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Energy Litigation Update 2018

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ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 5

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ENERGY LITIGATION UPDATE 2018

MARK D. CHRISTIANSEN*

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

A. Assignor sues working interest owners for failure to comply with contractual obligation under 1994 assignment to notify assignor of any future plans to plug the subject well.

In *American Star Energy and Minerals Corporation v. Armor Petroleum, Inc.*,¹ Armor appealed from the trial court's judgment in favor of the plaintiff, American Star, in this breach of contract action. The key controversy in this case was whether the defendant-lessees were obligated, under a provision of an assignment, to notify American Star of the proposal and plan to plug the subject well and also offer American Star the opportunity to purchase defendants' interests in lieu of plugging the well.

More specifically, the well at issue was located within the Rice Morrow Sand Formation unitized field established under OKLA. STAT. tit. 52, § 287.1 *et seq.* The Plan of Unitization became effective December 1, 1994. Some years later, the decision was made to plug the well. The unit sent notice of such intent to all lessees of the Rice Morrow Sand Formation. The

* Edinger Leonard & Blakley PLLC, Oklahoma City, Oklahoma. This paper was originally presented, in substantially the same form, at the November 2018 Annual Eugene Kuntz Conference on Natural Resources Law and Policy.

1. 89 O.B.J. 548 (Okla. App. 2018 - #115,490) (Not for Publication). For the published Appellant's brief and description of appeal, see *American Star Energy and Minerals Corporation v. Armor Petroleum, Inc.*, 2017 WL 3926079 (Okla. 2017).

well was plugged and abandoned on December 3, 2009. The defendants, who were lessees of the unit and successors to the obligations under the assignment, did not notify American Star of the impending plugging of the well or afford American Star the opportunity to exercise its purchase option prior to the closure of the well.

American Star filed this suit seeking damages for the cost of drilling a new well for purposes of developing a new formation. In their Answer, the defendants asserted (1) the unit, rather than the defendants, had control over the personal property of the well, and the unit should have been named in the lawsuit; (2) establishment of the unit abrogated and/or modified any rights, including notice rights, of American Star as to plugging and abandonment of the well; and (3) a contradictory finding would be an impermissible collateral attack on the Oklahoma Corporation Commission's order of unitization.

Following a bench trial, the trial court held for American Star, finding the contractual obligations contained in the assignment were continuing, assumed by the defendants, and did not conflict with the unitization plan or statutes. American Star was awarded \$200,000.00 in damages plus statutory interest at 5.5% calculated from June 6, 2016, until paid. The defendants appeal. In addressing certain of the key arguments of the defendants, the Oklahoma Court of Appeals stated in part as follows:

1. The court agreed that the unit had no obligation to notify American Star of its intent to plug the well. The unit operator was only required to provide notice to *lessees* of the subject tract, and American Star was not a lessee.

2. However, the defendants were obligated to provide notice to American Star pursuant to the terms of their assignment. Contrary to the assertion of the defendants, this contractual requirement in no manner conflicted with the notice requirements of the Plan of Unitization, or of the unitization statutes in general. The legal obligations under the assignment regarding the provision of notice by the defendants remained fully enforceable.

3. Finally, the trial court did modify the portion of the trial court's judgment that provided for interest at the rate of 5.5%² until paid. The court found that the statutes providing for post-judgment interest would be adhered to by stating in the judgment that "[t]he judgment shall earn

2. The statutory post judgment interest rate for 2016 was 5.5% under OKLA. STAT. tit. 12, § 727.1 (2013).

statutory interest in accord with OKLA. STAT. tit. 12, § 727.1 (2013) from June 6, 2016, until paid.”³

The court of appeals concluded that the trial court correctly entered judgment in favor of plaintiff. The judgment of the trial court was affirmed as modified.

For a lawsuit addressing disputes arising from informal oil and gas dealings and related tort claims among oil and gas entities and individuals, see *Online Oil, Inc. v. CO&G Production Group, LLC*.⁴

II. Royalty Owner Litigation

A. Court addresses continuing disputes as to scope of post-wellhead expenses that may be factored into the computation of gas royalty payments in Oklahoma.

The final appellate decision in *Pummill v. Hancock Exploration LLC*⁵ (*Pummill II*) presented an appeal of the District Court’s declaratory judgment on the merits, following a bench trial, rejecting the oil and gas-lessee defendants’ contention that they were allowed to proportionately charge certain expenses against the plaintiffs’ royalty interest payments. The Oklahoma Court of Appeals observed that “[t]he question of consequence on appeal involves Defendants’ challenge to the trial court’s determination of when the natural gas at issue here became a ‘marketable product.’”⁶

The Oklahoma Supreme Court in earlier proceedings in the case, *Pummill v. Hancock Exploration LLC*⁷ (*Pummill I*), was presented with the defendants’ petition for writ of certiorari to review the trial court’s four lengthy summary judgment orders in favor of the plaintiffs, which had been affirmed by the court of appeals. The underlying lawsuit asserted that the defendants had underpaid royalties by reducing royalty payments by certain post-production expenses. The summary judgment orders were titled “Summary Judgment Issue 1—Lease Language; Summary Judgment Issue

3. *Id.* ¶ 12.

4. 2018 OK CIV APP 1, 419 P.3d 337.

5. 2018 OK CIV APP 48, 419 P.3d 1268.

6. 419 P.3d at 1270. The “marketable product” standard was recognized in the landmark Oklahoma Supreme Court decision in *Mitteslaedt v. Santa Fe Minerals, Inc.*, 1998 OK 7, 954 P.2d 1203.

7. 2014 OK 97, 341 P.3d 69.

II—Form of Contract; Summary Judgment Issue III—Fuel Gas; and Summary Judgment Issue IV—Interest.”⁸

The defendant oil and gas companies asserted four primary issues on appeal: “Issue 1. The express language of their leases does not abrogate or negate the implied covenant to market in any way; Issue 2. The current or future use of a POP, POI or any other form of contract, instead of a fee based agreement with Enogex, does not change the amount of royalties due under the leases; Issue 3. Appellants are entitled to receive royalties on gas used off the lease or in the manufacture of products at the gas plant; and Issue 4. Appellants owe interest on royalties not timely paid without prior demand from the royalty owners.”⁹

In an unusual step, the Oklahoma Supreme Court, on its own initiative, set the matter for oral argument at a hearing conducted on November 5, 2014. At the hearing, the parties affirmed that Issue IV was not contested.¹⁰ As to the other three issues, the court found that “[t]he briefs filed and the oral argument . . . reveal that facts which could affect the resolution of the district court Issues I through III need to be addressed before the fact-finder, the district court.”¹¹

The Oklahoma Supreme Court vacated the ruling of the court of appeals, affirmed the district court in part (as to Issue IV) and reversed the district court in part (as to Issues I, II and III). The case was remanded to the district court to hear evidence and decide the disputed fact issues. The rulings of the district court on remand, which favored the Pummill plaintiffs, are described in detail on pages 1272 and 1273 of the 2018 appellate opinion in *Pummill II*.¹² The defendants appealed the district court’s judgment on remand. Three *amici curiae* sought leave and were allowed to file briefs in support of the defendants. An additional two groups sought leave and were permitted to file *amici curiae* briefs in support of the royalty-owner plaintiffs.

In affirming the district court’s judgment at the conclusion of the trial in favor of the Pummill Plaintiffs, the court held in part as follows:

1. Regarding the standard of review in this appeal, the Oklahoma Court of Appeals found that the primary relief sought by Pummill, and ultimately by the defendants, “concerned their competing views of the point at which gas production from the well becomes a ‘marketable product’ for purposes

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. 2018 OK CIV APP 48, ¶¶ 10-18, 419 P.3d at 1272 – 1273.

of calculating royalties due”¹³ under the leases. The court of appeals further observed that the Oklahoma Supreme Court has recognized “that oil and gas leases are ‘contracts,’ and has characterized an oil and gas producer’s liability under a lease as ‘purely contractual’ in nature (citations omitted).”¹⁴ The court of appeals found “that there is a ‘presumption of correctness’ afforded to a trial court’s findings of fact, even if those findings were adopted by the court from written findings prepared by counsel [for proposed use by the court] with minimal changes. . . . This Court will not disturb the trial court’s factual findings if they are supported by any competent evidence, including reasonable inferences derived from that evidence.”¹⁵

2. The court of appeals found that “[t]he issue of when natural gas first becomes ‘marketable’ has been the source of much contention and consternation in both legal and oil and gas circles for several years.”¹⁶

3. In summarizing certain legal principles, the court noted in paragraphs 26, 27 and 28 of its opinion that a lessee has an implied duty to obtain a “marketable product,” including the cost of preparing the gas for market and getting the gas to the place of sale in marketable form. As a general rule, the lessee may not deduct from royalty payments the costs of gathering, transportation, compression, dehydration, or blending if those costs are required to create a marketable product, unless the lease provides otherwise. The duty to market further includes the obligation to obtain the best price available. The lessee’s obligation is not unlimited. In *Mittelstaedt*, where the court considered a “gross proceeds” lease, the court recognized that, although expenses to obtain marketable production are not chargeable against royalty, reasonable “post-production expenses” might be applied against the royalty if the expenses involve “enhancing the value” of an already marketable product, and the lessee shows that the expenditures resulted in a proportionate increase in royalty revenue.¹⁷ Unfortunately, the Oklahoma Supreme Court in *Mittelstaedt* did not define the meaning of “marketable product,” nor has it done so since.¹⁸

13. *Id.* ¶ 20.

14. *Id.*

15. *Id.* ¶ 21-22.

16. *Id.* ¶ 25.

17. *Id.* ¶¶ 26-27.

18. *Id.* ¶ 28.

