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MCGINNIS LOCHRIDGE

Producer's Edge

TEXAS OIL AND GAS LAW BULLETIN

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About the *Producer's Edge*

The McGinnis Lochridge Oil and Gas Practice Group publishes the *Producer's Edge* with the purpose of keeping our valued clients and contacts in the oil and gas industry updated and informed regarding interesting Texas case law and regulatory developments, as well as providing insightful articles relevant to the oil and gas community. In this print and digital publication, we also routinely welcome various other practice groups to share guest articles surveying other areas of the law important to the oil and gas industry.

We hope that you find this publication to be helpful and we welcome you to share copies with your friends and colleagues. If your friends or colleagues would like to receive the *Producer's Edge*, please invite them to sign up at *mineral.estate/subscribe*.

If you have any comments or wish to discuss any of these articles, please contact authors directly, or send an email to *oilandgas@mcginnislaw.com*.

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EVENTS, PRESENTATIONS & PAPERS:

UPCOMING EVENTS

- RMMLF Young Professionals, *Case Law Update*, presented by Austin Brister, Houston, TX – **Feb. 6, 2020**
- Fundamentals of Oil, Gas and Mineral Law, *Emerging and Re-emerging Issues in the Use of the Surface for Oil and Gas Operations*, presented by Austin Brister – **March 26, 2020**
- 67th Annual Mineral Law Institute, *Prudent Operator Standard*, presented by Austin Brister, Baton Rouge, LA — **April 2, 2020**
- McGinnis Lochridge Seminar, *Ethical Considerations for In-House Counsel*, Houston TX — **April 30, 2020**
- 66th Rocky Mountain Mineral Law Institute (RMMLF), *Western U.S. Case Law Update*, presented by Austin Brister, Salt Lake City, UT — **July 25, 2020**
- RMMLF Onshore Oil & Gas Pooling and Unitization, Co-Chair Bruce Kramer will present the Basic Principles of Pooling and Unitization and Tim George will summarize Texas regulatory decisions in a panel discussion about recent developments at state conservation agencies, Westminster, CO — **Oct. 8-9, 2020**

RECENT EVENTS & PUBLICATIONS

- McGinnis Lochridge featured in Law360, *Top-Producing Eagle Ford Driller Hit with $44M Judgement* – **July, 2019**
- Donald D. Jackson quoted in Law360, *Pa. High Court Fracking Trespass Case Has Drillers On Alert* — **Sept. 9, 2019**
- Jonathan Baughman quoted in Law360, *6 Texas Supreme Court Oil and Gas Cases To Watch* — **Sept. 16, 2019**
- 37th Annual Advanced Oil, Gas & Energy Resources Law, *Changes to the MIPA in Horizontal Drilling*, presented by Tim George — **Sept. 19, 2019**
- 37th Annual Advanced Oil, Gas & Energy Resources Law, *State Preemption of Local Ordinances*, presented by Bruce Kramer — **Sept. 20, 2019**
- 37th Annual Advanced Oil, Gas & Energy Resources Law, *Trespass Cases*, presented by Donald D. Jackson — **Sept. 20, 2019**
- Institute of Energy Law, 18th Annual Energy Litigation Conference, co-chaired by Jonathan Baughman – **Nov. 14, 2019**

FEATURED ARTICLE

EMPLOYMENT LAW UPDATE:

The Fifth Circuit Addresses Day-Rate Compensation Schemes Under the Fair Labor Standards Act

By: Felicity A. Fowler and Veronica D. Cruz

This summer, the Fifth Circuit Court of Appeals addressed an often used and hotly litigated compensation practice adopted by oil and gas companies—day rates. Commonly utilized in the energy sector, companies engage highly skilled workers (such as drilling or well consultants) through an independent contractor arrangement and pay a "day rate" for the services of those individuals — a predetermined amount paid based on each day worked, regardless of the number of hours actually worked. Recently, this day-rate compensation scheme has spawned legal challenges across the United States. Specifically, in these lawsuits, workers allege (i) they were incorrectly classified as independent contractors under the Fair Labor Standards Act ("FLSA") and (ii) they are owed unpaid overtime compensation for hours worked over forty (40) per week.

In August 2019, the Fifth Circuit Court of Appeals (which covers Texas, Louisiana, and Mississippi) granted a "win" for employers adopting the day-rate compensation structure. Specifically, the Fifth Circuit in *Faludi v. U.S. Shale Solutions, L.L.C.* held a worker paid a day rate was exempt as a Highly Compensated Employee ("HCE") under the FLSA, and, therefore, was not entitled to overtime compensation. Although the court's holding in *Faludi* was limited to whether workers paid pursuant to a day-rate scheme are paid on a "salary basis" as required for the HCE exemption, the *Faludi* decision marks an important shift in wage and hour litigation facing the energy sector.

Wage and Hour Litigation Trends Affecting the Energy Sector

The FLSA is the federal law governing the payment of wages to employees and imposes a host of requirements on employers—namely, employers are required to pay employees overtime for any hours worked over forty (40) hours per week at a rate of 1.5 times the regular rate of pay. Issues that often arise for energy employers are (i) whether a worker is an employee or an independent contractor; and (ii) if the worker is an employee, whether the employee is exempt from the FLSA's overtime requirement.

The classification of a worker as an independent contractor is a hotly litigated issue because only employees—not independent contractors—are afforded the protections granted under the FLSA. Similarly, whether an employee is exempt from the overtime requirements of the FLSA is frequently challenged. Under the FLSA, if an employee falls within one of the statutorily defined exemptions, the employee is not entitled to overtime compensation. The most common exemptions

litigated for energy employers are the Executive, Administrative, and Professional exemptions—often referred to as the "White Collar Exemptions." To qualify under the White Collar Exemptions, employers must show:

(i) the employee is paid on a salary basis at a rate of at least $684 per week, or $35,568 per year (referred to as the "Salary Test");[1] and

(ii) the employee's primary duties relate to the performance of executive, administrative, or professional tasks, as defined under the regulations (referred to as the "Primary Duties" test).

Because workers in the oil and gas sector often receive a high day rate (sometimes exceeding $1,000 per day) or otherwise receive high salaries, employers often invoke the HCE-exemption in wage and hour lawsuits. Under the regulations, a highly compensated employee is exempt if:

(i) the employee earns at least $107,432 per year and the employee is compensated on a salary basis of at least $684 per week;

(i) the employee's primary duties relate to office or non-manual work; and

(i) the employee customarily and regularly performs at least one of the exempt duties of an exempt Executive, Administrative, or Professional employee.

The HCE exemption can be helpful to employers in the oil and gas sector because the exemption loosens the Primary Duties Test applicable to the White Collar Exemptions. Specifically, to satisfy the Primary Duties Test, the employee's primary duties must satisfy all of the requirements specifically outlined in the applicable regulation. Conversely, under the HCE exemption, a highly compensated employee may be exempt so long as the employee customarily or regularly performs at least one of the statutorily defined duties of an Executive, Administrative, or Professional employee, and these duties do not need to be the employee's primary duties.

As more and more companies utilized day rates, however, one important question lingered—whether a worker who receives a predetermined rate of pay for each day worked satisfies the FLSA's requirement that exempt employees must be compensated on a "salary basis." According to the regulations:

> An employee will be considered to be paid on a "salary basis"… if the employee regularly receives each pay period on a weekly, or less frequent basis, a predetermined amount constituting all or part of the employee's compensation, which is not subject to reduction because of variations in the quality or quantity of the work performed…. [A]n exempt employee must receive the full salary for any week in which the employee performs any work without regard to the number of days or hours worked. Exempt employees need not be paid for any workweek in which they perform no work.[2]

On its face, the regulation permits compensation structures that pay employees a predetermined amount, regardless of the number of hours actually worked. But, how is this regulation interpreted in the context of a day-rate scheme, where the worker's compensation is calculated on a daily basis (not on a weekly, or less frequent basis as stated in the regulations), but receives a paycheck based on a day rate on a weekly, or less frequent basis? Additionally, what happens if the worker voluntarily reduces his or her compensation by charging the employer less than a full day rate when less than a full day is worked? On August 21, 2019, the Fifth Circuit provided some clarification.

