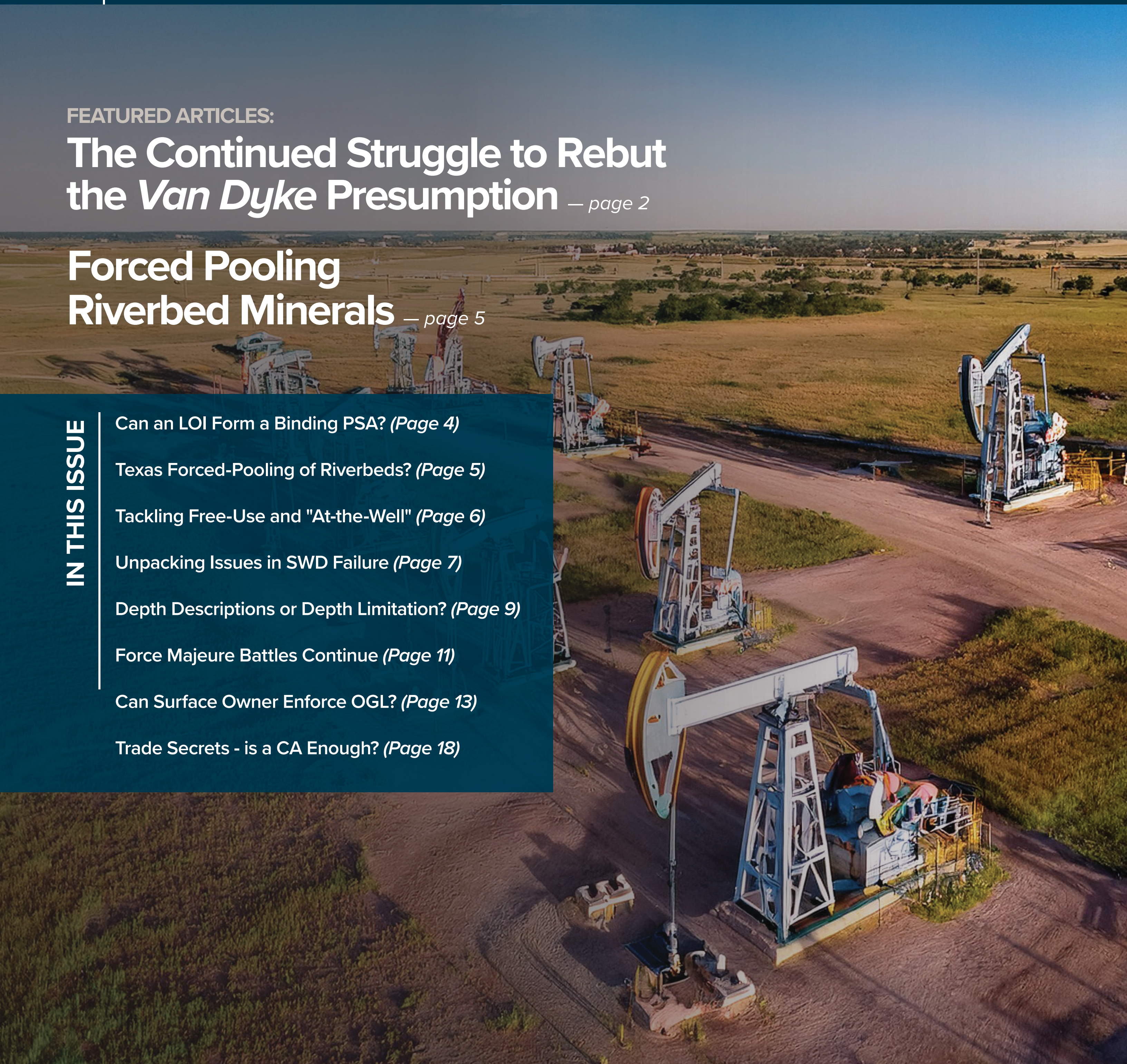
VOL. 6 | ISSUE 2

McGINNIS LOCHRIDGE

# Producer's Edge

## TEXAS OIL AND GAS LAW BULLETIN



FEATURED ARTICLES:

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## About the *Producer's*

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

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# EVENTS, PUBLICATIONS & AWARDS:

## SPEAKING ENGAGEMENTS AND PUBLICATIONS

- Austin Brister presented Annual Case Law Update for the Houston Bar Association's Energy Law Section
- Bruce Kramer presented at The Foundation for Natural Resources & Energy Law's 40th Annual O&G Short Course on "Voluntary Pooling & Utilization / Local Regulation"
- Austin Brister and Logan Jones published 2024 "Texas O&G Case Law Review," for SMU's "Annual TX Survey"
- Alejandra Salas's article "Legislative Law Update on Oil, Gas and Energy Law," published in The Texas Bar Journal
- Austin Brister presented: "COPAS Accounting Procedures – From a Litigation Perspective", at 50th Annual Ernie Smith Institute 2024
- Bruce Kramer at the Energy and Mineral Law Foundation (EMLF) in Lexington, KY on state and local regulation of CCUS projects
- Derrick Price presented: "Problems with Sharing: Pooling, Allocation, and Production Sharing Agreements" at the State Bar of Texas Oil, Gas & Mineral Title Examination Seminar in June 2024
- Austin Brister presented "JOA Disputes: Emerging and Re-Emerging Issues" at the IEL "Upstream O&G" conference, Oct. 2024

## AWARDS AND RECOGNITIONS

- McGinnis Lochridge was ranked a "Recommended Firm" by Benchmark Litigation 2024
- Jonathan Baughman and Travis Barton, were selected as "Litigation Stars" by Benchmark Litigation 2024
- Austin Brister was recognized on the "2024: 40 & Under List" by Benchmark Litigation
- Will Grubb was recognized on the "2024: 40 & Under List" by Benchmark Litigation
- William Grubb, Jordan Mullins, and Michael Kabat were recognized on the "2024: Future Stars List" by Benchmark Litigation
- Nineteen McGinnis Lochridge attorneys received 2024 Martindale-Hubbell AV Preeminent® Ratings
- Austin Brister was selected for the 2024 Lawdragon 500 Leading Energy Lawyers
- Will Grubb was selected for the 2024 Lawdragon 500 X Next Generation List
- McGinnis Lochridge was ranked a 2024 "Tier 2 National Law Firm" in Oil & Gas Law by U.S. News - Best Lawyers®
- McGinnis Lochridge was ranked a 2024 "Tier 1 Texas Law Firm" in Oil & Gas in the Houston and Austin Metropolitan Areas by U.S. News - Best Lawyers®
- McGinnis Lochridge was ranked as "Tier 1" and "Tier 2" in sixteen other categories by U.S. News - Best Lawyers® across the Houston and Austin Metropolitan Areas
- Twenty-six McGinnis Lochridge attorneys were recognized in the 2024 Edition of "The Best Lawyers in America®"
- Seven McGinnis Lochridge attorneys were recognized as 2024 Best Lawyers: Ones to Watch® in America
- Tim George was recognized as "Lawyer of the Year" for Oil and Gas Law in the 2024 Best Lawyers® Publication
- Jonathan Baughman serves as a Member of the State Bar of Texas' Pattern Jury Charge - Oil & Gas Committee
- Paul Simpson serves as Chair for the State Bar of Texas' Pattern Jury Charge - Oil & Gas Committee
- Jonathan Baughman serves as the Chair of the Louisiana Mineral Law Institute Advisory Council
- Austin Brister was appointed to an additional term on the Programs Committee for the Foundation for Natural Resources and Energy Law
- Austin Brister was elected as "Treasurer" of the Houston Bar Association's Energy Law Section (2024-2025)
- Austin Brister was appointed within the Advisory Council for the Institute for Energy Law
- Fourteen McGinnis Lochridge attorneys were recognized as 2024 Texas Super Lawyers
- Eight McGinnis Lochridge Attorneys were recognized as 2024 "Rising Stars" by Texas Super Lawyers

# The Continued Struggle to Rebut the *Van Dyke* Presumption

*By: M. Alejandra Salas*

Following the Texas Supreme Court's ruling in *Van Dyke v. Navigator Group* that courts interpreting "antiquated instruments" that use 1/8 within a double fraction must begin with the rebuttable presumption that 1/8 refers to the entire mineral estate, Texas courts have wrestled with its implications. Several 2023 decisions rendered by the El Paso Court of Appeals, reflect a trend toward near-automatic application of the presumption. To rebut this presumption, attorneys have made various novel arguments, but none have proven successful to date.

This article discusses a couple more cases in 2024. In each of these cases, one side successfully argued that the *Van Dyke* presumption applied, and the other side unsuccessfully argued that it was rebutted. Many anticipate that double-fraction cases will continue to steadily flow through Texas courts for the foreseeable future.

*Montgomery, Tr. of Tri-Mont Irrevocable Trusts v. ES3 Minerals, LLC*, No. 08-23-00153-CV, 2024 WL 2780419, at *1 (Tex. App.—El Paso May 30, 2024, no pet.), one of the most recent post-*Van Dyke* cases, exemplifies the litany of arguments raised to rebut the presumption. In that case, the El Paso Court of Appeals was asked to interpret a nonparticipating royalty interest (NPRI) in a 1955 deed, the most recent of the "antiquated instruments" that the El Paso Court of Appeals has been tasked with interpreting in this context, to determine whether the deed conveyed a floating ¼ royalty interest or a fixed 1/32 royalty interest.

