

Oil and Gas, Natural Resources, and Energy Journal

Volume 5 | Number 2

The 2019 Survey on Oil & Gas


September 2019

Texas

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Recommended Citation

Don Hueske & Garrett Korbitz, *Texas*, 5 OIL & GAS, NAT. RESOURCES & ENERGY J. 281 (2019), <https://digitalcommons.law.ou.edu/onej/vol5/iss2/23>

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Oil and Gas, Natural Resources, and Energy Journal

VOLUME 5

NUMBER 2

TEXAS



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I. Introduction

The following is an update on Texas legislative activity and case law relating to oil, gas and mineral law from August 1, 2018 to July 31, 2019.

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II. Judicial Developments

A. Accommodation Doctrine

1. VirTex Operating Co. v. Bauerle, No. 04-16-00549-CV, 2017 WL 5162546, at *1 (Tex. App.—San Antonio Nov. 8, 2017) *rev. denied* (Mar. 29, 2019), *reh'g filed* (May 15, 2019) (mem. op.).

Robert Leon Bauerle and Cynthia Bauerle (“the Bauerles”) own and operate an 8,500-acre ranch, which they regularly lease to hunters.¹ The hunters utilize helicopters on the land, often flying between 4-5 feet above the ground to capture deer.²

VirTex Operating Co., Inc. and VirTex Producing Company, L.P. (“VirTex”) own and operate nine wells on the property.³ VirTex proposed an easement to the Baurles in order to replace the generators with overhead powerlines to run the pumpjacks associated with the wells.⁴ The Bauerles refused this proposal and asked VirTex to halt construction of the powerlines. VirTex obliged.⁵ The trial court found in favor of the Baurles, finding that VirTex’s proposal to install the overhead powerlines violated the accommodation doctrine and that VirTex breached the surface use agreement that they had with the Baurles.⁶

On appeal, VirTex argued that the Bauerles failed to prove the elements of the accommodation doctrine.⁷ First, VirTex claimed that the Baurles failed to prove that the proposed powerlines would completely or substantially impair existing hunting operations on the land.⁸ The court rejected this argument, finding that there was sufficient evidence for a jury to conclude that the powerlines would significantly limit the Bauerles’s and their lessee’s use of the land for hunting activities.⁹ The evidence demonstrated that flying helicopters on the property with the presence of these powerlines would

1. *VirTex Operating Co. v. Bauerle*, No. 04-16-00549-CV, 2017 WL 5162546, at *1 (Tex. App.—San Antonio Nov. 8, 2017), *rev. denied* (Mar. 29, 2019), *reh'g filed* (May 15, 2019) (mem. op.).

2. *Id.*

3. *Id.* at *2.

4. *Id.*

5. *Id.*

6. *Id.* at *3.

7. *Id.*

8. *Id.*

9. *Id.* at *7.

constitute “a very dangerous situation,” with some pilots even saying that they would no longer conduct the flights if the powerlines were to stay.¹⁰

VirTex next argued that the Baurles did not prove that there was not a reasonable alternative to these helicopter operations.¹¹ The court again rejected this argument. VirTex argued that there were reasonable alternatives, such as four wheelers, which could be used where the proposed powerlines would be placed.¹² Further, this would allow the use of helicopters on the other 5,500 acres where there would be no powerlines.¹³ The Baurles countered, claiming that due to the unpredictable nature of the deer and the amount of ground the hunters must cover, helicopters are the only reasonable means of conducting the captures.¹⁴ Two of the hunters who lease the property from the Baurles supported their counter argument and claimed that they would no longer lease the property if they were unable to conduct the deer captures via helicopter.¹⁵

Lastly, VirTex argued that the Baurles had not shown that there was a reasonable, customary and industry-accepted alternative available to VirTex.¹⁶ However, the court found the Bauerle’s proposals had satisfied this element.¹⁷ The Baurles proposed a number of reasonable alternatives to the overhead powerlines such as: continuing running the pumpjacks with the generators, underground powerlines, or running the pumpjacks with diesel or natural gas.¹⁸ Evidence showed that running the pumpjacks by natural gas or by underground powerlines were reasonable alternatives, despite resulting in additional costs to VirTex.¹⁹ An owner and officer of VirTex also testified that they could continue powering the pumpjacks with the generators and that they were using this more expensive method elsewhere.²⁰ The court did not find that the additional hardships or costs that these alternatives posed made them unreasonable.²¹

10. *Id.* at *5.

11. *Id.* at *3.

12. *Id.* at *8.

13. *Id.*

14. *Id.* at *7.

15. *Id.*

16. *Id.* at *3.

17. *Id.* at *10.

18. *Id.* at *9.

19. *Id.* at *9-10.

20. *Id.* at *10.

21. *Id.*

The appellate court affirmed the trial court's judgment and the supreme court has denied VirTex's petition to hear the case.²²

B. Force Majeure Events

1. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018) *rev. denied*, 2019 Tex. LEXIS 834 (Tex. Aug. 30, 2019).

TEC Olmos, LLC (“Olmos”) entered into a farmout agreement (“agreement”) with ConocoPhillips Company (“ConocoPhillips”) to test-drill land that ConocoPhillips had leased.²³ The parties agreed to a specific date by which drilling had to be completed, a \$500,000 liquidated damages provision if Olmos did not meet this deadline, and a force majeure provision that outlined different occurrences which would toll the drilling deadline.²⁴ These occurrences included “fire, flood, storm, act of God, governmental authority, labor disputes, war or any other cause not enumerated herein but which is beyond the reasonable control of the Party whose performance is affected. . . .”²⁵

The price of oil dropped significantly after the parties entered into the agreement causing Olmos to lose its financing for the project. Unable to secure other financing, Olmos failed to meet the drilling deadline. Olmos invoked the force majeure provision claiming that the sudden drop in oil prices was a covered occurrence. ConocoPhillips sought a declaration that the drop in oil prices was not a covered occurrence and that they were entitled to the \$500,000 liquidated damages. The trial court granted ConocoPhillips' motion for summary judgment.²⁶

Olmos appealed, arguing that fact issues precluded summary judgment on their invocation of the force majeure clause and regarding whether the liquidated damages provision was an unenforceable penalty.²⁷

Olmos first argued that the downturn in oil prices was a covered force majeure event because the catch-all provision covered “any other cause not enumerated herein but which is beyond the reasonable control of the Party

22. *Id.* at *13.

23. *TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W.3d 176 (Tex. App.—Houston [1st Dist.] 2018) *rev. denied*, 2019 Tex. LEXIS 834 (Tex. Aug. 30, 2019).

24. *Id.*

25. *Id.*

26. *Id.* at 180.

