2020

OIL & GAS

CASE LAW UPDATE

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HOUSTON BAR ASSOCIATION

I. ARBITRATION

A. *Apache Corp. v. Bryan C. Wagner*, 2018 Tex. App. LEXIS 9766, 2018 WL 6215739 (Tex. App. Fort Worth November 29, 2018)

Facts

Wagner Oil Company ("WOC") purchased oil and gas related assets from Apache pursuant to a June 4, 2001, purchase and sale agreement (PSA) negotiated by WOC. Wagner, Trade, and W&C funded the $25 million purchase for 80%, 19%, and 1% shares, respectively, and after the purchase, WOC assigned its interest to Wagner, Trade and W&C. The assets purchased included property in Louisiana, where Apache was later sued over environmental damage claims. Apache sought indemnification from WOC under the PSA, to which indemnification and arbitration were continuous themes throughout.

WOC filed for a declaratory judgment in Tarrant County, Texas, claiming they were not subjected to the arbitration provision within the PSA. The Tarrant County Court agreed with Wagner, to which Apache appealed. However, the Court of Appeals found the claims were subject to the arbitration clause.

Analysis

Arbitration is a creature of contract between consenting parties. *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 629 (Tex. 2018). The parties bound by an arbitration agreement is typically determined by the parties' intent as expressed in the agreement terms. To compel arbitration, the movant must first establish the existence of a valid and enforceable arbitration agreement and then must establish if the claims at issue fall within the scope of the arbitration agreement. Doubts about scope are resolved in favor of arbitration, but the presumption favoring arbitration agreements arises only after the party seeking to compel arbitration proves that a valid arbitration agreement exists.

An arbitration clause is a "specialized kind of forum-selection clause," *Pinto Tech. Ventures, L.P. v. Sheldon*, 526 S.W.3d 428, 437 (Tex. 2017), and whether claims are covered by a forum-selection clause "should be [determined] according to a commonsense examination of the substance of the claims made." *In re Int'l Profit Assocs., Inc.*, 274 S.W.3d 672, 677-78 (Tex. 2009) (orig. proceeding). In determining if a claim falls under an arbitration clause, courts must focus on the factual allegations, rather than the legal causes of action asserted. Because arbitration clauses are a creature of contract, the circumstances in which non-signatories can be bound to one are rare. *Pinto Tech. Ventures, L.P.*, 526 S.W.3d at 443.

A contractual provision is viewed within the context of the entire contract. A contract is not ambiguous if the language can be given a meaning. It is only ambiguous if two or more meanings can be reasonably interpreted using the pertinent contract principles. Just because parties merely disagree over the terms does not mean a contract is ambiguous. The Court's primary concern is determining the true intent of the parties as expressed by the plain language.

WOC and Apache agreed to arbitration in the PSA for any disputes in connection with their agreement, and the assignment from Apache was made subject to the terms and conditions of the PSA. Therefore, there was a valid agreement to arbitrate.

Determining whether a claim involving a non-signatory must be arbitrated is a gateway matter for the trial court, not the arbitrator. *Jody James Farms, JV*, 547 S.W.3d at 629, 630. Here, the signatory defendant was trying to force non-signatory plaintiffs into a forum not selected by the plaintiffs. There are six scenarios where arbitration with non-signatories may be required: incorporation by reference, assumption, agency, alter ego, equitable estoppel, and third-party beneficiary. Apache argued that assumption, equitable estoppel, and incorporation by reference applied to WOC.

The Court agreed that WOC was subject to the PSA's arbitration clause and that the trial court erred by denying Apache's motion to compel arbitration. The case was remanded to the trial court to compel arbitration.

B. ***Trubenbach v. Energy Expl. I, L.L.C.*, 2020 Tex. App. LEXIS 2600 (Tex. App. – Dallas Mar. 27, 2020, n.p.h.)**

Facts

Energy Exploration ("Energy") invested in three ventures with TRU Exploration ("TRU"). Each venture included a joint venture agreement, a subscription agreement, and a confidential private placement memorandum. All the subscription agreements contained an arbitration clause. They were all signed by Energy and approved and accepted.

In January 2015, Energy filed suit against TRU, TRU Exploration "Creating TRU Partners," L.L.C., Trent Trubenbach, and Donna Burton asserting various claims including, but not limited to, securities fraud, breach of fiduciary duty, violation of the Texas Securities Act, and conspiracy. Energy also sought a temporary restraining order, a preliminary injunction freezing assets, and an accounting.

TRU filed a motion to stay litigation and to compel arbitration, which was denied. The Court proceeded, to which TRU filed an interlocutory appeal. Energy opposed the motion, arguing that the TRU defendants had filed the motion in an effort to avoid inspection of their bank records and financial information pertaining to Energy's investment. During the pending appeal, Energy began arbitration proceedings, which were stayed due to TRU starting bankruptcy proceedings. Energy sought relief from the bankruptcy court to allow the arbitration to proceed. In the arbitration hearing, an award was given in favor of Energy, against TRU.

Energy sought to affirm the award granted by the arbitrator. Trubenbach and Burton (collectively, "Trubenbach") opposed the confirmation and sought for it to be vacated, denying they were parties to any agreement including arbitration and they did not agree to arbitrate the claims. Trubenbach argued that the arbitrator exceeded his authority by entering an award against non-parties and ruling on the issue of arbitrability. The trial court affirmed the arbitration award, denying Trubenbach's motion to vacate the arbitration award.

Analysis

Arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to submit to arbitration. The party seeking arbitration must establish the existence of a valid, enforceable arbitration agreement, and that the claims at issue fall within the scope of the agreement. Arbitration is a matter of consent, and the Federal Arbitration Act does not require parties to arbitrate when they have not agreed to do so.

Non-signatories are normally not bound to arbitration agreements between others. However, non-signatories may be allowed or required to arbitrate if rules of law or equity would apply the contract to them generally. Whether a claim involving a non-signatory must be arbitrated is a "gateway matter" for the trial court that is subject to *de novo* review on appeal. The Court of Appeals found that by seeking arbitration, Trubenbach made themselves subject to the arbitration provisions within the subscription agreements.

Trubenbach argued that the award given by the arbitrator should be vacated because Energy waived its right to enforce the arbitration provisions. Citing *Henry v. Cash Biz, LP*, 551 S.W.3d 111 (Tex. 2018) and *Perry Homes v. Cull*, 258 S.W.3d 580 (Tex. 2008), Trubenbach claimed that Energy waived its right to arbitration by utilizing the judicial process in a manner inconsistent with its assertion of arbitration. However, there is a strong presumption against waiver of arbitration and the hurdle to overcome this is high. *Perry Homes*, 258 S.W.3d at 590. While Energy did file suit initially, Trubenbach immediately filed a motion to stay litigation and compel arbitration, to which Energy acquiesced three months after. The Court determined that three months was not a substantial delay in regard to the case as a whole, and as such, Energy did not substantially invoke the judicial process to Trubenbach's detriment or prejudice.

C. ***WEH-SLMP Invs., LLC v. Wrangler Energy, LLC*, 2020 Tex. App. LEXIS 1808 (Tex. App. Mar. 2, 2020)**

Facts

Wrangler filed suit against WEH for breach of contract regarding the acquisition, sale, and profit sharing of mineral interests and mineral leaseholds. WEH filed a demand for arbitration with the American Arbitration Association in accordance with the Federal Arbitration Act ("FAA"). The arbitrator awarded damages and attorneys' fees to WEH. WEH sough confirmation of the award, but Wrangler moved to vacate arguing the arbitrator "exceeded his powers" by awarding attorneys' fees. The trial court granted the motion to vacate the award and attorneys' fees.

Analysis

A trial court's vacatur of an arbitration award is reviewed *de novo* under the FAA based on the entire record. *In re Chestnut Energy Partners, Inc.*, 300 S.W.3d 386, 397 (Tex. App.—Dallas 2009, pet. denied). However, an arbitration award is treated the same as the judgment of a court of last resort. *Ancor Holdings, LLC v. Peterson, Goldman & Villani*, 294 S.W.3d 818, 826 (Tex. App.—Dallas 2009, no pet.). All reasonable presumptions are indulged to uphold the arbitrator's decision, and none is indulged against it. *Id.*

Arbitration awards made under the FAA must be confirmed unless vacated on certain limited grounds. Section 10(a)(4) of the FAA provides that an arbitration award may be vacated "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made."

Wrangler sought to vacate the arbitration award under "manifest disregard," claiming that the arbitrator exceeded his powers. However, their claim of manifest disregard required more than a mere error of law, not that the arbitrator decided the issue incorrectly or that he failed to understand or apply the law. The arbitrator must have known and deliberately ignored the law, which was not the case here.

The Court reversed the trial court's judgment and reinstated the award granted by the arbitrator.

II. ATTORNEY'S LIABILITY

A. *Wulchin Land, L.L.C. v. Ellis*, 2020 Tex. App. LEXIS 2275 (Tex. App. Corpus Christi, Mar. 19, 2020)

Facts

The Wulchins contracted for the purchase of contiguous 490 acre tracts of land in Live Oak County, Texas (Tracts A and B, collectively, the "Ranch"). Tract A was sold by John T. Schulz, Jr. Family Trusts and Tract B was sold by John T. Schulz, Jr., and his wife, Mary Deane Schulz (the "Sellers"). The Sellers represented that they owned and were conveying the entire surface estate; 50% of the mineral estate, subject to a 25% NPRI; and 100% of the executive rights to the mineral estate. The Wulchins were represented by their attorney, Sartori, in this matter, who additionally created Wulchin Land ("Wulchin") as a holding company for the Ranch. It would later be discovered that the Sellers only owned 25% of the minerals and 50% of the executive rights.

In 2009, Pioneer approached Wulchin to lease the mineral interests of the Ranch. At this time, Wulchin retained the services of attorneys Schneider and Forehand to examine title to the Ranch, who incorrectly asserted that the original understanding of the conveyance was correct.

In 2012, Pioneer inquired about extending the lease but informed Wulchin about a discrepancy regarding the ownership of the mineral estate, asking Wulchin to investigate and resolve said issue. Retaining new counsel to examine title, it was then discovered that the Sellers's had only owned 25% of the mineral estate, and 50% of the executive rights.

Wulchin filed suit for declaratory judgment, reformation, slander of title, fraud, negligent misrepresentation, breach of warranty, tortious interference, estoppel by deed, and adverse possession against Sharon Marie Schulz Ellis, individually and as the independent executrix and testamentary trustee of the estate of John T. Schulz and independent executive of the estate of Mary Deane Schulz; John T. Schulz, III; Jeffrey E. Schulz; Robert P. Schulz; and Paul J. Schulz (collectively, the "Schulz children"). Wulchin also filed suit against Sartori, Schneider, and Forehand for fraud and breach of fiduciary duty. The trial court granted summary judgment for all defendants against Wulchin without specifying the basis for its ruling, from which Wulchin appealed.

Analysis

The Court of Appeals examined the anti-fracturing rule and the discovery rule in regard to legal malpractice. The anti-fracturing rule prevents a plaintiff from converting professional negligence claims into other claims such as fraud, breach of contract, and breach of fiduciary duties. *Won Pak v. Harris*, 313 S.W.3d 454, 457 (Tex. App.—Dallas 2010, pet. denied) (citations omitted). If the gravamen of the plaintiff's complaint is that the attorney failed to exercise the normal degree of care, skill, or diligence in representing the plaintiff, then the claim sounds in negligence and the anti-fracturing rule applies. *Riverwalk CY Hotel Partners, Ltd. v. Akin Gump Strauss Hauer & Feld, LLP*, 391 S.W.3d 229, 236 (Tex. App.—San Antonio 2012, no pet.) (citations omitted). However, if for example, the claim focuses on an attorney obtaining an improper benefit, then the claim may appropriately be classified as a breach of fiduciary duty claim. *Id.*

Here, there was an issue of possible malpractice, not breach of duty or fraud. Representing different clients with adverse interests is not a breach of fiduciary duty; only if the lawyer has a direct pecuniary interest that is adverse to the client and pursues it his interest to the client's detriment. All claims of fraud and breach of fiduciary duty were dismissed by the Court.

