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because most of your contacts will be around your age and experience or younger with varying levels of experience.

Show up. After you figure out where you should be spending your time, and after you make some contacts, look for and take advantage of opportunities to work with and support your new contacts. Invite them to attend events with you, even if you know they were also invited and they will likely go on their own. Show up at their events, especially if they are the organizers and they want a good turnout. Donate your time and money when they are reaching out on social media for their charities. Nominate them for awards and recognition. Connect your contacts with each other. Offer to help them achieve their goals in any way you can (and without asking for a billing number if you are an attorney). This non-exhaustive menu of options can help you build trust on a personal level that will likely become trust on a professional level over time, which is good because your contacts will be decision makers or know decision makers in the future.

Professional development is tough; there are no shortcuts. Odds are you are not going to walk up to a CEO at a happy hour tomorrow and get his or her business the next day. It takes consistent effort over a long period of time. The three steps outlined above are a good start for those of us who have been putting off working on our professional development. Keep it simple and good luck.

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

By Brandon Durret, Dykema Cox Smith

This article is Part 2 in a two-part series. If you would like to read Part 1, click here.

II. PERILS OF THE "NOTWITHSTANDING" CLAUSE

Another idiom of oil and gas contract drafting is the addition of "notwithstanding anything else herein to the contrary," or language to similar effect, the intent of which is to give priority and control to its associated language. "When parties use the clause … in a paragraph of their contract, they contemplate the possibility that other parts of their contract may conflict with that paragraph, and they agree that this paragraph must be given effect regardless of any contrary provisions of the contract." *Helmerich & Payne Intern. Drilling Co. v. Swift Energy Co.*, 180 S.W.3d 635, 646 (Tex. App.—Houston [14th Dist.] 2005, no pet.).

Texas case law provides many examples of successful uses of the "notwithstanding" clause. *See id.* at 643. For example, in *Gulf Oil Corp. v. Southland Royalty Co.*, 496 S.W.2d 547 (Tex. 1973), the Supreme Court of Texas held that an oil and gas lease was extended beyond its hard-cap 50-year term, despite the lessee's failure to drill, because the lease provided that time lost due to a force majeure event would not count against the lessee, "anything in this lease to the contrary notwithstanding." However, two recent Texas cases demonstrate unsuccessful uses of the clause.

Westport Oil & Gas Co., L.P. v. Mecom, decided by the San Antonio Court of Appeals in December of 2016, is a prime example of a "notwithstanding" clause failing to have the desired effect. 514 S.W.3d 247 (Tex. App.—San Antonio 2016, no pet.). In Westport, the lessors under an oil and gas lease sued the lessee alleging underpayment of royalty. The lease provided that gas royalty would be based on "market value at the well," which Texas law defines as "the prevailing market price for gas in the vicinity at the time of sale, irrespective of the actual [gas purchase agreement] sale price." Id. citing *Bowden v. Phillips Petrol. Co.*, 247 S.W.3d. 690, 699 (Tex. 2008). Both parties admitted that the lessee had paid the lessors on this basis.

However, another lease clause provided that, "[n]otwithstanding any other provision of this lease to the contrary," any gas sales contract that lessee entered must have a sales price "computed on the average of the highest price paid by three separate Intrastate Purchasers of gas of like quality and quantity … ." Lessors argued that this clause amends the standard definition of "market value," obligating the lessee to pay the lease royalty based on this higher price basis. *See id.* at 252-53. Specifically, the lessors argued that the "notwithstanding" language shows the parties' intent for this clause to override the "market value" language.

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

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

Id. The court further held:

> "Although some leases may calculate the royalty owed based on the gas purchase agreement sales price, this one does not. … The two paragraphs do not refer to each other, and there is no other lease language that makes the royalty provision subject to the gas purchase agreement minimum sales price provision."

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

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

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

In August of 2017, the El Paso Court of Appeals similarly construed a "notwithstanding" clause in *Apache Deepwater, LLC v. Double Eagle Dev., LLC*, 2017 Tex. App. LEXIS 8062 (Tex. App.—El Paso 2017, pet. filed). This case involved a retained acreage clause in an oil and gas lease, which provided in part: "Notwithstanding anything to the contrary in the foregoing, Lessee covenants to release this lease after the primary term except as to each producing well on said lease … ." The lessee argued that this language effected a typical one-time or "snapshot" partial termination event at the end of the primary term.

The lessor, who brought the lease termination suit, argued that this language effected a "rolling" partial termination, meaning that each unit of lease acreage retained at the end of the primary term can only be perpetuated during the secondary term by continuous production from or operations on such unit itself. Its central argument was that the phrase "after the primary term" should be construed to mean a cessation of production any time after the primary term, not just once at the end of the primary term. The lessor cited the "notwithstanding" language as evidence of the parties' intent to negate the habendum clause, which would otherwise allow the lease to be perpetuated by production from anywhere on the leased premises. *See id.* at *11.

The court disagreed, holding that the retained acreage clause's language was not "clear, precise, and unequivocal" enough to negate the habendum clause and create rolling partial termination. *Id.* at *15-16. While it does create a special limitation on the lease, the retained acreage clause does not contradict the habendum clause or demonstrate intent to carve up the leased premises into a separate lease for each retained unit. As such, production from any well will perpetuate the partially-terminated lease during the secondary term.

Despite the "notwithstanding" clause, the court held that the lessor "cannot escape that it must find language that clearly negates the habendum" for the lease to have rolling partial termination. *Id.* at *16. In other words, the "notwithstanding" clause has no effect unless the lease language it precedes is in irreconcilable conflict with another lease term.

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

Pennsylvania Superior Court Weighs in on Subsurface Trespass

By Lucas Liben, Reed Smith LLP

The author would like to thank Kazi S. Ahmed, Summer Associate at Reed Smith LLP, for his contributions to this work.

On April 2, 2018, the Superior Court of Pennsylvania decided *Briggs v. Southwestern Energy Production Co.*, 184 A.3d 153