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## A State of Mind: Determining Bad Faith in Trespasses to Oil and Gas: A Call to Courts to Apply a True Subjective Analysis to Determine Whether a Trespasser to an Oil and Gas Estate Trespasses in Good or Bad Faith

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**A STATE OF MIND: DETERMINING BAD FAITH IN TRESPASSES TO OIL AND GAS: A CALL TO COURTS TO APPLY A TRUE SUBJECTIVE ANALYSIS TO DETERMINE WHETHER A TRESPASSER TO AN OIL AND GAS ESTATE TRESPASSES IN GOOD OR BAD FAITH**

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I. INTRODUCTION

It has always been the law of trespass *mesne profits* to an oil and gas estate that a trespasser is liable for the value of the oil and gas that it has produced from the estate to which it trespasses.<sup>1</sup> That value is determined after ascertaining whether the trespasser held an honest belief that he or she had the right to produce oil or gas from the estate upon which it trespassed.<sup>2</sup> In those cases, the trespasser is said to have trespassed in good faith.<sup>3</sup> Conversely, the trespasser acts in bad faith when it knowingly produces oil and gas without the right to do so.<sup>4</sup> The rule is couched subjectively from the perspective of the trespasser and not from the view of a reasonable person in the same position as the trespasser.<sup>5</sup>

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1. See *Guffey v. Smith*, 237 U.S. 101 (1915); *United States v. Wyoming*, 331 U.S. 440 (1947); *Loeb v. Conley*, 169 S.W. 575 (Ky. 1914); *Barnes v. Winona Oil Co.*, 200 P. 985 (Okla. 1921).

2. *United States v. Wyoming*, 331 U.S. at 458.

3. *Id.*

4. *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky. 1951).

5. See *id.*; *Sapulpa Petroleum Co. v. McCray*, 277 P. 589, 590 (Okla. 1929); *Barnes v. Winona Oil Co.*, 200 P. 985 (Okla. 1921); *Gulf Prod. Co. v. Spear*, 84 S.W.2d 452, 457 (Tex. 1935); *Alaska Placer v. Lee*, 553 P.2d 54, 58 (Alaska 1976); *United States v. Wyoming*, 331 U.S. at 440.

The majority of oil and gas producing jurisdictions announce that they apply a subjective standard.<sup>6</sup> However, while those jurisdictions recite the same rule, they do not apply it in the same fashion.<sup>7</sup> Instead, an objective test has crept into the reasoning of the courts in some jurisdictions.<sup>8</sup> Rather than determining the trespasser's subjective belief according to the facts, those courts treat certain facts as dispositive of the question of good or bad faith despite, and in some cases in spite of, evidence of an honest but mistaken belief of the trespasser's right to produce.<sup>9</sup>

Those jurisdictions that inject objective criteria to a patently subjective test do not properly apply the rule. The standard has always looked to the subjective belief of the trespasser and cloaked him with the status of good faith, provided his belief was honest, and regardless of outside factors that would cause a reasonable person to believe differently.<sup>10</sup> This Article calls the courts that adopt objective criteria to abandon their precedent and once more apply the well-reasoned subjective test for determining a trespasser's good or bad faith.

Section II of this Article states a brief history of the rule and demonstrates some of the variations that have evolved in different jurisdictions. Section III analyzes jurisdictions that do not follow the traditional pronouncement and application of the rule. The scope of this Article is limited only to the law of trespass as it pertains to oil and gas and does not discuss different approaches to calculating damages, such as royalty or value in place distinctions, once a finding of good faith is made. The Article does not analyze cases involving restitution or unjust enrichment by a trespasser for valuable improvements made to real property. Section IV is the conclusion and a call to courts to adopt the traditional approach as applied by Oklahoma, Kentucky, and Pennsylvania.

## II. HISTORY OF THE RULE

### A. *The Traditional Rule*

Kentucky, Oklahoma, Texas, Alaska, Pennsylvania, and Wyoming follow the traditional rule that a trespasser may deduct his reasonable costs of development if he held a subjective belief that he had the

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6. See *Rudy*, 236 S.W.2d 466; *Sapulpa*, 277 P. at 590 (Okla. 1929); *Barnes*, 200 P. at 985; *Gulf Prod. Co.*, 84 S.W.2d at 457; *Alaska Placer*, 553 P.2d at 54; *United States v. Wyoming*, 331 U.S. 440 (1947); *Crawford*, 57 A. at 47.

7. See *Dolch v. Ramsey*, 134 P.2d 19, 22 (Cal. Dist. Ct. App. 1943) (applying a prudent person standard); *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*, 100 S.E. 296 (W. Va. 1919).

8. See *Dolch*, 134 P.2d at 19; *Pentress Gas Co.*, 100 S.E. at 296.

9. See *Hous. Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75 (Tex. Comm'n App. 1933) (finding the trespasser acted in bad faith where they entered the land during the pendency of litigation).

10. *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037, 1039-41 (Ky. 1934).

right to produce the oil and gas.<sup>11</sup> The Kentucky Court of Appeals recited the rule as follows:

The test to determine whether one was a wilful [sic] or an innocent trespasser is, not his violation of the law in the light of the maxim that every man knows the law, but his honest belief and his actual intention at the time he committed the trespass.<sup>12</sup>

*Rudy v. Ellis* involved a lease that was invalid because a court-appointed trustee for contingent future interest-holders had not executed it.<sup>13</sup> After the execution of the lease and drilling of wells, a trustee was appointed.<sup>14</sup> But the court refused to confirm the lease, and a new lease was executed to a different lessee.<sup>15</sup> The court held that constructive notice was insufficient and that actual notice was required for a willful trespass.<sup>16</sup> The court concluded that the operator was an innocent trespasser entitled to deduct their costs.<sup>17</sup> The Kentucky court's test emphasizes what fundamentally distinguishes this test from a negligence-derived "prudent operator" or "reasonable operator" standard: The trespasser's internal state of mind, not an objective test of what the operator "should have" done.

There is a decision from the Kentucky Court of Appeals that appears to modify the traditional rule. However, upon a closer read of the case, it is clear that the court there, while reciting the rule differently, nonetheless applied the traditional rule. In *Loeb v. Conley*, the court considered a dispute between two lessees from the same lessor.<sup>18</sup> The first lease purported to convey forty acres to Conley.<sup>19</sup> The second lease purported to convey twelve acres to Loeb.<sup>20</sup> As is common, the land in the leases was only described by adjoinders and the eastern adjoinder and western adjoinder, were incorrectly identified.<sup>21</sup> The court nonetheless concluded that the description was sufficient to put Loeb on notice that his tract was subject to the Conley lease.<sup>22</sup>

The court applied the following test to determine whether Loeb could receive credit for the cost of drilled wells: "Whether they honestly believed and had reasonable grounds to believe that they had the

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11. See *supra*, note 7 and accompanying text.

12. *Rudy*, 236 S.W.2d at 468.

13. *Id.* at 466.

14. *Id.* at 467.

15. *Id.*

16. *Id.* at 468 ("It is suggested in appellants' brief that appellees should have examined the title and should have known the law, and that the attorney who advised the appointment of a guardian should have known the law. But in this state we have held that the rule of actual, not constructive, notice applies. A wilful trespasser is one who knows he is wrong; an innocent trespasser is one who believes he is right.").

17. *Id.* at 469.

18. *Loeb v. Conley*, 169 S.W. 575, 576-77 (Ky. 1914).

19. *Id.* at 576.

20. *Id.*

21. *Id.* at 576-77.

22. *Id.* at 578.

right, by virtue of their lease, to develop the property by boring these wells.”<sup>23</sup> This test arguably deviates from the traditional rule in incorporating the objective term “reasonable” to the rule. However, from that case it was clear that an operator’s reasonable grounds to believe their title is good is a relevant *factor* judging whether the operator honestly believed in the strength of their title. As will be discussed later, because the relevance of the basis for the operator’s belief in his title in determining his subjective belief, some courts have moved away from the classic test over time, focusing more on the objective reasonableness of the operator’s conduct and ignoring the operator’s subjective beliefs. In *Loeb*, the court expressly did not consider whether constructive notice of the Conley lease impacted the good faith of Loeb’s operations.<sup>24</sup> However, the court held that because Loeb was made aware of the prior lease before development and had the opportunity to get his money back, Loeb’s development was not in good faith.<sup>25</sup>

In *Swiss Oil Corp. v. Hupp*, the Kentucky Court of Appeals clarified *Loeb* and provided some additional insight in how to determine when a trespasser is innocent or willful.<sup>26</sup> The operator in *Swiss Oil Corp.* had color of title under a lease that was subsequently determined to be a top lease.<sup>27</sup> The operator had secured a legal opinion that the prior lease had forfeited for failure to develop.<sup>28</sup> After nu-

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23. *Id.* at 581.

