2014-2015 OIL & GAS CASE LAW UPDATE

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TEXAS CASES

CASES OUTSIDE OF TEXAS

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I. INTRODUCTION AND PURPOSE OF THIS PAPER

This paper covers selected oil and gas related case law from across America, released between September 1, 2014, and November 1, 2015. These briefs are not exhaustive as to all issues; generally, only relevant points of oil and gas common law are discussed. Cases in the "Oil & Gas Case Law from Outside Texas" portion appear in alphabetical order as to the state of origin.

II. TEXAS AND FIFTH CIRCUIT OIL & GAS CASE LAW

A. Anderson Energy Corporation v. Dominion Oklahoma Texas Exploration & Production, Inc.*, 469 S.W.3d 280 (Tex. App.—San Antonio 2015).*

On June 30, 2015, the San Antonio Court of Appeals held that coverage of a joint operation agreement was not limited to the interests owned by the original parties at the time of execution and was not terminable at will simply because it had no expiration date.[2]

2. Anderson Energy Corp. v. Dominion Okla. Tex. Exploration & Prod., 469 S.W.3d 280, 294 (Tex. App.—San Antonio, June 30, 2015).

Anderson Energy Corp. ("*Anderson*") and HighMount Exploration & Production Texas LLC ("*HighMount*") owned oil and gas leaseholds comprising a prospect covered by a 1977 Form Joint Operation Agreement (the "*J.O.A.*") that included a typewritten Area of Mutual Interest ("*AMI*") provision[3] governing outlining a defined area of for future development and a preferential right to purchase any sale of the signatories' interests.[4] The J.O.A. did not contain language that expressly made subsequent acquisitions by J.O.A. parties subject to the AMI clause nor any specific expiration date.[5]

Anderson was the successor-in-interest to Sun Gas Corp., which purchased a 50 percent stake in the disputed prospect area in 1980, from William Perlman ("*Perlman*").[6] Dominion Oklahoma Texas Exploration & Production Inc. ("*Dominion*") was the successor to Perlman's interest, but which later sold its interests covered by the J.O.A. to HighMount.[7]

Before the sale, Anderson sought a judicial determination that the interests acquired by Dominion were subject to the AMI clause, arguing that future acquisitions were covered within the broad language used in the J.O.A.'s Article I definition of "Contract Area" (that referred to "all of the lands" described in the included Exhibit A) and the broad description of Exhibit A of the said lands, the same being "all interest of the parties in the land located within the areas outlined" on the included plat. Anderson also argued the presence of the typewritten AMI clause illustrated clear intent that the J.O.A. would apply to interests acquired after 1980.[8]

Dominion countered (1) that the present tense used in the J.O.A.'s recitals and in the definitions of "oil and gas leases" and "oil and gas interests" (stating that the signatory parties "are owners") and (2) the lack of the phrase "area of mutual interest" and any reference to any future acquisitions in Exhibit A, meant the J.O.A. did not apply to interests acquired after execution of the J.O.A..[9]

In holding that the terms of the AMI clause extended to interests subsequently acquired within the boundaries of the area described in Exhibit A, the court first noted that it construed the definition of the "Contact Area" of the J.O.A., not just by isolated words or phrases within the J.O.A. and the

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3. A plat in Exhibit A of the J.O.A. contained the notation "AMI" on the hash marked boundary drawn thereon but not the actual words "Area of Mutual Interest."

4. 469 S.W.3d at 288.

5. *See id.*

6. *Id.* at 284.

7. *Id.*

8. *Id.*

9. *Id.* at 287.

instruments it referenced, but by considering the language used in the context of the entire agreement and related documents.[10] After noting that Kansas case law discounted Dominion's recital tense argument,[11] the court also highlighted Colorado case law, which noted it was standard practice in the oil and gas industry for parties to enter into J.O.A.'s with terms that would apply to interests to be acquired in the future.[12]

The court opined that the AMI provision was the "most telling indicator" of the intent of the signatories regarding future mineral property procurements as it was typewritten.[13] The court reasoned than an interpretation which the AMI did not cover interests acquired by successors-in-interests to the signatories "ignores and gives no effect to the typewritten AMI provision which the parties expressly inserted into the model form agreement," and that "[t]he present tense language may therefore be reasonably read as inclusive of the interests that the parties subsequently acquire, which then become interests that 'are owned' by the parties under the J.O.A.."[14]

Ultimately, the court overturned the trial court's decision and determined that the drafters had intended that the Contract Area would include the lands marked "AMI" in the Exhibit A plat, thus making the later-acquired properties within the hashed boundary of the plat subject to the terms of the typewritten AMI clause.[15]

The trial court had also held that the J.O.A. was terminable at will, as no specific term was provided for in the agreement.[16] The court of appeals reversed, holding that although the J.O.A. did not contain an express duration, it was not terminable at will by default, but instead should be construed to continue for a "reasonable time."[17] The court did not define, however, what a reasonable time would be, remanding that issue to the trial court.[18]

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10. *Id.* at 285.
11. Amoco Prod. Co. v. Wilson, 976 P.2d 941 (Kan. 1999).
12. 469 S.W.3d at 291.
13. *Id.* at 290.
14. *Id.*
15. *Id.*
16. *Id.* at 292.
17. *Id.* at 294.
18. *Id.*

B. Aycock v. Vantage Fort Worth Energy, LLC*, No. 11-13-00338-CV, 2015 WL 1322003 (Tex. App.—Eastland 2015, no pet. h.).*

On March 20, 2015, the Eastland Court of Appeals, in a memorandum opinion, upheld a summary judgment in favor of the defendant oil company lessee reaffirming that a nonconsenting[19] cotenant's remedy to seek profits from a lease is a traditional common law accounting from the leasing cotenant, rather than a suit against the lessee operator.[20] Specifically, the lessee did not owe unleased cotenants any portion of the bonus money paid to a leased cotenant.[21]

In early 2008, Vantage Fort Worth Energy, LLC ("*Vantage*"), leased a 1,409-acre tract in Erath County, Texas, for a three-year primary term from Fitzhugh H. Pannill Jr. and the Desdemona Cattle Company ("*Pannill and Desdemona*").[22] Pannill and Desdemona, along with the Charles L.B. Aycock, Edward S. Aycock, and Charlotte Cherry Aycock McHale (collectively, the "*Aycocks*"), owned undivided mineral interests in the 1,409 acres, with Pannill and Desdemona owning approximately 526 net mineral acres.[23] Vantage paid a bonus of $750 per mineral acre based on Pannill and Desdemona's proportionate ownership share of the property, providing for a total sum of $395,000.[24] In September, 2010, the Aycocks, acting as unleased mineral cotenants, mailed a letter to Vantage inquiring about the lease.[25] Vantage never responded, and no drilling or production ever occurred on the property prior to the end of the primary term in March, 2011.[26] The Aycocks sued Vantage in May, 2012 for unpaid bonuses, claiming they had ratified the lease to Pannill and Desdemona.[27] The trial court granted summary judgment in favor of Vantage.[28]

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19. Aycock v. Vantage Fort Worth Energy*, LLC,* No. 11-13-00338-CV, 2015 WL 1322003, at *3 (Tex. App., Mar. 20, 2015) (The court uses the terms "nonconsenting" and "unpaid mineral cotenant" instead of "unleased.").
20. *Id.* at *3.
21. *Id.*
22. *Id.* at *2.
23. *Id.*
24. *Id.*
25. *Id.* (Apparently, the Aycocks were seeking the same $750 per net mineral acre rate on their interests.)
26. *Id.*
27. Aycock v. Vantage Fort Worth Energy*, LLC,* No. 11-13-00338-CV, 2015 WL 1322003, at *2 (Tex. App., Mar. 20, 2015).
28. *Id.*

On appeal, the Aycocks argued that the trial court erred because their letter to Vantage in 2010 ratified the lease and entitled them to bonus payments under the lease.[29] They also argued that Vantage improperly leased the entire 1,409 acres from Pannill and Desdemona, rather than only their proportionate share.[30]

Vantage responded by relying on the proportionate reduction clause contained in the lease to show that Pannill and Desdemona only intended to lease their undivided share.[31] Despite all of these arguments, the Eastland Court of Appeals ruled that even if Pannill and Desdemona had leased the entire captioned tract, and the lease had been ratified, Vantage would still be entitled to summary judgment as a matter of law.[32]

Generally, the court noted, a cotenant can rightfully lease its undivided interest without joinder from the other cotenants.[33] If the lessor leases all the common property, the cotenants remedies are to either (1) ratify the lease and request an accounting for all profits received by the leasing cotenant,[34] or (2) refuse to ratify the lease and collect the value proportionate to his or her share of the minerals, less reasonable production expenses.[35] The court also noted several other routes to ratification for unleased mineral cotenants, such as actually filing suit,[36] execution and acceptance of a royalty deed,[37] and executing a conveyance that recognizes a lease.[38] If an unleased cotenant ratifies a lease, it may sue the lessor cotenant for an accounting of all money received by the lessor cotenant in the form of bonus, royalty, rentals, and other lease benefits that are actually attributable to the unleased cotenant's share of the common land.[39]

The Aycocks had asserted that Vantage was unjustly enriched as a result of making bonus payments to Pannill and Desdemona, and not to the "nonconsenting" (unleased) cotenants.[40] The Court of Appeals, however, satisfied that Vantage had only paid bonus to Pannill and Desdemona,

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29. *Id.* at *1.
30. *Id.* at *2.
31. *Id.*
32. *Id.* at *3.
33. Glover v. Union Pac. R.R. Co., 187 S.W.3d 201, 213 (Tex. App.—Texarkana, Feb. 17, 2006) (citing Burnham v. Hardy Oil Co., 147 S.W. 330, 334 (Tex. Civ. App., 1912)).
34. Tex. & Pac. Coal & Oil Co. v. Kirtley, 288 S.W. 619, 624 (Tex. Civ. App. 1926).
35. Cox v. Davison, 397 S.W.2d 200, 201 (Tex. 1965).
36. Montgomery v. Rittersbacher, 424 S.W.2d 210, 214 (Tex. 1968).
37. Loeffler v. King, 236 S.W.2d 772, 774 (Tex. 1951).
38. Grissom v. Anderson, 79 S.W.2d 619, 622-23 (Tex. 1935).
39. *Kirtley*, 288 S.W. at 624.
40. *Id.*

attributable to their interests, held that Vantage was not unjustly enriched because it did not profit at the expense of the unleased and unpaid cotenants.[41] Specifically, Vantage paid the proportionate amount of bonus pursuant to the negotiated lease terms based on the net acreage actually owned by Pannill and Desdemona.[42] The court held that a nonconsenting cotenant cannot seek compensation from the lessee in such a situation, ruling instead that the unpaid and unleased mineral cotenants can only recover bonus money paid to Pannill and Desdemona for the unleased interests, if any, and cannot recover any such payments from Vantage because such "[o]wners of undivided [mineral interests] are tenants in common."[43] The Court of Appeals affirmed the trial court's summary judgment in favor of Vantage and refused the Aycocks a new trial.[44]

C. Cerny v. Marathon Oil Corp*., 480 S.W.3d 612 (Tex. App.—San Antonio 2015).*

On October 7, 2015, the San Antonio Court of Appeals affirmed the decision of the district court, and concluded that when a royalty interest owner pleads for nuisance and negligence damages from toxic chemicals, an expert witness is required to prove causation.[45] In addition, the party asserting damages must rule out all other alternative causes.[46]

Michael and Myra Cerny's family (collectively, the "*Cernys*") purchased a one-acre tract of land in Karnes County, in 2002.[47] In 2002, the Cernys leased the mineral rights to Texas Crude Energy, LLC, Marathon Oil EF, LLC's ("*Marathon*") predecessor, for a lease bonus and lessor royalty interest.[48] The lease authorized the lessee to use the Cernys' surface to drill and for oil and gas operations.[49]

41. HECI Exploration Co. v. Neel, 982 S.W.2d 881, 891 (Tex. 1998).
42. *Id.*
43. Wilson v. Superior Oil Co., 274 S.W.2d 947, 950 (Tex. Civ. App. 1954).
44. *Id.*
45. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *30-31 ((Tex. App.—San Antonio 2015 Oct. 7, 2015).
46. *Id.* at *21.
47. *Id.* at *2.
48. Traditional and No-Evidence Motion for Summary Judgment at 3, Cerny v. Marathon Oil Corp., 480 S.W.3d 612, *1 (Tex. App.—San Antonio 2015).
49. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *2 (Tex. App.—San Antonio 2015 Oct. 7, 2015).

The Cernys' lease was pooled with other leases, creating the Brysch-Adams drilling unit.[50] In 2012, Marathon drilled a well on the unit.[51] Marathon did not place any wells or infrastructure on the Cernys' property.[52] The Cernys received royalty payments from production off of the Brysch-Adams unit.[53]

In 2013, the Cernys sued Marathon, Marathon Oil Corporation,[54] and Plains Exploration & Production Company ("*Plains*") for private nuisance, negligence, gross negligence, and negligence *per se*.[55] The Cernys alleged that, in 2012, they started experiencing a panoply of health issues such as daily headaches…rashes, chest pain, bone pain, strange nerve sensations, high blood pressure, irregular heartbeats, nausea, irrigation of the eyes, nose and throat, bronchitis, pain in the liver area, numbness in the externalities, and difficulty breathing.[56] The Cernys blamed their maladies on exposure to toxic chemicals from nearby oil wells.[57] In addition, since the family was surrounded on all sides by wells, the Cernys alleged they constantly smelled noxious odors, also resulting in health problems and mental distress.[58] The Cernys also contended the exposure worsened their pre-existing health conditions and created new health problems.[59] They also alleged the operations also damaged the foundation of their home.[60] In addition to the facilities allegedly emitting toxic chemicals and odors, the facilities created heavy traffic.[61] The noise and dust caused by the traffic disrupted the Cernys' use and enjoyment of their property.[62]

In their petition, the Cernys specifically noted that they were not seeking personal injury damages that would require expert testimony under the *Havner* standard.[63] Moreover, the Cernys' recognized that they were not seeking damages for any particular disease caused by the oil and gas

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50. *Id.*
51. *Id.*
52. *Id.*
53. *Id.*
54. *Id.* at *1-2.
55. *Id.* at *2.
56. *See id.* at *23-24.
57. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *16 (Tex. App.—San Antonio 2015 Oct. 7, 2015).
58. *Id.* at *3.
59. *Id.* at *4.
60. *Id.* at *2.
61. *Id.* at *3.
62. *Id.*
63. *See* Merrell Dow Pharms., Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997) (establishing that expert testimony is required to establish causation for medical conditions).

operations.[64] Rather, the Cernys sought damages for the discomfort created by Marathon and Plains, which included: "past and future 'fear, apprehension, offense, discomfort, annoyance, sickness, injury to health, exacerbation of physical health or pre-existing condition . . . nausea, loss of peace of mind, emotional harm or distress, [and] inconvenience . . .'."[65] The Cernys also sought damages for the damage to their home and punitive damages.[66]

Marathon and Plains filed no-evidence and traditional motions for summary judgment arguing that there was neither evidence nor an issue of material fact under the *Havner* standard.[67] Marathon and Plains explained that the Cernys could not prove even one element for any of their claims, specifically the causation element—which was required in each of the Cernys' claims.[68]

In response, the Cernys attached summary judgment evidence in the forms of several affidavits and reports.[69] First, affidavits of Michael, Myrna, and Cameron Cerny explained their personal experience with the operations and how their lives were affected.[70]

Second, the affidavit of Sharon Wilson—a lay person—described how Wilson took air samples of the fumes from the Marathon and Plains facilities and how these hazardous fumes were the same as the fumes that the Cernys experienced.[71] Third, an affidavit and report of Keith Zimmerman, an air quality expert, showed that the emissions exposed by the Marathon facilities over a five-week period exceeded federal air quality standards.[72] Fourth, the Cernys introduced an affidavit and report of David Mitchell, Ph.D.[73] Mitchell, a forensic meteorologist, found that emissions from the operations allegedly contained an amount of benzene more than four times the maximum safe threshold established by the Texas Commission on Environmental Quality.[74] Fifth, and lastly, was an affidavit and report of

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64. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *3 (Tex. App.—San Antonio Oct. 7, 2015).
65. *Id.*
66. *Id.* at *5.
67. *Id.* at *9.
68. *Id.* at *5.
69. *Id.* at *5-7.
70. *Id.* at *5-6.
71. *Id.* at *6.
72. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *6 (Tex. App.—San Antonio Oct. 7, 2015).
73. *Id.*
74. *Id.* at *7.

