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Kansas Oil and Gas Update

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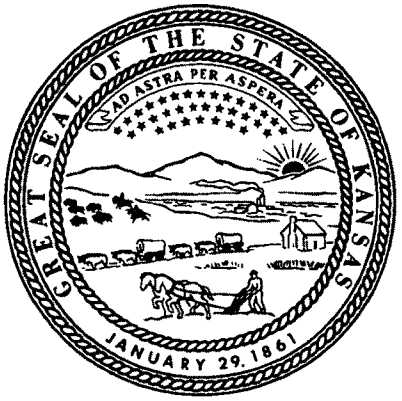
KANSAS OIL AND GAS UPDATE



By: David E. Pierce[1]

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I. BASIC "OIL & GAS" PROPERTY ISSUES

A. *Perpetuities Zombies and the Nonparticipating Royalty Interest*

Just when you thought the Rule Against Perpetuities (the "Rule") was dead and buried, it rises from the dead to again haunt Kansas oil and gas practitioners. Even with enactment of the Kansas Uniform Statutory Rule Against Perpetuities in 1992,[2] the Rule still manages to survive and invalidate oil and gas interests that would be recognized in any other states besides Kansas.[3]

Kansas stands alone in holding that a nonparticipating royalty interest can violate the Rule. The Kansas court of appeals recently reaf-

1. Professor of Law, Washburn University School of Law.
2. KAN. STAT. ANN. §§ 59-3401 to -3408 (2011) (effective July 1, 1992).
3. Rucker v. DeLay, 235 P.3d 566 (Kan. Ct. App. 2010), *rev'd in part, aff'd in part*, 289 P.3d 1166 (Kan. 2012).

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firmed the Kansas Supreme Court's prior holdings that a nonparticipating royalty interest does not "vest" until, and unless, there is actual production of oil or gas from the land covered by the interest.[4] If the land is not currently producing oil or gas, it cannot be said, at the time of the grant, that oil or gas will, or will not, be produced within twenty-one years from the date of the grant.[5] This odd vesting rule, however, is only applied to royalty interests. Mineral interests, even nonparticipating mineral interests,[6] are deemed by the Kansas courts, and every other court that has addressed the issue, to vest when the conveyance is made.[7]

The basic flaw in the Kansas analysis is that it confuses the potential *value* of the interest with *vesting* of the interest. This same value issue exists with the mineral interest. There may be lots of oil or gas in the land, no oil or gas, or something in between. But the presence of oil or gas is not a condition to the grantee receiving their interest in the land. There is no condition precedent to the granted interest taking effect.

The court of appeals wanted this issue to be reconsidered by the Kansas Supreme Court and concluded its opinion stating the following:

> We encourage the DeLays to seek review of our decision and our Supreme Court to accept, review, and determine whether the language found in . . . [prior cases] indicates a change in the application of the rule against perpetuities to royalty interests. Such a review could also include an examination of the issue of whether production is to continue to be the vesting event if the rule against perpetuities is to continue to be applied to these transactions.[8]

The court of appeals expanded the impact of the flawed Kansas royalty rule by applying it to a reservation of a royalty interest in the grantor. The conveyance at issue stated: "The grantor herein reserves 60% of the land owner's one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease

4. *Id.* at 570.

5. *Id.* at 574–75. A defeasible term nonparticipating royalty interest would be valid if the defeasible event must take place within the limitations of the Rule. *Id.* For example, "O conveys to A the right to receive 1/16th of all oil and gas produced from Section 30 for 20 years and so long as oil or gas is produced from Section 30." *Id.* Under this grant, the vesting condition is certain to occur, or not occur, within twenty years from the date of the grant. *Id.*

6. This includes nonparticipating mineral interests where the rights to bonus, delay rental, and the leasing power have been severed, leaving only the right to share in royalty as a mineral interest owner.

7. *See, e.g.*, Drach v. Ely, 703 P.2d 746, 751 (Kan. 1985) (refusing to apply the Rule to a nonparticipating mineral interest that was devoid of all "mineral" attributes except the right to receive royalty).

