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Having Your Cake and Condemning It Too: When Asserting the Power of Eminent Domain Constitutes Breach of an Oil and Gas Lease

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HAVING YOUR CAKE AND CONDEMNING IT TOO: WHEN ASSERTING THE POWER OF EMINENT DOMAIN CONSTITUTES BREACH OF AN OIL AND GAS LEASE

By John Allen Chalk, Sr. & Rebecca K. Eaton†

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I. INTRODUCTION—THE FACTUAL SCENARIO

The rapid increase in urban drilling for oil and gas in Texas, especially the shale natural gas plays that have become major producers of energy in Texas and other parts of the United States, have created new concerns for surface owners who also own the related minerals. One question is, how can land and mineral owners limit or prohibit surface use while leasing the minerals to producers? The advent of horizontal drilling that permits exploitation of leased minerals from off-site drilling locations prompts this new concern. The following is a scenario that frequently occurs in the current development and production of oil and natural gas, especially where minerals that a landowner leases are associated with a surface that the landowner concurrently uses for residential or commercial purposes.

A mineral and surface owner (the Lessor) negotiates an oil and gas lease (the Lease) with a producer (the Lessee) and makes sure that the Lease expressly, absolutely, and unconditionally prohibits the Lessee from drilling or placing pipelines on the surface of the property that is subject to the Lease (the Subject Property). Knowledgeable oil and gas lawyers represent both parties in the Lease negotiations. The parties file the Lease or a Memorandum of Lease in the Official Public Records of the Texas county where the Subject Property is located. The Lessee drills an off-site horizontal well that drains the oil and gas subject to the Lease.

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After the parties sign the Lease and file it of record, the Lessee requests that the Lessor grant a pipeline easement for a gathering pipeline to run through the Subject Property from the off-site well to a larger gathering pipeline. The Lease expressly, absolutely, and unconditionally prohibits Lessee's use of the Subject Property for pipelines and other surface uses. Relying on and citing the negotiated provisions of the Lease, the Lessor refuses to grant consent for the pipeline requested by the Lessee.

The Lessee wholly owns a subsidiary that is a "gas utility," as defined in Section 91.173(2) of the Texas Natural Resources Code and Sections 101.003(7) and 121.001 of the Texas Utilities Code, to whom the Texas Legislature has granted statutory eminent domain powers (the Condemnor). The Condemnor—who, again, is wholly-owned by the Lessee—initiates a condemnation action against the Lessor (the Condemnation) for a pipeline easement across the Subject Property, which Lessee's off-site natural gas well is draining. The Condemnor is operated by the Lessee's employees, to whom the Lessee pays wages with payroll checks that contain Lessee's name. These same Lessee employees, who report to Lessee's executive management, also manage the Condemnor. Further, the Condemnor and Lessee also have the same principal business office address; the same business telephone number; and the same employees and supervisors—all of whom have actual and constructive knowledge of the Lease and the Condemnation. Lessee's employees, who report to Lessee's supervisors, make the decision to condemn the Subject Property; however, the Condemnation is in the name of the Condemnor, the only party with eminent domain power. When the Lessee's employees work in the name of or act for the Condemnor, they use e-mail addresses, business cards, and stationery that reflect the Lessee's company name. Third-party vendors and independent contractors providing condemnation services and materials to and for the Condemnor are paid with checks sometimes drawn on the Lessee and sometimes on the Condemnor.

The Lessee is a corporation. The Condemnor is a limited partnership whose general partner is a limited liability company that is also wholly owned by the Lessee. A Lessee employee, to whom the Lessee pays wages, manages the Condemnor's general partner.

Query: Can the Lessor (also the "Condemnee" in the Condemnation) prevent the Condemnor from taking by eminent domain a pipeline easement across the surface of the Subject Property based on the express prohibitions in the Lease? Or can the Condemnor accomplish by the Condemnation what the Lessee, its parent, cannot do lawfully under the terms of the Lease?

II. THE TEXAS BUSINESS ENTITY PROTECTIONS

In Texas, separate business entities have unusually strong protections from attempts by third parties to invade or disregard entity separateness.¹ In recent years, both the Texas Legislature and the Texas Supreme Court have taken additional steps to protect separate business entities, even where such entities have parallel or even identical ownership and engage in joint or related activities.² To make a shareholder or beneficial owner of a corporation liable for the corporation's obligations, a plaintiff must now show "actual fraud on the [plaintiff] primarily for the direct personal benefit of the [share]holder, beneficial owner, subscriber, or affiliate."³ The corporate or entity shield is a strong one in Texas, especially against claims of *alter ego*, constructive fraud, sham to perpetrate a fraud, "or other similar theory."⁴ Lessee's corporate shield and Condemnor's limited partnership protection seem almost impenetrable even in the face of significant joint activities described in our fact pattern.

Disregard of the "legal fiction of the separate entities of two corporations" may be accomplished under Texas law based on any one of six fact patterns: (i) where parties use the legal fiction "as a means of perpetrating fraud"; (ii) where parties organize and operate a business entity "as a mere tool or business conduit of another corporation"; (iii) where parties resort to the legal fiction "as a means of evading an existing legal obligation"; (iv) where parties employ the legal fiction "to achieve or perpetrate monopoly"; (v) where parties use the legal fiction "to circumvent a statute"; or (vi) where parties rely upon the legal fiction "as a protection of crime or to justify a wrong."⁵

In Texas, disregard of the corporate fiction is most commonly used where a corporation "is organized and operated as a mere tool or business conduit of another corporation."⁶ This is also referred to as the *alter ego* theory.⁷ The *alter ego* theory is an "equitable doctrine" that arises when the unity between the parties is such that the separateness of the corporation has ceased and holding only the corporation liable

1. See *PHC-Minden, L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 173 (Tex. 2007) ("We required that the party seeking to ascribe one corporation's actions to another by disregarding their distinct corporate entities prove this allegation [jurisdictional veil-piercing to make out-of-state company subject to Texas court], because Texas law presumes that two separate corporations are distinct entities.")

2. See *TEX. BUS. ORGS. CODE ANN.* § 21.223 (West Supp. 2009); *SSP Partners v. Gladstrong Invs. (USA) Corp.*, 275 S.W.3d 444, 455 (Tex. 2008).

3. *TEX. BUS. ORGS. CODE ANN.* § 21.223(b).

4. See *id.* § 21.223(a)(2).

5. *Pac. Am. Gasoline Co. of Tex. v. Miller*, 76 S.W.2d 833, 851 (Tex. Civ. App.—Amarillo 1934, writ ref'd); see also *SSP Partners*, 275 S.W.3d at 451.

6. *SSP Partners*, 275 S.W.3d at 454; *Castleberry v. Branscum*, 721 S.W.2d 270, 272 (Tex. 1986); *Pac. Am. Gasoline Co.*, 76 S.W.2d at 851.

