

# Curative:

## When You Need to Resort to the Courts

---

A Look at Common Causes of Action by a Lessee or Operator  
in Texas

M. Ryan Kirby



KIRBY, MATHEWS  
& WALRATH

# Commonly Litigated Issues

- Mineral and Royalty Receiverships
  - Actions to protect both operator and unknown owners of mineral and royalty interests in producing lands
- Trespass to Try Title
  - Action to divest property from one party and vest it in another.
- Interpleader
- Declaratory Judgment
- Injunctive Relief
- Actions arising under Joint Operating Agreements
  - Typically consist of breach of contract claims.
- Actions arising under Preferential Right and Area of Mutual Interest Agreements
  - Rights triggered by purchase or sale of an interest in land



# Establishing a Receivership

- In order to establish a receivership, suit must be filed in the county where the property is located.
  - Civil Practices and Remedies Code §§ 64.091(b), 64.093(a), 15.011
- The party or parties filing suit must claim or own an undivided mineral (or royalty) interest in this state.
  - Civil Practices and Remedies Code §§ 64.091(b)(1), 64.093(a)(1), 64.093(a)(2), 15.011
- May also be brought by a party having, claiming, or owning an undivided leasehold interest arising from a mineral lease.
  - Civil Practices and Remedies Code §§ 64.091(b)(2)
- Applies to both missing mineral interest owner and to missing lessee of undivided leasehold interest.

# Receiverships – Who to sue?

- A person whose residence or identity is unknown, or a non-resident, who has not paid taxes on the interest or rendered it for taxes during the five year period immediately preceding the filing of the action.
  - Civil Practice and Remedies Code §§ 64.091(b) and 64.093(b)
- Plaintiff must claim that a diligent effort was made to locate the Defendant, and that the Plaintiff will suffer substantial damage or injury if no receiver is appointed
  - Civil Practice and Remedies Code §§ 64.091(c) and 64.093(c)
- Must name the last known owner or the last record owner of the interest.
  - Civil Practice and Remedies Code §§ 64.091(d)(1) and 64.093(d)(1)



# Who to Sue – Proving the Unknown

- Diligent Effort?
  - Search the Grantor/Grantee indices.
  - Search the Clerk's Register around the time of conveyance to find a return.
  - Search the tax rolls, going back at least 5 years.
  - Search voter registration lists.
  - Search the Yellow Pages, in print or online.
  - Search death records.
  - Search the probate records.
  - Internet based people searches.
  - Contact the previous record owner.

# Establishing Damages

- Must show that if the receivership is not established, the plaintiff will suffer substantial damage or injury.
- What constitutes substantial damage or injury?
  - Drainage or potential drainage.
  - Inability to drill resulting in termination of leasehold interest.
- Helpful, but not necessary, to have expert testimony in the form of a geologist or petroleum engineer.



# Proceeding with the Lawsuit – Notice

- Proper notice is vital to the Receivership Suit.
- Recommended procedure for service of notice:
  - **Affidavit for Citation by Publication**
    - Prepare an affidavit that states that the residence of the defendant is unknown or that they are non-residents, and that a diligent, yet unsuccessful, effort has been made to locate the defendant. Tex.R.Civ.P 109
  - **Issuance of the Citation**
    - Citation shall contain the names of the parties, the nature of the suit, legal description of the land involved, and a statement of the interests of the named parties. It shall also command the parties to appear and answer at, or before, 10:00 a.m. the Monday first following 42 days from the date of issuance. Tex.R.Civ.P. 114 & 115

# Proceeding with the Lawsuit – Notice (cont.)

- **Service of Citation**

- Shall be served by the Sheriff or any Constable of any county of the State of Texas, or by the clerk of the district court of the county in which the case is pending, by having the citation published once a week for 4 consecutive weeks, the first being at least 28 days prior to the return date of the citation. It shall also be in a newspaper in the county in which the land is situated, or if no paper there, then in an adjoining county. Tex.R.Civ.P. 116
- Make sure to follow up with the paper each week to ensure publication.



# Proceeding with the Lawsuit – Notice (cont.)

- **Return of Citation by Publication**

- The return shall be endorsed by the officer executing the citation and should state how and when the citation was executed and show the dates of actual publication. Must be accompanied by a printed copy of the publication. Must be more than 28 days after the date of first publication.

