THE POOLING CASE

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I. INTRODUCTION

This paper examines the litigation of disputes involving the exercise of voluntary pooling authority. Most Texas cases involving voluntary pooling have revolved around one of three fact scenarios: (1) cases in which lessee has formed a unit but has done so imperfectly or lacks authority (or full authority) to form the pooled unit in the way he desires (unauthorized pooling); (2) cases in which the lessee has the right to pool but does so for an improper purpose to the detriment of his lessor ("bad faith pooling"); and (3) cases in which a person whose interest is included within an area subject to pooling and who has not authorized pooling of his or her interest, has the right to ratify, decline to ratify or selectively ratify the pooled unit or units. This paper will first discuss the nature and historical genesis of the pooling power in Texas as well as issues common to all pooling cases. It will then discuss pre-filing case evaluation, procedural considerations, elements of proof, defensive issues and available remedies for the various different types of cases.

II. VOLUNTARY POOLING

A. The Nature of Pooling

Pooling generally is the aggregation of two or more separate tracts into a single base lease tract for purposes of drilling or production. Pooling in its proper application has two fundamental effects. It prevents physical and economic waste which might result from the drilling of unnecessary wells and it protects the correlative rights of mineral owners in a common reservoir.[2] The consequences of pooling were best described by the Texas Supreme Court in Southland Royalty Co. v. Humble Oil & Refining Co.,[3] in its discussion of the attributes of communitized leases. Paraphrasing the Court's opinion those attributes as regard pooling (or communitization) are:

1. Production on any part of the lease for any lease included in a pooled unit will extend the term as to all tracts or leases;[4]

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[2] *See,* F. Douglass, *Powers and Problems of Lessee Pooling*, 34 Inst. on Oil & Gas Law and Taxation 231, 232 (Southwestern Legal Foundation 1983); 1 H. Williams & C. Meyers, *Oil & Gas Law* § 901 at 3 (1993).

[3] 249 S.W.2d 914, 916 (Tex. 1952).

[4] In the event the lease agreement covering any unit tract contains a Pugh or retained acreage clause, production may perpetuate the lease or lease acreage only to the extent it is included in the pooled unit or acreage ascribed to the well as the case may be. *See* A. Cummings, *Pooling Issues -- Avoiding Pitfalls*, at E 18-20, ADV. OIL GAS & MIN. LAW COURSE (1995). Otherwise the pooling clause and unit production will constitute production for purposes of the habendum clause of each included lease and perpetuate the leases as to all of the lease acreage. *See Shown v. Getty Oil Co.,* 645 S.W.2d

2. Commencement of a well on any lease tract or lease included in the pooled unit will excuse the payment of delay rentals on all of the included leases or tracts;
3. Production from a well on any lease or tract relieves the lessee of the obligation to pay delay rentals on all included tracts and leases;
4. The lessee is relieved of the implied covenant of reasonable development of each tract or lease on a tract or lease basis;
5. Wells may be located within the unit without respect to the individual property or lease lines;
6. The lessee is relieved of the obligation to drill offset wells on other tracts covered by the lease or pooled unit;
7. Each lessor relinquishes its right to have their tract or the included part of their lease separately developed;
8. Each lessor relinquishes its right to receive all of the royalties from production from its own tract or lease to the extent included within the unit; and
9. Each lessor relinquishes its right to have wells drilled on its own tract offsetting wells or other tracts covered by the lease.

When tracts have been validly pooled, the entire tract may, for most purposes, be treated as if it were a single tract or lease. Thus, while an individual tract may not be entitled to a well a pooled tract may, as aggregated, be entitled to a well under the well density or spacing rules applicable to the field in which the unit is located. The trade-off that occurs is that production will be allocated on a pooled unit basis. That is, royalties on production will be allocated to each royalty owner in the proportion that that owner's tract bears to the total pooled unit.

B. How Pooling Occurs

Pooling in Texas is almost always voluntary and is a matter of contract though under limited circumstances pooled units may be compulsorily created under the Mineral Interest Pooling Act.[5] Absent pooling the rules of capture[6] and non-apportionment of royalties apply[7] though these doctrines have been somewhat modified by regulation of the Texas Railroad Commission. There is no implied or equitable pooling in Texas.[8] Pooled units to

555, 560 (Tex. Civ. App. -- San Antonio 1982, writ ref'd n.r.e.).

[5] Tex. Nat. Res. Code Ann. § 102 et seq. (Vernon Supp. 1989). The MIPA and its workings are beyond the scope of this paper, though some mention of the Act will be made in those instances where it has implications in connection with litigation of voluntary pooling disputes. For comprehensive discussions of the MIPA *see* B. Sullivan, *The Mineral Interest Pooling Act*, ADV. OIL, GAS AND MIN. LAW COURSE (1986) and Douglass, *Mineral Interest Pooling Act - Compulsory Pooling*, 14th ANN. OIL, GAS AND MIN. LAW INST. (1988).

[6] The non-apportionment rule means that the owner of minerals in one tract does not share in production from a well bottomed under another tract simply by virtue of the fact that his tract may be ascribed to a proration unit assigned to that well. *See Japhet v. McRae*, 276 S.W.2d 669, 670-81 (Tex. Com. App. 1925).

[7] Under the rule of capture each lease owner is entitled to extract so much oil and gas from a well bottomed under his tract as he can and own all the oil and gas without regard to the source of origin. *See Bender v. Brooks*, 7 S.W. 168, 170 (Tex. 1910).

[8] *See Ryan Consolidated Petroleum Co. v. Pickens*, 285 S.W.2d 201 (Tex. 1955), *cert. denied*, 351 U.S. 933 (1957); *Waters v. Bruner*, 355 S.W.2d 230, 235 (Tex. Civ. App. -- San Antonio 1962, writ ref'd n.r.e.).

be formed must be done by the voluntary act of the parties or by law.

Voluntary pooling can be accomplished in several ways. One is by execution of a community lease -- that is where two or more land owners include within the terms of a single lease their several tracts of land. In doing so, they create a unitary tract which is operated without regard to lease lines and in which the production is allocated among the various land owners on a pooled basis. In the case of a community lease the pooling is accomplished by the act of the lessors themselves.[9] Accordingly, there is no further or implied authority on the part of the lessee to pool and consequently little opportunity for violation of any pooling obligation.

Pooling can also be accomplished by a pooling agreement executed by owners of interests within the affected area.[10] Pooling can, in some cases also be effected by a persons even though that person is not bound to a lease providing for pooling.[11] However, the fact that one is a co-tenant or interest owner in lands included in a pooled unit does not mean that he will necessarily participate in production unit. An operator forming a pooled unit is under no obligation to offer the co-owners of the acreage included in a pooled unit the opportunity to participate in the unit[12] or even to advise of its formation. Unpooled interests on non-drillsite tracts do not necessarily have the right to share in production from a well or wells on a pooled unit.[13] Moreover, a non-drillsite co-tenant does not have the right to ratify a pooled unit including acreage in which his interest exists unless the pooling declaration purports to include his interest. An unleased co-tenant in a non-drillsite pooled tract may, however, be

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[9] *See* 6 H. Williams & C. Meyers, OIL & GAS LAW § 904 at 6-8 (1993).

[10] Most of the pooling agreements discussed in this paper involve pooling of all interests in the affected acreage. However, it is possible to create pooled units affecting only the leasehold working interest. One of the more common oil and gas agreements that effects a pooling of the working interest is in the joint operating agreement. Texas courts have held that an operating agreement results in a cross conveyance of ownership interests among the parties. *See Whelan v. Placid Oil Co.,* 198 F.2d 39, 42 (5th Cir. 1952); *Renwar Oil Corp. v. Lancaster,* 154 Tex. 311, 315, 276 S.W.2d 774, 776 (1955). The joint operating agreement itself has been held to be "in effect a unitization of the tract conveying an interest in realty . . . with income to be paid on the basis of each parties' acreage contribution to the whole unit." *Gillring Oil Co. v. Hughes*, 618 S.W.2d 874, 875 (Tex. Civ. App. -- Beaumont 1981, no writ). Non-operators should be aware that execution of an operating agreement may, depending upon the form of agreement, change the status of title, including any attendant leasehold obligations. In this context, the 1989 Model Form contains the following disclaimer: "Nothing contained in this Article III.B. shall be deemed an assignment or cross-assignment of interests covered hereby, and in the event two or more parties contribute to this agreement jointly owned Leases, the parties' undivided interests in the Leaseholds shall be deemed separate leasehold interests for the purpose of this agreement."

[11] *See Montgomery v. Rittersbacher*, 424 S.W.2d 210, 214 (Tex. 1968); *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810, 814 (Tex. Civ. App. -- Amarillo 1982, writ dismissed); *Ruiz v. Martin*, 559 S.W.2d 839, 943-844 (Tex. Civ. App. -- San Antonio 1977, writ ref'd n.r.e.).

[12] *See Donnan v. Atlantic Richfield Co.,* 732 S.W.2d 715, 717 (Tex. Civ. App. -- Corpus Christi 1987, writ denied).

[13] *Superior Oil Co. v. Roberts*, 398 S.W.2d 276, 277-78 (Tex. 1965); *Hunt Oil Co. v. Moore,* 656 S.W.2d 634, 642 (Tex. Civ. App. -- Tyler 1983, writ ref'd n.r.e.); *Sun Expl. & Prod. v. Pitzer*, 822 S.W.2d 294, 295 (Tex. Civ. App. -- Eastland 1991, writ denied).

able to ratify his co-tenant's lease and thereby participate in unit production.[14]

Pooling is most commonly effected under the pooling clause in an oil and gas lease. By including a pooling clause in an oil and gas lease, the lessors cloak the lessee with authority to form pooled units subject to certain limitations by undertaking certain acts pursuant to the terms of the lease. Typical language of an oil and gas pooling lease clause might read as follows:

> Lessee is hereby granted the continuing and recurring right but not the obligation to pool or unitize land covered by this lease or any part or interest therein with other lands, leases or interests as to any or all minerals, depths or horizons either before or after commencement of operations. A unit formed for such pooling for an oil well shall not exceed 40 surface acres plus a maximum acreage tolerance of 10% and for a gas well shall not exceed 320 surface acres plus a maximum acreage tolerance of 10% provided that larger units may be formed for an oil well or a gas well whether or not drilled as a horizontal drainhole well as prescribed or permitted by the rules and regulations of any governmental authority with jurisdiction over such matters for the drilling and operation of a well at a regular location or for obtaining maximum allowable from such well. Lessee may pool or combine land covered by this lease or any portion thereof as above provided as to oil and gas or either of them in any one or more stratum or strata. Units formed by pooling as to any stratum or strata need not conform in size or area with units formed as to any other stratum or strata and oil units need not conform as to area with gas units. The pooling in one or more instances shall not exhaust the rights of lessee to pool its lease or portions thereof into other units. Lessee shall exercise that option to pool as to each desired unit by executing an instrument identifying such unit, filing it for record in the appropriate records of the county in which all or part of such unit is situated. The effective date of pooling shall be the date of filing and such unit shall be effective as to all parties thereto, their heirs, successors and assigns irrespective of whether the unit is likewise effective as to all other owners of surface mineral royalty or other rights in the land included in such unit or whether there may be mineral royalty or leasehold interest in the lands within the unit which are not effectively pooled or unitized. Operations conducted on any part of such unit shall be deemed for all purposes, except the payment of royalties on production from the pooled unit, as operations conducted on said lands under this lease and referenced herein to operations on said lands on the leased premises shall be deemed to include operations on any portion of such pooled unit. For purposes of computing royalties and other payments on production, there shall be allocated to the land covered by this lease and included in such unit that proportion of the total production of unitized minerals from the unit after deduction of any used in lease or unit operations which the number of surface

[14] *See Fletcher v. Ricks Exploration*, 905 F.2d 890 (5th Cir. 1990); *Van Deventer v. Gulf Prod. Co.,* 41 S.W.2d 1029, 1038-39 (Tex. Civ. App. -- Beaumont 1931, writ ref'd).

> acres in such land covered by this lease within the unit bears to the total number of surface acres in the unit and the production so allocated shall be considered for all purposes, including payment or delivery of royalties, overriding royalties and any other payment out of production to be the entire production of unitized minerals from the land to which allocated in the same manner as though produced therefrom under the terms of this lease.

The foregoing pooling clause has been developed to accommodate most issues raised by reported cases involving pooling, however, no pooling clause can be viewed as a panacea. The pooling power is a matter of express contract, and the lessee must strictly observe language of the lease in order to validly form a unit.

C. The Effect of Pooling

When a unit is properly formed the effect is to cross-convey among all of the lessors of land in the unitized block so that they each own undivided interests under the unitized tract in the proportion their contribution bears to the unitized tract for the duration of pooling.[15] Pooling typically lasts for as long as production continues from the unit. Once a unit is formed, it can generally be terminated only by termination of the underlying leases or voluntary mutual agreement of all parties to terminate the pooled unit.[16] The pooling authority in the lease, though narrowly construed, could be written to allow for voluntary dissolution by the operator; however, the realities of the situation are such that it would rarely be in the operator's best interest to do so.