8. *Rucker*, 235 P.3d at 577.

made by the grantee or his subsequent grantees."[9] If the court finds this is some sort of future interest, it is nevertheless a future interest in a grantor, which must be a reversion,[10] and reversions are not subject to the Rule.[11]

It appears the court of appeals consciously elected not to avoid the Rule, under a grantor-reversion analysis, so application of the Rule to all nonparticipating royalty conveyances, whether retained by a grantor or conveyed to a grantee, could be reevaluated by the Kansas Supreme Court. The Court, however, elected to limit its review to the grantor-reversion issue by first noting the royalty interest at issue was a "reversion" retained by the grantors.[12] Next, the Court reaffirmed the rule that: "Future interests reserved or remaining in the grantor or his estate are not subject to the rule against perpetuities."[13] Therefore, because the DeLay's royalty interest was retained in the grantors as a reversion, the Court held that "the DeLay's royalty interest is not void under the rule against perpetuities."[14]

Because the Court was able to resolve the perpetuities dispute applying a grantor-reversion analysis, it did not address the Kansas rule that a royalty interest does not vest until there is production. The Court, however, offered the following comments on its production-vesting rule:

> The DeLays and *amicus curiae* urge us to overrule both cases now. They cite considerable criticism of our holding that a royalty interest is a future interest that vests at production. And we acknowledge that holding has been criticized as conceptually invalid . . . .
>
> . . .
>
> The criticism about this court's prior vesting analysis has some merit. Thus, we decline to extend it to royalty interests reserved in

9. *Id.* at 568. The grantor also argued this was a "mineral" interest as opposed to a "royalty" interest. *Id.* The court held it was a royalty interest and proceeded to address the perpetuities issue. *Id.* Had the court concluded it was a mineral interest, there were still lingering issues for the grantor because the deed creating the interest was not timely recorded as required by section 79-420 of the Kansas Statutes Annotate, which requires prompt recording or the severed mineral interest is void. *See generally* 1 DAVID E. PIERCE, KANSAS OIL AND GAS HANDBOOK § 5.10 (1986). The case law interpreting section 79-420 would have protected the grantor. For example, in *Medford v. Board of Trustees of Park College*, 175 P.2d 95, 100 (Kan. 1946), the court held that for "a *grantor* retaining, or excepting from, a conveyance, a vested and recorded title to any minerals is not required to record the instrument . . . by reason of . . . 79-420." *Id.*

10. THOMAS F. BERGIN & PAUL G. HASKELL, PREFACE TO ESTATES IN LAND AND FUTURE INTERESTS 56 (2d ed. 1984) ("When the owner of an estate transfers a lesser estate, the future estate that the owner keeps is called a *reversion*.").

11. LEWIS M. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS 280 (2d ed. 1966) ("As a general proposition, future interests reserved to or remaining in the grantor or in the estate of the testator are not subject to the rule [against perpetuities].").

12. Rucker v. DeLay, 289 P.3d 1166, 1170 (Kan. 2012).

13. *Id.* at 1171.

14. *Id.* at 1173.

> the grantor . . . . But we need not determine in this case whether we should overrule our caselaw holding royalty interests created in a transferee are future interests that vest at production because that issue is not squarely before us.[15]

The Court's statements suggest it would be open, given an appropriate case, to revisiting its production-vesting rule.

An issue not raised by the parties to the litigation was the possible application of the Kansas Uniform Statutory Rule Against Perpetuities ("KUSRAP") to the 1924 conveyance.[16] Although the KUSRAP did not take effect until July 1, 1992, and most of its provisions only have prospective effect, there is one provision that has retroactive application. Section 59-3405 of the Kansas Statutes Annotated addresses these issues by first providing, in subsection (a), that "this act applies to a nonvested property interest . . . [t]hat is created *on or after* the effective date of this act."[17] Subsection (b), however, applies to "a nonvested property interest . . . [c]reated *before* the effective date of this act . . . ."[18] To qualify for relief under subsection (b), the interest must be determined "in a judicial proceeding, commenced on or after the effective date of the act, to violate the state's rule against perpetuities as that rule existed before the effective date of this act . . . ."[19] Once this is established, the owner of the interest can petition "a court" to have it "reform the disposition in the manner that most closely approximates the transferor's manifested plan of distribution and is within the limits of the rule against perpetuities . . . ."[20]

Subsection (b) makes it possible to save most interests from the Rule, at least for a certain period of time. Courts are instructed to reform the instrument to approximate the duration that was intended by the parties, but within the limits of the Rule. In most cases, as in *Rucker v. DeLay*, the parties will intend for the grant to be forever. Only the Rule disrupts their expressed intention.[21] Therefore, the court should reform the conveyance to extend for as long as possible but still within the durational limits of the Rule.

