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The Pich Exception: Reservations, Exceptions to Warranty, and Exceptions to Grant in the Chain of Title.

Zackary D. Callarman*

INTRODUCTION

Attorneys and landmen alike encounter mineral reservations and exceptions on a daily basis. While the terms “reservation” and “exception” are not strictly synonymous, there are circumstances where an exception and reservation achieve the same result (e.g., an interest is retained by the grantor of the instrument).¹ Generally, a reservation is the creation of a new right or interest, by and for the grantor, in real property being granted to another.² On the other hand, the term exception has two definitions: (1) a description of a portion of the thing granted, which prior to the grant had been conveyed to another, and not necessarily so conveyed by the grantor, but by a prior grantor, or (2) the retention of an existing right or interest, by and for the grantor, in real property being granted to another.³ When the language in question is construed as an “exception to warranty,” the grantor will never retain the excepted interest. However, where the language in question is construed as an “exception to grant,” the grantor will retain the excepted interest if another party does not own said interest. A competent title examiner must be able to discern the difference between a reservation, exception to warranty, and an exception to grant, as the consequence of mistaking one for the other could lead to malpractice liability. This article examines Texas jurisprudence and aims to provide rule-based guidance to attorneys and landmen for interpreting reservation and exception provisions in the chain of title.

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1. *See, e.g.*, Pich v. Lankford, 302 S.W.2d 645, 650 (Tex. 1957) (citing Donnell v. Otts, 230 S.W. 864, 865 (Tex. Civ. App. 1921)).

2. *Reservation*, BLACK’S LAW DICTIONARY (8th ed. 2004).

3. *Exception*, BLACK’S LAW DICTIONARY (8th ed. 2004).

DISCUSSION

First, the following analysis will present a basic explanation of reservations and exceptions, as defined by Texas law. Thereafter, these basic definitions will gradually evolve pursuant to the distinguishing facts of each case examined.

A. Texas Courts Do Not Favor Reservations by Implication

Sharp v. Fowler is among the most widely cited Texas cases addressing mineral estate reservations.⁴ There, the Supreme Court of Texas stated two important rules that are universally followed by courts addressing the issue today: (1) a reservation of minerals must be by clear language in order to be effective; and (2) courts do not favor reservations by implication.⁵ In *Sharp*, Frost Lumber Industries, Inc. (Frost) conveyed 29.7 acres out of the Texas Central Railway Survey No. 13 to A.D. Cockrell (Cockrell) on February 4, 1935, excepting all of the minerals, which were owned by Louis Werner Sawmill Company (Werner) at the time (hereinafter referred to as the Frost Deed).⁶ Subsequently, Werner conveyed all of the minerals to Frost, who then conveyed all of the minerals to Cockrell.⁷ Next, Cockrell conveyed a three-fourths mineral interest to another party, such that he then owned all of the surface and an undivided one-fourth mineral interest.⁸ Thereafter, Cockrell died, and the administrator of Cockrell's estate conveyed said 29.7 acre tract to J.A. Browning, describing the subject lands as: "29.7 acres of the T.C. Railway Company No. 13, and being the same land described in a deed from [Frost], to A.D. Cockrell, dated the 4th day of February, A.D. 1935, and of record in Vol. 102, Page 462, Deed Records, Panola County, Texas" (hereinafter referred to as the Administrator's Deed).⁹

The successors-in-interest to Cockrell's estate, the petitioners, argued that the Administrator's Deed conveyed only the surface to Browning, reasoning that the Frost Deed, which was utilized for the legal description in the Administrator's Deed, conveyed only the surface.¹⁰ Conversely, respondents, successors-in-interest to Browning, argued that the Administrator's Deed did not expressly except or reserve any mineral

4. 252 S.W.2d 153 (Tex. 1952).

5. *Id.* at 154 (citing *Sellers v. Tex. Cent. Ry. Co.*, 17 S.W. 32 (Tex. 1891); *State v. Black Bros.*, 297 S.W. 213 (Tex. 1927)).

6. *Sharp*, 252 S.W.2d at 153.

7. *Id.* at 154.

8. *Id.*

9. *Id.*

10. *Sharp v. Fowler*, 252 S.W.2d 153, 153–54 (Tex. 1952).

interest and that any mineral interest owned by the grantor passed to the grantee of the Deed.¹¹

Ultimately, the court was asked to determine whether the use of the Frost Deed to describe the lands conveyed operated to transfer a lesser estate than Cockrell owned at the time of the conveyance.¹² In other words, the question was whether the reference to the Frost Deed was a description of the *estate* being conveyed to Browning, or merely a geographical description of the *land* being conveyed.

Importantly, the court noted that the Administrator's Deed conveyed 29.7 acres, "being the same land *described* in' the Frost Deed," explaining that to describe land is to define its physical location so that it may be located on the ground, rather than a definition of the estate conveyed by the Deed.¹³ However, the court explained that if the clause in the Administrator's Deed transferred the same "land *conveyed* in the Frost Deed," the outcome would have been different.¹⁴ Noting that the language in the Administrator's Deed did not evidence an intention to reserve the one-fourth mineral interest that the Estate owned at the time of conveyance, the court concluded that the interest passed to the grantee, and ultimately vested in the Respondents.¹⁵

B. Klein Court Holds that Exception of Interest Identical to Previously Reserved Interest was Included Only as an Exception to Warranty

When the provision in question expresses an intent only to except a previously reserved interest, Texas courts will construe the provision as an exception to warranty and will not credit the grantor with ownership of the excepted interest.¹⁶ Such was the case in *Klein v. Humble Oil & Refining Co.*, where by warranty deed dated May 29, 1928, Robert Stein and his wife conveyed a tract of land to F.F. Klein (hereinafter the Stein Deed) with the following reservation:

Grantors herein, however, reserve for themselves, their heirs and assigns, one-eighth (1/8) of all mineral rights in and under [ten] acres of land, running north and south, on the east end of the [sixty] acres herein conveyed, and it is understood and agreed that if no production of oil is had on said [ten] acres within a period of

11. *Id.* at 153–54.

12. *Id.* at 154.

13. *Id.* at 154 (emphasis added).

14. *Id.*

15. *Id.*

16. *See, e.g., Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911 (Tex. Civ. App.—Beaumont 1934, writ granted), *aff'd*, 86 S.W.2d 1077 (Tex. 1935).