III. EXPRESS LIMITATIONS ON THE POOLING POWER

A. Unit Formation

The pooling clause itself will have limitations in the manner in which the unit may be formed. Most require that the unit designation be signed by the lessee and filed of record before the unit is valid. However, it is important to examine the specific pooling clauses to determine what is required for valid unit formation. For example, in *Souder v. Frye*[17] the pooling clause provided authority to create a pooled unit and required the execution and recording of a unit declaration. Though the unit declaration was executed prior to expiration of the primary term of the lease, the lessee did not record the pooling declaration until after the lease expiration date. In that case, the court held the pooled unit did not become effective until recording and thus the Souder lease had expired.[18] By contrast the pooling clause at issue in *Tiller v. Fields*[19] did not require the recording of a unit in order for it to become effective. Thus, the unit became effective upon execution irrespective of when it was ultimately recorded.[20]

In addition, all owners of an interest in the lease must join in a unit declaration in order to assure validity. This rule originated in *Guaranty National Bank v. May*,[21] and was more recently obliquely addressed by the court

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[15] *See, Montgomery v. Rittersbacher*, 424 S.W.2d 210, 213 (Tex. 1968); *Veal v. Thomason*, 159 S.W.2d 472, 476 (Tex. 1942); *Brown v. Smith*, 174 S.W.2d 43, 46 (Tex. 1943).

[16] *See, Ladd Petroleum Corp. v. Eagle Oil & Gas Co.,* 695 S.W.2d 99, 106-107 (Tex. Civ. App. -- Fort Worth 1985, writ ref'd n.r.e.).

[17] 613 S.W.2d 63 (Tex. Civ. App. -- Ft. Worth 1981, no writ).

[18] *Id*. at 68.

[19] 301 S.W.2d 185 (Tex. App. -- Texarkana 1957, no writ).

[20] *Id.* at 191.

[21] 395 S.W.2d 80 (Tex. Civ. App. -- Waco 1965, writ ref'd n.r.e.).

in *Pampell Interests, Inc. v. Wolle*.[22] *Pampell* involved formation of a pooled unit by execution of unit declaration by a party with no apparent interest in the lease. The Court held that such an attempted pooling is void. This result casts doubt on the validity of a pooled unit formed by an operator's execution of a unit declaration, even under the terms of the joint operating agreement. The more prudent course in such case would clearly be for all joint interest owners to join in execution of the unit designation.

B. Time for Unit Formation

Most commercial forms of lease contain pooling clauses that authorize pooling both before and after drilling operations commence and different considerations would apply in each case. The advantages of pooling before drilling Have been described as follows:

> "(a) a development program can be outlined or scheduled based on lease availability through pooling; (b) the lessee can preserve his leases for future development based on information from wells as they are drilled; (c) if lessee pools in advance based on geological information, the test of reason may not be as severe; e.g., the unit well provides information which might have made the original unit unreasonable if the lessee had this later obtained unit well information at the time of creating the unit; (d) the actual ability to pool may be limited by pooling after drilling. In other words, if the lessee pools in advance it may be reasonably believe its well needs a higher allowable and thereby use the governmental authority pooling provision to pool a greater number of acres; (e) pooling in advance may help a lessee in the area of productive acreage. The lessee who pools before drilling may reasonably believe the entire unit is productive; however, the geological or engineering data developed from drilling a well may tell the lessee that a substantial portion of his unit is probably not productive in the same reservoir where the well is completed. Obviously, if the lessee had this data before the unit was formed, there would be substantial question about the reasonableness of the unit if the lessee knowingly included non-productive acreage in the unit. [23]

Pooling undertaken after the well has been drilled may also offer some advantage:

> (a) The most reasonable unit could be formed; (b) the well data obtained from drilling may enable a lessee to form units for the best development program of an area; (c) the regulatory authority may adopt either larger or smaller spacing or proration unit rules. If the lease allows pooling either before or after drilling, which most do, these are considerations not limitations on the right to pool."[24]

The most significant limitation on pooling after production commences is a practical one. That is, if the pooling does not occur after production begins, royalty payments on production prior to pooling must be paid on a tract basis and after pooling on a unit basis. One might reasonably anticipate a negative reaction from a lessor whose royalty is suddenly reduced. Such a case was *Tiller v.*

[22] 797 S.W.2d 392 (Tex. Civ. App. -- Austin 1990, no writ).

[23] Douglass, *Powers and Problems of Lessee Pooling*, note 2 *supra.*, at 248.

[24] *Id.*

Fields[25], in which the lessor complained of a pooling declaration filed for record after a gas well had been completed. The court eventually concluded the unit was validly formed, but reached that conclusion by noting that the effective date of the unit was in fact prior to the date the well was completed.[26] The court's discussion of two Oklahoma cases[27] suggests the following legal limitations on the lessee's authority to pool after production commences -- the pooling must have been done in good faith and within a reasonable time. However, legal limitations aside, the practical consequence that a claim may be raised by an unhappy lessor whose royalties are reduced by the creation of a pooled unit suggests the prudent course would be to attempt to form pooled units before production commences. In addition, the reasonable time element may dovetail into considerations regarding bad faith.

C. Unit Size

Because pooling is a matter of express contract, the power to pool will necessarily be limited by the instrument delegating the pooling authority. One of the primary issues that has been litigated relates to the size of the unit that may be formed. Many leases provide an expansion to the pooling power that allows units to be made larger in acreage than the normal unit size requirement if governmental authority adopts a larger well density or spacing requirement. This issue was litigated in *Jones v. Killingsworth*[28], involving a lease in the Fairway (James Lime) Field, Panola County, Texas. At the time the well was drilled on the lease in question statewide rules applied to the Fairway Field; however, subsequent to the execution of the lease, the Texas Railroad Commission adopted an 80-acre oil proration unit rule with an option to add up to an additional 80 acres. The lease provided as follows:

> "[S]hould governmental authority having jurisdiction prescribe or permit the creation of units larger than those specified, units thereafter created may conform substantially in size to those prescribed by governmental regulation."[29]

When the operator formed a 160-acre oil unit for a well on his lease, the drillsite lessor attacked the unit as being unauthorized by its pooling clause. The court reviewing the pooling clause language determined the lessors had agreed to units larger than the 40-acre basic unit provided in the lease but only to the extent larger units were prescribed (as opposed to permitted) by the regulatory authority. The pooling clause did not authorize expansion of the pooling authority to any size permitted by regulation, and the large pooled unit was held to be invalid.[30]

At the other end of the spectrum is the issue of the lessee's ability to establish pooled units smaller than the well density scheme established by the Texas Railroad Commission. This issue was specifically

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[25] 201 S.W.2d 185 (Tex. Civ. App. -- Texarkana 1957, no writ).

[26] *Id.*

[27] *Imes v. Globe Oil & Refining Co.,* 84 P2d 1106 (Okla. 1938) (under facts of case pooling after production was not done in reasonable time and not in good faith.); *Gilham v. Jenkins*, 244 P.2d 291 (Okla. 1952) (Pooling after commencement of production done within reasonable time and in good faith was held valid).

[28] 403 S.W.2d 325 (Tex. 1965).

[29] *Id*. at 327.

[30] The rule in the *Killingsworth* case was followed in *Hunt Oil Co. v. Moore*, 656 S.W.2d 634, 637-639 (Tex. Civ. App. -- Tyler 1983, writ ref'd n.r.e.) and in *Yelderman v. McCarthy*, 474 S.W.2d 781, 782-783 (Tex. Civ. App. -- Houston [1st Dist.] 1972, writ ref'd n.r.e.).

addressed in *Banks v. Mecom*,[31] in which a lessor complained of a 20-acre oil unit which had been formed under a pooling clause that allowed formation of oil units up to 40 acres. The Texas Railroad Commission's regulations at the time allowed for units of 40 acres as well. The court rejected the lessor's argument, holding that because the lease authorized formation of units of up to 40 acres, the lessee was allowed to create units up to that size including smaller units. Thus, neither the 40-acre maximum unit size under Railroad Commission rules, nor the maximum size allowed by the lease precluded the formation of units smaller than 40 acres.

D. Unit Configuration

The exact configuration of units is a matter seldom explicitly addressed in pooling clauses; however, unit configuration can become a substantial issue in a bad faith pooling case.[32] Generally a lessee acting in good faith enjoys relative freedom to configure the pooled unit in a way that satisfies its operational requirements. However, this is not always so. As lessors have become more sophisticated, many have begun including riders within a lease form, placing further limitations either on the size of units or the amount of acreage which must be included in a pooled unit formed under the terms of lease. For instance, many such riders provide that at least some specified fraction or percentage of the acreage included in a pooled unit shall be acreage covered by the lease.

While such clauses may seem innocuous enough at the time the lease is taken, a lessee at some point may well find itself faced with an impossible situation. For instance, consider a situation in which a subsequent drilling determines that only a small portion of the lease acreage is productive, but a part was within the productive limits of the reservoir and there is not enough lease acreage to support a well on the tract. Under those facts a lessee may be faced with having to pool non-productive acreage with other productive acreage in order to conform to the requirements in the pooling clause of the lease. Although Texas courts have not directly addressed the issue, the Oklahoma Supreme Court held that a unit which included non-productive acreage was formed in bad faith and subject to dissolution.[33] Similarly, if a lessor is faced with two or more lease clauses covering two or more leases that both contain this requirement and also a limitation on the overall size of units that can be formed, it may become mathematically impossible to comply with the express provisions of each lease. The lessee may not have authority to "harmonize" the conflicting provisions and thereby form a valid unit. It may simply be impossible to pool the two tracts.

E. Pooling Non-Contiguous Lands

Few Texas cases have addressed whether non-contiguous lands could be included in a pooled unit; however, because those Texas courts who have considered the issue have engaged in the fiction that oil and gas is produced uniformly from all of the pooled acreage[34] it would seem inconsistent to allow

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[31] 410 S.W.2d 300, 302 (Tex. Civ. App. -- Eastland 1967, writ ref'd n.r.e.).

[32] An obviously gerrymandered unit may be some evidence of bad faith particularly when coupled with other evidence. *See Elliott v. Davis*, 553 S.W.2d 223 (Tex. Civ. App. -- Amarillo 1977, writ ref'd n.r.e.); *Circle Dot Ranch, Inc. v. Sidwell Oil & Gas, Inc.,* 891 S.W.2d 842 (Tex. App. -- Amarillo 1995, writ denied).

[33] *See Imes v. Globe Oil & Refining Co*., 84 P.2d 1106 (Okla. 1938).

[34] *See Miles v. Amerada Petro. Corp.,* 241 S.W.2d 822, 824 (Tex. Civ. App. -- El Paso writ ref'd n.r.e).

the pooling of obviously non-contiguous lands. In any event, a determination of whether such pooling is authorized must begin with the express language of the lease. Most commercial lease forms with pooling clauses neither expressly allow nor expressly forbid the formation of units including non-contiguous lands. Given the courts' construction of pooling powers strictly within the lease terms, there is little guidance in the caselaw. One case that has considered the issue, at least obliquely, is *Estate of Grimes v. Dorchester Prod. Co.,*[35] in which a pooled unit included a drillsite tract and other lands separated from the drillsite tract by a narrow railroad right-of-way. The pooling clause at issue provided that the lessee could pool the lease premises with "adjacent lands provided any resulting consolidated estate shall not cover and include more than 640 acres consisting of contiguous tracts or tracts that are adjoined."[36] The lessor contended that the railroad right-of-way which bisected two tracts made the acreage of "non-contiguous lands or non-adjacent lands" and thereby rendered the unit void. It would appear that, reasonable or not, the pooling clause of the lease invalidated the pooled unit formed under these facts. The court avoided this narrow issue by carefully analyzing the pooling provision and concluding that the requirement that lands included in the unit be contiguous applied only to changes made in the unit by addition, removal or substitution. Thus, it did not apply to the original unit formation and did not invalidate the unit. However, this decision does not stand for the proposition that the pooling clause will not be strictly construed against the lessee's formation of a unit if the unit is formed in conflict with the express authority provided in the lease. It is the writer's opinion that generally the pooling of non-contiguous acreage would be invalid under most forms of pooling clause.

F. Modification or Termination of Units

A lessee's ability to either modify or terminate units will be limited by the express language of the pooling clause. Most commercially available forms of unit contain language allowing lessee to enlarge, reduce or change the shape of existing units. However, Texas cases that have considered the question demonstrate that, like the pooling-after-production-begins scenario, the implications for a lessee may be more practical than legal.[37] Any party adversely affected by a pooling decision in connection with the modification or termination of unit may institute action regardless of whether the modification or termination is strictly authorized.

Generally, under most forms of pooling declaration, a lessee may not unilaterally dissolve the unit but instead can do so only with agreement of all interest owners.[38] Because pooling effects a cross-conveyance, a pooled unit will continue for so long as production continues or operations are ongoing consistent with the requirements of the habendum clause of the leases included in the unit.[39]

G. Pooling as to Depth Intervals and Sands

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[35] 707 S.W.2d 196 (Tex. Civ. App. -- Amarillo 1986, writ ref'd n.r.e.).

[36] *Id.* at 201.

[37] *See Grimes v. La Gloria Corp.,* 251 S.W.2d 755, 759-61 (Tex. Civ. App. -- San Antonio 1952, no writ); *Expando Production Co. v. Marshall,* 407 S.W.2d 254, 259 (Tex. Civ. App. -- Ft. Worth 1966, writ ref'd n.r.e); *cf. Sunac Petroleum Corp. v. Parkes,* 416 S.W.2d 798, 801-02 (Tex. 1967) (regarding unit termination).

[38] *See Ladd Petroleum Corp. v. Eagle Oil & Gas Co.,* 695 S.W.2d 99, 107 (Tex. Civ. App. -- Fort Worth 1985, writ ref'd n.r.e.)

