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ANNUAL CASE LAW UPDATE

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2020 ANNUAL CASE LAW UPDATE
HOUSTON BAR ASSOCIATION, OIL & GAS SECTION

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I. INTRODUCTION

This paper summarizes and analyzes selected oil and gas cases from Texas decided after July 2018 and up to January 15, 2020 with a few significant exceptions on date range and jurisdiction. The arbitrary time period omits some significant decisions from 2018, but to avoid duplication found in other presentations and to limit the length of this report, the time cut-off was appropriate. If you have not done so, you should review *Murphy Expl. & Prod. Co.-USA v. Adams,* 560 S.W.3d 105 (Tex. 2018); *Tro-X, L.P. v. Anadarko Petroleum Corp.,* 548 S.W.3d 458 (Tex. 2018); *Endeavor Energy Res. v. Discovery Operating,* 554 S.W.3d 556 (Tex. 2018); *XOG Operating v. Chesapeake Expl. P'ship,* 554 S.W.3d 607 (Tex. 2018); *ConocoPhillips Co. v. Koopman,* 547 S.W.3d 858 (Tex. 2018) and *JPMorgan Chase Bank v. Orca Assets,* 546 S.W.3d 648 (Tex. 2018) in order to be more fully versed in recent Texas oil and gas jurisprudence.

This summary is not exhaustive, and it is necessarily limited to some of the more important oil and gas cases selected for discussion by the authors as well as some other recent decisions with an impact on oil and gas practitioners and their clients. In addition, one case from outside of Texas is included because of its novel subject in the area of mineral classification.

The comments in this presentation are necessarily limited to the reported decisions as the author was only involved in two of the cases discussed in this paper. Thus, some underlying facts not mentioned in the opinions but known to the litigants are not included herein. From experience with these matters, this is regrettable but these omissions are now part of the *stare decisis.*

An alphabetical organization has been chosen for this presentation as a continuance of the organization chosen by Professors Anderson and Ehrman with some additions for cases not decided when they wrote or considered by them. Where possible, we have noted whether the parties have petitioned for review with the Texas Supreme Court.

II. ACCOMMODATION DOCTRINE

A. *Harrison v. Rosetta Res. Operating, LP*, 564 S.W.3d 68, (Tex. App.—El Paso, 2018, n.p.h.)

Facts: The Harrison Trust ("Harrison") was Owner of the Surface of a 320-acre Relinquishment Lands Act tract. Harrison executed an oil and gas lease on behalf of the State with Eagle Oil & Gas Co. ("Eagle"). The lease had a clause regarding water use:

> Lessee shall have the right to use water produced on said land necessary for operations under this lease except water from wells or tanks of the owner of the soil; provided, however, Lessee shall

[1] Special thanks to Owen L. Anderson, Professor and Distinguished Oil and Gas Scholar of The University of Texas School of Law and Monika U. Ehrman, Associate Professor of Law, Faculty Director, Oil & Gas, Natural Resources, and Energy Center of The University of Oklahoma College of Law for use of parts of their paper presented at the 44th Ernest E. Smith Mineral Law Institute.

not use potable water or water suitable for livestock or irrigation purposes for waterflood operations without the prior consent of the owner of the soil.

Eagle assigned the lease to Comstock Oil and Gas ("Comstock"), which agreed to indemnify Eagle from claims arising from its operations. A few months later Harrison sued Eagle for negligence. As part of the settlement agreement, Comstock agreed to make repairs to a water well on Harrison's land and to buy 120,000 barrels of water from Harrison at fifty cents a barrel. Comstock bought that amount of water at the agreed upon price. A plastic-lined "frac pit" was also built to store water from the well, though that was outside the settlement agreement.

After drilling two oil wells, Comstock assigned its lease to Rosetta Resources Operating, LP, ("Rosetta"). Rosetta began purchasing water from an adjacent property and brought that water onto Harrison's property, without permission, using temporary water lines.

Harrison additionally alleged that Rosetta violated the "accommodation doctrine" because by not purchasing its water from Harrison, Rosetta had made the well and frac pit useless, thereby causing damage to the surface property.

Holding: The accommodation doctrine does not require mineral lessees to buy water from surface owners, nor is it negligent for a mineral lessee to reasonably use the surface as contractually allowed.

Rationale: The court first addressed and rejected Harrison's claim that Rosetta violated the accommodation doctrine, stating that "categorizing a refusal to buy goods produced from the land as "interference" with the land for purposes of the accommodation doctrine would stretch the doctrine beyond recognition." The court declined to stretch the doctrine, as doing so would require all oil and gas operations to buy their water from the surface owner, if available.

B. VirTex Operating Co. v. Bauerle, 04-16-00549-CV;___S.W.3d___, 2017 Tex.App. LEXIS 10413, Pet. denied March 29, 2019, Motion for rehearing den. October 18, 2019.

Facts: This dispute between the Bauerles and VirTex concerned the installation of overhead power lines across the Bauerles' ranch property near Dilley, Texas. The ranch comprises approximately 8,500 acres in Frio and Zavala Counties. The Bauerles own the surface estate of the 8,500-acre tract as well as a 2% royalty interest in the property. The Bauerles primarily use the ranch property to run a commercial hunting business and a cattle operation. The Bauerles lease the ranch and its facilities to hunters on a yearly basis. The main source of income for the ranch stems from the hunting leases.

Under the hunting leases, hunters use helicopters several times throughout the year on the ranch for a number of game operations, including brush and predator control, game surveys, and deer captures. Of these operations, deer captures are arguably the most important. Once pilots locate a deer, they are able to push the deer into an open area, where the deer can be captured with a net gun. The operation requires pilots to fly alongside the deer — approximately 4 to 5 feet above ground — weaving in and out of brush, while at the same time, dodging trees and other obstacles. The process has been described as one of "the most extreme [forms of] flying that you can possibly do." In addition to the deer capture operations, hunters also use helicopters for maintaining brush operations and predator control. Equipped with a tank and sprayers for brush control, helicopters fly over certain areas of the ranch and spray in order to enable taller brush to grow in a more favorable way for the deer. Hunters also use helicopters to hunt predators, such as coyotes, on the ranch.

VirTex is the Lessee of a 3,000 acre oil and gas lease within the 8,500 acre ranch. When Bauerle acquired the ranch, there was no oil and gas activity but the surface and minerals had been severed. VirTex drilled nine wells on 2,000 of the 3,000 acres and entered into a SUA with Bauerle for the installation and maintenance of tank batteries as well as other matters. VirTex had plans to drill numerous additional wells. Each of the nine wells is equipped with a pumpjack and the pumpjacks were powered by portable diesel electric generators pending the installation of overhead power lines. The ranch had one power line that ran along the entrance road to the hunting lodge. Bauerle described the proposed VirTex power lines as being like a spider web. Bauerle refused to grant a power line easement. Bauerle then filed a declaratory judgment action seeking a declaration that the overhead power lines would substantially impair Bauerle's pre-existing use of the lateral surface and super-adjacent airspace. VirTex counterclaimed for the right to install overhead power lines as a reasonable, customary practice in the oilfield and VirTex claimed there was no other industry method available.

Holding: To obtain relief on a claim that the mineral lessee has failed to accommodate an existing use of the surface, the surface owner has the burden to prove that (1) the lessee's use completely precludes or substantially impairs the existing use, and (2) there is no reasonable alternative method available to the surface owner by which the existing use can be continued. If the surface owner carries that burden, he must further prove that given the particular circumstances, there are alternative reasonable, customary, and industry-accepted methods available to the lessee which will allow recovery of the minerals and also allow the surface owner to continue the existing use. The Bauerles produced legally and factually sufficient evidence for the jury to find that their existing use of the surface and adjacent airspace would be substantially impaired by the installation of the proposed overhead power lines. There was sufficient evidence establishing no reasonable alternative methods existed by which the Bauerles could continue leasing the ranch to hunters who managed the property using helicopters. Finally, the Court found that burying power lines (as opposed to installing overhead power lines), fueling pump jacks by diesel or natural gas (as opposed to utility service), or continuing to use rented generators to operate the pump jacks were reasonable alternatives that could be used by VirTex to exploit the mineral estate.

Rationale: The trial court admitted the testimony of a helicopter pilot who testified to the danger posed by the power lines and the inconvenience and risk posed by the overhead power lines. This testimony satisfied the first and second prongs of the Accommodation Doctrine test as far as the jury was concerned. The third element or prong, i.e. the proposed alternative use is reasonable, was satisfied by VirTex's initial operations. The Court did not delve into the cost of portable diesel generators versus utility electricity. Although not mentioned, there is a fourth element of the Accommodation Doctrine enunciated in *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). In *Sun Oil Co. v. Whitaker*, 483 S.W.2d 808, 812 (Tex. 1972), the Texas Supreme Court limited *Getty Oil* to situations in which there are reasonable alternative methods that may be employed by the lessee on the leased premises to accomplish the purposes of the lease. In *Whitaker,* the landowner demonstrated that Sun Oil could bring salt water from an adjacent lease to be used in the waterflood on his lease. The Court refused to require off lease alternatives. In the VirTex case, the San Antonio Court of Appeals entertained a suggestion that VirTex could install gas pipelines from adjacent land to the Bauerle lease in order to operate the pumping jacks.

III. ARBITRATION

A. *Apache Corp. v. Bryan C. Wagner,* 2018 Tex. App. LEXIS 9766 (Tex. App.—Fort Worth 2018, pet. filed March 25, 2019)

Facts: Wagner Oil Company ("WOC") purchased oil and gas related assets, including Louisiana properties, from Apache pursuant to a June 4, 2001 purchase and sale agreement (PSA) that was negotiated by WOC and executed by Wagner on WOC's behalf in his capacity as its president. Wagner, Trade, and W&C provided the funds for the approximately $25 million purchase in, respectively, 80%, 19%, and 1% shares. After the sale, WOC assigned its interest to Wagner, Trade and W&C. Several years later, Apache was sued in Louisiana on environmental damage claims and a $15 million judgment resulted. Apache sought indemnity from WOC under the PSA. Wagner, et al. filed a declaratory judgment action in Tarrant County, Texas seeking a declaration that they were not subject to the arbitration provision. The Tarrant County court agreed and this appeal ensued. The Fort Worth Court of Appeals held that these claims were subject to the arbitration provision.

Reasoning: The standard of review of a trial court's denial of a motion to compel arbitration for an abuse of discretion and that requires a *de novo* review. As described by the Texas Supreme Court, arbitration is a creature of contract between consenting parties. The movant must first establish the existence of a valid and enforceable arbitration agreement and then must establish whether the claims at issue fall within the arbitration agreement's scope. Doubts about scope are resolved in favor of arbitration, but the presumption favoring arbitration agreements arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists.

An arbitration clause is a "specialized kind of forum-selection clause," *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 437 (Tex. 2017), and whether claims are covered by a forum-selection clause "should be [determined] according to a commonsense examination of the substance of the claims made." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677-78 (Tex. 2009) (orig. proceeding). To determine whether a claim falls within the scope of the agreement, courts must focus on the factual allegations of the complaint, rather than the legal causes of action asserted. Because forum-selection clauses are creatures of contract, the circumstances in which non-signatories can be bound to one are rare. *Pinto Tech. Ventures, L.P.*, 526 S.W.3d at 443.

In the PSA, WOC and Apache agreed to arbitrate "[a]ny disputes arising out of or in connection with this Agreement or the application, implementation, validity, breach or termination of this Agreement . . . pursuant to the dispute resolution provisions contained in Exhibit B," and the Apache Assignment to WOC was made subject "to the terms and conditions" of the PSA. Accordingly, Apache showed that there was a valid agreement to arbitrate between it and WOC.

Determining whether a claim involving a non-signatory must be arbitrated is a preliminary matter for the trial court, not the arbitrator. *Jody James Farms, JV*, 547 S.W.3d at 629, 630 ("Who may properly adjudicate arbitrability is critical to ascertaining the appropriate standard of review.").

This matter involved a signatory defendant trying to force non-signatory plaintiffs into a forum not selected by the non-signatory plaintiffs. There are six scenarios in which arbitration with non-signatories may be required: incorporation by reference, assumption, agency, alter ego, equitable estoppel, and third-party beneficiary. Apache argues that WOC's assignees are subject to three of these theories—assumption, direct benefits estoppel, and incorporation by reference. The court agreed and compelled arbitration.

B. *Rebellion Energy II, LLC v. Liberty Res. Powder River Operating, LLC, (Tex.App.—Houston [1st Dist.] November 5, 2019, n.w.h.) 2019 Tex. App. LEXIS 9652*

This case involved a June 2018 Purchase and Sale Agreement for Wyoming oil and gas assets by Rebellion from Liberty. The $106 million purchase price was subject to upward or downward adjustment based on various factors, e.g. title defects, claims, contract obligations. One of these contract obligations concerned a Gas Gathering and Processing Agreement ("GGPA"). Liberty was a party to the GGPA with a third party midstream services company, Thunder Creek. Liberty assigned the GGPA to Rebellion in the PSA.

The GGPA provided that, if Thunder Creek agreed to connect a new well to its gathering system and the Producer decided not to drill the well to the target depth or did not complete the well within 120 days of the notice, then the Producer would be obligated to reimburse Thunder Creek for all costs incurred in constructing facilities for that well. In this litigation, Rebellion claimed that, in 2017, Liberty provided Thunder Creek with notice for two new wells named Habanero and Nine Mile. Rebellion contended that Liberty later—but before execution of the PSA—made the decision not to complete the Habanero and Nine Mile wells and that Thunder Creek invoiced Liberty the amount of $749,064.82 for its work on those wells.

Liberty contended that, while it did provide Thunder Creek with notice for the two new wells in 2017, it notified Thunder Creek in January 2018 that it was delaying completion of the wells. Liberty then provided Thunder Creek with new notices of completion for the two wells on June 19, 2018, and August 7, 2018, respectively. Liberty alleged that, after the PSA closed and Rebellion assumed the GGPA, Rebellion decided not to complete the Habanero and Nine Mile wells and notified Thunder Creek of its decision. As a result, on August 15, 2018, Thunder Creek sent Rebellion two invoices totaling $749,064.82 for the costs for the Habanero and Nine Mile wells.

Liberty sent a Final Settlement Statement. Rebellion disputed the Final Settlement Statement and attached Thunder Creek's invoices and claimed a credit and a downward adjustment in the purchase price. Liberty disputed this claim. Rebellion invoked the accounting arbitration provision. Liberty claimed that the arbitration provision did not apply and the trial court agreed with Liberty. The 1st Court of Appeals noted that arbitration is favored by the courts but that this dispute was not arbitrable.

Holding: This dispute falls outside of the narrow accounting arbitration clause and the stay of the litigation was lifted.

Rationale: The 1st Court of Appeals closely analyzed Rebellion's allegations and Rebellion's reliance on provisions in the PSA. The court found that Rebellion's contentions did not comport with the specific third party dispute resolution matters addressed in another article of the PSA. Under the third party payments and disputes provision, Liberty was correct in resisting arbitration. After considering all of the PSA provisions, the court concluded the intent was not to include third party disputes as a property expense subject to upward or downward adjustment.

IV. ATTORNEYS' FEES

A. *Rohrmoos Venture v. UTSW DVA Healthcare, LLP,* 578 S.W.3d 469 (Tex. 2019)

Facts: UTSW, the tenant, sued Rohrmoos, the landlord, for breach of the lease contract and won a jury verdict. The lease agreement provided for "fee shifting" to the prevailing party, i.e. the American rule applicable in Texas is that each side pays its attorneys' fees, so "fee shifting" assesses fees against one party to be paid by that party to the prevailing party. USTW's attorney testified to reasonable and necessary attorneys' fees without reference to time sheets, work performed by other attorneys on the file, the necessity of the work and other details. The attorney did reference 3 of the 8 *Arthur Anderson* factors. The attorneys' fee award was $1,025,000. Rohrmoos challenged the finding that USTW was the prevailing party and challenged the evidence supporting the fee award. The Dallas Court of Appeals rejected both arguments and held that the "lodestar method" for calculating attorneys' fees did not apply in this case.

Holding: The Supreme Court holds that the evidence used to prove attorney's fees in this case was legally insufficient to support the fee award. Because the record did not provide the requisite details to support a fee award, the court of appeals' judgment was reversed as to the attorney's fee award and the case was remanded to the trial court for a redetermination of fees consistent with this opinion.

Rationale: **(1) Base Calculation: Time x Rate = Presumptively Reasonable**—The Supreme Court admonishes practitioners by stating that it should have been clear from the opinions in *El Apple, Montano*, and *Long* that the Supreme Court intended the lodestar analysis to apply to any situation in which an objective calculation of reasonable hours worked times a reasonable rate can be employed. The fact finder's starting point for calculating an attorney's fee award is determining the reasonable hours worked multiplied by a reasonable hourly rate, and the fee claimant bears the burden of providing sufficient evidence on both counts. *See El Apple*, 370 S.W.3d at 760. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. *See id.* at 762-63. This base lodestar figure should approximate the reasonable value of legal services provided in prosecuting or defending the prevailing party's claim through the litigation process. *Cf. Blanchard v. Bergeron*, 489 U.S. 87, 93, 109 S. Ct. 939, 103 L. Ed. 2d 67 (1989) (explaining that a fee-shifting statute "contemplates reasonable compensation . . . for the time and effort expended by the attorney for the prevailing [party], no more and no less").

(2) Enhancing or Reducing Base Calculation. The second part of El Apple's two-step analysis—adjusting the base calculation up or down based on relevant considerations—remains intact. Like the U. S. Supreme Court, the Texas Supreme Court recognizes that the base lodestar figure accounts for most of the relevant Arthur Andersen considerations. See *Arthur Andersen*, 945 S.W.2d at 818; *cf. Perdue*, 559 U.S. at 553; *Burlington*, 505 U.S. at 562-63; *Blum*, 465 U.S. at 898-900. An enhancement or reduction of the base lodestar figure cannot be based on a consideration that is subsumed in the first step of the lodestar method. *Cf. Perdue*, 559 U.S. at 553 (reaffirming that a lodestar enhancement may not be based on a factor that is included in the base lodestar calculation). As in the federal courts, the base lodestar calculation usually includes at least the following considerations from Arthur Andersen: "the time and labor required," "the novelty and difficulty of the questions involved," "the skill required to perform the legal service properly," "the fee customarily charged in the locality for similar legal services," "the amount involved," "the experience, reputation, and ability of the lawyer or lawyers performing the services," "whether the fee is fixed or contingent on results obtained," "the uncertainty of collection before the legal services have been rendered," and "results obtained." See *Arthur Andersen*, 945 S.W.2d at 818; *cf. Perdue*, 559 U.S. at 553 (noting that the base lodestar calculation appropriately accounts for the novelty and complexity of a case because those considerations are presumably "fully reflected in the number of billable hours recorded by counsel," and that the quality of the attorney's performance is likewise already accounted for because "considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate" (quoting *Blum*, 465 U.S. at 898; Del. Valley Citizens' Council, 478 U.S. at 566)); *Burlington*, 505 U.S. at 562-63 (disallowing an enhancement for contingency because it would likely duplicate in substantial part considerations already subsumed in the base lodestar calculation, as "[t]he risk of loss in a particular case (and, therefore, the attorney's contingent risk) . . . is ordinarily reflected in the lodestar—either in the higher number of hours expended to overcome the difficulty, or in the higher hourly rate of the attorney skilled and experienced enough to do so"). These considerations therefore may not be used to enhance or reduce the base calculation to the extent that they are already reflected in the reasonable hours worked and reasonable hourly rate. If a fee claimant seeks an enhancement, it must produce specific evidence showing that a higher amount is necessary to achieve a reasonable fee award. See <u>Perdue, 559 U.S. at 553</u> (observing that the requirement of "specific evidence" is essential "if the lodestar method is to realize one of its chief virtues, i.e., providing a calculation that is objective and capable of being reviewed on appeal"); *El Apple*, 370 S.W.3d at 760. If a fee opponent seeks a reduction, it bears the burden of providing specific evidence to overcome the presumptive reasonableness of the base lodestar figure.

(3) Standard Summary. To summarize, the lodestar method as presented in *El Apple* applies for determining the reasonableness and necessity of attorney's fees in a fee-shifting situation. Under the lodestar method, the determination of what constitutes a reasonable attorney's fee involves two steps. First, the [fact finder] must determine the reasonable hours spent by counsel in the case and a reasonable hourly rate for such work. The [fact finder] then multiplies the number of such hours by the applicable rate, the product of which is the base fee or lodestar. The [fact finder] may then adjust the base lodestar up or down (apply a multiplier), if relevant factors indicate an adjustment is necessary to reach a reasonable fee in the case. 370 S.W.3d at 760 (citations omitted).

The fact finder must first determine a base lodestar figure based on reasonable hours worked multiplied by a reasonable hourly rate. *Id.* In a jury trial, the jury should be instructed that the base lodestar figure is presumed to represent reasonable and necessary attorney's fees, but other considerations may justify an enhancement or reduction to the base lodestar; accordingly, the fact finder must then determine if the evidence of those considerations overcomes the presumption and necessitates an adjustment to reach a reasonable fee. Id. at 765; *see also* Perdue, 559 U.S. at 558-59 (suggesting that adequate appellate review is only feasible when the fact finder makes reasonably specific findings as to each step of the fee determination). *Arthur Andersen* lists relevant considerations that may justify an adjustment, but as explained above, considerations already incorporated into the base calculation may not be applied to rebut the presumption that the base calculation reflects reasonable and necessary attorney's fees. *See Arthur Andersen*, 945 S.W.2d at 818; *cf. Perdue*, 559 U.S. at 553; *Burlington*, 505 U.S. at 562-63; *Blum*, 465 U.S. at 898-900.

General, conclusory testimony devoid of any real substance will not support a fee award. Thus, a claimant seeking an award of attorney's fees must prove the attorney's reasonable hours worked and reasonable rate by presenting sufficient evidence to support the fee award sought citing to *Long*, 442 S.W.3d at 255-56; *Montano*, 414 S.W.3d at 736-37; *El Apple*, 370 S.W.3d at 763-64. Sufficient evidence includes, at a minimum, evidence of (1) particular services performed, (2) who performed those services, (3) approximately when the services were performed, (4) the reasonable amount of time required to perform the services, and (5) the reasonable hourly rate for each person performing such services. See El Apple, 370 S.W.3d at 762-63.

As the United States Supreme Court has observed, "[t]he lodestar method was never intended to be conclusive in all circumstances"; rather, "there is a 'strong presumption' that the [base] lodestar figure is reasonable, but that presumption may be overcome in those rare circumstances in which the lodestar does not adequately take into account a factor that may properly be considered in determining a reasonable fee." Perdue, 559 U.S. at 553-54. Thus, the second step of the lodestar method allows for the base lodestar figure to be adjusted up when considerations not already accounted for in the first step establish that the base lodestar figure represents an unreasonably low fee award, depriving fair compensation to the prevailing party's attorney. Likewise, the base lodestar figure can be adjusted down when it is established, based on considerations not already accounted for in the first step, to be an unreasonably high or excessive fee award, creating a windfall for the prevailing party or its attorney.

(4) Billing Records. Contemporaneous billing records are not required to prove that the requested fees are reasonable and necessary. *See El Apple*, 370 S.W.3d at 763; *see also Montano*, 414 S.W.3d at 736 (explaining that "*El Apple* does not hold that a lodestar fee can only be established through time records or billing statements"). Nevertheless, billing records are *strongly* encouraged to prove the reasonableness and necessity of requested fees when those elements are contested. In *El Apple*, the value of contemporaneous records for lodestar calculations is emphasized:

> An attorney could, of course, testify to these details, but in all but the simplest cases, the attorney would probably have to refer to some type of record or documentation to provide this information. Thus, when there is an expectation that the lodestar method will be used to calculate fees, attorneys should document their time much as they would for their own clients, that is, contemporaneous billing records or other documentation recorded reasonably close to the time when the work is performed.

370 S.W.3d at 763; *see also id.* at 762 (observing that hours "not properly billed to one's client also are not properly billed to one's adversary" under a fee-shifting statute (quoting *Hensley*, 461 U.S. at 434)). Creating the documents makes them available for production, provides a basis for testifying as to the reasonableness and necessity of the requested fees, and permits cross-examination.

The Texas Supreme Court in this case states that it is not endorsing satellite litigation as to attorney's fees although that seem inevitable. The Court observes that the fact finder will generally not benefit from attorneys cross-examining each other point-by-point on every billable matter. *See* Hensley, 461 U.S. at 437 ("A request for attorney's fees should not result in a second major litigation. Ideally, of course, litigants will settle the amount of a fee. Where settlement is not possible, the fee applicant bears the burden of establishing entitlement to an award and documenting the appropriate hours expended and hourly rates."). The Court urges parties to use discovery and pretrial procedure to evaluate attorney's fee claims and the evidence supporting them, then present to the fact finder the evidence relevant to determining a reasonable and necessary fee as discussed in this opinion.

B. *Nath v. Tex. Children's Hosp.*, 62 Tex. Sup. Ct. J. 1290, 2019 Tex. (June 21, 2019)

Facts: The trial court awarded $1.4 million in attorneys' fees for frivolous, unsubstantiated litigation. The case was appealed to the Supreme Court and remanded for fact finding. Appellee submitted affidavits and the trial court awarded the same $1.4 million.

Holding: The same standard for fee-shifting awards in *Rohrmoos* applies to fee-shifting sanctions awarded under Tex.Civ.Prac.&Rem.Code §§10.001-.006. and other punitive authority.

Rationale: Before a court may exercise its discretion to shift attorney's fees as a sanction, there must be some evidence of reasonableness because without such proof a trial court cannot determine that the sanction is "no more severe than necessary" to fairly compensate the prevailing party. *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 480 (Tex. 2008) (quoting *TransAmerican Nat. Gas Corp. v. Powell*, 811 S.W.2d 913, 917 (Tex. 1991)); *see also Low v. Henry*, 221 S.W.3d 609, 620 (Tex. 2007) ("[A] sanction cannot be excessive nor should it be assessed without appropriate guidelines."). "Consequently, when a party seeks attorney's fees as sanctions, the burden is on that party to put forth some affirmative evidence of attorney's fees incurred and how those fees resulted from or were caused by the sanctionable conduct." *CHRISTUS Health Gulf Coast v. Carswell*, 505 S.W.3d 528, 540 (Tex. 2016).

C. *Sundance Energy, Inc. v. NRP Oil & Gas LLP,* 2019 Tex.App. LEXIS 7223 (Tex.App.—Houston [1st Dist.] August 15, 2019

Facts: Sundance and NRP entered into a purchase and sale agreement (PSA) for all of Sundance's interests in oil and gas leases and wells in three counties in North Dakota. Sundance agreed to retain certain pre-sale liabilities, including joint interest billings (JIBs) attributable to periods of time prior to the effective date. Before and after the sale, NRP received JIBs totaling $146,000 from operators. Sundance agreed those costs were retained liabilities under the PSA, and reimbursed NRP the full amount. NRP subsequently received additional JIBs totaling approximately $900,000 attributable to ownership before the effective date of the sale. Sundance refused to reimburse NRP for those additional JIBs. NRP sued and the jury found that Sundance failed to comply with the PSA and awarded NRP nearly $1 Million in economic damages. The jury also answered a question in the jury indicating it determined Sundance was not entitled to any offsets. The parties agreed to try attorney's fees to the bench.

The trial court admitted NRP's attorneys' fees testimony and evidence despite its untimely disclosure. NRP presented evidence of time records, hourly rates, experience of its attorneys, and fees regularly charged by firms in Harris County, Texas for cases of this nature. NRP discounted the fees charged by 25% for work performed on claims for which attorneys' fees were not recoverable. Sundance's expert did not disagree with the hourly rates but opined that this litigation set the record for the most documents produced in discovery that had nothing to do with the trial. As such, Sundance concluded that only half of the fees were necessary. The trial court disagreed and awarded NRP all of the fees requested.

Holding: The late admission of attorneys' fees evidence is measured by an abuse of discretion standard and the 1st Court of Appeals found none here as the potentially erroneous evidentiary ruling will not be reverse unless the error caused the rendition of an improper judgment or prevented a proper presentation of the appeal. Neither applied in this case. The 1st Court of Appeals reviewed the *Arthur Anderson* factors and found that the attorneys' fees evidence of reasonableness and necessity was sufficient to support the award.

Rationale: The evidence presented complies with the *Rohrmoos* requirements.