Tex.R.Civ.P. 117

- Notice is the most important aspect of the Receivership lawsuit. Barring an error in the notice process, a receivership will typically survive attack.

# Selecting the Receiver

- The receiver may be the county judge, and his successors, or any other resident of the county in which the land is located, and is not required to post bond.
  - Civil Practice and Remedies Code §§ 64.091(d)(3) and 64.093(d)(3), 64.091(d)(5) and 64.093(d)(5)
- Recommended practice is to select the county judge or clerk, if they are willing to assume the position.
- You should contact any potential receiver beforehand in order to discuss the mineral receivership proceedings and responsibilities.



# The Hearing Process

- Once you have selected a receiver, set the hearing date after the return date of the citation, which is on or after the appearance date (42 days after the issuance of the citation). Make sure that the receiver is available on this date.
- Have the judge sign the order setting the date and make sure a copy is included in the cause file and another copy is sent to the receiver.

# The Hearing Process – Pre-Hearing

- Prepare a lease or ratification to be signed by the receiver. The following guidelines are recommended in order to minimize any legal or ethical concerns:
  - Prepare the receivership lease on the same form as other leases taken on the same tract.
  - The royalty in the lease should be approximately the same as that in the other leases.
  - Bonus paid should reflect the average bonus paid to other mineral lessors on the same tract.
  - The primary term should be the same as the other leases.
- Basically, the lease terms should be reasonable and substantially similar to the other leases taken on the same tract.
- The code allows for pooling of a mineral receivership and a royalty receivership into a unit not to exceed 160 acres for an oil well or 640 for a gas well +/- 10%, or into a unit that substantially conforms to a larger unit prescribed or permitted by governmental rule.
  - Civil Practice and Remedies Code §§ 64.091(h), 64.093(f)(3), and 64.093(g).



# The Hearing Process – Pre-Hearing (cont.)

- Preparation of Witness Testimony
  - Will likely need to offer the landman as a witness, and possibly the plaintiff.
  - The landman will testify as to the diligence of the search for the unknown owner. He will also testify as to the undivided interests owned by the plaintiff and the defendant. He can also testify as to the reasonableness of the terms offered in the lease, i.e. royalty, bonus, and primary term.
  - Either the plaintiff or the landman can testify that the plaintiff will suffer substantial damage or injury if the receiver is not appointed.
- The Plaintiff should also nominate and pay for an Attorney Ad Litem to represent the unknown defendant mineral or royalty interest owners.

# The Hearing Process – The Hearing

- Facts and Evidence
  - Make sure to get a record of the hearing.
  - Introduce certified copies of the leases held by the plaintiff in the subject property to show his undivided interest in the leasehold. These can also be used to show that the terms in the receivership lease are reasonable and similar to those in the leases already taken.
  - Present the testimony of the landman, plaintiff, or other expert, if necessary, showing the diligent but unsuccessful effort to locate the defendant, and that the plaintiff will suffer substantial damage or injury unless the receiver is appointed.
- Have an order appointing the receiver signed by the district judge.



# The Hearing Process – Post-Hearing

- Immediately pay the receiver the bonus money – it must be paid to the clerk of the court before the receiver executes the lease.
  - Civil Practice and Remedies Code §§ 64.091(h), 64.093(h).
- The bonus money will first be applied to the costs accruing in the case. Any balance will be held for the benefit of the defendant mineral or royalty owner.
- Later payments, e.g. royalty payments, should be paid into the registry of the court and impounded for the owner of the interest.
- Have the receiver execute the oath of receiver and file a copy with the case.

# The Hearing Process – Post-Hearing (cont.)

- Report of Receiver
  - After executing the oath, the receiver will sign the lease along with a report of the receiver.
  - Report states that bonus was received, the receiver executed the lease under the authority granted to him, on behalf of the defendant.
  - File the report with the case
- Judge's order approving the receiver's report should state that the lease is to be delivered to the plaintiff for filing. File this with the case also.
- Record the lease in the county clerk's office for the county in which the land is located.