[39] *Duffy v. Calloway,* 309 S.W.2d 853, 853-56 (Tex. Civ. App. -- Eastland 1968, writ ref'd n.r.e.).

In the absence of specific authority and under most commercial lease clauses, a lessee can probably configure units in any way that is reasonable. Thus assuming there is no conflict with the coverage of the individual leases, a pooled unit could be formed as to any depth or depths. And most commercial pooling clauses, like the sample clause set out earlier, provide that the pooling is authorized as to any stratum or strata, that the exercise in one or more instances shall not exhaust the power of the lessee to pool, and that units formed in one stratum need not conform in size or shape to units formed as to other strata. However, the lessee is limited under most lease clauses to pooling on a surface acreage basis and any attempt to allocate production on any other basis would likely be void.[40]

IV. IMPLIED LIMITATIONS ON THE POOLING POWER

As noted, the pooling clause empowers the lessee to unilaterally effect a spreading and cross-conveyance of the lessors' interest based upon his judgment that pooling is appropriate. Due to the nature of the pooling power, it has been compared to an agency power.[41] However, the agency analysis is not a good fit. While it is true that the lessee has been delegated the power to effect a cross-conveyance of minerals, thereby creating at least a limited agency, it would not be appropriate to apply all rules of agency to the pooling power. For instance, it does not appear that the lessee should be subject to a fiduciary duty.[42] The nature of the duty attending the pooling power is instead the duty to carry out a specific and limited contractual obligation.

Because the obligation is an express one, the reasonably prudent operator standard applicable to implied covenants does not apply. Instead the lessee is required to strictly exercise the authority granted in accordance with the lease language, subject however to some reasonable latitude. The lessee must be given a construction of the pooling clause which allows it to deal with unforeseen business conditions as stated by the court in *Tiller v. Fields*:

> "Anticipatory provisions in leases for the commitment by the lessee of leases to unitization, of necessity must be in general terms. Neither the lessor nor the lessee has any way of knowing at the time the lease is taken the fact with respect to which it will be necessary for the lessee to apply his power. It is not practicable for the lessee to await the ascertainment of such facts."[43]

Nonetheless, because the lessee has unilateral power to pool and there are situations where the interests of lessor and lessee can diverge (often radically)[44] Texas courts impose an overlying duty of good faith. That is, the lessee is required to make pooling decisions with reference to the interests of both lessor

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[40] *See Leach v. Brown*, 353 S.W.2d 920, 923 (Tex. Civ. App. -- San Antonio 1962, writ ref'd n.r.e.).

[41] *See Tiller v. Fields*, 301 S.W.2d 185, 189 (Tex. Civ. App. -- Texarkana 1957, no writ) (*quoting Phillips Petroleum Co. v. Peterson,* 218 F.2d 926 (10th Cir. 1954).

[42] Cases cited for the proposition that the pooling power is fiduciary in nature include *Expando Prod. Co. v. Marshall,* 407 S.W.2d 254, 260 (Tex. Civ. App. -- Fort Worth 1966, writ ref'd n.r.e.) which was based, in part upon the Oklahoma Supreme Court's opinion in *Imes v. Globe Oil Refining and Co.,* 184 Okla. 79, 84 P.2d 1106 (1938). Though the *Expando* decision has never been expressly overruled, its elevation of the operator's duty to a fiduciary level is inconsistent with the realities of pooling and has not been followed.

[43] *Tiller v. Fields,* 301 S.W.2d at 187-88.

[44] *See,* 4 H. Williams, *Oil & Gas Law* §670 at 83-4 (1994).

and lessee and is not allowed to consider only its own interests.

Though this duty has been said in at least two opinions to be a fiduciary duty[45] such that a breach would sound in tort, that contention seems to be at odds with established caselaw in Texas. Instead, the level of duty seems more akin to the contractual good faith duty under UCC §1.203.[46] The nature of the good faith duty was probably best expressed by the Amarillo Court of Appeals in *Elliott v. Davis* in which the Court described the duty as follows:

> "Although it has been said that the lessee has a fiduciary obligation in the exercise of the pooling power, it is submitted that the lessee is not a fiduciary and that the standards that apply to fiduciaries are entirely too strict. This is because the lessee has not undertaken to manage and develop the property for the sole benefit of the lessor. The lessee has substantial interest that must be taken into account and he should not be required to subordinate his own interest entirely to the interest of the lessor. Since his interest frequently conflicts with those of the lessor, however, he must exercise the power in fairness and good faith taking into account the interest above the lessor and lessee."[47]

In *Circle Dot Ranch, Inc. v. Sidwell Oil & Gas, Inc.,*[48] the Amarillo Court of Appeals elaborated on the standard announced in *Elliott v. Davis*, recognizing that the standard of care mandated by the Texas Supreme Court in *Amoco Prod. Co. v. Alexander*[49] was similar in nature if not in substance to the duty of good faith in pooling. The *Sidwell* court recognized "the material fact in this case is whether [the lessee] exercised the pooling option as a reasonably prudent operator would do under the same or similar circumstances by, among other things, using good faith, taking into account its and [the lessor's] interests."[50] The

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[45] *Expando v. Marshal*, at 260 (Stating that there is "no doubt but that there is a fiduciary obligation on the part of the lessee to exercise the utmost good faith towards the lessor in exercising the pooling power"); *Texaco v. Letterman*, *Id*. 343 S.W.2d 726, at 732 (Tex. Civ. App. -- Amarillo 1961, writ ref'd n.r.e) (lessor/lessee relationship is analogous to a principal/agent relationship with lessee having broad powers which must be exercised with a high degree of good faith and loyalty for the furtherance and advancement of the interest of the principal).

[46] Though clearly the "good faith" requirement in UCC §1.203 (Tex. Bus. & Comm. Code Ann. § 1.203 (Vernon 1991)) applies only to sales and is inapplicable to oil and gas lease transactions, it is likewise often confused as creating a separate fiduciary obligation of good faith and fair dealing. However, commentary to the rule makes clear that the doctrine of good faith "merely directs a court towards interpreting contracts within the commercial context in which they are created, performed, and enforced, and does not create a separate duty of fairness and reasonableness which can be independently breached." The standard under the UCC is one of "honesty in fact" in the performance or enforcement of the contract which seems to be much like the duty imposed on a lessee in the exercise of the pooling power.

[47] S*ee Elliott v. Davis*, 553 S.W.2d 223, 226-27 (Tex. Civ. App. -- Amarillo 1977, writ ref'd n.r.e) *quoting* E. Kuntz, *The Law of Oil & Gas,* §48.3 at 218 (1979).

[48] 891 S.W.2d 342 (Tex. App. -- Amarillo 1995, writ denied).

[49] 622 S.W.2d 563, 568 (Tex. 1981). "Every claim of improper operation by a lessor against a lessee should be tested against the general duty of the lessee to conduct operations as a reasonably prudent operator in order to carry out the purposes of the oil and gas lease."

[50] *Circle Dot Ranch,* at 891 S.W.2d 347. For an extensive discussion of the *Circle Dot* case and its implications *see* A. Cummings, *Pooling Issues*

Circle Dot seems fully consistent with the mainstream of Texas law regarding the good faith duty in the exercise of the pooling right.[51] It also conforms to the oft-quoted position expressed by Professor Kuntz in *The Law of Oil and Gas*, §48-3, at 218, that "the lessee has substantial interests which must be taken into account and it should not be required to subordinate its interest entirely to the interest of lessor. Since his interests frequently conflict with those of lessor, however, he must exercise the powers in fairness and good faith, taking into account the interests of both the lessor and lessee."

The good faith obligation of the pooling right implies several practical limitations on the lessee's power: units must be fairly regular in shape, consist of reasonably productive acreage, and not be formed solely for the purposes of lease preservation. Because these requirements are seldom expressly stated in the pooling clause, there is no formulaic guidance for whether the good faith requirements of the duty are being fulfilled.

> The issue of bad-faith pooling must be treated as one of fact and can rarely, if ever, be decided on a directed judgment basis… . Obvious gerrymandering of unit boundaries and express statements that they have been drawn to maintain leases will support a decision of bad faith pooling. Other relevant factors include pooling an undrilled tract just before the end of the primary term, testimony that the lessee did not consider geological factors in forming the unit, the absence of plans for additional development, pooling portions of leases with smaller royalties with a well-site lease that has ample acreage to support the well, the exclusion of productive acreage located near the well, and the inclusion of non-productive acreage or acreage which is probably not within the well's drainage pattern. Rejection of the unit by the Railroad Commission is also relevant but is not a determinative factor.[52]

Ordinarily, a determination of bad faith requires there be not only an impact to the lessor but a corresponding benefit to the lessee. While the *Circle Dot* analysis was based upon a no-evidence approach, it did not reject the fact-intensive analysis of good faith, which is employed in most bad-faith pooling cases. "The issue of bad faith pooling must be treated as one of fact and rarely, if ever, be decided on a summary judgment basis."[53]

Despite the fact that the existence of "good faith" is inherently a fact intensive inquiry, it could be decided as a matter of law if reasonable minds could not differ.[54] The party contesting a unit designation has a burden to affirmatively show the pooling was

-- *Avoiding the Pitfalls*, ADV. OIL & GAS LAW COURSE (1995).

[51] *See Amoco Production Co. v. Underwood,* 558 S.W.2d 509, 511-12 (Tex. Civ. App. -- Eastland 1977, writ ref'd n.r.e.); *Elliott v. Davis*, 553 S.W.2d 223, 226-27 (Tex. Civ. App. -- Amarillo 1977, writ ref'd n.r.e.); *Banks v. Mecom*, 410 S.W.2d 300, 303 (Tex. Civ. App. -- Eastland 1966, writ ref'd n.r.e.); *Vela v. Pennzoil Prod. Co.,* 723 S.W.2d 199, 205 (Tex. App. -- San Antonio 1986, writ ref'd n.r.e.); *Texaco, Inc. v. Letterman*, 343 S.W.2d 726, 732 (Tex. Civ. App. -- Amarillo 1961, writ ref'd n.r.e.); *Tiller v. Fields*, 301 S.W.2d 185, 190 (Tex. Civ. App. -- Texarkana 1957, no writ); *McCarter v. Ransom*, 473 S.W.2d 235, 239 (Tex. Civ. App. -- Corpus Christi 1971, no writ).

[52] 1 E. Smith & J. Weaver, *Texas Law of Oil & Gas*, at 229-30 (1994) (citations omitted).

[53] *Id.* (citations omitted).

[54] *See Circle Dot*, at 891 S.W.2d 348 (Dodson, J., concurring).

done in bad faith.[55] This requires presentation of more than a scintilla of evidence in support of a claim of bad faith in order to get the question to a jury.

The *Circle Dot* case melded the concept of good faith and fair dealing under *Elliott* with the reasonably prudent operator standard enunciated in *Amoco v. Alexander*, and for most purposes the two are compatible. However, if the *Amoco v. Alexander* standard applies to pooling decisions, it creates a quandary for a lessee, particularly in those instances where the lessee is the sole operator developing a field consisting of numerous leases. As the court noted in *Amoco v. Alexander*, the reasonably prudent operator standard is not made any less stringent simply because Amoco had other lessors in the field, and thus Amoco's status as common lessee did not affect its liability to the plaintiff. Hence, if an operator owes covenants in favor of each lease in the field and is obligated to protect and manage each lease as if that were its only lease in the field, it may necessarily be torn between conflicting obligations to parties as well as the further conflict of accommodating its own interests. It is not clear how this conflict can be resolved.

V. LITIGATION OF THE POOLING CASE

A. Parties

Some early cases that dealt with pooling scenarios held that any person owning any interest in the subject matter of the suit, whose interest will necessarily by affected by a judgment, is an indispensable party whose joinder is mandatory and whose non-joinder could affect the finality of any judgment.[56] Because pooling effects a cross-conveyance among royalty owners,[57] royalty and non-participating royalty owners were, under that view, absolutely indispensable parties under most fact patterns. However, this rule does not necessarily obtain under current Texas law. Tex. R. Civ. P. 39 governs the joinder of parties and provides the guidelines for determining whether a party is "needed for just adjudication" of a dispute. Rule 39 was extensively rewritten in 1971 so that it now closely parallels Fed. R. Civ. P. 19, and the current touchstone for joinder is whether the trial court should in the interests of justice proceed with those parties who are present.[58] Under this looser standard, the trial court has greater discretion to try a pooling case which does not include every owner of an interest in the pooled unit. For instance, in *Pampell Interests, Inc. v. Wolle*,[59] a lessor contested the eleventh-hour pooling of its acreage and the lessee defended on the ground, *inter alia*, that another working interest owner in the pooled unit had not been made a party to the suit. The trial court declared the lease terminated and the court of appeals affirmed, holding that the non-joined working interest owner was not indispensable so as to make his non-joinder fatal to the judgment.[60] Certainly, there may be cases where a trial court decides, in the exercise of its discretion, that it should not proceed to trial in the absence of all owners of interests in a pooled unit. Absent unusual facts, such an exercise of discretion will seldom provide any basis for relief on appeal.[61]

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[55] *See Smith v. Killough*, 461 S.W.2d 510 (Tex. Civ. App. -- Eastland 1970, write ref'd n.r.e).

[56] *See Belt v. Texas Co.,*175 S.W.2d 622,624 (Tex. Civ. App.-- Amarillo 1943, writ ref'd n.r.e.)

[57] *See Veal v. Thomason,* 138 Tex. 341, 159 S.W.2d 472 (1942).

