Institute for ENERGY LAW

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THE ENERGY DISPATCH

A PUBLICATION OF THE IEL YOUNG ENERGY PROFESSIONALS COMMITTEE

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The Energy Dispatch, the IEL's Young Energy Professional newsletter, contains substantive articles on trending legal issues in the energy industry, interviews, and professional development.

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Interview by Darya Shirokova

What motivated you to become a lawyer and later to specialize in energy litigation?

My motivation to become a lawyer probably arose from my natural inclination from an early age to argue, to challenge, to advocate (Just ask my parents!). In high school I had three academic interests: economics, international relations, and debate. My career as an advocate may have formally begun when our team won the state debate tournament. But my path to law school took many twists and turns, had many stops and starts, and went on almost forever. After more years than I care to admit, I obtained my B.A. Degree in Economics and Humanities at the University of Kansas, and from there studied religion and Buddhist philosophy in graduate school. Eventually, however, I saw the need to pursue a career that paid the bills.

I found myself in law school in the late 1970s. Oil prices had quadrupled in the first half of the decade and then doubled again at the end. The U.S. Government imposed wage and price controls; inflation ran rampant. Sitting in an energy regulation seminar in my third year of law school and having just read Daniel Yergin's 1979 book *Energy Future*, I decided to pursue a career in energy disputes. I embraced my future in energy as it combined international relations, economics, and advocacy, all longtime interests of mine. In my view, widgets were not worth fighting over; energy prices and supplies were.

What were the milestones in your legal career?

My career as an energy lawyer began in 1980 when I joined the Morris Laing law firm in Wichita, Kansas. With 15 lawyers, it specialized in oil and gas transactions and disputes. My first case was a dispute between a gas producer and an electric coop over interpretation of an area rate clause in a gas sales contract. Ten weeks later the head of litigation and I were in trial in federal court: we won. Next, I became the junior lawyer in a 4 billion dollar dispute between more than 20 U.S oil companies and the Department of Energy. When the trial finished a year later (our side won in federal district court but lost at TECA), I moved to Houston as an Associate at Fulbright & Jaworski, where I spent 25 years representing oil companies and service companies in all types of energy disputes in court, in front of the Railroad Commission of Texas' Oil & Gas Division, and in arbitration. In 1990 I took on my first international arbitration: a JOA dispute concerning a gas discovery off the coast of Ecuador.

When that case finally finished five years later—there were other cases along the way, and of course—I became a member of the Association of International Petroleum Negotiators at the urging of one of the experts in that case, Al Boulos. Attending an AIPN luncheon in 1996, I heard the luncheon speaker, an Amoco commercial representative, explain that Amoco intended to flip its capital expenditures for the next year from 70% domestic and 30% international to 70% international and 30% domestic. On the spot, I decided to devote my practice from then on to international energy disputes. Disputes, I knew, followed the money. Short on knowledge but long on audacity, I invited the world's leading energy arbitration lawyers and the heads of the world's leading arbitral institutions to the first-ever-anywhere international energy arbitration conference, hosted by the ABA and AIPN in Houston. None knew me, but they all came. I chaired the conference.

Other milestones: in 2002, I published a book titled *The Panama Convention and Its Implementation Under the Federal Arbitration Act*. Its publication led directly to a working relationship that continued up to my retirement in 2020, when the General Counsel of a large international oil field service company read the book and based on it introduced me to one of his Associate General Counsels. In 2007, I joined King & Spalding and again, fortune smiled as the firm had just adopted a new business strategy that focused on four practice areas, two being energy and international arbitration.

In 2012 I started teaching international arbitration at the University of Oklahoma College of Law at the invitation of Professor Owen Anderson. In 2014, I became President of

the AIPN, the only disputes lawyer to hold this position in the AIPN's 41-year history. In 2016, I began teaching international energy arbitration at Georgetown University Law Center. Perhaps more a "headstone" than a "milestone" (just joking), in 2017, I received the Institute for Energy Law's Award for Lifetime Achievement in Energy Litigation. In 2018, I received the University of Kansas Law School's Distinguished Alumni Award, and in 2021 I received the AIPN's Distinguished Negotiator Award. For these honors, coming at the end of my career as an advocate in international energy disputes, I am extremely grateful.

