Table of Contents

Don’t Forget About Duhig: Why Mineral Owners Should Pay Attention.................................2
Selected Oil and Gas Decisions..................................................................................................23
Selected Agriculture Decisions..................................................................................................26
Selected Wind Decisions............................................................................................................27
Articles of Interest ....................................................................................................................28

From the Editor:

This is my last issue as Editor-in-Chief of the Energy and Natural Resources Newsletter. It has been my honor and great privilege to serve you all as Editor for the last year. I have gotten to meet and know so many of you who are readers of this Newsletter and practice in the areas of oil and gas, water, wind and agricultural law, and I hope to continue to develop our professional relationships and friendships in the coming years. I would like to thank Professors Owen Anderson and Drew Kershen for their guidance and help during my tenure. After the July Bar Exam, I will join the firm of Mahaffey & Gore in Oklahoma City to practice oil and gas law. My friend and Associate Editor, Brad Torgerson, will be continuing his work with Hal Smith and Associates, doing in-house and field land work. We leave this Newsletter in the very capable hands of Derek Haysom as Editor-in-Chief, and Derek will be joined by Jordan Lepage and Daniel Franklin, who also share our passion for energy and natural resources law. Thank you all again for making this one of the best experiences of my professional life. In this edition, we have included a paper discussing the Duhig Rule as applicable to newly-emerging oil and gas producing states, written by Jarrad Cormier, an Oklahoma Law graduate. We hope you find Jarrad’s research informative and timely.

Oklahoma Bar Association Mineral Law Section Newsletter

<table>
<thead>
<tr>
<th>Brad Torgerson</th>
<th>John Paul Albert</th>
<th>Derek Haysom</th>
</tr>
</thead>
<tbody>
<tr>
<td>Associate Editor</td>
<td>Editor-in-Chief</td>
<td>Associate Editor</td>
</tr>
</tbody>
</table>

All case citations are as of 5-8-2014. The citations provided in this Newsletter do not reflect changes made by Lexis or Westlaw, or the case’s addition to a case reporter after that date. This Newsletter contains case decisions issued through 4-20-2014. This PDF version of the newsletter is word-searchable. If you have any suggestions for improving the Newsletter, please e-mail the editorial staff at ou.mineral.law@gmail.com.
Don’t Forget About *Duhig*: Why Mineral Owners Should Pay Attention

**Introduction**

Recent breakthroughs in hydraulic fracturing and horizontal drilling technologies have created a shale oil and gas boom across the United States.¹ Many shale formations previously considered incapable of commercial production and practically ignored are now producing tremendous amounts of hydrocarbons.² States such as North Dakota have seen, and will continue to see, immense growth in oil and gas operations within their borders rivaling those of traditional producers such as Texas, Oklahoma, and Louisiana. In fact, North Dakota’s oil production has skyrocketed from 100,000 barrels per day in the early 2000s to over 500,000 barrels per day in 2011³ largely due to its Bakken formation, which alone accounted for more than 400,000 barrels per day.⁴ Bakken wells are being completed at an astonishing rate—roughly 900 were completed in 2011, compared to a mere 31 in 2005.⁵

Additionally, states commonly known as traditional producers are tapping into many lucrative shale plays of their own. One prime example is Oklahoma, which has significantly increased its crude production. In just five years, Oklahoma increased production from 185,000 barrels per day to 305,000.⁶ Established and new producers alike will continue to see spectacular production rates as a result of the shale boom.

² Id.
³ James Mason, *Bakken’s maximum potential oil production rate explored*, Oil & Gas Journal, 4 Fig. 3 (Apr., 2012), http://solarplan.org/Research/Mason_Oil%20Production%20Potential%20of%20the%20North%20Dakota%20Bakken_OGJ%20Article_10%20February%202012.pdf.
⁴ Id.
⁵ Id.
Consequently, these states are also likely to see a dramatic increase in oil and gas litigation. With operators and brokers desperately trying to grab as much land as quickly as possible, granting language may become sloppy and disputes over conveyances are likely to occur. Court interpretation of ambiguous or careless granting language can result in outcomes wholly different than what at least one of the parties intended. In addition, many quiet title actions are brought by successors in interest some fifty years after the original deed, when the original parties are deceased and the original intent, to the extent it differs from the deed, cannot be known.  

An important principle in American jurisprudence and the conveyance of mineral rights is the Duhig Doctrine (“Duhig” or “Duhig Doctrine”)—a refined application of estoppel to issues involving fractional conveyances of mineral rights. Although Duhig is an established doctrine in many traditional oil and gas producing states including Oklahoma, careless granting language continues even in modern deeds and conveyances, which forces courts to regularly employ Duhig in quiet title actions. Despite its age, Duhig is very much alive and certainly relevant.

Being somewhat new to the game because of its shale boom, North Dakota courts have recently encountered thorny oil and gas issues. Perhaps because of this relative infancy, North Dakota adopted the Duhig Doctrine from Texas and its courts have since developed an expansive body of Duhig related jurisprudence. Sure to see increased conveyance litigation of its own, Oklahoma can look to North Dakota to further develop its own Duhig jurisprudence to expand upon the authority already established.

This paper will examine the Duhig Doctrine and its effect on oil and gas conveyances in five main sections. The first section covers a discussion of the facts and rationale used by the

---

7 See, e.g., Johnson v. Finkle, 837 N.W.2d 132 (N.D. 2013) (where conveyance was made by deed in 1962, and action to quiet title was brought by successors in interest in 2011); see also Nichols v. Groughnour, 820 N.W.2d 740 (N.D. 2012) (where children made conveyance by deed in 1955 and successors in interest brought quiet title action in 2011).
Texas Supreme Court in the iconic case of *Duhig v. Peavy-Moore Lumber Co.* Section two looks at the actual meaning of the Duhig Doctrine as interpreted by many courts and authorities. This section will also specifically address the roles of warranty clauses and quitclaim deeds in modern mineral conveyances. Section three looks at the application of *Duhig* in North Dakota and spotlights key cases in its evolution. Section four highlights recent *Duhig* litigation in North Dakota. Lastly, section five will address *Duhig*’s application in Oklahoma and whether it should look to North Dakota jurisprudence to fill in any gaps.

**Section 1: Duhig v. Peavy-Moore Lumber Co.**

Although the Duhig Doctrine was not established until the 1940’s, its rationale is based on estoppel, a doctrine firmly rooted in American jurisprudence.

**(a) The Facts**

The executor of the Alexander Gilmer Estate conveyed to W.J. Duhig (Duhig) the Josiah Jordan survey (survey), subject to a “reservation by the grantor of an undivided one-half interest in the minerals.” Duhig then conveyed by warranty deed the survey to Miller-Link Lumber Company (Miller), purportedly subject to a reservation by the grantor of an undivided one-half interest “in all of the mineral rights or minerals in and on the land.” Thereafter, Peavy-Moore Lumber Company (Peavy) became successor in title to Miller and acquired ownership of the survey and “whatever title and estate [Miller] acquired by the deed from Duhig.”