By way of background, in 1955 J.D. and Elva Arthur conveyed to W. Travis Lattner, Jr., "a non-participating royalty of one-fourth (1/4th) of the landowner's usual one-eighth (1/8th) royalty on oil and gas produced and saved from said land[.]" The trial court ruled that this language conveyed a fixed 1/32 NPRI.

On appeal, the appellate court outlined the standard announced in *Van Dyke* and, after reviewing the language in the deed, it emphasized that that the grantor's use of the phrase "the landowner's usual one-eighth 1/8th royalty" indicated that the parties were referencing the common understanding that 1/8 represented the full royalty interest, supporting the presumption of a floating royalty interest. Additionally, the court considered that the deed used the word "Grantors" in other parts of the document but switched to "landowner's usual 1/8 royalty" in the granting clause. According to the court, this deliberate choice of language also supported the presumption.

A number of arguments were made by the Arthurs' successors to rebut the presumption. First, they argued that the use of the word "all" in the Introductory Clause, the Arthur Reservation, the two conveyance recitals, and the Exception Clause indicated that the grantors were fully aware of their ownership and conveyed a fixed interest. But the court rejected the argument, noting that while "all" was used in some parts of the deed, the language was often modified to clarify the scope of what was actually being conveyed. Next, the court rejected the argument that the use of 1/8 to refer to the landowner's usual interest was not unique or specific to the royalty conveyance because 1/8 royalty in sulfur had also been reserved to the State as irrelevant to the interpretation of the oil and gas royalty interest.

Additionally, the court rejected the argument that although the deed itself did not explicitly contain a second double fraction for sulfur royalties, such a double fraction would be implied when calculating the quantum of the sulfur royalties conveyed to Lattner. Specifically, the Arthurs' successors urged the court to multiply the ½ of the grantors' present interest in sulfur royalties (as mentioned in the Second Conveyance Recital) by the grantors' 7/8 sulfur royalty (as referenced in the Mineral/Sulfur Reservation). Based on this calculation, they claimed that the deed involved the use of double fractions to determine the amount of sulfur royalties conveyed and thus, argued that the oil and gas royalties should be similarly interpreted as fixed through the use of double fractions. The court rejected the argument, stating that it was unpersuaded by the notion of inserting a double fraction where none explicitly appeared in the deed.

Finally, the court rejected the argument that the Arthur Reservation would be "nonsensical" if the Second Conveyance Recital conveyed everything to Lattner. Specifically, the reservation stated that the grantors reserve unto themselves "all of the oil, gas and other minerals, royalties, and mineral rights not hereinafter expressly conveyed[.]" The Arthurs' successors argued that this reservation would be "nonsensical" if the Second Conveyance Recital had conveyed everything to Lattner, implying that nothing would be left for the Arthurs to reserve. Thus, they argued, the deed conveyed a fixed 1/32 interest. In rejecting the argument, the court explained that the Lattner successors never argued that the Second Conveyance Recital conveyed everything to Lattner but only a ¼ royalty. Since the reservation was consistent with the conveyance of a floating royalty interest, the court found that the argument failed to rebut the presumption that the deed conveyed a floating ¼ NPRI.

The next case in 2024 represents the first time a federal court in Texas has applied the Texas Supreme Court's decision in *Van Dyke Saddleback Expl., LLC v. Brunelle*, No. 4:23-CV-03091, 2024 WL 3626508, (S.D. Tex. July 15, 2024), report and recommendation adopted, No. 4:23-CV-3091, 2024 WL 3628043 (S.D. Tex. July 31, 2024). The court was tasked with interpreting six deeds executed in 1929 that conveyed various fractions of "the landowner's 1/8 royalty interest." Notably, this case was filed by the operator, Saddleback, who sought to resolve the question of "what percentages of production it should pay to royalty interest owners under various oil and gas leases." Id. Not all interpleader-defendants were found, and many were dismissed. But generally, the royalty interests at issue affected over 300 individuals. The owners of the royalty interest that made an appearance moved for summary judgment, arguing that the deeds conveyed "floating" royalty interests, not "fixed" royalty interests.

The district court adopted the *Van Dyke* decision's rebuttable presumption that a double fraction like "1/64 of the landowner's 1/8 royalty interest" refers to the entire mineral estate, unless specific language rebuts that presumption. However, the court provided little analysis as to why the presumption was not rebutted beyond noting that the six deeds lacked language to indicate otherwise. The court stated, "nothing in the text of the six deeds rebuts the presumption that the deeds assign a floating royalty." As a result, the court granted the owners of the nonparticipating royalty interest partial summary judgment.

The post-*Van Dyke* legal landscape raises questions about whether the presumption ever truly can be rebutted. As courts apply the presumption with near-automatic deference, the path to overcoming it appears challenging and uncertain. It remains to be seen what level of evidence, specificity, or contextual support will finally tip the scales in favor of finding the presumption rebutted.


**About the Author**

***Alejandra Salas*** *is a litigation associate at McGinnis Lochridge, LLP. She represents oil and gas exploration and production companies, royalty owners, and mineral owners in a variety of litigation matters. Prior to joining the Firm, Alejandra served as a judicial law clerk to the Honorable David Counts of the United States District Court for the Western District of Texas, Midland/Odessa and Pecos Divisions.*

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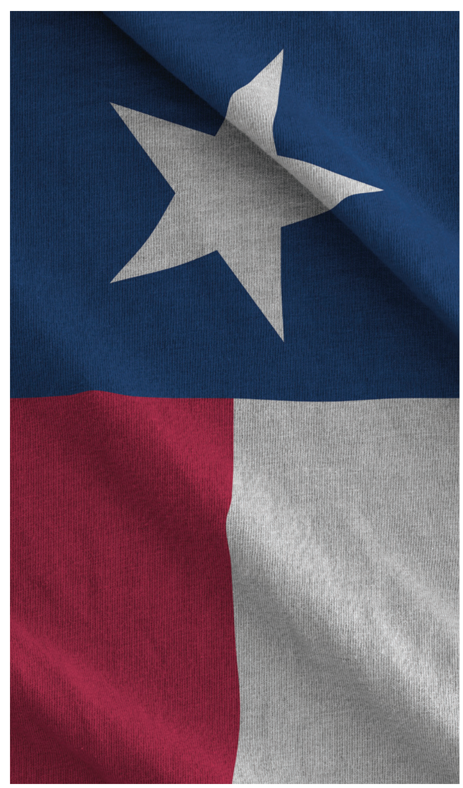
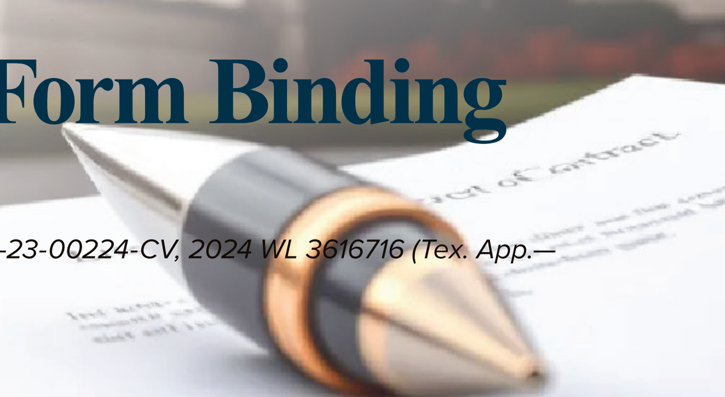


# Can Letters of Intent Form Binding Purchase Contract?



*Pappas Harris Capital, LLC v. Advance Hydrocarbon Corp., No. 14-23-00224-CV, 2024 WL 3616716 (Tex. App.—Houston [14th Dist.] Aug. 1, 2024, no pet. h.)*

*By: Austin W. Brister*

Purchase and sale transactions often progress through several stages of instruments, like layers of an onion, before they reach the final definitive purchase agreement, and perhaps even more layers before they reach the final assignment and post-closing items. But, when deals break down before reaching the finish line, disputes often arise as to whether the existing writings or communications are enough to form an enforceable agreement. Sometimes, the parties have little more than a confidentiality agreement or letter of intent; sometimes the parties have significant communications and informal agreements.

This recent case addressed whether letters of intent (LOIs) could create enforceable contracts in the course of asset purchase negotiations, even though they explicitly state that they are non-binding and that they are subject to future agreement. The Houston 14th Court of Appeals held that they were not an enforceable contract.

Advance Hydrocarbon Corporation ("Advance") sought to sell certain assets related to its saltwater disposal business. On August 1, 2018, Advance and Pappas Harris Capital, LLC ("Pappas") signed a Confidentiality Agreement to exchange confidential information for a possible transaction to acquire Advance's business, Advance provided a memorandum listing the assets for sale with general information. After review, Pappas prepared and signed an LOI on on September 24, 2018, proposing to purchase Advance's business and assets for $2 million. The LOI stated it was "not intended to create a binding contract" and was "subject to the execution of a mutually acceptable asset purchase agreement."

Over several months, the parties negotiated and Pappas conducted due diligence. Pappas discovered some listed assets were missing or in poor condition, leading to discussions on addressing these issues. Advance prepared a draft asset purchase agreement dated November 13, 2018, but it was never executed. On December 10, 2018, the parties met to resolve outstanding matters but did not reach a final agreement. Advance terminated the proposed transaction on December 14, 2018.