[58] *See Cooper v. Texas Gulf Industries, Inc.,* 513 S.W.2d 200, 204 (Tex. 1974).

[59] 797 S.W.2d 392 (Tex. App. -- Austin 1990, no writ).

[60] *Id.* at 394-95.

[61] In such a case the trial court's decision would be appealable only if some dispositive order were made such as a dismissal for failure to join indispensable parties or, in some cases,

Even if Rule 39 were to require joinder of all interest owners, Rule 42 may provide some relief. Class actions are expressly excluded from the ambit of Rule 39 and may be employed by royalty owners where their number is so great as to make joinder of all such parties impractical.[62] In *Leach v. Brown*[63] a royalty owner, pooled with 177 others, sought a royalty accounting, but her lawsuit was abated due to the absence of indispensable parties (the other royalty owners). When she recast her lawsuit as a class action so that absent owners could be represented by those who were parties, the court of appeals allowed her to proceed. Logically and legally, Rule 42 provides an excellent vehicle for proceeding in pooling cases where the numerosity requirement can be satisfied, provided the other requirements are also satisfied. For instance, *Leach v. Brown* might have produced a considerably different result if the plaintiff had been seeking to act as class representative in a suit to have a pooled unit declared void for bad faith pooling. In such a case the drillsite royalty owners have considerably different interests in the litigation than the non-drillsite owners because the effect of dissolution of the pooled unit will be to increase the drillsite owners' participation in production at the expense of the non-drillsite owners. Thus, the nature of the claim may dictate whether the class action is available to a royalty owner.

B. Jurisdiction

Because most pooling cases will involve title to land, jurisdiction requirements for Texas state courts will mandate that the case be filed in District Court.[64] However, there are still jurisdictional choices to make.

Prior to bringing suit, the plaintiff in a pooling case must decide whether to proceed in state or federal court: the defendant has a similar decision when served with process, and must ask itself whether it wishes to challenge the plaintiff's choice. Conventional wisdom holds that federal courts present a higher initial threshold for plaintiffs because of the interplay between Fed. R. Civ. P. 12(b)(6) (allowing motions to dismiss for failure to state a claim on which relief can be granted) and Fed. R. Civ. P. 56 (summary judgment). One might therefore expect that all the oil and gas cases decided in federal court had been removed there by a defendant. However, the reported caselaw includes cases which appear to have been brought by Texas plaintiffs, suing foreign defendants in a Texas federal district court.[65]

The question, whether a party seeks to initiate a suit in federal court or to remove one there, is one of federal judicial power. Whereas a state court of general jurisdiction is presumed to have the power to hear a case involving its citizens and/or the lands within its borders, there is a general presumption against federal jurisdiction, and the party seeking to invoke a federal court's power to hear a case must make an affirmative showing

abatement. The standard for appellate relief will be proof that the trial court abused its discretion, a relatively difficult standard to achieve.

[62] Tex. R. Civ. P. 42 requires the following to be proven: (1) the class is so numerous that joinder of all members is impracticable [note: not impossible], (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

[63] 298 S.W. 2d 185 (Tex. Civ. App. -- San Antonio 1957, writ ref'd n.r.e.).

[64] Tex. Gov't. Code Ann. § 24.007.

[65] *See e.g., Young. v. Amoco*, 610 F.Supp. 1479 (E.D. Texas 1985), *aff'd*, 786 F.2d 1161 (5th Cir. 1986)(dealing with effect of ratification of pooled unit on underlying leases).

of federal jurisdiction.[66] Federal courts have several bases for invoking their jurisdiction over the subject matter of a suit which are not likely to appear in the context of an oil and gas dispute.[67] However, the diversity-of-citizenship jurisdiction conferred by 28 U.S.C. § 1332(a)(1) has resulted in a few cases with pooling questions being decided by a federal court.[68] This statute requires (1) that the matter in controversy exceed the sum of $50,000, exclusive of interest and costs, and (2) that complete diversity of citizenship exists, such that no plaintiff is a citizen of the same state as any defendant.[69] A corporation whose state of incorporation differs from the state in which it has its principal place of business is deemed to be a citizen of both states, for purposes of invoking diversity jurisdiction.[70]-

Where the plaintiff elects to bring suit in state district court, the defendant may remove the matter to federal court under 28 U.S.C. § 1441, so long as the matter could originally have been brought there. And, while the federal statutes do not provide for a case originally brought in federal court to be transferred to a state court, such a result is possible in a suit brought as a federal declaratory-judgment action, under federal caselaw which addresses judicial efficiency and federal "forum shopping." In *Wilton v. Seven Falls Co.*,[71] the U.S. Supreme Court recently re-affirmed a line of cases holding that the goal of federal judicial efficiency encourages federal courts to dismiss or abate a federal declaratory-judgment action involving issues of state law, where those issues are being simultaneously addressed in a parallel state court action. The writer was unable to locate instances in which this doctrine was applied to an oil and gas case, but logically there is no reason not to do so, inasmuch as an oil and gas case will necessarily be governed by Texas law regardless of the forum. And because there is no express requirement that the state action be filed first, it would appear that the defendant who is unwilling to remain in a federal declaratory-judgment action, if he files suit quickly in state court and moves to abate the federal action, could take advantage of crowded federal dockets by employing this doctrine.

C. Venue

Selecting the proper venue in a pooling case is of paramount importance. Though parties always feel most confident proceeding in what they perceive to be the friendliest venue, if the wrong venue is selected and venue is mandatory elsewhere, the result is that the improper venue is fatal to the judgment. Since the majority of pooling cases will

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[66] *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 56 S.Ct. 780, 80 L.Ed. 1135 (1936); *see also*, Fed. R. Civ. P. 8(a)(1), which requires that the grounds for federal jurisdiction be pleaded in a plaintiff's complaint.

[67] For instance, federal jurisdiction comes into play, *inter alia*, in suits involving questions arising under the U.S. Constitution and statutes, suits between states and suits in which the United States is a party, as well as bankruptcy suits and certain antitrust suits.

[68] *See e.g., Young v. Amoco, supra; Phillips Petroleum Co. v. McIlroy*, 178 F.Supp. 107 (N.D. Tex. 1959)(declaratory-judgment action involving question whether instruments created community lease); *Mathis v. Texas Int'l. Petroleum Corp.*, 627 F.Supp. 759 (W.D. Tex. 1986) (lessors' breach of contract suit, brought in state court and removed to federal court, dealing with whether pooling triggered a Pugh clause); *Fletcher v. Ricks*, 905 F.2d 890 (5th Cir. 1990)(involving a lessee's right to participate in a gas unit which included a tract in which he owned a partial leasehold interest).

[69] 28 U.S.C. § 1332(a)(1); *Strawbridge v. Curtiss*, 7 U.S. 267, 2 L.Ed. 435 (1806).

[70] 28 U.S.C. § 1332(c).

[71] __ U.S. __, 115 S.Ct. 2137, 132 L.Ed.2d 214 (1995).

involve the issue of whether the unit is valid or whether it affects a royalty owner's interest, venue in most pooling cases is probably mandatory in the county in which the pooled unit is located.[72] Section 15.011 of the Texas Civil Practice and Remedies Code ("Lands") provides as follows: "Actions for recovery of real property or an estate or interest in real property, for partition of real property, to remove encumbrances from the title to real property, for recovery of damages to real property or to quiet title to real property shall be brought in a county in which all or part of the property is located." This section is a mandatory venue provision and the prosecution of a suit in another venue in such case if defendant has objected to venue, is reversible error.[73] As a consequence, any pooling lawsuit that includes causes of action based upon trespass to try title, suit to remove cloud from title, or slander of title must almost certainly be brought and tried in the county in which all or a part of the property is located. However, not all cases involving pooling must be brought in the county where the unit is located. It is not enough that the suit involves land, it must be a suit for recovery of land or damages thereto, or to quiet the title to land.[74] Thus an action for an accounting of unit production would not necessarily be required to be maintained in the county where the unit is located unless the suit also involves causes of action involving title to the unit. However, if the case involves multiple claims, some of which have mandatory venue and others of which may have permissive venues, the case must be brought in the county of mandatory venue.[75]

There are some cases that involve a more subtle analysis of whether a mandatory venue provision applies and where venue must or may be maintained. For example, if the plaintiff's action is purely for damages for breach of contract based upon breach of the express covenant in the pooling clause or upon breach of the implied covenant of good faith, or a suit requesting declaratory judgment, the action may fall out of the realm of Tex. Civ. Prac. & Rem. Code Ann. § 15.011, and into coverage of the "general rule" or some permissive venue statute. The determination of whether venue is mandatory under § 15.011 requires analysis of two venue facts -- the location of the land and the nature of plaintiff's claim.[76] The nature of plaintiff's claim is in turn determined by an analysis of the principal right asserted in the suit and the relief sought for the breach thereof.[77] If the nature of the claim is to somehow affect the validity or configuration of the pooled unit and/or the principal relief sought is to the same effect, venue will almost of necessity be in the county where all or part of the unit lands are located.

An example of a case in which mandatory venue was not applied is *McCarter v. Ransom*.[78] There, a lessor sued his lessee for breach of the implied covenant of good faith in the exercise of a pooling clause. The lessee sought a plea of privilege (the equivalent of a motion to transfer under the current venue practice) to be sued in the county of their residence, and the lessors sought to maintain

[72] Tex. Civ Prac. & Rem. Code Ann. § 15.011 (Vernon Supp. 1996).
[73] *Wichita County, Texas v. Hart*, 917 S.W.2d 779, 781 (Tex. 1996).
[74] *Ashby v. Delhi Gas Pipe Line Corp.,* 500 S.W.2d 686 (Tex. Civ. App.—San Antonio 1973, writ dism'd).
[75] Tex. Civ. Prac. & Rem. Code Ann. § 15.004 (Vernon 1995).
[76] *Roach v. Chevron U.S.A. Inc.*, 574 S.W.2d 200, 202 (Tex. Civ. App.—San Antonio 1978).
[77] *Id.*
[78] 473 S.W.2d 235, 237-39 (Tex. Civ. App.—Corpus Christi 1971).

venue in Matagorda County under the two venue provisions relating to contract actions, fraud and recovery of an interest real property. The trial court overruled the lessees' plea of privilege on the basis of Subdivisions 5 and 7 of the venue statute and, notably not on the basis of §14 relating to mandatory venue for actions involving title to real property. In overruling the lessees' plea, the Court found that the suit was one for breach of contract and that the only fact necessary in order to maintain venue in the county where the suit was brought was to show that the defendant had contracted in writing to perform the obligation in the county or some definite place therein named in the writing. Although venue was still found proper in county where the land in question was located, the Court did not base venue on the mandatory provisions for recovery of land. Another case, not involving pooling, that provides some bases for maintenance of suits involving breach of lease covenants in counties other than the county where the leased lands are located is *Trafalgar House Oil & Gas Inc. v. De Hinojosa*[79] which involved breach of an assignment clause in oil and gas lease. Though the claim did tangentially involve a claim to title or the right to acquire title to real property, it did not involve an action to recover an interest in real property and, the court held that venue was not mandatory in county where land was located.

Mandatory venue under Tex. Civ. Prac. & Rem. Code Ann. § 15.011 was found to apply to a claim for breach of an obligation arising under the terms of an oil and gas lease in *Getty Oil Co. v. Corbin*.[80] In *Getty Oil Co. v. Corbin*, plaintiffs contended that lessee's failure to additionally explore and develop the leased premises violated implied covenants contained in the lease and failed to comply with the "reasonably prudent operator" standard. Plaintiffs filed suit in the county where the land was located under the mandatory venue provision for land. Defendant filed a plea in privilege to be sued in county of their residence or principal office, which the trial court denied. On appeal, the court affirmed, holding that the plaintiff requested damages and a termination of a portion of the lease, and, therefore, the suit fell within the ambit of the mandatory venue statute. The Court's opinion includes a vigorous dissent which argues that the plaintiff had only asked for damages for breach of the covenant, specific performance of the covenant, and a declaration that the leased premises had not been reasonably explored, and not for termination of the lease.[81] The dissenting justice contended that because the termination of the lease was not at issue for a breach of a covenant, venue should not have fallen under the mandatory statute.[82]

If it is determined that mandatory venue does not apply, plaintiff can choose to bring suit in any venue that is proper.[83] The general venue rule is that a suit may be brought in a) the county in which all or a substantial part of the events or omissions giving rise to the claim occurred; b) the county of defendant's residence at the time cause of action accrued, if the defendant is a natural person; c) the county of the defendant's principal office in the state, if the defendant is not a natural person; or d) if Subdivisions (a), (b) and (c) do not apply, the county in which the plaintiff

[79] 773 S.W.2d 797 (Tex. Civ. App.—San Antonio 1989).

[80] 563 S.W.2d 342, 344 (Tex. Civ. App.—San Antonio 1983).

[81] *Id.* at 345.

[82] *Id.* at 346-47.

