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## Oil, Gas, and Mineral Law

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# OIL, GAS, AND MINERAL LAW

*Richard F. Brown\**

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## I. INTRODUCTION

This article focuses on the interpretations of, and changes relating to, oil, gas, and mineral law in Texas from December 1, 2017, through November 30, 2018. The cases examined include decisions of state and federal courts in the state of Texas and the U.S. Court of Appeals for the Fifth Circuit.<sup>1</sup>

## II. TITLE AND CONVEYANCING<sup>2</sup>

### A. *CONOCO PHILLIPS Co. v. KOOPMANN* (RULE AGAINST PERPETUITIES)

*ConocoPhillips Co. v. Koopmann*<sup>3</sup> held that the rule against perpetuities is generally not applicable in oil and gas conveyances if the termination of the prior estate is certain to occur and the next taker is ascertainable.<sup>4</sup> The case also construed part of the division order statute, and held that the statute did not bar a contractual claim for royalties and interest under the oil and gas lease.<sup>5</sup> Under a deed dated December 27, 1996, Grantor reserved a fifteen-year term non-participating royalty interest (NPRI) which could be extended “as long thereafter as there is production in paying or commercial quantities” under an oil and gas lease.<sup>6</sup> The deed also provided:

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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 title and conveyancing cases in the reporting period include: *Hahn v. Gips*, No. 13-16-00336-CV, 2018 WL 771908 (Tex. App.—Corpus Christi Feb. 8, 2018, pet. denied) (mot. for reh’g filed Apr. 10, 2019) (mem. op.) (partition deeds); *Haywood WI Units, Ltd. v. B&S Dunagan Inv., Ltd.*, No. 13-15-00454-CV, 2017 WL 6379737 (Tex. App.—Corpus Christi Dec. 14, 2017, pet. denied) (mem. op.) (royalty deed); *Bupp v. Bishop*, No. 04-16-00827-CV, 2018 WL 280408 (Tex. App.—San Antonio Jan. 3, 2018, pet. denied) (mem. op.) (reservations in conveyances); *Fort Worth 4th St. Partners, L.P. v. Chesapeake Energy Corp.*, 882 F.3d 574 (5th Cir. 2018) (covenants running with surface estate); *XTO Energy, Inc. v. EOG Res., Inc.*, 554 S.W.3d 127 (Tex. App.—San Antonio 2018, pet. filed) (foreclosure on equitable mineral interest); *Neuhoff v. Piranha Partners*, No. 07-16-00136-CV, 2018 WL 2223132 (Tex. App.—Amarillo May 15, 2018, pet. granted) (mem. op.) (extrinsic evidence to construe assignment); *Gonzalez v. Janssen*, 553 S.W.3d 633 (Tex. App.—San Antonio 2018, pet. filed) (subject to clause and breach of warranty); *Harrison v. Rosetta Res. Operating, L.P.*, No. 08-15-00318-CV, 2018 WL 3751740 (Tex. App.—El Paso Aug. 8, 2018, no pet.) (accommodation doctrine); *Crow v. Lookadoo*, No. 04-17-00338-CV, 2018 WL 4096400 (Tex. App.—San Antonio Aug. 29, 2018, no pet.) (mem. op.) (term royalty interests).

3. 547 S.W.3d 858 (Tex. 2018).

4. *Id.* at 873.

5. *Id.* at 879.

6. *Id.* at 863.

It is expressly understood, however, that if any oil, gas, or mineral or mining lease covering said land . . . is maintained in force and effect by payment of shut-in royalties or any other similar payments made to the lessors or royalty holder in lieu of actual production while there is located on the lease or land pooled therewith a well or mine capable of producing oil, gas, or other minerals in paying or commercial quantities but shut-in for lack of market or any other reasons, then . . . it will be considered that production in paying or commercial quantities is being obtained from the land herein conveyed.<sup>7</sup>

In 2009, the current lessee (Lessee) paid \$24,000 to extend the lease term to October 22, 2012. The land was leased and pooled, but near the end of the fifteen-year term of the NPRI there was no actual production.<sup>8</sup> When there was only four months left on the fifteen-year term of the NPRI, Grantor assigned a 60% interest in the NPRI to Lessee, “presumably as an incentive to motivate [Lessee] to begin drilling.”<sup>9</sup> On December 7, 2011, Lessee tendered shut-in royalty payments to the lessor (who was also the Grantee under the deed creating the term NPRI), and it was undisputed that there was no actual production on December 27, 2011, the date the NPRI term ended. “[T]he parties offered conflicting summary judgment evidence as to whether there was a well *capable* of producing in paying . . . quantities” on that date.<sup>10</sup> In February 2012, actual production commenced.<sup>11</sup> Lessee contended that Grantee’s future interest in the NPRI under the deed “was void under the rule against perpetuities” (Rule) and that Lessee’s “activities satisfied the deed’s savings clause.”<sup>12</sup> That is, Lessee was aligned with Grantor to preserve the reserved NPRI, because Lessee owned 60% of the NPRI.

“The Texas [c]onstitution prohibits perpetuities: ‘Perpetuities . . . are contrary to the genius of free government, and shall never be allowed.’”<sup>13</sup> Although the constitution provides no definition of “perpetuities,” the Texas Supreme Court has adopted the common law version of the Rule, which 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.”<sup>14</sup> “The Rule requires that a challenged conveyance be viewed as of the date the instrument is executed, and the interest is void if by any possible contingency the grant or devise could violate the Rule.”<sup>15</sup>

Under the Rule, Grantor’s interest in the NPRI was a vested fee simple, subject to an executory limitation. Grantee’s interest in the NPRI

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7. *Id.*

8. *Id.* at 863–64.

9. *Id.* at 863.

10. *Id.* at 864 (emphasis in original).

11. *Id.*

12. *Id.*

13. *Id.* at 866 (quoting TEX. CONST. art. I, § 26).

14. *Id.* at 867 (quoting BP Am. Prod. Co. v. Laddex, Ltd., 513 S.W.3d 476, 479 (Tex. 2017)).

15. *Id.* (citing Peveto v. Starkey, 645 S.W.2d 770, 772 (Tex. 1982)).

was a springing executory interest that would not vest until the conditions terminating Grantor's present possessory interest were met (the lack of or cessation of production at some indeterminable time). Therefore, Grantee's interest violated the Rule and was void.<sup>16</sup>

However, the supreme court decided to carve out an exception for oil and gas conveyances. The purpose of the Rule is to prevent "landowners from using remote contingencies to preclude alienability of land for generations."<sup>17</sup> "But here, [Grantor's] fee simple interest in the NPRI was certain to end, either because production in paying or commercial quantities ceased, . . . or the recoverable minerals were exhausted."<sup>18</sup> If Grantor had conveyed in fee simple absolute to Grantee, and then Grantee had conveyed the same term NPRI back to Grantor, in a separate conveyance, Grantee's future interest in the NPRI would not violate the Rule because it would be classified as a vested possibility of reverter.<sup>19</sup> Restraint on alienation is not an issue in the oil and gas context, and defeasible term interests in minerals actually promote alienability of land.<sup>20</sup>

[I]t is appropriate to hold that in this oil and gas context, where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the Rule does not invalidate the grantee's future interest. . . . We limit our holding to future interests in the oil and gas context in which the holder of the interest is ascertainable and the preceding estate is certain to terminate.<sup>21</sup>

After holding that the Rule did not void the Grantee's interest, the supreme court turned to the issue of whether Lessee's actions had perpetuated the NPRI under the savings clause. The supreme court held that "other similar payments" was ambiguous as a matter of law, summary judgment was inappropriate, and therefore remanded on the perpetuation of the NPRI.<sup>22</sup>

"Other similar payments" could mean delay rentals, extension payments, or any payment made during the secondary term in lieu of production.<sup>23</sup> "[T]here are both similarities and differences between shut-in royalties, delay rentals, and paid-up leases, depending on the criteria used to compare them."<sup>24</sup> Therefore, the supreme court determined that "there is more than one reasonable interpretation of 'other similar payments,'" making the savings clause ambiguous.<sup>25</sup>

In a separate issue, the supreme court held that the Natural Resources

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16. *Id.* at 868 (citing *Peveto*, 645 S.W.2d at 772).

17. *Id.* at 869, 873 (citing *Kettler v. Atkinson*, 383 S.W.2d 557, 560 (Tex. 1964)).

18. *Id.* at 871 (citing *Amoco Prod. Co. v. Braslau*, 561 S.W.2d 805, 808 (Tex. 1978); *Clifton v. Koontz*, 325 S.W.2d 684, 691 (Tex. 1959)).

19. *Id.* at 868.

20. *Id.* at 869.

21. *Id.* at 873.

22. *Id.* at 874-75.

23. *Id.* at 875.

24. *Id.*

25. *Id.*

Code did not preclude a breach of contract claim.<sup>26</sup> Grantee as Lessor was pursuing a breach of contract claim under the lease based on Lessee's failure to timely pay royalties.<sup>27</sup> Lessee contended there could be no breach of contract claim because Natural Resources Code Section 91.402(b) permits payments to be withheld without interest when there is a title dispute.<sup>28</sup> The lease contained its own payment schedule and recited that Lessee assumed all risk of title failures.<sup>29</sup>

Section 91.404(c) provide[d] a cause of action for a payee if the payor d[id] not comply with the requirements set out in section 91.402, but this d[id] not mean that the statute abrogate[d] a common law claim for breach of contract when there [wa]s a controlling lease between the parties.<sup>30</sup>

There is no clear language from the legislature indicating intent for the statute to preclude a common law claim of breach of contract.<sup>31</sup>

The significance of this case is that the rule against perpetuities does not apply in the oil and gas context if the termination of the prior estate is certain to occur and the next taker is ascertainable. Additionally, it determined the phrase "other similar payments" was ambiguous in a savings clause. It is also a significant holding that the division order statute (governing payment of royalties, suspension of payments, and interest) does not bar a contractual claim for payment and interest under the oil and gas lease.

B. *YOWELL v. GRANITE OPERATING CO. (ANTI-WASHOUT PROVISION FOR OVERRIDING ROYALTY)*

*Yowell v. Granite Operating Co.*<sup>32</sup> held that an anti-washout clause intended to preserve an overriding royalty interest was void under the rule against perpetuities (Rule).<sup>33</sup> The parties aligned as Assignor and Assignee under a 1986 assignment of the Subject Leases. In the assignment, Assignor reserved an overriding royalty in the Subject Leases. Later, the Subject Leases were top leased, there was litigation over production in paying quantities, and that litigation was settled. As part of the settlement, the Subject Leases were released, and Assignee acquired an interest in the top leases.<sup>34</sup> The "anti-washout clause" included in the assignment stated that: "Should the Subject Leases or any one of the Subject Leases terminate and in the event Assignee obtains an extension, renewal or new lease or leases . . . then the overriding royalty interest reserved herein shall attach to said extension, renewal or new lease or

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26. *Id.* at 879.

27. *Id.* at 876.

28. *Id.* at 876 (citing TEX. NAT. RES. CODE ANN. § 91.402(a)-(b)).

29. *Id.*

30. *Id.* at 879.

31. *Id.*

32. 557 S.W.3d 794 (Tex. App.—Amarillo 2018, pet. filed).

33. *Id.* at 803.

34. *Id.* at 798.

leases . . . .”<sup>35</sup> Assignor contended that Assignor’s overriding royalty interest burdened the top leases; Assignee contended that it did not.<sup>36</sup>

“[A]n overriding royalty interest created by [an] assignment [generally] does not survive the termination of the assigned lease.”<sup>37</sup> It was undisputed that the Subject Leases had terminated, and only the anti-washout clause could save the overriding royalty.<sup>38</sup> The parties agreed the top leases were not an “extension” because they did not continue the underlying leases. They disagreed whether they could be considered a “renewal” or “new leases.”<sup>39</sup> A “renewal” is when an old contract is replaced by a new contract.<sup>40</sup> The Amarillo Court of Appeals held that the top leases were not “renewals,” as there were material differences between the top leases and the Subject Leases.<sup>41</sup> The court reasoned that the top leases were “new leases” because they were independent from the Subject Leases, and, in fact, adverse to the Subject Leases.<sup>42</sup> Under the language of the anti-washout clause, all the conditions necessary for the override to attach to the top leases as “new leases” had occurred.<sup>43</sup>

The court next turned to whether attachment of the override to the top leases by the anti-washout clause violated the Rule.<sup>44</sup> Broadly, the Rule states that any interest “must vest, if at all, within twenty-one years after the death of some life . . . in being at the time of the conveyance.”<sup>45</sup> The application of the anti-washout clause to a new lease is apparently a question of first impression for Texas courts.<sup>46</sup> An interest that is contingent on the expiration of an existing lease generally violates the Rule.<sup>47</sup> The court determined that Assignor’s interest in the new leases was contingent on the expiration of the Subject Leases, which was an indefinite time.<sup>48</sup> Therefore, the Subject Leases were each a fee simple determinable and the application of the anti-washout clause to “new leases” violated the Rule.<sup>49</sup>

The court further held that Assignor’s interest depended on the creation of a new lease, which was an additional uncertain contingency violating the Rule.<sup>50</sup> That is, “[t]he time between the expiration of the [Subject Leases] and the [possible] creation of a new lease” was an “indeterminate

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35. *Id.* at 800.

