ORAL ARGUMENT – 11/14/01
00-1093
COASTAL V. COATES

REASONER: This case involves the forfeiture of a multi-well lease where Coastal had failed to pay royalties during an interim because it had issued a division order from the form set forth in 402(d), and the lessor had not responded to its request for a division order.

There was on-going litigation between Coastal and the lessors over a variety of leases and other wells. And they had during that period sent a demand letter referencing that litigation. They took the position that that demand letter was a written demand for payment of royalties under a new F-6 well, which the division order covered.

The CA affirmed that, and when it did it made, I respectfully submit, two fundamental errors that dramatically affect the jurisprudence of this state. First, it misconstrued the significance of executing a lease without warranty of title for the mineral estate. Secondly, it misconstrued the division order statute as containing two sets of provisions, one for oil and gas in C-1, another contained in the form D set forth as the statutory form. Thereby, it made the statute unworkable, and it created a situation where releases are executed without warranty or title. It will become virtually impossible to obtain a workable division order.

O'NEILL: But the first question will control the resolution of the second wouldn't it? I mean if were to find that the no warranty of title provision in the lease precludes the statutory indemnities, then we don't reach your issue no. 2?

REASONER: I would agree with that. I would like to turn very briefly to the point that's covered in Tab 1 of the booklets that I hope you have received. And that is, the position that I submit that is an impendent ground for reversal and rendition of this case. The lease provided for forfeiture if we withheld royalties unreasonably or wrongfully after a written demand. I respectfully submit that Coates in this case made no written demand within the meaning of that provision.

They sent us this letter dated March 28, 1998, and it is attached as an appendices to the brief. It said, Re Cause No. 39995G. It referred to a case pending in the 370th DC of Hidalgo County.

O'NEILL: It seems to me where that leads us is, in a demand letter that references litigation generally, are we then required to go back and look at the most recent petition and the demand letter can only cover what's in that most recent petition, or is referencing litigation in general broad enough to encompass the claims that are being made here even though the petition hasn't yet been amended?

REASONER: Yes, I think that's a very fair point. Here the 12th amended petition did not

cover the F-6 well. Production on the F-6 well had not begun. So when you filed a demand letter and referred us to the 12th amended petition, which would be to that litigation...

O'NEILL: Well that's my point though. If you're just referring to litigation, it doesn't necessarily mean that you're referring to the last petition. As long as the lease is covered it would seem that anything that came under that lease could be subject to the litigation. That's a very narrow reading you're giving us.

REASONER: You're sitting there, you're litigating and this litigation is about is about underpayment of royalties. They have demanded forfeiture in the past for underpayment of royalties. You will receive a letter that refers you to the litigation that says, I'm claiming forfeiture of the E lease, and the F lease, and refers you to this pending litigation. The CA was confused and said we can't look at parol evidence at all because it regarded as a contract construction issue...

O'NEILL: What do you think the letter should have said? What would be enough?

REASONER: I think if the letter had in anyway referred to our failure to pay royalties on F-6, or had told us they were not going to sign the division order, any of those things that referred us to the F-6 well would have been fine.

HANKINSON: If they had left off the RE: line and not referred to the litigation, then would it have been alright?

REASONER: I think that would become - a complex question. Obviously, I would not have the argument I have now because then we would look at it and say, well their demand and forfeiture for something...

HANKINSON: As I understand your argument it's the RE: line that references the pending litigation, which was for underpayment of royalties that you claim led Coastal to believe that this was a demand to pay the royalties that Coates was claiming had been underpaid, and that you had no notice that it was for a failure to pay royalties on a particular well.

REASONER: That is correct. At the F-6 well, the new well where production had not yet begun, was not in anyway involved in that litigation. Bo by referring us to that litigation, they were either deliberately or accidentally completely misleading us. And I respectfully submit under the plain meaning of English, that letter cannot refer to something not involved in the litigation at that point.