[83] *See Wilson v. Texas Parks & Wildlife Department*, 886 S.W.2d 259 (Tex. 1994); *Geochem Tech. Corp. v. Versekces*, 929 S.W.2d 85, 88 (Tex. Civ. App. -- Eastland 1996, no writ).

resided at the time of occurrence of action.[84] Venue may also be properly placed for purposes of a lawsuit regarding breach of an obligation arising under an oil and gas lease in the county where performance is called for under the lease. Tex. Civ. Prac. & Rem. Code Ann. § 15.035, entitled "Contract in Writing" provides as follows: "If a person has contracted in writing to perform an obligation in a particular county, expressly naming the county or a definite place in the county by that writing, suit on or by reason of the obligation may be brought against him either in that county or in the county in which the defendant has his domicile." Obviously, many of the obligations arising under an oil and gas lease, of necessity will be performable only in the county where the leased premises are located. Proper venue in the county where the leased premises are located for a lawsuit based upon breach of implied covenants under an oil and gas lease has been maintained against a lessee's challenge based under this statute.[85] There is also a line of Texas cases holding that the county where a contract was made is the county where a cause of action under the contract arises.[86] Proof of the location of execution of the contract may thus, provide additional proper venues under the general rule, § 15.002 (a)(1).

The recent changes in the venue statute may make it considerably easier for a defendant sued in a distant, though arguably proper, venue to secure a transfer to a more convenient venue. The 1995 amendments to Tex. Civ. Prac. & Rem. Code Ann. § 15.002(b) allow the court to order a transfer of venue for the convenience of parties and witnesses and in the interest of justice. This provision would not have any impact in those cases where venue is mandatory and applies only when the choice is between two or more proper venues. If a plaintiff can establish that his lawsuit is an action for breach of contract and/or does not involve the right to recover land or to quiet title in land, and particularly if the claim involves more than one lessee[87], the plaintiff may have the option to select between several counties under the general venue rule or under the permissive rule for contracts in writing. A plaintiff can also "hedge his bet" by bringing his suit in the county where the land is located under the permissible venue statute (regarding contracts in writing), even if the mandatory venue provision does not clearly apply.

D. Causes of Action

1. Breach of Contract

As previously discussed, most pooling is a matter of contract and implicates both express contractual rights and implied duties. As a consequence the most obvious cause of action based upon complaints regarding would be for breach of contract. Such a suit could be based upon a claim that the lessee violated an express lease covenant by exceeding the authority granted in the pooling clause or by improperly exercising those rights. Suit could also be brought based upon a claim of breach of the implied obligation to pool in good faith.

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[84] Tex. Civ. Prac. & Rem. Code Ann. § 15.002 (Vernon Supp. 1996).

[85] *See McCarter v. Ransom,* 473 S.W.2d 235, 237-39 (Tex. Civ. App.—Corpus Christi 1971); *Trafalgar House Oil & Gas Inc. v. De Hinojosa,* 773 S.W.2d 797, 798 (Tex. Civ. App.—San Antonio 1989).

[86] *See Procter v. Foxmeyer Drug Co.*, 884 S.W.853, 863-864 (Tex. App. -- Dallas 1994); *E.D.S. Energy Dev. Dervs. Inc. v. Bandera Trucking Co.*, 602 S.W.2d 215, 216 (Tex. Civ. App. -- Eastland 1990, no writ).

[87] Tex. Civ. Prac. & Rem. Code Ann. § 15.005 (Vernon Supp. 1995) provides "In a suit in which the plaintiff has established proper venue against a defendant, the court also has venue of all the defendants in all claims or actions arising out or the same transaction, occurrence, or series of transactions or occurrences."

Here the claim is essentially that a lessee's actions fail to meet the required standard of care in exercising its pooling authority.[88]

2. Trespass to Try Title

A trespass to try title action is concerned with the establishment of title and possession. It is a relatively arcane, but still useful action under Tex. R. of Civ. P. 783 through 809 and Chapter 38 of the Texas Property Code. The statutory trespass to try title action replaces certain earlier common law actions to recover real property. An action in trespass to try title is a trial of the right of possession. Because a royalty interest is non-possessory (the lessee has the right to possess the mineral estate), a royalty owner cannot maintain a right of action for trespass to try title, based upon that royalty interest alone.[89] However, if a lessor is also seeking to declare that an oil and gas lease has terminated due to cancellation of a unit, then a trespass to try title action would be proper.

This type of action requires the plaintiff to make specific allegations, and may be brought by one lawfully in possession of property against one who has unlawfully dispossessed the owner.[90] The defendant in a trespass to try title claim is the person alleged to be unlawfully in possession of the property, or unlawfully claiming title to the property.[91] The defendant in a trespass to try title action may answer "not guilty" and if he does so, he may present proof of any defensive matter except limitations which must be specially pleaded.[92] Logically, a trespass to try title claim would be brought by the drillsite owner in a pooling context and the defendants could include both the lessee and the other parties included in the unit.

The plaintiff must prove the strength of his own title, not the weakness of another's title, to prevail.[93] This may be done by proving:

a) a regular chain of conveyances from sovereign;

b) Plaintiff has a superior title out of a common source;

c) Plaintiff has title by limitations; or

d) Plaintiff had prior possession and that possession has not been abandoned.[94]

In the context of the pooling case, the proof would include, beyond proof of the common thread of title, that the cross-conveyancing attempted by the lessee was ineffective to divest full title in the mineral estate.

3. Suit to Remove Cloud on Title

A suit to remove a cloud on title is an equitable action to remove encumbrances on real property.[95] The principal issue in a suit to quiet title concerns the existence of a cloud on title, which equity will remove if found to exist. Any deed, contract, judgment or other instrument (not void on its face) which purports to convey any interest in or make any charge upon the land of a true owner, the invalidity of which would require proof, is a cloud upon the true owner's legal title. The general basis for an actionable claim in the

[88] As has been discussed the standard of care is much like the reasonably prudent operator standard applicable to implied covenants. *See*, notes 46 - 53, *supra*, and accompanying text.

[89] *Grasty v. Wood*, 230 S.W.2d 568, 571, (Tex. Civ. App. -- Galveston 1950, no writ).

[90] *See* Tex. R. Civ. P. 783 for the specific requirements of a petition for trespass to try title.

[91] *See* Tex. R. Civ. P. 784.

[92] *See* Tex. R. Civ. P. 788 and 789.

[93] *Rogers v. Ricane Enterprises, Inc.*, 884 S.W.2d 763, 769 (Tex. 1994).

[94] *Id.*

[95] *Ellis v. Waldrop,* 656 S.W.2d 902, 905 (Tex.1983); *Pampell Interests, Inc. v. Wolle*, 797 S.W.2d 392, 395 (Tex. App. -- Austin 1990 no writ).

context of pooling is that the purported pooling constitutes a cloud on the quality of the drillsite owner's title.[96] Cloud on title exists when an outstanding claim or encumbrance is shown which, on its face, if valid, would affect or impair the title of the owner of the property. The elements of proof necessary to sustain an action to remove cloud from title include:

a) description of property involved sufficient to identify it;

b) proof of plaintiff's right to title or, ownership of, property; and

c) statement of grounds rendering defendant's claim invalid.[97]

A suit to quiet title requires the allegation of an adverse claim. The gravity of that claim must be sufficient to place the property owner into a position such that it casts a cloud upon the owners enjoyment of his property.[98] A suit to remove cloud on title is a suit in equity; therefore, money damages are not available.[99] Similarly, attorney's fees are not recoverable by the prevailing party in a suit to remove cloud on title, unless the suit is brought under the Uniform Declaratory Judgment Act[100] in which case an award may be granted to either party in the discretion of the trial court if an award would be equitable and just.

The difference between a trespass to try title action and an action to remove cloud from title has been explained as follows:

> "A suit to remove cloud from title or suit to quiet title is different from an action in trespass to try title. A suit in trespass to try title is statutory and accords a legal remedy, while a suit to remove cloud or to quiet title accords an equitable remedy. Trespass to try title is an action to recover the possession of land unlawfully withheld from an owner who has a right of immediate possession. In this action no other principle is more pervasive than that which requires the plaintiff to recover on the strength of his own title; proof that the defendant has no title is insufficient for recovery. Plaintiff may meet this burden in one of four ways: 1) he can show title emanating from the sovereignty of the soil to himself; or 2) he can show title in himself emanating from a common source to which the defendant claims; or 3) he may show title through limitations; or 4) he can show prior possession antedating defendant's possession. (*Citations omitted*)
>
> A suit to quiet title requires the allegation of an adverse claim. The gravity of that claim must be sufficient to place the property owner into a position that if such claim is asserted, it may cast a cloud upon his enjoyment of the property. (*Citations omitted*) Although claimant must base his action

[96] Where one seeks to recover an interest in land by attacking the instrument under which he lost title, his lawsuit is one for the recovery of land, and if that instrument is filed of record and for that reason would cloud his title, the suit should be to remove a cloud upon title. *Best Inv. Co. v. Parkhill*, 429 S.W.2d 531, (Tex. Civ. App. -- Corpus Christi 1968 writ dism'd.); *DRG Financial Corp. v. Wade*, 577 S.W.2d 349, 352, (Tex. Civ. App. – Houston [14th Dist.] 1979, no writ).

[97] Dorsaneo, TEXAS LITIGATION GUIDE, Vol. 17, §257.02.

[98] *Katz v. Rodriguez*, 563 S.W.2d 627, 626-30 (Tex. Civ. App.—Corpus Christi 1977, writ ref'd n.r.e.) (*citing Mauro v. Lavlies*, 386 S.W.2d 825 (Tex. Civ. App.—Beaumont 1964, no writ))

[99] *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex. 1983).

[100] Tex. Civ. Prac. & Rem. Code Ann. §§ 37.001 et seq. (Vernon 1996).

> on the strength of his own title, (Citations omitted) he is not required to trace his title to either the sovereign or to a common source, as argued by defendant. (Citations omitted) It is clear that the claimant must show an interest of some kind, but it is error that the claimant must show fee simple or uncontestable interest."

4. Slander of Title

Slander of title is an action sounding in tort and could be applicable in an unauthorized or bad faith pooling case. The elements of a cause of action for slander of title are:

a) uttering and publishing slanderous words;

b) falsity of the words;

c) malice;

d) special damages;

e) ownership of and estate or interest in the property slandered; and,

f) loss of a specific sale.[101]

Since pooling typically involves a declaration placed in the public domain regarding the quality of the lessor's title, if that utterance is proven to be "false" due to invalidity of the pooling action, and the other elements are proven, a slander of title could elevate a simple contract action to a tort. Proof of special damages and proof of loss of a specific sale are interrelated. The Texas Supreme Court has held that a plaintiff must plead and prove loss of a specific sale to recover in a slander of title action.[102] The specific sale, however, need not be an enforceable contract in order for the sale to constitute sufficient evidence to support a judgment.[103] There need only be some evidence that, but for the slanderous utterance, a sale would have occurred and evidence of the terms of the lost sale. As is discussed above, damages are not available for suits to remove a cloud on title, nor are damages provided for in the statutory remedy of trespass to try title.[104] However, damages arising from a cloud on title may be recovered as a separate claim for slander of title, and as a consequence slander of title is a usual component of a suit to remove cloud from title.

The damages for slander of title are those amounts which would compensate for the actual loss suffered. The proper measure of damages is the amount for which the plaintiffs would have sold the lease, had the sale not been frustrated, minus the amount for which they could have sold a lease on the land at the time of the trial after the cloud is removed. An additional allowance should be made for the value of the use of the lease from the time the sale would have been concluded to the date of the judgment. Exemplary damages may also be allowed upon a proper showing of malice.[105] There has been some question whether attorneys fees could be awarded as an element of damages in a slander of title

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[101] *Pampell Interests, Inc. v. Wolle,* 797 S.W.2d 392, 395 (Tex. Civ. App. -- Austin 1990, no writ); *Associates Investment Co. v. Tyler*, 378 S.W.2d 717 (Tex. Civ. App.--San Antonio 1964, no writ); *Humble Oil & Refining Co. v. Luckel,* 171 S.W.2d 902 (Tex. Civ. App.--Galveston 1943, writ ref'd w.o.m.); *Reaugh v. McCollum Exploration Co*, 139 Tex. 485, 163 S.W.2d 620, 622 (1942).

[102] *See Ellis v. Waldrop,* 656 S.W.2d 902, 905 (Tex. 1983); *cf. A. H. Belo Corp. v. Sanders,* 632 S.W.2d 145 (Tex. 1982).

[103] *See Williams v. Jennings, Co.*, 755 S.W.2d 874, 884-85 (Tex. App. -- Houston [14th Dist] 1988, writ denied).

[104] *Ellis v. Waldrop*, 656 S.W.2d 902, 905 (Tex.1983); *Pampell Interests, Inc. v. Wolle*, 797 S.W.2d 392, 395 (Tex. App.-Austin 1990, no writ).

[105] *Reaugh v. McCollum Exploration Co.,* 139 Tex. 485, 163 S.W.2d 620, 622 (1942).

action.[106] However, the prevailing rule is that attorneys fees may not be recovered in such actions.

5. Uniform Declaratory Judgments Act

A common companion to any of the above suits for title is a claim for declaratory judgment, under the state or federal Declaratory Judgment Acts.[107] The Texas Declaratory Judgment Act provides for a judicial pronouncement of the rights of the parties to remove uncertainty, however, its primary allure for most parties is that it allows attorney fees to be awarded to either party (usually the prevailing party) at the trial court' discretion. If the bad faith pooling action is also actionable under breach of contract or underpayment of royalty theories, then the lessor might have other means of recovering attorneys fees,[108] but attorneys fees are usually not recoverable in a common law or equitable title action.

