

# **“MARKETABLE TITLE” VS. “DEFENSIBLE TITLE” WHEN EXAMINING OIL AND GAS INTERESTS: AN OVERVIEW OF THE LAW IN OKLAHOMA**

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**MEE MEE HOGE & EPPERSON**  
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## BRIEF RESUME - PART I

- Oklahoma City University (JD: Law in 1978)
- Practiced in OKC since 1979
- Partner with Mee Mee Hoge & Epperson in Oklahoma City
- Focuses his practice on mineral and surface titles, both examinations and litigation
- Serves as a consulting and testifying expert on title issues

## BRIEF RESUME - PART II

- Chair: Title Examination Standards Comm., Real Property Law Section, OBA-since 1988
- Adjunct Professor of Law at OCU: “Oklahoma Land Titles” (since 1982), and “Oil and Gas Title Examination” (2015)
- General Editor of, & contributing author to: Vernons 2d: Oklahoma Real Property Forms and Practice
- Frequently lectures and writes on surface and oil/gas title issues
- Presents an annual update on title cases, statutes & title standards for the OBA (since 2006)



## BRIEF RESUME - PART III

- 16 Published Articles in the Oklahoma Bar Journal
- Over 300 Presentations for Continuing Education Courses
- WEBSITE: [www.EppersonLaw.com](http://www.EppersonLaw.com)



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# BRIEF RESUME - PART IV

## Representative Projects:

- Assisted major oil producer to revise its categories for suspending proceeds due to unmarketable title (Production Revenue Standards Act).
- Prepared Amicus Brief to Oklahoma Supreme Court achieving a 9-0 reversal of trial court and COCA on issue of challenging ancient probate decrees (Bebout v. Ewell, 2017 OK 22).
- Secured Oklahoma AG Opinion interpreting safe distance of residential structures from producing wells (2009 OK AG 5; also see “Well Site Safety Zone Act: New Life for Act,” 80 OBJ 1061, by Kraettli Q. Epperson).
- Successfully aided a major oil producer in an arbitration to defend against a billion dollar title dispute in an acquisition matter.
- Served as an Arbitrator on a three-member panel to consider a multi-million dollar claim for damages caused by horizontal drilling/fracing on existing vertical wells.
- Completed Drilling Title Opinions and/or Division Order Title Opinions for multiple operators.
- Acted as a Court-Appointed Receiver to operate and sell 5 abstract companies in Southeast Oklahoma.
- Successfully served as an expert witness at a trial to construe a sizable mortgage release as a full rather than a partial release.



## OVERVIEW OF PAPER:

- What are the different qualities/types of title?
- Why do we care?
- Production Revenue Standards Act vs. Purchase and Sale Agreement
- Definitions:
  - Perfect Title vs. Marketable/Merchantable Title vs. Defensible Title
- Record Title
- Perfect Title
- Marketable Title/Merchantable Title
- Defensible Title
- Examples: Marketable vs. Defensible Title

# WHY DO WE CARE?

- Satisfy: Oklahoma Production Revenue Standards Act (“Revenue Standards Act”)

(52 O.S. §§ 570.1 to 570.15)

**OR**

- Satisfy: Purchase and Sale Agreement (“PSA”)

# REVENUE STANDARDS ACT

- Suspended Proceeds Produces:
- 12% (Marketable Title)
  - ***“Except as otherwise provided in paragraph 2 of this subsection, where proceeds from the sale of oil or gas production or some portion of such proceeds are not paid prior to the end of the applicable time periods provided in this section, that portion not timely paid shall earn interest at the rate of twelve percent (12%) per annum to be compounded annually, calculated from the end of the month in which such production is sold until the day paid.” (52 O.S. § 570.10 D.1)***
- 6% (Un-Marketable Title)
  - ***“Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of six percent (6%) per annum to be compounded annually, calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.” (52 O.S. § 570.10 D.2a)***





