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Heci v. Neel: Application of the Discovery Rule to Damages Arising out of Oil and Gas Leases.

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HECI V. NEEL: APPLICATION OF THE DISCOVERY RULE TO DAMAGES ARISING OUT OF OIL AND GAS LEASES

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I. Introduction 199
II. History and Purpose of Statutes of Limitations and the Discovery Rule 202
A. Prevention of Stale Claims 202
B. An Exception to the Rule 204
1. The Beginning of Discovery Rule Application 206
2. The Discovery Rule Expanded 207
III. HECI Exploration Co. v. Neel 210
A. Recovering for Subsurface Damage 212
B. Nature of an Oil and Gas Lease 213
C. Implied Covenants 214
D. The Supreme Court Departs from Implied Covenant Law 215
IV. The Neels' Injury was Inherently Undiscoverable 217
A. Notice 218
B. Distinguishing the Texas Supreme Court's "Analogous" Cases 223
C. Ramifications 226
D. Application of the Discovery Rule in Other Jurisdictions 228
V. Legislative Response 231
VI. Conclusion 233

I. INTRODUCTION

"Big oil" has long been an icon of wealth and prosperity in Texas.[1] However, for the oil business to function, oil and gas companies must negotiate contractual agreements with the land owners who live on and

1. *See* DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER 86-87 (1991) (stating that James Guffey, a spindle top strike promoter, "became a national symbol of instant wealth").

work the property under which the natural energy supplies lie.[2] Ideally, these contracts facilitate a symbiotic relationship between the parties.

Today, Texas land and mineral owners face a heavy burden in bringing claims for damages arising from oil and gas leases.[3] This new burden stems from a 1998 Texas Supreme Court decision, *HECI Exploration Co. v. Neel* ("*HECI*").[4] The plaintiffs in that case, the Neels, were like many families in Texas who have oil and gas leases—they did not live on the land where they have a mineral interest, and entrusted the responsibilities of the development of their mineral estate to an oil company through a lease.[5]

The Neels sued the oil company, HECI Exploration Company ("HECI"), after it received an award in a suit it brought against a second oil company, AOP Operating Corporation ("AOP"), for damage to the reservoir containing oil in which the Neels owned an interest.[6] According

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2. *See* EUGENE O. KUNTZ ET AL., OIL AND GAS LAW 107 (1986) (explaining that the oil and gas lease is both a conveyance of a right to an oil company to explore for gas and oil, and a contract giving the owner a royalty interest in any subsequent production); HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 202.1, at 14 (1988) (describing the oil and gas lease as an instrument by which a lessee is given authorization to go on land and prospect for oil and gas); *see also* SAMUEL H. GLASSMIRE, LAW OF OIL AND GAS LEASES AND ROYALTIES; A PRACTICAL LEGAL TREATISE ON PETROLEUM RIGHTS ACCRUING BY VIRTUE OF MINERAL DEEDS AND OIL AND GAS LEASES § 16, at 65-66 (1935) (describing the origin of oil and gas leases in 1853).

3. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 8 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (opining that the result of the Supreme Court's opinion in *HECI v. Neel* creates an unfair allocation and redistribution of responsibilities placed upon royalty owners and a restriction of their rights); Keely Coghlan, *Texas Eyes Changes to Royalty Dispute Clock*, THE OIL DAILY, Apr. 24, 2000, *available at* 2000 WL 10342847 (chronicling the new burden set by *HECI v. Neel* for mineral owners to bring suits arising out of oil and gas leases); Jonathan Weil, *Royalty Bill is Stymied By Oil Firms*, WALL ST. J., May 12, 1999, at T1, *available at* 1999 WL-WSJ5452327 (claiming it often takes longer than the statutory period to determine the damages arising out of oil and gas leases, but that *HECI v. Neel* effectively makes it impossible to bring actions over four years old).

4. *See* HECI Exploration Co. v. Neel, 982 S.W.2d 881, 891 (Tex. 1998) (holding that it is not a breach of an implied covenant in an oil and gas lease when a lessee does not notify royalty owners of damage to the leasehold and the lessee's intent to file suit).

5. *See* Transcript of Argument at 9, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (stating that the Neels, like hundreds of thousands of royalty owners, live in counties other than the county where they have property or mineral interests); *see also* Keely Coghlan, *Texas Eyes Changes to Royalty Dispute Clock*, THE OIL DAILY, Apr. 24, 2000, *available at* 2000 WL 10342847 (reporting that the landowner in the Neel case did not live on the land, but was confined to a nursing home).

6. *See* Neel v. HECI Exploration Co., 942 S.W.2d 212, 215 (Tex. App.—Austin 1997, writ granted) (relating that the Neels sued HECI to recover for their one-sixth share of the

to the Texas Court of Appeals in Austin, the discovery rule applied to toll the running of the statute of limitations on the Neels' cause of action, thereby entitling them to a damages award from HECI.[7]

The Texas Supreme Court, however, overturned the lower court decision, holding that the statute of limitations barred the Neels' cause of action.[8] The Texas Supreme Court's holding in *HECI* imposes upon land and mineral owners new and unreasonable requirements for applying the discovery rule.[9] As a result, Texas land and mineral owners must now accept burdens traditionally assumed by lessees, while oil and gas companies will benefit from a "don't ask, don't tell" policy.

This Comment first discusses the discovery rule as it applies to the tolling of statutes of limitations. Following a broad overview of the discovery rule, is an examination of the application of the discovery rule to suits arising out of oil and gas leases. Part II discusses the history of statutes of limitations and the discovery rule in Texas. An account of *HECI* follows in Part III, as well as a brief examination of the nature of an oil and gas

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judgment HECI received from AOP). The Neels sued HECI for "breach of the contract to pay royalty on production, negligent misrepresentation, breach of the implied covenant to protect the leasehold, an accounting, unjust enrichment, and punitive damages." *Id.* The damage award granted to HECI by the Fayette County District Court consisted of permanent injunctive relief against AOP, $1,719,956 in actual damages and $2,000,000 in punitive damages. *Id.*

7. *See id.* at 221-23 (concluding that the discovery rule applied to this type of case). The Austin Court of Appeals found that part of HECI's duty to protect the leasehold is to notify the Neels of the need for suit and of HECI's intent to sue; additionally, the court determined that the damage to the Neels' reservoir was the type that met the inherently undiscoverable and objectively verifiable requirements necessary to impose the discovery rule. *Id.*

8. *See HECI Exploration Co.*, 982 S.W.2d at 886 (holding that the damage to the common reservoir caused by AOP's overproduction was not inherently undiscoverable, that the Neels should have known of their cause of action against AOP, that the Neels should have known of HECI's claim against AOP, and that the discovery rule would not apply; thereby, time-barring the Neels' claims and precluding any judgment in their favor).

9. *See* Response to Application for Writ of Error at 12, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (arguing that if *HECI*'s assertions are correct, everyone would be obligated to check courthouses in counties where they have contacts to determine whether they have been injured or should be involved in a lawsuit); Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 9 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (suggesting that *HECI v. Neel* imposes a duty upon all royalty owners to either be petroleum engineers and landmen, or employ such professionals); Jonathan Weil, *Royalty Bill is Stymied By Oil Firms*, WALL ST. J., May 12, 1999, at T1, *available at* 1999 WL-WSJ5452327 (quoting former Governor Dolph Briscoe, Jr. as stating that royalty owners are now charged with knowledge that they do not actually have).

lease, including the important aspect of implied covenants. Part IV discusses how the Texas Supreme Court abandoned precedent by denying application of the discovery rule in *HECI*. Part IV also explores the ramifications of *HECI*, and the application of the discovery rule in other jurisdictions. Finally, this Comment proposes a legislative response to the problems resulting from the Texas Supreme Court's decision in *HECI*.

II. History and Purpose of Statutes of Limitations and the Discovery Rule

A. *Prevention of Stale Claims*

Statutes of limitations are legislative devices created to promote sound public policy.[10] Theoretically, statutes of limitations function as a compromise between affording plaintiffs a reasonable time to present their claims and protecting defendants from having to defend claims impaired by the passage of time and the loss of evidence.[11] In so doing, statutes of limitations serve the purpose of preventing stale claims[12] as well as compelling the assertion of claims during a time when evidence will be fresh

10. *See* Little v. Smith, 943 S.W.2d 414, 417 (Tex. 1997) (commenting that statutes of limitations serve the purpose of imposing finality); Trinity River Auth. v. URS Consultants, Inc., 889 S.W.2d 259, 263 (Tex. 1994) (suggesting that statutes of limitations serve the public interest in assuring that suits are brought in a timely manner where the parties and evidence remain fresh and, therefore, more accurate); Safeway Stores, Inc. v. Certainteed Corp., 710 S.W.2d 544, 545 (Tex. 1986) (recognizing society's interest in expediting dispute resolutions to reduce "the uncertainty and insecurity caused by unsettled claims [that] hinder the flow of commerce"); Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (asserting the importance of compelling claims before evidence is tarnished by time and the accused loses the fair opportunity to defend himself).

11. *See* Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990) (defining the purpose of statutes of limitations as establishing a point of repose which the legislature deems adequate for the plaintiffs and to protect defendants from "having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents or otherwise"); Rogers v. Ricane Enters., Inc., 930 S.W.2d 157, 166 (Tex. App.—Amarillo 1996, writ denied) (suggesting the purpose of statutes of limitations is to compel the exercise of an action within a reasonable time, thereby preserving for the defendant a fair opportunity to rely on available witnesses).

12. *See Murray*, 800 S.W.2d at 828 (noting the termination of stale claims as the purpose of statutes of limitation); *see also* Donald v. Amoco Prod. Co., 735 So. 2d 161, 167 (Miss. 1999) (discussing the goal of statutes of limitations as preventing stale claims). Application of the discovery rule would have allowed a claim to be pursued where any witnesses with knowledge of the relevant facts were likely dead, and even if they were still alive, they would be required to remember events from a minimum of twenty-seven years ago, and the relevant documents had likely been destroyed; the court surmised that "the events at issue in this case are not just stale, they are rancid." *Id.*

in the minds of the parties.[13] Justice Oliver Wendell Holmes described statutes of limitations as devices that serve the purpose of "preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."[14]

In most cases, the statute of limitations begins to run when the cause of action accrues.[15] Occasionally, the statute expressly sets out the date of accrual.[16] However, courts frequently must determine when the countdown begins.[17] In other words, the statute's time generally begins to accrue when the injury occurs, not when it is discovered.[18]

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13. *See* Price v. Estate of Anderson, 522 S.W.2d 690, 692 (Tex. 1975) (holding that a suit filed within the statute of limitations period that failed to join a necessary party was not barred when amended to include the party after the statute of limitations period ended); Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967) (affirming that statutes of limitations compel claims during a time period when witnesses' and parties' memories are fresh); Harrison Mach. Works v. Reigor, 64 Tex. 89, 90 (1885) (emphasizing the importance of timely claims to increase the likelihood of accurate witness accounts).

14. Order of R.R. Telegraphers v. Ry. Express Agency, Inc., 321 U.S. 342, 348-49 (1944).

15. *See Trinity River Auth.*, 889 S.W.2d at 262 (clarifying the general rule that a limitations period begins when a cause of action accrues—the time when the owner suffers injury); Houston Water-Works Co. v. Kennedy, 70 Tex. 233, 8 S.W. 36, 37-38 (Tex. 1888) (construing the beginning of the limitations period as when the legal injury occurs). The court determined that a negligently cut arch in the plaintiff's building constituted a legal injury giving rise to a cause of action; therefore, the limitations period began from that event regardless of the plaintiff's lack of knowledge of the injury. *See id.*; Advent Trust Co. v. Hyder, 12 S.W.3d 534, 538 (Tex. App.—San Antonio 1999, no pet. h.) (providing that the limitations period begins when the wrongful act occurs and the cause of action accrues).

16. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 16.003(b) (Vernon Supp. 2001) (setting the date of accrual for an injury causing death as the date of that person's death); S.V. v. R.V., 933 S.W.2d 1, 4 (Tex. 1996) (acknowledging that the statute rarely defines the date of accrual for limitations purposes).

17. *See S.V.*, 933 S.W.2d at 4 (commenting that the determination of the date of accrual is frequently left to the courts because of the legislatures' failure to define it explicitly); Moreno v. Sterling Drug, Inc., 787 S.W.2d 348, 351 (Tex. 1990) (categorizing that when the legislature fails to define the date of accrual the question becomes a judicial one, determined from the underlying statutory policy, without permitting unnecessary injustices); *see also* Childs v. Haussecher, 974 S.W.2d 31, 36 (Tex. 1998) (articulating the general rule governing accrual of a cause of action for personal injury as when the injury occurs because the accrual date in the statute was not explicitly defined).

