejudice. In *Longoria I*, the plaintiff sought to clear title by obtaining a declaratory judgment that a 1924 partition judgment was void.²³⁸ In that case, the San Antonio Court of Appeals found that if it were to find in the plaintiff’s favor, it could diminish other parties’ interests and damage any unnamed defendants’ ability to protect its interest.²³⁹ The court of appeals found the facts of *Longoria I* to be similar to *Pierce*, in which the court was asked to set aside King’s title documents.²⁴⁰ “When the trial court’s decision about whether absent persons should be joined as parties is guided by accepted legal rules and principles, we will not disturb that decision.”²⁴¹ Accordingly, the court held the claims were correctly dismissed under Rule 39(a).²⁴²

Regarding severance, “Rule 41 of the Texas Rules of Civil Procedure provides, ‘Any claim against a party may be severed and proceeded with separately.’”²⁴³ A court properly utilizes severance when “(1) the controversy involves more than one cause of action; (2) the severed claim is one that could be asserted independently in a separate lawsuit; and (3) the severed actions are not so interwoven with the other claims that they involve the same facts and issues.”²⁴⁴ Here, *Pierce* argued her claims against the surface owners should be severed from the mineral owners, which would require her to join fewer defendants in the litigation. The court of appeals reasoned that *Pierce*’s claims against all owners—surface and minerals—depended on her ability to set aside King’s title documents, which involved both the surface and minerals. Thus, the claims were “largely interwoven.”²⁴⁵ “Furthermore, the trial court determined, correctly, that the severance could result in the possibility of inconsistent verdicts, thereby undermining the controlling reasons for ordering a severance.”²⁴⁶ Accordingly, the court upheld the denial of the severance.

Finally, the court analyzed whether dismissal with prejudice was

235. *Id.*

236. *Id.* at 40–41 (quoting *Clear Lake City Water Auth. v. Clear Lake Utils. Co.*, 549 S.W.2d 385, 390 (Tex. 1977) (quoting TEX. CIV. PROC. & REM. CODE ANN. § 33.008)).

237. *Longoria v. Exxon Mobil Corp.* (*Longoria I*), 255 S.W.3d 174, 180 (Tex. App.—San Antonio 2008, pet. denied).

238. *Pierce*, 535 S.W.3d at 42 (citing *id.* at 182).

239. *Id.*

240. *Id.*

241. *Id.* (quoting *Longoria I*, 255 S.W.3d at 180).

242. *Id.*

243. *Id.* (quoting TEX. R. CIV. P. 41 (West)).

244. *Id.* (quoting *Liberty Nat’l Fire Ins. Co. v. Akin*, 927 S.W.2d 627, 629 (Tex. 1996)).

245. *Id.*

246. *Id.* at 43.

proper. The court relied on *Longoria II*,²⁴⁷ “which involved similar facts as in *Longoria I*, but resulted in dismissal *with prejudice*.” Here, Pierce was given plenty of opportunities to amend her pleadings and she drafted thirteen insufficient pleadings.²⁴⁸ Accordingly, the dismissal with prejudice was proper.²⁴⁹ Neither *Longoria I* nor *Pierce* considered Rule 39(b).²⁵⁰

The significance of this case is the court’s discussion of Rule 39(a) and Rule 41 in the context of litigation involving title to the mineral estate. In summary, it appears that surface, mineral, and easement owners must all be joined under Rule 39(a), if, as a practical matter, disposition of the action in a party’s absence may impair or impede another party’s ability to protect his interest.

