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TOP TEN TEXAS OIL AND GAS CASES OF 2018

This article discusses significant oil and gas decisions from state courts in Texas during 2018. It is not intended to be a strict legal analysis, but rather a useful guide for industry professionals in their daily work and attorneys providing advice to the oil & gas industry. A complete discussion of all legal analyses contained in the decisions are not always included.

1. *ConocoPhillips Co. v. Koopmann*, 547 S.W.3d 858 (Tex. March 23, 2018)

In this case, the Texas Supreme Court rejected ConocoPhillips's claim that standard term nonparticipating royalty interest reservations violate the Rule Against Perpetuities. In 1996, Lois Strieber sold 120 acres to Lorene Koopmann, reserving a 15-year one-half NPRI that could be extended "as long thereafter as there is production in paying or commercial quantities." The 15-year term ended Dec. 27, 2011. Koopmann subsequently gifted two-thirds of her undivided interest to her two children. Koopmann executed an oil and gas lease in 2007 that had a three-year primary term and an option to extend the primary term two additional years for \$24,000. Burlington (as lessee, the predecessor to ConocoPhillips) subsequently tendered this payment to the Koopmanns, thus extending the primary term to Oct. 22, 2012. Despite pooling activity and Strieber's conveyance of a 60 percent interest in her NPRI to Burlington, a wellsite within the pooled unit was not yet producing any oil or gas. Production began in February 2012, which was two months after the expiration of Strieber's 15-year term NPRI. Prior to

the expiration of the 15-year term, Burlington sent a letter to Koopmann that indicated it had identified a well location and also included "shut-in royalty payments" to the Koopmanns in an effort to perpetuate the NPRI beyond its 15-year primary term. A dispute later arose as to whether the well was *capable* of producing in paying or commercial quantities as of Dec. 27, 2011 (the NPRI's date of termination). Royalty payments were suspended, and a lawsuit ensued.

Burlington asserted the Koopmanns' future interest in Strieber's NPRI violated the Rule Against Perpetuities and was therefore void. The basis for this argument was that the phrase "as long thereafter" within the reservation created a springing executory interest in favor of the Koopmanns that was not certain to vest within the period required by the rule (21 years after the death of some life or lives in being at the time of conveyance). The Texas Supreme Court disagreed and held that Strieber actually conveyed a future interest to the Koopmanns that "vested" immediately and therefore did not violate the rule for two reasons:

- (1) The court strictly adheres to the rules of construction that courts should construe instruments equally open to two interpretations as valid rather than void and that the Legislature requires courts to reform an interest that violates this rule to effect the ascertainable general intent of the creator of the interest.
- (2) Modern scholarship supports

construing the rule based on its purpose and intent and avoiding its application when, like in the present case, doing so would not serve the rule's purpose.

This modern approach is particularly appropriate because restraints on alienability and promoting the productivity of land is not an issue in the context of oil and gas. Because the court reasoned that Strieber reserved the NPRI for a limitation certain to occur at some point (*i.e.*, for 15 years and as long thereafter as there is production in paying or commercial quantities), the Koopmanns' interest was more akin to a vested remainder (and not a springing executory interest) when it was created. Therefore, the court held that — in the context of an NPRI reservation — where a defeasible term interest is created by reservation, leaving an executory interest that is certain to vest in an ascertainable grantee, the rule does not invalidate the grantee's future interest.

Having found that Koopmanns' interest did not violate the rule, the Court still had to address whether the savings clause perpetuated the NPRI beyond its term. Since no well was actually producing on Dec. 27, 2011, Strieber's interest in the NPRI could continue beyond that date only if the savings clause's three requirements were satisfied: (1) There was a lease on the premises, (2) the lease was maintained in force and effect by payment of "shut-in royalties or any other similar payments made ... in lieu of actual production" and (3) there was a well "capable of producing oil, gas, or other minerals in paying or commercial quantities," but which is shut in "for lack of market or any other reason." The Texas Supreme Court affirmed the appellate court's holding that "or any other similar payments made" was ambiguous as a matter of law. Therefore, there were unresolved fact issues as to whether Burlington's payment of "shut-in" royalties (later couched as delay rental payments on appeal) extended the term NPRI that necessitated remand to the trial court.

Burlington also unsuccessfully argued that Section 91.402 of the Texas Natural Resources Code barred the Koopmanns' breach-of-contract claim and served as their exclusive remedy. That statute requires lessees to make royalty payments within 120 days after the end of the month of first sale of production, but it also allows a lessee to withhold royalty payments without interest when there is "a dispute concerning title that would affect distribution payments." Section 91.404(c) gives royalty owners a statutory cause of action for nonpayment of royalties and interest. Burlington argued the Texas Legislature intended royalty owners' cause of action for failure to pay royalties under Section 91.402 to be exclusive. Again, the Court disagreed with Burlington and held that the statute did not contain the requisite express "clear repugnance" to statutorily abrogate the Koopmanns' common-law cause of action based on the terms of their lease. Therefore, the Koopmanns were free to pursue that breach-of-contract claim.