27. *Id.*

whose performance is affected.”²⁸ The court stated that, because the provision did not explicitly enumerate a drop in oil prices as a covered occurrence, the real issue is whether the catch-all provision includes events that are foreseeable.²⁹ The court held that a market downturn is a foreseeable event and is therefore not a covered force majeure occurrence.³⁰

The court also used the canon of construction, *ejusdem generis*, to come to this conclusion.³¹ This principle states that “the latter must be limited to things like the former.”³² The court found that the former in this case, “fire, flood, storm, act of God, governmental authority, labor disputes, [and] war,” were not like the latter, a sudden drop in oil prices.³³ The former constituted natural or man-made disasters which are foreseeable but happen so rarely that planning for them and allocating risks based on them is not practical.³⁴ The latter, on the other hand, occur fairly frequently and can be insured against through means other than a force majeure provision.³⁵

Olmos next claimed that the trial court erred in awarding ConocoPhillips the \$500,000 liquidated damages because such damages constituted an unenforceable penalty.³⁶ However, the court in *Phillips v. Phillips* found that these contractual damages provisions are enforceable if it is impossible or very difficult to estimate the amount of damages and the amount of damages is reasonable under the circumstances.³⁷ Olmos asserted that the second element was not satisfied because the amount of damages provided for at the time of the agreement was not necessarily reflective of the estimated amount of damages at the time of the breach.³⁸ The court, finding this was not the test, stated that the test looks to whether the provision is a reasonable estimate of the damages at the time of the agreement, not at the time of the breach.³⁹ The court found that the damages provided for at the time the parties entered into the agreement were reasonable under the circumstances.⁴⁰

28. *Id.* 181-182 (citing *Valero Transmission Co. v. Mitchell Energy Co.*, 743 S.W.2d 658, 660 (Tex. App. – Houston [1st Dist.] 1987)).

29. *Id.* at 182 (referencing *Valero Transmission Co.*, 743 S.W. 2d 658).

30. *Id.* at 183.

31. *Id.* at 185.

32. *Id.* (citing, e.g., *Ross v. St. Luke’s Episcopal Hosp.*, 462 S.W.3d 496, 504 (Tex. 2015)).

33. *Id.* at 186.

34. *Id.* at 184.

35. *Id.*

36. *Id.* at 187.

37. *Id.* (citing *Phillips v. Phillips*, 820 S.W.2d 785, 788 (Tex. 1991)).

38. *Id.*

39. *Id.*

40. *Id.* at 188.

Therefore, the court denied both of Olmos' arguments and affirmed the ruling of the trial court. Olmos has petitioned the Texas Supreme Court to review the court of appeals decision.⁴¹

C. Executive Duties

1. *Texas Outfitters Limited, LLC v. Nicholson*, 572 S.W.3d 647 (Tex. 2019).

In 2002, Texas Outfitters Limited, LLC ("Texas Outfitters") offered to buy the 1,082-acre Derby Ranch (the "Ranch") surface estate.⁴² The Carters owned 50% of the mineral interest and the Hindeses owned the other 50%.⁴³ In 2002, Texas Outfitters purchased from Dora Jo Carter the Carters' surface estate, the executive rights to the Carters' 50% mineral interest, and a 4.16% royalty interest.⁴⁴ Texas Outfitters was later approached with two lease offers which were rejected in order to protect Texas Outfitters' hunting business. The first offer was made in March 2010 and was for a 22% royalty and a \$450 per acre bonus.⁴⁵ The second offer was made in June 2010 and was for a 25% royalty and a \$1,750 per acre bonus.⁴⁶ The Hindeses received the second offer to lease their 50% mineral interest which they accepted.⁴⁷ The Carters, wanting Texas Outfitters to lease their mineral interest, eventually sued Texas Outfitters after a year of negotiating a settlement of this issue. The Carters claimed that Texas Outfitters failure to lease was a breach of its duty of utmost good faith and fair dealing.⁴⁸ Texas Outfitters continued to receive offers to lease the Carters' mineral interest but opted to sell the surface and executive rights to a third party.⁴⁹

The trial court found in favor of the Carters and awarded them \$867,654.32 in damages.⁵⁰ The court of appeals affirmed, and the supreme court granted Texas Outfitters' petition to hear their appeal.⁵¹

The supreme court, noted said that determining whether an executive breached its duty to a non-executive turned on "whether the executive

41. *Id.* at 185.

42. *Texas Outfitters Ltd. v. Nicholson*, 572 S.W.3d 647, 649 (Tex. 2019).

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 649-50.

47. *Id.* at 649.

48. *Id.* at 649-50.

49. *Id.* at 650.

50. *Id.* at 650-51.

51. *Id.* at 651-52.

engaged in acts of self-dealing that unfairly diminished the value of the non-executive interest.”⁵² The court relied on the following principal findings from the trial court in coming to their conclusion:

[B]y refusing the El Paso lease, Texas Outfitters “chose to gamble” with both its own mineral interest and the Carters' much larger interest knowing that the Carters did not want to take that gamble; Texas Outfitters refused the El Paso lease knowing the Hindeses had already leased their 50% interest to El Paso, thereby diminishing the potential pool of lessees; and refusing the lease allowed Texas Outfitters to retain unfettered use of the surface to operate its planned hunting operations and to sell the ranch at a profit free of any encumbrances.⁵³

The court, recognizing the difficulty in determining whether an executive has breached its duty of utmost good faith and fair dealing, affirmed the lower courts' rulings finding that there was legally sufficient evidence to support the claim that Texas Outfitters had breached their duty to the Carters.⁵⁴ The court focused on the evidence presented that showed it was common for other owners in the area who ran commercial hunting operations to lease the minerals to operators who accommodated the surface use.⁵⁵ The court concluded that this evidence sufficiently supported the trial court's conclusion that Texas Outfitters' self-dealing unfairly diminished the value of the Carters' non-executive interest.⁵⁶

D. Post Production Costs

1. *Burlington Res. Oil & Gas Co. LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198 (Tex. 2019), *reh'g denied* by 2019 Tex. LEXIS 549 (Tex. May 31, 2019).

In 2005 Texas Crude Energy, LLC (“Texas Crude”) and Burlington Resources Oil & Gas L.P. (“Burlington”) entered into a Prospect Development Agreement (“PDA”) and Joint Operating Agreement (“JOA”) for oil and gas leases in Live Oak, Karnes and Bee Counties.⁵⁷ Under these agreements, Burlington, the operator, would receive an 87.5% working

52. *Id.* at 649 (quoting *KCM Fin., LLC v. Bradshaw*, 457 S.W.3d 70, 74 (Tex. 2015)).

53. *Id.* at 654.

54. *Id.*

55. *Id.* at 656.

56. *Id.* at 657-58.

57. *Burlington Res. Oil & Gas Co. v. Texas Crude Energy, LLC*, 573 S.W.3d 198, 201 (Tex. 2019), *reh'g denied*, 2019 Tex. LEXIS 549 (Tex. May 31, 2019).

interest in the leases and Texas Crude would receive a 12.5% working interest.⁵⁸ In addition, Texas Crude would receive an overriding royalty interest of 0% to 6.25% on leases taken within the Area of Mutual Interest (“AMI”).⁵⁹

The assignments of the overriding royalties contained granting and valuation clauses which contained similar language.⁶⁰ The Granting Clause provided:

[Assignor] does hereby ASSIGN, TRANSFER AND CONVEY unto [Assignee], its successors and assigns, those certain overriding royalty interests, as set out below, in the quantity described below in all oil, gas, condensate, drip gasoline and other hydrocarbons that may be produced and saved from those lands covered by those certain oil, gas and mineral leases described in Exhibit “A” attached hereto and made a part hereof for all purposes, and pursuant to the terms and conditions of the said oil, gas and mineral leases. Said overriding royalty interests shall be delivered to ASSIGNEE *into the pipelines, tanks or other receptacles* with which the wells may be connected, free and clear of all development, operating, production and other costs. However, ASSIGNEE shall in every case bear and pay all windfall profits, production and severance taxes assessed against such overriding royalty interest.⁶¹