24. *Id.* (“In disposing of this question we will leave entirely out of view the constructive notice furnished to the Loeb’s by the recorded lease of Conley, and further assume that when they took their lease from Sebastian they, in good faith, believed that Sebastian had the right to make the lease, thus narrowing the question down to the effect of the actual notice of Conley’s superior title before the expenditure of money in making the improvements.”).

25. *Id.* (“Fortunately there is little material dispute about the facts as to actual notice. After the Loeb’s had secured the lease from Sebastian, but before they had expended any money in improvements or in boring these wells, they not only had actual notice of the assertion of Conley’s claim, but actual notice of the existence of Conley’s lease, and there had been tendered back to them by Sebastian the money they paid to him for the lease. After receiving this actual notice and rejecting this tender, they proceeded to commence operations, but had only expended a few dollars before Conley brought this suit against them, in which he prayed that their lease be canceled, and that they be enjoined from entering upon the land or operating thereon for oil or gas or from interfering with him in any way in the development of the land. Therefore we may safely say from the record that all of the improvements for which the Loeb’s now seek compensation were made, not only after they had actual notice, by the service of process of this suit, but actual notice of the existence of Conley’s lease, and this lease, as we have said, furnished to them notice of the prior and superior claim and title of Conley to this land. Under these circumstances we think that the Loeb’s did not make these improvements in the good-faith belief that they had the right to make them, and so are not entitled to compensation.”).

26. *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037 (Ky. 1934).

27. *Id.* at 1039.

28. *Id.* at 1039–40.

merous decisions and appeals, the court ultimately ruled that the prior lease was held by production.<sup>29</sup>

The court first noted that the burden of proof is on the trespasser and that although the test is subjective, mere testimony by an operator that he or she had a good faith belief in the right to produce is insufficient.<sup>30</sup> The court then explained how circumstances were relevant to the determination of the operator's state of mind:

The test to be applied is that of intent, but, being a state of mind, it can seldom be proved by direct evidence. The conditions and behavior are usually such that the court can determine whether the trespass was perpetrated in a spirit of wrongdoing, with a knowledge that it was wrong, or whether it was done under a bona fide mistake, as where the circumstances were calculated to induce or justify the reasonably prudent man, acting with a proper sense of the rights of others, to go in and to continue along the way. And, in judging the trespasser's acts, regard must be had for conditions as they then appeared rather than as disclosed in the light cast backwards by the future. In a word, they are to be judged prospectively, not retrospectively. So, as stated in *Loeb v. Conley* whether a trespasser is to be so regarded depends upon the circumstances surrounding the transaction, and it is from those facts and circumstances that the court will determine whether he was acting in good faith and under an honest conviction that he was right in his assumption.<sup>31</sup>

This passage clarifies that the basis for an operator's belief in his or her title is relevant, not because the operator has to conform to a reasonable operator standard, but because the strength of the basis directly supports a determination that the operator indeed had an honest belief in the strength of the title.

While not applying state law and instead relying on federal principles of equity, the United States Supreme Court applied the traditional rule in *Guffey v. Smith*. There, the Court provided a good example of an application of the subjective test:

As respects the cost incurred prior to August 1, 1907, we think the objection is well taken, for up to that time Solley and his associates were in actual ignorance of the earlier lease, and were proceeding in the honest belief that the later lease, assigned to them by Willett, was the only one upon the premises. They paid a substantial sum for it, were let into possession by the lessor, and were not conscious that they were invading the rights of others. True, the prior lease had been properly recorded, but as they consulted an abstracter

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29. *Id.* at 1039–41.

30. *Id.* at 1041 (“To be sure, the mere testimony of the person affected that he acted in good faith and honestly believed he was right in the position he assumed is not conclusive or, indeed, sufficient of itself to entitle him to the advantage of one occupying the place of innocence or good faith.”).

31. *Id.* (citations omitted).

before consummating the transaction with Willett, and were advised that the title was clear, the constructive notice resulting from the recording of the prior lease was not inconsistent with an honest, though mistaken, belief on their part that they had acquired a perfect right to take and dispose of the oil. But the expenses incurred after August 1, 1907, are upon a different footing. On that date Solley and his associates were actually and fully informed of the prior lease and of the complainants' purpose to insist upon the rights conferred by it and to obtain redress for the invasion of those rights, so what was done thereafter cannot be regarded as anything less than a wilful taking and appropriation of the oil which was subject to the complainants' superior right.<sup>32</sup>

*Guffey* notes that constructive notice by itself is not sufficient to make the trespasser willful.<sup>33</sup> Instead, it is actual notice of the defect in their title that makes a person a bad-faith trespasser.

The Supreme Court of Oklahoma strictly applied the traditional rule in *Sapulpa Petroleum Co. v. McCray* to determine good or bad faith.<sup>34</sup> There, the trespasser, McCray, entered and developed property under a contract purporting that the grantors would subsequently convey leasehold rights to McCray.<sup>35</sup> Unknown to McCray, the grantors never completed the transactions necessary to vest the leases in McCray.<sup>36</sup> Because those transactions were never completed, McCray was trespassing.<sup>37</sup> Once he had notice of the issue, McCray sought specific performance of the defective leasehold conveyances.<sup>38</sup> The trial court denied specific performance, leaving McCray without a colorable right to develop the property.<sup>39</sup>

The Supreme Court of Oklahoma affirmed the trial court's finding of good faith, stating: "Good faith consists of an honest intention to abstain from taking any unconscientious advantage of another, even through forms or technicalities of the law, together with an absence of all information or belief of facts which would render the transaction unconscientious."<sup>40</sup> The Court explained that color of title sufficiently establishes good faith, and that "[t]he fact that a purchaser may err in judgment is not enough to impeach his good faith, but it exists when the purchase is made with an honest purpose, though the real estate is not acquired."<sup>41</sup> Finding good faith, the Court allowed McCray to de-

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32. *Guffey v. Smith*, 237 U.S. 101, 118-19 (1915).

33. *Id.*

34. See *Sapulpa Petroleum Co. v. McCray*, 277 P. 589, 590 (Okla. 1929); *Barnes v. Winona Oil Co.*, 200 P. 985 (Okla. 1921).

35. *Sapulpa Petroleum Co.*, 277 P. at 590.

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.* at 590-91 (holding the trial court's finding of good faith as a fact "is not clearly against the weight of evidence").

41. *Id.* at 590 (citing *Winters v. Haines*, 84 Ill. 585 (1877)).

duct the reasonable costs of production from the total damages.<sup>42</sup> This holding reflects a straightforward application of the subjective rule.

The Supreme Court of Texas generally applies the traditional rule, as announced in *Gulf Production Co. v. Spear*.<sup>43</sup> While the Court in *Spear* did not “undertake to prescribe a test for the determination of . . . good faith,”<sup>44</sup> it stated the general rule that, “[T]o act in good faith in developing a tract of land for oil or gas one must have both an honest and a reasonable belief in the superiority of his title.”<sup>45</sup> Lower courts adopted the “honest and reasonable” language, keeping the determination within the province of the trier of fact.<sup>46</sup> Texas courts continue to mix an objective component into the subjective test.<sup>47</sup>

Pennsylvania also applies the traditional rule. In *Crawford v. Forest Oil Co.*, the Supreme Court of Pennsylvania applied the rule where the operator made an error of law that rendered his title defective.<sup>48</sup> The subject property had been devised to the lessor “and to his children.”<sup>49</sup> The operator took a lease from the lessor alone, and continued producing from the leased premises after the lessor’s death, ignorant of the fact that, under Pennsylvania law, the devise at issue vested only a life estate in the lessor with a remainder in his children.<sup>50</sup>

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42. *Id.* at 590–91 (“A person who in good faith enters into peaceable possession of land upon which he owns an oil and gas lease and produces oil and gas therefrom, and thereafter said lease is declared void and invalid, the measure of damages to the landlord in an action for an accounting for the oil and gas produced from the said premises by the lessee is the value of the oil at the surface or in the pipeline or tanks, wherever the same may be, less the reasonable cost of producing the same.”) (quoting *Barnes v. Winona Oil Co.*, 200 P. 985, 985 (1921); citing *United States v. Gentry*, 119 F. 70 (8th Cir. 1902); *United States v. Homestake Mining Co.*, 117 F. 481 (8th Cir. 1902) (concerning action on advice of reputable counsel)).