[twenty] years, this reservation shall terminate and become null and void, and it is further understood that grantors herein are not to participate in any oil lease or rental bonuses that may be paid on any lease on said above described land, and hereby waive any rights they may have or be entitled to in any future oil or gas lease.¹⁷

Subsequently, by warranty deed dated July 16, 1928, F.F. Klein and his wife conveyed the same tract of land to D.D. Baker (hereinafter the Klein Deed) with the following provisions:

There is however excepted from this conveyance [one-eighth] of all mineral rights in and under [t]en acres of land running north and south on the east end of said [sixty] acres, and it is understood that if no production of oil is had on said [ten] acres within a period of [t]wenty years from May 29, 1928, then this reservation shall lapse. Also understood that the owner of said rights is not to participate in any oil lease or rental bonuses that may be paid for any lease, and have no interest in any future oil and gas lease The property herein conveyed is the same conveyed to us by Robert Stein and wife by deed dated May 29, 1928, and recorded in Guadalupe County, Deed Record Book 97, p. 398.¹⁸

Thereafter, when oil was discovered on the subject lands, Klein, believing that he owned a one-eighth mineral interest in the subject lands pursuant to the above provision, began conveying portions of the mineral interest to various other parties.¹⁹ Next, after acquiring an oil and gas lease covering the interest of Stein and his successors-in-interest, the Humble Company (Humble) began producing oil and gas from the lands; however, Humble did not pay Klein and his successors-in-interest for the one-eighth interest that he claimed he owned.²⁰ As a result, Klein brought suit against Humble, claiming that he excepted in himself an undivided one-eighth mineral interest in the deed from him to Baker and was thus due his share of the lease benefits.²¹ At trial, the court denied Klein any recovery, and Klein subsequently appealed.²²

On appeal, the court first explained that the cardinal rule in deed construction cases is to ascertain the intention of the parties from an

17. *Id.* at 912.

18. *Id.*

19. *Id.* at 913.

20. *Id.*

21. *Id.*

22. *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911, 913 (Tex. Civ. App.—Beaumont 1934, *writ granted*), *aff'd*, 86 S.W.2d 1077 (Tex. 1935).

examination of the entire instrument.²³ The court further cited two common canons of construction, noting that: (1) any doubt as to the language of the deed will be resolved against the grantor and in favor of the grantee (the Construe Against the Grantor Rule); and (2) that a deed will be construed as passing the entire fee-simple estate unless there are express words limiting the estate conveyed (the Greatest Estate Rule).²⁴ In addition, though noting that an exception and reservation may sometimes achieve the same result, the court distinguished the two.²⁵ It explained that a reservation must always be in favor of the grantor, while an exception is a mere exclusion from the grant and is in favor of the grantor only if the excepted interest is not owned by another party.²⁶

Next, the court emphasized the location of the granting paragraph and exception paragraph in the Klein Deed, respectively, explaining that Klein first conveyed “all that certain tract of land” (including a legal description of the land conveyed), followed by a separate paragraph laying out the exception of a one-eighth term mineral interest.²⁷ The court reasoned that the legal effect of the structure of the Klein Deed was to: (1) convey a fee-simple estate in all of the subject lands except a one-eighth mineral interest; and (2) provide warranty to the grantee covering the entire subject lands except the one-eighth mineral interest.²⁸

The court then dissected the language of the exception provision in the Klein Deed by contrasting it with the language of the reservation provision in the Stein Deed. While the grantors in the Stein Deed “reserve[d] for themselves,” the Klein Deed merely stated that a one-eighth interest was “excepted from this conveyance,” which evidenced that Klein did not intend to retain an interest in favor of himself.²⁹

In addition, the fact that Stein reserved a twenty year term mineral interest from the date of the Stein Deed (May 29, 1928) was a factor in the court’s analysis. While the Stein Deed reserved the one-eighth interest for a period of twenty years, the Klein Deed (dated July 26, 1928) excepted the one-eighth interest for “a period of twenty years from May 29, 1928,” which was the date of the Stein Deed, and was evidence that Klein intended only to except Stein’s prior term interest for warranty purposes.³⁰ Further, the Stein Deed reservation provided that the “grantors herein are

23. *Id.* at 914.

24. *Id.*

25. *Id.* at 915.

26. *Id.*

27. *Id.* at 914–15.

28. *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911, 915–16 (Tex. Civ. App.—Beaumont 1934, writ granted), *aff’d*, 86 S.W.2d 1077 (Tex. 1935).

29. *Id.* at 916.

30. *Id.*

not to participate in any oil lease,” while the Klein Deed exception provided that “*the owner of said rights* is not to participate in any oil lease.”³¹ This, according to the court, was further evidence that Klein was excepting only the rights that were owned by another party (Stein) to protect Klein on his warranty to Baker.³²

Lastly, the court highlighted the provision following the exception provision in the Klein Deed to support its ultimate conclusion. The provision identifies the lands conveyed by Klein to Baker as being “the same conveyed to us by Robert Stein and wife,” and includes a reference to the recording information for the Stein Deed.³³ According to the court, the effect of this reference was to clarify the intention of the parties.³⁴ In other words, this clause indicated that Klein intended to convey to Baker the identical lands and interest that Klein received from Stein, being the subject lands less a one-eighth mineral interest.³⁵ Ultimately, the court explained that if Klein intended to retain a one-eighth mineral interest in the lands, he would have expressed that intent prominently in the disputed provision.³⁶ After noting the absence of an express intent to reserve the mineral interest, the court concluded that Klein did not retain any interest in the subject lands.³⁷

C. The Pich Exception—A False Recital Will Not Operate to Nullify a Clear Exception from the Conveyance

Where a deed includes a clear and unambiguous exception followed by a “false recital” purporting to state why the exception is made, the provision will be construed as excepting an interest in favor of the grantor if said interest is not owned by another party.³⁸ Generally, a recital is defined as a formal statement included in a deed or writing to explain the reasons upon which the transaction is founded.³⁹ The recital is a “false recital” when the parties to the instrument include the recital in error.⁴⁰

31. *Id.* (emphasis added).

32. *Id.*

33. *Id.* at 913–14.

34. *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911, 915–16 (Tex. Civ. App.—Beaumont 1934, writ granted), *aff'd*, 86 S.W.2d 1077 (Tex. 1935).

35. *Id.* at 916.

36. *Id.* at 917.

37. *Id.*

38. *See, e.g., Pich v. Lankford*, 302 S.W.2d 645, 648 (Tex. 1957).

39. 4 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 21.10 (3rd ed. 2005).

40. 4 ALOYSIUS A. LEOPOLD, TEXAS PRACTICE SERIES: LAND TITLES AND TITLE EXAMINATION § 16.10 (3rd ed. 2005).

In *Pich v. Lankford*, L.A. Pich conveyed the subject lands to F.D. Turner on September 28, 1928, reserving “one[-]half of the full [one-eighth] [o]il [r]oyalty, or a [one-sixteenth] of all minerals produced on said land.”⁴¹ Next, on May 20, 1929, Turner conveyed the subject lands to Lewis B. Adams with no exceptions or reservations.⁴² Then, on February 27, 1930, Adams conveyed the subject lands to S.J. Higgs, reserving “one[-]fourth of all royalty, the same being [one thirty-second] 1/32 of all oil and gas produced from said land.”⁴³ Frank S. Magers, administrator of S.J. Higgs’s estate, conveyed all of the estate’s right, title and interest in the subject lands to Collins Howard on October 18, 1941, with no exceptions or reservations.⁴⁴

Subsequently, on January 26, 1943, Howard conveyed the subject lands to W.J. Sharp and his wife, Emma E. Sharp (hereinafter the Howard Deed).⁴⁵ The Howard Deed included the following language: “Save and Except an undivided three-fourths of the oil, gas and other minerals in, on and under said land, which have been heretofore reserved.”⁴⁶ On September 26, 1947, the Sharps conveyed the subject lands to A.H. and B.L. Lankford (hereinafter the Sharp Deed).⁴⁷ The Sharp Deed contained the following provision: “Save and Except an undivided three-fourths of the oil, gas and other minerals in and under the Southwest Quarter thereof, and an undivided one-fourth of the minerals in and under the remainder of said survey, which minerals do not belong to the grantors herein.”⁴⁸ Thereafter, on November 15, 1955, Howard quitclaimed to L.A. Pich all right, title and interest in the three-fourths mineral interest excepted and reserved in the deed from Howard to Sharp.⁴⁹ On December 12, 1955, Sharp quitclaimed to L.A. Pich all right, title and interest in the three-fourths mineral interest excepted and reserved in the deed from Sharp to Lankford.⁵⁰

Finally, Lankford, the original plaintiff, sued Pich et al., arguing that the grantors’ intent in the Howard and Sharp Deeds was to convey all interest owned by the grantors and that the language in those deeds did not reserve any interest in favor of the grantors.⁵¹ In addition, Lankford asserted that the exception language in the Howard and Sharp Deeds

41. *Pich*, 302 S.W.2d at 646.