7. *Castleberry*, 721 S.W.2d at 272.

would result in an injustice.⁸ Some of the ways that this unity of two or more entities has been shown in Texas cases include: (i) the corporation's total dealings with the other party; (ii) the degree to which the corporation has adhered to corporate formalities; (iii) the degree to which the corporation keeps separate its property from the property of the other party; and (iv) the amount of financial interest, ownership, and control the other party maintains over the corporation.⁹ And in certain cases,¹⁰ constructive fraud, rather than actual fraud, may suffice to prove *alter ego*.¹¹

Constructive fraud is a breach of a legal or equitable duty irrespective of moral guilt or deception,¹² whereas actual fraud “involves dishonesty of purpose or intent to deceive.”¹³ With constructive fraud, the legal duty arises out of informal fiduciary or confidential relationships.¹⁴ In a business transaction, the relationship that would create a fiduciary duty must exist prior to, and apart from, the agreement that plaintiff makes the basis of the lawsuit.¹⁵ Once a plaintiff establishes that a fiduciary relationship exists, the burden shifts to the defendant to show fairness of the transaction.¹⁶ A court may decide to disregard the corporate fiction when it finds that a party has used the corporate fiction “as part of a basically unfair device to achieve an inequitable result.”¹⁷

The Authors question whether Section 21.223 of the Texas Business Organizations Code and the *alter ego* theory apply in this fact pattern. *Alter ego* is not the question raised by our fact pattern. A validly ex-

8. *Id.* at 272–73.

9. *Id.* at 272.

10. *See Lucas v. Tex. Indus., Inc.*, 696 S.W.2d 372, 375 (Tex. 1984) (“Courts have generally been less reluctant to disregard the corporate entity in tort cases than in breach of contract cases.”); *see also Castleberry*, 721 S.W.2d at 280 (Gonzales, J., dissenting) (stating that courts are less willing to disregard the corporate entity in contract cases as opposed to tort cases).

11. *Castleberry*, 721 S.W.2d at 275–76. *But see SSP Partners*, 275 S.W.3d at 455 (acknowledging that although the Court has held that the corporate structure could be disregarded on a showing of constructive fraud in *Castleberry*, the Texas Legislature “has since rejected that view in certain cases” with the enactment of TEX. BUS. ORGS. CODE ANN. § 21.223 (West 2009) (formerly Texas Business Corporation Act, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1522 (expired Jan. 1, 2010))). *See generally* TEX. BUS. ORGS. CODE ANN. § 21.223 (stating that an exception to the business entity protection requires a showing of actual fraud perpetrated by the corporation on the obligee).

12. *Castleberry*, 721 S.W.2d at 273 (quoting *Archer v. Griffith*, 390 S.W.2d 735, 740 (Tex. 1964)).

13. *Castleberry*, 721 S.W.2d at 273.

14. *See Thigpen v. Locke*, 363 S.W.2d 247, 253 (Tex. 1962); *Pace v. McEwen*, 574 S.W.2d 792, 799 (Tex. Civ. App.—El Paso 1978, writ ref'd n.r.e.).

15. *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171, 177 (Tex. 1997); *see also Rutherford v. Exxon Co., U.S.A.*, 855 F.2d 1141, 1146–47 (5th Cir. 1988) (holding that oil and gas lease does not create a fiduciary relationship between lessor and lessee).

16. *See Pace*, 574 S.W.2d at 799.

17. *SSP Partners*, 275 S.W.3d at 454.

isting contractual obligation by the Lessee not to use the Subject Property bars any action, direct or indirect, that would breach that obligation. The connections of and relationships between the Lessee and the Condemnor are startling. Unfortunately, however, the Texas Supreme Court has made clear that the “single business enterprise” doctrine is not available in Texas to impose any limitation on the Condemnor based on the Lessee’s obligation, under the Lease, not to use the surface of the Subject Property for a pipeline.¹⁸ The “single business enterprise” theory “applies to corporations that engage in any sharing of names, offices, accounting, employees, services, and finances.”¹⁹ But these connections and relationships, at least to the Texas Supreme Court, do not rise to the level of abuse, injustice, or inequity that is necessary to hold corporations liable for each others’ obligations, as once favored in *Castleberry*.²⁰ The “single business enterprise” theory of liability will not support the imposition of one corporation’s obligations on another.²¹

III. THE SANCTITY OF CONTRACTS

Can the federal constitutional right and the sanctity of contract²² overcome the Texas legislative grant of eminent domain power to gas utilities? The legislative grant of eminent domain power is both authorized and limited by the United States and Texas constitutions.²³ What is the relationship between the constitutional sanctity of contracts and the constitutional grant of eminent domain power to the Texas Legislature? Can the Lessee in effect breach, with impunity, the Lease—a lawfully made contract between Lessor and Lessee—through the exercise of the Condemnor’s statutory power of eminent domain? Is lack of contract privity between Lessor and Condemnor enough to overlook the obvious and intentional disregard of the Lease prohibitions by the Lessee’s wholly-owned subsidiary with eminent domain power granted by the Texas Legislature? Are not the Lessor’s

18. *See id.* at 455.

19. *See id.* at 454.

20. *Id.* In *SSP Partners*, the Texas Supreme Court stated:

Creation of affiliated corporations to limit liability while pursuing common goals lies firmly within the law and is commonplace. [We have] never held corporations liable for each other’s obligations merely because of centralized control, mutual purposes, and shared finances. There must also be evidence of abuse, or as we said in *Castleberry*, injustice and inequity. By “injustice” and “inequity” we do not mean a subjective perception of unfairness by an individual judge or juror; rather, these words are used [in *Castleberry*] as shorthand references for the kinds of abuse, specifically identified, that the corporate structure should not shield—fraud, evasion of existing obligations, circumvention of statutes, monopolization, criminal conduct, and the like.

21. *Id.* at 456.

22. *See* U.S. CONST. art. I, § 10.

