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President's Memo

By Tyler K. Turner, Jeter, Turner, Sook, Baxter L.L.P

In a former life, I was a research economist. Though I didn't see myself staying in this field over the long run, I still use economic terms and concepts as an attorney. My favorite economic concept is "marginal benefits." Basically, marginal benefits are additional returns which accrue when an additional good or service is produced. As an oil and gas attorney, I am constantly thinking about the marginal benefits that lie beyond the current boundaries of my practice. I am fascinated by where the current frontiers lie and what additional work or issues are beyond them.

The last four years have been a challenge for all of us. Those of us who have survived have seen our frontiers pushed inward. Now we have the opportunity to expand again. As we do this, I hope that each of us takes this opportunity to consider the marginal benefits that are available beyond the frontiers of our practices. I encourage all of you to look for new areas of practice, take on issues that will challenge you, and expand what it means to be an oil and gas attorney.

I also want to encourage each of you to become more involved in the section. We are constantly searching for topics and speakers and would welcome input from our members. We are a small section and are fortunate to have a number of members who regularly give their time to speak at CLE's, but are always interested in new ideas or approaches. If you have something that you are interested in learning about, or if you want to give a presentation, please get in touch with a board member to discuss your ideas with them.

Thank you for giving me the opportunity to help guide this section; hopefully, this year will continue to be a busy one for all of us.

About the President

Tyler Turner *joined Jeter Law Firm in 2012, becoming a partner in 2016. With an extensive background in agricultural and mineral law, he focuses his practice primarily in the oil and gas area. Turner will serve as an adjunct instructor at Washburn University School of Law in 2019.*

Summer 2018

In This Issue

Kansas Supreme Court to Decide Title Company's Liability for Deed that Failed to Exclude Minerals

By Sarah Briley and Jon Schlatter, Morris Laing Evans Brock & Kennedy, Chtd.

In *LCL v. Falen*, 53 Kan. App. 2d 651, 390 P.3d 571 (217) the Court of Appeals of Kansas reversed the district court's grant of summary judgment on statute of limitations grounds for claims of negligence and breach of fiduciary duty brought against a title company. A petition for review of the case has been accepted and is currently pending before the Kansas Supreme Court.

Plaintiff LCL filed the initial lawsuit against James W. Falen, in his capacity as Sole Trustee of the James W. Falen Living Trust u/a dated April 30, 2007; Julie D. Falen; Gregory A. Falen; and Maryl M. Wesolowski (the Falens) seeking to quiet title to an undivided one-half interest in mineral rights associated with 203.2 acres of surface farmland in Rice County, Kansas (the subject property). The Falens filed counterclaims against LCL seeking to quiet title to those same mineral rights, but in their own favor, and filed a third-party suit against Rice County Abstract & Title Company, Inc. (RCAT) alleging claims of negligence, breach of implied contract, and breach of fiduciary duty. The underlying suit and counterclaim between LCL and the Falens were settled, and RCAT filed a motion for summary judgment in the third-party lawsuit on the basis of the statute of limitations. The district court found that all of the Falens' claims against RCAT were barred by the statute of limitations and granted the motion. The Falens' appeal followed.

In 1971, Mary Louise Falen and James C. Falen granted an undivided one-half interest in the minerals associated with the subject property to Mary's brother, John Weber. In 1982, the mineral owners granted an oil and gas lease on the subject property to Bert J. Fisher. Mary Louise and James' interest in the surface and an undivided one-half of the minerals was eventually transferred into the Mary Louise Falen Trust (MLF Trust). In 2007, the MLF Trust entered into a contract for the sale of the subject property to Sammy Dean. The listing information and contract made clear that the MLF Trust would reserve all of its mineral interest for 20 years after production ceased, and the title commitment included exceptions for the oil and gas lease and John Weber's mineral interest. However, the deed of sale, prepared by RCAT and recorded January 18, 2008, failed to include the language reserving the MLF Trust's mineral interest. The MLF Trust continued to receive royalties from the lease and paid property taxes on those royalties, as it had before the 2008 sale. The MLF Trust subsequently transferred its mineral interest to the Falens, and Sammy Dean transferred his interest to SDM Properties2, LLC (SDM2). The Falens continued to receive royalties and pay property taxes on those royalties as the MLF Trust had dome without interruption until August 1, 2014, when LCL first claimed title to the undivided one-half ownership interest to minerals associated with the subject property at issue in this lawsuit. The Falens also executed and recorded several transfers of their interests amongst themselves.