V. CONTRACT

A. *URI, Inc. v. Kleberg County,* 543 S.W.3d 755 (Tex. 2018)

This case is not an oil and gas case, but is included for Justice Guzman's writing on the appropriate use of "context" when construing an instrument. The following is what Justice Guzman said about "context" in the opinion's introduction:

> A word is not a crystal, transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.
> —Oliver Wendell Holmes
>
> We have long articulated a principle of contract construction that permits courts to consult the facts and circumstances surrounding a negotiated contract's execution to aid the interpretation of its language. Despite expounding on this principle from time to time, and as recently as last term, it remains susceptible to confusion and inconsistency when applied to unambiguous contract terms. The principle's limitations are, however, clear: surrounding facts and circumstances cannot be employed to "make the language say what it unambiguously does not say" or "to show that the parties probably meant, or could have meant, something other than what their agreement stated." In other words, extrinsic evidence may only be used to aid the understanding of an unambiguous contract's language, not change it or "create ambiguity."
>
> When interpreting a written contract, the prime directive is to ascertain the parties' intent as expressed in the instrument. "[O]bjective, not subjective, intent controls," so the focus is on the words the parties chose to memorialize their agreement. But language is nuanced, and meaning is often context driven. Contract language is thus construed in its lexical environment, which may include objectively determinable facts and circumstances that contextualize the parties' transaction. Surrounding facts and circumstances can inform the meaning of language but cannot be used to augment, alter, or contradict the terms of an unambiguous contract.

This case involved a settlement agreement concerning uranium mining activities and water well testing and water quality. The settlement agreement (and the words at issue) required URI to "return (to) suitability" any well whose water was suitable for irrigation. URI took a sample from Well I-11 in 1985 and then again in 1987. The samples taken in 1987 according to URI were "baseline" required samples before mining could begin. The 1987 samples categorized the water as not suitable for irrigation while the 1985 sample would have categorized the well as suitable for irrigation. Kleberg County argued that the surrounding circumstances must be considered and that those circumstances establish the 1985 samples as the correct "baseline" data. The Supreme Court ruled that the court of appeals impermissibility relied on extrinsic evidence of Kleberg County's subjective intent to construe the settlement agreement. The settlement agreement was unambiguous. The 1987 testing was the data to be used.

B. *IBM v. Lufkin Indus., LLC*, 573 S.W.3d 224 (Tex. 2019)

Facts: In 2009, Lufkin decided to upgrade its business-operations computer-software system. Over a period of several months, Lufkin and IBM engaged in numerous meetings, "discovery workshops," and other discussions in which they exchanged information about Lufkin's needs and IBM's capabilities. Lufkin's representatives explained that Lufkin needed an "out-of-the-box" or "off-the-shelf" system that could quickly replace its old system for a price lower than the cost of upgrading that system. Based on Lufkin's operational needs, IBM recommended its "Express Solution for SAP," which utilizes software developed by SAP.

During these extended discussions, IBM made numerous representations about its Express Solution that turned out to be false. Yet IBM continued to represent the Express Solution as a "fit" for Lufkin, hoping it could land the sale and then figure out how to provide what Lufkin needed.

In September 2009, IBM presented a demonstration of the Express Solution for Lufkin. During this demonstration, IBM's representatives again represented that the Express Solution would meet eighty percent of Lufkin's needs without any customization. In fact, the representatives knew that Express Solution was designed for much smaller operations and could not meet Lufkin's requirements without extensive and costly enhancements. Relying on IBM's misrepresentations, Lufkin agreed to a written contract with IBM in March 2010. The contract gave IBM about a year to finalize and implement the system, projecting that Lufkin could "go live" with IBM's Express Solution system on March 1, 2011.

The implementation did not go well. Each time, IBM assured Lufkin that the system would work as planned if Lufkin would just be patient while IBM addressed the issues. Over time, IBM convinced Lufkin to approve nine different "Project Change Requests" and increase the overall price. Ultimately, Lufkin paid IBM just under $13 million, an increase of about $6.6 million over the original price, and agreed to settle for a "go-live-ugly" implementation on January 1, 2012. Lufkin only agreed to these repeated delays and increased costs because IBM continued to represent that once implemented, the Express Solution would meet Lufkin's needs without any further enhancements, and by then it had invested so much time and money it could not start the process over.

On the day of the "go-live-ugly," Lufkin deactivated its old system at IBM's instruction. But Lufkin was unable to use the Express Solution to invoice customers, manage inventory, track orders, shipments, or costs, calculate payroll, or pay employees and vendors. Because the system did not integrate with Lufkin's financial modules, Lufkin had to delay filing public financial reports, and its stock lost value. In short, the system failure crippled Lufkin's business.

Procedural history: Lufkin filed suit against IBM, asserting claims for fraudulent inducement, fraudulent misrepresentation and concealment, negligent misrepresentation, and breach of contract. At trial, the jury found IBM liable on all claims. As damages for fraudulent inducement, the jury awarded $10 million for out-of-pocket losses and $11 million for additional costs to mitigate and replace IBM's system. As damages for fraud—which Lufkin refers to as "string-along fraud"—the jury awarded $3 million for out-of-pocket losses and $3 million for mitigation costs. But the jury awarded zero damages for negligent misrepresentation and breach of contract.

Based on the jury's verdict, the trial court entered judgment awarding Lufkin $21 million for fraudulent inducement, or alternatively, $6 million for the string-along-fraud claim "if the judgment above for fraudulent inducement is reversed by an appellate court." The court of appeals upheld IBM's liability for fraudulent inducement but reversed the alternative string-along-fraud award, concluding that claim was based on the same misrepresentations as the fraudulent-inducement claim. *Int'l Bus. Machs. Corp. v. Lufkin Indus., Inc.*, 564 S.W.3d

15, 32 (Tex. App.—Tyler 2017). The court also concluded that the evidence did not support all of the $11 million in mitigation damages and suggested a remittitur of about $3.5 million, which Lufkin accepted. *Id.* at 37.

Holding: Lufkin (1) cannot recover for fraudulent inducement because it expressly disclaimed any reliance on IBM's misrepresentations, (2) Lufkin cannot recover for so-called string-along fraud for the same reason, and (3) Lufkin is entitled to a new trial on its claim for breach of contract because the evidence conclusively established that it suffered some amount of damages as a result of IBM's breach.

Reasoning: The contract between Lufkin and IBM contained a merger clause and further provided that:

> In entering into this SOW, Lufkin Industries is not relying upon any representation made by or on behalf of IBM that is not specified in the Agreement or this SOW, including, without limitation, the actual or estimated completion date, amount of hours to provide any of the Services, charges to be paid, or the results of any of the Services to be provided under this SOW. This SOW, its Appendices, and the Agreement represent the entire agreement between the parties regarding the subject matter and replace any prior oral or written communications.

A merger clause, standing alone, does not prevent a party from suing for fraudulent inducement. *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 327 (Tex. 2011). And similarly, a clause that merely recites that the parties have not made any representations other than those contained within the written contract is not effective to bar a fraudulent-inducement claim. *Id.* at 334. But a clause that clearly and unequivocally expresses the party's intent to disclaim reliance on the specific misrepresentations at issue can preclude a fraudulent-inducement claim. *See Forest Oil Corp. v. McAllen*, 268 S.W.3d 51, 60-61 (Tex. 2008); *see also Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 179 (Tex. 1997). Not every such disclaimer is effective, and courts "must always examine the contract itself and the totality of the surrounding circumstances when determining if a waiver-of-reliance provision is binding." *Forest Oil*, 268 S.W.3d at 60. Specifically, courts must consider such factors as whether:

> (1) the terms of the contract were negotiated, rather than boilerplate, and during negotiations the parties specifically discussed the issue which has become the topic of the subsequent dispute;
>
> (2) the complaining party was represented by counsel;
>
> (3) the parties dealt with each other at arm's length;
>
> (4) the parties were knowledgeable in business matters; and
>
> (5) the release language was clear.

Italian Cowboy, 341 S.W.3d at 337 n.8; *see also Forest Oil*, 268 S.W.3d at 60. When "sophisticated parties represented by counsel disclaim reliance on representations about a specific matter in dispute, such a disclaimer may be binding, conclusively negating the element of reliance in a suit for fraudulent inducement." *Italian Cowboy*, 341 S.W.3d at 332 (citing *Schlumberger*, 959 S.W.2d at 179).

C. *Stephens v. Three Finger Black Shale P'ship*, 580 S.W.3d 687 (Tex. App.—Eastland 2019, pet. filed)

Facts: This is a complicated case involving greed and a cautionary warning to attorneys investing in business deals with persons who may or may not be clients. A geologist sought out acquaintances to acquire oil and gas leases in Fisher County with the view to selling those leases to an oil and gas industry participant for development. Several letter agreements were drafted and signed. One contained the denial of partnership provision found in JOA(s). One entity of the group entered into an agreement with Devon Energy to acquire for Devon Energy and then to sell 25,000 acres of oil and gas leases to Devon Energy. This sale eventually encompassed 30,000 acres of oil and gas leases in Fisher County. This sale was completed and the proceeds were distributed to the members of the group. Devon Energy expressed its interest in acquiring more acreage to certain members and some of these members acquired an additional 13,000 acres and sold it to Devon Energy without sharing this opportunity with the remaining members of the group. The members of the group excluded sued the members who profited from the additional sales to Devon Energy. After a three week trial and a 69 page jury charge with 54 questions with multiple parts, the jury returned a verdict for $94,000,000. The trial court reduced the verdict to $50,000,000, a sum that included exemplary damages.

Holdings: Reversed and rendered in part, affirmed in part, and remanded in part. In a case involving a project to buy oil and gas leases, the participation agreement did not create a partnership under *Tex. Bus. Orgs. Code Ann. § 152.056* as there was no joint bank account, distributions were made to the individual parties, and the overriding royalty interests were also paid directly to individuals and not to a partnership. An individual shareholder did not have standing to assert the company's claim for conspiracy, because the company was not a party to the lawsuit. The trial court erred by granting appellee a specific award of damages in the event the appellate court reversed the judgment of rescission, because that authority was expressly granted to courts of appeals under *Tex. Const. art. V, § 8*. As the letter agreement expressly disclaimed any fiduciary duty, no recovery could be had for breach of fiduciary duties. The participant who was also an attorney took actions that resulted in an attorney-client relationship with some of the claimants thereby imposing fiduciary duties on the attorney.

Reasoning: Appellants raised the issue of standing and capacity of some of the plaintiffs in the trial court. The court of appeals held that corporate stockholders cannot recover personally for a wrong done only to the corporation. That is true even if the stockholder may be injured by the wrong. *Linegar v. DLA Piper LLP (US)*, 495 S.W.3d 276, 279 (Tex. 2016). Until a corporation is dissolved, it maintains legal title to its assets. Shareholders have beneficial title only and cannot bring a corporate action in their own name. *El T.*, 921 S.W.2d at 253. So, as to one plaintiff, the court of appeals ruled that the plaintiff had no standing to recover. Second, the court of appeals ruled that a participation agreement was not a partnership agreement even though the participation agreement used the word "partner" and "partners" in various contexts. Without a partnership agreement there was no fiduciary duty or other partnership duties. The court reviewed the provisions of Chapter 152 of the Texas Business Organizations Code governing the nature and creation of partnerships and concluded that no partnership was formed. An attorney who was an investor and a signatory to the participation agreement also provided, the court found, legal services. The court also considered the claim of civil conspiracy, a damage spreading claim, and awarded actual and exemplary damages against the attorney and others.

D. *Le Norman Operating LLC v. Chalker Energy Partners III*, 547 S.W. 3d 27 (Tex.App.—Houston [1st Dist.] 2017, pet. granted); Chalker Energy Partners III *v. Le Norman Operating LLC,* 2019 Tex. 861, Oral argument on December 4, 2019)

Facts: This case was decided in 2017 so it should not be in this paper except for the late granting of a Petition for Review and the recent oral argument convened in this matter. This case is included in the Contract Section because it involves conditions precedent to contract formation. Chalker put oil and gas properties in the Panhandle up for sale. LNO participated in the bidding process but Jones Energy ultimately acquired the properties. Chalker was the designated representative of numerous working interest owners. Chalker and the other sellers retained Raymond James to assist in selling the assets.

On September 30, 2012, LNO and Chalker executed a Confidentiality Agreement ("CA"). The CA provided in Section 18, in part, that:

No Obligation. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof,…For purposes of this Agreement, the term "definitive agreement" does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.

It further stated that Chalker reserves the right, in its sole discretion, to: . . . (c) discontinue consideration of a transaction at any time; (d) reject any and all proposals made by any party with regard to a transaction; (e) terminate discussions and negotiations with [LNO] or any party at any time for any reason; and (f) conduct the process relating to a possible transaction in any manner it deems appropriate or change the procedure for conducting that process.

Finally, the Confidentiality Agreement provided that the parties agreed to waive consequential damages: "Neither party shall be liable to the other party hereunder for any special, indirect, incidental, consequential, punitive or exemplary damages of any kind or character, including lost profits or loss of business opportunity... arising out of this agreement."

In October 2012, Le Norman attended what the parties call "the Data Room Presentation," a slide presentation created by Raymond James regarding the use of the virtual data room—including maps, legal descriptions, production projections, and a form Purchase and Sale Agreement ("PSA"). The presentation included a slide describing the bid procedure which provided that once Chalker Energy received bids, each Seller "shall be given 24 hours to elect to sell their interest once the purchase price has been determined." It further provided, "Upon the negotiation of the PSA, each [Seller] shall be given 48 hours to elect to accept the terms of the PSA and execute the appropriate documents." Chalker reserved the right to negotiate with one or more prospective parties at any time and to enter into a definitive agreement for a transaction without prior notice to you or to other prospective parties.

LNO submitted a bid via e-mail on November 5, 2012, offering $322 million for 100% of the Assets. This bid stated that it was made "subject to the execution of a mutually acceptable PSA. LNO also included a copy of the form PSA from the virtual data room with redlined changes that Chalker Energy indicated were insignificant. Upon receipt of the first round of bids, Raymond James asked the two highest bidders, LNO and Jones Energy, to increase their bids and set a deadline of November 9, 2012, for submitting the revised bids. LNO revised its bid to offer $345 for 100% of the Assets, again expressly referring to the bid instructions and including a proposed PSA based on the form provided by the Sellers in the virtual data room.

Chalker (representing the Sellers) countered with less than 100%. LNO walked away but eventually made a "counter offer" (the words included in the subject matter lien) on November 19, 2012 to Chalker. This counter offer was for 67% and it required a response within 24 hours. Chalker polled the Sellers and informed LNO that the offer was accepted. Then, the Thanksgiving break in 2012 occurred. Jones Energy made a sweetened offer on the Monday after Thanksgiving and some of the Sellers decided the Jones Energy offer was better. Chalker polled all the Sellers and determined that the Jones Energy offer was preferred. By November 28, 2012, Chalker, the Sellers and Jones Energy had finalized and executed a PSA. LNO learned of this development and demanded performance.

Chalker and the Sellers argued that the condition precedent in the CA precluded an agreement. LNO argued that the counter offer was made without reference to the CA and bid procedures and that a binding contract resulted.

The trial court ruled in favor of Chalker. The 1st Court of Appeals reversed. This court determined that questions of fact existed with regard to whether the counter offer was separate and distinct from the CA and bid procedures and whether a contract was formed. The court relied on Texas Supreme Court precedent on the fact issue of whether the parties contemplated that a formal agreement was a condition precedent or merely a memorial of an already enforceable contract.

The trial court also granted summary judgment to Chalker based upon the Uniform Electronic Transactions Act because the parties did not agree to conduct business electronically and the email accepting LNO's offer lacked an electronic signature. The court of appeals disagreed. The UETA does not require an explicit agreement to conduct transactions electronically. The consent can be met by the context and surrounding circumstances.

As noted, the Texas Supreme Court ordered briefing on the merits and has heard oral argument. The opinion should be delivered by June 30, 2020. The issues presented here are significant and of importance to the oil and gas bar. There are many agreements in existence similar to the agreements analyzed in this case. The judicial interpretation of the effects and consequences of these agreements has some urgency as posed by this case and by the Enterprise case discussed later in this paper.

VI. DEED CONSTRUCTION

A. *Perryman v. Spartan Texas Six Capital Partners, Ltd.,* 546 S.W.3d 110 (Tex. 2018)

The court distinguished between a reservation and an exception. A reservation is used in a deed when the grantor wants to reserve something from the conveyance for herself, whether it be a right or an ownership interest. An exception notes and preserves a previous reservation made in prior deeds, and excludes from the current grant the right, or ownership interest which was previously reserved. In this case, there were two deeds, the second deed did not mention the prior reservation in the first deed. The Supreme Court disagreed with both the trial court and court of appeals' construction of the deed reservation and with the construction argued by both sides in the dispute. The court construed the "save and except" language of the 1977 deed as a reservation and held that the same language in the 1983 deed was not a reservation, but rather an exception to the grantor's warranty of title.

Holding that the phrase "which are now owned by Grantor" modifies the word "premises," not the phrase "1/2 of the royalties," the court concluded "that the most reasonable grammatical construction of this deed is that the clause excepts 1/2 of all royalties from the minerals produced from the 'premises which are now owned by grantor.'" As a result, the 1983 deed did not reserve any royalty interest.

B. *U.S. Shale Energy II, LLC v. Laborde Props., L.P.,* 551 S.W.3d 148 (Tex.2018)

Summary: Holders of nonparticipating royalty interests in oil and gas brought an action against the Landowner/Lessor, seeking a declaratory judgment that a deed reserved a floating 1/2 interest, resulting in a 1/10 royalty under the lease. Landowner counterclaimed, asserting that the deed reserved a fixed 1/16 royalty. The dispute centered around the interpretation of two different clauses from the deed: "an undivided one-half (l /2) interest in and to [the royalty] . . . in and under ... the above described premises, the same being equal to the 1/16th of production." The court reasoned that when the first clause was read independently, it indicated a floating royalty. The Supreme Court of Texas held that the second clause was not meaningless, and both clauses continued to be given effect in the face of leases departing from what was once a ubiquitous 1/8 royalty. The 1/16th clarified what a 1/2 interest in the royalty amount was when the deed was executed. In support, the Court referred to the comma placement in the second clause, which indicated a nonrestrictive dependent clause. Such a clause gives additional description or information that is incidental to the central meaning of the sentence. For these reasons, the Court found that the deed reserved a floating 1/2 royalty interest and ruled in favor of Holders. The dissent argued that the first clause did not clearly indicate a floating royalty and also that the two clauses should have been analyzed in isolation.

Background: In 1951, the Bryans conveyed a tract to S.E. Crews. The deed reserved a nonparticipating royalty interest in the minerals that stated:

> There is reserved and excepted from this conveyance unto the grantors herein, their heirs and assigns, an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals in and under or that may be produced or mined from the above described premises, the same being equal to one-sixteenth (1/16) of the production. This reservation is what is generally [sic] termed a non-participating Royalty Reservation....

In 2010, Laborde Properties L.P. (Laborde) acquired the tract, which had an oil and gas lease that provided a royalty of 1/5th of production. Laborde claimed that the Bryans' successors, including U.S. Shale Energy, (Plaintiffs) were only entitled to 1/16th of production, not half of the 1/5th. Plaintiffs then sued Laborde and sought half of l/5th. The question, therefore, is whether the royalty interest preserved in the deed was floating ("an undivided one-half (1/2) interest") or fixed ("one-sixteenth (1/16) of the production").

Procedural History & Result: Both parties sought declaratory judgments. The trial court granted Plaintiffs' motion, declaring that the deed reserved a floating interest. The San Antonio Court of Appeals reversed. The Texas Supreme Court reversed in a 6-3 decision.

Holding: The deed unambiguously reserved a floating royalty interest.

Rationale: The Texas Supreme Court held that the operative language in the lease was the first clause, reserving a floating interest in all mineral royalties. The Court reasoned that the intent of the deed appeared to be to reserve half of the lease royalty, because making the royalty fixed would render the first clause meaningless. There would be no need for the broad language that reserved one-half of all royalties if the parties only meant to reserve the fixed rate of $1/16^{th}$ of production. As there was no lease in place at the time of the conveyance, the Court reasoned that the only way to harmonize the meaning of the two clauses was to view the second clause as a clarifying reference to standard practice of reserving a 1/8th royalty, not a firm standard. As evidence of this intent, the Court looked at the grammatical structure of the sentence and, citing The Red Book, noted that the second clause was a nonrestrictive dependent clause, a type of clause which simply '"gives additional description or information that is incidental to the central meaning of the sentence."'

The Court concluded that the first phrase reserving a floating interest in the royalty received was the primary, operative language, and that "the only reasonable way to reconcile these clauses is to read the second clause, 'the same being equal to one-sixteenth (1/16) of the production,' to clarify, as an incidental factual matter, what a 1/2 interest in the royalty amounted to when the deed was executed."

Dissent: The dissent disagreed that first clause plainly meant to reserve a floating interest in the royalty and asserted that, at the time of the conveyance, the Bryans believed and intended to reserve a fixed 1/16th interest in production. The dissent reasoned that because the terms "Oil Royalty, Gas Royalty and Royalty in other Minerals," were capitalized, but not defined, the lease presented "the question of what specific 'Oil Royalty' the parties had in mind." The dissent then cited a mix of cases where similar language about oil royalties was sometimes held to be fixed and others times held to be floating, with the difference in construction coming from other language in the deeds that clarified the intended meaning of royalty.

The dissent asserted that the Court's construction incorrectly looked at the first clause in isolation, thereby ignoring the effect that the second clause had, and was meant to have, on the first clause's meaning. The dissent claimed when reading the clauses together, the second clause made it clear that "Oil Royalty" in the first clause referred to the then ubiquitous 1/8th royalty, not to general royalty rights. This meant that the first clause was simply clarified, not rendered meaningless, by the second clause. It concluded that per the deed's plain language, the retained royalty interest was meant to be fixed at 1/16th of production.

C. *Crow v. Lookadoo,* No. 04-17-00338-CV, 2018 Tex. App. LEXIS 6969 (Tex. App.-San Antonio Aug. 29, 2018, no pet.)

Facts: Kathaleen Brown (Kathaleen) conveyed a property to the Zoellers (the Zoellers) via Warranty Deed, which did not contain a mineral reservation for Kathaleen. Two months later, Kathaleen executed a Correction Deed that purported to replace the Warranty Deed. This Correction Deed contained a clause that reserved to Kathaleen a life interest in one-half the mineral royalties and upon her death reserved to her heirs (the Browns), a one-half NPRI.

Zoellers later conveyed their land to the Crows (the Crows) in an Assumption Warranty Deed (the "Assumption Deed"). The Assumption Deed referenced the mineral reservation in the Correction Deed and also reserved to the Zoellers a life interest in one-half the mineral royalties and a clause that such royalty interests would continue to the Zoellers' heirs until "the termination of production or lapse of the lease ...." At that point the interest would revert to the Crows.

In 1990, an oil and gas company interested in leasing the property requested that Kathaleen, the Crows, and the Zoellers execute a Stipulation of Interest (the Stipulation) in order to clarify the parties' interest. The Stipulation provided that "each of the undersigned hereby grant and convey to the others such interest as are necessary to effectuate the terms and provisions of this Stipulation of Interest."

The Stipulation then stated:

> (a) That as a result of the above described Deed and Correction Deed from Kathaleen E. Brown to [the Zoellers], Kathaleen E. Brown owns in and to the oil, gas and other minerals in the Subject Land for her lifetime an interest equal to 1/2 of the mineral interest owned by her in the Subject Land on June 4, 1983, the date of the above described Deed from Kathaleen E. Brown to Arno C. Zoeller, et ux., together with a like interest in and to all bonus, delay rentals, and royalties reserved and payable pursuant to any oil and gas lease in existence affecting the Subject Land, such mineral interest to be for the lifetime of Kathaleen E. Brown, and at her death, said mineral interest shall cease to exist and be of no further force and effect, at which time the heirs, devisees, or assigns of Kathaleen E. Brown, shall own a non-participating royalty interest in the Subject Land equal to 1/2 of the percentage mineral interest in the Subject Land owned by Kathaleen E. Brown on June 4, 1983 in and to all of the royalties reserved and payable under any oil and gas lease in existence covering the Subject Land.
>
> (b) That as a result of the above described Deeds and Correction Deed, [the Zoellers], their heirs and assigns, own a non-participating royalty interest in the Subject Land equal to 1/2 of their percentage mineral interest in the Subject Land on June 1, 1987, the date of the above described Assumption Warranty Deed, in and to all of the royalties reserved and payable under any oil and gas lease in existence covering the Subject Land.

> (c) That as a result of the above described Deeds and Correction Deed, all interests of Kathaleen E. Brown, and Arno C. Zoeller, et ux., in the Subject Land were conveyed to and acquired by Clyde L. Crow and wife, Georgia Crow, SAVE AND EXCEPT the specific mineral and non-participating royalty interest described as being owned by Kathaleen E. Brown, her heirs and assigns, in (a) above, and the non-participating royalty interest described as being owned by Arno C. Zoeller, et ux. in (b) above.

In 2010, the Crows entered into an oil, gas, and mineral lease with another company. The Crows sued the Browns and Zoeller. The Crows filed for summary judgment, alleging that Zoeller breached her fiduciary duty in depleting the corpus of the estate, that Browns' and Zoeller's interests had lapsed and vested in the Crows and that royalties were unjustly paid to Zoeller and the Browns.

Zoeller filed a motion for no-evidence summary judgment (alleging no evidence that her interest lapsed) and a traditional motion for summary judgment (asking for a declaration that her life-interest remains and will remain with her heirs as long as production continues). Browns filed motions for summary judgment, one against the Crows' claim of unjust enrichment and another seeking a declaration that the Browns are vested with a perpetual NPRI in the property.

Procedural History & Result: The trial court granted the Browns' motions and Zoeller's motion for traditional partial summary judgment, and denied Zoeller's no evidence motion and the Crows' motions. It also found the Correction Deed to be enforceable. The Crows appealed to the San Antonio Court of Appeals. The San Antonio Court of Appeals affirmed in part and vacated in part, as partial summary judgment against the Crows was proper, but the trial court improperly considered the deeds outside the four corners of the Stipulation.

Holding: Summary judgment against the Crows was proper as the Stipulation was in effect, unambiguous, and did not limit the duration of the Browns' and Zoellers' interest in the property to the duration of Kathaleen's life or to any leases existing at the time of the Stipulation.

Rationale: The court first noted that the Stipulation was a contract and so standard rules of contract interpretation applied to this case. The court then addressed the Crows' complaints that the trial court improperly relied on the Correction Deed and improperly interpreted the Assumption Deed. The court rejected both complaints as moot, because the Stipulation was unambiguous and so there was no reason to look at any of the deeds in order to interpret the Stipulation. In examining the Stipulation to determine whether the Browns' and Zoeller's interests had terminated, the court reviewed the below:

> . . . [Kathaleen] owns in and to the oil, gas, and other minerals in the Subject Land for her lifetime an interest equal to 1/2 of the mineral interest owned by her in the Subject Land on June 4, 1983. . . together with a like interest in and to all bonus, delay rentals, and royalties reserved and payable **pursuant to any oil and gas lease in existence** affecting the Subject Land, such mineral interest to be for the lifetime of [Kathaleen], and at her death, said mineral interest shall cease to exist and be of no further force and effect, at which time heirs, devisees, or assigns of [Kathaleen] shall own a non-participating royalty interest in the Subject Land equal to 1/2 of the percentage mineral interest in the Subject Land owned by [Kathaleen] on June 4, 1983 in and to all of the royalties reserved and **payable under any oil and gas lease in existence** covering the Subject Land.
>
> (Emphasis added by court).

The Crows argued that "lease in existence" language in the Stipulation resulted in the Browns' interest transferred only if an oil and gas lease was in existence at the time of Kathleen's death. The Crows also argued that the same language limited Zoeller's interest to any oil and gas lease in existence on the date the Stipulation was executed.

The court rejected both those arguments as the Stipulation did not make the transferring of interest "subject to" any lease in existence, as is the case when such "lease in existence" language is meant to be limiting an interest. The court instead found, in the language, no evidence that of an intention to make any interests at issue "subject to" the existence of any lease at the time of Kathleen's death or at the time that the Stipulation was executed.

Because the Stipulation did not limit the Browns' interest, the court rejected the Crows' claims of unjust enrichment against Browns as Browns received nothing that was owed to the Crows.

The court held summary judgment against the Crows was proper, but vacated the trial court's findings that were based on interpretations of any of the deeds dated before the Stipulation (though those findings had no bearing on the result of proper summary judgment.)

D. *Mellenbruch Family P'ship, LP v. Kennemer,* No. 04-17-00637-CV, 2018 Tex. App. LEXIS 6973 (Tex. App.-San Antonio Aug. 29, 2018, no pet.)

Facts: John H. Klattenhoff owned 160 acres of land in fee simple in La Salle County (the "Property"). He devised an undivided 1/2 interest in the Property to each of his two sons, Fred and Walter. On September 5, 1956, as part of a partition and distribution of the senior Klattenhoff's estate, one son, Walter, conveyed all his undivided interest to the other son, Fred. However, Walter reserved a twenty-year term NPRI and included a deed provision that, according to Appellees, Kennemer, provided if there was not paying production on the Property on September 5, 1976, the minerals Walter conveyed to Fred reverted to Walter.

