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Common Problems in Conveying Oil and Gas Interests.

Gloria L. Scott

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DEVELOPMENT OBLIGATIONS OF THE OIL AND GAS LESSEE

Gloria L. Scott

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Thirty years ago it was suggested that the law with respect to oil and gas would be more accurately designated "The Law of Oil and Gas Leases," since the development of oil and gas properties had been almost exclusively through leasing.¹ The particular needs of both the mineral owner and the producer are best served by the lease instrument since the mineral owner generally does not have the funds or the expertise to explore and develop his interest, and the producer usually does not wish to purchase his own land.² Because the basic purpose of an oil and gas lease is to see that both parties receive the rewards of production,³ it follows that the right to these rewards is conditioned on mutual obligations to assure the rights of both parties. It is the development obligations of the oil and gas lease, and in particular his drilling obligations, which form the basis of the present discussion. First, express lease clauses and, secondly, implied covenants are discussed.

I. THE OIL AND GAS LEASE

The nature of the lessee's property interest created by the oil and gas

1. Moses, *The Evolution And Development Of The Oil And Gas Lease*, SW. LEGAL FOUNDATION 2D INST. ON OIL & GAS LAW & TAX. 1, 1 (1951).

2. 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 601, at 2 (1980).

3. See *Canadian River Gas Co. v. Bivins*, 137 Tex. 347, 350, 153 S.W.2d 432, 434 (1941); *Cheek v. Metzger*, 116 Tex. 356, 360, 291 S.W.2d 860, 862 (1927); *Texas Co. v. Davis*, 113 Tex. 321, 325, 254 S.W. 304, 306 (1923); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 163, 254 S.W. 290, 291 (1923).

lease effects the obligations of the lessee and determines the remedies if such obligations are breached. The lease itself determines the character of the estate conveyed,⁴ and is the customary means of development in the oil and gas industry.⁵ In Texas, an oil and gas lease represents an interest in real property⁶ and conveys a determinable fee estate in the minerals.⁷ In "ownership in place"⁸ states, including Texas,⁹ the legal principles

4. See *Anders v. Johnson*, 276 S.W. 678, 679 (Tex. Comm'n App. 1925, holding approved); *Kidd v. Hickey*, 237 S.W.2d 389, 394 (Tex. Civ. App.—El Paso 1950, writ ref'd n.r.e.); *Curry v. Texas Co.*, 185 S.W.2d 256, 258 (Tex. Civ. App.—Eastland 1929, writ dismissed).

5. Moses, *The Evolution And Development Of The Oil And Gas Lease*, SW. LEGAL FOUNDATION 2D INST. ON OIL & GAS LAW & TAX, 1, 2 (1951). What was thought to be the nature of oil and gas influenced the characteristics of the early oil and gas lease. *Id.* at 204. As late as 1921, a Texas court said of the properties of oil and gas: "they are supposed to percolate restlessly about under the surface of the earth, even as the birds fly from field and the beasts roam from forest to forest . . ." *Medina Oil Dev. Co. v. Murphy*, 233 S.W. 333, 335 (Tex. Civ. App.—San Antonio 1921, writ dismissed). Because oil and gas were thought to flow in streams like underground water, exploration and production as soon as possible were necessary to preclude loss of an owner's rights of capture. See Hardwicke, *The Rule Of Capture And Its Implications As Applied To Oil And Gas*, 13 TEXAS L. REV. 391 (1935). It follows that the term of the lease was and continues to be of primary importance. See 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 5.01, at 1-2 (2d ed. 1973); 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 603-604, at 17-36 (1980).

6. See *Halbouty v. Railroad Comm'n*, 163 Tex., 417, 432, 357 S.W.2d 364, 375, cert. denied, 371 U.S. 888 (1962); *Lockart v. Williams*, 144 Tex. 553, 557, 192 S.W.2d 146, 148 (1946); *Veal v. Thomason*, 138 Tex. 341, 350, 159 S.W.2d 472, 476 (1942); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 401 (1933). In Kansas and Oklahoma, the oil and gas lease is not a conveyance of real property but a "license" to prospect for minerals. See *Shields v. Pink*, 372 P.2d 252, 255 (Kan. 1962); *Dickey v. Coffeyville Vitrified Brick & Tile Co.*, 76 P. 398, 398 (Kan. 1904); *State v. Shamblin*, 90 P.2d 1053, 1055 (Okla. 1939); *Kolachny v. Galbreath*, 100 P. 902, 906 (Okla. 1910). In Louisiana, a "servitude" is granted which may be lost after ten years of non-use. See *Starr Davis Oil Co. v. Weber*, 48 So.2d 906, 907 (La. 1950); *Deas v. Lane*, 13 So. 2d 270, 273 (La. 1943); *Ackee v. Caillouet*, 1 So.2d 530, 531 (La. 1941).

7. See *Halbouty v. Railroad Comm'n*, 163 Tex. 417, 432, 357 S.W.2d 364, 375, cert. denied, 371 U.S. 888 (1962); *Morris v. Vaughn*, 152 Tex. 491, 495, 260 S.W.2d 676, 678 (1953); *Parker v. Standard Oil Co.*, 250 S.W.2d 671, 680 (Tex. Civ. App.—Galveston 1952, writ ref'd n.r.e.).

8. The ownership in place theory provides that a landowner owns the oil and gas under his acreage. He may reserve or grant an interest in the minerals distinct from any surface interest. Although one may have title to minerals in place, ownership can be lost under the rule of capture by legitimate drainage. See 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 203.3 (1980).

9. See *Sheffield v. Hogg*, 124 Tex. 290, 297, 77 S.W.2d 1021, 1024 (1934); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 170-171, 254 S.W. 290, 291 (1923); *Texas Co. v. Daugherty*, 107 Tex. 226, 236, 176 S.W. 717, 719 (1915). See generally Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399 (1933).

of real estate ownership are applicable to the oil and gas lease.¹⁰ In the past, the granting clause was determinative of the interest conveyed. Today, however, the trend is to ascertain the intent of the parties by examining the whole instrument.¹¹

II. EXPRESS CLAUSES

A. *The Habendum and Delay Rentals*

The habendum clause determines the duration, or term, of the lease. In some early oil and gas leases, the habendum clause indicated a fixed term which did not provide for an extension of production occurred, nor was there a satisfactory exit if the lessee wished to surrender the lease before the term expired.¹² This "no-term" lease was disadvantageous because the lessee did not have to drill and could preclude development by anyone else so long as he paid the rental provided for in the lease.¹³

Later leases required the lessee to drill within a certain time to maintain the lease. The time allowed for drilling was the primary term of the lease.¹⁴ Typically this was a five or ten year period in which the lessee either commenced drilling operations or paid a delay rental.¹⁵ The delay rental clause was added to the habendum clause by an "or" or an "unless" clause allowing the lessee to "delay" the necessity of drilling.¹⁶ If the "or" form was used, the lessee was obligated to either drill or pay rent.¹⁷ Failure to do either resulted in forfeiture, a harsh consequence, or an action for damages.¹⁸ If a surrender clause was added, however, the lessee

10. See *Garza v. DeMantavoro*, 147 Tex. 525, 531-32, 217 S.W.2d 988, 992 (1949) See generally 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 3.04 (2d ed. 1973); 1A W. SUMMERS, *THE LAW OF OIL AND GAS* §§ 155, 165 (1962 & Supp. 1981).

11. See 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 3.05, at 3-33 to 34 (2d ed. 1973). Unlike other conveyances, however, the oil and gas lease is construed against the grantee. See *McMahon v. Christmann*, 157 Tex. 403, 409-10, 303 S.W.2d 341, 346 (1957).

12. See 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 3.05, at 3-33 to 34 (2d ed. 1973); see also 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 601 (1980); Moses, *The Habendum Clause In Oil And Gas Leases*, 7 S. TEX. L.J. 12, 12-17 (1963).

13. Moses, *The Habendum Clause In Oil And Gas Leases*, 7 S. TEX. L.J. 12, 17 (1963). The "no-term" lease is rarely used today. 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 601.3, at 7 (1980). In a Texas "no-term" lease there is no obligation to drill or produce. See *Fox v. Thoreson*, 398 S.W.2d 88, 90 (Tex. 1965).

14. H. WILLIAMS & C. MEYERS *OIL AND GAS TERMS* 570-71 (5th ed. 1981).

15. See *Fox v. Thoreson*, 398 S.W.2d 88, 91 (Tex. 1965). See generally 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* §§ 601-635 (1980).

16. V. KULP, *OIL AND GAS RIGHTS* § 10.28, at 597 (1954).

17. See *Hickerell v. Gregory*, 224 S.W. 691, 695, 698 (Tex. Civ. App.—Amarillo 1920, no writ).

18. *Id.* at 695, 698; see *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 514, 19 S.W.2d 27, 29 (1929).

could give up the lease by paying a nominal sum.¹⁹ Thus, he was relieved of any liability which might otherwise accrue thereafter.