43. *Compare Gulf Prod. Co. v. Spear*, 84 S.W.2d 452, 457 (Tex. 1935) (noting that “[for a trespasser] to act in good faith in developing a tract of land for oil or gas one must have both an honest and a reasonable belief in the superiority of his title”) with *Hous. Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75 (Tex. Comm’n App. 1933) (finding the trespasser acted in bad faith where they entered on the land during the pendency of litigation).

44. *Gulf Prod. Co.*, 84 S.W.2d at 457 (noting the question of good faith is an issue of fact for the trier of fact) (citing *Holstein v. Adams*, 10 S.W. 560 (Tex. 1889); *Pomeroy v. Pearce*, 2 S.W.2d 431 (Tex. Comm’n App. 1928); see also Will Crews Morris, Comment, *Oil and Gas—Right of Trespasser to Compensate for Improvements—What Constitutes “Good Faith”*, 12 TEX. L. REV. 210, 218 (1934)).

45. *Gulf Prod. Co.*, 84 S.W.2d at 457. The Court then notes a number of Texas cases and other authorities stating the general rule. *Id.* (citations omitted).

46. See, e.g., *Marathon Oil Co. v. Gulf Oil Corp.*, 130 S.W.2d 365, 376 (Tex. Civ. App.—El Paso 1939), *mod. on other grounds* 152 S.W.2d 711 (1941) (stating “[g]ood faith . . . depends upon the possessor who so develops having an honest and reasonable belief in the superiority of his title”) (citing *Gulf Prod. Co.*, 84 S.W.2d at 457).

47. See *infra* notes 135–162 and accompanying text.

48. *Crawford v. Forest Oil Co.*, 57 A. 47 (Pa. 1904).

49. *Id.* at 53.

50. *Id.* at 53–54.



The Supreme Court of Pennsylvania affirmed the superior court on damages, which had held that the trespasser was an innocent trespasser who was entitled to deduct his costs of production:

What is the true measure of damages in this case? The evidence shows that the defendant company took the oil under a claim of right which turned wholly on a question of law. In law it had no claim, but it thought the law gave it a claim. It was honestly mistaken when it made the entry, and therefore we are of opinion, as we have already indicated, that the net value of the oil in the pipe lines is the true measure of damages for the oil taken, and in arriving at that sum we have taken what the oil sold for in the market, and from this deducted the cost of production.<sup>51</sup>

The threshold issue of when a trespasser has actual notice of the competing claim can be a very difficult determination to make. In *Rudy*, the court clearly thought the fact that the defect in the lease was not court-approved did not render the trespass willful.<sup>52</sup> Similarly, in *Guffey* the Supreme Court thought that the failure of the operator's abstractor to find the prior lease did not render the trespass willful.<sup>53</sup> In *Crawford*, the court decided that the trespass was not willful because their claim turned wholly on a question of law (which the court implicitly concluded was not wholly unreasonable).<sup>54</sup> This raises the question of what relevance the basis for the operator's belief in his or her right to operate has to the subjective test.

Some states continue to apply the traditional rule with no variation,<sup>55</sup> some states that applied that rule early in their case law later include objective "reasonable" wording, while leaving the application unchanged.<sup>56</sup> Oklahoma is one example. While first employing the traditional rule,<sup>57</sup> the Oklahoma Supreme Court parted with a straightforward wording of that rule, adding "reasonable" language.<sup>58</sup>

In *Miller v. Tidal Oil Co.*, the Court added the word "reasonable" to the definition of good faith previously announced in *Sapulpa Petroleum* and *Barnes*.<sup>59</sup> In *Miller*, Tidal Oil Co. (Tidal) developed a tract of land with the belief that it had good title to the tract it developed.<sup>60</sup>

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51. *Id.* at 52.

52. *See supra* notes 15–17 and accompanying text.

53. *See supra* notes 29–30 and accompanying text.

54. *See supra* notes 48–49 and accompanying text.

55. *Crawford*, 57 A. at 47. *See also* *Guffey v. Smith*, 237 U.S. 101 (1915); *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*, 100 S.E. 296 (W. Va. 1919); *Barnes v. Winona Oil Co.*, 200 P. 985 (Okla. 1921); *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037 (Ky. 1934).

56. *Compare Barnes*, 200 P. 985 (applying a subjective intent test to determine good faith), *with Miller v. Tidal Oil Co.*, 17 P.2d 967, 970 (Okla. 1932) (adding a "reasonableness" component to the definition of good faith).

57. *See Barnes*, 200 P. at 285.

58. *See supra* note 52 and accompanying text.

59. For a discussion of *Sapulpa* and *Barnes*, *see Miller*, 17 P.2d at 967.

60. *Miller*, 17 P.2d at 967–68.

After an adverse ruling and subsequent appeals, the court held that Tidal did not have good title, and it was a trespasser.<sup>61</sup> The only issue left to determine was the amount of damages Tidal owed for trespassing—a question that required a finding of whether Tidal trespassed in good or bad faith.<sup>62</sup>

Beginning its analysis of the character of Tidal's trespass, the Court noted that good faith "exists when the purchase is made with an honest purpose," and continued along that line stating good faith "is said to be the opposite of fraud."<sup>63</sup> However, the Court then slightly modified the language of the traditional rule, holding: "Good faith, means that the taking is without *culpable negligence* or a willful disregard of the rights of others and in the honest and *reasonable* belief that it was rightful."<sup>64</sup> For the first time in Oklahoma, the Court seemingly inserted objective components to the test for determining whether good or bad faith by adding the terms "negligence" and "reasonable."<sup>65</sup>

The Court went on to announce that good faith exists where a legal wrongdoer acted in "honest belief that his conduct was lawful,"<sup>66</sup> mixing the objective "reasonable" standard with the subjective "honest belief."<sup>67</sup> While the Court modified the wording of the traditional rule to include objective criteria, it did not discuss how to apply those objective criteria, nor did it define the term "culpable negligence." In fact, the analysis of the trespasser's good faith did not incorporate an objective inquiry into the reasonableness of the trespasser's belief in their right to enter the property.<sup>68</sup> To date, neither Kentucky nor Oklahoma has applied an objective inquiry.

Following *Miller*, a few other jurisdictions adopted the mixed subjective-objective wording of the traditional rule for determining whether a trespass occurred with good or bad faith.<sup>69</sup>

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61. *Id.* at 968–69.

62. *Id.* at 970 (stating "[t]he rule is well established in this state that a person who in good faith enters into peaceable possession of land upon which he owns an oil and gas lease and produces oil and gas therefrom and the lease is thereafter declared void is entitled to the reasonable cost of producing the oil and gas in an action for an accounting by the landlord") (citing *Barnes*, 200 P. at 285; *Minshall v. Berryhill*, 205 P. 932 (Okla. 1921); *Woodworth v. Franklin*, 204 P. 452, 453 (Okla. 1921)).

63. *Miller*, 17 P.2d at 970; *Sapulpa Petroleum Co. v. McCray*, 277 P. 589, 590 (Okla. 1929).

64. *Miller*, 17 P.2d at 970 (emphasis added).

65. See RESTATEMENT (SECOND) OF TORTS § 283 (1965) (defining the standard of conduct of a "reasonable man").

66. *Miller*, 17 P.2d at 970.

67. *Id.*

68. *Id.*

69. See generally *United States v. Wyoming*, 331 U.S. 440, 458 (1947) (applying Wyoming law, noting that the determination of good faith was not before the Court, but that good faith is "something more than the trespasser's assertion of a colorable claim to the converted minerals"); *Hammond v. Ingram Ind., Inc.*, 716 F.2d 365, 371 (6th Cir. 1983) (applying Kentucky law) (noting that the law is "well-settled that an intentional trespasser is one who trespasses knowing he is wrong, while an innocent trespasser believes he is right") (citing *Lebow v. Cameron*, 394 S.W.2d 773, 776 (Ky.

The Alaska Supreme Court also adopted *Miller's* pronouncement, while signaling to the *per se* standard applied in *Houston Production Co. v. Mecom*, discussed below.<sup>70</sup> In *Alaska Placer*, the Lees trespassed on Alaska Placer Co.'s property and continued to extract minerals after litigation commenced between the parties.<sup>71</sup> The trial court found the Lees did not trespass in bad faith.<sup>72</sup> Upholding the trial court's characterization of the trespass,<sup>73</sup> the Court quoted *Miller*, stating that good faith is an "honest and reasonable belief" that the taking is rightful.<sup>74</sup> The Court also cited *Sapulpa Petroleum's* pronouncement that good faith is the "honest intention not to take unconscientious advantage of another."<sup>75</sup>

The Court did not agree with the argument that the Lees acted in bad faith simply because they possessed and mined the property after the commencement of litigation.<sup>76</sup> The Court distinguished the facts from those in *Mecom* explaining the Lees were in possession and mining *prior* to the commencement of litigation.<sup>77</sup> The decision appears to apply an objective component to the traditional rule, but fails to articulate how and when it would apply.<sup>78</sup>

These decisions continue to prove the validity of the traditional rule that is still applied by a majority of jurisdictions. A minority of courts break from the traditional application by adding an objective component to the subjective test.

