# AN OVERVIEW OF THE STANDARD MEASURE OF DAMAGES ARISING FROM CLAIMS ASSOCIATED WITH AN OIL AND GAS LEASE

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## I. INTRODUCTION: DAMAGES IN THE OIL & GAS INDUSTRY: THE SAME BUT DIFFERENT

This Article examines legal damages in the oil and gas industry. More specifically, this Article identifies the rules for measuring common legal damages in oil and gas cases. Further, this Article seeks to identify all potential forms of relief available for every common cause of action in the oil and gas industry but primarily examines damages available in the context of the lessee/lessor relationship.

Generally, legal damages seek to compensate a wronged party for the injury it suffered at the hands of a wrongdoer. With the exception of punitive damages, legal damages seek to place the wronged party, as nearly as possible, in the position that the wronged party would have been if not wronged by the wrongdoer.

The general idea for awarding legal damages in the oil and gas industry is, for all intents and purposes, no different. In essence, the only thing that is different about legal damages in the oil and gas industry and other more general legal damages is that the injuries sustained in the oil and gas industry are unique to the oil and gas industry. Damages in the oil and gas industry can be primarily understood through the lens of contract law and property law, as oil and gas law, in general, is a combination of contract law and property law.

For example, contractual damages in the oil and gas industry primarily revolve around a couple of commonly used contracts. Those contracts are the Oil & Gas Lease and AAPL Form Operating Agreements. Furthermore, an oil and gas operator owes mineral owners a variety of duties (primarily revolving around a judicially imposed duty to carry out oil and gas operations as a reasonably prudent operator), which, if breached, will result in a damages

award for the mineral owner. General common law concepts relating to injuries to real property apply in the context of the unique injuries that arise in the oil and gas industry and have their own oil and gas industry-centric damages rules.

Ultimately, all of the theories and principles underlying awarding legal damages are the same in the oil and gas industry as they will be in any other context, but hundreds of years of oil and gas jurisprudence have led to very oil and gas industry-specific rules for calculating damages.

## II. COMMON CONTRACTUAL DAMAGES IN THE OIL AND GAS INDUSTRY

Texas courts have long recognized that the standard measure of contract damages in the oil and gas industry are no different than contract damages in any other industry. Namely, "for breach of contract the injured party is entitled to have the value to him [for his] performance, and, in awarding compensatory damages, he should be put as near as possible in the same position as that in which he would have been put by performance."[1]

Furthermore, when seeking to prove the measure or amount of damages for breach of an oil and gas contract, the injured party must do so "with reasonable certainty."[2] Proving damages with a reasonable certainty does not mean that the measure of damages must be exact (which would oftentimes be next to impossible in the oil and gas industry), but instead means that the measure of damages must be "sufficient to afford [the factfinder] a reasonable basis for determining [the injured party's] loss."[3]

While it may be true that the general measure of damages for a breach of contract in the oil and gas industry is no different than the measure of damages for a breach of contract in any other industry, the oil and gas industry has several industry-specific contracts that present their own unique issues and considerations whenever they are breached. Among these industry-specific contracts are the oil and gas lease, the A.A.P.L. Model Form Operating Agreement, and the increasingly popular production sharing agreement (PSA).

### *A. Common Types of Damages for a Breach of an Oil and Gas Lease*

From an oil and gas lessor's perspective, there are a couple of important/practical scenarios where breach of lease claims arise: (1) the lessee isn't paying me what I am entitled to under my oil and gas lease (i.e.,

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1. Guardian Tr. Co. v. Brothers, 59 S.W.2d 343, 345 (Tex. App.—Eastland 1933, writ ref'd); *see also* Tex. Pac. Coal & Oil Co. v. Barker, 6 S.W.2d 1031, 1037 (Tex. 1928).

2. El Paso Nat. Gas Co. v. Minco Oil & Gas Co., 964 S.W.2d 54, 70 (Tex. App.—Amarillo 1997), rev'd on other grounds, 8 S.W.3d 309 (Tex. 1999).

3. *Id.* at 71 (quoting Vance v. My Apartment Steak House of San Antonio, Inc., 677 S.W.2d 480, 484 (Tex. 1984)).

failure to properly pay lease royalties in any form, or failure to properly market lease oil and gas production); (2) the lessee isn't properly developing the oil and gas resources underlying my property.

### *1. Damages for Non-Payment of Royalties Due Pursuant to an Oil and Gas Lease: Market Value vs. Proceeds Leases*

Arguably, the most common type of breach of lease claim arises from failure by the oil and gas lessee to properly pay royalties to the oil and gas lessor.[4] Improper payment of royalties typically arises in relation to royalties for gas, which is typically sold to an end user after significant processing and transportation. In general, an underpaid lessee is entitled to receive damages in an amount equal to the difference between the amount of royalty paid to him by the lessor and the amount of royalty that the lessor was actually required to pay to him under the oil and gas lease.[5] The measure of damages for failure to properly pay royalties under an oil and gas lease depends on whether the oil and gas lease is a "market value lease" or a "proceeds lease."

#### *a. Measuring Damages for Improper Payment Under a Market Value Lease*

The typical language in a market value royalty provision in an oil and gas lease is as follows: "The royalties to be paid by Lessee are as follows: . . . on gas . . . produced . . . and sold . . . off the premises . . ., the market value at the well of one-eighth of the gas so sold . . . ."

Under a market value lease, royalties are paid based on "the price a willing buyer under no compulsion to buy will pay to a willing seller under no compulsion to sell."[6] The market value is commonly measured "at the oil and gas" well but can be measured at any point in the drilling, shipping, or processing sequence designated by the parties to the oil and gas lease. "The preferred method of determining market value is by using actual sales that are 'comparable in time, quality, quantity, and availability of marketing outlets.'"[7] When information regarding comparable sales is not available, the market value will be based on the workback method, which uses "the proceeds of a downstream sale and [subtracts] postproduction costs incurred between [the market value point specified in the lease] and the point of sale."[8]

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4. There are many scenarios where an oil and gas lessee might improperly pay what is owed to an oil and gas lessor. For example, an oil and gas lessee could owe the lessor compensation pursuant to a surface damages clause, a most favored nations clause, a delay rentals clause, and many other clauses.

5. *See, e.g.*, Tenn. Gas Pipeline Co. v. Technip United States Corp., Tex. App. LEXIS 6419, at *14 (Tex. App.—Houston [1st Dist.] Aug. 21, 2008, pet. denied) (discussing benefit-of-the-bargain damages).

6. Bluestone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 388 (Tex. 2021) (quoting Heritage Res., Inc. v. NationsBank, Co., 939 S.W.2d 118, 125 (Tex. 1996)).

7. *Id.*

8. *Id.* at 389.

Ultimately, the measure of damages under a market value lease will be the difference between the amount that the lessee was actually paid by the lessee and the true market value as determined under a comparable sales or net back method.

*b. Measuring Damages for Improper Payment Under a Proceeds Lease*

The typical language of a proceeds royalty provision in an oil and gas lease is as follows: "The royalties to be paid by Lessee are as follows: . . . on gas . . . produced . . . and sold . . . at the well the royalty shall be one-eighth of the amount realized from such sale . . . ."

