
KANSAS OIL AND GAS LAW: DEFINING THE DUTY BETWEEN PARTICIPANTS IN A JOINT OPERATING AGREEMENT

[*AMOCO PRODUCTION CO. V. WILSON*, 976 P.2D 941
(KAN. 1999)]

I. INTRODUCTION

Attempting to define the relationship between operators and non-operators in a joint operating agreement (JOA) has become a new trend in oil and gas litigation.¹ In *Amoco Production Co. v. Wilson*,² the Kansas Supreme Court established the standard that will be applied to oil and gas operating agreements in Kansas.³ The court found that a duty of fair dealing was required from both parties and that this requirement placed the parties in a fiduciary-like relationship.⁴ Under this newly-established duty, individuals entering into a JOA for the development of oil and gas leases may no longer treat each other as adversaries.⁵ Instead, they must act with an attitude of full disclosure, fair dealing, and good faith.⁶ In the past, a definite standard between the operator and non-operator of an oil and gas interest had not been present in Kansas.⁷ While the court was reluctant to “specifically” state that a fiduciary duty exists, it did mandate that the operator treat the non-operator in a manner that is consistent with fiduciary principles.⁸

1. Ernest E. Smith, *Joint Operating Agreement Jurisprudence*, 33 WASHBURN L.J. 834, 835 (1994) (noting significant developments in the jurisprudence of interpreting and defining the joint operating agreements because of the use of the standardized joint operating agreement forms).

2. 976 P.2d 941 (Kan. 1999).

3. See *Amoco*, 976 P.2d 941 (adopting, for the first time, a standard that will be applied to all joint operating agreements regardless of the form used).

4. *Id.* at 950-51.

5. *Id.* at 950-55. The Kansas Supreme Court relied upon the Arkansas Supreme Court decision in *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 668 S.W.2d 16 (Ark. 1984), which cited the oft-quoted opinion of Chief Justice Cardozo in *Meinhard v. Salmon*, 164 N.E. 545 (N.Y. 1928) that required joint adventurers to act as co-partners, thus owing a duty of “finest loyalty” instead of vigorous competition.

6. *Amoco*, 976 P.2d at 951-55.

7. *Id.* at 951, 955. The prior Kansas cases addressing this issue include *First National Bank & Trust Co. v. Sidwell Corp.*, 678 P.2d 118 (Kan. 1984) and *Foley & Loomis v. Phillips*, 508 P.2d 975 (Kan. 1973). Although these cases did not deal directly with the relationship between joint operators, both cases were relied upon by the court and found to be consistent with this opinion. *Amoco*, 976 P.2d at 951-52, 955.

8. *Amoco*, 976 P.2d at 951-52, 955. Because of the reluctance of the court to consistently use the term fiduciary, this article will describe the duty as a fiduciary-like duty. The elements of a fiduciary relationship are noted by the court and the opinion cites case law that defines joint

The Kansas Supreme Court, in establishing the fiduciary-like relationship, drastically changed the way those participating in the oil and gas industry are required to deal with one another.⁹ The significance of this ruling cannot be limited to oil and gas ventures, as the establishment of a fiduciary-like relationship in these ventures will also spill out into the realm of general contract law and business associations. The most amazing aspect of this striking new precedent is that neither party requested that the court establish such a relationship.¹⁰ Both the Appellants¹¹ and the Appellee¹² felt that Kansas case law, and case law drawn from other oil and gas producing states, would cause the case to be decided in their favor without the establishment of such a duty.

When the Kansas Supreme Court established this fiduciary-like duty it struck a blow for equality between the non-operators and operators in these type of agreements.¹³ Only time will tell how the lower courts will apply this decision.

II. CASE DESCRIPTION

In August of 1980, a JOA for the development of Section 35, Township 29 South, Range 40 West in Stanton County, Kansas was signed by Amoco Production Company and Charles Wilson, Jr.¹⁴ This agreement was a joint venture with the purpose of exploring and developing all the rights on this section of land "below the base of the Hugoton formation."¹⁵ Charles Wilson, Jr., a sophisticated oil and gas business investor, held a valid lease on the South 1/2 of this section.¹⁶ Amoco Production Company purported to hold a valid oil and gas lease for the North 1/2 of this section.¹⁷ The agreement specified that Amoco would serve as the operator and Charles Wilson, Jr. as the non-

venture and fiduciary relationships. *Id.*

9. *Amoco*, 976 P.2d at 955. See Smith, *supra* note 1, at 835; see also Henry J. Eyring, Comment, *The Oil and Gas Unit Operator's Duty to Nonoperating Working Interest Owners*, 1987 BYU L. REV. 1293, 1294-97 (1987) (outlining the judicial struggle in making interpretations regarding duty); Guy E. Wall, *Joint Oil and Gas Operations in Louisiana*, 53 LA. L. REV. 79, 97-99 (1992) (noting the impact of the duty decision in the state of Louisiana).

