

# SMU Annual Texas Survey

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Volume 6

Article 10

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2020

## Oil, Gas, and Mineral Law

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### Recommended Citation

Monika Ehrman et al., *Oil, Gas, and Mineral Law*, 6 SMU ANN. TEX. SURV. 217 (2020)

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# OIL, GAS, AND MINERAL LAW

Monika U. Ehrman\*  
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## I. INTRODUCTION<sup>1</sup>

This article focuses on the interpretations of, and changes relating to, oil, gas, and mineral law in Texas from December 1, 2018, through November 30, 2019. The cases examined include decisions of state and federal courts in the state of Texas and the U.S. Court of Appeals for the Fifth Circuit. This article is not exhaustive but is necessarily limited to some of the more important oil and gas cases selected for discussion by the authors.<sup>2</sup>

## II. ADVERSE POSSESSION

### A. *MOORE V. MOORE*

In *Moore v. Moore*,<sup>3</sup> the trial court divided equally all “oil, gas, and other minerals” interests in a divorce.<sup>4</sup> Eight years later, the wife discovered certain such interests and asserted her one-half share. The ex-husband filed a petition, seeking a clarification order that the interests were his separate property. The trial court declined.<sup>5</sup> The Eleventh Eastland Court of Appeals affirmed, concluding that the ex-husband had failed to rebut the presumption that the interests were community property and failed to show “an actual and visible appropriation” of the interests to

1. This article covers the Texas cases and summaries presented by Professors Monika Ehrman and Owen Anderson at the 71st Annual Oil and Gas Law Conference, 2019 Recent Developments in Oil and Gas Law. Monika Ehrman & Owen Anderson, *Chapter 1: 2019 Recent Developments in Oil and Gas Law*, in PROCEEDINGS OF THE INSTITUTE ON OIL AND GAS LAW (Matthew Bender, 2020).

2. Page limitations of this publication required the omission of some cases of interest. The facts in the cases are sometimes simplified to focus on the legal principles. The authors note that these case summaries were previously published in the proceedings of the Institute of Energy Law’s 71st Annual Oil & Gas Law Conference, in 2020. The authors also thank the Oil and Gas, Natural Resources, and Energy Journal (ONE J) for its permission to publish certain identified case summaries.

3. 568 S.W.3d 725 (Tex. App.—Eastland 2019, no pet.).

4. *Id.* at 728.

5. *Id.*

establish adverse possession.<sup>6</sup> The court further treated the interests as nonpossessory and thus not subject to adverse possession.<sup>7</sup>

### III. AREA OF MUTUAL INTEREST (AMI)

#### A. *GLASSELL NON-OPERATED INTERESTS, LTD. v. ENERQUEST OIL & GAS, LLC*

In *Glassell Non-Operated Interests, Ltd. v. EnerQuest Oil & Gas, LLC*,<sup>8</sup> a group of oil companies agreed to cooperatively develop oil prospects and agreed to share interests that they acquired within a designated area of mutual interest (AMI). The agreement's sharing obligation directed that "[w]ithin thirty (30) business days after a [p]arty acquires an [a]cquired [i]nterest within the AMI after the execution of this [a]greement, such [p]arty shall promptly notify the other [p]arties in writing of the details of the acquisition of such [a]cquired [i]nterest."<sup>9</sup> And after an acquiring party has informed the other parties of the gained interests, a party "may elect in writing to acquire its pro-rata share of such [a]cquired [i]nterest."<sup>10</sup>

Plaintiffs sued EnerQuest because EnerQuest acquired an interest in the specific area after the agreement took effect but did not offer a share of the interests to the plaintiff parties. Specifically, two other parties to the agreement, DKE-Dyersdale, Inc. (DKE) and Pati-Dubose, Inc. (Pati-Dubose), assigned their interests to EnerQuest. Plaintiffs argued that EnerQuest breached the contract by refusing to offer a share of the newly acquired interests. The district court granted the companies summary judgment motion on their breach of contract claims.<sup>11</sup> EnerQuest appealed and the judgment was reversed and rendered in favor of EnerQuest.<sup>12</sup>

The U.S. Court of Appeals for the Fifth Circuit held that the contract between the parties "to cooperatively develop oil prospects did not include interests that one member of that group acquired before entering into that agreement."<sup>13</sup> The court reasoned that the parties' letter agreement concerning the AMI provision first stated that it applied to all lands within the Dubose Field that were acquired after the effective date of August 1, 2010.<sup>14</sup> However, the agreement expressly excluded "[a]ll interests, leases or agreements owned by a [p]arty prior to the [e]ffective [d]ate."<sup>15</sup> The Fifth Circuit agreed with EnerQuest that because DKE and Pati-Dubose were parties to the letter agreement and had owned

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6. *Id.* at 734.

7. *Id.*

8. 927 F.3d 303 (5th Cir. 2019).

9. *Id.* at 305.

10. *Id.*

11. *Id.* at 306.

12. *Id.* at 307.

13. *Id.* at 303.

14. *Id.* at 307.

15. *Id.* at 305.

their interests in the Dubose Field before August 1, 2010, those interests were excluded from the AMI.<sup>16</sup> The Fifth Circuit further concluded that if plaintiffs sought to “prohibit the type of activity in which EnerQuest engaged, they could have easily done so.”<sup>17</sup>

#### IV. CLASS ACTIONS AND CERTIFICATION

##### A. *REGMUND V. TALISMAN ENERGY USA, INC.*<sup>18</sup>

In *Regmund v. Talisman Energy USA, Inc.*, a group of lessors brought suit against Talisman Energy USA, Inc. (Talisman) concerning the method Talisman used to calculate royalties. They took issue with the “volumetric allocation and estimated shrinkage” that Talisman used in its royalty calculations.<sup>19</sup> Some of the gas produced from the leases was wet gas, which required stabilization prior to sale.<sup>20</sup> This process reduced the volume of gas sold. Plaintiffs filed a class action suit, arguing that their royalty payment should be based on the amount of production ultimately available for sale and sought certification of a class of nearly four thousand Texas mineral owners under Rule 23(b)(3) of the Federal Rules of Civil Procedure (hereinafter, Rule 23(b)(3)).

The district court denied class certification, finding that while there were common questions among the putative class, the questions did not predominate over the individualized issues in the case.<sup>21</sup> Adequacy was destroyed by risk of intra-class conflicts of interests.<sup>22</sup>

The court explained the legal standard for class certification under Rule 23(a):

(1) the class is so numerous that joinder of all members is impracticable [numerosity]; (2) there are questions of law or fact common to the class [commonality]; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class [typicality]; and (4) the representative parties will fairly and adequately protect the interests of the class [adequacy of representation].<sup>23</sup>

The court determined that typicality, adequacy, and predominance likely posed a significant hurdle for the plaintiffs.<sup>24</sup> Putative class members’ interest had the potential to conflict because when estimates were used to pay royalties some royalty owners could have been over paid while others were underpaid.<sup>25</sup> This conflict could not be solved by allowing the overpaid class members to opt out because Talisman demonstrated that all money attributable to royalties had already been paid out,

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16. *Id.* at 307.

17. *Id.*

18. No. 4:16-CV-02960, 2019 WL 2863926 (S.D. Tex. July 2, 2019) (mem. op.).

19. *Id.* at \*2.

20. *Id.* at \*1.

21. *Id.* at \*9.

22. *Id.* at \*7.

23. *Id.* at \*3.

24. *Id.* at \*4–9.