JEFFERSON: When you say the production had not yet begun, do you mean as of the date of that letter, or as of the date of this 12th amended petition?

REASONER: As of the date of the 12th amended petition.

JEFFERSON: Because production hadn't started in Nov. 1997?

REASONER: Yes. I believe that the F-6 well was about 8 days away from production.

HANKINSON: And the F-6 well was not included in the litigation?

REASONER: Not at that point, because no production had begun so there was nothing to complain about.

JEFFERSON: But the 12th amended petition did say any subsequent wells or units didn't it?

REASONER: I think it would have complained about other payment in that regard. It could not have complained about a failure to pay on a well where production had not yet begun.

BAKER: But it could apply to a well where no royalties at all had been paid and say that that's an underpayment can't they? I mean the failure to pay anything is just as much as an underpayment as not paying $10 isn't it? But the whole point is, because the well was not producing it can't be covered by that letter?

REASONER: By the 12th amended petition to which that letter referred is precisely. We have articulated that further in our brief. Let me now turn to what I believe are the errors of law that the CA made that I think make this so critical.

Basically, the CA held that the execution of a lease without warranty of title to the mineral estate is an agreement that you will not receive warranty of title or certification to the proceeds for payment of a division order. It is an agreement according to the Corpus CA that brings it under the otherwise agreed language of the division order in the statute - (c)(1)(c). So that when they did not warrant the title, to which we agreed of course to the underlying mineral estate, the CA by equating those two holds that we have thereby lost our right to certification of proceeds or warranty of proceeds. And here this chart at Tab 5 of your notebook shows that the exclusive list of provisions that is permitted under the division order statute. The CA holding knocks out the two Green provisions. She knocks out indemnity and reimbursement by reasoning that by agreeing to a lease without warranty of title to the mineral estate, we have thereby agreed that we would not be entitled to indemnification under a division order or reimbursement because there would be no certification or warranty of their right to proceeds under the royalties.

OWEN: I have a question about the lease. It seems to say that they don't warrant title. But it's agreed that if they own less than they purported to convey, that their royalties are proportionately reduced. And you have not seemed to stress that particular clause. Is there a reason for that?

REASONER: Why we have not stressed the proportionate reduction clause?

OWEN: It seems to me they've agreed that if they don't own what they say they do, they aren't entitled to be paid royalty.

REASONER: I think that that could have significance in a future scenario. But we have no dispute with them in that regard. And there really is no issue here about what amount of title, and their title of the mineral estate is not at issue here.

OWEN: My point is, even though they say we're not warranting title, if we don't own what we say we own, you don't have to pay us royalty on it.

REASONER: If that were determined...

OWEN: Do you see that as something different from what's in the statutory division order form on the you have to pay us back if we pay you royalty that you really aren't owed?

REASONER: Yes, I would see the statutory division order as giving us protection to seek reimbursement on indemnification if we had greatly overpaid the lessor. And it seems to me that the great difference is between warranty and the mineral estate, not warranty and title for it.

Another reason as to why I think that they are in error is that certification under the division order statute is an interest in personal property, and is equivalent to warranty as Prof. Burney points out in her article. Warranty of title to the mineral in the ground is a completely different thing. One is realty. The other is personalty. That's always worked in our title and the mineral estate, which _____ refused to do. But under the division order their warranty and their own title in the right to receive it. The measure of damages is different. Under failure of the mineral estate we would only get the cost of drilling, bonuses. Whereas the measure of damages under the division order would be the improperly paid proceeds.

I think it is clear that her equation of these two estates was erroneous. Once you recognize that failure to warrant one does not mean that you are a failure toward the other. It's clear that we have not _____. Section (c)(1)(c) then applies and we are entitled to withhold on certification.