Pappas filed suit alleging breach of the LOI and, alternatively, breach of an oral contract that was allegedly formed during the December 10 meeting. The trial court granted summary judgment in favor of Advance, Pappas appealed.

The Court of Appeals held that the LOI did not constitute an enforceable contract. It emphasized that the LOI explicitly stated it was "not intended to create a binding contract" and that the "transaction would be subject to the execution of a mutually acceptable asset purchase agreement"—a condition precedent that was never fulfilled. Further, the court rejected Pappas' argument that the LOI was an enforceable agreement obligating the parties to "work together in good faith to consummate the transaction," holding that agreements to negotiate toward a future contract are not legally enforceable, even if the party agreed to negotiate in good faith.

Regarding the alleged oral agreement from the December 10 meeting, the court found no enforceable contract was formed. In the court's view, Pappas did not provide any evidence regarding how the alleged oral contract would establish the elements of an enforceable contract. Further, the only offer made was the LOI, but it expressly indicated it was subject to a mutually acceptable asset purchase agreement, with was never satisfied. The court stated, "Pappas cannot now argue that the deal could be closed with a handshake or in some other manner that was not a mutually agreeable asset purchase agreement executed by both parties." Because material matters remained open for future negotiation, the court said that any alleged oral agreement was an unenforceable agreement to agree.

This case serves as a crucial reminder for oil and gas lawyers to exercise precision in drafting preliminary agreements and to manage client expectations regarding the enforceability of LOIs. Ensuring that any intent to create binding obligations is clearly expressed—and that all necessary agreements are duly executed—is essential to avoid similar disputes.


**About the Author**

***Austin Brister*** *is a partner in our Houston office. Austin represents small and mid-size oil and gas companies in a range of business disputes. Austin strives to help clients find creative and practical business solutions. But, when necessary, Austin works hard to implement aggressive, goal-focused strategies in the courthouse.*

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# Texas Supreme Court Rejects Forced Pooling of Riverbed Minerals

*Ammonite Oil & Gas Corp. v. R.R. Comm'n of Tex., No. 21-1035, 2024 WL 3210180 (Tex. June 28, 2024)*

*By: Austin W. Brister*

In this case, the Texas Supreme Court affirmed the Railroad Commission's rejection of 16 applications to force pool a narrow winding tract of riverbed minerals with neighboring horizontal wells pursuant to the Texas Mineral Interest Pooling Act ("MIPA"). The Court held that, because the wells would not drain the riverbed minerals, and because the applicant did not propose and prove that the wells could be drilled differently or extended to reach the riverbed minerals, substantial evidence supported the RRC's determination that the applicant failed to make a "fair and reasonable" offer to voluntarily pool as required by MIPA.

The applicant, Ammonite Oil Gas Corporation, was in the business of acquiring State riverbed leases and then getting them included in adjacent pooled units. In 2015, Ammonite acquired a lease of State minerals covering a narrow and winding stretch of the Frio River. EOG Resources, Inc. owned oil and gas leases on lands adjoining the river on both sides. EOG had permits for 16 horizontal Eagle Ford shale wells along the river banks, and was in the process of drilling the wells.

Ammonite sent EOG a series of letters proposing the formation of 16 pooled units, one for each well. Ammonite referenced "existing well[s]" and attached the plats associated with EOG's existing drilling permits. Those plats reflected that none of EGO's wells would reach the riverbed. Ammonite did not include any proposal or show that the wells could be drilled differently or extended to reach and produce Ammonite's minerals. EOG rejected Ammonite's offers.

Ammonite filed 16 MIPA applications with the Railroad Commission, one for each well. Ammonite did not put on any evidence of drainage or other technical evidence.

By the time of the hearing, all of the wells had been drilled, and it was uncontested that they were not draining the riverbed tract. EOG argued that, without evidence of drainage, Ammonite's pooling offer was not "fair and reasonable." EOG characterized Ammonite as seeking to obtain a share of production from EOG's wells without contributing anything to them. EOG presented unrebutted expert testimony opining that Ammonite's riverbed minerals could possibly be drilled and produced in the future with changes in technology or markets. EOG's expert also testified that the wells require significant capital investment, and that any single well carried a significant risk of commercial failure, such that success must be measured at the portfolio level with optimal spacing to maximize recovery and prevent waste. The Railroad Commission rejected the applications.

The Texas Supreme Court first analyzed the "fair and reasonable offer" requirement for a MIPA application. Because that phrase is not defined in MIPA, its application is subject to the Railroad Commission's discretion, to which courts give substantial deference. In the Court's view, the Railroad Commission was acting within its reasonable discretion, because EOG's wells, as permitted, did not drain the riverbed tract, and Ammonite made no effort to show that it was possible for EOG to modify its drilling plans or extend its existing wells to reach the riverbed.

The Court noted that MIPA requires pooling orders to afford each owner a "fair share," yet Ammonite was effectively seeking a share of EOG's production without contributing any minerals of its own. Further, the Court pointed to EOG's unchallenged expert testimony, and reasoned that requiring EOG to give Ammonite a share of production without anything in return would increase the risk that the wells would not be commercially viable.

Ammonite made a number of arguments that were rejected by the Court, and the Court's reasoning may be notable to practitioners. Ammonite argued that its offers were fair and reasonable when made because, at that time, "it would have required little additional drilling for each well to reach the riverbed tracts." The Court rejected this argument, reasoning that Ammonite's offers were based solely on the wells as they were permitted, which would not reach or produce riverbed minerals. In the Court's view, in order to be fair and reasonable, Ammonite would have had to propose and demonstrate the feasibility of different drilling, extending the wells, or of drilling additional wells. Ammonite's offers did neither, and therefore the Court held the Railroad Commission could reasonably hold they were unreasonable on their face.

The Court then turned to the Railroad Commission's second basis for rejecting Ammonite's application: its finding that Ammonite's requested order would not prevent waste or protect correlative rights. In the Court's view, waste is something that "reduces or tends to reduce the total ultimate recovery of oil … from any pool." "Correlative rights guarantee a mineral interest owner an opportunity to produce a 'fair share' of the reserves underlying his land." Ammonite argued that the location of EOG's wells leaves

Ammonite's riverbed mineral stranded, thereby resulting in waste and denying Ammonite its fair share. In the Court's view, even if Ammonite's riverbed minerals were left stranded, a forced-pooling order would not change that because EOG's wells were already drilled and producing at the time of the Railroad Commission's order, and those wells cannot produce riverbed minerals. Ammonite characterized EOG's expert testimony that future technology might allow riverbed drilling as "beyond speculative," but the Court rejected that argument explaining that Ammonite had the burden of proof and failed to put on any rebuttal expert testimony.

Ammonite also argued that a forced pooling order at this time would still prevent waste by incentivizing EOG to drill new wells or rework existing ones to extend into the riverbed. In the Court's view, the Commission's refusal to stretch its "limited authority to force pooling this far" was not unreasonable and was consistent with its prior decisions of refusing to exercise MIPA authority without proof of existing drainage. The Court also cited commentary explaining that, if additional drilling is required to drain the acreage sought to be pooled, then the requested force pooling should be denied in order to avoid the drilling of unnecessary wells.

Ammonite also argued that EOG should have originally proposed the wells to extend into the riverbed. The Court rejected that argument, as there was no proof that Ammonite offered its consent to that drilling, and Ammonite made no attempt to prove that it would have been technically or commercially feasible for EOG to do so.

# Tackling Free-Use and At-The-Well Royalties

*Carl v. Hilcorp Energy Co., 689 S.W.3d 894, 896 (Tex. 2024) on questions certified in Carl as Co-Tr. of Carl/White Tr. v. Hilcorp Energy Co., 91 F.4th 311, 313 (5th Cir. 2024).*

*By: M. Alejandra Salas*

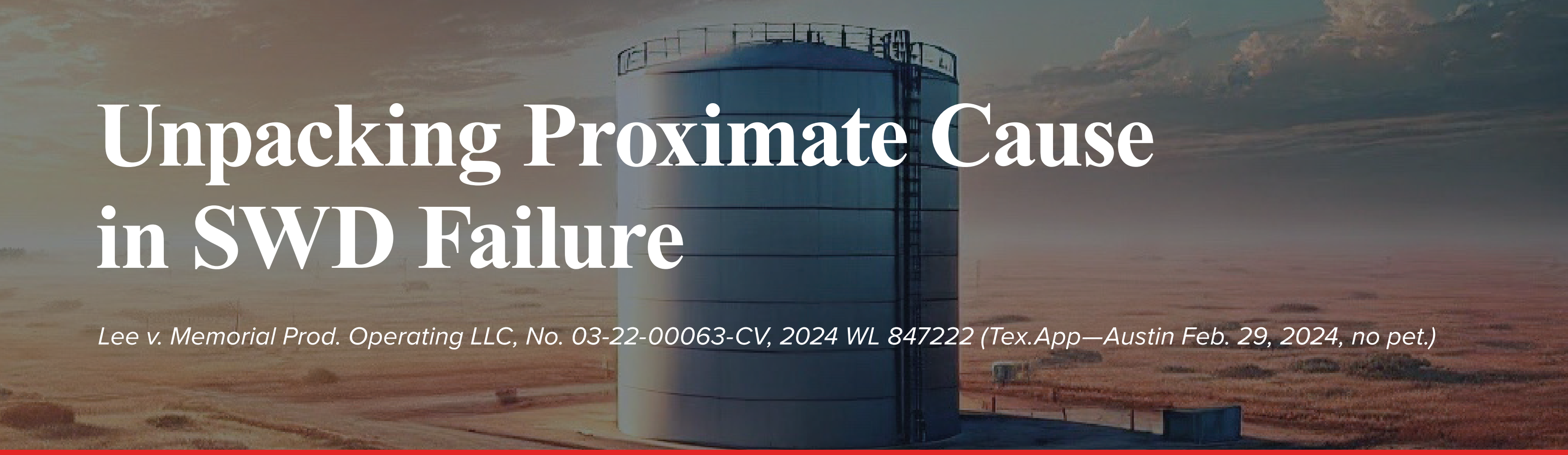
This lease royalty case involved a dispute over whether the lessee was permitted to deduct volumes of gas used off the premises to power post-production activities on other gas produced from the same well.

