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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, 2021 to July 31, 2022.

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II. Legislative and Regulatory Developments

There have not been any significant legislative or regulatory developments affecting Texas oil and gas law from August 1, 2021 to July 31, 2022.

III. Judicial Developments

A. Hlavinka v. HSC Pipeline Partnership, LLC[1]

In February of 2022, the Supreme Court of Texas heard an eminent domain dispute to decide whether a pipeline company had demonstrated common-carrier status with eminent domain authority to condemn an easement and construct a pipeline.[2]

Landowners, Terrance J. Hlavinka, Kenneth Hlavinka, Tres Bayou Farms, LP, and Terrance Hlavinka Cattle Company, challenged HSC Pipeline Partnership, LLC's ("HSC") right to condemn, arguing that "transport of polymer-grade propylene does not grant the pipeline company common-carrier status, and that the company's transport to an unaffiliated customer is insufficient to demonstrate that such transport is for public use."[3] HSC sought to exclude past sales of pipeline easements across the property as evidence of the value of the easement that the pipeline company seeks to condemn.[4]

The Hlavinkas own four tracts of land in Brazoria County.[5] A representative of the Hlavinka family, Terrance Hlavinka, who runs the family business, testified that the family's primary purpose in acquiring land was to sell pipeline easements.[6] Prior to this suit, the Hlavinka's land had approximately twenty-five easements on it, including one for which the family received $3.45 million and another for which it received $2 million.[7] This testimony was excluded at trial.[8]

In 2017, HSC installed its pipeline on the Hlavinka's property adjacent to two existing pipelines.[9] HSC initiated condemnation proceedings to condemn 6.41 acres of the property for an easement 30 feet wide and 1.8

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1. Hlavinka v. HSC Pipeline P'ship, LLC, No. 20-0567, 65 Tex. Sup. Ct. J. 1234, 2022 WL 1696443 (Tex. May 27, 2022).
2. *Id*.
3. *Id*. at *1.
4. *Id*.
5. *Id*. at *2.
6. *Id*.
7. *Id*.
8. *Id*.
9. *Id*.

miles long after the Hlavinkas rejected HSC's offer to purchase a pipeline easement.[10] The Hlavinkas sought dismissal of HSC's suit challenging HSC's power to exercise common-carrier eminent domain authority.[11] HSC sought a legal determination as to its common-carrier status.[12] The trial court granted HSC's motion for summary judgment and proceeded to a determination of the value of the land HSC had taken for the pipeline easement.[13]

The Hlavinkas gave testimony that the highest and best use of the land was for pipeline development and calculated a valuation of $3.3 million.[14] HSC requested the exclusion of Hlavinka's testimony.[15] The trial court granted HSC's motion, leaving the value of the property taken to be based on testimony regarding agricultural value.[16] The trial court awarded the Hlavinkas $132,293.36, being $108,967.36 for crop and surface damage and $23,326.00 for the easements.[17] The Hlavinkas appealed.[18] The Court of Appeals held that Business Organizations Code Section 2.105 grants condemnation authority to common-carrier pipelines that carry oil products or liquefied minerals, and that polymer-grade propylene is an "oil product" under that section.[19] The Court of Appeals reversed the trial court decision on two issues: (1) that the pipeline satisfied the public use requirement and (2) the exclusion of the Hlavinkas valuation testimony.[20] Both parties appealed.[21]

The Supreme Court of Texas held that Business Organizations Code Section 2.105 explicitly confers the condemnation "rights and powers" found in Natural Resources Code Sections 111.019 through 111.022 "for those common-carrier pipelines that transport the products that Section 2.105 identifies."[22] Further, the Court held that HSC established that polymer-grade propylene is an "oil product" within the meaning of that section because it is a derivative of crude petroleum.[23]

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10. *Id*.
11. *Id*.
12. *Id*. at *3.
13. *Id*.
14. *Id*.
15. *Id*.
16. *Id*.
17. *Id*.
18. *Id*. at *4.
19. *Id*.
20. *Id*.
21. *Id*.
22. *Id*. at *6
23. *Id*.

The Court also addressed whether HSC's pipeline served a public use.[24] The Court has established the test for determining public use in this context: "a pipeline serves a public use as a matter of law if it is reasonably probable that, in the future, the pipeline will serve even one customer unaffiliated with the pipeline owner."[25] The Hlavinkas argued that there should be an additional requirement; the manufacturer of the transported product must also have no affiliation with the pipeline owner.[26] The court of appeals concluded that a jury must resolve such a question, but the Supreme Court of Texas declined to add this additional requirement to the test for common carrier status.[27]

The Court held that this would inject substantial uncertainty into multi-parcel infrastructure development, risking inconsistent adjudications among multiple triers of fact, and that the ultimate question of whether something is a public use is to be decided by the courts as a matter of law.[28] Accordingly, the Court held that the HSC pipeline served at least one unaffiliated customer, and thus established that the pipeline served a public use.[29]

Finally, the Court determined that the Hlavinkas valuation testimony was appropriate because a condemnor must pay a fair price for the value of the land taken, and evidence of recent arms' length transactions that precede the taking are admissible to establish the property's highest and best use, and its market value.[30] The Court remanded the case to the trial court for a determination of the fair market value of the property.

2. Henry v. Smith[31]

In *Henry v. Smith*, the Court of Appeals for the Second Appellate District of Texas addressed the issue of whether pipeline burial covenants in oil and gas leases were covenants running with the surface, or whether the interests in said covenants were severed at the time of the post-lease mineral severance and therefore instead ran with the mineral estate. The court ultimately decided that the pipeline burial covenant was conveyed with the

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24. *Id.* at *7.
25. *Id*.
26. *Id*.
27. *Id*.
28. *Id*. at *8.
29. *Id*.
30. *Id.* at *9.
31. Henry v. Smith, 637 S.W.3d 226 (Tex. App.–Fort Worth 2021), *reh'g denied* (Dec. 16, 2021), *review denied* (June 17, 2022).

surface, as there was no express reservation or detachment of the covenants in the discussed severance deeds.

