Institute for ENERGY LAW
THE CENTER FOR AMERICAN AND INTERNATIONAL LAW

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CONTENTS

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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YEP Highlight - IEL Emerging Stars

Interview by: Julian Sharp, Haynes and Boone, LLP

Grant Armentor
Haynes and Boone, LLP

JS: What was your path towards becoming a lawyer?

GA: I grew up in Louisiana and attended LSU, where my interests in business and problem solving ultimately led me to pursue a legal career. After law school, I began practicing in Houston and found my way to energy law, which provided an opportunity to work on sophisticated transactions in an industry deeply connected to both Louisiana and Texas.

JS: How would you describe your practice?

GA: I have a broad energy transactional practice focused primarily on energy finance, acquisitions and divestitures, and upstream and midstream commercial arrangements. I represent energy companies, financial institutions and private capital providers in transactions involving the financing, development, acquisition and transportation of oil and natural gas assets.

JS: What draws you to energy law?

GA: Energy law sits at the intersection of law, business and a constantly evolving industry, so the work is both challenging and highly practical. I particularly enjoy helping clients develop legal solutions that advance their business objectives.

JS: What do you like to do when you're not working?

GA: Outside of work, I enjoy traveling with my wife, trying new restaurants and following LSU football and baseball. I also like to stay active through golf and pickleball and to spend time with family and friends.

Alejandra Salas
McGinnis Lochridge

JS: What was your path towards becoming a lawyer?

AS: My interest in the legal profession began with an internship at UT Austin's Immigration Clinic while I was an undergrad. The women teaching the clinic at the time inspired me to attend law school. That experience also prompted me to enroll in the Ethics & Leadership in Law, Politics & Government Bridging Disciplines Program at UT Austin, where I was able to take courses taught by law professors, further solidifying my interest in the legal profession. Throughout law school, I explored different areas of practice through various internships, including with an oil and gas midstream company, before completing a judicial clerkship after graduation. Though I did not originally intend to become an energy lawyer, these experiences helped shape me as an attorney and prepared me for a career in this practice area.

JS: How would you describe your practice?

AS: I represent oil and gas exploration and production companies, royalty owners, and mineral owners in state and federal court, with a focus on lease, royalty, and title disputes, joint operating agreement, midstream, and other contract disputes, and trespass and negligence claims. My work often involves nuanced legal questions and complex damages and valuation issues in both trial and appellate courts. I also handle matters where oil and gas issues intersect with bankruptcy proceedings.

JS: What draws you to energy law?

AS: What draws me to energy law is that it continues to evolve alongside the industry, so every case presents a new legal challenge and an opportunity to keep learning. The work is interesting because the legal questions often have a meaningful impact on the people and businesses involved.

JS: What do you like to do when you're not working?

AS: Outside of work, I enjoy spending time outdoors, traveling whenever I can, and training for the next marathon. On weekends, you'll usually find me watching Texas football with friends in the fall, going on long runs along the lake, picking up a new book, or exploring a new restaurant.

Expert Interview with John A. Harpole (Founder & President, Mercator Energy LLC)

Interview by: Katherine Raunikar, BakerHostetler

John A. Harpole is the founder and president of Mercator Energy, a natural gas brokerage firm in Littleton, Colorado. John has more than 35 years in the industry as a marketer, broker, negotiator, energy advisor, land man, and expert witness. He has served as an expert witness in a range of gas royalty matters, and has testified before FERC, Congress, and state legislatures on a range of matters relevant to natural gas valuation, including post-production-cost and royalty disputes, in both domestic and international contexts. He authored the Royalty-in-Kind to Low Income provisions of the Energy Policy Act of 2005 and has taught U.S. natural gas history to PetroChina and the People's Republic of China's Department of Price (within the NDRC).

KMR: Tell us a bit about your practice and the kind of work you typically do.

JAH: I founded Mercator Energy, a natural gas brokerage firm, in Littleton more than thirty years ago and still run it. My team manages day-to-day gas sales for natural gas producer clients in seven states across the U.S. We specifically manage: wellhead sales, gathering, processing, and interstate transportation contracts, plus nominations, scheduling, balancing, and accounting. Mercator also purchases natural gas for its end-use clients in six states and manages their day-to-day demand. We currently manage more than 1 billion cubic feet (Bcf) of gas per day. That hands-on work is the foundation for my consulting, advisory, teaching, and expert-witness engagements; I've spent my career moving gas from the wellhead to the burnertip.

Beyond the brokerage, I've advised producers, power producers, utilities, hedge funds and traders, vendors, and large industrial users, often at the CEO level. Projects range from helping an end user structure a Request for Proposal ("RFP"), to basin-level studies, to regulatory work before FERC and state legislatures. I was a senior midstream advisor to Hart Energy, writing a monthly column and chairing their Rockies Midstream Conference, and I taught U.S. gas history to PetroChina, where I was reportedly the first foreigner allowed to do so.

KMR: What kinds of issues do you usually get called in to help with as an expert witness?