18. *Trinity River Auth.*, 889 S.W.2d at 259, 262 (holding that "[a] cause of action accrues when a wrongful act causes some legal injury"); *accord* Coastal Plains, Inc. v. Mims, 179 F.3d 197, 214 (5th Cir. 1999) (articulating that accrual of a cause of action is when the injured party can seek a judicial remedy) (quoting Murray v. San Jacinto Agency, Inc., 800 S.W.2d 826, 828 (Tex. 1990)); *see also Childs*, 974 S.W.2d at 36-37 (affirming that the plaintiff's lack of knowledge of his injury does not preclude the accrual of a cause of action when the wrongful act occurs).

B. *An Exception to the Rule*

Nevertheless, courts recognize an exception where the rigid application of the statute of limitations is inappropriate.[19] Courts refer to this exception as the discovery rule.[20] The discovery rule is a legal mechanism that delays the commencement of the limitations period until the plaintiff knew or should have known of his injury.[21] The Texas Supreme Court applies the rule with the reasoning that "[c]ourts out of necessity have made exceptions in order to do justice."[22]

To justify the exception Texas courts apply a two-prong test. First, the nature of the injury must be inherently undiscoverable, and second, the evidence should be objectively verifiable.[23] This two-pronged requirement is a threshold inquiry preceding the application of the discovery rule.[24] An inherently undiscoverable injury is not detectable by the in-

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19. *See* Velsicol Chem. Corp. v. Winograd, 956 S.W.2d 529, 530-31 (Tex. 1997) (recognizing the societal benefit of the discovery rule's function of having "disputes either settled or barred within a reasonable time in situations in which it is difficult for the injured party to learn of the negligent act"); *S.V.*, 933 S.W.2d at 4 (expressing that the rule defining the accrual of a cause of action as when the legal injury occurs, regardless of whether it is discovered, subject to an exception of deferring the accrual date to when the plaintiff knew, or by exercising diligence should have known of the injury).

20. *See S.V.*, 933 S.W.2d at 4 (noting the first time the Texas Supreme Court referred to deferring accrual as the "discovery rule"); Riojas v. Phillips Properties, Inc., 828 S.W.2d 18, 21 (Tex. App.—Corpus Christi 1991, writ denied) (recognizing the discovery rule as a judicially constructed test, "which operates as an exception to the general rule").

21. *See* Servicios-Expoarma, C.A. v. Indus. Mar. Carriers, Inc., 135 F.3d 984, 988 (5th Cir. 1998) (stating that "[i]t is, of course, eminently reasonable that a cause of action should not 'accrue' until the plaintiff has actual or constructive knowledge of its existence"); *Advent Trust Co.*, 12 S.W.3d at 538 (acknowledging that if despite the exercise of reasonable diligence, a plaintiff did not learn of the wrongful act causing his injury until the expiration of the statute of limitations, the discovery rule may apply to defer the accrual until the plaintiff knew or should have known of the injury); Doe v. Grossman, No. CIV.A.3:99-CV-1336-P, 2000 WL 1400626, at *1 (N.D. Tex. Aug. 25, 2000) (noting that "the discovery rule is a plea in confession and avoidance" and the party seeking its application must raise or affirmatively plead it).

22. *Gaddis*, 417 S.W.2d at 580 (authorizing courts to use the discovery rule exception in claims against surgeons who leave foreign objects in their patients' bodies).

23. *See S.V.*, 933 S.W.2d at 15 (noting that the application of the discovery rule requiring the facts to be inherently undiscoverable and the injury itself to be objectively verifiable, serves to reduce the likelihood of injustice); Johnson v. Abbey, 737 S.W.2d 68, 69-70 (Tex. App.—Houston [14th Dist.] 1987, no writ) (recognizing that the discovery rule appropriately applies to cases of fraud and defamation where the information is inherently undiscoverable); Richard F. Brown, *Oil, Gas and Mineral Law*, 51 SMU L. REV. 1219, 1232-33 (1998) (restating inherent undiscoverability and objective verifiability as the critical elements in balancing the benefits and risks of the discovery rule exception).

24. *See* HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886 (Tex. 1998) (recognizing the two elements of the discovery rule analysis as bringing "predictability and consistency to our jurisprudence"); *S.V.*, 933 S.W.2d at 7 (recognizing inherent undiscoverability and

jured party despite the use of due diligence.[25] An injury is objectively verifiable if corroborated without the need for opinion or discretion.[26] These requirements combine to enable prosecution of meritorious claims, while precluding those that are stale or spurious.[27]

In line with this reasoning, courts also balance several factors when applying the discovery rule. These factors include: the nature of the case and evidence, the length of the limitations period, and the risk of fraudulent prosecution.[28] Through this balancing approach, courts seek to maintain the integrity of the primary purpose of statutes of limitations—the prevention of stale or fraudulent claims.[29]

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objective verifiability as the common thread connecting cases where the discovery rule had been deemed appropriate); Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 456 (Tex. 1994) (delineating objective verifiability and inherent undiscoverability as unifying factors for application of the discovery rule); Salinas v. Gary Pools, Inc., 31 S.W.3d 333, 336 (Tex. App.—San Antonio 2000, no pet.) (asserting that only when the facts reveal that the injury is inherently undiscoverable and objectively verifiable does the discovery rule apply to a case); Howard v. Fiesta Tex. Show Park, Inc., 980 S.W.2d 716, 718 (Tex. App.—San Antonio 1998, no pet.) (proclaiming that the two-pronged inquiry of inherent undiscoverability and objective verifiability is required for the discovery rule to apply).

25. *See Coastal Plains, Inc.*, 179 F.3d at 214 (asserting that "[i]nherently undiscoverable encompasses the requirement that the existence of the injury is not ordinarily discoverable, even though due diligence has been used") (quoting *Altai*, 918 S.W.2d at 456); AT & T Corp. v. Rylander, 2 S.W.3d 546, 556 (Tex. App.—Austin 1999, no pet.) (explaining that it is not sufficient for the injury to not be discovered, rather, it must be generally undiscoverable despite the exercise of due diligence). *Id.*

26. *See Coastal Plains, Inc.*, 179 F.3d at 215 (establishing that objective verifiability requires evidence which corroborates the claim's existence such as physical evidence or an objective eyewitness account); Askanase v. Fatjo, 130 F.3d 657, 668 (5th Cir. 1997) (recognizing objective verifiability as key when applying the discovery rule).

27. *See Childs*, 974 S.W.2d at 33 (noting the need to balance a plaintiff's ability to pursue meritorious claims while preventing the inundation of Texas courts and defendants with incomplete or speculative claims); *S.V.*, 933 S.W.2d at 6 (proclaiming that the combination of the two elements properly balance the purpose behind statutes of limitations of preventing stale claims, with the concerns of cutting off meritorious claims). *But see Rogers*, 930 S.W.2d at 169 (recognizing that using the discovery rule is not justified when a legal remedy is available, and that the purpose of the statute of limitations must be kept in mind).

28. *See* Harrison v. Bass Enters. Prod. Co., 888 S.W.2d 532, 538 (Tex. App.—Corpus Christi 1994, no writ) (listing the factors that courts of appeals have balanced when deciding whether to apply the discovery rule).

29. *See S.V.*, 933 S.W.2d at 6 (cautioning that preventing litigation of stale claims is the priority in a discovery rule analysis and that a judicial exception to a statute of limitations is not enforceable if based on the possibility of preclusion of a legal remedy if that priority becomes jeopardized); Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (identifying the prevention of litigating stale or fraudulent claims as the primary purpose of statutes of limitations).

1. The Beginning of Discovery Rule Application

The wide recognition and application of the discovery rule in Texas began in medical malpractice cases, particularly when foreign objects were left in a patient's body.[30] In these cases, the victim has no reason to suspect the injury and may not learn of it for an extended period of time.[31] Application of the discovery rule in this context prevents the "shocking result" of prioritizing the disadvantage to the defendant in having to defend an older claim, over the inability of the plaintiff to recover.[32] Ultimately, courts concluded that the purpose of statutes of limitations is not compromised in medical malpractice cases because the injury is corroborated through the discovery of the object within the victim's body.[33]

The first foreign object case to recognize the appropriateness of the discovery rule was *Gaddis v. Smith*.[34] In *Gaddis*, the plaintiff brought suit against two doctors alleging that her injury resulted from a surgical sponge left inside her body after performance of a caesarean section five years earlier.[35] The doctors asserted the two-year statute of limitations as an affirmative defense to the suit.[36] Departing from prior cases, the Texas Supreme Court reasoned that where a foreign object is left in a

30. *See S.V.*, 933 S.W.2d at 5-6 (referring to *Gaddis v. Smith* as the first time the exception was termed the "discovery rule"); *Gaddis*, 417 S.W.2d at 581 (identifying foreign object cases as special, thereby justifying the initiation of the statute of limitations when the plaintiff knows or should know about the injury caused by the foreign object).

31. *See* Bartley v. Euclid, Inc., 180 F.3d 175, 180 (5th Cir. 1999) (upholding the application of the discovery rule for repetitive trauma back injuries to operators of coal haulers because of excessive vibration). The discovery rule applied because, despite the plaintiffs' due diligence, the injuries were not the type that lent themselves to discovery within the statutory limitations period, and the plaintiffs did not have reason to suspect they were being injured. *Id.*; Hays v. Hall, 488 S.W.2d 412, 413 (Tex. 1972) (acknowledging a patient's inability to know of an injury when a foreign object is left in the body); *see also Gaddis*, 417 S.W.2d at 580 (recognizing that when a foreign object remains in a patient's body, the patient rarely has knowledge of the injury).

32. *Gaddis*, 417 S.W.2d at 581.

33. *See S.V.*, 933 S.W.2d at 6 (recognizing that the statute of limitations is generally deferred, and the discovery rule applied, in case of fraudulent claims). Robinson v. Weaver, 550 S.W.2d 18, 20 (Tex. 1977) (describing the ultimate goal of statutes of limitations as the prevention of stale claims). The court commented that "preclusion of a legal remedy alone is not enough to justify a judicial exception to the statute" and therefore, some valid claims may be unassertible. *See id.*

34. 417 S.W.2d 577 (Tex. 1967).

35. *See* Gaddis v. Smith, 417 S.W.2d 577, 578 (Tex. 1967) (explaining that Dorothy Gaddis underwent surgery to remedy internal pain, which she initially believed was caused by a tumor). The defendants, two doctors, performed a caesarean section. *Id.*

36. *Id.*; *see also* TEX. CIV. PRAC. & REM. CODE ANN. § 16.003 (Vernon 2001) (mandating that a personal injury action must commence within two years after accrual of the cause of action).

patient's body, the cause of action accrues when the patient learned or should have learned of the injury.[37]

Five years after *Gaddis*, in *Hays v. Hall*,[38] the Texas Supreme Court again applied the discovery rule in a case regarding negligence in performing a vasectomy.[39] In such a case, a patient has no way of knowing whether the procedure is unsuccessful, unless his wife becomes pregnant or he undergoes testing.[40] Therefore, the court held the patient had no duty to verify the success of treatment.[41]

2. The Discovery Rule Expanded

Although the discovery rule originated in medical malpractice cases, Texas courts have steadily applied it in other contexts.[42] For instance, legal malpractice claims are subject to the application of the discovery rule.[43] In *Willis v. Maverick*,[44] the Texas Supreme Court addressed a le-

37. *See Gaddis*, 417 S.W.2d at 580-81 (stating that because of the virtual certainty that a patient would not immediately know that a foreign object was left in the incision after surgery, the statute of limitations should not begin until the patient discovered such injury); Carrell v. Denton, 157 S.W.2d 878, 878 (Tex. 1942) (holding that the wrongful act was leaving the object in the patient's body before the incision was closed, and therefore, the cause of action accrued at that time). Consequently, the patient's suit failed because it commenced after the two-year limitations period. *Id.* at 878-89; Stewart v. Janes, 393 S.W.2d 428, 428-29 (Tex. Civ. App.—Amarillo 1965, writ refused) (determining that the rule of stare decisis required that the court follow the rule set forth in *Carrell v. Denton*, thereby foreclosing the injured plaintiff's ability to recover). During plaintiff's surgery on July 10, 1945, a gauze sponge was left in her body, yet she did not file suit until eighteen years later when she discovered the injury. *Id.*

38. 488 S.W.2d 412 (Tex. 1972).

