

A Day in the Life of a JOA – Selected Daily Operational Issues¹

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A. Basic JOA functions

Joint operating agreements (“JOA”) have been described by the Supreme Court of Texas as “contract[s] typical to the oil and gas industry whose function is to designate an ‘operator, describe the scope of the operator’s authority, provide for the allocation of costs and production among the parties to the agreement, and provide for recourse among the parties if one or more default in their obligations.’”² The JOA provides a mechanism to join together several mineral lessors, landowners, working interest owners, other investors and/or operators to agree on how joint exploration and production operations will be conducted. JOAs “govern operations involving great financial risk.”³ At its most basic level, the JOA fulfills three basic functions among interested parties: (1) exploration; (2) drilling; and (3) production.

The standard JOA typically contemplates two parties, or two groups of parties: (1) the operator; and the (2) non-operators. While a JOA can be a complex agreement that governs the exploitation of hydrocarbons among operators and non-operators,⁴ at the end of the day it is just another contract, and Texas courts have noted that “[i]n interpreting a joint operating agreement, we apply principles of contract law.”⁵ Texas

² *Tawes v. Barnes*, 340 S.W.3d 419, 426 (Tex. 2011) (quoting *Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207 S.W.3d 342, 344 n. 1 (Tex. 2006)).

³ *Tawes v. Barnes*, 340 S.W.3d at 426.

⁴ Professor Kuntz has noted “[t]he JOA is a carefully structured instrument designed to govern a great variety of operations over a long period of time.” 2 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS 107 (1989).

⁵ *ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 312 (Tex. App.—Houston [1st Dist.]

courts have routinely recognized that competent parties can contract for whatever they want, with some limited exceptions.⁶

B. History of the JOA

The most widely recognized JOA is the FORM 610 JOA published by the American Association of Professional Landmen (“AAPL”). That form has been modified in relatively substantial ways four times in its 50+ year history.

The first AAPL JOA was published in 1956. In 1967, the original JOA form was revised, and the AAPL JOA underwent substantive revisions again in 1977, 1982, and 1989. Many oil and gas companies, investors, operators, and non-operators use the entire form AAPL JOA, others make changes from the Form 610 and in some instances, oil companies utilize their own form JOA. Other form JOAs have been published, but are not used nearly as much as the AAPL Form 610 JOAs in the non-Rocky Mountain region.⁷

C. Important JOA provisions

All JOAs will define, in some way, the operational area. In the AAPL Form 610

2005, pet. denied).

⁶ *St. Louis S.W. Ry. Co. of Tex. v. Griffin*, 171 S.W. 703 (Tex. 1914) (“The citizen has the liberty of contract as a natural right which is beyond the power of the government to take from him.”).

⁷ See, e.g. J.O. Young, *Oil and Gas Operating Agreements: Producers 88 Operating Agreements, Selected Problems and Suggested Solutions*, 20 ROCKY MTN. MIN. L. INST. 197, 202 (1975). There are model JOAs for coalbed methane fields, offshore operations and international operations that may differ substantially from the AAPL Model Form 610s.

JOAs, the operational area is defined as the “Contract Area.” The AAPL Form 610-1989 JOA provides:

The following exhibits, as indicated below and attached hereto, are incorporated in and made a part hereof:

___ A. Exhibit “A,” shall include the following information:

- (1) Description of lands subject to this agreement,
- (2) Restrictions, if any, as to depths, formations, or substances,
- (3) Parties to the agreement with addresses and telephone numbers for notice purposes,
- (4) Percentages or fractional interests of parties to this agreement,
- (5) Oil and Gas Leases and/or Oil and Gas Interests subject to this agreement.⁸

Despite the inclination to define the “Contract Area” in terms of a set number of acres or in some other simple surface definition, the “Contract Area” is actually a multi-dimensional description that may cover only certain formations or up to or below certain depths.⁹ To avoid statute of frauds¹⁰ issues and to avoid future controversies on what the “Contract Area” really is, the parties should ensure the “Contract Area” is completely and accurately described where appropriate.¹¹

⁸ AAPL Form 610-1989 JOA at Art. II.A.

⁹ See, e.g. *Morgan v. Mobil Oil Corp.*, 726 F.2d 1474 (10th Cir. 1984).

¹⁰ The statute of frauds requires that the document “describe[] the property and contain[] sufficient data such that a party familiar with the locality can identify the property with reasonable certainty.” See TEX. BUS & COM. CODE § 26.01.

¹¹ See *Carpenter v. Phelps*, --- S.W.3d ----, 2011 WL 1233312, *4 (Tex. App.—Houston [1st Dist.] 2011, no pet. h.) (“we sustain issue two and hold that the

D. JOA issues

“Most oil and gas disputes are over the ‘meaning’ of a contract or conveyance.”¹² Professor Martin observes: “The source of [JOA] litigation now is not so much the specific language of the forms but the standard applied by the court to the conduct of the parties (especially the operator) under the agreement, or perhaps despite the agreement.”¹³

1. Other operations clause

Under the “other operations” clause in an AAPL 610-1989 JOA, the

Operator shall not undertake any single project reasonably estimated to require an expenditure in excess of _____ Dollars (\$_____) except in connection with drilling, sidetracking, reworking, deepening, completing, recompleting, or plugging back of a well that

statute of frauds applies and that any agreement between the parties concerning the M.T. Cole ‘A’ lease is not enforceable”); *Kuklies v. Reinert*, 256 S.W.2d 435, 444 (Tex. Civ. App.—Waco 1953, writ ref’d n.r.e.) (“It is our view, under the undisputed record and the foregoing authorities, that the description of the 230 acres out of the Julius Reinert tract is sufficient to bring it within the rules of construction laid down by our courts as hereinabove cited, and it necessarily follows from what we have said that the consolidated area is sufficiently described in the Gas Division Order and Operating Agreement.”).

¹² David E. Pierce, 1 TEXAS J. OF OIL, GAS, AND ENERGY LAW 1, 2 (2006).

