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Recent Developments in Oil and Gas Law

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# RECENT DEVELOPMENTS IN OIL & GAS LAW

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I. PROPERTY ISSUES

A. Ownership

1. Liability for Production of Injected Gas that Migrates Outside of a Storage Reservoir. *Northern Natural Gas Co. v. Nash Oil & Gas, Inc.*, 526 F.3d 626 (10th Cir. 2008).

   a. Northern operated the Cunningham storage field and became convinced that gas from the storage field was migrating beyond the boundaries of the field and being produced by gas wells owned and operated by Nash four miles beyond the storage field boundary.

   b. Court found that Northern reasonably believed Nash was producing Northern’s gas as of 2000; “Northern’s injury was reasonably ascertainable by 2000 at the latest . . . .”

   c. Northern filed suit in 2004 asserting claims for conversion, unjust enrichment, and pursuant to K.S.A. § 55-1210.

   d. Court holds the conversion claim was barred by a two-year statute of limitations (K.S.A. § 60-513(a)(2)) and the unjust enrichment claim by a three-year statute of limitations (K.S.A. § 60-512).

   (1) “Under the so-called ‘discovery rule,’ a cause of action for conversion accrues when the ‘fact of injury becomes reasonably ascertainable.’”

   (2) “Reasonably ascertainable” means “that a plaintiff has the obligation to reasonably investigate available sources that contain the facts of the [injury] and its wrongful causation.”
e. The court also holds that K.S.A. § 55-1210 does not create an independent cause of action but merely negates the rule of capture.

“That subsection [55-1210(c)(1)], however, does not create a new cause of action; rather, it simply abolishes the common-law rule of capture with respect to property rights of migrated gas such that a plaintiff is no longer precluded from bringing some other cause of action (conversion, breach of contract, or unjust enrichment, for example) to enforce those rights.”

f. Northern argues the statute of limitations only bars recovery for the time periods taking place before the time limit. For example, because suit was filed in 2004, Northern argues it should be able to collect conversion damages for a period up to two years (for conversion) and three years (for unjust enrichment) prior to the date of filing suit, and for all periods after suit is filed.

(1) Northern characterizes Nash’s act of producing Northern’s gas as a “continuing tort” thereby “entitling Northern to recover damages for each act occurring during the two-or three-year period immediately preceding this lawsuit.”

(2) The court rather summarily rejects Northern’s continuing tort theory stating: “In our judgment, the Kansas Supreme Court would not recognize the continuing-tort exception to the statute of limitations for these claims.”

(3) Dissenting Judge Henry would certify this question to the Kansas Supreme Court.

g. Note the dilemma this leaves Northern in: its gas is being produced by Nash; Nash has no right to do so under the rule of capture (because of the court’s interpretation of 55-1210(c)); 55-1210 does not create any sort of statutory right of action so Northern must rely upon common law remedies; Northern’s common law remedies are barred forever and as to all gas that Nash may extract in the future, by the statute of limitations.

(1) Northern’s only apparent remedy: eminent domain.

(2) This is probably what gas storage operators should do in all of these cases:

(a) Avoid, at all costs, reliance on K.S.A. § 55-1210; and
Condemn the area and rights needed to protect the gas storage facility.

An interesting question: how do we value the condemned interest in light of the court’s opinion?

h. **COMMENT:** I think the court erred when it failed to apply a continuing tort theory to the conversion claim.

(1) Conceptually, we are focusing on when can the party converting the personal property of another obtain title to the property.

(a) This is “adverse possession” of personal property.

(b) However, it only pertains to the extracted oil and gas, as it is extracted. Until removed from the reservoir it is not personal property. Therefore, there was nothing to convert until the gas was brought to the surface.

(c) Under the court’s analysis, it is essentially giving Nash title to all the gas its extracts from the ground whether in the past, present, or future.

(d) Consider this statement:

“In the case of a producing well [on land owned by another], the trespass and conversion are continuing. Therefore, the rightful owner could recover damages for any period within the statute of limitations for trespass and conversion so long as title to the underlying property has not been lost through adverse possession.”

**JOHN S. LOWE, OWEN L. ANDERSON, ERNEST E. SMITH, DAVID E. PIERCE, CASES AND MATERIALS ON OIL AND GAS LAW** 104 (5th ed. 2008).

The authors assume that damages could be recovered from the date of suit and reaching back the duration of the applicable statute of limitations. They also assume that the conversion would end prospectively.

(2) Another conceptual view:
(a) Until it has been established (by a "preponderance of the evidence"), pursuant to K.S.A. § 55-1210(c)(1), that the gas being produced by Nash is Northern's injected gas, there can be no conversion.

(b) Therefore, the "wrong" would not occur until the terms of 55-1210(c)(1) have been complied with to establish Northern's claim to the gas as migrated storage gas.

(c) Could this fact be established in the condemnation proceeding as part of the valuation process?

(3) The status of the "property" involved will impact the analysis.

(a) Note: If Nash took Northern's lawn mower and refused to give it back, it would be a conversion (and a theft). After two years from the date Nash takes the lawn mower (the statute of limitations), Nash will effectively be the new owner of the stolen lawn mower.

(i) Northern's cause of action to obtain damages for loss of the mower, or to replevy the mower, are barred.

(ii) In Kansas this not only bars a cause of action but also effectively vests title in the converter, Nash. See Taylor v. Missouri Central Type Foundry Co., 53 P.2d 815 (Kan. 1936).

(iii) "As in the case of adverse possession of realty, adverse possession of chattels for the statutory period operates not merely to bar the remedy but vests absolute title in the possessor, which is equally available for attack or defense." Taylor, 53 P.2d at 819 (quoting 2 Corpus Juris at 287).

(b) "Although we do not typically think in terms of adverse possession of personal property, the statute of limitations applicable to a cause of action for replevin or similar remedy will often have the same effect as
adverse possession in the real property context. The major difference is that the statute of limitations for personal property will be much shorter, such as one to three years. Often the key issue in the personal property context is determining the date on which the statute of limitations will commence.”


(c) Before Northern’s gas was produced by Nash, it could not constitute “goods or personal chattels belonging to another” so as to support a conversion claim. As to unproduced gas, Northern’s cause of action has not accrued.

(i) Assume Northern has two lawn mowers and Nash takes the first one in 2005 and the second one in 2007. Is there any doubt the statute of limitations on the second lawn mower would not begin to run until 2007 (as opposed to 2005)?

(ii) Northern’s gas molecules taken by Nash in 2005 should not impact Northern’s ability to complain about gas molecules that are first taken in 2007.

(iii) The only way Nash can obtain rights to Northern’s gas in the reservoir is through a real property adverse possession analysis – which implicates a 15-year statute of limitations. K.S.A. § 60-503 (adverse possession of real property).

(d) For unproduced gas might the statute of limitations be K.S.A. § 60-507 which provides:

“Unspecified real property actions. No action shall be maintained for the recovery of real property or for the determination of any adverse claim or interest therein, not provided for in this article, after fifteen (15) years from the time the cause of action accrued.”

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2. **Gas Storage Operator’s Application to FERC to Extend Boundaries of Storage Field Cannot Be Enjoined by Federal Court.** *Northern Natural Gas Co. v. Trans Pacific Oil Corp.*, 529 F.3d 1248 (10th Cir. 2008).

   a. Following a jury verdict that found Northern’s storage gas had not migrated to leases owned by Trans Pacific “on or after July 1, 1993,” Northern began pursuing administrative remedies first at the Kansas Corporation Commission and then at the Federal Energy Regulatory Commission.

      (1) The KCC proceedings were dismissed by Northern.

      (2) The FERC proceeding is to obtain a certificate of public convenience and necessity so Northern can expand its gas storage reservoir area to encompass the lands involved in the Trans Pacific trial.

   b. Court refuses to enjoin the FERC proceedings.

      (1) Northern contends the proceeding before FERC involves new evidence regarding migration.

      (2) “Moreover, the ultimate issue before FERC—whether or not Northern is entitled to a certificate of public convenience and necessity—is different from the ultimate issue that was before the jury here.”

      (3) The court lacks subject matter jurisdiction to interfere with an ongoing proceeding before FERC.

**B. Successive, Concurrent, and Simultaneous Interest Issues**


   a. In 1964 Osborn, as lessor, entered into an oil and gas lease covering a 520-acre tract of land. By 2004 the lease was owned by Brake (92%) and Blankinship (8%); Osborn’s surface and mineral interests were owned as follows:

      Tract #1 (South 240 acres).
      Surface: Dexter (100%); Minerals: Dexter (50%) and Monroe (50%).
Tract #2 (North 280 acres).
Surface & Minerals: Nelson (100%); Nonparticipating Royalty (Monroe).

b. In 2004 Brake and Blakinship, as lessees, and Dexter, Nelson, and Monroe as lessors, amended the original lease by requiring the lessees to undertake specific actions on the lease, by stated time frames, with the provision that “[f]ailure to comply with each of the conditions above set forth will result in termination of the oil and gas lease.”

c. Dexter and Nelson filed suit asserting a “failure to comply” and the trial court terminated the oil and gas lease, as to the mineral interests held by Dexter and Nelson.

d. On appeal, in addition to challenging the cancellation, the lessees contended that Monroe, as an undivided mineral interest owner in Tract #1, and as a nonparticipating royalty owner in Tract #2, was an indispensable party to the action.

e. The Court of Appeals adopts the reasoning stated in §§ 877.3 and 877.4 of the Williams & Meyers Oil & Gas Law treatise to conclude that a mineral interest cotenant (§ 877.3) and a nonparticipating royalty owner (§ 877.4) are not indispensable parties under Kansas Statutes Annotated § 60-219.

(1) With regard to the undivided mineral interest, any continuing burdens created by the action are a product of cotenancy, not the failure to join a party.