36. *Id.* at 799.

37. *Id.* at 800 (citing *Fain & McGaha v. Biesel*, 331 S.W.2d 346, 348 (Tex. Civ. App.—Fort Worth 1960, writ ref’d n.r.e.)).

38. *Id.* at 801.

39. *Id.*

40. *Id.* (citing *Renewal*, BLACK’S LAW DICTIONARY (9th ed. 2009)).

41. *Id.*

42. *Id.*

43. *Id.*

44. *Id.* at 801–02.

45. *Id.* at 802 (quoting *BP Am. Prod. Co. v. Laddex, Ltd.*, 513 S.W.3d 476, 479 (Tex. 2017)).

46. *Id.*

47. *Id.* (citing *BP Am. Prod. Co.*, 513 S.W.3d at 480).

48. *Id.* at 802–03.

49. *Id.*

50. *Id.* at 803.

period which could exceed” the limits of the Rule.<sup>51</sup> Note that the clause at issue in this case did not include the common language frequently found limiting its application to new leases “acquired (e.g., within one year) from the expiration of the” Subject Leases.<sup>52</sup>

The court also disagreed with Assignor’s argument that the overriding interest was a vested interest in 1986 when it was carved out of the Subject Leases.<sup>53</sup> The court reiterated that “[t]here could be no concurrent vesting of title in a new lease” which has the possibility of never coming into existence.<sup>54</sup>

This opinion does not discuss *ConocoPhillips Co. v. Koopman*,<sup>55</sup> in which the Texas Supreme Court held that the Rule would not apply in the context of certain oil and gas cases, specifically “where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee.”<sup>56</sup> The holding in that case was expressly limited “to future interests in the oil and gas context in which the holder of the interest is ascertainable and the preceding estate is certain to terminate.”<sup>57</sup>

The significance of the case is the holding that a typical anti-washout clause designed to preserve an overriding royalty violates the rule against perpetuities, if applied to new leases.

C. *PERRYMAN V. SPARTAN TEXAS SIX CAPITAL PARTNERS, LTD.*  
(DUHIG DOCTRINE)

*Perryman v. Spartan Texas Six Capital Partners, Ltd.*<sup>58</sup> construed the language in a deed to determine whether it created a reservation or an exception, and whether the *Duhig* doctrine applied. There were multiple parties, eight different deeds in the chain of title, and other ancillary issues. However, the principal issue was to construe language from a 1983 deed. Grantor then owned all of the surface and all of the minerals, subject to an outstanding 1/4 of royalty interest.<sup>59</sup> Grantor conveyed the property with general warranty:

L[ess, save and except] an undivided one-half (1/2) of all royalties from the production of oil, gas, and/or other minerals that may be produced from the above described premises which are now owned by Grantor. It being understood that all of the rest of my ownership in and to the mineral estate in and under the above described lands is being conveyed hereby.<sup>60</sup>

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51. *Id.*

52. *Id.* at 800–01.

53. *Id.* at 803.

54. *Id.*

55. 547 S.W.3d 858 (Tex. 2018).

56. *Id.* at 873.

57. *Id.*

58. 546 S.W.3d 110 (Tex. 2018).

59. *Id.* at 114.

60. *Id.*



The deed was silent as to the outstanding royalty interest, and the issue was to determine the Grantor's interest after giving effect to the deed.

The trial court construed the deed to reserve 1/2 of the royalties "now owned" by the Grantor to the Grantor.<sup>61</sup> The Fourteenth Houston Court of Appeals also construed the deed to reserve 1/2 of the royalties "in the premises" to the Grantor.<sup>62</sup> The court of appeals held that "because the deeds made 'no mention' of the 'previously excepted' royalty interests, and yet provided general warranties covering all the title purportedly conveyed, the grantors breached their warranties and thus 'are estopped from claiming a royalty interest in the subject property under the *Duhig* doctrine.'"<sup>63</sup> The Texas Supreme Court held that the deed "created an *exception* from the grant, not a reservation for the [G]rantor."<sup>64</sup> This clause did not *reserve* any royalty interest for Grantor because the deed "conveyed the entire property interest 'less, save and except' a 1/2 royalty interest, and [it] contained no language purporting to 'reserve' that excepted interest for or unto the [Grantor]."<sup>65</sup> Therefore, the *Duhig* doctrine did not apply.<sup>66</sup>

The deed conveyed all of Grantor's interest, except insofar as that conveyance was limited by this clause.<sup>67</sup> "Reservations must always be in favor of and for the benefit of the grantor" in a deed, and reservations are never implied.<sup>68</sup> Because the deed contained an exception, not a reservation, there was no need to consider *Duhig*.<sup>69</sup>

The supreme court analyzed the clause grammatically, utilizing the last-antecedent construction canon, the series-qualifier canon, and the absence of a comma to conclude that the now-owned-by-Grantor modifier applied to the last item in the series.<sup>70</sup> That is, "now owned" modified "premises," not "royalties." The supreme court also reasoned that although "a *conveyance* [of] a portion of the interest the grantor own[ed] might] imply that the grantor does not own and cannot convey [the full] interest[ ], an *exception* of a portion of the interest the grantor then owns does not."<sup>71</sup> "A deed that conveys all of the property interests but excepts a fraction of the interest the grantor now owns necessarily conveys all of the interests not excepted."<sup>72</sup> "As a result, the deed[ ] purported to convey 1/2 and except 1/2 of all of the . . . royalty interests, not just one

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61. *Id.* at 113.

62. *Id.*

63. *Id.* at 118; *see Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880-81 (Tex. 1940).

64. *Perryman*, 546 S.W.3d at 119 (emphasis added).

65. *Id.*

66. *Id.* at 120.

67. *Id.* at 119.

68. *Id.* (quoting *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1957)) (internal quotations omitted).

69. *Id.* at 119-20.

70. *Id.* at 121.

71. *Id.* at 123 (emphasis in original).

72. *Id.* at 123-24.

half of the royalty interest [Grantor] then owned.”<sup>73</sup>

The supreme court concluded that the deed conveyed all of the interests in the surface, mineral, and royalties of the acreage “less, save, and except” 1/2 of all royalties from the minerals produced from the premises owned by Grantor.<sup>74</sup> The royalty interest passed 1/2 to the grantee, 1/4 was owned by a third party, and Grantor still owned 1/4.<sup>75</sup>

This is a deed construction case that illustrates the distinction between a reservation and an exception, and the implications under the *Duhig* doctrine.

D. *UNITED STATES SHALE ENERGY II, LLC v. LABORDE PROPERTIES, L.P.* (FLOATING OR FIXED ROYALTY)

*United States Shale Energy II, LLC v. Laborde Properties, L.P.*<sup>76</sup> held that a deed reserved a floating, rather than a fixed, royalty.<sup>77</sup> The parties aligned as Grantor and Grantee under a 1951 deed which provided:

There is reserved and excepted from this conveyance unto the grantors herein, their heirs and assigns, an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals in and under or that may be produced or mined from the above described premises, the same being equal to one-sixteenth (1/16) of the production.<sup>78</sup>

Other than the single sentence quoted above from the deed, there was no other provision in the deed that might bear on the parties’ intent. There was no evidence the land was leased when the deed was executed.<sup>79</sup> The land was later leased under an oil and gas lease providing for a lessor’s royalty of 1/5.<sup>80</sup> The issue was whether Grantor reserved a fixed 1/16 royalty or a floating 1/2 of royalty (1/10). The parties sought a declaratory judgment, and the case was resolved on cross motions for summary judgment.<sup>81</sup>

The Texas Supreme Court stated the following:

A fractional royalty interest is referred to as a fixed royalty because it “remains constant” and is untethered to the royalty amount in a particular oil and gas lease. . . . A fraction of royalty interest is referred to as a floating royalty because it varies depending on the royalty in the oil and gas lease in effect and is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease.<sup>82</sup>

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73. *Id.* at 124.

74. *Id.* at 125.

75. *Id.*

76. 551 S.W.3d 148 (Tex. 2018).

77. *Id.* at 155.

78. *Id.* at 150.

79. *Id.* at 153.

80. *Id.* at 150.

81. *Id.* at 151.

82. *Id.* at 152 (citing *Hysaw v. Dawkins*, 483 S.W.3d 1, 9 (Tex. 2016)).

When read independently, the supreme court found that the first clause, which reserved “an undivided one-half (1/2) interest in” royalty, reserved a floating royalty interest.<sup>83</sup> “The issue is whether the second clause—‘the same being equal to one-sixteenth (1/16) of the production’—indicates an interest fixed at 1/16 of production despite the language in the first clause tying it to the royalty.”<sup>84</sup>

The supreme court sought to harmonize the two clauses in a way to give both clauses effect. The supreme court held that “the only reasonable way to reconcile these clauses is to read the second clause” as modifying the first clause of the deed, and clarifying “what a 1/2 interest in royalty amounted to when the deed was executed.”<sup>85</sup> The supreme court noted that while no lease was in effect when the deed was executed, the typical royalty rate at the time was 1/8.<sup>86</sup>

Thus, if the first clause of the deed reserved a floating royalty interest, a 1/2 of 1/8 royalty would equal a 1/16 total share of production, giving effect to both clauses in the deed.<sup>87</sup> The supreme court reasoned that this interpretation was the only way in which the first clause was not made meaningless “if a lease agreement provides for any royalty rate other than 1/8 (such as the 1/5 royalty currently in effect).”<sup>88</sup> The second clause clarified “as an incidental factual matter, what a 1/2 interest in the royalty amounted to when the deed was executed.”<sup>89</sup> That is, it was a “nonrestrictive dependent clause.”<sup>90</sup> The supreme court held that the deed “unambiguously reserved a floating 1/2 royalty interest.”<sup>91</sup>

The dissenting opinion and the court of appeals would hold that the reservation was a fixed royalty.<sup>92</sup> The dissent reasoned that the first clause reserves a 1/2 interest in “Oil Royalty, Gas Royalty and Royalty in other Minerals,” without defining “Royalty.”<sup>93</sup> The second clause completed the description of what is reserved by describing it as 1/16 of production.<sup>94</sup> That is a fixed royalty.<sup>95</sup> “[T]he second clause is not merely ‘incidental’; rather, it is the *only* language that sheds any light on the first clause’s meaning.”<sup>96</sup> In general, the dissent viewed the entire majority opinion as flawed because it began with the erroneous assumption that the first clause, read independently, was a floating royalty.<sup>97</sup>

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83. *Id.*

84. *Id.*

85. *Id.* at 153–54.

86. *Id.* at 153.

87. *Id.*

88. *Id.*

89. *Id.* at 153–54.

90. *Id.* at 154.

91. *Id.* at 155.

92. *Id.* at 156 (Boyd, J., dissenting).

93. *Id.* at 157.

94. *Id.* at 160.

95. *Id.*

96. *Id.* (emphasis in original).

97. *Id.* at 157.

The majority's conclusion that the first clause read independently created a floating royalty also appears contrary to conventional wisdom based on prior caselaw.<sup>98</sup> Generally, a reservation "in" royalty is fixed and a reservation "of" royalty is floating.

It was clearly part of the surrounding circumstances that the parties to the deed knew that the customary lease royalty was 1/8. As the split decision indicates, circumstance could "inform" the decision either way.<sup>99</sup> It was unthinkable in 1951 that the lease royalty would be less than 1/8, as deeds were ordinarily construed against the grantor so as to convey the greatest estate possible. This could have been another argument for a fixed 1/16 royalty supporting the dissent.

The case does a good job of assembling case law in this area and summarizing the supreme court's current holistic approach to deed construction. However, the majority does not seem to follow that holistic approach, relying instead upon one clause, disregarding the usual meaning of "in royalty," and assuming that "1/16 of production" did not mean 1/16 of production.