25. *Id.* at \*5–6.

so overpaid members could be vulnerable to liability under Talisman's counterclaim.<sup>26</sup> Therefore, because the different methods of calculation either burdened or benefitted different class members, the adequacy requirement could not be met.<sup>27</sup> Additionally, the court concluded that the plaintiffs were unable to satisfy the predominance requirement because the plaintiffs did not provide sufficient evidence that the royalty provisions in the leases at issue were substantially similar.<sup>28</sup>

## V. CONSENT TO ASSIGNMENT

### A. *BARROW-SHAVER RESOURCES CO. v. CARRIZO OIL & GAS, INC.*<sup>29</sup>

Carrizo Oil & Gas, Inc. (Carrizo) owned an interest as a lessee in the 22,000-acre Parkey lease that was set to expire if a producing well was not established. Carrizo entered into a farmout agreement with Barrow-Shaver Resources Co. (Barrow-Shaver) to drill on the lease in exchange for a partial assignment of Carrizo's interest in the Parkey lease.<sup>30</sup> An initial draft of the agreement contained a consent-to-assign provision preventing Barrow-Shaver from assigning its rights without Carrizo's express written consent. A later revised draft deleted this language, but Barrow-Shaver insisted on a consent-to-assign provision. Carrizo's representative assured Barrow-Shaver that Carrizo would provide its consent to assign; and the final agreement contained a consent-to-assign provision.<sup>31</sup>

Barrow-Shaver spent \$22 million drilling the well with no success and was approached by a buyer offering approximately \$27 million for Barrow-Shaver's rights.<sup>32</sup> Under the proposed agreement between the buyer and Barrow-Shaver, Carrizo would retain its interest provided for in the farmout. Carrizo refused to consent to the proposed agreement and instead proposed selling its interest in the Parkey lease to Barrow-Shaver for \$5 million. Barrow-Shaver refused Carrizo's offer, and as a result of Carrizo's non-consent to the proposed \$27 million purchase offer, Barrow-Shaver lost the sale.<sup>33</sup>

"Barrow-Shaver sued Carrizo for breach of contract, fraud, and tortious interference with contract."<sup>34</sup> After considering expert testimony and the court's instruction to the jury that evidence of prior drafts of the farmout agreement were to be used only to impeach the credibility of the witness testifying with regard to those prior drafts, the jury reached a verdict in favor of Barrow-Shaver for just over \$27 million. The Twelfth Tyler Court of Appeals reversed the trial court's judgment, holding that

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26. *Id.* at \*5.

27. *Id.* at \*7.

28. *Id.* at \*8-9.

29. 590 S.W.3d 471 (Tex. 2019).

30. *Id.* at 475.

31. *Id.* at 476.

32. *Id.*

33. *Id.*

34. *Id.*

because the consent-to-assign provision was unambiguous, the breach of contract issue should not have been submitted to the jury.<sup>35</sup> Regarding Barrow-Shaver's fraud claim, the appellate court held that there was no evidence supporting justifiable reliance.<sup>36</sup>

The Texas Supreme Court affirmed the court of appeals on different grounds, concluding that: (1) Carrizo's right to withhold consent was unqualified and that the contract did not impose a consent obligation on Carrizo; (2) evidence of the surrounding circumstances as well as industry custom and usage was inadmissible extrinsic evidence; (3) Carrizo's denial of consent could not have breached the parties' contract as a matter of law; and (4) Barrow-Shaver's fraud claim failed as a matter of law because Barrow-Shaver could not justifiably rely on Carrizo's misrepresentations regarding an unambiguous provision.<sup>37</sup>

In reviewing Barrow-Shaver's breach of contract and fraud claims, the supreme court noted that both claims turned on the meaning of the consent-to-assign provision. The supreme court first considered whether the consent-to-assign provision gave Carrizo an unqualified right to consent or a right qualified by a reasonableness standard. The supreme court determined the provision was unambiguous and "plainly state[d] that Barrow-Shaver cannot assign its rights unless it obtains Carrizo's consent, which must be express and in writing."<sup>38</sup> The supreme court also considered whether silence as to refusal or withholding consent should be interpreted to qualify Carrizo's right to withhold consent. The supreme court referenced its prior decision in *Fischer v. CTMI, LLC*,<sup>39</sup> noting that the terms of a contract must be definite and certain only as to terms that are "essential and material" to the agreement. The supreme court determined that the consent-to-assign provision was not material to the farmout agreement because the agreement established both the obligations of the parties, including "the manner in which Barrow-Shaver must drill the well in order to earn an interest under the agreement, what Barrow-Shaver will earn upon successful completion of a well, and what happens in the event that Barrow-Shaver fails to complete the well timely"; and the remedies for breach of such obligations.<sup>40</sup> Thus, silence as to when consent can be withheld "needs no supplement to aid its interpretation," as the terms relating to the withholding of consent were immaterial to the farmout agreement.<sup>41</sup>

The supreme court also considered whether the provision contained an implied obligation for Carrizo to justify withholding consent and an obligation not to withhold consent "unreasonably, arbitrarily, or 'illegiti-

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35. *Id.* at 478; *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, 516 S.W.3d 89, 92 (Tex. App.—Tyler 2017, pet. granted).

36. *Carrizo Oil & Gas, Inc.*, 516 S.W.3d at 98.

37. *Barrow-Shaver Res. Co.*, 590 S.W.3d at 482, 489, 493, 501.

38. *Id.* at 481.

39. *Id.*; *Fisher v. CTMI, LLC*, 479 S.W.3d 231 (Tex. 2016).

40. *Barrow-Shaver Res. Co.*, 590 S.W.3d at 482.

41. *Id.*

mately.’”<sup>42</sup> While the supreme court noted that the Business and Commerce Code imposes a duty of good faith in every contract, the supreme court stated that the duty of good faith is not applicable “where no specific obligation exists.”<sup>43</sup> The supreme court also noted that absent a special relationship, “parties to a contract have no duty to act in good faith” and that the consent-to-assign agreement imposes no duty or obligation on Carrizo.<sup>44</sup> Additionally, the supreme court noted that a special relationship did not exist between Barrow-Shaver and Carrizo as both were sophisticated parties. Thus, the supreme court concluded that the provision contained no obligation to which good faith could attach and declined to read “more stringent obligations than parties intended, as expressed by the negotiated, agreed-to language” in the farmout agreement.<sup>45</sup>

The supreme court disagreed with the lower court’s use of extrinsic evidence to construe the consent-to-assign provision because the farmout agreement was unambiguous.<sup>46</sup> However, it noted that the surrounding circumstances, and the sophistication of both parties, can be considered to “inform the meaning of the language the parties chose to effectuate.”<sup>47</sup> Furthermore, the supreme court clarified such consideration must not be used to change the language of an unambiguous contract or “to show that the parties probably meant, or could have meant, something other than what their agreement stated.”<sup>48</sup> Because of the parties’ sophistication and multiple edited drafts of the farmout agreement, the supreme court found that the consent-to-assign provision was “a bargained-for exchange between the parties.”<sup>49</sup>

Regarding Barrow-Shaver’s fraud claim, the supreme court considered whether Barrow-Shaver could have relied on Carrizo’s oral representations. The supreme court noted that a party’s reliance of an oral representation that directly contradicts the “express, unambiguous terms of a written agreement between the parties is not justified as a matter of law.”<sup>50</sup> The supreme court applied the standard that contradiction between the contract and representation exist “if the meaning of [the] contract ‘conflict[s] with the earlier representation such that a reasonable person could not read the agreement and still plausibly claim to believe the earlier representation.’”<sup>51</sup> Because the consent-to-assign provision directly contradicted Carrizo’s oral representations, Barrow-Shaver’s reli-

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42. *Id.* at 489.