(2) With regard to the nonparticipating royalty interest, they must, as before the cancellation, look to the mineral interest owner to protect their interests. The Williams & Meyers treatise indicates the nonparticipating royalty owner’s interests will be protected by the alignment of interests between executive (Nelson) and non-executive (Monroe) or, when the interests diverge, through the executive’s “duty of fair-dealing” toward the non-executive.

f. The court also notes the lessees did not dispute the alleged failure to comply with the express covenants contained in the lease amendment.

(1) Instead the lessees argued “substantial performance” through
significant effort and expenditures."

(2) The court holds this was inadequate to constitute compliance with express lease covenants that provided for termination in the event the specified acts were not accomplished within the stated time frames.

(3) In terminating the lease the court merely gives effect to the express agreement of the parties.

g. The plaintiffs requested attorney fees pursuant to Kansas Statutes Annotated § 55-202 which authorizes fees and damages when, following a proper pre-suit demand, a lessee improperly fails to comply with the lessor’s demand to release a terminated lease.

(1) Even though the plaintiffs were the prevailing party in this action, the trial court refused to award attorney fees.

(2) The court of appeals affirms this decision noting the award of fees under 55-202 is discretionary and the trial court’s decision will be reversed only for an abuse of discretion.

(3) The court concludes: “We simply cannot conclude that no reasonable person would have denied the fee request under these circumstances.”

2. **Distribution of Proceeds When Property is Sold that is Subject to a Life Estate and Remainder.** *In re Estate of Hjersted*, 285 Kan. 559, 175 P.3d 810 (2008).

a. Father owns life estate in land, his son owns the vested remainder.

b. Third party buys the land, in fee, from the father and son.

c. What do we do with the proceeds when the parties are not in agreement?

(1) Here no attempt at division was made during the father’s lifetime – the son retained all the money subject to a request by the father to receive 5% of the income.

(2) The issue became relevant when the father’s surviving spouse elected to take her spousal share and triggered the augmented estate procedure requiring a determination of how much of
the money in the son’s possession belonged to the father.

d. Two approaches:

(1) Value the life estate at the time of the sale and pay the father that value.

(2) Treat all the funds as principal and allow the life tenant to receive the income from the principal.

e. Kansas Supreme Court, at least for non-judicial sales, adopts the first approach, quoting the rule as stated in Am.Jur.2d:

“When a life tenant and a remainderman unite in a nonjudicial sale of the property, without agreeing as to the division or disposal of the proceeds, the life tenant is entitled to receive, absolutely, from such proceeds the estimated value of his or her estate computed as of the time of the sale.”

C. Using Property Law to Avoid Tort Liability

1. Hydraulic Fracturing of Gas Well that Extends Fractures Into Neighboring Lands is Not a Trespass. Coastal Oil & Gas Corp. v. Garza Energy Trust, Case No. 05-0466, 2008 WL 3991029 (Tex. Aug. 29, 2008), petition for rehearing filed Sept. 18, 2008. [Opinion subject to revision or withdrawal until the court releases it for final publication.]

   a. Coastal had an oil and gas lease from Salinas covering Tract 13; Coastal owned, in fee, Tract 12 which bordered Tract 13.

   b. Both tracts overly a natural gas reservoir, the Vicksburg T, a “tight” sandstone formation which can be commercially produced only by using hydraulic fracturing stimulation.

   c. Coastal drilled wells on Tract 12 which were 467-feet from Tract 13.

   d. Coastal fraced its wells using a frac designed to extend over 1,000 feet from the well.

   e. Expert for Salinas opined that as a result of the fracing 25-35% of the Tract 12 production came from Tract 13; Coastal’s expert testified there was no drainage from Tract 13 to Tract 12 as a result of the fracing.
f. The jury found, regarding the frac ing issue: "Coastal’s frac ing of the Coastal Fee No. 1 well trespassed on Share 13, causing substantial drainage . . . ." "Coastal acted with malice . . . ." $600,000+ in actual damages; $10,000,000 in punitive damages; $1,400,000 in attorney fees.

g. Court of appeals affirms, except as to the attorney fees calculation.

h. Supreme court reverses. "We hold that the rule of capture bars recovery of such damages."

(1) "The law of trespass need no more be the same two miles below the surface than two miles above."

(2) The majority refuses to address whether subsurface frac ing can give rise to an action for trespass.

(a) Instead, it finds that the "injury" element of a trespass claim is missing because the gas exited Salina’s property pursuant to the rule of capture. What?

"In this case, actionable trespass requires injury, and Salinas’s only claim of injury – that Coastal’s frac ing operation made it possible for gas to flow from beneath Share [Tract] 13 to the Share [Tract] 12 wells – is precluded by the rule of capture."

(b) "Salinas does not claim that the Coastal Fee No. 1 violates any statute or regulation."

(c) "He does not claim that the hydraulic frac ing operation damaged his wells or the Vicksburg T formation beneath his property."

(d) "Thus, the gas he claims to have lost simply doe not belong to him. . . . In sum, Salinas does not claim damages that are recoverable."

(3) Salinas’ remedy: "He may use hydraulic frac ing to stimulate production from his own wells and drain the gas to his own property – which his operator, Coastal, has successfully done already – and he may sue Coastal for not doing so sooner – which he has also done."
i. "[W]e find four reasons not to change the rule of capture to allow one property owner to sue another for oil and gas drained by hydraulic fracturing that extends beyond lease lines."

(1) The owner can exercise their capture rights.

(2) These issues should be managed by the Railroad Commission, not courts.

(a) "The rule of capture makes it possible for the Commission, through rules governing the spacing, density, and allowables of wells, to protect correlative rights of owners with interests in the same mineral deposits while securing 'the state's goals of preventing waste and conserving natural resources.'"

(b) "The Commission had never found it necessary to regulate hydraulic fracturing."

(c) "The Commission's role should not be supplanted by the law of trespass."

(3) Litigation process not well-suited to determining technical issues such as the drainage impact of a fracture.

(a) The experts agree: "that hydraulic fracturing is not optional; it is essential to the recovery of oil and gas in many areas, including the Vicksburg T formation in this case."

(b) The experts agree: "that hydraulic fracturing cannot be performed both to maximize reasonable commercial effectiveness and to avoid all drainage. Some drainage is virtually unavoidable."

(4) Nobody in the industry thinks it is a good idea to make hydraulic fracturing subject to trespass principles.

j. "Accordingly, we hold that damages for drainage by hydraulic fracturing are precluded by the rule of capture."

k. Justice Willett, concurring.

(1) Begins with lots of statistics concerning the need for oil and
gas and the importance of hydraulic fracturing in obtaining oil and gas from certain rock structures. He concludes:

"[M]aximizing recovery via fracturing is essential; enshrining trespass liability for fracing (a ‘tres-frac’ claim) is not."

(2) Justice Willett continues:

"Open-ended liability threatens to inflict grave and unmitigable harm, ensuring that much of our State’s undeveloped energy supplies would stay that way – undeveloped. Texas oil and gas law favors drilling wells, not drilling consumers. Amid soaring demand and sagging supply, Texas common law must accommodate cutting-edge technologies able to extract untold reserves from unconventional fields."

Query: Would the analysis be different if supply exceeded demand? Should it? Should it matter that current oil prices are $8.00/barrel vs. $148/barrel?

(3) Justice Willett’s problem with the majority’s approach:

"First, it nixes trespass-by-frac suits for drainage (the only damages sought here) by invoking the rule of capture. I agree such suits would subvert this time-honored rule, but I would foreclose them a half-step sooner under the same ‘balancing of interests’ approach we applied to subsurface fluid injection nearly a half-century ago in Railroad Commission of Texas v. Manziel. Such encroachment isn’t just ‘no actionable trespass’; it’s no trespass at all.”

(4) The march of progress and its impact on tort law:

"[O]rthodox trespass principles that govern surface invasions seem to me to have dwindling subterranean relevance, particularly as exploration techniques grow ever sophisticated. . . . I would confront Lord Coke’s maxim directly and decide whether land ownership indeed ‘extends to the sky above and the earth’s center below,’ or alternatively, whether that ancient doctrine ‘has no place in the modern world.’"

(5) "Balancing the respective interests as we did in Manziel, this
type of subsurface encroachment, like the waterflood in *Manziel*, simply isn’t wrongful and thus isn’t a trespass at all, not just a nonactionable trespass.”

(6) “Why hire a drilling contractor and field geologist to drill an unsightly and unpredictable offset well when you can go for a gusher in the courtroom? Just hire a lawyer and retain a testifying expert who can summarize with mind-boggling precision the fluid dynamics and fracture geometry that transpired beneath millions of tons of earth.”

(7) Railroad Commission, amicus curiae, noting the importance of fracing to the industry.

(a) Barnett Shale as “Exhibit A.” $8.3 billion into the local economy, $1.1 billion in state and local taxes, 83,823 jobs in 2007.

(b) “The success of the Barnett Shale is in large part a result of the use of stimulation technology,” namely hydraulic fracturing.”

(8) “The interplay of common-law trespass and oil and gas law must be shaped by concern for the public good.”

1. **Justices Johnson, Jefferson, and Medina, dissenting.**

(1) Their basic complaint is the majority fails to address the basic issue: is hydraulic fracturing a trespass?

(2) Concurring Justice Willett agrees on this point, but makes it clear he would conclude it is not a trespass; the dissenting judges seem to be unwilling to conclude it is not a trespass.

(3) Clearly believe that the rule of capture analysis applied by the majority cannot stand if the underlying activity allowing the drainage was a trespass.

(4) “Even if it were to be decided that hydraulic fracturing is subject to traditional trespass rules, equitable considerations are proper in determining the availability of damages for trespass . . . .”

(5) “In balancing the interests involved here, it seems that even
if hydraulic fracturing is subject to trespass law, precluding recovery of *exemplary* damages for a trespass through a hydraulic fracture could be deemed reasonable."