### III. LEASE AND LEASING<sup>100</sup>

#### A. *JPMORGAN CHASE BANK, N.A. v. ORCA ASSETS G.P., LLC* (DOUBLE LEASING AND DISCLAIMER OF WARRANTY)

*JPMorgan Chase Bank v. Orca Assets G.P.*<sup>101</sup> held that Lessee did not justifiably rely upon Lessor's misrepresentation that Lessor's acreage was open to lease.<sup>102</sup> JPMorgan (Bank), admittedly a sophisticated business entity, acted as Trustee and Lessor managing multiple tracts covering approximately 40,000 acres in the Eagle Ford Shale.<sup>103</sup> Mettham, (Banker) in charge of leasing for Bank, was also very experienced in leasing, and he executed approximately seventy-five leases in 2010 for Bank.<sup>104</sup> Banker leased the acreage in question to Lessee #1 in 2010, in one of the largest deals Banker did for the Trust that year. Lessee #1 did not record its lease for approximately six months.<sup>105</sup> Also during 2010, an experienced man-

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98. *See id.* at 156.

99. *Id.* at 158.

100. Other Lease and Leasing cases in the reporting period include: *Leavitt v. Ballard Expl. Co.*, 540 S.W.3d 164 (Tex. App.—Houston [1st Dist.] 2017, no pet.) (interest on suspended royalties); *Martin v. Newfield Expl. Co.*, No. 13-17-00104-CV, 2018 WL 1633574 (Tex. App.—Corpus Christi Apr. 5, 2018, pet. denied) (mem. op.) (offset well clause); *L.B. Hailey Ltd. P'ship v. Encana Oil & Gas (USA) Inc.*, No. 5:17-CV-00149-RCL, 2018 WL 3150691 (W.D. Tex. June 27, 2018) (post-production costs); *Greeheyco, Inc. v. Brown*, 565 S.W.3d 309 (Tex. App.—Eastland 2018, no pet.), *reh'g denied* (Jan. 31, 2019) (continuous drilling clause); *CCI Gulf Coast Upstream, LLC v. Circle X Camp Cooley, Ltd.*, No. 10-17-00325-CV, 2018 WL 4624012 (Tex. App.—Waco Sept. 26, 2018, pet. filed) (mem. op.) (free-gas clause); *Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 563 S.W.3d 449 (Tex. App.—Eastland 2018, pet. filed) (continuous development clause).

101. 546 S.W.3d 648 (Tex. 2018).

102. *Id.* at 650.

103. *Id.* at 650, 656.

104. *See id.* at 656.

105. *See id.* at 650.

agement team put together a new company (Lessee #2) for the purpose of acquiring acreage in the Eagle Ford. Lessee #2 was interested in various tracts controlled by Bank that Banker said were open. Lessee #2 knew that Bank customarily used a “no warranty” lease form, but, during the negotiations, Bank also insisted on expanding the “no warranty” language to include language that any lease would also be “without recourse against Lessor in the event of a failure of title, not even for the return of the bonus . . . .”<sup>106</sup> The change resulted in renegotiated terms for a letter of intent giving Lessee #2 thirty days after execution to re-examine title.<sup>107</sup>

Until the letter of intent was signed, Lessee #2 checked title regularly and knew the acreage was open. After the letter of intent was signed, Lessee #2 stopped checking. Three days after the letter of intent was signed, Lessee #1 filed its lease of record.<sup>108</sup> During the thirty-day period, Lessee #2 re-evaluated its existing title work, and then closed with Bank on two leases for a \$3.2 million bonus payment.<sup>109</sup> After Lessee #1 asserted priority, Bank tendered the \$3.2 million back to Lessee #2, although Bank contended it was not obligated to do so. Lessee #2 rejected the tender, and sued Bank for \$400 million in lost profits on theories of fraud and negligent misrepresentation.<sup>110</sup> The case was resolved under Texas Rule of Civil Procedure Section 166(g), which was effectively a summary judgment, for Bank.<sup>111</sup>

Fraud and negligent misrepresentation both include an element of justifiable reliance.<sup>112</sup> “Rule 166(g) authorizes trial courts to decide matters that, though ordinarily fact questions, have become questions of law because ‘reasonable minds cannot differ on the outcome.’”<sup>113</sup>

In this case, the misrepresentation upon which Lessee #2 relied turned on statements made by Banker during the negotiations. At the first meeting and at closing, Banker said the acreage was open. It was conceded that this representation was false, so the only issue was justifiable reliance.<sup>114</sup> The Texas Supreme Court held that reliance was not justified on two separate theories: (1) “red flags” indicating reliance is unjustified, and (2) direct contradiction.<sup>115</sup>

In *Grant Thornton*, the Texas Supreme Court “held that a person may not justifiably rely on a misrepresentation if there are red flags indicating

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106. *Id.* at 650–51.

107. *Id.* at 651.

108. *Id.* at 652, 658.

109. *Id.* at 652.

110. *Id.*

111. *Id.*

112. *Id.* at 653–54 (citing *Grant Thornton, LLP v. Prospect High Income Fund*, 314 S.W.3d 913, 923 (Tex. 2010); *Fed. Land Bank Ass’n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1992)).

113. *Id.* at 653 (quoting *Walden v. Affiliated Computer Servs., Inc.*, 97 S.W.3d 303, 322 (Tex. App.—Houston [14th Dist.] 2003, pet. denied)).

114. *Id.* at 654.

115. *Id.* at 660.

such reliance is unwarranted.”<sup>116</sup> The supreme court then examined at length the particular facts in this case.<sup>117</sup> The supreme court also examined at length the particular representations made that the acreage was open, offset by the written agreement that directly contradicted that representation.<sup>118</sup>

The supreme court stated the following:

We are not prepared to say that any single one of these [facts in this case] could preclude justifiable reliance on its own and as a matter of law. We especially reject the notion that the mere use of the negation-of-warranty and no-recourse provision in the letter of intent and the leases could wholly negate justifiable reliance. . . . [W]e must instead view the circumstances in their entirety while accounting for the parties’ relative levels of sophistication.<sup>119</sup>

After balancing all of the circumstances, the supreme court concluded that Lessee #2 could not show justifiable reliance.<sup>120</sup>

This is a fact specific case that may not offer very useful guidelines, but it is in the context of the fairly common circumstance of a lessor who thinks he may have open acreage but refuses to warrant title. Buyer beware.

B. *XOG OPERATING, LLC v. CHESAPEAKE EXPLORATION LTD. PARTNERSHIP (RETAINED ACREAGE CLAUSE)*

*XOG Operating, LLC v. Chesapeake Exploration Ltd. Partnership*<sup>121</sup> held that a retained acreage clause that turned on the size of a proration unit as *prescribed* by the Railroad Commission of Texas (TRC) was controlled by the Special Field Rules regardless of the acreage *assigned* by the operator to a proration unit.<sup>122</sup> The parties aligned as Assignor and Assignee under a term assignment (Assignment). Assignor conveyed to Assignee four leases covering 1,625.8 acres for a primary term of two years.<sup>123</sup> A retained-acreage provision in the Assignment provided that after the primary term, the leases would revert back to Assignor save and except the following:

[T]hat portion of [the leased acreage] included within the proration or pooled unit of each well drilled . . . . The term “proration unit” as used herein, shall mean the area within the surface boundaries of the proration unit then established or prescribed by field rules or special order of the appropriate regulatory authority for the reservoir in which each well is completed. In the absence of such field rules or

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116. *Id.* at 655 (citing *Grant Thornton*, 314 S.W.3d at 923 (internal quotations omitted)).

117. *See id.* at 655–58.

118. *See id.* at 658–60.

119. *Id.* at 655–56.

120. *Id.* at 660.

121. 554 S.W.3d 607 (Tex. 2018).

122. *Id.* at 608–09.

123. *Id.* at 609.

special order, each proration unit shall be deemed to be 320 acres of land . . . .<sup>124</sup>

During the primary term, Assignee completed six wells.<sup>125</sup> Five of the six wells were in the same field, and Special Field Rule 2 provided: “The acreage assigned to the individual gas well for the purpose of allocating allowable gas production thereto shall be known as the prescribed proration unit. . . . For allowable assignment purposes, the prescribed proration unit shall be a [320] acre unit.”<sup>126</sup> The field rule also provided that a proration unit of less than 320 acres is a “fractional proration unit.”<sup>127</sup> The sixth well drilled by Assignee had no applicable field rules.<sup>128</sup> In its regulatory filings with the TRC, Assignee assigned 800 total acres to proration units for four of its six wells.<sup>129</sup>

When the primary term of the Assignment expired, Assignor asserted that the retained-acreage provision held 804 acres (the assigned 800 acres for four wells, and two acres for each of the two remaining wells). Assignor demanded the reassignment of the remaining 821.8 acres (1,625.8 acres less 804 acres) to Assignor. Assignee refused, and asserted that the retained-acreage provision applied to 1,920 acres (320 prescribed acres for each of the six wells).<sup>130</sup> The main issue was whether Assignee retained all of the acreage under the retained-acreage provision.

The Texas Supreme Court reviewed the plain language of the retained-acreage provision and keyed in on the word “prescribed.”<sup>131</sup> The provision provides that the “proration unit” will be retained, and proration unit is defined in the provision as “the area within the surface boundaries of the proration unit then . . . prescribed by field rules . . . . In the absence of such field rules . . . , each proration unit shall be . . . 320 acres.”<sup>132</sup> The supreme court found that because five of the six wells had field rules which prescribed 320 acres to a unit (and anything smaller was a fractional unit), and because the sole remaining well had no field rules, the six wells in total held more acreage than the acreage originally assigned, as Assignee argued.<sup>133</sup>

Assignor contended the text of the provision limited itself by stating the retained-acreage is that which is “included within” the proration unit, and that only an operator can include acreage in a unit, not the TRC.<sup>134</sup> However, the supreme court disagreed, citing the express usage of the word “prescribed” in the provision as controlling.<sup>135</sup>

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124. *Id.* at 610.

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.* at 611.

130. *Id.*

131. *Id.* at 612–13.

132. *Id.* at 612.

133. *Id.*

134. *Id.*

135. *Id.*

Assignor further argued that this retained-acreage provision should apply the same as the provision in the companion case *Endeavor Energy*,<sup>136</sup> “which allowed an operator to retain [only the] land” it included in its regulatory filings.<sup>137</sup> However, in the *Endeavor Energy* case, the retained-acreage provision referred to “assigned” units, and here the units were “prescribed.”<sup>138</sup> In *Jones v. Killingsworth*,<sup>139</sup> the Texas Supreme Court found that the TRC may prescribe proration units and at the same time permit operators to assign units of other sizes, so the terms “are not mutually exclusive.”<sup>140</sup> Ultimately, the distinguishing factor between the *Endeavor Energy* case and this case was that, in *Endeavor Energy*, the term “prescribed proration unit” was not included in the retained-acreage provision or the field rules, but in the present case, the term was in both places.<sup>141</sup>

Assignor offered a number of other arguments, including that (1) the field rules only provided a maximum proration unit; (2) the field rules were not created for the purpose of determining the meaning of retained-acreage provisions; and (3) a result different than *Endeavor Energy* would create confusion.<sup>142</sup> However, the supreme court found that the field rules were clear about the 320-acre units.<sup>143</sup> Additionally, parties are free to include language from field rules into their contract, and the supreme court reiterated the *Endeavor Energy* case is different than this case.<sup>144</sup> The supreme court held that Assignee retained all of the acreage in the leases assigned in the Assignment.<sup>145</sup>

This is a contract construction case, and the supreme court has been consistent on insisting that agreements be construed so as to give words their plain meaning. Parties defining property rights by reference to regulatory matters are on notice that, as to proration units, there is a meaningful difference between acres *prescribed* and acres *assigned*.

C. *ENDEAVOR ENERGY RESOURCES, L.P. v. DISCOVERY OPERATING, INC. (RETAINED ACREAGE CLAUSE)*

*Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*<sup>146</sup> held that a proration unit *assigned* to a well in a retained acreage clause referred to the operator’s assignment of acreage in its regulatory filings with the TRC.<sup>147</sup> Endeavor Energy Resources (Operator) leased and completed multiple wells on its lease under Special Field Rules that pro-

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136. 554 S.W.3d 586 (Tex. 2018).

137. *XOG Operating*, 554 S.W.3d at 612–13.

138. *Id.* at 613.

139. 403 S.W.2d 325 (Tex. 1965).

140. *XOG Operating*, 554 S.W.3d at 613 (citing *Jones*, 403 S.W.2d at 328).

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. 554 S.W.3d 586 (Tex. 2018).