39. *See* Hays v. Hall, 488 S.W.2d 412, 414 (Tex. 1972) (establishing that in medical malpractice cases arising from a failed vasectomy operation the point of accrual is when the failure of the operation was, or should have been, discovered); *see also* Hackworth v. Hart, 474 S.W.2d 377, 379 (Ky. 1971) (announcing the rule that when the issue in a malpractice case is a failed vasectomy, the cause of action accrues when the pregnancy was or should have been discovered).

40. *Hays*, 488 S.W.2d at 414.

41. *See id.* (stating that it would be "absurd" and "unjust" to impose the statutory limitations period on a plaintiff injured by an ineffective vasectomy because the injury is not assumed and very possibly can only be discovered after the limitations period).

42. *See, e.g.*, Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988) (holding that there are sufficient compelling reasons for applying the discovery rule to legal malpractice causes of action); Kelley v. Rinkle, 532 S.W.2d 947, 949 (Tex. 1976) (promulgating a rule that if one's credit reputation is libeled when a defamatory report to a credit agency is published the discovery rule applies, and the period of limitations begins when the injured party learns, or should have learned, of the credit report); Slay v. Burnett Trust, 187 S.W.2d 377, 394 (Tex. 1945) (applying the discovery rule to a beneficiary's cause of action against the trustee of an estate for secretive dealings of which the trustee could not have known).

43. *See Willis*, 760 S.W.2d at 645 (establishing conclusively that in the interest of public policy and considering the fiduciary relationship, the discovery rule applies to legal mal-

gal malpractice suit arising out of a divorce proceeding.[45] Importantly, the court held that in a legal malpractice claim, the limitations period begins to run when the claimant discovers or, through the exercise of diligence, should have discovered the facts establishing the cause of action.[46]

In deciding *Willis*, the Texas Supreme Court clarified that it is not necessary for the claimant and defendant to have a special relationship for the discovery rule to apply.[47] According to the *Willis* court, in a legal malpractice case where a lawyer's expertise and the client's ignorance of the law combine to make an injury undiscoverable, the discovery rule is applied not because of the fiduciary relationship between the parties, but because of the inherent inability of the layman to perceive the injury at the time of the act.[48] The natural corollary to an attorney's expertise is the difficulty for a layman to discover negligence in the attorney's acts.[49] Thus, the party in the best position to know of an injury should bear a heavier burden in the balance between imposing limitation periods and allowing meritorious claims.[50]

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practice causes of action); Brown v. McCleskey, No. 07-99-0027-CV, 1999 WL 795478, at *4 (Tex. App.—Amarillo Oct. 6, 1999, no pet.) (not designated for publication) (reviewing a claim for legal malpractice under the discovery rule standards requiring inherent undiscoverability of the injury and its objective verifiability).

44. 760 S.W.2d 642 (Tex. 1998).

45. *See* Willis v. Maverick, 760 S.W.2d 642, 643-44 (Tex. 1998) (alleging that the defendant divorce attorney, who drafted the divorce settlement, negligently misrepresented the plaintiff's rights under the agreement).

46. *Id.* at 646; *see* Brown v. McCleskey, No. 07-99-0027-CV, 1999 WL 795478, at *7-8 (Tex. App.—Amarillo Oct. 6, 1999, no pet. h.) (not designated for publication) (analyzing and subsequently negating the application of the discovery rule to the plaintiff's legal malpractice claim).

47. *See S.V.*, 933 S.W.2d at 6 (acknowledging that the discovery rule is sometimes imposed without any requisite of a special relationship).

48. *See Willis*, 760 S.W.2d at 645 (referring to the attorney's fiduciary duty only as a secondary component further justifying applying the discovery rule in legal malpractice cases).

49. *See id.* at 646 (surmising that the injustice of denying relief to attorney malpractice victims outweighs the burden of applying the discovery rule upon that attorney); Burns v. Thomas, 786 S.W.2d 266, 267 (Tex. 1990) (indicating that the limitations period begins when the claimant discovers, or should have discovered, his injury).

50. *See Willis*, 760 S.W.2d at 646 (commenting that the reason for adopting the discovery rule in legal malpractice cases is the same as in cases for fraud, medical malpractice, and libel). Essentially, an attorney has expertise in the law and a layperson is unable to detect a misapplication of such expertise. *Id.*; *see also Kelley*, 532 S.W.2d at 949 (applying the discovery rule to a cause of action for libel to the plaintiff's credit report); *Gaddis*, 417 S.W.2d at 580 (supporting the application of the discovery rule in medical malpractice cases where a foreign object is left in a patient's body).

In addition to legal malpractice claims, the court expanded the discovery rule to other causes of action. For example, in *Kelley v. Rinkle*,[51] the Texas Supreme Court determined that the victim of a false credit report is only able to discover his injury when he is refused credit.[52] Although the credit report was publicly available, the claimant had no reason to presume that it was false or harmful, and therefore, had no duty to seek it out to ensure that it was correct.[53]

In reaching its conclusion, the *Kelley* court expressed a realistic concern over strictly imposing statutes of limitations when there is a potential for abuse of the superior knowledge and access to information that credit agencies enjoy.[54] The court's holding established how to calculate the limitations period for libel of one's credit reputation caused by a defamatory report.[55] The statute of limitations "begins to run when the person defamed learns of, or should by reasonable diligence have learned of, the existence of the credit report."[56]

In addition to *Kelley*, the Texas Supreme Court recognized the danger in protecting those with superior knowledge through the arbitrary use of statutes of limitations in *Slay v. Burnett Trust*.[57] In *Slay*, the court allowed a beneficiary to invoke the discovery rule when harmed by his trustee's secret dealings.[58] The court refused to require the beneficiary to delve

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51. 532 S.W.2d 947 (Tex. 1976).

52. *See Kelley*, 532 S.W.2d at 948-49 (recognizing that the denial of an application of credit is the first reasonable opportunity for the victim to learn of his injury). Kelley furnished an affidavit stating no knowledge of the credit report until after receiving several letters from businesses denying credit because of the information they acquired from the credit service. *Id.* at 949. These letters prompted Kelly to inquire about the credit information supplied to the businesses; it was at this time that Kelley learned of the faulty credit report. *Id.*

53. *See id.* (analogizing the reasoning for adopting the discovery rule in medical malpractice cases to the rule in credit libel). The court reasoned that a person has no reason to suspect that a credit agency has defamed him, hence there is no requirement to inquire about the possibility of such defamation. *Id.* Therefore, the injury is only discoverable when damage results from the faulty credit report. *See id.*

54. *See Kelley*, 532 S.W.2d at 949 (weighing the policy behind statutes of limitations against the detrimental effect their imposition could have in this fact situation). The court recognized the significance of credit by noting that "[w]hile the pervasive use of credit reporting agencies makes acquisition of credit much easier and more efficient, it also creates a potential for great abuse by those who would use the system to wrongfully injure the credit reputation of another." *Id.*

55. *See id.*

56. *Id.* at 948.

57. 187 S.W.2d 377 (Tex. 1945).

58. *See* Slay v. Burnett Trust, 187 S.W.2d 377, 394 (Tex. 1945) (asserting that absent knowledge of facts, injury to a beneficiary may require application of the discovery rule).

into the trustee's transactions.[59] Moreover, absent some evidence to put the beneficiary on inquiry notice, he did not have notice of his injury.[60]

As evidenced by these and other discovery rule cases, the discovery of an injury is dependent on the circumstances of the injury, as well as the plaintiff's diligence.[61] Additionally, the need for justice defines the application of the discovery rule.[62] Hence, the discovery rule should toll the statute of limitations when the injustice of denying the victim relief outweighs the need for the strict application of the statute of limitations.[63]

III. HECI EXPLORATION CO. V. NEEL

In *HECI Exploration Co. v. Neel*, the Texas Supreme Court departed from the long-recognized application of the discovery rule as a means to avoid injustice.[64] The supreme court overturned a precedent-based court of appeals decision to find the discovery rule did not apply to subsurface oil and gas reservoir damage.[65] The damage claimed in the case stemmed

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59. *See id.*

60. *See id.* (deciding that constructive notice is not imposed in reference to records in the trustees' offices).

61. Matthiessen v. Schaefer, 27 S.W.3d 25, 31 (Tex. App.—San Antonio 2000, no pet.) (quoting S.V. v. R.V., 933 S.W.2d 1, 7 (Tex. 1996)).

62. *See* Gaddis v. Smith, 417 S.W.2d 577 (Tex. 1967) (recognizing that courts will make exceptions based on necessity in order to serve justice).

63. *See* Willis v. Maverick, 760 S.W.2d 642, 646 (Tex. 1988) (balancing the burden upon an attorney by the application of the discovery rule against the "injustice of denying relief to unknowing victims"); Little v. Smith, 943 S.W.2d 414, 423 (Tex. 1997) (asserting the responsibility on the courts to balance the purpose of the discovery rule against the purpose of statutes of limitations).

64. *See HECI Exploration Co.*, 982 S.W.2d at 883-84 (creating a more onerous burden to meet the requirements of inherent undiscoverability and objective verifiability); *see, e.g.*, *Willis*, 760 S.W.2d at 645 (establishing conclusively that in the interest of public policy, the discovery rule should apply to legal malpractice causes of action); *Kelley*, 532 S.W.2d at 949 (approving the application of the discovery rule to claims based on injury from a libelous credit report); *Hays*, 488 S.W.2d at 414 (stating that it is "absurd" and "unjust" to impose the statutory limitations period on a plaintiff injured by an ineffective vasectomy because the injury is not assumed and very possibly only be discovered after the limitations period); *Gaddis*, 417 S.W.2d at 580 (stating that because of the virtual certainty that a patient will not know that a foreign object was left in the incision for a long time after the surgery, the statute of limitations would not begin until the patient discovers such injury); Slay v. Burnett Trust, 187 S.W.2d 377, 394 (1945) (asserting that absent the knowledge of facts in the exercise of due diligence, injury to a beneficiary may require application of the discovery rule); Keely Coghlan, *Texas Eyes Changes to Royalty Dispute Clock*, THE OIL DAILY, Apr. 24, 2000, *available at* 2000 WL 10342847 (asserting that before the 1998 *HECI v. Neel* decision, the statutes of limitations began to run in claims arising out of oil and gas claims upon discovery of a violation).

65. *See* Transcript of Argument at 2, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (reversing the

from an oil company's overproduction of the reservoir on an adjoining lease.[66]

The defendant, HECI, leased 269.71 acres of the Neels' land in Fayette County, Texas, under which the damaged reservoir existed.[67] In 1988, HECI sued the adjoining producer, AOP, in Fayette County district court,[68] alleging that AOP's overproduction damaged the reservoir and that such damage caused HECI to lose oil reserves.[69] In 1989, a jury awarded HECI $3,719,956 for damages to the reservoir in which the Neels owned a one-sixth royalty interest.[70]

Austin Court of Appeals and finding that the discovery rule did not apply because the type of injury the Neels suffered is not inherently undiscoverable as illustrated by their knowledge of wells on neighboring properties, which the court determined should have put the Neels on inquiry of whether they owned an interest in the common reservoir and whether that reservoir was being damaged); *see also* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 1 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (acknowledging the court of appeals decision in *Neel v. HECI* as correctly following precedent).

66. *See* Transcript of Argument at 2, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (stating that there was "water damage to the geological structure under [the] Neel lease"); Response to Application for Writ of Error at 3, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (noting that in violation of state regulations, AOP overproduced a well located on acreage adjacent to the Neels' land, thus causing a loss of reserves from one of the wells in which the Neels owned a one-sixth royalty interest); Douglas R. Johnson, *The Cooperative Venture: Revisiting the Relationship Between the Royalty and Working Interest in Texas*, 5 TEX. WESLEYAN L. REV. 253, 271 (1999) (outlining HECI's suit that claimed AOP violated the Railroad Commission's proration orders by overproducing its well, which resulted in a loss of HECI reserves).

67. *See* Response to Application for Writ of Error at 3, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (on file with the *St. Mary's Law Journal*) (explaining that Russell H. Neel, Sr. signed an oil lease in 1978, with Humble Exploration Company, Inc., and that upon the death of their mother, the children inherited her community interest in the lease, which assigned them a one-sixth royalty for all oil and gas produced in association with the lease).

