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Recent Developments in Oklahoma Oil and Gas Law

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K & H Well Service, Inc. v. Tcina, Inc. 2002 OK 62, 51 P.3d 1219

The "drilling rights" in lands comprising an oil and gas drilling prospect are rarely owned by a single party. Instead, several companies or individuals will have acquired oil and gas leases covering separate tracts that, taken together, comprise the prospect, or will have acquired oil and gas leases covering undivided fractional interests in the separate tracts, or both.[1] Typically, these parties, as owners of the "working interest" in the prospect, will provide for the drilling of a well on the prospect by entering into a joint operating agreement. In all likelihood, the working interest owners will enter into one of the editions of the Model Form Operating Agreement adopted by the American Association of Petroleum Landmen, the most recent edition being AAPL Form 610-1989 (the 1989 Model Form Agreement).[2]

In their joint operating agreement, one of the parties will be designated as operator,[3] with the other parties to the agreement being the non-operator parties.[4] The operator is responsible for directing and conducting all operations specified in the joint operating agreement.[5] The 1989 Model Form

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1. Rather than or in addition to having acquired oil and gas leases, occasionally a party will have acquired fee mineral interests in one or more of the tracts within the prospect.

2. MODEL FORM OPERATING AGREEMENT: A.A.P.L. FORM 610-1989 (Am. Ass'n of Petroleum Landmen 1989), *reprinted in* 5A VERNON'S OKLAHOMA FORMS § 10.47 (2d ed. Supp. 2002) [hereinafter 1989 MODEL FORM AGREEMENT]. By interlineations, deletions, and additions, the parties often alter, to some extent, the terms and provisions of the AAPL Model Form Agreement. In fact, the Model Form Agreement itself contains a section entitled "Other Provisions," left blank for the parties to insert additional provisions. With the exceptions noted, the AAPL Model Form Agreement may be said to be the "standard" agreement used in the oil and gas industry for conducting joint operations. "The [AAPL] model form is used in nearly every domestic, multiple party venture for the on-shore drilling of oil and gas." William A. Keefe, *The Oil and Gas Joint Operating Agreement: Unraveling Some Knots*, 36 ROCKY MTN. MIN. L. INST. 18-1, 18-2 (1990).

3. *See, e.g.*, 1989 MODEL FORM AGREEMENT, *supra* note 2, art. V.A.

4. *Id.*

5. *See, e.g., id.* ("_____ shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of this agreement.").

Agreement provides that in the operator's performance of services for the non-operator parties, the "Operator shall be an independent contractor not subject to the control or direction of the Non-Operators."[6] Unlike the active role played by the operator under the joint operating agreement, the agreement assigns a mostly passive role to the non-operator parties. Their primary role is to pay the operator their respective shares of the costs and expenses incurred by the operator in conducting the joint operations who in turn pays the third party suppliers of materials and services for the joint operations.[7]

Experienced non-operator participants in an oil and gas well have long known that, rather than taking an active part in the well's drilling and operation, they are well-advised to adhere to the essentially passive role they are expected to play. The law is well-settled that non-operator participants who take an active part in the conduct of the joint operations will be considered to be members of a mining partnership and hence personally liable for monies owed to third party creditors for materials and supplies for which the operator contracts.[8] In view of a recent Oklahoma Supreme Court decision, however, it appears that non-operator participants who avoid any

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6. *Id.*

7. *See id.* art. V.D.2 ("Except as herein otherwise specifically provided, Operator shall promptly pay and discharge expenses incurred in the development and operation of the Contract Area pursuant to this agreement and shall charge each of the parties hereto with their respective proportionate shares upon the expense basis provided in Exhibit 'C'."). The non-operator parties' role is not entirely passive, however. For example, the Model Form Agreement requires their consent for the plugging and abandonment of a well as a dry hole. *Id.* art. VI.E.1. They may elect not to participate in a well-completion attempt if the parties select Option No. 2 of article VI.C.1 of the 1989 Model Form Agreement. They have full and free access to all operations, *id.* art. V.D.5, and they also have the right to receive reports, test results, well logs, etc., *id.* art. V.D.7.

