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Recorded Memoranda: Just As Good As The Whole Document?

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I. Introduction

Oil and gas lessees and others acquiring real property rights and interests understand the importance of the recording of their interests. Once the instrument under which one holds an interest has been filed for record, anyone subsequently acquiring an interest from the same grantor is statutorily deemed to have notice of the instrument and to have taken subject to it, to the extent of any conflict between the interests conveyed. Conversely, if one fails to file the instrument under which he has acquired his interest for record, he runs the risk that his grantor may lease or convey to another, who will be free of the prior instrument unless otherwise on notice of it.

It has become increasingly common in Texas in recent years for some acquiring real property interests, especially oil and gas leases but other types of interests as well, to obtain the grantor's or lessor's execution of a brief memorandum giving notice of the transaction but not all of its terms and provisions and to file the memorandum but not the lease or other instrument itself. This is often done for very good reasons, such as the desire of an oil and gas lessee not to make public the royalty or other lease terms it has been willing to accept. Some lessees seem practically to have adopted a policy, at least in some areas, of never recording their complete leases but always only a memorandum, regardless of terms.

A related practice is for an oil and gas lease, an assignment of an oil and gas leasehold interest, or other instrument to be made expressly subject to an antecedent or contemporaneous unrecorded agreement without disclosure of the provisions of the unrecorded instrument. The intention, as in the case of memoranda executed for recording purposes, is to place third parties on notice of the existence of the agreement that is referred to without actually filing it for record.

The purpose of this presentation is to consider whether the recordation of a memorandum of an oil and gas lease or other conveyance, or a reference to an unrecorded agreement within one that is recorded is always sufficient to protect the interests of the respective parties to the transaction. It will also include guidance for those wishing to provide notice of their transactions by way of memoranda and for their counterparties.

II. The Recording Statutes

Texas law authorizes the recording of any "instrument concerning real or personal property" that has been acknowledged or sworn to with a proper jurat. TEX. PROP. CODE ANN. §12.001(a) (West 2004). This has been broadly construed to allow not only deeds, oil and gas leases, and other conveyances to be recorded, but also such instruments as an affidavit of heirship, *Turrentine v. Lasane*, 389 S.W.2d 336 (Tex. Civ. App.—Waco 1965, no writ), and a joint venture agreement for the ownership, development and sale of residential lots. *Pearson v. Wicker*, 746 S.W.2d 322 (Tex. App.—Austin 1988, no writ). Once an instrument has been properly recorded in the county real property records, all persons are considered to have notice of the instrument. TEX. PROP. CODE ANN. §13.002 (West 2004). Thus, any purchaser of an interest in a tract of land is on notice of the contents and effect of recorded instruments in the chain of

title to the interest regardless of his actual knowledge. *Abercrombie v. Bright*, 271 S.W.2d 734 (Tex. Civ. App.—Eastland 1954, writ ref'd n.r.e.). Although the primary purpose of the recording statutes may be to protect innocent purchasers for value, they also protect those whose rights are disclosed by the records. *Wallace v. Hoyt*, 225 S.W. 425 (Tex. Civ. App.—Austin 1920, writ ref'd).

Unless an instrument has been properly filed for record, it is void as to a creditor or subsequent purchaser for valuable consideration without notice. TEX. PROP. CODE ANN. §13.001(a) (West 2004). The avoidance of this result is the obvious reason it is critically important for any grantee, including an oil and gas lessee, to ensure that its conveyance is filed for record as soon as possible after it is obtained. But an instrument is binding on a subsequent purchaser, notwithstanding that it remains unrecorded, if the subsequent purchaser does not pay valuable consideration or has notice of the instrument. TEX. PROP. CODE ANN. §13.001(b) (West 2004). If a purchaser has notice of the instrument otherwise than statutory constructive notice, he is unable to purchase free of any rights created under it.

"Actual" notice chargeable to a purchaser under the recording statutes is not synonymous with knowledge. *See Flack v. First National Bank*, 148 Tex. 495, 226 S.W.2d 628 (1950). It includes express information of a fact, to be sure, but in law the term is more comprehensive. In law whatever fairly puts a person on inquiry is sufficient notice if a reasonably diligent inquiry would disclose the facts. *Hexter v. Pratt*, 10 S.W. 692, 693 (Tex. Comm'n App. 1928, judgm't adopted). Where a purchaser possesses facts, such as a reference in a deed in his chain of title to an unrecorded instrument recited to contain a mineral reservation, that are sufficient to put an ordinary prudent purchaser on inquiry, that purchaser will be treated as if it had pursued the inquiry and ascertained the facts and will be denied the status of innocent purchaser. *Wessels v. Rio Bravo Oil Co.*, 250 S.W.2d 668 (Tex. Civ. App.—Eastland 1952, no writ).

III. Application of Statutes to Recorded Notice of Unrecorded Instruments

Two cornerstones are thus apparent when considering the topic at hand, the extent to which a notice or a reference in a recorded instrument to an unrecorded instrument places a purchaser on notice of its contents. First, purchasers are bound to search the records and are on notice of the existence of recorded deeds and other instruments executed by the grantor and the grantor's predecessors in title encumbering the property. *Leonard v. Benford Lumber Co.*, 110 Tex. 83, 216 S.W. 382 (1919); *King v. Haley*, 75 Tex. 163, 112 S.W. 1112 (1889). And purchasers are held not only to notice of the contents of those recorded instruments but also any information that prudent inquiry into known facts would have revealed. *Jenkins v. Adams*, 71 Tex. 1, 8 S.W. 603 (1888); *Martel v. Somers*, 26 Tex. 551, 560 (1863). *See* 5 Aloysius A. Leopold, *Land Titles and Title Examination* §28.13 (Tex. Practice Series 3d ed. 2005). It follows that a purchaser must therefore be on notice of the contents of unrecorded instruments whose existence is disclosed of record, and this is indeed well established Texas law.

The most prominent exposition of the rule that a recorded reference places a purchaser on notice of the contents of an unrecorded instrument is of course *Westland Oil Development Co. v. Gulf Oil Corp.*, 637 S.W.2d 903 (Tex. 1982), a case well known to all Texas lawyers whose practice involves any aspect of oil and gas titles. Although analysis of the ramifications of

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