The "unless" lease gave the lessee an option to drill or to pay rent during the primary term. If he chose not to drill and failed to pay rent, the lease terminated, but there was no further liability for breach.²⁰ Usually a "thereafter clause" was incorporated to keep the lease alive after expiration of the primary term so long as there was paying production or the lessee was engaged in drilling operations.²¹ If there was no paying production or drilling operation in effect at the end of the primary term, the lease terminated by its own terms.²²

Although a surrender clause is unnecessary in an "unless" lease, the clause has been used.²³ Its continued use, however, now specifies the precise circumstances under which the lessee is relieved of his obligations either wholly or in part.²⁴ If a lessee takes advantage of the surrender clause, he should notify the lessor of the surrender and record the surrender in the appropriate county office.²⁵ Failure to perform these obligations may result in damages to the lessor who is unable to lease to another party because the record shows his land still to be encumbered.²⁶ The

19. See, e.g., *Title Ins. & Trust Co. v. Amalgamated Oil Co.*, 218 P. 71, 73 (Cal. Dist. Ct. App. 1923) (ten dollar payment as liquidized damages for surrender); *Cohn v. Clark*, 150 P. 467, 469 (Okla. 1915) (lessee required to pay one dollar before surrendering land); *Jackson v. Pure Oil Operating Co.*, 217 S.W. 959, 960 (Tex. Civ. App.—Fort Worth 1919, no writ) (one dollar payment for option to surrender). Where no sum was specified as consideration for surrender, several early Kentucky cases held the clause voided the lease. See *Killebrew v. Murray*, 151 S.W. 662, 664-65 (Ky. 1912); *Monarch Oil, Gas & Coal v. Richardson*, 99 S.W. 668, 669 (Ky. 1907); *Berry v. Frisbie*, 86 S.W. 558, 560 (Ky. 1905). A later Kentucky court reviewed this point and held that all the lease provisions were supported by the initial consideration; therefore, the surrender clause did not void the lease. See *Union Oil & Gas Co. v. Wiedeman*, 277 S.W. 323, 330 (Ky. 1925). The Supreme Court of Oklahoma has reached the same result. See *Rick v. Doneghey*, 177 P. 86, 89 (Okla. 1918).

20. See V. KULP, *OIL AND GAS RIGHTS* § 10.46, at 636 (1954); 3 H. WILLIAMS & C. MEYERS *OIL AND GAS LAW* § 601.5, at 11 (1980).

21. See 3 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 601.4, at 8 (1980).

22. See *Duke v. Sun Oil Co.*, 320 F.2d 853, 858, *reh. denied*, 323 F.2d 518 (5th Cir. 1963).

23. See *Jones v. Bevier*, 59 S.W.2d 945, 946 (Tex. Civ. App.—Beaumont 1933, writ ref'd); *Carey v. Texas Pac. Coal & Oil Co.*, 237 S.W. 309, 311 (Tex. Civ. App.—Fort Worth 1921, writ ref'd). See generally 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 7.02 (2d ed. 1973).

24. See *Superior Oil Co. v. Dabney*, 147 Tex. 51, 55, 211 S.W.2d 563, 565 (1948). See generally H. WILLIAMS & C. MEYERS, *Oil And Gas Terms* 742-43 (5th ed. 1981).

25. See *Kidd v. Hoggett*, 331 S.W.2d 515, 517 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.); *Witherspoon v. Green*, 274 S.W. 170, 171 (Tex. Civ. App.—Dallas 1925, no writ). See generally 4 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 680.1, at 284 (1980).

26. See *Reaugh v. McCollum Exploration Co.*, 139 Tex. 485, 490, 163 S.W.2d 620, 623 (1942); *Humble Oil & Ref. Co. v. Luckel*, 171 S.W.2d 902, 907 (Tex. Civ. App.—Galveston

lessee; therefore, could be liable for slander of title.²⁷

Today most lease forms utilize a "thereafter clause" and an "unless" provision with a surrender clause.²⁸ The modern lease provides for a delay rental unless drilling is commenced within the primary term; the lease, moreover, continues thereafter, so long as oil or gas is produced.²⁹ A lessee's obligation to perform under the "thereafter" clause depends on the interpretation of produced or production.³⁰ In Texas, production means production in paying quantities,³¹ although all matters influencing the reasonably prudent operator are considered.³²

When the lessee chooses not to drill and not to take advantage of a surrender clause, his compliance with the delay rental clause is essential. Failure to act in accordance with the lease provision will terminate the lease.³³ A lease forfeiture results when a delay rental, though timely mailed, does not arrive at the depository bank when the payment is due.³⁴ Once the lessee makes payment in the prescribed manner, however, failure of the bank to forward the payment to the landowner cannot be

1943, writ ref'd). See generally 4 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 679, at 282 (1980).

27. See *Reaugh v. McCollum Exploration Co.*, 139 Tex. 485, 490, 163 S.W.2d 620, 623 (1942); *Stovall v. Texas Co.*, 262 S.W. 152, 153 (Tex. Civ. App.—Fort Worth), writ ref'd per curiam, 114 Tex. 582, 278 S.W. 1115 (1924). See generally Kuntz, *Liability For Clouding Title To Oil And Gas Interests*, SW. LEGAL FOUNDATION 8TH INST. ON OIL & GAS LAW & TAX. 331, 332-41 (1957). Damages are recoverable where title to property is deliberately clouded or disparaged. *Kidd v. Hoggett*, 331 S.W.2d 515, 518 (Tex. Civ. App.—San Antonio 1960, writ ref'd n.r.e.).

28. See 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 7.02, at 7-4 (2d ed. 1973); 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 601.5, at 10 (1980).

29. See 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 3.01 (2d ed. 1973).

30. See *id.* § 5.01; H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 580 (5th ed. 1981). A lessee's obligation to continue producing and developing may arise when oil or gas is either found in paying quantities, produced in paying quantities, found, or produced. H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 457 (5th ed. 1981).

31. See, e.g., *Gulf Oil Corp. v. Reid*, 161 Tex. 51, 54-55, 337 S.W.2d 267, 269 (1960) (paying quantities include not only amount of production but also ability to market production at a profit); *Clifton v. Koontz*, 160 Tex. 82, 89, 325 S.W.2d 684, 691 (1959) (paying quantities are quantities sufficient to yield return in excess of operating costs, even though drilling and equipment costs may never be repaid and undertaking as a whole may be loss); *Garcia v. King*, 139 Tex. 578, 583, 164 S.W.2d 509, 511 (1942) (paying quantity is profit above cost of production, whether or not original investment, including cost of drilling, is ever recovered).

32. See *Clifton v. Koontz*, 160 Tex. 82, 96, 325 S.W.2d 684, 695 (1959). See generally 2 E. KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 26.7, at 273-85 (1964).

33. *National Ref. Co. v. Wagner*, 169 F.2d 43, 45 (10th Cir. 1948) (applying Kansas law); *Vaughan v. Doss*, 245 S.W.2d 826, 828 (Ark. 1952); *Hill v. Stanolind Oil & Gas Co.*, 205 P.2d 643, 648 (Colo. 1949); *Morton v. Sutcliffe*, 266 P.2d 734, 736 (Kan. 1954); *Browning v. Weaver*, 146 P.2d 390, 393 (Kan. 1944).

34. *Appling v. Morrison*, 227 S.W. 708, 709 (Tex. Civ. App.—El Paso 1921, writ dismiss'd).

charged to the lessee since the bank acts as the landowner's agent.³⁵ Similarly, if the lessor accepts late or incorrect payment of the delay rental, the lessee's actions are ratified and the terminated lease is revived.³⁶ When the lessee has made the delay rental payment in accordance with the lease, or when the lessor accepts payment when tendered, the lessee's obligation to drill is suspended for the rental period.³⁷

B. Drilling Operations and Savings Clauses

If the lessee has begun drilling operations during the primary term, the drilling operations clause extends the lease beyond the primary term until completion of the well.³⁸ The meaning given "drilling operations" determines whether the lessee's obligations have been met. Actual drilling is unnecessary as a general rule,³⁹ however, and substantial preparation is sufficient.⁴⁰ In *Reid v. Gulf Oil Corp.*,⁴¹ for example, the court held that

35. See *Carroll v. Roger Lacy, Inc.*, 402 S.W.2d 307, 315 (Tex. Civ. App.—Tyler 1966, writ ref'd n.r.e.); *Gulf Prod. Co. v. Perry*, 51 S.W.2d 1107, 1110 (Tex. Civ. App.—Texarkana 1932, writ ref'd); *Hunter v. Gulf Prod. Co.*, 220 S.W. 163, 166 (Tex. Civ. App.—Fort Worth 1920, no writ). *But see Nelson Bunker Hunt Trust Estate v. Jarmon*, 345 S.W.2d 579, 581 (Tex. Civ. App.—San Antonio 1961, writ ref'd) (lessee's rental check not honored because non-sufficient funds; lease terminated).