Under a proceeds or "amount realized" lease, royalties are paid based on "'the amount the lessee *in fact receives* under its sales contract . . .' regardless of whether it is more or less than market value."[9] A proceeds lease can be based on the gross amount received by a lessee before deducting any post-production costs or on the net amount received by a lessee after deducting post-production costs.[10] Thus, the measure of damages under a proceeds lease will be the difference between the amount that the lessor was actually paid by the lessee and the actual amount of proceeds realized by the lessee from the amount it was paid for its sale of the minerals.

A lessor has a right to statutory damages under the Texas Natural Resources Code, which provides that a lessee has a cause of action for nonpayment of oil and gas proceeds and is entitled to interest on those proceeds.[11] Additionally, a lessor who prevails in a case for non-payment of royalties under a breach of lease theory is also entitled to recover attorneys fees for unpaid royalties pursuant to Texas Natural Resources Code § 91.406 and Tex. Civ. Prac. & Rem. Code § 38.001.[12]

It is important to note that "[a] lessor or an owner of a royalty interest cannot claim forfeiture or termination of an oil and gas lease for nonpayment of royalties in the absence of a specific provision of the lease to that effect."[13] This means that damages for unpaid royalties will typically be a lessors primary (if not only) recourse in the event of unpaid royalties.

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9. Bluestone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 389 (Tex. 2021) (quoting Bowden v. Phillips Petroleum Co., 247 S.W.3d 690, 699 (Tex. 2008) (emphasis added)).

10. *See id.*

11. *See* TEX. NAT. RES. CODE §§ 91.402, 91.404.

12. TEX. NAT. RES. CODE § 91.406; TEX. CIV. PRAC. & REM. CODE § 38.001.

13. Blackmon v. XTO Energy, Inc., 276 S.W.3d 600, 606 (Tex. App.—Waco 2008, no pet.) (quoting Linton E. Barbee, *The Lessor's Remedies for Nonpayment of Royalty*, 45 TEX. L. REV. 132, 162 (1966)).

### *2. Damages for a Lessor's Breach of Implied Covenants Under an Oil and Gas Lease*

Courts across the country, including courts in Texas, have, in essence, made up certain covenants that an oil and gas lessee must comply with by virtue of its position as lessee under an oil and gas lease and because of the objectives of the oil and gas lease. Disputes over implied covenants in Texas typically arise in relation to the *implied covenant to market,* the *implied covenant to prevent drainage (i.e., drill an offset well),* and the *implied covenant to develop.* If a lessee breaches one of the implied covenants recognized in connection with the oil and gas lease, it can be held liable for the damages arising from such a breach.

#### *a. Damages Relating to the Implied Covenant to Market Hydrocarbons*

The implied covenant to market requires the operator to obtain the best price reasonably obtainable for the hydrocarbons produced from the lessor's property.[14] The implied covenant to market requires a lessee to use the diligence of a reasonably prudent operator in finding a suitable market in which to sell hydrocarbons extracted from a landowner's property and negotiating a sale.[15] Generally, an oil and gas operator is required to market the hydrocarbons within a reasonable time, at an appropriate price, and to do so free of post-production costs.[16]

A breach of the implied covenant to market typically arises in cases where a lessor argues that the hydrocarbons extracted from their land should have sold faster or for more money than they did. Regarding the argument that the hydrocarbons should have sold for more money when a lessee fails to comply with the implied covenant to market, a lessor is normally entitled to damages in the amount of the difference between the price that the hydrocarbons would have sold for had they been reasonably marketed and the actual contract price at the time of sale.[17]

Regarding the argument that hydrocarbons should have sold faster, in the event that a lessor breaches the implied covenant to market based on a failure to find a market or a failure to timely market the hydrocarbons at issue, the measure of damages for the lessor will be the loss suffered by the lessor

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14. Amoco Prod. Co. v. First Baptist Church, 579 S.W.2d 280, 286 (Tex. App.—El Paso 1979) *writ ref'd n.r.e.*, 611 S.W.2d 610 (Tex. 1980) (per curiam).

15. *Id.*

16. *Id.*

17. *Id.*; *see also* Yzaguirre v. KCS Res., 53 S.W.3d 368, 374 (Tex. 2001). It is worth noting that, in Texas, the implied covenant to market is trumped by a "market value" provision in a lease because an explicit market value provision shows that the parties have agreed on an objective way to calculate how royalties should be paid and what is owed under a lease. *Yzaguirre*, 53 S.W.3d at 374.

in the delay of extracting the minerals.[18] Absent drainage from the lessor's property, the oil and gas underlying the lessor's property will remain in place to be extracted at some point in the future.[19] "Thus, in theory, the measure of damages should be the interest on the sum that lessor would have received if the product had been properly marketed."[20]

### *b. Damages Relating to the Implied Covenant to Prevent Drainage (i.e., Drill an Offset Well)*

A lessee has a duty to protect its lessors from losing money because of drainage caused by drilling on adjacent property. In layman's terms, oil and gas are liquids and gases. Thus, they move (as one might expect of a liquid or gas) under the earth within the formation to which they are confined. Accordingly, depending on the structure of the oil and gas formation, drilling a well on one person's property can cause oil and gas to migrate to another person's property, thereby causing the person from whose property the oil and gas migrated to miss out on the compensation that it would have otherwise received had its lessee extracted that oil and gas from its property.

To prove a valid claim for a breach of the implied covenant to prevent drainage, a lessor must prove that (1) substantial drainage has taken place on the lessor's leasehold and (2) that an offset well would produce oil or gas in paying quantities (i.e., a reasonably prudent operator would have drilled an offset well).[21] In Texas, the implied covenant to prevent drainage applies not just to drainage that might occur from someone drilling a well on an adjacent property but also to field-wide drainage (i.e., drainage that might occur as a result of anyone drilling a well in the same field that would cause oil or gas to migrate from a lessor's property).[22] The implied covenant to prevent drainage requires a lessee to treat each lessor as an individual and to drill wells on a basis that protects the interest of each individual lessor.[23]

The Texas Supreme Court has held that "[t]he correct measure of damages for breach of the implied covenant of protection [against drainage] is the amount that will fully compensate, but not overcompensate, the lessor for the breach—that is, the value of the royalty lost to the lessor because of the lessee's failure to act as a reasonably prudent operator."[24] The Texas

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18. *See, e.g.*, Cabot Corp. v. Brown, 754 S.W.2d 104, 106 (Tex. 1987); *see also* PATRICK H. MARTIN & BRUCE M. KRAMER, 5 WILLIAMS & MEYERS, OIL AND GAS LAW, § 857 (LexisNexis Matthew Bender 2024).

19. MARTIN & KRAMER, *supra* note 18, at § 857.

20. *Id.*

21. Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 568 (Tex. 1981).

22. *Id.* at 567–68.

23. *See id.* at 567 n.1.

24. Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 18–19 (Tex. 2008); *see also* Mandell v. Hamman Oil & Ref. Co., 822 S.W.2d 153, 164 (Tex. App.—Houston [1st Dist.] 1991, writ denied), *abrogated by Coastal Oil & Gas Corp.*, 268 S.W.3d at 18 n.60 (quoting Se. Pipe Line Co. v.