The Valuation Clause provided that the assignment “shall be subject to the following terms and conditions”:

The overriding royalty interest share of production shall be delivered to ASSIGNEE or to its credit *into the pipeline, tank or other receptacle* to which any well or wells on such lands may be connected, free and clear of all royalties and all other burdens and all costs and expenses except the taxes thereon or attributable thereto, or ASSIGNOR, at ASSIGNEE's election, shall pay to ASSIGNEE, for ASSIGNEE's overriding royalty oil, gas or other minerals, the applicable percentage of the value of the oil, gas or other minerals, as applicable, produced and saved under the leases. “Value”, as used in this Assignment, shall refer to (i) in the

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* (emphasis original).

event of an arm's length sale on the leases, the *amount realized* from such sale of such production and any products thereof, (ii) in the event of an arm's length sale off of the leases, the amount realized for the sale of such production and any products thereof, and (iii) in all other cases, the market value at the wells.⁶²

Texas Crude accepted royalty payments for nine years which reflected the deduction of post-production costs. The two parties began to have disagreements and Texas Crude eventually sued Burlington claiming that the Valuation Clause entitled them to royalties free of post-production costs. Burlington countered, arguing that the Granting Clause, Valuation Clause, PDA, and JOA, when read together, permitted them to deduct Texas Crude's share of post-production costs.⁶³

The trial court, finding that Texas Crude was entitled to its royalty free of post-production costs, granted its motion for partial summary judgment. The trial court, however, authorized an interlocutory appeal which the court of appeals accepted. The court of appeals affirmed the trial court's judgment and Burlington appealed to the supreme court.⁶⁴

The supreme court stated that the dispositive issue in the case is whether the parties agreed to an "at the well" valuation entitling Burlington the right to deduct post-production costs from the royalty it paid to Texas Crude.⁶⁵ In order to make this determination the court reviewed the Granting Clause, Valuation Clause, and JOA.⁶⁶ The court first looked to the Granting and Valuation Clauses.⁶⁷ On the one hand, the clauses contained "into the pipeline" language which would suggest an "at the well" valuation entitling Burlington to deduct post-production costs from its royalty payments.⁶⁸ On the other hand, the Valuation Clause contained "amount realized" language which suggests that post-productions costs should not have been deducted.⁶⁹ Burlington then pulled language from the JOA to support its interpretation.⁷⁰ Burlington cited the following provision claiming it was consistent with their interpretation of an "at the wellhead" pricing point:

62. *Id.* (emphasis original)

63. *Id.* at 202.

64. *Id.*

65. *Id.* at 203.

66. *Id.* at 204.

67. *Id.* at 204-05.

68. *Id.* at 206.

69. *Id.* at 207.

70. *Id.* at 208.

Each party shall have the right but not the obligation to take in kind or separately dispose of its proportionate share of the oil and gas produced from the Contract Area In the event any party shall fail to make the arrangements necessary to take in kind or separately dispose of its proportionate share of the oil and/or gas produced from the Contract Area, Operator shall have the right, subject to the revocation at will by the party owning it, but not the obligation, to purchase such oil and/or gas or sell it to others at any time and from time to time, and shall account to such party for the *actual net proceeds received for such production* if sold to a non-affiliated third party in an arm's length transaction, or the current market price if purchased by Operator or an affiliate of Operator.⁷¹

The court found this persuasive as it had interpreted similar “net proceeds” language to authorize deduction of post-production costs before.⁷² The supreme court reversed the court of appeals stating that, in the context of all the agreements between the two, the “amount realized” language was in reference to the wellhead or nearby giving Burlington the right to deduct post-production costs from Texas Crude’s royalty payments.⁷³

E. Offset Requirements and Compensatory Damages

1. *Bell v. Chesapeake Energy Corp.*, No. 04-18-00129-CV, 2019 WL 1139584 (Tex. App.—San Antonio Mar. 13, 2019) *pet. for rev. filed* (Jun. 27, 2019).

This case came to the court of appeals by way of a permissive accelerated appeal.⁷⁴ At the trial court level, the trial court found for Bell who sought Compensatory Royalties for the horizontal wells drilled on adjacent lease tracts, with at least portions of the wellbore within 330 feet of Bell’s lease.⁷⁵ The court agreed to hear two questions surrounding the Bell and Ward leases.⁷⁶ The issues presented to the court involve lease interpretation of the

71. *Id.* (emphasis original).

72. *Id.* at 209 (citing *Judice v. Mewbourne Oil Co.*, 939 S.W.2d 133, 136 (Tex. 1996)).

73. *Id.* at 212.

74. *Bell v. Chesapeake Energy Corp.*, No. 04-18-2019-CV, 2019 WL 1139584, *1 (Tex. App.—San Antonio Mar. 13, 2019).

75. *Id.*

76. *Id.*

similar, yet different, Bell and Ward leases.⁷⁷ Both leases include language that reads:

ROYALTY – OIL GROSS PROCEEDS DEFINITION. “Gross Proceeds” as used herein shall mean the total proceeds received by Lessee for any sale of Oil or condensate;

ROYALTY – GAS GROSS PROCEEDS DEFINITION. “Gross Proceeds” as used herein shall mean the total proceeds received by Lessee for any sale of such Gas;

HORIZONTAL OR VERTICAL WELLS. A “Horizontal Well” shall mean a well where it is necessary to cut a window for the purpose of drilling horizontally a distance of over thirty (30) feet from the vertical well bore and for which the TRC or the appropriate state agency requires directional or inclination surveys to be filed and a “Vertical Well” shall mean a well having a vertical drain hole which shall not be deviated from the vertical except randomly to straighten a hole which has become crooked in the normal course of Drilling, or to sidetrack a portion of a hole because of mechanical difficulty in Drilling.⁷⁸

The following language is only contained within the Bell lease:

18. OFFSET REQUIREMENT AND COMPENSATORY ROYALTY. In the event a well (“Adjacent Well”) producing Oil or Gas in Paying Quantities is drilled and completed after the date of this Lease on land under which Lessor does not own the quantity of minerals or royalty as under the lands covered by this Lease, and such Adjacent Well is draining the Leased Premises or is deemed draining if the Adjacent Well is located within three hundred thirty (330) feet of the Leased Premises, or, when Lessee has an economic interest in said Adjacent Well and said Adjacent Well is located within four hundred sixty seven (467) feet of the Leased Premises (in the case of a Vertical Well, distance will be measured from the surface location or bottom hole location of the Adjacent Well, whichever is closer; in the case of a Horizontal Well distance will be measured from the surface location or the subsurface path of a horizontal drainbore, from its point of entry into the productive horizon to its terminus, whichever is closer),

77. *Id.*

78. *Id.*

then Lessee agrees to drill such offset wells which is [sic] reasonably designed to protect the Leased Premises from drainage, or at the option of Lessee, shall pay to Lessor the Compensatory Royalties set forth below, or execute and deliver to Lessor a release in recordable form releasing acreage in an amount equivalent to the number of acres required or permitted by the Texas Railroad Commission to drill an offset well to the formation of such Adjacent Well. Lessee shall have ninety (90) days from the date of first production of such Adjacent Well within which to Commence Actual Drilling Operations of an offset well or release offsetting acreage, and thereafter, Lessee's sole obligation shall be to pay Compensatory Royalties as set forth herein....⁷⁹

Finally, the following language is only found in the Ward lease:

17. DUTY TO EXPLORE DEVELOP AND PROTECT. Lessee also hereby expressly covenants and agrees to diligently and fully explore, develop, and protect the Leased Premises as a reasonably prudent operator.