36. *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219, 222 (Tex. 1977); *Mitchell v. Simms*, 63 S.W.2d 371, 373 (Tex. Comm'n App. 1933, holding approved); 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 606.3, at 104, § 606.6, at 183 (1980); see also *Buchanan v. Sinclair Oil & Gas Co.*, 218 F.2d 436, 440 (5th Cir. 1955) (lease did not terminate when lessor accepted \$643 instead of \$656.989 due). Technically, the lease is not revived; rather, the lessor is estopped to assert termination. See *Humble Oil & Ref. Co. v. Harrison*, 146 Tex. 216, 226, 205 S.W.2d 355, 361 (1947).

37. See *Humble Oil & Ref. Co. v. Harrison*, 199 S.W.2d 786, 789, rev'd on other grounds, 146 Tex. 216, 205 S.W.2d 355 (1947); *Stovall v. Texas Co.*, 262 S.W. 152, 154 (Tex. Civ. App.—Fort Worth), writ ref'd per curiam, 114 Tex. 582, 278 S.W. 1115 (1924); *Stine v. Producers' Oil Co.*, 203 S.W. 126, 129 (Tex. Civ. App.—Amarillo 1918, no writ).

38. See *Rogers v. Osburn*, 152 Tex. 540, 543, 261 S.W.2d 311, 313 (1953); 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 602.3 (1980). A drilling operations clause will keep the lease alive even though no production has been obtained at the end of the primary term. A typical drilling operations clause provides:

It is expressly agreed that if lessee shall commence drilling operations at any time, while this lease is in force, this lease shall remain in force and its terms shall continue so long as such operations are prosecuted.

H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 209-10 (5th ed. 1981). This clause is necessary in the majority of jurisdictions which hold the lease will terminate if there is no production at the end of the primary term. *Id.* at 209-10.

39. See *Terry v. Texas Co.*, 228 S.W. 1019, 1020 (Tex. Civ. App.—Fort Worth 1921, no writ); *McCallister v. Texas Co.*, 223 S.W. 859, 861-62 (Tex. Civ. App.—Fort Worth 1920, writ ref'd); 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 7.04, at 7-9 (2D ED. 1973).

40. See *Smith v. Gypsy Oil Co.*, 265 P. 647, 647 (Okla., 1928) (erecting derrick, moving machinery, and completing water well sufficient); *Cromwell v. Lewis*, 223 P. 671, 672 (Okla. 1923) (moving timbers sufficient as commencement); see also *Stoltz, Wagner & Brown v.*

“drilling operations” has a broad meaning and includes mechanical and physical activities required to bring about production in paying quantities.⁴² Without the drilling operations clause, the lessee’s failure to achieve production in paying quantities will cause the lease to terminate by operation of law at the end of the primary term.⁴³

A lessee’s obligation to drill or pay delay rentals is further conditioned by savings clauses providing for extension in the event of a dry hole, cessation of production, reworking, a force majeure, or the payment of shut-in royalty.⁴⁴ Typically, the dry hole clause keeps the lease in effect even though a dry hole has been drilled.⁴⁵ This clause, however, only maintains the lease until expiration of the primary term so that a drilling operations

Duncan, 417 F. Supp. 552, 563 (W.D. Okla. 1976); *Wilcox v. West*, 114 P.2d 39, 42 (Cal. Dist. Ct. App. 1941); *Leonard Cride Oil Co. v. Walton*, 197 N.W.2d 503, 511 (Mich. App. 1972). *But cf.* *Muth v. Aetna Oil Co.*, 188 F.2d 844, 849 (7th Cir. 1951) (moving rig incapable of drilling required well not commencement); *Goher v. Goff*, 42 N.W.2d 845, 846 (Mich. 1950) (where lessee failed to obtain well permit, act otherwise sufficient not commencement); *Dunbar v. Fuller*, 253 S.W.2d 684, 687 (Tex. Civ. App.—Austin 1952, writ ref’d) (attempt to procure equipment not commencement).

41. 323 S.W.2d 107, 115 (Tex. Civ. App.—Beaumont 1959), *aff’d*, 161 Tex. 51, 337 S.W.2d 167 (1960).

42. *See id.* at 115.

43. *See Baldwin v. Blue Stem Oil Co.*, 189 P. 920, 921 (Kan. 1920); *Browning v. Cavanaugh*, 300 S.W.2d 580, 582 (Ky. 1957); *Stanolind Oil & Gas v. Barnhill*, 107 S.W.2d 746, 749 (Tex. Civ. App.—San Antonio 1937, writ ref’d). In *Fox v. Thoreson*, 398 S.W.2d 88, 92 (Tex. 1965), however, the Texas Supreme Court held that lack of a pipeline to transfer available production did not result in failure of production when the well was begun and completed within the prescribed time. *See id.* at 92.

44. *See* 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 611, at 204 (1980). For other treatment of these clauses, see Berman, *Dry Hole, Drilling Operations, And 30 Day-60 Day Drilling Operations Clauses*, 38 TEXAS L. REV. 270 (1960); Hazlett, *Effects Of Temporary Cessation Of Production On Leases And Term Royalties*, SW. LEGAL FOUNDATION 10TH INST. ON OIL & GAS LAW & TAX. 201 (1959); Maxwell, *Termination Of Oil And Gas Leases—The Failure Of Drafting Solutions*, SW. LEGAL FOUNDATION 15TH INST. ON OIL & GAS LAW & TAX. 181 (1964); Sperling, *Habendum Clause As Affected By Shut-In, Commence Drilling, Continue Drilling And Other Clauses*, SW. LEGAL FOUNDATION 9TH INST. ON OIL & GAS LAW & TAX. 1 (1958).

45. *See Superior Oil Co. v. Stanolind Oil & Gas Co.*, 150 Tex. 317, 319, 240 S.W.2d 281, 283 (1951). For example, in the *Superior Oil* case, the clause read:

Should the first well drilled on the above described land be a dry hole, then and in that event, if a second well is not commenced on said land within twelve months from the expiration of the last rental period for which rental has been paid, this lease shall terminate as to both parties, unless the lessee on or before the expiration of the twelve months shall resume the payment of rentals in the same amount and in the same manner as hereinbefore provided.

Id. at 319, 240 S.W.2d at 283; *see also* 1 E. BROWN, THE LAW OF OIL AND GAS LEASES § 9.01, at 9-1 (2d ed. 1973); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 7 TEXAS L. REV. 539, 593 (1929).

clause is necessary to further extend the lease.⁴⁶ Absent other lease provisions, when a dry hole has resulted, a lessee's drilling obligation will not have been met since the lease agreement requires actual production.⁴⁷ If the lease does not specify when (or if) delay rentals are to be paid following a dry hole, litigation will likely result.⁴⁸ In Texas, the inclusion of a dry hole clause puts the lessee on notice that a dry hole might change the date for payment of rentals.⁴⁹ Thus, in *Superior Oil v. Stanolind*,⁵⁰ the lease terminated because the defendant lessee made timely payment of delay rentals under the original delay rental provision rather than the "dry hole" clause.⁵¹

The dry hole clause may also be coupled with a cessation of production clause which further conditions the lessee's drilling obligations.⁵² Essen-

46. The drilling operations clause keeps the lease alive if drilling has commenced by the end of the primary term even though there has been no production. H. WILLIAMS & C. MEYERS, *OIL AND GAS TERMS* 209-10 (5th ed. 1981). An example of a 30 day-60 day drilling operations clause reads:

If prior to discovery of oil or gas on said land Lessee should drill a dry hole or holes thereon, or if after discovery of oil or gas the production thereof should cease from any cause, this lease shall not terminate if Lessee commences additional drilling or re-working operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date next ensuing after the expiration of three months from date of completion of dry hole or cessation of production. If at the expiration of the primary term oil, gas or other mineral is not being produced on said land but Lessee is then engaged in drilling or re-working operations thereon, the lease shall remain in force so long as operations are prosecuted with no cessation of more than thirty (30) consecutive days, and if they result in the production of oil, gas or other minerals so long thereafter as oil, gas or other mineral is produced from said land.

Stanolind Oil & Gas Co. v. Newman Bros. Drilling Co., 157 Tex. 489, 491, 305 S.W.2d 169, 170 (1957).

47. See 1 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 9.03 (1981). Texas does not recognize an implied agreement allowing delayed completion past the date of expiration. See *Heard v. Nichols*, 293 S.W. 805, 807 (Tex. Comm'n App. 1927, judgm't adopted); *Morrison v. Swain*, 220 S.W.2d 493, 494 (Tex. Civ. App.—Eastland 1949, writ ref'd n.r.e.). *Contra McClain v. Harper*, 244 P.2d 301, 303 (Okla. 1952); *Simons v. McDaniel*, 7 P.2d 419, 420-21 (Okla. 1932).

