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Fifth Circuit Denies Removal for Claims Involving Financing Arranged with Help of the United States International Development Finance Corporation

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Box v. PetroTel, Inc., No. 21-10686, 2022 WL 1237603 (5th Cir. April 27, 2022) rejected federal agency and federal question removal of a case involving financing of an oil and gas project with assistance of the United States International Development Finance Corporation ("DFC").

Facts[1]

Douglas Box sued PetroTel Oman, LLC ("PetroTel") and affiliates[2] asserting claims arising from an alleged oral contract to help obtain financing for an oil and gas project in the Sultanate of Oman. PetroTel had been involved in hydrocarbon exploration and development in Oman since 2009. DFC is a federal agency[3] that assists private businesses with investments in foreign emerging markets. In 2019, DFC approved PetroTel's request to support fundraising for a project in Oman. According to PetroTel, DFC directed PetroTel to raise funds via a public offering of DFC guaranteed Certificates of Participation ("COP"). DFC required the fundraising to be handled by a "placement agent" that it supervised and whose selection was subject to its approval. DFC also required that proceeds of the offering be held and disbursed by a "payment agent" who also handled payments to the COP holders. Like the placement agent, the payment agent was supervised by, and subject to the approval of, DFC. PetroTel claimed that it paid for, and coordinated with, the placement agent. If more money needed to be raised, PetroTel would notify DFC which would direct the placement agent to issue and market additional COPs. Ultimately, $300,000,000 was raised through the "PetroTel-DFC partnership."[4]

Box and PetroTel disagreed about his involvement. PetroTel asserted that he had no involvement with arranging financing for the Oman project. Box claimed that, in 2017, he accepted PetroTel's verbal offer that "PetroTel would pay Box $1,000,000 to $2,000,000 in exchange for Box's assistance raising $200,000,000 to $300,000,000 in cash for the Oman Project" on the condition that there be no written agreement. According to Box, after accepting the offer, he worked diligently on arranging financing, without knowing that PetroTel did not intend to pay him. Box asserted that he met with DFC about a loan, forwarded information to PetroTel that spurred it to seek DFC's assistance, and became the primary contact between PetroTel and DFC. Upon learning about approval of PetroTel's financing request,

[1] All information in "Facts", including in footnotes, comes from *Box* at *1-2.
[2] The four other defendants/appellants listed in the caption are PetroTel, Inc., PetroTel Energy (Oman), Inc., PetroTel Oman Onshore, LLC, and Anil K. Chopra, Ph.D. (CEO of the PetroTel entities). The opinion's footnote 2 listed four "named defendants", omitting Dr. Chopra.
[3] DFC was the Overseas Private Investment Corporation before a merger occasioned by 2018's Better Utilization of Investments Leading to Development (BUILD) Act.
[4] DFC also provided $150,000,000 of insurance coverage for political risk protection.

Box allegedly contacted PetroTel about payment. He says PetroTel first claimed that payment would be illegal and later asserted that there was no contract.

Box sued in a Texas state court for breach of contract, quantum meruit, unjust enrichment, fraud or fraudulent inducement, negligent misrepresentation, and gross negligence. The case was removed on federal agency and federal question grounds. After the district court granted Box's motion to remand, the matter was appealed.

Court's Analysis

The Fifth Circuit said that the federal officer removal statute, 28 U.S.C § 1442(a)(1), required a removing defendant to show that: "(1) it has asserted a colorable federal defense, (2) it is a 'person' within the meaning of the statute, (3) that has acted pursuant to a federal officer's [or agency's] directions, and (4) the charged conduct is connected or associated with an act pursuant to a federal officer's directions."[5] Focusing on the third prong, PetroTel argued that it "acted under the DFC" because it "found, pa[id] for, and manage[d] financial entities for DFC so that DFC [could] sell securities, disburse funds, and repay security holders."[6] The Court viewed PetroTel's position as being that it acted under the DFC "because it had to follow certain DFC instructions and obtain the DFC's approval for issuing COPs and managing payments to COP investors."[7] Citing *Watson*, [8] the Court said that "acting under" must include "an effort [by the private party] to *assist*, or to help *carry out*, the duties or tasks of the federal superior."[9] In the Court's view, that doomed removal as DFC assisted with PetroTel's private project rather than PetroTel assisting with a project belonging to DFC.[10] Hence, PetroTel did not help perform a "duty, activity, or task that the DFC otherwise would have had to do itself."[11]

The Court also examined appellants' reliance on *Butler v. Coast Electric Power Assoc.,* 926 F.3d 190 (5th Cir. 2019), whose facts "undeniably bear some similarities to those here."[12] *Butler* allowed federal agency removal by three rural cooperatives that had loans from the Rural Utilities Service ("RUS"), a federal agency tasked with below-market lending to utilities providers in underserved rural areas.[13] The loans in *Butler* were "conditioned upon … compliance with strict RUS restrictions and approval requirements."[14] Given "the 'close and detailed lending relationship' between the RUS and the cooperatives, as well as their 'shared goal of furthering affordable rural electricity,'" *Butler* held that the cooperatives had "acted under a federal agency" and properly removed a case in which their members asserted

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[5] *Box* at *3.
[6] *Id.*
[7] *Id.*
[8] *Watson v. Phillip Morris Cos., Inc.,* 551 U.S. 142 (2007).
[9] *Box* at *3 (quoting "cleaned up" language from *Watson,* 551 U.S. at 151-2).
[10] *Id.*
[11] *Id.* at *4.
[12] *Id.*
[13] *Id.*
[14] *Id.*

state law claims that patronage capital had been improperly withheld from them.[15] The Court said that "DFC—like the RUS—is a federal agency tasked with using federal financial resources to further a federal purpose. And the DFC—like the RUS—regulates, supervises, and exerts a certain level of control over the entities to which it provides those resources."[16]

However, the Court opined that the rural cooperatives in *Butler* were "a fundamentally different kind of entity" than private entities like PetroTel.[17] Unlike for-profit entities serving their own purposes, the rural cooperatives were state-law non-profits "that 'exist to provide a public function conceived of and directed by the federal government'" and absent "a loan agreement with the cooperatives, the government itself would have to provide the service of delivering electricity to rural communities."[18] In that sense, the rural cooperatives were themselves "instrumentalities of the United States."[19] *Butler* was distinguishable because there was no indication that "the government itself would have to drill for hydrocarbons in Oman absent the PetroTel–DFC partnership."[20] Accordingly, removal was not proper under the theory that PetroTel was "acting under" a federal agency because PetroTel's Oman project was not something that "DFC—or any federal superior—otherwise would have had to do itself."[21]

Finally, the Court rejected federal question removal under the *Grable*[22] doctrine's four part test.[23] Appellants argued for *Grable* doctrine removal because: (1) the state court petition necessarily raised a federal issue by asserting claims that required the existence of a valid contract such that it was impossible for Box to prevail without adjudicating whether the alleged contract was void under federal securities law, and (2) *Grable* was an exception to the "well-pleaded complaint" rule.[24] The Fifth Circuit held that *Grable* was not an exception to the well-pleaded complaint rule and, therefore, one relying on *Grable* "must *still* show that the alleged federal issue arises on the face of the state court petition."[25] Applying that rule, the Court opined that the elements for proving the existence of a valid contract under Texas law did not include negating a claim that federal law invalidated the contract.[26] Indeed, it opined that holding otherwise would require a plaintiff to undertake the "virtually insurmountable burden of having to preemptively defeat, at the pleading stage, every available *defense* to contract validity."[27] The federal defense to contract validity was an affirmative defense that belonged in a

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[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at *4-5.
[19] *Id.* *5.
[20] *Id.*
[21] *Id.*
[22] *Grable & Sons Metal Products, Inc. v. Darue Engineering & Mfg.,* 545 U.S. 308 (2005).
[23] *Box* at 5. According to the Fifth Circuit, the *Grable* doctrine provides that, "even when a state court petition pleads only state law causes of action, federal jurisdiction nonetheless exists 'if a federal issue is: (1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress.'" Id. (citation omitted).
[24] *Id.*
[25] *Id.*
[26] *Id.* at *6.
[27] *Id.*

responsive pleading and that could not support jurisdiction even if it was "inevitable."[28] Therefore, the district court had correctly rejected federal question jurisdiction under *Grable* because the well-pleaded complaint rule was not satisfied.[29]

Conclusion

The Fifth Circuit will disallow federal agency removal based upon federal financing assistance for a private party's project in another country and will apply the well-pleaded complaint rule to claims of federal question jurisdiction under *Grable*.