Thomas Dydek, Ph.D. Dydek was a toxicologist who used the information from the other four affidavits to make a conclusion that the Cernys faced an increased risk of cancer from the exposure to the emissions.[75]

Marathon and Plains filed a motion to strike most of the Cernys' summary judgment evidence as inadmissible hearsay, unqualified lay opinions, and speculative and unreliable expert opinions.[76] The district court fully granted the motion to strike.[77] This left only the affidavits of Cameron Cerny, Zimmerman, and Mitchell.[78] In addition to striking the Cernys' evidence, the district court granted Marathon and Plains' no-evidence and traditional motions for summary judgment.[79] The Cernys appealed.[80]

On appeal, the court of appeals addressed two issues.[81] First, whether the district court erred in granting Marathon and Plains' no-evidence and traditional motions for summary judgment.[82] Second, whether the district court abused its discretion by striking the majority of the Cernys' summary judgment evidence.[83] The court first explained that if it affirms the no-evidence motion for summary judgment, the traditional summary judgment does not have to be addressed.[84] Marathon and Plains asserted that there was no evidence that their operations caused the Cernys damages under any claim brought.[85]

Next, the court addressed the *Havner* standard for causation and whether it applied.[86] Under this standard, expert testimony is necessary to create an issue of fact on the causation element for nuisance and negligent claims.[87]

With case law, the Cernys disputed that *Havner* was not applicable and they were not required to present medical expert testimony because they had disclaimed recovery for specific medical conditions or diseases.[88] Rather, the

75. *Id.*
76. *Id.*
77. *Id.* at *8.
78. *Id.*
79. *Id.* at *8.
80. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *8 (Tex. App.—San Antonio Oct. 7, 2015).
81. *Id.* at *8-9.
82. *Id.* at *8.
83. *Id.* at *8.
84. *Id.*
85. *Id.* at *9-10.
86. *Id.* at *20.
87. *Id.* at *21.
88. See Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 269 (Tex. 2004) (stating that symptoms of discomfort rather than diseases are nuisance damages, which do not require medical expert testimony). *See also* Morgan v. Compugraphic Corp., 675 S.W.2d 729, 733

Cernys sought recovery for nuisance, because of the discomfort they had experienced.[89] The Cernys believed that because they sought damages for discomfort instead of disease, they could establish causation under the general common law standard.[90]

The court rejected the case law presented by the Cernys, concluding that it was dicta and out of context—it failed to address the issue at hand: whether a medical expert was necessary to prove that the oil and gas operations caused the Cernys' health problems.[91] The distinction of symptoms or actual injury did not matter.[92]

Additionally, the Cernys asserted that a medical expert was not required to show a connection between oil field operations and symptoms, as this was within the knowledge of a layperson.[93] To support their claim, the Cernys used the Texas Supreme Court case of *Morgan v. Compugraphic Corporation*, which showed that the jury could infer a nexus between chemical fumes and injury.[94]

The court again rejected the Cernys' precedent, citing certain limitations in *Morgan's* application.[95] Specifically, the court noted that the Texas Supreme Court has stated that *Morgan* is a limited exception to the medical expert requirement, applying when "'both the occurrence and conditions complained of are such that the general experience and common sense of laypersons are sufficient to evaluate the conditions and whether they were probably caused by the occurrence.'"[96] The court of appeals explained that there must be a "strong, logically traceable connection" between the event and the condition.[97] Here, the Cernys had acknowledged that they suffered from their alleged physical and emotional conditions *before* Marathon and

(Tex. 1984) (holding that medical expert testimony on causation was not required when the layperson's testimony established a direct, logical sequence of events from the exposure to chemical fumes and injury, which the jury could infer a causal nexus).

89. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *12 (Tex. App.—San Antonio Oct. 7, 2015).

90. *Id.* at *12-13.

91. *Id.* at *13.

92. *Id.*

93. *Id.* at *14.

94. *Id.* at *13.

95. *Id.* at *15.

96. *Id.* at *14 (Tex. App.—San Antonio Oct. 7, 2015). *See* Guevara v. Ferrer, 247 S.W.3d 662, 668 (Tex. 2007) (noting that a medical expert is not necessary when an automobile accident causes a bone fracture because a lay person can infer a nexus between the occurrence and the condition).

97. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *14 (Tex. App.—San Antonio Oct. 7, 2015).

Plains began their operations.[98] Therefore, a connection could not be made between the event and the injury as necessary to apply the *Morgan* exception.[99]

On the other side, Marathon and Plains argued that, because the Cernys' claims of nuisance and negligence fell within the category of toxic torts, expert testimony was required. The court agreed, as the Cernys plead for damages from their contact with "noxious gases and chemicals," which included benzene and nitrogen dioxide. In Texas, the strict causation requirements from *Havner*—expert testimony—is necessary in toxic tort cases.[100] Therefore, the Cernys were required to present expert testimony in order to prove causation.

Next, the court of appeals explained that in order for the Cernys to have presented a viable fact issue on causation, a two-pronged analysis must be conducted.[101] First, the evidence must show the risk through epidemiological studies.[102] Second, the Cernys must be similar to the subjects in the study.[103] The court held the second requirement was not met.[104] The court of appeals concluded that the Cernys failed to create a material fact issue on each causation prong, even when considering the expert evidence struck by the district court.[105]

The Cernys' experts failed to rule out alternative causes to their injuries and damage to their property; many other potential factors could have led to their injuries.[106] "It was undisputed that" the Cernys had "multiple chronic health conditions" before Marathon and Plains began their operations.[107] The Cernys' home had property damage before the operations.[108] Moreover,

98. *Id.* at *15.
99. *Id.*
100. *Havner*, 953 S.W.2d, at 715–16, 720. *See* Baker v. Energy Transfer Co., No. 10-09-00214-CV, 2011 WL 4978287, at *5–7 (Tex. App. 2011) (stating that the *Havner* expert testimony requirement applied to nuisance and negligence claims based on oil and gas emissions).
101. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *18 (Tex. App.—San Antonio Oct. 7, 2015).
102. *Id.*
103. *Id.*
104. *Id.* at *19.
105. *Id.* at *22-23.
106. *Id.* at *20.
107. *Id.*
108. *Id.* at *20.

other oil and gas companies were working nearby—their operations could have easily caused the injury rather than Marathon and Plains.[109]

The court recognized that through epidemiological studies, the Cernys presented valid evidence that they were exposed to excessive amounts of toxic chemicals.[110] However, the Cernys failed to present evidence that Marathon and Plains *caused* this damage—or that they were similar to the subjects in the studies.[111] A medical expert did not show that the exposure happened after the Cernys medical conditions, or that the exposure created new medical conditions.[112] Because the Cernys failed to exclude other possibilities that caused their injury from the toxic chemicals, the expert opinions were unreliable and therefore, no evidence.[113]

Next, the court of appeals addressed the Cernys' private nuisance claims regarding the loss of the use and enjoyment of their home.[114] The court again concluded that the Cernys failed to raise an issue of fact on causation—even when considering the evidence from the stricken witnesses.[115]

The court first acknowledged the affidavits of the Cernys.[116] The Cernys explained that the oilfield operations created a large amount of dust, which prohibited them from going outside; the dust caused the family to have trouble breathing and created anxiety and depression.[117] In addition, the traffic from the oilfield trucks was extremely noisy.[118] However, the Cernys failed to identify the company associated with the trucks.[119]

The Cernys also noted that they began the smell bad odors, even when they closed the doors of their home.[120] The affidavit of Cameron Cerny, the Cernys' minor son, explained that he had to get "an inhaler from the doctor."[121] Cameron said that the odors had caused stress and frustration.[122]

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109. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *20-21 (Tex. App.—San Antonio Oct. 7, 2015).
110. *Id.* at *22.
111. *Id.* at *22-23.
112. *Id.* at *22.
113. *Id.* at *22-23.
114. *Id.* at *23.
115. *Id.*
116. *Id.* at *23-24.
117. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *24 (Tex. App.—San Antonio Oct. 7, 2015).
118. *Id.*
119. *Id.*
120. *Id.* at *24-25.
121. *Id.* at *25.
122. *Id.*

However, Cameron Cerny failed to identify an oil and gas company that created the odors.[123]

Furthermore, a letter from Marathon was included in the Cernys' evidence.[124] In the letter, Marathon stated that they conducted air monitoring on the Cernys' property.[125] The test results concluded that the sulfur dioxide and hydrogen sulfide levels on the property were below exposure guidelines; it was common for individuals to smell odors that were still far below guidelines.[126]

Lastly, the court acknowledged the affidavit of Sharon Wilson.[127] Wilson recorded a video showing a release of toxic chemicals.[128] Wilson took an air sample from the Cernys' property.[129] Wilson stated that the toxic chemicals found on the Cernys' property were the same as the chemicals released from Plains.[130]

After considering all of the evidence, the court concluded that it did not raise a material issue of fact to defeat the no evidence summary judgment.[131] First, the court explained that the evidence of the dust and noise from the oilfield traffic did not prove that Marathon and Plains were the proximate cause of the damage to the Cernys.[132] The court ruled that the Cernys failed to establish that their health problems were caused by oil and gas operations, as opposed to some other source.[133]

Second, the affidavits from the Cernys and Sharon Wilson were only speculative and conclusive as to the damage to the use and enjoyment on the Cernys property—it did not show that Marathon and Plains *caused* this damage.[134] The fact that winds blew from the Plains site does not prove that Plains caused the exposure; nor does the fact that the Cernys' property

123. *Id.*
124. *Id.* at 26.
125. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *26 (Tex. App.—San Antonio Oct. 7, 2015).
126. *Id.* at *26-27.
127. *Id.* at *28.
128. *Id.*
129. *Id.*
130. *Id.* at *29.
131. *Id.*
132. *Id.* at *29.
133. Cerny v. Marathon Oil Corp., 480 S.W.3d 612, at *29-30 (Tex. App.—San Antonio Oct. 7, 2015).
134. *Id.* at *29.

contained the same hazardous chemicals as the Plains drip site does not prove that Plains caused the damage.[135]

Third, the letter from Marathon only shows that the Cernys' property had chemicals and gases after testing; it did not constitute a confession from Marathon that their operations were the source of the chemicals.[136] The court concluded that the affidavits were only assumptions and too speculative in nature to defeat summary judgment.[137]

D. Leal v. Cuantos Antes Mejor LLC*, No. 04-14-00694, 2015 Tex. App. LEXIS 6724 (Tex. App.—San Antonio, July 1, 2015).*

On July 1, 2015, the Fourth District Court of Appeals of Texas affirmed the decision of the district court, concluding that a conveyance of a non-participating royalty interest was a "floating royalty"—that is, a freestanding royalty valued as the product of the fraction provided in the royalty conveyance and the lessor's royalty of any existing or future lease.[138] Thus classified, the non-participating royalty interest holder was only entitled to a fraction of the royalty.[139]

The dispute involved a sale of forty acres in Karnes County, Texas.[140] In 1988, David Martin Phillip and wife Marguerite W. Phillip (collectively, "the *Phillips*") conveyed the surface to Andrea Leal, who was a trustee for Ramiro Leal, and to Robert Leal (both parties collectively, "the *Leals*").[141] Phillip reserved the mineral estate, but conveyed a one-fourth (1/4) non-participating royalty interest ("*NPRI*") to the Leals.[142] Specifically, the deed provided that the Phillips were retaining all the minerals "except an undivided one-fourth (1/4) non-participating royalty interest hereinafter specifically conveyed to Grantees."[143] Further on, the conveyance provided "[t]here is specifically conveyed to Grantees herein . . . an undivided one-fourth (1/4) interest in and to all of the royalty paid on production."[144]

135. *Id.* at *29-30.
136. *Id.* at *30.
137. *Id.* at *30-31.
138. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694 2015 Tex. App. LEXIS 6724, at *10-11 (Tex. App.—San Antonio July 1, 2015).
139. *Id.* at *6.
140. *Id.* at *1.
141. *Id.* at *1-2.
142. *Id.* at *2-3.
143. *Id.* at *7-8.
144. *Id.* at *8.

The Phillips later executed an oil and gas lease with Hilcorp Energy as lessee.[145] The lease covered 152.2 acres of land; the Leals' forty acres were part of the lease.[146] The Phillips later conveyed their mineral interest to Cuantos Antes Mejor, LLC ("*Cuanto*").[147] After the conveyance to Cuanto, the Leals received a division order.[148] The Leals believed the order incorrectly stated their royalty interest and so filed a petition for declaratory judgment to clarify the 1988 conveyance.[149] Their contention was that the deed conveyed "'an undivided 1/4 interest in and to ALL of the royalty paid on production'."[150] Their interpretation meant that the Leals would receive a fixed 1/4 royalty interest.[151]

In response, Cuanto filed a counterclaim for declaratory judgment.[152] Cuanto disputed that the deed conveyed a floating 1/4 NPRI on the royalty paid on production "'from any oil and gas or other mineral leases on "subject property" in effect after [the deed]'."[153] Both the Leals and Cuanto filed motions for summary judgment.[154] Cuanto believed the division order correctly stated the Leals' royalty interest.[155] Cuanto's contention was that the deed conveyed "a non-participating royalty interest in 1/4 of any and all of the royalty paid on production from any oil and gas or other mineral leases . . . including the existing oil and gas lease."[156] The trial court granted summary judgment for Cuanto, holding that the 1988 deed conveyed a "floating" fraction of royalty.[157]

On appeal, the court of appeals addressed one issue: whether the royalty interest conveyed was a "fixed" NPRI—Leals' contention—or a "floating" NPRI, which was Cuanto's contention.[158] The court discussed the difference

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145. Brief of Appellee at 5–6, Leal v. Cuanto Antes Mejor, LLC, No. 04-14-00694-CV (Tex. App. 2014) (Hilcorp then assigned their lease to Marathon Oil Company.).
146. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694 2015 Tex. App. LEXIS 6724, at *2 (Tex. App.—San Antonio July 1, 2015).
147. *Id.* at *2.
148. *Id.*
149. *Id.* at *2-3.
150. *Id.* at *2.
151. *Id.* at *8.
152. *Id.* at *2.
153. *Id.* at *2-3.
154. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694 2015 Tex. App. LEXIS 6724, at *3 (Tex. App.—San Antonio July 1, 2015).
155. *Id.* at *2.
156. *Id.* at *8.
157. *See id.* at *3.
158. *Id.* at *5.

between fixed and floating royalties.[159] A fixed royalty represents a fixed fraction of total production.[160] The fixed royalty is not dependent on of the lessor's royalties later conveyed or reserved in the future.[161] In contrast, a floating royalty is considered a part of the total royalty interest, being a fraction of the royalty interest reserved by the lessor.[162] Such a royalty *is* dependent on existing and future royalty interests reserved.

The Leals disputed that the royalty was floating for three reasons. First, the Leals noted that the grantor in the disputed conveyance had reserved the mineral estate, "except an undivided 1/4 non-participating royalty interest."[163] The Leal's believed that because the deed did not include such as words "the" or "of" before any discrete royalty fraction in the conveying language, a fixed royalty was therefore conveyed.[164] Additionally, because the deed did not specify a particular lease, but instead "all the production," the conveyance therefore represented a fixed fraction of all production of multiple leases. Second, the Leals contended that since the conveyance language provided that the royalty was to be calculated as a specific fraction of " . . . all of the royalty paid on production," the royalty was fixed. Third, invoking a common canon of interpretation, the Leals believed the deed should be construed against the grantor.[165]

The court disagreed with all three of the Leal's arguments and concluded that the deed conveyed a floating royalty.[166] The court examined the deed as a whole to determine the parties' intent, rather than certain provisions or language separately.[167] Although the first paragraphs of the deed only the reservation of the mineral estate and the conveyance of the NPRI, the deed later expresses that the royalty is a floating royalty—it was a fraction of a royalty.[168] The deed stated "interest in and to all of the royalty"

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159. *Id.* at *6.
160. *Id.*
161. *Id.*
162. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694 2015 Tex. App. LEXIS 6724, at *6 (Tex. App.—San Antonio July 1, 2015).
163. *Id.* at *8.
164. *Id.*
165. The court disagreed with the Leal's third contention, because the deed was unambiguous. *See* Alexander Schroeder Lumber Co. v. Corona, 288 S.W.2d 829, 833 (Tex. Civ. App. 1956) ("The rule of strict construction against the grantor is resorted to only to resolve ambiguity and as an aid by legal presumption to arriving at intent.").
166. Leal v. Cuanto Antes Mejor LLC, No. 04-14-00694 2015 Tex. App. LEXIS 6724, at *9 (Tex. App.—San Antonio July 1, 2015).
167. *Id.*
168. *Id.*

and "interest in and to any royalty."[169] This language clearly established that the amount of NPRI depends on the amount of royalty the lease provided.[170]

E. Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 Tex. App. LEXIS 8673 (App.—San Antonio 2015).*

On August 19, 2015, the Court of Appeals of Texas's Fourth District in San Antonio affirmed the holding of the 365th Judicial Court of Dimmit County, Texas while considering the question of whether the surface owner or the mineral owner must grant permission for a third-party to drill a horizontal borehole through property to access an adjacent parcel of land.[171]