Could you describe your legal practice and the matters you are currently working on?

On September 1, 2020, I fully retired as a Partner at King & Spalding and as an advocate, but I continue to work as an energy arbitrator and expert witness. Recently I also agreed to consult for King & Spalding International on a host government energy dispute. This fall I taught international energy arbitration at Georgetown for a fifth time; the course deals with the substance of these disputes rather than with the processes for resolving them. I had 28 students, from all over, including Turkmenistan, and including a Major General in the U.S. Air Force. Over my career I have given some 200 guest lectures and conference presentations, and I continue to do that. In my spare time, I am also working on some writing projects, including one on the legal status of state contracts. Last year the Georgetown Journal of International Law published an article I wrote on Risk Mitigation in International Petroleum Contracts. As you can tell, I still enjoy writing and speaking about energy disputes.

Do you think energy litigation will change as a result of the energy transition?

To state this question another way: Will energy litigation itself undergo a transition because of the energy transition? My answer is Yes. As I said before, disputes follow the money. They will follow the changes to the industry, and the changes themselves, especially structural changes imposed by governments and courts, will generate disputes. But contracts with host governments and NOCs—production sharing contracts and concessions—remain long term; some current agreements date back to the 1970s, even to the 1950s. And disputes caused by the shift in leverage attributable to the obsolescing bargain will continue, regardless of the transition. LNG sales contracts and gas contracts disputes of various types will continue, especially since natural gas plays a role, whether welcome or not, in the energy transition. The likelihood exists, however, that host governments may become the claimants in some of these disputes if IOCs decide, on their own or under compulsion from their home governments, not to develop greenfield or brownfield projects because of the impact of fossil fuels on the global climate. NOCs will undoubtedly want to continue to produce oil and gas, at least until they find viable alternatives to their dependence on fossil fuels for their state budgets and economic development. Perhaps disputes will arise over how to restrain NOC oil production to protect the planet. In their turn, universities will need to modify their energy law curriculums in response to climate change and the energy transition; their leadership in the transition is imperative.

What are your favorite things to do when you are not working?

In my spare time, i.e., when I am not acting as an arbitrator or expert witness, I enjoy teaching. In addition to Georgetown, I am talking with another law school about teaching there. I also enjoy reading essays by writers on writing, exercising, looking at the sunset over the Jemez mountains in New Mexico, and sharing meals with good friends. I have returned to my study of Buddhist philosophy.

Do you have any advice to give to young lawyers in general and to energy litigators in particular?

Yes, I do. First, recognize that oral and written advocacy carry equal importance, and develop deadly skills in both. In international arbitration, the entire direct case goes into evidence in writing. But arbitrations can be won or lost based on oral presentations, in particular the advocate's answers to key questions from the tribunal. Second, young lawyers must learn the art of anticipation: in designing case strategy, in trial preparation, during the trials and hearings themselves, and in general in anticipating trends and challenges in the energy industry. Third, never stop learning. Clients demand counsel know and understand their business. I always ask my students if they know the difference between law students and lawyers: law students pay to learn; lawyers get paid to learn (directly or indirectly). Our clients even hire tutors for us; they're called experts. Disputes not only follow the money; they go to the lawyers who understand the industry, the players, and the disputes. Fourth, take the initiative; be audacious in your practice development. Become an expert. Reach out to clients and prospective clients: go global. And last, share your knowledge, your wisdom. Helping others, even competitors, pays dividends, often unexpected. Whenever possible, go in-house with your knowledge. That book about the Panama Convention, if only read by that one General Counsel, helped generate tens of millions of dollars in legal fees over two decades.