¹³ OIL AND GAS LAW FOR A NEW CENTURY: PRECEDENT AS PROLOGUE 98, 99 (Patrick H. Martin ed., Matthew Bender 1997) (Chapter Four, The Joint Operating Agreement – An Unsettled Relationship?, by Patrick H. Martin).

has been previously authorized by or pursuant to this agreement, provided however, that in case of explosion, flood or other sudden emergency, whether of the same or different nature, Operator may take such steps and incur such expenses as in its opinion are required to deal with the emergency to safeguard life and property but Operator, as promptly as possible, shall report the emergency to the other parties. If Operator prepares an AFE for its own use, Operator shall furnish any Non-Operator so requesting an information copy thereof for any single project costing in excess of _____ Dollars (\$_____).¹⁴

Given the tremendous expense typically associated with oilfield projects, and the quick response often necessary to react to changing circumstances, the “other operations” clause is frequently the subject of litigation. The bottom line advice for an operator proceeding under the “other operations” clause is to seek working

¹⁴ AAPL Form 610-1989 JOA at Art. VI.D. Note that the AAPL Form 610-1989 JOA only requires a pre-negotiated percentage of non-operators to consent to “other operations.” See AAPL Form 610-1989 JOA at Art. VI.D (“If within thirty (30) days thereof Operator secures the written consent of any party or parties owning at least _____% of the interests of the parties entitled to participate in such operation, each party having the right to participate in such project shall be bound by the terms of such proposal and shall be obligated to pay its proportionate share of the costs of the proposed project as if it had consented to such project pursuant to the terms of the proposal.”). The widely used AAPL Form 610-1982 JOA does not contain this provision.

interest owner approval/consent before conducting anything that could be construed as an “other operation.” As the cases described below demonstrate, the operator could be liable for damages *and* attorneys’ fees if the operator performs “other operations” without first issuing an AFE.¹⁵

The “other operations” clause broadly includes any well work and operations that are not either previously authorized by the parties or necessary to correct “sudden emergenc[ies].”¹⁶ The broad language of the “other operations” clause even would seemingly require an AFE for operations that are considered routine maintenance or trade association-recommended work (API,¹⁷ etc.), unless those operations were specifically approved in advance.

Given increased scrutiny on the industry associated with potential spills and other environmental impacts, important unanswered questions linger regarding an operator’s ability to react quickly to potential environmentally hazardous situations. For example, the operator may be faced with a non-“emergency” situation that nevertheless may need to be rectified promptly to avoid environmental contamination without enough time to formally issue an AFE and await responses.

¹⁵ It is worth noting that the AAPL Form 610-1989 JOA adds a provision that binds all parties to “other operations” if a previously negotiated percentage of the working interest owners consents to the operation.

¹⁶ See *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 756-57 (Tex. App.—El Paso 2000, no pet.) (“routine repairs” shall not be AFE’ed if below a \$30,000 single project expenditure limit in the “other operations” clause in Article VII.D.3 of an APPL Form 610-1977 JOA).

¹⁷ The American Petroleum Institute promulgates and publishes oil and gas standards, among many other things. See www.api.org.

a. *Paint Rock Operating, LLC v. Chisholm Exploration, Inc.*, 339 S.W.3d 771 (Tex. App.—Eastland 2011, no pet.) – operator breaches the JOA if it doesn’t provide an AFE before issuing a JIB

b. *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147 (Tex. App.—Eastland 2001, pet. denied) – non-operator’s refusal to consent to an “other operation” does not preclude the operation, but prohibits the operator from charging the non-operators for those expenses

In one recent case, the Eastland Court of Appeals faced a dispute over the operator’s untimely Joint Interest Billings (“JIBs”) and the non-operator’s alleged failure to timely challenge the charges.¹⁸ In that case, the operator sent JIBs to the non-operator that included, among other things, several repair operations that cost in excess of the \$10,000 “other operations” clause limit in the JOA and for which no AFE had been previously provided. The non-operator refused to pay those charges, because no AFE had been provided, and returned marked-up JIBs and a check for the balance of the charges. The operator sued the non-operator to recover the disputed charges.

In *Cone*, the operator, working under an AAPL Form 610-1982 JOA, proposed a water flood program and unitization for the purpose of secondary recovery of hydrocarbons.²⁰ All working interest owners except for Cone agreed to the water flood program and the unitization. The operator proceeded with the program and unitization despite Cone’s disapproval, which resulted in “significantly” increased production from the unit.²¹

The court cursorily determined – without an explanation – that the operator violates or breaches the JOA if the operator merely sends a JIB to a non-operator that includes expenses in excess of the previously negotiated “other operations” amount without first providing an AFE.¹⁹ Not only did the non-operator not pay for the charges identified in the JIB, the non-operator succeeded in showing the operator actually breached the JOA by failing to issue an AFE under the “other operations” clause. Under the *Paint Rock* opinion, an operator should take great care to ensure AFEs are issued when appropriate, and to ensure charges in excess of the “other operations” amount are only incurred in true emergency situations.

The operator charged Cone in connection with the water flood program which Cone refused to pay. The operator sued Cone and Cone counterclaimed. Cone argued that under the “other operations” clause, the operator could not proceed with any project that cost in excess of the pre-negotiated amount (\$15,000 in this case) without the consent of *all* working interest owners, and that proceeding with any such project constituted a breach of the JOA.²²

The court first noted that the relationship of the parties was that of cotenants to various leaseholds which compromised the Contract Area.²³ In a cotenant relationship, one cotenant can extract minerals from the

¹⁸ *Paint Rock Operating, LLC v. Chisholm Exploration, Inc.*, 339 S.W.3d 771 (Tex. App.—Eastland 2011, no pet.).

¹⁹ *Paint Rock*, 339 S.W.3d at 776.

²⁰ *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147 (Tex. App.—Eastland 2001, pet. denied).

²¹ *Cone*, 68 S.W.3d at 151.

²² *Id.* at 157.

²³ *Id.*

common property without first obtaining the consent of his cotenants.²⁴ The court first noted that the JOA “other operations” clause does protect working interest owners from being charged for a large expenditure that exceeds a predetermined amount (akin to veto power). The court noted, however that “this limitation is only for accounting purposes. This provision does not alter the common-law rule of unilateral extraction and development of minerals by cotenants. *The provision does not restrict production activities which may be undertaken by the operator on the contract area. . . . This provision does not allow the non-operator to prohibit operations by withholding his consent.*”²⁵

i. *Cone’s criticism of Texstar North America v. Ladd Petroleum*

The *Cone* court also pointed out that the Corpus Christi Court of Appeals reached a similar result in *Texstar North America v. Ladd Petroleum Corp.* after analyzing an identical contractual provision in an analogous JOA dispute.²⁶ The *Cone* court, however, did criticize the *Ladd Petroleum* opinion. In *Ladd Petroleum*, the JOA provided that “[w]ithout the consent of all parties, no well shall be reworked or plugged back.”²⁷ The operator proposed

reworking an already producing well to increase its production. The operator interpreted the “rework” provision to mean that it could not rework the well without the consent of all non-operators. One non-operator withheld his consent and the operator sued to compel the non-operator to consent.