---

8 *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878 (Tex. Comm’n App. 1940, opinion adopted); see *Melchoir v. Lystad*, 786 N.W.2d 8, 11 (N.D. 2010).


10 Id. at 878.
Both Peavy and Duhig claimed ownership of the remaining one-half mineral interest, the interest not owned by the Alexander Gilmer Estate. Peavy then brought suit against Mrs. Duhig, Duhig’s wife, and others for title and possession of the survey. The Gilmer Estate’s one-half mineral interest was not at issue as both Peavy and Duhig recognized its ownership. The trial court held in favor of Duhig, ordering that Peavy recover only title and possession of the surface, but not the one-half mineral interest, which remained with Duhig. “The trial court in effect determined that the reservation was effective to retain 1/2 of the [entirety of the] minerals for Duhig, which when taken with the outstanding 1/2 interest [of the Gilmer estate] left [Peavy] with only the surface.” Peavy appealed to the Court of Civil Appeals, which reversed the trial court’s judgment and held in favor of Peavy.

Mrs. Duhig appealed, claiming that Duhig’s conveyance to Miller reserved the remaining one-half interest. Indeed, after the granting language and warranty clause, the last paragraph of the deed stated “[b]ut it is expressly agreed and stipulated that [Duhig] herein retains an undivided one-half interest in and to all mineral rights of whatever description in the land.” Nonetheless, Peavy argued that the conveyance did not reserve the remaining one-half interest; rather, it only excepted the one-half interest that had already been reserved by the Gilmer Estate. According to Peavy, the deed granted both the surface estate and the one-half mineral interest, leaving Duhig with nothing.

(b) The Texas Commission on Appeals

---

11 Id. at 879; see Melchoir, 786 N.W.2d at 11.
12 Id. at 878-89.
13 Id.
14 Id.
15 Smith, supra note 9, at 2.
16 Duhig, 144 S.W.2d at 879.
17 Id.
18 Id.
19 Id.
20 Id.
The Texas Supreme Court adopted the opinion of the Texas Commission of Appeals, ruling in favor of Peavy.21 Specifically, it found that Peavy owned the surface and one-half of the mineral interest, the Gilmer Estate owned the other one-half of the mineral estate and Duhig owned nothing.22 The court stated that the appellate court’s ruling “should be affirmed by the application of a well settled principle of estoppel.”23

In support of its holding, the court focused on the granting/reservation clause and the warranty clause of the deed:

The granting clause of the deed, as has been said, purports to convey to the grantee the land described, that is, the surface estate and all of the mineral estate. The covenant warrants the title to ‘the said premises’. The last paragraph of the deed retains an undivided one-half interest in the minerals. Thus the deed is so written that the general warranty extends to the full fee simple title to the land except an undivided one-half interest in the minerals.24

In its analysis, the court first looked to the granting clause and reservation clause, which conveyed to the grantee the entire surface and one-half of the mineral interest, yet retained a one-half mineral interest in favor of Duhig.25 However, that reservation directly breached the warranty clause because it warranted both the surface and a one-half of the mineral interest.26 In other words, “[b]ecause [Duhig] purported to retain a one-half mineral interest and the other one-half mineral interest was owned by [the Gilmer Estate], [Duhig] breached the clause warranting title to [Peavy] a one-half mineral interest.”27 Under the principles of estoppel and because of

21 Id. at 880.
22 Id.
23 Id. (emphasis added); see Smith, supra note 9, at 3.
24 Id.
25 Id.; see Melchoir, 786 N.W.2d at 11 (citing Gawryluk v. Poynter, 654 N.W.2d 400 (N.D. 2002)); see also Brief of Defendant/Appellee EOG Resources at ¶34, Wenco v. EOG Resources, 822 N.W.2d 701 (N.D. 2012).
26 Id. (emphasis added).
27 Melchoir, 786 N.W.2d at 11 (citing Poynter, 654 N.W.2d 400); see Duhig, 144 S.W.2d at 880.
the warranty clause, Duhig was estopped from later asserting reservation of the one-half mineral interest. 28

**Section 2: What Does It Mean?**

Generally, the Duhig Doctrine states that when a grantor conveys the entire mineral interest, title to that mineral interest will “pass to his grantee under the doctrine of estoppel by deed.” 29 Therefore, a grantor cannot grant and reserve the same mineral interest, whether expressly or impliedly. 30 In both *Melchoir v. Lystad* and *Gawryluk v. Poynter* the North Dakota Supreme Court cited the following section from *Williams & Meyers Oil and Gas Law* for its description of the Duhig Doctrine:

The Duhig [Doctrine] says that where a grantor conveys land in such a manner as to include 100% of the minerals, and then reserves to himself 50% of the minerals, the reservation is not operative where the grantor owns only 50% of the minerals. The deed is construed as undertaking the transfer of 50% of the minerals to the grantee. Both this grant and the reservation cannot be given effect, so the grantor loses because the risk of title loss is on him. 31

Therefore, if a grantor purports to convey more than he owns, or does not own a sufficient mineral interest to satisfy the conveyance and the reservation, the grant will be satisfied first “because the obligation incurred by the grant is superior to the reservation.” 32 Put another way, one author defines Duhig as follows: if a grantor, who only owns a one-half mineral interest, purports to convey the entire mineral interest by warranty deed, including both surface and minerals, but fails to (1) “specifically identify the previously reserved one-half mineral interest” and (2) does not claim reservation of an additional one-half mineral interest in conjunction with

---

28 *Duhig*, 144 S.W.2d at 880; see *Melchoir*, 786 N.W.2d at 11 (citing *Poynter*, 654 N.W.2d 400); see also Smith, supra note 9, at 3.
29 *Id.*
30 See *Poynter*, 645 N.W.2d at 405.
31 *Melchoir*, 786 N.W.2d at 11; *Poynter*, 645 N.W.2d 400; see 1 *Williams & Meyers Oil and Gas Law*, § 311, p. 580.39 (2001).
32 *Id.*; see 1 *Williams & Meyers* at § 311, p. 580.34.
the outstanding mineral interest, then Duhig will prevent the grantor from retaining a one-half mineral interest by means of estoppel.\textsuperscript{33}

Perhaps seemingly obvious, but nonetheless important, is that Duhig does not apply if there is no outstanding interest.\textsuperscript{34} For example, had Duhig owned the entire mineral interest, rather than only a one-half interest, he would have been able to convey one-half and retain the other one-half.\textsuperscript{35} In \textit{Garza v. Prolithic Energy Co., L.P.},\textsuperscript{36} the Texas appellate court distinguished and declined to apply Duhig because the grantor owned the entire mineral interest and the conveyances did not exceed the mineral estate.\textsuperscript{37}