48. See, e.g., *Wilson v. Wakefield*, 72 P.2d 978 (Kan. 1937) (no delay rental due until third year of lease began when dry hole drilled during first year); *Schell v. Black*, 321 S.W.2d 373 (Tex. Civ. App.—Amarillo 1959, no writ) (lease terminated when no rental paid on or before anniversary after dry hole drilled in first year); *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 230 S.W.2d 346, 349 (Tex. Civ. App.—Eastland 1950) (lease terminated when rental paid two days after anniversary date fixed in rental clause), *aff'd*, 150 Tex. 317, 240 S.W.2d 281 (1951).

49. *Superior Oil Co. v. Stanolind Oil & Gas Co.*, 230 S.W.2d 346, 350 (Tex. Civ. App.—Eastland 1950), *aff'd*, 150 Tex. 317, 240 S.W.2d 281 (1951).

50. 150 Tex. 317, 240 S.W.2d 281 (1951).

51. See *id.* at 323, 240 S.W.2d at 285.

52. Under a typical Texas lease form the clause provides:

tially, the clause allows for a "grace" period in which there is no production.⁵³ Even without a specific clause, however, the lessee may be allowed a reasonable time in which to resume production when cessation is due to mechanical problems or well stoppage.⁵⁴ Nonetheless, when temporary cessation occurs in the secondary term, the lease automatically terminates if drilling or reworking operations are not begun prior to the expiration of the period specified in the lease.⁵⁵

Reworking a hole previously drilled may be sufficient to keep the lease alive during the primary term under the terms of the lease.⁵⁶ Defining "reworking" is, of course, important since the continuation of a lease may depend on whether the activity qualifies in a particular jurisdiction. For example, cleaning a silted up hole is a typical reworking operation.⁵⁷ Although some jurisdictions do not limit reworking operation to activities of a mechanical or drilling nature,⁵⁸ in Texas reworking operations means "actual work as operations which have theretofore been done, being done over, and being done in a good faith endeavor to cause a well to produce oil and gas or oil or gas in paying quantities as an ordinary competent operator would do in the same or similar circumstances."⁵⁹ Thus, in *Rog-*

If after the discovery of oil or gas the production thereof should cease from any cause, this lease shall not be terminated thereby if lessee commences drilling or reworking operations within sixty (60) days thereafter or (if it be within the primary term) commences or resumes the payment or tender of rentals on or before the rental paying date (if any) next ensuing after thirty (30) days following the cessation of production.

3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 615, at 260 (1980).

53. See *Clifton v. Koontz*, 160 Tex. 82, 88, 325 S.W.2d 684, 690 (1959); *Rogers v. Osborn*, 152 Tex. 540, 545, 261 S.W.2d 311, 314 (1953).

54. See *Amoco Prod. Co. v. Braslau*, 561 S.W.2d 805, 809 (Tex. 1978); *Watson v. Rochmill*, 137 Tex. 565, 567, 155 S.W.2d 783, 784 (1941); *Scarborough v. New Dominion Oil & Gas Co.*, 276 S.W. 331, 335 (Tex. Civ. App.—El Paso 1925, writ *dism'd w.o.j.*).

55. See *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 305 (5th Cir. 1955); *Samano v. Sun Oil Co.*, 621 S.W.2d 580, 583 (Tex. 1981); *Woodson Oil Co. v. Pruett*, 281 S.W.2d 159, 164 (Tex. Civ. App.—San Antonio 1955, writ *ref'd n.r.e.*); *Francis v. Pritchett*, 278 S.W.2d 288, 290 (Tex. Civ. App.—El Paso 1955, writ *ref'd*); *Adams v. Cannon*, 253 S.W.2d 948, 952 (Tex. Civ. App.—San Antonio 1952, writ *ref'd*).

56. H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 646 (5th ed. 1981). In *Rogers v. Osborn*, 152 Tex. 540, 261 S.W.2d 311 (1953), the Texas Supreme Court declined to pass on a trial court's definition of drilling and reworking as "actual work or operations which have heretofore been done, being done over, and being done in good faith . . ." *Id.* at 544, 261 S.W.2d at 313-14; see also *Johnson v. Houston Oil Co.*, 86 So.2d 97, 99 (La. 1956).

57. See *Rogers v. Osborn*, 152 Tex. 540, 549, 261 S.W.2d 311, 314 (1953); *Johnson v. Houston Oil Co.*, 86 So.2d 97, 99 (La. 1956); H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 646 (5th ed. 1981).

58. See *Harry Bourg Corp. v. Union Producing Co.*, 197 So. 2d 172, 177 (La. App.), writ *ref'd*, 199 So.2d 917 (La. 1967).

59. *Rogers v. Osborn*, 152 Tex. 540, 549, 261 S.W.2d 311, 314 (1953).

ers v. Osborn,⁶⁰ the court stated it could not hold as a matter of law that periodic flowing was not a reworking operation.⁶¹

If the lessee is prevented from meeting his lease obligations due to external forces beyond his control, Texas law will terminate the lease without an express clause to the contrary.⁶² A force majeure clause protects the lessee against automatic termination when the failure of production is due to causes specified in the lease.⁶³ In Texas, however, a lease terminates when performance in view of the force majeure is not inherently impossible.⁶⁴ Because the force majeure clause is strictly construed, it should be precise in specifying the causes of termination and the extension allowed in the event of delay or impossibility.⁶⁵ In *Gulf Oil Corp. v. Southland Royalty Co.*,⁶⁶ for example, Gulf argued that delays in production caused by Railroad Commission orders should not be included in the fifty year term of the lease because the lease included a force majeure clause.⁶⁷ The supreme court held that the lessee had not proved that all of his operations had been interrupted;⁶⁸ consequently, the force majeure clause did not control the habendum in this instance.⁶⁹ Although the force majeure clause excused the lessee for delays caused by other specified reasons, the fifty year term was plain, certain, and controlling.⁷⁰

Construing a force majeure clause more favorably for the lessee, the

60. 152 Tex. 540, 261 S.W.2d 311 (1953).

61. *See id.* at 544, 261 S.W.2d at 314. In *Rogers* the lease was terminated because the operations intended to extend the lease had been commenced after the expiration of the primary term. The court held there must be production from the very operations engaged in at the end of the primary term. *See id.* at 546, 261 S.W.2d at 315.

62. *See* *Vernon v. Union Oil Co.*, 270 F.2d 441, 443 (5th Cir.) (under Texas law unavoidable delays, acts of God, accidents, unfavorable economic conditions, financial difficulties of lessee are no excuse for lessee's failure to comply with lease provisions), *reh. denied*, 273 F.2d 178 (5th Cir. 1959). *Compare* *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 303 (5th Cir. 1955) (lessee must not be able to overcome bar in any manner if excuse is to be effective) with *Hoff v. Girdler Corp.*, 88 P.2d 100, 103 (Colo. 1939) (lease effective without production pending government prohibition of foreign sale of helium).

63. H. WILLIAMS & C. MEYERS, *OIL AND GAS TERMS* 283-84 (5th ed. 1981). *See generally* Merrill, *Lease Clauses Affecting Implied Covenants*, SW. LEGAL FOUNDATION 2D INST. ON OIL & GAS LAW & TAX. 144, 189-93 (1951); Sheinberg, *The Force Majeure Clause: A Tool For Mitigating The Effect Of The Determinable Fee Concept Of The Modern Oil And Gas Lease*, 6 U.C.L.A. L. REV. 269 (1959); Terry, *Miscellaneous Clauses In Oil And Gas Leases*, SW. LEGAL FOUNDATION 2D INST. ON OIL & GAS LAW & TAX. 264, 264-67 (1951).

64. *See* *Haby v. Stanolind Oil & Gas Co.*, 228 F.2d 298, 303 (5th Cir. 1955).

65. *See* *Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547, 550 (Tex. 1973).

66. 496 S.W.2d 547 (Tex. 1973).

67. *Id.* at 540. An express provision in the habendum clause, however, stated "that this lease shall not remain in force longer than fifty (50) years from this date." *Id.* at 540.

68. *Id.* at 550.

69. *Id.* at 550.

70. *Id.* at 552.

Fort Worth Court of Civil Appeals in *Gilbert v. Smedley*,⁷¹ held that lack of production by the lessee's receiver in bankruptcy was a delay within the force majeure clause.⁷² When an assignee of the lessee did not perform under the lease because he preferred to drill under the other leases, however, the delay was not within the lease clause providing for extension.⁷³ The paradox of a force majeure is evident. The force majeure clause, by definition, relates to events beyond the lessee's control, which presumably are unforeseeable.⁷⁴ The force majeure clause, however, will not trigger an extension unless the force majeure is an event specified in the lease clause. The lessee, therefore, must foresee the unforeseeable.⁷⁵ Thus, the clause must be broadly inclusive to provide for any conceivable contingency likely to disrupt development.

