READY! FIRE! AIM!
TWO DRAFTING TRAPS TO AVOID IN PAPERING A "RUSH" DEAL

Brandon Durrett, Partner
Dykema Cox Smith
San Antonio, Texas
bdurrett@dykema.com

Dallas Association of Professional Landmen Education Luncheon – February 19, 2019

Agreements for the acquisition of oil and gas properties—indeed, acquisition agreements in any context—often require highly complex legal drafting within a short time frame. Parties are typically eager to get under contract and close as quickly as possible to avoid the other party losing interest or backing out. Sellers, in particular, want to limit the amount of time their assets are off the market and the amount of time their buyers may inspect the assets for defects. These time constraints make acquisition agreements particularly prone to errors and drafting oversights.

This article will discuss the proper use and risky misuses of two clauses common to oil and gas acquisition agreements that are often perceived as drafting shortcuts in "rush" deals. The first topic is the effect of a "subject to the Purchase and Sale Agreement" clause in an assignment of leases, and the degree to which it controls over the actual assignment terms and prevents merger of the Purchase and Sale Agreement into the assignment. The second topic is when, how, and to what extent the phrase "notwithstanding anything herein to the contrary" will cause the language it precedes to override other contract terms.

I.
"SUBJECT TO THE PSA" CLAUSE VS. MERGER BY DEED

The urgency involved in a sale of oil and gas leases does not end when the parties sign a formal Purchase and Sale Agreement ("PSA"). In the author's experience, the parties' eagerness to close is usually even more intense. Typically, the weeks between contracting and closing is a whirlwind of time-intensive due diligence, including data room analysis, review of financial records and corporate filings, examination of title documents and material contracts, regulatory and environmental inspections, purchase price adjustments and knockdowns, and minor renegotiations.

With all that activity, both before and after getting under contract, the parties look for time-saving efficiencies wherever they can find them. As a result, the formal assignment of leases often gets less drafting attention than it deserves. Rather than carefully drafting the assignment to closely track the relevant PSA terms, it is tempting to simply pull an unrelated assignment form from your files, fill in the blanks and exhibits, and add a clause making the conveyance "subject to" the terms of the PSA. The thinking behind this approach is that the PSA terms will control in the event they conflict with the assignment terms, so an error or omission in the assignment is not critical.

This thinking is wrong and hazardous due to the legal doctrine of "merger by deed," or the merger doctrine. It holds that when the seller executes, and the buyer accepts, a conveyance pursuant to a contract for sale of real property, the contract "merges" into the conveyance. As a result, the contract terms regarding the property conveyed do not

survive closing, even if they contradict the conveyance terms.[1] Put another way:

> [I]n the absence of fraud, accident, or mistake in the execution, the deed, an absolute conveyance on its face, must be considered the *final expression* and the *sole repository* of the terms upon which [the parties] have agreed with respect to the *property conveyed*, the consideration, and the method of payment.[2]

But can the merger doctrine be expressly overridden? Not easily, it seems. The merger doctrine is so durable, in fact, that it cannot be defeated by making the conveyance "subject to the terms" of the contract for sale, as the following cases demonstrate in the oil and gas context.

A good illustration of how merger by deed and a "subject to" clause interact is *Devon Energy Prod. Co., L.P. v. KCS Res., LLC*, decided in 2014 by the Houston 14th District Court of Appeals.[3] Devon had entered a PSA to sell KCS a large package of mineral tracts, which was duly closed by delivery of deeds. Years later, a third party operator proposed new wells on some of the mineral tracts and a question arose as to whether Devon had conveyed all of its right, title, and interest in the entire tracts, per the deed language, or merely in certain existing wells thereon listed in the PSA. Devon filed a declaratory judgment action to determine the parties' respective rights.