This is not to say, however, that a grantor must own the entire mineral interest to avoid Duhig. If a grantor only conveys a fraction of whatever minerals he owns, Duhig does not apply.\textsuperscript{38} For example, if Duhig had conveyed a one-quarter interest, he would have retained a one-quarter interest, the grantee would receive a one-quarter interest and the Gilmer Estate would still retain one-half. In fact, a grantor who owned one-half of the mineral estate conveyed the minerals with an exception of “one-half of whatever oil, gas and other mineral interests that is owned by them at the time of this conveyance, conveying to the grantee one-half of said interest” was held to do precisely that.\textsuperscript{39}

\textbf{(a) No Warranty Clause Required}

\begin{itemize}
  \item \textsuperscript{34} Smith, supra note 9, at 4.
  \item \textsuperscript{35} See id.
  \item \textsuperscript{36} 195 S.W.3d 137, 146 (Tex. App.—San Antonio 2006, pet. denied).
  \item \textsuperscript{37} Id. at 146; see Smith, supra note 9, at 4.
  \item \textsuperscript{38} See 1 Eugene Kuntz, Oil and Gas § 14.5.
  \item \textsuperscript{39} See id.; see also Manson v. Magee, 534 So.2d 545 (Miss. 1988).
\end{itemize}
Multiple authorities, including many courts, agree that despite the *Duhig* court’s analysis of the warranty clause, *Duhig* is applicable even in the absence of such a clause.\(^{40}\) Both M. Steve Smith and the Kuntz Treatise on Oil and Gas cite the Texas appellate case *Blanton v. Bruce*\(^{41}\) for the notion that if a grantor asserts ownership in the conveyancing language of the deed, *Duhig* prevents the grantor from contesting that asserted ownership.\(^{42}\) In *Blanton*, although the deed at issue did not contain a warranty clause,\(^{43}\) it purported to convey the mineral interest and *Duhig*’s principle of estoppel applied.\(^{44}\) The court also pointed out that *Duhig* did not “say that the announced rule will apply only when the deed contains a ‘general warranty.’”\(^{45}\)

North Dakota also recognizes the argument that a warranty clause does not determine the applicability of *Duhig*. In *Miller v. Kloeckner*,\(^{46}\) the North Dakota Supreme Court applied *Duhig* to a deed with a special, or limited, warranty. And although one could argue that it nonetheless relied on a warranty of some kind, the court also stated “a *Duhig* result *may* be reached with a limited warranty or with no warranty.”\(^{47}\)

The *Miller* court cited *American Republics Corp. v. Houston Oil Co.*\(^{48}\) from the Fifth Circuit as additional support that “*Duhig* applies if there is a special warranty or no warranty.”\(^{49}\)

---

\(^{40}\) M. Steve Smith cites *Duhig*’s emphasis on the warranty clause as a likely reason for confusion in Texas courts over the operation of warranty clauses. For example, in *Walker v. Campuzano Enterprises, Ltd.*, No. 02-10-00061-CV, 2011 WL 945167 (Tex. App.—Fort Worth Mar. 17, 2011, no pet.)(mem. op.), a Texas appellate court confused the operative differences between granting and warranty clauses because it interpreted the warranty clause as enlarging the title conveyed. However, under *Duhig*, “[t]he granting clause, not the warranty, purports to convey a certain interest.” Smith, *supra* note 9, at 3; *see* *Duhig*, 144 S.W.2d at 880.

\(^{41}\) 688 S.W.2d 908 (Tex. App.—Eastland 1985, writ ref’d n.r.e.).

\(^{42}\) *See* 1 Eugene Kuntz, Oil and Gas § 14.5; *see also* Smith, *supra* note 9, at 5.

\(^{43}\) The deed in question was also not a quitclaim deed, the significance of which is discussed on p. 9.

\(^{44}\) *Blanton*, 688 S.W.2d at 911, 14-15; *see* Smith, *supra* note 9, at 5.

\(^{45}\) *Id.* at 911; *see* Smith, *supra* note 9, at 5.

\(^{46}\) 600 N.W.2d 881 (N.D. 1999); *see* Melchoir, 786 N.W.2d at 11(stating “[i]n Miller…[the North Dakota Supreme Court] recognized the rationale from *Duhig* may also be applied to a deed with no warranty provisions, and the key question is not what the grantor purported to retain for himself, but what the grantor purported to give the grantee”); *see also* Waldock v. Amber Harvest Corp., 820 N.W.2d 755, 759 (N.D. 2012).

\(^{47}\) *Id.* (emphasis added) (citing 1 Williams & Meyers, at 580.29-580.31 & 1 Eugene Kuntz, Oil and Gas § 14.5).

\(^{48}\) 173 F.2d 728, 734 (5th. Cir 1949).

\(^{49}\) *Miller*, 600 N.W.2d at 886.
Like Miller, American Republics involved a special limited warranty. The court stated that “[a] deed with special warranty, indeed, as we have seen a deed with no warranty at all, as completely estops the grantor from making a claim of title which would diminish the title of his grantee as would a deed with general warranty.” From these cases it is clear that the granting clause, which asserts the conveyance, determines Duhig applicability regardless of the presence of a warranty clause.

(b) Quitclaim Deeds

Kuntz suggests that Duhig may be inapplicable to quitclaim deeds. In support, it cites Bilby v. Wire where the Supreme Court of North Dakota refused to apply Duhig to quitclaim deeds. In Bilby, the court reasoned that in quitclaim deeds the grantor purports to convey no more than the interest he may own. Consequently, the grantor was not estopped from asserting after acquired title because the Doctrine “as a general rule, [will not] inure to the benefit of the grantee under a quitclaim deed.”

The Texas Supreme Court has also refused to apply principles of estoppel to quitclaim deeds. For example, in Kerlin v. Saucedal the court paid particular attention to the type of deed,
mirroring the analysis used by the North Dakota Supreme Court in Bilby.\textsuperscript{60} In support, it cited the 2003 Restatement (Third) of Property:

Under the doctrine of estoppel by deed, a purported transfer of land that the transferor does not own becomes enforceable and takes place automatically if the land is later acquired, but only if the deed represents to the grantee that title of a specified quality is being conveyed, which most warranty deeds but few quitclaim deeds do.\textsuperscript{61}

The court stated that the facts did not involve after-acquired title, but stressed that if even if they did quitclaim deeds do not warrant title, which prevents any application of estoppel by deed.\textsuperscript{62} In other words, because a quitclaim deed does not guarantee anything more than the grantor actually owns, it would be impossible for a grantor to purport to convey more than his legal interest.