Wulchin admitted that the statute of limitations had run on all of its claims except breach of warranty, but that it was entitled to the discovery rule on the claims of negligent misrepresentation and fraud. Under the discovery rule the accrual date is deferred until the plaintiff knows, or by exercising reasonable diligence should know, that it has suffered an injury that was likely caused by the wrongful acts of another. *Childs v. Haussecker*, 974 S.W.2d 31, 40 (Tex. 1998). The discovery rule applies when a plaintiff pleads and proves that its injury was inherently undiscoverable at the time it occurred but can be objectively verified. *S.V. v. R.V.*, 933 S.W.2d 1, 6 (Tex. 1997). Here, the Court did not apply the discovery rule for the claims of negligent misrepresentation and fraud because the information was available publicly. Wulchin had constructive notice by way of public record and the title defect would had been discoverable by due diligence.

However, the discovery rule does apply to instances of malpractice, and the statute of limitations does not begin until the client discovers or should have discovered the facts establishing the elements of a cause of action. *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 120-21 (Tex. 2001) (citing *Willis v. Maverick*, 760 S.W.2d 642, 646 (Tex. 1988)). Wulchin exercised due diligence by hiring attorneys to represent it in these transactions. Clients rely on the advice of their attorneys, and as such, Wulchin had no reason to search the public record of its own accord. For this reason, Wulchin was unable to discover its injuries from the legal malpractice of Sartori, Schneider, and Forehand. Sartori, Schneider, and Forehand did not establish a date to begin the toll of the statute of limitations; therefore, it was improper for the trial court to grant summary judgment based on limitations.

The Court also determined that the trial court erred in granting summary judgment to the Schulz children on the issue of breach of warranty. Wulchin contended that their breach of general warranty claim was not barred by limitations because such a claim does not accrue until an actual or constructive eviction occurs, and the Schulz children failed to conclusively establish this fact. The cause of action for breach of a covenant of general warranty does not arise until there has been an [actual or constructive] eviction. *Schneider v. Lipscomb Cty. Nat'l Farm Loan Ass'n*, 146 Tex. 66, 202 S.W.2d 832, 834 (Tex. 1947); *Stumhoffer v. Perales*, 459 S.W.3d 158, 165 (Tex. App.—Houston 2015, pet. denied); *Solares v. Solares*, 232 S.W.3d 873, 879 (Tex. App.—Dallas 2007, no pet.); *see Gibson v. Turner*, 156 Tex. 289, 294 S.W.3d 781, 787 (Tex. 1956). The Schulz children were not entitled to summary judgment on their limitations defense because they were unable to establish the accrual date.

III. CONTRACT

A. *Chalker Energy Partners III, LLC v. Le Norman Operating LLC*, 595 S.W.3d 668, 2020 Tex. LEXIS 161, 2020 WL 976930 (Tex. February 28, 2020)

Facts

Chalker acted as an agent for sellers (the "Sellers") who were selling oil and gas properties (the "Assets") worth several hundred million dollars via a bidding process. Bidders were to sign a confidentiality agreement before being allowed to enter a virtual room where information regarding the properties would be available for prospective buyers to analyze. The confidentiality agreement included the following clause:

> ***No Obligation***. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term "definitive agreement" does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.

Bidders were given forms to use to make the bids and a deadline of November 5, 2012, to submit their bids, to which the Sellers would determine if they would accept the bid. Le Norman Operating ("LNO") had signed said confidentiality agreement and participated in the bidding process. LNO initially bid $332 million for 100% of the Assets, which included a statement that the bid was "subject to execution of a mutually acceptable purchase and sale agreement ('PSA')" and included a PSA. The other highest bidder was Jones Energy ("Jones"). Both bidders were given the opportunity to raise their bids, and LNO raised their offer to $345 million for 100% ownership, which was initially refused.

The Sellers then offered to sell 67%, which LNO responded to on November 19 by email with the subject line "RE: Counter Proposal" setting the terms for acceptance, requiring the Sellers to accept by 5:00 PM the following day. Chalker forwarded this to the Sellers, who voted to sell and submitted their acceptance before LNO's deadline, but no PSA was executed. After this, there was a break for the Thanksgiving holiday during which time Jones came back and submitted a new offer with benefits that LNO would be unable to match. On November 28, the Sellers executed a PSA with Jones. Upon learning that the Sellers were going with Jones, LNO demanded the Sellers to honor the alleged contract entered into via the email exchange.

LNO sued for breach of contract, alleging that the Sellers had breached an agreement entered into via the November 19 and 20 emails to sell a 67% interest in the Assets. The trial court granted the Sellers' motion for summary judgment, finding that the parties did not intend to be bound to any agreement, a PSA was a condition precedent to contract formation, and there was no meeting of the minds. The Court of Appeals reversed, holding that whether the alleged contract was subject to the confidentiality agreement bidding procedures and if the parties intended to be bound by the terms in the November 19 and 20 emails were issues precluding summary judgment.

Analysis

The Supreme Court of Texas accepted that email is an accepted way of doing business, but parties can protect themselves with stipulations like they did here with the No Obligation clause in the confidentiality agreement. The parties here agreed that unless there was a definitive agreement that had been executed and delivered, there was no contract or agreement.

In *WTG Gas Processing v. Conoco Philips*, 309 S.W.3d 635, 637 (Tex. App. 2010), the Court found that the parties' prior agreement that no obligations would arise absent an executed and delivered PSA precluded a fact issue on contract formation. Execution of a PSA was a condition precedent to contract formation; thus, because the parties did not execute a PSA, no contract was formed as a matter of law.

Here, both parties agreed that a definitive agreement was a condition precedent to contract formation. While the No Obligation clause does not define *definitive agreement*, it does make clear that "the term 'definitive agreement' does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties." The emails in this case were closer to a preliminary agreement than a definitive agreement and indicated that the parties intended to execute a more formal document, such as a PSA, and as such there was no definitive agreement reached between the parties.

B. *Copano Energy, LLC v. Bujnoch*, 593 S.W.3d 721, 2020 Tex. LEXIS 49, 63 Tex. Sup. J. 348, 2020 WL 499765 (Tex. January 31, 2020)

Facts

This dispute stems from emails exchanged between both parties prior to the anticipated signing of a formal written agreement. The plaintiffs ("the Landowners"), claimed that the emails as a whole constitute an enforceable written contract satisfying the statute of frauds. The defendant ("Copano"), argued that the statute of frauds bars the claim. The Landowners sued for breach of alleged contract and tortious interference.

In 2011, the Landowners granted a 30 foot easement for a 24 inch pipeline to Copano. In December of 2012, Copano approached the Landowners regarding acquiring a second easement for an additional 24 inch pipeline. There was an email from the Landowners' attorney's (Marcus Schwartz) secretary (Debbie Bujnoch) to the landman for Copano (James Sanford) letting him know that they were available for a meeting. letting him know that they were available for a meeting. The Landowners further emailed Sanford to request the particulars of the easement. The series of December emails discussed the particulars of a second easement, but no mention of an agreement or to the outcome of a meeting.

On January 30, 2013, Sanford and Schwartz communicated for the first time, via email. Sanford communicated that Copano agreed to pay $70 per foot for the second gas line intended to be built, as well as addressing and correcting damages caused by construction of the first line. Schwartz responded: "James: In reliance on this representation we accept your offer and will tell our client you are authorized to proceed with the survey on their property. We would appreciate you letting them know a reasonable time before going on their property. mfs/bbc." The Landowners argued that this constituted an offer and acceptance.

Kinder Morgan, who was in the process of acquiring Copano, had utilized Percheron Field Services for the purposes of acquiring the easements for the second pipeline. A landman working for Percheron sent letters to the Landowners containing offers of $15 to $25 per foot of pipeline, which conflicted with the offered $70 per foot price offered to the Landowners by Sanford. These offers for the reduced amounts were not accepted. There was an offer of $88 per foot sent by Copano to a single landowner on February 12, 2013, but this was later contradicted by Percheron's offer of $15 per foot.

The second pipeline was never constructed, and no payment was ever rendered. The Landowners sued Copano for breach of contract alleging there was a contract. The Landowners also sued Kinder Morgan for breach of contract alleging Kinder Morgan assumed Copano's contractual obligations when it merged with Copano, as well as tortious interference with contract. The defendants moved for summary judgment, which the trial court granted.

The Court of Appeals affirmed summary judgment on tortious interference, but reversed on the breach of contract claim, to which Copano appealed.

Analysis

The statute of frauds requires that a contract for the sale of real estate be in writing, and signed by the person, or by someone legally authorized by him, charged with the promise or agreement. Because an easement is an interest in real estate, a contract for the sale of an easement is subject to the statute of frauds. *Pick v. Bartel*, 659 S.W.2d 636, 637 (Tex. 1983). The statute of frauds also requires all material details and essential elements of the agreement to be contained within the writing and to not have to resort to oral evidence. It does not need to be a single document, multiple documents can comprise a single contract, and those documents can even be executed at different times.

However, the January emails between the parties do not satisfy the statute of frauds. While they do contain an offer and acceptance, they do not refer to what is being offered and accepted, and are missing essential elements of the agreement. The Landowners argued that the earlier December emails between the attorneys contain the essential terms, such as the size and location of the property for sale. However, there was no agreement or intent to be bound by the terms in the December emails as to satisfy the statute of frauds.

"[A] writing that contemplates a contract to be made in the future does not satisfy the requirements of the statute of frauds." *Southmark Corp. v. Life Inv'rs, Inc.*, 851 F.2d 763, 767 (5th Cir. 1988) (applying Texas law). The future-tense phrasing in the December emails indicate that there was no agreement therein, and that it was in contemplation of a future contract.

The writings must evidence the "agreement…so that the contract can be ascertained" from the writing. *Cohen v. McCutchin*, 565 S.W.2d 230, 231 (Tex. 1978) (citing *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150, 152 (Tex. 1945)). The December emails only describe what the description of the terms of one party that were to be discussed at a future meeting, not an agreement of the party to be bound by a contract.

An essential element of a contract is a party's intent to be legally bound by the contract. *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 63 (Tex. 2014). Future looking writings do not satisfy the statute of frauds because they do not demonstrate an intent to be bound. The Court of Appeals failed by allowing a writing that showed that the parties merely agreed to something, but failing to demonstrate that the parties intended to bind the defendant to the terms of the December emails. Rather, they used the December emails to determine that they contained many of the terms, and then the January emails as an agreement. However, it did not demonstrate that Copano intended to be bound to the terms within the December emails.

The Court determined that there is nothing to tie together the terms within the December emails and the agreement within the January emails. The alleged contract by the Landowners was unenforceable under the statute of frauds, and the trial court was correct in granting summary judgment to Copano on breach of contract.

C. ***Cudd Pressure Control, Inc. v. Exco Res., Inc.*, 2020 Tex. App. LEXIS 2831, (Tex. App. Dallas March 31, 2020)**

Facts

Cudd Pressure Control ("Cudd") provided oil field services to Exco. The parties entered into a Master Service and Supply Agreement ("Master Agreement") in May 2010, wherein Cudd would supply various services.

In October 2011, they entered into a Work Order for hydraulic fracturing in east Texas and northern Louisiana that specifically incorporated the Master Agreement. Article 6 of the Work Order addresses billing, reconciliation reports, and invoices:

> [Exco] will be billed on a per stage basis at the worksite. The ticket will reflect a flat "per stage" fixed cost charge based on the assumed fixed cost recovery threshold of one contractor crew performing at least two (2) stages ("Fracs") in a 12 hour day, for an average of forty-four (44) Fracs per month in a twenty (20) day pumping month, and the applicable variable and line item costs. [Cudd] shall provide [Exco] a monthly or quarterly reconciliation report, at [Exco]'s option, clearly showing the difference between the total fixed costs billed during the period and the actual fixed costs due for the period.