Appellants Robert H. Henry, among others, ("Surface Owners") were the owners of the surface of a 15,000-acre tract of agricultural land in Archer County, Texas. Appellees George Ray Smith, among others, ("Lessees") were the lessees of three oil and gas leases pertaining to the tract. Each of the three leases contained special surface covenants, including one that required the Lessees to bury oil and gas pipelines to a certain depth at the request of the lessor.[32] When the leases were originally executed, the lessors owned both the surface and mineral estates; however, the surface estate was severed from the mineral estate by 1984 and 1994 deeds, which conveyed the surface "together with all singular rights and appurtenances thereto…" and "together with all improvements, structures and fixtures located thereon and all rights and appurtenances pertaining thereto," respectively.[33] In the severance deeds, the grantors reserved "all of Grantor's rights, titles, interests and estates in and to the oil, gas and other minerals . . . . and all rights and appurtenances pertaining thereto"[34] Therefore, the question arose whether the covenants contained in the leases regarding the surface estates were conveyed with the surface estates or reserved with the mineral estates. The Surface Owners subsequently requested that the Lessees bury all flow lines pursuant to the covenants contained in the oil and gas leases. The Lessees refused, taking the position that the Surface Owners could not enforce the covenants because the covenants had been severed from the surface estate through the severance of the oil and gas from the surface estate and, as such, the covenants no longer belonged to the Surface Owners.[35] The trial court ruled in favor of the Lessees.[36]

On appeal, the appellate court disagreed and found that a pipeline burial covenant is attached to the surface and therefore generally runs with the land and is conveyed through a deed conveying the surface.[37] In order to deviate from this general rule, a reservation or exception of the burial covenant must be expressly made.[38] The law disfavors reservations and will therefore not imply a reservation where one is not expressly made; the court

32. *Id*. at 230-32.
33. *Id*. at 232.
34. *Id.*
35. *Id.*
36. *Id.* at 232-33.
37. *Id.* at 234 (*see* Mobil Oil Corp. v. Brennan, 385 F.2d 951, 953–54 (5th Cir. 1967)).
38. *Id.*; *see* Farm & Ranch Invs., Ltd. v. Titan Operating, L.L.C., 369 S.W.3d 679, 681 (Tex. App.–Fort Worth 2012) *pet. denied*.

found that the severance deeds did not make such express reservations and refused to imply a reservation regarding the covenants in this case.[39]

C. Foote v. Texcel Exploration, Inc.[40]

In *Foote v. Texcel Exploration, Inc*., cattle ranchers sued Texcel after nearly 300 of their cattle were killed or injured from ingesting oil.[41] The cattle owners claimed that Texcel negligently failed to construct and maintain an adequate fence around the wellsite and tank battery on their leased land.[42] At the trial court, the jury determined that the cattle were not licensees and the cattle owners took nothing.[43] The Eastland Court of Appeals affirmed.[44]

The oil and gas operations took place on the Hertel Lease.[45] The Lease was adjacent to a tract of land that was used for wheat and cattle grazing.[46] When Texcel was notified that the cattle were going to be turned out on the adjacent land Texcel worked to make sure that the electric fence surrounding the Hertel Lease was working.[47] In April of 2017 "the cattle pushed through the fence and broke a PVC pipe on a tank holding saltwater and oil, which caused a spill."[48] The spill caused hundreds of cattle to be injured and 132 died.[49]

The appellants did not attempt to obtain jury findings on the established law found in *Satanta Oil Co.,* which says that the owner of the surface estate must prove that the mineral lessee or operator willfully injured the surface owner or lessee's cattle or negligently caused injury to the cattle by using more land than was reasonably necessary.[50] Instead, Foote sought to "expand the law by asserting that the law applicable to protect persons from a premises defect should be extended to their cattle."[51] The appellants argued that the cattle were invitees because they were present for the

39. *Id*. at 234-36.
40. 640 S.W.3d 574 (Tex. App.–Eastland 2022).
41. *Id.* at 579.
42. *Id.* at 578.
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id*.
47. *Id*. at 579.
48. .*Id.*
49. .*Id.*
50. .*Id*. at 580 (citing Satanta Oil Co. v. Henderson, 855 S.W.2d 888, 889-90 (Tex. App.–El Paso 1993)).
51. .*Id*. at 581.

mutual benefit of the surface owner and the surface lessee.[52] Specifically, they said "because Foote was in business with the farmer-lessee and the landowner, his status is extended to his cattle for the entire premises, including the area where Texcel was conducting oil and gas operations."[53]

The court did not find this argument compelling however, deciding that as a matter of law the evidence established that the cattle did not have the status of invitees on the area where the oil and gas operations were occurring.[54] It determined that the governing rule "likens wandering cattle and other domestic animals to trespassers upon the legitimate area of operations of the oil driller or producer."[55] Because the duty owed to a trespasser is only to refrain from injuring him through willful or gross negligence, the appellants were unable to recover.[56] Additionally, *Brown v. Lundell* held that an operator has no duty to fence or prevent livestock from entering an area used for oil and gas operations.[57] This meant Texcel could not be liable for allegedly inadequately building and maintaining the fence.[58] Foote's only avenue for relief would have been to prove that Texcel negligently exceeded their allotted reasonable use of the land.[59] Foote's alternative argument, that the cattle were poisoned on the part of the premise where they were indisputably invitees, was also unavailing.[60] Although fluids did escape the fenced area, it was the cattle that caused the fluid to escape in the first place.[61]

D. Rosetta Resources Operating, LP v. Martin, 645 S.W.3d 212 (Tex. 2022)[62]

In *Rosetta Resources Operating, LP v. Martin*, the Supreme Court of Texas considered the application of an express covenant to protect against drainage in an oil and gas lease addendum; specifically, whether an offset well clause imposed a general duty on the lessee to protect against all drainage, even when the draining well itself did not trigger such duty.

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52. .*Id*. at 580.
53. .*Id*. at 580-81.
54. .*Id*. at 581.
55. .*Id*. at 582 (citing Gen. Crude Oil Co. v. Aiken, 344 S.W.2d 668, 671 (Tex. 1961)).
56. .*Id*.
57. .Brown v. Lundell, 344 S.W.2d 863, 865–66 (Tex. 1961).
58. .*Id*. at 584.
59. .*Id*. at 582.
60. .*Id*.
61. .*Id*. at 583.
62. 645 S.W.3d 212 (Tex. 2022), *reh'g denied* (June 17, 2022).