43. *Id.* at 490.

44. *Id.*

45. *Id.* at 492.

46. *Id.* at 484.

47. *Id.* at 483 (citing *URI, Inc. v. Kleberg Cty.*, 543 S.W.3d 755, 763 (Tex. 2018)).

48. *Id.*

49. *Id.* at 484.

50. *Id.* at 498 (citing *JPMorgan Chase Bank, N.A. v. Orca Assets G.P., LLC*, 546 S.W.3d 648, 658 (Tex. 2018)).

51. *Id.*



ance on such oral representation was unreasonable.<sup>52</sup> The supreme court also noted that there were sufficient red flags surrounding the farmout agreement to negate justifiable reliance of the oral representations.<sup>53</sup>

## VI. CONVEYANCES

### A. *ELLISON v. THREE RIVERS ACQUISITION, LLC*<sup>54</sup>

In 1925, the Suggs family deeded several tracts of land to the Noelkes. One tract was described as “[a]ll of . . . [the] lands located North and West of the public road which now runs across the corner of [the survey], containing 147 acres more or less.”<sup>55</sup> There were 301 acres in the section described, but the parties and their successors treated the Suggs Deed as conveying 301 acres, not 147. In 2008, Samson Oil and Gas requested that Jamie Ellison, a mineral lessee on the Northwest Tract, sign a Boundary Stipulation signifying acceptance of the description of the 147-acre tract as set out in the letter. The stipulation purported to move the property line to a new location consistent with an original conveyance of just 147 acres, but it did not contain words of conveyance.

Ellison later brought suit against eleven defendants pleading several causes of action including trespass-to-try-title, conversion, unlawful drainage, gross negligence, and nonpayment of oil and gas proceeds. “Concho counterclaimed for breach of contract and sought declaratory judgment that a 2008 Boundary Stipulation confirmed that the boundary between the two leasehold estates was in a different location than claimed by Ellison.”<sup>56</sup> Ellison filed a summary judgment motion claiming that the leasehold encompassed a certain disputed tract of 154 acres. Concho moved for summary judgment asserting that a 2008 letter relinquished ownership to the disputed land and ratified the boundary as depicted in the Boundary Stipulation.

The trial court granted Concho’s motion and dismissed Ellison’s claims, and the jury returned a verdict in favor of Concho.<sup>57</sup> “Samson and Sunoco filed a joint motion for summary judgment, and Sunoco filed an independent motion for summary judgment; the trial court granted both motions.”<sup>58</sup> Ellison appealed and argued that the trial court erred by:

- (1) granting Concho’s motion for summary judgment;
- (2) failing to grant her own motion for summary judgment;
- (3) failing to enter a take-nothing judgment on Concho’s breach of contract counterclaim;
- (4) granting the motion for summary judgment filed jointly by Sunoco and Samson;
- (5) granting the independent motion for summary judgment filed by Sunoco; and
- (6) committing various errors and

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52. *Id.* at 501.

53. *Id.*

54. No. 13-17-00046-CV, 2019 WL 613262 (Tex. App.—Corpus Christi—Edinburg Feb. 14, 2019, pet. filed) (mem. op.).

55. *Id.* at \*2.

56. *Id.* at \*1.

57. *Id.* at \*4.

58. *Id.* at \*1.

omissions in the jury charge.<sup>59</sup>

The Thirteenth Corpus Christi–Edinburg Court of Appeals reversed and rendered in part and reversed and remanded in part, holding that Ellison raised a genuine issue of material fact as to her conversion claim and her Chapter 91 claim against Sunoco.<sup>60</sup> The appellate court first addressed Concho’s argument that the 2008 Boundary Stipulation was an enforceable conveyance because it satisfied the statute of frauds and contained words of grant. Here, the court disagreed because the Boundary Stipulation did not identify a grantor or a grantee, and lacked operative words of grant showing intention by a grantor to convey the disputed 154 acres to anyone else.<sup>61</sup> The court explained that the Boundary Stipulation was more similar to a “correction deed,” because the original 1927 Deed was not ambiguous.<sup>62</sup> Therefore, the court concluded that the Boundary Stipulation agreement was invalid and void.<sup>63</sup>

Based on the fact that Ellison proved superior title to the disputed 154 acres, the court agreed with Ellison that Concho acted as a bad-faith trespasser when it drilled an oil well within the disputed 154 acres because Concho “did not have an honest and reasonable belief in the superiority of its own title.”<sup>64</sup> This determination led the court to address whether summary judgment for Samson, who had drilled the well, and for purchasers of oil from the well, should be upheld against Ellison’s conversion claims and claim for failure to pay production proceeds under Chapter 91 of the Texas Natural Resource Code. The court noted that because Ellison owned superior title and has a right to oil from that land, she raised a genuine issue of material fact regarding the possession of the oil produced from the wells and whether Sunoco exercised wrongful dominion.<sup>65</sup> Furthermore, the court found that Ellison raised at least a genuine issue of material fact as to who was the statutory “payor” under the Texas Natural Resource Code.<sup>66</sup>

## VII. DEEDS & DEED CONSTRUCTION

### A. *TRIAL V. DRAGON*<sup>67</sup>

Leo Trial owned a 1/7 interest in a 237-acre property located in Karnes County, Texas. In 1983, Leo gifted “‘one-half (1/2) of all [his] right, title and interest in and to’ the Karnes County property” to his wife, Ruth.<sup>68</sup> The deed was recorded within days of execution. Thus, both “Leo and Ruth then each owned a 1/14 interest in the Karnes County property,

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59. *Id.*

60. *Id.* at \*14.

61. *Id.* at \*8.

62. *Id.*

63. *Id.*

64. *Id.* at \*11.

65. *Id.* at \*10.

66. *Id.* at \*14.

67. 593 S.W.3d 313 (Tex. 2019).

68. *Id.* at 315.

with Ruth's 1/14 interest being her separate property."<sup>69</sup>

In 1992, Leo and his still-living siblings, who also owned interests in the Karnes County property, purported to convey the entire property to the Dragons. Leo and his siblings executed separate but identical deeds conveying the property, which also contained a general warranty clause. The deeds also contained a fifteen-year mineral reservation but did not mention Ruth's 1/14 interest. Additionally, Ruth was not a party to the sale, nor was there indication that the Dragons knew of Ruth's interest. Ruth died in 2010, but her will was not probated. Thus, "Ruth's 1/14 interest passed to the Trial sons through intestacy, [which gave] each son a 1/28 interest in the Karnes County property."<sup>70</sup>

After the Trials' mineral reservation expired, the Dragons sought a new division order from the oil and gas operator that would direct the operator to make royalty payments to the Dragons in full.<sup>71</sup> The operator made such royalty payments until a lease status report showed that Ruth owned a 1/14 interest in the property, which passed to her sons through intestacy. A new division order, then, was entered to make royalty payments to the Trial sons.

