



# THE Energy Dispatch

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IEL YOUNG ENERGY  
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## Interview with Jason Bergeron, Senior Counsel - Litigation with Exxon Mobil Corporation

Interview by Laura Brown, Liskow & Lewis

**Jason, I've known you for some time, but I don't actually know your origin story. Can you walk us through your career path to the present day?**

My career path is not what you would consider a prototypical one leading to a legal career. My undergraduate degree was in Agricultural Business with absolutely no thought of going to law school. There are no lawyers in my family, so I really didn't have much appreciation for the profession. Out of college, I worked for the Louisiana Cooperative Extension Service as an Assistant County Agent with primary responsibilities managing a Parish 4-H youth program. It was an awesome experience where I spent a lot of time motivating young men and women to reach for the stars in terms of what they did with their lives. After a couple of years of working with some amazing kids, I took a dose of my own medicine and decided to go back to school to reach for a star of my own. A clerkship with a federal district judge followed, then 10 years with a law firm, and now finishing up my 10th year with ExxonMobil.

**Some readers may think that going in-house with a major energy company requires relocation—maybe internationally, and maybe frequently. What has your experience been?**

My time with ExxonMobil has been unique in that I've been able to stay in Baton Rouge during my tenure. That is certainly not the norm with major oil companies, but the bustling Louisiana litigation market has afforded me this unique opportunity, plus I've had some great managers who have recognized the value of having me closer to the action.

**All people are unique, and clients are people, so I find that all clients are unique in how they approach their role in legal work. I would describe you as "hands on." Can you talk about your management style? How has it evolved over time?**

Describing my management style as "hands on" is probably an understatement. The attorneys who work for me would probably say I'm a control freak, but I need to know as much about the case as anyone on my team because without that knowledge, I don't think I can make the kind of strategic decisions that need to be made, or give the client the kind of advice they need if I don't have full command of every aspect of a lawsuit. Plus, it's a lot of fun. I love litigation. Working up the facts of a case, collaborating with expert witnesses, deposing witnesses, all of that is what gets me fired up. I want the attorneys who work for me to know that I'm working just as hard as they are, so that when we are in a pinch to get something done, there is no hesitation to hunker down and complete the task at hand. Of course, my level of involvement has had to evolve over time as caseloads and case complexities increased. I've learned the hard way that doing a hundred things okay is not as good as doing ten things really good, so I've had to embrace the reality of delegation. Delegation can be tricky, but if you have mentored your team effectively, overall team performance is enhanced by allowing others to take charge of a given task. I've had to "let go" a bit, but I always keep my finger on the pulse of the case. Old habits are just too hard to break.

**You work on dockets that are high profile and/or high risk. Is that stressful? Fun? Challenging?**

Fun and challenging? Definitely. Stressful? Not really. But that is simply a function of always being prepared and never getting behind (or at least striving to stay ahead). Once you get into catch-up mode and lose control of a situation, that is when stress creeps in. Staying one step ahead of a case allows you to not be stressed when something unexpected happens. Conversely, if you are always in catch-up mode, then you will be in a perpetual state of stress, which is not good for you or the outcome of your case. Stress impairs your ability to think strategically and move proactively. Effectively managing stress through diligent preparation is the best recipe for success in high profile/high risk cases.

**And I'm realizing that I declared your dockets to be high profile/high risk without any explanation. Would you briefly summarize the work you do?**

Most of my work involves managing upstream environmental cases, focused almost exclusively in Louisiana. I work with multiple law firms under a "virtual law firm" model where we utilize the talent and resources from several firms to build an integrated legal team. Because we are putting lawyers together from different firms, that increases the demands from a case management standpoint as there is not a single point of contact like you might have when using only one firm. But the increased oversight managing the virtual law firm fits my "hands on" management style, so I think it works well from my vantage point.