Faludi v. U.S. Shale Solutions, L.L.C.[3]

Jeff Faludi ("Faludi") worked as a consultant for U.S. Shale Solutions, LLC ("U.S. Shale") for approximately 16 months. U.S. Shale engaged Faludi's services through an Independent Contractor Consulting Services Agreement, which provided that U.S. Shale would pay Faludi a rate of $1,000 per day for every day worked in Houston, Texas (and, a rate of $1,350 per day for every day worked outside of Houston), regardless of the number of hours Faludi actually worked. Under this arrangement, Faludi was entitled to receive the full day rate, even if he worked one hour. The Agreement required Faludi to submit invoices to U.S. Shale twice a month. The Agreement also stated that Faludi was an independent contractor—not an employee—of U.S. Shale.

During the parties' relationship, Faludi submitted invoices to U.S. Shale on a monthly or semi-monthly basis. Although the Agreement entitled Faludi to receive the full day rate regardless of the number of hours he actually worked, Faludi voluntarily billed the Company less than a full day when he worked less than a full day. The Com-

[1] Effective January 1, 2020, the Department of Labor revised the salary threshold applicable to the Executive, Administrative, and Professional exemptions. Previously, the salary threshold for these exemptions was $455 per week, or $23,660 per year.

[2] 29 C.F.R. § 541.602(a).

[3] *Faludi v. U.S. Shale Sols., L.L.C.*, 936 F.3d 215 (5th Cir. 2019).

pany paid Faludi based, on submitted invoices and never questioned why the invoices did not include the full day rate. Even with Faludi's voluntary reductions, Faludi received at least $1,000 every week in which he worked and earned approximately $260,000 each year.

After Faludi stopped working for U.S. Shale in March 2016, Faludi filed a lawsuit against the Company arguing that he was owed unpaid overtime compensation under the FLSA. U.S. Shale responded that Faludi was not entitled to overtime compensation because (i) Faludi was not an employee, and, therefore, not covered under the FLSA; and (ii) even if Faludi was an employee, Faludi was not entitled to overtime compensation because he qualified for the HCE exemption under the FLSA. The trial court ultimately sided with U.S. Shale and held that, even if Faludi was an employee (not an independent contractor), Faludi qualified for the HCE exemption.[4]

Faludi appealed the trial court's decision to the Fifth Circuit. The appeal primarily turned on whether: (i) U.S. Shale's day rate scheme satisfied the salary basis requirement to qualify for the HCE exemption; (ii) Faludi's voluntary reductions of the full day rate for days in which he worked less than a full day destroyed the exemption status; and (iii) Faludi's guaranteed weekly compensation was required to bear a reasonable relationship to the amount he actually earned each week.

In a 2-1 decision, the Fifth Circuit held the day rate Faludi received satisfied the salary basis test to qualify for the HCE exemption. Specifically, the majority held U.S. Shale's compensation structure satisfied the salary basis requirement because Faludi received his compensation on a weekly or less than weekly basis, as required under the regulation. In so holding, the majority rejected Faludi's argument that the compensation scheme violated the FLSA because U.S. Shale calculated his compensation more frequently than on a weekly basis. The court also held that Faludi's voluntary deductions did not destroy the exemption status. The court emphasized that Faludi voluntarily reduced his day rate by charging U.S. Shale less than a full day rate when he worked less than a full day. Essentially, the court reasoned that to hold otherwise would allow employees to destroy their exemption unilaterally by intentionally reducing their pay.

Finally, the majority rejected Faludi's argument that because his compensation was calculated on a daily basis the FLSA required there be a reasonable relationship between the guaranteed weekly amount and the amount actually earned. The court, however, held that the "reasonable relationship test" did not apply to the HCE exemption. Accordingly, the Fifth Circuit affirmed summary judgment in favor of U.S. Shale.

TAKEAWAYS AND INSIGHTS

The *Faludi* decision represents a significant win for employers; however, employers should be careful in interpreting *Faludi* too broadly. The majority did not give a blanket endorsement of any and all day rate compensation structures. In particular, important to the majority's decision was that Faludi was paid on a weekly or less than weekly basis in accordance with the FLSA (specifically, Faludi was paid twice a month). If U.S. Shale paid Faludi more frequently than on a weekly basis (e.g., twice a week), Faludi may have prevailed. Similarly, with respect to Faludi's reductions to the full day rate, the court emphasized the fact that Faludi unilaterally and voluntarily reduced the day rate. Had U.S. Shale made the reductions, the court would have likely found that the compensation practice did not satisfy the salary basis requirement.

In any case, the *Faludi* decision is a good reminder for employers adopting a day rate compensation structure to document the compensation structure in writing. Critical to the decision in *Faludi* was that the parties agreed in writing that Faludi would receive a fixed rate of pay for each day worked, regardless of the number of hours actually worked. Additionally, employers should review their current pay rates to ensure the rates satisfy the new salary thresholds adopted by the Department of Labor, effective January 1, 2020. Specifically, the Department of Labor ("DOL") increased the salary thresholds for the Executive, Administrative, and Professional exemptions from $455 per week (or $23,660 per year) to $684 per week (or $35,568 per year). Additionally, the DOL increased the salary threshold for the Highly Compensated Employee exemption from $100,000 to $107,432 per year.

[4] On summary judgment, the trial court concluded there was a genuine issue of fact as to whether Faludi was properly classified as an independent contractor. However, because the Court determined Faludi was exempt, it granted summary judgment in favor of U.S. Shale.

About the Authors

Felicity A. Fowler *is a partner, the attorney in charge of our Dallas office, and chair of the Employment and Employee Benefits Practice Group. Felicity represents employers in all facets of employment law, including litigation, arbitration, injunctive relief, administrative proceedings, counseling and trainings throughout the United States.*

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Texas Supreme Court Cases to Watch in 2020

By: Chris Halgren

As we head into the new year, several oil and gas cases are pending at the Texas Supreme Court. Here are some of the key cases we are watching (status as of Jan. 1, 2020):

Unleased Mineral Co-Tenants

***ConocoPhillips Company, et al v. Leon Oscar Martinez, Jr.*, et al. Cause No. 17-0822 (argued 9/17/19).**

The trial court's judgment, affirmed by the San Antonio Court of Appeals, held that the plaintiffs were contingent remaindermen of certain mineral interests. Because the plaintiffs did not ratify ConocoPhillip's leases, the lower courts held that those leases were not binding on the plaintiffs. As such, the plaintiffs became unleased mineral co-tenants, entitled to a co-tenancy accounting. Petitioners challenge, among other things (1) the nature of the plaintiffs' interest and whether they were properly held to be contingent remaindermen of a life estate and (2) the proper methodology for a co-tenancy accounting. ConocoPhillips raises several costs which it contends should have been considered when performing the accountings, such as, acquisition costs, royalty payments, and cost of capital.

