Title: IMPORTANT NEW STUFF YOU NEED TO KNOW ABOUT KANSAS OIL AND GAS LAW

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Section 1

Important New Stuff You Need to Know
About Kansas Oil and Gas Law

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1. Lessee MAW drilled coalbed methane wells and paid shut-in royalty to its lessors.
   a. Apparently at the time the shut-in royalty was paid dewatering operations on the wells had not commenced.
   b. The lessors sought to quiet title against MAW asserting its oil and gas leases had terminated because its wells were not capable of producing in paying quantities, and therefore could not rely upon the shut-in royalty clause.
   c. The trial court granted summary judgment to the lessors. MAW appealed.
   d. Supreme court reverses and remands to develop and evaluate the facts surrounding the wells in light of its opinion.

2. The relevant lease language:

   “2. This is a PAID-UP LEASE and shall remain in force and effect for a term of six (6) months (‘Primary Term’) from this date and as long thereafter as gas or its constituent products or other hydrocarbons are produced from said land, . . . or as long as LESSEE is conducting operations on said land . . . . If, at the expiration of the Primary Term, gas is not being produced from the premises . . . , but LESSEE is engaged in drilling, reworking or dewatering operations thereon, then this Lease shall continue in full force and effect as long as operations are being continuously prosecuted.”
“4. If, at any time, while there is a gas well or wells on the above land . . . , and such well or wells are shut in, and if this lease is not continued in force by some other provisions hereof or if a well has been completed and dewatering operations have commenced, then it shall, nevertheless, continue in force as long as said well or wells are shut in and it shall be considered that gas is being produced from the leased premises in paying quantities within the meaning of this lease by the LESSEE paying or tendering to LESSOR annually, in advance a substitute or shut-in gas royalty. . . .”

3. Just looking at the lease language for a moment:

a. First, the habendum clause can be satisfied by “conducting operations” or by “dewatering operations.”

b. The shut-in royalty clause can be satisfied with a gas well, that is shut in, and payment of shut-in royalty.

c. Do not need to pay shut-in royalty if “a well has been completed and dewatering operations have commenced.” (This is obvious from the habendum clause which equates “dewatering operations” with production and other events that will maintain the lease beyond its primary term.)

d. Note: Does this mean you can have a shut-in well that has not been completed and when dewatering operations have not yet commenced?

(1) That would be a logical conclusion from the express statement of what will, in any event, be considered as producing in paying quantities.

(2) It also fits the common sequence of events in the development of coalbed methane wells.

(3) This lease has been modified to try and account for the vagaries of coalbed methane development — unfortunately, most modified leases encountered in Kansas do not address all the vagaries.

(4) These partially modified leases leave us with some interesting interpretive issues as we seek to fit the unique physical facts of coalbed methane development into leases that were originally drafted, to a large extent, with conventional oil and gas development in mind.
(5) The court, however, makes it clear: "dewatering operations" were "not an indispensable step before the shut-in royalty clauses could come into play."

(6) So the question becomes, what steps, leading up to "dewatering operations," will allow the well to qualify for shut-in status?

(7) This gets to the core issue, when is a well "completed" ("capable") for purposes of a shut-in royalty clause?

e. An initial question would be, in the context of coalbed methane development, since the lease does not expressly require that it be "capable" of producing, is it appropriate – in this lease, under these circumstances – to automatically apply non-coalbed methane oil and gas law precedent (which implies a capability requirement) to the situation?

f. The court, quoting Judge Richard Greene's statements in two other recent shut-in royalty cases, began its analysis with the following cautionary statement:

"[O]il and gas law is not so much a unique body of law as it is a specialized application of contract law. The rights and obligations of those operating in the Kansas oil patch are governed by the terms and conditions of specialized contracts, and each dispute arising in this context can and should usually be resolved by the construction and application of such contracts."


g. Had the court been completely true to its contract-based analysis, we probably would not have had the benefit of the broader-based pronouncements contained in its opinion.

(1) The court deals with the "capability" issue by mitigating the "matter-of-law" requirement and instead adopting a "matter-of-fact" approach.

(2) The court's opinion should, therefore, be equally applicable to the frequently encountered lease clauses which expressly
state the shut-in well must be “capable” of producing.

4. As an aside: “capable” is one of those nebulous terms like “commence” in the commence-to-drill-a-well context.
   a. Would the Supreme Court be willing to give an equally accommodating interpretation to the commencement clause? Interestingly we don’t have a supreme court case on this issue, and the court of appeals’ approach in the Hall case is, I think, is open to legitimate debate.
   b. The practical considerations are the same: the well has already been drilled and you are trying to evaluate, in effect, the good faith of the lessee at the time they took the action. Keep that in mind as we examine the facts of this case.

5. Trial Court: Granted summary judgment quieting title in the lessor/landowners finding the leases could not be maintained under the shut-in royalty clause.
   a. The trial court’s holding was based upon the fact there had been no production from the wells, and therefore no gas marketed. Apparently the wells had not been dewatered, and no pipeline had been constructed to access a gathering system.
   b. Because of this state of affairs, the trial court found the wells were not capable of producing gas in paying quantities – because a dewatering system, pipelines to a gathering system, and a gathering system were “mechanical or engineering improvements” that were necessary before gas could be produced.
   c. The trial court relied upon a 5th Circuit case that equated a shut-in well to “the closing of the [valves]” which suggests that the well must be capable of producing when the valves are opened.
   d. The judge phrased the issue as: “Does the word ‘capable’ within the phrase ‘capable of producing in paying quantities’ require that a well be capable of production without any additional equipment?”

   (1) Relying on Texas law, the court held the wells here were not capable because it would require additional equipment (dewatering and gathering, etc.) to produce the wells.
This is what some have called the “flip-a-switch” test.

(a) If you can flip a switch, and the well starts producing, it is capable of producing.

(b) The only problem with this is that in almost every case some sort of remedial activity will have to take place to put a well back on production that has not been producing.

The case ended up in the Supreme Court after it was transferred from the Court of Appeals.

a. Procedural context: was summary judgment proper? No.

b. The case is remanded to the trial court for further proceedings in line with the court’s analysis.

The court notes that since the parties did not define “shut-in” in their lease, the court must define it applying “case law.”

a. Should the court be so quick to turn to case law before it exhausts the interpretive opportunities under the lease?

b. Other terms in the lease, surrounding circumstances, was it “ambiguous” to allow extrinsic evidence of intent, etc.

Court analyzes case law noting that “capable” of producing does not mean it can, in fact, produce.

a. Cases where there is no pipeline connection.

b. Cases where there is “no” market.

c. Cases where there is a crappy market. See comments about Tucker below.

Court rejects any sort of bright-line test for when a well qualifies as a shut-in well (absent specific lease language) by being sufficiently complete to be deemed capable of producing.

a. Important that the court declines “lessors’ invitation to adopt a rigid legal definition of shut-in entirely dependent upon whether
dewatering has begun or upon whether equipment or repairs are still needed."

b. The court continues, noting:

"[F]actors to be considered by the fact finder in determining whether a well is physically complete and capable of producing in paying quantities, i.e., shut-in, are those that affect the properties and potential of the well itself, rather than the likely success of any processing or transport of product that remains to be attempted or accomplished."

10. It is an issue of fact, appropriate for expert testimony, to determine "whether the subject wells were physically complete and capable of producing in paying quantities."

11. COMMENT: The court deals a well-deserved blow to the holding in Tucker v. Hugoton Energy Corporation, 855 P.2d 929 (Kan. 1993), which held that if a market, any market ("limited" market), is available for gas from the wells at issue, the shut-in royalty clause cannot be relied upon.

a. The court seems to suggest this is more of an implied covenant to market issue and not a shut-in well, capable of production, issue that would determine whether the lease was maintained under the shut-in royalty clause.

b. As the court in MAW notes:

"Although Tucker asserts that the total absence of a market for natural gas is a prerequisite to classify a well as shut-in and thus bring into play a shut-in royalty clause, this assertion appears to arise out of an overinterpretation of Pray and insufficient attention to the subject lessees' language. . . . In other words, Pray did not make the absence of a market a part of Kansas' definition of 'shut-in.'"

12. Although the court appropriately divorces compliance with the shut-in royalty clause from the implied covenant to market, this does not mean that factual issues of prudent operation and good faith are not relevant.

a. To determine whether the wells are in such a physical state as to be considered "capable" of producing and therefore "shut-in" wells under the clause, the court will have to evaluate the factual situation.
b. Evaluation of the facts may include whether MAW was acting in a prudent manner, and in good faith, when it didn’t just walk away from the holes it had drilled into the ground.

c. Instead, did MAW have sufficient information, as a prudent operator, to justify it in good faith going forward with dewatering operations and the other acts necessary to ultimately market gas from the leased areas?

d. Or, was it merely trying to hold acreage, by paying shut-in royalty, when there was no reasonable basis to believe a “gas well” in fact exists that can be “shut-in.”

e. The determination may be both objective and subjective: would a prudent operator (objective), and the lessee, in good faith (subjective), have thought the well had been completed to the point where it would, in fact, be brought into production, in due course?

13. In situations where you do not have actual production and marketing there is always a lack of certainty whether the well will, in fact, ultimately produce in paying quantities.

a. It may depend upon the terms of a gas contract that can be obtained in the future.

b. It may depend upon how the reservoir performs once the face of the coalseam is dewatered and actual gas production potentials are known.

c. In the first case courts have relied upon the lessee’s good faith, and reasonable belief the well will ultimately gain a market and produce in paying quantities.

d. It appears the court in MAW is allowing for a similar form of deference to lessee judgment when it can be shown to have some basis in reason (objective, prudent operator) and is undertaken in good faith by the lessee (subjective).

e. Keep in mind what the lessor is seeking to do in these cases: take a potentially producing lease and well away from the lessee.

(1) In these types of cases the lessor should have to carry the burden of showing that no reasonable person would believe,
based upon the information available, the lessee reasonably anticipated a productive well; and

(2) The lessor should be able to demonstrate the lessee's position is merely a sham to hold acreage that has not in any way been proven productive through the lessee's drilling activities on the leased land.


1. Lessee, Trivestco, shut in a gas well when its gas purchaser ceased making payments for gas and went into bankruptcy. The well was shut in for 2½ years during which no shut-in payments were tendered nor other action taken to remedy the lack of production.

a. Landowner Welsch demanded a release. Parties ended up in court with Welsch asserting the lease terminated under the habendum clause for failure to produce.

b. The trial court held it would be unfair to have Trivestco lose its lease. Trivestco was ordered to pay Welsch for unpaid shut-in royalty, alternatively the cessation in production was a temporary cessation and also protected by the force majeure clause. So—that would mean no shut-in royalty would be due?

c. Court of appeals reverses holding the lease terminated for non-payment of shut-in royalty and neither the cessation clause nor the force majeure clause apply.

2. Habendum clause: "term of three (3) years from this date (called the 'primary term') and as long thereafter as oil, liquid hydrocarbons, gas or other respective constituent products, or any of them, is produced from said land or land with which said land is pooled."

3. Shut-in Royalty Clause: "at any time either before or after the expiration of the primary term of this lease, if there is a gas well or wells on the above land . . . and such well or wells are shut in before or after production therefrom, lessee . . . may pay or tender annually at the end of each yearly period during which such gas well or gas wells are shut in, as substitute gas royalty, a sum equal to the amount of delay rentals provided for in this lease . . . and if such payments or tenders are made it shall be considered under all provisions of this lease that gas is being produced from the leased premises in paying
4. There was a gas well, the gas well was shut in, but lessee failed to make shut-in royalty payments.

   a. Could the lessee be sued for failure to make the payments? No, they were optional and nothing indicated the option had been exercised.

   b. What if the lessee really wanted to make the payments, but failed to do so?

   c. Classic condition vs. covenant analysis.

      (1) The language “may pay” and “if” the payment is made the lease will continue.

      (2) No obligation to pay, and failure to pay does not result in the conclusion, for habendum clause purposes, that gas is being produced in paying quantities.

      (3) This is a condition, not a covenant.

   d. No obligation to pay, no payment, no resulting satisfaction of the habendum clause, lease terminates for lack of production.

5. **Cessation Clause:** “If, . . . after discovery of oil, liquid hydrocarbons, gas or their respective constituent products, or any of them, the production thereof should cease from any cause, this lease shall not terminate if lessee commences reworking or additional drilling operations within sixty (60) days thereafter. . . .”

   a. Court holds lessee cannot rely upon the temporary cessation doctrine because the parties’ rights in the event of a cessation “from any cause” are addressed by the cessation clause.

   b. No action taken within the 60-day time frame to commence “reworking or additional drilling.”

   c. **Note:** if, as the court holds, the cessation clause replaces the temporary cessation doctrine, then the term “reworking” will need to be interpreted broadly.

      (1) Otherwise, you could have cessations caused by events that
do not require (or permit) additional drilling to solve but could extend beyond the 60-day grace period.

(2) The court seems to assume that the only thing you can do within the 60-day time frame is "reworking" or "additional drilling."

(3) So, does this mean that something that causes a cessation that does not require "reworking" or "additional drilling," such as full oil tanks and no available crude oil purchaser, means the lease terminates?

