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Lessee Under Unrecorded Farm Lease in Louisiana Had No Tort Claim Against Mineral Lessee for Crop Damages

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In *Precht v. Columbia Gulf Transmission, LLC*, 2019 WL 3368600 (W.D. La.), Columbia Gulf Transmission constructed a natural gas pipeline across land owned by a limited liability company, pursuant to a right-of-way agreement that required Columbia to pay for any damage to crops.[1] In addition, though, in return for a specified payment, the landowner released Columbia from any future claims the landowner might have for crop damages. Flavia and Kelly Precht later sued Columbia, alleging that they were farming the land pursuant to a verbal farming lease. In resolving cross motions for summary judgment, the court resolved several issues.

First, citing Civil Code article 2004, the court noted that a party can contract in advance to release another party from future liability for simple negligence (as opposed to gross negligence).[2] Thus, the release was not invalid altogether, as the Prechts had argued. But the release did not apply to claims brought by someone other than the landowner. Thus, the release did not bar the Prechts' claim.

Second, because the contractual clause that obligated Columbia to pay for damages to crops did not limit this obligation to paying for damages to crops that *belonged to the mineral lessor*, the clause appeared to be a *stipulation pour autrui* (third party beneficiary contract) under Civil Code article 1978, which states in part: "A contracting party may stipulate a benefit for a third person called a third party beneficiary." For this reason, the court rejected Columbia's argument that the Prechts could not assert a contract claim because no privity of contract existed. Instead, the court concluded that the clause could benefit a farming lessee. Thus, Columbia was not entitled to a summary judgment dismissing the Prechts' contractual claims.

However, the court also concluded that the Prechts were not entitled to a summary judgment that Columbia had contractual liability to them under the *stipulation pour autrui* because there was a genuine issue of material fact as to whether the Prechts actually had a valid verbal farming lease. The Prechts asserted that they had entered a verbal agreement with the husband of one of the members of the limited liability company that owned the land, but it was not clear that the husband had authority to grant a lease on behalf of the company.

Third, Columbia sought dismissal of the Prechts' tort claims on grounds that the Prechts could not show that they owned the crops that were damaged. The court agreed. Under Louisiana law, a person other than the owner of land can be the owner of crops growing on the land.[3] But Civil Code article 491 provides that, as to third persons, crops are presumed to belong to the owner of the land unless separate ownership is shown by an instrument filed for registry in the conveyance records of the parish where the land is located. This presumption is conclusive. That is, the presumption applies even if the third person knows that the crops belong to some person other

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[1] Under the Louisiana Civil Code, a pipeline right-of-way agreement may constitute a type of personal servitude known as a right of use. La. Civ. Code art. 639 ("The personal servitude of right of use confers in favor of a person a specified use of an estate less than full enjoyment."); La. Civ. Code art. 534 ("A personal servitude is a charge on a thing for the benefit of a person. There are three sorts of personal servitudes: usufruct, habitation, and rights of use.").
[2] Civil Code art. 2004 states in part: "Any clause is null that, in advance, excludes or limits the liability of one party for intentional or gross fault that causes damage to the other party."
[3] *See e.g.*, La. Civ. Code art. 474 (crops are classified as "movables" *if* they belong to a person other than the landowner); Civ. Code art. 463 (crops are component parts of tract of land *if* they belong to landowner); Civ. Code art. 462 (component parts of land, along with the land itself, are classified as "immovables").

than the landowner. The Prechts' alleged lease was verbal and thus was not recorded. Accordingly, Columbia was entitled to a dismissal of the Prechts' tort claims for damage to their crops.

Recent Legislative Developments in Louisiana

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The 2019 Session of the Louisiana Legislature made very minimal changes to the Louisiana law of oil and gas. Indeed, only two Acts were adopted that merit comment.

Authority of the State Mineral and Energy Board to Include a UCC-type Security Agreement in a State Lease

The first Act to be discussed is Act No. 403 that enacted Louisiana Revised Statutes section 30:127H, reading, as follows:

> The board may include in any lease entered into by the state, any state agency, or any political subdivision after July 31, 2019, a clause which grants a continuing security interest in and to all as-extracted collateral attributable to, produced, or to be produced, from the leased premises or from lands pooled or unitized therewith, as security for the prompt and complete payment and performance of the lessee's obligation to pay royalties or other sums of money that may become due under the lease, as contemplated by the Uniform Commercial Code. The board may subordinate the state's security interest in any amounts in excess of the royalties and other sums due to the state, to the security interest of one or more lenders. However, no less than thirty days prior to entering into the first lease that contains a clause granting a continuing security interest under the provisions of this Section, the board shall submit the proposed clause language to the House Committee on Natural Resources and Environment and the Senate Committee on Natural Resources for review.

The "board," to which reference is made, is the State Mineral and Energy Board which is statutorily charged with the responsibility to "administer the state's proprietary interest in minerals."[1] Hence, this legislation only pertains to mineral leases granted by the State of Louisiana on state lands or water bottoms, or by a state agency.

A bit of back story is appropriate here. Act No. 403 was adopted as Senate Bill No. 242, which bill, in turn, was a substitute for Senate Bill No. 179. The latter bill, as originally filed (and before substitution), would have made a radical change in the legal character of mineral leases (including those granted by private parties). The original bill would have amended article 123 of the Louisiana Mineral Code so that it would read, as follows:

> Payments to the lessor for the maintenance of a mineral lease without drilling or mining operations or production, or for the maintenance of a lease during the presence on the lease or any land unitized therewith of a well capable of production in paying quantities~~, and royalties paid to the lessor on production are rent~~. The royalties paid to the lessor on production and the state's in-

[1] LA. REV. STAT. ANN. § 30:121, *et seq.*

> kind royalty portion or monetary equivalent is not rent. A mineral lessee is obligated to make timely payment of rent according to the terms of the contract or the custom of the mining industry in question if the contract is silent.[2]

As originally proposed, the legislation had as its principal purpose to suppress the long-standing precept that royalty under a mineral lease is "rent," a tenet first recognized by the Louisiana Supreme Court in 1925,[3] and codified in article 123.

The original legislation was motivated by the fact that the State Mineral and Energy Board experienced a loss of revenue when one of its lessees entered bankruptcy, owing the State an amount of unpaid royalties. The State's proof of claim asserted a privilege (lien) under article 146 of the Mineral Code,[4] which claim was disallowed by the Bankruptcy Court in accordance with applicable bankruptcy law.[5]

Members of the State Mineral and Energy Board prevailed upon a legislator to seek to "fix" the issue that royalty is characterized as rent by introducing a bill essentially saying the opposite—that royalty under a mineral lease is *not* rent.

The bill as originally introduced was not favorably received by the industry. Among other reasons, under Louisiana law, rent is an essential component to constitute a lease under Louisiana law.[6] Thus, if there is no rent, there is no lease. The contract may be some other type of consensual arrangement, but would not be treated as a lease. To say the least, this would be very disruptive, both to landowners and to operators.