Article 18 of the Work Order addresses pricing and provides as follows:

> Pricing shall be determined by combining a Fixed Service Charge with applicable Variable Charges for the services performed by Contractor, in accordance with the pricing tables in sections (a) and (b) below. Thereafter, the service charges, rates, or other remuneration shall be changed only upon mutual agreement by both parties.

The pricing table in Article 18, section (a) provides that Cudd's Fixed Service Charge was $57,364.00 for its crew performing 44 fracs a month on a 12 hour basis.

Article 19 of the Work Order describes adjustment to pricing set forth in Article 18, specifically: "[a]ll fixed and variable prices herein shall be fixed for six (6) months" and "pricing may be adjusted once every six months to reflect any increase or decrease in the market prices of sand, organic chemicals, diesel fuel, labor, the replacement and recertification costs of Frac irons, Fluid-Ends, and expendables." Also important to the Court were provisions requiring thirty days' prior written request for a price change containing evidence of market price and a fifteen day opportunity to object and negotiate an agreed price increase.

At the end of the two year term of the Work Order, in December 2012, there were no reconciliation reports provided. Cudd invoiced Exco in February 2013, for $6,734,240.88 for increased costs of fluid-ends and frac irons. In June 2014, Cudd sued Exco for breach of contract, promissory estoppel, and mutual mistake and sought reimbursement the costs for fluid-ends replacement. Exco filed for summary judgment, Cudd's response included an affidavit from an Exco Vice President, to which Exco objected to under the parol evidence rule. On September 21, 2015, the trial court granted Exco's motion as to the promissory estoppel and mutual mistake claims and denied the motion as to the breach of contract claim.

Cudd amended its petition to assert only breach of contract, alleging it was entitled to "payment of the replacement fluid-ends as a fixed cost, pursuant to Article 6" of the Work Order. Exco filed for summary judgment, which was granted by the Court. Exco obtained leave to file a counterclaim for breach of contract, alleging Cudd had overcharged $136.00 per stage for fixed service charges. On Exco's breach of contract claim against Cudd, Exco argued Cudd failed to plead offset as an affirmative defense to Exco's claim for reimbursement. The Court ruled that Cudd was not entitled to any costs above $57,364.00 because no reconciliation reports were ever provided, and awarded Exco damages, attorney's fees, and interest.

Analysis

The first issue on appeal was whether there was an oral agreement between the parties that fluid-ends were a reimbursable expense rather than fixed service charge under the Work Order. Cudd asserted the trial court improperly refused to consider parol evidence that would have resolved the ambiguity of the Work Order and established the parties' oral agreement.

If a contract is written so that it has a definite meaning, then is it not ambiguous. Parol evidence is not allowed to create an ambiguity in a contract. If the language in a contract can have two or more reasonable interpretations, then it is ambiguous. Cudd did not plead or argue ambiguity in the trial court, but now argued on appeal that the Work Order was ambiguous because Article 19 does not state it is the sole or exclusive method to recover the cost of fluid-ends. Cudd cited to *Sage Street Associates v. Northdale Construction Co*, 863 S.W.2d 438 (Tex. 1983). However, *Sage Street* only stated that a court may conclude ambiguity in the absence of a pleading, not that it is unnecessary to plead ambiguity at the court level in order to raise the issue on appeal of a summary judgment case.

Even moving past any pleading defects, as evidenced by Cudd's failure to plead ambiguity in the trial court, the Court found that it was improper to admit parol evidence. The Court determined that the Work Order is unambiguous. An unambiguous contract will be enforced as written, and parol evidence will not be received for the purpose of creating an ambiguity or to give the contract a meaning different from that which its language imports. *David J. Sacks, P.C. v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008). The Court determined the trial court correctly excluded parol evidence.

Then, Cudd argued that the statute of frauds does not apply to the oral agreement that Exco would reimburse for the cost because it did not materially alter the obligations of the contract. The statute of frauds requires an agreement to be in writing if it cannot be performed within one year from the date it was made. However, not all oral modifications to a contract are barred by the statute of frauds. An oral modification of a written contract is enforceable under the statute of frauds only if the modification does not materially alter the obligations imposed by the underlying agreement. *Blackstone Med., Inc. v. Phoenix Surgicals, L.L.C.*, 470 S.W.3d 636, 647 (Tex. App.—Dallas 2015, no pet.). Here, the Court determined that the change was not an immaterial term. Articles 18 and 19 include how pricing changes were to be obtained. Pricing changes would materially alter how Exco managed its business.

The next issue raised was that the trial court erred in finding that Cudd failed to plead the defense of offset to Exco's counterclaim for breach of contract, and not allowing Cudd leave to amend, a trial amendment, or continuance for discovery. The Court agreed with the trial court that the live pleading only contained an affirmative defense to a prior claim that was disposed of on summary judgment, and did not contain an affirmative defense of offset for the claim before it. The Court found no abuse of discretion on this issue.

In its final issue, Cudd argued that the trial court was incorrect in finding that Article 6 of the Work Order was a condition precedent that barred Cudd's defense to Exco's counterclaim. At the pretrial conference, the trial court concluded "Cudd is not able to claim or offset additional amounts as a matter of law because no reconciliation reports were ever provided, regardless of whether the affirmative defense of offset had been adequately pled." Cudd argued that the duty lay with Exco to request the reconciliation reports and there were no deadlines for producing the reports. But the Court found that the language in the Work Order required Cudd to provide reports at Exco's option of either quarterly or monthly.

The Court affirmed the trial court judgment on all issues.

D. *McGehee v. Endeavor Acquisitions, LLC*, 603 S.W.3d 515, 2020 Tex. App. LEXIS 361 (Tex. App. El Paso April 29, 2020)

<u>Facts</u>

In November 2015, Endeavor Acquisitions, LLC ("Endeavor") solicited the purchase of property owned by Stewart and McGehee (the "Sellers"). The Sellers collectively owned 160 acres and one-half of the bonus and royalty on an oil and gas lease of the property's mineral interest. In their solicitation letter, Endeavor included a transmittal letter, two original purchase and sale agreements ("PSA"), six original general warranty deeds, and two IRS W-9 forms. Endeavor offered to purchase the entirety of the Sellers' interests for $185,000.00. If the Sellers accepted the purchase, they were to return the PSA and deeds signed before a notary and retain a copy for themselves and mail the documents to Endeavor. Upon receipt of the executed PSA and warranty deeds, Endeavor would be allowed thirty days to review title.

The Sellers crossed off the $185,000.00 purchase price offered for all of their interest, filled in $200,000.00, and initialed their changes. The Sellers did not alter the term "Seller" in the PSA to include all sellers. They executed the originals and returned them to Endeavor. Endeavor had taken an extended period to review the title and in March of 2016, issued two $100,000.00 checks, one to each of the Sellers. The Sellers informed Endeavor they had refused to negotiate the checks, arguing that the PSA was for a payment of $200,000.00 per seller. Endeavor disagreed, contending that "Seller" included both of the sellers and the total purchase price was for $200,000.00. The first set of checks expired, and Endeavor issued two new checks again for $100,000.00, set to expire June 5, 2016, being 45 days after issuance.

McGehee deposited his check on May 31, 2016, but was notified by the bank on June 6 that the check was returned for insufficient funds, but they would redeposit it for his benefit. Stewart deposited his check on June 3. Both checks were returned due to a stop payment order by Endeavor. Endeavor acknowledged that it stopped payment on both checks and then issued a third attempt at payment by direct wire transfer to the Sellers, but both Sellers reversed the payments and refused to accept.

The Sellers filed suit, seeking to invalidate the PSA and warranty deeds because Endeavor breached the PSA by failing to pay the stated consideration and to remove the cloud on their title due to the PSA and warranty deeds. The Sellers also tried to subvert the contract by claiming Endeavor failed to return a signed copy. Endeavor raised affirmative defenses including waiver and estoppel and asserted a counterclaim requesting a declaration that the PSA was a valid and enforceable contract for a total price of $200,000.00. The trial court denied the Sellers' motion and granted Endeavor's motions.

Analysis

The Court of Appeals rejected the Sellers' argument that Endeavor's failure to sign the PSA constituted an invalid contract. A contract is established when proven by a preponderance of evidence that an offer is accepted, accompanied by consideration. A contract consists of "(1) an offer, (2) an acceptance, (3) meeting of the minds, (4) each part's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding." Also applicable is the statute of frauds, which requires the contract be in writing for the sale of real estate. A contract does not need to be signed to be executed unless explicitly required by both parties.

Here, Endeavor's letter constituted an offer and set the terms for the purchase. The Sellers made a counteroffer by returning the contracts with the $200,000.00 amount. Endeavor accepted the counteroffer by delivering the first two payments of $100,000.00 for both sellers as stated in the PSA. There was no language within the PSA delivered to

Endeavor that would require Endeavor's signature to execute the contract, nor that Endeavor's signature and delivery were conditions precedent to the validity of the PSA.

The Court found that Endeavor manifested its assent to the counteroffer by tendering the $200,000.00 payment price indicated in the PSA. The Sellers manifested their assent by solely changing the price in the PSA without alteration to any of the other terms in the PSA. Thus, the Court found that a valid contract had been formed. The Sellers attempted to argue that Endeavor's order to stop payment on the second set of checks before their date of expiration constituted a breach of contract. However, the Court also rejected the Sellers' claim of breach of contract regarding the stop-payment orders by Endeavor. Though the stop payment orders were ordered before the date of expiration, they did not take place until the date the checks expired.

On the issue of attorney's fees and Endeavor's counter suit, the Sellers tried to claim that the mirror image rule applied. The mirror image rule is when a defendant files a countersuit and no new controversy exists, it an improper suit used only as a means to get attorney's fees. However, an exception to the mirror image rule existed here. When the plaintiff has claimed relief under the Declaratory Judgments Act, it is allowed for the trial court to grant attorney's fees to the defendant who counterclaims for declaratory relief.

IV. DEED CONSTRUCTION

A. *Piranha Partners v. Neuhoff*, 596 S.W.3d 740, 2020 Tex. LEXIS 136, 63 Tex. Sup. J. 474 (Tex. February 21, 2020)

Facts

In 1975, Neuhoff Oil & Gas ("Neuhoff") purchased an undivided two-thirds (2/3) interest in a mineral lease ("Section 28 Lease"), and a few years later sold the interest but reserved a three and three-fourths percent (3.75%) overriding royalty interest in the property. Eventually in 1999, Neuhoff sold its three and three-fourths percent (3.75%) overriding royalty interest at auction by assignment to Piranha Partners ("Piranha"), at which time there was only one well completed on the lease, known as the Puryear B #1-28 well.

Subsequent to the purchase by Piranha, an additional three wells were successfully drilled under the Section 28 Lease. Although Piranha purchased the overriding royalty interest from Neuhoff, the operator of those wells continued making payments to Neuhoff until 2012, when title opinions were obtained detailing that Piranha owned the overriding royalty interest in all of the land covered by the Section 28 Lease, not just in the Puryear B #1-28 well. With this discovery and support, the operator paid the overriding royalty on all the wells on the property to Piranha, including what was previously paid to Neuhoff, and demanded a refund from Neuhoff.

Neuhoff filed suit arguing that they sold only their overriding royalty interest in the Puryear B #1-28 well; whereas Piranha argued that Neuhoff sold the overriding royalty in all of Section 28, not just the Puryear B #1-28 well. The matter before the Court was mired in ambiguity regarding the differences between the intention of the seller, what the buyer thought to have purchased, and the selling documents.

Analysis

The Court noted that when interpreting documents, it must look at the intentions of both parties, the seller's intent when drafting the sale documents, and what the buyer believed they were purchasing within the "four corners," that is, what is specified within the writing of the document itself. The parties' different interpretations alone do not make for ambiguity, it is only ambiguous when both parties' interpretations can be reasonably drawn from the documents.