(6) "I would not render judgment for Coastal on the trespass claim based on the rule of capture and would consider Coastal’s issue as to whether hydraulic fracturing can constitute a subsurface trespass."

2. *Hydraulic Fracturing in Kansas; A Suggestion (Heading Them Off at the TresPass).*

a. One of the most interesting observations in the *Garza* case is the following statement by concurring Justice Willett:

“To many people, a subsurface intrusion of fissures, fluid, and proppant invites a simple application of rudimentary trespass principles. Why not call a tort a tort? Well, we affix that common-law label, and not every technical intrusion, no matter how small, warrants damages, no matter how large. Trespass is a court-defined doctrine, and it falls squarely on this Court’s shoulders to decide what is actionable. In doing so, we made clear in *Manziel* the common law must permit common-sense accommodations for technological breakthroughs that benefit society."

b. By carefully defining the nature of the property right, you either trigger, or avoid triggering, trespass tort consequences.

(1) If the party’s “property” interest includes the right to prevent fissures from entering their property through otherwise legitimate hydraulic fracturing, then the invasion is a trespass.

(2) If the party’s “property” interest does not include the right to prevent fissures from entering their property through otherwise legitimate hydraulic fracturing, then the invasion is not a trespass.

(3) It is the definition of the “property” interest that determines the existence, or non-existence, of the “tort.”

c. So, what is the “property” interest?

(1) Courts haven not addressed this issue in either the secondary recovery or hydraulic fracturing contexts.
(2) How about dealing with these problems using a "correlative rights" analysis?

(a) More flexible than a rule of capture analysis.

(b) More defined, and jurisprudentially-acceptable than a "trespass" or "no trespass" analysis.

(3) The one undeniable truth about the situation: all parties having an interest are within a pressure-connected reservoir where the action, or inaction, of one party can affect all the others.

(4) The public dimension: prevention of waste, maximize recovery, promote conservation.

d. The principle benefit of using a correlative rights analysis to define the property interest: it is flexible and can account for the complexity of development in a pressure-connected environment.

(1) Avoids letting one party dominate or obstruct others.

(2) Easy to accommodate emerging technologies.

(3) Easy to accommodate emerging public policies.

e. This is an area where the industry needs, and wants, the Kansas Corporation Commission to lead with some sort of regulation to protect correlative rights for all parties.

f. KCC leadership will likely play a major role in Kansas courts avoiding a trespass analysis.

(1) Justice Willett would leave this area to the Texas Railroad Commission.

(2) Justice Willett notes that although the Railroad Commission does not currently regulate hydraulic fracturing, some states do (Georgia by regulation; Virginia by statute).

(3) 90% of the wells in the United States employ some sort of hydraulic fracturing technique.

g. Possible Guidance:
II. CONTRACT ISSUES

A. Formation


   a. Hefton hired an auctioneer to sell five tracts of land at auction, subject to minimum sales prices the seller must obtain for each tract. Young was the high bidder on two tracts; his bid on tract 3 was below the minimum and his bid on tract 4 was above the minimum. Young asserted he was entitled to both tracts at the bid price because the auctioneer failed to give Young notice the land was being sold subject to the seller’s minimum price.

   b. The evidence was conflicting as to whether the auctioneer announced that any bid or contract was subject to the seller’s final approval.

   c. The sales bill stated: “All contracts will be signed at the end of the auction. Earnest money is only refundable if seller rejects contract.”

   d. No specific statement that the auction was “with reserve.”

   e. Court notes that many courts have relied upon the U.C.C. provision regarding auctions of “goods” for guidance in the real estate area.
(1) K.S.A. § 84-2-328(3) states: "Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale."

(2) This is consistent with the general rule that a "seller of property at auction has the right to prescribe, within reasonable limits, the manner, conditions, and terms of sale."

f. "Usually the auctioneer, at the time and place appointed for the auction, announces these terms and conditions that, when so announced, are generally deemed to supersede all others and to bind the purchaser even though he or she did not hear or understand the announcement or was not present at the time of the announcement and the terms were not brought to his or her actual attention."

g. The court notes there are three types of auctions:

(1) With reserve ("the placing of the property for sale is an invitation for bids, not an offer to sell");

(2) without reserve ("the placing of property for sale constitutes an offer to sell and each bid represents a conditional acceptance, subject to receipt of a higher bid"); and

(3) conditional ("the seller reserves the right to accept or reject bids after the close of the bidding.").

h. Court concludes, from all the evidence (much of it conflicting), the trial court properly concluded this was a "conditional auction." Conditioned upon the seller obtaining their minimum bid.

(1) No contract as to tract 3 because the amount bid was below the minimum amount. The bidder's offer was rejected.

(2) A contract was formed as to tract 4 because the amount bid exceeded the minimum amount. The bidder's offer was accepted, resulting in a contract.

i. Statute of frauds issue.

(1) K.S.A. § 33-106: "No action shall be brought whereby to charge a party ... upon any contract for the sale of lands ... unless the agreement upon which such action shall be
brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person thereunto by him or her lawfully authorized in writing."

(2) The memorandum can be an informal writing, several writings construed together, which provide the following information:

(a) The parties to the contract;
(b) the subject matter of the contract; and
(c) "the terms and conditions of all the promises constituting the contract and by whom and to whom the promises are made."

(3) It is interesting that the court states: "See Restatement (Second) of Contracts § 131 (1979)" following this list of requirements.

(a) Although the reference to "the terms and conditions of all the promises constituting the contract" seems a bit demanding, presumably to the extent a term or condition is not represented, it is simply deemed not to exist.

(b) This is where the Restatement citation becomes important because § 131 merely requires "reasonable certainty" regarding "the essential terms" of the contract, not all the terms.

(4) The court affirms the trial court's holding that the statute was satisfied by considering the "Exclusive Right to Sell Listing Agreement" which identifies the property and is signed by the seller, and the "Bid Sheet Information" with the bid receipt and check signed by the buyer. The terms and conditions of the sale were stated in the Internet sales bill and the printed sales bill.

j. This sort of lawsuit can be easily avoided by clearly stating, in all communications regarding the auction, whether the sale is "without reserve" or otherwise subject to enumerated conditions – the most common of which will be the minimum sales price acceptable to the
owner of the property being auctioned.


   a. Navair, Inc., for almost 30 years, was the exclusive distributor in Canada for IFR Americas, Inc. Navair would procure buyers of IFR’s products which IFR would sell at a discount to Navair.

   b. In October of 2002 IFR gave Navair notice that IFR would not renew their distributorship contract which would expire on October 31, 2002. In this case the court considers the precise date on which the contract would end as to a particular sale that Navair was concluding with the Canadian government when it received IFR’s non-renovation notice.

   c. The trial court granted IFR summary judgment concluding “IFR was willing to protect Navair’s price quotations until January 31, 2003” but not beyond that date.

   d. Navair contended the parties had agreed Navair would have a “reasonable time” to conclude the transaction with the Canadian government which was not concluded until after January 31, 2003.

   e. The Court of Appeals reverses the trial court and holds that an issue of material fact exists regarding how long “IFR was willing to protect Navair’s price quotations.”

   f. In the process of arriving at its decision, the court explores some of the foundations of contract law.

      (1) First, IFR argued that without a specific termination date any agreement to extend as to the Canadian government sale lacked an “essential term” and was therefore unenforceable.

      (2) The court rejects this argument noting that under such circumstances courts will readily imply a term: that the extension will be for a “reasonable time.”

      (3) Citing Kansas case law the court notes: “a ‘basic principle of contract construction is that where a contract does not specify the time of performance or for the occurrence of a necessary event, a reasonable time will be implied.’”
(4) This means the trial court, on remand, must ascertain what would be a reasonable time under all the circumstances.

g. IFR’s second argument is that since it understood the extension would end on January 31, and Navair did not, there was no “meeting of the minds” and therefore no mutual assent essential for the formation of a contract.

(1) This argument, which the court also rejects, allows it to discuss why the frequently stated requirement of “meeting of the minds” really does not require any such thing.

(2) It does this by distinguishing between the objective and subjective theories of contract.

(3) The court notes: “Contracts are not formed by comparing mental states [subjective theory]; they are formed by what the parties communicate [objective theory].” The court makes the point with the following quotation from the 4th edition of Williston on Contracts:

“In the formation of contracts . . . it was long ago settled that secret, subjective intent is immaterial, so that mutual assent is to be judged only by overt acts and words rather than by the hidden, subjective or secret intention of the parties. During the first half of the nineteenth century, however, there were many expressions which seemed to indicate a contrary rule. Chief among these was the familiar statement, still invoked by many courts today, that a contract requires a ‘meeting of the minds’ of the parties. However, the fundamental basis of contract in the common law is reliance on an outward act (that is, a promise), as may be seen by the early development of the law of consideration as compared with that of mutual assent.”


h. The court also relies upon the analysis of the Kansas Court of Appeals in Southwest & Associates, Inc. v. Steven Enterprises, LLC, where the phrase “meeting of the minds” is used but then immediately limited to its modern objective context:

“In order to find that Southwest and Steven Enterprises
entered into an enforceable contract, Southwest is required to show a meeting of the minds as to all essential terms. In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is the manifestation of a party's intention, rather than the actual or real intention. Put another way, the inquiry will focus not on the question of whether the subjective minds of the parties have met, but on whether their outward expression of assent is sufficient to form a contract."

i. The court uses these observations to conclude: “[E]ven if IFR understood that the extension would lapse on January 31, 2003, that understanding is irrelevant because there is no evidence that this understanding was communicated to Navair when the two parties agreed to an extension of the December Agreement.”

j. The Restatement (Second) of Contracts fully supports the objective analysis, except, in one situation: “misunderstanding.”

(1) Restatement (Second) of Contracts § 20 contains what I like to call the “Rule Against Perpetuities of Contract Law” and provides, in part:

“There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) neither party knows or has reason to know the meaning attached by the other . . . .”