After completing a well, the lessee may nonetheless be unable to meet his obligations to the lessor because there is no means to market production.⁷⁶ When this situation occurs, the shut-in royalty clause may allow the lessee to keep the lease alive by paying a stipulated sum of money,

71. 612 S.W.2d 270, 274 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.).

72. See *id.* at 274. The force majeure clause in *Smedley* read as follows:

If any operation permitted or required hereunder, or the performance by Lessee of any covenant, agreement or requirement hereof is delayed or interrupted directly or indirectly by any past or future acts, orders, regulations or requirements of the Government of the United States or any state or other governmental body, or any agency, officer, representative or authority of any of them, or because of delay or inability to get materials, labor, equipment or supplies, or on account of any other similar or dissimilar cause *beyond the control of Lessee*, the period of such delay or interruption shall not be counted against the Lessee, and the primary term of this lease shall automatically be extended after the expiration of the primary term set forth in Section 2 above, so long as the cause or causes for such delays or interruptions continue and for a period of six (6) months thereafter; and such extended term shall constitute and shall be considered for the purposes of this lease as a part of the primary hereof. The provisions of Section 4 hereof, relating to the payment of delay rentals shall in all things be applicable to the primary term as extended hereby just as if such extended term were a part of the original primary term fixed in Section 2 hereof. The Lessee shall not be liable to Lessor in damages for failure to perform any operation permitted or required hereunder or to comply with any covenant, agreement or requirement hereof during the time Lessee is relieved from the obligations to comply with such covenants, or agreements or requirements.

Id. at 271-72 (emphasis by the court).

73. *Id.* at 274.

74. *Id.* at 271-72; see H. WILLIAMS & C. MEYERS, OIL AND GAS TERMS 283-84 (5th ed. 1981).

75. See Walker, *Defects And Ambiguities In Oil And Gas Leases*, 28 TEXAS L. REV. 895, 899 (1950).

76. See 3 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 631, at 394 (1980). *But see* Gard v. Kaiser, 582 P.2d 1311, 1314 (Okla. 1978) (payment of shut-in royalty not required to keep lease in secondary term where lessee used diligent efforts to market production).

although there is no market for production.⁷⁷ The shut-in royalty payment serves a purpose during the secondary term similar to that of the delay rental payment in the primary term.⁷⁸ Shut-in royalty clauses usually apply only to gas wells, and since the meaning of "gas" may depend on the context in which the term is used, the clause should define "gas" explicitly to protect the interests of the lessee.⁷⁹ To comply with the terms of the shut-in royalty clause, the lessee must drill a well capable of producing gas in paying quantities.⁸⁰ Unless the lease contains a shut-in clause, the lessee's obligation to produce in paying quantities from a capable well will not be relieved, notwithstanding the lack of pipeline facilities.⁸¹

III. IMPLIED COVENANTS

The general rule that an express covenant restricts or negates an implied covenant⁸² explains why the oil and gas lease has evolved into a complicated and lengthy instrument relative to its original scope.⁸³ Express provisions are included largely to limit the lessee's duties, obligations, and liabilities;⁸⁴ implied covenants are necessary to protect the unsophisticated lessor who may be unfamiliar with his own rights, and thus hesitant to assert them.⁸⁵ The lessee, therefore, is bound by an over-all obligation to use the leased premises for exploration, development, and production of oil and gas.⁸⁶ Failure to meet this obligation may result in a termination of the lease.⁸⁷ A breach of an implied covenant, however, gen-

77. See *Giles v. McKanna*, 200 S.W.2d 709, 713 (Tex. Civ. App.—Austin 1947, writ ref'd n.r.e.); *Stanolind Oil & Gas Co. v. Barnhill*, 107 S.W.2d 746, 749 (Tex. Civ. App.—Amarillo 1937, writ ref'd).

78. See generally Walker, *Clauses In Oil And Gas Leases Providing For The Payment Of An Annual Sum As Royalty On A Non-Producing Gas Well*, 24 TEXAS L. REV. 478 (1946).

79. See generally Hardwicke, *Problems Arising Out Of Royalty Clauses In Oil And Gas Leases In Texas*, 29 TEXAS L. REV. 790 (1951).

80. See *Kidd v. Hoggett*, 331 S.W.2d 515, 519 (Tex. Civ. App.—San Antonio 1959, writ ref'd n.r.e.).

81. See *Midwest Oil Corp. v. Lund*, 376 S.W.2d 18, 20 (Tex. Civ. App.—Corpus Christi 1964, writ ref'd n.r.e.).

82. See Cage, *The Modern Oil And Gas Lease—A Facelift For Old 88*, SW. LEGAL FOUNDATION 31ST INST. ON OIL & GAS LAW & TAX. 177, 206 (1980).

83. *Id.* at 196.

84. *Id.* at 196. "[I]f there are blank areas just below the middle of the page, the lease form does not contain the safeguards lessees need." *Id.* at 196.

85. See Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 401 (1933).

86. *Texas Co. v. Davis*, 113 Tex. 321, 330, 254 S.W. 304, 306 (1923); *Chapman v. Ellis*, 254 S.W. 615, 618 (Tex. Civ. App.—Beaumont 1923, writ dism'd w.o.j.).

87. See *Texas Co. v. Davis*, 113 Tex. 321, 330, 254 S.W. 304, 306 (1923); see also Mun-

erally gives rise to a cause of action for damages, not for cancellation.⁸⁸

The performance required of the lessee is that of a reasonably prudent operator, one attempting to secure production in paying quantities.⁸⁹ The facts and circumstances in a given situation determine conformity with the standard.⁹⁰ Factors which have been considered in Texas include whether the lease as a whole was reasonably developed and whether there was sufficient evidence to show that additional development would result in production in paying quantities.⁹¹ Since the purpose of the oil and gas lease is the financial gain of both the lessee and lessor,⁹² however, the reasonably prudent operator is not expected to meet his implied obligations when there is no reasonable expectation of profit to himself.⁹³

The number of implied covenants applicable to an oil and gas lease varies from jurisdiction to jurisdiction.⁹⁴ In *Amoco Production Co. v. Al-*

sey v. Marnet, 113 Tex. 212, 219, 254 S.W. 311, 314 (1923); *Robinson v. Jacobs*, 113 Tex. 231, 238, 254 S.W. 309, 311 (1923); *Stephens County v. Mid-Kansas Oil Co.*, 113 Tex. 160, 173, 254 S.W. 290, 295 (1923).

88. *Guleke v. Humble Oil & Ref. Co.*, 126 S.W.2d 38, 40 (Tex. Civ. App.—Amarillo 1939, no writ); see *Phillips Petroleum Co. v. Rudd*, 226 S.W.2d 464, 466 (Tex. Civ. App.—Texarkana 1949, no writ) (implied obligations neither conditions subsequent nor limitations); *Freeman v. Magnolia Petroleum Co.*, 165 S.W.2d 111, 114 (Tex. Civ. App.—Amarillo) (breach of covenant subjects lessee's interest to suit for damages), *rev'd on other grounds*, 141 Tex. 274, 171 S.W.2d 339 (1942).

89. See *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 811-14 (8th Cir. 1905); *Clifton v. Koontz*, 160 Tex. 82, 96, 325 S.W.2d 684, 695 (1959).

90. *Brewster v. Lanyon Zinc Co.*, 140 F. 801, 811-14 (8th Cir. 1905).

91. See *Senter v. Shanafelt*, 233 S.W.2d 202, 206 (Tex. Civ. App.—Fort Worth 1950, no writ). For additional considerations, see generally 2 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 16.02, at 16-4 (2d ed. 1973).

92. See *Canadian River Gas Co. v. Bivins*, 137 Tex. 347, 350, 153 S.W.2d 432, 434 (1941); *Cheek v. Metzger*, 116 Tex. 356, 360, 291 S.W. 860, 862 (1927); *Stephens County v. Mid-Kansas Oil & Gas Co.*, 113 Tex. 160, 163, 254 S.W. 290, 291 (1923).

93. *Clifton v. Koontz*, 160 Tex. 82, 96, 325 S.W.2d 684, 695 (1959).

