



The Fourteenth Court of Appeals in Houston recently issued an opinion that will have profound impacts on mineral liens and contractual provisions purporting to waive mineral liens. The question of whether or not a pre-work contractual mineral lien waiver is enforceable is rooted in 2011 amendments made to Chapter 53 of the Property Code (the Mechanic's and Materialman's Lien chapter). Those amendments added 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." This prohibition nullified many contractual lien waiver provisions in construction contracts.

The mineral lien provisions of the Property Code (Chapter 56) do not address lien waivers, but they do incorporate portions of Chapter 53. In particular, Section 56.041 provides: "A claimant must enforce the lien within the same time and in the same manner as a mechanic's, contractor's, or materialman's lien under Chapter 53." For this reason, many believed contractual mineral lien waivers, like Chapter 53 M&M lien waivers, violated Texas public policy, and thus were unenforceable.¹ The Houston Fourteenth Court of Appeals recently upended that view in *Mesa S. CWS Acquisition, LP v. Deep Energy Expl. Partners, LLC*.²

In that case, Mesa Southern SWS Acquisition (Mesa), under an MSA, 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. 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.

In turn, Deep Energy relied on an oral ruling by the US Bankruptcy Court for the Northern District of Texas in *In Re: Energy & Exploration Partners, Inc., et al.*³ The bankruptcy court 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.

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¹ See Brian C. Mitchell, Clark A. Donat, Priority Pitfalls of Mineral Lien Waivers: A Recent Bankruptcy Ruling Has Far-Reaching Implications for Texas Mineral Lien Law, 13 Tex. J. Oil Gas & Energy L 179, 180 (2018).

² 14-18-00708-CV, 2019 WL 6210213 (Tex. App.—Houston [14th Dist.] Nov. 21, 2019, no pet. h.).

³ Case 16-04065, (Bankr. N. D. Tex. Jan. 26, 2017).

Mesa countered that this oral ruling had no precedential value, relying instead on Property Code § 56.041 and another bankruptcy court's published opinion in *In re Cornerstone E&P Co., LP*.⁴ The Cornerstone bankruptcy court held that § 56.041 required the court to incorporate the attorneys' fee provision in Chapter 53 into Chapter 56. The court reasoned: "reading the provisions of § 56.041 that a mineral lien claim must be enforced 'in the same manner' as liens under Chapter 53 to include both the duties required of and the rights granted to mechanics'/materialmen's lien claimants gives those provisions their most comprehensive application without nullifying or conflicting with other statutory provisions."

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.

This case (or one like it) seems destined for the Texas Supreme Court. In the meantime, oilfield service providers should not assume that advance contractual waivers of mineral liens are void as a matter of public policy. Service companies should attempt to strike such provisions from their master services agreements along with provisions limiting their claims against parents or affiliates of operators.

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⁴ *Baker Hughes Oilfield Operations, Inc. v. Union Bank of Cal., NA (In re Cornerstone E&P Co., LP)*, 435 B.R. 390 (N.D. Tex. 2010).