147. *Id.* at 589.



vided for 80-acre spacing and optional 160-acre spacing. Operator designated 80-acre proration units for its wells,<sup>148</sup> and its lease termed out under the retained acreage clause, which provided:

[T]he lease shall automatically terminate as to all lands and depths covered herein, *save and except* those lands and depths located within a *governmental proration unit assigned to a well . . .* with each such governmental proration unit to contain the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for *obtaining the maximum producing allowable* for the particular well.<sup>149</sup>

Discovery Operating, Inc. (Lessee) acquired a top lease on the acreage not included in the proration units and drilled additional wells on the lands originally leased by Operator, but not included in Operator's designated proration units. When Operator learned of Lessee's wells, it filed amended plats to include 160 acres for each of Operator's wells.<sup>150</sup> Lessee filed a trespass-to-try-title action against Operator. The TRC did not act on the amended plats because of the suit. The interpretation of the retained acreage clause turned on the meaning of the phrases "'proration unit assigned to a well' and 'maximum producing allowable for the particular well.'"<sup>151</sup>

One way the TRC manages mineral resources is by using production allowables and proration units.<sup>152</sup> "Generally, 'an operator must first designate [a well's] proration unit and the acreage assigned to it, then certify that the acreage is productive before receiving the well's production allowable.'"<sup>153</sup> The TRC requires operators "to 'file certified plats of their properties in the field, which plats show all those things pertinent to the determination of the acreage claimed for each well . . .'"<sup>154</sup> The field rules for the area where Operator's leases are located established a standard 80-acre proration unit, but allowed an operator to "assign a tolerance of not more than [80] acres of additional unassigned lease acreage to a well on an [80] acre unit and shall in such event receive allowable credit for not more than [160] acres."<sup>155</sup>

When the Texas Supreme Court analyzed the phrase "proration unit assigned to a well" the focus was on the word "assigned."<sup>156</sup> Operator argued the TRC assigned the 160-acre maximum. However, Lessee ar-

148. *Id.* at 591–92.

149. *Id.* at 600 (emphasis in original).

150. *Id.* at 593–94.

151. *Id.* at 600 (emphasis added).

152. *Id.* at 596.

153. *Id.* (quoting *Browning Oil Co. v. Luecke*, 38 S.W.3d 625, 634 (Tex. App.—Austin 2000, pet. denied)).

154. *Id.* at 599 (quoting Tex. R.R. Comm'n, *Special Order Adopting Rules and Regulations for the Spraberry Trend Area Field*, Oil & Gas Docket Nos. 125 & 126, 7 & 8–25,841 (Dec. 22, 1952)).

155. *Id.* (quoting Tex. R.R. Comm'n, *Final Order Amending Field Rule Nos. 2 and 3 in the Spraberry (Trend Area) Field Various Counties, Texas*, Oil and Gas Docket No. 08-0259977 (Dec. 16, 2008)).

156. *Id.* at 601.

gued the lessee or operator, Endeavor in this case, assigned the acreage, not the TRC.<sup>157</sup> “[T]he [TRC]’s statewide and field rules [acknowledge] the operator is responsible for ‘assigning’ acreage to a proration unit [in] its regulatory filings.”<sup>158</sup> This has consistently been upheld in the courts, and an amicus brief from the TRC concurred.<sup>159</sup> The TRC’s brief stated, “[I]f the operator’s assignment of acreage complies with the rules, the [TRC] will input that acreage into a well-tracking system, and it becomes ‘the lawfully assigned proration acreage for purposes of the [TRC]’s records.”<sup>160</sup> The supreme court concluded that “‘assigned’ [was] unambiguous and refer[red] to the [operator’s] assignment of acreage [in] its regulatory filings.”<sup>161</sup>

Operator argued that the TRC’s records cannot determine title. However, this “ignores the contractual nature of [Operator’s] leasehold interest.”<sup>162</sup> “Although the [TRC] does not unilaterally determine title by approving or accepting an operator’s assigned proration unit, the parties are free to agree that the operator’s leasehold interest will survive and continue only to the extent of that assignment.”<sup>163</sup>

Operator also contended that, regardless of the “assigned” language, the “maximum producing allowable” language meant that each unit automatically consisted of 160 acres.<sup>164</sup> Rule 4 of the Special Field Rules “provides that the maximum producing allowable for a well on an 80-acre proration unit is 515 barrels per day,”<sup>165</sup> but it was undisputed that Operator’s wells were producing below the allowable.<sup>166</sup>

Thus, Operator did exactly what it was required to do under the lease: it applied for the proration unit that would give it the maximum allowable.<sup>167</sup> “Rule 3 [of the Special Field Rules] provides that [Operator] could have attempted to assign to each of its existing proration units an additional 80 acres of ‘tolerance acreage.’”<sup>168</sup> In dicta, in an earlier draft of the opinion, the supreme court suggested that attempting to assign more acreage may have subjected Operator to liability for attempting to retain more acreage than the acreage required to obtain the maximum allowable.<sup>169</sup> The only citation was to a secondary authority and presumably refers to possible contractual liability to lessor for claiming too much acreage.

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157. *Id.*

158. *Id.* at 602.

159. *Id.* at 602 n.10.

160. *Id.*

161. *Id.* at 603.

162. *Id.*

163. *Id.*

164. *Id.*

165. *Id.* at 604.

166. *Id.* at 605.

167. *Id.* at 605–06.

168. *Id.* at 605.

169. See *Endeavor Energy Res., L.P. v. Discovery Operating, Inc.*, No. 15-0155, 2018 WL 1770290, at \*12 (Tex. Apr. 13, 2018).

The significance of this case is that operators, not the TRC, assign acreage to proration units for their wells. The TRC establishes the number of acres required or permitted for a proration unit, but the operators assign the acres to be included in a specific proration unit.

D. *TRO-X, L.P. v. ANADARKO PETROLEUM CORP.* (LEASE TERMINATED BY SUBSEQUENT LEASE)

*TRO-X, L.P. v. Anadarko Petroleum Corp.*<sup>170</sup> held that “when a lessor and lessee under an existing lease execute a new lease of the same mineral interests subject to the existing lease, the existing lease is terminated unless the new lease objectively demonstrates both parties’ intent otherwise.”<sup>171</sup> In 2007, Lessor leased multiple tracts (2007 Leases), and the 2007 Leases were eventually acquired by Anadarko.<sup>172</sup> In 2009, Anadarko failed to drill an offset well, and that failure may or may not have terminated the 2007 Leases. In 2011, Lessor demanded a release of the 2007 Leases. Lessor and Anadarko negotiated for leases on different terms (2011 Leases).<sup>173</sup> The earliest 2011 Lease was executed June 15, 2011, and all Leases were executed before June 30, 2011, but all 2011 Leases were effective on June 17, 2011. On June 30, 2011, the 2011 Leases were recorded, and Anadarko executed a release of the 2007 Leases. Anadarko’s interest in the 2011 Leases was acquired subject to a participation agreement under which TRO-X owned a 5% back-in after payout, which also applied to “top leases.” TRO-X contended that the 2011 Leases were top leases, and therefore subject to TRO-X’s 5% back-in.<sup>174</sup> The Participation Agreement contained an anti-washout clause to protect the back-in option that extended to “any renewal(s), extension(s), or top lease(s) taken within one (1) year of termination of the underlying interest.”<sup>175</sup> The issue was whether the 2011 Leases were top leases that did not wash-out TRO-X’s back-in, or new leases that washed out TRO-X’s back-in.

TRO-X contended that the 2011 Leases were top leases because “they neither make any mention of the 2007 Leases nor contain any indication that Anadarko and the [Lessors] intended the 2011 Leases to terminate the 2007 Leases.”<sup>176</sup> Anadarko argued that *Ridge Oil* stands “for the proposition that parties to an oil and gas lease terminate an existing mineral lease between them if they enter into a new lease with ‘the intent and understanding that, by doing so, they would effect a release’ of the prior lease.”<sup>177</sup> Further, Anadarko maintained that the 2011 Leases did not exist at the same time as the 2007 Leases, because the execution of the 2011

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170. 548 S.W.3d 458 (Tex. 2018).

171. *Id.* at 464.

172. *Id.* at 459–60.

173. *Id.* at 460.

174. *Id.* at 461.

175. *Id.* at 460.

176. *Id.* at 461.

177. *Id.* (quoting *Ridge Oil Co. v. Guinn Invs., Inc.*, 148 S.W.3d 143, 153 (Tex. 2004)).

Leases terminated the 2007 Leases. Therefore, the 2011 Leases cannot be top leases.<sup>178</sup>

The Texas Supreme Court agreed with Anadarko.<sup>179</sup> “In *Ridge Oil*, we recognized that “[e]ven if an oil and gas lease does not contain a surrender clause, the parties may mutually agree to a release, *or they effectively terminate their lease by signing a new one.*”<sup>180</sup> “TRO–X observe[d] that the *Ridge Oil* opinion cited *Sasser*, which TRO–X claim[ed] stands for the proposition that a subsequent lease cannot terminate a previous lease without evidence that the parties intended to do so.”<sup>181</sup> However, the supreme court disagreed with TRO–X’s assertion, and held that “an existing lease . . . terminates when the parties enter into a new lease covering that interest *unless* the new lease objectively demonstrates that both parties intended for the new lease not to terminate the prior lease between them.”<sup>182</sup> Further, “[a] party contending that a new lease did not terminate the previous one has the burden to prove and obtain a finding that the parties intended for the previous lease to survive execution of the new lease.”<sup>183</sup>

The supreme court found that no overlap existed between the 2007 Leases and the 2011 Leases, because the 2011 Leases terminated the 2007 Leases.<sup>184</sup> Therefore, there was no “top” lease.<sup>185</sup> Note that the supreme court did not consider whether the 2011 Leases were extensions or renewals under the anti-washout clause of the participation agreement, because TRO–X only asserted the 2011 Leases were top leases.<sup>186</sup>

The significance of this case is the holding that when a lessor and lessee under an existing lease execute a new lease of the same mineral interests subject to the existing lease, the existing lease is terminated unless the new lease objectively demonstrates both parties intended otherwise.

E. *MURPHY EXPLORATION & PRODUCTION CO.–USA v. ADAMS*  
(LOCATION OF OFFSET WELL)

*Murphy Exploration & Production Co.–USA v. Adams*<sup>187</sup> held that a horizontal well offsetting a horizontal well could be drilled anywhere on the leased premises under the terms of the offset well clause in the lease.<sup>188</sup> Well-established concepts applicable to vertical wells may not be applicable in the context of horizontal wells. The offset operator drilled a

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178. *Id.* at 462.

179. *Id.* at 463.

180. *Id.* (quoting *Ridge Oil*, 148 S.W.3d at 152–53 (emphasis in original)).

181. *Id.* (citing *Ridge Oil*, 148 S.W.3d at 153 n.34; *Sasser v. Dantex Oil & Gas, Inc.*, 906 S.W.2d 599, 603 (Tex. App.—San Antonio 1995, writ denied)).

182. *Id.* (citing *Ridge Oil*, 148 S.W.3d at 152–53 (emphasis in original)).

183. *Id.* at 464.

184. *Id.* at 466.

185. *Id.*

186. *Id.* at 465.

187. 560 S.W.3d 105 (Tex. 2018), *reh’g denied* (Nov. 30, 2018), opinion corrected and superseded.

188. *Id.* at 105.

horizontal well with a 1,800 foot lateral in the Eagle Ford Shale, 350 feet from the lease boundary parallel to the lease line, which triggered the offset well clause in Lessee's lease (because it was drilled less than 467 feet from the lease line).<sup>189</sup> Lessee elected to drill under the offset well clause, which required Lessee "to commence drilling operations on the leased acreage and thereafter continue the drilling of such offset well or wells with due diligence to a depth adequate to test the same formation from which the well or wells are producing from [sic] on the adjacent acreage . . . ."<sup>190</sup> Lessee drilled a horizontal well with a 1,800 foot lateral in the Eagle Ford Shale 1,800 feet from and parallel to the lease line with the offset operator. Lessor sued Lessee for breach of contract, alleging that Lessee's location failed to comply with the offset well clause.<sup>191</sup> Lessee counterclaimed, seeking declaratory relief regarding its obligations under and compliance with the offset well clause.<sup>192</sup> Lessor argued that an offset well "must be in close proximity to the lease line adjacent to the tract where the neighboring well is located" in order to prevent drainage, and that Lessee's well was not.<sup>193</sup> Lessee argued that the only specific requirements in the clause were that the well be "'on the leased acreage' and 'to a depth adequate to test the same formation,'" and that both requirements were met by Lessee's well.<sup>194</sup> It was undisputed that the lease was "drafted with horizontal shale drilling in mind."<sup>195</sup> Therefore, the Texas Supreme Court reasoned that "[t]he realities of this type of drilling are thus part of the 'facts and circumstances surrounding the contract's execution' that may 'inform' our construction of the lease language."<sup>196</sup>

The supreme court contrasted vertical drilling to horizontal drilling with hydraulic fracturing, in which points along the horizontal wellbore are perforated and fractured and oil and gas is drained from surrounding rock.<sup>197</sup> "[H]orizontal drilling does not involve shared reservoirs in the same sense" as vertical drilling because, although "the same strata of shale may underlie two separate tracts, little or no drainage will occur between the two tracts."<sup>198</sup>

With this context in mind, the supreme court concluded that while an implied proximity requirement may be a "reasonable premise in the context of vertical drilling, where placement of an offset well is an important factor in minimizing the amount of oil or gas being drained," the "same principle does not apply in the context of horizontal drilling and hydraulic

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189. *Id.* at 107.