Here, a series of leases contained the following provision:

> . . . in the event a well is drilled on or in a unit containing part of this acreage or is drilled on acreage adjoining this Lease, the Lessor [sic], or its agent(s) shall protect the Lessee's [sic] undrilled acreage from drainage and in the opinions of reasonable and prudent operations, drainage is occurring on the un-drilled acreage, even though the draining well is located over three hundred thirty (330) feet from the un-drilled acreage, the Lessee shall spud an offset well on said un-drilled acreage or on a unit containing said acreage within twelve (12) months from the date the drainage began or release the acreage which is un-drilled or is not a part of a unit which is held by production.[63]

The lessees subsequently formed a pooled unit partially including the lands covered by said leases and drilled a well, known as the Martin Well. Then, the lessee drilled a well known as the Simmons Well approximately 1.5 miles away on a separate, nonadjacent unit. The lessors brought an action against the lessees, alleging breach of contract for failing to protect the undrilled leased acreage from drainage from the neighboring unit.[64] The trial court ruled in favor of the lessee, while the court of appeals disagreed and ultimately concluded that the Martin Well triggered both a general duty to protect against drainage and a specific obligation to spud an offset well or release the undrilled acreage if, "in the opinions of reasonable and prudent operations, drainage is occurring on the un-drilled acreage."[65]

The Supreme Court of Texas cautioned that its decision may not prove to be useful guidance for determining how covenants to protect against drainage typically function, as the provision analyzed suffered "'from both a lack of accuracy and a lack of clarity,' including typographical and grammatical errors."[66] Nevertheless, the court found that the provision was ambiguous because there were two reasonable interpretations of its meaning, specifically regarding whether the Martin Well triggered the lessee's obligation to protect against drainage from the Simmons Well.[67] Therefore, because a fact issue remained on the breach of lease claim, summary judgment was not proper for either party and the case was remanded for further proceedings on the same.[68]

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63. *Id.* at 217.
64. *Id.*
65. *Id.* at 218.
66. *Id.* at 220.
67. *Id.* at 222-225.
68. *Id.* at 228.

E. Nettye Engler Energy, LP v. BlueStone Nat. Res. II, LLC[69]

On February 4, 2022, the Texas Supreme Court answered whether and to what extent a royalty interest bears a proportionate share of postproduction costs. In its opinion, the Court agreed with the appeals court findings that, in mineral disputes, delivery occurs at the gathering pipeline and that it was unnecessary to limit the delivery location to a specific pipeline nor prohibit delivery to a pipeline at or near the well.[70] However, it disagreed with its reasoning that a precedent case, *Burlington Resources,*[71] established the rule that the phrase "into the pipeline" was equivalent to "at the well," and creates valuation or delivery point "at the wellhead or nearby."[72] Instead, it reasoned that a gas gathering pipeline is a "pipeline" in plain, grammatical, and ordinary language, and that since nothing in the deed prohibited the delivery of Nettye Engler Energy, LP's ("Engler's") royalty from being located at or near the well, Engler's royalty interest bears its share of gas gathering and processing costs.[73]

This case concerned the interpretation of a 1986 mineral deed reserving an in-kind, non-participating royalty interest, with delivery of the fractional share "free of cost in the pipeline, if any, otherwise free of cost at the mouth of the well or mine[.]"[74] The parties, Engler and BlueStone Natural Resources II, LLC ("Bluestone,") agreed that royalty was free of production costs and postproduction costs incurred prior to delivery into the pipeline but disagreed about where the "pipeline" began for purposes of determining delivery under the terms of the deed in question, which significantly affected the royalty payments Engler would receive. Engler subsequently sued Bluestone for common-law conversion of royalty payments and argued that delivery occurred downstream of the wellsite at the transportation pipeline. Bluestone, on the other hand, argued that delivery occurred in the gathering pipelines at the wellsite, which burdened the royalty interest with all postproduction costs from that point until the gas was sold. The trial court agreed with Engler, but the court of appeals reversed and entered judgment in Bluestone's favor, reasoning that a precedent case, *Burlington Resources*, established the rule that the phrase

69. 639 S.W.3d 682 (Tex. 2022).
70. *Id.*
71. 573 S.W.3d 198 (Tex. 2019).
72. *Nettye* at 689.
73. *Id.* at 694.
74. *Id*. at 686.

"into the pipeline" was equivalent to "at the well," and creates valuation or delivery point "at the wellhead or nearby."[75]

Writing for the majority, Justice Devine rejected the argument that *Burlington Resources* set forth a bright-line rule that interprets the language "into the pipeline" and other similar phrases would always mean an "at the well" valuation point. Instead, the court's reasoning in *Burlington Resources* was that "all contracts . . . are to be construed as a whole to ascertain the parties' intent from the language they used to express their agreement."[76] If a contract is unambiguous, external evidence added to change or alter the deed's language should be rejected. Rather, the facts and circumstances surrounding that deed should merely clarify the meaning and terms expressed within it. The court, applying this reasoning, analyzed the deed similar to a plain meaning approach and relied on contemporaneous dictionary definitions, industry manuals, and applicable portions of Texas statutes and caselaw.[77] Thus, the court held that a gathering pipeline "is a pipeline in the ordinary, industry and regulatory meaning of the term."[78]

Here, Bluestone discharged its royalty obligations by the terms within the deed and properly deducted postproduction costs incurred after delivery into the gas gathering system located on the wellsite.[79] This creates significant implications down the road, as depending on the specific deed or lease language in issue, there may be opportunities for oil and gas companies to deduct postproduction costs associated with gathering pipelines when calculating royalties. Thus, from here on out, those within oil and gas industry should be aware that Texas law will require courts to analyze contract disputes on the parties' specific chosen language and closely analyze the particular deed or lease language at issue before changing its current royalty calculation process to deduct gathering costs as postproduction costs.

