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The Executive Right to Lease Mineral Real Property in Texas Before and After Lesley v. Veterans Land Board

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BEFORE AND AFTER LESLEY v. VETERANS LAND BOARD
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INTRODUCTION AND HISTORY OF THE EXECUTIVE RIGHT TO LEASE

Introduction

Components of a fee simple absolute ownership interest in a tract of real property can be split in time, as in present and future interests, or in space, as in the severance of mineral interests from the surface interest or depth dependent severances, or both. The mineral estate can be divided further still, with one type of mineral, such as oil and gas, being conveyed to one party and another type of interest, perhaps coal or uranium, being conveyed to another. A fee simple absolute ownership interest in one of these specific categories of minerals, such as hydrocarbons, can be further split into more elemental components that relate to development and recovery of profits for development. In Texas, the mineral estate in a specific mineral, like uranium, or particularly group of minerals, like oil and gas, consists of five components: (1) the right to develop (the right of ingress and egress); (2) the right to lease (the executive right); (3) the right to receive bonus payments; (4) the right to receive delay rentals; and (5) the right to receive royalty payments.1 These attributes, when taken together, are often referred to as a “bundle of sticks,”2 and it has been recognized that individual “sticks” can be sold while others are retained.

In addition to being defined as one of the five rights of a mineral owner, the executive right to lease have been defined by courts and treatises as the exclusive right to execute oil and gas leases.3 In 2011, the Texas Supreme Court (also referred to herein as the “Court”) released its opinion for the case of Betty Yvon Lesley, et al. v. Veterans Land Board of the State of Texas, et al.4 (hereafter, “Lesley”), a case that changed whether and how sticks (1) and (2) are related to one another—or even made possible the inadvertent fusion of the two.

Of all the rights contained within the fee mineral estate, the executive right to lease is possibly the

1 Altman v. Blake, 712 S.W.2d 11, 118 (Tex. 1986).
4 352 S.W.3d 479 (Tex. 2011).
right that the exact extent, purpose, and limitations are the least clearly defined by statute or case law. A glacial unfolding of opinions has slowly brought into focus the outlines of the executive right, but several questions and sources of confusion still remain. What actions entail exercising of the executive right? Can inaction by an executive rights owner (that may not want mineral development) be used to thwart development of the non-executives mineral estate? Why can’t a non-executive self-develop the minerals? (i.e. drill its own well without leasing) What is the scale and extent of the duty of the executive to Non-Participating Royalty Interest (“NPRI”) owners?

This article begins with a necessarily lengthy analysis of the history of the executive right, focused on how various Texas courts have analyzed the conveyance or retention of the right relative to conveyance and retention of related oil and gas real property such as the right to royalty, to self-develop, or to receive rentals and bonus. This is followed by a brief examination of the alienability, duration, and revocability of the executive right before tackling perhaps the largest current issue regarding the executive right—and the linchpin of the Lesley case—the case law landmarks that define the nature and activation of the duty owed by the executive right owner to the non-executive(s) mineral interest owners.

At this point, the latest executive right case law landmark, Lesley, is discussed. This begins with the factual and procedural background of the case and continuing with analysis of the opinion of the Texas Supreme Court with regards to the duty owed by the executive right owner, the timing of its activation, self-development by the non-executive, and passage of the executive right.

Next, a battery of questions are scrutinized through the prism of Lesley, such as the general duty owed by the executive to the non-executives and the practical application of that duty, the commencement of this duty, non-leasing by the executive right owner of its own interest or that of the non-executive(s), self-development by the non-executive(s), and the relationship between the executive right and payment of bonus. Finally, the article concludes with pontification on some questions remaining after Lesley, such as whether the executive should have to lease its own minerals or self-develop and what should be the duty owed by executives to non-participating royalty owners.
History

Little evidence is found definitively explaining from what fountainhead the executive right originally sprang. It seems likely that the executive right was derived in response to the fractionalization of mineral fee interests as so to ease the leasing of oil and gas interests, however, and that this seems to be the informal consensus of oil and gas practitioners and commentators as to why the executive right was originally crafted and later recognized. Persons acquiring interests in cotenancy may recognize that each division of ownership makes oil and gas development more difficult, not only because of the potential for disagreement regarding questions of exploration and development among the co-tenants, but also because of the likelihood that some of the interests may become owned by minors or other persons under a legal disability. Hence, leasing will be greatly facilitated if one of the co-tenants has the exclusive authority to execute leases. Similarly, co-owners—especially family members—may decide it is in their best interests to rely upon the special skill, contacts or expertise that one of them has acquired through previous experience or work in the oil industry. Among practitioners, the purpose of the power is to facilitate leasing—mineral co-tenants and potential lessors can put the leasing negotiations in the hands of the most sophisticated party among them. This provides potential lessees the benefit of only having to negotiate one lease instead of many.

On the other hand, it is also hypothetically possible that the severance of the executive right has nothing to do with a desire to facilitate mineral development. A purchaser who is primarily interested in surface use may insist upon acquiring the exclusive executive right to protect its surface investment. Since it has the exclusive right to execute oil and gas leases, it can impose limitations upon surface use in any lease that it may subsequently execute. This could lead to problems for both the executive rights owner and the owner of the nonparticipating mineral fee, particularly if their interests in mineral development diverge.

Eventually, disputes involving the executive right reached Texas courts. Here as we shall see, the executive right began not as a completely separate interest that could be conveyed or retained independently of all the other four mineral rights but rather as a portion of the mineral estate entangled
with the right to bonus and delay rentals whose retention or passage depended on a myriad of factors such as the intention of the parties as determined by either what other “sticks” were retained or passed or even outside evidence. In cases settling disputes over whether a deed retained/conveyed a royalty interest or a mineral interest, Texas courts first established a rule that a full mineral estate without the executive right, right to bonus, and the right to delay rentals was, in fact, a royalty interest only.

This somewhat arcane old regime began its evolution with Klein v. Humble Oil & Refining Co., where the disputed conveyance contained the following language: “[g]rantors…reserve…one-eighth (1/8) of all mineral rights… [but] grantors herein are not to participate in any oil lease or rental bonuses that may be paid on any lease…” Using parol evidence to ascertain the intention of the grantor, the Court opined “it was the intention of the parties…that the mineral estate reserved was to become a royalty interest under any lease thereafter executed, and that [grantee] had the authority to subject that interest to the terms of the lease…” before holding that the executive power had been passed to the grantee, leaving the grantors with the right of ingress and egress to develop and the right to royalty. Although the grant is admittedly ambiguous, as the Court notes, the Court’s decision to have the executive power pass is certainly a reasonable interpretation. The decision to have a royalty interest reserved, however—entitling the grantor to a one-eighth (1/8) share of production, is less clear. As one astute commentator noted, the Court’s conclusion that a royalty interest was reserved is not consistent with the Court’s quote that a mineral interest was reserved that converted to a royalty interest upon leasing. As will be shown, Klein represents the first link in a chain that, for a period of time, seemed to needlessly entangle the executive right with other mineral rights, namely the right to bonus and rentals.

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5 86 S.W.2d 1077 (Tex. 1935).
6 Id.
7 Id. (Grantor subsequently executed and recorded an instrument that stated, “[M]y interest is entirely a royalty interest and it is plainly recited in the deed from myself to [grantee]…I waive all of my rights in any oil or gas lease and shall only retain a royalty.”)
8 Id. at 1080 (emphasis added).
9 Id.
10 Bruce M. Kramer, Conveyance Mineral Interests—Mastering the Problem Areas, 26 TULSA L. J. 175, 179 (1990).
The second link appeared two years later in *Schlittler v. Smith*\(^\text{11}\) regarding a second dispute on whether a royalty or a mineral interest had been reserved. In *Schlittler*, a fee grantor conveyed the surface and mineral estate, but reserved to himself “an undivided one-half interest in and to the royalty rights on all oil and gas...in, on and under or that may be produced” for a ten year term.\(^\text{12}\) The trial court held that the grantor’s reserved interest was a non-participating royalty interest. The appellate court reversed, holding that the grantor’s reservation also included the executive right as well as a one-half interest in any bonuses and rentals paid by a lessee.\(^\text{13}\)

On appeal again, the Commission of Appeals of Texas reversed the appellate court and reformed the trial court’s decision to comprise instead a one-half (1/2) royalty interest reservation, noting that “[I]t is well settled that a grantor may reserve minerals or mineral rights and he may also reserve royalties, bonuses, and rentals, either one, more or all.”\(^\text{14}\) *Schlittler* differed from *Klein* in that the reservation of a royalty was expressed and recognized in the conveyance and was not the result of weighing which mineral property “sticks” had been conveyed and which had been reserved and whether the remaining “sticks” (in *Klein*’s instance, the executive right and the rights to bonus and delay rentals) still equated a mineral or royalty interest. However, *Schlittler* perhaps ends with a clue to the methodology at work in *Klein* in mysteriously equating passed executive rights and rights to bonus and rentals with reserving a royalty interest when the court opines, “[A] reservation of royalty on all oil, gas and minerals which may be produced necessarily implies that the grantor contemplated the leasing of the land for production. He reserved no right of leasing to himself, and consequently the grantee possesses such right.”\(^\text{15}\) In *Schlittler*, the commission of appeals approaches the question from the opposite direction that the Court in *Klein* did, determining that by reserving a royalty interest only, the grantor necessarily passed the executive right (along with the right to bonus and delay rentals—none of which were mentioned in the conveyance),

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\(^{11}\) 101 S.W.2d 543, 544-45 (Tex. 1937).
\(^{12}\) *Id.* at 544.
\(^{13}\) *Id.*
\(^{14}\) *Id.* at 545. The court also held that the royalty in any later oil and gas lease could not be less than a one-eighth royalty and that the grantor could receive no less than one-half of a one-eighth royalty, or no less than one-sixteenth of the total royalty, to be satisfied before the mineral owner could receive any royalty.
\(^{15}\) *Id.*
instead of ruling that by passing those things, the grantor reserved the right to royalty.

_Schlittler_ also ricochets down through case law history by containing one of the first mentions of the _duty_ owed by the executive right owner to the non-executives. In explaining this duty, the Commission of Appeals stated, “that self-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved. Of course, there should be _the utmost fair dealing_ on the part of the grantee in this regard.”

16 As we will see, the commission displays a measure of naiveté when it assumes, “[W]e think the self-interest on the part of the grantee may be trusted to protect the grantor as to the amount of royalty reserved.”

The third link appeared several years later when the Texas Supreme Court handed down the opinion in _Watkins v. Slaughter_.

18 _Watkins_ dealt with a reserved one-sixteenth (1/16) interest in the mineral estate in an instrument with a granting clause, similar to that in _Klein_ that provided:

“[T]he grantor retains title to a 1/16 interest in and to all of the oil, gas and other minerals _in and under_ and that _may be produced from said land_;...but it is...understood that the grantor...shall not receive any part of the money rental paid on any future lease; and the grantee...shall have authority to lease said land and receive the cash bonus and rental; and the grantor...shall _receive the royalty retained herein only from actual production_ of oil, gas or other minerals on said land.”

19 The grantor, however, thereafter let pass the executive right and the right to receive bonus and delay rentals. In answering the question of whether the grantor was a non-executive entitled to either a one-sixteenth (1/16) of one-eighth (1/8) of production (if judged a mineral interest), or the owner of a full one-sixteenth (1/16) (if judged a royalty interest), the Court found that such a conveyance indicated that the grantor intended to reserve only a royalty interest.

20 The interpretative methodology used in _Watkins_ differed from that of _Klein_ in that the former disregarded the use of the “in and under” language—a
classic indicator of a mineral interest—and dispensed unmentioned any falderal regarding mineral interests that converted to a royalty interest upon leasing. The Watkins court instead focused on the language “that may be produced” and “shall receive the royalty retained herein only from actual production”—emphasized above—as emphatically declaring the reserved interest a royalty and, again taking up the holding in Klein, seemed to establish a rule that a grant (or a reservation) of the executive right along with the rights to receive bonus (and perhaps delay rentals) left the party bereft of these components of the mineral interest with a royalty interest.

This rule lasted unchallenged until the Texas Supreme Court handed down their opinion in Grissom v. Guertersloh, settling yet another royalty vs. mineral interest dispute. In Grissom, the deed reserved for the grantor “[a]n undivided one-sixteenth (1/16th) of all the oil, gas and other minerals in and under the tract of land hereby conveyed; But [sic] the grantors waive all interest in and to all rentals or other consideration which may be paid to grantees for any oil and gas lease…” The Court noted that the grant was comprised of two clauses and that the first clearly reserved a one-sixteenth (1/16th) interest in the minerals in and under the described lands, with the second, while stripping away from the reserved mineral interest the executive right and the rights to receive bonus and delay rentals, did not otherwise change the reserved interest into a royalty interest. The Court noted that the granting clause made no reference to either royalties that might be paid under subsequent leases or any “royalty interest-creating” language such as interests “from actual production” or from minerals “produced, saved and made available for market.” The Court appeared to look at the components of the minerals estate and dole them out to the grantor or grantee based on the plain language of the conveyance. As one commentator has noted, the results in Grissom as compared to Schlittler and Watkins are difficult to reconcile, but Grissom and Schlittler at least parse the executive right and the other rights as components of the mineral

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21 WILLIAMS & MEYERS, supra note [-], § 304.5, at 477.
22 391 S.W.2d 167 (Tex. Civ. App.—Amarillo 1965, writ ref’d n.r.e.).
23 Id.
24 Id. at 170.
25 Id. at 170-171.
estate that can be separated free of the other “sticks.”

Thus, at the end of this initial phase, in three of the four cases described, the retained interest was determined to be a royalty interest with various opinions focusing on: (1) parol evidence to determine the intent of the parties (as in Klein); (2) conveyancing language such as “that may be produced” that traditionally has indicated a royalty interest (as in Watkins); and (3) the assumption that retention of a royalty interest somehow implies that the retainer intended for leasing to occur and thus the executive rights had passed (as in Schlitter). Klein and Watkins suggests that a full fee mineral estate minus the executive right, the right to bonus, and the right to rentals is a royalty interest. Only with Grissom does one find the mineral estate “sticks”—including the executive right—being treated more as specific real property components of the mineral estate instead of entangled features that get passed or retained based on terms of art, assumptions, and outside evidence.

