THE IMPACT OF MINERAL RIGHTS ON REAL ESTATE TRANSACTIONS; RECENT COURT OPINIONS

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CHAPTER 1

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Wesley Lloyd handles litigation and appeals in disputes involving upstream oil and gas operations and midstream pipelines. He has successfully represented clients as lead counsel in numerous trials and hearings, and has argued appeals at the Texas Supreme Court, the Fifth Circuit Court of Appeals and intermediate state appellate courts. Mr. Lloyd is Board Certified in Oil, Gas & Mineral Law by the Texas Board of Legal Specialization.

Mr. Lloyd also represents clients in government relations, including outreach to elected officials and agency personnel at all levels of government. For eight years he served as Governor Perry's appointee on two important statewide boards that are responsible for leasing state land for oil and gas development, and he currently serves as one of Governor Abbott's appointees to the Board of the Brazos River Authority.

Mr. Lloyd has is also a certified mediator and offers mediation services in disputes within his areas of expertise.

REPRESENTATIVE EXPERIENCE

Won defense verdict and attorneys fees award for oil well operator in week-long jury trial in Harris County concerning allegations of unpaid royalties under the Texas Natural Resources Code.

Won unanimous defense verdict on liability for defendant and no damages in week-long jury trial in Scurry County.

Won favorable ruling from TCEQ after trial at SOAH over wholesale water rates charged by Texas municipality.

Acquired $1.25 Million judgment in case in Bexar County concerning breach of fiduciary duty in oilfield investment dispute.

Won summary judgment for midstream pipeline company in Navarro County lawsuit over easement rights.

Won summary judgment for engineering firm involved in building collapse in Bosque County.

Successfully represented midstream pipeline company in multiple lawsuits involving the scope of easement rights in Hays County and McLennan County.

Successfully pursued and defended multiple claims related to surface use disputes between oil companies and surface owners throughout the state.

PRACTICE AREAS

Appellate
Environmental Law
Mediation
Water Law
Oil and Gas Law

EDUCATION

Texas Tech University School of Law, Lubbock, Texas J.D. – 2005
Texas A&M University, College Station, Texas B.S. – 2001

BAR ADMISSIONS

Texas, 2005
U.S. District Court Western District of Texas, 2005
U.S. District Court Eastern District of Texas, 2005
U.S. District Court Southern District of Texas, 2006
U.S. District Court Northern District of Texas, 2006
U.S. Court of Appeals 5th Circuit

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THE IMPACT OF MINERAL RIGHTS ON REAL ESTATE TRANSACTIONS; RECENT COURT OPINIONS

This paper will focus on recent[1] cases in oil and gas law, involving common issues and disputes that arise. The goal is to help you flag issues that you might need to pay attention to. This paper is not intended to be an exhaustive survey of any particular area of oil and gas law.

I. RECENT ("-ISH") INTERESTING OPINIONS IN OIL & GAS CASES

Deed Interpretation, Fixed v. Floating NPRI, Estate Misconception, Presumed Grant

In *Susan Davis Van Dyke et al. v. The Navigator Group. et al.*, 2020 Tex. App. LEXIS 10448; 2020 WL 7863330 (Tex. App—Eastland, December 31, 2020), the Eastland Court of Appeals applied recent fixed-versus-floating NPRI principles to a double-fraction mineral interest reservation. The Texas Supreme Court has requested merits briefing from the parties, but has not yet set oral argument. This case will be one to watch.

In a 1924 Deed Mulkey conveyed property to White and Tom and reserved "one-half of one-eighth of all minerals …" Van Dyke (heirs and assigns of Mulkey) claimed ownership of half of the minerals pursuant to the reservation. Navigator (heirs and assigns of White and Tom) claimed that Van Dyke only owns 1/16th and that Navigator owns the rest.

Ruling on dueling motions for summary judgment, the trial court agreed with Navigator and declared, among other things, that the Deed was unambiguous and that the Mulkeys reserved 1/16th of the minerals (1/2 of 1/8th) and conveyed 15/16ths to White and Tom.

Van Dyke also asserted claims under the estate misconception theory and the presumed grant doctrine and asserted estoppel defenses.

Van Dyke maintained that the trial court failed to construe the deed in light of the "estate misconception" prevalent at the time of the 1924 Deed. This theory refers to a once-pervasive misunderstanding that a mineral lease actually retained 1/8th of the minerals, rather than a fee simple determinable with the possibility of reverter in the whole. The theory is not new to oil and gas jurisprudence in Texas, but the court reasoned it would be new if it were applied to construe a reservation in which clear language was employed and in which there was an absence of contradictory fractions or terms.