18. OFFSET REQUIREMENT AND COMPENSATORY ROYALTY. In the event a well ("Adjacent Well") producing Oil or Gas in Paying Quantities is drilled and completed after the date of this Lease on land under which Lessor does not own the quantity of minerals or royalty as under the lands covered by this Lease, and such Adjacent Well is draining the Leased Premises or is deemed draining if the Adjacent Well is located within the spacing distance as set in the current field rules as promulgated by the Railroad Commission of Texas but must do so if the adjacent well is within four hundred sixty-seven (467) feet of the Leased Premises, distance will be measured from the surface location or bottom hole location of the Adjacent Well, whichever is closer; in the case of a Horizontal Well distance will be measured from the surface location or the subsurface path of a horizontal drainbore, from its point of entry into the productive horizon to its terminus, whichever is closer), then Lessee shall within one hundred eighty (180) days after commencement of production from such Adjacent Well, Commence the Actual Drilling Operations for the Drilling of an offset well on the Leased Premises and diligently pursue such Operations to the horizon in which such Adjacent

79. *Id.*

Well is producing, or at the option of Lessee, shall pay to Lessor the Compensatory Royalties set forth below, or execute and deliver to Lessor a release in recordable form surrendering acreage in an amount equivalent to the Well Tract of the Adjacent Well....⁸⁰

The first question presented to the court, which is the crux of Bell's appeal, is whether "the formula for calculating the Compensatory Royalty based on take points of the Adjacent Well within the triggering distance(s)" is contained in the unambiguous provisions of the Leases.⁸¹ The second question presented, which is the focus of Chesapeake's cross-appeal, is whether "the reasonably prudent operator standard appl[ies]... to the lessee's offset obligations" under the unambiguous terms of the leases.⁸²

The court determined that both questions depended on the construction of Paragraph 18 of the leases.⁸³ In examining Paragraph 18 of each lease, the court found that Chesapeake had three available courses of action once an adjacent well began producing: "(1) drill an offset well; (2) release sufficient acreage; or (3) pay the Compensatory Royalty."⁸⁴

With these three options in mind, the court turned to question number two (noting that Chesapeake's liability claim logically precedes Bell's compensation claim).⁸⁵ Chesapeake claimed that this standard was expressly included in the lease and provided numerous cases for support. The court found that Chesapeake's supporting cases claiming that this standard was expressly included in the lease were inapplicable and noted that nothing in Paragraph 18 of either lease that would suggest Chesapeake was to be held to the standard of a reasonably prudent operator standard, denied Chesapeake's claim and turned to Bell's compensation claim.⁸⁶

The court first looked to the lease, which defined Compensatory Royalty as "an amount equal to the Royalty Share of Gross Proceeds of production from the Adjacent Well."⁸⁷ Further, Gross Proceeds was defined as "the total proceeds received by Lessee for any sale of [Oil or condensate/ Gas]."⁸⁸ Finding that the issue turned on what "total proceeds" meant, the court turned

80. *Id.* at *2.

81. *Id.* at *1.

82. *Id.*

83. *Id.* at *4.

84. *Id.* at *4-5.

85. *Id.* at *5-6.

86. *Id.* *6-12.

87. *Id.* at *12.

88. *Id.*

to the lease language to determine if total proceeds meant “production from the entirety of a horizontal well, any part of which falls within the Trigger Distances, or production attributable only to those perforations (take points) that are within those Trigger Distances.”⁸⁹ The court started with the definition of Compensatory Royalty, particularly the words “Adjacent Well.”⁹⁰ The court found that the parties expressly stated how to determine if a horizontal well was within the Trigger Distances set out in the lease (“in the case of a Horizontal Well distance will be measured from the surface location or the subsurface path of a horizontal drainbore, from its point of entry into the productive horizon to its terminus, whichever is closer.”).⁹¹ Finding significance in this, the court concluded that Chesapeake’s Paragraph 18 obligations were triggered if the surface location of the horizontal well is within the Trigger Distances regardless of where the well went from there.⁹² Chesapeake argued that the nature of horizontal wells and case law supported their argument that Compensatory Royalties should be measured based on the take points. However, the court found that a plain reading of the lease did not support this.⁹³ The court noted that the cases were, again, distinguishable and if Chesapeake wanted the Compensatory Royalties to be calculated based on the take points, they should have said so in the lease.⁹⁴ Therefore, the court found that the Compensatory Royalties due to Bell were to be calculated based on the entirety of the horizontal well which surface location was within the Trigger Distances specified in the lease.⁹⁵

F. Continuous Development Provisions

1. Endeavor Energy Res., L.P. v. Energen Res. Corp., 563 S.W.3d 449 (Tex. App.—Eastland 2018) *pet. for rev. filed* (Mar. 13, 2019).

Endeavor Energy Resources, L.P. (“Endeavor”) was the successor in interest to a lease originally entered into between John Thomas Quinn (“Quinn”), lessor, and OGX Resources, LLC, lessee.⁹⁶ The lease had a three-year primary term and a continuous development provision, which is the

89. *Id.*

90. *Id.* at *13.

91. *Id.*

92. *Id.*

93. *Id.* at *13.

94. *Id.* at *13-15.

95. *Id.* at *16.

96. *Endeavor Energy Res., L.P. v. Energen Res. Corp.*, 563 S.W.3d 449, 451 (Tex. App.—Eastland 2018).

source of the conflict in this case.⁹⁷ The provision read, in relevant part, as follows: “Lessee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.”⁹⁸ Endeavor, which did not begin drilling until 145 days after the primary term had expired, drilled 12 wells over the next five years.⁹⁹ After the twelfth well was completed, Endeavor did not begin drilling the thirteenth within the next 300 days.¹⁰⁰ On the 311th day after the completion of the twelfth well, Quinn signed a new lease with Energen which quickly filed an action against Endeavor claiming that the continuous development provision in Endeavor’s lease had lapsed.¹⁰¹ Endeavor claimed that they had accumulated 227 additional days under the provision because they had the right to accumulate, for use on subsequent wells, the number of days that it drilled sooner than 150 days for each of the first twelve wells.¹⁰² Energen, however, claimed that the accumulated days could only be used to extend that deadline for the next well drilled.¹⁰³ The trial court, agreeing with Energen’s interpretation of the provision, granted Energen’s motion for summary judgment and denied Endeavor’s.¹⁰⁴ Endeavor appealed, claiming that the plain language of the provision allowed them flexibility in accumulating unused days.¹⁰⁵

The court of appeals disagreed with Endeavor’s interpretation and affirmed the trial court’s decision.¹⁰⁶ The court’s analysis focused on a couple points. First, they pointed out that the provision stated that the accumulated days could be used on the *next* allowed 150-day term.¹⁰⁷ The court, looking to the dictionary for support, found this to mean that the accumulation of days from the early drilling on one well could only be used to extend the drilling of the next, or immediately following, well, not other wells drilled in the future.¹⁰⁸ Second, Endeavor claimed that terminating the portions of the lease not yet developed would be contrary to the point of oil and gas leases, which

97. *Id.*

98. *Id.* at 452.