In the legislative process, the original bill (Senate Bill No. 179) was converted to a resolution of the Senate to request the Louisiana State Law Institute to study the issues presented, and to formulate a report and recommendation, including possible legislative language.[7]

The Committee undertook its work and recommended to the Legislature that the original bill was unworkable and fraught with problems, and submitted a suggested legislative fix that, prior to adoption as Act No. 403, was modified in several respects by the Legislature, resulting in the new section noted above.

Threshold of Consent Necessary to Conduct Operations on a Co-owned Tract or Land of Mineral Servitude

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[2] Interlined words are in the text of article 123 but would be eliminated by this legislation, while underscored words would be added.
[3] *Logan v. State Gravel Co.*, 103 So. 526 (La. 1925).
[4] "The lessor of a mineral lease has, for the payment of his rent, and other obligations of the lease, a right of pledge on all equipment, machinery, and other property of the lessee on or attached to the property leased."
[5] Section 545(2)(3) of the Bankruptcy Code.
[6] "The consent of the parties as to the thing and the rent *is essential* but not necessarily sufficient for a contract of lease." LA. CIV. CODE art. 2668.
[7] The Louisiana State Law Institute is formed by the Louisiana Legislature. LA. REV. STAT. ANN. § 24:201. Its purpose is "to promote and encourage the clarification and simplification of the law of Louisiana and its better adaptation to present social needs, to secure the better administration of justice, and to carry on scholarly legal research and scientific legal work." It operates through a number of committees with jurisdiction of particular matters, and its members is composed of lawyers, judges and law professors. This author is the Reporter for the Mineral Law Committee to which this subject matter was assigned.

Act No. 350 of the 2019 Legislative Session amended 3 articles of the Louisiana Mineral Code so as to reduce the level of consent needed to conduct operations on co-owned land or mineral servitude from 80% to 75%.

A bit of history is appropriate. When the Mineral Code was enacted in 1975, it required the unanimous consent of all co-owners (to our common law friends, think "tenants in common") before operations could be undertaken on a tract of land that was owned in indivision (co-owned) or on a mineral servitude that was co-owned, or under a mineral lease granted by some, but not all co-owners.[8]

In 1986, the Louisiana Legislature amended several of the co-ownership articles of the Louisiana Mineral Code. These included articles 164, 166, and 175.[9]

As amended at that time, the relevant articles permitted the conduct of exploration and production operations by the party desiring to operate who obtained the consent from less than all of the co-owners, provided that at least 90% of the co-owners had expressed their consent to such operations. In this manner, a minority of co-owners owning, in the aggregate, less than a 10% interest in the land or servitude could not frustrate the will of the great majority.

This amendment's rationale was explained in the Comment to 1986 Amendment under article 164 of the Louisiana Mineral Code, as follows:

> The 1986 amendments to Articles 164, 166, and 175 continue to preserve the principle in the Mineral Code that one co-owner may not conduct operations without the consent of his co-owner, *but limit this principle so that a small minority of co-owners cannot prevent mineral operations desired by other owners of rights in the land or mineral rights*. . . .
>
> *These amendments are intended to be read broadly in favor of allowing the majority of owners to develop where they so desire*. Thus the ninety percent is to be calculated such that it includes the interest of the owner seeking to gain the consent of the others.[10]

In 1988, the 90% threshold introduced in 1986 was lowered to 80%.[11] These amendments—as the commentary noted above explains—clearly and unambiguously evince the legislature's intent to permit the conduct of oil and gas operations by an operator to whom not less than 80% of the co-owners (of co-owned land or of a co-owned mineral servitude, as the case may be) have granted consent.

The 2019 amendment reduces the 80% threshold of consent to 75%. There seems to have been no significant issue of policy that motivated this reduction in the needed level of consent, and in fact, arguments could be made that the lowered standard was not in the interest of policy as it further diminishes the rights of co-owner to oppose activity with which it disagreed.

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[8] For a detailed consideration of these articles of the Mineral Code, s*ee* Patrick S. Ottinger, *Oil in the Family -- Obtaining the Requisite Consent to Conduct Operations on Co-Owned Land or Mineral Servitudes*, 73 LA. L. REV. 745 (Spring 2013).
[9] 1986 La. Acts No. 1047.
[10] LA. REV. STAT. ANN. § 31:164 cmt. (emphasis added).
[11] 1988 La. Acts No. 647.

Non-Operator Working Interest Owner was Liable to Operator for Proportionate Share of Costs to Plug and Abandon Well on the Outer Continental Shelf

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Apache Deepwater, L.L.C. and W.T. Offshore, Inc were parties to a joint operating agreement that governed the operation of three wells on the outer continental shelf, off the shore of Louisiana. *Apache Deepwater, L.L.C. v. W&T Offshore, Inc.*, 930 F.3d 647 (5th Cir. 2019). Apache served as operator. Apache made plans to plug and abandon the wells using an "intervention vessel," but later changed its plans to use a drilling rig. The use of the drilling rig was much more expensive than it would have been to use an intervention vessel.

When Apache sent an authorization for expenditure to W&T for use of the drilling rig, W&T refused to approve the AFE. Apache did the work anyway using the drilling rig. W&T only paid its proportional share of the estimated cost of plugging and abandoning the wells using an intervention vessel, rather than paying its proportionate share of the actual cost incurred using the drilling rig. Apache sued W&T in state court in Texas for breach of the parties' joint operating agreement. Apache removed the case to federal court.

W&T argued that Apache revised its plans in order to save itself money. W&T explained that Apache had contracted on its own account for drilling rigs that it no longer planned to use. According to W&T, Apache used one of the drilling rigs for the plugging and abandonment work in order to switch some of the costs of the drilling rig to the parties' joint account. In contrast, Apache denied this, stating that it used the drilling rig because it was not safe to attempt the plugging and abandonment work using the intervention vessel it had planned to use and that the Bureau of Safety and Environmental Enforcement had quit approving the use of intervention vessels for the type of work that needed done.

W&T argued that it was not liable for more than it had paid. W&T relied on section 6.2 of the joint operating agreement, which stated:

> **6.2. Authorization for Expenditure:** The Operator shall not make any single expenditure or undertake any activity or operation costing Two Hundred Thousand Dollars ($200,000) or more, unless an AFE has either (1) been included in a proposal for an activity or operation and is approved by the Participating Parties through their Election to participate in the activity or operation, or (2) received the approval of the Parties as a General Matter. When executed by a party, an AFE grants the Operator the authority to commit or expend funds on the activity or operation in accordance with this Agreement for the account of the Participating Parties....

Because the cost for use of the drilling rig greatly exceeded $200,000, W&T argued that it was not responsible for the expense because it had refused to approve the AFE.

Apache countered by relying on section 18.4 of the joint operating agreement, which stated:

> **18.4. Abandonment Operations Requirement by Governmental Authority:** The Operator shall conduct the abandonment and removal of any well, Production

System or Facilities required by a governmental authority, and the Costs, risks and net proceeds will be shared by the Participating Parties in such well, Production System or Facilities according to their Participating Interest Share.

