Energy Law: Recent Decisions

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Greg W. Curry
Gregory D. Binns
Mackenzie M. Salenger
Brett W. Rector

Thompson & Knight LLP

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I. SCOPE OF THE ARTICLE

This article surveys select oil and gas cases decided by Texas state and federal courts from October 23, 2016 through April 28, 2017. Below are one-paragraph abstracts of the selected cases. Full case summaries follow the abstracts.

II. ABSTRACTS

1. The Texas Supreme Court ruled that a shut-in royalty provision required the jury to measure a well's ability to produce in paying quantities at the time oil and gas was last sold or used from the well. A top-lease holder sought termination of a bottom lease under two theories: (1) that the bottom lease failed to produce in paying quantities through June 12, 2012 (the date the well valve was shut off) and (2) that the last well on the bottom lease was incapable of producing in paying quantities on June 13, 2012 (the date the bottom lessee tendered its shut-in royalty payment). A jury found for of the top lessee on the second theory, and the Amarillo Court of Appeals affirmed. However, the Texas Supreme Court held that the jury instructions on the second theory were immaterial because the shut-in royalty provision required an analysis of the well's capability to produce on June 4, 2012, the date gas was last "sold or used." Because the jury was instructed to evaluate well production as of June 13, rather than June 4, its findings could not support a judgment for the top lessee. Since the bottom lessee prevailed at trial on the only other material questions submitted to the jury, the Court reversed and rendered a take-nothing judgment in the bottom lessee's favor. *BP Am. Prod. Co. v. Red Deer Resources, LLC*, No. 15-0569, 2017 WL __ (Tex. Apr. 28, 2017).

2. The Texas Supreme Court held that the Texas Railroad Commission did not have exclusive or primary jurisdiction over claims for environmental contamination. Environmental contamination on a ranch resulted in an arbitration award against a Producer. The producer claimed the Railroad Commission had "exclusive or primary jurisdiction over environmental contamination claims, thus precluding suits for damages or other judicial relief." The Texas Supreme Court held that there was no exclusive jurisdiction because the Texas Legislature never clearly indicated that the Railroad Commission's authority "is intended to be exclusive of common-law actions." The Court also held that there was no primary jurisdiction because the claims at issue are "inherently judicial in nature" and thus "vacatur [was] not warranted for failure to abate the arbitration hearing." *Forest Oil Corp. v. El Rucio Land and Cattle Co. Inc., et al.*, No. 14-0979, 2017 WL 1541086 (Tex. Apr. 28, 2017).

3. In a split decision, the Texas Supreme Court affirmed that natural gas stored in Texas before being resold and shipped to out-of-state consumers is subject to taxation in Texas. A dispute arose between a local taxing authority and a pipeline operator regarding taxation of natural gas temporarily stored in Texas. The pipeline operator claimed that gas temporarily stored in Texas prior to resale was in the stream of interstate commerce and thus immune to state ad valorem taxes under the federal Commerce Clause. Both the trial court and court of appeals disagreed, holding that the state taxation satisfied the four-prong test established by the United States Supreme Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). A divided Texas Supreme Court affirmed, holding that the state tax

was (1) fairly apportioned; (2) did not discriminate against interstate commerce; (3) applied to activities with a "substantial nexus" to Texas; and (4) was "fairly related" to services provided by Texas. While acknowledging that "there may be circumstances in which taxation of gas runs afoul of the Commerce Clause," the Court concluded that the "nondiscriminatory taxation of surplus gas held without a destination for future resale . . . is just not one of them." *ETC Marketing Ltd. v. Harris County Appraisal District*, No. 15-0687, 2017 WL 1535215 (Tex. Apr. 28, 2017).

4. A trial court has discretion to dismiss a suit against an oilfield engineer without prejudice when the plaintiff fails to file a certificate of merit contemporaneously with its original suit. Operator filed suit against Oilfield Engineering Company for damage caused to a well and the formation. Operator failed to attach a certificate of merit to its original petition. Engineering Company moved to dismiss with prejudice for failure to comply with Section 15.002(a) of the Civil Practice and Remedies Code. Operator non-suited and later filed an amended petition with the required affidavit. Engineering Company again moved to dismiss with prejudice, arguing that the Operator's initial mistake was fatal to its claim and, alternatively, that the certificate of merit was deficient. The trial court denied the motion, but after the court of appeals reversed, the trial court dismissed the amended petition without prejudice. Engineering Company again appealed, arguing that the statute required a dismissal with prejudice. The court of appeals found for Engineering Company. However, the Texas Supreme Court held that Section 15.002(e) affords trial courts the discretion to dismiss with or without prejudice. The Court further held that trial courts, in deciding whether to dismiss with prejudice, should consider whether the underlying suit has merit. The Court thus reversed the court of appeals and reinstated the judgment of the trial court. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, No. 15-0123, 2017 WL 1545015 (Tex. Apr. 28, 2017).

5. Under Louisiana law, the subsequent purchaser doctrine bars suits for damages arising from drilling operations. A plaintiff sought damages from a drilling operator for contamination caused by drilling that occurred years before the plaintiff acquired the property. The operator sought dismissal under the subsequent purchaser doctrine, and the trial court granted the motion. On appeal, the United States Court of Appeals for the Fifth Circuit affirmed. Construing Louisiana law, the Fifth Circuit concluded that a "clear consensus" of Louisiana courts had applied the subsequent purchaser doctrine to cases involving mineral leases. Absent evidence the plaintiff had been assigned the right to sue for prior damage to the property, the Fifth Circuit held that Louisiana law barred the suit. *Guilbeau v. Hess Corp.*, No. 16-30971, 2017 WL 1393709 (5th Cir. Apr. 18, 2017).

6. A top lease does not violate the Rule Against Perpetuities so long as it presently conveys an interest in the lessors' possibility of reverter under the bottom lease. A dispute arose regarding whether a top lease was void as a perpetuity. The bottom lessee claimed the top lease was void under the Rule Against Perpetuities because it failed to convey a vested interest in the lessors' possibility of reverter; alternatively, the bottom lessee claimed its well was sufficiently productive to sustain the bottom lease. The trial court entered judgment for the top lessee. On appeal, the court of appeals agreed that the top lease

was valid, but remanded because the trial court's instruction improperly limited the paying-production analysis to a specific fifteen-month time period. The Texas Supreme Court affirmed, holding that the top lease conveyed a vested interest as required by the Rule and that the trial court erred in instructing the jury to consider a specific date range when deciding whether the well produced in paying quantities. *BP Am. Prod. Co. v. Laddex, Ltd.*, No. 15-0248, 2017 WL 889920 (Tex. Mar. 3, 2017).

7. When leases for minerals located in County A prohibit cross-conveyance of interests, the pooling of those minerals with minerals located in County B does not subject the County A minerals to taxation in County B. Landowners with minerals located in County A executed mineral leases which authorized pooling units. The owners' mineral interests were later pooled with mineral interests located in County B. County B sought to tax the landowners for their fractional interest in the pooled production units. The trial court ruled for County B. On appeal, the Tyler Court of Appeals determined that the underlying mineral leases expressly prohibited cross-conveyance of mineral interests between participants in the pooling agreement. Accordingly, the court held that the landowners had no taxable interest on minerals located in County B. The court reversed the trial court's grant of summary judgment and remanded for further proceedings. *Chambers v. San Augustine County Appraisal Dist.*, No. 12-15-00201-CV, 2017 WL 511892 (Tex. App.—Tyler Feb. 8, 2017, no. pet. h.).