JAH: Most engagements turn on how the physical gas market actually works. A common one is "marketable condition" and the first commercial market for a producer's gas, or where and in what condition gas first becomes saleable, which drives royalty calculations. I also handle midstream contract disputes, dedications, well-connection credits, whether an agreement is tied to one plant, or valuation work. I describe, in plain English, how gas is really bought, sold, gathered, processed, and transported.

KMR: How have these disputes changed over the past decade?

JAH: The disputes follow the industry, which has transformed at least twice in my career. The shale revolution (which introduced now-commonplace innovations such as horizontal drilling, multi-stage fracturing, and multi-well pads) means an operator now drills sixteen wells off a four-acre pad instead of one vertical well on 640 acres, and much of today's litigation comes from applying older agreements to that new world. The second shift was the frac-spread collapse after the 2014 oil crash, which moved midstream from percent-of-proceeds toward fee-based deals and set off post-production-cost disputes.

KMR: How does your background as a natural gas marketer and consultant help when you're working on litigation cases?

JAH: My credibility comes from still doing the work. That includes negotiating these contracts and selling this gas today, not from a decade-old memory. When I tell a court that no producer would commit gas without a release provision if the plant can't process it, I've negotiated hundreds of those contracts myself. I can point to real examples and speak to what's commercially reasonable. And much of the job is translating our industry's jargon into something a judge or jury can follow.

KMR: What advice would you give to young attorneys just starting out in energy law?

JAH: Learn how the physical business works before you argue about it. Understand the gas stream from wellhead to burnertip. This includes knowing the difference between wet versus dry gas, gathering and processing, how a pipeline tariff sets gas quality, and why FERC Orders 436, 500, and 636 reshaped the industry. Read the NAESB base contract. And don't be afraid to ask a marketer or engineer a "dumb" question. The lawyers who grasp the commercial reality ask the right questions and don't get surprised at deposition.

KMR: Tell me about the advisory side of your practice. What type of advice do you provide?

JAH: Much of it is helping a client see the full menu of options and the consequences of each. For a producer, that's weighing a percent-of-proceeds deal (really a wager on the frac spread) against a fee-based one; for an end user, that's structuring an RFP so proposals compare apples to apples. I've also done acquisition due-diligence

and reserves-valuation work and testified on valuation in tax and bankruptcy settings. And I track the geopolitical picture, which covers areas such as LNG exports, Texas grid reliability, and AI data-center demand, because gas prices don't move in a vacuum.

KMR: Given your experience across the natural gas value chain, which area do you see as having the highest potential for disputes in the near future?

JAH: Two areas. First, post-production costs and marketable-condition royalty disputes: who captures NGL value and who bears the cost of reaching a marketable product is genuinely unsettled. And I've been on the front lines of these fights in the Piceance. Second, the collision between exploding electricity demand and the physical gas system: AI data centers, electrification, and LNG exports are pulling on gas all at once, and the grid (especially in Texas) isn't ready. That produces disputes over firm capacity, curtailment, and who pays when the system is stressed.

KMR: Finally, what do you enjoy the most about your job?

JAH: The people, and the teaching. What still gets me out of bed is taking something complicated and making it click for a client, a jury, or a class of PetroChina marketers. This can be how a gas market facilitates trade, or how a molecule gets from a Western Colorado gas well to a burnertip in California. I'm fond of a Tommy Lasorda line, "[t]here are . . . those who make it happen, those who watch it happen, and those who wonder what happens." I like helping the last group understand, and helping the first decide better.

Ownership of Produced Water

Desireé M. Malone, FBFK Law; Tyler Boyce, King & Spalding LLP; Panuswee Dwivedi, ADI Analytics, LLC

Introduction: Waste to Riches

For decades, the oil and gas industry has categorized produced water as a costly byproduct of oil and gas production requiring regulation and proper disposal. Indeed, operators have traditionally spent millions of dollars on transportation and disposal costs, and regulators have focused on environmental contamination prevention, groundwater protection, and waste prohibitions.

Today, following the discovery of valuable minerals contained within produced water, the world is now witnessing the transformation of produced water from solely a costly burden to a potentially lucrative commodity. This shift has forced courts, landowners, operators, investors, and others to confront a question that previously held little to no significance: Who owns produced water?

The Pioneer Case: *Cactus Water Services, LLC v. COG Operating, LLC*

Against this backdrop, the Texas Supreme Court issued its opinion in the landmark case *Cactus Water Services, LLC v. COG Operating, LLC*, 718 S.W.3d 214 (Tex. 2025), reh'g denied (Sept. 5, 2025), holding that produced water ownership lies with mineral interest owners—not surface owners—under standard oil and gas leases.

COG held various mineral leases granting it the exclusive right to explore for and produce oil and gas, or oil, gas, and other hydrocarbons in lands located in the Delaware Basin. Several years later, Cactus purported to acquire title and rights to the produced water generated by oil and gas operations on the subject property from the surface owners and entered a produced water lease agreement. Relying on the produced water lease agreements, Cactus notified COG that it was entitled to the produced water generated as a result of COG's operations. COG initiated litigation shortly thereafter seeking a declaration that COG exclusively owned the produced water at issue. Notably, by the time this litigation commenced, COG had paid nearly $21 million in disposal fees.