Supreme Court has recognized the difficulty in quantifying with certainty the amount of royalty that migrated away from a landowner's property as a result of drainage from other properties.[25] Prior rules regarding a lessor's damages for a lessee's failure to protect against drainage lead to overcompensation to the lessee.[26]

Texas courts have permitted cancellation of a lease as a remedy for breach of lease where "the lessor proves that damages are impossible of ascertainment."[27] While rare, at least one Texas court has approved punitive damages for a lessee's breach of the implied covenant to prevent drainage.[28]

As is the case in many oil and gas disputes, determining damages for a breach of the implied covenant to prevent drainage will be highly expert-intensive. An expert will need to be able to quantify the value of the royalty that the lessor lost as a result of a lessee's failure to drill an offset well. This will require an expert who has knowledge about the migration of oil and gas within a given reservoir and how drilling a well within the same reservoir negatively impacted and caused losses to the lessor. The plaintiff's expert will also need to quantify all of this information into a certain dollar amount and explain the process for doing so in a way that is understandable to a jury.

### *c. Damages Relating to the Implied Covenant to Develop*

An oil and gas lessee has an implied duty to develop a lessor's property after production is obtained from the lessor's property. The implied covenant to develop (a.k.a., the implied covenant to drill additional wells) is "concerned with further drilling in known producing formations."[29] "Two types of harm are comprehended by the reasonable development covenant:

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Tichacek, 977 S.W.2d 393, 399 (Tex. App.—Corpus Christi 1998, pet. granted)) ("The measure of damages for breach of the drainage covenant was the royalty interest on the production lost by the producer's failure to prevent drainage.").

25. *Coastal Oil & Gas Corp.*, 268 S.W.3d at 19.

26. *Id.* at 18 ("We have held that '[o]ne measure of damages' for breach of the implied covenant of protection is 'the amount of royalties that the lessor would have received from the offset well on its lease.' But this would overcompensate the lessee if production from the offset well exceeded the drainage. Another measure of damages is the value of the royalty on the drained gas, but this, too, would overcompensate the lessee if not all of the drainage could have been prevented, either because of the nature of the field, or the regulatory system, or for whatever reason.").

27. MARTIN & KRAMER, *supra* note 18, at § 825; Christie, Mitchell & Mitchell Co. v. Howell, 359 S.W.2d 658, 659–60 (Tex. App.—Fort Worth 1962, writ ref'd n.r.e.).

28. Pan American Petroleum Corp. v. Hardy, 370 S.W.2d 904 (Tex. App.—Waco 1963, writ ref'd n.r.e.) (sustaining a $25,000 punitive damages award where the lessee misrepresented to the lessor and regulatory agency that only one reservoir existed under the lessor's leasehold—when there were in fact two reservoirs—so that it could avoid drilling a second well on lessor's property).

29. MARTIN & KRAMER, *supra* note 18, at § 831.

(1) permanent loss of recoverable hydrocarbons, a relatively rare case, and
(2) delay in recovering hydrocarbons in place, the typical case."[30]

Generally, to prove a breach of the implied covenant to develop, a lessor must show that additional development will probably be profitable for the lessee and that the lessee has acted imprudently (i.e., failed to act as a reasonably prudent operator) in failing to develop.[31]

The Texas Supreme Court has determined that when a lessee breaches the implied covenant of development, the lessee is required "to pay the lessor the amount [that the lessor] actually loses by awarding [the lessor], without deduction, the full value of royalty lost to him through the lessee's failure to exercise ordinary care to either develop the minerals in the leased premises."[32] Further, in rare cases, a lessor will be entitled to have its lease conditionally canceled where the lessor has given the lessee notice and a reasonable time to comply with its implied obligation to develop.[33] Conditional cancellation is only a potential remedy when a lessor's damages are incalculable. Further, conditional cancellation is "conditional" because a lessee is given a reasonable time to adequately develop the lessor's property before the lease is canceled.[34]

### *B. Other Common Damages Relating to an Oil and Gas Lease*

In addition to the damages typically arising out of or relating to the damages associated with an operator's failure to pay a royalty or properly develop the premises covered by the oil and gas lease, there are a few more common scenarios that a lessor and lessee should know about.

#### *1. Breach of Most Favored Nations Clauses*

A most favored nations clause (MFN) is a provision in a lease that typically provides that if a lessee pays a higher lease benefit (e.g., bonus, royalty, shut-in payment, delay rental, etc.) to another lessor located in a specific geographic area around the lessor's property, then the lessee must pay the lessor the difference between what the lessee paid the third party and

30. *Id.*
31. Superior Oil Co. v. Devon Corp., 604 F.2d 1063, 1066 (8th Cir. 1979); *see also* Hardin-Simmons Univ. v. Hunt Cimarron Ltd. P'ship, 2017 Tex. App. LEXIS 6934, at *19 (Tex. App.—Amarillo 2017, pet. denied).
32. Tex. Pac. Coal & Oil Co. v. Barker, 6 S.W.2d 1031, 1038 (1928); *see also* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 19 (Tex. 2008).
33. Slaughter v. Cities Serv. Oil Co., 660 S.W.2d 860, 862 (Tex. App.—Amarillo 1983, no writ).
34. *Id.*

what the lessee paid the lessor.[35] Damages under a most favored nation clause can be pretty extensive, given that landowners with a lot of bargaining power (i.e., landowners with large property holdings) typically insist on their lease, including an MFN provision. Thus, if a lessee makes a payment that triggers the MFN clause, then the amount owed to the landowner can multiply quickly.

For example, in *EP Energy E&P, L.P. v. Storey Minerals, Ltd.*, the MFN clause at issue required the lessee to execute an amendment and provide a higher bonus to the lessor if "lessee . . . acquires an Oil and Gas Lease" with a higher bonus payment.[36] The lessee acquired an oil and gas lease with a higher bonus than the bonus set out in the lessor's lease from another operator in the geographic area covered by the MFN clause.[37] Accordingly, the lessor contended that the MFN clause had been triggered.[38] The trial court agreed and awarded Storey Minerals a judgment of over $41 million in damages.[39] The damages were based on a per acre calculation and were calculated based on the difference between the bonus set out in the lessor's lease and the higher bonus provided for in the lease acquired by the lessee.[40] The San Antonio Court of Appeals affirmed the MFN issue.[41]

### *2. Pooling Disputes*

The Texas Supreme Court has made clear that "[a]bsent express authority, a lessee has no power to pool interests in the estate retained by the lessor with those of other lessors."[42] Accordingly, a lessee's power to pool comes through a pooling provision in the oil and gas lease.[43] However, even when a lessor grants a lessee the power to pool its property, they still limit the lessee's pooling power. One such example of a limitation is an "anti-dilution provision," which provides that a lessee is required to include a minimum percentage of the lessor's leased premises in any pooled unit, or in some instances, requiring that the lessee must include all of the lessor's leased premises in any pooled unit.[44]

Damages relating to pooling typically arise in cases where the lessor alleges that a lessee has pooled his property without authority, pooled his

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35. ANDERSON ET AL., 1 TEX. L. OIL & GAS § 4.9 (Lexis 2024).

36. EP Energy E&P, L.P. v. Storey Minerals, Ltd., No. 04-19-00534-CV, 2022 Tex. App. LEXIS 520, at *5 (Tex. App.—San Antonio Jan. 26, 2022, pet. denied) (mem. op.).

37. *Id.* at *2.

38. *Id.*

39. *Id.* at *3–4.

40. *Id.*

41. *Id.* at 2.

