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Table of Contents

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I. Introduction

The following is an update on Texas's case law and legislative activity relating to oil, gas and mineral law from August 1, 2015 to July 1, 2016.

II. Case Law

A. Title and Conveyancing

1. Hysaw v. Dawkins[1] (Will Construction; Fixed vs. Floating Royalty)

Ethel Hysaw ("Ethel") had three children, and devised her land in Karnes County, Texas to them. Each child was given a tract (each differing in size) in fee simple; however, as to the minerals,

> [e]ach of my children shall have and hold an undivided one-third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals in or under or that may be produced from any of said lands, the same being a non-participating royalty interest . . .[2]

Ethel's will further provided that (1) each child "shall receive one-third of one-eighth royalty, provided there is no royalty sold or conveyed by me covering the lands so willed," and (2) should there be any royalty sold during the lifetime, then each child "shall each receive one-third of the remainder of the unsold royalty."[3]

Some of the heirs believed a fixed one-twenty-fourth royalty was Ethel's intent because of the specific language "one-third of one-eighth." Others argued that a fixed fraction (multiplying the double fractions in Ethel's will):

> (1) [was] discordant with will language, evincing an intent that the siblings share royalties equally; (2) [added] language not

1. 483 S.W.3d 1 (Tex. 2016).
2. *Id.* at 5.
3. *Id.* at 5-6.

> found in the deed by inserting a fixed, single fraction of 1/24; and (3) [created] disharmony among the provisions by mixing fractional royalty interests with fractions of royalty interests to produce unequal treatment of Ethel's children.[4]

The trial court ruled that each child was entitled to a floating royalty (or that the royalties should be divided equally); however, the appellate court reversed, finding that each child was entitled to a fixed royalty, being a one-twenty-fourth royalty, with the excess to go to that sibling owning fee-simple title to the subject tract.[5]

The Supreme Court first provided background on mineral interests and the double-fraction dilemma, noting that "historical standardization" of the one-eighth royalty will not alter clear and unambiguous language that can otherwise be harmonized.[6] The Court went on to reiterate its commitment to a holistic approach aimed at ascertaining intent from all words and all parts of the conveying instrument and found that the appellate court erred by analyzing each royalty provision in isolation instead of examining the will language as a whole.[7]

The Court did not think that the size variations of the tracts conveyed to each child indicated that Ethel favored one child over any other, but instead considered "all the other language" in the four corners of Ethel's will in order to determine her intent.[8] The Court found that Ethel intended to treat her children equally, and as such, the royalties should be equally divided among them. In reaching this conclusion, the Court specifically considered:

> (1) The deliberate recitation of identical language to effect each child's royalty inheritance; (2) the use of double fractions in lieu of a single fixed fraction . . . ; (3) the first royalty provision's global application to all the children and the second provision's language restating the royalty devise of each child individually; and (4) the equal-sharing language in the third and final royalty clause.[9]

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4. *Id.* at 6.
5. *Id.* at 6-7.
6. *Id.* at 9-10.
7. *Id.* at 12.
8. *Id.* at 13-14 (noting that, although the daughters received larger sized tracts, the intrinsic value of the land bequeathed to Ethel's son is express).
9. *Id.* at 15.

Further, the third royalty clause provided testamentary intent of equal sharing between the children, as it provided that each child would "receive one-third of the remainder of the unsold royalty."[10]

"When the terms of a mineral conveyance are in dispute, our objective is to effectuate the parties' intent as expressed within the four corners of the conveyancing instrument."[11] Looking beyond "a mechanical approach requiring rote multiplication of double fractions," the court considered "the testatrix's will in its entirety, [and held] that she intended her children to share future royalties equally, bequeathing to each child a 1/3 floating royalty, not a 1/24 fixed royalty."[12]

While this decision does not provide a bright-line rule or test, it does provide instruction that a court will consider an instrument's language as a whole in order to deduce intent.

2. Wenske v. Ealy[13] (Deed Construction; Reservations and Exceptions)

In 1988, the Wenskes acquired a tract of land, subject to prior reservations totaling a one-fourth nonparticipating royalty interest ("NPRI"). In 2003, the Wenskes conveyed the property to the Ealys, reserving a three-eighths mineral interest. The 2003 deed to the Ealys was made subject to "Several Reservations and Exceptions to Conveyance and Warranty 'for all purposes,'" including the NPRI.[14] In 2011, both the Wenskes and Ealys executed oil and gas leases. In 2013, the Wenskes sought declaratory judgment declaring that the three-eighths interest they reserved was taken "free and clear" of the NPRI. The trial court granted the Ealys's motion for summary judgment, holding that the NPRI burdened the mineral owners proportionately. The appellate court affirmed.[15]

On appeal, the Court examined both the 1988 and 2003 deeds, noting that "the 1988 deed reserved…a royalty interest that is carved out of the total production achieved under a mineral lease, [and therefore] is considered a fraction of royalty or floating royalty."[16] The Wenskes argued that because the conveyance to the Ealys was made "subject to" outstanding NPRIs, the Ealys should have borne the entire royalty, and the Wenskes's

10. *Id.* at 15.
11. *Id.* at 16.
12. *Id.* at 4-5.
13. No. 13-15-00012-CV, 2016 WL 363735 (Tex. App. Jan. 28, 2016).
14. *Id.* at *1.
15. *Id.* at *2.
16. *Id.* at *4 (citing Medina Interests Ltd. v. Trial, 469 S.W. 619, 623 (Tex. App. 2015).

interest should not be burdened by the NPRI.[17] The Court, however, disagreed, stating that "because the 2003 Deed provides no guidance on this apportionment…the default rule should apply: 'Ordinarily the royalty interest…would be carved proportionately from the two mineral ownerships…'"[18]

Further, the Court noted that the 2003 Deed did not ever mention royalties, whereas the 1998 Deed clearly stated that the grantors reserve an undivided one-fourth interest *in the royalties* produced from the land.[19] "A deed will convey every interest held by the grantor except that which is clearly reserved or excepted."[20] Looking to this rule, the court disagreed with the Wenske's argument "that they could be unburdened by the NPRI simply by stating in the 2003 Deed that they conveyed the property to the Ealys 'subject to' the exception without even mentioning anything about royalties or that portions of the royalty estate owned by Vyvjala and Novak would be paid entirely by the Ealys."[21]

3. Leal v. Cuanto Antes Mejor, L.L.C.[22] (Deed Construction; Fixed vs. Floating Royalty)

In 1978, Phillip sold 40 acres of land in Karnes County to the Leals, excepting and reserving therefrom all minerals and royalties, but for "a one-fourth non-participating royalty interest in and to all of the royalty paid on production" to the Leals.[23] Phillip later conveyed his mineral interest to Cuanto Antes Mejor L.L.C., and entered into an oil and gas lease covering 152.2 acres, including the Leals' forty acres.[24]

A dispute arose between the Leals and Cuanto about how the one-fourth royalty interest should be construed. Leal argued that the deed created a fixed royalty in one-fourth of production. Cuanto argued that the interest was a floating royalty interest, and as such, entitled them to one-fourth of all royalty paid on production. The trial court held that it was a floating royalty interest, and that the Leals were entitled to one-fourth of royalty.[25]

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17. *Id.*
18. *Id.* (citing *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1957)).
19. *Id.* (emphasis added).
20. *Id.* (citing Day & Co. v. Texland Petroleum, Inc., 786 S.W.2d 667, 668 (Tex. 1990).
21. *Id.*
22. Leal v. Cuanto Antes Mejor, L.L.C., No. 04-14-00694-CV, 2015 WL 3999034 (Tex. App. Jul. 1, 2015).
23. *Id.* at *1.
24. *Id.*
25. *Id.*

The San Antonio Court of Appeals first provided a review of the canons of construction, and provided specific examples in which a royalty has been found to be "fixed" or "floating."[26] The court construed the deed as a whole, rather than separate terms and provisions, and upheld the trial court's ruling.[27]

4. Dragon v. Harrell[28] (Deed Construction; Fixed vs. Floating Royalty)

In 1991, the Harrells conveyed ten acres of land to Dragon. The Harrell deed was subject to prior reservations affecting the mineral estate, and contained a new reservation in favor of Harrell, stating:

> SAVE AND EXCEPT HOWEVER, and there is hereby reserved unto the GRANTORS, their heirs and assigns, a free non-participating interest in and to the royalty on oil, gas and other mineral in and under the hereinabove described property consisting of ONE-HALF (1/2) of the interest now owned by Grantors together with ONE-HALF (1/2) of the reversionary rights in and to the presently outstanding royalty in on and under said property, perpetually from date hereof. It being understood and hereby provided, however, that GRANTORS, their heirs or assigns, shall not be entitled to participate in the bonus money or annual delay rentals paid, or to be paid, under any present or future oil, gas and mineral lease on said premises, and that it shall not be necessary for GRANTORS, their heirs or assigns, to join in the execution of any future oil, gas or mineral lease or leases on said premises.[29]

