UTCLE The University of Texas School of Law

OIL, GAS & MINERAL CONVEYANCES:

THE PERENNIAL PROBLEMS
(AND HOW TO AVOID THEM)

Presented:
FUNDAMENTALS OF OIL, GAS AND MINERAL LAW
March 28, 2019
Houston, Texas

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14 Tex. J. Oil Gas & Energy L. 1

Texas Journal of Oil, Gas, and Energy Law
January, 2019

Article
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THE TEXAS SUPREME COURT'S EVOLVING MINERAL-DEED JURISPRUDENCE IN THE SHALE ERA: THE IMPLICATIONS OF *WENSKE v. EALY*

***2** The twenty-first century oil and gas boom in the Lone Star State stimulated the industry and enriched Texas landowners.[1] However, the technologies credited with igniting this boom, hydraulic fracturing and horizontal drilling, could not prevent the historic boom-to-bust cycle.[2] Instead, the production unleashed from shale plays in Texas and other states created a world-wide glut, sinking oil prices from highs above $100 to a low of $26 per barrel.[3] Yet, ***3** thanks in part to plays in West Texas, "Shale 2.0" is underway.[4] The booms have blessed--and cursed-- Texas, leading to a variety of legal disputes.[5] Disputes that have plagued Texas courts for decades include those involving ownership rights in the mineral estate. In fact, Texas courts have produced a robust body of law regarding the interpretation of mineral and royalty deeds.[6]

This article addresses the Texas Supreme Court's recent contribution to that jurisprudence in *Wenske v. Ealy*.[7] *Wenske* addressed this narrow issue: who bears the burden of a pre-existing non-participating royalty interest (NPRI) in the chain of title when a warranty deed conveys a fractional share of the minerals to a grantee? The grantors argued that the burden passed exclusively to the grantees.[8] A five-justice majority of the Texas Supreme Court disagreed. Instead, the opinion held that the plain language of the deed required the grantors, who had expressly reserved a fractional share of the minerals, to share the burden of the prior NPRI reservation in proportion to their interest in the mineral estate.[9]

In an introduction, the opinion expresses this view of its interpretation of the *Wenske* deed:

> Doing so allows us to reinforce a trend in our mineral-deed jurisprudence. Over the past several decades, we have incrementally cast off rigid, mechanical rules of deed construction. We have warned against quick resort to these default or arbitrary rules. And we do so again today by reaffirming the paramount importance of ascertaining and effectuating the parties' intent. We determine that intent by conducting a careful and detailed examination of a deed in its entirety, rather than applying some default rule that appears nowhere in the deed's text.[10]

This article analyzes *Wenske* and its implications for Texas's mineral-deed jurisprudence. Part I provides an overview of the dispute and the court decisions it generated, including a discussion of two problematic Texas ***4** Supreme Court opinions that it addresses, *Bass v. Harper*[11] and *Pich v. Lankford*.[12] Part II reviews the Texas Supreme Court's majority opinion in *Wenske* and the cases comprising and contradicting "the trend" it follows and the "default rules" the court has "cast off."[13] This article concludes that, consistent with the trend it identifies, the majority opinion provides guidelines that promote title stability without compromising the goal in all document interpretation cases: ascertaining the parties' intent.[14] Moreover, unlike the dissent, analyzed in Part III, the majority opinion has effectively clarified case law and the role of standard deed form clauses.[15] This article also discusses other issues that the Texas Supreme Court should address as it continues to develop Texas's mineral-deed jurisprudence in the next chapter of the Shale Era.[16]

I. OVERVIEW: THE *WENSKE* DISPUTE AND THE COURTS' OPINIONS

The *Wenske* dispute involved a 2003 warranty deed in which the Wenskes conveyed fifty-five acres in Lavaca County, Texas to the Ealys.[17] The deed's granting clause conveyed all the described acreage to the Ealys, but a subsequent clause expressly reserved "For Grantor and Grantor's heirs, successors, and assigns forever ... an undivided 3/8ths of all oil, gas, and other minerals ... from the Property."[18] Under a separate heading, "Exceptions to Conveyance and Warranty," the deed referenced prior interests owned by third parties created by reservation in a 1988 deed, a 1/4th floating non-participating royalty interest.[19] Following the reservation and exception clauses, the deed ***5** contained a "subject to" clause, the focus of the Wenskes' deed interpretation argument: "Grantor, for the Consideration and *subject to* the Reservations from Conveyance and the Exceptions to Conveyance and Warranty, grants, sells, and conveys to Grantee the Properly ...." (emphasis added).[20]

The Wenskes and Ealys agreed that the deed had created the following interests in the fifty-five acres: the Ealys owned all of the surface and 5/8ths of the mineral estate, while the Wenskes retained 3/8ths, meaning, the Wenskes and Ealys were cotenants in the mineral estate.[21] As cotenants, both parties had the right to execute oil and gas leases[22] and both did so in 2011.[23] In 2013, the Wenskes filed a petition for declaratory judgment asserting their mineral interest was free from the burden of the 1/4th NPRI reserved in 1988 and referenced in the 2003 deed.[24] However, the trial court disagreed and granted the Ealys' cross-motion for summary judgment.[25] In that motion, the Ealys argued that the 2003 deed required the mineral cotenants to bear the burden of the prior NPRI in proportion to their interests.[26]

A. Deed Language in the Court of Appeals: "Subject To" and "Exception" Clauses did not "Unburden" Grantors' Retained Mineral Interest from the Prior NPRI

In 2016, the court of appeals affirmed the trial court's judgment.[27] In reaching that conclusion, the appellate court addressed the Wenskes' deed interpretation arguments and their view that the trial court's ruling contradicted *Bass v. Harper*. Ultimately, the court of appeals concluded that *Bass* was not controlling, and found no support in the deed's language for the Wenskes' position.[28] Instead, the appellate court, like the trial court, found the deed's ***6** language required the parties to bear the burden of the NPRI in proportion to their fractional interests in the mineral estate.[29]

The court of appeals' interpretation of the deed's clauses incorporated reviews of the terms of the 1988 deed reserving the NPRI, and of basic property law principles. First, the court explained that, under the terms of the 1988 reservation, the NPRI owners were entitled to share in the proceeds from production from the "entire mineral estate."[30] Therefore, had the Wenskes leased before conveying to the Ealys, their entire mineral estate would have been burdened by the NPRI.[31] It follows, that by retaining part of the mineral estate in a subsequent conveyance, the Wenskes retained their share of the burden.