Offset Obligations

***Chesapeake Exploration, LLC, et al. v. Stanton Bell*, et al. Cause 19-0538 (merits briefing requested 10/18/19).**

This appeal arises from Chesapeake's Multi-District Litigation and concerns the proper method for computing compensatory royalties. The pertinent leases contain offset obligations, requiring Chesapeake to drill an offset well when a neighboring well is "deemed draining" the leased premises. If Chesapeake elects not to drill an offset well, then the lease requires Chesapeake to pay compensatory royalties valued by the production from the neighboring well. Among other things, Chesapeake argues that the lower court erroneously held that compensatory royalties should be computed based on all production from the neighboring well, even if the neighboring well is a horizontal well with portions outside the buffer zone set by the lease. Chesapeake also challenges the lower court's decision not to apply the prudent operator standard despite Chesapeake's allegation that the prudent operator standard is engrafted based on the express terms of the lease.

Retained Acreage Provisions

***Endeavor Energy Resources, LP v. Energen Resources Corporation*, et al. (merits briefing requested 10/18/19).**

The parties dispute the interpretation of a retained-acreage clause that provided for a partial termination if more than 150-days lapsed between

the completion of one well and the commencement of operations for drilling on a new well. However, the lease also provided that the lessee could “accumulate unused days” to extend the “next” 150-day period. Endeavor contends that this provision was improperly applied by the lower court, resulting in the termination of its leases.

Pooling

***Petrohawk Operating Company, et al. v. Margaret Ann Strickhausen,* Cause No. 19-0567 (merits briefing requested 12/13/19).**

The Petitioners/Lessees purported to pool the Respondent/Lessor lease into a pooled unit in order to drill a horizontal well. After accepting over $700,000 in royalties, the Lessor alleged that her lease was not properly pooled. The lower court rejected the Lessee's arguments that, among other things, the Lessor ratified the unit by accepting royalties. The San Antonio Court of Appeals, relying on recent Supreme Court precedent in Hooks and T.S. Reed, held that accepting royalties was not, by itself, sufficient to result in a ratification of the unit. The appellate court found that the Lessor's initial objection to the unit was sufficient to defeat the Lessee's implied ratification theory, despite the Lessor's acceptance of royalties after her initial objection.

About the Author

Chris Halgren *is a partner in our Houston office and a member of the Oil and Gas practice group. Chris represents clients in a wide variety of contract, tort, secured transactions and other civil litigation matters.*

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NEW ATTORNEY ANNOUNCEMENT

William K. Grubb

McGinnis Lochridge Welcomes William K. Grubb to the Firm's Oil & Gas Practice Group

We are pleased to welcome William K. Grubb as an associate attorney in Houston. He joins the firm's Oil & Gas Practice Group where he represents clients in oil & gas related litigation.

“We're pleased to welcome Will to the Oil & Gas Practice Group,” said Jonathan Baughman, who chairs the group. “We take new hires very seriously. With Will's high academic achievements and reputation as a hard worker, we are excited about Will joining our team where our focus is always on delivering outstanding results for our clients.”

Will received his J.D. from South Texas College of Law, where he graduated *summa cum laude* and third in his class. Will was the winner of numerous awards and legal competitions including the Chicago Bar Association and Spurgeon Bell Memorial Moot Court Competitions, and a seven-time CALI Award Recipient. He also served as the Assistant Note and Comment Editor of the South Texas Law Review in 2016. After law school, Will served as a judicial law clerk to the Honorable Thomas M. Reavley of the United States Court of Appeals for the Fifth Circuit.

After earning his B.A. from the University of Nebraska, Grubb returned to Houston, where he worked as an on-air reporter and drive-time producer at CBS Radio station KILT/Sports Radio 610 in Houston.

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Kevin M. Beiter

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Kevin is Board Certified in Oil, Gas and Mineral Law by the Texas Board of Specialization. He has been listed in Best Lawyers©, Oil & Gas Law since 2007 and Natural Resources Law since 1995, as well as in Litigation focusing on Construction, Environmental, Real Estate, Mergers and Acquisitions since 2011. He has been selected to the Texas Super Lawyers list, a Thomson Reuters service, since 2003. Kevin is a recognized speaker, lecturer, and author on the energy industry and related policy matters.

REPRESENTATIVE EXPERIENCE

- Represent purchasers and sellers of producing and mid-stream properties in property acquisitions and divestitures, including acquisitions by merger or company-level acquisitions.
- Negotiate and coordinate drafting of letters of intent, purchase and sale and related transactional documents and documenting post-closing agreements.
- Represent and advise purchasers, developers, and joint-interest owners in transactions regarding acquisition and development of international concession and energy exploitation projects, onshore and offshore in the Americas, western Africa, Europe and Australia.
- Representation of mineral owners, pipeline companies, and public entities in negotiation and drafting of oil and gas leases, unitization agreements, production sharing agreements, pooling agreements, licenses and easements for surface activities associated with mineral development, surface use agreements, easement agreements, and qualified mineral subdivisions agreements.
- Representation of oilfield operators and service providers in development of oilfield facilities, including salt water disposal facilities, solid waste disposal facilities and storage facilities.

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Reworking Operations Held Not to Satisfy Continuous Development Clause

HJSA No. 3, Ltd. P'ship v. Sundown Energy Ltd. P'ship, No. 08-18-00113-CV, 2019 Tex. App. LEXIS 7254 (Tex. App.—El Paso Aug. 16, 2019, no pet. h.)

By: Austin Brister and Ana Navarrete

This oil and gas lease termination dispute centered on a disagreement as to what type of "drilling operations" constituted "continuous drilling operations" under a continuous development clause. The court held that the lessee's reworking of existing wells did not satisfy the continuous development clause, resulting in a partial termination of the lease. The court held that, while the lease contained a definition of "drilling operations" that expressly included "reworking," that was a general definition that did not control over the more specific terms in the continuous development clause. In reaching its conclusion, the court analyzed the role of several lease provisions, including the continuous development clause, retained acreage provision, temporary cessation clause, and an agreed definition of "drilling operations."

The continuous development clause at issue read, in part, as follows:

> The obligation...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

Sundown Energy drilled fourteen development wells between February 2006 and March 2015. In January of 2016, HJSA sent Sundown a letter claiming that several portions of the lease had terminated because, between 2007 and 2013, Sundown had on five separate occasions allowed more than 120 days to elapse under the continuous development clause. HJSA contended that the continuous development provision required Sundown to spud-in and drill new wells outside of the producing areas, and that reworking on existing wells was insufficient.

Sundown countered that, while no new wells had been spudded-in during those periods, Sundown contended that it had satisfied the continuous development clause because the continuous develop provision only used the phrase "spudding in" for the first well, and

Sundown only had to commence "drilling operations" for subsequent wells. Sundown pointed to paragraph 18 in the lease which defined "drilling operations" as including not only actual operations for drilling a well, but also expressly including "reworking" and "reconditioning" operations.

The court rejected Sundown's argument that only the first well had to be "spudded-in." The court began by construing the continuous development provision as requiring the lessee to be in a "continuous drilling program." The court construed the lease as defining a "continuous drilling program" as "the spudding in of the first such continuous development well, and not more than 120 days elapsing between abandonment of one well and commencement of drilling operations on the next ensuing well." (emphasis supplied by court). The court rejected Sundown's argument that only the first well must be spud in, explaining that the inclusion of the word "such" in the description meant that all of the continuous development wells are necessarily of the same type – i.e., a well that is spudded-in.

The court also rejected Sundown's argument that the definition of "drilling operations" in paragraph 18 controls the interpretation of the continuous development clause, such that "drilling operations" on the "next ensuing wells" means Sundown could rework existing wells. The court explained that specific provisions control over general provisions, and in this case the definition of "drilling operations" in paragraph 18 was a general definition, and the continuous development provision was a specific provision. The court explained that several specific phrases in the continuous development clause modified the general definition in paragraph 18, including the phrases "continuous drilling program," "continuous development well," "spudded-in," "such," and "next ensuing well." According to the court, these more specific phrases "all clarify that Sundown was required to spud-in a new well in a non-producing area within 120 days of completion or abandonment of a prior well to maintain the lease in the areas not held by production."