23. U.S. CONST. amend. V; TEX. CONST. art. I, § 17.

contract rights, granted by the Lease, “property” within the meaning of the Fifth Amendment and Article I, Section 17, and therefore “property” taken by the Condemnation?²⁴

In *Monongahela Navigation Co. v. United States*, the United States Supreme Court held that the Fifth Amendment limited the United States government’s right to take by eminent domain a lock and dam on the Monongahela River between Pittsburgh and Morgantown, West Virginia. Prior to the condemnation, the government had given a private operator (the condemnee plaintiff) the right to build and operate the dam and lock and charge tolls for use of the lock.²⁵ The Court held that the United States government was liable to the condemnee for eminent domain damages, including the value of the condemnee’s franchise right to collect the tolls.²⁶ The Court noted that “after taking this property, the government will have the right to exact the same tolls the [condemnee] has been receiving.”²⁷

In *Long Island Water Supply Co. v. Brooklyn*, the United States Supreme Court permitted the condemnation of a water supply company’s property by the predecessor municipality to the City of Brooklyn, New York. At the time of the condemnation, the water supply company had an existing supply contract with the municipality.²⁸ Plaintiff argued “that a State or municipality cannot do indirectly what it cannot do directly; that as the municipality could not by any direct act release itself from any of the obligations of its contract, it could not accomplish the same result by proceedings in condemnation.”²⁹ The United States Supreme Court stated that “Whenever public uses require, the government may appropriate any private property on the payment of just compensation.”³⁰ In this case, the Court viewed the taking as an appropriation of the contract, a property right, for which the water supply company was entitled to condemnation damages.³¹ The Court upheld the municipality’s eminent domain power but agreed that the company was entitled to compensation for the contract rights that the municipality appropriated.³²

24. See *Omnia Commercial Co. v. United States*, 261 U.S. 502, 509 (1923) (“If, under any power, a contract or other property is taken for public use, the government is liable; but if injured or destroyed by lawful action, without a taking, the government is not liable.”); see also *Hallco Tex., Inc. v. McMullen County*, 221 S.W.3d 50, 56 (Tex. 2006) (stating that, although worded differently, Article I, § 17 is “comparable” to the Fifth Amendment and “it is appropriate to look to federal cases for guidance.”).

25. *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 344–45 (1893).

26. *Id.* at 336–37.

27. *Id.* at 337.

28. See *Long Island Water Supply Co. v. Brooklyn*, 166 U.S. 685, 690–93 (1897).

29. *Id.* at 689.

30. *Id.*

31. *Id.* at 691.

32. *Id.* at 692–93. The Court stated:

But into all contracts, whether made between States and individuals, or between individuals only, there enter conditions which arise not out of the

In *Howard Adams v. City of Weslaco*, a Texas court of appeals found that a restaurant grease disposal company “had property rights in its contracts with existing customers.”³³ The company sued the City after a new city ordinance granted an exclusive franchise to another disposal company.³⁴ The Texas court of appeals held that the city “appropriated the business and property of [the plaintiff] for [the City’s] own public use” and effectively “reassigned [the plaintiff’s] business and contracts to [another company].”³⁵ Thus, the City’s “taking” of the plaintiff’s contract rights entitled plaintiff to compensation.³⁶

To determine whether a condemnor owes a condemnee compensation for the “taking” of a contract, courts consider whether the taking “frustrated” the contract at issue, or whether the taking actually “appropriated” the contract for public use.³⁷ Can the Condemnor, in our fact pattern, be allowed to do what the Lessee cannot do—take a pipeline easement on the Subject Property? If so, under what circumstances? Is this a *Southern Union* situation in which affiliates cannot be held liable for each others’ contract obligations?³⁸ Is the Lessee’s business so intertwined and involved with the operations of the Condemnor as to allow the disregard of the corporate entities?³⁹

literal terms of the contract itself; they are superinduced by the preexisting and higher authority of the laws of nature, of nations or of the community to which the parties belong; they are always presumed, and must be presumed, to be known and recognized by all, are binding upon all, and need never, therefore, be carried into express stipulation, for this could add nothing to their force. Every contract is made in subordination to them, and must yield to their control, as conditions inherent and paramount, wherever a necessity for their execution shall occur. Such a condition is the right of eminent domain. This right does not operate to impair the contract affected by it, but recognizes its obligation in the fullest extent, claiming only the fulfillment of an essential and inseparable condition.

33. *Adams v. City of Weslaco*, No. 13-06-00697-CV, 2009 Tex. App. LEXIS 2809, at *39 (Tex. App.—Corpus Christi April 23, 2009, no pet. h.) (mem. op.).

34. *See id.* at *2.

35. *Id.* at *42–43.

36. *Id.* at *42 (citing *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 19 n.16 (1977) (contract rights are a form of property and as such may be taken for a public purpose provided that just compensation is paid)); *see also Lynch v. United States*, 292 U.S. 571, 579 (1934) (valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States).

37. *See Long Island Water Supply*, 166 U.S. at 691; *see also Omnia Commercial Co. v. United States*, 261 U.S. 502, 511, 513 (“As a result of this lawful governmental action the performance of the contract was rendered impossible. It was not appropriated but ended. . . Frustration and appropriation are essentially different things.”).

38. *See S. Union Co. v. City of Edinburg*, 129 S.W.3d 74, 87, 93 (Tex. 2003) (citing Texas Business Corporation Act, 75th Leg., R.S., ch. 375, § 7, 1997 Tex. Gen. Laws 1522 (expired Jan. 1, 2010), the predecessor to TEX. BUS. ORGS. CODE § 21.223 (West 2009), as the exclusive means by which to hold one corporation liable for obligations of a second corporation in which the first corporation owns shares).

39. *See State v. Lone Star Gas Co.*, 86 S.W.2d 484, 491, 495 (Tex. Civ. App.—Austin 1935, writ ref’d), *rev’d on other grounds*, 304 U.S. 224 (1938).

In our fact pattern, has the Condemnor appropriated the Lease? If so, is the Condemnor therefore required to compensate the Lessor for “taking” the Lease provisions that prohibit pipelines on the Subject Property?

IV. THE STATUTORY POWER OF EMINENT DOMAIN IN TEXAS⁴⁰

Sadie Harrison-Fincher and John Allen Chalk have previously summarized Texas eminent domain procedure found in Chapter 21 of the Texas Property Code.⁴¹ The general steps in the Texas condemnation process include: (i) condemnor must negotiate and make a good faith offer to purchase the landowner’s property; (ii) condemnor must provide the landowner with the Landowner’s Bill of Rights Statement prior to instituting condemnation proceedings; (iii) condemnor begins condemnation proceedings by filing a Petition for Condemnation in the designated court in the county where the property is located; (iv) the court has limited administrative authority to appoint three commissioners; (v) the commissioners’ hearing is held to determine fair market value of the property and damages with ten days’ prior notice of the hearing to the landowner; (vi) the commissioners render an award and assess costs; (vii) the condemnor deposits the amount of the commissioners’ award into the registry of the court and may take immediate possession of the property pending litigation; (viii) the landowner may accept the commissioners’ award or file objections to the award and proceed to trial as in any other civil case; (ix) the landowner’s withdrawal of funds waives the landowner’s right to contest the condemnor’s “right to take the property.”⁴²

Texas law recognizes the presumptions of “public use” and “necessity”⁴³ which provide a major advantage to condemnors. Texas condemnors have “broad discretion” in the exercise of their eminent domain powers.⁴⁴ The condemnor’s determination of what and how much land to take “is nearly absolute.”⁴⁵ In our fact pattern, Section 181.004 of the Texas Utilities Code provides that the Condemnor’s determination of the “necessity” of taking the Subject Property is con-

40. See generally Laura A. Hanley, Comment, *Judicial Battles Between Pipeline Companies and Landowners: It’s Not Necessarily Who Wins, But By How Much*, 37 HOUS. L. REV. 125, 132–33 (2000) (discussing the power of eminent domain).