The lease provided for a royalty calculated based on the "market value at the well." The lessor acknowledged that this "at the well" language, if standing alone, would generally entitle the lessee to deduct volumes of gas used in post-production activities. However, the lessor argued that two additional lease provisions modified that result. The Texas Supreme Court disagreed.

First, the lessor relied on a portion of the royalty clause indicating that royalty was due "on gas … produced from said land and sold or used off the premises." The lessor argued that this meant royalty was due on all volumes produced and used off the premises, which would not allow removal of fuel gas volumes used off premises when calculating royalty. The Court disagreed, reasoning that although the lessee was obligated to pay a royalty on all gas produced, the lessee was entitled to convert its downstream sales price into an at-the-well market value by deducting from its sales price the value of the gas that was used off the premises to prepare other royalty-bearing gas for sale. In the Court's view, when the value was calculated in this manner, the lessor was still paid on all volumes of gas produced.

The lessor also relied on a free-use clause, which provided "Lessee shall have free use of oil [and] gas for all operations hereunder, and the royalty shall be computed after deducting any so used." The lessor argued that this meant the lessee was only allowed free use of gas for operations on the leased premises, and was therefore required to pay a royalty for gas used in operations off the leased premises. The Court rejected that argument, reasoning that it was irrelevant whether the lessee was allowed free-use of certain gas, because that would not change the fact the lessor held an at-the-well royalty which meant it must share in post-production costs.

The lessor relied on *BlueStone Nat. Res. II, LLC v. Randle*, 620 S.W.3d 380, 387 (Tex. 2021), where the Texas Supreme Court held that a free-use clause allowing free use of gas used "in all operations … hereunder," meant the lessee was entitled to free on-lease use of gas, but did not entitle the lessee to free use of gas off the leased premises. The Court distinguished Randle, reasoning that it involved a "gross proceeds" royalty which generally does not bear post-production costs and "so the question of how to account for post-production costs was not before the Court at all in Randle." Further, in the Court's view, nothing in Randle suggests that a free-use clause can change an at-the-well royalty holder's obligation to bear its share of post-production costs.



# Unpacking Proximate Cause in SWD Failure

*Lee v. Memorial Prod. Operating LLC, No. 03-22-00063-CV, 2024 WL 847222 (Tex.App—Austin Feb. 29, 2024, no pet.)*

*By: Austin W. Brister*

Saltwater disposal wells rarely fail, but when they do, a complex web of legal issues can arise, such as potential regulatory matters, and potential claims for surface or subsurface damages, among other related operational concerns. A recent SWD failure case dives into critical questions of proximate cause and explores whether the reasonable prudent operator defense may shield against surface damage claims.

In this case, surface owners (members of the Lee family) brought suit against multiple prior operators for damages to the Lees' cattle operation and enjoyment of their Cedar Mountain Ranch in Coke County, arising from the failure of a saltwater disposal well that caused a large volume of saltwater to flow onto their property. A jury found in favor of the operators and the trial court rendered a take-nothing judgment; this appeal followed.

The well at issue (the SWD5) was originally drilled for oil and gas production in 1957, but it was converted into a saltwater-disposal well around 2007. Ownership and operation of the SWD5 changed hands several times in the following years. In September of 2014, Memorial injected volumes exceeding the permitted limits on several days, and on September 25, 2014 the wellbore failed causing a massive quantity of fluid to gush out of the ground causing significant alleged damages. The Lees were unhappy with the remediation efforts and brought suit.

Investigation revealed that there was severe degradation of the well's tubing and casing. The SWD5 had a mechanical packer installed at 4,492 feet, which was within 100 feet above the injection zone, as required by the Railroad Commission to prevent injected water from flowing up the wellbore. However, investigation revealed that there was also a second, undisclosed EE Packer was discovered at just 260 feet below the surface. The EE packer was not designed to function as a mechanical packer, and the Lees contended that it violated multiple regulatory requirements including reporting requirements, rules allowing only one packer and rules prohibiting the placement of a packer higher than 150 feet below the base of useable quality water.

The Lees asserted numerous causes of action, including negligence, nuisance, trespass, and a claim under Tex. Nat. Res. Code § 85.321 for alleged violation of several Railroad Commission rules and terms of the related disposal permit. The appeal primarily focused on procedural issues. However, some of the substantive oil and gas arguments and issues in this case may be notable as a case study for oil and gas practitioners.

For instance, the prior operators obtained leave to file an amended answer after the scheduling-order deadline which asserted the reasonably-prudent-operator defense expressly provided under Tex. Nat. Res. Code § 85.321. The Lees claimed this was an abuse of discretion arguing the defense was "legally futile" because the Lees interpreted the text of § 85.321 as limiting this defense to claims for "waste" to mineral interests, whereas the Lees were only claiming conventional surface damages and personal losses. The appellate court rejected each of these points of error on procedural grounds, reasoning that the "legally futile" analysis was not applicable since this was not a jurisdictional pleading issue, and holding that the proper analysis was whether the amendment would cause surprise or prejudice which the court reasoned could not be shown here because the asserted defense was part of the same statute under which the Lees brought their claim.

The Lees also claimed the trial court erred in dismissing their claims for breach of an oil and gas lease (in the form of a partial summary judgment and a directed verdict. In the appellate court's view, although the Lees produced evidence that they owned the surface estate, they failed to produce evidence that they were the successor owners of the mineral estate and thus successor lessors under the lease. As a result, in the court's view, this also rendered it immaterial whether the Lees proved that the defendants were successor lessees under the lease. Moreover, although the Lees presented evidence of a surface use agreement between the Lees and one of the defendants, in the appellate court's view that was immaterial because it was not the contract the Lees contend was breached.

The Lees also argued that the trial court made several errors relating to the jury charge, but the court held that the Lees failed to preserve these issues for appeal. Also, while the Lees contended that the charge should have included an instruction stating that compliance with Texas Railroad Commission cleanup standards is not a defense to civil liability, in the appellate court's view that was not reversible error because the related charge pertained to apportionment of damages caused by the breakout and nothing mentioned compliance with remediation standards. Also, the court found no error in the trial court's refusal to include a trespass charge, reasoning that there was no evidence that the defendants intentionally operated the well with the EE Packer. Moreover, in the court's view, any potential error was harmless, reasoning that the reasonable prudence of the defendants was part of the trial court's definition of negligence and therefore the jury would not have found trespass either.

Finally, the Lees challenged the legal and factual sufficiency of the evidence supporting the jury's finding of no negligence. In the court's view, even assuming the regulatory violations constituted negligence *per se*, the Lees failed to prove that such negligence proximately caused their damages. The operators denied knowledge of the EE Packer's installation, there was conflicting evidence about who installed it and when, and it was up to the jury to weight the evidence. Moreover, the court reasoned that the jury could have reasonably concluded that the EE Packer was the sole cause of the breakout but that the Lees failed to prove that any of the defendants installed it.

# Can PGP Qualify for Condemnation Authority?

*Right-Way Sand Co. v. S. Tex. Pipelines LLC, No. 01-23-00573-CV, 2024 WL 1862861 (Tex. App.—Houston [1st Dist.] Apr. 30, 2024, pet. filed)*

*By: M. Alejandra Salas*

The issue in this case was whether South Texas Pipelines LLC ("STX"), a subsidiary of Enterprise Products Partners L.P., had the power of eminent domain to condemn an easement across the appellants' ("Landowners") land for a new pipeline to transport polymer grade propylene (PGP).

STX filed suit against the Landowners seeking to exercise statutory power to condemn an easement. In response, the Landowners challenged STX's power to condemn, arguing that the PGP that STX sought to transport was not a substance qualifying for the power of eminent domain granted to pipelines under Texas statutes.

In *Hlavinka v. HSC Pipeline P'ship, LLC*, 650 S.W.3d 483, 494 (Tex. 2022), the Texas Supreme Court held that PGP is an "oil product" qualifying for statutory condemnation authority under section 2.105 of the Business Organizations Code because it is derived from crude oil. The Landowners sought to distinguish Hlavinka arguing that the PGP in Hlavinka which was derived from the catalytic fracturing and distillation of oil, whereas the PGP that STX would transport "might" come from the dehydrogenation of propane from a gas well rather than from crude petroleum or oil.

The appellate court rejected the Landowners' argument, reasoning that Tex. Nat. Res. Code §111.019 provides the power of eminent domain in relation to "crude petroleum," which the Hlavinka court held includes natural gas liquids. The court also cited to several definitions under Tex. Nat. Res. Code § 115.001(3), (5), and (7)(X), and concluded that the PGP produced by processing gas from a gas well through dehydrogenation would constitute a "petroleum product" since that phrase includes "liquid … derived from … gas." Further, because these definitions define "oil" as including "crude petroleum oil," and because PGP is a "petroleum product," in the court's view PGP produced from dehydrogenated gas would also necessarily be an "oil product' under section 2.105 of the Business Organizations Code.

