Dykema Cox Smith

Ready! Fire! Aim!
"Subject to the PSA" Clause
vs. Merger by Deed



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Why "Rush"?

- Is any deal *not* a "rush" deal?
- Avoid other party losing interest or backing out
- Limit time assets off market
- Limit buyer's time for due diligence
- Confidentiality concerns
- Meet closing deadline

Why "Rush"?



"Subject to the PSA" Clause

- "Subject to the PSA" clause or similar reference in assignment of leases sometimes perceived as "shortcut" to careful drafting
- "The terms of this Assignment are subject to the Purchase and Sale Agreement" between the parties

"Subject to the PSA" Clause

- Big question: Does it makes the PSA terms control over assignment terms if they conflict?
- Seems intuitive, but case law says no

"Subject to the PSA" Cases

- *Devon Energy Prod. Co. v. KCS Res. LLC*, 450 S.W.3d 203 (Tex. App.—Houston [14th Dist.] 2014, pet. denied).
- *Burlington Res. Oil & Gas Co. LP v. Tex. Crude Energy, LLC*, 516 S.W.3d 638 (Tex. App.—Corpus Christi 2017), *rev'd on other grounds*, No. 17-0216, 2019 WL 983789 (Tex. March 1, 2019).

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