42. Jones v. Killingsworth, 403 S.W.2d 325, 328 (Tex. 1965).

43. *See id.*

44. *See, e.g.*, Browning Oil Co. v. Luecke, 38 S.W.3d 625, 637 (Tex. App.—Austin 2000, pet. denied).

property in bad faith, or violated the specific limitations on pooling set out in an anti-dilution or other related limitations on pooling.[45]

### *a. Pooling Without Authority*

When a lessee pools a lessor's property without authority or goes beyond its pooling authority as outlined in the pooling provision set out in the lease, a lessor will have a claim for unauthorized pooling.[46] Success on such a claim, in the context of vertical wells will entitle the owner of the drillsite tract to receive the full, undiluted royalty share from production.[47] The owners of non-drillsite tracts that are pooled without or beyond the lessee's pooling authority are not entitled to any share of production, but such operations will not be effective to maintain their leases.[48]

Things get a bit more complicated when dealing with horizontal wells because the question becomes *what constitutes a drill site tract*, considering the fact that there are often multiple wellbore perforations underlying multiple tracts of land. In *Browning Oil Co. v. Luecke*, the Austin Court of Appeals determined that damages for improper pooling or pooling without authority in the context of horizontal wells should be determined based on the amount of production that "can be attributed to their tracts with reasonable probability."[49] The court did not provide any guidance on how to determine what share of production could be attributed to the lessor's tract with reasonable probability.[50] Commentators have suggested making this determination by simply looking at the length of productive wellbore within each tract, the length of perforated intervals within each tract, a fraction based on productive wellbore underlying a given tract divided by the total length of productive wellbore, and other similar measurements.[51] These potential standards are unlikely to provide a 100% accurate measurement of production that is reasonably attributable to a particular tract, but they do represent *a standard*. Other potential standards or options for making such a determination also likely do not offer a 100% accurate measure of production reasonably attributable to a particular tract, will be highly expert intensive, and likely very costly.

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45. *See, e.g.*, Amoco Prod. Co. v. Underwood, 558 S.W.2d 509, 513 (Tex. App.—Eastland 1977, writ ref'd n.r.e.) (requiring good faith when pooling).

46. *See Luecke*, 38 S.W.3d at 637.

47. Tittizer v. Union Gas Corp., 171 S.W.3d 857, 861 (Tex. 2005). *See also* Bruce M. Kramer, *Oil and Gas Leases and Pooling: A Look Back and a Peek Ahead*, 45 TEX. TECH L. REV. 877, 895 (2013).

48. Tittizer v. Union Gas Corp., 171 S.W.3d 857, 861 (Tex. 2005).

49. *Luecke*, 38 S.W.3d at 647.

50. *See id.*

51. AUSTIN W. BRISTER, DRILLING FOR DAMAGES: AN EXPLORATION OF ISSUES IN OIL AND GAS DAMAGES, CLE: DAMAGES IN CIVIL LITIGATION CONFERENCE, STATE BAR OF TEXAS 17 (2025).

### *b. Bad Faith Pooling*

Even when a lessee has the authority to pool, Texas law provides that a lessee must do so in "good faith, taking into account the interests of both lessee and lessor."[52] Just like any other "good faith" determination, whether a lessee exercised its pooling authority in good faith is highly fact-intensive. The damages associated with bad faith pooling can lead to the attempted pooling being declared void.[53] Further, damages for bad faith pooling are typically the same as the damages associated with situations where a lessee pools without authority, which are discussed in the previous section. In a scenario where a lessee is found to have pooled a non-drill site tract in bad faith simply in an attempt to try to hold the lease on which the non-drill site tract is located, this could easily result in lease termination as to the non-drill site tract.

## *C. Common Operating Agreement Damages*

An entire paper could be devoted to different remedies available to non-operating working interest owners and operators under a model form operating agreement. Accordingly, this section of the Article will address potential damages available to non-operating working interest owners or operators for commonly asserted breaches of certain provisions of a model form operating agreement and is not meant to provide an in-depth assessment of all of the potential damages and remedies available under an operating agreement.

At its core, an operating agreement is a contract. Thus, the primary measure of damages will be just like any other breach of contract action (i.e., the party who has been wrong "should be put as near as possible in the same position as that in which he would have been put by performance.").[54] However, oil and gas practitioners should be aware of the specific measure of damages associated with often litigated provisions of the model form operating agreements.[55]

Generally, "[t]he Operator may be liable for all consequential and punitive damages, may not be liable for such damages or may be liable for only a portion of such damages."[56]

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52. Elliot v. Davis, 553 S.W.2d 223, 226 (Tex. App.—Amarillo 1977, writ ref'd n.r.e.).

53. *Id.*

54. Guardian Tr. Co. v. Brothers, 59 S.W.2d 343, 345 (Tex. App.—Eastland 1933, writ ref'd); *see also Barker*, 6 S.W.2d at 1037.

55. My analysis of damages available under a model form operating agreement will be based on the A.A.P.L. Form 610 - 1989 Model Form unless I specify to the contrary.

56. ANDREW B. DERMAN, THE NEW AND IMPROVED 1989 JOINT OPERATING AGREEMENT: A WORKING MANUAL 31 (1991), https://www.hklaw.com/files/tklaw/wp-content/uploads/2019/02/25125630/New-and-Improved-Derman.pdf [hereinafter JOA WORKING MANUAL].

### *1. Damages for Breach of the Exculpatory Clause*

A commonly litigated provision of the model form operating agreement is the exculpatory clause. Under the model form operating agreement:

> Operator shall conduct its activities under this agreement as a reasonably prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation, but in no event shall it have liability as Operator to the other parties for losses sustained or liabilities incurred *except such as may result from gross negligence or willful misconduct*.[57]

Oftentimes, when a relationship between an operator and a non-operating working interest owner goes array, a non-operating working interest owner will bring a suit against the operator, claiming that the operator has breached the exculpatory clause by behaving in a grossly negligent manner or with willful misconduct.

> To support a finding of gross negligence, there must be evidence that [the operator] had 'actual subjective knowledge of an extreme risk of serious harm . . . . The magnitude of the risk is judged from the viewpoint of the defendant at the time the events occurred . . . . The harm anticipated must be extraordinary harm, not the type of harm ordinarily associated with breaches of contract or even with bad faith denials of contract rights; harm such as 'death, grievous physical injury, or financial ruin.'[58]

"Throughout the history of Texas law, 'willful misconduct' has been defined in a manner akin to 'gross negligence.'"[59] Thus, the burden of proving that an operator has violated the exculpatory clause is extremely high.

When a non-operating working interest owner proves that the operator acted with gross negligence or willful misconduct, the operator will only be liable for losses that result from its gross negligence or willful misconduct.[60] Thus, the proper measure of damages is highly dependent on what the operator did that constituted gross negligence or willful misconduct and what damages to the non-operator occurred because of such gross negligence or willful misconduct.[61] Ultimately, an operator may be liable for direct and

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57. *Id.* at 26 (the Exculpatory Clause) (emphasis added).

58. IP Petroleum Co. v. Wevanco Energy, L.L.C., 116 S.W.3d 888, 897 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (quoting Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 22–24 (Tex. 1994)).

59. *See id.* at 898 (quoting Marshall Indep. Sch. Dist. v. U.S. Gypsum Co., 790 F. Supp. 1291, 1300 (E.D. Tex. 1992)).