4. The court of appeals agreed with the trial court that the defendants failed to sustain their burden of proving that they were entitled to deduct proportionate post-production costs from royalties under *Mittelstaedt*.¹⁹

5. The court of appeals stated that the defendants were urging the court to adopt a definition of “marketable” identical to that of the Kansas Supreme Court in *Fawcett v. Oil Producers, Inc. of Kansas*. In that decision, the court found that production is merchantable once the operator has put it into a condition acceptable to a purchaser in a good faith transaction.²⁰ The defendants asserted that the gas at issue here was a marketable product at either or both (a) the custody meter, and (b) the wellhead where the defendants alleged the existence of hypothetical gas buyers.²¹

6. Turning to the defendants’ assertion that the court should adopt the Kansas Supreme Court’s holding in *Fawcett*, the court concluded that *Fawcett* had limited application in the *Pummill* case for at least three reasons: (a) The first and most obvious reason, as noted by the court, was that the Oklahoma Court of Appeals is bound to follow Oklahoma precedent (citing *Mittelstaedt* and *Wood* which were found to clearly apply to this litigation); (b) second, the court of appeals found no wording in *Fawcett* suggesting that the Kansas Supreme Court intended to overturn what the court of appeals described as the existing rule that a lessee-operator has the duty to make gas marketable and that it must do so free of cost for field services to royalty owners; and (c) *Fawcett* was factually distinguishable in that the *first, actual sales of gas occurred at the wellhead*, and the lease language clearly made reference to royalties measured by sales “at the mouth of the well” or “if sold at the well” in contrast to the “gross proceeds” language at issue here. That said, the court of appeals concluded that even if it used the definition of “marketable production” used in *Fawcett*, it would reach the same result under the circumstances presented in this case, pursuant to the court’s standard of review of whether the trial court’s decision was supported by competent evidence. The court of appeals affirmed the trial court’s decision on the marketability question.²²

7. The court of appeals stated that it found no error in the trial court’s finding that, in essence, the defendants could not employ “percentage of

19. *Id.* ¶ 41.

20. *Fawcett v. Oil Producers, Inc. of Kansas*, 352 P.3d 1032 (Kan. 1994).

21. 2018 OK CIV APP 48, ¶29, 419 P.3d at 1276.

22. *Id.* ¶44.

proceeds” contracts²³ simply in order to avoid the court’s decision prohibiting certain cost deductions from royalties.²⁴

8. Finally, with regard to the defendants’ argument that the ruling of the trial court would have wide-ranging, destructive ramifications for the oil and gas industry, the court of appeals found that this argument exaggerated the extent to which the issue presented to the court could be applied outside the limited realm of this case, and also ignored the requirements *Mittelstaedt* places on lessees in the position of the defendants. The court noted that this was the case particularly in the omission to recognize that the defendants did not present evidence going to each of the elements of *Mittelstaedt*.²⁵

The court of appeals affirmed the trial court’s ruling in favor of the plaintiff royalty owners.

B. Court of Appeals reverses certification of class of royalty owners.

The Oklahoma Court of Appeals, in *Whisenant v. Strat Land Exploration Co.*,²⁶ reversed a decision of the District Court of Beaver County certifying a royalty owner *class*. Whisenant sued Strat Land alleging, on behalf of a proposed class of similarly situated royalty owners, the underpayment or non-payment of royalties on natural gas and its constituents from certain Oklahoma wells. The evidence showed that the putative class included approximately eighty-eight Oklahoma wells and approximately 1,000 royalty owners throughout the United States.²⁷ The proposed class wells were located within, or adjacent to, Ellis, Harper, Beaver and Texas Counties.²⁸

Whisenant asserted that one of the issues of law and fact common to the proposed class was “whether gas [is] in Marketable Condition at the meter run/gathering line inlet”.²⁹ He additionally argued, among other issues, that Strat Land paid royalty to him and to the proposed class using a common method based on the *net revenue* Strat Land received under its marketing contracts rather than paying royalties based on the *gross amount* received

23. The court also referred to “PIP” contracts which were not defined in the opinion. *Id.* ¶ 45.

24. *Id.*

25. *Id.* ¶ 47.

26. 2018 OK CIV APP 65, 429 P.3d 703.

27. *Id.* ¶ 15 n.11.

28. *Id.* ¶ 2.

29. *Id.* ¶ 3.

by the midstream purchaser from its sale of the gas at interstate or intrastate markets.³⁰

The district court certified a class, subject to a series of exclusions not described below, consisting of all royalty owners in Oklahoma wells that:

- (a) [were] operated by [Strat Land]; (b) marketed by Strat Land to DCP Midstream (f/k/a Duke Energy Field Services)' and (c) that have produced gas and/or gas constituents (such as residue gas, natural gas liquids, helium, or condensate) from February 12, 2009 to the time Class Notice is given³¹

The district court granted class certification under OKLA. STAT. tit. 12, § 2023(B)(3). Strat Land filed an interlocutory appeal of the class certification order.³²

The court of appeals observed that the primary issue on appeal is whether there are common questions of law or fact. However, since the class was certified below under OKLA. STAT. tit. 12, § 2023(B)(3), the court noted the additional requirement that common issues *predominate* over other questions. The court stated, early in its discussion, that “[i]n the present case, class certification is inappropriate because a ‘highly individualized’ review of the facts pertaining to each of the numerous wells is necessary.”³³ In concluding that the lower court’s order granting class certification should be reversed, certain of the key findings of the court of appeals included the following:

First, the court found that the standards in Oklahoma for determining whether certain types of post-production costs may be deducted in the computation of gas royalty payments, as recognized in the landmark case of *Mittelstaedt v. Santa Fe Minerals, Inc.*,³⁴ require a fact-intensive inquiry. That the trial court found “that Strat Land had a common corporate policy of not paying royalty on the gross value of the gas produced under the leases”³⁵ was insufficient to satisfy the predominance requirement of OKLA.

30. *Id.* ¶ 4.

31. *Id.* ¶ 5.

32. Under Oklahoma state court procedure, an order granting or denying class certification is “subject to a de novo standard of review by any appellate court reviewing the order.” 12 OKLA. STAT. SUPP. 2014 § 2023(C)(2).

33. The Oklahoma Court of Appeals cited in support of this conclusion its earlier decision in *Strack v. Cont'l Res., Inc.*, 2017 OK CIV APP 53, ¶ 32, 405 P.3d 131, *cert. denied*.

34. 1998 OK 7, 954 P.2d 1203.

35. *Id.* ¶ 12.

STAT. tit. 12, § 2023(B)(3).³⁶ Rather, in discussing the complex analysis of determining whether the costs deducted in the computation of gas royalties were expenses necessary to make the gas a *marketable product*, the court of appeals stated that “highly individualized and fact-intensive review of each Class Members’ claim would be necessary to determine if [the defendant] underpaid oil or gas royalties.”³⁷

Second, as a consequence of the above, the court of appeals rejected Whisenant’s contention that “[c]lass action treatment will allow a large number of similarly situated individuals to prosecute their common claims in a single forum, simultaneously, efficiently, and without duplication of time, expense and effort on the part of those individuals, witnesses, the courts and/or [Strat Land].”³⁸ The court was likewise unpersuaded by Whisenant’s contention that disposing of the case as a class action would “avoid the possibility of inconsistent and/or varying results in this matter arising out of the same facts.”³⁹

Third, the Oklahoma Court of Appeals declined Whisenant’s assertion that “determination of the quality of gas and other facts pertinent to each well are susceptible to generalized proof.”⁴⁰

Fourth, the appellate court rejected the use of assumptions parallel to those used in the case of *Tyson Foods, Inc. v. Bouaphakeo*,⁴¹ finding:

[A]n assumption analogous to that forwarded by the employees in *Tyson*—*i.e.*, an assumption that, for each gas well within the proposed class, the royalty-valuation point and deductible costs can be set at the same average point and amount — is unwarranted.⁴²

The court concluded that a class-wide determination based either on the variables as they exist with Whisenant’s one well “or on an average sampling (*i.e.*, of gas quality, proximity of interstate pipelines, availability

36. The court of appeals cited *EQT Production Co. v. Adair*, 764 F.3d 347 (4th Cir. 2014) (“Even a plethora of identical practices will not satisfy the predominance requirement if the defendants’; common conduct has little bearing on the central issue in the litigation – in this case, whether the defendants underpaid royalties.”)

37. Citing *Strack v. Cont’l Res., Inc.*, 2017 OK CIV APP 53, ¶ 32, 405 P.3d 131, and *Foster v. Apache Corp.*, 285 F.R.D. 632, 638 (W.D. Okla. 2012).

38. *Whisenant*, 2018 OK CIV APP 65, ¶ 16, 429 P.3d at 710 (internal quotation omitted).

39. *Id.*

40. *Id.* ¶ 17.

41. 136 S.Ct. 1036 (2016).

42. *Whisenant*, 2018 OK CIV APP 65, ¶ 20, 429 P.3d at 710-11.

and proximity of processing plants, market realities, and so forth) would result in distorted and inconsistent awards to the various members of the class.”⁴³ Citing *Tyson Foods, Inc. v. Marez*,⁴⁴ the court noted that “a judgment must be based upon evidence that establishes essential facts as probably, not merely possibly being true.”⁴⁵

Fifth, the court of appeals found “[a] reliance upon facts derived from other wells would be as impermissible as it would have been to determine liability in *Wal-Mart* based upon generalized evidence derived from other store managers.”⁴⁶ The court of appeals rejected the plaintiff’s assertion that class action certification was appropriate here based on their contention that the case would rely on admissible expert testimony to prove class-wide liability.

Finally, the court held that, even if Strat Land paid royalties to the members of the putative class using a common method, “the establishment of this common fact fails to resolve the issue of liability, an issue which remains individual rather than common.”⁴⁷ The court specifically rejected Whisenant’s contention that the alleged common method was either right or wrong, class-wide.

Concluding that the predominance and superiority requirements for class certification under OKLA. STAT. tit. 12, § 2023(B)(3) were not satisfied in this case, the court of appeals reversed the trial court’s order granting class certification. Whisenant’s subsequent petition for certiorari review by the Oklahoma Supreme Court was denied by order issued on October 1, 2018. Mandate was issued on October 31, 2018.