In 2014, SDM2 sold its interest in the subject property to LCL. In an email prior to the sale, one of the members of LCL stated, "[W]e understand that the mineral rights do not go with the property." RCAT acted as both the title insurance agent and the closing agent for the sale, and the title commitment again excluded the oil and gas lease and the one-half mineral interest granted to John Weber in 1971. However, the contract between SDM2 and LCL and the eventual deed of sale both failed to include any language excluding the interest in mineral rights from the sale. After the sale, LCL contacted RCAT to ask about this discrepancy. RCAT's underwriter advised that the only way to return the mineral interest to the rightful owners was for LCL to execute a deed to the Falens. Instead, LCL chose to initiate a claim to the mineral rights on the title insurance policy. It was at this point that the MLF Trust and its successors in interest, the Falens, were first made aware of the defects in the MLF Trust/Dean deed, the Dean/SDM2 deed, and the SDM2/LCL deed in failing to reserve the mineral rights owned by the MLF Trust.

The district court granted summary judgment to RCAT on the Falens' claims of negligence, breach of implied contract, and breach of fiduciary duty. The Court of Appeals reversed on the claims of negligence and breach of fiduciary duty. There was no dispute that a two-year statute of limitations applied to the Falens' negligence claim. The Falens challenged the district court's finding as to the date on which the cause of action accrued. The district court found that RCAT breached a duty owed to the Falens on January 18, 2008 when the deed was recorded. However, the Court of Appeals found that a cause of action does not accrue until all of the essential elements of a claim are satisfied. Thus, an injury allegedly caused by a defendant's negligence does not become actionable until the plaintiff sustains damages as a result of the injury. Because the Falens continued to receive royalties and paid property taxes on those royalties until August 1, 2014, their cause did not accrue until they suffered actual damages through LCL's challenge to their entitlement to those royalties. The Court of Appeals found that while the Falens had suffered a legal injury on January 18, 2008, any claim for negligence they might have brought at that time would have been subject to dismissal for failure to allege actual damages. Thus, the cause of action for negligence accrued on August 1, 2014, when the Falens stopped receiving royalties due to them under the oil and gas lease.

The Court of Appeals further disagreed with the district court's finding that the statute of limitations began to run on January 18, 2008 because it was on that day that the Falens' injury became reasonably ascertainable. The Court of Appeals found that unlike *Bi-State Dev. Co., Inc. v. Shafer, Kline & Warren, Inc.*, 26 Kan. App. 2d 515, 990 P.2d. 159 (1999), which concerned a landowner's claims against a surveyor for professional negligence after the plaintiff's agent signed an easement describing a pipeline easement in a different location from a plat previously prepared by the surveyor, this was not a statute of limitations tolling case where the plaintiff alleges a negligent act caused a substantial injury that is not reasonably ascertainable until some time later. The Court found that instead, this was a case where a negligent act causes a substantial injury that does not actually occur until some time later. However, even if it had been a tolling case, the Court found that it would have been required to weigh the constructive knowledge of the deed against the fact that the Falens continued to receive royalty payments, to pay property taxes on those royalties, and to transfer the mineral property rights amongst themselves in contravention of the

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(Continued from Page 2)

2008 deed. Thus consideration of the totality of the circumstances weighed in favor of a finding that the injury sustained by the Falens was not reasonably ascertainable until August 1, 2014, and thus the statute of limitations did not bar the negligence claim.

The Falens also argued that their cause of action for breach of fiduciary duty was separate and distinct from their claim of negligence and that it accrued in 2014. They argued that only three months after the MLF Trust-Dean deed of sale that failed to reserve mineral rights was recorded, the MLF Trust filed and recorded with the register of deeds office a deed conveying those reserved mineral rights to the Falens. Because K.S.A. 58-2222 imparts constructive notice of the contents of a deed to all parties when a deed is filed with the register of deeds, the Falens argued that upon the filing of the mineral interest deed, RCAT became aware that it had negligently drafted, filed, and recorded the MLF Trust-Dean deed of sale. Thus, the Falens argued that RCAT breached the fiduciary duty owed to them on April 29, 2014 by filing and recording a deed transferring ownership of all surface rights and an undivided one-half interest in mineral rights from Dean to LCL with the knowledge (actual or constructive) that it negligently drafted, filed, and recorded the 2008 deed of sale. The district court dismissed this claim, finding that it was barred by the statute of limitations because the facts cited in support arose out of the same facts cited to support the 2008 negligence claim. The Court of Appeals disagreed, finding that the claim for breach of fiduciary duty accrued on August 1, 2014, when the Falens ceased receiving royalty payments and thus suffered damages. The Falens did not brief a challenge to the district court's finding on their breach of implied contract claim, and it was affirmed by the Court of Appeals. The district court did not determine whether a fiduciary relationship existed between the Falens and RCAT, and thus the Court of Appeals similarly declined to decide. The case was remanded to the district court.