C. *EXXONMOBIL CORP. v. LAZY R RANCH, LP*

*ExxonMobil Corp. v. Lazy R Ranch, LP*²⁵¹ held that there is nothing inherently undiscoverable about the possibility of contamination from oil and gas operations and surface spills, and therefore the discovery rule does not apply. ExxonMobil Corporation conducted oil and gas operations on the Lazy R Ranch for almost sixty years. Soon after ExxonMobil sold its operations in 2008, the landowner retained a registered environmental manager to investigate any possible contamination on the ranch. In a report dated March 31, 2009, the environmental manager identified four areas, previously under ExxonMobil’s control, affecting 1.2 acres on the 20,000 acre ranch where hydrocarbon contamination exceeded levels set by state law. He warned that there was a threat of groundwater contamination.²⁵² The landowner sued ExxonMobil for damages for remediation that landowner estimated would cost \$6.3 million, but landowner later amended to drop the damages claim to seek only a mandatory injunction for remediation at whatever cost.²⁵³ According to the landowner, the required remediation would necessitate the removal of significant volumes of contaminated soil and decontamination of the groundwater.²⁵⁴ ExxonMobil moved for summary judgment based on limitations and on other grounds, and the trial court granted the motion.²⁵⁵

“Generally, a cause of action accrues and limitations begin to run when facts exist that authorize a claimant to seek judicial relief.”²⁵⁶ For sum-

247. *Longoria v. Exxon Mobil Corp. (Longoria II)*, No. 04-15-00536-CV, 2016 WL 4013793, at *6 (Tex. App.—San Antonio July 27, 2016, pet. denied) (mem. op.).

248. *Pierce*, 535 S.W.3d at 43.

249. *Id.*

250. *Id.* at 43 n.9.

251. 511 S.W.3d 538 (Tex. 2017).

252. *Id.* at 540.

253. *Id.* at 540–41.

254. *Id.* at 541.

255. *Id.* 541–42.

256. *Id.* at 542 (citing *Sw. Energy Prod. Co. v. Berry-Helfand*, 491 S.W.3d 699, 721 (Tex. 2016); *Exxon Corp. v. Emerald Oil & Gas Co., L.C.*, 348 S.W.3d 194, 202 (Tex. 2011)).

mary judgment purposes, the environmental manager's report established that four ranch sites were contaminated as of March 2009. ExxonMobil did not argue that someone else was responsible for the contamination, but only that the landowner's deposition testimony showed that any contamination occurred before 2005 at the earliest. The landowner had testified that she had noticed oil spills on the Ranch for years. ExxonMobil presented additional evidence that two of the four sites were contaminated before 2005. As for the other two sites, the evidence was inconclusive as to whether the contamination occurred before or after 2005.²⁵⁷

Although the landowner invoked the discovery rule to defer the accrual of the landowner's claims and to delay commencement of the limitations period, the Texas Supreme Court refused to apply the rule, holding that there was nothing inherently undiscoverable about the possibility of contamination that kept the landowner from employing the expert sooner.²⁵⁸ The supreme court affirmed summary judgment as to the two long-abandoned sites and reversed and remanded as to the other two sites.²⁵⁹

Under Texas law, recovery of damages for a permanent injury to real property is limited to the difference in value before and after the injury.²⁶⁰ "Even if the injury is temporary, the cost to repair the injury cannot be recovered when it exceeds the land's loss in value due to the injury" (the economic feasibility exception).²⁶¹ Whether a landowner can sue for an injunction requiring an operator to perform remediation to prevent further contamination when the cost of remediation would exceed the value of the land, thus circumventing the economic feasibility exception, appeared to be a significant issue in the case and attracted several amicus briefs. The supreme court refused to consider the issue because it was not addressed in ExxonMobil's motion for summary judgment.²⁶²

The significance of this case is the holding that there is nothing inherently undiscoverable about the possibility of contamination and surface spills from oil and gas operations, and therefore the discovery rule does not apply.

D. *CASH v. KING*

*Cash v. King*²⁶³ held that attorney's fees are recoverable under the De-

257. *Id.* at 544.

258. *Id.*

259. *Id.* at 545–46.

260. *Id.* at 541 (citing *Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.)*, L.P., 449 S.W.3d 474, 478–79, 483 (Tex. 2014)).

261. *Id.* (citing *J & D Towing, LLC v. Am. Alt. Ins. Corp.*, 478 S.W.3d 649, 656 n.27 (Tex. 2016)).

262. *Id.* at 545–46.

