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LEXISNEXIS SUMMARY:
... Notwithstanding the reservation of damage determination for a later date, the Lessor and Lessee agreed to a 500' x 550' drilling location on its property. ... Ordinarily, Arkansas's after-acquired title statute would effect a transfer of title of the minerals via the warranty clauses of each of the deeds from the Snowdens to the latest surface owners. ... In its defense, the integration applicant offered evidence that no other leases in the unit other than the State lease were higher in bonus and royalty, that companies paid higher bonuses for large blocks such as the 5,273 acres owned by the State, that companies pay higher bonuses to public institutions to garner goodwill, and that the State was not subject to integration by the AOGC, so it could simply require the unit operator to carry its costs without leasing. ... This case provides a very succinct citation of the Strohacker rule: Where there is ambiguity as to minerals actually embraced in instruments purporting to convey or to reserve certain unspecified minerals under generalized terms as to minerals, a fact question is presented as to the true intent of the parties; and in such cases the contemporary facts and circumstances surrounding the execution of the instrument are admissible in evidence on the question. ... The Walls II Court affirmed much prior precedent on the subject and placed an affirmative duty on the buyer to inquire of rights of third parties in possession.

TEXT:
[*25]

I. Introduction

The past year saw a marked decrease in drilling and exploration activity in Arkansas with a commensurate decrease in new litigation. Cases from the height of the Fayetteville Shale boom in Arkansas, however, continue to work their way through the trial and appellate courts in Arkansas. There were no final decisions of note in any of Arkansas's Federal

District Courts nor were there any final opinions of note in the Eighth Circuit Court of Appeals relating to the oil and gas industry in Arkansas.

II. Arkansas General Assembly

The 89th General Assembly met in 2013 but was largely quiet with respect to oil and gas laws. A few controversial items died in committee with some new laws providing housekeeping amendments to existing oil and gas laws. A few new laws of note affect oil and gas leasing and title.

Act 999 of 2013 repealed *Arkansas Code Annotated § 18-12-207*. n1 This Act changes the forms of acknowledgements, which can now be found at *Arkansas Code Annotated § 16-47-107*. n2 The Act also provides a curative provision for all documents with defective acknowledgements filed since the effective date of the Act. n3 Among the [*26] defects cured are: failure to include the phrase "for the purposes and considerations therein;" wrong gender; failure to identify position of business entity representative; and any time there was a good faith attempt to comply with the law and the signature on the document is authentic. n4 Furthermore, the Act makes clear that any recorded document with a defective acknowledgment is constructive notice. n5

Act 1045 of 2013 gives legal force and effect to scrivener's affidavits. n6 Prior to this, scrivener's affidavits were only information and had no legal force or effect. n7 Under the Act, a scrivener's affidavit becomes legal notice of the correction to the document as of the recording of the affidavit unless the error was "obvious." n8 In the case of obvious errors, the notice relates back to the time of the recording of the original documents unless it would affect the rights of a bona fide purchaser. n9

Act 1231 of 2013 reduces the issuance time of a tax deed from 30 days to 10 days and the statute of limitations to contest a tax title from one year to 90 days. n10 Additionally, the law provides a mechanism for quieting title particular to tax deeds. n11 This does not appear to add any additional substance to quieting title in a tax deed.

The sole statute directly affecting the oil and gas industry is Act 1299 of 2013. n12 This Act is known as the Landowner Notification Act (LNA). n13 The LNA requires that operators seeking to drill in unconventional formations provide a detailed notice to the surface owner that owns the land where the operator intends to drill the initial well. n14 Notably, the LNA has no consequences to the operator for failing to comply.