F. EP Energy E&P Co., L.P. v. Storey Minerals, Ltd.[80]

In 2009, the parties entered into three identical oil and gas leases containing Most Favored Nations ("MFN") clauses. Article II of the leases required EP Energy E&P Company, L.P. ("EP Energy") to pay $500 in bonuses per net mineral acre for the right to lease the real property.[81] EP

75. *Id*. at 686-88.
76. *Id*. at 685.
77. *Id*. at 692-94.
78. *Id*. at 691.
79. *Id*. at 696.
80. 04-19-00534-CV, 2022 WL 223253 (Tex. App.–San Antonio Jan. 26, 2022).
81. *Id*. at *2.

Energy acquired two additional leases triggering the requirement to amend and pay additional bonuses.[82] The parties disagreed on the amounts due for bonuses, and Storey Minerals, Ltd., Maltsberger/Storey Ranch, LLC, and Rene R. Barrientos, Ltd. ("MSB") filed suit for breach of the leases.[83]

MSB moved for summary judgment arguing that EP Energy breached the MFN clause by failing to amend the leases and pay higher bonuses.[84] MSB sought damages and specific performance; EP Energy moved for summary judgment, arguing that plain language and surrounding circumstances established it did not breach the clause because it provided an amendment to the leases and offered to true-up payments.[85] The trial court granted MSB summary judgment requiring EP Energy to amend the leases and pay true-up bonuses.[86] The court also denied MSB's summary judgment motion on delay rentals because neither MFN-triggering lease provided for higher delay rentals.[87] After stipulating MSB's damages as $41,034,055 for all leases, the trial court rendered final judgment for MSB, concluding EP Energy breached the MFN clause and ordered it to amend the leases and pay the total damages.[88]

The MFN clause provided that if during the existence of the lease, EP Energy acquired a third-party lease on a portion of the leased premises with a bonus higher than the bonus being paid to MSB, EP Energy would execute an amendment "effective" as of the date of the third-party triggering lease to provide MSB "thereafter" the same percentage per net mineral acre bonus.[89] The parties agreed that EP Energy acquired a lease which triggered the MFN Clause and was required to amend the MSB leases to provide that MSB shall receive the same percentage of bonus thereafter.[90]

On appeal, the court rejected EP Energy's argument that it was only obligated to make payments beginning on the lease's effective dates because the plain, ordinary, and general meaning of "effective" and "thereafter" provides that EP Energy is required to execute an amendment to the leases, operative on the date EP Energy enters into a third-party lease, to provide to MSB afterward the same higher bonus per net mineral acre as

82. *Id*.
83. *Id*.
84. *Id*.
85. *Id*.
86. *Id*. at *3.
87. *Id*.
88. *Id*.
89. *Id*. at *4.
90. *Id*. at *5.

it provided in a third party lease.[91] Further, the Court stated that the plain language of the MFN clause required no prospective or retroactive construction because "it provided straightforward instruction."[92] The court read the MFN clause to provide that if the bonus amount is higher in a triggering lease, EP Energy must (1) execute an amendment to the leases to provide the same bonus per net mineral acre as the triggering lease and (2) pay the same bonus per net mineral acre as the triggering lease.[93]

The Court also rejected EP Energy's argument that the surrounding circumstances supported its argument that after it entered into triggering leases, it was only required to pay bonuses on acreage that it had paid bonuses on from that point forward because regardless of circumstances, "the parties edited drafts of lease terms, including the MFN clause, and the resulting lease terms represented a bargained-for exchange."[94] As such, the Court affirmed the trial court's ruling on summary judgment in favor of MSB.[95]

However, the Court did find that the trial court erred in granting MSB's request for specific performance in addition to damages because MSB offered no evidence to establish that the monetary damages sought would not be an adequate remedy at law.[96] Accordingly, the court reversed the portion of the trial court's judgment that ordered EP Energy to sign the lease amendment, and then denied judgment on MSB's request for specific performance. In all other respects, the trial court's judgment was affirmed.[97]

G. Samson Exploration, LLC v. Bordages[98]

In 1999, members of the Bordage family executed an oil and gas lease in favor of Samson Exploration, LLC, as Lessee, covering 95 acres in Hardin County, Texas.[99] No well was drilled on the 95-acre tract, but the tract was included in two units.[100] In 2001, Samson received a title opinion which noted that between 1938 and 1943 the then-owners conveyed an undivided one-third interest in the property to the Bordages, but the deed was never recorded in Hardin County.[101] Samson requested documentation from the

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91. *Id*.
92. *Id*. at *9.
93. *Id*.
94. *Id*. at *10.
95. *Id*. at *12.
96. *Id*. at *13.
97. *Id*.
98. 09-20-00174-CV, 2022 WL 120004 (Tex. App.–Beaumont Jan. 13, 2022).
99. *Id.* at *3.
100. *Id*.
101. *Id*.

Bordages in May of 2002.[102] The Bordages advised Samson that there was never a deed, but provided a copy of a Certificate of Interest which they believed to be sufficient to vest the Bordages with beneficial or equitable title to the one-third interest.[103] In September of 2002, Samson re-sent its May letter with a stamp marking it as a "second request."[104] In October of 2007, Samson received an affidavit from the transferring owners and a second copy of the Certificate of Interest.[105] In December of 2007, Samson began paying royalties to the Bordages on one of the two units, without payment of late charges or interest.[106]

In 2005, most of the Bordages joined active litigation against Samson, while the remaining landowners joined in 2006.[107] The Bordages claimed breach of lease agreements, failure to pay royalties, violation of the Texas Natural Resources Code, unpaid late charges, and negligence.[108] The trial court ruled in favor of the Bordages on summary judgment, awarding total damages of $12,955,919 which included $8,312,203 for accrued and unpaid royalties.[109]

Samson raised two issues on appeal: (1) the trial court erred in granting summary judgment against Samson and in failing to grant Samson's cross-motion for summary judgment and its motion for reconsideration; and (2) the trial court miscalculated late charges through its misconstruction of the late charge provisions of the leases.[110]

The appellate court affirmed the lower court's ruling, stating that when it construes an oil and gas lease, "we seek to enforce the parties' intention as they expressed it in the lease."[111] The court rejected Samson's argument that the lease only authorized a late charge on past due royalties, but not on past due late charges.[112] The lease provides that all past due royalties are subject to "a Late Charge based on the amount due."[113] The court sought to understand what "amount due" meant by reviewing the provision's final sentence which stated "any Late Charge that may become applicable shall