The court in *Ladd Petroleum* concluded that the operator could *not* compel the non-operator to consent to the proposed rework without the unanimous consent of all non-operators. The *Cone* court criticized *Ladd Petroleum* because of *Ladd Petroleum’s* overbroad or misguided interpretation of the “rework” provision.²⁸ The *Cone* court noted that the “rework” provision at issue was contained in the article of the JOA entitled “Expenditures and Liability of Parties,” and the *Cone* court did not “believe that the provision would have prevented the operator in *Ladd Petroleum* from reworking the well without every working interest owner’s consent if the operator chose to do so at the expense of itself and of the consenting working interest owners.”²⁹ The *Cone* court believed that the JOA provision could only prevent the operator from *charging* the non-operator for the reworking operation but could not prevent the operator from *performing* the reworking operation.³⁰

²⁴ *Id.*

²⁵ *Id.* at 157-58 (emphasis added). At least one court has noted that the holding in *Cone* cannot be construed as a universal rule that all cotenants have a right to develop their minerals. *See Veterans Land Bd. v. Lesley*, 281 S.W.3d 602, 620-21 and n. 11 (Tex. App.—Eastland 2009, pet. granted) (the Supreme Court of Texas has heard oral argument in this case, but as of the date of this paper, has not yet issued an opinion).

²⁶ *See Cone*, 68 S.W.3d at 158 (citing *Texstar N. Am., Inc. v. Ladd Petroleum Corp.*, 809 S.W.2d 672, 675 (Tex. App.—Corpus Christi 1991, writ den’d)).

²⁷ *Texstar N. Am., Inc. v. Ladd Petroleum Corp.*, 809

S.W.2d 672, 675 (Tex. App.—Corpus Christi 1991, writ den’d).

²⁸ *Cone v. Fagadau Energy Corp.*, 68 S.W.3d 147, 158 (Tex. App.—Eastland 2001, pet. denied).

²⁹ *Id.*

³⁰ *Id.*

- c. *LPCX Corp. v. Red Eagle Oil Co.*, 818 P.2d 431 (Okla. 1991) – operator liable for cost of work *and* attorneys’ fees when it performed “other operations” without an AFE but billed the expense to the non-operators

In *LPCX*, the parties entered into an operating agreement that required the operator to provide prior notification of reworking operations to the non-operators. The operator stipulated it had not provided prior notice of reworking operations as required in the agreement, although the operator did introduce into evidence drilling reports showing work in progress to show that some notification was provided. The non-operator introduced evidence showing the reworking operations would cost in excess of \$10,000 (the pre-negotiated amount over which notice was required). The trial court found in favor of the non-operator, requiring the operator to pay for the reworking operations *and* the non-operator’s attorneys’ fees.³¹ The Oklahoma Supreme Court affirmed the award.³²

- d. Recommendation for operators

Under older AAPL Form 610 JOAs, operators may face untenable situations: either proceed with reworking or other operations necessary to maintain or increase production at their sole expense if only one non-operator refuses to consent (under *Cone*), or worse, be prohibited from performing what the operator believes to be necessary reworking or other operations by a non-operator’s refusal to consent (under *Ladd Petroleum*). This predicament essentially permits a non-operator to hold

the operator hostage, either literally or monetarily.

To defeat this predicament, an operator should consider amending older AAPL JOAs to increase the single expenditure limit in the “other operations” clause, add the mandatory AAPL JOA Form 610-1989 provision that only requires a pre-negotiated percentage of non-operators to consent to reworking or other similar operations,³³ or broaden the definition of expenses “required to deal with [an] emergency to safeguard life and property.”³⁴

2. Liability of non-operator to third parties

The typical JOA provides some liability protection to non-operators for acts performed by the operator. Indeed, the Supreme Court of Texas has recognized that one of the primary reasons, if not the biggest reason, for the use of JOAs is to shield non-operators.³⁵ For example, the following collective provisions are designed at least in part to shield the non-operator from liability:

_____ shall be the Operator of the Contract Area, and shall conduct and direct and have full control of all operations on the Contract

³¹ *LPCX Corp. v. Red Eagle Oil Co.*, 818 P.2d 431, 434 (Okla. 1991).

³² *Id.* at 441-45.

³³ *See, e.g.* AAPL Form 610-1989 JOA at Art. VI.D (“If within thirty (30) days thereof Operator secures the written consent of any party or parties owning at least ____% of the interests of the parties entitled to participate in such operation, each party having the right to participate in such project shall be bound by the terms of such proposal and shall be obligated to pay its proportionate share of the costs of the proposed project as if it had consented to such project pursuant to the terms of the proposal.”).

³⁴ *See, e.g.* AAPL Form 610-1989 JOA at Art. VI.D.

³⁵ *Tawes v. Barnes*, 340 S.W.3d 419, 426 (Tex. 2011).

Area as permitted and required by, and within the limits of this agreement. In its performance of services hereunder for the Non-Operators, Operator shall be an independent contractor not subject to the control or direction of the Non-Operators except as to the type of operation to be undertaken in accordance with the election procedures contained in this agreement. Operator shall not be deemed, or hold itself out as, the agent of the Non-Operators with authority to bind them to any obligation or liability assumed or incurred by Operator as to any third party.³⁶

The liability of the parties shall be several, not joint or collective. Each party shall be responsible only for its obligations and shall be liable only for its proportionate share of the costs of developing and operating the Contract Area. . . . [N]o party shall have any liability to third parties hereunder to satisfy the default of any other party in the payment of any expense or obligation hereunder. It is not the intention of the parties to create, nor shall this agreement be construed as creating, a mining or other

³⁶ AAPL Form 610-1982 JOA at Art. V.A. The underlined text is now in the AAPL Form 610-1989 JOA at Art. V.A.

partnership, joint venture, agency relationship or association, or to render the parties liable as partners. . . .³⁷

Except as herein otherwise specifically provided, Operator shall promptly pay and discharge expenses incurred in the development and operation of the Contract Area pursuant to this agreement and shall charge each of the parties hereto with their respective shares upon the expense basis provided in Exhibit "C."³⁸

Courts have held that non-operators should be shielded from liability to non-governmental third party litigants for the debts, contracts, and torts of the operator where: (1) relevant JOA provisions are used; (2) operations and managerial control has been delegated to the operator; and (3) the non-operator does not exercise control over the operator or give specific work instructions to the operator. Given that under the above described circumstances, the non-operator is not involved in making most day-to-day decisions, this sort of limited liability is not unreasonable.

- a. *Tawes v. Barnes*, 340 S.W.3d 419 (Tex. 2011) – mineral lessor is not a third-party beneficiary of the JOA

Under a JOA, the parties agreed to the initial

³⁷ AAPL Form 610-1982 JOA at Art. VII.A. The underlined text is now in the AAPL Form 610-1989 JOA at Art. VII.A.

