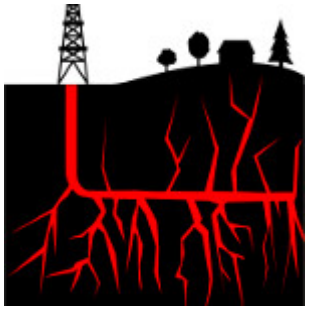
Pennsylvania, Texas Courts Disagree on Whether Rule of Capture Applies to Fracturing



A recent Superior Court of Pennsylvania ruling in a case concerning hydraulic fracturing runs counter to a ruling in a similar case by the Texas Supreme Court, reports John B. McFarland in Graves, Dougherty, Hearon & Moody's **Oil and Gas Lawyer Blog**.

The Pennsylvania court held that "hydraulic fracturing may constitute an actionable trespass where subsurface fractures, fracturing fluid and proppant cross boundary lines and extend into the subsurface estate of an adjoining property for which the operator does not have a mineral lease, resulting in the extraction of natural gas from beneath the adjoining landowner's property."

In doing so, McFarland explains, the court rejected the reasoning of the Texas Supreme Court when that court held that the rule of capture prevented any such cause of action.

Read the article.

Energy Company's Bankruptcy Generating Enron-Sized Legal Fees

Hundreds of lawyers and financial consultants involved in the $42 billion corporate restructuring of Energy Future Holdings, once the largest power supplier in Texas, have been paid a gusher of cash, and more huge paydays may be in the works, reports ***The Houston Chronicle***.

Mark Curriden of The Texas Lawbook writes that the law firms, banks and consultants working on the EFH case have received more than $600 million, making it one of the most complex and expensive corporate bankruptcies in U.S. history. For comparison, similar fees in the Enron bankruptcy topped $700 million.

"The total fees for all the professionals – for the lawyers, bankers, accountants, restructuring experts for all the companies involved – will probably hit $1 billion," EFH General Counsel Andy Wright told The Texas Lawbook in an exclusive interview.

Read the article.

Judge Dismisses Exxon's Lawsuit, Letting Multi-State Fraud Investigation Continue

Exxon Mobil Corp.'s attempt to derail a multistate fraud investigation into the company's public comments about climate change flamed out in a New York court, according to wire services, via ***The Dallas Morning News***.

The report says a U.S. district judge in New York on Thursday dismissed Exxon's lawsuit claiming officials in New York and Massachusetts conspired with environmental groups in planning the securities-fraud probe and made up their minds about its outcome before it started.

Judge Valerie Caproni said in her ruling that Exxon's tactic of suing in federal courts in New York and Texas to stop the state probes "running roughshod over the adage that the best defense is a good offense."

Read the *Dallas News* article.

An Indemnity Agreement Means What it Says

Charles Sartain offers a reminder that a court will (if it's doing its job) enforce an agreement according to what it

actually says, not by that which one party or the other would have liked it to say or imagines that it said.

Writing in Gray Reed's **Energy & the Law** blog, Sartain discusses *Claybar v. Samson Exploration.* That case involved an agreement over an indemnity clause in a contract for the drilling of petroleum wells and related operation on property owned by Claybar.

Sartain presents the facts of the case, including a break-down of both side's positions.

"Generally, indemnity agreements do not apply to claims between the parties but apply to claims made by others who are not parties to the agreement," Sartain writes. "However, the parties can write an agreement to indemnify one another against claims they later assert against each other. To do so, the parties must expressly and specifically state that intention."

Read the article.

Political and Economic Realities Hamper Efforts to Reopen U.S. Waters to

Offshore Drilling

A **post on the website** of Haynes and Boone calls attention to the apparent failure to acknowledge how the economic realities of oil and gas leasing and operating in the Outer Continental Shelf (OCS) in increasingly deepwater environments at a time of low oil and gas prices impacts the Interior Department's stated goal of achieving "American Energy Dominance."