Pursuant to two leases collectively known as the Cutlass Lease, Lightning Oil Company ("*Lightning*") owned leaseholds covering approximately 3,251.53 acres in Dimmit County, Texas ("*Mineral Estate*"). Briscoe Ranch, Inc. ("*Briscoe Ranch*") owned the severed surface estate, known as the Cochina East Ranch.[172] When the surface estate was initially severed, the predecessor in title to Briscoe Ranch did not expressly reserve any specific rights to access or control the earth under the surface estate.[173]

Briscoe Ranch owned the rest of the mineral interest in the Cochina East Ranch, and leased the interest to Anadarko E&P Onshore, LLC ("*Anadarko*"). Anadarko also obtained permission from Briscoe Ranch pursuant to a Surface Use and Subsurface Easement Agreement that allowed Anadarko to build drill pads and drill a well on the tract in which Anadarko had no mineral interest but that was contiguous to the tract over which Anadarko owned the leasehold interest.[174]

To the south of the mineral estate lies the 15,200-acre Chaparral Wildlife Management Area, ("*Chaparral WMA*"), a wildlife sanctuary managed by the Texas Parks and Wildlife Department ("*TPWD*").[175] TPWD owned the surface estate of the Chaparral WMA and a 1/6th mineral

169. *Id.*
170. *Id.*
171. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00152-CV, 2014 Tex. App. LEXIS 11844, at *2 (App.—San Antonio 2014). This case has more than one citation as it has been heard by the Texas Fourth District Court of Appeals multiple times. This case occurred before the one listed in the subheading because it was an interlocutory appeal.
172. *Id.* at *2.
173. *Id.*
174. *Id.* at *3.
175. *Id.* at *2.

interest.[176] The Light family, some of whom formed Lightning Oil, owned the remaining 5/6ths of the mineral estate.[177]

In October 2009, Anadarko obtained a lease to develop the Chaparral WMA. The Chaparral WMA lease required Anadarko to utilize off-site drilling locations "when prudent and feasible."[178] Thereafter, Anadarko avoided drilling from the surface of the Chaparral WMA and instead drilled horizontally from other tracts that it leased adjacent to the Chaparral WMA.[179] Anadarko had been trying to negotiate a surface use agreement with TPWD for several years before litigation.[180]

Upon Anadarko informing Lightning that it intended to stake a well on the surface of the Mineral Estate, Lightning staked its own proposed well site, the Cutlass No. 3, at the same location.[181] Lightning opposed Anadarko's planned drilling operations, claiming that Anadarko's drilling operations would require Lightning to have to drill additional offset wells to prevent drainage from Anadarko's wells and that Anadarko's wellbore would interfere with Lightning's drilling plans.[182]

After discussions stalled, Lightning sued Anadarko, and sought an injunction to prevent Anadarko from drilling through Lightning's leasehold. Lightning contended that as the leaseholder, it had the right to exclude Anadarko from drilling through the surface within the boundaries of the Cutlass Lease.[183] Further, Lightning claimed that Briscoe Ranch's permission to Anadarko to drill through the surface was insufficient.[184]

At the temporary injunction hearing, Lightning offered expert testimony to describe its plans to develop the Mineral Estate, the nature of formations and drilling procedures in the area, and a leaseholder's obligations generally.[185] Lightning claimed Anadarko's proposed wells could potentially harm its future drilling operations.[186] While the trial court granted a temporary restraining order enjoining Anadarko from using the surface of the Mineral Estate based on the allegations in Lightning's petition, it eventually

176. *Id.*
177. *Id.* at *2.
178. *Id.* at *3.
179. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00152-CV, 2014 Tex. App. LEXIS 11844, at *3 (App.—San Antonio 2014).
180. *Id.*
181. *Id.*
182. *Id.* at *4.
183. *Id.*
184. *Id.* at *5.
185. *Id.*
186. *Id.*

denied Lightning's motion for summary judgment, ruling instead that while Anadarko's conduct could constitute a trespass, based on the evidence presented, there was no interference with Lightning's mineral interest under the Cutlass Lease.[187]

Lightning then sought a restraining order and injunction in an interlocutory appeal to the San Antonio Court of Appeals.[188] Specifically, Mr. Light, Lightning's owner, sought a temporary injunction to enjoin Anadarko from drilling one or more horizontal wells through its mineral estate to access and produce from Anadarko's adjacent mineral estate, alleging that if Anadarko was allowed to drill through the Mineral Estate it "certainly could" harm the value of the Mineral Estate by causing damage to the producing formations through use of inadequate casing during drilling.[189] Mr. Light further explained that Anadarko's proposed plan to build 15 drill pads with five wells each would place a "tremendous burden" on Lightning and would disrupt their drilling plan completely.[190] If Lightning did not timely drill offset wells, it would "have to pay compensatory royalty or give up acreage."[191] Lightning went on to argue more points of possible injury to their operations in the future.[192]

The court of appeals only considered whether the injunction was appropriate pending a trial on the merits.[193] The court deferred to the trial court on the merits to determine whether Anadarko's plan to drill through Lightning's Mineral Estate to reach its own adjacent mineral estate will constitute a trespass and whether a third party surface owner with no interest in the Mineral Estate has the right to consent to such drilling activity.[194]

Regarding the injunction, the Court of Appeals held that, while the evidence presented by Lightning showed a *potential* for injury to Lightning's mineral interests in the future, and a *potential* for increased costs to Lightning in the future, Lightning was not entitled to the injunction because Lightning failed to prove an imminent and irreparable injury would occur pending trial

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187. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00152-CV, 2014 Tex. App. LEXIS 11844, at *5 (App.—San Antonio 2014).
188. *Id.*
189. *Id.* at *11.
190. *Id.* at *12.
191. *Id.*
192. *Id.*
193. *Id.* at *5-7.
194. *Id.* at *5-7.

on the merits.[195] Further, the court held in the interlocutory appeal, Lightning had not proven that these potential injuries could not be remedied by quantification and compensation, and had also failed to prove the absence of an adequate remedy at law.[196] Thus, Lightning had failed to prove that any injury to its Mineral Estate—and its rights to develop the Mineral Estate—was "probable, imminent and irreparable" in the interim pending trial as required for the issuance of a temporary injunction.[197]

Given the result of the interlocutory appeal, on November 24, 2014, the trial court denied Lightning's motion, and without stating the grounds for its decision, granted Anadarko's motion.[198] It then severed the remaining issues to make its order final and appealable.[199] Lightning appealed the trial court's order to the San Antonio Court of Appeals.[200]

Appealing from the trial on the merits, Lightning moved for traditional summary judgment on (1) its request for a permanent injunction against Anadarko drilling through the Cutlass Lease and (2) its request for the court to declare that Briscoe Ranch could not "grant Anadarko a right to trespass through Lightning's property."[201] Anadarko countered by moving for summary judgment on the grounds that no evidence existed that it had committed a trespass on Lightning's mineral estate.[202]

In its petition, Lightning first contended that because it had the right to exclude as lessee, Anadarko was trespassing on Lightning's leasehold estate.[203] Lightning pointed to various cases to assert the nature of their leasehold interest.[204] Anadarko disputed that the surface owner owns and controls the strata and pore space comprising the subsurface estate, and therefore Briscoe Ranch's permission was sufficient.[205] Further, Anadarko provided case law that concluded the surface owner owns the actual strata

195. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00152-CV, 2014 Tex. App. LEXIS 11844, at *16 (App.—San Antonio 2014).
196. *Id.*
197. *Id.*
198. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00903-CV, 2015 Tex. App. LEXIS 8673, at *6-7 (App.—San Antonio 2015). This is the case stated in the subheading and follows subsequently to the case described *supra* at notes 171-197.
199. *Id.* at *7.
200. *Id.*
201. *Id.* at *5.
202. *Id.*
203. *Id.* at *9-12.
204. *Id.*
205. *Id.* at *12.

and pore space under the surface estate.[206] Because Briscoe Ranch—not Lightning—owned the earth beneath the surface, it could grant sole permission to site a well on the ranch and to drill through the strata comprising the Cutlass Lease.[207]

The court disregarded Lightning's case law, holding it did not address the central question at hand: who owns the strata and pore space in the subsurface estate?[208] The court concluded that, generally, the surface estate owner controls the earth and pore space beneath the surface estate. Citing *Coastal Oil & Gas Corp. v. Garza Energy Trust*, the court noted that while the mineral estate owner is entitled to "a fair chance to recover the oil and gas in or under [the surface estate],"[209] given the absence of a grant of a right to control the subterranean structures in which the oil and gas molecules are held, the mineral estate owner *does not* control the volume of strata underpinning the surface of the captioned land.[210] Therefore, Lightning did not own or control the earth surrounding any hydrocarbon molecules that may lie within the boundaries of its leases.[211] Instead, the court opined that the surface estate owner controls the surface and subsurface and may grant Anadarko permission to site a well on its ranch, drill down through the earth within the boundaries of the Cutlass Lease, and directionally alter its wellbore into the volume of strata comprising the Chaparral WMA.[212]

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206. *Lightning Oil Co. v. Anadarko E&P Onshore LLC*, No. 04-14-00903-CV, 2015 Tex. App. LEXIS 8673, at *12-13 (App.—San Antonio 2015). *See* Springer Ranch, Ltd. v. Jones, 421 S.W.3d, 273, 283 (Tex. App. 2013) ("[O]wnership of the hydrocarbons does not give the mineral owner ownership of the earth surrounding those substances."); *see also* Dunn-McCampbell Royalty Interest, Inc. v. Nat'l Park Serv., 630 F.3d 431, 441 (5th Cir. 2011) ("[T]he conveyance of mineral rights ownership does not convey the entirety of the subsurface."); Humble Oil & Ref. Co. v. West, 508 S.W.2d 812, 815 (Tex. 1974) ("[T]he surface of the leased lands remaining as the property of the [surface estate owners] included the geological structures beneath the surface.").

207. *Lightning Oil Co.*, 2015 Tex. App. LEXIS 8673, at *12.

208. *Id.* at *3 (noting that the *Day* case did not differentiate owning the "oil and gas in the ground" and the "oil and gas and the ground") (citing Edwards Aquifer Authority v. Day, 369 S.W.3d 814 (Tex. 2012)); *Id.* ("*Stephens* does not directly address who owns the earth surrounding the minerals."); *Id.* at *4 ("But unlike *Villarreal*, there is no evidence that Anadarko conducted a seismographic survey of Lightning's mineral estate."); *Id.* ("Lightning offers no evidence that Anadarko has bottomed or opened a well within the Cutlass Lease . . . *Hastings* is distinguishable [from the facts at hand]."); *Id.* at *5 (". . . several factors undermine *Howell's* applicability in [Lightning's] appeal.").

209. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 15 (Tex. 2008) (quoting Gulf Land Co. v. Atl. Ref. Co., 131 S.W.2d 73, 80 (Tex. 1939)).

210. *Lightning Oil Co.*, 2015 Tex. App. LEXIS 8673, at *13-14.

211. *Id.* at *14.

212. *Id.*

In its second issue, Lightning alleged that Anadarko committed tortious interference with its lease activities.[213] Anadarko argued that Lightning had no legal right to exclude Anadarko from drilling through the earth within the boundaries of the Cutlass Lease, and thus produced no evidence of an essential element of Lightning's trespass claim.[214]

The court again disagreed with Lightning, as it found that Anadarko had established that its actions were justified and no evidence of trespass existed. Because Anadarko obtained permission from Briscoe Ranch—the owner of the earth beneath the surface—Anadarko had the legal right to drill on and through the subsurface estate of the Briscoe Ranch to reach its mineral estate.[215] The court held that Lightning did not have the right to exclude Anadarko, opining that Lightning "has no right to exclude others from the earth surrounding the oil and gas hydrocarbons in [Lightning's lease]."[216] In its rationale, the Court noted that unless Lightning was given the right to control the earth in the mineral estate, Lightning did not control "the mass that undergirds the surface of the [conveyed land]."[217] Although Anadarko could not produce oil and gas from the Cutlass Lease without Lightning's permission, Anadarko had proper permission to penetrate the earth beneath the Briscoe Ranch.[218]

Having failed to provide any evidence that Lightning had a right to exclude others from the earth surrounding the oil and gas hydrocarbons in the Cutlass Leases, the court dismissed the trespass claims of Lightning and granted the summary judgment motion sought by Anadarko.[219] The court did note that Anadarko could not complete its wellbores in, or produce oil or gas from, Lightning's leasehold without Lightning's permission.[220]

Prior to this decision, Texas case law was fragmented on the issue of who exactly comprises the necessary parties to drill-through agreements. *Humble Oil and Refining Company v. L & G Oil Company* established that a leasehold owner only needed permission from the surface owner to drill from

213. *Id.* at *16.
214. *Id.* at *16-17.
215. *Id.*
216. *Id.* at *15.
217. *Id.* at *14. ("Lightning does not own or control the earth surrounding any hydrocarbon molecules that may lie within the boundaries of the Cutlass Lease.") (citing *Dunn-McCampbell*, 640 F.3d at 441).
218. Lightning Oil Co. v. Anadarko E&P Onshore LLC, No. 04-14-00903-CV, 2015 Tex. App. LEXIS 8673, at *14 (App.—San Antonio, 2015).
219. *Id.* at *15-16.
220. *Id.*

a tract in which it had no leasehold interest to penetrate a tract in which it held a leasehold interest.[221] Conversely, *Chevron Oil Company v. Howell* granted an injunction against Chevron from drilling a directional well from a surface tract on which it did not own the leasehold interest.[222] The *Chevron* court reasoned that "anytime you drill into something there is bound to be some damage."[223] Both decisions were refused review by the Texas Supreme Court.

F. Medina Interests Ltd. v. Trial*, 469 S.W.3d 619 (Tex. App.—San Antonio, 2015, writ denied).*

On June 24, 2015, The Fourth Circuit Court of Appeals of Texas, San Antonio, interpreted a 1949 deed to determine whether the grantors reserved a floating or fixed non-participating royalty interest.[224] After determining the instrument was not ambiguous, the court determined the grantors intended to reserve a floating royalty.

In September of 1949, Annie Trial, along with six of her eight children, (hereafter, collectively the "*Trials*") conveyed by warranty deed (the "*1949 Deed*") all of the surface and mineral interests in a 278-acre tract of land in Karnes County, Texas.[225] The grantees were Leo and Alex Trial, the two remaining children.[226] In the deed, the Trials reserved an "undivided interest in and to the 1/8 royalties paid the land owner upon production of oil, gas and other minerals from said 278 acre tract of land."[227] Medina Interests, Ltd. ("*Medina*") is the successor-in-interest to the original grantees. Medina

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221. A similar decision was reached in Atlantic Refining Company v. Bright & Schiff, 321 S.W.2d 167 (1959) two years later. Humble Oil & Refining Co. v. L. & G. Oil Co., 259 S.W.2d 933, 933 (Tex. Civ. App. 1953)

222. Chevron Oil Co. v. Howell, 407 S.W.2d 525, 525 (Tex. Civ. App. 1966).

223. *Id.* at 528.

224. Medina Interests Ltd. v. Trial, 469 S.W.3d 619, 620 (Tex. App.—San Antonio, 2015, writ denied). The fixed vs. floating royalty question comes up quite frequently. A fixed royalty provides the mineral owner with a fixed percentage of royalty ownership that is not dependent on the size of the royalty provided in the lease. A floating royalty is described as a fraction *of* the royalty (*i.e.* 1/2 *of* 1/8, or 1/16). The floating royalty is multiplied on the lessor's royalty provided for in the lease and, therefore, becomes larger as the lease royalty becomes larger. *See* PATRICK H MARTIN & BRUCE M. KRAMER, WILLIAMS AND MEYERS, OIL AND GAS LAW § 327.1, at 81 (2014).

225. *Medina Interests Ltd.*, 469 S.W.3d at 620-21.

226. *See id.* at 620.

227. *Id.* at 619.

entered into a paid up oil and gas lease[228] in 2007 and Marathon Oil was one of the lessees. In the "Stipulations of Mineral Interests" sent to all of the prospective royalty owners, Marathon contended that the Trials had reserved "all of the royalties of leases entered into subsequent to the date of the 1949 Deed."[229]

Medina sued the Trials for trespass to try title and for money had and received. Medina contended that the Trial children named as grantors of the 1949 Deed shared a fixed 1/8 royalty. The Trials argued that they each were entitled to a portion of a floating royalty. The trial court determined that the deed reserved a floating royalty for each of the six Trial children mentioned as grantors, and no royalty for Annie Trial.

