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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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Young Energy Professional Highlight – Matt Smith, Kean Miller LLP

Interview by Cristina Goulet, Kean Miller LLP

CG: Can you describe your career path and what led you to your current role?

MS: I was in sales and management in college and went to law school thinking it would help me advance in a business role – I didn't think I'd be a lawyer when I entered law school. But I enjoyed certain subjects, was fortunate to land a couple great summer associate positions which led to offers, and found myself with a decision to make. I accepted a job with Kean Miller and have been with the firm for almost 11 years now. Instead of a law degree helping me with a business job, the sales and management experience has ended up helping me with my legal career.

CG: How do you stay updated with the latest developments and trends in energy law?

MS: I follow a handful of legal accounts on Twitter (still hard to acknowledge it as X) and read through Energy & Environmental Law360 headlines for day-to-day updates. For more substantive developments, I try to be intentional with my CLE and target energy-related seminars like those offered by IEL.

CG: How important is mentorship in the energy sector, and what advice do you have for young attorneys who are in the market for a good mentor?

MS: Mentorship is important in the practice of law generally, but more so with an energy practice. The subject matter can be complex and the stakes often higher so it can be harder to find opportunities which help you take the next step. A good mentor can help you understand complex issues and identify ways to develop. Mentorship can also be different for each person – you could have a mentor in your practice area, a litigation or transactional mentor in another practice area, a mentor for marketing and business development, etc. To find the right mentor(s), look for people that have done what you want to do and just ask questions.

CG: What strategies do you use to prevent burnout?

MS: At some point I realized that the work is always there, and you have to stop. Prioritization and understanding what has to happen now as opposed to later – even if that means the next day or week – is a big part of that. I try not to waste time during the day so that I can keep my time after work or on the weekends. Sometimes it's unavoidable but it should be necessary when it happens.

CG: What organizations are you involved in outside of IEL?

MS: I do a lot with the Cystic Fibrosis Foundation and have also been involved with the Louisiana Association of Defense Counsel.

CG: What has been your favorite IEL event?

MS: Probably the Conference on Renewable Project Development because the subject matter is developing and changing. It's interesting to see what legal issues become more significant and how analogous practices can be applicable.

CG: What has been the most rewarding aspect of your career?

MS: Seeing law students that I helped recruit become my partners. It's one thing to see someone's potential and share a vision with them, but watching them fulfill that potential, grow, and succeed has been an incredible experience.

Expert Interview with Reece Rondon, Hall Maines Lugrin

Interview by Aaron Koenck, Hall Maines Lugrin

Reece Rondon is a shareholder at Hall Maines Lugrin. In addition to serving as a mediator, Reece focuses his practice on trying commercial disputes, including coverage and subrogation litigation involving the London and domestic energy insurance market. Prior to joining Hall Maines Lugrin, Reece served with distinction as a Texas District Court judge for nearly nine years, presiding over more than 125 jury trials. He also worked on corporate/securities matters for a national law firm, advising clients on mergers, acquisitions, and public securities offerings.

AK: How did you become interested in mediation and becoming a mediator?

RR: My interest in becoming a mediator followed my time on the bench in Harris County. It seemed like an easy way to start generating revenue for the firm, and I wanted to continue to learn additional skills, areas of the law, and get to know other attorneys as I returned to private practice. Moreover, serving as a mediator was another way I felt I could give back to the bar at large.

AK: Were there things in your background that drove your interest in becoming a mediator or that you believe help make your mediation practice successful?

RR: I had the honor of serving the people of Harris County as a judge for nine years prior to returning to private practice. I think that experience made serving as a mediator a natural fit for me. I've learned it's something I enjoy doing from time to time.

AK: Are there particular types of disputes you enjoy mediating?