**So, there will always be disputes, and "normal" tort or contract cases. Some environmental or "license to operate" litigation has a different thesis. To me – whether or not they think through the logistics or consequences of a world with drastically limited energy – some of these sentiments are kind of existential; it's that oil and gas production is fundamentally bad. Do you agree? If so, how do you combat that? If not, what do you think about them? In either case, what does it make you think about the future?**

There are certainly groups that believe the oil and gas industry is bad, but equally troubling are the people that might not necessarily be inclined to think that way, but also don't appreciate the incredible contributions this industry has made to society. From providing the critical fuel that allowed the Allies to prevail in World War II, to any of the modern technological advances in medicine, agriculture, and engineering that allow us to enjoy the safety, security and comforts that we take advantage of every day. Like it or not, the world we live in today, especially in the United States, would not be possible without fossil fuels. Does that mean there is not room for improvement in how we use fossil fuels or the development of alternative energy sources? Absolutely not. However, if we decided tomorrow to just stop using fossil fuels, our lives would be very different, and not necessarily for the better.

**For my second understatement of this interview, I would describe this year as "challenging." Structural injustices and racial inequality in this country have been laid tragically bare, and the ongoing COVID-19 pandemic continues to spread. Can you talk about ExxonMobil's leadership in these contexts?**

Those are both very important issues and I'm proud to be part of a company (and industry) that is taking the lead on both fronts. Within ExxonMobil's Law Department, diversity

and inclusion is a top of mind issue. Whether we are talking about hiring, promotion, or professional development, we strive to do these things with the intentional goal of increasing the diversity of our legal team, both internally and externally. Diversity and inclusion is not something that just happens organically. It has to be deliberate, otherwise real change is never achieved. On the COVID-19 front, crisis management is not something new to this industry. Whether we are talking about the international threats posed by various regimes to any of the hurricanes that periodically ravage the Gulf Coast, the oil and gas industry is on the front lines providing the critical fuel, energy and products that allow us to overcome what at times can appear to be an impossible situation. The oil and gas industry has certainly not escaped the economic strain that COVID-19 has had on the world economies, but I'm confident that our industry will lead the way out of this crisis.

**Jason, I appreciate your leadership. Thank you for sharing your time with the Young Energy Professionals of IEL.**

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## Energy Law Then & Now: A Multigenerational Discussion – Part III

*In Patrick H. Martin's storied career in oil and gas law, he has been a law professor, author and editor of essential legal publications, and the chief oil regulator in Louisiana. In this multi-part interview, Patrick is interviewed by his son Drew Martin, an oil and gas attorney in Louisiana and a member of IEL's 2019-2020 Leadership Class.*

*Part III of this interview considers environmental matters, public perception of oil and gas companies, and reflections on Martin's role as Louisiana's Commissioner of Conservation.*

**The green movement as we know it in the industry really began about when you began your career. Previously, you mentioned that some of your first responsibilities as in-house counsel for Gulf involved environmental compliance. Do you feel comfortable making any predictions about the future vis-à-vis the impact of environmental issues on the oil and gas industry in general, or mineral law in particular? Many within the industry are concerned about large-scale climate change litigation. Any thoughts on that prospect?**

In my last semester of law school, I recall being stopped in the hall of the Duke law school by a fellow student who demanded to know why I would go to work for an oil company. So, even then oil companies were scorned by a segment of the society.

Humans have always feared environmental change and the potential for catastrophe, whether it is from floods or

volcanoes or wildfire. People have often thought humans have brought on the wrath of God or the gods. Is climate change occurring primarily through human action? I have no reason to doubt that scientists are correct in many of their assessments, and a reasonable course of action is to diminish fossil fuel's contribution to environmental degradation. In an article I wrote 44 years ago, I pointed out the necessity for such change. Looking back at it, I see I wrote "People have become aware of the true costs of development and have sought ways in which to limit pollution and limit or prevent future encroachments by man on the environment. . . . Adverse environmental impacts from a project should be limited, but it is inevitable that they will occur; it will be impossible to maintain a decent standard of living without accepting some compromises on environmental protection."

I'm reminded of a joke from a movie that was popular around that time. This guy goes to a psychiatrist and says, "Doc, uh, my brother's crazy; he thinks he's a chicken." And the doctor says, "Well, why don't you turn him in?" The guy says, "I would, but I need the eggs." The eggs of course are our dependence on fossil fuels, especially oil and natural gas. It's great to develop sources of energy that contribute less to environmental degradation, but it will be many years before oil and gas become irrelevant. Our great progress with fracking and shale development has been such that we have become an exporter; the natural gas we send abroad improves the environmental future as other countries need less coal to burn.