### III. NON-TRADITIONAL RULE STATES

A minority of jurisdictions, while citing the traditional rule, nonetheless take a radically different approach to classifying one as a good- or bad-faith trespasser. While not uniform in their approach, the

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1965); *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky. 1952)); *Alaska Placer Co. v. Lee*, 553 P.2d 54, 58 (Alaska 1976) (defining good faith as an "honest and reasonable belief" that the taking is rightful) (citing *Miller*, 17 P.2d at 967); *Dethoff v. Zeigler Coal Co.*, 386 N.E.2d 1373, 1385 (Ill. App. Ct. 1979), *rev'd on other grounds*, 412 N.E.2d 526 (Ill. 1980).

70. *Alaska Placer*, 553 P.2d at 58. *Hous. Prod. Co. v. Mecom*, 62 S.W.2d 75 (Tex. Comm'n App. 1933) is discussed *infra* notes 139–163 and accompanying text.

71. *Alaska Placer*, 553 P.2d at 56.

72. *Id.* at 54–58.

73. *Id.* at 58 (citing *Bostic v. Whited*, 93 S.E.2d 334, 335 (Va. 1956) (noting that factors such as reliance on counsel have been held sufficient to find good faith) (citing *Elk Horn Coal Co. v. Anderson Coal Co.*, 223 F. Supp. 746, 750 (E.D. Ky. 1963); *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037, 1041–42 (1934)).

74. *Id.* at 58 (citing *Miller v. Tidal Oil Co.*, 17 P.2d 967 (Okla. 1932)).

75. *Id.* The Court in *Alaska Placer* defines "good faith" in a mineral-trespass claim as an "honest and reasonable belief that the taking is rightful," but fails to further elucidate application of the "reasonableness" standard, noting good faith is an "honest intention not to take unconscientious advantage of another." (internal quotations omitted).

76. *Id.* at 60–61.

77. *Alaska Placer*, 553 P.2d at 60 (emphasis added).

78. *Id.* at 58 (citing *Miller v. Tidal Oil Co.*, 17 P.2d 967 (Okla. 1932)).

courts of those states do not inquire into the trespasser's subjective intent. In fact, in those states, the trespasser's honest mistake as to whether he or she holds good title is irrelevant. What is relevant is whether the behavior was objectively reasonable. The states that follow the objective rule are West Virginia, California, and, under limited circumstances, Texas.<sup>79</sup>

West Virginia first adopted the objective rule in *Pittsburgh & West Virginia Gas Co. v. Pentress Gas Co.*<sup>80</sup> The plaintiffs in *Pittsburgh* were the successors in interest to two oil and gas leases that covered two separate parcels of property.<sup>81</sup> The leases were "no term" leases, meaning that the lessee must drill a well or pay a set price, in this case quarterly, to its lessor in order to hold the lease.<sup>82</sup> For several years, the lessee paid the quarterly price to the lessor to hold the leases.<sup>83</sup> At the conclusion of one of the quarterly periods, the lessor notified the lessee that the leases were terminated and refused tender of the next quarterly lease payments.<sup>84</sup> The lessor then executed new leases to the same parcels.<sup>85</sup>

The new lessees were the defendants in *Pittsburgh*.<sup>86</sup> The defendants were aware of the prior leases taken by the plaintiff.<sup>87</sup> The defendants filed a lawsuit in equity that requested that the court enjoin the plaintiff's conduct on the leases because the same had terminated.<sup>88</sup> The defendants then drilled producing wells upon the property.<sup>89</sup> The West Virginia Supreme Court overturned the trial court's decision, holding that the plaintiff's leases had not terminated.<sup>90</sup> Subsequently, the plaintiffs filed a lawsuit in equity demanding the trial court enjoin the defendants from further operations.<sup>91</sup> The defendants argued that they were good-faith trespassers in drilling the wells and requested an offset for the costs to drill and operate the wells that had been trespassed.<sup>92</sup> The West Virginia Supreme Court described the issue as whether the defendant's knowledge of the plaintiff's claim

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79. For reasons discussed *infra*, it appears California courts have adopted the non-subjective rule; however, there is some ambiguity in the case law. *See Dolch v. Ramsey*, 134 P.2d 19 (Cal. App. 1943) (applying a prudent person standard). *But see* *Quentin v. Caubu*, 137 P.2d 880, 884 (Cal. App. 1943) (citing *Dolch* and applying an "honest mistake" standard).

80. *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*, 100 S.E. 296, 296 (W. Va. 1919).

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.* at 297.

89. *Id.*

90. *Id.* at 300.

91. *Id.* at 297.

92. *Id.*

of title and the facts upon which the plaintiff supported that claim foreclosed them from the status of a good-faith trespasser.<sup>93</sup> In other words, can an honest mistake to the law, as opposed to the facts, leave one a good-faith trespasser?<sup>94</sup>

The Court in *Pittsburgh* cited to the traditional rule noting that:

[W]here the trespass is willful, the measure of damages is the value of the property at the time and place of demand, without deduction for labor and expense; but where such trespass is not willful, but is the result of a mistake of fact, the measure of plaintiff's damages is the value of the article after its severance, less the proper expense of such severance.<sup>95</sup>

While noting the traditional rule, the court nonetheless held that a party can never be a good-faith trespasser as a matter of law if the only basis for their trespass is a mistake of law.<sup>96</sup> The court cited holdings from earlier cases in which it had denied a trespasser the right to offset the value of improvements made to the real estate upon which it trespassed.<sup>97</sup>

The court in *Pittsburgh* did not employ the traditional rule. It was clear from the case that the defendants held an honest, yet mistaken, belief that they had legal title to the oil and gas estate.<sup>98</sup> The Court in *Pittsburgh* did not dispute the trespasser's honest belief of good title. Instead, the Court created a bright-line rule that an operator is a bad-faith trespasser when its mistake goes to the law and not to the facts.<sup>99</sup> *Pittsburgh* has been criticized by commentators.<sup>100</sup> It is not difficult to see why, as the test essentially leaves one strictly liable as a bad-faith

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93. *Id.*

94. *See generally id.* From the facts, it appears that the Court did not question that the defendant's mistake as to the law was honest. *Id.* In those states that adopt the subjective rule, a mistake as to only the law is still a sufficient basis to hold one a good faith trespasser. *See Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037, 1042 (Ky. 1934) (stating "the test is not the trespasser's violation of the law in the light of the maxim that every man knows the law, but is his sincerity and his actual intention at the time").

95. *Pittsburgh*, 100 S.E. at 298.

96. *Id.*

97. *Id.* at 297 (citing *Chesapeake & Ohio Ry. Co. v. Deepwater Ry. Co.*, 50 S.E. 890 (W. Va. 1905); *Snider v. Snider*, 3 W. Va. 200 (1869); *Dawson v. Grow*, 1 S.E. 564 (W. Va. 1887); *Hall v. Hall*, 5 S.E. 260 (W. Va. 1888)).

98. *Pittsburgh*, 100 S.E. at 298.