Appellant Mellenbruch Family Partnership, LP ("Mellenbruch"), was a partnership comprised of Fred's descendants. After Walter died, he devised his estate to his four daughters, the Appellees (collectively Kennemer).

In March 2016, about the time a well began producing on the Property, Mellenbruch filed a declaratory judgment action to determine who owned the minerals conveyed under the 1956 Deed. Appellees moved for partial summary judgment, asserting that because there was no paying production on the term expiration date (i.e., September 5, 1976), then on that date, the minerals Walter had conveyed to Fred reverted to Walter.

Procedural History & Result: The trial court granted Kennemer's motion for partial summary judgment, and later granted Kennemer's motion for final summary judgment. Mellenbruch appealed. The appellate court affirmed summary judgment on the deed construction, adverse possession, and trespass-to-try-title questions, but reversed its award of attorneys' fees.

Rationale: The court held that the mineral interests had in fact reverted in the absence of production. Thus, Walter and Fred Klattenhoff each owned an undivided one-half interest in a 160-acre tract of land in La Salle County, Texas, both surface and minerals, as devisees of their father. In a 1956 deed, Walter conveyed the land to Fred, reserving a 1/32 royalty interest subject to defeasance if there was no paying production within 20 years. There was no production from the land on September 5, 1976. After production was established in 2016, a partnership composed of Fred's descendants filed suit seeking a judgment for title to the entire mineral estate. Walter's descendants responded that the one-half mineral interest in the land conveyed in 1956 had reverted to Walter.

The determination for the court was the meaning of "this grant," "the minerals hereby conveyed," and "the said Grantor." The court gave the words their plain meaning within the context and did not find it difficult in construing the language by holding for Kennemer. The court also rejected an argument of adverse possession because there had been no drilling or production that would allow possession.

E. *Osley v. Naylor,* No. 04-17-00372-CV, 2018 Tex. App. LEXIS 6618 (Tex.App.-San Antonio Aug. 22, 2018, pet denied)

Facts: Florence Martin, Osley's great-grandmother devised 2,440 acres of land in thirds to three devisees. Florence Martin devised 1/3 to Osley's grandfather. Florence Martin reserved an undivided 1/8 NPRI on the entire land to be owned by her descendants, including Osley's grandfather. When Osley's grandfather died he devised his interest and his NPRI to his wife, Osley's grandmother.

Osley's grandmother owned 1/3 of the NPRI and the 1/3 interest in the land with an additional 238 acres when she died, a total of 1,050 acres. In 1988, Osley was granted two tracts of land by a partition deed, Tract-1 of 101 acres and Tract-2 of 112 acres, and a twenty-year term 1/8 NPRI on all of the grandmother's land, to settle a contest to the grandmother's will. Tract -1 was burdened by the NPRI but Tract-2 was not burdened because it was never part of Florence Martin's land.

In 1990, Osley's guardian executed the deed at issue. This deed conveyed Osley's interest in Tract-1 and Tract-2 and the NPRIs to Naylor.

Naylor and Osley disagree as to which lands the NPRIs attach. Osley argues "she conveyed one half of her interest in the NPRIs for wells producing from only" Tract-1 and Tract-2. "Naylor argues Osley conveyed one half of her entire interest in the NPRIs, meaning for wells produced anywhere" on Florence Martin's land or Osley's grandmother's land.

The first paragraph of the guardian deed grants an undivided one-half interest in all of Osley's interest and NPRIs in all of the minerals that may be produced from the 1050 acres and imposes burdens. Similarly, the second paragraph "has two main components: a perpetual NPRI grant, and burdens imposed."

Procedural History & Result: Both parties "filed competing motions for partial summary judgment." The trial court only granted Naylor's motion and declared that the "NPRIs are not limited to wells producing only" from Tract-1 and Tract-2. Osley appealed the trial court's severance order making Naylor's summary judgment final.

Holding: [1] In the first paragraph "[t]he deed's plain language unambiguously demonstrates that it does not" limit the grant in each NPRI to Tract-1 and Tract-2 of the land to restrict Naylor's interest in the term NPRI to only those wells produced from Tract-1 and Tract-2. [2] In the second paragraph, like the first paragraph, the language does not limit the grant to Tract-1 and Tract-2. [3] the "subject to provision applies to the entire conveyance" to protect Osley from title warranty breaches but does not limit the protections to Tract-1 and Tract-2. [4] ascertaining the parties' intent from the plain language of the deed and concluding that the only reasonable interpretation for the NPRI grants is that Naylor's interest includes the 1,050 acres from Osley's grandmother and the interest in Florence Martin's 2,440 acres, parol evidence or resort to rules of construction are not considered.

Rationale: [1] The geographic scope of the grant is certain and definite and it does not limit the grant in each NPRI to Tract-1 and Tract-2 and not to the rest of the land because the grant separated the two related but separate types of interests with the phrase "together with." Because the "together with" creates a logical break from the reversionary interest what followed was different from what was just recited. The court concluded that the meanings are plain and complete when considered in the context of the term NPRI grant for the 1,050 acres and the reversionary interest limited to Tract-1 and Tract-2. Moreover, the limitations apply to the burdens and not to the geographic scope of the term NPRI because the words used, the sentence structure, and the limiting language in the Guardian Deed "indicate the limitations apply to the burdens."

[2] As for the second paragraph, the geographic scope is also certain and definite and grants a one-half interest in the NPRI to the entire Florence Martin land. Likewise, looking at the components and the entire second paragraph of the guardian deed's limitations apply to the burdens and not to the geographic scope for the same reasons in the first paragraph.

[3] The appellate court analyzed that the subject-to provision puts Naylor on notice of any "restrictions or encumbrances that do or may apply." But nothing in the provision "expressly or implicitly overrides the geographic scope" for the NPRIs that were stated in the guardian deed.

[4] The review of the deed supports the conclusion.

F. *Jarzombek v. Marathon Oil Co.*, No. 04-18-00587-CV, 2019 Tex. App. (Tex. App.—San Antonio 2019, pet. denied July 12, 2019)

Facts: This case involves two deeds: a partition deed in 1965 and a general warranty deed in 1976. The language of both deeds is relevant. The 1976 Deed is of primary concern, and it references the 1965 Deed.

1965 Deed

In 1965, Ben and Olga Janacek purchased seventy acres of land from Olga's parents' estate via a partition deed (the 1965 Deed). Ben and Olga wanted to purchase the property in fee simple, but they could not afford to buy out the entire mineral estate. Thus, the 1965 Deed conveyed the executive interest, lease money, delay rentals, and bonus money to Ben and Olga, but it partitioned "the royalty interest in and to the oil, gas and other minerals in and under the land" by reserving an "undivided one-fifth interest" to Olga and each of her four siblings. The royalty reservation would end after a term of twenty years unless there was ongoing production in paying quantities. The possibility of reverter was conveyed to Ben and Olga.

1976 Deed

In 1976, Ben and Olga conveyed the seventy acres of land and some or all of their mineral interests to Max and Bennye Swafford. The parties do not dispute the surface estate conveyance, but they disagree on what mineral interests the 1976 Deed conveyed.

The 1976 Deed has eight major paragraphs. The underlines below show the language Ben and Olga emphasize. The fifth paragraph states as follows:

> Such conveyance is subject, however, to <u>all</u> mineral conveyances, mineral reservations, oil, gas and other mineral leases, royalty conveyances, or reservations, easements, ordinances and rights-of-way of record in the office of the County Clerk of Karnes County, Texas.

The sixth paragraph consists of an introduction and three numbered subparagraphs:

In addition to the above exceptions this conveyance is <u>subject to</u> the following:

1. Right-of-way Easement . . . .
2. Road Deed . . . .
3. Four-fifths (4/5ths) royalty interest, the royalties, bonuses, rentals and all other rights described in [the 1965 Deed], reference to which instrument is here made for all purposes, together with all rights, express or implied in and to the property covered by this policy arising out of or connected with said interests and conveyance.

The seventh paragraph provides the warranty:

> TO HAVE AND TO HOLD the above described premises, subject to the above set forth exceptions and reservations, together with all and singular the rights and appurtenances thereto and in anywise belonging unto the said MAX E. SWAFFORD and wife, BENNYE SWAFFORD, their heirs, and assigns, forever; and we do hereby bind ourselves, our heirs, executors and administrators to WARRANT and FOREVER DEFEND, subject to the above set forth exceptions and reservations, all and singular the said premises unto the said MAX E. SWAFFORD and wife, BENNYE SWAFFORD, their heirs and assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof.

The dispute in this appeal pertains to the interpretation of the 1965 and 1976 deeds, specifically, the disposition of the possibility of reverter. The parties agree that there was no production from the seventy acres during the twenty-year period from 1965-1985, and that the twenty-year term royalty reservation terminated. The remaining question is who owns the 4/5ths royalty interest that Ben and Olga received under the 1965 Deed.

In a deed, "[t]he words 'subject to,' used in their ordinary sense, mean subordinate to, subservient to or limited by." *Wenske*, 521 S.W.3d at 796 (quoting *Kokernot v. Caldwell*, 231 S.W.2d 528, 531 (Tex. Civ. App.—Dallas 1950, writ ref'd)). In some cases, the words "subject to" may be used to limit the estate granted. *Id.* at 796-97. But typically, "the principal function of a "subject-to" clause in a deed is to protect a grantor against a claim for breach of warranty when some mineral interest is already outstanding." *Id.* at 796. The actual meaning of a "subject-to" clause in a particular deed is determined by "[g]iving the deed's words their plain meaning, reading it in its entirety, and harmonizing all of its parts." *See id*. at 797.

Janaceks' (sic) Arguments

The Janaceks present three issues: (1) a "for all purposes" argument, (2) a "subject to" argument, and (3) an "heirs and assigns" argument. The Janaceks insist that the 1976 Deed's four uses of "subject to" and its incorporation of the 1965 Deed "for all purposes" means the 1976 Deed reserved the possibility of reverter future interest to Ben and Olga.

Swaffords' Arguments

The Swaffords assert that the 1976 Deed's four uses of "subject to" are merely notices of prior reservations or warranty. They argue that, under established principles of deed construction, the plain language of the 1976 Deed conveyed the possibility of reverter to Max and Bennye.

Holding: The 1976 Deed's plain language is unambiguous and it simply does not conform to the Janaceks' subject to, for all purposes, and heirs and assigns language arguments. Instead, "[g]iving the [1976 Deed]'s words their plain meaning, reading it in its entirety, and harmonizing all of its parts," we conclude the 1976 Deed conveyed the royalty future interest to Max and Bennye Swafford, *see Wenske*, 521 S.W.3d at 797, and the trial court followed the law when it denied the Janaceks' motion for summary judgment and granted summary judgment for the Swaffords.

G. *Ellison v. Three Rivers Acquisition LLC*, No. 13-17-00046-CV, 2019 Tex. App. LEXIS 1062 (Tex. App.—Corpus Christi 2019, pet. filed May 31, 2019)

Facts: J. D. Sugg owned Section 1, a 640 acre tract of land, in Irion County, Texas. He died in 1925 and his estate and family made a conveyance in 1927 as their part of a swap of land with some neighbors. A public road crossed Section 1 diagonally from the northeast to the southwest. The 1927 deed described the conveyance as "all of Section 1 north and west of the public road…containing 147 acres, more or less."

The land within Section 1 north and west of the public road actually measures 301 acres according to a survey commissioned by the Sugg family in 1939. This tract of land north and west of the public road was referred to by the parties as the Northwest Tract. The Pilon family became successors to the title in the Northwest Tract and the oil and gas leases executed on the Northwest Tract referred to the 1927 deed but also continued the "147 acres" language being the tract lying north and west of the public road. The Pilon lease was acquired by Ellison and Ellison operates a vertical well on the Pilon lease. Ellison paid *ad valorem* taxes on the entire 301 acres and filed Form P-12(s) with the RRC claiming 320 acres as Operators of the Pilon leases.

In 2006, Sugg, owner of the Southeast Tract, executed and recorded a gift mineral deed, conveying the Southeast Tract to his four children. This deed is the only Sugg chain of title document that describes the boundaries of the Southeast Tract: "being a tract of land lying South and East of the public road which runs NE and SW across Survey [Section] 1, containing 493 acres, more or less." The four children subsequently executed the Sugg Lease of the Southeast Tract to a Samson affiliate and recorded a lease memorandum.

In October of 2006, Samson received a title opinion addressed to Tim Reece, Samson's landman; the title opinion covered the Southeast Tract, for purposes of drilling Samson's Sugg Well #1 on the tract. The title opinion acknowledged the Sugg 2005 property tax document showing that the Suggs only claimed 339 acres of land. The title opinion also advised that the 1927 Deed tract is shaped approximately like a triangle, which would be true only if the disputed 154 acres were part of the Northwest Tract. Furthermore, the attorney who wrote the title opinion warned that the Southeast Tract description in the original 1930 Sugg deed was defective and opined that he saw "no evidence of where the 493 acres is located on the ground. As a technical matter, this description is incorrect." Samson's surveyor prepared a preliminary survey plat (the Samson plat) for a W-1 well permit application. In the plat, Samson instructed the surveyor to credit 493 acres to the Southeast Tract.

In December of 2006, landman Reece sent a letter to the Ellisons titled "Statewide *Rule 37* Exception Request" for Samson's Sugg Well #1 location. This letter did **not** include the Samson Plat. Instead, it asked the Ellisons to waive objections to Samson's application to locate Sugg Well #1 "100 feet South of the public road." The letter to the Ellisons shows an execution date of January 1, 2007. A similar letter was addressed to the Richey family as the owners of the mineral interest of the Northwest Tract. Later in 2007, Samson received a division order title opinion for the Samson Sugg Well #1 and the Southeast Tract, again addressed to Reece. Comment No. 4 in the opinion repeated the concern from the 2006 title opinion that the Sugg Lease Southeast Tract description was inadequate; it further counseled to confine drilling to land not located within the boundary of the 1927 Deed tract. Over the next two years, Samson filed well applications for Wells #2, #3, and #4. In all these applications, Samson included the disputed 154 acres as part of the Southeast Tract.

In 2007, the Sugg family surface owners of the Southeast Tract executed a warranty deed that purported to convey to the Richey family only the surface of a "certain tract of land," located north and west of the public road, which "would be considered 154 acres." This deed vaguely asserted that the "South Boundary" of the Northwest Tract was located somewhere north and west of the public road and yet south of Richey's tract. Shown in the opinion and the power point for this paper. According to the record, Reece averred that he spoke with Jamie Ellison at this time, and again in 2008, to explain the legal effects of this deed.

In 2008, Samson proposed to drill Sugg Well #3, which is within the disputed 154-acre tract. Reece prepared a boundary stipulation of Ownership of Mineral Interest Agreement ("the 2008 Boundary Stipulation") for execution by the Sugg family and Richey family mineral owners. The Boundary Stipulation acknowledged that the Southeast Tract constituted only the "remaining" acreage in Section 1, after giving full effect to the 1927 Deed conveyance. However, Reece asserted in the Boundary Stipulation that there was a "question" as to the "physical location" of the 1927 Deed tract, which Reece claimed only contained 147 acres. The Boundary Stipulation purported to resolve the question by using the "new" boundary from Samson's 2008 New Survey Plat, which was a repeat of Samson's 2006 Preliminary Survey. The plat further gave credit to the 2007 Sugg Deed, stating that the surface and mineral ownership "appear to be different." The Boundary Stipulation stated it was effective as of July 8, 1987, the date the Pilon Leases were created.

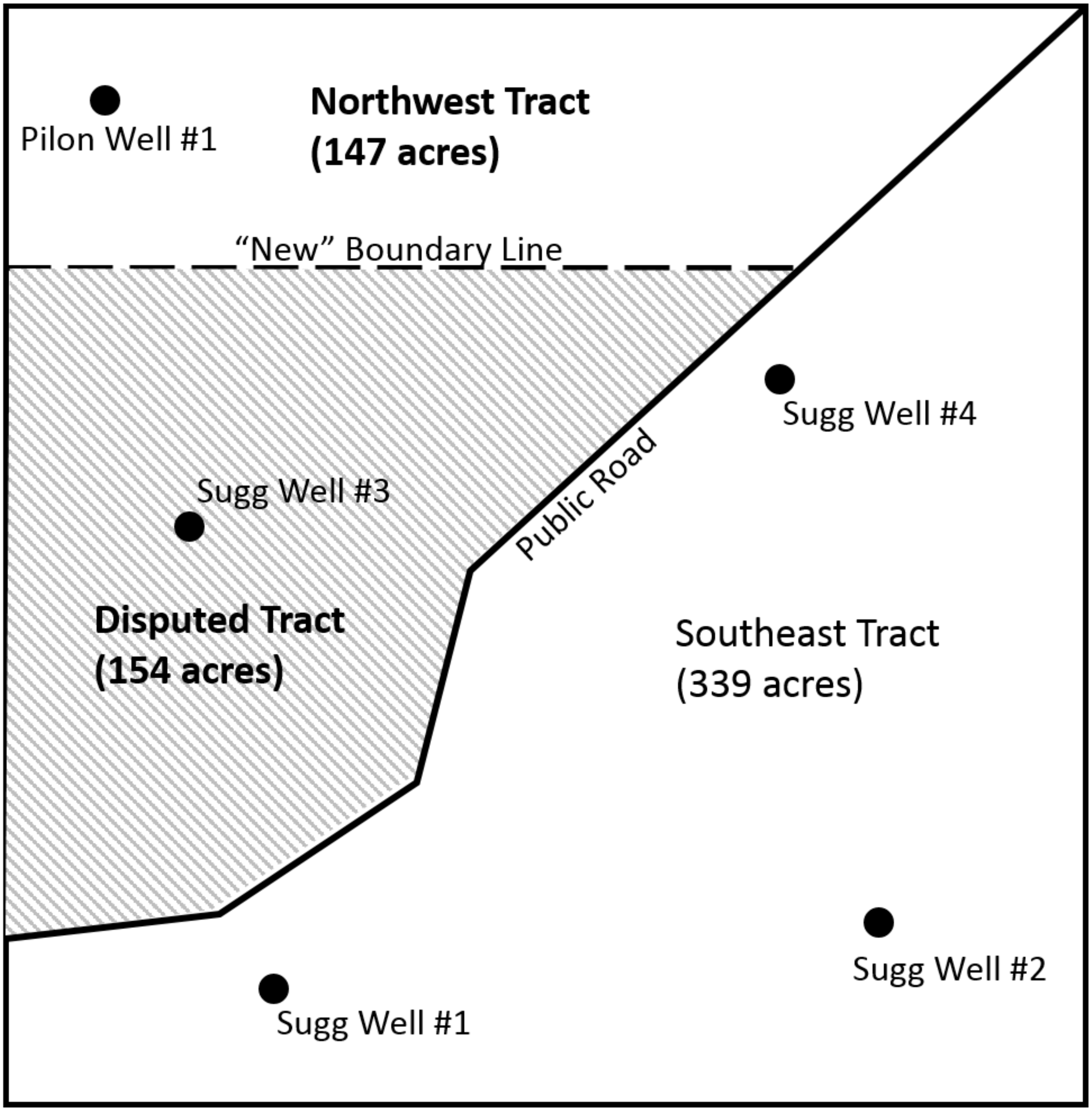
In 2008, Reece delivered a letter to Jamie Ellison. The letter purportedly included a copy of the Boundary Stipulation and asserted that Reece had conversed with Jamie in 2007 about its subject matter. Reece represented to Jamie Ellison in the letter that the 2008 Boundary Stipulation was created and executed in 1987, even though it was written by Reece in 2008. Reece's letter to Jamie did not contain any words of conveyance; it simply requested, "Please signify your acceptance of the description of the Richey 147-acre tract as set out in the [Boundary] Stipulation by signing both copies of this letter . . . Upon your acceptance a more formal and recordable document will be provided." There is no evidence that any such second document was prepared or delivered to the Ellisons. Jamie Ellison allegedly signed and returned the letter although Marsha Ellison alleges that his signature was possibly forged. The record also reflects that Concho was unaware of Reece's letter until December of 2013, six months after Ellison filed this suit.

Samson subsequently drilled Sugg Well #3 within the disputed 154-acre tract. Well #4 was drilled in a location that is closer than the minimum distance required from the Northwest Tract, assuming the public road is the boundary. *See*16 *Tex. Admin. Code § 3.37(a) (2018)* (Tex. R. R. Comm'n, Statewide Spacing Rule).

In 2010, Samson sold the Sugg Lease and Sugg Wells #1, #3, and #4 to Three Rivers Acquisition LLC by quitclaim assignment. Three Rivers Acquisition LLC recompleted Sugg Well #1 without obtaining a new *Rule 37* exception permit. In 2011, Three Rivers Acquisition LLC obtained an additional title opinion for the Southeast Tract. In 2012, Three Rivers Acquisitions LLC assigned the lease to COG Operating LLC. Concho also obtained a title opinion for the Southeast Tract. Throughout this time period, Sunoco purchased the oil produced from Sugg Wells #1, 3, and 4.

In 2013, Ellison filed a trespass-to-try-title suit against Concho and Samson. Concho filed counterclaims against Ellison for breach of contract and declaratory judgment. Both Ellison and Concho filed cross-motions for summary judgment. Concho argued that the 2008 letter to Jamie Ellison: (1) relinquished any claim of ownership Ellison might possess to land beyond the 147-acre tract as depicted in the 2008 Boundary Stipulation; and (2) ratified the boundary as depicted in the 2008 Boundary Stipulation and letter. The trial court granted Concho's motion and dismissed all of Ellison's claims with prejudice.

Ellison settled her claims against Samson; however, Samson remained in the suit because Sunoco filed a cross-claim against Samson for indemnification. Against Sunoco, Ellison alleged claims of conversion and a claim for damages under section 91.404 of the Texas Natural Resources Code ("the division order statute"). *See* Tex. Nat. Res. Code Ann. *§ 91.404* (West, Westlaw through 2017 1st C.S.). Sunoco filed one motion for summary judgment jointly with Samson and one motion for summary judgment separately; both generally argued that Ellison's claims against Sunoco fail regardless of the ownership of the disputed 154 acres because Sunoco was not the "payor" under the division order statute. The joint motion was concerned with Ellison's claims against Sunoco for the time period during which Samson operated the wells and sold the oil produced from the wells to Sunoco. Sunoco's separate motion dealt with Ellison's claims relating to the time periods that Samson's successors-in-interest owned and operated the wells and sold the oil produced to Sunoco. The trial court granted both motions for summary judgment and dismissed Ellison's claims against Samson and Sunoco.



Holding: Ellison owns superior title to the disputed 154 acres and Concho was a bad faith trespasser. Ellison's claims for conversion and under the Division Order statute were sent back to the trial court for further proceedings.

Reasoning: The Texas Supreme Court has held that "the specification of acreage is the least reliable data point in descriptions of land and will be rejected if it is inconsistent with the actual land conveyed." *AIC Mgmt. v. Crews*, 246 S.W.3d 640, 645 (Tex. 2008). The 1927 deed conveyed the land north and west of the public road. This was a metes and bounds description and it controlled. The Boundary Agreement did not contain words of grant and was ineffectual to change the description of the land conveyed by the 1927 deed and it was improper to consider the Boundary Agreement where there was no uncertainty, doubt or dispute with regard to the description. The court likened the Boundary Agreement to a correction deed but again without some ambiguity or error the Boundary Agreement could not be considered a correction deed. Based on the quitclaim to Concho's predecessor, the RRC filings, and its title opinions, the court concluded that Concho could not have an honest and reasonable belief in the superiority of its title. As such, Concho was a bad-faith trespasser and the measure of damages does not allow for deduction of any costs. Finally, Ellison had met all of the requirements under the Division Order statute to make a claim against Sunoco and Samson for the proceeds of production, interest and attorneys' fees. The Texas Supreme Court has requested briefing on the Application for a Petition for Review.

H. *Rahlek, Ltd. v. Wells*, No. 11-17-00141-CV, 2019 Tex. App. LEXIS 4249 (Tex. App.—Eastland May 23, 2019, Petition for Review filed October 16, 2019)

Facts: On July 6, 2006, Rahlek, Ltd. and Eugenia Harris Campbell conveyed the property and certain mineral and royalty interests they owned in and under the property to Lake Phantom Acres, L.P. by a warranty deed with a vendor's lien. At the time of this conveyance, Rahlek and Campbell collectively owned the surface and one-quarter (1/4) of the minerals and royalties, each owning a 1/8th interest. The other three-quarters (3/4) is not involved. The deed language involved provides:

> Grantor RESERVES unto itself and its successors and assigns all current oil and gas production. Grantor CONVEYS unto Grantee and its successors and assigns one-eighth (1/8) of mineral and royalty on all new production which are owned by Grantors upon the date of this conveyance.

The parties stipulated at trial that "current oil and gas production" meant production from wells producing on the date of the 2006 Deed. Further, they stipulated that "new production" meant production from new wells drilled after the date of the 2006 Deed. On the date of the conveyance, the property was subject to two oil and gas leases signed in the 1920s.

According to Appellants, the plain language of the specific conveyance indicated that the grantors conveyed only a fraction (1/8) of their collective mineral and royalty interests out of a total of (1/4) on all new production and that grantors did not convey the entirety of each of their fractional interests. Appellants argued that the specific conveyance limited the scope of the general conveyance. Under Appellants' interpretation, the legal effect of such conveyance was that they retained seven-eighths (7/8) of their collective one-quarter (1/4) mineral interest and seven-eighths (7/8) of the royalties on new production attributable to such one-quarter (1/4) mineral interest.

Appellees, on the other hand, argued that, because each grantor owned an undivided one-eighth (1/8) mineral and royalty interest and because the deed conveys that same interest ("one-eighth (1/8)") in "mineral and royalty on all new production," the deed indicates that the grantors conveyed the entirety of each of their fractional interests in mineral and royalty on all new production. Appellees argue that the word "which" in the specific conveyance refers to the two separate one-eighth (1/8) interests that each grantor owned. Appellees also argue that the word "of" in the phrase "one-eighth (1/8) of mineral and royalty" does not proportionally reduce the grant but simply highlights the type of interests being conveyed. Appellees also note that Appellants did not expressly reserve any mineral interests other than "current oil and gas production." Under Appellees' interpretation, the grantors did not reserve any interest in minerals or royalties on new production.

Holding: The court of appeals agreed with the Appellees in part under the greatest possible estate rule and in part on the clear unambiguous language of the deed.

Reasoning: In this case, the deed *does* express an intent to convey both the surface estate and the mineral estate, the court concluded that the grantors were required to expressly reserve a mineral interest if they intended to reserve such an interest. Because the 2006 Deed limited its general conveyance to only the listed reservations and exceptions, and then only reserved "all current oil and gas production" without reserving any other mineral interests, both reservations and exceptions in deeds must be clear and specific. The courts will not find "reservations by implication." *Perryman v. Spartan Tex. Six Capital Partners, Ltd.*, 546 S.W.3d 110, 119 (Tex. 2018) (quoting *Sharp*, 252 S.W.2d at 154). "A reservation of minerals to be effective must be by clear language."

Id. This court distinguished the holding in *Hunsaker v. Brown Distributing Co.,* 373 S.W.3d 153 (Tex.App.—San Antonio 2012, pet. denied).

I. *Weed v. Frost Bank*, 565 S.W.3d 397 (Tex. App.—San Antonio 2018, pet. den.)

Facts: This is a community property separate property classification case involving oil and gas interests. Mr. Weed acquired numerous oil and gas properties during his marriage to Elizabeth. All of the deeds identified the grantee as "Rees R. Oliver, Jr., as his sole and separate property and estate." Mr. Oliver's heirs argued that the community presumption was rebutted by this language. Frost Bank, the executor of his will, found that there was no evidence to support the tracing of the funds used to acquire these interests and concluded that the oil and gas interests were community property. The trial court agreed with Frost Bank and the heirs appealed.

Holding: The Court of Appeals determined that Frost Bank rebutted the separate property presumption created by the deed recitals and that the separate property presumption disappeared. The Court of Appeals affirmed the trial court because of the community property presumption. The heirs had the burden to show by clear and convincing evidence that the oil and gas interests at issue were Rees's separate property. It is undisputed in this case, however, that no financial records exist to trace the funds used by Rees to purchase the oil and gas interests. Thus, the only evidence supporting the Weed Appellants' assertion that the oil and gas interests were Rees's separate property is the language in the deeds themselves. These deed recitals, however, by themselves, are not sufficient evidence to overcome the community property presumption as a matter of law.

Reasoning: The Court of Appeals engages in a lengthy analysis and review of Texas Supreme Court opinions on the classification of property incident to a marriage. The heirs argued that the deed language rebutted the presumption of community property where the asset was acquired during marriage. The court requires a tracing of funds before this conclusion can be reached. Here, there was no evidence to demonstrate that the funds used were separate property.