While these cases dealt with passage of the executive right, other cases struggled with the related question of how to define the executive right itself. Early Texas courts considered the executive to be a power coupled with an interest. One Texas court of appeals described a “naked” executive right (one held without any of the other mineral right “sticks”), as being a power “coupled with an interest which could not be revoked at the will of the [conveyors].” The court also disallowed the non-executive from seeking a partition of the undivided mineral estate. A “power coupled with an interest” has been described as “an interest [that is not] held for the benefit of the principal, and it is irrevocable due to the agent’s interest in the subject property.” Since this definition of a “power coupled with an interest,” where the ‘agent’ (the executive) has no apparent duty to the ‘principle’ (the non-executive), is difficult to reconcile with the executive right where, as described below, the executive owes the non-executives a sort of fiduciary duty, the whole premise of the executive right being a “power coupled with an interest”

26 Kramer, supra note 10 at 183.
27 Kramer, supra note 10 at 186, citing e.g. Superior Oil Co. v. Stanolind Oil & Gas Co., 240 S.W.2d 281 (1951), aff’g, 230 S.W.2d 346 (Tex. Civ. App.—Eastland 1950); Allison v. Smith, 278 S.W.2d 940 (Tex. Civ. App.—Eastland 1955, writ ref’d n.r.e.).
29 Id. at 354-55.
30 BLACK’S LAW DICTIONARY 540 (2nd pocket ed. 2001).
rested upon unstable judicial granite.

Not surprisingly, given this uncertainty, changes occurred. In Pan American Petroleum Corp. v. Cain, the Texas Supreme Court considered the circumstance of a grantor who conveyed one-fourth (1/4) of the entire mineral estate while reserving for himself the “stripped” executive right. After the grantor died, the question arose of whether or not the reserved “stripped” executive right terminated by action of law, as the deed did not describe the intended fate of that executive power. The Court, believing that the executive right must be a possessory estate in order for it be properly classified as a “power coupled with an interest,” and because the grantor had no such possessory interest due to the non-possessory nature of the executive right, held that the executive right could not be a “power coupled with an interest” and was not inheritable. In its opinion, the Court framed what rights were and were not included in the executive right:

“[T]he executive right … is not a power coupled with an interest, and it is equally clear that the power to lease is not in itself an interest in land. It does not entitle the holder, either presently or at any time in the future, to possession or use of, or any benefit arising from, the land or any part thereof … It is not an estate in the property, and its scope and extent is governed by the instrument creating it.”

Thus, the Texas Supreme Court in Pan American defined the executive right as a power and not as property right. Furthermore, this power was revocable upon death of the principal.

Given the parallel developments in Klein, et al. described above, wherein the courts seemed to be groping towards treating the executive right as a real property interest, Pan American’s holding of the executive right being a contractual right began to grind harshly against the unfolding Texas case law. Not surprisingly, this categorization eventually changed in the late 1980s when Texas courts considered a trio

31 355 S.W.2d 506 (Tex. 1962).
32 Id. at 507.
33 Id. The court opined that the parties could have avoided this problem by describing the executive power as inheritable. Id. at 510-11.
34 Id. at 508-09.
36 Pan American Petroleum Corp., supra note [-].
of cases all seeking to determine who had what mineral interest after execution of a (later contested) instrument.

Chronologically, the first of these cases was *Diamond Shamrock Corp. v. Cone*, wherein the court was faced with the challenge of determining who among the grantor and grantee had what mineral right(s) after execution of a conveyance of the surface estate of a captioned tract that contained the following reservation:

“There is reserved...all oil, gas and other minerals in, under and that may be produced....However, grantors herein shall receive no part of any lease or bonus money..., or any delay rental paid keep said lease in force. The grantors herein shall receive money from such lease only in case of actual production of oil, gas or other minerals...”

Despite the last clause’s similarities to language in *Klein*, which in that case ultimately resulted in only a royalty being reserved, the court in *Diamond Shamrock* simply ignored the last sentence and held that the while the grantee did indeed receive the executive right, the right to receive bonus, and the right to delay rentals, the clear intent of the parties, requiring no application of any canons of interpretations such as the “greatest estate” canon, was that the grantor retained a mineral interest instead of a royalty interest. The right of self-development, being correlative to the executive right (as discussed below), also presumably passed.

The second case emerged a year later. In *Elick v. Champlin Petroleum Co.* the Court of Appeals in Houston (14th District) ruled that a party with no other interest in the mineral estate could hold the executive right. The court ruled that “[t]he fact that [the non-mineral interest owning] appellants are required to join in the execution of a valid oil, gas and mineral lease covering the tract does not interfere with the power to lease the mineral estate any more than if the [non-mineral interest owning] appellants reserved exclusive executive rights to lease the mineral interest.”

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37 673 S.W.2d 310 (Tex. App.—Amarillo 1984, writ ref’d n.r.e.).
38 *Id.* at 151.
39 697 S.W.2d 1 (Tex. App.—Houston [14th Dist.] 1985, writ ref’d n.r.e.).
Finally, in 1990’s opinion Day & Co. v. Texland Petroleum, the Texas Supreme Court not only endorsed the Houston Court of Appeal’s Elick position, it also categorized the executive right to lease as a distinct property right whose transfer is governed by the laws of real property. Day involved the question of whether the executive right was passed through a conveyance of minerals in which the grantor reserved an undivided 1/4 mineral interest. The Court ruled that the executive right had so passed because it was not expressly reserved in the grant, stating “[w]hen an undivided mineral interest is conveyed, reserved, or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intent is expressed.” Being a real property interest, like a NPRI, the executive right does therefore not terminate upon the death of the holder as a contract right would.

**THE MODERN EXECUTIVE RIGHT TO LEASE OIL AND GAS INTERESTS**

*Definition and Nature of the Right*

Eventually, the executive right came of age and, in the face of more analytical scrutiny by modern courts in more recent cases, stood out more distinctly from the other rights comprising the mineral estate. The case of Altman v. Blake, cited by many sources as the definitive Texas case for the proposition that the mineral estate consists of five distinct “sticks,” seemed to help usher in the modern view of the five-faceted separable mineral estate. In Altman, an owner of the entire fee mineral estate was held by the Texas Supreme Court to have retained a mineral fee interest despite having conveyed away the right to collect delay rentals and the executive right. The Court noted that it had “before recognized that a mineral interest shorn of the executive right and the right to received delay rentals remains an interest in the mineral fee.”

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40 786 S.W.2d 667 (Tex. 1990).
41 Id. 669 n. 1.
42 Altman, supra note 3.
43 See John Lowe et al., Cases and Materials on Oil and Gas Law at 557 (5th ed. 2008); Patrick Martin and Bruce Kramer, Oil and Gas Cases and Materials at 546 (9th ed. 2011); Williams & Meyers, supra note [ ], § 304.10 fn. 7.
44 Altman, supra note 3 at 120.
45 Id. at 118-19 (citing Delta Drilling Co. v. Simmons , 338 S.W.2d 143, 145 (Tex. 1960)).
Definitions of the modern executive right can be read very broadly: “the right to take or authorize all actions which affect the exploration and development of the mineral estate ... [including] the right to engage in or authorize geophysical exploration, drilling or mining, and producing oil, gas and other minerals.” However courts rarely use the term in this broad sense. More commonly, they equate the executive right with the right to execute oil and gas leases.

Ultimately, the executive right must be analyzed as a separate interest in land, because it is frequently severed from other incidents of mineral ownership. Non-executive mineral interest owners have no power to lease their minerals. Rather, that power resides in the hands of the owner of the executive right. Since the owner of a royalty normally has no right to participate in the leasing process, it is dependent upon the action of the mineral estate owner in realizing any income from its interest. Thus, all royalty rights such as NPRIs are, by definition, non-executive rights. The executive right may also be severed from an interest in the mineral estate itself. Thus, the owner of Blackacre may convey away an undivided one-half interest in the minerals, retaining the other one-half interest plus the exclusive executive right. The grantee in such a transaction has received an interest commonly referred to as a nonparticipating mineral fee. This type of interest differs from a royalty in that its owner is entitled to one-half of all benefits allocable to the mineral estate under an oil and gas lease, including the bonus and delay rentals. The right to execute the lease itself, however, is held entirely by the grantor.

The Alienability, Duration and Revocability of the Executive Right

Most courts have held that the power to lease is freely assignable. This power to lease another
party’s minerals is also irrevocable.52 This durability resulted despite the different labels sometimes attached to the executive right in the past, such as a power coupled with an interest in the land,53 a pure contractual right,54 a power of appointment,55 or simply a portion of the fee mineral estate that has been severed from the other portions of the mineral estate—as we have seen, the modern Texas view.56

Being a real property interest, the executive right is not only irrevocable in Texas, but also perpetual. Richard Hemmingway has noted that the “executive right granted or reserved to the holder, his heirs, successors and assigns is presumptively perpetual and hence purports to allow the creation of interests in real property that will vest at some indefinite time in the future.”57 Despite being an inchoate interest that may not be actively used for leasing oil and gas interests for decades, if ever, and hence may not “vest” within twenty-one (21) years of a life in being, it is unlikely that the executive right violates the rule against perpetuities in Texas—even in circumstances where the executive right holder has no other component of the mineral estate (sometimes called a “bare” or “stripped” executive right)—as Texas classifies the right as a separate and alienable portion of the mineral estate.58

While conveyance of the mineral estate with specifically expressed reservations of some sticks generally means that the other unmentioned sticks are conveyed (the “greatest estate” canon of interpretation in action), conveyance of specific sticks generally means the unexpressed sticks remain with the grantor. For example, in Burns v. Andus,59 the grantor expressly conveyed an executive right over a reserved mineral interest. The 11th Appeals Court determined that, while a conveyance of all the oil, gas and other minerals (or similar grant) passes all the mineral estate, where only one or more portions of the mineral estate is expressly conveyed, the rest of the unmentioned components of the mineral estate remain with the grantor.

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53 R. Hemingway, Oil and Gas Law and Taxation, §2.2(B) (4th Ed. 2004).
54 Id.
55 Pan Am. Petroleum Corp. v. Cain, 355 S.W.2d 506 (Tex.1962) (Executive power is held to be less than one coupled with an interest but more than a license or naked right.)
57 R. Hemingway, Oil and Gas Law and Taxation, §2.2(C) (4th Ed. 2004).
58 Id. (This is in contrast to other states, such as California, where in Dallapi v. Campbell, 114 P.2d 646, Cal.App.1941, a court determined that a stripped executive right was only a contractual right which allowed the executive to convey a real property interest beyond the period of lives in being plus twenty-one (21) years.)
mineral estate remain with the grantor. Specifically related to Burns, this meant that the only portion of the mineral estate that was passed was the executive right—the non-executive grantor retained all the other portions of the mineral estate and the grantee/executive owned a portion of the mineral comprised only of the executive right. Here, not only was the ability of the executive right to exist as a completely stripped and separate mineral property right recognized, but the result also aligned with the view of Grissom that the retained mineral rights (self-development, bonus, rentals and royalty) did not transform themselves into a mere royalty right with no self-development ingress allowed.

The Duty of the Executive to the Non-Executives

Texas courts have wrestled with describing exactly what standard of duty is owed by the executive to the non-executives for decades. The exact duty owed by the executive to the non-executives has been painstakingly parsed out, word by word, in a bevy of cases. Like the collection of phrases used to determine the necessary threshold of certainty a jury needs to decide a case or convict or acquit a defendant, such as “clear and convincing evidence” and “evidence beyond a reasonable doubt,” the spectrum of the scope of the executive duty is embodied by phrases. These include a rainbow of locutions starting with the lowest measure of care as “a duty of ordinary good faith,” to a duty of “utmost good faith without a fiduciary obligation,” to a duty of “utmost good faith with a fiduciary obligation,” up to the “standard” fiduciary obligation as it is widely understood outside of the oil and gas law realm. An executive’s duty in the realm of oil and gas law currently sits at third tier mentioned above, right below a “standard” fiduciary duty.

Within their landmark Manges v. Guerra opinion the Supreme Court of Texas paralleled the duty of “utmost fair dealing” with fiduciary obligations. Such fiduciary standards traditionally require

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60 Id. at 420.
61 Id. at 419-20.
62 See Kulander, supra note [-], Part III and accompanying text.
63 See Lesley, supra note [-] at 481; see also Dearing, Inc. v. Spiller, 824 S.W.2d 728, 732 (Tex. App.—Fort Worth 1992, writ denied) (“This is a more stringent standard than simple good faith but has generally been considered one step below a true fiduciary obligation.”).
64 673 S.W.2d 180 (Tex. 1984).
putting the beneficiary party’s interest above the agent’s interest. The most appropriate application of the
general fiduciary duty to the specific confines of the executive right to lease oil and gas real property
interest has proven elusive, however. Manges did not apply the highest fiduciary duty—which would be
that the executive rights owner must subordinate its own interest to those of the non-executive right
interest holders—but instead held that the executive should get every benefit for them that it exacts for
itself—a sort of “fiduciary duty lite.” In addition, any leases executed by the executive covering its own
mineral interest that were not exactly identical to those covering the interest of the non-executive(s) were
not automatically violative of this utmost good faith standard, if the portions of the lease that were not
identical were not material to the development of the mineral estate nor the proceeds derived therefrom.

Manges hinged upon a case of blatant self-dealing by the executive. Manges owned the executive
rights covering minerals owned in fee by non-executive co-tenants Guerra. Manges entered into an
“Option Contract” covering the minerals of Guerra (as well as other acreage in thirteen other counties
where Manges owned an interest) that authorized the other party, GPE, to develop the minerals covered
by the agreement but with no obligation to pay the Guerra bonuses or delay rentals and “no obligation to
drill or develop the minerals on the Guerras Lands.” In addition, Manges borrowed money from GPE
and entered into a “Repayment Agreement, Collateral Assignment, and Security Agreement.” The Court
noted that “[f]or seven years, the GPE contracts tied up the Guerra lands with no bonuses or delay rentals
for the Guerras.” Further, Manges executed a deed of trust to secure a personal note held by the Bank of
the Southwest National Association that covered “all of the oil, gas and other mineral interests . . .
including . . . executive rights and powers” owned by Manges. Accordingly, Guerra alleged that these
agreements “withdrew the Guerra minerals from the market for leases to third parties,” and thus violated

65 Id. at 183.
denied).
67 Manges v. Guerra, 621 S.W.2d 652, 654 (Tex. App.—Waco 1981), aff’d in part rev’d in part, 673 S.W.2d 180
(Tex. 1984).
68 Id.
69 Id.
70 Id.
the duty owed to the non-executives by the executive.  

All three courts that eventually considered the case hinged their decision on the naked self-dealing. The Supreme Court affirmed the lower courts’ holdings that unwound the lease and deed of trust, assessed punitive damages, and confirmed that Manges’ breached his fiduciary duty. The Court reasoned that the “fiduciary duty arises from the relationship of the parties” and then introduced the “fiduciary duty lite” level of care still observed in Texas today, over thirty years later, with a quote known to most Texas oil and gas practitioners: “[the fiduciary] duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every benefit that he exacts for himself.”