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Professional Development in 10 Easy Steps

J.D. Neary, Chief Legal Talent Officer, McGuireWoods

Associates must not only serve clients, but also juggle conflicting demands, manage more junior lawyers and paralegals, and develop the skills needed to take their career to the next level.

Trying to do all those things well, while finding time for a life outside work, can seem daunting. Based on 35 years of experience in law firms and almost 20 years helping McGuireWoods lawyers, what follows are 10 essential steps, in no particular order, to professional development success.

1. **NEVER STOP LEARNING.**
   MCLE programs should not be the entirety of your training. Constantly look for ways to improve skill sets and your knowledge of the law. Stay current with changes in the law and developments that impact your practice.

2. **INVEST IN YOURSELF.**
   Don't limit your decisions to the boundaries of your firm's professional development budget. Take a class or join an organization you pay for yourself. These kinds of investments provide great long-term dividends.

3. **DEVELOP STRONG COMMUNICATION SKILLS.**
   Being a good writer and oral advocate will take you far, so time spent honing these skills is an excellent investment. Firms often offer programs to assist in both areas. A quick way to get started: Read good writing. Books, magazines, legal decisions — it doesn't matter, as long as it's quality reading.

4. **HONE BUSINESS DEVELOPMENT SKILLS.**
   At its core, a firm's business model is based on the ability to sell their people and their capabilities to clients. Become proficient in marketing yourself and the firm.

5. **BEFRIEND TECHNOLOGY.**
   Technological advances have dramatically changed the practice of law over the past 30 years, with more changes to come. Learn how to use the firm's technology to the advantage of you and your clients. Know what technology clients use and what their expectations are.

6. **MEET TARGETS.**
   Being productive is an important part of success. If you struggle to reach billable targets, a number of folks can help, starting with your supervisor and department chair.

7. **BE A TRUSTED ADVISER.**
   One of a lawyer's most important roles is as a trusted adviser. Understand what that entails and work toward that goal, first with partners, then with clients. Understand the client and the client's industry. Always look at the big picture and be prepared to offer carefully thought-out solutions, taking into account the client's legal and business needs.

8. **PLAN AHEAD.**
   Regularly think about your practice area and where it might be headed. Then determine where to position yourself on that growth pathway.

9. **PACE YOURSELF.**
   Learn to manage time and develop coping mechanisms for stress to avoid burnout and ensure long-term success. Effectively leverage firm resources to support objectives, ask for help when needed and invest energy in your personal life.

10. **TAKE CHARGE.**
    This one seems self-evident, but it can be easy to put your head down, work hard and neglect to plan your next career steps. By operating from the stance that you will have a career and not just a job, direct your focus to areas you want to develop.

Young Energy Professional Highlight: Clayton Hart, Kirkland & Ellis LLP

Interview by Carl Stenberg, Kirkland & Ellis LLP

CS: Clayton, can you tell us about yourself?

CH: I'm the youngest of three siblings and was born and raised in Jasper, Texas. After graduating from high school in 2012, I attended Belmont University in Nashville, TN and graduated with a B.B.A in Music Business and Entertainment in 2016. Music is a huge passion of mine, and I lived in Nashville for another year and a half post-grad while pursuing a career in songwriting and session-guitar work. I think I still have a few things hiding on Spotify somewhere (my Mimi is my main monthly listener)!

However, I always envisioned going to law school at some point, and decided to make the transition away from pursuing music as a career and apply to schools in the fall of 2017. My Dad (Alan Hart, 81') is a South Texas College of Law - Houston alumnus, and I had friends there, so it just seemed like the right fit for me. Being located in downtown Houston, right in the heart of the US energy capitol, it was important for me to immediately become immersed in anything related to energy law that South Texas had to offer, and while there, I worked my way up to become both President of the South Texas Oil & Gas Law Society (follow us on LinkedIn & Instagram!) and the South Texas Chapter of the Association of International Petroleum Negotiators. While in school, we made it a point to attend as many IEL conferences in Houston as we possibly could, and always left those events feeling vastly more educated in the subject matter and connected to those within the industry. To me, the proximity to those events is one of the true benefits of studying energy law in Houston and going to South Texas.