99. *Id.*

100. *See* 1 NANCY SAINT-PAUL, SUMMERS OIL AND GAS § 2:7 (3d ed. 2004) (noting that *Pittsburgh* departs from the subjective rule that finds bad faith from "whether the trespasser had the actual intention of violating the rights of another or the honest belief of exercising his or her own privileges at the time of the trespass."); *id.* § 2:4 (criticizing the rule and noting its departure from the subjective rule); Morris, *supra* note 44, at 218 (noting criticism); P. E. D., Oil and Gas—Improvements by Good Faith Trespasser—Mistake of Law, 6 TEX. L. REV. 547, 548 (1928) (noting departure from the rule and criticism of the same).

trespasser. Presumably, the only type of trespass that could conceivably meet its good-faith test would be a pure mistake of fact.<sup>101</sup>

It is not entirely clear whether California rejects the traditional rule. While California recognized the rule early in its statehood,<sup>102</sup> a series of holdings from the state's intermediate courts inconsistently applied the rule and at times appear to reject it directly.<sup>103</sup> One such case was *Dolch v. Ramsey*.<sup>104</sup> In *Dolch*, a court of appeals departed from the subjective rule.<sup>105</sup> The defendant in *Dolch* removed ore from property he did not own.<sup>106</sup> The trial court held that the removal of ore was in good faith and the result of "inadvertence and an honest mistake and without any knowledge of the ownership of plaintiff."<sup>107</sup> The defendant believed that the plaintiff had abandoned the mine.<sup>108</sup> Prior to the defendant's trespass, the plaintiff carved a 154-foot tunnel into the mountain through which he removed and sold the mineral.<sup>109</sup> The plaintiff later left the mine, which was permissible under mining moratorium acts passed by Congress.<sup>110</sup> From these facts, it was not disputed that title to the mineral claim belonged to the plaintiff.<sup>111</sup> The defendant supported his belief that the mine was abandoned from the condition in which he found the property.<sup>112</sup> Specifically, the trial court found that the terrain was covered by bushes and trees.<sup>113</sup> The defendant did testify, however, that from the property he could see at least two "corner stakes," a requirement of a claim to a mineral interest.<sup>114</sup>

The defendant produced a picture taken from a position where one of the corner stakes would be clearly visible.<sup>115</sup> The court states, "the conclusion is inescapable that had [the defendant looked from that position] towards this corner stake he must have seen it."<sup>116</sup> Also, it is

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101. See *Taylor v. Higgins Oil & Fuel Co.*, 2 S.W.2d 288, 304 (Tex. Civ. App.—Beaumont 1928, writ dismissed w.o.j.). But see *Rieckhoff v. Consol. Gas Co.*, 217 P.2d 1076, 1080 (Mont. 1950) (citing *Pittsburgh* in dicta and agreeing with its holding as applied to the facts of that case).

102. See, e.g., *Maye v. Yappen*, 23 Cal. 306, 309 (1863); *Empire Gravel Mining Co. v. Bonanza Gravel Mining Co.*, 7 P. 810, 812 (Cal. 1885).

103. *Maye*, 23 Cal. at 310–13, (recognizing that in earlier cases the form of the action—trover, trespass *quer quasi figet*, or trespass mesne profits—governed the measure of a damages a plaintiff was owed).

104. *Dolch v. Ramsey*, 134 P.2d 19 (Cal. Ct. App. 1943) (*Dolch* involved a mineral interest, ore, and not oil and gas).

105. *Id.* at 22.

106. *Id.* at 21.

107. *Id.* at 20.

108. *Id.* at 21.

109. *Id.* at 20.

110. *Id.* at 22.

111. *Id.* at 19–20.

112. *Id.* at 20.

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

undisputed that had defendant followed the law in locating his mineral claim on what he believed was the plaintiff's abandoned mineral claim, he would have discovered additional evidence of the plaintiff's claim.<sup>117</sup>

From these facts, the appellate court concluded that the trial court erred in finding the defendant a good-faith trespasser.<sup>118</sup> First, as with *Pittsburgh*, the court cited the subjective rule:

The measure of damages in an action for trespass on a mining claim, in the absence of oppression, fraud or malice, is the amount which will compensate for all the detriment proximately caused by the trespass. Accordingly, where one invades another's mine as the result of inadvertence or an honest mistake, the measure of damages therefor is the value of mineral extracted, less the cost of mining and milling. . . . Where the trespass is intentionally committed, with knowledge of the owner's rights, the measure of damages is the value of the mineral after reduction, without deducting the expenses of mining and milling.<sup>119</sup>

Although the court cited the subjective rule, it did not apply it subjectively. Instead, it looked at the evidence, which included the testimony from the defendant about his intentions in trespassing, and concluded that the law must impute bad faith.<sup>120</sup> In support, the court wrote:

A person *may not have actual knowledge of certain facts*, but if he has knowledge of sufficient facts to cause *a reasonably prudent person of ordinary intelligence to make inquiry*, the law will impute knowledge of those facts which may be easily ascertained by reasonable inquiry. When the law imputes knowledge, it has the same legal effect as though there was actual knowledge.<sup>121</sup>

From that language, it is unmistakable that the court applied a rule at odds with the traditional rule. The court did not subjectively apply the rule it recited, but instead relied upon objective criteria—"a reasonably prudent person"—to determine if the defendant was a good-faith trespasser. The court downplayed, even disregarded, the actual state of mind of the defendant and instead relied upon what it believed the defendant should know.<sup>122</sup> The court's language suggests that an honest belief of good title—the traditional rule—will not support a status of good faith if that honest belief was unreasonably held as judged from the perspective of a reasonably prudent man.

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117. *Id.* at 21.

118. *Id.* at 23.

119. *Id.* at 19.

120. *Id.* at 22.

121. *Id.*

122. *Id.* at 21–23.

At least one other court cited *Dolch* with approval.<sup>123</sup> Subsequent to *Dolch*, other California Courts of Appeal reached seemingly conflicting holdings.<sup>124</sup> In *Ehrhart v. Bowling*, the court of appeals cited *Pittsburgh* in dicta in upholding a jury's finding of bad faith.<sup>125</sup> Curiously, the court held that the trial court did not err in its jury instruction on when a person trespasses in good or bad faith.<sup>126</sup> That instruction read:

[Y]ou are instructed that the measure of damages . . . shall be governed by the following rule: If you should find that the plaintiff . . . was the owner of such mine, and that the same was invaded by the defendants . . . as the result of an honest mistake and inadvertence, the measure, of damages would be the value of the mineral extracted from the ore, less the cost of production, but if you should find that such invasion, if any, was intentional and with knowledge of plaintiff's rights, then I instruct you that the measure of damages would be the value of the mineral extracted from the ore, without any deduction for expenses of mining, milling or production.<sup>127</sup>

The instruction recites the subjective rule. The trial court did not modify the rule to instruct the jury that the honest mistake of the defendant is held to a reasonable-man standard, meaning that if that reasonable man would have acted differently then the defendant committed bad-faith trespass. The court of appeals did not find the instruction erroneous and held that the jury had sufficient evidence to support a finding of bad faith.<sup>128</sup> From that holding, the court noted in dicta that the defendant's belief alone is not sufficient to support a finding of good faith.<sup>129</sup> From that point, the court cited the *Pittsburgh* holding that a party is not a good-faith trespasser if they "know[ ] all of the facts which constitute [their] claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land."<sup>130</sup> As discussed above, *Pittsburgh* does not employ the subjective rule. In *Ehrhart*, the court seemingly approved an instruction that is in accord with the subjective rule, but cited with approval, albeit in dicta, language at odds with that rule.<sup>131</sup>

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123. *Tejeda v. Taylor*, No. B173254, 2005 WL 583334 (Cal. Ct. App. Mar. 14, 2005) (citing *Dolch* for the prudent person standard).

124. *See generally id.*; *Daly v. Smith*, 33 Cal. Rptr. 920, 923 (Cal. Ct. App. 1963) (signaling to *Dolch* while applying a more subjective standard); *Quetin v. Caubu*, 137 P.2d 880, 884 (Cal. Ct. App. 1943) (citing *Dolch* and applying an "honest mistake" standard); *Martinez v. De Los Rios*, 331 P.2d 724, 727 (Cal. Ct. App. 1958) (citing *Dolch* and applying "good faith" standard).

125. *Ehrhart v. Bowling*, 97 P.2d 1010, 1013 (Cal. Ct. App. 1940).

126. *Id.* at 1014.

127. *Id.* at 1013.

128. *Id.* at 1013–14.

129. *Id.* at 1013.

130. *Id.*

131. *Id.* at 1013–14.



Finally, in *Whittaker v. Otto*, the court of appeals upheld a jury verdict finding good faith despite evidence that the defendant had actual awareness of the adverse claim of the plaintiff.<sup>132</sup> Unlike in *Dolch*, where the court found an abuse of discretion, the appellate court did not find this verdict to be against the weight of the evidence even though the defendant had actual knowledge of the plaintiff's adverse claim.<sup>133</sup> Instead, the court stressed that the issue of good or bad faith is a jury question and that the jury could have decided that the defendant's reliance on the advice of counsel made them good-faith trespassers.<sup>134</sup>

The holding in *Whittaker* appears inconsistent with the court's prior holding in *Dolch*. In *Dolch* the court decided that the fact finder—the trial court—abused its discretion in finding the defendant was a good-faith trespasser.<sup>135</sup> While the defendant in *Dolch* had not sought the advice of counsel before deciding to trespass, the court stressed that it was his failure to make inquiries that made him a bad-faith trespasser. Because there were facts that would have placed a reasonably prudent man on notice, the defendant had constructive notice of the plaintiff's superior title.<sup>136</sup>

It is difficult to reconcile the disjunction between *Dolch* and *Whittaker*. In both cases the fact finder determined the status of the defendant as one of good or bad faith, yet the court overturned the decision in the former and not in the latter. The only distinction between the two cases is that in *Whittaker*, but not in *Dolch*, the defendant trespassed after obtaining advice of counsel.<sup>137</sup>

While Texas is a traditional rule state, as discussed above,<sup>138</sup> it does have one notable exception in which it applies the non-traditional rule: A person is a bad-faith trespasser per se if they first trespass after a lawsuit over their title is commenced.<sup>139</sup> This is true even if the trespasser holds an honest and good-faith belief as to the superiority of

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132. *Whittaker v. Otto*, 248 Cal. App. 2d 666, 669 (1967) (one of several defendants to that lawsuit had actually checked record title and ascertained that title was not in his lessor). *But see Dolch v. Ramsey*, 134 P.2d 19, 22 (Cal. Ct. App. 1943).