In 2013, the Harrells filed suit against Dragon, arguing that the Harrell Deed reserved a fixed fractional royalty interest, and as such, they were entitled to one-half of total production of the oil and gas produced from the premises conveyed. Dragon filed a counterclaim seeking declaratory judgment that the Harrell deed "reserved a one-half (1/2) fraction of royalty interest in the Property."[30] The trial court granted the Harrell's motion for summary judgment, and Dragon appealed.[31]

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26. *Leal* at *2-3.
27. *Leal* at *4.
28. Dragon v. Harrell, No. 04-14-00711-CV, 2016 WL 1238165 (Tex. App. Mar. 30, 2016).
29. *Id.* at *4.
30. *Id.* at *1.
31. *Id.*

It was undisputed that Dragon owned the mineral estate; the parties disagreed on the meaning of the Harrell reservation. Dragon argued that because "the [reserved] interest consists of 'the royalty on oil, gas, and other mineral[s],' and not 'all of the oil, gas, and other minerals,' the [Harrell] Reservation clearly creates a fraction of royalty."[32] Dragon also asserted that "the reserved interest comes out of 'the royalty on oil, gas and other minerals.'"[33] Harrell contended that its reservation "reserved a fixed fractional royalty interest entitling [them] to…one-half (1/2) of total production of the oil and gas produced from the Subject Land."[34]

The Court reviewed the Harrell reservation and found that it reserved a "non-participating interest in and to the royalty" consisting of "the interest now owned by Grantors" and "the reversionary rights in and to the presently outstanding royalty."[35] By reading the deed as a whole, the Court concluded that the phrases mentioned referred to the prior reservations in the deed, and thus, proper construction of the Harrell reservation required an analysis of them.

The Harrell deed was subject to four prior reservations; however only the first two were disputed and addressed by the Court. The first reservation provided:

> 1. Mineral Reservation contained in, and herein quoted verbatim, from a Deed of Conveyance to Claude D. Winerich, from Frank A. Winerich and Ida Lee Winerich, dated February 17, 1940, recorded in Volume 118, Page 615–616, of the Deed Records of Karnes County, Texas, said reservation being as follows, to-wit: "It is expressly agreed under this conveyance that the Grantors hereby retain one-sixteenth (1/16th) or one-half (1/2) of the one-eighth (1/8th) of all minerals in, on and under said above described 611 acres, said interest to be a participating interest."[36]

The second reservation provided:

> 2. An undivided one-fourth (1/4th) interest in and to all of the oil royalty, gas royalty and royalty in other minerals reserved for the natural life of C.D. Winerich and Dorice Winerich, and contained in that certain Deed of Conveyance from C. D.

32. *Id.* at *2.
33. *Id*.
34. *Id*.
35. *Id.*
36. *Id.* at *2-3.

> Winerich and Dorice Winerich to Frances W. Bowers, said Deed of Conveyance being recorded in Volume 240, Pages 267–269, of the Deed Records of Karnes County, Texas.[37]

The Court found that the first reservation was a participating mineral interest, including the right to develop, lease, and to receive bonus, delay rentals, and royalty.[38] The second reservation created a life estate equal to one-fourth of the royalties paid on any oil, gas, or other minerals produced.[39] The Harrells acquired the reversionary estate, subject to the life estate of Doris Winerich; therefore, they owned "15/16 of the mineral estate, less a life estate in a one-fourth floating royalty interest, but with a reversionary interest to that then-outstanding life estate royalty interest."[40] Thus, based on these two prior reservations, the Harrell grantors could convey only the following: the fifteen-sixteenths of the mineral estate, less a life estate in a one-fourth floating royalty interest, but with a reversionary interest to that then-outstanding life estate royalty interest.[41]

In its analysis, the Court applied a holistic approach, and its primary concern was to determine the parties' intentions as expressed by the words the parties used.[42] Further, the Court stated it would look at the four corners of the instrument and read the instrument as a whole, not isolating a single clause or phrase.[43]

In analyzing the Harrell deed reservation, the Court stated "[t]he Harrell reservation does not identify the interest as being in and to the oil, gas, and other minerals; it unambiguously states it is an interest in the *royalty* on those minerals."[44] Further, the language makes clear that the royalty interest was reduced by the prior reservations.[45] In examining the entire deed with all of its words and parts, the Court held that the Harrell deed reserved to the Harrell grantors a fraction of royalty interest, being one-half of fifteen-sixteenths of whatever royalty is to be paid from the land.[46]

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37. *Id.*
38. *Id.*
39. *Id.*
40. *Id.* at *4.
41. *Id.*
42. *Id.* at *1.
43. *Id.*
44. *Id.* at 4.
45. *Id.*
46. *Id.* at 5.

The analysis of the Court follows the *Hysaw* decision's guidance that an instrument's language as a whole shall be considered to deduce the intent of the parties.

5. Mueller v. Davis[47] (Property Descriptions; Statute of Frauds)

This case involved two deeds that did not contain a description of the property conveyed. In *Mueller*, the court held that for a deed to satisfy the statute of frauds, the description of the land must include information regarding the size, shape, and boundaries of the land being conveyed, or otherwise make reference to another instrument of record containing same, such that the land conveyed can be identified with reasonable certainty, by someone familiar with the area, to the exclusion of other property.[48]

In 1991, Davis acquired two mineral deeds from Virginia Cope and James Mills that lacked descriptions of the property conveyed.[49] The deeds referenced "[a]ll of those certain tracts or parcels of land out of the following surveys in Harrison County, Texas, described as follows," and provided a listing of parcels identifying acreage by quantity included in what appeared to be oil and gas production units.[50] Additionally, the deeds contained a "Mother Hubbard," or coverall clause.

Mueller later acquired mineral deeds from Cope and Mills, Davis's grantors, which included the land previously conveyed to Davis. Mueller sued, alleging that the deeds to Davis were void under the statute of frauds. The trial court granted summary judgment in favor of Davis.[51]

On appeal, the Texarkana Court of Appeals reversed and remanded.[52] The Court held that in order to satisfy the statute of frauds, a deed must have a specific description of the land. In this case, description of the acreage within a specific survey was not sufficient.[53] Furthermore, the Court found that the Mother Hubbard clause was insufficient to rescue the lack of a legal description, as the clause was only effective if the deed contained a description adequate to identify specific property.[54] The Court remanded for the lower court to decide what interests, if any, were conveyed.

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47. Mueller v. Davis, 485 S.W.3d 622 (Tex. App. 2016).
48. *Id.* at 627.
49. *Id.* at 625.
50. *Id.*
51. *Id.*
52. *Id.* at 633.
53. *Id.* at 628.
54. *Id.* at 631.

6. Medina Interests, Ltd. v. Trial[55] (Deed Construction; Fixed vs. Floating Royalty)

Annie Trial, along with her eight children, owned 278 acres in Karnes County, Texas. In 1949, she and six of her children sold their interests in the land to the other two children, reserving "an undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals."[56] Furthermore, the deed provided that all of the children would share equally in the royalties.[57]

Medina, as successor in interest to the purchasers, executed an oil and gas lease with Marathon, and Medina and the Trials disagreed on what type of interest had been reserved.[58] Medina argued that the deed reserved a fixed royalty of 1/8, which would mean that each child held a one-eighth interest in a one-eighth royalty.[59] The Trials disagreed, and argued that they reserved a floating royalty of one-eighth of royalty.[60] The trial court agreed with the sellers and found that the deed reserved a floating royalty interest for each of the children.[61]

The San Antonio Court of Appeals affirmed. The Court explained that the usual royalty provided in mineral leases when the 1949 deed was executed was one-eighth, and reasoned that the deed reference to "the 1/8 royalty" was based on the erroneous assumption that a landowner's royalty would always be one-eighth.[62]

The Court noted that there was not a lease in place at the time the deed was executed, and found that the use of the phrase "the 1/8 royalty" should be construed to mean whatever future royalty interest a lessor might obtain in a future lease, whether that be one-eighth or a different fraction.[63] Additionally, the deed referenced "royalties paid to the landowner," which the court believed suggested a floating royalty interest. Finally, the Court reasoned that because the lease repeatedly stated that royalties would be shared equally between the eight children, this was further evidence that the parties intended to create a floating royalty.[64]

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55. Medina Interests v. Trial, 469 S.W.3d 619 (Tex. App. 2015).
56. *Id.* at 624.
57. *Id*.
58. *Id.* at 621.
59. *Id*.
60. *Id*.
61. *Id*.
62. *Id.* at 625.
63. *Id*.
64. *Id*. at 625-26.