KCS argued that because the rights of the parties rest solely in the deeds, per the merger doctrine, a construction of the PSA by the court would not resolve any justiciable claim and therefore the court lacked jurisdiction to do so. Devon countered that because the deeds were "expressly made subject to" the PSA, no merger occurred and the PSA terms still control what interests were conveyed. The court disagreed:

> The Supreme Court of Texas has long recognized that the conveyance provisions in a contract for the sale of real property merge into the deed executed in accordance with the contract. The merger doctrine requires courts to look to the deed alone in evaluating the parties' respective rights even if the terms of the deed vary from the contract.[4]

The court further stated, "we reject Devon's argument that the [deed's] language that it is 'subject to' the PSA indicates the parties' intent that the PSA would not be merged into, superseded by, or mooted by the [deed]."[5] As supporting evidence, the court cited revisions made to legal descriptions in the deed exhibits due to title errors found during KCS's due diligence investigations, though the PSA exhibits were not correspondingly revised. "[I]f the conveyance terms of the [deed] were 'subject to' the PSA," the court stated, "then the revisions the parties made to deeds during the due diligence period would be irrelevant" and would "undermine the purpose of the merger doctrine."[6]

---

[1] *Alvarado v. Bolton*, 749 S.W.2d 47, 48 (Tex. 1988).
[2] *Carter v. Barclay*, 476 S.W.2d 909, 914-15 (Tex. Civ. App.—Amarillo 1972, no writ) (emphasis added);
[3] 450 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).
[4] *Id.* at 211.
[5] *Id.* at 214.
[6] *Id.*

The court also rejected Devon's argument that because the PSA contains surviving collateral terms, meaning contract obligations not fully performed by execution and delivery of the deeds, such as indemnification provisions and covenants to cooperate in effectuating the intent of the PSA. The court agreed that such terms are not released or impaired by the merger doctrine, observing that the PSA merges into the deed only as to "'property conveyed, the consideration, and the method of payment.'"[7] But Devon's claim failed because the parties disputed the scope of the conveyance itself, not surviving collateral terms of the PSA.

In March of 2017, the Corpus Christi Court of Appeals directly addressed a similar merger question involving an overriding royalty conveyance in *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*.[8] Burlington and Texas Crude had entered a Prospect Development Agreement ("PDA") with an "Area of Mutual Interest" clause providing, among other things, that Texas Crude will reserve an overriding royalty in any oil and gas lease it assigns to Burlington, and likewise Burlington will assign an overriding royalty to Texas Crude in any oil and gas lease it acquires.

All of the assignments creating Texas Crude's overriding royalties stated that the override will be paid based on the "amount realized" from the sale of production. As operator and owner of the working interests that the overrides were carved out of, Burlington had been proportionately deducting post-production costs from Texas Crude's overriding royalty payments. However, prompted by the landmark holding in 2016 by the Supreme Court of Texas in *Chesapeake Exploration, L.L.C. v. Hyder*,[9] Texas Crude sued Burlington to recover those post-production costs, arguing that the "amount realized" language in the assignments prohibited such deductions.

Burlington countered that the PDA does not authorize or contemplate overrides that are free of post-production costs, and that, because the override reservations and conveyances were expressly made "subject to the terms and conditions of the PDA," the court should construe them as "typical" overrides that bear such costs. Citing *Devon*, the court disagreed based on application of the doctrine of merger by deed:

> [E]ven assuming that the PDA … contemplated only the reservation of "typical" [overrides], which would bear post-production costs, the assignments themselves are the only instruments we must look to in determining whether such "typical" [overrides] were, in fact, conveyed. We conclude that they were not.

Like *Devon*, the *Texas Crude* case demonstrates that "subject to" language in the closing assignment pursuant to a PSA has little or no effect in preventing application of the merger doctrine. Disappointingly, the court does not explain how or why. But this case prompts the author to wonder, "What is the actual function or purpose of a 'subject to the PSA' clause in a closing conveyance?" It is present in most, if not virtually all, assignments closing large PSAs. But if it does not prevent merger, and the surviving collateral PSA terms are enforceable regardless, does it have any legal effect at all? The only effect the author can think of is to

[7] *Id.* citing *Carter*, 476 S.W.2d at 914-15.