An attorney representing a lessor who is unsure of the ultimate merit of his case should carefully consider suing for declaratory judgment, to avoid subjecting his client to exposure for the lessee's attorneys fees. In *Smith v Killough*,[109] a losing landowner was required to pay his opponents' attorneys fees. Similarly, in *MCZ, Inc. v. Triolo*,[110] a lessor sued a non-participating royalty owner, seeking a declaratory judgment that the non-participating royalty owner could not selectively ratify individual units formed under a lease with standard pooling provisions. The validity of the units was not in question, but the issues concerned the apportionment of royalties in two units. The lessee interplead the disputed royalties. The lessor prevailed at trial, but the Court of Appeals reversed and also held that both the non-participating royalty owner and the lessee could recover their attorneys fees from the lessor who had filed the suit.

In appropriate circumstances, a lessee's counsel might seek a declaratory judgment, if such relief could allow the lessee to recover attorneys fees in an action it must defend anyway. The courts have disapproved declaratory judgment counterclaims that seek nothing more than a negative finding on a plaintiff's principal claims, in order to recover attorneys fees.[111] However, if a declaratory judgment counterclaim addresses issues not raised in an existing suit, attorney fees may be awarded.[112] Thus, where a lessor has merely threatened a suit for cancellation, or where a suit initially filed does not affirmatively assert a cause of action for cancellation, then the lessee's counsel might consider pleading for a declaratory judgment on the cancellation issue, as a possible means of recovering its own

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106 *Walker v. Ruggles*, 540 S.W.2d 470 (Tex. Civ. App. – Houston [14th Dist.] 1976 no writ), held that the damages could include attorneys fees. Two subsequent cases, *Ryan v. Mo-Mac Properties*, 644 S.W.2d 791 (Tex.App. -- Corpus Christi. 1982, writ ref'd n.r.e), and *Sadler v. Duvall*, 815 S.W.2d 285, (Tex. App. -- Texarkana 1991, writ denied), expressly declined to follow *Walker*, and the Texas Supreme Court expressly disapproved another holding in *Walker*, that a loss of a specific sale was not a requirement for proving damages. *See A. H. Belo Corp. v. Sanders*, 632 S.W.2d 145 (Tex. 1982).

107 Tex. Civ Prac. & Rem. Code, §§37.001-008; 28 USC §§2201-02.

108 Tex. Civ Prac. & Rem. Code, §§38.001; Tex. Nat Res. Code §91.406

109 461 S.W.2d 510 (Tex. Civ. App.—Eastland 1970, writ ref'd n.r.e.).

110 708 S.W.2d 49 (Tex. App.—Houston [1st Dist.] 1986, writ ref'd n.r.e.).

111 *See HECI Exploration Co. v. Clajon Gas Co*., 843 S.W.2d 622, 638-39 (Tex. App. – Austin, 1992, writ denied).

112 *See Coastal States Crude Gathering Co. v Natural Gas Odorizing, Inc.,* 899 S.W.2d 289, 291 (Tex. App. – Houston [14th Dist.] 1995, writ denied).

attorneys fees. Of course, before doing so, the lessee and its counsel should feel confident that they have a strong case supporting the validity of the existing unit.

E. Defenses

The burden of proof of breach of the pooling obligation is on the plaintiff. As such, a general denial under Rule 92 is sufficient to put the plaintiff to the burden of proving its claims. Affirmative defenses are required to be specially pleaded before a defendant will be entitled to present proof of those defenses. Because an affirmative defense is known as a "confession and avoidance," the burden is on the defendant to prove its elements.[113]

1. Waiver

Waiver is the intentional relinquishment of a known right or intentional conduct inconsistent with claiming that right.[114] It requires that the plaintiff have had knowledge of the right to either participate in or disavow a pooled unit and evidence of a conscious intention to give up that right, such as express relinquishment or conduct inconsistent with intent to claim that right.[115] Waiver relies upon evidence of intentional conduct on the part of the plaintiff and not upon the conduct of the defendant in reliance upon plaintiff's conduct.[116]

One example of waiver assertion as a defense in the pooling context is when a lessee, seeking to avoid the termination of a lease, asserts that the lessor's execution or ratification of a unification agreement served as waiver of past lease defaults and ratification of the lease in the unit.[117] In *Westbrook v. Atlantic Richfield Co.*[118] the lease terminated at the end of a primary term because the well was drilled within an improperly pooled unit, but off the lease. The lessees claimed that the lessor's ratification of another unit, formed after the termination of the lease, waived lease defaults. The court held the ratification of the second unit, did not revive the lease, refusing to extend the rule as stated by Professor Summers.[119]

2. Estoppel

Estoppel is an equitable defense based upon the premise that one who acts in a way intended to induce reliance on the part of the other may not use that conduct in reliance to assert liability against the person.[120] Accordingly, estoppel requires evidence of some action taken by the plaintiff that was reasonably calculated to induce reliance of the defendant such that he acted upon the plaintiff's conduct.[121] A common type of estoppel is equitable estoppel which is based upon the premise that a person who excepts the benefits of some act on the part of another must also except the burdens.

For equitable estoppel to exist, there must be:

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[113] *See Woods v. William M. Mercer, Inc.* 769 S.W.2d 515, 517-581 (Tex. 1988).

[114] *See Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987).

[115] *See Pioneer Oil Co. v. Vallejo*, 750 S.W.2d 928, 929 (Tex. App. -- Corpus Christi 1988, no writ); *PGP Gas Products, Inc. v. Reserve Equipment, Inc.* 667 S.W.2d 604, 609 (Tex. App. -- Austin 1984, writ ref. n.r.e.).

[116] *See Pioneer Oil Co. Vallejo*, 750 S.W.2d at 929; *Giddings v. Giddings*, 701 S.W.2d 288, 289 (Tex. App. -- Austin 1985, writ ref'd n.r.e.).

[117] *See* 5 Summers, LAW OF OIL AND GAS, § 970, p. 11.

[118] 502 S.W.2d 551 (Tex. 1973).

[119] *Id.* ("Execution of a unitization agreement by the lessor in a lease has been held a waiver of all past defaults and ratification of the lease in the unit.").

[120] *See Wirtz v. Sovereign Camp, W.O.W.*, 114 Tex. 471, 268 S.W. 438, (1925); *Pioneer Oil Co. v. Vallejo*, 750 S.W.2d at 929.

[121] *Id.*

1) a false representation or concealment of material facts;

2) made with actual or constructive knowledge of the facts;

3) to a party without, or the means of acquiring knowledge of the real facts;

4) made with the intention it should be acted upon; and

5) to the party to whom it was made must have relied on or acted on it to his prejudice.122

An example of possible equitable estoppel in the case of a pooled unit would be a non-drillsite owner accepting royalties on a pooled basis even if the unit were not validly formed. In this case, acceptance of the benefits may also compel that he accept the burdens, because a non-drilled site owner would not have the right to participate in unit production absent participation in the unit. In contrast, the drillsite owner would not be estopped necessarily by acceptance of royalties on a unit basis absent other factors. Since the drillsite owner would be entitled to royalties on at least the basis of unit production, there is no unwarranted benefit which would require acceptance of the burdens of the pooled unit.

The defense of estoppel may be applied in the pooling context when lessors attempt to invalidate a pooling area from which they have been accepting royalties. In *Estate of Grimes v. Dorchester Gas Producing Co.*[123] the court held that "because of the acceptance of royalties paid by virtue of that production by appellants are now estopped to deny the validity of the 'consolidated area' described in that instrument."

3. Ratification

Ratification as it relates to non-joint interest in pooled units is discussed in greater detail elsewhere in this paper. However, ratification is the explicit adoption option of a prior unauthorized act, by one with knowledge of all material facts.[124] Once a prior unauthorized act is adopted, it is treated for all purposes as if it were the act of the ratifying party. In most context ratifications can occur in several ways. One, obviously, would be express ratification by a written instrument. Another form of ratification, which has found some acceptance in the caselaw, but would seem less likely in most cases, is a ratification implied by conduct, i.e., similar to the equitable estoppel principle.[125] Obvious problems with the ratification by conduct theory are proof of intention on the part of the ratifying party and the fact that exactly what the ratifying party is ratifying will always be subject to some question.

4. Accord and Satisfaction

Accord and satisfaction is a common law contract theory of settlement. It occurs when two parties in conflict over the degree of performance required under a pre-existing contract, resolve their dispute and discharge their pre-existing obligation through a new contract, express or implied.[126] When asserted and proved as a defense, it constitutes a ban to

122 *Vallejo* 750 S.W.2d at 729; *Edwin M. Jones Oil Co. v. Pend Oreille Oil & Gas Co.* 794 S.W.2d 442, 447 (Tex. App. -- Corpus Christi 1990, writ denied).

123 707 S.W.2d 196, 205 (Tex. Civ. App. -- Amarillo 1986, writ ref'd n.r.e.).

124 *See Enserch Corp. v. Rebich*, 925 S.W.2d 75, 83 (Tex. App. - Tyler 1996, writ dism'd); *Sun Operating L.P. v. W. Oatman*, 911 S.W.2d 749, 756 (Tex. App. -- San Antonio 1995, writ denied).

125 *See Simms v. Lakewood Village Property Owners Assoc., Inc.*, 895 S.W.2d 779, 784-785 (Tex. App. -- Corpus Christi 1995, no writ); *Zieban v. Platt*, 786 S.W.2d 797, 802 (Tex. App. -- Houston [14th Dist.] 1990, no writ).

126 *See Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969).

any action under the original obligation.[127] To be effective, the accord and satisfaction requires the performance of the new promise, or a clear intent that the new promise alone can be accepted as satisfaction.[128] Furthermore, an accord and satisfaction must usually be supported by consideration.[129] Accord and satisfaction generally requires one party to take "half a loaf" and is akin to a settlement.

5. Release

Release is very similar to waiver in that it occurs when a party having a right or claim with knowledge of that claim elects to relinquish the claim. With a release, however the parties have contractually discharged claims and causes of action arising out of a particular transaction.[130] It is most often seen in the context of settlement, but is not subject to the statute of frauds.

6. Statutes of Limitations

Texas law provides several different statutes of limitations, such as the two-year statute for actions other than actions for debt and under contract. Tex. Rev. Civ. Stat. Ann. §16.003, a four-year statute of limitations for contract actions and actions for debt. Tex. Civ. Prac. & Rem. Code §16.004, various statutes of limitations relating to title or real property. See Tex. Civ. Prac. & Rem. Code §§ 16.021 - 16.037. Applying these statutes to pooling causes of action, the two-year statute of limitations that would apply to slander of title or any other tort therein. Also, any claims related to bad-faith pooling or unauthorized pooling would be subject to the four-year statute of limitations. Actions such as trespass to try title or suit to quiet title may be subject to the three-year statute of limitations relating to real property which is known as the "color of title" statute. Tex. Civ. Prac. & Rem. Code § 16.024. Under the three-year real property statute of limitations, a person feasibly in possession of property under title or color of title can perfect title to the property over the course of three years of uninterrupted possession. In the case of a pooled unit, a unit declaration may be seen as the inception of color of title. Thus, even if unauthorized, a pooled unit declaration, properly placed to record as to an interest which is continued and operated under for three years, could mature the cross-conveyed titles on the expiration of the three-year period. As a practical matter, this statute would seldom find any application since long before three years elapse, the lessee is doing his job, royalties will have been paid and an issue will have been raised.

F. Remedies

A landowner who proves that he has been wrongfully pooled may elect to pursue one or more of a variety of available remedies, depending upon the specific circumstances involved. Those remedies include legal cancellation or equitable rescission of the unit, cancellation of the underlying leases, money damages for breach of contract, money damages under tort theories, money damages under equitable theories, money damage under statutory causes of action, and if a related tort theory can be proven, punitive damages. Ancillary relief should include interest, attorneys fees and court costs. Other available remedies might include declaratory judgment, equitable relief, such as equitable reconfiguration of the unit or an accounting, and title actions under common law or equity, such as removal of a cloud on title or a quiet

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[127] *See Harris v. Rowe*, 593 S.W.2d 303, 306 (Tex. 1979).

[128] *See Anderson Dev. Co. v. Producers Grain*, 558 S.W.2d 924, 926 (Tex. Civ. App. -- Eastland 1977, writ ref'd n.r.e.).

[129] *See Pickering v. First Greenville Nat'l. Bank*, 495 S.W.2d 16, 19 (Tex. Civ. App. -- Dallas 1973, writ ref'd n.r.e.).

[130] *See Williams v. Glash*, 289 S.W.2d 261, 263-264 (Tex. 1990).

title action. When selecting appropriate remedies, the attorney should consider factors such as the value of existing and future production, the number and location of wells, the anticipated future exploration and development, underground geological data, seismic data, specific lease provisions, Railroad Commission density and spacing requirements and the competitive interest in the area. These types of factors will be important for evaluating the damages or other available relief that could be recovered under each available remedy.

The most important factor for selecting a remedy is where the existing unit wells are located. If the landowner client has all of the unit wells on his tract, then he probably hopes to have the unit canceled, in order to increase his net revenue interest in the existing production. A landowner who does not have existing wells on his own tract might seek to cancel the unit, in order to require development of his own tract, either by the existing lessee, or by a new lessee if the cancellation of the unit also results in expiration of the existing lease due to lack of commercial production. In both of these instances, there is some danger that future development will prove cancellation of the unit to be an unwise choice. The landowner who succeeds in obtaining all of the royalty interest in existing wells may be sorely disappointed if the lessee later drills better wells on his neighbor's land. Likewise, an landowner who owns no interest in the drillsite tract may be sorely disappointed in the results of subsequent drilling efforts on the lands he succeeds in having excluded from a unit. Some technical evaluation of these factors should be made before a landowner elects to seek cancellation of a unit, and it would be wise for the landowner's attorney to send his client a letter advising of these possibilities beforehand.