[28] *Id.*
[29] *Id.*

FERC Updates Voluntary Gas Price Reporting Policy

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On April 21, 2022, the Federal Energy Regulatory Commission (FERC) revised its guidelines pertaining to the voluntary reporting of natural gas transaction prices to price index publishers (e.g., NGI, S&P, OPIS, Argus, ICIS, and others). Specifically, FERC issued a Revised Policy Statement (RPS) modifying the standards for such reporting to price index publishers. In doing so, FERC largely adopted policies first proposed in late 2020. The RPS is effective on December 31, 2022.

There has been a dramatic decline in voluntary reporting of natural gas transaction prices since 2010. FERC hopes the changes in the RPS will help encourage more market participants to report their transactions to price index publishers.

The RPS revises price index policy standards for market participants. It will allow market participants to report either their next-day or their next-month transactions. Previously, for those choosing to report, reporting both was required. Additionally, FERC will now permit data providers to self-audit twice per year rather than annually.

The RPS also modifies FERC price reporting standards to require price index publishers to disclose when they use a market assessment other than trades at the index specified location to calculate the price index. Additionally, price index publishers will need to seek approval or re-approval from FERC every seven years that they meet the standards set forth in the Initial Policy Statement (IPS). Finally, beginning six months after the effective date of the RPS, interstate natural gas pipelines and public utilities using price indices in jurisdictional tariffs will no longer be entitled to a rebuttable presumption that such indices provide for just and reasonable rates, unless the referenced price index publisher has obtained the IPS-related FERC approval.

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Court Holds That Louisiana Law Allows Operator of Compulsory Drilling Unit to Deduct Post-Production Costs

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A federal district court held that, when the operator of a drilling unit created by order of the Louisiana Office of Conservation sells the portion of unit production attributable to an unleased tract, the unleased mineral owner is liable for its proportionate share of post-production costs, which the operator may deduct from the payment it makes to the unleased owner. *Johnson v. Chesapeake Louisiana, LP*, 2022 WL 989341 (W.D. La.) (Hicks, J.). The court reached this decision in resolving Chesapeake's motion to reconsider the court's prior ruling on the question. In reaching its conclusion, the court relied on the doctrine of *negotiorum gestio*—a quasi-contract legal theory that the unit operator did not assert prior to the court's original decision on the question. The court reconciled this doctrine with provisions of Louisiana Revised Statute 30:10(A)(3), which had been the focus of the parties' arguments before the original decision.

The Relevant Provisions of La. Rev. Stat. 30:10(A)(3)

Louisiana law authorizes the Commissioner of Conservation to create drilling units[1] and pool the separately owned mineral interests within these units.[2] Louisiana Revised Statute 30:10(A)(3) states:

> If there is included in any unit created by the commissioner of conservation one or more unleased interests for which the party or parties entitled to market production therefrom have not made arrangements to separately dispose of the share of such production attributable to such tract, and the unit operator proceeds with the sale of unit production, then the unit operator shall pay to such party or parties such tract's pro rata share of the proceeds of the sale of production within one hundred eighty days of such sale.

The dispute in this case concerns application of this provision when a unit operator who has sold the portion of production attributable to an unleased tract incurs post-production costs in handling that production, as operators of natural gas wells often do.

This Dispute

The defendants (collectively, "Chesapeake") were the operators of a Haynesville Shale unit created by the Office of Conservation. The unit contains

[1] La. Rev. Stat. 30:9(B) (authorizing Commissioner to create drilling units).
[2] La. Rev. Stat. 30:10(A)(1) (requiring Commissioner to pool separately owned interests if the owners have not already done so).

several unleased interests. Chesapeake operated a unit well that produced natural gas, and the owners of the unleased interests did not make their own arrangements to sell the natural gas attributable to their interests. Accordingly, Chesapeake sold the natural gas attributable to those interests. Chesapeake incurred a variety of post-production costs in handling the natural gas, including costs for gathering, compression, treatment, processing, transportation, and dehydration. Chesapeake paid each owner of an unleased mineral interest an amount equal to that owner's proportion share of the net proceeds of such activity. That is, Chesapeake subtracted its post-production costs from the gross proceeds of the sale, then paid each owner its proportionate share of the remaining amount (the net proceeds).

A group of unleased owners gave notice to Chesapeake, asserting that Chesapeake was underpaying them. Those unleased owners stated that Louisiana Revised Statute 30:10(A)(3) prohibits Chesapeake from deducting its post-production costs from the gross proceeds prior to calculating the amount payable to unleased owners. Chesapeake disagreed and continued to deduct its post-production costs. In October 2016, a group of unleased owners filed suit in state court—the 42nd Judicial District Court for DeSoto Parish. Chesapeake removed the case to the United States District Court for the Western District of Louisiana.[3]

The plaintiffs based their argument on the language of Louisiana Revised Statute 30:10(A)(3). They note that this provision states in part that the operator must pay the owners of unleased tracts within the unit the "tract's pro rata share of the proceeds of the sale of production." The plaintiffs argued that, based on the natural meaning of "proceeds," the quoted phrase requires the unit operator to pay each unleased owner that owner's share of the gross proceeds of the sale, rather than the net proceeds remaining after deduction of post-production costs.

Chesapeake disagreed. Chesapeake noted that the provision states the operator must pay unleased owners a "tract's pro rata share of the proceeds of the sale of production *within one hundred eighty days of such sale*" (emphasis added). Chesapeake argued that this provision merely provides a deadline for making payment and that the provision does not attempt to govern whether the payment owed is a "pro rata share" of gross proceeds or net proceeds. Chesapeake also argued that the post-production costs it incurs are reasonably necessary, that the post-production activities that give rise to such costs add value to the natural gas that it sells, and that the unleased owners would be unjustly enriched if Chesapeake were required to absorb all those costs and pay the unleased owners a share of the gross proceeds, rather than a share of net proceeds.[4]

The court granted partial summary judgment in favor of the unleased owners, ruling that Chesapeake was not entitled to deduct post-production costs.[5] The court reasoned that the language of Louisiana Revised Statute 30:10(A)(3)

[3] The plaintiffs also alleged that Chesapeake violated the Well Cost Reporting Statute, La. Rev. Stat. 30:103.1.
[4] Johnson v. Chesapeake Louisiana, LP, 2019 WL 1301985 (W.D. La.).
[5] Johnson v. Chesapeake Louisiana, LP, 2019 WL 1301985 (W.D. La.).

favored their position. Further, because a statute addresses the issue, a resort to unjust enrichment could not prevail. Chesapeake filed a motion for reconsideration.[6] The court agreed to a hearing, but the hearing and resolution of the motion to reconsider was delayed due to the COVID pandemic.