J. *Yates Energy Corp. v. Broadway Nat'l Bank*, No. 04-17-00310-CV, 2018 Tex. App. LEXIS 10517 (Tex. App.—San Antonio 2018, pet. filed June 27, 2019)

Facts: This is a deed correction case decided after the enactment of the Correction Deed statute, *Tex. Prop. Code Ann. § 5.029*. Broadway Bank, as trustee, prepared and filed an amended correction deed in 2013 to amend a 2005 mineral deed. The 2005 mineral deed to a beneficiary of the trust was a conveyance in fee simple. In 2006, Broadway Bank executed a Correction Mineral Deed changing the fee mineral interest to a life estate with the remainder to the Trustor's descendants. The original grantee ("John") did not sign the Correction Mineral Deed. In 2012, John conveyed all of his right title and interest to Yates Energy. Yates Energy conveyed this property to EOG and numerous other grantees. In 2013, a title attorney for EOG raised the correction deed problem. Also in 2013, Broadway Bank prepared another correction deed, the 2013 Amended Correction Deed, and got John to sign, the Trustor's descendants to sign and signed itself. The intervening interest owners were not included in the 2013 Amended Correction Deed and did not sign it. John died in 2014. Broadway Bank sought a declaratory judgment that EOG et al. only received a life estate under and pursuant to the Correction Mineral Deed changing the fee to a life estate. EOG, et al. also sought a declaratory judgment that the 2006 and 2013 Correction Deeds were ineffective, that the 2005 Mineral Deed was binding and enforceable and that John had breached his warranty. The probate court ruled in favor of Broadway Bank.

Holding: The 2013 Amended Correction Deed did not comply with the requirements of Section 5.029 of the Tex.Prop.Code, and as a result, it did not replace the 2005 Mineral Deed. The court reversed the probate court's judgment in favor of Broadway Bank and rendered judgment in favor of Yates Energy that the 2013 Amended Correction Deed is invalid as a matter of law. The court reversed the portion of the probate court's judgment denying Yates Energy's breach of express warranty counterclaim and remanded the claim to the probate court for further proceedings including consideration of the claim for attorneys' fees.

Reasoning: Under the Correction Deed statute, Tex. Prop. Code Ann. § 5.029, there are two types of corrections: material and non-material. For material corrections, all parties, including intervening parties, must execute the deed for it to be effective as to all. Non-material corrections only require the execution by one party.

The court held that *section 5.029* sets forth two ways in which a correction instrument making a material change must be executed in order to replace an original recorded instrument. *See Laredo Merchs Ass'n*, 2016 Tex. App. LEXIS 8901, 2016 WL 4376627. The statute provides that the correction instrument must be "executed by each party to the recorded original instrument" — in other words, the original parties — or, if applicable, "a party's heirs, successors, or assigns." These methods of execution are linked by the phrase, "or, if applicable" to which the court applied its ordinary meaning. *See id.*; *Tanya L. McCabe Trus*t, 531 S.W.3d at 794. The court restated the general understanding of the word "or" as a disjunctive conjunction "used to link alternatives." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1232 (2002). "The term separates words or phrases, indicating that 'either of the separated words or phrases may be employed without the other.'" *In re B.N.S.*, 247 S.W.3d 807, 809 (Tex. App.—Dallas 2008, no pet.)(citing *Jones v. State*, 175 S.W.3d 927, 932 (Tex. App.—Dallas 2005, no pet.)). The phrase "if applicable" is a conditional clause meant to apply when appropriate or relevant. WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 76, 865, & 1232 (2002). Therefore, when read together, which of the two separate ways a correction instrument making a material change must be executed depends on whether the condition outlined by the "if applicable" provision is triggered.

The court held that the provision is triggered and a correction instrument making a material change must be executed by a party's heirs, successors, or assigns, as opposed to the original parties of the recorded instrument, if the property interest conveyed in the original instrument has been assigned or conveyed by an original party to that party's heirs, successors, or assigns.

Accordingly, to comply with Section 5.029, the 2013 Amended Correction Deed was required to be signed by the successors in interest to Broadway Bank, who were John and his siblings, as well as the successors and assigns to John, which was anyone who currently held an interest in the royalty at the time the 2013 Amended Correction Deed was signed.

Based on the foregoing analysis, the court held that by including only the signatures of the original parties to the 2005 Mineral Deed and not the signatures of the parties' heirs, successors, or assigns, the 2013 Amended Correction Deed did not comply with the requirements of Section 5.029 of the Code, and as a result, it did not replace the 2005 Mineral Deed. *See* Tex. Prop. Code Ann. § 5.030(a)(1). Accordingly, John received a fee simple mineral interest in the trust property under the 2005 Mineral Deed and subsequently conveyed a fee simple royalty interest to Yates Energy Corporation, which then assigned its rights in the royalty interests in the trust property pursuant to a farmout agreement in a series of assignments dated effective February 1, 2012. The court reversed the probate court's grant of summary judgment in favor of Broadway Bank and declared the 2013 Amended Correction Deed to be invalid.

K. *Verde Minerals, LLC v. Burlington Res. Oil & Gas Co., LP,* No. 2:16-CV-463, 2019 U.S. Dist. LEXIS 4182 (S.D. Tex. Jan. 9, 2019)

Facts: Verde Minerals, LLC brought a class action against 1893 Oil & Gas, Ltd. and ELP2 Minerals, alleging that the defendants violated their obligation to pay oil and gas royalties to Verde and other similarly situated parties. Verde claimed that its interest is derived from a series of grants executed between 1919 and 1921 that concerned 2,092-acre property known as the Edward Mattison Survey. The defendants argued that the deeds did not convey any ownership interest to Verde. Both parties filed cross-motions for summary judgment.

Issue: Did the Mattison Deeds convey any ownership interest to the plaintiffs?

Result: The United States District Court for the Southern District of Texas denied the defendant's motion for summary judgment, granting in part and denying in part the plaintiff's motion for partial summary judgment. The court granted the plaintiff's motion for leave to amend its pleadings.

Holding: The Mattison Deeds conveyed a floating royalty interest to Verde.

Reasoning: The court first addressed the defendant's contention that the Statute of Frauds precluded the Mattison deeds from conveying any legally recognizable property interest. Each of the Mattison Deeds purported to convey acreage:

> being a part of the Edward Mattison Survey of 2,092.08 acres of land out of Block Sixteen (16) of Live Bee Land Subdivision No. 4, according to the map or plat of said Live Bee Land Subdivision No. 4 on file in the office of the Clerk of the County Court and Record of said Live Oak County, Texas, and originally part of the Festus Doyle Survey No. 4 in said County.

The defendants argued that this grant failed because it lacked boundary descriptions or other means to identify the acreage. However, because Verde sought to recover a share of oil and gas proceeds as opposed to rights in the surface estate, the court rejected the defendant's argument, explaining that "as long as the Mattison deeds and the documents referenced therein provide sufficient means to determine with reasonable certainty the grantee's share of the oil and gas proceeds conveyed" the description was sufficient.

The court then turned to the analysis of the Mattison deeds. The court noted that the grantees of the deed were conveyed a pro rata portion of "all moneys that may be received by [Mattison] for one-half of all oil, gas or minerals that may be found by [Mattison] upon said entire tract and sold by him, after paying the expenses of refining, marketing, shipping, storing and other necessary expense on same." The court explained that despite the absence of the word "royalty," the language of the deed conveyed a royalty interest, but the deed did not convey rights to bonus payments and delay rentals.

The court also rejected the defendant's arguments that the interests granted by Mattison contained unenforceable personal covenants, based on the reasoning that Mattison

> "'covenant[ed] on behalf of himself, his heirs, executors, administrators and assigns' to make the payments that Verde claims were improperly withheld. If the payment obligation had been limited to the oil and gas proceeds that Mattison himself personally received, it would have made no sense for the instrument to state that the obligation would be binding on Mattison's successors."

In response to the defendant's contention that the Mattison Deeds violate the rule against perpetuities, the court distinguished the case at hand from the case law cited by the defendants by explaining that the deeds did not "defer the effective date of the conveyed interests until after the expiration of some other, earlier-conveyed royalty interest." Additionally, the court rejected the defendant's additional arguments that the companies acquired any interest held by Verde or its predecessors through adverse possession and that Verde's claims are time-barred.

Finally, the court granted Verde's motion for leave to amend its pleading to add Burlington Resources Oil and Gas Company as a defendant, to add additional named plaintiffs as other alleged successors of Mattison's grants, and to add a cause of action seeking a declaratory judgment that the Mattison deeds conveyed a mineral interest or a royalty interest. In footnote 17 of the court's opinion, the court clarified that it's holding does not necessarily entitle Verde to a declaratory judgment, but that the court assumes that Verde can establish a chain of title based on the order.

L. *Wagenschein v. Ehlinger*, No. 13-17-00515-CV, 2019 Tex. App. LEXIS 5949 (Tex. App.—Corpus Christi July 11, 2019, n.p.h.)

Facts: This dispute concerns the construction of a mineral interest reservation included in a 1989 warranty deed. Oswalt Wagenschein, et. ux. owned a 241.69 acre tract of land in DeWitt County, Texas. After their deaths, the seven heirs conveyed the property to Mueller with the following reservation:

> THERE IS HEREBY RESERVED AND EXCEPTED from this conveyance for Grantors and the survivor of Grantors, a reservation until the survivor's death, of an undivided one-half (1/2) of the royalty interest in all the oil, gas and other minerals that are in and under the property and that may be produced from it. Grantors and Grantors' successors will not participate in the making of any oil, gas and mineral lease covering the property, but will be entitled to one-half (1/2) of any bonus paid for any such lease and one-half (1/2) of any royalty, rental or shut-in gas well royalty paid under any such lease. The reservation contained in this paragraph will continue until the death of the last survivor of the seven (7) individuals referred to as Grantors in this deed.

In 2006, the Muellers executed an oil, gas, and mineral lease with Trinity Energy Services, L.L.C., who then assigned the lease to Pioneer Natural Resources USA, Inc. (Pioneer). Clara, one of the Wagenschein heirs, died in 2009, leaving Dwight Binz and appellant Carol Edwards as her heirs. In 2010, Pioneer drilled and began production on its first well on the property. The surviving Wagenschein Heirs each signed division orders, accepting and receiving their respective shares of what would have been Clara's interest as well as their own. More heirs died over the succeeding years. After each death, Pioneer distributed the decedent's interest by signed division orders to the then-surviving Wagenschein Heirs. Pioneer interpreted the reservation as providing a joint tenancy with right of survivorship. Descendants of the deceased heirs who were not receiving any royalty brought suit claiming that their share of the one half of royalty was still payable to them until the last heir died, that the life estate was the measurement of time and not an event to foreclose their interest. On motions for summary judgment, the trial court ruled for Ehlinger declaring that the royalties reserved in the deed pass to the surviving original grantors upon the death of each of the seven original grantors and, at the time of the rendering of this judgment, record title to the royalties reserved in said deed is shared by the three surviving grantors.

Holding: The court of appeals affirmed the trial court judgment.

Reasoning: The court of appeals addressed Ehlinger's equitable estoppel argument as to the descendants of one of the deceased Wagenschein Heirs. The court held that the Wagenschein Heirs accepted the benefit of the reservation passing through survivorship, i.e. the survivors accepted the increased share from the division and vesting of the deceased heir's share among the survivors. Consequently, having once enjoyed the benefits of joint tenancy with right of survivorship, the now-deceased Wagenschein Heirs cannot, through their heirs, sue to claim benefits as tenants in common. *See Lopez*, 22 S.W.3d at 864. As appellees argued, it would be unconscionable to allow such a claim. *See id.* Secondly, the court of appeals construed the agreed unambiguous reservation as doing exactly what Ehlinger and Pioneer claimed. The estate created was a joint tenancy with right of survivorship.

M. *Trial v. Dragon*, 2019 Tex. LEXIS 637; 62 Tex. Sup. J. 1292; 2019 WL 2554130 (June 21, 2019)

Facts: Leo Trial and his six siblings each owned a 1/7 interest in certain real property situated in Karnes County, Texas, which totaled 237 acres. In 1983, Leo gifted to his wife, Ruth, "one-half (1/2) of all of [his] right, title and interest in and to" the Karnes County property. As a result of that gift, Leo and Ruth then each owned a 1/14 interest in the Karnes County property, with Ruth's 1/14 being her separate property. The deed was recorded in Karnes County within days of execution.

In 1992, Leo and his still-living siblings purported to convey the entire Karnes County property to the Dragons. Leo and his siblings executed separate but identical deeds, each containing the following language: "WE, LEO TRIAL of Karnes County, Texas, [and other grantors] . . . do BARGAIN, GRANT, SELL AND CONVEY unto the [Dragons] all that certain parcel or tract of land, lying and being situate[d] in Karnes County, Texas . . . ." The Dragons paid approximately $100,000 for the property, which was financed in part over a fifteen-year period. The Dragons did not obtain a title opinion or title insurance and were not represented by counsel. The deed contained a fifteen-year mineral reservation and a general warranty clause that provided:

> TO HAVE AND TO HOLD the above described premises, together with all and singular the rights and appurtenances thereto in anywise belonging unto the [Dragons], their heirs and assigns forever, and We do hereby bind ourselves, our heirs, executors and administrators to WARRANT AND FOREVER DEFEND all and singular the said premises unto **[*3]** the [Dragons], their heirs and assigns against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

The deed did not mention Ruth's 1/14 interest, there is no indication that the Dragons were actually aware of Ruth's interest, and Ruth was not a party to the 1992 sale.

Leo died in 1996. Under his will, his entire estate was devised to trust for the remainder of Ruth's life, and, upon her death, the corpus went to their two sons, Joseph and Michael. The will named Ruth as independent executrix of the estate and trustee of the trust. After Leo's death, Ruth continued to accept and endorse the Dragons' remaining payments from the 1992 sale and later endorsed the release of lien, signing on Leo's signature line as "Leo Trial by Ruth Trial." Ruth died in 2010, but her will was not probated. As a result, Ruth's 1/14 interest passed to the Trial sons through intestacy, giving each son a 1/28 interest in the Karnes County property.

In 2008, after the Trials' mineral reservation expired, the Dragons approached the oil and gas operator for a new division order, which would direct the operator to begin making the royalty payments to the Dragons in full. The operator did so until 2014 when a lease status report showed that Ruth owned a 1/14 interest "in her own right," that she had died intestate, and that she had two sons. Accordingly, a new division order was entered, directing the operator to make royalty payments to Joseph Trial and Michael Trial, the two sons, in a suspended account. The Dragons filed suit against the Trial sons, asserting multiple causes of action including breach of warranty and estoppel by deed. The case was presented in competing summary judgment motions, both traditional and no-evidence. The trial court denied the Dragons motion and granted the Trials' motion. The Court of Appeals reversed holding that the *Duhig* doctrine applied to grantors, grantees, privies in blood, privies in estate, and privies in law.

Holding: *Duhig* does not apply in this situation because the Trial sons were not parties to the 1992 deed from their father to the Dragons and the Trial sons received their 1/14th interest from a chain of title separate and apart from their father's title. The case is remanded to the trial court to address the unresolved questions of breach of warranty in the 1992 conveyance.

Reasoning: The *Duhig v. Peavy-Moore Lumber Co*., 135 Tex. 503, 144 S.W.2d 878 (Tex. 1940) case concerns specific facts that are not present in the Trial/Dragon litigation. In *Duhig* the estoppel doctrine was applied to the present grantor not some remote successor. In *Duhig* the present grantor possessed the exact interest to remedy the deficiency. In the Trial/Dragon litigation, Father Trial did not possess the exact interest to remedy the deficiency at the time of the 1992 deed because Father Trial had conveyed one half of his interest to his wife nearly a decade before. Further, this earlier conveyance was of record before 1992.

The Supreme Court holds in the broadest sense that estoppel by deed stands for the proposition that all parties to a deed are bound by the recitals in it, which operate as an estoppel. The binding effect is not limited to the parties to the deed but extends to the parties' privies, privies by blood, privies by estate, and privies in law. The facts in this case differ significantly from those in *Duhig.* Although *Duhig* still has its place in Texas jurisprudence, the Court concluded that it did not apply to defeat the Trial Brothers' claim to title.

The Court also addressed the after-acquired title aspect of *Duhig* within the confines of the broader estoppel theory. The Court states that *Duhig* did not hold that any after-acquired title passed. *See id.* In *Duhig*, at the very time of execution and breach, the grantor owned the exact mineral interest required to remedy that breach and was thus subject to an instant transfer based on equitable principles. *See id.* Thus, *Duhig* stands for the proposition that if a grantor reserves an interest and breaches a general warranty at the very time of execution, then an immediate passing of title is triggered to the grantee for that property that was described in the reservation—in other words, if the grantor owns the exact interest to remedy the breach *at the time of execution* and equity otherwise demands it. *See id.*

Finally, the Court notes that the *Duhig* doctrine is a doctrine of estoppel and not one of replacement. Dragon argued that the Trial Brothers should be estopped to claim the 1/14th interest in order to satisfy their father's warranty. The court of appeals awarded title to the Dragons as a remedy for their breach of warranty claim. The Court rejected this argument and this award holding that the proper remedy was for money damages, if appropriate.

N. *In re Estate of Ethridge,* 2019 Tex.App. LEXIS 9564 (Tex.App.—Eastland October 31, 2019, n.p.h.)

Facts: This is a will construction case but it is included in the Deed Cases because of the similarity in the standards of review and interpretation. In this case, the testator prepared a one page type written will that appointed Davis as Independent Executor and gave him all "my personal effects…" Davis received royalty and deposited the royalty into a bank account opened in the name of the Estate of Mildred Etheridge. Davis then withdrew the monies and spent them on non-Estate matters. Mildred Etheridge's heirs sued for an accounting. Davis claimed he was entitled to the royalties as they were Etheridge's personal effects. Davis argued that the royalties were not specifically devised in the will or included in the inventory and passed to him. The trial court held that Davis misapplied the funds and that the royalties were not "personal effects."

Holding: The Eastland Court of Appeals affirmed the trial court.

Rationale: The will had no residuary clause. Personal effects have customarily been defined narrowly as a subset of personal property. Mineral interests and royalty do not fall within the typical definition of personal effects. The royalty payments passed outside of the will by intestacy to Mildred's heirs.

VII. EXECUTIVE RIGHT

A. *Tex. Outfitters, Ltd., LLC v. Nicholson*, 572 S.W.3d 647 (Tex. 2019)

Facts: Dora Jo Carter owned the surface estate of a 1,082-acre tract in Frio County known as Derby Ranch. She and her two children, Carolyn Nicholson and William Carter, Jr., collectively owned an undivided

50% interest in the mineral estate. The Hindes family, relatives of the Carters, owned the other 50% mineral interest. In 2002, the Carters sold the surface estate to Texas Outfitters Limited, LLC, along with a 4.16% mineral interest and the executive rights to the 45.84% mineral interest retained by the Carters. Frank Fackovec, Texas Outfitters' sole owner, intended to use the ranch as his residence as well as to operate a hunting business. He testified at trial that he would not have purchased the property without the executive rights and the corresponding control over future mineral development.

In March 2010, Texas Outfitters received and rejected an offer to lease its and the Carters' mineral interest. Fackovec testified that he believed the offer, which included a $450-per-acre bonus and a 22% royalty, was too low.

In June 2010, the Hindeses leased their 50% mineral interest in the ranch to El Paso Oil Exploration & Production Company for a $1,750-per-acre bonus and a 25% royalty. El Paso made the same offer to Texas Outfitters for the remaining 50% interest, and the Carters wanted Fackovec to accept it. Fackovec was aware of the Carters' position but rejected the offer. At trial, the parties presented competing testimony regarding the reason for the rejection. Fackovec testified he thought the bonus was too low and wanted to wait for prices to go up as the oil play matured. Dora Jo Carter testified that, although she and Fackovec did not specifically discuss the El Paso lease, Fackovec had told her he "planned not to lease because of his business."

The Carters requested a meeting with Fackovec, which took place in August 2010 and involved both the parties and their attorneys. The bulk of the negotiations appears to have centered on an arrangement for the Carters to buy back their executive rights. At the conclusion of the meeting, the parties had reached an agreement in principle whereby: (1) Texas Outfitters would convey to the Carters the executive rights on their retained mineral interest; (2) the deed conveying those rights would include as-yet unspecified surface protections to be included in the El Paso lease and any future lease; (3) Texas Outfitters would execute the lease as to its own 4.16% mineral interest; (4) the Carters would forgive $263,000 of the owner-financed note on the ranch (approximately half of what was still owed); and (5) El Paso would prepay Texas Outfitters a negotiated amount for surface damages and water usage. However, the agreement was never finalized because the parties were unable to agree on the scope of the additional surface protections, which the Carters concluded were too onerous and would unduly restrict their ability to lease the minerals in the future.

The Carters sued Texas Outfitters and Fackovec in June 2011. They alleged that Texas Outfitters, as holder of the executive rights to the Carters' mineral interests, breached the duty of utmost good faith and fair dealing by refusing to enter the El Paso lease. After the Carters filed suit, Texas Outfitters received two more offers to lease the ranch's minerals. The first included a larger bonus than the El Paso offer—$2,000 per acre—but was withdrawn when the lessee learned El Paso had already leased the Hindeses' interest. The second included a $1,500-per-acre bonus and was also withdrawn by the lessee.

Ultimately, drilling in the area revealed that the land was not as productive as anticipated, and Texas Outfitters received no further lease offers. In 2012, Texas Outfitters sold the ranch for approximately $3.5 million, retaining a portion of the mineral interest.

After a bench trial, the trial court rendered judgment for the Carters and against Texas Outfitters for $867,654. The trial court made numerous findings of fact and conclusions of law. The court of appeals affirmed indicating that Texas Outfitters refusal of the El Paso lease offer was arbitrary and a self-motivated refusal to permit any lease.

Holding: This case demonstrates yet again the fact-dependent nature of executive duty inquiries. Under Texas case law, the Carters had the burden to show that Texas Outfitters engaged in acts of self-dealing that unfairly diminished the value of the Carters' non-executive interest. The Carters carried this burden. Because more than a scintilla of evidence supported the trial court's finding that Texas Outfitters breached its executive duty, the Court affirmed the court of appeals' judgment.

Reasoning: The executive right—one of the "bundle of sticks" inherent in mineral ownership—encompasses the right to execute oil and gas leases. *Lesley v. Veterans Land Bd. of State*, 352 S.W.3d 479, 480-81 (Tex. 2011). When the executive right is "severed from other incidents of mineral ownership," *Id.* at 487, issues often arise as to the nature of the duty owed to the non-executive mineral- or royalty-interest owner. The Court has described the parameters of this duty as "difficult to determine," "imprecise," and unsusceptible to a "bright line rule." *Id.* at 488; *Bradshaw*, 457 S.W.3d at 74. However, the Court has articulated several guiding principles.

First, the duty does not require an executive to subjugate his interests to those of the non-executive; rather, the executive must "acquire for the non-executive every benefit that he exacts for himself." *Bradshaw*, 457 S.W.3d at 81 (quoting *Lesley*, 352 S.W.3d at 490). These concepts, "no-subjugation" and "equal-benefits", were first applied in *Manges v. Guerra*, 673 S.W.2d 180, 181-82 (Tex. 1984). Second, in *Lesley* the Court rejected the argument that an executive is wholly shielded from liability for inaction, i.e., failure to lease, noting that if an executive's refusal to lease upon request "is arbitrary or motivated by self-interest to the non-executive's detriment, the executive may have breached his duty." 352 S.W.3d at 491. The Court stopped short of articulating a general rule governing liability for refusing to lease because the executive's conduct in *Lesley* went beyond such inaction. *Id.* Specifically, the executive in *Lesley*, a subdivision developer that owned the surface and part of the mineral estate, as well as all the executive rights, imposed restrictive covenants constraining mineral development in the subdivision to protect future lot owners. *Id.* at 481. The Court held that the executive breached its duty by imposing limitations on future leasing that benefitted its interest in the surface estate to the detriment of the mineral interest owners. *Id.* at 491

Finally, in *Bradshaw* the Court synthesized its previous discussions of the contours of the executive duty to provide "the controlling inquiry" in ascertaining whether an executive breached his duty to a non-executive: "whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest." 457 S.W.3d at 82. In doing so, the Court recognized the utility of the no-subjugation and equal-benefits principles, while clarifying that they cannot be applied in a vacuum and must account for the fact that executives and non-executives often "do not share in all the same economic benefits that might be derived from a mineral lease." *Id.* at 83. The non-executive in *Bradshaw* alleged that, in executing the lease, the executive agreed to a lower shared royalty rate in exchange for an enhanced bonus for itself. *Id.* The Court held that such conduct, if proved, was "the essence of self-dealing" because the executive "misappropriated what would have been a shared benefit . . . and converted it into a benefit reserved solely for itself." *Id.* And the developer in *Lesley* did not merely act to benefit its surface interest; it did so in a manner that unfairly harmed the non-executive mineral owners' interests. 352 S.W.3d at 491.

However, the Court continues to recognize that evaluating compliance with the executive duty is rarely straightforward and is heavily dependent on the facts and circumstances. The Court found that in *Texas Outfitters,* the executive gambled its interest and Carter's interest on a higher bonus to the detriment of the Carters.

The Court did concede that an executive generally does not breach her duty by declining a lease in honest anticipation of obtaining better terms for all. The trial court did not go so far as to find that Texas Outfitters refused to execute any lease. But the trial court did find that the refusal to execute the El Paso lease was a much larger gamble with respect to the Carters' interest (and one Fackovec knew they did not want to take), that Texas Outfitters took this gamble knowing the pool of potential lessees had been diminished, and that refusing the lease benefitted Texas Outfitters' surface interest to the Carters' detriment. The trial court further recognized that protection of the surface interest was important to Texas Outfitters in light of its insistence on acquiring the executive rights as part of the ranch's purchase and its longstanding plan to use the ranch for hunting. The Court read the trial court's findings to include a determination that Texas Outfitters refused the El Paso lease to benefit its surface interest.

VIII. FARMOUT AGREEMENT

A. *Peregrine Oil & Gas, LP v. HRB Oil & Gas, Ltd.,* No. 01-17-00180-CV, 2018 Tex. App. LEXIS 7183 (Tex. App.—Houston [1st Dist.], pet. denied)

Facts: Peregrine Oil & Gas, LP ("Peregrine") entered into a "Participation Agreement" with HRB Oil & Gas, Ltd. and VHPM, LLC ("HRB") among others that set forth the terms and conditions to drill wells on an offshore oil and gas lease between the United States Department of Interior, Mineral Management Service, and Peregrine. For HRB and other entities to earn an interest under the lease each entity had to pay its share of expenses. The Participation Agreement provided for Before Payout revenue and cost percentages and an After Payout revenue and cost percentages. In December 2015, Peregrine notified HRB that payout had occurred months earlier and that a "reconciliation of accounts" was necessary because the payouts issued in June 2014 were based on the agreed Before Payout percentage rather than based on the agreed After Payout percentage. Based on the reconciliation, HRB owed Peregrine for overpayments made by Peregrine to HRB. Peregrine claimed it was entitled to reimbursement and sent JIBs for this amount as well as other expenses. HRB refused to reimburse. All other working interest owners re-paid the overpayments.

Peregrine asserted causes of action for breach of contract for refusing to return the money and "money had and received." HRB answered by denying the claims and asserting affirmative defenses and moved for partial summary judgment arguing that the contract claim fails because Peregrine negligently made the payments and this cannot constitute a breach of contract, and the statute of limitations bars the claim for money had and received. Peregrine referred to the Offshore Operating Agreement ("OOA") and its requirement that any JIBs must be paid before the JIBs can be contested. HRB asserted that the OOA only addresses the payment of costs incurred while operating the lease. HRB argues that the overpayments are not costs even though the overpayments were included as part of a JIB. Peregrine argued that the OOA requires HRB to pay the disputed amount and then to contest the charges. Peregrine filed a motion for summary judgment asserting that the OOA obligates HRB to reimburse them for the costs delivered.

Procedural History & Result: The trial court denied Peregrine's motion and granted HRB's motion. Peregrine filed a motion for reconsideration. Peregrine had failed an amended petition after HRB filed its Motion for Summary Judgment. To rectify this deficiency, the trial court withdrew and replaced its original order with an amended order specifying that the Amended Motion for Partial Summary Judgment was granted.

Holding: [1] The undefined term "charges" raises a genuine issue of material fact in the interpretation of the OOA. Peregrine's motion on its claim for breach of contract was affirmed. The court held that the trial court erred in granting HRB's motion on its claim for breach of contract.

[2] The trial court did not err on case law that states that absent a contractual obligation, there can be no breach of contract.

[3] The trial court did not err in granting HRB's summary judgment that the statute of limitations bars Peregrine's money had and received claim.