94. Merrill lists four covenants: "the implied covenant to drill an exploratory well; the implied covenant to drill additional wells; the implied covenant for diligent and proper operation of the wells and for marketing the product, if oil or gas is discovered in paying quantities; and the implied covenant to protect the leased premises against drainage by wells on adjoining land." M. MERRILL, *COVENANTS IMPLIED IN OIL AND GAS LEASES* 23 (2d ed. 1940). Walker also lists four: "(1) the covenant to develop the premises with reasonable diligence, (2) the covenant to protect the premises against drainage by using reasonable diligence in drilling offset wells, (3) the covenant to use reasonable diligence in producing the oil and in marketing or utilizing the gas, and (4) the covenant to use reasonable care in conducting all operations affecting the lessor's royalty interest." Walker, *The Nature Of The Property Interests Created By The Oil And Gas Lease In Texas*, 11 TEXAS L. REV. 399, 401 (1932). Summers lists five: "(1) A covenant to drill wells within a reasonable time, testing the land for oil and gas; (2) a covenant to drill test wells within a reasonable time after notice, even though the lease provides for delay by the payment of delay rentals; (3) a covenant, if oil or gas be found in paying quantities, to proceed with reasonable diligence in

exander,⁹⁵ the Texas Supreme Court listed three broad implied covenants: development of the premises, protection of the leasehold, and management and administration of the lease.⁹⁶ Within these categories other implied covenants exist,⁹⁷ and it is not particularly important where the covenants are placed within these broad categories.⁹⁸ For example, a lessee's duty to seek favorable administrative action may be part of either the implied covenant of protection or the implied covenant of management.⁹⁹ For the purposes of the present discussion, the implied covenants within the three broad categories will be limited to five: reasonable development, further exploration, protection against drainage, achieving maximum recovery, and obtaining favorable administrative rulings.

A. *Development of Premises*

If the lease makes no express provision for further development once production is achieved, an implied covenant for continued development using reasonable diligence arises.¹⁰⁰ This duty, however, may be qualified by several considerations, including an express covenant providing for the extent of development, the profitability of further development in light of the reasonably prudent operator standard, and, in general, the facts and circumstances of the particular case which determine reasonable

drilling a sufficient number of wells to reasonably develop the premises; (4) a covenant to protect the land from drainage through wells on adjoining lands by drilling offset wells; and (5) a covenant to market the product of producing wells." 2 W. SUMMERS, OIL AND GAS § 395, at 535-36 (1959). Whether these implied covenants arise by reason of the facts surrounding them or by operation of law has been a point of controversy. 2 E. BROWN, THE LAW OF OIL AND GAS LEASES § 16.01, at 16-3 (2d ed. 1973). If the intent of the parties is determinative, the covenants are implied in fact. *Freeport Sulphur Co. v. American Sulphur Royalty Co.*, 117 Tex. 439, 449, 6 S.W.2d 1039, 1041 (1928); see Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 402 (1933). When the promotion of fair dealing is desired based on a particular relation between the parties, the covenants are implied in law. See *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 517, 19 S.W.2d 27, 29 (1929); 1 H. TIFFANY, REAL PROPERTY § 49, at 125 (2d ed. 1970); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 402 (1933). The issue of whether implied covenants existed in law or in fact with regard to the oil and gas lease was raised by a Texas court in *Texas Pac. Coal & Oil Co. v. Stuard*, 7 S.W.2d 878, 882 (Tex. Civ. App.—Eastland 1928, writ ref'd), but it was not specifically answered. See Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 404-05 (1933).

95. 622 S.W.2d 563 (Tex. 1981).

96. See *id.* at 568.

97. *Id.* at 568.

98. *Id.* at 568-70.

99. *Id.* at 570.

100. See 2 E. BROWN, THE LAW OF OIL AND GAS LEASES § 16.02, at 16-15 to 16-16 (2d ed. 1973).

diligence.¹⁰¹

The Texas Supreme Court recognized the first of these qualifications in *Simms Oil Co. v. Flewellen*,¹⁰² holding that an express obligation regarding development precludes any implied covenant to that effect.¹⁰³ Even when the lessor may realize a benefit, the lessee is not obligated to carry on operations at a loss.¹⁰⁴ Although this qualification receives less emphasis than other obligations, it is well established and, consequently, widely applied.¹⁰⁵ A different, and broader, expression of the qualification is that there is no obligation to drill additional wells when there is a small probability of making a profit on further development operations.¹⁰⁶

In Texas, whether the lessee is under an implied obligation to further explore the leasehold once production has been achieved is uncertain.¹⁰⁷ Unlike the covenant of reasonable development, the covenant of further exploration is applied to unproven territory and, consequently, involves a greater risk to the lessee than the covenant reasonably to develop.¹⁰⁸ In the landmark case of *Clifton v. Koontz*,¹⁰⁹ the Texas Supreme Court held that there was no implied covenant to explore distinguishable from the

101. See *Brewster v. Lanyon Zinc Co.*, 140 F. 801 (8th Cir. 1905).

102. 138 Tex. 63, 156 S.W.2d 521 (1942).

103. *Id.* at 66, 156 S.W.2d at 523; *accord Warren v. Amerada Petroleum Corp.*, 211 S.W.2d 314, 317 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.) (development made discretionary with lessee by terms of lease contract); *Magnolia Petroleum Co. v. Page*, 141 S.W.2d 691, 693 (Tex. Civ. App.—San Antonio 1940, writ ref'd) ("when expressed covenants appear in a lease, implied covenants disappear"). When the productive capacity of the property is unknown or uncertain, however, it may be impractical to provide an express schedule for development. *Lowe, Representing The Landowner In Oil And Gas Leasing Transactions*, 31 OKLA. L. REV. 257, 283 (1978).

104. See 2 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 16.02, at 16-21 (2d ed. 1973).

105. See, e.g., *Chenoweth v. Pan Am. Petroleum Corp.*, 315 F.2d 63 (10th Cir. 1963) (construing Oklahoma law); *United Central Oil Corp. v. Helm*, 11 F.2d 760 (5th Cir. 1926); *Goodwin v. Standard Oil Co.*, 290 F. 92 (8th Cir. 1923).

106. See *Robinson v. Miracle*, 293 P. 211, 213 (Okla. 1930); *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 429, 6 S.W.2d 1031, 1036 (1928).

107. See Meyers, *The Implied Covenant of Further Exploration*, 34 TEXAS L. REV. 553, 554 (1956); Pickerill, *Is There A New Implied Covenant Of Explorvelopment?*, SW. LEGAL FOUNDATION 20TH INST. ON OIL & GAS LAW & TAX. 245, 246 (1980). Although there is a question as to whether the lessee has an implied obligation to explore further apart from his obligation to develop, he does have an implied right to explore should he elect to do so. See *Yates v. Gulf Oil Corp.*, 182 F.2d 286, 289 (5th Cir. 1950); *Labbe v. Magnolia Petroleum Co.*, 350 S.W.2d 873, 877 (Tex. Civ. App.—San Antonio 1961, writ ref'd n.r.e.).

108. See 2 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 16.05, at 16-128 (2d ed. 1973). According to Brown, the covenant is more properly denoted "The Implied Covenant Requiring Lessees of Producing Oil Leases to Explore Deeper Formations Without Any Reasonable Expectation of Profit Therefrom." *Id.* § 16.05, at 16-126.

109. 160 Tex. 82, 97, 325 S.W.2d 684, 696 (1959).

covenant to develop,¹¹⁰ and that the lessee's duty is to be evaluated by a general standard of reasonable diligence.¹¹¹ In *Koontz* the lessor attempted to cancel the lease on the theory that production in paying quantities had ceased.¹¹² In the alternative, he contended the lessee had breached his implied duty to develop and explore.¹¹³ The court rejected both theories, holding that under the facts and lease terms there was no duty to further explore.¹¹⁴ The court's ruling, however, was limited to the facts of the case.¹¹⁵

Only a few months after the *Koontz* decision, the Fifth Circuit apparently recognized an implied covenant of further exploration and development.¹¹⁶ In *Sinclair Oil & Gas Co. v. Masterson*,¹¹⁷ the lessors sought to enforce covenants for adequate exploration and development of thirty-one separate leases covering approximately 90,000 acres.¹¹⁸ The oil rights and the gas rights had been partitioned some years earlier.¹¹⁹ Although the owners of the gas rights had adequately explored and developed the property, no oil wells were drilled on the Mastersons' land following the partition.¹²⁰ Sinclair, the oil lessee, contended it was not obligated to explore for oil, arguing that the covenants of exploration and development were not divisible between itself and the owner of the gas rights.¹²¹ The court, however, held that the exploration for gas did not inure to the benefit of Sinclair since expert testimony indicated that oil on the Masterson land existed in deeper strata which had not been adequately explored.¹²² Exploration of one part of the lease, therefore, did not discharge an obligation to explore other parts, even when production ensued in the former.¹²³

110. *Id.* at 97, 325 S.W.2d at 696.

111. *Id.* at 96, 325 S.W.2d at 695.

112. *Id.* at 84, 325 S.W.2d at 687.

113. *Id.* at 84, 325 S.W.2d at 687.

114. *Id.* at 98, 325 S.W.2d at 697.

115. *Id.* at 97, 325 S.W.2d at 696.

116. See *Sinclair Oil & Gas Co. v. Masterson*, 271 F.2d 310, 320-21 (5th Cir. 1959), *cert. denied*, 362 U.S. 952 (1960).

117. 271 F.2d 310 (5th Cir. 1959), *cert. denied*, 362 U.S. 952 (1960).