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15. *Id.* at 1172, 1173 (citing Cosgrove v. Young, 642 P.2d 75, 87 (Kan. 1982) (Herd, J., dissenting)).

16. This issue was raised by the Author in an *amicus curiae* brief filed in the appeal to the Kansas Supreme Court. As noted in the brief, the Author was not representing any client or other interest, but filed the brief "because of [his] academic interest in the issues before the Court." Brief of Amicus Curiae at 1, Rucker v. DeLay, Case No. 101,766, 2012 WL 5052519 (Kan. July 14, 2011).

17. KAN. STAT. ANN. § 59-3405(a) (2011) (emphasis added).

18. *Id.* § 59-3405(b) (emphasis added).

19. *Id.*

20. *Id.*

21. The court of appeals in *Rucker* noted the following: "The trial court stated that its ruling for the Ruckers [voiding the grant under the Rule] was not what was intended by the parties to the transaction in 1924 . . . ." Rucker v. DeLay, 235 P.3d 566, 569 (Kan. Ct. App. 2010).

The *amicus curiae* in *Rucker* suggested that the Kansas Supreme Court reform the conveyance using joint measuring "lives-in-being" when the conveyance was made in 1924, plus twenty-one years.[22] This could be further expanded by providing that it would extend for so long as oil or gas is produced from the conveyed interest, with the requirement that the production event begin during the perpetuities period. The following sample language was offered to the court:

> Reformation would be a simple matter of selecting a few high profile individuals living on May 17, 1924 [the date of the conveyance] that can be used as measuring lives followed by 21 years. For example, the conveyance could be reformed so that its duration would run for a period of 21 years following the last to die of Prince Phillip, the Duke of Edinburgh, husband to Queen Elizabeth II (born 10 June 1921), and actor Mickey Rooney, formerly known as Joe Yule, Jr. (born 23 September 1920). The duration could be extended even further by allowing it to continue beyond the 'lives in being plus 21 years' period by adding a defeasible element: and 'so long as' oil or gas is produced from the conveyed land. This assumes the 'production' requirement is met during the joint lives plus 21-year period.[23]

The statutory reformation provisions give the law considerable retroactive effect and should provide parties subject to the Rule the bargaining power needed to negotiate away most perpetuity issues. This will not occur, however, until courts affirm that the statutory language means what it says.

The Kansas enactment of the Uniform Statutory Rule Against Perpetuities also has one weakness that could have a zombie-like effect. The legislative bill that was used to enact the KUSRAP contained multiple subjects that could void the KUSRAP under article 2, section 16 of the Kansas Constitution.[24] Kansas, like many states, has a constitutional prohibition on combining multiple subjects into a single bill to combat the practice of "logrolling." Logrolling takes place when legis-

22. Under section 59-3405(b), "a court" can be petitioned to reform the interest once it is "determined in a judicial proceeding . . . to violate" the Rule. § 59-3405(b). It would appear proper to do this at any point in time during the proceeding. When the Rule's application is not determined until a final order of the Kansas Supreme Court, the losing party should be able to request reformation in a rehearing motion. The other alternative, which seems permissible under the express wording of the statute, is to request reformation in a subsequent action in district court once the judgment voiding the interest under the Rule is final. This approach, however, was rejected by the Colorado Supreme Court in *Argus Real Estate, Inc. v. E-470 Public Highway Authority*, 109 P.3d 604, 613 (Colo. 2005). The Court in *Argus* held the request for reformation must be made during the case that voided the interest under the Rule. *Argus*, 109 P.3d at 613. The best and safest approach would be to plead reformation as an alternative defense in the answer at the very beginning of the litigation.

