Litigation Update for the Energy Industry in Oklahoma, With Select Cases From Other Jurisdictions

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I. Non-Operator v. Operator and Other Oil and Gas Operations-Related Cases

A. Court affirms decision against well service company and in favor of Operator, finding that the limitation of liability provisions of the services contract would not be enforced based upon the evidence at trial showing unequal bargaining position.

In Arnold Oil Properties LLC v. Schlumberger Technology Corp., Schlumberger provided certain cementing services in connection with a well operated by Arnold. Arnold asserted in this lawsuit that Schlumberger put more cement in the well than was needed with the result that the top of the cement rose to 10,595 feet (rather than the target 10,900 foot depth communicated to Schlumberger by Arnold. Because the cement rose to shallower depths in the well, the cement covered a shallower zone in the well that Arnold had identified for production. Arnold incurred almost $1 million of additional expense as a result of sidetracking around the cement to reach the zone that could no longer be produced out of the original bore hole.

In an effort to recover those additional expenses, Arnold filed the present lawsuit against Schlumberger for breach of contract, negligence and gross negligence.

Schlumberger moved for summary judgment based upon the limitation of liability provisions of its contract with Arnold. After finding that the contract was clear and unambiguous, the District Court held that the indemnity provisions in the contract merely operated to indemnify the parties against third party claims and was not exculpatory. So the court denied summary judgment and the case proceeded to trial. The jury returned a verdict finding that the parties were equally negligent and that Schlumberger had breached its contract with Arnold. The jury awarded $350,000.00 in damages to Arnold and found that Schlumberger was not grossly negligent. The jury also found that the parties were in unequal bargaining position. Schlumberger appealed the Court’s denial of judgment as a matter of law.

Schlumberger first argued that the District Court misconstrued the indemnity and hold-harmless provisions in the parties’ contract based on its mistaken belief that the parties did not intend to bar claims by Arnold against Schlumberger. The Tenth Circuit agreed with the District Court that the evidence at trial was sufficient to support the jury’s findings: “Thus, even if we were to hold the language of the parties’ contract operates to exculpate Schlumberger from any and all liability, because of the parties’ unequal bargaining position, we would have to find the exculpatory provision unenforceable under Oklahoma law. Either way, the contract cannot exculpate

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1 672 F.3d 1202 (10th Cir. 2012).
Schlumberger from its liability in this case.”

Schlumberger additionally argued that the District Court should have granted its motion for judgment as a matter of law that the limitation of liability provisions limited Arnold’s recovery to the cost of services rendered---$40,893.37. However, after reviewing the evidence shown at trial concerning the non-negotiability of services contracts of the type at issue in this case, the Court of Appeals found that the evidence was sufficient for the jury to conclude that Arnold did not have a free choice in seeking alternate services, and the parties were in unequal bargaining positions. The non-negotiable nature of the form contract was so well-known that Arnold did not see the written contract, and Schlumberger did not ask Arnold to sign it until the work had already been completed. As such, the Tenth Circuit found that it could not enforce the limited liability provision of the contract. The court affirmed the District Court’s judgment in favor of Arnold.

B. Order granting summary judgment in favor of operator in lawsuit for unpaid joint interest billings was reversed based upon the existence of material disputed facts concerning the defenses asserted by the non-operator.

The case of Newfield Exploration Mid-Continent, Inc. v. Petroleum Development Co., the operator (Newfield) sued the non-operator (PDC) for breach of an operating agreement dated November 14, 1996, by virtue of PDC’s failure to pay some $109,290.66 in joint interest billings with respect to the subject well. Newfield also sought to foreclose the operator’s lien that it had perfected with the filing of a lien statement. The district court entered summary judgment in favor of Newfield for the principal sum of $117,025.05 with prejudgment interest in the amount of $37,354.38, which was calculated at the rate of 6% per annum pursuant to the method described in the operating agreement. The non-operator PDC appealed.

On appeal, PDC asserted that the district court erred because disputed material facts rendered summary judgment improper. In particular, PDC argued that it was excused from paying the delinquent joint interest billings because of alleged gross negligence and willful misconduct on the part of the operator. PDC listed a series of complaints about the operator’s performance and asserted that the operator was grossly negligent in preparing its workover and accompanying authority for expenditure (AFE), and in the actual work performed during the workover of the well. PDC also alleged that the operator’s failure to provide PDC with daily reports was willful

2 672 F.3d at 1207.
4 The opinion of the court indicates that the AFE submitted by the operator estimated a 10-day project for $121,000, but the actual work took a month and cost $239,000.
After reviewing the series of factual assertions of PDC that are set out in the court’s opinion, the court concluded that the material facts relating to the issue of whether the operator’s actions constituted gross negligence or willful misconduct were in dispute, and that questions remained as to whether the exculpatory clause contained in the operating agreement entitled PDC to a defense to the operator’s breach of contract claims. The court of appeals reversed the trial court’s summary judgment ruling in favor of the operator.

C. Non-Operator Sues Operator for Drilling a “Horizontal” Well Rather Than a “Vertical” Well.

The case of Summa Engineering, Inc. v. Crawley Petroleum Corp.,\(^5\) presented the court was with a complicated factual history that began with a new well proposal for a prospect in Jackson County, Oklahoma that was presented by Summa’s representatives to Mack Energy, calling for the drilling of a vertical well and including a number of other terms and conditions. Mack Energy and Crawley responded to the proposal by indicating that they were interested in pursuing Summa’s prospect, but Crawley and Mack proposed certain additional and different terms than those set forth in Summa’s proposal. A series of additional exchanges occurred between the parties with proposals and counter-proposals of various additional terms and amendments to the agreement. The parties finally reached a final agreement.

In May 2004, Crawley proposed the drilling of a horizontal well to Mack under the terms of a separate operating agreement (JOA) between those two parties and mailed the representative of Summa a copy of that letter. Two representatives of Summa responded by separate letters to Crawley and Mack explaining that they thought the well should be drilled vertically rather than horizontally, for stated reasons. Several months later, Crawley advised Summa that the horizontal well had been drilled. Since Summa had a carried working interest to casing point, it asked Summa to confirm its election to participate in the after-casingpoint operations and completion of the well. Summa made no election. In a second letter with an AFE attached, Crawley proposed re-entering and deepening the well and a second lateral to a specific depth. One of Summa’s representatives responded and again recommended a vertical well.

In 2006, several years after the well became productive, Summa sued Crawley and Mack for breach of contract and negligence. The case proceeded to a bench trial in July 2009. At the close of Summa’s case, the defendants demurred to the evidence, arguing that there was no requirement in the final agreement to drill a “vertical” well. They also argued that, by virtue of the terms of the agreement, the defendants owned 100% of the leasehold interest and assumed 100% of the risk and cost of drilling the

\(^5\) 2012 OK CIV APP 69, 286 P.3d 653.
well and were entitled to drill the well in the way they chose.

In response, Summa asserted that the negotiations back and forth between the parties were for changes to the original proposal, and that the parties were substantially renewing the original proposal which was incorporated into the revised versions of the agreement. The defendants responded that, under basic contract law and 15 O.S. § 71, a qualified proposal is a new proposal.

Summa also argued that the defendants had acted imprudently and were not in good faith in drilling the well because they had been warned that they were going to have a problem drilling a horizontal well.

The trial court sustained the defendants’ demurrer. Summa appealed.

In affirming the decision of the trial court, the Court of Appeals found as follows:

The defendants argued that Summa’s initial proposal (which required the drilling of a vertical well) was rejected by the defendants’ counter-offer and the subsequent offers and counter-offers, and that the final agreement did not expressly or impliedly include the requirement that the well be drilled vertically. The court agreed, finding that the defendants offered new terms which completely changed the proposal and constituted a rejection or counter-proposal.

Summa additionally argued that the defendants breached the agreement by improperly imposing a casing point election when no casing point had been reached, then unilaterally absorbing Summa’s carried working interest in the well when Summa did not make an election. The court disagreed. The court found that the agreement imposed no conditions or requirements regarding the defendants’ determination of when casing point had been reached. The court further observed that Summa did not object to the defendants’ casing point definition when Summa received the notice letter, and did not object to the request that Summa make an election.

Summa finally argued that the defendants were negligent in drilling the horizontal well because they were warned ahead of time by Summa that they would not hit the target zone. The court found that there was no evidence that the defendants’ decision to drill a horizontal well was made in bad faith or was performed negligently, unreasonably or without due diligence. To the contrary, Summa’s own evidence established that the well was productive.
D. Court rejects assertion that non-operator informally agreed to extend the effectiveness of an expired participation agreement.

In 2001 Trinity Fund, LLC v. Carrizo Oil & Gas, Inc., an operator (Carrizo) and a non-operator (Trinity) signed an agreement setting out the terms and conditions of the non-operator’s participation in wells drilled on certain prospects. The agreement provided that if Trinity did not pay its share of the drilling and casing costs for the first well on the Blair-Pickering Prospect on or before October 19, 2007, the participation agreement would automatically terminate. It was undisputed that Trinity did not make that payment, so the agreement automatically terminated at the end of the day on October 19, 2007.

Thereafter, the two parties exchanged a series of emails. Carrizo asserted that the emails constituted a written agreement by Carrizo and Trinity to continue forward under the terms of the participation agreement (a) except that the termination provision associated with the non-payment of costs for the first well on the Blair-Pickering Prospect was not part of the extended contract, and (b) except that the agreement included a new provision under which Trinity would receive a 1% rebate.

Carrizo alleged that Trinity breached the alleged agreement by not paying any of the costs for any of the Commitment Wells. Carrizo sued Trinity for, among other things, breach of contract, quantum meruit and promissory estoppel. The jury found that the companies had in fact agreed in writing to continue forward under the terminated participation agreement under the terms asserted by Carrizo, and it awarded damages.

On appeal, the Texas Court of Appeals held in part as follows:

1. With respect to the breach of contract claim, the court found that, under the unambiguous language of the emails, there was no mutual understanding and assent by Carrizo and Trinity to a written agreement to continue forward under the participation agreement. Since the payment required to keep the agreement in effect was not paid, the participation agreement terminated on October 19, 2007. Carrizo was thereafter relieved of its obligation to assign Trinity any interest in the Commitment Wells, and Trinity had no further obligation to pay any costs under the terminated agreement. 393 S.W.3d at 451.

2. In response to Carrizo’s contention that the issue of whether the parties agreed to the alleged extension agreement was a fact question for the jury whose determination should not be disturbed on appeal, the court found that the negotiations, alleged offers and alleged acceptances were in writing and the language used was unambiguous. As a result, the issue of whether the parties agreed to the alleged

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6 393 S.W.3d 442 (Tex. App. – Houston 2012).
extension agreement was a question of law for the court. 393 S.W.3d at 453.

3. With regard to Carrizo’s quantum meruit claim (alleging that Carrizo rendered valuable services or furnished materials for Trinity), because of the termination of the participation agreement, Trinity held no interest in the prospects or leases that benefitted from the costs Carrizo sought to recover. Consequently, this claim failed.

4. Finally, Carrizo’s promissory estoppel claim first focused on select statements made prior to the execution of the participation agreement. The court noted, however, that the participation agreement expressly stated that “[t]his instrument contains the final and entire agreement of [Carrizo and Trinity] with respect to the matters covered by this Agreement and supersedes all prior communications and agreements (written, oral or otherwise) in this regard.” Consequently, the statements relied upon by Carrizo could not provide evidence to support a promissory estoppel claim by virtue of the parol evidence rule and the integration clause of the participation agreement.

5. Carrizo’s promissory estoppel claim was also based on certain statements made after the participation agreement terminated. However, the court found that the statements were too vague and indefinite to constitute a promise that would support a finding of promissory estoppel.

E. Court Determines Whether Future-Acquired Oil and Gas Leases Were Subject to JOA Entered Into Over 30 Years Earlier.

In Clovelly Oil Co., LLC v. Midstates Petroleum Co., LLC, the dispositive question was whether an oil and gas lease acquired by Midstates in 2008 was subject to the terms and provisions of the pre-existing operating agreement (JOA). The JOA was entered into in 1972, and Clovelly was the current operator. Midstates was a non-operator. The JOA was a 1956 AAPL Form 610 model form operating agreement.

In 2008, Midstates acquired a new oil and gas lease covering lands that were included within the unit area described in the JOA. In April 2009, Midstates re-entered an abandoned well and started preparing locations for other abandoned wells on the new lease. Clovelly promptly notified Midstates that its lease acquisition and its operations were subject to the provisions of the JOA. Clovelly asserted that it was entitled to its proportionate share of the new lease and that it had the right to operate the new wells. When Midstates disagreed, Clovelly sued for breach of contract and declaratory judgment. The trial court granted partial summary judgment in favor of Midstates declaring that the JOA did not apply to the new lease that had been acquired some 35 years after the date of the JOA.

Clovelly appealed. The Court of Appeals reversed and held that the JOA did apply to the new lease. The Louisiana Supreme Court granted discretionary review.

After reviewing the provisions of the JOA in detail, the Louisiana Supreme Court concluded that the JOA applied “to leases and unleased mineral interests located within the geographic area described in Exhibit ‘A,’ which were owned by the parties at the time the JOA was executed.” In reaching this conclusion, the court made the following observations, among others:

1. It found that the Court of Appeals (which had ruled that the JOA applied to new leases) ignored the present tense language of the preamble of the JOA as well as the present tense wording in Section 1(4). The Preamble refers to leases and unleased mineral interests in the subject lands of which parties to the JOA “are owners.” Section 1(4) defines “oil and gas interests” as “unleased fee and mineral interests in tracts of land lying within the Unit Area which are owned by the parties.

2. The court distinguished the prior decision of the Kansas Supreme Court in Amoco Production Co. v. Charles B. Wilson, Jr., Inc., in which that court rejected Amoco’s argument that the use of the present tense word “are” in the Whereas clause of the Preamble limited the JOA to leases that were in effect at the time the JOA was executed. The Louisiana court found that even where a contract contains both preprinted and handwritten or typed terms, the contract must still be interpreted as a whole, and with an effort to give effect to, and harmonize, all provisions of the agreement. It distinguished the Kansas decision that relied on certain language the parties had inserted in the Exhibit A to their JOA, and the court noted that the Kansas court stated that it was not holding that all after-acquired leases were covered by the JOA. The Louisiana court also noted that the Kansas decision was influenced by the presence of fiduciary duties imposed on parties to a joint venture.

3. The Louisiana Supreme Court further found that to hold that future leases in the unit area are subject to the JOA would also render Section 23 of the JOA virtually without effect. Section 23 is the provision that allows the parties to choose whether to participate in renewal or extension leases. Even if the point were to be made that Section 23 applies to “extension and renewal” leases but not to “new” leases, the court found that would be an unusual outcome because it would mean that the parties would have the “option” whether to participate in the types of leases that would be more familiar to the parties, but that “new future” leases, with which they have less familiarity, would automatically be subject to the JOA.

The court noted in footnote 35 of its opinion that the American Association of Professional Landmen had filed an amicus brief in support of Midstates assertion that

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8 112 So.3d at 193.
9 976 P.2d 1941 (Kan. 1999).
the new leases were not covered by the JOA.

II. Royalty Owner Litigation

A. Appellate court vacate federal district court order from Oklahoma granting certification of a royalty owner class.

The Tenth Circuit’s recent decision in Chieftain Royalty Company v. XTO Energy, Inc., was one of two opinions issued by that court on the same date, vacating a Federal District Court order granting certification of a statewide class of royalty owners under Federal Rule 23(b)(3). Three amicus curiae briefs were filed in this appeal by the Mid-Continent Oil & Gas Association of Oklahoma, the Oklahoma Independent Petroleum Association and Linn Operating, Inc.

The class certified by the district court consisted of “[a]ll non-excluded persons or entities who are or were royalty owners in Oklahoma wells since July 1, 2002 where XTO . . . is or was the operator (or, as a non-operator, XTO separately marketed gas).” The class included over 16,000 royalty owners, some 14,300 oil and gas leases and approximately 2,300 Oklahoma wells.

The court found that, under Oklahoma law and absent lease language negating the implied covenant to market or permitting certain deductions, the lessee has an implied covenant to bear the costs that are necessary to make the gas a marketable product. Chieftain alleged that XTO underpaid royalties by improperly deducting costs incurred to transform the gas produced at the wellhead into a marketable condition. Chieftain asserted claims for (a) breach of contract, (b) tortious breach of contract, (c) breach of fiduciary duty, (d) fraud, (e) conversion, (f) conspiracy, (g) accounting, and (h) injunctive relief.

XTO argued that individual issues precluded the requirements of Rule 23 from being satisfied in this case on two primary grounds. First, XTO urged that each oil and gas lease must be examined individually to determine whether the implied covenant to market has been negated by the terms of the particular lease. Second, XTO contended that the point at which production becomes a marketable product varies from well to well because the composition of gas extracted from wells depends on the type, depth and location of the underground deposit and the geology of the area. Consequently, a well-by-well individual analysis is required.

In concluding that the district court erred in certifying the class, the Tenth Circuit made a series of findings, with some of the more significant rulings being as follows:

10 2013 WL 3388629 (10th Cir. July 9, 2013).
(1) The court stated at the outset that it had discussed at length the applicable law governing class certification in its opinion of the same date in the *Roderick* case, and that it would not be repeating that discussion in this opinion.

(2) The district court in *Chieftain* erred in relaxing the required “strict burden of proof” and in foregoing the rigorous analysis required by Rule 23.

