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TEXAS SUPREME COURT 2021 YEAR IN REVIEW

Cases of Interest to In-House Counsel

January 26, 2022 | Noon-1:00 P.M.

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2021 OVERVIEW

A Few Observations

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IN RE K&L AUTO CRUSHERS
627 S.W.3d 239 (Tex. 2021)

IN RE K&L AUTO CRUSHERS

- **Procedural Posture:** K&L sought mandamus relief after the trial court quashed K&L's subpoenas and denied reconsideration

- **Key Issue**: Whether rates medical providers charged other patients for the same services plaintiff received during the same time period plaintiff received them are discoverable

- **The Court's Answer:** YES!

➢ The Court had approved of identical discovery requests in *In re N. Cypress Med. Ctr. Operating Co., Ltd.*, 559 S.W.3d 128, 129 (Tex. 2018)

➢ The Court held the requests were **relevant** because the rates charged to others could be compared to the rates the providers charged the plaintiff

➢ The requests were **proportional** because they were narrowly tailored to the *same* services plaintiff received during the *same* time period he received them

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IN RE K&L AUTO CRUSHERS

Key Takeaways

- The Court appears interested in weighing in on discovery disputes.
- The Court is willing to afford defendant's the discovery needed to attack the reasonableness of medical charges, within reason.
- A discovery request, even if technically relevant, may not be discoverable if it does not meet the proportionality test

IN RE EXXON MOBIL CORP.

2021 WL 5406052 (Tex. Nov. 19, 2021)

IN RE EXXON MOBIL CORP.

- **Procedural Posture:** Exxon sought mandamus relief after the trial court denied Exxon's motion to enforce compliance with its discovery requests
- **Key Issue**: Same as *K&L Auto Crushers*
- **The Court's Answer:** No surprise, the same as *K&L Auto Crushers*

➢ The Court's holding in *K&L Auto Crushers* was "dispositive of the issues" in this case

➢ The Court doubled down on its holding that rates charged to other patients for the *same* services during the *same* time period are **relevant** to determining the reasonableness of medical charges to the plaintiff

➢ The Court suggests the higher dollar value of the claims made the discovery requests more **proportional** than lower dollar cases (i.e. *North Cypress* [≈$8,000], *K&L Auto Crushers* [$1.2 million])

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IN RE EXXON MOBIL CORP.

Key Takeaways

- The Court solidified its position on the relevance of the rates charged to *other* patients in determining the reasonableness of charges to a plaintiff.
- The Court will apply this rule, regardless of the dollar value of the claims.
- But the Court seems *more* inclined to conclude such requests are proportional if the value of the claims is higher.

APACHE CORP. v. DAVIS
627 S.W.3d 324 (Tex. 2021)

APACHE CORP. v. DAVIS

- **Procedural Posture:** Trial court entered judgment for Davis after jury found that but for her complaint of gender discrimination, Apache would not have terminated her when it did.

- **Two Tests for Determining Causation**

➢ "But-for" test-whether "the employee's protected conduct must be such that, without it, the employer's prohibited conduct would not have occurred when it did."

➢ A set of five factors used for analyzing circumstantial evidence

- **Key Issue**: Which test controls in retaliation cases brought under § 21.055?

- **The Court's Answer:** The "But for" causation test

➢ The Court noted that, in a prior decision, it did not substitute the "factor" test for the "but-for" causation test.

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APACHE CORP. V. DAVIS

Key Takeaways

- **This is a win for employers**

➢ There is less grey area under the "but-for" causation test than a test that weighs or counts factors.

➢ That is demonstrated in this case, where the Court applied the but-for test and held there was insufficient evidence to conclude that but-for Davis's complaint, Apache would not have terminated her.

- **The Court seems keen on protecting the "but-for" causation test**

➢ The Court wants to avoid "punishing employers for legitimately sanctioning misconduct or harboring bad motives never acted upon . . . ." (emphasis added).

TEX. DEP'T OF TRANSP. v. LARA
625 S.W.3d 46 (Tex. 2021)

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TEX. DEP'T OF TRANSP. v. LARA

- **Procedural Posture:** The Court of Appeals held plaintiff's retaliation claim should have been dismissed.
- **Key Issue**: Does an accommodation request qualify as opposition to a discriminatory practice under § 21.055?
- **The Court's Answer:** Yes, but *only if* the request alerts the employer to the discrimination at issue

➢ Holding an accommodation request can *never* qualify as opposition is too broad

➢ **But** merely requesting an accommodation, even several times, isn't enough to invoke the protections of § 21.055

➢ The request must *actually* alert the employer to discrimination

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TEX. DEP'T OF TRANSP. v. LARA

Key Takeaways

- When it comes to assessing retaliation claims, the Court prefers substance over form.
- Employers should be aware that an accommodation request *can* qualify as opposition to discrimination.
- The battle is won or lost over the *content* of the request (i.e. whether it puts the employer on notice of discrimination).
- Look to federal law.