RR: I think before any attorney mediates a case for their client, it's important to have an independent set of eyes review the case so the attorney can better understand it and appreciate the strengths and weaknesses. Larger cases are often mock tried. However, cases with a smaller amount in controversy are not due to economic constraints. Mediation can be an alternative method of having an independent set of eyes on the case. The independence of the mediator can help the attorneys and their clients understand the value of their case and how each side perceives the dispute. That perspective can help get it resolved at mediation, or it might provide an opening to get it resolved after mediation.

AK: What advice would you give to young attorneys before their first mediation and more experienced lawyers for achieving the best outcome for their clients in mediation?

RR: First, develop a strategy for the mediation. In developing this strategy, it is important to set expectations for your client and the goals of the mediation. Develop this strategy together. Moreover, know what your final number is before you go in. This is another reason why it is important to develop and discuss your strategy before the mediation as the offers from each side may be shocking to a client who is mediating a case for the first time.

Lastly, learn to know when to say when at the mediation. You do not always have to place your final dollar on the table if the other side indicates it is not willing to seriously mediate or still has certain expectations that cannot be bridged by the mediator at the mediation. By leaving some room to negotiate toward your final number after the mediation, you can still give settlement a chance once the dust settles and people realign expectations.

AK: Can you give examples of your best practices and how you apply those best practices to help the parties leave the mediation with a positive outcome?

RR: As the mediator, it is important to set the tone and expectations with the lawyers and clients. This includes building a rapport with each so they can trust you as mediator and reducing the skepticism they have in the mediation process. This is particularly important when explaining to them their case is not as good or has more exposure than they thought when they walked in the door. I also like to remind the litigants, even if they are seasoned litigants, that the process is not picking a winner or loser. Instead, I work with both sides to see if there is an overlap in their ranges to see if they can resolve the matter and each work to that goal. Sometimes this outcome is not able to be achieved, but it's more easily achieved if the parties understand no one is getting the upper hand or "winning" in that process.

Statutes of Limitations in Texas Arbitrations: Questions Answered, Questions Raised by CPRC 16.073

William W. Russell and Christopher Donovan, Reed Smith LLP

In 2023, the Texas legislature sought to put to rest any questions as to whether statutes of limitations apply in Texas arbitrations. By enacting Section 16.073 of the Civil Practice and Remedies Code, the legislature answered some questions, but did it raise others in its application?

In years past, there has been some question as to whether and when Texas statues of limitations apply in arbitrations. Many courts outside of Texas (e.g., Minnesota and Massachusetts) construed their states' statutes of limitation as not applying in arbitration. *See* Cameron Pope, *Texas Arbitration Law: More Choices—and More Risk—Than Ever*, 2 HLRE 1, 6 n.27 (2012) (collecting cases outside of Texas). Those courts generally reason that terms commonly used in statutes of limitations, like "action" and "suit," do not include arbitrations. *See, e.g., Son Shipping Co. v. De Fosse & Tanghe*, 199 F.2d 687, 689 (2d Cir. 1952); *Har-Mar, Inc. v. Thorsen & Thorshov, Inc.*, 218 N.W.2d 751 (Minn. 1974); *Carpenter v. Pomerantz*, 634 N.E.2d 587, 590 (Mass. App. Ct. 1994). By comparison, many Texas statutes of limitations use similar language, thus potentially lending support for an argument that they should not apply in arbitrations. *See, e.g.*, TEX. CIV. PRAC. & REM. CODE § 16.004 (providing that a "person must bring *suit* on the [certain] *actions*" within four years after the cause of action accrues (emphasis added)). Implicating similar reasoning, courts have struggled with the question of whether filing an arbitration tolls the statute of limitations in Texas. *See, e.g., Fonseca v. USG Ins. Servs.*, 467 F. App'x 260, 261 (5th Cir. 2012) (reaffirming that a "demand for arbitration does not toll the statute of limitations"); *EcoProduct Sols., L.P. v.*

ENGlobal Eng'g, Inc., No. 01-10-00366-CV, 2011 Tex. App. LEXIS 4923, at *23 (Tex. App.—Houston [1st Dist.] June 30, 2011, pet. denied) (declining to establish a rule that "filing of an unaccepted arbitration document substitutes for commencement of litigation or otherwise tolls limitations"); *Sun v. Al's Formal Wear of Houston, Inc.*, 14-96-01516-CV, 1998 WL 726479 (Tex. App.--Houston [14th Dist.] Oct. 15, 1998, no pet.) (holding that the statute of limitations was not tolled by a petition to enforce an invalid arbitration award).

