Deans of Oil & Gas Practice Lecture

The Role of the Energy Industry in the Development of Common Law and Statutory Law

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§ 1.01 Introduction

It is a great and unexpected honor to receive the Dean's Award from the Institute for Energy Law. I feel undeserving as I review the list of former recipients of the Dean's Award. I am not able to give you the depth of analysis about oil and gas law that you would receive from past recipients like Ernest Smith, who was the Dean of the UT Law School when I was there. Nor do I have the depth of experience in the energy industry that would match the careers of my friends Charles Matthews and Ted Frois.

Instead, I can draw only from my own experience in representing the energy industry for more than 40 years in cases, big and small. I have had a hand in drafting agreements over the years for energy companies, primarily dealing with issues of indemnity, insurance, and contractual limitations. But most of my experience has been in litigation rather than transactional matters, although transactions have often been at the center of many of the lawsuits I have handled.

As I have seen, some things about energy law change, and some do not. In my earliest years, I was working with a wonderful energy lawyer named Bill Parse, who at that time was fighting the DOE on extensive regulations that no longer exist. Bill and I were also working on a royalty case, the first royalty case I had ever handled, for Colorado Interstate, a subsidiary of Coastal. On the other side was the Bivins family, a prominent family in the Texas Panhandle. Working with us was a young assistant general counsel, who was not sure he really wanted to practice law and thought he might decide to teach law at the University of Wyoming Law School. He was Mike Beatty, destined to become a premier litigator in the energy field. I did not cross pass with him again until 2020 in dealing with a royalty class action suit.

In any event, the royalty suit for Colorado Interstate was settled. As the General Counsel explained, he had found a pot of money to settle the case—until the next issue arose. So we were closing not the book on the Bivins family, but only a chapter in what was expected to be a continuing saga. I thought that was a funny way to do business. Some things do not change.

§ 1.02 A Thesis about the Energy Industry and the Development of the Law

[1] Overview

As I have reflected on my experience in representing members of this industry, I have developed the thesis that is the subject of my talk today. My thesis is related to the development of the law. Many judges remark that the quality of their decision-making depends greatly on the quality of the advocacy by lawyers. But the practice of law is not a freestanding art form; it results from issues that are brought to the courts by clients.

That brings me to my thesis, which is: The development of the law in Texas, both common law and statutory law, and no doubt the development of the law in other states, has resulted in large

part from the challenging issues that have been brought for decision by the energy industry. And that is true not just on issues unique to energy or oil and gas law, but issues that affect many industries and many people in their everyday work and lives. I believe this thesis is borne out by my experience during the last four decades.

[2] Indemnity and Insurance Issues

In my early years as a lawyer, I was primarily doing insurance defense work, a lot having to do with oilfield accidents. I remember showing up in Matagorda County, Texas, then a hot bed of litigation, to argue that an indemnity provision did not protect the operator of an oil and gas well from an injury suffered by the employee of a drilling contractor whose lawyer was noted plaintiffs' lawyer Ernest Cannon. The accident happened when the employee was going down a lift in a rig for the purpose of retrieving his coin collection to show the company man while they were waiting for the completion of a wireline survey. I successfully argued that the injury did not arise, as required, out of the work to be performed under the contract. My client, the drilling contractor, was not happy about the result. The contractor wanted to indemnify the operator because the operator sent the contractor most of its work. I had to explain, though, that the insurance company would not honor the indemnity unless the indemnity was valid and applicable.

That was my first introduction to the tripartite relationship among operators, drilling contractors, and insurance companies. Little did I know when handling this relatively small personal injury case, that many years later, I would be faced with the same tripartite relationship when arguing in the Texas Supreme Court in the largest appeal of my career on a certified question from the United States Court of Appeals for the Fifth Circuit. *In re Deepwater Horizon*[1] presented the question whether Transocean's $750 million tower of insurance policies provided coverage to BP for the Macondo disaster. This time the contractor did not want to cede its coverage to the operator, nor did the insurance companies, and I argued for all of them.