190. *Id.*

191. *Id.*

192. *Id.*

193. *Id.* at 109–10.

194. *Id.* at 108.

195. *Id.* at 110.

196. *Id.* (quoting *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 757–58, 765 (Tex. 2018)).

197. *Id.* at 110–11.

198. Jason Newman & Louis E. Layrisson III, *Offset Clauses in a World Without Drainage*, 9 TEX. J. OIL & ENERGY L. 1, 25 (2013).

fracturing.”<sup>199</sup> The supreme court noted that the offset clause “makes complete sense if the parties intended to require accelerated drilling when production from a well on an adjacent tract evidenced that the leased tract was also capable of production,” and stated that “this is the only reasonable interpretation of the provision in light of the parties’ recognition of the horizontal shale drilling at issue.”<sup>200</sup> The supreme court completed its analysis by limiting its holding to the circumstances of this case, which involved “unconventional production in tight shale formations.”<sup>201</sup>

The opinion strictly and literally construes the terms of the agreement which is consistent with the supreme court’s recent opinions. The difficulty was in finding a meaning for “offset” in the context of drilling in which no drainage can occur. The supreme court concluded that it was a trigger for accelerated drilling, unrelated to drainage, but nevertheless a trigger tied to propinquity.

F. *DEVON ENERGY PRODUCTION CO., L.P. v. APACHE CORP.*  
(PAYMENTS TO NON-PARTICIPATING LESSEE’S  
ROYALTY OWNERS)

*Devon Energy Production Co. v. Apache Corp.*<sup>202</sup> held that the operator of a well was not responsible under the Texas Natural Resources Code for paying royalties directly to lessors with whom the operator did not have a lease.<sup>203</sup> Apache had 1/3 of the minerals under the lease and Devon had 2/3 of the minerals under the lease. They were unable to agree upon a joint operating agreement, and Apache drilled seven producing wells. After Apache recovered its costs, Apache paid Devon “its two-thirds share of the net revenue to which Apache believed Devon was entitled as Apache’s cotenant in the mineral estate.”<sup>204</sup> Devon’s lessors sued both Apache and Devon, and all claims were eventually resolved, except Devon’s claim that Apache was obligated to pay royalties directly to Devon’s lessors under the Texas Natural Resources Code.<sup>205</sup>

The Eastland Court of Appeals noted that the law was clear that Devon, as lessee, became the mineral cotenant with Apache, as lessee, and that the producing cotenant Apache was obligated to account to Devon as the nonproducing cotenant.<sup>206</sup> However, the issue here was to determine which party was obligated to Devon’s lessors. Devon asserted that Section 91.402 of the Texas Natural Resources Code required Apache to directly and immediately pay to Devon’s lessors the royalty

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199. *Murphy Expl.*, 560 S.W.3d at 112.

200. *Id.* at 113.

201. *Id.*

202. 550 S.W.3d 259 (Tex. App.—Eastland 2018, pet. denied).

203. *Id.* at 264.

204. *Id.* at 260.

205. *Id.* at 260–61.

206. *Id.* at 261.

payments due under the leases between Devon and Devon's lessors.<sup>207</sup> Section 91.402(a) states:

The proceeds derived from the sale of oil or gas production from an oil and gas well located in this state must be paid to each payee by payor on or before 120 days after the end of the month of first sale of production from the well. After that time, payments must be made to each payee on a timely basis according to the frequency of payment specified in a lease or other written agreement between payee and payor.<sup>208</sup>

The court noted that the critical inquiry was whether Apache and Devon's lessors had a "payor-payee" relationship.<sup>209</sup> Section 91.401(2) defines "payor" as:

[T]he party who undertakes to distribute oil and gas proceeds to the payee . . . as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due. The payor is the first purchaser of such production of oil or gas from an oil or gas well . . . .<sup>210</sup>

Section 91.401(1) defines "payee" as: "any person or persons legally entitled to payment from the proceeds derived from the sale of oil or gas from an oil or gas well located in this state."<sup>211</sup> Devon argued "that Apache [was] a 'payor' because Apache was the 'operator of the well from which [oil and gas] production was obtained,'" and "that the Lessor Plaintiffs were 'payees' because they were 'legally entitled to payment from the proceeds derived from the sale of oil or gas from an oil or gas well located in this state.'"<sup>212</sup> The court disagreed.<sup>213</sup>

"In construing the definition of 'payee,'" the court reasoned that "the phrase 'legally entitled to payment' is significant."<sup>214</sup> Also, the court reasoned that "in construing the definition of 'payor,' the word 'undertakes' is significant."<sup>215</sup> The court noted that "[t]he dictionary defines 'undertake' as '[t]o take on an obligation or task.'"<sup>216</sup> Thus, the court found that in order to "qualify as a 'payor' who owes a 'payee,' the 'payor' must have 'undertake[n]—set out to obligate itself—to the 'payee' in some way."<sup>217</sup> Moreover, the court concluded that Devon's lessors were "not 'payees' of Apache because Apache never 'undertook' to enter into a legally binding relationship with them, such that [Devon's lessors] were then 'legally entitled to payment' from Apache."<sup>218</sup>

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207. *Id.* at 262 (citing TEX. NAT. RES. CODE ANN. § 91.402).

208. *Id.* (quoting NAT. RES. CODE § 91.402(a)).

209. *Id.*

210. *Id.* (quoting NAT. RES. CODE § 91.401(2)).

211. *Id.* (quoting NAT. RES. CODE § 91.401(1)).

212. *Id.* at 262–63.

213. *Id.* at 263.

214. *Id.*

215. *Id.*

216. *Id.* (quoting *Undertake*, BLACK'S LAW DICTIONARY (10th ed. 2014)).

217. *Id.*

218. *Id.*

The court also held that even if Devon's lessors were payees under the Texas Natural Resources Code, Apache did not fit within the statutory definition of payor.<sup>219</sup> Devon relied upon *Prize Energy*, which held that the operator was a payor and the owner of a nonparticipating royalty was a payee.<sup>220</sup> The court found a royalty interest and a NPRI to be distinguishable because by the very act of drilling, the operator undertook to pay the NPRI owner.<sup>221</sup> Thus, Apache and Devon's lessor did not have a payor-payee relationship under the Texas Natural Resources Code.<sup>222</sup>

This case is significant because it holds that the operator has no duty to pay the nonparticipating lessee's lessors. The opinion does not address the other questions surrounding the nonparticipating lessee's duties, such as when to pay, and the nonparticipant's lease terms are sure to have some effect on lessee's obligations.

#### IV. INDUSTRY CONTRACTS<sup>223</sup>

##### A. *ALLEN DRILLING ACQUISITION CO. v. CRIMSON EXPLORATION INC.* (JOA REMEDIES FOR DEFAULT)

*Allen Drilling Acquisition Co. v. Crimson Exploration Inc.*<sup>224</sup> held that an operator who invoked the deemed non-consent election against a defaulting nonoperator waived the right to sue the nonoperator for unpaid well costs, but did not waive any of the other specific remedies available to the operator under the 1989 Model Form Joint Operating Agreements (JOAs).<sup>225</sup> The facts involved multiple agreements, with overlapping joint operating agreements, areas of mutual interest and contract areas, with multiple breach of contract claims, with limitations and waiver issues, and billing disputes—all largely resolved on competing motions for summary judgment. The Waco Court of Appeals determined which agreements were applicable, the mineral formations to which they applied, and the remedies to which the parties were entitled. These issues were mostly matters of contract construction, but many of the issues could be of inter-

219. *Id.*

220. *Id.* (citing *Prize Energy Res., L.P. v. Cliff Hoskins, Inc.*, 345 S.W.3d 537, 561 (Tex. App.—San Antonio 2011, no pet.)).

221. *Id.* at 264.

222. *Id.*

223. Other industry contracts cases in the reporting period include: *Glassell Non-Operated Interests, Ltd. v. Enerquest Oil & Gas, LLC*, CV H-16-1573, 2017 WL 6626652 (S.D. Tex. Dec. 28, 2017), *rev'd*, 927 F.3d 303 (5th Cir. 2019) (area of mutual interest); *Basic Energy Services, L.P. v. EXCO Res., Inc.*, No. 05-15-00667-CV, 2018 WL 564157 (Tex. App.—Dallas Jan. 26, 2018, pet. filed) (mem. op.) (indemnities in a Master Services Agreement); *Dimock Operating Co. v. Sutherland Energy Co.*, No. 07-16-00230-CV, 2018 WL 2074643 (Tex. App.—Amarillo Apr. 24, 2018, pet. denied) (mem. op.) (calculation of payout under FOA); *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. filed) (force majeure and foreseeability); *MJR Oil & Gas 2001 LLC v. AriesOne, L.P.*, 558 S.W.3d 692 (Tex. App.—Texarkana 2018, no pet.) (ROFR as covenant running with land).

224. 558 S.W.3d 761 (Tex. App.—Waco 2018, pet. filed).

225. *Id.* at 779.



est, particularly in the context of overlapping JOAs, and in the area of mutual interest agreements.

However, the issue of general interest involved remedies and the defaulting nonoperator. Three wells were drilled.<sup>226</sup> Two of the wells were obligation wells, and the nonoperator could not elect not to participate.<sup>227</sup> Cost of the wells skyrocketed over the original estimates, the nonoperator failed to pay, and the operator deemed the nonoperator a non-consenting party.<sup>228</sup> The operator could not recover its costs from the wells.<sup>229</sup> The JOA principally controlling the dispute was based upon the American Association of Petroleum Landmen (AAPL) Form Operating Agreement 610-1989.<sup>230</sup> The operator ultimately sought to foreclose on the nonoperator's interest.<sup>231</sup>

It was undisputed that the wells were drilled under the JOA, that the nonoperator defaulted in the payment of well costs, and that the operator deemed the nonoperator to be a non-consenting party as to the wells drilled. However, when the operator sought to foreclose its lien, the nonoperator asserted that the nonoperator was not in default as a non-consenting party and that the operator's relief was limited to proceeds from the wells.<sup>232</sup> The deemed non-consent remedy that was at issue in this JOA provided:

Operator . . . may deliver a written Notice of Non-consent Election to the defaulting party at any time after the expiration of the fifteen day cure period following delivery of the Notice of Default, in which event . . . the nonpaying party [Nonoperator] will be conclusively deemed to have elected not to participate in the operation and to be a Non-Consenting Party with respect thereto under Article VI.B or VI.C. to the extent of the costs unpaid by such party, notwithstanding any election to participate theretofore made. *If election is made to proceed under this provision, then non-defaulting party [Operator] may not elect to sue for the unpaid amount.*<sup>233</sup>

The nonoperator conceded that it was subject to the provisions of the JOA denying the nonoperator a share of the proceeds from the wells until the operator recovered 400% of the well costs, but the nonoperator contended that the non-consent penalty was the only recourse available to the operator.<sup>234</sup> The court disagreed.<sup>235</sup> "The deemed non-consent provision specifically spelled out the other remedy that would not be available as the suit for damages. No other remedy is specifically excluded; therefore, the other remedies [in the JOA] continued to be availa-

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226. *Id.* at 766.

227. *Id.* at 777 n.11.

228. *Id.* at 766.

229. *Id.* at 779 n.14.

230. *Id.* at 765 n.2.

231. *Id.* at 777.

232. *Id.*

233. *Id.* at 778 (emphasis added by the court).

234. *Id.* at 779.