**You were Louisiana's Commissioner of Conservation in the early 1980s. Tell me a little bit about that experience – were you fully prepared for the job on Day 1, did anything in particular surprise you, did it give you any additional insight on how the energy law environment works, etc.?**

At the beginning of July 1982, Governor Dave Treen appointed me to be Commissioner of Conservation for the State of Louisiana. I was sworn in and went home to get ready to come to the first day on the job the next morning. But I was alerted to the fact that there was trouble brewing. A natural gas bubble had been building and was now collapsing. A familiar cycle. A Louisiana entrepreneur named Ken Martin had been drilling Tuscaloosa Trend wells in the area north of Baton Rouge, and his drilling contractor was now about to walk off the job on one of the wells without completing the well or doing a proper P & A. The morning newspaper so reported. I drove by the well site on my way in to work, where I found that a drilling rig was being dismantled, and trucks were preparing to load up drill pipe and other equipment. I walked to the supervisor's trailer and introduced myself as the Commissioner of Conservation, and politely suggested he should refrain from further efforts

to decommission the well operations. He made a phone call to his superiors. And lo, the machines stopped. I looked around and thought – "Hey, this could be cool. I can stop the machines. If I sound authoritative, no one suspects I'm improvising."

*[Editor's Note: Because this interview was divided into several issues, I must point out Professor Martin's talent for humor and symmetry. If this sounds familiar, it's because it echoes Martin's experience of "stopping the machines" on his first day as in-house counsel at Gulf in Part I of this interview (see Dispatch Issue #9)].*

The next two years were a great experience. I had a competent staff of engineers, geologists, and other state employees who showed up every day to perform important tasks that were indispensable to good development of oil and gas and other energy resources. I especially enjoyed presiding over many conservation hearings for pooling and unitization and related activities. I made court appearances from time to time, testified in Congressional and Federal administrative agency hearings, worked with Governor Treen on energy policy issues, and represented the state in certain national activities such as the Interstate Oil and Gas Conservation Commission and the energy group of the National Governors' Association.

**If you were named Commissioner of Conservation again today, what do you think the biggest difference would be for you?**

As best as I can imagine it, the basic functions of the office are unchanged. The regulatory concerns have shifted a bit to the new technology of horizontal drilling with fracking. The end focus remains the same: "prevent waste and protect correlative rights."

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## Lessons Learned from COVID-19

*The adversity that we're all facing in 2020 is reminding us--as well as our colleagues and clients--that we are all people with unique life situations and challenges that we are dealing with every day, many of which have been exacerbated as of late. These are strange times and I've found that people are mostly very understanding about a person's unique circumstances, their working from home, and even having their child wander into a video call. We should all do what we can to be understanding and extend some grace in these strange times we're going through, and hopefully that attitude will continue after we emerge on the other side.*

- Brett Podkanowicz, EnCore Permian, Midland, TX

*The importance of sticking to routine. I treat every day like I am going to the office. Breakfast with the family, get dressed for the day, head to the home office and don't break until lunch. I try to set up social calls during lunch ("hey, let's virtually go to lunch"). Sticking to this schedule has allowed for the days to seem normal and made it easier to maintain work and workflow.*

- Niki Roberts, Akin Gump, Houston, TX

*Get up and get dressed each day in comfortable yet professional clothing. It may be fun to work in your pajamas for a day or two, but you will feel more productive and professional if you look the part. Keep to a set schedule. To the extent it is possible, choose an area of your house to work in that is free from distractions. Once you are done with your work for the day, take time to unwind, relax, and enjoy your family. If possible, get out of the house and take a walk to help shift your mind from work to play.*

- Kelly O'Bryan da Mota, Cimmaron Land, Katy, Texas

*I cannot do back to back meetings from home, like I could when we were in the office. If I am unable to move meetings, and find myself on calls all day, I end hour-long meetings after 50 minutes, so that I can eat lunch, check on my kids, refill my water, etc. I have found some coworkers cannot take another email right now, but others cannot talk on the phone while simultaneously home schooling kids. I try to ask each about preferences when there is something to be discussed. I keep a nice outfit near my computer, because everyone turns on video conference when I least expect it.*

- Lauren Woodard, Shell Oil Company, Houston, Texas

*Working from home has blurred the line between work and home. I saw a tip on social media to light a candle to signal the end of the workday and transition the space to "home". This has helped immensely in keeping a work-life balance during these times!*