The result was in favor of Transocean. I recall the celebration dinner afterwards with the General Counsel of Transocean and others. They seated me at the head of the table, and I demurred, noting that the handling of the appeal was a joint effort among many talented lawyers, including John Elsley and Steve Roberts. Steve was the one who responded, "Reagan, you don't understand, if the appeal had been lost, it would have been your fault, so you get to sit at the head of the table." Maybe that is why my opposing counsel just before argument asked, "Reagan, do you think we can just settle this?"

In *Deepwater Horizon*, the Texas Supreme Court reasoned that when an insurance policy refers to what is required by the drilling contract, the drilling contract must be consulted in order to determine the scope of the policy coverage. That holding was contrary to the "four corners rule" that you look only to the policy language.

I advocated and agreed with that position. But the additional policy argument I personally wanted the Court to adopt was to depart from a reflexive approach to try to find insurance coverage whenever it is requested. Texas has adopted the strongest version of *contra proferentum*—if there are two reasonable policy interpretations, regardless of how much more reasonable one

[1] *In re Deepwater Horizon*, 470 S.W.3d 452 (2015).

interpretation is than the other, the court should always adopt the one in favor of coverage.[2] What I argued instead was that courts should look at the intent of the parties in contracting rather than simply trying to find insurance coverage whenever possible. For decades I had seen the problem of insurance policies not matching contracts, and in fact it is impossible for companies to tailor every contract so that it matches every insurance policy in every situation.

Still, however, I was very glad for the result we received in *Deepwater Horizon*. The opinion was a reasonable interpretation of the relevant policies rather than a slavish adherence to the four corners rule.

Returning to my early days in Matagorda County, the indemnity issue that I had argued there preceded the express negligence rule in Texas. The adoption of that rule came in a case involving a company that manufactured fuel additives, *Ethyl Corp. v. Daniel Construction*.[3] The express negligence rule greatly clarified the enforceability of indemnity agreements in all types of industries, including the energy industry.

As the *Ethyl* opinion led to the use of clearly enforceable indemnities, the Texas Legislature decided that indemnities were creating inequities, because small drilling contractors were being required to indemnify energy producers. As a result, Texas adopted the Oilfield Anti-Indemnity Act.[4]

In connection with the hearings on that Act, my law firm at that time, Fulbright & Jaworski, did a rare bit of lobbying for one of its clients, Red Adair. The lobbying was successful, resulting in an exception for companies that extinguished "wild well" fires.[5]

Red Adair was a pudgy, redhaired man, with a ruddy complexion, and maybe 5 foot 5 inches with his boots on. After he testified in the Texas Legislature, with Royce Till at his side, the first comment from a member of that body was to remark that Red did not look anything like the actor who portrayed him in the movie "Hellfighters," that actor being John Wayne. While Red did not have the physical stature of John Wayne, he had great stature for what he did. Red was persuasive.

The invalidation of some indemnity agreements as a result of the Oilfield Anti-Indemnity Act and the express negligence rule led to a focus on additional insured provisions, the provision that was at issue in the *Deepwater Horizon* appeal I argued. A Texas Supreme Court opinion involving Getty Oil established the principle that additional insured provisions can be separate from indemnity obligations, so that they apply regardless of whether or not the indemnity is valid. That principle has not been accepted in other jurisdictions but it is the law in Texas thanks to the opinion in *Getty Oil*.[6] That decision, once again, has wide applicability to businesses and individuals in all areas of our economy.

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2 *See, e.g., Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

3 *Ethyl Corp. v. Daniel Constr. Co.*, 725 S.W.2d 705 (Tex. 1987)

4 Tex. Civ. Prac. & Rem. Code Chapter 127.

5 Tex. Civ. Prac. & Rem. Code §§127.001(5), 124.004 (4)-(5).

6 *Getty Oil Co. v. Ins. Co. of N. Am.*, 845 S.W.2d 794 (Tex. 1992).