B. Leases

1. Chesapeake Exploration, L.L.C. v. Hyder[65] (Deduction of Post-Production Costs)

Chesapeake acquired the Hyder Family lease covering 948 acres in the Barnett Shale. The lease provided for "'a perpetual, cost-free (except only its proportion of production taxes) overriding royalty of five percent (5.0%) of gross production obtained' from directional wells drilled on the lease but bottomed on nearby land."[66] Since the Hyders' lease was not pooled with the producing land, the overriding royalty was created as inducement for the grant of surface use rights.[67] The lease also contained a clause stating: "Lessors and Lessee agree that the holding in the case of *Heritage Resources, Inc. v. NationsBank* shall have no application to the terms and provisions of this Lease."[68]

Chesapeake deducted costs incurred in transporting, marketing, and selling the gas from the overriding royalty. The Hyders brought suit, arguing that their overriding royalty should be based on the sale price of the gas without any deduction of post-production costs. [69] The trial court ruled that the post-production costs had been improperly deducted, and awarded the Hyders $575,359.90.[70] On appeal, the San Antonio Court of Appeals affirmed.[71]

The Texas Supreme Court interpreted its ruling in *Heritage Resources, Inc. v. NationsBank*, in which the Court held that although a royalty is "usually subject to post-production costs, including taxes…and transportation costs…the parties may modify this general rule by agreement."[72] Chesapeake argued that the phrase "cost free overriding royalty" was synonymous with the accepted definition of an overriding royalty, in that some are free of production costs, but generally bear their share of post-production costs. The Court rejected this argument largely on its finding that since the lease allowed the Hyders to take their overriding royalty in kind, they would have done so free of post-production costs. Additionally, Chesapeake argued that the lessors had the right to take the

65. 483 S.W.3d 870 (Tex. 2016).
66. *Id.* at 872.
67. *Id*.
68. *Id*.
69. *Id*.
70. *Id*.
71. *See* Chesapeake Expl., L.L.C. v. Hyder, 427 S.W.3d 472 (Tex. App. 2014).
72. *Chesapeake Expl., L.L.C.*, 483 S.W.3d at 872.

overriding royalty in kind, and had they done so, they might have incurred lower post-production costs than that of the lessee.[73] The majority ruled that "'cost-free' in the overriding royalty provision includes post-production costs."[74]

In his dissent, Justice Brown, along with three other justices, took issue with the majority regarding the cost-free language of the overriding royalty only referring to post-production costs.[75] The dissenters noted that even though the general rule is that the language references post-production costs, parties commonly intend for the royalty interest to be free of production costs.[76] Thus, the dissenters did not think that the cost-free language expressed "an intent to abrogate the default rule that the lessee bears post-production costs."[77]

The majority also noted that production taxes are not always post-production costs and that parties "often allocate tax liability on the royalty owners while at the same time specifically emphasizing that the royalty is free from production costs."[78] The dissenters, unlike the majority, did not find that the reference to production taxes supported the Hyders' argument that "cost-free" means free of post-production costs.[79]

2. ConocoPhillips Co. v. Vaquillas Unproven Minerals, Ltd.[80] (Retained Acreage Clauses)

Conoco and Vaquillas were parties to two oil and gas leases.[81] Both leases contained retained acreage clauses setting forth the number of acres surrounding each producing or shut-in gas well that Conoco was entitled to retain after its continuous development program ended.[82]

The retained acreage clause in each lease provided that after Conoco's continuous drilling program ended:

> Lessee covenants and agrees to execute and deliver to Lessor a written release of any and all portions of this lease which have

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73. *Id.* at 875.
74. *Id*.
75. *Id.* at 877.
76. *Id*. at 878.
77. *Id.*
78. *Id.*
79. *Id*. at 879.
80. ConocoPhillips Co. v. Vaquillas Unproven Minerals, Ltd., No. 04-15-0066-CV, 2015 WL 4638272 (Tex. App. Aug. 5, 2015).
81. *Id.*
82. *Id.*

> not been drilled to a density of at least 40 acres for each producing oil well and 640 acres for each producing or shut-in gas well, except that in case any rule adopted by the Railroad Commission of Texas or other regulating authority for any field on this lease provides for a spacing or proration establishing different units of acreage per well, then such established different units shall be held under this lease by such production, in lieu of the 40 and 640–acre units above mentioned.[83]

Conoco drilled several producing gas wells and assigned 640 acres to each.[84] After Conoco would not release 600 acres that were assigned to each gas well, Vaquillas brought suit, alleging that because of a Railroad Commission field rule, Conoco breached the retained acreage clause.[85] The trial court ruled that Conoco was only entitled to retain forty acres per well.[86] Conoco appealed.

The San Antonio Court of Appeals affirmed, holding that the Railroad Commission did adopt a field rule applicable to the lease.[87] The field rule states:

> Rule 2. No well shall hereafter be drilled nearer than FOUR HUNDRED SIXTY SEVEN (467) feet to any property line, lease line or subdivision line and no well shall be drilled nearer than ONE THOUSAND TWO HUNDRED (1,200) feet to any applied for, permitted or completed well in the same reservoir on the same lease, pooled unit or unitized tract.[88]

The rule does not expressly provide for a specific number of acres per well, but, Railroad Commission Rule 38 states that if the spacing rule is 467-1200, as is the case here, then the acreage requirement shall be forty acres for both oil and gas wells.[89] The retained acreage clause in the lease did not contain an exception that limited the field rule to a maximum number of acres assigned to a well, but did contain an exception, which stated that if the field rule provides "spacing or proration establishing

83. *Id.* at *1.
84. *Id.*
85. *Id.*
86. *Id.*
87. *Id.* at *5.
88. *Id.* at *3.
89. *Id.*

different units of acreage per well," a well would hold only the acreage provided for in that rule.[90]

The Court found that the retained acreage clause in each of the leases included an exception requiring that if field rules were adopted providing for spacing or proration units of a different size in terms of acreage, then the field rules would control. In this case, the established spacing that provided for forty acres per well, as opposed to 640 acres per gas well.[91]

3. XOG Operating, L.L.C. v. Chesapeake Exploration Limited Partnership[92] (Assignments; Retained Acreage Provisions)

XOG Operating assigned several leases covering approximately 1,625 acres to Chesapeake for a primary term of two years and "as long thereafter as operations…are conducted upon [the leased premises] with no cessation for more than sixty (60) consecutive days."[93] The agreement provided that "[a]fter the expiration of the Primary Term…all rights under this [assignment agreement]…shall terminate, and said lease shall revert to Assignor, except as expressly provided in Article IX."[94] Article IX states, in pertinent part:

> Upon expiration of the Primary Term of this Assignment ... this Assignment and all rights created hereunder shall terminate as to all lands and depths covered hereby. Said lease shall revert to Assignor, *save and except that portion of said lease included within the proration* or pooled *unit of each well drilled under this Assignment* and producing or capable of producing oil and/or gas in paying quantities. *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 special order, *each proration unit shall be deemed to be 320 acres* of land in the form of a square as near as practicable surroundings [sic] a well completed as a gas well producing or capable of production in paying quantities.... Upon termination or partial termination of this Assignment and the

90. *Id*. at *4.
91. *Id*. at *5.
92. 480 S.W.3d 22 (Tex. App. 2015).
93. *Id.* at 22.
94. *Id.*

> rights created hereunder, Assignee shall promptly provide Assignor with a fully executed and recordable release of this Assignment. . . .[95]

The assigned acreage was subject to a field rule that provided for a prescribed proration unit of 320 acres.[96] Additionally, the rule required that any unit containing less than 320 acres be considered a "fractional proration unit."[97] During the primary term, Chesapeake drilled six producing wells and assigned fractional proration units for each well.[98] The six units totaled 802 acres.[99]

XOG brought suit, alleging that the wells only retained the 802 acres and that the remaining 823 acres reverted to XOG.[100] In response, Chesapeake argued that the parties intended for Chesapeake to retain the acreage prescribed by the field rules, and as a result Chesapeake was entitled to retain all of the acreage assigned to it.[101] The trial court ruled in favor of Chesapeake, and the Amarillo Court of Appeals affirmed.[102]

On appeal, the Court found that the retained acreage clause specified that the acreage retained by the assignee and excluded from reversion is the "proration unit" of each well.[103] The Court applied the Railroad Commission field rules and established that each unit in question comprised 320 acres in size.[104] Ultimately, the Court held that when Chesapeake assigned "fractional proration units" to its wells, the meaning of the assignment was not modified.[105]

4. Aycock v. Vantage Fort Worth Energy[106] (Cotenancy; Effect of Ratification)

Pannill, Desdemona and the Aycocks owned undivided mineral interests in 1,409 acres in Erath County, Texas. In March 2008, Desdemona leased

95. *Id*. at 24-25 (emphasis added).
96. *Id*. at 25.
97. *Id*.
98. *Id*.
99. *Id*.
100. *Id*.
101. *Id*.
102. *Id*. at 24.
103. *Id*. at 28.
104. *Id*. at 29.
105. *Id*.
106. Aycock v. Vantage Fort Worth Energy, No. 11-13-00338-CV, 2015 WL 1322003 (Tex. App. Mar. 20, 2015).

its interests to Vantage for $750 per net mineral acre, resulting in a bonus of $394,574.60. In September 2010, when the Aycocks learned of the Desdemona/Vantage lease, they sought to lease their interest with Vantage. Vantage never responded, no well was drilled, and in 2011, the Desdemona lease expired.[107]

In May 2012, the Aycocks sued Vantage for unpaid bonuses, claiming that their September 2010 letter constituted a lease ratification, and as such, they were entitled to $750 an acre for their mineral interest in the leased tract. The Aycocks also asserted that Vantage improperly leased the entire property from Pannill and Desdemona. The trial court denied the Aycocks' claims, and granted Vantage's motion for summary judgment. [108]

The Eastland Court of Appeals affirmed, holding that the Aycocks had no basis on which they could make a claim against Vantage for unpaid bonuses.[109] The Court noted that a cotenant can rightfully lease its undivided interest without joinder from the other cotenants.[110] If a lessor leases all of the common property, the cotenants are left with two remedies – they can either (1) ratify the lease and request an accounting for all profits received by the leasing cotenant, or (2) refuse to ratify the lease and collect the value proportionate to their share of the minerals, less reasonable production expenses.[111]

The Court also discussed other ways unleased mineral cotenants could ratify leases, including filing suit, executing and accepting a royalty deed, and/or executing a conveyance that recognizes the lease.[112] If an unleased cotenant ratifies a lease, the unleased cotenant may sue the lessor cotenant for all of the money received by the lessor cotenant in the form of lease benefits that are attributable to the unleased cotenant's share of the common land.[113]

The Aycocks claimed that Vantage was unjustly enriched by the bonus payments that were made to Pannill and Desdemona and not to the unleased cotenants.[114] The Court stated that Vantage was not unjustly enriched

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107. *Id*. at *1.