"Once a serious concern only to small and mid-sized operators, the existence of mounting decommissioning liabilities to new lessees and predecessors-in-interest has stunned the offshore industry where some companies are discovering that their decommissioning liabilities are greater than existing assets," according to **Robert (Bob) P. Thibault** and **Christopher J. Reagen**.

"This new reality in the OCS has created barriers to entry for all but the super-majors as new, small, and mid-sized independents face impossible-to-satisfy demands for many operators and leases," they write.

Read the article.

Houston Trial Lawyer Courtney Ervin Joins Hicks Thomas as a

Partner

Trial lawyer Courtney Ervin has joined commercial litigation boutique Hicks Thomas LLP, the **firm announced**.

“Courtney is a highly skilled and effective trial lawyer” said Hicks Thomas co-founder John B. Thomas. “She is an exceptional advocate and has great instincts. Her addition enhances our diversity and positions us to serve our client needs well into the future.”

Ervin was profiled as one of the leading energy litigation lawyers in the U.S. in 2016 by The Legal 500 and has repeatedly earned a place on the Texas Rising Stars list recognizing up-and-coming lawyers, the firm said in a release.

She earned her law degree from the University of Houston Law Center, magna cum laude, and her bachelor’s degree from Colorado State University.

Read details of the announcement.

Global Warming Public

Nuisance Actions Will Stay in Federal Court

A U.S. District Court has rejected motions filed by the cities of Oakland and San Francisco to remand two global warming public nuisance lawsuits filed by the cities in state court against several large energy companies, reports **Anthony B. Cavender** in Pillsbury's **Gavel2Gavel blog**.

The companies are BP P.L.C., Chevron Corporation, ConocoPhillips Company, Exxon Mobil Corporation and Royal Dutch Shell plc). The case is *The People of the State of California v. BP P.L.C., et al.*

"The complaints filed by the City of Oakland and the City of San Francisco are based on the premise that, despite knowing of the risks associated with climate change and global warming, these companies continued to produce and sell their products to the public that uses fossil fuels in their day to day operations," Cavender writes. "The complaints seek an abatement fund to pay for seawalls and other infrastructure to address rising sea levels."

Read the article.

FERC has Options if Court of

Appeals Shuts Down Operating Interstate Pipeline

Image by NPCA Online

Randall S. Rich of Pierce Atwood LLP, writing in the firm's **Energy Infrastructure Blog**, considers the question: Can an interstate natural gas pipeline continue to operate if a court vacates its certificate authorizations?

He raises the question in light of a federal appellate court's ruling that raises the possibility that it will vacate certificates of public convenience and necessity authorizing the construction and operation of the Florida Southeast Connection pipelines. Those pipelines are currently transporting natural gas to power plants in Florida.

He covers the facts of the case and then discusses a legal theory that may permit the pipelines to continue to transport natural gas if the certificate orders were vacated.

Read the article.

Landman Contract Defeated by the Statute of Frauds

Charles Sartain and **Chance Decker**, writing in Gray Reed & McGraw's **Energy & the Law blog**, describe a contract case in which an oil and gas landman found out that the contract he signed with a purported agent for a client was unenforceable.

The independent landman signed a contract with the purported agent of the plaintiffs, in which the producers were to pay Moore "$600 per mineral acre for for leases signed. The plaintiff said he helped secure numerous leases, but defendants refused to pay.

The authors explain that the court found that the contract didn't specify the properties it applied to, this violating the Statute of Frauds. Sartain and Decker then offer some ways the contract could have been written so it would have been enforceable.

Read the article.

On-Demand: The Current (and Future) State of Oil and Gas M&A

Gibson, Dunn & Crutcher has posted an **on-demand webcast** that discusses what the firm has been seeing and expects to see in the future in regard to mergers and acquisitions in the oil and gas industry.