[3] Tort Law: The Concept of Control

Another development that has wide application in Texas law is the concept of control as a basis for tort liability. The concept grew out of a judicial response to the decisions in *Shell Oil Co. v. Lamb*[7] and [8]*Abalos v. Oil Development Co. of Texas*, that a premises owner has no duty to an injured contractor because the contractor is the one who has been entrusted with doing the work safely and has expertise in how to do the work. That led to decisions recognizing that the exercise or right of control over contractors can lead to liability on the part of the owner. Early decisions applying that new doctrine included *Tovar v. Amarillo Oil*[9] and *Exxon Corp. v. Tidwell*.[10] Cases outside the energy industry also dealt with the issue, but the Texas Supreme Court's best explication of the doctrine came in *Clayton W. Williams, Jr., Inc. v. Olivo*,[11] which also clarified and differentiated the various types of premises and negligent activity cases.

The Legislature thought the stretching of control as a basis for liability was going too far and enacted Chapter 95 of the Texas Civil Practice & Remedies Code, which narrows the scope of the duty owed by owners and general contractors to employees of contractors. Not only must there be control, but the control must be more than the right to order the work to start or stop or to inspect progress or receive reports, and the owner or general contractor must have actual knowledge of the danger or risk that caused the injury.

Chapter 95 was itself later narrowed in a case involving a petrochemical plant. Under that decision, [12] for Chapter 95 to apply, the contractor's employee must have been injured because of a condition or use of the *improvement* the contractor was hired to make. That has led to questions on whether the improvement to property in drilling rig accidents must concern the drilling activity itself rather than conditions of equipment associated with drilling. For example, there is an argument that the drilling rig itself is not an improvement because it is not a fixture but will be removed after the well is completed without injury to the well or real property.[13] That issue has not yet been resolved.

[4] Trespass: New Issues

Trespass is an old tort that does not always fit in well with current law. In *Lightning Oil Co. v. Anadarko*,[14] the Texas Supreme Court dealt with subterranean trespass and held that the mere fact of a trespass did not entitle Lightning Oil to relief despite the existence of some injury;

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7 493 S.W.2d 792 (Tex. 1973).

8 544 S.W.2d 627 (Tex. 1976).

9 *Tovar v. Amarillo Oil Co.*, 692 S.W.2d 469 (Tex.1985) (per curiam) (following the decision that was before the court at the same time and decided a month earlier, *Redinger v. Living, Inc.*, 689 S.W.2d 415 (Tex. 1985)).

10 *Exxon Corp. v. Tidwell*, 867 S.W.2d 19, 23 (Tex.1993).

11 952 S.W.2d 523 (Tex. 1997).

12 *Ineos USA, LLC v. Elmgren*, 505 S.W.3d 555 (Tex. 2016).

13 *See, e.g., Lopez v. Ensign U.S. S. Drilling, LLC*, 524 S.W.3d 836 (Tex. App.—Houston [14th Dist.] 2017, no pet.); *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 50 (2015) (defining improvement).

14 *Lightning Oil Co. v. Anadarko E&P Onshore, LLC*, 520 S.W.3d 39 (Tex. 2017).

the injury was not sufficient to justify relief. Trespass law has always recognized mere trespass without injury, but not some injury with no right of recovery or redress. Every unauthorized entry is a trespass even if no damage is done.[15] Perhaps, the law will begin to recognize damages from trespass only when there is a substantial interference with property rights, akin to nuisance liability.[16]

There is also the question now being raised in the Texas Supreme Court about when a claim for subsurface trespass accrues. The actual issue for decision in that case is when limitations begins to run on an alleged threat of subterranean migration that is claimed to cause a present and recoverable increase in drilling costs.[17]

Further, in cases such as those involving allegations of climate change, is trespass still a purely intentional tort? What level of fault or awareness of the likelihood of trespass is necessary for liability? The case law is not clear.[18] Other questions exist. Is there a way to apportion liability when damages allegedly result from conduct and also from natural disasters? Should there be an apportionment of causation and then a second apportionment of fault, as the newly drafted Third Restatement suggests?[19] These are all interesting issues that may well be raised by the energy industry and decided by courts and legislatures.

