Head-to-Head: Texas Legislature Looks to Close First Purchaser Protection Gap with 'Texas First Purchaser Lien Act'

By Ellen M. Conley, Liz Felicidario | March 31, 2021

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In previous articles, we discussed the bankruptcy court ruling by Judge Craig A. Gargotta of San Antonio in *In Re First River Energy LLC* that Texas oil and gas royalty owners and producers (referred to as "interest owners") do not hold automatically perfected, senior secured security interests to secure amounts owed to them for their oil and gas production ultimately sold on their behalf by a third party (referred to as a "first purchaser") when such first purchaser is organized in a state other than Texas, which was recently affirmed by the Fifth Circuit in a February 3rd opinion by Circuit Judge Edith H. Jones.[1] Meanwhile, Oklahoma's Oil and Gas Owner's Lien Act of 2010 (the "2010 Act") was found to have created an automatically perfected first-priority lien outside of the governance of the Uniform Commercial Code, further advancing Oklahoma's lead in the Texas-Oklahoma first purchaser protection matchup.

On March 11, 2021, Representative Charlie Geren introduced House Bill No. 3794, providing the Texas Legislature with the opportunity to potentially strengthen the protections allotted Texas interest owners by repealing Section 9.343 (formerly Section 9.319) to the Texas Business and Commerce Code—the Texas First Purchaser Statute—and replacing it with an act relating to oil and gas liens (as currently drafted, the "Texas First Purchaser Lien Act"). If passed, the Texas First Purchaser Lien Act would take effect September 1, 2021.

Under the Texas First Purchaser Lien Act, each interest owner would be granted an oil and gas real property lien (rather than a personal property security interest) "to the extent of the interest owner's interest in oil and gas rights" to secure the obligations of a first purchaser to pay amounts owed such interest owner for its production. The lien would be granted and exist "as part of and incident to the ownership of oil and gas rights" in Texas. The Texas First Purchaser Lien Act would replace a security interest as a claim against personal property governed by the Uniform Commercial Code with a lien tied to an interest owner's real property interest in oil and gas rights. "Oil and gas rights" are defined in the Texas First Purchaser Lien Act as any legal or equitable right, title or interest in or to oil or gas from land in Texas, including, but not limited to, oil or gas in place before severance and oil or gas production, or the right to receive a portion of the proceeds, on severance. Unlike the Texas First Purchaser Statute, this lien is intended to be a part of and appurtenant to the ownership of "oil and gas rights" under Texas real property law. The oil and gas lien would (i) exist in and attach to all oil and gas before severance; (ii) continue uninterrupted and without lapse in all oil and gas on and after severance; (iii) continue uninterrupted and without lapse in and to all proceeds from the sale of the oil or gas and (iv) exist until the interest owner has received the sales price for its oil and gas.

With respect to competing liens, not only would an interest owner's oil and gas lien under the Texas First Purchaser Lien Act be perfected automatically without the need to file a financing statement or other type of documentation, but such lien would also have priority over any other lien, whether

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arising by contract, law, equity or otherwise or any security interest, except for a "permitted lien" (as defined in and otherwise contemplated by the Texas First Purchaser Lien Act).

The Texas First Purchaser Lien Act contains similar provisions to those found in Oklahoma's 2010 Act, which was passed to cure defects in Oklahoma's prior first purchaser statute that were highlighted by the court in *In re SemCrude, L.P.* The 2010 Act passed its first test in *In re First River Energy, LLC*, where Oklahoma producers, unlike Texas producers, were successfully able to argue that they held a first, prior and automatically perfected lien (rather than a security interest) pursuant to the 2010 Act. If House Bill No. 3794 becomes law, Texas interest owners may obtain better outcomes in future *SemCrude* and *First River* style cases.

For additional information or assistance, please contact one of the attorneys listed below.

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[1] To access our March 2020 article from the *Texas Bar Journal*, click here; to access our February 2021 update, click here.

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