10. Appellee's Motion for Rehearing at 2-3, *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999) (No. 96-77999-A). A careful reading of the briefs submitted by the parties indicates that no specific request for the establishment of a fiduciary relationship was made. Amoco strongly emphasized this point in a motion for rehearing that was denied. *Id.*

11. Brief of Appellant Wilson at 41-42, *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999) (No. 99-77999).

12. Brief of Appellee at 43-46, *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999) (No. 99-77999).

13. See *Amoco*, 976 P.2d at 952 (noting that the operator does not hold a clear position of dominance over the non-operator, but instead the parties are viewed more as co-partners or joint venturers).

14. *Id.* at 943.

15. *Id.*

16. *Id.*

17. *Id.*

operator.¹⁸ Both parties would share equally in the profits and losses from mineral production “below the base of the Hugoton formation.”¹⁹ The Hugoton formation is at a depth of 3000 feet and the agreement applied to all minerals found below that depth.²⁰

In reality, the interest that Amoco had purchased from Warren Plummer in 1944 had a depth limitation that covered only the rights from the Hugoton down to 3,400 feet.²¹ Amoco was aware of the depth limitation due to a previously obtained title opinion, but did not indicate to Wilson that it owned anything less than all rights below the Hugoton base.²² The operating agreement stated that each party held title to the area described in the agreement and neither party was required to obtain a title opinion to verify such claims.²³

Shortly after the agreement, the parties jointly developed a producing gas well from the Panoma Council Grove formation, which is below the Hugoton formation but above the 3400 feet limitation.²⁴ After the 1980 JOA was entered into, Mr. Wilson assigned leasehold interests to UMC Petroleum Corporation, Charles Wilson, Jr. Inc., Billy Powell, and Barbara Powell, the other members of the suit listed as appellants.²⁵

In 1995, Amoco obtained a lease covering the remaining interest in the North 1/2 of Section 35 from Parker & Parsley Lease Company.²⁶ Upon obtaining this lease, Amoco contacted Mr. Wilson to inquire about his interest in a farmout agreement assigning to Amoco his rights to depths below 3400 feet for the South 1/2 of the section.²⁷ Under a farmout agreement, Mr. Wilson would assign a portion of his acreage to Amoco in exchange for Amoco performing drilling operations.²⁸

Mr. Wilson indicated that the section was covered by a JOA and referred to the description of the unit area from the 1980 agreement.²⁹ The unit area was described in Exhibit A of the 1980 agreement as “All rights below the base of the Hugoton.”³⁰ Amoco insisted that since it acquired the lease from Parker & Parsley after the JOA, that the

18. *Id.* at 947.

19. *Id.*

20. *Id.*

21. *See* Amoco Prod. Co. v. Wilson, No. 96-C-4, at 2 (D. Ct. Stanton County Oct. 31, 1996) (noting that there was in fact a limitation on the interest that Mr. Plummer received in 1944 and the rights that he did not own were held by Santa Fe Land Development).

22. *See* Amoco, 976 P.2d at 943 (pointing out that shortly after obtaining the lease Amoco had a title opinion done that revealed that there was a limitation on the lease from Mr. Plummer).

23. *Id.* at 946.

24. Brief of Appellee, *supra* note 12, at 2.

25. Brief of Appellant Wilson, *supra* note 11, at 8.

26. Amoco, 976 P.2d at 943-44.

27. *Id.* at 944.

28. *See* JOHN S. LOWE, OIL AND GAS LAW 369-71 (3d ed. 1995) (giving a basic description of the terms of a farmout agreement).

29. Amoco, 976 P.2d at 944.

30. *Id.* at 947.

interest was not subject to the prior operating agreement.³¹ Amoco subsequently completed multiple producing oil wells on the designated land at a depth below 5,800 feet in the St. Louis formation.³² Litigation quickly followed the discovery of these highly profitable wells.³³ Wilson demanded to participate in the production of the newly developed wells, asserting they were subject to the existing operating agreement.³⁴ Amoco denied this request and sought a declaratory judgment from the District Court of Stanton County.³⁵ The declaratory judgment was granted and subsequently upheld on appeal.³⁶

III. BACKGROUND

Joint ownership of an oil and gas interest can be created through several factual scenarios.³⁷ The most common is when owners of respective oil and gas leases pool their interests³⁸ to meet a standard spacing unit that is legislatively prescribed.³⁹

Furthermore, another common reason for joint ownership is the economic risk of an unprofitable well.⁴⁰ Mineral depletion has required investors to drill deeper than ever before to obtain production.⁴¹ This type of drilling operation is an expensive undertaking.⁴² As a result of these costs even the largest companies will seek a joint investor to share the risk and cost of drilling.⁴³ These risks are often leveraged by sharing them through joint development agreements, the most common being the JOA.⁴⁴

When investors or operators are considering entering into a JOA there are numerous issues to be considered.⁴⁵ A well designed JOA will

31. *Id.* at 944.

