



The Rule Against Perpetuities “Washes Out” Anti-Washout Provision—But Texas Statute Might Provide a Lifeboat

By [Deana Allen](#)

The Texas Supreme Court recently considered the application of the Rule Against Perpetuities (the “Rule”) to an anti-washout provision in an assignment of a 1986 lease. In its ruling, the Court held: (1) an overriding royalty agreement was both a contractual right and a property right; (2) that, due to multiple contingencies in the overriding royalty agreement, the Rule Against Perpetuities did apply; and (3) that a Texas Statute may save the reservation. Companies operating in Texas should closely review anti-washout provisions to determine whether the Rule Against Perpetuities might invalidate anti-washout provisions and whether such interest might be reformed and validated pursuant to Texas’ reformation statute set forth in Section 5.043 of the Texas Property Code.

Case Background:

In *Yowell v. Granite Operating Company*, No. 18-0841, 2020 Tex. LEXIS 425 (May 15, 2020), certain successors-in-interest (the “Yowells”) owned an overriding royalty interest previously reserved in an assignment of a 1986 lease acquired by Granite Operating Company.

In 2007, Amarillo Production Company obtained a top lease covering the same minerals as the 1986 lease and sued Granite claiming the 1986 lease terminated due to lack of production. Amarillo and Granite agreed to settle the case with Granite releasing the 1986 lease and Amarillo assigning its top lease to Granite, reserving an overriding royalty interest.

The Yowells then filed suit to enforce their overriding royalty interest in the new leases and recover payments owed. Granite claimed that the Yowells’ overriding royalty interest did not attach to the 2007 lease because it violated the Rule.

Rule Against Perpetuities in Texas:

Texas has adopted the common law version of the Rule which provides that no [property] interest is valid unless it must vest, if at all, not later than twenty-one years after the death of some life or lives in being at the creation of the interest. Notably, the Rule is one of possibility, not probability. Therefore, if an interest in property subject to the Rule **may** not vest within the perpetuity period, it is void.

Court's Analysis:

Because the Rule only applies to property interests, the Court first analyzed the nature of the overriding royalty interest reserved in the assignment. The Court held that the overriding royalty interest was a contract right, *and* a property right subject to the Rule.

The Court then determined whether the property interest in future leasehold estates violated the Rule. The anti-washout provision in the assignment provided as follows:

Should the Subject Leases . . . terminate and in the event Assignee [the lessee] obtains an extension, renewal or new lease or leases . . . then the overriding royalty interest reserved herein shall attach to said extension, renewal or new lease or leases
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The Court distinguished this case from a prior decision by the 10th Circuit in *Independent Gas & Oil Producers, Inc. v. Union Coil Co. of Cal.*, 669 F.2d 624 (10th Cir. 1982), which held that the property interest in any renewal or extension of an underlying lease was vested at the time of the assignment, on the grounds that such decision did not address “new” leases as provided for in the anti-washout provision at issue.

The Court noted that the overriding royalty interest in any new lease in this case was subject to multiple contingencies not certain to occur. In addition to the requirement that the underlying lease terminate, vesting of the Yowells’ overriding royalty interest would occur only if the mineral interest owner actually executed a new lease and such lease was acquired by successors to the original assignee in the assignment. As a result, the Court held that the property interest in any new lease did not vest at the time of the assignment and violated the Rule.

Nevertheless, Section 5.043 of the Texas Property Code requires reformation, if possible, of property interests that violate the Rule to validate such interest consistent with the creator’s intent. Granite argued that an instrument must be either a trust or will to qualify for reformation under the statute. However, the Court disagreed and held that Section 5.043 applies to commercial instruments creating property interests that violate the Rule. As a result, the Court remanded the case back to the trial court for further proceedings on whether it was possible to reform the overriding royalty reservation to comply with the Rule.

For more information on this decision, please contact [Deana Allen](#).