- Erica Hough, Talen Energy, The Woodlands, TX

*I have found that an external web cam offers better picture quality and is more convenient when in my real or home office. Using the external web camera allows me to conduct video meetings with my laptop docked as it otherwise would be. It also allows me to place the camera at eye level which can be challenging with an integrated camera.*

- Daniel Stanton, Kean Miller LLP, New Orleans, Louisiana

*I slide a mattress against my home office door to help quiet the noise of barking dogs during conference calls. Also, having a quality VPN phone in your home office (like one you probably have in your work office) really helps. You just won't*

*have the sound or signal quality problems you might have with a mobile phone.*

- Daniel Kirksey, Kirkland & Ellis LLP, Houston, TX

*Consider taking a short stay-cation! I recently did and it really helped to get a few days to myself. I'm an introvert and had been around my family non-stop for months. I love my family dearly, but a few days away really helped recharge my batteries. I even did it during the work week and worked from the hotel. Even though I was working, being by myself and having more quiet time still recharged my batteries. I highly recommend it for any of those introverts out there needing a little time to themselves - take it!*

- Eric C. Camp, Decker Jones, PC, Accra, Ghana

## Young Energy Professional Highlight - Bianca Roberson, Shell Legal Counsel – Global Litigation

Interview by Miles Indest, McGuireWoods LLP



### SuperLawyer and SuperMom

During her interview with IEL, Bianca described her incredible journey from the Harris County District Attorney's Office to Shell—all while balancing her one-year-old daughter on her lap.

Bianca has enjoyed an amazing career with plenty of adventure.

Before law school, she used her finance degree as a gasoline scheduler at Morgan Stanley in New York City, responsible for the physical movement of gasoline product across the Gulf of Mexico. Bianca then moved to Houston to work for a private oil company, but law school kept calling her name. Through her time at Texas Southern University's law school, Bianca clerked for a judge and the notable Rusty Hardin. These relationships led to her first job out of law school, and in the courtroom, as an Assistant District Attorney. For three years as an ADA, Bianca cultivated her voice as an attorney, identified her legal style, and found her passion for dispute resolution.

But through some "sheer luck," a new opportunity came knocking. Bianca saw that Shell's Global Litigation Group had an opening, so she decided to take a chance. Sure enough, Bianca got the job! Now, Bianca serves as legal counsel for Shell, where she handles a variety of employment cases, including wrongful termination, harassment, discrimination, etc. Bianca is also responsible for upstream personal injury

cases, and other personal injury and property issues related to Shell franchise sites.

### Comments on the COVID Quarantine

Bianca stays optimistic, even in tough times. Despite COVID-19's negative impacts, she tries to focus on the beautiful things in our lives and careers. One thing the quarantine affirmed is how "truly human" our coworkers are.

With our many video calls from home, we can enjoy the many traits that make our colleagues unique. We hear their kids in the background; we see their dogs and house decorations—which helps us care more about their personal interests and find new ways to connect. Ultimately, Bianca hopes the pandemic will help us more appreciate work-life balance and understand our colleagues and their needs.

### Hobbies

Bianca is a proud mother who spends much of her free time with her husband and three children (ages 7, 3, and 1). She also candidly admits to enjoying self-care and reality TV shows—such as *The Real Housewives*, *The Bachelorette*, and *90 Day Fiancé*.

### Advice to Young Lawyers

"Be the problem solver—the person who runs towards problems and not away from them. You will gain expertise and skills by raising your hand for projects that you know nothing about. If you do a good job, you will often be viewed as the expert on that subject moving forward."

"Teamwork is important, so do not be afraid to ask for help. Early on, newer attorneys may sit on a task for way too long, fearing that asking for help would signal incompetence. Maintain relationships with your team and be willing to ask for guidance."



Louisiana! Oklahoma! California! What's new, interesting, or important to watch in your state? Please submit your highlights to *The Energy Dispatch* and help us cover the broadest geographic area possible.

**All States.** The first episode of [IEL's Podcast Series](#), "Trade Secrets in Energy: From Protection to Prosecution," is now available. Tune in to hear Miles Indest of McGuire Woods and Brett Podkanowicz of EnCore Permian discuss the intersection of energy and trade secret litigation.