32. *Id.*

33. *Id.* at 941.

34. *Id.* at 944.

35. *Id.*

36. *Id.*

37. See EUGENE O. KUNTZ ET AL., OIL AND GAS LAW: CASES AND MATERIALS 622 (3d ed. 1999) (providing a basic overview of joint ownership and the issues created as a result of multiple ownership).

38. Pooling is defined as, "bringing together, either by voluntary agreement or by order of administrative agency small tracts or fractional interests to drill a well." LOWE, *supra* note 28, at 437-38.

39. These pooled units are legislatively prescribed in order to encourage conservation and help thwart the waste that is caused by over drilling. *Id.*

40. See KUNTZ ET AL., *supra* note 37, at 622 (noting the existence of a constant market motivation to encourage the joint ownership of oil and gas interests).

41. See George W. Hazlett, *Drafting of Joint Operating Agreements*, 3 ROCKY MTN. MIN. L. INST. 277 (1957) (discussing how minerals that were available at lower depths have been removed and current drilling practices require deeper drilling operations).

42. *Id.*

43. See KUNTZ ET AL., *supra* note 37, at 622 (stating the necessity of joint ownership because the failure of one major drilling operation can seriously jeopardize the financial stability of an investor).

44. Hazlett, *supra* note 41, at 277.

45. KUNTZ ET AL., *supra* note 37, at 622.

clearly define each of these issues and will cater to the individual needs of the parties.⁴⁶ Examples of issues that need to be addressed include: who will act as the operator, what acreage will be covered by the agreement, the distribution of production profits, and how the costs of exploration will be divided among the parties.⁴⁷ Failure to properly address any of these important issues could mire the parties of the JOA in expensive and lengthy litigation.⁴⁸ One oil and gas author has cautioned drafters by stating that the cost of correctly drafting “a thousand different agreements may be nominal in comparison to the cost to their client of a major deficiency” leading to litigation.⁴⁹

JOAs are commonly created on a standardized form that the parties modify.⁵⁰ The American Association of Petroleum Landmen (A.A.P.L.)⁵¹ first developed a model form operating agreement in 1956.⁵² This standardized form was created in an attempt to give basic guidance to the attorneys that are involved in negotiation of the development agreements between operators and non-operators.⁵³

Generally, the operator will be responsible for the day-to-day production duties and the non-operator will only share in the costs and profits from the production.⁵⁴ The operator traditionally is a sophisticated party with extensive experience in the oil and gas industry. Therefore, the JOA will generally grant the operator broad rights in production decisions.⁵⁵ Typically, operators have a large financial investment in the development and production process.⁵⁶ Thus, they will commonly make decisions that will benefit both parties.⁵⁷ It is when the interests of the operator and the non-operator diverge that the issue of duty arises between the parties.⁵⁸

Kansas is not the only state which has faced the dilemma of defining such a relationship. Most other oil and gas producing states have also dealt with conflicts in the relationship between operators and non-operators, and more specifically, the duty owed to one another

46. Hazlett, *supra* note 41, at 279-80.

47. See KUNTZ ET AL., *supra* note 37, at 622 (explaining the decisions that must be made when an oil and gas agreement is formed); Eyring, *supra* note 9, at 1293-94.

48. Amoco Prod. Co. v. Wilson, 976 P.2d 941, 941 (Kan. 1999). When one considers the attorney fees and legitimate costs that were expended by all of the parties to this litigation, it readily shows the importance of properly drafting a joint operating agreement.

49. See Hazlett, *supra* note 41, at 279-81 (cautioning investors to pay attorneys to properly draft joint operating agreements even if modification of the standard forms is required).

50. *Id.* at 278.

51. “A.A.P.L.” is the American Association of Petroleum Landmen.