99. *Id.*

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.* at 451-52.

105. *Id.* at 453-54.

106. *Id.* at 457.

107. *Id.* at 455.

108. *Id.*

is the development of minerals.¹⁰⁹ They claimed that the inclusion of the continuous development provision was so that the entire leasehold estate would be developed.¹¹⁰ The court agreed with Endeavor that this was the purpose of an oil and gas lease.¹¹¹ However, this was one of the very reasons they agreed with Energen's interpretation. The court, pointing out that Endeavor's interpretation allowed Endeavor to cease development operations for over a year, found that Endeavor's interpretation conflicted with the very purpose of the continuous development provision.¹¹² For these reasons, the court of appeals affirmed the lower court's decision. Endeavor has since petitioned the supreme court for appeal.¹¹³

G. Correction Instruments

1. Yates Energy Corp. v. Broadway Nat'l Bank, No. 04-17-00310-CV, 2018 WL 6626605 (Tex. App.—San Antonio Dec. 19, 2018) *pet. for rev. filed* (Jun. 27, 2019) (memo op.)

Mary Frances Evers ("Mary") created an intervivos trust, containing mineral interests, which was amended several times throughout her life.¹¹⁴ The most recent amendment was executed in February 2003 and provided that Broadway Bank, the trustee, was to allocate the property upon her death to her descendants, per stirpes.¹¹⁵ After Mary's death, Broadway Bank distributed 25% shares to each of four living descendants in fee simple via a 2005 Mineral Deed, including John Evers.¹¹⁶ According to the 2003 Trust Amendment, John Evers was only to receive a life estate in the minerals and therefore Broadway Bank executed a 2006 Correction Mineral Deed to John for a life estate in the minerals.¹¹⁷ John did not sign the correction deed. In 2012, John conveyed his interest in the minerals via a Royalty Deed to Yates Energy Corporation.¹¹⁸ Yates Energy Corporation, in compliance with a farmout agreement with EOG Resources, conveyed 70% of its rights in the

109. *Id.* at 456.

110. *Id.*

111. *Id.* at 457.

112. *Id.*

113. *Id.*

114. *Yates Energy Corp. v. Broadway Nat'l Bank*, No. 04-17-00310-CV, 2018 WL 6626605, *1 (Tex. App.—San Antonio Dec. 19, 2018), *pet. for rev. filed* (Jun. 27, 2019) (memo op.).

115. *Id.*

116. *Id.* at *1-2.

117. *Id.* at *2.

118. *Id.*

minerals to EOG Resources.¹¹⁹ Yates ultimately assigned the rest of their interest to numerous parties.¹²⁰

In 2013, a title examiner informed EOG Resources that there may be some issue with the 2006 Correction Mineral Deed, namely the fact that John's signature was missing from the document.¹²¹ Further, the 2003 Trust Amendment could be read as giving Broadway Bank the right to convey only a life estate in the subject land and therefore the 2005 Mineral Deed could have only conveyed to John a life estate in the minerals.¹²² Attempting to cure these errors, Broadway Bank executed an Amended Correction Deed in 2013 including John and all the original grantees.¹²³ However, it did not include Yates Energy Corporation or any of the assignees of Yates' interest.¹²⁴ After John died in 2014, the parties disputed whether John had conveyed his interest to the remaindermen of his life estate or if he had conveyed the interests to Yates Energy Corporation and their assignees.¹²⁵ The probate court concluded that the 2013 Amended Correction Deed, which granted John Evers a life estate, was valid.¹²⁶ It also concluded that Yates Energy Corporation had a life estate in the minerals and because John had died the interests were now owned by John's remaindermen.¹²⁷

The crux of the appeal dealt with the argument that the 2013 Amended Correction Deed was invalid because of the material corrections statute.¹²⁸ It is undisputed that a material correction was made under the statute, but the issue was whether the right people executed the corrective instrument. The statute first identifies who *may* execute a correction:

In addition to nonmaterial corrections, including the corrections described by Section 5.028, the parties to the original transaction or the parties' heirs, successors, or assigns, as applicable may execute a correction instrument to make a material correction to the recorded original instrument of conveyance. . . .¹²⁹

119. *Id.*

120. *Id.*

121. *Id.* at *3.

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.* at *4.

127. *Id.*

128. *Id.*

129. TEX PROP. CODE § 5.029(a) (Lexis Advance through the 2019 Reg. Sess.)

It then identifies who *must* execute a correction:

A correction instrument under this section must be:

(1) executed by each party to the recorded original instrument of conveyance the correction instrument is executed to correct or, if applicable, a party's heirs, successors, or assigns. . . .¹³⁰

The court focused on the words “or, if applicable” in coming to its conclusion.¹³¹ Siding with Yates Energy Corporation, the court of appeals held that:

a correction instrument making a material change must be executed by a party's heirs, successors, or assigns, as opposed to the original parties of the recorded instrument, if the property interest conveyed in the original instrument has been assigned or conveyed by an original party to that party's heirs, successors, or assigns.¹³²

In other words, John Evers received a full fee simple interest in the 2005 Mineral Deed and subsequently conveyed that interest to Yates Energy Corporation in the 2012 Royalty Deed.¹³³ By not including all the required signatures on the corrective instruments of the 2005 Mineral Deed, the corrective instruments were found to be ineffective.¹³⁴

H. Estoppel by Deed

1. Trial v. Dragon, No. 18-0203, 2019 WL 2554130 (Tex. June 21, 2019).

Leo Trial and his six siblings each owned a 1/7 interest in a tract of land.¹³⁵ In 1983, Leo gifted half of his interest to his wife, Ruth, leaving himself with a 1/14 interest and his wife with a 1/14 interest.¹³⁶ In 1992, Leo and his siblings conveyed their interest to the Dragons reserving a fifteen-year mineral interest.¹³⁷ The Trials also generally warranted the conveyance. Ruth, however was not a party to the Dragon conveyance and her interest was not

130. TEX PROP. CODE § 5.029(b) (Lexis Advance through the 2019 Reg. Sess.)

131. *Yates Energy Corp.*, 2018 WL 6626605 at *6.

132. *Id.* at *5.

133. *Id.* at *7.

134. *Id.*

135. *Trial v. Dragon*, No. 18-0203, 2019 WL 2554130, *1 (Tex. 2019).