[8] 516 S.W.3d 638 (Tex. App.—Corpus Christi 2017, pet. granted).

[9] 483 S.W.3d 870 (Tex. 2016).

supply record notice to future purchasers that they may be subject to unperformed surviving collateral obligations under the PSA.

As *Texas Crude* demonstrates, the merger doctrine can override "subject to" language not just in PSAs, but in any kind of oil and gas agreement that contemplates formal transfer of a real property interest. This may include farmouts, lease offers, participation agreements, joint ventures, operating agreements, and letter agreements.

Keep in mind that the merger doctrine only applies to assignment terms "with respect to the property conveyed, the consideration, and the method of payment [of consideration]."[10] But *Texas Crude* illustrates the long reach of the merger doctrine in abrogating the terms of the underlying agreement. Specifically, merger extends even to real covenants benefiting the interest conveyed—calculation of royalty, in this case—not just to terms which directly control the size and shape of the property conveyed, such as legal description or reservations.

Texas law does not give us a comprehensive list of the types of assignment terms that may be subject to merger, but they appear to include the following:

- Legal descriptions[11]
- Reservations from the grant (depths, royalty, security interest, etc.)[12]
- Exceptions to the grant (tracts, prior reservations, easements, etc.)[13]
- Warranties and disclaimers thereof (general vs. special vs. none, against encumbrances, etc.)[14]
- Conveyance language (quitclaim vs. grant of land, grantor's capacity, etc.)[15]
- Royalty calculation (sales price vs. market value, etc.)[16]
- Performance covenants and conditions (payment or drilling obligations, etc.)[17]
- Restrictions on use[18]
- Reservations of vendor's liens[19]

Although the author has not identified Texas cases directly on point, merger would also arguably eliminate, if left out of the assignment, terms like special limitations on the duration of the grant (as in term assignments, oil and gas leases, etc.), proportionate reductions of the grant (for an overriding royalty, for example), and consents to assign. However, Texas cases also illustrate the type of collateral contract terms which would survive closing and *not* be merged into the assignment, like indemnity obligations,[20] arbitration provisions,[21] obligations to furnish materials (title policy, files, data, etc.),[22] and releases and assumptions of liability.[23]

---

[10] *Carter*, 476 S.W.2d at 914-15.

[11] *Devon Energy*, 450 S.W.3d at 209; *Woods v. Selby Oil & Gas Co.*, 2 S.W.2d 895 (Tex. Civ. App. 1927, affirmed 12 S.W.2d 994, Tex. Com. App.).

[12] *Barker v. Coastal Builders, Inc.*, 271 S.W.2d 798 (Tex. 1954); *Tex. Indep. Exploration, Ltd. v. Peoples Energy Production-Texas L.P.*, 2009 Tex. App. LEXIS 6941 (Tex. App.—San Antonio 2009, no pet.).

[13] *Turberville v. Upper Valley Farms, Inc.*, 616 S.W.2d 676 (Tex. App.—Corpus Christi 1981, no writ).

[14] *Alvarado v. Bolton*, 749 S.W.2d 47 (Tex. 1988).

[15] *Commercial Bank, Uninc, v. Satterwhite*, 413 S.W.2d 905 (Tex. 1967).

[16] *Tex. Crude, LLC*, 516 S.W.3d at 642.

[17] *Sunderman v. Roberts*, 213 S.W.2d 705 (Tex. App.—San Antonio 1948, no writ).

[18] *Smith v. Harrison County*, 824 S.W.2d 788 (Tex. App.—Texarcana 1992, no writ).

[19] *Scull v. Davis*, 434 S.W.2d 391 (Tex. Civ. App.—El Paso 1968, writ ref'd n.r.e.).