(2) This is a restatement of the holding in the *Raffles v. Wichelhaus* case regarding the two ships named Peerless which sailed from Bombay; one in October, the other in December.

(3) Although this would seem like a big hole in the objective theory of contracts, as a practical matter it is usually subsumed by interpretive rules, such as those found at Restatement (Second) of Contracts § 201, where at least one party is deemed to have known, or should have known, of the meaning attached by the other.


a. $5.6 million contract in which Carrothers Construction agreed to build a wastewater treatment plant for the City of South Hutchinson.

b. Contract contained a liquidated damages clause providing for $850 per day in liquidated damages for each day Carrothers failed to meet the “substantial completion” deadline and the “final completion” deadline.

c. Carrothers did not complete all its work on the plant until 171 days beyond the stated completion date. This resulted in the City holding back $145,350 in liquidated damages.

d. Issue #1: did substantial completion occur when the City began using the plant (in November) or when all the computer controls and safety devices were completed (in January)?

(1) Court looks to the contract terms to define “substantial completion.”

(2) The contract specified the “work” that must take place to achieve completion includes completing the computer control and safety systems, which was not done until 171 days after the completion date.

(3) Although the City was actually using the plant by operating it manually (without computers and safety devices) beginning in November, it was not “substantially complete” until January.

e. Issue #2: does the liquidated damages clause provide for an illegal “penalty”?

(1) The propriety of liquidated damages is a question of law.

(2) The burden of proof is on the party challenging the clause.

f. Legal principles applied by the court to resolve issue #2:

(1) Penalty is designed to “secure performance.” I.e., make it
cost so much they must perform.

(2) Liquidated damages designed as “payment of a sum in lieu of performance.”

NOTE: This analysis supports the “efficient breach” concept.

(3) “The instrument must be considered as a whole, and the situation of the parties, the nature of the subject matter and the circumstances surrounding its execution taken into account.”

(4) Two considerations given “special weight”:

(a) The amount is conscionable. “[R]easonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach . . . .”

NOTE: As noted below, the court accepts the proposition that this includes not only a prospective inquiry (what could the parties have anticipated at the time they entered into the contract) but also a retrospective inquiry (is it conscionable in light of the actual loss suffered by the non-breaching party).

(b) The amount is uncertain. “[T]he nature of the transaction is such that the amount of actual damages resulting from default would not be easily and readily determinable.” Evaluated at the time the contract is entered.

g. Court tests the “reasonableness” of the liquidated damages applying (1) a predictive analysis: is the amount reasonable in light of what the parties knew, or could know, at the time they entered into the contract; plus (2) an actual comparative analysis: is the amount reasonable in light of the actual damages suffered by the claimant?

h. RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1981) (emphasis added) states:

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of
proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty.

(1) It appears the "or" has been read more like an "and" by requiring the damages to pass both measures: reasonable when compared to "anticipated" damages and "actual" damages.

(2) The comments to the black-letter statement support the "or-equals-and" interpretation: "The parties to a contract may effectively provide in advance the damages that are to be payable in the event of breach as long as the provision does not disregard the principle of compensation."

(a) If no damages are in fact incurred, then the concept of compensation would be disregarded if the breaching party were nevertheless required to pay liquidated damages.

(b) Comment a. to § 356 of the Restatement also provides: "The central objective behind the system of contract remedies is compensatory, not punitive. Punishment of a promisor for having broken his promise has no justification on either economic or other grounds and a term providing such a penalty is unenforceable on ground of public policy."

(c) An endorsement of the "efficient breach" concept.

i. Citing Hutton Contracting Co., Inc. v. City of Coffeyville, 487 F.3d 772 (10th Cir. 2007), the court observes: "The Hutton court indicated that Kansas courts have not definitively answered the question whether the enforceability of liquidated damages provisions should be determined prospectively only, or whether Kansas courts would also apply a supplemental retrospective analysis."

(1) The court examines a series of Kansas Court of Appeals cases and concludes it has applied a supplemental retrospective analysis in the past.

(2) "Thus, to the extent this court has acknowledged that liquidated damages must bear some reasonable relationship to the actual injury or damages caused by the breach, this court has recognized that a retrospective analysis of a
Applying the tests to the facts:

(1) Step #1: Is the amount conscionable: “reasonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach.”

(a) $5.6 million contract compared to $145,350 for a six month delay; less than 3% of the total contract amount.

(b) Prospective Inquiry: Court recites the types of damages considered by the City’s consulting engineers, MKEC Engineering Consultants, Inc., and concludes: “In light of these potential actual expenses, the amount set forth in the contract of $850 per day is reasonable when viewed prospectively.”

(c) Retrospective Inquiry: Carrothers argues the City incurred no damages due to the delay because they were able to actually use the plant before it was completed.

(i) City in fact had an engineer on site daily until the project was completed. Also required additional City staff involvement until it was completed.

(ii) “Thus, the amount of liquidated damages set forth in the contract of $850 per day was reasonable when viewed retrospectively in relation to the actual damages sustained by the City caused by Carrothers’ delay.”

(2) Step #2: Were the damages resulting from the default “easily and readily determinable”?

(a) The City’s consulting engineers in this case, MKEC, did an excellent job, at the time the contract was drafted, analyzing the potential elements of loss that should be considered in arriving at the $850/day liquidated damages provision.
(b) "As demonstrated by the many factors MKEC considered in determining the appropriate amount of liquidated damages, the actual damages would have been difficult to calculate at the time the parties entered into the contract."

k. Court affirms trial court's grant of summary judgment to the City.

l. The court's adoption of the additional "retrospective" inquiry may not be consistent with the route the Kansas Supreme Court may ultimately follow.

(1) For example, on May 16, 2008 the Kansas Supreme Court issued its opinion in Kansas Heart Hospital, L.L.C. v. Idbeis, 184 P.3d 866 (Kan. 2008), where the court considered whether a bylaw requiring a stockholder to sell its stock back to the company at a pre-determined price was an illegal penalty.

(2) The court, without discussion, rejects a retrospective analysis stating: "The determination of whether there is a penalty does not depend on speculating on the performance of investments." To support this proposition it cites the TMG Life case, a 1995 Court of Appeals case, and quotes the following passage from TMG Life: "The reasonableness of a liquidated damages clause should be determined as of the time the contract was executed, not with the benefit of hindsight."

(3) Because the court does not address the precise issue of a prospective and retrospective inquiry, the context of its statement in Kansas Heart Hospital may be to merely highlight that there is a prospective analysis – not that a court would never evaluate the situation using a retrospective analysis. This issue apparently remains open for the Kansas Supreme Court – although the Kansas Court of Appeals has clearly adopted a prospective and retrospective analysis in the Carrothers case.

   a. Rabb Sales, Inc. entered into a contract giving it the right to distribute the products of Domino Amjet, Inc.

   b. Domino filed a motion to dismiss in response to Raab’s complaint asserting breach of contract, negligent misrepresentation, and unjust enrichment.

   c. One of Domino’s defenses to the contract claim was that Domino terminated the contract in November 2006. However, the contract contained what is commonly referred to as an “evergreen clause” which would automatically extend the contract for an additional year (November 1 to October 31) “in the absence of three months’ prior written notice by either party.”

      (1) Under this provision the notice of termination would apparently have been due before August 1.

      (2) Therefore, the contract was extended through October 31, 2007 unless some other event terminated it, and assuming the proper termination notice is given to prevent the contract from extending beyond October 31, 2007.

      (3) The court denies Domino’s motion to dismiss Raab’s contract claim.

   d. The court grants Domino’s motion to dismiss Raab’s negligent misrepresentation claim after finding it barred by the “economic loss doctrine” recognized by Illinois law.

      (1) The court found that Illinois law applied to the dispute because of an express choice of law provision.

      (2) Under the economic loss doctrine “a plaintiff may not recover solely economic damages in a tort action.” Such “economic losses due to defeated expectations of a commercial bargain” are matters of contract, not tort.

   e. The Kansas Court of Appeals has applied the economic loss doctrine in several cases.
(1) *Pendville v. Contemporary Homes, Inc.*, 32 Kan. App.2d 435, 83 P.3d 1257 (2004), collects the relevant Kansas case law and describes the purpose of the rule as follows: “The doctrine is designed to prevent a party from asserting a tort remedy in circumstances governed by the law of contracts.”

(2) The doctrine recognizes that a contract can provide a sort of immunity from tort liability when the asserted wrong would otherwise be a potential breach of contract.

(3) However, the doctrine is still being defined in Kansas. See generally, Kevin Breer & Justin D. Pulikkan, *The Economic Loss Rule in Kansas and its Impact on Construction Cases*, 74 J. Kan. B. Ass’n 30 (2005).

III. MISCELLANEOUS OIL & GAS ISSUES

A. Procedural Issues


   a. Nationwide royalty class action filed in Kansas state district court against ExxonMobil. ExxonMobil removed to federal court pursuant to the Class Action Fairness Act of 2005 (“CAFA”).

   b. Plaintiff seeks to remand to state court asserting the amount in controversy is not in excess of the required $5 million threshold to remove under the CAFA.

   c. ExxonMobil affidavit asserting the proposed accounting sought by Plaintiff will cost approximately $1,342 per well with a total cost of $6.7 million.

   d. Remand to state court denied:

   “The court finds that the defendant Exxon has provided consistent and satisfactory evidence which demonstrates that it is more likely true than not that the matter in controversy is in excess of $5 million, and that the court accordingly has jurisdiction to hear the present removal action under CAFA.”

   a. In this case the plaintiff attempts to skirt the $5 million Class Action Fairness Act threshold by using the following forms of pleading:

   (1) “[C]lass-wide damages *may* be less than $5 million.”