Against that backdrop, in 2023, Texas enacted Section 16.073 of the Texas Civil Practice & Remedies Code ("CPRC"), which provides: "A party may not assert a claim in an arbitration proceeding if the party could not bring suit for the claim in court due to the expiration of the applicable limitations period," subject to certain exceptions discussed below. TEX. CIV. PRAC. & REM. CODE § 16.073(a). The Texas Senate Research Center explained that, with Section 16.073, the Texas legislature intended to "clarify the statute of limitations for asserting a claim in an arbitration proceeding by prohibiting a party from asserting the claim in arbitration after expiration of the applicable limitations period, except under certain conditions," reasoning that "alternative dispute resolution is only intended to provide a different forum for deciding disputes, *not to change the substantive law* underlying the dispute." Senate Research Center, Bill Analysis, H.B. 1255 (emphasis added).

But will Section 16.073 achieve the consistency that the Texas legislature envisioned?

For starters, though the Texas Senate Research Center described statutes of limitations as "substantive law," *id.*, Texas law—like many common law jurisdictions—regards statutes of limitation as procedural law. *Baker Hughes, Inc. v. Keco R. & D., Inc.*, 12 S.W.3d 1, 4 (Tex. 1999) ("Statutes of limitations are procedural."); *Integrity Glob. Sec., LLC v. Dell Mktg. L.P.*, 579 S.W.3d 577, 587 (Tex. App.—Austin 2019, pet. filed) (applying Texas procedural law, including statutes of limitation, even though parties designated Delaware substantive law through a choice-of-law provision). Nothing in the text of Section 16.073 suggests that it upends this principle of Texas law.

Despite the legislature's discussion of the statue as substantive law, Section 16.073 was inserted into a procedural chapter—"Title 2: Trial, Judgment, and Appeal"—not the Texas domestic or international arbitration acts found in CPRC sections 171 and 172. Could this impact Section 16.073's treatment as procedural or substantive law?

Relatedly, "the designation of the place of arbitration traditionally has been treated as consent to the procedural law of that place," i.e., the arbitration law of the seat—the *lex arbitri*. *See* Cindy G. Buys, *The Arbitrators' Duty to Respect the Parties' Choice of Law in Commercial Arbitration*, 79 ST. JOHN'S L. REV. 59, 73 (2005). With that in mind, could this procedural-substantive law distinction raise additional questions regarding the application of statutes of limitations in arbitral proceedings in ways that the Texas legislature may not have intended? An arbitrator seated in Texas, for instance, conceivably could decide to apply Texas statutes of limitations, including Section 16.073, as the *lex arbitri* procedural law to arbitral proceedings governed by the substantive law of another state. On the flip side, an arbitrator seated outside of Texas might refuse to apply the Texas statutes of limitations, deeming it to be inapplicable court procedural law—even if the dispute is governed by Texas substantive law.