23. Brief of Amicus Curiae, *supra* note 16, at *14.

24. David E. Pierce, *Void Enactments of the Kansas Legislature*, 80 J. KAN. BAR ASS'N 28, 36–37 (2011) (analyzing this problem in detail).

lative proposals are combined into a single bill in hopes the combination will garner the votes necessary for passage.[25] Although the court of appeals rejected this argument in *Larson Operating Co. v. Petroleum, Inc.*,[26] review was not sought before the Kansas Supreme Court. The *amicus curiae* stated the following in its brief in *Rucker*: "[I]t is my opinion the legislative bill giving rise to the KUSRAP contained more than one subject and therefore all the enactments under the bill, including the KUSRAP, are void pursuant to Article 2, Section 16 of the Kansas Constitution."[27] For purposes of the *Rucker* litigation, the *amicus curiae* conceded the following: "The one-subject issue has not been raised in this litigation, so I will assume, consistent with the court's holding in *Larson*, that the KUSRAP is valid."[28]

These issues were not addressed in the Kansas Supreme Court's opinion because the interest did not violate the Rule. The validity and scope of the KUSRAP must await future court action.

B. *Understanding Warranties in Oil & Gas Conveyances*

What sort of protection does a grantee receive when their grantor "warrants" the interest they are conveying? The warranty is frequently comprised of stock language, or stock language within a statute is triggered by use of the term "warrants." For example, in Kansas, the use of the phrase "conveys and warrants" triggers the following statutory warranties:

> [C]ovenants from the grantor, . . . [and grantor's heirs and assigns], that the grantor is lawfully seized of the premises, has good right to convey the same and guarantees the quiet possession thereof, that the same are free from all encumbrances, and the grantor will warrant and defend the same against all lawful claims.[29]

In *RAMA Operating Co. v. Barker*,[30] the court addressed the meaning of commonly encountered warranty language in an assignment of an oil and gas lease.[31] B.F. Babb and Eleanor Babb granted an oil and gas lease to Barker on May 6, 1996. Barker also obtained an identical lease from the Babbs dated May 6, 2001.[32] The assignment was exe-

25. *See* State *ex rel.* Stephan v. Thiessen, 612 P.2d 172, 178–79 (Kan. 1980) (discussing logrolling and riders).

26. Larson Operating Co. v. Petroleum, Inc., 84 P.3d 626, 633–34 (Kan. Ct. App. 2004).

27. Brief of Amicus Curiae, *supra* note 16, at *12.

28. *Id.*

29. KAN. STAT. ANN. § 58-2203 (2011).

30. RAMA Operating Co. v. Barker, 286 P.3d 1138 (Kan. Ct. App. 2012).

31. An unexplained fact noted by the court was that the parties' contract provided the assignment would be "without warranty," but the assignment document contained the warranty at issue. *Id.* at 1141. The parties proceeded to deal with the issues as though the warranty clause was properly included in the assignment. *Id.*

32. *Id.* The court noted this second lease was taken while the primary term of the prior lease was still in effect. *Id.* Although not discussed in the opinion, it is likely

cuted on April 9, 2001, and contained the following warranty language:

> Assignor covenants with the Assignee, its or his heirs, successors or assigns: That the Assignor is the lawful owner of and has good title to the interest above assigned in and to said lease, estate, rights and property, free and clear from all liens, encumbrances, or adverse claims; That said lease is a valid and subsisting lease on the land above described, and all rentals and royalties due thereunder have been paid and all conditions necessary to keep the same in full force have been duly performed, and that the Assignor will warrant and forever defend the same against *all persons whosoever lawfully claiming or to claim the same.*[33]

On July 1, 2001, when drilling operations were about to commence on the leased land, a RAMA representative learned that a prior lessee, Bear Petroleum, was claiming that its lease was still in effect because of pooled production and because a prior release had been given by mistake.[34] The court ultimately found that Barker had established, in support of his motion for summary judgment, that at the time the assignment was made, (1) there had been no production from the pooled area identified by Bear Petroleum for twenty-three months; (2) there were no facts to support that the interruption was a temporary cessation or excused by the proper payment of shut-in royalty; and (3) Bear Petroleum had given releases of its rights in the leased land on October 3, 1996, and on March 1, 2001, with Bear Petroleum contesting only the second release as a mistake.[35]