The Dragons filed suit against the Trial sons alleging breach of warranty and estoppel by deed. Both sides entered competing summary judgment motions. The trial court ruled in favor of the Trial sons on both the breach of warranty and estoppel by deed claims.<sup>72</sup> The Fourth San Antonio Court of Appeals reversed the trial court's judgment based on the Texas Supreme Court's decision in *Duhig*.<sup>73</sup> The appellate court held that estoppel by deed applied because Leo, the grantor, breached the general warranty deed at the time of execution of the deed by "purport[ing] to convey what he did not own."<sup>74</sup> The appellate court also concluded that as beneficiaries of Leo's estate, the Trial sons were also estopped from claiming an interest in the property because estoppel by deed applied to "grantors . . . privies in blood, privies in estate, and privies in law."<sup>75</sup>

However, the Texas Supreme Court reversed the court of appeals and remanded the case to the trial court to determine whether damages are appropriate.<sup>76</sup> The supreme court reviewed the applicability of both the estoppel by deed doctrine and its decision in *Duhig*.<sup>77</sup> The supreme court outlined the general rule of estoppel by deed stating that "'recital of one deed in another binds the parties and those who claim under them,'"<sup>78</sup>

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 316.

73. *Dragon v. Trial*, 568 S.W.3d 160, 167–69 (Tex. App.—San Antonio 2017, pet. granted) (mem. op.); *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940).

74. *Dragon*, 568 S.W.3d at 167.

75. *Id.* at 169.

76. *Trial*, 593 S.W.3d at 324.

77. *Duhig*, 144 S.W.2d at 880.

78. *Trial*, 593 S.W.3d at 318 (citing *Carver v. Jackson*, 29 U.S. 1, 83 (1830)).

including privies in blood, privies in estate, and privies in law. The supreme court noted, however, the limitations of the doctrine stating that the doctrine does not bind mere strangers, those who claim by title paramount the deed, persons claiming by adverse title, or “persons claiming from the parties by title anterior to the date of the reciting deed.”<sup>79</sup> The supreme court also noted that the doctrine is not binding on individuals that are not a party to the reciting deed, nor to individuals that claim title independently from the subject deed in question. The supreme court found that Ruth’s 1/14 interest became her separate property that the Trial sons inherited when she died.<sup>80</sup> Thus, the supreme court held that the doctrine of estoppel by deed did not apply to the Trial sons’ claim because the sons did not claim under the 1992 deed, but instead claimed an interest by a title predating the 1992 sale and independent from the 1992 deed.<sup>81</sup>

The supreme court distinguished the Trial sons’ claim from previous case law. The court determined that unlike *XTO Energy*, where it was held that grantees are bound by recitals in their chain of title, the Trial sons attained their 1/14 interest from a source that is both separate and apart from the deed to the Dragons.<sup>82</sup> Additionally, the court also distinguished that unlike *Angell*, where the supreme court held that a descendant to the grantee was bound to the language of the deed from which she claimed interest, the Trial sons claimed interest from their mother, who was not a party to the 1992 deed.<sup>83</sup>

The supreme court concluded that *Duhig* wasn’t applicable in this case because Leo did not own the interest required to remedy the breach at the time of execution, but it was instead owned by Ruth as her separate property.<sup>84</sup> The supreme court emphasized the fact that the Trial sons inherited their interest from their mother and not Leo to conclude that after-acquired title did not apply to the Trial sons’ interest.

Further, the supreme court determined that the lower court correctly found that Leo breached the 1992 deed at the time and execution of the deed.<sup>85</sup> The supreme court found that the deed did not contain language indicating that he was conveying “his interest” or that the Dragons were receiving land subject to an outstanding interest.<sup>86</sup> The supreme court also briefly addressed the question of damages and noted that the lower court did not decide damages for the breach of warranty. Thus, the supreme court reversed the court of appeals’ judgment and remanded the case to the lower court to address the question of damages.<sup>87</sup>

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79. *Id.*

80. *Id.* at 321.

81. *Id.*

82. *Id.* at 320–21.

83. *Id.*

84. *Id.* at 319.

85. *Id.* at 321–22.

86. *Id.* at 322.

87. *Id.* at 324.

B. *WAGENSCHHEIN V. EHLINGER*<sup>88</sup>

The Wagenscheins owned a tract of land in DeWitt County; and upon their death, their seven children (the Wagenschein Heirs) inherited the property. The heirs executed a warranty deed in 1989 to Mueller containing the following language:

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.<sup>89</sup>

In 2006, the Muellers executed a mineral lease with Trinity Energy Services, LLC who assigned the lease to Pioneer Natural Resources USA (Pioneer). One Wagenschein Heir, Clara, died in 2009, leaving Carol Edwards and Dwight Binz as heirs. Pioneer began production on the property in 2010; and the Wagenschein children signed division orders accepting shares of what would have been Clara's interest. Pioneer interpreted the warranty deed as providing a joint tenancy with right of survivorship. Accordingly, as each Wagenschein Heir died, Pioneer distributed the decedent's interest by signed division orders to the surviving Wagenschein Heirs.

In 2015, children of a deceased Wagenschein Heir sued, alleging that the deed created a tenancy in common as opposed to a joint tenancy. The trial court disagreed and found that the royalties reserved in the deed pass to the surviving original grantors upon the death of each of the seven original grantors.<sup>90</sup> The Thirteenth Corpus Christi–Edinburg Court of Appeals affirmed the judgment of the trial court, holding that the trial court properly granted summary judgment to the appellees.<sup>91</sup> Because the language of the deed reserved an interest for the “grantors’ successors,” and included the word “survival” in the opening and closing statements, the appellate court determined that the grantors intended to reserve a joint tenancy with the right of survivorship.<sup>92</sup> Furthermore, the appellate court looked to Section 11.001(a) of the Texas Estates Code to conclude that the appellants were quasi-estopped from arguing that the interest reserved was a tenancy in common because they had already ac-

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88. 581 S.W.3d 851 (Tex. App.—Corpus Christi–Edinburg 2019, pet. denied).

89. *Id.* at 853.

90. *Id.* at 854.

91. *Id.* at 859.

92. *Id.* at 858–59.

cepted the benefits of a joint tenancy.<sup>93</sup>

C. *RAHLEK, LTD. v. WELLS*<sup>94</sup>

In 2006, Rahlek Ltd. (Rahlek) and Eugenia Harris Campbell (Campbell) conveyed property and certain mineral and royalty interests to Lake Phantom Acres, L.P. by warranty deed with a vendor's lien. The deed language provided that: "Grantor RESERVES unto itself and its successors and assigns all current oil and gas production. Grantor CONVEYS unto Grantee and its successors and assigns one-eighth (1/8) of mineral and royalty on all new production which are owned by Grantors upon the date of this conveyance."<sup>95</sup>

Campbell and Rahlek owned the surface and one quarter of the minerals and royalties in and under the property. Lake Phantom divided the property and conveyed its interest to multiple parties. In 2014, Robert G. Wells, a subsequent property owner, filed a declaratory judgment against Rahlek and Campbell to determine what interests the grantor actually conveyed in the 2006 deed. Campbell conveyed all the mineral and royalty interest she owned to her four children. The children joined the lawsuit in 2015, asking the court to interpret the deed in their favor. The trial court construed the deed to convey the entirety of the grantors' mineral and royalty interest on all new production and to reserve "all current oil and gas production."<sup>96</sup> And the Eleventh Eastland Court of Appeals affirmed the trial court's interpretation.<sup>97</sup>

The appellate court noted that the dispute focused on the specific conveyance of an interest and mineral royalties "'on all new production.'"<sup>98</sup> Appellants argued that the plain language of the specific conveyance indicated that the grantors conveyed only a fraction of their mineral and royalty interests and did not convey the entirety of each of their fractional interests. Under Appellants' interpretation, the conveyance was that they retained seven-eighths of their collective one-quarter mineral interest and seven-eighths of the royalties on new production.