On rehearing, Chesapeake argued that each unleased owner would be entitled to its proportionate share of unit production in kind. Of course, most unleased owners do not take their proportionate share in kind. Rather, although there is no contractual relationship between the unit operator and the unleased owners, the unleased owners depend on the unit operator to handle the production and then send them a monetary payment. Chesapeake argued that, when a unit operator handles and sells an unleased owner's proportionate share of production, the operator is essentially managing the affairs of the unleased owners and that the law of *negotiorum gestio*, a theory of quasi-contract found at Louisiana Civil Code articles 2292 through 2297 applies. Civil Code article 2292 states:

> There is a management of affairs when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances.

Prior courts have stated that the relationship between the operator of a compulsory unit and unleased owners is quasi-contractual. Further, Chesapeake's argument that its handling of an unleased owner's share of production plausibly falls within the literal circumstances described by Civil Code article 2292. A close reading of Louisiana Revised Statute 30:10(A)(3) shows that it does not expressly authorize the operator to sell the share of production attributable to unleased owners. Rather, the provision describes the operator's payment obligation in the event that "the unit operator proceeds with the sale of unit production." Thus, the operator has no contractual and no express statutory authority to sell the unleased owner's share of production. Further, an operator could reasonably believe that an unleased owner (even if it preferred a higher payment amount) would approve of the operator's post-production handling of the natural gas and sale of the natural gas if made aware of the circumstances.

Chesapeake also noted that Civil Code article 2297 requires "[t]he owner whose affair has been managed … to reimburse the manager for all necessary and useful expenses." Thus, so long as post-production expenses incurred by an operator are necessary and useful, as Chesapeake asserted its post-production expenses were, Civil Code article 2297 requires that the owner reimburse those expenses. Moreover, by paying the unleased owners their proportionate share of the net proceeds (gross proceeds minus post-production costs), as Chesapeake

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[6] In resolving the motion to reconsider, the court noted that, although parties often refer to "motions to reconsider," the Federal Rules of Civil Procedure do not refer to such a motion by name. However, Federal Rules of Civil Procedure 59 and 60 provide means to challenge final judgments, and Rule 54 provides a means to challenge an interlocutory order. An order granting a partial summary judgment is generally an interlocutory order.

says it did, it was paying the unleased owners their share of gross proceeds, minus the amount owed by the unleased owner to the operator pursuant to Civil Code article 2297. Further, Chesapeake noted that the unleased owners did not dispute that the operator is entitled to deduct from gross proceeds each unleased owner's proportionate share of the Louisiana severance taxes owed on production. Thus, even the unleased owners concede that the amount owed under 30:10(A)(3) is not a proportionate share of the entire gross proceeds.

The federal district court granted Chesapeake's motion to reconsider, concluding that Louisiana Revised Statute 30:10(A)(3) and the law of *negotiorum gestio* both apply, and that a reconciliation of these provisions leads to the conclusion that the operator of a unit created by the Office of Conservation is entitled to deduct its useful post-production costs from the gross sales proceeds before calculating the amount due to each unleased owner.

NOTE: On the same day as the court issued this decision on reconsideration in *Johnson*, the court issued a decision with the same holding in a putative class action, *Self v. BPX Operating Co.*, 2022 WL 989345 (W.D. La.) (Hicks, J.) (a unit operator is entitled to deduct post production costs from the proceeds of sale before distributing the applicable proportionate share of proceeds of sale to unleased owners who did not make their own marketing arrangements). In *Self*, the court also granted a motion to certify the issue for immediate interlocutory appeal under 28 U.S.C. § 1292. Further, another section of the United States District Court for the Western District of Louisiana reached the same result in *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1447595 (W.D. La.) (Foote, J.).

Ten-year limitations period applies to forfeiture claim under Louisiana's Well Cost Reporting Statute. Scope of forfeiture can include claim for post-production costs.

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A federal district court held that the prescriptive period for a forfeiture claim under the penalty provision of Louisiana's Well Cost Reporting Statute is ten years.[1] In a separate ruling, the court held that the scope of a forfeiture can include post-production costs.[2] Finally, in *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1575850 (W.D. La.), the court granted a motion to certify these issues for interlocutory appeal.

The Well Cost Reporting Statute

Louisiana Revised Statute 30:103.1 protects the interests of parties in a compulsory drilling unit who own mineral interests that are not subject to a mineral lease held by the unit operator. The statute does so by giving such owners the right to request certain information from the operator regarding costs and revenue. Louisiana Revised Statute 30:103.2 puts teeth into the operator's reporting obligation by providing for a penalty in the event that the operator fails to provide information requested and then, after receiving notice of such initial failure, fails to timely correct the omission. The penalty is a forfeiture of the operator's right to demand that the owner who requested the information pay its proportional share of "the costs of the drilling operations of the well." Revised Statutes 30:103.1 and 30:103.2 are sometimes called, collectively, the Well Cost Reporting Statute.

Liberative Prescription

In Louisiana law, the limitations period or statute of limitations on civil claims is called a period of "liberative prescription." Civil Code article 3447 states: "Liberative prescription is a mode of barring of actions as a result of inaction for a period of time."

The Dispute Regarding the Prescriptive Period

BPX Operating Co. (BPX) is the operator of a Haynesville Shale unit created by the Louisiana Office of Conservation. Dow Construction, LLC (Dow) is a non-operator mineral lessee in the unit. Dow sued BPX, asserting that BPX forfeited its rights to collect a proportionate share of well costs from Dow by failing to provide information as required under the Well Cost Reporting Statute. BPX filed a Rule 12(b)(6) motion to dismiss for failure to state a claim, asserting multiple arguments in

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[1] *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1557273 (W.D. La.) (Foote, J.).
[2] *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1447595 (W.D. La.).

support of the motion to dismiss. One of these was that Dow's forfeiture claim is prescribed (time barred).[3]

In support of this prescription defense, BPX argued that the forfeiture claim is a penalty claim, that acts or omissions that give rise to penalties are essentially delicts (torts), that delicts are subject to a one-year prescriptive period under Civil Code article 3492, and that courts in prior cases have applied a one-year prescriptive period to penalty claims.[4]

Dow countered that penalty claims are not always classified as delictual. Dow argued that a cause of action under the Well Cost Reporting Statute's forfeiture provision is a personal action that arises from an operator's breach of a quasi-contractual obligation established by statute, and that the prescriptive period for personal actions is ten years under Civil Code article 3499.[5]

The court stated that, in determining whether a cause of action is based in tort, contract, or quasi-contract, a court must look at the nature of the underlying duty. The obligations under the Well Cost Reporting Statute apply when there is no contract between the operator and mineral interest owner. Thus, the duty is not contractual. The failure to provide information required by the Well Cost Reporting Statute might have some resemblance to a tort, but Louisiana courts have held that the relationship between the operator of a compulsory drilling unit and the other mineral interest owners in the unit is quasi-contractual. That suggests that a forfeiture claim should be classified as quasi-contractual. The prescriptive period for quasi-contract claims is ten years.