[5] Other Tort Law Issues

Other developments in tort law are attributable to the energy industry. For Nabors Drilling, I reversed a judgment in the Texas Supreme Court, with the holding that Nabors owed no duty to warn its employees that they should not drive while fatigued.[20] The principle that employees do not need to be instructed on commonly known risks may ultimately shape the tort of negligent training and supervision, which is still in flux.[21]

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15 *Dunn v. Houston Lighting & Power*, 2001 WL 996082 (Tex. App.—Houston [1st Dist.] Aug. 30, 2001, pet. denied).

16 *See Crosstex N. Texas Pipeline, L.P. v. Gardiner*, 505 S.W.3d 580 (Tex. 2016).

17 *See Swift Energy Operating, LLC v. Regency Field Servs. LLC*, 2019 WL 1547608 (Tex. App.—San Antonio Apr. 10, 2019, pet. granted).

18 *See, e.g., Coinmach Corp. v. Aspenwood Apartment Corp.*, 417 S.W.3d 909 (Tex. 2013) (referring to negligent trespass); *Sciscoe v. Enbridge Gathering (North Texas), L.P.*, 519 S.W.3d 171 (Tex. App.—Amarillo 2015) (referring to negligent trespass), *rev'd on other grounds, Town of Dish v. Atmos Energy Corp.*, 519 S.W.3d 605 (Tex. 2017); *Nugent v. Pilgrim's Pride Corp.*, 30 S.W.3d 562 (Tex. App.—Texarkana 2000, pet. denied) (trespass must have been "practically certain" effect).

19 *See* Restatement (Third) of Torts: Apportionment of Liability § 26A.

20 *Nabors Drilling, U.S.A., Inc. v. Escoto*, 288 S.W.3d 401 (Tex. 2009).

21 The Texas Supreme Court has repeatedly said that it has not definitively ruled on the scope of negligent hiring and training or supervision claims. *Endeavor Energy Resources, L.P. v. Cuevas*, 593 S.W.3d 307, 311 (Tex. 2019) (discussing negligent hiring under Chapter 95); *JBS Carriers, Inc. v. Washington*, 564 S.W.3d 830, 842 (Tex. 2018) (negligent hiring and training discussed). The claims are, however, supported by a "broad consensus" of Texas courts of appeals. *Wansey v. Hole*, 379 S.W.3d 246, 247-48 (Tex. 2012).

In *Nabors Well Services v. Romero*,[22] the Texas Supreme Court overruled its long-held rule that prohibited evidence of non-use of seat belts. The Court reasoned that the regime of proportionate responsibility in Texas favored including both injury-producing and occurrence-producing conduct. That rationale has been applied in other contexts.

The proportionate responsibility statute was also important in a case I handled for ConocoPhillips; in fact, the statute resulted in a change in substantive law. ConocoPhillips was sued for converting oil belonging to the Republic of Mexico because condensate delivered to one of its refineries in Louisiana allegedly contained condensate stolen by cartel members and then resold across the border. Conversion is an archaic tort, and there was no defense at common law for the innocence or good faith of the person in possession of stolen property.[23] But conversion is a tort, and the Texas proportionate responsibility statute applies to all torts, which meant that a jury would decide what percentage of responsibility to apportion to the defendants and what percentage to apportion to the cartels.[24] That essentially ended the other side's zeal for this litigation.

In a refinery explosion case in Corpus Christi, I dealt with the novel issues of negligent budgeting and negligent undertaking, which did not succeed on appeal, resulting in a reversal and rendition. [25] As far as I know, it was the first case to submit negligent undertaking in Texas, which the court of appeals found not to have been supported. I say it was the first because a later Texas Supreme Court case reversed and remanded a negligent undertaking case on the ground that the errors in submitting the charge should result in a new trial because it was a novel theory.[26] Yet in our case, we got the claim submitted in exactly the way the Texas Supreme Court later said to submit it.