136. *Id.*

137. *Id.*

mentioned in the conveyance.¹³⁸ In 2010, Ruth died intestate, leaving each of her two sons, Joseph and Michael, a 1/28 interest in the subject land.¹³⁹ After the fifteen-year mineral reservation expired, the Dragons became aware of the 1/14 interest that Ruth and Leo's two sons owned and filed suit for breach of warranty and estoppel by deed.¹⁴⁰ The trial court granted the Trials' motion for summary judgment, which the Dragons appealed.¹⁴¹ The court of appeals reversed finding that because Leo breached the general warranty at the time of conveyance to the Dragon's, estoppel by deed forbids Leo, as well as his "grantors, grantees, privies in blood, privies in estate, and privies in law" (his sons) from claiming an interest in contradiction of the general warranty.¹⁴² The supreme court accepted the Trials' petition for review.¹⁴³

The supreme court first addressed the applicability of the *Duhig* rule and estoppel by deed.¹⁴⁴ The court, looking to the ruling in *Duhig*, concluded that it only applied when the grantor (Leo) "owns the exact interest to remedy the breach at the time of execution and equity otherwise demands it."¹⁴⁵ At the time of execution, Leo did not own the interest that would remedy the situation because he had already conveyed it to Ruth.¹⁴⁶ Therefore, the *Duhig* rule did not apply. The court pointed out, however, that if Leo had held the interest in a trust for his two sons, the outcome may have been different.¹⁴⁷ The court also found that estoppel by deed did not apply. Estoppel by deed means that all parties to a deed are bound by the deed's recitals, which operate as an estoppel.¹⁴⁸ However, Joseph and Michael were not parties to the Dragon deed and they did not claim their interest arose through the Dragon deed.¹⁴⁹ Therefore, the court found that estoppel by deed also did not apply based on these facts.¹⁵⁰ The supreme court reversed the court of appeals decision on the application of the *Duhig* rule and estoppel by deed.¹⁵¹ It did,

138. *Id.*

139. *Id.*

140. *Id.* at *2.

141. *Id.*

142. *Id.*

143. *Id.* at *3.

144. *Id.* at *4.

145. *Id.* at *5 (citing *Duhig v. Peavy-Moore Lumber Co.*, 144 S.W.2d 878, 880 (Tex. 1940)).

146. *Id.*

147. *Id.*

148. *Id.* at *6.

149. *Id.* at *7.

150. *Id.*

151. *Id.* at *9.

however, find that the neither the trial court nor the court of appeals addressed the breach of warranty claim correctly.¹⁵² The court said that the real issue, that had not been answered by either of the previous courts is:

whether the Trial sons are liable for damages when they fail to warrant and defend against their own adverse claim to the property—their claim deriving from the interest they inherited from Ruth's separate property—and if so, what the amount of those damages would be.¹⁵³

Because both courts failed to address this question, the supreme court remanded to the trial court for further proceedings.¹⁵⁴

I. Refusal of Consent to Assignment

1. Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc., No. 17-0332, 2019 WL 2668317 (Tex. June 28, 2019).

Carrizo Oil & Gas, Inc. (“Carrizo”) held a lease on 22,000 acres, which was set to expire in April 2011. In order to maintain the lease, it entered into a farmout agreement with Barrow-Shaver Resources Company (“Barrow-Shaver”) in March 2011.¹⁵⁵ The agreement provided that if Barrow-Shaver drilled a producing well, Carrizo would assign its interest in the 22,000-acre lease to Barrow-Shaver.¹⁵⁶ The consent to assign provision in the agreement read: “[t]he rights provided to [Barrow-Shaver] under this Letter Agreement may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo.”¹⁵⁷ Evidence demonstrated that Barrow-Shaver wanted language in the provision that stated consent would not be unreasonably withheld.¹⁵⁸ However, after repeated oral assurances from Carrizo that consent would not be unreasonably withheld, Barrow-Shaver signed the agreement without this language included.¹⁵⁹ Barrow-Shaver was ultimately unsuccessful in drilling the well, but was approached by Raptor Petroleum II, LLC (“Raptor”) about assigning Barrow-Shaver’s interest in the farmout agreement.¹⁶⁰ Carrizo would not

152. *Id.*

153. *Id.*

154. *Id.*

155. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas, Inc.*, No. 17-0332, 2019 WL 2668317

156. *Id.*

157. *Id.* at *2.

158. *Id.* at *1.

159. *Id.*

160. *Id.* at *2.

consent and the deal with Raptor fell through. Barrow-Shaver sued Carrizo claiming breach of contract, fraud, and tortious interference.¹⁶¹

The trial court found that, although the agreement was unambiguous, the consent to assignment provision was silent as to the reasons for which Carrizo could withhold its consent.¹⁶² Therefore, the court submitted the issues to the jury which unanimously found in favor of Barrow-Shaver for approximately \$27 million. On appeal, the court reversed this decision finding that, because the consent to assign provision was silent as to when consent could be withheld, Carrizo could withhold consent for any reason.

The first issue addressed by the supreme court was whether Carrizo had an unqualified right to withhold consent. Barrow-Shaver claimed that, according to industry custom, consent could not be unreasonable or arbitrarily withheld.¹⁶³ The court first stated that the consent to assign provision was unambiguous.¹⁶⁴ However, the agreement was silent as to when consent could be withheld.¹⁶⁵ In cases such as this, the court can only supplement or give further definition to silence as it relates to a *material* term of the contract.¹⁶⁶ The court here, noting that the purpose of a farmout agreement is the farmee's obligation to drill, found that a consent to assign provision is not material to the farmout and therefore cannot be supplemented or given further definition.¹⁶⁷ The court also found that when an agreement is sufficiently definite to understand each parties' rights obligations, as they are here, additional terms are not material.¹⁶⁸

Barrow-Shaver next argued that the court should impose an implied duty of good faith and fair dealing on Carrizo.¹⁶⁹ The court, however, found that, absent a special relationship, parties to an agreement have no duty to act in good faith.¹⁷⁰ Here, the court found that because both parties are sophisticated in oil and gas matters, farmouts do not inherently create unequal bargaining power for one side, and the two parties specifically negotiated this provision,

161. *Id.*

162. *Id.* at *3.

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* at *7.

168. *Id.*

169. *Id.* at *12.

170. *Id.* at *13.

that there was no special relationship between the two and therefore no implied duty of good faith and fair dealing.¹⁷¹

Finding that the terms of the farmout agreement were unambiguous and that there was no duty of good faith and fair dealing, the court turned to the meaning of the consent to assign provision.¹⁷² Agreeing with the court of appeals, the supreme court found that Carrizo's ability to withhold consent was unqualified could therefore withhold "consent for any reason, expressed or not, reasonable or not, legitimate or not, or no reason at all."¹⁷³ Therefore, because the provision allowed Carrizo to withhold its consent for any reason, it could not have breached the agreement and there could not have been tortious interference as a matter of law and therefore these claims should not have been submitted to the jury.¹⁷⁴

Justice Guzman, disagreeing with the majority, noted that precedent throughout the years supports the conclusion that even though the terms of the consent to assign provision were unambiguous, the court should have allowed in trade custom and usage to inform the contract which would have resulted in the application of a reasonableness standard to the provision. By not doing so, the court erred in concluding that the consent to assign provision was silent as to when consent could be withheld, which would have been answered using trade custom and usage evidence. Further, because trade custom and usage in a specific scenario is a question of fact, the trial court properly submitted the issue to the jury. Another point to the trade custom and usage issue was that Carrizo could have just contracted around it and that by not doing so, and assuring Barrow-Shaver it would give consent, established that Carrizo intended to abide by trade custom and usage.¹⁷⁵

The court, addressing the second issue, turned to Barrow-Shaver's fraud claim.¹⁷⁶ The crux of the court's holding on this matter deals with one essential element of a fraud claim: whether the claimant justifiably relied on the representation.¹⁷⁷ The court here found that Barrow-Shaver did not justifiably rely on Carrizo's landman's claim that consent would not be unreasonably withheld.¹⁷⁸ First, this oral promise was in direct contradiction

171. *Id.* at *14.