133. *Ehrhart*, 97 P.2d at 1013.

134. *Whittaker*, 248 Cal. App. 2d at 676–77.

135. *Dolch*, 134 P.2d at 22.

136. *Id.*

137. Courts in other jurisdictions in which the subjective-rule is employed have noted that advice of counsel is one strong factor a fact finder can rely upon to support a conclusion that one trespassed in good faith. *Swiss Oil Corp. v. Hupp*, 69 S.W.2d 1037, 1041–42 (Ky. 1934) (stating the trespasser's acting "upon the advice of reputable counsel" is a factor evidencing good faith.). In other jurisdictions, advice of counsel is viewed as conduct that leaves one a good-faith trespasser per se. *Alaska Placer Co. v. Lee*, 553 P.2d 54, 59 (Alaska 1976) (noting that "[r]eliance on the advice of a reputable counsel has been held to be a sufficient basis for a finding that a trespass was made in good faith" (citations omitted)).

138. *See supra* Section II.A. (or footnotes 43–47 and accompanying text).

139. *Hous. Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75, 77 (Tex. Comm'n App. 1933).

their title.<sup>140</sup> The seminal case that decided this point was *Houston Production Co. v. Mecom Oil Co.*<sup>141</sup>

In *Mecom*, the defendant trespassed under color of title and for the first time after a lawsuit was filed against it that alleged that its title was defective.<sup>142</sup> The defendant was held to be a trespasser as to the plaintiff whose title was found superior.<sup>143</sup> On the question of trespass and the proper damages to award the plaintiff, the jury found that the plaintiff trespassed in good faith and thus the defendant was entitled to an offset for the costs to drill and operate the well.<sup>144</sup> A judgment was entered from those proceedings.<sup>145</sup>

The defendant in *Mecom* appealed the judgment against him, and the court of appeals ruled in his favor.<sup>146</sup> The Texas Supreme Court then reversed the decisions of both courts and entered judgment in favor of the plaintiff.<sup>147</sup> The Court held that a person is a bad-faith trespasser per se if they first trespass after the filing of a lawsuit over their title.<sup>148</sup> In support, the Court cited *Pittsburgh* and wrote:

We are inclined to adhere to the well-established rule that, where one enters into possession of land and makes improvements thereon with full knowledge of the pendency of an action to enforce an adverse claim to the premises, he cannot be considered a trespasser in good faith so as to entitle him to recover the cost of his improvements.<sup>149</sup>

The Court also relied upon Texas case law in which the Texas Supreme Court ruled that a trespasser is not entitled to an offset for improvements erected upon real property after a lawsuit over title commences.<sup>150</sup>

*Mecom* was an action at law for trespass and not one at equity. The Court noted that it was disinclined to create an exception for oil and gas trespassers based on a need to avoid drainage from adjoining

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140. *Id.* at 76.

141. *Id.* at 75.

142. *Id.*

143. *Id.* at 76.

144. *Id.* at 75.

145. *Id.*

146. *Id.*

147. *Id.* at 77.

148. *Id.*

149. *Id.*

150. *Henderson v. Ownby*, 56 Tex. 647 (1882). At least one commentator has criticized the Texas Supreme Court's reliance on *Henderson*. Morris, *supra* note 44 at n. 19 (“[*Henderson*] involved the right of a tenant, who had erected a house on premises which were in litigation under an agreement with the unsuccessful claimant of the premises, to remove the house after title had been determined [sic].”).

property.<sup>151</sup> Curiously, the Court appeared ready to reach a different result if the action was filed in equity.<sup>152</sup>

*Mecom* is not without its critics;<sup>153</sup> some believe that the Court misplaced its reliance on both Texas and out-of-state case law.<sup>154</sup> Specifically, one commentator noted that the *Mecom* Court erroneously relied on the United States Supreme Court decision in *Guffey v. Smith* in reaching its holding, noting that in *Guffey* the trespasser knew that another had superior title.<sup>155</sup> Equipped with that knowledge, the trespasser continued producing because he believed that the true owner could not enforce its title in the property under Illinois law.<sup>156</sup> The federal court, bound by federal (and not state) principles of equity, refused to deny the plaintiffs relief and found that the defendant's actual knowledge made them bad-faith trespassers.<sup>157</sup>

Moreover, critics believe that there is no practical reason for the rule the Court crafted in *Mecom*.<sup>158</sup> One commentator notes that holding any single factor as dispositive ignores the central principle of the subjective rule: whether the trespasser held an honest belief that his title was superior.<sup>159</sup> In fact, it may well be that a trespasser continues to hold an honest belief to the superiority of its title even after a lawsuit over title is commenced.<sup>160</sup>

Withstanding the criticism, *Mecom* has never been overruled. Nevertheless, without citing *Mecom*, the Texas Supreme Court in *Brannon v. Gulf States Energy Corp.* held that a person was not a bad-faith trespasser as a matter of law for drilling two wells with notice of another's claim to superior title.<sup>161</sup> Dispositive to the court's decision, and perhaps the reason it did not cite *Mecom*, was the fact that the trespass occurred before a lawsuit over title to the property at issue

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151. *Mecom*, 62 S.W.2d at 77. Other courts have crafted exceptions for oil and gas trespassers who trespass under color of title in the form of an oil and gas lease. Their argument in support of the exception is that a lessee often must continue to produce to avoid losing their lease and should not rely to their detriment on the adverse claim of another.

152. *Id.* (noting a different result in equity because a "court of equity . . . has ample authority to take such action as will prevent the property's being drained of its oil and gas pending the final adjudication of title.").

153. Morris, *supra* note 44, at 221.

154. See *supra* note 149. The *Mecom* Court also cited to the United States Supreme Court decision *Guffey v. Smith*, 237 U.S. 101 (1915). For a discussion on *Guffey*, see notes 29–30 *supra*.

155. Morris, *supra* note 44, at 219.

156. *Id.* at n.45.

157. *Id.*

158. *Id.* at 220–21.

159. *Id.*

160. *Id.*; see also *Gulf Prod. Co. v. Spear*, 84 S.W.2d 452, 453 (Tex. Comm'n App. 1935) (noting conflict in the reasoning of the court in *Gulf Prod. Co. v. Spear*, and *Mecom*).

161. *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 224 (Tex. 1977).

began.<sup>162</sup> This was true even when a third well was drilled on the property after the lawsuit was filed.<sup>163</sup>

In *Whelan v. Killingsworth*, an appellate court refused a trespasser's request to overturn *Mecom*, where the trespasser argued that he had a duty to prevent drainage of the lessor's property during the pendency of the lawsuit over the title.<sup>164</sup> The court in *Whelan* based its decision to uphold *Mecom* on the ground that "district courts have ample equity powers to provide for the development of property pending the final outcome of litigation, and can exercise those powers when necessary and when called upon to do so."<sup>165</sup> Interestingly, the court's reasoning in *Whelan* is identical to the court's reasoning in *Mecom*. In both cases, the court held that a district court's equitable powers provide adequate protections to an alleged trespasser—who is later held to have won title—during the pendency of litigation from subsequent claims for its failure to produce, to protect against drainage, to develop, or other duties it may hold under an oil and gas lease. Nevertheless, *Whelan* was a lawsuit for rescission heard by the court in equity, while *Mecom* was a lawsuit at law for trespass.

#### IV. A CALL TO THE COURTS OF THE NON-TRADITIONAL STATES

The traditional rule, with its subjective focus on the good or bad faith of the trespasser, promotes two goals. First, it promotes the traditional goal of tort law: compensation without working a windfall. Second, it promotes the sound goal of restricting punitive damages to only those cases in which the defendant's conduct warrants such an award.<sup>166</sup> To that end, the traditional rule ensures that the plaintiff is fairly compensated for the monetary harm caused by the defendant's tortious conduct.

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162. *Id.* at 224.