**2018 AMENDMENTS TO:  
“PRODUCTION REVENUE STANDARDS ACT”**

**(520.5 § 570.10 - November 1, 2018)**

**PART I - Partially “Marketable”**

**(570.10.B.4)**

- 4. “Any delay in determining the persons legally entitled to proceeds from production caused by unmarketable title shall not affect payments to persons whose title is marketable, or that portion of a person’s interest which is marketable.”**

**2018 AMENDMENTS TO:  
“PRODUCTION REVENUE STANDARDS ACT”**

**(520.5 § 570.10 - November 1, 2018)**

**PART II - 6% vs. PRIME  
(570.10.D.2.a)**

- 2. a. “Where such proceeds are not paid because the title thereto is not marketable, such proceeds shall earn interest at the rate of (i) six percent (6%) per annum to be compounded annually for time periods prior to November 1, 2018, and (ii) the prime interest rate as reported in the Wall Street Journal for time periods on or after November 1, 2018,...” [March 22, 2018 - 4.75%.]**

# 2018 AMENDMENTS TO: “PRODUCTION REVENUE STANDARDS ACT”

(520.5 § 570.10 - November 1, 2018)

## PART III - HEIRSHIP AFFIDAVIT (570.10.D.2.a)

2. a. “...calculated from the end of the month in which such production was sold until such time as the title to such interest becomes marketable or the holder has received an acceptable affidavit of death and heirship in conformity with Section 67 of Title 16 of the Oklahoma Statutes, or as set forth in subparagraph b of this paragraph. Marketability of title shall be determined in accordance with the then current title examination standards of the Oklahoma Bar Association.”

# 2018 AMENDMENTS TO: “PRODUCTION REVENUE STANDARDS ACT”

(520.5 § 570.10 - November 1, 2018)

## PART IV - INTERPLEADER ELECTION (570.10.D.2.b)

2. b. “Where marketability has remained uncured, or the holder has not been provided an acceptable affidavit of death and heirship in conformity with Section 67 of Title 16 of the Oklahoma Statutes, for a period of one hundred twenty (120) days from the date payment is due under this section, any person claiming to own the right to receive proceeds which have not been paid because of unmarketable title may require the holder of such proceeds, or the holder of such proceeds may elect, to interplead the proceeds and all accrued interest into court for a determination of the persons.”

# MARKETABLE TITLE

**In Oklahoma, the Title Standards define marketable title as: “[Title] free from apparent defects, grave doubts and litigious uncertainty, [consisting] of both legal and equitable title fairly deducible of record.”**

**Hull, et al. v. Sun Refining, 1989 OK 168, ¶9, 789 P.2d 1272 ("Marketable title is determined under §540 [now §570.10] pursuant to the Oklahoma Bar Association's title examination standards.").**

**16 O.S. App. § 1.1.**



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# TITLE STANDARDS ARE “PERSUASIVE” - PART I

- The Oklahoma Supreme Court found:

“such title examination standards and the annotations cited in support thereof to be persuasive”

Blair v. Richardson, 2016 OK 96, footnote 24, 381 P.3<sup>rd</sup> 717;  
Knowles v. Freeman, *supra* note 5



# TITLE STANDARDS ARE “PERSUASIVE” - PART II

- Also see: OK AG Opin. 79-230

¶0 “The Attorney General is in receipt of your request for an opinion wherein you ask, in effect, the following question:

“Where there is an alleged conflict between a title examination standard as promulgated by the Oklahoma Bar Association and the Oklahoma State Statutes, which should prevail?”

¶1 “Title examination standards are adopted by the Oklahoma Bar Association through its House of Delegates and are published as a part of the Oklahoma Statutes Annotated by the West Publishing Company as a convenience to the title examiners. The title examination standards are uniform interpretations for the application of the law that attorneys should use when examining titles. Title examination standards are not state statutes and, are not promulgated by the Legislature.

¶2 “It is, therefore, the opinion of the Attorney General that where there is a conflict between a title examination standard promulgated by the Oklahoma Bar Association and the Oklahoma Statutes, the statutory provisions set out by the Legislature shall prevail.”