2. Endeavor Energy Resources, L.P. v. Discovery Operating, Inc., 554 S.W.3d 586 (Tex. Apr. 13, 2018)

Endeavor Energy Resources, L.P. v. Discovery Operating, Inc. is yet another retained-acreage case decided by the Texas Supreme Court in 2018. The facts were as follows: Endeavor acquired oil and gas leases covering a 640-acre tract and the north half of an adjoining 640-acre tract to the south. The leases contained retained acreage clauses and Endeavor drilled four wells on the leases. The two wells drilled on the 640-acre tract were both located in the southeast quarter of the section. The two wells drilled in the north half of the adjoining tract were both drilled in the eastern portion of that half section. After completing the wells, Endeavor filed certified proration plats with the Texas Railroad Commission. The plats designated approximately 81 acres for each well encompassing a total of 320 acres (two quarter sections where the wells were actually located).

After the primary terms of Endeavor’s leases expired, Patriot Royalty and Land LLC reviewed the leases and proration plats Endeavor filed with the RRC and concluded that Endeavor’s leases terminated as to the northwest quarter of Section 9 and the southwest quarter of Section 4. Patriot then obtained leases on that acreage and later assigned them to Discovery. Discovery then drilled producing wells on that acreage, which led to the lawsuit.

When Endeavor learned that Discovery had drilled wells on the tracts, it objected to Discovery’s assertion of any leasehold interest. Relying on the retained acreage clauses, Discovery asserted that Endeavor’s leases had expired as to the lands outside the 81-acre proration units Endeavor formed at the RRC. In response, Endeavor argued that it retained 160 acres around each well because the leases’ references to “maximum producing allowable” meant that each proration unit automatically consists of the greatest amount of acreage permitted per RRC rules.

At the time, the RRC’s rules for the Spraberry Trend Area allotted 80 acres to a proration unit with an additional 80 acres of “tolerance acreage” at the operator’s election. The Spraberry field rules required operators to file certified plats describing their proration units. The leases’ retained acreage clauses stated, “[this] lease shall automatically terminate ... save and except those lands and depths located within a governmental proration unit assigned to a well ... [containing] the number of acres required to comply with the applicable rules and regulations of the Railroad Commission of Texas for obtaining the maximum producing allowable for the particular well. “The Texas Supreme Court concluded that the leases’ use of “assigned” referred to the lessee’s assignment of acreage through its regulatory filings.

Focusing on the specific lease

language, the Court agreed with Discovery that the retained acreage clauses required the operator to file a plat assigning only the amount of acreage necessary to obtain the maximum producing allowable as determined by the applicable field rules, which in this case was 80 acres. To retain 160 acres, Endeavor needed to actually assign 160 acres to each well, which it did not do. Having met the threshold requirement for compliance with the field rules, Endeavor retained “exactly what it bargained for: approximately 81 acres per well.”

Notably, the Court further indicated that “[a]lthough such an assignment would hypothetically raise each well’s maximum producing allowable, when productive acreage is a component of the maximum producing allowable — as it is here — the operator must verify that additional acreage is actually necessary or required to achieve the maximum allowable” or it may “open itself up to claims that it is not acting in good faith in purporting to retain a substantially greater amount of acreage.”

3. *XOG Operating, LLC v. Chesapeake Expl., Ltd. P’Ship*, 554 S.W.3d 607 (Tex. Apr. 13, 2018)

This case is a companion to the *Endeavor* case. Like in *Endeavor*, the court wrestled with how much acreage was retained by a retained acreage clause. Here, the retained acreage clause in a term assignment from XOG Operating to Chesapeake stated Chesapeake would keep the leased acreage within the proration or pooled unit of each drilled well. However, the assignment contractually defined “proration unit” to include the boundaries of a proration unit “then established or prescribed by field rules.” The commission’s field rules for the Allison-Britt Field applied. A “prescribed” proration unit under the Allison-Britt rules was 320 acres per well.

Chesapeake filed its Form P-15 for each well and assigned proration units totaling 800 acres. XOG Operating sued Chesapeake after Chesapeake refused to release or reassign any acreage to XOG. Each side moved for summary judgment. XOG argued that the disputed acreage was not retained by Chesapeake pursuant to the term assignment's retained acreage provision because Chesapeake failed to "assign" that acreage to a proration unit in its P-15 filings. Chesapeake argued that it retained 320-acre units as "prescribed by field rules."

The same principles applied in *Endeavor* were applied in this case, but this time with a different result based on the alternative language in the retained acreage clause. The Court acknowledged that although retained acreage provisions are based on regulatory filings and rules, they are fundamentally contractual in nature and parties to these clauses are presumed to know the law and to have stated their agreement in light of it.