A much larger explosion, this one in 1989 at the Houston Chemical Complex of Phillips 66, led to years of lawsuits. For me, that litigation overlapped with massive litigation arising from the HF acid leak at the Marathon Refinery in Galveston. Both virtually consumed ten years of my career. No legal issues developed from either. I won both trials in the acid leak litigation, and the results of the trials in the Houston Chemical Complex litigation caused the other side to appeal. The lack of resulting precedent supports my thesis; our energy clients had no issues to resolve on appeal.

The only lasting legal development arising out of the lawsuits spawned by the Houston Chemical Complex explosion was *Burrow v. Arce*.[27] That case resulted from disputes among plaintiffs' counsel, more specifically, from allegations that some plaintiffs' lawyers breached their fiduciary duties to their clients by engaging in an aggregate settlement. Such breaches were held

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22 *Nabors Well Servs., Ltd. v. Romero*, 456 S.W.3d 553 (Tex. 2015).

23 *See Schwartz v. Pinnacle Commc'ns*, 944 S.W.2d 427, 432-33 (Tex. App.—Houston [14th Dist.] 1997, no pet.).

24 *See Pemex Piloerection y Produccion v. BASF Corp.*, 2011 WL 11569219, at *17 (S.D. Tex. Feb. 11. 2011).

25 *Coastal Corp. v. Torres*, 133 S.W.3d 776 (Tex. App.—Corpus Christi 2004, pet. denied).

26 *Torrington Co. v. Stutzman*, 46 S.W.3d 829 (Tex. 2000).

27 997 S.W.2d 229 (Tex. 1999).

to justify fee forfeiture even in the absence of any damages, because settlements by Phillips at least matched what plaintiffs were getting in trial.

[6] Exemplary Damages

Exemplary damages is another issue that has developed in substantial part in cases involving the energy industry. For many years, gross negligence was virtually never successful in Texas courts. All a defendant had to do was to produce evidence of "some care." *Burke Royalty v. Walls*[28] abolished the "some care" doctrine, ushering in more than a decade of cases in which gross negligence became frequently alleged and frequently found by juries, who often viewed gross negligence as only a slightly higher form of ordinary negligence. I recall a CLE program where Frank Branson, a noted plaintiffs' lawyer, extolled *Burke Royalty* as the best decision he had seen in his career.

That development led to the redefinition of gross negligence by the Supreme Court in *Transportation Insurance Co. v. Moriel*,[29] to differentiate gross negligence from ordinary negligence. The opinion in *Moriel* begins with a discussion of *Burke Royalty*. The *Moriel* definition was adopted by the Texas Legislature in Chapter 41 of the Civil Practice & Remedies Code, a comprehensive statutory scheme to control the incidence and size of awards of exemplary damages.

Since then, liability for gross negligence has seldom survived on appeal. *Mobil Oil v. Ellender*[30] is still one of the few Texas Supreme Court cases that upheld a finding of gross negligence, when contractors were exposed without protection to a risk from which the company protected its own employees. A more typical result is *Diamond Shamrock v Hall*,[31] an appeal I handled arising out of another refinery explosion. The Texas Supreme Court found no evidence of gross negligence. By doing so, the Court sidestepped the issue of what the cap is on employee death cases for gross negligence.