# “DEDUCIBLE OF RECORD” - PART I

- **16 O.S. § 15: Necessity of Acknowledgment and Recording as to Validity - Acknowledge and Record as Condition for Judgment Lien to be Binding against Third Persons**

**“Except as hereinafter provided, no acknowledgment or recording shall be necessary to the validity of any deed, mortgage, or contract relating to real estate as between the parties thereto; but no deed, mortgage, contract, bond, lease, or other instrument relating to real estate other than a lease for a period not exceeding one (1) year and accompanied by actual possession, shall be valid as against third persons unless acknowledged and recorded as herein provided. No judgment lien shall be binding against third persons unless the judgment lienholder has filed his judgment in the office of the county clerk as provided by and in accordance with Section 706 of Title 12 [12-706] of the Oklahoma Statutes.”**





# “DEDUCIBLE OF RECORD” - PART II

- **16 O.S. § 16: Constructive Notice**

**“Every conveyance of real property acknowledged or approved, certified and recorded as prescribed by law from the time it is filed with the register of deeds for record is constructive notice of the contents thereof to subsequent purchasers, mortgagees, encumbrancers or creditors.”**



# RECORDING OIL & GAS LEASES

**“It is mandatory for any instrument affecting real property or an interest therein to be filed of record in the county land records to give constructive notice. This includes mineral deeds and oil and gas leases.”**

**Anson Corporation v. Corp. Commission of Oklahoma, et al, 1992 OK CIV APP 37, ¶19, 839 P.2d 676, 679**



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# RECORDING JUDGMENTS - I

- **12 O.S. §181: “When any part of real property, the subject matter of an action, is situated in any other county or counties than the one in which the action is brought, a certified copy of the judgment in such action must be recorded in the office of the county clerk of such other county or counties, before it shall operate therein as notice. It shall operate as such notice, when recorded in the office of the county clerk, in the county where it is rendered.” and**



# RECORDING JUDGMENTS - II

- **16 O.S. §31: “Any judgment or decree of a court of competent jurisdiction finding and adjudging the rights of any party to real estate or any interest therein, duly certified, may be filed for record and recorded in the office of the register of deeds, with like effect as a deed duly executed and acknowledged.”**



# RECORDING JUDGMENTS - III

- In addition, 58 O.S. §711, which is the probate code provides:

**“When a judgment or decree is made, setting apart and defining the homestead, confirming a sale, making distribution of real property, or determining any other matter affecting the title to real property, a certified copy of the same must be recorded in the office of the county clerk of the county in which the real property is situated...”**



# RECORDING FORCED POOLING ORDERS

- **“An affidavit evidencing any election for the drilling of a well under a pooling order issued pursuant to the proceedings set out in subsection (e) of Section 87.1 of Title 52 of the Oklahoma Statutes shall constitute constructive notice of the rights under the election claimed by the affiant when the affidavit is filed of record in the office of the county clerk for the county in which the lands described in the pooling order are located.”**
- **“The affidavit shall set out the name, address, if known, and election or deemed election for each pooled respondent included in the affidavit and shall have a copy of the pooling order attached. The affidavit may be filed by the operator designated in the pooling order or by any other interested party with knowledge of any election made. Filing of the affidavit shall not affect notice provided by virtue of pooling proceedings conducted by the Commission.”**

**52 O.S. § 87.4**



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# QUALITY OF TITLE

- **Perfect Title**
- **Merchantable or Marketable Title**
- **Defensible Title**



## ■ PERFECT TITLE

**“If the term ‘free from defects’ means free from all flaws or defects, both of record and in fact, we are speaking of the perfect title, and long ago Lord Chancellor Hardwick stated that ‘it is impossible in the nature of things that there should be a mathematical certainty of a good title.’”**

*Standards of Mineral Title Examination—Marketable Title vs. Defensible Title, G.D. Ashabranner, 9 Mineral Law Institute 95 (Rocky Mountain Mineral Law Institute, 1964).*



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- MARKETABLE TITLE

**“Marketable title has also been defined as title that is saleable (i.e., that which a purchaser can be required to accept) as opposed to being perfect.”**

*See Thomas P. Schroedter, Oil and Gas Title Examination and Title Curative: Marketable v. Defensible Title, Comprehensive Land Practices, an AAPL Publication at III-48 (1st ed. 1984).*



## ■ EXPECTATION

According to Kuntz: “With respect to ordinary land transactions, it is well established that, *in the absence of a specific provision on the subject, it is implied in every executor contract for the sale of land that the vendor must provide merchantable or marketable title.* The same is true in the instance of contracts for the execution or assignment of an oil and gas lease. The vendor need not have such title at the time the contract is entered into, provided that he is able to perform at the proper time and place, or before trial.”