The granting clause of the assignment from Neuhoff to Piranha does not expressly describe the interest being conveyed but points to the description within Exhibit A for the interest being conveyed. Exhibit A describes the interest as follows:

Lands and Associated Well(s): Puryear #1-28
Wheeler County, Texas
NW/4, Section 28, Block A-3, HG&N Ry Co. Survey

Oil and Gas Lease(s)/Farmout Agreement(s):

Oil & Gas Lease(s)
Lessor: [the Puryears]
Lessee: Marie Lister
Recorded: Volume 297, Page 818

This description notes the "Lands and Associated Well(s)" which identifies the land and the well that existed at the time, and the "Oil and Gas Lease(s)" which identifies the lease that was burdened by the three and three-fourths percent (3.75%) overriding royalty interest. Exhibit A does not offer further clarification as to whether the interest conveys the well, the land, or the lease.

Piranha argued that rules of construction must be applied and that the assignment must be construed to:

1. Confer upon the grantee the greatest estate that the terms of the instrument will permit. *Waters v. Ellis*, 158 Tex. 342, 312 S.W.2d 231, 234 (1958).
2. Reject any alleged exception, reservation, or limitation that is not expressly and clearly stated in the written document. *Perryman v. Spartan Texas Six Capital Partners, Ltd*, 546 S.W.3d 110, 119 (2018).
3. Resolve any doubts against the party who drafted the document. *Garrett v. Dils Co.*, 299 S.W.2d 904, 906 (1957).

However, Neuhoff contended that because the assignment is unambiguous, the Court could determine the parties' intent by harmonizing any conflicting language. *Citizens Nat. Bank in Abilene v. Texas & P. Ry. Co.*, 150 S.W.2d 1003, 1006 (1941).

The Court found Exhibit A to be ambiguous because although it identified the well, land, and lease, it failed to identify whether the well, land, or lease defined the scope of the overriding royalty assigned, thus making either party's interpretation reasonable. The Court used a "holistic and harmonizing approach" to all portions of the assignment, considering each portion equally. In doing so, it became apparent that the rest of the clauses in the assignment show that it was to include any working interest, leasehold rights, overriding royalty interests, and reversionary rights that Neuhoff may have had, and that Neuhoff conveyed its entire interest under the Section 28 Lease.

The Court determined that in reading Exhibit A in harmony with the other provisions of the assignment, the Lands and Associated Well(s) section simply identified the only well in existence at the time, and did not limit the overriding royalty to that single well.

B. ***ConocoPhillips Co. v. Ramirez*, 599 S.W.3d 296, 2020 Tex. LEXIS 44, 63 Tex. Sup. J. 299 (Tex. January 24, 2020)**

Facts

This case arises from a family dispute stemming from the passing of the matriarch of the family, Leonor. Leonor owned all of the surface and a ¼ mineral interest in the Ranch "Las Piedras." Her will devised to her son a life estate to the "Las Piedras" ranch, with his children being the remaindermen. The son signed an oil and gas lease covering the ranch, that was eventually acquired by ConocoPhillips from EOG.

The son died and was survived by his three children (the plaintiffs), who received their remainder interests in the ranch. The plaintiffs sued ConocoPhillips and EOG for an accounting and seeking to establish that they owned a ¼ interest. They alleged that the lease covered the life estate of their father, and as remaindermen, upon his death the lease was not binding on them.

The trial court awarded the children damages, prejudgment interest, a per diem for 80 days preceding the final judgment, and attorneys' fees for a total judgment of nearly $12 million against ConocoPhillips. From this, ConocoPhillips appealed.

Analysis

On appeal, the Court sought to find the intention of the testatrix at the time of construction by looking to the four corners of the will. In Leonor's will, "Ranch 'Las Piedras'" was capitalized and placed in quotations indicating that the name had a specific meaning to the family. Reviewing 80 years of conveyances to the land showed that "Las Piedras" referred only to the surface estate of a 1,058 acre tract. The will refers to this land as the "Las Piedras" pasture, indicating that it covered only the surface estate and did not include the oil, gas, and minerals under the tract, which were to remain undivided. The Court held that the grandchildren's interpretation of the will was erroneous and that the judgment for accounting and payment was to be reversed.

V. EASEMENTS

A. *Atmos Energy Corp. v. Paul*, 598 S.W.3d 431, 2020 Tex. App. LEXIS 1926, 2020 WL 1057331 (Tex. App. Fort Worth March 5, 2020)

Facts

In 1960, an easement was granted giving a blanket easement, allowing a right of way for the grantee to construct, maintain, and operate pipelines over and through 137 acres of property. This pipeline ran along the southern border of the property. In 2017, the current owner of the property (Paul) denied the current holder of the easement (Atmos) access to the property to lay an additional pipeline. The proposed pipeline would run diagonally southeast across the property. Atmos had tendered $70.31 to Paul in accordance with the original easement which called for $1.00 per rod of pipeline laid.

Atmos sued for breach of contract due to Paul's denial of access to his land, alleging he violated the Easement Agreement. Atmos alleged it was necessary to construct the second pipeline to meet the increased needs of the region that the first line, on its own, would not be able to provide. After the suit was filed, the parties entered into a "Right of Possession and Use Agreement" that would allow Atmos to access the property, conditioned on the Court's ruling.

Paul admitted he denied Atmos access to his property, but in doing so, did not breach the Easement Agreement. He believed that the Easement Agreement only created one right of way and easement, allowing for multiple pipelines but not multiple easements. Relying heavily on *Houston Pipe Line Company v. Dwyer*, 374 S.W.2d 662, 665-66 (Tex. 1964), Paul argued that Atmos's predecessor set the location of the easement and the maximum pipeline diameter allowed when it laid the initial line in 1960.

Atmos argued that the case at hand was distinguishable from *Dwyer*. The easement in *Dwyer* only allowed for one single pipeline, whereas here there was a multiple pipeline expansible easement. The language in the Easement Agreement here was for "pipe *lines*." Both parties had agreed that more than one pipeline could be laid. *Dwyer* did not address whether the location fixed by a first line laid would apply to additional pipelines.

Paul moved for summary judgment, which the Court granted and entered a final judgment that Atmos take nothing. The Court also found that the 1960 easement was not a blanket easement, that Atmos exceeded its rights by installing the second pipeline, and that Paul did not breach the Easement Agreement by not consenting to the installation. Atmos appealed.

Analysis

Texas law establishes that an easement is a nonpossessory interest that gives the holder use of the property for a particular purpose. The holder's rights are limited to what is expressed in the grant and the party cannot exceed the rights expressed in the easement. The dominant party cannot exceed the bounds of the easement. The law balances this by requiring that the servient estate cannot interfere with the right of the dominant estate for uses granted to it by the easement. The servient estate must yield any use that interferes with the dominant estate's exercise of use.

The Court looked at the true intentions of the parties as expressed in the easement to determine the scope of the conveyed interest, reading it as a whole with all parts weighed evenly. If the language in a contract can be given a certain or definite meaning, the Court must interpret the contract as a matter of law. Ambiguity only becomes an issue if there can be more than one meaning given after the rules of construction are applied.

In Texas, a blanket easement is an easement without a metes and bounds description of is location on the property. *First Am. Title Ins. Co. of Tex. v. Willard*, 949 S.W.2d 342, 344 n.2 (Tex. App.—Tyler 1997, writ denied). An easement over an entire servient tract is a blanket easement. Blanket easements are used often for long route utility lines, such as pipelines and electrical lines. *Id.*

The Court determined that the Easement Agreement was unambiguous and was a blanket easement allowing for multiple pipelines to be constructed. Paul was not entitled to summary judgment; the case was reversed and remanded.

B. ***Southwestern Elec. Power Co. v. Lynch*, 595 S.W.3d 678, 2020 Tex. LEXIS 159, 2020 WL 960993 (Tex. February 28, 2020)**

Facts

Southwestern Electric Power Company ("SWEPCO") acquired a 1949 easement from its predecessor to construct a transmission line. The easement allowed SWEPCO to erect a set number of towers, poles, and anchors but more could be constructed by compensating the landowners. It also allowed the right of ingress and egress over the encumbered properties to construct and maintain the lines. The plaintiffs ("Landowners") purchased land encumbered by the easements. SWEPCO undertook a modernization project on the original line and made offers to supplement the easement to allow SWEPCO to expand the easement to 100 feet wide. Some owners accepted, but the Landowners did not. SWEPCO completed their project pursuant to the original terms of the easement.

After the project was completed, the Landowners filed suit seeking a declaratory judgment that would fix SWEPCO's easement to 30 feet wide, being 15 feet on either side of the transmission line. SWEPCO argued lack of justiciability, as the Landowners had not suffered an injury. The trial court allowed extrinsic evidence, over SWEPCO's objection, that showed historical easements that supported the Landowners' argument that the easements should be limited to 30 feet wide. The trial court ruled against SWEPCO and limited their easements to 15 feet to either side of the transmission lines.

On appeal, SWEPCO argued the trial court lacked subject matter jurisdiction due to no justiciable controversy because they had not utilized the easements unreasonably. SWEPCO also argued that the Court incorrectly interpreted the easements and that they were express general easements, and that the Court should not have allowed in extrinsic evidence.

Analysis

The Court first addressed the issue of subject matter jurisdiction, ruling that a controversy remained even after the completion of the project due to SWEPCO's attempt to obtain 100 foot wide easements. This would indicate that there is possible future use of the Landowners property, therefore giving the Landowners cause to file suit.

The next issue was the scope of SWEPCO's easements. When construing terms of an easement, the rules of contract interpretation should be used to look at the express terms of the easement to determine its scope. The plain language of the easements grants SWEPCO: (1) a right of way on the Landowners' properties on which SWEPCO may construct a transmission line along a particular course; and (2) the right of ingress and egress over the Landowners' properties adjacent to the right of way for the purpose of constructing, removing, reconstructing, and maintaining the transmission line. There was not a specific maximum width of the right of way, nor do they specify how much land SWEPCO was entitled to access under the ingress and egress provision. SWEPCO maintained that this was a general easement, entitling it to reasonable access to as much of the Landowners' properties reasonably necessary to maintain the line.

The Court looked at whether the trial court erred in admitting extrinsic evidence. SWEPCO argued that the easements "purposefully and unambiguously impose no specific, fixed limitation" of the easements' width, and therefore the trial court inappropriately considered extrinsic evidence showing SWEPCO's historical use of the easements to add a 30 foot width limitation to the easements. SWEPCO contended that the omission of any specific width of the easements was a deliberate and purposeful decision that the signatories to the easements made in 1949. In support of its position, SWEPCO pointed to the common use of general easements that lack specific widths as necessary tools that allow utility companies to acquire flexible easements that account for growth and change in the transmission lines. Indeed, as SWEPCO observed, the language in the 1949 easements authorizes SWEPCO to accommodate possible changes in technology that might require the installation of poles made from different material as well as the addition of more poles. Because the general nature of the easements was deliberate—not ambiguous—SWEPCO argued that the trial court and the Court of Appeals erred in fixing the easements' width at 30 feet based on the Landowners' extrinsic evidence showing SWEPCO's historical use of the easements.

The trial court relied on *Houston Pipe Line Co. v. Dwyer*, 374 S.W.2d 662, 666 (Tex. 1964) to determine that that once the transmission line was constructed in 1949, the rights under the easements became "fixed and certain," limiting it to a 30 foot wide easement based on SWEPCO's historic use of the land. However, the Court here found this case closer to *Knox v. Pioneer Natural Gas Co.*, 321 S.W.2d 596 (Tex. App.—El Paso 1959, writ ref'd n.r.e.), as the easements in both cases authorized the grantee the right to construct, maintain, repair, and improve a utility line and granted right of ingress and egress as necessary to access the right of way.

The Landowners argued that once SWEPCO utilized the easement to construct the transmission line and a 30 foot wide right of way in 1949, it became fixed at 30 feet wide. The Court disagreed, just because a width is not specified in the easement does not mean extrinsic evidence can be used to prescribe a width. This would obviate the flexibility that parties bargain for in a general easement. The Court recognized that a general easement does not require a fixed width. The Court explained in *Coleman v. Forister*, 514 S.W.2d 899 (Tex. 1974), "[a] grant or reservation of an easement in general terms implies a grant of unlimited reasonable use such as is reasonably necessary and convenient and as little burdensome as possible to the servient owner."