42. *Id.*

43. *Id.*

44. *Pich v. Lankford*, 302 S.W.2d 645, 646 (Tex. 1957).

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* at 646–47.

50. *Pich v. Lankford*, 302 S.W.2d 645, 647 (Tex. 1957).

51. *Id.*

created a “cloud on [plaintiff]’s title” and sought to have the cloud on title removed.⁵² Ultimately, the trial court ruled that Lankford was the owner of the entire mineral estate, less the previously reserved royalty interests.⁵³ On appeal, the Amarillo Court of Civil Appeals, citing *Klein*, affirmed the trial court’s judgment; however, Pich’s subsequent writ of error to the Supreme Court of Texas was granted.⁵⁴

On review, Pich argued that: (1) the effect of the language in the Howard and Sharp Deeds was to except an undivided three-fourths mineral interest from the grant; (2) the fact that a false reason may have been given for the exception does not alter the effect of the exception; (3) said interest was necessarily retained by the grantor because no one else in the chain of title owned it; and (4) he owned said interest as the successor-in-interest to Howard and Sharp.⁵⁵ Contrarily, Lankford argued that neither Howard nor Sharp intended to retain a mineral interest in their respective deeds, but rather inserted the exception provisions to account for the previously reserved royalty interests and thus to protect themselves for warranty purposes.⁵⁶

In its analysis, the court began by noting that a mineral interest and a royalty interest are distinct interests in land.⁵⁷ Moreover, the court explained that an interest in land excepted from the grant will not pass to the grantee.⁵⁸ After reflecting upon the specific language of the disputed provisions in the Howard and Sharp Deeds, the court reasoned that instead of excepting only such interests as “have heretofore been reserved” or that “do not belong to the grantors herein,” each deed expressly excepted an undivided three-fourths mineral interest in plain and unambiguous language.⁵⁹ The court further stated that each exception was followed by a recital that purported to explain why the interest was excepted.⁶⁰ Recalling that there were no prior *mineral reservations* in the chain of title—there were only royalty reservations—the court identified the recitals in the Howard and Sharp Deeds as “false recitals.”⁶¹ Citing *Roberts v. Robertson*, a Vermont Supreme Court case, the court adduced that including a false reason for an exception from the grant will not diminish the effect of the

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.* at 647–48.

56. Pich v. Lankford, 302 S.W.2d 645, 648 (Tex. 1957).

57. *Id.* (citing Richardson v. Hart, 185 S.W.2d 563 (Tex. 1945)).

58. *Id.* (citing King v. First Nat’l Bank of Wichita Falls, 192 S.W.2d 260, 262 (Tex. 1946)).

59. *Id.*

60. *Id.*

61. *Id.* (emphasis added).

exception or operate to vest the grantee of the deed with the excepted interest.⁶²

Though not binding, *Roberts* exemplified the court's logic in *Pich* and bears noting. In *Roberts*, the grantor, J.C. Roberts, conveyed several specifically identified tracts of land, with the following provision: "Said J.C. Roberts *reserving lots sold*, Nos. 1, 2, 3, [. . .] 32, 33."⁶³ While the majority of the enumerated lots listed in the provision had been sold, lots 32 and 33 had not. There, the court held that the effect of the structure of the provision above was to except lots 32 and 33 from the grant, despite the fact that said lots had not been previously sold.⁶⁴ In other words, the false recital that lots 32 and 33 had been previously sold did not alter the fact that lots 32 and 33 were excepted from the grant, and were not conveyed to the grantee by the deed. The court further noted that the result of the case would have been different if the provision instead stated, "I except all the lots heretofore sold," as such would indicate only an exception to warranty.⁶⁵

The *Pich* court next cited its holding in *Umscheid v. Scholz* to further support its reasoning.⁶⁶ In that case, the deed at issue conveyed a tract of land with the following provision: "[I]t being understood that the public thoroughfare formerly existing along the edge of the river at this point is not intended to be conveyed by these presents, the corporation of the [C]ity of Bexar having the right to open said thoroughfare when it sees fit."⁶⁷ Thereafter, the successors-in-interest to the grantee in the above-referenced deed claimed title to lands that were previously used as a thoroughfare.⁶⁸ Though noting that there was no evidence that the City had the right to open said thoroughfare, the court in *Scholz* determined that: (1) the exception was not affected by the false recital; (2) the land was effectively excepted from the grant; and (3) said land did not pass to the grantee of the deed.⁶⁹

Returning to the facts of *Pich*, the court rejected Lankford's argument that Howard and Sharp included the exception provisions merely for warranty purposes.⁷⁰ The court contrasted the prior reservations of royalty interests from the express exception of a three-fourths mineral interest in

62. *Pich v. Lankford*, 302 S.W.2d 645, 648 (Tex. 1957) (citing *Roberts v. Robertson*, 53 Vt. 690. (1881)).

63. *Roberts*, 53 Vt. at 692.

64. *Id.* at 693.

65. *Id.*

66. *Pich*, 302 S.W.2d at 649 (citing *Umscheid v. Scholz*, 16 S.W. 1065 (Tex. 1891)).

67. *Umscheid*, 16 S.W. at 1066.

68. *Id.*

69. *Id.* at 1066–67.

70. *Pich v. Lankford*, 302 S.W.2d 645, 649–50 (Tex. 1957).

the Howard and Sharp Deeds, explaining that construing the Howard and Sharp Deeds as excepting only the royalty interests for warranty purposes would be reforming the deeds.⁷¹ Restated, the court refused to construe the provisions as an exception of the prior reserved *royalty interests* because the Howard and Sharp Deed provisions were an express exception of a *mineral interest*.⁷²

Furthermore, though the Lankfords relied on *Klein* to support their position, the court expressly distinguished the case from *Klein*. In *Klein*, the subsequently excepted interest was identical to the prior reserved interest—a one-eighth mineral interest.⁷³ As noted above, the prior reservation in this case was a royalty interest and the subsequently excepted interest was a mineral interest, which was critical to the court's reasoning.⁷⁴

After all, the court reasoned that though the language of the Howard Deed did not expressly reserve an interest in favor of Howard,⁷⁵ the language effectively excepted a three-fourths mineral interest from the grant.⁷⁶ Moreover, because no one else in the chain of title had previously reserved said three-fourths mineral interest, the interest remained in Howard and ultimately vested in Pich via quitclaim deed. As a result, the court adjudged Pich the owner of an undivided three-fourths mineral interest in the subject lands, reversed both lower courts' judgments, and remanded to the trial court for entry of a consistent judgment.⁷⁷

D. A False Recital Stating that a Mineral Interest Had Been Previously Conveyed, Without Words Expressing a Clear Intent to Reserve or to Except Said Interest, Will Be Construed as an Exception to Warranty

Where a false recital appears at the beginning of the provision and does not clearly express an intent to reserve or except an interest from the grant, Texas courts will construe the provision as an exception to warranty.⁷⁸ In *Ladd v. DuBose*, the Republic Insurance Company conveyed the subject lands to Porter and Bosworth on March 1, 1943,

71. *Id.*

72. *Id.* at 650 (emphasis added).

