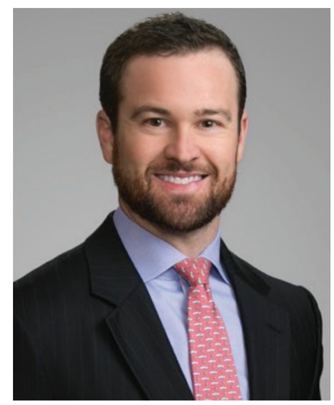
Top 10 Texas Oil and Gas Cases of 2019



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This article discusses significant oil and gas decisions, in chronological order, 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.

Ellison v. Three Rivers Acquisition LLC, No. 13-17-00046-CV, 2019 WL 613262 (Tex. App. — Corpus Christi, Feb. 14, 2019, pet filed)

This case demonstrates two important lessons for oil and gas practitioners regarding (1) interpreting discrepancies between metes and bounds property descriptions and general acreage statements and (2) best practices for drafting boundary stipulations.

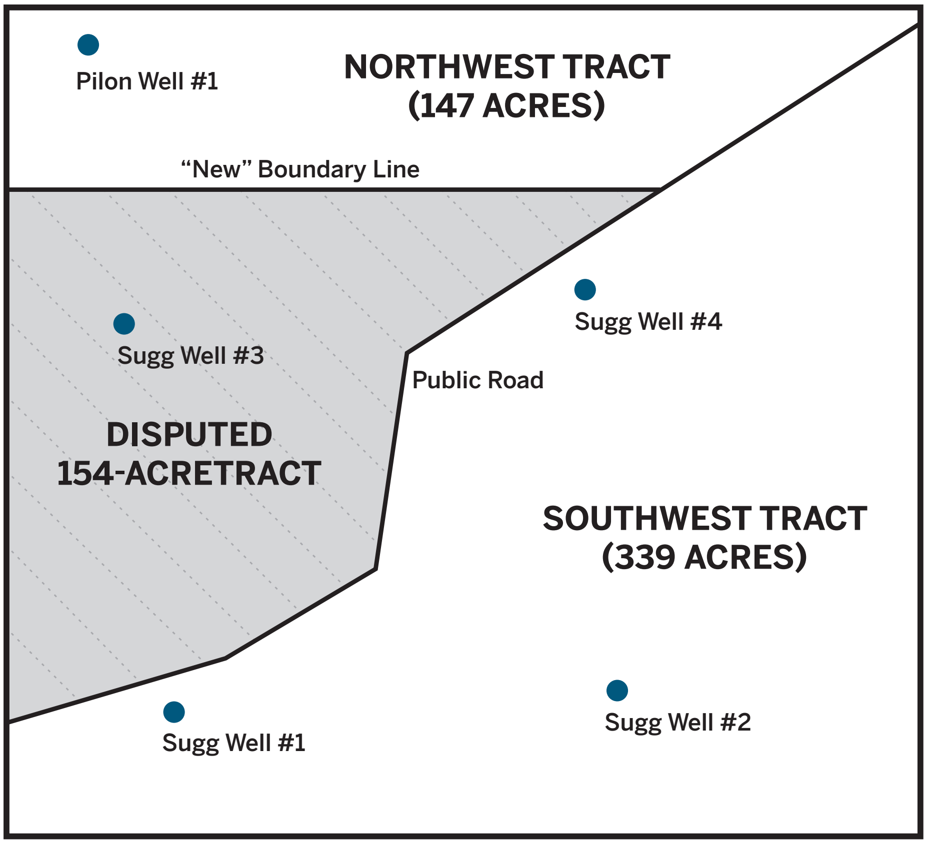
When J.D. Sugg died in 1925, his family inherited a section of land in Irion County. Some of Sugg's heirs agreed to swap land with the Noelkes, nearby landowners. To effectuate the swap, the Suggs executed a deed on July 26, 1927, which conveyed several tracts to the Noelkes. The Sugg deed described one of these tracts as

> all of ... the lands located North and West of the public road which now runs across the corner of [the applicable survey], containing 147 acres more or less.

There was just one problem: there were actually 301 acres in the section northwest of the only public road that ever ran through the survey. Thus, the question became, did the deed convey all 301 acres northwest of the public road, or just 147 acres?