Members of Gibson Dunn's Mergers and Acquisitions and Oil and Gas Practice Groups produced the 60-minute presentation to (1) discuss the current state of mergers and acquisitions at the corporate level ("M&A") and acquisitions and divestitures at the asset level ("A&D") in those segments of the energy sector comprised of upstream oil and gas, midstream oil and gas, and oilfield services; (2) identify trends in M&A and A&D in those segments; and (3) use their crystal balls to attempt to foresee what the future holds for M&A and A&D in those sectors.

Panelists are partners **Michael P. Darden**, **Tull Florey** and **Justin T. Stolte**. The moderator is **Jeffrey A. Chapman**.

Watch the on-demand webcast.

Exxon's Response to Climate-Change Case: Sue the Lawyers

As climate-change lawsuits against the oil industry mount, Exxon Mobil Corp. is taking a bare-knuckle approach rarely seen in legal disputes: It's going after the lawyers who are suing it, according to a **Bloomberg report**.

Exxon's targets include the attorneys general of New York and Massachusetts, hitting them with suits, threats of suits or demands for sworn depositions. The company claims the lawyers, public officials and environmental activists are "conspiring" against it in a coordinated legal and public relations campaign, writes **Bob Van Voris**.

He quotes Howard Erichson, an expert in complex litigation and a professor at Fordham University School of Law in New York: "It's an aggressive move. Does Exxon really need these depositions or is Exxon seeking the depositions to harass mayors and city attorneys into dropping their lawsuits?"

Read the Bloomberg report.

Deans & Lyons Represents Family of Man Killed in

Oklahoma Gas Well Explosion

The family of Parker Waldridge, one of five workers killed in the Jan. 22 gas well explosion near Quinton, Oklahoma, has hired the Texas trial law firm **Deans & Lyons, LLP**, to investigate and pursue a lawsuit involving the deadliest oil and gas drilling disaster since the 2010 Deepwater Horizon rig explosion in the Gulf of Mexico.

“Mr. Waldridge was an incredible man who will be terribly missed by his family,” said Deans & Lyons co-founder Michael Lyons. “While we mourn the tremendous loss experienced by all the families impacted by this tragedy, there are a number of questions raised about the circumstances of this explosion and what could have been done to prevent it.”

In a release, the firm said:

> According to published reports, Waldridge, 60, of Crescent, Oklahoma, was among the workers trapped in an operations room when the first of two explosions occurred at the well site operated by Oklahoma City-based Red Mountain Energy. The drilling contractor was Houston-based Patterson-UTI Energy Inc., a company with an extensive history of fatal accidents and safety violations.
>
> The resulting inferno was so intense that the site was inaccessible to emergency workers until the following day. An initial report by the U.S. Chemical Safety Board indicated that rig workers were preparing to change out a drill bit at the time of the explosion, but the investigation is not yet complete.
>
> “The Waldridge family and the families of the other victims deserve to know the truth about what happened,” said Mr. Lyons. “Oil field work has inherent dangers, but this disaster appears to have been preventable if safety had been the paramount concern of this operation.”

Deans & Lyons represents clients in a broad range of complex personal injury and wrongful death claims, including cases involving the oil and gas industry.

Chevron Fights California Cities' Climate-Change Lawsuits With 'Creative Lawyering'

Lawyers for Chevron Corp., hoping to keep climate-change lawsuits by California cities out of state courts, have sued Oslo-based Statoil, calling it "one of many" oil producers that should help foot the bill if the industry is found liable, reports ***The Los Angeles Times***.

Kartikay Mehrotra writes that adding foreign companies to the litigation is a tactical maneuver to keep the dispute out of state court, where the cities have more favorable prospects, and force it into federal court.

She quotes Julia Olson, executive director and chief legal counsel for the environmental law group Our Children's Trust: "The industry is grasping at straws while looking for any way out of these cases and using creative lawyering to do so. By cherry-picking Statoil, a sovereign Norwegian entity, Chevron hopes to reinforce federal jurisdiction."

Read the *LA Times* article.