III. Oil and Gas Lease Cancellation, Termination and Breach of Obligation Cases (Other Than Royalty)

A. Oklahoma Supreme Court resolves oil and gas lease termination claims, the “capability” doctrine and related legal principles.

The case of *Hall v. Galmor*,⁴⁸ presented the appeal of the trial court’s judgment, after a bench trial, denying the appellants’ petition to cancel oil and gas leases of the appellee. “Between the years 1954 and 2008, the predecessors-in-interest [to Galmor] entered into 30 oil and gas leases

43. *Id.* ¶ 21.

44. 1996 OK CIV APP 137, ¶ 8, 931 P.2d 760.

45. *Whisenant*, 2018 OK CIV APP 65, ¶ 16, 429 P.3d at 711.

46. *Id.* ¶ 22.

47. *Id.* ¶ 23.

48. 2018 OK 59, 427 P.3d 1052.

covering mineral interests in lands located in Beckham County, Oklahoma.”⁴⁹ All 30 leases contained habendum clauses that made the leases valid for primary terms lasting between 90 days and 10 years, and then for secondary terms thereafter lasting as long as oil or gas was “produced” from the leased premises.⁵⁰ Some 29 of the leases also contained “cessation of production” clauses that gave the lessee a grace period ranging between 60 days and 6 months during which to re-establish production either by reworking the existing well or by drilling a new well.⁵¹

Galmor’s predecessors-in-interest drilled seven wells during the primary terms of the leases. Those wells were located on lands covered by fourteen of the 30 leases at issue. The lands covered by two of the fourteen leases were also subject to voluntary pooling agreements with lands covered by six more leases on which no wells had been drilled. The lands covered by the remaining ten leases did not have completed wells and were not otherwise held under a voluntary pooling agreement or a statutory spacing unit. During the secondary terms of the fourteen leases on which wells had been drilled, six of the seven wells actually produced oil and gas. Some of the wells drilled prior to the 1990’s ceased production for a number of years during that decade, but afterwards attained their previous production levels.⁵²

Writer’s Note: The 36-page opinion in the *Hall* case (when viewed on the OSCN website) contains multiple pages describing the factual and procedural background in this factually-complex lawsuit. The readers are referred to that opinion for a description of the additional facts and history of the case. In the interest of brevity, this summary of the *Hall* decision will now move to a description of *some* of the many rulings in the case.

In May 2016, at the conclusion of a two-day bench trial, the trial court issued judgment against Hall on his lease termination claims and other claims. The district court relied on the Oklahoma Supreme Court’s prior decision in *Pack v. Santa Fe Minerals, Inc.*,⁵³ where the court held that a lease will continue as long as the well is capable of production in paying quantities subject, of course, to any violations of any other express provisions such as the shut-in royalty clause or implied covenants such as the covenant to market. The trial court also relied upon *James Energy Co. v.*

49. *Id.* ¶ 1.

50. *Id.*

51. *Id.*

52. *Id.* ¶¶ 2–3.

53. 1994 OK 23, ¶ 21, 869 P.2d 323, 329.

HCG Energy Corp.,⁵⁴ where the court held that “the lessor must demand that an implied covenant be complied with before a court of equity will grant a forfeiture” and that “the lessor, not a stranger to the lease . . . , must make demand on the lessee to comply with the implied covenants.”⁵⁵

The trial court specifically found that all seven of the wells at issue were capable of producing in paying quantities during the period they were shut in, and that no demand to comply with implied covenants was made by the royalty owners to the lessees. Hall appealed the trial court’s judgment to the Oklahoma Supreme Court which retained the appeal. In affirming in part, and reversing in part, the judgment of the trial court, some of the pertinent rulings of the court were as follows:

1. Hall argued on appeal that, in order for a well to be “capable” of producing in paying quantities, “the well must be maintained in turn-key condition such that it will produce in paying quantities immediately upon being turned ‘on.’”⁵⁶ The court found that this proposed definition was first announced by the Texas Court of Appeals in a 1993 decision.⁵⁷ The Oklahoma Supreme Court had earlier stated that “the characteristic that distinguishes a ‘shut-in’ well from a wells experiencing a ‘cessation of production’” is that the well is “capable” of production in paying quantities in the first situation.⁵⁸ In assessing whether a well is “capable” of producing in paying quantities, the court ruled that the relevant time period to be considered is the moment prior to the shutting-in of the well. “So long as the well was complete and was producing in paying quantities when it was shut in, the well remains ‘capable’ and the habendum clause in the leases remains satisfied throughout the shut-in period.”⁵⁹ The court affirmed the trial court’s rejection of Hall’s proposal that Oklahoma courts adopt the Texas rule and require operators to continually maintain their shut-in wells in turn-key condition.⁶⁰

2. The Oklahoma Supreme Court then reviewed the evidence presented at trial bearing on the capability of the subject wells. Hall primarily

54. 1992 OK 117, ¶¶ 17–18, 847 P.2d 333, 338.

55. *Hall*, 2018 OK 59, ¶ 10.

56. *Id.* ¶ 23.

57. *Id.* ¶ 24 (citing *Hydrocarbon Management, Inc. v. Tracker Exploration, Inc.*, 861 S.W.2d 427 (Tex. App. 1993)). The Texas Supreme Court is cited as having later approved that definition of “capability” in its decision in *Anadarko Petroleum Corp. v. Thompson*, 94 S.W.3d 550, 558 (Tex. 2002).

58. *Hall*, 2018 OK 59, ¶ 21.

59. *Id.* ¶ 26.

60. *Id.*

challenged the trial court's factual finding of capability on the basis that the wells were in disrepair after being shut-in for over four years. The court found that its analysis in the preceding discussion (paragraph 1, above) disposed of this argument. Evidence of the wells' *current or post-shut-in condition* is not relevant to whether the wells were capable of producing in paying quantities on the date the wells were shut-in.⁶¹

3. This court's affirmation of the trial court's finding of "capability" prevents Hall from contending that "production" ceased. As previously stated, the court defined the term "production" as meaning "capable of producing in paying quantities." If the wells are capable of paying production, then they must be considered producing wells, and the habendum clauses permitting the leases to continue "for so long . . . as oil or gas continues to be produced" have not been breached. Consequently, the trial court did not err in finding the leases were still viable.⁶²

4. Hall further contended that the *cessation of production clauses* of the oil and gas leases resulted in the termination of the leases. However, citing *Pack v. Santa Fe Minerals*,⁶³ the court found that a well's capability to produce in paying quantities will satisfy both the habendum clause and the cessation of production clause of the lease, and the cessation of production clause is only triggered where a well has become *incapable* of paying production.⁶⁴

5. Hall next argued that the above outcomes would allow a lessee to "sit" on a well capable of production in paying quantities, without any actual production, for an indefinite time period, thereby rendering the cessation of production time limits of no effect. However, the court responded by observing that the lessor could make a written demand for compliance with the implied covenant to market, which would force the lessee to commence actual production of the gas out of the ground and market the production or else face the possibility of lease cancellation.⁶⁵

6. The court found that the trial court addressed Hall's claims for breach of the express lease terms by finding that the wells were capable of "paying production," and then proceeded to assess whether the leases could be cancelled for breach of any other express or implied provisions or covenants. The trial court correctly found that the leases could not be

61. *Id.* ¶¶ 27–29.

62. *Id.* ¶ 33.

63. 1994 OK 23, 869 P.2d 323.

64. *Id.* ¶¶ 34–37.

65. *Id.* ¶¶ 38–39.

canceled due to a failure to satisfy the prerequisite for a *demand to market* made by the lessors.⁶⁶

7. Hall additionally argued that Oklahoma's statutory Pugh clause⁶⁷ required the trial court to invalidate Galmor's interest in the Pugh Clause Lands—*i.e.*, those portions of the leased lands falling outside the two 160-acre spacing units.⁶⁸ Hall argued that Section 87.1(b) “would permit Galmor to retain the Pugh Clause Lands only if a producing well had been drilled on those lands within a 90-day grace period following expiration of the lease's primary term, which did not happen.”⁶⁹ After a detailed review and discussion of this so-called statutory Pugh clause, the court concluded that the effect of OKLA. STAT. tit. 52, § 87.1(b) is as follows: In cases of spacing units of 160 acres or more, a producer will have 90 days after the expiration of the primary term of the lease to develop the lands outside the spacing unit. If the producer does not do so, the lease will expire as to those lands.⁷⁰ The court further stated “[s]ection 87.1(b) was meant to prevent a unit well's production from satisfying the habendum clause of *any lease* for more than ninety days beyond the expiration of the primary term as to acreage outside of the unit when the leased premises, or any portion thereof, is included in a unit of 160 acres or more.”⁷¹ Consequently, the court concluded that Galmor's leasehold interests in the Pugh Clause Lands should be forfeited, “unless he can demonstrate that Section 87.1(b) is somehow unconstitutional.”⁷² The court then found the statute to be constitutional.⁷³

8. Finally, Hall argued that the trial court erred in quieting title in favor of Galmor in lands covered by Non-Unit oil and gas leases (*i.e.*, leases covering lands on which no well had ever been drilled by Galmor or his predecessors). Since no wells were ever drilled on those lands and there was no evidence showing that such lands had been included in a spacing unit or pooling agreement, the habendum clauses of the Non-Unit leases were not satisfied. Galmor's leasehold rights in those lands terminated upon the expiration of the primary terms of the Non-Unit leases. The trial court erred in quieting title to that portion of the lands in Galmor. Title should

66. *Id.* ¶¶ 40–42.

67. 52 O.S. § 87.1(b).

68. *Id.* ¶ 43.

69. *Id.*

70. *Id.* ¶ 51.

71. *Id.* ¶ 54.

72. *Id.* ¶ 55.