52. KUNTZ ET AL., *supra* note 37, at 623.

53. Hazlett, *supra* note 41, at 278-80.

54. Eyring, *supra* note 9, at 1293.

55. KUNTZ ET AL., *supra* note 37, at 623.

56. *Id.*

57. *Id.*

58. Hazlett, *supra* note 41, at 280.

based on the terms of the JOA.⁵⁹ This litigation has produced a variety of results.⁶⁰

First, it should be noted that several other states readily employ the interpretation of a fiduciary relationship between operators and non-operators. The Kansas Supreme Court in *Amoco* often quoted the Arkansas Supreme Court's decision in *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*⁶¹ *Texas Oil* was factually similar to the Kansas case in that the non-operator requested that the leases, later acquired by the operator, also be subject to the agreement.⁶² The non-operator originally contributed leases for the supervision of the operator for development, but the operator discovered the contributed leases were executed by the wrong individual.⁶³ Following this discovery, the operator leased the land from the proper individual and did not provide an opportunity for the non-operator to participate in the transaction.⁶⁴ The court held in favor of the non-operator and required the operator to share the new leases based upon the JOA.⁶⁵ The court found that the JOA gave rise to "a relationship of trust and confidence"⁶⁶ between the operator and non-operator and thus required "a duty of fair dealing."⁶⁷

A similar controversy arose in Michigan when it was determined that a non-operator did not own a twenty-five percent interest as he believed, and the remainder of the interest was later obtained by the operator. The Court of Appeals of Michigan, found that the operator was a fiduciary to the non-operator because a joint venture was created by the JOA.⁶⁸ Therefore, a duty between the operator and the non-operator was created upon entering into a JOA.⁶⁹

The Tenth Circuit, in the case of *Dime Box Petroleum Co. v. Louisiana Land and Exploration Co.*,⁷⁰ applied Colorado law in a matter where the non-operator claimed breach of fiduciary duty.⁷¹ The court determined that the operator would owe the non-operator a fiduciary duty because of the joint venture created by the JOA.⁷²

59. See generally *Dime Box Petroleum Corp. v. Louisiana Land and Exploration Co.*, 938 F.2d 1144 (10th Cir. 1991); *Texas Oil & Gas Corp. v. Hawkins Oil & Gas, Inc.*, 668 S.W.2d 16 (Ark. 1984).

60. See generally *Dime Box*, 938 F.2d at 1144; *Schmude Oil Co. v. Omar Operating Co.*, 458 N.W.2d 659 (Mich. 1990); *Texas Oil*, 668 S.W.2d at 16.

61. *Amoco Prod. Co. v. Wilson*, 976 P.2d 941, 951-52 (Kan. 1999) (citing *Texas Oil*, 668 S.W.2d at 16).

62. *Texas Oil*, 668 S.W.2d at 16.

63. *Id.*

64. *Id.*

65. *Id.* at 17.

66. *Id.*

67. *Id.*

68. *Schmude Oil Co. v. Omar Operating Co.*, 458 N.W.2d 659, 666 (Mich. 1990).

69. *Id.*

70. 938 F.2d 1144 (10th Cir. 1991).

71. *Id.* at 1145-46.

72. *Id.* at 1147. This case provided the following three elements required under Colorado law for establishment of joint ventures: "(1) a joint interest in property; (2) an express or implied

However, since the JOA included an exculpatory clause, which was found to eliminate the fiduciary duty, no fiduciary duty was found to exist.⁷³ Thus, the Tenth Circuit was willing to make a parallel between a JOA and a joint venture, but the exculpatory clause relieved the operator of any liability that did not rise to the level of gross conduct or willful negligence.⁷⁴

Had the Kansas court, in *Amoco*, used the reasoning found in *Dime Box*, it would have been able to rule for Amoco, the operator, based on the JOA that stated no mining partnership was formed.⁷⁵ In fact, Amoco made such an argument before the Kansas Supreme Court in its motion for rehearing.⁷⁶

In contradiction, several other states have ruled that a JOA does not create a joint venture or fiduciary duty.⁷⁷ These states include Oklahoma and Texas, both of which have decades of well-developed mineral law.⁷⁸

The Texas courts have held that a JOA does not create a "special relationship"⁷⁹ that requires "a duty of good faith and fair dealing."⁸⁰ Later the Tenth Circuit, while applying Texas law, using a similar line of reasoning to *Dime Box*,⁸¹ found that the wording in the exculpatory clause of the JOA limited the parties relationship and that a duty existed only to avoid conduct that was grossly negligent or represented willful misconduct.⁸² In accordance with Texas court opinions, the Supreme Court of Oklahoma noted that "[a]n operating agreement in itself does not create a mining partnership."⁸³

The Tenth Circuit revisited the issue in 1993, this time applying Wyoming law, and again determined that if a JOA creates a joint venture or a fiduciary duty, it must be specifically spelled out by the

agreement to share in the losses or profits of the venture; and (3) conduct showing cooperation in the venture." *Id.* at 1146-47. Therefore, a joint venture and the absence of an exculpatory clause would create a fiduciary relationship. Although the elements of a joint venture were not specifically addressed by the court in this manner, the necessary elements in Kansas are in the most basic form joint ownership, joint operation, and an express or implied agreement. Carla L. Hand, *The Joint Venture - - What it is and How to Recognize its Features*, 52 J. KAN. B. ASS'N 227, 227-29 (1983).