8. The Fourth Court of Appeals held (1) that Heirs defeated Grantee's motions for summary judgment on trespass to try title claim by producing some evidence of ownership in one-half of a mineral estate and (2) that Grantee, as cotenant, was not liable on theory of bad faith trespass. Grantor conveyed her entire surface estate and one-half of her mineral estate to Grantee. Grantor's Heirs contend that they own the remaining one-half interest in the mineral estate. Because Grantee would not recognize this ownership interest, Heirs sued Grantee for trespass to try title, bad faith trespass, as well as other intentional torts. Both sides moved for summary judgment. Grantee claimed that Heirs had no mineral interest because they offered no evidence of ownership and there was a broken chain of title. The trial court granted Grantee's motions. After considering the timely-filed summary judgment evidence, the affidavits of heirship, death certificates, and relevant deeds, the Fourth Court of Appeals held that Heirs produced more than a scintilla of evidence to prove ownership, thereby defeating Grantee's no-evidence and traditional motions for summary judgment on the trespass to try title claim. The court further held that Grantee satisfied its burden in conclusively proving its cotenancy affirmative defense and thus Grantee was entitled to traditional summary judgment as to the bad faith trespass claim and other tort claims. Accordingly, the court affirmed, reversed, and remanded the case for further proceedings. *Radcliffe v. Tidal Petroleum, Inc.*, No. 04-15-00644-CV, 2017 WL 511219 (Tex. App.—San Antonio Feb. 8, 2017, no. pet. h.).

9. An instrument executed in 1906 purporting to "forever" transfer a one-half interest in a mineral estate without limitation or condition should be treated as a mineral deed, rather than a mineral lease. Party A and Party B each claimed rights to the one-half mineral interest referenced in a 1906 instrument. Party A, successors-in-interest to the original grantors, argued that the 1906 instrument

was a mineral lease that was released by a subsequent 1908 Release executed by the original grantees. The trial court entered judgment for Party A. On appeal, the Tyler Court of Appeals concluded that the plain language of the 1906 instrument conveyed a one-half mineral interest to the grantees without limitation or condition. Accordingly, the court concluded that the 1906 instrument was a mineral deed, not a lease. Likewise, the court noted there were various discrepancies between the 1906 instrument and the instrument the 1908 Release purported to release. Accordingly, the court held that the 1908 Release had no effect on the 1906 instrument. *Richardson v. Mills*, No. 12-15-00170-CV, 2017 WL 511893 (Tex. App.—Tyler Feb. 8, 2017, pet. filed).

10. Rule 39(a) of the Texas Rules of Civil Procedure does not require a plaintiff to join neighboring landowners in a royalty dispute unless and until the neighboring landowners assert an interest in the disputed minerals. A landowner executed a mineral lease with an oil and gas operator; the lease was pooled with leases from several adjacent properties. The operator claimed the landowner had previously transferred his mineral interests to several adjacent landowners pursuant to the strip-and-gore doctrine and that any royalties should thus be credited to the adjacent landowners. The landowner filed suit, and the operator moved to compel joinder of the adjacent landowners as "necessary parties" under TRCP 39. The trial court granted the motion, and dismissed the case when the landowner refused to join the additional parties. A divided court of appeals affirmed. The Texas Supreme Court, however, determined that TRCP 39(a) requires joinder of only parties who "claim[] an interest relating to the subject of the action." Because the adjacent landowners had not yet claimed an interest in the disputed minerals, they were not necessary parties under TRCP 39. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017).

11. An operator may arbitrarily withhold consent for assignments of a farmout agreement when the circumstances surrounding execution of the consent-to-assign provision show that the operator was given unqualified authority to object. Operator A executed a farmout agreement with Operator B. The farmout agreement included a consent-to-assign provision requiring Operator A's "express written consent" for any assignment. When Operator A later blocked Operator B from assigning its rights under the agreement, Operator B filed suit. A jury ultimately found for Operator B. Over one dissenting vote, the Tyler Court of Appeals reversed. The majority concluded Operator A had unqualified authority to block any assignment by Operator B and was thus entitled to judgment as a matter of law. The lone dissenting justice disagreed that Operator A could arbitrarily withhold consent, and would have ordered the trial court to admit evidence regarding the parties' negotiation of the consent-to-assign provision during a second trial. *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, No. 12-15-00083-CV, 2017 WL 412892 (Tex. App.—Tyler Jan. 31, 2017), *reh'g denied* (Mar. 23, 2017).

12. Repair work on saltwater disposal wells can qualify as "reworking operations" for purposes of a cessation-of-production provision. An oil and gas lease included a cessation-of-production provision stating that a halt in production would not terminate the lease if Operator A "commence[d] additional drilling or re-working operations within sixty (60)

days . . . ." Operator A was forced to halt oil production to repair a saltwater disposal well that processed drilling wastewater. Operator B believed the halt in production terminated the lease, and filed suit to enforce a new lease covering the same property. Operator A argued that "reworking operations" included repairs to the saltwater disposal well. The trial court disagreed, and instructed the jury that reworking activities included only work performed on the producing wells, not the disposal well. The Eastland Court of Appeals reversed, and concluded that repairs of disposal wells could qualify as "reworking operations" so long as an ordinarily competent operator would have engaged in the same repairs to re-start production of oil and gas in paying quantities. *Crystal River Oil & Gas, LLC v. Patton*, 510 S.W.3d 226 (Tex. App.—Eastland 2016, no pet.).

13. The addition of two leases to a recorded mortgage was a material correction that must satisfy the requirements of Section 5.029 of the Texas Property Code. A dispute arose regarding the validity of a correction instrument that altered the description of certain mortgaged property. In 2011, the Grantor executed a mortgage giving the Bank a security interest in several oil and gas leases described in an exhibit attached to the mortgage. Grantor thereafter assigned Party A overriding royalty interests in the leases covered by the 2008 mortgage, as well as two additional leases not named in the 2008 mortgage. In 2013, a revised mortgage was recorded that replaced the original exhibit from 2008 with a corrected exhibit that included the two additional leases from the 2011 transaction with Party A. The mortgage was then foreclosed by Party B, who argued that Party A's interest in the two leases were extinguished. The trial court agreed. On appeal, the First Court of Appeals held that the 2013 correction to the mortgage was a material correction that must satisfy the requirements of the Texas Property Code. Because the 2013 correction instruments were unsigned—which violated the statute—the correction instruments were invalid. Accordingly, Party B's foreclosure affected only the leases named in the 2008 mortgage, which did not include the two leases in which Party A had overriding royalty interests. The judgment of the trial court was reversed and remanded. *Tanya L. McCabe Trust v. Ranger Energy LLC*, 508 S.W.3d 828 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

14. Landowners provided sufficient notice of a corrected right of first refusal instrument as required by Sections 5.028 and 5.031 of the Texas Property Code when unsigned copies of the corrected document were provided to the relevant parties. However, the landowners' suit for specific performance was barred by limitations because it was filed more than four years after the offending sale. Party A sought specific performance of a right of first refusal for two mineral interests purchased by Party B. The trial court rendered judgment for Party A. On appeal, the Amarillo Court of Appeals held that Party A complied with the statutory requirements to correct a scrivener's error in the original instrument. However, Party A's suit as to one mineral interest was barred because suit was filed more than four years after that interest was sold to Party B. The other mineral interest purchased by Party B was subject to Party A's right of first refusal despite Party B's attempt to structure the purchase as a involuntary foreclosure sale. *Tregellas v. Archer*, 507 S.W.3d 423 (Tex. App.—Amarillo 2016, pet. filed).

15. Because a lease was unambiguous and two lease paragraphs had

independent purposes, the Fourth Court of Appeals held that a lease royalty provision determined the formula for calculating the royalty owed. A 1974 oil and gas lease contained two paragraphs, which the Owners and Producer contended provided for differing formulas to calculate the amount of royalty owed. Applying lease construction principles, the court held that the lease was unambiguous and that the contested paragraphs had independent purposes: "paragraph 3 defin[ed] the royalty owed and paragraph 17 set[] a minimum contract price for any future gas purchase agreement." After concluding that paragraph 3 controlled, the court further held that "the trial court erred when it denied [the Producer's] motion for directed verdict on the [Owners'] breach of contract claim for underpaid royalties" because the Owners made judicial admissions that the Producer paid all royalties due under paragraph 3. Accordingly, the court reversed and rendered a take nothing judgment against the Owners on the breach of contract claim for underpaid royalties and related claims. *Westport Oil & Gas Co., L.P. v. Mecom*, No. 04-15-00714-CV, 2016 WL 7234056 (Tex. App.—San Antonio Dec. 14, 2016, no pet.).