The Court held that acreage "included within the proration unit for each well ... prescribed by field rules" referred to acreage set by the field rules, not acreage "assigned" by the operator (like in *Endeavor*). At the time, the field rules defined a "prescribed" proration unit as 320 acres for the Allison-Britt Field. Therefore, under the retained acreage provision's language, Chesapeake retained 1,920 acres for its five wells drilled — not just 800 acres. The Court distinguished *Endeavor* from this case in that the field rules in *Endeavor* referred to assignments by operators claiming acreage. The field rules in this case referred to "assigned" acreage as well, but unlike the rules in *Endeavor*, the rules here also "prescribed" proration units.

4. *Dimock Operating Co. v. Sutherland Energy Co. LLC*, No. 07–16–00230–CV, 2018 WL 2074643 (Tex. App. — Amarillo, April 24, 2018, pet. denied) (memorandum opinion)

This case discusses the impact of certain key contractual provisions within a farmout agreement, and it displays how the court will interpret such provisions based on the farmout's express language. *Dimock* yet again highlights the importance of paying close attention to the express language in your oil and gas agreements, as standard provisions within oil and gas agreements frequently vary in wording.

Dimock Operating Co. and Dimock entered into a seismic exploration and farmout agreement in which Dimock (farmor) farmed out 15 sections in Hardeman County to Sutherland (farmee). The parties agreed that upon "project payout," Sutherland would assign well operations and a 51 percent working interest back to Dimock, and the remaining 49 percent would be assigned to various charities. "Project payout" was the point at which revenues equaled two times Sutherland's capital costs. A dispute subsequently arose as to whether Sutherland reached payout.

This case addresses four significant oil and gas issues. First is whether costs incurred by Sutherland after drilling its initial well constitute "capital cost[s]" and should therefore be considered in determining whether Sutherland reached "project payout." The SEFA expressly defined Sutherland's capital cost as "cost[s] incurred by Farmee [Sutherland] for land and seismic for the Hamrick Area 3D Shoot ... a fifty thousand dollar (\$50,000) prospect fee, and cost for drilling, testing, completing, and equipping, the Initial Earning Well." Land and seismic costs were undefined. The Court found that, contrary to Dimock's argument, "land and seismic costs" were not ambiguous merely because the terms had no contractual definitions. Nor were the terms "deposit" and "prospect fee" ambiguous within the agreement. Additionally, one punctuation mark cost Dimock a financial blow: a comma. Dimock argued that the placement of the comma after the word "equipping" made the definition of "capital costs"

ambiguous. The Court disagreed and concluded that it was a grammatical error to contend that the comma's placement indicated a modifying element — seismic costs were “capital costs” under the SEFA.

Interestingly, at trial, Sutherland passed up the opportunity to obtain a ruling from the trial court that “project payout” had not occurred. Instead, it requested that the court find that “capital costs” included the cost of undertaking seismic operations — a fact that Sutherland assumed would resolve the question of project payout. The Court of Appeals did not find the solution so simple. There was a finding about whether project payout had occurred, but there was no finding on whether the capital costs claimed by Sutherland were actually proper under the SEFA. Of the 66 points of error Dimock raised on appeal, many were reversed and remanded to the trial court for further proceedings because there was no adjudication of these key issues.

Next, Dimock argued that the joint operating agreement executed along with the SEFA obligated Sutherland to seek the consent of the nonoperators before incurring expenses associated with the seismic operations. The court disagreed. The SEFA provided Sutherland with the “sole, exclusive and irrevocable right to conduct Seismic Operations” and the right to “use its sole discretion to determine the type, nature, timing, and extent of all Seismic Exploration Operations. “The operating agreement, in contrast, obligated Sutherland as the operator to seek consent from nonoperators for any project reasonably estimated to cost more than \$25,000. Sutherland argued that the JOA was not effective as between Dimock and Sutherland until after project payout— when Dimock actually owned an interest in the contract area. The court disagreed with Sutherland yet ruled in Sutherland's favor on this issue. The SEFA stated that the SEFA would serve as the governing agreement in the event of any conflict between the operating agreement and the SEFA. Language giving Sutherland discretion to

determine when to conduct seismic operations prevailed over the subsequent operations language in the JOA.

While the trial court did not specify the reason it concluded that Sutherland had the right to conduct the seismic operations, the controlling language within the SEFA could have served as the basis for such a holding. Therefore, the Court of Appeals affirmed the trial court's judgment.

Dimock also brought a claim for fraud alleging Sutherland falsely represented that seismic analysis was needed to locate the proper drill site, thus inducing Dimock to include seismic costs in the parties' agreement. Contrary to its representations, Sutherland did not undertake seismic operations prior to drilling the first well. Sutherland alleged Dimock did not reasonably rely on this alleged misrepresentation. The Court concluded that Sutherland did not conclusively negate justifiable reliance, however, and that summary judgment on Dimock's fraud claim was improper and would be remanded for trial.