73. *Dime Box Petroleum Corp. v. Louisiana Land and Exploration Co.*, 938 F.2d 1144, 1147-48 (10th Cir. 1991).

74. *See id.*; *see also* *Agland, Inc. v. Koch Truck Line, Inc.*, 757 P.2d 1138 (Colo. Ct. App. 1988); *Fulenwider v. Writer Corp.*, 544 P.2d 408, 410 (Colo. Ct. App. 1975).

75. *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999).

76. Appellee's Motion for Rehearing, *supra* note 10, at 5-6.

77. These states were heavily cited and relied upon by the appellee Amoco in an attempt to persuade the court to allow a rehearing. *Id.* at 7, 8.

78. *See Stine v. Marathon Oil Co.*, 976 F.2d 254 (5th Cir. 1992).

79. *Crowder v. Tri-C Resources, Inc.*, 821 S.W.2d 393 (Tex. Ct. App. 1991).

80. *Id.*

81. 938 F.2d at 1147, 1148.

82. *Stine*, 976 F.2d at 260.

83. *Sparks Bros. Drilling Co. v. Texas Moran Exploration Co.*, 829 P.2d 951, 953 (Okla. 1991).

parties and not implied by their actions.⁸⁴ With nearly all of the major oil and gas producing states previously determining this issue, it was only a matter of time before a similar controversy developed in Kansas.⁸⁵

IV. ANALYSIS

A. *Supreme Court Findings*

The Kansas Supreme Court reversed the decisions of the district court and the Kansas Court of Appeals. The findings of the supreme court that establish precedent in the field of oil and gas litigation were derived from two separate sources.⁸⁶ The first source of the findings is rather typical in that they were submitted, briefed, and argued by the individual parties.⁸⁷ The second source of the findings appears to be supplemental research done by supreme court Justice Larson that neither party submitted, briefed, or argued.⁸⁸ First, the matters argued and subsequently decided by the court will be examined.

i. *The WHEREAS Clause*

The printed section of the JOA began with the words "WHEREAS, the parties to this agreement are owners of oil and gas leases covering . . . the tracts of land described in Exhibit 'A' . . ." ⁸⁹ The meaning and importance of this statement was contested by the parties. Amoco contended this present tense vernacular plainly indicated a desire to refer to leases in possession at the time of the signing.⁹⁰ Thus, it would not encompass the newly acquired land.⁹¹

UMC Petroleum, conversely, argued that the whereas clause was not inconsistent with the meaning of the remainder of the JOA.⁹² As a result, the clause should not be given such weight simply because it was written in the present tense.⁹³ More importantly, Amoco was aware of

84. See *Connaghan v. Maxus Exploration Co.*, 5 F.3d 1363, 1365 (10th Cir. 1993) (applying Wyoming law).

85. See Ernest E. Smith, *Duties and Obligations Owed by an Operator to Non-Operators, Investors, and Other Interest Owners*, 32 ROCKY MTN. MIN. L. INST. 12-1 (1986) (discussing different developments in oil and gas producing jurisdictions).

86. *Amoco Prod. Co. v. Wilson*, 976 P.2d 941, 953-55 (Kan. 1999).

87. Brief of Appellant Wilson, *supra* note 11, at 1; Brief of Appellant UMC at 1, *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999) (No. 99-77999); Brief of Appellee, *supra* note 12, at 1. The arguments that were asserted by the parties were all addressed by the supreme court and either accepted or rejected. *Amoco*, 976 P.2d 941, 947-50.

88. Appellee's Motion for Rehearing, *supra* note 10, at 1-3. This research lead Justice Larson to rely upon several articles published in the *Rocky Mountain Mineral Law Institute*.

89. *Amoco*, 976 P.2d at 945.

90. *Id.* at 949.

91. *Id.*

92. Reply Brief of Appellant UMC Petroleum at 3-4, *Amoco Prod. Co. v. Wilson*, 976 P.2d 941 (Kan. 1999) (No. 99-77999).

93. *Id.* at 14-17.

its limited interest before the JOA was signed.⁹⁴ Thus, UMC Petroleum contended that this clause was used only referring to the leases intended to be developed.⁹⁵

The court decided that the mere use of the word “whereas” in the opening paragraph of the printed form did not limit the agreement to cover only those leases in existence at the time the agreement was signed by the parties.⁹⁶ The condemning fact for Amoco was that the “whereas” clause referred to Exhibit A to define the interests to be covered, which contained the contradictory “[a]ll rights below the base of the Hugoton” language.⁹⁷

ii. Failure of Title

The next issue to be considered by the court was the failure of title contentions made by Amoco. Amoco sought to place the burden of the mistake regarding title on the Plummers by arguing that when Amoco received the deed from the Plummers it appeared on its face to convey title with no depth limitation.⁹⁸ The court, however, rejected this argument because Amoco had knowledge of the depth limitation on the lease from a previously obtained title opinion.⁹⁹