CS: Very interesting! How would you describe your practice?

CH: I'm an associate in the Real Asset Transactions (RAT) group in the Houston office of Kirkland & Ellis LLP. Our group primarily handles domestic asset-level oil & gas transactions, but generally, we represent a myriad of private equity clients and strategic buyers doing mergers, acquisitions, divestitures and joint venture formations in the energy industry with a particular focus on domestic energy transactions in the upstream and midstream sectors. To me, it's just a thrill to be a few doors down from people who are literally considered to be among the best in the world at what they do.

CS: How do you think your practice will evolve in the coming years?

CH: I think over the next 20 years or so we'll see the traditional scope of the oil & gas practice pivot into a broader "energy" practice as the emphasis for increasing activity in the renewable space grows; i.e., a healthy mixture of both traditional oil & gas and renewable deals. But, with that said, the economics of renewables still have a long way to go, and until renewable projects make more financial sense to investors than traditional oil & gas plays, I don't see the paradigm shifting on a meaningful scale. However, there is certainly a feeling of the tide beginning to turn, and I truly believe we're now embarking on perhaps the most exciting, and important, period of innovation in this industry's history from both a technological and lawyering perspective. It's not hyperbole to say that the companies and firms behind the innovative solutions, technologies and transactions in the next few years will determine how the world obtains energy for the next century and beyond. Frankly, it's just a privilege to be a part of.

CS: Clayton, what do you like to do in your spare time?

CH: When not stuck behind a computer screen, I love being around family and friends, enjoying the outdoors (big Memorial and Buffalo Bayou guy), making music, and exercising as much as possible. These are my non-negotiables. No matter what, I make sure that each week I'm getting all of these boxes checked at some point, even if only for a little bit.

CS: Before we go, do you have any advice for young lawyers?

CH: Always look for ways to provide value and be a student of the craft. Although not the most glamorous of work streams, the classic junior tasks are where every deal begins and ends. If you can find a way through these tasks to ensure you're adding value and making your senior attorney's life a little bit better, you're doing exactly what you should be. It's always helpful for me to spend as much time as possible thinking back on deals post-sign and/or close and do an honest self-assessment; e.g., where could I have done more? what could I have done better?

Keeping a healthy perspective is crucial as well. While at Kirkland, there have certainly been times where I've wanted to throw my laptop out of my apartment window while up working well after midnight. However, these moments come and go and are the rarity, not the normality, and that's important to remember. No matter how bad it gets, or how late you're up working, it's helpful to remember that once upon a time you were just a law student who would've done anything to be there... and now you are. As Dory says...just keep swimming, friends.

CS: Thank you for your time, Clayton.

Supreme Court PennEast decision: a Close Call for a Critically-Important Federal Regulatory Power

Laura T.W. Olive, Ph.D., NERA Economic Consulting

On June 29, 2021, the US Supreme Court confirmed that under the 1938 Natural Gas Act (NGA) and its Section 7(c) pipeline certification process, the Federal Energy Regulatory Commission (FERC) can confer on pipeline companies the ability to invoke eminent domain on private and public land. But the ruling was a close call—decided 5 to 4.

PennEast Pipeline Company, LLC applied to the FERC for authorization to construct a 116-mile, 1.1 billion cubic feet per day (bcf/d) pipeline between Luzerene County, Pennsylvania and Mercer County, New Jersey. The pipeline would carry Marcellus gas to markets in New Jersey, Pennsylvania, and New York. PennEast conducted an open season after which it executed contracts for about 90 percent of its capacity with 12 shippers, including utilities (e.g., ConEd of New York, Elizabethtown Gas, and New Jersey Natural Gas Company), power producers, and gas producers in the Marcellus shale basin. FERC granted PennEast a Certificate of Public Convenience and Necessity (CPCN) in January 2018 (Docket No. CP15-558, 19 January 2018).

