The Duties of Concurrent Owners of Oil and Gas Interests: Tenneco Oil Co. v. Bogert

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I. INTRODUCTION

More than one person may own mineral rights to a particular piece of property. Whenever this type of common interest in property exists, a number of troublesome questions arise as to the respective rights and obligations of the co-owners to each other with respect to the property involved. Case law analysis illustrates difficulty in both defining and predicting the parameter of the co-tenant relationship. Nevertheless, courts must at least provide some type of guidelines so that cotenants may effectively fulfill their various duties.

Recently, many questions have surfaced as to the scope of the duties between or among concurrent owners of oil and gas interests, especially between operators and nonoperators. Does the operator of a mineral estate owe a greater duty of loyalty to its nonoperating co-owners? Does the duty rise to the level of a fiduciary duty? In Tenneco Oil Co. v. Bogert 1 the District Court for the Western District of Oklahoma was called upon to answer these questions and thus define the attendant duties of concurrent owners of oil and gas interests. The court analyzed the various theories upon which a cotenant operator of a unit well may be liable to his fellow cotenants for failing to drill an increased density well or share information concerning drainage caused by a well drilled on an adjacent tract by the operator.

II. STATEMENT OF THE CASE

A. Summary of Facts

In Tenneco Oil Co. v. Bogert, the court was presented with a dispute involving adjoining tracts of mineral properties in Oklahoma. 2 The Corporation Commission designated a single 640 acre drilling and spacing unit (section 4) for the production of gas and gas condensate on a tract of

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2. Id.

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land located in Blaine County, Oklahoma. The Commission also force pooled five common sources of supply under section 4 and designated the defendants, Buck Drilling and Exploration, Buck Exploration, C. Paul Buck, and Irene P. Buck (hereinafter collectively referred to as Buck), as operators of the unit well. Buck commenced drilling a test well, the Pavlu No. 1-4 well, in the southwest quarter of section 4 in August, 1973. As of October 22, 1973, Tenneco Oil Company owned about seventy-six percent of the working interest in oil and gas leases covering section 4. Buck, along with others, owned the remainder. Buck and Tenneco Oil Company entered into an operating agreement in an attempt to define the duties of the two parties. The agreement expressly required Buck to drill the Pavlu No. 1-4 test well. Furthermore, the parties expressly agreed that liability would be several, and that each party would be responsible only for its obligations. Soon thereafter, the Pavlu 1-4 well was completed and continued to produce in paying quantities.

Section 3, the tract adjoining section 4, was unspaced at the time of the agreement. While both Buck and Bogert Oil Company (Bogert) owned a share of the working mineral interest in section 3, Tenneco had no interest. In 1974, Buck commenced drilling the Melew-White No. 1 well which was later completed as a producing gas well. Buck's operation of this well was the subject of controversy among Buck, Bogert and Tenneco. Tenneco alleged that the Melew-White No. 1 well drained hy-

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3. Id. at 963. These tracts of land are located in "Blaine County, Oklahoma, namely, Section 3, Township 18 North, Range 10 West [hereinafter section 3] and Section 4, Township 18 North, Range 10 West [hereinafter section 4]." Id.
4. Id.
5. Id.
6. Id. This well was drilled after Buck obtained a location exception from the Corporation Commission.
7. Id. More specifically, the operating agreement contained the following language. The liability of the parties shall be several, not joint or collective. Each party shall be responsible only for its obligations, and shall be liable only for its proportionate share of the costs of developing and operating the Unit Area. . . . It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other partnership or association, or to render them liable as partners.

8. Id.
9. Id.
10. Id. at 963-64. Although the section 3 well was drilled only 330 feet east of the western boundary of section 4, Tenneco did not allege its illegality. Subsequent to the completion of this well, Buck filed for and was granted permission from the Corporation Commission to create a 640 acre drilling and spacing unit for the production of gas and gas condensate which encompassed all of section 3. The Commission further granted a location exception for this well. Tenneco did attack this exception, however, inasmuch as they asserted before the court that the question of voidness vel non of this order was not essential to its claims against Buck and Bogert. The Court felt it did not have to address this issue. Id. at 964 n.2.
drocarbons from under section 4.11 Tenneco also claimed that Bogert and Buck knew of this drainage, and that they therefore owed a duty to Tenneco to either drill an increased density well in section 4 in order to counteract the drainage caused by the Mehew-White No. 1 well, or to inform Tenneco of the drainage so that they could take corrective action.12

B. Issues of the Case

Tenneco alleged four grounds upon which either Buck or Bogert should have either drilled an increase density well to counteract drainage, or should have informed Tenneco of the drainage. The only one of the four grounds of liability which the court applied to Bogert was the fiduciary duty which arose from a relation of mutual trust and confidence.13 The court was also required to rule on the other three theoretical bases of liability advanced by Tenneco. The first theory that the court addressed was whether Buck owed Tenneco a fiduciary duty of good faith and fair dealing, as a consequence of the joint operating agreement designating Buck’s position as operator of the Pavlu 1-4 well.14 Next, the court was called upon to determine whether or not Buck breached its implied duty of good faith, inherent in every contract,15 by failing either to inform Tenneco of the drainage or drilling an increased density well in section 4. Finally, the court examined Tenneco’s argument that Buck breached its duty as a “prudent operator” by failing to protect section 4 from drainage.16

The court refused to accept Tenneco’s argument that a co tenancy in an oil or gas estate imposes a duty on a co tenant who knows of drainage from under the joint estate to take affirmative steps to inform his fellow