(4) Or, does it mean that you must respond, within 60 days, to fix the problem – even though it may not require commencement of "reworking or additional drilling operations"?

(5) The court’s interpretation, excluding any temporary cessation doctrine considerations, means the full universe of events that can interrupt production (event those not technically within the scope of "reworking" or "additional drilling"), must somehow be accounted for.

(6) One way to do it is give the term "reworking" the broadest possible definition such as: anything a lessee would do to respond to a cessation of production from a lease.

6. Force Majeure Clause: "Lessee shall not be liable for delays or defaults in its performance of any agreement or covenant hereunder due to force majeure. The term 'force majeure' as employed herein shall mean: any act of God . . . ; exhaustion or unavailability or delays in delivery of any product, labor, service, or material."

a. The court holds this clause did not apply because nothing prevented the lessee from paying the shut-in royalty.

b. This assumes the force majeure clause cannot be an independent basis for excusing performance. What if this were an "oil" well where the option to pay shut-in royalty does not exist?

c. I think the court perhaps misses the more fundamental analysis to reject the lessee’s force majeure claims: the clause only applies to covenants – not conditions. The court needs to apply the same covenant/condition analysis to this clause that it applies to the shut-in
royalty clause.


1. Lessee completed a gas well that was shut in, “purportedly waiting for a connection to a pipeline.” No shut in royalties were paid. Lessor’s sought cancellation of the lease which was granted by summary judgment by the trial court for failing to pay shut in royalties.

2. The shut-in clause states:

   “Where Gas from a well capable of producing Gas (or from a well in which dewatering operations have commenced), is not sold or used after the expiration of the Primary Term, Lessee shall pay or tender as royalty to Lessor... One Dollar per year per net mineral acre, such payment or tender to be made on or before the anniversary date of this Lease next ensuing after the expiration of 90 days from the date such well is shut in or dewatering operations are being conducted.”

3. The trial court treated payment of the shut in payment as a condition. The court of appeals holds it is a covenant. Therefore, non-payment gives rise to an obligation to pay, not a condition to the continuing validity of the lease.

4. The court notes an interesting problem for the trial court to address on remand: the shut in clause does not state that payment of the shut in will be a substitute for production under the habendum clause.

5. The habendum clause states:

   “[T]his Lease shall remain in force for a term of five (5) years from this date (’Primary Term’) and as long thereafter as oil or gas of whatsoever nature or kind is produced from the Premises or on acreage pooled or unitized therewith, or operations are continued as hereinafter provided. If, at the expiration of the Primary Term, oil or gas is not being produced from the Premises or on acreage pooled or unitized therewith but Lessee is then engaged in drilling, reworking or dewatering operations thereon, then this Lease shall continue in force so long as such operations are being continuously prosecuted...”
6. Note that “dewatering operations” alone will perpetuate the lease under the habendum clause – regardless of what the shut in royalty clause says.

   a. Therefore, the shut in clause merely imposes a payment obligation when dewatering operations are taking place – there is no need to tie the shut in clause to the habendum clause for dewatering – because dewatering is an event that extends the lease under the habendum clause.

   b. That is not the case when the well is “shut in” for lack of a market (or some reason other than dewatering operations).

7. The court suggests two possible solutions:

   a. “Examining the history and purpose of such clauses, however, one could argue that the required modification of the habendum clause by the shut-in royalty clause should be inferred.”

      (1) Relevant evidence concerning problems associated with gas wells and the use of shut-in royalty clauses would assist a court in resolving this interpretive issue.

      (2) Surrounding circumstances evidence could assist a court in deciding that one party’s interpretation is more likely what a reasonable person would have intended.

   b. The other option, is: apply the rule that “ambiguities should be construed in favor of lessor and against lessee . . . .”

      (1) However, this is the least desirable rule of construction that can be applied only after the lease is found to be “ambiguous” and the court considers all other forms of evidence to try and resolve the ambiguity – in accordance with the intent of the parties.

      (2) The “construe against the lessee” rule of construction should only be used after all other interpretive aids have been applied but fail to offer sufficient guidance to resolve the ambiguity.

   c. A third consideration: the lessee has drilled a well and proven the property to be productive. Cancellation of the lease will result in loss of the well.

1. The Palmers, in 1996, entered into an oil and gas lease with a primary term that expired in 1998. The shut-in royalty clause of the lease had been stricken from the lease form. The lease contained the following minimum royalty clause:

   “Lessee [Lessor?] shall receive a minimum royalty of $1,000.00 beginning at the end of the second year, either through actual production or by a [sic] paying the difference of actual royalty paid and the amount due by a payment within 30 days of the annual anniversary date of this lease.”

2. Although lessee drilled one “gas well” on the leased land, it was apparently a dry hole and never produced any oil or gas.

   a. However, during every year from 1998 through 2005 the Palmers were paid, and accepted, $1,000 by the lessee, presumably under the minimum royalty clause.

   b. In 2006 the Palmers signed a “ratification” of the lease, without being paid anything to do so.

   c. A few months later the Palmers made demand on the lessee to release the lease.

3. There was nothing in the lease that would suggest payment of minimum royalty would relieve the lessee of the basic requirement to have production in paying quantities under the habendum clause to extend the lease.

   a. The minimum royalty clause assumes there is production in paying quantities – but if annual royalty revenues do not equal $1,000, the lessee will be obligated to pay the difference.

   b. Minimum royalty is designed to generate for the lessor a minimum income and does not alter the basic production requirements imposed by the habendum clause.

4. The lessee asserted equitable estoppel as a defense, relying upon the lessor’s acceptance of the $1,000 payments from 1998 through 2005.

   a. The court discusses situations where there is production from a lease,
the lease terminates, and the lessor continues to accept its royalty share of production. In those cases there is no “benefit” to the lessor because they would be entitled to all the production from the well under the terminated lease – not merely the royalty share that was paid and accepted.

b. In this case there was no production so the partial payment of production revenue analysis does not fit the facts. The court nevertheless concludes the lessor did not receive a benefit because it might have been able to lease its property for more than the $1,000.

c. This analysis is weak, considering the land had been condemned by a dry hole – $1,000 may have been a good deal from 1998 through 2005.

d. Does the court really need to address this at all? At most, the only reasonable assumption of a lessee making the $1,000 payment is that it might extend the lease for one year. When the lessee sought a ratification in 2006, it would appear any reliance-based estoppel related solely to pre-2006 time frames. Also, the mere seeking of a ratification might suggest the lessee was not willing to rely upon the lessor’s acceptance of the $1,000 payments.

5. The ratification was not supported by consideration.

a. The lessee failed to pay anything for the ratification. Apparently it had paid other landowners up to $10,000 for a lease ratification on nearby lands.

b. At the time the ratification was sought, the parties had no lease and the lessee was offering nothing to, in effect, acquire a lease. This is a good case for first-year law students studying contracts – you need some sort of consideration to support the Palmers’ ratification.

c. The trial court also found that the Palmers lacked capacity to enter into the contract and the terms of the contract were unconscionable. The court of appeals rejects these findings because there was no evidence to show the mental capacity of the Palmers at the time they entered the ratification and no evaluation of the conscionability of the contract at the time it was entered.

6. The plaintiffs followed K.S.A. § 55-202 in making their demand for a release and therefore qualified for recovery of their attorney fees.
a. Awarding attorney fees is discretionary with the trial court once it is determined the statute has been followed to set up entitlement to an attorney fee award.

b. Here the court found the trial court properly exercised its discretion to award attorney fees but failed to go through the eight-factor analysis in Supreme Court Rule 1.5(a) to determine what would be a reasonable fee.

c. The Palmers requested attorney fees of $36,181.35; the court awarded $18,000, without indicating how the $18,000 was arrived at. The court remands the case so the trial court can fully evaluate what is a reasonable fee.

d. **NOTE:** I wonder if the trial court was exercising its discretion to award fees, but only some fees? Since the decision to award any fee is discretionary with the court, should it not be able to exercise that discretion in a metered way based upon the merits of the lessee's defense?

(1) It would appear that discretion to award 100% or 0% of the requested attorney fees – presumably based upon the equities of the situation – would allow the court to justifiably award 50%.

(2) The court of appeals’ remand does not necessarily limit the trial court’s ability to award 50% of the requested fees, but the trial court must explain how it arrived at that figure.

(3) The process would be as follows: fee request is determined proper under K.S.A. § 55-202, court considers the eight factors to support the amount requested, *then* the court applies the equities of the case to determine whether all, some, or none of the requested fees will be awarded.

1. The oil and gas lease provided:

   "Lessee covenants and agrees:

   . . . .

   (h) To drill three wells within 180 days of the date of this lease and said wells shall be in production within 180 days of the drilling date provided that: Lessee has evidence of commercial quantities of oil or gas available, all required rights-of-way are obtained in a timely manner, and Lessee is not prevented from achieving production status due to circumstances beyond Lessee's control."

2. Lessee did not complete the third well until the 182nd day and production from the gas wells was delayed due to problems with accessing a gathering line.

3. Nothing to indicate that a failure to drill and produce from the wells within 180 days was anything other than a covenant.

   a. Arguably, the 2-day delay may not have even been a material breach. But in any event the court finds there was no basis, under the facts, to justify the drastic remedy of cancellation that would result in a forfeiture by the lessee.

   b. The failure to have the two gas wells on production within 180 days came within the express excuse provision on rights-of-way. Court also finds Lessee was not required to seek condemnation to obtain a right-of-way.


1. Mobil Oil Corporation ("Mobil") was sued for "the purported improper deduction of expenses from the payment of royalties to lessors."

2. The plaintiffs sought to certify a class action for all royalty owners owning interests under oil and gas leases with Mobil covering gas produced from designated formations within the areal confines of the Kansas Hugoton Gas Field and which is marketed by Mobil through two gathering systems connected to designated gas processing facilities.
a. The class encompassed approximately 2000 oil and gas leases and more than 5000 potential class members.

b. The plaintiffs contended, and the district court agreed, the class could be properly certified because “questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.”

3. Mobil appealed the district court’s certification of the class asserting abuse of discretion in not properly ruling on two major issues raised by Mobil that impact whether common issues predominate over individual issues.

a. **Choice-of-law issue**: that if the court applied the proper choice of law standard, *lex loci contractus*, then it would have to inquire how each oil and gas lease was formed and, in many cases, consider the laws of other jurisdictions to resolve the plaintiffs’ claims.

b. **Implied covenant issue**: to determine whether there is an implied covenant the court must make “‘an examination of the lease and its amending documents and the facts and circumstances surrounding these documents’ execution’ in order to determine whether the parties reached ‘the unspoken agreement specifically alleged.’”

4. The court of appeals finds no abuse of discretion and affirms the district court’s certification of the class.

a. **Choice-of-law issue**: labeling Mobil’s argument “disingenuous” it concludes the choice of law principle involved is not *lex fori* (the location of the court hearing the matter) but rather *lex rei sitae* – the place where the property is situated (the land and wells covered by the oil and gas leases). The court rejects the notion that the place of contracting should govern oil and gas leases which, in these situations, relate to a specific tract of land and for this class, all the land is located within the State of Kansas.

b. **Implied covenant issue**: the court first defines and narrows the limits of Mobil’s argument by stating: “Mobil’s challenge is based solely on its reading of our Supreme Court’s opinion in *Smith v. Amoco Production Company* . . . and specifically the court’s holding that the implied covenant to market gas produced at reasonable terms within a reasonable time is *implied in fact* rather than in law.”
c. The court further characterizes Mobil's implied covenant argument stating:

(1) "No owner of a Kansas royalty interest has been required to prove a specific intent to include an implied covenant in an oil and gas lease."

(2) "The [Smith] opinion contains no hint that the court intended to overrule in any way prior cases which have not required proof of a factual intent for implied covenants to exist."

(3) "Indeed, one need not examine parole evidence, surrounding circumstances, or extant industry practice to determine whether such covenants should be implied."

(4) "No direct language in Smith indicates that the implied covenants which have been read into oil and gas leases for years are hereafter to be proven to be within the subjective intent of the parties at the times the leases were entered into."

(5) "As before, implied covenants are essentially presumed to be the intent of both parties and need not be proven by reviewing the specific intent of the executing parties; individualized proof of intent has never been required."

(6) "There was no abuse of discretion in the selection of choice of law principles or in rejecting an individualized examination of the circumstances surrounding each of the leases in order to determine whether implied covenants were intended."

5. The court's ultimate conclusion regarding the implied covenant issue is:

"We align our court with those of Louisiana, North Dakota, and Oklahoma in holding that in a purported class action claiming improper calculation of royalties, there is no need to examine individual lease formation and the intent of the parties thereto for purposes of determining predominance of common issues of manageability in certification proceedings where there has been shown a systemic common course of conduct by an oil and gas lessee in calculating royalties payable."

6. COMMENT (My Analysis):

a. Disclaimer. I have worked with many producers, as an attorney
consultant and as an expert witness, promoting the not too radical concept that before you can be held liable for breach of a contract, you need to look at the terms of the contract, determine their meaning, and apply them to the facts.

(1) The basic right to have your contractual obligations to a particular plaintiff determined by the terms of your contract with that plaintiff, should not be lost merely because the case is pursued as a class action.