263. No. 04-16-00700-CV, 2017 WL 3701781 (Tex. App.—San Antonio Aug. 23, 2017, no pet.) (mem. op.).

claratory Judgment Act in a suit over title to a leased mineral estate. Decedent died intestate with her three children as her only heirs at law. On the date of death, Decedent owned real property in Karnes County. One child qualified as Administrator and elected to pursue certain claims owing to the estate. The other two children (Children) elected not to finance that litigation, and they each executed assignments to the Administrator conveying whatever they were entitled to receive from the Estate “other than that already received.”²⁶⁴ The Children’s interest in the mineral estate was subject to outstanding mineral leases. The Administrator executed a mineral deed as “Independent Executor,” conveying the entire mineral estate in the real property to the Administrator individually.²⁶⁵ The Children filed suit against the Administrator seeking a declaratory judgment that the assignments they executed did not convey their interests in the mineral estate to the Administrator.²⁶⁶ Administrator sought a declaration that the mineral deed was valid because the Children’s assignments transferred their interests in the mineral estate.²⁶⁷

The first issue was whether the assignments included the Children’s interests in the mineral estate or whether the assignments excepted that interest with the words “other than already received.” The second issue was whether the court properly awarded attorney’s fees to the Children.²⁶⁸

The San Antonio Court of Appeals agreed with the Children’s construction of the assignments. “[W]henever a person dies intestate, all of his estate shall vest immediately in his heirs at law.”²⁶⁹ The court stated that “vest” means to “give into the possession or discretion of some person or authority.”²⁷⁰ Further, the phrase “already received” means to “take possession or delivery of” prior to a specified time.²⁷¹ When the Decedent died intestate, the Children’s interests in all of the estate assets immediately vested. Using the plain meaning of the language used in the assignment, the court of appeals reasoned that interests “already received” would include the mineral estate before the Children executed the assignments to the Administrator.²⁷² Therefore, the Children did not assign their interests in the mineral estate to the Administrator because it was “already received” under the terms of the assignment at the time of Decedent’s death. Thus, the Administrator’s conveyance of the mineral estate to himself was void.²⁷³

264. *Id.* at *1.

265. *Id.*

266. *Id.*

267. *Id.*

268. *Id.* at *3.

269. *Id.* at *2 (quoting TEX. PROB. CODE ANN. § 37 (West) *repealed by* Acts 2009, 81st Leg., R.S., ch. 680 § 10(a) (although repealed, the Probate Code was in force at the time of the assignments)).

270. *Id.*

271. *Id.*

272. *Id.* at *3.

273. *Id.*

Attorney's fees are generally not available in trespass-to-try-title actions, which is generally the only method for establishing ownership or title to real property.²⁷⁴ However, "a claimant is not required to bring a trespass-to-try-title action when the action is for relief that pertains to a nonpossessory interest."²⁷⁵ Because there were "outstanding mineral leases covering the disputed mineral estate," the Children only had a nonpossessory interest in the mineral estate.²⁷⁶ Therefore, they were not required to bring a trespass-to-try-title action, and the court properly awarded attorney's fees under the Declaratory Judgment Act.²⁷⁷

The significance of the case is the holding that trespass-to-try-title actions are not necessary when the action is for relief that pertains to a nonpossessory interest.

VI. REGULATION ISSUES²⁷⁸

A. *RING ENERGY V. TREY RESOURCES, INC.*

*Ring Energy v. Trey Resources, Inc.*²⁷⁹ held that pre-injury injunctive relief challenging the injection of fluids into an injection well permitted by the Texas Railroad Commission (Commission) may be sought outside of the Commission and in any county where the injury is threatened. Trey Resources, Inc. (Trey) was conducting oil and gas operations in Andrews County, Texas. Trey obtained nine permits from the Commission for the operation of injection wells. Ring Energy, Inc. (Ring) operated several oil wells that were near the injection wells.²⁸⁰ Before Trey began operating the injection wells, Ring filed suit in Andrews County seeking an injunction against Trey's operation of the injection wells.²⁸¹ Ring sued under Texas Natural Resources Code Section 85.321, which gives a property owner a private cause of action if that owner's property "may be damaged" by waste.²⁸² Ring claimed that Trey's injection wells would cause substantial damage to Ring's mineral interest and would result in waste.²⁸³