Finally, Dimock alleged Sutherland breached its fiduciary duty. The JOA created a contractual fiduciary duty requiring Sutherland to properly account for the distribution of well proceeds to Dimock. Dimock alleged that Sutherland breached this duty by failing to distribute the well proceeds to Dimock and converting them for Sutherland's own use. The Court recognized that while a JOA alone does not generally create a fiduciary relationship, the “Custody of Funds” provision (which is standard in most model forms of the JOA) states that the agreement does not establish a fiduciary relationship between the parties “for any purpose other than to account for Non-Operator funds as herein specifically provided.” This language effectively created a contractual fiduciary duty to Dimock from Sutherland to properly account for the distribution of well proceeds. Because the Court identified unresolved fact issues as to this claim,

summary judgment on the claim was improper as well and would be remanded for trial.

5. *Devon Energy Production Co. L.P. v. Apache Corp.*, 550 S.W.3d 259 (Tex. App. — Eastland, April 30, 2018, pet. denied Oct. 19, 2018)

In this case of first impression, the Eastland Court of Appeals held that Section 91.402 of the Texas Natural Resources Code (the “Division Order Statute”) does *not* require an operator to pay lease royalties to mineral interest owners who have leased to a different working interest owner. And, by implication, the Court held that such mineral interest owners are *not* entitled to royalties under the Division Order Statute until payout of the well from which royalties are due.

Norma Jean Hester leased her undivided one-third mineral interest in a tract of land in Glasscock County to Apache, reserving a 25 percent royalty. The remaining mineral owners leased their combined two-thirds mineral interest to Devon, also reserving a 25 percent royalty. Devon and Apache were unable to agree on a JOA. Apache then drilled seven producing oil and gas wells on the property and, after payout, paid Devon its two-thirds share of the production revenue net of Apache’s costs.¹ Apache left it to Devon to pay the Devon lessors their quarter royalty.

The Devon lessors sued Devon and Apache alleging generally that they had not been paid all royalties due under their leases with Devon, among other claims. Devon filed a cross-claim against Apache seeking a declaratory judgment that the Division Order Statute required Apache to pay the Devon lessors’ royalties under Devon’s leases: (i) directly and (ii) *before payout* of Apache’s wells. Devon alleged Apache was then to charge those royalty payments against Devon in determining the wells’ payout point.

The Eastland Court of Appeals noted

the rules of equitable accounting among mineral co-tenants are well established. “A co-tenant has the right to extract minerals from common property without first obtaining the consent of his co-tenants; however, he must account to them on the basis of the value of any minerals taken, less necessary and reasonable costs of production and marketing.” It was also clear that Devon and Apache, as lessees, were co-tenants in the mineral estate.

However, the question of *which* co-tenant must pay royalties to the lessors of a nonparticipating working interest owner under the Division Order Statute has never been addressed by the Texas appellate courts. The statute provides as follows:

“The proceeds derived from the sale of oil or gas production from an oil or gas well located in this state must be paid to each payee by payor on or before 120 days after the end of the month of first sale of production from the well. After that time, payments must be made to each payee on a timely basis according to the frequency of payment specified in the lease or other written agreement between payee and payor.”²

Siding with Apache, the Court focused on the words “payor” and “payee” in the statute to determine Devon — not Apache — was obligated to pay the Devon lessors. A “payor” is “the party who *undertakes* to distribute oil or gas proceeds to the payee, whether as the purchaser of the production of oil or gas generating such proceeds or as operator of the well from which such production was obtained or as lessee under the lease on which royalty is due.”³ A “payee” is “any person

legally entitled to payment from the proceeds derived from the sale of oil or gas from an oil or gas well located in this state.”⁴

The Court held Apache and the Devon lessors did not have a “payor-payee relationship” under the Division Order Statute because Apache did not “undertake” to pay the Devon lessors by entering into leases with them. Thus, even though Apache was the “operator of the well from which ... production was obtained,” it was not a “payor” under the Division Order Statute. Paying the Devon lessors their lease royalty was Devon’s obligation, not Apache’s.

The Court’s opinion did not expressly address the issue of *when* a royalty owner who has leased to a nonparticipating working interest owner is entitled to royalties pursuant to their lease — before or after payout. However, the Court’s opinion appears to have answered that question by implication. The Division Order Statute does not require an operator to pay royalties to mineral interest owners who have leased to a different working interest owner. And, Texas co-tenancy law does not require the operator to pay net production revenues to a nonparticipating co-tenant until after payout. Thus, absent special lease provisions, a mineral estate lessor is not entitled to lease royalties from a well drilled by the lessee of a different mineral estate co-tenant until after payout of the well from which royalties are due. Until that point, the operator is not required to pay net production revenue to the other lessee/nonparticipating co-tenant, and the other lessee/nonparticipating co-tenant has received no revenues on which royalties are due to his lessor.

6. *TRO-X L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458, (Tex. 2018)

This case is a cautionary tale about failing to draft robust “anti-washout” clauses. In 2007, TRO-X entered into

five mineral leases covering acreage in Ward County, Texas. The leases contained identical terms, including a 660-foot offset well clause. TRO-X later entered into a participation agreement transferring its interest in the 2007 leases to Eagle Oil and Gas and reserving a 5 percent back-in option once the 2007 leases reached “project payout.” The participation agreement contained an “anti-washout clause” providing that TRO-X’s back-in option “shall extend to and be binding upon any renewal(s), extension(s), or top lease(s) taken within one year of termination of the underlying interest.”

