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Restraints on Alienation and Consent-to-Assign in Light of *Mayo Foundation vs. BP*

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One of the longstanding uncertainties among energy transactional attorneys in Texas has been whether a consent-to-assign provision in an oil and gas lease is valid, and to what extent. Litigation attorneys were of little help to their transactional peers, since there is virtually no direct guidance on that issue from state courts over the past 100+ years since the market developed in Texas. There are several possible reasons why that could be: most lessors freely give consent; a rights holder seeking to transfer their asset resolves any concerns by paying a "consent fee" to the lessor; mass transactions exclude any nonconsenting assets; the rights get transferred without bothering to ask for consent and no one knows or cares; or, even if there is a full-blown dispute, it gets handled in a state trial court and is never appealed to result in a published decision. All a litigator could say in response to their transactional colleague's questions about a consent-to-assign issue was "that's a great question; nobody knows for sure[1] – you want to be the first to find out?" Anyone who has dealt with transactional matters can tell you the goal is to get a deal done with the least amount of litigation risk, so perhaps that only fed back into the cycle of uncertainty as more often than not a client would prefer to avoid any fight over a consent provision if at all possible. That may be about to change going forward, however, now that there is some recent published guidance on enforceability.

That guidance comes from a decision in March 2020 by the federal district court in Amarillo—*Mayo Foundation for Medical Education and Research v. BP America Production Company*, 447 F. Supp. 3d 522 (N.D. Tex. 2020)—and it is a good example also of the scenario where a dispute becomes important enough to the parties to be litigated, but goes no further than the trial court after a flurry of activity at the earliest stages: i.e., that of seeking an injunction or declaratory relief that determines if a deal will move forward. Fortunately, this dispute occurred before a federal district court judge who gave a well-reasoned written opinion providing analysis on some of the outstanding questions, which can help nudge the law moving forward.

The legal question in most instances is actually two-fold given that perhaps the most common type of consent-to-assign provides that a lessor cannot "unreasonably withhold" its approval. That creates two aspects for analysis: (1) is the consent requirement even valid to start, and, if so, (2) was consent reasonably withheld. The first is usually just a legal question based on the plain language of the lease and fairly well-established principles of law (contract and property law). The second, as with any matter of "reasonableness," is highly dependent on the particular circumstances which, unfortunately, often must be assessed only in the advances stages of a deal since that is where a consent issue may first come to the forefront.

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[1] *See* 4 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS 307-08 (1990) (noting far back as the 1990s that "there are surprisingly few decisions addressing the validity of transfer clauses in oil and gas and other mineral leases," and describing any answer to the question even then as a "theoretical one").

To understand the impact of the Amarillo federal court's decision in *Mayo Foundation v. BP*, the following addresses first the background of that dispute, then the legal framework of analysis, and finally the decision and its potential impact on the future.

I. An Unusual Dispute Out in the Texas Panhandle

The court in *Mayo Foundation v. BP* did an excellent job of painting a picture for the backdrop of its decision, even tracing the history of the land all the way back to the Civil War. Picking up at the point in time where it matters most for this discussion though, the original oil and gas lease at issue was created in 1994 between a widowed ranch owner (Barbara Lips) and Alpar Resources, Inc. That instrument contained a provision stating Alpar could not assign or transfer its rights (at least not in part as opposed to whole), expressed as follows:

> The right and obligations of Lessee hereunder are not assignable or transferable in any respect as to segregated portions of the leased premises or as to only certain depths under the leased premises.

A court considering that language perhaps would be inclined to find a way of enforcing the anti-assignment as stated if Alpar had turned around and itself tried to violate its promise to the widow right away. But Ms. Lips died not long after the lease was created and the royalty rights passed through her will in 1995 to a charitable endowment of the renowned Mayo Clinic in Minnesota (i.e., the "Mayo Foundation for Medical Education and Research," which, as noted below, is apparently quite involved in owning oil and gas interests).

One year after that, in 1996, Alpar assigned its rights in the particular leased interests at issue in the case—"Section 157"—to Amoco Production Company,[2] who entered into an operating agreement with Courson Oil & Gas, Inc. The operating agreement then granted Courson a preferential right to purchase Amoco's interests, should it ever desire to sell.

The Mayo Foundation agreed to various lease amendments in the years that followed, with the last one in 1998 including a modification of the anti-assignment provision to provide for a more qualified consent right that is commonly found in agreements for all types of commercial transactions with financing, articulated in this instance as follows:

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[2] It does not appear to be addressed in any filings or the Amarillo court's ruling whether consent was ever sought or given for the first assignment in 1996 by Alpar to Amoco, which, if done in "segregated" part as the circumstances seem to suggest, would be contrary to the precise restriction in the original lease. It is also unknown whether the Mayo Foundation gave consent to that early assignment or it occurred without seeking or giving consent and no one cared to try and enforce. That could have been a relevant factor if it occurred in the latter manner, but nothing about it appears in the public record beyond the court expressing in dicta that the original anti-assignment language was probably unenforceable. *See Mayo Found. for Med. Educ. & Research v. BP Am. Prod. Co.*, 447 F. Supp. 3d 522, 532 (N.D. Tex. 2020). That is true as a point of legal analysis, yet still the actions (or inaction) of the lessor at an earlier time can be relevant also to what became disputed with the amended version of the assignment in this case. *See* T. Ray Guy & Jason E. Wright, *The Enforceability of Consent-to-Assign Provisions in Texas Oil and Gas Leases*, 71 SMU L. Rev. 477, 495-96 (2018) (discussing defenses to violation of a valid restraint, including waiver by earlier consent). That is a tangential point of note here though.

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