Rationale: [1] The OOA provides that upon receipt of a JIB a party should first pay the charges and then notify the other party of any charges in dispute. Because the term "charges" is not defined and the parties' intent is unclear with regard to what charges a non-operator is required to pay, and despite the affidavit of a designated expert stating this is common practice, the intent of the word "charges" is not clear. Because it can be interpreted broadly and narrowly an issue of material fact exists as to whether the alleged overpayments are "charges."

[2] *Mobil Producing Texas & New Mexico, Inc. v. Cantor,* 93 S.W.3d 916 (Tex. App.—Corpus Christi 2002, no pet.) stands for the proposition that if no contractual provision exists then no breach of contract claim exists and a claim can only exist under a quasi-contract claim such as unjust enrichment.

[3] The appellate court reasoned that Peregrine's argument that the cause of action for money had and received did not accrue until after it had reconciled its accounts and submitted for repayment was erroneous because the provision requiring Peregrine to question the correctness of past bills within twenty-four months does not demonstrate that the parties intended to extend the statute of limitations. In other words, Peregrine's twenty-four-month obligation to question bills paid does not extend the statute of limitations until those bills have been questioned.

B. *TEC Olmos, LLC v. ConocoPhillips Co.,* 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018, pet. denied)

Facts and Procedural History: TEC Olmos entered into a farmout agreement to test-drill land leased by ConocoPhillips. The contract contained a liquidated damages clause requiring Olmos to pay $500,000 if it did not begin drilling by the deadline. The contract also included a *force majeure* clause which provided that:

> Should either Party be prevented or hindered from complying with any obligation under this Agreement . . . by reason of fire, flood, storm, act of God, governmental authority, labor disputes, war, or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected, then the performance of any such obligation is suspended.

Following the execution of the contract, the entity chosen by Olmos to finance the project backed out, which prevented Olmos from meeting the drilling deadline specified in the contract. Olmos attempted to invoke the *force majeure* clause, arguing it had no obligation to pay ConocoPhillips liquidated damages.

Procedural History: ConocoPhillips sued Olmos, and sought a declaration that Olmos's claim did not constitute a *force majeure* event. Olmos asserted affirmative defenses of *force majeure* and unenforceable penalty. The trial court granted ConocoPhillips's motion for summary judgment, and Olmos appealed.

Issue: Did the trial court properly consider the foreseeability of changes in the oil and gas market when determining the applicability of the *force majeure* clause in the contract?

Holding: The court affirmed the judgment as modified. The trial court properly granted summary judgment for ConocoPhillips because changing commodities prices did not fall under the "catch all" provision of the *force majeure* clause as fluctuations in the market are foreseeable. Additionally, Olmos's inability to obtain financing was not like the other events enumerated in the contract under the *ejusdem generis* doctrine. Furthermore, summary judgment was proper on Olmos's unenforceable penalty claim because the evidence provided as to the reasonableness of the penalty focused on events occurring after the execution of the contract, as opposed to when the contract was signed.

Rationale: The court offered two primary reasons for holding that a foreseeable event did not fall under the "catch all" provision of the *force majeure* clause. First, the court explained Olmos's interpretation of the "catch all" provision was too broad, and that adopting a broad interpretation would "relieve Olmos of liability because of a circumstance that it was aware of, but took no steps to specifically address in the contract." The court looked to *Valero Transmission Co.* in which it had previously held that a significant change in market price, not specially listed as a *force majeure* event, was foreseeable and would not trigger a *force majeure* clause. *Valero Transmission Co. v. Mitchell Energy Co.,* 743 S.W.2d 658, 663 (Tex. App.—Houston [1st Dist.] 2018). The court drew from common law principles to explain that fluctuations in the oil and gas market are foreseeable as a matter of law, and therefore are not considered a *force majeure* event unless specifically listed in the contract. Because fluctuations in the oil market were not enumerated in the contract, Olmos argues that the event falls within the "catch all" provision. The court rejected this argument saying that a '"catch all' provision requires a showing of unforeseeability, which Olmos did not and cannot make ... [therefore,] Olmos's failure to perform was not excused by the *force majeure* clause of the contract."

Second, the court held that the application of *ejusdem generis* suggests that a decline in oil prices was not the type of event covered by the *force majeure* clause. The doctrine of *ejusdem generis* stands for the proposition that when more specific items in a list are followed by a catch all other, then the latter must be limited to things like the former. The court cited a New Jersey case which held that a broad "catch all" *force majeure* clause could not be applied to events different from those enumerated explicitly in the contract (the plaintiffs inability to get insurance was not in the same class as labor strikes, fires, floods, earthquakes, war or acts of God). The court held that changes in commodities markets do not fit into the types of events specified in the contract such as natural or man-made disasters and labor disputes. Therefore, the trial court properly granted summary judgment for ConocoPhillips on this issue.

In support of its claim that the liquidated damages sought by ConocoPhillips were an unenforceable penalty, Olmos argued that fact issues existed as to whether actual damages for non-drilling bears any relation to the $500,000 penalty. The court rejected Olmos's argument and held that "the subsequent change in oil prices does not mean that the liquidated damages provision was unreasonable at the time it was agreed on by the parties." The court modified the judgment to make Olmos jointly and severally liable with Terrace, the financing entity, for the attorney's fees awarded to ConocoPhillips.

Dissent: Judge Harvey Brown dissented claiming that the majority "[took] an approach counter to established contract-interpretation rules and engrafts a term not found in the parties' contract." He argued that the parties did not agree to "a narrow and restrictive unforeseeability requirement" and that the general nature of the contract at issue differs from the warranty contracts in the case law used by the majority and ConocoPhillips.

C. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, No. 17-0332, 2019 Tex. LEXIS 688, 2019 WL 2710045 (June 28, 2019)

Facts: Carrizo was a lessee in a 22,000-acre lease, which was set to expire on April 23, 2011, if a producing well was not drilled in accordance with the lease agreement. Carrizo entered into a farmout agreement with Barrow-Shaver, in which Barrow-Shaver would earn a partial assignment of Carrizo's interest in the lease in exchange for its services in drilling a producing well. Carrizo and Barrow-Shaver entered into a letter agreement to set the terms of the farm-out. The Supreme Court took pains to detail the oil and gas experience of the negotiators as well as the oil and gas experience of the founders of Barrow-Shaver and Carrizo.

As negotiations progressed, the parties focused on the consent-to-assign provision. Barrow-Shaver's first version did not address consent-to-assign. Carrizo sent a revised draft with a consent-to-assign provision that provided consent shall not be unreasonably withheld. Carrizo later revised this provision to delete the "shall not be unreasonably withheld" language. Barrow-Shaver exchanged a draft with a consent to assign provision that included the "shall not be unreasonably withheld" language. Carrizo sent back a draft eliminating this language. Barrow-Shaver testified that the Carrizo negotiator, a vice president level corporate officer, assured him on several occasions that Carrizo would give Barrow-Shaver consent to assign if Barrow-Shaver chose to assign its rights in the future.

The farm-out letter agreement included the following consent-to-assign clause:

> The rights provided to [Barrow-Shaver] under this Letter Agreement may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo.

The "shall not be unreasonably withheld" language was eliminated from the executed copy of the farm-out agreement.

As required by the farm-out agreement, Barrow-Shaver drilled a well on the 22,000 acres before the deadline. Barrow-Shaver drilled more than one well on the 22,000 acres at a cumulative cost of $22,000,000 without spectacular results.

Raptor Petroleum II, LLC, approached Barrow-Shaver to secure an assignment of the farm-out agreement with Carrizo and, after negotiations, Raptor agreed to pay Barrow-Shaver $27,690,466.86 for an assignment of its farmout with Carrizo. On May 7, 2012, Barrow-Shaver contacted Carrizo for its consent to the assignment of the farmout to Raptor. Carrizo eventually demanded Barrow-Shaver pay $5,000,000.00 for the lease before it would give its consent for the assignment from Barrow-Shaver to Raptor. Barrow-Shaver declined to pay Carrizo $5,000,000.00. Without Carrizo's consent to the assignment of the farmout, Raptor withdrew its offer to Barrow-Shaver.

Barrow-Shaver sued Carrizo for breach of contract, fraud, and tortious interference with contract. Both parties agreed that the consent-to-assign provision is unambiguous. Barrow-Shaver asserted that although the consent-to-assign provision was unambiguous, it was silent as to the basis on which Carrizo could withhold its consent. Barrow-Shaver, therefore, argued that the jury must hear evidence of industry custom and usage to determine whether Carrizo breached the contract. Carrizo disagreed, contending that the consent-to-assign provision is not silent, rather it clearly imposes a hard consent obligation on Barrow-Shaver such that Carrizo could withhold its consent for any reason. The trial court allowed testimony as to industry custom and usage in relation to the breach of contract claim. Carrizo argued that the prior drafts of the agreement should be admitted to inform the jury of the surrounding circumstances of the consent-to-assign provision. The trial court disagreed.

The trial court submitted the breach of contract question to the jury, explaining that it may consider evidence of industry custom in deciding whether Carrizo breached the agreement. The jury reached a unanimous verdict in favor of Barrow-Shaver on all three of its claims, awarding $27,690,466.86 in total damages, in addition to pre-judgment interest and attorneys' fees. The court of appeals reversed the trial court's judgment.

Holding: In construing the parties' farmout agreement, the Court held that the contract imposed no consent obligation on Carrizo and that Carrizo's right to withhold consent is unqualified. The Court held that evidence of the surrounding facts and circumstances concerning the consent-to-assign provision—including the substantive negotiations and prior drafts of the farmout agreement, as well as industry custom and usage—was inadmissible extrinsic evidence, which was not to be used to imply an obligation into the agreement. The Court declined to read a reasonableness standard—or impose any obligation not already in the contract—into the parties' bargained-for consent-to-assign provision. The Court held that Carrizo's denial of consent to Barrow-Shaver's proposed assignment could not have breached the parties' contract as a matter of law. Finally, the Court concluded that Barrow-Shaver could not justifiably rely on Carrizo's misrepresentations concerning an unambiguous provision. The Court held, as a matter of law, that Barrow-Shaver's fraud claim fails.

Reasoning: The Court notes that Carrizo did not demand $5,000,000 for consent to Barrow-Shaver's assignment to Raptor. Rather, Carrizo offered to sell its interest in the 22,000 acres including its override to Barrow-Shaver for $5,000,000 thereby eliminating the need for consent. Barrow-Shaver did not counter this offer to purchase. Barrow-Shaver characterized Carrizo's denial of consent as a cash-for-consent demand bordering on extortion.

The Court addressed Barrow-Shaver's breach of contract claim first in its analysis. The drill to earn farmout agreement is a common industry agreement. Both parties are sophisticated, experienced energy companies. The consent-to-assign provision was not ambiguous. In such a situation, the Court will give a contract its plain, grammatical meaning to effectuate the intent of the parties. Here, no assignment of Barrow-Shaver's rights under the farmout agreement can be made without Carrizo's express written consent. The question then becomes whether Carrizo's right is an unqualified right or whether, as Barrow-Shaver argues, this right is qualified by a reasonableness standard.

The consent-to-assign provision only requires that the consent be written and express, no other qualifiers are present, e.g. notarized, specific format, signed by the president, etc. The Court says that the crux of this contract construction issue is whether the agreement's **silence** as to refusal or withholding of consent should nevertheless be interpreted to qualify Carrizo's right to withhold consent to an assignment of Barrow-Shaver's rights as farmee. Here, Barrow-Shaver argued that the consent-to-assign clause lacked certainty and definiteness.

Silence as to a material term differs from silence as to an immaterial or non-essential term. *See generally Fischer v. CTMI, L.L.C.*, 479 S.W.3d 231, 240 (Tex. 2016) (holding that a contract clause was enforceable because it was "sufficiently definite to enable a court to determine [the party's] obligations and to provide a remedy for its breach"). In *Fischer v. CTMI*, the Court explained that "a contract must address all of its essential and material terms with 'a reasonable degree of certainty and definiteness'" to be enforceable. *Id.* at 237. An agreement's terms must be "sufficiently definite to enable a court to understand the parties' obligations." *Id.* But the Court notes that the terms need be definite and certain only as to the terms that are "material and essential" to the agreement. *See id.* (citations omitted); *T.O. Stanley Boot Co. v. Bank of El Paso*, 847 S.W.2d 218, 221 (Tex. 1992).

Material and essential terms are those that the parties would consider "vitally important ingredients" to their agreement and are determined on a case-by-case basis. *See Fischer*, 479 S.W.3d at 237. A material term that appears to be indefinite or uncertain may be supplemented or given further precision. *See* id. *at* 239-40. Because only material and essential terms need be sufficiently definite and certain, and the Court refrains from rewriting or adding to parties' contracts, it follows that a term that is immaterial or non-essential may not be supplemented or given further precision. *See id.*

Under the parties' farmout agreement, the consent-to-assign provision is not material and no supplementation is necessary or allowed to understand the parties' obligations. *See* id. at 237; *T.O. Stanley Boot Co.*, 847 S.W.2d at 221. Each contract should be considered separately to determine its material terms. In considering what terms are material, courts must be mindful of the nature of the contract. For example, in a contract to loan money, the amount to be loaned, the loan's maturity date, its interest rate, and its repayment terms are generally considered the material terms. *See T.O. Stanley Boot Co.*, 847 S.W.2d at 221. In a farmout situation, the farmee is obligated to drill on the land, and no mineral interest transfers to the farmee until it satisfies its drilling obligation under the farmout agreement. *See Farmout Agreement*, WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS (16th ed. 2015). Because the primary purpose of a farmout agreement is the farmee's obligation to drill on the land to complete the transfer of an interest, a consent-to-assign provision is not material to the farmout.

Where the obligations are clear and enforceable based on the agreement's terms, the Court refused to imply a term relating to the withholding of consent. The court held that terms relating to the withholding of consent are immaterial to the farmout agreement, and the agreement's purported silence as to when consent may be withheld is of no legal consequence and needs no supplement to aid its interpretation.

The second step in the Court's analysis was on the use of extrinsic evidence. The parol evidence rule bars consideration of evidence that contradicts, varies, or adds to the terms of an unambiguous written agreement. Nonetheless, a court "may still consider the surrounding 'facts and circumstances'" as an "aid in the construction of the contract's language." *First Bank v. Brumitt*, 519 S.W.3d 95, 110 (Tex. 2017).

In this case, the Court finds that the consent-to-assign provision is unambiguous. The parties are sophisticated oil and gas entities that had representatives with extensive experience in the oil and gas industry. Each party was represented by counsel in this arm's-length transaction. The parties' experienced representatives considered and edited drafts of the agreement before coming to a final agreement. Accordingly, the surrounding circumstances establish that the consent-to-assign provision was a bargained-for exchange between the parties. Those are the only facts and circumstances courts can consider without delving into the parties' intent beyond what their agreement plainly yields. *See Murphy Expl.*, 560 S.W.3d at 109 (explaining that courts may not consider surrounding circumstances to alter an unambiguous contract (citing *URI, Inc.*, 543 S.W.3d at 758)). And just as in *National Union Fire Insurance*, the unambiguous provision that purports to be absolute or unqualified controls, and therefore courts may not consider extrinsic evidence that varies the agreement. *See* 907 S.W.2d at 521. When a contract is unambiguous, courts cannot consider outside evidence, including industry custom and usage, to alter or contradict the terms. *See, e.g.,* URI, Inc., 543 S.W.3d at 757-58; *Nat'l Union Fire Ins.*, 907 S.W.2d at 520-21.

The third step in the Court's analysis concerned the Court's perception that Barrow-Shaver was arguing for an implied covenant of good faith and fair dealing. In this regard, the Court held that it had not extended the duty of good faith and fair dealing to farmout agreements between sophisticated parties, and the Court declined to do so here. A farmout agreement does not create inherently unequal bargaining power or give one of the parties an opportunity to take advantage of the other, especially when both parties are highly sophisticated oil and gas entities. And here, those sophisticated parties specifically negotiated the farmout agreement—a specialized oil and gas agreement between a lessee and an entity who has the resources to drill on the prospect—in an arm's-length transaction. There was no special relationship in the farmout context to give rise to a duty of good faith and fair dealing. Additionally, it is longstanding Texas law that there is not an implied covenant of good faith and fair dealing in every contract.

Without an implied covenant, the Court construed the consent-to-assign provision according to its plain language. The Court concluded that Carrizo could refuse consent for any reason, expressed or not, reasonable or not, legitimate or not, or no reason at all. As a result, Carrizo could not breach the farmout agreement by refusing consent as a matter of law.

The fourth step in the Court's analysis concerned the public policy of Texas to not hinder oil and gas exploration and development as argued by the dissent and Barrow-Shaver. Under a farmout agreement, the lessee chooses to farm out its drilling obligation to another operator in exchange for a transfer of interest upon the drilling of a successful well. *See Farmout Agreement*, WILLIAMS & MEYERS MANUAL OF OIL AND GAS TERMS (16th ed. 2015). A lessee generally would not choose to farm out its obligation to an unsophisticated party because the lessee bears the risk of failed drilling and would therefore look to farm out to an experienced operator. *See generally id.* JUSTICE GUZMAN'S dissent asserts that Carrizo effectively prevented the development of oil and gas under the farmout, and underlying lease, by refusing to consent to Barrow-Shaver's proposed assignment. The majority notes that JUSTICE GUZMAN'S dissent fails to recognize that Carrizo, and farmors generally, have an ongoing interest in exercising caution as to the operator obligated to drill. In arguing that the Court should reinstate the jury's verdict, the majority argues that JUSTICE GUZMAN'S dissent assumes that Carrizo was not acting reasonably in desiring that Raptor not be the operator to develop the minerals and discounts that Carrizo, as the farmor, had a significant interest in ensuring that the drilling not be done by an operator it deemed too risky. Thus, the majority argues that using the jury's finding as to industry custom to hold that a farmor has to justify withholding its consent would actually seem to hinder the development of oil and gas. *See generally Coastal Oil & Gas Corp.*, 268 S.W.3d 1, 39 (Tex. 2008).

The fifth and final step in the Court's analysis concerned Barrrow-Shaver's fraud allegations. Barrow-Shaver argued that it signed the farmout agreement—containing the consent-to-assign provision with no qualifying "cannot be unreasonably withheld" language—because Carrizo assured Barrow-Shaver that Carrizo would consent. Carrizo countered that Barrow-Shaver could not justifiably rely on any assurances of consent when the farmout agreement's consent-to-assign provision directly and unambiguously addressed consent to assign. Carrizo also argued that any reliance is not justified because Barrow-Shaver knew that Laufer, the landman who negotiated the consent-to-assign provision on Carrizo's behalf, was not authorized to bind the company.

The Court directed its attention to the justifiable reliance element of the fraud cause of action. It observed that during the negotiations on the consent-to-assign provision, Laufer promised Barrow-Shaver on three separate occasions that although Carrizo insisted on deleting the "shall not be unreasonably withheld" language, Carrizo would work with Barrow-Shaver on any future assignment, and would give consent. Laufer said, "It won't be a problem" and "Don't worry about it. We will work with you. We will promise you . . . the consent and it won't be a problem."

In light of these comments, the Court must review whether, as a matter of law, Carrizo could have committed fraud—specifically, whether Barrow-Shaver could have justifiably relied on Carrizo's representations. *See Orca Assets*, 546 SW.3d at 653. Judgment without or against a jury verdict is proper at any course of the proceedings only when the law does not allow reasonable jurors to decide otherwise." (quoting *Wilson*, 168 S.W.3d at 823)). "Justifiable reliance usually presents a question of fact" for the jury to decide. *Id.* at 654 (citation omitted). But justifiable reliance may "be negated as a matter of law when circumstances exist under which reliance cannot be justified." *Id.* (citations omitted). To determine whether, as a matter of law, justifiable reliance has been negated, the Court must consider the contract and the nature of the parties' relationship. *See id.*

The Court referred to its opinion in *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., L.L.C.* as being particularly relevant here. In that case, a mineral interest lessee's reliance on extra-contractual representations by the lessor's agent was not justifiable. *Id.* at 650. The Court concluded that Orca should have been alarmed by the "negation-of-warranty provision's direct contradiction of the representation upon which Orca claim[ed] to have relied." *Id.* at 658. This should have alarmed Orca, the Court explained, because "Texas courts have repeatedly held, a party to a written contract cannot justifiably rely on oral misrepresentations regarding the contract's unambiguous terms." *Id.* Under both prongs of the test for justifiable reliance, i.e. subject representations directly contradicted by express provisions and "red flags", the Court concluded that Barrow-Shaver could not have reasonably relied on the representations in order to support a fraud cause of action.

Dissent: Justice Guzman would affirm the trial court verdict. She writes that the majority categorically discards trade custom and usage on the grounds that "the term [consent] can easily be understood according to its plain, ordinary, and generally accepted meaning." According to Justice Guzman, this is a fundamental analytical mistake that ignores precedent.

Consulting trade custom and usage to inform the meaning of words and expressions in a contract is neither a novel idea nor a modern convention. More than a hundred years ago, the Court acknowledged that,

> where there is nothing in the agreement to exclude the inference, the parties are always presumed to contract in reference to the usage or custom which prevails in the particular trade or business to which the contract relates; and the usage is admissible for the purpose of ascertaining with greater certainty what was intended by the parties.

Notwithstanding the Court's assertion to the contrary, even when terms "can easily be understood according to [their] plain, ordinary, and generally accepted meaning," industry custom and usage informs the meaning of terms that might otherwise seem intuitive to industry outsiders. Numerous states have long held so, and Texas is no exception.

The Court's categorical rejection of trade-custom-and-usage evidence leads the Court to the erroneous conclusion that the consent clause is "silen[t] as to refusal or withholding of consent." In so holding, the Court assumed express language is necessary for the consent clause to mean consent cannot be unreasonably withheld. This assumption fails because reasonableness is already embedded in the contract through trade custom and usage. The Court's contrary assertion notwithstanding, reading a particular industry custom and usage into the consent provision would not rewrite the agreement because the custom and usage preexisted the agreement and "the parties are always presumed to contract in reference" to it "where there is nothing in the agreement to exclude the inference." The absence of an otherwise redundant reasonableness qualifier does not deprive the clause of the meaning trade custom and usage confers. According to Justice Guzman, the industry usage and custom informs the courts in their interpretations and industry custom, in this instance, is for reasonable withholding of consent. She observes that trade custom and usage is not equivalent to judicially imposed terms which of course are not permitted.

Justice Guzman is also troubled by the majority's refusal to consider trade and/or industry custom because any consideration of such evidence necessitates admission of all evidence pertaining to the parties' negotiation history—not just the prior drafts and oral representations that were admitted into evidence, but also evidence of the parties' subjective beliefs. This, however, plainly violates the parol evidence rule. When a contract is written and unambiguous, like the consent clause here, the parol evidence rule prohibits consideration of oral or extrinsic evidence to modify or contradict the contract's terms. To circumvent this fundamental contract-construction principle, the majority contends the parties' negotiation history must be admitted into evidence—not to establish the terms of the parties' written contract—but to show the parties' intent to exclude the usage. But when the only purpose of extrinsic evidence is to show the parties intended the contract to say something other than what it says, such evidence is inadmissible.

Justice Boyd would remand the case for a new trial because the trial court excluded the first draft of the consent-to-assign clause submitted by Carrizo. Carrizo offered evidence that the first draft of the parties' written agreement expressly prohibited Carrizo from unreasonably withholding its consent, consistent with Barrow-Shaver's alleged industry usage. But Carrizo insisted that provision be deleted from the written contract, and Barrow-Shaver agreed, even though it considered the revision a major change that meant Carrizo could withhold its consent for any reason. This evidence tends to establish that Barrow-Shaver knew Carrizo's intent was *inconsistent* with the alleged industry usage, and thus rebuts the presumption that the parties impliedly incorporated the alleged industry usage in their contract. The jury never heard Carrizo's evidence regarding the parties' prior drafts and negotiations, however, because the trial court sustained Barrow-Shaver's objection and excluded it. Justice Boyd concludes the trial court erred by excluding the negotiations evidence. Carrizo was entitled to submit surrounding-circumstances evidence to rebut the presumption that the parties contracted with respect to the alleged industry usage.

IX. Free Gas Clause

A. *CCI Gulf Coast Upstream, LLC v. Circle X Camp Cooley, Ltd.,* 2018 Tex. App. LEXIS 7828, 2018 WL 4624012 (Tex. App.—Waco 2018, pet. denied—October 4, 2019)

Facts: Camp Cooley, Ltd., Lessor, entered into an Oil and Gas Lease for exploration or oil and gas interests with Lancer Resources Company, Lessee-1. Lancer assigned its interest in the Lease to Red Willow

Production, LLC, "via an Assignment of Oil and Gas Leases dated June 15, 2004." Lessor entered into an Oil and Gas Lease with Red Willow Production, Lessee-2 for exploration of oil and gas interests. On August 31, 2011 Circle X Camp Cooley, Ltd. purchased land and all mineral interest owned from CCR Restructuring, formerly known as Camp Cooley, Ltd., "via a Special Warranty Deed with Vendor's Lien."

Red Willow Production assigned its interest in both Leases to CCI Gulf Coast Upstream LLC. The lease contained language allowing the use of free gas produced from the land for agricultural and domestic purposes. "Circle X notified CCI in writing of its intent to utilize free gas." CCI denied use of the gas.

Circle X filed suit "seeking declaratory judgment, specific performance, and requesting damages for breach of contract under a promissory estoppel theory" and CCI filed an answer denying all allegations. Circle X then moved for partial summary judgment "arguing that the leases were unambiguous," they were entitled to free gas, and CCI breached the lease by refusing to provide Circle X with free gas.

Procedural History & Result: The trial court granted Circle X's motion and denied CCI's motion. After a hearing that focused on damages, attorney's fees and a CCI's newly-raised standing argument the court entered a final judgment. The final judgment entitled Circle X to a declaration that the lease unambiguously allows Circle to make use of the free gas and entitling them to $15,000 in damages due to the breach, and $31,520 in reasonable and necessary attorney's fees.

Holding: [1] CCI's newly-raised argument is a capacity challenge and not a standing challenge;

[2] the lease provides quantifiable gas to be used by using any that is not used for operations and affirms the trial court's finding;

[3] the lease provides readily ascertainable geographical limits on use of the gas and affirms the trial court's finding;

[4] the lease conforms to the statute of frauds because of quantifiable and definite use of the gas and affirms the trial court's finding; and

[5] the clause does not violate public policy because there is no regulation that this use contravenes public policy and affirms the trial court's finding.

Rationale: [1] because CCI raised its standing/capacity issue after the granting of the summary judgment it becomes a capacity issue that is waived if not timely raised.

[2] the lease language unambiguously provides that the Lessor shall have the privilege of using gas out of any gas not needed for operations. This language limits Circle X to gas that is not used for operations, therefore, quantifiable and not indefinite.

[3] The appellate court rejects CCI's argument that the geographic scope of the free-gas clause is indefinite because it does not define "vicinity." The common and ordinary meaning of the word vicinity may be indefinite but the additional language in the lease provides context that the usage of the free gas was for lands in which Circle X owns and limited to domestic and agricultural purposes. Therefore, the clause provides a readily ascertainable geographical limits on Circle X's use of free gas.

[4] because the gas is definite in terms of quantity and geographic scope the statute of frauds claim is rejected.

[5] the clause providing the use of free gas does not violate public policy because CCI failed to point to any rule that the enforcement of the clause would violate and even CCI's expert stated that they did not explain how the clause violated any regulations.

X. IMPLIED COVENANTS

A. *Seeligson v. Devon Energy Prod. Co., L.P.,* No. 17-10320, 2018 U.S. App. LEXIS 29359 (5th Cir. Oct. 16, 2018).

The court found Devon Energy Production Co. LP's alleged breach of implied duty to market could support class certification. The court reasoned that the question of a breach of implied duty, the duty to market, is a common question that could support class certification. Texas Law states that, to determine whether there was a breach of an implied duty the court must focus on the behavior of the lessee rather than on evidence of sales, because the behavior presents at least one contention that is central to the validity of each class member the lower court did not abuse its discretion in finding commonality.

XI. INDEMNITY

A. *N. Am. Tubular Servs., LLC v. BOPCO, L.P.,* No. 02-17-00352-CV, 2018 Tex. App. LEXIS 7152 (Tex. App.—Fort Worth Aug. 30, 2018, no pet.), reh'g denied (Oct. 25, 2018)

Under the oilfield master services contract, the appellate court rejected the argument that New Mexico law applied to the indemnity provisions over the contracted Texas choice of law provision. The court held that there was no public policy or other reason to reject that contract provision.