Moreover, the Mulkeys could not have been operating under the misconception because they had not leased the minerals and thus owned all the attributes of the mineral estate. The court further opined that as a general rule courts construe simple fractions, such as a fraction of 1/8th (or a variation thereof), as a fixed royalty interest, which is calculated simply by multiplying the fractions.

Because the 1924 Deed was unambiguous and contained no inconsistencies to be harmonized, the Mulkeys reserved a 1/16th interest in the mineral estate and not one-half.

Van Dyke also maintained that the trial court should have interpreted the Deed in accordance with the presumed grant doctrine. Their position was that application of that theory would have established their ownership of half of the minerals or, at a minimum acted to create a fact issue that would survive summary judgment. This doctrine operates as a common law form of adverse possession, allowing a claimant to establish title by circumstantial evidence. If established, the law permits an inference that the apparent owner has parted with his title.

The court opined that reliance on the doctrine was misplaced because Van Dyke's claim was not based on a gap or missing link in the chain of title that would necessitate a presumed grant. Rather, Van Dyke's claim was based solely on their mistaken interpretation of the unambiguous 1924 Deed.

Further, Van Dyke's claims were not made in conjunction with a claim of superior right to the land on which the minerals were being produced. Van Dyke attempted to apply the doctrine to establish the quantum of the ownership in the mineral estate. But the court noted that the quantum of interest was already established under the 1924 Deed. Therefore, the presumed grant doctrine cannot be used to reinterpret and alter the Deed's unambiguous terms.

The most interesting issue here is whether the Supreme Court will, for the first time, allow application of the presumed grant theory in the context of a chain of title with no gaps. The second interesting thing to watch is whether the Court will apply the estate-misconception doctrine to a situation where the grantor had not actually leased the minerals, and therefore could not have "misconceived" that it owned 1/8 of the minerals as opposed to a 1/8 royalty interest.

Van Dyke tells a story that elicits sympathy, because for many years the parties acted as though she owned half of the minerals. And now, those minerals are worth millions of dollars. But if the Court sticks to the four corners of the deed, and does not broaden application of the presumed grant and estate misconception theories, then the lower court's opinion is likely to stand.

[1] Post-Covid, the term "recent" needs to be expanded a bit since it might have been a while since you attended a CLE in person. So, this update goes back a little farther than it normally would.

Surface Use – The Accommodation Doctrine

In *Lyle v. Midway Solar, LLC*, 618 S.W.3d 857 (Tex. App.—El Paso, December 30, 2020), the El Paso Court of Appeals analyzed a dispute between a solar developer and the mineral owner.

Midway, the solar development company, developed a 315-acre tract in Pecos County pursuant to a 55-year solar development lease with the surface owners. Neither Midway nor the surface owners owned the underlying minerals and they did not obtain surface use agreements or waivers from the mineral owners.

Midway designated the perimeter of the solar project as an undevelopable area reserved for oil and gas surface operations, but without undertaking any geological investigation or soliciting any input from the mineral owners. The mineral owners had never attempted to develop the minerals in the past, and no evidence of future plans was offered.

Once construction of the project was complete, Lyle sued the surface owners and Midway for damages to the mineral estate, claiming the defendants violated the accommodation doctrine by impairing development of the mineral estate. The project ended up covering about 70 percent of the surface tract. Defendants moved for partial summary judgment asserting that the accommodation doctrine did not apply because plaintiffs had not developed the mineral estate and had no plans to do so, and therefore there was nothing to accommodate. The trial court agreed and entered a take-nothing final judgment against the mineral owners.

On appeal, the El Paso Court of Appeals affirmed and held that unless and until the mineral owners attempted to develop the mineral estate, use of the surface estate was uninhibited by the accommodation doctrine. The court noted that under the current state of the evidence and the causes of action asserted, the case was premature until the mineral owner actually attempted to develop the minerals. Therefore, the trial court's judgment was reformed to be without prejudice.