On appeal, the only issue before the Court of Appeals was whether the 1949 Deed reserved a fixed or fractional royalty. To interpret the reservation, the court turned to the examples provided in WILLIAMS & MEYERS, OIL AND GAS LAW—the oft cited authority on questions of floating or fixed royalty reservations.[230] The court first noted that the phrase in the deed, "the 1/8 royalties" typically provides for a fixed royalty.[231] The court noted, however, that in interpreting an unambiguous deed, a Texas tribunal must consider the entire document to harmonize the language and give effect to all of the provisions within the deed.[232]

The court first noted that when the 1949 Deed was executed, no existing oil and gas lease covered the captioned land. In older deeds, such as the 1949 Deed, the 1/8 royalty provided to landowners was so consistent and ubiquitous that landowners would often refer to *the* 1/8 royalty, when they actual meant to refer to the royalty, of whatever size, that the lease provided to the landowner.[233] Therefore, the court reasoned that reference to "the 1/8 royalty" arose from an (erroneous) assumption that the lessor's royalty for any future lease would always be 1/8.[234]

228. A paid up oil and gas lease is one in which the lessee pays all of the delay rentals for the entire primary term up front so that the lease will not fail for untimely, or improper payment of delay rentals.

229. A stipulation of mineral interests is that a tool oil producer often use to ensure agreement between the parties as to their prospective mineral ownership. It is essentially a cross-conveyance where all parties can agree on mineral ownership, even when their actual ownership is not completely clear. *Medina*, 469 S.W.3d 619, at *1.

230. *E.g.* Dawkins v. Hysaw, 450 S.W.3d 147, 153 (Tex. App. 2014).

231. *Medina*, 469 S.W.3d at 624.

232. Coker v. Coker, 650 S.W.2d 391, 393 (Tex. 1983).

233. Graham v. Prochaska, 429 S.W.3d 650, 660 (Tex. App. 2013).

234. *Id.* at 625.

The court then noted that the 1949 Deed used language that contemplated the possibility of future production.[235] This, it thought, evidenced the idea that the grantors contemplated future leasing on the property and that they intended their interests to adjust according to the royalties under the lease.[236] Further, the court noted "the estate misconception theory."[237] Because the grantors reserved "the 1/8 royalties paid the land owner upon production," and later discussed "royalties paid the land owner," the court held that the Trials did not intend to fix their ownership at 1/8.[238] Therefore, the court held that the trial court properly determined that each of the six Trial children reserved a floating 1/8 of whatever landowner's royalty was provided under any current or future oil and gas lease.[239]

G. Titan Operating, LLC v. Marsden*, No. 02-14-00303, 2015 Tex. App. LEXIS 9076 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).*

On August 27, 2015, the Second District Court of Appeals of Texas reversed the decision of the district court and concluded that when a royalty interest holder accepted benefits flowing from the lease, it was precluded from bringing a claim for nuisance against the leaseholder.[240]

Marcus and Laura Marsden's family (collectively, "the *Marsdens*") resided near Aledo, Texas on a 6.2-acre tract of land.[241] During the first years of the Marsdens' ownership of the property, the area was nearly entirely residential with little oil and gas exploration and production activity.[242]

In 2004, a representative from Hollis R. Sullivan, Inc. ("Sullivan") went to the Marsdens to negotiate an oil, gas, and mineral lease.[243] The resultant

235. *Medina*, 469 S.W.3d at 624. (The court did not specifically point to any dispositive language, but examples of language within the deed that contemplates future production includes "upon production," and "in case of production" and "royalties paid to the landowner.").
236. *See id.*
237. *See* Garrett v. Dils Co., 299 S.W.2d 904, 907 (Tex. 1957) (taking judicial notice "of the fact that the usual royalty provided in mineral leases is one-eighth").
238. *Medina*, 469 S.W.3d at 624.
239. *Id.* at 626.
240. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *1 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
241. *Id.* at *1.
242. *Id. at *2.*
243. *Id.*

lease limited surface access for the lessor a number of ways.[244] First, a provision of the lease stated that "no well [could] be drilled within two hundred (200) feet of any residence or barn" on the Marsdens' land without their consent.[245]

The Marsdens and Sullivan negotiated and executed an addendum clause in the lease. The lease addendum contained the following provisions:

1. [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.[246]
8. [The Marsdens] hereby give[] and grant[] to [Sullivan] the temporary right of ingress and egress over [and] upon the southeast corner of [the Marsdens'] land to access the drilling rig [and/or] vehicles for the purpose of drilling and completing a well. [Sullivan] agrees to repair any damage incurred to [the property] as a result of its use of said lands for access and to restore the surface to as near its original condition as practical upon conclusion of its access needs. As consideration for the rights granted herein, [Sullivan] shall pay [the Marsdens] $700.00.[247]

The proposed well site was on the land of Normal Miller ("*Miller*"), who owned land adjoining the Marsdens' property. Marcus Marsden had his concerns about the location being close to his property. But, in September 2004, the Marsdens signed the lease with Sullivan, receiving a royalty bonus from production.[248]

244. *Id.* *3.
245. *Id.* at *29.
246. *Id.* at *3-4.
247. *Id.* at *4.
248. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *4 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).

Sullivan later assigned its interest in the lease to Titan Operating, LLC ("*Titan*").[249] In 2009, Titan entered into a surface use agreement with Miller.[250] The agreement also described the location of the well site.[251] The well would be close to the outskirts of Miller's property, which was close to the north edge of the Marsdens' property.[252] The Marsdens' home was on the northwest corner of their land.[253] In addition to the well location, the agreement included provisions that promised that Titan would use "hospital-grade mufflers on drilling rig motors and on compressors" to limit noise.[254] Also, operation sites would be reduced from 3.5 to 1.5 acres when drilling was completed.[255] Titan met with individuals who lived near the well site to explain the process; the Marsdens were not present at the meeting.[256]

In August 2009, Titan's first well was completed. Marcus Marsden later claimed that the well site boundary was 176 feet from his house, and the well was drilled around 300 feet away from the house. Later in 2009, Titan sought consent from Marcus to place a pipeline under the east side of the Marsdens' property. Marcus agreed to the easement, but he later claimed he would not have done so if he thought it wasn't necessary for future production.

In September 2011, Titan drilled two more wells.[257] The drilling and fracking process created problems for the Marsden family.[258] Marcus testified about the drilling, citing the 24-hour-a-day process and how it was always loud, the fumes caused the family to stay inside, and the light from the site kept them up at night.[259] Even after the drilling was completed, the Marsdens were frustrated from the site operations; trucks could come and go, stirring dust and emitting exhausts that could be smelled from their home.[260]

In June 2011, the Marsdens sued Titan and Miller.[261] Specifically, the Marsdens brought an intentional nuisance claim against Titan, asserting Titan

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249. *Id.* at *6.
250. *Id.*
251. *Id.*
252. *Id.* at *2.
253. *Id.*
254. *Id.* at *7.
255. *Id.*
256. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *7 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
257. *Id.* at *8.
258. *Id.*
259. *Id.*
260. *Id.* at *8-9.
261. *Id.* at *10.

substantially interfered "with the use and enjoyment of their property."[262] Titan asserted a general denial and pleaded the affirmative defense of quasi-estoppel.[263] Moreover, Titan sought summary judgment on Marsdens' nuisance claim, but the district court denied it.[264]

At trial, Laura Marsden testified that her life was "turned upside down" because of Titan's drilling; her once peaceful residence had become constantly noisy and "unbearable."[265] Laura also stated that she did not review the mineral lease before signing it and also consented to the pipeline that Titan proposed in 2009.[266] In addition, Laura said that she knew that a well could be drilled anywhere on Miller's property.[267] Marcus testified towards the damages; he sought damages for their family's suffering during the entirety of Titan's drilling process.[268] This included the "complete destruction of the peace and quiet and enjoyment of [his] property[,] . . . being awoken in the middle of the night[,] . . . going outside and smelling the gas fumes[,] . . . all of the . . . traffic and the pumps on the truck[,] . . . all of the . . . compressor noises[,] and everything that goes along with that well site [that] completely disrupts a person's enjoyment of their own house."[269] Marcus also testified—with the confirmation of a real estate appraiser—that the property had decreased in value from Titan's operations.[270]

Chris Hammack was a petroleum engineer who helped manage and plan the well site for Titan.[271] Hammack testified that the Texas Railroad Commission granted Titan a permit to drill the well at this site.[272] In addition, Hammack noted that Titan looked at several factors when deciding a well-site location; this includes: topography concerns, access in and out of the site, and access to existing pipelines.[273] Using these factors, the site close to the Marsdens' property was "very good."[274] The noise of a well site was not

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262. *Id.* at *11.
263. *Id.*
264. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *11 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
265. *Id.* at *11-12.
266. *Id.*
267. *Id.*
268. *Id.*
269. *Id.* at *12-13.
270. *Id.* at 13.
271. *Id.* at *14.
272. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *14 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
273. *Id.*
274. *Id.* at *15.

disputed, but Hammack asserted that it was could not be considered a nuisance.[275]

James Yelverton, a production superintendent who managed the drilling site near the Marsdens' home, also testified.[276] He noted that the compressor on Miller's property had a very high quality hospital-grade muffler to reduce the noise.[277] Yelverton explained that he limited truck traffic—in response to complaints—by only allowing traffic to and from the site during daylight hours.[278] Additionally, he stated that the Marsdens never contacted him with any complains.[279] Yelverton believed that the operations at the well site were not substantively different from any other well site with which he was involved.[280] In addition to Hammack and Yelverton, Danny Brown—Titan's operation manager—stated that he had never heard any complaints from the Marsdens relating to the well operations.[281]

After the evidence was presented, ten out of twelve jurors found that Titan created an intentional nuisance and the Marsdens were not estopped from filing suit.[282] Marcus and Laura Marsden were each awarded $18,000 in damages.[283] Titan then filed a motion for judgment notwithstanding the verdict.[284] Titan requested the trial court to ignore the jury's finding against their estoppel claim and that as a matter of law; quasi-estoppel precluded the Marsdens from filing suit.[285] The trial court denied Titan's motion and Titan appealed.[286]

On appeal, the court addressed one issue: whether Titan proved "its quasi-estoppel affirmative defense as a matter of law."[287] Quasi-estoppel denies a party from "accepting the benefits of a transaction and then subsequently taking an inconsistent position to avoid corresponding obligations or effects."[288] The court of appeals noted several cases of when

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275. *Id.*
276. *Id.* at *17.
277. *Id.*
278. *Id.*
279. *Id.* at *18.
280. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *18 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
281. *Id.* at *19.
282. *Id.* at *19-20.
283. *Id.* at *20.
284. *Id.*
285. *Id.*
286. *Id.*
287. *Id.*
288. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *21-22 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).

quasi-estoppel was applied.[289] In particular, the court looked at *Ainsworth v. Oil City Brass Works* wherein the Beaumont court of appeals concluded that the plaintiffs were precluded from filing suit, because the use of the defendant's oil and gas exploration and production operations were "naturally to be expected and contemplated."[290]

After analyzing *Ainsworth* and several other examples of quasi-estoppel, the court agreed with Titan and concluded that the Marsdens were precluded from bringing an intentional nuisance claim.[291] Upon making this decision, the court looked at the actions of the Marsdens—when negotiating the lease and during the subsequent drilling operations.[292]

First, the court stated that the Marsdens' lease expressly allowed Titan to conduct oil and gas operations on adjoining lands of the well site.[293] Moreover, the lease gave examples of what the operations could be, including laying pipelines, and building roads and other structures.[294] In exchange for these advantages given to Titan, the Marsdens would receive compensation in the form of a royalty on production, as well as a per-acre bonus.[295] Marcus Marsden testified that he received all entitled bonuses and did not return any received.[296]

Second, the court noted that Marcus Marsden had acknowledged all along that a well would be drilled on the adjoining property.[297] In the lease that Marcus took part in negotiating, he prohibited a well being drilled on his property, but said that his property could be used as a part of the well site.[298] He did not prohibit a well being drilled on the adjoining land near his home.[299] Marcus also testified himself that he did not approach Titan when he knew that Titan was drilling close to his property.[300] Additionally, the Marsdens did not dispute Titan's actual drilling procedures; nor did they contend Titan broke any laws when conducting drilling operations.[301]

289. *Id.* at *22.
290. *Id.* at *24-25.
291. *Id.* at *25.
292. *Id.*
293. *Id.* at *26.
294. *Id.*
295. *Id.* at *26-27.
296. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *27 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
297. *Id.*
298. *Id.* at *29, n. 21.
299. *Id.* at *29.
300. *Id.* at *27-28.
301. *Id.* at *28.

Lastly, the court acknowledged that although Titan's operation of the well was much closer to the Marsdens' home than expected, the Mardens' actions after drilling—the acceptance and retention of benefits coming from the lease—showed their objective authorization of drilling.[302] Because they accepted from the benefits from the exact lease they are objecting, the Marsdens were precluded from bringing a nuisance suit.[303] Therefore, the trial court erred in denying Titan's motion for judgment notwithstanding the verdict.[304]

H. Contango Operators, Inc. v. Weeks Marine, Inc.*, 613 F. App'x 281 (5th Cir. 2015).*

On May 28, 2015, the Fifth Circuit United States Court of Appeals affirmed the trial court's decision holding the United States and a dredging subcontractor 60 percent and 40 percent liable, respectively, for damages to a pipeline submerged in the Gulf of Mexico. The third-party contractor appealed the District Court's finding of negligence, or in the alternative, the percentage of responsibility allocated. The United States argued that an exculpatory clause in the original pipeline permit precluded liability. The Fifth Circuit found each of the appellants' arguments unpersuasive and affirmed the district court's decision.[305]

In November 2007, the Army Corps of Engineers (the "*Corps*," or the "*Government*") issued a permit allowing Contango Operators, Inc. ("*Contango*"), to build a pipeline in the Gulf of Mexico.[306] Due to an undisputed oversight, the Corps did not forward the plans for the new pipeline its own Waterways Division—the entity responsible for approving dredging contracts.[307] In April of 2008, Contango completed the pipeline.[308] In August of 2009, Weeks Marine, Inc. ("*Weeks*") received a contract from the Corps to dredge the same channel across which the Contango pipeline ran.[309] The plats provided by the Corps did not include Contango's

302. *Id.* at *29.
303. *Id.* at *31.
304. Titan Operating, LLC v. Marsden, No. 02-14-00303, 2015 Tex. App. LEXIS 9076, at *32 (Tex. App.—Fort Worth, Aug. 27, 2015, writ denied).
305. Contango Operators, Inc. v. Weeks Marine, Inc., 613 F. App'x 281 (5th Cir. 2015).
306. *Id.* at 283.
307. *Id.*
308. *Id.*
309. *Id.*

pipeline.[310] However, the pipeline was discoverable by using other agencies' charts and was also mentioned in a Coast Guards' notice to local mariners.[311] Weeks failed to use any of the other sources, relied entirely on the information provided by the Corps, and subsequently struck the pipeline in February 2010 during dredging operations.[312] Contango sued Weeks and the government alleging general maritime negligence.[313] The Weeks was held 40 percent liable, and the U.S. government was held 60 percent liable at trial.[314]

On appeal to the United States Fifth Circuit, Weeks argued that it did not breach its duty of care by relying solely on the Corps' specifications of pipeline locations.[315] In support, Weeks relied on *Michigan Wisconsin Pipeline Co. v. Williams–McWilliams Co.*, another Fifth Circuit decision dealing with dredging and notice.[316] The court, however, held that *Michigan Wisconsin* was inapposite to these facts; that case dealt with whether or not the government could be held liable to an injured third-party based on its representations or omissions in dredging specifications.[317] Here, the question was whether a third-party was liable to the injured party, a completely different question.[318] The court also noted that although industry custom was to use the specification and plats provided by the Corps, the risk of harm significantly outweighed the burden of downloading the other charts or local mariners' notices.

Weeks also argued that the apportionment of 40 percent of the liability was unreasonable because it had simply relied on the Corps' positive statements as to the location of pipelines in the area. The court held that "[u]nder general maritime law, joint tortfeasors are jointly and severally liable for the plaintiff's damages."[319] Further, "[a]pportionment is not a mechanical exercise that depends upon counting up the errors committed by both parties."[320] In addition, courts must determine liability based on the

310. *Id.*
311. *Id.*
312. Contango Operators, Inc. v. Weeks Marine, Inc., 613 F. App'x 281, 283 (5th Cir. 2015).
313. *Id.*
314. *Id.*
315. *Id.* at 284.
316. Mich. Wis. Pipeline Co. v. Williams–McWilliams Co., 551 F.2d 945 (5th Cir. 1977).
317. *Id.* at 951–53.
318. *Contango Operators, Inc.*, 613 F. App'x at 286.
319. Coats v. Penrod Drilling Corp., 61 F.3d 1113, 1116 (5th Cir. 1995).
320. Stolt Achievement, Ltd. v. Dredge B.E. Lindholm, 447 F.3d 360, 370 (5th Cir. 2006).

entire sequence of events.[321] Thus, the district court's determination that Weeks was 40 percent responsible did not constitute clear error.[322]

The Government asserted that an exculpatory clause within the initial permit to Contango precluded its liability. The clause reads, in relevant part:

> *Limits of Federal Liability.* In issuing this permit, the Federal Government does not assume any liability for the following:
>
> b. Damages to the permitted project or uses thereof as a result of current or future activities undertaken by or on behalf of the United States in the public interest.[323]

The court determined that by a clear reading of the permit, the phrase "the Federal Government does not *assume* any liability," means the Government did not take on any new liability.[324] The court held that the government's liability arose independently of the permit with Contango, and was instead based on the Government's subsequent duty to warn Weeks of the location of pipelines before dredging occurred.[325]

The Government also argued a litany of points based on the Corps' other regulations and documents with hopes of informing the court's opinion of the intent embodied by the exculpatory clause. The court held all of the Government's arguments irrelevant, however, because each was based on extrinsic evidence that could not be considered where a permit's language is not ambiguous.[326] Most notably, the Government contended that the court was required to defer to its own reasonable interpretation of its regulations. The court stated, "That may be true, but those rules are inapplicable because we are interpreting a permit, not a regulation."[327] The court held, that despite any language in the permit between Contango and the Corps, the Government

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321. *Id.*
322. *Contango Operators, Inc.*, 613 F. App'x at 289-90
323. *Id.* at 286.
324. Id.
325. *Id.*
326. *Id.*; *see* Wal–Mart Stores, Inc. v. Qore, Inc., 647 F.3d 237, 243 (5th Cir. 2011) (extrinsic evidence is anything not located within the document itself).
327. *Contango*, 613 Fed. Appx. at 287 ("The Corps has no power to escape [the] duty through regulation; instead, the question is whether Contango gave up its right to sue by accepting the permit's terms.").

failed to fulfill its subsequent duty to warn Weeks of the locations of the pipeline, and for that, the Government was liable.