[20] *Devon Energy*, 450 S.W.3d at 209.

[21] *Stanford Dev. Corp. v. Stanford Condominium Owners Ass'n*, 285 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2009, no pet.).

[22] *Pleasant Grove Builders, Inc. v. Phillips*, 355 S.W.2d 818 (Tex. Civ. App.—Dallas 1962, writ ref'd n.r.e.).

[23] *Bates v. Lefforge*, 63 S.W.2d 360 (Tex. Com. App. 1933, holding approved); *Baker v. Baker*, 207 S.W.2d 244 (Tex. Civ. App.—San Antonio 1947, no writ).

II.
PERILS OF THE "NOTWITHSTANDING" CLAUSE

Another idiom of oil and gas contract drafting is the addition of "notwithstanding anything else herein to the contrary," or language to similar effect, the intent of which is to give priority and control to its associated language. "When parties use the clause … in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract."[24]

Texas case law provides many example of successful uses of the "notwithstanding" clause.[25] However, *Westport Oil & Gas Co., L.P. v. Mecom*, decided by the San Antonio Court of Appeals in December of 2016, is a prime example of a "notwithstanding" clause failing to have the desired effect.[26] In *Westport*, the lessors under an oil and gas lease sued the lessee alleging underpayment of royalty. The lease provided that gas royalty would be based on "market value at the well," which Texas law defines as "the prevailing market price for gas in the vicinity at the time of sale, irrespective of the actual [gas purchase agreement] sale price."[27] Both parties admitted that the lessee had paid the lessors on this basis.

However, another lease clause provided that, "[n]otwithstanding any other provision of this lease to the contrary," any gas sales contract that lessee entered must have a sales price "computed on the average of the highest price paid by three separate Intrastate Purchasers of gas of like quality and quantity … ." Lessors argued that this clause amends the standard definition of "market value," obligating the lessee to pay the lease royalty based on this higher price basis.[28] Specifically, the lessors argued that the "notwithstanding" language shows the parties' intent for this clause to override the "market value" language.

The lessee countered that the clause only restricts the sales price that lessee may accept when entering a gas sales contract, but does not alter the "market value" price basis for lessors' royalty. The court agreed:

> [T]he notwithstanding clause operates only against "any other provision of this lease to the contrary." Construing the plain language of the royalty and gas purchase agreement sales price provisions in light of the applicable case law, we conclude the royalty provision is not contrary to the gas purchase agreement provision and the notwithstanding clause does not elevate [the] gas purchase agreement minimum sales price over [the] express market value at the well royalty provision.[29]

The court further held:

> "Although some leases may calculate the royalty owed based on the gas purchase agreement sales price, this one does not. … The two paragraphs do not refer to

[24] *Helmerich & Payne Intern. Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 646 (Tex. App.—Houston [14th Dist.] 2005, no pet.).
[25] *See id.* at 643.
[26] 514 S.W.3d 247 (Tex. App.—San Antonio 2016, no pet.).
[27] *Id.* citing *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d. 690, 699 (Tex. 2008).
[28] *See id.* at 252-53.
[29] *Id.*

> each other, and there is no other lease language that makes the royalty provision subject to the gas purchase agreement minimum sales price provision."[30]

In other words, the court did not give effect to the "notwithstanding" clause because the language it preceded was *not in conflict* with the royalty clause. The lease royalty was not based on sales price, so the lease provision requiring a minimum sales price did not affect the calculation of royalty. As such, the court held that it could give full meaning and effect to both clauses at the same time and rendered judgment for the lessee.

The *Westport* opinion provides an important practice tip for effective use of a "notwithstanding" clause: reference the conflicting contract language that it is intended to override. A court may be more likely to find a conflict between the relevant contract clauses if the contract reads, "notwithstanding the terms of Paragraph 13," for example.