(3) The commonality requirement of Rule 23 requires that the common contention be of such a nature that it is capable of classwide resolution, which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

(4) The district court erred in not examining whether lease language variations destroy the possibility of resolving a common question on a classwide basis. The district court must address the lease language issue as it relates to Rule 23 before certifying the class. Some 13,568 oil and gas leases were never examined prior to the ruling on class certification.

(5) The district court must rigorously analyze whether Rule 23(a)’s commonality requirement has been satisfied.

(6) The district court is encouraged on remand to address the issue of marketability directly in the court’s commonality analysis, keeping in mind that, under Oklahoma law, gas can be in marketable condition at the well.

(7) Because the commonality, typicality and adequacy requirements of Rule 23(a) tend to merge, the district court should consider whether the concerns identified by the Tenth Circuit have any effect on the required showing of typicality and adequacy.

(8) The district court is further directed to reconsider the predominance requirement under Rule 23(b)(3) in light of referenced recent holdings of the United States Supreme Court as well as the concerns identified in the *Roderick* decision.

(9) The district court appears to have failed to have addressed the elements of the underlying causes of action.

Finally, for the same reasons as those described in *Roderick*, the appellate court rejected Chieftain’s assertion that, under the doctrines of collateral estoppel or judicial estoppels, XTO was estopped from litigating the issue of class certification due to XTO’s agreement to a class-wide royalty owner settlement in a prior class action lawsuit. The Tenth Circuit vacated the district court’s class certification order and remanded the case for further proceedings consistent with its opinion.
B. Appellate court vacate federal district court order from Kansas granting certification of a royalty owner class.

The Tenth Circuit’s recent decision in Wallace B. Roderick Revocable Living Trust v. XTO Energy, Inc.,\(^\text{11}\) was one of two opinions issued by that court on the same date, vacating a Federal District Court order granting certification of a statewide class of royalty owners under Federal Rule 23(b)(3). The class certified below consisted of “[a]ll royalty owners of [XTO] . . . from wells located in Kansas that have produced gas and/or gas constituents (such as residue gas or methane, natural gas liquids, helium, nitrogen or condensate) from January 1, 1999 to present.” The class included thousands of royalty owners, some 650 oil and gas lease and over 300 wells spread across ten different fields in Kansas.

The court found that, under Kansas law, the lessee has an implied covenant to bear the costs that are necessary to transform the natural gas production into a marketable product, absent contractual language providing to the contrary. The plaintiff in Roderick alleged that XTO systematically underpaid royalties by deducting costs associated with making the gas production (and its constituent products) a marketable product. XTO was alleged to have marketed gas to unaffiliated third parties under contracts that (a) paid a cash fee coupled with an in-kind transfer, (b) supplied a percentage of the proceeds for an index price to pay for the gathering and processing of the production, or (c) used some combination of these methods. Royalties were allegedly paid by sharing with the royalty owners a proportionate share of these costs. The plaintiff asserted claims for breach of contract, unjust enrichment and an accounting.

XTO argued the individual issues precluded the requirements of Rule 23 from being satisfied in this case on two primary grounds. First, XTO urged that each oil and gas lease must be examined individually to determine whether the implied covenant to market has been negated by the terms of the particular lease. Second, XTO contended that the determination of when and where the production from a given well becomes a marketable product requires an individualized well-by-well analysis.

In concluding that the district court erred in certifying the class, the Tenth Circuit made a series of findings, with some of the more significant rulings being as follows:

1. The district court has an independent obligation to conduct a rigorous analysis before concluding that Rule 23’s requirements have been satisfied.

2. The district court abused its discretion by applying a less demanding standard that resolved doubts in favor of certification and by possibly having altered the burden of proof by requiring XTO to disprove commonality.

\(^{11}\) ___ F.3d ___ 2013 WL 3389469 (10\(^{th}\) Cir. July 9, 2013).
(3) The commonality requirement of Rule 23 requires that the common contention be of such a nature that it is capable of classwide resolution, which means that the determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.

(4) Given known variations in the language of the oil and gas leases (some 430 of which were not reviewed by the district court before entering its order), it was Roderick’s burden to affirmatively demonstrate commonality on the implied duty of marketability.

(5) Once gas is in marketable conduct, the implied covenant to market is satisfied, regardless of whether a market exists at that location (e.g., gas may be marketable at the well).

(6) The propriety of XTO’s deductions might vary by well, depending on the quality of the gas from the particular well.

(7) Because the commonality, typicality and adequacy requirements of Rule 23(a) tend to merge, the district court on remand should consider whether the issues identified by the Tenth Circuit likewise have an impact on the typicality and adequacy requirements for certification.

(8) XTO’s alleged uniform payment methodology would not be enough to satisfy the predominance requirement of Rule 23(b)(3). Rule 23 (b)(3)’s predominance requirement is far more demanding than Rule 23(a)’s commonality requirement.

(9) On remand, the district court should additionally consider in determining if the predominance prerequisite of Rule 23(b)(3) is met the same issues the court has emphasized in relation to the requirements of Rule 23(a).

Finally, the appellate court rejected Roderick’s assertion that, under the doctrines of collateral estoppel or judicial estoppels, XTO was estopped from litigating the issue of class certification due to XTO’s agreement to a class-wide royalty owner settlement in a prior class action lawsuit. The Tenth Circuit vacated the district court’s class certification order and remanded the case for further proceedings consistent with its opinion.

C. Court affirms denial of class certification in royalty owner lawsuit.

The case of El Reno Rod, Gun & Development Corporation v. Mack Energy Company12 involved a lawsuit by plaintiff royalty owners against Mack Energy alleging

that they were underpaid royalties on oil. The plaintiffs asserted that Mack sold the oil at below-market prices to a buyer named Enerwest, and that Mack and Enerwest were commonly owned and controlled. The plaintiffs claimed that their royalty payments should not be based upon alleged affiliate transactions, but should instead be based on the subsequent arms-length oil sales by Enerwest. Specifically, the royalty owners asserted that they should be paid based on the “work-back method” under which allowable costs and expenses are deducted from the proceeds from the first downstream, arms-length sale.

The plaintiff filed a motion asking the court to certify a statewide class of royalty owners in Mack Energy’s Oklahoma wells that produced oil that was sold by Mack to Enerwest. At the hearing on class certification, Mack showed that 97% of the oil produced by Mack Energy in Oklahoma and sold to Enerwest is transported by Enerwest to its blending stations where the oil is blended with additional oil purchased from third parties before being sold as a new, homogenized product.\(^\text{13}\)

However, Mack noted that the oil from the Plaintiffs’ particular wells is in the 3% of Mack’s oil that does not go through the blending process. Mack asserted that this remaining 3% of its oil is produced from leases (such as Plaintiffs’ Canadian County leases) that are too distant for Enerwest to economically transport the oil to its blending stations. The 3% of the oil from those leases is sold under “exchange agreements” which provide for Enerwest’s sale of the oil at the lease to third parties who then sell a similar quantity of oil back to Enerwest at the oil market center in Cushing. The transactions provided for a price differential between the sale at the lease and the return sale, which the court described as “essentially a transportation fee to get oil from a lease to the market center. The plaintiffs asserted that the value of the oil at the Cushing market center should be the starting point for the work-back method used to arrive at the price for the oil.

The District Court denied class certification, finding that since the oil from the Plaintiffs’ wells was dealt with by Mack Energy in an entirely different way than 97% of the oil attributable to the proposed class, the elements required for class certification were not satisfied. The court emphasized in particular that the Plaintiffs’ claims were not typical of the claims of the proposed class as a whole. The Plaintiffs appealed.

The Court of Appeals recited at length the detailed findings and conclusions of District Judge Miller in his order denying class certification, and the appellate court summarily affirmed the District Court’s order pursuant to Oklahoma Supreme Court Rule 1.202(d).

\(^\text{13}\) The court noted that “[t]he operation generally involves blending less valuable ‘sour oil’ with more valuable ‘sweet oil’ in order to create a combined product that can still be sold as ‘sweet oil.’”
D. Court grants in part, and denies in part, motions to dismiss the First Amended Complaint in class action royalty lawsuit.

In Hitch Enterprises, Inc., et al. v. Cimarex Energy Co., Hitch filed a proposed class action royalty lawsuit against the defendant oil and gas entities for the alleged “underpayment or non-payment of royalties on natural gas and/or constituents of the gas stream produced from wells in Oklahoma through improper accounting methods.” An early complex procedural history in the case preceded the defendants’ pending Motion to Dismiss First Amended Complaint in whole or in part on a series of independent grounds.

The court granted that motion in part and denies it in part. In a very lengthy order, some of the primary rulings of the court were as follows: First, because the plaintiffs failed to identify or describe their individual oil and gas leases (and the royalty terms therein) or attach copies of the leases to their complaint, the first amended complaint failed to state plausible claims for breach of oil and gas leases by breach of the duty to market implied therein under the prior Twombly decisions and subsequent precedents. That claim was dismissed without prejudice.

Second, because plaintiffs at the early stage of the litigation were permitted to plead alternative theories and seek relief in the alternative, the court denied the defendants’ motion to dismiss the plaintiffs’ claim for unjust enrichment based upon the contention that the royalty owners could not sue for unjust enrichment because they had an adequate remedy at law under their lease contracts.

Third, because the court could not determine at the early stage of the lawsuit whether such equitable remedies were necessary to afford the parties complete relief, the court denied the defendants’ motion to dismiss the plaintiffs’ claims for an accounting and disgorgement.

Fourth, the plaintiffs asserted claims for fraud, deceit and constructive fraud based on alleged misrepresentations and concealment of information on monthly royalty payment check stubs. The court found that the plaintiffs’ allegations of intent in connection with the claims of fraud and deceit were sufficient under applicable standards. However, the plaintiffs’ allegation of “reliance” was conclusory and lacking factual specificity. The plaintiffs’ allegations in support of their claim for constructive fraud were found to be sufficient both factually and legally.

While the plaintiffs were not entitled to pursue a claim for breach of fiduciary duty

\[15\] 859 F.Supp.2d at 1253.
under the provisions of 52 O.S. §570.10(A) of the Production Revenue Standards Act, the court found that the plaintiffs were entitled to make a claim for breach of fiduciary duty under the unitization orders.

With regard to plaintiffs’ claims for tortious breach of the implied duty of good faith and fair dealing and tortious breach of lease, the relationship between royalty owners and operators was not sufficient to result in the type of special relationship needed to support such claims, so these claims should be dismissed. Further, the defendants were entitled to dismissal of the plaintiffs’ conversion claims inasmuch as a debtor-creditor relationship does not give rise to a claim for conversion.

In sum, the court dismissed the claims for: (a) breach of lease, (b) fraud, deceit and constructive fraud, (c) breach of fiduciary duty under 52 O.S. §570.10(A), (d) tortious breach of implied duty of good faith and fair dealing in the lease, (e) tortious breach of lease, (f) conversion, (g) the plaintiffs’ allegations of conspiracy and joint venture, (h) any allegations seeking relief against Cimarex Energy for conduct in connection with the alleged breach of leases occurring prior to December 6, 2005, and (i) any allegations that seek relief against the co-defendants for conduct in connection with the alleged breach of leases occurring prior to May 27, 2006.

The court added that the dismissal of the claims for (a) breach of lease, (b) fraud, deceit and constructive fraud, and (c) the plaintiffs’ allegations of conspiracy and joint venture, would be “without prejudice” and the plaintiffs were given an opportunity to amend their complaint.

E. Court addresses the extent to which oil and gas royalty auditors employed by the federal government may file qui tam suits using information obtained, and previously disclosed to the government, as part of their job responsibilities for the government.

In Little v. Shell Exploration & Production Co., the Fifth Circuit Court of Appeals held, as a matter of first impression and with regard to the issue of “standing” alone, that relators who were federal government employees had standing to file a qui tam lawsuit under the False Claims Act (“FCA”). The relators were auditors for the federal Minerals Management Service (“MMS”) and, as part of their job responsibilities for the government, they focused on uncovering and reporting any underpayments and fraud that might occur in connection with the royalty payments made by Shell and other oil and gas lessees and operators with respect to federal lands.

In 2006, the relators filed two qui tam suits alleging that Shell had defrauded the government out of certain royalties by taking unauthorized deductions for expenses

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17 690 F.3d 282 (5th Cir. 2012).
incurred in gathering and storing oil from a group of its offshore drilling platforms. The suits were later consolidated. It was undisputed that the claims alleged in the lawsuit were discovered during the course of their work as federal auditors, that reporting the information to the MMS was a requirement of their employment, and that the information was in fact communicated to the MMS before the relators’ filing of the suit. The district court granted Shell’s motion for summary judgment based upon the public disclosure bar and based upon the provisions of the FCA which describe who may bring a qui tam action. The relators appealed.

The Fifth Circuit first held that the federal auditors had standing to file the qui tam action. With regard to the public disclosure bar of the FCA, the court remanded the case with directions that the district court reexamine the summary judgment evidence to determine whether a preclusive public disclosure had in fact occurred. To the extent that the district court should find on remand that a public disclosure occurred, the court held that the relators could not qualify as “original sources” under the FCA because an original source must have direct and independent knowledge and must have voluntarily provided that information to the government. Here, the relators’ disclosures to the government were involuntary since they were specifically employed by the agency to disclose fraud. As a result, if a public disclosure is found to have occurred, the suit must then be dismissed.

In a concurring opinion, one of the three judges on the panel observed that, even though Congressional enactments had granted standing to the federal oil and gas royalty auditors, the wisdom of Congress in doing so might be questioned because the auditors may be subject to criminal or professional liability in connection with the filing of such qui tam lawsuits. The judge cited 18 U.S.C. § 208 which implicates criminal liability when a federal employee participates substantially in a lawsuit as such an employee and possesses a personal financial interest. Second, the concurring opinion noted that “the Code of Federal Regulations prohibits government employees from using ‘nonpublic Government information’ to further their private interests.” Finally, the judge observed that the Government Accountability Office’s standards for government auditors directs that all federal auditors “should be free both in fact and appearance from personal, external, and organizational impediments to their independence.”

19 Id. at § 3730(e)(4).
20 5 C.F.R. §§ 2635.101(b)(3) and 2635.703(a).
21 690 F.3d at 295, citing Chapter 3.03 of the Government Accountability Office’s Generally Accepted Government Auditing Standards.
III. Oil and Gas Lease Cancellation, Termination and Breach of Obligation Cases (Other Than Royalty)

A. Trial court’s summary judgment ruling in favor of mineral owners on claims for lease termination based upon alleged failure of production in paying quantities is reversed on appeal.

The case of MB White, Inc. v. Gaskins,22 involved a suit by mineral owners who sought judicial cancellation of the oil and gas lease that covered their property. The oil and gas lease was dated November 19, 1953, and was for a primary term of one year. The landowners alleged that the lease terminated under its terms for failure to produce in paying quantities for all or part of the period from 2001 to 2008. The trial court granted the plaintiff mineral owners’ motion for summary judgment. The lessee appealed.

The Oklahoma Court of Appeals began its analysis by noting that the term “produced,” when used in a “thereafter” provision in the habendum clause of an oil and gas lease, means the lessee must produce in quantities sufficient to yield a return, however small, in excess of the expenses necessary to lift the oil from the ground, even though the costs of drilling and completing the well might never be recouped. However, the court also recognized that the “marketing” of production is not required in order to satisfy the habendum clause. Rather, citing Pack v. Santa Fe Minerals, Inc.,23 the court stated that “produced” means “capable of producing in paying quantities” and does not include marketing of the product. The court additionally cited the decision in Stewart v. Amerada Hess Corp.,24 for its holding that “under no circumstances will cessation of production in paying quantities ipso facto deprive the lessee of his extended-term” oil and gas lease.

After reviewing the summary judgment record, the court concluded that “[t]he only acceptable evidentiary materials supporting Landowners’ motion for summary judgment” were the Oklahoma Tax Commission production sales records, and that this evidence failed to establish a lack of production. Rather, at most, the Tax Commission records were found to have supported a conclusion only that oil and gas were not marketed during the relevant period. However, marketing is not required in order to satisfy the habendum clause, the Tax Commission records. The court concluded that the undisputed facts did not support a summary judgment ruling in favor of the landowners.

The appellate court reversed the summary judgment ruling in favor of the

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23 1994 OK 23, 8, 869 P.2d 323, 326.
landowners and remanded the case to the trial court.

B. Appellate court reverses trial court’s summary judgment ruling that oil and gas leases expired due to a failure to produce in paying quantities for an unreasonably long period.

The court in Goll v. GBF Oil Co., LLC, reviewed a summary judgment ruling of the trial court in favor of the plaintiff mineral owners and against the defendant oil and gas companies on the issue of whether certain oil and gas leases had expired due to a failure to produce in paying quantities for an unreasonably long period of time. The plaintiffs filed their lawsuit on January 28, 2011, asking the court to determine that the defendants’ oil and gas leases covering the plaintiffs’ lands had expired since the well producing from those leases was alleged to have not produced in paying quantities sufficient to yield a return in excess of lifting costs on the well.

In support of their motion for summary judgment, the plaintiffs offered the testimony of their expert Dan Reineke who “opined that the leases expired due to non-commercial production for twenty-nine (29) months before the lawsuit was filed.” The plaintiffs argued that a twelve month period of production in less than paying quantities is sufficient to support cancellation of the leases. The appellant oil companies asserted that their evidence showed that the well generated a profit over lifting costs in September, October and December 2008, May, July and December 2010 and the first six months of 2011, and that the only reason the well did not generate a profit over lifting costs in 2009 was because of workover costs.

