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## **OIL, GAS & MINERAL CONVEYANCES:**

### **THE PERENNIAL PROBLEMS (AND HOW TO AVOID THEM)**

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## OIL, GAS, AND MINERAL CONVEYANCES

Oil, gas and mineral conveyances involve transfers of interests in real property and are therefore subject to the Statute of Frauds. Under that statute, conveyances of interests in the oil, gas and mineral estate must normally be in writing, a deed, containing an adequate description of the property. In general, deeds conveying interests in the oil, gas and mineral estate are subject to the same rules that govern other real property conveyances. Yet conveyances of these sub-surface interests create unique interpretative problems for title examiners. These problems have challenged courts for decades, producing legal opinions parties should heed when interpreting and drafting oil, gas and mineral deeds.<sup>1</sup> The surge in pro-

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<sup>1</sup> Because Texas courts have produced some of the most well-known, and notorious, opinions on these title issues, this paper focuses on those decisions, and then provides some general comparisons to approaches used in other jurisdictions. Unpublished opinions issued in civil cases prior to Jan. 1, 2003 have no precedential value but are still cited within this paper to provide additional case law on certain subjects. *See* Tex. R. App. P. 47.7 (noting the precedential value of opinions issued after 2003 regardless of designation).

duction from shale plays across the country ensures this trend will continue. This paper examines several perennial conveyancing problems, describes courts' responses to interpreting these problems, and suggests drafting techniques for avoiding them.<sup>2</sup>

## A. The Rules of Deed Interpretation

In addressing the interpretative problems posed by oil, gas and mineral conveyances, courts apply rules of interpretation, or construction, used for interpreting other documents, such as contracts and wills. However, because the issue is the interpretation of a conveyance of real property rather than the interpretation of a contract for the sale of personal property, the Uniform Commercial Code is not determinative.<sup>3</sup> Therefore, attorneys and jurists rely primarily on common law rules when interpreting conveyances of oil, gas and other minerals. Although variations exist from jurisdiction to jurisdiction, these rules are frequently set forth as a three-step process.

First, a court strives to ascertain the parties' intent by examining the language contained within the "four corners" of the document. If the language is not clear, in the next step in the interpretative process, courts will enlist a "catalogue of canons of construction."<sup>4</sup> Theoretically, these canons function as aids in determining intent, rather than as rules dictating a particular outcome. The list of canons began developing at common law and includes such directives as "construe the document against the drafter," "the law abhors forfeiture," and "typewritten or handwritten provisions control over printed form provisions."<sup>5</sup> Because the list of canons is lengthy and varied, advocates generally can produce canons which support their competing interpretations of the document.

If after applying these canons a court determines that the meaning is still unclear, the document may be labeled ambiguous.<sup>6</sup> The determination of ambiguity, however, is a question of law for the court. The ambiguity finding is significant for at least two reasons: First, it precludes the granting of a motion for summary judgment because the interpretation

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<sup>2</sup> Portions of this paper appear in Laura H. Burney, *Interpreting Mineral and Royalty Deeds: The Legacy of the One-Eighth Royalty and Other Stories*, 33 ST. MARY'S L.J. 1 (2001). This fundamentals paper focuses on deed interpretation issues frequently encountered by oil and gas title examiners. In the interest of time and space, this paper does not address the myriad issues title examiners face, such as tracing ownership, boundary determinations, community property and inheritance issues, or problems caused by concurrent ownership.

<sup>3</sup> The UCC does apply to contracts for the sale of produced oil and gas since these substances become personal property after severance.

<sup>4</sup> See Bruce Kramer, *The Sisyphean Task of Interpreting Mineral Deeds and Leases: An Encyclopedia of Canons of Construction*, 24 TEX. TECH. L. REV. 1 (1993).

<sup>5</sup> See Laura H. Burney, *The Regrettable Rebirth of the Two-Grant Doctrine in Texas Deed Construction*, 34 S. TEX. L. REV. 73, 76-77 (1993).

<sup>6</sup> See Kramer at 61-62; Mark K. Glasser & Keith A. Rowley, *On Parole: The Construction and Interpretation of Written Agreements and the Role of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657, 693 (1997).

of the instrument becomes a fact issue.<sup>7</sup> Second, the ambiguity determination permits the consideration of extrinsic evidence.<sup>8</sup>

## 1. Can Courts Consider Extrinsic Evidence in Interpreting Deeds?

In general, courts are consistent in permitting the consideration of extrinsic evidence once the document has been labeled ambiguous. However, they are frequently hesitant to consider such evidence prior to making that determination. Instead, many courts profess to be confined to the “plain meaning” of words found within “the four corners” of the document, even when determining whether the document is ambiguous as a matter of law. Although courts frequently fail to articulate reasons for excluding extrinsic evidence at this point in the interpretative process, that approach may stem from confusion about the role of the parol evidence rule in document interpretation.

The parol evidence rule is a rule of substantive contract law that prohibits courts from considering extrinsic evidence, oral or otherwise, which contradicts or varies the terms of an “integrated” document. Under this rule, then, the initial inquiry is whether the document is “integrated” and final, rather than incomplete. If the document is “integrated,” a question of law for the court, then evidence of prior or contemporaneous agreements is not admissible.<sup>9</sup> However, evidence that does not contradict the terms of the “integrated” agreement is admissible. Moreover, extrinsic evidence could also be admitted under the fraud exception to the parol evidence rule.<sup>10</sup>

However, strictly speaking, the parol evidence rule does not prevent a court from considering extrinsic evidence in the interpretative process. Professor Corbin explained the distinction as follows:

The ‘parol evidence rule’ is not, and does not purport to be, a rule of interpretation or a rule as to the admission of evidence for the purpose of interpretation. Even if a written document has been assented to as the complete and accurate integration of the terms of a contract, it must still be interpreted; and all of those factors that are of assistance in this process may be proved by oral testimony.<sup>11</sup>

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<sup>7</sup> See *Coker v. Coker*, 650 S.W.2d 391, 393 (Tex. 1983).

<sup>8</sup> A Mississippi Supreme Court decision articulated the steps in the interpretative process as follows: 1) “the court will attempt to ascertain intent by examining the language contained within the ‘four corners’ of the instrument in dispute”; 2) the use of applicable canons of contract construction; and 3) consideration of extrinsic or parol evidence. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 351–53 (Miss. 1990).

<sup>9</sup> For an excellent discussion of the parol evidence rule and rules of interpretation see Glasser and Rowley, *On Parole: The Construction and Interpretation of Written Agreements and the Rule of Extrinsic Evidence in Contract Litigation*, 49 BAYLOR L. REV. 657 (1997).

<sup>10</sup> See 2 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 816.03[6] (1998); Scott J. Burnham, *The Parol Evidence Rule: Don’t Be Afraid of the Dark*, 55 MONT. L. REV. 93, 133 (1994).

<sup>11</sup> 3 CORBIN ON CONTRACTS § 579 (1960). But see Eric A. Posner, *The Parol Evidence Rule, The Plain Meaning Rule, and The Principles of Contractual Interpretation*, 146 U. PA. L. REV. 533, 534 (1998). The author states the parol evidence rule as follows: “A court will refuse to use evidence of the parties’ prior negotiations in order to interpret a written contract unless the writing is (1) incomplete, (2) ambiguous, or (3) the product of fraud, mistake, or a similar bargaining defect.” In a footnote, the author also notes that “purists will object that I conflate the plain meaning rule, which I treat as exception two, and the parol evidence rule. As far as I can tell, nothing turns on this distinction, and my version avoids needless complexities. Because both the parol evidence rule and

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