   (2) “Class-wide, Plaintiff does not seek or claim, based on *presently available information*, any right to recover in excess of $5 million. Should that information change, Plaintiff, on behalf of the class, will move for leave to amend to seek in excess of $5 million and consent to removal of this class under the Class Action Fairness Act (since there is not 1 year removal time limit on CAFA diversity removal).”

   b. The court concludes that neither of these statements will prevent the case from remaining in federal court.

   (1) BP established that the likely costs to it, in the event plaintiff prevails, are in excess of $12 million.

   (2) The plaintiff’s statements do not rise to the level “of the sort of unconditional waiver which has been found, in the cases cited by plaintiff, to be a sufficient basis for reducing the amount in controversy.”

B. Crimes in the Oil Patch


   a. Bursack was informed that his lease would be placed in a unit, and he would share in unit production; a well had been recently completed on his land.

   b. Bursack didn’t take the idea of unitization real well. He stated:

      “[T]hey will never sell any oil off that lease. And they are going to pay, pay, pay.”
“Bursack angrily told Bishop he wanted 100 percent of the royalties, and if her company did not do what he wanted they would ‘pay, pay, pay.’”

c. Oil tanks damaged by shotgun fire; valve handles cut off; damage to the oil well.

d. Driver of oil tanker truck was leaving the Bursack property when he heard gunshots. “He looked in his rearview mirror and saw oil leaking from the side of the trailer he was pulling.”

e. “In April 2005, Bursack was arrested in his home following a standoff with law enforcement officers. Bursack resisted arrest. During a search of the Bursack home, officers recovered 90 firearms.”

f. He was charged and convicted of: criminal threat, criminal discharge of a firearm at an occupied vehicle, criminal damage to property, aggravated assault, and obstructing legal process. “He was sentenced to 36 months’ probation with an underlying prison term of 26 months.”


a. A common grackle, several flickers, and a bluebird took up residence in various heater/treaters in oil fields in Barber County, Kansas. As it turned out, it was their permanent residences. The birds were unable to exit the heater/treaters and died.

(1) Special agents with the U.S. Fish and Wildlife Service, Department of Interior, in February 2006 inspected 150 heater treaters in Kansas oil fields and found that 65 of them contained bird remains; approximately 300 birds. 10 of the birds were confirmed to be “migratory birds” protected by the Migratory Bird Treaty Act.

(2) The Service commenced an educational/outreach program to inform the industry of the problem and how it could be corrected. KIOGA took an active part in the educational program.

(3) Granted the industry until January 1, 2007 to take corrective
action to avoid prosecution.

b. How did the Service find out there were birds in my heater/treater? Landowner reports.

c. April 24, 2007 inspection of Apollo Energies’ heater/treaters Agent Brooks saw a bird carcass; came back on April 27 with a search warrant and recovered the body of a Northern flicker from Apollo’s heater/treater.

(1) Northern flicker is a “migratory bird.”

(2) Sought to suppress the bird carcass asserting the search warrant was obtained through false statements in the affidavit. Court finds the defendant’s claims are not supported by the evidence.

d. Similar course of events at oil lease operated by Dale Walker; the search netted two Northern flicker bodies and that of an Eastern bluedbird in one heater/treater. Another heater/treater at another of Walker’s leases resulted in discovery of a common grackle body in a louvered portion of a heater/treater.

e. The criminal statute:

“[I]t is unlawful at any time, by any means, or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill, possess, offer for sale, sell . . . any migratory bird, any part, nest of egg of any such bird . . . included in the terms of the conventions between the United States and Great Britain for the protection of migratory birds . . . .”

16 U.S.C. § 703(a) (emphasis added).

f. The federal prosecutor’s theory:

(1) Misdemeanor violations under the MBTA are strict liability crimes – need not show any intentional act.

(2) Allowing a condition to exist which can result in the death of a bird is an unlawful “take” under the MBTA.

g. The court adopts the prosecutor’s positions:
(1) "The failure to act, with knowledge that dead birds were often found trapped in the equipment, is a sufficient level of culpable conduct for purposes of § 703."

(2) "Defendants were not 'passive,' standing quietly on the sidelines. They both actively operated equipment for the production of oil. Accordingly, the court rejects defendants' argument that they engaged in no affirmative acts or negligence and that they were merely passive actors."

h. COMMENT: Not all courts agree with the strict liability approach or that merely maintaining equipment where birds are incidentally killed can constitute a "take" under the Act.

(1) Most birds have been classified as "migratory" birds subject to the protection of the MBTA. See 50 C.F.R. § 10.13 (list of migratory birds--includes, e.g., 33 species of sparrow, 7 species of blackbird, 7 species of dove, 3 species of robin).

(2) If a migratory bird gains access to a pit or open tank, and is killed, the U.S. Fish and Wildlife Service will view it as an unlawful "take" by the owner or operator of the facility.


(3) More recent attempts to expand the operation of the MBTA have resulted in a judicial backlash that has probably narrowed its application. See, e.g., Newton County Wildlife Ass'n v. U.S. Forest Service, 113 F.3d 110 (8th Cir. 1997), cert. denied, 522 U.S. 1108 (1998); Mahler v. U.S. Forest Service, 927 F. Supp. 1559 (S.D. Ind. 1996).

(4) United States v. WCI Steel, Inc., 2006 WL 2334719 (N.D. Ohio Aug. 10, 2006) (WCI found "not guilty" of MBTA criminal charges because government could not prove, beyond a reasonable doubt, the birds did not die of natural causes before being found on WCI's premises). The judge notes the differing fundamental interpretations of the MBTA stating:
“Federal decisions are divided and unclear concerning whether activities not directed at migrating birds are penalized by the MBTA. One side of the spectrum holds that the plain language of the MBTA indicates that the Act proscribes only activities which directly kill or exploit to harm birds, such as hunting, poaching, and trafficking of birds and their parts . . . . Decisions from this side of the spectrum appear to read the MBTA as prohibiting deliberate molestation of migratory birds. There is, however, no consensus on when the consequences of human activity are deemed direct or incidental . . . .

The government urges interpretation from the other side of the spectrum . . . employing strict liability to the deaths of birds due to toxic waste in ponds . . . .”

_WCI Steel_, 2006 WL 2334719 at *3-*4.

(5) If ten birds fly into a pit and die, are there potentially ten separate violations or one? See _Corbin Farm Service_, 578 F.2d at 260 ("multiple bird deaths resulting from a single transaction cannot be separately charged under the MBTA.") and _United States v. FMC Corp._, 572 F.2d 902 (2d Cir. 1978).


C. **Clean Water Act: Defining “Waters of the United States”**

1. U.S. Army Corps of Engineers authorized to issue permits "for the discharge of dredged or fill material into the navigable waters . . . ."

2. "Navigable waters" means "waters of the United States . . . ."


   a. Corps defined "waters of the United States" to include "not only actually navigable waters but also tributaries of such waters, interstate waters and their tributaries, and nonnavigable intrastate waters and their tributaries, and nonnavigable intrastate waters whose use or misuse could affect interstate commerce."

   (1) Also included were all "freshwater wetlands" adjacent to
other covered waters.

(2) "Freshwater wetland" was defined as: "an area that is 'periodically inundated' and is 'normally characterized by the prevalence of vegetation that requires saturated soil conditions for growth and reproduction.'"

b. Riverside owned 80 acres which it filled with dirt to construct houses. The Corps believed the area was an "adjacent wetland" and brought suit to enjoin the construction because Riverside had failed to obtain a § 404 "dredged or fill" permit.

c. Issue: Is the area encompassed by the jurisdictional grant of authority over "waters of the United States?" Are adjacent wetlands "waters of the United States" as the term is used in the Clean Water Act?

(1) Yes.

(2) "In view of the breadth of federal regulatory authority contemplated by the Act itself and the inherent difficulties of defining precise bounds to regulable waters, the Corps' ecological judgment about the relationship between waters and their adjacent wetlands provides an adequate basis for a legal judgment that adjacent wetlands may be defined as waters under the Act."


a. Hoffman constructed houses in an area previously used to grow soybeans. Corps decided Hoffman needed a § 404 permit and fined Hoffman $50,000 and ordered him to restore the wetlands to their original condition.

b. The area "was not directly connected to any body of water, either on the surface or by groundwater, and lay approximately 750 feet from Poplar Creek."

c. Court held for Hoffman because the Corps failed to establish a nexus with interstate commerce because they merely alleged the area could be a "potential habitat for migratory birds." Suggests that had the Corps shown the area was actually used by migratory birds it would be deemed a wetland.
However, the U.S. Supreme Court rejects the Corps' Migratory Bird Rule as a basis for asserting jurisdiction over abandoned gravel pit in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001).

a. Corps, by regulation, defined “waters of the United States” broadly and asserted jurisdiction over “an abandoned sand and gravel pit in northern Illinois which provides habitat for migratory birds.”

b. Issue: did Congress intend to regulate such activities under the Clean Water Act?

c. 404(a) gives the Corps authority to issue permits “for the discharge of dredged or fill material into the navigable waters at specified disposal sites.”

(1) Corps’ definition of “waters of the United States” includes:

“[W]aters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds, the use, degradation or destruction of which could affect interstate or foreign commerce . . . .”

(2) Corps’ clarification of its jurisdiction stated its authority extended to all intrastate waters:

“a. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or

b. Which are or would be used as habitat by other migratory birds which cross state lines; or

c. Which are or would be used as habitat for endangered species; or

d. Used to irrigate crops sold in interstate commerce.”

d. The Corps determined the abandoned gravel pit was “waters of the United States” because it was visited by migratory birds.

(1) The County wanted to use the area to build a site for baled non-hazardous solid waste.
(2) Corps denied the County a § 404 permit.

(3) 7th Circuit: the Act reaches as many waters as the Commerce Clause allows, including these.

e. Analysis and holding:

(1) "In order to rule for [the Corps] here, we would have to hold that the jurisdiction of the Corps extends to ponds that are not adjacent to open water."