118. *Id.* at 312.

119. *Id.* at 313.

120. *Id.* at 313.

121. *Id.* at 312.

122. *Id.* at 321.

123. *Id.* at 321. The court distinguished *Clifton v. Koontz*, noting the two cases were factually dissimilar. See *id.* at 321. In *Felmont Oil Corp. v. Pan Am. Petroleum Corp.*, 334 S.W.2d 449 (Tex. Civ. App.-El Paso 1960, writ *ref'd n.r.e.*), the lessor had attempted to subdivide the obligation to explore by separating the oil rights among several leases. The court declined to follow *Masterson*, holding that the obligation was unified, and the lessor could not impose a greater burden on the lessee than he had originally assumed. *Id.* at 437.

Since neither profitability nor the prudent operator standard are clearly applicable to the covenant to explore, determination of its breach, if it exists, should be based on several factors.¹²⁴ Specifically, these factors should include the amount of time since lessee drilled his last well, the number of acres in the leasehold, the density of wells in one area as opposed to another, the feasibility of exploration, and the readiness of another lessee to explore the leasehold.¹²⁵

B. Protection of Leasehold

The law of capture entitles an owner to appropriate as much oil and gas as he can from his property whether or not they were originally under his land.¹²⁶ Since an adjacent mineral owner has the same right of appropriation, he may cause the depletion of his neighbor's oil or gas unless the latter drills additional wells to offset the drainage. Therefore, to protect the interests of both parties, unless there is an express provision to the contrary, the lessee is under an implied obligation to prevent drainage or depletion of his lessor's oil and gas at any time during the life of the lease.¹²⁷ When the covenant is implied, it is immaterial whether there has been production¹²⁸ or delay rentals have been paid.¹²⁹

The reasonably prudent operator standard is applied in determining if

124. See Ver Schure, *Another Look At The Implied Covenants*, ROCKY MT. 26TH ANN. MINERAL LAW INST. 887, 905-06 (1980).

125. *Id.* at 905-906.

126. See 2 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 16.02, at 16-89 (2d ed. 1973); H. WILLIAMS & C. MEYERS, *OIL AND GAS TERMS* 666-668 (5th ed. 1981).

127. *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 425, 6 S.W.2d 1031, 1034-35 (1928) (covenant applies if drainage exists at time lease executed); *Magnolia Petroleum Co. v. Page*, 141 S.W.2d 691, 693 (Tex. Civ. App.—San Antonio 1940, writ ref'd) (implied covenant to prevent drainage when lease is silent); *Guffey Petroleum Co. v. Jeff Chaison Townsite Co.*, 107 S.W. 609, 610, (Tex. Civ. App. 1908, no writ) (covenant applies if drainage subsequent to execution of lease); see also *Humphreys Oil Co. v. Tatum*, 26 F.2d 882, 884 (5th Cir. 1928); *Sinclair Oil & Gas Co. v. Bryan*, 291 S.W. 692, 693 (Tex. Civ. App.—Galveston 1927, writ ref'd); *Humble Oil & Ref. Co. v. Strauss*, 243 S.W. 528, 537 (Tex. Civ. App.—Amarillo 1928, no writ); Ver Schure, *Another Look At Implied Covenants*, ROCKY MT. 26TH ANN. MINERAL LAW INST. 887, 888-93 (1980); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 433 (1933).

128. See *Stanolind Oil & Gas Co. v. Christian*, 83 S.W.2d 408, 409 (Tex. Civ. App.—Texarkana 1935, writ ref'd) (lease specifically relieving lessee of implied covenant to develop does not excuse breach of obligation to protect from drainage).

129. *Texas Co. v. Ramsower*, 7 S.W.2d 872, 875 (Tex. Comm'n App. 1928, judgment adopted) (obligation to drill offset well not relieved by payment of delay rental absent express provision; no waiver unless clearly intended). In other jurisdictions covenants against drainage are waived if rentals are accepted. See *Orr v. Comar Oil Co.*, 46 F.2d 59, 63 (10th Cir. 1930); *Clear Creek Oil & Gas Co., v. Brunk*, 255 S.W. 7, 8 (Ark. 1923); *Stanley v. United Fuel Gas Co.*, 78 S.E. 344, 345 (W.Va. 1916).

the lessee's obligations have been met.¹³⁰ The lessee, however, is not required to drill offset wells to the extent that he will not realize a profit.¹³¹ Usually the lessor has the burden of proof to show there would be a profit from the offset well¹³² and that the amount of damages sought is equal to royalty which the lessor would have received had an offset well been drilled.¹³³

Problems, however, arise when the lessee is a common lessee of several tracts in the same field and the lessee is draining one lessor's property from adjacent leases.¹³⁴ In this situation, the lessee has no incentive to offset the drainage since he can recover the same oil from his existing wells without incurring the cost of an additional well.¹³⁵ Accordingly, some jurisdictions imply a separate covenant by the common lessee to refrain from depleting his lessor's minerals by the lessee's affirmative acts on adjacent lands.¹³⁶ The depletion covenant, as applied in California and Mississippi, dispenses with the prudent operator standard, imposing an

130. See *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 425, 6 S.W.2d 1031, 1035-1036 (1928); *Texas Co. v. Ramsover*, 7 S.W.2d 872 874 (Tex. Comm'n App. 1928, judgment adopted); *Chapman v. Sohio Petroleum Co.*, 297 S.W.2d 885, 887 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.).

131. *Tide Water Assoc. Oil Co. v. Stott*, 159 F.2d 174, 177 (5th Cir. 1942) (implied covenant only if off-set well will produce profit to lessee), *cert. denied*, 331 U.S. 817 (1943); *Chapman v. Sohio Petroleum Co.*, 297 S.W.2d 885, 887 (Tex. Civ. App.—El Paso 1957, writ ref'd n.r.e.) (no duty without reasonable profit to lessee); *Hutchins v. Humble Oil & Ref. Co.*, 161 S.W.2d 571, 573 (Tex. Civ. App.—Galveston 1942, writ ref'd) (no duty if a loss to lessee). *Contra Phillips Petroleum Co. v. Millette*, 72 So.2d 176, 179 (Miss. 1954) (substantial drainage found and off-set well required even though no profit probable). Under Louisiana law, the lessee must also seek compulsory unitization if the well is not potentially profitable. *Williams v. Humble Oil & Ref. Co.*, 432 F.2d 165, 173-74 (5th Cir. 1970), *cert. denied*; 402 U.S. 934 (1971).

132. See 2 E. BROWN, *THE LAW OF OIL AND GAS LEASES* § 16 (2d ed. 1973). The amount of damage must be pleaded and proved with reasonable certainty. See *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 425, 6 S.W.2d 1031, 1034 (1928); *Bryan v. Sinclair Oil & Gas Co.*, 1 S.W.2d 917, 919 (Tex. Civ. App.—Galveston 1927, no writ). See generally Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 435 (1933).

133. *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 425, 6 S.W.2d 1031, 1036-37 (1928) (value of royalties that would have accrued plus legal interest).

134. See Hardy, *Drainage Of Oil And Gas From Adjoining Tracts—A Further Development*, 6 NAT. RESOURCES J. 45, 52 (1966); Comment, *Liability of an Oil and Gas Lessee for Causing Drainage: A Standard For Texas*, 51 TEXAS L. REV. 546, 548 (1973).

135. See M. MERRILL, *COVENANTS IMPLIED IN OIL AND GAS LEASES* 18 (2d ed. 1940).

136. See *R.R. Bush Oil Co. v. Beverly-Lincoln Land Co.*, 158 P.2d 754, 758 (Cal. Dist. Ct. App. 1945); *Phillips Petroleum Co. v. Millette*, 72 So.2d 176, 178-79 (Miss. 1954); *Shell Oil Co. v. Stansbury*, 410 S.W.2d 187, 188 (Tex. 1966). See generally Seed, *The Implied Covenant in Oil and Gas Leases to Refrain from Depletory Acts*, 3 U.C.L.A. L. REV. 508 (1956).

absolute duty on the lessee to offset any drainage to adjacent tracts.¹³⁷ The common-lessee, moreover, cannot limit this duty by including an express offset distance in the lease agreement.¹³⁸ Although the Texas Supreme Court recognized the depletion covenant in *Shell Oil Co. v. Stansbury*,¹³⁹ the prudent operator standard was retained.¹⁴⁰ Texas, however, like California and Mississippi, does not allow the common lessee to limit his obligation by an express lease provision.¹⁴¹

Like other covenants, the obligation to prevent drainage is generally construed as a covenant rather than a condition or a limitation. Thus, in an action for breach, the remedy is damages rather than forfeiture.¹⁴² When money damages are inadequate, however, the court may grant equitable relief in the form of a conditional decree of cancellation.¹⁴³ Because implied covenants are contractual, however, the lessor must prove the lessee committed an independent tort to recover punitive damages for breach of the implied covenant of protection.¹⁴⁴

C. Management and Administration of Lease

Under the broad management covenant is the obligation to produce and market the oil and gas with due diligence.¹⁴⁵ The lessee must use all

137. See *R.R. Bush Oil Co. v. Beverly-Lincoln Land Co.*, 158 P.2d 754, 759 (Cal. Dist. Ct. App. 1945); *Phillips Petroleum Co. v. Millette*, 72 So.2d 176, 178-79 (Miss. 1954).