Eagle Oil and Gas eventually assigned its interest in the 2007 leases to Anadarko. A year later, Anadarko completed a well on land adjacent to the tract covered by the 2007 leases approximately 550 feet from the lease line. Anadarko then failed to drill an offset well within the required period. When one of the lessors alleged Anadarko breached the 2007 leases’ offset well clause, Anadarko engaged all of the lessors in negotiations that culminated in their executing new leases. These 2011 leases were with the same lessors and covered the same mineral interest as the 2007 leases, but they did not release — and in fact did not even mention — the 2007 leases. The 2011 leases all specified an effective date of June 17, 2011, and were executed on various dates between June 15 and June 30, 2011, on which date Anadarko executed a written release of the 2007 leases. When TRO-X later approached Anadarko to confirm that its back-in interest in the 2011 leases was valid, Anadarko denied that it was.

TRO-X filed suit against Anadarko in February 2014, asserting claims for breach of contract and trespass to try title. The case was tried to the bench, with the central issue being whether the 2011 leases were “top leases” in which TRO-X retained its back-in interest or new leases that washed out TRO-X’s interest. Anadarko argued the very act of executing the 2011 leases terminated the 2007 leases. Therefore, according to Anadarko, the

2011 leases were not top leases because they were never in effect at the same time as the 2007 leases. TRO-X, however, argued the 2007 leases remained in effect until Anadarko executed its release. Therefore, according to TRO-X, the 2007 and 2011 leases were all in effect between June 17, 2011 (the 2011 leases' effective date) and June 30, 2011 (the date Anadarko executed its release of the 2007 leases). Thus, TRO-X alleged the 2007 and 2011 leases were in effect at the same time, albeit briefly, and thus the 2011 leases were top leases subject to TRO-X's back-in interest. The trial court sided with TRO-X. The El Paso Court of Appeals reversed, holding that TRO-X had not proved the parties intended the 2011 leases to be top leases. The Texas Supreme Court granted review.

The Court began its analysis with the familiar maxim that mineral leases are interpreted using the same rules applied to other contracts. Thus, whether the parties intended the 2011 leases to be top leases must first be determined by reviewing the 2011 leases' plain language. If the plain language unambiguously provided the 2011 leases were or were not top leases, the inquiry is complete. The Court then explained that, "[b]asically, a top lease is a subsequent oil and gas lease which covers one or more mineral interests subject to a valid, subsisting lease." A top lease becomes effective only upon termination of the bottom lease.

The Court then summarized the law regarding lease termination through execution of a new lease in three parts. First, "when a lessor and lessee under an existing lease execute a new lease of the same mineral interest subject to the existing lease, the existing lease is terminated unless the new lease objectively demonstrates both parties' intent otherwise[.]" Second, "[a] party contending that a new lease did not terminate the previous one has the burden to prove and obtain a finding that the parties intended for the previous lease to survive execution of the new lease." And third, "[t]he proof must be either specific language in the

new lease objectively demonstrating that intent, or an ambiguity in the new lease as to termination of the previous lease together with evidence that the parties did not intend the new lease to terminate the prior lease."

The Court found the 2011 leases did not contain language indicating the parties intended the 2007 leases to survive the 2011 leases' execution. Therefore, the 2007 leases were terminated by the 2011 leases' execution and were never in effect at the same time as the 2011 leases. Accordingly, the 2011 leases were not top leases and were not subject to TRO-X's back-in interest. The fact that Anadarko executed a release of the 2007 leases a few days after some of the 2011 leases were executed was irrelevant because the 2011 leases were unambiguous.

One might assume that TRO-X's back-in interest could easily have been preserved if the parties had included language in the participation agreement making the anti-washout clause applicable to "new leases." However, on July 26, 2018, the Amarillo Court of Appeals held that such a clause violates the Rule Against Perpetuities.⁵ In light of the Texas Supreme Court's opinion in TRO-X, the Amarillo Court's opinion in *Yowell* will be one to watch in 2019.

7. *Murphy Exploration & Production Co.-USA v. Shirley Adams, et al.*, 560 S.W.3d 105 (Tex. 2018), opinion corrected and superseded (Nov. 30, 2018)

In this case, the Texas Supreme Court held that an offset well clause in an operator's leases with the plaintiffs did not require the operator to drill wells reasonably calculated to protect against drainage from the neighboring tract. Four justices issued a stinging dissent⁶ arguing the majority disregarded the well-established meaning of the term "offset well" as used in the Texas oil field for decades.

In 2009, Murphy Exploration & Production Co.-USA entered into two oil and gas leases with the plaintiffs (the Herbsts). The leases contained identical offset well clauses, which provided:

It is hereby specifically agreed and stipulated that in the event a well is completed as a producer of oil and/or gas on land adjacent to and contiguous to the leased premises, and within 467 feet of the premises covered by this lease, that Lessee herein is obligated to ... commence drilling operations on the leased acreage and thereafter continue the drilling of **such off-set well or wells** with due diligence to a depth adequate to test the same formation from which the well or wells are producing from the adjacent acreage.