# After the Hearing

- The receivership will continue as long as the unknown owner or his heirs, assigns, or personal representatives fail to appear before the court in person or by agent or attorney to claim the defendant's interest.
  - Civil Practice and Remedies Code §§ 64.091(e), 64.093(e).
- Motion for new trial must be filed within 2 years of the date of the judgment.
  - Tex.R.Civ.P. 329
- An attack on the order appointing the receiver must be direct in the cause in which the appointment was made. It may be collaterally attacked only when the court failed to obtain jurisdiction to issue the order.
- Most attacks are based on improper notice. In the absence of proper notice, the appointment of the receiver is voidable, but not void.

# Trespass to Try Title

- One of the most common types of litigation in the oil and gas field.
- Variety of issues can spark a trespass to try title suit:
  - Determining an non-participating royalty interest owner.
  - Determining mineral interest vs. royalty interest.
  - Resolving competing claims under separate chains of title.
- Governed by Texas Property Code §22.001 and Texas Rules of Civil Procedure § § 783-809.
- Equitable alternatives include Action to Quiet Title or the Declaratory Judgment Act.



# Interpleader

- Interpleader protects the filing party from multiple liability by interpleading the property that is subject to conflicting claims.
  - Useful when two or more persons claim funds that are in the hands of a disinterested party.
- If deemed appropriate by the court, the court can do four things:
  - Require the stakeholder to deposit funds or property into the registry of the court.
  - Discharge the stakeholder from the suit.
  - Grant court costs and attorney fees to the stakeholder.
  - Continue the suit on the merits between rival claimants to determine rights to the money or property.

# Declaratory Judgment

- Declaratory actions establish existing rights, statuses, or other legal relationships.
  - Cannot be used as an affirmative ground of recovery to alter rights, status, or relationships.
  - Appropriate only when there is a justiciable controversy about the rights and status of the parties, and the declaration would resolve the controversy.
  - The controversy must be real and substantial, involving a genuine conflict of tangible interests and not merely a theoretical dispute.



# Declaratory Judgment Availability

- Civil Practice and Remedies Code chapter 37
  - Construction or validity of a written instrument
    - Deed, will, written contract, or other writing.
  - Construction or validity of statute, ordinance, contract, or franchise
    - A person whose rights, status, or other legal relationships are affected thereby.
  - Rights relating to trust or estate
    - A person interested as an individual, or through an executor or administrator, a trustee, guardian, other fiduciary, creditor, devisee, legatee, heir, next of kin, or other beneficiary in the administration of a trust or estate of a decedent, infant, mentally incapacitated person, or insolvent.

# Declaratory Judgment NOT Available

- No justiciable conflict
- Potential tort liability
- Future controversy
- Issue in another court
- Issue in the same suit
- Court lacks jurisdiction over underlying dispute
- Earlier judgment
- Criminal issues
- Suit against the government



# Injunctive Relief

- Prohibitory
  - Prohibit a party from continuing certain conduct.
- Mandatory
  - Requires another party to act affirmatively rather than merely to refrain from certain conduct.

# Injunctive Relief (cont.)

- Temporary Restraining Order (TRO)
  - Preserves the status quo of the subject matter of the litigation under a preliminary hearing can be held on application for a temporary injunction.
- Temporary Injunction
  - Preserves the status quo of the subject matter of the litigation until a final hearing can be held on the merits of the case.
- Permanent Injunction
  - Grants the injunctive relief the applicant is entitled to as part of the final judgment after a trial on the merits.



## Injunctive Relief (cont.)

- Prerequisites for Injunctive Relief
  - Permanent relief.
  - Probable right to relief.
  - Probable injury – imminent harm, irreparable injury, and no adequate remedy at law.

# Causes Arising Under a Joint Operating Agreement

- Joint Operating Agreements (JOAs) based on contract and contract law.
- Causes of action typically arise from breach of contract.
- Common cause of action under JOAs regards the “exculpatory clause.”
  - Clause requires that the operator perform in a good and workmanlike manner.
  - Also shields operator from liability unless complaining party can prove gross negligence or willful misconduct.
    - Gross negligence and willful misconduct normally associated with tort, but in this instance can result in recovery for breach of contract.



# Preferential Right and Area of Mutual Interest Actions

- Preferential Right
  - “Right of First Refusal”
    - Offers the owner of a preferential right the option of purchasing property on the same terms and conditions as those offered by a third party.
- Litigated for a variety of reasons
  - Waiver
  - Laches
  - Estoppel
- Buyer can be liable for violation of preferential right as well as seller.