102. *Id*. at *4.
103. *Id*.
104. *Id*.
105. *Id*. at *5.
106. *Id*.
107. *Id*.
108. *Id*. at *6.
109. *Id*. at *8.
110. *Id*. at *2.
111. *Id*. at *10 (quoting Tittizer v. Union Gas Corp., 171 S.W.3d 857, 860 (Tex. 2005)).
112. *Id*. at *14.
113. *Id*. at *12.

be due and payable on the last day of each month."[114] Because the parties chose to include language which specified when late charges commence and when they become due and payable, the court found that late charges were necessarily encompassed in the "amount due" on which the late charge is based.[115] According to the court, when this provision is read in conjunction with the provision specifying the time for royalty payments, the plain language of the lease states that late charges commence at the beginning of each month, become due and payable at the end of each month, and do not limit a late charge to past due royalties.[116] Further, the court ruled that the contract's language authorized compounding the late charges on the basis that the late charges become part of the "amount due."[117]

The court also rejected Samson's argument that royalties were not due prior to 2007 because of a title dispute.[118] The lease did not contain language about to whom payments would be made, but rather by when payments should be made.[119] The court stated that the "plain language of the lease does not excuse non-payment of late charges in the event of a title dispute.[120] According to the court, no language in the lease supports Samson's interpretation of excusing nonpayment of late charges in the event of an ownership issue.[121] Further, even if the lease had provided an excuse for non-payment of late charges, the summary judgment evidence did not show the existence of a bona fide dispute regarding the title.[122] As such, the lease permitted the compounding of late charges, did not provide an exception to the payment of late charges, and no bona fide title dispute existed that would alter when the royalties were due under the lease.[123] The Court affirmed the trial court's judgment in favor of the Bordages family.[124]

114. *Id*. at *13.
115. *Id.*
116. *Id*.
117. *Id*. at *14-15.
118. *Id*. at *19.
119. *Id*. at *17.
120. *Id*. at *18.
121. *Id*.
122. *Id*. at *19.
123. *Id*. at *19.
124. *Id*. at *20.

H. Ammonite Oil and Gas Corporation v. Railroad Commission of Texas[125]

This case concerns an appeal by Ammonite Oil and Gas Corporation ("Appellant'). Appellant filed an application to force pool its certain minerals interest in State-owned riverbed acreage operated by EOG Resources Inc. under the Mineral Interest Pooling Act (the "Act"). The Texas Railroad Commission (the "Commission) denied the application. Appellant appealed and the trial court affirmed the order. Appellant appealed.

Appellant is the lessee of acreage in the Frio River owned by the state of Texas. EOG drilled 16 wells on an adjacent property. Appellant offered to pool their acreage with EOG, which EOG rejected. Appellant then filed 16 applications to pool under the Mineral Interest Pooling Act asserting that "forced pooling was necessary under MIPA to prevent the waste of its riverbed minerals and to protect its correlative right to a fair share of the common reservoir's production."[126] The Commission consolidated the applications.

EOG objected to the application and a hearing was held before the Commission. The hearing examiners recommended approval of 15 of the applications for forced pooling. However, the Commission rejected the recommendations and denied all 16 applications. In doing so, it issued the following conclusions of law:

> 1. Pursuant to Texas Natural Resources Code 102.016, notice of the hearing was given to all interested parties . . . .
>
> 2. Ammonite failed to make a fair and reasonable offer to voluntarily pool as required by Texas Natural Resources Code 102.013.
>
> 3. Force pooling will not prevent waste, protect correlative rights, or avoid the drilling of unnecessary wells as required by Texas Natural Resources Code 102.011.
>
> 4. The Commission lacks authority to issue a compulsory pooling order for the Naylor Jones Unit 26 No. 2H because Ammonite's proposed unit size exceeds the limits authorized by Texas Natural Resources Code 102.011 and cannot be reformed.

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125. No. 04-20-00465-CV, 2021 WL 4976324, at *1 (Tex. App.–San Antonio Oct. 27, 2021).

126. *.Id.*

> 5. Because the applicant failed to meet its burden of proof to prove that the granting of the application is necessary to prevent waste, protect correlative rights, or avoid the unnecessary drilling of wells, the necessary pre-requisites for MIPA pooling have not been established. Ammonite's applications for all sixteen (16) units must be denied.[127]

Appellant filed for judicial review of the Commission's order, and the trial court affirmed the decision. On appeal, Appellant argued the Commission ruling was a misinterpretation of the Act and deviated from its own precedent. Moreover, Appellant contended that the district court erred in failing to address the issues of law.

The appellate court affirmed. Under MIPA, an application for a forced pooling order must be preceded by a fair and reasonable offer to the owner/operator of the wells.[128] A mineral owner must meet one of three statutory requirements to have its MIPA application approved; it must establish that the force-pooled unit(s) would "(1) avoid the drilling of unnecessary wells, (2) protect correlative rights, or (3) prevent waste."[129] The Court held that the Commission's order was based on evidence and reason; that Ammonite's voluntary pooling offers were not fair and reasonable in the Commission's discretion and that Ammonite failed to meet its burden of establishing one of the three statutory requirements.[130]

I. Carl v. Hilcorp Energy Company[131]

Anne Carl and Anderson White, as Co-Trustees of the Carl/White Trust ("Plaintiff"), is the successor-in-interest lessor. Defendant, Hilcorp Energy Company ("Hilcorp") is the successor-in-interest lessee. The Defendant operates two wells on the leased premises. The Plaintiff alleged that Defendant underpaid royalties in violation of its lease. The section specifically at issue here is Paragraph 3. Paragraph 3 states:

> [Gas Royalty Clause] The royalties to be paid by Lessee are: . . . (b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or

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127. *Id*. at *2.
128. Tex. Nat. Res. Code Ann. § 102.013.
129. Tex. Nat. Res. Code Ann. § 102.011.
130. *Ammonite* at *3.
131. No. 4:21-CV-02133, 2021 WL 5588036, (S.D. Tex. Nov. 30, 2021).