(2) If this case is interpreted as preventing a court from considering the express terms of proposed class member contracts as part of the rigorous analysis to determine whether class certification is proper – I see no way the opinion can stand.

b. Choice of Law. Although conceptually the choice of law argument seems plausible, as a practical matter Mobil’s position cannot be supported.

(1) Kansas has always had a strange set of rules for classifying oil and gas leases – but that is not justification for magnifying their strangeness by giving effect to the literal statements of past courts.

(2) It indeed would be an odd state of affairs if contracting parties, physically located in Texas, could enter into an oil and gas lease covering land in Kansas and then apply Texas law to determine their rights in the “Kansas” lease.

(3) Putting aside classification, the overall impact of oil and gas leasing is more “land” and “real property” oriented than it is simply a commercial transaction.

(4) However, as you get a contract removed from the leasing transaction, and deal with assignments, operating agreements, and other types of contracts, it starts to look more commercial-oriented and less property-oriented.

c. Implied Covenant to Market. Note that the court was reluctant to address, and did not address, to what extent a court can or must consider the express terms of the various oil and gas leases in determining whether to exercise its discretion to grant or deny class
(1) Instead the court focuses on subjective intent and the use of extrinsic evidence — presumably this means extrinsic to the contracts themselves.

(2) The court simply states an extreme version of an argument and then rejects it, without ever confronting the real issue.

(3) The real issue is: just because a lessee may use the same calculation to pay royalty to many royalty owners under many different lease contracts, does that mean we can ignore all those contracts, and rely solely upon the class representative’s contract, when every member of the class asserts their contract has been breached and that they are entitled to damages?

(4) It defies fundamental fairness to let counsel pick a representative contract, file suit on behalf of others who have different contracts, allege breach of an implied covenant to market, and then effectively negate the terms of thousands of contracts that get lumped into the class.

(5) Note that each of the cases the court cites in support of its implied covenant analysis preface the implied covenant’s existence on a review of the express terms of the lease. The court itself summarizes the law stating: “Under Kansas law, an implied covenant can only be defeated by express language showing a contrary intent.”

(a) This is another way of saying you must at least look at the express terms of the oil and gas lease to determine what it says about the issue.

(b) This is particularly important in cases where the plaintiffs argue you should ignore lease language that says royalty is due on the “market value of the gas at the well” when they are asserting that, through the magic of the implied covenant to market, it really means “market value of the gas not at the well but at an interstate pipeline after it has been moved long distances.”
(c) Shouldn't the express "at the well" language of the lease be considered when someone is asserting an implied covenant that will, in effect, destroy the express "at the well" language?

(d) The court uses the "implied covenant to market" as though the parties before it are in agreement as to its meaning and effect. That is what the lawsuit is about: can the implied covenant to market be used to negate express lease language and does the implied covenant to market require marketing downstream of the wellhead without regard for what the lease says.


1. In 1998 Ritchie Corp. sold 16.8 acres to BFI Waste Systems of North America, Inc. (BFI) [Waste Connections is the successor to BFI]. The acreage consisted of a landfill and a waste transfer station. As part of the sale Ritchie retained a reversionary interest in the transfer station acreage which required BFI to pay a sum per ton of waste processed at the transfer station. At the end of 35 years Ritchie would receive the transfer station acreage back pursuant to its reversionary interest.

2. The agreement contained the following clause concerning the transfer station:

"**Right of First Refusal.** At all times this escrow agreement is in effect Buyer shall have a right of first refusal with respect to Seller's interest in this escrow agreement, including without limitation Seller's reversionary interest in the Property, however designated, to the effect that upon receipt by Seller of any offer to purchase Seller's interest in this Agreement or the Property by a third party, Seller shall give written notice to Buyer of the fact and terms of such third party offer. Buyer shall have forty-five (45) days after its receipt of such notice to notify Seller in writing of its election to purchase such interest(s) on such financial terms (the "Election Term"). In the event Buyer does not notify Seller of its election to purchase such interest(s), then Seller may sell such interest(s) on such identical terms to such third party so long as such sale is consummated within ninety (90) days after such Election Term. If such sale to the third party is not consummated within such period, then the Buyer shall again have the right of first refusal to purchase such interest(s) prior to any sale to any third party. This right of first refusal shall specifically not apply to any transfer or assignment by Seller to an affiliate of Seller or to any stockholder of Seller or any of their affiliates."
3. As an aside, since the escrow agreement was for 35 years, under the Kansas common law rule against perpetuities it could be argued the entire clause would be void.

4. Kansas has traditionally applied the rule against perpetuities to preferential rights to purchase. See generally Gore v. Beren, 254 Kan. 418, 867 P.2d 330 (1994) (rule not violated because interest would vest within a life in being at the time of its creation – otherwise the court noted: “Agreements creating an option or preemptive right to purchase real estate constitute property interests which are subject to the rule against perpetuities.”).

5. Ritchie could elect to sell the transfer station at any time during the 35-year escrow term. This sale would trigger, at that time, the springing executory interest in BFI to acquire the interest which would be viewed as a non-vested future interest in the transfer station held by Ritchie.

6. Because it is not possible to state that the event triggering BFI’s future interest (sale by Ritchie) in the land will, or will not, occur (vest) within 21 years from the date of sale, December 29, 1998 (it could be up to 35 years after), the interest, at common law, would be void.

7. However, Kansas, effective July 1, 1992, adopted the Uniform Statutory Rule Against Perpetuities, K.S.A. §§ 59-3401 to 59-3404 (2005). This statute can save the preferential right from the rule in this case in two ways:

   a. Under the “wait-and-see” provision which provides the interest is valid if it “either vests or terminates within 90 years after its creation.” K.S.A. § 59-3401(a)(2) (2005). In this case, Ritchie will either sell, or not sell, the interest within 35 years so we know it will either vest or terminate in 90 years.

   b. Under the facts this commercial transaction is a “nondonative transfer” which is no longer subject to any rule against perpetuities restrictions pursuant to K.S.A. § 59-3404(1). Therefore, we would not have to resort to any of the savings provisions of the Act (such as the 90-year wait-and-see provision) because the transaction is taken completely out of the rule’s operation.

8. We have a potential problem in Kansas – caused primarily by me. I believe the Uniform Statutory Rule Against Perpetuities is void in Kansas because it was enacted in violation of Article 2, Section 16 of the Kansas Constitution which states:
“No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes...”

a. The original bill which contained the Uniform Statutory Rule Against Perpetuities also contained two other provisions: repeal of the Bulk Sales Act and statutes adopting a conservation easement program. All three concerned some version of a “uniform law” as adopted by the National Conference of Commissioners of Uniform State Laws (Uniform Law Commission).

b. This precise issue was addressed in Larson Operating Co. v. Petroleum, Inc., 32 Kan. App.2d 460, 84 P.3d 626 (2004). The log-rolling history of the bill was not presented; the court of appeals’ decision is unconvincing. Review by the Kansas Supreme Court was not sought. Basic position of the court:

“Here the subject matter of the enactment did not embrace ‘dissimilar or discordant subjects’ but rather embraced a singular purpose: amendment and enactment of certain uniform acts in an attempt to harmonize them with Kansas legislative intent. [what?] Joinder of these enactments and amendments of uniform laws in a singular enactment did not offend the constitution, since there was no obvious intent to tie a matter of legislative merit to an unworthy matter.”

c. The court’s analysis amounts to: if you put the word “uniform” in the title of the act, then they all have one thing in common, they are “uniform” acts. So, the “uniform” death penalty act could be considered in conjunction with the “uniform” partial birth abortion act?


a. Holland & Hart represented Buell Development Corporation in connection with the sale of stock in Kings County Development Corporation to John Rocovich. The issue concerned an option in favor of Buell to acquire from Rocovich a percentage of the Development Corporation’s minerals in California in the event Development Corporation ever decided to distribute these interests to its shareholders.
b. Rocovich apparently had some level of control over Development Corporation where he could initiate the corporate action to cause the distribution of minerals to its shareholders.

c. Dispute arose over whether this option violated the rule against perpetuities (among other claims), and Buell settled the matter by reducing its right to share in a distribution of minerals. The jury valued this reduction at $3,364,011, plus $2,125,195 in interest. Trial court: found the agreement violated the rule against perpetuities and the law firm was negligent for not addressing the matter properly.

d. On appeal the court reverses noting that it was not possible for Buell and Rocovich to in any way contract to create a perpetuity as to property owned by a third party, Development Corporation. Therefore, the agreement did not violate the rule against perpetuities.

e. **But wait, we are not done with you.** We are remanding the case so Buell’s malpractice claim can be considered in light of the fact the agreement did not violate the rule against perpetuities. Instead, the issue is whether the attorneys were negligent by not recognizing “the clear potential for dispute” associated with the rule against perpetuities, and then failing to take the necessary action by drafting the agreement to avoid a potential perpetuities claim.

10. Once we get past the rule against perpetuities, we come to the major problem with the preferential right to purchase: the package transaction.

a. Lots of litigation where a party has a preferential right to purchase property “A” which is subsequently sold in a transaction consisting of properties “A” and “B” and the selling/buying party tries to avoid an exercise of the preferential right by loading up the purchase price on the “A” part of the transaction.

b. Package transactions have many other problems. For example, can the preferential rights holder insist that: (1) it can buy the entire package for the package price? (2) property “A” can only be sold separately? Can the preferential rights holder be forced to bid on the entire package or none at all? If they are not required, or able, to purchase the package – how will the package purchase price be allocated to the single preferential rights property? See generally *Navasota Resources, L.P. v. First Source Texas, Inc.*, 249 S.W.3d 526 (Tex. Ct. App. 2008).
11. Risks for everyone:

a. The attorney representing the seller of the property burdened by the preferential right. To what extent can the attorney assist their client in avoiding the limitations of the preferential right by making literal use of the terms of the contract?

(1) For example, the clause involved in the *Waste Connections* case states: “This right of first refusal shall specifically not apply to any transfer or assignment by Seller to an affiliate of Seller or to any stockholder of Seller or any of their affiliates.”

(2) Could the seller’s attorney suggest that the asset burdened by the preferential right be transferred to “an affiliate of Seller” and then have the stock (not the asset) in the affiliate sold to the desired buyer?

(3) Rule 8.4 Misconduct. “It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . .”

(4) What if the conduct is approved by the Texas Supreme Court? *Tenneco Inc. v. Enterprise Products Co.*, 925 S.W.2d 640 (Tex. 1996). Court holds that a transfer of stock is not a transfer of the company’s assets and therefore, unless the preferential rights provision states otherwise, a stock transfer is not a triggering event. This has given rise to the “Texas Two-Step” approach for avoiding preferential rights provisions.

(i) Do you then have a duty to counsel your client on this available option?

(ii) To what extent will Texas law on this issue transfer to other jurisdictions? Kansas?

(iii) Practical considerations: litigation magnet.
b. The attorney representing the seller of the property burdened by the preferential right. To what extent can the attorney assist their client in avoiding the limitations of the preferential right by manipulating the purchase price allocation?

(1) Rule 8.4 Misconduct. "It is professional misconduct for a lawyer to: . . . (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation . . . ."

(2) In Waste Connections the dispute was over purchase price allocation. The total purchase price was $4.95 million, the seller allocated $2 million to the transfer station, but the buyer, in the event BFI/Waste Connections exercised its option, would still be obligated to pay $3.5 million for the landfill portion of the package.

(3) No deceit here because all the relevant facts were clearly stated in the sales agreement between Ritchie (seller) and Cornejo (buyer). Their agreement stated:

"2.1 Purchase Price and Payment. The purchase price for the entirety of the Assets [landfill and transfer station] shall be Four Million Nine Hundred Fifty Thousand Dollars ($4,950,000), payable in cash or certified funds at Closing, of which Two Million Dollars ($2,000,000) will be allocated to and paid to Ritchie Corporation for the purchase of its rights and the assumption of its obligations under the Escrow Agreement."

"In the event that Waste Connections of Kansas, Inc. shall, upon receipt and due and proper notice from Sellers, elect to exercise its right of first refusal under the Escrow Agreement, the parties agree that the purchase price for the remaining Assets shall be Three Million Five Hundred Thousand Dollars ($3,500,000.00), payable in cash or certified funds at Closing."

(4) Notice of the sale was provided to Waste Connections, along with a copy of the Cornejo/Ritchie agreement. Ritchie indicated in the notice that is had "received an offer to acquire its interest in the escrow agreement for $2,000,000.00 cash as specified in the attached Asset Purchase Agreement. . . ."
(5) Waste Connections tendered $2 million but also sought to preserve its rights to argue the purchase price should be $1.45 million ($4.95 million - $3.5 million).

(6) Waste Connections sued Ritchie, trial court held for Ritchie and awarded Ritchie $108,972.15 in attorneys fees pursuant to the prevailing party attorney fees provision in their agreement. The court of appeals reverses finding that allowing Ritchie to obtain $2 million for what Cornejo was willing to pay only $1.45 million “would evade the ‘spirit of the bargain . . . .”

(7) The court concludes: “Ritchie acted in bad faith by attempting to maximize its profits to ‘recapture opportunities foregone’ through granting of the right of first refusal.”

c. The attorney representing the buyer of property subject to the preferential right to purchase. The buyer cannot merely accommodate whatever scheme the seller may come up with to negate another party’s preferential right to purchase.