8. By taking an active part in the conduct of the joint operations, a non-operator party satisfies the "cooperation in the project" element of a mining partnership (joint interest in the property and agreement to share in profits and losses being the other two elements). *See, e.g.*, Sparks Bros. Drilling Co. v. Tex. Moran Exploration Co., 1991 OK 129, ¶ 15, 829 P.2d 951, 953; *accord* Jenkins v. Pappas, 1963 OK 143, ¶ 13, 383 P.2d 645, 647; Edwards v. Hardwick, 1960 OK 38, ¶ 36, 350 P.2d 495, 502. While these three elements have been universally recognized in all jurisdictions that have considered the matter as being the prerequisites for the existence of a mining partnership, Terry Noble Fiske, *Mining Partnership*, *in* 26 OIL & GAS INST. 187, 194-95 (Matthew Bender 1975), in the reported cases it is the element that the Oklahoma courts call "cooperation in the project" that is "the principal issue, if not the only real one . . . ." *Id.* at 200. The Oklahoma Supreme Court has described "cooperation in the project" as "actively joining in the promotion, conduct or management of the joint venture." *Edwards*, ¶ 36, 350 P.2d at 502. What the Oklahoma court calls "cooperation in the project" has been variously described in other jurisdictions as a "mutual right of control," Hamilton v. Tex. Oil & Gas Corp., 648 S.W.2d 316, 321 (Tex. App. 1982), and as "joint operation," Blocker Exploration Co. v. Frontier Exploration, Inc., 740 P.2d 983, 985 (Colo. 1987).

possibility of being considered mining partners by scrupulously refraining from taking an active role in the drilling and operation of the well may nevertheless be personally liable for their proportionate share of costs and expenses owed to such third party creditors.[9]

In *K & H Well Service, Inc. v. Tcina, Inc.*, when K & H did not receive payment for supplies, materials, and services it provided in connection with the reworking and drilling of several oil and gas wells, it filed oil and gas well lien statements as provided by statute.[10] Shortly thereafter, K & H brought suit to foreclose its lien and sought judgment for the unpaid amount. K & H named Tcina, Inc. (Tcina), the operator of the wells and the company that had engaged its services, as a defendant. K & H also named as defendants Tcina Holding Company, Limited (Holding Co.) and others as working interest owners of the wells.[11] At trial, Tcina presented evidence that it served as merely a "contract operator" and thus owned no working interest in the wells; that it had advised K & H at the outset that it was the agent for the working interest owners for whom the work was to be performed; and that the working interest owners would pay for the work.[12] Tcina asserted that, as an agent for disclosed principals, it had no liability for the amount owed to K & H for the work K & H had performed.[13] As for defendant Holding Co., it asserted that it owned no interest in the leasehold estate to which K & H's lien pertained, because, while it appeared of record to be the owner of a five percent working interest, it was in fact simply the owner of a "carried interest" and thus not subject to K & H's lien.[14]

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9. K & H Well Serv., Inc. v. Tcina, Inc., 2002 OK 62, ¶ 16 n.17, 51 P.3d 1219, 1225 n.17.

10. *Id.* ¶ 2, 51 P.3d at 1221. Title 42, section 144 of the Oklahoma Statutes, last amended in 1963, provides that:

> Any person, corporation, or copartnership who shall, under contract, expressed or implied, with the owner of any leasehold for oil and gas purposes, . . . or with the trustee or agent of such owner, perform labor or services, . . . or furnish material, machinery, and oil well supplies used in the digging, drilling, torpedoing, completing, operating, or repairing any oil or gas well, shall have a lien upon the whole of such leasehold . . . or lease for oil and gas purposes, the buildings and appurtenances, the proceeds from the sale of oil or gas produced therefrom inuring to the working interest, . . . and upon the material and supplies so furnished, . . . and upon all the other oil or gas well fixtures and appliances used in the operating for oil and gas purposes upon the leasehold for which said material and supplies were furnished or labor or services performed.