When a well on a neighboring tract triggered this clause, Murphy drilled a well on the Herbsts' tract ... 2,100 feet from the triggering well. It was undisputed this well would *not* prevent drainage from the neighboring tract. Thus, the Herbsts argued the well did not satisfy the leases' offset well clause because it was not designed to protect against drainage.⁸ In response, Murphy argued the well satisfied the offset well clause because it was drilled on the leased premises to the same depth as the triggering well, which Murphy claimed is all the leases' explicit language required. Murphy argued the notion that an offset well must actually protect against drainage or even be reasonably calculated to do so has no place in horizontal drilling in tight shale formations where drainage is minimal. The trial court sided with Murphy. The San Antonio Court of Appeals sided with the Herbsts. The Texas Supreme Court granted review.

The Texas Supreme Court began its analysis by noting the law is well-established that courts interpret oil and gas leases just like any other contract. Thus, a court must read the lease, give its terms their plain and ordinary meaning, and enforce the lease as written. Courts may not modify a lease's explicit language absent extraordinary circumstances. However, a court can consider the context in which a lease was negotiated and executed to inform its interpretation of the words used in the lease. And, a court can interpret words and phrases in a lease in accordance with any special definitions those terms have in a particular industry.

In a 5-4 opinion, the Court held Murphy's offset well clause did *not* require Murphy to drill a well to protect against drainage from the neighboring tract and that Murphy's well, some 2,100 feet from the triggering well, satisfied the leases' offset well clause. The Court's opinion was based on two important premises. First, the Court held Murphy's leases provided their own definition of "offset well." That is, the leases stated that when the offset well clause was triggered, Murphy had to drill a well (1) on the Herbsts' tract, (2) with due diligence, and (3) to the same depth as the triggering well, and the drilling of "**such offset well**" would satisfy the offset well clause. Because the leases used the term "such offset well" when setting forth three criteria for a satisfactory well, but did not include a proximity requirement or an express protection requirement, the Court would not impose one.

Second, the Court considered the "surrounding circumstances" under which the leases were executed in interpreting the offset well clause. The Court noted leases were executed in 2009 and were drafted with horizontal drilling in the Eagle Ford Shale in mind. The Court considered expert testimony presented by Murphy that drainage is almost nonexistent from horizontal wells in tight-shale formations like the Eagle Ford. Thus, the Court concluded it would be "illogical" for an offset well clause to

require a well — even an “offset well” to attempt to protect against nonexistent drainage.

Four justices dissented, arguing the commonly understood definition of “offset well” required Murphy to drill its offset well at a location where a reasonably prudent operator would drill to protect the leasehold from actual or potential drainage, regardless of whether any was actually occurring. The dissent claimed the majority opinion effectively read the term “offset” out of the leases.

While the Court purported to limit its holding to the facts before it, the Murphy opinion may have far-reaching consequences for the Texas oil and gas business. The vast majority of wells drilled in Texas today are horizontal, tight-shale wells. The Court’s opinion indicates the common understanding of an “offset well” is antiquated in this context. How can operators protect against drainage that does not exist? The Murphy opinion indicates the Texas Supreme Court believes they cannot — and that they no longer have to even try.

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

In this case, the Texas Supreme Court considered whether the royalty interest reserved to the grantor in a 1951 deed was fixed (set at a specific percentage of production) or floating (dependent on the royalty amount in the applicable oil and gas lease). In 1951, J.E. and Minnie Bryan conveyed by deed a tract of land in Karnes County to S.E. Crews. The deed reserved an NPRI to the Bryans, as follows:

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.

Through a series of conveyances, U.S. Shale acquired a share of the Bryans’ NPRI. In 2009, EOG acquired a lease on the subject tract providing for a lessor’s royalty of 20 percent, *i.e.*, one-fifth. In 2010, Laborde acquired some of the property burdened by the Bryan-U.S. Shale NPRI and thus became a lessor under EOG’s lease. EOG sent Laborde a division order crediting the Bryan heirs and U.S. Shale with one-half of the one-fifth royalty under EOG’s lease for a total royalty of one-tenth of production. Laborde disputed the division order, alleging the Bryan heirs and U.S. Shale should only be credited with one-sixteenth of production by virtue of a fixed one-sixteenth NPRI reserved in the Bryan deed. After Laborde notified EOG of its disagreement, EOG put all parties in suspense, and litigation ensued. The trial court ruled for the Bryan heirs and U.S. Shale. The Court of Appeals reversed, and the Texas Supreme Court granted review.

The Texas Supreme Court explained that a royalty may be conveyed or reserved as a “fractional” royalty interest or a “fraction of” royalty interest. A “fractional” royalty interest is referred to as a “fixed” royalty because it remains constant and is untethered to the royalty amount in a particular oil and gas lease. A “fraction of” royalty interest is referred to as a “floating” royalty because it varies depending on the royalty in the oil and gas lease in effect and is calculated by multiplying the fraction in the royalty reservation by the royalty in the lease.