12. Id. at 4.
13. Id. The court held that although the Bogert Oil Company had actually been operating the unit well, Tenneco had stated no support holding that a “party employed by a designated unit operator to perform certain tasks related to the operation of a well thereby partakes of the designated operator’s legal obligations to the non-operating interest holders.” Id. Thus, the other alleged grounds of liability would have no bearing on Bogert as they were not in the relationship of operator or non-operator.
14. Id. at 966.
15. See Codding & Sons v. Armour & Co., 404 F.2d 1, 8 (10th Cir. 1968); Ryder Truck Rental, Inc. v. Central Packing Co., Inc., 341 F.2d 321 (10th Cir.), cert. denied, 382 U.S. 827 (1965); see also S. Williston, WILLISTON ON CONTRACTS § 670 (3rd ed. 1961); A. CORBIN, CORBIN ON CONTRACTS § 541 (1951).
cotenants or to take compensatory action on their behalf.\textsuperscript{17} Tenneco cited four Oklahoma Supreme Court cases which placed cotenants in a relationship of mutual trust and confidence.\textsuperscript{18} Nevertheless, the court stated that these decisions were not relevant to the facts and circumstances presented by Tenneco, and thus provided no support for the attempt to create a fiduciary duty to drill an additional well or share information.\textsuperscript{19}

The court next found that the existence of a joint operating agreement did not automatically presuppose that the operator owed a fiduciary duty to the non-operator. Tenneco cited, among other cases, \textit{Britton v. Green}\textsuperscript{20} as support for its position.\textsuperscript{21} However, the court distinguished the case by the very language in the \textit{Britton} case.\textsuperscript{22} The court stated that the language in the agreement between the parties in \textit{Britton} clearly created an unrestricted joint venture subject to the substantive law of partnerships, and thus, the duties that accompany a fiduciary relationship.\textsuperscript{23} Moreover, the court noted that the the decisions in the cases supporting the fiduciary duty claim turn on the rights and liabilities fixed by the

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\item[\textsuperscript{17}] \textit{Id.} at 965.
\item[\textsuperscript{18}] Plaintiff's Brief, supra note 11, at 7-10; see Rex Oil Ref., Inc. v. Shirvan, 443 P.2d 82 (Okla. 1967) (holding that the acquisition by one cotenant of a gas lease on additional acreage within the spacing orders, adding such additional acreage to acreage entitled to share in production of the gas from the well, inured to the benefit of the other cotenants to the extent of their undivided interest in the original lease and the well thereon); Ellis v. Williams, 297 P.2d 916 (Okla. 1956) (holding that an outstanding tax title acquired by one cotenant in order to gain an advantage over her cotenants inured to the benefit of all); Burt v. Steigleder, 132 Okla. 217, 219, 270 P. 54, 56 (1928) (holding that the facts revealed here warranted the application of the theory that a purchase of an outstanding adverse title by a cotenant will be held in equity to have been made for and on behalf of the other cotenants as well as himself); Arthur v. Coyne, 32 Okla. 527, 529, 122 P. 688, 689 (1912) (holding that in scheduling a previously jointly owned lot in his own name, without the knowledge of his cotenant, defendant committed a fraud because his intention was to secure the full title in himself alone; and as a result of the manner in which this legal title was acquired, it inured to the benefit of his cotenant).
\item[\textsuperscript{19}] \textit{Tenneco}, 630 F. Supp. at 965.
\item[\textsuperscript{20}] 325 F.2d 377 (10th Cir. 1963).
\item[\textsuperscript{21}] Plaintiff's Brief, supra note 11, at 4-7.
\item[\textsuperscript{22}] \textit{Britton}, 925 F.2d at 383. In \textit{Britton}, the court stated:

[ Cotenants] undoubtedly may, be their separate agreements, employ an operator to possess and manage the cotenancy, without creating a trust relationship between themselves and the operating agent. . . . But when, as here, co-tenants undertake to designate a cotenant as operating agent, to exploit the cotenancy for their mutual profit, they become co-adventurers in the enterprise, and stand in a fiducial relationship to each other and to the operating agent.

\textit{Id.}
\item[\textsuperscript{23}] \textit{Tenneco}, 630 F. Supp. at 966. It is important to note that this case involves an operator who became one solely by virtue of a written agreement, unlike the \textit{Tenneco} case in which the operator was designated as such through a forced pooling order by the corporation commission prior to the written agreement.
\end{itemize}
contract. The opinion stated that the provisions of the operating agreement between Buck and Tenneco specifically defined and limited the "right to drill additional wells, . . . but imposed no obligation on Buck as operator to drill any well but the Pavlu 1-4." Accordingly, the court held that it could find no basis for reading into the parties' contract a fiduciary duty obligating Buck to drill an additional well simply because it had knowledge of drainage by the Melew-White well.

In analyzing Tenneco's next allegation, the court recited the general principle of law that each party to a contract has a duty of good faith performance such that neither party shall be deprived of the fruits of its bargain. Tenneco claimed that Buck breached its duty by failing to drill an additional density well or by failing to inform Tenneco of the drainage. The court found no proof to support the contention that the parties bargained for and agreed upon an unstated obligation to drill an additional well. Absent proof, the court held that there was no evidence to show that Buck did not perform its part of the contract in good faith.