73. *See supra* text accompanying note 29.

74. *Pich*, 302 S.W.2d at 650.

75. The court only discusses the interest of Howard, here, because once Howard excepted the three-fourths mineral interest in the deed to Sharp, the recital in the deed from Sharp to Lankford that the grantor did not own a three-fourths mineral interest was no longer false.

76. *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1957).

77. *Id.*

78. *Ladd v. DuBose*, 344 S.W.2d 476, 479 (Tex. Civ. App.—Amarillo 1961, no writ).

reserving a one-fourth mineral interest for a fifteen year term, provided that said interest shall terminate unless minerals are being produced in paying quantities at the end of the term.⁷⁹ Porter and Bosworth subsequently conveyed the lands to J.L. Ladd et al., with no exceptions or reservations. Thereafter, on December 8, 1947, J.L. Ladd et al. conveyed the subject lands to Frank F. DuBose (hereinafter the Ladd Deed) with the following provisions:

It is agreed and understood that a one-fourth mineral interest has been heretofore sold and it is further understood and agreed that a *one-fourth mineral interest in said land together with the right of ingress and egress thereon, is reserved to the grantors, their heirs and assigns, and is excepted from this grant. It is the intention of this instrument to convey the vendee a one-half mineral interest, together with all surface rights.*⁸⁰

At trial, the parties did not contest that Ladd clearly reserved a one-fourth mineral interest in himself.⁸¹ However, the interest at issue was the outstanding one-fourth mineral interest depicted in the bold language above (previously reserved by Republic Insurance Company), which terminated on March 1, 1948, after there was no mineral production from the subject lands.⁸²

After the trial court adjudged DuBose to be the owner of the one-fourth interest at issue, Ladd appealed, asserting that the deed unambiguously conveyed only the surface and a one-half mineral interest to DuBose and that the one-fourth interest at issue thus remained with the grantor (Ladd).⁸³ Conversely, DuBose argued that the clause stating that Ladd's intention was "to convey to vendee a one-half mineral interest, together with all surface rights,"⁸⁴ was included only as a limitation of warranty, given that: (1) Ladd expressly reserved a one-fourth mineral interest in the deed; (2) Republic Insurance Company, at the time of the deed, still owned a term one-fourth mineral interest; and (3) Ladd, after his reservation, could only convey a present one-half mineral interest to DuBose.⁸⁵

The court began its analysis by defining the interests at issue. At the time of the Ladd Deed, dated December 8, 1947, Republic owned a

79. *Id.* at 478.

80. *Id.* at 477–78 (emphasis added).

81. *Id.* at 478. As shown by the italicized language in the above provision.

82. *Id.*

83. *Id.*

84. Ladd v. DuBose, 344 S.W.2d 476, 478 (Tex. Civ. App.—Amarillo 1961, no writ).

85. *Id.*

determinable fee in one-fourth of the minerals. Ladd owned the future interest following the determinable fee (known as a possibility of reverter), which means that in the event that there was no mineral production in paying quantities on March 1, 1948, said one-fourth mineral interest would vest back into Ladd.⁸⁶

The issue, then, was whether the bold language in the provision above, together with the subsequent intention clause expressed an intent to reserve the possibility of reverter that followed Republic's term interest, which Ladd owned at the time of the deed.⁸⁷

While noting that Ladd clearly reserved a separate one-fourth mineral interest in the deed, the court distinguished that clause from the clause at issue to reach its conclusion. The court reasoned that the terms "reserve" and "except" pertained only to Ladd's additional one-fourth mineral reservation, and that the "agreed and understood" language in bold above did not indicate an intent to except or reserve the possibility of reverter.⁸⁸ Essentially, if Ladd had intended to except or reserve the possibility of reverter, he could have easily done so by utilizing the correct language, which he failed to do. The court briefly concluded that the intention clause following the exception and reservation paragraph was included only as a limitation of warranty.⁸⁹

Next, noting similarities between the facts of the current case and the out-of-state case of *Whitman v. Harrison*,⁹⁰ the court explained that an exception must be construed as an exception to the warranty unless the grantor included the appropriate words in the instrument to express an intent to reserve the interest at issue.⁹¹ In *Whitman*, the grantor owned all of the surface rights of an eighty acre tract, with five mineral acres in fee, and a reversionary mineral interest as to sixty out of the eighty acres.⁹² There, the Oklahoma Supreme Court held that the grantor's conveyance of the entire eighty acres, subject to the prior mineral conveyances covering seventy-five acres, conveyed all of the grantor's reversionary interest in the sixty acres because the grantor did not include any words expressing an intent to reserve the reversionary interest.⁹³

Returning to Texas authority, the court in *Ladd* cited several deed construction rules, all of which were variations of the Greatest Estate Rule

86. *Id.*

87. *Id.*

88. *Id.* at 478–79.

89. *Id.* at 479.

90. 327 P.2d 680 (Okla. 1958).

91. *Ladd v. DuBose*, 344 S.W.2d 476, 479 (Tex. Civ. App.—Amarillo 1961, no writ) (citing *Whitman*, 327 P.2d at 682).

92. *Whitman*, 327 P.2d at 681–82.

93. *Whitman*, 327 P.2d at 683.

and the Construe Against the Grantor Rule to justify its position.⁹⁴ First, when the conveyance is made by warranty deed, it “will be construed to confer upon the grantee the greatest estate that the terms of the instrument will permit.”⁹⁵ Second, any doubt as to the proper construction of a deed is to be resolved against the grantor.⁹⁶ Finally, “where a deed is capable of two constructions[,] the one most favorable to the grantee and which conveys the largest interest [that] the grantor could convey will be adopted.”⁹⁷

Interestingly, the court distinguished *Ladd* from *Pich*, explaining that the instrument in *Pich* included an express *reservation*, while the current case—with respect to the possibility of reverter—did not.⁹⁸ It appears that the use of the word “reservation,” in the court’s analysis of *Pich*, was to use the word loosely, as the interest retained by the grantor in *Pich* was construed as an exception from the grant, not a reservation.⁹⁹ While *Ladd* and *Pich* are fairly distinguishable, the court’s analysis of *Ladd* in relation to *Pich* left a bit to be desired. In the absence of a thorough court discussion, it could be helpful to seek guidance by reviewing the distinguishing facts of each case. In *Pich*, the exception appeared at the beginning of the provision and was separated from the false recital by a comma: “*Save and Except an undivided three[-]fourths of the oil, gas and other minerals in, on and under said land, which have been heretofore reserved.*”¹⁰⁰

Yet, in *Ladd*, the provision at issue did not include express reserve or except language regarding the one-fourth possibility of reverter; rather, the language explained that the parties understand that a one-fourth interest had been sold prior to the conveyance:

*It is agreed and understood that a one-fourth mineral interest has been heretofore sold and it is further understood and agreed that a one-fourth mineral interest in said land together with the right of ingress and egress thereon, is reserved to the grantors, their heirs and assigns, and is excepted from this grant.*¹⁰¹

94. *Ladd*, 344 S.W.2d at 480.