163. *Id.* A commentator contends that this decision "muddies" the waters in Texas as to whether *Mecom*'s holding is still good law. However, because the Court in *Bran-non* found controlling the timing of the trespass, whether it occurred prior to the filing of a lawsuit over title, the decision is not at odds with *Mecom*. To the contrary, it is in accord with *Mecom*'s holding. *Houston Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75, 76 (Tex. Comm'n App. 1933) (distinguishing the facts of its case, trespass after a lawsuit to title was filed, with cases in which the trespass occurred before a lawsuit over title was filed); see also *Mayfield v. de Benavides*, 693 S.W.2d 500, 504 (Tex. App. 1985) (noting *Mecom* and citing it for rule that one who first trespasses after a lawsuit is filed is per se a bad-faith trespasser and noting that the converse is not also true).

164. *Whelan v. Killingsworth*, 537 S.W.2d 785, 787 (Tex. Civ. App.—Texarkana 1976, no writ); see also *Humble Oil & Ref. Co. v. Luckel*, 154 S.W.2d 155, 157 (Tex. Civ. App.—Beaumont 1941, writ refused w.o.m.) (citing *Mecom Oil Co.*, 62 S.W.2d at 76). The Court in *Humble Oil & Ref. Co. v. Luckel* denied a party's request for an injunction during the pendency of lawsuit over title because there existed an adequate remedy at law. In so finding, the Court noted that if the trespasser continued to trespass during the pendency of the appeal over title, they would owe the value of all production with no offset for their costs to produce. *Id.*

165. *Whelan*, 537 S.W.2d at 787.

166. See generally *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991).

By their nature, oil and gas require substantial expense to remove and transport. Therefore, for a plaintiff to realize a monetary loss from the trespass of oil and gas from under its property, he would need to first spend the same expenses incurred by the defendant. Essentially, the traditional rule leaves the trespasser as the plaintiff's proxy: Unless the trespasser realizes a profit, the plaintiff suffers no actual monetary damages.<sup>167</sup> The traditional rule also avoids a windfall to the plaintiff—the common law abhors windfalls.<sup>168</sup> Because the trespasser improves real property through its trespass, those improvements remain a part of the realty and thus belong to the plaintiff.<sup>169</sup> As a result, regardless of whether the trespasser realized a profit, the plaintiff is still entitled to an award of the wells that trespassed into the estate. In addition to the wells, if the plaintiff is also entitled to all production from those wells, without offset, it would truly work a windfall.

For the plaintiff to earn a windfall under the above analysis, there is an assumption that there was a good-faith trespass. However, if the trespass was in bad faith, the traditional rule still promotes a just result. In the case of a bad-faith trespasser, the rule punishes the trespasser by awarding, in addition to the trespassing wells, the gross proceeds of the trespasser's production.<sup>170</sup> Many courts have compared the measure of damages associated with a bad-faith trespass to punitive damages, and the comparison is appropriate.<sup>171</sup> Punitive damages aim to punish a defendant's grossly inappropriate conduct and to deter others from engaging in similar behavior.<sup>172</sup> Accordingly,

167. See generally *Champlin Ref. Co. v. Aladdin Petroleum Corp.*, 238 P.2d 827, 830 (Okla. 1951) (refusing to award costs of drilling a dry hole to the plaintiffs); see, e.g., *Lawrence Oil Corp. v. Metcalfe*, 100 S.W.2d 217 (Ky. 1936).

168. See, e.g., *Arthur v. Catour*, 803 N.E.2d 647, 649 (Ill. App. Ct. 2004) (quoting *Wilson v. Hoffman Group, Inc.*, 546 N.E.2d 524, 530 (Ill. 1989) (“[I]t is of course true that ‘[t]he purpose of compensatory tort damages is to compensate the plaintiff for [her] injuries, not to punish defendants or bestow a windfall upon plaintiffs.’”), *aff'd*, 833 N.E.2d 847 (Ill. 2005)).

169. *Campbell v. New Haven*, 125 A. 650, 651 (Conn. 1924).

170. *Alaska Placer Co. v. Lee*, 553 P.2d 54, 57–58 (Alaska 1976) (stating the “harsh rule” for willful trespass “operates as a form of punitive damages, with the goal of deterrence”).

171. *Id.*; see also *Whitaker v. Otto*, 248 Cal. App. 2d 666 (1967); *Athens & Pomeroy Coal & Land Co. v. Tracy*, 153 N.E. 240, 244 (Ohio Ct. App. 1925).

172. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 19 (1991) (upholding a jury instruction stating punitive damages are “‘not to compensate the plaintiff for any injury’, but ‘to punish the defendant’ and ‘for the added purpose of protecting the public by [detering] the defendant and others from doing such wrong in the future’”); *ex rel G.J.D. v. Johnson*, 713 A.2d 1127, 1133 (Pa. 1998) (“[T]he primary goals of punitive damages have been achieved. The tortfeasor has been punished and, presumably, deterred; he now serves as an example to others in the hope that they too may be deterred.”); see also *Tillett v. Lippert*, 909 P.2d 1158, 1162 (Mont. 1996) (holding punitive damages serve both to punish and to set an example); *Ex parte Vulcan Materials Co.*, 992 So. 2d 1252, 1274 (Ala. 2008) (stating “[p]unitive damages exist to accomplish society’s goals of punishing and deterring egregious tortious conduct”); *RESTATEMENT (SECOND) OF TORTS* § 908 cmt. a (1979) (stating “[t]he purposes of

in awarding damages based on the state-of-mind of the tortfeasor—either good faith or bad faith—the traditional rule is in accord with the common law that permits the award of punitive damages where the same are justified.<sup>173</sup>

On the other hand, the non-traditional rule promotes neither of the goals of the traditional rule. First, it ignores the goal of tort law to compensate the plaintiff and in every case works a windfall on the plaintiff. Next, it awards the plaintiff punitive damages without considering the trespasser's conduct. The courts that employ the non-traditional rule apply rigid, objective criteria to determine if a party is a bad-faith trespasser.

While not directly discussing the traditional rule and thus not contrasting it to the rule it ultimately applied, the Court in *Pittsburgh* stressed that a trespasser may not rely on a mistake of law to support his status as a good-faith trespasser. The Court reasoned that a party may not rely on an error of law because everyone is assumed to know the law:

Why should one be treated as acting in good faith when dealing with property as his own, when he knows all of the facts which constitute his claim, as well as the claim of his adversary, which facts, when properly construed, give him no title to the land? Such a holding would make every man a judge of the law in his own case, instead of being bound by the law as interpreted by those charged with that duty. We must therefore conclude that the defendants, when they drilled the wells on these lands, were willful trespassers, just as much so as though there had been no question but that the plaintiffs had the superior right. They could not decide the disputed question in their own favor, and then proceed with the hope that their acts would be characterized by this court as in good faith, even though their judgment upon the law of the case should not be approved.<sup>174</sup>

The *Pittsburgh* Court's reasoning echoes a common maxim of the criminal law that ignorance of the law is no excuse.<sup>175</sup> However, that principle is misplaced when applied to cases regarding a trespass to an oil and gas estate. In fact, that principle was directly rejected by at least one court<sup>176</sup> and impliedly rejected by other courts, each of

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awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future").

173. While justifications may differ slightly between jurisdictions, courts generally uphold awards of punitive damages where justified. *See generally* Maley v. Palanuk, 505 P.2d 336, 337 (Or. 1973) (leaving the question of punitive damages to the jury where justified by the defendant's state of mind); Sabir v. Jowett, 214 F. Supp. 2d 226 (D. Conn. 2002) (finding that, on a motion for new trial, remittitur will not be justified if the ratio of compensatory to punitive damages is within the constitutionally acceptable range).

174. *Pittsburgh & W. Va. Gas Co. v. Pentress Gas Co.*, 100 S.E. 296, 298 (W. Va. 1919).

175. *Bryan v. United States*, 524 U.S. 184, 194–96, (1998).

176. *United States v. Homestake Mining Co.*, 117 F. 481, 485–86 (8th Cir. 1902).

which relied upon the traditional rule.<sup>177</sup> Those courts hold that any honest mistake, even one as to the law, is sufficient to make one a good-faith trespasser.<sup>178</sup> In *United States v. Homestake Mining Co.*, the United States Court of Appeals for the Eight Circuit put it best when it wrote:

The test to determine whether one was a willful or an innocent trespasser is not his violation of the law in the light of the maxim that every man knows the law, but his honest belief, and his actual intention at the time he committed the trespass; and neither a justification of the acts nor any other complete defense to them is essential to the proof that he who committed them was not a willful trespasser.<sup>179</sup>

The court in *Homestake* also noted the inescapable reality that in nearly every trespass the trespasser relies on some mistake of law to support his status as a good-faith trespasser.<sup>180</sup> Essentially, *Pittsburgh* created a *per se* bad-faith standard, the result of which leaves every defendant a trespasser in bad faith and awards every plaintiff a windfall.

