OIL AND GAS LAW: 2014–2015

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I. INTRODUCTION

The following Survey provides a brief overview of significant oil and gas law decisions of the United States Court of Appeals for the Fifth Circuit that occurred between July 1, 2014, and June 30, 2015 (the survey period). Royalty deduction litigation remains ripe both in federal and state courts. The Authors expect the volume of royalty litigation to increase as operators more aggressively seek to deduct costs from royalty and royalty owners seek to raise their effective royalty rate against lower commodity pricing. Also,

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given current low oil and gas commodity prices, it is unsurprising to note the increased volume of oil and gas related bankruptcy cases during the survey period—a trend the Authors expect to continue, at least in the short-term. The Fifth Circuit also decided statutory and contract construction cases during the survey period.

II. ROYALTY DEDUCTION CASES: *WARREN V. CHESAPEAKE EXPLORATION, L.L.C.* AND *POTTS V. CHESAPEAKE EXPLORATION, L.L.C.* CONTINUE TEXAS TREND

In *Warren v. Chesapeake Exploration, L.L.C.*, Charles Warren and Robert Warren, along with Abdul and Joan Javeed (collectively Lessors), entered into separate oil and gas leases with FSOC Gas Co. Ltd., predecessor-in-interest to Chesapeake Exploration, L.L.C. and Chesapeake Operating, Inc. (collectively Lessee).[1] Lessors filed suit in Texas federal district court alleging that Lessee breached the leases for "failing to comply with the lease provisions in calculating royalties."[2] Lessors argued that Lessee was paying royalties that had been diluted by Lessee's deduction of post-production costs and expenses.[3] Neither party disputed that Lessee subtracted post-production costs from the royalties—Lessee merely maintained that it had the right to do so under the terms of the leases.[4]

The leases executed by Charles Warren and Robert Warren (the Leases), and not the lease executed by Javeed, contained a royalty clause "based on the amount realized at the well for gas sold by" Lessee: "As royalty, Lessee covenants and agrees . . . (b) to pay Lessor for gas and casinghead gas produced from said land (1) when sold by Lessee, [22.5%] of *the amount realized by Lessee*, *computed at the mouth of the well* . . . ."[5]

Attached to the Leases were identical addendums that touched post-production costs and expenses:

> Notwithstanding anything to the contrary, herein contained, *all royalty paid to Lessor shall be free of all costs and expenses related to the exploration, production and marketing of oil and gas production from the lease including, but not limited to, costs of compression, dehydration, treatment and transportation*. Lessor will, however, bear a proportionate part of all those expenses imposed upon Lessee by its gas sale contract to the extent incurred subsequent to those that are obligations of Lessee.[6]

1. Warren v. Chesapeake Expl., L.L.C., 759 F.3d 413, 414 (5th Cir. July 2014).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.* at 416 (alteration in original).
6. *Id.* (emphasis added).

The addendum also provided that, should any provisions of the addendum be inconsistent with terms of the lease, the addendum shall supersede and the lease terms shall be subrogated to the express and implied terms of the addendum.[7]

In their complaint, the Warrens alleged "that sales occurred downstream from the mouth of the well and that post-production costs incurred delivering the gas to that point of sale have been deducted in calculating royalty payments."[8] The district court viewed the language of the lease and the "amount realized at the well" language in connection with the Supreme Court of Texas's decisions in *Heritage Resources, Inc. v. NationsBank*[9] and *Judice v. Mewbourne Oil Co.*[10] and determined that Lessee "was authorized to make post-production deductions in determining the amount realized at the mouth of the well, despite the provisions in the Warrens' leases that the royalty would be free of certain post-production costs."[11]

The court opined that "[t]he phrase 'amount realized by Lessee, computed *at the mouth of the well*'" classifies the royalty as net proceeds, with the physical point of calculation being at the mouth of the well.[12] In *Judice*, the Supreme Court of Texas recognized that when net proceeds calculations are used, deductions are inferred.[13] Lessors could have excluded the "computed at the mouth of the well" language, which would have changed the outcome of the case, allowing for Lessors "to receive 22.5% of the amount realized by Lessee"—which would have given Lessors 22.5% of the sales contract price received by Lessee, without deductions for post-production costs.[14] Lessors did not do this.[15] Instead, they relied on the language included in the addendum, which provided that if any portion of the lease "is 'contrary' to or 'inconsistent' with the addendum, then the addendum supersedes the printed portion of the lease."[16] In this case, however, the royalty provision was not inconsistent with the addendum because "[t]he addendum does not change the point at which all royalty is computed, which is the mouth of the well."[17] As such, Lessee was entitled to deduct post-production costs from Lessor's royalty.[18]

Functionally, the court reached the same results in *Potts v. Chesapeake Exploration, L.L.C.*[19] The royalty provision in *Potts* provided:

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7. *Id.*
8. *Id.*
9. Heritage Res., Inc. v. NationsBank, 939 S.W.2d 118, 131 (Tex. 1996).
10. Judice v. Mewbourne Oil Co., 939 S.W.2d 133, 136 (Tex. 1996).
11. *Warren*, 759 F.3d at 415.
12. *Id.* at 417 (emphasis added).
13. *Id.* (citing *Judice*, 939 S.W.2d at 136).
14. *Id.* at 417–18.
15. *Id.* at 418.
16. *Id.*
17. *Id.*
18. *See id.*
19. *See* Potts v. Chesapeake Expl., L.L.C., 760 F.3d 470, 471–74 (5th Cir. July 2014).

> The royalties to be paid by Lessee are: . . . on gas . . . the market value at the point of sale of 1/4 of the gas sold or used. . . . Notwithstanding anything to the contrary herein contained, all royalty paid to Lessor shall be free of all costs and expenses related to the exploration, production and marketing of oil and gas production from the lease including, but not limited to, costs of compression, dehydration, treatment and transportation.[20]

Paragraph 37 of the lease provided:

> Payments of royalties to Lessor shall be made monthly and shall be based on sales of leased substances to unrelated third parties at prices arrived at through arms length negotiations. Royalties to Lessor or leased substances not sold in an arms length transaction shall be determined based on prevailing values at the time in the area. Lessee shall have the obligation to disclose to Lessor any information pertinent to this determination.[21]