Apache argued that, under section 18.4, parties to the joint operating agreement who participated in a well (W&T had participated) are obligated to pay their proportionate share of the cost of plugging and abandonment operations required by governmental authorities, without regard to whether they approve AFEs for those operations.

The court concluded that the joint operating agreement was ambiguous. Therefore, it denied motions for summary judgment and the case went to trial. A jury concluded that Apache was not required to get W&T's approval to use the drilling rig for the plugging and abandonment operations and that W&T breached its contractual obligations by not paying its proportionate share of the costs of the plugging and abandonment operations. The jury nevertheless found that Apache had acted in bad faith, thereby causing W&T's failure to comply with the contract, and that $17,000,000 (a portion of W&T's share of the difference in costs between using the drilling rig and using an intervention vessel) would be sufficient to compensate W&T. The court entered a money judgment of $43.2 million in favor of Apache and against W&T, holding W&T liable for its proportionate share of the entire difference, without a $17 million credit. W&T appealed.

The United States Fifth Circuit affirmed. The appellate court concluded that Apache's interpretation of the joint operating agreement made more sense. The Fifth Circuit thought it would be a ridiculous result if a party to the JOA could insulate itself from a share of costs for a plugging and abandonment operation required by the government simply by refusing to approve an AFE. W&T argued that Apache could have refused the government's order to plug and abandon the wells. Later, according to W&T, when the federal government plugged and abandoned the wells on its own and billed Apache for the costs, then Apache could bill each party to the JOA for its share of costs. The Fifth Circuit rejected this argument as well.

Finally, the court rejected W&T's argument that the lower court erred by not giving W&T a credit of $17,000,000. W&T noted that Civil Code article 2003 states:

> An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

The Fifth Circuit noted, however, that the Louisiana Supreme Court held in *Lamar Contractors, Inc. v. Kacco, Inc.*, 189 So. 3d 394 (La. 2016), that this article's bar on recovery only applies when an obligor shows that an obligee's failure to perform a contractual obligation caused the obligor's failure to perform. But W&T's failure to perform was not caused by any failure of Apache to perform. The Fifth Circuit rejected W&T's argument that *Lamar* did not apply because that case involved an obligee that was negligent, but not one that was in bad faith. The Fifth Circuit also rejected W&T's arguments that the appellate court's interpretation of article 2003 violated public policy and that *Lamar* should not be followed because it did not constitute *jurisprudence constante*.[1] Accordingly, the Fifth Circuit affirmed.

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[1] Louisiana does not follow the doctrine of *stare decisis*. Under Louisiana's civil law tradition, the primary source of law is statutory, and even opinions of the Louisiana Supreme Court are merely secondary law. However, under Louisiana's doctrine of *jurisprudence constante*, a long line of consistent authority is entitled to respect.

The United States Court of Appeals for the Sixth Circuit Finds No Subsurface Trespass in Context of Natural Gas Storage Operations

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In *Baatz v. Columbia Gas Transmission, LLC*, the United States Court of Appeals for the Sixth Circuit recently affirmed a district court decision granting summary judgment to Columbia Gas on claims that its storage operations constituted a trespass on plaintiffs' lands.[1] The court also concluded that the plaintiffs were not entitled to recover for unjust enrichment. However, for procedural reasons discussed below, the court upheld the grant of summary judgment to plaintiffs on their unjust enrichment claims, but limited damages to periods in which the plaintiffs owned the land, as opposed to the entire time that Columbia Gas engaged in storage operations using the plaintiffs' lands (i.e., instead of starting the damages calculation decades earlier).

The facts were straightforward: Columbia Gas has been storing gas in the Medina Storage Field since 1959. Landowners within the storage field, who purchased their properties at the earliest in 1990, sued Columbia Gas, claiming that it intentionally invaded the subsurface of their properties to store natural gas without their permission. They further claimed that Columbia had unjustly enriched itself by failing to pay a fair market rental since operations started for the easement they claimed was needed to use the subsurface. The district court split its decision, finding that there was no subsurface trespass under Ohio law, but that each of the landowners was entitled to damages starting from the date that they purchased their property because Columbia had failed to compensate them for using their subsurface for storage.

On appeal, the court first observed that, under Ohio law generally, a trespass is an unlawful entry upon the property of another. Moreover, to establish a trespass, a plaintiff must demonstrate that it has a possessory interest in the property and that the offending party entered the property without authority. Here, the court held that the landowners lacked the necessary possessory interest in the subsurface based on the Ohio Supreme Court's decision in *Chance v. BP Chemicals, Inc.*[2] Interpreting *Chance*, the court stated, "[to] interfere with [a property owner's possessory interest in the subsurface], the [alleged trespasser] must interfere 'with the reasonable and foreseeable use of [the owner's] properties.'" "Thus, under Ohio law, to survive summary judgment on the trespass claim ..., Landowners must show that Columbia Gas interfered with the possessory interest in their subsurface (i.e., interference with a reasonable and foreseeable use of the subsurface) ... Landowners cannot do that here: indeed, each Landowner in this case has admitted that they have not used and do not intend to use their subsurface."

As to the landowners' claim for additional unjust enrichment damages, the court first held that Columbia Gas was entitled to oppose that claim on the basis that the landowners were not entitled to any unjust enrichment damages at all, due to their lack of a possessory interest in the relevant subsurface property. The landowners had argued that this position was unavailable to Columbia because it had failed to appeal the award of damages in the first place. "Columbia Gas ... does not attack the underlying damages award ... [but] instead, argues an alternative basis for affirmance by attacking the reasoning of the district court's judgment. This is a distinction with a difference." With respect to the merits of Columbia's argument, the court agreed: "[T]he Landowners do not have a 'reasonable and foreseeable use' of their subsurface. As such, the Landowners do not have a present possessory interest in their subsurface." And because they lacked a possessory interest in the subsurface, they could not convey it to Columbia Gas. The court rea-

[1] 929 F.3d 767 (10th Cir. 2019).
[2] 670 N.E.2d 985 (Ohio 1996).

soned, therefore, “that the possessory interest in the subsurface could not have been a benefit conferred by the Landowners upon Columbia Gas” – a necessary condition to an unjust enrichment claim in Ohio.

In sum, the court concluded that even though the district court found Columbia Gas liable to the landowners for unjust enrichment damages, no further damages could be awarded because no damages should have been awarded at all.

United States Supreme Court Defers Decision to Allow for Additional Briefing and Oral Arguments in Pending Challenge to Tenth Circuit Court of Appeals Decision on Whether Congress Ever "Disestablished" the Muscogee (Creek) Nation Reservation

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In a decision issued August 8, 2017, in the appeal of the defendant's conviction for an alleged brutal crime, the Tenth Circuit Court of Appeals reached findings and conclusions that are of substantial concern to both the energy industry and the business community generally in one of the major oil and gas-producing states.[1] Murphy, a member of the Muscogee (Creek) Nation, asserted in this appeal that he was wrongly prosecuted and convicted in the Oklahoma state courts for a crime that occurred in Indian Country (as defined in 18 U.S.C. §1151) over which the federal courts have exclusive jurisdiction. The state district court rejected Murphy's argument, finding that the crime had occurred on state land.