Additionally, the opinion recites basic principles of conveying that have been recognized by the Texas Supreme Court: "a deed will convey every interest held by the grantor except that which is clearly reserved or excepted."[32] In support of that proposition, the appellate court cited *Day & Co. v. Texland Petroleum*,[33] a 1990 Texas Supreme Court case that endorsed viewing a warranty deed as passing the "greatest possible estate" to the grantee.[34] Contradicting the Wenskes' view, "the

greatest possible estate" would be one unburdened, rather than solely burdened, by pre-existing NPRIs. Recognizing that point, the court of appeals searched the deed's language for terms supporting the Wenskes' view. Instead, the appellate court concluded that, "we disagree with [the Wenskes] that they could be unburdened by the NPRI simply by stating in the 2003 Deed that they conveyed the property to the Ealys 'subject to' the exception without even mentioning anything about royalties" or that the burden of the NPRI "would be paid entirely by the Ealys."[35]

B. Case Law in the Court of Appeals: Bass v. Harper Dismissed but a "Default" Rule from Pich v. Lankford Endorsed

Throughout their briefing, the Wenskes claimed that a 1969 Texas Supreme Court case, *Bass v. Harper,* instructed that a "subject to" clause operates to place the burden of a prior NPRI solely on a grantee.[36] Yet, the court of appeals distinguished *Bass* because it dealt with a different title issue-- ***7** fractional interests in the mineral estate--and because it "[said] nothing" about the prior-NPRI burden issue.[37] Instead, the court of appeals pointed to a 1957 Texas Supreme Court case, *Pich v. Lankford,* and viewed that case as support for a "default" rule requiring mineral estate cotenants to share the burden of a prior NPRI in proportion to their interests.[38] The Texas Supreme Court's majority opinion in *Wenske,* however, criticized the appellate court for applying a "default rule" to the Wenske deed.[39] Regarding *Bass,* the *Wenske* majority not only agreed that it did not control, but dismissed it as out of step with Texas's "evolving mineral-deed-construction jurisprudence."[40] On the other hand, the *Wenske* dissent defended the precedential value of *Bass* and *Pich*.[41] To assess these varying opinions, *Bass* and *Pich* are analyzed below. This analysis supports the *Wenske* majority opinion's conclusion to limit the precedential value of these two problematic opinions.

1. *Bass v. Harper*: An Example of "Perennial Problems" with Oil and Gas Titles

The contradictory views espoused by the court of appeals, the majority, and dissenting opinions in *Wenske* portend the problems with *Bass v. Harper*. The *Bass* deeds, and the Texas Supreme Court's opinion in *Bass,* invoke confusing labels and expressions of fractional interests created by factors that writers have explained and the Texas Supreme Court has acknowledged: The "estate misconception" and "the legacy of the 1/8th landowner's royalty." The once-common 1/8th landowner's lease royalty caused confusion about the estates owned by landowners, which affected drafting.[42] For example, an owner of an undivided one-half interest in the mineral estate, who as a matter of law would receive one-half of the once-common 1/8th lease royalty, would mistakenly express her interest as "one-half of 1/8th royalty" or as a 1/16th mineral interest.[43]

***8** In *Bass,* the Texas Supreme Court, as described below, falls prey to these problems. However, the *Wenske* appellate court noted that the Bass deeds contained classic terms used to create fractional interests in the mineral estate.[44] Specifically, Mr. Bass owned 8/14ths of the mineral estate under a ninety-acre tract, while the other 6/14ths had been reserved earlier by a third party.[45] Bass executed a warranty deed granting an undivided one-half of his interest in the mineral estate "subject to" the previously reserved 6/14ths mineral interest, to the Millers.[46] Because of other conveyances, the Bass-to-Miller deed defined Ms. Harper's interest.[47] Once the land was leased, an oil company concluded that Ms. Harper owned a 2/7ths interest (or one-half of Bass's 8/14ths) and credited her with that fractional share of the 1/8th lease royalty.[48] Disagreeing with the oil company, Bass's argument as described by the trial court was that the "subject to" clause in his deed to Miller reserved 7/14ths in Bass and conveyed only 1/14th to Miller.[49] Both the trial court and the court of appeals rejected this argument and ruled in favor of Ms. Harper.

The appellate court in *Bass,* like the appellate court in *Wenske,* invoked basic rules of conveying approved by the Texas Supreme Court: a warranty deed "conveys the greatest estate possible," and "reservations must be made by clear language."[50] That court of appeals in *Bass* also agreed that Bass's deed "did not expressly reserve any fixed amount of royalty interest in the grantor" and that the "subject to" clause merely served to protect Bass from breaching his warranty of title.[51] Still reflecting effects of the "estate misconception," however, the court of appeals described Ms. Harper's interest as "2/7ths of the royalty interest," rather than as a 2/7ths mineral interest that would entitle her to that fractional share of the 1/8th landowner's lease royalty.[52]

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First appeared as part of the conference materials for the
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