68. Neel v. HECI Exploration Co., 942 S.W.2d 212, 215 (Tex. App.—Austin 1997, writ granted) (stating that in 1985, HECI learned of AOP over production from a well adjacent to the Neels' land). After three complaints to the Railroad Commission, HECI unsuccessfully attempted to secure regulatory action to prevent AOP's continuation of the wrongful acts. *Id.*

69. *Id.*; Transcript of Argument at 6, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*).

70. *See Neel*, 942 S.W. at 215 (outlining HECI's damage awards as: permanent injunctive relief against AOP, actual damages of $1,719,516 and $2,000,000 in punitive damages).

A. *Recovering for Subsurface Damage*

The Neels did not discover HECI's lawsuit against AOP until May 1993.[71] In December 1993, they sued HECI to recover their one-sixth share of the judgment against AOP.[72] The suit was undisputedly beyond the normal four-year limitations period.[73] However, the Neels relied upon the application of the discovery rule for the survival of their claims.[74]

According to the court of appeals in Austin, requiring HECI to inform the Neels of HECI's case against AOP was part of the implied covenant of an oil company to protect the lease.[75] The court held that the covenant to protect does not stop at the lessee's portion of the leasehold, but also encompasses the leasehold in its entirety, including the portion retained by the lessor.[76] The Texas Supreme Court rejected imposing this responsibility, and in denying the application of the discovery rule, the supreme court prevented the Neels from recovering damages.[77]

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71. *Neel*, 942 S.W.2d at 215; Transcript of Argument at 5, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (stating that the Neels became aware in May 1993 of the HECI-AOP suit by a phone call from a lease broker).

72. *See Neel*, 942 S.W.2d at 215 (noting that the Neels asserted that HECI breached their contract by not paying royalty on production, that HECI was liable for negligent misrepresentation, that HECI breached the implied covenant to protect the leasehold and that HECI benefited from unjust enrichment).

73. *See id.* at 220 (stating that the Neel's suit "is beyond even a four-year statute of limitations on all cause of action").

74. *See id.* (stating that a breach of an implied covenant to protect the leasehold would have occurred in 1988 when HECI filed suit against AOP, yet the four-year limitations period also expired for that cause of action).

75. *See id.* at 218 (explaining that when a mineral lessee determines that it must sue another operator to protect the leasehold, the lessee must notify the mineral owners of the need for the suit and also that the lessee intends to sue). The court agreed that HECI was not required, and indeed, had no right to sue on the Neel's behalf. *Id.* The court concluded that "the implied covenant to protect the leasehold is not so onerous as to require unauthorized suits, but not so narrow as utter abandonment of part of the leasehold." *Neel* 942 S.W.2d at 218.

76. *See id.* (finding that the duty to protect the leasehold includes the entire entity, not just the producer's share of the "theoretic production"); Transcript of Argument at 8, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (arguing that HECI's decision to protect the leasehold made it necessary to protect it in its entirety); Response to Application for Writ of Error at 13, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (contending that HECI's duty is to protect the entire leasehold, not merely HECI's interest).

77. *See HECI Exploration Co.*, 982 S.W.2d at 888 (holding that the statute of limitations bars "the Neels' claims for breach of contract and negligent misrepresentation . . . on

B. *Nature of an Oil and Gas Lease*

The Neels and HECI executed a lease creating rights and obligations between the parties. HECI's right to sue AOP derived from the lease between HECI and the Neels, which granted HECI a right to the mineral estate.[78] Before the Neels entered the oil and gas lease with HECI, they owned the oil and gas beneath their land.[79] By entering the lease with HECI, the Neels conveyed their rights in the minerals to HECI, and reserved a one-sixth royalty interest in the oil produced.[80]

An oil and gas lease is designed to benefit both the lessor and lessee,[81] with the lessor providing the minerals and the lessee providing the knowledge and equipment to exploit those minerals for the common advantage of both parties.[82] Each party must cooperate in the venture to ensure its

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the existence of an implied covenant that the lessee will notify royalty owners that an adjoining operator has injured the reservoir").

78. *See Neel*, 942 S.W.2d at 218 (analyzing the responsibilities inherent in oil and gas leases). The court of appeals noted that HECI has a duty to give the Neels an account of their royalty share for oil produced on the land covered by the lease. *Id.* Therefore, the court reasoned that the wrongful overproduction of the reservoir did not "free HECI to recover compensation for unproduced, unproducible reserves without any obligation to the remainder of the leasehold and the Neels." *Id.*

79. *Id.* at 216 (stating that prior to the lease, the Neels owned the oil under their land); *see also* Elliff v. Texon Drilling Co., 210 S.W.2d 558, 561 (Tex. 1948) (declaring that in Texas, "the landowner is regarded as having absolute title in severalty to the oil and gas in place beneath his land"); HOWARD R. WILLIAMS & CHARLES J. MEYERS, OIL AND GAS LAW § 203.3 (1988) (explaining that Texas adopts the ownership in place theory of the nature of the interest a landowner possesses in oil and gas). The ownership in place theory maintains that a landowner possesses the same interest in the oil and gas contained in his land as he possesses in the land itself. *Id.*; SAMUEL H. GLASSMIRE, LAW OF OIL AND GAS LEASES AND ROYALTIES; A PRACTICAL LEGAL TREATISE ON PETROLEUM RIGHTS ACCRUING BY VIRTUE OF MINERAL DEEDS AND OIL AND GAS LEASES § 23 (1935) (explaining that Texas adopts an extreme application of absolute ownership with regard to the oil and gas lease). Mineral deeds and oil and gas leases create a "separate and absolute fee estate in the oil and gas in place." *Id.*

80. *Neel*, 942 S.W.2d at 216; *see* Tex. Oil & Gas Corp. v. Ostrom, 638 S.W.2d 231, 234 (Tex. App.—Tyler 1982, writ ref'd n.r.e.) (relating that a lessor reserves a "nonpossessory reversionary interest in the minerals" with the execution of an oil and gas lease).

81. *See* EUGENE O. KUNTZ ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 125 (3d ed. 1998) (describing the oil and gas lease as a business transaction from which both parties (lessor and lessee) anticipate making a profit).

82. *See id.* § A.1 (explaining that an oil and gas lease mineral owner transfers his mineral rights to an oil company, which has both the capital and expertise that the mineral owner lacks, for the purpose of exploration and development, and with the expectation by both parties of making a profit); Douglas R. Johnson, *The Cooperative Venture: Revisiting the Relationship Between the Royalty and Working Interest in Texas*, 5 TEX. WESLEYAN L. REV. 253, 253 (1999) (explaining that instead of purchasing the land from which they hope to produce oil and natural gas, oil companies enter into leases with landowners). Such leases allocate to the oil company the mineral rights from the land, and rights to develop

success[83] When a lessee enters into an oil and gas lease, the consideration given to the lessor is often very small, evidencing the lessor's desire for the resulting royalties as the primary purpose of the lease.[84]

C. *Implied Covenants*

In general, a lessee's obligation derives from the express clauses in the oil and gas lease.[85] However, Texas historically recognizes implied covenants as part of an oil and gas lease.[86] In Texas, there are implied covenants to: develop the leasehold; to protect the leasehold; and to manage the leasehold.[87] The duty to protect the leasehold includes preventing the depreciation of the lessor's interest.[88] However, the relationship be-

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and extract those minerals; the land and royalty owners receive a fractional royalty interest in exchange for relinquishing the right to develop to the oil company. *See id.*

83. EUGENE O. KUNTZ ET AL., OIL AND GAS LAW § 55.1 (1991).

84. *See* Danciger Oil & Ref. Co. of Tex. v. Powell, 154 S.W.2d 632, 635-36 (Tex. 1941) (identifying the potential for royalties as the predominate benefit and motivation for a lessor to enter an oil and gas lease). The court recognized that a lessor enters an oil and gas lease with the expectation of exploration and development of his land and the hope of receiving royalties as a product of this exploration and development, thereby explaining why the consideration given to a lessor when entering a lease is traditionally very small. *Id.*; RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 2.1 (1971) (explaining that the lessee bears the cost of the exploration, development and production, and that the lessor benefits through payments by the lessee to enter the lease, to maintain development rights, and also to account for the mineral owner's share in the production).

85. *See* Gulf Prod. Co. v. Kishi, 129 Tex. 487, 103 S.W.2d 965, 969 (1937) (explaining that express covenants of the lease should be considered first when interpreting a lease).

86. *See* Amoco Prod. Co. v. Alexander, 622 S.W.2d 563, 567 (Tex. 1981) (explaining that development of the lease and matters concerning the protection of the lessor's interest in the leasehold are traditionally not detailed by express language within the lease). Courts recognize implied covenants in an oil and gas lease, which relate to the lessee's duties to protect and develop the lease, dating back to the earliest oil and gas litigation. *Id.*

87. *See id.* (listing the major implied covenants of an oil and gas lease). Implied covenants exist to: develop the lease, to protect the lease, and to manage the lease. *Id.*; RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 8.1 (1971) (summarizing the categories of implied covenants in an oil and gas lease). One implied covenant is to develop the lease by drilling the initial well and to continue development after beginning production. *Id.* The implied covenant of protection requires the lessee to protect against drainage and to refrain from depreciating the lessor's interest. *Amoco Prod. Co.*, 622 S.W.2d at 567. Finally, the lessee is bound by the implied covenant to manage and administer the lease through production and marketing, to use reasonable care in operating the lease, to produce and develop using modern methods and to seek administrative action when necessary. *Id.*

88. *See Amoco Prod. Co.*, 622 S.W.2d at 567 n.1 (providing that protection of the lessor's interest is among the recognized implied covenants in oil and gas leases); RICHARD W. HEMINGWAY, THE LAW OF OIL AND GAS § 8.1 (1971) (including as a component of the implied covenant to protect the lease the obligation to refrain from actions which depreciate the lessor's interest in the leasehold).

tween the lessee and the lessor does not rise to a fiduciary level.[89] Instead, the scope of the lessee's implied duty to protect the leasehold[90] is measured by the objective standard of the reasonably prudent operator.[91]

D. *The Supreme Court Departs from Implied Covenant Law*

In *HECI v. Neel*,[92] the Texas Supreme Court stated that it "has not lightly implied covenants in mineral leases,"[93] yet it also recognized the long established existence of implied covenants.[94] The Neels contended that HECI had an obligation to notify them of the AOP suit, and that HECI violated the implied covenants of the lease by not doing so.[95]

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89. *See* Transcript of Argument at 8, HECI Exploration Co. v. Neel, 982 S.W.2d 861 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (asserting that a fiduciary relationship did not exist between a lessee and a royalty owner); Neel v. HECI Exploration Co., 942 S.W.2d 212, 218 (Tex. App.—Austin 1997, writ granted) (explaining that the lessee does not serve a fiduciary role in relation to the lessor). By the same token, the appellate court discarded as overly narrow the theory that when oil is drained it is not part of the leasehold, and therefore the duty to protect the leasehold "would not require the lessee to seek compensation for oil not part of the leasehold on behalf of someone to whom the lessee owes no fiduciary duty." *Id.*

90. *See id.* (recognizing the lessee's duty to protect the leasehold). The appellate court did not limit the duty to protect the leasehold to the lessee's share of the potential production, but held that the duty applied to the entire leasehold, including the interest retained by the lessee. *Id.*

91. *See HECI Exploration Co.*, 982 S.W.2d at 889 (promulgating the standard of the reasonably prudent operator as that which the lessee must meet to fulfill the purposes of the lease); *Amoco Prod. Co.*, 622 S.W.2d at 568-69 (recognizing the reasonably prudent operator standard of care as an essential element in oil and gas leases).

92. 982 S.W.2d 881 (Tex. 1998).

93. Transcript of Argument at 10, HECI Exploration Co. v. Neel, 982 S.W.2d 861 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (mentioning that "[i]mplied covenants are disfavored").

94. *See HECI Exploration Co.*, 982 S.W.2d at 889 (listing the widely recognized covenants historically implied in oil and gas leases); *Amoco Prod. Co.*, 622 S.W.2d at 567 (noting that courts have recognized implied covenants since the earliest oil and gas litigation).