73. *Id.* ¶¶ 56–66.

instead be quieted in favor of Hall due to his Top Leases covering those lands. To the extent the court reversed the trial court's judgment against Hall on his quiet title claims concerning the Pugh Clause Lands and lands covered by Non-Unit leases, the court likewise vacated the portion of the judgment denying his cause of action for slander of title as to those lands.⁷⁴

The court remanded the case, based on the above rulings, with instructions to conduct further proceedings in a manner consistent with the court's opinion.⁷⁵

IV. Oil and Gas Contracts, Transactions and Title Matters

A. Court addresses dispute over whether a binding contract to sell oil and gas properties was formed as a result of e-mail negotiations and communications.

The court's ruling in *Le Norman Operating LLC v. Chalker Energy Partners III, LLC*,⁷⁶ is likely to be criticized by those who favor certainty in contracting. The *Le Norman* case addresses several issues that can easily arise, and lead to litigation, in energy and resources transactions. It illustrates the complications and resulting litigation risks associated with (a) negotiating the more-detailed terms of a transaction by e-mail, (b) engaging in communications and negotiations governed by the Uniform Electronic Transactions Act, *infra*, and (c) attempting to contract with (or as a part of) a group of counter-parties aligned in the transaction but with each having its own individual decision whether to accept or reject the final proposals.

The Chalker Energy parties (Sellers) desired to sell their interests in certain oil and gas properties located in the Texas panhandle. They engaged the Raymond James firm to conduct the sale process. The group of Sellers also designated Chalker Energy Partners (Chalker Energy) to function as their designated agent in conducting the sale.⁷⁷ Remora, one of the Sellers, monitored the sales efforts and reported back to the other Sellers. "The Sellers entered into the 'Chalker Engagement Agreement,' which set out the process by which potential sales of [the assets] would be considered."⁷⁸

74. *Id.* ¶¶ 67–69.

75. *Id.* ¶ 70.

76. 547 S.W.3d 27 (Tex. App. – Hou. 2017).

77. *Id.* at 31.

78. *Id.*

In August 2012, Raymond James sent an e-mail to potential buyers announcing the sale of the assets and advising as to the person to whom interested parties should direct their inquiries. Le Norman was one of the parties who received that e-mail and decided to engage in the bidding process.⁷⁹ On September 30, 2012, Le Norman and Chalker signed a confidentiality agreement so that Le Norman could view the information in the virtual data room concerning the assets and participate in the bid process. A form Purchase and Sale Agreement was available in the data room for potential buyers to review.⁸⁰ In addition to confidentiality provisions, the confidentiality agreement provided in relevant part, in section 18:

No Obligation. The Parties hereto understand that unless and until a definitive agreement has been executed and delivered, no contract or agreement providing for a transaction between the Parties shall be deemed to exist and neither Party will be under any legal obligation of any kind whatsoever with respect to such transaction by virtue of this or any written or oral expression thereof, except, in the case of this Agreement, for the matters specially agreed to herein. For purposes of this Agreement, the term “definitive agreement” does not include an executed letter of intent or any other preliminary written agreement or offer, unless specifically so designated in writing and executed by both Parties.⁸¹

The confidentiality agreement further stated that Chalker Energy

reserves the right, in its sole discretion, to: ... (c) discontinue consideration of a transaction at any time; (d) reject any and all proposals made by any party with regard to a transaction; (e) terminate discussions and negotiations with [Le Norman] or any party at any time for any reason; and (f) conduct the process relating to a possible transaction in any manner it deems appropriate or change the procedure for conducting that process.⁸²

Raymond James made a presentation to potential bidders, which Le Norman attended, advising as to the bid procedure and the use of the virtual

79. *Id.* at 32.

80. *Id.*

81. *Id.*

82. *Id.*

data room containing detailed information regarding the assets and other materials. The potential bidders were instructed to include with their bids a marked copy of the proposed form of purchase and sale agreement provided in the data room, indicating additions or deletions required by the bidder in order to sign the document as a definitive purchase and sale agreement.⁸³ The bidders were advised that, once Chalker Energy received bids, each member of the Sellers group “shall be given 24 hours to elect to sell their interest once the purchase price has been determined.”⁸⁴ The presentation further advised potential bidders that, “[u]pon the negotiation of the PSA, each [Seller] shall be given 48 hours to elect to accept the terms of the PSA and execute the appropriate documents.”⁸⁵

The data room presentation provided a further disclaimer to Le Norman and the other potential bidders, stating:

[Chalker Energy] reserves the right to negotiate with one or more prospective parties at any time and to enter into a definitive agreement for a transaction without prior notice to you or to other prospective parties. [Chalker Energy] also reserves the right to terminate, at any time, further participation in the due diligence and proposal process by any party and to modify any procedures without providing any reason therefore. [Chalker Energy] intends to conduct its business in the ordinary manner during the evaluation and offer period; however, [it] reserves the right to take any action, whether in or out of the ordinary course of business, which in its sole discretion it deems necessary or prudent in the conduct of such business.⁸⁶

On November 5, 2012, Le Norman submitted a bid via e-mail offering \$322 million for 100% of the assets (*i.e.*, requiring that all members of the Seller group agree to sell under the proposed terms). Le Norman’s bid stated that it was subject to the execution by the parties of a mutually acceptable Purchase and Sale Agreement. Le Norman also included with its bid a redlined copy of the proposed form of purchase and sale agreement showing the changes required by Le Norman. Chalker Energy and Remora both indicated that the changes of Le Norman were insignificant.⁸⁷

83. *Id.* at 33.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 33–34.

“Upon receipt of the first round of bids, Raymond James asked the two highest bidders, [Le Norman] and Jones Energy, to increase their bids.”⁸⁸ Le Norman revised its bid to \$345 million for 100% of the assets, and Le Norman again included a proposed purchase and sale agreement based on the form provided by the Sellers in the virtual data room. Chalker Energy selected Le Norman’s bid to present to the other Sellers and gave them 24 hours to respond. When the elections of the other Sellers resulted in only 82% of the assets being committed to Le Norman’s offer, the parties continued their negotiations and made several offers and counter-offers. Those negotiations were ultimately unsuccessful. On November 14, 2012, Le Norman informed Chalker Energy by e-mail that it would no longer pursue the transaction, however it left open the possibility that some agreement might be reached in the future.⁸⁹

On November 19, 2012, in response to a new offer from the Sellers for a smaller percentage of the assets, Le Norman sent an e-mail to Raymond James proposing new terms. The e-mail subject line stated, “RE: Counter Proposal.”⁹⁰ Among a total of seven deal points, Le Norman offered \$230 million for 67% of the assets and provided that it was subject to a “PSA similar to what we returned with the above caveats,”⁹¹ and also required the execution by the parties of a joint operating agreement (to be attached to the purchase and sale agreement) and a non-compete agreement. Unlike Le Norman’s prior bids, this counter proposal did not make any reference to the bid procedure and it advised Raymond James that Le Norman would not accept any changes to the proposal and would not extend the deadlines stated in its proposal.⁹²

On November 20, 2012, Raymond James replied to Le Norman’s counter proposal, stating: “We have the group on board to deliver 67% subject to a mutually agreeable PSA. We are calling to discuss next steps and timing. Chalker *et al.* will be turning a PSA tonight to respond to your last draft. Please give me a call to discuss scheduling and timing.”⁹³ On the same date, Chalker Energy sent an e-mail to the other members of the Seller group advising of the e-mail sent earlier in the day to Le Norman, discussing the uncertain timing, and asking that the Sellers “monitor your e-mail for updates and/or any requests that may be necessary to complete the

88. *Id.* at 34.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* at 35.

preparation of agreements for the sale.”⁹⁴ The parties continued to work toward finalizing the purchase and sale agreement. The parties needed to complete key exhibits to that agreement, as well as an escrow agreement, non-compete agreement and a joint operating agreement. “E-mails continued to pass between the parties including an e-mail from Chalker Energy to [Le Norman] discussing the Assets and referring to them as ‘what is being sold to Le Norman.’”⁹⁵ At the end of the day on November 21st (the day before Thanksgiving Day), Chalker Energy e-mailed Le Norman an updated draft of the purchase and sale agreement and state that it would not expected to hear from Le Norman until Monday, November 26th.⁹⁶

Also on November 21st, a representative from Jones Energy sent a new offer to Chalker Energy that Chalker viewed as providing benefits that the Le Norman deal did not offer. On November 23rd, Chalker submitted ballots to the Sellers to determine if they were willing to negotiate a sale of the assets to Jones Energy, and the Sellers responded in the affirmative. Chalker and Jones Energy negotiated final terms for the purchase and sale agreement.⁹⁷

On November 28, 2012, the Sellers and Jones Energy finalized and signed their purchase and sale agreement. On the same day, Le Norman delivered a purchase and sale agreement to Chalker Energy. Upon learning of the deal reached between the Sellers and Jones Energy, Le Norman sent several letters demanding that the Sellers “honor the contract they had entered into on November 19-20.”⁹⁸ The purchase and sale transaction with Jones Energy proceeded forward and the sale of assets closed on December 12, 2012. However, when Jones Energy learned of the claims and demands of Le Norman, it refused to release the escrowed funds and asserted that the Sellers’ failure to disclose Le Norman’s demands was a breach of the Jones Energy purchase and sale agreement.⁹⁹

Le Norman sued the Sellers asserting that they breached their agreement to sell a 67% interest in the assets for \$230 million.¹⁰⁰ Le Norman also sued Jones Energy for tortious interference with Le Norman’s alleged contract, but that suit was later settled. The trial court granted summary judgment in favor of the Sellers finding, among other things, that the Sellers

94. *Id.*

95. *Id.*

96. *Id.* at 35–36.

97. *Id.* at 36.