**All States/Texas.** On June 23, 2020, the United States Senator for Texas, John Cornyn, introduced the SAVE Jobs Act to assist the American energy sector in retaining jobs during the challenging economic times following the shutdowns caused by COVID-19. *Save American Vital Energy Jobs Act*, S. 4041, 116th Cong. (2019-2020). The bill aims to provide administrative clarity and short-term regulatory relief to the American energy sector by (1) extending the commence construction window for the 45Q tax credit by one year; (2) suspending certain capitalization rules, allowing taxpayers to immediately expense certain direct and indirect costs, such as inventory, that would otherwise be required to be capitalized in 2020; (3) reducing the required deposit of certain motor fuel excise taxes paid every two weeks by taxpayers from 95% to 25%, without reducing the total tax liability these companies owe the government; (4) allowing taxpayers to expense 100% of intangible drilling costs in 2020; (5) streamlining existing authority to grant lease extensions and suspensions of production and operations during the pandemic; (6) simplifying the existing process for royalty rate reductions to provide more timely relief during the pandemic; and (7) delaying the deadline for recalculation of royalty payments under the 2016 ONRR Valuation Rule until July 1, 2022. Importantly, the SAVE Jobs Act must pass both the Senate and the House and be signed by the President before it becomes law.

- Alex Kuiper & Jennifer Martin, *Kuiper Law Firm*

**Minnesota; D.C.; Other States.** Whether climate change litigation belongs in federal or state courts continues to be an issue at the forefront of this litigation. While the Fourth, Ninth, and Tenth Circuits have recently remanded suits by cities and counties seeking climate change-related infrastructure damages to state courts, the issue remains unsettled in the First and Second Circuits. On July 15, 2020, the defendant energy companies renewed their plea to the U.S. Supreme Court, urging the Supreme Court to review the Fourth Circuit's affirmation of the trial court's remand order. See *BP PLC et al. v. Mayor and City Council of Baltimore*, case number 19-1189, in the U.S. Supreme Court. Meanwhile, states and municipalities continue to file new climate-change cases. On June 24, 2020, the Minnesota Attorney General sued several energy companies, including the American Petroleum Institute, for deceiving consumers about climate-related hazards, alleging that the energy companies engaged in climate-related fraud. On July 27, 2020, ExxonMobil Oil Corporation removed the case to federal court. See *State of*

*Minnesota v. American Petroleum Institute et al.*, case number 0:20-cv-01636, in the U.S. District Court for the District of Minnesota. A day later, on June 25, 2020, the Washington, D.C. Attorney General filed a similar lawsuit, accusing energy companies of deceiving consumers and concealing climate-change related risks caused by fossil fuels. On July 20, 2020, ExxonMobil Oil Corporation removed the case to federal court. See *District of Columbia v. ExxonMobil et al.*, case number 1:20-cv-01932, in the U.S. District Court for the District of Columbia.

- Elizabeth Byrne, *Liskow & Lewis*

**Pennsylvania.** Clarification of the law regarding cessation of production and abandonment of an oil and gas lease may be on the way in Pennsylvania. Mitch-Well Energy, Inc. was the successor lessee of oil and gas leases requiring it to drill a certain number of wells and make certain minimum payments, including shut-in payments. Mitch-Well drilled one well on each of the leases before their primary terms expired. But, for a period of approximately 16 years between 1996 and 2013, the wells did not produce oil and gas in paying quantities and Mitch-Well did not make any payments required under the leases. The lessors sought a judicial determination that Mitch-Well abandoned the leases. The trial court found that Mitch-Well abandoned the leases due to lack of production and failure to make the required minimum payments. Notably, the trial court did not hear any testimony from Mitch-Well regarding its good faith determination that the wells were productive. On appeal, the Pennsylvania Superior Court affirmed the trial court's holding. *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, 217 A.3d 1259 (Pa. Super. Ct. 2019). On April 14, 2020, the Pennsylvania Supreme Court accepted Mitch-Well's appeal and specifically requested that the parties address *Jacobs v. CNG Transmission Corp.* and *Aye v. Philadelphia Co.*, two significant cases in Pennsylvania's cessation of production and abandonment jurisprudence.

