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Aftermath of the SemGroup Case: Oklahoma Enacts the Oil and Gas Owners' Lien Act of 2010

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Oklahoma Enacts the Oil and Gas Owners' Lien Act of 2010

By Fred H. Miller and Alvin C. Harrell

BACKGROUND

SemGroup LP, a limited partnership organized in Delaware, and its various affiliates (together, SemGroup), was in the business of purchasing oil and gas derived from wells in several jurisdictions including Oklahoma.¹ Pursuant to industry custom, SemGroup paid the interest owners (persons owning an interest in oil and gas rights before the first sale of the oil or gas²) for the purchased oil on the 20th day of any given month, and for the gas on the 25th day, as to oil and gas produced in the previous calendar month. For example, payment would occur on June 20 or June 25 for the May production.

SemGroup, as the “first purchaser,” would then resell to subsequent purchasers. In these subsequent resales, the sale price could be paid by an exchange of oil and gas, by set-off and net-out of transactions, or by a cash equivalent or deferred cash payment (*e.g.*, by check or an “account”³). The extracted oil and gas might be stored in temporary, local storage tanks, or delivered to the subsequent purchaser by pipeline. SemGroup incurred debt for financing its purchases, and this debt was secured by the oil and gas inventory owned by SemGroup, and any proceeds from the resales. SemCrude, one of the affiliates, owned a deposit account in Massachusetts with Bank of America and another with a bank in Dumas, Texas, where proceeds were deposited.

SemGroup also was engaged in a variety of hedging and derivatives transactions, including

bets on falling oil prices.⁴ These bets went wrong when oil prices did not fall, and on July 22, 2008, SemGroup filed a petition under Chapter 11 of the U.S. Bankruptcy Code.⁵ The filing occurred immediately before or after payment was due to interest owners for oil and gas purchased in June 2008, and as a result, the interest owners were not paid for June or July. At the time it filed bankruptcy, SemGroup, as relevant, held unsold oil and proceeds, including proceeds in deposit accounts, which became assets of the bankruptcy estate as well as being claimed by interest owners and secured lenders, all of whom then litigated the priority of their claims as to these assets in the bankruptcy case.⁶

Focusing on Oklahoma and ignoring the deposit accounts (which implicate additional issues), and aside from Uniform Commercial Code (UCC) Articles 9 and 2,⁷ there were two

relevant Oklahoma statutes. One, the Oil and Gas Owners' Lien Act,⁸ created a lien, called a "continuing security interest," on extracted oil and gas and its proceeds, and made the lien valid without possession but required a filing in the county in which the well was located. This lien was subordinate to buyers in ordinary course of business as defined in the UCC,⁹ but otherwise had priority from the time of extraction, with modest exceptions, and continued in proceeds for at least a year. Most importantly, however, section 548.6(C) stated that nothing in the Oil and Gas Owners' Lien Act should be construed to impair or affect the rights, priorities or remedies of any person under the UCC.

The other relevant Oklahoma statute was the Production Revenue Standards Act.¹⁰ The most important provision was section 570.10A, which provides essentially that all proceeds from the sale of oil or gas production should be regarded as separate and distinct from all other funds of any person receiving or holding the same, until such time as the proceeds are paid to the owners legally entitled, and that the proceeds are to be held for the benefit of the interest owners legally entitled but that no express trust is created. In the *SemGroup* litigation, the interest owners argued (among other things) that this imposed fiduciary duties in the nature of an implied or resulting trust, giving them a priority claim.¹¹

Most of the *SemGroup* litigation was ultimately settled, before a pending appeal could be completed, but the Delaware Bankruptcy Court first made several findings:

- Notwithstanding an Oklahoma attorney general's opinion issued after the bankruptcy case began, holding that section 570.10A creates an implied trust, the Bankruptcy Court held otherwise.¹²
- In the *SemGroup* litigation relating to Kansas and Texas, the Bankruptcy Court concluded that Delaware law controlled the issues relating to competing claims to the assets (including priority), and not the laws of Kansas or Texas (where the production was located).¹³

The Bankruptcy Court held that the assets were not "as extracted collateral" under UCC Article 9 (and thus Delaware law controlled perfection and priority),¹⁴ and since the interest owners were unperfected under Delaware Article 9 they lost priority to the secured lenders who were so perfected.¹⁵

THE 2009 LEGISLATIVE RESPONSE

Bills were promptly introduced in the 2009 Oklahoma Legislature to address the issues in the *SemGroup* litigation. An initial bill favored by interest owners would have given them a position similar to the result provided in the legislation that ultimately passed in 2010 (SB 1615), but essentially equivalent to that of a purchase money security interest under UCC Article 9. However, as with some of the similar lien acts in other states, an Article 9 solution would be dependent on application of the Oklahoma UCC.¹⁶ This bill failed to pass. Another bill put forward by the purchasers from interest owners would have essentially adopted the Texas non-uniform amendment to Texas UCC Article 9 (essentially giving interest owners the position of a purchase money security interest but without the UCC requirements of filing, notice and the like).¹⁷ This bill likewise failed to pass. In essence, the two bills killed each other.