Finally, the court addressed Tenneco's argument that because a lessee has an implied covenant to develop a lease as a prudent operator, which includes a duty to protect against drainage by the lessee's other operations, an interest holder in a unitized section has an implied duty to conduct operations as a prudent operator. The opinion concluded that, although one court hinted that an operator under a voluntary pooling agreement may have a duty to protect against drainage, the comments were merely dictum and therefore not persuasive authority meant to bind future courts. Moreover, the court avoided the question of whether the Oklahoma Corporation Commission's designation of Buck as unit operator created a "prudent operator" duty to protect against drainage, by ruling that the proper forum to address the issue would clearly be the

24. Id. at 967.
25. Id. at 969.
26. Id.
28. Plaintiff's Brief, supra note 11, at 11-12; see also Tenneco, 630 F. Supp. at 969. This allegation attempts to sever the implied obligation of good faith inherent in every contract from the express terms set forth in the operating agreement which did not impose a duty on Buck to drill an additional density well or to inform Tenneco of such drainage.
29. Id. The proof necessary to support this contention would ordinarily be found in the conduct of the parties and the circumstances surrounding the execution of the contract.
30. Id.
31. Id.
32. Id. at 970.
III. THE DEVELOPMENT OF LAW REGARDING JOINT TENANCY IN OIL AND GAS RIGHTS

In order to efficiently analyze the ruling in the Tenneco case, it is important to first understand the basic concepts behind joint tenancy law as applied to oil and gas rights. Tenancy in common has been defined as a joint estate in which there is unity of possession, but separate and distinct titles. The relationship may be voluntary or involuntary. Thus, the owners of an undivided interest in oil and gas rights are tenants in common: each holds separate titles, "the only essential [common] element being a possessory right as to which, all are entitled to equal use and possession." As a result of the possessory right, each cotenant is entitled to enter upon the premises for the purpose of exploring for oil and gas. One cotenant, however, cannot exercise that right to the exclusion of the other. Thus, where drilling results in profits, the producing cotenant must account to the nonconsenting or nonproducing cotenant for his proportionate share of the return, less the reasonable and necessary expense of developing, extracting, and marketing the product.

Historically, courts have shown liberal attitudes in construing what are reasonable and necessary costs in the development, operation, and marketing of oil and gas. The rationale behind courts' leniency stems from the equitable principles behind the rule. The inherent unfairness

33. Id. at 972. The court noted that this would not be unfair to the plaintiffs because of the fact that Tenneco and Buck were presently adjudicating several matters relating to this case before the Corporation Commission. This matter, could thus be settled before the proper court at the proper time.

34. BLACK'S LAW DICTIONARY 1314 (5th ed. 1979); see also De Mik v. Cargill, 485 P.2d 229, 233 (Okla. 1971) (examining the right to partition by cotenants).

35. De Mik, 485 P.2d at 233.


37. Earp, 167 Okla. at 89, 27 P.2d at 858; see also Prairie Oil & Gas Co. v. Allen, 2 F.2d 566 (8th Cir. 1924). The court in Prairie made the following statement:

[I]f one tenant is able and willing to develop the mine and extract the oil before it is entirely lost and his cotenant is not, he should be allowed to do so without incurring the penalty of accounting to his cotenant for the gross amount of oil produced; but since he may not convert, to any extent, his cotenant's interest, he must account to the latter for his proportion of the net value of the oil produced, which is its market value, less the cost of extracting and marketing.

Id. at 573.

38. Moody v. Wagner, 167 Okla. 99, 23 P.2d 633 (Okla. 1933). The court in Moody made the following observation:

[T]he tenant who keeps aloof and free from risk until the hazards have all been run and the
of forcing the developing cotenant to bear the full loss if the venture proves a disaster, has prompted most producing states to enact forced pooling laws.\textsuperscript{39} Forced pooling laws both protect the state's citizens from over-drilling and protect owners of adjoining mineral rights from drainage, by forcing the non-consenting owner to accept administratively determined fair terms.\textsuperscript{40} Often these statutes are unnecessary because the parties contract on their own according to their perceived duties. Typically, when a leasehold is concurrently owned, before beginning exploration and development of the premises, the co-owners will enter into an operating agreement specifying the rights and liabilities of the parties and designating one cotenant to operate the property.\textsuperscript{41} These agreements will normally set forth an "Accounting Procedure" which specifies agreed upon charges against the joint account, the methods of calculating costs and expenses, and the methods of calculating credits to the joint account for the proceeds of the disposal of lease equipment and materials.\textsuperscript{42}

Even though the courts, the legislature, and the parties have attempted to define and delineate the rights and obligations of concurrent owners of oil and gas properties, the extent and character of the duties continues to be uncertain.\textsuperscript{43} The major issue appears to be whether or not a fiduciary relationship exists between or among concurrent
dangers are all past, and then comes forward seeking to share in the profits of a venture he had not the courage to join, and to the success of which he has contributed nothing, certainly is not in a position to demand that the court, in ascertaining what the profits are, shall be cautious almost to niggardliness towards those whose capacity and enterprise have made the venture a success.\textsuperscript{44}

Id. at 102, 23 P.2d at 636 (citations omitted).

\textsuperscript{39} For example, the Oklahoma legislature enacted Okla. Stat. tit. 52, § 87.1(d) (1981). This section provides that where cotenants disagree on whether to drill, the Corporation Commission may on proper application compel the co-owners to pool and develop their interests as a unit, sharing the expenses and risks as well as any profits. The Commission is authorized to fix the proportionate part of the cost, which contribution obligation is enforceable by the operator of the unit against the nondeveloping cotenant by a lien on the mineral leasehold estate or rights owned by that cotenant. See also Anderson v. Corporation Comm'n, 327 P.2d 699 (Okla. 1957) (discussing why an order authorizing the payment for a proportionate share of the cost of production or a presumed election to sell did not amount to an illegal taking of private property for private use without due process of law); Wakefield v. State, 306 P.2d 305 (Okla. 1957) (determining whether a compulsory pooling order was a reasonable regulation under the police power); Amis v. Bryan Petroleum Corp., 185 Okla. 206, 90 P.2d 936 (1939).