The argument that (d) contains additional provisions is clearly wrong under the statutory language. (C) says it's for both oil and gas. Subsection (e) of the statute which provides for the _____ of the royalties says you do so when you meet the criteria of (c). (D) is not even mentioned. So that if (d) did contain additional provisions, which by statutory definition it cannot, then you wouldn't be able to withhold royalties under (e). It would be nonsensible to set the standard in (c), have the form in (d) with different provisions, and say that there is one form you can use for oil and gas, and another for oil.

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RESPONDENT

LAWYER: We are obviously here today because you have some questions about the CA's opinion in this case, and I would like to take my time to answer any questions you have and assure you that that opinion is indeed completely consistent with every opinion this court has ever handed down on document interpretation and on statutory interpretation. That opinion is also completely consistent with basic oil and gas principles that Coastal tends to ignore. And it also is consistent with industry past practices.

O'NEILL: It seems like the determinative question to get there is whether the no warranty of title provision excludes these indemnities. If we answer that question a certain way do we get to the statutory question?

LAWYER: You are right.

O'NEILL: So if you could address Mr. Reasoner's argument in that regards. Why aren't these different? He talks about the damages are different and therefore the indemnification is different. Is it true that on the warranty of title you get damages for cost of drilling the well as opposed to damages on the warranty of title to the production or proceeds of production as some different measures of damages, because if that's the case it would seem they would be two different warranties?

LAWYER: It is not the case. They have not accurately represented the effect of the no warranty and the lease verses the indemnity. Both of those provisions are risk shifting contractual devises. And the appellee says, I hereby give no warranty of title. And that title refers to the minerals and the royalties, the real property interest, which will eventually become personal property proceeds. But the way you determine the title to those proceeds as this court has recognized in virtually every title opinion it's handed down is by figuring out the title in the minerals.

O'NEILL: I understand the title piece. But what I'm concerned with is if the damages piece is different as a result of the breach, then it would seem the purpose of the indemnities are different.

LAWYER: They are not different. In both, if you are warranting your title to the minerals in the royalties, you will be liable for damages in anything that you obtain that you were not entitled to. That is the same once you get to the division order.

O'NEILL: He says you're liable for the cost of drilling the well.

LAWYER: That is not correct.

HECHT: So if I lease you the property to drill a well on and I don't own the property, and I have a warranty of title, you can't sue me for breach?

LAWYER: No, that is correct. My point is, let's assume that there was no problem with

the title as in this case. And then the issue is, that's not your problem. The problem is later I overpay you royalties. Could they sue me if I made a warranty in the lease for breach of that contractual provision and sue me and recover damages? The answer is yes.

O'NEILL: But they couldn't recover damages for the cost of drilling the well.

LAWYER: It would work both ways. That warranty, in the standard leases where there is a broad warranty of titles in the minerals in the royalty, assume that the lessor does not own title. I could be liable for my damages for not the whole cost of drilling the well, they could not ever get me for that. But they could get me for the money I paid when my title failed. And they paid me a lot of money for that, the bonus.

OWEN: Just taking your lease standing up. It has a proportionate reduction clause in _____ in royalties. Even if there is no warranty of title, if you say I own a certain proportion and you don't, your royalty gets reduced.

LAWYER: Exactly.

OWEN: But even under the common law what would prevent an operator from suing you if they overpaid your royalty? What in this lease would prevent that from happening under our standard...

LAWYER: Within our warranty clause?

OWEN: When it contemplates that you only get paid for what you own royalty wise.

LAWYER: So they will reduce - if I don't own the title, I say, I purport to convey 100% of the royalties to the lessee. That means I would be entitled to the whole 1/8th landowner royalty under the lease. If it turns out I only own ½ of that, I only get ½ of that royalty.

OWEN: So let's say there's no dispute that you only own ½, but they mistakenly pay you for 3/4, and then they say, whoops we made a mistake, we want our money back. What under this lease prevents them from getting that money back?

LAWYER: Under our lease?

OWEN: Yes.

LAWYER: The no warranty clause would prevent them from suing me on my lease.