³⁸ AAPL Form 610-1982 JOA at Art. VII.D.; AAPL Form 610-1989 JOA at Art. V.D.2.

drilling of one gas well and permitted the operator to propose additional drilling operations. A non-operator proposed drilling two additional gas wells and the non-operators consented. The operator chose to go non-consent and one of the non-operators replaced the original operator on the two non-consent wells (the operator cannot continue as the operator on wells it has elected to non-consent). Importantly, under the JOA, the consenting parties agreed to pay all royalties which would have been owed to the lessors of the leases by the non-consenting parties had they consented to the additional operations from the beginning. The lessor sued the prior operator and the new operator seeking to recover additional royalties.

The case first ended up before the United States Bankruptcy Court for the Southern District of Texas, which held that one of the parties that had remained a non-operator throughout was obligated to perform the original operator's duties of paying the lessor's royalties.³⁹ The bankruptcy court then found the non-operator liable to the lessor, as a third-party beneficiary, for unpaid royalties.⁴⁰ The non-operator appealed to the United States District Court for the Southern District of Texas, which affirmed the bankruptcy court.⁴¹ The non-operator, not content with the district court's ruling, appealed to the Fifth Circuit. The Fifth Circuit then certified a question to the Supreme Court of Texas.⁴²

³⁹ *Barnes v. Dominion Ok. Tex. Exploration & Prod., Inc. (In re Moose Oil & Gas Co.)*, 347 B.R. 868, 874 (Bankr. S.D. Tex. 2006).

⁴⁰ *Id.*

⁴¹ *Tawes v. Barnes*, No. V-06-123, 2008 WL 905209 at *10, *17 (S.D. Tex. Mar. 31, 2008).

⁴² *In re Moose Oil & Gas Co.*, 613 F.3d 521 (5th Cir. 2010).

The Supreme Court of Texas ultimately concluded that the lessor was *not* a third-party beneficiary of the JOA because the JOA Royalty Provision (in this instance) was only intended to allocate general expenses among the parties consenting to the drilling of additional, non-consent wells, and the JOA Royalty Provision only provided clarity to the operator for accounting purposes.⁴³ After this fanciful journey through both state and federal district and appellate courts, the Fifth Circuit ultimately incorporated the Texas Supreme Court's holding.⁴⁴

During the journey, both the Supreme Court of Texas and the Southern District of Texas recognized the liability shield available to non-operators under the AAPL Form 610-1982 JOA at issue: "JOAs govern operations involving great financial risk and are therefore utilized for the purpose of shielding non-operators, like Tawes, from liability for all costs or other obligations incurred in conducting the operations,"⁴⁵ and "[i]ndeed, Texas courts have held that

⁴³ *Tawes*, 340 S.W.3d at 425-26, 428-29 ("The generalized nature of the JOA Royalty Provision, coupled with the JOA's all-encompassing accounting scheme for non-consent wells, lacks the specificity necessary to directly benefit a third-party beneficiary to the Dominion-Moose Agreements. . . . As derived from our analysis of the unambiguous language of the Dominion-Moose Agreements in light of both oil and gas industry standards and customs and Texas case law, we conclude that Dominion and Moose clearly intended to allocate responsibility for the payment of many categories of expenses in the context of drilling non-consent wells. Accordingly, any benefit Barnes derived by way of the JOA Royalty Provision was merely incidental and not enough to entitle her to the third-party beneficiary status she seeks. Therefore, Barnes may not enforce the Dominion-Moose Agreements under this theory of recovery.").

⁴⁴ *In re Moose Oil & Gas Co.*, --- F.3d ----, 2011 WL 2521094 (5th Cir. Jun 27, 2011).

⁴⁵ *Tawes*, 340 S.W.3d at 426.

non-operators are generally not liable under partnership, joint venture or agency theories for operator's development and operation costs."⁴⁶

- b. *Lavy v. Pitts*, 29 S.W.3d 353 (Tex. App.—Eastland 2000, pet. den.) – non-operators not liable for pumper's personal injuries because non-operator did not exercise control over the operations or give any instructions

After an explosion occurred that severely injured a pumper, the pumper sued the non-operator under a premises liability theory, alleging that pooled hydrocarbon vapors constituted a dangerous condition. The pumper alleged the non-operator retained the right to control the production operations and owed him, as an invitee, a duty of reasonable care to remedy or warn him of the dangerous condition. The non-operator moved for summary judgment and the trial court granted the non-operator's motion.

The court recited the JOA provision in which the non-operator delegated "power and authority" to the operator and gave the operator the authority to "conduct and direct and have full control of all operations."⁴⁷ The appellate court rejected the pumper's cause of action against the non-operator because the evidence failed to show

that [the non-operator] had any knowledge of the day-to-day operations of [the operator]. The evidence also

⁴⁶ *Tawes v. Barnes*, No. V-06-123, 2008 WL 905209 at *9 (S.D. Tex. Mar. 31, 2008).

⁴⁷ *Lavy v. Pitts*, 29 S.W.3d 353, 357-58 (Tex. App.—Eastland 2000, pet. denied). The JOA at issue appears to be an AAPL Form 610-1982 model form based on the cited provisions.

failed to show that [the non-operator] exercised any control over [the operator]'s operations or gave any detailed instructions to [the operator] about how to conduct its business. The authorization for expenditure sheets produced by [the plaintiff] only showed that [the non-operator] exercised control over the expenditures for which he was accountable under the A.A.P.L. agreement. The expenditure estimates related only to the cost of operations, not to the method. In short, the record fails to show any evidence of the "nexus" between any control retained by [the non-operator] and a duty of care owed to [the plaintiff].⁴⁸

Surprisingly, there are not any other readily apparent reported Texas cases relying on *Lavy* for a similar proposition. Presumably, the lack of any such cases may suggest plaintiffs are no longer suing non-operators and instead seek to recover any and all damages from the operator.

- c. *Berchermann v. The Western Company*, 363 S.W.2d 875 (Tex. App.—El Paso 1962, writ ref'd n.r.e.) – non-operators not held liable to suppliers hired by the operator when the operator failed to pay

The operator agreed under a joint operating agreement to refrain from obligating itself to operations that cost in excess of \$2,500 without written approval of the non-

⁴⁸ *Lavy*, 29 S.W.3d at 359.

operators. The operator regularly billed the non-operators their proportionate share of expenses. Several suppliers of the operator were not paid by the operator and subsequently sued both the operator and the non-operators, even though they had not contracted with the non-operators, nor did they ever send the non-operators any bills, invoices, or notices of any sort.

The court first found that the operator and non-operators had not created a partnership or a mining partnership, and then concluded that the suppliers “failed to prove the necessary elements of partnership and agency so as to make the [non-operators] jointly and severally liable with [the operator] for the debts and obligations incurred by [the operator].”⁴⁹

d. Non-operator considerations

The non-operator should take caution to ensure it does not enter into contracts with suppliers or contractors who are supplying goods or conducting work in the Contract Area for the operator. The non-operator should also not act on bills or invoices that may be sent to the non-operator from suppliers or contractors, and should not refer to themselves or the group in a way that connotes a partnership or joint venture.