95. *Id.* at 480 (citing *Waters v. Ellis*, 312 S.W.2d 231, 234 (Tex. 1958)).

96. *Id.* (citing *Garrett v. Dils Co.*, 299 S.W.2d 904, 906 (Tex. 1957)).

97. *Ladd v. DuBose*, 344 S.W.2d 476, 480 (Tex. Civ. App.—Amarillo 1961, no writ) (citing *Chestnut v. Casner*, 42 S.W.2d 175, 178 (Tex. Civ. App.—Austin 1931, writ ref’d)).

98. *Id.* (emphasis added).

99. *Pich v. Lankford*, 302 S.W.2d 645, 650 (Tex. 1957) (emphasis added).

100. *Id.* at 646 (emphasis added).

101. *Ladd*, 344 S.W.2d at 477 (emphasis added).

Unlike *Pich*, the purported exception in *Ladd* is essentially a false recital appearing at the beginning of the provision that, according to the court, did not express a clear intent to except or reserve an interest from the grant.¹⁰² Ultimately, the court reasoned that crediting Ladd as reserving or excepting the possibility of reverter from the grant would be to credit a reservation by implication, which Texas law expressly forbids.¹⁰³ Thus, the court adjudged DuBose to be the owner of an undivided three-fourths mineral interest in the lands at issue, being the one-half mineral interest expressly conveyed, plus the one-fourth possibility of reverter that had since merged into a fee mineral interest after the expiration of the fifteen year term.¹⁰⁴

E. An Exception Only of Prior Reserved Interests Will Not Effectuate an Exception in Favor of the Grantor, Even if There Are No Such Prior Reservations

Similarly, where the false recital of a prior reservation or exception appears in the same clause as the purported exception, the provision will be construed as an exception to warranty only, and will not operate to except an interest in favor of the grantor.¹⁰⁵ In *Miller v. Melde*, Allen conveyed the subject lands to K.R. Miller, with no exceptions or reservations.¹⁰⁶ Subsequently, Miller conveyed the subject lands to the Bergstroms (hereinafter the Miller Deed) with the following provision: "However, there is reserved and excepted in prior conveyances one-half . . . of the oil, gas and other minerals in or under said premises for a term of fifteen . . . years from the date of said reservation."¹⁰⁷ At trial, the court determined that Miller did not reserve any interest in the land.¹⁰⁸ As a result, Miller appealed.¹⁰⁹

On appeal, Miller, relying on *Pich*, argued that he effectively reserved a one-half mineral interest in the land pursuant to the provision in the Miller Deed.¹¹⁰ However, the court disagreed, reasoning that the provision at issue did not reserve or except a mineral interest in clear and

102. *Id.* at 478–79.

103. *Ladd v. DuBose*, 344 S.W.2d 476, 479 (Tex. Civ. App.—Amarillo 1961, no writ) (citing *Sharp v. Fowler*, 252 S.W.2d 153, 154 (Tex. 1952)).

104. *Id.* at 480.

105. *Miller v. Melde*, 730 S.W.2d 12, 13 (Tex. App.—Corpus Christi 1987, no writ).

106. *Id.* at 12.

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 13.

unambiguous language.¹¹¹ Moreover, the court distinguished the case from *Pich*, explaining that the Miller Deed only excepted from the grant the mineral interests that were “reserved and excepted in prior conveyances.”¹¹² Because there were no prior reservations or exceptions in the chain of title, the court reasoned that Miller did not effectively except any interest from the grant.¹¹³ As a result, the court determined that Bergstrom acquired all of the mineral interest owned by Miller.¹¹⁴

F. Conveyance Made “Subject to” a Purported Reservation in a Deed Restriction Instrument Will Not Effectuate a Reservation in Favor of the Grantor

Likewise, where a conveyance is made “subject to” prior reservations in the chain of title, and the instrument itself does not express an intent to reserve or except an interest in favor of the grantor, Texas courts will construe the language as an exception to warranty.¹¹⁵ In *Farm & Ranch Investors, Ltd. v. Titan Operating, LLC*, Caldwell’s Creek, Ltd. (Caldwell) owned a sixty acre tract of land known as Caldwell’s Creek Addition (Addition).¹¹⁶ Thereafter, Caldwell filed a dedication and restrictions instrument in the county deed records covering said land.¹¹⁷ The instrument included the following restriction: “No oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to the limited partnership of Caldwell’s Creek, L[tid].”¹¹⁸

From 1994 to 1999, Caldwell conveyed, via warranty deed, lots out of the Addition to various parties.¹¹⁹ None of the deeds included an express mineral reservation;¹²⁰ however, each deed included the following provision: “This conveyance is made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed

111. *Miller v. Melde*, 730 S.W.2d 12, 13 (Tex. App.—Corpus Christi 1987, no writ).

112. *Id.*

113. *Id.*

114. *Id.*

115. *Farm & Ranch Investors, Ltd. v. Titan Operating, LLC*, 369 S.W.3d 679 (Tex. App.—Fort Worth 2012, *petition denied*).

116. *Id.* at 680.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

for record in the office of the County Clerk of Tarrant County, Texas.”¹²¹ In 2005, Caldwell, believing itself to be the owner of all of the mineral estate of the Addition, purported to convey all of the mineral estate to Farm & Ranch Investors, Ltd. (Farm & Ranch).¹²² Later in 2008, Farm & Ranch sought to execute an oil and gas lease covering the Addition with Titan Operating, LLC (Titan).¹²³ However, Titan believed that Farm & Ranch did not own any interest in the lands, and instead executed leases with the various grantees of the deeds from Caldwell.¹²⁴ As a result, Titan sued Farm & Ranch in order to remove the cloud on title, and the trial court determined that Farm & Ranch did not own any mineral interest in the Addition.¹²⁵

On appeal, Farm & Ranch contended that: (1) the deed restrictions filed by Caldwell operated to reserve the mineral estate in favor of Caldwell; and (2) that the “subject to” language in the subsequent deeds effectively conveyed only the surface to the grantees of said deeds.¹²⁶ In its first holding, the court explained that Caldwell did not reserve a mineral interest in the Addition because Caldwell already owned both the surface and the minerals at the time that Caldwell filed the dedication and restrictions instrument.¹²⁷ Citing precedent, the court noted that an owner of lands could not reserve in himself an interest in property that he already owns.¹²⁸

Moreover, although Farm & Ranch argued that the phrase stating that the mineral rights “shall continue to belong” to the limited partnership was a clear reservation, the court dismissed this argument on account that the instrument in question was not a conveyance or a lease, but was merely a dedication and deed restriction instrument, which thus could not reserve an interest.¹²⁹

In its second holding, the court determined that the phrase “shall continue to belong” could not be interpreted as a future reservation.¹³⁰ Instead, the court agreed with the trial court’s interpretation that the dedication and deed restrictions instrument would not operate to deprive Caldwell of the mineral interest that it owned at the time of the filing.¹³¹

121. Farm & Ranch Investors, Ltd. v. Titan Operating, LLC, 369 S.W.3d 679, 680 (Tex. App.—Fort Worth 2012, *petition denied*).