Subsequent to Manges, Texas courts have continued to apply this “fiduciary duty lite” approach to executive rights cases, not requiring that the executive must always subordinate its own interest to that of the non-executive(s), as might be applicable in the case of a trustee, agent or more traditional fiduciary. Richard Hemingway noted in his treatise Oil and Gas Law and Taxation that Texas courts have typically examined the factual specifics of executive duty cases and considered whether the executive leasing power was exercised in a way that a similarly-situated fee mineral owner exercising the executive right to lease over its own interest would have acted and whether the executive had sought any advantages that the non-executive(s) would not receive.

Application of this “fiduciary duty lite” proved challenging. While the subsequent case of In re Bass reaffirmed that Texas executives owe the non-executives “a fiduciary duty,” the Texas Supreme Court applied the duty differently. In Bass, the fee mineral owner owned approximately 20,000 acres encumbered by a 1/12th NPRI. In 1995, the mineral owner hired Exxon to conduct a seismic reflection

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71 Id. at 655.  
72 Manges, 673 S.W.2d at 183.  
73 Id. at 183-84.  
74 Id.  
75 Hemingway, Oil and Gas Law and Taxation, §2.2(c); See e.g. In Re Bass, 113 S.W.3d 735 (Tex. 2003); Hlavinka v. Hancock, 116 S.W.3d 412 (Tex. App. 2003).  
77 113 S.W.3d 735 (Tex. 2003).  
78 Id. at 737.
survey on the tract but did not subsequently lease. Due to this lack of leasing, owners of an undivided portion of an outstanding NPRI sued, arguing that the mineral owner had violated its executive duty to them by not leasing. The NPRI owner also sought disclosure of the confidential seismic data as proof that the tract would be profitable to lease. The Texas Supreme Court reversed a lower court ruling compelling disclosure of the seismic data and scrutinized the nature of the fiduciary duty owed the NPRI owner, specifically focusing on the alleged duty to develop the tract. After noting that the executive’s duty comes from agency jurisprudence arising from a special position between the parties, the Court noted that a duty to develop arises from, “the implied covenant doctrine of contracts law in which courts read a duty to develop into an oil and gas lease when necessary to effectuate the parties’ intent.” After distinguishing these two duties, the Court noted that the executive was only required to get for the non-executive what it got for itself. Therefore, since the executives did not lease and received no benefits therefrom, the executive had not violated its duty because neither party had received any benefit from leasing or otherwise.

Bass is clearly distinguishable from Manges: “What differentiates this case from Manges, however, is that no evidence of self-dealing exists here.” In Bass, the executive had not refused to lease when presented with the opportunity. In addition, no evidence existed that the executive had entered into contracts that had the effect of making the minerals unleaseable. Thus, in Bass the executive had not “used the executive powers to benefit himself with no similar benefit to the non-executives” as was the case when Manges refused to lease, executed the options contracts with GPE, and encumbered the non-executive minerals to a deed of trust.

After Bass and, as discussed below, before Lesley, the executive could refuse to lease if offered

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79 Id. at 738.
80 Id. at 737.
81 Id. at 738.
82 Id. at 743 (citing Danciger Oil & Ref. Co. v. Powell, 154 S.W.2d 632, 635 (Tex. 1941)).
83 Id. at 744-45.
84 Id.
85 Id. at 745.
86 Manges, 673 S.W.2d at 182.
the opportunity for almost any reason, seemingly including denials motivated by self-dealing by the executive that could be unfavorable to the non-executives. In Hlavinka v. Hancock, non-executive mineral fee owners brought an action for a breach of fiduciary duty against the executive (and surface owner) after the executive declined offers to lease the non-executives’ mineral interest. The Corpus Christi Court of Appeals held that the executives did not breach their duty to the non-executives when executive did not accept a lease with different bonus and royalty rates than neighboring leases. The court opined that Hlavinka did not involve, “a case where the Hlavinkas were arbitrarily refusing to lease under any circumstances.” In addition, Hlavinka involved no self-dealing and was not “a case where the executives entered into a transaction affecting the mineral estate where they exacted a benefit for themselves to the exclusion of the” non-executives.

Similarly, in Aurora Petroleum, Inc. v. Newton, Bass also served as the principal rationale for the court’s acceptance of an executive’s refusal to lease. In Aurora, the plaintiffs were owners of terminable nonexecutive minerals interests in three-fourths of the fee mineral estate. The executive defendant owned the remainder of the fee mineral estate and both the executive rights and reversionary interest covering the terminable interests. The terminable interests would revert to the executive if they were not maintained by production. The non-executives decided to enter into a lease with Aurora Petroleum, and when the executive refused to ratify the lease, Aurora sought a judicial declaration on behalf of itself and its “lessors” that the executive had breached its fiduciary duty for not doing so. The plaintiffs asked the court to transfer the executive right to the owners of the non-executive terminable interest. The Amarillo Court of Appeals rejected this argument and instead held that plaintiffs were essentially arguing for the executive to have a duty to lease or self-develop, a supposition that cannot arise.

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88 Id. at 18.
89 Id. at 419.
90 Id.
91 287 S.W.3d 373 (Tex. App.—Amarillo 2009)
92 Id. at [-].
93 Id. at [-].
in Texas without an oil and gas lease.\textsuperscript{94} Citing \textit{Bass}, the court held that the executive does not have a duty to execute an oil and gas lease and that its executive duty to non-executives instead springs forth only upon the execution of a lease.\textsuperscript{95} Only once the lease is signed does the duty arise for the executive to acquire every benefit for the non-executive that the executive acquires for himself.\textsuperscript{96}

Therefore, in both \textit{Hlavinka} and \textit{Aurora}, the courts cited \textit{Bass} in holding that the executive had not violated its fiduciary duty to the non-executives because no leases had been signed. This was legal landscape in Texas with regards to the executive’s duty to lease at the time of the \textit{Lesley}.

\textit{The Different Duties Owed to Non-Executive Mineral Fee Owners and NPRI Owners}

Is an NPRI owner entitled to the same fiduciary duty from an executive as a non-executive mineral owner? The answer may lie in the difference between and NPRI and a non-executive mineral fee. An NPRI is a type of royalty that is conveyed or reserved by fee mineral or another royalty interest, meaning that they are ultimately “carved” out of the fee mineral estate and not a leasehold estate like an overriding royalty interest (“\textit{ORI}”).\textsuperscript{97} Some NPRIs last only for a certain time interval while others are perpetual.\textsuperscript{98} Texas courts have consistently characterized NPRIs as an incorporeal interest in land the owner of which cannot explore for the minerals itself nor is the owner a necessary party to a lease of the mineral estate but rather only is entitled to an interest in “actual production” once the minerals are severed.\textsuperscript{99} The NPRI owner generally has no right to receive any lease bonus or delay rentals and does it have any power to make a lease.\textsuperscript{100} In the other hand, NPRIs usually are free of the costs of drilling and

\textsuperscript{94} Id. at [-].
\textsuperscript{95} Id.
\textsuperscript{96} Id.
\textsuperscript{97} SHADE, supra note 48, at 15 (4\textsuperscript{th} ed. 2008). (NPRIIs are generally expressed as a fraction of production of 8/8ths.)
\textsuperscript{98} Id.
\textsuperscript{100} Magnolia Petroleum Co. v. Storm, 239 S.W.2d 437, 438 (Tex. App.—El Paso 1950, writ ref’d n.r.e.) (wherein the court defines the nature of an NPRI interest).
production. NPRIs have been defined as “an interest in the gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty, which does not carry with it the right to participate in the execution of, the bonus payable for, or the delay rentals to accrue under oil, gas, and mineral leases executed by the owner of the mineral fee estate.”

Texas courts have differentiated the presence or absence of an implied covenant to protect or develop a non-executive mineral interest depending on whether the non-executive interest was a fee mineral interest or an NPRI. In Danciger Oil & Refining Co. v. Powell, the Texas Supreme Court explained that a covenant to protect or development may be implied if it appears “that it is necessary to infer such a covenant in order to effectuate the full purpose of the contract as a whole as gathered from the written instrument.” In Danciger, the Court considered a mineral deed that unconditionally granted the fee minerals for an unlimited period of time. The grantor retained a 1/8th NPRI. When considering a tussle over whether the executive grantee owed a duty to develop to the NPRI-retaining grantor, the Court stated “there is nothing in the instrument to indicate that its dominant purpose was to obtain an exploitation or development of the property for oil and gas mining purposes.” In holding that no duty to develop existed, the Court noted that even though the grantor retained a 1/8th NPRI, this was insufficient in itself to require “reading into the contract” a covenant to speedily develop the property in the event commercial hydrocarbons were found. Likewise, in Pickens v. Hope, the San Antonio Court of Appeals held that a fee mineral executive co-tenant owes fiduciary duties to its fellow non-executive co-tenants, but that such duties did not necessarily extend to an owner of an NPRI. This reticence strongly suggests there is no implied covenant in Texas for an executive to protect or to develop NPRI-burdened minerals.

103 154 S.W.2d at 632, 635 (Tex. 1941).
104 Id. at 636.
105 Id.
106 Id.
107 764 S.W. 2d 256, 266-67 (Tex. App. – San Antonio 1988, writ denied).
108 Id.
The NPRI owner does not obtain any possessory interest in the land or any title to the minerals. The NPRI owner is also not a co-tenant with the mineral fee owner but instead has an incorporeal hereditament analogous to the right to receive future rents of real property. The NPRI owner does not have “that degree of control over the executive that usually characterizes a ‘principal-agency’ relation” and, hence, has no power to lease, because it does not own a property interest that can be leased. Finally, the relationship between the NPRI owner and the executive is not like that of a trust relationship because the executive does not own anything that encumbers the NPRI interest and over which it would owe equitable duties such as the executive control over the non-executive fee mineral interest. In a real sense, the NPRI owner is just along for the ride.

This difference resonates between the two towers of Bass and Manges, described above, in that the non-executive interest owned in Bass was an NPRI whereas in Manges the non-executive interest was a mineral fee. Unlike an interest in the mineral fee, an NPRI is “an interest in gross production of oil, gas, and other minerals carved out of the mineral fee estate as a free royalty. . .” and was not a leasable interest. The executive obviously does not owe the NPRI owner a duty to lease an interest that is not capable of being leased.

**FACTUAL AND PROCEDURAL BACKGROUND TO LESLEY V. VETERANS LAND BOARD**

*Introduction and Factual Background*

The power of the executive right owner and the level of consideration that he or she must give the non-executives are still being litigated. Recently the Texas Supreme Court handed down an opinion in which the executive right played a defining role and the Court’s ruling, although somewhat terse, helped to shed further light on this most mysterious “stick” in the mineral right faggot. This case, Lesley, marks a

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109 *Id.* (quoting an article written by A. W. Walker, Jr. and presented to the Wichita County Bar Association in December of 1946). (Emphasis by author.)

110 *Id.*

111 *Id.*

112 *Id.*

113 *Bass*, 113 S.W. 3d at 745 n.2 (emphasis in original)(citing Lee Jones, Non-participating Royalty, 26 Tex. L. Rev. 569 (1948)).
turning point in executive right jurisprudence as it comes as a result of the inevitable transference of the executive right into the hands of a party that did not want to lease because of its surface interest and its development scheme thereon.

The Barnett-Shale play is a recently discovered gas deposit lying west of the Dallas/Fort Worth “Metroplex” and which underlies the property at issue. Within five (5) years it has become the largest gas play in the continental United States. Leasing and exploration activity, such as seismic reflection data gathering, have occurred and continue all around the “Mountain Lakes Development”—the name of the captioned tract. Prior to economic hydraulic fracturing and horizontal drilling technology and higher gas prices, the Barnett Shale was considered a “trap rock” that held oil and gas within more traditional reservoirs below it. By 2000, however, higher gas prices and better drilling technology led to a deluge of gas production in and around Denton, Tarrant, and Wise counties in Texas, with over 10,000 wells drilled by 2008.\textsuperscript{114} Lease bonuses in the region topped $26,000 per mineral acre in the most prospective portions of the Barnett Shale.\textsuperscript{115}

The Barnett itself ranges in depth from 6,500 feet to 8,500 feet and is found below the Marble Falls Limestone and above the Chappel Limestone.\textsuperscript{116} Wells in the Barnett are typically horizontal with well spacing ranging from 60 to 160 acres per well, draining a highly variable reservoir thickness of 100 to 600 feet. Government sources place 327 Tcf of gas in the Barnett, with forty-four Tcf being recoverable, and with each ton of shale producing a generous 300-350 Scf of natural gas.\textsuperscript{117}

In \textit{Lesley}, the tract in question was a 3,923.58-acre swath of land near the middle of the Barnett Shale play in Erath County, Texas that was conveyed in 1998 by Betty Yvon Lesley (“Lesley” without italics) to the predecessor of Bluegreen Southwest One, L.P. (“Bluegreen”), a Florida real estate


\textsuperscript{116} \textit{Id.}

\textsuperscript{117} \textit{Id.}
Completed in two deeds, the conveyances contained a reservation of a portion of Lesley’s fifty-percent (50%) undivided mineral estate but passed all of the executive rights. The executive rights holder therefore owned twenty-five percent (25%) of the minerals but all of the executive rights to lease. In addition, the developer owned all of the surface estate. The housing developer intended to develop the surface into a series of “ranchettes”—individual housing sites each comprising about five (5) acres or so of land. Intermixed into the individual lots would also be communally-held lands managed by a community organization.

In preparation for marketing the approximately 1200 surface tracts, the developer had printed sales materials advertising the fact that no drilling would ever take place on the subject land—this promoted claim seen as an enticement for those looking to avoid possibly having to deal with the gas shale development then rampant throughout the region. In addition, each of the individual lot owners would take deeds subject to a covenant against drilling that required the purchasers to acquiesce to anti-drilling covenants and other limitations that effectively prevented the development of the mineral estate. Specifically, the “Declaration of Covenants” signed by the surface tract purchasers provided: “No commercial oil drilling, oil development operations, oil refining, quarrying or mining operation of any kind shall be permitted. No derrick or other structures designed for the use of boring for oil or natural gas shall be erected, maintained or permitted upon any Tract.” Although the Declaration of Covenants has been amended from time to time, it was never repealed or withdrawn. Each surface landowner and their successors, heirs and assigns who purchased a lot took their respective assignment of interests subject to this covenant. The deeds for the individual lots, however, each passed the associated fee minerals without mention of the executive right.

These limitations on drilling were used by the executive to heighten its return from selling the

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118 Lesley, 352 S.W. at 481.
119 Id.
120 Id.
121 Id.
122 Id. at 482.
1200 tracts, a benefit derived from snuffing out the development hopes of the non-executives. Thus, the owner of the executive right was also the surface developer and had self-interest in maximizing profits from lot sales. Wanting to take advantage of this favorable leasing climate but finding themselves under the thumb of an obdurate executive, the owners of the majority share non-executive, non-surface, mineral interest brought suit.