However, the main reason the *Westport* court did not find a conflict between the relevant lease clauses is because avoiding conflicting contract terms is *the court's job*. "To construe an unambiguous lease, we 'examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'"[31] In other words, courts prefer a construction that gives effect to both clauses over a construction that renders one or the other meaningless, even in the face of a "notwithstanding" clause indicating the parties' understanding that the clauses might conflict.

In August of 2017, the El Paso Court of Appeals similarly construed a "notwithstanding" clause in *Apache Deepwater, LLC v. Double Eagle Dev., LLC*.[32] This case involved a retained acreage clause in an oil and gas lease, which provided in part: "Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease … ." The lessee argued that this language effected a typical one-time or "snapshot" partial termination event at the end of the primary term.

The lessor, who brought the lease termination suit, argued that this language effected a "rolling" partial termination, meaning that each unit of lease acreage retained at the end of the primary term can only be perpetuated during the secondary term by continuous production from or operations on such unit itself. Its central argument was that the phrase "after the primary term" should be construed to mean a cessation of production *any time* after the primary term, not just once at the end of the primary term. The lessor cited the "notwithstanding" language as evidence of the parties' intent to negate the habendum clause, which would otherwise allow the lease to be perpetuated by production from anywhere on the leased premises.[33]

The court disagreed, holding that the retained acreage clause's language was not "clear, precise, and unequivocal" enough to negate the habendum clause and create rolling partial termination.[34] While it does create a special limitation on the lease, the retained acreage clause does not contradict the habendum clause or demonstrate intent to carve up the leased premises into a separate

[30] *Id.*
[31] *Id.*
[32] 2017 Tex. App. LEXIS 8062 (Tex. App.—El Paso 2017, pet. denied).
[33] *See id.* at *11.
[34] *Id.* at *15-16.

lease for each retained unit. As such, production from any well will perpetuate the partially-terminated lease during the secondary term.

Despite the "notwithstanding" clause, the court held that the lessor "cannot escape that it must find language that clearly negates the habendum" for the lease to have rolling partial termination.[35] In other words, the "notwithstanding" clause has no effect unless the lease language it precedes is in irreconcilable conflict with another lease term.

Apache Deepwater shows us that a "notwithstanding" clause has no substantive power by itself. It is not a substitute for thoughtful drafting. It does not make the language it modifies any more clear or precise, nor does it lend analytical strength to the argument of the party referencing it. It is merely a tie-breaker, which is activated only in the unlikely event of a tie. Thus, as in *Westport*, a "notwithstanding" clause becomes relevant when the court cannot reconcile two contradictory terms, which courts try to avoid.

[35] *Id.* at *16.

DYKEMA COX SMITH

Ready! Fire! Aim!
Two Drafting Traps to Avoid in Papering a "Rush" Deal

Brandon Durrett, Partner
San Antonio
DAPL Luncheon
February 19, 2019

Why "Rush"?

- Is any deal *not* a "rush" deal?
- Avoid other party losing interest or backing out
- Limit time assets off market
- Limit buyer's time for due diligence
- Confidentiality concerns
- Meet closing deadline

Why "Rush"?

Two Common Clauses

- Four cases to discuss
- Two clauses sometimes perceived as "shortcuts" to careful contract drafting:
  1. "Subject to the PSA" clause in assignment of leases
  2. "Notwithstanding anything else herein to the contrary"

"Subject to PSA" Cases

- *Devon Energy Prod. Co. v. KCS Res. LLC*, 450 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).
- *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 516 S.W.3d 638 (Tex. App.—Corpus Christi 2017, pet. granted).

"Subject to PSA" Cases

- "The terms of this Assignment are subject to the Purchase and Sale Agreement" between the parties
- Big question: Does it makes the PSA terms control over assignment terms if they conflict? Seems intuitive.
- Spoiler alert: No!