# Broad Assignments & Deep Disputes: Decoding Depth Descriptions

*Occidental Permian, Ltd. v. Citation 2002 Inv. LLC, 689 S.W.3d 899 (Tex. 2024)*

By: Austin W. Brister

Assignments of oil and gas leases often consist of broad and abstract granting clause in the body, which then points to an exhibit for a listing of the specific interests being assigned, and it is not uncommon for the attached exhibits to contain descriptive information regarding rights and interests within those leases, such as relevant wellbores, tracts or depths. Where the instruments are not clear, this can sometimes lead to disagreement as to whether the descriptive information is intended to limit the scope of the assignment, or to merely serve as helpful descriptive information.

In 2020, the Texas Supreme Court released its opinion in *Piranha Partners v. Neuhoff*, addressing how to interpret an assignment with broad language in the body, and descriptive information in the exhibit, and held that when properly harmonized the descriptive information in the exhibit was descriptive rather than limiting.

The Texas Supreme Court revisited the issue of harmonizing an assignment's broad body and descriptive exhibits in the recent case, *Occidental Permian, Ltd. v. Citation 2002 Inv. LLC*. That case focused on a 1987 assignment of a large acreage bundle of Texas oil and gas properties, from a predecessor of Occidental Permian, Ltd. et al (Occidental) to a predecessor of Citation 2002 Investment LLC (Citation). The body of the assignment contained multiple granting clauses, one which assigned "all of [assignor's] right, title and interest in and to the oil and gas fee, mineral and leasehold estates described in EXHIBIT A" and another that assigned "all of [assignor's] right, title and interest in and to any contracts or agreements, including, but not limited to [...] rights above or below certain footage depths or geological formations, affecting the property described in EXHIBIT A." The assignment stated "[i]t is the intent of this ASSIGNMENT to transfer [...] all rights and interests now owned by [assignor ...] in the leases and other rights described herein, regardless of whether same may be incorrectly described or omitted from Exhibit A."

The attached Exhibit A consisted of numerous pages of spreadsheet entries that described the assigned leases. A few rows not only described assigned leases, but also contained entries in neighboring columns that described (a) tracts of land within those leases, some of which also included a depth description, such as "Sec 28: W1/2 SE1/4, from 8,361 feet to 8,393 feet" and (b) related agreements under which third parties had interests that encumbered those leases (such as a farmout agreement).

Occidental contended that these depth descriptions effectively reserved the "deep rights" in those leases. Citation, on the other hand, claimed that those entries did not limit the scope of the assignment, but instead merely identified portions of the interests that were subject to the described agreements and third-party interests.

The Texas Supreme Court began by recognizing that the first granting clause pertained to leases, while the second granting clause pertained to contract rights, whereas only the second granting clause specifically instructs that depth specifications on the exhibit were not determinative. In the court's view, that reflected a separation between leasehold estates which would not be depth limited, versus contract rights that may be depth limited. The court said the final "intent" clause confirmed that reading, as it clarifies that the intent was to assign all of the assignor's interest in the "leases" that were "described herein," "regardless of whether same may be incorrectly described or omitted." In the court's view, that language reflected an intent to assign all interests in the described leases without limitation, and was not consistent with an interpretation that the assignor intended to reserve deep rights in the leasehold interests.

Occidental argued that this final clause was an overly broad Mother Hubbard clause that could not be read to effectively remove the assignor's reservation of portions of the leases. The court recognized that a Mother Hubbard clause is "a catch-all for small, overlooked interests," but that it "is not effective to convey a significant property interest not adequately described in the deed." However, in the court's view, this final clause was not a Mother Hubbard clause, and was instead "a general grant of conveyance" that expressly "transfer[s] and convey[s]" the leasehold interests listed, consistent with the first granting clause that "plainly grants" all of the assignor's rights in the leases. The fact that a final sentence expressly reserved future interests acquired by the assignor in the same properties reflected the intended scope of reservations, in the court's view, which did not encompass a reservation of interests deeper than the depth descriptions.

Occidental argued that this interpretation was improper because it would render the depth descriptions meaningless. The court disagreed, pointing out that in *Piranha* the court held that an exhibit to an assignment set forth descriptions of tracts found within each conveyed estate for descriptive purposes without serving to reserve interests.

Occidental also argued that the assignment's use of "subject to" in several locations demands a limited reading of the depth descriptions. The court disagreed, pointing out that while a "subject to" clause can serve to limit the scope of a conveyance, they are also "widely used for other purposes," such as notifying the grantee of an outstanding right or obligation affecting the property. In the court's view, the proper reading of the descriptions on Exhibit A were that they provided notice that the assigned leasehold interests were "subject to" certain burdens and existing operations. The court explained its reasoning, stating that neither the "subject to" clauses, the body of the assignment, nor the exhibits indicated that the depth descriptions in the exhibit were intended to reserve portions of the assigned leases to the assignor. Instead, the court reasoned that the "subject to" language pointed to terms and conditions, none of which directed that Exhibit A limits the scope of leasehold interests assigned.

Occidental argued that two entries conflicted with this interpretation, because they did not correspond to a third party interest described in the same row. The court rejected that argument, stating "[a] grantor who intends to reserve specific interests while otherwise granting all of its 'right, title and interest' in the described estate must do so explicitly." In the court's view, two potentially conflicting spreadsheet entries "are insufficient to constitute a reservation of rights not expressed in the Assignment or Exhibit A."

# NEW ATTORNEY ANNOUNCEMENT

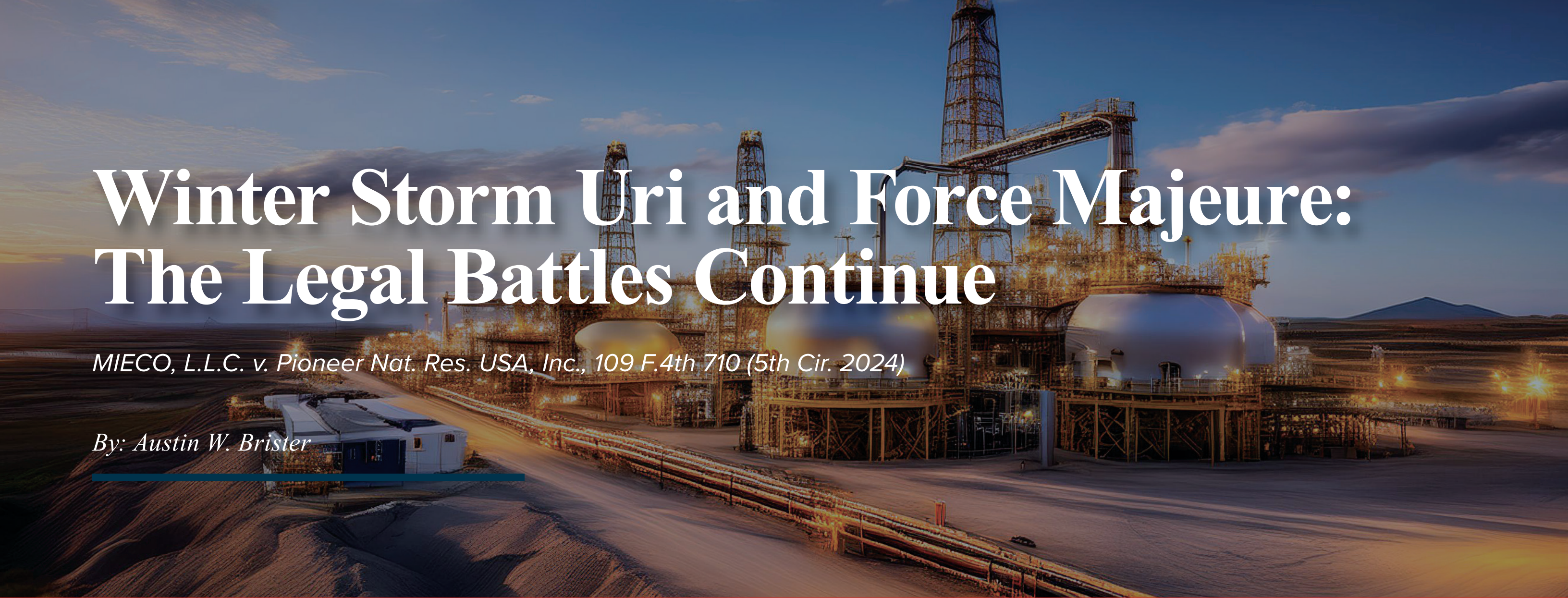
## McGinnis Lochridge Welcomes Elizabeth H. Lawrence

We are pleased to welcome Elizabeth H. Lawrence as an associate attorney in Houston. She joins the firm's Oil & Gas Practice Group where she represents clients in oil & gas related litigation.

After earning a bachelor's degree in applied mathematics, a master's degree in secondary education, and teaching high school mathematics for several years, Elizabeth earned her J.D. from the University of Louisville, Brandeis School of Law, where she graduated summa cum laude.

Elizabeth spent the last few years practicing commercial litigation in Kentucky and Texas, where she is licensed in both states. Elizabeth has won multiple summary judgments, one appeal, and obtained her client's release from imprisonment pending appeal on motion to the United States Court of Appeals for the Sixth Circuit. Elizabeth's practice includes a wide range of commercial litigation matters with a focus on oil and gas issues.