COG argued the produced water in dispute was part and parcel of the production stream of its oil and gas operations, and the language contained within the mineral leases it held granted exclusive ownership to COG. On the other hand, Cactus argued that because produced water contains, at least in part, subsurface water molecules, it belongs to the surface owner similar to ownership of groundwater. In sum, Cactus' position was produced water is water for purposes of ownership.

The Court expressly rejected the molecule-by-molecule approach followed by Cactus and stated:

> Produced water is an inherent and inescapable byproduct of oil-and-gas production. *Cactus Water*, 718 S.W.3d at 217.
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> * * *
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> Since the dawn of the petroleum era, the burden and expense of liquid-waste disposal has been an unwanted, but quotidian, fact of oil-and-gas production. Disposing of produced water is one of the largest operation costs for an oil well and a significant factor in well profitability. *Id.* at 219-220 (internal quotations omitted).
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> Despite its colloquial appellation, produced water is not water. While produced water contains molecules of water, both from injected fluid and subsurface formations, the solution itself is waste—a horse of an entirely different color. Statutes and regulations treat water and produced water differently and distinctly because they are distinct and different. Produced

> water is a hazardous, even toxic, mixture produced with hydrocarbons and separated from them after extraction at the wellbore. Unlike water, produced water is subject to laws distinctly focused on oil-and-gas production and environmental safety concerns. Water is something that must be protected from oil-and-gas waste; the two are not interchangeable. *Id.* at 227 (emphasis added).

Further, the Court recognized the long-standing characterization of produced water and the risks and costs associated with treatment, transportation, and disposal:

> Long considered a burdensome and costly byproduct of oil-and-gas production, this briny mixture of drilling, fracking, and formation fluids has emerging beneficial-use applications if properly processed and treated. Government regulators and industry players have historically treated produced water as oil-and-gas waste and placed the burden of proper handling and disposal on the mineral estate's oil-and-gas operator. *Id.* at 216.

As the majority recognized and the concurrence explicitly identified, the decision in Cactus Water: (1) is only a default rule that parties are free to contract around; (2) does not apply to ownership of unleased minerals or other substances; and (3) did not determine a mineral interest owner's obligations to the surface estate as it concerns leased groundwater.

We are likely to see future litigation on these points, in addition to other areas. As commercial utility and value increase, ownership disputes surrounding produced water are likely to be more frequent, especially as it concerns future contractual reservations.

In the meantime, surface owners seeking to retain ownership of produced water are free to negotiate and include express reservations in any lease executed with mineral owners. However, those provisions must be mutually agreed upon and it is unlikely for mineral owners to agree to such provisions. Even if mineral owners do agree to such provisions, the aspect of who bears the risk and burden of disposal of unused or valueless produced water would create substantial liability exposure.

As ownership issues arise and continue to evolve, courts may look to *Cactus Water* as either binding (e.g. Texas) or persuasive (e.g. other jurisdictions) precedent or completely distinguish it based on different legal frameworks or facts. As of mid-2026, no other appellate court has issued a merits decision on produced water ownership, though follow-on litigation to *Cactus Water* was filed in November 2025 in the Texas Business Court. *Cactus Water Services, LLC v. COG Operating, LLC and ConocoPhillips Co.*, Case No. 25-BC11A-0078 (Tex. Bus. Ct.). In this follow-on case, Cactus took the position that the Supreme Court's decision did not adjudicate the owner of the as-yet extracted produced water still below-ground. However, a notice of non-suit was filed on February 5, 2026.

The Texas legislature attempted to address the ownership of brine with two proposed bills titled "Relating to the production and ownership of brine" (SB 1763 and HB 246) in the 89th Legislatures Regular Session (2025). Neither bill made it out of committee.

Because the Legislature did not codify a rule, courts are left without direct statutory guidance, and the question of who owns dissolved minerals, such as lithium in produced water or brine, remains unsettled in many cases. It is worth distinguishing what Texas *did* enact in 2025—separate legislation reshaping liability and regulatory rules for produced water operations, and the Railroad Commission's adoption of Statewide Rule 82 to regulate brine production wells and Class V spent-brine return injection wells (*See also* Brine Mining & Brine Production (Lithium)). However, these measures address regulation and liability, not the ownership question SB 1763 targeted.

Commercial and Industry Considerations: Implications of Growing Produced Water Volumes

Due to produced water rapidly evolving from a costly disposal challenge into a strategic asset class, operators, midstream companies, and regulators are now forced to rethink long-standing produced water management practices and contractual provisions. Management practices prove to be even more critical in U.S. shale plays increasing in well maturity, with rising water-to-oil ratios (WOR) driving significant growth in water volumes, particularly in the Permian Basin. This growth in produced water volumes renders the question of ownership even more critical to the industry at large.