41. See John Allen Chalk, Sr. & Sadie Harrison-Fincher, *Eminent Domain Power Granted to Private Pipeline Companies Meets With Greater Resistance From Property Owners in Urban Rather Than Rural Areas*, 16 TEX. WESLEYAN L. REV. 17, 20 (2009); see also TEX. PROP. CODE ANN. §§ 21.001–.004 (West 2004).

42. See *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965).

43. See *Block House Mun. Util. Dist. v. City of Leander*, 291 S.W.3d 537, 546 (Tex. App.—Austin 2009, no pet.).

44. *Webb v. Dameron*, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref’d n.r.e.).

45. *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 268–69 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

clusive.⁴⁶ Likewise, the Texas Legislature's declaration that a specific exercise of eminent domain is for public use is "conclusive."⁴⁷ Section 251.001 of the Texas Local Government Code gives municipalities the power of eminent domain to provide for police stations, jails, schools, hospitals, airports, streets, parks, and cemeteries, among other public services.⁴⁸ Section 111.019 of the Texas Natural Resources Code gives common carriers the power of eminent domain for the "construction, maintenance, or operation of the common carrier pipeline."⁴⁹ In Texas, becoming a common carrier is not difficult. To be deemed a common carrier, a pipeline carrier files with the Texas Railroad Commission "a written acceptance of the provisions of [Chapter 111 of the Natural Resources Code] expressly agreeing that, in consideration of the rights acquired, it becomes a common carrier subject to the duties and obligations conferred or imposed by [Chapter 111]."⁵⁰ Texas courts give "great weight to the [Texas Railroad Commission's] determination" that a pipeline company qualifies as a common carrier.⁵¹ The Texas Legislature has also made sure that common carriers, in whatever business entity form created under or recognized by Texas statutes, have all "the rights and powers conferred . . . by Sections 111.019-111.022, of the Natural Resources Code."⁵²

Section 181.001 *et seq.* of the Texas Utilities Code also gives "gas utilities" that are not common carriers the same eminent domain power as a common carrier.⁵³ The Texas Legislature must grant the power of eminent domain to a pipeline company, not a common carrier.⁵⁴ In the exercise of their eminent domain powers, these "gas util-

46. See *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 856 (Tex. App.—Tyler 1999, pet. denied) (citing *Housing Auth. of Dallas v. Higginbotham*, 135 Tex. 158, 173–74, 143 S.W.2d 79 (1940); *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1984, no writ)).

47. *Coastal Indus. Water Auth. v. Celanese Corp. of Am.*, 592 S.W.2d 597, 599 (Tex. 1979).

48. TEX. LOC. GOV'T CODE ANN. § 251.001 (West 2005).

49. TEX. NAT. RES. CODE ANN. § 111.019 (West 2001) (eminent domain power to "common carriers" pursuant to §111.002); *Id.* at §111.019(b) ("In the exercise of the power of eminent domain . . . a common carrier may enter on and condemn the land, rights-of-way, easements, and property of any person or corporation necessary for the construction, maintenance, or operation of the common carrier pipeline.").

50. TEX. NAT. RES. CODE ANN. § 111.020(d) (West 2001).

51. *Vardeman v. Mustang Pipeline Co.*, 51 S.W.3d 308, 312 (Tex. App.—Tyler 2001, pet. denied) (citing *State v. Pub. Util. Comm'n of Tex.*, 883 S.W.2d 190, 196 (Tex. 1994)).

52. TEX. BUS. ORGS. CODE ANN. § 2.105 (West 2009).

53. *Chalk & Harrison-Fincher*, *supra* note 41, at 17–18 (citing *Mercier v. MidTexas Pipeline Co.*, 28 S.W.3d 712, 717–18 (Tex. App.—Corpus Christi 2000, pet. denied); *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 564–65 (Tex. App.—San Antonio 1998, pet. denied)).

54. *Id.* at 17 & n. 2; see also *Dwight Moore*, Note, *Procedure — Condemnation Cases*, 21 BAYLOR L. REV. 100, 100 (1969); *Fort Worth & D.C. Ry. Co. v. Ammons*, 215 S.W.2d 407, 409 (Tex. Civ. App.—Amarillo 1948, writ ref'd n.r.e.); accord *Byrd Irrigation Co. v. Smythe*, 146 S.W. 1064, 1065 (Tex. Civ. App.—San Antonio 1912, no writ).

ities” also must comply with Chapter 21 of the Texas Property Code.⁵⁵ The Texas Legislature does not limit this power to take private land by whether or not the taking is for public or private pipeline use.⁵⁶ Several other states grant the power of eminent domain to private entities for natural resource development, including Arizona, Colorado, Idaho, Montana, Nevada, North Dakota, Oklahoma, South Dakota, Utah, and Wyoming.⁵⁷

This legislative grant of eminent domain power to gas utilities in Texas reflects a legislative determination that the exercise of eminent domain power serves a public purpose.⁵⁸ Public use, necessity, amount, and location of the property to be taken are legislative, not judicial, decisions conferred on the condemnor in the absence of the condemnor’s abuse of discretion in the taking.⁵⁹ Based on this legislative grant of eminent domain power, a “conclusive” presumption of “public use” arises in the absence of allegations that the condemnor abused its discretion in the exercise of its eminent domain power.⁶⁰ Because no statute requires a condemnor to establish the necessity for the taking, in our fact pattern the Condemnor’s determination of necessity is conclusive, absent a showing of abuse of discretion. To establish an abuse of discretion, the Lessor in our fact pattern must show fraud, bad faith, or arbitrary and capricious action by the Con-

55. See *Coastal Indus. Water Auth. v. Celanese Corp. of America*, 592 S.W.2d 597, 599 (Tex. 1979); *Burch v. City of San Antonio*, 518 S.W.2d 540, 545 (Tex. 1975); *Loesch v. Oasis Pipe Line Co.*, 665 S.W.2d 595, 598–99 (Tex. App.—Austin 1984, writ ref’d n.r.e.).

56. See *Loesch*, 665 S.W.2d at 598–99 (“[T]hrough an exercise of the power of eminent domain . . . [the corporation] submits to the regulatory provisions . . . so that its ownership of the pipeline, under such regulations, is a ‘public use’ by legislative declaration, irrespective of whether the pipeline is available for public use.”).