III. Arkansas Court of Appeals Decisions

Arkansas recognizes that an oil and gas lessee may use so much of the surface as is reasonable to extract oil and gas. n15 Liability for surface damages attaches only when surface use exceeds what is reasonable. n16 In the Author's experience, the oil and gas industry in Arkansas negotiates monetary damages for surface use upfront whether or not [*27] the use is reasonable. This practice builds goodwill for the lessee and often avoids unnecessary litigation. If the parties cannot reach an agreement, litigation can result. A recent example is Odell Pollard, P.A. v. SEECO, Inc. n17

In this case, the Lessor reserved the issue of surface damages occasioned by the lease for a later date. n18 Notwithstanding the reservation of damage determination for a later date, the Lessor and Lessee agreed to a 500' x 550' drilling location on its property. n19 Notably, the lease terms did not specify what was "reasonable." n20 The Lessor constructed its drilling pad on a portion of the leased tract that was part of an existing residential development. n21 Because of the location of drill site, the Lessee claimed that it rendered 25.19 acres of land unfit for residential development purposes. n22 As a measure of damage, the Lessor sought diminution of value. n23

The Lessee moved for summary judgment, offering an affidavit to prove that its surface use was reasonable. n24 The Lessor responded with its own affidavit, answering with the same allegations made in its complaint. n25 The trial court ruled for the Lessee. n26 The Lessor appealed, and the Court of Appeals observed that the lease did not define what was "reasonable." n27 Noting the absence of any specific provision governing the reasonableness of the Lessee's

conduct in the lease, the court ruled in favor of the Lessee. n28

This opinion confirms a long-held rule that surface damages occasioned by mineral owners or mineral lessees must be unreasonable before a claim for damages attaches. n29 A closer observation of the facts of this case provides some guidance to reasonableness. The Lessee justified its location of the drill site based upon "geological concerns regarding potential faulting and appellees' desire to run additional wells from the same drilling pad in a future drilling phase." n30 With this established, the Lessee followed up on its proof by pointing out the alternative to the site chosen - the Lessor's "front yard and [*28] driveway." n31 One may infer from this decision that reasonableness in the selection of a drill site may encompass geological factors, future development plans, and the viability of other locations on the leased tract.

Last year, Mr. Daily reviewed the case of Mauldin v. Snowden. n32 In that case, the Arkansas Court of Appeals allowed reformation deeds to avoid the effect of the after-acquired title statute. n33 This year, a very similar case made its way to the Court of Appeals - The Longing Family Revocable Trust v. Snowden. n34

This case involved nearly identical facts as Mauldin. The Snowdens conveyed the minerals to a company they controlled, issued a warranty deed with no mineral reservation to the surface owner, and that surface owner conveyed by warranty deed to another surface owner free of reservation. n35 The Snowdens then deeded the minerals out of their shell company back to themselves. n36 Ordinarily, Arkansas's after-acquired title statute n37 would effect a transfer of title of the minerals via the warranty clauses of each of the deeds from the Snowdens to the latest surface owners. n38

The Longing Revocable Trust attempted to quiet title against the Snowdens, and the Snowdens filed a third-party complaint for reformation against the Trust's grantors who took from Snowdens. n39 The trial court granted the reformation and quieted title in the Snowdens. n40 The Court of Appeals affirmed the ruling of the trial court. n41 Like the Mauldin decision, this decision dilutes the after-acquired title statute. Title examiners simply cannot rely on after-acquired title in the wake of these decisions. Curiously, the party quieting title against the Snowdens in both cases never raised the defense of bona fide purchaser. It is elementary that equity prohibits the reformation of deeds when prejudice results to a subsequent bona fide purchaser. n42 Look for this issue to come up in the future - the Author, in examining oil and gas title, saw the Snowdens repeat this type of [*29] transaction on over 1,500 acres of land in the heart of the Fayetteville Shale.