(1) Tortious interference issues.

(2) The attorney advising the buyer must be as attuned to the situation as the attorney advising the seller.

(3) The buyer may become the enabler.

12. Observations by the Waste Connections court regarding the “package deal”:

a. “The package deal is a risky situation in the terms of the right of first refusal. There is ‘a risk in package deals that the purchase price may be unfairly allocated or padded to defeat the rights of first refusal.’ . . . In a package deal situation, more protection needs to be given to the right of first refusal to prevent collusion or bad faith. In a package deal, the purchase price should come under greater scrutiny and any doubt in the amount should be resolved to protect the right of first refusal.”

b. “In the context of a package deal involving a right of first refusal, the price for the total package generally should not fluctuate based upon whether the right of first refusal is executed. Ritchie should not be able to receive more money after exercise of the right of first refusal.
For the right of first refusal to be given its lawful effect, Ritchie should be in the same financial position regardless of whether WCK exercises the first refusal.”

c. "Because there are a multitude of ways that a sale can circumvent a grantee’s right of first refusal in a package deal, the duty of good faith and fair dealing should be applied prominently in cases like the one before us.”

13. The drafting response would be to address the problem head-on in the next document, having learned the most recent lessons of avoidance and abuse.


1. Consistent with the strong freedom of contract positions taken by the Kansas Supreme Court in recent years, the Court of Appeals enforces two contract clauses that significantly restrict a home buyer’s remedies.

2. The first clause was contained in a house inspection contract between Sheila Santana and Tom F. Beard Inspections, LLC ("TFB").

   a. Santana hired TFB to inspect a house she was purchasing from Mary Olguin.

   b. After purchasing the house Santana discovered “animal odors and damage, dry rot in wood trim elements, and evidence of past water leakage.” When she sued TFB for negligence, fraud, and violations of the Kansas Consumer Protection Act (KCPA), TFB was granted summary judgment because of a release and limitation of liability contained in the inspection contract between Santana and TFB.

   c. In the contract Santana “releases and exempts . . . [TFB] from all liability and responsibility for the cost of repairing or replacing any unreported defect or deficiency and for any consequential damage, property damage, or personal injury of any nature.”

   d. As a backup, another clause provided that if TFB is found liable under any theory of recovery, “liability . . . shall be limited to a sum equal to the amount of the fee paid . . . for the inspection and report.”
e. The court affirms the trial court’s grant of summary judgment to TFB finding that the inspection contract was unambiguous and Santana had failed to introduce any evidence to establish a material issue of fact regarding her unconscionability claim.

3. Santana also sued the seller and the seller’s real estate agent alleging negligence, fraud, and KCPA violations.

a. However, the purchase contract contained a mediation clause which required “[a]ny dispute” to be “submitted to mediation in accordance with the rules and procedures of the Homesellers/Homebuyers Dispute Resolution System.”

b. The clause expressly included disputes concerning disclosure, or non-disclosure, of information relating to the condition of the house being sold.

c. Santana nevertheless filed suit, the defendants answered and asserted the failure to mediate as a defense, and Santana subsequently filed a motion to compel mediation.

d. In response to Santana’s motion, the defendants filed a motion to dismiss which the trial court granted.

e. The Court of Appeals affirms the trial court’s actions holding the clause, although not explicit on the matter, clearly implied that mediation was a condition precedent to pursuing remedies through litigation.

f. As Judge Greene observes in his opinion:

“There is no middle ground: mediation cannot effectively and fully serve its purpose of alternative resolution unless attempted prior to suit.”

g. Under these circumstances the trial judge properly dismissed the action.

4. The court’s holding in Santana lends support to a number of contractual techniques that may be used to have the parties confer with one another before they sue one another.

a. For example, an obligation to provide the other contracting party with
notice of an alleged breach, and a period of time to address the matter before suit can be filed, is a type of mediation clause because it allows the parties to talk, explain, clarify, negotiate, and hopefully settle their disputes.

b. Although the ability to immediately sue the other party may have been jealously preserved in the past, today contract clauses that require or allow the parties to confer before suing are viewed favorably by the courts.

II. PROPERTY ISSUES


1. McGinty sought to quiet title to an interest they acquired through a 1974 partition action in which, as the court states: “The owners of the remaining 50% of the mineral interest were not personally served in the action, were apparently not served by publication, and did not participate in the action partitioning the subject tract.”

2. The 1974 sheriff’s deed did not mention minerals but conveyed the land by legal description to a third party purchaser, McGinty’s predecessor in interest, who was the successful bidder at the partition sale.

   a. The court holds McGinty received whatever minerals the parties had to convey by operation of K.S.A. § 58-2202.

   b. Justice Johnson, writing for the court, takes the opportunity to “spell it out for the defendants” that McGinty received not only the surface estate but also 50% of the minerals.

3. Although there is some suggestion in the opinion that the interests of the cotenants who did not receive notice in the 1973 partition hearing were not represented in the present quiet title action, that was not the case. In some instances the successors to the cotenants were directly involved and in other instances their interests were represented by Coral Production Corp. that held oil and gas leases from the interest owners as well as production proceeds awaiting distribution pending the determination of title.

4. The court holds the trial court, in 1974, had jurisdiction to affect the title of the cotenants it had before it – even though other cotenants had not been
given notice of the partition proceedings and an opportunity to be heard.

5. The court states: “The challenger must show that the nonjoined person or entity was a necessary or indispensable party to the action, i.e., that the property interests of the nonjoined party were adversely affected by the judgment partitioning the named parties’ property interests.”

   a. “[W]e discern no compelling policy reason to create a rule in this state that forces a property owner to join all owners of all property interests in order to partition the particular portion of the property in which the petitioner has an interest.”

   b. “Accordingly, we decline to create a new mandatory joinder requirement for partition actions in this state. The efficacy of a judgment in a partition action in which less than all owners are named parties must turn on whether the property interest of a nonjoined owner has been prejudiced or adversely affected by the partition judgment.”

6. **COMMENT:** The essence of cotenancy is that *every* cotenant has a vested property right in participating in *any* partition of the co-owned property.

   a. Although courts should be reluctant to invalidate proceedings that are over 30 years old, the nature of mineral ownership is such that the Kansas Legislature, as a matter of public policy, has refused to apply time-based curative procedures to mineral title defects.

   b. If notice was not provided to a cotenant, either personally or by publication, the proceeding should be a nullity because there is no way you can conduct a partition proceeding without attempting to join all cotenants.

   c. Cotenants have an undivided interest in the whole such that not even a part of the whole should be subjected to a judicial sale without joining all cotenants.

   (1) The cotenant may want to sell their interest at the same time - a sale of 100% may provide the only opportunity to realize maximum value of all undivided interests.

   (2) The cotenant may want to buy the other interests.

   (3) The cotenant may want to exercise their statutory right to
object to any sale as being "oppressive." K.S.A. § 60-1003(d).

(4) The cotenant may want to argue for partition in kind of the whole.

(5) The cotenant may want to make sure they are involved to avoid collusive action by the other cotenants.

d. The cotenant’s rights can be protected only if they are given notice and an opportunity to be heard.

e. It will be interesting to see what sort of maneuvering the court’s opinion invites.

f. When you get a chance, read this opinion and see if you would like to be subjected, for no good reason, to the tone our Kansas Supreme Court uses in evaluating the appellant’s arguments.


1. In 2005 Dick Properties conveyed land to Leland Schonthaler, but excepted all: “[e]asements, rights of way, mineral reservations, oil and gas leases, and restrictions of record.”

a. From this the court of appeals concludes that Schonthaler owned the land and “Dick Properties owns all mineral interests in the land.”

b. Dick Properties therefore retained the benefits as the lessor under a 1988 oil and gas lease with the current working interest owner of the oil and gas lease: Paul Bowman Oil Trust (“Bowman”).

c. Bowman sought to renew a saltwater disposal agreement that would allow it to dispose of salt water from the leased land and from other lands.

2. The issue: who must Bowman contract with for saltwater disposal rights that extend beyond those encompassed by its rights as an oil and gas lessee?

a. The surface owner only (Schonthaler)? The mineral owner only (Dick Properties)? Both the surface owner and mineral owner?
b. The parties stipulated that the disposal of water under the disposal agreement did not impact the oil and gas rights of Dick Properties.

3. Held: The surface owner, Schonthaler, owns the rights to dispose of things on the property that do not impact oil and gas operations – therefore Bowman need not contract with the mineral owner (Dick Properties).

4. Analysis: “We do not think Dick Properties retains sufficient interest in this real estate that would require it to be a party to a saltwater disposal lease. . . . In our view, what Dick Properties reserved was simply the mineral interests to the real estate.”

   a. Court examines the mineral interest retained by Dick Properties as though it was merely the rights to oil and gas.

   b. Would the outcome be different if indeed Dick Properties owned “all” the minerals in the land – not just the oil and gas?

   c. Court concludes Dick Properties lacked the ability to use its mineral interest to authorize the disposal of salt water produced off premises.

5. Conclusion: “Therefore, we hold Dick Properties transferred the rights to the saltwater disposal agreement to Schonthaler by execution of the deed.”

6. My analysis: take a look at the deed at page 35 of this Outline.

   a. It is obvious the court focused on the wrong language. This deed was not part of the court’s opinion; I obtained a copy from counsel when I could figure out the language the court was using to do its analysis.

   b. Schonthaler was conveyed: “SURFACE RIGHTS ONLY”

   c. The language the court focuses on as the excepted mineral interest was instead an exception to the warranty clause of the deed.

   d. This means Dick Properties owned “all” the minerals – except perhaps those associated with the surface itself.

   e. Who owns the subterranean rock structure where the salt water is being injected?

   f. Who owns the subterranean rock structures one has to pass through to get to the rock structure and space where the salt water is being
injected?

g. Will Kansas apply the same sort of “all minerals” analysis to a “SURFACE RIGHTS ONLY” grant that it does to a mineral grant? E.g., surface destruction test, community knowledge test.

h. Does a “SURFACE RIGHTS ONLY” grant to a grantor give that grantor less rights in “minerals” than would be the case if they owned the fee and conveyed “all minerals” to a grantee?
WARRANTY DEED

Dick Properties, LLC (hereinafter Grantor)

CONVEYS AND WARRANTS TO:

Leland Schonthaler (hereinafter Grantee) all of the following described REAL ESTATE in Rooks County, Kansas, to-wit:

SURFACE RIGHTS ONLY in and to:

THE SOUTHEAST QUARTER (SE¼) OF SECTION 7; THE SOUTHWEST QUARTER (SW¼) OF SECTION 8; and THE NORTHWEST QUARTER (NW¼) OF SECTION 17, ALL IN TOWNSHIP 10 SOUTH, RANGE 19 WEST OF THE SIXTH P.M.,

for and in consideration of Ten and other dollars.

TO HAVE AND TO HOLD THE SAME, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever. And said Grantor for itself, its successors and assigns, does hereby covenant, promise and agree, to and with said grantee, that at the delivery of these presents grantor is lawfully seized in its own right, of an absolute and indefeasible estate of inheritance, in fee simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unencumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and encumbrances, and that Grantor hereby warrants and agrees to defend title to the lands herein described.

EXCEPT AND SUBJECT TO: Easements, rights of way, mineral reservations, oil and gas leases, and restrictions of record.

Dated this 12th day of August, 2005.

Dick Properties, LLC

Hugh C. Dick, Co-Manager

ACKNOWLEDGMENT

STATE OF IOWA, COUNTY OF POLK, ss:

The foregoing Warranty Deed was acknowledged before me this 16th day of August, 2005, by Hugh C. Dick, Co-Manager of Dick Properties, LLC, on behalf of himself and the company, and for the uses and purposes therein set forth, and such person duly acknowledged the execution of the same.

My appointment expires: 11-10-07

Notary Public

State of Kansas
ROOKS COUNTY

This instrument was filed for record in m office at 10:30 o'clock A.M. on the 31 day of August, 2005 and is duly recorded in Book 350 o records at page 513

Register of Deeds

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1. In 1924 land was conveyed with the following reservation in the grantor:

   "The grantor herein reserves 60% of the land owner’s one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees."

2. The grantees’ successors, Rucker, assert this created a reservation of a perpetual nonparticipating royalty interest which violates the rule against perpetuities and is therefore void.

3. The grantors’ successors, DeLay, assert this created a reservation of a mineral interest, which vested immediately, and even if it is a royalty interest it was excepted from the grant by the grantors and not subject to the rule.

4. In a thoughtful and thorough opinion Justice Larson, assigned to the court of appeals panel, works through the extensive body of case law on distinguishing a “mineral” interest from a “royalty” interest.

   a. Focusing on language indicating a right was created in the minerals when “developed,” the court concludes, as did the trial court, a royalty interest was reserved.

   b. This required analysis of the perpetuities issue -- which again involved analysis of an extensive body of case law unique to Kansas.