Trey filed a motion to dismiss Ring's suit and maintained that the court in Andrews County lacked subject matter jurisdiction because the suit should have been filed in Travis County.²⁸⁴ Both Trey and Ring agreed that Section 85.321 permitted an injured party to file suit in the county where the injury occurred, but they disagreed as to whether an uninjured

274. *Id.*

275. *Id.*

276. *Id.*

277. *Id.* (citing *Glover v. Union Pac. R.R. Co.*, 187 S.W.3d 201, 210-11 (Tex. App.—Texarkana 2006, pet. denied)).

278. Another case dealing with regulation issues was *Sec. & Exch. Comm'n v. Mieka Energy Corp.*, 259 F. Supp. 3d 556 (E.D. Tex. 2017) (joint venture interests as securities).

279. 546 S.W.3d 199 (Tex. App.—El Paso 2017, no pet.).

280. *Id.* at 203.

281. *Id.*

282. *Id.* (quoting TEX. NAT. RES. CODE ANN. § 85.321 (West 2011)).

283. *Id.*

284. *Id.*

party could file outside Travis County.²⁸⁵ Because the permit had not been put into use and because no injury had occurred, Trey contended that the suit should be viewed as an appeal of the issuance of the permit by the Commission, and therefore Ring could only seek injunctive relief in Travis County.²⁸⁶ Trey's argument relied on Texas Natural Resources Code Section 85.241, which provides that anyone who is affected by an order of the Commission related to the waste of oil and gas may sue the Commission in Travis County.²⁸⁷ Ring argued that Section 85.321 also permits suits for equitable relief in any state court where venue is proper. The trial court dismissed for lack of subject matter jurisdiction.²⁸⁸

The El Paso Court of Appeals considered the language of Sections 85.241, 85.321, and 85.322. Section 85.241 provides that anyone "who is affected by . . . orders of the commission relating to oil or gas and the waste of oil or gas . . . may file suit against the commission" so long as that suit is brought in Travis County.²⁸⁹ Section 85.321 permits suits in law or equity by someone "who owns an interest in property or production that may be damaged by another party," if that other party is committing waste.²⁹⁰ Section 85.322 states that no suit against the Commission "shall impair or abridge or delay a cause of action for damages or other relief that a land owner, or producer might have for violation of a rule or order of the Commission."²⁹¹

In analyzing the statutory language to determine legislative intent, the court of appeals used several grammatical tools of interpretation, including the use of "modal auxiliary verbs."²⁹² Additionally, the court looked at the act as a complete document.²⁹³ After studying the text of the statutes and finding no other adequate remedy, the court determined that the "Legislature intended to allow pre-injury injunctive relief in the county where the injury is threatened."²⁹⁴

The significance of this case is the holding that the Commission does not have exclusive or primary jurisdiction over suits seeking pre-injury injunctive relief against the operation of injection wells.

B. *FOREST OIL CORP. v. EL RUCIO LAND & CATTLE CO., INC.*

*Forest Oil Corp. v. El Rucio Land & Cattle Co., Inc.*²⁹⁵ held that the Texas Railroad Commission (TRC) did not have exclusive or primary jurisdiction over claims for environmental contamination. Forest Oil Corporation (Forest) held a mineral lease and operated a natural gas plant on

285. *Id.*

286. *Id.*

287. *Id.* at 205 (citing TEX. NAT. RES. CODE ANN. § 85.241 (West 2011)).

288. *Id.* at 203.

289. *Id.* at 205 (quoting TEX. NAT. RES. CODE ANN. § 85.241 (West 2011)).

290. *Id.* at 206 (quoting TEX. NAT. RES. CODE ANN. § 85.321 (West 2011)).