Does the Insurance Policy Incorporate the Service Contract by Reference? An Examination of *In Re Deepwater Horizon*

Image by U.S. Coast Guard

A Steptoe & Johnson article takes a look at the way additional insured coverage under an insurance policy is analyzed when there is an underlying drilling contract limiting the additional insured coverage to the scope of the liability assumed in the service contract.

The article in *The National Law Review* discusses *In re Deepwater Horizon*, a Texas Supreme Court case that governs allocation of risk, assumed liabilities, and the granting of

additional insured status in underlying service contracts, and the precedent the case established.

The article also considers some other cases that were litigated after the *Deepwater Horizon* case.

Read the article.

Can Emails Establish an Easement in Texas?

Charles Sartain, in a discussion involving a Texas case concerning a disagreement over the negotiation of the payment for a pipeline easement, addresses the issue of whether emails can create a contract.

Writing in the Gray Reed & McGraw **Energy & the Law blog**, Sartain outlines the facts in *Bujnoch v. Copano*. In an early email exchange, the pipeline company set the price at $70 per foot, with both sides apparently agreeing. But when the property owner receives the paperwork, the price is listed at $25.

Sartain addresses the questions of: Could the emails be read together to make a written contract? Did the emails omit essential terms? Was the description of the easement sufficient? Did "futuristic" language contemplate an agreement to be executed in the future? And, Did the parties agree to transact business electronically?

[Read the article](#).

Fifth Circuit En Banc Simplifies Rule for Identifying Maritime Contracts in the Oilfield

The Fifth Circuit *en banc* has handed down an historic re-working of the test for determining whether oilfield contracts are maritime or non-maritime in nature, according to a **Baker Donelson post**.

Christopher Hannan writes that the *en banc* decision in *In Re Larry Doiron, Inc*. simplifies decades' worth of confusing and often inconsistent jurisprudence to give a more streamlined and hopefully predictable rule for determining whether oilfield contracts are maritime or not.

He quotes the *en banc* ruling:

> First, is the contract one to provide services to facilitate the drilling or production of oil and gas on navigable waters? . . . Second, if the answer to the above question is "yes," does the contract provide or do the parties expect that a vessel will play a substantial role in the completion of the contract? If so, the contract is maritime in nature.

Read the article.

Answers Demanded Following Deadly Oklahoma Rig Explosion

Monday's blowout near Quinton, Oklahoma, that killed five workers is the deadliest oil and gas incident since the 2010 Deepwater Horizon disaster in the Gulf of Mexico. As this incident moves from the recovery of the victims to the cleanup and investigation stage, a prominent Texas trial lawyer says the industry must use this tragedy as a signal to self-reflect and take stock of their safety procedures, according to a post on the website of **Androvett Legal Media & Marketing**.

"When it comes to rig blowouts, somebody made a mistake," says trial lawyer **Frank Branson** of **The Law Offices of Frank L. Branson**, who has handled numerous oilfield tragedies, including involvement in a 2015 onshore rig explosion where three men died in a well blowout near Midland, Texas.

"Every driller and operator knows that well control must be maintained at all times. That's rule number one on these rigs. A failure to control the well is inexcusable and absolutely preventable. With so much at stake, companies like Patterson-UTI and Red Mountain Energy must make worker safety – not shareholder profits – the overriding priority.

"Patterson-UTI, one of the largest onshore rig operators in the U.S., has been called out for its safety shortcomings by

name in Congressional reports and has been fined by OSHA following earlier oil and gas well fatalities. As the families of those killed search for answers, it's clear that relatively toothless regulations are not enough to ensure the safety of hardworking oilfield workers. In cases like these, American jurors will be called upon to determine who was at fault and return a verdict that will make sure these companies put worker safety first."

Royalty Owners Seek Class-Action Status Against Talisman Energy USA

Royalty owners are seeking class-action status in a lawsuit against Talisman Energy USA, Inc. over claims the company manipulated production volumes for wells operated in the Eagle Ford shale basin in South Texas, according to a post on the website of **Androvett Legal Media and Marketing**.