More Accommodation Doctrine

Another accommodation doctrine case that is worth discussing is *VirTex Operating Co. v. Bauerle*, 2017 Tex. App. LEXIS 10413; 2017 WL 5162546 (Tex. App—San Antonio 2017, pet. den'd). Although the opinion from the San Antonio Court of Appeals was issued back in 2017, it was long believed that the Supreme Court would ultimately weigh in and either reverse or modify the opinion. Therefore, some practitioners opted not to cover it in case law updates, or would devote minimal time to it. But in 2019, the Supreme Court denied the petition and motion for rehearing. Coverage of the impact of the case was then diminished by Covid. So, I'll include it here with some cautionary words.

In this case, Bauerle owned the surface of a large 8,000+ acre ranch in South Texas, which he leased to deer hunters. VirTex is the mineral lessee on approximately 3,000 of those acres. VirTex desired to install overhead power lines to new wells that were drilled and/or planned. The total number planned was 43 wells.

Bauerle contended that the power lines would prevent his hunters from utilizing helicopters to capture deer, count deer and assist in predator management. After VirTex voluntarily ceased installing the lines in order to try to work out an agreement, Bauerle sued and alleged violation of the accommodation doctrine. He also sought a declaratory judgment that VirTex's planned power lines would violate the accommodation doctrine.

Bauerle's evidence of alternative uses available to VirTex was primarily that sour gas from the wells could be transported to an amine sweetening plant on an adjacent ranch, sweetened, and then pipelined back onto the ranch. He also opined that VirTex could bury electric power lines or use diesel generators. Bauerle's evidence of preclusion of his existing use was testimony from his hunting lessee to the effect that he would no longer lease the property for hunting if the power lines were installed.

The jury found that the accommodation doctrine was violated. The jury also found that Bauerle had incurred reasonable and necessary attorneys fees and determined the amount. The San Antonio Court of Appeals affirmed the verdict.

But Supreme Court precedent establishes that off-lease alternatives should not be considered by the jury. It is well-established that off-lease alternatives are not to be considered in the accommodation doctrine analysis. If accommodation is not possible within the confines of the leased premises, the surface use must yield. For example, in *Sun Oil Co. v. Whitaker*, a dispute over a limited water supply between a surface owner engaged in irrigated farming and an oil company planning to engage in water flooding of the subterranean oil reservoir was resolved in favor of the mineral owner. The surface owner could not force the oil company to acquire water it needed for oil recovery operations from sources off the premises—even though the surface owner needed the same water for irrigation—because to do so "would be in derogation of the dominant estate." *Whitaker*, 483 S.W.2d at 812.

And the rule cuts both ways. *Getty* established that the surface owner's alternatives must be available on the same land. *Getty v. Jones*, 470 S.W.2d 618, 622 (Tex. 1971, op. on rehearing) (inquiry was reasonable means of irrigating "this land."). And in *Merriman*, the Supreme Court actually reversed the lower court's holding that the surface owner's alternatives could include other leased tracts besides the property where the cattle operation was conducted. 407 S.W.3d at 250 ("the court of appeals improperly considered the land leased by Merriman in determining whether he

produced evidence that he had no reasonable alternatives to continue his cattle operation.).

In *VirTex,* the San Antonio court made ample mention of the off-lease amine plant as the "next best alternative" to above-ground power lines. The opinion mentions it so often that readers are led to believe that Texas law allows consideration of off-lease options. Here are some of the statements the lower court made:

- "the Bauerles' expert, Mike Kramer, presumed VirTex could obtain an easement **over neighboring property** for a natural gas line and access to an amine plant."
- "Kramer took into account the fact that the natural gas would have to be piped from the existing wells on the Bauerles' ranch **to a neighboring ranch** that had an amine plant, where the gas could be sweetened. After the gas was sweetened, it would be **piped back to the Bauerles' ranch** to power the wells."
- "Kramer based his opinion on his forty years of experience working in the oil and gas industry and various bids he obtained, taking into account the process of sweetening the gas **at the neighboring amine plant**."
- "Phipps pointed out that **VirTex would need to obtain an easement from the neighboring property** in order to access the closest amine plant, where the natural gas could be sweetened. Phipps also testified **it was unclear whether an easement could be obtained**."

Yet, the Texas Supreme Court denied review, so the opinion stands. But beware, with respect to the accommodation doctrine, *VirTex* is bad precedent and should probably just be ignored entirely until the San Antonio Court has an opportunity to write on the issue again.