At first glance, that may not seem terribly anomalous. After all, it happens in litigation. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717 (1988) (Scalia, J.) (affirming the longstanding principle that states can apply their own procedural laws, including statutes of limitation, to disputes governed by the substantive law of another state). But, in finding that statutes of limitations are procedural in nature, courts historically have reasoned that such limitations do "not extinguish the underlying right but merely cause[] the remedy to be withheld," and this rationale applies in the conflicts of laws context. *Id.* at 724. Indeed, "the right subsists, and the forum may choose to allow its courts to provide a remedy, even though the jurisdiction where the right arose would not." *Id.* (citing *Graves v. Graves's Ex'r*, 5 Ky. 207, 209 (1810)). Though a state may have an interest in determining when parties can avail themselves of its courts, would that rationale even apply—or apply with the same force—where parties have elected for arbitration seated in Texas in lieu of the court system? Thus, would Section 16.073 undermine the consistency that the Texas legislature envisioned by, potentially, barring parties arbitrating in Texas from asserting Texas claims after the expiration of Texas statutes, while allowing parties arbitrating outside of Texas to maintain Texas claims that would be time-barred under Texas law?

Even setting aside potential conflicts of laws issues, the potential for ambiguity and inconsistency in the application of Section 16.073 might also arise when considering the relation-back doctrine. In Texas, the relation-back doctrine generally allows a party to bring an otherwise untimely claim in an amended pleading if the claim would not have been untimely when the original pleading was filed and provided that the new claim is not based on a new, distinct, or different transaction or occurrence. TEX. CIV. PRAC. & REM. CODE § 16.068. Insofar as an arbitrator considers the relation-back doctrine part of the statute of limitations law for the seat of the arbitration, does Section 16.073 effectively prevent the arbitrator from applying the relation-back doctrine, given that Section 16.073 bars a party from asserting "*a claim* in an arbitration proceeding if the party could not bring *suit* for *the claim* in court due to the expiration of the applicable limitations period"? TEX. CIV. PRAC. & REM. CODE § 16.073(a) (emphasis added).

Similar ambiguity might arise where a dispute starts in court and is ordered to arbitration. Section 16.073(b) provides, notwithstanding subsection (a), that:

> A party may assert a claim in an arbitration proceeding after the expiration of the applicable limitations period if: (1) the party *brought suit for the claim* in court before the expiration of the applicable limitations period; <u>*and*</u> (2) the parties to the claim agreed to arbitrate the claim or a court ordered the parties to arbitrate the claim.

TEX. CIV. PRAC. & REM. CODE § 16.073(b) (emphasis added). Taking its text literally, would Section 16.073(b) prevent a party ordered to arbitration from invoking the relation-back doctrine for new claims in amended arbitration demands because, in that scenario, the party did not "*[bring] suit for the claim in court* before the expiration of the applicable limitations period"? *Id.* (emphasis added).

Along similar lines, Texas court procedures also allow a litigant to assert an otherwise untimely "counterclaim or cross claim" if it "arises out of the same transaction or occurrence that is the basis of an action" and is filed "not later than the 30th day after the date on which the party's answer is required." TEX. CIV. PRAC. & REM. CODE § 16.069. Section 16.073 does not mention counterclaims or cross claims. But, if we assume that its use of the more general term "claim" includes counterclaims and cross claims, Section 16.073 arguably might bar the respondent in an arbitration proceeding from asserting untimely counterclaims and cross claims that would not be barred if the dispute was litigated in Texas state court. TEX. CIV. PRAC. & REM. CODE § 16.073(a) ("A party *may not assert a <u>claim</u> in an arbitration proceeding* if the party could not <u>*bring suit for the claim*</u> due to the expiration of the applicable limitations period." (emphasis added)). Is this an unintended constriction on arbitration claims, or is it just another instance where court procedures provide more expansive options to parties than typical arbitration procedures?

Additionally, Section 16.073(b) essentially aims to toll the limitations period if a claim is timely filed in court and then ordered to arbitration. Who would determine whether the claim was timely filed in this scenario? Would it have to be the court before compelling arbitration? Would that question not be solely within the arbitrator's jurisdiction? *See, e.g., Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S.Ct. 524, 529-30 (2019).

Overall, do these potential inconsistencies put Texas arbitrations on different and more restricted limitations footing than Texas court cases? Section 16.073 laudably answered important questions about the application of statutes of limitations in Texas arbitrations, perhaps bringing it more in line with parties' expectations. But has the act given rise to some difficult questions in its implementation? It may be years before we know whether the Texas legislature was successful in achieving the consistency it sought between arbitration and court cases.