16. An operator had no rights to a 400-acre tract under any reasonable construction of an option contract. A dispute arose between Operator A, Operator B, and a landowner regarding the land secured by an option contract executed in 2009. Landowners granted Operator A the option to lease "1237.54 acres situated in Goliad County, Texas, and being all of the 1637.69 acre tract described on exhibit A attached hereto, save and except a 400.15 acre tract" described in a separate lease memorandum. Operator A claimed the contract gave it rights to select any acreage out of the 1,673.69-acre tract. The landowners and Operator B—which executed a subsequent lease for the 400.15 acre tract—argued that the 400.15-acre tract was excluded from the option contract. The Texas Supreme Court held (1) that the option contract was unambiguous and (2) that the words "save and except" clearly excluded the 400.15-acre tract. Because the only reasonable interpretation of the contract favored the landowner and Operator B, the Court affirmed and remanded for further proceedings. *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598 (Tex. 2016).

III. CASE SUMMARIES

1. *BP Am. Prod. Co. v. Red Deer Resources, LLC*, No. 15-0569, 2017 WL __ (Tex. Apr. 28, 2017).

In *Red Deer Resources*, the Texas Supreme Court held that a well's ability to produce in paying quantities for purposes of a shut-in royalty provision must be measured during the time period specified in the lease.

BP America Production Co. owned a lease covering approximately 2,100 acres in Lipscomb and Hemphill Counties, Texas (the "BP Lease"). BP initially maintained two active wells during the relevant time period, but as of the beginning of 2012, only one producing well remained. After reviewing the well's production, Red Deer Resources, LLC obtained top leases to the property. BP subsequently shut in its well on June 12, 2012. BP informed the lessors on June 13, 2012 that it was invoking the shut-in clause in the BP Lease and provided checks for the shut-in royalty payments. In relevant part, the shut-in royalty clause provided that payment of an annual shut-in royalty within twelve months of the last day oil and gas was sold or used from a well capable of producing gas would sustain the BP Lease for a twelve-month period.

Red Deer filed suit to terminate the BP Lease, asserting two separate theories of termination: (1) that BP's lease failed to produce in paying quantities through June 12, 2012 (the day the well valve was closed) and (2) that the only still-producing BP well was incapable of producing in paying quantities on June 13, 2012 (the date BP tendered its shut-in royalty payment). The jury rejected Red Deer's first theory, but agreed that the well was incapable of producing in paying quantities on June 13. The trial court entered judgment for Red Deer on the second theory. The Amarillo Court of Appeals affirmed.

On appeal, the Texas Supreme Court focused primarily on what date should be used to determine if the well was capable of producing in paying quantities for purposes of the shut-in royalty clause. BP argued that either June 4 (the last day gas was sold or used from the well) or June 12 (the day it closed the valve well) was the operative date. For its part, Red Deer argued that June 13 (the date BP invoked its shut-in rights) was the operative date, and claimed that shut-in royalties could sustain the BP Lease only if BP's well was capable of producing in paying quantities as of that date—a position based largely on the holding in *Hydrocarbon Management, Inc. v. Tracker Exploration., Inc.*, in which the Amarillo Court of Appeals ruled that a well must be "capable of producing gas in paying quantities at the time it was shut-in."

To resolve the dispute, the Court focused on the plain language of the BP Lease. In particular, the shut-in royalty provision gave BP the right to maintain the lease by paying an annual shut-in royalty within a year of the last day oil or gas was "sold or used" from a well capable of producing gas. Based on this provision, the Court held that the operative date for the paying-production analysis was the date on which the last gas was sold or used from the well, not the date BP closed the well valve nor the date BP paid the shut-in royalty. To the extent its holding conflicted with the analysis in *Tracker*—a decision the Court called "confusing and inconsistent"—the Court held that the particular language in the BP Lease must control.

The Court turned next to the specific findings reached by the jury. Because it was undisputed that gas was last sold or used on June 4, 2012, Red Deer had the burden to prove that the BP well could not produce in paying quantities over a reasonable period of time as of that date. Since Red Deer failed to request a jury finding on the paying-producing analysis as of June 4—and because BP prevailed at trial on the only other material questions presented to the jury—the Court reversed and rendered a take-nothing judgment in BP's favor.

2. *Forest Oil Corp. v. El Rucio Land and Cattle Co. Inc., et al.*, No. 14-0979, 2017 WL 1541086 (Tex. Apr. 28, 2017).

In *Forest Oil*, the Texas Supreme Court held (1) that the Texas Railroad Commission "did not have exclusive jurisdiction over the claims at issue" because the Legislature did not "demonstrate[] its clear intent" to "abrogate landowners' common-law claims," and (2) that the "doctrine of primary jurisdiction does not apply to claims that are 'inherently judicial in nature.'"

James A. McAllen, who controlled a 27,000-plus-acre ranch, leased approximately 1,500 acres to Forest Oil, who maintained a processing plant on some of the leased acres. McAllen sued Forest Oil in the 1990s for underpayment of

royalties and underproduction of the lease; this suit was resolved with a Settlement Agreement and a Surface Agreement. In relevant part, the two agreements barred Forest Oil from bringing, storing, or disposing "of any hazardous materials on the surface of the Leases;" required that Forest Oil "remove from the Leases . . . any hazardous material placed or released thereon by" it; perform "remedial work caused by its operations and activities on the Leases;" and finally comply with all applicable laws and regulations.

In 2004, McAllen discovered that Forest Oil had contaminated the property and had donated to him a piece of contaminated pipe that resulted in the amputation of McAllen's right leg below the knee. McAllen filed suit, alleging that Forest Oil was liable for "environmental contamination, improper disposal of hazardous materials on the Ranch, and maliciously donating the contaminated pipe that caused his injury." In 2007, Forest Oil asked the Railroad Commission to investigate the contamination and then to approve clean-up plans.

McAllen's suit was arbitrated. The panel's decision declared that Forest Oil had continuing duties under the Surface Agreement to "locate, remediate, and dispose of all hazardous and non-hazardous materials from the Ranch and [pay] for all future remediation costs and activities." The panel also awarded McAllen more than $22 million in fees and damages.

Forest Oil moved to vacate, arguing that arbitration was improper because the Railroad Commission had "exclusive or primary jurisdiction" over McAllen's claims. The trial court and court of appeals affirmed the arbitration award.

On appeal, the Texas Supreme Court again affirmed. Although the Railroad Commission has "extensive statutory authority to regulate contamination from oil and gas operations," the Court concluded that the Legislature never indicated that the Railroad Commission's authority was "intended to be exclusive of common-law actions." The Court further held that the doctrine of primary jurisdiction did not apply because McAllen's claims were inherently judicial. Accordingly, the Railroad Commission did not have exclusive or primary jurisdiction over McAllen's contamination claims.

3. *ETC Marketing Ltd. v. Harris County Appraisal District*, No. 15-0687, 2017 WL 1535215 (Tex. Apr. 28, 2017).

Over one dissenting vote, the Texas Supreme Court affirmed that the Commerce Clause does not bar state taxation of natural gas temporarily stored in Texas.

ETC Marketing, Ltd. purchases gas in Texas for shipment and resale across the United States. After purchase, the gas is immediately transferred to an affiliated pipeline company which stores the gas at the Bammel Facility in Harris County, Texas. This facility, which utilizes the below-ground Bammel reservoir to store a "vast amount" of natural gas, maintains a permanent supply of "cushion gas" which is subject to state ad valorem taxes. However, ETC claimed that the remaining gas stored in the Bammel Facility is exempt from state taxation because it is in interstate commerce.