Further, noted the court, an unleased mineral interest owner's claim against a unit operator for nonpayment or underpayment of the interest owner's share of unit production is governed by a ten-year prescriptive period. This is relevant because a mineral interest owner's forfeiture claim under Louisiana Revised Statute 30:103.2 is closely related to such a person's claim for nonpayment or underpayment of the person's share of the proceeds of unit production. The close relationship weights in favor of applying the same prescriptive period. Indeed, a strong argument exists that a forfeiture claim is really just a claim for an underpayment of the proceeds of unit production. This is because, when a 30:103.2 forfeiture applies, the mineral interest owner is entitled to its proportionate share of revenue from the unit, without a deduction of well costs. A forfeiture claim is essentially a claim that the operator has underpaid the mineral interest owner by improperly deducting well costs from the payments it makes to the mineral interest owner, rather than paying the full amount owed. All these reasons supported the court's conclusion that the prescriptive period for Revised Statute 30:103.2 forfeiture claims is ten years.[6]

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[3] *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1557273 (W.D. La.).
[4] *Id.*
[5] *Id.*
[6] *Dow Construction, LLC v. BPX Operating Co.*, 2022 WL 1557273 (W.D. La.).

The Dispute Regarding the Scope of the Forfeiture Statute

Dow's forfeiture claim includes a claim that BPX forfeited its rights to collect a share of post-production costs from Dow. BPX filed a partial motion to dismiss, arguing that post-production costs are outside the scope of the forfeiture provisions of Louisiana Revised Statute 30:103.2.

In resolving the scope of the forfeiture provision, the court considered Revised Statutes 30:103.1 and 30:103.2 together. First, Revised Statute 30:103.1 requires the operator to provide certain information upon request by the owner of a mineral interest that is not under lease to the operator. The information that the operator must provide, upon request, includes an initial report containing "the costs of drilling, completing, and equipping the unit well," plus quarterly reports containing the total amount of production from the unit well, the price received from any sale of unit production, operating costs, and "[a]ny additional funds expended to enhance or restore the production of the unit well." Second, Revised Statute 30:103.2 provides for a forfeiture (when the operator fails to timely provide information requested and then fails to correct the initial failure when notified of it) of the operator's right to demand from the party requesting the information that party's share of "the costs of the drilling operations of the well." The meaning of "costs of the drilling operations of the well," as used in the Revised Statute 30:103.2 forfeiture provision, was at issue.

The court held that the forfeiture provision is broad enough to cover post-production costs. In reaching that conclusion, the court reasoned that Revised Statutes 30:103.1 and 30:103.2 should be read together. The court noted that the information to which an unleased mineral owner is entitled under 30:103.1 includes costs other than production costs. For example, it includes the price at which unit production is sold by the operator. Thus, reasoned the court, a reasonable interpretation of "the costs of drilling operations" could include the post-production costs incurred prior to the sale.

However, in concluding that the forfeiture provision includes post-production costs, the court primarily relied on a broad reading of the provision in 30:103.1 that requires the operator to provide information regarding "funds expended to enhance or restore the production of the unit well." The court reasoned that to "enhance" production could include both steps that increase production and steps that improve the quality of the product produced. Thus, the post-production costs that an operator incurs, which generally are costs incurred to improve the quality of natural gas in order to make it marketable, can be considered information which an unleased owner can seek under 30:103.1. This conclusion of the court was relevant because the court also concluded that the costs to which the Revised Statute 30:103.2 forfeiture provision applies should match the costs covered by the information provisions in Revised Statute 30:103.1.

NOTE: In this case, the court also held like the court in *Johnson v. Chesapeake Louisiana, LP*, 2022 WL 989341 (W.D. La.) (Hicks, J.), which is discussed in this issue of the "Oil & Gas E-Report," that, if an unleased mineral owner in a compulsory unit fails to make its own arrangements to market its share of unit production, and the unit operator does so, the operator is entitled to deduct post-production costs before paying the unleased owner its proportionate share of the unit proceeds obtained by selling that production.

When Louisiana Office of Conservation Undertakes Containment Operations Pursuant to Its Issuance of Declaration of Emergency, the Office Can Recover Costs Only from Current Operator of Record and Working Interest Owners

Keith B. Hall
LSU Law Center

Litel Explorations, LLC v. Aegis Development Co., LLC, 202 WL 1023248 (La. App. 3rd Cir.) addresses what persons are liable for costs incurred by the Louisiana Office of Conservation in responding to an emergency situation. The Louisiana Third Circuit held that, when the Office of Conservation undertakes containment operations pursuant to its issuance of a declaration of emergency, the Office can recover costs only from the current operator of record and working interest owners.

Office of Conservation's Authority to Conduct Operations at Oilfield Sites

Louisiana has enacted two main provisions that authorize the Office of Conservation to conduct operations at sites within its jurisdiction.

First, in 1993, Louisiana enacted the "Louisiana Oilfield Site Restoration Law," which is found at Revised Statute 30:80 *et seq*. This establishes a tax on the production of oil and gas in order to establish and fund an Oilfield Site Restoration Fund that can be used to plug and abandon orphaned wells and conduct restoration operations at orphaned oilfield sites. This law also establishes a process by which operators and working interest owners who are transferring their entire interest to another person may shield themselves from liability to the State for future plugging, abandonment, or other restoration operations for the transferred interest by establishing and fully funding a site-specific trust account that can be used for these operations.

Second, in 1999, Louisiana enacted Revised Statute 30:6.1. This statute authorizes the Office of Conservation to issue a declaration of emergency when immediate action is needed to prevent an incident occurring or threatening to occur at an oilfield site, pipeline, or other facility under the Office's jurisdiction from causing "substantial or irreparable damage to the environment or a serious threat to life or safety." After issuing a declaration, the Office of Conservation has authority to undertake containment or abatement operations to address the emergency.

The State's Recovery of Restoration Costs

Louisiana Revised Statute 30:93 requires the Office of Conservation to seek recovery of any costs the Office incurs in plugging, abandonment, or restoration operations at an orphaned site or a site for which the Office has issued a declaration of emergency. The statute also governs which persons have liability to the State for such costs.

For operations at orphaned sites for which there is no site-specific trust account, the Office of Conservation may seek recovery from the "responsible party," which is defined by Revised Statute 30:82 to mean the last operator of record and that operator's partners or working interest owners.[1] In addition, if costs exceed $250,000, the Office may proceed "in inverse chronological order" to seek recovery from past operators and working interest owners.[2]

For operations at orphaned sites for which a fully-funded site-specific trust fund has been established and approved by the Office of Conservation, the Office must first look to the site-specific trust account. If those funds are not sufficient, the Office may seek recovery from the "responsible party," but not from past operators and working interest owners.[3]

If a site-specific trust has been established, but not fully-funded and approved, the Office's recovery of costs generally follows rules somewhat similar to those that apply if no site-specific trust account has been created.[4]

Finally, "[f]or a response to any emergency as provided in R.S. 30:6.1, recovery of costs shall be against the responsible party."[5]

This Dispute

The Office of Conservation issued a declaration of emergency for a well that allegedly was leaking natural gas and liquids to the surface. The Office also conducted containment operations. The then-current operator became insolvent. The Office sought to recover its response costs from certain prior operators and working interest owners. Those companies argued that, because the Office had acted pursuant to its emergency declaration powers, the Office could only seek recovery from the current operator of record and its partners or working interest owners.

The Office of Conservation argued that, if a well is orphaned (there seemed to be some disagreement about whether or when the well was actually orphaned), then the Office can seek recovery from any past operator or working interest owner (if costs exceed $250,000), even if the Office has operated under its emergency declaration authority. The district court disagreed and granted summary judgment in favor of the former operator and working interest owners from whom the Office sought recovery.