Merger Doctrine

- When seller executes and buyer accepts conveyance pursuant to contract for sale of real property, contract terms "merge" into conveyance
- Conveyance is "final expression and sole repository" parties' deal terms

Merger Doctrine

- Exceptions to merger: fraud, accident, or mistake
- Not helpful – must prove these in court to get deed reformation

Merger Doctrine

- Contract terms do *not* survive closing if they concern: (a) property conveyed, (b) consideration, or (c) method of payment
- Collateral contract terms *do* survive closing – obligations which are not fully performed by execution and delivery of conveyance

Devon v. KCS

- Houston 14th District 2014, petition denied
- Devon entered and closed PSA to sell producing acreage to KCS
- New wells were proposed and dispute arose as to whether KCS acquired Devon's interest in entire tract, or just wellbores

Devon v. KCS

- Conveyance said all right, title, and interest in entire tract, no reservation
- Devon argued it agreed to sell only wellbores under PSA, and PSA controls because "subject to PSA" language in conveyance prevents merger

Devon v. KCS

- Court disagrees, applies merger doctrine
- Doesn't care what PSA says about property to be conveyed – conveyance controls
- Merger doctrine "requires courts to look to the deed alone in evaluating rights, even if the terms of the deed vary from the contract."

Devon v. KCS

- Reasoning: If PSA controls, then revisions to conveyance to fix legal descriptions would not be valid
- Recognizes that deals can change between contract and closing, usually undocumented except in conveyance
- Collateral terms of PSA survive closing, like indemnity and covenant to cooperate in effectuating intent of PSA

Burlington v. Texas Crude

- Corpus Christi 2017, petition granted
- Burlington and Texas Crude enter AMI agreement – Burlington takes WI and Texas Crude gets override
- Assignments say overrides to be paid based on "amount realized" from sale of production

Burlington v. Texas Crude

- Burlington deducts post-production costs from Texas Crude's override
- Texas Crude sues for underpayment because "amount realized" prohibits such deductions (per *Hyder* decision)
- Burlington countered that it agreed only to "typical" post-production cost-bearing overrides under AMI, and AMI controls because assignment is "subject to" AMI

Burlington v. Texas Crude

- Court disagrees, applies merger doctrine
- "Subject to" clause has no effect on merger doctrine
- Again, doesn't care whether AMI only allows "typical" overrides because assignments control, and they bar deductions
- Note: extremely important case regarding post-production cost deductions

Burlington v. Texas Crude

- Not a PSA, but same effect
- Merger can apply to any contract contemplating a transfer of real property
- Farmout, participation agreement, joint ventures, operating agreement (forfeiture or blackout clause), lease offers, letter agreements

Burlington v. Texas Crude

- Demonstrates merger applies to real covenants affecting the property, not just the size/shape/nature of the property
- Calculation of basis for royalty payments, in this case

Merger Doctrine

- If "subject to PSA" clause doesn't prevent merger, and collateral terms will survive anyway, what does the clause do?
- Puts subsequent purchasers on notice of possible surviving collateral contract obligations under PSA (same as any other "subject to" clause)

Merger Doctrine

- Subject to merger, per Texas case law:
  - Legal descriptions, reservations, exceptions
  - Warranties of title
  - Conveyance language (quitclaim vs. grant of land)
  - Depth severances
  - Performance covenants, royalty calculation, restrictions on use, vendor's liens

Merger Doctrine

- Not subject to merger, per Texas case law (surviving collateral PSA terms):
  - Indemnity and arbitration provisions
  - Furnish materials and "build to suit"
  - Release or assumption of liability

Merger Doctrine

- Could not locate Texas authority:
  - Conveyance of surface equipment/fixtures, files/data, rights under related contracts?
  - Reps/warranties/disclosures (environmental, condition of property, fitness for purpose, material contracts, liabilities/claims, NRI burdens)?

Merger Doctrine

- Could not locate Texas authority:
  - Consent to assign?
  - Proportionate reduction (e.g., in overriding royalty)?
  - Special limitations on grant (e.g., retained acreage)?