In a 126-page opinion addressing the issues on appeal, the Tenth Circuit found that, under the principles of *Solem v. Bartlett,*[2] Congress never *disestablished* the Creek Reservation. The case was remanded to the state district court to issue a writ of habeas corpus vacating *Murphy's* conviction and sentence.

Royal filed a Petition for Writ of Certiorari to the United States Supreme Court on February 6, 2018. The Petition was granted by the Court on May 21, 2018. Multiple amicus curiae briefs were filed. The parties and certain of the amicus participants presented oral argument to the Supreme Court on November 27, 2018.

On December 4, 2018, the Supreme Court directed the parties, the Solicitor General, and the Muscogee (Creek) Nation to file supplemental briefs addressing two questions:

> (1) Whether any statute grants the state of Oklahoma jurisdiction over the prosecution of crimes committed by Indians in the area within the 1866 territorial boundaries of the Creek Nation, irrespective of the area's reservation status. (2) Whether there are circumstances in which land qualifies as an Indian reservation but nonetheless does not meet the definition of Indian country as set forth in 18 U. S. C. §1151(a).[3]

The supplemental briefs were filed in late December 2018, and in January 2019. On June 27, 2019, the appeal in *Murphy* was restored to the calendar for re-argument, but without specifying a particular date. As of the date this report was prepared, no specific date appeared to have been set for the presentation of the anticipated further oral arguments before the Court.

As a final note for those who are only lightly watching for further developments in this case, the case appears to be destined to experience at least three name changes during the several years it has pended on appeal. At the time the Tenth Circuit proceedings were filed and through the date the Tenth Circuit issued its decision, the case was entitled *Murphy v. Royal*.[4] Mr. Terry

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[1] *Murphy v. Royal*, 866 F.3d 1164 (10th Cir. 2017).
[2] 465 U.S. 463, 470 (1984).
[3] https://www.supremecourt.gov/search.aspx?Search=17-1107&type=Site. See Order in Pending Case dated December 4, 2018, *Carpenter v. Murphy,* No. 17-1107, Before the United States Supreme Court.
[4] 866 F.3d 1164 (10th Cir. 2017).

Royal was, at that time, the Warden of the Oklahoma State Penitentiary. When initial oral arguments were presented to the United States Supreme Court in the Fall of 2018, the case was entitled *Carpenter v. Murphy,*[5] because Mr. Mike Carpenter had assumed the role of Interim Warden of the Oklahoma State Penitentiary. By letter dated July 25, 2019, counsel for the Petitioner notified the Clerk for the United States Supreme Court that Mr. Tommy Sharp now serves as the Interim Warden of the Oklahoma State Penitentiary and will be automatically substituted as the Petitioner in this appeal in future proceedings.

[5] No. 17-1107, Before the United States Supreme Court.

Tenth Circuit Court of Appeals Affirms District Court's Finding of Trespass by Pipeline Owner Who Continued to Operate Pipeline After Expiration of its Limited Term Easement, but Reverses the Permanent Injunction Below Based Upon the Standard Applied in Granting the Injunction

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The dispute presented in *Davilla v. Enable Midstream Partners L.P.*[1] arose in connection with the expiration of a 20-year pipeline easement that covered certain Native American Indian allotted lands in Oklahoma. Enable Intrastate Transmission, LLC owned and operated a natural gas pipeline that traversed the lands. After the easement expired, Enable did not remove the pipeline, but rather continued to operate it. Enable ultimately approached certain of the allottees and sought a new 20-year easement. It also applied to the Bureau of Indian Affairs (BIA) for approval of a new easement. However, Enable failed to obtain approval for the proposed new easement from the allottees of a majority of the equitable interests in the land, as required by applicable regulations.

As a result, the BIA cancelled Enable's right-of-way application. As Enable continued to operate the pipeline, a large group of individuals who held certain rights in the subject lands (the Allottees) filed suit in federal court alleging that Enable was trespassing on their land. They asked the court to enter an injunction compelling Enable to remove its pipeline. The parties were able to stipulate to most of the relevant facts. The Allottees moved for summary judgment on the issues of liability for trespass and injunctive relief. The court granted the Allottees' motion and requests for relief. Enable appealed.

Enable asserted two primary arguments on appeal. First, it argued that "the district court erred in granting summary judgment in favor of the Allottees on their trespass claims."[2] Second, Enable asserted that "the district court erred in issuing a permanent injunction to enforce the summary judgment ruling."[3]

In addressing the issues raised on appeal, the Tenth Circuit noted at the outset that "it is *the law*, not the material facts, that complicates this case."[4] The court further recognized that "[b]ecause we lack a federal body of trespass law to protect the Allottees' federal property interests, we must borrow state law to the extent it comports with federal policy."[5] The court went on to observe that "[t]he State of Oklahoma recognizes a right of action in trespass where one person 'actual[ly] physical[ly] inva[des] . . . the real estate of another without the permission of the person lawfully entitled to possession.'"[6] The Tenth Circuit concluded as follows:

> Our reading of Oklahoma law thus yields three elements constituting the Allottees' federal trespass claims. First, the Allottees must prove an entitlement to possession of the allotment. Second, they must prove Enable physically entered or remained on the allotment. Finally, they must prove Enable lacked a legal right—express or implied—to enter or remain. The stipulated facts already described definitively prove the first two elements.[7]

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[1] 913 F.3d 959 (10th Cir. 2019).
[2] *Id.* at 964.
[3] *Id.* at 965.
[4] *Id.* (Emphasis added by the court).
[5] *Id.*
[6] *Id.* at 966.
[7] *Id.*

However, Enable took issue with the entry of summary judgment on the *third* element of the trespass claim. Enable contended that it had produced evidence of consent sufficient to prove a legal right to maintain the pipeline on the subject lands despite the expiration of the easement. More specifically, Enable showed that, in 2004, it had "obtained written consent forms from five of the thirty-seven individual Allottees in this case,"[8] showing that the five were willing to grant a new right-of-way for the pipeline in exchange for cash consideration.

While the Tenth Circuit noted that "evidence of a plaintiff's consent to a defendant's entry on the land will defeat liability in cases where the plaintiff's consent itself creates a right to enter or remain,"[9] it found that such evidence would not be sufficient in the present context.