Sustainable Aviation Fuel Needs a Moment, Even As It Is Having a Moment

Hilary Soileau and Simas Gerdvila, K&L Gates LLP

The idea that Sustainable Aviation Fuel (SAF) will play a major role in the aviation industry's decarbonization is not new. In November 2021, the United States (US) Federal Aviation Administration adopted a Climate Action Plan for the domestic aviation industry to achieve net zero by 2050. In October 2022, the International Civil Aviation Organization, an agency of the United Nations, adopted a Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) for the global aviation industry. In 2023, the European Union (EU) adopted a ReFuelEU Aviation Regulation, which set a 70% target for green aviation fuels by 2050. Each plan listed SAF as a key tenet of accomplishing net zero by 2050.

Much like ethanol blended into gasoline can be pumped into most vehicles at any service station, SAF blended with traditional jet fuel can be lifted from preexisting fueling stations to power preexisting aircraft. This makes SAF the most economical and expedient option for decarbonization available to the aviation industry. Because SAF is blended with jet fuel, a refined petroleum, some clean energy proponents oppose it entirely. Others view it as a valid transition fuel, similar to the role of liquified natural gas and carbon capture in long-term global decarbonization.

SAF has been in the spotlight in the first half of 2024. With the aforementioned net-zero deadlines looming and tax credits up for grabs, the aviation industry is swiftly progressing on SAF projects. In January, LanzaJet opened the world's first ethanol-to-jet fuel plant in Georgia, United States. In February, at the Singapore Airshow, Asia's largest aviation industry event, Singapore announced a levy on passenger tickets for all flights leaving Changi Airport, one of the top five busiest international airports in 2023 according to Forbes, to pay for SAF acquisition. In April, both DG Fuels, LLC and Sumitomo Corporation publicized progress on separate SAF plants in Louisiana, United States. The Internal Revenue Service (IRS) provided long-awaited Inflation Reduction Act (IRA) guidance on SAF credits and safe harbors via Notice 2024-37 in the last week of April followed by guidance on procedures to register as a 45Z Clean Fuel producer via Notice 2024-49 in the last week of May. Also in May, the Renewable Fuels Association, composed of leaders in the US SAF industry, joined its European counterparts in a challenge to ReFuelEU Aviation Regulation prohibiting crop-based biofuels in the European Union.

But, like most other clean energy developments, a slew of obstacles stands in the way of SAF's short-term success.

First, feedstock is limited because the non-fossil feedstocks used to create SAF are often wastes (municipal waste or used cooking oil), residues (nut shells, corn cobs and husks, animal manure, leaves, and branches), and by-products of other processes (animal fats or nonuniform produce that cannot be sold for food) or are grown on limited agricultural land (corn and soybeans).

Second, not all SAF is created equally. This principle manifests itself in many ways.

SAF created from different feedstocks can be mixed with jet fuel in different proportions, maxing out at 50%. Accordingly, feedstocks that can be blended in higher quantities with jet fuel are in greater demand.

Despite CORSIA's global aviation emissions goals, the credit systems differ from country to country (and state to state within the United States), resulting in arbitrary distinctions in the demand for certain feedstocks.

For example, the EU's Renewable Energy Directive considers any feedstock that is a "waste" or "residue" "to have zero life-cycle greenhouse gas [(GHG)] emissions up to the process of collection of those materials." However, different EU Member States have interpreted this requirement differently. Some governments have decided to keep demand down on certain feedstocks that have value in other capacities, such as food. In such cases, a government may disincentivize using a particular feedstock by counting it as a product rather than as a waste or residue thus requiring a calculation of its GHG emissions prior to collection for use as a feedstock. In contrast, a government may qualify a feedstock as a waste or residue to prop up a domestic industry. This incongruence has impacted everything from palm oil to animal fat.