**Section 3: North Dakota & Duhig**

In 1971, The North Dakota Supreme Court adopted the Duhig Doctrine in Kadrmas v. Sauvageau.\textsuperscript{63} In that case, Sauvageau owned a one-half mineral interest in the subject property.\textsuperscript{64} He then conveyed his interest by warranty deed to Kadrmas, but “excepting and reserving unto the grantors One-half (½) of all oil, gas, Uranium and all other minerals.”\textsuperscript{65} The warranty clause warranted title to the deed’s conveyance but contained no reservation or exception language.\textsuperscript{66} The court concluded that “the Sauvageaus could not convey and warrant, and reserve and retain, the same thing at the same time, but the warranty obligation is superior to the Sauvageaus’

\begin{itemize}
\item \textsuperscript{60} See id. at 930.
\item \textsuperscript{61} Id.
\item \textsuperscript{62} Id.
\item \textsuperscript{63} 188 N.W.2d 753, 756 (N.D. 1971).
\item \textsuperscript{64} Id. at 753; see Miller, 600 N.W.2d at 884.
\item \textsuperscript{65} Id. at 753-54; see Miller, 600 N.W.2d at 884.
\item \textsuperscript{66} Id. at 754; see Miller, 600 N.W.2d at 884.
\end{itemize}
reservation rights.” With one exception, North Dakota has consistently applied Duhig to conveyance issues since Kadrmas.

Like Texas, North Dakota’s application of Duhig is based on estoppel. Specifically, “estoppel by warranty, a subset of estoppel by deed, which precludes a warrantor of title from questioning the title warranted.” Importantly, Duhig’s foundational authority in North Dakota is not merely a product of common law. In Acoma Oil Corp., the North Dakota Supreme Court cited multiple North Dakota property statutes that reinforce the Duhig Doctrine. Acoma also applied the Duhig principles to a grant of mineral rights, where there were outstanding royalty interests burdening the property. “Like Duhig, in cases where a grantor conveys some mineral interests while keeping some mineral interests in the same tract of land without an explicit

---

67 Id. at 756; see Miller, 600 N.W.2d at 884.
68 Melchoir, 786 N.W.2d at 11.
69 Id.; see Miller, 600 N.W.2d at 885 (citing Mau v. Schwan, 460 N.W.2d 131, 134 (N.D.1990)); see also Acoma Oil Corp. v. Wilson, 471 N.W.2d 476, 479-80 (N.D.1991); Sibert v. Kubas, 357 N.W.2d 495, 49 (N.D. 1984).
70 See Acoma Oil Corp., 471 N.W.2d at 479.
71 In Mau, supra, we observed that several North Dakota statutes reinforced the result in Duhig.

Section 47-09-13, N.D.C.C., provides:

“Grant shall be interpreted in favor of grantee-Exceptions.-A grant shall be interpreted in favor of the grantee, except that a reservation in any grant, and every grant by a public officer or body, as such, to a private party, is to be interpreted in favor of the grantor.”

Section 47-09-16, N.D.C.C., provides:

“Transfer vests actual title-Thing includes incidents.-A transfer vests in the transferee all the actual title to the thing transferred which the transferor then has unless a different intention is expressed or is necessarily implied. It also transfers all its incidents unless expressly excepted, but the transfer of an incident to a thing does not transfer the thing itself.”

Section 47-10-08, N.D.C.C., provides:

“Grant conclusive against whom.-Every grant of an estate in real property is conclusive against the grantor and every one subsequently claiming under him, except a purchaser or encumbrancer who in good faith and for a valuable consideration acquires a title or lien by an instrument that first is duly recorded.”

Id. at 480-81.
reservation, the focus is on whether or not the grantor has enough mineral interests in the tract of land to satisfy the conveyance.”

_Gilbertson v. Charlson_  

In 1981 the North Dakota Supreme Court issued its opinion in _Gilbertson v. Charlson_, which caused some authors to question the future application of _Duhig_. The decision had such a profound effect that one author deemed _Duhig_ dead.  

_Gilbertson_ has its roots in 1943 when the State of North Dakota issued to Thorlackson by warranty deed title to the relevant property, subject to a reservation of “five percentum (5%) of all oil, natural gas and minerals.” When Thorlackson died, title passed to his three children, each of whom owned an undivided one-third interest in the surface and 95% of the minerals. By warranty deed in 1947, two of the children (grantors) conveyed their interests in the property to the third child, Gilbertson (grantee), reserving “to the Grantors fifty (50%) Per Centum of all oil, natural gas and minerals which may be found on or underlying said lands, including fifty (50%) percentum of rentals and other income therefrom.”

Plaintiffs, those with mineral rights under grantee, brought action to quiet title arguing that the conveyance from the two children to the third child “impliedly warranted a conveyance of 50 percent of the mineral rights.” On appeal, they argued that “the grantors, from their reservation of fifty percent of the section’s minerals, had purportedly conveyed the remaining

---

72 Acoma Oil Corp., 471 N.W.2d at 482.  
73 301 N.W.2d 144 (N.D. 1981).  
76 _Gilbertson_, 301 N.W.2d at 145.  
77 _Id._  
78 _Id._  
79 _Id._ at 146.
fifty percent mineral interest to the grantee.”80 Because North Dakota owned 5 percent of the minerals, grantors could not have reserved 50 percent and convey the other 50 percent.81 Therefore, grantors breached their warranty and were estopped from asserting title to the 50 percent reservation under Kadrmas (and Duhig).82 According to plaintiffs, they were entitled to a 50 percent conveyance plus their original 31\(\frac{2}{3}\) percent (\(\frac{1}{3}\) of 95 percent), to total 81\(\frac{2}{3}\) percent of the mineral interest.83

Grantors argued that Kadrmas and Duhig were inapplicable because before the conveyance between the children, grantee and grantors owned the entire 95 percent mineral interest as co-tenants.84 According to grantors, Kadrmas and Duhig did not apply:

when title to the outstanding mineral interest was held by a grantee rather than a prior grantor of a third party. Because the grantee [ ] held title to the outstanding mineral interests, [grantor] asserted that there would be no eviction by one holding a paramount title. Grantor concluded that, absent the failure of the grantee’s title, the grantors had not breached their warranty by reserving fifty percent of the sections mineral interests.85

The North Dakota Supreme Court focused on this issue of notice and affirmed summary judgment in favor of the grantors.86 The court distinguished the facts in Gilbertson from those in Kadrmas. Specifically, in Kadrmas, there was no claim that the grantee “had either direct or constructive knowledge that the grantors owned less than 100 percent of the mineral interest.”87 However, in Gilbertson, the grantee “had actual notice of the outstanding 31\(\frac{2}{3}\) percent interest as she was the owner of that interest.”88 Moreover, grantee also had constructive notice of North

80 Plumly, supra note 75, at 125.
81 Id.
82 Gilbertson, 301 N.W.2d at 146; Plumly, supra note 75, at 126.
83 Id.
84 Gilbertson, 301 N.W.2d at 146.
85 Plumly, supra note 75, at 126.
86 Gilbertson, 301 N.W.2d at 146; Plumly, supra note 75, at 126.
87 Gilbertson, 301 N.W.2d at 146-48.
88 Id. at 148.
Dakota’s 5 percent reservation because it was recorded.\textsuperscript{89} When the grantee had both actual and constructive knowledge of the outstanding mineral interest, estoppel was not warranted and, therefore, \textit{Duhig} does not apply.\textsuperscript{90} In other words, “[t]he idea of applying estoppel…departs materially from the basis on which \textit{Duhig} and \textit{Kadrmas} were decided.”\textsuperscript{91}

