Top 10 Oil & Gas Cases of 2017 - Part 3

by **Chance Decker & Ryan Sears of Gray Reed**

1. ***Samson Exploration, LLC v. T.S. Reed Properties, Inc., et al*, No. 15-0886 (Tex. June 23, 2017).**

This case involved a dispute over a mistaken, overlapping pooling designation. In 2001, Samson created a gas unit covering certain depths in East Texas. Samson then drilled and obtained production from two wells in the unit. The first well was produced at approximately 12,300 feet (Well No. 1). The second well produced at approximately 13,000 feet (Well No. 2). Samson then unilaterally amended its unit designation to change the unit's depth to "12,400 feet and below." Thus, the amendment had the effect of removing Well No. 1 from the pooling unit.

After amending the first pooling unit, Samson filed a second unit designation covering much of the same acreage as the first. This second unit covered "production occur[ing] below a depth of 12,000 feet." Due to an error by Samson's lawyer, this second unit designation did not include a depth limitation (it should have included all depths below 12,000 feet, <u>and above 12,400 feet</u>). Thus, the second unit overlapped with the first unit at depths below 12,400 feet. And, because Well No. 2 was producing at approximately 13,000 feet, it was within the boundaries of *both* pooling units.

Samson claimed its failure to include a depth limitation on the second pooling unit was an error, and refused to pay royalties from Well No. 2 to the owners in the second pooling unit at depths between 12,000 and 12,400 feet (the "Overlapping Unit Owners"). Not surprisingly, the Overlapping Unit Owners filed suit.

The Texas Supreme Court rejected all three of Samson's arguments. First, the Court rejected Samson's "scrivenor's error" argument, holding that such an error only excuses a party from the express terms of their contract if it evidences a *mutual* mistake in documenting the parties' agreement. Though Samson presented evidence that *Samson* made a mistake by failing to include a depth limitation in the second pooling designation, it presented no evidence the *Overlapping Unit Owners* made a mistake.

Next, the Court rejected Samson's argument that a pooling was a cross-conveyance and the Overlapping Unit Owners had nothing to convey in the second pooling. The Court explained that although pooling designations do affect a cross-conveyance of title, oil and gas leases and pooling designations are subject to basic contract law in addition to the law of real property. Thus, the fact that a cross-conveyance of title may fail does not excuse an operator from paying royalties in accordance with the express contractual terms of their mineral leases' pooling clauses. Because the express terms of the Overlapping Unit Owners' leases required Samson to pay them on Well No. 2, Samson was required to do so, cross-conveyance failures notwithstanding.

Finally, the Court held Samson's claim for reimbursement from payments already made to other royalty owners was barred by the "Voluntary Payment Rule." That rule provides "[M]oney voluntarily paid on a claim of right, with full knowledge of all the facts, in the absence of fraud, deception, duress, or compulsion, cannot be recovered back merely because the party at the time of payment was ignorant of or mistook the law as to his liability." Accordingly, the unit owners at depths below 12,400 feet who had been paid a full royalty on Well No. 2 were allowed to keep the overpayments, and Samson was forced to pay the Overlapping Unit Owners out of its working interest revenues.

2. ***Apache Deepwater, LLC v. Double Eagle Development, LLC*, No. 08-16-00038-CV, 2017 WL 3614298 (Tex. App.—El Paso Aug. 23, 2017).**

This case analyzed whether a retained acreage clause provided for "rolling terminations" after the expiration of a lease's primary term or "snapshot termination" at the expiration of a lease's primary term. In 1975, Apache's predecessor (Apache) leased a 640-acre tract in Reagan County. The habendum clause provided a four-year primary term and a secondary term for "as long thereafter as oil, gas, or other minerals or leased substances or any of them are produced from the leased premises . . .." The lease defined the "leased premises" as the entire 640-acre tract. Apache divided the lease into four 160- acre proration units. Each unit had one producing well within its boundaries. At the end of the lease's primary term, all four wells were producing. However, in the ensuing years, three of the four wells ceased production.

In 2012, the property owner leased the property within the three non-producing proration units to Double Eagle. Double Eagle then demanded Apache to execute releases for the property in the non-producing units. Apache refused, contending production from the well in the producing unit held the entire 640-acre tract. Double Eagle then sued for a declaration the lease expired within the non-producing units.

The crux of the dispute was the interplay between the lease's habendum and retained acreage clauses. The lease's retained acreage clause provided

Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease, operations for which were commenced prior to or at the end of the primary term and the proration units as may be allocated to said wells under the rules and regulations of the Railroad Commission of Texas or 160 acres, whichever is greater…

Apache contended this retained acreage clause provided for "snapshot termination." That is, Apache contended this clause required a single snapshot-in-time evaluation as of the end of the lease's primary term, and because each of the four proration units had a producing well in it on that date, the termination obligation in the retained acreage clause did not apply. Conversely, Double Eagle contended the retained acreage clause provided for "rolling terminations." That is, Double Eagle contended that following the primary term, the lease would expire as to any proration unit that did not have a producing well within it at any time (to the extent not saved by the continuous operations clause).