The District Court

The non-executives filed suit against Bluegreen and the individual lot owners, who included in their number the Veterans Land Board of the State of Texas, in Erath County, in 2005, complaining about the restrictive covenants that limited mineral development. The 266th District Court of Erath County issued their opinion January 17, 2007, and held that Bluegreen, deemed to be the sole owner of the executive rights, owed the non-executives a duty to seek out or cooperate with a prospective lessee.

The District Court also found that the executive had breached its fiduciary duty to the non-executives by: (1) implementing restrictive covenants that barred mineral development; (2) entering into deeds of trust that encumbered the property as mortgagor; and most importantly (3) failing to lease the

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123Because of the potential windfall to the developer by selling its surface properties at a higher price with the promise of no drilling, an argument could be made that he reaped a benefit his co-tenants did not and thus they are due an accounting of a portion of the profits. In White v. Smyth, 214 S.W.2d 967 (Tex. 1948), Smyth and others sued mineral estate co-tenant White and others, seeking partition and accounting for rock asphalt removed from the common property. The Supreme Court of Texas found for Smyth, casting aside White’s argument that he merely took his share of the rock asphalt. Further, the court said,

“The rock asphalt was owned in undivided interests by all the co-tenants. Their ownership extended to all of the rock asphalt and to all of the advantages and peculiar conditions and stages of the development of the property at the time when petitioner terminated the lease. This ownership extended to the developed pit with its great wall of easily accessible rock asphalt and the valuable mining site. It extended to the use value of the rock asphalt and to its profit possibilities.” (emphasis added by author)

Non-development of natural resources which reaped for the executive rights owner an actual monetary benefit could be said to be worthy of an accounting if “peculiar conditions” included not disturbing a “valuable drilling site.” Tactically, this accounting—in lieu of clearance to lease and receive royalty from subsequent drilling—is almost certainly not what the potential plaintiffs want in this circumstance.

124Id. at 147046. In addition, the developer had printed sales brochures wherein the fact that no drilling would be permitted through the use of restrictive covenants on the lots was advertised as a positive sales point.


minerals when an opportunity presented itself.\textsuperscript{127} The District Court also found that the restrictive covenants were not binding on the non-executives and that the executives could develop the oil, gas and minerals under the captioned tract themselves—they could, in other words, “self-develop.”\textsuperscript{128} With this setback, Bluegreen and some of the individual tract owners (including the Veteran Land Board) appealed the district court’s order in support of Lesley’s motions of summary judgment to the Court of Appeals in Eastland.\textsuperscript{129}

*The 11\textsuperscript{th} Court of Appeals*

The 11\textsuperscript{th} Court of Appeals (“11\textsuperscript{th} Appeals Court”), in a decision written by Justice Terry McCall,\textsuperscript{130} overruled the trial court, reversing the trial court’s summary judgment in all respects as a matter of law and remanding to the trial court for hearings consistent with its opinion.\textsuperscript{131} Among the findings by the 11\textsuperscript{th} Appeals Court, six resonant most loudly with regards to Texas executive rights jurisprudence.

First, the 11\textsuperscript{th} Appeals Court found that Bluegreen (and the individual lot owners to whom the executive right had passed in some cases) had not breached their duty because the owner of the executive does not have a duty to lease the minerals, holding that “Bluegreen did not breach a duty by failing to lease [the non-executives’] minerals.”\textsuperscript{132}

Second, the 11\textsuperscript{th} Appeals Court ruled that since the developer in Lesley had not leased the land, the fiduciary duty had not been activated, opining, “No breach of fiduciary duty can occur until the executive exercises the executive rights.”\textsuperscript{133} In reaching this conclusion, the court quoted from *Bass*:

“The Guerras sued Manges for self-dealing in leasing a portion of the estate to himself at unfair terms. We stated that “[a] fiduciary duty arises from the relationship of the parties.”

\textsuperscript{127} Lesley, 352 S.W. at 482.  
\textsuperscript{128} Id.  
\textsuperscript{129} Id.; see Lesley, 281 S.W.3d 602 (Tex. App.—Eastland 2009, pet. granted).  
\textsuperscript{130} Lesley, 352 S.W.3d at 482.  
\textsuperscript{131} Id.  
\textsuperscript{132} Id. at [-].  
\textsuperscript{133} Id. at [-].
. . . [t]hat duty requires the holder of the executive right, Manges in this case, to acquire for the non-executive every benefit that he exacts for himself.” Accordingly, we held that Manges breached his fiduciary duty to the Guerras by making a lease to himself under numerous unfair terms.

. . . .

*What differentiates [Bass] from Manges, however, is that no evidence of self-dealing exists here.* Bass has not leased his land to himself or anyone else. Bass has yet to exercise his rights as the executive. Because Bass has not acquired any benefits for himself, through executing a lease, no duty has been breached. Thus, the present facts are distinguishable from *Manges.* [113 S.W.3d at 744-45]"  

From this quote, the 11th Appeals Court then suggested the rule, “The court’s analysis in *Bass* establishes that no breach of fiduciary duty can occur until the executive exercises the executive rights.” The court parsed out the rule into three components, finding that “[a] fiduciary duty only occurs if (1) the executive exercises the executive rights (2) the executive acquires benefits from the minerals for himself by exercising the executive rights, and (3) the executives fails to acquire every benefit for the non-executive mineral owners that he acquired for himself.” Thus, since the anti-drilling covenants, conditions and restrictions, created by the executive “for the purpose of maintaining the integrity of the subdivision” were not an exercise of the executive right and therefore did not breach the fiduciary duty owed by the executive, and would not have breached such duty even if they did constitute an exercise of the executive duty.

Fourth, the non-executive not only passed the right to lease when they severed the executive right, but also passed all right of self-development. The 11th Appeals Court noted that, “[h]ad the [non-executives] retained the executive rights and the *correlative* right to develop, the restriction against mineral development would not prohibit them from exercising the [leasing and self-development]

134 *Id.* Emphasis by author.
135 *Id.*
136 *Id.*
137 *Id.*
138 *Id.*
Finally, the courts considered the validity of the covenants. The non-executives argued that the covenants were invalid because the mineral rights had effectively not passed through the developer to the lot owners because the covenants made the grant void and, generally speaking, that the anti-drilling covenants violated the dominance of the mineral estate. The trial court had agreed, saying that the anti-drilling covenants were void. However, the 11th Appeals Court held that the anti-drilling covenants made after the mineral assignments from the non-executive to the executive impliedly precluded self-development, in essence conveying away that right and seemingly creating a peculiar new category of non-possessory mineral owners whose property is not dominant over the surface estate.

**The Opinion of the Texas Supreme Court**

Lesley filed their Petition of Review on May 18, 2009. The Texas Supreme Court accepted the petition on July 2, 2010. The case drew widespread attention across the realm of oil and gas law, drawing three *amicus curiae* briefs in support of Lesley by Professor Emeritus Bruce M. Kramer (Texas Tech University School of Law), the Texas General Law Office, and veteran oil and gas practitioner Maston C. Courtney of Amarillo, Texas. Representing Bluegreen was Laura H. Burney, professor of oil and gas law at St. Mary’s School of Law, while Cotton, Bledsoe, Tighe & Dawson, PC, a Midland, Texas firm known for oil and gas litigation, represented the non-executives. Oral argument was given in Austin on September 15, 2010. On Aug. 26, 2011, the Court issued its opinion.

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139 *Id.* (emphasis by author)
140 *Id.*
141 *Id.*
142 *Id.* at [-].
143 53 Tex. Sup. Ct. J. 911 (July 2, 2010).
146 *Lesley*, 352 S.W. 3d at 479.
Passage of the Executive Right

The non-executives, as they did at the 11th Appeals Court level, again argued that, since the executive surface owner placed restrictive anti-drilling covenants on the lot buyers that prevented them from leasing their tracts, the Bluegreen had effectively reserved the executive right.147 This assertion was rejected by the Court, who noted that amendments to the covenants covering the lots could be amended or even repealed entirely by a two-thirds vote of the lot owners, suggesting that the rights were transferred and merely subject to the covenant limitations.148 Then, perhaps less flippantly, the Court also noted the factual similarities between Day & Co. and Lesley regarding passage of the largest possible estate before deducing that,

“When an undivided mineral interest in conveyed, reserved or excepted, it is presumed that all attributes remain with the mineral interest unless a contrary intention is expressed. Therefore when a mineral interest is reserved or excepted in a deed, the executive right covering that interest is also retained unless specifically conveyed. Likewise, when a mineral interest is conveyed, the executive right incident to that interest passes to the grantee unless specifically reserved.”149

Drawing from Day & Co., the Court applied the same reasoning to the facts of Lesley, pronouncing that the Bluegreen deeds passed the executive right along with the fee surface and mineral interests to the individual lot owners because Bluegreen did not expressly except the executive right in the deed.150 Therefore, the executive right passed to the lot owners, but was subject to the anti-drilling covenants.151

Self-Development by the Non-Executives

The Supreme Court also quickly dispensed with Lesley’s argument that the non-executive can self-develop the minerals. Squelching the notion that the right to self-develop and the executive right to

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147 Id. at 20.
148 Id. at 33.
149 Lesley, 352 S.W.3d at 486.
150 Id. at 486-487.
151 Id. at 487.
lease are separate and independent “sticks” in the mineral rights bundle, the Court cited their opinion in *French* wherein they opined in dicta,

“We have stated that ‘the right to develop is a correlative right and passes with the executive rights.’ By this rule, petitioners have no right to develop. Having rejected the premise of their argument, and holding instead that they are owed a duty by the executive, we decline to reconsider the relation between the right to develop and the executive right.”

As detailed below, this quote from *French* cites, in turn, to a footnote in dicta within *Day & Co.*, that, in turn, cites to another footnote in dicta from an even earlier case.

*Duty of the Executive Right*

Not surprisingly, with regards to the exact duty owed by the executive, the executives and the non-executives tried to align the situation in *Lesley* with the two main cases they see as favorable to their cause. The executives latched onto *Bass*, echoing the 11th Appeals Court notion that the executive’s duty does not arise until leasing, and since they refused all possible lease offers, there was no duty. In contrast, the non-executives invoked *Manges* and the self-dealing involved in that case, arguing that the executive’s reading of *Bass* that allows for no breach of duty until leasing occurs (and hence, no leasing) cannot be reconciled with both *Manges* and the obvious executive self-dealing present in *Lesley*.

Declining the prizes behind each proffered door, the Court instead blazes its own, more nuanced, interpretive trail. After a ramble through much of the above-described case law describing the jurisprudential evolution of the duty of the executive right, the Court first disagrees with the non-executives, saying that their notion that the duty to lease found in *Manges*, as the non-executives argue is evidenced by the damages levied on *Manges* for failure to lease, could not be reconciled with *Bass* and *Lesley*, noting:

“The tension…[between]…*Bass* and *Manges* is relieved by the fact that Manges’ finding

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of breach was in the context of pervasive self-dealing. In other words, Manges breached his duty not merely because he failed to lease to third parties as opposed to no one at all, but because he failed to lease to third parties as opposed to himself. The tacit assumption in Manges was that the minerals would be leased to someone. That was not the assumption in Bass, where the parties disputed whether the mineral should be leased at all.\textsuperscript{154}

Thus, the self-dealing in Manges resulted in the breach of the fiduciary duty, not the lack of leasing.\textsuperscript{155} In Manges, the Court noted, the “tacit assumption...was that the minerals would be leased to someone” eventually, contrasting the notion in Bass that “the parties [in Bass] disputed whether the minerals should be leased at all.”\textsuperscript{156}

Then the Court deals with Bluegreen’s argument that Bass could be invoked for the proposition that, whether self-dealing is present or not, the existence of no lease means no fiduciary duty exists between the executive and the non-executive:

“Nevertheless, we do not agree with Bluegreen and the land owners that Bass can be read to shield the executive from liability for all inaction. It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive’s refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive’s detriment, the executive may have breached his duty. While there was an allegation of self-interest in Bass, we concluded that it was not sufficiently supported by the record to warranty compelling discovery of privileged information.”\textsuperscript{157}

Even though the executive right holder in Lesley had not executed any oil and gas leases, the Court held that Bluegreen, “…exercised the executive right to limit future leasing by imposing restrictive covenants on the subdivision. This was no less an exercise of the executive right that Manges’ execution

\textsuperscript{154} Lesley, 352 S.W. 3d at [–].
\textsuperscript{155} Id. at 491.
\textsuperscript{156} Id. (Monica Ehrman, in her paper \textit{Duties of the Executive After Lesley v. Veterans Land Board} presented to the 38\textsuperscript{th} Annual Ernest E. Smith Oil, Gas & Mineral Law Institute in Houston on March 30, 2012, first highlighted this difference in the way the Court viewed the parties’ expectation in \textit{Manges} and \textit{Bass}.)
\textsuperscript{157} Id. at 491.
of a deed of trust covering the Guerra’s mineral interest.”158

Instead of establishing a specific rule regarding the fiduciary duty of executive in relationship to a refusal to lease, the Court instead reasoned that “an executive’s refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive’s detriment, the executive may have breached its duty.”159 The Court remanded the issue for the trial court to decide whether the executive breached its duty by not entering into leases.160 Instead of expanding on the issue, the Court briefly explained that it would not give a “general rule” because of the varying circumstances from which an executive could be liable for breaching its fiduciary duty, stating:

“But we need not decide here whether as a general rule an executive is liable to a non-executive for refusing to lease minerals, if indeed a general rule can be stated, given the widely differing circumstances in which the issue arises.”161

Regarding the restrictive covenant, the Court did hold that Bluegreen violated its fiduciary duty by placing it on the individual lots.162 Although the Court recognized that Bluegreen wanted to protect the homeowners from disruptive activity related to drilling, the Court stated that protection could be achieved through the accommodation doctrine.163

**ANALYSIS OF THE EXECUTIVE RIGHT IN TEXAS AFTER LESLEY**

Executive rights have perplexed courts for a long time and have caused them to struggle with even consistently classifying this most mysterious of the mineral interests. Lesley speaks little toward some questions regarding bonus payment negotiation and reception, treatment of non-executive fee mineral interests versus NPRIs with regards to the fiduciary duty of the executive, or duties by the non-executive to lease or self-develop its own minerals. Lesley does change the timing and application of the

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158 *Id.*
159 *Id.*
160 *Id.*
161 *Id.*
162 *Id.* at 492.
163 *Id.* (For a detailed discussion of the accommodations doctrine in Texas, see Douglas R. Hafer, et. al., *A Practical Guide to Operators/Surface-Owner Disputes and the Current State of the Accommodations Doctrine*, 17 Tex. Wesleyan L. Rev. 47 (2010)).
duty owed by the executive to the non-executives, when and how this duty is activated, and squelches self-development by the non-executive.