For example, the water production for some wells located in the Permian Basin can reach 12 barrels of water per barrel of oil as the water-to-oil ratios range from 30% to 95%. Exhibit 1 illustrates that produced water volume is expected to grow to ~22.8 million barrels per day by 2027:

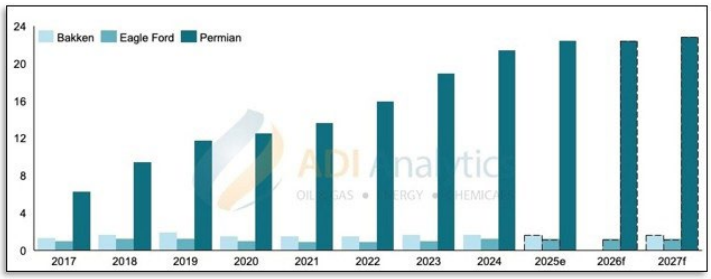

Exhibit 1 Produced water in select U.S. shale plays in million barrels per day.

As produced water volumes rise, there is a growing realization that produced water contains economically significant concentrations of valuable minerals, including: lithium (up to ~500 ppm in some basins), bromine (up to ~6,100 ppm), iodine, magnesium, boron, and trace rare earth elements.

With total produced water volumes reaching tens of millions of barrels per day, even modest concentrations can become commercially meaningful at scale. The industry increasingly views mineral extraction as a "royalty-like" revenue stream that can offset water management costs. Companies are already piloting and commercializing direct lithium extraction (DLE) technologies integrated into oilfield infrastructure, reducing permitting timelines compared to conventional mining while leveraging existing wells and surface rights.

Going forward, the evolving legal definition of produced water has tangible implications for multiple stakeholders across the oil and gas industry as can be observed from industry behavior, such as the following:

- Operators pursuing mineral extraction—lithium, iodine, and others—as a royalty-like revenue stream and advancing commercial projects (*e.g.* companies and operators implementing brine initiatives);
- Midstream companies building dedicated water systems under long-term contracts with minimum volume commitments, moving millions of barrels per day through pipeline networks rather than trucking (*e.g.* companies and operators operating large-scale pipeline systems to handle produced water);
- Technology developers positioning extraction and treatment systems as add-on modules to existing water networks (*e.g.* companies and operators deploying proprietary systems for filtration, treatment, and extraction, including direct lithium extraction (DLE), reducing permitting timelines and enabling incremental revenue without new standalone projects);
- Operators seeking to sell produced water in an attempt to turn a profit on what was once an unwanted and costly byproduct of oil and gas operations;
- Landowners monetizing surface access and pore space;
- Technology firms deploying integrated treatment and extraction solutions to embed value capture directly into water handling systems; and
- Regulatory pressure—recycling mandates and limits on disposal due to seismicity—forcing operators toward reuse and infrastructure investment (*e.g.* Colorado mandates 2% recycled water in hydraulic fracturing starting 2026).

In practical terms, this means produced water now sits within a multi-party value chain governed by contracts, infrastructure, and emerging revenue streams, even as the legal framework for ownership and rights remains unsettled. Further, while produced water is typically disposed of and injected into disposal wells, operators are now having to seek alternatives in the face of seismicity, geological, and producing well interference risks and issues tied to disposal.

The prospect of extracting commercially valuable minerals (*e.g.* lithium) from produced water has transformed the legal and commercial landscape surrounding oil and gas operations and disposal. Despite guidance from the Texas Supreme Court in *Cactus Water* concerning ownership pursuant to standard leases, significant questions remain unanswered. Further, as produced water volumes rise and result in additional regulations arising from seismic, geological, and interference issues associated with disposal activities, produced water sales and recycling and reuse efforts are likely to rise.

The Exclusive Remedy Defense and Its Application in Owner Controlled Insurance Programs

Courtney Giles, Baker McKenzie

Energy, construction, and other large industrial projects often involve complex contractor-subcontractor relationships and risk-allocation arrangements. Owner Controlled Insurance Programs (OCIPs) can help manage these risks by providing centralized insurance coverage and greater certainty regarding liability exposure, including when it comes to injuries on the job site. This article will examine how Texas courts have examined the potential liability of contractors and subcontractors for injuries that occur on the job site when workers' compensation insurance coverage is provided under an OCIP.

Texas Workers' Compensation and the Exclusive Remedy Defense

The Texas Workers' Compensation Act (TWCA) is designed to provide employees with certainty that their medical bills and lost wages will be covered if they are injured, saving time and litigation expense inherent in proving fault in a common law tort case. In turn, an employer subscribing to workers' compensation is entitled to assert a statutory exclusive remedy defense against the tort claims of employees for job-related injuries. So, when an employee is injured on the job, recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage against the employer for a work-related injury or death. *See* Tex Lab. Code § 408.001(a). *(This article focuses on non-death personal injury claims and the exclusive remedy provision in section 408.001(a). This article does not address the exceptions provided in section 408.001(b). See Tex Lab. Code § 408.001(b) ("This section does not prohibit the recovery of exemplary damages by the surviving spouse or heirs of the body of a deceased employee whose death was caused by an intentional act or omission of the employer or by the employer's gross negligence.").)*

Notably, an employee can have more than one "employer" for the purposes of the exclusive remedy defense. *See Wingfoot Enters. v. Alvarado*, 111 S.W.3d 134, 134 (Tex. 2003). Under section 406.123(a) of the Texas Labor Code, "[a] general contractor

and a subcontractor may enter into a written agreement under which the general contractor provides workers' compensation insurance coverage to the subcontractor and the employees of the subcontractor." TEX LAB. CODE § 406.123(a). If the general contractor "provides" workers' compensation insurance, it becomes a statutory employer of the subcontractor's employees for purposes of the workers' compensation laws. *See id.* § 406.123(e).