Of course, I was glad to win *Diamond Shamrock v. Hall* on the ground of no gross negligence. But the question on what the cap is in employee death cases has remained since 1995. In that year, the exemption of employee death cases was dropped from Chapter 41 with no attention to how you calculate the cap when there is no recovery of either of the two components of the cap—economic damages and noneconomic damages.[32]

In *Diamond Shamrock v. Hall*, the plaintiff raised the issue of whether the cap on exemplary damages in Chapter 41 was unconstitutional. That argument went nowhere. But largely so did the reverse argument that the recovery of exemplary damages in a civil case is unconstitutional. I spent a lot of time working for a major energy company developing those defensive arguments. Likewise, we included such arguments in the extensive litigation that

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28 *Burke Royalty Co. v. Walls*, 616 S.W.2d 911, 920 (Tex. 1981).

29 879 S.W.2d 10 (Tex. 1994).

30 *Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917 (Tex. 1998).

31 *Diamond Shamrock Refin. Co. v Hall*, 168 S.W.3d 164 (Tex. 2005).

32 See H. Victor Thomas & Reagan W. Simpson, *Unsettled Questions of Texas Law—Claim for Exemplary Damages Against an Insured Employer for a Work-Related Death*, 53 S. Tex. L. Rev. 787 (2012).

resulted from the explosion at the Houston Chemical Complex, but the arguments never got traction.

The Exxon Valdez incident did lead to a 1:1 ratio of exemplary damages to compensatory damages in maritime cases, the only exemplary damages cap ever imposed by the United States Supreme Court.[33] Otherwise, the most that has come so far from the constitutional arguments by defendants were decisions requiring better jury instructions to provide guidance to juries and enhanced appellate review of excessiveness of exemplary damages awards.[34]

Of course, no discussion of the impact of the energy industry on the development of the law should fail to at least mention *Texaco v. Pennzoil*.[35] The judgment that was signed awarded amounts, including exemplary damages, that supposedly exceeded the world's bonding capacity. In the days before cell phones, a walkie-talkie communication signaled the signing of the judgment and the need to file Texaco's bankruptcy petition. A lasting effect of that case as well as the Valdez litigation is bond reform. Texas and many other states have adopted limits on bonding, to prevent Texaco-type bankruptcies because of large judgments.[36]

[7] Contract Law: Freedom of Contract and the Economic Loss Rule

Also traceable to the energy industry is arguably the most important development in Texas contract law in my career. The backdrop was a case involving the oil field servicing company Schlumberger, although in a case about diamonds rather than oil. The Texas Supreme Court case held that fraud did not vitiate a disclaimer of reliance in a heavily negotiated and heavily lawyered settlement agreement between sophisticated parties.[37] "Fraud vitiates everything" was a depressing mantra at Fulbright & Jaworksi in defending the case against John O'Quinn and Steve Susman. But I remarked that a party cannot be defrauded about the meaning of a disclaimer of reliance. That was essentially the holding.

Justice Craig Enoch, who wrote the *Schlumberger* opinion, thought it was a narrow holding, and he was surprised by its expanding application in later years. It all started, in my view, in a case called *Forest Oil*, another settlement agreement case, this time between a drilling company and the surface owner.[38] Texas Supreme Court Justice Don Willett, now a judge on the

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[33] *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

[34] *See, e.g.*, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); Anthony J. Franze & Shelia B. Scheuerman, *Instructing Juries on Punitive Damages: Due Process Revisited After* State Farm, U. PA. J. CONST. LAW 423 (2004); *In re J.F.C.*, 96 S.W.3d 256, 268 (Tex. 2002) (heightened standard of review for excessiveness of exemplary damages awards on appeal); *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006) (constitutionality of exemplary damages award is a legal issue).

[35] *Texaco, Inc. v. Pennzoil, Co.*, 729 S.W.2d 768 (Tex. App.—Houston [1st Dist.] 1987, writ ref'd n.r.e.).

[36] *See* Tex. Civ. Prac. & Rem. Code §52.006 (limiting bonds by dollar amount and percentage of net worth as well as other protections); *see also* Doug Rendleman, *A Cap on the Defendant's Appeal Bond?: Punitive Damages Tort Reform*, 39 AKRON L. REV. 1089 (2006) (listing *Texaco v. Pennzoil*, the Exxon Valdez oil spill, and tobacco verdicts as the impetus for 41 states to enact bond reforms).