> used . . . [Free Use Clause] Lessee shall have free use of oil, gas, coal, wood and water from said land, except water from Lessors' wells, for all operations hereunder, and the royalty on oil, gas and coal shall be computed after deducting any so used.[132]

Plaintiff's claim for breach of contract originates under the Class Action Fairness Act.[133] Plaintiff specifically alleged that Paragraph 3 requires a royalty to be paid for any gas used off the premises. Moreover, they claim the Free Use Clause allows gas to be used only on the leased premises. Here, the Plaintiff alleged that defendant used gas off the premises to power equipment for hydrocarbon processing, requiring royalty to be paid on all such gas used.

In response, Hilcorp argued that it did not violate the clause and that the case should be dismissed. Hilcorp argued that this is an "at the well" lease, and that with respect to an "at the well" lease royalty, payments do not need to be paid for gas used to process the lease's raw gas for use in downstream sale.

Here, the court first considered the concepts of gas production, and "market value at the well" leases. The Court explained, "[p]roduction is the process of bringing minerals to the surface. Production for raw gas occurs at the wellhead. A royalty payment, which represents a lessor's fractional share of production from a lease, may be calculated at the wellhead or at any downstream point, depending on the lease terms."[134]

The Court specifically focused on the concept of "market value," which they explain, means "the price a willing buyer under no compulsion to buy will pay to a willing seller under no compulsion to sell."[135] Moreover, they found,

> The preferred method of determining market value is by using actual sales that are "comparable in time, quality, quantity, and availability of marketing outlets." When comparable sales data are unavailable, an alternative methodology for determining "market value" at a specified valuation point is the "net-back" or "workback" method. When the location for measuring market value is "at the well" (or equivalent phrasing), the workback method permits an estimation of wellhead market value by using the proceeds of a downstream sale and subtracting

132. *Id.*, citing to Lease Agreement, Doc. 13-1, ¶ 3 (emphasis added).

133. 28 U.S.C. § 1332(d).

134. *Carl* at *2, citing BlueStone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 386-87 (Tex. 2021).

135. *Id.*, citing *Randle*, 620 S.W.3d, at 388.

> postproduction costs incurred between the well and the point of sale.[136]

Additionally, the Court pointed to a recent Texas Supreme Court decision which held that under a "market value lease" postproduction costs are normally deducted from the royalty.[137]

The Court held that the Plaintiff's arguments were unavailing regarding the Gas Royalty Clause. Applying the proper methodology, the Court held that postproduction costs must be deducted from the royalty.[138] The Court came to this conclusion in part because the gas used off the premises is used to power equipment for said postproduction activities. In turn, the court found that these "off-lease" uses had been properly deducted from the royalty calculation.

The Court also rejected the Plaintiff's arguments regarding the Free Use Clause. The Plaintiff argued that this clause allowed the Defendant free use of gas for operations only on the lease. The Defendant countered that "these provisions do not preclude lessees from deducting gas used as fuel or in-kind payment for post-production services in 'market value at the well' leases."[139] The Court found the cases the Defendant cited to be persuasive here. Specifically, a 1982 Fifth Circuit case in which that court "found that 'the market value at the well' language controlled and that the lease operator could deduct the cost of gas used as fuel for post-production services.[140] In turn, it agreed with the Defendant that the proper application of the "market value at the well" provision is the critical clause.[141]

In response, the Plaintiff looked to the recent *Randle* decision from the Texas Supreme Court. It argued that this decision set a standard in which "'sold or used off the premises' and 'free use' clauses require the lessee to pay full royalty for gas used off the premises, regardless of whether the lease agreement contains a 'market value at the well' provision."[142] However, the Defendant responded that this interpretation of *Randle* was incorrect. They contend that in *Randle*, the lease agreement did not include a "market value at the well" provision that allowed for the deduction of

136. *Id.* (internal citations omitted).

137. *Id.* at *3. (citing Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 122-23 (Tex. 1996); Burlington Res. Oil and Gas Co. LP v. Texas Crude Energy, 573 S.W.3d 198, 203 (Tex. 2019)).

138. *Id*.

139. *Id.*

140. *Id.* at *3, (citing Piney Woods Country Life School v. Shell Oil Co*.,* 539 F. Supp. 957, 958 (S.D. Miss. 1982)).

141. *Id.* at *4.

142. *Id.*

post-production costs. Here, the Court agreed that *Randle*, did not supersede previously cited cases such as *Burlington Resources, French*, or *Heritage.*

For the reasons above, the Court granted Defendant's Motion to Dismiss without prejudice.

J. Fitzgerald as Trustee for Jackson Family Mineral Trust v. Apache Corporation[143]

Fitzgerald ("Plaintiff") (a successor-in-interest lessor of the lease at issue) brought suit against Apache ("Defendant") (a well operator and successor-in-interest lessee of the lease at issue). At issue was Plaintiff's allegation that Defendant pays "no royalty" for gas used off-lease. Plaintiff contends that two lease clauses require such payment be made.

Plaintiff alleged that the Defendant typically used gas off the leased premises for postproduction purposes. Plaintiff cited two sections of the lease, which they contend required Defendant to pay royalties. First, the "market value at the well clause" and the "on-lease free-use clause." Plaintiff contended both clauses require payment for off-lease gas use. In turn, Plaintiff brought a single claim for breach of lease, as an individual and as the representative of a class including:

> All current royalty owners in Texas wells where Apache Corporation (including its affiliated predecessors) was the operator (or a working interest owner who marketed its share of gas and directly paid royalties to the royalty owners) from April 1, 2011 to the date Class Notice is given under oil and gas leases which expressly contain the off-lease use of gas royalty clause, the on-lease free use clause, or both.[144]

Apache rejected the Plaintiff's argument and argued that the case should be dismissed. Specifically, the Defendant claimed no royalty is owed on postproduction costs. Indeed, both parties agree that the "non-payment" at issue only concerns gas used in postproduction.