The El Paso Court of Appeals sided with Apache. For the retained acreage clause to modify the habendum clause and provide for rolling proration unit terminations during the lease's secondary term, it had to contain "clear, precise, and unequivocal language" expressing a "clear intent" to do so. The court held the lease's retained acreage clause did not contain such language. Instead, the court held the retained acreage clause provided that *after* the end of the primary term, the lessor could insist that any part of the leasehold that was not within a proration unit which had either a producing well or a well under development that later came into production *at* the end of the lease's primary term, must be released. The language used limited the lessor's right to demand a release "after the primary term" to acreage not within a proration unit with a producing well or continuous operations leading to a producing well "*prior to or at the end of the primary term.*" Thus, the court held the lease did not contain "clear, precise, and unequivocal" language providing for rolling terminations, and that production from any well within the leased tract would hold the lease on the entire tract.

3. *Enterprise Products Partners, and Enterprise Products Operating, L.L.C. v. Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P., No. 05-14-01383, 2017 WL 3033312 (Tex. App.—Dallas July 18, 2017).*

In this case, the Dallas Court of Appeals reversed one of the largest jury verdicts in Texas history. In 2011, Enterprise approached **Energy Transfer Partners, L.P. and Energy Transfer Fuel, L.P. ("**ETP") to discuss a project to retrofit, and eventually to build a crude oil pipeline from Cushing, Oklahoma to Houston, Texas. ETP agreed to work with Enterprise to determine the viability of the project. The parties called the proposed pipeline the "Double E Pipeline."

Enterprise and ETP then entered into a series of preliminary agreements, including a Letter Agreement and Term Sheet. The Letter Agreement stated:

***Neither this letter nor the JV Term Sheet create any binding or enforceable obligations between the Parties and** . . . **no binding or enforceable obligations shall exist between the Parties with respect to the Transaction unless and until the Parties have received their respective board approvals and definitive agreements memorializing the terms and conditions of the Transaction have been negotiated, executed and delivered by both of the Parties**.*

Enterprise and ETP then attempted to secure enough shipping commitments to ensure the Double E Pipeline's viability. They agreed they needed commitments for at least 250,000 barrels per day for ten years to go forward with the project. At the same time, Enterprise contacted Enbridge (US) Inc. to discuss an alternative pipeline. Enbridge already operated a pipeline system from Alberta, Canada to Cushing, and was considering extending its pipelines from Cushing to Houston. Enterprise told Enbridge that if the Double E open season did not garner sufficient shipping commitments, Enterprise was interested in a Cushing-to-Houston pipeline with Enbridge.

The Double E open season closed without sufficient shipping commitments, and Enterprise terminated its participation in the project. Enterprise and Enbridge then agreed to work together on the alternative Cushing-to-Houston pipeline. Enterprise and Enbridge received sufficient shipping commitments, and announced plans for their pipeline soon after.

ETP sued Enterprise for breach of joint enterprise and breach of fiduciary duty, among other claims. ETP alleged it and Enterprise entered into a partnership to "market and pursue a pipeline from Cushing, Oklahoma to the Texas Gulf Coast" and that Enterprise usurped a business opportunity of that partnership by joining with Enbridge on the alternative pipeline. ETP claimed damages equal to the present value of the profits Enterprise would receive during the life of its pipeline with Enbridge. After a four-week trial, the jury found for ETP and the trial court awarded ETP over $500 million in damages.

Om appeal, Enterprise argued ETP's claims were barred by the failure of conditions precedent. That is, Enterprise argued that before a partnership or joint venture could be formed: (1) both parties' boards of directors had to approve the joint venture, and (2) the parties had to execute and deliver definitive joint venture agreements. Because these things never happened, Enterprise agued the conditions precedent to formation of a joint venture were never fulfilled, and ETP's claims should have been dismissed as a matter of law.

ETP did not deny the conditions precedent did not occur, but argued that whether a partnership was formed is controlled by a five-factor test set out in the Texas Business Organizations Code, which includes, amongst other factors, "an expression of an intent to be partners in [a] business." Thus, ETP argued the unfulfilled conditions precedent did not preclude the formation of the partnership because the Letter Agreement, other preliminary agreements, and the parties' conduct were evidence of "an expression of an intent to be partners in a business."

The Dallas Court of Appeals disagreed. The court held the factors set forth in the Code are not exclusive and must be supplemented by the "principles of law and equity." One of those "principles of law" is the law of conditions precedent. And, a condition precedent is "an event that must happen or be performed before a right can accrue to enforce an obligation." Because the conditions precedent had not occurred, and absent a jury finding of waiver, ETP could not recover on its claims, and take-nothing judgment in favor of Enterprise.

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