An affiliate of Chesapeake Exploration, L.L.C. (Chesapeake), Chesapeake Operating, Inc. (COI), operated a lease on Chesapeake's behalf.[22] COI, as agent for Chesapeake, sold "gas produced from the lease to Chesapeake Energy Marketing, Inc. (CEMI)" at the wellhead.[23] CEMI transported the gas and re-sold it to unaffiliated purchasers at distant gas pipeline hubs.[24] CEMI paid Chesapeake the weighted average sales price that CEMI received when it sold the gas downstream, after deducting post-production costs that CEMI incurred between the wellhead and the unaffiliated sales points.[25] Chesapeake paid its lessors 1/4 of the price it received from CEMI as royalty.[26]

The lessors protested that their "royalty payments were improperly calculated because post-production costs had been deducted in arriving at the value on which royalty was based."[27] Accordingly, the lessors filed suit for Chesapeake's allegedly improper deductions.[28] On cross-motions for summary judgment, the district court held that Chesapeake could calculate "market value at the point of sale" by starting with the "market value received from unaffiliated purchases and subtracting reasonable post-production costs incurred between the downstream points of sale to unaffiliated purchasers and the point of sale to CEMI."[29] The lessors argued that under paragraph 37,

20. *Id.* at 471–72 (alterations in original).
21. *Id.* at 472.
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.* at 473.

the "point of sale" is the "point at which CEMI sold the gas to unaffiliated purchasers."[30]

Applying Texas law, the district court determined that the royalty clause "unambiguously requires Chesapeake to pay 1/4 of the market value of the gas at the point at which Chesapeake sells the gas."[31] Because in the present case Chesapeake sold the gas at the wellhead, generally no post-production costs were incurred.[32] If the gas were sold downstream from the wellhead, "the lessee would be required to pay 1/4 of the market value of the gas calculated at that point of sale and could not deduct post-production costs incurred between the wellhead and the point of sale."[33] And when an operator sells gas at the wellhead, the operator typically incurs no costs for compression, dehydration, treatment, or transportation, so the market value at the wellhead is de facto "free of all costs and expenses."[34] Since Chesapeake's sales occurred at the wellhead and the lessors did not contend that sales to unaffiliated third parties were below market, the court determined that "Chesapeake could arrive at the market value at the wellhead by deducting reasonable post-production costs to deliver the gas from the wellhead to the point at which the gas was sold to unaffiliated purchasers."[35]

Citing *Warren* in approving this net-back method, the court discussed the infamous *Heritage Resources, Inc. v. NationsBank* case out of the Supreme Court of Texas, which has caused great amounts of consternation in recent years.[36] Both *Warren* and *Potts* are in line with the Supreme Court of Texas's reasoning not only in *Heritage* but also the Court's recent opinion in *Chesapeake Exploration, L.L.C. v. Hyder*.[37]

III. BANKRUPTCY CASES

A. *Mineral Lien Subcontractors:* Endeavor Energy Resources, L.P. v. Heritage Consolidated, L.L.C.

In *Endeavor Energy Resources, L.P. v. Heritage Consolidated, L.L.C. (In re Heritage Consolidated, L.L.C.)*, Endeavor Resources, L.P. and Acme Energy Services, Inc. (Drillers) were unpaid for drilling work on a well owned by bankruptcy debtors.[38] Drillers filed a mineral lien pursuant to a

30. *Id.*
31. *Id.*
32. *Id.* at 473–74.
33. *Id.* at 474.
34. *Id.*
35. *Id.*
36. *Id.* at 474–75.
37. *See* Chesapeake Expl., L.L.C. v. Hyder, No. 14-0302, 2016 WL 352231, at *2–5 (Tex. Jan. 29, 2016).
38. Endeavor Energy Res., L.P. v. Heritage Consol., L.L.C. (*In re* Heritage Consol., L.L.C.), 765 F.3d 507, 509 (5th Cir. Aug. 2014).

Texas statute as well as a claim in the debtors' bankruptcy.[39] The primary question before the court was whether the trial court errantly dismissed Drillers' mineral subcontractors' lien claims on summary judgment.[40]

Heritage Standard Corporation (HSC) owned mineral leases for a nonfunctioning well in Winkler County, Texas.[41] Operations for the well were governed by several contracts that bore on Drillers' ability to recover on their claims, including a farmout agreement for George Staley to develop the well; an assignment contract from Staley to Lake Hills Productions, Inc. (referred to here and in the case as Lakehills) to perform the work under the farmout agreement; and a joint operating agreement (JOA) between HSC, Staley, Lakehills, and Stratco Operating Co., Inc. (Stratco) to develop the well, effective January 2008.[42]

A month after the effective date of the JOA, Lakehills assigned its interests to Trius Energy, LLC (Trius), who was subsequently added as a party to the JOA.[43] After Trius's addition, Trius was responsible for 87.5% of well expenditures, and HSC was responsible for 12.5% of well expenditures.[44] In July 2008, Lakehills replaced Stratco as the operator, rendering Lakehills responsible for operations on the well, while Trius and HSC were responsible for payments to Lakehills for its work on the well.[45] Lakehills contracted with Drillers, who performed work on the well over the course of several months in mid-2008.[46]

Trius and HSC apparently stopped making payments to Lakehills for its work; subsequently, Lakehills failed to pay Drillers for their work.[47] Accordingly, Drillers filed mineral liens against HSC to recover the money allegedly owed for their services.[48] Drillers' liens were duly and timely filed.[49]

Subsequent to Drillers' lien filings, HSC assigned its interest in the well to Heritage Consolidated (Heritage).[50] After a series of contractual defaults among many of the parties to the agreements, "HSC, Heritage . . . , Trius, Stratco, Lakehills, and Staley negotiated a settlement agreement . . . in May 2009."[51] "Under the settlement agreement, Lakehills received a 1% interest in the well as consideration for releasing its operator liens against HSC and

39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.*
47. *Id.* at 510.
48. *Id.*
49. *See id.*
50. *Id.*
51. *Id.*

Heritage . . . ."[52] The settlement also obligated Trius to satisfy Drillers' liens and to indemnify the other signatories against Drillers' liens.[53] Yet Drillers were never paid for their services.[54]

HSC and Heritage filed for Chapter 11 bankruptcy, and "Drillers filed proofs of claim in their bankruptcies asserting secured lien claims and, alternatively, unsecured nonpriority claims"; Drillers also sought a "determination of the validity, extent and priority of their mineral liens."[55] The bankruptcy court entered judgment against the Drillers on each issue.[56]