However, Appellees, argued that, because each grantor owned an undivided one-eighth mineral and royalty interest and because the deed conveys that same interest one-eighth in "mineral and royalty on all new production," the deed indicates that the grantors conveyed the entirety of each of their fractional interests in mineral and royalty on all new production.<sup>99</sup> Appellees also noted that Appellants did not expressly reserve any mineral interests other than "current oil and gas production."<sup>100</sup> Under

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93. *Id.* at 857–58.

94. 587 S.W.3d 57 (Tex. App.—Eastland, 2019, pet. denied).

95. *Id.* at 65.

96. *Id.* at 63.

97. *Id.* at 75.

98. *Id.* at 66.

99. *Id.*

100. *Id.*

Appellees' interpretation, the grantors did not reserve any interest in minerals or royalties on new production.

Because the 2006 Deed limited its general conveyance to only the listed reservations and exceptions, and then only reserved "all current oil and gas production" without reserving any other mineral interests, the grantor failed to reserve any interest in new production.<sup>101</sup> The appellate court explained that both reservations and exceptions in deeds must be "clear and specific."<sup>102</sup>

## VIII. EASEMENT

### A. *TEXAN LAND & CATTLE II, LTD. v. EXXONMOBIL PIPELINE CO.*<sup>103</sup>

Appellant Texan Land & Cattle (Texan) owned a tract of real property in Harris County, and appellee ExxonMobil Pipeline (Exxon) owned a pipeline easement across the property. Appellee's easement rights arose from a December 1919 right of way deed granted to appellee's predecessor. The deed provided that the purpose of the easement is "to lay, maintain, operate and remove pipeline for the 'transportation of oil and gas,'" but the deed did not define oil and gas.<sup>104</sup> Appellant landowner sued Exxon, claiming that it was exceeding its right under the easement, asserting that the deed only gave Exxon the right to transport crude oil. Texan sought an injunction and damages for trespass. The trial court denied Texan's summary judgment motion and the Fourteenth Houston Court of Appeals affirmed.<sup>105</sup>

The appellate court explained that because the easement did not define "oil and gas," the terms should be given their plain and ordinary meaning.<sup>106</sup> Both the layman's dictionary and industry reference books supported the appellee's argument that gasoline and diesel fall under the meaning of the term oil and gas. The appellant argued that Texas case law and a 1920 taxation statute demonstrate that the term "oil" should only refer to crude petroleum.<sup>107</sup> However, the appellate court did not find these arguments persuasive and affirmed summary judgment in favor of the appellee.<sup>108</sup>

## IX. EXECUTIVE RIGHT

### A. *TEXAS OUTFITTERS LTD., LLC, v. NICHOLSON*<sup>109</sup>

The Carters owned the surface estate and 50% of the mineral interest

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101. *Id.* at 68.

102. *Id.* at 65.

103. 579 S.W.3d 540 (Tex. App.—Houston [14th Dist.] 2019, no pet.).

104. *Id.* at 542.

105. *Id.* at 548.

106. *Id.* at 547.

107. *Id.* at 547–48.

108. *Id.* at 548.

109. 572 S.W.3d 647 (Tex. 2019).

underneath a 1,082-acre tract in Frio County.<sup>110</sup> In 2002, the Carters sold Frank Fackovec the surface estate, the executive rights, and a 4.16% mineral interest in the tract. Fackovec was the sole owner of Texas Outfitters Limited, LLC. The Carters retained 45.84% of the mineral estate, and the Hindeses, relatives of the Carters, owned the remaining undivided 50% mineral interest underneath the tract.<sup>111</sup>

In March 2010, Texas Outfitters received an offer to lease its and the Carters' mineral interest for a 22% royalty and a \$450.00 per-acre bonus.<sup>112</sup> Texas Outfitters rejected the deal because it claimed the offer was too low. In June of 2010, the Hindeses leased their mineral interest to El Paso Oil Exploration & Production Company for a 25% royalty and a \$1,750.00 per-acre bonus.<sup>113</sup> El Paso made the same offer to Texas Outfitters, but Fackovec rejected the offer, despite knowing that the Carters desired to enter the lease.

After negotiations between the parties failed in 2011, the Carters sued Texas Outfitters, alleging that Texas Outfitters breached the duty of utmost good faith and fair dealing by refusing the El Paso lease. The trial court determined that Texas Outfitters breached its duty, and awarded the Carters \$867,654.00 in damages. The Fourth San Antonio Court of Appeals affirmed the trial court's decision, and Texas Outfitters petitioned for review.<sup>114</sup> The Texas Supreme Court affirmed the opinion of the court of appeals.<sup>115</sup>

The supreme court held there was legally sufficient evidence to support the trial court's finding that Texas Outfitters breached its executive duty because Texas Outfitters acted in a manner to benefit the surface interest at the detriment of the mineral interest, unfairly diminishing the value of the non-executive interest.<sup>116</sup>

The supreme court reiterated that as the holder of the exclusive right to lease the Carters' mineral interest, Texas Outfitters owed them the duty of utmost good faith and fair dealing.<sup>117</sup> The supreme court admitted that the parameters of this duty are "difficult to determine" but rearticulated some guiding principles from its past decisions.<sup>118</sup> First, the executive "must 'acquire for the non-executive every benefit that he exacts for himself.'"<sup>119</sup> Second, the executive may have breached its duty by refusing to lease the mineral estate upon request if the decision is "arbitrary or moti-

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110. *Id.* at 649.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Tex. Outfitters Ltd., LLC v. Nicholson*, 534 S.W.3d 65, 81 (Tex. App.—San Antonio 2017, pet. granted).

115. *Tex. Outfitters Ltd., LLC*, 572 S.W.3d at 657–58.

116. *Id.* at 657.

117. *Id.*

118. *Id.* at 652.

119. *Id.* (citing *Lesley v. Veterans Land Bd.*, 352 S.W.3d 490, 491 (Tex. 2011) (internal citations omitted)).



vated by self-interest to the non-executive's detriment."<sup>120</sup> Third, in such a case, the "controlling inquiry" is "whether the executive engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest."<sup>121</sup>

In explaining its reasoning, the supreme court stated the proper standard of review for a legal sufficiency challenge: the challenge will fail if there is even a scintilla of evidence to support the trial court's determinations.<sup>122</sup> The supreme court reviewed the trial court's principal findings and concluded that it had determined that "Texas Outfitters refused the El Paso lease to benefit its surface interest."<sup>123</sup> The supreme court then turned to whether this conduct rose to the level of self-dealing that unfairly diminished the value of the Carters' non-executive interest, pursuant to the inquiry set out in *Bradshaw*.