OWEN: Not on the lease. They just overpaid you. They mistakenly overpaid you royalty. And this lease prevents them from suing you for that overpayment under unjust enrichment, under any other theory.

LAWYER: Of course the lease determines the royalty right. So that's why they would be suing me.

OWEN: But they overpaid you. They just made a mistake.

LAWYER: If they overpaid me, it is that no warranty clause that would prevent them from suing me on the contract. Now could the payor use some doctrines of say unjust enrichment to then sue...

OWEN: There's been no breach of warranty. They aren't saying you don't own what - they agree you only own ½. You say you only own ½. But they paid you as if you owned 3/4. And they just made a mistake. And your lease contemplates that you only get what your supposed to get royalty wise. So why would their suit against you to get back an overpayment be somehow in conflict with the lease?

LAWYER: It would not. They could sue for overpayment under our unjust enrichment.

OWEN: And your lease doesn't prohibit that?

LAWYER: A no warranty clause - I'm not making any promises. So if it is the no warranty lease, then yes they cannot sue me on the contract. What I am saying is there are always...

OWEN: But they can get the money back?

LAWYER: There is a way for them to get the money back.

OWEN: Nothing in the lease prevents them from getting overpayments back from you?

LAWYER: There are the other theories outside the contract such as unjust enrichment.

HECHT: How does that differ from an indemnity in the division order?

LAWYER: It doesn't, and that is the point.

HECHT: Well if it doesn't, then how is it foreclosed by the no warranty of title in the lease?

LAWYER: The statute says, and I point out that we would ask this court to look at the real documents. There is a reason that counsel for Coastal did not put up any of the actual documents. If you look at this statute, the issue is, has Coates agreed otherwise down here in (c), have they agreed otherwise that they would not be willing to sign a division order that makes them take on this risk of indemnifying for an overpayment.

HECHT: That's just not true. If you want to look at the actual language it says, the statute says indemnity with respect from all liability resulting from payments made to the owner.

LAWYER: That's exactly right.

HECHT: And the lease doesn't refer to that.

LAWYER: Yes it does. The lease royalty clause refers to warranty of title. If you look...

HECHT: Right. Which is different from the payments.

LAWYER: No it is not. That gets to the crux of the misrepresentation of their entire case. It is the sky is blue principle of oil and gas law that this court has recognized in every title opinion it's handed down.

OWEN: You just keep focusing on the no warranty. But there's another whole sentence after that that says, if we don't own what we say we do basically, we only get paid royalty for what we own. So your lease contemplates that even if there's a breach of title, you still only get the royalty based on what you actually own.

LAWYER: No. What this clause is doing, this is a pro-lessor clause that you don't see usually. It's saying, I am not making any promises about my title. Usually in lessor forms, the warranty is there. But then...

OWEN: But you are promising that if I don't own what I own, that I can't get paid for anything other than what I own. I may not be liable for drilling costs and all this other, but nothing in this lease will allow me to make a claim royalty wise on anything that I don't own.

LAWYER: They can. It gives the payor the right. It gives the payor the right that if I had purported to convey more than I own, that they can reduce my minerals proportionately. It protects them. But that is still not the issue under the statute that you raised Justice Hecht. And that is, how do they figure out title to the proceeds of production? The way they figure that out is by studying the title to the minerals. That is a principle that Coastal seeks to avoid and they cannot. They finally admit on page 40 of their brief, that maybe the title to these proceeds, which are personal to you, that's correct, maybe that is somehow tied to the title of the minerals. It is absolutely tied.

OWEN: But don't they do the same thing in deciding how much the lease obligates them to pay you on royalty? Because even if you say you own the whole thing, and it turns you don't, they examine title and find out that you don't, the lease still says you only get royalty on what you actually own based on your title. So how is the lease different from requiring you to pay back royalty that you don't own title to?