In a dissent, Judge Priscilla Owen disagreed with the majority's interpretation of the exculpatory clause in the permit.[328] She placed far less emphasis on the word "assume" than did the district court, or the majority.[329] She believed "assume"—in addition to the rest of the permit that provided for exculpation of a wide range of liabilities—evidenced the Government's intent to disallow the types of claims brought by Contango.[330]

III. OIL & GAS CASE LAW FROM OUTSIDE TEXAS

A. Oneok, Inc. v. Learjet, Inc.*, 135 S. Ct. 1591 (2015).*

In April of 2015, The United States Supreme Court decided an appeal of a multidistrict litigation proceeding concerning several retail natural gas purchasers ("*Purchasers*") price manipulation claims against several interstate pipeline companies ("*Companies*"). The Purchasers, constituted primarily of manufacturers, hospitals, and other similar institutions, each purchased natural gas directly from the Companies. It was not disputed on appeal that the Companies engaged in behavior that affected the price of both wholesale and retail natural gas.[331] The only issue on appeal was whether the Natural Gas Act[332] (the "*Act*") preempted state-law antitrust claims. More specifically, whether the Act preempted the field of state antitrust laws regarding the natural gas market's retail prices.[333] The Court held that the state claims were not preempted.

The District Court for the District of Nevada held that the Act's language preempted the state law claims because the Act gave federal courts exclusive jurisdiction over activities by natural gas companies engaging in interstate commerce.[334] The Ninth Circuit Court of Appeals reversed,

328. *See generally id.* at 289.
329. *See id.*
330. *Id.* at 290.
331. Oneok, Inc. v. Learjet, Inc., 135 S. Ct. 1591, 1594 (2015).
332. 15 U.S.C.A. § 717b, 717d (a) (West 2015).
333. *Oneok, Inc.*, 135 S. Ct. at 1595 (Field preemption occurs where Congress manifests intent to forbid a state to take action within a certain *field* of law. It then becomes irrelevant whether a state law conflicts with the federal law, the state simply cannot regulate within that area.).
334. *Id.* at 1598.

holding that the price manipulation affected not only interstate, wholesale prices, but intrastate, direct retail prices as well. The Ninth Circuit believed that state regulation of intrastate natural gas pricing was not preempted by the Act.

The Companies argued before the Supreme Court that because their activities affected interstate commerce, the state claims are preempted by the Act. The Supreme Court first looked to the Act to determine the extent of its power. The Act gives the Federal Energy Regulatory Commission ("*FERC*") the power to regulate interstate transportation of natural gas, and the resale of natural gas in interstate markets.[335] The Court noted that Congress specifically left regulation of the rest of the natural gas market to the states.[336]

The Court then stated that the test for preemption considers the "*target* at which the state law *aims* in determining whether the law is pre-empted."[337] Thus, the fact that a state law might have an effect on interstate activities does not alone preempt the law. States have extensive common law and statutory schemes designed to remedy antitrust violations.[338] Congress also clearly intended not to disrupt these long-standing state remedies, and to strike a careful balance between the federal laws and traditional state regulation.[339] Therefore, because the state anti-trust laws in question only aimed to regulate retail activities, rather than their effects on wholesale prices, they were not preempted by the federal law. The state's interest in preventing anti-trust activity within its own boundaries also outweighed any ancillary affects the suits might have on the wholesale price of natural gas.[340]

In a dissent joined by Chief Justice Roberts, Justice Scalia gives § 717(d) of the Act a much broader reading.[341] He reads the statute to give the FERC preemptive authority on both wholesale rates and any other activity that might affect wholesale rates.[342] Thus, the Companies' manipulation of pricing that affected both wholesale and retail prices falls solely within the purview of the FERC's authority.[343]

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335. 15 U.S.C.A. § 717(b) (West 2015).

336. Northwest Cent. Pipeline Corp. v. State Corp. Comm'n of Kan., 489 U.S. 493, 507 (1989).

337. *Oneok, Inc.*, 135 S. Ct. at 1599.

338. *Id.* at 1601.

339. *Id.*

340. *See id.* at 1602–03.

341. *Id.* at 1604 (Scalia, J., dissenting).

342. *Id.* at 1604-05.

343. *Id.*

B. Energy & Env't Legal Inst. v. Epel*, 793 F.3d 1169 (10th Cir. 2015).*

In a decision released July 13, 2015, the United States Court of Appeals for the Tenth Circuit upheld Colorado's renewable energy mandate known as the Renewable Portfolio Standard. This law requires electricity generators to ensure that a minimum 20 percent of the electricity they sell to Colorado consumers comes from renewable sources.[344] The law was created by the passage of Amendment 37 by Colorado voters in 2004 and codified in 2005 as Colorado Revised Statute § 40-2-124.

The court struck down the challenge brought by Energy and Environmental Legal Institute ("*E&E Legal*"), an organization "engaged in strategic litigation, policy research, and public education on important energy and environmental issues"[345] that asserted that the law violates the "dormant" Commerce Clause of the U.S. Constitution by restricting how out-of-state goods are produced, as it requires out-of-state electricity generators to comply with Colorado law.[346] Specifically, E&E Legal contended that since Colorado citizens received their electricity from a grid connecting eleven states, Canada, and Mexico, some out-of-state coal producers (such as one E&E Legal member) would lose business to utilities located outside of Colorado that feed into the Colorado grid and that did not have to operate under the renewable energy mandate.[347]

E&E Legal's challenge to the Colorado law relied on *Baldwin v. G.A.F. Seelig, Inc.*,[348] a decision in which the U.S. Supreme Court held that one state cannot regulate its own prices through prohibiting the importing of less expensive goods in interstate commerce, and that a statewide prohibition on goods acquired with lower prices in interstate commerce was the equivalent of a customs tariff.

In a unanimous decision, the court noted that "we don't see how *Baldwin* . . . require[s] us to strike down Colorado's mandate."[349] The court held the law was not a price control statute.[350] In addition, the court ruled the law did not link prices paid in Colorado with those paid out of state and that

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344. Energy & Env't Legal Inst. v. Epel, 793 F.3d 1169, 1170 (10th Cir. 2015).
345. *About*, ENERGY AND ENVTL. LEGAL INST., *available at* http://eelegal.org/?page_id=1657 (last visited Feb. 23, 2016).
346. *Energy & Env't Legal Inst.*, 793 F.3d at 1170.
347. *Energy & Env't Legal Inst.,* 793 F.3d at 1170.
348. Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511 (1935).
349. *Energy & Env't Legal Inst.,* 793 F.3d at 1173.
350. *Id.*

it did not discriminate against out-of-state producers.[351] The court opined that no evidence had been presented that showed any disproportionate adverse effect was felt by out-of-state generators or, conversely, any disproportionate advantage had been enjoyed by Colorado generators.[352]

The court of appeals found that E&E Legal failed to show how the mandate violated the "dormant" Commerce Clause and agreed with the district court which had held that the law "does not mandate that an out-of-state energy generator do business in any particular manner…" The court further noted that Colorado electricity providers may buy and sell from both in-state and out-of-state generators. Instead, the [law] regulates whether energy purchased by a Colorado utility from a generator will count towards the renewable energy quota, and thus "does not impose conditions on the importation of electricity into Colorado."

C. Fawcett v. Oil Producers, Inc.*, 352 P.3d 1032 (Kan. 2015).*

On July 2, 2015, the Supreme Court of Kansas unanimously reversed the decision of the Kansas Court of Appeals in a case that considered the proper way to calculate royalty payments under the Marketable Condition Rule. The Court concluded that costs incurred post-sale and post-production by third party purchasers were to be shared by the royalty interest holder and the lease operator. Kansas, like a minority of other hydrocarbon-producing states, has extended the implied covenant to market in what has become known as the "marketable condition rule."[353] This rule provides that the lessee has the implied duty to produce a marketable product and that the cost of the marketable product lies exclusively with the lessee. Only *after* the lessee has achieved a marketable product can any additional costs incurred by the lessee to heighten the worth of the hydrocarbons be subtracted from royalty payments. Before the case, however, Kansas courts had not uniformly defined what "marketable" natural gas was, thus creating doubt about how exactly a lessee should calculate royalty payments from the proceeds received for natural gas.

The dispute involved a class of lessors with landowner royalty interests covering 25 oil and gas leases taken from 1944 to 1991 (collectively, "*Fawcett*") and a lease operator, Oil Producers, Inc. of Kansas ("*OPIK*"). On the captioned leaseholds, OPIK itself did not subtract from the royalty

351. *Id.*
352. *Id.* at 1174.
I. 353. Fawcett v. Oil Producers, Inc., 352 P.3d 1032, 1034 (Kan. 2015).

proceeds due Fawcett any of the cost of services performed. Because OPIK did not own local gathering or processing facilities, however, it sold the raw natural gas from the wellhead to certain named third parties[354]—the first sale—who then processed the gas and sold the refined product again in a second sale at an interstate pipeline. The revenue OPIK received from the raw gas depended on how much the third party purchasers received at the second sale before the gas entered the interstate pipeline system. OPIK received proceeds from the third parties equal to the price paid for the processed gas in the second sale minus the costs incurred to process the gas before the second sale.

A dispute arose about the point at which the royalties due Fawcett were to be calculated and the deductions that were to be made from the proceeds. Fawcett filed a class action, contending that the costs incurred to process the gas were OPIK's responsibility, as these costs were necessary to make the gas marketable. Fawcett argued that the royalties should have instead been calculated using the actual gross revenue from the sale of gas received from the first purchasers in the second sale, which did not include the costs incurred to process the gas by the first purchasers. Fawcett compared the amount OPIK received from the third party as "net" proceeds, because the deductions were subtracted from the gross price. OPIK contended that the royalty payments were correct, as they represented the actual proceeds from its sale of the gas at the wellhead.

The district court granted partial summary judgment for Fawcett, holding that OPIK had a duty to make the gas marketable—free of cost to Fawcett. The district court concluded that OPIK must bear the burden of expenses such as "gathering charges, compression charges, dehydration, treatment, processing, fuel charges, fuel lost or unaccounted for, and or third party expenses incurred to make the gas marketable."[355] The district court did not make a damage calculation, as its order only considered a question of law as to whether the operator had a legal duty to make the gas marketable before royalty deductions could be made. The court of appeals affirmed the district court's order.

354. Fawcett v. Oil Producers, Inc., 49 Kan. App. 2d 194, 195–96 (Kan. Ct. App. 2013) (stating the third parties included: ONEOK Midstream Gas Supply, L.L.C., Duke Energy Field Services, Unimark L.L.C., and DCP Midstream, LP).

355. Fawcett v. Oil Producers, Inc., 352 P.3d 1032, 1039 (Kan. 2015) (In a separate matter, the district court granted summary judgment in favor of Fawcett, concluding that conservation fees must be paid solely by the operator. Conservation fees "function essentially as a state-assessed mill levy on gas sold by the operator.").

On review, the Supreme Court of Kansas addressed whether OPIK was responsible under the common law marketable condition rule for the costs and adjustments taken by the third party purchasers between the first and second purchases. First, the Court looked at the actual language from the leases between OPIK and Fawcett. The leases provide that Fawcett would receive royalties from proceeds "from the sale of gas as such at the mouth of the well where gas is only found or if sold at the well."[356] Here, the gas sold at the well by OPIK was not yet processed.

Fawcett argued that the "marketable condition rule" applied, and therefore OPIK must bear the all the costs associated with processing the raw natural gas into the quality necessary to enter the interstate pipeline system. Practically speaking, Fawcett believed that the price received by OPIK was shorted by the amount spent to process the gas between the wellhead (the first sale) and the interstate pipeline (the second sale) and that Fawcett's royalty should not have to bear any costs attributable to processing across that interval. The Court disagreed, concluding that Fawcett improperly equated marketable condition with interstate pipeline quality.

Next, the Court analyzed OPIK's implied duty to make the gas marketable. OPIK contended that it had fulfilled this duty with its third party purchase agreements—the first sale—and that the royalty owners, having the opportunity to receive a portion of the higher prices achievable because of post-production processing, must pay their portion of that post-production processing cost. The Court agreed with OPIK, citing three Kansas cases[357] en route to concluding that while costs incurred to make raw gas acceptable to third parties would be the exclusive obligation of the operator, raw natural gas sold at the wellhead *can* be marketable. Post-sale and post-production expenses to transform raw natural gas into pipeline quality gas are therefore different—and OPIK and Fawcett must share these costs.

The Court stated that OPIK's duty to make gas marketable did not extend past the first sale. Because the sale was made at arm's-length and was in good faith, and the gas was in a condition acceptable to a purchaser, OPIK

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356. *Id.* at 1036-37, 1039 (Although 3 of the 25 leases contained different language, the court concluded that they would be treated the same for this analysis, as the gas was sold by OPIK at the wellhead.).

357. *See* Gilmore v. Superior Oil Co., 192 Kan. 388, 389–90 (1964) (concluding that compression costs were necessary to transfer and sell the gas); Schupbach v. Cont'l Oil Co., 193 Kan. 401 (1964); Sternberger v. Marathon Oil Co., 257 Kan. 315, 322 (1995) (holding when royalties are to be paid on the value of gas at the well, but no market exists there, the royalty owner must bear a proportional share of the reasonable expenses of transporting the gas to market).

had satisfied its duty to Fawcett. Any expenses necessary after this initial sale were to be shared by both Fawcett and OPIK.

D. Netahla v. Netahla*, 346 P.3d 1079 (Kan. 2015).*

On April 10, 2015 the Supreme Court of Kansas released an opinion that addressed the effect a "subject to" clause in a mineral deed where there was an existing oil and gas lease covering the same property.[358] The Court decided whether the "subject to" clause in the defeasible mineral deed incorporated the shut-in royalty provision of the existing oil and gas lease into the definition of "production" within the mineral deed.