As another anecdote, the industry has yet to agree on a generally applicable life-cycle assessment for calculating GHG reduction. The IRA requires use of CORSIA'S life-cycle assessment model or a similar method. The IRS's recent Notice 2024-37 created a safe harbor to permit domestic corn and soybean crops for use as feedstocks and established a SAF-specific life-cycle assessment model (SAF GREET). Previously, the renewables industry disagreed on whether to consider farming practices in a determination of whether those feedstocks would achieve the 50% GHG emissions reduction required by the IRA (see Notice 2024-06). Those methods assessed emissions reduction varying between 10% and 50%. Now, the IRS, with support from the US Department of Agriculture, has introduced SAF GREET specifically to consider certain climate-smart farming practices (depending on the crop, a combination of no-till farming, cover cropping, and enhanced nitrogen fertilizing) in establishing the required 50% emissions reduction.

Meanwhile, per EU Regulation 2023/2405, set to take effect in 2025, SAF made from any food or feed crop would not qualify for incentives, although, as noted above, opponents are currently challenging this part of the legislation before the European Court of Justice. Supporters fear that allowing food and feed crops will cut into the already limited agricultural land across Europe and result in additional carbon-emitting changes in land use, such as deforestation to create additional farmland. A 2023 report by the Royal Society estimated that replacing the jet fuel needs of the United Kingdom with SAF would require approximately 68% of current UK agricultural land.

Other SAF challenges tie back to the issue of limited feedstock as well. According to the International Air Transport Association, in 2023, SAF production reached 600 million liters annually, but the industry requires 449 billion liters annually to achieve net zero by 2050. While the technology currently exists to create these biofuels, the industry needs to strategically scale production. Scaling requires new plants, but to maintain the GHG emissions reductions required of SAF, producers must consider the entire carbon supply chain from the point of acquiring the feedstock. Plants must be near enough to the feedstock or have a low-carbon-emissions means of getting the feedstock to the plant. Limited feedstock availability limits the "ideal" location of these developments.

Granted, the future of the IRA tax credits is uncertain pending the outcome of the 2024 presidential election. Moreover, the IRA Clean Fuel Production tax credit only runs through 2027, which many consider an insufficient runway to incentivize building a SAF facility. These concepts, too, inhibit the ability to scale the SAF industry at the rate it desires.

Further advancements in science and technology could exponentially enhance SAF production. While there has been a focus on biofuels, e-fuels made from carbon capture, low-carbon electricity, and green hydrogen are advancing. For example, the ReFuelEU Aviation Regulation sets a mandatory SAF sub-target for synthetic fuels like e-kerosene and other e-fuels. Additionally, ASTM International, a standards organization, has an active task force working toward approving 100% SAF rather than a blend. This is important because, in practice, fossil-based SAF may struggle to qualify for the 45Z Clean Fuel Production tax credit in the IRA without further aid of carbon capture and sequestration processes.

As if there was not enough competition for feedstock for SAF alone, the aviation industry is competing with the marine shipping and road freight industries as well. As of 2020, the International Energy Agency reports that road traffic caused nearly three-quarters of the emissions from the transportation sector. On the surface, this statistic may suggest that road traffic warrants the greatest percentage of feedstock, but that subsector has been the most successful

at decarbonization outside of alternative fuels thus far with the prevalence of electric vehicles and noteworthy investment into hydrogen for heavy-duty trucking. Electric or hydrogen-powered aircraft or vessels are still years away from mass use. The maritime industry has, however, seen efforts to retrofit vessels to run on entirely green fuels such as green ammonia or methanol. This method, while a more significant step toward decarbonization, holds substantial risks if the fuel that powers the retrofitted vessel never scales to the necessary levels. Further, while incentives exist to encourage purchase and use of these alternative fuels in the form of tax credits, there are other areas of the law that disincentivize the same actions; for example, the tax code currently requires an excise tax on alternative fuels for vessels but not on diesel fuel. Instead, the aviation industry has solidly leaned into transition fuels and a slower evolution toward decarbonization.