The Suggs, Noelkes and their respective successors always treated the Sugg deed as conveying 301 acres, not 147. Nevertheless, in 2008, Samson Oil and Gas asked Jamie Ellison (who had acquired a mineral lease on the northwest tract) to sign a boundary stipulation purporting to resolve the metes and bounds versus acreage discrepancy in the Sugg deed. The boundary stipulation would have moved the property line to a new location consistent with an original conveyance of just 147 acres. Thus, the boundary stipulation would have

FIGURE 1



made the property lines look like Figure 1.

Ellison apparently signed a letter to Samson stating he agreed to the new boundary, but Samson never actually sent him a boundary stipulation and the letter didn't contain any conveyance language. Ellison's surviving spouse, Marsha, maintained that Ellison's signature on the letter was a forgery.

Samson subsequently drilled a producing oil well south of the new boundary line on the 154-acre tract that Samson contended was *not* conveyed in the Sugg deed. Concho eventually acquired Samson's lease. Throughout this time period, Sunoco purchased the oil from the well on the disputed 154-acre tract.

In 2013, Marsha Ellison, filed a trespass-to-try title suit against Concho, arguing she was the rightful lessee of the disputed 154-acre tract. Concho moved for summary judgment on Marsha's claims, arguing the 2008 letter signed by Jamie Ellison (1) relinquished any claim Marsha might possess in the land beyond the 147-acre tract depicted in the 2008 boundary stipulation and (2) ratified the boundary as depicted in the 2008 boundary stipulation and letter. Concho also brought a counterclaim against Marsha for breach of the 2008 boundary stipulation letter (it argued the letter was a contract). The trial court granted Concho's motion and dismissed all of Marsha's claims. The jury awarded Concho $1,030 in out of pocket damages and $392,479.39 in attorneys' fees on its breach of contract claim.

The Court of Appeals reversed, holding the 2008 boundary stipulation was null and void. The court held that, notwithstanding the metes and bounds versus acreage statement discrepancy in the Sugg deed, it unambiguously conveyed 301 acres — not 147 — because the metes and bounds description controls.

Likewise, because there was only one public road running through the section, there was no legitimate dispute about where the property boundary was prior to the 2008 boundary stipulation being executed. In the absence of a legitimate boundary dispute, a boundary stipulation is only effective if it contains words of conveyance (like a deed) and complies with the Statute of Frauds. Here, the 2008 boundary stipulation and letter from Samson to Jamie Ellison contained neither.

Thus, the two lessons this case teaches are (1) in case of a discrepancy between a metes and bounds description and a statement of acreage, the metes and bounds description controls, unless the language of the conveyance or the facts clearly demonstrate otherwise, and (2) always use words of conveyance in boundary stipulations to ensure their enforceability.

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

In this case, the Texas Supreme Court held that a royalty delivered "into the pipeline, tanks or other receptacles with which the wells may be connected" is akin to a royalty delivered "at the wellhead." Thus, the payee was entitled to deduct its postproduction costs from its royalty calculation, notwithstanding the fact the royalty would be calculated based on the "amount realized" from downstream sales.

Amber Harvest LLC, an affiliate of Texas Crude Energy LLC, owns overriding royalty interests in oil and gas leases operated by Burlington Resources Oil & Gas Co. in Live Oak, Karnes and Bee counties. The royalty is "delivered by [Burlington] into the pipelines, tanks or other receptacles" to which the wells are connected, free of production costs and calculated based on the "value of the oil, gas or other minerals" produced under the leases. The term "value" is defined as the "amount realized" from the sale of the oil or gas produced from the leases or any product thereof.

For nine years, Burlington

deducted its postproduction costs from the amount realized on downstream sales prior to calculating Texas Crude and Amber Harvest's royalties. Disagreements arose, and citing the ORRI's definition of "value," Texas Crude alleged it was entitled to royalties based on the sales price derived from downstream sales with no deduction for Burlington's postproduction costs. Relying on the Texas Supreme Court's 2016 opinion in *Chesapeake Exploration & Production LLC v. Hyder*, the trial court granted summary judgment for Texas Crude and the Court of Appeals affirmed. The Texas Supreme Court granted review to clarify its holding in *Hyder.*

In general, oil and gas royalty interests are free of production expenses, but usually subject to postproduction costs. Postproduction costs generally refer to processing, compression, transportation and other costs to prepare raw oil or gas for sale at downstream locations.