235. *Id.*

ble to [the operator].”<sup>236</sup> The court based its holding on the plain language of the JOA.<sup>237</sup>

The nonoperator also contended that a party electing to go non-consent is not in breach of contract.<sup>238</sup> The court held that the nonoperator did not elect to go non-consent and also could not elect to go non-consent as to the obligation wells.<sup>239</sup> “The crucial distinction here, however, is that [the nonoperator] did not elect to go non-consent.”<sup>240</sup> As a defaulting non-consenting party, the other remedies provided in the JOA were also available to the operator. The underlying default continued to exist.<sup>241</sup>

Article XVI.1 of the JOA authorized the operator to “suspend any or all of the rights of the defaulting party granted by this Agreement until the default is cured.”<sup>242</sup> Article VII.B of the JOA provided that each party granted to the other party: “[A] lien upon any interest it now owns or hereafter acquires in Oil and Gas leases and Oil and Gas Interests in the Contract Area. . . . To secure performance of all its obligations under this agreement including but not limited to payment of expense, interest, and fees. . . .”<sup>243</sup> Therefore, the nonoperator’s rights were suspended under the JOA, the operator had a lien on nonoperator’s interests, and foreclosure was an available remedy.<sup>244</sup>

The significance of the case is the strict and narrow construction of the non-consent election and the clear distinction between a “non-consenting party” who elected to go non-consent and a “defaulting” party who is deemed to be a non-consenting party under common JOA provisions.

B. *SEISMIC WELLS, LLC v. SINCLAIR OIL & GAS CO.*  
(ATTORNEY’S FEES UNDER JOA)

*Seismic Wells, LLC v. Sinclair Oil & Gas Co.*<sup>245</sup> held that attorney’s fees were not recoverable under the prevailing party provision of the JOA.<sup>246</sup> The JOA’s prevailing party provision stated: “In the event any party is required to bring legal proceedings to enforce any financial obligation of a party hereunder, the prevailing party in such action shall be entitled to recover . . . a reasonable attorney’s fee.”<sup>247</sup> There were multiple agreements between the parties, and Seismic (plaintiff) asserted many claims against Sinclair (defendant). The plaintiff lost on all claims, and the defendant sought to recover over \$1 million in attorney’s fees as the

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236. *Id.*

237. *Id.*

238. *Id.* (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005)).

239. *Id.*

240. *Id.*

241. *Id.*

242. *Id.* at 780 (quoting the JOA).

243. *Id.*

244. *See id.* at 782.

245. 750 F. App’x 278 (5th Cir. 2018) (per curiam).

246. *Id.* at 279.

247. *Id.* at 280.

prevailing party under the JOA provision quoted above.<sup>248</sup>

In determining whether the defendant was entitled to attorney's fees under this specific provision, the U.S. Court of Appeals for the Fifth Circuit looked critically at the language in the contract and the claims alleged by the plaintiff.<sup>249</sup> The issue was whether the JOA's prevailing party provision applied in this case and, more specifically, whether the plaintiff sought to enforce any financial obligation under the JOA.<sup>250</sup>

The Fifth Circuit examined the plaintiff's claims and held that a majority of them, such as fraud, "sought to void the agreements, not enforce them."<sup>251</sup> The Fifth Circuit stated that because these claims "sought to render the contracts *unenforceable*, they do not come within the scope of the fee provision."<sup>252</sup>

Count 6 and Count 12 of the petition alleged claims for breach of contract as typically used to enforce contracts.<sup>253</sup> However, both of those counts pertained to alleged breaches of other agreements.<sup>254</sup> The Fifth Circuit then analyzed the word "hereunder" in the JOA prevailing party provision.<sup>255</sup> The Fifth Circuit found that "hereunder" is recognized as meaning "this Contract."<sup>256</sup> Because the Fifth Circuit found that the alleged breaches were under other agreements and separate from the JOA, and because the prevailing party provision of the JOA only applied to the JOA, these counts could not be used to recover attorney's fees.<sup>257</sup>

But, Count 12 also alleged a breach of the JOA, stating that the defendant refused to assign operating rights and to reassign a well to the plaintiff.<sup>258</sup> Here, unlike the other claims, the Fifth Circuit found that plaintiff sought to enforce the JOA.<sup>259</sup> However, the claim must also "seek[ ] to enforce a 'financial obligation.'"<sup>260</sup> A financial obligation "requires some nexus to a monetary or pecuniary obligation of the party."<sup>261</sup> Although the plaintiff sought to recover monetary damages, it did not seek to enforce a financial obligation.<sup>262</sup> The Fifth Circuit also held that "[t]urning over operatorship rights and running the well on [the plaintiff's] preferred terms are not *financial* obligations."<sup>263</sup> Therefore, because none of the plaintiff's claims sought to enforce a financial obligation under the

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248. *Id.*

249. *See id.* at 280–81.

250. *Id.* at 281.

251. *Id.*

252. *Id.* (emphasis in original).

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* (citing *Intercontinental Grp. P'ship v. KB Home Lone Star L.P.*, 295 S.W.3d 650, 661 (Tex. 2009)).

257. *Id.*

258. *Id.*

259. *Id.*

260. *Id.*

261. *Id.* (quoting *In re WBH Energy, L.P.*, No. 15-10003-HM, 2016 WL 3049666, at \*12–13 (Bankr. W.D. Tex. May 20, 2016)).

262. *Id.* at 282.

263. *Id.* (emphasis in original).

JOA, the prevailing party provision did not apply, and the defendant was not entitled to obtain attorney's fees.<sup>264</sup>

The significance of the case is that it interprets a common form JOA prevailing party provision for the recovery of attorney's fees. The provision is strictly limited to claims asserted to enforce financial obligations under the JOA (i.e., an obligation to pay, not a recovery for damages).

C. *EAGLE OIL & GAS CO. v. SHALE EXPLORATION, LLC*  
(CONFIDENTIALITY AGREEMENT AND TRADE SECRETS  
AS TO PROSPECT)

*Eagle Oil & Gas Co. v. Shale Exploration, LLC*<sup>265</sup> held that a compilation of ownership data within a prospect may constitute a trade secret, and misappropriation of that data may result in a judgment for lost profits.<sup>266</sup> The operator developed a large prospect for drilling horizontal shale wells in an area where ownership was highly fractionalized. There were tens of thousands of mineral owners and the county records were not available online.<sup>267</sup> The operator had as many as 100 people working on the prospect and compiled lease and leasing information for a year with specialized software.<sup>268</sup> The ultimate goal was to find a business partner that would drill for oil or gas and flip the acreage to that driller.<sup>269</sup> The operator made a deal with Apache for Apache to take 300,000 or more acres at \$800 per acre, and Apache purchased all of the acres the operator was able to deliver.<sup>270</sup>

However, the operator also showed the prospect to other companies, including the competitor. There was a confidentiality and non-competition agreement.<sup>271</sup> The operator and the competitor had several lengthy meetings, and the operator disclosed most of its information, including the "treasure map," which showed the open acreage in areas included in the drilling units together with the lease schedule, and other maps distinguishing between open and leased lands.<sup>272</sup> After the operator made its deal with Apache, the competitor immediately formed a subsidiary under an unrelated name to take title to leases in the county, and also formed a leasing company under an unrelated name to conduct the leasing program.<sup>273</sup> There was no other competitor for leases in the county.<sup>274</sup> The competitor, without doing any title work, directed the leasing company to acquire leases in the areas targeted by the operator and gave the leasing

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264. *Id.*

265. 549 S.W.3d 256 (Tex. App.—Houston [1st Dist.] 2018, pet. dism'd).

266. *Id.* at 263.

267. *Id.* at 264.

268. *Id.* at 270–71.

269. *Id.* at 264.

270. *Id.* at 265, 277.

271. *Id.* at 264.

272. *Id.* at 264–65.

273. *Id.* at 265.

274. *Id.* at 273.

company the treasure map.<sup>275</sup> The operator acquired far more than 300,000 acres for Apache,<sup>276</sup> but the competitor acquired more than 11,000 leases in six weeks.<sup>277</sup> The competitor was the operator's only competition in the county, and that competition caused the average bonus to go up, and the operator was not able to acquire and sell the competitor's 11,000 leases to Apache.<sup>278</sup>

The operator sued the competitor for breach of contract and misappropriation of a trade secret.<sup>279</sup> The jury found for the operator, and awarded \$14,300,000 for lost profits and \$4,500,000 in exemplary damages.<sup>280</sup> The operator had to choose its remedy between its contract or tort claim,<sup>281</sup> and judgment was entered on misappropriation of a trade secret.<sup>282</sup> On appeal, the principal issues were whether there was a trade secret, the sufficiency of the evidence on lost profits, and the sufficiency of the evidence on exemplary damages.

"[The operator] had to prove that it disclosed a trade secret to [the competitor], in confidence, and that [the competitor] breached this confidence and made unauthorized use of the secret."<sup>283</sup> "A compilation of business information that provides a competitive advantage over those who lack the compilation may constitute a trade secret."<sup>284</sup> Although much of the information may have been derived from public sources, the compilation may constitute a trade secret.<sup>285</sup> The First Houston Court of Appeals held the evidence was factually sufficient to support the jury's implicit finding of a trade secret.<sup>286</sup>

To prove damages for lost profits, the operator relied upon expert testimony to establish lost profits attributable to "(1) leases that it would have acquired but for [the competitor's] conduct; and (2) increased leasing costs resulting from [the competitor's] wrongful competition."<sup>287</sup> In summary, the operator's expert calculated damages under (1) by subtracting \$250 per acre (the most the operator ever paid prior to the competitor's entry into the prospect) from \$800 per acre (Apache's price) for all of the thirty-five leases within the prospect that the competitor obtained. The result was \$6 million in lost profits, and the jury awarded \$4 million.<sup>288</sup> The operator's expert calculated damages under (2) as falling within a

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275. *Id.* at 273–74.

276. *Id.* at 265.

277. *Id.* at 273.

278. *Id.* at 266, 275.

279. *Id.* at 265.

280. *Id.* at 263.

281. *Id.* at 269.

282. *Id.* at 266.

283. *Id.* at 269 (citing *RSM Prod. Corp. v. Global Petrol. Grp.*, 507 S.W.3d 383, 393 (Tex. App.—Houston [1st Dist.] 2016, pet. denied)).

284. *Id.* at 270 (citing *Computer Assocs. Int'l v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)).

285. *Id.*

286. *Id.* at 272.

287. *Id.* at 266.

288. *Id.*

range of \$15 million to \$25 million for lost profits. The operator's expert eliminated all of the leases the operator acquired for \$300 per acre or less as within the range of acquisition costs, absent the competition. As to the 926 leases acquired by the operator which cost more than \$300 per acre, the operator's expert calculated the high end of the range by subtracting \$150 per acre (the operator's initial standard offer) from the actual cost. For the low end of the range, the operator's expert subtracted \$250 per acre (the operator's highest price paid prior to the competitor's entry into the prospect) from the actual cost. The range was \$15 to \$25 million, and the jury awarded \$10.3 million, for a total award of \$14.3 million for lost profits.<sup>289</sup> The competitor's expert effectively testified that the operator suffered no lost profits.<sup>290</sup>

The court reviewed the evidence on damages for lost profits and found the evidence to be legally sufficient.<sup>291</sup> It was clearly important, and simplified the necessary proof, that there was no other competition in the prospect and Apache was ready to buy all of the leases the operator could obtain.<sup>292</sup> The competitor also challenged the judgment because the jury's award was *less* than the lower end of the range established by the operator's expert. The court held that the jury's finding was within the range of the testimony, because the competitor's own expert established the lower end as zero, and the jury was not required to pick a number within the range of the operator's expert testimony.<sup>293</sup>

The court reversed the jury's award of \$4 million in exemplary damages.<sup>294</sup> The operator "had to prove by clear and convincing evidence that the lost profits it suffered resulted from malice," and malice requires a specific intent that the competitor intended to cause the operator a substantial injury.<sup>295</sup> "[T]he intent to commit the tort alone cannot justify an award of exemplary damages," or every intentional tort would justify exemplary damages.<sup>296</sup> "Rather, the substantial injury [the competitor] intended must be independent and qualitatively different from the compensable harms associated with [the operator's] claim for misappropriation of trade secrets. [The competitor's] conduct also must have been outrageous, malicious, or otherwise reprehensible."<sup>297</sup>

The court held that there was no evidence of any harm other than the competitor's purchase of some of the leases and increased costs.<sup>298</sup> Apache did not walk away, and drilling stopped only because the results were poor.<sup>299</sup> The dissent would affirm on exemplary damages because

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289. *Id.* at 275–76.

290. *Id.* at 278.

291. *See id.* at 275–78.

292. *See id.*

293. *Id.* at 278.

294. *Id.* at 285.

295. *Id.* at 283.

296. *Id.*

297. *Id.* (citations omitted).

298. *Id.* at 284–85.