LAWYER: Because in this lease in the first sentence it says, I am not making any

promises about my title. Which you are pointing out in the proportionate reduction clause is that they figure out in the title that I shouldn't be paid as much, they won't do it. But what we are shifting away...

OWEN: And you agree that under the common law you can get back under unjust enrichment anything they've overpaid you in the past?

LAWYER: Yes.

OWEN: So how is that different from this indemnity clause?

LAWYER: The issue in this case is under (c). We are under (c). And this division order statute has a very clear purpose. And that purpose is to ensure that leases are not used to amend leases. They have misrepresented what the division order statute was intended to do.

O'NEILL: But if these indemnifications are different in anyway, it would not be an amendment to the lease? If the warranty of title is in anyway different from the warranty of title to proceeds as opposed to the warranty of title to minerals, if those two warranties are different in anyway, then it's not an amendment to the lease?

LAWYER: Your question is, are they a contradiction? Have the parties agreed otherwise? That is the issue for the court.

O'NEILL: And that's what I keep focusing in on.

LAWYER: And the answer to your question is they are not different.

O'NEILL: Again, that gets back to my question. In order for your argument to succeed, these warranties have to be identical in every respect?

LAWYER: Well the issue has to be this. I think this is the issue. The issue is would a lessor who is bargained away warranty of title about the royalty payments nonetheless be required under that statute, under the plain language of the statute in the legislative history, would that lessor be required to sign a document, a division order? That is not a contract. It's a unilateral document set by the payor/lessee. Should they have to sign that and subject themself to indemnity for the payments when they have shifted away that contractual agreement in the lease.

O'NEILL: Only if those are the same things.

LAWYER: And they are the same and this is why. What you need to Coastal is if they are not determining title to these minerals, all of their minerals by an examination to the minerals in the ground, how are they figuring out that title?

OWEN: But isn't that what they do under the lease? The lease tells them they only have to pay you royalty on what you own, and they figure out title under the lease to pay you royalty on what you own. So what's the difference?

LAWYER: There is none. That is the point. There is no difference between examining the title, and I figure out as this court pointed out in Concorde, although there were different opinions on the title issue, you went through 91.402. And you point out the way we figure out who gets the proceeds is by figuring out the title to the minerals.

OWEN: Which is what we do under this lease.

LAWYER: Exactly. That is my point.

OWEN: And the lease says you're only entitled to royalty on what you own.

LAWYER: Yes. So we're assuming if they pay everything correct, they are not in trouble, and we're not in trouble. But the issue here is, under (c) would a royalty owner when the express purpose of the legislative history behind this statute is to protect royalty owners, and in fact, the legislative history if you look on page 29 of our brief and you look at the Nat'l Assoc of Royalty Owners concerns, one of the whole points of the division order statute was to be sure that lessors did not have to sign division orders with indemnities.

OWEN: What can they get under that indemnity clause that they can't get under the lease under common law?

LAWYER: Under our lease we have agreed otherwise that we won't subject ourselves to damages if they make a mistake about our title.

OWEN: What can they get under that indemnity clause that they cannot get under your lease?

LAWYER: Under this indemnity clause they could get damages for the mistake in payment but they cannot get that...

OWEN: What damages could they get?

LAWYER: If they overpay us, they could get those damages.

OWEN: You've already conceded that if they overpay you, they can get...

LAWYER: No, I did not concede that. Our lease says, as to royalty payments, if you make a mistake, we are making no promises about that. That is the contradiction.

OWEN: But you say under the common law, which overlays your lease, they can get under unjust enrichment, they get the money back.

LAWYER: But that begs the question as to whether or not under this statute, that's what we are construing here. This is a separate issue to see whether or not they might have a remedy. The whole point is, had Coastal tendered a division order that this statute required our client to sign, that's the issue - a condition.

ENOCH: The only way that you can have a promise to Coastal to give them back any overpayment they make in terms of a contractual promise is through a warranty of your interest in the minerals?