291. *Id.* (quoting TEX. NAT. RES. CODE ANN. § 85.322 (West 2011)).

292. *Id.* at 208.

293. *Id.* at 210.

294. *Id.* at 215.

295. 518 S.W.3d 422 (Tex. 2017).

the McAllen Ranch. Various owners of the ranch (McAllen) sued Forest alleging environmental contamination and improper disposal of hazardous materials on the ranch.²⁹⁶ McAllen asserted multiple claims, including trespass, negligence, negligence per se, fraud, assault, intentional battery, and breach of contract.²⁹⁷ McAllen won in arbitration.²⁹⁸ While the matter was pending, McAllen had also requested that the TRC investigate whether contamination had occurred on the ranch. The TRC placed Forest in its voluntary Operator Cleanup Program. At the time the opinion was issued, the TRC had approved some of Forest's proposals, but the TRC had not yet approved Forest's proposed final remediation plan.²⁹⁹ Forest sought to vacate the arbitration award because the TRC had exclusive or primary jurisdiction over McAllen's claims, precluding the arbitration.³⁰⁰

The threshold question for exclusive jurisdiction is whether "the Legislature gives the agency alone the authority to make the initial determination in a dispute."³⁰¹ If an agency has exclusive jurisdiction, parties must utilize all administrative remedies before seeking judicial review of the agency's action.³⁰² Thus, if the TRC had exclusive jurisdiction, the arbitration panel lacked jurisdiction to enter the award, and the trial court lacked jurisdiction to confirm it.³⁰³ The Texas Supreme Court noted that abrogation of common-law rights is disfavored and that legislative intent to abrogate common-law rights must be clearly indicated.³⁰⁴ Forest identified multiple Texas statutes as examples of the legislature's intent to abrogate common-law rights.³⁰⁵ The supreme court stated that these statutes allow the TRC to regulate and oversee environmental issues in oil and gas production and operations; however, none of the statutes clearly indicate legislative intent to abrogate or foreclose common-law rights.³⁰⁶

The supreme court then considered whether the TRC has primary jurisdiction over environmental contamination claims. Primary jurisdiction is a prudential doctrine that resolves authority issues when both an agency and the courts have the right to make an initial determination in a dispute.³⁰⁷ Trial courts should allow an agency to make the initial determination when: "(1) an agency is typically staffed with experts trained in handling the complex problems in the agency's purview; and (2) great benefit is derived from an agency's uniformly interpreting its laws, rules,

296. *Id.* at 426.

297. *Id.* at 430.

298. *Id.* at 427.

299. *Id.* at 426.

300. *Id.* at 427.

301. *Id.* at 428 (quoting *Cash Am. Int'l Inc. v. Bennett*, 35 S.W.3d 12, 15 (Tex. 2000)).

302. *Id.*

303. *Id.*

304. *Id.* (citing *Cash Am. Int'l Inc.*, 35 S.W.3d at 16).

305. *Id.* at 428–29 (quoting TEX. HEALTH & SAFETY CODE ANN. § 401.415(a) (West 2010); TEX. NAT. RES. CODE ANN. §§ 85.321, 91.101(a)(4), 91.1011, 91.602(a) (West 2011); TEX. WATER CODE ANN. § 26.131(a)(1) (West 2008)).

306. *Id.* at 429.

307. *Id.*

and regulations, whereas courts and juries may reach different results under similar fact situations.”³⁰⁸ The primary jurisdiction doctrine “does not apply to claims that are inherently judicial in nature.”³⁰⁹ The supreme court held that McAllen’s claims were all inherently judicial in nature.³¹⁰

The supreme court also determined that “McAllen’s common-law claims are not dependent on the standards of regulatory compliance.”³¹¹ Although the TRC may make determinations as to McAllen’s contamination claims, it cannot oust the court of jurisdiction to decide those claims.³¹² Forest complained that this subjected Forest to the risk of double liability: damages payable to McAllen (who could pocket the money) and a TRC order to clean up the mess. The supreme court responded that Forest could manage its risk by complying with TRC statutes and orders.³¹³

The significance of this case is the holding that the TRC does not have exclusive or primary jurisdiction over environmental claims.