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.* at 680–81.

126. *Id.* at 681.

127. Farm & Ranch Investors, Ltd. v. Titan Operating, LLC, 369 S.W.3d 679, 681 (Tex. App.—Fort Worth 2012, *petition denied*).

128. *Id.* (citing *Reeves v. Towery*, 621 S.W.2d 209, 213 (Tex. App.—Corpus Christi 1981, writ ref’d n.r.e.)).

129. *Id.* at 682.

130. *Id.*

131. *Id.*

The court then examined each of the deeds from Caldwell to the various other lot owners, noting that the language in each deed did not expressly reserve or except any interest, but rather stated that the conveyance was subject to any mineral reservations of record.¹³² The court further cited the reasoning of its sister court in a similar case, noting that “subject to” language is generally construed as a limitation of warranty, and not a reservation or exception in favor of the grantor.¹³³ After analyzing the holding of its sister court and citing the Greatest Estate Rule, the court determined that the “subject to” provision in this case was included as an exception to warranty only.¹³⁴

Lastly, the court analyzed the effect of the “subject to” clause in context of the purported reservation in the deed restriction instrument. The court restated its holding that the deed restriction instrument did not reserve a mineral interest in favor of Caldwell, and thus reasoned that the case was akin to *Miller*, where the provision at issue only excepted prior reserved interests.¹³⁵ Like *Miller*, the court reasoned that the deeds from Caldwell did not effectively reserve or except an interest in favor of Caldwell because: (1) the deed provisions merely made the conveyances subject to any mineral reservations of record; and (2) there were no mineral reservations of record.¹³⁶ Thus, the court concluded that Farm & Ranch, as successor-in-interest to Caldwell, did not own any mineral interest in the subject lands.¹³⁷

G. The Term “Reserve” and/or “Except” is Not Requisite to Reserve/Except an Interest in Favor of the Grantor

In *Houchins v. Devon Energy Prod. Co.*, the court held that the terms “reserve” and/or “except” were not necessary in order to effectuate a mineral reservation/exception in favor of the grantor.¹³⁸ By Warranty Deed dated February 2, 1994, Phillip H. Trew conveyed the subject lands to Darrell E. Houchins and Cynthia A. Houchins.¹³⁹ The warranty deed included the following provision:

132. *Id.* at 682–83.

133. *Farm & Ranch Investors, Ltd. v. Titan Operating, LLC*, 369 S.W.3d 679, 683 (Tex. App.–Fort Worth 2012, *petition denied*) (citing *Wright v. E.P. Operating Ltd. P’ship*, 978 S.W.2d 684, 688 (Tex. App.–Eastland 1998, *petition denied*)).

134. *Id.* at 683–84.

135. *Id.* at 684.

136. *Id.*

137. *Id.*

138. No. 01-08-00273-CV, 2009 WL 3321406 (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, *petition denied*) (*memorandum opinion*).

139. *Id.* at *1.

This conveyance is expressly made subject to any and all restrictions, covenants and easements, if any, relating to the hereinabove described property, but only to the extent they are still in effect, shown of record . . . and to all zoning laws, regulations and ordinances of municipal or other governmental authorities, if any, but only to the extent they are still in effect, relating to the hereinabove described property. This conveyance is also expressly subject to all restrictions, covenants and easements set forth in the Note and Deed of Trust executed and delivered to Grantor. *To the extent that Grantor maintains any mineral rights to the subject property, Grantor expressly retains such mineral rights and exempts same from the conveyance herein.* Grantees accept property in its ‘AS IS’ condition.¹⁴⁰

In 2001, Trew executed an oil and gas lease covering the subject lands, and the Devon Energy Production Company (Devon), as successor-in-interest to the original lessee, prepared to drill for oil and gas on said lands.¹⁴¹ The Houchinses, claiming to be the owners of the mineral interest in the lands, denied Devon access to the lands; subsequently, Devon sued.¹⁴² At trial, the court granted Devon’s motion for summary judgment, holding that Trew unambiguously reserved all of the minerals in the subject lands, and the Houchinses appealed.¹⁴³

On appeal, the Houchinses relied on *Klein* and argued that the language stating that the Grantor “expressly retains [the] mineral rights to the subject property and exempts same from the conveyance” was merely an exception to warranty and did not operate to reserve an interest in favor of Trew.¹⁴⁴ The Houchinses further supported their argument by noting that the provision preceding the language excepted only easements and other restrictions of record.¹⁴⁵ Further, the Houchinses argued that the clause should be construed in context of its surrounding language.¹⁴⁶ In addition, the Houchinses contended that the use of “retain” and “exempt” was similar to *Klein* and did not express a clear intent to reserve the minerals.¹⁴⁷

In its analysis, the court began by distinguishing the case from *Klein*. It reasoned that Trew’s reference to a specific “[g]rantor” in the provision

140. *Id.* (emphasis added).

141. *Id.*

142. *Id.*

143. *Id.* at *2.

144. *Houchins v. Devon Energy Prod. Co.*, No. 01-08-00273-CV, 2009 WL 3321406, at *2 (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, *petition denied*) (*memorandum opinion*).

145. *Id.*

146. *Id.*

147. *Id.* at *3.

was unlike *Klein*—where the excepted interest was in favor of the “owner of said rights.”¹⁴⁸ Instead, the court explained that when construing deed language as an exception or reservation, its objective is to determine the parties’ expressed intent within the four corners of the instrument.¹⁴⁹ Moreover, rather than attempting to discern the subjective intent of the parties, the court will examine all of the language within the deed to determine the intent of the parties as expressed by the instrument.¹⁵⁰

After a discussion of the above rules, the court held that the disputed language expressed a clear intent to reserve the mineral estate from the conveyance.¹⁵¹ The court noted that to hold otherwise would utterly disregard the language of the deed, which is contrary to the court’s role in a deed construction case.¹⁵² Furthermore, the court relied upon the dictionary definitions of “maintain” and “retain” to support its conclusion. Quoting both Black’s Law Dictionary and Merriam-Webster’s Collegiate Dictionary, the court held that the definition of “maintain” was to “continue in possession of (property, etc.),” and “retain” was “to keep in possession or use.”¹⁵³ Therefore, the use of these words sufficiently expressed Trew’s intent to reserve the mineral estate in the lands.¹⁵⁴

In their final contention, the Houchinses argued that the deed was ambiguous and should thus be reformed. The court disagreed, stating that a mere disagreement over the interpretation of a deed provision does not render it ambiguous.¹⁵⁵ Rather, in order to be ambiguous, the deed must be susceptible to more than one meaning, and each potential meaning must be reasonable.¹⁵⁶ After holding that the deed in question was not ambiguous, the court concluded that Trew clearly retained the mineral estate in the lands.¹⁵⁷ Thus, affirming the trial court’s holding on the matter.¹⁵⁸

148. *Id.*

149. *Id.* (citing *Luckel v. White*, 819 S.W.2d 459, 461 (Tex. 1991)).