> When it comes to maintaining a pipeline over Indian allotted land, however, Congress has dictated the prerequisites of a right to enter by statute. Enable thus has no legal right to keep a structure on the Allottees' land unless and until it secures a right-of-way for that purpose from the Secretary of the Interior. *See* 25 U.S.C. § 323. The Secretary must, in turn, have the approval of the relevant Indian stakeholders.[10]

The court found that the authorities cited by Enable fell short of holding "that one cotenant has no right of action for trespass under Oklahoma law when another cotenant—much less a *small minority* of cotenancy interests—has agreed to a right-of-way easement."[11] Moreover, the court observed that, even if Oklahoma law were to provide that such evidence could defeat a trespass claim, "federal courts should only incorporate state rules of decision into federal claims to the extent those rules are consistent with federal law and policy."[12] The court concluded that Enable's view of the law would "frustrate federal Indian land policy, effectively robbing Indian allottees and the government of meaningful control over alienation."[13] Enable lacked a legal right to keep the pipeline in the ground.

The Tenth Circuit then turned to the second key argument of Enable with regard to the trespass claim—*i.e.,* that, even if the easement had expired, no duty to remove the pipeline ever arose because the Allottees never demanded that Enable remove it. Recognizing, again, that Oklahoma law would be incorporated into the subject federal claim so long as it did not frustrate federal policy, the court found that Oklahoma case law does not create a requirement that prior demand be made.[14] Rather, citing provisions of the Restatement (Second) of Torts, "the easement's expiration created a duty to remove the pipeline. . . Indeed, there would have been no sense in limiting the easement term to twenty years otherwise."[15]

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[8] *Id.*
[9] *Id.* at 967.
[10] *Id.*
[11] *Id.*
[12] *Id.*
[13] *Id.* at 967-68.
[14] *Id.* at 969.
[15] *Id.* The court did, however, discuss the easement holder's potential right to re-enter the property after the expiration of the easement for the purpose of removing the pipeline. *Id.* at 969-70.

The court concluded that "Enable acquired the pipeline *already knowing* the right-of-way would eventually expire. It therefore cannot—and indeed does not—claim it lacked notice of its duty to remove or intent to maintain the trespass."[16]

Finally, the Tenth Circuit reviewed Enable's challenge to the permanent injunction issued by the district court requiring Enable to remove the pipeline. As to this third basis for the appeal, the court agreed with Enable. The court recognized that a district court abuses its discretion when it bases its decision on an erroneous conclusion of law. Here, "the district court relied primarily on Oklahoma law—with supplemental authority from other federal courts—to conclude that 'equity will restrain [a continuing] trespass.' [citations omitted] As a result, it did not apply the usual four-factor test guiding federal courts' grant of permanent injunctive relief."[17]

The court found that, in determining whether to apply Oklahoma law or federal law in determining the standards for a permanent injunction, the court should consider:

> (1) "whether application of state law would frustrate specific" federal interests, (2) whether there is a "need for a nationally uniform body of law," and (3) other considerations such as whether "application of a federal rule would disrupt commercial relationships predicated on state law."[18]

The Tenth Circuit held that the district court erred because the circumstances in the present lawsuit indicated a distinct need for nationwide legal standards. "This uniform standard is necessary because the Secretary has undoubtedly approved easements over and across Indian land in multiple states."[19] The court noted that similar circumstances as those in the present dispute could lead other easement holders to be subject to an order of removal upon expiration of their easements. If the court did not apply a uniform standard in determining those issues, "an easement holder in Oklahoma and one in Kansas could be subject to differing permanent injunction standards despite both receiving an easement from the Secretary of the Interior pursuant to the same federal program."[20]

> By failing to apply the federal courts' traditional equity jurisprudence to its remedy analysis, the [district court] committed an error of law and thus abused its equitable discretion. Accordingly, we must reverse the injunction order and remand for a full weighing of the equities.[21]

The Tenth Circuit Court of Appeals affirmed the district court's grant of summary judgment in favor of the Allottees. It reversed the entry of the permanent injunction, and remanded the case for further proceedings.

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[16] *Id.* at 970.
[17] *Id.* at 971.
[18] *Id.* at 972.
[19] *Id.* at 972.
[20] *Id.*at 972.
[21] *Id.* at 971.

Where a Consent-to-Assign Clause Did Not Provide a Standard for Refusing to Approve an Assignment, the Texas Supreme Court Refused to Read a Reasonableness Standard

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Carrizo Oil & Gas, Inc. owned an interest in an oil and gas lease. Carrizo granted a farmout to Barrow-Shaver Resources, Co. by way of a letter agreement. *Barrow-Shaver Resources Co. v. Carrizo Oil Gas, Inc.*, 2019 WL 2668317 (Tex. 2019). The agreement contained a consent-to-assign clause that stated:

> The rights provided to [Barrow-Shaver] under this Letter Agreement may not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo.

This clause had been the subject of some negotiation. Barrow-Shaver negotiated to have the consent-to-assign clause state that Carrizo would not unreasonably withhold consent. Carrizo did not agree to that, but a Carrizo landman who was negotiating the deal on behalf of his company told a Barrow-Shaver representative that Carrizo would give its consent if Barrow-Shaver later decided to assign its interest. The parties entered the agreement. Later, however, when Barrow-Shaver sought to assign its interest, Carrizo refused to consent.

Barrow-Shaver sued Carrizo and prevailed at the trial court level, but the appellate court reversed. The Texas Supreme Court then granted review and affirmed. The Texas Supreme Court had noted that the state's jurisprudence has declined to read a reasonableness standard into consent-to-assign clauses that do not put conditions on the right to approve an assignment. Further, the court noted that, under Texas law, an implied covenant of good faith and fair dealing does not exist in every contract. Such a duty generally does not exist under Texas law absent a special relationship. No special relationship existed here.

Further, the consent-to-assign clause was not ambiguous. Therefore, the court rejected Barrow-Shaver's argument that industry custom imposed a duty of reasonableness on a party that is requested to consent to an assignment. The court stated that extrinsic evidence could not properly be used to create an ambiguity or vary the meaning of an unambiguous contract.

Finally, Barrow-Shaver could not assert a fraud claim based on Carrizo's failure to act in accordance with the representation by a Carrizo negotiator that Carrizo would consent to an assignment in the event that Barrow-Shaver later chose to assign its interest. A required element of a fraud claim is justifiable reliance on a representation. The Texas Supreme Court stated that Barrow-Shaver could not justifiably rely on the Carrizo landman's representation that Carrizo would consent to an assignment when the written agreement plainly addressed the subject of consents to assignment, without restricting Carrizo's right to object to an assignment.

Never Trust Your Cotenants – Ouster in West Virginia

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"My possession of said land has been, and is, actual, hostile, visible, notorious, exclusive, continuous and peaceable." One of several cotenants to land in northern West Virginia attested to this in an affidavit in 1903. While it is clear that the affiant was attempting to adversely possess the property, can one cotenant, who has an equal right to the possession of commonly held property along with all other cotenants, adversely possess the interests of his cotenants? West Virginia courts recognize the doctrine of ouster, which allows a cotenant in possession to acquire all interest of his or her cotenants in property, similar to adverse possession. As with its sister concept, adverse possession, recorded evidence of ouster is difficult to identify. In situations satisfying the elements for ouster, identifying and applying the principle is an effective way to clear clouds on title.