Soon after receiving the authorization from FERC, PennEast next sought in Federal District Court in New Jersey to enforce the federal eminent domain power granted to it by the FERC's approval of the pipeline on several parcels of state-owned or controlled land. New Jersey moved to dismiss the complaint on grounds of sovereign immunity, but the District Court denied the motion and granted PennEast's request. The case went to the Supreme Court, not through the D.C. Circuit Court where challenges to FERC decisions are normally heard, but through the Third Circuit after it vacated the District Court's ruling. The Supreme Court agreed to take up the case to determine whether the Natural Gas Act (NGA) authorizes delegated private pipeline companies to condemn state land (*PennEast Pipeline Co., LLC v. New Jersey, et al.,* No. 19–1039. Decided 29 June 2021).

The issue presented to the Court harkened back to the first days of the nation—what did the colonies give up in ratifying the U.S. Constitution? Ultimately, the Court found that the colonies accepted that the new federal government (and its delegates) had the basic power to invoke eminent domain over state land.

More than 70 percent of the world's gas pipelines—built by investors, not governments—are in the United States. The competitive natural gas market supplies homeowners and business at prices far below those anywhere else in the world: $5.51/MMBtu compared to Europe's $31.05/MMBtu for October 2021 (for current spot prices, see https://bit.ly/36D1Bo0 and https://bit.ly/2U5likO). US consumers have saved over $1.5 trillion in gas and electricity costs compared with their European counterparts since the shale revolution took hold and coal-fired power generation was replaced by cleaner natural gas-fired generation (see "History's Greatest Public-Private Infrastructure Partnership: The US Gas Market and It's Role in a Low-Carbon Continent," NERA, 8 October, 2021). In addition, shale gas has given the US petrochemical industry a new low-cost resource for feedstock to produce plastics, synthetic fibers, paints, and many other products—resulting in $99 billion of investment in new or expanded facilities since 2010 (see Petrochemicals Analytics, "Global Data; Shale Gas Is Driving New Chemical Industry Investment in the US"). The nature of the US gas market is a reflection not of wealth of resources or economic policy but of how the nation governs itself, promotes competition, and protects the private property of investors. The success of the US gas market is the result of a long evolution of uniquely American institutions.

FERC has a long track record of certification, delegating eminent domain authority to pipeline companies with more than 400 CPCNs granted since 2000. With just one more vote, the dissenters (Justices Barrett, Thomas, Kagan, and Gorsuch) would have blocked PennEast and other certificated pipelines' power to invoke eminent domain on state-owned lands. The dissenting justices held that the states never relinquished their sovereign immunity from the type of lawsuit that condemnation brings under the exercise of eminent domain when they ratified the US Constitution. The result would have been that private pipeline companies (delegated power through FERC certification) could invoke eminent domain only against private landowners—not state-owned land (if the state objects). As such, interstate natural gas pipelines would have to avoid crossing any state-owned land—a practical impossibility as state governments own about 9 percent of land in the United States (see "State-Owned Lands in the Eastern United States: Lessons from Land Management in Practice," PERC Public Land Report, Property and Environment Research Center, March 2018).

Had the dissenters prevailed, a major tool conferred on interstate natural gas pipelines through the FERC certification process would have been lost. Denying PennEast the ability to condemn New Jersey-owned land would have effectively killed a project whose useful public-interest purpose to provide competitive Marcellus-region gas to East Coast markets was apparent based on the growing demand and changing US supply for natural gas (and recognized by the FERC through the grant of a CPCN).

The majority saw reasons to give PennEast the ability to condemn state-owned rather than just privately-owned land. In their opinion, those five justices (Chief Justice Roberts, joined by Justices Alito, Breyer, Kavanaugh, and Sotomayor) held that the colonies, in ratifying the Constitution, accepted that the new federal government (and its delegates) had the basic power to invoke eminent domain over state land. The opposite

ruling would have increased uncertainty not only for natural gas pipeline projects but also other interstate infrastructure projects requiring federal approval.