In applying Oklahoma oil and gas lease law to the facts in this case, the Court of Appeals observed as follows:

1. In Oklahoma, the term “produced” means production in paying quantities. The phrase means the lessee must produce in quantities sufficient to yield a return, however small, in excess of “lifting expenses” even though the costs of drilling and completing the well might never be recovered.

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26 Id. at ¶5. Mr. Reineke’s report concluded that the well was non-commercial for the twenty-nine month period from August 2008 through December 2010, with a net operating loss of $15,857.00.
27 The parties disputed whether the costs of replacing the downhole pump and anchor in October 2009 should be categorized as lifting costs or workover costs. The appellate court found that the trial court erred in granting summary judgment based on competing evidence. See footnote 7 of the opinion.
28 The Court of Appeals noted that, under prior case law, lifting expenses are those necessary to lift the oil from the ground and may include, but are not limited to, “costs of operating pumps, pumpers’ salaries, costs of supervision, gross production taxes,
2. Only those expenses which are directly related to lifting or producing operations can be offset against production proceeds to determine whether a well is a producing well.

3. The appropriate time period for determining profitability is a time appropriate under all the facts and circumstances of each case. The time period is not measured in days, weeks or months, but by a time appropriate under all of the facts and circumstances of each case.

The appellate court concluded that there was a substantial controversy as to whether the well failed to produce in paying quantities for an unreasonable period of time, and that the time period to be used in measuring the well’s profitability was a triable issue. Therefore, it found that the trial court erred in granting summary judgment in favor of the mineral owners.

C. Court rejects mineral owner-lessee’s request that new duties and standards be adopted in Pennsylvania for measuring the oil and gas lessee’s development and production of oil and gas leases.

The case of Caldwell v. Kriebel Resources Co., LLC,29 involved an oil and gas lease that had been entered into in January 2001 under which Caldwell leased certain mineral rights in Pennsylvania lands to Kriebel. The leased provided for an initial 24-month term that would be extended so long as oil or gas was being produced. Caldwell agreed that gas was being produced. However, Caldwell filed suit asserting that the drilling activities under the lease to date only involved shallow gas drilling and that the defendants had not initiated any drilling activities for natural gas in the Marcellus Shale formation. The trial court dismissed the claims.

On appeal the court first addressed Caldwell’s claim that Pennsylvania law should recognize a new duty on the part of an oil and gas lessee to drill to and produce from all economically exploitable strata of natural gas underlying the lease,30 and that it is not sufficient for the lessee to only produce gas from shallow formations. The court noted that the subject oil and gas lease contained express wording in paragraph 11 that “[n]o inference or covenant shall be implied as to either party hereto since the full contractual obligations and covenants of each party is [are] herin fully and expressly set forth.”31 The court further recognized that Pennsylvania law prohibits the implication of royalties payable to the lessor, electricity, telephone, repairs and other incidental lifting expenses.” See footnote 4 of the opinion.

29 2013 WL 3486851, 2013 PA Super 188.
30 In support of that contention, the plaintiff cited the Louisiana case of Goodrich v. Exxon Co., 608 So.2d 1019, 1027-28 (La. App. 1992).
31 2013 WL 3486851 at *3.
covenants where the contract contains express wording on the subject matter. Accordingly, the court concluded that it was unable to imply the covenant requested by the mineral owners, and it further found that it was not persuaded that such a new covenant should be recognized under Pennsylvania law generally.

The court then recognized that Caldwell also asked the court to recognize a new duty on the part of oil and gas lessees to develop the lease and produce hydrocarbons in paying quantities under a “good faith” standard. Caldwell asserted that a lessee who only produces from shallow formations is not acting in good faith, and that Caldwell should have been given the opportunity to present evidence of Kriebel’s bad faith at trial (rather than the court summarily denying the claim through motion practice). Caldwell proposed that the new standard for a showing of production in paying quantities should require “good faith” on the part of the lessee in producing all economically producible gas strata, as well as good faith in “marketing, delivery, production amounts, additional wells, compression, etc.”

In support of this contention, Caldwell cited T. W. Phillips Gas and Oil Co. v. Jedlicka, in which the Pennsylvania Supreme Court recognized that where production from a well has been marginal or sporadic such that the well’s profits do not exceed its operating expenses, a determination of whether the well has produced in paying quantities includes consideration of whether the operator is acting in “good faith” in continuing to operate the well. However, the court in the present Caldwell case noted that the subject well was producing in profitable quantities and was simply not producing from as many formations as Caldwell desired.

The court concluded that the subject oil and gas lease did not require of Kriebel the level of performance asserted by Caldwell, and the court further declined to recognize such a new and broader duty on the part of oil and gas lessees.

IV. Oil and Gas Contracts, Transactions and Title Matters

A. Court addresses contention that buyer of minerals had duty to disclose to seller that a producing well was located within a unit that included the minerals, that production proceeds were in suspense for the owner and related information.

In Croslin v. Enerlex, Inc., the three plaintiff mineral owners sued Enerlex seeking a judgment cancelling certain mineral deeds in favor of Enerlex. Enerlex made an unsolicited offer, which was accepted by the Croslin group, to purchase certain

32 Id. at *4.
34 2013 OK 34, ___ P.3d ___.

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mineral interests from the three selling owners for a total sum of $4,100.00, with the buyer being entitled to thereafter receive “all royalties, accruals and other benefits, if any, from Oil and Gas heretofore or hereafter run.” At the time the owners agreed to sell the minerals, he did not know that a currently producing well was located within a unit that included the purchased interests and that the State Treasurer’s office was holding some $10,000.00 in unclaimed proceeds attributable to the subject interests. When the selling owners later learned of the existing production and the undistributed royalties awaiting the owners of the minerals, they filed suit seeking cancellation of the deeds. On motion for summary judgment, the Trial Court ruled in favor of the sellers and cancelled the mineral deeds. Enerlex appealed.

The Oklahoma Court of Appeals reversed the District Court’s ruling and found that Enerlex, the grantee-purchaser of the minerals, was a "silent" grantee with no duty to disclose the information relied upon by the sellers in seeking cancellation of the deeds:

"The 1988 Uptegraft opinion clearly held that a grantee with knowledge may remain a silent grantee and is under no duty to speak unless he chooses to do so, and then he must speak the truth and not suppress the facts within his knowledge or materially qualify fact stated (sic)."

Among other arguments, the sellers asserted that, because Enerlex knew of funds being held in suspense attributable to the subject mineral interests, Enerlex made "active misrepresentations" to the sellers by Enerlex’s inclusion of the words "if any" in the above-quoted words of the mineral deed concerning the grantee’s right to receive royalties, accruals and other benefits from prior oil and gas production. The court found that those words were not a positive representation or misrepresentation of material facts sufficient to trigger a duty on the part of Enerlex to disclose additional known facts concerning the properties.

The Oklahoma Supreme granted discretionary review of the lower courts’ decisions. In the attached lengthy opinion of the Court, it vacates the Court of Appeals’ opinion and affirms the summary judgment ruling of the District Court cancelling the mineral deeds. The Oklahoma Supreme Court stated in part as follows:

¶37 In summary, defendant wanted to spend a total of $4,100.00 in cash and get nearly $10,000.00 in cash plus four mineral acres and future

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income. To accomplish its goal, defendant offered to purchase the four mineral acres from plaintiffs for a total of $4,100.00, and relying on plaintiffs' ignorance of the nearly $10,000.00 of accrued mineral proceeds, defendant provided plaintiffs mineral deeds transferring both the four mineral acres and the accrued mineral proceeds. Defendant obtained the mineral deeds from plaintiff by false representation and suppression of the whole truth. Defendant is liable to plaintiffs for constructive fraud. . . .

¶30 . . . the accrued mineral proceeds undoubtedly motivated defendant's unsolicited offers to purchase the mineral interest. Although defendant's letter referred to "mineral interest" and did not mention accrued mineral proceeds, defendant's mineral deed conveyed the "mineral interest" and also made a representation about the accrued mineral proceeds. It provided that the grant of the mineral interest was intended to grant defendant the right to "all royalties, accruals and other benefits, if any, from all Oil and Gas heretofore or hereafter run." (Bold added [by the Court]). Instead of disclosing the nearly $10,000.00 of accrued mineral proceeds to the plaintiffs, defendant remained silent, and, with the "if any" language in the mineral deed, indirectly if not directly, created a false impression that defendant did not know of any production or any accruals from all oil and gas heretofore run. Plaintiffs relied, to their detriment, on the false impression created by the "if any" language. The "if any" language in the mineral deeds discouraged, rather than encouraged, the plaintiffs to make an independent investigation into the mineral interest.

¶31 Further, defendant discouraged plaintiffs from doubting defendant's truthfulness through the false impression that defendant had not investigated the ownership of the mineral interest. The false impression was created by the language in defendant's offer letter that "when the Mineral Deed has been received by our office, we will begin our title examination" and that the drafts will "be paid upon completion of the title examination."

¶32 The language in defendant's mineral deed assigning the accruals of royalties, if any, from heretofore runs gave rise to a duty on the part of defendant to disclose the whole truth, including all material facts about the accrual of the mineral proceeds. Deardorf expressed the principles governing defendant's duty - where defendant is under a duty to say nothing or to tell the whole truth, defendant's duty to tell the whole truth may arise from partial disclosure and defendant conveying a false impression by disclosing some facts and concealing others is guilty of fraud in that the concealment is in effect a false representation that what is

disclosed is the whole truth. Plaintiffs were entitled to summary judgment on the legal issue of defendant's disclosure duty as a matter of law.

The Court additionally discussed the mineral owner-sellers’ contention that the pooled mineral interest statutes (52 O.S. §§ 55.1 et seq.) and the unclaimed property statutes (60 O.S. §§ 651, et seq.) express a public policy that obligated Enerlex, as a proposed buyer, to disclose to the sellers the proceeds being held in suspense with regard to the subject minerals.

The Oklahoma Supreme Court vacated the Court of Appeals’ decision and affirmed the District Court’s summary judgment in favor of the plaintiff-sellers.  

B. Applying the decision in Croslin, the court affirms the rescission and cancellation of mineral deeds.

The case of Enerlex, Inc. v. Unknown Heirs, Executors, etc. of Thomas Howard Carpenter, involved issues similar to those presented in the foregoing Croslin case. Enerlex purchased a one acre mineral interest from the Heirs of Thomas Carpenter, who died in 1981. The Heirs executed mineral deeds in January 2009, and those deeds were recorded the next month. In July 2009, Enerlex filed suit seeking a judgment quieting title in the minerals and declaring Enerlex's entitlement to receive $5,000 in unclaimed royalties attributable to the interest. The Heirs asserted that the deeds had been procured by Enerlex through fraud and should be cancelled. In particular, the Heirs asserted, among other things, that Enerlex failed to disclose that the mineral interest was subject to a forced pooling order and that an escrow account held funds attributable to their interest in the amount of some $5,000. Enerlex responded that, by making these claims, the Heirs were violating their warranty obligations by attempting to prevent the quiet and peaceable possession of the property and by failing to defend title against adverse claim. Enerlex also alleged that the Heirs were slandering its title and tortuously interfering with its contractual rights.

The trial court entered summary judgment in favor of the Heirs and found that they were entitled to rescission and cancellation of their deeds to Enerlex. Enerlex

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39 See also Harbour Mineral Properties v. Pence, 82 Okla. Bar J. 585 (Okla. App. 2011 - #108,822) (Not for Publication). Note: This opinion was originally designated by the Oklahoma Court of Appeals for publication. However, on May 2, 2011, in denying certiorari, the Oklahoma Supreme Court withdrew the case from publication. The Court of Appeals in Harbour held that the seller of the minerals had submitted evidence that the buyer obtained the seller’s assent to the purchase contract by failing to disclose that the minerals were in a producing oil and gas unit and that funds were being held in suspense in a formal fund attributable to the mineral interest. It affirmed the district court’s order cancelling the deed.

appealed.

The Court of Appeals noted and summarized the Oklahoma Supreme Court’s recent decision in *Croslin v. Enerlex, Inc.* in which it affirmed the cancellation of certain mineral deeds based upon misrepresentations and constructive fraud. The Court of Appeals stated that “[w]e find no significant distinction between the facts in *Croslin* and the facts before us, with the exception that, in this case, Enerlex claimed at times not to have known of the existence of the escrowed funds.” The court found that this distinction made no difference because, if neither party knew of the escrowed funds at the time of the purchase, the agreement could be rescinded for mutual mistake. Pursuant to the ruling of the Oklahoma Supreme Court in *Croslin*, the appellate court affirmed the rescission of the deeds in this case.

C. Court reverses summary judgment ruling in oil and gas mortgage foreclosure action.

In *Pat Bar, L.L.C. v. Oak Creek Oil, LLC.*, Pat Bar sued Oak Creek to enforce a promissory note and foreclose a mortgage of oil and gas properties. The plaintiff attached a copy of the mortgage to its petition but did not attach a copy of the note. On cross-motions for summary judgment, the trial court granted judgment in favor of Oak Creek. Pat Bar appealed.

On appeal, Oak Creek argued that it was entitled to judgment as a matter of law because Pat Bar lacked standing to bring this action under *Wells Fargo Bank, N.A. v. Heath*. In the *Heath* case, the Oklahoma Supreme Court held that

“[t]o commence a foreclosure action in Oklahoma, a plaintiff must demonstrate it has a right to enforce the note and, absent a showing of ownership, the plaintiff lacks standing. . . Thus, a foreclosing entity has the burden of proving it is a person entitled to enforce an instrument by showing it was (i) the holder of the instrument, (ii) a nonholder in possession of the instrument who has the rights of a holder, or (iii) a person not in possession of the instrument who is entitled to enforce the instrument pursuant to Section 12A O.S. 3-309 or subsection (d) of Section 12A-3-418 of [title 12A].”

The court noted that Pat Bar was not either (a) the holder of the note nor (b) the nonholder in possession of the note who had the rights of a holder. 12A O.S. §3-301. As a result, the remaining inquiry was whether Paul Bar was a person not in possession of the note who was entitled to enforce the note pursuant to 12A O.S. 3-309.

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41 2013 OK 34, ___ P.3d ___.
43 2012 OK 54, 280 P.3d 328.
The court further observed that Oak Creek alleged that no note ever existed, while Pat Bar claimed the note was lost. Accordingly, the issue of whether there was a promissory note was a material fact in dispute. The appellate court reversed the summary judgment ruling in favor of Oak Creek.

D. Court Declines to Recognize an Unprecedented Right of Redemption in the Context of a Partition Sale.

The case of Noble v. Noble, while not an oil and gas property case, deals with a principal of real estate law that can certainly arise in an oil and gas context. The Plaintiffs and Defendant inherited from their grandfather 880 acres of real property in Major County, Oklahoma. When they could not agree to a manner for partitioning the property “in kind,” the plaintiffs brought the present lawsuit seeking a partition “by sale.” The trial court appointed commissioners to appraise the property, directed the sale of the property by the county sheriff for not less than two-thirds of the appraised value, and ordered a division of the proceeds among the Plaintiffs and Defendant. The commissioners returned their report valuing the property at $528,000.00, and neither side objected to the report.

The Appellees purchased the property at the sheriff’s sale for $378,400.00 (i.e. 72% of the value determined by the commissioners). The Plaintiffs below filed a motion to confirm the sheriff’s sale. The Defendant filed an object and a Notice advising that the Defendant was exercising its “right of redemption.” After a hearing, the trial court denied the asserted right of redemption and a sheriff’s deed issued to the Appellees. The Defendant appealed.

In affirming the decision of the trial court the Court of Appeals noted that the statutes establishing the procedures for partition make no provision for an owner to have a right of redemption after the sheriff’s sale in furtherance of a partition by sale. Moreover, no party in the case had cited, nor did the appellate court find, any Oklahoma decisions addressing whether a right of redemption exists in partition lawsuits. Rather, the Defendant cited and relied upon Oklahoma cases involving mortgage foreclosure sales where a right of redemption has been recognized. The Court of Appeals declined to establish new law recognizing a right of redemption within the context of partition by sale. Among other considerations, the court found that one co-owner of the property to be partitioned by sale has no more superior claim to possession of the whole parcel than any other co-owner. In contrast, where a mortgage or other lien foreclosure is involved, one might reasonably argue that the owner of the property sold in satisfaction of the mortgage or tax debt ought to be afforded the right to rescue his property from loss by satisfying the debt for which the sale was ordered.

44 2013 OK CIV APP 41, ___ P.3d ___.

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The court concluded that, in a partition action, a right to redemption would lie, if at all, only with the existence of statutory authority and the presence of a debtor-creditor relationship. The court affirmed the trial court conclusion that no right of redemption existed in the present case.

As a final note, the Appellees requested an award of appellate attorney’s fees under the frivolous appeal provisions of 20 OS. §15.1. However, given the lack of a precedential ruling on the issue of redemption in partition sales, the court was reluctant to characterize the appeal as wholly without merit under the cited statute such as to warrant an award of appellate attorney’s fees.

E. Court finds that (a) attempt to challenge the adequacy of notice provided in connection with a 1998 force pooling order was an impermissible collateral attack on the order, and (b) defendants who invoked the Nonjudicial Marketable Title Procedures Act during the course of the lawsuit were entitled to fees and costs.