The court explained that this interpretation did not render the custom definition of "drilling operations" meaningless because it is used in the temporary cessation provision, which specifically allowed the lessee to save the lease by conducting timely "drilling operations as defined herein." The court also explained that the definition's introductory phrase (reading "whenever used in this lease") was not controlling and could not be interpreted as requiring that the general definition impose a greater duty than the specific obligations defined in the development paragraph.

Finally, the court affirmed the trial court's orders striking portions of an affidavit of an attorney who had negotiated the lease, claiming it informed rather than varied or contradicted the contract. The court explained that, "[w]hile a reviewing court may consider the surrounding circumstances of the contract, we may only consider objective, not subjective, evidence." The court also rejected the argument that HJSA's acceptance of royalties for years was course-of-performance evidence that favors its reading of the contract. The court rejected that argument, explaining that course-of-performance evidence is not considered in construing an unambiguous lease.

About the Authors

Austin Brister *is a partner in our Houston office and a member of the Oil & Gas Practice Group. Austin represents oil and gas exploration and production companies and landowners in complex litigation.*

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Buyer Not Entitled to Offset for Unpaid JIBs Mistakenly Omitted From Post-Closing Statement

By: Austin Brister

Sundance Energy, Inc. v. NRP Oil & Gas LLP, 2019 Tex. App. LEXIS 7223 (Tex. App.—Houston [1st Dist.] Aug. 15, 2019, pet. filed)

This case out of the Houston First Court of Appeals involves a breach of retained liabilities provisions in a purchase and sale agreement, focusing on the legal and factual sufficiency of the jury's damages award in light of its alleged failure to account for the seller's evidence of an offset, whether the attorneys' fees awarded by the trial court were reasonable and necessary, and whether it was an error for the court to admit evidence of attorneys' fees in light of untimely disclosures.

Sundance and NRP entered into a purchase and sale agreement (PSA), under which Sundance agreed to sell to NRP all of Sundance's interests in oil and gas lease and wells in three counties in North Dakota. The parties agreed to a purchase price of approximately $35 Million, and Sundance agreed to retain certain pre-sale liabilities, including joint interest billings (JIBs) attributable to periods of time prior to the effective date of the sale. Before and after the sale, NRP received JIBs totaling $146,000 from operators. Sundance agreed those costs were retained liabilities under the PSA, and reimbursed NRP the full amount. NRP subsequently received additional JIBs totaling approximately $900,000 attributable to ownership before the effective date of the sale. Sundance refused to reimburse NRP for those additional JIBs, and this lawsuit followed.

Following a trial, the jury found that Sundance failed to comply with the PSA and awarded NRP nearly $1 Million in economic damages. The jury also answered a question in the jury indicating it determined Sundance was not entitled to any offsets. The parties agreed to try attorney's fees to the bench. Sundance filed objections claiming NRP failed to properly disclose its witnesses and evidence for attorney's fees. The court granted two resets to allow NRP time to remedy the issue, and the attorney's fees issues were tried to the bench nearly six months after the initial trial had begun. The court awarded NRP attorney's fees in the amount of $396,007, $50,000 for appeal to an intermediate appellate court, and $50,000 for appeal to the Texas Supreme Court.

On appeal, Sundance challenged only the jury's damages award in light of its alleged failure to "account for uncontroverted evidence" of an offset, and the trial court's award of reasonable attorney's fees in light of untimely disclosed evidence and Sundance's arguments that the evidence was legally and factually insufficient to support the award.

About the Author

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Class Certification Denied in Royalty Class Action Suit

Regmund v. Talisman Energy USA, Inc., No. 4:16-CV-02960, 2019 U.S. Dist. LEXIS 110363 (S.D. Tex. 2019)

By: Will Grubb and Austin Brister

The Plaintiffs, a putative class of lessors under oil and gas leases, brought claims against Talisman Energy USA, Inc. ("Talisman") relating to Talisman's "volumetric" method of calculating royalties. Some of the gas produced is "wet gas," which requires stabilization prior to sale, which results in a reduction or "shrinkage" of the volume sold. Talisman commingled the production from numerous leases for processing at the stabilization facility, and then allocated the sales volumes back to individual leases on the basis of wellhead metered volumes (a "volumetric" allocation), and applied an estimate of overall shrinkage.

The Plaintiffs filed this class action suit, taking issue with Talisman's commingling of gross production, practice of volumetrically allocating net sales volumes, and the usage of estimated (rather than actual) shrinkage volumes. Instead, the Plaintiffs argued that their leases require royalties to be calculated based on the actual amount of production from their leases ultimately available for sale.

The Plaintiffs sought to certify a class pursuant to Federal Rule of Civil Procedure 23(b)(3). Talisman challenged the adequacy requirement for class certification, arguing that "an impermissibly high risk of conflicts of interests exists among the putative class members." The court agreed and explained that putative class members' interest could conflict because, when estimates were used to pay royalties, some royalty owners could have been overpaid while others could have been underpaid. Thus, if ultimately successful, the underpaid class members would receive additional payouts, whereas the overpaid class members may be subject to Talisman's counterclaim for recoupment. The court also explained that this conflict could not be solved by allowing overpaid class members to opt out because Talisman provided evidence that all money attributable to the royalties were already paid out, meaning overpaid class members could be opened up to liability under Talisman's counterclaim. Finding that the two methods of calculation each benefited or burdened different class members, the court found the adequacy requirement could not be met.

Talisman challenged the adequacy requirement for class certification, arguing that an "an impermissibly high risk of conflicts of interests exists among the putative class members."

The court also held that the Plaintiffs failed to meet the predominance requirement for class certification because the Plaintiffs did not provide adequate evidence that the royalty provisions in the leases at issue were substantially similar. The court made a similar finding for damages resulting from allegations of breach of contract. Thus, due to issues relating to adequacy and predominance, the court denied class certification.

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Mineral Lien Claimant Must Establish Materials Were "Used In" Mineral Activities

ELG Oil, LLC v. Stranco Servs., LLC, No. 04-19-00088-CV, 2019 Tex. App. LEXIS 8946 (Tex. App.—San Antonio Oct. 9, 2019, no pet.)

By: Austin Brister

In this case, the San Antonio Court of Appeals held that a mineral subcontractor claiming a mineral lien must conclusively establish that its labor, materials, machinery, and supplies were "used in" mineral activities, not merely "related to" mineral activities.

ELG entered into a contract with Turn-Key Specialists, Inc. to add natural gas bullet storage tanks to a treatment facility. Turn-Key then subcontracted to Stranco. Stranco was presumably not paid for its work, and Turn-Key filed for bankruptcy. Stranco filed suit against ELG, and moved for a partial summary judgment on its claim to foreclose on its alleged mineral lien. The trial court granted Stranco's motion and awarded Stranco attorney's fees.

Stranco contended that it was only required to prove that its labor and services were "related to" mineral activities. The court acknowledged that Section 56.002 of the Texas Property Code provides for mineral liens "to secure payment for labor or services related to the mineral activities." However, the appellate court pointed out that Stranco must qualify as a "mineral subcontractor" in order to claim a lien, and the statutory definition of "mineral subcontractor" requires a mineral subcontractor "conclusively establish the labor and services it provided were 'used in' mineral activities." The court also pointed out that "mineral activities" is defined, in pertinent part, as certain types of work "on oil or gas pipelines."

The appellate court then turned to Stranco's summary judgment evidence. Stranco primarily relied upon an affidavit from its owner, stating that Stranco performed mineral activities on ELG's property, including work on the "pipelines and the pipeline terminal station" and furnishing materials "used in connection with ... pipelines and the pipeline terminal station."