Despite initial reactions by some that \textit{Gilbertson} repudiated \textit{Duhig}, subsequent cases indicate that \textit{Duhig} remains. For example, a mere three years after \textit{Gilbertson}, the North Dakota Supreme Court issued its opinion in \textit{Sibert v. Kubas}.\textsuperscript{92} In that case, the court considered whether a grantee’s constructive notice of a third-party interest in minerals alone precluded application of \textit{Duhig}.\textsuperscript{93} It found that such notice does not automatically operate as preclusion and, therefore, \textit{Duhig} was applicable.\textsuperscript{94} The court stressed its refusal to:

\begin{quote}
extend \textit{Gilbertson}'s application to situations where, as in this case, a grantee, without an outstanding mineral interest in the conveyed property, merely has notice of an outstanding mineral interest in a third party which is not in conflict with other facts actually or constructively known by that grantee. Such an extension would unduly impair the function of warranty deeds and the principle recognized in \textit{Kadrmas} that a warranty obligation is superior to a grantor’s reservation rights.\textsuperscript{95}
\end{quote}

Doubtless aware of the criticism leveled at its decision in \textit{Gilbertson},\textsuperscript{96} the court further stated that without facts similar to \textit{Gilbertson} and a grantee’s notice of an outstanding third party interest, \textit{Duhig} would apply.\textsuperscript{97} Almost 20 years later the same court echoed this identical rationale in \textit{Johnson v. Finkle}, addressed below.

\begin{footnotes}
\item\textsuperscript{89} Id.
\item\textsuperscript{90} Plumly, \textit{supra} note 75, at 127.
\item\textsuperscript{91} Maxwell, \textit{supra} note 74, at 439
\item\textsuperscript{92} 357 N.W.2d 495 (N.D. 1984).
\item\textsuperscript{93} Id. at 496.
\item\textsuperscript{94} Id. at 498.
\item\textsuperscript{95} Id.
\item\textsuperscript{96} See, e.g., Maxwell, \textit{supra} note 74.
\item\textsuperscript{97} See \textit{id}.
\end{footnotes}
Section 4: Recent North Dakota Duhig Litigation


In 1950 John C. Nichols (John C.) owned the entire surface and a one-half mineral interest in the subject property. Although both parties involved in the litigation were descendants of John C., the appellants were successors in interest to the eight siblings of John C.’s son, John Q. Nichols (John Q.), and the appellees were the successors of John Q. himself. Upon the death of John C. and his wife, their nine kids came to each own a one-ninth interest in the surface and a 1/18 mineral interest. In 1955, eight of the children conveyed by warranty deed to the ninth child, John Q., each of their “undivided one-ninth interest in and to” the surface. Additionally, and important to the issue of Duhig, the deed also stated that it:

hereby excepted from this grant and there is hereby reserved from this grant, to the grantors, 25% of all minerals, gas, oil and hydrocarbon compounds and 25% of all royalties on account thereof with the right to prospect, explore and drill for such gas, oil, and hydrocarbon compounds on and under the surface of said land.

The litigation arose when, in 2011, plaintiffs/appellees, John Q.’s successors, brought a quiet title action against defendants/appellants, the successors in interest to John C.’s eight siblings, “to determine ownership of the one-half mineral interest originally owned by John C. Nichols.”

The defendants claimed that all eight warranty deeds were part of a single transaction, whereby John C.’s one-half interest was split in two, leaving John Q. with a one-quarter interest.

---

98 Nichols, 820 N.W.2d at 742.
99 Id.
100 Id.
101 Id.
102 Id.
and the remaining eight siblings with a collective one-quarter interest.\textsuperscript{104} Despite the existence of extrinsic evidence showing that the original intent of the parties may have been otherwise, the district court granted summary judgment in favor of plaintiffs, John Q.’s successors, finding that the warranty deeds merely reserved one-quarter of each siblings’ 1/18 mineral interest.\textsuperscript{105} Therefore, John Q. owned 7/18 of the minerals and the other eight siblings collectively owned 11/18.\textsuperscript{106} The North Dakota Supreme Court affirmed the district court and held that John’s Q.’s successors owned 7/18 of the mineral interest and John C.’s eight siblings’ successors together owned the remaining 11/18 of the mineral interest.\textsuperscript{107}

In affirming the district court, the North Dakota Supreme Court relied on \textit{Gilbertson}.\textsuperscript{108} To begin, the court stated that in \textit{Gilbertson} it held “\textit{Duhig} did not apply when the grantors and a grantee were co-tenants in the property conveyed between themselves.”\textsuperscript{109} Further, the three distinguishing factors between \textit{Duhig} and \textit{Gilbertson} were (1) co-tenancy between the grantor and grantee, (2) grantee ownership of a proportion of the mineral interests and, (3) grantee’s actual notice of the mineral interest.\textsuperscript{110}

Although the court did not specifically address any issues of notice to the grantee, it did mention that the grantee in \textit{Gilbertson} had actual notice of the outstanding mineral interest, and “was clearly aware her grantors and cotenants….were not warranting title to 50% of the minerals…owned by Gilbertson.”\textsuperscript{111} Unfortunately, the \textit{Nichols} majority somewhat abruptly ended its opinion. It simply affirmed the district court’s application of \textit{Gilbertson}, stating that

\begin{itemize}
\item \textsuperscript{104} \textit{Nichols}, 820 N.W.2d at 743.
\item \textsuperscript{105} See id.; see also \textit{Mineral Law Newsletter, supra} note 101, at 14.
\item \textsuperscript{106} Id.
\item \textsuperscript{107} Id. at 742.
\item \textsuperscript{108} Id. at 746-47.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id. at 747.
\item \textsuperscript{111} Id. (citing \textit{Gilbertson}, 301 N.W.2d at 148).
\end{itemize}
“the *Duhig* rationale does not apply to a grantor's transfer to a cotenant and the grantor in each deed in this case could not reserve 1/4 of all mineral interests in the tract of land.”\(^{112}\)

Justice Kapsner’s concurring opinion stressed that *Gilberston* should not prohibit *Duhig’s* application between siblings merely because the grantor and grantee were co-tenants.\(^{113}\) Rather, *Gilbertson’s* application should depend on both (1) co-tenancy and (2) “notice of the status of the mineral interests provided to both grantor and grantees by instruments of record.”\(^{114}\) While the majority focused on co-tenancy, Kapsner’s concurring opinion stresses the equal importance of notice.