95. *See Neel*, 942 S.W.2d at 217 (summarizing the Neels' contentions about HECI's duties in the lease). The Neels sought recovery from HECI for what the Neels alleged was a "breach of the implied covenant to protect the leasehold" and also for breaching the royalty provision of the lease. *Id.* The court of appeals recognized that the lessee's duty is to protect the leasehold. *Id.* at 217-18; *Amoco Prod. Co.*, 622 S.W.2d at 567 (listing the major implied covenants of an oil and gas lease that exist to develop the lease, to protect the lease, and to manage the lease); *see also* Response to Application for Writ of Error at 12-13, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (explaining that the Neels alleged that when HECI sued AOP "solely for its own benefit, rather than for the mutual benefit of itself and the Neels," HECI breached its duty under the implied covenant to protect the leasehold).

Ultimately, the Texas Supreme Court rejected the Neels' claims.[96]

Unlike the Texas Supreme Court, the court of appeals agreed with the Neels. It held that a mineral lessee who sues for damages to protect the lease must notify the interest holders in the lease of the lessee's intent to sue.[97] The court reasoned that a producer's right to recover for lost production includes the concomitant responsibility of notification of that lost production.[98] Additionally, the court held that HECI benefited at the Neels' expense when HECI recovered all of the damages without having to compensate the Neels for their share of the lost production profits.[99]

The Texas Supreme Court reached a conclusion contrary to the court of appeals. The supreme court agreed that allowing AOP to drain the lease without taking action would have been a violation of HECI's obligation to protect the leasehold.[100] However, it concluded that HECI had no duty to notify the Neels of its intent to sue.[101] The Texas Supreme Court reasoned that a requirement for this type of notification was "unnecessary to give effect to the purpose of the lease as a whole."[102]

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96. *See HECI Exploration Co.*, 982 S.W.2d at 888.

97. *See Neel*, 942 S.W.2d at 218 (concluding that the implied covenant to protect the leasehold includes the obligation to notify the lessor of the need to sue and that the lessee intends to sue). The court of appeals reasoned that the implied covenant to protect the lease includes not construing it so narrowly as to eliminate the obligation to inform the lessor about a potential suit, which the court concluded equals abandonment of part of the leasehold. *Id.* The appellate court stated that notification serves both the lessors and lessees: it allows lessees to meet their obligation to protect the entire leasehold, and alerts the lessor of impending action, thus giving the lessor the option to pursue any claims. *Id.*

98. *See id.* (finding that the "derivative right to recover for lost production has corollary responsibilities"). The appellate court determined that HECI had an obligation to notify the Neels of the AOP suit. *Id.*

99. *See Neel*, 942 S.W.2d at 218 (stating that HECI may not recover compensation for the unproduced and unproducible reserves free from its obligation under the lease to the Neels and the remainder of the leasehold).

100. *See* Transcript of Argument at 6, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (recognizing that all parties conceded that HECI would have breached the covenant to protect the leasehold if it stood by and allowed AOP to drain the leasehold); *see also Amoco Prod. Co.*, 622 S.W.2d at 568 (finding that the implied covenant to protect the leasehold includes the duty to protect against drainage); 5 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 61.3 (1978) (establishing that protecting the leasehold from drainage is "but a specific application of that general duty" to protect the lease).

101. *See HECI Exploration Co.*, 982 S.W.2d at 883 (holding that "there is no implied covenant that requires a lessee to give notice of its intent to sue an adjoining operator because such a duty is not necessary to effectuate the full purpose of the lease").

102. *See id.* at 890 (deciding that the notification requirement of the intent to sue does not fall within the parameters and application of implied covenants).

Based on the *HECI* holding, the Texas Supreme Court found the oil and gas lease valid even though the Neels, the royalty interest holders, did not receive their share of the royalties.[103] HECI received a damage award from AOP for the reduction in value and damage to the entire reservoir although the Neels owned a royalty interest in that reservoir.[104] This award serves as compensation for the loss of minerals due to the wrongful activity of AOP, thereby including the Neels' lost royalties.[105]

IV. THE NEELS' INJURY WAS INHERENTLY UNDISCOVERABLE

The Texas Supreme Court recognized that the damage award likely benefits HECI and deprives the Neels of their royalty.[106] Regardless, the court adhered to a strict application of the statute of limitations, and refused to apply the discovery rule.[107] Instead, the court maintained that the Neels should have known that there was a common reservoir beneath their land and their neighbor's land.[108] The supreme court further determined that the Neels should have known an adjoining operator has the capacity to deplete a reservoir, thus making the injury resulting from that depletion inherently discoverable.[109] Finally, the court insisted that roy-

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103. *See id.* at 888.

104. *See* Response to Application for Writ of Error at 4, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (reporting that HECI recovered damages in the amount of $3,719,956 from AOP for loss of reserves in the well in which the Neels owned a one-sixth royalty interest).

105. *See* Transcript of Argument at 9, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (asking if HECI proposed that, as lessees, they should have the right to sue for damages for the whole leasehold estate, but have no obligation to share the proceeds with the royalty owners); Response to Application for Writ of Error at 13, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (contending that once HECI determined it was necessary to file suit to protect the leasehold, HECI "had to protect the entire leasehold, not just its own 5/6th interest"); Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 4 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (theorizing that HECI's damage award from AOP likely included the Neel's share in royalties).

106. *See HECI Exploration Co.*, 982 S.W.2d at 891 (recognizing that HECI likely recovered damages to all of the interests, including the Neels' royalty interest).

107. *Id.* at 888.

108. *See id.* at 886 (determining that a royalty owner should know whether a common reservoir lies beneath its lease and whether other operators in the area are damaging that reservoir).

109. *See id.* at 886 (stating that a "[r]oyalty owners cannot be oblivious to the existence of other operators in the area or the existence of a common reservoir").

alty owners must exercise due diligence to enforce any contractual obligations within the statutory period.[110]

These conclusions, however, contradict precedent and the basic nature of the oil and gas lease. Specifically, previous courts considered the relative lack of knowledge of a claimant in relation to the defendant when deciding whether the claimant should have known of his injury.[111] Therefore, when the defendant is in the best position to know of the damages, that superior knowledge justifies application of the discovery rule.[112] In an oil and gas lease, the defendant lessee has knowledge and expertise which the lessor does not share.[113] Indeed, landowners are dependent on the lessee's expertise when they enter into the lease.

A. *Notice*

In addition to ignoring precedent that considered the relative expertise of the parties, the *HECI* court also disregarded precedent regarding notice. According to the Texas Supreme Court, subsurface injury to land is not inherently undiscoverable to a layperson.[114] To support that assertion, the court stated that the Railroad Commission has operation records of common reservoirs.[115] However, the court arguably contradicted itself

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110. *See* HECI Exploration Co. v. Neel, 982 S.W.2d 881, 887-88 (Tex. 1998) (expressing that a royalty owner may not sit on his hands for years and then sue for breach of contract if reasonable diligence would reveal the injury within the limitations period).

111. *See* Willis v. Maverick, 760 S.W.2d 642, 644-45 (Tex. 1998) (explaining that the superior knowledge possessed by an attorney may necessitate the application of the discovery rule in a legal malpractice suit); Andretta v. West, 415 S.W.2d 638, 641 (Tex. 1967) (determining that the superior knowledge a oil company enjoys calls for the application of the discovery rule in cases brought by royalty owners); Gaddis v. Smith, 417 S.W.2d 577, 580 (Tex. 1967) (recognizing that a surgeon has complete control of a surgical procedure, and therefore it is proper to apply the discovery rule in suits brought by patients damaged by foreign object left in their bodies).

112. *See* Shivers v. Texaco Exploration & Prod., Inc., 965 S.W.2d 727, 734 (Tex. App.—Texarkana 1998, pet. denied) (recognizing that an injury satisfies the inherent undiscoverability requirement of the discovery rule when the defendant is an expert); *see generally* Steven K. Ward, *Legal Malpractice in Texas*, 19 S. TEX. L.J. 587, 613 (1978) (recognizing the difficulty of a plaintiff, who is not in the best position to know of his injury, to detect such injury).

113. *See Andretta*, 415 S.W.2d at 641 (stating that a lessee as the holder of an executive right has superior knowledge over a lessor "so far as the lease amendment and the payments thereunder are concerned").

114. *See HECI Exploration Co.*, 982 S.W.2d at 886 (advancing that the existence of operators on adjoining lands should put royalty owners on notice of potential damage to their subsurface reservoirs).

115. *Id.*; *see also* Salinas v. Gary Pools, Inc., 31 S.W.3d 333, 337 (Tex. App.—San Antonio 2000, no pet.) (relating that the Texas Supreme Court in *HECI v. Neel* rejected HECI's contention that public records kept by the Texas Railroad Commission provides constructive notice to the plaintiff of damage to their reservoir). The *Gary Pools* court

by conceding that not "all records maintained by the Railroad Commission constitute constructive notice to royalty owners of their content."[116]

Despite the *HECI* court's recognition that constructive notice was not necessarily supplied by Railroad Commission records, the court admonished oil and gas lessors to make inquiries of their lessees periodically, in case there is some injury which the lessor should know.[117] Although the *HECI* court acknowledged that it could not impose constructive notice upon the Neels,[118] it found that the Railroad Commission records were publicly available.[119] As a result, this finding made the Neels' injury inherently discoverable.[120]

In *Advent Trust Co. v. Hyder*,[121] the Texas Court of Appeals in San Antonio criticized the supreme court's reasoning in *HECI*. The court of appeals determined that the notice provided by Railroad Commission records was unfair in its allocation of responsibility.[122] The appellate court questioned, "[h]ow [are] royalty owners, the trust officers for minors, lawyers, and judges, who are not knowledgeable about the state of the Railroad Commission records, able to distinguish between production records that provide constructive notice and those that do not?"[123]

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noted the Texas Supreme Court's commentary that constructive notice applies in limited circumstances such as probate proceedings and suits to try title; however, the *Gary Pools* court also acknowledged that even though public records may "not provide constructive notice to . . . plaintiffs as a matter of law," they could serve as a source of information, thus preventing an injury from being inherently undiscoverable. *Id.* at 337-38.

116. *HECI Exploration Co.*, 982 S.W.2d at 886.

117. *See id.* at 887-88 (maintaining that a royalty owner not making frequent inquires regarding their leasehold cannot then sue for damages to that leasehold if beyond the limitations period).

118. *See id.* at 887 (mentioning that even though some railroad commission records provide constructive notice, "the records regarding illegal production by AOP are not of that character in the context of the Neel's claims against HECI").

119. *See id.*; *Gary Pools, Inc.*, 31 S.W.3d at 337-38 (relying on *HECI* to confirm that records, not construed as providing constructive notice, could still negate the application of the discovery rule); AT & T Corp. v. Rylander, 2 S.W.3d 546, 556 (Tex. App.—Austin 1999, no pet.) (referring to *HECI* and concluding that the plaintiff's cause of action was not inherently undiscoverable because the information was publicly available).

120. *See id.* (noting that "filings and other materials publicly available from the Railroad Commission are a ready source of information, and a cause of action for failure to provide that same information is not inherently undiscoverable").

121. 12 S.W.3d 534 (Tex. App.—San Antonio 1999, no pet.).

122. *See* Advent Trust Co. v. Hyder, 12 S.W.3d 534, 539 n.1 (Tex. App.—San Antonio 1999, no pet.) (questioning the language of the Texas Supreme Court in *HECI v. Neel*). The appellate court expressed fear that the decision in *HECI* will require the inherently unfair necessity for royalty owners to hire experts to interpret Railroad Commission records to determine whether they reveal that the royalty owners have a cause of action. *Id.*

123. *Id.* at 539.

Even if a mineral owner took it upon himself to investigate Railroad Commission records, the records are confusing and difficult to decipher.[124] Unlike producers who possess expertise and expensive equipment, royalty owners are not in the best position to know of damage to the mineral estate.[125] Therefore, as the *Neel* appeals court noted, royalty owners should not be "required to stake out all government agencies in which their lessee's might initiate proceedings that might affect their royalty owners' interests."[126] The requirement to research all records for some potential injury or to inquire about possible lawsuits or damage, creates an unreasonable burden on one attempting to show the due diligence necessary to invoke the discovery rule.[127]

In fact, the Texas Supreme Court adopted very similar reasoning in *Andretta v. West*.[128] In *Andretta*, the royalty interest holder did not know that the lessee and the holders of the executive rights to the mineral estate changed the lease's payment terms.[129] Under those circumstances, the non-participating interest holder's only sources of information were the participating royalty interest holders, the lessee, and the lease it-

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124. *See* Response to Application for Writ of Error at 8, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (stating that the Railroad Commission records would not inform the Neels that HECI had either filed suit, or recovered from AOP); Jonathan Weil, *Royalty Bill Is Stymied by Oil Firms*, WALL ST. J., May 12, 1999, at T1, 1999 WL-WSJ 5452327 (reporting that a Railroad Commission hearings examiner testified at a deposition that "even commission staff members can't determine many basic characteristics about a well just from an operator's public filings").