Postproduction processing enhances oil and gas' value after it leaves the well. Therefore, accounting for postproduction costs becomes necessary when a royalty is valued at the wellhead, but the sale used to calculate the royalty occurs downstream. In this situation, the lessee is generally entitled to deduct its postproduction costs from the downstream sale price prior to calculating the royalty.

Of course, parties are free to contract for a royalty valued downstream, without deduction of postproduction costs. In *Chesapeake Exploration & Production LLC v. Hyder*, 483 S.W.3d 870 (Tex. 2016), for example, the Texas Supreme Court held that a royalty based on the "amount realized" from a downstream sale of oil or gas grants the royalty holder a right to a percentage of the sale proceeds with no adjustment for postproduction costs.

Texas Crude and Amber Harvest argued the "amount realized" language in the ORRI creates the kind of cost-free royalty the Supreme Court discussed in *Hyder*. The operative clause required Burlington to pay a royalty based on the "value" of the oil and gas produced and defined "value" as the "amount realized" from Burlington's sales.

In this case, however, the Texas Supreme Court clarified that even when a royalty is *calculated* based on the amount realized on downstream sales, a payee is entitled to deduct postproduction costs if the royalty is "valued" at the wellhead.

Here, Texas Crude and Amber Harvest's royalty interest was to be "delivered to [Texas Crude] into the pipelines, tanks or other receptacles with which the wells may be connected, free and clear of all development, operating, production and other costs." Though this language is not a model of clarity, the Texas Supreme Court held this clause is akin to delivering a royalty at the wellhead. When a royalty is delivered, and thus valued, at the wellhead, the payee is entitled to deduct postproduction costs, even when the sales used to calculate the royalty occur downstream.

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

Texas Outfitters is the Texas Supreme Court's latest analysis of the executive mineral right — and likely the most significant Texas oil and gas case of 2019. Texas Outfitters involved a ranch in Frio County. The surface of the ranch was owned by the Carter family. The mineral interests were owned 50% by the Carters and 50% by their cousins, the Hindes family.

In 2002, the Carters sold the surface of the ranch, a 4.16 mineral interest and the executive rights to their entire 50% mineral interest to Frank Fackovec through his company, Texas Outfitters Limited. The Carters retained their 46% mineral interest in the ranch. Fackovec paid the Carters approximately $1 million for the ranch and mineral interest. Fackovec intended to operate a high-end deer breeding and hunting operation on the ranch. Thus, purchasing the executive rights was very important to Fackovec because he believed it would allow him to control leasing. The trial record showed that after Fackovec bought the ranch, he built a main lodge, hunters' cabins and deer breeding pens and installed irrigation wells and expensive deer blinds.

Fast forward to 2010 when the development of the Eagle Ford Shale is in its early stages. In March 2010, Fackovec receives an offer to lease his and the Carters' mineral interests for $450 per acre and 22% royalty. Fackovec rejects this offer.

In June 2010, El Paso Oil Exploration & Production Co. offered Fackovec a $1,750-per-acre bonus and a quarter royalty to lease his and the Carters' mineral interest. The Hindes family accepts El Paso's identical offer for their 50% undivided mineral interest, but Fackovec rejects the offer. Fackovec testified he rejected El Paso's offer because (1) he thought he could get a better bonus and (2) he wanted better surface protections for his hunting operation. The Carters wanted Fackovec to accept El Paso's offer. Therefore, the Carters and Fackovec engaged in negotiations for the Carters to buy their executive rights back from Texas Outfitters. The negotiations were unsuccessful because, according to the Carters, the surface protections Fackovec demanded were not reasonable. In fact, at trial, Dora Joe Carter testified that during the negotiations, Fackovec stated he would never agree to any lease. Eventually, El Paso withdrew its offer.

The Carters sued Fackovec and Texas Outfitters in June 2011 alleging 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 Hindes family's 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.

The trial court found that Fackovec breached his executive duty to the Carters by not accepting El Paso's lease offer. The Court of Appeals and the Texas Supreme Court affirmed. The Texas Supreme Court's opinion is remarkable for two reasons.

First, the court clarified that whether the executive is accused of breaching his duty by executing a lease or by refusing to execute a lease, courts will still analyze the entire transaction to determine whether the executive engaged in acts of self-dealing that unfairly diminished the value of the nonexecutive interest.