In this diversity case, the court applied Texas law.[57] Under Texas law, mineral liens are governed by statute and are granted to both mineral contractors and mineral subcontractors.[58] Importantly, mineral lien statutes are designed to protect laborers and materialmen and must be liberally construed to that end.[59] Mineral contractors furnish or haul materials or perform labor under a contract with a mineral property owner.[60] Mineral subcontractors furnish or haul materials or perform labor under a contract with a mineral contractor.[61] Mineral contractors and mineral subcontractors are largely treated the same under the mineral lien statute,[62] but there are two notable exceptions: (1) because of the lack of contractual privity with the mineral owner, "subcontractors must give notice to the mineral owner when filing material liens"—mineral contractors have no such notice requirement; and (2) contractors must be in contractual privity with the mineral owner—subcontractors merely need to have a contractual relationship with the mineral contractor.[63] Accordingly, the important distinction between a mineral contractor and a mineral subcontractor is the existence of a contractual relationship between the owner and the laborer.[64]

When a well has multiple owners, as in this case, a single laborer may be a mineral contractor to one owner and a mineral subcontractor to another owner.[65] The primary legal question before the court in *Endeavor* was whether the Drillers were contractors or subcontractors with regard to HSC and Heritage, the resolution of which turned on the existence of a contractual

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52. *Id.*
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.* at 511.
58. *Id.*
59. *Id.*
60. *Id.* at 512.
61. *Id.* (quoting TEX. PROP. CODE ANN. § 56.001).
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.*

relationship between Drillers, on the one hand, and HSC and Heritage, on the other hand.[66]

The court determined that a genuine issue of material fact existed regarding whether the Drillers were mineral contractors or mineral subcontractors with regard to HSC and Heritage.[67] Drillers demonstrated in the summary judgment record that HSC was an owner of the "working interest in the lease when Drillers actually performed their work and perfected their liens."[68] Drillers also demonstrated that "HSC was the record owner of 100% of the lease, and retained 12.5% of the working interest" in the lease even after the farmout agreements and assignments were entered.[69] Drillers demonstrated that Lakehills had a contractual relationship with HSC as assignees of Staley.[70] "[I]n the light most favorable to Drillers, this evidence demonstrate[d] that Lakehills was a contractor at the time that Drillers performed their work on the well."[71] Because there was evidence that Lakehills, as a mineral contractor, contracted with Drillers to perform services on the well, Drillers were mineral subcontractors when the evidence was viewed in the light most favorable to them as non-movants; accordingly, there was a genuine issue of material fact regarding whether Drillers were mineral subcontractors vis-à-vis HSC and Heritage.[72]

In response, HSC and Heritage argued that Drillers could not have been mineral subcontractors because Lakehills obtained a 1% ownership interest in the lease under the settlement agreement, and therefore was a co-owner and not a mineral contractor.[73] The court rejected HSC and Heritage's argument that Lakehills' ownership related back to the time prior to Drillers' work because (1) under the mineral lien statutory scheme, it was possible for Lakehills to be both a co-owner and a mineral contractor—thus, Drillers could still be a mineral subcontractor for Lakehills even if it were a co-owner; and, more importantly, (2) the doctrine of after-acquired title and the relation back doctrine exist to *expand* the interest to which a lien can attach.[74] By applying the relation back doctrine to deprive Drillers of their pre-existing rights, the purpose of the mineral lien statute was frustrated: the mineral lien statute must be liberally construed to protect contractors.[75]

Endeavor once again demonstrated the importance of mineral lien statutes in protecting oilfield services companies, which are frequently treated less favorably than other parties in complex oil and gas exploration

66. *Id.*
67. *Id.* at 513.
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.* at 513–14.
75. *Id.* at 514.

activities.[76] In light of the protective statutory scheme established by the Texas Legislature, the Fifth Circuit properly resolved the issue of the relation back doctrine as applied in this case.[77] Practitioners may also take interest in Judge Elrod's citation to Justice Antonin Scalia and Brian Garner's *Reading Law: The Interpretation of Legal Texts*, which, since its publication in 2012, has been increasingly adopted as persuasive authority by conservative jurists.[78]

B. Trustee Capacity Limitations: Morton v. Yonkers (In re Vallecito Gas, L.L.C.)

In *Morton v. Yonkers (In re Vallecito Gas, L.L.C.)*, Harvey Leon Morton (Trustee), trustee of the Vallecito Gas, L.L.C. (Debtor) bankruptcy estate, sought to void certain overriding royalty interests adverse to the bankruptcy estate.[79] In March 2006, Debtor purchased a lease called the Hogback lease, which at the time of the bankruptcy was apparently Debtor's only significant asset.[80] The Hogback lease was located on Navajo Nation land in New Mexico and was subject to the jurisdiction of the Navajo Nation.[81] Debtor subsequently assigned interests in the Hogback lease, one of which led to litigation in New Mexico (the *Burle* litigation).[82] The *Burle* litigation settled in November 2006, but one of the defendants failed to perform under the settlement agreement; thus, related litigation continued until September 2007.[83]

Subsequent to the litigation settlement but prior to settlement enforcement in September 2007, Debtor recorded an assignment of the Hogback lease to Briggs-Cockerham, LLC (Briggs).[84] Briggs then sold overriding royalty interests but did not seek or receive approval for the creation of the overriding royalty interests from the Navajo Nation.[85]

In November 2007, Debtor filed for bankruptcy and the Trustee was appointed. Trustee "sought to sell the Hogback Lease, subject only to the Navajo Nation's royalty" interest, to Vision Energy, LLC.[86] In other words, Trustee sought to washout the overriding royalty interest owners (ORRI

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76. *See id.*

77. *See id.* at 518.

78. *Id.* at 515; *see also* Hysaw v. Dawkins, No. 14-0984, 2016 WL 352229 (Tex. Jan. 29, 2016) ("Words must be given the meaning they had when the text was adopted." (quoting ANTONIN SCALIA & BRIAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 78 (2012))).

79. Morton v. Yonkers (*In re* Vallecito Gas, L.L.C.), 771 F.3d 929, 931–33 (5th Cir. Nov. 2014).

80. *Id.* at 931–32.

81. *Id.* at 931.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.* at 932.