- Chelsea Heinz, *Babst Calland*

**Texas.** A Court of Appeals opinion suggests landowners will have significantly more leverage during pipeline condemnation proceedings because landowners may use high value past pipeline transactions with pipeline companies without the authority of eminent domain to value the taken land. The opinion also holds: 1) past transactions between landowners and pipeline companies with eminent domain authority may not be used to value the taken land because the transaction was not voluntary; and 2) a pipeline company does not conclusively prove a landowner's land is being taken for "public use" pursuant to the Texas Constitution when the pipeline company has the appropriate Railroad Commission T-4 Permit and a transportation service agreement with one unaffiliated company. The case is

*Hlavinka v. HSC Pipeline P'ship, LLC*, 01-19-00092-CV, 2020 WL 3393540, (Tex. App.—Houston [1st Dist.] June 18, 2020).

**Editor's Note:** Look for a more detailed analysis of *Hlavinka* in the next issue of *The Energy Dispatch*.

- Jesse Nation, *Branscomb Law*

## Cybersecurity and Working Remotely

Shawn Morgan (WV) and Gillian Flick (PA), Steptoe & Johnson PLLC

Over the last decade, the importance of protecting businesses from cybersecurity attacks has risen. Companies have increased budgets to protect their data, but attackers continue to try to break through our virtual walls. Due to the COVID-19 pandemic, millions of people now work from their homes. The closure of non-essential businesses and the recent "Stay at Home" orders in effect for various states have forced businesses to transition their employees to remote work. The switch to a predominantly remote workforce can pose increased risks to businesses unless they focus attention on needed cybersecurity protocols. Taking a few introductory steps can ensure a strong foundation for maintaining cybersecurity during this unprecedented time.

First, businesses should provide basic guidance for staff on how to create a more secure remote work environment. A key initial step is to ask employees to look for the devices in their homes that are connected to the wireless home network and to ensure that those devices are secure and password-protected. Importantly, some of these devices – like cell phones, gaming devices, tablets/iPads, and wireless assistants, such as Alexa, Google Home, and Siri, can be triggered to "listen" to and record conversations. This poses a business risk, if confidential discussions are inadvertently recorded. The best way to ensure these devices are not "listening" is to remove them from all office spaces. Keeping these devices updated and making sure they are all secured with unique passwords provides another layer of protection. Likewise, adding a required password to a home wireless network, or updating the default administrator password, is another key step to prevent unauthorized users from connecting to an employee's personal network.

Second, companies should advise their employees about the increased risks of phishing and spam attacks, which become more prevalent when employees work remotely. As guidance regarding COVID-19 changes daily, scammers' targeting becomes more sophisticated and cyberthreats arrive more frequently by email. Scammers love to take advantage of the headlines, by sending emails about coronavirus updates with links to click, which send unwary computer users to

fraudulent websites. These sites trick victims into revealing sensitive information, providing unauthorized access to computer systems, or donating to fraudulent charities or causes. Employees should be reminded to:

- exercise caution in handling any email relating to COVID-19;
- avoid clicking on links in unsolicited emails and be wary of email attachments; and
- use trusted sources such as legitimate, government websites for up-to-date information regarding COVID-19.

Third, businesses should verify that their remote, online meetings are being conducted securely. According to the National Cyber Security Centre (NCSC), multiple criminal groups have ramped up activity since January. As meetings, conferences, and other events are moved online, companies face increased risks of exposure to malware and ransomware. Moreover, because most businesses have moved to online meetings via platforms such as Zoom, WebEx, Microsoft Teams, Avaya Spaces, and Skype Business, heightened protections are required to ensure the privacy of business and customer data. Chiefly, security measures must be put in place while businesses use these virtual platforms. In cases where confidential corporate information or sensitive data (like personal health information) must be discussed, it's important to remember that laws on protecting data still apply. Utilizing free accounts during this time can expose a business to a variety of negative consequences if that data is breached and/or misused. Some of these virtual platforms have reported that hackers can tap into a webcam and/or microphone without the user's knowledge, exposing secret information. To enhance security during online meetings, companies should:

- use a password, not just a log-in for access to meetings;
- require the "host" to admit meeting attendees;
- set up the meeting to always encrypt the discussion "traffic"; and
- consider whether meetings need to be recorded, record only when necessary, and delete recordings when no longer needed.