In 2009, the Harris County Appraisal District ("HCAD") assessed ad valorem taxes on all gas stored by ETC at the Brammel facility. HCAD argued that the stored gas was not in the stream of interstate commerce, and even if it was, that the tax

was valid under the United States Supreme Court's decision in *Complete Auto Transit, Inc. v. Brady*, which provides the test for determining whether state taxation of interstate commerce violates the federal Constitution. The trial court and the court of appeals found for HCAD; both courts assumed that the gas was in interstate commerce, but ruled that the taxes satisfied the *Complete Auto* test.

On appeal, the Texas Supreme Court was tasked with determining three issues: (1) whether the tax on ETC's gas violated Sections 11.01(c)(1) and 22.02(a)(1) of the Texas Tax Code; (2) whether ETC's gas was in interstate commerce; and, if so, (3) whether the tax satisfied the four-prong test from *Complete Auto*.

The Court quickly dismissed the first issue. The Texas Tax Code forbids taxation of personal property "temporarily located" in the state. Because ETC's gas was not stored in Texas for long, ETC claimed state law provided an independent shield against taxation. ETC failed to raise this argument before the trial court, however, and the Court deemed the argument waived.

Similarly, the Court concluded that the stored gas was in interstate commerce. HCAD argued that ETC's gas was not in transit during the relevant time period, thus removing it from the stream of interstate commerce. The Court disagreed, citing binding precedent holding that gas placed in an interstate pipeline system qualified as interstate commerce. Because ETC's gas was transported via a pipeline system that connected to an interstate pipeline network, the Court ruled that the gas had entered interstate commerce.

Having found the gas in interstate commerce, the Court turned to the four-prong *Complete Auto* test. As summarized by the Court, *Complete Auto* requires a state tax on interstate commerce to: "(1) apply to an activity with a substantial nexus with the taxing state; (2) be fairly apportioned; (3) not discriminate against interstate commerce; and (4) be fairly related to the services provided by the state."

On the first prong, the Court held that the relevant inquiry was not whether ETC was physically present in the state, but rather whether the property to be taxed was located in the relevant jurisdiction for a sufficient period of time. Noting both that ETC "entrust[ed] massive quantities of gas . . . for extended storage and eventual transportation" and that ETC had "full discretion to decide when and where to deliver its gas" the Court ruled that any gas temporarily stored in Texas had a "substantial nexus" to the state.

On the second prong, the Court rejected ETC's argument that the gas could be taxed in multiple states. Since Texas's ad valorem tax—and presumably the ad valorem taxes imposed by other states—reached only gas present in a particular state as of January 1, the Court found no risk of double taxation. Consequently, the Court ruled that the second prong of *Complete Auto* was satisfied.

A similar conclusion followed for the third and fourth prongs. Because HCAD taxed all qualifying property without respect to whether the property was owned by an in-state or out-of-state entity, there was no discrimination against interstate commerce. Likewise, the Court held that ETC's stored gas benefited from various state services, *e.g.*, fire and emergency services, to an extent proportional to the amount of tax levied. Having concluded that all four prongs of the *Complete Auto* test were

satisfied, the Court affirmed the judgment below.

4. *Pedernal Energy, LLC v. Bruington Eng'g, Ltd.*, No. 15-0123, 2017 WL 1545015 (Tex. Apr. 28, 2017).

In *Pedernal*, the Texas Supreme Court held that a trial court has discretion under Section 15.002(e) of the Civil Practice and Remedies Code to dismiss a suit against an oilfield engineer with or without prejudice when the plaintiff fails to file the required certificate of merit.

Pedernal Energy, Ltd. sued Bruington Engineering, LLC to recover damages caused by allegedly substandard engineering services rendered during fracking operations in Zapata County, Texas. Pedernal claimed Bruington caused damage to both the well and the formation. However, Pedernal failed to file a certificate of merit with its original petition as required by Section 15.002(a).

Bruington moved to dismiss with prejudice. Pedernal non-suited, and later filed an amended petition with the required affidavit. Bruington again moved to dismiss with prejudice, arguing that Pedernal's initial mistake was fatal to its claim and, alternatively, that the certificate of merit was deficient. The trial court denied the motion, but after the court of appeals reversed, the trial court dismissed the amended petition without prejudice. Bruington again appealed, arguing that the statute required the dismissal to be with prejudice. The court of appeals agreed, and dismissed Pedernal's suit with prejudice. Pedernal appealed.

The Texas Supreme Court ruled that Section 15.002(e) affords trial courts the discretion to dismiss with or without prejudice. Specifically, the statute states that a dismissal "may" be with prejudice. Thus, while the statute clearly authorizes a dismissal with prejudice, such a dismissal is not required. Accordingly, the Court held that the court of appeals erred in concluding that the trial court was obliged to dismiss with prejudice.

Nevertheless, the Court noted that a trial court's discretion under Section 15.002(a) was not unlimited. Because the statute did not offer specific guidance to aid trial courts, the Court considered various standards to govern the decision to dismiss with or without prejudice. The Court rejected the "good cause" standard proposed by Pedernal, noting that the statute limited this standard to situations in which a certificate of merit was filed within 10 days of the original petition. The Court noted that, had the Legislature intended to extend the "good cause" standard to other parts of the statute, it would have expressly provided for it.

Absent clear direction, the Court reasoned that the statue was designed to ensure that suits against licensed professionals had some merit, and adopted this as the guiding standard. Applying this standard to the case at hand, the Court concluded that the trial court did not abuse its discretion when it decided to dismiss without prejudice. During a hearing on Bruington's second motion to dismiss, the trial court heard evidence regarding the mistakes made by Bruington during the fracking operation. This evidence was sufficient to support a finding that Pedernal's suit had merit. The Court thus reversed the court of appeals and reinstated the judgment of the trial court.

5. *Guilbeau v. Hess Corp.*, No. 16-30971, 2017 WL 1393709 (5th Cir. Apr. 18, 2017).

In *Guilbeau*, the United States Court of Appeals for the Fifth Circuit ruled that the subsequent purchaser doctrine applied to mineral leases and barred suits for damages arising from drilling operations that occurred prior to the landowner's purchase of the property.

In 2007, Kenneth Guilbeau purchased property in Louisiana on which oil and gas operations had previously been conducted by predecessors to Hess Corp. At the time Guilbeau purchased the property, all wells had been plugged and abandoned. The relevant purchase agreement did not assign Guilbeau the right to sue for property damage arising before the sale. Nevertheless, Guilbeau sued Hess to recover damages stemming from contamination caused by the prior drilling operations. Hess moved to dismiss under the subsequent purchaser doctrine. The district court granted Hess's motion after concluding that Louisiana law barred Guilbeau's claims.

On appeal, the Fifth Circuit was forced to resolve a potential ambiguity in the most recent Louisiana Supreme Court decision to address the subsequent purchaser doctrine. In *Eagle Pipe & Supply, Inc. v. Amerada Hess Corp.*, the Louisiana Supreme Court held that property damage created a personal right to sue that could only be transferred to subsequent property owners via express agreement. In a footnote, however, the *Eagle Pipe* court suggested that the subsequent purchaser doctrine may not apply to situations involving mineral leases. Relying on this footnote, some Louisiana courts had ruled that the doctrine did not apply to mineral leases.

The Fifth Circuit disagreed. Citing decisions from the First, Second, and Third Louisiana Circuit Court of Appeals, the Fifth Circuit held that Louisiana courts had reached a "clear consensus" that the subsequent purchaser doctrine applied to expired mineral leases. Accordingly, the Fifth Circuit affirmed.

6. *BP Am. Prod. Co. v. Laddex, Ltd.*, No. 15-0248, 2017 WL 889920 (Tex. Mar. 3, 2017).

In *Laddex*, the Texas Supreme Court held that a top lease conveying an interest in a lessor's possibility of reverter did not violate the Rule Against Perpetuities.

In 1971, BP America Production Co. acquired an oil and gas lease for land in Roberts County, Texas (the "BP Lease"). BP maintained a single producing well on the property. With the exception of a slowdown in production from August 2005 to November 2006, the well produced steadily during the relevant time period.