5. The court holds the interest, as a perpetual “royalty” interest, violated the rule against perpetuities.

6. Regarding the reservation in the grantor, the court acknowledges the conceptual problem associated with the Kansas Supreme Court’s holding that the vesting event for a royalty interest is upon production.

   a. Interests retained by a grantor are typically viewed as being vested, because the grantor never parts with the excepted interest – if it was vested before the conveyance, and they never part with the interest, then it must be vested after the conveyance.

   b. However, in Kansas since the vesting event is production, such an interest is never vested, in the grantor or anyone else, until and unless, there is production.
7. Justice Larson dutifully notes that the court of appeals is constrained by Kansas precedent, but invites counsel to seek review of the court’s holding by the folks that can revisit the Kansas rule:

“We encourage the DeLays to seek review of our decision and our Supreme Court to accept, review, and determine whether the language found in Sidwell, Drach, and Singer indicates a change in the application of the rule against perpetuities to royalty interests. Such a review could also include an examination of the issue of whether production is to continue to be the vesting event if the rule against perpetuities is to continue to be applied to these transactions.”

8. COMMENT: Although the Kansas Uniform Statutory Rule Against Perpetuities generally applies prospectively to transactions occurring after July 1, 1992 (K.S.A. § 59-3405), there is an important exception found at §(b) of 59-3405 which states:

“If a nonvested property interest . . . was created before the effective date of this act and is determined in a judicial proceeding, commenced on or after the effective date of this act, to violate this state’s rule against perpetuities as that rule existed before the effective date of this act, a court upon the petition of an interested person may reform the disposition in the manner that most closely approximates the transferor’s manifested plan of distribution and is within the limits of the rule against perpetuities applicable when the nonvested property interest or power of appointment was created.”

a. Now that the DeLay’s interest has been “determined in a judicial proceeding” to violate the Kansas common law rule against perpetuities, the DeLay’s, by K.S.A. § 59-3405, are authorized to raise their void interest from the dead through reformation.

b. Reformation would work like this:

(1) the obvious intent of the grantor was to retain a perpetual interest;

(2) since a perpetual interest violates the rule, let’s come up with a limitation the court can impose that will satisfy the rule;

(3) easiest way: identify a group of people living on May 17, 1924 (the date of the conveyance) and use the group as measuring lives to try and bring you within 21 years of the
date of production (the vesting event).

c. This is clearly what the statute contemplates – and gives the Kansas Uniform Statutory Rule Against Perpetuities significant retroactive effect.

d. Rucker will want to defend this attempt by arguing the Statutory Rule was the product of a bill with multiple subjects and therefore violates the Kansas Constitution – and is void – and therefore we are back to the common law rule without the reformation remedy!


1. Parties owned lots surrounding a common pond. Their predecessors-in-interest entered into a declaration granting to each lot owner the right to use a 15-foot strip of land extending from the water’s edge for use and access to the pond. The trial court held the declaration created a mere license that was not binding on successors. The court of appeals reverses, finding the document created an easement, binding on successors and assigns, and the servient landowner was required to remove a berm and landscaping that obstructed free use of the 15-foot easement.

2. The document states:

   “4. Easements. The owners of each of the lots . . . hereby grants to each of the others owners license to enter upon his or its property in order to gain access to the pond and dam by the most direct route, and further grants license to enter upon and use that portion of his or its property which is within fifteen (15) feet of the water’s edge.”

3. The trial court focused on the word “license” while the court of appeals engaged in a thorough qualitative examination of the document considering the legal elements of an easement vs. license.

4. The court begins by identifying five factors to consider in ascertaining whether an easement of license is intended:

   a. **How is it created?** In writing (easement) or oral (license). If in writing, are there words of grant you would associate with the conveyance of a right in property? (easement) Labels are not determinative.
b. **Nature of the right?** Right to use a particular portion of the land. Authority to maintain or improve the burdened property? (easement).

c. **Duration of the right.** A stated duration, or unlimited duration. Binding on successors and assigns. (easement).

d. **Consideration.** Substantial consideration (easement).

e. **Reservation of power to revoke the right.** Generally, the more open-ended the right to revoke the more likely it is a license as opposed to an easement.

5. Applying the five factors to the document at issue, and also considering that it was filed for record with the Register of Deeds, the court of appeals has no difficulty in concluding the document created an easement as opposed to a license.

6. Because the court found the berm and plantings impaired the other lot owners’ easement, they must be removed.


1. Water District looking for water sources and sought a temporary easement to enter Shipe’s land to conduct test drilling in search of water. Permission was denied and the Water District sought to condemn the necessary easement. The trial court granted the requested easement and the Shipes filed this separate action for injunctive relief.

2. The basis for the Shipe’s objection was that without a permanent access to the point of diversion, the Water District could not obtain any water rights. Since the Water District does not own any water rights, and does not own a permanent right to make a diversion, the district court saw no reason to allow a temporary easement to look for water.

3. The Supreme Court notes the Water District does not need to own a water right in order to obtain a temporary easement to search for water under its authorizing statutes.

4. The issues raised regarding the Water District’s ability to obtain a water right is not ripe because the District may never decide to seek a water right.

5. The Shipes lack standing to complain about any sort of taking regarding
water rights because they currently have no water rights in their property.

6. Court notes the following basic rules of property in water:
   a. “[T]he Kansas Legislature established that a water right, whether 
      vested or appropriated, is ‘a real property right appurtenant to and 
      severable from the land on or in connection with which the water is 
      used and such water right passes as an appurtenance with a 
      conveyance of the land by deed, lease, mortgage, will, or other 
      voluntary disposal, or by inheritance.’”
   b. “[A] water right does not constitute ownership of the water itself; it 
      is only a usufruct, a right to use water.”
   c. “[T]he KWAA [Kansas Water Appropriation Act] dedicates water 
      resources to the use of the public, prohibits water rights in excess of 
      the reasonable needs of the appropriators, and subjects water rights 
      to the principle of beneficial use.”
   d. “The effect of these principles is that the Shipes do not own the rights 
      to the water appurtenant to their land simply because they own the 
      land. To hold water rights, they must have applied for and been 
      granted the rights.”

F. Court Discusses Basic Ownership Rights in Trade Secrets. Progressive Products, 
Inc. v. Swartz, 205 P.3d 766 (Kan. Ct. App. 2009), review granted (March 8, 
2010).

1. Progressive Products, Inc. ("PPI") manufactures and sells a ceramic coating 
   for pipe elbows known as Ceram-Back. VIN Manufacturing, LLC ("VIN") 
   was formed by persons who were formerly employed by PPI. VIN was 
   created to compete with PPI by offering coating services using PPI’s formula 
   for Ceram-Back.

2. PPI sued VIN and the other participants asserting they misappropriated PPI’s 
   trade secrets regarding Ceram-Back.

3. The district court found that PPI had “a trade secret that included the Ceram- 
   Back formula, mixing process, the pricing method contained in the computer 
   program, and the price sheet ....” The district court entered an injunction 
   against VIN ordering it to pay PPI a 20 percent royalty on sales occurring 
a. PPI appealed arguing the court should have imposed a permanent injunction against any use of PPI trade secrets.

b. VIN cross-appealed arguing there was insufficient evidence to support that PPI had a trade secret to misappropriate.

4. First inquiry, under the Kansas Uniform Trade Secrets Act ("KUTSA"), did PPI have a trade secret to protect?

   a. K.S.A. § 60-3320(4) defines "trade secret" as:

   (4) "Trade secret" means information, including a formula, pattern, compilation, program, device, method, technique, or process, that:

   (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use, and

   (ii) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

b. The parties agree that under appropriate circumstances customer lists, price lists, computer programs, Ceram-Back formula, and the mixing and application process can all be a "trade secret" under 60-3320(4)(i).

c. The matter in dispute is whether PPI took the "efforts that are reasonable under the circumstances to maintain its secrecy."

5. The court analyzes each asserted trade secret to determine whether PPI took the "efforts that are reasonable under the circumstances to maintain its secrecy."

   a. Ceram-Back formula. Yes. Although PPI posted an MSDA sheet listing the product's ingredients, PPI took actions to prevent employees from disclosing the formula to the public.

   b. The mixing process. No. "PPI points to no proof that it treated this information with any secrecy, and no such evidence could be found in the record."

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c. The batch method of determining the volume of product required for a job. Yes. Although it was possible for an employee to calculate the product volume associated with the batch method, "KUTSA only requires efforts to maintain secrecy that are reasonable under the circumstances; perfection is not required."

d. Price lists. No. These were disclosed to any customer who requested them. "Thus, as a matter of law, the price sheets did not constitute trade secrets, and the district court erred in holding otherwise."

e. Customer lists. No. This was not addressed by the trial court.

6. Because the Ceram-Back formula and the batch method constituted trade secrets, the court must review whether they were misappropriated by VIN.

a. K.S.A. § 60-3320(2) defines "misappropriation" as:

(2) "Misappropriation" means:

(i) acquisition of a trade secret of another by a person who knows or has reason to know that the trade secret was acquired by improper means; or

(ii) disclosure or use of a trade secret of another without express or implied consent by a person who

(A) used improper means to acquire knowledge of the trade secret; or

(B) at the time of disclosure or use, knew or had reason to know that his knowledge of the trade secret was

(I) derived from or through a person who had utilized improper means to acquire it;

(II) acquired under circumstances giving rise to a duty to maintain its secrecy or limit its use; or

(III) derived from or through a person who owed a duty to the person seeking relief to maintain its secrecy or limit its use; or

(C) before a material change of his position, knew or had reason to know that it was a trade secret and that knowledge of it had been acquired by accident or mistake.

b. K.S.A. § 60-3320(1) defines "improper means" as:

(1) "Improper means" includes theft, bribery, misrepresentation, breach or inducement of
a breach of a duty to maintain secrecy, or espionage through electronic or other means.

7. The facts supported a finding that VIN employees obtained the Ceram-Back formula, and the batch method information, from PPI and used it in their operations.

8. Remedy: K.S.A. § 60-3321 addresses the remedies for misappropriation of a trade secret as follows:

(a) Actual or threatened misappropriation may be enjoined. Upon application to the court, an injunction shall be terminated when the trade secret has ceased to exist, but the injunction may be continued for an additional reasonable period of time in order to eliminate commercial advantage that otherwise would be derived from the misappropriation.

(b) In exceptional circumstances, an injunction may condition future use upon payment of a reasonable royalty for no longer than the period of time for which use could have been prohibited. Exceptional circumstances include, but are not limited to, a material and prejudicial change of position prior to acquiring knowledge or reason to know of misappropriation that renders a prohibitive injunction inequitable.

(c) In appropriate circumstances, affirmative acts to protect a trade secret may be compelled by court order.

9. The trial court relied upon subsection (b) to order payment of a royalty.

   a. The facts do not support application of subsection (b) because there are no "exceptional circumstances" to warrant letting VIN to continue using the misappropriated trade secrets.

   b. There is no public interest nor any equitable consideration that would justify allowing VIN to be given the benefit of the royalty remedy.

   c. The court remands for the trial court to consider an appropriate remedy under subsection (a) of 60-3321.

   d. Regarding the duration of any prohibitory injunction, the court quotes the comment to the Uniform Trade Secret Act which states:
“Subject to any additional period of restraint necessary to negate lead

time, an injunction accordingly should terminate when a former trade

secret becomes either generally known to good faith competitors or

generally knowable to them because of the lawful availability of

products that can be reverse engineered to reveal a trade secret.”

e. The court’s interpretation of this comment is as follows:

“The injunctive relief ordinarily should continue only until the
defendant could have acquired the information by proper means.

Injunctions extending beyond this period are justified only when
necessary to deprive the defendant of a head start or other unjust
advantage that is attributable to the misappropriation. . . . More

extensive injunctive relief undermines the public interest by unduly

restraining legitimate competition.”

G. Court Allows Reformation of Deed to Remedy Parties’ Mutual Mistake as to

Land Being Conveyed. Unified Government of Wyandotte County/Kansas City

v. Trans World Transportation Services, L.L.C., 227 P.3d 992 (Kan. Ct. App.,

March 26, 2010).

1. Wyandotte County (WC), in 1997, leased land to Trans World. The land

was part of an 8.95-acre parcel where, in 1989, WC built a fire station

occupying 2.58 acres of the land, with an address of 444 Kindelberger Road.
The remaining 6.45-acre tract contained a 27,164 square-foot building with

an address of 420 Kindelberger Road and a mailing address of 400

Kindelberger Road. The two tracts were never formally separated by deed or

other action.

2. In the lease to TransWorld the leased area was described as: “One Building

and Improved Grounds located at 420 Kindelberger Road, Kansas City,

Kansas, consisting of a total of 280,962 square feet or 6.45 acres (+/-), with

a 27,164 square feet building . . . .”

3. A dispute arose between the parties and as settlement WC agreed to convey

to TransWorld the leased land. The WC resolution authorized issuance of a

deed conveying the property at 400 Kindelberger Road to TransWorld.

4. When WC ordered title insurance the commitment referred, mistakenly, to

the entire 8.95-acre tract. The same description was used in the warranty

deed to TransWorld.

5. When WC discovered the mistake, TransWorld denied the mistake was
mutual and demanded that WC either enter into a lease for the fire station or have the fire department move out within 30 days.

6. WC sued seeking reformation of the deed, due to mutual mistake, so that it covers only the 6.45-acre tract the parties intended to convey pursuant to their settlement agreement. Trial court held for WC, TransWorld appeals asserting reformation was improper and, in any event, the boundary line drawn by the court for the reformed deed was improper.