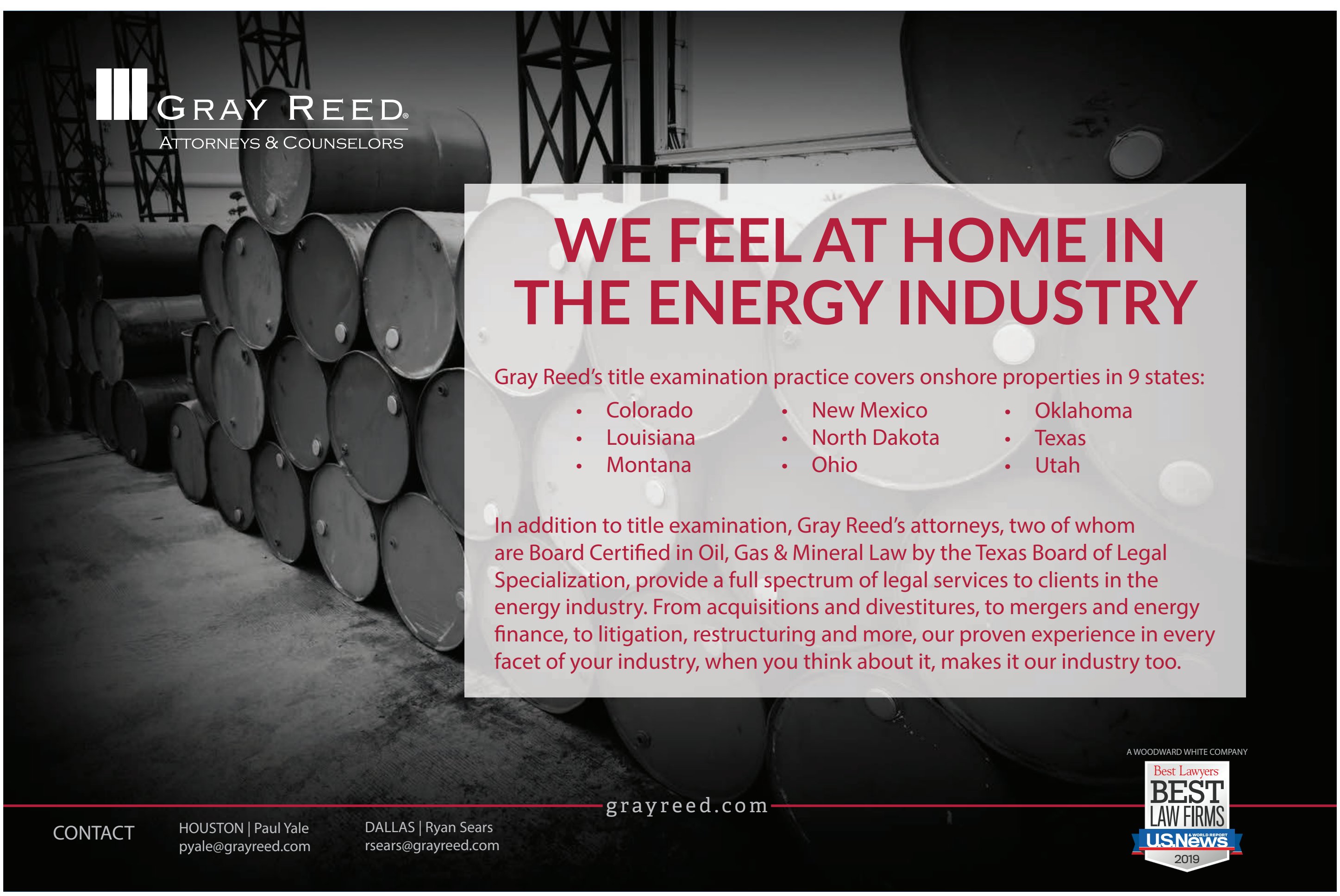
Second, the court held that an executive may be required to accept an offer to lease both the nonexecutive's minerals and his or her own mineral interest in certain situations (remember, El Paso's offer was for both the Carters' and Texas Outfitters' mineral interests). This is a significant change in Texas executive rights jurisprudence. And in a state that values private property rights, as Texas courts purport to do, a Texas Supreme Court mandate that an executive right owner may be required to lease not just a nonexecutive interest owner's minerals against his will, but in fact must lease *his own* mineral interest in certain circumstances, is quite remarkable.