Owners) from the Hogback lease.[87] Briggs disclaimed any interest in the Hogback lease.[88]

Trustee filed an adversary proceeding against the overriding royalty interest owners in March 2010, seeking to void the overriding royalty interests on the ground that the Navajo Nation had not approved the transfer of those interests as required under the Navajo Nation Code.[89] The bankruptcy court concluded that Trustee could not raise the lack of Navajo Nation approval and that the ORRI Owners "were entitled to a credit against the estate for the amount they paid" for the overriding royalty interests because they had purchased the assignments from Briggs "in good faith and without knowledge of the bankruptcy filing."[90]

Trustee argued that he had authority to raise the lack of Navajo Nation approval to void the overriding royalty interests because the Navajo Nation Code apparently provides that any interest created without approval is void.[91] After discussing evidentiary issues, the court turned to questions of standing and capacity.[92] The court determined that Trustee had no capacity to raise the issue because the Navajo Nation Code serves to protect the Navajo Nation from exploitation, not Trustee's interests.[93] Accordingly, the court determined that a stranger to the overriding royalty assignments does not have any basis to raise lack of compliance with the Navajo Nation Code to void the overriding royalty interest.[94]

C. Classification of the Bankruptcy Estate: Baker v. Baker (In re Baker) *and* Holt Texas, Ltd. v. Zayler (In re T.S.C. Seiber Services, L.C.)

In *Baker v. Baker (In re Baker)*, subsequent to divorce proceedings between Joan Baker and Joe Baker, Joe Baker initiated Chapter 12 bankruptcy proceedings.[95] Under the terms of the final divorce decree, Joe Baker was awarded a certain parcel of property known as Poppies (the Property), as his sole and separate property, with Joan Baker divested of any interest in the Property.[96] However, the Bakers included a draft deed with the divorce decree wherein the Property was conveyed to Joe Baker with a reservation in favor of Joan Baker of *all the minerals* under the Property.[97]

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87. *See id.*
88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.* at 933.
94. *Id.* at 934.
95. Baker v. Baker (*In re* Baker), 593 F. App'x 416, 416 (5th Cir. Feb. 2015) (per curiam).
96. *Id.*
97. *Id.*

Joan Baker executed the deed and subsequently sold all of her interest in the Property to the Charles Hamill Jeffrey Trust (the Trust).[98]

Under Joe Baker's reorganization plan, the Property was sold to John W. Baker (John).[99] Prior to the sale, John received a title commitment identifying the mineral reservation in favor of Joan Baker; accordingly, John had notice of the reservation of the minerals to Joan.[100] The bankruptcy court confirmed the sale to John and "instructed the estate 'to execute a general warranty deed conveying the estate's interest, surface and mineral'" to John.[101] Of course, the mineral estate did not reside in the bankruptcy estate because it had been transferred to Joan Baker in the divorce proceedings.[102]

Eight months after the sale to John, John filed a motion to compel seeking to amend the bankruptcy deed to "convey the mineral interests to him in conformity with the amended order of sale."[103] The Fifth Circuit determined that the "deed from the estate to [John] conveyed whatever interest the estate had in the property as of the date of the deed's execution."[104] In other words, because the bankruptcy estate did not contain the minerals under the Property that had been previously transferred to Joan, and because John had notice of the prior transfer, the minerals were not transferred to John.[105] The court did not address the state court issue of conformity with the divorce proceedings.[106]

The court again dealt with *what* is part of the bankruptcy estate in *Holt Texas, Ltd. v. Zayler (In re T.S.C. Seiber Services, L.C.)*.[107] In 2008, operator EnCana Oil & Gas (USA), Inc. (EnCana) engaged T.S.C. Seiber Services, L.C. (Debtor) to build a natural gas pipeline in Robertson County, Texas.[108] Debtor hired contractors to perform the services, including Holt Texas, Ltd. (Holt) and Transamerica Underground Limited (TAUG).[109] Under EnCana's agreement with Debtor, "if a subcontractor notified EnCana that it had not been paid by [Debtor], EnCana would withhold all sums remaining and make no further payments to [Debtor]."[110]

EnCana made two payments to Debtor constituting half of the contract price.[111] Thereafter, in August 2009, TAUG notified EnCana that Debtor was

98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.* (quoting the bankruptcy court).
102. *See id.* at 417.
103. *Id.*
104. *Id.* at 418.
105. *See id.* at 417–18.
106. *See id.*
107. Holt Tex., Ltd. v. Zayler (*In re* T.S.C. Seiber Servs., L.C.), 771 F.3d 246, 248 (5th Cir. Nov. 2014).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*

not paying TAUG for its services and, under Texas law, TAUG "would look to EnCana for payment of the $96,300 that TAUG claimed it was owed."[112] Pursuant to its contract, and with subsequent reports that Debtor failed to pay other subcontractors, EnCana withheld the remaining half of the contract payments.[113] The timing of the remaining events was important to the court's holding.

In September 2009, EnCana filed an interpleader in the Northern District of Texas naming Debtor and the project's subcontractors, including Holt and TAUG, as defendants.[114] EnCana deposited just above $345,000 into the registry and disclaimed an interest in the interpled funds.[115]

In October 2009, Debtor filed for bankruptcy in the Eastern District of Texas, and the court appointed Stephen Zayler as trustee (Trustee).[116] Shortly after filing, Holt notified EnCana of the deficient payments and that it sought $207,480.80 for unpaid work.[117] It was undisputed that EnCana had actual knowledge of Holt's status as unpaid prior to formal notice "because EnCana included Holt as a defendant in the earlier-filed interpleader action."[118]

In November 2009, TAUG duly and timely filed its affidavit claiming a mineral lien against EnCana.[119] In March 2010, Holt filed its affidavit claiming a mineral lien.[120] After the mineral liens were filed, the interpleader action was transferred to the Eastern District of Texas and referred to the bankruptcy court.[121] Only after transfer of the interpleader action did the bankruptcy court discharge EnCana from the interpleader action; the discharge order was not appealed.[122]

Holt and TAUG filed for summary judgment seeking payment of interpled funds under Chapter 56 and Chapter 162 of the Texas Property Code.[123] The bankruptcy court held that neither statute applied, denied Holt and TAUG the interpled funds, and determined that the interpled funds were part of the bankruptcy estate.[124]

The question on appeal was whether the lower courts erred in holding that the disputed funds were part of the bankruptcy estate.[125] Under the Bankruptcy Code, the bankruptcy estate is created at the time of the filing of the petition and includes "all legal or equitable interests of the debtor in

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112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 249.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.*
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*

property as of the commencement of the case."[126] Accordingly, if Debtor had no legal or equitable interest, or if Holt or Taug held a superior interest to Debtor in the interpled funds at the time of the bankruptcy filing, the Trustee must yield.[127]

As noted earlier, the timing of events was tantamount to resolution of the dispute. Here, the interpleader action preceded the bankruptcy filing; accordingly, the Trustee argued that the bankruptcy estate included the interpled funds.[128] But the court disagreed; under Texas law, legal possession to the funds deposited in the registry remains unresolved until a discharge order is entered in the interpleader action.[129]