(2) "We cannot agree that Congress’ separate definitional use of the phrase ‘waters of the United States’ constitutes a basis for reading the term ‘navigable waters’ out of the statute."

(3) "The term ‘navigable’ has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."

(4) Court avoids the commerce clause issue:

"Permitting [the Corps] to claim federal jurisdiction over ponds and mudflats falling within the “Migratory Bird Rule” would result in a significant impingement of the States’ traditional and primary power over land and water use."


a. What if the nearest undisputed “waters of the United States” is over 10 miles away from the wetland but the wetland can be linked with the “waters of the United States” through a series of ditches, tributaries, and other conduits?

b. What if the wetland is separated from the “waters of the United States” by a man-made berm or other structure?

c. Four justices dissenting in Rapanos (opinion by Justice Stevens joined by Souter, Ginsburg, and Breyer): deem the potential cumulative effect on downstream water sufficient to authorize the Corps to exercise its discretion to regulate activities on these wetlands. Justice Breyer would dispose of the issue by holding the
The Corps has been given the power to regulate to the extent of the commerce clause, which includes these isolated wetlands.

d. Four justices in the plurality in *Rapanos* (opinion by Justice Scalia joined by Roberts, Thomas, and Alito):

(1) First, there is a qualitative requirement that the water-carrying land feature be substantial enough to be considered "waters of the United States."

"In sum,... the phrase 'waters of the United States' includes only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[, ] oceans, rivers, [and] lakes.'... The phrase does not include channels through which water flows intermittently or ephemerally,\(^1\) or channels that periodically provide drainage for rainfall."

(2) Second, there must be a "continuous surface connection" between the wetland at issue and the "waters of the United States" identified in item (1) above.

"Therefore, only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act. Wetlands with only an intermittent, physically remote hydrologic connection to 'waters of the United States' do not implicate the boundary-drawing problem of *Riverside Bayview*, and thus lack the necessary connection to covered waters that we described as a 'significant nexus' in *SWANCC*..

(3) The plurality summarizes its test as follows:

"Thus, establishing that wetlands such as those at the Rapanos and Carabell sites are covered by the Act requires two findings: First, that the adjacent channel contains a 'water of the United States,' (i.e., a relatively permanent body of

\(^1\)Ephemeral: "lasting a very short time; short-lived; transitory . . . ." *WEBSTER’S NEW UNIVERSAL UNABRIDGED DICTIONARY* 651 (1996).
water connected to traditional interstate navigable waters); and second, that the wetland has a continuous surface connection with that water, making it difficult to determine where the ‘water’ ends and the ‘wetland’ begins.”

e. Justice Kennedy’s concurring opinion: The wetlands must have a “significant nexus” to “navigable waters in the traditional sense.”

(1) This is an extension of Riverside Bayview Homes to wetlands that may be far removed from what everyone would agree are “navigable waters in the traditional sense.”

(2) However, the intervening tributaries, ditches, and other land forms must result in a “significant nexus” between activities on the wetland and the traditional navigable water that is connected to the wetland by the tributaries, ditches, and other land forms.

(3) “Accordingly, wetlands possess the requisite nexus, and thus come within the statutory phrase ‘navigable waters,’ if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as ‘navigable.’ When, in contrast, wetlands’ effects on water quality are speculative or insubstantial, they fall outside the zone fairly encompassed by the statutory term ‘navigable waters.’”

(4) “When the Corps seeks to regulate wetlands adjacent to navigable-in-fact waters, it may rely on adjacency to establish its jurisdiction. Absent more specific regulations, however, the Corps must establish a significant nexus on a case-by-case basis when it seeks to regulate wetlands based on adjacency to nonnavigable tributaries.”

7. Importance of the issue to the oil industry: CWA § 311 is the part of the Act regulating oil spills and the Spill Prevention Control and Countermeasure Plan (SPCC Plan) program. The scope of § 311 is also defined, or limited, by the required nexus with “waters of the United States.”

a. Also impacted by the § 404 program which requires a permit to develop in areas classified as “wetlands.”

b. Also impacted by the § 402 NPDES permitting program which
addressing discharges into "waters of the United States," including storm water discharges.


a. The facts:

(1) Landowners sue oil and gas operator seeing $38,537,500 in remediation expenses to address oil spills, salt water spills, and related soil and groundwater contamination.

(2) OPA: "navigable waters" = "waters of the United States"

b. Analysis and holding:

(1) Congress intended the terms to have the same meaning in the OPA as they have in the CWA.

(2) Groundwater is not included.

(3) Spills onto dry land are not included.

(4) "[A] generalized assertion that covered surface waters will eventually be affected by remote, gradual, natural seepage from the contaminated groundwater is insufficient to establish liability under the OPA."

c. OPA permits action based upon a discharge or a "threat" of a discharge.

d. "[T]he Rices have failed to produce evidence of a close, direct and proximate link between Harken's discharges of oil and any resulting actual, identifiable oil contamination of a particular body of natural surface water that satisfies the jurisdictional requirements of the OPA."

9. If operations are contemplated in a wetland area, the permitting process may be simplified if the activity is covered by a "nationwide" permit. Reissuance of Nationwide Permits; Notice, 72 Fed. Reg. 11092 (March 12, 2007).

a. The Reissuance authorizes 50 categories of Nationwide Permits.

b. E.g., Nationwide Permit No. 8 "Oil and Gas Structures on the Outer

c.  See generally David E. Pierce, Assessing Thirty Years of Federal Environmental Regulation of Upstream Oil and Gas Activities, 50 INST. ON OIL & GAS L. & TAX’N 5-1. 5-5 tp 5-11 (1999).


10. If an individual § 404 permit is required, it may constitute a "major federal action" significantly impacting the environment which can trigger review under the National Environmental Policy Act, to include conducting an environmental assessment and possibly preparation of an environmental impact statement.

11. Must anticipate wetland permit problems: Erickson v. Dart Oil & Gas Corp., 474 N.W.2d 150 (Mich. App. 1991) (delay caused by need for wetlands permit to build lease road was not a force majeure event under the oil and gas lease).

D. SPCC Planning under the Clean Water Act after Rapanos v. United States

1. Section 311 of the Clean Water Act (“CWA”) addresses all aspects of oil spills. The basic regulatory requirement is found as § 311(b)(3), 33 U.S.C. § 1321(b)(3) which provides, in part:

   The discharge of oil or hazardous substances . . . into or upon the navigable waters of the United States . . . in such quantities as may be harmful as determined by the President . . . is prohibited . . .

2. The essential jurisdictional requirement of this law is a connection with “navigable waters” which is defined by the Act as “waters of the United States.” The “harmful quantities” of oil have been designated by the EPA to include any discharge of oil that will:

   Cause a film or sheen upon or discoloration of the surface of the water or adjoining shorelines or cause a sludge or emulsion to be deposited beneath the surface of the water or upon the adjoining shorelines.
40 C.F.R. § 110.3 (known as the “sheen test”).

3. Congress has directed the EPA to adopt regulations: “establishing procedures, methods, and equipment . . . to prevent discharges of oil . . . from onshore facilities and offshore facilities, and to contain such discharges . . . .” CWA § 311(j)(1)(C), 33 U.S.C. § 1321(j)(1)(C).

a. EPA responded by adopting Spill Prevention Control and Countermeasure (“SPCC”) Plan regulations.

b. SPCC Plan required only if the following criteria are met:

   (1) The aboveground storage capacity of the facility is over 1,320 gallons (excluding any single container with a capacity less than 55 gallons); or the total capacity of underground storage tanks at the facility exceeds 42,000 gallons (unless in compliance with Underground Storage Tank program);

   (2) it is a "non-transportation-related" facility;

   (3) "Engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products;" and

   (4) the facility is located in an area from which it could "reasonably be expected to discharge oil in harmful quantities," applying the sheen test, into waters of the United States.

40 C.F.R. § 112.1.

c. The location part of the SPCC Plan test should be applied using the following guidelines:

"This determination shall be based solely upon a consideration of the geographical, locational aspects of the facility (such as proximity to navigable waters or adjoining shorelines, land contour, drainage, etc.) and shall exclude consideration of manmade features such as dikes, equipment or other structures which may serve to restrain, hinder, contain, or otherwise prevent a discharge of oil from reaching navigable waters of the United States or adjoining shorelines . . . ."

40 C.F.R. § 112.1(d)(I).
d. Some version of these regulations has been around since December 11, 1973, revisions were proposed in 1991, *Oil Pollution Prevention: Non-Transportation-Related Onshore and Offshore Facilities*, 56 FED. REG. 54612 (Oct. 22, 1991), but not finalized until 2002. *Oil Pollution Prevention and Response; Non-Transportation-Related Onshore and Offshore Facilities*, 67 FED. REG. 47042 (July 17, 2002).

e. Although the revisions reduce regulatory requirements in many ways, there are also new requirements and, as with any new regulatory focus, a renewed emphasis on enforcement.

f. **Current Status of the SPCC Regulations:** The new regulations will not be implemented until July 1, 2009. *Oil Pollution Prevention; Non-Transportation Related Onshore and Offshore Facilities*, 72 Fed. Reg. 27443 (May 16, 2007). The delay gives the EPA time to “promulgate further revisions to the SPCC rule before owners and operators are required to prepare or amend, and implement their SPCC Plans.” 72 Fed. Reg. at 27443-44.

4. The major impact will be that many oil and gas operators will need to prepare SPCC Plans for their facilities that have the potential to impact “navigable waters.” Although this basic requirement has been around for almost 30 years, many operators will be surprised to learn that their particular facilities are subject to this regulation.