## ■ MARKETABLE TITLE

**“merchantable title” and “marketable title” are usually used interchangeably and cover the same quality of title.**

The Oklahoma Supreme Court views the terms “merchantable title” and “marketable title” as synonyms. See Knowles v. Freeman, 1982 OK 89, ¶16 649 P.2d 532, 535 (Okla. 1982).



## ■ DEFENSIBLE TITLE

- Defensible title has generally been defined as:

***“...[S]omething less than marketable; it is imperfect on the record but is possible to defend.”***

- So, it is generally understood: “Defensible Title” is a lower standard than “perfect or marketable title.”

*See Thomas P. Schroedter, Oil and Gas Title Examination and Title Curative: Marketable v. Defensible Title, Comprehensive Land Practices, an AAPL Publication at III-48 (1st ed. 1984), note 5.*



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- **DEFENSIBLE TITLE**

**This lack of specific objective guidance concerning “defensible title” creates the requirement that one must look to any agreement between the seller and buyer for guidance (such as the Purchase and Sale Agreement - PSA).**



- **DEFENSIBLE TITLE**

**As noted in another professional article: “*The concept of a defensible title is one which, if challenged, has sufficient merit under the relevant court decisions to be successfully defended...*”**

*See e.g. Robert G. Pruitt, Jr. Mining Claim Titles for Investors and Lenders, 33 Rocky Mtn. Min. L. Inst. 9, 9.08 fn. 71 (1988).*



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## ■ DEFENSIBLE TITLE

As a recent professional article declared:

***“There is no legally or commonly accepted meaning for ‘defensible title’, so it must be defined in each asset purchase agreement.”***

Allen D. Cummings, Randy Browne *Meeting of the Minds on Title Defects*, 48 Rocky Mtn. Min. L. Inst. 27, 27.07 (2002).



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## ■ DEFENSIBLE TITLE

IF NOT “MARKETABLE”, IT DOES NOT HAVE TO BE:

- Perfect, without even minor defects;
- Marketable;
- Of record;
- Free from the need to rely on parole evidence;
- Free from the need to rely on affidavits; and
- Free from the need for litigation to prove the title is valid.





# PSA TERMS-I--DEFENDABLE

**“title which sellers can successfully defend against a claim to the contrary made by a third party, based upon industry standards in the acquisition of oil and gas properties, and in the exercise of reasonable judgment and in good faith...”.**



# PSA TERMS--II--"EITHER"

- “fairly deducible of record and/or provable title evidenced by documentation that although not constituting perfect, merchantable, or marketable title, can be successfully defended if challenged.”
- “a record or beneficial title that...”



# PSA TERMS--III--RECORD

**“clean, unencumbered, uncontested, record title to an interest in the Sellers that is (i) evidenced by instruments filed of record in accordance with the conveyancing and recording laws of the applicable jurisdiction...”**



# LITIGATION

- **Defensible title is necessarily viewed through the lens of litigation.**
- **Defensible title is, again by definition, NOT free from litigious uncertainty.**
- **By the usual definition, defensible title is that which “can be successfully defended if challenged.”**
- **Litigious uncertainty [such as a court challenge] is, by definition, expected.**



# CONCLUSION

- Defensible title, if defined in the PSA as non-record or “beneficial” or “provable title,” then it can be less than perfect or marketable title, and does not need to be provable of record.
- Instead, assuming there is a challenge (as in a lawsuit), such title needs to simply be provable by recorded and/or non-recorded documentation:
- Including affidavits of heirship, unrecorded conveyances, joint interest billings, forced pooling affidavits, and other practical proof which is shown to be usually relied on in the industry.