The appellate court characterized Stranco's affidavit as conclusory because it failed to provide any facts showing how Stranco's work and materials on the bullet storage tanks were connected to the oil and gas pipelines.

The appellate court characterized Stranco's affidavit as conclusory because it failed to provide any facts showing how Stranco's work and materials on the bullet storage tanks were connected to the oil and gas pipelines. The court acknowledged that, to be "used in" mineral activities, the work did not have to be performed directly on the pipelines themselves, but Stranco's summary judgment evidence failed to establish a link between the bullet storage tanks and the pipelines.

The failure to link Stranco's work to the pipelines themselves was further exacerbated by ELG's summary judgment evidence. ELG submitted two affidavits which described the work Stranco performed as being limited to the addition of bullet storage tanks within the facility, and not work on pipelines themselves. ELG's affidavits further indicated that no pipelines that combine in the facility and the pipelines were actually segregated from the facility. The court explained that "we must resolve all doubts in favor of ELG."

As a result, the San Antonio Court of Appeals held that the trial court erred in granting summary judgment in favor of Stranco, reversed the trial court's judgment, and remanded the cause to the trial court for further proceedings.

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Texas Courts Continue to Analyze Oil and Gas Cases Under the Texas Citizen's Participation Act

McDonald Oilfield Operations, LLC v. 3B Insp., LLC, No. 01-18-00118-CV, 2019 Tex. App. LEXIS 6400 (Tex. App.—Houston [1st Dist.] July 25, 2019, no pet.) and *Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp.*, 2019 Tex. App. LEXIS 6833 (Tex. App.—Dallas Aug. 7, 2019, no pet.)

By: Will Grubb and Austin Brister

In this business torts case between pipeline monitoring companies, Houston's First Court of Appeals held that the trial court erred by denying a motion to dismiss pursuant to the Texas Citizens Participation Act (TCPA). At issue were causes of action for defamation, business disparagement, tortious interference with contract, and tortious interference with prospective business relations. Each of these causes of action centered around an alleged conversation where Kelly McDonald contacted a former client of 3B Inspection, and said 3B was "not a real company" and its principal "did not know what he was doing." 3B also asserted that McDonald Oilfield intentionally cancelled sponsorship of federal "Operator Qualifications," allegedly with "malicious intent to shut down the project and cause harm to 3B Inspection's business relationship with its client."

At the outset, the court held that the TCPA applied because these statements were an exercise of McDonald's right of free speech on a matter of public concern because they related to environmental, economic, and safety concerns regarding goods and services in the marketplace. Because the TCPA applied, the court explained that each cause of action based on these statements must be dismissed unless the party bringing the action establishes by clear and specific evidence a prima facie case for each essential element of the respective claim.

As to the defamation action, the court held that dismissal was required because 3B did not submit clear and specific proof of defamation damages nor defamation per se. As for the business disparagement claim, dismissal was required because the only evidence of damages submitted to the court was a "general statement that 3B Inspection suffered unspecified 'delay damages' and 'damages to its reputation.'" As the court explained, "bare, baseless opinions do not create fact questions and neither are they a sufficient substitute for the clear and specific evidence required to establish a prima facie case under the TCPA."

Regarding the tortious interference with contract claim, dismissal was also required because "A general statement that a contract with a customer exists, without details about the specific terms of the contract, is insufficient to maintain a tortious-interference-with-contract claim."

Finally, the court turned to the claims for tortious interference with prospective business relations, which were asserted by 3B and several of 3B's employees. After McDonald filed its TCPA motion, 3B and the employees nonsuited this cause of action. However, McDonald argued it was still entitled to attorney's fees because its TCPA motion survived the nonsuit. The court held that, while a plaintiff has an absolute right to nonsuit a claim before resting its case-in-chief, "that nonsuit shall have no effect on any motion for sanctions, attorney's fees or other costs, pending at the time of the dismissal." Because the employees made no effort to provide clear and specific proof of this cause of action, the appellate court reversed the trial court's holding denying McDonald's TCPA motion to dismiss those claims, and remanded the case to the trial court for further proceedings.

Pearl Energy Inv. Mgmt., LLC v. Gravitas Res. Corp., 2019 Tex. App. LEXIS 6833 (Tex. App.—Dallas Aug. 7, 2019, no pet. h.)

Gravitas sued Pearl Energy, Pearl's founder William Quinn, and AVAD Energy Partners, LLC relating to the purchase of natural gas assets in Utah.

Gravitas discovered what it believed was "substantial potential" of undrilled wells and the potential for significantly

reduced operating costs in an area in Utah that was then owned by Anadarko. Gravitas approached Anadarko about purchasing the assets, and submitted an offer. Anadarko sought a bidding process, and Gravitas submitted the highest bid. Gravitas then turned to find additional financing.

Gravitas approached Pearl with a high-level description of the investment, and sent Pearl a signed NDA. Pearl never countersigned the NDA. Gravitas shared with Pearl significant information about the property and their beliefs regarding substantial potential of undrilled wells and potential reduced operating costs.

About one month later, Gravitas advised Anadarko it expected to have financing commitments soon, but Anadarko indicated it was considering a sale to another buyer. One month later Anadarko indicated it had already signed a purchase and sale agreement with AVAD. Pearl's founder sits on the board for AVAD, and AVAD is a company within Pearl's investment portfolio.

Gravitas filed suit against Pearl, Quinn, and AVAD for, among other things, breach of the NDA and violations of the Texas Uniform Trade Secrets Act. The defendants moved to dismiss pursuant to the TCPA. The trial court denied the TCPA motion to dismiss on the grounds that the suit did not relate to the Defendants' exercise of the rights of free speech or association. The Dallas Court of Appeals affirmed.

The court held that the claims did not implicate the right of association because "communication between individuals who join together must involve public or citizen's participation" and the Defendants did not show the communication of Gravitas's confidential information involved any public or citizen participation. As the court explained, "Construing the TCPA to find a right of association simply because there are communications between parties with a shared interest in a private business transaction does not further the TCPA's purpose to curb strategic lawsuits against public participation."

The court held the Defendants did not meet their burden to prove the claims implicate the exercise of the right of free speech, defined as "a communication made in connection with a matter of public concern." Here, the court explained that the communications were not of a public concern, because they all involved private business transactions, the economic interests involved were private, and the plaintiffs and certain defendants took steps to keep the information private. Accordingly, the court could not conclude the communications were at least tangentially related to a matter of public concern.

As a result, the court affirmed the trial court's order denying the motions to dismiss pursuant to the TCPA.