LAWYER: Yes.

ENOCH: And if you expressly in the lease refuse to give them a warranty on your mineral interests, they cannot get a contractual promise out of you to reimburse them for any overpayments?

LAWYER: Exactly.

ENOCH: If they attempt by a division order to force you to make that promise that you will pay them back, then that is inconsistent with the lease which refuses to give them that promise?

LAWYER: That's exactly correct.

ENOCH: Now the question is, the lease says that you agree to a proportionate reduction if you don't own what you own. How is that not a contractual obligation on your part if they just - well you agree to take less than what you expect if it's _____ with your title, but that's not the same thing as a contractual promise to pay them back if they've already paid you?

LAWYER: Right. What the proportionate reduction clause does - we've got to understand what usually happens with an oil and gas lease at that early stage. A lessee to avoid a trespass will come out and get a lease from at least one of the co-tenants, because as we know mineral titles are a mess. And there's probably at least one tenant we can figure out who owns it say undivided ½. I get that lease. I am not a trespasser. I will not be liable for drilling. But then the lessee knows at that point that probably this one lessor owns less than 100% of the minerals, so they want the proportionate reduction clause in there to say, Look if it actually turns out when I finally do the division order title opinion, which is going to determine how we pay the proceeds, I get to pay you less. And the lessor is perfectly willing to have that in there even in a no warranty lease, because they don't think they should be paid for more than they own. That's the role of the proportionate reduction clause.

ENOCH: But does that proportionate reduction clause after a payments been made, is

that a contractual obligation to pay back....

LAWYER: No. The only role of the proportionate reduction clause is it gets the payor/lessee the right that once they do figure out title and it turns out the lessor owns less, it gives them the right not to overpay. That's the point. It's a protection for the payor.

ENOCH: So now if you sign the division order that has a requirement that you are now somehow warranting how much you're owed, you would be undertaking a contractual obligation to reimburse any previous payments that had been made that were over that would ultimately be determined...

LAWYER: Exactly. And that is squarely within the plain meaning of the statute, and your interpretation which is the same one that the CA _____ respects this otherwise agreed language. I would ask you to look at the legislative history which is appropriate under statutory interpretation. This whole statute was passed because of abuses with the division order. The whole point of the statute was to stop lessee/payors from unilaterally sticking provisions in there when really what the division order is supposed to be is a certification of interests. That's why certification of title is completely separate from indemnification. Coastal improperly blurs those distinctions. Had Coastal tendered to us a mere certification of title, we would have had to have signed it. And then they would have had any concerns they had about title _____. Ironically here they didn't have any concerns about our title. That is why they have consistently paid Coates with no division orders.

JEFFERSON: Under 94.102(d), is that what you're relying on in, the first sentence: if an owner and a producing party will not sign a division order because it contains provisions in addition to those in (e) the payor shall not withhold payment totally because of such refusal?

LAWYER: Exactly.

JEFFERSON: Can that sentence be read to impose on you an obligation to tell Coastal why it is that you're not signing the division order?

LAWYER: Absolutely not. And it was written that way for a reason.

JEFFERSON: Because it says, if you will not sign it because it contains those, then payer shall not withhold payment solely because of _____ refusal. How is the payor to know what the basis of your refusal to sign _____?

LAWYER: First of all, we've got to remember, this burden is not on the payee. Nothing in the statute puts a burden on a payee to say, why aren't you signing a division order. We must remember that there is nothing in contract. This lease like virtually every oil and gas lease does not require the lessor to sign a division order as a condition to getting paid. Common law does not require a payee to sign one. The division order developed as this unilateral document that lessee sent once production was obtained because they needed to update their title information. And they wanted

certification affirmation about title. That's why we don't see this statute written to put the burdens on the lessor. The whole point of the statute was there had been a lot of abuses with the division order that this court addressed in Gavinda(?), in Middleton. The point of the statute was to address abuses, but understandably payor sometimes wants an affirmation of title. So the legislature didn't want to make it more difficult for payors to get a division order.