C. *ETC MARKETING, LTD. v. HARRIS COUNTY APPRAISAL DISTRICT*

*ETC Marketing, Ltd. v. Harris County Appraisal District*³¹⁴ held that natural gas stored in Texas for future transportation and sale in interstate commerce was subject to ad valorem taxation in Texas. ETC Marketing, Ltd. (ETC), a natural gas marketer, conducted business in Texas and had multiple employees and offices in the state. Its purpose was to buy and sell natural gas for the interstate market. It bought principally from the “Katy Hub,” a central delivery and distribution point for natural gas in and out of Texas, and sold to out of state customers. ETC “immediately entrusted” gas it purchased to its affiliate Houston Pipeline Company (Houston), an intrastate pipeline company located wholly in Texas. Houston stored ETC’s gas for several months in the Bammel reservoir, which Houston owned, in Harris County, Texas. This allowed ETC to market and sell the gas at a more financially advantageous time. All of the gas from ETC, others in the pipeline, and that which is already in storage is commingled and segregated only by paper allocations. To maintain pressure in the system, Houston maintains a permanent supply of “cushion gas” in the reservoir. Houston paid ad valorem taxes on the cushion gas, equipment, and property it owned in Harris County, including that related to the Bammel reservoir. Houston did not pay tax on stored gas owned by marketers like ETC, and ETC did not pay tax. In 2009, the Harris County Appraisal District (HCAD) appraised natural gas ETC

308. *Id.* at 429–30 (citing *Subaru of Am., Inc. v. David McDavid Nissan*, 84 S.W.3d 212, 221 (Tex. 2002)).

309. *Id.* at 430 (quoting *Amarillo Oil Co. v. Energy-Agri Prod., Inc.*, 794 S.W.2d 20, 26 (Tex. 1990)).

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 429.

314. 528 S.W.3d 70 (Tex. 2017).

had purchased at the Katy Hub and stored with Houston in the Bammel reservoir and assessed ETC ad valorem taxes.³¹⁵ ETC challenged the assessment arguing that the stored gas was in interstate commerce and exempt from state ad valorem taxation.³¹⁶

The case turned upon the Commerce Clause in the U.S. Constitution, which governs the power to regulate interstate commerce.³¹⁷ If a tax implicates interstate commerce, the most recent test adopted by the U.S. Supreme Court for determining whether a state tax violates the Commerce Clause is set forth in *Complete Auto Transit, Inc. v. Brady*.³¹⁸ To remain valid under the Commerce Clause, the ad valorem tax must: “(1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state.”³¹⁹ In addition to this more recent precedent, the Texas Supreme Court assumed that the older “in transit” test articulated in *Minnesota v. Blasius*³²⁰ has some continuing validity. If property is “in transit,” it is not taxable. However, if it stopped, the purpose of the stoppage is critical to determining if the property remained “in transit.”³²¹ The supreme court concluded that the “in transit” test was part of determining the substantial nexus.³²²

Despite the natural gas coming to rest in the Bammel reservoir and HCAD’s arguments urging the supreme court to determine the gas did not even implicate interstate commerce, the supreme court followed *Maryland v. Louisiana*, which states that “gas crossing a state line at any stage of its movement to the ultimate consumer is in interstate commerce during the entire journey.”³²³ Thus, ETC’s gas was in interstate commerce.³²⁴

A majority of the analysis focused on the substantial nexus prong of the *Complete Auto* test. First, concentrating on what is actually taxed by HCAD—the natural gas itself—the supreme court determined the scope of the inquiry turned on the link between the natural gas and the jurisdiction taxing the property rather than whether ETC was located within the taxing jurisdiction.³²⁵ The natural gas was located in Harris County for a substantial period of time because it was stored in the Bammel reservoir. The link between the property and the state is the relevant consideration for the “nexus” inquiry.³²⁶

315. *Id.* at 73.

