TOP TEN TEXAS OIL AND GAS CASES OF 2019 – PART 3 OF 3

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This is the final installment of the three-part series discussing significant oil and gas decisions from state courts in Texas during 2019. It is not intended to be a strict legal analysis, but rather a useful guide for landmen in their daily work. Therefore, a complete discussion of all legal analyses contained in the decisions are not always included.

7. Wagenschein v. Ehlinger, 581 S.W.3d 851 (Tex. App.—Corpus Christi 2019, pet. filed).

In this case, the Corpus Christi Court of Appeals examined the difference between a "tenancy in common" and a "joint tenancy" upon the death of an interest owner. Under a tenancy in common, the deeded interest descends to the heirs and beneficiaries of the deceased cotenant. In a joint tenancy with right of survivorship, on the other hand, upon the death of one joint tenant, that tenant's share in the property passes to the surviving joint tenants, not the heirs of the deceased joint tenant. Once all of the joint tenants pass away, the joint tenancy is extinguished.

The dispute in *Wagenschein v. Ehlinger* was over property in Dewitt County. The property was owned by seven individuals (the "**Wagenschein Heirs**") in a tenancy in common. In 1989, the Wagenschein Heirs sold the property and executed a deed containing the following royalty 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.***

Pioneer Natural Resources Company ("**Pioneer**") drilled a producing well on the property in 2010 and began paying the Wagenschein Heirs royalties. As each Wagenschein Heir died, Pioneer credited their royalty interest to the surviving heirs, thus increasing their respective royalty payments.

In 2015, the children of one of the deceased Wagenschein Heirs filed suit against their family members, alleging that because the 1989 deed referenced the royalty reservation being credited to "Grantors and Grantors' ***successors***" it created a "tenancy in common" and not a "joint tenancy." If the deed created a tenancy in common, the children of the deceased Wagenschein Heirs would inherit their parents' royalty interest rather than have it passed to the surviving Wagenschein Heirs.

The trial court and the court of appeals disagreed with the Plaintiffs. Though the deed used the word "successor" one time, it unambiguously reserved the royalty interest to the Wagenschein Heirs and the "***survivor[s]***" of the Wagenschein Heirs, not their "successors", "heirs" or "beneficiaries." Thus, the deed unambiguously created a joint tenancy with right of survivorship, not an inheritable tenancy in common, and as each Wagenschein Heir died, their interest in the property passed to their surviving siblings, not their children.

8. *HJSA No. 3 Limited Partnership v. Sundown Energy, LP, et al.*, --S.W.3d--, No. 08-18-00113-CV, 2019 WL 3852677 (Tex. App.—El Paso Aug. 16, 2019, pet. filed).

This case deals with a dispute over the interpretation of a continuous development clause contained in an oil and gas lease. HJSA No. 3 Limited Partnership ("**HJSA**") succeeded to the interest of the lessor under an oil and gas lease which became effective on August 4, 2000. The lease had a primary term of six years, and a continuous development clause which afforded Sundown Energy, LP ("**Sundown**") and its partners (successors to the lessees) the right to delay termination of the lease by engaging in continuous drilling operations.

The lease contained the following relevant provisions:

> [Para. 7(a)] After the sixth anniversary of the Effective Date, and subject to the provisions of Paragraph 7(b), Lessee shall reassign to Lessor or Lessor's designee, all of Lessee's operating rights in all tracts of the
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> [Para. 7(b)] The obligation in 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.
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> [Para. 18] *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.(emphasis added).

HJSA alleged that the lease terminated because, during a period between 2007 and 2013, Sundown did not comply with the continuous development obligation by allowing more than 120 days to elapse between the spudding of subsequent wells. Sundown countered that it has engaged in continuous drilling operations as defined in Paragraph 18. Sundown argued that reworking operations it conducted on existing lease wells satisfied the obligation contained in Paragraph 7.

Both parties moved for summary judgment and the trial court ruled in favor of Sundown, accepting Sundown's argument that the definition of "drilling operations" set out in Paragraph 18 must be read into Paragraph 7. In reversing the trial court, the court of appeals cited the rule of contract construction that specific provisions control over general provisions in an agreement.

The court reasoned that Paragraph 7(b) created a special limitation, and that in order to avoid the operation of the special limitation, Sundown was obligated to spud a new well in non-producing areas

each 120 days. Paragraph 7 described the sort of drilling operation that would satisfy the continuous obligation, and that work was more specific than the general definition contained in Paragraph 18.

Sundown and the dissent argued that the phrase at the beginning of Paragraph 18 ("*Whenever used in this lease..*") required that the definition be incorporated into Paragraph 7, to ensure that the provisions of Paragraph 18 were not rendered meaningless. If read together, as suggested by Sundown, its activities on the lease premises satisfied the continuous drilling obligation. The court disagreed. The specific provisions of Paragraph 7 controlled, and since the lease used the term "drilling operations" in other provisions beyond Paragraph 7, the court's ruling would not render Paragraph 18 meaningless.

9. *Kevin Scribner v. Randal Wineinger, Individually and D/B/A Akins Oil Company and Parra Oil and Gas, Inc.,* -- S.W.3d --, No. 02-19-00208-CV (Tex. App.—Ft. Worth Oct. 17, 2019 no pet.).