42 OKLA. STAT. § 144 (2001).

11. *K & H*, ¶ 3, 51 P.3d at 1221.

12. *Id.*, ¶ 5, 51 P.3d at 1222.

13. *Id.*

14. *Id.* ¶ 6, 51 P.3d at 1222.

The trial court entered judgment against K & H, denying both its claim for a monetary judgment and for foreclosure of its liens.[15] The Oklahoma Court of Civil Appeals affirmed the trial court's judgment with respect to Tcina.[16] The court of civil appeals agreed with Tcina's position, as apparently had the trial court, that because Tcina owned no working interest in the wells and had engaged K & H's services as the agent for disclosed principals, Tcina was not liable for the sums owed to K & H.[17] The Court reversed the judgment regarding Holding Co., however, finding, contrary to Holding Co.'s contention, that the company owned a working interest in the wells.[18] The Court not only allowed K & H to foreclose its lien "on the leasehold in which [Holding Co.] was a part owner," but also held that K & H was entitled to a money judgement against Holding Co.[19] — and that the amount of such judgment should be for the entire sum owed to K & H.[20]

On certiorari, the Oklahoma Supreme Court vacated the opinion, affirmed the trial court's finding of no liability on Tcina's part,[21] agreed with the court of civil appeals that the evidence established that Holding Co. owned a working interest in the wells,[22] allowed K & H to foreclose its lien as to Holding Co.'s leasehold interest,[23] and also held that K & H was entitled to a money judgment against Holding Co., but not necessarily for the entire sum owed to K & H.[24] Instead, the court directed the trial court to determine on remand whether a mining partnership existed between and among Holding Co. and the other working interest owners. If the trial court determined that such a relationship existed, Holding Co. would be personally liable for the entire debt.[25] In this respect, the court's directive to the trial court is unremarkable, for mining partners are indeed liable to third party creditors of the mining partnership for the full amount owed.[26] However, the court further indicated

15. *Id.* ¶ 7, 51 P.3d at 1222.

16. *Id.*

17. K & H Well Serv., Inc. v. Tcina, Inc., No. 93,451, slip op. at 4-5 (Okla. Civ. App. filed Mar. 13, 2001).

18. *Id.* at 5-6.

19. *Id.* at 6.

20. *Id.* at 7.

21. K & H Well Serv., Inc. v. Tcina, Inc., 2002 OK 62, ¶ 11, 51 P.3d 1219, 1223-24.

22. *Id.* ¶ 15, 51 P.3d at 1224.

23. *Id.* ¶ 14, 51 P.3d at 1224. This determination is distinguishable from the Oklahoma Court of Civil Appeals'perhaps unintentionally broader statement as to the foreclosure's encompassing the entire leasehold as to which Holding Co. was only a part owner. *See infra* text accompanying note 19.

24. *K & H*, ¶¶ 15-16, 51 P.3d at 1224-25.

25. *Id.*

26. 2 HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 435.1, at 505 (2002).

that, if the trial court determined that a mining partnership did not exist between and among Holding Co. and the other working interest owners, nevertheless Holding Co. would be personally liable in an amount commensurate with its proportionate interest in the wells.[27]

The court based its pronouncement — regarding a leasehold owner's *in personam*, several liability for its proportionate share of the debt for materials and services where no mining partnership exists — on what the court referred to as its "holding" in *Sparks Brothers Drilling Co. v. Texas Moran Exploration Co.*,[28] a case the court decided in 1991.[29] In a footnote reference to *Sparks*, the *K & H* court stated that:

> Appellee misreads *Sparks* when it asserts that it holds when no mining partnership is found to exist, each participant's liability for a well's drilling costs is *in rem only*. *Sparks* holds that each participant's liability — when no mining partnership exits — is limited to that quantum of interest [here 5%] which each participant possesses in the well, i.e., each participant is *severally* liable for expenses in direct proportion to the quantum of leasehold-interest owned. The obligation is not just *in rem* but rather is *both in rem* and *in personam*.[30]

In *Sparks*, an unpaid drilling contractor alleged the existence of a mining partnership. A divided court determined that the evidence was insufficient to establish the "cooperation in the project" element of a mining partnership and hence reversed the trial court's judgment that had imposed joint and several liability for the debt upon leasehold-interest owner Texas Moran.[31]

At the outset of its opinion in *Sparks*, the court stated that: "If a mining partnership exists, then Texas Moran is jointly and severally liable for the costs incurred. If there is not a mining partnership, then Texas Moran is severally liable, that is liable only to the extent of its interest in the well."[32] However, whether the latter statement above quoted was, strictly speaking, a "holding" of the case is subject to question. In addition to drilling contractor Sparks, there were several other lien-claimant, unpaid suppliers who were parties to the suit.[33] The Court did not remand the case to the trial court explicitly for the entry of an *in personam* monetary judgment against Texas

27. *K & H*, ¶ 16, 51 P.3d at 1225.
28. 1991 OK 129, 829 P.2d 951.
29. *K & H*, ¶ 16, 51 P.3d at 1225.
30. *Id.* ¶ 16 n.17, 51 P.3d at 1225 n.17.
31. *Sparks*, ¶ 20, 829 P.2d at 954.
32. *Id.* ¶ 1, 829 P.2d at 952 (citations omitted).
33. *Id.* ¶ 9, 829 P.2d at 953.

Moran. Instead, it remanded the case "[b]ecause the record does not show that the trial court determined the priority of the liens."[34] Moreover, the court did not state in *Sparks* that its reference to a non-operator's being "severally liable" absent a mining partnership meant that the non-operator was subject to *in personam* as well as *in rem* liability.[35]

Most importantly, the court's basis in *Sparks* for its statement that "[i]f there is not a mining partnership, then Texas Moran is severally liable, that is liable only to the extent of its interest in the well" merits examination.[36] To support the statement, the court cited an article appearing in the October 29, 1983, issue of the *Oklahoma Bar Journal*, which stated that "[i]f no . . . [mining partnership] exists, each party's liability is several, and judgment may only be enforced against each personally for his pro rata amount of the indebtedness."[37] The author of that article cites to section 246 of volume 58 of *Corpus Juris Secundum*. However, the only statement in that section to which the author could have been referring reads: "[w]here partnership liability exists, every partner is liable to third parties for the obligations of the partnership jointly with his copartners *and not merely for a pro tanto amount of the indebtedness*,"[38] citing two Oklahoma cases, *Henderson v. Curtis*,[39] and *Premier Investment Co. v. Williams Iron Works Co.*,[40] and one Texas case, *Wright v. Terry*,[41] in support.[42] However, none of the cited cases imply, much less hold, that, absent the existence of a partnership, the court can find the participants nevertheless personally liable for a proportionate share of the debt incurred by the active participant.

In *Henderson*, the Oklahoma Supreme Court simply affirmed the trial court's finding that the defendants engaged in a mining partnership rather than holding that their agreement constituted, as they contended, merely a

34. *Id.* ¶ 20, 829 P.2d at 954.

35. One commentator, perhaps reflecting a widely held view of the holding in *Sparks*, stated in 1999 that: "[In *Sparks*,] [t]he Oklahoma Supreme Court found that there was no mining partnership and that therefore the nonoperator was not personally liable for the delinquency." Ronald T. Sponberg, *The Use of Tort and Statutory Duties to Enlarge Contract Obligations Under the Lease and the Operating Agreement—Oklahoma Law*, 50 INST. ON OIL & GAS L. & TAX'N 7-1, 7-71 (1999).

36. *Sparks*, ¶ 1, 829 P.2d at 952.