7. HELD: Affirmed. The deed was properly reformed by the trial court.

8. Law of reformation mutual mistake. To prove mutual mistake concerning a written instrument, a party must prove, by clear and convincing evidence:
   a. a prior agreement by the parties that the written instrument seeks to evidence;
   b. that a mistake occurred in preparing the written instrument [as opposed to a mistake associated with the prior agreement the instrument seeks to evidence]; and
   c. where there is no fraud or inequitable conduct by a party [which could allow for a unilateral mistake], that the mistake is mutual.

9. Other rules: Mutual mistake is not affected by a party’s negligence in failing to carefully examine the instrument.

10. Applied to the facts of this case:
   a. Deed that is the object of the mistake was entered into to effectuate the parties’ prior settlement agreement.
   b. Settlement agreement referred solely to the 400 Kindelberger Road property, not the fire station property. WC commissioners authorized conveyance of the 400 Kindelberger Road property.
   c. It was clear the prior settlement agreement conveyed only the leased property and not the fire station.
   d. “There is overwhelming evidence of the mutual mistake by the parties in delivering and accepting a deed inconsistent with their clear intention expressed in their unambiguous settlement agreement.”
11. Law of reformation for mutual mistake.
   a. "When a mutual mistake is made in describing property in a deed and
      the instrument does not convey the property intended, the deed may
      be reformed to conform to the parties' original intentions."
   b. The grantor did not intend to convey the property and the grantee has
      no right to retain the property.
   c. "Under these circumstances, the court will step in to correct the
      mistake, provided that the grantor would be prejudiced by a failure to
      reform the deed, and the grantor's position in equity is superior to that
      of the grantee."

12. Court upholds the division of the lands and rejects TransWorld's merger
    argument noting that merger is a matter of intent and the mutual mistake
    demonstrates the parties did not intend to merger the settlement agreement
    into the erroneous deed.

H. Railroad Must Pursue Formal Public Utility Abandonment Procedures Before
    it is Possible to Abandon Right-of-Way. Bitner v. Watco Companies, Inc., 226

1. Bitner asserts it is the owner of a reversionary interest in land in which an
    easement for a railroad tract was granted to Watco's predecessor-in-interest
    in 1889. Bitner argues the right-of-way has been abandoned so that Bitner's
    land is no longer burdened by the easement. Apparently a football field and
    track have been built on the lots burdened by the easement.

2. Watco raises two defenses. First, that it owns the land in fee so it cannot be
    abandoned. Second, that even if all it owns is an easement, the only way it
    can be abandoned is by following the abandonment procedure administered
    by the federal Surface Transportation Board.

3. The trial court, and the court of appeals, each hold that in order to abandon
    a railroad right-of-way it can only be done with approval by the appropriate
    federal (49 U.S.C. § 10903) or state (K.S.A. § 66-525) authority.

4. The court suggests Bitner's remedy is to pursue an abandonment with the
    Surface Transportation Board.

5. Arguably 49 U.S.C. § 10903 and K.S.A. § 66-525 should be limited to
    situations where the railroad seeks to abandon its service obligation as a
public utility. The court in this case seeks to burden the private property owner’s reversionary interest – established in 1889 – with regulatory obligations created a century after the basic property rights of the parties were established.

a. Arguably, as a matter of state property law, the railroad’s easement will terminate once it ceases using the land for the rights encompassed by the easement.

b. The reversion is automatic once the intent to abandon exists – without regard for regulatory limitations.

6. The court’s holding fits nicely with the Rails-To-Trails program designed to allow a public interest group to take control of the reversionary interest for public trails – a program which has its own “ takings” problems.


1. The trustee in bankruptcy commenced a Bankruptcy Code 11 U.S.C. § 363(h) proceeding to sell all rights in the land in which Jonathon held legal title to a 1/3rd undivided interest as a joint tenant with his brother James and his father Wayne.

2. When the requirements of § 363(h) are met the trustee can sell 100% of the jointly held property in order to maximize the value of the debtor’s undivided interest in the property.

3. The non-debtor joint owners are forced to sell their interests; if they want to keep the land, they have to be the successful bidders at the sale.

4. Separate from the right to sell Jonathon’s 1/3rd interest, a preliminary issue is whether Jonathon really owns a 1/3rd interest when it can be proven: the father paid all the purchase price, manages the property as his own, and intended the joint tenancy merely as an estate planning tool – with no intent to make a present gift of the interest to either of the two sons.

5. In the past, Kansas courts have been willing to look behind the recorded document to ascertain the true intent of the parties to the conveyance – even though there is nothing ambiguous about the deed. Opportunity for courts to practice some equity to protect the party contributing the money – typically from a child’s creditor.
a. Part of this willingness may be the product of applying bank account and other personal property joint tenancy law to the real property context.

b. This is understandable since K.S.A. § 58-501 applies to "[r]eal or personal property granted or devised to two or more persons . . . ."

c. However, the world of personal property does not operate under the real property recording laws, such as K.S.A. § 58-2221 (2005) (providing for recording of "[e]very instrument in writing that conveys . . . [r]eal estate . . . or . . . whereby any real estate may be affected . . . .") and K.S.A. § 58-2222 (2005) (recording imparts "notice to all persons of the contents thereof; and all subsequent purchasers and mortgagees shall be deemed to purchase with notice.").

d. But, personal property often operates under its own unique bodies of law, such as the Uniform Commercial Code. E.g., Bridges v. Central Bank and Trust Co., 926 F.2d 971 (10th Cir. 1991) (certificate of deposit owned by five individuals in "or" form, and held in joint tenancy, could be pledged by any one of the five and allow the creditor to receive 100% of the proceeds upon default; relying upon UCC § 3-116(a) and § 9-1205).

6. The court in Kasperek explores the precise basis for allowing a court to look behind the recorded document and holds that in Kansas the theory is based upon an implied trust which implicates statutes that specifically address the concept in real estate transactions.

a. K.S.A. §§ 58-2401 to 58-2408 (2005), is an act, that took effect in 1868, to address the use of trusts in land to defraud creditors.

b. Under the facts the father Wayne had the burden to establish that his son Jonathon had an agreement to hold the property in trust for the father.

c. The court proceeds under the assumption Wayne was able to show an agreement that Jonathon held his interest in trust for his father - but then addresses the effect this unrecorded interest would have on a bona fide purchaser.

7. The court concludes: "The rights and powers of a bona fide purchaser include the right to obtain title to property free of certain unrecorded interests . . . ."
and, for purposes of the trustees avoidance powers under 11 U.S.C. § 544, it is not necessary to have a transfer by the debtor to trigger the trustee’s bona fide purchaser status.

8. The court’s opinion does an excellent job of collecting and analyzing Kansas cases on a BFP’s obligation to make inquiry of facts beyond the recorded document.

a. Issue: to what extent must the trustee (BFP) make inquiry regarding the nature of the holdings by the three named joint tenants?

b. Held: the joint tenancy deed establishes as a matter of law that the parties each owned an undivided one-third interest in the property and absent special circumstances triggering a duty to inquire beyond the deed, no duty exists – merely because the property is held in joint tenancy.

c. The court reasons:

“We believe that a duty to inquire about the possibility of an implied trust or other unrecorded agreements when title is held by joint tenants undermines the purpose of the Kansas recording statutes, imposes an undue burden on purchasers, and impairs the reliability of record title.”


1. What is a joint tenancy audit? It is a study of events taking place under the joint tenancy relationship to determine whether it has, in fact, been severed so that the presumed deceased joint tenant is actually a cotenant that retains their undivided interest in their estate at death.

2. The risks here can be significant because if the joint tenancy was severed during the decedent’s lifetime, the decedent’s undivided interest will not go to the surviving joint tenant but will instead pass under the decedent’s will or intestate succession – or by other means, such as a transfer-on-death deed.

3. It is a high-risk proposition because it is generally “winner-take-all” meaning if there has been a “severance” of the joint tenancy the surviving joint tenants will take nothing from the decedent; the decedent’s heirs or devisees will take it “all.”
4. When the joint tenants entered into different oil and gas leases at different times (even though with the same lessee), did that act sever the joint tenancy and create a tenancy in common by operation of law?

a. Issue has not been litigated in Kansas – probably because the prospect of a severance was not considered by anyone.

b. The issue was recently the subject of litigation in Pennsylvania. _In re Estate of Quick_, 905 A.2d 471 (Pa. 2006) (no severance of the joint tenancy resulted because there was no “intent” to sever).

5. If one joint tenant enters into a mortgage will that cause a severance of their interest in Kansas?

a. Because Kansas follows a “lien” theory of mortgages, as opposed to a “title” theory, it should not result in a severance because nothing has been conveyed to the mortgagee.

b. However, we have problems with “dicta law” on this subject in _Hall v. Hamilton_, 667 P.2d 350, 354-55 (Kan. 1983), where the court stated:

   “It is undisputed that any joint tenant may sever his or her joint tenancy interest in real property by . . . mortgaging the joint tenancy interest . . . .”

c. Although the statement in _Hall_ was _dicta_, it was picked up as “law” in _Hutchinson National Bank and Trust Co. v. Brown_, 753 P.2d 1299, 1301 (Kan. Ct. App. 1988), _rev. denied_ (June 22, 1988), where the court states:

   “The Bank contends that the plain language in _Hall_ requires Kansas courts to find that a pledge acts as a severance of the joint tenancy interest because there is no legal distinction in the operative effect of a mortgage or pledge (other than the type of property encumbered). We agree.”

d. What does the governing statute say regarding the mortgage/pledge issue?

   (1) The governing statute is _K.S.A. § 58-501 (2005)_ which has been around since 1939 and is one of the few provisions of the 1939 Property Act that was given complete retroactive
effect: “The provisions of this act shall apply to all estates in joint tenancy in either real or personal property heretofore or hereafter created . . .”

(2) The last phrase of K.S.A. § 58-502 makes it clear that the mere granting of a lien on property is not viewed as the severing event, but rather the foreclosure of the lien that results in a change of title through an actual sale of the interest:

“[N]othing herein contained shall prevent execution, levy and sale of the interest of a judgment debtor in such estate and such sale shall constitute a severance.”

(3) No court in Kansas has focused on this express language in the statute – at least not in the Hall or Hutchinson National Bank contexts.

e. The mortgage issue, and even the pledge issue, remain open issues in Kansas.

(1) K.S.A. § 58-502 takes the most appropriate approach to the issue by making an actual change of title to the encumbered interest the clear, defining event in which a severance will occur.

(2) Until a sale, and the resulting change in ownership, the joint tenancy would remain in effect. Not even the filing of a foreclosure action would cause a severance because no change in title will occur until the action has successfully run its course and a sale is completed.

(3) If a lender wants to protect itself from the winner-take-all aspects of joint tenancy, it should, as a condition to making the loan, require their borrower to sever the joint tenancy and convert it into a tenancy in common – unless, of course, the bank feels lucky and the borrower is the youngest and healthiest of the joint tenants.

6. Technical aspects of severance: “destroying” one of the “four unities.” The “four unities” at common law required to create, and maintain, a joint tenancy are:
Interest: the tenants must have one and the same interest.

Title: the interests must accrue by one and the same instrument or conveyance.

Time: the interests must commence at one and the same time.

Possession: the property must be held by one and the same undivided possession.

a. If one of the "unities" is "destroyed," or "lacking," then the joint tenancy becomes a tenancy in common and the survivorship rights are eliminated.

b. Is it possible for a joint tenant to own less than an equal, undivided interest and still satisfy the unity of "interest" (tenants must have one and the same interest)? Not really – except, perhaps, in Kansas.

c. *In re Estate of Lasater*, 54 P.3d 511 (Kan. Ct. App. 2002), rev. denied (Dec. 17, 2002) (joint tenancy can be created when one joint tenant is conveyed 99% and the other 1% – this does not, according to the court, violate the unity of interest). *Lasater*: right result, even though the unities analysis is open to challenge.

d. A strong argument can be made that *courts need to abandon the unities analysis altogether*. 
   
   (1) The unities analysis never fit the cases dealing with bank accounts.
   
   (2) The Court of Appeals in *Lasater* properly focuses on the *intent* of the parties to resolve these issues. The intent was extremely clear in *Lasater*.

e. **K.S.A. § 58-501 (2005)** provides a statutory basis for abandoning the unities analysis and focusing on intent by providing:

   "Real or personal property granted or devised to two or more persons including a grant or devise to a husband and wife shall create in them a tenancy in common with respect to such property unless the language used in such grant or devise makes it clear that a joint tenancy was intended to be created . . . ."
K. **The Latest Populist Uprising: Transfer on Death Conveyances of Interests in Real Estate and Motor Vehicles.**

1. The court in *Kasperek* offered the following thoughts:

   "We also note that, by statute, Kansas permits interests in real property to be titled in a ‘transfer-on-death’ form, so that the estate planning attempted by Wayne could have been accomplished by designating directly on the deed the beneficiaries in whom the Property would vest upon his death. See Kan. Stat. Ann. § 59-3501. Such a designation may be changed or revoked without the consent of the beneficiary. *Id.* § 59-3503. The availability of transfer-on-death deeds in Kansas obviates the need to resort to a joint tenancy deed as an estate planning tool, and increases the reliability of land records. *The fact that Kansas has such a statute further weighs against imposing a duty on purchasers to inquire of joint tenants regarding whether their interests are subject to a secret trust and were intended to vest only on death of one of the joint tenants.*"

2. Kansas Statutes Annotated, Chapter 59, Article 35. – Transfer-On-Death


   c. K.S.A. § 59-3512 (other nontestamentary transfers).