In 1969, Joe and Rose Netahla (collectively, "*Grantors*") granted an oil and gas lease to Mack Oil Company ("*Lessee*"). The lease was for a primary term of five years and would continue "as long thereafter as oil, liquid hydrocarbons, [or] gas . . . is produced from said land."[359] The lease also contained a shut-in royalty clause, providing for a shut-in royalty to be paid annually.[360]

Less than seven months later, Grantors conveyed to Frank Netahla ("*Grantee*") "an undivided one-half interest in and to all of the oil gas and other minerals . . . that may be produced" via a "Sale of Oil and Gas Royalty"—a mineral deed."[361] The deed also expressly provided that it was "subject to" all of the terms of the existing oil and gas lease, but further entitled Grantee to "one-half of the money rentals which may be paid to extend the term" of the lease, as well as "one-half of all of the oil royalty, and gas rental or royalty due and to be paid under the terms of said lease."[362] Finally, the deed provided that it would remain in existence "*for a period of the next 15 years from June 1, 1970 and as long thereafter as oil and /or gas is produced from these premises or the property is being developed or operated*."[363]

The Lessee brought in a well on December 3, 1970, and filed an affidavit of production. Much later, the well was shut in, and no production occurred

358. *See* Netahla v. Netahla, 346 P.3d 1079 (Kan. 2015) (stating that "subject to" clauses are used in mineral conveyances to reference preexisting interests such as oil and gas leases. These are generally used to protect the grantor from breaching warranties for not referencing other outstanding interests.).
359. *Id*. at 1080.
360. *Id.*
361. *Id.*
362. *Id.*
363. *Id.* at 1081 (emphasis alterations in original).

between the period of 1985 and 2003, at which point another operator assumed control of the operations of the lease and once again began producing oil or gas from the previously shut in well. In 2012, the heirs of the Grantors, as plaintiffs, sought declaratory judgment that the royalty interest under the 1970 mineral deed had terminated. However, the State District Court in Sumner, Kansas granted summary judgment for the Grantee's heirs and held that the mineral interest was "in full force and effect."[364] In affirming the trial court, the Court of Civil Appeals reasoned that the combination of the "subject to" language in the mineral deed and the temporal proximity between the signing of the lease and deed indicated that the parties intended the instruments to be read together.[365] Furthermore, because the lease provided a shut-in royalty that would save the lease in the event of non-production, the Court of Civil Appeals concluded that, because the shut-in royalties were properly paid, the same constructive production was also intended to extend the mineral deed.[366]

In reversing the Court of Civil Appeals, the Supreme Court of Kansas stated, "generally, 'the event which perpetuates the term of the mineral interest must be found in the instrument creating it.'"[367] To determine whether the term of the mineral deed was extended by the lease's shut-in provision, the Court looked to Kansas precedent, as well as a decision from Texas, for guidance. Under Kansas law, the shut-in royalty provision is considered to exist solely for the benefit and privilege of the oil and gas lessee.[368] Prior Kansas cases also held that the shut-in royalty provisions are not contemplated to create rights for anyone else outside the lease unless expressly referenced in the subsequent instrument.[369] The Court then referenced Texas law that held the "subject to" language qualifies the terms of a mineral deed, rather than alters or creates new affirmative rights.[370] "Subject to," according to its ordinary usage, means "subordinate to . . . or limited by."[371] Therefore, under Kansas law, the Court held, unless the mineral deed expressly states otherwise, payment of shut-in royalties

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364. *Id.*
365. *Id.* at 1079.
366. Netahla v. Netahla, 346 P.3d 1079, 1079 (Kan. 2015).
367. *Id.* at 1081 (citing *Classen v. Fed. Land Bank of Wichita*, 617 P.2d 1255 (Kan. 1980)).
368. *Dewell v. Fed. Land Bank*, 380 P.2d 379, 381-82 (Kan. 1960).
369. *See Dewell*, 380 P.2d at 381-82. *See also Classen*, 617 P.2d at 1261-62.
370. Kokernot v. Caldwell, 231 S.W.2d 528, 531 (Tex. App. 1950) (quoting Englestein v. Mintz, 177 N.E. 746, 752 (Ill. 1931)).
371. *Id.*

pursuant to an oil and gas lease does not satisfy the actual production or development required to extend the term of a defeasible mineral deed.

In the instant case, the Court concluded that the "subject to" language in the mineral deed did not incorporate provisions from the existing lease.[372] The Court would only look to the deed itself to determine whether the interest terminated. Because there was no production in 1985 when the deed's term ended, the interest terminated at that time.

E. Tellus Operating Group, LLC v. Maxwell Energy Inc.*, 156 So.3d 255 (Miss. 2015).*

On January 22, 2015, the Supreme Court of Mississippi interpreted two possibly ambiguous provisions of the Mississippi forced pooling statute.[373] The Court upheld the Mississippi Oil and Gas Board's ruling that the operator had complied with all of the statutory requirements and allowed the operator to charge the nonconsenting owner the statutorily prescribed alternate rate for cost of production.

Tellus Operating Group began working in 2006 to develop a unit in Jefferson Davis County. In order to comply with Mississippi's good-faith requirements contained within the forced pooling statute, Tellus informed the various mineral interest owners of their statutory options via mail. Those options included entering into a lease, entering into a farmout agreement, or becoming a cost-bearing working interest owner—sharing in all of the associated operating risks and costs. Tellus also sent a letter stating that parties interested in the third option would need to execute an Authorization for Expenditure ("*AFE*") and Joint Operating Agreement ("*J.O.A.*").

D.E. Maxwell, owner of Maxwell Energy ("*Maxwell*"), selected the third option but struck through the portion of the agreement stating he would agree to the terms of the J.O.A. and entered, by hand, that he would participate "as to Maxwell Energy, Inc.'s proportionate share of .00971714[percent] in accordance with applicable law set out in Miss. Code 53–3–7." No one at Maxwell ever signed the necessary J.O.A. or any AFE. The original J.O.A. contained "alternate-risk" penalties requiring non-consenting parties to cover the actual costs of drilling before payments are

372. *Netahla v. Netahla,* 346 P.3d 1079, 1085 (Kan. 2015).
373. Tellus Operating Grp., LLC v. Maxwell Energy, Inc., 156 So. 3d 255, 260-61 (Miss. 2015).

made, in addition to further payments up to a stated percentage to compensate consenting parties for taking the risk of the project.[374]

After the required ninety-day statutory period, Tellus sought forced unit integration from the Mississippi Oil and Gas Board (the "*Board*"). This included forcing Maxwell in as a nonconsenting owner subject to the alternate-risk penalties. Maxwell sought a continuance, stating that it wanted the opportunity to negotiate a better deal with Tellus and that it was willing to forward the anticipated upfront costs. Several days before the Board hearing on the pooling question, Maxwell sent Tellus an alternate J.O.A. At the hearing, Maxwell argued for more time, and Tellus argued that it had met its statutory burden in order to impose a force-pooling order.

At the hearing, the parties went through the original J.O.A., point by point, arguing whether each term was reasonable. Most notably, testimony existed that while the alternate-risk penalties were high, they were not extraordinary or unjustifiable. In the end, the Board was persuaded to grant the petition to force pool the interest. Most likely, the Board was persuaded that ninety-six percent of the interest owners, and at least twenty-one other sophisticated parties, had already entered into the unit.[375]

Within twenty days of the ruling, Maxwell sent Tellus a check for \$18,277.94 and a letter stating that it wanted to participate on a cost basis, sharing in the same cost and risk as the other consenting owners. Tellus refused to accept the check, and Maxwell appealed to the chancery court that, in turn, found that the Board's order was not supported by substantial evidence. The chancery court also held that Maxwell's unilateral offer, in the form of the check, satisfied the voluntary integration[376] provision of the pooling statutes. Tellus appealed the decision to the Mississippi Court of Appeals that, in turn, initially upheld the lower court's decision, but on

374. *Id.* at 258 ("non-consent penalties" in form J.O.A. parlance).

375. *Id.* (The Court noted that because such a high percentage of the affected parties—96 percent of the working interest in the caption area—had already signed the disputed J.O.A. gave weight to the apparent reasonability of its terms because sophisticated parties were thought to be able to easily spot a J.O.A. with non-favorable terms and also have the power to bargain for a better deal. Furthermore, the Court noted the late hour in which Maxwell was opposing the deal and the significant burden of operating under separate J.O.A's.).

376. *Id.* at 258; MISS. CODE. ANN. § 53-3-7(2)(g)(iii) (Rev. 2003) (Under the Mississippi statutory code, an operator who is about to be forcefully pooled into a unit has one final opportunity to join the J.O.A. "on the same cost basis as the consenting owners by agreeing in writing to pay that part of the costs of such development and operation chargeable to said nonconsenting owner's interest, or to enter into such other written agreement with the operator as the parties may contract.").

rehearing reversed and issued an opinion in favor of Tellus. Maxwell appealed.

On review, the Supreme Court of Mississippi first addressed whether the Board's decision was supported by substantial evidence and found that it was. In analyzing the pooling statutes, the Court first looked to Mississippi Code § 53-3-7(2)(a), which sets out the good-faith requirement, the various options the interest owner may consent to, and the outcome if a landowner should not consent.[377] The statute provides that parties may consent to an agreement "on reasonable terms," and the Court held that a J.O.A. is an appropriate vehicle to memorialize such an agreement. Furthermore, the Court held that the two parties had not entered into an agreement sufficient to satisfy the statute prior to Tellus's petition for integration.

The Court then turned its analysis to § 53-3-7(2)(g)(iii), which provides a final opportunity for nonconsenting owners to gain the benefits of a consenting owner provided they enter into a written agreement with the operator, and that offer is accepted and filed within twenty days of the pooling order. It was Maxwell's contention that its check and letter stating that it agreed to the same terms as the other consenting owners satisfied that requirement.

The Court held that, when read together, the two statutes provide that a nonconsenting owner can either enter into the written agreement that the Board found reasonable, or negotiate for a separate written agreement. Maxwell's unilateral actions were found to not satisfy the requirements of the two statutes to the extent Maxwell sought to escape the Board's terms of the forced pooling order under § 53-3-7(2)(g)(iii). To hold otherwise, the Court opined, would create a loophole in the statutes and abrogate their intended effect. An interest owner could exempt itself from the good faith and reasonable terms requirements in § 53-3-7(2) by waiting for the forced pooling order to be issued by the Board and then sending a check with its own, non-negotiated, highly favorable terms that the operator would then be bound to accept out of fear of subsequent litigation.

F. First Baptist Church of Roswell v. Yates Petroleum Corp., *345 P.3d 310 (N.M. 2015).*

On February 20, 2015, the Supreme Court of New Mexico held that a form division order's waiver-of-interest clause was unenforceable due to a

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377. *Tellus*, 156 So. 3d at 260; *see* MISS. CODE. ANN. § 53-3-7(2)(a) (Rev. 2003).

New Mexico Act reflecting a strong public policy of protecting payees with lesser bargaining power.

Petitioners—various owners of royalty interests in oil and gas production from the Runnin' AZH Com. No. 1 Well in Eddy County, New Mexico—were sent form division orders from Yates Petroleum ("*Yates*") requiring the petitioners to prove up marketable title. The division order included a clause that entitled Yates "to withhold payments of interest until the claim [against title] is settled."[378] Approximately three years passed between when Yates sent out the division orders and when they were returned. Pursuant to the no-interest clause in the division order, Yates returned the royalty principal to each rightful owner, but refused to pay interest. The petitioners sued, claiming that Yates's division order clause was in direct violation of provisions of the Oil and Gas Proceed Payments Act (the "*Act*").[379] More specifically, § 70-10-4 of the Act specifically provided all funds withheld from the rightful payee for more than six months should be held in a suspense account with an interest rate of 1.5 percent above the going rate at the Federal Reserve Bank of Dallas.[380]

The New Mexico district court agreed with the petitioners, finding that the clause in the division order clearly violated § 70-10-4 of the Act and ordered Yates to pay the interest due on the principal. On appeal the court of appeals reversed, however, opining that legislative action alone that confers a benefit on a party does not outweigh New Mexico's established public policy promoting the freedom to contract. Furthermore, the appellate court noted that because § 70-10-3 of the Act provided for contractual modification of when royalty payments could be made,[381] this ability to circumvent the statute extended to § 70-10-4. The court noted the lack of legislative abrogation of the Supreme Court of New Mexico's decision in *Murdock v. Pure-Lively Energy*, when the court held, under similar facts, that there was an enforceable right to contractually modify whether interest is to be paid on the principal in the interim.

378. First Baptist Church of Roswell v. Yates Petroleum Corp., 345 P.3d 310, 311 (N.M. 2015).

379. *Id.*; *see* N.M. STAT. ANN. §§ 70-10-1, 6 (1991).

380. N.M. STAT. ANN. §§ 70-10-4(b) (stating that "[t]he person entitled to payment from the suspended funds shall be entitled to interest on the suspended funds [at the] rate charged by the federal reserve bank of Dallas to member banks plus one and one-half percent on the date payment is due.").

381. N.M. STAT. ANN. §§ 70-10-3(b) ("The oil and gas proceeds . . . shall be paid . . . not later than six months . . . unless other periods or arrangements are provided for in a valid contract with the person entitled to such proceeds.").

In reversing the opinion of the court of appeals and reinstating the order of the trial court, the Supreme Court first addressed statutory interpretation and the public policy behind the Act. The Court also considered the confluence between the freedom to contract and clear legislative authority to the contrary.

In determining that the division order provisions violated the Act, the court first looked to the text of the entire Act. First, the Court noted that § 70-10-4 has two requirements. Subsection A mandates that when funds cannot be paid on time pursuant to the time constraints of § 70-10-3, they are to be held in a suspense account. Subsection B provides that interest will accrue at the statutory rate while the funds are in the suspense account. The Court held that this displayed clear legislative intent that when rightful payees, for whatever reason, do not receive payment on time, they should receive interest on their principal.

Yates argued that although the no-interest provision of the contested division orders may appear to contravene Subsection B of the Act, under New Mexico law parties are able to contract around these statutes so long as they are not contrary to public policy. Yates furthered asserted that because the Act has no provision expressly declaring the public policy of the state, it is free to contract around the statute.

In rejecting Yate's argument, the Court stated that "[j]ust because the Legislature did not expressly include a statement of what the public policy is in the text of the statute does not mean that it does not intend to further a strong public policy."[382] The Court then addressed every provision in the Act and determined that, as a whole, the Act represents a specific and strong public policy in favor of protecting interest owners.[383] It noted that at every turn the New Mexico legislature, through provisions of the Act, placed the burden of proper and timely payment on the payor, clearly illustrating the intent to protect payees.[384] The Court held that in this limited context, the specific and clear directives of the Act dictate a public policy that outweighs the freedom of contract.[385] In fact, the Court noted that this case illustrates the exact situation the statute was designed to remedy.[386] Yates, the party

382. *First Baptist*, 345 P.3d at 314.
383. *Id.*
384. *Id.*
385. *Id.*
386. *Id.*

with the clearly superior bargaining power, provided these form division orders that the petitioners must agree to before they could hope to be paid.[387]

The Court then addressed Yate's argument that, because § 70-10-3 allows for contractual modification, and § 70-10-4 is silent on the issue, the legislature intended that parties could contract around the provisions in § 70-10-4.[388] The Court returned to what it considered basic contract interpretation principles and held that providing express permission to contract around § 70-10-3 strengthened the argument that the legislature did not intend to extend this contractually permissive penumbra over § 70-10-4.[389] The Court also noted the fundamental difference between contracting when a party will get paid and contracting for whether a party will get paid.[390]

As additional support for the Court's arguments, it then distinguished *Murdock*, holding that in that case, even with very similar facts, the court did not interpret the Act as in the present case.[391] Instead the *Murdock* court interpreted a very general set of statutes that applied to commercial transactions before allowing for contractual modification of interest payments.[392] Finally, the Court noted the clear mandate set out by the Act, and more specifically § 70-10-4, regarding the clear legislative intent to protect interest owners and their financial wellbeing from the working interest owners with the clearly superior bargaining power.

Yates makes clear the need to examine form division order language and confirm nothing therein amends New Mexico's statutory interest requirement on suspended funds. Provisions deemed to do so will not be enforced.

G. Beardslee v. Inflection Energy LLC*, 31 N.E.3d 80 (N.Y. 2015).*

In March of 2015, the New York Court of Appeals issued an opinion based on two certified questions from the Second Circuit asking the court to interpret the effects of New York's *de facto* moratorium on hydraulic fracturing ("*fracking*") and horizontal drilling on several oil and gas leases.[393] First, under New York law, was the state's moratorium a *force majeure* event

387. *Id.*
388. *Id.*
389. *Id.*
390. First Baptist Church of Roswell v. Yates Petroleum Corp., 345 P.3d 310 (N.M. 2015).
391. *Id.*
392. *See* Murdock v. Pure-Lively Energy, 775 P.2d 1292, 1295 (N.M. 1989) (interpreting N.M. STAT. ANN. § 56-8-3(b)).
393. Beardslee v. Inflection Energy L.L.C, 31 N.E.3d 80 (N.Y. 2015).

for the purposes of the oil and gas lease?[394] Second, was the habendum clauses in the leases modified by application of the *force majeure* clauses, thereby extending the primary terms in question?[395] The New York Court of Appeals held that the oil and gas leases expired on their own terms—therefore, it was not necessary to decide the first issue.[396]

In 2001 through 2009, several leases and renewals were signed in Tioga County, New York, with Victory Energy Company as lessee.[397] The leases that provide the basis of this litigation were later assigned to Inflection Energy and provided for a five-year primary term.[398] Each contained identical *force majeure* clauses that provided:

> If and when drilling or other operations hereunder are delayed or interrupted by lack of water, labor or material, or by fire, storm, flood, war, rebellion, riot, strike, differences with workmen, or failure of carriers to transport or furnish facilities for transportation, or as a result of some order, rule, regulation, requisition or necessity of the government, or as a result of any other cause whatsoever beyond the control of Lessee, the time of such delay or interruption shall not be counted against Lessee, anything in this lease to the contrary notwithstanding. All express or implied covenants of this lease shall be subject to all Federal and State laws, Executive Orders, Rules or Regulations, and this lease shall not be terminated, in whole or in part, nor Lessee held liable in damages for failure to comply therewith, if compliance is prevented by, or if such failure is the result of any such Law, Order, Rule or Regulation.[399]

In July of 2008, New York Governor David Paterson issued an executive order initiating the state's environmental entities to review the impacts of fracking and horizontal drilling on the environment.[400] So as to give the relevant state environmental agencies time to complete their due diligence, the order provided that (essentially) no fracking permits would be issued until the impact studies were completed.[401] This restriction continued until 2012 and beyond, longer than the primary term of any captioned lease.