The Duty Owed by the Executive to the Non-Executives Generally

From a public policy angle, the executive right most likely was first created and recognized to facilitate the leasing of hydrocarbon real property. The 11th Appeals Court’s opinion was entirely divorced from this view.

If the executive rights holder has an interest in seeing the minerals remain undeveloped, such as the case of Lesley, a temptation may arise to put self-interest ahead of the interest of the mineral co-tenants—a situation not compatible with the duties of a fiduciary. In Lesley, the developer had an incentive to prevent oil and gas development in order to increase the value of the surface in the eyes of prospective lot buyers. In such a case, the interests of the supposed fiduciary are pulling in two directions. The developer, as the executive right holder, had a fiduciary duty to its mineral co-tenants while also having self-interest in maximizing profits from lot sales. Bluegreen violated the fiduciary duty with the anti-drilling covenants placed on the lots in an attempt to stop the lot owners from leasing themselves.

That the 11th Appeals Court did not reflect upon the self-dealing of Bluegreen and the friction this created with the fiduciary duty of the executive is exceptional. The self-dealing of the executive in Manges powered the opinion of the Texas Supreme Court. The lack of self-dealing is what the court in Bass noted when distinguishing that case from Manges. The implications are clear: if no evidence of self-dealing by the owner of executive rights existed in Lesley, Bass may have been applicable. What differentiates Lesley from Bass, however, was the evidence of self-dealing.

By creating the anti-drilling covenants, Bluegreen effectively condemned minerals owned by a non-executive. When the executive right and a reason for the executive to avoid development combine with the rule from Bass that the executive’s duty does not begin until a lease is taken, the executive right can easily and temptingly become a means to prevent development. Whatever the reason for the initial existence of the executive right, that it was not created to prevent leasing is manifest.
The Court squelched this chicanery, however, by making it clear that a surface owner does not have any effective eminent domain power to condemn mineral development through such covenants. Fortunately, the Supreme Court’s decision provides further definition of the duty owed by the executive to the non-executives. Ultimately, the biggest variable in executive rights cases that attempt to construe the extent and timing of the fiduciary duty is self-dealing by the executive. It seems one can put Manges and Bass on a spectrum, with the first representing what happens with egregious self-dealing, and the second being what happens with clean hands, while Lesley is perhaps in the middle.

Another outlet for the non-executives to seek remedy might possibly have been an action seeking declaration that the executive covenants acted as a private takings of their use of real property. Inverse condemnation is an action against a party which has not yet exercised its formal power of eminent domain, but which has provided no compensation for an act that constitutes an effective taking of a real property right. However, for this cause of action to exist, denial of the development mineral estate must be effectively complete, leaving no reasonable alternative for development of the oil and gas.

Commencement of the Executive Duty and Inaction by the Executive

Prior to Lesley, questions existed about exactly when the duty owed by the executive to the non-executives sprang into existence. Bass suggested that the executive’s duty was only triggered by leasing and that, until leasing actually took place, no duty existed. Lesley established two other triggers, both that could exist before leasing. First, the Court opined,

“It may be that an executive cannot be liable to the non-executive for failing to lease minerals when never requested to do so, but an executive’s refusal to lease must be examined more carefully. If the refusal is arbitrary or motivated by self-interest to the non-executive’s detriment, the executive may have breached his duty.”

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166 Certainly, this was what many oil and gas law practitioners took away from In re Bass. An informal survey of over a dozen oil and gas practitioners known to the author over the course of 2011 found all believed In re Bass established that the trigger of the executive’s duty to the non-executive was the act of leasing.
Therefore, while the Court went on to refuse to consider establishing a general rule that the executive is liable for refusing to lease, they wisely established that a refusal by the executive to lease that stemmed from arbitrary self-dealing could be actionable if proved. While proving a self-dealing motive can be difficult, this change by the Court represents an important step towards making the executive’s duty responsive to the apparent purpose of the executive right: to facilitate leasing of a tract with multiple owners. In refusing to consider establishing a general rule that the executive is liable for refusing to lease, the Court went on to say that such a concrete, un-nuanced holding was unnecessary because of the multitude of differing circumstances found in each such squabble.

The Court’s refusal to succumb to the temptation to establish a general rule requiring leasing by a non-executive (who may not be engaged in self-dealing) while instead focusing on both the timing and the presence or absence of arbitrary and capricious designs of the executive contrary to its duties to the non-executives is, in this author’s opinion, an excellent case of judicial foresight. Scenarios will arise where one or more non-executives want to lease while the executive (who typically owns a portion of the minerals himself) and possibly one or more other non-executives will want to wait, possibly for better terms or higher prices, or both. In such trying circumstances, the executive now still has room—and time—to maneuver in order ascertain the best path forward for itself and all its non-executive charges. A hard-and-fast rule that leases must be taken by the executive at the first opportunity would be clumsy and may lend itself to abuse by non-executives in league with potential lessees with ulterior motives.

Self-Development by the Non-Executive

Regarding self-development, the Lesley court cites its prior language in French v. Chevron U.S.A., Inc., reciting that, “the right to develop is a correlative right and passes with the executive rights.” Therefore, notwithstanding the General Land Office of Texas,167 the contrary thoughts of longtime oil and

gas law expert Professor Emeritus Bruce M. Kramer, and this author’s disagreement with the concept, and despite the seemingly favorable facts in support of the non-executives in Lesley, the Supreme Court’s quick and unanimous rejection of reconsideration of the relationship between the right to develop and the executive right provides every indication that the rule is here to stay.

Disappointingly, the Supreme Court provides little reasoning for this portion of the Lesley opinion outside mention of the executive’s fiduciary duty seemingly being the protective mechanism for the interests of the non-executive. Both the Supreme Court and the 11th Appeals Court point to a string of three cases that, they claim, support their finding that a non-executive cannot self-develop.

The first case cited is Altman v. Blake, which primarily concerned (yet again) the question of whether a conveyed interest is a royalty or a mineral interest. The deed in question conveyed “…an undivided one-sixteenth (1/16) interest in and to all of the oil, gas and other minerals in and under and that may be produced…but [the conveyed interest] does not participate in any rentals or leases… [but includes] the rights of ingress and egress at all times for the purpose of mining, drilling, exploring, operating and developing said lands…” The grant also included the proviso that the grantee would “not participate in any rentals or leases” and provided that “the rights of ingress and egress at all times for the purpose of mining, drilling, exploring and developing said lands” would pass in the deed.

This language was held to be a conveyance of 1/16 of the mineral fee trimmed of the right to lease and the right to receive delay rentals. Harkening back to the older mineral interest vs. royalty cases discussed above, the grantor argued that the deed was only a grant of royalty because of the reservation of the executive right and the right to rentals. Even without taking into the consideration the

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170 712 S.W.2d 117 (Tex. 1986).
171 Id. at 117-118.
172 Id. at 118, 120.
173 Id. citing Delta Drilling Co. v. Simmons, 338 S.W.2d 143 [at?] (1960); Grissom v. Guertersloh, 391 S.W.2d 167 (Tex.Civ.App.—Amarillo, 1965 writ ref’d n.r.e.); Etter v. Texaco, 371 S.W.2d 702 (Tex.Civ.App.—Waco, 1963, writ ref’d n.r.e.).
express grant of ingress and egress rights, the Court found that similarly constructed conveyances had been held to convey mineral interests instead of royalty interests.\textsuperscript{174} In disagreeing with Blake’s argument that the conveyance consisted of only a right to royalty instead of a mineral interest (right of ingress and egress in “stick” parlance), the court opined:

“…[the grantors contend] the grantee did not receive the right of ingress and egress because that right necessarily was reserved to the grantor as part of the power to lease. Whether this contention is correct or not, it cannot distinguish this deed from those construed by the courts in \textit{Delta Drilling, Etter, and Grissom}. In all those cases, the exclusive right to lease was retained by the grantor. If the right to lease includes the exclusive right of ingress and egress, that right was retained by the grantors in \textit{Delta Drilling, Etter, and Grissom}.”\textsuperscript{175}

The court then interpreted the conveyance as a grant of the mineral estate (which traditionally includes right of self-development) to the grantee and the retention of the executive right to lease to the grantor. One commentator has pointed out how this “conditional statement concerning an issue that was not before courts in any of the referenced cases, has repeatedly been cited for the proposition that the right of ingress and egress is unseverable from the executive right.”\textsuperscript{176} Note, however, that no fusion or even connection between the right of development and the executive right is evident in the Court’s language. In addition, this dicta had no bearing on the outcome of the case—that the mineral estate is comprised of five separate components and the right of self-development was passed and recognized as a separate interest—its own “stick”—and not part of the executive right.

\textit{Altman} was later cited in a footnote in \textit{Day} as standing for the proposition that the right to self-develop is somehow correlative with the executive right.\textsuperscript{177} To very briefly review, \textit{Day} involved the question of whether the executive right was passed through a conveyance of minerals in which the grantor reserved a fractional mineral interest but made no other express reservations. The Court held that the executive right was conveyed because it was not expressly reserved in the grant. While \textit{Day} is a key case

\textsuperscript{174} Id.
\textsuperscript{175} Id. at 119.
\textsuperscript{176} Texas General Land Office amicus brief, \textit{supra} note [-] at 4.
\textsuperscript{177} \textit{Day}, 786 S.W.2d at 668-70 and n.1.
regarding how Texas has “unbundled” the various mineral rights and allowed them to be reserved and conveyed,\textsuperscript{178} how such a ruling links the executive right and right to self-development is not explained therein or in \textit{Lesley}.

\textit{Day}, in turn, is cited later in a footnote in \textit{French v. Chevron}.\textsuperscript{179} \textit{French} was another important case in the pantheon of decisions dealing with whether a conveyance passed a mineral or royalty interest. In the first footnote, the Court surmises that, while the conveyance at issue provided that the grantor had reserved the right of self-development, \textit{Day} provides that the development right passes with the executive right when undifferentiated.\textsuperscript{180}

Thus, from a case (\textit{Altman}) that does not expressly hold that the right to self-development and the executive right pass as one in a conveyance\textsuperscript{181} and a reliance on footnotes in \textit{French} and \textit{Day}, cases that did not directly speak to any link between the executive right and the right of self-development, do we come to the Court making the decision to seemingly and essentially combine the executive right and the self-development “sticks” of the mineral estate.

The right to self-develop is broad. In other states, cases have stated in dicta that a non-executive mineral owner may still enter the subject tract and self-develop.\textsuperscript{182} One commentator reads the right to self-development as “the right to develop the minerals…This includes the right to use so much of the surface as is reasonably necessary to develop the underlying minerals. …Mineral ownership also includes rights to ingress and egress.”\textsuperscript{183} Another brace of commentators favor the notion of the executive right and

\begin{itemize}
\item \textsuperscript{179}896 S.W.2d 797, n.1.
\item \textsuperscript{180}Id. (“First, the right to develop is a correlative right and passes with the executive rights.”) citing \textit{Day}, supra note [\textsuperscript{7}], 786 S.W.2d 667, 669 n.1.
\item \textsuperscript{181}\textit{Altman} harkens back to three earlier cases. Derrick Price, in his article \textit{Executive Rights: Keep 'em if You Got 'em} (\textit{TEXAS OIL AND GAS LAW JOURNAL}, December 2011, vol. no. 6) insightfully notes that Altman relied on three prior Texas cases, \textit{Delta Drilling Co. v. Simmons} 338 S.W.2d 143 (1960), \textit{Etter v. Texaco} 371 S.W.2d 702 (Tex. Civ. App.—Waco 1963, writ ref'd n.r.e.) and \textit{Grissom} (supra note [\textsuperscript{7}]) to find that a “mineral interest shorn of the executive right and the right…remains an interest in the mineral fee.” None of \textit{Delta Drilling}, \textit{Etter} or \textit{Grissom} holds that the right of self-development passes with the executive right in a conveyance.
\item \textsuperscript{182}Cormier v. Ferguson, 92 So. 2d 507 (La. App. 1957); Crews v. Burke, 309 P.2d 291 (Oklahoma 1957) (This case appears guided by the grant of self-exploration and development rights to the non-executive.)
\item \textsuperscript{183} SHADE, supra note 48, at 12.
\end{itemize}
the right of self-development as being correlative and, after a practical analysis of the roles of the executive, potential operator (lessee) and non-executives, have pronounced ominously:

“The right to lease and the right to develop are correlative….The mineral owner’s right to develop and to lease cannot be exercised simultaneously, at least in practice, since leases always convey the exclusive right to operate on the land. Thus it is unlikely in the extreme that parties who create a non-leasing interest in land intend for the owner to be able to exploit the minerals.

The practical results of separating the development right from the executive right would be disastrous: if the nonexecutive could develop at any time, despite the execution of a lease covering the land, no lease is likely to be executed because operators could not afford the risk. The executive right would accordingly be rendered nugatory. On the other hand, if the development right was considered to exist only if no lease existed on the land, there would be the further problem of determining whether the exercise of such right gave the owner exclusive operating rights. If so, the executive right is rendered nugatory. If not, the development right is not worth much, since the owner would be risking his capital to explore for the benefit of a subsequent lessee who enters under the lease to drill development wells in a proven field.”

This author respectfully submits some of these fears are misplaced. As to the first paragraph above, since the executive right most likely sprang into existence to facilitate leasing when several parties owned undivided interests in the mineral estate, and since it is unlikely that the owner of a small fraction of the mineral estate will self-develop for economic reasons (i.e., the need to account to the other undivided co-tenants) and practical reasons (most parties do not have the money, time, and expertise to explore and develop mineral property), it is unlikely that any of the parties privy to the creation of the non-leasing interest in land—executive or non-executive—even considered self-development by the non-executive, thus eliminating the need for any speculation on their intent.

As to the second paragraph above, since leases contain the right of exclusive development by the lessee operator, and since an executive that is leasing any part of the mineral interest over which it owns the executive right will usually be leasing all of the mineral interest over which it owns the executive

184 WILLIAMS & MEYERS, supra note [-], 1 § 304.10, at 477.
right, once the leasing starts, the right of self-development for the non-executive should disappear just like the right of self-development for the executive. Simply put, the executive will likely be leasing all interests covered by the executive right it owns at the same time. Therefore, if operators are worried about a self-developing non-executive interest, they can procure a lease over that interest and the threat of self-development by that particular non-executive dissipates. So far as exclusive operating rights are concerned, again, leasing the non-executive interests from the executive should acquire for the lessee exclusive operating interests over that portion of the mineral estate without the non-executive ever getting involved.