# HYPOTHETICAL#1A\*

## Joint Tenants/Life Tenants

- Marketable Title: Judicial proceedings conclusively establishing the death of the interest owner have been conducted and the applicable order or decree has been recorded.
- Defensible Title: The joint tenant/life tenant is deceased, causing the interest to terminate by operation of law, and no estate tax is due. But, nothing has been recorded.

\* Examples provided by John Myles in-house counsel for Walter Duncan Oil, LLC (Used with permission).



# HYPOTHETICAL#1B

## Joint Tenants/Life Tenants

- **Marketable Title:** Judicial proceedings conclusively establishing the death of the interest owner have been conducted and the applicable order or decree has been recorded.

*[Affidavit terminating the interest that complies with 58 O.S. Section 912.C has been recorded.]*

- **Defensible Title:** The joint tenant/life tenant is deceased, causing the interest to terminate by operation of law, and no estate tax is due. But, nothing has been recorded.

*[Seller will provide a “no tax due” letter from the OTC.]*



# HYPOTHETICAL#2

## Intestate Decedent

- **Marketable Title**: The applicable order or decree has been recorded for more than ten (10) years. (OR)  
No proceedings have been conducted, but an affidavit of death and heirship that complies with TES \_\_\_ has been recorded for more than ten (10) years.
- **Defensible Title**: Judicial proceedings have been concluded but the final decree has not been recorded for more than ten (10) years, if at all.





# HYPOTHETICAL#3

## Mortgages

- Marketable Title: The record contains a properly executed release. (OR)

It can be conclusively established from facts contained in the record that the mortgage is unenforceable pursuant to 46 O.S. Section 301.

- Defensible Title: There is a properly executed release, but it has not been recorded. (OR)

No release has been executed, but the underlying obligation has been paid in full. (OR)

The mortgagee is still alive/in existence, acknowledges payment of the debt, and is willing to execute and deliver a release.



# HYPOTHETICAL#4

## Corporate Successorship

- Marketable Title: A certified copy of the Articles of Merger/Name Change are included in the record.
- Defensible Title: Applicable articles of merger/name change are obtainable from the applicable Secretary of State's office and recorded.



# HYOTHETICAL#5

## Trust (juridicial relationship) as Seller

- **Marketable Title:** Title is held by “John Smith, as Trustee of the John Smith Revocable Trust dated January 1, 2009”, and the conveyancing instrument is executed in that manner.
- **Defensible Title:** John Smith has been succeeded as trustee of the trust and the current trustee(s) is able and willing to provide a copy of the trust agreement and documentation evidencing the death/resignation of John Smith and his succession.



# HYPOTHETICAL#6

## Trust (as an entity) as Seller

- **Marketable Title:** Title is held by “The John Smith Revocable Trust dated January 1, 2009”, the record contains a Memorandum of Trust that complies with 58 O.S. Section 175.6a, and the conveyancing instrument is executed by the current trustee(s) as established by the Memorandum.
- **Defensible Title:** John Smith has been succeeded as trustee of the trust and the current trustee(s) is able and willing to provide a Memorandum of Trust that complies with 58 O.S. Section 175.6a.



# SUGGESTED READINGS

- Allen D. Cummings, Randy Browne *Meeting of the Minds on Title Defects*, 48 Rocky Mtn. Min. L. Inst. 27, (2002).
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- Benjamin F. Hackett, *Whistling Past the Graveyard to the Tune of Defensible Title*, Mineral Lawyers Society of Oklahoma City, October 20, 2005.
- Kraettli Q. Epperson, *Marketable Title: What is it? And Why Should Mineral Title Examiners Care?*, The 2007 Rocky Mountain Mineral Law Foundation Institute, Westminster, Colorado, September 13, 2007.
- Eugene Kuntz, *A Treatise on the Law of Oil and Gas*, Anderson Publication Company, 1989.



## **AUTHOR'S 10 MOST RECENTLY PUBLISHED OBJ ARTICLES**

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