The court also rejected Wilson’s theory of interpretation that “one cannot lose what one never had” regarding ownership of the deeper lease.¹⁰⁰ The court reached this decision based on the fact that when the controversy arose Amoco had possession of the Parker & Parsley lease.¹⁰¹

The court then briefly set out the purposes of a failure of title provision relying on the writings of Professor Ernest Smith.¹⁰² The failure of title provision is created to properly protect an innocent third party from one who is not a member of the JOA gaining control of a leasing interest.¹⁰³ Since Wilson was a member of the agreement, this argument was inapplicable.¹⁰⁴ The court was unwilling to allow Amoco to hide behind such a provision and benefit from misleading behavior.¹⁰⁵

94. *Amoco*, 976 P.2d at 948.

95. Reply Brief of Appellant UMC Petroleum, *supra* note 92, at 4.

96. *Amoco*, 976 P.2d at 953.

97. *Id.*

98. Brief of Appellee, *supra* note 12, at 1.

99. *Amoco*, 976 P.2d at 953.

100. *Id.* at 953-54.

101. *Id.*

102. *Id.* at 954. It should be noted that Kansas has a statute that deals with after acquired title. KAN. STAT. ANN. § 58-2207. There is also common law doctrine that will grant after-acquired title. For further discussion of these concepts see DAVID E. PIERCE, KANSAS OIL AND GAS HANDBOOK § 6.27 (1st ed. 1986) for a greater description of Kansas law and the common law doctrine.

103. *Amoco*, 976 P.2d at 954.

104. *Id.*

105. *Id.*

The court also agreed with Wilson's and UMC Petroleum's contention that the onus was not on Mr. Wilson to examine the title because in the agreement title examinations were deemed unnecessary.¹⁰⁶ Instead, it was Amoco's responsibility to ensure it possessed ownership of the land described.¹⁰⁷

iii. Definition of the Unit Area Provision

The court readily embraced the contention of UMC and Wilson that Exhibit A, defining the unit area, should be the controlling provision.¹⁰⁸ Exhibit A cited the unit area to equal "[a]ll rights below the base of the Hugoton."¹⁰⁹ This was the exact provision that was deemed to be of lesser importance by the district court and the Kansas Court of Appeals.¹¹⁰ The supreme court, on the other hand, found Exhibit A of "utmost importance" because the language of the agreement regarding the unit area was defined by Exhibit A.¹¹¹

Even more condemning, Amoco, the drafter of the JOA, chose to define the "Interests of Parties" by a reference to Exhibit A.¹¹² The Kansas Supreme Court believed this "clearly show[ed] the importance to be given to this exhibit."¹¹³ Primarily using this provision, the Kansas Supreme Court found that Appellants Wilson and UMC Petroleum should be allowed to share in the benefits of the production from the newly acquired lease.¹¹⁴

iv. Joint Venture and Fiduciary Duty Concept

If the opinion was limited only to the findings above, it would have limited weight and a case specific impact.¹¹⁵ However, Justice Larson's opinion extended beyond the parties briefs to include personal research in establishing the joint venture and fiduciary duty concept.¹¹⁶ The closest statement by a party calling for such a finding was located in Appellant Wilson's brief.¹¹⁷ Citing past case law,¹¹⁸ Wilson contended that the relationship with Amoco required Amoco to "deal fairly and in good faith in every contract to protect the reasonable expectations of

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Amoco Prod. Co. v. Wilson*, No. 96-C-4, at 5 (D. Ct. Stanton County Oct. 31, 1996).

111. *Amoco*, 976 P.2d at 954.

112. *Id.*

113. *Id.*

114. *Id.* at 955.

115. David E. Pierce, *Kansas Supreme Court Applies Joint Venture Analysis to Operating Agreement*, OIL, GAS & MINERAL LAW SECTION (Kansas Bar Association, Topeka, KS), June 1999, at 4.

116. Appellee's Motion for Rehearing, *supra* note 10, at 2-3.

117. Brief of Appellant Wilson, *supra* note 11, at 40-42.

118. *Wayman v. Amoco Oil Co.*, 923 F.Supp. 1322, 1355 (D. Kan. 1996).

the parties.”¹¹⁹ The Kansas Supreme Court fully embraced this argument and was willing to extend and amplify it.¹²⁰