316. *Id.*

317. *Id.* at 75 (citing U.S. CONST. art. I, § 8, cl.3).

318. *Id.* at 76 (citing *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977)).

319. *Id.* (citing *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 30 (1988), *Complete Auto*, 430 U.S. at 288)).

320. 290 U.S. 1, 9 (1933).

321. *ETC Mktg., Ltd.*, 528 S.W.3d at 76.

322. *Id.* at 77 (citing *Diamond Shamrock Ref. & Mtkg. Co. v. Nueces Cty. Appraisal Dist.*, 876 S.W.2d 298, 302 (Tex. 1994)).

323. *Id.* (quoting *Maryland v. Louisiana*, 451 U.S. 725, 754–55 (1981)).

324. *Id.* at 78.

325. *Id.* at 78–85.

326. *Id.* at 79.

Second, the supreme court considered whether there was “continuity of transit,” because the natural gas comes to a stop for a period of time in the Bammel reservoir and then resumes its journey.³²⁷ Because the natural gas was not held in the Bammel reservoir for some purpose related to the continuation of the journey (i.e., a temporary stop), but rather for the pleasure of the owner in timing the supply and demand of the natural gas market, the supreme court held that the transit stopped in Harris County.³²⁸

Third, the “fairly apportioned” prong of the *Complete Auto* test is satisfied if the ad valorem tax is “internally and externally consistent.”³²⁹ Because the property is taxed based upon its location within a taxing unit on a certain day of the year, the supreme court determined that it did not create a greater burden on property in transit than on property not in transit within the taxing unit. The property can only be in one place at one time; therefore, the natural gas would not be taxed multiple times in different jurisdictions while it was being held in the Bammel reservoir.³³⁰ This path of analysis also led the supreme court to conclude that the ad valorem tax was not discriminatory and that it treats the property in transit identically to the property within the taxing unit that is stationary.³³¹ Last, the supreme court held that the ad valorem tax helped pay for community services, like police and fire protection, which benefit ETC’s stored natural gas because such services will protect the property if the need arises.³³²

The holding does not constitute blanket approval of any taxation of stored natural gas, but nondiscriminatory taxation of surplus gas held in storage without a destination for future resale does not violate the Commerce Clause.

VII. CONCLUSION

Title and conveyancing cases are frequently focused on document construction and have limited effect as precedents. *Wenske v. Ealy*³³³ is far more significant, because it attempts to summarize and explain how courts are to analyze documents to find the elusive “intent of the parties.” The trend of the decisions for years has been quite pronounced that rules of construction are not favored and that courts should search for intent within the four corners of the document. The corollary of that thesis is that documents should be enforced as written, and the courts should not create provisions that do not exist. The dissent in *Wenske* is correct that there is no language in the deed that would subject Grantor’s interest to bearing any part of the outstanding NPRI. However, the majority, in-

327. *Id.* at 79–80.

328. *Id.* at 84.

329. *Id.* at 86 (quoting *Goldberg v. Sweet*, 488 U.S. 252, 261 (1989)).

330. *Id.*

331. *Id.* at 87.

332. *Id.* at 88.

333. 521 S.W.3d 791 (Tex. 2017).

formed by the nuances of oil and gas law, determined that the parties intended otherwise. This is the close question that divided the supreme court. Were they deciding what the deed said or what the parties to the deed probably meant, which would be colored by the supreme court's views of what the parties should have meant? It was not helpful for the supreme court to suggest that "[g]oing forward, drafters of deeds should endeavor to plainly express the contracting parties' intent within the four corners of the instrument they execute."³³⁴ Drafters of deeds have been trying to do that for over one hundred years. Precedent still matters to define how "intent" should be expressed, or every deed will be litigated.