*Johnson* involved a quiet title action to a one-half mineral interest in North Dakota between Nancy Finkle (Finkle) and the Johnsons (Johnsons).\(^{115}\) In 1949, the Andersons (Andersons) sold one-half of the mineral interest in the subject property to a third party.\(^ {116}\) Then in 1957, the Andersons entered into a contract for deed\(^ {117}\) with Henry Johnson.\(^ {118}\) The contract language stated: “The grantor reserves a 1/4 mineral interest, including gas and oil, in the above described premises, as of the date of this contract.”\(^ {119}\) In 1967, after Henry Johnson met his obligations under the contract for deed, the Andersons conveyed the subject property to Henry Johnson by warranty deed, subject to a reservation clause, which read: “The grantor reserves a 1/4 mineral interest, including gas and oil, with the right of ingress and egress for the purpose of mining,

---

\(^{112}\) *Id.*

\(^{113}\) *Id.* at 747-48.

\(^{114}\) *Id.* at 748.

\(^{115}\) *Johnson v. Finkle*, 837 N.W.2d 132, 133 (N.D. 2013).

\(^{116}\) *Id.* at 135.

\(^{117}\) Generally, a contract for deed is “[a] conditional sale contract for the sale of real property.” It is also known as an installment land contract, land sales contract, or a land contract. Black's Law Dictionary (9th ed. 2009), contract

\(^{118}\) *Johnson* 837 N.W.2d at 133-34.

\(^{119}\) *Id.* at 134.
exploring or drilling for the same." \(^{120}\) In 2011, the Johnsons, heirs to Henry Johnson, brought a quiet title action against Finkle, heir to the Andersons, claiming that they were the rightful owners of the entire one-half mineral interest that had originally belonged to Henry Johnson. \(^{121}\) Finkle counter-claimed that she owned a one-quarter mineral interest in the property by virtue of the granting language in the contract for deed and the subsequent warranty deed. \(^{122}\)

The district court granted the Johnsons’ motion for summary judgment and quieted title to one-half of the minerals in favor of the Johnsons, holding that the Andersons owned a one-half mineral interest, conveyed the entire mineral interest, and retained a one-quarter interest. \(^{123}\) The deed to Henry Johnson conveyed the entire mineral interest, reserving a one-quarter interest and, therefore, the Andersons conveyed a greater mineral interest than they owned. \(^{124}\)

On appeal, Finkle argued that *Gilbertson* not *Duhig*, controlled because Henry Johnson owned a mineral interest in the property after the 1957 contract, but before the 1962 conveyance, which left Finkle with a one-quarter mineral interest and the Johnsons with a one-quarter mineral interest. \(^{125}\) The North Dakota Supreme Court affirmed and distinguished *Johnson* from *Gilbertson*, holding that the 1957 contract for deed for was not satisfied until after the Andersons conveyed the property by warranty deed in 1962. \(^{126}\) “Because Henry Johnson did not own an outstanding mineral interest in the property prior to the 1962 deed, *Gilbertson* [did] not apply.” \(^{127}\)

While it is true that in *Gilbertson*, “the Court declined to apply the *Duhig* [Doctrine] when the grantor owned an interest in the property prior to the disputed conveyance,” the

---

\(^{120}\) *Id.*  
\(^{121}\) *Id.*  
\(^{122}\) *Id.*  
\(^{123}\) *Id.*  
\(^{124}\) *Id.* at 135.  
\(^{125}\) *Johnson*, 837 N.W.2d at 135.  
\(^{126}\) *See Johnson*, 837 N.W.2d at 137.  
\(^{127}\) *Id.*
Johnson Court stressed that *Gilbertson* is limited to its unique facts.\(^{128}\) Moreover, Henry Johnson did not own any interest in the property after the 1957 contract for deed because the Andersons retained title to the property until the 1962 conveyance.\(^{129}\) The conveyance, rather than the contract for deed is what vested ownership to Henry Johnson and was, therefore, controlling.\(^{130}\)

Although the court distinguished *Gilbertson* based on the lack of pre-conveyance ownership, rather than actual notice, it nonetheless addressed the notice issue. Certainly not convinced that Henry Johnson had any actual knowledge of the outstanding interest, the court noted that Henry Johnson could have had constructive notice of the third party mineral interest.\(^{131}\) However, even if he had such notice, it “alone is not enough to preclude application of the [Duhig Doctrine].”\(^{132}\) The court further pointed out that it has “refused to extend *Gilbertson*’s application and [has] applied the Duhig doctrine to situations where a grantee, without an outstanding mineral interest in the conveyed property, merely has notice of an outstanding mineral interest in a third party which is not in conflict with other facts actually or constructively known by that grantee.”\(^{133}\)

**Takeaway**

*Gilbertson* and its progeny suggest that constructive notice of an outstanding mineral interest is insufficient to trigger *Gilbertson*. However, a critical takeaway from both *Sibert* and *Johnson* is that constructive notice alone is insufficient, *unless* such notice conflicts with other known facts of an outstanding mineral interest.\(^{134}\) If a grantee has constructive notice, which is in conflict with other facts actually or constructively known, it is unlikely *Duhig* can be relied

\(^{128}\) Id. at 136.
\(^{129}\) Id. at 137.
\(^{130}\) Id.
\(^{131}\) Id. at 137.
\(^{132}\) Id.
\(^{133}\) Id. (citation omitted).
\(^{134}\) *Sibert*, 357 N.W.2d at 498; *Johnson*, 837 N.W.2d at 137.
upon. This is especially true when the outstanding mineral interest is recorded, because a party is deemed to have constructive notice upon filing.135

**Section 5: Duhig’s Application in Oklahoma**

Oklahoma’s recognition of *Duhig* is also based on the principle of estoppel.136 As stated in *Young v. Vermillion*,137 *Duhig*:

stands for the proposition that where a warranty deed is executed by a grantor who owned one-half or less of the minerals, and the same grantor then attempted to convey and retain a one-half mineral interest, the warranty deed conveys to the grantee an absolute fee simple subject only to the reservation of the one-half interest previously retained by the grantor's predecessor in title.138

Oklahoma first recognized *Duhig* in *Birmingham v. McCoy*.139 In *Birmingham*, Wilson conveyed by warranty deed to a third party a one-half mineral interest.140 Wilson then conveyed the relevant property by deed to Johnson, subject to a reservation of an undivided one-half mineral interest.141 Wilson’s heirs argued that the Johnson deed did not convey any mineral rights because, as indicated by the county clerk records, Wilson only owned one-half of the minerals, which were reserved in the deed.142

In rejecting this argument, the Oklahoma Supreme Court cited *Murphy v. Athans*143 for the principle that “where a grantor conveys land by warranty deed but excepts one-half the

---

135 See *Gilbertson*, 301 N.W.2d at 148.
137 1999 OK CIV APP 114, 992 P.2d 917.
138 *Combs*, 2011 OK CIV APP 102, 267 P.3d at 153 (citing *Young*, 1999 OK CIV APP 114, ¶ 8, 992 P.2d 917, 919 (emphasis omitted)).
139 358 P.2d 824, 828 (1960).
141 See *Combs*, 2011 OK CIV APP 102, ¶ 16, 267 P.3d at 153.
143 1953 OK 373, 265 P.2d 461.
minerals, he is estopped to assert title to said mineral interest where one-half the minerals have been conveyed prior to his conveyance.”\textsuperscript{144}

Although Oklahoma does not have cases like *Gilbertson*, *Nichols*, or *Johnson*, attorneys should be on the lookout for these issues in Oklahoma conveyances. Because both Oklahoma and North Dakota alike recognize the Duhig Doctrine and its principles of estoppel, it is foreseeable that Oklahoma courts will look to North Dakota for refinement of its Duhig Doctrine and apply it much the same.