***Murphy Land Group LLC v. Atmos Energy Corp.*, — S.W.3d —, No. 12-18-00138-CV, 2019 WL 1716359 (Tex. App. — Tyler April 17, 2019, pet. filed)**

Murphy Land Group LLC v. Atmos Energy Corp.) is a pipeline dispute from Houston County. Atmos operated pipelines across Murphy's land under three easements granted to Atmos' predecessor. The easements granted Atmos "the right of way and easement to construct, maintain, and operate pipelines and appurtenances thereto" along with "ingress and egress from the premises, for the purpose of constructing, inspecting, repairing, maintaining, and replacing the property of [Atmos]."

In 2012, Murphy and Atmos executed a "roadway lease" granting Atmos a 40-foot "right of way and easement" on a path that Atmos would select across Murphy's property. The roadway lease expired in 2015.

Murphy contended that Atmos' pipeline easements "merged" into the roadway lease such that when the roadway lease expired, so too did the pipeline easements. Therefore, when Atmos entered onto Murphy's property in 2016 to commence a temporary pigging operation, Murphy filed suit seeking



a declaratory judgment that (1) Atmos' easements expired upon the expiration of the roadway lease and (2) that even if the easements had not expired, they did not give Atmos the right to conduct "smart pigging" operations using gas flaring to move the pig along the pipeline.

The trial court dismissed Murphy's claims on summary judgment and the Court of Appeals affirmed. The court explained that the merger doctrine refers to the "absorption of one contract into another subsequent contract." When the same parties to one contract enter into a subsequent contract *dealing with the same subject matter* as their first contract without stating whether the second contract operates to discharge or substitute the first contract, the two contracts must be interpreted together and the latter contract prevails to the extent they are inconsistent. For the merger doctrine to apply, the subsequent contract must (1) be between the same parties as the first, (2) embrace the same subject matter as the first and (3) have been so intended by the parties.

Here, the pipeline easements and the roadway lease did not deal with the same subject matter. Though the easements provided Atmos with the right of ingress and egress in general terms, the roadway lease gave Atmos the right to construct a roadway of a specific size on a specific path of Atmos' choosing with no limitations on the purposes for its use. Because the easements and the roadway lease did not deal with the same subject matter, the merger doctrine did not apply and Atmos' easements survived the roadway lease's expiration.

The court also sided with Atmos on the pigging issue. The court stated: "When interpreting the granting language of an easement, [courts] resolve all doubts about the parties' intent against the grantor … in order to confer upon the grantee the greatest estate possible under the instrument." Accordingly, an easement grantee receives, by implication, all rights "reasonably necessary" to enjoy the rights the easement grants expressly. These rights may change over time and in accordance with technological advances.

Here, the pipeline easements authorized Atmos to "construct, maintain, and operate pipelines and appurtenances thereto" along with "ingress and egress from the premises, for the purpose of constructing, inspecting, repairing, maintaining, and replacing the property of [Atmos]." It was undisputed that a pipeline pigging operation is a pipeline "maintenance" procedure and thus clearly fell within the scope of the easement. And the invention of gas flared "smart pigs," which are used to detect defects, deformities and other issues in the pipelines, was a technological development that fell within the scope of the easements' permitted uses. Therefore, Atmos would be allowed to conduct smart pigging operations on Murphy's land pursuant to its pipeline easements.

***Joseph Russell Trial and Michael Leo Trial v. Jerome Dragon Jr. and Patricia G. Dragon,* — S.W.3d —, No. 18-0203, 2019 WL 2554130 (Tex. June 21, 2019)**

In this case, examining whether the estoppel by deed doctrine applies to prevent petitioners from asserting title to an interest they inherited from their mother, when their father previously purported to sell that interest to the respondents, the Texas Supreme Court reversed and remanded the Court of Appeals' judgment by holding that neither the estoppel by deed doctrine nor the opinion in *Duhig* apply.

Leo Trial and his six siblings each owned a 1/7th interest in real property situated in Karnes County. In 1983, Leo gifted to his wife, Ruth, "one-half (1/2) of all of [his] right, title and interest in and to" the property. As a result, Leo and Ruth each owned a 1/14th interest in the property, with Ruth's 1/14th being her separate property. Said conveyance was recorded in Karnes County a few days after execution.