98. *Id.*

99. *Id.*

100. *Id.*

had not reached a binding contract to sell any part of the assets to Le Norman. However, the trial court specifically denied Sellers' motion for summary judgment on the grounds of (a) the statute of frauds, with the Sellers contending that there was a failure to include sufficient property descriptions, and (b) Sellers' assertion that there was no acceptance of the alleged offer. The parties appealed.¹⁰¹

In addressing Le Norman's assertion on appeal that a contract had been reached with the Sellers, certain of the key holdings of the Texas Court of Appeals were as follows:

First, the court described some of the pertinent rules of Texas contract law relating to the formation of contracts:

An enforceable and legally binding contract exists if it is sufficiently definite, certain, and clear in its essential terms. A binding agreement may exist when parties agree on some terms sufficient to create a contract, leaving other provisions for later negotiation. When an agreement leaves essential (or material) matters open for future negotiation and those negotiations are unsuccessful, however, the agreement 'is not binding upon the parties and merely constitutes an agreement to agree. The question of what terms are essential to a contract is determined on a contract-by-contract basis, depending on the subject matter of the contract at issue. The parties must have a meeting of the minds and must communicate consent to the essential terms of the alleged agreement, which is determined based on an objective standard of what the parties said and did rather than on their subjective states of mind.¹⁰² [citations omitted]

Second, the court found that the confidentiality agreement provided that a letter of intent or preliminary agreement was not a definitive agreement. However, the confidentiality agreement did not describe what constituted a definitive agreement. After reviewing the facts in this case in detail, including examples of specific members of the Seller group who stated that they intended to enter a binding agreement with Le Norman before a definitive agreement was reached, the court concluded that a fact issue existed as to whether the November 19-20 e-mail chain and subsequent written elections were sufficient to constitute a definitive agreement for the

101. *Id.* at 37.

102. *Id.* at 41.

sale of the assets.¹⁰³ Thus, the court of appeals concluded that the trial court erred in granting summary judgment in favor of the Sellers.¹⁰⁴

Third, the court reversed the trial court's entry of summary judgment in favor of the Sellers based on the Uniform Electronic Transactions Act (UETA) and the trial court's finding that the parties did not agree to conduct business electronically, and because the e-mail lacks an electronic signature.¹⁰⁵ The court first reviewed the pertinent elements of the UETA:

Under the UETA, a legal requirement of a writing can be satisfied with an electronic record, and a legal requirement of a signature can be satisfied by an electronic signature. TEX. BUS. & COM. CODE ANN. § 322.007(c), (d) (West 2015). The UETA applies "only to transactions between parties each of which has agreed to conduct transactions by electronic means." *Id.* § 322.005(b) (West 2015). Contrary to the Sellers' argument, the UETA does not require an explicit agreement to conduct transactions by electronic means, but instead provides, "Whether the parties agree to conduct a transaction by electronic means is determined from the context and surrounding circumstances, including the parties' conduct." *Id.*¹⁰⁶

The court reviewed the facts and circumstances presented in this lawsuit and concluded that "the conduct of the parties here in engaging in negotiations and other relevant business via electronic means constitutes at least some evidence that the parties agreed to conduct some of their transactions electronically."¹⁰⁷ The trial court's summary judgment ruling against Le Norman on this issue was reversed.¹⁰⁸

After addressing other issues in the appeal, the court of appeals affirmed in part and reversed in part the judgment below and remanded the case for further proceedings.¹⁰⁹

103. *Id.* at 41–43.

104. *Id.* at 47.

105. *Id.* at 48.

106. *Id.* at 47.

107. *Id.*

108. *Id.* at 48.

109. *Id.* at 53.

V. Marketing and Refining of Oil and Gas Production

A. Widely followed rulings of the Bankruptcy Court in In re Sabine Oil & Gas Corp., allowing the debtor to reject midstream services contracts, are affirmed by the district court and Second Circuit.

The United States District Court for the Southern District of New York was presented in 2017, in *In re Sabine Oil & Gas Corp.*,¹¹⁰ with the appeal of three highly-publicized rulings of the bankruptcy court in the Chapter 11 proceedings of Sabine Oil & Gas Corp. Those rulings determined that “appellants’ agreements with Sabine to provide gathering services did not run with the land under Texas property law.”¹¹¹ The court therefore granted Sabine’s motion to reject the agreements as executory pursuant 11 U.S.C. § 365(a). In reviewing the bankruptcy court’s rulings, the district court recognized at the outset:

[I]t is not possible for a debtor to reject a covenant that “runs with the land,” since such a covenant creates a property interest that is not extinguished through bankruptcy. The parties here agree on the foregoing, and therefore their dispute comes down to whether the Agreements run with the land and therefore cannot be rejected pursuant to § 365(a).¹¹²

After a detailed review of pertinent case law and the United States Bankruptcy Code, the court rejected the appellants’ assertion that the gathering services agreements dedicated the oil and gas leases of Sabine to the contracts in a way that conveyed a property interest in the lands. Rather, the court concluded that the agreements granted to appellants “merely [the] contractual right to be the exclusive providers of certain services for gas and condensate produced in certain areas.”¹¹³ Since the agreements did not touch and concern the land, the bankruptcy court did not err in holding that the agreements did not run with the land as real covenants.

The court also rejected the appellants’ argument that agreements constituted equitable servitudes under Texas law. The district court found that the appellants’ agreements did not satisfy the requirements for being equitable servitudes since, among other reasons, the agreements did not

110. 567 B.R. 869 (S.D.N.Y. 2017).

111. *Id.* at 871.

112. *Id.* at 874.

113. *Id.* at 875.

“limit Sabine’s use of its property interests in the Dedicated Areas. Moreover, the Agreements benefit only appellants, not their land.”¹¹⁴

The district court affirmed the orders of the bankruptcy court. The gas processing companies (Nordheim) appealed.

In a decision issued in May 2018,¹¹⁵ the United States Court of Appeals for the Second Circuit addressed the appeal of the judgment of the Southern District of New York. The parties to the appeal agreed that for a real covenant to run with the land under Texas law, it must (in addition to three other requirements that were not in dispute) touch and concern the land, and whether the legal test includes a requirement of horizontal privity.

The Second Circuit found that it did not need to determine whether the agreement “touches and concerns” the land, because it found that Texas law still required horizontal privity and that test was not met in this case. In order for the parties to the original agreement to have been in horizontal privity with one another, there must have been some common interest in the land other than the purported covenant itself at the time it was executed.¹¹⁶ The court agreed with the bankruptcy court that horizontal privity remained a requirement of Texas real covenants.

The court then rejected Nordheim’s contention that horizontal privity of estate is established through the separate agreements conveying the pipeline easement and a separate parcel of land. The bankruptcy court below determined that this separate conveyance was insufficient to establish horizontal privity of estate. The Second Circuit agreed with the bankruptcy court.¹¹⁷

The order of the district court was affirmed.

B. Court finds that the transportation of liquid propane is not an ultrahazardous activity for purposes of strict liability.

The case of *Elmore v. Dixie Pipeline Company*,¹¹⁸ involved an appeal of the trial court’s summary judgment rulings in favor of Dixie, as well as an appeal of the court’s ruling that the testimony of plaintiff’s expert was inadmissible as to the standard of care for pipeline operators and related issues. Dixie operates a pipeline extending approximately 1,100 miles from Texas to North Carolina. Liquid propane is transported through the pipeline. On November 1, 2007, the pipeline ruptured at a location

114. *Id.* at 877.

115. *In re Sabine Oil & Gas Corporation*, 734 Fed. Appx. 64 (2d Cir. 2018).

116. *Id.* at 66.

117. *Id.* at 67.

118. 245 So.3d 500 (Miss. App. 2017).

approximately 1.1 miles from Elmore's home. Elmore sued Dixie, as operator of the pipeline, asserting that "her house suffered structural damage as a result of the shockwaves from the explosion."¹¹⁹ Elmore asserted claims of negligence, strict liability and punitive damages.

Prior to trial, the circuit court granted summary judgment in favor of Dixie as to Elmore's claims for strict liability, punitive damages and negligence. The court also excluded the testimony of Elmore's expert witness Dr. Clarke, a metallurgical engineer. Elmore appealed.

As a foundational matter, the court recognized that the National Transportation Safety Board (NTSB) investigated the pipeline rupture at issue in this case and reached certain conclusions. "Importantly, the NTSB concluded that the following were not factors in the rupture: corrosion, excavation damage, the controller's actions, or the operating conditions of the pipeline."¹²⁰ The NTSB ultimately concluded that "the probable cause" of the subject pipeline rupture "was the failure of a weld that caused the pipe to fracture along the longitudinal seam weld, a portion of the upstream girth weld, and portions of the adjacent pipe joints."¹²¹

The court of appeals addressed the exclusion of Dr. Clarke's proposed testimony regarding the standard of care of pipeline operators and the alleged breach of that standard by Dixie. The court evaluated the proposed expert testimony under Rule 702 of the Mississippi Rules of Evidence¹²² and *Daubert v. Merrell Dow Pharmaceuticals, Inc.*¹²³ After reviewing in detail the materials relied upon by Dr. Clarke, certain materials he did not review and rely on, the information and opinions that would be relevant to the plaintiff's claims and conflicts between the NTSB's report and the opinions of Dr. Clarke, the court affirmed the circuit court's exclusion of his testimony. The court found in part: "Since Dr. Clarke lacked familiarity with or understanding of the federal regulations and standards, the circuit

119. *Id.* at 502.

120. *Id.*

121. *Id.* (internal citation omitted)

122. Rule 702 stated at the time of these proceedings: "If scientific, technical or other specialized knowledge will assist the trier of fact in understanding the evidence or determining a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training or education, may testify in the form of an opinion or otherwise if (1) the testimony is based upon sufficient facts or data, (2) the testimony is a product of reliable principles and methods, and (3) the witness has applied the principles and methods reliably to the facts of the case." *Id.* at *3.

