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Texas SC's Interpretation of Royalty Devise Could Shake Up Texas Title

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When Ethel Hysaw drafted her will in October 1947, the world was different.

The Yankees had just beaten the *Brooklyn* Dodgers in the World Series and Chuck Yeager broke the sound barrier for the first time. Gary Cooper topped the box office.

Oil and gas was likewise in a totally different place. In 1947, nearly all oil and gas leases carried a standard one-eighth royalty, not the generous one-fifth and one-fourth royalties common in recent times.

With this in mind, take a look at the following devise in Ethel Hysaw's will, currently at the center of a Texas Supreme Court case argued this week:

> That each of my children shall have and hold **an undivided one third (1/3) of an undivided one-eighth (1/8) of all oil, gas or other minerals** in or under or that may be produced from any of said lands, the same being a non-participating royalty interest …

Interpretation of the bolded language above has forced Hysaw's descendants into two camps.

One side interprets the plain language of the devise to conclude that 1/3 of 1/8 equals 1/24, and so the devised interest is limited to a 1/24 non-participating royalty interest (NPRI). To them, interpreting the devise only requires that the court read it and perform simple arithmetic. This was the conclusion of the court of appeals, too.

The others ask the Supreme Court to take into account that 1/8 happened to be the standard lease royalty at the time, and so the interest granted is actually 1/3 of whatever royalty a lease might carry. For a modern lease with a 1/4 royalty, for example, we're now talking about a much larger a 1/12 NPRI – and double the money for those descendants.

Is the Customary Royalty Inadmissible Extrinsic Evidence?

The Supreme Court finds itself in a difficult spot here.

On the one hand, Texas courts have always been reluctant to introduce extrinsic evidence to construe oil and gas conveyances where the instrument is unambiguous. This was the rationale of the court of appeals when it performed simple multiplication to determine that 1/3 of 1/8 was 1/24.

On the other hand, the Supreme Court has already taken judicial notice of a historical, customary one-eighth royalty, in a decision issued just earlier this year. In *Bradshaw*, Justice Guzman wrote the opinion of the Court:

> A one-eighth royalty appears to have been commonplace in the general era in which the 1960 deeds were executed. As one commentator wrote in a well-regarded article, "**The usual royalty is 1/8, and this fact is so generally known that judicial knowledge may be taken of it**." (citations omitted).

Note, *Bradshaw* also quoted the same commentator in saying – in 1948, as it happens – that more sophisticated conveyancers were the transacting interests of "*not less than* the usual 1/8," in order to expressly avail themselves to an increase in lease royalty rates in the future. So, *Bradshaw* and its incorporation of this commentary is maybe a zero-sum game for the Hysaw descendants arguing for a higher NPRI.

It remains to be seen if the Supreme Court will put on blinders and confine itself to the four corners of Hysaw's will, or open itself up to considering the customary 1/8 royalty rate in construing her will.

Ethel Hysaw's will is certainly not the only instrument that contains this sort of "one-third of one-eighth" language. Texas Title examiners and those paying (and receiving) royalties will therefore need to closely watch the Supreme Court's interpretation of this devise. We will update this post when the Court renders its decision.

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Demetri J. Economou