Non-participating royalty interests, and fiduciary duty owed by executive rights owner

Texas Outfitters, Ltd. v. Nicholson, 572 S.W.3d 647 (Tex. 2019) presents a good analysis of the issues that can arise when the owner of executive rights (which include control over leasing and the terms) has an incentive to prevent or impede mineral development to the detriment of owners of non-participating royalty interests (who, subject to certain duties described in this case, have no control over lease terms).

Texas Outfitters owned the surface, 4.16% of the minerals, and 45.84% of the executive rights in a 1,082 acre ranch in Frio County. The Carters owned a non-participating royalty interest and the right to receive a portion of any bonus money paid for a lease.

An oil company leased the other half of the minerals from the other (third-party) owner, and then offered to lease the half controlled by Texas Outfitters. But Texas Outfitters refused. The motive for doing so was to prevent use of the surface for mineral development, presumably on the assumption that no oil company would risk fronting all the costs to drill and being forced to rely on recoupment in the co-tenancy accounting context while only having a net revenue interest below 50%.

The Carters sued. Testimony during the bench trial indicated that Texas Outfitters was motivated to prevent mineral development so that its hunting operations would not be impeded or harmed. The judge awarded damages to the Carters for the amount of bonus they would have received. The court found that Texas Outfitters chose to gamble with its interest, and thus gambled with the Carters' as well, by purportedly holding out for better offers. The court of appeals affirmed.

The Supreme Court also affirmed. The Court noted the distinction between situations where the executive grants a lease on terms that favor it over the non-executive, and the situation in which the executive refuses to lease at all. The Court found it important that refusing to lease to the same company diminished marketability of the minerals to other potential lessees, the practical consequence of which was to retain unfettered use of the surface. The Court emphasized that executive duty inquiries are fact-dependent.

Condemnation, Property Owner Value Testimony

In the much-anticipated case of *Hlavinka v. HSC Pipeline P'ship*, LLC, __ S.W.3d __, (Tex. 2022), the Texas Supreme Court recently addressed several issues of importance to the Texas energy sector and midstream pipeline condemnation authority. The most interesting part of the opinion is related to the admissibility of property owner testimony on value of the land that is based on the "corridor theory" that has been percolating through condemnation trial work for many years.

The Hlavinkas own 15,000+acres in Brazoria County. HSC owns pipeline systems in Texas. HSC's manager, Enterprise Products, applied to the Railroad Commission for a permit to operate a new 44-mile long pipeline for the transportation of products including polymer grade propylene. The parties were unable to agree on terms for an easement across four tracts of land.

HSC filed a condemnation suit. The Hlavinkas challenged HSC's eminent domain power asserting that the pipeline was not for public use and that propylene is not crude oil. As a result, they alleged, HSC is not a common carrier and thus does not have authority to condemn private property. HSC filed a motion for partial summary judgment to establish its right to condemn as a matter of law.

The trial court excluded testimony of Terrance Hlavinka related to damages and valuation of the easement. Ultimately, the trial court granted the MSJ,

awarded HSC a permanent 30-foot pipeline easement and a temporary workspace easement, excluded the landowner testimony, and awarded them $132,293.36 as compensation for the taking.

The case proceeded through the 1st Court of Appeals in Houston and on to the Texas Supreme Court. The Texas Supreme Court essentially addressed two questions: (1) Does HSC have condemnation authority?; and (2) Should Mr. Hlavinka's valuation testimony have been allowed?

The Court first addressed whether HSC had eminent domain authority. The Texas legislature created two sources of condemnation power for pipelines: Business Organizations Code Section 2.105 & Natural Resources Code Chapter 111.

Business Organizations Code Section 2.105 provides: In addition to the powers provided by the other sections of this subchapter, a corporation, general partnership, limited partnership, limited liability company, or other combination of those entities engaged as a common carrier in the pipeline business for the purpose of transporting oil, oil products, gas, carbon dioxide, salt brine, fuller's earth, sand, clay, liquefied minerals, or other mineral solutions has all the rights and powers conferred on a common carrier by Sections 111.019-111.022, Natural Resources Code.

Hlavinka argued that to qualify for the power, HSC must first qualify as a common carrier under Natural Resources Code Section 111.002 in order to qualify under the Business Organizations Code Section 2.105. In other words, Hlavinka argued these two statutes were not independent grants of authority, but instead that Section 2.105 was subordinate to the Section 111.002.