A non-operator can engage in routine activities as provided in the JOA, like proposing, receiving, and consenting/non-consenting to AFEs as allowed under the JOA without fear of a finding that the non-operator gave instructions or exercised control. The non-operator can also participate in joint owner meetings pursuant to the terms of the JOA without fear of a

⁴⁹ *Berchermann v. The Western Co.*, 363 S.W.2d 875, 878 (Tex. App.—El Paso 1962, writ ref’d n.r.e.) (citing *Youngstown Sheet and Tube Co. v. Penn.*, 363 S.W.2d 230 (Tex. 1963)).

finding that the non-operator gave instructions or exercised control.

3. The JOA operator is held to the “reasonably prudent operator” standard

Under the APPL Form 610-1989 JOA:

[The] Operator shall conduct its activities under this agreement as a reasonably prudent operator, in a good and workmanlike manner, with due diligence and dispatch, in accordance with good oilfield practice, and in compliance with applicable law and regulation, but in no event shall it have any liability as Operator to the other parties for losses sustained or liabilities incurred except such as may result from gross negligence or willful misconduct.⁵⁰

This provision is obviously exculpatory, and to prevail in a suit for breach of contract related to the operator’s performance of its obligations under the JOA, the non-operator usually must prove the operator was either grossly negligent or acted with willful misconduct when it breached the JOA.⁵¹

a. Gross negligence

To prove gross negligence, the plaintiff must show the defendants “had actual subjective knowledge of an extreme risk of serious

⁵⁰ APPL Form 610-1989 JOA at Art. V.A.

⁵¹ *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888, 896 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (citing *Cone*, 68 S.W.3d at 155; *Abraxas Petroleum Corp.*, 20 S.W.3d at 759)).

harm.”⁵² The magnitude of the risk is judged from the viewpoint of the defendant at the time the events occurred. The harm anticipated must be “extraordinary harm, not the type of harm ordinarily associated with breaches of contract or even with bad faith denials of contract rights; harm such as ‘death, grievous physical injury, or financial ruin.’”⁵³

b. Willful misconduct

Texas courts have defined “willful misconduct” in a manner akin to gross negligence.⁵⁴ A finding of willful misconduct requires evidence of “a specific intent by [the operator] to cause substantial injury to [the non-operators].”⁵⁵

c. Operator standards under prior AAPL JOAs

The standard JOA operators are held to have evolved over time, at least under AAPL JOAs. The AAPL Form 610-1956 JOA provides:

Operator . . . shall conduct and direct and have full control of all operations on the Unit Area as permitted and required by, and within the limits of, this agreement. It shall conduct all such operations in a good and workmanlike manner....⁵⁶

⁵² *IP Petroleum Co.*, 116 S.W.3d at 897.

⁵³ *Id.* at 896 (quoting *Transp. Ins. Co. v. Moriel*, 879 S.W.2d 10, 24 (Tex. 1994)) (citing *Bluebonnet Sav. Bank, F.S.B. v. Grayridge Apartment Homes, Inc.*, 907 S.W.2d 904, 911 (Tex.App.—Houston [1st Dist.] 1995, writ denied)).

⁵⁴ *IP Petroleum Co.*, 116 S.W.3d at 898.

⁵⁵ *Id.*

⁵⁶ AAPL Form 610-1956 JOA.

The AAPL Form 610-1977 and 1982 JOA provides:

Operator . . . shall conduct and direct and have full control of all operations on the Contract Area as permitted and required by, and within the limits of, this agreement. It shall conduct all such operations in a good and workmanlike manner. . .

⁵⁷

The original operator standard began with a “good and workmanlike manner,” which most courts construed to mean the operator must act as a “reasonably prudent operator.”⁵⁸ The most recent AAPL Form 610 JOA (the 1989 JOA quoted above) now explicitly requires the operator to act as a “reasonably prudent operator.”⁵⁹

d. What is a reasonably prudent operator?

A reasonably prudent operator is an operator of ordinary prudence.⁶⁰ Such an operator has neither the highest nor the lowest prudence, but merely possesses average

⁵⁷ AAPL Form 610-1977 and 1982 JOA.

⁵⁸ *See, e.g. Norman v. Apache Corp.*, 19 F.3d 1017, 1029-30 (5th Cir. 1994) (applying Texas law and analyzing an unidentified JOA from with an operator’s conduct clause identical to the AAPL Form 610-1956 JOA); *Johnston v. Am. Cometra, Inc.*, 837 S.W.2d 711, 716 (Tex. App.—Austin 1992, writ denied) (analyzing an AAPL Form 610-1977 JOA).

⁵⁹ AAPL Form 610-1989 JOA at Art. V.A.

⁶⁰ *Good v. TXO Prod. Corp.*, 763 S.W.2d 59, 60 (Tex. App.—Amarillo 1988, writ denied); *Shell Oil Co. v. Stansbury*, 401 S.W.2d 623, 629 (Tex. App.—Amarillo 1988) *writ ref’d n.r.e.* 410 S.W.2d 187 (Tex. 1966).

prudence and intelligence and acts with ordinary diligence under the same or similar circumstances.⁶¹

Whether or not an operator acted as a “reasonably prudent operator” is a question of fact for the jury to determine.⁶² The duty owed to non-operators is a specific duty of care which is not a matter within the knowledge of an average juror but is instead an area of specialized knowledge requiring expert testimony.⁶³

- e. *IP Petroleum Co., Inc. v. Wevanco Energy, L.L.C.*, 116 S.W.3d 888 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) – even if the jury finds the operator acted with gross negligence or with willful misconduct, if the evidence does not support such a finding, the operator cannot be found to have violated the JOA

In *IP Petroleum*, the court drew a line between breach of contract claims requiring a showing of gross negligence and those that do not require such a showing. The parties signed a JOA providing that the operator would drill a well sufficient to test a particular formation. As the well began to reach the target depth, the operator became concerned the well was taking on too much water, open hole completed the well, and insisted that the well had been drilled to or through the target formation. The operator gave notice of his intention to plug and abandon the well and, under the JOA, the non-operators could either agree or take over the well. The non-operators rejected both

⁶¹ *Id.*

⁶² *Cabot Corp. v. Brown*, 754 S.W.2d 104, 108 (Tex. 1987).

⁶³ *Bonn Operating Co. v. Devon Energy Prod. Co., LP*, 2009 WL 484218, *15 (N.D. Tex. 2009).

options and sued the operator.