About the Authors

Sarah Briley *practices in general civil litigation, employment litigation, and oil and gas litigation. In 2012, Sarah graduated from the University of Kansas School of Law, where she earned a Certificate in Media Law and Technology and served as a Staff Articles Editor for the Kansas Journal of Law and Public Policy. While attending law school, Sarah served as a law clerk for Judge Michael J. Malone of the Douglas County District Court.*

Jon Schlatter *has a unique skill set and years of experience in the complex worlds of oil and gas law, bank regulation, and real estate law. Mr. Schlatter has been involved in permitting numerous secondary and tertiary recovery projects, including the State's first underground pad drilling project, and he has participated in many KCC matters, acquisitions, and other transactions. He has also represented clients in multiple lease termination cases, terms mineral and royalty interest cases, lien rights cases, and other oil and gas litigation.*

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Unpublished (Until Now)

By Lane R. Palmateer, Law Office of Lane R. Palmateer

In addition to the main articles in this newsletter, several unpublished opinions over the last year deserve a brief mention. Please always remember that the co-editors of this newsletter greatly appreciate your submissions of any and all cases of interest.

•*Adamson v. Drill Baby Drill, LLC*, Kansas Court of Appeals #115,762 (Unpublished Opinion filed January 26, 2018). Plaintiffs' appeal of dismissal was denied, but the Defendant's request for remand to assess attorney fees was granted.

•*EOBM Royalties, LLC, v. Bayliss*, Kansas Court of Appeals #116,531 (Unpublished Opinion filed June 23, 2017). Plaintiff investors, who were granted partial summary judgment, are affirmed on appeal.

•*Lewis v. Kansas Production Company, Inc.*, Kansas Court of Appeals #115,174 (Unpublished Opinion filed August 18, 2017). Affirmed termination of lease due to failure to prudently explore or develop in violation of an implied covenant, but reversed assessment of attorney fees as unsupported by the law.

•*Nemesis Partners, Inc., v. Martin*, Kansas Court of Appeals #115,891 and 115,892 (Unpublished Opinion filed February 17, 2017). This appeal concerns sanctions over a discovery dispute. The imposition of sanctions was affirmed, but the orders of dismissal and journal entry of judgment were remanded for further proceedings.

•*Shepherd v. Thompson*, Kansas Court of Appeals #116,364 (Unpublished Opinion filed June 23, 2017). Summary judgment in favor of plaintiff affirmed on appeal, following discussion of finding of ambiguity and application of statutory rule of construction.

About the Author

Lane R. Palmateer *is a sole practitioner in Wichita assisting clients with estate planning, wills and trusts, powers of attorney, business entities and transactions, and oil and gas law, especially Kansas Corporation Commission practice. Palmateer also manages rental properties and volunteers as a Court Appointed Special Advocate (CASA) for children in the foster care system.*

Plain Language of Disposal Agreement Allows Off-Lease Water Disposal

By David Bengtson, Stinson Leonard Street

Doce Limited Partnership owned a tract of land that was leased by SandRidge Exploration and Production, LLC in Harper County, Kansas. In addition to the oil and gas lease, Doce and SandRidge also entered a Surface Right of Way and Easement for a disposal well on Doce's land.

The Surface Right of Way and Easement provided that Doce granted to SandRidge the right to "drill, complete, construct, use, or operate … a saltwater disposal well for [SandRidge's] use … for the disposal of saltwater … and other liquids produced from oil and gas operations operated by or on behalf of SandRidge."

In November of 2013, SandRidge completed a disposal well on the land covered by the Surface Right of Way and Easement. That disposal well was connected to a saltwater disposal system that included over 50 other wells, in addition to the producing well located on Doce's land. When Doce learned that SandRidge was disposing "off-lease" water in the disposal well, it sued SandRidge alleging breach of contract and unjust enrichment.

Doce alleged that the Surface Right of Way and Easement only allowed SandRidge to dispose of on-lease water because it did not expressly state that SandRidge was allowed to dispose of foreign or off-lease water. SandRidge argued that the Surface Right of Way and Easement allowed SandRidge to dispose of water produced "from oil and gas operations operated by [. . .] SandRidge," without regard to whether those operations were on-lease or off-lease.

The Court agreed with SandRidge and granted it summary judgment. The Court found that the plain language of the Surface Right of Way and Easement provided that SandRidge could dispose of any water produced by oil and gas wells operated by SandRidge and that there was no language limiting that right to only on-lease water. The Court also recognized that SandRidge was leasing the land from Doce for oil and gas exploration so it already had a common-law right to dispose of the on-lease water. Therefore, if the Surface Right of Way and Easement only gave SandRidge the right to dispose of on-lease water, then it would have been entirely meaningless because SandRidge already had that right under its oil and gas lease.