57. Alexandra B. Klass, *The Frontier of Eminent Domain*, 79 U. COLO. L. REV. 651, 659 (2008).

58. See *Chalk & Harrison-Fincher*, *supra* note 41, at 18; see also *Mercier*, 28 S.W.3d at 718–19; *Teco Pipeline Co.*, 985 S.W.2d at 564–65. The Texas Legislature has recognized the threat to private ownership rights in land and minerals by the exercise of eminent domain power, but neither the Texas Legislature nor the Texas courts have chosen to provide any protections from the Lessee and Condemnor in our fact pattern—ignoring the Lessor’s contract rights in the Lease. A for-profit corporation may not engage in a combination of the petroleum oil producing business in Texas and the oil pipeline business in Texas “other than through stock ownership in a for-profit corporation engaged in the oil pipeline business and other than the ownership or operation of private pipelines in and about the corporation’s refineries, fields, or stations.” See TEX. BUS. ORG. CODE ANN. § 2.007(3) (West 2009). This statutory prohibition provides no protection to the Lessor in our fact pattern. If anything, this statute appears to authorize the Lessee’s sole ownership of the Condemnor.

59. See *Chalk & Harrison-Fincher*, *supra* note 41, at 21.

60. *Coastal Indus. Water Auth.*, 592 S.W.2d at 600.

demnor.⁶¹ At the present time, this abuse of discretion defense is the Lessor/Condemnee's last hope in Texas.⁶²

The Texas Legislature has recognized the threat to private ownership rights in land and minerals by the exercise of eminent domain power, but neither the Texas Legislature nor the Texas courts have chosen to provide lessors any protections from the lessees and condemners who, as in our fact pattern, choose to ignore a lessor's contract rights in a lease. A for-profit corporation may not engage in a combination of (1) "the petroleum oil producing business in [Texas]" and (2) "the oil pipeline business in [Texas] other than through stock ownership in a for-profit corporation engaged in the oil pipeline business and other than the ownership or operation of private pipelines in and about the corporation's refineries, fields, or stations . . ."⁶³ This statutory prohibition provides no protection to the Lessor in our fact pattern. If anything, this statute appears to condone and approve the Lessee's sole ownership of the Condemnor.

V. ABUSE OF DISCRETION AS THE LESSOR'S (CONDEMNEE'S) LAST HOPE⁶⁴

The Lessor in our fact pattern is now the subject of a condemnation action by the Condemnor and is now also a surface owner whose property is about to be taken for the construction, installation, and operation of a pipeline on the Subject Property, in spite of the Lease prohibitions. This kind of eminent domain taking usually allows a condemner to transport any substance coming out of or related to the wells to which the proposed pipeline is to be connected (which legally could include salt water, other drilling fluids, and related chemicals). A condemner's condemnation easement is perpetual and allows a condemner to come and go at will on the lessor's property. This easement by condemnation often allows the later construction and installation of additional pipelines on the same condemnation easement. "The condemner's discretion to determine what and how much land to condemn for its purposes—that is, to determine public necessity—is nearly absolute. . . . Courts do not review the exercise of that discretion without a showing that the condemner acted fraudulently, in bad faith, or arbitrarily and capriciously, i.e., that the condemner clearly abused its discretion."⁶⁵ But it is the landowner, the Lessor/

61. See *Anderson v. Clajon Gas Co.*, 677 S.W.2d 702, 704 (Tex. App.—Houston [1st Dist.] 1984, no writ).

62. See *Zboyan v. Far Hills Util. Dist.*, 221 S.W.3d 924, 928 (Tex. App.—Beaumont 2007, no pet.); *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 268–69 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

63. TEX. BUS. ORGS. CODE ANN. § 2.007(3) (West 2009).

64. See *Zboyan*, 221 S.W.3d at 928; *Newsom*, 171 S.W.3d at 268–69.

65. *Newsom*, 171 S.W.3d at 268–69; see also *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 856 (Tex. App.—Tyler 1999, pet. denied) ("Since Article 1436 [now TEX. UTIL. CODE ANN. § 181.004 (West 2007)] does not require a showing of neces-

Condemnee in our fact pattern, who has the burden to establish the affirmative defenses of fraud, bad faith, or arbitrary and capricious action.⁶⁶ This includes the burdens of proof and persuasion.⁶⁷

The Lessor/Condemnee in our fact pattern has to plead and present some evidence of the Condemnor's abuse of discretion during the trial on the Condemnation.⁶⁸ The Condemnor's abuse of discretion may be shown by proving that the Condemnor's decision to condemn was made in bad faith, was arbitrary and capricious, or was fraudulent.⁶⁹ Pleading that the Condemnor's exercise of the right of eminent domain was an arbitrary and capricious action is "sufficient to raise an issue of fact as to whether the [Condemnor's] actions were intended for 'public necessity' or arbitrary and capricious purposes."⁷⁰

sity, the determination by the condemnor of the necessity for acquiring certain property is conclusive, unless the landowners meet their burden of showing fraud, bad faith, abuse of discretion or arbitrary and capricious action."); *Clajon Gas Co.*, 677 S.W.2d at 704, 705 ("If the statute under which the condemnor is delegated the right to exercise the power of eminent domain does not require a distinct showing of necessity, the determination by the condemnor of the necessity for acquiring certain property is conclusive, absent fraud, bad faith, abuse of discretion, or arbitrary and capricious actions. . . . [O]nce the jury found that there was no evidence of arbitrary and capricious action by the [condemnor], the [condemnor's] burden of showing necessity was met."); *City of Wichita Falls v. Thompson*, 431 S.W.2d 909, 911 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) ("[T]he necessity of showing fraud or clear abuse of discretion applies only to an attack upon the necessity of the taking of certain property or a certain amount thereof for an authorized purpose, and . . . such a burden is not imposed when the attack asserts the purpose for the taking is not one authorized by the Legislature."); *Webb v. Dameron*, 219 S.W.2d 581, 584 (Tex. Civ. App.—Amarillo 1949, writ ref'd n.r.e.) ("Necessarily a broad discretion is vested in those to whom power of eminent domain is delegated, and as a general rule the courts of this country will not disturb their action in the absence of fraud, bad faith, or gross abuse of discretion.").

66. *Newsom*, 171 S.W.3d at 269; see also *Harris County Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 316 (Tex. App.—Houston [14th Dist.] 2008, no pet.) ("[Condemnee] had the burden to plead and prove that the [condemnor's] action was founded in fraud or was arbitrary and capricious."); *Houston Lighting & Power Co. v. Klein Indep. Sch. Dist.*, 739 S.W.2d 508, 520 (Tex. App.—Houston [14th Dist.] 1987, writ denied) ("In a condemnation case, it is the condemnee who must show that the condemnor abused its discretion. . . . [Thus,] the trial court properly allowed [the condemnee] to open and close both the evidence and the argument.").

67. See *Houston Lighting & Power Co.*, 739 S.W.2d at 520.

68. See *Clajon Gas Co.*, 677 S.W.2d at 704.

69. *Textac Partners I*, 257 S.W.3d at 316; *Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 565–66 (Tex. App.—San Antonio 1998, pet. denied).