**Conclusion**

The Duhig Doctrine is well established among oil and gas producing states, and subject only to refinements made state by state. Lately, North Dakota’s prolific Duhig jurisprudence has further refined the Doctrine within its borders. These refinements offer experience that Oklahoma courts may look to for guidance. However, Oklahoma courts should not make the same mistake that the North Dakota Supreme Court made in *Gilbertson*. Because *Gilbertson* was so heavily criticized by Professor Maxwell,\textsuperscript{145} the North Dakota Supreme Court has taken great care to limit it to its peculiar facts, apparently lacking the courage to overrule it.

Of course, attorneys should pay close attention to mineral conveyance between cotenants. However they should also keep an eye on conveyances between non co-tenants, where a grantor with constructive notice has knowledge of facts that conflict with other known facts of an outstanding interest. To avoid uncertain outcomes highlighted above, attorneys should pay close attention to detail and ensure diligent and accurate conveyancing.

\textsuperscript{144} *Combs*, 2011 OK CIV APP 102, ¶ 87, 267 P.3d at 153 (citation omitted).

\textsuperscript{145} See Mawell, *supra* note 74.
**Selected Oil and Gas Decisions**

**Federal**

**8th Circuit**

*Alliance Pipeline L.P. v. 4.360 Acres of Land, More or Less, in S/2 of Section 29, Tp. 163 North, Range 85 West, Renville County, N.D., No 13-1003, 2014 WL 1141057 (8th Cir. March 24, 2014); 2014 U.S. App. LEXIS 5388*

After a pipeline company (“Appellee”) was unable to reach an agreement with property owners (“Appellants”) regarding an easement for construction of a pipeline across Appellants’ land, Appellee brought an action for condemnation and for immediate use and possession of Appellants’ land for the easement. The trial court granted summary judgment in favor of Appellee, and the appellate court affirmed, holding that Appellee fulfilled its duty to negotiate in good faith, Appellants received reasonable notice that Appellee was applying to the federal agency for the right to condemn Appellants’ land, and that state law did not apply to the federal agency’s condemnation ruling as to a natural gas pipeline.

**Northern District of Oklahoma**


The Osage Nation (the “Tribe”) granted oil and gas leases (the “Leases”) to an oil and gas company, who hired another oil and gas company (“Plaintiff”) to operate the Leases. After the Tribe and Plaintiff were unable to reach a settlement as to the erection of electrical lines on the Leases, the parties proceeded to arbitration. After an arbitration award was granted, Plaintiff brought suit in federal district court to appeal the award. However, the federal district court dismissed the action, finding that appeal of an arbitration award under the Osage Allotment Act was purely a state law matter unless some other basis for federal jurisdiction existed.

**State**

**Mississippi**


An oil and gas company (“Operator”) filed a petition (the “Petition”) with the regulatory agency (the “Board”) to force-integrate a drilling unit and charge each non-consenting owner the penalties allowed by law. One of the unit owners (“Appellee”) contested the Petition, claiming that Operator had not negotiated in good faith before filing the Petition. However, after Board approval, Appellee agreed to integrate its interest. Appellee then appealed the Board’s decision, and the trial court reversed, finding that the terms offered to Appellee were unreasonable and Appellee had agreed to participate in the unit. The appellate court on rehearing reversed, holding that since Appellee did not agree to one of the statutory options or reach another agreement with Operator, Operator could charge the non-consent penalties.

**New Jersey**


An oil and gas producer (“Defendant”) agreed to sell natural gas to an oil and gas marketing company (“Plaintiff”) under the terms of a natural gas purchasing agreement (the “Agreement”). After Defendant was unable to receive natural gas from its offshore facility due to a pipeline leak, Defendant declared force majeure under the Agreement and stopped all gas deliveries to Plaintiff. Plaintiff filed suit for breach of contract but the trial court ruled in favor of Plaintiff. The appellate court affirmed, holding that since the Agreement did not specify any particular source from which Defendant intended to sell gas, Defendant could not rely on the force majeure provision of the Agreement.
Oklahoma

Gaskins v. Texon, LP, 321 P.3d 985, 2014 OK CIV APP 22

An individual ("Seller") sold crude oil to a midstream company, which then commingled and sold it to a downstream purchaser ("Buyer"). After the midstream company went bankrupt, Seller was never paid for the sale of his crude oil. Seller brought suit against Buyer, claiming that Buyer was under a duty to hold Seller's proceeds in trust under the Production Revenue Standards Act (the "Act"). The trial court granted Buyer's motion to dismiss, and the appellate court affirmed, holding that the Act does not impose a trust upon downstream purchasers, but instead only applies to the relationship between operators and royalty owners.

Pennsylvania


An agent ("Agent") for multiple oil and gas companies ("Defendants") attempted to lease oil and gas rights from mineral owners ("Plaintiffs"). After making changes to the lease form proposed by Defendants, Plaintiffs returned the lease to Agent as a counteroffer. The next day, Plaintiffs notified Agent that the counteroffer was revoked. Agent then sent Plaintiffs a check for the amount stated in the counteroffer, but Plaintiffs voided the check and returned it to Agent. After Agent recorded the counteroffer lease form but Defendants later claimed no interest in the property, Plaintiffs brought suit for slander of title. The trial court found in favor of Defendants, and the appellate court affirmed, holding that the slander of title claim was time-barred since no affirmative acts of the Defendants invoked the continuing violation doctrine.


A couple ("Lessors") leased a 62-acre mineral tract to an oil and gas company ("Lessees"). However, Lessee paid a bonus payment on only 31 acres due to a prior mineral reservation. Lessee subsequently obtained title in the other 31 acres. Near expiration of the primary term of the lease, Lessee exercised a lease extension option by tendering payment on the full 62 acres. Plaintiff brought an action for a declaratory judgment that the lease only covered 31 acres, but the trial court granted Lessee's Motion for Summary Judgment. The appellate court affirmed, holding that Lessors' after-acquired title to the full 62 acres inured to the benefit of Lessee by way of estoppel by deed.