At the trial court, the jury found the operator had been grossly negligent and engaged in willful misconduct, but on appeal the Houston Court of Appeals found the evidence only supported a finding of ordinary negligence.⁶⁴ Given that the evidence only supported a finding that the operator engaged in ordinary negligence, the court concluded that the operator did not breach the JOA because the JOA only provided a remedy for the non-operator if the operator caused losses or liabilities as a result of gross negligence or willful misconduct.⁶⁵

f. COPAS issues

Operators and non-operators should also be aware of COPAS accounting procedures usually attached to and made a part of most JOAs. Under Article II (Direct Charges), Section 12 (Other Expenditures) 1974 COPAS, the “Operator shall charge the Joint account with the following items: . . . Any other expenditure not covered or dealt with in the foregoing provisions of this Section II, or in Section III, and which is incurred by the Operator in the necessary and proper conduct of the Joint Operations.”⁶⁶ In one case, the court held that this COPAS “catch-all” provision allows the operator to charge the joint account for expenses incurred by

⁶⁴ *IP Petroleum Co.*, 116 S.W.3d at 898.

⁶⁵ *Id.* See also *Amoco Rocmount Co. v. Anschutz Corp.*, 7 F.3d 909, 923 (10th Cir. 1993).

⁶⁶ “Direct Charges” an Operator may charge the Joint Account under Section II of COPAS usually include rentals, royalties, labor, employee benefits, material, transportation, contract services, equipment and facilities furnished by operator, damages and losses to joint property, legal expenses, taxes, insurance and the “other expenditures” discussed above. Section III of COPAS usually sets out the overhead charges an Operator may charge the Joint Account.

the operator (3-D seismic testing in that case) which are necessary and proper, or in other words are “prudent.”⁶⁷

The 1984 COPAS contains a slightly different provision, adding an “of direct benefit” requirement: “Any other expenditure not covered or dealt with in the foregoing provisions of this Section II, or in Section III and *which is of direct benefit to the Joint Property* and is incurred by the Operator in the necessary and proper conduct of the Joint Operations.”⁶⁸

However, the “new” 2005 COPAS added a requirement that the parties approve any charges made under the “Other Expenditures” catch-all provision: “Any other expenditure not covered or dealt with in the foregoing provisions of this Section II (*Direct Charges*), or in Section III (*Overhead*) and which is of direct benefit to the Joint Property and is incurred by the Operator in the necessary and proper conduct of the Joint Operations. Charges made under this Section II.15 shall require approval of the Parties, pursuant to Section I.6.A (*General Matters*).”

This new voting requirement was specifically added as a means to safeguard non-operators: “This (Other Expenditures) provision in COPAS 1984 and 1986 remains in the COPAS 2005 form, but to reduce disputes and alleviate concerns that this provision could be used as a ‘catchall’ for an operator to charge costs a nonoperator may consider covered by overhead, a charge made under this provision in COPAS 2005 now requires approval of the nonoperators pursuant to the approval by the parties section in the general provisions. This

⁶⁷ *Gaither Petroleum Corp. v. Hilcorp Energy I, L.P.*, 2002 WL 1965457, *3 (Tex. App.—Corpus Christi 2002, no pet.).

⁶⁸ COPAS 1984-1 Onshore Accounting Procedure (emphasis added).

provision in COPAS 2005 provides flexibility by allowing the operator to attempt to recover unforeseen costs not addressed in the direct charges section and not built into the overhead rate. The voting requirement safeguards the nonoperators and provides an objective standard for nonoperators to use to determine the validity of any charges made under this other expenditures section.”⁶⁹

- i. Operator must timely send JIBs, but if the non-operator fails to timely object, the non-operator may still be liable for the charge

AAPL JOAs require the operator to send JIBs to “Non-Operators on or before the last day of each month for their proportionate share of the Joint Account for the preceding month.”⁷⁰ Nevertheless, if the operator does not timely send JIBs but the non-operator does not timely object or challenge the JIB, the non-operator may still be liable for the charge. Unfortunately for the operator, the non-operators, in a standard JOA, are given up to twenty-four (24) months to submit a challenge following the end of the calendar

⁶⁹ McClellan and Cougevan, *The New COPAS Accounting Procedure*, *The Landman Magazine* (AAPL May/June 2006) at 46-47. *See also* Boigon, *The Joint Operating Agreement in a Hostile Environment*, 38th Annual Institute on Oil and Gas Law and Taxation (Southwestern Legal Foundation 1987) at pp. 5-21 to 5-22 (“The nonoperators could also argue the objectionable costs were not ‘necessary or proper’ to the conduct of operations as required by Section II.12 of the Accounting Procedure or that the costs were not ‘reasonable and necessary’ as required either by the common-law rules relating to the operating cotenant’s right of reimbursement or by the ‘reasonably prudent operator’ standard inherent in the JOA.”)

⁷⁰ AAPL Form 610-1982 JOA at Art. 1.2 (recognizing a standard COPAS accounting procedure).

year in which the JIB was issued.⁷¹

- ii. *Paint Rock Operating, LLC v. Chisholm Exploration, Inc.*, 339 S.W.3d 771 (Tex. App.—Eastland 2011, no pet.) – non-operator fulfills JIB objection requirement without explaining why it objects to JIBs

In one recent case, the Eastland Court of Appeals faced a dispute over the operator’s untimely JIBs and the non-operator’s alleged failure to timely challenge the charges.⁷² In that case, the operator admittedly sent JIBs up to six months late. The non-operator reviewed those invoices and disagreed with several charges. The non-operator disagreed with the operator’s decision to increase the \$400 overhead rate charged per month per well, the operator’s decision to hire a production supervisor,⁷³ and several repair operations that were not preceded by an AFE. The non-operator marked through, circled, or otherwise notated the disputed charges, returned those marked-up JIBs and a check for the balance of the charges. The operator sued the non-operator to recover the disputed charges.

The court first noted that “[t]he purpose of the JOA’s written exception provision was to provide the operator with notice. The JOA, however, does not define what constitutes a sufficient written exception.”⁷⁴ In its first holding, the court determined that the non-operator had properly excepted to

the disputed charges because the operator *knew* what charges were objected to and why, even though the non-operator only marked through the disputed charges and did not provide an explanation. The court cautioned, however, that “[w]e do not hold that marking out charges on a JIB and returning it to the operator is sufficient, as a matter of law, to comply with COPAS Article 1.4.”⁷⁵

In the court’s next holding, the court found that the operator could not escalate overhead rates in the manner in which it did. The JOA allowed for an annual adjustment of overhead expenses as of the first day of April of each year by the percentage increase or decrease in the average weekly earnings of Crude Petroleum and Gas Production Workers for the last calendar year. In going back several years and determining what the rate should have been if the operator had made an annual adjustment, the court found the operator violated the JOA and charged an excessive overhead amount. The court held that the operator “was entitled to readjust the overhead rate as of April 1, 2006, *but only from the rate currently in effect.*”⁷⁶ Lastly, the court determined that the operator violated the JOA by undertaking repairs in excess of \$10,000⁷⁷ without first issuing an AFE.