In 2002, Kevin Scribner's father transferred the working interest in an Archer County mineral lease to Scribner via an assignment filed in the public records. In 2010, Louise Daniel, acting under Scribner's father's will, assigned that same working interest to Latigo Drilling, LLC ("**Latigo**"). Latigo began operating the lease. After a series of recorded conveyances, Randal Wineinger and David Park acquired the working interest in June of 2016. On October 1, 2016, Wineinger and Park assigned the interest to Parra Oil & Gas, Incorporated ("**Parra**"). From 2010 and thereafter, Parra and each of its predecessors in title exclusively operated the lease, received the revenues therefrom (less royalties) and paid all taxes attributable thereto.

In June of 2016, Parra discovered the 2002 assignment to Scribner. Parra's attorney contacted Scribner via email asking for an assignment of the working interest in light of Daniel's "mistake" in not finding the 2002 assignment. Parra's counsel followed up with Scribner two more times requesting an assignment. Scriber refused.

In June of 2018, Scribner sued Wineinger and Parra claiming ownership of the working interest. Wineinger and Parra responded that their predecessors acquired the working interest through adverse possession, citing 16.025 of the Texas Civil Practice and Remedies Code, which provides as follows:

> (a) A person must bring suit not later than five years after the day the cause of action accrues to recover real property held in peaceable and adverse possession by another who:
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> (1) Cultivates, uses, or enjoys the property;
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> (2) Pays applicable taxes on the property; and
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> (3) Claims the property under a duly registered deed.

If an action for real property is barred by the five-year statute, then "the person who holds the property in peaceable and adverse possession has full title, precluding all claims." To adversely possess a mineral interest, the adverse possessor must drill and produce oil or gas from the estate.

In response, Scribner claimed that when Parra's counsel requested an assignment, he acknowledged Scribner's superior title, thus defeating adverse possession.

By the time Parra's counsel contacted him in June of 2016, the five-year limitations period had already run. During that five-year period, Scribner's working interest was not in Wineinger or Parra's possession, but rather, was in the possession of their predecessors. Thus, Parra's counsel's acknowledgement of Scribner's title in 2016 could not undo the running of the limitations period, which expired in 2015.

Accordingly, the trial court granted summary judgment for Wineinger and Parra and the court of appeals affirmed. Wineinger and Parra had acquired Scribner's working interest by adverse possession.

10. Mesa S. CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC, 14-18-00708-CV, 2019 WL 6210213 (Tex. App.—Houston [14th Dist.] Nov. 21, 2019, no pet. h.).

This case examined whether or not a pre-work contractual mineral lien waiver is enforceable based upon amendments to Chapter 53 of the Property Code (the Mechanic's and Materialman's Lien chapter) enacted in 2011. The operative language was added to section 53.286, which provides "[n]otwithstanding any other law and except as provided by § 53.282 [the statutory lien waiver forms], any contract, agreement, or understanding purporting to waive the right to file or enforce any lien or claim created under this chapter is void as against public policy."

Southern SWS Acquisition ("**Mesa**"), under a master services agreement, performed work on three wells for an operator, Deep Operating, LLC ("**Deep Operating**"). Mesa was not fully paid, so it filed three mineral liens in Milam County encumbering Deep Operating's property under Chapter 56 (the Mineral Lien chapter). After Deep Operating filed for bankruptcy protection, Mesa filed suit against Deep Operating's parent company, Deep Energy Exploration Partners, LLC ("**Deep Energy**"). Deep Energy moved for summary judgment on Mesa's claims, arguing that Mesa contractually waived its right to assert liens against Deep Operating's wells and waived its right to seek payment on the contract from any entity other than Deep Operating. The trial court granted Deep Energy's motion and dismissed Mesa's claims.

At the court of appeals, Mesa argued mineral lien waivers are void as against public policy because Chapter 56 incorporates Chapter 53's restriction against no-lien clauses. Mesa contended that such a restriction relates to timing or enforcement of lien rights. Mesa relied on the well settled proposition that Texas lien statutes should be "liberally construed" and cited numerous examples of such liberal constructions and previous incorporations of portions of Chapter 53 into Chapter 56 liens.

Deep Energy relied on an oral ruling by the US Bankruptcy Court for the Northern District of Texas which held that such advance lien waivers are valid because (i) the Texas legislature specifically did not include a prohibition against them in Chapter 56 and (ii) Texas courts' preference that parties are free to contract around statutory or constitutional rights outweighs public policy arguments against mineral lien waivers.

Mesa countered that this oral ruling had no precedential value, relying instead on Property Code § 56.041 and another bankruptcy court's published opinion which required courts to incorporate the attorneys' fee provision in Chapter 53 into Chapter 56.

The court of appeals decided to sidestep this fight stating, "[w]e need not decide and express no opinion whether Mesa's liens are valid because Mesa is not entitled to recover on the liens against Deep *Energy*." (emphasis added). The court focused on the Payment of Claims provision in the MSA and agreed with Deep Energy's contention that the MSA's Payment of Claims clause required that Mesa "look solely and exclusively to Deep Operating for payment." Relying on a 2012 case out of the Dallas Court of Appeals and a 2015 decision from the Texas Supreme Court, the Houston Court concluded that when a party to a contract agrees to seek payment or damages only from one source to the exclusion of all others, that party has effectively waived its rights to such payment or damages from other parties. Regardless of the label, the Payment of Claims provision effectively waived Mesa's liens. Thus, this provision appears to have functioned as a de facto lien waiver.

CONCLUSION …

We hope this series 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, consult a lawyer.

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