In 1992, Leo and his siblings purported to convey the entire Karnes County property to the Dragons. Each of the seven siblings executed identical deeds, 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 1992 deed contained a 15-year mineral reservation and a general warranty clause that provided:

> We do hereby bind ourselves, our heirs, executors and administrators to WARRANT AND FOREVER DEFEND all and singular the said premises unto the [Dragons], their heirs and assigns against every person whomsoever lawfully claiming or to claim the same, or any part thereof.

It should be noted that Ruth was not a party to the 1992 deed, and the deed did not mention Ruth's 1/14th interest. The Dragons were not otherwise aware of the 1983 gift deed as they did not obtain a title opinion. Leo died testate in 1996 with his entire estate going to trust for the benefit of Ruth for life, then corpus to his two sons. Ruth died in 2010. As a result, Ruth's 1/14th interest passed to the Trial sons, giving each a 1/28th interest in the property.

In 2014, after an operator noticed from a lease status report that Ruth owned an undivided 1/14th interest, said operator prepared a new division order and began paying the Trial sons their respective royalties in a suspended account. This prompted the Dragons to sue.

The Dragons argued that under *Duhig* and its progeny, Leo breached the general warranty in the 1992 deed at the time of execution because he owned only half of what he purported to convey, and the Trial sons, as Leo's direct heirs, are bound by the deed's general warranty and are estopped from asserting title on any portion of the property.

Conversely, the Trials argued that estoppel by deed does not apply because the Trial sons are not claiming an interest in the property under their father, Leo, the original grantor to the Dragons in the 1992 deed, but rather they are claiming that their interest arises from their mother who did not execute the 1992 deed and, thus, could not be bound by that deed.

The court explained that over the years, the doctrine of estoppel by deed developed to have a wide application that "all parties to a deed are bound by the recitals therein, which operate as an estoppel, working on the interest in the land if it be a deed of conveyance, and binding both parties and privies; privies in blood, privies in estate, and privies in law." The court provided that estoppel by deed "does not bind mere strangers, or those who claim by title paramount the deed. It does not bind persons claiming by an adverse title, or persons claiming from the parties by title anterior to the date of the reciting deed."

The court here explained that *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." The court stated that the facts in this case differ significantly from those in *Duhig* — namely, Leo did not own the interest required to remedy the breach at the time of the 1992 deed to the Dragons, but rather Ruth owned the 1/14th interest as her separate property. The court highlighted that estoppel by deed "does not bind individuals who are not a party to the reciting deed, nor does it bind those who claim title independently from the subject deed in question."

The Dragons further argued that *XTO Energy*, 357 S.W.3d 47, and *Angell*, 225 S.W.3d 834, are applicable to show that the Trial sons are estopped from claiming the 1/14th interest. However, the court said that neither decision applies here as *XTO Energy* and *Angell* stand for the principle that grantees are bound by recitals in their chain of title. Again, here, the Trial sons are claiming through their mother, not their father who executed the 1992 deed that contained the general warranty.

The Dragons went on to argue that under *Houston First American Savings v. Musick*, 650 S.W.2d 764, at the time the Trials' sons inherited the disputed 1/14th interest, the after-acquired title rule was triggered and the interest vested immediately in the Dragons to make them whole under the express terms of the 1992 deed. The court here disagreed because *Musick* dealt with "a party claiming in the same capacity as the original grantor who made the warranty." And here, conversely, the Trial sons' claim to the 1/14th interest has nothing to do with the 1992 deed to the Dragons whereby Leo purported to convey the entire interest.

The court explained that although the Court of Appeals misapplied *Duhig*, there is no question that Leo breached the general warranty at the time of execution, and therefore the proper remedy is monetary damages. And because the Trial sons are the direct heirs of Leo, they are bound by the general warranty to warrant and forever defend the Dragons from adverse claims to the property. The only question is "whether the Trial sons are liable for damages when they fail to warrant and defend against their own adverse claim to the property — their claim deriving from the interest they inherited from Ruth's separate property — and if so, what the amount of those damages would be."

The court held that because the Trial sons' claim to the 1/14th interest in the subject property is derived from their mother, an independent source predating the 1992 deed, estoppel by deed and the decision in *Duhig* do not apply to divest the Trial sons of their interest. Accordingly, the Texas Supreme Court reversed the Court of Appeals' judgment divesting the Trial sons of their interest and remanded the case to the trial court to determine whether damages are appropriate.