   Practically, if operators find the title situation problematic, they will inform the mineral owners of their concerns and the mineral owners, guided as necessary by the duties owed by the executive described above, will likely eventually provide the reassurance the potential lessee desires, hopefully without litigation between the mineral owners. Ultimately, self-development of part of the mineral estate is just not that common in oil and gas development, particularly for smaller fractional interests, not only because of the necessary co-tenant accounting, but also because many mineral owners simply do not have the expertise and equipment necessary.

   Modern self-development is not just a matter of drilling wells, however. It involves assessing future borehole geometry and surveying pad sites. Before that, surficial geological mapping and seismic reflection surveys may be conducted as well as logging of existing wells and offsite research of logs, maps, and core. All of these activities are commonly thought to be included in the right of self-development, hence the inclusion the “rights to ingress and egress” in the above definitions.

   Are these activities proscribed by the Court’s invocation of footnotes to dicta in prior cases that did not primarily focus on the issue of the nature and extent of executive rights? One doubts the Court considered the implications of such a dogmatic and broad change to the property rights held by non-executives. For example, by combining the right to self-develop with the executive right without first

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185 Unless, perhaps, the executive is engaged in the self-dealing shenanigans described below called the “poison pill.”
analyzing all the activities that may be included under the category of “self-development,” the Court has cast more doubt upon the rights of a non-executive to conduct geophysical surveys to assess what sort of mineral assets it may own.\textsuperscript{186} That the executive right was not created to prevent mineral self-development (as the Court believes) is probable; that the executive right was not created to prevent a non-executive from simply taking stock of its property through logging, mapping and seismic surveys is certain.

The Supreme Court also does not mention whether the right to self-development and the executive right can be expressly passed or withheld separately in a conveyance. No evidence suggests that the right to self-develop cannot be expressly withheld in a conveyancing instrument while the executive right is allowed to pass, although the emphatic way with which the Supreme Court denied Lesley’s argument that they should be allowed to self-develop raises doubts about the Court’s continuing interest in seeing the executive right and the right of self-development as individual “sticks” in the “bundle” which comprise the mineral estate. After all, by finding the rights “correlative”—without further explanation—it is but a small step to finding them completely indivisible under any circumstance.

When considering self-development by a non-executive, \textit{Martin} again warrants scrutiny.\textsuperscript{187} While \textit{Altman}\textsuperscript{188} is renowned for helping establishing the five “sticks” of mineral ownership in Texas, the \textit{Martin} court underscored the ability of the individual components of the mineral estate to be conveyed and retained in holding. “All these rights are transferable and a grantor can transfer all of them, or only part of them, but in reserving the minerals, \textit{all are retained that are not specifically granted.}”\textsuperscript{189} In Lesley, the right to self-development—the right of ingress and egress in the parlance of \textit{Altman}—was clearly retained by the non-executives, and yet the Texas Supreme Court appears to be harkening back to the days where highly technical—some might say arcane—readings of the deed language and perusal of

\textsuperscript{186} There was already a measure of doubt in any event. See Hlavinka v. Hancock, 116 S.W.3d 412, 418 (Tex. App.—Corpus Christi 2003, rev. denied) (the executive has the power to negotiate surface damage agreements relating to geophysical operations); Portwood v. Buckalew, 521 S.W.2d 904, 916 (Tex. Civ. App.—Tyler 1975, writ ref'd n.r.e.).

\textsuperscript{187} Martin, \textit{supra} note [-].

\textsuperscript{188} Altman, \textit{supra} note [-].

\textsuperscript{189} Martin, 302 S.W.2d at 678. (emphasis added)
parole evidence governed whether the various “sticks” when retained or conveyed together, are transformed into another “stick” altogether. Instead of transforming the right to bonus and rentals into a royalty interest when the executive is passed, however, as was done in *Klein and Watkins*, the *Lesley* court is confirming subsuming the right to development into the executive right when the executive right only is passed, despite the clear lack of an expressed conveyance of the development right or the finding of intent of the non-executives, perhaps through parole evidence, to do so.

The correlative executive right/self-development rule of the Supreme Court in *Lesley* is most perplexing in a situation where the executive owns little or no other interest and the non-executive owns most or all the rest of the mineral estate. Consider a scenario wherein one party owns only the executive right, and a second party owns one hundred percent (100%) of the rest of the mineral estate. From a public policy standpoint that favors oil and gas development, in such a situation does it make sense that the second party should not be allowed to self-develop? While the above may be an extreme case, a more realistic scenario might involve one or more non-executives with a strong majority of the mineral interest, high oil and gas prices, and an executive right holder with an associated minority or even trivial mineral interest that may not have a motivation to lease. If the non-executive(s) are willing and able to self-develop, even if it may mean carrying the executive right holder’s smaller interest, should the executive rights holder still be able to prevent production?

This author suggests that it should not be so. The public policy of Texas that favors regulated mineral development and basic tenants of real property law both argue that the executive right does not prevent the non-executive mineral co-tenants from conducting self-development efforts. The right of development is one of five “sticks” that comprise the total package of mineral ownership, a separate and equal right to that of the executive right. By claiming that the owner of the executive right can also prevent the non-executive mineral co-tenants from self-development, the two sticks of self-development and executive rights have been impliedly combined, leaving the non-executive with only the rights to the money from leasing and possible production—the rights to collect bonus, delay rentals and royalty.

If the Court is concerned about self-development circumventing the power the of executive, the
Court should remember that, speaking practically, self-development is a self-limiting phenomenon as development by a party that does not own the entire mineral estate is often unprofitable because if the other mineral co-tenants do not lease, then the self-developing party is left accounting for their interest. If a self-developer owns ninety percent (90%) of the minerals and its co-tenant owns ten percent (10%), the self-developing owner must pay ten percent (10%) of the net profits (i.e. less a pro-rata share of development and production costs) to the minority owner, with no possible recoupment for dry hole costs. While such a ten percent (10%) “carried interest” may still be economic, consider what a twenty-five percent (25%) carried interest does to the economics of a development project. A non-executive with a ninety percent (90%) mineral interest in a tract may decide, after conducting its economic forecast, that the ten percent (10%) unleased interest can be carried and that the prospect is still economic. On the other hand, the owner of a non-executive three-quarters (75%) share of the minerals is very likely not to self-develop if it cannot get the other mineral co-tenant(s) on board because the unleased quarter significantly cuts into the net profits of any development. The unleased portion of the tract in effect becomes a “poison pill” that kills development across the entire mineral estate. This aspect of profitability versus the mineral estate portion owned by the self-developer introduces an interesting “governor” on self-development by non-executives: in cases where the self-developer(s) owns a significant portion of the mineral estate, such as the example above with the executive owning ninety percent (90%)—arguably the scenario wherein allowing self-development by non-executives makes the most sense—self-development will be more likely to take place. When the potential self-developer(s) do not own a large share of the minerals, self-development is less likely to be economically feasible.

On the theoretical side, the executive right was derived in response to the fractionalization of mineral fee interests as so to ease the leasing and logistics of oil and gas interests. One commentator states the purpose of the power is to facilitate leasing—mineral co-tenants and potential lessors can put the leasing negotiations in the hands of the most sophisticated party among them.\footnote{JOHN S. LOWE ET AL, Oil and Gas Law, supra note [-] at 602 (5th ed. 2008).} This provides potential lessees the benefit of only having to negotiate one lease instead of several. Such separation of

\footnote{JOHN S. LOWE ET AL, Oil and Gas Law, supra note [-] at 602 (5th ed. 2008).}
the executive right also alleviates the problems of mineral interests owned by minors or persons under a legal disability.\textsuperscript{191} No one has ever suggested a valid practical reason that the executive right should be used as a tool for a surface owner to prevent a majority-owning mineral non-executive from developing its own minerals.

When courts make decisions about the nature and extent of real property rights without considering the collateral effects of their decisions and the unintended consequences these decisions have on these rights, unrelated third parties often find that the nature of their property rights have changed, often not in a way they would expect or like.\textsuperscript{192} For example, consider a non-executive party who wants to see if its mineral estate may be prospective for oil, perhaps to see if the executive really was behaving as a prudent mineral lessor by turning down leases. If it and the executive rights holder are at odds over whether development should take place,\textsuperscript{193} the non-executive will be in a weaker position when attempting to determine whether valuable minerals may be on the estate if it cannot itself procure geophysical or even surficial mapping assessments. The Court’s affirmation of the joined nature of the executive right and the right to self-development in \textit{Lesley} has opened the door to this problem and potentially lowered the value of the non-executive’s mineral property without compensation.

\textit{Leasing the Non-Executive Minerals}

Before the \textit{Lesley} opinion was handed down, the consensus in Texas—in invoking \textit{Bass}—was that there was no duty for an executive to lease. And, further, that the reason there was no duty to lease was because the fiduciary duty of the executive did not arise until leasing occurred. \textit{Lesley} opens the box to the concept (and the lawsuits that will surely follow) that the executive might be liable to non-executive(s) for refusing to lease.

One of the most succinct explanations of why the \textit{Bass} rule—the rule later partially overturned by

\textsuperscript{191} \textit{Id.}
\textsuperscript{192} The author thanks former Texas Court of Appeals judge Rick Strange for providing this thought.
\textsuperscript{193} Such a conflict may arise if the potential lessee is known by the non-executive to be in a position to favor the executive, such as with non-arm’s-length leases which may contain terms which disadvantage the non-executive.
the Texas Supreme Court—does not adequately serve to protect the non-executives is provided by Texas attorney Maston Courtney in his *amicus curiae* received by the Texas Supreme Court on June 10, 2009,\(^{194}\) that first noted that the duty owed by the executive to the owner of a *non-participating royalty interest* (as in *Bass*) arises from the contractual position of the parties\(^{195}\) and is not based on the relationship of the parties as is found in the duty owed between an executive and non-executive *mineral owners*.\(^{196}\) Therefore, while no duty to the NPRI owner “arises except in connection with the exercise of the leasing privilege by the executive. … By contrast, in [*Lesley*] the executive…destroyed the economic value of [the] non-executive mineral estate while securing for the executive, who also was the owner of the surface estate, a substantial increase in the value of his surface estate.”\(^{197}\)

After *Lesley*, with its negative treatment of the findings described above in *Hlavinka* and *Aurora*,\(^{198}\) the Court has slightly changed direction again, plotting a course further from *Bass* and indicating that Texas courts will consider the reason(s) why an executive has rejected a proffered lease when considering whether the executive has violated its duty. No longer will *Bass* provide an impenetrable shield against self-serving executives refusing to lease. Now, courts in Texas will consider whether the denial of a leasing opportunity was inspired by self-dealing on the part of the executive. Whether this will lead to an uptick of actions brought by non-executives remains to be seen.

While *Lesley* still does not provide a bright-line rule as to the beginning on the executive’s duty to the non-executive, it does seem to indicate that (1) deciding to lease or not to lease may be subject to scrutiny; and (2) that any benefit that goes to the executive that is not shared by the non-executive is suspect.

While it seems as if self-dealing motivations by the executive that denies leasing opportunities to


\(^{195}\) *Id.* at 2, citing *Plainsman Trading Co. v. Crews*, 898 S.W.2d 786, 789-790 (Tex. 1995) (Wherein the duty owed by the executive to the owner of an NPRI was seen as contractual and provided only a right for the NPRI to receive a share of production if and when produced.)

\(^{196}\) *Id.* at 2, citing *English v. Fisher*, 660 S.W.2d 521, 524-25 (Wherein the duty owed by the executive to the non-executives was seen as a arising from the relationship between the parties and not a contractual provision.)

\(^{197}\) *Id.* at 2-3.

\(^{198}\) *Lesley*, *supra* note [-] at 491, n.78.
non-executives is now an open avenue for litigation by unhappy non-executives, simple arbitrariness by
the executive in refusing to lease, whether through confusion, stubbornness or sheer inertia may not be. If
clear evidence of self-dealing is not present and raised by the non-executive(s), it would appear clear
evidence that leasing at the offered-and-denied terms is otherwise common in the area and that the
executive is not being a reasonably prudent lessor by avoiding leasing must be supplied by the non-
executive to succeed in proving a violation of the executive’s duty.

Ultimately, the executive right should not be a tool to facilitate non-development through
schemes of the executive right holder contrary to the clear wishes of the non-executive(s). A duty to
eventually lease lies with the executive right, a duty recognized by the Texas Supreme Court in Manges:
“[t]he duty to develop known minerals by the executive depends upon economics.”199 “Economics” in this
case is whether a prudent owner would lease the minerals independent of rewards that may come to the
executive that the non-executive will not realize.

Leasing the Executive Minerals

Destroying the economic value of the non-executive mineral estate can be potentially be achieved
via a more subversive route in the situation where the executive owns a percentage of the mineral estate
that, if left unleased, renders the tract uneconomic to lease, and then refusing to lease that portion. This is
a situation similar to the self-development scenario discussed above, wherein the executive owns a
percentage of the undivided fee mineral estate and the executive right over the entire estate, except that in
this instance the executive agrees to lease the non-executives’ minerals while refusing to lease his own.
The executive’s reason for not leasing may be sound—an offered lease with uneconomic terms or plans to
self-develop. The reason could also be rooted in self-interest only, such as trying to improve the value of
the surface by preventing drilling. The executive is therefore not refusing to lease the mineral interests of
the non-executive mineral holder and thus can claim that it is fulfilling its fiduciary duty to the non-
executive, a duty that, after Lesley, might include leasing if a lease is offered. Interestingly, in such a case

199 Manges, supra note [-] at 268-269. Emphasis by author.
the executive (at least technically) appears to have met the strictest level of fiduciary duty that requires the “agent party”—the executive—to place the interest of the principal—the non-executive—above his own self-interest. The executive can argue that it had met the letter of this highest duty by acquiring a benefit for the non-executive that it had denied himself.

As we have seen with the “poison pill” described above, however, unleased undivided acreage in a tract can eliminate leasing or self-development altogether. For example, if the executive owned twenty-five percent (25%) of the undivided mineral estate as well as all of the executive rights, and refused to lease its quarter, as in Lesley, then if development occurred, a quarter of the proceeds would go directly to the executive instead of the executive receiving the more typical product of a quarter multiplied by the royalty fraction in the lease. Above a certain threshold of unleased acreage, this effectively strangles leasing because the oil company cannot make a profit.

Simply put, leasing of the executive minerals, if it is necessary to get the non-executive minerals leased, should be a necessary part of the duty owed by the executive. As this author opined before:

“In a way analogous to how the “clear and convincing” evidentiary standard necessarily includes the less stringent “preponderance of the evidence” standard, bundled in the fiduciary duty of the executive rights holder as defined by Manges is necessarily included the less stringent duty for the executive to act as a reasonably prudent operator. Certainly if the executive was approached by a potential lessee with a leasing offer that was favorable in the present regional leasing environment, and particularly if leasing and perhaps production was occurring near and around the leasehold in question, then a reasonably prudent executive would and should lease his own interests if the law would require him to lease the non-executive’s interest. To not make such an assumption would be to cast away, in some instances such as that confronted in Lesley, any duty owed by the executive rights holder.”