70. *Clajon Gas Co.*, 677 S.W.2d at 704.

The Condemnor's abuse of discretion can be shown in the Condemnation in one of three ways: (i) fraud;⁷¹ (ii) bad faith;⁷² or (iii) arbitrary and capricious action.⁷³

"In the condemnation context, fraud means 'any act, omission or concealment, which involve[s] a breach of legal duty, trust or confidence, justly reposed and is injurious to another, or by which an undue and unconscientious advantage is taken of another.'"⁷⁴ Note that this definition of fraud appears to be specific to the "condemnation context" and appears to be broader and less stringent than common law fraud. Common law fraud requires a material, false representation, knowingly or recklessly made, with the intent that another party rely on the representation, and on which the other party actually relies to his/her detriment.⁷⁵

"Bad faith" means "more than mere negligence; it implies 'an intent to injure, or some other improper motive.'"⁷⁶ "Mere bad judgment does not qualify as bad faith. Rather, a claimant must show a knowing 'disregard' of their rights."⁷⁷

"In the same context, arbitrary and capricious, like abuse of discretion, means 'willful and unreasoning action, action without consideration and in disregard of the facts and circumstances'"⁷⁸ "[W]hen 'there is room for two opinions, an action cannot be deemed arbitrary when it is exercised honestly and upon due consideration, regardless of how strongly one believes an erroneous conclusion was reached.'"⁷⁹

71. *E.g.*, *Textac Partners I*, 257 S.W.3d at 316; *Newsom*, 171 S.W.3d at 269.

72. *See Westgate, Ltd. v. State*, 843 S.W.2d 448, 1992 Tex.LEXIS 160, *32 (Tex. 1992) (Mauzy, J., dissenting) (quoting King v. Swanson, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ)); *Westgate, Ltd.*, 1992 Tex.LEXIS 160, *37 (Doggett, J., dissenting) (citing *Citizens Bridge Co. v. Guerra*, 258 S.W.2d 64, 69 (Tex. 1953)).

73. *See Westgate, Ltd.*, 1992 Tex.LEXIS 160, *37 (Doggett, J., dissenting) (citing *Wagoner*, 345 S.W.2d at 763); *see also Textac Partners I*, 257 S.W.3d at 316; *Webb*, 219 S.W.2d at 584.

74. *Newsom*, 171 S.W.3d at 269 (quoting *Wagoner v. City of Arlington*, 345 S.W.2d 759, 763 (Tex. Civ. App.—Fort Worth 1961, writ ref'd n.r.e.)).

75. *See In re International Profit Assocs.*, 274 S.W.3d 672, 678 (Tex. 2009). A cause of action also exists for fraud by nondisclosure. *See Bradford v. Vento*, 48 S.W.3d 749, 754–55 (Tex. 2001); *Insurance Co. of N. Am. v. Morris*, 981 S.W.2d 667, 674 (Tex. 1998); *Worldwide Asset Purchasing, L.L.C. v. Rent-A-Center East, Inc.*, 290 S.W.3d 554, 566 (Tex. App.—Dallas 2009, no pet.); *McCarthy v. Wani Venture, A.S.*, 251 S.W.3d 573, 585–86 (Tex. App.—Houston [1st Dist.] 2007, pet. denied); *see also TEX. BUS. & COM. CODE ANN. § 27.01* (West 2009) (stating that statutory fraud requires a transaction involving real estate or stock).

76. *Westgate, Ltd. v. State*, 843 S.W.2d 448, 459 (Tex. 1992) (Mauzy, J., dissenting) (quoting King v. Swanson, 291 S.W.2d 773, 775 (Tex. Civ. App.—Eastland 1956, no writ)).

77. *Id.* at 461 (Doggett, J., dissenting) (citing *Citizens Bridge Co. v. Guerra*, 258 S.W.2d 64, 69 (Tex. 1953)).

78. *Newsom*, 171 S.W.3d at 269 (quoting *Wagoner*, 345 S.W.2d at 763).

79. *Id.* (quoting *Ludewig v. Houston Pipeline Co.*, 773 S.W.2d 610, 614 (Tex. App.—Corpus Christi 1989, writ denied)).

This abuse of discretion is the Lessor/Condemnee's last hope for complete victory.⁸⁰ If the Lessor/Condemnee can withstand the Condemnor's motion for summary judgment, motion for directed verdict, or motion for judgment *non obstante veredicto*, the Lessor/Condemnee gets to repossess the property taken including the pipeline in the ground.⁸¹ If a jury finds that the Condemnor abused its discretion in taking the Subject Property, a court should deny acquisition or continued possession of the Subject Property by the Condemnor.⁸² The Condemnor does not get another condemnation effort for the same property. If Lessor/Condemnee pleads and proves that the Condemnor abused its discretion, the victory entitles the Lessor/Condemnee to a return of all rights in the surface and a dismissal of all Condemnor's easement rights,⁸³ as well as attorney fees and costs.⁸⁴

A number of Texas cases have held that a condemnee either created a fact issue as to a condemnor's abuse of discretion or established that a condemnor's action constituted abuse of discretion.⁸⁵ A number of

80. See *Houston v. Hamons*, 396 S.W.2d 662, 663, 665 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref'd n.r.e.) (citing *City of Wichita Falls v. Thompson*, 431 S.W.2d 909, 911 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.)); *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281, 281 (Tex. Civ. App.—Eastland 1944, writ ref'd w.o.m.); TEX. PROP. CODE ANN. §21.019(c) (West 2004).

81. See TEX. PROP. CODE ANN. § 21.021(a) (West 2004) (listing the requirements necessary for condemnor to enter condemnee's land); see also *Ludewig*, 773 S.W.2d at 615 (holding that condemnor pipeline company did not commit trespass by entering subject property after complying with TEX. PROP. CODE ANN. § 21.021(a)); Hanley, *supra* note 41, at 130.

82. See *Hamons*, 496 S.W.2d at 663 (overruling condemnor's points of error attacking findings because evidence supported jury's finding "that the [condemnor] acted arbitrarily or capriciously in taking the fee simple title to the tract of land in question"); see also *id.* at 665 (stating that because jury's findings were sustained the issue of market value was immaterial); *Thompson*, 431 S.W.2d at 911 (affirming trial court's holding canceling condemnation as to the portion of land that jury determined had been taken in city's abuse of discretion).

83. See *Hamons*, 496 S.W.2d at 663; see also Hanley, *supra* note 41, at 143 ("If the landowner objects to the special commissioners' award and does not consent to the taking, 'both the condemnation and the amount of compensation are issues to be resolved by the trial court and the factfinder.'" (quoting *Tigner v. City of Angleton*, 949 S.W.2d 887, 890 (Tex. App.—Houston [14th Dist.] 1997, no writ)).