On appeal, the Louisiana Third Circuit affirmed, holding that when the Office of Conservation operates under its emergency declaration authority, it may seek recovery of its costs only from the "responsible party," meaning the last operator of record and its partners or working interest owners.

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[1] La. Rev. Stat. 30:93(A)(1).
[2] *Id.*
[3] La. Rev. Stat. 30:93(A)(2).
[4] La. Rev. Stat. 30:93(A)(3).
[5] La. Rev. Stat. 30:93(A)(4).

Court Rules that a Backdated Lease is Not Effective to Attribute Past Production to a Severed Mineral Owner under the Ohio Dormant Mineral Act

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In *Stalder v. Gatchell*, 2022 Ohio App. LEXIS 1226, a producer asserted that production under a backdated oil and gas lease precluded the surface owner from successfully abandoning the severed mineral interest that was the subject of the lease under the 2006 version of the Ohio Dormant Mineral Act (the "2006 DMA"). Despite the high volume of 2006 DMA litigation in Ohio, the producer's argument was a case of first impression. Nevertheless, the Seventh District Court of Appeals applied ordinary rules of statutory construction to find that such production was not a savings event under the 2006 DMA.

Background Facts

In 1904, Margaret J. Gatchell conveyed the subject property, reserving one-half of the oil and gas (the "Gatchell Severed Mineral Interest"). After several intermediary conveyances, Thayer Parry conveyed the Gatchell Severed Mineral Interest to Society National Bank, Trustee. Thayer Parry also appointed Society National Bank as the executor of his Last Will and Testament.

Thayer Parry subsequently died in 1996, with his estate being probated out-of-county. His will directed Society National Bank to distribute the trust to his only child, Richard Parry, upon his passing. Although no deed or other title transaction was recorded conveying the Gatchell Severed Mineral Interest to Richard Parry, he became the equitable owner of the Gatchell Severed Mineral Interest upon the admission of Thayer Parry's will to probate.

In 2012, Jesse and Lindsay Stalder (the "Stalders") acquired the surface and the remaining one-half of the oil and gas interest in the property and executed an oil and gas lease with Gulfport Energy Corporation ("Gulfport"). Gulfport paid the Stalders a proportionately reduced lease bonus and royalties based on the earlier one-half mineral reservation by Margaret J. Gatchell.

In 2015, the Stalders attempted to abandon the Gatchell Severed Mineral Interest under the 2006 DMA. They mailed a notice of abandonment to KeyBank, which they had learned was the successor-in-interest to Society National Bank, and recorded an affidavit of abandonment. KeyBank did not respond to the notice of abandonment by recording either a claim to preserve the Gatchell Severed Mineral Interest or an affidavit identifying a savings event under the 2006 DMA, which would have precluded the Stalders from completing the abandonment process. Thus, after more than 60 days elapsed from the date KeyBank was served with a notice of abandonment, the Stalders had the severance deed notated with a statement that the Gatchell Severed Mineral Interest was abandoned.

Prior to the Stalders' 2015 abandonment attempt, Gulfport recorded a declaration of pooling and unitization for the Truax Unit, which included a portion of the land affected by the Gatchell Severed Mineral Interest. Gulfport started producing from the Truax Unit in the second quarter of 2015. Additionally, in 2017, Gulfport entered into an oil and gas lease with Richard Parry and his wife, Mallette Parry (the "Parrys"), covering the Gatchell Severed Mineral Interest. Importantly here, the parties made the lease effective May 16, 2014, more than three years prior to the date the lease was actually executed.

The Litigation

In April 2018, the Stalders filed a complaint seeking a declaratory judgement that the Gatchell Severed Mineral Interest was abandoned and reunited with the surface of the subject property under the 2006 DMA. They also asserted breach of contract claims against Gulfport seeking payment of the one-half lease bonus and royalties associated with the Gatchell Severed Mineral Interest. The Parrys filed an answer and a counterclaim seeking their own declaratory judgement affirming their ownership of the Gatchell Severed Mineral Interest. Gulfport answered, challenging the Stalders' interest in the Gatchell Severed Mineral Interest due to alleged deficiencies in the Stalders' abandonment attempt. Although the Stalders and the Parrys later reached a settlement stipulating to their ownership of the Gatchell Severed Mineral Interest – the Stalders (75%) and the Parrys (25%) – the trial court granted summary judgement in favor of the Stalders, finding that their 2015 effort to abandon the Gatchell Severed Mineral Interest was successful.[1] The trial court further ruled that Gulfport should have paid the Stalders the one-half lease bonus and royalties associated with the Gatchell Severed Mineral Interest. Gulfport appealed the trial court's judgment to the Seventh District Court of Appeals of Ohio.

On appeal, Gulfport argued that the Stalders' 2015 abandonment attempt was not successful because of the following statutory savings event under the 2006 DMA:

> *Within the twenty years immediately preceding the date on which notice is served or published*… [t]here has been actual production or withdrawal of minerals *by the holder* from the lands, from lands covered by a lease to which the mineral interest is subject…or, in the case of oil or gas, from lands pooled, unitized, or included in unit operations… in which the mineral interest is participating.[2]

(Emphasis added.) Thus, according to Gulfport, the Stalders were not entitled to be paid a lease bonus and royalties attributable to the Gatchell Severed Mineral Interest.

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[1] While there was a dispute as to the effect of the settlement agreement (*i.e.*, whether the Stalders and the Parrys jointly owned the Gatchell Severed Mineral Interest or the Stalders alone owned by the Gatchell Severed Mineral Interest), due to its inconsistency with the trial court's judgment entry, it was ultimately held by the Seventh District Court of Appeals that, at least between the Stalders and the Parrys, the settlement agreement was valid and binding.

[2] R.C. 5301.56(B)(3)(b).

Argument and Holding

In order for actual production to be a savings event under the 2006 DMA, the production must be “by the holder.” In this instance, there was production from Gulfport’s Truax Unit in the second quarter of 2015, prior to the Stalders serving a notice of abandonment upon KeyBank. Additionally, Gulfport claimed it was producing oil and gas by virtue of a lease with a holder of the Gatchell Severed Mineral Interest – Richard Parry. Although Richard Parry did not have record title to the Gatchell Severed Mineral Interest, he became the equitable owner thereof back in 1996, when his father passed away. Thus, Gulfport argued that production from the Truax Unit, coupled with a lease from the Parrys that was backdated to 2014, qualified as a statutory savings event that precluded the Stalder’s abandonment of the Gatchell Severed Mineral Interest. However, the Court rejected this argument.

Despite Richard Parry not being the record title owner of the Gatchell Severed Mineral Interest, under the 2006 DMA, he was nonetheless a “holder” under the 2006 DMA thereof based on his equitable ownership.[3] However, the Court held that Gulfport’s and the Parry’s backdating their lease to 2014 did not establish that there was actual production by a “holder” prior to the Stalders’ 2015 abandonment attempt. In reaching this conclusion, the Court relied on the plain language of the 2006 DMA to find that “[t]he insertion of a 2014 effective date into a 2017 lease does not show the past production occurring in 2015 was "by" the new lessor under the DMA and the timeframe set forth therein.” Likewise, because no other holder of the Gatchell Severed Mineral Interest (*i.e.*, Society National Bank or its successor, KeyBank) could claim to have actually produced oil and gas in the twenty years immediately preceding the Stalders’ 2015 abandonment attempt, the production claimed by Gulfport did not constitute a savings event under the 2006 DMA. Thus, the Court affirmed the trial court’s decision granting summary judgement to the Stalders.