In Tucker v. Special Energy Corp., the Oklahoma Court of Appeals reviewed the latest judgment of a trial court in a case that has been the subject of protracted legal proceedings. Some of the key factual elements of this case were as follows:

The 1998 Corporation Commission Force Pooling Application

In July 1998, DPC Corporation filed an application with the Corporation Commission seeking to force pool certain property that included the Taft mineral acreage. The application listed W.H. and Hazel Taft as owners but did not contain any mailing address for either one of them. In August 1998, the Commission entered an order force pooling the unit and finding “that DPC had exercised due diligence to locate each respondent and required DPC to escrow any funds payable to those respondents who could not be located.” (¶4).

In 2004, Joseph Taft executed certain leases covering the Taft mineral acreage, including a lease to Tucker covering 2/3rd of the five-acre interest. But it was not until 2004 and 2005 that any proceedings were instituted to judicially determine the heirs of W.H. and Hazel Taft.

The 2005 Corporation Commission Application

In June 2005, Tucker filed an amended application with the Corporation Commission asking it to construe, clarify and vacate the 1998 force pooling order. Tucker challenged the adequacy of the pooling notice given in 1998 based upon the

45 2013 OK CIV APP 56, ___ P.3d ___.
The ALJ concluded (a) that the notice given in the 1998 matter was sufficient, (b) that because Joseph Taft was not a record owner in 1998, he would not have been a proper party, and (c) that Tucker’s application was an impermissible collateral attack on the 1998 Pooling Order. The Commission Appellate Referee affirmed the ALJ’s report and the Corporation Commission denied Tucker’s application on May 5, 2006. Tucker did not appeal the order.

The 2006 Quiet Title Lawsuit

In December 2006, Tucker and Joseph Taft filed the present action seeking an order determining and quieting title to Tucker’s leasehold interest and Taft’s mineral interest. The plaintiffs also sought an accounting for the proceeds from the production of minerals attributable to those interests. In January 2007, prior to the assertion of any counterclaims, the attorney for the Special Energy defendants sent a letter to the plaintiffs demanding the non-judicial resolution of the plaintiffs’ claims. The attorney tendered curative instruments to remove the cloud of plaintiffs’ claims and to quiet title in the defendants. The plaintiffs did not execute the tendered instruments. The defendants then counterclaimed to quiet title in them.

The District Court granted the defendants’ motion to dismiss the lawsuit on the ground that it constituted an impermissible collateral attack on the 1998 force pooling order. The Court of Appeals affirmed. However, the Oklahoma Supreme Court reversed. It found that the Corporation Commission does not have the authority to determine the effect of its order on a legal title to property. Rather, it is the district courts that have jurisdiction to resolve disputes over private rights. The Oklahoma Supreme Court held that the plaintiffs’ suit to quiet title and to receive an accounting properly invoked the jurisdiction of the district courts and that the Commission could not grant the remedy the plaintiffs sought. See Tucker v. Special Energy Corp. 47 The court concluded that a district court “clearly has jurisdiction to adjudicate the legal effect . . . of a Commission order . . . upon title to land,” citing Nilsen v. Ports of Call Oil Co., 1985 OK 104, ¶12, 711 P.2d 98, at 101.

Proceedings After Remand to the District Court

The Oklahoma Supreme Court remanded the case to the District Court. On remand, the parties entered into a series of stipulations establishing the facts described

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47 2008 OK 57, 187 P.3d at 733.
The District Court proceeded to conduct a trial based upon the stipulations of the parties. In reviewing what the court considered to be some of the key stipulations, the trial court observed:

“Since the remand of this matter, the Plaintiffs admit that they are owed no sums under the 1998 Pooling Order, and instead, that Plaintiffs herein seek to have the pooling order declared void as to their interest. The Plaintiffs have specifically disclaimed being owed any funds ‘held in escrow.’ . . . Based on this stipulation, the Court finds that the Plaintiffs’ current and actual claims are the exact claims expressly rejected and disallowed as an ‘impermissible collateral attack’ by the Oklahoma Supreme Court in its prior opinion.”

The District Court went on to find:

(A) Tucker had previously challenged the validity of the pooling order, the Corporation Commission rejected his challenge and Tucker elected not to appeal the Commission’s final order, with the result that that determination was binding on the trial court under the doctrine of issue preclusion.

(B) In any event, even if the Plaintiffs were to be given another challenge to the 1998 force pooling order, that order “was correctly and properly obtained because every diligent effort was made to provide notice to all those who would claim an interest. The ‘heir’ of W. H. Taft was unknown because the ‘heir” (Joseph Taft) elected to file no probate action for nearly thirty (30) years.”

(C) “[T]he Court finds that the 1998 Pooling Order is valid and proper in all respects and applies to the mineral interest now claimed by the Plaintiffs. . . The Defendants also published notice of their pooling application, giving proper ‘constructive notice’ to any unknown ‘heirs.’ ”

(D) Given that the plaintiffs stipulated that they are owed no sums under the 1998 force pooling order, the court denied the plaintiffs’ equitable claim for an accounting.

The trial court entered judgment in favor of defendants and thereafter awarded the defendants attorneys fees and costs against the plaintiffs under Oklahoma’s


49 Id.

50 Id.
Nonjudicial Marketable Title Procedures Act (NMTPA).\textsuperscript{51}

The Appeal of the District Court’s New Judgment

The plaintiffs appealed the adverse ruling of the District Court. The Court of Appeals noted that the plaintiffs devoted four of their five propositions on appeal to their effort to again challenge the 1998 force pooling order due to alleged inadequate notice. In rejecting the plaintiffs renewed challenge to that polling order:

(A) The court noted that this same complaint of the plaintiffs had been at the heart of every proceeding before the Corporation Commission and the trial court since 2005.

(B) The Corporation Commission, Oklahoma Court of Appeals and Oklahoma Supreme Court had all recognized that any challenge to the validity of the 1998 pooling order at this late date amounted to an impermissible collateral attack on the pooling order because no jurisdictional infirmity was shown on the face of the record.

(C) The Corporation Commission in the 2005 proceeding again rejected Tucker’s challenge to the pooling order and the Commission’s order was not appealed and is now final.

On the final appeal issue regarding the award of attorney fees, the plaintiffs argued that they never made a pre-litigation demand on the defendants for non-judicial resolution of their quiet title claim. However, the court noted that, prior to the assertion of any counterclaims, the defendants made written demand on the plaintiffs for non-judicial curative action and submitted to the plaintiffs the instruments necessary to remove the cloud created by plaintiffs’ claims, and the plaintiffs did not respond. Considering the underlying purpose of the NMTPA, the Court of Appeals stated that this case presented the precise set of facts and circumstances in which the NMTPA authorizes an award of attorneys fees and costs against the plaintiffs. The trial courts judgment in favor of the defendants and awarding attorney fees and costs to the defendants was affirmed.

F. Overriding royalty interest owners sue for alleged “washout” of their overrides by taking no action to preserve underlying oil and gas leases in continuing force and effect.

In Stroud Production, L.L.C. v. Hosford,\textsuperscript{52} the claims of the parties related to the alleged “wash out” of overriding royalty interests in two oil and gas leases. The Hosford group had been assigned, in varying percentage shares, a collective 5% overriding

\textsuperscript{51} 12 O.S. § 1141.1 – 1141.5.

\textsuperscript{52} 2013 WL 811454 (Tex. App. – Hous. 2013).
royalty interest in the two Base Leases in September of 1978. An affiliate of Stroud bought the Base Leases in December 2003, and Stroud became the operator of the one producing well on those leases. The following are certain of the events noted by the court that occurred after the transfer of the Base Leases and operatorship of the well that maintained those leases in force and effect:

January 13, 2004: Stroud’s landman obtained copies of the assignments of the overriding royalty interests to the Hosford group and advised Stroud that none of those assignments contained “extension and renewal” clauses.

January 20, 2004: A “polished rod” on the only producing well holding the Base Leases in force and effect broke and production ceased.

Thereafter: Stroud admitted that he knew that after the well ceased production, Stroud had 90 days (under the provisions of the Base Leases) to commence work or the Base Leases would terminate.

Although Stroud acknowledged that the necessary repairs for the broken well “weren’t out of the normal,” none of the Stroud defendants conducted repairs or undertook additional drilling or reworking operations during that 90-day period.

February 19, 2004: The affiliate of Stroud that owned the Base Leases entered into a new oil and gas lease with one of the two mineral owner-lessors under the Base Leases.

April 20, 2004: Due to the absence of the foregoing activities during the 90 day period, the Base Leases terminated on this date.

April 29, 2004: Stroud made a presentation to a group of potential investors representing that Stroud intended to repair the broken well and perform additional work.

May 2004: It appears that the affiliate of Stroud obtained a new lease from the other mineral owner-lessee in May. (See footnote 5 of the opinion).

May 2004: At a cost of $7,500, Stroud repaired the well and resumed production shortly thereafter. No overriding royalty interests were assigned as to the new leases.

The overriding royalty owners sued Stroud and its affiliate that owned the Base Leases for breach of contract, intentional termination of overriding royalty interests and a series of other theories for recovery.

At the trial, the court directed a verdict in favor of the Stroud group on the overriding royalty interest owners’ claims for breach of duty of good faith and fair dealing, fraudulent concealment and breach of implied covenant to develop. The
remaining claims were submitted to the jury which found that the affiliate of Stroud intentionally terminated the Base Leases in order to destroy the Hosford group’s overriding royalty interests, that the affiliate converted the proceeds from the overrides, Stroud intentionally interfered with the override owners’ right to receive their overrides, and Stroud and its affiliate engaged in a conspiracy to deprive the overriding royalty owners of their interests. The court entered judgment on the jury verdict for damages in the approximate amount of $250,000, for pre-judgment interest in the amount of approximately $40,000, and for attorney’s fees in the amount of approximately $360,000. The Stroud defendants appealed.

The Texas Court of Appeals affirmed the judgment in part and reversed it in part. Certain of the key rulings were as follows:

1. With regard to the duty owed to override owners, the court observed that the Texas courts have been reluctant to recognize any sort of duty, fiduciary or otherwise, flowing from a lessee to the holder of an overriding royalty interest. The court found that, other than the fact that the Hosford group held overriding royalty interests in the Base Leases, there was no evidence of any special relationship of trust and confidence between the Hosford group and the owner of the Base Leases.

2. The court concluded that because there was no evidence that the Stroud defendants violated any express or implied contractual duty, and there was no evidence of the existence of a fiduciary or confidential relationship, the trial court erred in entering judgment against the Stroud defendants based upon the override owners’ claim that the defendants intentionally terminated the Base Leases to destroy their overriding royalty interests.

3. The trial court erred in entering judgment against the Stroud defendants based upon the override owners’ conversion claims.

4. The Hosford plaintiffs were not legally entitled to recover overriding royalties once the Base Leases terminated. The trial court erred in entering judgment in favor of the override owners on their tortious interference claim.

5. The trial court likewise erred in entering judgment in favor of the override owners on their conspiracy claims.

G. Non-Operators, as third-party beneficiaries, enforced their right to sell their working interests under the agreement entered into by the operator.

Before the court in Chesapeake Louisiana, L.P. v. Buffco Production, Inc., were

multiple cross-motions for summary judgment on various disputes related to the purchase and sale of oil and gas properties. Chesapeake (as buyer) and Buffco (as seller) entered into a letter agreement under which Chesapeake agreed to acquire a three-year term assignment of the working interests of Buffco and its non-operating cotenants in the subject leases as to multiple oil and gas units in several counties in East Texas for a sales price of $232,146,680.00. The court opined that, given Chesapeake’s express agreement under the contract to make the same offer under the same terms to the non-operators in the properties, “the Non-Ops Clause clearly meant that Chesapeake intended to acquire all of the leasehold estate beneath the properties described in the exhibits.

The evidence showed that, in the course of the due diligence review, the title report inaccurately reflected that the Geisler Unit was owned 50% by Buffco and 50% by Freeman. It was undisputed in the case that the correct ownership tabulation for the working interest in that unit was Buffco (25%), Freeman (22%), Freeman Capital (3%) and Harleton (50%). It was also undisputed that neither Buffco nor Freeman advised Chesapeake of the correct ownership for the Geisler Unit at or prior to the closing.

On the closing date, Chesapeake paid the full purchase price for the Geisler Unit ($13,600,000) to Buffco who in turn delivered 50% of those proceeds to Freeman. None of the proceeds were paid to Harleton and Freeman Capital. Chesapeake and Buffco agreed to delay the closing on certain other properties covered by the letter agreement, and the parties ultimately agreed to cancel the purchase and sale of those properties.

Because Chesapeake paid the full purchase price for the Geisler Unit but received only a 47% interest in that unit, Chesapeake sued Buffco for breach of contract. The non-operating working interest owners (Freeman Capital and Harleton) intervened in the lawsuit to seek enforcement of the letter agreement as sellers. They advised that they stood ready, willing and able to make assignments to Chesapeake upon receipt of their shares of the agreed purchase price. On December 31, 2011, Chesapeake and Buffco entered into a confidential settlement agreement settling all claims between those two parties. The intervening non-operators continued to pursue their claims. In ruling on the issues presented, the court held in part as follows:

1. The court found that it was clear that the parties understood that the non-operators would benefit from the letter agreement and that Chesapeake and Buffco intended to confer such a benefit on the non-operators. Accordingly, the non-operators were third-party beneficiaries to the letter agreement and had standing to enforce its terms.

2. The court ruled that Buffco and Freeman were unjustly enriched by Chesapeake’s payment to them of the full $13,600,000 purchase price for the Geisler Unit since 53% of the working interest rights in that unit were owned at the time of the
closing by Harleton and Freeman Capital. To remedy that unjust enrichment, the court imposed a constructive trust on the portion of the funds paid by Chesapeake which rightfully belonged to Harleton ($6,800,000) and Freeman Capital ($408,000), representing the total sum of $7,208,000 (53% of the $13,600,000 purchase price). The court further directed, as part of the specific performance remedy, that Chesapeake receive a corresponding assignment of Harleton’s 50% interest and Freeman Capital’s 3% interest in the Geisler Unit.

3. Since the court found that the non-operators were entitled to enforce the letter agreement and sell their working interests to Chesapeake, the court denied Chesapeake’s request for a refund of the purchase price that it overpaid to Buffco and Freeman (i.e., the $7,208,000 attributable to the interests Buffco and Freeman did not own). However, as indicated in the preceding paragraph, Chesapeake was entitled to an assignment of the additional 53% interest in the unit.

4. Finally, the court rejected Harleton’s claims that Buffco violated a “right of first refusal” owing to Harleton because Harleton admitted that it would not have purchased Buffco’s interest in the subject property even if Buffco had offered to sell it prior to the Buffco-Chesapeake closing at the agreed $20,000 per acre price. That admission precluded Harleton from asserting that it was damaged by the failure of Buffco to recognize its alleged right of first refusal.

H. Court finds that the recording of an oil and gas lease by a non-record mineral owner was sufficient to disrupt the twenty-year period of non-use of the minerals under the North Dakota statutes relating to abandoned minerals.

The North Dakota Supreme Court’s decision in Estate of Christeson v. Gilstad, 55 involved the state’s statutory procedure by which a surface owner may succeed to ownership of abandoned mineral interests underlying their lands. 56 Christeson had acquired the surface and one-eighth of the miner rights in certain lands in 1963. In 1964, she conveyed her surface rights to the Gilstads but reserved her mineral interest. In 1989, the successors to Christeson upon her prior death (who were the legal owners, but they had not placed their succession ownership “of record”) executed an Oil and Gas Lease on the property, and the lease was recorded in the real estate records.

In 2007, the Gilstads, as current owners of the surface estate, published a Notice of Lapse of Mineral Interests under N.D.C.C. ch. 38-18.1 to have the minerals deemed abandoned. The Gilstads mailed copies of the Notice of Lapse to the deceased Christeson using the address that appeared of record.

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55 829 N.W.2d 453, 2013 ND 50.
56 Chapter 38-18.1, N.D.C.C.
The North Dakota statute provided that a “mineral interest is, if unused for a period of twenty years immediately preceding the first publication of the notice required by section 38-18.1-06, deemed to be abandoned, unless a statement of claim is recorded in accordance with section 38-18.1-04.” The statute goes on to provide that a mineral interest is deemed to be used when, among other things, “d. The mineral interest on any tract is subject to a lease, mortgage, assignment, or conveyance of the mineral interest recorded in the office of the recorder in the county in which the mineral interest is located.”

The dispositive issue in the present case was whether the recording of a lease executed by one who is the legal owner of the mineral interest but is not the “record owner” constitutes a “use” under the above statutes. The Gilstads asserted that only an oil and gas lease executed by a “record” owner of the mineral interest can constitute a use under the Act. The trial court held in favor of Christeson and against the Gilstads.

In affirming the ruling that the Gilstads did not acquire the minerals under North Dakota’s abandoned mineral statutes, the court noted that the terms “owner” and “record owner” do not appear in the subject statutes, and that there is not requirement that the type of lease needed to constitute a “use” be executed by a “record” owner. The court further found that the Gilstads had cited no precedent to support their argument, and the court declined to imply such a requirement.

I. Court finds that genuine issues of material fact precluded a summary judgment disposition of whether certain pre-petition conveyances of term overriding royalty interests and net profits interests constituted real property conveyances or should be recharacterized as debt instruments.

In certain adversary proceedings in In re ATP Oil & Gas Corporation, the court was presented with motions for summary judgment on the issue of whether certain pre-bankruptcy petition transactions between the debtor (ATP) and TM and Diamond constituted real property conveyances (which is the way the documents characterized the conveyances) or should instead be recharacterized as debt instruments. The conveyances transferred term overriding royalty interests and net profits interests. Competing expert testimony was presented which addressed the economic substance of the conveyances and industry custom.