“A well-documented rise in global temperatures has coincided with a significant increase in the concentration of carbon dioxide in the atmosphere. Respected scientists believe the two trends are related. For when carbon dioxide is released into the atmosphere, it acts like the ceiling of a greenhouse, trapping solar energy and retarding the escape of reflected heat. It is therefore a species—the most important species—of a 'greenhouse gas.'”
Recent Developments in Oil & Gas Law
by
David E. Pierce
Washburn Law School

**Northern Natural Gas v. Nash**

- Northern thought its storage gas was migrating four miles beyond its storage boundaries where it was being produced by Nash.
- Northern suspected Nash was producing storage gas as early as 2000.
- Northern filed suit in 2004 asserting conversion and unjust enrichment.

**Northern Natural Gas v. Nash**

- Northern also asserted a statutory claim under K.S.A. 55-1210.
- **Court Holds:** conversion claim barred by 2-year statute of limitation; unjust enrichment claim barred by 3-year statute.
- Cause of action for conversion accrues when the "fact of injury becomes reasonably ascertainable."
Northern Natural Gas v. Nash

- K.S.A. 55-1210 does not create an independent cause of action but merely negates the rule of capture.
- Enables Northern to bring a common law action (such as conversion or unjust enrichment) relating to its stored gas.

Northern Natural Gas v. Nash

- Northern argues for a "continuing tort" theory that would allow it to recover for gas taken within the statute of limitations from the date of suit and going back either two years (conversion) or three years (unjust enrichment).
- Also protect future takes.
- Court rejects the "continuing tort" theory.

Northern Natural Gas v. Nash

- Northern's only apparent remedy: eminent domain.
- Query: how will the court hearing the eminent domain case value the property that is being taken from Nash (in light of the court's holding in this case)?
- K.S.A. 55-1210 has been a really bad deal for the gas storage operators.
Northern Natural Gas v. Nash

• COMMENT: I think the court erred with its rejection of the continuing tort analysis.
• Outline Pages 3-6.
• When can the party converting the personal property of another obtain title to the converted property?
• Adverse possession of personal property.
• No property to convert until it is produced.

Northern Natural Gas v. Nash

• Can there be a conversion of anything until Northern establishes, by a “preponderance of the evidence,” pursuant to K.S.A. 55-1210(c)(1), that the gas being produced is Northern’s injected gas?
• Adverse possession of personal property: the lawn mower example.
• Loss of remedy and title. Taylor v. Missouri Central Type Foundry Co.

Northern Natural Gas v. Nash

• As to unproduced gas, Northern’s cause of action has not accrued — nothing has been wrongfully taken from Northern.
• Northern’s gas molecules taken by Nash in 2005 should not impact Northern’s ability to complain about different gas molecules that are first taken in 2007.
**Northern Natural Gas v. Nash**

- Denying Northern a continuing tort theory in this case amounts to adverse possession of real property (the unproduced gas) applying a 2-year statute of limitations.
- K.S.A. 60-507: Statute of limitations for "unspecified real property actions" is 15 years.

**Northern Natural v. Trans Pacific**

- Jury verdict adverse to Northern finding its gas had not migrated into Trans Pacific Oil Corp.'s lands "on or after July 1, 1993."
- Northern pursued administrative remedies (eminent domain) before the KCC and FERC.
- Voluntarily dismissed the KCC proceeding.
- Trans Pacific seeks to enjoin the FERC proceeding.

**Northern Natural v. Trans Pacific**

- Northern: FERC proceeding concerns new evidence regarding migration and the issue before FERC is fundamentally different.
- Seeking certificate of public convenience and necessity under the Natural Gas Act to expand storage field boundaries.
- Statutory prelude to condemnation.
Northern Natural v. Trans Pacific

- Court lacks subject matter jurisdiction to interfere with an ongoing proceeding before FERC.

Dexter v. Brake

- Cotenants, Royalty Interests, and Indispensable Parties.
- 1964 Osborn enters into 520-acre lease.
- 2004 lease owned: Brake (92%) and Blankinship (8%).
- Osborn had made conveyances of the surface, minerals, and nonparticipating royalty.

Dexter v. Brake

- Ownership of the 520 acres:
  - Tract #1 (South 240 acres)
    Surface: Dexter (100%)
    Minerals: Dexter (50%) Monroe (50%)
  - Tract #2 (North 280 acres)
    Surface & Minerals: Nelson (100%)
    Nonparticipating Royalty: Monroe
**Dexter v. Brake**

- 2004 all parties amend lease and create specific conditions that lessee must meet to maintain the lease in effect.
- Dexter and Nelson file suit asserting lessee failed to comply; trial court terminated the lease as to the interests of Dexter and Nelson.
- On appeal, lessees contend Monroe was an indispensable party.

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**Dexter v. Brake**

- Monroe, as an *undivided mineral interest owner*, is not a necessary party.
- Does not change his basic cotenancy relationship.
- Monroe, as a *nonparticipating royalty interest owner*, is not a necessary party.
- Does not change their right to demand that their executive look out for their interests.

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**Dexter v. Brake**

- Will "*substantial performance*" avoid the express lease termination clause?
- No. Give effect to the express terms, including the termination clause.
Dexter v. Brake

- Attorney fees under K.S.A. 55-202?
- The lessors prevailed and apparently gave the proper pre-suit notice to qualify for attorney fees.
- Discretionary with the trial court; not mandatory.
- No abuse of discretion under these facts.

In re Estate of Hjersted

- Father owns life estate in land, his son owns the vested remainder.
- Third party buys the land, in fee, from the father and son.
- What do we do with the proceeds when the parties are not in agreement?

In re Estate of Hjersted

- Two approaches:
  (1) Value the life estate at the time of the sale and pay the father that value.
  (2) Treat all the funds as principal and allow the life tenant to receive the income from the principal.
- Kansas Supreme Court, at least for non-judicial sales, adopts the first approach.
In re Estate of Hjersted

- Quoting Am.Jur.2d:
  - "When a life tenant and a remainderman unite in a nonjudicial sale of the property, without agreeing as to the division or disposal of the proceeds, the life tenant is entitled to receive, absolutely, from such proceeds the estimated value of his or her estate computed as of the time of the sale."

Coastal Oil & Gas v. Garza

- Coastal had a lease on Tract 13 from Salinas.
- Coastal owned, in fee, Tract 12 which abutted Tract 13 on two sides.
- Coastal had wells on both tracts.
- Coastal fraced its well on Tract 12 located 467-feet from Tract 13; frac designed to extend over 1,000 feet from the wellbore.

Coastal Oil & Gas v. Garza

- Jury: Coastal's fracing was a trespass on Tract 13; intentional act.
- $600,000+ in actual damages.
- $1.4 million in attorney fees.
- $10 million punitive damages.
- Court of Appeals: affirms but sends attorney fees issue back for recalculation.
- Supreme Court: reverses; rule of capture bars recovery of damages.
Coastal Oil & Gas v. Garza

- Majority: there can be no trespass because under the facts there was no injury.
- The only loss was the migration of gas which is protected by the rule of capture.
- What?

Coastal Oil & Gas v. Garza

- Justice Willett, concurring.
- Address the issue: is hydraulic fracturing a trespass?
- His answer: no.
- Fracing of wells is essential.
- 90% of the wells in the U.S. have been fraced.

Coastal Oil & Gas v. Garza

- Rely on the Manziel waterflood case.
- “Balancing the interests” to arrive at the conclusion that fracing wells is not wrongful “and thus isn’t a trespass at all.”
Coastal Oil & Gas v. Garza

• Some of the interests to balance:
  • Barnett Shale: $8.3 billion into local economy; $1.1 billion in state and local taxes; 83,823 jobs in 2007.
  • "The interplay of common-law trespass and oil and gas law must be shaped by concern for the public good."

Coastal Oil & Gas v. Garza

• Dissenting Justices.
  • Majority fails to address the issue: is hydraulic fracturing a trespass?
  • Not clear they would adopt a trespass standard.
  • Other interests could be considered.
  • No punitive damages.

Coastal Oil & Gas v. Garza

• The Kansas Context:
  • "Why not call a tort a tort? Well, we [Texas Supreme Court] affix that common-law label . . . Trespass is a court-defined doctrine, and it falls squarely on this Court's shoulders to decide what is actionable." Justice Willett.
Coastal Oil & Gas v. Garza

The Kansas Context:

By defining the nature of the property right, you either trigger, or avoid triggering, trespass tort consequences.

It is the definition of the property interest that determines the existence, or non-existence, of the tort.

Coastal Oil & Gas v. Garza

The Kansas Context:

What is the "property" interest?

"Correlative rights" analysis seems appropriate.

Flexible. Accommodates public and private interests.

The only ownership theory fully suited to the common reservoir environment where these issues take place.

Coastal Oil & Gas v. Garza

The Kansas Context:

This is an area where the industry needs, and wants, the Kansas Corporation Commission to lead with some sort of regulation to protect correlative rights for all parties.

KCC leadership in this area could help shape Kansas law when the trespass issue arises.
Coastal Oil & Gas v. Garza

- Guidance:
- Zinke & Trumbo, Ltd. v. KCC
- Cities Service Oil Co. v. KCC
- The Trees Oil Co. v. KCC
- Tidewater/Manziel/Syverson cases.

Young v. Hefton

- Contract formation through the real estate auction.
- Issue: Was the seller obligated to sell the auctioned real estate to the high bidder?
- Court finds the sale was conditional; conditioned upon obtaining a minimum price.

Young v. Hefton

- Sales bill stated: "All contracts will be signed at the end of the auction. Earnest money is only refundable if seller rejects contract."
Young v. Hefton

- No contract as to tract 3 because the amount bid was below the minimum amount. The bidder's offer was rejected.

- Contract formed as to tract 4 because the amount bid exceeded the minimum amount. The bidder's offer was accepted.

Young v. Hefton

- Three types of auctions:
  - With Reserve ("the placing of the property for sale is an invitation for bids, not an offer to sell");
  - Without Reserve ("the placing of property for sale constitutes an offer to sell and each bid represents a conditional acceptance, subject to receipt of a higher bid"); and
  - Conditional ("seller reserves the right to accept or reject bids after the close of the bidding.").