IV. Arkansas Supreme Court Decisions

In 2012, the Arkansas Supreme Court took a rare appeal from the Arkansas Oil and Gas Commission (AOGC). n43 By statute, the AOGC must issue its unit integration orders with provisions specifying the reasonable consideration for the involuntary transfer of the owner's drilling rights to the parties who elect to participate in drilling. n44 To accomplish this statutory directive, the AOGC's rules specify that the integration applicant furnish evidence of "the highest and/or best cash bonus and royalty terms that the applicant has knowledge of that have been offered and accepted or contracted for, for any acreage within the units(s) where the well is located." n45 Zelda Walls and Richard Gawenis objected to the applicant's bonus and royalty rates offered at the integration hearing. n46 The basis of their objection was that the State of Arkansas leased lands in the same unit for a bonus and royalty of $ 1,601.51/acre and 22%, respectively. n47

In its defense, the integration applicant offered evidence that no other leases in the unit other than the State lease were higher in bonus and royalty, that companies paid higher bonuses for large blocks such as the 5,273 acres owned by the State, that companies pay higher bonuses to public institutions to garner goodwill, and that the State was not subject to integration by the AOGC, so it could simply require the unit operator to carry its costs without leasing. n48 The AOGC rejected Walls's claims. n49 On appeal, the Court held that "the statute simply does not require the Commission to award the highest bonus historically paid." n50 This agrees with the statute's plain wording of "reasonable" consideration. Notably, the AOGC rules require evidence of the highest bonus and royalty paid of which the applicant is aware, but the rule does not state that the AOGC will award this to the royalty owner. Hence, the rule and the statute jibe. Integration applicants should take note of this case and prepare for this type of objection when gathering evidence of the highest bonus and royalty paid in the unit to present to the AOGC.

A case of first impression came before the Court this year examining what happens when a mineral deed purporting to convey an undivided [*30] interest gets recorded without filling in the blanks stating the interest conveyed. n51 The granting language of the mineral deed in this case read that the grantors did "hereby grant, bargain, sell and convey" to the grantor "an undivided interest in and to all the oil, gas and other minerals." n52 The unfilled blank was between the "an" and "undivided." n53 The sole question was whether the omission of the percentage interest rendered the deed void and unenforceable. n54

The Court drew upon two statutes, *Arkansas Code Annotated §§18-12-102(b)* and *18-12-105*, to render the opinion. n55 The former statute provides that any use of "grant, bargain, and sell" is an express covenant of fee simple title. n56 The latter statute provides that all deeds are to be construed as conveying fee simple unless there are express words limiting the estate. n57 Precedent interpreting the meaning of fee simple in these statutes dictates that fee simple is "the greatest estate or interest owned by a person to convey." n58 These statutes and the precedent interpreting them give rise to the presumption that a grantor intends to convey all interests when making a deed. n59 Applying these rules to the granting language of the unfilled blank mineral deed, the court concluded that the grant was all of the interest owned by the grantor. n60 The Court relied on the Oklahoma case of Beaton v. Pure Oil Co., which presented substantially the same facts to render its opinion. n61

Strohacker cases continue to make the rounds through the appeallate courts in Arkansas. As noted in last year's update, the Strohacker rule is a rule peculiar to Arkansas that limits a reservation or grant of "minerals" to only those substances in the time and place of the execution of the deed "generally regarded as minerals in legal and commercial usage." n62 A recitation of the many permutations and the evolution of Strohacker would consume one half of a law review issue. Suffice to say, the rule can be difficult to follow due to the geographic and temporal elements. The latest Strohacker case is Nicholson v. Upland Industrial Development. n63 This case provides a very succinct citation of the Strohacker rule:

> Where there is ambiguity as to minerals actually embraced in instruments purporting to convey or to reserve certain unspecified [*31] minerals under generalized terms as to minerals, a fact question is presented as to the true intent of the parties; and in such cases the contemporary facts and circumstances surrounding the execution of the instrument are admissible in evidence on the question. Furthermore, the intent of the parties will be determined so as to be consistent with and limited to those minerals commonly known and recognized by legal or commercial usage in the area where the instrument was executed. n64