After conducting a very detailed review of the records in a series of prior hearings on related issues, as well as the evidence presented by the parties on the current motions, the court concluded that it could not decide the issues on a summary judgment basis because the conflicting presentations showed genuine issues of material fact.

J. Volumetric production payment assignments from a working interest owner to certain banks were found to not violate the obligations to the other parties to applicable joint operating agreements.

The case of McCall v. Chesapeake Energy Corporation, involved an appeal by McCall of the district court’s judgment dismissing her claims under Fed. R. Civ. P. 12(b)(6). McCall was a non-operator in various wells in which Chesapeake was a co-working interest owner. McCall alleged that Chesapeake’s volumetric production payment (VPP) transactions with various third parties violated the duties Chesapeake owed to McCall under applicable joint operating agreements (JOAs).

The court found that “[a]s a matter of law, the conveyances from the Chesapeake Defendants to the banks in this case were term overriding royalty interests, which conveyed only an interest in gas when it was produced and not ownership of the unproduced gas in the ground.” The court cited prior authority for the proposition that “the essential difference between a sale of a royalty interest and a sale of a mineral interest in land leased for minerals is that the purchaser of the royalty interest receives nothing under the lease unless profitable production is obtained.”

Finding that the JOAs between McCall and Chesapeake expressly contemplated that the working interest owners indeed may convey their interests in the proportionate share of the production in just the manner presented in this lawsuit, and the VPPs did not convey the unproduced gas in the ground, McCall’s claims for breach of contract and conversion failed.

K. Trustee in bankruptcy asserts that agreement was a loan rather than an assignment. Financing statements were invalidated due to the incorrect description of the debtor’s name.

In C. W. Mining Company v. Standard Industries, Inc., the court was presented with a dispute over the characterization and effect of an Advance Payment Agreement between a coal broker (Standard) and the bankrupt coal producer (C.W. Mining or “CWM”). The bankruptcy Trustee asserted that, when considered as a whole, the agreement unambiguously provided security for loans issued by Standard to CWM. Standard, on the other hand, alleged that it pre-purchased coal from CWM and took title to that coal the instant it was mined. Under Standard’s interpretation, it owned the coal mined by CWM. The court found that each of those conflicting interpretations of the nature of the transaction found certain support in the wording of the Advance Payment Agreement, with the result that the agreement was ambiguous on the issue of whether

59 Id. at 64.
60 Id. at 64-65.
Standard and CWM intended to create a genuine assignment or, instead, a loan transaction disguised as an assignment. As a consequence, the court could not decide the question through a summary judgment ruling.

The court also addressed the contention that the financing statements filed to perfect certain security interests incorrectly described the name of the debtor and were ineffective under the provisions of Utah Code Ann. § 70A-9a-506(3). In particular, the registered organization name of CWM was “C. W. Mining Company.” The financing statements filed by the appellants in this case described the debtor as “CW Mining Company.” The Trustee submitted a declaration from the director of the Utah Division of Corporations and Commercial Code indicating that a search under the debtor’s correct name using the filing office’s standard search logic would not have revealed the creditor’s security interest due to the incorrect description of the debtor’s name. In finding that the financing statement was ineffective, the court observed that “revised Article 9 is unforgiving of even minimal errors.”

L. Court Declines to Imply a Reservation of Minerals in Deeds of Residential Lots.

The case of Farm & Ranch Investors, Ltd. v. Titan Operating, L.L.C.,63 dealt with the following primary factual scenario. Caldwell’s Creek owned some sixty acres of land known as the Caldwell’s Creek Addition. One of the restrictions contained in the dedication recorded in the land records provided that “no oil drilling, oil development operations, oil refining, quarrying or mining operations of any kind shall be permitted upon or on any lot. All mineral rights shall belong and shall continue to belong to the limited partnership of Caldwell’s Creek, LTD.”

After the restrictive covenants were recorded, the land was divided into lots and the lots were sold to individual owners. The warranty deeds in favor of the individual owners stated that the conveyances were “made subject to any and all easements, restrictions, and mineral reservations affecting said property that are filed for record in the office of the County Clerk of Tarrant County, Texas.” The deeds did not contain a separate reservation of the mineral interest. Thereafter, Caldwell’s Creek purported to convey all of the oil, gas, and mineral rights to Farm & Ranch by special mineral deed. Farm & Ranch negotiated to grant an oil and gas lease to Titan. However, Titan decided that Farm & Ranch did not hold the mineral rights in the Caldwell’s Creek addition and refused to enter into a lease with Farm & Ranch. Instead, Titan entered into leases with the nine owners of lots in the addition. Then Titan sued Farm & Ranch seeking a declaratory judgment that it owned leases covering the mineral rights in the nine lots.

62 Id. at 728.
The trial court granted summary judgment in favor of Titan finding that Titan owned fee simple determinable title to the minerals under these nine subject lots in the Caldwell’s Creek subdivision pursuant to its oil and gas leases. Farm & Ranch appealed.

The Texas Court of Appeals affirmed the trial court’s decision. At the time Caldwell’s Creek, Ltd. filed the restrictions, it owned both the mineral and surface rights to the land. The court found that an owner cannot reserve to himself an interest in property that it already owns. The recorded dedication and restrictions did not convey any surface or mineral estates to another party. The court additionally noted in its opinion that the recorded restrictions were subject to change by a vote of 70% of the lot owners. So, to construe the restriction as a reservation of the mineral rights would mean that the lot owners could vote to divest Caldwell’s Creek, Ltd. of its mineral rights simply by voting it to themselves. The court rejected Farm & Creek’s contention that the restrictions and the deeds must be read as an integrated instrument of conveyance. The argument of Farm & Creek ignored the fact that the restrictions were neither a lease nor an instrument of conveyance, and thus could not reserve an interest. When Caldwell’s Creek conveyed its interests to the lot owners without reservation, it conveyed its interests in both the mineral and surface. The appellate court concluded that the trial court did not err in granting Titan’s motion for summary judgment.

M. Applying Illinois law, court rejects attempt to convert a letter of intent that expressly disclaimed any binding effect into an enforceable contract.

In BPI Energy Holdings, Inc. v. IEC (Montgomery), LLC, the plaintiff BPI was a producer of coal bed methane gas, and the defendant Drummond was a coal mining company. BPI and Drummond entered into a memorandum of understanding, which was followed by a letter of intent ("LOI"), under which BPI agreed to sell coal options to Drummond, and Drummond agreed to lease to BPI the right to produce gas from any of its coal holdings. The LOI recited that the parties desired to form a strategic alliance. When the subsequent efforts of the parties to pursue the proposed transaction, Drummond terminated the letter of intent, and BPI sued to enforce the LOI. The court observed that the LOI expressly stated that

the parties acknowledge that this [letter of intent] does not constitute a binding agreement upon the parties. . . . A binding commitment . . . will result only from execution of definitive agreements.

The court held that a document can be a contract without calling itself a contrace, and it noted that many letters of intent give rise to contractual rights and obligations.

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64 664 F.3d 131 (7th Cir. 2011). Decided December 8, 2011.
65 Id. at 134-135.

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However, "when a document says it isn't a contract, it isn't a contract." The court went on to state that "[i]t is reckless to rely on an agreement expressly stated to be nonbinding. Such a statement is equivalent to saying 'you rely at your peril.'" The plaintiffs' efforts to use the doctrine of promissory fraud as a means of overcoming the express disclaimers in the LOI were rejected by the court.

V. Marketing and Refining of Oil and Gas Production

A. Court finds that supplier of gas who invoked force majeure did not have a duty to seek replacement gas for delivery under the supply contract.

The case of *Ergon-West Virginia, Incorporated v. Dynegy Marketing & Trade*, presented a dispute under two contracts between Dynegy (a gas supplier) and the Ergon entities that managed refinery plants. Since the 1990s, Dynegy had contracted to supply Ergon's natural gas supply. When Hurricanes Katrina and Rita occurred in 2005, Dynegy's own gas suppliers declared force majeure, which led Dynegy to in turn invoke force majeure under the two contracts as it reduced its supply of gas to Ergon. As a result, Ergon had to buy gas on the open market at higher prices during the period of force majeure.

Ergon sued Dynegy asserting that its contracts required Dynegy to attempt to procure replacement gas, and that Dynegy made no attempt to do so. Dynegy denied that it had any such obligation.

After a bench trial, the district court held that one of the contracts was ambiguous and that extrinsic evidence showed that the contract did not obligate Dynegy to attempt to secure replacement gas. However, as to the other gas supply contract, the court found that the force majeure clause was unambiguous and required the party invoking force majeure to demonstrate that the applicable event was one that it could not overcome with due diligence. The force majeure provision in the second contract also indicated that force majeure events had the additional attribute of being events which by the exercise of due diligence such party is unable to prevent or overcome. Accordingly, the district court found that Dynegy did have the asserted obligation under that contract and it awarded Ergon damages equal to the difference between the cover

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66 *Id.* at 136.
67 *Id.* at 139.
68 706 F.3d 419 (5th Cir. 2013).
69 Dynegy offered unrebutted testimony in the form of an expert witness who testified that it is a universal practice in the gas industry for a downstream supplier to declare force majeure when its upstream supplier has done so and that the downstream supplier is not expected or obligated to search for replacement gas. 706 F.3d at 423.
price and the Dynegy contract price plus pre-judgment interest.

On appeal, the Fifth Circuit found that the district court erred in finding that the first contract was ambiguous. The first contract's force majeure provision required the party invoking force majeure to try to remedy the event “with all reasonable dispatch,” which the court found to be an unambiguous phrase. However, the appellate court found that it was nevertheless appropriate for the district court to look to extrinsic evidence to determine what “reasonable dispatch” involves under the circumstances of this case. In particular, the trial court properly considered the unrebutted extrinsic evidence, the expert testimony, regarding the standards used by the gas industry to determine what was “reasonable dispatch” under the circumstances. The Fifth Circuit concluded that the district court did not clearly err in finding that “reasonable dispatch” does not include a duty to try to secure replacement gas.

As to the second gas supply contract, the appellate court found that the trial court erred in finding that the contract was unambiguous since the pertinent provisions of the force majeure provision were subject to multiple reasonable meanings. Because the court found that the second contract was ambiguous, it held that the trial court erred in not considering the same extrinsic evidence and expert testimony that the court took into account in finding in favor of Dynegy as to the first supply contract. Based upon that expert testimony, the Fifth Circuit held that Dynegy was not liable to Ergon for its failure to seek replacement gas.

VI. Surface Use, Surface Damages, Oklahoma Surface Damages Act, Condemnation and Environmental Cases

A. Court dismisses appeal of orders in Surface Damages Act proceedings on the basis that the appeal was premature.

The case of Calyx Energy, LL v. Hall,\(^70\) involved a surface damages appraisal action commenced by Calyx, as operator, under the Oklahoma Surface Damages Act (the “Act”).\(^71\) The three appraisers returned a report assessing $12,500 in surface damages. The landowners demanded a jury trial, and the jury assessed damages to be in the amount of $23,500. Because the damages award on the jury verdict exceeded the appraisers’ award of $12,500, the court found that the landowners were entitled to a reasonable attorney fees.

The landowners requested that the trial court award treble damages based on their contention that the operator violated the Act by failing to post the damages bond required by Section 318.4 of the Act. That claim was tried to the court which ruled that,  

\(^{70}\) 2013 OK CIV APP 4, 295 P.3d 30.  
\(^{71}\) 52 O.S. § 381.2 to 318.9.
while Calyx had failed to post a location damage bond as required by the Act, it had not done so “willfully and knowingly” because it had in good faith confused the requirement for a “plugging bond” (which it had filed) with the Act’s own requirement for a damages bond. The court therefore denied the request for treble damages.

The landowners then sought to recover additional costs and attorneys fees incurred in connection with their unsuccessful effort to obtain treble damages. In support of that request, the landowners asserted that (a) the amount they recovered pursuant to the surface damages judgment, plus (b) the amount they recovered in costs and attorneys fees pursuant to the court’s original award of fees and costs from the jury trial, exceeded the amount of an offer of judgment that had been made by Calyx pursuant to 12 O.S. §1101.1. The trial court denied this motion. The landowners appealed.

On appeal, the Calyx argued that the appeal should be dismissed as premature since the landowners still had pending claims for bad faith negotiations, nuisance and trespass, which remained to be disposed of in the lawsuit. The court noted that the landowners had joined their tort claims for nuisance and trespass in the Surface Damages Act proceeding by filing an answer and counterclaim. The landowners later added the assertion that Calyx failed to post the required location damages bond.

The Pretrial Order, over the landowners’ objection, provided that only the surface damages issue would be tried to the jury. After the surface damages judgment was entered and attorneys fees were awarded to the landowners, the location damages bond issue was tried to the District Court without a jury. The court denied the landowners’ motion for treble damages. The District Court deferred ruling on the tort claims and the assertion that Calyx failed to negotiate in good faith.

With respect to Calyx’s assertion that the appeal should be dismissed as premature, the Court of Appeals found that the issues that had been resolved in the case were the amount of surface damages, the failure to post the location damages bond and the two attorney fee motions. The court noted that, under 52 O.S. §318.6, any aggrieved party may appeal from the verdict rendered upon the jury trial. However, neither party had appealed the surface damages award. Rather, the landowners had appealed only the treble damages and attorney fee orders. The court found that a party may appeal a surface damages judgment even though a related tort claim remains pending, one may not separately appeal the rulings on a landowner’s various claims for damages under the Act. The court stated:

72 In paragraphs 7 and 8 of the opinion, the Court of Appeals notes that an Answer and Counterclaim cannot normally be filed in a surface damages appraisal proceeding under the Act, but it states that the propriety of the landowners’ filing was not an issue in the appeal.
“We hold that alleged violations of the Surface Damages Act are part of the statutory remedy provided by the Act to landowners for damage to the surface of their property resulting from oil and gas drilling operations. Therefore, a judgment on a jury’s surface damages verdict cannot be entered until all alleged violations of the Act have been resolved. To hold otherwise would authorize a separate appeal from the surface damages decision and the decision of as many different violations of the Act as a landowner might allege.”  

The Court of Appeals observed that it could find no support in the prior decisions of the Oklahoma Supreme Court for a multiple-appeal process.

Since the location damages and treble damages order did not resolve all of the issues relating to the landowners’ Surface Damages Act claim (their claim for treble damages for failure to negotiate in good faith pursuant to Section 318.9 remained pending), that order was not appealable.

With respect to the one order granting attorney fees and the second order denying additional attorney fees, the court found that, ordinarily, an order awarding attorney fees in a special proceeding is an appealable order. However, the surface damages award on which the two orders were predicated did not resolve all the issues in the case, so that the orders were subject to revision at any time before a final judgment adjudicating all the claims was filed with the court clerk. 12 O.S. §994(A). As a result, those orders were not appealable. Lacking any appealable orders, the appeal was dismissed.

B. Court affirms finding that geophysical exploration company had acquired the right to enter the surface and conduct testing activities.

The case of Kimzey v. Flamingo Seismic Solutions Inc. involved the appeal of a summary judgment ruling in favor of Flamingo finding that it had permission from the owners of the mineral rights and/or oil and gas leasehold rights to enter the surface of the subject property and conduct seismic testing. The District Court found that it is wellsettled under Oklahoma law that an owner of mineral interests and/or oil and gas leasehold rights can validly grant a permit authorizing another person to conduct seismic exploration of the mineral estate. Thus, no trespass had occurred. The trial court further found that there is no support in the prior court decisions for the landowners’ assertion that there must be a benefit to the mineral estate in order for an owner to have authority to assign its right to conduct seismic operations. However, the

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73 2013 OK CIV APP 4 at ¶15.
74 696 F.3d 1045 (10th Cir. 2012).
court found that there was in fact a benefit to the mineral estate in the form of a greater potential for oil and gas development as a result of the seismic testing activities. When Flamingo moved for an award of attorneys fees, the landowners argued that, because the court found that there was no trespass, the court did not address the issue of the alleged injury to their land, with the result that the attorneys fee provisions of 12 O.S. §940(A) did not apply. The court rejected that argument and awarded attorney fees to Flamingo. The landowners appealed.

In affirming the decision of the District Court, the Tenth Circuit Court of Appeals found in part as follows:

1. It agreed with the District Court that Oklahoma law clearly permits owners of mineral estates to grant access to the surface property in order to conduct seismic exploration. Among other authorities, the court cited Enron Oil & Gas Co. v. Worth\textsuperscript{75} for its finding that a “mineral owner may sever and assign the surface easement for the limited purpose of conducting geophysical exploration.”

2. The court noted that the Oklahoma Legislature recently confirmed this “historical right” through the enactment of 52 O.S. § 803, effective July 1, 2012, which provides in part:

“[T]he mineral owner has had, and shall hereafter continue to have, the right to make reasonable use of the surface estate, including the right of ingress and egress therefor, for the purpose of exploring, severing, capturing and producing the minerals underlying the tract of real property or lands spaced or pooled therewith.” [Section 803(A)] “It is the intent of this act to confirm the mineral owner’s historical right to make reasonable use of the surface estate, . . .” [Section 803(F)].

3. Citing Hinds v. Phillips Petroleum Co.,\textsuperscript{76} the Tenth Circuit rejected the landowners’ assertion that, while a mineral owner may assign its right to an oil and gas lessee, a lessee may not similarly assign its right.