RODRIGUEZ: The written notice, how did you provide notice of the F-6 lease?

LAWYER: That written notice is titled Demand For Payment. All we talked about earlier was the _____. They don't talk about the whole substance of the notice. The notice comes after Coastal has told Coates, this F-6 well is producing.

RODRIGUEZ: But the statute requires you to place in writing the notice.

LAWYER: No, we're not under statute first of all. We're under the express demand provisions of paragraph 9 of our lease. If you look in the handout, that's what we were under here. There's no doubt about it. This is not a statutory notice requirement. But even if it were, I would have to look at Coke(?) Oil v. Wilbur, which did construe the 91.404 demand requirement. Coke Oil v. Wilbur rejected a lessee's argument that a demand to the lessee, the party with all the information, was somehow insufficient. Becuase the court said, a lessee has all the information at its fingertips to figure out the demand. That was the case here. You look at the demand requirements in our lease. It said make a written demand for payment. Our demand letter does that. It says, demand for payment. It references this lease, and it references the exact paragraph we're talking about.

Coastal does not claim that they don't understand what that demand meant. That is not their position here. In fact, if you look at page 47, they come out and say, when they got this demand they knew the F-6 was producing. They knew that they were getting those proceeds. They knew they didn't get to keep them all, and they did not pay. The reason they said they did not pay is because Coates did not sign a division order. But Coates was not required to sign the division order they tendered under the plain language of the statute. Had they tendered a mere certification of interests, we would have been happy to sign it. The truth is, they didn't have any concern about our title.

I would also like to remind the court that all the other protections in this statute for payors, if they had any concern about title they do not have to pay. Payors do not have to worry that they are making overpayments. This statute strikes a balance between payees and payor, and we believe that the express language of the statute and the legislative history supports that, and we ask you to consider it.

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REBUTTAL

REASONER: Let me briefly try to suggest some of the issues that have been raised. I respectfully submit that one point of our disagreement perhaps we should ask the court's leave to submit a brief letter brief by both sides. The amicus brief, the Texas Oil & Gas Ass'n I respectfully submit, clearly submits the law. If a lessor warrants title that is not in fact sound(?), settled contract law would allow the lessee to recover its costs of drilling as well as consideration paid for the lease.

Warranty or mineral title does not subject you to the consequential damages like wrongful payment of royalty, etc. The law makes it clear division.

I think your point Justice O'Neill is precisely correct. There are two separate estates here. One is real property. One is personalty. Warranty implications are different. A refusal to warrant one is not an agreement that you are not requiring a warranty on the other.

Ms. Burney goes too far when she says they were willing to certify because certification would have been a warranty of title. And they have told us, and what the Corpus court bought it said in 66, is failure to warrant title to the mineral estate is an agreement by us when we signed the lease, but they won't warrant title to the personalty.

ENOCH: If Coates had warranted their interest in the property, would they have been obligated under the lease if there was a payment of royalty in excess of their warranty interest to have reimbursed you that amount of money?

REASONER: I think then we would get into issues on the proceeds of royalty. If we overpaid is the fact that they warranted title to the mineral estate make a difference? I would think probably not.

ENOCH: The argument is that the entitlement to the personalty is traced to the title to the mineral interests under oil and gas law established in this state by this court. And so the argument is the warranty of the interests of the personalty is traced to the warranty of the minerals. The argument then is, that if you warrant the title to the minerals that imposes an obligation that if you're overpaid that the person who paid the money can come back and get it because it was beyond what was warranted.