60. JOA WORKING MANUAL, *supra* note 56, at 31.

61. OBO, Inc. v. Apache Corp., 566 S.W.3d 26, 34 (Tex. App.—Houston [14th Dist.] 2018, no pet.).

consequential damages arising from its breach of the exculpatory clause, punitive damages, or both.[62]

### *2. Damages for Torts Associated with the Operator/Non-Operator Relationship*

In *Hill v. Heritage Resources, Inc.*, the El Paso Court of Appeals examined whether a party to a Joint Operating Agreement (JOA) could be held liable under a tort and breach of contract theory.[63] Specifically, an operator filed suit against non-operators alleging tortious interference with contract and business relationships, slander of title, and fraud based on the non-operator's attempts to remove the operator.[64] The court stated that "[w]hile it is clear that the right to remove an operator under a J.O.A., and participation or non-participation in a subsequent J.O.A. operation are undoubtedly contractual rights, it does not necessarily follow that a party's actions regarding the J.O.A. contract can never rise to the level of a tort."[65] The court also noted that a JOA was merely a standardized form that had minimal safeguards from the misconduct of a party, and the facts forming the operator's claims based on tort and contract were sufficiently independent to allow recovery based on tort and contract theories.[66]

Though this particular case involved claims by an operator against non-operators, both operators and non-operators alike should be aware of potential liability for both their tortious conduct and their conduct that breaches the operating agreement.

### *3. Damages Related to Defaults Based on a Party's Failure to Pay Financial Obligations Relating to the JOA*

Disputes over costs and expenses arise frequently in the context of the operator and non-operator relationship. One of the most common scenarios where operator and non-operator disputes arise are in the context of a non-operator failing to pay its share of costs relating to joint interest billings. It is worth noting that even if a non-operator claims that expenses by the operator are improper or incorrect, the 1984 and 2005 Council of Petroleum Accountants Societies (COPAS) forms governing accounting procedures for JOAs provide that bills and statements from the operator will nonetheless be conclusively presumed to be true and correct twenty-four months after the

62. *See, e.g.*, Stine v. Marathon Oil Co., 976 F.2d 254 (5th Cir. 1992) (interpreting the exculpatory clause and establishing the scope of available damages); IP Petroleum Co., 116 S.W.3d at 898 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (clarifying the recoverability of direct damages once gross negligence is proven); *see also* JOA WORKING MANUAL, *supra* note 56, at 29–31.

63. Hill v. Heritage Resources, Inc., 964 S.W.2d 89 (Tex. App.—El Paso 1997, pet. denied).

64. *Id.* at 107.

65. *Id.* at 112.

66. *See id.* at 98.

calendar year in which they are charged unless the non-operator makes an exception during the twenty-four-month "lookback" period.[67] Such a failure to challenge by the non-operator will make it easier for an operator to prove its damages in the event that it files suit against the non-operator because its charges are deemed correct.

One way for an operator to reduce the amount owed to it by the non-operator (i.e., reduce or mitigate its damages) is by netting the non-operator's share of oil and gas production as provided in Section VII.D.

Article VII.D., entitled Defaults and Remedies, also provides that:

> If any party fails to discharge any financial obligation under this agreement, including without limitation the failure to make any advance under the preceding Article VII.C. or any other provision of this agreement, within the period required for such payment hereunder, then in addition to the remedies provided in Article VII.B. or elsewhere in this agreement, the remedies specified below shall be applicable.[68]

According to the JOA, the rights of a party who is in default are suspended.[69] Further, "[a]n Operator who is in default can be replaced by a vote of the Non-Operators owning a majority interest."[70] A defaulting party also loses its right to receive operating information, elect to participate in operations, and receive proceeds from the sale of production. Non-defaulting parties are also permitted to sue the defaulting party to recover money, interest, consequential damages, and attorneys fees and costs of court.[71] Additionally, if a party to the JOA defaults and is deemed not to participate, the defaulting party effectively forfeits its economic interest in the Contract Area covered by the JOA.[72] Accordingly, there are a number of potential damages that a non-defaulting party can seek against a party to the JOA that defaults for failure to discharge its financial obligations under the JOA.

### *4. Breach of the Assignment; Maintenance of Uniform Interest Provision*

The Maintenance of Uniform Interest Provision of the JOA seeks to maintain administrative convenience for the operator under the JOA by prohibiting the transfer of divided interest in the area covered by the JOA.

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67. JOA WORKING MANUAL, *supra* note 56, at 98.

68. JOA WORKING MANUAL, *supra* note 56, at 82 (the Defaults and Remedies Clause).

69. *Id.* at 95.

70. *Id.*

71. *Id.* at 94–96; *see also id.* at 96 (Defaults and Remedies Clause at ¶ 2) (stating that "[n]on-defaulting parties or Operator for the benefit of non-defaulting parties may sue . . . to collect the amounts in default, plus interest accruing on the amounts recovered from the date of default until the date of collection at the rate specified in Exhibit 'C' attached hereto. Nothing herein shall prevent any party from suing any defaulting party to collect consequential damages accruing to such party as a result of the default.").

72. *Id.*

A.A.P.L. Form 610 - 1989 Model Form, Art. VIII.D (the MUI Provision).[73] "There are no clear damages that flow from [a violation of the MOI provision]. Conceptually, the remedy for [a breach of the MOI provision] would be for specific performance and damages, if any could be proven."[74]

## III. DAMAGES FOR COMMON PROPERTY-RELATED CAUSES OF ACTION IN THE OIL AND GAS INDUSTRY

### *A. Damages Relating to Trespass on the Mineral Estate*

In the oil and gas industry, the issue of trespass arises both above and below the surface of the property. Often, the owner of the minerals underlying the surface of a piece of property is not the same person who owns the surface itself. Accordingly, in the "old days," conflict would arise when an oil and gas lessee would go onto the surface of a property to conduct oil and gas operations without the express permission of the actual surface owner. I attribute this problem to the "old days" because this issue has mostly been resolved by the common law *dominant estate doctrine* and through surface use agreements between the oil and gas lessee and the surface owners. Additionally, another form of trespass that is attributable to the "old days" is slant hole drilling. This situation arises when an oil and gas lessee drills a well at an angle that causes the wellbore to cross property lines from a property on which it has a right to drill to a property to which it does not have a right to drill.[75] The issue of slant hole drilling has mostly been resolved by Texas's court's articulation of property rights associated with the mineral estate underlying the surface of the property (i.e., oil and gas lessors and lessees now better under the nature of their rights under and oil and gas lease and the nature of the mineral estate). More recently, trespass claims in the oil and gas industry have been associated with fracing. Specifically, trespass claims have been related to cracks in the sedimentary rock formations caused by fracing, which—similar to slant hole drilling—can cross property lines from a property where a lessee is permitted to drill to a property where the lessee is not permitted to drill.[76]

Trespass is the "unauthorized entry upon the land of another."[77] Trespass "may occur when one enters—or causes something to enter—

73. *Id.* at 103.

74. *Id.*

75. PATRICK H. MARTIN & BRUCE M. KRAMER, MANUEL OF OIL AND GAS TERMS 306, 1108 (18th ed. 2021) (defining "slant drilling" and "directional drilling").