AEROTEK, INC. v. BOYD
624 S.W.3d 199 (Tex. 2021)

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AEROTEK, INC. v. BOYD

- **Procedural Posture:** The trial court denied Aerotek's motion to compel arbitration. The Court of Appeals affirmed.

- **Key Issue**: Is an employee's mere denial enough to demonstrate he or she did not electronically sign an arbitration agreement?

- **The Court's Answer: NO!**

➢ Aerotek proved the efficacy of the security procedure applied to determine the person to which the electronic record or electronic signature was attributable, as required by the Texas Uniform Electronic Transactions Act, Tex. Bus. & Com. Code § 322.001 et seq.

➢ That shifted the burden to the employees to "demonstrate how their electronic signatures could have wound up on the [arbitration agreements] without their having placed them there themselves."

➢ The employees merely denied having signed the agreements. The Court said that was insufficient because "arguments are not evidence . . . ."

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AEROTEK, INC. v. BOYD

Key Takeaways

- This is yet another win for employers because the employee's burden to disprove he or she signed an arbitration agreement is now more difficult to satisfy.
- The dissenting opinion suggests the Majority is impermissibly weighing evidence
- The Court seems willing to consider advancements in technology as part of its calculus.
- As the dissent quips, "[n]o doubt, 'the times they are a-changing'."

WASTE MGMT. v. STEVENSON
622 S.W.3d 273 (Tex. 2021)

WASTE MGMT. v. STEVENSON

- **Procedural Posture:** Trial court granted summary judgment for Waste Management; Court of Appeals reversed
- **Key Issue**: Does a contract between dual employers negate a person's status as an "employee" under the WCA?
- **The Court's Answer:** No! Thus, the WCA's "exclusive remedy" provision precluded plaintiff's suit against Waste Management for common-law negligence.

➢ The right-to control test determines one's employment status, not a side agreement between one's dual employers

➢ That test asks "whether the employer has the right to control the progress, details, and methods of operations of the work." (quoting *Limestone Prods. Distrib., Inc. v. McNamara*, 71 S.W.3d 308, 312 (Tex. 2002) (per curiam))

➢ The employee was not a party to the contract between the temporary labor supplier for whom he worked and Waste Management

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WASTE MGMT. v. STEVENSON

Key Takeaways

- In WCA cases, the Court prefers looking to the “facts on the ground” surrounding one’s employment rather than what a contract says.
- Determining whether the “exclusive remedy” provision applies is a fact-intensive inquiry that demands more than what a contract between one’s employers says.
- Texas favors “freedom of contract” but with limits.
- In dual-employment cases under the WCA, the employee is an interested party, not just the employers.

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REGENCY FIELD SERVICES, LLC
v.
SWIFT ENERGY OPERATING, LLC
622 S.W.3d 807 (Tex. 2021)

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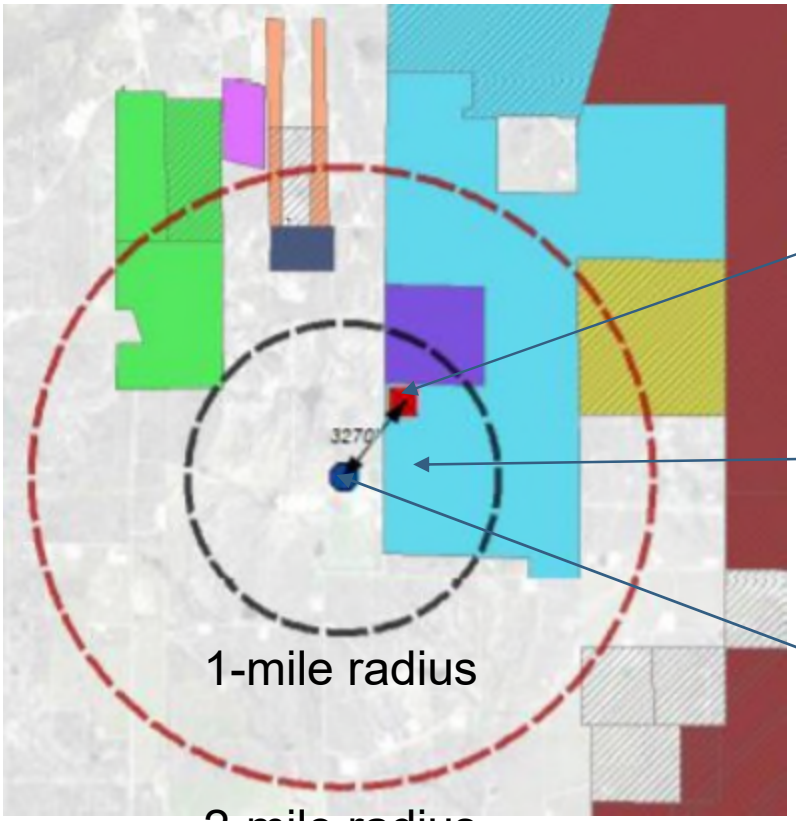
REGENCY FIELD SERVS., LLC v. SWIFT ENERGY OPER. LLC