*Elizabeth H. Lawrence*



# Winter Storm Uri and Force Majeure: The Legal Battles Continue

*MIECO, L.L.C. v. Pioneer Nat. Res. USA, Inc., 109 F.4th 710 (5th Cir. 2024)*

*By: Austin W. Brister*

Winter Storm Uri sent shockwaves through Texas, freezing gas supplies at a time of critical need and plunging the state into widespread power outages. In the aftermath, the courts have been flooded with force majeure claims, many of them hinging on widely used contracts like the NAESB model form. This recent case delves deep into pivotal force majeure issues tied to the NAESB form and arising out of Winter Storm Uri. With these common strings, this case could have implications (small or large) for other similar pending disputes across the state.

In this case, the Fifth Circuit analyzed a customized NAESB in the context of a dispute as to whether a force majeure clause applied to excuse a producer's failure to supply gas in the aftermath of Winter Storm Uri, whether it obligated the producer to procure spot market gas when their own production was disrupted by the force majeure event.

Pioneer Natural Resources USA, Inc. ("Pioneer"), a natural gas producer operating in the Permian Basin, entered into a firm contract with MIECO, L.L.C. ("MIECO"), an energy trading firm. The parties used a North American Energy Standards Board ("NAESB") Base Contract for Sale and Purchase of Natural Gas, but included some custom modifications, including some modifications to the force majeure provisions. Under the contract, Pioneer agreed to deliver 20,000 MMBtu of natural gas daily to MIECO at the Ehrenberg pooling hub on the Arizona-California border.

Pioneer produces natural gas in the Permian Basin as a byproduct of its crude oil extraction operations and sends it to Targa Pipeline Mid-Continent WestTex ("Targa") for processing. After processing, Targa returns the residue gas to Pioneer, and Pioneer considers that residue its "gas supply" for sales to customers like MIECO. When production is insufficient to meet contractual demands, Pioneer occasionally purchases supplemental gas on the spot market.

In February 2021, during Winter Storm Uri, Pioneer failed to deliver the contracted amounts of gas from February 14 to 19. Pioneer did not provide replacement gas, and MIECO had to purchase replacement gas on the spot market at significantly higher prices, incurring approximately $9 million in additional costs. MIECO sued Pioneer for breach of contract, seeking damages for the cost differential.

The underlying NAESB contained three force majeure provisions:

> **Section 11.1:** "Neither party shall be liable ... for failure to perform ... caused by Force Majeure," which it defined as including an event that "prevents one party from performing its obligations ... and which, by the exercise of due diligence, the claiming party is unable to overcome or avoid."
>
> **Section 11.2:** Indicated that FM included weather-related events causing regional freezing of pipelines, but said "Seller and Buyer shall make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event ... in order to resume performance."
>
> **Section 11.3:** Indicated that a loss or failure of "Seller's gas supply" would qualify as FM only pursuant to Section 11.2.

The district court granted summary judgment in favor of Pioneer, holding that Pioneer properly invoked the force majeure clause and was not obligated to procure spot market gas. MIECO appealed, challenging the court's interpretation of the force majeure provisions and arguing that genuine issues of material fact precluded summary judgment.

The Fifth Circuit interpreted the force majeure provisions under New York law as specified in the contract, but it noted that New York law on these issues appeared consistent with Texas law. The court addressed four primary issues: whether "prevent" requires impossibility, whether the phrase "Seller's gas supply" included replacement gas from spot markets, whether the force majeure provision excused Pioneer from seeking replacement gas, and whether there were genuine issues of material facts that precluded summary judgment.

First, regarding the term "prevent," MIECO argued that it required Pioneer to demonstrate that performance was rendered literally impossible by the force majeure event. The court referenced several dictionary definitions and concluded that the ordinary meaning of "prevent" also includes hindering or impeding performance, not just making it impossible. Further, in the court's view, interpreting "prevent" to require impossibility would render other provisions of the force majeure clause superfluous, such as the requirement for the claiming party to be "unable to overcome or avoid" the event by exercising due diligence. The court reasoned that, if "prevent" meant "impossible," then there would be no reason to add this further provision and it would be impermissibly rendered meaningless. The court also said that interpreting "prevent" to mean "impossible" would render the force majeure provision superfluous with the common law defense of impossibility, which would be inconsistent with the parties' intent in negotiating an express force majeure provision.

The court also relied on its prior decision in *Ergon-West Virginia, Inc. v. Dynegy Marketing & Trade*, 706 F.3d 419 (5th Cir. 2013), where the court refused to read the phrase "rendered unable" to require proof that no gas was available on spot markets, reasoning that it would render the force majeure provision meaningless since some gas would always be available somewhere in the world at some price. In the MEICO court's view, that case "counsels strongly" against reading the word "prevent" to mean "make impossible." The court also noted that multiple other recent cases have issued similar holdings.

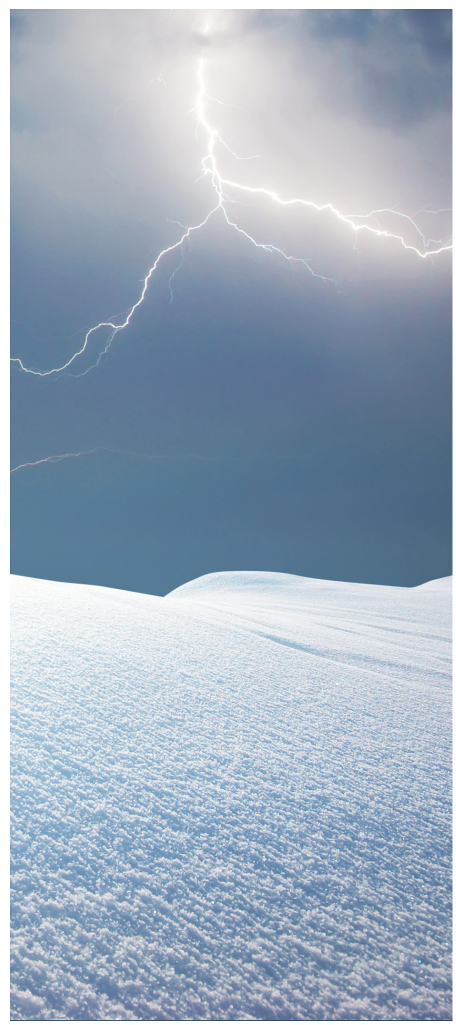
Regarding the meaning of "Seller's gas supply," MIECO contended that it included gas available on the spot market that Pioneer could have purchased to fulfill its contractual obligations. The court rejected this argument, interpreting "Seller's gas supply" to refer only to the gas Pioneer produced and processed through Targa in the Permian Basin. In the court's view, the possessive "Seller's" indicates ownership or control, which would not extend to gas available for purchase on the spot market, and because Pioneer is a producer and not a reseller, the court reasoned that its "gas supply" naturally refers to its own production.

The court went further, stating that even if the contract were ambiguous, the extrinsic evidence in the record would lead to the same result. For example, the court reviewed a history of NAESB rejecting amendments to its contract that it said could have imposed obligations to procure spot market gas, and suggested that history shows that the current NAESB form does not include spot market gas within the phrase "Seller's gas supply."

Although the court affirmed the district court's interpretation of the contract, the Fifth Circuit held that summary judgment was improper because there were unresolved factual disputes. For instance, the court found that there were genuine issues of fact regarding whether Winter Storm Uri actually "prevented" Pioneer's performance and whether Pioneer exercised "due diligence" and ma[d]e "reasonable efforts to avoid the adverse impacts of a Force Majeure."

The court also held that Pioneer's interpretation—that its obligations were completely excused when it lost its gas supply due to Uri—would render meaningless the additional requirements to exercise "due diligence" and "make reasonable efforts." In the court's view, the requirement to "make reasonable efforts to avoid the adverse impacts of a Force Majeure and to resolve the event or occurrence once it has occurred in order to resume performance" imposes two independent requirements, including a duty to make reasonable efforts to avoid the adverse impacts, not just to overcome the force majeure event itself. Thus, whether Pioneer met this obligation was a question of fact unsuitable for summary judgment.

This case is notable for its illustration of how courts may interpret force majeure provisions, particularly in the context of NAESB contracts, extreme weather events, and the relevance of spot market replacement gas. It also underscores that, even where a force majeure provision is triggered, a party may have further obligations such efforts to mitigate the effects as well as efforts to overcome the force majeure event.



# Who Can Enforce Surface Provisions in an OGL?

*Unitex WI, LLC v. CT Land & Cattle Co., LLC, No. 07-23-00390-CV, 2024 WL 3249338 (Tex. App.—Amarillo June 28, 2024, pet. filed)*

*By: M. Alejandra Salas*

Mineral owners are often subject to general oil and gas lease forms that include provisions benefitting the surface estate. But, when they own no interest in the surface, who, if anyone, has the right to enforce those provisions?

In this case, CT Land and Cattle and Cattle Co., LLC sought to enforce a provision in a 1948 mineral lease requiring Unitex WI, LLC and Unitex Oil and Gas, LLC (Unitex) to bury pipelines on the ranch land surface CT Land acquired in 2013. Minerals had been developed from the property over the years, and pipelines existed on the land when CT Land purchased it. In 2019, CT Land invoked the burial provision in the mineral lease and sued Unitex for breach of the lease and for declaratory relief when Unitex refused to comply. After a bench trial, the trial court ruled in favor of CT Land, finding that CT Land had the right to enforce the pipeline burial provision and that Unitex was required to bury all pipelines constructed under the 1948 lease below plow depth as quickly as reasonably practicable. Unitex appealed this finding.