The Court noted that the facts here are nearly identical to another 2021 case, *Carl v. Hilcorp Energy Company*. There, the court found for the defendants. Here, similar to the analysis in *Carl,* the Court looked to *Bluestone*, *Burlington*, and *Randle* for the proper method of interpreting a

143. No. CV H-21-1306, 2021 WL 5999262 (S.D. Tex. Dec. 20, 2021).
144. *Id.* at *2.

contract. Specially, it found that "a court's objective is to 'ascertain the parties' true intentions as expressed in the writing."[145]

First, the Court analyzed "market-value-at-the-well royalty," and "free use on-lease" clauses. In interpreting the proper application of "market-value-at-the-well royalty, the Court reasoned that "[m]arket value, if possible, is calculated by using 'actual sales that are "comparable in time, quality, quantity, and availability of marketing outlets."'"[146] Considering the findings in *Burlington*, the Court further reasoned:

> When the location for measuring market value is 'at the well' (or equivalent phrasing), the workback method permits an estimation of wellhead market value by using the proceeds of a downstream sale and subtracting postproduction costs incurred between the well and the point of sale. Although parties may define post-production costs any way they choose, the term generally applies to processing, compression, transportation, and other costs expended to prepare raw oil or gas for sale at a downstream location.[147]

The Court also relied heavily on these cases in their analysis of the "free use" clause. Here, the clause specially states: "Lessee shall have free use of oil, gas, . . . for all operation hereunder; and the royalty on oil or gas shall be computed after deducting any so used."[148] The Court gave heavy weight to the recent Texas case *Randle*. It noted that the court there differentiated between gas used off premises by third parties and gas used off lease that is returned to the premises to power infrastructure on the lease. While the former requires royalty payment, the latter does not.

Next the Court analyzed the specifics of the lease at issue. First, the "market value at the well" clause states:

> The royalties to be paid Lessors are: . . . (b) on gas, including casinghead gas or other gaseous substance, produced from said land and sold or used off the premises or in the manufacture of gasoline or other product therefrom, the market value at the well of one-eighth (1/8) of the gas sold or used;[149]

145. *Id*. at *3 (citing BlueStone Nat. Res. II, LLC v. Randle, 620 S.W.3d 380, 387 (Tex. 2021)).

146. *Id.* at *4.

147. *Id.* (citing *Burlington*, 573 S.W.3d at 203 (internal quotation marks omitted)).

148. *Id.* at *4.

149. *Fitzgerald*, 2021 WL 5999262 at *2 (emphasis in original).

Second, the "on-lease free-use clause" states:

> Lessee shall have free use of oil, gas, wood, and water from said land, except water from Lessors' wells, for all operation hereunder; and the royalty on oil or gas shall be computed after deducting any so used.[150]

The Defendant argued that it has "no liability if it deducted only post-production costs under a market value at the well lease."[151] Indeed, both parties agreed that all gas at issue was used in postproduction or as compensation to midstream operators. However, Plaintiff contended that Defendant is "still liable for royalties on the gas used off-lease because the market value at the well clause addresses only the valuation of the royalty payment and does not address the amount of gas on which Apache owes a royalty."[152]

The court noted that the lease in question is materially similar to the lease in *Randle*. However, Defendant distinguishes this case by the fact that the lease in *Randle* did not have a "market-value-at-the-well" provision, and so the *Randle* court only examined the issue of "free use" clauses. Instead, the here court looked to *Carl* for guidance, reasoning "that the free-use clause "can be read in harmony" with the market-value clause."[153] Therefore, even if the "free use" clause is found to only apply to gas used on the premises, gas used off the premises may still be deducted if used in postproduction.

Importantly, the Defendant argued the two provisions apply to different types of gas usage. While the "free-use" clause addresses gas used on the leased premises, the market-value provision concerns postproduction wherever it occurs. Therefore, even if the "free use" clause is interpreted similarly to that in *Randle* it would not be dispositive on the overall question here.

The Court noted that the Defendant had conceded "whether the gas is sold or the gas is used off lease, her royalty is based on the market value, which requires the deduction of postproduction costs."[154] In turn, the Court reasoned the Defendant failed to adequately explain why it would be owed royalties on gas that is consumed in the postproduction process and receive royalty payment at market value for gas that is sold. Looking to a Fifth Circuit decision, the court explained, "[l]ogic and equity dictate that all of

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150. *Id*.
151. *Id.* at *6.
152. *Id.*
153. *Id.*
154. *Id.* at *7.

the plant fuel value is a processing cost; none of this fuel survives to be marketed by any of the working interest owners; by definition, it is all used to facilitate the production of the gas that is sold."[155] Therefore, "if all the gas used off lease is consumed in postproduction services for gas that is sold, there is no amount of remaining gas used for which a royalty payment could be calculated."[156]

The Court held that the Plaintiff's only assertions were that the Defendant deducted costs that were permitted to be deducted. The Plaintiff failed to make any claim that the Defendant underpaid royalties. Therefore, the Plaintiff has failed to make a claim for breach. In turn, the Motion to Dismiss was granted and the court dismissed the case without prejudice.

K. In re Eagleridge Operating, LLC[157]

In March of 2022, the Supreme Court of Texas heard a premises-defect case in which Eagleridge Operating, LLC ("Eagleridge") sought mandamus relief from a trial court order that struck its responsible-third-party designation under Chapter 33 of the Texas Civil Practice and Remedies Code.[158]

Aruba Petroleum Inc. ("Aruba") owned a minority working interest in a wellsite, served as operator of record, and received an operations fee from the majority working-interest owner, USG Properties Barnett II, LLC ("USG").[159] Aruba was responsible for operating, drilling, and servicing the wellsite for four years until April 2017.[160] At that time, Aruba conveyed its ownership to USG and stopped servicing as the operator.[161] Prior to such conveyance, USG entered into a written contract with Eagleridge to serve as operator, but Eagleridge did not assume control of the wellsite until May 2017.[162] A few months later, the gas line ruptured and injured plaintiff Earmon Lovern.[163] The Loverns filed suit, and the trial court granted the motion to strike and the motion for partial summary judgment, prompting Eagleridge to seek mandamus relief, which the court of appeals denied.[164] In a split decision, that court held that *Occidental Chemical Corp. v.*

155. *Id.* (citing Piney Woods Country Life Sch. v. Shell Oil Co., 905 F.2d 840 (5th Cir. 1990)).
156. *Id.*
157. 642 S.W.3d 518 (Tex. 2022).
158. *Id*.
159. *Id*. at 521.
160. *Id*.
161. *Id*.
162. *Id*.
163. *Id*.
164. *Id*. at 523.