3. Addresses all the testamentary issues regarding an incomplete, totally revocable, gift. K.S.A. § 59-3507 ("A deed in transfer-on-death form shall not be considered a testamentary disposition and shall not be invalidated due to nonconformity with the provisions of chapter 59 of the Kansas Statutes Annotated.").

4. The only formality required: the deed must be recorded. K.S.A. § 59-3501(a).

   a. No delivery requirement.

   b. Grantee/beneficiary need not be aware that the conveyance exists. K.S.A. § 59-3501(b).

5. The only unique limitation: cannot be “revoked by the provisions of a will.” K.S.A. § 59-5503(c).
6. No alternative beneficiaries stated in the deed, the gift will lapse if the designated beneficiary predeceases the grantor. K.S.A. § 59-3504(c).

7. Transfer-on-death conveyance by a joint tenant will not sever the joint tenancy; the transfer-on-death beneficiary will receive the interest only if the joint tenant grantor is the last surviving joint tenant. K.S.A. § 59-3505.

8. What follows is a 2006 drafting exercise, concerning Transfer-On-Death Deeds, given to my students at Washburn.
TRANSACTIONAL SKILLS
DRAFTING

Applying Legal Principles to Accomplish the Client's Goals

Today among the most important estate planning tools are the durable power of attorney and transfer-on-death documents. Transfer-on-death documents are an improvement over the use of joint tenancy as a probate-avoidance tool because the donee does not currently receive an enforceable right in the property. This means the donee has no power over the property and the donor can change the deed at any time without the donee's consent. If the donor fails to act, the property will pass to the currently listed donee at the donor's death. Absent statutory authorization, these transfer-on-death arrangements would violate the Statute of Wills. (The Kansas version of the Statute of Wills is found at Kan. Stat. Ann. § 59-606 (2005)). Because the donor if free to change their mind, the gift is not complete until the donor dies. Until the donor's death, they can alter the donee's ability to receive the property.

This Exercise addresses the drafting of a transfer-on-death (“TOD”) conveyance. TOD conveyances are governed by Kan. Stat. Ann. §§ 59-3501 to 3507 (2005). However, you have a preliminary problem because the property being transferred is the right to receive a share of helium gas produced from wells drilled on land owned by Dock Hillard. In 1988 Dock received the interest described in the document labeled Exhibit A. Dock wants to use a TOD conveyance to transfer 76% of Dock's helium rights to his son, Stephen Hillard.

Step One of the Drafting Process: Validation.

**First Task:** Prepare a one-page memorandum of law addressing whether the helium royalty Dock wants to transfer to Stephen is an “interest in real estate” as contemplated by Kan. Stat. Ann. § 59-3501(a) (2005). You can assume that unless the interest is a § 59-3501(a) “interest in real estate,” then the TOD procedures for “real estate” will not be available.


**Third Task:** Draft the TOD conveyance to transfer 76% of Dock's helium royalty rights to Stephen.

**Fourth Task:** Draft a one page letter to Dock explaining what he needs to know about the TOD conveyance you have prepared. Dock has already asked you the following questions: (1) Do I have to give the TOD conveyance to Stephen? (2) Do I have to tell Stephen I have conveyed the interest to him? (3) After I sign and record the TOD conveyance to Stephen, can I later change my
mind and transfer the interest to someone else? (4) Can I use the value of the 76% interest covered by the TOD conveyance as collateral for a loan? (5) Can Stephen encumber the 76% interest by borrowing against it? Provide Dock with the information he will need to know in order to understand the rights created by his TOD conveyance to Stephen.

EXHIBIT A

STATE OF KANSAS

COUNTY OF SHAWNEE

Witnesseth that on this 10th day of June 1988 Forrest Hillard, as the owner of the following land in fee simple absolute: Section 3, Township 11 South, Range 15 East of the 6th Principal Meridian, in Shawnee County, Kansas (the “Land”); hereby conveys and warrants to Dock Hillard, for a term of 21 years from the date of this conveyance and so long thereafter as helium is produced from the Land, one-eighth of all the helium produced and saved from the Land.

[Signature]

FORREST HILLARD

Prepare the documents and deliver your final product to Shirley in Room 302 by Noon on March 10, 2006. Obtain your examination number for this Exercise #8 from Shirley.

As appropriate, apply the principles set out in Richard Wydick’s *Plain English for Lawyers* and the citation format specified in the “Practitioners’ Notes” portion of *The Bluebook*. All citations should be imbedded in the text of your work; no footnotes. Edit your work.
MEMORANDUM OF LAW

TO: File
FROM: David E. Pierce
DATE: 2 October 2006

I. QUESTION: Can the transfer-on-death (“TOD”) device under Kan. Stat. Ann. § 59-3501 (2005) be used to transfer the right to a share of helium produced from land?

II. ANSWER: Most likely. An interest classified as personal property for “oil and gas law” purposes can still be “an interest in real estate” for purposes of the TOD statutes.

III. DISCUSSION: The meaning of the phrase “an interest in real estate,” as used in Kan. Stat. Ann. § 59-3501(a) (2005), is a matter of statutory interpretation requiring application of Kan. Stat. Ann. § 77-201 (Supp. 2005), which provides: “In the construction of the statutes of this state the following rules shall be observed ... Eighth. ‘Land,’ ‘real estate’ and ‘real property’ include lands, tenements and hereditaments, and all rights to them and interest in them, equitable as well as legal.” This adopts a broad interpretation of “real estate” without any limitation on how the rights at issue might be classified for “oil and gas law” purposes. The critical inquiry is to ascertain the “intent of the legislature” when it used the phrase “an interest in real estate” to define the permissible scope of the TOD device. Mitchell v. Liberty Mut. Ins. Co., 24 P.3d 711, 719 (Kan. 2001).

In Dubowy v. Baier, 856 F. Supp. 1491 (D. Kan. 1994), the court applies a similar analysis to define the phrase “interest in ... real property” as used in Kan. Stat. Ann. § 60-1002 (2005) (quiet title statute). The court surveys various sources defining the phrase “interest in real estate” and notes: “Among property rights that have been found by courts to constitute an interest in real estate are leases, easements, rights to royalties, right to profits and ownership of mineral rights.” Id. at 1497 (emphasis added). This encompasses Dock’s helium rights which are one of the metaphorical “sticks” comprising the bundle of sticks that make up the “real estate.” Creation of the right requires a conveyance evidenced by a writing and administered under the recording acts. It is not similar to a transfer of a car or other item of tangible personal property that might be located on the land, instead it is a right, an interest, carved from land itself; “an interest in real estate.”

The TOD statutes have not been addressed by Kansas courts. [As of 2006] Although for oil and gas law purposes Dock’s helium interest could be classified as personal property, under certain circumstances it may also be classified as real property. See In re Sellens, 637 P.2d 483, 486 (Kan. Ct. App. 1981) (distinguishing “accrued” royalty from “unaccrued” royalty). Perhaps because of these inconsistent approaches, the court in National Bank of Tulsa v. Warren, 279 P.2d 262, 285-86 (1955), refused to apply oil and gas law classifications when evaluating whether conveyance of a production payment “affected” real estate under a mortgage registration tax statute. In Platt v. Woodland, 246 P. 1017, 1020 (Kan. 1926), the court, interpreting the scope of the term “estate” in a statute, holds the term was used as a “general” term, not a “technical” term and encompassed “whatever the grantor could convey ... .” The phrase “interest in real estate,” if similarly interpreted as a “general” term, would include Dock’s helium interest that was carved out of the real estate.
TRANSFER-ON-DEATH DEED

Dock Hillard as owner ("Dock") transfers on death to his son, Stephen Hillard, as grantee beneficiary, the following described interest in real estate:

An undivided 9.50% of 100% of all the helium produced from:
Section 3, Township 11 South, Range 15 East of the 6th Principal Meridian, in Shawnee County, Kansas (the "Land"), for a duration continuing until 10 June 2009 and so long thereafter as helium is produced from the Land.

THIS TRANSFER ON DEATH DEED IS REVOCABLE. IT DOES NOT TRANSFER ANY OWNERSHIP UNTIL THE DEATH OF DOCK. IT REVOKES ALL PRIOR BENEFICIARY DESIGNATIONS BY DOCK FOR THIS INTEREST IN REAL ESTATE.

Signed 6 October 2006.

DOCK HILLARD, Owner

ACKNOWLEDGMENT CERTIFICATE

Shawnee County, Kansas

This Transfer-On-Death Deed was acknowledged before me on 6 October 2006 by Dock Hillard.

DONNA K. HAVERKAMP
Notary Public
My Appointment Expires: __________

Until notified otherwise, all tax statements that relate to the interest described in this Transfer-On-Death Deed should be sent to:

Dock Hillard, 1301 S.W. High, Topeka, Kansas 66604-1220.
Dear Dock:

Enclosed is the Transfer-On-Death Deed ("TOD" deed) you requested. Rights under a TOD deed are defined by several Kansas statutes. The TOD deed statutes apply to "an interest in real estate." This phrase is not defined and raises the issue whether a share of helium produced from land is "an interest in real estate." Complex classification principles create some risk the helium transfer could be challenged as not being an interest in real estate. My opinion is the statute will most likely be interpreted to include your helium interest. In the event I am wrong, it would mean the TOD deed to Stephen will not be given effect and the property will become part of your estate.

There are several things you should know about the Transfer-On-Death Deed rules in Kansas. First, the transfer will not have any effect at your death unless the deed is recorded with the Register of Deeds prior to your death. You do not have to give the deed to Stephen or even inform him that you have made the deed, although recording will make it a matter of public record. You can change your mind at any time during your life by conveying the property to someone else, or by following a simple statutory revocation procedure. However, you cannot revoke the TOD deed by your Will. Although you do not hold the helium in joint tenancy, in the event you did, entering into this TOD deed would not sever or otherwise change your rights as a joint tenant. You will be able to deal with the interest covered by this TOD deed in any manner you desire during your lifetime. You can borrow against it and use it as collateral; it will be subject to the claims of your creditors and Stephen will take the property subject to any conveyances, liens, and other burdens occurring during your lifetime. If Stephen dies before you, his interest will lapse, which means the property will be part of your estate at your death. Although it is possible to designate alternative beneficiaries in the TOD deed, you have not chosen to do that in your deed. Stephen will not be able to borrow against, or otherwise encumber the property.

As a relatively new approach to disposing of property, it is important that if you ever decide to revoke the transfer, or make other dispositions of this property, please contact me so I can assist you by ensuring all statutory requirements are met. Let me know if you have any questions.

Sincerely;

David E. Pierce

DEP:dep
Enclosure: Transfer-On-Death Deed
III. OTHER ISSUES


1. Court holds that a series of Kansas statutes and regulations the Kansas Corporation Commission sought to apply to Colorado Interstate’s Boehm Gas Storage Facility were preempted by two federal laws: the Natural Gas Act and the Pipeline Safety Act.

2. The Kansas statutes and regulations were the product of explosions in Hutchison, Kansas associated with the escape of gas stored in nearby salt caverns.

3. The court first notes that the storage of gas in interstate commerce “fall[s] within the scope of transportation covered by the NGA” and that the Kansas laws seek to regulate Colorado Interstate’s gas storage operations which involve “‘facilities of natural gas companies used in transportation and sale for resale of natural gas in interstate commerce.’”

4. The court ultimately finds that the Kansas laws directly impact activities which fall within FERC’s exclusive authority under the NGA, and are therefore impliedly preempted, and are also preempted by express language in the Pipeline Safety Act.

5. The court concludes:

“[T]he Kansas enabling statutes purport to give the KCC the authority for permitting and abandoning storage facilities of interstate natural gas transportation companies like CIG, and this statute and the regulations promulgated in the exercise of that authority are impliedly pre-empted by the NGA [Natural Gas Act]. In addition, the Kansas statute and regulations setting forth and enforcing safety standards on CIG’s underground storage facility, which is an interstate natural gas pipeline facility, are expressly preempted by the PSA [Pipeline Safety Act]. Thus, the court finds that the Kansas Gas Storage Statutes . . . and the Kansas Gas Storage Regulations . . . violate the Supremacy Clause, are pre-empted by the NGA and PSA, and have no force or effect on the plaintiff’s interstate gas pipeline, storage facilities and transportation at CIG’s Boehm Underground Gas Storage Field.”

1. Evenson owned 160 acres which included some outbuildings and shade trees. The neighbor was conducting a controlled burn on its property, which became uncontrolled, and burnt up trees and outbuildings on the Evenson property.

2. Evenson wants $300,000+ to replace the damaged trees; Lilley wants to pay the difference between the fair market value of the land before and after the fire: $4,687 (which included the depreciated value of the buildings too).

3. Evenson argued the damage was temporary and therefore the cost of remediation should be the measure of damages – and if damages are limited to the fair market value of the land – then damages would be $160,000.

4. Lilley argued the damage was permanent and therefore should be measured by the difference in fair market value before and after the fire.