On appeal, among other things, the court examined whether CT Land could enforce the pipeline burial provision in the mineral lease. Notably, the lease specified that the "Lessee" was required to bury pipelines below plow depth when requested by the "Lessor." CT Land was not a party to the original lease, nor a lessor. Nevertheless, CT Land argued that the surface deed from Andrew P. Fuller Revocable Trust (the Trust) to its predecessors (the Senns) conveyed the rights of the lessor, including the right to enforce the burial provision because that conveyance was made "subject to" the mineral lease. CT Land argued that by rendering the conveyance to the Senns "subject to" that lease, the Senns (and ultimately CT Land) "were 'assigned the rights, interests, and obligations of the lessor under the Lease which pertain to the surface estate.'" The appellate court disagreed with CT Land's interpretation of the "subject to" clause, finding that it merely limited the estate being conveyed by acknowledging the existing mineral lease but did not create new rights for the surface owners. Thus, the burial covenant remained with the lessor's estate and did not pass to the Senns or CT Land.

Citing two Fifth Circuit cases, CT Land also argued that the burial provision ran with the land, meaning that it could be enforced by successive surface owners. After noting that federal precedent is not binding in Texas state courts, except on issues of federal law, the court explained that the cases cited by CT Land also suggested that covenants running with the land could be limited or abrogated under certain conditions, such as when the parties expressly detached the covenant.

Turning CT Land's argument, the court emphasized that the 1948 lease specifically granted the right to require burial of the pipelines to the "Lessor," which included the original lessors, their heirs, successors, or assigns. Importantly though, the lease did not extend this right to future surface owners. The court found that had the original parties to the lease intended for the covenant to be enforceable by subsequent surface owners, they could have explicitly used language to that effect. Their failure to do so, the court found, indicated an intent for the right to be exclusive to the lessor and those holding the lessor's interest under the lease.

The court also found that the burial provision had been effectively detached from the surface estate through the "subject to" clause in the deed that conveyed the property to CT Land's predecessors. According to the court, the "subject to" clause limited the estate being conveyed by making it subordinate to the existing mineral lease, but it did not transfer the lessor's rights to the surface owners. Moreover, the court reemphasized that the Trust reserved mineral rights and the right to use the surface for mineral development, including the right to lay pipelines. This reservation of rights further indicated that the burial covenant remained with the lessor's estate and was not passed to subsequent surface owners. If CT Land were allowed to enforce the burial provision, it would conflict with the Trust's reserved rights to use the surface for mineral development.

# New Business Courts: Strategic Considerations for Oil and Gas Counsel

*By: Austin W. Brister and Ashley N. Vega*

## Introduction

On September 1, 2024, Texas unveiled a significant change to its legal landscape: the opening of the new Texas Business Courts, which, for now, is comprised of five separate divisions. This new specialized court system, designed to handle complex commercial disputes, represents a major shift in how high-stakes business litigation may be conducted in the Lone Star State. For in-house counsel in the oil and gas industry, this development warrants close attention and careful consideration.

The Texas Business Courts will potentially impact a wide range of cases, from high-value contract disputes to intricate corporate governance issues. As with any substantial change to the legal system, this new court structure brings with it a host of potential questions, challenges, strategies, and other considerations.

For example:

- How will the limited jurisdiction of these new courts fit within the types of disputes common in the oil and gas sector?
- What strategic implications might arise from the Business Courts' mandate to issue written opinions, unlike their district court counterparts?
- What potential pros and cons may arise from submitting a case to the new Business Courts?
- How might existing agreements and future contracts be affected by this new forum?

This article aims to provide oil and gas in-house counsel with a practical overview of the new Texas Business Courts, as well as some potential impacts and strategic considerations. We'll examine the structure, jurisdiction, and procedural aspects of the new system, explore potential strategic considerations, and discuss the possible implications for the energy industry.

## Purpose and Intent

The Texas Business Courts aims to address what legislators identified as a growing need for specialized courts to handle complex business litigation. Twenty-nine other states have already created specialized business courts, and the Texas legislature saw the need to do the same to ensure that Texas remains an attractive state for companies to do business and resolve disputes.

The primary goals of this new system include:

- Creating more predictable outcomes for business disputes;
- Making Texas a more attractive venue for resolving commercial conflicts; and
- Improving efficiency in handling complex business cases.

Proponents of the Business Courts argue that this system will allow for the development of a specialized system for complex business litigation, not only allowing judges to develop specialized expertise but will also resulting in streamlined rules and concentrated dockets for certain major business dispute. Additionally, proponents argue that it will increase efficiency, as litigants in Business Courts will not have to compete for hearings and trial scheduling alongside the already busy, overburdened criminal and family law dockets.

## Initial Business Courts

The new law creates 11 multi-county Business Court divisions. However, initially, Texas will only open five divisions, representing the majority of the state's population and business base. The five initial divisions include:

- First Business Court Division, located in Dallas
- Third Business Court Division, located in Austin
- Fourth Business Court Division, located in San Antonio
- Eighth Business Court Division, located in Fort Worth
- Eleventh Business Court Division, located in Houston

Each Business Court division has been appointed two judges, each of whom will serve a two-year term. These five divisions are fully operational beginning September 1, 2024.

In addition, a newly created Fifteenth Court of Appeals will open September 1, 2024, based in Austin.

## Jurisdiction and Case Eligibility

The Texas Business Courts are courts of limited jurisdiction, as opposed to the general jurisdiction granted to state district courts under the Texas Constitution. Their limited jurisdiction, set forth in Texas Government Code Sec. 25A.004, is described by a detailed list of claims, with a variety of limitations, exceptions, and exclusions. The following is an overgeneralization of those categories for illustration.

### *1. Major Corporate Governance Claims*

One category covers what might be generally summarized as major corporate governance claims, including cases involving: (1) Derivative actions; (2) Corporate governance and internal corporate affairs issues; (3) Securities and trade regulation litigation cases against certain parties; (4) Actions by a business or its owner against another owner or officer; (5) Actions to hold owners or executives responsible for breaches of duty; (6) Actions to hold owners or governing persons liable for obligations of the business; and (7) Actions arising out of the Texas Business Organizations Code.

Key Threshold Requirement, Only for Non-Public Companies: For claims involving publicly traded companies there is no minimum amount in controversy to establish Business Court jurisdiction. However, for other entities, in order to establish Business Court jurisdiction, the claim must involve a minimum of $5 million in controversy

### *2. Major Contract/Transaction Disputes*

Another category covers what might be generally summarized as certain major contract or transactional disputes, including claims that:

(1) involve an amount in controversy exceeding $10 million; AND

(2) one of the following apply:

(a) the claim arises out of a “Qualified Transaction” (generally defined as one where a party pays or receives, or is required to pay or is entitled to receive, consideration with a value of more than $10 million, or lends or borrows more than $10 million, excluding those involving a bank, credit union, or savings and loan association);

(b) the parties agreed to Business Court jurisdiction in the underlying contract or in a subsequent contract (excluding insurance contracts); OR

(c) the claim arises out of a violation of the Texas Finance Code or the Business & Commerce Code, by an organization (or officer or governing person on its behalf) other than a bank, credit union, or savings and loan association.

### *3. Related Equitable Jurisdiction*

The statute also provides Business Courts with jurisdiction covering actions seeking injunctive relief or declaratory judgment involving disputes based on a claim otherwise within the Business Court’s jurisdiction.

### *4. Supplemental Jurisdiction*

The Business Courts may have supplemental jurisdiction over any other claims related to a case within the court's jurisdiction, but only if all parties to the claim and the judge agree. If the parties do not agree to the court’s supplemental jurisdiction, then the claims may proceed in a separate court, such as a state district court, concurrently with the claims pending in Business Court.

### *5. Exclusions from Jurisdiction*

Certain types of cases are expressly excluded from the jurisdictional reach of the Business Courts, except on a "supplemental" jurisdiction basis, including:

- Cases related to a consumer transaction;
- Deceptive Trade Practices Act claims;
- Free Enterprise and Antitrust Claims;
- Cases brought by or against a government entity;
- Cases to foreclose on a lien on real or personal property;
- Cases brought under the Family Code, Estates Code, Insurance Code, and Chapter 53 and Title 9 of the Property Code;
- Cases involving the production or sale of farm products, under 9.102

of the Texas Business & Commerce Code; and

- Cases related to insurance coverage.
- Additionally, the following three types of cases cannot go to Business Court regardless of any supplemental jurisdiction:
- Cases involving medical malpractice;
- personal injury; and
- Cases involving legal malpractice.

## Key Considerations for Oil and Gas In-House Counsel:

- Many oil and gas contract disputes may meet the $10 million amount in controversy threshold, but the underlying contracts might not have involved $10 million in initial consideration or lending. For example, joint operating agreements or midstream contracts like gas purchase agreements often involve no initial monetary consideration but can lead to significant disputes in excess of $10 million. Disputes may arise as to whether the definition of "qualified transaction" is broad enough to encompass transactions with little or even no monetary consideration, but significant value over the life of the contract.
- If a contract or transaction does not qualify as a "qualified transaction," Business Court jurisdiction can still be established so long as the amount in controversy exceeds $10 million and the parties expressly agree to Business Court jurisdiction. Some commentators argue that a general "choice of business courts" provision will establish this element, while others suggest the clause should expressly incorporate supplemental claims.