108. *Id*.

109. *Id*. at *3.

110. *Id*. at *1 (citing Glover v. Union Pac. R.R. Co., 187 S.W.3d 201, 213 (Tex. App. 2006)).

111. *Id.* at *2 (citing Tex. & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619, 624 (Tex. Civ. App. 1926); Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965).

112. *Id*.

113. *Id.* at *2.

114. *Id.* at *3.

because it did not profit at the expense of the unleased cotenants, as Vantage only made bonus payments to Pannill and Desdemona based on their net acreage.[115] Furthermore, the Court held that the Aycocks could only recover bonus money from Pannill and Desdemona, and not Vantage, since owners of undivided interests are tenants in common.[116]

5. KCM Financial, L.L.C. v. Bradshaw[117] (Executive Duties)

Betty Lou Bradshaw ("Bradshaw") inherited an undivided one-half (1/2) non-participating royalty interest ("NPRI") in 1773 acres in Hood County, Texas.[118] The language reserving the NPRI mandated that any future royalty be "not less than" one-eighth, which was the usual royalty in 1960, when the NPRI was created.[119] The non-participating royalty interest, being non-executive in nature, entitled Bradshaw to an interest in the gross production (the royalty interest), but did not include the right to negotiate lease terms or to receive any delay rentals or bonuses.[120]

Steadfast Financial, L.L.C. (renamed KCM Financial) acquired the right to purchase the land. In a 2006 deal, KCM and Range Production, L.P. ("Range") agreed to have KCM sell the land to Range, reserving the minerals, and to lease the mineral estate to Range. The lease provided for a one-eighth royalty and a bonus of $7,505 per acre, totaling more than $13,000,000 for the portion of the property burdened by Bradshaw's interest.[121]

Bradshaw sued both KCM and Range, alleging that KCM violated its fiduciary duty to her as the non-executive interest holder because the customary royalty rate for leases in Hood County at the time of the KCM-Range lease had increased to one-fourth.[122] Bradshaw argued that KCM engaged in self-dealing by negotiating an above-market bonus payment at the expense of a lower royalty.[123] Bradshaw further asserted that Range conspired with and aided and abetted KCM's breach.[124] KCM argued that

115. *Id.*
116. *Id*.
117. 457 S.W.3d 70 (Tex. 2015).
118. *Id*. at 75.
119. *Id.*
120. *Id*. at 78.
121. *Id.*
122. *Id*.
123. *Id.*
124. *Id*.

there was no breach because it obtained the minimally acceptable royalty and it was the "same" for both the executive and non-executive.[125]

The trial court dismissed Bradshaw's claims, holding that neither KCM nor Range had breached any duty or obligation owed to her. The case came before the Texas Supreme Court on the issue of whether evidence existed from which a jury could conclude that KCM breached a duty to Bradshaw in negotiating the terms of the mineral lease.[126] The Court remanded Bradshaw's claim against KCM for trial, but it dismissed her case against Range.

When determining whether the executive breached its duty to the non-executive, the court looks to "whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest."[127] In this case, the court found that Bradshaw's claim that the executive misappropriated a shared benefit and converted it into a benefit only for itself would constitute self-dealing if it was proven that the executive acted with the intent to diminish the value of the shared benefit.[128] The court declined to create any bright-line rule that "merely obtaining the minimally acceptable royalty discharges, as a matter of law, the executive's duty."[129] Rather, the court stated that in analyzing the executive's duty, the transaction must be viewed as a whole, which requires a review of all of the terms of the lease.[130]

In finding that, while "failure to obtain a market-rate royalty does not, in and of itself, constitute a breach of [the executive's] duty," the court reasoned that there was at least some evidence to support Bradshaw's allegation that the mineral lease was the product of self-dealing.[131] The court, therefore, affirmed the court of appeals' judgment as to the breach of duty claim finding that summary judgment was not proper because a fact question existed.[132]

In holding that Bradshaw's derivative liability claims against Range failed as a matter of law, the Court determined there was no evidence that Range was complicit in the alleged breach of duty or otherwise had any

125. *Id*. at 83.
126. *Id*.
127. *Id*. at 82.
128. *Id*. at 83.
129. *Id*. at 84.
130. *Id*.
131. *Id*. at 89.
132. *Id*. at 90.

duty to Bradshaw in its dealings with KCM.[133] Range, as lessee, engaged in "nothing more than a typical business transaction."[134] The Court agreed that "in negotiating with the executive, a lessee should not fear liability for doing nothing more than getting a good deal closed."[135] The Court held that even if KCM was found to have breached a duty owed to Bradshaw, its liability cannot be imputed to Range as a matter of law and, therefore, rendered judgment in favor of KCM.[136]

In summary, the court reaffirmed that "[a]n executive owes a duty of utmost good faith and fair dealing to a non-executive," and may not engage in self-dealing.[137] The court declined to rule that a below-market royalty rate, in itself, constitutes a breach of that duty.[138]

C. Industry Agreements

1. Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration and Producing Company[139] (Joint Operating Agreement Not Limited to Interest Owned at Time of Execution)

In 1980, Perlman and Sun Gas ("Sun") entered into an agreement under which Perlman assigned to Sun an undivided 50% working interest in certain Eagle Ford-area oil and gas interests.[140] The parties entered into a drilling program whereby Sun could earn additional interests by participating in additional drilling, and a joint operating agreement ("JOA") to cover all operations under the agreement.[141] The JOA included a preprinted preferential right to purchase provision and a typewritten area of mutual interest ("AMI") agreement, supported by a plat depicting the boundaries of the AMI.[142]

Thereafter, Anderson Energy Corporation ("Anderson"), successor to Sun and Dominion Oklahoma Texas Exploration and Production Company ("Dominion"), acquired Perlman's interest.[143] Dominion drilled numerous gas wells within the described AMI agreement, and then sold its interest to

133. *Id*. at 85-86.
134. *Id*. at 86.
135. *Id.*
136. *Id*. at 84.
137. *Id*. at 89.
138. *Id*. at 74.
139. 469 S.W.3d 280 (Tex. App. 2015).
140. *Id*. at 284.
141. *Id.* at 284-85.
142. *Id.*
143. *Id.*

HighMount without first presenting the offer to Anderson as required by the JOA.[144] Without offering Anderson any right to participate, HighMount acquired additional interests in the area.[145] Before the sale was completed, Anderson filed a breach of contract suit against Dominion (and other Dominion entities in the chain of title).

Before the sale was completed, Anderson filed a breach of contract suit against Dominion (and other Dominion entities in the chain of title). Anderson alleged that the JOA was breached when Dominion (and its entities) acquired numerous interests and drilled more than 100 wells in the AMI without providing Anderson notice or the opportunity to participate.[146] Additionally, Anderson claimed that the preferential right was violated when HighMount acquired the properties from Dominion, since Anderson was not given any option to acquire the interests.[147]

HighMount responded by arguing that the JOA only covered those interests owned by the parties upon execution of the JOA, and, therefore, the AMI and preferential right could not be breached in relation to the after-acquired properties.[148] HighMount also claimed that the JOA had already terminated, or the claims were precluded by waiver or laches because Anderson failed to honor or assert rights under the JOA.[149]

The San Antonio Court of Appeals relied on the "four corners" rule when it reviewed the JOA sections referencing the contract area.[150] The Court disagreed with HighMount's argument that numerous portions of the JOA were in present tense, and, therefore, the JOA must be read as including only the interests owned by the parties at the time that the JOA was executed.[151] It reasoned that various clauses within the JOA suggested that the contract included oil and gas leases, as well as "lands."[152] Similarly, Exhibit A to the JOA identifies the "Contract Area," and defines it as the "Land and Leases" and "Initial Wells" to be developed and operated under the JOA.[153] The Court reasoned that the inclusion of "land" in addition to "leases" showed that the contract area was

144. *Id.*
145. *Id*.
146. *Id*. at 285-86.
147. *Id.*
148. *Id*. at 291.
149. *Id*. at 299.
150. *Id*. at 287.
151. *Id*.
152. *Id*. at 290.
153. *Id*. at 291.