394. *Id.*
395. *Id.*
396. *Id.*
397. *Id.*
398. *Id.*
399. *Id.*
400. *Id.*
401. Beardslee v. Inflection Energy L.L.C, 31 N.E.3d 80, 82 (N.Y. 2015).

During this interval, no operations, production, or royalty payments were conducted or paid on any of the leases.[402]

In February 2012, after the primary terms of the captioned leases had expired, the lessors thereunder sought declaratory judgment in the United States District Court for the Northern District of New York.[403] These lessors claimed the leases had expired per their own terms as a matter of law.[404] The lessees counterclaimed, arguing that the leases had not expired due to constructive production as provided by the *force majeure* clauses.[405] The district court found that, by the plain terms of the lease, the leases had expired whether or not the moratorium would be considered a *force majeure* event as such a clause only possibly applies to events that occur during the secondary term.[406] The United States Court of Appeals for the Second Circuit, recognizing the "great commercial and environmental"[407] implications of the decision, issued the two certified questions noted above to the New York Court of Appeals.[408]

In holding that the leases were no longer valid, the court first reviewed and considered New York common law regarding contract interpretation.[409] In New York, the intent of the parties controls the interpretation and great weight is given to the plain meaning of an unambiguous contract.[410] As such, courts may not add or distort terms using the pretext of interpretation.[411] The court also noted that considerable weight should be given to oil and gas terms, as they are highly specialized and have very specific meanings.[412]

Application of the common law to the leases followed, with the court first noting that the habendum clause of an oil and gas lease defines its duration. The captioned leases each provided that the lease shall last for five years and thereafter as long as oil and gas is being produced in paying quantities. Considering only the express language of the leases, the court held that the *force majeure* clauses did not modify the primary terms of the leases because the habendum clauses did not refer to the *force majeure* clause

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402. *Id.*
403. *Id.*
404. *Id.*
405. *Id.*
406. *Id.*
407. *Id.* at 83.
408. Beardslee v. Inflection Energy L.L.C, 31 N.E.3d 80, 82 (N.Y. 2015).
409. *Id.*
410. Greenfield v. Philles Records, 780 N.E.2d 166, 170 (N.Y. 2002).
411. Riverside S. Planning Corp. v. CRP, 920 N.E.2d 359, 363 (N.Y. 2009)(quoting Reiss v. Financial Performance Corp., 764 N.E.2d 958, 961 (N.Y. 2001)).
412. Wiser v. Enervest Operating, LLC, 803 F. Supp. 2d 109, 117 (N.D.N.Y. 2011).

and did not otherwise contain language incorporating any other terms of the lease. Additionally, no part of the *force majeure* clause specifically referenced or modified the habendum clause.

The lessees also argued the phrase "anything in this lease to the contrary notwithstanding"[413] located in the *force majeure* clause should control—regardless of other terms in the lease.[414] In rejecting this argument, the court noted that this language only controls where confliction exists between terms[415]. In the captioned oil and gas leases, the court held no conflict existed between the primary term in the habendum clause and the *force majeure* clause.[416] More importantly, the court cited that the *force majeure* clause only and "expressly refers to a delay or interruption in drilling or production."[417] This was found not implicate the primary term, because in the primary term the only obligation was to pay delay rental payments, not to drill or produce.[418] Therefore, the *force majeure* clause could only be intended to save a lease that was in its secondary term.[419]

The court also looked to other states with more developed oil and gas jurisprudence and determined that its decision was in line with such case law.[420] After receiving the answer to the certified questions, the Second Circuit Court of Appeals adopted the New York Court of Appeal's findings.

H. Hall v. Malloy*, 862 N.W.d 514 (N.D. 2015).*

On April 28, 2015 the Supreme Court of North Dakota released an opinion addressing an appeal regarding a quiet title action construing North Dakota's statutory after-acquired title doctrine.[421] The Court also took the opportunity to address the propriety and the nature of the interests conveyed in a divorce judgment.[422] The trial court found in favor of plaintiff by

413. *Beardslee*, 31 N.E.3d at 84.
414. *Id.*
415. *Id.*
416. *Id.*
417. *Id.*
418. *Id.*
419. *Id.*
420. *Beardslee*, 31 N.E.3d at 85 (citing Gulf Oil Corp. v. Southland Royalty Co., 496 S.W.2d 547, 522 (Tex. 1973)); San Mateo Cnty. Coll. Dist. v. Half Moon Bay LP, 65 Cal. Rptr. 2d 287, 293 (Cal. Ct. App. 1998); Natural Gas Pipeline Co. v. Zimmer, 477 F. Supp. 66, 70 (N.D. Tex. 1977), *aff'd* 576 F.2d 106 (5th Cir. 1978); *Cf.* Sun Operating LP v. Holt, 984 S.W.2d 277, 282–83 (Tex. App. 1998).
421. Hall v. Malloy, 862 N.W.2d 514 (N.D. 2015).
422. *Id.*

summary judgment, the Supreme Court of North Dakota affirmed on a direct appeal.[423]

The defendants, Howard "Harry" L. Malloy, in his capacity as trustee of the Harry L. Malloy Irrevocable Family Mineral Trust, and his ex-wife, Lorraine Malloy (hereinafter, collectively referred to as the "*Trust*") disputed the ownership resulting from a conveyance to the predecessor in interest of the plaintiff, Todd Hall ("*Hall*").[424] Hall claimed that he owned nine mineral acres resulting from that conveyance, while the Trust claimed he only owned four and a half mineral acres.[425]

In 1982, Harry L. Malloy conveyed a 90 net mineral acres to himself as a trustee of the Harry L. Malloy Trust.[426] The next year, Harry Malloy and his wife Loraine Malloy were divorced and the divorce judgment required that Harry Malloy convey "one-half of [his] interest in and to the mineral acres."[427] Harry Malloy complied with the court order, not only conveying half of his extensive, individually owned mineral interests (approximately 2,200 acres) to his former wife, but also executing a quitclaim deed purporting to convey an undivided half of the 90 acres he owned in his capacity as a co-trustee.[428] In 1995, the trustees of the now disputed 90 acres filed a quitclaim deed removing that property from the Trust.[429] As a result, Harry Malloy then purportedly owned the 90 acres in an individual capacity.[430] Finally, in 1997, Harry Malloy executed a quitclaim deed to Hall's predecessor in interest quitclaiming the 90 acres in the grantee's favor, but reserving 90 percent of the mineral estate.[431]

In June 2013, Hall sued the Trust to quiet title and attempt to determine the exact interest conveyed by the 1997 quitclaim deed to Hall's predecessor in interest.[432] The Trust claimed that the 1995 conveyance, through the after-acquired property doctrine, gave Lorraine Malloy title to her half of the 90

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423. N.D. CENT. CODE § 28–27–01 (2013) ("A judgment or order in a civil action or in a special proceeding in any of he district courts may be removed to the [S]upreme [C]ourt by appeal as provided in this chapter.").

424. Hall v. Malloy, 862 N.W.2d 514 (N.D. 2015).

425. *Id.*

426. *Id.*

427. *Id.* (discussing how a divorce settlement required Harry Malloy to convey an undivided one half in all of his personal property).

428. *Id.* (The other trustee was Janet L. Holt).

429. *Id.*

430. *Id.*

431. *Id.*

432. Hall v. Malloy, 862 N.W.2d 514 (N.D. 2015).

acres.[433] The trial court held that the 1983 divorce judgment and subsequent quitclaim deed did not convey the 45 acres as the Trust contended because Harry Malloy only owned the property in his capacity as the trustee.[434] Furthermore, the trial court determined that North Dakota's after-acquired title doctrine did not transfer title to Lorraine Malloy when Harry Malloy reacquired the property pursuant to the 1995 quitclaim.[435] This was because neither the divorce judgment nor the quitclaim deed were a "proper instrument" under North Dakota law and were, therefore, not subject to the after-acquired property doctrine.[436] According to the trial court, when the property was transferred to Hall's predecessors in interest, he was conveyed an undivided 10 percent of 90 mineral acres—or 9 mineral acres—rather than an undivided 10 percent of 45 acres—or 4.5 mineral acres—as the Trust claimed.[437]

On appeal, the Trust argued that the 1983 divorce judgment was a "proper instrument" and, therefore, when Harry Malloy owned the land in his individual capacity, the after-acquired property statute affected a legal conveyance to Hall's predecessor in interest.[438] Furthermore, the Trust argued that the plain language contained in the divorce judgment evidences a clear intent to convey after-acquired property to Lorraine Malloy.[439]

In affirming the trial court's summary judgment, the Supreme Court of North Dakota first noted that the state courts retain the power to "have a direct effect upon title to real property" and that it is possible for the courts to affect a transfer of property.[440] The issue then became whether a judicial transfer was affected by the after-acquired property statute, which applies "[w]hen a person purports by proper instrument to grant real property in *fee simple*."[441] The Court then looked to the statutory history of North Dakota Century Code title 47 and determined that a judgment is a "proper instrument" under title 47, contrary to what the trial court ruled.[442] But the Court stated that the

433. *Id.*
434. *Id.*
435. *Id.*
436. *Id.* at 517 (citing N.D. CENT. CODE § 47–10–15 (2013)).
437. *Id.*
438. *Id.*
439. *Id.*
440. *Id.* at 518 (citing McKenzie Cnty. v. Hodel, 467 N.W.2d 701, 704–05 (N.D. 1991)).
441. N.D. CENT. CODE § 47–10–15 (2013) (emphasis added).
442. *Id.*; *Hall*, 862 N.W.2d at 520 (citing 1877 Revised Code of the Territory of Dakota, Civ. Code § 647; 1887 Compiled Laws of Territory of Dakota, Civ. Code § 3268; 1895 Revised Codes of North Dakota, Civ. Code § 3563; 1899 Revised Codes of North Dakota,

inquiry does not end there—the statute further requires that the instrument grant real property in *fee simple*.[443] Therefore, when an interest is conveyed via a quitclaim deed, the after-acquired property statute does not transfer the after-acquired title because a quitclaim deed only conveys the grantor's current interest, rather than fee simple interest to the real property.[444] The decision, therefore, turned on whether the divorce judgment granted Harry L. Malloy's "right, title and interest in land [or] the land itself."[445]

The 1983 divorce judgment provided that, "Lorraine Malloy was 'to receive one-half of [Harry's] interest in and to the mineral acres."[446] The Court held that the quoted language evidences a clear intent by the court to convey Harry L. Malloy's current interests, rather than the fee simple to the land.[447] Therefore, the trial court did not err in deciding that the after-acquired property clause did not affect a transfer of the 45 undivided acres of minerals and surface when Harry L. Malloy took ownership in 1995, and that the conveyance in 1997 transferred title to 10 percent of the minerals under the full 90 acres.

In a brief dissent, Justice Carol Kapsner agreed with each point of the majority's legal analysis except the last. She contended that the majority misinterpreted the intent of the divorce judgment, believing instead the language of the judgment clearly contemplated that Harry Malloy would take steps to ensure that Lorraine seek half of *all* the property that Harry owned—not just his current interest at the date of the divorce judgment. She argued that the divorce judgment as a whole evidenced an intent to include after-acquired property.[448]

I. Ladra v. New Dominion, LLC*, 2015 OK 53 (Okla. June 30, 2015).*

On June 30, 2015, the Supreme Court of Oklahoma reversed and remanded a lower court's decision regarding the exclusive jurisdiction of the Oklahoma Corporation Commission (the "*OCC*") over disputes arising from oil and gas operations in the state.[449]

Civ. Code § 3563; 1905 Revised Codes of North Dakota, Civ. Code § 5001; 1913 Compiled Laws of North Dakota, Civ. Code § 5546).

443. *Hall*, 862 N.W.2d 514.
444. *See* Carkuff v. Balmer, 795 N.W.2d 303, 308 (N.D. 2011).
445. *Id.*
446. *Hall*, 862 N.W.2d at 521.
447. *Id.*
448. *Id.*
449. *Ladra v. New Dominion, LLC*, 353 P.3d 529, (Okla. June 30, 2015).

The dispute arose from earthquake activity on property in Prague, Oklahoma. On November 5, 2011, a 5.0 magnitude earthquake caused the home of Sandra Ladra ("*Ladra*") to shake.[450] The earthquake caused rock from Ladra's two-story fireplace to crumble.[451] The rocks fell on Ladra, causing serious injury to her knees and legs.[452]

Ladra claimed that the companies engaged in ultra-hazardous activities and had acted negligently when they failed and to operate or maintain their injection wells in such a way as to not cause or contribute to seismicity.[453] Specifically, Ladra asserted that Appellees' injection wells caused the earthquake, which proximately caused her injuries.[454] Ladra sought personal injury damages that totaled over $75,000 in a claim filed in district court against New Dominion LLC, Spess Oil Company, and John Does 1–25 (collectively "*Appellees*"). Appellees countered with a motion to dismiss for improper jurisdiction. The district court ruled in favor of the Appellees, concluding that the OCC had exclusive jurisdiction over cases that involved oil and gas operations. Ladra filed a petition in error with the Supreme Court of Oklahoma.

The Court first addressed the scope of the OCC's exclusive jurisdiction. In Oklahoma, the OCC has exclusive jurisdiction over "the exploration, drilling, development, production, and operation of wells used in connection with the recovery, injection or disposal of mineral brines."[455] The Court explained that the OCC's jurisdiction is limited to the resolution of public disputes, which does not include a suit solely for damages or disputes between two or more private persons.

Moreover, the Court noted that district courts have limited authority when examining OCC orders. District courts may only inquire into the validity of an OCC order regarding whether the OCC had jurisdiction to initially make an order. Allowing the district court to have jurisdiction in the present, however, did not amount to incorrect "oversight and control" over the OCC here, as district courts have exclusive jurisdiction over private tort actions even if oil and gas operations regulated by the OCC are at issue.

The Court ruled in favor of Ladra, explaining that Ladra ultimately sought damages for Appellees' failure to use ordinary care in their operations.

450. *Id.*
451. *Id.*
452. *Id.*
453. *Id.*
454. *Id.*
455. *Id.* at 531 (citing 17 O.S. 2011 § 52).

Whether Appellees' use of the wells constituted negligence was a question in the jurisdiction of the district court. The Court noted that this was not an issue arising from an OCC order, but rather an issue of damages only. The Court reversed and remanded for Ladra.

J. Kennedy v. Consol Energy Inc.*, 116 A.3d 626 (Pa. Super. Ct. 2015).*

In 1961, the predecessors in title of the Kennedys (collectively, the "*Kennedys*") conveyed certain coal veins in Greene County in southwestern Pennsylvania to Consol Energy Inc. ("*Consol*") reserving the oil and gas mineral estate. Then, in 2005, Consol began degassing[456] one of the captioned coal seams seeking to market the coalbed methane ("*CBM*") found within. In 2007, the Kennedys filed suit in the Court of Common Pleas in Greene County to quiet title to the CBM. In addition, the Kennedys claimed trespass and conversion resulting from Consol's drill traversing the Kennedys' oil and gas estate in order to produce the CBM. The trial court found for Consol on all issues, including ownership of the CBM, as well as the intentional trespass and conversion claims.

On appeal to the [court], the Kennedys claimed that the trial court wrongfully applied *U.S. Steel Corp v. Hoge*, which held that absent an express provision stating otherwise, "subterranean gas is owned by whoever has title to the property in which the gas is resting."[457] The Kennedys argued that the deeds affecting the conveyance expressed a clear intent to reserve the CBM with the phrase, "all of the oil and gas *in place*."[458] The Superior Court was not persuaded, instead finding no intent to reserve the CBM because the conveyance in question made no express mention of CBM and seemed instead to contemplate only traditional oil and gas operations. Thus persuaded, the court found that the two parties to the 1932 conveyance only intended for the reservation to extend to oil and natural gas, not CBM.

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456. *Kennedy v. Consol Energy Inc.,* 116 A.3d 626, 630 (Pa. Super. Ct. 2015). Degasification is a reference for the process used to extract CBM from coal. "Present in the coal itself is coalbed methane gas, a highly combustible gas that must be ventilated during the coal mining process to prevent explosion or inhalation. Formerly the practice was to vent the gas into the atmosphere. More recently, coalbed gas has proved to be commercially marketable, and hence, valuable. Consequently, wells are drilled to extract coalbed methane gas from the coal, a process called degasification. Degasification is undertaken prior to the mining of coal to prevent explosions in the mine, and the goal is remove fifty to eighty percent of the coalbed methane.". *Id.*

457. U.S. Steel Corp. v. Hoge, 468 A.2d 1380, 1383 (1983).

458. *Kennedy*, 116 A.3d at 632 (emphasis added).