[3] *M&H Partnership v. Hines*, 7th Dist. Harrison No. 14 HA 004, 2017-Ohio-923, ¶ 19, 86 N.E.3d 780 (holder is defined broadly and includes those who may derive rights from the record holder such as by testate or intestate succession).

Norman, Oklahoma Ordinance Requiring Oil and Gas Operators to Carry at Least $2 Million Insurance is Preempted by State Law

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Section 13-1502.1(a)(4) of the Municipal Code of Norman, Oklahoma requires oil and gas operators to maintain an umbrella insurance policy with at least $2 million in coverage. *Magnum Energy, Inc. v. Board of Adjustment*, 2022 WL 840198 (Okla. 2022). Magnum, Energy, Inc. ("Magnum"), which has operated a well within Norman, Oklahoma since 1989 applied to the Board of Adjustment for the City of Norman (the "Board") for a waiver of this requirement, but the Board denied the request.

Magnum appealed the denial to the District Court of Cleveland County, asserting that Norman's ordinance is preempted by state law because the ordinance conflicts with 52 O.S. § 137.1. That court granted summary judgment in favor of Magnum. The Board appealed and the Court of Civil Appeals reversed. The Oklahoma Supreme Court then granted Magnum's petition for review.

The Oklahoma Supreme Court noted state law once gave local governments broad authority to regulate and even prohibit oil and gas activity, but that the state significantly narrowed the authority of local governments to regulate oil and gas activity when the state repealed 52 O.S. § 137 and replaced it with 52 O.S. § 137.1 in 2015.

Under 52 O.S. § 137.1, local regulation of oil and gas production is limited to three types of laws. First, local governments retain authority to enact "reasonable ordinances, rules and regulations concerning road use, traffic, noise and odors incidental to oil and gas operations within its boundaries, provided such ordinances, rules and regulations are not inconsistent with any regulation established by Title 52 of the Oklahoma Statutes or the Corporation Commission."

Second, local governments may "establish reasonable setbacks and fencing requirements for oil and gas well site locations as are reasonably necessary to protect the health, safety and welfare of its citizens but may not effectively prohibit or ban any oil and gas operations, including oil and gas exploration, drilling, fracture stimulation, completion, production, maintenance, plugging and abandonment, produced water disposal, secondary recovery operations, flow and gathering lines or pipeline infrastructure." Finally, a local government "may enact reasonable ordinances, rules and regulations concerning development of areas within its boundaries which have been or may be delineated as a one-hundred-year floodplain but only to the minimum extent necessary to maintain National Flood Insurance Program eligibility."

The Oklahoma Supreme Court concluded that Norman's insurance mandate does not fall within any of the three categories of permissible local regulation of oil and gas activity. The Board argued that, notwithstanding 52 O.S. § 137.1, local governments still have a general police power that they may use to regulate oil and gas activity. The Court rejected that argument. The Board cited a case in which the Oklahoma Supreme Court upheld a local ordinance that required oil and gas companies to carry insurance. The Court noted, however, that the case cited by the Board was from 1931, long before 52 O.S. § 137.1 was enacted. The Court acknowledged that, prior to the enactment of 52 O.S. § 137.1, local governments had broad authority to regulate and even prohibit oil and gas activity within their boundaries. However, 52 O.S. §137.1 changed that. The Court held that Norman's requirement that oil and gas operators carry insurance is preempted by state law and therefore the requirement is unenforceable.

Texas Supreme Court Enforces Limitation on Liability in Natural Gas Utility Tariff

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The Supreme Court of Texas encountered an issue of first impression on whether a limitation of liability provision in a utility tariff bars the utility's liability for damages suffered by a residential customer's houseguests. The Court held that it does. *CenterPoint Energy Resources Corp. v. Ramirez*, 640 S.W.3d 205 (Tex. 2022)

Facts

Adrian and Graciela Castillo purchased a new home built by WestWind Homes in 2011. A plumber, Armando Aguilar & Sons Contractor, installed the home's gas lines. After the City of Laredo issued a certificate of occupancy, the Castillos moved into the residence. CenterPoint Energy Resources Corp. installed a gas meter outside the home and initiated gas service thereafter.

Graciela's parents, Fernando and Minerva Ramirez, became frequent visitors and guests at the home over the next three years. The Ramirezes used the home's gas services for cooking and showering. In February 2015, Fernando attempted to repair the Castillos' electric clothes dryer, and inadvertently opened the valve on an unused gas line behind the dryer. The escaped gas accumulated to combustible levels and ignited. The resultant explosion damaged the Castillos' home and seriously injured Fernando.

The Ramirezes sued the homebuilder, the plumber, and CenterPoint for personal-injury damages under theories of negligence and gross negligence. They alleged that all three defendants breached a duty to plug or seal the unused gas line. The Ramirezes contended that the defendants failed to provide essential equipment, not that the defendants' equipment failed.

The case proceeded to a jury trial against the homebuilder and CenterPoint after the plumber settled. The trial court directed a verdict for the homebuilder and CenterPoint on the Ramirezes' gross negligence and exemplary-damages claims. The jury found that the defendants were at fault on the three negligence submissions, and apportioned responsibility 60% to the homebuilder, 34% to CenterPoint, and 6% to the plumber. The jury awarded the Ramirezes more than $6.9 million in damages.

CenterPoint moved for judgment notwithstanding the verdict and, in the alternative, a new trial. The motion asserted that the jury's verdict was immaterial because CenterPoint is entitled to judgment as a matter of law based on the terms of its tariff, which was filed with and approved by state regulators. The trial court denied the motion and rendered judgment on the verdict. Based on the jury's proportionate responsibility findings, the trial court rendered judgment that the homebuilder was jointly and severally liable for all of the Ramirezes' damages and

CenterPoint was liable only for its proportionate share of the damages. The homebuilder settled with the Ramirezes while the case was on appeal.

Court of Appeals

The court of appeals affirmed the judgment against CenterPoint. It held that the provisions of the utility's tariff are enforceable only against the utility's customers. It found that the Ramirezes were not CenterPoint's customers, presumably because they did not contract for the utility's services. Although the tariff's special definition of "Consumer, Customer and Applicant" broadly defines the terms to mean "a person or organization utilizing services or who wants to utilize services to CENTERPOINT[,]" the court held that the scope of the defined term was narrowed to exclude houseguests. The court did not define the term "customer" except to state that the Ramirezes were not CenterPoint's customers.

The court held that the tariff's liability limitations did not apply to the Ramirezes' negligence claims because a tariff can only govern the relationship between a utility and its customers. The court rejected CenterPoint's argument that the limitations on liability extend to any damage or loss caused by gas after it leaves the meter or escapes from the consumer's housepiping, not just a customer's damage or loss.

CenterPoint filed a petition for review, and the Supreme Court of Texas granted it to address the enforceability of the limitation of liability provisions in the tariff.

The Tariff

Consistent with Texas' regulatory scheme under the Gas Utility Regulatory Act, CenterPoint filed a tariff with the Texas Railroad Commission, which is given broad regulatory authority to ensure utilities provide "safe, adequate, efficient, and reasonable services." The Texas Railroad Commission approved CenterPoint's tariff, which applies to "all Consumers" "[u]nless otherwise expressly stated" and except "insofar as [the tariff's rules] are changed by or are in conflict with any statute of the State of Texas, valid municipal ordinance, valid final order of any court or of the Railroad Commission of Texas, or written contract executed by Company." In the event of a conflict any "such statute, ordinance, order or contract shall control to the extent that it is applicable to the Consumer(s) in question," but "whenever possible, the[] rules shall be construed harmoniously with such laws, contracts, ordinances, and orders." The tariff specifies that the terms "'Consumer, Customer and Applicant' are used interchangeably" and broadly defined to "mean a person or organization utilizing services or who wants to utilize services to CENTERPOINT[.]"