\textsuperscript{40} See 1 R. Myers, THE LAW OF POOLING AND UNITIZATION VOLUNTARY—COMPELSORY § 801 (1967).

\textsuperscript{41} Id.

\textsuperscript{42} See H. Williams & C. Meyers, MANUAL OF OIL AND GAS TERMS § 503.2 (1971).

owners.\textsuperscript{44} A fiduciary relationship has been said to exist in every possible case in which there is confidence reposed on one side resulting in domination or influence on the other.\textsuperscript{45} Whenever a fiduciary relationship exists, the fiduciary is prohibited from acquiring rights in the property or interest antagonistic to the person with whose interests he has become associated.\textsuperscript{46} The term fiduciary has been defined as “a person holding the character of a trustee, or a character analogous to that of a trustee, in respect to the trust and confidence involved in it and the scrupulous good faith and candor which it requires.”\textsuperscript{47} Most courts have not ventured to state that ordinary cotenants stand in a fiduciary relationship.\textsuperscript{48} Nevertheless, a basic principle that the majority of courts have adhered to is that cotenant owners of estates in land stand in a relationship of mutual trust, and neither shall be permitted to act in hostility to the other in reference to the common estate.\textsuperscript{49} There are no hard and fast rules on how a cotenant can maintain the relationship of mutual confidence. Thus, courts often impose their own duties on cotenants according to what they believe to be fair and equitable under the circumstances.\textsuperscript{50}

IV. Analysis of TENNECO

No standard rules exist concerning the existence and character of

\textsuperscript{44} H. Williams & C. Meyers, Oil & Gas Law § 510 (1971).
\textsuperscript{45} Pure Oil Co. v. Byrnes, 388 Ill. 26, 57 N.E.2d 356, 361 (1944); Albrecht v. Hunecke, 196 Ill. 127, 63 N.E. 616, 618 (1902); Rees v. Briscoe, 315 P.2d 758, 759 (Okla. 1957).
\textsuperscript{46} Rees, 315 P.2d at 762; see Rex Oil Ref., Inc. v. Shirvan, 443 P.2d 82, 87 (Okla. 1967).
\textsuperscript{47} Black's Law Dictionary 752 (5th ed. 1979).
\textsuperscript{48} See generally Britton v. Green, 325 P.2d 377 (10th Cir. 1963) (indicating that there is no necessary fiduciary relationship between or among concurrent owners but finding, however, that a fiduciary relationship arose from an operating agreement made by the concurrent owners); Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947); Tanner v. Olds, 29 Cal. 2d 110, 173 P.2d 6 (1946); Pure Oil Co. v. Byrnes, 388 Ill. 26, 57 N.E.2d 356 (1944); Zeigler v. Brennan, 237 Ill. 15, 86 N.E. 597 (1908); Dilworth v. Messenger, 121 Ill. App. 2d 250, 257 N.E.2d 573 (1953); Kentucky West Virginia Gas Co. v. Hatfield, 260 Ky. 315, 85 S.W.2d 672 (1935); Phillips v. Homestake Consol. Placer Mines Co., 51 Nev. 226, 273 P. 657 (1929); Zimmerman v. Texaco, 409 S.W.2d 607 (Tex. Civ. App. 1966), (there being no fiduciary relationship, lessee of one cotenant owed no duty to nonleasing cotenant to prevent drainage or to seek a Railroad Commission order standardizing testing methods so as to prevent alleged overproduction from other premises) error ref'd n.r.e., 413 S.W.2d 387 (Tex. 1967); Wainwright v. Wainwright, 359 S.W.2d 628 (Tex. Civ. App. 1962); Smith v. Bolin, 261 S.W.2d 352 (Tex. Civ. App. 1953), rev'd in part, 153 Tex. 486, 271 S.W.2d 93 (1954).
\textsuperscript{49} See Rex Oil Ref., Inc. v. Shirvan, 443 P.2d 82 (Okla. 1967); Ellis v. Williams, 297 P.2d 916 (Okla. 1956); Wallace v. Brooks, 194 Okla. 137, 140, 147 P.2d 784, 790 (Okla. 1944); Burt v. Steltzeder, 132 Okla. 217, 270 P. 54 (1928); Arthur v. Coyne, 32 Okla. 527, 528, 122 P. 688, 689 (1912).
\textsuperscript{50} See generally 4 G. Thompson, On Real Property § 1801 (1979).
the relationship between or among cotenant owners of oil and gas interests. One authority states that:

[i]t two situations give rise to most of the problems involving the existence and extent of fiduciary relations between tenants in common. These are (a) the effort by one cotenant to buy in and later to assert a superior title to the detriment of his cotenants; and (b) the making of an agreement with the other cotenants, in which some advantage is gained by "overreaching" the others.\(^{51}\)

The case in *Tenneco* can be categorized as a dispute arising out of the second situation presented. A number of previous Oklahoma decisions dealing with this situation appear to have imposed various duties on cotenants according to what the court perceived to be fair and equitable under the specific facts and circumstances.\(^{52}\) The court in *Tenneco* did not stray from this equitable concept.\(^{53}\) The court reached its decision by examining previous Oklahoma cases and differentiating the facts of those cases from those of the present dispute.

