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Limiting *Duhig* Exceptions v. Reservations

The commonly accepted *Duhig* doctrine applies to general warranty conveyances of interests in the mineral estate where the owner of a fractional interest reserves a share thereof without referencing a prior mineral severance and is therefore estopped from claiming the total reserved interest. Where the granted interest cannot be fully realized, a breach of warranty has occurred. *See Duhig v. Peavy-Moore Lumber Co*., 144 S.W.2d 878 (Tex. 1940).

The Supreme Court of Texas recently revisited *Duhig* and ultimately rejected applying the doctrine, in *Perryman v. Spartan Tex. Six Capital Partners*, Ltd., 546 S.W.3d 110 (Tex. 2018), which involved a series of eight (8) deeds, beginning with a 1977 deed which contains the following operative language:

> LESS, SAVE AND EXCEPT an undivided one-half (1/2) of all royalties from the production of oil, gas and/or other minerals that may be produced from the above described premises which are now owned by Grantor.

(the "Clause"). The next seven (7) deeds all contain general warranties, but several fail to disclose prior severances of royalty interests.

The crux of *Perryman* centered on the application of "save and except" clauses accompanied by the phrase "which are now owned by Grantor" where a deed does not disclose that the grantor is vested with only a fractional mineral interest. The trial court interpreted the Clause as reserving one-half (1/2) of the royalty interest *owned by the grantor*, thereby eliminating the necessity to apply the *Duhig* doctrine. The court of appeals disagreed and held that the Clause reserved to the grantor one-half (1/2) of *all* royalties produced and therefore created a *Duhig* problem because the phrase "which are now owned by the Grantor" does not put grantees on notice that the grantors did not own all of the royalties.

The Supreme Court of Texas agreed with the court of appeals regarding the treatment of the phrase "which are now owned by the Grantor"; however, it rejected the conclusion that there was a *Duhig* issue because the Clause merely created an exception from the grant, rather than a reservation for the grantor. As a result, the Court resolved that the subsequent deeds could not result in over-conveyances triggering the application of the *Duhig* doctrine. *Perryman* is a significant development as it limits the application of *Duhig*, holding that it does not apply where a general warranty deed contains an exception of a mineral interest, rather than a reservation to the grantor.

While Pennsylvania has not formally adopted the *Duhig* doctrine, it is based on the well-settled Estoppel by Deed theory, which provides that where one conveys land with a covenant of warranty against all lawful claims and demands, he cannot be allowed to set up against his grantee any right or interest greater than what was purportedly conveyed. *See Shedden v. Anadarko E&P Co., L.P*., 88 A.3d 228 (Pa. Super. 2014) (citing *Dixon v. Fuller,* 46 A. 553 (Pa. 1900)).

For a copy of the *Perryman* decision or questions regarding the application of *Duhig* in Pennsylvania, Ohio, or West Virginia, please contact the Oil and Gas Group at Dickie, McCamey & Chilcote, P.C.

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