intended to cover the initial leases and wells, as well as the unleased lands described in Exhibit A.[154]

The Court held that the parties to the JOA intended to include interests acquired by them, or by their successors, in the future, within the lands of the contract area subject to the JOA.[155] Additionally, the Court found that the contract area must include subsequently acquired interests in order to give the AMI effect[156] and held that AMIs, by definition, are intended to cover future acquisitions.[157]

In determining the JOA's duration, the Court held that because there was not a specified term in the JOA, the JOA's term was for a "reasonable time."[158] The Court did not address what constitutes a "reasonable time," but remanded the issue to the lower court.[159]

2. Anadarko Petroleum Corporation v. TRO-X, L.P.[160] (Lease Termination)

The Cooper family executed five leases with TRO-X.[161] TRO-X assigned the leases to Eagle Oil & Gas Co. ("Eagle"), but retained a reversionary interest providing it with a "back-in" option to receive five percent of its original working interest.[162] The "back-in" option also applied to "renewal(s), extension(s), or top lease(s) taken within one year of termination of the underlying interest."[163] Eagle subsequently assigned its interest to Anadarko, who began drilling operations.[164]

The Coopers later sent Anadarko, Eagle's assignee, a demand letter, claiming that the leases had been breached for failure to timely drill offset wells as required.[165] Anadarko "determined that it had, in fact, breached the Off-Set Well Provision, and that Cooper's written demand automatically re-vested the leased mineral interests back into the Coopers."[166] Anadarko negotiated new leases with the Coopers and agreed to release the old leases,

154. *Id.*
155. *Id.* at 291-92.
156. *Id*. at 290.
157. *Id.* at 291.
158. *Id*. at 292-94.
159. *Id*. at 294.
160. No. 08-15-00158-CV, 2016 WL 1073046 (Tex. App. Mar. 18, 2016).
161. *Id*. at *1.
162. *Id.*
163. *Id*.
164. *Id*.
165. *Id.* at *2.
166. *Id*.

but called the old leases "existing leases" in the negotiations.[167] The new leases were executed and recorded in June of 2011. The releases were executed later in June, but not recorded until August of 2011.[168] TRO-X was not informed of the new leases, nor did it consent to the releases. The new leases used the same form as the original TRO-X leases, but changed the length of the primary term, required a larger bonus, and imposed a 240-day continuous drilling commitment.[169]

TRO-X sued Anadarko, seeking to exercise its "back-in" option, claiming that the new leases were top leases.[170] The trial court ruled in favor of TRO-X, but the El Paso Court of Appeals reversed and rendered judgment in favor of Anadarko.[171] The main issue, as framed by the Court, was whether the delay between the execution of the new leases and the release of the old leases evidenced the Coopers' intent that the new leases were top leases, which could only come into being upon the recording of the releases.[172]

The Court noted that TRO-X bore the burden of proving that the Coopers intended to top-lease, and held that they failed to provide enough evidence to support such a conclusion.[173] The Court instead found that the delay between the execution of the new leases and release of the old leases did not evidence an intent to top-lease, and that a "lessor is deemed to have waived any formal surrender requirements if it signs a new lease with the intent to terminate the old one."[174]

The effect of the Court's ruling was to wash-out TRO-X's back-in. This case continued the general practice in Texas precluding washouts in cases involving bad faith or a breach of a fiduciary duty, but allowing them, unless strictly forbidden by the terms of the agreement.

167. *Id*.
168. *Id*. at *3.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*.
173. *Id*. at *6.
174. *Id*.

D. Regulation of Drilling and Production

1. Hooks v. Samson Lone Star, Limited Partnership[175] (TXRRC Filings Do Not Constitute Constructive Notice)

Charles Hooks leased his property in Hardin and Jefferson counties to Samson Lone Star Limited Partnership (now known as Samson Lone Star L.L.C. (hereinafter "Samson")).[176] The Jefferson County lease contained provisions that required Samson to prevent drainage from wells drilled on adjacent lands, and further provided that if a gas well was completed within 1,320 feet from the leased tract (the "buffer zone"), Samson was required to either: (1) drill an offset well, (2) pay compensatory royalties, or (3) release the offset acreage.[177] The lease did not allow for pooling.[178]

In 2000, Samson began drilling a well (BSM 1) on a tract adjacent to the Hooks' lease.[179] Although the drillsite was outside the buffer zone, the well was directionally drilled so that the bottom was within 1,320 feet from the leased property.[180] Samson provided Hooks a copy of a reconfigured plat that showed the bottom hole location to be *outside* the buffer zone. Samson filed the plat with the Texas Railroad Commission in December of 2000.[181] In 2001, Samson sought to amend Hooks' lease and pool 50 acres of it into the BSM 1 unit.[182] Based on the plat he was previously provided, Hooks agreed to the pooling, executed the required documents, and was sent royalty checks.[183]

Hooks later discovered that the well bottomed inside of the lease's buffer-zone and filed suit against Samson in 2007, alleging fraud, among other claims.[184] Specifically, Hooks alleged that Samson made false representations concerning the location of the well's bottom to avoid paying compensatory royalties that accrued before the unit was formed.[185] Hooks also claimed that the four-year statute of limitations applicable to its claim

175. 457 S.W.3d 52 (Tex. 2015).
176. *Id*. at 55.
177. *Id.*
178. *Id*.
179. *Id.*
180. *Id*.
181. *Id.* at 59.
182. *Id*.
183. *Id.* at 66.
184. *Id.* at 56.
185. *Id.*

should not apply since Samson had fraudulently induced Hooks to believe that the BSM 1 well was 1,400 feet from Hooks' lease.[186]

The trial court found that Hooks could not have discovered the true facts within the limitations time period.[187] Thus, Hooks had additional time to file the suit, and the jury awarded Hooks approximately twenty-one million dollars in damages.[188] Samson appealed, and the appellate court reversed, finding that the statute of limitations barred Hooks' claims because Hooks should have known that the BSM 1 well bottomed within his lease's buffer-zone when Samson proposed pooling.[189] Hooks appealed to the Texas Supreme Court.

The Court upheld the trial court's ruling, holding "when the defendant's fraudulent misrepresentations extend to the Railroad Commission record itself, earlier inconsistent filings cannot be used to establish, as a matter of law, that reasonable diligence was not exercised."[190] The Court found that it was up to the jury to determine whether Hooks used reasonable diligence because reasonable diligence is a question of fact, not law.[191]

Ultimately, the Court held that there was some evidence to support the jury's finding that the Hooks were delayed in bringing the claim because of Samson's fraud.[192] The Court stated that when fraudulent documents are part of the public record, a mineral owner is entitled to rely on them, even if there are other public records that contradict the fraudulent documents.[193] The Supreme Court remanded the case to consider the merits of Hooks' claims.

2. Railroad Commission of Texas v. Gulf Energy Exploration Corporation[194] (Liability for Improper Plugging)

This case arises out of the Railroad Commission's orders requiring American Coastal Enterprises ("ACE") to plug abandoned, inactive off-shore wells.[195] ACE owned a number of inactive offshore wells in the Gulf of Mexico. In March 2008, the Texas Railroad Commission ordered ACE

186. *Id*.
187. *Id*. at 57.
188. *Id*. at 55.
189. *Id*. at 56.
190. *Id*. at 61.
191. *Id.* at 59.
192. *Id.*
193. *Id.* at 60.
194. 482 S.W.3d 559 (Tex. 2016)
195. *Id*. at 562.

to plug the inactive wells, but in May 2008, ACE declared bankruptcy. [196] As a result, the Commission assumed the plugging responsibilities, and Superior Energy Services was awarded a contract to plug eight of the ACE wells, two of which were at issue in this case.[197] About a year prior to the service contract, Gulf Energy Exploration ("Gulf") acquired a lease that encompassed eight of the inactive wells, and requested the Railroad Commission's approval to begin reworking operations some of them.[198]

After Gulf's request, representatives from Gulf, ACE, and the Commission met to discuss the abandoned wells, and orally agreed that the Railroad Commission would delay plugging four of the eight wells.[199] Furthermore, the parties agreed that Gulf would post a bond and apply to take over operations of the four wells no later than June 12, 2008.[200] Soon thereafter, the agreement was reduced to writing in the form of a "formal Settlement and Forbearance Agreement."[201] Despite the agreed upon terms, one of the four wells that Gulf was to operate was plugged between the time that the oral agreement was reached and the written agreement was executed.[202] After obtaining legislative consent, Gulf brought suit against the Railroad Commission for breach of contract and negligence.[203]

The trial judge ruled that the parties had entered into a binding oral contract.[204] The Railroad Commission disagreed with the trial judge's ruling, and also with the judge's instructions to the jury because the instructions did not include a question on contract formation, nor did they include a question as to whether the Railroad Commission acted in good faith when plugging the well.[205] The jury ruled in favor of Gulf, and awarded $2,500,000.00, the maximum amount permitted by legislative consent.[206] The Railroad Commission appealed, and the Corpus Christi Court of Appeals affirmed.[207]

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196. *Id.* at 563.
197. *Id*.
198. *Id*.
199. *Id.*
200. *Id.*
201. *Id.*
202. *Id.*
203. *Id*. at 564.
204. *Id*. at 566.
205. *Id*. at 571-72.
206. *Id.*
207. *See* R.R. Comm'n of Texas v. Gulf Energy Expl. Corp., 480 S.W.3d 570 (Tex. App. 2014).