*Tenneco* Oil Company asserted that a general rule regarding the duties of concurrent owners of estates in land had been established in Oklahoma. The general rule would substantially state that:

Cotenant owners of an estate in lands stand in a relation to each other of mutual trust and confidence, and neither will be permitted to act in hostility to the other in reference to the joint estate; and a distinct title acquired by one will ordinarily inure to the benefit of all.\(^{54}\)

However, the court refuted this argument by recognizing that the facts and circumstances of the cases cited were clearly different than those in

\(^{51}\) 4 R. Powell, Real Property 605 (1954).

\(^{52}\) See generally Britton v. Green, 325 F.2d 377 (10th Cir. 1963); Frankfort Oil Co. v. Sankard, 279 F.2d 436 (10th Cir. 1960); Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947); British Am. Oil Prod. Co. v. Midway Oil Co., 82 F.2d 1049 (Okla. 1938).

\(^{53}\) The evidence revealed, and was not controverted by *Tenneco*, that the Pavli 1-4 well had produced hydrocarbons in excess of those produced by the Melew-White No. 1 well. This finding may have had some influence on the court.

\(^{54}\) *Tenneco*, 630 F. Supp. at 965; see also Rex Oil Ref., Inc. v. Shirman, 443 F.2d 82 (Okla. 1967) (holding that the acquisition by one cotenant of a gas lease on additional acreage within the spacing orders, adding such additional acreage to acreage entitled to share in production of the gas from the well, inured to the benefit of the other cotenants to the extent of their undivided interest in the original lease and the well thereon); Ellis v. Williams, 297 F.2d 916 (Okla. 1956) (holding that an outstanding tax title acquired by one cotenant in order to gain an advantage over her cotenants inured to the benefit of all); Burt v. Steigleder, 132 Okla. 217, 270 P. 54 (1928) (holding that the facts revealed here warranted the application of the theory that a purchase of an outstanding adverse title by a cotenant will be held in equity to have been made for and on behalf of the other cotenants as well as himself); Arthur v. Coyne, 32 Okla. 527, 528, 122 P. 688, 689 (1912) (Syllabus by the court) (holding that in scheduling a previously jointly owned lot in his own name, without the knowledge of his cotenant, defendant committed a fraud, because his intention was to secure the full title in himself alone; and as a result of the manner in which this legal title was acquired, it inured to the benefit of his cotenant).
the present case, and therefore, the duties imposed were irrelevant.\textsuperscript{55}

For instance, in \textit{Rex Oil Refining, Inc. v. Shirvan},\textsuperscript{56} the evidence revealed that a cotenant of an 80 acre leasehold acquired by assignment the leasehold in an adjoining 80 acre parcel, thereby giving him a greater interest in the production from the one well drilled upon the 160 acre drilling and spacing unit comprising the two parcels. The court ruled that it would be inequitable to permit one cotenant to retain all interest in the 80 acre leasehold assigned.\textsuperscript{57} Accordingly, the court held that the acquisition was held in trust for the other cotenants to the extent of their respective undivided interests in the original 80 acre lease and the well thereon.\textsuperscript{58} The \textit{Rex} court considered the theory that a cotenancy relationship is one of mutual trust and confidence in reference to the joint estate and that a distinct title acquired by one will ordinarily inure to the benefit of all.\textsuperscript{59} However, the court also recognized that the doctrine, "is one of equitable cognizance and is not applied by hard-and-fast rules, but in accordance with the facts of the particular case."\textsuperscript{60} Other cases have held that when one cotenant purchases real property sold at a bona fide sheriff's sale under a judgment foreclosing a mortgage on the property, pays fair and adequate consideration, and is not guilty of fraud, deceit or collusion, the purchaser will be allowed the full benefit of his purchase.\textsuperscript{61}

\textsuperscript{55} Tenneco, 630 F. Supp. at 965.
\textsuperscript{56} 443 P.2d 82 (1967) (Irwin, J., dissenting).
\textsuperscript{57} Id. at 88. The court stated:

[T]hat it would be unfair and inequitable to permit the plaintiff to retain all interest in the lease covered by the assignment from Amerada to plaintiff and . . . that plaintiff holds the same in trust for the individual defendants to the extent of their respective undivided interests in the Evans original 80 acre lease and the well thereon.

\textit{Id.}

\textsuperscript{58} Id. The court believed this to be fair in that the defendants were willing, and the lower court's judgment provided that their interests in the adjoining 80 acre lease bear a proportionate share of such lessor's reserved overriding royalty. Thus, the decree could not be seen as a gift. Three members of the court dissented with this opinion, arguing that (1) there was no fiduciary relationship among the cotenants, and (2) even if a fiduciary relationship was present, it arose out of the property or interests common to the parties. Thus, a fiduciary relationship would have arisen out of the 80 acre leasehold and not out of the other 80 acre leasehold acquired. Therefore, no duties of the fiduciary would relate to the 80 acre leasehold acquired. \textit{Id.} at 90.