While an industry cannot subsist on subsidies, the various policies are intended to increase clean energy development and permit time for the parties to develop meaningful business relationships that last beyond the expiration of any government incentives. ReFuelEU Aviation has put the onus on suppliers to ensure a minimum blend target of SAF, which will gradually increase until 2050, but there are incentives for offtakers who are paying premiums. This type of mandate shows commitment to the goal but risks the loss of credibility if the goal cannot be achieved due to a lack of supply, for instance. In the United States, developers are now able to utilize the IRA in lieu of the traditional tax equity structure to fund energy projects with the introduction of transferable tax credits, which the IRS provided final regulations on 25 April 2024 (89 FR 34770), and direct payment in lieu of tax credits. Critics say this permits companies to claim to meet their emissions reduction goals without changing their actions to reduce their emissions. If these policies can support the scaling of SAF by making development more economical despite the expenses of new technology and acquiring feedstock in a competitive market, they may also stabilize SAF to a decreased price.

Unlike the EU or US schemes, Singapore's SAF levy unifies the buying power of various airlines into the hands of the airport without the pressure to hit a mandatory volume of SAF, but Singapore's promise to provide cost certainty to airlines and passengers by not changing the levy even if the price of SAF increases may result in lifting less SAF than projected. Supporters of the net-zero goals are not strangers to virtue signaling, though. Airlines have been offering passengers the option to contribute an extra fee for SAF supply; although those funds from private individuals are a drop in the bucket of the investment required to impact emissions, individuals are voluntarily paying corporations to support their clean energy endeavors. Some argue that Singapore's levy will have an impact by signaling demand to suppliers in Asia.

Regardless of the tight timelines to meet these decarbonization goals, they have yet to be the downfall of any airline. Through the various clean energy policies and incentives, some companies may be able to profit from clean fuel investments. The battle continues about whether the path to net zero should be slow and steady, doing it once and doing it "right," versus making immediate changes with steps like transition fuels, such as SAF. There may be no singular pathway, but by exploring both the options and policy schemes, each industry participant should be able to achieve its own version of success.

Producers May Subtract Gas Used to Power Post-Production Activities From "At-the-Well" Royalty Payments

Andrew F. Gann, Jr., Miles O. Indest, and Ryan J. Frankel, McGuireWoods, LLP

In *Carl v. Hilcorp Energy Co.*, the Texas Supreme Court—addressing certified questions from the Fifth Circuit—held that producers may subtract the volume of gas powering post-production activities from "at-the-well" royalty calculations as a post-production cost.

Hilcorp, an energy exploration and production company, held leases with the royalty holders, Anne Carl and related parties, that conveyed an "at-the-well" royalty. In other words, Carl's "royalty interest [was] in the minerals as they come out of the ground, not after processing, transportation, or other 'post-production' efforts have increased the mineral's value." Hilcorp used some of the gas produced from Carl's well to power post-production activities "off the premises" for other gas produced from the well. As a result, Hilcorp subtracted the volume of gas used in its post-production efforts from the total volume of gas used to calculate Carl's royalty.

Hilcorp's calculations spurred litigation. Carl asserted that Hilcorp could not subtract the volume of gas used in post-production and that she was entitled to a royalty on all gas produced from the well.

First, Carl argued that the lease did not allow Hilcorp to subtract gas used in post-production activities because the lease required royalty payments on "*all* gas produced from the well." Hilcorp argued that this provision did not overcome the fact that an "at-the-well" royalty allows for gas used in post-production to be subtracted from Carl's royalty. The Court sided with Hilcorp, holding that it "was entitled to account for reasonable post-production costs, which include the value of the gas used off the premises to prepare other royalty-bearing gas for sale." The parties *could* have contracted differently, but they did not.