TAUG provided notice to EnCana prior to the filing of the interpleader; the safe harbor provided by the notice provision protected TAUG as long as the statutory affidavit was timely filed (and it was).[130] Because the Bankruptcy Code expressly allows post-petition perfection of liens, TAUG's mineral lien was valid against EnCana at the time of EnCana's discharge regardless of the fact that it was perfected after filing.[131]

Holt, however, provided notice to EnCana only after the interpleader action had been filed.[132] The Trustee argued that the filing of the interpleader automatically satisfied EnCana's liability to Debtor (and thus the interpled funds were part of Debtor's bankruptcy estate).[133] But the court rejected the Trustee's argument—depositing funds in an interpleader action is insufficient to transfer an interest to Debtor; rather, an order of discharge is necessary.[134] Because the order discharging EnCana was made subsequent to Holt's mineral lien perfection, Holt's interest in the interpled funds was superior—the interpled funds were not part of the bankruptcy estate.[135] The issue of whether the funds were part of the bankruptcy estate was actually settled by EnCana's unappealed discharge order.[136]

These cases demonstrate not only the importance of timing in resolving what is in the bankruptcy estate but also raise important questions about notice and procedure. Both cases emphasized the importance of notice; in *Holt*, EnCana's notice of deficiencies in payments by Debtor,[137] and in *Baker*, John's notice of a prior conveyance of the mineral estate in the divorce proceeding.[138]

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126. *Id.* (quoting 11 U.S.C. § 541(a)(1) (2012)).
127. *Id.*
128. *See id.* at 250–53.
129. *Id.* at 252.
130. *Id.* at 251.
131. *Id.*
132. *Id.* at 250–51.
133. *Id.* at 250, 252.
134. *Id.* at 252.
135. *Id.* at 252–53.
136. *See id* at 251–53.
137. *See id.*
138. Baker v. Baker (*In re* Baker), 593 F. App'x 416, 417–18 (5th Cir. Feb. 2015) (per curiam).

D. *Be Technical, Not Hypertechnical:* Baker Hughes Oilfield Operations, Inc. v. Morton (In re R.L. Adkins Corp.)

In *Baker Hughes Oilfield Operations, Inc. v. Morton (In re R.L. Adkins Corp.)*, an undersecured creditor appealed the bankruptcy court's refusal to allow it to promote its unsecured claim to secured status.[139] Baker Hughes Oilfield Operations, Inc. (Baker Hughes) and other creditors filed for involuntary Chapter 7 bankruptcy against R.L. Adkins Corp. in July 2011, which was subsequently converted to a Chapter 11 proceeding.[140] Scott Oils, Inc. (Scott Oils) proposed to purchase the mineral properties of the debtor and filed a plan proposing the sale of substantial mineral interests, including ninety leases and several wells, to Scott Oils for over $3.4 million.[141]

The plan recognized that Baker Hughes had a lien on four of the mineral leases and one well.[142] The value of Baker Hughes's claim in the well was $321,506.28, but it was only secured for $38,753.22.[143] Baker Hughes filed an election to have its claim treated as secured to the full extent.[144] Scott Oils replied, pointing out that the statute denies such an election when "such property is sold under § 363 of this title or is to be sold under the Plan."[145]

Several days of hearing on confirmation of the plan ensued, and the plan was ultimately confirmed.[146] Fatally, Baker Hughes did not attend the hearing and did not object or appeal any act or decision prior to confirmation of the plan.[147] Following confirmation, Baker Hughes pursued its claim and argued that it could either make a credit bid at the sale of the collateral or be granted the election it sought.[148] In support of its argument, Baker Hughes argued that, contrary to Supreme Court precedent, the debtor sold the property free of liens without allowing Baker Hughes, a lienholder, to credit bid.[149]

The court found Baker Hughes's arguments hypertechnical—Baker Hughes had never sought a credit bid, and "there is no bidding without belief that the value of the collateral is higher than that of the lien."[150] The plan provided secured creditors a right to credit bid, and the court noted that Baker Hughes's uncertainty "could have been easily resolved at the hearing on

139. Baker Hughes Oilfield Operations, Inc. v. Morton (*In re* R.L. Adkins Corp.), 784 F.3d 978, 979 (5th Cir. Apr. 2015).
140. *Id.*
141. *Id.*
142. *Id.*
143. *Id.*
144. *Id.*
145. *Id.* (quoting 11 U.S.C.A. § 1111(b)(1)(B)(ii) (2012)).
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.* at 980.

confirmation or by objection or even appeal."[151] But Baker Hughes did not appeal the binding, final judgment, much less participate in the underlying proceedings.[152] Accordingly, the court affirmed the lower court's holdings rejecting Baker Hughes's claim on the basis of Baker Hughes's procedural deficiencies, without regard to Baker Hughes's hypertechnical attempts to the contrary.[153]

IV. LOUISIANA PROPERTY LAW

A. *Forced Pooling, Mootness, and Prescription:* Fite Oil & Gas, Inc. v. SWEPI, L.P.

The court's per curiam opinion in *Fite Oil & Gas, Inc. v. SWEPI, L.P.* disposed of competing royalty payment claims under Louisiana's forced pooling statute.[154] Fite Oil & Gas, Inc. (Fite) and SWEPI, L.P. (SWEPI) owned competing leases over some of the same property.[155] Fite claimed SWEPI's leases conflicted with Fite's, while SWEPI claimed some of the interests were "top leases."[156]

Pursuant to a Louisiana statute, SWEPI informed Fite in October 2009 of its intent to drill a well in a unit, approved by the Louisiana Commissioner of Conservation, covering some of Fite's leasehold.[157] "By statute, owners of separately-owned tracts within a drilling unit approved by the Commissioner may agree to pool their interests and jointly develop the property."[158] Under the statute, the person who drills the well is entitled to recover out of the production "the drilling, completion, and operating costs allocable to the non-participating owner," and then retain an additional "risk charge" for the assumption of risks in drilling the well.[159] Once costs and the risk charge are recovered, the non-participating owners are entitled to their share of production revenues.[160]

After additional discussions, SWEPI informed Fite in December 2010 of the costs of the well, referred to the statutory risk penalty that non-participating working interest owners must bear, and offered Fite "a chance to participate by agreeing to share in the costs of the well."[161] The