125. *See Advent Trust Co.*, 12 S.W.3d at 539 n.1 (describing royalty interest owners as a "less-knowledgeable class" as compared to experts in the oil and gas business).

126. *Neel*, 942 S.W.2d at 221.

127. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 1 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (stating that the Neel decision sets a precedent which puts an unfair burden on royalty owners).

128. 415 S.W.2d 638 (Tex. 1967).

129. Andretta v. West, 415 S.W.2d 638, 639 (Tex. 1967) (explaining that the oil and gas lease in question was amended without the plaintiffs' knowledge to substitute monthly cash payments for the original production agreement; the amendment was executed and recorded after the plaintiff acquired his royalty interest). The plaintiff owned a one-fourth non-participating royalty interest in an oil and gas lease. *Id.* The amendment to the lease was made pursuant to a dispute between the lessee and the participating royalty interest owners over a producing well on adjoining property and whether there was an obligation for the lessee to drill an offset well. *Id.* The parties resolved the dispute by agreeing that the lessee would pay the participating royalty owners "monthly 'a lieu royalty in cash equivalent to one-eight of the proceeds from the sale of all oil produced and sold from' the well on the adjoining tract." *Id.*

self.[130] The Texas Supreme Court determined that the claimant did not have reason to suspect the change, and was therefore under no obligation to inquire or search for a change.[131] The court further concluded that the superior knowledge possessed by the operator obligated him to notify the nonparticipating royalty interest holder about the lease amendment.[132]

Similar to the claimant in *Andretta*, the Neels had no occasion to search Railroad Commission records or make inquiries to HECI as to damage to the reservoir.[133] Also, HECI possessed superior knowledge and the high degree of expertise necessary to detect such injuries.[134] This high degree of expertise required to detect an injury is a primary characteristic of inherent undiscoverability.[135] Accordingly, the Texas Supreme Court should have applied the discovery rule to the Neels' claim since the burden upon the defendant in defending a suit beyond the limitations period

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130. *Id.*

131. *See Andretta*, 415 S.W.2d at 638 (finding that the plaintiff did not have to search for an amendment to the lease when he had no suspicion of such a change). The court determined that the plaintiff did not have constructive notice, thereby requiring him to search the records or inquire of the other parties to the lease, even though the amendment was recorded; the plaintiff had no reason to suspect that there had been any changes made to the lease. *Id.*; *see also* Harwell v. State Farm Mut. Auto. Ins. Co., 896 S.W.2d 170, 174 (Tex. 1995) (concluding that an insurer had no obligation to continuously monitor courthouse records to determine whether an insured was served despite notice that suit had been filed).

132. *See Andretta*, 415 S.W.2d at 641 (recognizing the superior knowledge possessed by the lessee in an oil and gas lease and concluding that the knowledge was sufficient to create a duty to notify the lessor about an amendment).

133. *See* Response to Application for Writ of Error at 7, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (enforcing the principle that a person must have facts which require investigation to put them on notice of an injury); Richard F. Brown, *Annual Survey of Texas Law; Oil, Gas and Mineral Law*, 51 SMU L. REV. 1219, 1233 (1998) (advancing that the Neels had no reason to suspect overproduction of the common reservoir by AOP or the depletion of their own reserves; therefore, notwithstanding that the Railroad Commission records and state court proceedings were public filings, the injury to the Neels was reasonably unknown and application of the discovery rule was appropriate).

134. *See HECI Exploration Co.*, 982 S.W.2d at 884 (tracing the myriad of HECI's actions over a four-year period to halt AOP's overproduction of the reservoir); *see also Andretta*, 415 S.W.2d at 641 (stating that the lessee, as the executive right holder, has superior knowledge in administering oil and gas leases and payments made thereunder).

135. *See S.V.*, 933 S.W.2d at 7 (describing an inherently undiscoverable injury as one which is unknown to the plaintiff without any fault of their own); Poth v. Small, Craig & Werkenthin, L.L.P., 967 S.W.2d 511, 515 (Tex. App.—Austin 1998, no pet.) (stating that if an injury is unlikely to be discovered despite due diligence, it is inherently undiscoverable); Thompson v. Espey Huston & Assocs., 899 S.W.2d 415, 422 (Tex. App.—Austin 1995, no writ) (finding negligent engineering services inherently undiscoverable because of the high degree of expertise necessary to detect faulty service).

is less onerous than the severe injustice caused to the plaintiff by barring the suit.[136]

In addition to the relatively high degree of expertise enjoyed by the lessee/producer in an oil and gas lease, the producer has a significant amount of power and knowledge.[137] HECI could have met its burden to notify the Neels of the damage to the reservoir and the subsequent suit against AOP by simply inserting a note into the Neels' monthly royalty statement.[138] Conversely, the Neels' burden to discover the injury was considerably more onerous.[139] For the Neels to have known of their injury, they would have had to search and decipher the Railroad Commission records, inquire of HECI on a regular basis, scour court filings in counties other than their county of residence, or read low-circulating trade magazines.[140] These requirements appear particularly disproportionate when compared to the minimal actions that HECI would have to take to inform the Neels of the suit.[141]

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136. *See* Little v. Smith, 943 S.W.2d 414, 422 (Tex. 1997) (recognizing that the proper balance between the discovery rule and statutes of limitations occurs through the requirements of inherent undiscoverability and objective verifiability); Riojas v. Phillips Prop., Inc., 828 S.W.2d 18, 25 (Tex. App.—Corpus Christi 1991, no writ) (stating the Texas Supreme Court's practice of balancing the purposes of statutes of limitations with the injustice of barring suits when determining whether to apply the discovery rule).

137. *See Andretta*, 415 S.W.2d at 641 (recognizing the superior knowledge of, and the power entrusted to, oil and gas lessees).

138. *See* Response to Application for Writ of Error at 6, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (observing that a simple note in the monthly royalty statement would have been sufficient to inform the Neels of HECI's intent to sue AOP).

139. *See* Response to Application for Writ of Error at 11-12, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (reviewing the various sources of information available to the Neels, and revealing the undue burden each of them imposed). Checking the court files in the county where the land was located would have been insufficient because other venues were possible. *Id.* Furthermore, the trade publications that the Neels would have to review are not widely available. *Id.* at 12. Moreover, it is unreasonable to expect a landowner to check the court records every few weeks in each county. *Id.*

140. *See* Transcript of Argument at 9, HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886-87 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (naming the various sources from which the Neels could have allegedly gleaned information regarding injury to the reservoir and also of HECI's suit against AOP); Response to Application for Writ of Error at 6, HECI v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (citing the Railroad Commission records, Fayette County District court records, Fayette County weekly newspaper, and Petroleum Information (a trade publication) as possible sources where the Neels could discover their injury).

141. *See* Response to Application for Writ of Error at 6, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (noting that a note in a royalty statement world provide the Neels regarding

B. *Distinguishing the Texas Supreme Court's "Analogous" Cases*

In denying the application of the discovery rule to the Neels' claims,[142] the Supreme Court referred to four "analogous" oil and gas cases for support.[143] The referenced cases, however, are all distinguishable from *HECI.* In each case, the plaintiff knew facts that should have triggered knowledge of their injury.[144]

The first case relied upon by the *HECI* court was *Shivers v. Texaco Exploration & Production, Inc.*[145] In *Shivers*, a royalty owner sued the lessee/producer for not revealing that the leased wells were subject to a tax credit.[146] However, in facts distinctly different from those in *HECI*, the plaintiff had information that should have put him on notice that he had a tight well formation which fell under the tax credit: an IRS Form 1040 instruction booklet, a story in the local newspaper, and actual notice in the form of production information on the royalty checks.[147]

HECI's intent to sue AOP); Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 11 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (observing that a simple note from HECI to the Neels would have provided sufficient notice to the Neels of HECI's suit against AOP).

142. *See HECI Exploration Co.*, 982 S.W.2d at 888.

143. Shivers v. Texaco Exploration & Prod., Inc., 965 S.W.2d 727 (Tex. App.—Texarkana 1998, pet. denied); Rogers v. Ricane Enters., Inc., 930 S.W.2d 157 (Tex. App.—Beaumont 1995, writ denied); Koch Oil Co. v. Wilber, 895 S.W.2d 854 (Tex. App.—Beaumont 1995, writ denied); Harrison v. Bass Enters Prod., 888 S.W.2d 532 (Tex. App.—Corpus Christi 1994, no writ).

144. *See Shivers*, 965 S.W.2d at 735 (finding that the plaintiff should know that the well in which he owned an interest was eligible for a tax reduction because he possessed an IRS instruction booklet, a story ran in the local newspaper, and from production information on his royalty checks); *Rogers*, 930 S.W.2d at 169 (denying the application of the discovery rule to a conversion action against working interest owners and oil and gas purchasers because the plaintiffs should have known of the injury since the wells were located on the their property); Koch Oil Co. v. Wilber, 895 S.W.2d 854, 859 (Tex. App.—Beaumont 1995, writ denied) (stating that the statute of limitations barred royalty owners' action against operators for failure to pay royalties; the discovery rule did not apply because the record contained letters written six years before initiation of the suit, expressing the plaintiffs' complaint of not receiving royalties for months); Harrison v. Bass Enters. Prod. Co., 888 S.W.2d 532, 538 (Tex. App.—Corpus Christi 1994, no writ) (denying the application of the discovery rule to toll a cause of action by a non-participating royalty owner against a well operator and the other interest owners for unpaid royalties, because evidence showed that the plaintiff had in his own files a memo revealing cessation of royalty payments).

145. 965 S.W.2d 727 (Tex. App.—Texarkana 1998, writ denied).

146. Shivers v. Texaco Exploration & Prod., Inc., 965 S.W.2d 727, 730 (Tex. App.—Texarkana 1998, writ denied).

147. *See id.* at 735 (listing the various sources available which would put the plaintiff on notice of a tight formation well and the subsequent tax credit).

In the next case supporting the *HECI* court's decision, *Rogers v. Ricane, Enterprises, Inc.*,[148] the discovery rule did not apply in a suit for conversion of wells and title to the property.[149] The court found the injury inherently discoverable.[150] Unlike the Neels' damage, however, the discovery of the damage did not require subsurface knowledge of a third-party's land.[151] The plaintiff had a working interest in the land and clearly saw the wells producing on the property for years before he made his claim.[152]

Additionally, the discovery rule did not apply in the third case cited by the *HECI* court, *Koch Oil Co. v. Wilber*.[153] Here, mineral owners sued the lease operators for failure to pay royalties.[154] Evidence existed establishing that the owners knew of the cessation of the payments as much as four years prior to filing their petition.[155] The owners sent complaint letters to the producers about the cessation of payments, and testified that they were actually aware of the injury long before filing suit.[156] Conversely, the Neels were never aware of the damage to their reservoir during the limitations period.[157]

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148. 930 S.W.2d 157 (Tex. App.—Beaumont 1995, writ denied).

149. *See* Rogers v. Ricone Enters., Inc. 930 S.W.2d 157, 169 (Tex. App.—Beaumont 1995, writ denied) (finding that the conversion of the wells was not fraudulently concealed or inherently undiscoverable).

150. *See id.* at 169 (explaining that the allegedly converted wells were openly located on the plaintiff's own premises because the drilling was above the surface and openly visible).

151. *See id.* (recognizing that evidence of production was available by visual inspection).

152. *See* Response to Application for Writ of Error at 9-10, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (explaining that the plaintiffs in *Rogers* sued for conversion and were working interest owners, making it "reasonable to expect them to be on the land they claimed to own and see a well drilled by someone else"); *see also* Neel v. HECI Exploration Co., 942 S.W.2d 212, 222 (Tex. App.—Austin 1991, writ granted) (promulgating the contention that the discovery rule does not apply if the royalty interest owners "knew facts that should have triggered knowledge of their injury").

153. 895 S.W.2d 854 (Tex. App.—Beaumont 1995, writ denied).

154. *See* Koch Oil Co. v. Wilber, 895 S.W.2d 854, 860-61 (Tex. App.—Beaumont 1995, writ denied) (explaining that the plaintiffs were royalty interest owners who brought suit against the operator of their oil and gas lease for failure to pay royalties).