B. *Anadarko Petroleum Corp. v. Houston Casualty Co.,* 573 S.W.3d 187 (Tex. 2019)

Summary: Anadarko Petroleum Corporation held twenty-five percent of the ownership interest in the Macondo Well in a joint-venture arrangement with BP and MOEX Offshore. In a separate proceeding, the federal district court for the Eastern District of Louisiana held BP and Anadarko jointly and severally liable. BP and Anadarko entered into a settlement agreement providing that Anadarko would transfers its ownership interest to BP and pay $4 billion. In exchange, BP agreed to release any claims against Anadarko and indemnify Anadarko from any future litigation related to the incident. Before the incident, Anadarko purchased an "energy package" from Lloyd's of London, which provided that coverage for defense costs was limited to twenty-five percent of the policy's $150 million limit, based on Anadarko's twenty-five percent ownership interest. The provision the case turned on contained the following language:

> *[A]s regards any liability of [Anadarko]* which is insured under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . *the liability of Underwriters under this Section III shall be limited* to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded [Anadarko] under this Section III.

Underwriters asserted that the "liability" to which the limitation applied included not only the damages paid by Anadarko to resolve underlying claims against them but also Anadarko's defense costs in connection with such claims. Anadarko argued, among other things, that the provision limits only the Underwriters' obligation to pay damages to third-parties, not to its defense expenses. The Texas Supreme Court agreed with Anadarko and relied on black letter rules of construction. Reasoning that the use of the terms "liability" elsewhere in the policy evidenced a distinction from the broad dictionary definition urged by the Underwriters that included defense expenses. This resulted in the use of "liability" not equating to defense costs, which would be the expenses incurred by Anadarko to defend itself against liabilities or damages owed to a third party.

XII. JOINT OPERATING AGREEMENT

A. *Allen Drilling Acquisition Co. v. Crimson Expl. Inc.,* 558 S.W.3d 761 (Tex. App.—Waco 2018, n.p.h.), reh'g denied (Nov. 6, 2018)

Summary: The trial court's interpretation of the parties' oil and gas development agreements was in error because the overall agreement and original Joint Operating Agreement (JOA) were not superseded by later agreements, and because leases attached to the JOA were not depth-limited, as the original Area of Mutual Interest (AMI) was not limited to the Rodessa formation. Even if the subsequent agreement contained a merger clause, the subsequent agreement did not supersede the JOA between the companies relating to the development of oil and gas interests. The later agreements did not contain language specifically superseding the original agreements, the subsequent agreement referred to a smaller area than in original agreement, and original agreement did not contain a depth limit.

Facts: Crimson Exploration Co. (Majority Operator) and Allen Drilling Acquisition Co. (Minority Operator) formed Elgin Holdings LLC to acquire and develop oil and gas leases, but dissolved the entity and restructured their relationship through a serious of agreements: The Overall Agreement (dated March 2006), The Original Joint Operating Agreement (date March 2006), The Ecco Participation Agreement (dated June 2006) and the Ecco Joint Operating Agreement (dated June 2006). The Overall Agreement provided that Majority Operator owned 77.5% of the leases and Minority Operator owned 22.5%. Majority Operator assigned Minority Operator an undivided 22.5% working interest in additional leases within an Area of Mutual Interest (AMI). Majority Operator represented and warranted that the leases listed constituted all "oil and gas leases or other ownership interest in the lands to which Crimson or its Affiliates have any right, title or interest at the time of Closing within the Area of Mutual Interest."

Procedural History: Majority Operator brought suit against Minority Operator for breach of the Original JOA but made additional claims and counterclaims. The parties filed a number of motions, including Minority Operator's motion for partial summary judgment claiming that Majority Operator breached the Overall Agreement by failing to convey all of the leases it owned in the AMI area at the time of the closing.

The trial court denied Minority Operator's summary-judgment motion and granted summary judgment in favor of Majority Operator. Minority Operator appealed. The trial court considered summary judgment on the issue of damages, judicial foreclosure, and attorney's fees, which were resolved in Majority Operator's favor. Minority Operator appealed both the trial court's grant of Majority Operator's motions for summary judgment and the denial of its motion for partial summary judgment. The Waco Court of Appeals issued a memorandum opinion, reversing the trial court's judgment and remanding the case back to the trial court. Minority Operator filed a motion for rehearing, which the court granted. The court of appeals withdrew its memorandum opinion and substituted this judgment in its place.

Result & Rationale: The Waco Court of Appeals held Minority Operator is in default under the Ecco JOA, and Majority Operator is entitled to exercise its remedies of suspension and foreclosure. Additionally, the Ecco Participation and JOA did not supersede the Overall Agreement and the Original JOA. The court noted that the Ecco Participation Agreement or JOA lacked express language stating the parties' intention to supersede the Original JOA. Despite the merger clause included in the Ecco Participation Agreement, which provided that there were no other agreements, representations, or warranties outside of those agreed to in the Ecco Participation Agreement, the court determined that there were significant differences in the property covered by each agreement. This led the court to conclude that the merger clause was not intended to apply to the Original JOA and did not supersede it. The court also reasoned that the Original JOA, the later Ecco Participation Agreement, and the JOA were not inconsistent because the agreements concerned different AMI's. Therefore, the trial court erred in determining that the Participation Agreement and Ecco JOA superseded the Original JOA.

Next, the appellate court addressed whether the Original JOA AMI was limited to the Rodessa formation. The court explained that if "the parties desired to impose a depth restriction under the AMI, they could have used the language ultimately used in the Ecco JOA that specially limited the JOA and the AMI to the Rodessa formation." Based on this reasoning, the court determined that the trial court erred in holding that the Original JOA AMI was limited to the Rodessa formation.

The statute of limitations barred Minority Operator's breach-of-contract claims based on the excluded leases. To decide whether Minority Operator had a right to participate in the excluded leases, the court addressed Majority Operator's argument that the statute of limitations barred Minority Operator's claim. Because Minority Operator asserted that Majority Operator breached its duty to assign the Excluded Leased in March of 2006 but did not assert the claim until 2013, Minority Operator's breach of contract claim was untimely. Therefore, the trial court did not err in granting Majority Operator's summary judgment on this issue or by denying Minority Operator's motion for partial summary judgment on Minority Operator's excluded-leases counterclaims.

Minority Operator also asserted that the trial court erred in dismissing its breach of contract counterclaim addressing the AMI because Majority Operator did not move for summary judgment on that claim. The court of appeals agreed with Minority Operator based on its prior determination that the Original JOA was not superseded. Finally, the court concluded that based on the summary judgment evidence, Majority Operator failed to conclusively establish the amount of Minority Operator's default, making the trial court's damage award calculations erroneous.

B. *OBO, Inc. v. Apache Corp.,* 566 S.W.3d 26, (Tex.App.—Houston [14th Dist.] 2018, no pet.)

Facts: OBO, Inc. ("OBO") entered into agreements with Permian Basin Joint Venture, LLC ("PBJV") *that required the Operator to also be a working interest owner*. OBO owns an 11 percent working interest and PBJV owns 81.4 percent working interest in the same unit. By 2007, PBJV became the Operator and entered into a Contract Services Agreement with Apache Corporation where Apache became the contract operator. Apache was "subject to the reasonable direction of" PBJV. Apache sent out Joint Interest Billings to working interest owners in the unit, including OBO. PBJV and Apache sued OBO for failure to pay its share of operating expenses under the agreement. OBO answered and denied the allegations asserting that Apache lacked standing to sue because it was not a working interest owner and could not be an Operator as stated in the agreement between OBO and PBJV.

Procedural History & Result: The trial court granted PBJV's motion for summary judgment and awarded them $195,330.45 and denied OBO's motion for partial summary judgment ordering OBO takes nothing on its counterclaims against Apache.

Holding: [1] "The trial court did not err in granting summary judgment against OBO's request for declaration that Apache could not act "as an Operator because it was permitted to delegate duties and the delegate was not a unit operator and only 'acting as operator'."

[2] Apache could not be held liable for breach of a unit operating agreement because it was never a party to the agreement.

Rationale: [1] Reading the provisions in the agreement as contended by OBO would create a prohibition against the delegation of operator duties and it is well known that duties are delegable.

[2] Apache not being the unit operator means that OBO's claims were based on Apache's alleged breach of the agreement they made between PBJV. However, OBO does not explain how OBO can recover from Apache when they were not a party to the agreement.

C. *Endeavor Energy Res., L.P. v. Staley*, 569 S.W.3d 319 (Tex. App.—El Paso 2019)

Facts: The operator of oil and gas leases under a 1989 Model Form JOA contracted for services with the Appellants and was unable to pay for the services. The Appellants filed liens. The operator made assignments of interests as required under contracts that existed before the services were performed so Appellees took their interests subject to the liens. Appellants filed state court lawsuits to foreclose on the liens. The operator filed for bankruptcy. The state court litigation was abated. The operator and Appellants entered into a settlement agreement in the bankruptcy proceeding and then the operator was discharged. Appellees argued that the settlement agreement and the discharge extinguished the claim for unpaid services and there was no amounts left to be paid on the Appellants' claims. The trial court granted summary judgment to Appellees on competing motions for summary judgment.

Holding: The court of appeals affirms the trial court.

Reasoning: The El Paso Court of Appeals distinguished *Staley* from *Atkins Petroleum Corp.*, 799 S.W.2d at 467, a case decided by the court on similar facts. In *Atkins*, the agreement reached by the corporation and lien claimants provided that a judgment would not be enforced against the corporation, dismissed the pending suit without prejudice, and expressly stated ownership of the debt and liens would be transferred to a trustee who would seek to foreclose the liens. In *Staley,* the language of the Stipulation expressly released not only the underlying debt owed by Heritage but the lien against Heritage as well. The Stipulation stated that Endeavor's "recovery"—Heritage's acknowledgment of the debt's validity, the priority status in bankruptcy of part of the Stipulated Amount, and the rest of the Stipulated Amount as an unsecured claim—would "be in full and final satisfaction of their putative claims and liens against any interests of Heritage and/or the Trust in the oil and gas leases and the well. The Stipulation also stated each side released the other from all claims whatsoever arising out of or relating to the facts and circumstances of the Adversary Proceeding, or that were or could have been asserted in the Adversary Proceeding and/or the Proofs of Claim. The court noted this is the type of language acknowledged in *Atkins* that would demonstrate a mutual intent to discharge a debt by accord and satisfaction. *Id.*, at 468.

While Endeavor contended the language reserving "claims and liens" held against Staley preserved the debt and lien, the only lien on record was against Heritage for the debt of the Invoiced Amounts, which was specifically reduced to the Stipulated Amount by the terms of the Stipulation. If Staley had received his interest in the well prior to the perfection of the mechanic's lien, and if the lien affidavit had been perfected as to *both* Heritage and Staley, then perhaps Endeavor could have argued severance and have reserved a right to proceed separately against Staley's interest after settling with Heritage in bankruptcy court. Instead, the Stipulated Amount was given partial priority in the bankruptcy, thus ensuring payment by Heritage of at least some part of that amount, in exchange for "full and final satisfaction" of Endeavor's claims and liens against Heritage. The court found that the Stipulation was an accord and satisfaction because it was the mutual intent of the parties "that payment of the new amount will amount to full satisfaction of the existing claim." *Atkins Petroleum Corp.*, 799 S.W.2d at 468.

D. *Flamingo Permian Oil & Gas, L.L.C. v. Star Expl., L.L.C.*, 569 S.W.3d 329 (Tex. App.—El Paso 2019)

Facts: This case was an interlocutory appeal of a temporary injunction issued in favor of Star involving removal of an operator under a Joint Operating Agreement ("JOA"). Flamingo was the operator and Star was the majority non-operating interest owner. On January 24, 2018, Star Exploration called a meeting to vote on the removal of Flamingo as operator. Omar Minhaj was in attendance at the meeting on behalf of Flamingo. The members voted (1) to remove Flamingo as operator due to alleged violations of the JOA for, among other things, allowing liens to be placed on the property, and (2) to install Star Exploration as operator. Flamingo sued Star and the non-operating working interest owners. Star counterclaimed seeking (1) to restrain Flamingo from refusing to execute and deliver a proper joint Form P-4 designating Star as the Operator; (2) to restrain Flamingo from interfering with this change of operatorship at the RRC; (3) to restrain Flamingo from operating after delivering the Form P-4; (4) to restrain Flamingo from interfering or refusing to cooperate with Star's operations; and (5) to restrain Flamingo from refusing to deliver the well files and other records.

Holding: The court of appeals affirmed the trial court's issuance of a temporary injunction.

Reasoning: To obtain a temporary injunction, the applicant must plead and prove three specific elements: (1) a cause of action against the defendant; (2) a probable right to the relief sought; and (3) a probable, imminent, and irreparable injury in the interim. *Id.* An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any certain pecuniary standard. Flamingo claimed that Star could not meet its burden to demonstrate an irreparable injury. Star argued that the value of the oil, gas and other minerals in the Contract Area is speculative and as such prevents the quantification of damages. Since the damages cannot be quantified, Star argued that the injury must be irreparable. The court of appeals did not accept this reasoning but affirmed on the grounds that Flamingo would not be able to pay a money judgment.

XIII. MIDSTREAM AND TRANSPORTATION

A. *Enter. Prods. Partners, L.P. v. Energy Transfer Partners, L.P.*, 529 S.W.3d 531 (Tex. App.—Dallas 2017, pet. granted June 28, 2019)

The Texas Supreme Court scheduled this matter for oral argument in October. It does not fall within the time range of this paper but it has notoriety because of the dollar amounts involved. The decision in this case will have ramifications for the mid-stream and downstream segments of the oil and gas industry.

As a refresher, Enterprise and Energy Transfer Partners, L.P. ("ETP") entered into a series of agreements to explore the conversion of the Old Ocean pipeline to transport oil from the storage facility in Cushing to the Houston area. In this process, they marketed the pipeline to various producers but could not generate enough interest to reach the "nominations" threshold for an economic project ostensibly because the pipeline would not connect with Canada and points south. As a result, they terminated their agreements. Two weeks before the "nominations" deadline, Enterprise began negotiations with Enbridge but did not disclose these discussions to ETP. Enbridge owned a pipeline system from Alberts to Cushing. Enterprise and Enbridge agreed to work together on modifying the Seaway Pipeline to carry oil south and to construct a new pipeline in the Seaway ROW.

ETP sued Enterprise for breach of joint enterprise and breach of fiduciary duty. ETP claimed a partnership to market and pursue a pipeline from Cushing to the Texas Gulf Coast. ETP claimed that Enterprise usurped this business opportunity by teaming with Enbridge. The jury awarded $320,000,000 as damages for breach of the duty of loyalty. Enterprise defended by referring to the agreements which required board of director's approval of the final agreements. ETP argued that provisions in the Tex.Bus.Org.Code controlled the fact determination of whether a partnership was formed. The Court of Appeals reversed the trial court.

XIV. MINERAL DEFINITION

A. *Murray v. BEJ Minerals, LLC,* 908 F.3d 437 (9th Cir. 2018)(*en banc* rehearing ordered 920 F.3d 583 [April 4m, 2019])(certified question to Montana Supreme Court on May 20, 2019) .

Facts: "In 2006, an amateur paleontologist" uncovered a well-preserved fossil of two dinosaurs fighting on a Montana ranch ("the Ranch") that had "huge scientific value" according to experts. Lige and Mary Ann

Murray ("the Murrays") own the surface estate of the Ranch where the paleontologist uncovered the fossil. In 2005, Jerry and Robert Severson ("the Seversons"), the previous owners of the Ranch sold the surface estate and 1/3 of the mineral estate to the Murrays. The conveyance expressly reserved the remaining 2/3 of the mineral estate giving them ownership as tenants in common with the Murrays to all right, title, and interest in any "minerals" found in the land. After the Murrays informed the Seversons of the fossils, the Murrays filed the underlying suit seeking a declaratory judgment that the fossils belonged to them as owners of the surface. The Seversons asserted a counterclaim seeking a declaratory judgment that the fossils belonged to the mineral estate. Whether the fossils are "minerals" within the meaning of the mineral deed determines who owns the fossils.

Procedural History & Result: The district court granted summary judgment for the Murrays finding that the fossils were not "minerals" within the meaning of a mineral deed.

Holding: The Ninth Circuit reversed and held that dinosaur fossils constitute "minerals" pursuant to the terms of the mineral deed.

Rationale: The Supreme Court has recognized that the word "mineral" depends on the context in which it is used and a dictionary definition will not work. Since the parties do not dispute that the fossils are minerals in a scientific sense as being composed of a certain chemical disposition, the word must be interpreted in the ordinary meaning unless the parties give the word a special meaning. The Ninth Circuit recognized the different and inconsistent definitions of the word mineral under dictionary definitions and Montana statutes. However, the Supreme Court of Montana has relied on a test from the Texas Supreme Court that defined a mineral as a substance that is rare and exceptional in character. Although this definition is non-categorical, "whether all examples of a substance" must meet the test "in order for some examples" of the substance to be considered minerals, the fossils are rare and exceptional. Therefore, the fossils are "minerals" pursuant to the terms of the Deed and belong to the owners of the mineral estate. On May 20, 2019, the 9th Circuit, *en banc,* certified the following question to the Montana Supreme Court: Whether, under Montana law, dinosaur fossils constitute "minerals" for the purpose of a mineral reservation?

XV. OIL AND GAS LEASES

A. *Endeavor Energy Res., L.P. v. Energen Res. Corp.,* 563 S.W.3d 449, (Tex. App.—Eastland, 2018, pet. filed)

This case involved the construction of a continuous development clause in an oil and gas lease and specifically how the days are calculated. The clause at issue read as follows:

> Lessee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.

Endeavor Energy Resources, L.P. ("Endeavor") argued that its cumulative unused days during the continuous development program allowed it to extend the period between its 12th and 13th well by 377 days (150 [from clause]+ 227 [accumulated days under the continuous development program]). The appellate court upheld the judgment of the trial court, stating that Endeavor's lease terminated and that the use of word "next" in the continuous development clause meant that well construction period immediately subsequent to completion of the prior term and not as a cumulative total. The court referred to the Merriam-Webster dictionary's definition of the word "next" as "immediately adjacent (as in place, rank or time)."

B. *Bell v. Chesapeake Energy Corp.*, No. 04-18-00129-CV, 2019 Tex. App. LEXIS 1978 (Tex. App.—San Antonio Mar. 13, 2019)

Facts: This is another permissive accelerated appeal on a controlling issue of law. The appeal involves the interpretation of two oil and gas leases representative of numerous leases involve in multi-district litigation concerning Compensatory Royalty. The issues certified by the trial court, and accepted by the court of appeals, for permissive interlocutory appeal are:

> 1. Under the unambiguous provisions of the Leases, is the formula for calculating Compensatory Royalty based on take points of the Adjacent Well within the triggering distance(s) set forth in the Leases?
> 2. Under the unambiguous provisions of the Leases, does the reasonably prudent operator standard apply, in whole or in part, to the lessee's offset obligations?

The first issue is the subject of Bell's appeal; the second issue is the subject of Chesapeake's cross-appeal.

Bell, et al. assert that adjacent Wells were drilled and Chesapeake did not comply with the terms of the oil and gas leases. Bell, et al. seek damages for the breach of contract in the form of Compensatory Royalty.

Paragraph 18 of each Lease provides Chesapeake with three alternative courses of action once an Adjacent Well begins production: (1) drill an offset well, (2) release sufficient acreage, or (3) pay Compensatory Royalty. Chesapeake contends that these obligations operate only within the confines of the reasonably prudent operator standard. In other words, Chesapeake need not perform any obligation under Paragraph 18 unless an Adjacent Well is substantially draining the Leased Premises and a reasonably prudent operator would drill an offset well to protect against that drainage with a reasonable expectation of profit from such a well. *See Amoco Prod. Co. v. Alexander*, 622 S.W.2d 563, 568 (Tex. 1981). Bell contends, and the MDL court agreed, that the Paragraph 18 obligations apply when an Adjacent Well is deemed to be draining the Leased Premises, without regard to the reasonably prudent operator standard.

As noted, one of Chesapeake's Paragraph 18 options is to pay Compensatory Royalty, which both Leases define as "an amount equal to the Royalty Share of Gross Proceeds of production from the Adjacent Well." Bell contends that this means that Compensatory Royalty is calculated based on production from the entirety of a given Adjacent Well. Chesapeake contends, and the MDL court agreed, that, in the context of a horizontal Adjacent Well, Compensatory Royalty is calculated based on production only from those take points that fall within the Leases' Trigger Distances. Thus, Compensatory Royalty from a horizontal well whose take points do not all fall within the Trigger Distances is only a percentage or fraction of the production from the well as a whole.

Holding: The reasonably prudent operator standard which imposes proof of profitability does not apply to Paragraph 18 of either oil and gas lease under consideration in this appeal. Compensatory Royalty must be calculated according to the express term of the Leases—by reference to production from the entirety of an Adjacent Well, regardless of whether that well is vertical or horizontal, parallel or perpendicular, running toward or away from the Leased Premises. The MDL court erred by granting Chesapeake's motion for summary judgment redrafting the Compensatory Royalty clause to include only production allocable and attributable to portions of an Adjacent Well.

Reasoning: Under the reasonably prudent operator ("RPO") standard, an operator need not drill an offset well to protect the leased premises from drainage unless there is proof "(1) of substantial drainage of the lessor's land, and (2) that a reasonably prudent operator would have acted to prevent substantial drainage from the lessor's land." *Amoco*, 622 S.W.2d at 568. The second element is construed to excuse an operator from drilling an offset well if there is no reasonable expectation of profit. *See HECI Expl. Co. v. Neel*, 982 S.W.2d 881, 889 (Tex. 1998); *Amoco*, 622 S.W.2d at 568. This standard does not apply in this case because the language of the obligation to drill an offset well is clear, direct and mandatory, citing to *Perryman* discussed above. Chesapeake *shall* commence the actual drilling, pay compensatory royalty or release the lease within a specified time of first production from the Adjacent well. The Lessor is not required to prove either (1) or (2) in this situation. The court declined to re-write the parties' agreement. In addition, the reference to the implied covenant to protect does not implicate the RPO standard into Paragraph 18.

As to the method of calculating compensatory royalty, the court notes that the gist of Chesapeake's argument is that calculating Compensatory Royalty according to the plain language of the Leases is a bad deal, but that is the deal the parties made and the court refused to rewrite it under the guise of interpreting it. *See Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006)("[W]here the language is plain and unambiguous, courts must enforce the contract as made by the parties, and cannot make a new contract for them, nor change that which they have made under the guise of construction."). The court of appeals states that the "parties make their own contracts, and it is not within the province of this court to vary their terms in order to protect them from the consequences of their own oversights and failures." *Springer Ranch*, 421 S.W.3d at 280. In this case, the court observes that this is especially so given that Chesapeake is a sophisticated business player that was represented by highly competent and able legal counsel who actively negotiated the Lease terms with the knowledge, and even expectation, that an Adjacent Well would be drilled horizontally. *See Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 180 (Tex. 1997).

The court concluded that the MDL court erred by altering the method for calculating Compensatory Royalty specifically stated in the Leases. The Compensatory Royalty is calculated by the Royalty Share of Gross Proceeds of production from the entirety of an Adjacent Well. Compensatory Royalty is not limited to production allocable only to take points within the Trigger Distances.

C. *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed)

Facts: Cimarex and Anadarko were co-tenants in the mineral estate in certain property in Ward County, Texas by virtue of oil and gas leases. Anadarko successfully drilled and completed two producing wells on the property. Cimarex sued for an accounting. Cimarex and Anadarko settled the dispute in June 2013 whereby Anadarko agreed to account to Cimarex on a monthly basis. In August 2015, Cimarex sued Anadarko for breach of the settlement agreement because Anadarko ceased the agreed upon monthly accountings. Anadarko defended on the basis that Cimarex's oil and gas lease terminated and the mineral estate reverted to Cimarex's lessors. Thus, Cimarex was no longer a co-tenant and no accounting was due. Cimarex argued that the plain language of the habendum clause, which was written in the passive voice, only required production on the subject property, and did not require Cimarex to be the one to actually cause the production. Cimarex pointed out that there was in fact production on the subject property—albeit production caused by Anadarko—and contended that this was sufficient to extend the lease into its secondary term. According to Cimarex, the parties deliberately chose to draft the lease in the passive voice, allowing for any production on the subject property to suffice to extend the lease into the secondary term, regardless of who caused the production. Anadarko argued that various courts of appeal, including the 8th Court of Appeals, have interpreted similar mineral leases—which contain habendum clauses requiring production to keep a lease alive without specifying who was required to cause the production—to impose an obligation on the lessee to actually cause the production. Anadarko relied on the El Paso Court's holding in *Hughes v. Cantwell*, 540 S.W.2d 742 (Tex. App.—El Paso 1976, writ ref'd n.r.e.) in support of its argument. The trial court agreed with Anadarko.

Holding: The court of appeals affirmed the trial court judgment and the award of attorney's fees to Anadarko.

Reasoning: Cimarex and Anadarko became cotenants in the mineral estate by taking oil and gas leases from lessors who were co-tenants in the mineral estate. One co-tenant may enter upon the premises and explore for and produce the oil, gas and other minerals, including the other co-tenant's share of the oil, gas and other minerals, with impunity provided the producing co-tenant accounts to the non-producing co-tenant.

A mineral lease grants a fee simple determinable to the lessee. *BP Am. Prod. Co. v. Red Deer Res., LLC*, 526 S.W.3d 389, 394 (Tex. 2017). A typical clause states that the lease lasts for a relatively short fixed term of years (primary term) and then "as long thereafter as oil, gas or other mineral is produced (secondary term)." The court concluded, however, that where a mineral lease states that its primary intent is for the exploration, drilling and production of oil and gas, it naturally follows that the lessors' intent is to require the lessee to, at some point in time, take action to cause production on the land, or provide some type of cash consideration, such as delay rental payments, to keep a lease alive. *Hughes*, 540 S.W.2d at 743; *see also Hydrocarbon Mgmt.*, 861 S.W.2d at 437-38 (where the purpose stated in the habendum clauses of the leases is for "'exploring, drilling, mining and operating for and producing oil, gas and all other minerals . . . ' [i]t naturally follows that the intention of the parties was for the lessees to do something that would bring about the exploration and production of oil and gas"); *Endeavor Energy Res., L.P.*, 554 S.W.3d at 597 (lessors typically desire that the operator fully develop the lease and produce as much as possible to maximize the lessors' royalties, as "the dominant purpose of a lease is to discover and produce oil and gas . . . ") citing *Rogers v. Osborn*, 152 Tex. 540, 261 S.W.2d 311, 315 (1953) (Wilson, J., concurring)).

Since Cimarex did not drill or operate, Cimarex's fee simple determinable ended upon expiration of the primary term without the necessity of any action on the part of the lessors or Anadarko.

The court also rejected Cimarex's argument that the settlement agreement on the accounting issue was tantamount to a Joint Operating Agreement. The settlement agreement merely provided for the common law remedy concerning co-tenants and was not a joint operating agreement. The court also denied Cimarex's quasi-estoppel argument. For purposes of the quasi-estoppel analysis, the court must assume that Anadarko stepped into the shoes of the lessors and could not assert its position that Cimarex's lease terminated unless the lessors could do so themselves. *See, e.g., Cambridge Prod., Inc. v. Geodyne Nominee Corp.*, 292 S.W.3d 725, 732 (Tex. App.—Amarillo 2009, pet. denied). The court concluded that the fact the lessors accepted royalties during the primary term based on Anadarko's production did not preclude them from asserting that the lease terminated due to Cimarex's failure to cause production on the subject property after the primary term ended.

D. HJSA No. 3, Ltd. P'ship v. Sundown Energy LP, 2019 Tex.App. LEXIS 7254 (Tex.App.—El Paso August 16, 2019, n.p.h.)

Facts: This case concerns the interpretation and application of a continuous drilling provision on a 30,450 acre oil and gas lease in Ward County, Texas. The lease under consideration followed a 75 year fixed term lease with Gulf Production Co./Chevron U.S.A., Inc. Since there was already production, the lease provided for a six year grace period in which it would be maintained by production anywhere on the lease. At the end of the six years, the lease could only be maintained by production from each individual tract (the opinion never identifies what this term means) or if the lessee was engaged in a "continuous drilling program." The lessors filed suit to terminate the lease alleging that on five separate occasions the lessee had allowed more than 120 days to elapse between completion or abandonment of operations on one well and the spudding-in of the next well. The lessee claimed that during those periods other wells were worked over and the reworking was included in the definition of "drilling operations."

The critical issue in this case was--what type of "drilling operations," as that term is used in Paragraph 7(b), qualified as "continuous drilling operations" serving to extend the lease as to all tracts not held by production. Both parties agreed, the contract is unambiguous. Paragraph 7 (b) provided:

> The obligation in Paragraph 7(a) above to reassign tracts not held by production shall be delayed *for so long as Lessee is engaged in a continuous drilling program* on that part of the Leased Premises outside of the Producing Areas. The *first such continuous development well* shall be spudded-in on or before the sixth anniversary of the Effective Date, with no more than 120 days to elapse between completion or abandonment of operations on one well and *commencement of drilling operations on the next ensuing well*. [Emphasis added].