151. *Id.*
152. *Id.* at 979.
153. *See id.* at 980.
154. Fite Oil & Gas, Inc. v. SWEPI, L.P., 600 F. App'x 239, 245 (5th Cir. Feb. 2015) (per curiam).
155. *Id.* at 240.
156. *Id.* For more information on top leases, see Benjamin Robertson, Comment, *Top Lease Vultures: Title Failure, Bad Faith Pooling, and the Validity of Top Leases in the Texas Shale Plays*, 44 TEX. TECH L. REV. 463, 479 (2012).
157. *Fite Oil*, 600 F. App'x at 240.
158. *Id.* (quoting LA. STAT. ANN. § 30:10(A) (2013)).
159. *Id.* (quoting LA. STAT. ANN. § 30:10(A)(2)(b)(i)).
160. *Id.*
161. *Id.*

well was completed in March 2010; production from the well ended in December 2011.[162] Revenue from the well never exceeded the costs of drilling and completion.[163] SWEPI paid Fite nothing because Fite was non-participating and SWEPI did not recover its costs.[164] Because SWEPI's costs were never recovered, the risk penalty was also never assessed.[165]

Fite sued SWEPI, ultimately seeking a declaration that SWEPI was obligated to pay Fite's lessors the royalties due from production.[166] The parties filed cross-motions for summary judgment contending that, under the Louisiana statute, the other party was obligated to pay Fite's lessors' royalties.[167] Importantly, the royalty owners were never added to the lawsuit as necessary parties.[168] The court requested supplemental briefing on whether the lessors' royalty claims were prescribed under Louisiana law.[169]

The first issue before the court was whether the pending action between SWEPI and Fite tolled Fite's royalty owners' claims. But because the royalty owners were not parties to the lawsuit and no monetary relief was sought on their behalf, the court determined that the lawsuit was ultimately a contest only between Fite and SWEPI and that the lessors' claims were never properly before the court.[170] Accordingly, their prescription period was not tolled.[171]

The second issue before the court was whether Louisiana's ten-year prescription period or its three-year prescription period applied.[172] Personal actions in Louisiana typically have a ten-year prescription period, but actions to recover royalty payments from the production of minerals prescribe in three years.[173] Prescription begins at the time the payment is exigible; thus, each royalty claim accrues as payments are due, and the final payment was made at cessation of production in December 2011.[174] Fite argued that "portion of production" claims under the forced pooling statute are quasi-contractual claims subject to the ten-year prescription period, not payments of royalties subject to the three-year period.[175] The court rejected Fite's claim.[176] After all, Fite's obligations stemmed from leases it entered into with lessors—the terms of Fite's leases control payments to mineral

162. *Id.*
163. *Id.*
164. *Id.*
165. *Id.*
166. *Id.* at 240–41.
167. *Id.* at 241.
168. *Id.*
169. *Id.*
170. *Id.*
171. *Id.*
172. *Id.* at 244.
173. *Id.*
174. *Id.*
175. *Id.*
176. *Id.* at 245.

owners.[177] Fite's decision not to participate does not convert the interests they leased to unleased interests; they were merely forcibly pooled into the unit, and the operator could market the production allocable to Fite's leases as well as the production allocable to interests that did participate.[178] Fite's lessors were not entitled to seek a portion of production (as would someone who did not lease) but were only able to seek unpaid royalties under their lease.[179] Because the parties to the lawsuit conceded facts regarding prescription that make a determination of which company must pay royalties moot in this litigation, the issue did not need to be decided.[180]

B. Umbrella Insurance Policy After Well Blowout: Pioneer Exploration, L.L.C. v. Steadfast Insurance Co.

In the diversity case of *Pioneer Exploration, L.L.C. v. Steadfast Insurance Co.*, the court applied an umbrella policy to a well blowout in Louisiana.[181] Pioneer Exploration, L.L.C. (Pioneer) sued insurer Steadfast Insurance Co. (Steadfast) for its failure to cover damages related to a gas well blowout in Cameron Parish, Louisiana.[182] The well suffered a blowout in January 2008, causing certain substances to flow from the wellhead until March 2008.[183] The contamination covered roughly twelve acres of land, including some contamination on a neighbor's property.[184]

Pioneer immediately commenced response and cleanup operations, including hiring various companies to control and plug the well, a process that took approximately fifty days to accomplish.[185] As part of their cleanup efforts, Pioneer constructed levees and impoundments to prevent fluids from flowing onto nearby lands.[186] When those areas threatened to overflow, Pioneer brought in vacuum trucks to remove and properly dispose the waste.[187] After plugging, Pioneer undertook environmental remediation on the affected land—both its lessors' property and neighboring property.[188]

Pioneer's blowout was covered by three policies: (1) a "control of well" insurance policy, issued by another insurer; (2) a commercial general liability

177. *Id.*
178. *Id.*
179. *Id.*
180. *Id.* Importantly, Fite's and SWEPI's concessions are not binding on the royalty owners; accordingly, had the royalty owners actually taken steps to institute litigation, this case would not bind them. *Id.*
181. Pioneer Expl., L.L.C. v. Steadfast Ins. Co., 767 F.3d 503, 506–08 (5th Cir. Sept. 2014).
182. *Id.* at 506.
183. *Id.* at 507.
184. *Id.*
185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*

policy issued by Steadfast; and (3) an umbrella policy issued by Steadfast.[189] After Steadfast refused coverage, Pioneer filed suit seeking coverage under both policies for expenses in cleaning up and remediating the property, for defense and indemnity of claims by neighbors, and for insurance bad faith.[190] The policy at issue in the case was the umbrella policy.[191]

Under the applicable portion of the umbrella policy, a property damage exclusion provided that the policy does not apply to damage to "[p]roperty you *own*, *rent or occupy*, including any costs or expenses incurred by you, or any person or organization or entity, for repair, replacement, enhancement, restoration or maintenance of such property for any reason, including prevention of injury to a person or damage to another's property."[192]

The umbrella policy at issue therefore did not apply to property "owned, rented or occupied" by Pioneer.[193] A key issue in the case was whether Pioneer owned, rented, or occupied the property.[194] Pioneer argued that it did not own, rent, or occupy the surface estate because it only owned a mineral lease.[195] The court rejected the theory because under Louisiana law, a mineral owner has concurrent use of the land with the surface owner and, even if it did not, the language of the exclusion was broad enough to encompass the surface property.[196] The court determined that, at a minimum, Pioneer had a right to occupy the property under the broad rights conferred on it under the mineral lease.[197] Because Pioneer had a right to occupy the surface to explore and produce minerals, the court said the exclusion applied—"Pioneer 'owned, rented or occupied' the property within the meaning of the exclusions."[198]