Landowners purchase properties aware of any encumbrances, and easements are a common encumbrance. Landowners are charged with notice of easements that may encumber their property, including easements that do not contain a specific width but instead include general language. *Williams v. Thompson*, 152 Tex. 270, 256 S.W.2d 399, 403 (Tex. 1953). The Landowners here purchased these properties with notice of SWEPCO's easements. SWEPCO attempted to negotiate additional terms, but the Landowners did not agree, as such, they were still subject to the original general easements. However, the Landowners were not without recourse. The holder of a general easement is obligated to use the easement in a reasonable manner and only to the extent necessary.

The Court affirmed the Court of Appeals in that the trial court had proper jurisdiction. However, the Court of Appeals erred in fixing the width of the easement. SWEPCO acquired general easements over the Landowners' properties, with authorized activities and rights granted to SWEPCO for specific purposes relating to a transmission line. There are no fixed widths for the easements, nor were they required to be fixed.

VI. IMPLIED COVENANTS

A. ***Seeligson v. Devon Energy Prod. Co., L.P.*, 804 F. App'x 304 (5th Cir. 2020) and *Seeligson v. Devon Energy Prod. Co., L.P.*, Civil Action No. 3:16-CV-00082-K, 2020 U.S. Dist. LEXIS 23166, 2020 WL 636224 (N.D. Tex. Feb. 11, 2020)**

<u>Facts</u>

Similarly situated royalty owners (the "Plaintiffs") alleged that Devon Energy Production Company, L.P. ("DEPCO"), deliberately underpaid and improperly underpaid royalties that were owed to the Plaintiffs for gas that was processed through the Bridgeport Gas Processing Plant ("Bridgeport Plant"). DEPCO served as either the lessee, operator, and/or the entity required to remit revenue to the royalty owners. DEPCO sold residue gas and NGLs at or near the wellhead to Devon Gas Services, LP ("DGS"). The relevant leases provided that the royalty on gas sold at the wellhead "shall be one-eighth of the net proceeds received from such sale." On the other hand, for gas sold or used off premises, the royalty shall be "the market value at the well of one-eighth of the gas so sold or used."

All of the sales occurred under one common contract called the Gas Purchasing and Processing Agreement ("GPPA"). Under the GPPA, DGS paid DEPCO 82.5% of the prices they received from the sale of residue gas and NGLs and deducted a 17.5% processing fee. The Plaintiffs claimed that DEPCO improperly passed the 17.5% fee onto them, reducing their royalty payments by 17.5%. The Plaintiffs argued that the notably reduced royalty fee was a breach of the duty to market because a reasonably prudent operator would have obtained a lower fee.

The district court granted the Plaintiffs' motion on class certification and, for the most part, the Fifth Circuit affirmed that class certification. The Fifth Circuit did remand on two specific issues regarding commonality and predominance. Specifically, "whether additional specific evidence supports the conclusion that the breach of the duty to market and damages from any breach can be evaluated class wide or if a well-by-well analysis is required."

<u>Analysis</u>

In determining whether a breach can be found on a class wide basis, a plaintiff would have to show the rate a reasonably prudent operator ("RPO") would have received on the class wide basis. This analysis is both relevant to determine whether the breach and damages are capable of a class wide resolution. The Court determined that since the gas is sold and bought under one contract, the Plaintiffs would not have to show proof of other sales to determine what the RPO rate would be; the RPO rate is subject to generalized proof and can be used as to the class as a whole.

Next, the Court considered whether the Plaintiffs could provide proof of a breach that is both generalized and common to the class. Usually, class members have all suffered the same injury, but a breach can also be determined by a defendant's injurious conduct, even when the effects of the damages are different. The Court found that the 17.5% rate was systematically applied to all the leases without regard to the location or to the differences between various lease provisions. Since the 17.5% rate applied to all of the class members, the Plaintiffs could provide generalized common evidence that the rate was just an artificial means to lower the price of gas sales. The Court further determined that since this was a class composed of entirely proceeds leases, every lease was injured by the same improper fee, and the operator could be liable under sham transactions.

DEPCO argued that the 17.5% rate was a discounted sale while the Plaintiffs suggested that it was a processing fee. However, it did not matter how the 17.5% was characterized. DEPCO still owed a duty to the class members to get the best price possible and act in a reasonably prudent manner to get the lowest processing fee available. Thus, it did not change the fact that DEPCO still had a duty to market, or preclude class certification.

Finally, the Court rejected DEPCO's argument that the bifurcated royalty provisions precluded class certification under *Exxon Corp. v. Middleton,* 613 S.W.2d 240, 242 (Tex. 1981). DEPCO argued that if DGS processed the gas off lease, then the gas would be sold "off the premises," triggering a market value royalty obligation and precluding class certification. However, DEPCO's claim fails under *Middleton*, in questioning where the sale occurred. It is undisputed that the gas was sold after it was processed, and it was sold at the wellhead; triggering proceeds royalty obligations.

Because each member experienced the same injury from the same pricing fee, the Court found that the breach could be determined on a class wide basis.

The Plaintiffs were able to show what rate a reasonably prudent operator would have received on a class wide basis; thus, the Court found that a breach could be determined class wide. The Court also found that the Plaintiffs provided sufficient evidence to calculate class damages. Therefore, the Court determined that the Plaintiffs reached the burden in showing that class certification was appropriate. The Court also dealt with other issues like discovery and limitations, but they found the issues not as dominate over the commonality question issues.

VII. JOINT OPERATING AGREEMENT

A. *In re EXCO Servs.*, No. 18-30167, 2020 Bankr. LEXIS 1097, 2020 WL 1951582 (Bankr. S.D. Tex. Apr. 22, 2020)

Facts

In 2013, EXCO acquired interests in oil and gas assets from Chesapeake Exploration. Subsequently, EXCO entered into two separate agreements to sell production from the wells. The oil agreement called for the sale of oil production from EXCO to Chesapeake Energy Marketing ("CEMI"). The gas agreement related to an underlying contract that arranged for the sale of natural gas production to CEMI. The oil agreement required CEMI to purchase the oil produced from the wells assigned to EXCO for a term of one year. Afterwards, the oil agreement renewed annually for twelve years, however CEMI had the right of first refusal (ROFR) to purchase the oil.

In 2016, EXCO and Admiral (a collection of various holding companies) entered into two joint operating agreements ("JOAs"), which included the wells EXCO received from Chesapeake. Pursuant to the JOAs, EXCO was the operator and Admiral was a non-operating working interest owner. Also in 2016, EXCO formed Raider Marketing ("Raider") to serve as a marketing affiliate. EXCO entered into a marketing services agreement with Raider to market oil and gas produced from the leases of EXCO and Admiral. The marketing agreement provides for a 3% marketing fee for Raider's services. EXCO contended that Admiral should share its proportionate burden of the marketing fee; but Admiral contended that the marketing agreement with Raider breached their JOAs.

EXCO filed for bankruptcy, and part of their plan was to assume both JOAs following the confirmation of its Chapter 11 plan. Admiral filed a motion to determine the cure amount for the alleged breaches of the JOAs. Both parties filed for summary judgement on the limited issue of whether the JOAs permitted EXCO to charge Admiral the marketing fee. The Court denied both parties' motions for summary judgement since more discovery was needed.

Analysis

Both parties contended that the provisions of Article XVI of the JOAs controlled over the general form provision of Articles I-XV of the JOAs. Article XVI.Y of the JOAs governed marketing, and is subject to EXCO's obligations under the existing marketing agreement. Thus, EXCO's marketing rights with respect to Admiral's share of production was subject to EXCO's oil and gas agreements with CEMI. Admiral argued that because EXCO could not charge CEMI for marketing, then EXCO could also not charge Admiral for marketing. However, that argument failed. Looking at the marketing agreement, the Court found that EXCO was not primarily responsible for marketing production sold to CEMI. EXCO's oil agreement with CEMI allowed EXCO to solicit higher offers during the ROFR term. If EXCO solicited a higher offer and CEMI used its ROFR, then Admiral would benefit and EXCO could share those fees with Admiral.

Section 6 of the oil agreement does not specify EXCO's right to market production, but rather sets forth the manner of delivery, calculation of price, and method of payment. The Court concluded from the oil agreement that EXCO operated the wells and delivered its oil production to CEMI, and in return CEMI marketed and sold the oil to third parties, then paid EXCO. The subsections of Section 6 make it clear that the parties contended that CEMI would handle, market, and sell the oil production. However, Section 6.d does permit EXCO to solicit higher offers for the oil during the ROFR term, and if EXCO obtained a higher offer, CEMI could use its ROFR. The Court also concluded that if CEMI ever released any of the oil because they refused to use their ROFR, then EXCO would have been able to market Admiral's share of the oil production pursuant to the JOAs. However, the Court concluded that more discovery was needed to determine the extent of the marketing efforts.

The gas agreement differed from the oil agreement because it could imply that EXCO could be responsible for marketing the gas. However, there are no provisions in the agreement concerning marketing. The Court concluded that the gas agreement was ambiguous as to who was responsible for such marketing. Regardless, the issue was moot because EXCO stated that it had flared all of the gas during the applicable periods.

The Court held that the JOAs did not allow EXCO to charge Admiral a marketing fee as to oil, but only if EXCO could obtain a higher price than CEMI during the ROFR term and CEMI either paid that price or released the production to EXCO to sell somewhere else. However, since discovery was still needed on those issues, the Court denied both parties' motion for summary judgement.

VIII. MIDSTREAM AND TRANSPORTATION

A. *Energy Transfer Partners, L.P. v. Enter. Prods. Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020)

Facts

In 2011, Enterprise approached Energy Transfer Partners ("ETP") about converting the Old Ocean pipeline into one that could transport oil south from Cushing, Oklahoma, to Houston, Texas. ETP owned the pipeline but Enterprise held a long term lease on it. The parties agreed to explore the possibilities of the venture in three written agreements. In the agreements, they reiterated their intent that neither party be bound to proceed until both companies' board of directors had approved the execution of a formal contract. The parties then formed an integrated team to pursue the venture and obtain sufficient shipping commitments. A Federal Energy Regulatory Commission rule governs that new interstate pipelines are required to have an "open season" in which shippers are asked to commit to daily barrel volumes and tariffs. The open seasons were unsuccessful, so Enterprise began preparing its exit and started negotiating with Enbridge. Two weeks later Enterprise ended its relationship with ETP orally and in writing.

The next month Enbridge and Enterprise became co-owners of the Seaway pipeline. They received an anchor shipper commitment from Chesapeake, which resulted in numerous other commitments during their open season; the new Wrangler pipeline was very successful. ETP sued on the basis that ETP and Enterprise entered into written agreements to market and pursue a pipeline, and that Enterprise breached the statutory duty of loyalty when they pursued the Wrangler project with Enbridge.

The jury returned a verdict that ETP and Enterprise had entered into an agreement to market and pursue a pipeline project and awarded ETP damages. The Court of Appeals reversed and rendered judgement for Enterprise. The Texas Supreme Court affirmed the Court of Appeals.

Analysis

The Court looked at Section 152.051(b) of the Texas Business Organizations Code ("TBOC") to determine whether a partnership was formed. They looked at the intent, the use of the name, and five other factors. In a first for the Court, they addressed whether parties' freedom to contract conditions precedent to partnership formation can override the statutory test. The condition precedent to the contract included a disclaimer that the parties' performance of their obligations did not constitute the parties as partners in connection with forming a joint venture. The Court concluded that the disclaimer language expressly negated any intent of the parties to form a joint venture or partnership. The Court held that ETP and Enterprise did not have the intent to be partners.

However, performance of a condition precedent can be waived or modified by the party to whom the obligation was due by word or deed. ETP was required to show that Enterprise waived this right or to prove it conclusively. The Court held that ETP had done neither. ETP did not show any evidence that Enterprise specifically disavowed the agreement to have both boards of directors approve the final contract, or that Enterprise acted inconsistently with that requirement.

The Court affirmed the Court of Appeals that parties can conclusively negate the formation of a partnership under Chapter 152 of the TBOC through contractual conditions precedent. ETP and Enterprise did so in this case and there was no evidence that Enterprise waived those conditions.