The tariff further assigns consumers the responsibility for "installing and maintaining Consumer's housepiping," meaning "[a]ll pipe and attached fittings which convey gas from the outlet side of the meter to the Consumer's connection for gas appliances."

The tariff specifically disclaims liability for the escape of gas. In particular, it states "…Company shall not be liable for any damage or loss caused by the escape of gas from Consumer's housepiping or Consumer's appliances." The next limitation more broadly limits the utility's liability after gas leaves the "point of delivery," meaning "[t]he point where the gas is measured for delivery into Consumer's housepiping":

> …(b) Company shall not be liable for any damage or injury resulting from gas or its use after such gas leaves the point of delivery other than damage caused by the Company [1] in the manner of installation of the service lines, [2] in the manner in which such service lines are repaired by the Company, and [3] in the negligence of the Company in maintaining its meter loop. All other risks after the gas left [sic] the point of delivery shall be assumed by the Consumer, his agents, servants, employees, or other persons.

The parties dispute the applicability of the exception pertaining to negligent maintenance of the meter loop based on the evidence adduced at trial.

Supreme Court of Texas Analysis

The Court found that the filed-rate doctrine applied in this case because state law created a regulatory agency and a statutory scheme under which the regulator determines reasonable rates for the utility services provided by CenterPoint. Under this doctrine, a tariff filed with and approved by a regulatory agency in accordance with the statutory scheme is presumed reasonable unless a litigant proves otherwise. The court held that "the regulatory body's rate-making authority encompasses the power to limit liability as an inherent part of the rate the utility charges for its services."

The Ramirezes asserted that the tariff's provisions cannot be construed as binding on a litigant who lacked a contractual relationship with the utility. They claimed that they did not fall within the definition of consumer in the tariff. The Court disagreed, holding that the tariff broadly defines the terms "Consumer, Customer and Applicant" as applying to "a person or organization utilizing services or who wants to utilize services to CenterPoint Energy Entex." The tariff does not define "utilizing," and the commonly understood definition is to "make use of," "to put to use," and to "make practical and effective use of." Because the evidence adduced at trial reflects that the Ramirezes actively made use of the gas services CenterPoint provided to the Castillo residence, the Court held the Ramirezes utilized the service as consumers. The Court went on to specifically reject the contentions that: "(1) 'the Ramirezes were visiting the Castillos and were not residents or tenants of their home' and (2) 'the tariff provides the terms consumer, customer, and applicant are used interchangeably,' which necessarily means that 'each term can be substituted wherever any of the terms are used.'"

After this finding, the Court held that the Ramirezes' injuries fell within the express scope of the limitation of liability because the gas leak occurred after the point of delivery from a leak in the housepiping. It so found based on the plain language of the tariff but also based upon its own precedent. The Court reiterated its prior observation in *Houston Lighting & Power Co.*[1] that:

> a public utility, being strictly regulated in all operations with considerable curtailment of its rights and privileges shall likewise be regulated and limited as to its liabilities. In consideration of its being peculiarly the subject of state control, 'its liability is and should be defined and limited.' There is nothing harsh or inequitable in upholding such a limitation of liability when it is thus considered that the rates as fixed by the Commission are established with the rule of limitation in mind.

Because CenterPoint is a regulated entity, it has no ability to limit who may use its services and no control over who a paying customer permits to use its services. The Court recognized that "[w]ithout a limitation of liability, the potential for substantial damages awards either threatens the financial integrity of the utility or must be passed on with regulatory approval to all rate payers. Those consequences ensue whether the tort claims come from the bill payer or the bill payer's cohabitants and guests."

Conclusion

The tariff provides that the utility "shall not be liable for *any* damage or loss" in the limited circumstance where damage or loss is "caused by the escape of gas from Consumer's housepiping or Consumer's appliances." The houseguests at issue were injured in that exact manner. The Court held that the houseguests' negligence claims were precluded because the tariff's terms expressly apply to "all consumers" and the houseguests meet the tariff's special definition of that term. Because the tariff was approved by a regulatory body, it was not a "mere contract" and instead carries "the force and effect" of law. As consumers, the houseguests are bound by the tariff's terms, and neither assent nor actual knowledge was required to enforce its terms as written.

[1] *Houston Lighting & Power Co. v. Auchan USA, Inc.*, 995 S.W.2d 668 (Tex. 1999).

Louisiana Amends Risk Charge Statute

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Act 5 of the 2022 Regular Session of the Louisiana Legislature amends the state's "risk charge statute," which is found in Louisiana Revised Statute 30:10. The risk charge statute applies in the context of drilling units created by the Louisiana Office of Conservation.

The Basics of the Risk Charge Statute

Under both the pre-amendment and post-amendment versions of the risk charge statute, the statute authorizes a unit operator to send a risk charge notice to each non-operator lessee in the unit.[1] Such a notice informs the non-operator lessees of proposed unit operations and gives the non-operator lessees a choice whether to participate in a proposed operation. The risk charge statute specifies a variety of information that must be included in the notice, including a description of the proposed operation and an estimate of its costs.[2] If a non-operator lessee agrees to participate in the operation, that lessee becomes obligated to pay its proportionate share of the costs (even if those costs exceed the estimate).

If a non-operator lessee chooses not to participate in the proposed operation, that lessee is not required to come out-of-pocket to pay a share of the costs of the operation. Further, if the operations result in production of oil or gas, the operator must pay the non-participating lessee an amount sufficient to cover the lessee's lease royalty and overriding royalty obligations on such production.[3] However, except for the amount needed to pay its royalty owners, the non-participating lessee does not receive any further payment until the well has earned enough to pay both its costs and a risk charge.[4] The retention of the risk charge by the operator and any participating non-operator lessees compensates them for assuming the economic risks of the operation.

The 2022 Amendments to the Risk Charge Statute

Act 2022 No. 5 amends the risk charge statute in several ways. Prior to Act 5, a non-operator lessee who chose to participate in a proposed operation was

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[1] La. Rev. Stat. 30:10(A)(2)(a)(i). The term "risk charge notice" is added by Act 5. The pre-amendment version of the risk charge statute simply referred to the "notice." The provision which exempts unleased mineral interests from the risk charge is found at La. Rev. Stat. 30:10(A)(2)(e).
[2] La. Rev. Stat. 30:10(A)(2)(a)(i).
[3] La. Rev. Stat. 30:10(A)(2)(b)(ii)(aa). The statute puts certain limitations on the amount that the operator must pay to a nonparticipating lessee to cover overriding royalty obligations. *Id.*
[4] La. Rev. Stat. 30:10(A)(2)(b)(i). The amount of the risk charge varies. The charge is two hundred percent of a tract's allocate share of the costs for a unit well or substitute unit well, including a cross-unit well that will serve as the unit's unit well or substitute unit well. *Id.* The charge is one hundred percent of a tract's share of the costs of any other cross-unit well or an alternate unit well. *Id.* The risk charge is also one hundred percent for a "subsequent operation," which includes such operations as reworking, recompleting, extending a well, or sidetracking. La. Rev. Stat. 30:10(A)(2)(b)(v).

required to pay its proportionate share of costs within sixty days of receiving detailed invoices. If a lessee that elected to participate did not pay timely, that lessee would be treated as a lessee that had chosen not to participate. Some operator representatives expressed concern that allowing sixty days for payment gave non-operator lessees a way to "game" the system whenever drilling operations were to be conducted and completed before the passage of sixty days after sending a risk charge notice.