The Authors believe that this result may be different in Texas, where the accommodation doctrine controls.[199] However, under the evidence presented in this appeal as documented in the decision, there likely would not have been enough evidence presented to overcome a similar finding by the court. While Pioneer pointed to extrinsic evidence that certainly would have buttressed its case, the court rejected the evidence because it determined the umbrella policy was not ambiguous.[200] Under Texas law, there may be an argument

189. *Id.*
190. *Id.* at 507–08.
191. *Id.* at 508.
192. *Id.* at 509.
193. *Id.*
194. *Id.* at 513.
195. *Id.*
196. *Id.* at 514.
197. *Id.* This is of course not true with unleased neighboring lands, which were dealt with separately in the opinion. *See id.* at 518–19.
198. *Id.* at 515.
199. *See* Valence Operating Co. v. Tex. Genco, LP, 255 S.W.3d 210, 215–16 (Tex. App.—Waco 2008, no pet.) (stating that mineral owners must accommodate the surface owner if a reasonable alternative method of extraction exists).
200. *Pioneer Expl.*, 767 F.3d at 515.

that the terms "occupy" and "lease" are ambiguous with respect to oil and gas leases. For example, unlike Louisiana, a Texas oil and gas lease is a fee simple determinable interest, not a "lease" in a renter's sense, rendering the term capable of multiple reasonable meanings, and thus ambiguous.[201]

C. Pooling and Commingling: Breton Energy, L.L.C. v. Mariner Energy Resources, Inc.

Conn Energy, Inc. and Breton Energy, L.L.C. (Appellants) are leasehold owners in the West Cameron 171 lease (WC 171).[202] IP Petroleum Company and International Paper Company (Appellees), successors-in-interest to Apache Corporation and Apache Shelf, Inc., along with Mariner Energy, Inc., Mariner Energy Resources, Inc., f/k/a Mariner Energy, Inc., Mariner Energy Resources, and Mariner Energy, Inc. f/k/a Forest Energy Resources, are operators and interest owners of the West Cameron 172 lease (WC 172).[203] Both WC 171 and WC 172 share a common reservoir, the K-1 Sands (K-1).[204]

In 1998, Appellees, operators of WC 172 at that time, submitted a request to the Minerals Management Service (MMS) to drill a well on lands contiguous to WC 171, to which Appellants objected.[205] MMS approved Appellees' drilling plan, conditioned with the limitation that because seismic data showed two separate oil and gas reservoirs, the K-1 sands and the K-2 sands, Appellees' must produce the reservoirs as "two separate completions."[206] A well was completed in 1999 in the K-2 sands.[207] Approximately eleven years later, Appellants proposed drilling a well on WC 171 and requested records from the MMS to determine if there had been well production from the K-1 sands.[208] The MMS records reported no well production, and Appellants completed a $6 million well in the K-1 sands.[209] The well production results were disappointing, and Appellants filed suit alleging that the K-1 reservoir had been depleted.[210]

Under Appellants' Second Amended Complaint, Appellants alleged that Appellees committed (1) unlawful drainage and trespass and (2) waste.[211] The district court granted Appellees' Rule 12(b)(6) motion and Appellants appealed.[212] Louisiana follows the "Rule of Capture," which provides:

201. *See* Jupiter Oil Co. v. Snow, 819 S.W.2d 466, 468 (Tex. 1991) (stating that common oil and gas leases are fee simple determinable estates).
202. Breton Energy, L.L.C. v. Mariner Energy Res., Inc., 764 F.3d 394, 396 (5th Cir. Aug. 2014).
203. *Id.*
204. *Id.*
205. *Id.* at 397.
206. *Id.*
207. *Id.* at 396.
208. *Id.*
209. *Id.* at 397.
210. *Id.*
211. *Id.*
212. *Id.*

> A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals, provided it is not prohibited by law. He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.[213]

Applying the Rule of Capture, Louisiana law does not allow "unlawful drainage" claims, except when there is "negligent or intentional waste under Articles 9 and 10, or against another who may be contractually obligated to protect his property from drainage."[214] The court determined that because all of Appellants' claims for drainage under Article 14 were "limited to an assertion that [Appellees were] is committing waste," the exception to Article 14 was a nullity, and Appellants' claim for unlawful drainage failed without prejudicing a claim for waste.[215] Likewise, the court determined that the trespass exception to Article 14 did not apply and that regulatory violations (here the MMS approval/restriction) do not rise to the level of trespass.[216]

Under the issue of waste, Appellants argued that Appellees committed waste by "reducing the quantity of oil and gas recoverable under prudent and proper operations; inefficiently, excessively, or improperly using, or unnecessarily dissipating reservoir energy; and physically wasting hydrocarbons."[217] Appellants alleged that the discrepancy in bottom-hole pressure between what was expected and what was measured was so great that there could be "no other explanation for a substantial depletion of K-1 other than a perforation at the K-1 level."[218] Appellants also alleged that "commingling" of K-1 and K-2 occurred, resulting in a larger-than-expected recovery by Appellees from K-2, and that the pressure in the K-1 reservoir was substantially equal to that of the K-2 reservoir—a clear indication that there had been "communication between the wells."[219] This overproduction of the K-2 by commingling supports the theory that once the reservoirs have been commingled, "you may no longer be able to produce the same amount of hydrocarbon that you would if you produced them separately without being affected by one another."[220]

The court next turned its attention to the notion of inefficiently, excessively, or improperly using or unnecessarily dissipating reservoir energy and determined that it is plausible that by perforating the K-1 sands while drilling the K-2, Appellees "improperly used and dissipated the

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213. *Id.* at 398 (quoting LA. STAT. ANN. § 31:8 (2013)).
214. LA. STAT. ANN. § 31:14.
215. *Breton Energy*, 764 F.3d at 407.
216. *Id.* at 407–08.
217. *Id.* at 399–400 (footnotes omitted).
218. *Id.* at 401.
219. *Id.*
220. *Id.*

reservoir energy which has the consequence of reducing the total amount of recoverable oil and gas."[221] The court determined that claims for drainage against all parties were properly dismissed, and all claims for waste against all parties, except for IP Petroleum Company (the perforating Appellee), were properly dismissed as well.[222]

D. Pipeline Replacement: Angus Chemical Co. v. Glendora Plantation, Inc.

Angus Chemical Company (Appellee) is the owner of a nitroparaffin production plant in Louisiana, which, as a by-product, produces wastewater that is removed through an underground pipeline that passes through lands owned by other parties to a separate wastewater treatment plant.[223] In 1978, Appellee's predecessor-in-interest acquired servitudes and rights-of-way from those landowners to construct and operate a wastewater pipeline.[224] Glendora Plantation, Inc. (Appellant) acquired property owned by George P. Smelser and Mary Tilford Smelser (the Property), who entered into an agreement granting a right-of-way easement to Appellee's predecessor-in-interest, providing