76. *See* Coastal Oil & Gas Corp. v. Garza Energy Tr., 268 S.W.3d 1, 10 (Tex. 2008).

77. Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011).

another's property."[78] To prove a trespass claim, the plaintiff must show that it owned the property or had a right to exclude others from the property.[79]

The damages associated with a trespass

> reflect the sum necessary to make the victim whole or place him in the position he would have been but for the trespass. That sum includes the cost to repair any damages to the property, the loss of use of the property, and the loss of any expected profits from the property's use.[80]

In general, when a mineral lessor brings a claim for trespass based on a lessee's unlawful entry, drilling, and drainage of the lessor's mineral estate, the lessor is, similar to a landlord's reversion interest in the surface estate, primarily seeking damages to his reversionary interest in the minerals.[81] Damages for trespass based on improper or wrongful drainage of the lessor's mineral estate will be in the form of a reduction of value to the lessor's reversionary interest.[82] Such damages are not speculative so long as the lessor proves that his mineral estate was actually injured by the actions of the lessee trespasser.[83]

There are three basic forms of trespass to the mineral estate that arise in the oil and gas industry. The first is trespass, which results in production; the second is known as dry hole trespass; and the third is geophysical trespass.

### *1. Damages for Trespass That Results in Production*

When a lessee trespasses on the mineral estate, the measure of damages to the mineral owner will depend on whether the lessee is a good faith or a bad faith trespasser.[84] A good faith trespasser is a trespasser who mistakenly believes that he has a valid right to drill and produce the minerals at issue.[85] A bad faith trespasser is a trespasser who knows that he does not have the right to produce the mineral interest owner's mineral but does so anyway.[86]

Claims relating to good faith trespass typically arise in cases where a lessee continues to produce oil and gas from a lessor's property after a lease

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78. *Id.*

79. N. Shore Energy, L.L.C. v. Harkins, 501 S.W.3d 598, 605 (Tex. 2016) (internal citations omitted) (citing Envtl. Processing Sys., L.C. v. FPL Farming Ltd., 457 S.W.3d 414, 424 (Tex. 2015); Barnes v. Mathis, 353 S.W.3d 760, 764 (Tex. 2011)).

80. Palacios v. Patel, No. 02-18-00119-CV, 2018 LEXIS 4093, at *30 (Tex. App.—Fort Worth June 7, 2018, no pet.) (internal citations omitted) (citing Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 921 (Tex. 2013)).

81. *Coastal Oil & Gas Corp.*, 268 S.W.3d at 10.

82. *See id.*

83. *See id.* at 10–11.

84. Moore v. Jet Stream Investments, Ltd., 261 S.W.3d 412, 428 (Tex. App.—Texarkana 2008, pet. denied).

85. *Id.*

86. *Id.* at 429.

terminates, and the lessee is unaware of such termination. The proper measure of damages awardable to a mineral interest owner in the case of a good faith trespass by a mineral lessee "is the value of the minerals minus drilling and operating costs."[87]

A lessee's conduct in claims relating to bad faith trespass is much more egregious. That is, the lessee produces from the mineral owner's mineral estate when the lessee knows that the lessee does not have a right to, or the lessee continues producing minerals from the mineral owner's mineral estate once the lease has terminated and the lessee knows that the lease has terminated. "The measure of damages for bad faith trespass" is "the value of the things mined at the time of severance without making deduction for the cost of labor and other expenses incurred in committing the wrongful act . . . or for any value he may have added to the minerals by his labor."[88]

### *2. Damages for Dry Hole Trespass a/k/a Kishi Trespass*

Claims for dry hole trespass occur when a lessee unlawfully enters and drills on a lessor's mineral estate and the well drilled by the lessee is a dry hole (i.e., it fails to produce oil or gas). The appropriate measure of damages for dry-hole trespass is the loss of the speculative use of the mineral estate by the mineral owner.[89] If a lessee enters upon the mineral owner's land in an attempt to develop it "and by their attempt destroy the oil and value of the land, then [the lessee] would be liable to the [mineral owner] for the damages suffered by them. . . ."[90] The mineral owner must prove that the lessee's trespass "proximately resulted in the loss of the market value of his property."[91] In this context, this essentially means that the owner of the mineral estate is entitled to the value of the bonus that it would have received had the trespassing lessee not drilled a dry hole and decreased the speculative value of the mineral estate.

### *3. Damages for Geophysical Trespass*

Geophysical trespass occurs when a lessee conducts unlawful exploration on the mineral estate.[92] Unlawful exploration entails unlawful geological exploration like seismic, shooting, infrared, and countless other

87. *Id.* at 428.

88. *See id.* at 428–29 (citing Mayfield v. de Benavides, 693 S.W.2d 500, 506 (Tex. App.—San Antonio 1985, writ ref'd n.r.e.)).

89. Humble Oil & Refining Co. v. Kishi, 276 S.W. 190 (Tex. Comm'n App. 1925), set aside on reh'g, 291 S.W. 538; *see also* Humble Oil & Refining Co. v. Luckel, 154 S.W.2d 155 (Tex. App.—Beaumont 1941, writ. ref'd w.o.m.).

90. *Luckel*, 154 S.W.2d at 157.

91. *See* Thomas v. Tex. Co., 12 S.W.2d 597, 598 (Tex. App.—Beaumont 1928, no writ).

92. MARTIN & KRAMER, *supra* note 18, at § 230.

activities.[93] "In the absence of a surface trespass, Texas courts have consistently found no geophysical trespass even though the seismic waves may actually enter the non-consenting mineral owner's land."[94] Thus, in Texas, a mineral interest owner will need to show that the lessee unlawfully entered onto their property and conducted geophysical exploration activities.

Generally, damages for geophysical trespass can be measured by: (1) "[t]he value of the right to enter on the land for the survey. The right to go on land for a geophysical survey is a valuable interest with a reasonably ascertainable market value;" (2) "[t]he loss of speculative value by reason of the unfavorable publicity resulting from the survey;" (3) "[t]he value to the trespasser of the information it obtained by the geophysical trespass;" or (4) "on an appropriate showing of facts, punitive damages . . . ."[95] Further, so long as the lessee does not make a physical entry onto the mineral interest owner's property, there is no liability merely because shock waves relating to geophysical testing pass through the mineral interest owners land, even though such conduct by the lessee affords the lessee information relating to the mineral estate and the speculative value of the mineral estate is affected thereby.[96]

### *B. Damages to Mineral Reservoirs and Correlative Rights*

"The oil and gas beneath the soil are considered to be a part of the realty. Each owner of land owns separately, distinctly and exclusively all the oil and gas under his land and is accorded the usual remedies against trespassers who appropriate the minerals or destroy their market value."[97]

> The term "correlative rights" is merely a convenient method of indicating that each owner of land in a common source of supply of oil and gas has legal privileges as against other owners of land therein to take oil or gas therefrom by lawful operations conducted on his own land; that each such owner has duties to the other owners not to exercise his privileges of taking so as to injure the common source of supply; and that each such owner has rights that other owners not exercise their privileges of taking so as to injure the common source of supply.[98]

Accordingly, a mineral owner cannot intentionally or negligently impair the ability of other landowners to capture minerals.[99]