IX. MINERAL DEFINITION

A. ***Murray v. BEJ Minerals, LLC*, 464 P.3d 80 (Mont. 2020) and *Murray v. BEJ Minerals, LLC*, 924 F.3d 1070 (9th Cir. 2019)**

<u>Facts</u>

George Severson began leasing his farm and land to the Murrays in 1983, and from that point on, he periodically transferred portions of his interest in the property to his two sons (the "Seversons"), and sold the remaining interest to the Murrays. In 2005, the Seversons severed the surface estate from the mineral estate and sold their remaining surface interest to the Murrays. The purchase agreement required that the parties execute a mineral deed, which apportioned one-third of the mineral rights to Robert Severson, one-third to Jerry Severson, and one-third to the Murrays. Thus, the Murrays owned the entire surface estate and one-third of the mineral estate. The agreement required both parties "to inform all of the other Parties of any material event which may affect the mineral interests and to share all communication and contracts with all other Parties." BEJ Minerals, LLC, and RTWF, LLC (collectively, "BEJ"), are the successors in interest to the Seversons.

In 2005, the Murrays happened upon a number of small fossils, but found them to be insignificant at the time. However, afterward, the Murrays found and excavated several valuable dinosaur fossils on the property. Both parties agreed that these discoveries were extremely rare and highly valuable, with both parties stipulating that they were worth several million dollars.

In 2013, BEJ claimed an ownership interest in the fossils based on their stake in the mineral estate. The Murrays, as the sole owner of the surface estate, sought a declaratory judgement, arguing that the fossils found on the property are owned solely by the Murrays. BEJ then filed a counterclaim, requesting a declaratory judgement, claiming that the fossils are "minerals" and part of the mineral estate.

The district court found that the fossils were not "minerals" and granted summary judgement to the Murrays. On appeal, the Ninth Circuit reversed the district court's holding, to which the Murrays appealed.

Analysis

BEJ argued that the test for determining mineral status is whether the material at issue is technically a mineral, and if yes, whether that mineral is "exceptionally rare and valuable." However, the Murrays argued that just because a substance is rare and valuable, that does not make it a mineral. The Court adopted the rule that the end goal when examining a general mineral reservation is to interpret the term "minerals" according to its "ordinary and natural meaning" unless the parties manifest a different intention in the transacting document. The Court held that the best method for determining whether a substance fits within the ordinary and natural meaning of "mineral" is to use contextual cues, such as "an analysis of the term as used in the instrument; whether the material's mineral content makes it rare and valuable; and the material's relation to, and the effect of removal on, the surface."

The Court first examined the term "minerals" and the language surrounding the term in the mineral deed. The Court specifically looked at the language "oil, gas, hydrocarbons, and minerals in, on and under, and that may be produced from the [property]" with the right of "mining, drilling, exploring, operating, and developing said lands for oil, gas, hydrocarbons, and minerals." The Court concluded that they would interpret the deed language with the maxim of *expression unius est exclusion alterius*, which means the expression of one thing implies exclusion of another. Since "fossils" is not included in the expression above, it cannot be implied in the general grant of all other minerals. The common understanding of the word "mineral" was contended by both parties as the mining of hard compounds or oil and gas for refinement and economic use. The deed makes no statement about reserving fossils if found on the property. There are also no references of fossils when looking in Montana law at the statutory definition of "minerals."

The Court held that the dinosaur fossils found on the Murrays' property were not minerals under either the common or ordinary meaning. The word "minerals" is usually known as a resource, which often are nonrenewable.

The Court then determined whether the fossils' mineral content made them "rare and valuable." The Court looked at *Heinatz. v. Allen,* 217 S.W.2d 994 (1949) and determined that "rare and valuable" means the usefulness of the substance; if the substance can be refined. The Court held that fossils are not rare and valuable under this definition because fossils' value does not depend on their mineral composition. Dinosaur fossils are valuable because of their existence as remains of once living animals.

Finally, the Court looked at the substance's relation to and effect on the surface. If a substance is closely related to the surface, and if the surface would have to be removed or destroyed to get to the substance, then it is likely that substance is not considered a mineral. Here, the Court concluded that fossils have a close relationship with the surface because soil erosion and other natural events can cause them to be exposed to the surface. The Court also held that when excavating the fossils, it impacts the land; thus, fossils are not minerals because they are so closely related to the land.

The Court concluded that under Montana law, dinosaur fossils do not constitute a "mineral" for the purpose of a mineral reservation. Minerals in the context of a mineral reservation involves resources such as hard compounds, oil, and gas which are mined as a raw material to be further processed, refined, and used for economic use. The dinosaur fossils found on the property belonged solely to the Murrays.

X. OIL AND GAS LEASES

A. ***Devon Energy Prod. Co., L.P. v. Sheppard*, No. 13-19-00036-CV, 2020 Tex. App. LEXIS 4742, 2020 WL 3478680 (Tex. App. June 25, 2020) and *Devon Energy Prod. Co., L.P. v. Sheppard,* 2020 Tex. App. LEXIS 8378, 2020 WL 6164467 (Tex. App. Corpus Christi October 22, 2020)**

Facts

In 2007, Sheppard and Crain (collectively, "Sheppard") leased mineral interests to Devon Energy Production Co., et al. ("Devon"). The leases contained royalty provisions that provided royalty on gas to be free and based only on gross proceeds. The leases defined gross proceeds as "the total monies and other consideration accruing to or paid [Devon] or received by [Devon] for disposition or sale of all unprocessed gas proceeds, residue gas, gas plan products or other products." The parties agreed that on all oil and gas produced under the leases, the royalty would be paid as a percentage of Devon's gross proceeds from the sale to downstream purchasers.

The leases contain an "add-back" provision in paragraph 3(c) which states:

> (c) If any disposition, contract or sale of oil or gas shall include any reduction or charge for the expenses or costs of production, treatment, transportation, manufacturing, process or marketing of the oil or gas, then

> such deduction, expense or cost shall be added to the market value or gross proceeds so that Lessor's royalty shall never be chargeable directly or indirectly with any costs or expenses other than its pro rata share of severance or production taxes.

The leases also contain the following provision in the addenda:

> L. ROYALTY FREE OF COSTS:
>
> Payments of royalty under the terms of this lease shall never bear or be charged with, either directly or indirectly, any part of the costs or expenses of production, gathering, dehydration, compression, transportation, manufacturing, processing, treating, post-production expenses, marketing or otherwise making the oil or gas ready for sale or use, nor any costs of construction, operation or depreciation of any plant or other facilities for processing or treating said oil or gas. Anything to the contrary herein notwithstanding, it is expressly provided that the terms of this paragraph shall be controlling over the provisions of Paragraph 3 of this lease to the contrary and this paragraph shall not be treated as surplusage despite the holding in the cases styled. *Heritage Resources, Inc. v. NationsBank*, 939 S.W.2d 118 (Tex. 1996) *and Judice v. Mewbourne Oil Co.*, 939 S.W.2d 135-36 (Tex. 1996).

Sheppard sued alleging that Devon was selling the oil and gas produced under the leases with an $18.00 per barrel "reduction" on the sales price attributable to "gathering and handling, including rail car transportation." They also claimed that Devon breached the leases because they failed to add the $18.00 per barrel "reduction" amount to the royalty that is calculated pursuant to the "shall be added" provision in paragraph 3(c). In 2017, the parties executed a "Joint Stipulation as to Disputed Issues for Adjudication," identifying 23 issues for adjudication, many of which concerned the $18.00 per barrel charge that involved the reduction for post-production costs. The trial court found in favor of Sheppard on all 23 issues and rendered a declaratory judgement. Devon appealed.

<u>Analysis</u>

Devon argued that this provision was an "add-back" clause, but Sheppard argued that it was an "add-to proceeds" clause. Devon claimed that the royalties from the leases are based on the gross proceeds they received at the point of sale with no deductions. They also argued that an adjustment to the royalty base for post-production expenses is dependent on when and where those expenses are incurred relative to the point of sale for each transaction. Devon believed that they were not obligated to add any charges or reductions that downstream purchasers incurred. However, Sheppard contended that there was nothing in the leases that stated Devon must incur the expense for it to be subject to the "shall be added" clause. Sheppard believed that Devon was required to add all charges and reductions to the royalty base.

The Court determined that if they were to agree with Devon, it would render paragraph 3(c) meaningless or superfluous. Instead, the Court concluded that the "royalty is paid as a fraction of the value of the oil and gas produced from the leases" and the value increases when the minerals are processed, fractionated, transported, and then finally put on the open market to standardized prices. The "add-back" provision in the leases make economic sense to both parties because Sheppard can collect a royalty based on the standardized market and Devon is able to freely make those decisions. Thus, the Court held that the leases provided a "proceeds-plus" royalty, with the point of valuation at the market center.

The Court went on to examine the 23 declarations Sheppard brought to the Court. The Court categorized them into six categories: (1) Adjustment of Fixed Amount with Stated Purpose, (2) Adjustment of Fixed Amount Without Stated Purpose, (3) Adjustment Based on Processor's Actual Costs, (4) Adjustments for Unit Fuel/Lease Fuel, (5) Adjustment for Production Retained or Lost by Third Parties, and (6) Excess Value Resulting from Application of Contractually Fixed Recovery Factors. The Court concluded that Devon was required to add the first two categories to the gross proceeds to calculate Sheppard's royalties because fixed deductions was a charge or reduction as stated in 3(c) of the leases. However, if the fixed deduction in the leases did not specify the purpose for the reductions, then Devon was not required to add the amounts to their gross proceeds to calculate the royalties. The Court reversed the trial court's summary judgement in favor of Devon.

The third category concerned sales agreements with downstream purchaser's post-production expenses that were deducted from a published index price. These adjustments reflect the "actual transportation, processing, and marketing costs of the third party purchaser." The Court concluded that these expenses should be added to the gross proceeds under 3(c) of the leases. Finally, the Court concluded that the last three categories were not charges or reductions that need to be added to the royalty base.

The Court of Appeals reversed the trial court's judgement on issues pertaining to adjustment of fixed amount without stated purpose, adjustment for unit fuel/lease fuel, and adjustment for production retained or lost by third parties. The rest of the issues were affirmed.

B. *Mayo Found. for Med. Educ. & Research v. BP Am. Prod. Co.*, 447 F. Supp. 3d 522 (N.D. Tex. 2020)

Facts

Alpar Resources, Inc. ("Alpar"), entered into a hydrocarbon exploration and production agreement with Barbara Lips ("Lips") in 1994. Most of the lease is like other common Texas oil and gas leases, except for the closing paragraphs. Those paragraphs differ to protects Lips's surface rights "more particularly and expansively" than other common leases do. Paragraph 7 reserves an absolute veto over any assignments of Alpar's lease interest to Lips. In 1995, Lips devised ownership to an endowment arm of the Mayo Clinic ("Mayo"). In 1996, Alpar assigned to Amoco Production Co. ("Amoco"), certain acreage from the Alpar Lease in a farmout agreement. This agreement included Section 157 in Roberts County, Texas. Then, Amoco entered into an operating agreement with Courson Oil & Gas, Inc. ("Courson"), to drill additional wells in Section 157. The agreement also gave Courson the preferential right to purchase Section 157 if Amoco wished to sell all or any part of its lease interest.

However, the rights and obligations contained in the Alpar Lease changed throughout the primary term. The Third Amendment thereto removed and replaced the original consent to assign clause with a less restrictive clause which allowed for a lesser restraint on alienation. In 2019, BP American Productions ("BP"), who was the current lessee, finalized a purchase and sale agreement with Latigo Petroleum, LLC ("Latigo"), which included Section 157. However, BP offered Courson the preferential right to purchase its lease interest in Section 157. Mayo opposed the assignment of Section 157 to Courson and they exercised their right to withhold consent under the Third Amendment.

Mayo filed an application for temporary restraining order and preliminary injunction.