84. See TEX. PROP. CODE ANN. § 21.019(c); see also *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 275 (Tex. App.—Houston [1st Dist.] 2005, pet. denied).

85. See *City of Wichita Falls v. Thompson*, 431 S.W.2d 909 (Tex. Civ. App.—Fort Worth 1968, writ ref'd n.r.e.) (affirming judgment in trial court that city abused its discretion in condemning, for construction of municipal water supply, the portion of condemnee's land that was above the lake level because such property was neither incidental to nor connected with the declared purpose of constructing and developing a water supply and in controlling, maintaining and protecting same.); see also *Harris County Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 314–16 (Tex. App.—Houston [14th Dist.] 2008, no pet.) (where condemnee alleged that commissioners court was willfully indifferent to the hospital district's statutory independence and that hospital district abdicated its responsibilities to make an independent determination of the public necessity for taking condemnee's property, court held that the conflicting and contested evidence created fact issue as to whether action by county commissioners and hospital district amounted to arbitrary and capricious conduct); *Newsom*, 171

Texas cases also have held that the condemnee either did not create a fact issue as to a condemnor's abuse of discretion or did not establish that a condemnor's action constituted an abuse of discretion.⁸⁶

VI. THE PROCEDURAL CONFUSION—HOW DOES THE LESSOR/ CONDEMNEE RESIST THE INEQUITY?

Much confusion exists about how the Lessor/Condemnee in our fact pattern can successfully resist the Condemnation. The Lessor's well-designed plans and efforts to get a Lease that keeps the Lessee off the Subject Property and prohibits the Lessee's use of the Subject Property have now been frustrated and defeated by the Condemnation. As Condemnee, the Lessor cannot understand, much less accept, that the Lessee's wholly-owned subsidiary "gas utility" can successfully condemn an easement across the Subject Property for one or more pipelines—an activity expressly prohibited by the Lease.

In this confusion, a condemnee usually makes several attempts to resist the condemnation that will not work. A plea to the jurisdiction of the condemnation court is limited to statutory prerequisites that a condemnor has ignored or violated.⁸⁷ Only certain courts have emi-

S.W.3d at 269 (fact issue existed as to whether the District declined to exercise its discretion, and thereby abused its discretion, in determining whose land to condemn for a pond and in deciding whether to condemn condemnee's land in easement or in fee for a ditch expansion); *Houston Lighting & Power Co. v. Klein Indep. Sch. Dist.*, 739 S.W.2d 508 (Tex. App.—Houston [14th Dist.] 1987, writ denied) (expert testimony regarding health risks associated with power lines and condemnor's intra-office communication regarding knowledge as to potential risks and refusal to re-route lines because of cost was some evidence from which jury could have concluded that condemnor abused its discretion in taking condemnee's property—not with regard to the general determination of *necessity*, but with regard to *choosing that particular location* for placement of power lines); *Harmon*, 178 S.W.2d at 294 (affirming judgment against condemnor where evidence was shown from which jury could have concluded that condemnor abused its discretion in seeking to condemn "excess acreage" for private use).

86. *See Anderson v. Teco Pipeline Co.*, 985 S.W.2d 559, 565–66 (Tex. App.—San Antonio 1998, pet. denied) (where condemnor was under no contractual or regulatory authority to deliver gas when it authorized the construction of the pipeline, but it was undisputed that the pipeline was needed because the only existing pipeline for transporting gas in the area had been over capacity for years and prevented gas from getting to market, court stated that there was no evidence of arbitrary or capricious action by condemnor); *Ludewig*, 773 S.W.2d at 614 (where condemnees alleged that condemnor could have avoided condemnees' land by routing the pipeline along public roads, court held that neither condemnor's act of choosing the most economically feasible path nor condemnor's failure to choose an equally feasible alternative path constituted arbitrary or capricious conduct).

87. *But see PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 477 (Tex. 2008) ("Even as to these statutory requirements [TEX. PROP. CODE ANN. § 21.012(b) (West Supp. 2009)], we held in *Hubenak v. San Jacinto Gas Transmission Co.* that the 'unable to agree' requirement is not jurisdictional, and a failure to meet this requirement may be remedied by abating the proceeding for a reasonable period to allow the condemnor to meet the requirement.").

ment domain jurisdiction.⁸⁸ If a condemnor files a condemnation in the wrong court, it may give rise to a successful plea to the jurisdiction. The eminent domain statute requires certain notices.⁸⁹ If a condemnor fails to give these notices, it may give rise to a successful plea to the jurisdiction.⁹⁰ Condemnation petitions must meet certain requirements.⁹¹ But a condemnee can waive a plea to the jurisdiction by participating in a special commissioner's hearing or by accepting a special commissioners' award.⁹²

In the condemnation context, the Texas Supreme Court has also severely limited the scope of pleas to the jurisdiction and protected subject matter jurisdiction.⁹³ Without an abject, total, and continuing failure of the Condemnor in our fact pattern to observe the requirements in Chapter 21 of the Texas Property Code, the Lessor/Condemnee has no effective weapons in a plea to the jurisdiction.⁹⁴

The Lessor/Condemnee's best weapons are attacks on the merits of the Condemnation, which may include motions to dismiss and motions for summary judgment.⁹⁵ In *Harris County Hosp. Dist. v. Textac Partners I*, the condemnee, Textac, moved to dismiss a condemnation action at the trial court based on the merits of its claims.⁹⁶ Textac asserted that the condemnor "engaged in fraud, acted in an arbitrary and capricious manner, or abused its discretion when it sought to condemn Textac's property."⁹⁷ The trial court granted the motion and the

88. TEX. PROP. CODE ANN. § 21.001–.003 (West 2004).

89. TEX. PROP. CODE ANN. § 21.016 (West 2004).

90. *But see* *City of Desoto v. White*, 288 S.W.3d 389, 398–99 (Tex. 2009) ("An abatement is generally appropriate to cure pre-suit notice deficiencies.").

91. TEX. PROP. CODE ANN. § 21.012(b) (West Supp. 2009).

92. *See* *State v. Jackson*, 388 S.W.2d 924, 925 (Tex. 1965); *Maberry v. Pedernales Electric Coop., Inc.*, 493 S.W.2d 268, 270 (Tex. Civ. App.—Austin 1973, writ ref'd n.r.e.).

93. *See* *White*, 288 S.W.3d at 398–99 (suspended police officer's failure to recite specific appeal grounds not jurisdictional under Civil Service Commission statute); *PR Invs. & Specialty Retailers, Inc. v. State*, 251 S.W.3d 472, 477 (Tex. 2008) (statutory requirements of TEX. PROP. CODE ANN. § 21.012(b) are not jurisdictional); *Univ. of Tex. Med. Branch at Galveston v. Barrett*, 159 S.W.3d 631, 632 (Tex. 2005) (public employer's plea to jurisdiction denied although public employee didn't wait statutory grievance period before filing suit); *Hubenak v. San Jacinto Gas Transmission Co.*, 141 S.W.3d 172, 191 (Tex. 2004) (holding that although TEX. PROP. CODE ANN. § 21.012 requirements must be met by the condemnor, they are not jurisdictional and any failure to meet these requirements, upon objection, will only result in an abatement, not a dismissal of the proceeding).