172. *Id.* at *16.

173. *Id.*

174. *Id.* at *17.

175. *Id.* (Guzman, J., concurring).

176. *Id.* at *18.

177. *Id.* at *19.

178. *Id.* at *21.

to the written contract.¹⁷⁹ Second, Barrow-Shaver is a sophisticated party with full understanding of the implications of the consent to assign provision that they agreed to.¹⁸⁰ Third, Carrizo's oral representations were vague and unverifiable which should have alerted Barrow-Shaver that they could not be relied upon.¹⁸¹ Finally, Barrow-Shaver should have known that the landman acting on behalf of Carrizo had no authority to assure Barrow-Shaver that consent would not be unreasonably withheld.¹⁸²

Justice Guzman also disagreed with the majority's conclusion as to the fraud claim. Justice Guzman stated that "a fraud claim can be based on a promise made with no intention of performing, irrespective of whether the promise is later subsumed within a contract" because "the legal duty not to fraudulently procure a contract is separate and independent from the duties established by the contract itself."¹⁸³ Further, the court has recognized that "[b]reach alone is no evidence that breach was intended when the contract was originally made," but "breach combined with 'slight circumstantial evidence' of fraud is enough to support a verdict for fraudulent inducement."¹⁸⁴ Justice Guzman, who would have found a breach of contract as stated above, stated that she would have also found at least some evidence that Carrizo did not intend to give consent, regardless of their repeated representations, and therefore perpetrated a fraud upon Barrow-Shaver.¹⁸⁵

Therefore, because the majority found that the consent to assign provision was unambiguous, there was no breach of the farmout agreement.¹⁸⁶ Also, because Barrow-Shaver could not have justifiably relied on Carrizo's representations, there could not have been a fraud.¹⁸⁷

179. *Id.* at *20.

180. *Id.* at *17.

181. *Id.* at 21-22.

182. *Id.* at *18-19.

183. *Id.* (Guzman, J., concurring) (quoting, *Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex. 1998)).

184. *Id.* (Guzman, J., concurring) (quoting *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 305 (Tex. 2006) (internal quotation omitted)).

185. *Id.* (Guzman, J., concurring).

186. *Id.* at *22.

187. *Id.*

J. Cotenancy

1. *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, 574 S.W.3d 73 (Tex. App.—El Paso 2019), *pet. for rev. filed* (June 28, 2019).

In late 2009, Cimarex leased an undivided 1/6 mineral interest held by the Estate of F. Kirk Johnson, III.¹⁸⁸ Between 2007 and 2010, Anadarko acquired the other 15/16 mineral interests in the land.¹⁸⁹ In 2011 and 2012, Anadarko commenced drilling operations on two wells on the land, and by December 2012, both wells were producing in paying quantities.¹⁹⁰ In early 2011, F. Kirk Johnson, IV and Marsland Johnson succeeded the interests of the Estate of F. Kirk Johnson, III and executed two top leases to Petro-Land Group, Inc., which eventually assigned the leases to Anadarko.¹⁹¹ Cimarex learned of the wells in September 2012 and subsequently wrote a letter to Anadarko demanding their proportionate share of royalties, an accounting of the costs and revenues associated with the wells, and affording them the opportunity to join in the operation of the wells through a joint operating agreement (“JOA”).¹⁹² Anadarko eventually responded recognizing Cimarex’s right to its proportionate share of royalties because of its status as a non-participating co-tenant.¹⁹³ However, the payments never came and Cimarex sued. In addition, Cimarex filed an application to force pool an Anadarko well that was located one foot within Cimarex’s lease boundary.¹⁹⁴

The two parties reached a settlement in June 2013 which resolved the lawsuit and the force pooling application.¹⁹⁵ The settlement provided that: (1) Anadarko would provide an accounting for Cimarex’s share of production on the two wells; (2) they would pay them for their proportionate share of production through May 2013, less Cimarex’s share of drilling, completion, and operating costs; and (3) going forward, Anadarko would account to Cimarex monthly for their share of production.¹⁹⁶ Both parties agreed to pay their respective royalties to their lessors.¹⁹⁷

188. *Cimarex Energy Co. v. Anadarko Petroleum Corp.*, 574 S.W.3d 73, 80-81 (Tex. App.—El Paso 2019), *pet. for rev. filed* (June 28, 2019).

189. *Id.* at 81.

190. *Id.*

191. *Id.* at 82.

192. *Id.*

193. *Id.*

194. *Id.* at 83.

195. *Id.*

196. *Id.* at 83-84.

197. *Id.*

Anadarko complied with the settlement agreement, and in December 2014, when the primary term of Cimarex's lease expired, Anadarko ceased making payments to Cimarex.¹⁹⁸ Anadarko claimed that Cimarex's lease had expired and therefore there was no longer an obligation to make the payments.¹⁹⁹ Further, it claimed that because the lease had expired and Anadarko had paid the bonus provided for in the top lease, Anadarko had the only valid lease on the property.²⁰⁰ Cimarex sued, alleging Anadarko had breached their contractual obligation under the settlement agreement.²⁰¹ Both parties moved for summary judgment.²⁰² The trial court granted Anadarko's motion for summary judgment finding that Cimarex could not rely on Anadarko's production to extend the lease into the secondary term.²⁰³ Cimarex appealed.

Cimarex raised three arguments during its appeal as to why the lease had not terminated in December 2014. First, it argued that the terms of the lease were ambiguous, hereby raising an issue of fact which should have been presented to a jury.²⁰⁴ The court of appeals found that there was only one reasonable interpretation of the lease and therefore the lease was unambiguous.²⁰⁵ The court, in coming to this conclusion, focused on the language of the habendum clause: "as long thereafter as oil or gas is produced from said land or from land with which said land is pooled."²⁰⁶ Cimarex argued that the passive nature of the provision only required production on the land and did not require any specific party to cause the production.²⁰⁷ However, the court recognized that various Texas courts, including their own, had interpreted similar language to require the lessee to be the party to cause production.²⁰⁸ In other words, Cimarex needed to be the one that caused production from said land, not a third party such as Anadarko. The court also found significance in the fact that, because the lease was signed with Cimarex, it was the lessor's intent that Cimarex would be the party to cause the production.²⁰⁹

198. *Id.* at 84.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* at 84-85.

203. *Id.* at 85.

204. *Id.*

205. *Id.* at 98-99.

206. *Id.* at 90.

207. *Id.*

208. *Id.*

209. *Id.* at 92.