And as to the applicable locality, the Court quoted the trial court's order:

> In Strohacker, the court did not say that the exploration or production, or the legal or commercial usage of oil and gas assumed them to be included in "minerals," would have to be limited to the county in which the property is located. The Court finds that to be a misconception, which is apparently commonly held. n65

Nicholson involved a 1903 reservation of minerals in White County, Arkansas. n66 The opponents of the reservation pointed to the proponent's lack of appreciable evidence relating to oil and gas exploration in White County. n67 The proponents instead presented evidence of oil and gas exploration in White, Pulaski, Conway, Pope, and Independence Counties. n68 The court approved of this evidence. n69 It cannot be understated that Strohacker is not a county-specific determination. The Author routinely sees this misconception among practicing attorneys in Arkansas. If there is

evidence of oil and gas exploration in the surrounding counties before or during the time of the mineral reservation, a mineral reservation will pass the Strohacker test.

In last year's update, the court of appeals ruled on the case of Walls v. Humphries. n70 That opinion was overruled this year by the Arkansas Supreme Court. n71 Briefly, the facts in Walls I and Walls II were that the record owner of the property gave possession of the property to a buyer under an unrecorded contract of sale. n72 After this, the record owner gave an oil and gas lease and a mineral deed to the property without notifying the lessee/buyer of the unrecorded land contract. n73 While being a race-notice state, Arkansas recognizes that actual notice of a party in possession's rights is imputed to a purchaser. n74 This rule [*32] was first applied by the court in an oil and gas case in Henry v. Gulf Refining Co. n75

The Walls II Court affirmed much prior precedent on the subject and placed an affirmative duty on the buyer to inquire of rights of third parties in possession. n76 The Court stopped short of ruling in favor of the appellants because there was a fact question as to whether the appellants were in exclusive possession. n77 Where the possession is not exclusive, the buyer has no duty to inquire of the nature of the third party's rights. n78

In light of the Walls II decision, those buying leases or minerals should obtain an affidavit of use and occupancy from the seller demonstrating exclusive possession. This should provide some measure of protection by demonstrating that the buyer inquired of possession. When rendering title opinions in Arkansas, the title examiner should disclaim any opinion on the rights of parties in possession.

Legal Topics:

For related research and practice materials, see the following legal topics:
Energy & Utilities LawExploration, Discovery & RecoveryGeneral OverviewEnergy & Utilities LawOil IndustryGeneral OverviewEnergy & Utilities LawOil, Gas & Mineral InterestsSurface Use Interests

FOOTNOTES:

n1. Act 999, H.B. 1907, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

n2. Id.; see *Ark. Code Ann. § 16-47-207* (2013).

n3. Ark. H.B. 1907.

n4. Id.

n5. Id.

n6. Act 1045, S.B. 1137, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

n7. Id.

n8. Id.

n9. Id.

n10. Act 1231, S.B. 297, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

n11. Id.

n12. Act 1299, H.B. 2001, 89th Gen. Assemb., Reg. Sess. (Ark. 2013).

n13. Id.

n14. Id.

n15. See *Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160, 163 (Ark. 1974)* (surface use must be "reasonable," and reasonableness requires surface use to be the conducted in the "least injurious" way possible).

n16. See id.

n17. *Odell Pollard, P.A. v. SEECO, Inc., 2013 Ark. App. LEXIS 338.*

n18. *Odell Pollard, P.A., 2013 Ark. App. LEXIS 338, at 2.*

n19. Id.

n20. See id.

n21. Id. at 3.

n22. Id.

n23. Id.

n24. Id. at 4.

n25. Id.

n26. Id.

n27. See id. at 5-7.

n28. Id. at 8 ("The agreement does not seem to confer any more rights to appellants than they had under the

oil and gas lease and at law.").

n29. See id. at 7 (citing *Diamond Shamrock Corp. v. Phillips, 511 S.W.2d 160 (Ark. 1974)).*

n30. Id.