Analysis

Texas courts have long recognized that plaintiffs must prove two key elements to be granted a preliminary injunction: (1) substantial likelihood of success on the merits, and (2) substantially likely to suffer irreparable harm if the injunction was not granted. The Court concluded that Mayo would most likely be able to prove that the consent to assign clause was valid, but would not be able to prove that its refusal to consent to assign Section 157 to Courson was reasonable. Both factors are required to meet the first element, which only one was met in this case. The second factor of reasonableness was considered using the factors of the "assignee's solvency and track record on making timely royalty payments, assignee's industry reputation for honesty and reliability, assignee's prior working relationship with lessor, assignee's capacity to operate the leasehold in an efficient manner, whether assignee is a 'lease flipper' that will not actively develop the property, whether assignee would increase the number of non-cost bearing interests on the property, such as overriding royalties and production payments," and if the prospective assignee is a competitor in the field. The Court held that based on the facts submitted, Mayo did not satisfy the element of reasonableness. Mayo did not provide evidence of any of the factors except the last factor, a competitor in the field. Courson was a direct competitor to Latigo, but the Court observed that no federal or state courts have adopted that factor when determining reasonableness.

Next, the Court looked at the second element and determined that Mayo failed to show the Court convincing evidence that they would have suffered irreparable harm if they were not given a preliminary injunction. Mayo did not demonstrate anywhere in the briefing that they would suffer any specific injury, but had only speculated that Courson might injure their interests in Section 157.

The Court denied Mayo's request for a preliminary injunction because they were not likely to succeed on the merits and not likely to suffer irreparable harm in the absence of a preliminary injunction.

XI. OVERRIDING ROYALTY INTERESTS AND ROYALTY INTERESTS

A. ***Yowell v. Granite Operating Co.*, No. 18-0841, 2020 Tex. LEXIS 425, 2020 WL 2502141 (May 15, 2020)**

Facts

In 1986, Aikman Oil Corp. ("Aikman"), obtained an oil and gas lease covering a section of land in Wheeler County, Texas ("1986 Lease"). Aikman subsequently assigned its interest to Jay Haber, and reserved a 2.25% ORRI. The assignment included the following anti-washout provision:

> Should the Subject Leases…terminate and in the event, Assignee obtains an extension, renewal, or new lease or leases covering or affecting all or part of the mineral interest covered and affected by said lease or leases, then the overriding royalty interest reserved herein shall attach to said extension, renewal, or new lease or leases…

Through a series of conveyances, Tommy Yowell, et al. (collectively, "the Yowells"), became vested with Aikman's ORRI and Upland Resources Inc. ("Upland"), became vested with Jay Haber's leasehold interest in the 1986 Lease.

In May 2007, Amarillo Production Co. ("Amarillo"), executed a top lease ("2007 Lease") with the same mineral owner and covering the same property as the 1986 Lease. Subsequently, Amarillo sued Upland, alleging that Upland's 1986 Lease terminated due to lack of production and that the 2007 Lease was in effect. Pursuant to the settlement between Amarillo and Upland, it was agreed that: (1) the 1986 Lease terminated; (2) the

2007 Lease was in effect; (3) Upland was assigned the leasehold interest in the 2007 Lease; and (4) Amarillo was vested with a 5% ORRI in the 2007 Lease. Subsequently, Upland changed its corporate identity to Granite Operating Company ("Granite"). Following the settlement agreement, Granite stopped paying the Yowells' ORRI under the 1986 Lease.

The Yowells sued Granite to reinstate payment of their ORRI, seeking a judicial declaration of ownership and recovery of payments owed.

Analysis

The Court noted that for the Rule Against Perpetuities (the "Rule") to be implicated, the Yowells' reservation of an ORRI in new leases must first be determined to be an interest in real property. In concluding that the Yowells' interest was indeed an interest in real property, the Court stated:

> An ORRI is a share of production created and paid out of a lessee's interest under an oil and gas lease....We have long held that ORRI's, like other royalty interests in production, are nonpossessory property interests. See State v. Quintana Petroleum Co., 134 Tex. 179, 133 S.W.2d 112, 114-15 (Tex. 1939) (citing Tennant v. Dunn, 130 Tex. 285, 110 S.W.2d 53, 57 (Tex. [Comm'n Op.] 1937) (rejecting the argument that ORRI did not create an interest in land)).

Accordingly, the Court found that the Yowells' reservation of an ORRI in new leases was also subject to the Rule. To determine whether the Yowells' ORRI under future leases violated the Rule, the Court examined whether the ORRI vested at the time of its creation, or whether the ORRI would vest within the Rule's prescribed timeframe. The Court held that at the time the ORRI was reserved, it provided no immediate, fixed right of present or future enjoyment as to future leases because those leases were not yet in existence. Consequently, the Court held that Yowells' ORRI in future leases did not vest at the time of its creation but was instead an executory interest.

Furthermore, the Court held that the ORRI in future leases would not vest within the 21 years prescribed by the Rule. The Yowells' ORRI in a future lease was contingent on three events that might not occur within the Rule's timeframe. First, the 1986 Lease would not terminate "as long thereafter as either oil, gas…or other mineral…is produced from said land hereunder," meaning that the 1986 Lease could continue indefinitely. Second, it was not certain the mineral owner would sign a new lease. And third, it was not certain that the lease would be obtained by a successor of the leasehold owner of the 1986 Lease. Thus, the Court found that the Yowells' ORRI in new leases violated the Rule. The Court also differentiated between overriding royalty interests and non-participating royalty interests when applying the Rule in that a non-participating royalty interest remains with the land irrespective of the lease's lifetime, whereas the owner of an ORRI in a potential future lease does not have a present right to a share of future production.

The Court next looked at reformation of interests violating Rule Against Perpetuities under Texas Property Code §5.043. The Court held that §5.043 is "a judicial mandate to which statute limitations do not apply, and it requires reformation of commercial instruments creating property interests that violate the Rule," including the Yowells' ORRI in future leases. The Court's rationale was that §5.043 extends to instruments other than trust and wills, including commercial instruments, based on the language in §5.043(d), which states, in part, that §5.043 "applies to legal and equitable interests, including noncharitable gifts and trusts." Furthermore, the language used in §5.043(d) was inclusive, and that noncharitable gifts and trusts are only examples of instruments to which the statute applies. Accordingly, the Court construed the statute as non-exhaustive.

Finally, the Court held that the language used in §5.043 "is an instruction to courts on how to remedy a violation of the Rule, not a cause of action that would be subject to a statute of limitations." Accordingly, the Court rejected the argument that §5.043 did not apply to the Yowells' ORRI due to the running of the applicable statute of limitations because "the Yowells' ORRI [was] a real property interest, and [the Yowells sought] a judicial declaration of ownership of that interest in the 2007 Lease" rather than a cause of action subject to a statute of limitations. Despite the Court's conclusion that §5.043 applied to the reformation of the Yowells' ORRI, it left open the question whether or not the ORRI could successfully be reformed under the statute. Specifically, the Court remanded for further proceedings because "the parties disagree, however, about whether – and, if so, how – the Yowells' interest in new leases may be reformed under the statute to reflect the creator's intent within the limits of the Rule."

The Texas Supreme Court held that the Yowells' overriding royalty interest violated the rule against perpetuities because it was not vested at the time of its creation and was contingent on three events that might does not happen at all. However, Tex. Prop. Code Ann. § 5.043 could be applied to reform the reservation in the assignment to comply with the rule.

B. *Jones Energy, Inc. v. Pima Oil & Gas, L.L.C.*, 601 S.W.3d 400 (Tex. App. 2020)

Facts

In 1980, Grace Hill executed an oil and gas lease with Moody Energy Company ("Moody"), which covered Section 117 in Hemphill County, Texas. In 1991, Hill executed an oil and gas lease with John Wright, which covered the southwest quarter of Section 117. Spring acquired its interest in Section 117 by an assignment that was recorded in 1998. The only producing wellbores in Section 117 were the Gracie 117-1 and the Charles

H. Wright 117-1 at that time. Prior to Spring's assignment of Section 117, Pima and Spring entered into a retainer agreement wherein Pima agreed "to conduct geologic evaluations on acquisition opportunities as requested by Spring for purposes of identifying proven undeveloped locations, behind pipe zones, and other drilling opportunities." Spring agreed to assign Pima an ORRI in Section 117 in exchange. The assigned ORRI included the property in Section 117 "SAVE AND EXCEPT ALL THE RIGHTS ABOVE THE GRANITE WASH IN THE SW/4", which included the Gracie #1-117 well. In 2011, the Gracie 117-1H horizontal well was completed in the Granite Wash formation in the west half of Section 117. Pima claimed they were entitled to an ORRI in the Gracie 117-1H well.

In 2015, Pima sought a declaratory judgement against Jones Energy, Inc. ("Jones"), but Jones contended that the production from the wellbore was excluded due to the save and except clause in the assignment. In 2016, Pima filed for a partial summary judgement alleging that they were entitled to an ORRI under the assignment. In 2017, Jones filed for a partial summary judgement. The Court granted Pima's partial summary judgement and denied Jones's partial summary judgement.

<u>Analysis</u>

Jones claimed that production from the Gracie 117-1H well was excluded from the assignment due to the save and except clause. On the other hand, Pima claimed that at the time of the assignment, the Gracie 117-1H well not "open to production" from the Gracie 117-1 vertical wellbore, therefore it was not excluded. The issue was then whether the parties to the assignment intended to exclude production from a particular interval of formation or from a particular wellbore.

Jones contended that the retainer agreement supported the finding that production from the Gracie 1-117H well was excluded from the ORRI due to the save and except clause, as it is the controlling language that clarifies the intent of the parties. The Court concluded that the language in paragraph 7 of the assignment intended that in the event of a conflict between two documents, the retainer agreement would control. According to paragraph 7 in the assignment, Pima's right to the ORRI excluded zones that were being produced by already existing wells. Thus, Jones did not breach the assignment by not paying Pima the ORRI due.

The Court reversed the judgement of the trial court, holding that the ORRI granted to Pima by the assignment excluded production from the Gracie 117-1H well.

XII. POOLED UNIT

A. ***Samson Expl., LLC v. T.W. Moak & Moak Mortg. & Inv. Co.***, No. 09-18-00463-CV, 2020 Tex. App. LEXIS 443, 2020 WL 238538 (Tex. App. Jan. 16, 2020)

Facts

Samson Exploration, LLC ("Samson"), Bold Minerals ("Bold"), and Lucas Petroleum Group, Inc. ("Lucas"), executed and recorded a unit designation that pooled and combined certain leases and lands for "the production, storage, processing, and marketing of gas and all hydrocarbons and gaseous substance." Moak sued Lucas and Bold, alleging that they were record owners of mineral and leasehold interests that entitled them "to participate in production of oil, gas, and other minerals therefrom or from lands pooled therewith, or proceeds from the sale thereof." Moak was not a party to any operating agreement governing the oil and gas operations within the unit, and they did not own any property interest in the subject properties or within the boundaries of the unit at the time of its execution. Moak had subsequently acquired the mineral estate or the working interest in several properties either through foreclosure or by oil and gas leases with third party purchasers.

Moak filed a motion for partial summary judgement contending that their participation in the pooled unit did not end with the foreclosure of the properties. Samson filed a motion for summary judgement claiming that at the time the unit was created, Moak did not own any interest in the properties and had no interest in the production from the wells. The trial court found for Samson's motion as to Moak's claim for an accounting and denied both motions as to the remainder of the issues.

The trial court reaffirmed its summary judgement ruling that the termination of the mineral lease from foreclosure did not change any of the lands committed to the unit. The trial court found in favor of Bold against Moak, but in favor of Moak against Samson on its claim for conversion and unjust enrichment.

Analysis

The Court concluded that since there were no minerals produced from the subject properties and Moak had no contractual relationship with either defendant, Moak did not prove they were entitled to their accounting claim. Moak also did not revise or ratify the leases on the subject properties that had been terminated by the foreclosure, further proving that they were not entitled to the accounting claim. The Court held that the trial court did not err in granting Samson and Bold their summary judgement.