> an option to acquire a right of way and easement with the right to construct, maintain, inspect, operate, protect, alter, repair, replace and change the size of a pipeline for the transportation of liquids, gases, solids . . . together with all incidental equipment and appurtenances, either above or below ground, including but not limited to filtering devices, valves, meters, drips and other necessary and convenient installations, on, over, under, across and through the . . . property . . . .[225]

Appellee's predecessor-in-interest exercised its option and installed a 12" pipeline across the Property in 1979.[226] After multiple leaks throughout the years, Appellee desired to replace the pipeline and install a 16" pipeline instead.[227] Appellee subsequently sent a proposal to Appellant to abandon the 12" pipeline in place and lay a new 16" pipeline—to which Appellant did not agree.[228]

Appellee subsequently filed an action for declaratory judgment seeking in part to determine that "(1) [Appellee] has a valid servitude; (2) per the servitude, [Appellee] may abandon the 12" pipeline after a new pipeline is in service; [and] (3) [Appellee] may lay a 16" pipeline, fiber optic cables, and a

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221. *Id.* at 405.
222. *Id.* at 409.
223. Angus Chem. Co. v. Glendora Plantation, Inc., 782 F.3d 175, 177 (5th Cir. Mar. 2015).
224. *Id.*
225. *Id.*
226. *Id.*
227. *Id.* at 177–78.
228. *Id.* at 178.

tracer wire."[229] Subsequent to filing the suit, Appellee installed the 16" pipeline, along with two fiber optic cables and a tracer wire on top of the pipeline.[230] The only issues appealed from the district court were "(1) whether the Agreement allowed [Appellee] to abandon the 12" pipeline, (2) whether the Agreement allowed [Appellee] to install the fiber optic cables, and (3) whether the district court improperly denied [Appellant's] motion to compel discovery."[231]

No dispute existed concerning whether the 16" pipeline could replace the 12" pipeline—the issue was whether the 12" pipeline had to be removed or if it could remain in place.[232] The court reviewed a plethora of definitions of *replace* and determined that in this case it meant to "substitute."[233] The court further clarified that "[i]t is too much of a stretch to say that the Agreement is clear and unambiguous in its language when there are multiple reasonable interpretations of the *implications* of the word 'replace.'"[234] As such, the court determined there was an issue of material fact as to whether removal of the 12" pipeline was required and partial summary judgment was improper.[235]

On the issue of installation of fiber optic cables, the Agreement terms indicated that equipment can be installed with the pipeline that are "*incidental* equipment and appurtenances, either above or below ground, including but not limited to filtering devices, valves, meters, drips, and other *necessary and convenient* installations."[236] Using a broad interpretation of this language, the court concluded that installation of the fiber optic cables was permissible, "whether viewed as 'incidental' or 'necessary and convenient.'"[237]

V. FORM CONTRACTS CONTROL: *ZENERGY, INC. V. PERFORMANCE DRILLING CO.*

Zenergy, Inc. (Operator) entered into a contract with Performance Drilling Company (Contractor) wherein Contractor was to drill an oil well in Calcasieu Parish, Louisiana.[238] The parties entered into an onshore daywork drilling contract using an International Association of Drilling Contractors

229. *Id.*
230. *Id.*
231. *Id.* at 180.
232. *Id.*
233. *Id.* at 181.
234. *Id.* at 182.
235. *Id.*
236. *Id.* at 184.
237. *Id.* at 185.
238. Zenergy, Inc. v. Performance Drilling Co., 603 F. App'x 289, 290 (5th Cir. Mar. 2015) (per curiam).

form.[239] Work on the well was to be completed with deviation surveys conducted every 1,000 feet.[240] Once the well depth reached between 9,000 and 10,000 feet, a survey indicated a deviation of seven degrees or greater.[241] Operator called out a third-party contractor to conduct an independent deviation survey; however, the technician mistakenly used incorrect data from a different deviation survey, showing only a two-degree deviation.[242] Subsequently, Operator advised Contractor to continue drilling and Contractor drilled the well to 11,060 feet.[243] A separate third-party contractor was then called out to log the well and informed Operator that the hole was severely deviated.[244] Operator called back out the previous third-party survey contractor, who used the correct data this time, and determined that the wellbore was deviated by twenty degrees at a horizontal displacement of 1,145 feet.[245] After completion, Operator paid Contractor only for days that the wellbore deviation was less than five degrees, and Operator subsequently filed suit seeking declaratory judgment.[246]

Operator claimed that Contractor breached its contractual obligations by "drilling a deviated well, failing to provide a working conventional drift indicator, failing to provide accurate reports, violating the covenant requiring compliance with Louisiana law, and failing to perform in good and workmanlike manner."[247] The district court granted Contractor's motion for directed verdict holding that "under the Contract [Operator] bore all of the risk of a deviated wellbore."[248]

The court focused on the three types of contracts for onshore drilling: the daywork contract, the footage contract, and the turnkey contract.[249] Each of these contracts imputes different levels of risk to the operator and contractor, with the daywork contract having the most risk to the operator.[250] In a daywork contract, "the operator pays the contractor a fixed price per day to drill the well and assumes all of the risks of the drilling operation except for those expressly assigned to the contractor."[251] No provisions contained in the daywork contract between Operator and Contractor were instructive as to the risk allocation of a deviated wellbore.[252] Additionally, there is a "general commercial expectation in the drilling industry that it is the operator

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239. *Id.*
240. *Id.* at 291.
241. *Id.*
242. *Id.*
243. *Id.*
244. *Id.*
245. *Id.*
246. *Id.* at 291–92.
247. *Id.* at 292.
248. *Id.*
249. *Id.* at 293.
250. *See id.* at 292–93.
251. *Id.* at 293.
252. *Id*. at 293–94.

in a daywork contract who bears the risk of a deviated wellbore."[253] The court determined that because Operator had any of these three contract options to choose from, and chose the daywork contract with no provision imputing liability for a deviated wellbore on Contractor, Operator's "selection of the daywork contract elucidates their intentions with respect to the allocation of this risk."[254]

253. *Id.* (citing Owen L. Anderson, *The Anatomy of an Oil and Gas Drilling Contract*, 25 TULSA L.J. 359, 374 (1990)).
254. *Id.* at 295–96.