The supreme court explained that cases involving "diverg[ing] legal positions make it difficult when [ ] an executive crosses the line from lawfully promoting his own surface interest to unlawfully doing so at the expense of the non-executive interest."<sup>124</sup> Here, the trial court recognized that Texas Outfitters' decision to acquire the executive rights was central to Fackovec's purchase of the land and his plan to operate a commercial hunting business.<sup>125</sup> At trial, the Carters presented evidence that, in the area, it was not unusual for land burdened by an oil and gas lease to also be used for commercial hunting operations. Additionally, the supreme court pointed out that Texas Outfitters denied the lease knowing about the Hindeses' lease with El Paso, which "unfavorably affected" the pool of potential lessees.<sup>126</sup> Therefore, Texas Outfitters gambled on getting a better lease offer in the future, even though the circumstances made such an offer unlikely. The supreme court held that this evidence was sufficient to demonstrate that "Texas Outfitters engaged in acts of self-dealing that unfairly diminished the value of the Carters' mineral interest."<sup>127</sup>

However, the supreme court cautioned that "[t]his case demonstrates yet again the fact-dependent nature of executive duty inquiries," and that an executive primarily interested in the surface does not necessarily breach his duty by engaging in conduct that benefits the surface but not the mineral estate.<sup>128</sup> But here, Texas Outfitters "chose to reap the benefits of an unburdened surface estate to the Carters' detriment," leading the court to hold that that more than a scintilla of evidence existed to support the trial court's finding that Texas Outfitters had breached its executive duty.<sup>129</sup>

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120. *Id.*

121. *Id.* (citing *KCM Fin. LLC v. Bradshaw*, 457 S.W.3d 70, 82 (Tex. 2015)).

122. *Id.* at 653.

123. *Id.* at 655.

124. *Id.* at 656.

125. *Id.* at 649.

126. *Id.* at 657.

127. *Id.*

128. *Id.*

129. *Id.*

## X. INSURANCE

A. *ANADARKO PETROLEUM CORP. v. HOUSTON CASUALTY CO.*<sup>130</sup>

Anadarko Petroleum Corporation (Anadarko) held twenty-five percent of the ownership interest in the Macondo Well in a joint-venture arrangement with BP and MOEX Offshore. After the well blow out from the Deepwater Horizon, claims against the parties were consolidated into a multi-district litigation (MDL) in the Federal District Court for the Eastern District of Louisiana. The MDL held BP and Anadarko jointly and severally liable, and the parties reached a settlement agreement providing that Anadarko would transfer its ownership interest to BP and pay \$4 billion.<sup>131</sup> “In exchange, BP agreed to release any claims against Anadarko” and indemnify Anadarko from any future litigation related to the incident.<sup>132</sup>

Before the incident, Anadarko had purchased an energy package from Lloyd’s of London, which provided excess-liability coverage limited to \$150 million per occurrence. The underwriters paid Anadarko \$37.5 million based on Anadarko’s twenty-percent ownership in the joint venture that operated the Deepwater Horizon.<sup>133</sup> Anadarko sought additional payment for its defense expenses, which the underwriters refused, asserting that the policy caps Anadarko’s coverage at \$37.5 million, which was already paid. Anadarko then sued the underwriters, prompting the Underwriters to file a summary-judgment motion, contending that the Joint Venture Provision (JVP) included in Anadarko’s liability policy prevented additional recovery for defense costs.<sup>134</sup>

Section III of Anadarko’s policy requires the underwriters to indemnify Anadarko for its “Ultimate Net Loss,” defined in the policy as “the amount [Anadarko] is obligated to pay, by judgment or settlement, as damages resulting from an ‘Occurrence’ covered by this Policy, including the service of suit, institution of arbitration proceedings and all ‘Defense Expenses’ in respect of such ‘Occurrence.’”<sup>135</sup> The underwriters agreed that this clause entitled Anadarko to recover the legal costs incurred defending against a third party, but argued that a JVP reduces the \$150 million limit. The first clause of the JVP provides that:

[A]s regards any liability of [Anadarko] which is insured under this Section III and which arises in any manner whatsoever out of the operation or existence of any joint venture . . . in which [Anadarko] has an interest, the liability of Underwriters under this Section III shall be limited to the product of (a) the percentage interest of [Anadarko] in said Joint Venture and (b) the total limit afforded

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130. 573 S.W.3d 187 (Tex. 2019).

131. *Id.* at 189.

132. *Id.*

133. *Id.* at 190.

134. *Id.* at 191.

135. *Id.* at 190.

[Anadarko] under this Section III.<sup>136</sup>

The second clause provides an exception to the first clause's limit, stating that "the Joint Venture Clause shall not apply to any liability of [Anadarko], when as a result of the circumstances of the Occurrence, the terms of the Joint Venture agreement place the whole of the liability of the Joint Venture on [Anadarko]."<sup>137</sup> Finally, a third clause provides another exception, which is triggered if Anadarko is found legally liable for an amount over Anadarko's twenty-five percent interest:

In the event [Anadarko] becomes legally liable in a court of competent jurisdiction for an amount greater than their proportionate ownership interest, Underwriters hereon agree to provide coverage to [Anadarko] to the extent the legal liability increases [Anadarko's] working interest percentage liability. If [Anadarko] becomes legally liable for a greater percentage than their ownership interest, the liability of Underwriters shall be the combination of [Anadarko's] working interest percentage ownership and the additional percentage(s) for which [Anadarko] becomes legally liable.<sup>138</sup>

The trial court denied the underwriters summary-judgment motion, holding that the JVP was unambiguous and that the third clause's exception increased the underwriters' liability.<sup>139</sup> The Ninth Beaumont Court of Appeals reversed the trial court's judgment in favor of the underwriters.<sup>140</sup> Anadarko appealed to the Texas Supreme Court, which reversed.<sup>141</sup>

The supreme court held that the first clause of the JVP does not limit coverage from Anadarko's defense expenses.<sup>142</sup> The supreme court began by examining the first clause of the JVP to determine whether Anadarko's defense expenses constituted an insured liability arising out of a joint venture. The policy did not define "liability," but the supreme court concluded that because the policy distinguished between liabilities and expenses, liability referred to "an obligation imposed on Anadarko by law to pay for damages sustained by a third party who submits a written claim."<sup>143</sup> Therefore, the court applied Anadarko's construction of "liability," which did not include defense expenses.<sup>144</sup>

The underwriters argued that even if liability includes defense expenses, the JVP scales Section III's coverage of Anadarko's Ultimate Net Loss, which includes defense expenses. The supreme court stated that the underwriters had "misread[ ] the Joint Venture Provision," because the

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136. *Id.*

137. *Id.*

138. *Id.* at 191.

139. *Id.*

140. *Hous. Cas. Co. v. Anadarko Petroleum Corp.*, 552 S.W.3d 268, 282 (Tex. App.—Beaumont 2016, pet. granted) (mem. op.).

141. *Anadarko Petroleum Corp.*, 573 S.W.3d at 198.

142. *Id.* at 191–93.

143. *Id.* at 193.

144. *Id.* at 193–94.

clause states that the underwriters' liability under Section III is limited "as regards any liability" of Anadarko that is insured and arises out of a joint venture.<sup>145</sup> The supreme court explained that the phrase "'as regards' . . . limits the Underwriters' liability 'with respect to' or 'concerning' Anadarko's 'liability' that is insured and arises out of a joint venture."<sup>146</sup> Because Anadarko's defense expenses are not liabilities, the supreme court concluded, "the clause does not limit the Underwriters' liability 'as regards' those expenses."<sup>147</sup> The underwriters contended that such a construction would produce an absurd result, creating two separate liability limits in Section III. However, the supreme court was not persuaded and explained that there is only one excess-liability limit in Section III: "\$150 million is the maximum the underwriters will ever have to pay to indemnify Anadarko for its Ultimate Net Loss, which includes both liabilities and defense costs. But when the JVP applies, the most the Underwriters must pay for Anadarko's joint-venture liabilities is \$37.5 million."<sup>148</sup> Therefore, the court held that the JVP does not limit the underwriters' liability for Anadarko's defense expenses.<sup>149</sup>

## XI. OIL AND GAS LEASES

### A. *HJSA No. 3, LTD. PARTNERSHIP V. SUNDOWN ENERGY, LP*<sup>150</sup>

HJSA No. 3 LP (HJSA) executed a mineral lease with Sundown Energy (Sundown), which contained a continuous development clause. Paragraph 7(a) provided that "this lease shall continue for so long as oil and gas is produced . . . in paying quantities, subject to the reassignment provisions set forth below."<sup>151</sup> Subsequent provisions stated that:

The obligation in Paragraph 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.*<sup>152</sup>

Sundown began drilling in February 2006 and drilled fourteen wells from February 2006 to March 2015.<sup>153</sup> In January 2016, HJSA notified Sundown that its lease had terminated as to certain areas because Sundown failed to engage in continuous operations as defined by the lease. HJSA argued that Paragraph 7 of the lease required Sundown to spud-in

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145. *Id.* at 196–97.