McMullen County



Layline's JCB Horton 1 Well

Swift's PCQ Lease

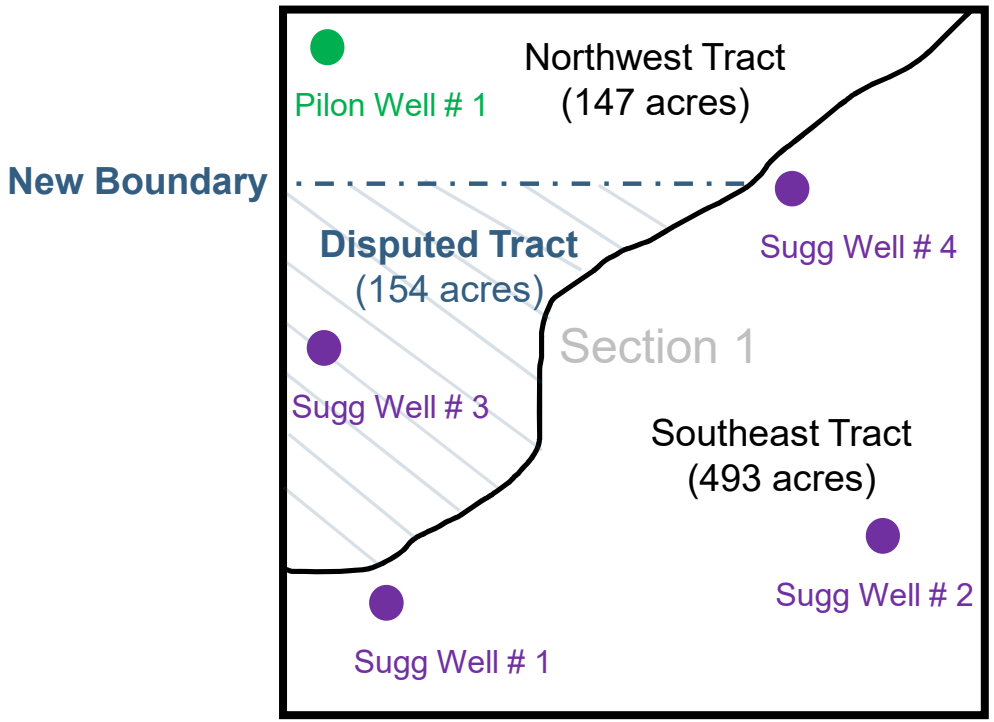
Regency's Tilden AGI 1 Well

Key Takeaways

- Contaminants migrating into the subsurface space covered by a mineral lease does not establish the lessee sustained a legal injury—contaminants must invade or interfere with lessee's legal rights.
- Still unclear when such a claim accrues.
- Claimants should consider pleading discovery rule if there is concern about limitations.

CONCHO RESOURCES, INC.
v.
ELLISON
627 S.W.3d 226 (Tex. 2021)

CONCHO RESOURCES, INC. v. ELLISON



Key Takeaways

- Adjacent owners are free to resolve boundary disputes by agreement in lieu of costly litigation.
- A boundary stipulation may be more favorable than litigation if parties want to maintain a status quo.
- Leaseholders must ratify the owners' boundary stipulation that signifies the leaseholder's acceptance of the description of the tracts as set out in the boundary stipulation.

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SUNDOWN ENERGY, LP v. HJSA NO. 3
622 S.W.3d 884 (Tex. 2021)

SUNDOWN ENERGY, LP v. HJSA NO. 3

"Whenever used in this lease the term 'drilling operations' shall mean: actual operations for drilling, testing, completing and equipping a well (spud in with equipment capable of drilling to Lessee's object depth); reworking operations, including fracturing and acidizing; and reconditioning, deepening, plugging back, cleaning out, repairing or testing of a well."