Merger Doctrine

- More direct language: "PSA terms shall control over assignment terms in the event of a conflict"
- Will that fully defeat merger? Never tested. ¯_(ツ)_/¯
- If you can defeat merger, would you want to?
- Perpetual title defect – subsequent purchasers can never trust the terms of the assignment

Merger Doctrine

- When in doubt, be explicit about what you want
  - Incorporate PSA terms by reference: Seller makes special warranty "as more particularly defined in Sections 12-13" of the PSA
  - Sections 12-13 of the PSA "shall survive execution and delivery of this Assignment as independent contractual obligations."

"Notwithstanding" Cases

- *Westport Oil & Gas Co., L.P. v. Mecom*, 514 S.W.3d 247 (Tex. App.—San Antonio 2016, no pet.).
- *Apache Deepwater, LLC v. Double Eagle Dev., LLC*, 2017 Tex. App. LEXIS 8062 (Tex. App.—El Paso 2017, pet. denied).

"Notwithstanding" Cases

- "Notwithstanding anything else herein to the contrary," [insert language here] – many variants
- Intended to give priority and control to associated language if other parts of contract conflict with it
- Many examples of successful uses in Texas law

Westport v. Mecom

- San Antonio 2016, no petition
- Oil & gas lease provided for gas royalty based on "market value at the well," which lessee paid
- Lease also provided that gas sales contracts must have sales price based on highest price paid by three separate intrastate purchasers, "notwithstanding any other provision of this lease to the contrary"

Westport v. Mecom

- Lessors sued lessee for underpayment of royalty because gas contract language gives better basis
- Argued gas contract language amends/overrides "market value" language via "notwithstanding" clause

Westport v. Mecom

- Court said no, "notwithstanding" clause has no effect because the market value language is not contrary to the gas contract provision
- Royalty is not based on sales price, so the gas contract language dictating sales price did not affect royalty
- Court held it could give full meaning to both provisions

Westport v. Mecom

- Court's *job* is to avoid finding an irreconcilable conflict between contract provisions
- "'To construe an unambiguous lease, we 'examine and consider the entire writing in an effort to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless.'"

Westport v. Mecom

- Court prefers construction that gives effect to both provisions, not just one or the other
- This is true even though "notwithstanding" clause shows parties' acknowledgment that conflict may exist

Westport v. Mecom

- Part of court's reasoning was that the two provisions "do not reference each other"
- Maybe court more likely to find conflict if you reference the provision to be overridden, i.e., "notwithstanding the terms of Paragraph 13"

Apache Deepwater vs. Double Eagle

- El Paso 2017, petition denied
- Retained acreage clause: "Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease …"
- Lessor argued this is "rolling" partial termination, like separate leases clause

Apache Deepwater vs. Double Eagle

- Lessor argued that "after the primary term " means *any time* after the primary term, not one-time event
- Cited "notwithstanding" clause as evidence of intent to amend habendum clause ("for so long thereafter as oil or gas is produced")
- Habendum would otherwise allow lease to be perpetuated by one producing well anywhere on the lease, even after primary term

Apache Deepwater vs. Double Eagle

- Court disagreed, held it was one-time "snapshot" partial termination
- Language not "clear, precise, and unequivocal" enough to negate habendum
- Clear enough to create one-time special limitation, but not multiple

Apache Deepwater vs. Double Eagle

- Lessor "cannot escape that it must find language that clearly negates the habendum"
- Again, "notwithstanding" clause has no effect unless court finds irreconcilable conflict with another provision

Apache Deepwater vs. Double Eagle

- Shows that "notwithstanding" clause has no substantive power by itself
- Does not make associated language any clearer or more precise – no substitute for thoughtful drafting
- Merely a tie-breaker, in the unlikely event of a tie

Thanks for listening!

Questions?