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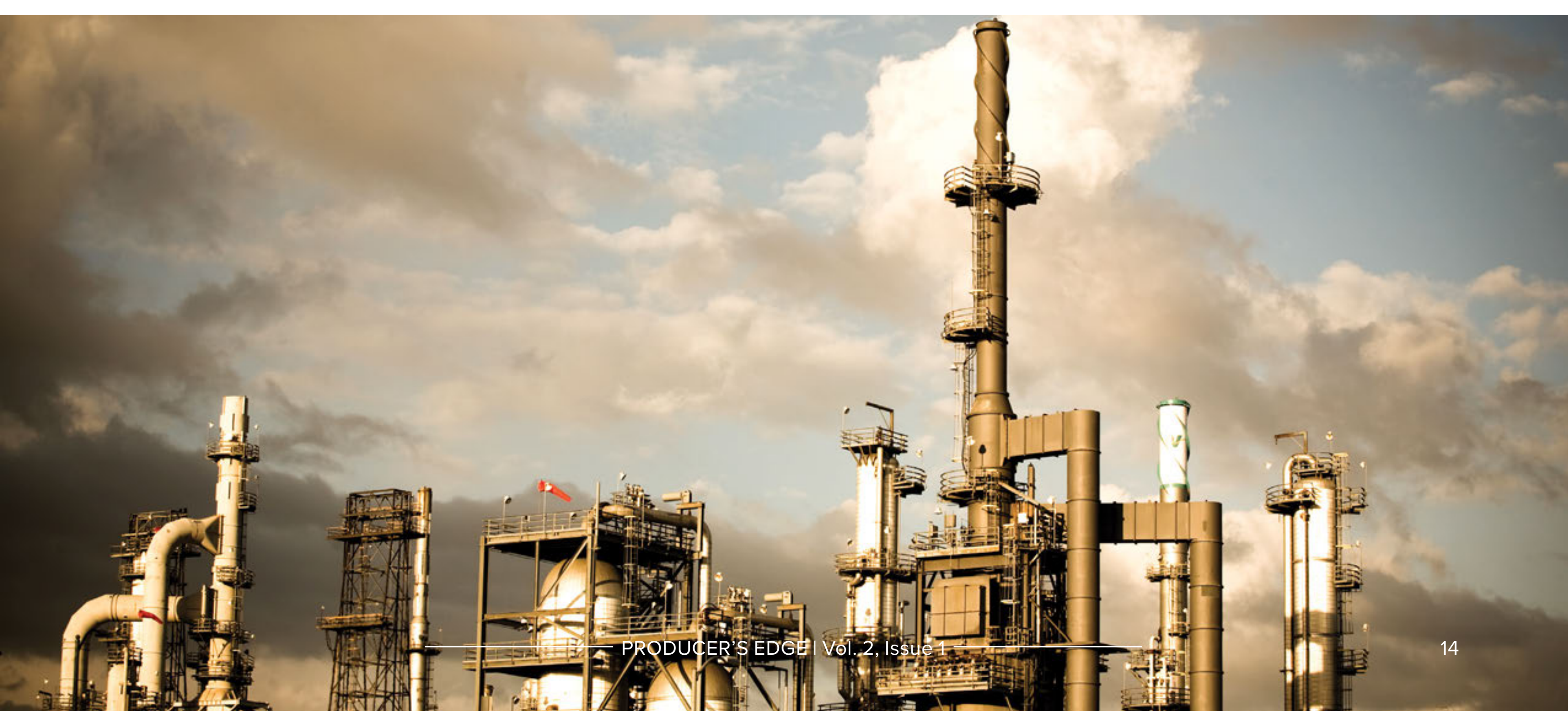

Mineral Buyer Unable to Demand Prior Unclaimed Royalties From Comptroller

Enerlex, Inc. v. Hegar, No. 03-18-00238-CV, 2019 Tex. App. LEXIS 6771 (Tex. App.—Austin Aug. 7, 2019, pet. filed)

By:Ana Navarrete and Austin Brister

In *Enerlex*, the Austin Court of Appeals held that a mineral buyer could not demand payment from the Texas Comptroller of Public Accounts for prior unclaimed royalty payments relating to the purchased royalty interest, because those royalty payments were turned over to the Comptroller under the prior owner/grantor's name.

Enerlex acquired the mineral interests under two mineral deeds which conveyed the minerals underlying the property and "all royalties, accruals and other benefits, if any, from all Oil and Gas heretofore or hereafter run." Enerlex subsequently sent an Unclaimed Property General Claim form to the Comptroller for $4,652.91 in unclaimed royalty payments which had been sent to the State under the prior reported owner's name. The Comptroller denied the claim, explaining the mineral deed transferred the mineral interests, but did not transfer the right to obtain prior proceeds from those interests from the Comptroller. Enerlex filed suit, and the trial court affirmed the Comptroller's results.

The Austin Court of Appeals affirmed the trial court's holding, explaining that section 74.501(e) of the Texas Property Code "unequivocally" states that the Comptroller "may not pay" an unclaimed-property claim to "an assignee of the reported owner." As a result, the parties' intentions in their transaction was not controlling. However, the court indicated that its holding does not interfere with contractual rights a grantee may have against its grantor, nor does the holding suggest that a grantor may not sell and assign his rights to unclaimed property. Rather, this case merely holds that an assignee must look to its contract with the property owner rather than the Comptroller through the unclaimed-property process. While the Comptroller did not dispute that for more than a decade it had paid similar claims, the court declined to hold that an agency is estopped from changing course when it determines that its earlier interpretation of a statute was erroneous.

Disposal Well Operator Held Not to Be an "Affected Person" With Standing to Challenge Competitor's Application for Disposal Well Permit

NGL Water Sols. Eagle Ford, LLC v. R.R. Comm'n, No. 03-17-00808-CV, 2019 Tex. App. LEXIS 10302 (Tex. App.—Austin Nov. 27, 2019, no pet. h.)

By:Ana Navarrete and Austin Brister

This case involves a dispute as to whether a competitor saltwater disposal well operator is an "affected person" under 16 Tex. Admin. Code §3.9(5)(E) and, thus, whether such competitor has standing to challenge an application for disposal well permit.

NGL Water Solutions Eagle Ford (NGL) operated a saltwater disposal well under a permit issued by the Texas Railroad Commission (RRC). In April of 2016, one of its competitors, Blue Water, filed an application to operate a commercial injection well at a nearby location. NGL protested the application. At the RRC hearing, Blue Water claimed that NGL was not entitled to protest Blue Water's application because NGL was not an "affected person". NGL argued that Blue Water's permit was not in the "public interest" because there was no present industry need for additional disposal capacity in the area, because NGL had existing injection wells with excess capacity in the area.

The RRC examiners found that NGL did not present sufficient evidence that it "has suffered or will suffer actual injury or economic damage other than that of the general public or as a competitor." As a result, the RRC determined NGL was not an "affected person" under Statewide Rule 9, and therefore was not entitled to protest Blue Water's permit application. Because there were no remaining protests, the RRC remanded Blue Water's application for administrative review, where it was approved administratively.

Shortly after the RRC issued Blue Water's permit, NGL filed suit against the Texas Railroad Commission (RRC) and Blue Water Disposal, alleging the RRC erred when it denied NGL "party status" to protest Blue Water's disposal permit, and when it subsequently approved and issued the permit administratively. The Austin Court of Appeals affirmed the RRC and trial court, noting that § 3.9(5) defines "affected persons" in a way that "contains an express exclusion- the person must suffer actual injury or economic damage other than as a member of the general public or as a competitor." "Rather than presenting evidence of injury or economic damage other than that of a competitor, NGL challenged the merits of the application on the ground that the proposed well would not be in the "public interest" by offering evidence of excess disposal capacity... [I]ts evidence did not identify harm or economic damage other than as a competitor." As a result, the court held that the RRC acted within its discretion by remanding the permit for administrative approval.

As a result, the RRC determined NGL was not an "affected person" under Statewide Rule 9, and therefore was not entitled to protest Blue Water's permit application.

Appellate Court Dissolves an Operator's Injunction Against Town of Flower Mound

Town of Flower Mound v. EagleRidge Operating, LLC, 2019 Tex. App. LEXIS 7561 (Tex. App.—Fort Worth Aug. 22, 2019, no pet.)

By:Ana Navarrete and Austin Brister

In this case, the Fort Worth Court of Appeals held that the trial court lacked authority to grant a temporary injunction against the Town of Flower Mound enjoining the enforcement of a local ordinance that limited truck traffic to and from well sites.

EagleRidge Operating, LLC ("EagleRidge") operated wells in Flower Mound, Texas. EagleRidge's operations produced wastewater that was removed from well sites by tanker truck. A city ordinance adopted by the Town of Flower Mound provided that work on wells (other than drilling) must occur only between 7:00 am and 7:00 pm during the week and between 9:00 am and 5:00 pm on Saturdays. The city determined that EagleRidge's wastewater removal was subject to the time restraints of the ordinance.