The Supreme Court disagreed. Instead, it held Section 2.105 explicitly expands condemnation authority to pipeline entities engaged as common carriers for the transport of products beyond those included in the Natural Resources Code. The Court noted that Section 2.105 did not refer to Section 111.002 at all. Instead, it "explicitly expands condemnation authority to pipeline entities engaged as common carriers for the transport of products beyond those included in Section 111.002." Although both the Section 2.105 provision and the Section 111.002 provisions refer to Section 111.019, the Court found that both "provide alternative paths to obtaining that power."

The next question was whether polymer-grade propylene is an "oil product" under Section 2.105. Section 2.105 does not define the meaning of "oil product." The Natural Resources Code defines "oil" as "crude petroleum oil" and "petroleum product" to include "any other liquid petroleum product or byproduct derived from crude petroleum oil." The Railroad Commission defines "product" to include "refined crude oil, . . . processed crude petroleum, residue from crude petroleum, . . . blends or mixtures of petroleum, and/or any and all liquid products or by-products derived from crude petroleum oil or gas, whether hereinabove enumerated or not."

HSC claimed that polymer-grade propylene is an "oil product" since it can be derived as a byproduct of crude oil. Conversely, Hlavinka claimed it is not an "oil product" because it is not a naturally occurring byproduct of refined petroleum.

The Supreme Court held that polymer-grade propylene is an "oil product." It is a derivative of crude petroleum made by further distilling and deriving product from propane and natural gas, both of which are components of crude petroleum. Enterprise collects the refinery-grade propylene from more than 40 area crude oil refineries before Enterprise further refines it into polymer-grade propylene.

Lastly, the Court determined that the pipeline serves a public use. Both the US and Texas Constitution requires that a pipeline be for a public use in order to exercise eminent domain authority. Section 2.105 incorporates this by requiring a pipeline transporter must be engaged as a common carrier to qualify to exercise eminent domain authority.

The test to determine common carrier status was set forth by the Texas Supreme Court as follows: "A pipeline serves a public use as a matter of law if it is reasonably probable that, in the future, the pipeline will 'serve even one customer unaffiliated with the pipeline owner.'" It cannot be solely for the builder's exclusive use.

The Court found the contract with Braskem to be sufficient proof of common carrier status because "it is an existing transportation contract with an unaffiliated customer, and the pipeline connects to existing pipeline networks, making the transportation network feasible." Further, the Court stated "the pipeline has additional capacity and terminates near other potential customers" and "HSC has publicly filed a tariff with the Railroad Commission demonstrating that it offers and markets the pipeline for public hire."

Hlavinka further argued there should be an additional requirement that the manufacturer of the transported product must have no affiliation with the pipeline owner. Hlavinka argued that even though Braskem takes title to the product before it enters HSC's pipeline, they could have just as easily taken title at the other end of the line. The Supreme Court disagreed, refusing to add this additional requirement to the test for common carrier status.

Having determined that HSC enjoyed eminent domain authority, the question then was whether Mr. Hlavinka should have been permitted to testify about other arms' length sales for pipeline easements across the property.

Generally speaking, a property owner may testify about the market value of the property taken so long as their testimony is based on facts that demonstrate the market value, rather than on speculative or intrinsic

facts. Arms' length transactions are appropriate evidence of market value, "provided the sales are voluntary, contemporary, local, and "involve land with similar characteristics."

HSC argued that the Hlavinka's current use of the property–agriculture–should be considered the land's highest and best use. The Hlavinkas argued that given the location of the land, their intent in purchasing, and the number of pipelines already in place, the highest and best use was for pipeline easements and the land should be valued as such.

The Court noted that although there was a presumption that the existing use is a property's highest and best use, that may be rebutted by a landowner. The Court held that the testimony from Mr. Hlavinka about the prior arms' length pipeline sales offered at least some evidence that the condemned land could have been sold to another pipeline at a significantly higher price than its agricultural value.

Next, HSC argued that Mr. Hlavinka's testimony violated the project-enhancement rule by considering enhancement to the land from the pipeline itself, which is not proper. The Court, however, noted that it was not that the HSC pipeline that would make the easement valuable; it is valuable because of purchasers other than HSC who value its geographic qualities. This was not created by HSC's interest or pipeline but is based on the value of the easement itself, which is something the landowners could sell to another party. The number of pipelines on the property and prices paid to secure those easements is evidence of the value of the land, regardless of HSC's condemnation.