Moreover, the *Pittsburgh* rule sanctions every defendant with punitive damages regardless of his level of fault. Meanwhile, punitive damages are rarely awarded under the common law since it focuses on fully compensating parties harmed by the conduct of another.<sup>181</sup> The Oklahoma Supreme Court noted as much in *Barnes v. Winona Oil Co.*<sup>182</sup> There the Court applied the traditional rule and stressed that a bad-faith trespasser willfully trespasses.<sup>183</sup> The defendant who trespassed with actual knowledge that he did not own title to the property was a bad-faith trespasser.<sup>184</sup> Such knowledge is the opposite of good faith. The Court wrote:

To permit the owner of the land or another lessee to recover from the person who is in peaceful possession of the land and producing oil or gas therefrom, the value of the oil at the surface without deducting therefrom the cost of producing would be analogous to permitting the recovery of exemplary damages. The damages recoverable would be more than compensatory.<sup>185</sup>

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177. See, e.g., *Rudy v. Ellis*, 236 S.W.2d 466, 468 (Ky.1951); *Sapulpa Petroleum Co. v. McCray*, 277 P. 589, 590 (Okla. 1929); *Gulf Prod. Co. v. Spear*, 84 S.W.2d 452, 457 (Tex. 1935); *Crawford v. Forest Oil Co.*, 57 A. 47 (Pa. 1904); *United States v. Wyoming*, 331 U.S. 440 (1947).

178. See, e.g., *Rudy*, 236 S.W.2d at 468; *Sapulpa Petroleum*, 277 P. at 590; *Gulf Prod. Co.*, 84 S.W.2d at 457; *Crawford*, 57 A. at 47; *United States v. Wyoming*, 331 U.S. at 440.

179. *Homestake Mining Co.*, 117 F. at 486.

180. *Id.* at 485-86.

181. *Barnes v. Winona Oil Co.*, 200 P. 985, 987 (Okla. 1921).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

Likewise, the United States Appeals Court for the Eight Circuit, applying South Dakota law, articulated a succinct explanation for how the rule distinguishes between a good- and bad-faith trespasser. There, the court wrote:

[T]he law, in its wisdom, perceives the marked difference in the heinousness of the offenses of those who . . . with actual intention to rob others of their rights, trespass upon their property, and of those who trespass by mistake, and with no evil purpose, no actual, willful intent to commit a wrong; and it declares that the former class shall pay to their victims the full value of the lumber or the ore they take at the time they sell or use it, while the latter class shall be relieved from liability upon restitution of the value of the timber in the trees or of the value of the ore in the mine.<sup>186</sup>

*Pittsburgh* and the non-traditional-rule states do not address a rationale for permitting a punitive-damage-like recovery absent a showing that the trespasser's actions were willful.

Unlike in other states in which the non-traditional rule is employed, Texas offers a rationale for its award of bad faith damages without a showing of willful conduct in *Mecom*.<sup>187</sup> There, the Court noted that when a party knows of a pending lawsuit over title to the property upon which it wishes to operate for oil and gas, "he cannot be considered a trespasser in good faith so as to entitle him to recover the cost of his improvements."<sup>188</sup> As discussed above, the court's reasoning relied upon the trespasser's knowledge that at the time he first trespassed litigation was ongoing over the title to the property upon which he trespassed.<sup>189</sup> The Court in *Mecom* did not hold that knowledge pre-lawsuit of a claim by another that they had superior title made one a per se bad-faith trespasser. In that situation, the trespasser's status as a good- or bad-faith trespasser was still measured under the traditional rule.<sup>190</sup> In that respect, *Mecom* is less rigid than *Pittsburgh*.

However, *Mecom* still works a result that cuts against the purpose of the traditional rule. As one commentator, critical of *Mecom*, noted there is no reason to treat differently a case in which a defendant first trespasses after a lawsuit is filed.<sup>191</sup> That commentator noted:

[T]o hold that any single fact or combination of facts . . . negatives good faith as a matter of law, ignores the principle upon which relief is based and, without reason . . . For it is not unreasonable to believe that the pervasive justice of equity may discern a deserving trespasser who honestly and reasonably believes that he had title,

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186. *United States v. Homestake Mining Co.*, 117 F. 481, 485–86 (8th Cir. 1902).

187. *Hous. Prod. Co. v. Mecom Oil Co.*, 62 S.W.2d 75, 77 (Tex. Comm'n App. 1933).

188. *Id.*

189. *Id.*

190. *Id.*

191. *Morris*, *supra* note 44, at 220–21.



although he knew of the adverse claim and suit filed to assert it, or that it may detect and penalize a despicable interloper . . . .<sup>192</sup>

A party may have a strong and honest conviction that their interest in title is superior to another who has filed a lawsuit over the same. Moreover, in cases where the trespasser takes under color of title through an oil and gas lease, there is an even more compelling need to provide that trespasser with latitude to err in his judgment on title even if his first operation on the property occurs after a lawsuit is filed concerning the property's title.

The most compelling concern is that, if the court ultimately upholds the trespasser's title and the trespasser failed to drill any oil or gas wells, he runs the risk that his lessor will later sue to invalidate the oil and gas lease for his failure to produce oil or gas in paying quantities. In other words, the trespasser runs the risk of winning the battle (his title is upheld) but losing the war in a subsequent lawsuit with his lessor over lease termination.

This is especially true in cases like *Mecom* where the lessee-trespasser's first foray onto the property occurs after a lawsuit was filed. In those cases, no oil or gas well had been drilled. Had the trespass occurred before the lawsuit was filed, there would presumably be wells upon the property at issue and thus the lessee-trespasser may have savings clauses in the lease, or defense at law (such as the doctrine of cessation of production), to protect him in a lessor's subsequent lawsuit to invalidate his lease.<sup>193</sup> Allowing the lessee-trespasser to continue the trespass ensures that if he is later found not to have trespassed—he owns the right to operate from the oil and gas estate—he will continue to maintain that right after the lawsuit over title as against any challenge from his lessor.

That traditional rule works no harm to the true owner of the oil and gas. If the trespasser does not realize a profit, the plaintiff inherits the wells without any of the costs to drill. Likewise, in the case where a

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192. *Id.*

193. A "savings clause" is a provision added into an oil and gas lease extending the lease beyond the fixed primary term where production is not attained in paying quantities. See *Sword v. Rains*, 575 F.2d 810, 812-913 (10th Cir. 1978) (extending a lease under a continuous operations clause even though production was not attained); *Samano v. Sun Oil Co.*, 621 S.W.2d 580, 580-82 (Tex. 1981) (holding lease terminated where express savings clause allowed 60-day grace period and production ceased for seventy-three days). The temporary cessation of production doctrine protects a lessee from forfeiting the lease where production in paying quantities ceases "temporarily." See *Saulsberry v. Siegel*, 252 S.W.2d 834, 835 (Ark. 1952) (determining based on the facts that a four-year cessation due to fire was temporary, allowing the lease to remain effective); note that the equitable doctrine of repudiation will not apply here. That doctrine provides that if a lessor to an oil and gas lease is unsuccessful in a lawsuit against his lessee to invalidate their oil and gas lease and the lessee has not yet entered the secondary term, the primary term of the lease is tolled for that period of time during which the lawsuit was ongoing. *Exploracion de la Estrella Soloataria Incorporacion v. Birdwell*, 858 S.W.2d 549, 544 (Tex. App.—Eastland 1993, no pet.).

profit is realized, the plaintiff earns the wells and whatever profits the trespasser earned.

#### V. CONCLUSION

All courts should correctly apply the subjective test to determine a trespasser's good or bad-faith status. Courts wrongly applying an objective component to the test should cease that application and adopt the traditional rule. The subjective standard universally pronounced by all oil and gas producing jurisdictions should remain subjective and not be compromised with an objective component. The subjective application of the traditional rule avoids awarding the injured party a windfall and treats both trespasser and oil or gas owner fairly. Additionally, it allows the trespasser to deduct his reasonable costs of development where the trespasser honestly believed he had the right to produce the oil or gas from the estate upon which he trespassed. This gives the injured party the benefit of production without awarding the windfall of production costs. Courts that apply an objective standard destroy this subjective and fair application of the rule by measuring the reasonableness of the trespasser's honest belief. Such an application exposes the good-faith trespasser to unwarranted damages and is simply an incorrect application of an axiomatic rule.