150. *Houchins v. Devon Energy Prod. Co.*, No. 01-08-00273-CV, 2009 WL 3321406, at *3 (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, *petition denied*) (*memorandum opinion*).

151. *Id.* at *4.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.*

156. *Houchins v. Devon Energy Prod. Co.*, No. 01-08-00273-CV, 2009 WL 3321406, at *4 (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, *petition denied*) (*memorandum opinion*).

157. *Id.* at *5.

158. *Id.*

H. When a Deed Identifies the Excepted Interest by Providing the Recording Information for the Instrument Where the Interest was Originally Excepted or Reserved, the Exception Will Be Construed as an Exception to Warranty

In *Thomason v. Badgett*, Dan Reese conveyed the subject lands to Kenneth Hopkins in 1996 (hereinafter the Reese Deed), reserving a one-half mineral interest.¹⁵⁹ Then, Hopkins conveyed the lands to Thomason and Lupton (hereinafter the Hopkins Deed) “save and except” the Reeses’ one-half mineral interest as shown in the Reese Deed.¹⁶⁰ Next, Thomason and Lupton subdivided the lands and conveyed the lots to various parties.¹⁶¹ Each deed included one of the following clauses:

SAVE AND EXCEPT: ALL OIL, GAS AND OTHER MINERALS AS RECORDED IN [the Reese Deed] AND [the Hopkins deed].

SAVE & EXCEPT: OIL, GAS AND OTHER MINERALS AS RECORDED IN [the Reese deed] AND [the Hopkins deed].

SAVE & EXCEPT: ALL OIL, GAS AND OTHER MINERALS AS RECORDED IN [the Reese deed] AND OTHER OIL, GAS AND MINERALS AS RECORDED IN [the Hopkins deed].¹⁶²

Thereafter, Thomason and Lupton leased the subject lands to Devon Energy Production Company (Devon), asserting that they owned an undivided one-half mineral interest in the lands.¹⁶³ Devon then notified Thomason and Lupton that it was concerned that Thomason and Lupton did not own a mineral interest in the lands.¹⁶⁴ Thomason and Lupton subsequently sued the current lot owners in a trespass to try title action.¹⁶⁵ The trial court granted motion for summary judgment in favor of the current owner, the Badgett family.¹⁶⁶ As a result, Thomason and Lupton appealed.¹⁶⁷

159. No. 02-12-00303-CV, 2013 WL 3488254, at *1 (Tex. App.–Fort Worth July 11, 2013, *petition denied*) (*memorandum opinion*).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.*

165. *Thomason v. Badgett*, No. 02-12-00303-CV, 2013 WL 3488254, at *1 (Tex. App.–Fort Worth July 11, 2013, *petition denied*) (*memorandum opinion*).

166. *Id.*

167. *Id.*

On appeal, Thomason and Badgett cited *Pich*, arguing that although they did not expressly reserve a mineral interest, they effectively excepted a mineral interest from the grant in their favor.¹⁶⁸ Moreover, Thomason and Lupton argued that while the Reese Deed reserved a one-half mineral interest, the majority of their deeds to the current landowners excepted “all” of the mineral estate, which effectively meant that Thomason and Lupton retained the remaining one-half mineral interest that they owned at the time of each conveyance.¹⁶⁹

The court ultimately disagreed with Thomason and Lupton, explaining first that the exception in the deeds to the current owners did not specifically describe the excepted interest, but rather only directed the reader to two prior deeds in the chain of title—the Reese and Hopkins Deeds.¹⁷⁰ Further, the court reasoned that though the Reese Deed effectively reserved a one-half mineral interest, the Hopkins Deed only excepted the interest as reserved in the Reese Deed; so the Hopkins Deed did not reserve any interest in the lands.¹⁷¹ Thus, at the time of the deeds to the current lot owners, Reese owned 50% of the minerals, and Thomason and Lupton owned 50% of the minerals.¹⁷² Likening the case to *Titan*, the court determined that the effect of the language in the deeds from Thomason and Lupton to the current owners was to convey the mineral and surface estates of the lands subject to any prior recorded reservations, to-wit: the Reese reservation.¹⁷³

Finally, the court held that the use of the word “all” in the deeds to the current owners excepting “all oil, gas and other minerals as recorded” did not clearly express an intent for Thomason and Lupton to retain a mineral interest.¹⁷⁴ The court reasoned that “all” did not necessarily mean 100% of the minerals, rather, it meant that the interest excepted from the conveyance was all of the interest as recorded in prior deeds.¹⁷⁵ The court further noted that the language was unclear at best, in which case the language is to be construed against the grantor.¹⁷⁶ As a result, the court

168. *Id.* at *2.

169. *Id.* at *3.

170. *Id.* at *2.

171. Thomason v. Badgett, No. 02-12-00303-CV, 2013 WL 3488254, at *2 (Tex. App.—Fort Worth July 11, 2013, *petition denied*) (*memorandum opinion*).

172. *Id.*

173. *Id.* (citing *Farm & Ranch Investors, Ltd. v. Titan Operating, LLC*, 369 S.W.3d 679, 684 (Tex. App.—Fort Worth 2012, *petition denied*)).

174. *Id.* at *3.

175. *Id.* (emphasis added).

176. *Id.*

affirmed the trial court's judgment, holding that Thomason and Lupton owned no interest in the subject lands.¹⁷⁷

I. The Griswold Extension of the Pich Exception

The court in *Griswold v. EOG Res., Inc.*, citing *Pich* as binding precedent, held that a clause saving and excepting an interest "heretofore reserved by predecessors in title" effectively excepted an interest in favor of the grantor.¹⁷⁸ It reasoned that the provision at issue was a clear and unambiguous exception followed by a false recital.¹⁷⁹

In 1926, R. Allred and his wife conveyed the subject lands to J.H. Barker, reserving a one-half mineral interest.¹⁸⁰ Thereafter, Rex Calaway received a foreclosure judgment against both Barker and Allred, such that the mineral estate and surface estate merged, and Calaway was vested with the land via constable's deed pursuant to the foreclosure judgment.¹⁸¹ Next, Calaway conveyed the subject lands to R.E. Stewart, with no reservations or exceptions.¹⁸² Ultimately, Dorothy Williams and Kathryn Wellington were vested with ownership of the lands, with no intervening mineral reservations or exceptions.¹⁸³ Subsequently, Williams and Wellington conveyed the subject lands to James and Diana Caswell (hereinafter the Caswell Deed) with the following provision: "LESS, SAVE AND EXCEPT an undivided [one-half] of all oil, gas and other minerals found in, under[,] and that may be produced from the above described tract of land heretofore reserved by predecessors in title."¹⁸⁴ The Caswells then conveyed the subject lands to the Griswolds with an identical save and except provision as shown above.¹⁸⁵ The Griswolds then leased the lands to EOG Resources, Inc. (EOG), and later brought suit after EOG paid the Griswolds based on a one-half mineral interest.¹⁸⁶ At trial, the court granted EOG's motion for summary judgment, holding that the Griswolds owned only a one-half mineral interest in the lands.¹⁸⁷

177. *Thomason v. Badgett*, No. 02-12-00303-CV, 2013 WL 3488254, at *3 (Tex. App.—Fort Worth July 11, 2013, *petition denied*) (*memorandum opinion*).