West Virginia courts recognize that the ouster of a cotenant may occur when all elements of adverse possession are met and there are objective facts to show specific intent to oust the cotenant.[1] Ouster requires a tenant in common to occupy common property openly, notoriously and exclusively as the sole owner, while keeping up improvements, paying the real estate taxes and receiving the rents and profits.[2] Proof of these elements shows an intention to ignore the rights of the ouster's cotenants and such acts amount to an expulsion of non-possessing cotenants.[3] The ouster's possession will be regarded as adverse to his cotenants from the time the cotenants are shown to have knowledge of such acts and claims.[4] The ousting cotenant must take actual possession of the property and claim title to the entire property for a period that satisfies the statute of limitations for adverse possession (10 years in West Virginia).[5] Obtaining an interest in property by deed is not enough to affect ouster; the ousting cotenant must take actual possession of the land.[6]

Silent possession is not sufficient. An ousting cotenant must act openly and notoriously to a degree that precludes doubt of the ouster's intentions. A written document is not necessary to affect ouster. Acts not witnessed by written documents, such as verbal partitions, exclusive occupation with notice to cotenants of the hostility of the claim, a verbal promise to convey land or a repudiation or disavowal of cotenancy with the non-possessing cotenants have all effectively shown ouster.[7] Because a cotenant has no duty to monitor property held in common for dishonest actions by an ousting cotenant, non-possessing cotenants must have notice of the ouster's claim.[8]

The greatest difficulty in proving ouster is that evidence often hinges on facts outside of record title. The intent of the ousting cotenant, exclusivity of the ouster's possession and non-possessing cotenants' knowledge of the adverse claim can be difficult to determine via record title. Courts have found that extensive improvement by the ousting cotenant of a nature that was certain

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[1] *Cooey v. Porter*, 22 W. Va. 120 (1883).
[2] *Cochran v. Cochran*, 55 W. Va. 178 (1904); *See* W.Va. Code §. 55-2-1.
[3] *Id.*
[4] *Id.*
[5] *Hutchens v. Denton*, 83 W. Va. 580 (1919).
[6] *Reed v. Bachman*, 61 W. Va. 452 (1907).
[7] See *Russell v. Tennant*, 63 W. Va. 623 (1908); *Cochran* 55 W. Va. 178; and *Reed* 61 W. Va. 452.
[8] See *Reed* 61 W. Va. 452.

to place cotenants on notice is sufficient to prove open and notorious exclusive possession.[9] Such improvements or development may include timber or coal operations.[10] Evidence of timber or coal development may also appear in assessment records, giving title examiners a firm piece of evidence for which to search and utilize in an ouster analysis.

There are several clues that title examiners can point to as signs that ouster may have occurred. Usually an examiner is alerted to the possibility of ouster by a lack of recorded documentation regarding the property from non-possessing cotenants. An affidavit whereby an ousting cotenant claims exclusive ownership in land is a clear indication that a cotenant in possession is attempting to oust his non-possessing cotenants.[11] An instrument providing an ousting cotenant with colorable title to all interest in property is also a good indication that the ousting cotenant may claim exclusive possession of the land. Instruments providing colorable title can include deeds from cotenants purporting to convey all interest in property, improperly executed or acknowledged deeds, void partition actions, deeds executed by void powers of attorney and land sale contracts with no deed finalizing the sale.

Evidence of extensive development of the land by the cotenant in possession, including timber and coal development, can also indicate that ouster occurred.[12] Other evidence which may indicate that one cotenant has exclusive control and possession includes a change in assessments removing cotenants, conveyances of the land not executed by the non-possessing cotenants and mineral leases executed by only the cotenant in possession. Because the taking of profits by a cotenant is a legal right, mineral development alone may not be adverse to non-possessing cotenants. A cotenant's right to mineral development is subject to an accounting of profits to fellow cotenants. Evidence that the cotenant in possession did not account to cotenants for mineral development would show an intent to exclusively possess the property.

In instances where non-possessing cotenants disappear from record title, there are likely circumstances outside of the record which indicate that the ousting cotenant put non-possessing cotenants on notice of his or her exclusive claim. Such circumstances could include verbal notification of the exclusive claim, verbal agreements or land development. A title examiner could infer the existence of an unrecorded exclusive claim through a lack of recorded documentation regarding the interests of non-possessing cotenants and evidence of sole exercise of ownership by the cotenant in possession in the chain of title.

The ouster of cotenants to a severed mineral estate is more difficult to accomplish. If ouster is commenced prior to an oil and gas severance by the ousting cotenant, continued occupation of the surface will provide the severed mineral owners with valid title to the minerals.[13] If ouster of cotenants to the surface occurs after a mineral severance, possession of the surface will not divest the owners of the severed minerals. Because West Virginia does not allow production of oil and gas without consent from all cotenants, actual development of the minerals for the statutory period without an accounting may be sufficient to acquire title by ouster.[14] The prohibition on production without consent of all cotenants is subject to the Cotenancy Modernization and Majority Protection

[9] *Laing v. Gauley Coal Land Co.*, 109 W. Va. 263 (1930).
[10] *Id.*
[11] See *Cooey*, 22 W. Va. 120, *Laning*, 109 W. Va. 263 and *Russell*, 63 W. Va. 623.
[12] *Laing*, 109 W. Va. 263.
[13] 1 Williams & Meyers, Oil and Gas Law § 224 (2018).
[14] *Id.*

Act, which allows production with the consent of only 75% of cotenants.[15] However, West Virginia courts have not addressed the ouster of cotenants to severed minerals. Although ouster of cotenants to severed minerals is more difficult, land with a long history of mineral development may warrant more extensive research into production history to determine if sufficient evidence for ouster is present.

Confirming title to land using the doctrine of ouster is not painless. For more recent ouster claims, obtaining a declaratory judgment through an action to quiet title confirming that the cotenant in possession ousted the non-possessing cotenants is likely necessary. Older ouster claims with a long record history of exclusive ownership by the ousting cotenant and his or her successors may not require an action to quiet title. The doctrine of tacking applies to ouster claims, as with adverse possession. A current cotenant in possession may claim ouster through the actions of his predecessors in interest which occurred decades ago. In instances where the cotenant in possession stands to obtain significantly larger payments through a successful ouster claim, the landowner may willingly undertake an action to quiet title independently of the mineral developer, relieving the developer of significant costs and the headaches associated with litigation.