Those cases which address fundamental property rights will be of continuing significance. *Lightning Oil v. Anadarko*³³⁵ determined the broad outlines of the surface owner's rights in the subsurface. It seems likely that the Accommodation Doctrine will continue to expand to resolve competing cotenant interests, both surface and subsurface. At this moment, *XTO v. Goodwin*³³⁶ is a petition-filed case that seems likely to cause a stir, whether or not the supreme court takes it up. It clearly takes on subsurface trespass issues the supreme court has been avoiding, raises questions for allocation wells, and raises questions about the efficacy of division orders. The voluntary payment rule really has no place in resolving issues when payments are made pursuant to division orders. Division orders are essentially an executory accord. Everyone wants payments to be made, any disputes will be raised later, and if not raised timely, will be barred. There is no reason why the payor under the division order statute should assume or be burdened with extra risk. To hold otherwise will defeat the purpose of the statute and result in more suspended payments.

The most important cases on lease and leasing issues in this Survey period confirmed that "reasonable time" in the context of production in paying quantities will essentially always be a fact question, and that the date for determining whether a well is capable of producing in paying quantities under a shut-in royalty clause is the last date gas was sold or used (but again measured over a "reasonable time").³³⁷ The Survey period also generated a case that is the first example to show that there are facts so bad that a complete refusal to lease may be the basis for liability owed by the executive to the non-executive.³³⁸

Although raised in a petition filed case, if "consent" does not have a fixed meaning (sole and absolute discretion or which will not be unreasonably withheld), then there are many industry contracts that are at risk for not having adequately defined the form of consent the parties in-

334. *Id.* at 798.

335. *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017).

336. *XTO Energy, Inc. v. Goodwin*, No. 12-16-00068-CV, 2017 WL 4675136 (Tex. App.—Tyler Oct. 18, 2017, pet. filed).

337. *See* *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 482 (Tex. 2017); *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 395 (Tex. 2017).

338. *See* *Texas Outfitters Ltd. v. Nicholson*, 534 S.W.3d 65, 71 (Tex. App.—San Antonio 2017, pet. filed).

tended.³³⁹ Lease pooling in Texas continues to challenge oil and gas lawyers and jurists to better define the fundamental property and contract rights of the parties. *Samson v. Reed*³⁴⁰ does not help very much, but will certainly make life more difficult for operators. The supreme court should have addressed the fundamental question: what is a pooling? Instead, it imposed liability because a designation of unit was filed. If an unauthorized pooling does not bind lessor, why would it bind lessee?

Because title issues may have originated very long ago and the number of theoretically interested parties may have exploded over the decades, the questions of who must be joined and the party who must bear the cost and risk of joinder may be of great significance. It seems likely that the current cases confirm that most potential owners must be joined, and generally the burden will fall on the plaintiff.³⁴¹ The trend to limit the Discovery Rule continues with the supreme court's refusal in *ExxonMobil v. Lazy R Ranch* to apply the Discovery Rule to contamination cases originating on the surface or from operations that are visible on the surface.³⁴² Because limitations on the Discovery Rule are categorical, this should limit many untimely claims.

The well-established limit on the jurisdiction of the Texas Railroad Commission and the sometimes concurrent jurisdiction of the courts was affirmed during this Survey period.³⁴³ Simplified, ad valorem taxation of gas in storage probably comes down to whether the gas is clearly in transit or has stopped without a destination outside of Texas.³⁴⁴

339. See *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89 (Tex. App.—Tyler 2017, pet. filed).

340. *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766 (Tex. 2017).

341. See *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 912 (Tex. 2017); *Pierce v. Blalack*, 535 S.W.3d 35, 40 (Tex. App.—Texarkana 2017, no pet.).

342. *ExxonMobil Corp. v. Lazy R Ranch, LP*, 511 S.W.3d 538 (Tex. 2017).

343. See *Ring Energy v. Trey Res., Inc.*, 546 S.W.3d 199 (Tex. App.—El Paso 2017, no pet.); *Forest Oil Corp. v. El Rucio Land & Cattle Co.*, 518 S.W.3d 422, 428–29 (Tex. 2017).

344. See *ETC Mktg. Ltd. v. Harris Cty. Appraisal Dist.*, 528 S.W.3d 70 (Tex. 2017).