123. 509 U.S. 579, 589, 113 S.Ct. 2786, 125 L.Ed.2d 469 (1993).

court properly excluded his ability to opine as to the standard of care for pipeline operators or any violation of that standard of care by Dixie.”¹²⁴

Turning to the circuit court’s dismissal of Elmore’s strict liability claims, the court considered the six factors set forth in the RESTATEMENT (SECOND) OF TORTS Section 520:

(a) existence of a high degree of risk of some harm to the person, land[,] or chattels of others, (b) likelihood that the harm that results from it will be great, (c) inability to eliminate the risk by the exercise of reasonable care, (d) extent to which the activity is not a matter of common usage, (e) inappropriateness of the activity to the place it was carried on, and (f) extent to which its value to the community is outweighed by its dangerous attributes.¹²⁵

The court noted that the transportation of liquid propane is a regulated commercial activity, subject to state and federal regulations. Moreover, it found that “the transportation of liquid propane is of great value to commerce and local, regional, and nationwide communities.”¹²⁶ The court concluded that, overall, the transportation of liquid propane does not constitute an ultrahazardous activity.

With respect to the lower court’s dismissal of the plaintiff’s negligence claim, in light of the exclusion of her expert’s testimony, Elmore asserted on appeal that the doctrine of *res ipsa loquitur* should have been applied. However, the court of appeals concluded that this doctrine was not available to the plaintiff because the second element of the doctrine (*i.e.*, “the injury must be such that in the ordinary course of things it would not occur if those in control of the instrumentality used proper care”¹²⁷) was not demonstrated by the plaintiff. Rather, the court reviewed particular aspects of the evidence presented to the circuit court and found that “there is simply no evidence that in the ordinary course of things, the pipeline would not have ruptured had Dixie used proper care.”¹²⁸

Finally, the court concluded that its affirmance of the dismissal of the plaintiff’s claims of strict liability and negligence rendered moot any consideration of the circuit court’s dismissal of the claim for punitive damages.

124. *Elmore*, 245 So.3d at 506.

125. *Id.* at *6-*7 (citing RESTATEMENT (SECOND) OF TORTS § 520 (AM. LAW INST. 1977)).

126. *Id.* at *7.

127. *Id.* at *8.

128. *Id.*

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

*A. Court of Appeals upholds the “larger parcel” valuation method in
determining the value of the property taken.*

The case of *State ex rel. Dept. of Transportation v. H&L Double MC, LLP*,¹²⁹ involved a condemnation action filed by the Oklahoma Department of Transportation (“ODOT”). The landowner filed this appeal from the trial court’s journal entry on the jury verdict. The commissioners appointed by the trial court to appraise the 3.36 acres of land at issue determined that H&L was entitled to receive just compensation in the amount of \$103,850.00. H&L and the ODOT both filed demands for a jury trial, although H&L later withdrew its demand.

At the conclusion of the jury trial, the jury returned a verdict determining the value of the taking to be \$30,400.00. However, the verdict included a note indicating a value of twenty-two cents a square foot. Because the verdict could not be reconciled, the trial court granted H&L’s motion for new trial. The case proceeded to a new, second trial. The jury returned a verdict of \$33,000.00. H&L appeals.

On appeal, H&L asserted that the trial court erred in the admission of ODOT’s expert appraiser’s appraisal and his testimony regarding the same. H&L alleged that Grace’s appraisal was based on a “larger parcel” valuation method that was held unconstitutional in *State ex rel. Department of Transportation v. Caliber Development Co.*¹³⁰ However, the court of appeals found that, contrary to H&L’s assertion, *Caliber* did not hold that the larger parcel method of valuation was unconstitutional. In *Caliber*, with respect to the larger parcel method, the court of appeals found the expert was permitted to extensively testify about the valuation method. Contrary to H&L’s assertions on appeal, the court of appeals did not address or hold that the method was constitutionally invalid.

In this case, Grace specifically testified that he used the larger parcel valuation method in determining a value for the property. H&L has not provided the court with any authority that this is a constitutionally invalid method of valuation. This assertion of error is denied.

H&L further asserts that Grace’s appraisal “was based on the unconstitutional ‘before-and-after’ valuation method,”¹³¹ citing *Caliber* at ¶

129. 2018 OK CIV APP 54, 423 P.3d 702.

130. 2002 OK 60, ¶ 36, 52 P.3d 1014, 1033.

131. *H&L Double MC, LLP*, 2018 OK CIV APP 54, at ¶ 13.

10. The court of appeals disagreed and found that Grace's appraisal was based on the larger parcel method. So, this assertion of error was denied.

The court of appeals affirmed the trial court's judgment from the conclusion of the second trial.

See also, *State ex rel. Dept. of Transportation v. Pennington*,¹³² in which the court of appeals affirmed the judgment below, rejecting multiple assertions by the landowner that the trial court erred in connection with the condemnation proceedings below.

B. Court holds that wind energy developer's excavation work in construction of wind turbines constituted "mining" under federal regulations applicable to the Indian lands.

The case of *United States v. Osage Wind, LLC*,¹³³ involved a 2010 lease by Osage Wind of solely *surface rights* to approximately 8,400 acres of private fee land in Osage County, Oklahoma. Osage Wind leased the land for the purpose of building a commercial wind farm—a facility that collects and stores wind-generated electricity. The court described the proposed project as follows:

The planned wind-farm involved the installation of eighty-four wind turbines secured in the ground by reinforced concrete foundations, underground electrical lines running between the turbines and a substation, overhead transmission line, meteorological towers, and access roads. These structures would occupy around 1.5 percent of the total acreage of leased surface land. In September 2011, OMC [Osage Mineral Council] and the United States expressed concern that the planned project would interfere with oil and gas production by blocking access to the mineral estate.¹³⁴

In light of the foregoing concern, the OMC filed suit in October 2011 to prevent Osage Wind from constructing the proposed wind farm.¹³⁵ In that lawsuit, OMC alleged "that the planned wind farm would unlawfully deprive OMC's oil-and-gas lessees of reasonable use of the surface estate."¹³⁶ The court ruled against OMC in that case because there was no

132. 417 P.3d 1274, 2018 OK CIV APP 39.

133. 871 F.3d 1078 (10th Cir. 2017).

134. *Id.* at 1083.

135. *See Osage Nation ex rel. Osage Minerals Council v. Wind Capital Grp., LLC*, No. 11-CV-643-GKF-PJC, 2011 WL 6371384 (N.D. Okla. Dec. 20, 2011).

136. *Osage Wind, LLC*, 871 F.3d at 1083 (10th Cir. 2017).

evidence that the oil and gas lessees were planning to use the surface estate in a manner that would conflict with Osage Wind's proposed use of the land.

In October 2013, Osage Wind began site preparation and road construction for the wind farm. Excavation work for the wind turbines had begun by September 2014.

Each turbine required the support of a cement foundation measuring 10 feet deep and up to 60 feet in diameter. . . This process involved the extraction of soil, sand, and rock of varying sizes—all of which was of a common mineral variety, including limestone and dolomite. Rock pieces smaller than 3 feet were crushed into even smaller sizes.¹³⁷

In November 2014, the United States, as trustee for the mineral estate on behalf of the Osage tribe, sued Oklahoma Wind to halt the excavation work. In that lawsuit, the U.S. ultimately sought damages based on the alleged unauthorized extraction of reserved minerals. In particular, the U.S. asserted that the sand, soil and rock extraction activities of Osage Wind “was ‘mining’ under 25 C.F.R. § 211.3 and thus required a mineral lease under 25 C.F.R. § 214.7.”¹³⁸ The district court granted summary judgment in favor of Osage Wind and ruled that the excavation work did not constitute mining under Section 211.3, with the result that the leasing requirement was not triggered under Section 214.7.

On the final day of the appeal deadline, the United States advised OMC that it did not intend to appeal the district court's ruling. Although the OMC was not a party to the proceedings before the district court, the Tenth Circuit allowed OMC to appeal the summary judgment. It found that OMC had a “unique interest in this case entitling it to appeal without having intervened below.”¹³⁹

The Tenth Circuit began its review of the liability issues in the case by describing its assessment of what it perceived to be key underlying facts:

137. *Id.*

138. *Id.*

139. *Id.* at 1086. The court emphasized that “[a] generalized interest in vindicating a legal right is not enough to trigger our unique-interest exception. An interested person must have a particularized and significant stake in the appeal, and must further demonstrate cause for why he did not or could not intervene in the proceedings below. OMC's interest here is particularized and significant because the Osage Nation *owns* the beneficial interest in the mineral estate at use.”

Osage Wind engaged in large-scale mineral excavation work to install wind turbines. It first removed rock sediment and soil from the ground, creating large holes into which it could pour a cement foundation for each turbine. Next, it sorted the extracted rock material into small and large pieces, and then crushed the smaller pieces so they would be the proper size for backfilling the holes. Finally, it positioned the bigger rock pieces adjacent to the backfilled excavation sites. All of this was done to add structural support to the large wind turbines installed deep in the ground. The question here is whether this excavation work—digging, sorting, crushing, and backfilling—constitutes “mining” under 25 C.F.R. § 211.3.¹⁴⁰

The district court below “held that the definition of mining *necessarily* involves the commercialization of mineral materials, *i.e.* the sale of minerals.”¹⁴¹ The Tenth Circuit disagreed and found that the text of Section 211.3 “does not indicate that mining is confined to commercializing extracted minerals or relocating them offsite—instead it refers merely to the ‘science, technique, and business of mineral of mineral development.’”¹⁴² The court also rejected Osage Wind’s contention that other regulations suggest that Section 211.3 contemplates that “mining” involves the sale of minerals.

The Tenth Circuit additionally recognized “the long-established principle that ambiguity in laws designed to favor the Indians ought ‘to be liberally construed’ in the Indians’ favor.”¹⁴³

Importantly, the court agreed that “merely encountering or incidentally disrupting mineral materials would not trigger § 211.3’s definition,” and that “the simple removal of dirt does not constitute mining.”¹⁴⁴ However, the court noted that Osage Wind did not merely dig holes in the ground but went further:

After Osage Wind removed the rock materials from each hole, it acted upon the minerals by altering their natural size and shape in order to take advantage of them for a structural purpose. Osage Wind needed to stabilize these tall wind turbines, and

140. *Id.* at 1087.

141. *Id.* at 1089.