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93. *See id.*
94. *Id.*
95. *Id.*
96. Kennedy v. General Geophysical Co., 213 S.W.2d 707 (Tex. App. 1948, writ ref'd n.r.e.) (noting that "[t]respass may . . . be committed by shooting onto or over the land, by explosions, by throwing substances, by blasting operations, by discharging soot and carbon, but not by mere vibrations.").
97. Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561 (Tex. 1948).
98. *Id.* at 562–63.
99. *See id.*

Texas courts recognize that the correlative rights doctrine only works if each mineral owner is "afforded the opportunity to produce his fair share of recoverable oil and gas beneath his land."[100] Accordingly, a mineral owner who negligently or intentionally interferes with the correlative rights of another mineral owner is liable for damages for the value of otherwise recoverable hydrocarbons that were lost due to the other mineral owner's negligent impairment of the reservoir and correlative rights at issue.[101]

### *C. Common Surface Damage*

The correct measure of surface damages is highly dependent on whether an injury to real property is considered temporary or permanent. If damages to the surface are temporary, then the property owner is entitled to "the cost to repair any damage to the property, loss of use of the property, and loss of any expected profits from the use of the property."[102] Repair damages are equal to "the reasonable cost of the repairs necessary to restore the property to its condition immediately prior to the injury."[103] Loss of use damages are damages for the injury sustained "by being deprived of the use of the property."[104]

If damages to the surface are permanent, then the property owner is entitled to "the difference between the value of the land immediately before the injury and its value immediately after."[105] Accordingly, depending on the value of the property, the property owner may be inclined to argue that the injury to the property is temporary or permanent in order to increase the amount of damages available.

#### *1. Damages for Surface Trespass*

There are many scenarios where an oil and gas lessee can be sued for trespass. One scenario might be where the lessee's employees enter a property they have no right to be on. Another, more common, scenario where trespass arises in the oil and gas context is where an oil and gas lessee exceeds the scope of their surface rights under an oil and gas lease or by

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100. *See id.* at 562.

101. *See id.* at 561.

102. Coinmach Corp. v. Aspenwood Apartment Corp., 417 S.W.3d 909, 921 (Tex. 2013) (citing Meridien Hotels, Inc. v. LHO Financing P'ship 1, L.P., 255 S.W.3d 807, 821 (Tex. App.—Dallas 2008, no pet.).

103. Z.A.O., Inc. v. Yarbrough Drive Ctr. Joint Venture, 50 S.W.3d 531, 545 (Tex. App.—El Paso 2001, no pet.) (quoting Lone Star Dev. Corp. v. Reilly, 656 S.W.2d 521, 525–26 (Tex. App.—Dallas 1983, writ ref'd n.r.e.)).

104. *Id.*

105. Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P., 449 S.W.3d 474, 478 (Tex. 2014) (quoting Fort Worth & D.C. Ry. Co. v. Hogsett, 4 S.W. 365, 366 (Tex. 1887)).

contaminating the surface of the property with oil or some other toxic chemical or substance.

Texas courts consider many factors in considering what damages are available for an unlawful entry onto the property of another. Further, "[t]he commission of a trespass does not necessarily mean the actor will be liable for damages."[106] The Waco Court of Appeals has explained that damages under a trespass theory depends on the nature of the trespass and the nature of the harm:

> Every unauthorized entry upon land is a trespass even if no damage is done. However, to determine what damages, if any, are recoverable for a trespass, the type of conduct or nature of an activity that causes the entry must be identified. While a trespass is a trespass, different recoveries are available, depending on whether the trespass was committed intentionally, negligently, accidentally, or by an abnormally dangerous activity.[107]

> [O]ne who invades or trespasses upon the property rights of another, while acting in the good faith and honest belief that he had the lawful and legal right to do so, is regarded as an innocent trespasser and liable only for the actual damages sustained.[108]

> When the trespass causes a temporary injury, the "amount necessary to place the plaintiff in the position it would have been in but for the trespass" generally includes the cost to repair any damage to the property, loss of use of the property, and loss of any expected profits from the use of the property.[109]

As mentioned above, if the trespass results in a permanent injury, the property owner will be entitled to the difference in the value of the land immediately before and immediately after the trespass. Ultimately, "the measure of damages in a trespass case is the sum necessary to make the victim whole, no more, no less."[110]

Texas courts have also awarded damages for emotional distress or mental anguish upon "a showing of deliberate and willful trespass and actual property damage."[111] Furthermore, a lessee trespasser could be liable for

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106. *Coinmach Corp.*, 417 S.W.3d at 920 (quoting Zapata v. Ford Motor Credit Co., 615 S.W.2d 198, 201 (Tex. 1981)).

107. Watson v. Brazos Elec. Power Coop., 918 S.W.2d 639, 645 (Tex. App.—Waco 1996, writ denied) (internal citation omitted) (citing RESTATEMENT (SECOND) OF TORTS §§ 158, 165–66 (AM. L. INST. 1965)).

108. Wilson v. Texas Co., 237 S.W.2d 649, 651 (Tex. App.—Fort Worth 1951, writ ref'd n.r.e.).

109. *Coinmach Corp.*, 417 S.W.3d at 921 (quoting Meridien Hotels, Inc. v. LHO Financing P'ship 1, L.P., 255 S.W.3d 807, 821 (Tex. App.—Dallas 2008, no pet.)).

110. *Meridien Hotels, Inc.*, 255 S.W.3d at 821.

111. *Coinmach Corp.*, 417 S.W.3d at 922; *see also* Pargas of Longview, Inc. v. Jones, 573 S.W.2d 571, 574 (Tex. App.—Texarkana 1978, no writ).

exemplary damages if its trespass was the result of "(1) fraud; (2) malice; or (3) gross negligence."[112]

### *2. Damages for Negligence*

A lessor whose property is damaged by the operations of the oil and gas lessee may assert negligence against the lessee in the absence of or in addition to claims that may be asserted under a surface damages provision in an oil and gas lease. Just like in any other negligence case, the lessor will need to show that the defendant lessee owed the lessor a duty, the lessee breached the duty, the lessor was injured, and the lessor's injury was proximately caused by the lessee's breach.[113] Generally, a lessor will assert that the lessee owed him a duty not to damage his property.

As noted previously, the appropriate measure of damages for real property depends on whether the injury is temporary or permanent. Specifically, with regard to negligence:

> [i]f land is temporarily but not permanently injured by the negligence or wrongful act of another, the owner would be entitled to recover the amount necessary to repair the injury, and put the land in the condition it was at the time immediately preceding the injury, with interest thereon to the time of the trial.[114]

> The companion rule, of equally venerable provenance, states that "the true measure of damages in case of permanent injury to the soil is the difference between the value of the land immediately before the injury and its value immediately after."[115]

Ultimately, the true measure of damages is typically what it costs to restore the property.[116] However, when the property at issue cannot be restored, courts will award damages equal to the loss of the fair market value of the property as a whole.[117] Furthermore, when the cost of repairs or restoration exceeds the diminution of the property's value to such a degree that repairs are not economically feasible, then an injury will be treated as permanent for the sake of damages and damages will be awarded based on the loss of the fair market value of the property.[118] This is known as the economic feasibility rule.[119]

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112. *Coinmach Corp.*, 417 S.W.3d at 922 (quoting TEX. CIV. PRAC. & REM. CODE § 41.003(a)).