5. The district court rules the damage was permanent and awarded damages of $7,687.

6. Court of appeals notes the purpose of any measure of damages is to compensate the injured party for their injury.

   a. The court notes that in some situations where you can show that trees had an independent value that is proven, recovery may be obtained for the loss of that value.

   b. This is not a replacement value analysis. Although Evenson presented evidence of what it would cost to replant big trees, it offered no evidence as to the distinct value of the big trees to the property – that was lost by the damage.

   c. “In light of the lack of evidence demonstrating the value of the trees destroyed by the fire, the proper measure of damages is the difference between the market value of the property before and after the fire.”

7. The court referred to the Evenson’s restoration cost figure of $307,999 as “patently unreasonable.”
Important New Stuff

you need to know about

Kansas Oil & Gas Law

by

David E. Pierce
Professor, Washburn Law School

Contract Issues

"While there is a gas well... on the above land..., and such well or wells are shut in, and if this lease is not continued in force by some other provisions hereof or if a well has been completed and dewatering operations have commenced, then it shall, nevertheless, continue in force as long as said well or wells are shut in and it shall be considered that gas is being produced from the leased premises in paying quantities... by the LESSEE paying... to LESSOR annually, in advance a substitute or shut-in gas royalty..."

Contract Issues

• Tucker v. Hugoton Energy Corporation's "limited" market analysis is no longer part of the shut-in analysis.
• Apparently lessees can now reject a crappy gas sales deal without fear of losing their lease – implied covenant issue not a shut-in royalty clause issue.

Contract Issues

• "Capable" is one of those nebulous terms like "commence."
• Court rejects the "flip-a-switch" approach.
• Dewatering is not the test.
• A shut-in well can clearly be "capable" even when it is currently unable to produce.
• Issue of fact.

Contract Issues

• Capability will include a factual analysis of the situation.
• Objective facts – prudent operator.
• Subjective facts – good faith of this lessee.
• In situations where you do not have actual production and marketing there is always a lack of certainty whether the well will, in fact, ultimately be a paying well.
Contract Issues

- **Shut-In Royalty Clause: Failure to Pay, Lease Terminates.**
  - *Welsch v. Trivestco Energy Co.*
  - Gas purchaser goes bankrupt, gas well shut in for 2.5 years, no shut-in royalty paid.
  - Trial court: lease not terminated.
  - Court of Appeals: lease terminated.

Contract Issues

- **Condition vs. covenant.**
  - No obligation to pay, no payment, no resulting satisfaction of the habendum clause, lease terminates for lack of production.

Contract Issues

- **Cessation of production clause:**
  - "If, . . . after discovery of . . . gas . . . the production thereof should cease from any cause, this lease shall not terminate if lessee commences reworking or additional drilling operations within sixty (60) days thereafter. . . ."

Contract Issues

- **Force Majeure Clause:**
  - "Lessee shall not be liable for delays or defaults in its performance of any agreement or covenant hereunder due to force majeure. The term 'force majeure' as employed herein shall mean: any act of God . . .; exhaustion or unavailability or delays in delivery of any product, labor, service, or material."
Contract Issues

- Not prevented from "paying" money to lessor under shut-in royalty clause.
- Court misses another opportunity to use its contract condition/covenant analysis.
- Force majeure clause does not excuse failure to fulfill a condition.

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Contract Issues

"Where Gas from a well capable of producing Gas (or from a well in which dewatering operations have commenced), is not sold or used after the expiration of the Primary Term, Lessee shall pay or tender as royalty to Lessor . . . One Dollar per year per net mineral acre, such payment or tender to be made on or before the anniversary date of this Lease next ensuing after the expiration of 90 days from the date such well is shut in or dewatering operations are commenced and thereafter on or before the anniversary date of this Lease during the period such well is shut in or dewatering operations are being conducted."

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Contract Issues

- Minimum Royalty Clause: Not A Substitute for Production.
- Palmer v. Bill Gallagher Enterprises
- "[Lessor] shall receive a minimum royalty of $1,000.00 beginning at the end of the second year, either through actual production or by . . . paying the difference of actual royalty paid and the amount due by a payment within 30 days of the annual anniversary date of this lease."

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Contract Issues

- Shut-In Royalty Clause: Failure to Pay Does NOT Cause Lease to Terminate.
- Daniels v. Quest Cherokee, L.L.C.
- Well shut it, lessee failed to timely pay shut-in royalty.
- Trial court: automatic termination.
- Court of Appeals: reverse because it was a covenant not a condition.

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Contract Issues

- Covenant not a condition.
- Another problem – the shut-in clause nowhere states that payment of shut-in royalty will be a substitute for production under the habendum clause.
- Purpose of the clause analysis.
- Interpret against the lessee?
- Ambiguous; other interpretive tools first.

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Contract Issues

- Nothing in the clause that suggests payment will extend the lease.
- Acceptance of payments: no estoppel.
- Ratification of lease: no consideration.
Contract Issues
- Express Clause Requiring Drilling and Production of Wells Was a Covenant Not a Condition.
  - *Beachner v. SEK Energy, L.L.C.*
  - Lease imposed a covenant to drill, not a condition.

Contract Issues
- Implied Covenant to Market as a Unifying Concept in Class Certification.
  - *Farrar v. Mobil Oil Corporation.*
  - Choice of Law issue: is it possible to have an oil and gas lease covering land in Kansas governed by Texas law? No.
  - Implied Covenant issue: are Kansas oil and gas leases subject to some sort of implied covenant to market? Yes.

Contract Issues
- Perpetuities Issues:
  - *Gore v. Beren*
  - Kansas Uniform Statutory Rule Against Perpetuities (and the Kansas Constitution)
  - *Temple Hoyne Buell Foundation v. Holland & Hart*

Contract Issues
- Right of First Refusal and the Package Sale.
  - Texas Two-Step: step 1, transfer property to subsidiary; step 2, sell stock in subsidiary to party desiring to buy the asset – now owned by the subsidiary.
  - *Tenneco Inc. v. Enterprise Products Co.*

"Lessee covenants and agrees:
  (h) To drill three wells within 180 days of the date of this lease and said wells shall be in production within 180 days of the drilling date provided that: Lessee has evidence of commercial quantities of oil or gas available, all required rights-of-way are obtained in a timely manner, and Lessee is not prevented from achieving production status due to circumstances beyond Lessee's control."

"Lessee covenants and agrees:
  (h) To drill three wells within 180 days of the date of this lease and said wells shall be in production within 180 days of the drilling date provided that: Lessee has evidence of commercial quantities of oil or gas available, all required rights-of-way are obtained in a timely manner, and Lessee is not prevented from achieving production status due to circumstances beyond Lessee's control."
Contract Issues

• "Because there are a multitude of ways that a sale can circumvent a grantee's right of first refusal in a package deal, the duty of good faith and fair dealing should be applied prominently in cases like the one before us."

Contract Issues

• Release and Limitation of Liability Clauses; Mediation Clauses.
  • Santana v. Olguin
  • Santana "releases and exempts ... [TFB] from all liability and responsibility for the cost of repairing or replacing any unreported defect or deficiency and for any consequential damage, property damage, or personal injury of any nature."

Contract Issues

• If TFB is found liable under any theory of recovery, "liability ... shall be limited to a sum equal to the amount of the fee paid ... for the inspection and report."
  • "Any dispute" regarding the sale must be "submitted to mediation in accordance with the rules and procedures of the Homesellers / Homebuyers Dispute Resolution System."

Contract Issues

• The Court of Appeals affirms the trial court's actions holding the clause, although not explicit on the matter, clearly implied that mediation was a condition precedent to pursuing remedies through litigation.
  • "There is no middle ground: mediation cannot effectively and fully serve its purpose of alternative resolution unless attempted prior to suit."

Property Issues

• All Cotenants Not Necessary Parties to Partition and Sale of Interests in Co-Owned Land.
  • McGinty v. Hoosier
  • 1974 partition action in which 50% of the mineral interest owners received no notice of the action; nor was there publication notice.

Property Issues

• This action is a quiet title action by the successor to the partition sale purchaser.
  • Court holds the partition action was valid as to the interests held by the parties who received notice so when the sale took place, their undivided interests were sold to the purchaser.
  • The other interest owners were not necessary parties because their interests were not sold.
Property Issues

- "[W]e discern no compelling policy reason to create a rule in this state that forces a property owner to join all owners of all property interests in order to partition the particular portion of the property in which the petitioner has an interest."

- Cotenant may want to sell their interest at the same time – a sale of 100% may provide the only opportunity to realize maximum value of all undivided interests.
- The cotenant may want to buy the other interests.
- The cotenant may want to exercise their statutory right to object to any sale as being "oppressive."
- The cotenant may want to argue for partition in kind of the whole.
- The cotenant may want to make sure they are involved to avoid collusive action by the other cotenants.

- Exception to the warranty, not the grant.
- The operative language not considered by the court: "SURFACE RIGHTS ONLY"
- What is the scope of a "surface rights only" conveyance?
- Is it narrower than conveying "all minerals" to someone?

- Who Has the Right to Authorize Salt Water Disposal in an Underground Formation: Surface Owner or Mineral Owner?
- Dick Properties, LLC v. Paul H. Bowman Trust
- Court holds only the "surface" owner needs to consent.
- Look at the deed at page 35 of the Outline.

- Perpetuity Zombies: Nonparticipating Mineral Interests.
- Rucker v. DeLay
- 1924 reservation in the grantor:
- "The grantor herein reserves 60% of the land owner's one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees."
Property Issues

• "Mineral" Interest or "Royalty" Interest?
• Nonparticipating Royalty Interest
• Does it violate the common law rule against perpetuities?
• Exception analysis: this piece never left the grantor's ownership.
• Problem: never vested until, and unless, there is "production."

Property Issues

• Violates the rule against perpetuities even when it is an exception to the grant retained by the grantor because, in any event, it will not vest unless, and until, there is production.
• Not certain to occur within a life in being plus 21 years.
• Void.

Property Issues

• Court invites them to appeal – and invites the Supreme Court to accept the appeal.
• I would invite them to file a petition, back in district court, to seek reformation under K.S.A. § 59-3405(b) – the only provision of the Kansas Uniform Statutory Rule Against Perpetuities that can apply retroactively from the July 1, 1992 enactment date.

Property Issues

• The other party can attack the constitutionality of the Kansas USRAP as being the product of multiple subjects in a single bill.
• Reformation: pick some measuring lives that take you up to the present. The only limit: people alive as of the date of the grant in 1924.

Property Issues

• Pick everyone you know who is at least 87 years old and have it extend for 21 years after the last of them to die.
• That should get you at least 30 years of additional royalty enjoyment.

Property Issues

• Distinguishing the License from the Easement.
• Gilman v. Blocks
• "4. Easements. The owners of each of the lots... hereby grants to each of the other owners license to enter upon his or its property in order to gain access to the pond and dam by the most direct route, and further grants license to enter upon and use that portion of his or its property which is within fifteen (15) feet of the water's edge."
Property Issues

- Ownership Rights in Water.
  - *Shipe v. Public Wholesale Water Supply District No. 25*
  - Outline pages 39-40.

Property Issues

- Ownership Rights in Trade Secrets.
  - *Progressive Products, Inc. v. Swartz*
  - Outline pages 40-44.

Property Issues

- Reformation of Deed to Correct Parties' Mutual Mistake as to Land Conveyed.
  - *Unified Government of Wyandotte County/Kansas City v. Trans World Transportation Services, L.L.C.*
  - Outline pages 44-46.

Property Issues

- Railroad Unable to Abandon Right-of-Way.
  - *Bitner v. Watco Companies, Inc.*
  - Outline pages 46-47.

Property Issues

- Inadequacies of Joint Tenancy.
  - *In re Kasparek*
  - Father purchased farm land and took title in his name and that of his two sons, as joint tenants.
  - Son goes bankrupt; trustee is able to claim, as a bona fide purchaser, 1/3rd of the land for the bankrupt estate.

Property Issues

- Evidence showed the father paid all the purchase price, farmed the land, and included his son's names purely for estate planning purposes.
  - For bankruptcy law, you look at the recorded deed and nothing in the deed indicated the son held it in trust for his father, or in any manner other than as an undivided 1/3rd interest owner.
Property Issues

• Trustee in bankruptcy uses procedure to force a sale of the farm to realize the highest price for the son's 1/3rd.

Other Issues

• Measure of Damage for Loss of Trees.
  • *Evenson v. Lilley*
  • Trees may have an independent value that can be considered beyond the fair market value of the land before and after the loss.
  • Court rejects replacement value.
  • $4,687 vs. $307,999
  • Value of land: $160,000

Property Issues

• The Joint Tenancy Audit.
  • Was it "severed" at some point in time?
  • Are you treating property as subject to survivorship when there is a valid basis to argue a severance of the joint tenancy that converted the joint tenants into tenants in common?
  • Outline pages 49-52.

Other Issues

• Underground Gas Storage
  • *Colorado Interstate Gas Co. v. Wright*
  • Pre-emption of state law.
  • Outline page 60.

Property Issues

• Transfer-On-Death Deed.
  • Court in *Kasperek* uses the availability of this option as evidence the father did not intend to make a future gift of the land to his sons.
  • Student drafting exercise; Outline pages 55-59.