Barrow-Shaver Resources Co. v. Carrizo Oil & Gas Inc., — S.W.3d —, No. 17-0332, 2019 WL 2668317 (Tex. June 28, 2019)

In this case, the Texas Supreme Court held that evidence of industry custom cannot be used to alter an unambiguous consent to assignment clause. The case involved Carrizo Oil & Gas Inc.'s interest in a 22,000-acre lease in North Texas. The lease was set to expire if a producing well was not drilled by April 23, 2011. Carrizo entered into a farmout agreement with Barrow-Shaver Resources Co. in which Barrow-Shaver would earn a partial assignment of Carrizo's interest in the lease in exchange for drilling a producing well. The farmout was memorialized in a letter agreement. An early draft of the letter agreement contained the following "soft" consent to assignment language:

> 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 which consent shall not be unreasonably withheld.

In subsequent negotiations, Carrizo removed the "which consent shall not be unreasonably withheld" language. Thus, the consent to assignment clause read as follows:

> 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 ~~which consent shall not be unreasonably withheld~~.

Barrow-Shaver objected to the deletion of this language, but according to Barrow-Shaver, Carrizo's land manager assured Barrow-Shaver that Carrizo would provide its consent to assignment. Barrow-Shaver ultimately relented and accepted the "hard" consent to assignment clause Carrizo demanded.

Before Carrizo's lease expired, Barrow-Shaver drilled an unsuccessful well on the farmed out acreage (spending $22 million in the process). Raptor Petroleum II LLC then offered Barrow-Shaver $27 million for its farmout rights. Carrizo, however, would not consent to the assignment. Instead, it proposed selling its interest in the lease to Barrow-Shaver for $5 million. Barrow-Shaver did not respond to the offer, and Raptor's offer for the farmout rights fell through.

Barrow-Shaver sued Carrizo for breach of contract and fraud, alleging that even though the consent-to-assignment clause didn't expressly say it, industry custom imposed a reasonableness requirement upon Carrizo's right to withhold consent. According to Barrow-Shaver, conditioning consent to an assignment upon the payment of $5 million from the assignor was not reasonable and offended oilfield custom. The jury agreed and awarded Barrow-Shaver a $27 million verdict against Carrizo.

Barrow-Shaver's victory was short-lived. The Court of Appeals reversed the trial court and entered a take-nothing judgment in favor of Carrizo. The Texas Supreme Court affirmed, holding that the absence of language in the farmout agreement requiring Carrizo's withholding of consent to be reasonable meant Carrizo could withhold consent for any reason or no reason at all. When an agreement is unambiguous, as the farmout agreement was, evidence of industry custom cannot be used to impose obligations the contract's plain language does not impose itself. Additionally, because the farmout agreement unambiguously gave Carrizo a hard consent right, Barrow-Shaver could not have reasonably relied upon Carrizo's land manager's representations that consent would not be withheld. Thus, Barrow-Shaver's fraud claim was dismissed as well.

***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 co-tenant. 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 Co. 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.

***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 succeeded to the interest of the lessor under an oil and gas lease that became effective Aug. 4, 2000. The lease had a primary term of six years and a continuous development clause that afforded Sundown Energy LP 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 lease not then held by production.
>
> [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.
>
> [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 nonproducing 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.

Kevin Scribner v. Randal Wineinger, Individually and D/B/A Akins Oil Co. and Parra Oil and Gas Inc., — S.W.3d —, No. 02-19-00208-CV (Tex. App. — Fort 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 began operating the lease. After a series of recorded conveyances, Randal Wineinger and David Park acquired the working interest in June 2016. On Oct. 1, 2016, Wineinger and Park assigned the interest to Parra Oil & Gas Inc.. 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 alleged mistake in not finding the 2002 assignment. Parra's counsel followed up with Scribner two more times requesting an assignment. Scribner refused.

In June 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;
>
> (2) Pays applicable taxes on the property; and
>
> (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 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 acknowledgment 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.

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 prework contractual mineral lien waiver is enforceable based upon amendments to Chapter 53 of the Property Code (the mechanic's, contractor's or 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."

Mesa Southern CWS Acquisition, under a master services agreement, performed work on three wells for an operator, Deep Operating LLC. Mesa was not fully paid, so it filed three mineral liens in Milam County encumbering Deep Operating's property under Chapter 56 (the lien's against mineral property chapter). After Deep Operating filed for bankruptcy protection, Mesa filed suit against Deep Operating's parent company, Deep Energy Exploration Partners LLC. 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 U.S. 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 that 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 article will help 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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