Our firm recently encountered a situation in northern West Virginia which presented a strong case for the application of ouster. Adam Manning leased his farm to Donald Franks in 1862. The agreement stated that upon Adam and his wife's deaths, Elizabeth Franks would receive the farm. Elizabeth was Adam's daughter and Donald's wife. Upon Adam's death prior to 1872, all of his heirs, except Elizabeth and a son, John Manning, conveyed their interests in the farm to Donald. John Manning conveyed his interest to Elizabeth Franks. Elizabeth died intestate prior to 1903 and pursuant to West Virginia intestacy law, her children with Donald acquired her interest in the farm. John Manning later quitclaimed the same interest he previously conveyed to Elizabeth to Donald Manning, providing Donald with color of title to John's interest. Donald executed and recorded an affidavit stating that his children were the intestate heirs of his wife, but that Donald had exclusive ownership and possession of the farm. Donald clearly intended to provide notice of his open, notorious and hostile claim to all interest in the farm through the affidavit. Donald's Will later devised the farm to only one of his sons, and none of Donald and Elizabeth's other children contested his ownership.

The instruments of record show that Donald effectively ousted his cotenants. Record title reflects sole and exclusive possession by Donald adverse to his wife and children. The affidavit provides notice to all parties that Donald claimed exclusive ownership. The lack of adverse claims by Donald and Elizabeth's other children shows that they recognized Donald's exclusive ownership of the farm. Had the title examiner not applied ouster in this instance, the oil and gas developer would be faced with an extensive heirship search and numerous additional cotenants. Ownership of the oil and gas by non-possessing cotenants would have also created conflicts with future oil and gas severances. Due to the age of the ouster claim at issue, no curative action was recommended by the title examiner. The recorded affidavit makes this situation straightforward. Donald clearly claimed exclusive possession adverse to his children in order to acquire all interest in the farm, and the affidavit provided record notice to all parties. However, the title examiner could have determined that Donald ousted his cotenants even if the affidavit were not recorded.

The doctrine of ouster applies to only a narrow set of factual circumstances and may be difficult to prove through record title. However, a knowledgeable title examiner should understand

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[15] *See* W.Va. Code §§. 37B-1-1, et seq.

ouster and recognize situations where it may apply. Perfecting a claim of ouster does require some work on the part of the ousting cotenant, but can compensate for any difficulty by quieting a landowner's title and providing oil and gas developers with an easier path to production. In spite of its difficulties, ouster remains an important principle to be considered by title examiners and operators.

Under Facts of Case, an Operator Could Not Use the Surface of a Tract in West Virginia to Support the Production of Minerals from Another Tract, Notwithstanding the Mineral Estate Owner's Grant of Pooling Authority to Oil and Gas Lessee

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In 1901, the owners of a 351-acre tract granted an oil and gas lease to a predecessor-in-interest to EQT Production. *EQT Production Co. v. Crowder*, 828 S.E.2d 800 (W. Va. 2019). In 1936, the then-landowner sold the land, but reserved all minerals, thereby creating a split estate. The land was later subdivided and the plaintiffs owned certain tracts. In 2011, EQT and the owners of the mineral estate associated with the land owned by the plaintiffs amended the 1901 oil and gas lease to give EQT pooling authority. EQT later used the surface of the plaintiffs' land to drill horizontal wells that had take-points beneath the plaintiffs' land, as well as beneath neighboring lands, including lands that were not included in the original 351-acre tract to which the 1901 lease applied. However, those other lands had been pooled with the leased tract. The plaintiffs sued EQT, alleging that the company's use of their land to produce minerals from other lands was a trespass. The trial court agreed and, after a jury trial to determine the quantum of damages, awarded a total of $190,000 to the plaintiffs.

EQT appealed to the West Virginia Supreme Court, which affirmed. EQT argued that the pooling clause of the oil and gas lease authorized the company to pool, and that this gave the company the right to create a pooled unit that included the plaintiffs' land and also to use the plaintiff's land to support production of minerals from other tracts in the unit. The court rejected this argument, concluding that the mineral estate owners' agreement to the 2011 amendment granting pooling authority to EQT could not impose on the surface estate the obligation to host surface operations for producing minerals from other lands.

EQT apparently argued that the use of the plaintiffs' land was reasonably necessary to support mineral production from other lands, but the court rejected this too, reasoning that the implied easement of surface use that generally is part of an oil and gas lease only applies for surface operations reasonably necessary for producing minerals from the same tract, not from other lands.

Fifth Circuit: Class Arbitrability is a Gateway Issue Closed to Arbitral Decision by a Class Arbitration Bar

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20/20 Communications, Inc. v. Crawford,[1] held that class arbitrability is a "gateway issue" for determination by a court absent a "clear and unmistakable" agreement for arbitral determination. Applying that test, the Fifth Circuit ruled that the parties' class arbitration bar precluded their agreement from clearly and unmistakably providing that an arbitrator would decide class arbitrability. Who decides class arbitrability—court or arbitrator—can be very important because the Federal Arbitration Act ("FAA) provides for only limited review of arbitral decisions.[2]

The Facts.[3] 20/20's field sales managers executed its standard arbitration agreement containing a class arbitration bar. That bar allowed an arbitrator to "hear only individual claims" and prohibited arbitration "as a class or collective action…to the maximum extent permitted by law." After many managers asserted identical class claims by amending individual arbitration claims, 20/20 asked a court to declare that class arbitration was a gateway issue for court resolution and that the class bar was effective. With that case pending, several claimants requested clause construction awards allowing class arbitrations. Six arbitrators issued clause construction awards; and, one allowed class arbitration.[4] 20/20 filed a second federal case seeking to vacate the award permitting class arbitration and appealed the award's confirmation. Eventually, based upon a holding that class arbitration was an issue for the arbitrator, the first case was dismissed, resulting in a second appeal. The appeals were consolidated.

The Decision. The Fifth Circuit observed that neither it nor the Supreme Court had decided whether availability of class arbitration was a "gateway issue."[5] Based upon fundamental differences between bilateral and class arbitrations, the Court "had no difficulty" agreeing with the unanimous view of those Circuits who had ruled[6] and held that class arbitrability was a gateway issue.[7]

Next, the Court applied the gateway issue rule to decide if the arbitrator was the proper decision maker under the parties' agreement.[8] The class bar provision provided:

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[1] 930 F.3d 715, (5th Cir. 2019).

[2] See, *Hall Street Assoc., L.L.C. v. Mattel, Inc.,* 552 U.S. 576 (2008) (parties could not agree to expand the FAA grounds for review to include legal error). However, as the FAA is not exclusive*, id.* at 590, a properly drafted arbitration agreement can allow review of an arbitrator's award for legal error at least where allowed by state law. See, e.g., *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 87 & 97 (Tex. 2011).

[3] All recited facts are from *id.* at *1-2.

[4] That arbitrator's award held that the class bar was prohibited by the National Labor Relations Act. *Id.* *1. Later, the Supreme Court held exactly the opposite in *Epic Systems Corp. v. Lewis,* 584 U.S. ____, 138 S.Ct. 1612 (2018).

[5] *20/20* at *2.