Some available remedies may be mutually inconsistent, and should be asserted only in the alternative. Before trial, the landowner and his attorney should make a critical evaluation of the nature of their claims and the various damage models. They should then elect specific remedies to pursue and then present a case seeking only those remedies, in order to avoid making an internally inconsistent presentation. If there is no conflict in the positions to be asserted, a plaintiff may wait until after a verdict to elect which remedy to accept, depending upon the jury findings, and that election will then be binding. Of course, some times it may be necessary to go forward on the basis of alternative pleadings in specific circumstances, but there is a real danger of a loss of credibility in pursuing alternative remedies through trial of a case.

1. Cancellation or Reformation of the Unit.

Most wrongful pooling cases will seek cancellation of the unit. The usual rationale for cancellation is that the unit was never validly formed, because the lessee exceeded his pooling authority.[131] The majority of reported cases reflect that the plaintiffs sought a declaratory judgment to establish cancellation. This is certainly a viable method for accomplishing that result, although it does carry a potential for an award of attorneys fees against the plaintiff if the plaintiff is incorrect. Other available causes of action include suits to remove a cloud on title, or suits to quiet title, on the basis that the unit creates a burden on the mineral and royalty interests in the unit. Trespass to try title may be available mineral

[131] Absent express authority, a lessee has no power to pool interest in the estate retained by lessor with those of other lessors *Jones v. Killingsworth*, 403 S.W.2d 325 (Tex. 1965). When a lessee exceeds that authority, then the unit was never validly formed, and is therefore invalid *ab initio*. *Id.; Amoco Production Co. v. Underwood*, 558 S.W.2d 509 (Tex. Civ. App.—Eastland 1977, writ ref'd n.r.e.).

owners who seek to void leases covering their interests, as a consequence of cancellation of a unit.

2. Recovery of Damages

Damages are recoverable for breach of contract based upon actual and consequential damages. In the case of breach of the pooling obligation based upon unauthorized pooling, the damages would likely be based upon the amount the owner would have received but for the unauthorized pooling. For instance if the plaintiff is the owner of a drillsite tract and is complaining of pooling, the measure of damages would be the amount the owner would have received on a tract basis without consideration of the unauthorized pooling. However, in the case of a non-drillsite owner, the measure of damages may be more elusive.

Careful consideration must be given to the implications of contesting a pooling. Obviously, if your client is a non-drillsite tract owner, the effect of dissolution of the pooling may be to eliminate any right to participate in production from a well on the pooled acreage. However, even in such case unanticipated results can occur. In *Williamson v. Mobil Producing Texas New Mexico, Inc.*[132] Mobil had formed a pooled unit surrounding its Choice Thompson well and had included the Williamsons' acreage in the pooled unit. The Thompsons later filed suit to set aside the pooling on the grounds that it had been done in bad faith. Mobil began suspending royalties otherwise attributable to the Williamson lease on the grounds that if the unit were dissolved, the Williamsons would no longer share in production. The Williamsons sued for breach. The pooling provision in the Williamson lease read as follows:

> "Lessee shall file written unit designations in the county in which the premises are located. The unit shall become effective on the date provided in the designation or, if the designation makes no such provision, it shall become effective on the date it is filed for record. A unit established hereunder shall be valid and effective for all purposes of this lease even though there may be mineral, royalty or leasehold interests in lands within the unit which are not effectively pooled or unitized. Such units may be designated at any time before or after the completion of a well or wells or production therefrom and lessee may reduce, enlarge, modify or dissolve such unit or units at any time prior to the discovery of oil or gas or other minerals on the pooled acreage, or, after the discovery of same, at any time subsequent to the cessation of production thereof by filing a written declaration to such effect in the same county…. In lieu of the royalties herein provided, lessor shall receive on production from a unit so pooled only such portion of the royalty stipulated herein as the amount of his acreage placed in the unit or the royalty interest therein on an acreage basis bears to the total acreage so pooled in the particular unit involved."

On cross motions for summary judgment the district court entered judgment for Mobil on Williamsons' breach of contract claim. The Court of Appeals reversed, holding that the lease agreement as written determined the basic rights of the parties. The court determined the relevant language to be in the granting clause of the lease, which read,

[132] 737 S.W.2d 917 (Tex. App. -- Beaumont 1987, no writ).

"lessor in consideration of Ten and no/100 Dollars in hand paid receipt of which is hereby acknowledged and of the royalties herein provided and of the agreements of lessee herein contained hereby grants… ." The court noted that the lessee clearly had made an express written agreement to pay royalties to the Williamsons and to continue paying the royalties to the Williamsons until production ceased. The fact that a question might arise regarding entitlement to royalties did not provide Mobil with an excuse. Since it had agreed that "the unit shall become effective on the date provided in the designation"… . and "a unit established hereunder shall be valid and effective for all purposes of this lease even though there may be mineral, royalty or leasehold interests in lands within the unit which are not effectively pooled or unitized," the court found there was no bona fide dispute as to title between the Williamsons and Mobil but only a dispute as to whether a unit is formed in good faith as between the Thompsons and Mobil. This is the case where non-drillsite owner had the opportunity to have his cake and eat it too. He had the benefits of drillsite production despite the fact that his acreage was not ultimately determined to be validly pooled.

As in any breach of contract, even if more extensive special damages are not provable, nominal damages will generally be recoverable in some amount.

3. Ratification

Not all pooling litigation involves landowners seeking to avoid the pooling of their interests. In a few reported cases, lessors have sought to preserve existing units, in order to receive royalties on production from wells outside their lands but within the original units, or to prevent the lessees from enlarging an existing unit and further diluting their royalty interests.[133] In *Sunac Petroleum Corporation v. Parkes*[134], an overriding royalty owner unsuccessfully sought to validate a unit in order to continue the lease in which he held an overriding royalty interest. The available legal and equitable remedies in these cases are generally the same as those available to parties seeking to avoid pooling, but the positions are reversed. The outcome will depend upon the particular facts and clauses in issue in each case.

A number of cases have also dealt with parties who seek to have their interests included within pooled units. Typically, in those cases, the plaintiff owns a mineral or royalty interest in lands outside the drillsite tract for a well, but within the pooled unit for the well, so they seek to have their interests joined in the unit, in order to share in the production revenues from the unit well. The rights of the parties will depend upon the specific nature of their interests. Many of the reported cases deal with community leases, rather than actual pooled units, but the legal theories are essentially the same for both. If the interest sought to be pooled is a non-participating royalty interest, subject to a lease with a pooling clause (or a community lease), the owner's primary remedy is to ratify the unit or the lease, as soon as he learns of its existence. The legal theory is that the owner of the executive rights who executes the lease has no power to authorize pooling of the non-participating royalty interests, but by including a pooling clause in the lease, he proposes to do so.[135]

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[133] *See, e.g., Grimes v. La Gloria Corp.*, 251 S.W.2d 755, (Tex. Civ. App.-- San Antonio 1952, no writ); *Expando Production Co. v. Marshall*, 407 S.W.2d 254 (Tex. Civ. App.—Fort Worth 1966, writ ref'd n.r.e.).

[134] 416 S.W.2d 798 (Tex. 1967).

[135] The non-participating royalty owner is not bound by that unauthorized act, but it may

Until the royalty owner ratifies, he may not share in the unit production, but properly drafted pleadings in a lawsuit may create a ratification.[136] However, if the royalty owner's pleadings question the validity of the pooling, they will not accomplish a ratification.[137] The royalty owner may not be required to ratify the lease as a whole, but may instead elect to selectively ratify only individual units.[138]

The issues are different where the interest sought to be included in a unit is an unleased mineral interest, rather than a non-participating royalty interest. As is discussed in prior sections there is no fiduciary or other agency relationship between mineral co-tenants, and the lessee of one co-tenant is under no duty to notify the other co-tenants of the existence of a lease or a unit, and has no obligation to include them in the unit.[139] The theory of an unauthorized act of a leasing agent does not apply to this relationship. If the mineral owner does not ratify the unit, he cannot recover his share of production from wells on lands where he owns no interest, and filing suit to recover a share of unit production does not create an effective ratification pooling the unleased mineral interest.[140]

The language of the cases cited above disfavors attempts by a mineral owner to obtain an unleased share of production form lands where he owns no interest. None of the reported cases deal with instances where the mineral owner offered to lease an interest under the same terms as the co-tenant's lease but was rebuffed by the lessee. Although the courts might create a different rule under those circumstances, the existing cases provide no rationale for doing so and in fact the authorities appear to be in conflict.[141]

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ratify it and then participate in the benefits of the unit. *See Montgomery v. Rittersbacher*, 424 S.W.2d 210 (Tex. 1968); *Standard Oil Co. of Texas v. Donald*, 321 S.W.2d 602 (Tex. Civ. App.—Fort Worth, 1959, writ ref'd n.r.e.).

136 *Montgomery v. Rittersbacher*, 424 S.W.2d 210 (Tex. 1968).

137 *Brown v. Getty Reserve Oil, Inc*., 626 S.W.2d 810 (Tex. Civ. App.—Amarillo 1982, writ dism'd).

138 *MCZ, Inc. v. Triolo, supra.*; *see also, May v. Cities Service Oil Co*., 444 S.W.2d 822 (Tex. Civ. App. – Beaumont 1969, writ ref'd. n.r.e.) (royalty owner found not to be estopped from ratifying lease after second well had been drilled on tract in which he owned no interest, even though he had earlier refused to ratify the lease when prior, smaller well had been drilled).

139 *Donnan v. Atlantic Richfield Co.,* 732 S.W.2d 715 (Tex. Civ. App. — Corpus Christi 1987, writ denied).

140 *Superior Oil Company v. Roberts*, 398 S.W.2d 275 (Tex. 1965); *Sun Exploration and Production Co. v. Pitzer*, 822 S.W.2d 294 (Tex. Civ. App. — Eastland 1991, writ denied); *Donnan, supra.*

141 *Fletcher v. Ricks Exploration,* 905 F.2d 890 (5th Cir. 1990), held that a lessee of a fractional mineral interest in one non-drillsite tract within a unit could not join in the unit by ratifying the unit agreement after a successful well had been drilled. The Court found that the lessee was not a co-tenant with other lessees within the unit. That finding appears to be a misstatement of Texas law, as numerous other cases have held that oil and gas lessees become co-tenants in the mineral estate in the leased premises. A better analysis would be that the ratification was ineffective, since that lessee's lease was not listed in the Unit Declaration as one of the leases being unitized. Another rather strange holding appears in *Russell v. City of Bryan,* 846 S.W.2d 389 (Tex. Civ. App. — Houston [14th Dist.] 1993, writ denied), where the Court overturned a summary judgment for a lessee in a large field-wide unit, rendered against an unleased mineral owner in a non-drillsite tract, by holding that the rule of capture did not apply to land within the unit. This holding is impossible to reconcile with the numerous other cases on point. The Court was clearly influenced by the circumstances that the tract in question was a city park within a large field-wide unit,

A ratification must be timely, or the right to ratify may be waived. In *Nugent v. Freeman*,[142] a landowner who knowingly waited two years before ratifying a community lease, which had been fully developed in the interim, was found to have waited too long before accepting the pooling offer, so he could no longer have his interests pooled. Other cases have found differently. In *Ruiz v. Martin*[143], the royalty owner was allowed to ratify more than six years after a lease was executed, but almost immediately after the first well was drilled. And in *May v. Cities Service Oil Co.*[144] a delay of over eight years was allowed, where the royalty owner refused to ratify a lease when the first well was drilled on his lands, but then ratified the lease after a second, much better well was drilled upon lands in which he owned no interest.

In almost all of the cases, the pooling becomes effective at the time of the ratification, so the royalty owner does not receive a share of any production before that time. However, a different result was reached in *De Benavides v. Warren*,[145] where non-participating royalty owners did not learn of a lease and pooling designation until ten years after the lease was executed and seven years after production was established on the unit. The royalty owners were allowed to retroactively ratify the lease, effective as of first production, and to obtain a judgment against the lessors for their share of production, on the grounds that the lessors had violated a duty of utmost good faith by failing to notify the non-participating royalty owners when the lease was first executed. The fact that the lease and the pooling agreement were both filed for record was held to be insufficient to discharge the duty to notify the non-participating royalty owners that they could ratify the leases if they so elected.

There is conflicting authority concerning whether all mineral and royalty owners within a unit must ratify, before the unit is valid as to any owner. *Whelan v. Placid Oil Company*,[146] expressly upheld the validity of a unit, where all the mineral interests were not joined. Most of the other cases cited in this section have impliedly reached the same conclusion. However, two cases have held that a lease is not effectively communitized until all the non-participating royalty owners ratify it, so that owners of non-drillsite royalty interests were not entitled to a share in lease production, even after they expressly ratified the lease.[147] Interestingly, a different result was ultimately reached in *May v. Cities Service Oil Co.*, a case involving the same lease and many of the same parties as *Guaranty National Bank*, but a later well on a different tract. Perhaps some distinction could be made between pooled units and community leases, or between ratifications required for owners of non-participating royalty interests and unleased mineral interests, but the courts have not discussed them, and it is difficult to discern a coherent line of reasoning in this area.

It is equally hard to follow the reasoning in two oft-criticized cases, *London v.*

limiting the mineral owner's surface access to the minerals under his tract.