146. *Id.* at 197.

147. *Id.*

148. *Id.*

149. *Id.* at 198.

150. 587 S.W.3d 864 (Tex. App.—El Paso 2019, pet. filed).

151. *Id.* at 868.

152. *Id.* at 868–69.

153. *Id.* at 869.

and drill a new well outside of the producing area within 120 days of completing or abandoning a drilled well. Sundown contended it had maintained the lease because of its reworking and reconditioning of existing wells.<sup>154</sup>

HJSA sued Sundown in May 2016, and the trial court granted partial summary judgment to Sundown, holding that Sundown's reworking efforts maintained the contested areas. HJSA appealed. The Eighth El Paso Court of Appeals reversed the trial court's decision granting summary judgment for Sundown and denied HJSA's cross motion for partial summary judgment.<sup>155</sup>

The appellate court determined that Paragraph 7(b) of the lease operated as a special limitation on the limits of the lease.<sup>156</sup> Sundown argued that because Paragraph 18 of the lease included reworking and reconditioning in the definition of drilling operations, its actions were sufficient under the continuous development clause. HJSA argued that Paragraph 7(b) created a specific provision, precluding the Paragraph 18 definitions from extending the lease. The appellate court agreed with HJSA, explaining that "the definition in Paragraph 18 informs the duty in Paragraph 7(b) by confirming the duty already independently described in Paragraph 7(b): to spud-in with equipment capable of drilling to Lessee's object depth."<sup>157</sup> The appellate court determined that the lease required Sundown to spud-in a continuous development well within 120 days of completing or abandoning a prior well.<sup>158</sup> Therefore, Sundown's actions were insufficient to hold the contested areas. One justice dissented from the majority opinion, arguing that by requiring Sundown to spud-in a continuous development well within 120 days of a completion or abandonment of a prior well, the majority read a more specific requirement into the lease than was expressly stated.<sup>159</sup>

## XII. POST-PRODUCTION COSTS

### A. *BURLINGTON RESOURCES OIL & GAS CO., LP v. TEXAS CRUDE ENERGY*<sup>160</sup>

Burlington made overriding royalty payments to Texas Crude for nine years, deducting certain post-production costs. Texas Crude brought suit, alleging that the deductions were improper. The trial court ruled that the deductions were improper and the Thirteenth Corpus Christi–Edinburg Court of Appeals affirmed.<sup>161</sup> The Texas Supreme Court reversed, hold-

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154. *Id.*

155. *Id.* at 877.

156. *Id.*

157. *Id.* at 875.

158. *Id.* at 876.

159. *Id.* at 877–83.

160. 573 S.W.3d 198 (Tex. 2019).

161. *Burlington Res. Oil & Gas Co., LP v. Tex. Crude Energy, LLC*, 516 S.W.3d 638, 649 (Tex. App.—Corpus Christi–Edinburg 2017, pet. granted).

ing that the deductions were proper.<sup>162</sup>

The agreement provided:

The overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit into the pipeline, tank or other receptacle to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto, or ASSIGNOR, at ASSIGNEE's election, shall pay to ASSIGNEE, for ASSIGNEE's overriding royalty oil, gas or other minerals, the applicable percentage of the value of the oil, gas or other minerals, as applicable, produced and saved under the leases. "Value", as used in this Assignment, shall refer to (i) in the event of an arm's length sale on the leases, the amount realized from such sale of such production and any products thereof, (ii) in the event of an arm's length sale off of the leases, the amount realized for the sale of such production and any products thereof, and (iii) in all other cases, the market value at the wells.<sup>163</sup>

In reversing, the supreme court held that the "delivered . . . 'into the pipeline[ ]'" phrase fixed the point of royalty valuation to "the physical spot where the interest must be delivered—at the wellhead or nearby," thus entitling Burlington to deduct post-production costs from the value, regardless of which of the three value clauses were applicable.<sup>164</sup> The supreme court accepted Burlington's bolstering argument a JOA between the parties had valuation provisions that were consistent with deducting post-production costs and rejected Texas Crude's argument that those provisions had merged into the parties' assignment and overriding royalty agreement.<sup>165</sup>

The supreme court stated that the court of appeals had misunderstood its decision in *Chesapeake Exploration, LLC v. Hyder*:

We have never construed a contractual "amount realized" valuation method to trump a contractual "at the well" valuation point. To the contrary, prior decisions suggest that when the parties specify an "at the well" valuation point, the royalty holder must share in post-production costs regardless of how the royalty is calculated.<sup>166</sup>

### XIII. ROYALTY PAYMENT

#### A. *CIMAREX ENERGY CO. v. ANADARKO PETROLEUM CORP.*<sup>167</sup>

Cimarex Energy Corporation (Cimarex) and Anadarko Petroleum Corporation (Anadarko) were co-tenants on a lease in Ward County.<sup>168</sup>

162. *Burlington Res. Oil & Gas Co.*, 573 S.W.3d at 211–12.

163. *Id.* at 201–02.

164. *Id.* at 211.

165. *Id.* at 209–11.

166. *Id.* at 205 (citing *Chesapeake Expl., LLC v. Hyder*, 483 S.W.3d 870, 874 (Tex. 2016)).

167. 574 S.W.3d 73 (Tex. App.—El Paso 2019, pet. filed).

168. *Id.* at 80.

Both held leases giving them undivided fractional mineral interest on the same property. The Cimarex lease contained a habendum clause, which provided for a primary term of five years, and a secondary term that said the lease would continue “as long thereafter as oil and gas is produced from said land or from with which said land is pooled.”<sup>169</sup> The lease was paid up but did not relieve Cimarex from paying royalties on actual production during the primary term. Cimarex did not drill or commence operations during the primary term.

Anadarko drilled two wells on the property. In September 2012, Cimarex demanded payment for its proportionate share of royalties on the production, and after the payments were not forthcoming, Cimarex filed suit against Anadarko.<sup>170</sup> Cimarex estimated that Anadarko owed it approximately \$3.5 million from the first well and an undetermined amount for the second. In June of 2013, the parties entered into a Settlement Agreement, requiring Anadarko to pay Cimarex its share of production for the two wells drilled on the property and to continue to account for Cimarex’s monthly share of production.<sup>171</sup>

In August 2015, Cimarex filed an additional lawsuit against Anadarko, alleging that it breached the Settlement Agreement for failing to make the monthly payments to Cimarex.<sup>172</sup> Anadarko contended that because Cimarex’s lease had expired, it was not obligated to make the payments because Cimarex no longer had an interest in the property. The trial court granted Anadarko’s motion for summary judgment and denied Cimarex’s cross-motion.<sup>173</sup> Cimarex appealed and the Eighth El Paso Court of Appeals affirmed the judgment of the trial court, holding that the trial court properly granted summary judgment to Anadarko and properly denied Cimarex’s motion for summary judgment.<sup>174</sup> It also decided that the award of attorney’s fees to Anadarko was proper.<sup>175</sup>

In holding that the trial court correctly granted summary judgment for Anadarko, the court of appeals first addressed Cimarex’s contention that the terms of the lease were ambiguous concerning whether Cimarex was required to directly cause production on the property to keep the lease alive in the second term.<sup>176</sup> Under Cimarex’s interpretation, Anadarko’s production on the lease should be sufficient to meet the production requirement. The appellate court rejected this argument because the lease intended “Cimarex to take some action to cause production on the subject property in order to keep the lease alive, and that it could not simply rely on a cotenant’s production in the absence of any cash consideration

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169. *Id.* at 81.