The paragraph describes the "continuous drilling program" to maintain the lease; that program is—the spudding-in of the first *such* continuous development well, and not more than 120 days elapsing between abandonment of one well and commencement of drilling operations on the *next ensuing well*. "Such" is defined as "of the same class, type, or sort." *Such*, Merriam Webster's Collegiate Dictionary (10th ed. 1997). "Ensuing" means "to take place afterward or as a result." *Ensue*, Merriam Webster's Collegiate Dictionary (10th ed. 1997).

The El Paso Court of Appeals concluded that the first of the continuous development wells, which are necessarily all of the same type due to the use of "such" in reference to them, must be spudded-in. Drilling operations then must commence on the next resulting well—a continuous development well—within 120 days of the completion or abandonment of a prior well. The lessee argued that the definition of "drilling operations" given in paragraph 18 must be read into this paragraph to give it the meaning intended by the parties. Paragraph 18 defined "drilling operations" as follows:

> Whenever used in this lease the term 'drilling operations' shall mean: actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); reworking operations, including fracturing and acidizing; and reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well.

The lessee contended the definition agreed to by the parties allowed it to continue the lease by performing any of the three defined varieties of drilling operations on the next ensuing well: (1) spudding-in a new well, (2) reworking operations on an existing well, or (3) reconditioning, deepening, plugging back, cleaning out, or repairing or testing an existing well. As for the requirement that these operations be performed on the "next ensuing well," the lessee asserted this does not mean "next new well," but simply means on the next well on which any of the three varieties of drilling operations occur. The lessor, on the other hand, argued that Paragraph 7(b) is a specific provision, and that the obligations of that paragraph required the lessee to engage in a continuous drilling program by spudding-in a new well on an undeveloped area within 120 days of abandoning a prior well to maintain the lease. Lessor contended the term "drilling operations" was modified by "on the next ensuing well," and by the other provisions of Paragraph 7(b) referring to "continuous drilling program," "continuous development well," and "spudding-in," thus precluding the work and repair definitions from Paragraph 18 from operating to extend the lease.

Holding: The El Paso Court of Appeals determined under the unambiguous terms of the lease that the lessee was required to engage in a continuous development program to maintain the lease under Paragraph 7 (b) and that program required the spudding in of a continuous development well within 120 days of the completion or abandonment of a prior well.

Rationale: The parties agreed that the lease was unambiguous. Course of performance, an affidavit by the scrivener, and other extrinsic evidence was not allowed to vary the terms of the contract. Although Texas courts disfavor forfeitures, this was not a forfeiture. This lease termination provision was a special limitation on the duration of the fee simple determinable. The trial court failed to distinguish the general provisions of Paragraph 18 with the specific directives of Paragraph 7.

XVI. OVERRIDING ROYALTY INTERESTS AND ROYALTY INTERESTS

A. *Yowell v. Granite Operating Co.,* 557 S.W.3d 794 (Tex. App.—Amarillo, 2018, pet. filed September 6, 2018)

Facts: The Yowell Group ("Yowell Group") are successors-in-interest to an overriding royalty interest reserved by Aikman Oil, when it assigned mineral leases to a third-party. The leases contained an anti-washout clause that stated:

> Should the Subject Leases or any one of the Subject Leases terminate and in the event Assignee obtains an extension, renewal or new lease or leases covering or affecting all or part of the mineral interest covered and affected by said lease or leases, then the overriding royalty interest reserved herein shall attach to said extension, renewal or new lease or leases; and an appropriate recordable instrument shall be executed to evidence Assignor's overriding royalty interest therein. Further, any subsequent extension or renewal or new lease or leases shall contain a provision whereby such overriding royalty shall apply and attach to any such subsequent extensions or renewal of Subject Leases.

One of these leases was acquired by Upland Resources, which later changed its name to Granite Operating Company ("Granite"). In 2007, Amarillo Production Company ("APC") obtained top leases to the same land and filed suit, claiming that the Granite's leases had terminated due to cessation of production. APC and Granite settled their lawsuit, with Granite releasing its interest in the original lease and APC assigning its top leases to Granite, while retaining a 5% overriding royalty, with both parties agreeing to an apportionment of liability in the event that the Yowell Group sued to enforce its royalty interest. Granite was then sold by its original owners ("Peyton Group") to an L.L.C. owned by Apache. Granite assigned the top leases to Apache.

In 2013, Yowell Group sued Granite and Apache ("Granite/Apache") because Granite/Apache refused to pay them the overriding royalty interest from the original lease. Granite/Apache, seeking indemnification, separately sued both Peyton Group and another group, ("PAC Group"). PAC group filed a cross action against the Yowell Group, asking for a declaration that the Yowell Group's royalty interest had terminated. Peyton Group filed a counterclaim against Granite/Apache.

Procedural History: This case is effectively two lawsuits, one between the Yowell Group and Granite/Apache along with PAC Group, the other between Granite/Apache and Peyton Group. The trial court granted Granite/Apache's and PAC Group's motions for summary judgment against the Yowell Group. The Yowell Group appealed to the Amarillo Court of Appeals. The trial court also granted Peyton Group's summary judgment motion against Granite/Apache, dismissing Granite/Apache's indemnification claim. Granite/Apache appealed this ruling to the Amarillo Court of Appeals.

Yowell Group's Appeal
Result: The Amarillo Court of Appeals affirmed the motion against Yowell Group.

Holding: The anti-washout clause did not attach to the Yowell Group's overriding royalty interest to the new lease as that would violate the rule against perpetuities and the new lease could not be said to be a renewal or extension of the previous lease.

Rationale: In declining to apply the overriding royalty interest to the new lease, the Amarillo Court of Appeals noted that for the anti-washout condition to kick in three things would have to happen.

> (1) one or more of the subject leases terminates; (2) the assignee (Haber or his successor) obtains an extension, renewal, or new lease or leases; and (3) the extension, renewal, or new lease covers or affects all or part of the mineral interest covered and affected by the subject leases.

The court first noted that there was no dispute that the subject lease terminated. The next question therefore was whether there was an extension, renewal, or new leases. Both parties agreed that the lease was not an extension and the court established that the new lease was not a renewal as there were many different terms in the new lease and all the parties executing the new lease were different than the parties to the original lease. The lessees were also not successors of each other and the new top lease was actually adverse to the interests of Granite/Apache at the time.

The court then looked at whether the reservation of an overriding royalty interest in a future hypothetical lease violated the rule against perpetuities ("the Rule") and held that it did. The court noted a previous Texas Supreme Court ruling had addressed the extension of overriding royalty interests in the case of renewals or extensions of underlying leases, but stated that Texas courts have not answered whether such clauses may attach to future hypothetical leases without violating the Rule. As the vesting of this new lease interest would only kick in at the termination of the previous lease, and the previous lease was of an indefinite duration, the court concluded that this royalty interest was not certain to vest within 21 years of some life in being and therefore did not pass the Rule.

The Yowell Group argued that the court should reform the clause rather than striking it out of the contract, citing Section 5.043 of the Tex. Prop. Code Ann. The court rejected that argument, noting that the statute has never, as far the court could find, been used to reform a commercial instrument. Therefore, the court declined to reform the provision to comply with the rule.

The Court also affirmed PAC's motion for summary judgment on the grounds that a reformation claim is subject to a four-year statute of limitations.

Because the more recent lease was new, not an extension or renewal of the old lease, the court held that the anti-washout clause violated the rule of perpetuities and therefore the Yowell Group's overriding royalty interest did not enter into the new lease.

Granite/Apache's Appeal

Result: The Amarillo Court of Appeals affirmed the motion against Granite/Apache.

Holding: The indemnification agreement did not require Peyton Group to indemnify Granite/Apache in the lawsuit.

Rationale: The court looked at the language of the contract and ruled that it was not meant to cover suits from the Yowell Group. The contract between Peyton Group and Granite/Apache stated that Peyton Group would indemnify Granite/Apache:

> [F]rom ... any Adverse Consequence arising from or in connection with all pending or threatened claims or causes of action asserted against Upland in the litigation styled Amarillo Production Company v. Upland Resources, Inc.[,] Cause No. 12,021, in the 31st District Court in and for Wheeler County, Texas ....

The court then examined whether the Yowell Group lawsuit arose from the claims against Upland (later Granite) in the APC lawsuit.

The court concluded that though the Yowell lawsuit might have been linked to the settlement of the lawsuit, it could not be said to have arisen from the "pending or threatened claims or causes of action asserted against Upland", therefore Peyton group had no duty to indemnify Granite/Apache.

Dissent: There was a short dissent that argued that summary judgment was improper because this was such a novel issue.

B. *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019)

Facts: In 2005, Burlington and Texas Crude executed a Prospect Development Agreement (PDA) and a Joint Operating Agreement (JOA). The agreements applied to leases in an Area of Mutual Interest (AMI) in the "Sugarloaf Prospect" located in parts of Live Oak, Karnes, and Bee Counties. Under the PDA, Burlington would operate the entire field, and each party would receive a percentage of the other's working interests in leases either party had previously acquired in the AMI. Burlington got 87.5% of the working interests, and Texas Crude got 12.5%. Under the PDA and JOA, Texas Crude received an overriding royalty interest, ranging from 0% to 6.25%, on leases within the AMI. Texas Crude retained an overriding royalty interest on leases it originated, and it assigned these interests to its affiliate, AmberHarvest. On leases Burlington originated, Burlington assigned an overriding royalty interest to Texas Crude, and Texas Crude later assigned the interest to AmberHarvest. The ORRI assignments, whether from Burlington to Texas Crude or from Texas Crude to AmberHarvest, contained a clause the parties call the Granting Clause and a clause the parties call the Valuation Clause.

The Granting Clause provides:

> [Assignor] does hereby ASSIGN, TRANSFER AND CONVEY unto [Assignee], its successors and assigns, those certain overriding royalty interests,…Said overriding royalty interests shall be delivered to ASSIGNEE <u>into the pipelines</u>, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production and other costs. However, ASSIGNEE shall in every case bear and pay all…taxes assessed against (the) overriding royalty interest. (emphasis added).

The Valuation Clause provides that the assignment "shall be subject to the following terms and conditions":

> The overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit <u>into the pipeline</u>, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto, or ASSIGNOR, <u>at ASSIGNEE's election</u>, shall pay to ASSIGNEE, for ASSIGNEE's overriding royalty oil, gas or other minerals, the applicable percentage of the <u>value</u> of the oil, gas or other minerals, as applicable, produced and saved under the leases. "<u>Value</u>", as used in this Assignment, shall refer to <u>(i) in the event of an arm's length sale on the leases, the amount realized from such sale of such production and any products thereof, (ii) in the event of an arm's length sale off of the leases, the amount realized for the sale of such production and any products thereof</u>, and (iii) in all other cases, the market value at the wells. (emphasis added).

The parties agreed on two points that simplified the analysis: (1) the sales were arms-length, and (2) AmberHarvest took its royalty payments in cash, not in kind.

For nine years, Burlington made royalty payments only after charging the royalty holder its proportionate share of the post-production costs expended to bring the products from the wells to the point of sale. Texas Crude later sued Burlington, alleging that the parties' contracts prohibited Burlington from charging post-production costs to the royalty holder. Burlington contends that the contracts require the royalty holder to bear its share of post-production costs. All parties agreed that the relevant contracts are unambiguous and therefore amenable to judicial interpretation.

Proceedings: On cross motions for summary judgment, the trial court ruled in favor of Texas Crude and Burlington suggested an interlocutory appeal to which Texas Crude agreed.

Holding: Construing the overlapping contractual provisions based on the language the parties chose, the Court concluded that Burlington may deduct post-production costs when calculating royalty payments.

Rationale: The question before the Court resembles the question presented in *Chesapeake Exploration, L.L.C. v. Hyder*, 483 S.W.3d 870 (Tex. 2016), another case in which the question was whether a royalty interest bears its share of post-production costs. In *Hyder*, as in prior decisions, the Court has emphasized that "the effect of a lease is governed by a fair reading of its text." *Id.* at 876 (discussing *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118 (Tex. 1996)). The Court interpreted the contract language at issue in *Hyder* to create a royalty interest free from post-production costs. *Id. Hyder* and other decisions interpreting royalty agreements serve as informative guides for the Court’s decision, but the decisive factor in each case is the language chosen by the parties to express their agreement. *See Heritage Res*., 939 S.W.2d at 124 (Owen, J., concurring) ("Our task is to determine how those costs were allocated under *these* particular leases."). The contractual language at issue in *Texas Crude* differed from the language at issue in *Hyder*. The difference affected the outcome in *Texas Crude*.

The dispositive question in this case was whether the parties agreed to an "at the well" valuation point or its equivalent. If they did, Burlington may deduct post-production costs when calculating royalty payments based on downstream sales of treated and transported products. If they did not, Texas Crude would be entitled to a percentage of the downstream sales price, without deductions, under the plain language of the Valuation Clause. This question was answered based on the language used in the agreement. The Court was persuaded that Burlington's position was more faithful to all of the contractual language chosen by the parties and more aligned with the parties' intent as expressed in writing.

Burlington emphasized the course of the parties' performance of the agreements. Texas Crude accepted Burlington's practice of deducting post-production costs for years before raising an objection. But both parties moved for partial summary judgment under the theory that the agreements are unambiguous. Where contracts are unambiguous, the courts will not resort to the parties' course of performance to determine meaning. *Frost Nat'l Bank v. L & F Distribs., Ltd.*, 165 S.W.3d 310, 313 n.3 (Tex. 2005); *E. Montgomery Cty. Mun. Util. Dist. No. 1 v. Roman Forest Consol. Mun. Util. Dist.*, 620 S.W.2d 110, 112 (Tex. 1981) (*per curiam*).

Burlington made other arguments for its construction. Burlington pointed to the Granting Clause's provision that "overriding royalty interests shall be delivered to ASSIGNEE into the pipelines, tanks or other receptacles with which the wells may be connected." Burlington argues that requiring delivery of the interest "into the pipelines, tanks, or other receptacles" has the effect of requiring valuation of the interest "at the well." Courts have often interpreted the phrase "at the well" or "at the wellhead" to establish a wellhead valuation point, which generally requires the royalty holder to bear post-production costs. *See Heritage Res.*, 939 S.W.2d at 126-30 (Owen, J., concurring) (discussing Texas and out-of-state decisions). Texas Crude argued that because the assignments make the Granting Clause "subject to" the Valuation Clause, the Valuation Clause controls.

According to Texas Crude, the Valuation Clause entitled it to a percentage of the "amount realized" from the sale without deduction of post-production costs.

The Court noted that the Valuation Clause contains an "into the pipeline" provision nearly identical to that found in the Granting Clause. The Valuation Clause provided: "The overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit into the pipeline, tank or other receptacle to which any well or wells on such lands may be connected . . . ." Burlington urged that "into the pipeline, tank or other receptacle" identifies the valuation point for the royalty. This valuation point was essentially the same as the "at the well" valuation point addressed in previous decisions. *See* Hyder, 483 S.W.3d at 873 ("The oil royalty bears postproduction costs because it is paid on the market value of the oil at the well."); *Heritage Res.*, 939 S.W.2d at 122-23; *id.* at 129 (Owen, J., concurring); *Judice*, 939 S.W.2d at 135-36; *Warren*, 759 F.3d at 417.

C. *Strickhausen v. Petrohawk Operating Co.*, No. 04-18-00636-CV, 2019 Tex. App. LEXIS 3268 (Tex. App.—San Antonio Apr. 24, 2019, pet. filed 07-02-2019)

Facts: This case is a permissive appeal on a controlling question of law. Defendants breached Strickhausen's oil and gas lease by pooling her interest without her express written consent. Strickhausen, the owner of a 50% interest in the oil and gas lease, accepted and cashed over $590,000 in royalties from the pooled unit production. The Strickhausen lease contained the following provision in addition to the no pooling without written consent provision:

> At any time during the term of this Lease if Lessee requires Lessor to execute any document, including division orders or any other agreement connected in any way to this Lease or the minerals extracted from the Leased Premises, Lessee agrees that Lessor's execution of such agreement(s) shall not, irrespective of the language contained therein, constitute a waiver, acceptance, ratification, revivor or adoption of this Lease or a waiver of any claim, demand or cause of action Lessor or any royalty owner may have or claim for any breach of an expressed or implied obligation arising out of or in any way connected with this Lease unless such document expressly states that its purpose is the acceptance, ratification, revivor or adoption of a prior questionable lease or waiver of a claim or defense and such document is agreed to after and upon advise [sic] of Lessor's counsel, with such counsel indicating his concurrence by signing such document or a separate letter so stating. Further, Lessee agrees to reimburse Lessor for reasonable attorney's fees incurred by Lessor in connection with Lessor's attorney's review of such agreements.

The lessees/operators pooled Strickhausen's lease without written consent effective January 1, 2012 and in September asked Strickhausen to ratify the pooled unit. In February 2013, lessees/operators sent a check to Strickhause for royalty from the well on the pooled unit. Strickhausen's attorney responded by acknowledging an offer to settle made by lessees/operators and made a counter-offer. Strickhausen cashed the check and continued to cash checks until she filed this lawsuit. The trial court found on competing Motions for Summary Judgment that Strickhausen had waived the breach of contract as to pooling and that Defendants had not waived their right to assert estoppel and that quasi-estoppel was an available defense.

Holding: The court of appeals reverses the trial court's summary judgment in favor of the lessees/operators.

Reasoning: The court requires evidence establishing ratification to show "(1) approval by act, word, or conduct, (2) with full knowledge of the facts of the earlier act, and (3) with the intention of giving validity to the earlier act." *Bank of Am., N.A.*, 510 S.W.3d at 505-06. The *Hooks* decision appears to stand for the legal proposition that if the lessor challenges the pooled unit, the evidence cannot conclusively establish as a matter of law the lessor's "intention of giving validity to the earlier act" of pooling. The court of appeals declined to address the estoppel issues as the permissive appeal was limited to ratification.

D. *Regmund v. Talisman Energy USA, Inc.*, 2019 U.S. Dist. LEXIS 110363; 2019 WL 2863926 (S.D.Tex. 2019)

Facts: Regmund, et al. are royalty owners complaining of Talisman's commingling of production at the wells and an allocation method for volumetric allocation of the production and volumetric calculation of royalties. Regmund, et al. sought class certification in the U. S. District Court, S.D. Texas, Houston Division.

Talisman operated 468 wells in the Eagle Ford Shale and paid royalties to 3,957 royalty owners. The wells produced oil/condensate and natural gas. At the well level, the oil, gas, and water components are separated and metered. The components are recombined or "commingled" when they enter the stabilization facility. Some of the Eagle Ford Shale production is fairly stable "black oil," which requires little to no treatment before sale. Other production is "wet gas," which requires processing called stabilization. Stabilization of wet gas produces "flash gas" by removing lighter hydrocarbons from the oil and condensate; flash gas results in a reduction or "shrinkage" of the volume for sale. Flash gas can then be separately processed or sold as residue gas and natural gas liquids ("NGLs").

As a result of the class certification hearings, some of the royalty owners would be overpaid and some would be underpaid. Talisman testified that all royalty had been paid on the total production. Since most if not all royalty owners had signed Division Orders, the court found that there were irreconcilable conflicts of interest among the class members. The underpaid would have a cause of action against the overpaid for money had and received. The court found that the individualized issues involved in the over 2000 oil and gas leases outweighed the common issues.

Holding: Although the putative class presented common questions, those common questions did not predominate over the individualized issues in the case. The class also faced a high risk of intra-class conflicts of interest which destroyed the adequacy element. The court denied the class certification.

E. *Enerlex, Inc. v. Hegar,* 2019 Tex.App. LEXIS 6771 (Tex.App.—Austin, August 7, 2019, pet. denied)

Facts: This case involves escheated royalty and working interest payments. Enerlex researches the annual list of escheated royalty and working interest payees published by the Comptroller. §74.201 & §74.307, Tex.Prop.Code. Based on this research, Enerlex locates these owners and buys their interest. Enerlex then applies to the Comptroller for payment of the amounts held in the escheat accounts. In an earlier case, Enerlex was successful in claiming the escheated amount. In this case, the Comptroller denied Enerlex's application. In this case the escheated account contained $4,652.91 and Enerlex paid $2,000.00 for the interest.

The Comptroller uses the escheated funds and is not required to pay interest on these amounts. *Clark v. Strayhorn,* 184 S.W.3d 906, 911 (Tex.App. —Austin 2006, pet. denied, *cert. denied*, 549 U.S. 995; 127 S.Ct. 508; 166 L. Ed.2d 369). Chapter 74 of the Texas Property Code provides the mechanism for these payees to demand and receive payment of escheated funds. Section 74.501 (e), Tex.Prop.Code provides:

> Except as provided by Subsection (f), the comptroller may **not** pay to the following persons a claim to which this section applies:
>
> (e) a creditor, a judgment creditor, a lienholder, or an **assignee of the reported owner** or of the owner's heirs; or…(emphasis added).

Although Enerlex was a grantee, the Comptroller equated that term with "assignee" and refused to pay Enerlex the escheated funds to Enerlex. Enerlex was entitled to all funds going forward but to none of the escheated funds. The trial court affirmed the Comptroller's decision.

Holding: The Austin Court of Appeals affirmed the trial court's decision.

Rationale: While the Comptroller did not dispute that for more than a decade it had paid similar claims, the court declined to hold that an agency is estopped from changing course when it determines that its earlier interpretation of a statute was erroneous. And the court noted that the grantee still had a cause of action against the grantor for payment of these funds.

XVII. RIGHT OF FIRST REFUSAL

A. *Carl M. Archer Trust No. Three v. Tregellas,* 566 S.W.3d 281 (Tex. 2018).

Facts: On June 12, 2003, members of the Cook family executed a warranty deed conveying the surface estate of a tract of land in Hansford County, Texas to the trustee of Carl and Mary Archer Trust No. Three (Trustees). The sellers retained ownership of the mineral estate but separately granted a right of first refusal (ROFR) to purchase this estate to the trust. Trustees' attorney discovered that the ROFR incorrectly described the property as being in Ochiltree County rather than Hansford County. This was fixed in September 2004. On March 28, 2007, two of the ROFR Grantors executed a mineral deed conveying their interest to Ronald and Donnita Tregellas (Tregellas). ROFR Grantors did not notify the Trustees. Trustees learned of the conveyance on May 4, 2011. The next day Trustees sued ROFR Grantors and Tregellas alleging that the Trustees had the right to purchase the conveyed interest and that they had not been given notice of the sale and desired to purchase the conveyed interest.

ROFR Grantors and Tregellas raised the defense that the four-year statute of limitations barred the contract claims. The Trustees amended their pleadings and pursued relief only against Tregellas and alleged that the ROFR ripened into an option contract to purchase the conveyed interest. The Trustees also alleged that Tregellas was on actual or constructive notice of the ROFR and stood in the shoes of the ROFR Grantors, and that the statute of limitations did not bar their contract claims because (1) the contract at issue was created when the Trustees exercised their option to purchase the mineral interest, which occurred less than four years before the underlying suit, and alternatively (2) the discovery rule and the doctrine of fraudulent concealment tolled the limitations period.

Procedural History & Result: After a bench trial the trial court rendered judgment for the Trustees and granted specific performance ordering Tregellas to convey the mineral interest upon the Trustees deposit of the purchase price ($9,000) into the court's registry. The trial court found that the filing of the petition was exercising the Trustees ROFR and ROFR Grantors and Tregellas did not disclose that they were willing to sell the interests. The trial court also found that Tregellas took the ROFR Grantors' mineral interest with notice of the ROFR and were not *bona fide* purchases and therefore the statute of limitations did not bar Trustees' cause of action because if the Trustees would have been on notice they would have exercised their ROFR. The trial court also found that Trustees did not know of their injury, nor in the exercise of reasonable diligence should they have known, until May 4, 2011.

The appeal court reversed and held that Trustees' cause of action for breach contract accrued when the minerals were conveyed without notice and that the discovery rule does not apply to delay accrual because Trustees' injury is easily discoverable with reasonable diligence. The Trustees filed petitions for review of both judgments.

Holding: [1] Action accrued, for purposes of four-year limitations period, when vendors sold interest without notifying holders, and [2] discovery rule applied to defer start of four-year limitations period.

Rationale: [1] At issue was the accrual date of the statute of limitations. The Texas Supreme Court agreed with the appellate court that the accrual date for limitations purposes is the date of conveyance. The ROFR was breached when the ROFR Grantors conveyed their mineral interest without notifying Trustees of the offer to purchase the mineral interest. This is because once Trustees learned of the conveyance they lost the right to purchase the interest at the time contemplated by the ROFR. Furthermore, the Court examined Trustees' reasoning and noted it was circular because they were injured only when they attempted to exercise their option by seeking specific performance. So, by suing for specific performance they suffered an injury entitling them to sue for specific performance. The court noted that Trustees did not distinguish between an action to enforce the ROFR and an action to enforce a contract to purchase the mineral interest.

[2] At issue was whether Trustees' injury was the type of injury that the Trustees could have discovered through the exercise of reasonable diligence. There is no evidence that they were on notice before May 2011. The Court reasoned that the ROFR holder who has been given no notice of an intent to sell or of a third-party offer generally has no reason to believe that her ROFR may have been impaired. The Court concluded that reasonable diligence is not continually monitoring the public records for evidence of an offer or of an injury. The Court's holding was specific to the conveyance of property in breach of a ROFR, where there is no notice of the ROFR Grantor's intent to sell or of a purchase offer, is inherently undiscoverable and that the discovery rule does apply to defer accrual of the ROFR holder's cause of action until they know of the injury. The Court noted the competing policies at play, i.e. preventing stale claims versus discouraging deceptive conduct.

B. Cody Texas, L.P. v. BPL Exploration, Ltd., 04-17-00810-CV; (Tex.App.—San Antonio, December 11, 2019, *en banc*)

Facts: Cody breached a ROFR contained in a JOA by failing to correctly relate the price and other material terms of the offer to BPL. BPL did not file suit within the four year statute of limitations. BPL argued that limitations was tolled by the discovery rule and fraudulent concealment. The trial court found that BPL's breach of contract claims and fraud claims were not barred by limitations.

Holding: The San Antonio court affirmed the trial court after discussing the "law of the case" doctrine and electing not to follow that doctrine in this instance. The San Antonio court also decided *en banc* that it had erroneously granted Cody's Post-judgment Bill of Review. These two holdings led the San Antonio court to reinstate the trial court's original judgment.

XVIII. STRIP AND GORE DOCTRINE

A. *Green v. Chesapeake Expl., L.L.C.*, No. 02-17-00405-CV, 2018 Tex. App. LEXIS 10307 (Tex. App.—Fort Worth Dec. 13, 2018, n.p.h.)

Facts: In 1955, E.G. Senter & Company (Senter Company) purchased 85.58 acres of land in Arlington, Texas. In 1970, Senter Company conveyed the surface and part of the mineral estate of the eastern 30.591 acres (the Highway Tract) to the State of Texas for the construction of Highway 360, reserving only the "oil, gas[,] and sulphur" under the Highway Tract (the Mineral Tract). The deed provided that Senter Company would be able to access the highway from its remaining 54.95 acres (the Remaining Tract). Senter Company reserved no other minerals under the Highway Tract, and it waived "all rights of ingress and egress to the surface [of the Highway Tract] for the purpose of exploring, developing, mining or drilling."

In April 1972, Senter Company conveyed the entire Remaining Tract to Arlington South Properties #2 in fee simple via a general warranty deed, retaining only a vendor's lien. Although that deed is subject to "all easements, restrictions, reservations, and/or zoning ordinances, if any, affecting the" Remaining Tract, nothing in the record indicates that any existed at that time, and Senter Company did not expressly reserve any interest in the Remaining Tract.

After a series of conveyances and acquisition of oil and gas leases, Chesapeake Exploration obtained a drilling opinion in 2009 indicating that the Senter Trusts had never owned an interest in the Mineral Tract because—by application of the strip—and—gore doctrine to the 1972 deed from Senter Company to Arlington South—Senter Company had conveyed all of its interest in the Mineral Tract to Arlington South along with the Remaining Tract. Accordingly, even though Chesapeake drilled a producing well from the I-20 JV Unit, it never paid any royalties to the Senter Trusts.

The Senter trusts sued Chesapeake, et al. claiming that the conveyance of the Remaining Tract to Arlington South did not include the Mineral Tract. Senter claimed that the strip and gore doctrine could not apply because the alleged "strip" was 30.591 acres out of a 85.58 acre tract contradicting the small, narrow strips of land element of the doctrine. Senter also contended that the doctrine only applies to ambiguous deeds and that this deed was not ambiguous. Finally, Senter argued that they were entitled to summary judgment on their trespass to try title claims because the doctrine did not apply. The trial court agreed with Chesapeake, et al. and granted summary judgment against Senter.