37. Philip O. Watts, *Contingent Liability of the Passive Working Interest Investor Under Operating Agreements in Oklahoma*, 54 OKLA. B.J. 2797, 2798 (1983).

38. 58 C.J.S. *Mines and Minerals* § 246 (1948) (emphasis added).

39. 1936 OK 639, 65 P.2d 986.

40. 1936 OK 653, 63 P.2d 705.

41. 78 S.W.2d 1043 (Tex. Civ. App. 1935).

42. The above quoted statement also appears with substantially the same language in section 390 of the 1998 revision of *Corpus Juris Secundum, Mines and Minerals*, volume 58, citing no additional cases.

"grubstake" contract.[43] In *Premier*, the court rejected defendant Premier's contention that it had merely purchased an interest in the well, finding instead that the terms of its contract with the lessee, as well as certain activities on its part, clearly evidenced the existence of a mining partnership.[44] Additionally, in *Wright*, the court simply found that the agreement of the well participants established the existence of a partnership and hence conferred joint and several liability.[45] In short, the idea that passive participants in a drilling venture, found not to have become mining partners, are nevertheless liable for a pro tanto amount of the indebtedness appears to have been an unfounded assumption on the part of the author of the statement found in the *Corpus Juris Secundum* treatise.

Moreover, in *McAnally v. Cochran*,[46] the Oklahoma Supreme Court squarely held that, absent the existence of a mining partnership, "no personal judgment can be obtained against the cotenants in the leasehold estate other than [against] those who contracted for the material and labor."[47] And in *Conservation Oil Co. v. Graper*,[48] in reversing a personal judgment granted in favor of an oil and gas lien claimant against a leasehold owner with whom no privity of contract existed, the court stated that:

> The trial court evidently assumed that a right to a lien also entitled the lien claimant to a personal judgment for the amount of his claim. In this the trial court is mistaken, as the lien statutes (sections 10977, 10978, 10979, O.S. 1931) only grant to subcontractors a lien upon the property of the owner and only in the manner and to the extent therein stated.[49]

Oklahoma's current oil and gas well lien statute, title 42, section 144 of the Oklahoma Statutes, mirrors the former Oklahoma lien statutes cited by the Court in *Conservation Oil*, granting only a lien upon property and making no provision for granting a personal judgment in favor of the lien claimant.[50]

In assessing the import of *K & H*, it is important to note that the case is not, *on its facts*, contradictory to the court's holdings in *McAnally* and *Conservation Oil*. The salient and uncontroverted fact in *K & H* is that Tcina acted as an agent for the non-operator working interest owners in contracting

43. *Henderson*, ¶¶ 7, 10, 65 P.2d at 987.
44. *Premier*, ¶ 5, 63 P.2d at 706.
45. *Wright*, 78 S.W.2d at 1044.
46. 1935 OK 81, 46 P.2d 955.
47. *Id.* ¶ 22, 46 P.2d at 959.
48. 1935 OK 626, 46 P.2d 441.
49. *Id.* ¶ 19, 46 P.2d at 444.
50. *See supra* text accompanying note 10.

with K & H for materials and services for the wells; in other words, it served as the agent for disclosed principals.[51] On the other hand, in *McAnally*, the court found that working interest owners Root and Hoxie "had exclusive control during the drilling of the well and with no authority to act for any other cotenant,"[52] and in *Conservation Oil* the lack of any privity of contract between the lien claimant supplier of services and the leasehold owners precluded the lien claimant's entitlement to a personal judgment.[53]