In March 2007, the lessors entered a top lease with Laddex, Ltd. for the same property covered by the BP Lease. The top lease stated that it would commence on (1) the date when written releases of the BP Lease were filed or (2) the date a judgment terminating the BP Lease became final and nonappealable. The top lease further provided that it was "intended to and does include and vest in Lessee any and all remainder and reversionary interest and after-acquired title of Lessor in the Leased Premises upon expiration of any prior oil, gas, or mineral lease . . . ."

Laddex alleged that the BP Lease terminated because the lone well failed to produce in paying quantities during the

fifteen-month slowdown period in 2005 and 2006. BP moved to dismiss, arguing that Laddex lacked standing because Laddex's top lease violated the Rule Against Perpetuities and was thus void. The trial court denied BP's motion and a jury concluded that (1) the well failed to produce in paying quantities during the slowdown period and (2) that a reasonably prudent operator would not have continued to operate the well during that same period.

On appeal, the Amarillo Court of Appeals agreed that the top lease did not violate the Rule Against Perpetuities. However, the court of appeals remanded the case because the trial court erred in limiting the jury's paying-production inquiry to only the fifteen-month slowdown period. On this second point, the court held that the controlling issue was whether the well failed to produce "over a reasonable period of time," not whether the well failed to produce during the limited slowdown period. Both BP and Laddex filed a petition for review.

In deciding the case, the Texas Supreme Court first addressed the standing issue. The Court agreed with BP that a top-lease conveyance contingent on the expiration of a determinable-fee bottom lease, without more, would be void as a perpetuity. However, the Court noted that not all top leases were so contingent; for example, a top lease that presently conveyed the lessors' possibility of reverter under the bottom lease would necessarily satisfy the Rule.

Accordingly, the Court turned to the specific language of the Laddex top lease. Though the lease was not a "model of clarity," the Court concluded that it was "plausible" that the top lease was a present "partial alienation" of the lessor's possibility of reverter under the BP Lease. Specifically, the Court cited the provision in the top lease stating that the lease was "intended to and does include and vest in Lessee any and all remainder and reversionary interest . . . of Lessor . . . upon the expiration of any prior oil, gas, or mineral lease." While the Court noted that this provision could be interpreted both as a present conveyance (which would satisfy the Rule) and as a contingent conveyance (which would violate the Rule), it held that the proper approach was to interpret the lease, wherever possible, in a way that rendered it valid. Consequently, the Court concluded that the top lease was a present conveyance of the lessors' possibility of reverter—which rendered the top lease valid and afforded Laddex standing to sue.

The Court turned next to the jury instruction regarding cessation of production. Citing longstanding precedent from *Clifton v. Koontz*, 325 S.W.2d 684 (1959), the Court reiterated that "there can be no limit as to time . . . in determining the question of whether paying production from the lease has ceased." Because the jury instruction limited the paying-production analysis to the fifteen-month slowdown period—a limitation clearly at odds with *Clifton*—the Court affirmed the court of appeals' decision to remand for a new trial. In so holding, the Court rejected BP's request to render judgment in BP's favor, noting that the evidence presented in the trial court could lead a reasonable jury to conclude on remand that the well ceased to produce in paying quantities.

7. *Chambers v. San Augustine County Appraisal Dist.*, No. 12-15-00201-CV, 2017 WL 511892 (Tex. App.—Tyler Feb. 8, 2017, no. pet. h.).

In *Chambers*, the Tyler Court of Appeals held that mineral owners whose

minerals were located in one county and were later pooled into production units spanning two counties could not be taxed by both counties where the relevant mineral leases prohibited cross-conveyance of interests.

A collection of landowners (the "Chambers") executed mineral leases for 652 acres of land in Shelby County, Texas. The Chambers' minerals were pooled into two production units containing interests in both Shelby County and neighboring San Augustine County. The San Augustine Central Appraisal District ("SCAD") tried to tax the Chambers for their fractional royalty interest in the two production units. The Chambers sued and the trial court entered judgment for SCAD.

On appeal, the Chambers raised two issues. First, they argued that their mineral leases expressly precluded cross-conveyance of mineral interests. Second, they claimed that, because royalty interests are interests in real property, such interests could only be taxed by the county in which the property was located. The court of appeals combined both issues into a single analysis, stating that "whether the pooling result in cross-conveyance, and whether the minerals SCAD seeks to tax lie within or outside the boundaries of San Augustine County, depends on construction of the language in the [Chambers'] leases." In particular, the court focused on a provision of the leases specifying that pooling units "shall not have the effect of exchanging or transferring any interests under" the leases.

The court noted that pooling agreements generally entailed cross-conveyance of mineral interests such that each participant owns a proportional, undivided interest in the pooled minerals. Under this default rule, the Chambers would own a fractional interest in the entire production unit and could be taxed accordingly

However, the Chambers' leases changed the default rule; indeed, the leases expressly prohibited cross-conveyance via pooling agreement. Consequently, the court held that the Chambers held an interest only in their original minerals located in Shelby County and had no obligation to pay taxes to San Augustine County. The court reversed and remanded for further proceedings.

8. *Radcliffe v. Tidal Petro., Inc.*, No. 04-15-00644-CV, 2017 WL 511219 (Tex. App.—San Antonio Feb. 8, 2017, no pet. h.).

In *Radcliffe*, the Fourth Court of Appeals held (1) that the heirs of a grantor, who conveyed one-half of her mineral estate to a grantee, produced some evidence of ownership in one-half of the mineral estate to defeat the grantee's motions for summary judgment, and (2) that the grantee was not liable on the theory of bad faith trespass and thus summary judgment was properly granted.

This case deals with the ownership of one-half of a mineral estate under 120 acres of land in Texas. In 1945, Emma Radcliffe, now deceased, owned land in Texas and conveyed her "entire surface estate and half of the mineral estate to Tidal Petroleum, Inc.'s predecessor-in-interest." A dispute arose when the Radcliffes—Emma's grandchildren, Brett and Robert, and Mamba Minerals, LLC, the successor-in-interest to grandchild Amber—notified Tidal that they had a one-half interest in the mineral estate. Tidal dismissed these claims of ownership.

In response, the Radcliffes sued Tidal for trespass to try title, bad faith trespass, and several other torts. Both sides moved for summary judgment. Tidal contended that the Radcliffes do not own any mineral interest in the tract because they offered no evidence of such ownership and there is a gap in the chain of title. The trial court eventually granted Tidal's motions yet failed to specify the grounds for its decision.

On appeal, the Radcliffes primarily argued that Tidal's no-evidence and traditional motions for summary judgment should not have been granted because a fact issued had been raised below. The Fourth Court of Appeals agreed as to the Radcliffes trespass to try title claim, but affirmed the trial court's order against the Radcliffes as to bad faith trespass and the other tort claims.

Regarding the claim for trespass to try title, the court analyzed the chain of title for the one-half mineral interest from Emma to her heirs. The court concluded that the Radcliffes had produced "more than a scintilla of summary judgment evidence" to show that they took under intestate succession, as they produced some evidence of an unbroken chain of title for the one-half mineral interest from Emma down to her grandchildren. Thus, the court held that fact issues existed and Tidal's no-evidence and traditional summary judgment motions were improperly granted.

The court then considered the Radcliffes' bad faith trespass claim. Because the court had already decided that there was more than a scintilla of evidence to show ownership, it focused its analysis on Tidal's assertion that there was no evidence of lack of consent because (1) "one cannot commit an unauthorized entry onto a nonpossessory interest" and (2) it "had an absolute right to enter under the doctrine of cotenancy."

First, the court explained that "[o]wners of undivided portions of oil and gas rights in and under real estate are tenants in common, and an oil and gas lessee of a co-tenant becomes a co-tenant with the co-tenants of his lessor." The court then reiterated that "[i]t has long been the rule in Texas that a cotenant has the right to extract minerals from common property without first obtaining the consent of his cotenants." Thus, the law of cotenants applied and, as an oil and gas lessee of the Radcliffes' cotenant, Tidal was the Radcliffes' cotenant.