Based upon the assertions made by R.A. Schremmer on behalf of Bear Petroleum, RAMA ceased its drilling operations and ultimately sued Barker for damages associated with a breach of Barker's warranty in the lease assignment to RAMA. Barker defended, arguing RAMA had overreacted to a baseless claim made by Bear Petroleum. RAMA argued that Barker's warranty covered "adverse claims" against the assigned leasehold. Barker responded that its warranty only covered those who are "lawfully claiming" an adverse right.[36] The court found that RAMA's "adverse claims" portion of the warranty clause was not part of the warranty of title, but rather was a present covenant. Therefore, if there were no adverse claims when the assignment was made, there would be no breach of the representation. Any continuing obligations to "warrant" and "defend" would be limited to those "lawfully claiming" an adverse interest.[37]

Barker was top leasing himself instead of seeking an extension under the existing lease.

33. *Id.* at 1143–44 (emphasis in original).
34. *Id.* at 1141–42.
35. *Id.* at 1147.
36. *Id.* at 1143.
37. *Id.* at 1144.

The court observed "that in the absence of a lawful claim by Bear Petroleum to the interest conveyed to RAMA, Barker had no duty to defend and did not breach his covenant of warranty of title."[38] The court, as noted above, found that the summary judgment evidence established that Bear Petroleum did not have a lawful claim. Therefore, the court held that RAMA took action in response to "a mere allegation of paramount title or claim" and thereby assumed the risk that the "adverse claim might not prove lawful."[39] The court applied the legal principle that under this form of warranty clause, "[a] breach does not occur without a disturbance of possession and eviction under an adverse title which existed at the time of the conveyance."[40]

The court's holding in *RAMA* reinforces the importance of not relying upon standard language to express a desired right. It is apparent that RAMA believed that if anyone came forward and made a claim that impaired its lease rights, such as the Bear Petroleum claim, Barker would at least cover the expenses to establish that the claim was *not* lawful and any losses suffered by RAMA as a result of the claim. Barker's position, and that of the court, is that the risk of unsuccessful claims, such as the Bear Petroleum claim, fall on the assignee, unless express language in the assignment is used to shift them to the assignor. That, of course, is the lesson of the case. If RAMA wants protection from these sorts of unfounded claims, the stock "lawful claims" warranty language in deeds, assignments, and statutory warranty provisions, must be modified accordingly.[41]

II. Statutory Issues

A. *Liberal Joinder Rules Result in Unnecessary Litigation*

Rarely does an appellate court have prompt feedback that its holding in a prior case was demonstrably wrong.[42] The court's need to revisit *Dexter v. Brake* in 2012 (*"Dexter II"*) was a testament to its error in the 2008 *Dexter v. Brake* case (*"Dexter I"*).[43] In *Dexter I*, the court allowed a lease termination suit to proceed without joining a cotenant

38. *Id.*

39. *Id.*

40. *Id.* at 1143 (quoting Lewis v. Jetz Serv. Co., 9 P.3d 1268, 1270 (Kan. Ct. App. 2000)).

41. The court noted that Bear Petroleum may have been liable for slander of title. *Id.* at 1148. The assignees, however, are not seeking a cause of action or judicial remedy; they simply want to be made whole in the event a claim is made. The assignees would like to look solely to their assignor for a remedy and let the assignor pursue the third party claimant.

42. The court, however, cannot be faulted for failing to anticipate, in 2008, the problem that arose in 2012 because the entireties clause theories were not presented to the court in the 2008 proceeding. The point to be made, however, is that requiring joinder of an interested party in the 2008 proceeding would have foreclosed the issue, regardless of its merits, from being litigated in a subsequent proceeding.

43. *See* Dexter v. Brake, 269 P.3d 846 (Kan. Ct. App. 2012) (*Dexter II*); *see also* Dexter v. Brake, 174 P.3d 924 (Kan. Ct. App. 2008) (*Dexter I*).

mineral owner who was subject to the oil and gas lease at issue. The parties to the litigation were arguing over whether the lease had terminated. The *Dexter I* court relied upon commentary in the *Williams & Meyers* treatise to the effect that a failure to join all cotenants merely means the lessee may continue to have a relationship with the suing cotenants. The lessee would continue to have leasehold rights through the unjoined lessor and in that capacity be a cotenant with the unleased cotenant.[44] As *Dexter II* demonstrates, the entireties clause issue fundamentally changed the factual context that was assumed to exist for the commentary in the *Williams & Meyers* treatise.