Owner Controlled Insurance Programs

Enter the Owner Controlled Insurance Program (OCIP). An OCIP is a project-specific insurance program purchased by the project owner to provide insurance coverage for multiple parties working on a construction project, including the owner, general contractor, and enrolled subcontractors. In Texas, when an OCIP includes workers' compensation coverage and an employer is enrolled in the program, the OCIP can support a workers' compensation subscriber relationship that may allow participating employers to assert the exclusive remedy defense. Whether exclusivity applies depends on the specific OCIP structure, enrollment status, policy language, and employment relationship. However, a general contractor that is part of an OCIP is generally immune from tort claims brought by a subcontractor's employee that is injured on site.

Specifically, the Texas Supreme Court has made clear that "a premises owner that contracts for the performance of work on its premises, and provides workers' compensation insurance to the contractor's employees pursuant to that contract, is entitled to the benefit of the exclusive remedy defense generally afforded only to employers by the Texas Workers' Compensation Act." *Entergy Gulf States, Inc. v. Summers*, 282 S.W.3d 433, 435 (Tex. 2009). In *Entergy*, the employer was the subcontractor and the worker's compensation policy was procured by the general contractor. *Id.* at 436. The general contractor and premises owner were able to invoke the protections of the exclusive remedy defense for work-related injuries sustained by the subcontractor's employees. *Id.* at 444-45.

In *HCBeck, Ltd. v. Rice*, the Texas Supreme Court similarly concluded that the Texas workers' compensation insurance scheme was intended to make the exclusive remedy defense available to a general contractor who, by use of a written agreement with the owner and subcontractors, provided workers' compensation insurance coverage to its subcontractors and the subcontractors' employees. *HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 360 (Tex. 2009). In *HCBeck*, the Texas Supreme Court found that the OCIP established and paid for by the landowner pursuant to its contract with the contractor, qualified as "providing" workers' compensation insurance to subcontractors in a manner that was consistent with Texas Labor Code § 406.123(a). *Id.* As such, the contractor should have been afforded the exclusive remedy defense against the employee's negligence claims. *Id.*

The Texas Supreme Court again confirmed this concept in *TIC Energy & Chem., Inc. v. Martin*, 498 S.W.3d 68 (Tex. 2016). In this personal injury case, "Union Carbide Corporation employed Kevin Martin at its facility in Seadrift, Texas." *Id.* at 70. "Martin lost one of his legs in a workplace accident and recovered workers' compensation benefits through an [OCIP] administered by Union Carbide's parent company, Dow Chemical Company." *Id.* "Martin subsequently sued TIC Energy & Chemical, Inc. (TIC), a subcontractor providing maintenance services at the Seadrift facility, alleging TIC's employees negligently caused his injury." *Id.* The Texas Supreme Court was faced with the question of whether TIC, as a subcontractor, could invoke the exclusive remedy defense as a co-employee to the injured party (an employee of the general contractor) "by virtue of the general contractors' written agreement to provide workers' compensation insurance to the subcontractor." *Id.* at 69.

The court analyzed two relevant sections of the Workers' Compensation Act: section 406.122 and section 406.123. *See id.* at 72-74. First, section 406.122(a) deems "all persons providing work or services for a general contractor to be employees of the general contractor except for independent contractors and their employees." *Id.* at 73. Conversely, section 406.122(b) "affirmatively excludes subcontractors and their employees as the general contractor's employees" if the subcontractor is operating as an independent contractor, and has entered into a written agreement with the general contractor that evidences a relationship in which the subcontractor assumes the responsibilities of an employer for the performance of work. *See id.* at 73-74; TEX LAB. CODE § 406.122(b). Second, section 406.123 "provides for an election by which a general contractor may become a statutory employer by agreeing, in writing, to provide workers' compensation insurance to the subcontractor." *Id.* at 76.

After analyzing these provisions, the Texas Supreme Court found that "[t]aken together, the only plausible reading of the statute is that section 406.122 states a general rule of employment status for workers' compensation purposes and section 406.123 deviates from that rule by creating the fiction of another." *TIC Energy & Chem., Inc.*, 498 S.W.3d at 76. Since an agreement existed complying with section 406.123, the employer's employees were construed to be co-employees with the subcontractor TIC, thereby entitling TIC to rely on the worker's compensation exclusive remedy defense.

The Texas Supreme Court has continued to confirm this application of the exclusive remedy defense when it comes to negligence cases. *See, e.g., Berkel & Co. Contractors, Inc. v. Lee*, 543 S.W.3d 288, 296 (Tex. App.—Houston [14th Dist.] 2018), *aff'd in part, rev'd in part on other grounds*, 612 S.W.3d 280 (Tex. 2020) (holding that the injured worker and subcontractor were "statutory co-employees" of the general contractor under the TWCA, which therefore provided the worker's exclusive remedy.); *Waste Mgmt. of Tex., Inc. v. Stevenson*, 622 S.W.3d 273, 276 (Tex. 2021).