113. RESTATEMENT (SECOND) OF TORTS § 281 (AM. L. INST. 1965).

114. Gilbert Wheeler, Inc. v. Enbridge Pipelines (E. Tex.), L.P., 449 S.W.3d 474, 478 (Tex. 2014) (quoting Trinity & S. Ry. Co. v. Schofield, 10 S.W. 575, 576–77 (Tex. 1889)).

115. *Id.* (quoting Fort Worth & D. C. Ry. Co. v. Hogsett, 4 S.W. 365, 366 (Tex. 1887)).

116. *Id.*

117. *Id.* at 478–79.

118. *Id.* at 481.

119. *Id.*

### *3. Damages for Nuisance*

On the same note, nuisance is a common cause of action asserted in oil and gas property damage cases because these cases often involve some type of interference with the lessor property owner's use and enjoyment of his property. Nuisance actions in the oil and gas industry revolve around spills or releases of foreign substances (i.e., oil or wastewater), flaring, smells, etc. Nuisance claims are especially popular with landowner plaintiffs because nuisance does not concern itself with the degree of care used by the lessee "but on the degree of danger or annoyance existing even with the best of care."[120] In other words, in Texas, all that is needed to show a nuisance is something that interferes with the lessor landowner's use and enjoyment of his property.[121]

Just like property damages arising from a lessee's negligence and other property damages, the proper measure of damages for nuisance depends on whether the nuisance is temporary or permanent.

> It has long been the rule in Texas that if a nuisance is temporary, the landowner may recover only lost use and enjoyment (measured in terms of rental value) that has already accrued. Conversely, if a nuisance is permanent, the owner may recover lost market value—a figure that reflects all losses from the injury, including lost rents expected in the future. Because the one claim is included in the other, the two claims are mutually exclusive; a landowner cannot recover both in the same action.[122]

In other words, if a nuisance is of the character that would affect property values, the injury it causes should be measured by the change in market value.[123] But if it is impossible to tell how much the nuisance would affect the property's value, damages will compensate the plaintiff only for injuries resulting from an isolated occurrence.[124]

### *4. Damages Relating to the Accommodation Doctrine*

In Texas, the surface estate is subservient to the mineral estate.[125] This is known as the "dominant estate doctrine," and it gives the mineral owner the right to enter onto the surface of the property (a surface that the mineral owner may have title to) for the purpose of development and exploration of

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120. William R. Keffer, *Drilling for Damages: Common Law Relief in Oilfield Pollution Cases*, 47 SMU L. REV. 523, 525 (1994).

121. *Id.*

122. Schneider Nat'l Carriers, Inc. v. Bates, 147 S.W.3d 264, 276 (Tex. 2004).

123. *Id.*

124. *See, e.g.*, *id.* at 276–78.

125. *See* Getty Oil Co. v. Jones, 470 S.W.2d 618, 621 (Tex. 1971).

the minerals.[126] This includes performing all work that is incident to developing and exploring minerals.[127] Without the dominant estate doctrine, there would be many situations where—due to the nature, location, and sometimes competing interests of the surface and mineral owners—valuable mineral resources would go undeveloped.

Texas courts have recognized the importance of balancing the interests of the mineral owner and surface owner.[128] Specifically, Texas courts have sought to protect the interest of surface owners' existing use of the surface estate from excessive or unreasonable use of the surface estate by the mineral owner through the accommodation doctrine.[129] Surface owners must show that "(1) the lessee's use completely precludes or substantially impairs the [surface owner's] existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued."[130] If the surface owner is able to carry its burden on both of the proceeding requirements, "he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use."[131]

With regard to the proper measure of damages, in the event that a mineral owner makes unreasonable use of the surface, the mineral owner will have the right to resolve its unreasonable use and "will not be liable in damages beyond the decrease in the value of the use of the land from the time" the unreasonable use began to the time the unreasonable use ceased.[132] Additionally, in failure to accommodate cases, surface owners frequently seek injunctive relief to require the mineral estate owner to stop the unreasonable use.[133]

Ultimately, when a mineral owner makes unreasonable use of the surface estate and fails to accommodate preexisting use, the proper measure of damages awardable to the surface owner can be awarded damages for the decrease in the value of the surface from the time the unreasonable use began to the time the unreasonable use stopped.

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126. *See id.*

127. *Id.* at 621–22.

128. *Id.*

129. *Id.* at 622.

130. Merriman v. XTO Energy, Inc., 407 S.W.3d 244, 249 (Tex. 2013) (citing *Getty Oil Co.*, 470 S.W.2d at 628).

131. *See id.* (citing Tarrant Cnty. Water Control & Improvement Dist. No. One v. Haupt, Inc., 854 S.W.2d 909, 911 (Tex. 1993)).

132. *Getty Oil Co.*, 470 S.W.2d at 623.

133. *See, e.g.*, *Merriman*, 407 S.W.3d at 246–47.

## IV. CONCLUSION

This Article does not cover every potential scenario in which a claim for damages can arise in the oil and gas industry. Instead, it seeks to analyze how damages are measured in common scenarios arising in the oil and gas lease.

In general, "[a]n award of damages is defined as the sum of money the law awards as pecuniary compensation, recompense, or satisfaction for an injury done or a wrong sustained as a consequence of a breach of a contractual obligation or a tortious act."[134] Pecuniary damages compensate a plaintiff for the injuries sustained as a result of a tortious act, while compensatory damages seek to repair the wrong that has been done to the plaintiff.[135] In any case, the general purpose underlying any damages award is to place the injured party in the place that he would have been in if not for the injury.

The same principles apply to damages awards for injuries sustained in the oil and gas industry. For example, if a lessee fails to properly pay royalties under an oil and gas lease, the proper measure of damages is the difference between what royalty was actually paid and what royalty should have been paid to the lessor. Such a measure of damages seeks to place the lessor in the position he would have occupied if not for the mispayment. On the other hand, if a lessee pollutes the surface owner's property, the damages awarded are the cost it takes to repair the surface to its pre-pollution condition if the property is repairable; if not, then the lessee is liable for the fair market value of the property prior to the pollution. In either case, the purpose of the damage award is to put the surface owner, as nearly as possible, in the position he would have occupied if not for the injury.

Placing the wronged party in the position that he would have occupied if not for the injury should be in the back of any oil and gas practitioner's mind when he is assessing potential damages available to his client. "What value was lost by my client because of the oil and gas operator's failure to drill an offset well and protect against drainage?" "What value was lost by my client because the oil and gas operator spilled oil on his property?" "What value was lost by my client because the oil and gas operator failed to properly pay him under the lease?" There are countless scenarios where injuries can arise in the oil and gas industry. Regardless of the type of injury, an oil and gas practitioner should consider what amount of damages it is going to take to make the injury right and to make their client whole.

Coming to a definitive answer on what it will take to make your client whole can often turn on the analysis of an expert. For example, a lawyer alone cannot opine or reasonably determine that an offset well would have been likely to produce X amount of drainage and would have resulted in Y amount

134. City of Dallas v. Cox, 793 S.W.2d 701, 733 (Tex. App.—Dallas 1990, no writ) (citation omitted).
135. *See id.*

of royalty payments for his client. Instead, a geologist, and likely an oil and gas economist, will need to study the facts to make a reasonable determination on such an issue. Finding competent experts will be the key to damages awards in many oil and gas cases.