138. See *Shell Oil Co. v. Stansbury*, 410 S.W.2d 187, 188 (Tex. 1966).

139. 410 S.W.2d 187 (Tex. 1966).

140. See *id.* at 188. The profitability of the offset well, however, is not determined in light of the lessor's other operations in the same field. See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563 (Tex. 1981).

141. See *Shell Oil Co. v. Stansbury*, 410 S.W.2d 187, 188 (Tex. 1964); see also *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 572 (Tex. 1981).

142. *Mitchell v. Mesa Petroleum Co.*, 594 S.W.2d 507, 513 (Tex. Civ. App.—San Antonio 1979, writ ref'd n.r.e.); see *West-Texas Land Co. v. Simmons*, 566 S.W.2d 719, 722 (Tex. Civ. App.—Eastland 1978, writ ref'd n.r.e.); Ver Schure, *Another Look At The Implied Covenants*, ROCKY MT. 26TH ANN. MINERAL LAW INST. 887, 892 (1980); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 435 (1933).

143. See *Waggoner Estate v. Sigler Oil Co.*, 118 Tex. 509, 525, 19 S.W.2d 27, 30 (1929); *Texas Pac. Coal & Oil Co. v. Barker*, 117 Tex. 418, 425, 6 S.W.2d 1021, 1036-37 (1928); 5 H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 825.2, at 160.2 (1980); Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 435 (1933).

144. See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 571 (1981).

145. *Hanover Co. v. Hines*, 11 S.W.2d 621, 625 (Tex. Civ. App.—Fort Worth 1928, writ ref'd); see Walker, *The Nature Of The Property Interests Created By An Oil And Gas Lease*, 11 TEXAS L. REV. 399, 437 (1933) (implied covenant of reasonable diligence to produce oil and in marketing or utilizing gas).

legitimate means to produce as much oil and gas as possible.¹⁴⁶ The implied obligation to maximize recovery, for example, may require the lessee to use modern production techniques.¹⁴⁷ This duty, moreover, may arise regardless of the available techniques at the time the lease was executed.¹⁴⁸ The lessee's obligation to manage the lease properly, however, is also expressed as an implied duty to seek favorable administrative action.¹⁴⁹

Because of the pervasive nature of state regulation of oil and gas production, the lessee's fulfillment of his implied duties requires him to represent his lessor's interest before administrative agencies. For example, proration orders may drastically limit the allowable production allocated to a proposed well, making it infeasible to drill.¹⁵⁰

The lessee's position is that of agent or representative of the lessor,¹⁵¹ and his position in attacking an administrative regulation can take three forms: (1) the particular regulation does not prohibit the action sought by the lessee; (2) the regulation prohibiting performance is itself invalid; and (3) the action sought by the lessee requires an exception to the regulation.¹⁵² The lessee, of course, cannot avoid his implied duties when the regulation is inapplicable or invalid.¹⁵³ Conversely, when an order, rule, or regulation is valid, diligent and proper operation demands compliance.¹⁵⁴

146. *Livingston Oil Corp. v. Waggoner*, 273 S.W. 903, 907 (Tex. Civ. App.—Amarillo 1925, writ ref'd).

147. See 5 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 861.3, at 429 (1980).

148. See *Wadkins v. Wilson Oil Corp.*, 6 So.2d 720, 721 (La. 1942) (lease cancelled for breach when lessee did not drill in chalk formation even though technique for acidizing was unknown when lease executed).

149. See 5 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 361.4 (1980); Merrill, *Fulfilling Implied Covenant Obligations Administratively*, 9 OKLA. L. REV. 125, 126 (1956); Merrill, *Current Problems In The Law Of Implied Covenants In Oil And Gas Leases*, 23 TEXAS L. REV. 137, 144 (1944).

150. See TEX. ADMIN. CODE ANN. tit. 16, §§ 3.39, 3.52, 3.91 (McGraw-Hill 1980). As one commentator has observed, however, proration orders are generally subject to change over periods of time. Meyers, *The Effect On Implied Covenants Of Conservation Laws And Practices*, ROCKY MT. 4TH ANN. MINERAL LAW INST. 463, 478 (1958). Thus, a prior determination that allowables were not sufficient to justify the cost of a well should not preclude a subsequent suit based on an increased allowable. *Id.* at 478.

151. *Railroad Comm'n v. Humble Oil & Ref. Co.*, 101 S.W.2d 614, 623 (Tex. Civ. App.—Austin 1936), *rev'd on other grounds*, 133 Tex. 330, 128 S.W.2d 9 (1939).

152. Merrill, *Fulfilling Implied Covenant Obligations Administratively*, 9 OKLA. L. REV. 125, 127 (1956).

153. 5 H. WILLIAMS & C. MEYERS, *OIL AND GAS LAW* § 861.4, at 432 (1980); see *Renner v. Monsanto Chem. Co.*, 356 P.2d 326, 335-36 (1960) (proration orders did not effect lessee's implied obligation to offset drainage).

154. See Eberhardt, *Effect Of Conservation Laws, Rules And Regulations On Rights Of Lessors, Lessees And Owners Of Unleased Mineral Interests*, SW. LEGAL FOUNDATION 5TH INST. ON OIL & GAS LAW & TAX. 125, 138-40 (1954).

When the regulation allows for exceptions, however, the lessee's course of action is less clear cut.

In Texas, for example, rule 37¹⁵⁵ of the Railroad Commission regulates the spacing of oil wells; no well may be drilled nearer than 467 feet from any lease boundary or 1200 feet from any completed well in the same producing formation.¹⁵⁶ The rule, however, allows an operator to seek an exception based on waste or confiscation.¹⁵⁷ In certain situations, rule 37 may prohibit the lessee from drilling a proposed offset well unless an exception well permit is obtained. As with other implied covenants, the prudent operator standard determines whether the lessee is under a duty to seek the exception well permit.¹⁵⁸ If the exception well is potentially profitable, and if it appears probable that the commission would grant the exception, the lessee is under an implied duty to seek the exception well permit.¹⁵⁹

If the exception well permit is denied after a "reasonably prudent application," the lessee incurs no liability for failing to drill.¹⁶⁰ Whether the lessee must appeal the denial of the exception is uncertain.¹⁶¹ One thing, however, is certain: a lessee who attempts to justify his failure to drill without first seeking a rule 37 exception acts at his own peril.¹⁶²

IV. CONCLUSION

As the oil and gas lease has evolved into the complex and lengthy instrument it is today, the lessee's obligations have become better defined for the most part.¹⁶³ The cautious attorney, however, should familiarize

155. TEX. ADMIN. CODE ANN. tit. 16, § 3.37 (McGraw-Hill 1980).

156. *Id.* tit. 16, § 3.37 (a) (1).

157. *Id.* tit. 16, § 3.37 (a) (1). See generally Douglass & Whitworth, *Practice Before The Oil And Gas Division of the Railroad Commission of Texas*, 13 ST. MARY'S L.J. 719, 724-26 (1982).

158. Merrill, *Fulfilling Implied Covenant Obligations Administratively*, 9 OKLA. L. REV. 125, 128 (1956); see *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 569-70 (1981).

159. *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 570 (Tex. 1981).

160. See *id.* at 570. This is a fact question for the jury and may be established by expert testimony. See *id.* at 570.

161. *Id.* at 570.

162. Compare Merrill, *Current Problems In The Law Of Implied Covenants In Oil And Gas Leases*, 23 TEXAS L. REV. 137, 145-46 (1944) (lessee under duty to exhaust all avenues of available appellate revenue absent clear and convincing evidence by lessee that appeal would be fruitless) with Eberhardt, *Effect Of Conservation Laws, Rules And Regulations On Rights Of Lessees, Lessors And Owners Of Unleased Mineral Interests*, SW. LEGAL FOUNDATION 5TH INST. ON OIL & GAS LAW & TAX. 125, 156 (1954) (calling Merrill's suggestion "barratrous balderdash").

163. See *Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 570 (Tex. 1981) ("It is the failure to act . . . that triggers the loss").

himself with the consequences of the variety of express clauses discussed herein before merely adopting a "boilerplate" provision. In addition the attorney must be cognizant of the various implied obligations of the lessee in order to properly advise his client of the client's rights under the lease instrument. The attorney must not only be aware of the governmental regulations affecting the lessee's performance under the lease, he must also foresee the multitude of possible conflicts between the lessor and lessee, tailoring the instrument to meet the expectation of both parties.