Industry Update: Litigation Continues to Abound After Winter Storm Uri

Elizabeth "Libby" McDonnell, Hedrick Kring, PLLC

The aftermath of February's Winter Storm Uri has triggered an array of ongoing legal proceedings in Texas, from personal injury/wrongful death matters to bankruptcy and breach of contract, Texas Deceptive Trade Practices Act (DTPA) claims, and class actions. For example, earlier this year, the state's largest power cooperative, Brazos Electric Power Cooperative, filed a Chapter 11 bankruptcy in the Southern District of Texas. In court documents, the company says it received invoices totaling over $2.1 billion from the Storm, an essentially unpayable amount. *See In re: Brazos Elec. Power Coop., Inc.*, Cause No. 21-30725, in the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

Griddy Energy, a power retailer, also filed for bankruptcy and faced a class action lawsuit filed in Harris County, in which former customers may now pursue legal claims in the bankruptcy court to recover any monies they may have already paid for electricity they consumed during the Storm. *See Khoury v. Griddy Energy LLC*, Cause No. 2021-10004, in the 133rd Judicial District Court of Harris County, Texas; T*exas v. Griddy Energy LLC & Griddy Holdings LLC*, Cause No. 2021-11518, in the 133rd Judicial District Court of Harris County, Texas.

Further, a recent federal Complaint filed in October in Bankruptcy Court reveals that Houston-based Entrust Energy is suing for alleged breach of a supply contract to provide electric power prior to and during Winter Storm Uri. According to Entrust, it was forced to buy power on the spot market at radically higher prices due to the ERCOT-imposed real-time market price-cap of $9,000 a megawatt-hour, an approximate 10,000% increase from pre-storm electricity market prices. Entrust claims the push to the spot market forced the retailer into bankruptcy due to the enormous price increases imposed during the Storm. Entrust is seeking to recover the costs it claims it had to incur from the alleged breach. *See In re: Entrust Energy Inc. et al.*, Cause Nos. 21-bk-31070 and 21-ap-03930, pending in the United States Bankruptcy Court for the Southern District of Texas, Houston Division.

In the commercial context, a Texas-based manufacturer recently has accused Des Moines-based MidAmerican Energy Services of price gouging during February's Texas freeze. In the federal lawsuit, J&M is arguing that MidAmerican tried to unlawfully use the statewide Uri disaster to take advantage of and price-gouge thousands of its larger commercial customers. Claims under the Texas DTPA, breach of contract, negligence, and misrepresentation have been brought. *See J&M Plastics, Inc. v. MidAmerican Energy Servs.*, Cause No. 2:21-cv-00206, in the U.S. District Court for the Eastern District of Texas, Marshall Division.

In another commercial case, Anheuser-Busch filed a declaratory action in a natural gas contract context under New York law for one of its commercial plants in Houston against Symmetry Energy Solutions. It is alleging price gouging and has asked the court to determine the amount owed for Busch's purchase of natural gas in February 2021. *See Anheuser-Busch Cos. LLC v. Symmetry Energy Solutions LLC*, Cause No. 2021-55546, in the 334th Judicial District Court of Harris County, Texas.

In all of this, ERCOT is resiliently claiming sovereign immunity, and the array and number of lawsuits has prompted numerous defendants and courts to transfer cases to a Judicial Panel on Multidistrict Litigation. *See, e.g., In re Winter Storm URI Litig.*, Cause No. 2021-0313, in the Supreme Court of Texas. Importantly, earlier this year, a divided Texas Supreme Court declined to determine whether ERCOT is entitled to immunity. The outcome was contested, with four justices issuing dissents, and paves the way for the issue to return to the Court. ERCOT, in fact, recently re-petitioned for a ruling on its immunity status, and at the end of October, a Dallas appellate court heard oral arguments in another pending case to determine whether ERCOT is immune from litigation. *See In re: Elec. Reliability Council of Tex. Inc. et al.*, Cause No. 21-0834, in the Supreme Court of Texas; *Panda Power Gen. Infrastructure Fund LLC v. Elec. Reliability Council of Tex. Inc.*, Cause No. 05-18-00611-CV, in the Court of Appeals for the Fifth District of Texas.