[37] *Schlumberger Tech. Corp. v. Swanson*, 959 S.W.2d 171 (Tex. 1997).

[38] *Forest Oil Corp. v. McAllen*, 268 S.W.3d 51 (Tex. 2008).

Fifth Circuit, dropped a footnote in his opinion saying that disclaimers are enforceable in ordinary contracts as well as in settlement agreements.[39] That footnote led to a general acceptance of the enforceability of disclaimers, and I relied on that footnote in a case I successfully argued in the Texas Supreme Court between a computer company and an oil field service company.[40] A disclaimer was upheld in that pure contract case, without the requirement of lawyers or any negotiation about the disclaimer itself.

The *Forest Oil* footnote further led or at least contributed to an explosion of cases by the Texas Supreme Court extolling freedom of contract, many involving members of the energy industry.[41] The Texas Supreme Court has said that the "utmost liberty of contracting" is the "one thing which more than another public policy requires."[42]

That remarkable statement dovetails with the most expansive application of the economic loss rule in our country by the Texas Supreme Court.[43] As that rule was first being accepted in Texas, a noted energy-related case was front and center.[44] Another energy-related opinion in a case I handled, against Dean and later President Bill Powers, was for years one of the most cited cases on the economic loss rule.[45]

The purposes of these twin developments in Texas law seem to be twofold: (1) require parties to set the boundaries for resolving their disputes rather than asking courts to bail them out of a mess and (2) remove tort law from commercial disputes to add to the certainty of the law for sophisticated parties.

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[39] 268 S.W.3d at 58 n.25 (The reasoning of [*Schlumberger*] applies broadly to contracts generally, and we see no reason to accept McAllen's restrictive interpretation.).

[40] *See Int'l Bus. Machs. Corp. v. Lufkin Indus., LLC*, 573 S.W.3d 224 (Tex. 2019).

[41] *See Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471 (Tex. 2019); *Godoy v. Wells Fargo, N.A.*, 575 S.W.3d 531, 538-39 (Tex. 2019); *Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 230 (Tex. 2018); *RSL Funding, LLC v. Newcome*, 569 S.W.3d 116, 123 (Tex. 2018); *In re Marriage of I.C. and Q.C.*, 551 S.W.3d 119 (Tex. 2018); *Endeavor Energy Resources, L.P. v. Discovery, Operating, Inc.*, 554 S.W.3d 586, 595 (Tex. 2018); *ConocoPhillips Co. v. Koopman*, 547 S.W.3d 858, 877 (Tex. 2018); *Shields Ltd. Pushup v. Bradberry*, 526 S.W.3d 471, 474 (Tex. 2017); *Coyote Lake Ranch v. City of Lubbock*, 498 S.W.3d 53, 59 (Tex. 2016); *Philadelphia Idem. Ins. Co. v. White*, 490 S.W.3d 468, 474 (Tex. 2015); *Cosgrove v. Cade*, 468 S.W.3d 32, 40 (Tex. 2015); *Royston, Raygor, Vickery & Williams, LLP v. Lopez*, 467 S.W.3d 494, 504 (Tex. 2015); *Zachry Constr. Corp. v. Port of Houston Auth. of Harris County*, 449 S.W.3d 98, 116 (Tex. 2014); *Moayedi v. Interstate 35/Chisam Rd, L.P.*, 438 S.W.3d 1, 6 (Tex. 2014); *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 513 (Tex. 2014); *Gotham Ins. v. Warren E&P, Inc.*, 455 S.W.3d 558, 564 (Tex. 2014); *FPL Energy, LLC v. TXU Portfolio Mgmt. Co.*, 426 S.W.3d 59, 65 (Tex. 2014).

[42] *Nafta Traders, Inc. v. Quinn*, 339 S.W.3d 84, 95-96 (Tex. 2011).