EagleRidge sought, and the trial court granted, a temporary restraining order prohibiting the city from enforcing the ordinance against EagleRidge. On appeal, Flower Mound claimed the trial court lacked jurisdiction to grant the injunction because the ordinance is a penal ordinance, meaning EagleRidge must demonstrate an irreparable injury to a vested property right to enjoin the enforcement of a penal ordinance.

The Fort Worth Court of Appeals first turned to determining whether the ordinance was a penal ordinance. The court determined that it was, because its purpose was to address a public wrong and promote the public welfare in terms of environment, infrastructure, health, welfare and safety, the city issued EagleRidge a citation for violating the ordinance, and that violation was considered unlawful and punishable by a fine.

Because the ordinance was penal in nature, in order to establish jurisdiction, EagleRidge had the burden to demonstrate irreparable injury to a vested property right. The court held that the fines alone did not cause irreparable injury because the record does not show that the fines would be so great so as to destroy the business, nor that the ordinance imposes penalties on EagleRidge's customers who would be reluctant to expose themselves to criminal prosecution in order to challenge the law. EagleRidge submitted evidence of an increase in operating costs to comply with the ordinance, economic losses which might occur if the wells become unprofitable, which could lead to some wells needing to be shut down because they could become unprofitable in the future.

The court held that this was not sufficient to establish irreparable harm. The court construed these arguments as a claim for a regulatory taking, but noted that EagleRidge failed to offer evidence of the value of the mineral interest in place or any loss of value. The court held that the argument that wells might have to be shut down was speculative. In rejecting a temporary injunction based on such a claim, the court held EagleRidge offered no evidence of the value of the mineral interest in place or the loss of any value.

In conclusion, the court dissolved the temporary injunction issued by the trial court and remanded the case back to the trial court for further disposition on the merits.

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Devise of "Personal Effects" In A Will Held Not to Include Mineral Interests

In re Estate of Ethridge, No. 11-17-00291-CV, 2019 Tex. App. LEXIS 9564 (Tex. App.—Eastland Oct. 31, 2019, no pet.)

By: Will Grubb, Ana Navarrete, and Austin Brister

In this case, the Eastland Court of Appeals held that a devise of "personal effects" in a will did not include mineral interests.

Mildred Ethridge died in 1994. In her will, which she drafted without the assistance of an attorney, she recited that the will was "for the purpose of the distribution of my entire estate, real, personal and mixed, which I wish to have take effect at my death." However, her will contained only two devises: (1) she devised "all my personal effects" to her nephew Davis, and (2) she devised her "residence and homestead" to another person.

The trial court determined that, because there was no residuary clause in the will, Ethridge's will failed to dispose of the minerals. As a result, Ethridge died intestate as to her mineral interests. Davis, a nephew by marriage, appealed that decision, contending that the term "personal effects" referred to all property of any kind owned by Ethridge and that he was entitled to her mineral interests.

The court disagreed, observing that the phrase "personal effects" has "customarily been defined narrowly as a subset of personal property… generally refer[ing] to articles bearing intimate relation or association to the person of the testator." As examples, the court cited cases referring to clothing, jewelry, luggage, "toilet articles," eye glasses, dentures, and "similar chattels." The court concluded that "Mineral interests do not fall within the typical definition of personal effects." The court indicated that there was no clear intention in the will to give that phrase any other meaning.

The court acknowledged that the will declared the intention of disposing of all the testator's property, and indicated that "the mere making of a will is evidence that the testator had no intent to die intestate and creates a presumption that the testator intended to dispose of his entire estate." However, that presumption "is not strong enough to empower a court to write a residuary clause into a will where none previously existed."

The appellate court concluded that the trial court correctly determined that Ethridge died intestate as to her mineral interests.

Heirs Estopped From Claiming Interests Reserved in 1989 Warranty Deed

Wagenschein v. Ehlinger, 2019 Tex. App. LEXIS 5949 (Tex. App—Corpus Chisti July 11, 2019, pet. filed)

By: Will Grubb, Ana Navarrete, and Austin Brister

In this case, the Corpus Christi Court of Appeals held that, when grantors of a 1989 warranty deed signed division orders and accepted royalty payments consistent with treatment of the reservation as creating a joint tenancy with right of survivorship, that established an affirmative defense of quasi-estoppel, subsequently estopping those grantors' heirs from claiming the reservation created a tenancy in common.

In 1989, all seven heirs of Norman Wagenschein ("Wagenschein Grantors") executed a warranty deed conveying their surface and mineral estates in a 241-acre tract of land. That deed contained a reservation clause, reserving "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 may be produced from it." The reservation clause contained one sentence saying the interest was in favor of Grantors and Grantors' "successors" and another indicating the interest was in favor of Grantors and Grantors' "survivors." Another sentence in the reservation clause indicated "[t]he 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."

This dispute ultimately turned on whether the interest reserved was a tenancy in common or a joint tenancy with right of survivorship. As the court explained, "[u]nder a tenancy in common, the deeded interest descends to the heirs and beneficiaries of the deceased cotenant and not to the surviving tenants. A joint tenancy, on the other hand, carries a right of survivorship. In a survivorship, upon the death of one joint tenant, that tenant's share in the property does not pass through will or the rules of intestate succession; rather, the remaining tenant or tenants automatically inherit it." (internal citations omitted)

In 2009, one of the seven Wagenschein Grantors died, leaving two descendants. Rather than credit those descendants with their mother's undivided 1/7th interest, the six surviving Wagenschein Grantors treated the interest as a joint tenancy with right of survivorship, with each signing division orders for a 1/6th share and thereafter accepting a 1/6th share. Three more Wagenschein Grantors died in 2011, 2012, and 2014, in each instance they left surviving descendants. After each death, the surviving Wagenschein Grantors signed amended division orders continuing to treat the interest as a joint tenancy rather than crediting those descendants with an interest.

In 2015, the descendants of the deceased Wagenschein Grantors filed suit, seeking a judicial declaration that the interests reserved under the 1989 warranty deed were in the form of a tenancy in common (thus, passed to them), not a joint tenancy with right of survivorship.

The Corpus Christi Court of Appeals held that the deceased Wagenschein Grantors were quasi-estopped from taking the position that the 1989 deed created a tenancy in common as opposed to a joint tenancy—because they knowingly treated the interest as a joint tenancy and accepted the benefits of a joint tenancy. The court held that, "having once enjoyed the benefits of joint tenancy with right of survivorship, the now-deceased [Wagenschein Grantors] cannot today, through their heirs, sue to claim benefits as tenants in common . . . it would be unconscionable to allow such a claim."

The court then turned to interpretation of the deed. The court pointed out that the opening and closing statements of the reservation clause use the word "survivor," which is indicative of a joint tenancy. While the reservation clause also included the word "successor," the court indicated that word could apply to either descendants or survivors. As a result, the court concluded that the language of the 1989 warranty deed intended to reserve a royalty in the form of a joint tenancy with right of survivorship.

Acknowledgment of Record Title Held Not to Defeat Adverse Possession Claim

Scribner v. Wineinger, No. 02-19-00208-CV, 2019 Tex. App. LEXIS 9170 (Tex. App.—Fort Worth Oct. 17, 2019, no pet.)

By: Will Grubb, Ana Navarrete, and Austin Brister

In this leasehold adverse possession case, the Fort Worth Court of Appeals held that an acknowledgement of the record title holder's title by an adverse possessor will not defeat an adverse possession claim if the limitations clock had already run out before the acknowledgement occurred. The trial court granted summary judgment in favor of the oil and gas company on their affirmative defense of adverse possession and limitations title under the five-year statute.