It should also be noted that if the working interest owners in *K & H* had entered into a joint operating agreement, the court failed to mention it in its opinion, and it played no part in the court's analysis.[54] One of the purposes of a modern joint operating agreement is to spell out the intended relationship of the parties. If the parties adhere to the relationship as described, hopefully the courts will give credence to the agreement assuming it is not contrary to applicable law — and will give it credence not only as among the parties, but also with respect to third parties. The 1989 Model Form Agreement speaks specifically to the relationship between the designated operator and the non-operator parties as to the operator's dealings with third-party suppliers of materials and services for the joint operations. It provides that the "[o]perator shall not be deemed, or hold itself out as, the agent of the Non-Operators with authority to bind them to any obligation or liability assumed or incurred by Operator as to any third party."[55] Absent facts establishing the existence of a mining partnership, if the operator adheres to the above quoted provision of the joint operating agreement, in other words, if the operator does not hold itself out to third-party suppliers as being the agent of the non-operator parties in contracting for materials and services for the joint operations, it would appear that under *K & H* the non-operator parties nevertheless are personally liable for a share of the contracted debt proportionate to their interest in the well. On the other hand, *K & H* can be read, insofar as its statements concerning *in personam* several liability are concerned, as applying only to situations in which an operator has in fact acted as agent for the non-operator parties. Unlike the operator in *K & H,* it is reasonable to assume that

51. K & H Well Serv., Inc. v. Tcina, Inc., 2002 OK 62, ¶¶ 10-11, 51 P.3d 1219, 1223.

52. *McAnally*, ¶ 21, 46 P.2d at 958.

53. *Conservation Oil*, ¶ 19, 46 P.2d at 444.

54. Typically, when the joint operations are conducted by a "contract operator," as was the case in *K & H*, the working interest owners enter into the usual joint operating agreement in which one of them will be designated as operator. The designated operator engages the services of a "contract operator" but, it would appear, absent an agreement among the parties to the contrary, remains responsible for the obligations imposed upon the designated operator by the joint operating agreement.

55. 1989 MODEL FORM AGREEMENT, *supra* note 2, art. V.A.

operators do not ordinarily purport to act as the agent for the non-operating parties, much less as disclosed principals. However, if *K & H* entitles an oil and gas lien claimant to a personal judgment against each non-operator working interest owner in an amount commensurate with that owner's interest in the well even where the operator has not acted as the non-operators' agent, then *K & H* must be regarded as implicitly overruling *McAnally*, and *Conservation Oil*.

Perhaps the court will have occasion to revisit this matter. In any event, non-operator parties, who will be paying to the operator their proportionate shares of third-party costs, should address how to avoid personal liability if the operator fails to pay a third party. Otherwise, if *K & H* is to be understood as holding that non-operator parties are personally liable to third-party suppliers of materials and services for a share of the debt proportionate to their interest in the well, then the non-operator parties may find themselves paying for their share of such costs twice — once, in having remitted their share to the operator, and, again, in having to pay the supplier if the operator fails to do so. Just as homeowners have a statutory right to defer paying their contractors until they provide proof that the subcontractors have been paid,[56] the non-operator parties could insist that joint operating agreements establish a similar procedure. Operators, undoubtedly, would not favor such a procedure. It would impose an additional administrative burden on the operator, with consequent delay and expense. Because most oil and gas exploration and production companies serve as the operators of some wells and are non-operator parties as to others, it seems unlikely that such a procedure would find widespread support. A better approach, and perhaps a feasible one, would be to require the operator to insist upon the inclusion in its contracts with third-party suppliers of materials and services of a provision stating that the supplier agrees that it will look solely to the operator for payment and acknowledges that the operator acts as an independent contractor and not as agent for the non-operator well participants. Such a provision probably would effectuate the supplier's intent and understanding of the transaction and would simply make explicit what was otherwise implicit.