94. *But see* *Whittington v. City of Austin*, 174 S.W.3d 889, 904 n.11 (Tex. App.—Austin 2005, pet. denied) (proof-of-necessity determination still considered jurisdictional and not procedural).

95. *See* *Harris County Hosp. Dist. v. Textac Partners I*, 257 S.W.3d 303, 305–06 (Tex. App.—Houston [14th Dist.] 2008, no pet.); *Bevly v. Tenggasco Gas Gathering Co.*, 638 S.W.2d 118, 121 (Tex. App.—Corpus Christi 1982, writ ref'd n.r.e.) (stating that condemnee challenged "necessity" for taking by motion for dismissal).

96. *Textac Partners I*, 257 S.W.3d at 306.

97. *Id.* at 312.

condemnor appealed.⁹⁸ The appellate court reviewed the motion to dismiss as if it had been filed as a motion for summary judgment.⁹⁹ “Generally, a ‘motion to dismiss’ does not address claims on the merits. It is directed to procedural or avoidance issues.”¹⁰⁰ According to the appellate court, Textac’s motion went to the merits of its case and was “the functional equivalent of a motion for summary judgment.”¹⁰¹

In another motion to dismiss case, condemnees objected to the failure of the condemnor’s board of directors to pass a formal resolution of necessity.¹⁰² The appellate court stated that the condemnees’ objections were sufficient to raise the issue of whether the condemnor had the right to condemn and to require the condemnor to show that it had taken all necessary steps in the manner, and at the time, required by the eminent domain statute.¹⁰³ Thus, the court sustained condemnees’ jurisdictional objections and reversed and remanded the case to the trial court to conduct proceedings in conformity with the appellate court’s opinion.¹⁰⁴

But if a condemnee does not attack the merits or plead and prove its defense of abuse of discretion, the condemnee cannot overcome the presumption of necessity and a trial court may dismiss all of the condemnee’s attempts to stop the taking.¹⁰⁵

The Lessor/Condemnee in our fact pattern most likely will be forced to take the attack on the merits to the jury, especially on the abuse of discretion defense.¹⁰⁶ In *Brazos River Conservation & Reclamation Dist. v. Harmon*, a Texas appellate court held that a jury’s

98. *Id.* at 305.

99. *Id.* at 312 (“[W]e conclude that Textac’s motion to dismiss is the functional equivalent of a motion for summary judgment directed to the merits of the Hospital District’s authority to condemn its property pursuant to Section 281.050 [of the Texas Health and Safety Code].”).

100. *Id.*

101. *Id.* at 312–13 (citing *VanZandt v. Holmes*, 689 S.W.2d 259, 261 (Tex. App.—Waco 1985, no writ) (such attacks by motion to dismiss generally involve pleas in abatement, special exceptions not cured by amendment, mootness, lack of prosecution, or lack of jurisdiction)).

102. *Bevly v. Tenggasco Gas Gathering Co.*, 638 S.W.2d 118, 120 (Tex. App.—Corpus Christi 1982, writ ref’d n.r.e.).

103. *Id.* at 120 (“The initial burden is on the condemnor to show the right to take and compliance with the procedural steps involved.”).

104. *Id.* at 121–22.

105. See *Valero Eastex Pipeline Co. v. Jarvis*, 990 S.W.2d 852, 856 (Tex. App.—Tyler 1999, pet. denied) (holding that trial court had no authority to grant motion to dismiss on the issue of necessity where landowners failed to plead any of the affirmative defenses related to abuse of discretion and failed to offer any evidence to support motion to dismiss); see also *Whittington v. City of Austin*, 174 S.W.3d 889, 898 (Tex. App.—Austin 2005, pet. denied) (“Once the presumption of necessity arises, the defendant can contest the fact of necessity only by establishing affirmative defenses such as fraud (that, contrary to the ostensible public use, the taking would actually confer only a private benefit), bad faith, or arbitrariness.”).

106. See *Malcomson Rd. Util. Dist. v. Newsom*, 171 S.W.3d 257, 268–69 (Tex. App.—Houston [1st Dist.] 2005, pet. denied); *Jarvis*, 990 S.W.2d at 856; *Houston v. Hamons*, 396 S.W.2d 662, 663 (Tex. Civ. App.—Houston [14th Dist.] 1973, writ ref’d

finding that a condemnor abused its discretion permitted the trial court to enter judgment on the jury's findings and to deny the condemnation.¹⁰⁷ The appellate court saw no other way to give meaning and effect to the jury's findings on abuse of discretion in the taking than by denying the condemnation: "If the jury's findings are not given the . . . effect [of denying the condemnation], conviction on the ground of abuse of discretion would be practically meaningless and furnish nothing final and definite to govern the action of either the condemnor or the condemnee."¹⁰⁸

In another Texas condemnation case, a jury found that a city acted arbitrarily or capriciously by taking the condemnee's land in fee simple when the city only needed air rights, and the trial court rendered judgment denying the city's right to condemn the land.¹⁰⁹ On appeal, the appellate court held that the evidence presented at the trial court permitted the jury to find that the city's decision to take fee simple title from the landowner, instead of just air rights, was vindictive, made only after negotiations with the landowner failed.¹¹⁰

But the attack on the merits also presents problems for our Lessor/Condemnee. Is the Lease in our fact pattern admissible in the Condemnation to show the Condemnor's abuse of discretion? The Lease is between Lessor and Lessee. Lessee is not a named party in the Condemnation. The court that hears the Condemnation will probably not allow the Lessor/Condemnee to join the Lessee because the Lessee is not a "gas utility" with eminent domain power. Given that the Condemnor is not a party to the Lease, will the Lessor as Condemnee be allowed by the trial court to introduce evidence of a breach of the Lease, which prohibits pipelines on the Subject Property? If the Lessor chooses to file a breach of contract action against the Lessee in a separate lawsuit, would the Lessor be allowed to introduce the Condemnation as evidence of breach of the Lease?

Is our fact pattern and the resulting Condemnation an injury to the Lessor/Condemnee without a remedy?

n.r.e.); *Brazos River Conservation & Reclamation Dist. v. Harmon*, 178 S.W.2d 281, 294 (Tex. Civ. App.—Eastland 1944, writ ref'd w.o.m.).

107. *Harmon*, 178 S.W.2d at 294.

108. *Id.* at 293.

109. *Hamons*, 396 S.W.2d at 665.

110. *See id.* at 664.