299. *Id.* at 285.

there was some evidence that the competitor never drilled, never planned to drill, but intended to position itself to break up prospective drilling units, thus forcing additional negotiations and opportunities for the competitor.<sup>300</sup> The question was not whether the competitor succeeded, but what it intended.<sup>301</sup> Exemplary damages are not compensation for economic loss, but a punishment, and the jury could award those damages for deterrence and retribution.<sup>302</sup>

The opinion follows precedent that extensive compilations of land data on a prospect may be a trade secret. It also offers guidance on presenting expert testimony on damages for lost profits from misappropriation of such a trade secret. Finally, it highlights the distinct elements of proof required to support exemplary damages.

## V. LITIGATION<sup>303</sup>

### A. *CARL M. ARCHER TRUST NO. THREE v. TREGELLAS* (RIGHT OF FIRST REFUSAL AND DISCOVERY RULE)

*Carl M. Archer Trust No. Three v. Tregellas*<sup>304</sup> held that the discovery rule applied to toll the statute of limitations on behalf of the holder of a right of first refusal (ROFR) without notice of a sale subject to the ROFR.<sup>305</sup> The trustees of the Carl M. Archer Trust No. Three and the Mary Frances G. Archer Trust No. 3 (Holders) were granted a ROFR to purchase the mineral interest in a tract of land in Hansford County, Texas.<sup>306</sup> Four years after the ROFR was first granted, the mineral owners conveyed the mineral interest in the tract at issue to Ronald Ralph Tregellas and Donnita Tregellas (Purchasers) without first offering the mineral interest to Holders.<sup>307</sup>

Holders did not learn of the conveyance to Purchasers until more than four years later, and immediately filed suit against Purchasers.<sup>308</sup> Purchasers argued that the suit was barred by the statute of limitations because it was filed more than four years after the conveyance of the

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300. *Id.* at 286–87 (Jennings, J., dissenting in part).

301. *Id.* at 288.

302. *Id.* (citing *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 873 (Tex. 2017)).

303. Other litigation cases in the reporting period include: *MCG Drilling Invs., LLC v. Double M Ranch, Ltd.*, No. 11-14-00299-CV, 2018 WL 2022590 (Tex. App.—Eastland Apr. 30, 2018, no pet.) (mem. op.) (trespass-to-try-title); *Mellenbruch Family P’ship, L.P. v. Kennemer*, No. 04-17-00637-CV, 2018 WL 4096390 (Tex. App.—San Antonio Aug. 29, 2018, no pet.) (mem. op.) (adverse possession of minerals in TTT); *Seeligson v. Devon Energy Prod. Co., L.P.*, 753 F. App’x 225 (5th Cir. 2018) (per curiam) (class action on duty to market); *Dorfman v. JPMorgan Chase Bank, N.A.*, No. 02-17-00387-CV, 2018 WL 5074769 (Tex. App.—Fort Worth Oct. 18, 2018, no pet.) (mem. op.) (colorable legal claim to title as a defense); *M&M Res., Inc. v. DSTJ, LLP*, 564 S.W.3d 446 (Tex. App.—Beaumont 2018, no pet.) (trespass-to-try-title).

304. 566 S.W.3d 281 (Tex. 2018).

305. *Id.* at 292.

306. *Id.* at 284.

307. *Id.* at 285.

308. *Id.*

mineral interest.<sup>309</sup> Holders argued in part that the statute of limitations should be tolled by the discovery rule, because Holders had no reason to know that a conveyance had been granted four years prior.<sup>310</sup>

The trial court found that the statute of limitations did not bar the suit by Holders, and that Holders were entitled to specific performance of the ROFR.<sup>311</sup> Purchasers appealed to the court of appeals, which reversed the trial court and found that the statute of limitations began to run when the mineral interests were conveyed, the discovery rule did not apply, and the suit was barred by the statute of limitations.<sup>312</sup> The sole issue before the Texas Supreme Court was whether the discovery rule applied.

Generally, the statute of limitations for a matter “begins to run when facts come into existence that authorize a party to seek a judicial remedy.”<sup>313</sup> Under this general rule, the statute of limitations for a breach of contract action begins to run “the moment the contract is breached.”<sup>314</sup> “Texas courts consistently hold, and [the supreme court agreed], that a right of first refusal is breached when property is conveyed to a third party without notice to the rightholder.”<sup>315</sup> “Because [Holders] sued more than four years after they were injured, the claim is time-barred unless the accrual date is otherwise deferred.”<sup>316</sup>

“The discovery rule is a ‘limited exception’ to the general rule that a cause of action accrues when a legal injury is incurred.”<sup>317</sup> Under the discovery rule, a cause of action does not accrue “until the plaintiff knew or should have known of the facts giving rise to the cause of action.”<sup>318</sup> “[The supreme court] appl[ies] the discovery rule when the nature of the injury is inherently undiscoverable and the evidence of injury is objectively verifiable.”<sup>319</sup> That the injury was objectively verifiable was undisputed.<sup>320</sup>

In order to determine whether the discovery rule tolled the statute of limitations for the breach of the ROFR, the supreme court considered whether the injury sustained by Holders was one “that could be discovered through the exercise of reasonable diligence.”<sup>321</sup> An injury must be undiscoverable during the limitations period for the discovery rule to apply, but the discovery rule is only applied categorically.<sup>322</sup> Therefore, the issue is not whether these particular Holders could have discovered the

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309. *Id.* at 286.

310. *Id.*

311. *Id.*

312. *Id.*

313. *Id.* at 288 (quoting *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003)).

314. *Id.*

315. *Id.*

316. *Id.* at 290.

317. *Id.* (citing *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 66 (Tex. 2011)).

318. *Id.* (citing *S.V. v. R.V.*, 933 S.W.2d 1, 4 (Tex. 1996)).

319. *Id.* (citing *S.V.*, 933 S.W.2d at 6).

320. *Id.*

321. *Id.* (citing *Marshall*, 342 S.W.3d at 66).

322. *Id.*



injury.<sup>323</sup>

The supreme court held that the type of injury sustained by Holders was undiscoverable because “a rightholder who has been given no notice of the grantor’s intent to sell or the existence of a third-party offer generally has no reason to believe that his interest may have been impaired.”<sup>324</sup> The supreme court noted that reasonable diligence on part of the rightholder would not include “monitor[ing] public records for evidence of such an impairment.”<sup>325</sup>

Therefore, the supreme court concluded:

We therefore hold that a grantor’s conveyance of property in breach of a right of first refusal, where the rightholder is given no notice of the grantor’s intent to sell or the purchase offer, is inherently undiscoverable and that the discovery rule applies to defer accrual of the holder’s cause of action until he knew or should have known of the injury.<sup>326</sup>

By footnote, the supreme court also said the following: “We limit our holding to this particular breach—conveyance with *no* notice of the intent to sell or the existence of an offer—of this particular type of right.”<sup>327</sup> In this case, Purchasers “were not bona fide purchasers for value,” but purchased with notice, and Purchasers were subject to judgment for specific performance under the ROFR.<sup>328</sup>

The significance of this case is that the holder of a ROFR for a mineral interest is not required to monitor property records for an impairment of the ROFR to preserve the right to sue for a breach of the ROFR.

#### B. *LACKEY v. TEMPLETON* (TRESPASS-TO-TRY-TITLE)

*Lackey v. Templeton*<sup>329</sup> reversed and rendered a summary judgment for the appellees because the appellees failed to plead a trespass-to-try-title action.<sup>330</sup> This case involved many parties, and numerous claims and motions, including motions for partial summary judgment generally based on claims of superior title. The appellees sought relief under the Declaratory Judgment Act (DJA). The appellants filed special exceptions and contended that the appellees must replead their case as a trespass-to-try-title action. The trial court denied the special exceptions and granted partial motions for summary judgment in favor of the appellees. The issue before the Beaumont Court of Appeals was whether the appellees should have pled a trespass-to-try-title action, instead of an action under the

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323. *Id.*

324. *Id.* at 292.

325. *Id.*

326. *Id.*

327. *Id.* at 292 n.10 (emphasis in original).

328. *Id.* at 286.

329. No. 09-17-00183-CV, 2018 WL 3384570 (Tex. App.—Beaumont July 12, 2018, pet. denied) (mem. op.).

330. *Id.* at \*1.

DJA.<sup>331</sup>

The DJA provides that:

[A] person interested under a deed . . . or whose rights, status, or other legal relations are affected by a . . . contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder.<sup>332</sup>

A declaratory judgment action allows “parties to seek a declaration of rights under certain instruments.”<sup>333</sup> The DJA has different pleading and proof requirements than a trespass-to-try-title action, which is found in the Texas Property Code (TPC). The TPC “states that a trespass to try title action is the method of determining title to lands, tenements, and other real property,”<sup>334</sup> and it has been held that it “is the exclusive remedy by which to resolve competing claims to property.”<sup>335</sup> “To prevail in a trespass-to-try-title action, a plaintiff must usually (1) prove a regular chain of conveyances from the sovereign, (2) establish superior title out of a common source, (3) prove title by limitations, or (4) prove title by prior possession coupled with proof that possession was not abandoned.”<sup>336</sup> “A dispute involving a claim of superior title must be brought as a trespass-to-try-title action.”<sup>337</sup>

The appellants timely filed special exceptions in the trial court, which should have been granted, and therefore the court of appeals reversed and rendered on the declaratory judgment without prejudice to any pending trespass-to-try-title claims.<sup>338</sup> There are examples in other opinions where cases were tried as a declaratory judgment proceeding without timely objection, and then, on appeal, the courts have struggled to fit the pleadings and trial within the requirements of trespass-to-try-title to avoid a second trial. This case is a clear example of a timely objection in the trial court against proceeding outside the confines of the pleading and proof required in trespass-to-try-title. “[T]he fact that the DJA might otherwise cover their claims does not mean that the claims may be brought under the DJA if they must be brought as trespass-to-try-title actions.”<sup>339</sup> Essentially, “[a] dispute involving a claim of superior title must be brought as a trespass-to-try-title action.”<sup>340</sup>

This case clearly should have been tried in trespass-to-try-title and illustrates the proper procedure for objecting in the trial court and preserv-

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331. *Id.* at \*1–4.

332. *Id.* at \*5 (quoting TEX. CIV. PRAC. & REM. CODE ANN. § 37.004(a)).

333. *Id.* (quoting *Martin v. Amerman*, 133 S.W.3d 262, 265 (Tex. 2004)).

334. *Id.* (quoting TEX. PROP. CODE ANN. § 22.001(a)).

335. *Id.* (citing *Lile v. Smith*, 291 S.W.3d 75, 77 (Tex. App.—Texarkana 2009, no pet.)).

336. *Id.* (quoting *Martin*, 133 S.W.3d at 265).

337. *Id.* (citing *Coinmatch Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909, 926 (Tex. 2013)).

338. *Id.* at \*6.

339. *Id.* (citing *Martin*, 133 S.W.3d at 267; *Jinkins v. Jinkins*, 522 S.W.3d 771, 786 (Tex. App.—Houston [1st Dist.] 2017, no pet.)).

340. *Id.* at \*5 (citing *Coinmatch*, 417 S.W.3d at 926).

ing error by filing special exceptions. It also illustrates that the improper declaratory judgment will be reversed and rendered. Under some facts, there may be limitations issues triggered by a failure to timely file and plead in trespass to try title.

## VI. REGULATION<sup>341</sup>

### A. *RAILROAD COMMISSION OF TEXAS v. POLK OPERATING, LLC* (JURISDICTION ON APPEAL)

*Railroad Commission of Texas v. Polk Operating, LLC*<sup>342</sup> held that the district court in Austin had jurisdiction to hear an appeal from TRC orders that failed to grant all of the relief requested.<sup>343</sup> Polk Operating, LLC (Polk) operated an oil and gas waste facility licensed by the TRC. The TRC brought an enforcement action against Polk involving inadequately lined and over capacity storage pits. Evergreen Underground Water Conservation District intervened. According to Polk, the intervention was urged on by Polk's competitor. Evergreen "sought discovery regarding the identity of Polk's customers, Polk's compensation arrangements, and Polk's activities on the property adjacent to its recycling facility."<sup>344</sup>

Polk objected to the discovery request, and after an administrative law judge (ALJ) entered a protective order, but granted discovery, Polk asked the TRC to reverse the ALJ's interim orders and to "fashion a more comprehensive protective order" to prevent the release of trade secrets.<sup>345</sup> The TRC responded by strengthening the protective order, but did not reverse the discovery request.<sup>346</sup> When Polk responded by filing for a writ of mandamus and writ of injunction in the Austin district court, the TRC argued "that Polk failed to exhaust its administrative remedies at the agency level" and that the TRC had jurisdiction.<sup>347</sup> The district court denied the TRC's plea to the jurisdiction, and an interlocutory appeal to the Austin Court of Appeals followed.<sup>348</sup> The issues were whether Polk exhausted the administrative remedies available to it at the TRC, and whether Polk had "standing to challenge the discovery orders because [Polk] was successful in its appeal to the [TRC]."<sup>349</sup>

The TRC argued that "Polk's appeal to the [TRC] did not explicitly reference the ALJ's failure to make a necessity finding regarding Polk's

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341. The other regulation case in the reporting period was *Armour Pipe Line Co. v. Sandel Energy, Inc.*, 546 S.W.3d 455 (Tex. App.—Houston [14th Dist.] 2018, pet. denied) (authority to do business).