The Interaction of the TWCA with Insurance Policies

Additionally, Texas courts have been clear when determining whether a party is an "employer" for the purposes of the workers' compensation laws that this statutory definition is unique to the workers' compensation scheme. *See Maxim Crane Works, L.P. v. Zurich Am. Ins. Co.*, 642 S.W.3d 551, 552-53 (Tex. 2022) (holding "the TWCA does not affect the enforceability of an additional-insured provision under the [Texas Anti-Indemnity Act]").

For example, in *Maxim Crane*, the Texas Supreme Court declined to import terms from the TWCA into the Texas Anti-Indemnity Act (TAIA) in determining whether the TAIA's employee exception applied. *Id.* In that case, Tyler Lee was injured on a construction site when a crane collapsed and crushed his leg. *Id.* at 554. Lee was an employee of Skanska USA Building, Inc. (Skanska), the general contractor on the construction site that offered a contractor-controlled insurance program (CCIP) that included workers' compensation coverage. *Id.* at 553-54. Skanska hired Berkel & Company Contractors, Inc. (Berkel) as a subcontractor for the project. *Id.* at 554. "Although Berkel enrolled in Skanska's CCIP as required, Berkel also had its own commercial general liability" coverage under a policy issued by Zurich American Insurance Company (Zurich). *Id.* at 553. Berkel then leased a crane from Maxim Crane Works, L.P. (Maxim) for use on the construction project. *Id.* Lee sued Maxim, among others, for his injuries and Maxim settled with Lee after a jury found Maxim 10% responsible. *Id.* at 554. Maxim had also filed cross-claims against Zurich, seeking coverage as an additional insured under Berkel's policy. *Id.*

The parties agreed that Zurich's liability hinged on whether Lee was "an employee of the indemnitor," Berkel, triggering the employee exception of the TAIA. *Id.* at 557. All parties agreed that Lee was not Berkel's "employee" under the common, ordinary meaning of that term. *Id.* But Maxim contended that the court should construe the term "employee" in section 151.103 of the TAIA to include any person or entity that the TWCA would treat as an "employee" of Berkel. *Id.* The court "decline[d] to consider Maxim's extrinsic sources as evidence of the purpose and object of the TAIA" because there was no indication that "the Legislature did not intend for the ordinary meaning of employee to govern." *Id.* at 560. The court thus held that "the word 'employee' in section 151.103 of the TAIA bears its common, ordinary meaning, which is not affected by whether the indemnitor and injured employee are considered co-employees for purposes of the TWCA." *Id.*

More recently, the Court of Appeals of Texas addressed the "depth and breadth of the 'exclusive remedy' defense provided by the [TWCA]" and its effect on whether a party was covered under an umbrella insurance policy. *Lexington Ins. Co. v. Exxon Mobil Corp.*, 736 S.W.3d 1, 4 (Tex. App.—Beaumont 2025, pet. granted). In that case, Exxon Mobil Corporation (Exxon Mobil Corporation and ExxonMobil Oil Corporation were both parties to this case and collectively referred to herein as "Exxon") contracted with Brock Services, Ltd. ("Brock") to supply scaffolding services at an Exxon refinery in Beaumont, Texas. *Id.* at 5. Exxon implemented an OCIP that provided workers' compensation coverage to Brock employees. *Id.* Several Brock employees were injured after an explosion at the Beaumont refinery and sued Exxon. *Id.* at 5. Exxon settled the claims, and then sought coverage as an additional insured under Lexington Insurance Company's (Lexington) umbrella policy issued to Brock, claiming that under the policy, Lexington has to provide a defense and contribute $25 million to the settlement with the injured Brock employees. *Id.* Exxon and Lexington disputed whether Exxon was an additional insured, and if so, whether the umbrella policy excluded coverage for the Brock employees' work-related injuries as statutory employees of Exxon under the TWCA. *Id.* at 5-6. After an arbitration proceeding solely determined that Exxon was an additional insured under Lexington's umbrella policy, the trial court affirmed the arbitration award and thereafter granted summary judgment against Lexington, "finding that Lexington owed payment to Exxon under the umbrella policy, awarding Exxon the full [$25 million] limits under the Lexington umbrella policy." *Id.* at 6. Lexington appealed.

On appeal, Lexington argued, in part, that the trial court should have vacated the arbitration award and certain policy exclusions precluded Exxon from recovering under the umbrella policy. *Id.* Exxon argued that the arbitration award was properly confirmed and the Lexington umbrella policy exclusions did not apply. *Id.* The Court of Appeals affirmed the trial court's judgment affirming the arbitration award that Exxon was an additional insured under the Lexington umbrella policy. *Id.* at 9. However, the court reversed the judgment of the trial court on the Lexington umbrella policy exclusions, finding that the policy excluded coverage for the Exxon entities as to the work-related claims made by the Brock plaintiffs because the plaintiffs had received benefits provided by a workers' compensation policy purchased by Exxon under its OCIP. *Id.* at 16-17.