Scribner's father owned the leasehold interest under an oil and gas lease in Archer County, Texas. In 1999, Scribner's father assigned all the working interest to Scribner by virtue of an assignment and bill of sale that was filed of record. When Scribner's father died, the executor of his estate executed an assignment to an oil and gas company, but did not obtain Scribner's signature. In fact, Scribner was not even aware of the assignment to him until 2016.

Meanwhile, beginning at least in 2010, Parra and its predecessors (who obtained an assignment from the executor following the death of Scribner's father) operated the lease, received revenue, and paid all taxes. This competing chain of title was reflected in assignments that were also recorded in Archer County.

In June of 2016, an attorney representing Parra discovered the 2002 Assignment, and asked Scribner to execute an assignment in favor of Parra to cure the cloud on title. One of the owners of Parra worked with Scribner's wife and also sent her a draft assignment and asked her to have Scribner sign it.

Scribner filed suit asserting claims for trespass to try title, and the appellees responded by asserting the affirmative defense of perfection of title by adverse possession under the five-year statute of limitations (section 16.025 of the Tex. Civ. Prac. & Rem. Code).

Scribner argued that, when appellees contacted Scribner regarding execution of the proposed assignment, those contacts constituted an acknowledgment of title that precluded any limitations from running in appellees' favor as a matter of law, and was evidence showing that any possession by appellees was not adverse.

The appellate court held that any acknowledgement of title in 2016 did not preclude limitations from running in favor of the appellees. The court stated that "an acknowledgment of title precludes limitations from running in favor of an adverse-possession claimant only if it occurs before limitation title is completed." Here, the five-year limitations period ran from April of 2010 through April of 2015, and all of Scribner's alleged evidence of an "acknowledgment of title" occurred in the summer of 2016. "Accordingly, assuming without deciding that the three contacts at issue constitute "acknowledgements of title" in Scribner, we conclude as a matter of law that they did not preclude limitations from running in favor of Appellees' predecessors in title."

The court also held that any acknowledgement of title in 2016 did not create a genuine issue of material fact on whether the possession by the appellees was adverse to Scribner

during the statutory time period. The court acknowledged that, "a possessor's acknowledgement of title in another after the limitation period may tend to show that the possession was not adverse." Here, however, there was no evidence that the attorney or the owner that contacted Scribner and Scribner's wife had any affiliation with the lessees who possessed the leasehold interest between April 2010 and April 2015.

The court also rejected Scribner's argument that appellees' claim was defeated because they had knowledge of the break in the chain of title. As the court explained, knowledge of a possible break in the chain of title through Scribner might prompt an investigation into the property's title, but that knowledge is not evidence that the appellees would disavow the title to the property that was cured by their predecessors. "Scribner is again relying upon events that occurred too late to be of help to him."

As a result, the appellate court determined that the trial court properly quieted title in Parra, decreed that it was the owner of the property, and ordered that Scribner take nothing on any causes of action that relied on his claim of title.

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NEWS & UPDATES

McGinnis Lochridge in 2020 Edition of U.S. News – Best Law Firms

The 2020 edition of U.S. News – Best Law Firms recognized McGinnis Lochridge in 21 practice areas, recognizing the work of the firm's attorneys in Austin and Houston.

The U.S. News – Best Law Firms rankings are based on a rigorous evaluation process, including the collection of client and attorney evaluations, peer review by leading attorneys in their fields, and review of additional information provided by law firms as part of the formal submission process.

McGinnis Lochridge Attorneys Recognized in Benchmark Litigation Rankings

McGinnis Lochridge is pleased to announce that Travis Barton, Jonathan Baughman and Steven Watkins have once again been recognized in the 2020 Benchmark Litigation Rankings and their colleague Felicity Fowler was recognized in the 2019 Benchmark Litigation Labor & Employment Rankings. This recognition is significant as it is the only publication that focuses exclusively on litigation in the U.S.

SAVE THE DATE

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Ethical Considerations for In-House Counsel

Join the McGinnis Lochridge attorneys for a seminar focusing on a variety of ethical issues in the oil and gas industry.

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11:30 a.m.–5:00 p.m.

609 Main Street
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Lunch will be served. Complimentary parking.
Accreditation: Texas CLE - pending

To register, email *events@mcginnislaw.com*
or call Katelynn McGuire at 713-615-8532.

McGinnis Lochridge Growth Leads to New Office Space in Houston

In early September, McGinnis Lochridge relocated its Houston office to 609 Main St., Suite 2800, Houston. This move was the result of significant growth in 2018 and 2019. The new office space is 14,000 square feet and is able to accommodate the continued addition of both attorneys and support staff for the foreseeable future.

"We are excited about our firm's continued growth and expansion," said Jonathan Baughman, Partner-in-Charge of the firm's Houston office and Chair of the firm's Oil & Gas Practice Group. "The addition of new attorneys, enhanced practice areas, and clients as well as the expansion of our representation of current clients convinced us that this was the right time to make the move," Baughman said. "With more sophisticated technology, dynamic attorneys, knowledgeable support staff and efficient and flexible office configuration, we look forward to serving our clients in the years ahead."

"609 Main has become the newest highly-visible landmark on Houston's downtown skyline," said Jeff Pace, Executive Managing Director of HPI Tenant Advisors. "The building's state-of-the-art systems, including LEED® Platinum Certification, efficient floor plates, robust amenities and keen design aesthetic will serve the firm well in attracting and retaining talent and being a showcase for the future of smart law firm design." The building, designed with full height windows to maximize natural light, has a café, high-performance fitness center, roof gardens and on-site parking.

Since 2018, McGinnis Lochridge has added attorneys in its Houston office to its Labor and Employment, Oil and Gas, and International Trade Practices Groups. McGinnis Lochridge has had significant growth over the last 2 years by adding 33 lawyers firm-wide.

About McGinnis Lochridge

McGinnis Lochridge is a highly experienced, multi-practice Texas law firm with more than 75 lawyers. Founded in 1927, McGinnis Lochridge has for more than 90 years maintained strong ties to its judicial and legislative traditions. The Firm has been fortunate to count among its lawyers distinguished leaders in judicial and governmental positions, including state and federal trial judges, a Texas Supreme Court justice, a Fifth Circuit justice, state and federal legislators, a past president of the Texas Bar, and even a governor of Texas. The Firm has continued to grow and adapt to meet clients' needs in a changing and increasingly complex business environment.

Today, from offices in Austin, Houston, Dallas, and Decatur, the Firm's attorneys represent energy clients throughout the country in complex litigation and arbitration. We have proven skills handling sophisticated disputes involving geology, geophysics, and petroleum engineering. Several of our lawyers have professional backgrounds and credentials in those areas. Because of the Firm's long history in handling energy disputes, the Firm's Oil & Gas Practice Group includes lawyers with a deep understanding of hydrology, seismic interpretation, log analysis, drilling, completions, hydraulic fracturing, reservoir engineering, production, transportation, hydrocarbon processing, and other related technical areas.

Throughout its history, the Firm has been a leader in the development of oil and gas law serving as trial and appellate counsel in several landmark cases setting important oil and gas law precedents. The Firm successfully represents oil and gas producers, marketers, and transporters in a wide range of matters including disputes over leasehold rights, joint interest billing, royalties, prudent operations, and constitutional limits on regulations that would unreasonably impair the oil and gas business.

At McGinnis Lochridge, each client and every legal matter receives partner-level attention. This client focus ensures maximum value, efficiency, and results. At the same time, the breadth of our practice areas enables clients to rely on McGinnis Lochridge as a comprehensive resource — a single-source, trusted advisor able to address the most challenging business and legal needs.

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