In particular, operator representatives stated that a non-operator lessee could elect to participate in a proposed operation that would be completed quickly (before the 60-day deadline for payment), then if the operation proved to be unsuccessful a lessee that had agreed to participate could simply not pay. The result would be that such a lessee would be treated as a non-participating lessee. Such a lessee would then be subject to a risk charge, but given that the risk charge is only payable out of production, such a lessee might escape with no real liability. Act 5 amends the risk charge statute by giving the operator the option to require that any non-operator lessee electing to participate in a proposed operation must pay its proportionate share of the estimated costs of an operation at the time the lessee submits its election to participate. If the non-operator lessee fails to submit payment with its election to participate, the lessee is treated as if it chose not to participate.

Act 5 also amends the risk charge statute to place a condition on the operator's obligation to pay non-participating lessees an amount sufficient to cover the non-participating lessee's lease royalty and overriding royalty obligations. As amended, the risk charge does not require the operator to make such payments unless the non-participating lessee has provided certain information to the operator. This information includes a true and complete, or redacted, copy of the lease or other agreement that creates the royalty obligation. If the non-participating lessee chooses to provide a redacted copy, rather than a complete copy, the redacted copy must provide in full the provisions that deal with determination and calculation of the royalty due. The non-participating lessee must also provide a sworn statement of its ownership interest.[5]

In addition, Act 5 adds to the risk charge statute a provision that no change of the ownership of a non-participating lessee is binding on the operator until the new nonparticipating lessee provides the operator with a certified copy of the instrument or instruments that constitute the chain of title from the original to the new nonparticipating lessee.[6] Another amendment provides that, if the operator secures a title opinion covering a tract burdened by a lease held by a nonparticipating lessee, the operator may treat the costs of that title opinion as costs recoverable from that tract's share of the proceeds of production from the

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[5] La. Rev. Stat. 30:10(A)(2)(b)(ii)(aa), (gg).
[6] La. Rev. Stat. 30:10(A)(2)(b)(ii)(ii).

operation.[7] In such an event, the nonparticipating lessee is entitled to receive a copy of the title opinion.

Act 5 also adds a section providing that an operator can use the risk charge process for "any subsequent unit operations." "Subsequent unit operation" is defined as meaning "a recompletion, rework, deepening, sidetrack, or extension conducted within the unitized interval for a unit or units" created by the Office of Conservation.[8] The amendments also include definitions of "extension," "recompletion," "rework," "sidetrack," and "unitized interval."

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[7] La. Rev. Stat. 30:10(A)(2)(b)(ii)(jj).
[8] La. Rev. Stat. 30:10(C).

The U.S. Supreme Court Limits Federal Court's Jurisdiction Over Confirming and Vacating Arbitration Awards

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Many energy transaction contracts contain arbitration clauses to force disputes outside of the court system. Under the Federal Arbitration Act (FAA), 9 U.S.C. § 1 et seq., a party to an arbitration agreement is able to seek various forms of assistance from a federal court. For example, Section 4 authorizes a party to ask the court to compel an arbitration proceeding. Additionally, Sections 9 and 10 authorize a party to apply to the court to confirm or vacate an arbitral award.

On March 31, 2022, in *Badgerow v. Walters*[1], the U.S. Supreme Court held the Federal Arbitration Act does not entitle federal courts to "look through" the underlying dispute for a federal question that would establish jurisdiction to confirm or vacate an arbitral award.

Background

In *Vaden v. Discover Bank*[2], the U.S. Supreme Court had assessed whether there is a jurisdictional basis to decide an FAA Section 4 petition to compel arbitration by examining the parties' underlying dispute. The Court's ruling in *Vaden* rejected using the well-pleaded complaint rule ordinarily used to analyze federal jurisdiction and substituted instead the "look through" approach for federal jurisdictional analysis in arbitrability disputes. Under this substituted approach, courts may "look through" a FAA Section 4 petition to determine whether the petition "is predicated on an action that 'arises under' federal law," as required by 28 U.S.C. § 1331. This "'look through' analysis does not depend upon the petition's strict language, but upon 'the controversy' or 'substantive conflict between the parties.'"

In *Badgerow*, the Court addressed whether this same "look through" analysis applies to requests to confirm or vacate an arbitral award under FAA Sections and 9 and 10. In this case, Denise Badgerow worked as a financial advisor for REJ Properties, which was run by Greg Walters, Thomas Meyer, and Ray Trosclair (collectively "the Respondents"). Badgerow's employment contract required her to bring claims arising out of her employment to arbitration. Badgerow believed she was improperly fired and initiated an arbitration action against the Respondents, alleging unlawful termination under both federal and state law. The arbitrators dismissed Badgerow's claims, siding with the Respondents.

[1] 142 S. Ct. 1310, 1314 (2022)
[2] 556 U.S. 49 (2009).

Badgerow believed fraud had tainted the arbitration proceeding and sued the Respondents in Louisiana state court. The Respondents removed the case to Federal District Court and requested the District Court to confirm the arbitral award. Badgerow moved to remand the case to state court arguing the District Court lacked jurisdiction over the parties' applications to confirm or vacate the award under FAA Sections 9 and 10.

The District Court found it had jurisdiction under the "look through" approach adopted in *Vaden* and that fraud had not infected the arbitration proceeding. The Court of Appeals for the Fifth Circuit affirmed the District Court's finding of jurisdiction.

The U.S. Supreme Court's Decision

The U.S. Supreme Court explained that its approval of the "look through" jurisdictional approach for an FAA Section 4 petition in *Vaden* relied on that section's express language. The Court highlighted that Section 4 states that a party to an arbitration agreement may petition for an order to compel arbitration in a "United States district court which, save for [the arbitration] agreement, would have jurisdiction" over "the controversy between the parties." The Court stated that Sections 9 and 10 do not have this "save for" clause. For this reason, the Court found that Sections 9 and 10 "do not instruct a court to imagine a world without an arbitration agreement, and to ask whether it would then have jurisdiction over the parties' dispute." In an 8-1 decision, the Court held that "under ordinary principles of statutory construction, the look-through method for assessing jurisdiction should not apply." Accordingly, "[w]ithout that statutory instruction, a court may look only to the application actually submitted to it in assessing its jurisdiction."

In his dissent, Justice Breyer contended that adopting the "look through" analysis has practical advantages as a simple, single jurisdictional test. Further, Justice Breyer highlighted "the majority holds that a party can ask a federal court to order arbitration under Section 4, but it cannot ask that same court to confirm, vacate, or modify the order resulting from that arbitration under Section 9, 10, or 11."

Addressing Justice Breyer's dissent in its opinion, the Court expressed it "will not impose uniformity on the statute's non-uniform jurisdictional rules." Further, the Court stated that it "can see why Congress chose to place fewer arbitration disputes in federal court." Section 9 and 10 applications "concern[] the contractual rights provided in the arbitration agreement." As "adjudication of such state-law contractual rights…typically belongs in state courts," the Court reasoned that "Section 9 and 10 applications conform to the normal—and sensible—judicial division of labor: The applications go to state, rather than federal, courts when they raise claims between non-diverse parties involving state law."

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