\textsuperscript{59} Id. at 87.
\textsuperscript{60} Id. at 87 (quoting 20 AM. JUR. 2d Cotenancy and Joint Ownership § 70 (1965)).
\textsuperscript{61} Wallace v. Brooks, 147 P.2d 784, 789 (Okla. 1944); see also Burt v. Steigledger, 132 Okla. 217, 270 P.2d 54 (1928). In \textit{Burt}, the court stated that,

"[t]he foreclosure was open, and both plaintiff and Shultz were parties. It would be a great injustice to Shultz to hold that he could not buy for his own account. If he could not, then he would be compelled either to allow the property to be sacrificed, if there were no bidders, or with his own funds to buy for the benefit of the plaintiff as well as of himself. The plaintiff then would only need to keep still and thus throw the whole risk of the purchase on Shultz. Thus, an irresponsible person might prevent his responsible cotenant from protecting himself."
The other cases relied on by Tenneco to support its proposition that Buck and Bogert owed Tenneco a fiduciary duty arising from the co-tenancy deal with fact situations similar to that in Rex. That is, situations where one concurrent owner acquires an outstanding interest without sharing it with another concurrent owner. This is not the situation in Tenneco. Moreover, each of these opinions recognize that the facts and circumstances of the case are controlling. The court in Tenneco held that there was no authority or existing rule of law stating that "a co-tenant in [an] oil or gas estate who knows of drainage from under the joint estate has an affirmative duty to inform his fellow cotenants or take compensatory action on their behalf..." Quite to the contrary, the court found that the general law in Oklahoma is that, "[t]here is no trust relationship between co-tenants as such — one is not the agent of the other." In accordance with this finding, the court ruled that under these circumstances Tenneco failed to establish a claim upon which relief could be granted against Buck or Bogert.

The remaining claims against Buck alone arose out of the joint operating agreement between Tenneco and Buck. The parties entered into the agreement as a result of the Corporation Commission's orders force pooling five common sources of supply under section 4, and designating Buck to operate the unit well. Again, the ruling on these claims rested upon the facts and circumstances of the case, and specifically upon the language of the agreement.

The first of these theories of liability addressed by the court suggests that as a consequence of the joint operating agreement, Buck owed a fiduciary duty to act in good faith, and that by failing to drill an additional well in section 4, Buck breached its duty. Tenneco cited Britton v. Green as supporting its position. Although the Britton case ruled

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63. Tenneco, 630 F. Supp. at 965.
64. Id. (quoting Britton v. Green, 325 F.2d 377, 383 (10th Cir. 1963)).
65. Tenneco, 630 F. Supp. at 965. As was previously mentioned, because Tenneco's other bases of liability had been found inapplicable to Bogert, summary judgment and dismissal of the complaint in favor of Bogert were ordered. Id.
66. Id. at 964-66.
67. 325 F.2d 377 (10th Cir. 1963). The Tenneco court also noted that Tenneco relied on Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc., 282 Ark. 268, 668 S.W.2d 16 (1984), as a case supporting this proposition. However, the court found that the agreement in this case could not be differentiated from the present agreement on the basis of its express language. Thus, it disregarded this case in its analysis. See Tenneco, 630 F. Supp. at 966-67 n.6.
68. Plaintiff's Brief, supra note 11, at 4-7.
that the operator had a fiduciary relationship toward his non-operating cotenants, the facts and circumstances in Britton can be easily differentiated from those in the Tenneco case. The Britton court held that there is not necessarily a fiduciary relationship between or among concurrent owners. Moreover, they may "employ an operator to possess and manage the cotenancy without creating a trust relationship." However, cotenants, by separate agreement, may designate a single cotenant as an operating agent, to exploit the cotenancy for their mutual profit, and thus become co-adventurers. Co-adventurers, as opposed to cotenants, stand in a confidential and fiduciary relationship within the general scope of the enterprise. In Britton, the defendant entered into various written agreements whereby she agreed, among other things, to drill and complete a well on each of the leases and operate the same to the mutual interest of all parties "... as economically as good business judgment will warrant." The plaintiffs alleged that the defendant failed to properly complete the wells by misoperating and mismanaging both leases. Although not expressly stated, the language of the agreement clearly established the cotenants as co-adventurers. As previously mentioned, the co-adventurer relationship imposes upon the operator certain fiduciary duties which were breached by the defendant's mismanagement. In contrast, the language in the Tenneco agreement specifically denied a fiduciary relationship. The agreement expressly stated that:

[e]ach party shall be liable only for its proportionate share of the costs of developing and operating the Unit Area . . . . It is not the intention

69. Britton, 325 F.2d at 383.
70. Id.
71. Id.
72. Id.; see also Eagle-Picher v. Mid-Continent Lead & Zinc Co., 209 F.2d 917 (10th Cir. 1954); Taylor v. Brindley, 164 F.2d 235 (10th Cir. 1947); Vilbig Constr. Co. v. Whitham, 194 Okla. 460, 152 P.2d 916 (1944); Blackstock Oil Co. v. Caston, 184 Okla. 489, 87 P.2d 1087 (1939); cf. Brannan v. Sohio Petroleum Co., 260 F.2d 621 (10th Cir. 1958); Rees v. Briscoe, 315 F.2d 758 (Okla. 1957).
73. Britton, 325 F.2d at 379.
74. Id.
75. Tenneco, 630 F. Supp. at 966. The express language states:
It is agreed that Seller shall have active charge of the operation of said leasehold estate, and that said premises shall be operated to the mutual interest of all parties hereto as economically as good business judgment will warrant. It is further agreed that the parties hereto will observe the spirit as well as the strict letter of this contract and work at all times to the mutual advantage of each other in the management and operation and development of said lease.
76. Britton, 325 F.2d at 381 n.2.
77. Tenneco, 630 F. Supp. at 966. This mismanagement included the alleged default in the payment of a promissory note, and the failure of the mortgagors to efficiently operate the oil and gas leases, to keep and maintain the mortgaged property in good state of repair, and to cure title defects as required by the mortgage. See Britton, 325 F.2d at 379.
of the parties to create, nor shall this agreement be construed as creat-
ing, a mining or other partnership or association, or to render them
liable as partners.77
This language evidences that the Tenneco court could not possibly find
that fiducial duties arose out of an implied partnership. To do so would
be to hold contrary to the intention of the parties. Thus, the present case
is easily differentiated from Britton.