170. *Id.* at 82.

171. *Id.* at 83.

172. *Id.* at 84.

173. *Id.* at 80.

174. *Id.* at 101.

175. *Id.*

176. *Id.* at 93.

paid to the lessors.”<sup>177</sup>

Cimarex also argued that paying royalties to the lessor during the primary term extended the lease into the secondary term because the lease used the passive tense describing the nature of the lease without specifying who was to cause production on the land to keep the lease alive. The appellate court overruled this argument, concluding that if it interpreted the lease the way Cimarex suggested, that it would be deciding that “there were no significant differences between the requirements imposed on Cimarex in both the primary and secondary terms of the lease.”<sup>178</sup> Cimarex’s also asserted that the appellate court should not hold that its lease had expired because it attempted to enter into a formal joint operating agreement with Anadarko. The appellate court disagreed and pointed to the law of co-tenancy, which allows co-tenants to act independently without duties to one another.<sup>179</sup> It also rejected Cimarex’s argument that ruling in favor of Anadarko would discourage operators from taking minority interest leases in the future.<sup>180</sup>

Cimarex additionally argued that the Settlement Agreement between the parties should be treated as a joint operating agreement, as to satisfy the production requirement, extending the life of the lease. The appellate court rejected this argument concluding that the Settlement Agreement did not include any information to suggest that the parties entered into a joint operating agreement.<sup>181</sup> Additionally, the appellate court stated that Anadarko’s post-settlement conduct did not confirm the existence of a joint operating agreement.<sup>182</sup> Furthermore, Cimarex argued that Anadarko is barred from claiming that the leases terminated because Cimarex paid royalties to the lessors. The appellate court rejected Cimarex’s contention, reasoning that its previous interpretation of the habendum clause required Cimarex to actually produce on the lease to extend it into the secondary term.<sup>183</sup> The appellate court also overruled Cimarex’s final argument that the court should reverse the award of attorney’s fees.<sup>184</sup>

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177. *Id.*

178. *Id.* at 94.

179. *Id.* at 95–96.

180. *Id.* at 96.

181. *Id.* at 98–99.

182. *Id.*

183. *Id.* at 100.

184. *Id.* at 100–01.



## XIV. TRADE SECRETS

A. *PEARL ENERGY INVESTMENT MANAGEMENT, LLC v. GRAVITAS RESOURCE CORP.*<sup>185</sup>

An oil and gas production company (Production Company) sued a private equity firm, an investment fund, and one of the fund's portfolio companies (collectively, Private Equity Firm). Production Company spent considerable time and resources researching a potential property acquisition, which they developed a confidential financial report over. After an NDA was signed, Production Company shared their report with Private Equity Firm, hoping Private Equity Firm's fund would help finance their acquisition.<sup>186</sup> Private Equity Firm then communicated the confidential information from Production Company's report to their portfolio company and proceeded to purchase the property out from under the Production Company, using the information from the confidential report.<sup>187</sup> Private Equity Firm filed a motion to dismiss Production Company's claims pursuant to the Texas Citizens Participation Act (TCPA), which was denied by the trial court.<sup>188</sup> This prompted the Private Equity Firm to appeal to the Fifth Dallas Court of Appeals.

On appeal, the court affirmed the trial courts denial of Private Equity Firm's motion to dismiss.<sup>189</sup> The appellate court reasoned that the purpose of the TCPA, on which Private Equity Firm based their motion, was to dispose of lawsuits designed to inhibit the first amendment rights of others.<sup>190</sup> The Private Equity Firm's communication of the confidential report was not protected as a right of association under the TCPA because it did not concern the public good or citizen participation. The appellate court reasoned that construing the Private Equity Firms' communication as protected by the TCPA, merely because the Private Equity Firms communicated it to their portfolio company with a shared common interest, would not further the legislative goals of the TCPA.<sup>191</sup> Further, the appellate court held that the Private Equity Firm's communications were not protected as free speech under the TCPA because they did not involve a matter of public concern, but only the Private Equity Firms' own financial interests.<sup>192</sup> For these reasons, the appellate court affirmed the trial court's denial of Private Equity Firms' motion to dismiss pursuant to the TCPA.<sup>193</sup>

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185. No. 05-18-01012-CV, 2019 WL 3729501 (Tex. App.—Dallas Aug. 7, 2019, no pet.) (mem. op.); case summary from *Recent Case Decisions*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 375, 379 (2019) (reprinted with permission).

186. *Pearl Energy Inv. Mgmt., LLC*, 2019 WL 3729501, at \*2.

187. *Id.* at \*3.

188. *Id.*

189. *Id.* at \*7.

190. *Id.* at \*5.

191. *Id.*

192. *Id.* at \*6.

193. *Id.* at \*7.

B. *McDONALD OILFIELD OPERATIONS, LLC v. 3B INSPECTION, LLC*<sup>194</sup>

Pipeline Inspection Company (Company) was sued by Competing Pipeline Inspection Company (Competitor) after Competitor hired an independent contractor previously employed by Company. Competitor brought claims under theories of business disparagement, defamation, and tortious interference with contract, alleging that Company made disparaging remarks about Competitor to Competitor's client. Company unsuccessfully moved to dismiss Competitor's claims pursuant to the Texas Citizens Participation Act (TCPA). An appellate opinion followed, and Company successfully motioned for a rehearing. Upon rehearing, the First Houston Court of Appeals reversed and remanded back to the trial court.<sup>195</sup>

Under the TCPA, the trial court is obligated to dismiss Competitor's claims upon proof that the litigation was brought in response to Company's exercise of their right to free speech, unless Competitor established a prima facie case for each claim by clear and specific evidence.<sup>196</sup> First, the appellate court held that the TCPA was triggered because Company's alleged statements regarded the independent contractor's operator qualifications.<sup>197</sup> Thus, Company was exercising their right to free speech because Company's statements implicated public safety issues and were related to a matter of public concern. Second, the appellate court held that Competitor's claims were merely supported by conclusory statements, and thus insufficient to establish a prima facie case by clear and specific evidence.<sup>198</sup> For these reasons, the appellate court reversed and remanded, concluding that the trial court abused its discretion in denying Company's motion to dismiss pursuant to the TCPA.<sup>199</sup>

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194. 582 S.W.3d 732 (Tex. App.—Houston [1st Dist.] 2019, no pet.); case summary from *Recent Case Decisions*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 375, 379 (2019) (reprinted with permission).

195. *McDonald Oilfield Operations*, 582 S.W.3d at 752–53.

196. *Id.* at 744 (citing TEX. CIV. PRAC. & REM. CODE ANN. §§ 27.005(b)–(c)).

197. *Id.* at 746.

198. *Id.* at 750.

199. *Id.* at 752–53.