After explaining the law of cotenancy, the court stated that it was possible to bring a trespass action for a nonparticipating royalty interest or a mineral interest. Thus, Tidal's admission that it removed minerals from the tracts constituted more than a scintilla of evidence on the element of lack of consent. The court explained that Tidal's admission that "it did not obtain the Radcliffes' permission to enter and produce on the . . . leasehold" constituted "some evidence of lack of consent." Thus, the Radcliffes had offered some evidence on their bad faith trespass claim.

Nevertheless, the court held that the trial court properly dismissed the bad faith trespass claim and other tort claims because Tidal conclusively proved each elements of its cotenancy affirmative defense. As the Radcliffes' cotenant, Tidal had the "right to enter the leasehold and produce oil and gas from it without the Radcliffes' prior consent."

Therefore, the court affirmed the trial court's order against the Radcliffes' bad faith trespass and other tort claims, reversed

with respect to the Radcliffes' trespass to try title claim and remanded the case for further proceedings.

9. *Richardson v. Mills*, No. 12-15-00170-CV, 2017 WL 511893 (Tex. App.—Tyler Feb. 8, 2017, pet. filed).

In *Richardson*, the Tyler Court of Appeals held that a 1906 instrument purporting to "forever" transfer an "undivided one-half interest in the oil, gas, and other minerals" was a mineral deed, not a lease, and concluded that a later-recorded release referencing the same property had no effect on the 1906 deed.

This case involved the construction of two instruments: a 1906 instrument executed in favor of Robert Lindsey and June C. Harris and a 1908 Release signed by Lindsey and Harris. For years, the successors-in-interest to the grantors of the 1906 instrument (the "Appellees") received royalty payments for one-half of the relevant minerals. When the payments stopped, Appellees filed suit against the heirs, devisees, and assigns of Lindsay and Harris (the "Appellants). The trial court determined that the two instruments were ambiguous and ruled that the 1908 Release was intended to release the 1906 instrument.

On appeal, the court was asked to determine whether the 1906 instrument was a mineral deed or a mineral lease and what effect, if any, the 1908 Release had on the 1906 instrument. As to the 1906 instrument, the court held that the instrument's plain language conveyed the mineral interest without condition or limitation. As such, the court concluded that the 1906 instrument was a mineral deed, rather than a lease.

The court dismissed Appellees' alternate claim that the 1906 instrument was an executory contract that required Harris and Lindsey to perform certain services as a pre-condition to the transfer of the mineral interests. While the 1906 instrument contained several recitals about services Harris and Lindsey were to perform for the original grantors, the court found no evidence that the 1906 instrument contemplated a future conveyance of the minerals. Instead, the 1906 instrument clearly passed title on the date of execution. While the original grantors might have grounds to set aside the conveyance had Harris and Lindsey failed to perform, no such action was filed. Accordingly, the court held that that 1906 instrument deeded a one-half mineral interest to Harris and Lindsey (and thus to Appellants).

The court then addressed the 1908 Release. The Release purported to release an earlier instrument dated July 9, 1907. As Appellants noted, the 1906 instrument could not be the document referenced in the Release because the 1906 instrument was dated July 9, 1906. Appellees argued the date discrepancy was a mere mistake.

The court sided with Appellants. In support, it highlighted other discrepancies between the 1908 Release and the 1906 instrument, including language in the Release referencing an "expired" term of development that did not appear in the 1906 instrument and descriptions of a grantee different from the one stated in the 1906 instrument. Based on these discrepancies, the court concluded that the 1908 Release was tied to a document other than the 1906 instrument. Consequently, the Release could have no effect on the 1906 instrument.

After emphasizing that both the 1906 instrument and 1908 Release were unambiguous on their face—thus precluding admission of extrinsic evidence—the court

reversed the trial court and rendered a judgment that Appellees take nothing. However, the court enforced a prior stipulation reached by the parties, in which Appellants agreed that Appellees had rights to a small percentage of the disputed minerals for reasons unrelated to the underlying dispute.

10. *Crawford v. XTO Energy, Inc.*, 509 S.W.3d 906 (Tex. 2017).

In *Crawford*, the Texas Supreme Court held that a plaintiff landowner does not need to join neighboring landowners as necessary parties in a royalty dispute unless and until the neighboring landowners assert an interest in the minerals subject to the dispute.

In 1964, Mary Ruth Crawford conveyed the surface estate of 146 acres located in Tarrant County, Texas (the "Crawford Tract"), reserving the associated mineral rights. In 1984, she further conveyed the property immediately north and south of the Crawford Tract without reserving the mineral rights. In 2007, she executed an oil and gas lease for the Crawford Tract that was subsequently obtained by XTO Energy, Inc. (the "Crawford Lease"). XTO pooled the Crawford Lease into a production unit that included property adjacent to the Crawford Tract. After production began, XTO obtained a title opinion stating that the 1984 conveyance of the land north and south of the Crawford Tract also conveyed the minerals under the Crawford Tract pursuant to the strip-and-gore doctrine. Accordingly, XTO began diverting royalties associated with the Crawford Tract to the adjacent landowners.

Richard Crawford—who inherited Mary Ruth's estate upon her death—filed suit for breach of contract. In the trial court, XTO argued that Crawford was required to join the adjacent landowners as necessary parties under Rule 39 of the Texas Rules of Civil Procedure. The trial court agreed, and dismissed Crawford's suit when he failed to add the adjacent landowners as defendants. The court of appeals affirmed.

On appeal, the Texas Supreme Court was tasked with determining whether Rule 39(a)(2) of the Texas Rules of Civil Procedure—which requires the joinder of any person who "claims an interest relating to the subject of the action"—compelled Crawford to join the adjacent landowners in his suit against XTO. The Court concluded that it did not, and reversed and remanded the case to the trial court.

The Court observed that Rule 39(a)(2) defined a necessary party as someone who "claims an interest" in the relevant suit. Noting that none of the adjacent landowners had demanded or asserted ownership of the disputed minerals, the Court concluded that none of the adjacent landowners had "claim[ed] an interest" in the disputed minerals as required by Rule 39(a)(2).

In so holding, the Court rejected XTO's argument that the adjacent landowners claimed an interest in the Crawford Tract minerals via their deeds and mineral leases. None of the relevant leases or deeds asserted ownership in the relevant minerals. Nor had the adjacent landowners claimed ownership via the strip-and-gore doctrine. That XTO believed the adjacent landowners had a *potential* claim under the strip-and-gore doctrine was of no consequence when, as here, the adjacent landowners had done nothing to advance that claim.

The Court agreed that XTO could face inconsistent obligations if Crawford prevailed at trial without first joining the adjacent landowners. Nevertheless, the Court held that XTO's remedy was not mandatory joinder under Rule 39, but rather permissive joinder under Rule 37. As the Court noted, there was "no impediment to XTO utilizing Rule 37 to bring in the adjacent landowners itself in order to avoid the risk of future lawsuits and inconsistent judgments."

11. *Carrizo Oil & Gas, Inc. v. Barrow-Shaver Res. Co.*, No. 12-15-00083-CV, 2017 WL 412892 (Tex. App.—Tyler Jan. 31, 2017), *reh'g denied* (Mar. 23, 2017).

In *Carrizo Oil & Gas, Inc.*, a divided panel of the Tyler Court of Appeals held that a farmout agreement gave a lease owner the right to arbitrarily block any assignment of rights to a new third-party operator.

In this case, Barrow-Shaver Resources Co. ("BSR") executed a farmout agreement with Carrizo Oil & Gas, Inc. ("COG") for a parcel of land with no active drilling activity. Pursuant to a consent-to-assign clause, BSR was required to obtain the "express written consent" of COG before it could assign, sublease, or otherwise transfer its interests in the Agreement. During negotiations, BSR attempted to include language preventing COG from unreasonably withholding its consent. COG refused to agree to that language, but orally assured BSR that it would likely consent to a future assignment.