Turning to the Bryan deed, the Court found that read independently, the first

clause of the royalty reservation unambiguously reserved a floating royalty (“an undivided one-half (1/2) interest in and to the Oil Royalty, Gas Royalty and Royalty in other Minerals”). The issue was whether the second clause (“the same being equal to one-sixteenth (1/16) of the production”) indicated an intent to fix the Bryans’ NPRI at one-sixteenth of production. In determining that it did not, the Court noted that when the Bryan deed was executed, a one-eighth lessor’s royalty was “ubiquitous.” Thus, even though no lease was in effect covering the Bryans’ property at the time the deed was executed, the Bryans must have assumed that when a lease was taken on the property, it would provide for a one-eighth royalty. Of course, one-half of a one-eighth royalty equals one-sixteenth. Thus, the Court reasoned the Bryans must have intended to reserve a one-half floating royalty, which the Bryans must have assumed would equal one-sixteenth of production. Had they not, the first clause of the reservation tying the NPRI to the applicable royalty would be rendered meaningless. Accordingly, the Court reinstated the trial court’s judgment finding the Bryan deed unambiguously reserved a floating one-half royalty interest.

Three justices dissented⁹, finding the Bryan deed’s reference to one-half of the “Oil Royalty, Gas Royalty and Royalty in other Minerals,” none of which were defined terms in the deed, did not unambiguously create a floating royalty. The dissent found the reservation’s second clause, however — “the same being equal to one-sixteenth of production” — could not have more plainly stated an intent to reserve a fixed one-sixteenth royalty. Accordingly, the dissent would have held the Bryan deed’s reservation created a fixed one-sixteenth royalty interest.

9. *Louis Dorfman, et al. v. JP Morgan Chase Bank N.A., et al.*; No. 02-17-00387-CV, 2018 WL 5074769, (Tex. App. — Fort Worth, Oct. 18, 2018, no pet.)

This is the second appeal in a lawsuit over a title dispute in Karnes County, Texas. In 2010, Petrohawk Properties L.P. acquired a lease on approximately 200 mineral acres in the Eagle Ford. The owners of the property were Dorfman and Moravits.¹⁰ Dorfman and Moravits traced their ownership in the tract back to a 1901 deed from William Mayfield to Mary Moravits. Around the same time that Petrohawk acquired its lease, JP Morgan Chase Bank N.A., acting as trustee for the Red Crest Trust, leased the very same acreage to Orca Assets G.P. LLC. Orca traced the trust’s ownership back to a 1929 deed from Mary Moravits to H.J. McMullen. Unbeknownst to JP Morgan, however, the 1929 deed from Moravits to McMullen had been “cancelled and held for naught” by a 1944 judgment in a lawsuit by Mary Moravits and her sons. It is unclear just what Orca knew about this judgment. It was undisputed that when Orca leased the acreage from JP Morgan, however, Orca knew there was a “problem” with the title but was prepared to defend it and believed it could be resolved in the Red Crest Trust’s favor. In 2011, Petrohawk filed suit against JP Morgan and Orca seeking to quiet title based on the 1944 judgment. The trial court sided with Petrohawk, Dorfman and Moravits. The 1929 deed was void and, as a result, so was Orca’s lease.

The trial court allowed a permissive interlocutory appeal of its title decision, and the Court of Appeals affirmed. The case was then remanded back to the trial court for adjudication of Dorfman and Moravits’ tort claims against JP Morgan and Orca.

Specifically, Dorfman and Moravits alleged JP Morgan and Orca had slandered their title to the disputed acreage and that JP Morgan had been negligent in leasing the acreage to Orca when it should have known the Red Crest Trust did not own it. A slander of title claim, however, requires evidence of “legal malice” from the defendant. And malice is not

present if a claim to title is made under a reasonable belief that the claimant had title. Therefore, if a party claims title “under color of title upon the advice or attorneys, or upon reasonable belief that a party has title to the property acquired,” he has not acted with legal malice. Likewise, a negligence claim requires proof the defendant acted unreasonably.

Both the trial court and the Court of Appeals found that Dorfman and Moravits presented no evidence that JP Morgan or Orca acted with legal malice or even unreasonably when they claimed title to the disputed acreage. The Court of Appeals noted that JP Morgan and Orca had several legal arguments as to why, notwithstanding the 1944 judgment, they held valid title to the acreage, and “[a]lthough these arguments were unavailing at the end of the day, they evinced the reasonableness of JP Morgan and Orca Assets’ belief under the applicable law that JP Morgan held title to the tract.” The absence of any proof of unreasonableness was fatal to Dorfman and Moravits’ slander of title, negligence and tortious interference claims. Thus, the claims were dismissed.