The Texas Supreme Court has broadened what constitutes exercising the executive right. Leasing is not the only action which now constitutes exercising the duty as the Court noted when they held the executive had, “exercised the executive right to limit future leasing by imposing restrictive covenants on

the subdivision.” This suggests that when the executive does anything to limit future leasing of the non-executive’s minerals, it has “exercised the executive rights.” Therefore, one of the events that should activate the duty is the offering of a commercially-reasonable lease covering the non-executive’s portion of the minerals—and, if such a lease will only be forthcoming if the executive’s portion of the mineral estate is leased as well, then fulfillment of the executive’s duty should also include leasing of his own minerals. In such a way, the executive cannot use the “poison pill” method of leasing the non-executives minerals without leasing its own to prevent any development of the subject tract.

Would this duty to lease be present in a typical co-tenant relationship where each co-tenant held the executive right for the minerals it owned? Certainly not, but then taking up the mantle of ownership of the executive right over another’s minerals comes laden with a high duty of care toward that non-executive, and anyone acquiring that right must be aware that any activity perpetrated (or inactivity when a reasonably prudent mineral owner would do otherwise) by the executive in the future could potentially expose that executive to liability to the non-executive for failure to act in the non-executive’s interest.

One judicial remedy that may be considered where a court finds the executive is compromised with regards to its duty to the non-executives because of some other benefit that could accrue to the executive but that also harms the non-executive(s) (or the executive finds itself in a similar tight spot and wants to avoid getting sued) is to have a receivership established. This is discussed in Appendix A.

*The Executive Right and Negotiation of Bonus*

If the executive leases and receives a bonus, should the non-executive get any portion of that money? When the instrument severing the executive right either (1) passes the executive right but retains the right to collect bonus for the (now) non-executive portion or (2) retains the executive right but passes the right to collect bonus for the (now) non-executive portion, who keeps the bonus paid from leasing? This is an easier question if the document severing the executive right addresses who is to receive the bonus. In such a case, since the right to receive bonus and the executive right have been recognized as

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201 *Lesley, supra* note [-] at 491.
separate component interests of the full mineral estate that are freely severable if so expressed in the conveyance, the intention expressed by the grantor, unless deemed ambiguous, should control, assuming that the grantor also actually owns the right to receive bonus.

This could be a more puzzling question in the situation where (1) the right to receive bonus is not addressed in the instrument that severs the executive right from the other incidents and (2) there is ambiguity in whether the non-executive interest is a mineral interest or a royalty interest. Williams and Meyers in their Treatise on oil and gas law have pontificated, “The participation in lease benefits by a nonexecutive mineral owner depend on the terms of his deed, but typically such owner shares in bonus, rental and royalty.” In the case of an NPRI, bonus—in the situation of a separated executive right—stays with the executive, even that bonus that can be attributable to the non-executives’ royalty acreage.

For example, assume Owen owns a 1/4 mineral interest and conveys to Bruce 1/2 of his 1/4 mineral interest but reserves unto himself the executive right. Assuming the instrument of conveyance was unambiguous and that Owen initially owned the right to collect bonus, when subsequent leasing of Bruce’s non-executive portion of the mineral estate takes place, who is entitled to the bonus? In essence, if the instrument does not expressly de-couple the right to receive bonus from the executive right, is the non-executive right holder entitled to its fair share of bonus consideration? In this example, the non-executive should get the bonus, because it is a mineral interest.

While bonuses in the last ten years have often been calculated at many thousands of dollars an acre, historically, bonus was not a primary vector of recompense for a lessor. Royalty was (and still is) considered the biggest (potential) money-maker for lessors, with bonus, delay rentals, and shut-in royalty coming in a distant second, third and fourth. Therefore, in the past, bonus was not a primary point of negotiation, but rather a distant second to royalty in importance to the lessor(s). Signing bonuses,

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202 Burns v. Audas, 312 S.W.2d 417, 419 (Tex. Civ. App.—Eastland 1958, no writ); Martin v. Snuggs, 302 S.W.2d 676 (Tex. Civ. App.—Ft. Worth 1959, writ ref’d n.r.e.) (wherein a mineral estate owner successfully retained an executive right, while transferring rights to bonus and delay rentals, without creating a retained royalty instead, as seen in Klein and Watkins).

203 WILLIAMS & MEYERS, supra note [-], § 339.1 (saying that the terms of the severance deed should control).

204 Personal communication, Professor of Oil and Gas Law John S. Lowe, Southern Methodist University School of Law, July 13, 2012.
typically a lump sum given up front per acre multiplied by the percentage of undivided fee mineral ownership of the lessor, used to be somewhat comparable to delay rentals. 205 While an enticement to lease, the signing bonus was not traditionally the prime vector of profit for lessors that royalty was and remains. Before the 1980s, bonuses were low, being generally about $100-$400 per acre in speculative areas, and were often used as “grease payments” by landmen to facilitate leasing by enticing reluctant or unsophisticated parties with the promise of instant, guaranteed money in return for signing a form lease produced by the lessee. 206 With such nominal bonuses, a tenancy to have the executive sweep in bonus actually due the non-executive mineral interest owner may have taken hold in certain corners, whether due to non-executive inattentiveness, ignorance of their right to same, mistake on the nature of their non-executive interest (i.e. believing it to be a royalty instead of a mineral interest) or a charitable belief that the executive ought to get a small sum for its work in leasing.

This has changed dramatically in recent times, particularly with the advent of the internet and the more rapid dissemination of information about regional leasing trends. With bonus levels in the Barnett Shale reported as being up to $25,000 per acre in 2008, 207 leasing bonuses now rival production royalty as the main profit source to lessors and a major negotiation point in any leasing transaction. Modern bonuses can be an immense vector of recompense for lessors, amounting to multiple thousands of dollars an acre, and bonus has become an important point of negotiation between lessors and lessees.

In addition, consider the situation where the bonus attributable to the executive mineral interest is due the executive and the corresponding royalty is due the non-executive—can an executive in that circumstance negotiate a higher bonus and a lower royalty? The obvious temptation for the bonus-owning executive is to negotiate a higher bonus—particularly if the executive right owned is stripped of

205 Personal communication, Professor of Oil and Gas Law John S. Lowe, Southern Methodist University School of Law, July 13, 2012.
any other mineral ownership rights—and to potentially accept a lower royalty in return. That this is not in line with the fiduciary duty of the executive is axiomatic, but also potentially the source of liability for an executive innocent of any manipulation of lease negotiations alleged to have been steered to the detriment of the non-executives. *Lesley* does not resolve this issue of who should pay the non-executive mineral interest owner or what duty is owed the non-executive in such royalty/bonus negotiations, but with bonuses steadily increasing, these questions will wax in importance and parties potentially owed bonus and royalties will more closely scrutinize the severance deed and case law for language divining whether the executive or non-executive should get the bonus.208

*Lesley* may provide some clues, however, about where the law in Texas now lies. *Lesley* makes clear that an executive cannot ignore the interest of the non-executive in leasing;209 so, if in negotiations in a situation where the executive gets the entire bonus, if the executive were to propose to a lessee that it should receive a lease for a huge bonus and no royalty, it would seem clear that the executive would have violated its fiduciary duty. While detecting the self-dealing of such an extreme case is easy, consider a leasing scenario where the executive owns the bonus associated with a mineral interest, the non-executive owns the royalty interest associated with a mineral interest, and where a lessee then offers the choice of an industry- and regionally-standard $500/acre bonus and 1/6 royalty or a $1000/acre and 1/8 royalty. In this case, must the executive choose the first offer, even if data suggests that the acreage is not prospective and a reasonably prudent lessor (who owned the whole mineral interest—royalty and bonus) in its position would normally take the second option? What would happen if the executive negotiated with the oil company for a higher royalty and lease?

A related question is who does the paying of the bonus to the non-executive mineral interest owner—the executive itself or the lessee. Even if the non-executive owns the bonus, the executive may want to be a conduit for that money. Money paid to middlemen sometimes disappears before it gets to its

208 See Mull Drilling Co. v. Medallion Petroleum, Inc., 809 P.2d 1124, 1126 (Colo. App. 1991) (court ruled that the nonexecutive owner was not entitled to bonus since the severance deed expressly provided that “the reservation and exception being nonparticipating in any leases, participation being limited to royalties only payable under said leases ... “)  
209 *Lesley*, supra note [-] at 491.
intended recipient, and the party not paid may want to hold the original payor accountable.

These questions are made more difficult by the fact that, while the Court in *Manges* equated the executive right to a true fiduciary, 210 later decisions have pulled back so that currently the standard is good faith at the level of “upmost fair dealing.”211 The executive owner has the right to lease, and leasing historically has triggered a bonus payment. When bonuses were nominal, whether the money got to the bonus-owning non-executives was a smaller concern in the oil and gas industry.212 Now that bonuses can rival royalty in magnitude and can be a key negotiating point, more care is necessary.

Perhaps the most practical way to read the holding in *Lesley* and prior cases with regards to the duty of the executive is to say that the cases show a willingness of the courts to protect non-executives against overreaching. That is easy to see in the facts of *Manges*. If that is the correct interpretation, however, we still confront the issue of what constitutes overreaching. One view might be that so that so long as what an executive does is within the “mainstream” of industry practice, it is not a breach. Another view might be that the executive has an obligation to seek advantage for the non-executive along with advantage for himself. So, for example, the executive could negotiate and accept both a higher bonus and royalty, but could not “prefer” a higher bonus (where the executive gets the bonus) over a higher royalty (which the non-executive gets). In addition, *Lesley* suggests that a higher bonus (where the executive gets the bonus) over a higher royalty (which the non-executive gets) could “activate” the executive right in a way similar to how formulation of the anti-drilling covenants “activated” the executive right in *Lesley*.

**UNANSWERED QUESTIONS AND OPINIONS THEREON**

Of the flotilla of questions remaining around the executive right and the right to self-develop, the

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210 673 S.W.2d 180 (Tex. 1984).
211 *Lesley, supra* note [-] at 481.
212 One reason bonuses were historically nominal was that while royalty payments were calculated based upon the actual ownership of the lessor as determined after the often-painstaking title work on a smaller tract that went on before actual drilling and production, bonuses were paid at the leasing stage where the percentages of ownership were (and still are) typically less certain. Therefore, bonus is different than the rest of the payments to lessors in that overpayments of bonus to owners that later are determined to not have the interest the lessee thought they had when paying the bonus are often let go as the cost of doing business, absent fraud or other shenanigans by the lessors. Royalty, rentals and shut-ins—generally paid after the lessee is surer of who owns what—are paid with a less cavalier attitude. Perhaps that cavalier attitude has carried over to bonus and executive rights.
limited scope of *Lesley v. Bluegreen* and the light touch of the Supreme Court conspired to only sink a
couple. The following questions are among those that remain.

*Does the Executive Have to Lease Its Own Minerals?*

Before *Bass*, no Texas court had addressed whether the conveyance of the executive right created
an implied covenant to enter into oil and gas leases. As *Lesley* illustrates, if courts do not recognize that
a conveyance of the executive right creates some implied duty for the executive to trigger oil and gas
operations through self-development or leasing, then the potential exists for non-executives to have their
bargained-for property interest rendered valueless.

Normally, co-tenants are not under any obligation to lease if other co-tenants lease. Such
obstinacy can make it impossible to economically lease a tract for reasons explained above. Separation of
the executive right introduces a complexity, however, if the executive also owns some of its own minerals
as well as the executive right over minerals owned by another. The question raised then is: if the
executive agrees to lease the minerals of the non-executives but refuses to lease its own minerals, has it
activated the executive right as to the unleased minerals? An argument could be made that such a refusal
is an example of the “inaction” cited above regarding the drilling covenants. By refusing to lease its
own minerals, the executive could effectively strangle leasing opportunities that the fiduciary duty it owes
to the non-executive would normally require the executive to take.

Since leases are conveyances of real property interests (a fee simple determinable), it might at
first blush seem unlikely that a court would make an executive alienate through leasing its portion of the
mineral estate. A closer look, however, at the nature of executive’s fiduciary duty suggests another
direction. If a court casts the executive’s fiduciary duty in the strictest light, the executive must put the
non-executive’s interest before its own. It logically follows that if the only way for a non-executive’s
mineral interest to be developed requires leasing the executive’s mineral estate as well as that of the non-

213 *In re Bass*, 113 S.W.3d 735, 743 (Tex. 2003).
214 *Lesley*, *supra* note [ ] at 491.
executive, than choosing not to accept a commercially-reasonable oil and gas lease over the executive’s own minerals in such a case—particularly if driven by self-dealing—not only affects the non-executive’s interest and is thus an exercise of the executive right but also results in the executive putting its own interest ahead of the non-executive in clear violation of its duty. Just as an agent must put the interests of a principle ahead of its own, the executive under the strictest version of the fiduciary duty would have to put the non-executive’s interest ahead of its own. Therefore, even if the executive did not want to lease its own mineral interest, probably because of some other benefit it is receiving as in the Lesley case, it would have to sacrifice that interest and see that what is necessary for the non-executive’s wishes—development of its minerals—is seen through, meaning that it would lease its own minerals if that was the only way for the non-executive’s minerals to be leased and developed.

On the other hand, if the “fiduciary duty” is read as being one of “utmost good faith and fair dealing” then the issue is murkier. Here, the executive may not have to put the non-executive’s interest above its own and may therefore not have to lease its own interest, even if such a lease would be necessary to get the non-executive’s minerals leased.

Another wrinkle that should matter in the circumstance where a non-executive wants the executive to lease the executive’s own minerals so that the non-executive can get a lease is the reason that the executive chooses not to lease its own minerals. If the reason involves self-dealing that is not connected to the benefit of the non-executive, fiduciary duties may have been activated and leasing may have to follow. If, however, the reason is that the executive believes the lease terms are not sufficient or believes, in good faith, that current hydrocarbon prices are too low to warrant leasing and higher prices are on the horizon or some other reasonable motivation, then self-leasing by the executive should not be required.

Of course, the executive does not have to accept every lease offered. Such a condition could lead the non-executive(s) and a producer/lessee to collude so that the executive is forced to accept a lease with

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uneconomic terms. An executive rights holder should never be obligated to sign a lease that no reasonably prudent mineral owner would sign independent of any executive duty.