The Commission appealed the Court of Appeal's decision, and the Texas Supreme Court reversed and remanded for a new trial.[208] The Court looked to Texas Natural Resources Code Section 89.001 and found that a state agency that regulates natural resources is protected if the agency acts in good faith.[209] Although the evidence did not establish conclusively that the Commission acted in good faith in plugging the wrong well, a jury could reasonably infer that a Commission representative made a mistake as to which four wells were to be plugged, or a jury could reasonably infer that there was a clear discrepancy between the well that was to be plugged and the well that was improperly plugged.[210] Because the Commission's good faith argument was an issue of fact, the Court held that the question should have been submitted to the jury.[211]

As to the contract issue, the Railroad Commission argued that a fact issue existed as to whether the contract was entered into when the parties met, or when the formal written document was signed, and as such, this issue should have been submitted to the jury.[212] The Court agreed with the Railroad Commission, and found that the evidence submitted at trial raised a valid issue as to whether the parties reached a binding agreement at their meeting.[213] Thus, the trial court erred in ruling that a contract based on the oral agreement was formed because the issue should have been submitted to the jury.[214]

Finally, the Court held that the issue of the Railroad Commission's good faith in plugging the well also should have been submitted to the jury.[215] Therefore, the Texas Supreme Court remanded the case back to the trial court.[216]

3. Sciscoe v. Enbridge Gathering (North Texas), L.P.[217] (Trespass by Airborne Particles)

In this case, the Amarillo Court of Appeals held that airborne particles can constitute trespass.[218] From 2005 to 2009, various operators constructed

208. *Gulf Energy Expl. Corp.*, 482 S.W.3d at 562.
209. *Id.* at 565-66.
210. *Id*. at 570-71.
211. *Id.* at 571.
212. *Id.* at 573.
213. *Id.*
214. *Id.* at 575.
215. *Id.*
216. *Id.* at 576.
217. No. 07-13-00391-CV, 2015 WL 3463490 (Tex. App. June 1, 2015).
218. *Id.* at *8.

natural gas compressor stations and a metering station, collectively referred to as "the Ponder Compressor Station."[219] The sites were within a half-mile of DISH, which is a residential community in Denton County, Texas.[220] Beginning in 2005, the property owners complained to the operators of excessive noise and offensive odors, but were "assured the smell was merely an odorant and no harmful gases or pollutants were being emitted."[221] Three years later, other property owners contacted the Texas Commission on Environmental Quality ("TCEQ") about the noise and odor coming from the Ponder Compression Station, claiming that the activities were causing the residents to experience nausea and headaches.[222] TCEQ conducted an investigation, but could not confirm the nuisances.[223]

The property owners hired an environmental and sampling firm to investigate their claims.[224] The firm's report detected benzene, xylene, yethyl benzene, toluene, and other substances in the air surrounding the residential neighborhood.[225] In March 2010, TCEQ "installed and began operating AugoGC Monitors to record hourly air samples of regulated volatile organic compounds (VOCs)".[226] TCEQ determined that the operators' facilities were within emission limits.[227]

The property owners filed suit in 2011, alleging that the noise and emissions from the operators' facilities created a public and private nuisance and also that the chemicals in the air constituted trespass.[228] The operators separately moved for summary judgment.[229] The trial court granted the summary judgment without giving a basis for its decision.[230]

On appeal, the main issue was whether property owners could seek damages over a decrease in property values due to trespass of light, noise, and airborne chemical particulates that originated and crossed over from the operators' facilities.[231] The operators asserted that the migration of particulates did not constitute trespass because as a matter of law, trespass

219. *Id.* at *3.
220. *Id.*
221. *Id.* at *4.
222. *Id*.
223. *Id*.
224. *Id.*
225. *Id*.
226. *Id*.
227. *Id.*
228. *Id*.
229. *Id.*
230. *Id.* at *2.
231. *Id.* at *3.

requires a physical entry and a significant deposit of chemical particulates on property.[232]

The Court of Appeals relied on *Coastal Oil & Gas Corp. v. Garza Energy Trust* to analyze the trespass cause of action.[233] The Texas Supreme Court has recognized invasions of airspace as a trespass.[234] Trespass occurs when a physical entry that is not authorized has occurred on the surface of a property or in the adjacent airspace of a property.[235] An "invisible trespass" can become a cause of action if there is an actual injury caused.[236]

Because the Court could not hold as a matter of law that trespass did or did not occur, the Court remanded the case for further proceedings on whether a migration of airborne particulates originating from the operators' facilities can constitute trespass.[237] Although the Court did not rule on whether airborne particulates can constitute trespass, the Court acknowledged that trespass may occur if an operator intentionally and voluntarily allows particulates to enter another's property and those particulates caused injury.[238]

E. Litigation

1. Titan Operating, L.L.C. v. Marsden[239] (Nuisance; Quasi-Estoppel)

The Marsdens purchased their home near Aledo, Texas in 1997. It was located on the northwest side of a 6.2-acre tract in a residential neighborhood.[240] In 2004, they executed an oil and gas lease to Sullivan.[241] The lease contained a well-setback provision that provided that "no well [could] be drilled within two hundred (200) feet of any residence or barn…" without consent from the lessor.[242] Another provision gave the lessee the right to access the leased premises to reach drilling sites and

232. *Id*. at *7.
233. *Id*. at *8 (examining Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 11 (Tex. 2008)).
234. *Id.*
235. *Id*. at *7.
236. *Id*. at *8.
237. *Id*. at *12.
238. *Id*. at *9.
239. Titan Operating, L.L.C. v. Marsden, No. 02-14-00303-CV, 2015 WL 5727573 (Tex. App. Aug. 27, 2015).
240. *Id*. at *1.
241. *Id.*
242. *Id.*

other related operations on adjacent land,[243] and an addendum to the lease provided that:

> [The Marsdens] and [Sullivan] agree that no drilling or other activities will be conducted upon the surface of [the Marsdens' property] and that no roads, pipelines, tanks, heaters, separators, injection wells, or other surface equipment will be placed on [the Marsdens' property] without the prior, written consent of [the Marsdens. *[B]ut [Sullivan] shall have the right to prospect, drill, and produce oil and gas from beneath the surface of [the Marsdens' property] by operations which it may conduct on adjoining or nearby lands through the drilling, operating, and maintaining of directional wells located on the surface of such adjoining or nearby lands.*[244]

The Marsden lease was eventually assigned to Titan Operating, L.L.C. ("Titan").[245] Titan decided to place its drillsite on the land immediately to the North of the Marsden's property, the southwest corner of which was approximately 176 feet north of the Marsdens' house, with the actual well sitting 300 feet from the Marsdens' house.[246] Five additional wells were drilled north of the Marsdens' property.[247] The Marsdens complained of noise from the drilling and operations, and claimed to not have been able to sleep or enjoy their house.[248]

The Marsdens brought suit for nuisance and sought damages based on the loss of enjoyment of their property as well as the decrease in property value.[249] The jury found that Titan Operating deliberately created a private nuisance and that the Marsdens were not estopped from bringing a nuisance claim.[250] The jury awarded the Marsdens $36,000 (being $18,000 to Marcus Marsden and $18,000 to Laura Marsden).[251] Titan filed a motion for judgment notwithstanding the verdict, asking the trial court to disregard the jury's decision, but the trial court denied the motion. Titan appealed.[252]

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243. *Id*.
244. *Id*. at *2 (emphasis added).
245. *Id*.
246. *Id*. at *3.
247. *Id*.
248. *Id*. at *4.
249. *Id*.
250. *Id*. at *7.
251. *Id*.
252. *Id*.