[43] *See LAN/STV v. Martin K. Eby Constr. Co.*, 435 S.W.3d 234 (Tex. 2014).

[44] *See Signal Oil and Gas Co. v. Universal Oil Prods.*, 572 S.W.2d 320 (Tex. 1978).

[45] *Sterling Chems., Inc. v. Texaco Inc.*, 259 S.W.3d 793 (Tex. App.—Houston [1st Dist.] 2007, pet. denied).

Thus, in the *Carrizo Oil & Gas* case,[46] the industry policy of requiring reasonableness for withholding a consent to transfer did not affect a clear agreement to provide otherwise. Even more significant, in a dispute between pipeline companies, the Texas Uniform Partnership Act was supplanted by a condition precedent, much to the surprise of many academicians who thought that a partnership can arise despite contract language.[47]

Nevertheless, circumstances may inform what words or phrases mean, as in the use of the term "offset well" in the context of the world of unconventional drilling.[48] And in any event, courts still must grapple with "opaquely worded" oil and gas agreements and must come to some conclusion.[49]

That brings me to a point I should not neglect. In my years of practice, I have seen not just opaquely worded oil and gas contracts but important contractual language that simply makes no sense. Likewise, I have seen addenda and form documents added to lengthy contracts with no regard to the inconsistencies that are created. Form contracts have their place, like the IADC contract and JOAs. But we are in an era, especially in Texas, when companies have the opportunity to set their own boundaries, damages for breach, remedies, limitations provisions, and so forth.

That is an opportunity that the energy industry should not miss. There is very little in the way of contractual provisions that will be void as violative of public policy. A footnote in *ARCO v. Petroleum Personnel*[50] raised the issue of whether an indemnity for grossly negligent conduct may be against public policy, an issue that still has no bright-line answer.[51] The Texas Supreme Court cannot seem to bring itself to state flatly that a release of future grossly negligent conduct violates public policy.[52] But a contractual provision that allows recovery for damages intentionally caused by the other contracting party is a rare instance of a void provision.[53]

In this era of freedom of contract, perhaps it is still better to get an agreement signed than to have one that is capable of being interpreted with any certainty if a dispute arises. But to echo my thought in my first royalty case, that seems like a funny way to do business.

§ 1.03 Conclusion

Having done this review from my experience of more than four decades of practice, I believe my thesis is well supported. The energy industry has raised many important and interesting

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46 *Barrow-Shaver Resources Co. v. Carrizo Oil & Gas, Inc.*, 590 S.W.3d 471 (Tex. 2019).

47 *Energy Transfer Partners, L.P. v. Enterprise Products Partners, L.P.*, 593 S.W.3d 732 (Tex. 2020).

48 *Murphy Expl. & Prod. Co.-USA v. Adams*, 560 S.W.3d 105 (Tex. 2018).

49 *Burlington Resources Oil & Gas Co. LP v. Texas Crude Energy, LLC*, 573 S.W.3d 198, 211-12 (2019).

50 *Atl. Richfield Co. v. Petroleum Personnel, Inc.*, 768 S.W.2d 724 (Tex. 1989).

51 *Fairfield Ins. Co. v. Stephens Martin Paving L.P.*, 246 S.W.3d 653, (Tex. 2008) (noting that it may be against public policy for an insurance policy to cover grossly negligent conduct but upholding coverage in that case).

52 *Zachry Constr. Corp. v. Port of Houston Auth. of Harris County*, 449 S.W.3d 98, 116 (Tex. 2014) ("We have *indicated* that pre-injury waivers of future liability for gross negligence are void as against public policy.") (emphasis added).

53 *See id.*

issues that have propelled significant developments of the common law and statutory law that apply widely to our society. Because of the importance of the energy industry, the challenges it faces, the changing environment of our world, the energy industry will continue to aid in the development of important legal principles to guide us in the future.

I feel privileged to have experienced and participated in this development of the law over my career, just as I feel privileged to receive the Dean's Award from the Institute for Energy Law.