BSR spent $22 million drilling wells on the property, without success. BSR then entered negotiations with Raptor Petroleum II, LLC to assign BSR's interests under the agreement for approximately $27 million. However, COG demanded payment of $5 million—nearly the entire profit BSR would realize on the transaction—before it would consent. BSR refused, the deal with Raptor fell through, and BSR filed suit alleging breach of contract, fraud, and tortious interference with contract. A jury found for BSR.

On appeal, COG advanced three key arguments: (1) that the farmout agreement gave COG the right to block the assignment to Raptor for any reason or no reason; (2) that the trial court erred by excluding evidence of the parties' prior negotiations over the consent-to-assign provision; and (3) that COG's alleged oral promise that it would approve any assignment was superseded by the express terms of the farmout agreement.

Over a single dissenting vote, the court of appeals sided with COG on each point. First, the court noted that Texas law allows parties to arbitrarily withhold consent absent an express provision otherwise. This default rule was reinforced when, as here, the parties ultimately rejected language requiring COG to act reasonably. Because the agreement unambiguously gave COG authority to withhold consent for any reason or no reason, the court concluded that COG was entitled to judgment as a matter of law on BSR's contract claim.

The court reached the same conclusion on BSR's fraud claims. The court noted that BSR—an experienced operator in the oil and gas industry—could not justifiably rely on oral promises made before the agreement was signed. Likewise, COG's contractual right to withhold consent was an affirmative defense to any claim for tortious interference. Accordingly, the court reversed and rendered a take-nothing judgment for COG on all claims.

Writing separately, Justice Brian Hoyle concurred with the majority's decision to reverse. However, Justice Hoyle disagreed that the agreement gave COG the right to arbitrarily withhold consent. He thus dissented from the decision to render a take-nothing judgment and instead sought to remand the case for a new trial.

12. *Crystal River Oil & Gas, LLC v. Patton*, 510 S.W.3d 226 (Tex. App.—Eastland 2016, no pet.).

In *Crystal River*, the Eastland Court of Appeals held that repair work on saltwater disposal wells could qualify as "reworking operations" under a cessation-of-production provision so long as an ordinarily competent operator, under similar circumstances, would engage in the same repairs.

Crystal River Oil & Gas, LLC operated a lease in Stonewall County, Texas. Oil production resulted in large amounts of saltwater, which required use of a saltwater disposal well. When the disposal well broke down, Crystal River was forced to halt oil production while repairs were made. Robert Patton became aware of the halt in production, acquired new leases for the same property, and filed suit to terminate Crystal River's original lease.

Crystal River's original lease included a cessation-of-production provision stating that, if production ceased after the primary term, the lease would not terminate if Crystal River "commence[d] additional drilling or re-working operations within sixty (60) days . . . ." At trial, Crystal River argued that the repair work on the broken saltwater disposal well was sufficient to invoke the savings provision. Patton disagreed, arguing that the lease required Crystal River to conduct reworking operations on the producing oil wells, themselves. The trial court adopted Patton's interpretation, and instructed the jury to decide whether Crystal River "fail[ed] to commence drilling or reworking activities *on the producing wells in question* within 60 days after the wells ceased to produce oil and gas." The jury answered in the affirmative, and the trial court entered judgment for Patton.

On appeal, the Eastland Court of Appeals addressed the definition of "reworking operations" under Texas law. After reviewing relevant portions of the Texas Pattern Jury Instructions and precedent from the Amarillo Court of Appeals, the court held that the scope of "reworking operations" was a fact-dependent analysis that generally included whatever steps "an ordinarily competent operator would [take] under the same or similar circumstances to restore production." Repair work on saltwater disposal wells could qualify under this standard. Indeed, the court cited with approval the decision in *Pro-Chem, Inc. v. Lassetter Petroleum, Inc.*, in which the Kansas Court of Appeals held that work associated with the re-routing of a saltwater disposal pipeline satisfied a similar cessation-of-production provision.

Because the original lease did not limit what activities qualified as reworking operations, the court concluded that the trial court erred in instructing the jury to consider only work performed on the producing wells. Accordingly, the court reversed and remanded for further proceedings. In so holding, the court rejected a request to render judgment for Crystal River. Instead, the court ruled that the factfinder was required to decide on remand whether Crystal River's repairs of the disposal wells qualified as reworking operations under the lease.

13. *Tanya L. McCabe Trust v. Ranger Energy LLC*, 508 S.W.3d 828 (Tex. App.—Houston [1st Dist.] 2016, pet. filed).

In *McCabe Trust*, the First Court of Appeals held that a correction instrument containing material corrections to a recorded mortgage was ineffective because it was not executed by the parties to the original mortgage as required by Section 5.029 of the Texas Property Code.

The underlying dispute involved two leases—the McShane Fee Lease and the Brice Lease. Both leases were subject to multiple transfers and assignments. As relevant to this case, Mark III Energy Holdings, LLC executed a mortgage with the Peoples Bank in 2008 (the "2008 mortgage"). The 2008 mortgage granted the Bank a security interest in several leases. At the time of execution, the mortgage referenced six encumbered leases; the McShane Fee and Brice Leases were omitted by mistake.

Beginning in 2011, Mark III made multiple assignments of overriding royalty interests in the McShane Fee and Brice Leases to the Tanya L. McCabe Trust, the McCabe Family Trust, and the Rochford Living Trust (the "Trusts"). One year later, Mark III and the Bank executed a modified security agreement and deed of trust. The security instruments again mistakenly omitted the McShane Fee and Brice Leases.

The Bank recognized the error in 2013 and recorded a revised version of the deed of trust (the "2013 deed of trust") and a revised version of the mortgage (the "2013 mortgage") adding the McShane Fee and Brice Leases. Notably, neither the Bank nor Mark III signed the correction instruments before they were recorded; instead, the Bank used copies of the signature pages from the original 2012 deed of trust and the original 2008 mortgage.

The Bank transferred its rights to Ranger Energy in March 2013, which foreclosed on the 2013 mortgage. Ranger filed a declaratory judgment action against the Trusts, arguing that the Trusts' overriding royalty interests in the Leases had been extinguished by the foreclosure. In response, the Trusts claimed the 2013 deed of trust and 2013 mortgage were invalid because they failed to comply with Texas law governing correction instruments. Accordingly, the Trusts claimed that the 2008 mortgage was the operative document. Because the McShane Fee and Brice Leases were not listed in the 2008 mortgage, the Trusts claimed their overriding royalty interest in those two leases was unaffected by the foreclosure. The trial court entered a judgment for Ranger.

On appeal, the Trusts argued two points: (1) that the 2013 deed of trust and 2013 mortgage contained "material corrections" and thus fell under Section 5.029 of the Texas Property Code and (2) that the corrected instruments did not comply with Section 5.029 because they were not executed by the parties to the original instruments. The court of appeals agreed on both grounds.

First, the court noted the general rule that "the addition of land to a conveyance that correctly conveys other land is a material change." Because the 2013 deed of trust and 2013 mortgage purported to add the McShane Fee and Brice Leases to prior instruments that already conveyed interests in other leases, the correction was a material change that fell under Section 5.029.

Second, the court noted that Section 5.029 requires that correction instruments making a material change be (1) executed by the original parties and (2) recorded wherever the original instrument was recorded. It was undisputed that the 2013 deed of trust and 2013 mortgage were not executed by the original parties. Accordingly, the correction documents were invalid.

Lastly, the court rejected several alternative arguments raised by Ranger. In particular, Ranger claimed that Mark III ratified the 2013 correction instruments and that the Trusts were required to show that they were bona fide purchases with respect to the McShane Fee and Brice Leases. The court ruled that both arguments depended on proof that the 2013 instruments were valid. Because the 2013 instruments were ineffective, Ranger's arguments failed. The Court thus reversed, rendered judgment stating that the 2013 deed of trust and 2013 mortgage did not affect the Trusts' interests in the Leases, and remanded for further proceedings.