The Fort Worth Court of Appeals reversed the trial court's judgment on the grounds that the affirmative defense of quasi-estoppel should have resulted in a directed verdict for Titan.[253] Quasi-estoppel applies when it would be "unconscionable to allow a person to maintain a position inconsistent with the one to which he acquiesced or from which he accepted a benefit."[254] For this affirmative defense to apply, "the party being estopped must have had knowledge of all material facts at the time of the conduct on which the estoppel is based."[255]

In this case, the addendum to the Marsden lease specifically gave the lessee "the right to prospect, drill, and produce oil and gas from beneath the surface of [the leased premises] *by operations…on adjoining or nearby lands* through the drilling, operating, and maintaining of directional wells *located on the surface of such adjoining or nearby lands*."[256] The Court found that Marcus Marsden "recognized that the terms of the bargain that he struck in his lease were that drilling could not occur on his property but that the southeast corner of his property could be used to travel to a drilling site and that drilling could occur on adjoining land."[257] During lease negotiations, the Marsdens had the opportunity to negotiate for larger setback provisions, but did not. There were no allegations of negligence by Titan, nor was there any evidence that Titan violated any laws or regulations in drilling its wells.[258] Furthermore, the Marsdens accepted royalties from the well, which was pooled with a portion of their land.[259] Because the Marsdens "unconscionably accepted benefits of transactions… while taking positions that inconsistently attempt[ed] to avoid the obligations and effects (including all of the circumstances forming the gravamen of their nuisance claim) of those same transactions," the Court held that as a matter of law, quasi-estoppel barred the Marsdens' claim of nuisance against Titan.[260]

253. *Id*. at *9.
254. *Id*. at *7 (citing Little v. Delta Steel, Inc., 409 S.W.3d 704, 711 (Tex. App. 2013).
255. *Id*. (citing Nash v. Beckett, 365 S.W.3d 131, 144 (Tex. App. 2012); Lindley v. McKnight, 349 S.W.3d 113, 133 (Tex. App. 2011).
256. *Id*. at *8.
257. *Id*. at *9.
258. *Id.*
259. *Id*. at *10.
260. *Id.*

2. Cerny v. Marathon Oil Corporation[261] (Nuisance; Negligence; Causation)

In 2010, the Cernys leased the minerals underlying their one-acre tract in Karnes County, Texas to Marathon Oil Corporation's predecessor.[262] The lease authorized Marathon to use the surface of the Cernys' land, but Marathon has not placed any wellheads or infrastructure on it.[263] The Cernys' lease was pooled with other leases as part of the Brysch-Adams Unit. The Unit contains three wells.[264]

In 2013, the Cernys sued Marathon and Plains Exploration for private nuisance, negligence, gross negligence and negligence per se, claiming that noise, odors, and toxic chemicals from their oil and gas operations made the Cerneys sick and damaged their property.[265] The district court granted Marathon and Plains' no-evidence and traditional summary judgment motions.[266] The San Antonio Court of Appeals affirmed, finding that the evidence provided by the Cernys, "consisting of lay affidavits and non-medical expert testimony" failed to present more than a scintilla of evidence to support their claims.[267]

The general rule in Texas is "that expert testimony is necessary to establish causation as to medical conditions outside the common knowledge and experience of lay persons."[268] In this case, the Cerny's petition only sought recovery for nuisance symptoms typical of discomfort rather than disease, and disclaimed "any 'personal injury damages' that would invoke [the need for expert testimony under] *Merrell Dow Pharms. v. Havner*"; therefore, they did not present medical expert testimony to prove causation of their physical injuries.[269]

The Cernys also relied on *Morgan v. Compugraphic Corp.* in support of their claim that medical expert testimony was unnecessary.[270] The Court

261. 480 S.W.3d 612 (Tex. App. 2015).
262. *Id*. at 615.
263. *Id*.
264. *Id*.
265. *Id*. at 615.
266. *Id*. at 617.
267. *Id*. at 624.
268. *Id*. at 618 (citing Guevara v. Ferrer, 247 S.W.3d 662, 665 (Tex. 2007)).
269. *Id*.
270. *Id*. at 619. See also Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733 (Tex. 1984) (providing an exception to the general rule requiring a medical expert on causation of a medical condition, but applying only where "both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are

rejected this argument and distinguished the facts of this case from those of *Morgan*. The Court agreed with the defendants' argument that "the Cernys' nuisance and negligence claims are in the nature of toxic tort claims which fall outside a lay person's general knowledge and experience, and must therefore be proven with expert testimony."[271] "Plaintiffs seeking relief for injuries of any nature caused by exposure to or migration of a toxic substance must meet the stringent proof requirements imposed by the Texas Supreme Court in *Havner* and its progeny."[272] In *Havner*, the Court ruled that:

> expert testimony is necessary in a toxic tort case in order to prove (i) the applicable standard of care, (ii) that the defendant's conduct more than doubled the risk, as shown by two epidemiological studies, (iii) that the plaintiff's injuries were caused by the defendant's conduct, and (iv) that the plaintiff's injuries were not caused by other possible sources.[273]

For the Cernys' claim that they became ill from the oil and gas operations, the Court found that the Cernys suffered from chronic pre-existing health conditions.[274] For the Cernys' property damage claim, more specifically that their home had developed foundation damage, the Court found that the home had foundation damage prior to when Marathon began operations.[275] Furthermore, the Cernys failed to negate other possible sources of chemicals other than Marathons' operations, which prompted the Court to hold that "an expert's failure to rule out alternative causes of injury renders the opinion unreliable, and legally constitutes no evidence."[276]

In rejecting the Cernys' nuisance claims for loss of enjoyment and use of their land, the Court held that their claims resulting from dust, noise, traffic, and foul odors were "too conclusory and speculative."[277] Further, the Court of Appeals clarified that the causation standard for nuisance and negligence

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sufficient to evaluation the condition and whether they were probably caused by the occurrence.")

271. *Id*. at 620.

272. *Id*.

273. *Id*. (citing Merrell Dow Pharms. v. Havner, 953 S.W.2d 706, 715-16, 20 (Tex. 1997)).

274. *Id*. at 622.

275. *Id*. at 621.

276. *Id*. at 622.

277. *Id.* at 625.

claims based on noises, odors, and other exposures to oil and gas operations is that an expert must rule out alternative causes of injury.[278]

3. Lightning Oil Co. v. Anadarko E&P Onshore L.L.C.[279] (Subsurface Trespass)

In this trespass case, the Court ruled that ownership of oil and gas does not include the right to control other portions of the subsurface.[280] Anadarko leased the Chaparral Wildlife Management Area.[281] The area is south of the Briscoe Ranch, which was leased to Lightning Oil ("Lightning").[282] Anadarko was required under the Chaparral lease to use off-site drilling when "prudent and feasible."[283] To comply with this requirement, Anadarko acquired a surface and subsurface agreement from the Briscoe Ranch surface owner.[284] The agreement authorized Anadarko to place drilling rigs on the ranch property, and authorized Anadarko to drill horizontal wells that would pass through the Briscoe Ranch lease and be bottomed in the Chaparral lease.[285]

Lightening filed a trespass suit against Anadarko, alleging that it had the exclusive right to decide who could drill the property.[286] The trial court ruled in favor of Anadarko and Lightening appealed.[287]

After reviewing various cases[288] that dealt with a party's ownership rights in the subsurface of a tract where the mineral rights were severed from the surface rights, the San Antonio Court of Appeals affirmed.[289] The Court found that a party who owns the oil and gas rights does not own the right to control other components of the subsurface.[290] Instead, the owner of

278. *Id*. at 622.
279. 480 S.W.3d 628 (Tex. App. 2015).
280. *Id*. at 636.
281. *Id.* at 631.
282. *Id*.
283. *See* Lightening Oil Company v. Anadarko E & P Onshore, L.L.C., No. 04-14-00152-CV, 2014 WL 5463956 (Tex. App. Oct. 29, 2014).
284. *Lightening Oil*, 480 S.W.3d at 31.
285. *Id*. at 636.
286. *Id*. at 630.
287. *Id*. at 632.
288. *See* Edwards Aquifer Auth. v. Day, 369 S.W.3d 814 (Tex. 2012); Stephens City. v. Mid–Kansas Oil & Gas Co., 254 S.W. 290, 295 (Tex. 1923); Villarreal v. Grant Geophysical, Inc., 136 S.W.3d 265, 268 (Tex. App. 2004); Hastings Oil Co. v. Tex. Co., 234 S.W.2d 389, 398 (Tex. 1950); Chevron Oil Co. v. Howell, 407 S.W.2d 525, 526 (Tex. Civ. App. 1966).
289. *Lightening Oil*, 480 S.W.3d 633-34.
290. *Id.* at 635.

the surface estate owns the non-minerals beneath the surface.[291] Therefore, the Court ruled in favor of Anadarko and held that the surface owner of the Briscoe Ranch could grant Anadarko permission to drill through the subsurface to reach the Chaparral lease.[292]

4. Ranchero Esperanza, Ltd. v. Marathon Oil Company[293] (Property Damage; Discovery Rule)

Marathon had a lease on a 20,000-acre ranch, where it plugged and abandoned Well 812 in 1989.[294] Well 812 was used for a water flood project until Marathon ceased all operations shortly thereafter.[295] Ranchero purchased the property in 2004.[296] In 2008, Aspen, a subsequent oil and gas lessee, discovered that Well 812 was leaking a large amount of salt water due to water injection nearby.[297] Furthermore, Aspen discovered that the leak was due to the well's improper plugging, which caused surface and subsurface pollution and destruction.[298]

Ranchero filed a claim against Marathon, alleging that the leak had killed vegetation on the property and decreased the property value by $3,700,000.00.[299] Marathon moved for summary judgment, arguing that Ranchero did not have standing because it was not the owner of the land at the time of the alleged negligent plugging and that the suit was barred by the statute of limitations.[300] The trial court granted Marathon's motion for summary judgment.[301] Ranchero appealed.[302]

The El Paso Court of Appeals reversed in part and affirmed in part.[303] The Court stated:

> the well-established rule in Texas [is] that a cause of action for injury to land is a personal right belonging to the person who owns the property at the time of injury, and that a mere

291. *Id.*
292. *Id.* at 638.
293. 488 S.W.3d 354 (Tex. App. 2015).
294. *Id.* at 356.
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.* at 357.
300. *Id.*
301. *Id.* at 358.
302. *Id.*
303. *Id.* at 366.