142. *Id.*

143. *Id.* at 1090 (citations omitted).

144. *Id.* at 1091 (internal citation omitted).

“develop[ed]” the removed rock in such a way that would accomplish that goal.¹⁴⁵

The Tenth Circuit concluded that “there is ambiguity in the scope of ‘mineral development’ and the extent to which that phrase includes the sorting and crushing of minerals for the purpose of backfilling and stabilization.”¹⁴⁶ Citing again the rule that ambiguous laws designed to favor the Indians are to be liberally construed in the Indians’ favor, the court held that Osage Wind’s excavation work constituted mining under Section 211.3 and that the company was required to secure a federally-approved lease from OMC under Section 214.7. The summary judgment ruling in favor of Osage Wind was reversed and the case was remanded for further proceedings.

C. Court finds that plaintiff-town’s claims for trespass and nuisance with respect to natural-gas compressor stations and metering station were barred by limitations.

In *Town of Dish v. Atmos Energy Corporation*,¹⁴⁷ the town filed suit on February 8, 2011, against the defendant-owners of four natural gas compressor stations and a metering station located just outside the town. The town asserted claims for injuries based upon trespass and nuisance. The evidence in the case showed that the residents of the town began complaining about the noise and odor emanating from those facilities as early as 2006, although arguments were made as to whether the operative facts that would begin the running of the limitations period occurred as early as 2006.

The trial court granted summary judgment in favor of the defendants based on the two-year statute of limitations. The Texas Supreme Court affirmed, finding that the defendant energy companies had “proven that any legal injury the residents suffered commenced, at the latest, in May 2008.”¹⁴⁸ As a result, the two-year statute of limitations barred the town’s claims.

145. *Id.* at 1091-92.

146. *Id.* at 1092.

147. 519 S.W.3d 605 (Tex. 2017).

148. *Id.* at 614.

D. Court finds that county ordinance prohibiting storage and permanent disposal of wastewater was preempted by state law.

Under the facts presented in *EQT Production Company v. Wender*,¹⁴⁹ EQT operated one underground injection control well (UIC) located in Fayette County, West Virginia. The well was used to dispose of wastewater generated by hundreds of conventional vertical producing oil and gas wells operated by EQT both within and outside the county.¹⁵⁰ EQT injected the wastewater underground into a confined, underground formation for permanent disposal.¹⁵¹ EQT's operation of the UIC well was subject to state regulations and was authorized by a state-issued permit. Further, in the interest of protecting underground sources of drinking water, EQT's disposal operations were also subject to federal regulation (administered by the state) under the Safe Drinking Water Act, 42 U.S.C. § 300f *et seq.* which imposes certain regulations on injection wells.

Notwithstanding the state and federal regulations, Fayette County enacted, on January 12, 2016, a blanket ban on all permanent disposal of wastewater within the county.¹⁵² The Ordinance also banned the storage of wastewater at conventional well sites.¹⁵³ The Ordinance stated that the ban would "specifically apply to injection wells for the purpose of permanently disposing of natural gas waste and oil waste."¹⁵⁴ On January 13, 2016, immediately after the ordinance was enacted, EQT filed suit in the United States District Court for the Southern District of West Virginia to enjoin key aspects of the Ordinance as being preempted by state and federal law.

The district court entered a temporary restraining order and preliminary injunction in favor of EQT.¹⁵⁵ Both parties moved for summary judgment. EQT argued that the Ordinance's ban on operation of its state-licensed injection well was preempted by West Virginia's UIC permit program. Because West Virginia's UIC permit program was not only enacted pursuant to state law and also mandated by the federal Safe Drinking Water Act, EQT argued that the Ordinance's ban on injection wells was preempted by federal law. The district court granted summary judgment to

149. 870 F.3d 322 (4th Cir. 2017).

150. *Id.* at 327.

151. *Id.*

152. The ordinance was entitled "Ordinance Banning the Storage, Disposal, or Use of Oil and Natural Gas Waste in Fayette County, West Virginia." *Id.* at 327-328.

153. *Id.* at 336.

154. *Id.* at 328.

155. *Id.*

EQT and permanently enjoined the challenged provisions of the Ordinance.¹⁵⁶ The defendants appealed.

In reviewing the preemption issues presented in this appeal, the Fourth Circuit described one of the first questions to be addressed as being the following:

Under West Virginia law, may the County prohibit EQT from engaging in precisely the activity—permanent disposal of wastewater at the UIC well—that has been sanctioned by a state permit, effectively nullifying the license issued by West Virginia’s DEP pursuant to state statutory authority? . . . We need only determine whether a West Virginia county is authorized to take aim at the permitted activity itself, enacting a blanket prohibition on conduct specifically licensed by the state.¹⁵⁷

The court observed that counties of the State have only the limited powers granted to them by the West Virginia Constitution and the Legislature. The court noted that it would make no sense to assume that the State would delegate to a county, a creature of the State, the power to undo the State’s permitting scheme.¹⁵⁸ Finding that all local law in the State is subject to the implied condition that the law may not be inconsistent with state law and must yield to the predominant power of the state, the court held that the Ordinance’s ban on the operation of EQT’s UIC well was preempted by state law.

The County argued that the savings clause of the West Virginia Water Pollution Control Act,¹⁵⁹ which governs the state’s permitting of UIC wells, recognized that the County had the authority to enact ordinances for the elimination of hazards to the public health and to abate anything the commission determined to be a public nuisance. The court found that the County’s argument proposed an unreasonably broad interpretation of the Water Pollution Control Act’s savings clause. The court concluded that a more logical reading would be to view the clause as providing clarification that the possession of a state permit would not preclude all local regulation touching on the licensed activity. For example, the County might bring a

156. *EQT Prod. Co. v. Wender*, 191 F.Supp.3d 583, 603 (S.D.W. Va. 2016).

157. *Wender*, 870 F.3d at 332.

158. *Id.* at 333.

159. See W. VA. CODE § 22-11-27, which provide in part: “[N]othing herein contained shall abridge or alter rights of action or remedies . . . , nor shall any provisions . . . be construed as estopping the state, municipalities, public health officers, or persons . . . in the exercise of their rights to suppress nuisances or to abate any pollution....”

common law action for public nuisance with respect to state-permitted UIC wells. The Fourth Circuit noted that “[a] county has the ‘power to abate nuisances, not to determine what shall be considered nuisances.’”¹⁶⁰ The court concluded that the Ordinance’s prohibition on all disposal of wastewater in UIC wells was preempted by state law.

The court then reviewed the Ordinance’s restriction on the storage of wastewater at conventional well sites. Having already found that the Ordinance’s core prohibition on permanent wastewater disposal was preempted, the court noted that there was little left to discuss concerning the ancillary storage restriction. Considered separately, the Ordinance’s restriction on storage was found to be inconsistent with the state Oil and Gas Act and was preempted. The Oil and Gas Act vests the state Department of Environmental Protection with “exclusive authority over regulation of the state’s oil and gas resources, including ‘all matters’ related to the ‘development, production, storage and recovery of this state’s oil and gas.’”¹⁶¹ The court found that the DEP’s authority extended to the regulation of the storage of wastewater at conventional production well sites.

The Fourth Circuit affirmed the judgment of the district court in all respects.

E. Court resolves venue issues of lawsuit relating to injection wells permitted by the Texas Railroad Commission.

The case of *Ring Energy v. Trey Resources, Inc.*,¹⁶² presented the *first impression* question of “whether a trial court outside of Travis County has the jurisdiction to enjoin a party with a valid permit from developing and using an injection well based on the claims that the injection well will cause imminent and irreparable injury to the complaining party.”¹⁶³

Trey applied to the Texas Railroad Commission for nine permits to inject fluids into designated wells located in Andrews County, Texas. On January 17, 2013, the Commission granted the applications without any formal hearing.¹⁶⁴ On September 23, 2013, and before any injection operations began, Ring sued Trey in Andrews County. Ring first alleged that the Commission permits were void *ab initio* due to an alleged failure to give

160. *Wender*, 870 F.3d at 336. (citing *Sharon Steel Co. v. City of Fairmont*, 334 S.E. 2d 616, 625 (W. Va. 1985)).

161. *Id.* (citing W. VA. CODE § 22-6-2(c)(12)).

162. 546 S.W.3d 199, (Tex. App. – El Paso 2017).

163. *Id.* at *1.

164. *Id.*

proper notice to Trey's predecessor. Ring further alleged that fluid injection would cause substantial damage to Ring's mineral interest and result in waste, and it sought damages and equitable relief under TEX. NAT. RES. CODE ANN. § 85.321 (West 2011).¹⁶⁵ Finally, Ring asserted "that its interests were in imminent danger of irreparable harm, and sought a temporary restraining order, and a temporary and permanent injunction."¹⁶⁶

Trey moved to dismiss Ring's lawsuit for lack of subject matter jurisdiction. Trey argued that Ring failed to exhaust its administrative remedies before the Commission, and that any appeal of the Commission's order(s) must be filed in Travis County, the county in which the Texas state capitol, and the Commission, are located. Both sides agreed that damages would be available if the injection wells did in fact cause injury, and that Ring could seek pre-damage injunctive relief in Travis County. However, Trey maintained that any suit outside of Travis County would be a collateral attack on a permit issued by the Commission. The trial court granted the motion to dismiss. Ring appealed.

In rejecting Trey's arguments and reversing the trial court's order dismissing Ring's lawsuit, the Texas Court of Appeals emphasized in part the following findings:

First, the general venue provisions in Texas permitted a suit to be filed where all or a substantial part of the events giving rise to the claim occurred.¹⁶⁷ That venue would often be a county other than Travis County.¹⁶⁸

Second, the court rejected Trey's argument that the Texas Railroad Commission held exclusive jurisdiction over injection wells until all administrative avenues had been exhausted. Under the Texas Constitution,¹⁶⁹ "[d]istrict courts are courts of general jurisdiction and generally have subject matter jurisdiction absent a showing to the contrary."¹⁷⁰

Finally, with respect to Trey's assertion that Ring's lawsuit was a collateral attack on an order of the Commission, the court distinguished cases relied upon by Trey as involving specific findings of the Commission that were in conflict with the lawsuit in question. In this case, there were no specific findings by the Commission that might provide the court with

165. *Id.* at *2.