4. The court also rejected the landowners’ contention that the court in Hinds conditioned the alienability of easements under an oil and gas lease on a benefit to the land. Moreover, the court found that the defendant’s actions in the present case were specifically for exploration and directly related to the mineral estate underlying the landowners’ surface estates.

5. The court found that Flamingo entered the surface of the property with the

\textsuperscript{75} 1997 OK CIV APP 60, 947 P.2d 610, 613.  
\textsuperscript{76} 1979 OK 22, 591 P.2d 697, 699.
express written consent of the owners of the leasehold interests, so not trespass occurred. To the extent that the landowners raised on appeal allegations that Flamingo made an unreasonable use of their land, the court declined to address those allegations since it found that the landowners did not raise that issue in the District Court.

6. Regarding the award of attorneys fees, Flamingo first argued that the appellate court lacked jurisdiction to review the award of attorneys fees because the landowners did not file a second notice of appeal after the district court’s fee award. However, the court found that the landowners, within 30 days of the order awarding fees, filed their opening brief in the first-noticed appeal of the summary judgment ruling and specifically challenged the fee award in that brief. The court found that it would be appropriate to construe the landowners’ brief as the functional equivalent of a notice of appeal from the order awarding fees since the brief provided all the forms of notice required by Fed. R. App. P. since the brief provided all the forms of notice required by Fed. R. App. P. 3(c)(1).

7. In rejecting the landowners’ argument that 12 O.S. §940(A) was inapplicable in this case because the District Court found that no trespass had occurred and, therefore, did not reach the issue of damages, the court cited several cases for the proposition that a defendant who successfully defends a property damage claim is entitled to an award of attorney fees under Section 940.

VII. Conservation Commission-Related Cases

A. Corporation Commission finds that respondent made an oral election to participate in well under force pooling order, and that respondent was also judicially stopped from denying its participation election.

The case of Chaparral Energy, LLC v. Copenbarger involved a force pooling order obtained by Chaparral for a proposed well which named the Copenbarger Trust as a respondent. The pooling order provided that any respondent who failed to elect in writing to participate in the proposed well would be deemed to elect to instead receive a one-eighth royalty and bonus payment in lieu of participation.

The Copenbarger Trust asserted that it did not elect to participate in the well under the pooling order. Rather, the Trust alleged that it entered into a private oral agreement with Chaparral’s landman to participate in the well based on a fixed, up-front investment for a sum equal to the estimated dry hole costs. Chaparral denied that any private agreement had been reached and it alleged that the Trust made an oral election to participate in the well under the pooling order and that Chaparral accepted that oral

election.

The present dispute arose when the new well was drilled, was unsuccessful and was plugged as a dry hole, and Chaparral billed the Trust for an additional amount of well costs. The Trust participated in a proceeding that challenged the reasonableness of the costs billed by Chaparral. After the reasonable costs were determined in those proceedings, Chaparral sought to collect the unpaid costs from the Trust. The Trust then filed the present application with the Corporation Commission seeking a determination that the Trust did not elect to participate under the force pooling order.

The ALJ found that there was no private agreement between the Trust and Chaparral, and that the Trust made no proper election to participate under the pooling order. The Appellate Referee reversed the ALJ's order and found that, even though the Trust did not make a written election to participate, its conduct (e.g., telephone conversations and payment of costs) constituted an oral election to participate under the pooling order. The Appellate Referee further found that the Trust was judicially estopped from denying that it elected to participate under the pooling order because it participated in the hearing to determine the reasonableness of Chaparral's well costs. The Corporation Commission approved the Referee's report. The Trust appealed.

The Oklahoma Court of Appeals affirmed. After reciting the standard of review on appeal with respect to orders of the Corporation Commission, the court found that the Referee’s report contained extensive findings of fact and conclusions of law and that those findings and conclusions were supported by substantial evidence.

B. Respondent’s failure to make timely election under force pooling order that respondent appealed did not render the appeal moot.

In [Nicks v. Dexxon, Inc.],78 Dexxon, as the operator of two wells, filed a spacing application and two force pooling applications in which Nicks was the sole respondent. The Commission granted the applications. Nicks appealed those orders in the present cause.

Dexxon filed a motion to dismiss Nicks’ appeal on the grounds that Nicks lacked standing and that the appeal had become moot since the date it was filed. The basis for those contentions was that (a) the pooling orders required that an election to participate be made within twenty days, (b) the orders were not stayed pending the appeal, and (c) Nicks failed to make an election within the required time period. However, the Court of Appeals found that Nicks’ failure to make an election under the pooling orders did not affect the status of the case at the time the appeal was filed, that the relief sought by Nicks on appeal was still available, and that the appeal had not become moot. The court denied the motion to dismiss.

The court additionally rejected Nicks’ argument that it had been denied due process in the Commission proceedings by not being allowed to conduct discovery as to the “actual expenditures” incurred by Dexxon in connection with the two wells. The court observed that “[t]he evidence indicates that Dexxon provided evidence of expenditures actually incurred, as well as the fair market value for services actually provided by Dexxon in drilling the wells.”79 The court found that such evidence was sufficient to meet the requirements of 52 O.S. §87.1(e) and Wood Oil Co. v. Corporation Commission.80

The court found no reversible error and affirmed the orders of the Commission.

C. Party who asserted a disputed claim to an interest in proposed unit area, and who received actual notice of drilling and spacing unit application with the Corporation Commission and participated actively in the proceedings, is found to have waived any failure by the applicant to mail notice of the proceedings to that claimant.

In Amtex Oil and Gas Inc. v. American Natural Resources, L.L.C., 81 Amtex appealed a drilling and spacing unit order of the Oklahoma Corporation Commission. American Natural Resources (ANR) filed an application to establish 40-acre drill and spacing units for certain common sources of supply underlying certain lands in Seminole County, Oklahoma. In its application, ANR alleged that it had conducted a diligent search of the county records to locate respondents, and “[t]he name and address of each party entitled to notice of this Application are as shown on Exhibit ‘A’” Exhibit A did not list Amtex. ANR published notice of the hearing on the application in The Seminole Producer and The Journal Record newspapers.

Counsel for Amtex filed an entry of appearance and notice of protest with the Commission. At the hearing before the administrative law judge (ALJ), ANR’s landman testified that Amtex did not own an interest in the unit, but that Amtex had filed a lis pendens notice in the county records giving notice of a district court lawsuit in which Amtex sued ANR and asserted that Amtex did own an interest in the unit. Counsel for ANR acknowledged at the hearing that he was aware that Amtex claimed an interest in the unit, and that he made the conscious decision to exclude Amtex from the spacing case because he did not want to make any admission that Amtex could use in the district court litigation. He argued that ANR was not required to give notice of Amtex because it owned no interest of record in the subject lands. Amtex argued that since ANR knew that Amtex claimed an interest in the unit, ANR should have given Amtex

79 Id. at footnote 1.
80 1953 OK 386, 3, 268 P.2d 878, 885.
The ALJ’s report recommended that ANR’s application be denied based on the failure to give Amtex notice. However, the appellate referee found that, since Amtex obtained actual notice of the proceedings and actively participated in the protested hearing before the ALJ, ANR’s spacing application should be granted. The Commission agreed with the ALJ and entered an order establishing drilling and spacing units as requested by ANR.

In affirming the order of the Commission, the court noted at the outset of its opinion that Amtex did not contend on appeal that ANR’s omission of Amtex from the mailed notices deprived Amtex of the opportunity to be heard. Rather, Amtex had received notice through other means and had actually protested ANR’s application.

Second, with regard to Amtex’s contention that ANR’s alleged misrepresentations to the Commission regarding notice amounted to intrinsic fraud, the court observed that Amtex had raised that same allegation before the Commission. The Commission found that, in spite of the alleged fraud, Amtex received actual notice, made a general appearance and participated fully in the hearing. The court found that “[a] party waives the requirement of notice by a general appearance.” (¶14).

Finally, Amtex asserted that, apart from the notice issues, the spacing order was not supported by substantial evidence and was offensive to the protection of correlative rights. The court review key aspects of the evidence that ALJ presented to the ALJ and found that the Commission’s findings were supported by substantial evidence. The court affirmed the order of the Corporation Commission.

VIII. Suits Over International Energy Operations

A. Claims for tortious interference and award of $66.5 million in actual damages in connection with failed oil and gas project in Bulgaria upheld on appeal.

Under the facts presented in Carlton Energy Group, L.L.C. v. Phillips, CBM Energy had entered into a contract with the government of Bulgaria in October of 2000 which permitted CBM to explore for natural gas on a large tract of land in Bulgaria. In order to obtain financing to fulfill its obligations under the Bulgarian concession, CBM entered into an agreement with Carlton on April 25, 2003 under which Carlton was to provide phased payments totaling $8 million in exchange for a large interest in the project. In an effort to obtain additional funding in the summer of 2004 to support its payment obligations, Carlton submitted a proposed agreement to Phillips under which

Phillips would agree to pay $8.5 million in exchange for a 10% interest in the project. Phillips did not provide any funding to Carlton, and Phillips later asserted that, contrary to Carlton’s contentions, it never entered into a contract with Carlton. In particular, Phillips signed the proposed letter agreement and returned it to Carlton for it to sign and accept the agreement. Phillips asserted that Carlton never provided him with a counterpart signed by Carlton.

Carlton later learned that, in the Fall of 2004 during the period when Carlton was providing Phillips with technical data concerning the project during their negotiations, “Phillips and his representatives, without Carlton’s knowledge, were in direct contact with CBM about the Bulgaria Project.”

Carlton alleged that Phillips was taking action to supplant Carlton’s position with CBM in relation to the project. In February 2005, EurEnergy, a company connected to Phillips, made a proposal to CBM and then entered into a joint development agreement under which EurEnergy provided funding to CBM for the project. As part of that contract, CBM agreed to declare Carlton in default of its obligations under the CBM/Carlton contract, and Carlton did so. “CBM and EurEnergy’s relationship subsequently soured, and litigation between CBM and EurEnergy ensued.” Bulgaria thereafter terminated the concession it had granted to CBM.

Based on the complex factual history described in the court’s opinion, Carlton sued Phillips, EurEnergy and several other Phillips-related entities for tortious interference with the CBM/Carlton agreement, breach of contract and related claims. After a lengthy trial, the jury found that Phillips did in fact enter into the contract with Carlton and breached that contract. The jury awarded actual damages in the amount of $66.5 million. The jury further found that Phillips and EurEnergy intentionally interfered with the CBM/Carlton agreement, and that Carlton suffered $66.5 million in actual damages on that claim. The jury also awarded $8.5 million in punitive damages against Phillips and awarded the same amount against EurEnergy. The trial court, sua sponte, suggested a remittitur in the amount of $31.16 million, finding that the award of $66.5 million in actual damages was not supported by factually-sufficient evidence. The court, in its judgment on the jury verdict, awarded Carlton a reduced amount of $31.16 million in actual damages. The judgment assessed punitive damages in the amount of $8.5 million against Phillips, with the same award against EurEnergy. The defendants appealed.

In reversing the judgment of the trial court in part, the court of appeals first concluded that Carlton had submitted ample evidence to support the jury’s conclusions with respect to the tortious interference claim. The appellate court also reviewed the expert testimony and other evidence presented at trial and concluded that, even though Carlton’s attorney suggested in closing argument that the jury award actual damages of

83 Id. at *3.
84 Id. at *4.
$31.16 million, the jury’s award of $66.5 million was supported by the evidence.\textsuperscript{85} The trial court erred in requiring a remittitur from $66.5 million to $31.16 million, and that portion of the judgment was reversed. The court distinguished the prior Texas Court of Appeals decision in Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C.,\textsuperscript{86} in which the court concluded that the proof of lost profits from a failed oil and gas project opportunity was largely speculative and did not prove the damages with required standard of reasonable certainty. The court noted that, unlike Ramco, the present suit was not a lost profits case.

B. Court finds that sovereign immunity compelled the dismissal of the plaintiffs’ lawsuit against the Republic of Iraq, and that the “commercial activity” exception was not available under the facts presented.

In Terenkian v. Republic of Iraq,\textsuperscript{87} two Cyprus oil brokerage companies sued the Republic of Iraq for the alleged breach of two contracts for the purchase and sale of Iraqi oil. The contracts were negotiated “under the auspices of the United Nations Oil for Food Program.”\textsuperscript{88} The plaintiffs asserted that, after the contracts had been signed by the Republic’s State Oil Marketing Organization (“SOMO”), Iraqi officials demanded that the plaintiffs pay additional fees that were not required under the contracts. When the plaintiffs refused to make the additional payments, SOMO unilaterally canceled the contracts. The plaintiffs alleged that they had been damaged by the actions of SOMO with the resulting loss of over $6 million in brokerage fees. In order to support the jurisdiction of the court without violating the Foreign Sovereign Immunities Act (“FSIA”),\textsuperscript{89} the plaintiffs asserted, and the district court found, that the “commercial exception” to sovereign immunity provided in Section 1605(a)(2) of FSIA was applicable. That exception applies where a lawsuit is based on “an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.”\textsuperscript{90} The district court denied Iraq’s motion to dismiss. Iraq appealed.

The Ninth Circuit Court of Appeals concluded that the district court erred in

\begin{footnotesize}
\textsuperscript{85} The court distinguished the prior Texas Court of Appeals decision in Ramco Oil & Gas Ltd. v. Anglo-Dutch (Tenge) L.L.C., 207 S.W.3d 801 (Tex. App.-Hous. 2006), in which the court concluded that the proof of lost profits from a lost oil and gas project opportunity was largely speculative and did not prove the damages with reasonable certainty. The court noted that, unlike Ramco, the present suit was not a lost profits case.
\textsuperscript{86} 207 S.W.3d 801 (Tex. App.-Hous. 2006).
\textsuperscript{87} 694 F.3d 1122 (9th Cir. 2012).
\textsuperscript{88} Id. at 1126.
\textsuperscript{89} 28 U.S.C. § 1602 et seq.
\textsuperscript{90} Id. at § 1605(a)(2).
\end{footnotesize}
finding that the “commercial activity” exception allowed the court to proceed against Iraq and it reversed and directed the dismissal of the suit. The court found, among other considerations, that even if Iraq had executed the contract in the United States (a conclusion it found to be unsupported by the evidence), that fact alone was not sufficient to demonstrate a significant activity or a substantial contact in or with the United States for purposes of the first clause of Section 1605(a)(2). With regard to the judicial estoppel argument of the plaintiffs, the court held that “[e]ven if Iraq had conceded in other litigation that contracts made pursuant to the Oil for Food Program were commercial activities carried on in the United States,” a federal court must independently determine that it has jurisdiction, and judicial estoppels or concessions by the parties are not a substitute for subject matter jurisdiction. In an effort to support the exception under the third clause of Section 1605(a)(2), which requires a showing that the commercial activity of the foreign state causes a direct effect in the United States, the plaintiffs argued that some of the oil that was to be purchased was meant for the domestic market, and payment for all oil purchased was to be made by deposit into an account with a New York bank. The court concluded that these were only indirect effects and not the type of “direct effect” required under the third clause of Section 1605(a)(2).

C. Court resolves dispute over the manner for selecting arbitrators for a three-party dispute under an arbitration clause that appeared to designed for only two-party disputes.

The case of BP Exploration Libya Ltd. v. ExxonMobil Libya Ltd. involved a Drilling Services Agreement under which Noble agreed to provide drilling services to Exxon for deepwater oil wells to be drilled offshore in Libyan waters. Approximately one year after that agreement was signed, Exxon and BP entered into an Assignment Agreement under which “Exxon agreed to assign, and BP agreed to assume, the Drilling Agreement for the time necessary for BP to drill two deepwater wells in those Libyan waters.” Noble consented to the assignment. When disagreements later arose between all three parties (Noble, Exxon and BP) and Noble invoked contractual arbitration procedures, it became apparent that the applicable agreement to arbitrate was designed for two-party disputes. In particular, the agreement provided that disputes between Noble, Exxon and BP would be arbitrated “before three arbitrators appointed in accordance with the rules of the Arbitration and Conciliation Act 1990 (‘ACA’).” The rules of the ACA provide that where the agreement provides for three arbitrators to be selected, “each party shall appoint one arbitrator, and the two arbitrators thus appointed shall choose the third arbitrator,” or, failing an ability of the two to agree, the third

91 694 F.3d at 1137.
92 689 F.3d 481 (5th Cir. 2012).
93 Id. at 484.
94 Id. at 485.
95 See Article 7(1) of the ACA Rules.
arbitrator is to be appointed by the court.

When Noble served its arbitration demand on Exxon and BP, who had their own disagreements as to which of them was liable for any sums due Noble, they each wanted to appoint their own arbitrator, which would have resulted in there being no neutral arbitrator. When efforts to reach an agreement on an alternative selection process failed, BP filed suit in the district court under, among other authority, a provision of the Federal Arbitration Act which gives courts certain rights to appoint arbitrators where the provisions of the agreement to arbitrate fail to provide an effective appointment procedure.96 BP proposed four alternative procedures to the court. The district court ultimately ordered that the three arbitrators that had been selected by the parties through their earlier communications would each serve, and that they should reach unanimous agreement on two neutral arbitrators, resulting in a panel of five arbitrators. If the three should be unable to agree on the two neutral arbitrators, the Secretary-General of the Permanent Court at The Hague would appoint the two neutral arbitrators. Noble appealed. On appeal, Noble argued that the district court erred in ordering a five-member panel when the contract provided for a three-member panel, and Noble asserted that Exxon and BP should be required to appoint a single arbitrator in spite of the differences that existed between those two parties. Noble also argued that the court did not have the authority to resolve the arbitrator selection dispute.