The lessons learned in *Paint Rock* can be summarized as follows: (1) the operator must timely submit JIBs; (2) the non-operator should provide a timely exception

⁷¹ AAPL Form 610-1982 JOA at Art. 1.4.

⁷² *Paint Rock*, 339 S.W.3d 771.

⁷³ The current operator had replaced a previous operator who had consistently charged the \$400 per month per well overhead charge and the non-operator informed the previous operator it felt a production supervisor was unnecessary. *Id.* at 775-76.

⁷⁴ *Id.* at 776.

⁷⁵ *Id.* at n. 4.

⁷⁶ *Id.* at 776 (emphasis added).

⁷⁷ The JOA at issue in *Paint Rock* required the operator to issue an AFE if any operational costs were expected to exceed \$10,000, as discussed above under the “Other Operations” clause section of this paper.

to any disputed charges; (3) the non-operator should explain why it excepts to any disputed charges (assuming the operator would not already know why the charges were disputed); (4) annual overhead can only be readjusted from the rate currently in effect – even if the rate had not been adjusted in prior years; and (5) the most elementary lesson – an operator should send an AFE if an expense is expected to exceed the pre-negotiated “other operations” amount.

4. Non-consent penalty provisions

In a typical JOA, a “non-consent” clause provides that if one party proposes an operation (often the drilling of a well), that party must provide notice⁷⁸ and the other party or parties then have a choice to participate or not.⁷⁹ If one party chooses not

⁷⁸ The Houston Court of Appeals has recognized that if a non-operator fails to fulfill the notice requirements, it cannot rely on the non-consent provision to penalize another party. *See El Paso Production Co. v. Valence Operating Co.*, 112 S.W.3d 616, 623-24 (Tex. App.—Houston [1st Dist.] 2003, pet. denied) (“Even if Valence’s contention is correct, Sonat’s failure to consent to the rework operation cannot result in the imposition of any of the contractual penalties because the obligation to give timely notice of consent is triggered only by the required notice of proposed operations. Because the evidence conclusively established that Valence did not give such notice, it was error for the trial court to submit jury question number six.”). *See also ExxonMobil Corp. v. Valence Operating Co.*, 174 S.W.3d 303, 317 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (“[N]otice’ from strangers to the JOA, coming after the farmout agreement had already been executed, entirely failed to satisfy the purpose of the notice requirement, namely, that Valence be given the opportunity to consent, or not, to a proposal made by a party to the JOA who had agreed to all its terms and conditions-not by strangers to the JOA with different interests.”).

⁷⁹ *See, e.g.* AAPL Form 610-1989 JOA at Art. VI.B. *See In re Reveille Res. (Tex.), Inc.*, --- S.W.3d ---, 2011 WL 149872 (Tex. App.—San Antonio 2011, no pet.) (Non-operator withdrew consent to drill a well

to participate, under the “non-consent” clause, the party who proposed the operation would bear the full responsibility for out-of-pocket costs for drilling the proposed well. The party who proposed the operation is then permitted to recover its costs of production until a stated percentage, sometimes 200%, 300%, 400%, and so on. The percentage acts as a penalty to discourage a non-participating party from realizing revenues or profits when it assumed no risk.⁸⁰ One now-former member of the Supreme Court of Texas has suggested the “non-consent penalty” would be more aptly described as a “liquidated bonus clause.”⁸¹

- a. *XTO Energy Inc. v. Smith Prod. Inc.*, 282 S.W.3d 672, n. 2 (Tex. App.—Houston [14th Dist.] 2009, no pet.) – a non-operator cannot change its election to avoid potential non-consent penalties even if thirty days from the date of the notice have not gone by

In *XTO Energy*, a non-operator first sent in elections not to participate in the drilling of four new wells. After the remainder of the non-operators timely elected to participate, one non-operator – within thirty days from

and sued the operator for allegedly wrongfully withholding \$455,377.91 in revenues. The non-operator sought a writ of attachment and the court ordered the operator to deposit the disputed amount in the registry of the court. The operator sought a writ of mandamus, which was conditionally granted.)

⁸⁰ *See, e.g. Beckham Res., Inc. v. Mantle Res., L.L.C.*, 2010 WL 672880, *1 (Tex. App.—Corpus Christi 2010, pet. denied).

⁸¹ *See XTO Energy Inc. v. Smith Prod. Inc.*, 282 S.W.3d 672, n. 2 (Tex. App.—Houston [14th Dist.] 2009, no pet.) (quoting *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 665-66 (Tex. 2005) (BRISTER, J. concurring)).

the date the notice was sent – sent signed AFEs to the operator indicating it now had elected to participate. The non-operator explained that the previous election not to participate had been sent in error and those notices are revoked. The operator refused to recognize the changed election and proceeded with drilling the four new wells.

The court noted that the JOA was not ambiguous, because according to the JOA, “[o]nce a receiving party timely gives notice of its election regarding the drilling operation by properly replying within the thirty days, the Notice Period has expired as to that party. . . . When, as in this case, all receiving parties give notice of their elections in less than thirty days after receiving the notice, the Notice Period expires in less than thirty days.”⁸² The court went on to find that permitting the operator to act in reliance on elections was important because “otherwise, as to quickly drilled wells, a party might change its election to avoid dry-hole costs that the party previously agreed to bear or to share in the rewards of a successful well when the party had not shared in the risks.”⁸³

The court emphatically concluded:

Under the unambiguous language of the JOAs, if, after proper notice of a proposal to drill an additional well under Article VI.B.1., a party to the JOAs timely and properly gives notice to the proposing party as to whether it elects to participate in the cost of the proposed operation, then that party may not change its election,

⁸² *XTO Energy Inc.*, 282 S.W.3d at 678.

⁸³ *Id.* at 679.

even if it seeks to do so within thirty days after receipt of the proposing party’s notice and regardless of whether the other parties have materially changed their positions in reliance on the initial election.⁸⁴

- b. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656 (Tex. 2005) – the operator can commence subsequent operations before the expiration of the notice/participation election period

In *Valence*, the parties executed a modified AAPL Form 610-1977 JOA which contained a standard non-consent provision. The operator provided notice to the non-operators of its intention to drill eight new wells, but in each case began preparatory work – and in some cases – actual drilling, before thirty days had elapsed from the notice date. One non-operator received the notices but did not elect to participate and the operator imposed the non-consent penalty. The non-operator disputed the imposition of the non-consent penalty, arguing that the operator could not proceed with any work before thirty days had elapsed from the notice of intention to perform drilling or other proposed operations. The non-operator sued and the trial court rendered summary judgment in

⁸⁴ *Id.* at 681. In dissent, Justice Eva Guzman (then with the Fourteenth Court of Appeals) noted that “[t]he contractual provisions at issue describe no circumstance under which the thirty-day Notice Period expires in less than thirty days. . . . The intent of a contract is not changed simply because the circumstances do not precisely match the anticipated scenarios. [] Because the interpretation urged by [the non-operator] is reasonable, the contracts are, at best, ambiguous. Thus, I would reverse and remand the case for further proceedings.” *Id.* at 685, 688.

favor of the operator.