The court further analyzed the relationship created by Buck and
Tenneco through the joint operating agreement, and the duties that may
have been established had this agreement created a joint venture. Pre-
exisiting law established that the existence and extent of fiduciary duties
owed by parties of a joint venture to develop oil and gas properties is
controlled by the terms of the agreement between the parties.78 The
court compared Frankfort Oil Co. v. Snakard79 and British American Oil
Producing Co. v. Midway Oil Co.80 to the Tenneco case to illustrate how
Oklahoma courts have interpreted certain operating agreements.

The Frankfort case involved an action for breach of an operating
agreement which had created a joint adventure as to mineral leases.81
Upon finding that the agreement between the parties created a joint ad-
venture,82 the court accordingly held that the relationship so created was
fiduciary in character.83 The written agreement defined the relationship
between the parties.84 The court concluded that Frankfort had not
breached its fiduciary duty by withholding geological and geophysical
information because there was no contractual obligation to divulge that
information.85 Similarly, Buck could not be held to have breached any
type of fiduciary duty arising out of the operating agreement in Tenneco.

77. Tenneco, 630 F. Supp. at 963.
78. Id. at 967; see also Frankfort Oil Co. v. Snakard, 279 F.2d 436 (10th Cir. 1960).
79. 279 F.2d 436 (10th Cir. 1960).
80. 183 Okla. 475, 82 P.2d 1049 (1938).
81. 279 F.2d at 436. 82. Id. at 443. As with the other cases previously discussed, which characterized the relationships as joint adventures, the court here also based its conclusion on the fact that the parties entered into a common undertaking involving jointly owned property and a sharing of profits.
83. Id.; see also Vilbig Constr. Co. v. Whitham, 194 Okla. 460, 152 P.2d 916 (1944).
84. Frankfort, 279 F.2d at 443. The court stated that:
"[t]he extent and effect of such relationship is determined by the written agreements be-
tween the parties defining and delineating the powers and rights of each. In such a situa-
tion it is presumed that they delegated all the powers they wished to confer upon each
other and withheld all powers of authority not affirmatively delegated."

Id.
85. Id. The operating agreement provided that the nonoperator (Snakard) had the right of
access to the leased premises, of inspection of the log, of samples and cuttings from wells drilled, and
of inspection and audit of the operator’s books. Frankfort had seismographic surveys and other
gophysical work done on the land. The court found nothing in the operating agreement requiring
The agreement provided that the operator be required to furnish certain information. However, Tenneco never asserted that Buck failed to provide them with information. Instead, it alleged that Buck breached its fiduciary duty by failing to inform Tenneco of information of the drainage. As in Frankfort, the Tenneco court found that no fiduciary duty was breached because there was no contractual obligation to provide information.

Even if the drainage information was the basis for Buck's decision to drill the adjacent well, no duty to Tenneco was breached by not sharing the information. The court based this finding upon language stated in *British American Oil Producing Co. v. Midway Oil Co.* In this case, the Supreme Court of Oklahoma refused to find a breach of contract or a breach of fiduciary duty on the part of the operator. Midway, as plaintiff, alleged that, while developing the area specifically covered by the contract, British American, as operator, obtained information which induced it to purchase certain leases, and therefore British American was under a duty to Midway to permit them to join in the purchase of the leases. The court could find nothing in the contract that would prevent either party from acting outside of the area for his own benefit and thus concluded that no duty was violated.

In the present case, the joint operating agreement required Buck to drill only one test well and specifically defined and limited the right to drill additional wells, with or without the other's consent. It imposed no obligation on Buck as operator to drill any well but the required test well. Upon analysis of the prior cases, the court, supporting a literal

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Frankfort to furnish reports on geographical work and thus, no contractual obligation to Snakard to divulge this information. *Id.* at 442.

86. The operating agreement guaranteed Tenneco access to all relevant information pertaining to the development or operation of the Unit Area and provided that:

Operator (Buck) shall, upon request, furnish each of the other parties of copies of all drilling reports, well logs, tank tables, daily gauge and run tickets and reports of stock on hand at the first of each month, and shall make available samples of any cores or cuttings taken from any well on the Unit Area.

*Tenneco*, 630 F. Supp. at 968.

87. *Id.*

88. *Id.*

89. 183 Okla. 475, 82 P.2d 1049 (1938).

90. *Id.* at 1051. The court ruled that "[i]t is the duty and the right of competent contracting parties, dealing together in the management of their properties, to provide their own terms as to respective duties, and when they have done so, it will be assumed that no other duties were undertaken or other liabilities intended to be provided." *Id.* at 1050.

91. *Id.* at 1052.

92. Buck's Brief in Support of its Motion to Dismiss Plaintiff's Complaint at 16-18, Tenneco Oil Co. v. Bogert, 630 F. Supp. 961 (W.D. Okla. 1986) [hereinafter Defendant's Brief]; see also Frankfort, 279 F.2d at 440-41. In this case, the agreement provided that when notice of intent to
and limited reading of the operating agreements, stated that it would refuse to rewrite the parties' contract by finding a fiduciary duty obligating Buck to drill an additional well merely on the fact that Buck had knowledge of drainage by the Mehew-White well. The rationale employed by the court in reaching the conclusion that the joint operating agreement did not impose a fiduciary duty upon Buck to drill an additional well to protect against drainage also appears in its analysis of Tenneco's assertion that Buck breached an implied duty to act in good faith with respect to the agreement. Specifically, the court again held that there was no evidence that would indicate that the parties bargained for and agreed upon an unstated obligation to drill an additional well or share unspecified information, or that the drilling of an additional well was essential to accomplish the purpose of the joint operating agreement.