At the outset, the Fifth Circuit Court of Appeals noted that no party sought to submit the pending disputes to decision by the court rather than through arbitration. Rather, the sole relief sought was a judicial resolution of the parties’ impasse over the selection of the arbitrators. The court also found that a three-party dispute was not “unforeseen” under the Assignment Agreement because Exxon and BP had provided for the procedure to follow if Noble was also involved in a dispute with Exxon and BP.97 However, the court agreed with Exxon and BP that the contractually-specified arbitrator appointment process “has reached a ‘mechanical breakdown’ or lapse, thereby authorizing the district court to intervene under § 5.”98 With regard to the district court’s prescribed solution, the Fifth Circuit found that the district court erred in providing for a panel of five arbitrators when the agreement of the parties expressly provided for a three-member panel because Section 5 did not authorize the court to disregard express provisions of the agreement. The appellate court directed the district court to enter a new order appointing three arbitrators. In particular, the appellate court instructed the lower court to consider the approach of entering an order that would require BP and Exxon to select a second arbitrator to serve with the arbitrator appointed by Noble. If BP and Exxon cannot agree, the district court would appoint the second arbitrator. Likewise, if the two arbitrators are unable to agree on the selection of a neutral arbitrator, the court would select the third arbitrator. The district court was given the

97 689 F.3d at 496.
98 Id. at 491.
discretion to prescribe any alternative or modified method so long as it is consistent with the appellate opinion.

D. Court finds that series of prior lawsuits over the same subject matter precluded the plaintiffs’ present suit and that sanctions were appropriate.

The case of Grynberg v. Total Compagnie Francaise des Petroles,99 involved a familiar factual backdrop that has been the subject of a series of prior lawsuits, some of which have been mentioned in prior annual editions of this report.100 Jack Grynberg and Pricaspian Development Company (“PDC”), the assignee of a substantial portion of the rights originally claimed by Grynberg in the subject matter of this lawsuit, sued the Total and Shell defendants. The plaintiffs contended that the defendants misappropriated Grynberg’s discovery that the Greater Kashagan Oil Field (“GKOF”) had significant potential for oil and natural gas production. They asked the court for judgment in the amount of twenty percent of the net profits earned from the production of oil and natural gas in the GKOF. The district court in this decision addressed the defendants’ motions to dismiss.

In an apparent effort to avoid a finding that the plaintiffs’ claims had already been adjudicated in the prior lawsuits that involved the same subject matter, the plaintiffs amended their original complaint to drop each of their original causes of action and they instead asserted a due process claim and a claim under a general tort liability provision of the Civil Code of the Republic of Kazakhstan. With respect to the motions to dismiss those new claims, the court found that the claims were barred by a three year statute of limitations. The court additionally found that the doctrine of claim preclusion mandated the dismissal of the plaintiffs’ claims. With respect to the defendants’ request for sanctions, the court determined that the plaintiffs’ counsel did not have a reasonable basis to believe that the claims asserted in the original and amended complaints were warranted by existing law, or by a non-frivolous argument for extending, modifying or reversing existing law or establishing new law. It additionally ruled that the plaintiffs “abused the judicial process and acted in bad faith in filing the instant lawsuit.”101 The court awarded monetary sanctions against both the plaintiffs and their counsel.

The court faced similar issues in a second case, Grynberg v. BP P.L.C.102 That case involved a suit by Grynberg and certain related entities against the BP defendants, Statoil and others. Before the court were motions to dismiss and other pending motions. The plaintiffs in this suit alleged several civil Racketeer Influenced and Corrupt

100 See 2012 WL 4095186 at *2-3 where the courts lists citations to some eight prior rulings of various courts that dealt with aspects of the controversy in this case.
101 Id. at 17.
Organization Act ("RICO") violations by the defendants. The disputes between the parties arose from an alleged 1990 agreement and venture for exploration and production in Kazakhstan and the GKOF, litigation that commenced between the parties in 1993, settlement agreements reached in 1999, and a series of other lawsuits, arbitrations, transactions and events that followed over subsequent years.

Among other rulings, the court determined that, under the transactional test for determining whether the present lawsuit involved the same claims as the proceedings from prior years, the court found that the claims brought by the plaintiffs in the present lawsuit were the same claims as those addressed in arbitration proceedings that were commenced in 2002, decided by the arbitrator in 2010 and addressed on appeal in 2012. Accordingly, the court concluded that the present suit was precluded by the doctrine of res judicata and should be dismissed.

E. Based upon the doctrine of forum non conveniens, court finds that negligence suit filed in the Texas courts should be dismissed and refiled in the courts of Peru.

The case of In re BPZ Resources, Inc.103 involved an explosion on a Peruvian-flagged oil tanker that occurred off the coast of Peru which led to the deaths of two crew members and injuries to several more. At the time of the explosion, the tanker was moored near the CX-11 crude oil platform owned by BPZ Peru, a Peruvian company. BPZ Energy, a Texas company, was the parent of BPZ Peru. BPZ Resources, Inc. a Texas company, was the parent of BPZ Energy. Several crew members and their family sued BPZ Resources and BPX Energy in the District Court of Harris County, Texas for negligence, including wrongful death and survival claims, and sought damages under general maritime law. The court observed that

[plaintiffs’] theory of the case revolves around decisions made in Houston to step up production on the CX-11 platform. [Plaintiffs] allege that relators made decisions to step up production, which required storage of more oil on the [tanker] that it was equipped to handle. . . They allege this is the true cause of the explosion.104

The defendants moved to dismiss the suit on the basis of the inconvenient forum doctrine on the grounds that the suit was brought by residents of Peru, it concerned an incident in the territorial waters of Peru, it involved a Peruvian tanker, Peruvian law would apply, witnesses could not be compelled to travel to the Texas courts and other legal proceedings relating to the incident were already pending in Peru. The district court denied the defendants’ motion. The defendants, as relators, petitioned the Texas Court of Appeals for a writ of mandamus compelling the district court to grant their

104 359 S.W.3d at 871.
motion.

The appellate court engaged in a detailed review of the legal standards for the dismissal of a case under the doctrine of forum non conveniens as codified in Texas,\textsuperscript{105} and as it related to the facts in this case. The court observed that the first requirement is that an alternate forum exist in which the claim or action may be tried. Under controlling case law, "[a]n alternate forum does not provide an adequate remedy if the remedies it offers are so unsatisfactory they comprise no remedy at all."\textsuperscript{106} The plaintiffs asserted, among other arguments, that the Peruvian courts provided an inadequate alternative forum because (a) Peru was unsafe due to political unrest, (b) the country's judicial system was corrupt, (c) the Peruvian legal system does not allow for deposition or provide compulsory process, (d) the parties would be limited to three witnesses for each controverted fact, and (e) a person who has an interest in a lawsuit may not serve as a witness.

The court reviewed the evidence presented and concluded, among other things, that the plaintiffs "have not presented evidence that the Peruvian judicial systems is so corrupt as to effectively provide them with no remedy at all."\textsuperscript{107} After reviewing the relationship of the claims, the underlying incident and the parties to both Peru and Houston, and after reviewing the other factors to be considered under Texas procedure in ruling on a motion to dismiss based upon forum non conveniens, the court conclude that "[t]he trial court's denial of the relators' motion to dismiss violated section 71.05(b) and was an abuse of discretion."\textsuperscript{108} The court conditioned its ruling on the acceptance of jurisdiction by the Peruvian courts.

\textbf{F. Court affirms order dismissing case for lack of personal jurisdiction.}

The case of Grynberg v. Ivanhoe Energy, Inc.,\textsuperscript{109} involved a lawsuit filed by Jack J. Grynberg, Cotundo Minerals, S.A., an Ecuadorian company, RSM Production Corporation (whose president was Grynberg) and Archidona Minerals, S.A. Cotundo held seventeen mining concessions from the Republic of Ecuador which gave Contundo "the exclusive right to explore and produce oil from nearly 200,000 acres in the Pungarayacu Heavy Tar Sands Oil Deposit for thirty years."\textsuperscript{110} Grynberg contacted Ivanhoe Energy regarding the Pungarayacu prospect and provided Ivanhoe with proprietary and confidential information that included Grynberg's estimates of the oil deposits in the Pungarayacu. Ivanhoe, in turn, sent Grynberg information concerning its oil processing technology. After continued discussions, it became apparent that the

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\textsuperscript{105} Texas Civil Practice and Remedies Code, Section 71.051.
\textsuperscript{107} 359 S.W.3d at 875.
\textsuperscript{108} Id. at 881.
\textsuperscript{109} 2012 WL 2855777 (10\textsuperscript{th} Cir. 2012).
\textsuperscript{110} Id. at *1.
\end{flushleft}
parties would not be reaching an agreement to develop the Pungarayacu, so Grynberg requested that Ivanhoe return the confidential information. The plaintiffs later learned that representatives of Ivanhoe subsequently pursued discussions directly with Ecuadorian officials, and an Ivanhoe affiliate ultimately signed a contract with the government to develop the Pungarayacu. In the same time frame, Ecuador declared the mining concessions of Cotundo as expired.

The plaintiffs alleged that Ivanhoe and its affiliates took the plaintiffs’ confidential information under false pretenses, made false representations and interfered with the plaintiffs’ property interests. The plaintiffs further suggested that Ivanhoe may have used improper means to persuade Ecuador to revoke their concessions and award them to Ivanhoe. The present lawsuit was filed in United States District Court for the District of Colorado, asserting claims of fraud, intentional and tortious interference with prospective unique business advantages, unjust enrichment, civil conspiracy and violations of RICO laws. Upon the motion of the defendants, the district court dismissed this action without prejudice for lack of personal jurisdiction and denied the alternative motion of the plaintiffs to transfer the case to the federal courts of California where Ivanhoe’s plant was located. The plaintiffs appealed.

The Tenth Circuit Court of Appeals affirmed the district court’s decision and found that the plaintiffs had failed to establish either general jurisdiction or specific jurisdiction in Colorado over the defendants. In likewise upholding the denial of the plaintiffs’ alternative motion to transfer the suit to California, the court reviewed the factors to be considered in determining whether to dismiss a suit rather than transfer it. The court noted that the district court had found “that the parties agree that Plaintiffs action would not be time barred if filed in another district.” However, the plaintiffs asserted that eighteen months had passed since the filing of the motion to transfer and that there was a substantial risk that the claims would be time-barred in California if a new lawsuit had to be filed. The appellate court indicated that its role was to review the ruling made by the district court based on the circumstances presented at the time it ruled, and not based on changes in circumstances that occurred after that ruling. The court further noted that the interests of the plaintiffs could have been protected by filing a protective lawsuit in California after the district court in Colorado dismissed the case. The plaintiffs additionally argued that the dismissal of their action and denial of the motion to transfer caused prejudice to the plaintiffs by exposing them to the defendants' motion for more than $800,000 in attorneys’ fees and costs. However, the court that this was not the type of prejudice that is of concern under the federal transfer statute.112

111 Id. at *18.
G. Court affirms dismissal of RICO claims against arbitration counsel.

In RSM Production Corp. v. Freshfields Bruckhaus Deringer U.S. L.L.P., RSM, whose chief executive officer was Jack Gryenberg, had obtained an exclusive agreement with the nation of Grenada for the exploration, production and development of oil and gas. RSM alleged that, after the agreement was executed, a key official for Grenada advised that “he expected significant bribe payments from RSM and Gryenberg in order for RSM and Gryenberg to do business in Grenada,” but they refused to make such payments. The years that followed involved a complex series of factual and procedural events that led to growing disagreements between RSM and Grenada and included an arbitration over the propriety of Grenada’s denial of RSM’s offshore license application. Freshfields served as arbitration counsel for Grenada. The arbitration panel ultimately ruled that the license application submitted by RSM to Grenada was untimely.

In the present lawsuit, RSM alleged that Freshfields “was part of a conspiracy to bribe Genadian officials and deny RSM its offshore licensing rights,” and asserted that the firm had specifically conspired to violate the Racketeer Influenced and Corrupt Organizations Act (“RICO”). The district court granted Freshfields’ motion to dismiss under Rule 12(b)(1) on the grounds that the complaint was barred by res judicata in view of prior proceedings in New York. RSM appealed, arguing that Freshfields was not in privity with the defendants in the New York litigation. The appellate court affirmed the district court on a different basis. The appellate court found that RSM’s complaint alleged “no conduct by Freshfields beyond the provision of normal legal services in arbitration and so fails to support a reasonable inference that Freshfields ‘agree[d] to assist others in the commission of unlawful acts.’”

IX. Other Energy Industry Cases

A. Court addresses Petitioner’s object to ex parte communications between hearing officer in administrative hearings and state and federal agencies involved in the proceeding.

The court in Arbuckle Simpson Aquifer Protection Federation of Oklahoma, Inc. v. Oklahoma Water Resources Board was presented with a request for a writ of

113 682 F.3d 1043 (D.C. Cir. 2012).
114 Id. at 1046.
115 Id. at 1047.
118 682 F.3d at 1051.
119 2013 OK 29, ___ P.3d ___.

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prohibition and mandamus seeking disqualification of a hearing officer in administrative proceedings before the Oklahoma Water Resources Board (OWRB). The OWRB had made a tentative Maximum Annual Yield determination with respect to the Arbuckle Simpson Aquifer. Pursuant to 82 O.S. §1020.6, once the OWRB reached its tentative finding, it was required to hold hearings so that any interested parties would have the right to present evidence in support of, or opposition to, the OWRB’s determination.

Pursuant to OAC § 785:4-3-4, the OWRB appointed a hearing examiner to supervise, direct, preside over and conduct the hearing. Under applicable procedures, once the hearings are completed, the hearing examiner makes a recommendation to the OWRB, which then proceeds to make a final determination of the maximum annual yield by issuing a final order with findings of fact and conclusions of law.

The Petitioner asked the court to disqualify the hearing examiner and to restart the proceedings with a new hearing examiner, and to prohibit ex parte communications between the hearing examiner and the OWRB and other agencies. The Petitioner contended that the hearing examiner was involved in several post-hearing ex parte communications with adverse parties, including representatives of the OWRB and the United States Geological Survey. The evidence presented to the court indicated that the hearing examiner acknowledged (a) speaking by phone with the OWRB’s General Counsel to inquire about assistance from the OWRB’s staff in locating evidence contained in the record on certain issues, (b) communicating with the OWRB’s Staff Attorney to obtain assistance in locating evidence, and (c) that she received information from the USGS which was forwarded to her by the OWRB’s General Counsel concerning a hydrology study in the area in question.120 As to the third category, the court noted that the fact that the hearing examiner did not solicit the information did not change the fact that an ex parte communication occurred indirectly between USGS employees who appeared as witnesses in the proceedings and the hearing examiner.

In addressing this request for relief, the court first observed that Article II of the Administrative Procedures Act specifically prohibits ex parte communications by members or employees of an agency assigned to render a decision or make findings of fact or conclusions of law in an individual proceeding. Participants in hearings governed by Article II of the Act are also guaranteed a fair and impartial hearing or consideration. However, the court went to reach the following conclusions:

1. The OWRB was not a “party” to the proceedings. Rather, the OWRB is the agency holding the proceedings. As a result, communications between the hearing examiner with the OWRB were not covered by the ex parte communications prohibitions of 75 O.S. §313.

2. However, the court found that the hearing officer’s communications with

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120 Id. at ¶5.
outside federal agencies such as the USGS were another matter. The *ex parte* communications between the hearing officer and other agencies serving as witnesses, passed to the hearing officer through the OWRB, created the impression of partiality. Because agencies and their representatives function much like a court when conducting adjudicative proceedings, they are bound by minimum standards of due process.\(^{121}\)

3. The court found that, to “have the OWRB, which is not a party to the proceedings and thus permitted to communicate with the hearing officer, acting as a conduit for favorable witnesses to present further unchallenged testimony to the hearing officer without notice to the other parties allows one to question the hearing officer’s impartiality. . . If post-hearing communications from the USGS and other agencies about the record were necessary, then notice and an opportunity for all parties to participate should have been provided.”\(^{122}\)

The court issued a writ of mandamus compelling the hearing officer to provide notice of her *ex parte* communications to all parties to the proceedings, and to disclose the contents of those communications to the parties and incorporate those communications and responses to them in the record. Justices Taylor and Winchester dissented from the opinion and stated that they would have denied all relief sought by the Petitioner. Justice Watt concurred with the granting of the writ but dissented from the denial of the request for disqualification of the judge, citing the court’s prior disqualification of a trial judge under similar circumstances in the case of *Miller Dollarhide, P.C. v. Tal.*\(^{123}\)


Without attempting to describe the lengthy and complex factual and procedural history of this case in detail, those involved in either expert witness work or a litigation practice may want to note for future reference the case of *Ellison v. Campbell.*\(^{124}\) In that lawsuit, the plaintiffs had previously alleged in a separate lawsuit that the defendants were responsible for causing pollution of the groundwater on the Ellisons’ property. Campbell was hired to serve as an expert witness for the plaintiffs. The plaintiffs and their attorneys in that prior lawsuit alleged in the present action that the defendant expert witness had been negligent, had breached his contractual obligations and in fact


\(^{122}\) 2013 OK 29 at ¶13.

\(^{123}\) 2007 OK 58, ¶20, 163 P.3d 548.

had tortuously breached its contract in the course of performing as an expert witness in the prior underlying pollution lawsuit. The plaintiffs alleged that, as a result of the defendant’s performance, they were required to settle the pollution lawsuit for far less than the actual value of that case. The defendants asserted counterclaims for declaratory judgment, breach of contract and unjust enrichment.