10. *Carl M. Archer Trust No. Three, et al v. Ronald Ralph Tregellas and Donnita Tregellas*, 566 S.W.3d 281 (Tex. 2018)

In this case, the Texas Supreme Court held the Discovery Doctrine tolled the statute of limitations for breach of a right of first refusal (“ROFR”) in mineral property even though the conveyance made in violation of the ROFR was filed in the public records. In June of 2003, members of the Cook family executed a deed conveying the surface estate of a tract of land in Hansford County, Texas (top of the Panhandle) to two trusts (the “Trustees”). The sellers retained the mineral estate, but granted the Trustees a right of first refusal (“ROFR”) to purchase the mineral estate.

In March of 2007, two of the ROFR grantors (the “Farbers”), executed a

mineral deed conveying their interest in the mineral estate to Ronald and Donnita Tregellas. The Farbers did not notify the Trustees of the sale, but the deed was filed of record on March 30, 2007. Nevertheless, the Trustees did not learn of the sale until May 4, 2011. The Trustees then promptly sued the Farbers and the Tregellas for breach of the ROFR and tortious interference on May 5, 2011. The Trustees sought damages and specific performance requiring the Tregellas to transfer the mineral interest to the Trustees.

The defendants argued the Trustees’ claims were barred by the statute of limitations. Specifically, the defendants argued the Trustees’ claims accrued on March 28, 2007 at the very moment the mineral estate was transferred to the Tregellas in violation of the ROFR. Because the Trustees did not file suit until May 5, 2011, the defendants argued the Trustees missed the four-year statute of limitations by seven days. In response, the Trustees argued the Discovery Doctrine tolled the limitations period to May 4, 2011, the date they learned of the offending conveyance, among other arguments.

The trial court sided with the Trustees, but the Amarillo Court of Appeals reversed, holding that the Trustees cause of action accrued when the mineral estate was conveyed without notice on March 28, 2007. The court of appeals held that the breach of a right of first refusal is not the type of “inherently undiscoverable” injury to which the Discovery Doctrine applies because conveyance documents, like the Farber to Tregellas deed, are usually filed in the public records.

The Texas Supreme Court reversed the court of appeals and reinstated the trial court’s judgment. The Court noted that a ROFR grantor has a duty to provide the grantee with notice of his or her intention to sell the property burdened by the ROFR. Thus, a ROFR holder does not have a duty to “continually monitor public records” for conveyances made in violation of the ROFR. Accordingly, the violation

of a ROFR is the type of “inherently undiscoverable” injury to which the Discovery Doctrine applies. This situation is different than an underpaid royalty owner, for example, who has a duty to confirm his or her royalties have been paid correctly, and thus, is put on notice of royalty underpayments based on Railroad Commission filings. Pursuant to the Discovery Doctrine, the Trustees’ claim for breach of the ROFR did not accrue until May 4, 2011, the date on which the Trustees discovered the offending conveyance, and thus, their May 5, 2011 lawsuit was timely. The

Court, therefore, reinstated the trial court’s judgment, and awarded the Tregellases’ mineral estate to the Trustees.

CONCLUSION

We hope this article has helped you address the legal issues presented by modern oil and gas activities. As always, if you believe one of these decisions might have a bearing on an action you are about to take or a decision you might make, then consult an oil & gas lawyer.

¹ Prior to commencing drilling operations, Apache sent Devon an Authorization for Expenditure offering to jointly develop the property. Ultimately, Devon elected not to participate in drilling the wells.

² Tex. Natural Res. Code § 91.402(a) (Vernon Ann. 2016).

³ Tex. Natural Res. Code § 91.401(2) (Vernon Ann. 2016).

⁴ Tex. Natural Res. Code § 91.401(1) (Vernon Ann. 2016).

⁵ See *Tommy Yowell, et al. v. Granite Operating Co., et al.*, No. 07-17-00112-CV, 2018 WL 3596744 (Tex. App. — Amarillo, July 26, 2018).

⁶ Justices Johnson, Green, Guzman and Boyd.

⁷ The leases covered adjacent 302-acre tracts in Atascosa County.

⁸ The Herbsts did not contend Murphy’s offset well had to “actually” protect against drainage and never stated how close to the triggering well the offset well had to be. Rather, the Herbsts merely argued the offset well had to be “in close proximity to the lease line adjacent to the tract where the triggering well was drilled” and that Murphy’s purported offset well was not close enough.

⁹ Justices Boyd, Johnson and Blacklock.

¹⁰ As used herein, “Dorfman” and “Moravits” refers collectively to the plaintiffs, Louis Dorfman, K1 Holdings Ltd., Sam Myers, J.M.D. Resources Inc., Bill Cogdell Bowden, Barbara Standfield, Stacey Dorfman-Kivowitz, Julia Dorfman, Mark Dorfman, David Phillip Cook, Cheryl King Cook, Sam Y. Dorfman Jr., Frank Moravits, individually and as the trustee of the Moravits Children Trusts Nos. 1 and 2, Shelby Moravits and Jerry Kortz.

¹¹ Dorfman and Moravits also brought claims against JP Morgan and Orca for tortious interference with property rights and tortious interference with existing and prospective contractual relationships. However, the appellate Court’s analysis was limited to the slander of title claim.



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