Fourth, employers should stress the need to restrict confidential information to the company's computer network and not to personal computers or devices not connected to the company's network. While protecting data comes at a cost, some affordable measures to implement include double authentication for signing into work systems through the use of passwords, and the use of RSA tokens or similar means of access to the company's network. Some systems require a password and a code that is sent via text, while others

call an employee's phone to provide the security of double authentication.

Finally, the most important thing a business can do is to create a "see something, say something" culture by encouraging employees to report any suspicious emails so that others may be on the lookout as well. Sending test emails to employees to make sure they follow proper procedure is another way for a company to protect itself.

As we navigate these new remote ways of working and conducting business, it's important to review applicable policies, procedures and protocols to ensure that you are keeping information secure.

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## Efficient Breach and Contract Performance

Joe Castelli, White & Case LLP

The COVID-19 pandemic and rapid decline in commodity prices in the first half of 2020 has made it difficult for some marketplace participants to satisfy their contractual obligations. The COVID-19 pandemic shuttered business and decreased demand. In April 2020, benchmark U.S. West Texas Intermediate (WTI) prices even fell to negative territory. While prices have rebounded, with WTI trading in the low \$40s per barrel in August 2020, the economic pain of rollercoaster prices and the COVID-19 pandemic has caused energy companies to reexamine their ongoing contractual arrangements.

Can, or should, certain contractual obligations be abandoned? This intentional decision would be different from nonperformance as a result of something outside the parties' control – such as the infamous force majeure clause that was rarely examined so closely prior to the COVID-19 pandemic. Rather, a contracting party decides intentionally not to perform under the contract. Courts tend not to have a favorable opinion of intentional breaches. But what if the breach makes sense from an economic point of view? That is, if the breach is efficient?

### a. *Leaf Invenergy* and the Doctrine of Efficient Breach

Efficient breach, as its name implies, is the doctrine "based on the idea that a party might find it economically worthwhile to breach a contract because that breach yields economic benefits that exceed the value of the damages it must pay to the non-breaching party" (*Leaf Invenergy Co. v. Invenergy Renewables LLC*, 210 A.3d 688, 703 (2019)).

The *Leaf Invenergy* case in the Supreme Court of Delaware



clearly laid out the doctrine of efficient breach. In *Leaf Invenergy*, Invenergy Wind LLC (“Invenergy”) engaged in an \$1.8 billion asset sale. Leaf Invenergy Company (“Leaf”), a noteholder of Invenergy, had a contractual right in Invenergy’s limited liability company agreement (the “LLC Agreement”) that Invenergy was prohibited from engaging in a “Material Partial Sale” without Leaf’s consent. And if Invenergy engaged in a Material Partial Sale without consent of the majority noteholders, it would be required to pay a “Target Multiple,” defined as a multiple of the noteholders’ initial investment, that grew over time.

#### b. Damage Calculations in an Efficient Breach

Invenergy argued that it had not breached the consent provision. It lost that one. But on the damages calculation, Invenergy argued that even if it had breached the consent provisions of the LLC Agreement, Leaf should not be entitled to any damages because Leaf had not suffered any damages from the transaction. At the trial stage, the Delaware Court of Chancery agreed with Invenergy and awarded only one dollar in nominal damages.

The Court of Chancery held that Invenergy had breached the LLC Agreement by not obtaining Leaf’s consent, and therefore not paying the Target Multiple – which Leaf argued was north of \$126 million. The Court of Chancery relied on the “well-settled rule” of expectation damages, or “the value that the performance would have had to the injured party.” The Court of Chancery also stated that both parties, Invenergy and Leaf, believed that Leaf would be entitled to the Target Multiple if Invenergy engaged in a Material Partial Sale without Leaf’s consent.

So how did the Court of Chancery reason that only nominal damages were sufficient? First, the Court of Chancery found that the parties’ subjective expectations were unreasonable and therefore would not form the basis of a damages award. Then, the Court of Chancery stated that Leaf could not recover unless it showed “actual damages by showing that it suffered harm as a result of [the transaction without Leaf’s consent] or that it would have secured additional consideration given the opportunity to negotiate for its consent.” Leaf had shown neither; hence, nominal damages.