The original oil and gas lease was granted in 1964 and covered a single tract of 520 acres. While still subject to the oil and gas lease, the 520-acre tract was divided into a 280-acre tract ultimately owned by Nelson, with Nelson owning all the mineral interest, subject to a nonparticipating royalty interest in Monroe. The mineral interest in the remaining 240 acres became owned one-half by Dexter and one-half by Monroe.[45] In *Dexter I* the court noted that "[t]he terms of the original oil and gas lease are not material to the issues framed in this litigation."[46] In *Dexter II*, however, the original oil and gas lease became a major focus of the litigation because of the entireties clause, which provided as follows:

> If the leased premises [the 520-acre tract] are now or hereafter owned in severalty or in separate tracts [the 280-acre and 240-acre tracts], *the premises, nevertheless, may be developed and operated as an entirety*, and the *royalties shall be paid to each separate owner in the proportion that the acreage owned by him bears to the entire leased area.* There shall be no obligation on the part of the lessee to offset wells on separate tracts into which the land covered by this lease is now or may hereafter be divided by sale, devise, or otherwise, or to furnish separate measuring or receiving tanks for the oil produced from such separate tracts.[47]

The lessee's right to operate "the [520-acre] premises . . . [a]s an entirety" created the problem in *Dexter II*. In *Dexter I*, Nelson and Dexter brought suit and obtained a judgment canceling Brake's oil and gas lease. As to Dexter's 240-acre tract, they were aware that Brake could continue to operate on their lands because of his lease covering Monroe's one-half mineral interest. Nelson, however, argued that Brake had no right to be on his land because he owned all the mineral interest in the 280-acre tract.[48]

In *Dexter II*, as in *Dexter I*, the court had no problem finding that Brake had failed to comply with amendments to his lease, which re-

44. *Dexter I*, 174 P.3d at 930–31.
45. *Dexter II*, 269 P.3d at 851.
46. *Dexter I*, 174 P.3d at 928.
47. *Dexter II*, 269 P.3d at 860 (emphasis added).
48. *Id.* at 859.

quired Brake to take specific action to prevent the lease from terminating. *Dexter II* came about when Monroe sought to terminate Brake's lease as to his one-half mineral interest. The same facts as were presented in *Dexter I*, on behalf of Nelson and Dexter, were relied upon to hold that the lease terminated as to Monroe in *Dexter II*.[49]

In *Dexter II*, the Monroe termination action was consolidated with a separate action brought by Nelson and Dexter suing for "trespass, conversion, and an accounting of income from gas and oil sales because Brake ha[d] continued unabated with his oil and gas production on their properties."[50] Regarding the Nelson and Dexter claims, the court noted that the statute of limitations did not begin to run on the trespass and conversion claims until June 12, 2006, when the trial court held the lease should be cancelled. The court also held this was a continuing trespass and that the statute of limitations would not begin to run, on the trespass claim, until the trespass ended.[51]

The court also had to determine whether Brake was a "good faith" or "bad faith" trespasser. Brake claimed substantial operating expenses during the duration of his trespass. If his trespass was in "bad faith," he could recover no operating expenses. As to the Dexter tract, in which Monroe had a one-half mineral interest, Brake continued to be entitled to possession of the wells and property located on the Dexter tract. The trial court, however, found that Brake was a bad faith trespasser as to the Nelson tract, because Brake had no rights, through Monroe or otherwise, in the Nelson tract. The court of appeals reversed this finding, relying on Brake's argument that under the entireties clause, Brake, as lessee of the entire 520-acre tract, had a right to continue operations on both of the divided interests comprising the leased land: "[W]e do find that Brake relied in good faith on his belief that he had a continuing responsibility to Monroe under the entirety clause of the Lease."[52] Under Brake's oil and gas lease with Monroe, Monroe was entitled to a share of royalties generated from wells located anywhere on the 520-acre lease.