166. *Id.*

167. TEX. CIV. PRAC. & REM. CODE ANN. § 15.002(a) (West 2002).

168. *Ring Energy*, 546 S.W.3d at 211.

169. Tex. Const. art. V, § 8.

170. *Ring Energy*, 546 S.W.3d at 211.

confidence “that the Commission’s expertise was actually applied to the waste potential for the nine wells at issue.”¹⁷¹

For another lawsuit raising other issues with regard to claims by one operator against another alleging that several injection wells were damaging the plaintiff’s interests, see *In re Discovery Operating, Inc.*¹⁷²

VII. Oklahoma Corporation Commission Matters

A. Court resolves dispute as to Commission proceedings brought pursuant to the Oklahoma 2011 Shale Reservoir Development Act, now known as the Oklahoma Extended Horizontal Well Development Act (SRDA).

In *Continental Resources, Inc. v. Fairfield Mineral Company, LLC*,¹⁷³ Continental appealed the Oklahoma Corporation Commission’s order issued on Continental’s application to have four separately designated common sources of supply pooled into a single unit under the Oklahoma 2011 Shale Reservoir Development Act, now known as the Oklahoma Extended Horizontal Well Development Act (SRDA).¹⁷⁴

Continental had already completed a multi-unit horizontal well (the Ritter well) in the Woodford formation. The evidence showed that the Ritter well also penetrated the Mississippian formation. The Hunton formation was shown to be beneath the Woodford. This qualified the Hunton and Woodford to be each considered as “associated common sources of supply” under the SRDA.

The Commission entered its order, now the subject of this appeal, establishing the “Woodford Unit” as consisting of the Woodford common source of supply and its associated common sources of supply (the Mississippian and Hunton) “but only for the purpose of inadvertent penetration into those formation.”¹⁷⁵ The Commission’s order provided that an owner who did not elect to participate in the already-drilled Woodford well would relinquish its rights in the Woodford; however, the owner would only relinquish rights in the Mississippian and Hunton shale formations as to a well that inadvertently penetrated those two formations.¹⁷⁶

171. *Id.* at 215.

172. 216 S.W.3d 898 (Tex. App. – Eastland 2007).

173. No. 116,284 (Companion with Case No. 116,285), Oklahoma Court of Appeals (Decision Issued June 13, 2018 - Not for Publication).

174. OKLA. STAT. tit. 52, §§ 87.6-87.9 (2011).

175. Opinion in No. 116,284, at page 6.

176. *Id.*

The Commission interpreted the SRDA to limit use of each multi-unit horizontal well to the development of a targeted reservoir. As a result, according to the Commission, the additional Mississippian, Springer and Hunton shale formations could not be developed by the Ritter well.

The order of the Commission provided for elections to participate in drilling, or alternatively relinquishment of rights, separately as to each unit. The order specifically stated that any owner subject to the order would have the right to a separate election as between the Woodford, Mississippian and Springer units. In sum, the Commission pooled the units but declined to “aggregate” them for development, election and relinquishment purposes.

Continental appealed the order. It argued that it had the right to pool several discrete common sources of supply such that owners in all the pooled formations would be required to elect to participate in the cost of drilling and completion of the Woodford well—or their right to drill in *all* common sources of supply would be transferred by operation of law to Continental. Fairfield protested, complaining *inter alia* that Continental had declined to recommend separate elections for each of the formations.

After reviewing the case and applicable legal principles, the Oklahoma Court of Appeals concluded that only the Woodford and its associated common sources of supply were “affected units” for the Ritter well. Consequently, this cause never reached consideration of the remaining formations for possible pooling with the Woodford because they are not, under the facts in this case, “affected units” for the Ritter well.¹⁷⁷ The court found that the result was that the SRDA does not, under the facts of this case, provide authority for pooling the four formations.

In conclusion, the court held that Continental sought to aggregate the four shale formations so as to require an election on the Ritter well or relinquishment of rights to drill in all four shale formations. The Commission denied that request and entered an order that pooled the targeted formation and its associated common sources of supply and made separate provisions for other formations. The court concluded that the Commission’s denial of the application was in accord with general pooling law principles applicable at the time of the decision. In addition, the evidence here indicated that only the Woodford and its associated common sources of supply were “affected units.” Therefore, the Commission was found to have reached the correct result under the SRDA.

177. The court noted that the phrase “affected unit” is not separately defined in the OKLA. STAT. tit. 52, § 87.8. However, the court found that the term clearly means the unit where the well is drilled or proposed (here the Woodford unit) together with its associated common sources of supply. *Id.* at 10.

The decision of the Commission was affirmed. The court of appeals specifically stated in its concluding findings that its opinion was limited to the facts of the case.

VIII. Other Energy Industry Cases

A. Tenth Circuit Court of Appeals addresses objections to District Court approval of class settlements in the so-called “hot fuel”¹⁷⁸ litigation.

Proposed class action lawsuits continue to play a significant role in the energy and resources litigation field. In *In re Motor Fuel Temperature Sales Practices Litigation*,¹⁷⁹ the court was presented with multiple proposed class action suits in multiple states (later consolidated as multidistrict litigation) filed on behalf of consumers who purchased gasoline. The suits alleged that the defendant retailers of gasoline failed to control for, or at least disclose, the effects of temperature on the energy value of a gallon of gasoline purchased at the gas pump.¹⁸⁰ Several of the parties entered into class settlements approved by the district court. The present appeals focused on the district court’s approval of the settlement agreements and its interpretation of one of the agreements.¹⁸¹ While the page limitations on this paper do not allow for a summary of the entire lengthy opinion of the Tenth Circuit, a number of the court’s rulings are of particular interest.

First, in addressing an interpretational argument, the court considered the meaning and effect of the commonly-used phrase “including, without limitation.” With respect to the use of that phrase in the paragraph of the settlement agreement at issue with one of the appellants’ arguments, the Tenth Circuit found:

Under [*State v. Larson*, 184 Wash.2d 843, 365 P.3d 740 (2015)], we conclude that Section 4.7’s use of the phrase “including, without limitation” indicates [that the listed contract types provide] “illustrative examples” of the types of agreements that will trigger Section 4.7, “rather than an exhaustive list” of the agreements that will do so, 365 P.3d at 743. But, under *Larson*, we likewise conclude that Section 4.7’s list of “illustrative

178. See Scott Cannon, “Attorneys fees ruling comes in ‘hot fuel,’” KANSAS CITY STAR (Aug. 24, 2016), <http://www.kansascity.com/news/business/article97684152.html>.

179. 872 F.3d 1094 (10th Cir. 2017).

180. *Id.* at 1102.

181. *Id.*

examples” nevertheless demonstrates an “inten[t] to limit the scope of” Section 4.7 to agreements that are “similar” to those examples. 365 P.3d at 743. And, under *Larson*, we reach that conclusion despite the fact that Section 4.7 prefaces its list of illustrative examples with the phrase “including, without limitation.”¹⁸²

Second, the court recognized the general rule that non-settling co-defendants have no standing to object to a proposed class settlement, because “they lack ‘a legally protected interest in the settlement’ and therefore can’t satisfy Article III’s injury-in-fact requirement.”¹⁸³ However, the court found that a “[c]ourts have recognized a limited exception to this rule where non-settling parties can demonstrate they are ‘prejudiced’ by a settlement.”¹⁸⁴ The court noted that prejudice, in this context, “means ‘plain legal prejudice’ as when the settlement strips the party of a legal claim or cause of action.”¹⁸⁵ The Tenth Circuit concluded that plain legal prejudice had not been shown by the non-settling appellants who made that assertion in this case.

Third, an appellant presented a novel argument regarding the inclusion of go-forward provisions in the class settlements. Appellant objected to the settlement agreements’ release provisions that enjoined settlement class members from suing the defendants for future actions taken by the defendants that were authorized or required by the settlement agreements. The appellant argued that if a plaintiff tried to sue defendants today alleging that their gasoline sales practices in future years would violate consumer law, the complaint would be dismissed as unripe. But here, by calling the document a settlement agreement rather than a complaint, appellant contended that the court’s approval of the settlement agreements with their future-conduct releases constituted an improper advisory opinion violative of Article III standing principles. The court declined to consider this argument for reasons described in the opinion.¹⁸⁶

As a final example of issues of interest discussed in the Tenth Circuit’s decision, appellants objected to provisions in certain of the settlement agreements under which defendants “agreed to convert pumps at its existing gas stations in certain states to Automatic Temperature Control (ATC)

182. *Id.* at 1106.

183. *Id.* at 1110.

184. *Id.*

185. *Id.*

186. *Id.* at 1115.

pumps, and to install ATC pumps at its new gas stations in certain states.”¹⁸⁷ Appellants argued:

(1) regulators and policymakers have long debated requiring or authorizing ATC at retail but have ultimately “chosen not to,” . . . ; (2) selling gas by the gallon is lawful; (3) deciding whether to use ATC is a policy decision best left to the legislature; (4) the district court made an impermissible policy judgment about ATC when it found that class members would derive some benefit from the settlements to the extent that the settlements will increase the odds of conversion to ATC; (5) what the plaintiffs actually seek here is a change in the existing law, which is a political remedy, not a judicial one; and (6) the district court lacked authority to provide that political remedy under Article III.¹⁸⁸

The Tenth Circuit rejected this objection and noted that the lower court’s approval of the settlement agreements did not order states to require, or even to allow, conversion to ATC. Rather, that decision remains in the hands of state lawmakers. The district court’s approval of the class settlements did not usurp the legislature’s role.

The court affirmed the district court’s approval of the ten settlement agreements at issue in this appeal.

187. *Id.* at 1103.

188. *Id.* at 1115.