In doing so, the court reasoned that the Employers' Liability Exclusion in the umbrella policy applied. The Employer's Liability Exclusion in the policy stated, in relevant part, that the policy did not apply to bodily injury to an "employee" of the "Insured" and "applies whether the 'Insured' may be liable as an employer or in any other capacity." *Id.* at 10 (cleaned up). So, the question became whether the Brock employees were "employees" of "the Insured" (Exxon) as defined in the exclusion and the insurance policy. *Id.* at 13.

Exxon contended that the Brock employees were not Exxon's employees at common law or under the contract between Brock and Exxon because that contract expressly stated that Brock's employees were not Exxon's employees and that they were independent contractors. *Id.* Exxon argued that this conclusion does not change even though they may

be deemed a "statutory employer" for the purposes of the TWCA and therefore not subject to common law actions for negligence. *Id.* On the other hand, Lexington argued that "the word 'employee' as used in the context of an employers' liability exclusion necessarily includes those who . . . are deemed to be the insured's employees for the purposes of the workers' compensation laws," "because an employer's liability to its employees already has protection from that risk under worker's compensation laws and insurance for worker's compensation benefits." *Id.* (cleaned up).

In considering that commercial general liability policies "were never meant to cover claims by employees against their employers," *Id.* at 14 (cleaned up), the court concluded:

> Similarly, in the context of this excess policy, it was never intended to provide coverage for workers' compensation or benefits for an employer's liability to its own employees. The umbrella policy expressly states that the excess policy provides no broader coverage than the underlying CGL policy. And we conclude the excess policy does not provide Exxon liability coverage for bodily injuries sustained by its statutory employees to include the personal injury of plaintiffs in the underlying case. *Id.*

The court went on to distinguish *Maxim Crane* on grounds that "Maxim was not enrolled in Skanska's CCIP and could not be considered a statutory employer under the workers' compensation statute." *Id.* at 15 (citing Maxim Crane, 642 S.W.3d at 555). In contrast, the court noted that "[a]s a statutory 'employer,' Exxon was entitled to invoke the exclusive remedy defense of the workers' compensation statute for personal injuries incurred by Brock's employees even as to its own negligence." *Id.* at 16. "This principle has been repeatedly upheld by the Texas Supreme Court . . . ." *Id.* (citing Waste Mgmt., 622 S.W.3d at 276-85; Exxon Corp. v. Perez, 842 S.W.2d 629, 630 (Tex. 1992)). Thus, because "the Employee Liability Exclusion in the umbrella policy at issue applie[s] and exclude[s] coverage for the Brock employees' work-related injur[y]" claims against Exxon, "Lexington had no duty to provide liability coverage for the claims in question." *Id.* at 17. Following this reasoning, the Court of Appeals concluded that Lexington had no duty to defend Exxon in the suit and no duty to indemnify Exxon for the settlement amounts it paid. *Id.* at 17-19.

Exxon filed a Petition for Review, which the Supreme Court of Texas granted on June 12, 2026. In its brief, Exxon told the Supreme Court of Texas that "[t]he opinion below leaves Texas businesses—especially in industrial facilities in Beaumont—with a gap in what, before this opinion, was a comprehensive insurance package." *Exxon Mobile Corp. v. Lexington Insurance Co.*, No. 25-0410, Petitioners' Brief on the Merits, at 35. And the "Court should not leave Texas businesses to suffer the profound impacts of a coverage gap that leaves them without full insurance protection." *Id.* at 37.

While the Court of Appeals' ruling underscores the importance of carefully assessing OCIP arrangements and how statutory employer status may affect insurance coverage and interact with certain policy exclusions, we wait to see what the Texas Supreme Court has to say.

Fifth Circuit Clarifies General Causation Standard in Toxic Tort Cases

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Ruffin v. BP Exploration & Production, Inc., No. 23-30854, 176 F.4th 855 (5th Cir. May 27, 2026) United States | Legal Update | June 2026

Key Takeaways

- **No quantitative dose rule.** The Fifth Circuit rejected the notion that an expert witness must identify a threshold quantitative dose at which a chemical (or mixture) can cause injury to prove general causation. Instead, the Court held that an expert need only opine that exposure can cause harm at a level that a human could have realistically experienced. A supported range (e.g., via toxicological profile, temporal factors, or occupational vs. non-occupational comparisons) suffices.
- **Chemical identification is required.** The Court affirmed that an expert must identify the chemical to which the plaintiff was exposed and link that exposure to studies analyzing that chemical's toxicity. An expert's reliance on studies of a class or group of chemicals, without connecting the toxicological data to the chemical at issue, creates an "analytical gap" between the studies and the expert's opinion.
- **Disease causation requires a direct link.** The Court held that general causation requires reliance on studies that demonstrate disease-specific human relevance, not merely general carcinogenesis. The fact that a chemical has been classified as a carcinogen is not probative of the question of whether a plaintiff's specific cancer phenotype can be caused by exposure to that chemical.