(b) The [illegible] Paragraph 7(a) above to reassign tracts not held by product[illegible]be delayed for so long as Lessee is engaged in a continuous dr[illegible]rogram on that part of the Leased Premises outside of the [illegible]cing Areas. *The first such continuous development well [illegible] be spudded-in on or before the sixth anniversary of the Effe[illegible]e Date, with no more than 120 days to elapse between completion [illegible] abandonment of operations on one well and commencement of drilling operations on the next ensuing well.*

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SUNDOWN ENERGY, LP v. HJSA NO. 3

Key Takeaways

- Sophisticated parties have broad latitude in defining the terms of their business relationship and courts are obliged to enforce the parties' bargain according to its terms.
- Unless a defined term within a contract creates an ambiguity or conflicts with another provision of the contract, courts are obligated to incorporate the specific definition when interpreting other provisions containing the term.
- A similarly-worded lease can be held under a continuous drilling clause even without actual drilling.

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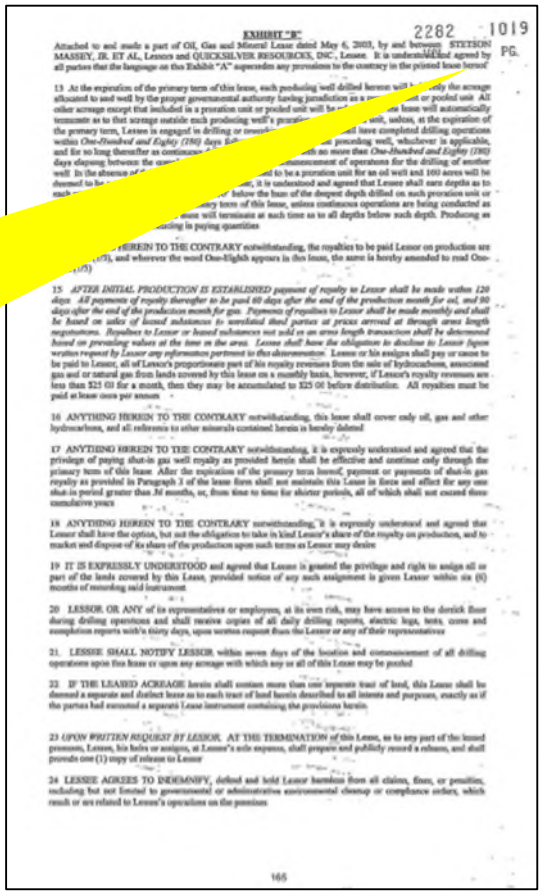
BLUESTONE NATURAL RESOURCES II
v.
RANDLE
622 S.W.3d 884 (Tex. 2021)

BLUESTONE NAT. RES. II v. RANDLE

"the language … supersedes any provisions to the contrary in the printed lease."



BLUESTONE NAT. RES. II v. RANDLE

Key Takeaways

- "Gross value received … without deduction" and "Market value at the mouth of the well" are inherently inconsistent.
- Court rejected BlueStone's argument that *Burlington Resources* created an "at the well" supremacy rule.
- Courts must enforce unambiguous contracts as written.

BPX OPERATING CO.
v.
STRICKHAUSEN
629 S.W.3d 189 (Tex. 2021)

BPX OPERATING CO. v. STRICKHAUSEN

Did Lessor ratify the pooling of her oil and gas lease?

- Knew her lease had been pooled.
- Believed that pooling violated her lease because her consent was not obtained in advance.
- Tried to negotiate a settlement with Lessees.
- Armed with that knowledge, and without obtaining a settlement, lessor voluntarily chose to accept more than $700,000 in royalty payments from the pooled unit.

BPX OPERATING CO. v. STRICKHAUSEN

Key Takeaways

- No bright line rule for implied ratification. Courts use totality of the circumstances approach.
- “Clear-showing requirement.” Implied ratification requires conduct unequivocally inconsistent with a denial of a contract.

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JLB BUILDERS, LLC v. HERNANDEZ
622 S.W.3d 860 (Tex. 2021)

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JLB BUILDERS, LLC v. HERNANDEZ

Did JLB exercise control?

- Had safety inspectors on-site.
- Required subcontractors to use safety harnesses.
- Globally managed the daily schedule and the order of work.
- Aware that towers could fall over if improperly braced or hit by strong wind or a crane.

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JLB BUILDERS, LLC v. HERNANDEZ

Key Takeaways

- Contracts with subcontractors should include language to the effect that:
  - the general contractor does not have authority or supervision over the manner or means of the subcontractor's work;
  - the subcontractor takes full responsibility for its employees and their safety.

- Remind general contractors and their employees to refrain from exercising too much control over the manner and means of their subcontractors' work to avoid liability from subcontractors' employees' negligence claims.

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QUESTIONS

CLE ACCREDITATION

- **COURSE NUMBER: 174146705**
- **ACCREDITED HOURS: 1.00**
- **ETHICS HOURS: 0.00**

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