REASONER: I think in property law - property law is both logic and history. But formal things make a difference. In this court's decision in _____ where you did not apply the venue statute because claims for accrued and past due royalties are personalty rather than realty, that distinction was dispositive. Here we get to the division law statute which requires a lessor to sign a division order. If we comply with the statute it was designed to try to end some of this endless litigation. Here in this division order it doesn't go back to the original title opinion. As you know under tax planning these wealthy families are constantly making transfers, transferring a variety of interests. We have 29 payees on this division order. It was designed to put the payor in a position where they could pay with some certitude that they would either have an opportunity to get their money back, or if they are sued by somebody who was underpaid or who had not even signed the

division order because the interest was not disclosed, that they could seek indemnification.

It's not asking for drilling costs back, etc., as you would get on a mineral estate.

ENOCH: But if I refused to give you the warranty of title to mineral interests, which is the precursor my warranty of my entitlement to what has turned in to a personalty, if I refuse to do that, then the fact that it's not - the warrant in the division order doesn't cover everything that you would otherwise be obligated for under a warranty of title, but it does create a warranty in one particular _____, that a warranty of the title would do, which is the entitlement, the ownership of what's derived as personalty. Wouldn't that be inconsistent?

REASONER: No. I think not. If you refuse to give me a warranty of title, I ask you for a lease, you refuse to give me a warranty of title. I know I'm going to drill at my risk. I know I'm going to pay you a bonus at my risk. If title fails I'm not going to get it back because you didn't warrant the title. Then we begin production. Proceeds are now personalty. Now I'm asking you to warrant the title to those proceeds. Different title. Title to personalty not the same as title to real property.

ENOCH: But without that warranty, the argument of Ms. Burney is without that personalty warranty and you paid the royalty to this mineral interest owner, she says she would be obligated to pay you back any overpayment. You're saying that's not true?

REASONER: Let's say we've got A, B and C. I overpay A, the lessee. I underpay B, and I underpaid C. B and C are not going to sue A. They are going to sue me.

ENOCH: A is the warranty owner. He refuses to give you the warranty. Had he given you that warranty, would you have the authority under that warranty to reclaim overpayment to A the royalty? I'm talking about warranty of the mineral interest. If you overpay them according to that mineral interest would you have the authority under that warranty to seek reimbursement of that overpayment?

REASONER: On reflection by Justice Owen's question, I think that the proportionate reduction clause shows that it's not inconsistent with reducing their royalty interests. However, I would be remitted I suppose to some type of common law theory. If they had not signed a division order, I think they could take the position that I had paid at my risk. By warranting title to the mineral estate they are not certifying a warranty that they are entitled to the division order that set forth.

ENOCH: You do disagree with Ms. Burney that a mere warranty of their mineral interests would not entitle you to seek reimbursement from them if you overpaid them on the royalties?

REASONER: I don't think that their warranty or nonwarranty of the mineral estate would go to the overpayment. The proportionate reduction clause would give me a right to reduce the amount of royalty...

ENOCH: But it would not give you the right to sue them to recoup the overpayment?

REASONER: I think that I might be able to sue on unjust enrichment or some theory such as that. But we're talking here about a statutory right that was designed to bring order and more stability to the relationships between payors and payees in this context. And I respectfully submit that Coastal fully complied with the statute, that the CA's analysis was erroneous, and that therefore, forfeiture of the lease was an error. They are not entitled to forfeit this lease after our compliance with the statute.

JEFFERSON: Do you agree with Ms. Burney that her clients had no obligation in refusing to sign that division order to explain to you the reasons _____?

REASONER: I don't think that we were entitled to any detailed explanation. I do think when it says written demand that that means that we were entitled to notice. They forfeited that lease because we failed to pay royalties under the F-6 well because we were waiting for a return of the division order. So I think that they were obligated to sign it because we had complied with the statute, and that goes to the CA. I think they were also obligated to make a written demand that put us on notice. If they say, we're demanding royalties payable under the H-well, then I don't think that gives them the right to terminate because we were not paying royalties under F-6. And I respectfully submit that the clear way to read that letter with it's _____, which is to look at the last live pleading.