Background

Floyd Ruffin worked as a shoreline clean-up worker in Louisiana for five months after the 2010 Deepwater Horizon oil spill. Diagnosed with prostate cancer five years later, he brought a toxic tort claim against BP through the Deepwater Horizon medical-benefits class action settlement's Back-End Litigation Option (BELO), alleging that his exposure to polycyclic aromatic hydrocarbons (PAHs) caused his prostate cancer. BELO requires plaintiffs to prove the "legal cause

of the claimed injury or illness is exposure to oil or other chemicals used during the response." Under Fifth Circuit precedent, plaintiffs must satisfy both general causation—whether a chemical can cause the condition in the general population—and specific causation.

Plaintiff's Expert Testimony

Plaintiff's causation expert, a genetic and molecular epidemiologist, opined that Ruffin was exposed to PAHs—a class of over 200 distinct compounds found in crude oil with varying toxicological profiles. The plaintiff's expert relied on studies showing that benzo(a)pyrene, one type of PAH, was carcinogenic to humans, but insisted that his testimony concerned crude-oil exposure generally—not benzo(a) pyrene specifically. The expert's ultimate opinion was that exposure to PAHs is capable of causing cancer in humans, and that Ruffin's exposures were the cause of his prostate cancer.

District Court Ruling

The district court granted a Rule 702 motion and excluded Plaintiff's expert testimony on general causation because it neither identified "the harmful level of exposure to a chemical" necessary to cause prostate cancer, nor proved Ruffin was actually exposed to that level. With no expert testimony to prove causation, the district court entered summary judgment.

Fifth Circuit Analysis

I. Fifth Circuit Rejects Strict Dose Requirement

The Fifth Circuit rejected a strict quantitative dose requirement, departing from several unpublished Fifth Circuit decisions in BELO cases that had held experts were required to "determine not only whether a chemical can cause certain health effects, but also at what level of exposure those health effects appear." Those decisions, lacking precedential force, relied on *Allen v. Pennsylvania Engineering Corp.*, 102 F.3d 194, 199 (5th Cir. 1996). The Fifth Circuit found Allen had been over-read. *Allen* required only evidence of "the harmful level of exposure to a chemical"—not a precise numerical floor. The Fifth Circuit also cited *Wright v. Willamette Industries, Inc.*, 91 F.3d 1105, 1107 (8th Cir. 1996), which rejected "a mathematically precise table equating levels of exposure with levels of harm." The Court explained that the proper general causation standard requires a reliable expert opinion that the specific chemical at issue can cause the disease at exposure levels a human could realistically experience. This standard does not demand a precise quantitative dose—it demands analytical reliability and an evidentiary connection to realistic exposure.

II. Expert Exclusion Affirmed Based on Analytical Gaps

Despite rejecting a strict quantitative dose rule, the Fifth Circuit affirmed exclusion of the plaintiff's expert testimony due to "analytical gaps," which undermined the general causation opinion and made the expert's testimony unreliable.

a. Analytical Gap One: Non-Specific Chemical Analysis

General causation requires that the expert demonstrate the specific chemical to which the plaintiff alleges exposure can cause the plaintiff's condition in the human population. The plaintiff's expert's causation opinion treated PAHs as a unified class, but his carcinogenicity data pertained only to benzo(a)pyrene—a single compound among the more than 200 chemicals within that class.

By the expert's own admission, benzo(a)pyrene is "probably the only" PAH confirmed to be a human carcinogen, yet neither Ruffin's complaint nor his expert's testimony identified benzo(a)pyrene as the chemical to which Ruffin was exposed. Plaintiff's expert equivocated on whether Ruffin encountered benzo(a)pyrene at all.

The expert repeatedly described PAHs as "the chemical at issue" while relying on benzo(a)pyrene data to support his general causation opinion. The Court found this mismatch—using data regarding one compound to support an opinion about a 200-compound class—to be an impermissible analytical leap that Rule 702 does not allow.

b. Analytical Gap Two: Cancer Generalization

Even if benzo(a)pyrene were properly identified as the chemical at issue, the expert's general causation opinion failed on a second independent ground. General causation requires demonstrating that the specific chemical can cause the plaintiff's specific condition—here, prostate cancer—not merely cancer in general.

Plaintiff's expert relied on studies showing that benzo(a) pyrene causes tumors and skin papillomas in animals, and is classified as a human carcinogen. The Court—citing *Allen*—held that a chemical's general carcinogen classification "is not probative of the question whether [the plaintiff's] cancer was caused by [the chemical]." Classification alone does not satisfy the general causation burden.

Plaintiff's expert's studies connecting the chemical to prostate cancer specifically relied again on broad PAH-exposure data rather than benzo(a)pyrene data—compounding the first analytical gap and leaving his general causation opinion without adequate evidentiary support at both levels of the analysis.

Conclusion

While the decision in *Ruffin v. BP* did not adopt a stringent dose quantification standard, it reinforced strict Rule 702 scrutiny on chemical specificity and disease-specific fit. Causation challenges in toxic tort cases increasingly turn on the analytical quality of the expert's methodology: whether the underlying studies address the relevant chemical's toxicity and whether those studies link that chemical to the plaintiff's specific condition. As *Ruffin* demonstrates, challenging an opposing expert's analytical rigor remains an important tool to defeating broad chemical-class theories at the summary judgment stage and at trial.

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