The cases cited by Tenneco as support for its allegation, merely reiterate the general principle that, "[e]very contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." This duty is based on fundamental notions of fairness that neither party shall do anything which will destroy or injure the other party's right to receive the fruits of the bargain. The fruits of Tenneco's bargain in the present case was the drilling of one well by Buck and the disclosure of certain information. Tenneco never claimed that these terms were not complied with in good faith. Thus, the court concluded that there could be no grounds for finding that Buck breached its implied obligation to perform its contract in good faith.

Lastly, the court addressed the question of whether or not Buck

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94. Id.
97. C.H. Codding & Sons v. Armour & Company, 404 F.2d 1 (10th Cir. 1968) and Western Natural Gas Co. v. Cities Serv. Gas Co., 507 P.2d 1236 (Okla. 1972) acknowledge this doctrine, but the fact situations are not even remotely familiar to the present action. Thus comparing the equitably analysis of these cases was considered unnecessary. For example, *Codding* involved a determination of whether a duty omitted from the express terms of the contract could be implied from the contract "as construed by the conduct of parties." In the *Tenneco* case there was no express provision dealing with a duty to drill an additional well, and no conduct that would in any way support a finding that this would be necessary in order to accomplish the purpose of the contract.
owed Tenneco a “prudent operator’s” duty to protect section 4 from drainage similar to that owed by a mineral lessee to a mineral lessor. As with the other issues in this case, the court based its analysis upon the facts and circumstances of the case. 99 In this instance, however, the court sidestepped the major issue by holding that to whatever extent Tenneco sought to adjudicate matters arising out of the Corporation Commission’s designation of Buck as unit operator, or its obligations to protect correlative rights attendant thereto, the proper forum was the Commission. 100

The court ignored the Samson Resources Co. v. Corporation Commission 101 case presented by Tenneco as authority for its position, by interpreting its comments as clearly obiter dictum. 102 In Samson, the court compared a mineral lessor’s right to enforce a lessee’s implied covenant to develop a lease as a prudent operator and duty to protect against drainage by the lessee’s other operations, with an interest holder’s right in a unitized section to enforce the unit operator’s duty to conduct operations as a prudent operator. 103 The Tenneco court interpreted these comments to be merely words of consolation to the losers of the Samson case. 104 The court apparently believed that the Samson court was simply affording the losers a glimmer of hope in that they may subsequently prevail in another forum. 105 The agreement in Tenneco was a voluntary joint operating agreement between the parties as opposed to a Corporation Commission’s designation of an operator by a forced pooling order, and thus, the Commission lacked jurisdiction to adjudicate this matter. 106 On the contrary, the Tenneco case involved a forced pooling order; and therefore, any Commission-conferred power to protect correlative rights by drilling an increased density well must be adjudicated by the Corporation Commission itself. 107

99. The duty of a lessee to protect the leasehold from drainage derives from the fact that the lessor, by virtue of the lease, contracts away his right to develop and operate the property. S. H. WILLIAMS & C. MEYERS, OIL AND GAS LAW § 802.1 (1985). The facts in the Tenneco case reveal a much different situation, in that Tenneco had as much right to petition the Corporation Commission for permission to drill an increased density well as did Buck.
100. Tenneco, 630 F. Supp. at 971-72.
103. Samson, 702 P.2d at 23.
104. Tenneco, 630 F. Supp. at 970.
105. Id.
The *Tenneco* court did not expressly rule on whether or not the original order designating Buck as the unit operator in section 4 conferred upon Buck the duty to protect correlative rights by drilling an increased density well. However, the opinion suggests that Buck would not have this duty.\(^\text{108}\) The court bases this suggestion upon a statement of policy issued by the Corporation Commission on May 3, 1984. This statement announced the Commission's policy that all pooling orders relate only to the well proposed to be drilled under the order and do not determine the rights and equities of increased density wells which might be drilled in the unit.\(^\text{109}\) Thus, it appears that a ruling on the possible liability as a "prudent operator" would turn upon the facts and circumstances of the case including the express language in the operating agreement.

V. Conclusion

Issues similar to those presented in the *Tenneco* case have been ruled on in other jurisdictions. All courts have held that there is no duty to drill off-setting wells for the purpose of protecting the joint interest in the minerals under the common trust from drainage, even though drainage was occasioned by the cotenant's activities on the adjacent premises.\(^\text{110}\) Further, the *Tenneco* court concluded that there was no basis for imposing a duty upon Buck to drill an additional well to prevent against drainage in section 4 or to share information concerning the drainage. The court reached this conclusion by differentiating the facts and circumstances here from those in other cases which held the cotenants to a higher level of trust and confidence.

The *Tenneco* ruling does not hold cotenants to a high level of trust as a fiduciary. However, special circumstances may reveal that a fiduciary duty does exist. The existence of a separate agreement providing for a fiduciary duty or an equitable complaint of fraud or bad faith may lead courts to hold otherwise. Thus, cotenants should attempt to avoid these problems by clearly and carefully defining their rights and obligations in a written contract. The *Tenneco* case reveals that a fiduciary duty will not be inferred from a contract absent special circumstances.

Mary Kay Morrisey

\(^{108}\) Id. at 971.

\(^{109}\) Id.