n31. Id. at 5.

n32. See Thomas A. Daily, Arkansas Oil and Gas Update, *19 Tex. Wesleyan L. Rev. 281 (2012);* see *Mauldin v. Snowden, 386 S.W.3d 560 (Ark. 2011).*

n33. See *Mauldin, 386 S.W.3d at 285-86.*

n34. *Longing Revocable Trust v. Snowden, 2013 Ark. App. LEXIS 81, at 2-3.*

n35. Id.

n36. Id.

n37. Ark. Code. Ann. § 18-12-601 (2013).

n38. See e.g. *Hayes v. Coats, 238 S.W.2d 935 (Ark. 1951)* (statute applied to grantor of mineral deed who re-acquired the mineral interest after foreclosure that purported to cut off the rights of his mineral grantees); *Sheppard v. Zeppa, 133 S.W.2d 860 (Ark. 1939)* (statute applied to widow who executed mineral deed for her son's interest and later acquired it after son came of age).

n39. *Longing Revocable Trust, 2013 Ark. App. LEXIS 103, at 4-5.*

n40. Id. at 5.

n41. Id. at 5-6.

n42. *Statler v. Painter, 133 S.W.3d 425, 429 (Ark. App. 2003).*

n43. *Walls v. Ark. Oil & Gas Comm'n, 2012 Ark. LEXIS 439 (2012).*

n44. *Ark. Code Ann. § 15-72-304* (2013).

n45. Arkansas Oil and Gas Commission General Rules and Regulations, A-3(b)(2)(G)(ii) (Feb. 8, 2013).

n46. *Walls, 2012 Ark. LEXIS 439, at 1.* These rates ranged from $ 225-$ 800/acre in bonus with a corresponding 1/8-3/16 in royalty. Id. at 3.

n47. Id. at 5-6.

n48. Id. at 10-11.

n49. Id. at 5-6.

n50. Id. at 11.

n51. See *Barton Land Servs. v. SEECO, Inc., 2013 Ark. LEXIS 263 (Ark. 2013).*

n52. Id. at 2-3.

n53. Id. at 7-8.

n54. Id. at 7.

n55. See id. at 10-11.

n56. Id. at 11.

n57. Id. at 12.

n58. Id.

n59. See id. at 10-12.

n60. Id. at 13.

n61. Id. at 13-15 (citing *Beaton v. Pure Oil Co., 483 P.2d 1145 (Okla. 1971)).*

n62. See Daily, supra note 32, at 282.

n63. *Nicholson v. Upland Indus. Dev., 2012 Ark. LEXIS 355 (Ark. 2012).*

n64. Id. at 5-6. (citing *Ahne v. Reinhart & Donovan Co., 401 S.W.2d 565, 568-69 (Ark. 1966)).*

n65. Id. at 6.

n66. Id. at 2.

n67. See id. at 6-7.

n68. See id. at 6.

n69. Id. at 9-10.

n70. See Daily, supra note 32, at 283-84; see *Walls v. Humphries, 2012 Ark. App. LEXIS 10* (Walls I), overruled by, *2013 Ark. LEXIS 337* (Walls II).

n71. *Walls II, 2013 Ark. LEXIS 337.*

n72. Id. at 2-3.

n73. Id.

n74. See id. at 9-13.

n75. *Henry v. Gulf Refining Co., 2 S.W.2d 687 (Ark. 1927).*

n76. See *Walls II, 2013 Ark. LEXIS 337, at 11-16.* ("Our law is clear that a subsequent purchaser is charged with notice when the land is in possession of someone other than the record owner, even though the subsequent purchaser may not be aware of the third person's possession.").

n77. Id. at 16-18.

n78. Id. (citing *Story v. Grayson, 185 S.W.2d 287 (Ark. 1945); Rubel v. Parker, 155 S.W. 114 (Ark. 1913)).*