

The Supreme Court of Texas Weighs in on the Enforceability of Consent-to-Assign Provisions

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In June 2018, the Supreme Court of Texas refused to read a reasonableness qualification into a consent-to-assign provision and instead held that consent could be withheld, even arbitrarily. *Barrow-Shaver Res. Co. v. Carrizo Oil & Gas Inc.*, No. 17-0332, 2019 WL 2668317 (Tex. June 28, 2019). Consent-to-assign provisions are common in the energy industry in everything from oil and gas leases, to joint operating agreements, and other asset agreements. As such, the Court's decision is likely to reverberate in industry circles for some time.

Consent-to-assign clauses are designed to protect mineral-interest owners in *de facto* partnerships with their co-interest owners from suddenly assigning an interest in the business relationship to a fly-by-night outfit. These provisions generally come in one of two types: (1) a "soft" consent that requires a valid justification for withholding consent, usually that the assignment is to an irreputable party that will harm the financial interests of all interest owners and (2) a "hard" consent that allows consent to be withheld for any reason or no reason at all. Holders of hard consent rights receive better protection from risky assignments, but the counter-party is left at the right-holder's mercy. The Court's recent opinion is a perfect illustration of this balance of interests.

Barrow-Shaver executed a farm-out agreement with Carrizo that stated Barrow-Shaver's resulting mineral rights would "not be assigned, subleased or otherwise transferred in whole or in part, without the express written consent of Carrizo." When Barrow-Shaver attempted to assign its leasehold interest after expending considerable resources on a dry hole, Carrizo refused to consent unless it received a \$5 million payment. Barrow-Shaver refused, arguing in the resulting lawsuit that an implied covenant to only withhold consent reasonably should be read into the farm-out agreement and that industry custom and practice required implying a reasonableness requirement. The trial court allowed admission of custom-and-practice evidence at trial, and the jury found for Barrow-Shaver. The court of appeals reversed on the grounds that evidence of custom and practice is irrelevant in interpreting an unambiguous hard consent.

The Supreme Court affirmed in a hotly disputed 5-4 decision. The majority reasoned that the absence of an express reasonableness standard in the farm-out agreement meant that Carrizo had no obligation to act reasonably in withholding consent. This conforms with general Texas case law that parties are free to contract as they choose, even if the resulting obligations are onerous or unfair. The majority further held that the farm-out agreement was unambiguous, and testimony regarding industry custom and practice could not vary the clear, agreed-upon contract terms. The dissenting opinions took little issue with interpreting the consent-to-assign as hard, but would have allowed in the custom-and-practice testimony.