155. *See id.* at 859 (citing the record as reflecting that the plaintiffs were aware that royalty payments had ceased).

156. *See id.*

157. *See* HECI Exploration Co. v. Neel, 982 S.W.2d 881, 884 (Tex. 1998) (referring to the fact that the Neels "did not learn of the suit between HECI and AOP until May 1993," which was after the statute of limitations period).

Finally, *Harrison v. Bass Enterprises Production Co.*[158] was another example used by the *HECI* court for not applying the discovery rule in a suit by royalty owners for ceased royalty payments.[159] The undisputed evidence showed that, unlike the Neels, the owner/claimant had in his own personal files a memo indicating production.[160] A mere inspection of his own files would have revealed the lack of proper royalty payments.[161]

Although not referred to by the *HECI* court, *Hues v. Warren Petroleum Co.*[162] is another case distinguishable from *HECI* where the court declined to apply the discovery rule.[163] In this suit for damages to land resulting from a gas leak, the trial court deemed the injury inherently discoverable because of widespread and adverse publicity in the local media where the damaged property existed and where the plaintiff resided.[164] In contrast to *Hues*, the public information available to the Neels was not widespread by any standard.[165]

In fact, in each of the proffered cases where the discovery rule did not apply, there was knowledge which a layperson could perceive without expert analysis that should have revealed the plaintiffs' injury.[166] The supreme court required the Neels to have a higher level of knowledge than the knowledge requirements of prior, rejected discovery rule cases.[167]

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158. 888 S.W.2d 532 (Tex. App.—Corpus Christi 1994, no writ).

159. *See* Harrison v. Bass Enters. Prod. Co., 888 S.W.2d 532, 535 (Tex. App.—Corpus Christi 1994, no writ) (affirming the trial court's conclusion, which refused to utilize the discovery rule in a dispute involving "unpaid oil and gas royalties").

160. *See id.* at 538 (reciting the undisputed fact that the plaintiff filed a memo indicating production from his non-participating royalty interest ten years before filing suit).

161. *See id.*

162. 814 S.W.2d 526 (Tex. App.—Houston [14th Dist.] 1991, writ denied).

163. *See* Hues v. Warren Petroleum Co., 814 S.W.2d 526, 528 (Tex. App.—Houston [14th Dist.] 1991, writ denied) (determining that a cause of action by landowners against a gas company for gas leaks was not tolled by the discovery rule because the landowners had notice of the damage from widespread publicity about the leaks).

164. *See id.* (stressing that widespread publicity of the plaintiffs' injury meant that it was not inherently undiscoverable, therefore the discovery rule did not apply).

165. *See* Response to Application for Writ of Error at 6, HECI v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (on file with the *St. Mary's Law Journal*) (listing obscure sources of information available to the Neels).

166. *See id.* at 10 (explaining that in *Harrison v. Bass Enters Prod. Co.*, *Koch Oil Co. v. Wilber*, and *Rogers v. Ricane Enters., Inc.*, the plaintiffs had actual knowledge of their injuries, thereby barring the use of the discovery rule to toll the limitations periods).

167. *See* Lewey v. H.C. Frick Coke Co., 31 A. 261, 261 (Pa. 1895) (describing a suit where the defendant tunneled under the plaintiff's land to remove coal). The court recognized that the plaintiff had no way of learning of his injury and wrote:

> [t]o require an owner, under such circumstances, to take notice of a trespass upon his underlying coal at the time it takes place, is to require an imposibility(sic); and to hold that the statute begins to run at the date of the trespass is in most cases to take away

The court admonished the Neels by requiring them to exercise diligence in protecting their interests, and not to be oblivious to possible sources of damage.[168] However, that diligence would require constant inspection of public filings, frequent inquiries to all producers, and an advanced knowledge of the complications and damages that could result from shared reservoirs and other geological factors.[169]

Thus, the *HECI* court created a new standard for due diligence and inherent undiscoverability.[170] The Texas Supreme Court stressed that "to be inherently undiscoverable; an injury need not be absolutely impossible to discover, else suit would never be filed and the question whether to apply the discovery rule would never arise."[171] However, the *HECI* court pushes the envelope of impossibility by imposing an unreasonable due diligence standard.[172]

C. *Ramifications*

As a result of the *HECI* decision, a court can impose knowledge upon an individual even if he has no reason to suspect his injury or the capability to discover it, as long as the information that reveals the injury is publicly available.[173] So far, this decision has influenced at least one court on

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the remedy of the injured party before he can know that an injury has been done him. A result so absurd and so unjust ought not to be possible.

Id. at 263.

168. *See* Transcript of Argument at 4, HECI Exploration Co. v. Neel, 982 S.W.2d 881, 886 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (stating that the Neels had the obligation to determine whether they had an interest in the oil reservoir, and whether the reservoir received damage by others operating in the area).

169. *See id.* at 886-87 (citing the lessee, Railroad Commission records, and filings as sources available to the Neels revealing their injury); *see also* Transcript of Argument at 3, HECI Exploration Co. v. Neel, 982 S.W.2d 881 (Tex. 1998) (No. 97-0403) (transcript on file with the *St. Mary's Law Journal*) (implying some doubt about the reasonableness of expecting the Neels to know that HECI had sued AOP). Justice Abbott questioned whether the Neels needed to scour courthouse records for evidence of a lawsuit by HECI against AOP. *See id.*

170. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner 1 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (recognizing *HECI v. Neel* as a redistribution of responsibilities and the departure from prior case law).

171. S.V. v. R.V., 933 S.W.2d 1, 7 (Tex. 1996).

172. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 4 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (questioning in what context the discovery rule will be available as interpreted by the *HECI* decision).

173. *See* Salinas v. Gary Pools, Inc., 31 S.W.3d 333, 336 (Tex. App.—San Antonio 2000, no pet. h.) (relying on *HECI* to confirm that records not construed as providing constructive notice may still be sufficient to negate the application of the discovery rule);

the standard necessary for an inherently undiscoverable injury.[174] In *Hutchison v. Union Pacific Resources Co.*,[175] Hutchison alleged that the resource company, without her notification, caused production to cease on one of the wells in which she owned a mineral interest.[176] The court of appeals in Austin originally applied the discovery rule to Hutchison's cause of action, reasoning that the cessation of production did not put her on inquiry of any wrongful act.[177] The court of appeals recognized that legitimate reasons may exist regarding cessation of production, and therefore, cessation alone is not sufficient to cause a mineral owner to suspect injury.[178]

However, on appeal, the Texas Supreme Court vacated the court of appeals' decision.[179] The Texas Supreme Court required a new opinion to comport with the *HECI* requirements.[180] Now, according to the new *HECI* standards, mineral owners must realize all potential damages associated with their oil and gas leases to establish an inherently undiscoverable injury.[181] Considering Hutchison's argument in light of *HECI*, the court of appeals reasoned that if a royalty owner should know that wells on adjacent properties draw from a common reservoir and could therefore damage that reservoir, they should also assume that the cessation of

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AT & T Corp. v. Rylander, 2 S.W.3d 546, 556 (Tex. App.—Austin 1999, no pet.) (referring to *HECI* to conclude that the plaintiff's cause of action was not inherently undiscoverable because the information showing the injury was publicly available); *see also* Matthiessen v. Schaefer, 27 S.W.3d 25, 31-32 (Tex. App.—San Antonio 2000, no pet.) (illustrating the impact of the *HECI* decision in the defendant's argument that if information containing flood data is publicly available, the discovery rule would not apply).

174. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 8 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (reviewing the "fallout" from the *Neel* decision).

175. No. 03-96-00715-CV, 1999 WL 298325, at *1 (Tex. App.—Austin May 13, 1999, pet. denied) (not designated for publication).

176. *See* Hutchison v. Union Pac. Res. Co., No. 03-96-00715-CV, 1999 WL 298325, at *1 (Tex. App.—Austin May 13, 1999, pet. denied) (not designated for publication) (reciting Hutchison's rights as an overriding royalty on production from the oil and gas lease, a right of notification if production ceased, and right to elect for reassignment of the working interest to her if production ceased).

177. *See id.* at *2 (tolling the tortious interference cause of action because the court did not determine that Hutchison had reason to suspect her injury).

178. *See id.* (explaining that the evidence did not establish that it was apparent that the cessation was a breach of a duty owed Hutchison, and therefore, not apparently wrongful).

179. *See id.*

180. *See id.*

181. *See Hutchison*, No. 03-96-00715-CV, 1999 WL 298325, at *2 (stating that the Texas Supreme Court remanded the case to the Court of Appeals in Austin for reconsideration in light of *HECI v. Neel*).

production was a result of wrongdoing, rather than a legitimate cessation occurring during the normal course of production.[182]

The reach of *HECI*, which allegedly only covers claims arising out of damages to oil and gas reservoirs,[183] actually extends to further increase the burden upon land and mineral owners, while decreasing the producer's responsibilities.[184] In August, 2001, the Texas Supreme Court, in *Wagner & Brown, Ltd. v. Horwood*,[185] relied on *HECI* to determine that a royalty owner has a duty to investigate the fees listed on his royalty statements.[186] The supreme court rejected an appellate court's application of the discovery rule on a claim by royalty owners claiming excessive charges by a producer.[187]

As a result of *Horwood*, the Texas Supreme Court once again places a demanding and unreasonable burden on the lessor in an oil and gas lease.[188] The court not only imposes the burden upon royalty owners to constantly monitor producers for inaccurate reporting, but goes even further to find that if the producer does misrepresent fees, the royalty owner is still not entitled to use the discovery rule.[189] Thus, *Horwood* makes it increasingly apparent that the court will continue to use *HECI* as precedent to shift more and more responsibility from the lessee to the lessor in oil and gas leases.[190]

D. *Application of the Discovery Rule in Other Jurisdictions*

The Texas Supreme Court's decision in *HECI* departed not only from Texas precedent, but from the approach adopted in other states. Like Texas, other jurisdictions apply the discovery rule when a foreign object is

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182. *See id.* at *3 (concluding upon remand that the discovery rule did not apply to Hutchison's cause of action because the injury was not inherently undiscoverable).

183. *See* Wagner & Brown, Ltd. v. Horwood, 2001 WL 987344, at *3 (Tex. 2001) (not designated for publication) (explaining that *HECI* has precedential authority for claims resulting from damage to oil and gas reservoirs).

184. *See id.* at *5 (determining that expecting lessors to discover improper charges in their royalty statements is not an onerous burden).

185. 2001 WL 987344 (Tex. 2001).

186. *See* Wagner & Brown, Ltd. v. Horwood, 2001 WL 987344, at *5 (Tex. 2001) (not designated for publication) (stating that "those who receive statements listing fees charged should be alerted to the need to perform additional investigation to protect their interests").

187. *See id.* at *6 (reversing the court of appeal's decision to apply the discovery rule). In *Horwood*, the supreme court determined that "[t]he fact that a lessee allegedly misrepresented information in a particular case . . . does not affect the categorical determination of inherent undiscoverability in a discovery rule analysis." *Id.* at *4.

188. *Id.* at *4.

189. *Id.*

190. *See Horwood* 2001 WL 987344, at *4.

left in a patient's body during surgery.[191] These jurisdictions also share the goal Texas courts identify as the reason for the discovery rule: achieving justice.[192] To meet this goal, application of the discovery rule has expanded beyond medical malpractice claims to other cases, such as breach of contract and damage to land.[193]

The Arizona Supreme Court recognizes the discovery rule as an exception to statutes of limitations. In *Gust, Rosenfeld & Henderson v. Prudential Insurance Co. of America*,[194] the Arizona Supreme Court observed the importance of the discovery rule as an exception "to mitigate the harshness that the traditional rule was capable of inflicting on a plaintiff who did not know of the breach."[195] To decide whether the discovery rule applied to contract cases, the Arizona high court reviewed the state's discovery rule history.[196] In support of its decision the Arizona Supreme Court turned to a 1932 case, *Tom Reed Gold Mines Co. v. United Eastern Mining Co.*[197] In *Tom Reed*, the court held that the statute of limitations for the wrongful removal of underground ore tolled until the discovery of the injury,[198] because it was necessary to obviate

191. *See Robinson*, 550 S.W.2d at 19 (stating that the application of the discovery rule as illustrated in *Gaddis v. Smith* is the majority rule in the United States); *Gaddis*, 417 S.W.2d at 578 (recognizing that a growing number of jurisdictions embrace the discovery rule in foreign-object cases); Fernandi v. Strully, 173 A.2d 277, 282 (N.J. 1961) (commenting that other jurisdictions are increasingly applying a discovery rule method to cases where foreign objects are left in patients' bodies).