It should be noted that even under the oil and gas lien statutory regime — as understood and applied in *McAnally*, and *Conservation Oil*, granting to the lien claimant *in rem* relief only if the well is a producer, the non-operator working interest owners who have paid their share of costs to the operator (the paying owners) nevertheless face the possibility of effectively having to pay twice if the operator fails to pay the third-party lien claimant. This occurs because, under the Oklahoma oil and gas lien statute, the lien claimant's *in*

56. *See* 42 OKLA. STAT. § 142.1 (2001).

rem relief includes the right to obtain production proceeds that the paying owners would otherwise receive.[57] Clearly, this is an intended consequence of the *in rem* relief accorded by the Oklahoma oil and gas lien statute. As the court stated in *K & H*, "Since statehood Oklahoma has sought through legislative enactments to protect those who provide labor and materials to others which result in the enhancement of the latter's property."[58] If the well is a producer, the paying owners' property has been enhanced. Accordingly, they bear the burden of the *in rem* relief imposed by statute notwithstanding the fact that they paid their share of costs to the operator who then failed to pay the supplier. In this situation, it should be noted that the paying owners possess their own remedy. The paying owners have a contractual lien on the production proceeds of the defaulting operator by virtue of the provision in the joint operating agreement providing for one.[59] If the well is a producer, the paying owners who find themselves in effect paying their proportionate shares of the lien claimant's bill twice — once by having paid the defaulting operator and again by having their share of production diverted to the lien claimant — will nevertheless be able to recoup their "second payment" by enforcing their own contractual lien against the defaulting operator.[60]

However, in many instances in which the operator has received payment from the non-operator working interest owners for their shares of third-party costs yet has failed to pay the third-party lien claimant, not only is the operator insolvent but also the well is a dry hole. Consequently, both the third-party lien claimant's statutory *in rem* lien rights and the paying owners' contractual lien rights amount to virtually nothing because, the well being a dry hole, no production proceeds exist. In that situation, if courts hold that the lien claimant's rights against the paying owners for their proportionate share of the debt are not only *in rem* but also, as indicated in *K & H*, *in personam*, then the paying owners will be compelled to pay their share of the debt twice. Thus, the paying owners will be left with the dubious opportunity to recover as creditor claimants in the operator's bankruptcy proceeding. Conversely, if the courts hold that the lien claimant's rights against the non-operator working interest owners are *in rem* only, as the Oklahoma Supreme Court previously held in *McAnally* and *Conservation Oil*, then the paying owners will not be

57. *Id.* § 142.1; *see supra* note 10. To enforce its lien against production proceeds, the lien claimant must deliver a copy of its lien claim statement to the purchaser of such production. *Id.* § 144.1.

58. K & H Well Serv., Inc. v. Tcina, Inc., 2002 OK 62, ¶ 26, 51 P.3d 1219, 1227.

59. *See, e.g.*, 1989 MODEL FORM AGREEMENT, *supra* note 2, art. VII.B.

60. The extent of such recoupment and the rapidity at which it is accomplished will, of course, depend upon the productivity of the well and the extent of the operator's working interest.

compelled to pay their share of the debt twice, but the lien claimant will be compelled to look to the operator's bankruptcy proceeding to satisfy its debt.[61] Who should bear the consequences of the operator's non-performance and misfeasance in this situation — the supplier of materials and services or the paying owners? While the supplier's *in rem* relief will prove virtually worthless, because the well is a dry hole, for the same reason the paying owners will not be unjustly enriched if the burden in question is placed on the supplier. Because in contracting with the operator to supply materials or services for the well, the supplier probably relied solely upon the credit of the operator, a persuasive case can be made that the burden should lie with the supplier rather than with the paying owners. *K & H* appears to hold otherwise.[62] As suggested above, however, perhaps *K & H* should be viewed as limited to its facts and hence as imposing *in personam* liability on the non-operating well participants when the operator in fact acts as the agent of disclosed principals.[63]

61. Perhaps the Oklahoma legislature has tempered an overextended operator's temptation to "rob Peter to pay Paul" — i.e., to take monies received from the non-operator working interest owners for their share of well costs and use the money for other purposes — by providing that such monies are trust funds in the hands of the operator, and that the operator's using those funds for other purposes constitutes embezzlement. 42 OKLA. STAT. § 144.2 (Supp. 2002).

62. *K & H*, ¶ 16, 51 P.3d at 1225.

63. *Id.* ¶ 15, 51 P.3d at 1224.