The consequences of the February Storm have been devastating for many businesses and consumers alike, and the high costs that were incurred are being scrutinized from a legal perspective by providers, customers, and legal scholars. For example, many providers face strong claims for damages from their customers; on the other side, claims are also being made for breach of contract because customers have not paid, or not fully paid, invoices for the exorbitantly high utilities. Further, the multitude of suits being filed demonstrate growing traction for class actions against electric providers but also reflect that energy providers are seeking protection under bankruptcy laws. The uncertainty of what legal precedent will come is still unfolding.

Who Has the Right to Sue for Past Damage to Property? A Louisiana Appellate Court Refines the Case Law.

Mark R. Deethardt, Liskow & Lewis

The "subsequent purchaser doctrine" has been litigated extensively in Louisiana legacy cases involving claims for oilfield remediation. As background, exploration and production in many Louisiana oilfields started in the mid-twentieth century, and property is often sold or transferred decades after oil and gas operations have ended. The subsequent purchaser doctrine provides that a current landowner has no standing to bring a lawsuit for property damage that occurred prior to its acquisition—unless the prior landowner made a valid assignment of the right to sue for past damage. This is because the right to sue for damage is considered a personal right. However, until recently, no Louisiana appellate court had addressed whether the doctrine barred a claim brought by a closely held or family-owned company who acquired the property in an intra-family transfer. In *Louisiana Wetlands, LLC v. Energen Resources Corporation*, 2021-0290 (La. App. 1 Cir. 10/4/21), 2021 WL 4548529, ---So. 3d---, the Louisiana First Circuit held that the subsequent purchaser doctrine applies to property transfers from family members to a company which they also own.

Louisiana Wetlands involved a 300-acre tract of land that had been passed down to various individual family members through successions for over a century. After all exploration and production activities on the property had ended, in 2009, several of the family members formed New 90, LLC to manage this and other family-owned property. After creating New 90, the individual family owners of the property executed an Act of Transfer on March 20, 2009 that transferred their interests in the property to New 90 in exchange for membership interests in the LLC. The Act of Transfer specifically stated that the family owners transferred and conveyed to New 90 "all and singular the whole of all right, title, interest, and ownership" that they held in the property "with full and general warranty of title, and with full subrogation to all rights of warranty and all other rights as held therein by said vendor."

In December 2016, New 90 and another plaintiff-landowner sued various oil and gas companies for contamination to the property based on historical exploration and production activities dating back to the 1940s. The defendants claimed that New 90 was barred under the subsequent purchaser doctrine from suing for alleged damage to the property that occurred before New 90 acquired it in 2009. The trial court agreed and dismissed all of New 90's claims.

On appeal, New 90 primarily argued that the subsequent purchaser doctrine applies only to transactions involving an arm's-length sale of property, not to transfers of property from family members to an LLC in exchange for an ownership interest in the company. After examining the subsequent purchaser jurisprudence, the First Circuit found that the subsequent purchaser doctrine applies to New 90—who acquired the property by particular title without an automatic transfer of personal rights—and held that "it is immaterial how property is transferred to a particular successor. If the transferring instrument does not contain an explicit assignment of the personal right to sue for damages to the property, the right remains with the transferor."

Finally, the First Circuit rejected New 90's alternative argument that the 2009 Act of Transfer contained a specific and express assignment of the personal right to sue for pre-acquisition property damages. Instead, the court found that the Act's general assignment and subrogation language was too broad to assign the right to sue for pre-acquisition damages to New 90 because it did not mention either the personal right to sue for pre-acquisition damages, the right to seek restoration of the property, or any of the mineral leases that previously covered the property.

Louisiana Wetlands firmly establishes that the subsequent purchaser doctrine applies to all property transfers by particular title.

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