192. *See Lewey*, 31 A. at 263 (tolling the statute of limitations until the plaintiff learns of his injury because any other result would be absurd and unjust); Gust, Rosenfeld & Henderson v. Prudential Ins. Co., 898 P.2d 964, 967 (Ariz. 1995) (en banc) (explaining the reason for applying the discovery rule as "it is unjust to deprive a plaintiff of a cause of action before the plaintiff has a reasonable basis for believing that a claim exists"); Touchet v. Baker Hughes, Inc., 737 So. 2d 821, 824 (La. Ct. App. 3d Cir. 1999) (explaining that statutes of limitations should be suspended when required by equity and justice); Ruth v. Dight, 453 P.2d 631, 635 (Wash. 1969) (construing a duty for the court to apply statutes of limitations to further justice).

193. *See, e.g., Gust, Rosenfeld & Henderson*, 898 P.2d at 965 (applying the discovery rule to toll the commencement of a breach of contract claim); Donald v. Amoco Prod. Co., 735 So. 2d 161, 168 (Miss. 1999) (using the discovery rule in a suit arising out of damage to land until the radioactive waste became apparent); U.S. Oil & Refining Co. v. Wash. Dep't of Ecology, 633 P.2d 1329, 1334 (Wash. 1981) (approving the discovery rule as a method of tolling accrual of a cause of action for unlawful waste discharges on land).

194. 898 P.2d 964 (Ariz. 1995) (en banc).

195. Gust, Rosenfeld & Henderson v. Prudential Ins. Co. of Am., 898 P.2d 964, 966 (Ariz. 1995) (en banc).

196. *See id.* at 966-67 (reviewing the application of the discovery rule in past cases arising out of a tort claim and medical malpractice claim).

197. 8 P.2d 449 (Ariz. 1932).

198. *See Gust, Rosenfeld & Henderson*, 898 P.2d at 967 (holding that the statute of limitations began to run upon discovery of the injury, since the nature of the situation included "the inherent opportunity to take the one secretly").

the defendant's "inherent opportunity to take the ore secretly."[199] Here again, the defendant was in the best position to know of this taking because of its superior knowledge.[200]

The Supreme Court of Mississippi found in *Donald v. Amoco Production Co.*[201] that radiation damage to property was also inherently undiscoverable.[202] Importantly, the Mississippi court considered the inexperience of a layman as a significant reason to allow the discovery rule to toll the statute of limitations.[203] The court was also cognizant of the dangerous precedent that it would set by holding the plaintiff responsible for knowing of the invisible injury to his property.[204] Unlike the Texas court, the Mississippi court did not want to impose upon future purchasers of real property the undue burden and cost of the necessary environmental surveys to disclose radioactive waste damage.[205]

Thus, this "best position" or "superior knowledge" capability of a defendant is a persuasive reason for applying the discovery rule.[206] Courts do not favor limiting suits where the defendant benefits from their own knowledge at the expense of an ignorant plaintiff.[207] The Arizona Supreme Court articulates the basic rationale for such a policy in asserting that "the law should not reward secretiveness."[208] Other jurisdictions dif-

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199. *Id.*

200. *Id.*

201. 735 So. 2d 161 (Miss. 1999).

202. *See* Donald v. Amoco Prod. Co., 735 So. 2d 161, 166 (Miss. 1999) (finding radioactive material invisible, and detectable only by using a survey meter, thereby making the damage inherently undiscoverable).

203. *See id.* at 168 (opining that a laymen could not realistically perceive the injury until it was readily apparent).

204. *See id.* (suggesting that any other decision would "engender disrespect for our civil justice system" and would put an unreasonable burden on future purchasers of real property) (quoting *Owens-Illinois, Inc. v. Edwards*, 573 So. 2d 704, 708-09 (Miss. 1990)).

205. *See id.* (recognizing the costly and time-consuming nature of environmental reports, which are necessary before they are discoverable).

206. *See* Bauman v. Day, 892 P.2d 817, 828 (Alaska 1995) (identifying the most common policy reason for the discovery rule as prohibiting the defendant from profiting from his own superior position and from the plaintiff's ignorance); *Gust, Rosenfeld & Henderson*, 898 P.2d at 967 (citing the common thread running through discovery rule applications as the protection of the plaintiff based on the defendant's superior position); *U.S. Oil & Refining Co.*, 633 P.2d at 1334 (stating that justice is not served if statutes of limitations are used against a plaintiff and the relevant information is in the defendant's hands).

207. *See Bauman*, 892 P.2d at 827 (holding that a plaintiff's ignorance should not be the source of the defendant's benefits); U.S. Oil & Refining Co. v. Wash. Dep't of Ecology, 633 P.2d 1329, 1334 (Wash. 1981) (rejecting the appropriateness of allowing a knowledgeable defendant to benefit from an ignorant plaintiff when the defendant is in control of the relevant information).

208. *Gust, Rosenfeld & Henderson*, 898 P.2d at 969.

fer from Texas in that they avoid placing undue burdens upon injured plaintiffs considering the relative expertise of parties.

V. LEGISLATIVE RESPONSE

As discussed above, the Texas Supreme Court's decision in *HECI* contradicts both Texas precedent and the approach adopted in other jurisdictions. The legislature has the responsibility to respond and correct the mistakes made in *HECI*.[209] This type of legislative response occurred following the Texas Supreme Court's decision in *Computer Associates International, Inc. v. Altai, Inc.*[210] There, the supreme court denied the application of the discovery rule in a suit for the misappropriation of trade secrets.[211] The court placed the burden upon the owner of the trade secret to discover that the secret had been stolen, although evidence of the theft was not discovered until after the limitations period.[212]

The Texas Legislature responded *to Altai* by reinstating the discovery rule in suits involving the misappropriation of trade secrets.[213] The Legislature recognized that when trade secrets are stolen, the theft could go undetected for a period of time that exceeds the statutory limitations period.[214] Consequently, it condemned the Texas Supreme Court's decision in *Altai*, stating that the "result of this holding is that a judicial remedy is

209. *See* S.V. v. R.V., 933 S.W.2d 1, 3 (Tex. 1996) (recognizing that it is the prerogative of the legislature to enact statutes of limitation); Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 9 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (declaring that according to checks and balances, the legislature has a duty to pass legislation to compensate for error in judgments by the Texas Supreme Court).

210. 918 S.W.2d 453 (Tex. 1994).

211. *See* Computer Assocs. Int'l, Inc. v. Altai, Inc., 918 S.W.2d 453, 457-58 (Tex. 1994) (examining trade secret misappropriations and determining that although some are difficult to discover, generally, the statutory limit is ample for the detection of the misappropriation). The court opined that an owner of a trade secret should be suspicious of competitors' products which are similar to their own products, especially if a former employee is working for the competitor. *Id.* at 457. The court also suggested that the owner of a trade secret should be astute in monitoring the misappropriation of those secrets. *Id.* at 456-57.

212. *See id.* (warning that trade secrets are a valuable commodity and need protection through extensive precautions).

213. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 16.010 (Vernon Supp. 2001) (mandating that a person must bring suit for misappropriation of trade secrets not later than three years after the misappropriation is discovered or by the exercise of reasonable diligence should have been discovered).

214. *See* HOUSE COMM. ON CIVIL PRACTICES, BILL ANALYSIS, Tex. H.B. 368, 75th Leg., R.S. (1997) (recognizing the difficulty for the true owner of a trade secret to learn of its theft).

lost to the true owner if a tortfeasor can conceal his use of the trade secret for the two year limitations."[215]

As with the theft of trade secrets, a judicial remedy is lost to mineral owners if subsurface or other concealed damages remain undiscovered for a period of time exceeding the statutory limitations period.[216] For that reason, legislation similar to the type adopted in response to *Altai* should be drafted and enacted to prevent *HECI*'s unjust results in future cases.[217] The inherent disproportionate allocation of knowledge and expertise amongst parties to an oil and gas lease requires that the statute of limitations for damages arising out of a lease not begin until the injured party knew or should have known of his injury.

Legislation addressing this issue was introduced and defeated in both the 1999 and 2001 legislative sessions.[218] According to the *Wall Street Journal*, the defeat was due, in large part, to persuasion by oil and gas lobbyists.[219] The lobbyists contend that such legislation would open the door to a floodgate of litigation by mineral owners attempting to benefit from past injuries.[220]

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215. *Id.*

216. *See* Donald v. Amoco Prod. Co., 735 So. 2d 161, 166-67 (Miss. 1999) (stating that "it is illogical to bar an action before its existence is known").

217. *See* Laura H. Burney, *HECI v. Neel* and Proposed Discovery Rule Legislation: Point/Counterpoint; The View of the Royalty Owner, Address Before 18th Annual Advanced Oil, Gas & Mineral Law Course 9 (Sept. 21-22, 2000) (transcript on file with the *St. Mary's Law Journal*) (advocating for legislation, similar to that for theft of trade secret actions, to adopt a discovery rule for suits arising out of oil and gas leases).

218. *See* Tex. H.B. 3482, 76th Leg., R.S. (1999) (adding Subsection (d) to Section 16.004 to read:

> For the purposes of this section, a cause of action arising out of or relating to an interest in an oil and gas lease does not accrue until the facts giving rise to the cause of action are discovered or by the exercise of reasonable diligence should have been discovered. The trier of fact shall examine the circumstances of each particular case to determine what facts by the exercise of reasonable diligence should have been discovered without regard to whether the facts giving rise to the cause of action are inherently undiscoverable);

Keely Coghlan, *Texas Eyes Changes to Royalty Dispute Clock*, THE OIL DAILY, Apr. 24, 2000, *available at* 2000 WL 10342847 (recognizing the failed legislative attempt to institute a statutory discovery rule in oil and gas disputes).

219. *See* Jonathan Weil, *Royalty Bill is Stymied by Oil Firms*, WALL ST. J., May 12, 1999, at T2, *available at* 1999 WL-W3J5452327 (referring to the heavy pressure from oil-and-gas company lobbyists upon Texas House and Senate committees).

220. *See* Keely Coghlan, *Texas Eyes Changes to Royalty Dispute Clock*, THE OIL DAILY, Apr. 24, 2000, *available at* 2000 WL 10342847 (quoting a spokesperson for the Texas Oil and Gas Association as claiming that the legislation is merely an attempt by plaintiffs' attorneys to find "a new pot of gold at the end of the rainbow"). The spokesman claimed plaintiffs will go as far back as Spindletop to discovery injuries for which they could sue. *Id.*; Jonathan Weil, *Royalty Bill is Stymied By Oil Firms*, WALL ST. J., May 12,

However, new legislation should once again be introduced in the 2003 legislative session. The legislation should state the simple requirement that the accrual of a cause of action arising out of an oil and gas lease should not begin until evidence of the cause of action is, or by the exercise of reasonable diligence, discovered. This language comports with the well-established purpose of the discovery rule: to accomplish justice. The rational and just application of such a discovery rule quashes any argument by the opposition purporting that ancient injuries may be conjured up and brought back upon unwitting defendants. For example, if such a statute existed before the *HECI* decision, and if HECI had simply sent a letter notifying the Neels of their injury, the discovery rule would not have applied, and summary judgment would have been proper. Thus, such legislation would quell fears among mineral owners that they must rush to the courthouse upon any indication of injury to save potential claims from the arbitrary administration of the statute of limitations.

VI. CONCLUSION

The discovery rule remains an important component of Texas law. If an injury is inherently undiscoverable and objectively verifiable, the discovery rule is appropriate. *HECI Exploration Co. v. Neel* is not good law; it sets the due diligence standard too high for inherently undiscoverable damages to mineral estates.

Oil companies are naturally in a better position to know of injuries to mineral owners. These companies possess superior knowledge in most, if not all, aspects of the industry. Royalty owners, on the other hand, must hire landmen and geologists to gain comparable knowledge. This requirement does not comport with reasonable standards of due diligence. Applying the discovery rule to delay the running of statutes of limitations until the plaintiff knew, or should of known of his injury is an established and logical aspect of our jurisprudence. Because the court system will not implement this judicial device, the legislature should mandate it.

1999, at T1, *available at* 1999 WL-WSJ 5452327 (quoting the same representative for the Texas Oil and Gas Association this time asserting that the legislation would be "a bonanza for plaintiffs' attorneys . . . [and] was drafted solely to promote class-action royalty lawsuits").