Finally, the Court noted that due to the prior private pipeline sales on the property, this case was unique. This makes it distinguishable from other cases where landowners sought to testify about the "going rate" for pipeline easements in the area, but where there was no indication that such sales had occurred. Ordinarily, there is no credible evidence that the land could be sold as a pipeline easement to another were it not condemned for the same purpose. Again, the prior sales to other pipeline companies and the number of lines on the property provide some evidence that the Hlavinkas could have sold to another company but were instead forced to sell to HSC.

The Court avoided making widely applicable precedent, though, and emphasized that this case does not stand for the proposition that "any land a pipeline traverses instantly or always becomes a pipeline corridor with a corresponding rise in market value." Instead, "a landowner must show a 'reasonable probability' that the land would 'likely be needed in the near future for another use by another interested market participant.'" A single pipeline or an ancient pipeline may not be sufficient to show an increase in market value as they may not indicate a current market absent the taking exists. However, in a case like this with "frequent, recent, comparable sales" such evidence should be admitted to allow the fact finder to decide whether there is a reasonable probability that the easement condemned would likely have been sold to another pipeline in the near future.

The Supreme Court summarized the takeaway: "A condemnation should not be a windfall for a landowner. Nor should it be a windfall for a private condemnor. A condmenor must pay fair price for the value of the land taken. Evidence of fair market sales to secure easements running across the property that precede the taking are admissible to establish the property's highest and best use, and its market value, at the time of the taking."

Based on this, the Court held that the trial court committed harmful error when it excluded Mr. Hlavinka's testimony. Thus, a new trial as to market value was ordered. The Court noted that HSC is free to challenge any assumption made by Mr. Hlavinka, and the jury is free to adjust the market valuation of the property based on all admissible evidence.

Consent To Assign An Oil And Gas Lease; Restraint On Alienation.

Mayo Found. For Med. Educ. & Research v. BP Am. Prod. Co., 2020 U.S. Dist. LEXIS 48841 (N.D. Tex., Mar. 20, 2020), examines Texas public policy against restraints on alienation.

In this federal court case, the lease from Barbara Lips to Alpar Resources included Section 157 and other lands. Paragraph 7 reserved to Lips an absolute veto right over any assignment of Alpar's interest in the Lease. An amendment to the lease replaced the original Paragraph 7 with this less-restrictive clause:

> "The rights and obligations of the Lessee hereunder are not assignable or transferable in any respect by it, except upon the written approval of [Mayo], which approval shall not be unreasonably withheld."

Lips donated her interest in the land to the Mayo Foundation. Alpar farmed out acreage, including Section 157, to Amoco. Amoco and Courson Oil & Gas entered into an operating agreement to drill wells on Section 157. The operating agreement granted Courson a preferential right to purchase Section 157 should Amoco sell its interest.

BP America succeeded to the leasehold interest and finalized an agreement to sell Section 157 and other lands and offered Courson its preferential right to purchase Section 157. Courson accepted. Mayo withheld approval because of its past unpleasant history with Courson. Nevertheless, BP notified Mayo that Courson had elected to acquire BP's rights in Section 157.

Mayo sued and requested a preliminary injunction. In deciding whether to grant the injunction, the court

was presented with two questions of first impression. First, given Texas' strong presumption against restraints on alienation of property and the presumption that an oil and gas lessee may freely assign its interests, should Paragraph 7 be recognized as a valid right to withhold consent? Second, if Mayo may withhold consent, was such a refusal to consent "reasonable" here? The court ultimately found that the consent-to-assign paragraph was valid, and that Mayo's refusal to consent was unreasonable.

The court found the amended consent-to-assign to be a promissory restraint on alienation of property. Promissory restraints are valid if they permit alienation to at least some possible alienees. By prohibiting "unreasonable" refusals to consent, the provision did not veto assignment to all possible assignees.

The court looked to sources beyond Texas law to arrive at six factors to determine whether it is "reasonable" for a lessor to refuse to consent to the assignment of an oil and gas lease. The court concluded that Mayo's refusal to consent to the assignment to Courson was not reasonable under those factors. The court also found that Mayo failed to establish that it would suffer the required irreparable harm absent the drastic relief of a preliminary injunction.

Because Mayo failed to establish two of the factors that were necessary for an injunction, its motion was denied without prejudice.

The takeaway from this federal district court opinion is that injunctions are decided on limited evidence without full development of the underlying facts, and the irreparable harm hurdle is quite high. This result doesn't mean that Mayo could not prove at trial that its veto was not reasonable. The past contentious business relationships, including litigation, could be a valid reason for refusing to consent to an assignment.