[142] 306 S.W.2d 167 (Tex. Civ. App. – Eastland 1957, writ ref'd. n.r.e.).

[143] 559 S.W.2d 839 (Tex. Civ. App.—San Antonio 1977, writ ref'd n.r.e.).

[144] 444 S.W.2d 822 (Tex. Civ. App. -- Beaumont 1969, writ ref'd n.r.e.).

[145] 674 S.W.2d 353 (Tex. Civ. App.—San Antonio, 1984, writ ref'd n.r.e.).

[146] 274 S.W.2d 125 (Tex. Civ. App.—Texarkana 1954, writ ref'd n.r.e),

[147] *Guaranty National Bank & Trust v. May*, 395 S.W.2d 80 (Tex. Civ. App. – Waco 1965, writ ref'd. n.r.e.); *Brown v. Getty Reserve Oil, Inc.*, 626 S.W.2d 810 (Tex. Civ. App. -- Amarillo 1982, writ dism'd).

Merriman[148] and *Verble v. Coffman*.[149] Both of those cases allowed a non-participating royalty owner under a lease to ratify the lease and participate in royalties on production form lands where that owner did not own an interest, despite a "negative entireties" clause in the lease expressly denying any attempt to establish a community lease. Both of these cases held that a separate pooling clause in the lease, allowing the lessee to form designated pooled units, somehow overrode the negative entireties clause and authorized communitization even in lands that were not included in any pooled units. *London* cited to *Ruiz v. Martin,*[150] which held that an express entireties clause was not necessary to create a community lease, but it did not explain why a negative entireties clause should be unenforceable. Both *London* and *Verble* seem to confuse the clearly defined pooling power given a lessee under a typical lease pooling clause with the broader and more nebulous doctrine of communitization of multiple interests by execution of a single lease.

4. Mineral Interest Pooling Act

The issues surrounding the Mineral Interest Pooling Act ("MIPA"),[151] are numerous and sometimes unsettled, and in any event are largely beyond the scope of this paper.[152] However, the MIPA can be used either offensively or defensively in a pooling case, and thus deserves some mention here. A mineral, royalty or working interest owner in a non-drillsite tract within a unit may wish to file an action under the MIPA to force his or her way into the unit, if the interest cannot otherwise be pooled. Likewise, an operator may wish to file a MIPA action to force a recalcitrant royalty or mineral owner in a drillsite tract to have its interests diluted according to a unit formula.

In a shorthand summary, a MIPA action is a proceeding at the Railroad Commission of Texas, to force-pool interests of owners into units generally conforming to standard proration units, but not to exceed 160 acres for oil wells and 640 acres for gas wells (plus a 10% tolerance) established by the Railroad Commission for wells drilled or proposed to be drilled into fields discovered after March 6, 1961. The pooling must be for purposes of avoiding the drilling of unnecessary wells, preventing waste or protecting correlative rights, and the unit must contain acreage that the Commission determines to lie within the productive limits of the reservoir. A jurisdictional precondition to filing an action is a fair and reasonable pooling offer extended to the owner of the interests to be force-pooled. A non-consenting owner cannot be forced to pool his interests under a formula that would allocate less production to him than he would receive under a surface acreage based formula. Working interest or mineral interest owners being force-pooled who do not elect to bear their share of drilling costs up front will be charged with a non-consent penalty not to exceed 100% of actual costs. An operator's chargeable costs are limited by the Act and may be determined by the Commission. After notice and hearing, the Commission may enter

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[148] 756 S.W.2d 736 (Tex. Civ. App.-Corpus Christi, 1988, writ denied).

[149] 680 S.W.2d 69 (Tex. App. – Austin 1984, no writ).

[150] 559 S.W.2d 839 (Tex. Civ. App. -- San Antonio 1977, writ ref'd n.r.e.).

[151] Tex. Nat Res. Code Ann. §§ 102.001-112.

[152] Several fine papers have been presented in prior years. *See, e.g*., F.Douglass, *The Mineral Interest Pooling Act*, 14th Annual Oil, Gas & Mineral Law Inst. (Apr. 15, 1988); J. Peden, *The Mineral Interest Pooling Act, From the Examiner's Position*, 7th Annual Natural Resources Law Inst. (Mar. 13, 1981); B. Sullivan, *The Texas Mineral Interest Pooling Act*, Advanced Oil, Gas and Mineral Law Course (Sept. 18, 1986).

a force pooling order. The Commission's Order may be appealed to the district court where the land is located, but without a trial *de novo*. The effective date of the pooling is not defined in the Act. The Order becomes effective only on the date it is entered by the Commission, and it cannot be given retroactive effect.[153] In practice, the Commission now enters interim orders, which may be effective between the date they are entered after a hearing, and the date a final order is entered by the Commission, which may be several years later.[154] It cannot be effective before the date of filing of the action at the Railroad Commission. However, in *London v. Merriman, supra.*, the royalty owners had obtained a pooling order under the MIPA, and then recovered in court for the royalty share of production attributable to their interests before the effective date of the MIPA pooling order, on the grounds that they could ratify a community lease. Operations on and production from units formed under the MIPA maintain leases in effect the same manner as in standard pooled units. Units continue for a year after the Order, if there are no operations of production, or else for six months after the completion of a dry hole or the cessation of production.

G. Attorneys Fees

1. Texas Civil Practices & Remedies Code Ann. § 38.001 et seq.

Although Texas courts follow the American rule that each party must bear its own attorneys fees, there are statutes which would allow a prevailing party in a pooling action to recover its attorneys fees. The most commonly used is Tex. Civ. Prac. & Rem. Code Ann. §§ 38.001 et seq. which provides that a prevailing plaintiff in a contract action may recover his reasonable and necessary attorneys fees incurred in prosecution of the claim. The reasonable and necessary standard requires evidence of a reasonable and necessary attorneys fee for the nature and extent of services provided. This usually requires expert testimony by an attorney having some level of experience and knowledge of the nature of the case and of the services rendered, and of fees charged by attorneys of similar competence and experience. In addition, under §38.001 a court is allowed to take judicial notice of reasonable and necessary attorneys fee in which case a court drawing upon its own knowledge of the case and nature of legal services rendered may determine the amount of attorneys fees to be awarded. In general, the amount of a reasonable and necessary attorneys fee is a question of fact that may be submitted to the jury along with other fact determinations. Quite often, however, parties will agree to try attorneys fees to the judge, particularly given the uncertainties of trying that type of issue to a jury.

2. Texas Declaratory Judgment Act

Attorneys fees may also be recoverable under Tex. Civ. Prac. & Rem. Code § 37.009 when the suit invokes the Texas Uniform Declaratory Judgments Act. The standard for awards of attorneys fees under the Declaratory Judgments Act is "just and equitable" fees. Unlike the statute providing for a prevailing plaintiff's attorneys fees in a contract action,[155] the Declaratory Judgments Act allows the trial court to award fees to the winner, the loser, or to no one at all.[156] The plaintiff may therefore

[153] *Buttes Resources Co. v. Railroad Comm.*, 732 S.W.2d 675 (Tex. App. Houston [14th Dist.] 1987, writ ref'd n.r.e.).

[154] *Railroad Comm. V. Pen Oreille Oil & Gas Co., Inc.*, 817 S.W.2d 36 (Tex. 1991).

[155] Tex. Civ. Prac. & Rem. Code § 38.001(8).

[156] *See e.g., MCZ, Inc. v. Triolo*, 708 S.W.2d 49 (Tex. App. -- Houston [1st Dist.] 1986, writ ref'd n.r.e). (awarding fees to prevailing defendant in pooling action).)

be well advised not to plead for declaratory relief unless it is necessary to do so, since it presents at least the possibility of a judgment for the other party's attorneys fees should the plaintiff's cause be found to be less than just. Because attorneys fees are awardable under the Declaratory Judgments Act based upon a just and equitable standard, it is unclear whether a party is entitled to submit the issue to a jury for trial. Arguably, the amount of attorneys fees actually incurred would be an issue of fact. However, the just and equitable element almost certainly makes this an issue for the trial judge alone. Since attorneys fees, if awarded, would be in the discretion of the court, the standard for review on appeal is the abuse of discretion standard.[157] This presents a fairly high hurdle for the party challenging an award of attorneys fees on appeal. A trial court abuses its discretion only if the action taken is so arbitrary and unreasonable that it amounts to a clear and prejudicial error of law,[158] or if the action is taken without reference to any guiding rules and principles.[159]

3. Texas Natural Resources Code

The Texas Natural Resources Code §91.403 provides remedies for a party who has not paid royalties on oil and gas production from lands in which they own an interest. If the royalty owner prevails, it also provides for an award of attorneys fees. The standard for awards of attorneys fees under this act is "reasonable and necessary," similar to the standard in a contract action. If the premise for a claim is that the pooling clause was unlawful and that royalties have consequently been unjustly withheld, or if the claim similar to the claim in the *Williamson* case, § 91.403 may provide a basis for award of attorneys fees.

H. Punitive Damages

Since most claims related to pooling will be contractual in nature, punitive damages are not awardable.[160] To the extent a separate and independent tort can be alleged which provides for damages separate and apart from contractual damages, punitive damages may be available based upon that tort and the contract giving rise to the tort.[161] Punitive damages are intended both to punish the wrongdoer for the conduct complained of and to deter similar conduct on the part of others.[162] Accordingly, Texas courts allow consideration both of the economic impact of the punitive damages on the wrongdoer and the relationship of the actual damages to the punitive damages.[163] While there is no fixed maximum multiple, there is some guidance for punitive damages in the Tex. Civ. Prac. & Rem. Code §§ 41.008, 41.010 and 41.011 Because proof of financial wherewithal is admissible for purposes of determining the amount of punitive damages and that type of evidence could result in an unfair trial if admitted during the liability phase, a party against whom punitive damages are asserted has the right to require bifurcation of the punitive damage phase of trial from the liability phase.[164] Bifurcation does not occur automatically, but requires a motion timely

[157] *Oake v. Collin County*, 692 S.W.2d 454, 455 (Tex. 1985).
[158] *Loftin v. Martin,* 776 S.W.2d 145, 146 (Tex. 1989).
[159] *Wright v. Brooks*, 773 S.W.2d 649, 651 (Tex. App. – San Antonio 1989, writ denied).
[160] *Amoco v. Alexander*, 622 S.W.2d 563, ____ (Tex. 1981).
[161] *See Twin City Fire Ins. Co. v. Davis*, 904 S.W.2d 663, 665-666 (Tex. 1995); *Federal Express Corp. v. Dutschmann*, 846 S.W.2d 282, 284 (Tex. 1993).
[162] *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10,29 (Tex. 1994); *Parker v. Parker*, 897 SW.2d 918, 930 (Tex. App -- Fort Worth 1995, writ denied).
[163] Tex. Civ. Prac. & Rem. Code Ann. §§ 41.008 and 41.011.
[164] See Tex. Civ. Prac. & Rem. Code § 41.009.

filed by the person seeking bifurcation. Timely filed is not defined, however, as one might anticipate. The motion should be filed not simply before beginning of the trial, but prior to voir dire examination of the jury.[165]

I. Interest

Pre-judgment and post-judgment interest are allowed as elements of damage under Tex. Rev. Civ. Stat. Ann. Art. 5069.103 - 105. For contract claims, the pre-judgment interest rate will be either the appropriate statutory rate or rate contractually agreed to by the parties. Absent an agreement as to the proper rate, if the amount of damages is easily ascertainable, the pre-judgment interest is calculated at the rate of 6% per annum.[166] If the parties contractually agreed upon a rate, the post-judgment rate for contract claims will be the lesser of the contract rate or 18%.[167] If the contract is silent as to the post-judgment interest rate, it is the rate published in the Texas Register for the month preceding the judgment, with a minimum rate of 10% and a maximum rate of 20%.[168]

For tort claims, the prejudgment interest rate is calculated the same as the postjudgment rate – the rate computed by the Consumer Credit Commissioner and published in the Texas Register.[169]

1. Costs

Under Tex. R. Civ. P. 131, the prevailing party is entitled to an award of costs in bringing the action. Costs by rule include the costs of transcription, court filing fees, costs for masters, interpreters, guardians ad litem and other such costs and fees as may be expressly permitted by other statutes.[170] These costs, however, do not include expenses one might ordinarily anticipate in litigation. A prevailing party is required to submit a bill of costs, and those costs will be included in the judgment and may be executed upon in the same way as damages awarded in the judgment.[171]

VI. CONCLUSION

The pooling case is unique because of the nature of the rights in issue. It involves both contractual and real property law issues and its own unique group of litigation concerns. In determining how to proceed in filing, preparing and trying a pooling case, the lawyer must carefully consider all of the available theories and remedies and determine which one apply to the specific facts in the case. Equally important as legal analysis, some analysis must be undertaken of the way in which the chosen remedy may affect participation in future unit production. Moreover, because pooling is a relatively foreign concept to laymen and the proof can be complex, the lawyer must frame the case in a way that reduces undue complication and makes the case more comprehensible to a jury.

[165] § 41.009.
[166] Tex. Rev. Civ. Stat. Ann. Art. 5.069-1.03 and 1.04.
[167] Tex. Rev. Civ. Stat. Ann. Art. 5.069-1.05 § 1.
[168] Tex. Rev. Civ. Stat. Ann. Art. 5.069-1.05 § 2.
[169] *Id.*
[170] Tex. Civ. Prac. & Rem. Code § 31.007(b).
[171] *Id.* at § 31.007(a).