Texas


Mineral owners ("Lessors") granted an oil and gas lease which was eventually owned by an oil and gas company ("Lessees"). The lease contained separate clauses pertaining to the deductibility of post-production costs from Lessors' royalty and overriding royalty. After Lessee deducted certain post-production costs from Lessors' royalty and overriding royalty, Lessors filed suit. The trial court found in favor of Lessors, and the appellate court affirmed, holding that under the terms of the lease, Lessors' royalty could not be charged costs between the point of delivery and point of sale and the "cost free" language pertaining to the overriding royalty disallowed all deductions except production taxes.


An oil well operator ("Defendant") bought an insurance policy from an insurance company ("Plaintiff") to protect against costs associated with regaining control of a blown out well. After a blowout occurred and Plaintiff paid on the policy, Plaintiff brought suit for reimbursement in equity on the grounds that Defendant misrepresented owning 100% of the well. The trial court granted summary judgment in favor of Defendant, but after several appeals, the Texas Supreme Court reversed, holding that when a contract between parties contains clauses directly addressing the issues in dispute, a plaintiff is limited to contract claims rather than equity claims.


An oil company's ("Appellee") predecessor assigned an oil and gas interest comprised of four oil and gas leases to a partnership's ("Appellant") predecessor, providing for a production payment in favor of Appellant. After Appellee obtained new production on only two of the four leases and paid Appellant only for those tracts, Appellant brought suit. The trial court found in favor Appellee, but the appellate court reversed, holding that the fundamental nature of production payments do not mandate proportionate
reduction when some of the underlying leases terminate.


A landowner (“Appellee”) filed an affidavit for adverse possession of a parcel of land that had remained fenced in with Appellee’s property for many years. A neighboring landowner (“Appellant”) then brought an action claiming record title of the parcel after discovering that an early deed, conveyed to Appellant’s predecessor-in-title, originally included the parcel within its metes and bounds description. Appellee counterclaimed, and the trial court granted summary judgment in favor of Appellee. However, the appellate court reversed and remanded, holding that Appellant held title to the parcel because the two preceding deeds that conveyed Appellant’s property had effectively included the disputed parcel by incorporating the early deed’s original metes and bounds description.

**West Virginia**

*Trans Energy, Inc. v. EQT Production Co.*, 743 F.3d 895 (4th Cir. 2014)

Oil and gas companies (“Appellees”) purchased certain oil and gas interests which had competing claims of from another oil and gas company (“Appellant”). After discovering the competing claims, Appellees brought a declaratory judgment action and an action to quiet title. The trial court granted Appellees’ motion for summary judgment, and the appellate court affirmed, holding that since Appellant’s interest was derived from an unrecorded transfer, Appellees were not put on notice of a competing claim and thus were entitled to bona fide purchaser protection.
Federal

8th Circuit


Consumers “(Appellants”) bought products from a food company (“Appellee”) purported to be 100% kosher beef. After learning the products were not fully kosher, Appellants brought a class-action suit, claiming that they had suffered an economic injury-in-fact due to paying increased prices for products that were not, in fact, 100% kosher. The trial court granted Appellee’s motion to dismiss with prejudice, due to a lack of Article III standing from Appellant. However, the appellate court reversed and remanded, holding that while Appellants did not have Article III standing because they did not suffer particular injury, the proper disposition was to dismiss to state court without prejudice.

District of Columbia Circuit


A federal regulatory agency (“Appellee”) passed a rule requiring country-of-origin labeling for “muscle cuts” of meat by retailers and requiring a list of production steps from each country. A group of trade associations (“Appellants”) challenged the rule in district court, but the district court denied relief. The appellate court affirmed, holding that while Appellants did not have Article III standing because they did not suffer particular injury, the proper disposition was to dismiss to state court without prejudice.

State

Minnesota


Two farmers (“Appellants”) purchased fertilizer from a fertilizer company (“Respondent”) and applied it to their corn fields. After Appellants did not obtain the yields they were expecting, they brought suit against Respondent, claiming the fertilizer they purchased contained an insufficient level of nitrogen to enable the promised or expected yields. The trial court granted summary judgment in favor of Respondent, and the appellate court affirmed in part, reversed in part and remanded, holding that since state law abrogated the common law economic-loss doctrine, the trial court erred in barring Appellants’ negligence claim under the common law doctrine.

Texas


An automobile driver (“Appellant”) collided with cattle owned by a cattle company (“Appellee”) after midnight on a roadway. Appellant brought an action against Appellee for damages, and the trial court granted Appellee’s motion for directed verdict. The appellate court affirmed, holding that the standard of liability was dictated by statute, and Appellee had not “permitted” his cattle to roam as the term is used in the pertinent statute. Additionally, the court held that cattle being outside of a fenced area does not automatically give a presumption of negligence without other factors.
New York


A municipality (the “Municipality”) issued a permit to a wind company (“Petitioner”), allowing it to construct turbines for a commercial wind farm. Upon request by Petitioner, the Municipality extended the construction deadline until the earlier of one year or 90 days after the conclusion of a lawsuit brought against the Municipality by a third party. Petitioner then advised the Municipality it was considering using alternate turbine models for the project and requested a second extension, which was denied. Petitioner brought suit challenging the Municipality’s denial for extension, but the appellate court affirmed the denial, holding that since there was a material change in circumstances since the permit had been issued, the Municipality’s refusal to extend was not arbitrary or capricious.

Texas


A wind energy company (“Petitioner”) contracted to sell electricity and renewable energy credits (“RECs”) to a power marketer (“Respondent”). After Petitioner failed to provide the contractual amounts of electricity and RECs, Respondent brought suit, and Petitioner counterclaimed arguing that Respondent failed to provide Petitioner with sufficient transmission capacity. The trial court issued a declaratory judgment that the parties’ contracts required Respondent to provide transmission capacity, but declared that the contracts’ liquidated damages provisions were unenforceable. The lower appellate court reversed, but the Texas Supreme Court held that Petitioner bore the risk of inadequate transmission capacity and that the liquidated damages provisions applied only to the RECs and were unenforceable as a penalty.
ARTICLES OF INTEREST

Oil and Gas


Will Thanheiser, Revisiting the Executive Right Holder’s Authority to Pool Non-Executive Interests, 9 Tex. J. Oil Gas & Energy L. 101 (2013-2014)


Keliianne Chamberlain, Unjust Compensation: Allowing a Revenue-Based Approach to Pipeline Takings, 14 Wyo. L. Rev. 77 (2014)


Water


Wind

Jeff Thaler, In the Public Trust: The Crucial Role of Ocean Wind Power, 31-WTR Del. Law. 20 (Winter 2013-2014)

Agriculture


For a more complete list of articles related to agricultural law, please consult the Agricultural Law Bibliography of the National Agricultural Law Center, http://www.nationalaglawcenter.org/reporter/caseindexes/. This bibliography is updated quarterly and provides a comprehensive listing of agricultural law articles.