The trial court's ruling allowing $186,631.77 of the claimed $264,982.95 in operating expenses was affirmed. The allowed expenses were those incurred during the period between August 1, 2004, when *Dexter I* terminated the lease as to Nelson and Dexter, and January 25, 2008, the date the court of appeals affirmed the trial court's actions in *Dexter I*. Excluded expenses included those (1) incurred *before* the date the lease was held to have terminated (August 1, 2004); (2) incurred *after* the lease, as to Monroe, ceased to produce in paying quantities (June 2008); and (3) individual items incurred during

49. *Id.* at 854–55.
50. *Id.* at 850.
51. *Id.* at 854.
52. *Id.* at 861.

the August 1, 2004, to June 2008 window, but not adequately established by the evidence.[53]

It is apparent that the court was reluctant to mandate joinder in *Dexter I*. This usually occurs after the court has reasoned that the action can go forward without impacting the joined and non-joined parties. This assumes the court has been able to accurately predict all the myriad rights that might be asserted by the parties in subsequent litigation. If the court's prediction proves inaccurate, it can result in subsequent litigation of issues that should have been addressed in the prior action. Had the court in *Dexter I* been made aware of the entireties clause argument that was so prominent in *Dexter II*, it is likely the court would have held Monroe was a "contingently necessary" party under the Kansas joinder statute.[54] The court could have required joinder of Monroe with Nelson and Dexter, and adjudicated their rights in a single proceeding in 2008. Instead, it required multiple actions in the trial court and two trips to the court of appeals.

B. *Oil & Gas Laws Passed by the 2012 Kansas Legislature*

The 2012 Kansas Legislature enacted two laws that directly impact the oil and gas industry. The first is the Legislature's obligatory enactment of authority to regulate hydraulic fracturing.[55] This law amends the existing Section 55-152 of the Kansas Statutes Annotated by adding the following language: "The commission [Kansas Corporation Commission] may also promulgate rules and regulations necessary for the supervision and disclosure of any well on which a hydraulic fracturing treatment is performed."[56] The Kansas Corporation Commission has been effectively regulating hydraulic fracturing for decades by specifying minimum casing requirements and other procedures to keep oil and gas separate from the groundwater.[57] The new language was added merely to allow Kansas legislators to say they have addressed the imaginary problems associated with hydraulic fracturing.

The second law establishes abbreviated procedures and guidelines for "land-spreading" to "[d]ispose of solid waste generated by drilling oil and gas wells . . . ."[58] The goal of the statute is to avoid the need to obtain a solid waste permit when the waste fits within the guidelines established by the statute. Most of the programmatic aspects of land-spreading oil and gas drilling wastes are left for administrative devel-

53. *Id.* at 852, 857.

54. *See* Dexter v. Brake, 174 P.3d 924, 930 (Kan. Ct. App. 2008) (applying KAN. STAT. ANN. § 60-219 (2011)).

55. Act of July 1, 2012, vol. 1, ch. 101, § 1, 2012 Kan. Sess. Laws 750 (to be codified at KAN. STAT. ANN. § 55-152).

56. *Id.*

57. *E.g.*, KAN. STAT. ANN. §§ 55-157 to -159 (2011) (surface casing requirements to protect groundwater).

58. Act of July 1, 2012, vol. 2, ch. 170, § 1(8)(A), 2012 Kan. Sess. Laws 1770 (to be codified at KAN. STAT. ANN. § 65-3407(c)).

opment by the Kansas Department of Health & Environment.[59] The "process," including enforcement, is to be administered jointly by the Kansas Department of Health & Environment and the Kansas Corporation Commission pursuant to "a memorandum of agreement."[60]

III. CONCLUSION

Kansas courts continue to address foundational "oil & gas law" issues in unique and complex factual contexts. The report for this year again illustrates how oil and gas law principles can vary from state-to-state. This simple fact highlights why a publication like the Texas Wesleyan Law Review's Annual Survey on Oil and Gas law is so helpful and important for those who practice in this area.

59. *See id.* § (8)(A)–(C).
60. *Id.* § (8)(D).