Young v. Hefton

- Court notes that many courts rely upon the U.C.C. provision regarding auctions of "goods" for guidance in the real estate area.
- K.S.A. § 84-2-328(3) states: "Such a sale is with reserve unless the goods are in explicit terms put up without reserve. In an auction with reserve the auctioneer may withdraw the goods at any time until he announces completion of the sale."
**Navair, Inc. v. IFR Americas**

- Navair, for nearly 30 years was the exclusive distributor of IFR products in Canada.
- IFR provided its products to Navair at a discount which it then sold to its Canadian customers.

Following termination of the distributorship the parties agreed to extend the termination date as to one pending sale being negotiated with the Canadian government.

- IFR argues they agreed upon a set date of January 31, 2003.
- Navair argues they agreed upon a reasonable time to conclude the sale.

The trial court granted summary judgment for IFR finding the agreed termination date was January 31, 2003.

- The court of appeals reverses holding it is an issue of fact regarding how long "IFR was willing to protect Navair's price quotations."
**Navair, Inc. v. IFR Americas**

- Issue: If IFR intended a termination date of January 31, and Navair did not, since there was no "meeting of the minds" was a contract formed regarding the matter?
- IFR attempts to inject a *subjective* theory of contracts.
- Under an *objective* theory there need be no "meeting of the minds" in a literal sense of the phrase.

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- Contracts are not formed by comparing mental states [subjective theory]; they are formed by what the parties *communicate* [objective theory].
- "In determining intent to form a contract, the test is objective rather than subjective, meaning that the relevant inquiry is *the manifestation of a party's intention*, rather than the actual or real intention."

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- The Restatement (Second) of Contracts fully supports the objective analysis, except, in one situation: § 20 dealing with "Misunderstanding":
- "There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and (a) *neither party knows or has reason to know the meaning attached by the other* . . . ."
Navair, Inc. v. IFR Americas

- This is a restatement of the holding in the *Raffles v. Wichelhaus* case regarding the two ships named Peerless which sailed from Bombay; one in October, the other in December.

Navair, Inc. v. IFR Americas

- Although this would seem like a big hole in the objective theory of contracts, as a practical matter it is usually subsumed by interpretive rules, such as those found at *Restatement (Second) of Contracts* § 201, where at least one party is deemed to have known, or should have known, of the meaning attached by the other.

Carrothers Construction v. City

- $5.6 million contract in which Carrothers Construction agreed to build a wastewater treatment plant for the City of South Hutchinson.
- Contract contained a liquidated damages clause providing for $850 per day in damages for each day Carrothers failed to meet the "substantial completion" deadline and the "final completion" deadline.
Carrothers Construction v. City

• Analysis used to determine whether a liquidated damages clause is really an unlawful penalty provision.
• Issue: Does the liquidated damages clause provide for an illegal "penalty"?
• Does it Compensate Non-Performance as opposed to Compel Performance?

Carrothers Construction v. City

• Legal principles applied by the court:
  • Penalty designed to "secure performance."
  • Liquidated damages designed as "payment of a sum in lieu of performance."
• NOTE: This analysis supports the "efficient breach" concept.

Carrothers Construction v. City

• Two considerations given "special weight": conscionable and uncertain.
  • #1: The amount is conscionable. "[R]easonable in view of the value of the subject matter of the contract and of the probable or presumptive loss in case of breach . . . ."
  • $145,250 damages / $5.6 million contract = 3% of the total contract price.
Carrothers Construction v. City

• Court tests the "reasonableness" of the liquidated damages applying:
  • (1) predictive analysis: is the amount reasonable in light of what the parties knew, or could know, at the time they entered into the contract; plus
  • (2) retrospective (actual comparative) analysis: is the amount reasonable in light of the actual damages suffered by the claimant?

Carrothers Construction v. City

• Court of Appeals applies the additional "retrospective" inquiry.
  • 10th Circuit suggests Kansas would go that route. However:
    • The Kansas Supreme Court may not follow the additional "retrospective" inquiry.

Carrothers Construction v. City

• For example, on May 16, 2008 the Kansas Supreme Court issued its opinion in Kansas Heart Hospital, L.L.C. v. Idbeis, Case No. 97,131, 2008 WL 2065843 (Kan., May 16, 2008), where the court considered whether a bylaw requiring a stockholder to sell its stock back to the company at a pre-determined price was an illegal penalty.
Carrothers Construction v. City

• The court, without discussion, rejects a retrospective analysis stating: "The determination of whether there is a penalty does not depend on speculating on the performance of investments."
• The argument was absent the bylaw the stockholder could sell its stock at its current fair market value, not the original purchase value adjusted for inflation.

Carrothers Construction v. City

• Looking at current values would be similar to a retrospective comparative analysis: comparison of actual loss, at the time the bylaw is triggered, compared to the current value of the stock.
• The Supreme Court rejects this approach.

Carrothers Construction v. City

• To support this proposition it cites the TMG Life case, a 1995 Court of Appeals case, and quotes the following passage from TMG Life: "The reasonableness of a liquidated damages clause should be determined as of the time the contract was executed, not with the benefit of hindsight."
Carrothers Construction v. City

- Restatement (Second) of Contracts § 356(1) (1981) (emphasis added) states:
  - "(1) Damages for breach by either party may be liquidated in the agreement but only at an amount that is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss. A term fixing unreasonably large liquidated damages is unenforceable on grounds of public policy as a penalty."

Carrothers Construction v. City

- The Kansas Court of Appeals, in Carrothers, reads the "or" in the Restatement as an "and," suggesting a prospective and retrospective analyses must be satisfied.
- If freedom of contract is a major public policy, why not enforce the clause if it meets either analysis?
- This would be consistent with use of the word "or" instead of "and" in the Restatement.

Raab Sales v. Domino Amjet

- The "evergreen" clause.
- Automatic contract extension unless advance notice given in a timely manner.
- Rabb Sales, Inc. entered into a contract giving it the right to distribute the products of Domino Amjet, Inc.
**Raab Sales v. Domino Amjet**

- One of Domino's defenses to the contract claim was that Domino terminated the contract in November 2006.
- The contract contained an "evergreen clause" which would automatically extend the contract for an additional year (November 1 to October 31) "in the absence of three months' prior written notice by either party."

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**Raab Sales v. Domino Amjet**

- Court denies Domino's motion to dismiss Raab's contract claim.
- Court grants Domino's motion to dismiss Raab's negligent misrepresentation claim after finding it barred by the "economic loss doctrine" recognized by Illinois law.

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**Raab Sales v. Domino Amjet**

- Under the economic loss doctrine "a plaintiff may not recover solely economic damages in a tort action."
- Such "economic losses due to defeated expectations of a commercial bargain" are matters of contract, not tort.

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**Raab Sales v. Domino Amjet**

- The Kansas Court of Appeals has applied the economic loss doctrine.
- *Pendville v. Contemporary Homes, Inc.*, 32 Kan. App.2d 435, 83 P.3d 1257 (2004), collects the relevant Kansas case law and describes the purpose of the rule as follows: "The doctrine is designed to prevent a party from asserting a tort remedy in circumstances governed by the law of contracts."

**Raab Sales v. Domino Amjet**

- The doctrine recognizes that a contract can provide a sort of immunity from tort liability when the asserted wrong would otherwise be a potential breach of contract.

**Hershey v. ExxonMobil**

- Nationwide royalty class action filed in Kansas state district court.
- Removed to federal court under the Class Action Fairness Act of 2005 ("CAFA").
- Plaintiff seeks remand asserting amount in controversy is less than $5 million.
- Exxon established amount at issue is in excess of $6.7 million. Remand denied.
**Eatinger v. BP America**

- Class Action Fairness Act again.
- Plaintiff trying to fashion a petition that will stay in state court.
- Equivocal language that the claim may be less than $5 million not sufficient.
- BP offered evidence to establish the likely number at $12 million.

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**State v. Bursack**

- Bursack informed his lease was being unitized.
- He didn't want to share his royalty with others.
- Made some threats.
- Shot-up some oil tanks, the well, and the truck removing oil from the lease.

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**U.S. v. Apollo Energies**

- Idle heater/treater on lease became a trap for migratory birds.
- U.S. Fish & Wildlife Service, after warnings to the public and the industry at large, commenced enforcement of the Migratory Bird Treaty Act.
**U.S. v. Apollo Energies**

- Migratory Bird Treaty Act
- "[It shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird . . . ."
- "Migratory bird" has been defined to include about any bird (33 species of sparrow, 7 species of blackbird, etc.)

**U.S. v. Apollo Energies**

- "The failure to act, with knowledge that dead birds were often found trapped in the equipment, is a sufficient level of culpable conduct for purposes of 703."
- Operation of oil and gas wells and equipment where birds became trapped made the defendants "active" participants, not "passive actors."

**U.S. v. Apollo Energies**

- "[It shall be unlawful at any time, by any means or in any manner, to pursue, hunt, take, capture, kill, attempt to take, capture, or kill . . . any migratory bird."
- Accidental death in pits?
- Indirect vs. direct injury?
**U.S. v. Apollo Energies**

- If a migratory bird gains access to a pit or open tanks, and is killed, the U.S. Fish and Wildlife Service will view it as an unlawful "take" by the owner or operator of the facility.

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**U.S. v. Apollo Energies**

- "Federal decisions are divided and unclear concerning whether activities not directed at migrating birds are penalized by the MBTA. One side of the spectrum holds that the plain language of the MBTA indicates that the Act proscribes only activities which directly kill or exploit to harm birds, such as hunting, poaching, and trafficking of birds and their parts . . . . Decisions from this side of the spectrum appear to read the MBTA as prohibiting deliberate molestation of migratory birds." *WCI Steel* case.