The trial court granted the defendants’ motion to dismiss the negligence and tortious breach of contract claims. The case proceeded to jury trial in 2010. At the conclusion of the trial, and based on the jury’s verdict, the trial court entered a judgment finding in favor of the plaintiffs and against the defendants in the amount of $408,748.68, plus statutory interest, on the breach of contract claim. The defendants appealed.

In a 2-1 decision, the Oklahoma Court of Appeals found that the trial court erred in not requiring the plaintiffs to present an expert witness to refute the defendant Campbell’s own expert testimony and to establish that the defendants’ actions constituted a breach of contract. Rather than presenting a like scientific expert to counter Campbell’s testimony, the plaintiffs presented as witnesses (a) one of the defense attorneys from the underlying pollution lawsuit who testified that Campbell’s expert report did not make sense, that Campbell was unable to support the report at his deposition, and that the Ellisons’ pollution lawsuit was in serious trouble after Campbell’s deposition, and (b) one of the plaintiff attorneys from the present lawsuit and the underlying pollution lawsuit who

C. Court affirms the dismissal of action seeking to appeal County Assessor’s valuation of drilling rig and other oil field equipment.

In Cactus Drilling Co. v. Hefley, the County Assessor of Coal County had valued a drilling rig and other oil field equipment of Cactus that was located in the county. Cactus appealed the assessment to the County Board of Equalization, which affirmed the Assessor’s valuation. Cactus then commenced the present lawsuit in the District Court for Coal County seeking further review of the assessment which it contended placed too high of a value on its property.

In order to initiate the effort to obtain further review, Cactus filed a “Petition [for] De Novo Appeal with the District Court on July 9, 2008. Plaintiff attached to that petition a “Notice of Appeal” addressed to the County Clerk.

On December 30, 2008, by check dated two days earlier, Cactus paid the assessed tax and alleged that its payment was accompanied by a Form 990 “Payment of Taxes under Protest Due to Pending Appeal. However, the employees of the County Treasurer’s office testified that Cactus’ payment was not accompanied by either a Form

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125 2012 OK CIV APP 101, 290 P.3d 284.
990 (Notice of Payment Under Protest) or a copy of the Plaintiff’s Petition for De Novo Appeal as required by 68 O.S. §2884(B).

The County Assessor and other county defendants moved to dismiss Cactus’ Petition on the ground that 68 O.S. §2884(B) required that Cactus (a) give notice of its protest of the assessment on a prescribed form at the time of payment of the tax, and (b) attach to the notice of protest the petition for review that it filed in the District Court. Since Cactus had taken neither of those required steps, the County defendants asserted that the trial court lacked subject matter jurisdiction to hear Cactus’ appeal. Cactus responded with the assertion that the case had been on file for almost two years, the parties had proceeded with preparations toward the trial date, and the County defendants suffered no prejudice from Cactus’ failure to attach its protest form to the Petition that it filed. The trial court granted the motion to dismiss. Cactus appealed.

In affirming the trial court’s finding that it lacked subject matter jurisdiction and the court’s dismissal of Cactus’ lawsuit, the Court of Appeals noted the applicable statutes relied upon by the County defendants and stated: “The legislature has specified in §2884(B) when and how the notice of protest must be given. The language of the statute leaves no room for substantial compliance. Failure to notify the county treasurer of the payment of tax under protest with a copy of the petition for review attached as required by §2884(B) deprives the court of subject matter jurisdiction to act.”

D. Reserve pits used in commercial oil development are found to be outside the reach of the Migratory Bird Treaty Act.

In United States v. Brigham Oil and Gas, L.P., the government had initially charged seven oil and gas companies with violations of the Migratory Bird Treaty Act ("MBTA"). Three of the companies entered into plea agreements and the charges against one of the companies were dismissed by the government. Brigham, Newfield and Continental Resources proceeded to defend the charges filed against them and they moved the court to dismiss the indictments against them for violations of the MBTA. As to all three defendants, the indictments were based upon the discovery of dead migratory birds near the companies’ reserve pits in North Dakota.

The court found the reserve pits were not directed at migratory birds or their habitats, and that the pits had little effect on bird habits "except to attract occasional birds which mistake the pits for a pond or lake.” The court ruled that "the use of reserve pits in commercial oil development is legal, commercially-useful activity that

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126 Id. at ¶16.
129 840 F.Supp.2d at 1211.
stands outside the reach of the MBTA, and it granted the three defendants’ motions to dismiss.

E. **Rulings entered in the litigation concerning the Deepwater Horizon oil spill in the Gulf of Mexico in 2010.**

Over the past year, litigation continued in relation to the oil spill that began on April 20, 2010 at the Deepwater Horizon rig in the Gulf of Mexico. The court in *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, On April 20, 2010,* was presented with cross-motions for partial summary judgment concerning the extent of BP’s obligations to indemnify and defend Transocean with regard to pollution claims of third parties. Transocean contended that its drilling contract with BP required BP to defend and indemnify Transocean “from claims and liabilities related to pollution originating below the surface of the water, even if Transocean is strictly liable or the pollution was caused by Transocean’s negligence or gross negligence,” and that the obligation included punitive damages and penalties. BP asserted, *inter alia,* that Transocean’s interpretation of its indemnity obligation would run afoul of applicable public policy and law that “prohibits and invalidates a contractual indemnity that purports to include gross negligence, punitive damages, or CWA civil penalties.” The parties agreed that maritime law governed the drilling contract. The court held that, subject to certain stated conditions,

BP is required to indemnify Transocean for compensatory damages asserted by third parties against Transocean related to pollution that did not originate on or above the surface of the water, even if the claim is the result of Transocean’s strict liability . . . negligence, or gross negligence. . . . BP does not owe Transocean indemnity to the extent Transocean is held liable for punitive damages. . . BP does not owe Transocean indemnity to the extent Transocean is held liable for civil penalties under Section 311(b)(7) of the CWA.\(^{135}\)

In *In re: Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010,* the court was presented with cross-motions for partial summary judgment regarding the liability of the BP, Anadarko and Transocean entities under the Oil Pollution Act of 1990 (“OPA”) and the Clean Water Act (“CWA”). The court ruled

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130 Id.
132 Id. at 992.
133 The court observed that article 25.1 of the drilling contract expressly provided for “indemnification for liabilities caused by [Transocean’s] gross negligence.” Id. at 998-99.
134 Id. at 992.
135 Id. at 1009.
that, because the Deepwater Horizon was being used as an offshore facility at the time of the incident, BP and Anadarko, co-lessees of the area in which the offshore facility was located, are responsible parties with regard to the discharge of oil that occurred beneath the surface of the water. Transocean, as owner/operator of the [mobile offshore drilling unit], is not a responsible party under OPA for the discharge that occurred beneath the surface of the water (though it may be liable for removal costs under Section 1004(c)(3)). Liability for OPA removal costs and damages is joint and several vis-à-vis BP and Anadarko and the subsurface discharge.\(^{137}\)

The court additionally found that BP and Anadarko were “liable for civil penalties under Section 311(b)(7) of the CWA . . . because they are both owners of the offshore facility from which oil discharged.”\(^{138}\) However, because there were disputed facts as to whether Transocean met the definition of an “operator” of the offshore facility, the court could not determine its liability through a summary judgment procedure.

\textit{In re BP P.L.C. Securities Litigation}\(^{139}\) involved seven consolidated securities class actions in which it was alleged, among other things, that during the years leading up to the Deepwater Horizon incident, repeated misrepresentations and omissions on the part of BP “conceal[ed] the true state of BP’s safety programs and the Company’s risk exposure and [kept] the value of BP ADSs [American Depositor Shares] artificially inflated.”\(^{140}\) The plaintiffs asserted that they lost “a substantial portion of their investment when the true state of BP’s operations was revealed, tragically, through the Deepwater Horizon catastrophe and subsequent oil spill.”\(^{141}\) The defendants in the suits were BP plc and BP America, Inc. and nine of their present and former officers and directors. The plaintiffs alleged violations of section 10(b) of the Securities and Exchange Act of 1934.

In this ruling, the court addressed the defendants’ Motion to Dismiss the Claims of the BP ADS Purchasers in the Ludlow Plaintiffs’ Consolidated Class Action Complaint. In a lengthy order that reviewed the requirements of the applicable securities laws, the court concluded that the motion to dismiss should be granted. The court allowed the plaintiffs twenty days within which to file an amended complaint in conformity with the court’s order if they wished to do so.

On the same date and in the same consolidated actions,\(^{142}\) the court also ruled

\(^{137}\) \textit{Id.} at 755-56.
\(^{138}\) \textit{Id.} at 761.
\(^{140}\) \textit{Id.} at 774.
\(^{141}\) \textit{Id.}
on the defendants’ Motion to Dismiss the Claims of BP ADS Purchasers in the New York and Ohio Plaintiffs’ Consolidated Class Action Complaint and on the Motion to Dismiss the Claims of Purchasers of BP Ordinary Shares. Those motions involved claims against BP plc, BP America, Inc. and BP Exploration & Production, Inc. and ten of their present and former officers and directors. The New York and Ohio plaintiffs asserted violations of section 10(b) of the Securities and Exchange Act of 1934, rule 10b-5 of the Securities and Exchange Commission, and section 20(a) of the Exchange Act, and also pled claims under New York common law and English law. The court observed that “[f]rom the date of the Deepwater Horizon explosion through May 28, 2010 . . . BP’s securities fell in value by 48%, wiping out over $91 billion in market capitalization, and causing Plaintiffs to lose as much as 40% of their investments.”

After a very lengthy discussion of the issues presented and the pertinent allegations, the court found that the plaintiffs had adequately pled section 10(b) violations by BP plc, BP America, BP Exploration & Production, Anthony Hayward and Douglas Suttles, and also adequately pled control person liability under section 20(a) as to the defendants Hayward and Suttles. The motions to dismiss were granted in other respects.

The court also dismissed a suit by nine individual participants and beneficiaries of four BP employee investment and savings plans regulated by ERISA. The court additionally granted in part and denied in part motions to dismiss a series of complaints filed by certain coastal parishes in Louisiana, four cities in Alabama, three states from the United Mexican States, and various local government entities who joined in a Local Government Entity Master Complaint.

F. Suits related to the Deepwater Horizon oil spill filed by plaintiffs alleging that the defendant companies used their contributions in dealing with the incident but did not compensate them.

The oil spill that began in April 2010 at the Deepwater Horizon rig in the Gulf of Mexico gave rise to lawsuits of many forms related to the direct impacts and consequences of the incident itself. However, the litigation fallout from the tragic event also extended into disputes over certain collateral issues. One such area of litigation involved plaintiffs who alleged that they provided services or intellectual property in connection with the defendant companies’ effort to halt and remediate the oil spill, with the plaintiffs alleging they were not paid for their services or ideas. Additionally, those who were already developing and promoting technologies for oil spill remediation, who made efforts to avail themselves of the business opportunities afforded by this high profile incident, landed in a lengthy jury trial involving two well-known Hollywood stars.

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143 Id. at 724.
145 In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mexico, on April 20, 2010, 835 F.Supp.2d 175 (E.D. La. 2011) (decided December 9, 2011).
Indeed, when a company confronted with a disaster on the scale of the Deepwater Horizon oil spill receives some 123,000 volunteered suggestions from the public as to how the company might address and remedy the spill, it should come as no surprise that differing perceptions can follow as to which of the suggestions were in fact used, and whether any compensation should be paid for the proffered ideas. The remedial efforts associated with the Deepwater Horizon oil spill have led to several lawsuits in which the plaintiffs asserted that they were not fairly compensated for their contributions to those efforts.

In Richards v. British Petroleum, Richards filed a pro se complaint alleging that she provided BP with ideas for containing the flow of oil and cleaning up the oil that was released and that BP, Halliburton, Transocean, Cameron and the Gulf Coast Claims Facility had used her intellectual property without compensating her for it. The proposals the plaintiff allegedly provided for how to address the oil spill included, among others:

(1) plugging the leak using a combination of materials, (2) placing a giant plunger on the well, (3) using a vinegar solution to clean up the spill, (4) the use by BP of spiritual terms to inspire confidence and respect for the American people, . . . (7) an email to Kenneth Feinberg concerning the drilling of a hole and siphoning of oil.

After examining Richards' complaint and amended complaint, the court found that the plaintiff's claims were “implausible due to the dearth of factual matter therein. The Court is unable to draw an inference that any of the named defendants are liable for the alleged patent and copyright infringement and theft of intellectual property.” The court granted the defendants’ motions to dismiss.

The plaintiff in Southeast Recovery Group, LLC v. BP America, Inc. sued for breach of contract and sought to recover more than $1 million for helicopter services allegedly provided to BP in connection with the Deepwater Horizon incident. BP pled fraud among its defenses to this claim. The United States moved to intervene in the case and sought a stay of the proceedings “on grounds that it is currently conducting an active criminal investigation, including grand jury proceedings, concerning the same transaction.” The court noted that BP, who was a potential victim of any criminal

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148 Id. at 733.
149 Id. at 737.
151 Id. at 165.
fraud identified through the criminal proceedings, did not oppose the government's motion. Subject to a series of conditions described in its ruling, the court allowed the government to intervene and stayed the civil proceedings pending the outcome of the criminal investigation.

The case of Stanwood Boom Works, LLC v. BP Exploration & Production, Inc., 152 involved a series of emails, negotiations, proposals and counter-proposals in June and July of 2010 concerning the contractual specifications and purchase price for an oil containment boom that Stanwood proposed to sell to BP. When the communications ended without a purchase of the containment boom from Stanwood, it sued BP asserting claims of breach of contract and promissory estoppel. In affirming the district court's ruling in favor of BP, the Fifth Circuit concluded that “BP’s purchase order was not an offer because BP’s signature, after Stanwood’s assent, was a condition precedent to contract formation.” 153 Even if BP's purchase order were to be considered an offer, the court found that Stanwood’s response was not an acceptance. The court likewise found against Stanwood on its claim of promissory estoppel, noting that BP had promptly advised Stanwood that the purchase order was on hold due to the inability to obtain BP management approval.

In Vann v. British Petroleum Oil Co., 154 the court denied Vann’s appeal of the trial court’s order dismissing without prejudice “his suit alleging that the defendants violated his civil rights when they failed to financially compensate him after he submitted to them, and they used, his plans for a device designed to stop the Deepwater Horizon oil spill.” 155 The plaintiff moved for leave to proceed in forma pauperis on appeal. After reviewing the procedural history showing that the plaintiff had made little effort in the proceedings below to respond to the requests for additional information regarding his claims, the court dismissed the appeal as frivolous.

G. Hollywood intersects with the Deepwater Horizon oil spill.

Actors Kevin Costner and Stephen Baldwin, among others, were adversaries in a real life lawsuit that proceeded to a nine-day jury trial in federal court in New Orleans in June 2012. The case was styled Contogouris v. Westpac Resources, LLC. 156 Stephen Baldwin was the co-plaintiff and Kevin Costner was among the co-defendants.

Since the mid-1990s, Costner received occasional publicity with respect to his investment in, and promotion of, novel technology designed to clean-up oil spills, but

152 476 Fed. App’x 572 (5th Cir. 2012).
153 Id. at 575.
154 451 F. App’x 404 (5th Cir. 2011).
155 Id. at 405.
that venture had experienced mixed results. On April 20, 2010, the Deepwater Horizon
oil spill commenced in the Gulf of Mexico. As a result of negotiations that followed in the
aftermath of that incident and continuing through mid-May, Costner (through his entity
WestPac Resources), Baldwin and several other parties invested in and formed Ocean
Therapy Solutions, LLC (OTS) to market the unique oil spill clean-up technology
generally, and to promote the use of that technology by BP in particular. After forming
OTS, Costner and other representatives and contractors of OTS promptly made
contacts with BP to market the technology for use in the ongoing oil spill.

By virtue of the lengthy chronology of communications and events detailed in the
often-conflicting assertions of the litigants, certain of the members of OTS soon
proposed that a "cash call" be made that would have required Baldwin and his co-
plaintiff to invest an additional $1.18 million in OTS, with uncertainty as to the purposes
for which the additional money would be used. Costner and Smith (one of Costner's
primary associates in the OTS venture) were alleged to have pushed for the cash call
up to the point when, on June 11, 2010, Baldwin and Contogouris agreed to sell their
interests and signed transfer agreements agreeing to transfer their interests to Smith or
his designee.

In the present lawsuit, which was filed in December 2010, Baldwin and
Contogouris alleged, among many other assertions, that the "cash call" was a sham that
never occurred and was calculated to pressure the plaintiffs to sell their interests in OTS
before the company realized the profits from anticipated transactions with BP. The
plaintiffs asserted that the defendants led them to believe that BP had made no
agreements to purchase OTS's product at the time plaintiffs agreed to sell their
interests, and that plaintiffs only later learned that BP had, days earlier, placed an order
for 32 units, which substantially contributed to over $30 million in distributions to the
members of OTC between July and December 2010. Costner and the other defendants
responded with many counter-allegations, including that they had no duty to disclose
the alleged information to the plaintiffs, that the plaintiffs possessed actual or
constructive knowledge of the facts they alleged were misrepresented and/or omitted by
the defendants, and that the transfer documents included a waiver and release of their
claims. At the conclusion of the trial, the jury reached a verdict in favor of the
defendants and against the plaintiffs.158

157 Pre-Trial Order at 6-14, Contogouris v. Westpac Res., LLC, No. 10-4609 (E.D. La.