Property Owner Rule

In *Jatex Oil & Gas, L.P. v. Nadel & Gussman Permian, L.L.C.*, 629 S.W.3d 397 (Tex. App.—Eastland 2020, no pet.), the Eastland Court examined the question of whether a property owner could testify about the value of mineral working interests under the property owner rule. The court also examined tortious interference and the reasonably prudent operator standard.

Jatex owned a working interest and NGP was the operator of the Clyde Prospect in Glasscock County. Jatex executed a promissory note to Security Bank secured by its working interest in the prospect. Jatex defaulted on the note. Security Bank foreclosed and purchased the working interest for $1,500,000.

NGP proposed to deepen the Vaqueros 47 No. 1 Well. Jatex alleged that NGP improperly included it in the project because Jatex did not make a written election to participate. Jatex contended that because of the resulting erroneous charges, Security Bank foreclosed on the working interest. Jatex sued for breach of the JOA, failure to act as a reasonably prudent operator, and tortious interference with the promissory note.

In response to NGP's motion for summary judgment, Jatex submitted a declaration by its owner Truitt estimating the fair market value of the foreclosed working interest. The court held that his opinions were not admissible. A property owner is generally qualified to testify to the value of his property even if he isn't an expert. But the rule doesn't apply to matters that are of a "technical or specialized nature." An owner of a working interest isn't qualified under the Rule to give lay opinion evidence on the value of mineral reserves because of the technical, specialized nature of that valuation.

Regarding deepening costs and withheld revenues, the court held that NGP did not wrongfully debit drilling expenses from Jatex's account. NGP asserted that Jatex lacked standing to seek recovery of its share of the deepening costs because Jatex assigned its interest to Security Bank. The court disagreed. Jatex's assignment did not terminate or release its rights under the JOA. However, Jatex had no claim for withheld revenues because Jatex had assigned them to Security Bank and NGP paid them to the bank.

Regarding foreclosure damages, relying on Truitt's opinion Jatex valued the foreclosed working interest to be worth closer to $12 million than the $1.5 million paid by Security Bank and based its damages on that calculation. Because Truitt's valuation was inadmissible that proof failed.

Jatex then cited a letter from Jatex to Security Bank and a "loan history" statement that were part of NGP's motion for summary judgment. Because Jatex didn't direct the trial court to the loan history in its response to the motion it could not point to that evidence for the first time on appeal. But neither the loan history nor the letter supplied a critical element of the income approach for determining fair market value.

Further, NGP could not have reasonably foreseen that debiting Jatex's account would have likely caused Security Bank to foreclose on the lien. The foreseeability of consequential damages for breach of contract is assessed at the time the contract is formed, not at the time the contract is breached.

Regarding the tortious interference claim, Jatex's assertion that NGP tortiously interfered with an oral forbearance agreement with Security Bank failed because it provided no details about the specific terms of the agreement or how Security Bank may have breached the agreement by foreclosing.

In sum, the Texas Property Owner Rule does not allow a non-expert to testify on matters requiring expert testimony. Further, the operator may pay proceeds from a well to the lender to whom the working interest owner made a collateral assignment of net revenues from the well, instead of to that working interest owner. Finally,

a claim for failure to act as a reasonably prudent operator for failing to comply with an operating agreement is a contract claim, not a tort claim.

Overriding Royalty, Wash-Out Provisions, Rule Against Perpetuities

Yowell v. Granite Operating Co., 620 S.W.3d 335 (Tex. 2020), concerned an overriding royalty interest that purportedly was protected by an anti-washout clause. The Texas Supreme Court held that an anti-washout provision could not extend an existing overriding royalty interest to new leases when it was not clear that the interest would vest within a certain period of time.

In a 1986 assignment of an oil and gas lease, the assignor reserved to itself an ORRI (that the Yowells eventually came to own) which contained an anti-washout clause. That clause provided that if the leases terminated then the ORRI would apply to any "extension, renewal or new lease or leases."

Through a dispute over whether a top-lease was valid and eventual negotiation of a settlement, the underlying lease was terminated and the top-lease took effect. In 2013, the Yowells filed suit to recover their ORRI, which they claimed automatically attached to the new leases. The Defendants contended that the language purporting to attach the ORRI to new leases violated the rule against perpetuities.