14. *Tregellas v. Archer*, 507 S.W.3d 423 (Tex. App.—Amarillo 2016, pet. filed).

In *Tregellas*, the Amarillo Court of Appeals held that landowners satisfied Sections 5.028 and 5.031 of the Texas Property Code when they sent unsigned copies of a corrected right of first refusal ("ROFR") instrument to the original grantors. However, the court concluded that limitations barred the landowners' attempt to specifically enforce their right to purchase mineral interests sold more than four years prior to the suit.

In 2003, the trustees of the Archer Trusts ("Archer Trustees") acquired a surface estate in Hansford County, Texas via warranty deed. At the same time, the Archer Trustees obtained a right of first refusal for the minerals associated with the surface estate. The Archer Trustees subsequently discovered that the ROFR listed the wrong county and prepared a corrected ROFR instrument. Unsigned copies of the corrected ROFR were sent to each of the original grantors, and a signed copy was recorded in Hansford County.

On March 28, 2007, two of the original grantors transferred their undivided mineral interests to Ronald Ralph Tregellas and Donnita Tregellas ("Tregellas") via recorded deed. The Archer Trustees were not informed of the sale until May 4, 2011. The Archer Trustees filed suit the next day to specifically enforce their right to purchase the 2007 minerals.

In 2012, Tregellas acquired a second mineral interest covered by the ROFR. Because the Archer Trustees' right of first refusal was subordinate to the original grantors' right to mortgage their minerals, Tregellas structured the 2012 purchase as a foreclosure sale. The Archer Trustees were again not informed of the transfer; when the second sale was discovered, the Trustees amended their 2011 petition to allege that Tregellas obtained the 2012 minerals via subterfuge. The trial court granted specific performance for the Archer Trustees as to both the 2007 and 2012 minerals.

Tregellas argued three points on appeal: (1) that the corrected ROFR was invalid because it did not comply with the Texas Property Code; (2) that limitations barred the Archer Trustees' suit to purchase the 2007 minerals; and (3) that the 2012 transaction was not a voluntary sale subject to the ROFR.

As to the first issue, the court of appeals noted that a correction instrument need only "substantially comply" with the requirements of the Texas Property Code. Because the Archer Trustees met the essential requirements of the Code in preparing and recording their corrected ROFR instrument—including efforts to mail copies of the instrument to each original grantor and recording the corrected document in Hansford County—the court overruled Tregellas' first point.

On the second issue, The court agreed that limitations barred any suit associated with the 2007 minerals. The 2007 minerals were transferred to Tregellas on March 28, 2007, and the Archer Trustees' cause of action accrued as of that date. Because a suit for specific performance must be brought within four years after the cause of action accrues, the Archer Trustees' suit filed on May 5, 2011 was outside the limitations period. While the court acknowledged that the Archer Trustees first learned of the 2007 transaction on May 4, 2011, it rejected arguments seeking to toll or otherwise extend the limitations period. In particular, the court noted that the 2007 transaction was evidenced by a recorded deed and was thus discoverable by the exercise of reasonable diligence.

Lastly, the court ruled that the 2012 transaction was a voluntary sale subject to the ROFR. While the parties focused on Tregellas' attempt to structure the 2012 transaction as a foreclosure sale, the court looked instead to events preceding the 2012 transaction. For example, the court noted that the grantors to the 2012 transaction failed to disclose to the Archer Trustees that Tregellas had offered to purchase their minerals. Noting that "the right to receive notice of a third-party offer is recognized as one of the distinct legal rights which are included in the concept [of] right of first refusal," the court ruled that the grantors' failure to disclose Tregellas' offer was itself a violation of the ROFR. Accordingly, the court affirmed the trial court's judgment enforcing the ROFR as to the 2012 minerals.

15. *Westport Oil & Gas Co., L.P. v. Mecom*, No. 04-15-00714-CV, 2016 WL 7234056 (Tex. App.—San Antonio Dec. 14, 2016, no pet.)

In *Westport*, the Fourth Court of Appeals held that a 1974 oil and gas lease was unambiguous, the royalty and gas purchase agreement paragraphs in the lease had independent purposes, and thus the express royalty provision in the lease determined the royalty owed.

This case focused on the relationship between paragraph 3 and paragraph 17 in a 1974 oil and gas lease (the "Lease"), which provided for differing formulas to calculate the amount of royalty owed to the royalty owners (the "Owners").

Paragraph 3 "define[d] the royalty owed to the lessor for oil, gas, and sulphur and address[ed] various conditions that affect the royalty." Specifically, the contested provision of paragraph 3 described the royalty due as "forty-two percent (42%) of the market value at the well."

Paragraph 17 "address[ed] 'contract[s] for the sale of gas . . . produced from the leased premises'" and "set a minimum contract price for any future gas purchase agreement" as "the average of the highest price paid by three separate Intrastate Purchasers of gas."

The Owners sued the gas producer (the "Producer") for underpayment of

royalties as well as overcharged compression fees, fraud, and statutory violations. All parties filed motions for summary judgment. The trial court granted the Producer's motion as to the Owners' claims of overcharged compression fees, fraud, and statutory violations and granted the Owners' motion seeking confirmation that the royalty formula described in paragraph 17 controlled over the formula described in paragraph 3.

On appeal, the Fourth Court of Appeals looked to the lease's plain language to determine whether paragraph 3 or paragraph 17 controlled. After concluding that the lease was unambiguous, the court ruled that the paragraphs had independent purposes, with "paragraph 3 defin[ing] the royalty owed and paragraph 17 set[ting] a minimum contract price for any future gas purchase agreement." Accordingly, the court held that paragraph 3 provides the royalty owed under the Lease as the market value at the well.

After noting that paragraph 3 controlled the current dispute, the court explained that the Owners were bound by their prior admission that the Producer had paid the full royalties owed under paragraph 3. Therefore, the court found no evidence that the Producer owed unpaid royalties under the lease. It thus reversed and rendered a take nothing judgment against the Owners on their contract claim, their declaratory judgment action, and their claim for attorneys' fees

16. *N. Shore Energy, L.L.C. v. Harkins*, 501 S.W.3d 598 (Tex. 2016).

The Texas Supreme Court held that an operator had no rights to a 400-acre tract under a contract that gave the operator the option to lease a certain acreage "save and except" that particular 400-acre property.

In 2009, the Harkins family granted North Shore Energy, LLC an option to select land to lease from a larger tract. The option contract stated that it covered "1237.54 acres situated in Goliad County, Texas, and being all of the 1637.69 acre tract described on exhibit A attached hereto, save and except a 400.15 acre tract" described in a separate lease memorandum. North Shore ultimately leased 169.9 acres; the selected acreage included much of the 400.15-acre tract excepted from the option contract. A second oil and gas operator—Dynamic Production Inc.—subsequently leased the full 400.15-acre tract from the Harkins.

North Shore filed suit to quiet title, and later added claims for geophysical trespass and tortious interference. North Shore argued that it had the right to select any acreage out of the full 1,673.69 acres referenced in the option contract. In response, the Harkins and Dynamic argued that the contract excluded the 400-acre tract. The trial court found the agreement ambiguous and entered a partial summary judgment for North Shore. A jury later found for North Shore on its claims for geophysical trespass and tortious interference. The court of appeals agreed that the agreement was ambiguous, but reversed the trial court's grant of summary judgment.

The Texas Supreme Court took a different approach, concluding that the option contract was unambiguous and that use of the words "save and except" expressly excluded the 400.15-acre tract. The Court rejected North Shore's interpretation of the contract because it required the Court to ignore the plain language of the agreement. Since the only

reasonable interpretation of the option contract favored the position advanced by the Harkins and Dynamic, the Court held that the contract gave North Shore no right to lease the 400-acre tract. Accordingly, the Court ruled that neither the Harkins nor Dynamic could be liable on any of the claims asserted by North Shore. The Court thus affirmed the decision to remand for further proceedings.