Attorneys for plaintiffs Rayanne Regmund Chesser, Gloria Janssen, and Michael and Carol Newberry filed a motion Jan. 22, 2018, seeking class certification in U.S. District Court for the Southern District of Texas and named lawyers Bryan O. Blevins Jr. and Mike Hamilton of **Provost Umphrey Law Firm, L.L.P.**, to represent the class. The lawyers estimate

approximately 4,000 royalty owners could be involved.

“It’s clear that Talisman knew what they were doing when the company voluntarily commingled production from different wells and then allocated net sales in violation of best oilfield practices and Texas law,” said Blevins. “We intend to prove that the amounts paid to the royalty owners were based on manipulated production volumes.”

The lawsuit charges that from Jan. 1, 2013, to June 1, 2016, Talisman failed to report, account for and make royalty payments based on its lease agreements. In addition, the company is accused of altering wellhead production volumes by as much as 20 percent and paying royalties based on estimated sales volumes instead of the actual amount of oil or gas sold or saved.

In 2010, Talisman entered the Texas oil and gas market in a joint venture with Statoil. In July 2013, the agreement was revised, with Statoil assuming half the well operations and Talisman operating the other half. Shortly after that, royalty owners noticed a difference in reported production volumes from Talisman compared to Statoil.

Talisman Energy USA is an indirect subsidiary of Calgary, Alberta–based Talisman Energy Inc., which was acquired by Repsol S.A. in 2015.

The case is Rayanne Regmund Chesser, Gloria Janssen, Michael Newberry and Carol Newberry v. Talisman Energy USA, Inc. No. 4:16-cv-02960 in the U.S. District Court for the Southern District of Texas, Houston Division.

Tax Reform Impact On Energy? Short Answer: MLPs Are Fine

Baker Botts partner Mike Bresson told listeners at the beginning of the law firm's recent webinar that "Master limited partnerships [MLPs] did just fine on tax reform."

Joseph Markman, writing in **Oil and Gas Investor** about the webinar presentation, quoted Bresson: "The first big [change], which is definitely a positive, is a reduction in tax rates," said Steve Marcus, partner and Dallas-based department chair in taxes. "The corporate tax rate's been reduced from 35% to 21%."

Another change, however, may have a slightly negative impact, now that interest deductions are limited. The limitation amounts to about 30% of an MLP's adjusted taxable income. How this affects the typical MLP depends on its tax shield.

Markman explains: "For an MLP to calculate the 30% limitation on its ability to deduct its own net business interest expense, it must determine its share of 'excess taxable income' allocated to it from a subsidiary partnership. An MLP's unitholder would then determine 'excess taxable income' in calculating the limitation with respect to its net business interest expense."

Read the article.

Judge Fines Environmental Attorneys $52,000 for 'Frivolous' Injection Well Suit

A federal judge has ordered a pair of attorneys for an environmental group to pay $52,000 in legal fees to an energy company because, the judge said, they filed a "frivolous" legal challenge to a fracking waste injection well in Pennsylvania, according to **a report** by StateImpact, a reporting project of NPR member stations.

"U.S. Magistrate Judge Susan Paradise Baxter of the Western District of Pennsylvania ruled the attorneys, Thomas Linzey and Elizabeth Dunne, should pay part of Pennsylvania General Energy's (PGE) legal fees for advancing a "discredited" legal argument that had already been defeated in prior decisions," writes reporter **Reid Frazier**. "In addition to the fine, the judge referred Linzey to the state Supreme Court Disciplinary Board for additional discipline."

In her opinion, Baxter wrote:

> The continued pursuit of frivolous claims and defenses, despite Linzey's first-hand knowledge of their insufficiency, and the refusal to retract each upon reasonable request, substantially and inappropriately

prolonged this litigation, and required the Court and PGE to expend significant time and resources eliminating these baseless claims.

Read the StateImpact article.