Jenkins precludes Eagleridge's argument that Aruba should be designated as the responsible third party.[165] The Supreme Court of Texas reviewed only whether precedent in *Occidental* precludes Aruba's responsibility for any defects in the pipeline.[166]

The Court reasoned that a responsible third party is any person who is alleged to have caused or contributed to causing in any way the harm for which recovery of damages is sought, whether by negligent act or omission, by any defective or unreasonably dangerous product, by other conduct or activity that violates an applicable legal standard, or by any combination of these.[167]

The Court explained, as it did in *Occidental*, that a property owner may have responsibility for a dangerous condition on its property whether created by the owners or others, but the owner's duty is not the same as an independent contractor's.[168] Under this theory, an owner has premises liability.[169] Under premises liability principles, a property owner generally owes those invited onto the property a duty to make the premises safe or to warn of dangerous conditions as reasonably prudent under the circumstances.[170] However this duty generally runs with the ownership or control of the property and upon a sale ordinarily passes to the new owner.[171]

The Court rejected Eagleridge's argument that Aruba was an independent contractor because it received payment from USG, as Aruba's receipt of compensation for its efforts as operator of record neither transforms it from an owner into an independent contractor or third party nor materially distinguishes the facts of this case from *Occidental*.[172] Being financially compensated for managing your property interests in a tenancy in common does not give rise to a third party relationship with respect to the property, but is more akin to reapportioning revenues and expenses among co-owners.[173] The Court held that an agreement strictly between tenants in common to allocate expenses, assign responsibilities, and compensate for disparate efforts in a joint endeavor does not create an exception to *Occidental* as to improvements each party would otherwise

165. Occidental Chem. Corp. v. Jenkins, 478 S.W.3d 640 (Tex. 2016).
166. *Id*. at 525.
167. *Id*. (citing Tex. Civ. Prac. & Rem. Code § 33.011(6)).
168. *Id*. at 527.
169. *Id*.
170. *Id*.
171. *Id*.
172. *Id*. at 529.
173. *Id*.

have been free to construct without the consent of the other.[174] As such, the Court denied Eagleridge's mandamus petition.[175]

L. Shirlaine West Properties Limited v. Jamestown Resources, L.L.C.[176]

Shirlaine West Properties Ltd. involves a dispute over the allocation of postproduction costs in royalty valuations.[177] Shirlaine (lessor) filed suit against Jamestown (lessee) alleging underpayment of royalties, contending that the lease unambiguously provides that royalty are not subject to direct or indirect postproduction costs.[178] The court held that the lessor's royalty interest was burdened by postproduction costs and that the royalty clause in the contract unambiguously fixed the wellhead as the valuation point for market value royalty calculations.[179]

In its analysis, the court acknowledged the royalty clause principles developed in *Bluestone*.[180] These include that unique words and phrases about royalties in oil and gas leases may mean something different than they appear, may mean nothing at all, or may be altered from their unique meaning with other contract terms.[181] It depends on "whether the words used clearly express the intent of the parties to deviate from the traditional meanings."[182]

While leases that calculate royalties based on market value at the wellhead generally burden the lessor's royalty with postproduction costs, the court identified two exceptions that related to sentence one and two of the royalty clause.[183] These exceptions included "proceeds" leases and "amount realized" leases.[184] In *Hyder*, a proceeds lease was found—the gas royalty language allowed a royalty of "25% of the price actually received by the Lessee"—that was "free and clear of all production and post-production costs and expenses."[185] The royalty did not bear postproduction costs because it was based on the price the lessee actually received, not the

174. *Id*.
175. *Id*. at 530.
176. No. 02-18-00424-CV, 2021 WL 5367849 (Tex. App.–Fort Worth Nov. 18, 2021).
177. *Id.* at *1.
178. *Id*.
179. *Id.*
180. *Id*. at *4.
181. *Id*. (citing Bluestone Nat. Res. II, LLC v. Randle, 601 S.W.3d 848, 855 (Tex. App.–Fort Worth 2019); Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC 573 S.W.3d 198, 203-04 (Tex. 2019)).
182. *Id.*
183. *Id*. at *4-5.
184. *Id*. at *5.
185. *Id*. (citing Chesapeake Expl. L.L.C. v. Hyder, 483 S.W.3d 870, 871 (Tex. 2016)).

market value at the well.[186] In *Warren*, the "amount realized" clause would have allowed the calculation of royalty based on the price actually received by the Lessee without the proceeds being net of postproduction costs.[187] However, these "proceeds" and "amount realized" exceptions were not helpful for Shirlaine because the royalty clause, according to sentences one and two, fixed "market value as the measure of value and set the location of the value at the point of sale," and it was "uncontroverted that the point of sale of the gas in question was at the wellhead."[188]

Other language in the royalty clause also attempted to prevent royalties from being subject to postproduction costs.[189] However, the court considered sentences four, five, and six of the leases to be surplusage because the value at the well was already net of reasonable marketing costs.[190] Sentence seven of the royalty clause became the central dispute of the case, providing that "[i]f Lessee realizes proceeds of production after deduction for any expenses of production, gathering, dehydration, separation, compression, transportation, treatment, processing, storage or marketing, then the proportionate part of such deductions shall be added to the total proceeds received by Lessee for purposes of this paragraph."[191] Interpretating sentence seven to mean that Lessors were entitled to have postproduction expenses added back into the total proceeds would have been in conflict with sentences one and two.[192]

The court, quoting *Valence*, decided to harmonize the royalty clause in an effort to prevent any provisions from being rendered meaningless.[193] In doing so, it determined that sentence seven was not applicable.[194] "Finding the lease agreement unambiguous, no evidence of breach of the lease agreement, and no damages caused by any alleged breach," the court affirmed the judgment for Jamestown Resources.[195]

186. *Id*.
187. *Id*. (citing Warren v. Chesapeake Expl. L.L.C., 759 F.3d 413, 417 (5th Cir. 2014)).
188. *Id*. at *5-6.
189. *Id*. at *6.
190. *Id*.
191. *Id*. at *7.
192. *Id*.
193. *Id*. (quoting Valence Operating Co. v. Dorsett, 164 S.W.3d 656, 662 (Tex. 2005)).
194. *Id.*
195. *Id.*