The extension and amplification was finding a fiduciary-type obligation that is inherently present in a JOA unless there was a clear disclaimer in the agreement.¹²¹ The JOA clearly indicated that a mining partnership was not created, but the court found this language still did not prevent establishing the fiduciary type obligation.¹²² This argument was neither fully suggested by Wilson or UMC Petroleum in their briefs or in the oral argument phase.¹²³ Wilson did cite one case that the supreme court relied upon to establish this duty. In *First National Bank & Trust Co. v. Sidwell*,¹²⁴ the existence of the joint venture relationship was discussed, but Wilson did not heavily rely on such a position from this case.¹²⁵ This case was cited by Wilson because the parties in *Sidwell* were joint adventurers and could expect fair dealing and honest disclosure from one another.¹²⁶

The court used the language of this case to establish the fiduciary-type duty.¹²⁷ Professor David Pierce¹²⁸ remarks that Justice Larson’s “basic syllogism is: a joint operating agreement creates a joint venture, a joint venture creates fiduciary duties, therefore a joint operating agreement creates fiduciary duties.”¹²⁹ It should be pointed out that the court did not specifically state it was establishing a fiduciary duty.¹³⁰ Instead it requires “full, fair, open, and honest disclosure of everything affecting the relationship”¹³¹ because of a “close relationship of trust and confidence.”¹³² It would be difficult to interpret such a statement in any way other than as an establishment of a fiduciary duty.¹³³

This duty can only be avoided in Kansas through detailed, specific contractual language which, without a doubt, establishes the rights and obligations of both the operator and the non-operator.¹³⁴

v. Appellee’s Objection

Subsequent to the court’s finding of a joint venture leading to a

119. *Amoco*, 976 P.2d at 948.

120. *Id.* at 953-55.

121. *Id.* at 955.

122. *Id.*

123. Brief of Appellant Wilson, *supra* note 11, at 11; Brief of Appellant UMC Petroleum, *supra* note 87, at 8.

124. 678 P.2d 118 (Kan. 1984).

125. Brief of Appellant Wilson, *supra* note 11, at 40.

126. *First National Bank & Trust Co. v. Sidwell*, 678 P.2d 118, 126 (Kan. 1984).

127. *Amoco*, 976 P.2d at 955.

128. Professor of Law, Washburn University School of Law.

129. Kansas Bar Association, *supra* note 115, at 4.

130. *Id.*

131. *Amoco*, 976 P.2d at 955.

132. *Id.*

133. Kansas Bar Association, *supra* note 115, at 4.

134. *Id.*

fiduciary type duty, Amoco filed a motion for rehearing with the Kansas Supreme Court.¹³⁵ It stated that such a finding was improper because neither counsel was given an opportunity to brief or argue such finding.¹³⁶ Amoco's counsel cited *Johnson v. Kansas Neurological Institute*,¹³⁷ a case in which the Kansas Supreme Court criticized the Kansas Court of Appeals for acting in a similar manner.¹³⁸ In *Johnson*, the supreme court stated that it was unacceptable to make such a determination without allowing counsel to properly brief the issue in that case.¹³⁹ The argument of Amoco's counsel fell on deaf ears as the motion for rehearing and a request to brief such an issue were denied.¹⁴⁰ The establishment of this duty creates and opens a whole new area for oil and gas attorneys to consider.¹⁴¹

B. Significance of the Holding

When Justice Larson delivered the opinion of the Kansas Supreme Court in this decision, he changed the way every JOA developed in Kansas *should* be written.¹⁴² In equating the entry into a JOA to the creation of a joint venture the court brought fiduciary-like duties into the equation, making the operator fully accountable to the non-operator.¹⁴³ This will apply not only in subsequent land acquisitions, as was the situation in this case, but will also spill into the multitude of other matters governed by JOAs, such as profit sharing, drilling decisions, and marketing and production matters.¹⁴⁴

In interpreting the relationship between the parties, the court heavily relied, once again, upon the writings of Professor Ernest Smith.¹⁴⁵ Professor Smith addressed several important factors for the drafting attorney to remember when considering the duty between the operator and the non-operator in the drafting phase.¹⁴⁶

First, the people entering into JOAs are not typical landowners entering into a mineral lease, but generally are experienced in the sophisticated business of oil and gas transactions.¹⁴⁷ These people are represented by attorneys that are well capable of drafting a JOA that

135. Appellee's Motion for Rehearing, *supra* note 10, at 1.

136. *Id.* at 2-3.

137. 727 P.2d 912 (Kan. 1986).

138. *Id.*

139. *Id.* at 916.

140. Amoco Prod. Co. v. Wilson, No. 96-77999-AS (Kan. Apr. 27, 1999) (order denying motion for rehearing).

141. Kansas Bar Association, *supra* note 115, at 4.

142. *Id.*

143. *Id.* at 5.