342. No. 03-17-00080-CV, 2018 WL 1004567 (Tex. App.—Austin Feb. 22, 2018, no pet.) (mem. op.).

343. *Id.* at \*1.

344. *Id.*

345. *Id.*

346. *Id.* at \*2.

347. *Id.*

348. *Id.*

349. *Id.*

trade-secret objections” and that because the TRC did strengthen the protective order Polk lacked standing because “Polk’s appeal to the [TRC] was successful.”<sup>350</sup>

In determining whether Polk had exhausted its remedies with the TRC, the court reasoned that failure to “invoke the trade-secret necessity issue . . . would constitute a waiver of the necessity issue, not a failure of jurisdiction.”<sup>351</sup> “Thus, the adequacy or sufficiency of Polk’s appeal of the interim orders of the [TRC] does not affect the district court’s jurisdiction here.”<sup>352</sup>

In regard to the standing issue, the court reasoned that the TRC had not granted *all* of the relief requested.<sup>353</sup> “The [TRC] . . . did strengthen the protective order as requested . . . , [but] did not reverse the discovery orders . . . .”<sup>354</sup> “Thus, Polk did not receive all of its requested relief.”<sup>355</sup>

The case followed existing precedent that the filing of a motion for rehearing is jurisdictional, but the sufficiency of that motion is not. On its face, the TRC did not grant all the relief requested.

## VII. CONCLUSION

Frequently, title and conveyancing cases turn on document construction, and an opinion may be more or less important, depending upon how frequently similar language is used in the industry. Opinions that reach fundamental concepts of title are likely to be much more significant in the evolution of jurisprudence related to oil, gas, and mineral law. In *ConocoPhillips Co. v. Koopmann*,<sup>356</sup> the Texas Supreme Court carved out a unique exception to the rule against perpetuities limited to the oil and gas context. It is likely that this limitation on the Rule will have broad application, because property rights in the industry are frequently derived from oil and gas leases. Oil and gas leases almost always create a fee simple determinable interest (the term of the lease is for a term of years and for so long thereafter as oil, gas, or other mineral is produced in paying quantities) in the lessee, with the possibility of reverter in the lessor. Creating additional rights after lease termination is common, and this case broadly holds that the termination of an oil and gas lease is certain, that defeasible term interests in minerals promote the public policy of alienability of land, and the artificial construct of a twenty-one-year window will not be used as the test for an illegal restraint.

If *Yowell v. Granite Operating Co.*<sup>357</sup> stands up upon review, the holding (that an overriding royalty cannot attach to a new lease under an anti-washout clause because it violates the rule against perpetuities) will be

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350. *Id.*

351. *Id.* at \*3.

352. *Id.*

353. *Id.*

354. *Id.*

355. *Id.*

356. 547 S.W.3d 858 (Tex. 2018).

357. 557 S.W.3d 794 (Tex. App.—Amarillo 2018, pet. filed).

very significant. As between “extensions,” “renewals,” and “new” leases, the most common fact pattern is “new” leases. *Koopmann* was not considered in *Yowell*, but *Yowell* has the additional uncertainty of whether or not there actually will be a new lease, and there is no time limit in *Yowell* for the acquisition of that lease. However, in *Yowell*, the holder of the interest is ascertainable and the preceding estate is certain to terminate.

Although much of the opinion in *Perryman v. Spartan Texas Six Capital Partners, Ltd.*<sup>358</sup> is focused on parsing the language of a specific deed, the more lasting significance is the Texas Supreme Court’s emphasis on limiting the *Duhig* doctrine to reservations without implications for exceptions. An excepted interest, regardless of who owns it, is simply not conveyed to grantee.

Many, perhaps most, deed construction cases in Texas arise in the context of oil and gas interests, because that is where the money is. Generic rules of deed construction have a significant impact on the ownership of minerals. For perhaps a hundred years, the trend of the cases was driven by canons of construction, which were broadly conceived as rules to resolve uncertainty in deed construction. The hope was that the canons would bring greater certainty to uncertain deeds, reducing the need to resort to litigation. Eventually, there was a canon to support any conclusion desired. For about twenty or thirty years, the Texas Supreme Court has been moving away from canons or rules toward a more holistic approach of divining the parties’ intent from the words used within the document and harmonizing the entire document.<sup>359</sup> *United States Shale Energy II, LLC v. Laborde Properties, L.P.*<sup>360</sup> is particularly useful in summarizing this holistic, plain meaning approach to deed construction. It appears to elevate the importance of grammar and punctuation over precedent, although precedent has been one of the most important tools for the lawyer seeking certainty. Oddly, it also comes at a time when the world is moving toward reducing all communications to 140 characters. It will be interesting to see the first case turning on the meaning of an emoji in a text. The split opinion in this case illustrates the tension between determining intent from the document, and construing the document based on what the parties “must have” intended.

The interests of the lessor and lessee under an oil and gas lease are generally aligned on wanting the maximum production at the best price as soon as possible. However, because the lessor generally gets a free ride on the path to reaching those goals, it is not surprising that the lessor and lessee are frequently in conflict on the details of the lessee’s performance. For lessors, it has always been a source of concern that the lessee is taking too long and holding too much acreage for too little effort. Some version of a retained acreage clause is now common in oil and gas leases. How-

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358. 546 S.W.3d 110 (Tex. 2018).

359. See, e.g., *Wenske v. Ealy*, 521 S.W.3d 791, 792 (Tex. 2017).

360. 551 S.W.3d 148 (Tex. 2018).

ever phrased, such clauses have the general effect of limiting the time and the acreage that the lessee can hold. The interests of the lessor and lessee are not aligned on such a clause, which always favors the lessor. A common way to settle on the terms of the clause is to find as much common ground as possible. Both parties want to produce as much as possible out of a single well, so any restrictions on the lessee should not extend to limiting the allowable production from a well. Therefore, it is quite common for retained acreage clauses to be tied to the regulations bearing on production—allowables and acreage assigned to wells for purposes of determining the right to produce and allowables. Because the regulatory scheme functions as government policy, and is separate from any private party's particular objective, it also has some moral high ground as regarding fairness.

Because the parties have no control over the regulatory universe, incorporating regulatory matters into a private contract is not without risk. The companion cases of *XOG Operating, LLC v. Chesapeake Exploration Ltd. Partnership*<sup>361</sup> and *Endeavor Energy Resources, L.P. v. Discovery Operating, Inc.*<sup>362</sup> are intended to definitively resolve the differences in common retained acreage clauses which either refer to acreage “assigned” or “prescribed” for purposes of allowable and proration units. In summary, the Texas Supreme Court says that parties are free to contract by including such terms in their leases, but the results may be significantly different and turn upon the usage of such terms in the regulatory universe.

In *Murphy Exploration & Production Co.-USA v. Adams*,<sup>363</sup> the Texas Supreme Court held that an implied proximity requirement may be a “reasonable premise in the context of vertical drilling, where placement of an offset well is an important factor in minimizing the amount of oil or gas being drained,” but the “same principle does not apply in the context of horizontal drilling and hydraulic fracturing.”<sup>364</sup> This statement may be an important precursor for opinions to come. With the dramatic shift of the industry away from vertical wells to horizontal wells, oil and gas jurisprudence has been left far behind. There has been surprisingly little litigation, but there is a sense that an explosion is coming. Issues involving allocation wells, trespass, pooling, implied lease covenants, implied lease easements, payment of royalty, retained acreage clauses, surface rights, and the accommodation doctrine all seem to be ripe for challenge and redefinition.

*Devon Energy Production Co., v. Apache Corp.*<sup>365</sup> recognizes the duty the lessee owes to the lessor to pay royalty under the lease, but refuses to find an extension of that duty under the division order statute. Operators

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361. 554 S.W.3d 607 (Tex. 2018).

362. 554 S.W.3d 586 (Tex. 2018).

363. 560 S.W.3d 105 (Tex. 2018).

364. *Id.* at 112.

365. 550 S.W.3d 259 (Tex. App.—Eastland 2018, pet. denied).

and nonoperators may continue to shuffle that duty between them, or among them, if a third party “payor” is included. However, the duty to pay is the lessee’s duty, and the lessor’s recourse will be against the lessor’s lessee. Although *Koopmann* is discussed above under title and conveyancing cases, it also appears to have a significant impact on payment of royalty under the division order statute. When the statute was enacted, it was viewed as a compromise between lessors and lessees. Lessors wanted an obligation imposed upon lessees to timely pay royalty. Lessees were willing to accept the statutory obligation to timely pay, but only because there was a statutory right to suspend, primarily for title issues. *Koopmann* suggests the lessees got nothing in the trade.

Most production is governed by some form of operating agreement, and most operating agreements are based on some version of the AAPL Form 610 Operating Agreement. Thus, any decision construing such an agreement is likely to have extensive and continuing importance. While the draftsmen of those form agreements are concerned with protecting the interests of the nonoperators, it is fundamental to the concept of the operating agreement that one party has to step up and assume the role of the operator for the benefit and interest of all in the joint operations. It is of great importance to protect the operator, who is effectively assuming risk for all, against the defaulting nonoperator. In *Allen Drilling Acquisition Co. v. Crimson Exploration, Inc.*,<sup>366</sup> the Waco Court of Appeals strongly puts the hammer on the defaulting nonoperator who fails to pay. Many operating agreements include advance payments to lower the operator’s risk, but the granting of a lien and a possible foreclosure has long been perceived as an important protection for the operator.

Similarly, *Seismic Wells, LLC v. Sinclair Oil & Gas Co.*<sup>367</sup> enforces the right to recover attorneys’ fees on a financial obligation under the operating agreement. Such a claim is most likely to originate with the operator as plaintiff. Recovery of fees on most other claims is left to applicable law in the applicable jurisdiction.

In recent years, the Texas Supreme Court has acted to severely limit the application of the discovery rule, which was invoked by the litigants in almost every case involving a statute of limitations.<sup>368</sup> One of the tools employed by the supreme court to limit such contests was to impose the requirement that the discovery rule would only be applied categorically. That is, there is not a contest in every case to determine if a specific litigant should have known of the accrual of the cause of action. Rather, the availability or not of the discovery rule is determined categorically by the kind of case before the court. The supreme court has generally rejected the application of the discovery rule, and in the context of oil and gas cases, has found that publicly available documents (such as documents at

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366. 558 S.W.3d 761 (Tex. App.—Waco 2018, pet. filed).

367. 750 F. App’x 278 (5th Cir. 2018).

368. *See, e.g., ExxonMobil Corp. v. Lazy R Ranch L.P.*, 511 S.W.3d 538 (Tex. 2017).

the TRC) make the discovery rule inapplicable.<sup>369</sup> However, in *Carl M. Archer Trust No. Three v. Tregellas*,<sup>370</sup> the supreme court refused to impose a duty on the holder of a ROFR to continually check the deed records to determine if the ROFR had been breached. The holding seems to be consistent with the general rule that property owners, while bound by the previous record title, are not bound by subsequent changes in record title.

In 2004, the Texas Supreme Court reasserted that the trespass-to-try-title statute provides “*the* method for determining title to . . . real property.”<sup>371</sup> Since 2004, there have been two or three cases every year in which the litigants are disputing whether they can try a title case by some other proceeding, usually under the Declaratory Judgment Act. *Lackey v. Templeton*<sup>372</sup> is an example for this reporting period. It highlights the proper challenge to pleadings other than trespass-to-try-title. Special exceptions should be made in the trial court, and if not granted, on appeal a judgment will be reversed and rendered.

After twenty-three years of commenting on Oil, Gas, and Mineral Law for the *SMU Annual Texas Survey*, this is my final contribution. The majestic evolution and refinement of our jurisprudence has been, and will continue to be, an amazing testament to the efficacy of the rule of law.

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369. See, e.g., *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 68–69 (Tex. 2011).

370. 566 S.W.3d 281 (Tex. 2018).

371. *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004) (citing TEX. PROP. CODE ANN. 22.001(a)).

372. No. 09-17-00183-cv, 2018 WL 3384570 (Tex. App.—Beaumont July 12, 2018, pet. denied) (mem. op.).