## Jury Trial Rights and Appellate Process

Importantly, the right to a jury trial is preserved in the Business Court system. For cases originally filed in a district court, jury trials will likely be held in the same county where the plaintiff filed the lawsuit. For cases originally filed in the Business Court, the plaintiff will get to choose any proper county for a jury trial after pre-trial resolution by the Business Court.

Appeals from the Business Courts will be handled by the new Fifteenth Court of Appeals, with further discretionary review available from the Texas Supreme Court.

## Strategic Considerations for Oil and Gas Counsel

### *Assess pros and cons of new venue*

For cases filed on or after September 1, 2024, litigants will have the option to file qualifying cases directly in the Business Courts or transfer qualifying cases to the Business Courts. This creates new strategic considerations for where to file suits and whether to seek removal. Among those considerations:

- Assess the potential impact of having business court judges, who are appointed rather than elected, presiding over your cases, and how this might affect jury selection and trial strategy.
- Assess whether expedited resolution aligns with your litigation strategy for each case. While faster outcomes can be beneficial, they may not always serve your company's interests, particularly in complex, high-stakes disputes.
- Consider the potential impact on discovery timelines and motion practice. The specialized nature of the court may lead to more streamlined processes.
- Be prepared for a potentially different pace of litigation, which may require adjustments to your internal case management processes.

### *Choice of Forum/Venue Provisions*

One significant potential issue is the application of the existing body of Texas case law regarding choice of forum and venue to the new Business Court cases. Although there is a considerable body of Texas case law on the subject in general, it remains to be seen how those principles will be applied in the context of the new Business Courts.

Food for Thought: Consider amending existing agreements to include choice of forum and venue provisions that expressly agree to Business Court jurisdiction.

### *Evaluate Potential Written Opinions*

Consider the long-term implications of seeking written opinions in your cases. While they may provide clarity, they could also set unfavorable precedents.

Unlike state district courts, the Business Courts are required to issue written opinions for dispositive rulings when requested by the parties or when they are on issues important to state jurisprudence. Before diving head-first into the new Texas business courts, in-house counsel should consider the potential impact of written opinions on your company's business and legal strategies outside of the immediate dispute. Consider the following:

Potential Benefits: Proponents of the new Business Court argue that requiring written opinions at the lower court level will benefit Texas by speeding up the development of Texas law to guide Texas businesses, contract drafting and governance, and lead to a more well-developed body of law to provide more predictable outcomes in major disputes.

Potential Drawbacks: On the other hand, it is not always desirable to have written opinions at the lower court level. For instance, written opinions can significantly increase public awareness of the dispute and lower court outcome. Similarly, some may perceive a risk that an adverse written opinion could have far-reaching implications beyond the immediate case.

While it is not entirely clear the precedential weight such written opinions will carry on that same court, on other business courts, or on state district courts, they are likely to at least carry some persuasive authority. As a result, for better or for worse, lawyers will often benefit in the near future by expanding their legal research to cover potential Business Court opinions.

### *Anticipate Possible Constitutional Challenges*

A significant issue to be aware of is that several trial bar groups have promised to present constitutional challenges to the existence of the new Business Court system. In fact, some have already been filed and ruled upon by the Texas Supreme Court. The new Business Court law anticipated these challenges, placing exclusive jurisdiction to hear this type of litigation in the Texas Supreme Court, presumably hoping to dramatically shorten the amount of time to obtain a final ruling on any constitutional issues raised.

### *Anticipate Strategies to Avoid Business Courts*

While the Business Courts are intended to be ideal for certain complex business disputes, in reality, a core strategy of some litigants will likely be to avoid Business Court. A variety of motives could underly an attempt to avoid Business Court. For example, some may avoid Business Court out of a desire to avoid the delay, expense, or uncertainties posed by potential constitutional challenges or procedural issues. Others may attempt to avoid Business Court to avoid a particular judge or to guide the case to a district court they prefer. Some may desire to avoid the written opinions that will flow out of the Business Courts. Of course, in the world of complex commercial litigation, one should also anticipate opponents who may challenge jurisdiction for the primary purpose of delaying and complicating litigation.

There will likely be a variety of creative methods and strategies for avoiding Business Court. Counsel should be prepared to spot and counter such strategies. The most obvious substance of such disputes will center on whether a case qualifies under the various statutory criteria, limitations, or exceptions, and whether other claims can fall within the court's supplemental jurisdiction. Of course, others may attempt to add claims against third parties primarily for the purpose of avoiding a contractual choice of Business Courts provisions.

### *Removal and Remand*

Develop a decision-making framework for determining when to file in or seek removal to the Business Court. Factors might include the complexity of the case, desired speed of resolution, and the potential impact of a written opinion on your company's broader legal interests. Likewise, develop a decision-making framework for determining when to avoid Business Court. Unless all parties agree to the transfer, be aware of the 30-day deadline for removal after discovering facts establishing business court jurisdiction.

## Conclusion

The Texas Business Courts represent a significant shift in the state's approach to complex commercial litigation. For in-house counsel in the oil and gas industry, these courts offer both opportunities and challenges. With the opening of the Business Courts, it is crucial to:

- Consider your company's/client's goals for seeking or avoiding Business Court jurisdiction, and weigh the perceived pros and cons. As this is a developing area, this will likely require some monitoring for developments, and the goals and strategies may evolve over time.
- If your company/client prefer to seek Business Court jurisdiction, then consider amending existing contracts to ad-dress permissive or exclusive Business Court jurisdiction, especially for high-value transactions.
- Develop strategies to evaluate whether certain cases are, or are not, ideal for Business Court.
- Prepare your legal team for the nuances of this new specialized court system, including the impact of written opinions.
- Stay informed about developments, including potential constitutional challenges and early rulings.

By proactively adapting to this new system and carefully considering each case's unique circumstances, you can position your company/client with purpose, whether that means seeking to leverage the potential benefits of the Texas Business Courts while mitigating potential risks or avoiding the Texas Business Courts and its perceived risks and challenges.

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# Protecting Proprietary Information:
## Is a Confidentiality Agreement Enough?

*Frank Surveying Co., Inc. v. Harp, No. 3:22-CV-02837-B, 2024 WL 3625670 (N.D. Tex. Aug. 1, 2024)*

*By: M. Alejandra Salas*

Protecting proprietary information is a key concern for many businesses, and issues can arise when employees transition between competitors. While confidentiality agreements can play an important role in protecting trade secrets, companies sometimes face challenges in demonstrating whether they are sufficient, alone, to safeguard sensitive data. One recent case, involving surveying maps in the oil and gas industry, brings attention to the importance of having clear policies and procedures in place.

In this recent trade secret case, Frank Surveying Co., Inc. (FSC) accused its former employee, M. Dillion Harp, and his new employer, Manhard Consulting Limited, of misappropriating proprietary surveying maps. The case, heard in the Northern District of Texas, highlights the challenges some companies face in protecting their confidential information, even when employees sign confidentiality agreements.

The dispute centered around sensitive Base Map Files, which contained survey data and boundary information collected by FSC. Harp, a licensed surveyor, had signed a confidentiality agreement prohibiting him from sharing FSC's confidential information. However, FSC alleged that when Harp joined Manhard in November 2022, he took these sensitive files with him. The situation was further complicated by the fact that the files had been sent to a client while Harp was still employed at FSC and were later shared with Manhard for a project.

FSC filed suit against Harp, Manhard, and other FSC employees, claiming violations of the Defense Against Trade Secrets Act (DTSA) and breach of contract. The company moved for partial summary judgment on its DTSA claim against Harp and Manhard, as well as on the breach of contract claim against Harp. However, the court denied FSC's motion on both counts, citing several unresolved issues of material fact.

In evaluating the DTSA claim, the court considered six factors to determine whether the Base Map Files constituted trade secrets. While the files were not generally known outside FSC, the court found that many employees had access to them within the company. More critically, FSC's efforts to protect the secrecy of the information were deemed insufficient. The company had not labeled the files as confidential or trade secrets, nor had they trained employees to treat the information as particularly sensitive. Additionally, FSC regularly shared these files with clients upon request, without implementing additional safeguards.

The court also noted that FSC failed to provide sufficient evidence regarding the value of the Base Map Files to the company or its competitors, or the cost and effort involved in developing them. There was some indication that portions of the information in the files might be publicly available through state government websites, further complicating the trade secret status.

Regarding the breach of contract claim, the court identified two key issues. First, the court determined that FSC failed to prove that the confidentiality agreement was enforceable after Harp's employment ended. This was particularly relevant as FSC's main contention was that Harp breached the agreement by using the Base Map Files at Manhard after the company obtained them from the client. Second, there was insufficient evidence to conclusively determine whether Harp had actually shared the files with Manhard, either directly or indirectly.

This case underscores the importance of implementing multi-faceted measures to protect proprietary information, which may in some cases go beyond relying solely on confidentiality agreements. Companies should evaluate the sufficiency of labeling of sensitive documents, sufficiency of their access controls, training for employees, and company procedures for sharing sensitive data with third parties. Additionally, businesses should evaluate whether their confidentiality agreements specify the duration of the obligations, including whether they extend beyond the term of employment.

As many businesses increasingly rely on proprietary information for competitive advantage, this case serves as a reminder of the complexities involved in safeguarding trade secrets in the modern workplace.

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