144. Amoco Prod. Co. v. Wilson, 976 P.2d 941, 950-55 (Kan. 1999).

145. Distinguished Professor of Law, University of Texas.

146. Smith, *supra* note 1, at 851.

147. *Id.*

sets the standard for the duty of the operator to the non-operator.¹⁴⁸ It does not appear that the Kansas Supreme Court is unwilling to allow the standard of care or duty required to be the subject of the agreement, but it was unwilling to allow basic statements, like the parties are not forming a mining partnership, to control the relational duties between an operator and a non-operator.¹⁴⁹ Drafting an agreement that limits the duty between the parties of a JOA may require more time and attorney fees than some clients are willing to accept.¹⁵⁰ Yet, the drafting attorneys must carefully make the clients aware of the pitfalls of a poorly drafted agreement.¹⁵¹

Next, Professor Smith points out that since the 1977, 1982, and 1989 A.A.P.L. model joint operating forms have been modified to establish gross negligence or willful misconduct as a duty,¹⁵² the question now becomes what will this language cover and how will it be applied. For the time being, Kansas has seemingly answered this question by stating that this type of language will not allow a duty that is less than that of a fiduciary if exculpatory language is not further clarified and an alternative duty plainly established.¹⁵³

Professor Pierce has deemed this decision by the Kansas Supreme Court to be of great importance, and it would be difficult to disagree when the implications of this case are considered.¹⁵⁴ The financial impact that this case had on the parties involved was enormous:¹⁵⁵ the ownership of Amoco in the Parker & Parsley lease was reduced from seventy-five percent of production after costs to twenty-five percent of production.¹⁵⁶ A simple economic analysis will, therefore, force drafters of JOAs to realize the importance of properly drafting these agreements.¹⁵⁷

This decision will bring one of two results, either it will drastically change the way an operator treats a non-operator or the way attorneys draft operating agreements.¹⁵⁸ Regardless of which occurs, one thing is certain, Kansas oil and gas law will forever be affected by this case.¹⁵⁹

148. *Id.*

149. *Amoco*, 976 P.2d at 954.

150. Hazlett, *supra* note 41, at 279-81.

151. *Id.*

152. Smith, *supra* note 1, at 847.

153. Kansas Bar Association, *supra* note 115, at 4.

154. *Id.* at 2-4.

155. *Amoco Prod. Co. v. Wilson*, 976 P.2d 941, 955 (Kan. 1999).

156. *Id.*

157. Christopher Lane & Catherine J. Boggs, *Duties of Operator or Manager to Its Joint Venturers*, 29 ROCKY MTN. MIN. L. INST. 199, 238-39 (1983).

158. Kansas Bar Association, *supra* note 115, at 3-5.

159. *Id.* at 4-5.

C. Additional Implications

Even though this case will have an enormous impact on Kansas oil and gas law, it would be short-sighted to believe that is the only area of Kansas law that is potentially affected by such a decision. With the supreme court mandating that business relationships such as these be subject to the laws of fiduciary, every contract for a joint investment in business or real estate should clearly define the duties of each party, because a failure to do so will likely bring about the application of the fiduciary-like standard.¹⁶⁰

Another key implication that might easily be overlooked is that along with establishing a fiduciary-like duty in such cases, the arena of punitive damages now becomes available as a damage remedy.¹⁶¹ Any time there is a contract for a venture by multiple parties, if there is a fiduciary-like standard available, punitive damages may be applied.¹⁶²

V. CONCLUSION

In *Amoco Production Co. v. Wilson*, the Kansas Supreme Court established the duty between operators and non-operators in a JOA.¹⁶³ Now, after entering into a JOA an operator owes a non-operator a duty that is similar to a fiduciary duty.¹⁶⁴ Although the court does not specifically use the word fiduciary in of situation, it does state that this relationship is a “close relationship of trust and confidence,” and more importantly that the parties have an obligation that demands “full, fair, open, and honest disclosure of everything affecting the relationship.”¹⁶⁵ It would be very difficult to interpret the language of the court in any other manner than the establishment of a fiduciary relationship.¹⁶⁶

Future drafters of JOAs in Kansas must remember that the supreme court did not mandate an automatic fiduciary duty, but instead stated that a clearly drafted agreement that eliminated this type of relationship would be upheld.¹⁶⁷ This now places the challenge on the drafting attorneys in Kansas to convince their clients that a properly drafted JOA that clarifies the relationship between operator and non-operator is worth the extra financial investment.

Every mineral investor already knows to carefully examine a JOA before signing, now every mineral investor in Kansas should know to also carefully examine the case of *Amoco Production Co. v. Wilson*

160. *Id.*

161. *Id.* at 5.

162. *Id.*

163. *Amoco Prod. Co. v. Wilson*, 976 P.2d 941, 954-55 (Kan. 1999).

164. *Id.* at 955.

165. *Id.*

166. Kansas Bar Association, *supra* note 115, at 4, 5.

167. *Amoco*, 976 P.2d at 954-55.

before entering into such an agreement.

Richard James