> subsequent purchaser does not have standing to recover for injuries committed before his purchase.[304]

In this case, Marathon's negligent plugging occurred before Ranchero owned the property and the salt water damage occurred after Ranchero's purchase; therefore, the Court found that Ranchero had standing to bring a claim.[305]

While Ranchero had standing to assert a claim, its claims were barred by the two-year statute of limitations because the claim was filed more than two years after Aspen discovered the leaking salt water.[306] The discovery rule did not toll the statute, since the damage from the salt water was not inherently undiscoverable.[307] "An injury is inherently undiscoverable if it is by nature unlikely to be discovered within the prescribed limitations period despite due diligence."[308]

5. Cosgrove v. Cade[309] (Unambiguous Errors in Deeds; Notice; Discovery Rule)

This case reiterates that mineral owners should carefully review their deeds to ensure that mineral reservations are properly included. Specifically, the Supreme Court held that "[p]lainly obvious and material omissions in an unambiguous deed charge parties with irrebuttable notice for limitations purposes."[310] The discovery rule, which tolls the statute of limitations until a party discovers the injury giving rise to the claim, applies in limited situations where the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.[311] The statute of limitations begins to run when a deed is executed and continues to run when a deed is properly recorded because it is publicly available.[312]

Barbara Cosgrove ("Cosgrove") purchased a two-acre tract from Michael and Billie Cade ("Cades") in 2006.[313] The deed, each page of which was signed or initialed by the Cades, did not reserve the mineral rights, but the

304. *Id*. at 355-56.
305. *Id*. at 363.
306. *Id.* at 365.
307. *Id*. at 363.
308. *Id*. at 366 (quoting S.V. v. R. V., 933 S.W.2d 1, 7 (Tex. 1996)).
309. 468 S.W.3d 32 (Tex. 2015).
310. *Id.* at 34 (quoting TEX. PROP. CODE ANN. § 13.002).
311. *Id*. at 36.
312. *Id.* at 38-39.
313. *Id.* at 35.

Real Estate Contract's "Special Provisions" clause stated: "'Sellers to retain all mineral rights.'"[314] A closing document prepared by the title company required both parties "fully cooperate, adjust, and correct any errors or omissions and to execute any and all documents needed or necessary to comply with all provisions of the above mentioned real estate contract."[315] The parties did not dispute that "the deed mistakenly – but unambiguously – failed to reserve the mineral rights."[316]

Prior to the sale, the Cades leased their mineral interests to Dale Resources, L.L.C., and ultimately Chesapeake became the operator of the lease.[317] In 2010, the Cades demanded a corrective deed from the Cosgroves when Chesapeake alerted them to a "problem" with the deed's mineral reservation.[318] The Cosgroves refused, claiming that the Cades' claims were barred by the statute of limitations.[319] In 2011, the Cades sued Cosgrove for a declaratory judgment that they were the owners of the mineral interests.[320] In Texas, a four-year statute of limitations governs deed reformation claims.[321] The trial court granted summary judgment, finding that the Cades' claims were time-barred.[322] The court of appeals reversed, stating the discovery rule delayed the accrual of limitations for the deed reformation claim.[323]

Texas law provides for a rebuttable presumption that a grantor has immediate knowledge of defects in a deed that result from mutual mistake.[324] Since a grantor has actual knowledge that the deed is incorrect, the limitations period on a claim to reform an incorrect deed begins as soon as the deed is executed.[325]

The discovery rule, which tolls the statute of limitations until a party discovers the injury giving right to the claim, applies in limited situations where "the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable."[326] Therefore, the Court

314. *Id.* at 41.
315. *Id*.
316. *Id*. at 42.
317. *Id.* at 35.
318. *Id.*
319. *Id.*
320. *Id*. at 42.
321. *Id*. at 35.
322. *Id*. at 36.
323. *Id.*
324. *Id*. (citing Sullivan v. Barnett, 471 S.W.2d 39, 45 (Tex. 1971)).
325. *Id.*
326. *Id.* at 36.

held where a deed is unambiguous, the "[p]arties are charged as a matter of law with knowledge of an unambiguous deed's material omissions from the date of its execution, and the statute of limitations runs from that date."[327] The parties have actual knowledge of what a deed includes and excludes.[328] Where a reservation of rights, such as the Cades' mineral reservation, is omitted from the instrument, "the presumption of knowledge is irrefutable because the alleged error is obvious."[329]

Moreover, "obvious omissions are not inherently undiscoverable."[330] Texas Property Code 13.002 puts all parties on notice, including the grantor, of a deed's contents.[331] Mineral interest owners must read and inspect their deeds to ensure that their mineral interests are properly reserved.[332] The Cades' injury could not be deemed undiscoverable because the deed was publicly available.[333] "Section 13.002 establishes a lack of diligence in the discovery of a mistaken omission in an unambiguous deed as a matter of law."[334] As the Court provided in *Hooks v. Sampson Lone Star, L.P.*, "(1) reasonable diligence includes examining 'readily available information in the public record,' and (2) 'reasonable diligence should lead to information in the public record.'"[335] The Court rejected the Cades' claims, finding that they could not argue they acted with reasonable diligence when they failed to notice a plain mistake when executing their own deed, as the deed was readily available for inspection at the time of signing and in the public records for the remainder of the limitations period.[336]

The Court has now expressly found that the discovery rule does not toll the statute of limitations where an unambiguous deed includes plainly obvious and material omissions.[337] The statute begins to run at execution, when all parties are put on notice.[338] If a deed is properly recorded, Texas Property Code 13.002 imposes notice on the grantor of the deed's

327. *Id.* at 37.
328. *Id.*
329. *Id.*
330. *Id.* at 38.
331. *Id.*
332. *Id.*
333. *Id.*
334. *Id.*
335. *Id.* at 39 (citing Hooks v. Sampson Lone Star, L.P., 457 S.W.3d 52, 60 (Tex. 2015)).
336. *Id.*
337. *Id.* at 34.
338. *Id.* at 40.

contents.[339] Therefore, mineral owners should be especially careful to review deeds to ensure reservations are properly included.

III. Legislative Update

A. Transfer on Death Deeds[340]

Effective September 1, 2015, Texas Estate Code Section 114.151 allows for Transfer on Death Deeds. Lawmakers believe this provision will provide a simplified process for the non-probate transfer of real estate.

A Transfer on Death deed operates the same as any other conveyance, except that title does not pass to the grantee until the grantor's death. The property conveyed passes outside of the grantor's estate. To be effective, a Transfer on Death Deed must be signed, notarized, and recorded in the deed records of the county where the property is located prior to the death of the grantor. It may not be created through the use of a power of attorney. An unrecorded Transfer on Death Deed is ineffective to convey property.

The statute permits the naming of alternative beneficiaries in the Transfer on Death Deed; however, the statute does not permit a grantor to convey under complicated distribution provisions or to several people in varying percentages. If the grantor changes his or her mind, a Transfer on Death Deed may be revoked by the filing of a "Cancellation of Transfer on Death Deed" form or by the recording of a subsequently executed conveyance of the same property. A Transfer on Death Deed may not be revoked by a will.

B. House Bill 2207[341]

Effective January 1, 2016, the general rule of "first in time, first in right" no longer applies in the case of real estate mortgages and their priority over subsequently filed oil and gas leases. House Bill 2207 creates a legislatively imposed subordination of a prior mortgage to a subsequent oil and gas lease. This legislation will result in savings in time, energy and costs to producers that were previously required to obtain subordination agreements from lienholders.

In the case where a lease is taken on land that is already subject to a mortgage and the mortgage is foreclosed, the statute provides that the oil and gas lease does not terminate, even if the lease has not been subordinated to the mortgage. Under the bill, when the leased property is

339. *Id.*
340. TEX. EST. CODE ANN. § 114.151 (West 2015).
341. Tex. H.B. 2207, 84th Leg., Reg. Sess. (2015).

later sold in a foreclosure sale, any rights granted to the lessee to use the surface terminate, and any royalty payments which become due after the sale pass to the purchaser of the foreclosed property.

The loss of surface rights will not likely be an issue on leases of smaller tracts, but might become problematic on large tracts or tracts on which oil and gas wells have been or are currently being drilled. For this reason, it may still be advisable to obtain a subordination agreement from a lienholder for tracts of land upon which surface operations are conducted or contemplated.

C. House Bill 40[342]

House Bill 40 confirmed the state's exclusive jurisdiction to regulate oil and gas operations. Additionally, the bill expressly preempts a municipality or other political subdivision from regulating oil and gas operations. Although the bill preserves a municipality's authority to regulate "aboveground activity" that relates to oil and gas operations, it does not preserve any other political subdivision's authority.

In regard to "aboveground activity," a municipality can assert jurisdiction over oil and gas operations if (i) it is commercially reasonable, (ii) it does not effectively prohibit oil and gas operations conducted by a reasonably prudent operator, and (iii) it is not otherwise preempted from doing so by state or federal law. The bill lists examples of what constitute "aboveground activity," and includes fire and emergency response, traffic, lights, noise, notice, and setback requirements.

342. Tex. H.B. 40, 84th Leg., Reg. Sess. (2015).