About the Author

David Bengston *has extensive experience representing oil and gas companies in nearly all aspects of their business, including litigation, transactional matters, title opinions, and regulatory issues. His litigation experience ranges from the defense of statewide royalty owner class action lawsuits to routine lawsuits over operational and contractual matters. His regulatory experience ranges from complex multi-party field rules hearings to routine regulatory filings and applications. He also routinely counsels oil and gas clients on the application of state regulatory law and case law to their operations and activities. He also has extensive experience in preparing drilling, division order, and acquisition title opinions.*

Kansas Supreme Court to Rule on Common Law Rule Against Perpetuities Regarding Common Mineral Conveyance Language

By Will Wohlford and Jon Schlatter, Law Offices of Morris Laing Evans Brock & Kennedy, Chtd.

Editor's Note: *We reported this case to you in the Spring 2017 Newsletter after the Ruch County District Court had heard summary judgment arguments. As predicted, the case has landed in Topeka due to the far reaching impact the decision will have on many Kansas oil and gas interests.*

The *Jason Oil Company, LLC v. Littler, et al.*, Kansas Supreme Court Appeal No. 17-118387-S case presents important questions regarding the application of the common law Rule Against Perpetuities to the widely-utilized term mineral reservations. The deeds at issue in this case granted to grantees the entirety of certain tracts, but reserved the minerals for the grantor, for a period of years or as long thereafter as oil, gas or other minerals may be produced from such lands. The defendants in the case were generally split along two sides. On one side, the heirs of the original grantee argue that they are the owners of the minerals, contending that the Rule Against Perpetuities voids the mineral reservation. On the other side, the heirs of the original grantor argue that applying the Rule Against Perpetuities in this manner would unnecessarily undermine the intent of the parties to the transaction, and as such, the Rule Against Perpetuities should not be applied.

The case is currently pending before the Kansas Supreme Court, although no date for argument has been scheduled at the time this article was drafted. Numerous interested parties have filed briefs in this proceeding as Amicus Curiae, including the Kansas Independent Oil & Gas Association, Eastern Kansas Oil & Gas Association, and the Wichita Association of Petroleum Landmen. These Amicus have supported the arguments of the original grantors, arguing that the Rule Against Perpetuities should not be applied in a manner that vitiates the intent of the parties to the original transaction. In essence, although a technical application of the Rule Against Perpetuities could arguably void these types of mineral reservations, these Amici and the grantor defendants argue that to do so in a manner that would so clearly undermine the intent of the parties to the original transaction would be unreasonable, and would throw the ownership of minerals throughout the state into flux. These parties cite numerous cases from other states and jurisdictions in which this specific issue was decided, and in which the courts have uniformly refused to apply the Rule Against Perpetuities to invalidate these term mineral reservations.

In addition, as discussed above, the deeds at issue in this case generally appear to take the following form:

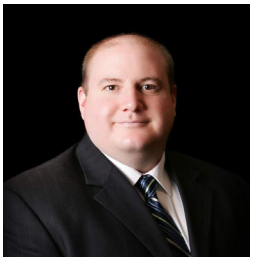
Grantor grants greenacre to Grantee, Grantor reserves the minerals for so long as minerals are produced from greenacre, thereafter the minerals transfer to Grantee

Notably, strictly construed, the Rule Against Perpetuities might arguably apply to this type of transaction. However, it is clear that the Rule does not apply to transactions in the following form:

Grantor grants greenacre to Grantee, who in turn grants the minerals in greenacre back to Grantor for so long as minerals are produced therefrom, and thereafter the minerals in greenacre are to revert to Grantee

The question presented to the Kansas Supreme Court in this appeal is whether the Rule Against Perpetuities should be applied strictly so as to disparately treat these two transactions, which are for all practical purposes identical in outcome, purpose, and intent. In addition, it is evident that applying the Rule Against Perpetuities to these term mineral reservations would also clearly undermine the intent of the parties to the original transaction, and would upset mineral ownership in hundreds, if not thousands, of tracts throughout the State of Kansas. Obviously, the outcome of this case could have deep impacts throughout the oil and gas industry in Kansas.

About the Authors



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Jon Schlatter *has a unique skill set and years of experience in the complex worlds of oil and gas law, bank regulation, and real estate law. Mr. Schlatter has been involved in permitting numerous secondary and tertiary recovery projects, including the State's first underground pad drilling project, and he has participated in many KCC matters, acquisitions, and other transactions. He has also represented clients in multiple lease termination cases, terms mineral and royalty interest cases, lien rights cases, and other oil and gas litigation.*