The intermediate appellate court reversed and rendered judgment in favor of the non-operator. The Supreme Court of Texas concluded that the relevant provisions of the JOA “place[] no temporal limitation on [the operator’s] ability to commence work on the proposed projects. The Agreement clearly states that ‘[t]he parties receiving such a notice shall have thirty (30) days after receipt of the notice within which to notify the parties wishing to do the work whether they elect to participate in the cost of the proposed operation.’”⁸⁵ The Court went on to find that “the thirty-day notice period sets a deadline for Dorsett to decide whether to participate in proposed operations. Nothing in the language of the Agreement forbids the operator from commencing work before the end of the notice period.”⁸⁶ The Court also concluded that the non-consent provision is not an unenforceable liquidated damages provision.⁸⁷

5. Removal or resignation of the operator

The typical JOA provides two basic ways to facilitate the resignation or removal of the operator.

a. Resignation/deemed resignation

The APPL Form 610-1989 JOA provides:

Operator may resign at any time by giving written notice thereof to Non-Operators. If

⁸⁵ *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005).

⁸⁶ *Id.* at 662-63. *See also Bonn Operating Co. v. Devon Energy Prod. Co., L.P.*, 613 F.3d 532, 535-36 (5th Cir. 2010).

⁸⁷ *Valence Operating*, 164 S.W.3d at 664-65.

Operator terminates its legal existence, no longer owns an interest hereunder in the Contract Area, or is no longer capable of serving as Operator, Operator shall be deemed to have resigned without any action by Non-Operators, except the selection of a successor.⁸⁸

Deemed resignations obviously spur litigation. For example, in *Hill v. Heritage Resources, Inc.*, the non-operators argued there was a deemed resignation of the operator because the operator did not have a cost-bearing interest.⁸⁹ The court ultimately sided with the operator.⁹⁰ In another case, the court found the non-operators knowingly selected a successor operator who did not own any interest in the contract area and thereby waived the operator-interest requirement.⁹¹

b. Removal

The AAPL Form 610-1989 JOA also provides a mechanism for the non-operators to forcefully remove the operator:

⁸⁸ AAPL Form 610-1989 at Art. V.B.1.

⁸⁹ *Hill v. Heritage Res., Inc.*, 964 S.W.2d 89, 104 (Tex. App.—El Paso 1997, pet. denied).

⁹⁰ Plaintiffs also argued there was legally insufficient evidence, or it was against the great weight and preponderance of the evidence, for the jury to find the operator did not breach the JOA when it became insolvent (an alleged deemed resignation). *See Heritage*, 964 S.W.2d at 140. The court rejected that argument because the plaintiffs drafted the jury questions regarding the operator’s status as the operator and did not request an issue on the operator’s bankruptcy and its impact on its status as the operator. *Id.* In doing so, the plaintiffs waived any error on this issue. *Id.*

⁹¹ *Purvis Oil Corp. v. Hilin*, 890 S.W.2d 931, 937 (Tex. App.—El Paso 1994, no writ).

Operator may be removed only for good cause by the affirmative vote of Non-Operators owning a majority interest based on ownership. . . . For purposes hereof, “good cause” shall mean not only gross negligence or willful misconduct but also the material breach of or inability to meet the standards of operation contained in Article V.A. or material failure or inability to perform its obligations under this agreement.⁹²

In some instances, however, even if the parties agree that the operator should be removed, another agreement may preclude the non-operators from removing the operator.⁹³ Other factors may also intervene to preclude the removal of an operator, for example automatic bankruptcy protection if the operator files for bankruptcy.⁹⁴

c. Injunction to remove an operator

In a more drastic case, the non-operators in an international JOA voted to remove the operator due to alleged breaches of the JOA and the failure to proceed in a good and workmanlike manner.⁹⁵ The operator

⁹² AAPL Form 610-1989 at Art. V.B.1. *See, e.g. R & R Res. Corp. v. Echelon Oil and Gas, L.L.C.*, 2010 WL 5575919, *2 (Tex. App.—Austin 2011, pet. filed June 22, 2011) (non-operators voted to remove operator for “good cause” due to alleged accounting deficiencies, among other things).

⁹³ *Inex Indus., Inc. v. Alpar Res., Inc.*, 717 S.W.2d 685 (Tex. App.—Amarillo 1986, no writ).

⁹⁴ *See, e.g.* 11 U.S.C. § 362.

⁹⁵ *See Tri-Star Petroleum Co. v. Tipperary Corp.*, 101 S.W.3d 583 (Tex. App.—El Paso 2003, pet. denied).

allegedly refused to step down and the non-operators sued, seeking an injunction forcing the operator to step down. The trial court granted the injunction. On appeal, the court noted:

It was within the trial court’s discretion to find that the status quo between the parties consisted in non-operator working interest owners having the contractual ability under the JOA to follow the provision for removal and selection of successor as written, which [the operator] now challenges as invalid and requiring judicial determination of cause for removal. . . . By [one of the non-operator’s] amended original petition, it alleged that it had a right, based on a majority vote of the non-operators to be the successor Operator. Mr. David Bradshaw, CEO and Director of [one non-operator], testified that [the non-operators] voted their interests to remove in January 1999. According to Mr. Bradshaw, [the operator] was furnished with copies of the vote ballots and has not resigned operations. Mr. Bradshaw also testified as to the same result in the November 2000 ballot vote. Further, Mr. Bradshaw testified that it was [one non-operator’s] position that [the operator] has failed or refused to carry out or perform duties under the JOA. . . . The trial court

could conclude from the evidence that the non-operators determined that they had cause to remove [the operator] as Operator.⁹⁶

E. Conclusion

The JOA is a lengthy, complicated agreement that governs various subjects among multiples parties. Oftentimes, what may appear to be a straightforward standard AAPL JOA has been modified in material respects, obviously impacting the obligations, duties, and rights of the parties. The bottom-line and obvious advice to an operator or non-operator is to know and understand the various terms of the agreement, and to strictly comply with those terms to the extent possible. An imprudent and reckless party to a JOA faces the fear of dire consequences, including the adverse award of significant actual monetary damages, the possibility of the adverse award of the opposing parties' attorneys' fees, and/or even injunctive relief in some circumstances.

⁹⁶ *Id.* at 588-90.