[6] The Court cited *Del Webb Cmtys., Inc. v. Carlson*, 817 F.3d 867, 877 (4th Cir. 2016); *Reed Elsevier, Inc. ex rel. LexisNexis Div. v. Crockett,* 734 F.3d 594, 599 (6th Cir. 2013); *Herrington v. Waterstone Mortg. Corp.*, 907 F.3d 502, 506–07 (7th Cir. 2018); *Catamaran Corp. v. Towncrest Pharmacy*, 864 F.3d 966, 972 (8th Cir. 2017); *Eshagh v. Terminix Int'l Co., L.P.*, 588 F. App'x 703, 704 (9th Cir. 2014); *JPay, Inc. v. Kobel,* 904 F.3d 923, 935–36 (11th Cir. 2018), cert. denied, 139 S.Ct. 1545 (2019). *Id.* at *2. The Third Circuit had also so ruled. See, e.g., *Opalinski v. Robert Half International Inc.,* 761 F.3d 326, 329 & 335-6 (3d Cir. 2014).

[7] *Id.* at *3.

[8] *Id.* at *3-5.

> this Agreement prohibits the arbitrator from consolidating the claims of others into one proceeding, to the maximum extent permitted by law. This means that an arbitrator will hear only individual claims and *does not have the authority to fashion a proceeding as a class or collective action* or to award relief to a group of employees in one proceeding, to the maximum extent permitted by law.

(Court's emphasis).[9] The Court concluded that provision barred class arbitrations as far as possible while also "foreclos[ing] any suggestion that the parties meant to disrupt the presumption that questions of class arbitration are decided by courts rather than arbitrators"; and, it further opined that "[h]aving closed the door to class arbitrations to the fullest extent possible, why would the parties then re-open the door to the possibility of class arbitrations, by announcing specific procedures to govern how such determinations shall be made?"[10] Accordingly, the Court found nothing delegating the class arbitration determination "to the arbitrator with the clear and unmistakable language required by Supreme Court precedent."[11]

The Court also considered provisions providing that: (a) disputes about the "meaning" of the agreement were "arbitrability issues" for the arbitrator to resolve, (b) the arbitrator would apply…[rules] of the American Arbitration Association ('AAA') *except where such rules are inconsistent with this Agreement, in which case the terms of this Agreement will govern"*, and (c) "*[e]xcept as provided below,…*all disputes and claims… shall be determined exclusively by final and binding arbitration".[12] The Court found that those provisions "arguably" allowed an arbitral decision on class arbitration but for the class bar.[13] For example, the provision incorporating the AAA rules was "arguably relevant…, considering that Rule 3 of the AAA Supplementary Rules for Class Arbitration provides that the arbitrator is empowered to determine class arbitrability."[14] However, the Court noted that two of the provisions contained exception clauses expressly negating their effect if they conflicted with other provisions as they clearly did with the class bar.[15] And, regardless of the exceptions, none of three provisions specifically discussed class arbitration; and, therefore, under the general contract construction rule favoring specific contractual provisions, those general provisions were trumped by the specific class arbitration bar.[16]

Conclusion. *20/20* teaches two lessons. First, undesired consequences of the chosen arbitration rules can be avoided by combining a clear statement of the desired result with an exception clause providing that anything to the contrary in the rules will not apply. Second, at least in the Fifth Circuit, a well-written class arbitration bar (sometimes called a class action waiver) protects against both arbitral decision of class arbitrability and class arbitration.

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[9] *Id.* at *3.
[10] *Id.* at *3-4.
[11] *Id.* at *4.
[12] *Id.* at *5 (court's emphasis).
[13] *Id.*
[14] *Id.* Perhaps because it was distinguishable as involving no exception clause limiting the application of the AAA rules, the court did not reference a prior holding that class arbitrability was for the arbitrator when AAA rules were incorporated. See, *Reed v. Florida Metropolitan University, Inc.,* 681 F.3d 630 (5th Cir. 2012), abrogated in part on other grounds, *Oxford Health Plans LLC v. Sutter,* 569 U.S.564 (2013). *Reed* held that incorporation of AAA Rules "constitutes a clear agreement to allow the arbitrator to decide whether the party's agreement provides for class arbitration". *Id.* at 635-6. One suspects that the court felt a push to recognize class arbitrability as a gateway issue so that the class bar could operate to erase an award that was clearly erroneous after *Epic* and that might have required confirmation if reviewed as a non-gateway issue. See, e.g., *Hall Street*, *supra,* n. 2.
[15] *Id.*
[16] *Id.* at *5.

EPA Releases Draft Oil & Gas Wastewater Management Study

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On May 15, 2019, the US Environmental Protection Agency (EPA) released a draft study related to the options available to regulators and the regulated community regarding the treatment and/or disposal of produced water generated from the extraction of oil and gas. The agency is seeking public comment on the draft, which must be filed with EPA no later than July 1, 2019. The draft study attempts to summarize how EPA, states, tribes and others view the current state of regulation and management of wastewater from the oil and gas industry and provides insight into how this wastewater might be returned to beneficial uses.

The study contains a general update regarding the status of wastewater management options available for produced water across the country, as well as the challenges, which include surface water discharge in very limited circumstances under current law, treatment followed by discharge to a surface water which, while available to the industry, has very high costs related to pre-discharge treatment necessary to address constituents contained in the wastewater, including total dissolved solids (TDS), and underground injection. Injection has been the predominant means of disposing of wastewater that can no longer be re-used. Even this last option, though most available, also presents challenges due to costs associated with delivery of the water to a permitted underground injection control (UIC) facility and the limitations on the volume of wastewater which can be accepted at these facilities.

While the study is not a rule-making and does not have the force and effect of a statute or a rule, the results of the study may influence future rule-making. It provides an opportunity for industry to express its hopes for increased wastewater handling options – including expanded re-use and recycling options, as well as regulatory relief in order to encourage some of these options. The study also provides industry opponents an opportunity to express concerns regarding the safety of the various wastewater handling options. Substantial concerns were expressed by NGOs and others regarding the content of wastewater generated by the oil and gas industry and the potential impacts to the environment of allowing for the discharge of these wastewaters to the surface or subsurface, as well as concerns related to seismicity and the lack of established data to allow for the use of surface water discharges or re-use of wastewater in the water cycle. EPA is hoping to receive input about incentivizing and/or encouraging the re-use and recycling of produced water and what regulatory changes can be made to provide better options for the handling and disposal of this wastewater and has requested comment regarding the following questions:

What non-regulatory steps should EPA take to encourage the re-use and recycling of produced water?

Considering the cost of transporting and treating produced water, would revising 40 CFR Part 435 to allow for broader discharge of produced water shift the way produced water is currently handled?

Should EPA continue to distinguish between discharges from onshore oil and gas facilities located east and west of the 98th meridian or establish a national policy irrespective of geographic location?

What steps could EPA take that might incent re-use of produced water within and outside of the oilfield?

The study does not announce or discuss any new initiative at this time regarding regulatory efforts to address wastewater generated by the oil and gas industry. However, the information in the study will undoubtedly influence the manner in which future regulation may be drafted. EPA hopes to finalize the study and announce any further steps it may take by the end of 2019.

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