The Supreme Court of Delaware reversed the decision on damages. The Court of Chancery had reasoned that Invenergy would likely have not engaged in the transaction if it had to pay the Target Multiple to Leaf, and that the transaction did not cause actual harm to Leaf: “Rather than examine the issue of damages in terms of whether Invenergy was contractually obligated . . . to pay Leaf the Target Multiple, the Court of Chancery approached the

issue of damages by focusing on the loss of value to Leaf from Invenergy’s participation in a Material Partial Sale without Leaf’s consent.” Leaf had bargained for the consent provisions in the LLC Agreement, and the Supreme Court of Delaware held that the correct measure of Leaf’s damages was the Target Multiple.

#### c. The Doctrine of Efficient Breach

In doing so, the Supreme Court of Delaware also rejected the lower court’s application of the doctrine of efficient breach. The Court of Chancery had concluded that Invenergy had decided to engage in an “efficient breach” by engaging in transaction without consent and failing to pay the Target Multiple, but that the breach was “efficient” because Leaf had not demonstrated actual damages.

The Court of Chancery’s application, however, does not take into account that an efficient breach can be efficient “only if [the breaching party] can compensate the injured party for his losses and still retain some of the benefits from the breach” (*Bhole, Inc. v. Shore Invs., Inc.*, 67 A.3d 444, 453 (Del. 2013) (emphasis added) (quoting *DuPont v. Pressman*, 679 A.2d at 445-46)). An efficient breach must yield “economic benefits that exceed the value of the damages [the breaching party] must pay to the non-breaching party.” Efficient breach does not allow a party effectively to elect which damages calculation it will pay to the non-breaching party. Invenergy had not compensated Leaf, and therefore Invenergy had not engaged in an efficient breach.

Importantly, the doctrine of efficient breach does not reject the idea that a breach has actually occurred. This point distinguishes efficient breach from the concept of force majeure – *i.e.*, excused non-performance resulting from circumstances (a pandemic, perhaps?) outside a party’s control. Most analysis regarding force majeure is centered around *whether* a breach occurred – not what happens when it has been determined that a breach has already occurred.

#### d. Value Maximization and Efficient Breach

The *Revlon* case, well-known to law students everywhere, requires that a Delaware corporation’s board of directors take steps to maximize shareholder value when the corporation is in “Revlon world” – when the corporation is being sold or when a change of control becomes inevitable (*Revlon, Inc. v. Macandrews & Forbes Holdings, Inc.*, 506 A.2d 173 (1986)). But even if a breach appears economically efficient, the governing body of a company may be reluctant to breach due to concerns about liability for breach of fiduciary duties to the company. Can an efficient breach accord with a decision maker’s fiduciary duties, especially

when the company is in *Revlon* world?

The Delaware Court of Chancery has made some indications that the answer is yes. In fact, giving consideration to an efficient breach of the company's obligations may even be required. In *Frederick Hsu Living Trust v. ODN Holding Corp.*, the Delaware Court of Chancery stated that "even with an iron-clad contractual obligation, there remains room for fiduciary discretion because of the doctrine of efficient breach. Under that doctrine, a party to a contract may decide that its most advantageous course is to breach and pay damages. Just like any other decision maker, a board of directors may choose to breach if the benefits (broadly conceived) exceed the costs (again broadly conceived)" (*Frederick Hsu Living Trust v. ODN Holding Corp.*, 2017 Del. Ch. LEXIS 67, \*54-55). In fact, it should not be assumed that compliance with a contract discharges directors' fiduciary duties: "A corollary of this principle is that directors who choose to comply with a contract when it would be value maximizing (broadly conceived) to breach could be subject, in theory, to a claim for breach of duty. For a contract with a third party, the business judgment rule typically will govern and prevent such a claim from getting beyond the pleading stage, but the fiduciary standard of conduct remains operative and the underlying legal theory therefore exists."

In 2020, the COVID-19 pandemic and crash in commodity prices have forced numerous companies into *Revlon* world, and it is likely we will see more sales and bankruptcies in the near future. Here, the doctrine of efficient breach carries more weight because *Revlon* imports the efficient-breach doctrine into the list of economic realities directors are compelled to consider in their profit-maximization analysis. While courts have not directly tackled the question of whether current public safety and economic conditions warrant an efficient breach, efficient breach is an important concept for participants to consider in navigating a turbulent market.



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