Second, Carl argued that the Court's prior decision in *BlueStone Natural Resources II, LLC v. Randle* barred Hilcorp from subcontracting post-production costs from the "at-the-well" royalty calculation. She read *Randle* to mean that "free-use" clauses—such as the one in Carl's lease—changed her obligation to bear her share of post-production costs. The Court rejected this argument, stating that *Randle* only "reiterate[d] the longstanding rule that an 'at-the-well' royalty 'bears its usual share of post-production costs.'"

Practical Takeaways

The Texas Supreme Court's decision in *Carl v. Hilcorp* provides clarity for producers and royalty holders related to post-production costs. It reaffirms that producers—with an "at-the-well" royalty—may subtract the value of gas used in post-production activities on or off the premises from the royalty calculation, including the value of gas used to power post-production activities. Rather than removing a royalty holder's obligation to share post-production costs, *Randle* confirmed that "at-the-well" royalty holders bear their usual share of post-production costs.

However, an "at-the-well" calculation is not without limitations. The Court also noted that, "[i]f some of the gas produced from the well were 'used off the premises' for something other than post-production activities on other gas produced from the well, then a royalty would be due on the gas so used." In the future, there is still room for argument among producers, royalty holders and the courts over where, how and why post-production activities and costs are incurred.

Special thanks to summer associate Michael L. Johnson who contributed to the article. He is not licensed to practice law.

Professional Development Insight: Building Your Online Persona

Rhianna Hoover and Caitlin Kim, Debevoise & Plimpton LLP

In late 2023, researchers from the Harvard Business Review analyzed a sample of 1,741 executives and found that a more enhanced "digital professional presence," or DPP—as measured by the amount of content in the executives' personal LinkedIn profiles—is positively linked to compensation. The connection was strongest for junior executives. Indeed, the researchers found that those with five years of professional work experience had 5.2% higher pay associated with enhanced DPP, as compared to just 1.9% higher pay for those with at least 15 years of experience.

What does this mean for junior lawyers?

Perhaps the biggest takeaway of the study is that junior professionals stand to benefit from developing a robust online persona. We've long understood that personal branding is key to career success, but in today's world of 24/7 internet access, widespread social media usage, and increasing prevalence of artificial intelligence, it's more important than ever to ensure that you have a visible online presence that reflects both your personal values and professional qualifications. As the Harvard Business Review researchers noted, "[a] simple resume and a list of references no longer captures the essence of our professional capabilities . . . [T]he intentional management of our online personas . . . enabl[es] us to reap the rewards of our full human capital."

The process is a gradual one; it will take time to curate digital profiles that accurately display who you are and what you care about, as well as your career goals and accomplishments. That's why it's important for even the most junior lawyers to start now.

What can junior lawyers do now to develop their online persona?

Below are five concrete next steps that junior attorneys can take now to begin developing an online persona that will positively impact career growth:

1. Define your brand. Identify the key characteristics that you want your online persona to reflect. These characteristics might relate to your values or passion for a certain area of law, your unique background and perspectives on the industry, or your professional experience (or some combination of the above).

2. Stay in the know. Read business and trade media – it's important to keep up to date on current events and news related to the legal areas you've identified as part of your brand.

3. Connect, both online and in-person. Approach networking with the mindset of building genuine connections with others who share your professional and personal interests, rather than chasing opportunities. Getting involved with professional organizations like the Institute for Energy Law's YEP Committee is a great way to start.

4. Create and share content. Visibility is a vital part of generating a unique personal brand. Regularly post information that you find interesting or useful to others in the industry, including your own thought leadership. Don't limit yourself to LinkedIn; other social media platforms are also part of your online persona and offer additional opportunities to showcase your personal and professional values.

5. Stay consistent. Building an online presence is a long-term project. It's important to stay consistent in tone and style across your online profiles, to maintain regular activity, and to revisit your goals often to make sure that they are accurately reflected online.

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