Cimarex's second argument was that the lease unambiguously allowed Cimarex to rely on Anadarko's production to carry the lease into the secondary term.²¹⁰ Cimarex noted that the primary term was written in the passive voice, did not specify who was to cause production, and allowed Cimarex to rely on Anadarko's production.²¹¹ They then pointed out that the habendum clause was also written in the passive voice and failed to specify who was to cause production and therefore, it would be inconsistent to say that Cimarex could not also rely on Anadarko's production during the secondary term.²¹² The court disagreed with this argument as well. The court found that the lessor has the right to impose different requirements on a lessee during the primary and secondary terms.²¹³ The court stated:

[T]here is nothing inherently contradictory with a lessor requiring a lessee to make royalty payments on a co-tenant's production during the primary term of a lease—particularly where the primary term is paid-up—while at the same time requiring the lessee to cause its own production on the subject property in order to extend the lease into a secondary term, where there is no cash consideration paid.²¹⁴

Cimarex's final argument was that the settlement agreement, in effect, created a JOA between the two parties.²¹⁵ The court, finding none of the hallmarks of a JOA and finding it significant that the settlement agreement consistently referred to Cimarex as a "non-participating co-tenant", denied this argument and again found in favor of Anadarko.²¹⁶

Rejecting all of Cimarex's arguments that the lease did not actually terminate in December 2014, the court affirmed the trial court's ruling in favor of Anadarko.²¹⁷

210. *Id.* at 94.

211. *Id.*

212. *Id.* at 90.

213. *Id.* at 94.

214. *Id.*

215. *Id.* at 95.

216. *Id.* at 97.

217. *Id.* at 101.

L. Top Leases

1. *TRO-X, L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458 (Tex. 2018).

In 2007, TRO-X executed oil and gas leases (“2007 Leases”) with David E. Cooper; Hill–Cooper, Ltd.; Richard W. Cooper; Kendall C. Hill; and Shirley Cooper (“the Coopers”).²¹⁸ The leases contained a provision requiring TRO-X to drill an offset well if a well was drilled on adjacent land within 660 feet of the lease boundaries and producing in paying quantities.²¹⁹ If TRO-X failed to do so, then upon demand from the Coopers, TRO-X was required to release a specified portion of the lease.²²⁰ TRO-X later assigned its interest to Eagle Oil & Gas Co. (“Eagle Oil”).²²¹ The participation agreement, which effectuated the assignment, contained a 5% working interest back-in option to TRO-X if the leases reached “project payout.”²²² The participation agreement also included an anti-wash out clause providing that the back in option could not be eliminated by the surrender of the leases by Eagle Oil or a subsequent assignee and the subsequent reacquisition of a lease on the same land free of the 5% working interest.²²³

Eagle Oil assigned its interest in the 2007 Leases to Anadarko.²²⁴ Anadarko eventually completed a well within 660 feet of the 2007 Leases boundary, and failed to complete an offset well as required.²²⁵ In May 2011, Richard Cooper wrote a letter to Anadarko demanding that the land specified in the lease be released due to Anadarko’s failure to drill the offset well.²²⁶ Anadarko complied and then approached the Coopers about signing new leases on the interests covered under the 2007 Leases.²²⁷ The Coopers, reaching agreeable terms with Anadarko, executed new leases on their interest in 2011 (“2011 Leases”).²²⁸ The 2011 Leases do not mention the 2007 Leases, nor do they contain language releasing the 2007 Leases.²²⁹ Although the 2011 Leases did not contain language releasing the 2007

218. *TRO-X, L.P. v. Anadarko Petroleum Corp.*, 548 S.W.3d 458, 459 (Tex. 2018).

219. *Id.*

220. *Id.*

221. *Id.*

222. *Id.* at 460.

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

229. *Id.*

Leases, Anadarko did record releases (“the Releases”) of the 2007 Leases in June 2011 within a few days of when the 2011 Leases were recorded.²³⁰ TRO-X approached Anadarko about its back in option and Anadarko denied its validity.²³¹ TRO-X’s sued.²³²

The trial court found that the 2011 Leases were top leases because the 2007 leases remained in effect until the Releases were executed, which was after the execution of the 2011 Leases.²³³ On appeal, the court determined that TRO-X was tasked with proving that the Coopers did not intend for the 2011 Leases to terminate the 2007 Leases in order to prevail.²³⁴ The court, after reviewing the evidence presented, determined that TRO-X failed to prove the Coopers intent for the 2011 Leases to be top leases and therefore reversed the trial court’s holding.²³⁵

Whether or not the 2011 Leases were top leases of the 2007 Leases remained the main issue at the supreme court.²³⁶ Anadarko claimed that, because the “leases did not exist at the same time, and the 2011 Leases were not contingent on expiration or termination of the 2007 Leases because execution of the 2011 Leases terminated the 2007 Leases,” the 2011 Leases were not top leases.²³⁷ TRO-X countered claiming that, absent discrete evidence of intent to eliminate a lease(s), predecessor existing leases remain effective. The supreme court sided with Anadarko.²³⁸ The court stated that:

an existing lease between the parties as to an interest terminates when the parties enter into a new lease covering that interest unless the new lease objectively demonstrates that both parties intended for the new lease not to terminate the prior lease between them.²³⁹

Further, the court clarified that the party claiming that a new lease did not terminate the previous one, in this case TRO-X has the burden of proving the parties’ intent that the previous lease was to survive execution of the new lease.²⁴⁰ It also clarified that it is the intent of both parties that is relevant, not

230. *Id.*

231. *Id.*

232. *Id.* at 461.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.* at 462.

238. *Id.* at 463.

239. *Id.*

240. *Id.*

just the lessors.²⁴¹ The court found that TRO-X did fulfill this burden and therefore the 2011 Leases terminated the 2007 Leases, hereby affirming that court of appeals decision.²⁴²

M. Upcoming Cases

I. ConocoPhillips Co. v. Leon Oscar Ramirez, Jr., 534 S.W.3d 490 (Tex. App.—San Antonio 2017), cert. granted 2019 Tex. LEXIS 716 (Tex. June 28, 2019).

Leon Oscar Ramirez, Sr. (“Leon Sr.”) was the beneficiary of a life estate of a 1/4 interest in a tract of land which he inherited from his mother, Leonor.²⁴³ Leon Sr. executed a lease with ConocoPhillips (“Conoco”) for his interest in the land in 1993 and 1997.²⁴⁴ The remaindermen of Leon Sr.’s interest, Leon Oscar Ramirez, Jr. (“Leon Jr.”), Minerva, and Rosalinda, were not signatories to these leases.²⁴⁵ Leon Sr. passed away in 2006, terminating his life estate.²⁴⁶

In 2010, Leon Jr., Minerva, and Rosalinda filed suit against Conoco claiming that, because they were remainderman and had an interest in the subject land’s minerals, and they did not sign the prior leases, the leases were not binding on them and therefore they were entitled to a cotenancy accounting and payment of their proportionate share of production by Conoco.²⁴⁷ The court of appeals affirmed the lower court’s ruling in favor of Leon Jr., Minerva, and Rosalinda finding that the leases were not binding on them and therefore they were cotenants entitled to their share of production from the leases.²⁴⁸

The Texas supreme court granted review of this case in June 2019. Oral arguments are set for September 17, 2019.²⁴⁹

241. *Id.* at 464.

242. *Id.* at 465.

243. *ConocoPhillips Co. v. Leon Oscar Ramirez, Jr.*, 534 S.W.3d 490, 496-97 (Tex. App.—San Antonio 2017), cert. granted 2019 Tex. LEXIS 716 (Tex., June 28, 2019).

244. *Id.* at 496.

245. *Id.*

246. *Id.* at 497.

247. *Id.* at 498.

248. *Id.* at 515.

249. *ConocoPhillips Co. v. Ramirez*, 2019 Tex. LEXIS 716 (Tex. June 28, 2019).