Holding: The Court of Appeals applied the doctrine to this case and noted that the doctrine was not limited to ambiguous deeds. The court affirmed the summary judgment.

Reasoning: The strip—and—gore doctrine is used to aid in determining a grantor's intent—not as to the land described in the deed itself, but as to adjoining land not referenced in the deed. *Strayhorn v. Jones, 157 Tex. 136, 300 S.W.2d 623, 638 (Tex. 1957)* (holding that the doctrine applies only when a description of the specific strip is not included in the field notes of the adjoining land's conveyance; otherwise, there would be no need to employ a rule of construction or presumption and that it applies even though ambiguity is not claimed). the doctrine applies when the evidence shows that (1) the adjoining land is of a certain character—relatively narrow, small in size and value in comparison to the expressly conveyed land, and no longer of importance or value to the grantor of the larger tract, (2) the adjoining land was not included in the property description in the deed at issue, and (3) no other language in the deed indicates that the grantor intended to reserve an interest in the adjoining land. It is presumed that a party granting land does not intend to retain a narrow strip between the land sold and the boundary line in the absence of express provision to that effect in the deed, especially where the strip is so narrow *as to be of no practical use to the grantor*. This presumption . . . is, however, rebuttable, *the question being purely one of intention*; and when the intention is ascertainable from the face of the instrument or a record, other evidence is not admissible." (emphases added). The strip—and—gore doctrine applies when it appears that a grantor has conveyed all land owned by him adjoining a narrow strip of land that has ceased to be of any benefit or importance to him[;] the presumption is that the grantor intended to include [that] strip in [the] conveyance[] unless it clearly appears in the deed, by plain and specific language, that the grantor intended to reserve the strip. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906, 909 (Tex. 2017). Application of the strip—and—gore doctrine is highly policy-driven: it discourages title disputes and prolonged litigation—providing certainty in land titles—and encourages the use and development of real property. The doctrine applies when adjoining land ceases to benefit or be important to the grantor upon conveyance of land described in deed. The doctrine's presumption applies to mineral interests. *Angelo v. Biscamp,* 441 S.W.2d 524, 527 (Tex. 1969); *Escondido Servs., LLC v. VKM Holdings, LP*, 321 S.W.3d 102, 109 (Tex. App.—Eastland 2010, no pet.); *Glover v. Union Pac. R.R.*, 187 S.W.3d 201, 212 (Tex. App.—Texarkana 2006, pet. denied).

XIX. REGULATORY ISSUES

A. NGL Water Sols. Eagle Ford, LLC v. R.R. Comm'n, No. 03-17-00808-CV, 2019 Tex. App. LEXIS 10302 (Tex. App.—Austin Nov. 27, 2019, n.p.h.)

Facts: NGL operated a salt water disposal well ("SWD") under a permit issued by the Texas Railroad Commission ("RRC"). In April 2016, Blue Water filed an application with the RRC to operate a commercial injection well at a nearby location. Blue Water fully complied with all requirements and the RRC was prepared to issue the permit. NGL discovered this application and filed a protest. Blue Water requested a hearing and argued that NGL was not entitled to protest because NGL was not an "affected person" under Statewide Rule 9, i.e. a person who has suffered or will suffer actual injury or economic damage *other than* as a member of the general public or *as a competitor,* and includes surface owners of property on which the well is located and commission-designated operators of wells located within one-half mile of the proposed disposal well." 16 Tex.Admin.Code §3.9(5)(E)(ii). Blue Water argued and NGL did not dispute the fact that NGL was a competitor and the NGL's SWD was more than one-half mile distant. The hearing examiner agreed with Blue Water and the RRC adopted this decision.

Holding: NGL's District Court litigation was not barred by sovereign immunity. The RRC's decision that NGL was not an "affected person" was supported by substantial evidence. Finally, the RRC's administrative approval of Blue Water's permit application was appropriate.

B. Town of Flower Mound v. EagleRidge Operating, LLC, 2019 Tex. App. LEXIS 7561 (Tex. App.—Fort Worth Aug. 22, 2019, n.p.h.).

Facts: Before EagleRidge took over operation of a number of oil and gas wells within Flower Mound, Flower Mound adopted an ordinance that limited the work hours for oil and gas operations. The ordinance included truck deliveries except in the case of emergencies. EagleRidge applied for a variance. Flower Mound issued a citation and fined EagleRidge for hauling salt water on a Sunday in violation of the ordinance. EagleRidge filed an application for a TRO and Temporary Injunction. The trial court held a hearing and granted the temporary injunction. Flower Mound argued that the District Court did not have jurisdiction to issue a temporary injunction.

Holding: The Temporary Injunction was dissolved and the case remanded to the trail court.

Rationale: The ordinance was penal in nature. It addresses a public wrong and promotes the welfare of the Flower Mound's citizens. Because the ordinance is penal in nature, EagleRidge must demonstrate irreparable injury to a vested property right. EagleRidge had a vested property right but could not show irreparable injury. EagleRidge's claim that §65.011 (5), Tex.Civ.Prac.&Rem.Code dispensed with a showing of irreparable injury was rejected. The Texas Supreme Court has interpreted this section to require both an irreparable injury and an inadequate remedy at law. Finally, the Fort Worth Court of Appeals rejected EagleRidge's arguments under §211.011, Tex.Loc.Gov't Code Ann. The legislature granted statutory authority for a restraining order but not for temporary injunctions.

XX. TRESPASS TO TRY TITLE

A. *Estate of Gibbs*, No. 02-18-00086-CV, 2019 Tex. App. LEXIS 4452 (Tex. App.—Fort Worth May 30, 2019, n.p.h.)

Facts: In 1990, Bell and Bert signed a Trust Agreement. Bell gave Bert $13,845.16 to use as a down payment on 30 acres and Bert would own as trustee for his children and Bell. Bert sold 15 acres and accounted to Bell. Later, Bert sold the remaining 15 acres but did not account to Bell. These conveyances were invalidated as a fraud on the community in Bell's divorce proceeding and were awarded to Bell's wife. Bell died in 2004. The ex-wife executed oil and gas leases on the remaining 15 acres. Bell sought a declaratory judgment as to her rights and ownership under the Trust Agreement. The ex-wife obtained summary judgment on the ground that the claim had to be asserted as a Trespass to Try Title and not a declaratory judgment action.

Holding: Summary judgment for the ex-wife reversed. Bell could proceed by declaratory judgment as she was seeking a declaration of trust and she also sought one half of the bonus and royalty, non-possessory interests, paid under the oil and gas leases.

Reasoning: Bell's declaratory judgment action sought vindication of her equitable status under the Trust Agreement and not to determine title to the 15 acres. As such, it was a proper use of the Declaratory Judgment Act.

B. *M & M Res., Inc. v. DSTJ, LLP*, 564 S.W.3d 446 (Tex. App.—Beaumont 2018, n.p.h.)

Facts: This case involves one of those unilateral determination of lease termination clauses and whether the case should proceed as a trespass to try title or declaratory judgment action. DSTJ retained ELR to negotiate with landowners in Jefferson County and obtain leases of mineral properties. ELR procured several leases in the area DSTJ desired, but ELR acquired the leases in the name of M & M, another company in which the ELR owners had an interest. M & M then executed an "Assignment of Oil, Gas and Mineral Leases" ("the Assignment") which assigned twenty-one leases to DSTJ. The Assignment reserved an overriding royalty interest and contained a provision by which the assigned leases would automatically terminate and revert to M & M upon default by DSTJ. Paragraph M of the Assignment states

> If Assignee fails to make any payment under this Assignment when due, and still fails to pay within 30 days following receipt of Assignor's written demand for payment by certified mail to the address shown above, return receipt requested, Assignor shall have the option to terminate this Assignment in its entirety at the expiration of that 30-day period by filing written notice of termination in the real property records of Jefferson County, Texas. Upon termination, the Leases shall automatically revert to Assignor without any further action, together with all of Assignee's right, title and interest in all equipment, personal property and fixtures located on, or held or used in connection with the Leases. The reverted interests shall be free of all liens, security interests, production burdens and other encumbrances and defects created by, through or under Assignee, all of which shall be void as to Assignor. Assignor's remedies in this Paragraph M are cumulative, and are in addition to any other legal or equitable remedies available to Assignor for Assignee's breach of this Assignment.

M & M claimed unpaid ORRI, sent the letter and the filed the written termination. M&M filed a declaratory judgment action to validate its actions and the terms of Paragraph M. DSTJ counterclaimed against M & M and filed special exceptions to the declaratory judgment action. On a partial summary judgment the trial court found for M & M on all provisions of Paragraph M. At the trial of the remaining issues, M & M received an award of $500,000 in attorneys' fees. The trial court eventually sustained the special exceptions to the declaratory judgment claims and M & M appealed.

Holding: The court of appeals affirms the trial court's grant of DSTJ's special exceptions.

Reasoning: In this case, the underlying dispute involved ownership of the possessory interest in the mineral estates at issue. The proper and mandatory vehicle for resolving those claims is a trespass to try title action. *See id.; Lackey*, 2018 Tex. App. LEXIS 5249, 2018 WL 3384570, at *6; *Jinkins*, 522 S.W.3d at 786; *see also*Tex. Prop. Code Ann. § 22.001. M & M may not proceed alternatively under the UDJA to seek recovery of their attorney's fees. *See* Martin, 133 S.W.3d at 267; *Jinkins*, 522 S.W.3d at 786.

C. ***McDuff v. Brumley*, No. 07-17-00248-CV, 2019 Tex. App. LEXIS 1347 (Tex. App.—Amarillo Feb. 22, 2019)(petition for review filed June 12, 2019).**

Facts: Brumley filed a quiet title lawsuit against McDuff concerning a 345.9 acre tract of land. Brumley claimed title through a deed from Corker and Brumley asserted the 10 year adverse possession statute. McDuff filed a counterclaim seeking a declaratory judgment that Corker owned no interest in the 345.9 acres and McDuff denied the adverse possession claim. The jury ruled in favor of Brumley's adverse possession claim. McDuff appealed on an alleged error in jury submission.

Holding: The judgment of the trial court is reversed, and judgment is rendered denying all relief requested.

Reasoning: Given the Brumleys' pleadings, the evidence, the arguments of counsel presented during trial, the jury charge presented by the parties, the arguments or lack thereof made during the charge conference, and the objection of the McDuffs' counsel to the trial of any theory not raised by the pleadings, the court concluded that the issue of determining title via a trespass-to-try-title suit was not tried by consent. Accordingly, because the judgment entered was not supported by the pleadings nor tried by consent, that judgment cannot stand.

It has long been understood that the purpose of a traditional suit to quiet title is not to settle a title dispute but is instead intended to remove a cloud from the title created by an invalid claim being made by the defendant. *See Thomson v. Locke*, 66 Tex. 383, 1 S.W.112, 115 (Tex. 1886) (holding that a suit to quiet title lies "to enable the holder of the feeblest equity to remove from his way to legal title any unlawful hindrance having the appearance of better right"). The principal issue in a suit to quiet title is the existence of a cloud that equity will remove. To remove that cloud, "the plaintiff must prove, as a matter of law, right, title, or ownership in himself with sufficient certainty to enable the court to see that he has a right of ownership and that the alleged adverse claim is a cloud on the title that equity will remove." *Hahn v. Love*, 321 S.W.3d 517, 531-32 (Tex. App.—Houston [1st Dist.] 2009, pet. denied). The elements of a suit to quiet title are (1) the plaintiff has an interest in specific property, (2) title to the property is affected by a claim by the defendant, and (3) the defendant's claim, though facially valid, is invalid or unenforceable. *Montenegro v. Ocwen Loan Servicing, LLC*, 419 S.W.3d 561, 572 (Tex. App.—Amarillo 2013, pet. denied) (citing *Vernon v. Perrien*, 390 S.W.3d 47, 61 (Tex. App.—El Paso 2012, pet. denied)).

A trespass-to-try-title action, on the other hand, is the appropriate legal procedure by which rival claims to title are to be adjudicated. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 755 (Tex. 2003). To recover in a trespass-to-try-title action, the plaintiff must recover upon the strength of his own title. *Rogers v. Ricane Enters.*, 884 S.W.2d 763, 768 (Tex. 1994). The plaintiff may recover (1) by proving a regular chain of ***conveyances*** from the sovereign, (2) by proving a superior title out of a common source, (3) by proving title by limitations, or (4) by proving prior possession and that the possession has not been abandoned. *Id.*

When a party claims title by adverse possession, the claim may be resolved *only* in a statutory trespass-to-try-title action. *Martin v. Amerman*, 133 S.W.3d 262, 267 (Tex. 2004).

D. ***Fort Apache Energy, Inc. v. Short OG III, Ltd. (In re Aztec Oil & Gas, Inc.)* 2019 U.S. Dist. LEXIS 96182; 2019 WL 2410408 (June 7, 2019)**

Facts: This case involves title to a 112.174 acre tract in Tyler County, Texas. In 1971, H. G. Hrivnatz, Sr., as trustee, acquired an undivided one half interest in the mineral estate under this tract. Hrivnatz, Sr. died in May 1992. His will devised 50% to his wife, Vannie, and 25% to each of his two sons, Hrivnatz, Jr. and David

Hrivnatz, to be held in trust by his wife for her life. Vannie executed two durable powers of attorney to Hrivnatz, Jr. but neither was recorded. Hrivnatz, Jr. executed a January 1, 2009 oil and gas lease to Miller Energy, Inc. signing as Hrivnatz, Jr. but with no reference to the POA(s). Fort Apache concluded that the Miller lease was defective and took a new lease from Hrivnatz, Jr. on February 10, 2012 that described all of Hrivnatz, Jr.'s capacities. This lease and the new POA from Vannie were recorded. Later, David's son and executor of his estate denied Hrivnatz Jr.'s authority to bind his brother's estate. This case concerned the claims of the 2009 oil and gas lessee against the 2012 oil and gas lessee to title to the oil and gas in place.

Holding: In his direct and concise style, Judge Lynn Hughes held that Fort Apache had fulfilled the pleading requirements of the Trespass to Try Title claim and that Fort Apache had superior title to the Hrivnatz mineral estate under the 2012 oil and gas lease.

Rationale: The 2009 oil and gas lease was ineffective. An unrecorded power of attorney does not authorize the grantor to convey the property. Tex.Prop.Code Ann. §13.001 (b). The 2012 oil and gas lease was effective. Fort Apache recorded three POA(s) and a memorandum of the lease in the Tyler County real property records. Fort Apache prevailed on its TTT claims.

E. ***Scribner v. Wineinger,*** 2019 Tex.App. LEXIS 9170, 2019 WL 5251134 (Tex.App.—Fort Worth, October 17, 2019, n.p.h.)

Facts: This case concerns adverse possession of an oil and gas leasehold interest. Wineinger's predecessors in interest obtained adverse possession title before the conveyance to Wineinger. Wineinger's acknowledgment of title in Scribner avails Scribner of no remedy as title vested in the predecessors before these acknowledgments. Scribner's father conveyed all of the working interest to Scribner in 2002 by an assignment filed of record in Archer County. Scribner claimed he did not know of the assignment until 2016. The executrix of Scribner's father's estate assigned the working interest to Wineinger's predecessors who produced oil and gas for over five years under a registered deed. The predecessors perfected adverse title. Subsequent acknowledgments do not undo the adverse possession title. The trial court granted summary judgment to Wineinger.

Holding: The Fort Worth Court of Appeals affirmed the trial court.

Rationale: Under the holdings of *BP Am. Oil Prod. Co. v. Marshall*, 342 S.W.3d 59, 69 (Tex. 2011) and *Nat. Gar Pipeline Co. of Am. V. Pool*, 124 S.W.3d 188, 192-93 (Tex. 2003) and §16.025, Tex.Civ.Prac.&Rem.Code, Wineinger as the regular assignee of operators who had used or enjoyed the property, paid the applicable taxes and claimed under a duly registered deed was vested with the working interest. A possessor's acknowledgment of title in another after the limitation title has been completed does not destroy the limitation title. *Bruni v. Vidaurri*, 140 Tex. 138, 166 S.W.2d 81, 88 (1942).

XXI. WORKER'S COMPENSATION

A. ***W&T Offshore, Inc. v. Meyers,*** No. 14-16-00378-CV, 2018 Tex. App. Lexis 9890 (Tex. App.—Houston [14th Dist.] Dec. 4, 2018)

Facts: Meyers was working on a W&T oil and gas rig off the Louisiana Coast, when a crane cable broke and dropped a weight on his foot, crushing it. The cable had not been changed or replaced in three years, the time recommended that it should be changed as a safety recommendation. Meyers sued W&T, alleging a failure to warn of hidden danger, failure to maintain a safe work environment, and failure to inspect, maintain, and repair equipment.

Procedural History: The trial court found W&T liable under a general-negligence question and dismissed W&T motion for judgment notwithstanding the verdict. W&T appealed.

Result: Reversed and Remanded.

Holding: OCSLA required the application of Louisiana substantive law and Louisiana law required that a premise-liability theory of recovery be submitted. Because it was not, the trial court's decision was overruled. However, the Court remanded the case to the trial court, because Louisiana law, unlike Texas law, allows for the discretion to remand the case in the interest of justice.

Rationale: The jury charge submitted a general-negligence question rather than a premise-liability question. W&T alleged that Meyers did not secure a necessary jury finding under Meyer's only viable theory of recovery, premise liability, as required by Louisiana law. The Court agreed. First, the Court noted that Texas procedural law requires that if an improper theory of recovery is submitted, then any unsubmitted theory of recovery, even the correct theory, is waived. The Court rejected the claim that W&T invited the error, as W&T took no action that convinced the trial court to adopt the general-negligence charge as opposed to the premise liability charge.

The Court then noted that because the accident occurred off the coast of Louisiana, under the Outer Continental Shelf Lands Act (OCSLA), Texas courts must apply Louisiana substantive law, as opposed to Texas law, as a surrogate for federal law when there are gaps in the coverage of federal law. The Court rejected the claim that Meyers waived the application of substantive Louisiana law by not pleading for that application, because "OCSLA does supersede the normal choice-of-law rules that the forum would apply" and OCSLA does not require such pleading.

The Court then looked at Louisiana law and held that general negligence and premise-liability were different theories of recovery, which are not substitutable for each other. The Court held that premise-liability was clearly appropriate and therefore sustained W&T's appeal and overruled the trial court's ruling.

The Court remanded to the trial court with instructions for how a Texas court should submit a Louisiana premises-defect theory to a jury. The Court held that this was in the interest of justice as Louisiana law had not been settled at the time of the trial on how to submit different theories of recover.

The Court then rejected W&T's claim that it did not owe Murphy a duty because it had no control over the work of Murphy, an employee of a contractor, because W&T did have control over the cable.

XXII. SLAPP AND ANTI-SLAPP

A. *Lona Hills Ranch, LLC v. Creative Oil & Gas Operating, LLC*, 549 S.W.3d 839 (Tex. App.—Austin 2018, pet. granted, aff'd in part, rev'd in part December 20, 2019 opinion)

Facts: The Ranch, which is the lessor under an oil-and-gas lease covering minerals in Lee County, Texas, brought suit against the operator of the well on the lease, Creative Oil & Gas Operating, LLC ("the Operator"), for trespass and trespass to try title, alleging that the lease had terminated. Creative Oil & Gas, LLC ("the Lessee"), intervened in the suit as a party to the lease. The Operator and the Lessee asserted counterclaims against the Ranch for breach of contract, which the Ranch sought to dismiss under the TCPA.

The Ranch filed a complaint with the Texas Railroad Commission in January 2017 to challenge the Operator's "good faith claim" to a continued right to operate the lease. The Ranch asserted that the lease had expired by its own terms for lack of production. The Operator responded to the complaint by submitting various recorded instruments, production information, and operating history of the Lease. Ultimately, after a hearing, the Railroad Commission issued a final order concluding that the Operator had presented a "good faith claim" to operate the Lease.

The Ranch did not challenge the Railroad Commission's final order but instead filed the underlying trespass and trespass-to-try-title suit against the Operator. In support of its claims the Ranch again asserted that the lease had terminated under its own terms for lack of production.

The Operator filed an answer denying the Ranch's claims. Although contending that, as an operator only, it has no working interest in the lease, the Operator also asserted counterclaims for breach of the lease contract, alleging that the Ranch had breached the lease by (1) "claiming [to purchasers] that the Lease has terminated" and thereby "wrongfully preventing the purchasers of oil and gas production from the Lease from paying Creative for the proceeds of sales of production"; (2) "wrongfully complaining to the Commission that the Lease has terminated"; and (3) "filing this suit when [the Ranch] has failed to comply with § 11 of the Lease requiring notice and the opportunity to cure any alleged default prior to the commencement of any litigation seeking termination or forfeiture of the Lease." The Lessee intervened in the suit and asserted its own breach-of-contract counterclaim. According to the Lessee's plea in intervention, the Ranch breached the lease "by the filing of this lawsuit in violation of the express terms of the Lease" and by "wrongfully claiming the Lease has terminated and wrongfully repudiating the Lease."

The Ranch timely filed a motion under the TCPA seeking to dismiss both the Operator's and the Lessee's breach-of-contract counterclaims. *See Tex. Civ. Prac. & Rem. Code § 27.003(a)* (authorizing motion to dismiss "[i]f a legal action is based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association"). The Ranch asserted that the counterclaims were subject to dismissal under the TCPA because they implicated the Ranch's "exercise of the right to free speech"—asserting its opinion to third parties that the lease has terminated—and its "exercise of the right to petition"—the filing of its complaint to the Railroad Commission and of this lawsuit. The Operator and the Lessee filed a joint response, urging that the TCPA does not apply because their counterclaims are premised on the Ranch's failure to give the Lessee notice and the right to cure as required by section 11 of the lease.

The trial court held a hearing on the Ranch's motion to dismiss but did not rule on the motion. As such, the motion was denied by operation of law. *See id. § 27.008(a)* (providing that motion to dismiss is overruled by operation of law if not ruled on by 30th day after hearing on motion). This interlocutory appeal followed. *See id.*§ 51.014(a)(12) (authorizing interlocutory appeal from denial of TCPA motion to dismiss).

Holding: The court of appeals determined that the trial court properly refused to dismiss the Lessee's breach-of-contract counterclaim that is based on the Ranch's complaint to the Railroad Commission and the filing of the Ranch's lawsuit. The court of appeals also determined that the trial court erred by denying the Ranch's motion to dismiss (1) the Operator's breach-of-contract counterclaims in their entirety; and (2) the Lessee's breach-of-contract counterclaim that is based on the Ranch's alleged communications to third parties and reversed the trial court's order in these respects and render judgment dismissing (1) the Operator's breach-of-contract counterclaims in their entirety; and (2) the Lessee's breach-of-contract counterclaim that is based on the Ranch's alleged communications to third parties.

Holding: The Texas Supreme Court noted that the TCPA is amended effective September 1, 2019 and that the amendments would preclude this litigation. Nonetheless, there are other cases still pending under the old law. The Court found that the matters alleged by the Lessee and Operator were not matters of public concern. Rather, these matters were matters of private concern.

Rationale: The TCPA provides a two-step process to expedite the dismissal of a "legal action" that is "based on, relates to, or is in response to a party's exercise of the right of free speech, right to petition, or right of association." *Tex. Civ. Prac. & Rem. Code § 27.003(a)*. First, the movant seeking dismissal under the TCPA must "show[] by a preponderance of the evidence that the [nonmovant's] legal action is based on, relates to, or is in response to the [movant]'s exercise of (1) the right of free speech; (2) the right to petition; or (3) the right of association." *Id.*§ 27.005(b). Second, if the movant makes that showing, the burden shifts to the nonmovant to "establish[ ] by clear and specific evidence a prima facie case for each essential element of the claim in question" to avoid dismissal. *Id.*§ 27.005(c). If the nonmovant meets that burden and the "legal action" would otherwise survive, the TCPA still allows the movant to obtain dismissal by "establish[ing] by a preponderance of the evidence each essential element of a valid defense to the nonmovant's claim." *Id.*§ 27.005(d).

The review expressly includes "the pleadings and supporting and opposing affidavits stating the facts on which the liability or defense is based," and the TCPA contemplates primary reliance on such proof. *Id.§ 27.006(a)*; *see* Hersh, 526 S.W.3d at 467 ("[I]t would be impossible to determine the basis of a legal action, and thus the applicability of the Act, without considering the plaintiff's petition. . . . The basis of a legal action is not determined by the defendant's admissions or denials but by the plaintiff's allegations. . . . When it is clear from the plaintiff's pleadings that the action is covered by the Act, the defendant need show no more.").

The court will review de novo whether a party carried its assigned burden under this statute. The Operator and the Lessee insisted that their breach counterclaims were premised solely on their allegations that the Ranch had breached section 11 of the lease by commencing litigation in the Railroad Commission and this case without first giving notice and the opportunity to cure. But the examples from the pleadings plainly showed that the Operator and the Lessee seek relief that is predicated, in addition to alleged breach of section 11, on an alleged injury caused by the Ranch's communications regarding the lease termination. As such, the Ranch established by a preponderance of the evidence that the Operator and the Lessee's counterclaims were "based on, relate[] to, or [are] in response to" the Ranch's "exercise of the right of free speech." *See*Tex. Civ. Prac. & Rem. Code § 27.005(b)(1); *Serafine v. Blunt*, 466 S.W.3d 352, 372-73 (Tex. App.—Austin 2015, no pet.) (Pemberton, J., concurring) (explaining that "is based on, relates to, or is in response to "element is met if "challenged 'legal action' seeks relief predicated on alleged injury from some communication that can be said to fall within the TCPA's definitions of" protected expressive activities"); *see also* Hersh, 526 S.W.3d at 467 (holding that when it is clear from nonmovant's pleadings that the action is covered by TCPA, movant "need show no more").

Having determined that the Ranch met its initial burden under the TCPA, the court must next address whether the Operator and the Lessee "establishe[d] by clear and specific evidence a prima facie case for each essential element of the objected to claim in question." *Tex. Civ. Prac. & Rem. Code § 27.005(c)*. The elements of a breach-of-contract claim are (1) the existence of a valid contract between the parties; (2) performance (or excuse) by the party asserting the claim; (3) breach of the terms of the contract by another party; and (4) damages resulting from the breach. *See, e.g.,* C.W. 100 Louis Henna, Ltd. v. El Chico Rests. of Tex., L.P., 295 S.W.3d 748, 752 (Tex. App.—Austin 2009, no pet.).

The lease at issue provides, in part, as follows:

> [N]o litigation shall be initiated by [the Ranch] with respect to any alleged breach or default by Lessee hereunder, for a period of at least ninety (90) days after [the Ranch] has given Lessee written notice fully describing the breach or default, and then only if Lessee fails to remedy or commence to remedy the breach or default within such period.

As to the Lessee, the court found that the counterclaim was in effect a mandatory counterclaim permitted under the statute.

XXIII. WARRANTY PROVISIONS

A. *Dorfman v. JPMorgan Chase Bank, N.A.*, No. 02-17-00387-CV, 2018 Tex. App. LEXIS 8538 (Tex. App.—Fort Worth 2018, n.p.h.)

Facts: In 1929, Mary Moravits, et vir. conveyed a 200.1 acre tract to McMullen. In 1944, Moravits sued the successor to McMullen to cancel the deed. McMullen's successor disclaimed any interest in the 200.1 acre tract. McMullen's successor was a trust and JP Morgan Chase became the trustee of the trust. The trust then leased this land to Orca. Moravits leased the land to Dorfman Production Company. The trial court ruled in favor of Dorfman and the Fort Worth Court of Appeals agreed with Dorfman's claim in an interlocutory appeal. The subject litigation was on the remand to consider tort claims of Dorfman against JP Morgan and Orca. Dorfman alleged slander of title, tortious interference with property rights, negligence, gross negligence and negligent hiring, retention and supervision. The trial court granted JP Morgan's and Orca's summary judgment motions on all of the tort claims.

Holding: The Fort Worth Court of Appeals affirmed the trial court's judgment.

Reasoning: JPMorgan, the Orca Entities, and Dorfman each had a good-faith basis to assert title to the tract. Indeed, this court grappled with tracing the fractured title interests, the effect of the 1944 judgment on the 1929 deed, and JPMorgan's reasons to assert title. *See* Orca Assets, 470 S.W.3d at 158-67. Although this court ultimately concluded that Dorfman's title was superior, JPMorgan's lease to Orca Assets during a time that it held a colorable legal claim to title is not rendered tortious based on hindsight. The court concluded that Dorfman proffered no, or less than a scintilla of, summary-judgment evidence regarding essential elements of each of its tort claims directed to JPMorgan's or the Orca Entities' actions regarding the tract. The court found no malice and no loss of a sale in the slander of title cause of action.