178. 459 S.W.3d 713, 720 (Tex. App.—Fort Worth, 2015, *petition denied*).

179. *Id.*

180. *Id.* at 716.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Griswold v. EOG Res., Inc.*, 459 S.W.3d 713, 716 (Tex. App.—Fort Worth, 2015, *petition denied*).

185. *Id.* at 717.

186. *Id.* at 716–17.

187. *Id.* at 715–16.

On appeal, the Griswolds argued that the exception in the Caswell Deed was limited only to prior reservations in the chain of title, and that because there were no such prior reservations, all of the mineral estate passed to them via the deed.¹⁸⁸ Contrarily, EOG argued that the provision clearly expressed an intent to except a one-half mineral interest, and the phrase “heretofore reserved by predecessors in title” was a false recital that did not alter the interest excepted from the grant.¹⁸⁹

After discussing the Greatest Estate Rule and Construe Against the Grantor Rule, the court restated the technical distinctions between a reservation and exception, further noting that a save-and-except clause can fail to pass title in some instances, at which point title to the excepted interest will remain in the grantor if the interest is not owned by a predecessor-in-title.¹⁹⁰

Furthermore, the court analogized the case with *Pich*, reasoning that the similarities between the facts of both cases render *Pich* binding authority on the matter.¹⁹¹ Like *Pich*, the court in *Griswold* explained that the Caswell Deed included a plain and unambiguous exception of a one-half mineral interest, followed by a phrase purporting to state why the exception was made.¹⁹² In other words, the chain of title in *Griswold* conclusively showed that there were no effective prior mineral reservations from predecessors in title, as the only prior reservation had been extinguished in the foreclosure judgment.¹⁹³ Despite that the chain of title conclusively negated the given reason for the exception, the court explained that “the giving of a false reason for an exception from a grant does not operate to alter or cut down the interest or estate excepted, nor does it operate to pass the excepted interest or estate to the grantee.”¹⁹⁴ As a result, the court concluded that Williams and Wellington effectively excepted a one-half mineral interest in favor of themselves via the Caswell Deed, and affirmed the trial court’s judgment.¹⁹⁵

Though it is fairly clear that the *Griswold* court’s adherence to the ruling in *Pich* can be attributed mostly to the doctrine of *stare decisis*, it is still helpful to note the differences between the cases to understand the extension of the rule in *Pich*. In *Pich*, the provision at issue appeared as follows: “Save and Except an undivided three-fourths of the oil, gas and

188. *Id.* at 718.

189. *Id.*

190. *Griswold v. EOG Res., Inc.*, 459 S.W.3d 713, 718 (Tex. App.—Fort Worth, 2015, *petition denied*).

191. *Id.* at 718–19.

192. *Id.* at 720.

193. *Id.*

194. *Id.* (quoting *Pich v. Lankford*, 302 S.W.2d 645, 648 (Tex. 1957)).

195. *Id.*

other minerals in, on and under said land, which have been heretofore reserved.”¹⁹⁶ Again, the court in *Pich* determined that this provision was a clear exception of a three-fourths mineral interest, followed by a false recital.¹⁹⁷ Although the court did not emphasize the placement of the comma in the provision, it is clear that a comma separates the exception from the recital, which could have been a factor in the court’s reasoning.

In *Griswold*, however, the provision at issue was as follows: “LESS, SAVE AND EXCEPT an undivided [one-half] of all oil, gas and other minerals found in, under[,] and that may be produced from the above described tract of land heretofore reserved by predecessors in title.”¹⁹⁸ Notably, the exception and false recital in the *Griswold* provision are not separated by a comma, but rather appear as the same general clause. Yet, despite this distinction, the courts in both *Pich* and *Griswold* reached the same conclusion.

CONCLUSION

For the practitioner, it is helpful to consider several factors when interpreting whether the provision at issue is a reservation, exception to warranty, or exception to grant. Context, diction, and overall sentence structure are imperative when interpreting these provisions. Generally, a reservation is the easiest to spot, yet it is important to remember that the term “reserve” is not strictly necessary to effectuate a reservation in favor of the grantor.¹⁹⁹

Next, when faced with “exception” language, the reader should examine the provision closely to determine if the provision is an exception to warranty or an exception to grant. Where the clause saves and excepts only the interests “as reserved in prior conveyances,” Texas courts will generally construe the provision as an exception to warranty.²⁰⁰ Likewise, where the exception provision excepts an identical interest as reserved in

196. *Pich*, 302 S.W.2d at 646.

197. *Id.* at 648.

198. *Griswold v. EOG Res., Inc.*, 459 S.W.3d 713, 716 (Tex. App.–Fort Worth, 2015, *petition denied*).

199. *See e.g.*, *Houchins v. Devon Energy Prod. Co.*, No. 01-08-00273-CV, 2009 WL 3321406, at *4 (Tex. App.–Houston [1st Dist.] Oct. 15, 2009, *petition denied*) (*memorandum opinion*) (holding that grantor’s use of words “retain” and “exempt” clearly expressed an intent to reserve a mineral interest from the grant).

200. *See generally* *Thomason v. Badgett*, No. 02-12-00303-CV, 2013 WL 3488254, at *2 (Tex. App.–Fort Worth July 11, 2013, *petition denied*) (*memorandum opinion*); *Miller v. Melde*, 730 S.W.2d 12, 13 (Tex. App.–Corpus Christi 1987, no writ); *Ladd v. DuBose*, 344 S.W.2d 476, 479 (Tex. Civ. App.–Amarillo 1961, no writ).

a prior deed, courts are more likely to interpret the provision as an exception to warranty.²⁰¹

On the other hand, where the provision includes a clear and unambiguous exception of an interest, followed by a false recital purporting to state why the exception is being made, Texas law provides that: (1) the exception is from the grant; (2) the excepted interest will not pass to the grantee of the deed; and (3) the excepted interest will remain in the grantor if another party does not own it.²⁰² In such an instance, it is important to know the context (*e.g.*, the chain of title prior to the deed). Essentially, if the exception appears before the recital and the chain of title conclusively negates the recited reason for the exception, the recital is a “false recital” that will not alter the fact that the interest is excepted from the grant.²⁰³ Contrarily, where the structure of the provision is such that the false recital appears before the exception, the provision is more likely to be construed as an exception to warranty.²⁰⁴ Lastly, after a fact-intensive analysis of the provision at issue under the common law rules set forth above, the Greatest Estate Rule and the Construe Against the Grantor Rule can provide guidance, and can ultimately tip the scale in favor of the grantee of the deed when in doubt.

201. See generally *Klein v. Humble Oil & Ref. Co.*, 67 S.W.2d 911 (Tex. Civ. App.—Beaumont 1934, writ granted), *aff'd*, 86 S.W.2d 1077 (Tex. 1935).

202. See generally *Pich v. Lankford*, 302 S.W.2d 645, 645 (Tex. 1957); *Griswold*, 459 S.W.3d 713.

203. See *Griswold*, 459 S.W.3d at 720.

204. See generally *Miller*, 730 S.W.2d 12.