Turning to the trespass claims, the Kennedys relied on the report of an expert witness that stated that approximately 30 percent of the length of the well bore was outside of Consol's coal seam. The Kennedys argued that this report created a genuine issue of material fact by establishing the intent to trespass. Under the 1961 deed, however, the court noted that "Consol had a 'free, uninterrupted use and enjoyment of right of way into and under' land owned by the Kennedys." Therefore, the court held that the Consol's right to enter adjacent strata in order to capture the CBM negated the 'lack of privilege' element of intentional trespass.[459]

Finally, the Kennedys claimed that the Consol was liable for conversion because, as Consol's drillbit bored through the adjacent formation to achieve production from the captioned coal seam, it was simultaneously capturing gas owned by the Kennedys. While the Superior Court agreed with the proposition in the abstract, the court stated that in order to establish conversion, a claimant carried the burden of proving how much natural gas was taken. In order to rebut their lack of proof on the amount of gas converted, the Kennedys argued that the court should apply the confusion of goods doctrine because their gas had been intermingled with that of Consol.[460] The court held that the confusion of goods doctrine was inapplicable because it is reserved for situations in which a party intentionally and fraudulently intermixes chattels so that they cannot be distinguished.[461]

K. Harrison v. Cabot Oil & Gas Corp*., 110 A.3d 178 (Pa. 2015).*

The Supreme Court of Pennsylvania, on February 17, 2015, took up a certified question from the Third Circuit Court of Appeals and determined whether an oil and gas lessor's pursuit of declaratory relief was tantamount to a repudiation of an oil and gas lease. The Court held that seeking declaratory relief alone was not repudiation and therefore, without other considerations, does not entitle the lessee to equitable extension of the primary term.

In 2007, Wayne Harrison ("*Harrison*"), as lessor, entered into a lease with Cabot Oil & Gas Corp. ("*Cabot*") as lessee. The lease had a five-year

459. *See* Kopka v. Bell Tel. Co., 91 A.2d 232, 235 (Pa. 1952).

460. Stone v. Marshall Oil Co., 57 A. 183, 186 (Pa. 1904). "Confusion of goods" is a legal doctrine that provides an innocent party with the full amount of the profits of the goods as a remedy when a wrongdoer purposefully and fraudulently commingles fungible goods so that an accurate accounting cannot be made. *Id.*

461. *See id.*

primary term plus an option for a five-year extension. Approximately two and a half years into the primary term, Harrison brought suit against Cabot in the Federal District Court for the Middle District of Pennsylvania, seeking declaratory relief to invalidate the lease on the basis of a fraudulent inducement claim. Harrison claimed that Cabot, through an agent, had employed deception in convincing him to execute a lease providing for a bonus amount that was substantially less than what some of his neighbors would later receive. During the subsequent litigation, Cabot sought relief in the form of a tolling of the primary term during the course of litigation.[462] Cabot claimed that the litigation amounted to a repudiation of the lease by the lessor under Pennsylvania law and cited as further justification the idea that it was imprudent for an oil and gas operator to expend exploration and production capital on land under a clouded leasehold title.

In refusing to toll the lease's primary term, the district court relied primarily on the *Derrickheim Co. v. Brown*.[463] In *Derrickheim*, the Supreme Court of Pennsylvania held that the express terms of a lease should take a higher priority than an operator's decision to forego exploration or production as a result of title litigation. More specifically, the district court was not persuaded by Cabot's disquisition of the case law of other jurisdictions,[464] holding instead that "[u]ntil Pennsylvania courts say otherwise, this Court will not find that a party's filing of a lawsuit . . . amounts to a repudiation of a lease."[465]

The district court also relied on another Pennsylvania federal case holding that it was "bad law and even worse public policy" to deem similar situations as repudiation subject to equitable-extension.[466] The court felt that oil and gas lessees already hold greater bargaining power than the small landowners. On appeal, the Third Circuit, upon request from Cabot, queried the Supreme Court of Pennsylvania to resolve the issue via certified question.

On appeal, Cabot argued that due to the increasing use of fracing technology and the concomitant surge of oil and gas activity in decade prior, lessors to oil and gas leases with lower-than-market bonuses and royalties were increasingly using frivolous litigation in an attempt to wait out the

462. *Id.* Hence, once litigation was over, the amount of time litigation took would be tacked on to the end of the primary term. *Id.*

463. Derrickheim Co. v. Brown, 451 A.2d 477 (1982).

464. *Harrison*, 887 F. Supp. 2d; *see also* Muller v. Leyendecker, 697 S.W.2d 668, 672 (Tex. Ct. App. 1985); *see also* Greer v. Carter Oil Co., 25 N.E.2d 805, 810 (Ill. 1940).

465. *Harrison*, 887 F. Supp. 2d at 597.

466. *Id.* (citing Lauchle v. Keeton Group L.L.C., 768 F. Supp. 2d 757, 762 (D. Pa. 2011)).

primary terms of their current leases. The landowners wanted new leases with more favorable terms. Furthermore, Cabot argued that because horizontal drilling and hydraulic fracturing completions were so much more expensive than vertical drilling into conventional reservoirs, the court should reconsider the equitable balance between producers and landowners.

In addition to their arguments from the federal court, the Harrison's countered that oil and gas companies are still very capable of controlling the terms of their oil and gas leases and that such equitable rebalancing would detract from what little bargaining power allegedly unsophisticated landowners do have. If oil and gas producers feel that they are being harmed by frivolous title challenges, they can easily adjust their leases; adding the tolling provisions they now seek in court. Furthermore, Harrison, along with several amicus briefs, noted that oil and gas companies take significant multi-million dollar risk on an almost daily basis. Balancing prudent exploration and the possibility of challenges to title is simply a risk that companies should be accustomed to enduring.

In its analysis, the Supreme Court of Pennsylvania first cited state contract case law on anticipatory repudiation. Essentially, it found that the burden for showing anticipatory repudiation of a contract is extremely high, requiring "absolute and unequivocal refusal to perform"[467] and that the filing of a declaratory judgment action does not meet this burden. The Court also noted that the Pennsylvania Declaratory Judgment Act was designed to effectuate the policy of providing easy and efficient access to a determination of legal rights. To chill a landowner's desire to utilize this mechanism would be in direct contravention of a legislative edict.

In agreeing with the federal district court and holding that a challenge to title is not, in and of itself, a repudiation that warrants equitable-extension of the primary term, the Court refused to disturb the current power distribution between producers and landowners—especially in situations where the landowner sought only a declaration of his or her rights. Because the producers have the better bargaining power, their remedy is to add the tolling language into their leases.

L. Herder Spring Hunting Club v. Keller*, 93 A.3d 465 (Pa. Super. 2014).*

On May 9, 2014, the Superior Court of Pennsylvania vacated the decision of the Court of Common Pleas of Centre County regarding the lack

467. *Id.* (citing McClelland v. New Amsterdam Cas. Co., 185 A. 198, 200 (1936)).

of proper notice given to county authorities for the reservation of mineral rights from a 1935 tax sale, pursuant to the Act of March 28, 1806. The Court instead quieted title in the name of the claimant, the successor-in-interest to the purchaser of the captioned land in the tax sale, thus extinguishing the mineral estate. The decision marked the first time in over a century that the legality of "title washes" in Pennsylvania had been comprehensively reviewed and upheld by a court of appeals.[468] The elimination of the severed mineral estate during this process is known among Pennsylvanian practitioners as a "title wash." By failing to record the mineral reservation, the severed mineral estate was "washed out" and reunited with the surface estate by the act of the tax sale.[469]

In 1894, Harry and Anna Keller (collectively, the "*Kellers*") acquired a tract of "unseated"[470] real property in a tax sale. The real estate consisted of 460 acres known as the Eleanor Siddons Warrant (the "*captioned land*"). On June 20, 1899, the Kellers conveyed the surface rights of the captioned land by deed to Isaac Beck, Isaiah Beck, and James Fisher, reserving to themselves and their heirs and assigns all mineral rights. The deed was recorded on August 8, 1899.

For the next two decades, the surface of the captioned land regularly changed hands. In February 1910, the surface was sold to Arthur Baird. Thereafter, Baird sold the surface to Robert Jackson and Thomas Litz in August 1910. In 1922, Jackson and Litz conveyed the surface to Ralph Smith. Then, in November 1935, the Centre County Commissioners attained title to the surface through a Treasures Sale, which consisted of the Treasurer offering the captioned land for sale for unpaid real estate taxes. Because no bid reached the offered price, the Commissioners purchased the captioned land—which was still categorized as unseated. On June 3, 1941, the Commissioners sold the captioned land to Max Herr. Herr died intestate on February 2, 1944.

In 1959, Herder Spring Hunting Club ("*Herder*") was interested in purchasing the captioned land from Herr's widow. After conducting a title search, the reservation of mineral rights was disclosed to Herder. Herr's

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468. *See* Nathanial Holland, *Pennsylvania Title Washes Upheld*, STEPTOE & JOHNSON (June 1, 2014), http://www.steptoe-johnson.com/content/pennsylvania-title-washes-upheld (last visited Sep. 29, 2015).

469. *Id.*

470. *Keller*, 93 A.3d. Prior to 1961, Pennsylvania distinguished seated and unseated land. Unseated land was unoccupied and unimproved. Unseated land was unoccupied and unimproved whereas seated land contained permanent improvements as indicate a personal responsibility for taxes. *Id.*

widow conveyed the property to Herder on November 30, 1959. The deed included a clause that subjected the conveyance to all exceptions and reservations in the chain of title.

After an interval of shale containing natural gas was found on the captioned land, Herder filed a quiet title action. Herder contended that the 1935 Treasures Sale terminated the Kellers' 1899 reservation of mineral rights. Specifically, Herder claimed that the captioned land was assessed as unseated in the 1935 tax sale and that the sale effectively rejoined the mineral and surface rights because the Kellers failed to record their reservation, which was a requirement under the Act of March 28, 1806 (the "*Act of 1806*").

The trial court held that because the Keller's reservation of all mineral rights was recorded—and that Herder had actual notice of the reservation—the mineral rights belonged to the Kellers' heirs.[471] The trial court awarded fee simple in the mineral rights in the property to the Kellers.

On appeal, the Superior Court interpreted Section 1 of the Act of 1806.[472] Under the Act of 1806, if one acquired unseated land, that party was required to provide a statement that described the land to the county commissioners, "or the board for the assessment and revision of taxes, so that a proper tax assessment could be levied."[473] Failure to provide such notice resulted in an assessment "four times the amount of the tax to which such tract or tracts of land would have been otherwise liable." A later law, the Act of 1815, allowed the sale of unseated lands to satisfy tax obligations.

Since the Act of 1806 did not expressly cover the particular situation encountered here, however, the Court turned to case law from the time of the conveyances. Pursuant to *Hutchinson v. Kline*,[474] the Court noted that tax sales of surface estates designated as "unseated" also passed a severed mineral estate when the mineral estate owner had failed to give notice to the county commissioners to create a separate mineral assessment. If this notice is not given, then the tax assessment must be based on the property as a whole. The Court concluded that if a tract of unseated land was assessed as a whole, the *entire* property is subject to a tax sale.[475]

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471. *Id.* (The trial court also denied Appellee's adverse possession claim, which was not disputed by either party on appeal.).

472. 72 P.S. § 5020-409 (1993) (originally enacted as Act of March 28, 1806, P.L. 644).

473. *Keller*, 93 A.3d at 468-69.

474. Hutchinson v. Kline, 199 Pa. 564, 568-69 (Pa. 1901).

475. *Id.* at 469 (citing *F.H. Rockwell & Co. v. Warren Cty.*, 228 Pa. 430, 431-32 (1910)) ("[S]eated lands are assessed in the name of the owners while unseated lands are assessed by survey or warrant numbers, regardless of the owners whose names if used at all are only for the purpose of description.").

Applying this analysis, the Court noted that upon the severance of the captioned land in 1899, the Kellers did not inform the county commissioners about the severance of surface and mineral rights, and the captioned land continued to be taxed as a whole. Therefore, when the treasurer acquired the surface of the captioned land in 1935 due to unpaid real estate taxes, the mineral estate of the captioned land was also subsequently acquired by the commissioners.[476]

The Court concluded that Appellee heirs had two years from Herr's possession of title to inform the commissioner about their mineral rights. Because the heirs failed to make their claim known, Herder could rely on the deed, which did not include any reservation of mineral rights. Moreover, the Court noted that although the 1959 deed to Herder included a clause that subjected the captioned land to all exceptions and reservations, no valid exceptions or reservations existed in the chain of title of captioned land. The Court vacated the trial court's summary judgment order awarding mineral rights to the Kellers' heirs, and remanded to trial court to award the mineral rights to Herder.

M. Swords Creek Land P'ship v. Dollie Belcher*, 762 S.E.2d 570 (Va. 2014).*

On September 12, 2014, the Supreme Court of Virginia revisited the question of who owns the Coal Bed Methane ("*CBM*") per the terms of a deed that severed coal from the surface estate. The Court held that where the deed unambiguously conveyed only coal. The Court also held that the surface owner was not unjustly enriched when it entered into a CBM lease.

In 1887, the original grantor conveyed "all of the coal, in, upon and underlying" their 891.75 acres of land to Joseph I. Doran and W.A. Dick. The deed also conveyed the timber that "may be necessary to use to successfully and conveniently mine said coal,"[477] as well a surface easement to access the coal on this and other tracts. Through mesne conveyances starting from the grantor and grantee to the original conveyance, Dollie Belcher with others, (the "*Surface Owners*") and Swords Creek Land Partnership (the "*Coal Owner*"), respectively, came to acquire the contested interests.

476. *Id.* at 473 (Neither the Treasures Sale nor the 1941 deed mentioned any reservation of mineral rights).
477. *Id.*

In 1991 the Coal Owner signed a 10-year primary term natural gas lease that expressly included CBM, with Pocahontas Gas Partnership. Through mense assignments, this lease passed to CNX.[478] In 2011, the Surface Owners sued the Coal Owner to determine ownership. Considering the undisputed facts, the trial court ruled that the original conveyance concerned only the coal, necessary timber and access rights, and that CBM was a "distinct mineral estate."[479]

The Supreme Court of Virginia agreed. At the time of the severance, coal was only contemplated to include the actual solid substance used for fuel. The Court emphasized its previous reasoning in *Harrison-Wyatt LLC v. Ratliff* wherein the Court settled the question of CBM ownership a decade earlier in an action with almost identical facts.[480] The Court in *Harrison-Wyatt* held that CBM, although slightly attracted to coal seams, exists independent of coal while within the seams and is therefore a wholly distinct mineral estate. Furthermore, parties to these 100-year-old conveyances could not have known of the future value of CBM and therefore could not have intended to convey it along with the other minerals.

The Coal Owner tried to distinguish *Harrison–Wyatt,* as fracturing the coal seam in that case the was unnecessary as the natural gas had moved away from the seam. In rejecting this argument, the Court reasoned that because CBM is a separate mineral estate, its exact location should not dictate the outcome of the ownership.

In interpreting the deed in question, the Court found no ambiguity in the terms and therefore relied on the "four corners" approach[481] to ascertain the intent of the drafters. The Coal Owner attempted to convince the court that the deed was ambiguous because other provisions of the deed contained reference to "other things" and "and rights and privileges."[482] But in constructing the deed, the Court held that any references to "other things" are

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478. *Id. See* VA. CODE ANN. § 45.1-361.22 (1990) (stating that The Virginia Gas and Oil Act contains a provision that allows for payors, seeing an impending ownership conflict, to enter a pooling order and pay a 1/8 royalty into an escrow account pending the final outcome of the dispute. Since 1992, CNX availed itself of same and properly paid royalties into the escrow account. As such, they were not a party to this suit).

479. Swords Creek Land P'ship v. Belcher, 762 S.W.2d 570, 572 (Va. 2014) (citing the trial court opinion).

480. Harrison–Wyatt, LLC v. Ratliff, 593 S.E.2d 234, 238 (Va. 2004).

481. Pyramid Dev., LLC v. D & J Assocs., 553 S.E.2d 725, 728 (Va. 2001) ("When the language of a deed is clear, unambiguous, and explicit, a court interpreting it should look no further than the four corners of the instrument under review.").

482. *Swords Creek Land P'Ship*, 762 S.E.2d at 572–73.

limited to modifying the very specific coal, timber, and access rights contained in the granting clause.[483]

The Coal Owner also argued that the natural gas lease facilitated CBM production that unjustly enriched the Surface Owners. In dismissing this argument, the Court held that because the CBM belonged to the Surface Owners, no benefit could be conferred at the expense of the Coal Owner. The Coal Owner also argued that because it has an exclusive right to access to the coal seam, the Surface Owners could not have acquired the CBM without their permission. This point was moot, however, as it was the Coal Owner who allowed the operator onto the property through the lease. The Court could not be persuaded to require the Surface Owners to pay the Coal Owner for the operator's access to the CBM it acquired by the Coal Owner's lessee.

483. *Id.*