**Is There Now an Implied Covenant for the Executive to Self-Develop?**

With the accepted and reaffirmed rule expressed in *Lesley* that the non-executive cannot self-develop its own minerals, the Texas Supreme Court has, in effect, combined the executive right and the right of self-development in the executive right holder. The two primary ways an executive would exercise these rights, therefore, is either to enter into oil and gas leases or to develop the minerals himself. Related to the question of whether the executive has a duty to seek out, or at least sign commercially reasonable leases when approached, is whether there is a duty to self-develop the non-executive’s minerals. An implied covenant to develop a non-executive’s minerals and an implied covenant to enter into oil and gas leases covering the interest of a non-executive are different concepts, but since the Texas Supreme Court has combined these two “sticks,” they have opened the door to the question of whether the fiduciary duty owed by the executive holder of the self-development right of the non-executive requires the executive to self-develop the minerals of the non-executive.

Self-development of a non-executive’s minerals and leasing a non-executive’s minerals are, of course, just as different as self-development or leasing of one’s own minerals. A mere implied covenant to enter into oil and gas leases would mean that the executive must exercise its executive right to lease the non-executives minerals (and maybe its own) at some point in time and cannot sit on this right whatever the circumstances—but it is not required to self-develop. In effect, *Lesley* seems to add to the executive’s fiduciary duty an implied covenant for an executive to set aside “self-dealing” when considering whether to accept a commercially reasonable lease over a non-executive’s minerals. If that is the case, and since *Lesley* makes clear that the executive holds not only the right to lease the non-executive’s minerals but also the right to self-develop the non-executive’s minerals, does not the executive’s fiduciary duty extend to the self-development component of the rights owned by the executive? This implies that once one party holds an executive right/self-development right for another party, then the first party would be obligated
to develop the non-executive’s property—whether by leasing or self-development—if it could achieve commercial production, or be compelled to allow the non-executive to self-develop.

**What Executive Duty is Owed during Lease Negotiations?**

The practical question of how a bonus-owning executive negotiating a lease can bargain for the amount of bonus received while maintaining its fiduciary duty to the non-executive(s) remains after *Lesley*. Now that bonuses have grown to be a primary revenue generator for lessors, how do bonus-owning executive lessors balance what they ask for bonus with what they ask for royalty that is to be paid to the non-executive? The trouble that arises stems from the fact that royalty and bonus are often inversely related: higher bonus often means lower royalty.

Even with the high bonuses now being paid, if significant production is acquired production royalty—commonly more than 20% these days—will significantly outpace bonus over the duration of the lease. On the other hand, if little or no production is ultimately forthcoming, then signing bonuses represent the only substantial profit to the lessor from leasing. When lease negotiations are underway, typically asking for a higher bonus means receiving a lower royalty, and vice versa. Hence, bonus and royalty are intertwined as potential profit sources, and either may be the primary source of lessor revenue.

The bonus-owning executive may be innocent of any self-dealing when it asks for a higher bonus. Consider a bonus-owning executive that believes that the acreage under consideration for leasing is unprospective. In such a circumstance without executive right separation, a prudent lessor would typically ask for a higher bonus, believing that royalty would not be forthcoming. Asking for a higher bonus in return for a lower royalty as an executive under circumstances, even ones as innocent as this, however, could leave the executive open to a claim of self-dealing if subsequent wells on the lease turned out to be a producer but the non-bonus-receiving non-executives all received a lower royalty because the bonus-owning executive had asked for a higher bonus. Again, the executive right in such a situation creates a potential conflict of interest that casts a shadow on anything the executive does, however blameless.

In addition, royalty clauses are not completely about the level of royalty. Suppose the executive
agreed to a lease for a large bonus but also agreed to a royalty clause that no experienced lessor would agree to instead of the more typical Texas landowner royalty provision that includes the right to terminate the lease for breach? This would also appear to be a breach of the executive’s duty.

 Practically speaking, at the present time it would seem inadvisable for a bonus-owning executive lessor to accept a higher bonus in return for a lower royalty for any reason, or even to negotiate a higher bonus independent of what the royalty might be. In light of Lesley, a cautious counselor may advise an executive client against taking such a higher bonus or, especially, negotiating for a higher bonus. One workaday solution might be for the executive to seek a “stipulation” with the non-executive(s) making clear that the non-executive(s) will not consider the bonus-owning executive’s negotiations concerning bonus to be a breach of its duty. Such a stipulation may not be forthcoming, however, and could further strain relationships among the lessors in already contentious situations.

When Does the Executive’s Duty Become Effective?

When the Lesley court held that the executive exercised its executive right upon the creation of the restrictive covenants, this seemed to move the activation of the executive’s fiduciary duty back in time from leasing to a point where the executive acts in such a way that is detrimental to the interests of the non-executives. While this sounds bad for an executive looking for a way to kill leasing, what exactly does this change for the non-executive? First, the Court has made it clear in a string of cases that self-dealing on the part of the executive is the prime mover of judicial action on the behalf of non-executives. Inaction by the executive, or simply leasing the portion owned by the non-executive while keeping the executive’s portion unleased (thus using the “poison pill” ploy described above) can itself be self-dealing by the executive but of the sort that requires no affirmative action by the executive, and that is therefore less likely to give rise to the evidence that often comes to light in discovery which highlights self-dealing.

Second, if there is provable self-dealing involved, while Lesley has seemingly knocked down the Bass shield for executive non-leasing, how can non-executives prove that the non-leasing is a violation of the executive’s right in the first place? Does the non-executive have to resort to skullduggery such as
spying on the executive to see if it is approached for leasing purposes or sending undercover lessees to the executive—possibly with terms that might favor what the non-executive wants—to see if they get turned down? How many courts are going to want to be the arbitrator of what is a “reasonable” offer that the executive should have accepted?

Third, the Court in Lesley ruled that Bluegreen had exercised its executive right in making the anti-drilling covenants—the same covenants that the Court disallowed upon remand. Is the executive right now “activated” somehow? Does the executive right holder now have to seek a competitive lease or, at least, accept one should it happen to come along? If so, what if the lessee that now appears is motivated by the non-executive(s) making some phone calls behind the scenes? Can the non-executives now conduct geophysical exploration?

Or, on the other hand, did the Court in Lesley rule that the anti-drilling covenant crossed a line that violated the duty of the executive right holder, was therefore discarded, and now the situation has returned to exactly where it was before, where continued inactivity by the executive is still excused. If so, less has changed then meets the eye.

Jurisprudence related to hydrocarbon development is primarily concerned with facilitating development while protecting correlative rights. This should not only be pursued between owners of different tracts but also undivided owners within one tract. This author submits for consideration that the executive’s duty to the non-executives should be considered effective at the instant the executive right is separated.

Who Gets Paid the Bonus?

The Supreme Court of Texas first considered the question of bonus distribution in the aforementioned case of Burns217 wherein a deed expressly gave the grantee the executive rights over the reserved portion of the mineral estate. The grantee executed a lease and received a bonus, which it kept

217 Burns, supra note [·].
instead of sharing on a pro rata basis with the non-executive.\textsuperscript{218} The non-executive grantor filed suit, claiming that it had not passed the bonus with the executive right.\textsuperscript{219} The court found that if the conveyance expressly retains or grants a mineral estate, severing the executive right alone does not change the resultant non-executive mineral estate to a royalty, and that therefore the non-executive grantor was entitled to the bonus money.\textsuperscript{220}

While there may be some doubt about exactly where the standard of care owed by the executive to the non-executive(s) lies—either putting the non-executive(s) before the executive (a traditional agent/principle-type arrangement that comes freighted with the strictest fiduciary standard) or getting for the non-executive(s) everything that the executive gets (the practical threshold of conduct seemingly established by the “utmost good faith and fair dealing standard,” that being one step below strictest fiduciary), nothing in either possibility suggests that the executive should keep a bonus attributable to the portion of a mineral estate owned by the other non-executive parties. Rather, both suggest that a lessor executive should turn over to the non-executive(s) that portion of the lease bonus attributable to the undivided mineral interest owned by the non-executive(s) unless the instrument severing the executive right stipulates otherwise. \textit{Lesley} does nothing to disturb this ground.

A tougher question emerges about the actual payment logistics of bonus—should it go from the lessee directly to the non-executive or through the executive first. \textit{Bass} suggests that the agency relationship between the executive and non-executive is strictly for the negotiation and execution period of the lease, and generally cannot be construed to go beyond that act, certainly not before and maybe not after the leasing. This would, in turn, suggest that the executive is not an agent for the non-executive when handling bonus funds. \textit{Lesley}, however, generally extends this duty to any activity by the executive that affects the non-executives interest. Still, however, this author would recommend a lessee directly pay the bonus-owning non-executive all bonus, as well as any royalty or rental owed to the non-executive

\begin{flushleft}\textsuperscript{218} \textit{Id.} at 418. \\
\textsuperscript{219} \textit{Id.}
\textsuperscript{220} \textit{Id.}\end{flushleft}
mineral owner, unless receiving express written instructions to the contrary from the non-executive, as the real property right of the non-executive mineral owner entitles it to bonus originating from the lessee. 221

What About the Duty Owed NPRI Owners?

As noted previously, non-executive mineral fee owners and NPRI owners are in different positions with regards to the executive, potentially giving rise to different duties owed by the executive to both. After Lesley, has the Court dissolved this fiduciary duty distinction between a non-executive mineral interest owner and an NPRI owner?

Technically speaking, when the Court set out the fiduciary issue in Lesley, they did not distinguish between whether the duty is exclusively for a non-executive mineral interest owner or an NPRI owner, or both, saying instead merely, “[w]e come now to the principal issue in the case: the nature of the duty that the owner of the executive right owes to the non-executive interest owner . . .” 222 Had the Court wanted to create a expressly distinction, it would seem to follow that the opinion would have at this point specifically said what type of interest was to be the recipient of the fiduciary duty, but instead the Court uses the generic term “non-executive interest owner.” 223 The Court defines the difference between a non-executive mineral fee interest and an NPRI, but makes no further explicit distinction in the opinion, including whether they are owed the same level of fiduciary duty by the executive. 224 Furthermore, the Court does not distinguish between non-executive mineral fee interests and NPRIs when it opines that “[t]he law has never left non-executive interest owners wholly at the mercy of the executive.” 225 Although the Court does vaguely acknowledge the existence of a distinction in the application of the fiduciary duty when it mentions the “variety of non-executive interests” since the Court does not expressly state that different non-executive minerals are due a different measure of duty, one interpretation may be that the Lesley opinion purposefully dissolves any fiduciary duty distinction between a non-executive mineral

221 The author thanks Texas oil and gas attorney Terry Cross for his assistance in formulating this analysis.
222 Id. at 487 (emphasis added by author)
223 Id.
224 Id.
225 Id. at 488.
interest owner and an NPRI owner.

Such analysis may, however, ascribe more thought to the use of the technical language in the opinion than the Court actually considered. If the Court is not being as precise with its use of the technical language, it would be unwise to ascribe too much to the Court’s use of the generic “non-executive interest owner” in the Lesley opinion. This author submits that it is clear that the duty should differ as between a non-executive fee mineral owner and an NPRI owner, given the fundamentally different nature of their interests, as described above. This would seem especially true if the royalty owner owns a fraction of the royalty as opposed to a fractional royalty. In the second case, the real property interest is a perpetual and defined interest in royalty, whereas in the first case, the “fraction of royalty” is derived from whatever royalty interest arises from the terms of a lease—it is carved from the lease and derivative thereto. It may be a stretch to think that the Court actually intended to articulate a standard for all non-executive interests.

This author submits that the executive should owe a non-executive mineral co-tenant a higher duty of care over the owner of a fixed, perpetual NPRI. With a fixed and perpetual NPRI there is little the executive can do to affect the NPRI holder other than sign a lease, or not. In such circumstance, the executive can’t really treat the non-executive better than itself since the executive has no control over the amount of royalty that the NPRI holder receives and, since the NPRI holder is not entitled to bonus or delay rentals, the executive’s decisions in that regard have no bearing on the non-executive. The circumstances become very different when mineral co-tenants are involved and the executive’s decisions can impact all aspects of the non-executive’s participation and compensation.

Ultimately, however, it is believed by this author that the Court has simply ignored the various types of non-executive mineral interest and seemingly by default has recognized a common duty for all executives to all types of non-executive interests. It is suspected, however, that whether that duty is found to have been breached will be highly fact specific and depend on nature of the relationship of the parties.
APPENDIX A—RECEIVERSHIP AS A REMEDY

Courts will be increasingly challenged to find solutions to legal imbroglios involving non-executives wanting to develop the minerals and executives who did not. The appointment of a receiver could effectuate a process by which non-executive mineral estate owners could develop their estate while letting surface owners have their concerns addressed by a receiver experienced in oil and gas development before a plan is submitted for court approval.

The remedy of receivership is available in actions between mineral co-tenants.226 § 64.001 of the Texas Civil Practices and Remedies Code (Vernon 1986) delineates the circumstances under which the remedy of a statutory receivership can be appointed. Receivership is covered by § 64.001(a)(3) and (b):

(a) A court of competent jurisdiction may appoint a receiver

(3) in an action between partners or others jointly owning or interested in any property or fund...

(b) The party (applying for a receiver) must have a probable interest in or right to the property or fund, and the property or fund must be in danger of being lost, removed, or materially injured.

Receiverships have been equated to other terms such as “overseer” or “escrow agent.”227 A receivership is an equitable remedy that is available at the discretion of the trial court.228 Equitable appointment of a receiver is done through the Tex. Civ. Prac. & Rem. Code Ann. § 64.001(a) (6). Appointment of a receiver can be sought through an independent hearing and does not have to be linked to another action, nor is it abuse of discretion for a court to grant a receivership in such a case.229 An owner with both surface and mineral—along with executive rights to lease—and non-executive mineral interest holders had interests in the same land such that a court could appoint a receiver in an action between the parties.230 Limiting this, risk of loss or actual damage to the property is required for receivership status, and no receiver will be appointed if the only motive is an inability of a party to have

226 Tex. Jur. 3d, Receivers §§ 18 to 45.
230 Id. at 443.
the property developed. Among co-tenants, a court may appoint a receiver if it is necessary to prevent loss through drainage onto adjoining tracts, particularly if the failure to prevent drainage is caused by a refusal to agree on development or operations related thereto.

The finding of a strict fiduciary duty as employed in *Manges* may not be necessary for a receivership. However, a receiver may only be appointed if it is for the benefit of all interested parties, and not just the party seeking receivership. Although courts have criticized the *Manges* decision, the level of duty owed, whether it be the highest fiduciary standard or the “utmost far dealing” standard, can probably both warrant the appointment of a receiver. In *Hawkins*, the court appointed a receiver when the executive rights owner accepted a lease with a 1/8 royalty and declined one with a 1/4 royalty. The non-executive landowners were granted a receiver to execute a lease. In *Hawkins*, as in *Hunt*, the court seemed to downplay the relative difference between receiverships granted in law or equity.

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232 *Hawkins* at 444.
235 *Hawkins*, at 444.