The Amarillo Court of Appeals held that the provision violated the Rule and was not subject to reformation under section 5.043 of the Texas Property Code. The court also stated that even if it were subject to reformation it would decline to reform the ORRI under section 5.043 due to the Yowells' nearly six-year delay in filing suit.

The Supreme Court held that the ORRI is a real property interest that violates the Rule. The Court reasoned that under the rule "no interest is valid unless it must vest, if at all, within twenty-one years after the death of some life or lives in being at the time of the conveyance." The Court first concluded that the overriding royalty interest did not vest at the time of creation because it provided no "immediate, fixed right of present or future enjoyment as to new leases because those leases were not yet in existence." The Court then noted that it was possible for the interest to vest outside the timeframe allowed by the rule against perpetuities. Thus, the provision was invalid as written.

Nonetheless, the Court also held that the anti-washout provision should be "reformed" under section 5.043 of the Texas Property Code to "reflect the creator's intent." This statute provides that "[w]ithin the limits of the rule against perpetuities, a court shall reform or construe an interest in real property that violates the rule to effect the ascertainable general intent of the creator of the interest." The Court concluded that the reformation statute applied and remanded the case for further proceedings related to reformation of the specific clause at issue.

Oil-and-Gas Lease Interpretation: Force Majeure, Retained Acreage

In *MRC Permian Co. v. Point Energy Partners Permian LLC*, 624 S.W.3d 643 (Tex. App.—El Paso 2021, pet. granted, — Tex. Sup. Ct. J. — (May 27, 2022), the Supreme Court will be examining an interesting opinion from the El Paso Court of Appeals that resulted from a permissive interlocutory appeal.[2]

The case presents two questions about contract interpretation of oil and gas leases plus another question about tortious interference with contract. First, what is the best reading of the force majeure clause at issue? Second, how does this contract—and possibly other oil-and-gas contracts—measure how far a "wellbore extends horizontally in the producing formation"? Third, do the facts here present a fact issue about tortious interference in contract?

MRC Permian signed four essentially identical leases with mineral owners to develop oil and gas wells in Loving County. After a three-year primary term, to perpetuate the leases MRC had to drill a new well every 180 days. It was undisputed that MRC missed that 180-day deadline. Point Energy then signed a new lease with the mineral owners.

But MRC claimed it properly gave notice under the force majeure clause, which would have extended the deadline. Whether that deadline was extended turns on whether MRC properly had a right to invoke the force majeure clause. The force majeure event MRC alleges occurred was off-lease wellbore instability, which set off a chain reaction that delayed drilling the next well. In response, Point Energy argues that a scheduling incident was the real cause of the missed deadline and thus there was no force majeure and the lease terminated. The trial court decided that the lease had terminated as matter of law. The court of appeals held that fact issues precluded summary judgment and reversed.

If the lease did terminate, then that necessitates answering another question under the lease. The lease provides that upon termination the lessee retains acreage around each developed well, and MRC will retain the lease for that acreage so long as it produces in paying quantities. For each well, the acreage is determined by three facts: (1) is it an oil or gas well; (2) is it vertical or horizontal; and (3) did its wellbore extend horizontally more than 5,000 feet or not. All wells in dispute are horizontal oil wells, so the only question is does each

[2] Portions of the summary for this case were borrowed, liberally but with the utmost respect, from Osler McCarthy's summary when the Texas Supreme Court granted the Petition for Review.

wellbore extend horizontally in the producing formation for at least 5,000 feet. With respect to one well, MRC concedes it does not. MRC contends the lease requires measuring from where the wellbore enters the formation until it exits, while Point Energy argues it depends on angles and perforation of the wellbore. The trial court denied Point's motion for summary judgment seeking a declaration of the exact amount of acreage that was retained. Because the appellate court held that fact issues existed as to whether the lease actually terminated, it declined to decide the issue of how much acreage was retained due to a lack of ripeness.

Finally, MRC claimed that Point Energy and some of its agents concealed their connections to one another and induced the mineral owners to breach their lease with MRC. Point Energy responded that it had a good-faith belief the contract was terminated, there was no evidence that it knew it was not, and their leases are top leases that cannot interfere with MRC's rights. The trial court granted summary judgment for Point and dismissed MRC's claims. The El Paso court reversed, holding that fact issues precluded summary judgment.

The Supreme Court granted review. Oral argument has not yet been set. For a number of reasons, this case will be interesting to watch and could yield several important holdings that impact the oil and gas industry.