Next, the Court looked at the trial court's final judgement. Samson argued that the trial court incorrectly interpreted the unit's designation and wrongly awarded Moak royalties on a reversionary interest that was never leased or pooled in the unit. Generally, oil and gas leases and pooling clauses are matters of contract, so there needs to be a contractual relationship for someone to collect royalties. Since Moak had no contractual relationship with the defendants and no evidence that Moak entered into an agreement with the mortgagees to ratify or revive the leases or any agreement with the defendants, they had no obligation to pay Moak any royalties. The Court further concluded that Moak failed to prove their claims for unjust enrichment and conversion as well.

The Court affirmed the trial court's ruling in favor of Samson and Bold on Moak's accounting claim, but reversed the decision on awarding equitable damages against Samson. The Court also affirmed the decision that Moak take nothing from Bold.

XIII. SLANDER OF TITLE

A. *Quintanilla v. West*, No. 04-16-00533-CV, 2020 Tex. App. LEXIS 332, 2020 WL 214757 (Tex. App. Jan. 15, 2020)

Facts

Oscar Quintanilla and Andrew West entered into a trading agreement in 2014, in which Quintanilla provided the capital that West used for trading. In the agreement, both parties agreed to share the profits or losses equally from the trading account. By the end of 2014, the total losses in the trading account exceeded $14 million. In 2016, Quintanilla and West terminated their business relationship, and Quintanilla demanded that West pay the $7 million that was owed to him under the trading agreement. Quintanilla filed a financing statement and memorandum in the real property records in McMullen County, Texas.

However, West contended that he satisfied his debt to Quintanilla through two additional agreements. West also claimed that when he was in the process of selling mineral interests, the sale was terminated by the buyer because of Quintanilla's filings in the real property records. West filed suit against Quintanilla for slander of title and fraudulent liens claiming Quintanilla knowingly and intentionally slandered West's title to the mineral interest by filing false lien documents when he had already satisfied the debt.

Quintanilla moved to dismiss West's claims under the Texas Citizens Participation Act (TCPA). The Court denied Quintanilla's motions, but on appeal they reversed the judgement. However, the Texas Supreme Court reversed the Court of Appeals judgement and remanded the case.

Analysis

West owned ORRIs on several mineral interests in the county, which related to nine oil and gas leases. In 2016, West entered into an agreement with a third party investment group to sell his ORRIs. When West was in the process of closing the deal, the third party group backed out because the Quintanilla liens clouded West's ownership and his ability to convey clear title to them. West lost the sale resulting in alleged damages of $900,000.00. The Court concluded that West had met his burden in providing clear and specific evidence; Quintanilla's liens caused special damages to West's interest in land because of the loss of the ORRI sale with the third party group.

Quintanilla argued that West also had to show actual damages and not just the loss of a specific pending sale. However, under the TCPA, the nonmovant is only required to "adduce evidence supporting a rational inference as to the existence of damages, not their amount or constituent parts." *Deuell v. Tex. Right to Life Comm., Inc.,* 508 S.W.3d 679, 689 (Tex. App.—Houston [1st Dist.] 2016, pet. denied). The TCPA only required that West produce evidence that was sufficient to support a rational inference that Quintanilla's actions caused him some damage from the loss of the sale. Since West produced sufficient evidence to support that Quintanilla's liens caused West to lose the sale of his ORRIs, West had met the burden of establishing a prima facie case for special damages of his slander of title claim.

The Court affirmed the prior decision that Quintanilla met his initial burden in proving that the TCPA applied to West's slander of title claim. The Court concluded that West established by clear and specific evidence a prima facie case for each essential element of his slander of title and fraudulent lien claims. Quintanilla's motion to dismiss West's claims was denied.

XIV. SLAPP AND ANTI-SLAPP

A. *Creative Oil & Gas, LLC v. Lona Hills Ranch, LLC*, 591 S.W.3d 127 (Tex. 2019)

Facts

Lona Hills Ranch, LLC ("Ranch"), and Creative Oil & Gas, LLC ("Lessee"), entered into an oil and gas lease. Creative Oil & Gas Operating, LLC ("Operator"), was the operator of the only producing well on the lease. The Ranch sued the Operator for trespass and trespass to try title, claiming that the lease had terminated due to the cessation of production. The Lessee intervened as a party to the lease, and both the Lessee and the Operator filed counterclaims for breach of contract. However, the Ranch filed a TCPA motion to dismiss the counterclaims, claiming that their statements about the lease were an exercise of their right to free speech and right to petition. The motion was denied by the trial court.

The Court of Appeals held that the counterclaims of the Lessee and the Operator failed and should have been dismissed. The Operator was not a party to the lease and could not assert a breach of contract, and the Lessee failed to identify a provision of the lease that was violated. The Court of Appeals also concluded that the Operator could not prove a prima facie breach of contract case because they were not a party to the lease that contained the notice and cure provision. The Lessee's claim did not fall under the TPCA since it was not "factually predicated" on the Ranch's right to petition. The Ranch had contractually agreed to limit its right to petition under the notice and cure provision of the lease. The Court of Appeals dismissed both Operator and Lessee's counterclaim.

Analysis

The Lessee and the Operator both alleged that they were damaged when the Ranch communicated to third parties about the lease being expired. They also contended that their counterclaims were not based on, related to, or in response to "a communication made in connection with a matter of public concern." The Court concluded that the Ranch's communications to third parties which the counterclaims were based on did not involve matters of public concerns under the TCPA. The Court examined whether the communications to third parties of the alleged termination of the lease were in connection with a matter of public concern. The TPCA defines a matter of public concern to include an issue that relates to "environmental, economic, community well-being", "the government", or "a good, product or service in the marketplace." Tex. Civ. Prac. & Rem. Code § 27.001(7)(B), (C), (E).

The Ranch claimed that their communication was covered by the TPCA because it involved the lease and its products, which are both a good, product, or service in the marketplace. However, Section 27.001(7)(E) does not include every kind of good, service, or product but only those in the marketplace. From looking at the statute, "in the marketplace" suggests that goods or services must have some connections to a wider net of potential buyers or sellers, instead of only connected to parties in a particular transaction. The Court also found the phrase "matter of public concern" to mean matters of political, social, or other concern to the community, and not purely private matters. Thus, the Ranch's communications to third parties were not covered by the TPCA because the counterclaims are based on private business communications with third party purchasers of a particular well. There was no evidence that the counterclaims contained any relevance to the wide net of the marketplace or involved any matters of public concerns. But instead, the communications were made between private parties only concerning the production of a single well. Next, the Ranch argued that the counterclaims implicated economic well-being under Section 27.001(7)(B) since the claims could affect the economic interest of others that had an interest in the well. Still, the Court came to the same conclusion as above, that the dispute only affects the fortunes of the private parties and not the public at large.

The counterclaims also alleged that the Ranch breached Section 11 of the lease, which required the parties to give written notice of any alleged breach and an opportunity to cure prior to litigation, by initiating litigation in the Railroad Commission and with this case. The TCPA allows a motion to dismiss a counterclaim if it is "based on, related to, or is in response to a party's exercise of the…right to petition." Tex. Civ. Prac. & Rem. Code § 27.003(a). The Court concluded that the filings by the Ranch in this suit and the administrative proceeding in the Railroad Commission were an exercise of the right to petition defined by the TPCA. However, the Court held that the Operator was not a party to the lease and did not present clear and convincing evidence as to how they benefited from the lease, so they could not recover damages from the breach.

The counterclaims that related to the Ranch's communications with third parties were not covered by the TPCA, so the Court of Appeals' judgement was reversed. The Court of Appeals' judgement dismissing the counterclaim for the right to petition was affirmed.

B. *Quintanilla v. West*, No. 04-16-00533-CV, 2020 Tex. App. LEXIS 332, 2020 WL 214757 (Tex. App. Jan. 15, 2020)

See discussion above under Slander of Title.

C. *Segundo Navarro Drilling, Ltd. v. San Roman Ranch Mineral Partners, Ltd.*, No. 04-19-00484-CV, 2020 Tex. App. LEXIS 6634, 2020 WL 4808716 (Tex. App. Aug. 19, 2020) and *Segundo Navarro Drilling, Ltd. v. San Roman Ranch Mineral Partners, Ltd.*, No. 04-19-00484-CV, 2020 Tex. App. LEXIS 4642, 2020 WL 3441434 (Tex. App. June 24, 2020)

<u>Facts</u>

San Ramon ("Ramon") owned mineral rights in the Eagle Ford Shale in Webb County, Texas. In 2008, they signed three oil and gas leases with Segundo Navarro Drilling, Ltd. ("SNDL"), to develop those minerals. Lewis Petro Properties, Inc. ("LPP"), operated the wells on the land that were under the leases. The leases contained provisions which allowed SNDL to conduct seismic "shoots," or surveys, on the leased land, which are necessary to develop the minerals in the Eagle Ford Shale formation. The leases provided that SNDL provide Ramon with a copy of any seismic data that was obtained from 3D seismic surveys SNDL conducted on the leased land. It was also agreed that SNDL would not sell such seismic data without Ramon's consent. Once the leases were executed, LPP contracted with Global Geophysical Services, Inc. ("Global"), to conduct seismic shoots in an area called Hawk Field, which included a portion of Ramon's lease.

The contract provided that LLP had the right to grant permission to conduct seismic shoots and that Global will own any resulting data. Global would also have the "sole right to grant non-exclusive licenses" to the data, and Global was responsible for obtaining any necessary permits. After Global finished the shoots, it licensed the seismic data to LPP and to unidentified third parties. However, Global did not obtain permission from Ramon to conduct any shoots on any portion of Hawk Field. Roman claimed that neither SNDL nor LPP had the authority to grant Global permission to survey Roman's land. Roman learned about Global conducting seismic shoots over their land and selling the data from those shoots, and they requested a copy of the data from SNDL. SNDL responded saying that they did not own the data; they would need Global's permission to turn it over. Roman then requested the data from Global, who offered to license the data to Roman for $20,000.00 per acre. Global informed Roman that they had obtained permission from SNDL to conduct the shoot and market the data.

When both SNDL and Global refused to turn over the data, Roman sued SNDL and LLP ("the Appellants") for breach of contract and conversion, and sought a declaratory judgement on their rights under the three leases. They also alleged that they were entitled to exemplary damages because the Appellants actions were actual fraud or malice. The Appellants filed a motion to dismiss Roman's claims under the TCPA, arguing that Roman's claims implicate the Appellants' exercise of the right of association. In response, Roman argued that their claims relate only to private business interests, so they do not fall under the TCPA. The trial court ruled in favor with Roman and denied the TCPA motion. The Appellants then filed an interlocutory appeal to challenge the denial of their TCPA motion. The Appellate Court affirmed the trial court ruling, but the Appellants filed a motion for a rehearing of the Appellate Court's judgement.

Analysis

The TPCA motion relied on the right of association, so the Appellants were required to show by a preponderance of evidence that Roman's legal action was based on, related to, or was in response to a "communication between individuals who join together to collectively express, promote, pursue, or defend common interests." Tex. Civ. Prac. & Rem. Code §§ 27.001(2), 27.003(a), 27.005(b). The Appellants believed that communications among themselves should satisfy this definition because they had a common interest in successfully extracting minerals from the Hawk Field shoot. The trial court held that the claims related to business interests and not public interest, thus the TCPA cannot apply to the claims.

The Appellants contended that the trial court erred in concluding that "common interests" cannot include private interests. However, the Court disagreed relying on *Kawcak v. Antero Resources Corp.,* 582 S.W.3d 566 (Tex. App.—Fort Worth 2019, pet. denied). In *Kawcak*, the Court concluded that "common" should relate to a group or community because that definition fits within the stated purpose of the TCPA. The Appellants had also not shown how their right to "participate in government" is helped by defining the word "common" to include their private business interests. The Legislature also amended the TCPA to plainly state that the "exercise of the right of association means to join together collectively express, promote, pursue, or defend common interests relating to a governmental proceeding or a matter of public concern."

The Court came to the same conclusion to deny the TCPA motion, and they affirmed the trial court's judgement.