THE RESULT: SB 1615

Effective Date

Before the 2010 legislative session was underway in Oklahoma, a compromise was negotiated that that basically became Enrolled Senate Bill No. 1615 (SB 1615 or the bill).¹⁸ SB 1615 was signed by the governor on April 19, 2010.¹⁹ Section 14 of the bill carries an emergency clause and therefore it became effective that same date.²⁰ This is critical since the bill follows fairly closely the previous 2009 interest owners' effort, and Section 4 of the bill proclaims in part: "An oil and gas lien exists and is perfected from the effective date of this act."²¹

Overview of SB 1615

SB 1615, the Oil and Gas Owners' Lien Act of 2010, repealed the former Oil and Gas Owners' Lien Act.²² It does not repeal the Production Revenue Standards Act,²³ and thus leaves undisturbed the attorney general's opinion that a trust is created by this provision (as well as the remaining litigation on this issue).²⁴ In Oklahoma, a state court opinion could control the decision of the Delaware Bankruptcy Court to the contrary.²⁵ However, bill Section 6 provides in part that a purchaser (defined under bill Section 2.15. as a person that is not an affiliate of the first purchaser)²⁶ who takes, receives or purchases oil or gas from a first purchaser is relieved of any obligations created by section 570.10A if either 1) the purchaser is

a buyer in ordinary course of business (BIOCOB) as defined in the UCC Article 9²⁷ or 2) the purchaser has paid all the consideration due to the first purchaser, including by exchange of oil or gas, net-out, or set-off, under all applicable enforceable contracts in existence at the time of payment.²⁸ The second category of purchaser above is important since BIOCOB status arguably requires the payment of new value and therefore payment by net-out or set-off may not qualify, and also under the UCC a BIOCOB must have possession or a right to possession.²⁹ A subsequent purchaser from the first purchaser also is protected by the shelter doctrine.³⁰

To the extent that an Oklahoma court might uphold an interest owners' retention of a trust against the first purchaser (e.g., under section 570.10A), that trust is redundant with the idea that the interest owner also has a lien, but retention of the trust concept in the Oklahoma statutes was a necessity in view of the uncertainty on this issue in the ongoing *SemGroup* litigation on the trust fund issue (e.g., relating to claims arising before the effective date of SB 1615).

SB 1615: CHAPTER AND VERSE

Reviewing SB 1615 with an eye to the issues in the *SemGroup* litigation, the most important provisions are noted here. Section 3.A. of the bill grants each interest owner an oil and gas lien (oil and gas lien) to secure the obligations of the first purchaser to pay the sales price, to the extent of the interest owners' interest in oil and gas sales derived from the interest owners' oil and gas rights.³¹ Under bill Section 2.9.a., oil and gas rights include oil, gas, proceeds (proceeds under bill Section 2.14. are what is paid or to be paid from the sale of oil or gas under an agreement to sell, including oil or gas on or after extraction,³² inventory of raw, refined or manufactured oil or gas, rights to products of same, and proceeds, whether cash, accounts, chattel paper, instruments, documents or pay-

“Section 4 also provides that the interest owners' oil and gas lien is automatically perfected without the need to file a financing statement or any other type of documentation...”



ment intangibles), an oil and gas lease, a pooling order and an agreement to sell.³³ Illustrative examples of oil and gas rights are included in bill Section 2.9.b.³⁴ Section 3.A. also states that “[t]he oil and gas lien is granted and exists as part of and incident to the ownership of oil and gas rights.”³⁵

This makes clear that the interest owners' oil and gas lien created by SB 1615 is not a UCC Article 9 security interest but rather arises as part of a real estate interest of the interest owner in the oil and gas; therefore, the governing law (with respect to a choice of law) is the law of the jurisdiction in which the well is located.³⁶ This avoids the UCC Article 9 choice of law rules for personal property that resulted in certain interest owners' claims being determined under Delaware law in the *SemGroup* litigation.³⁷ Indeed, Section 9 of the bill provides that no provision in an agreement to sell or otherwise that would apply the law of another jurisdiction is valid as a matter of public policy (but the protections of SB 1615 may be waived under specified circumstances as

described in Section 9 of the bill, and noted below).³⁸ Section 3 of the bill also provides that the interest owners' lien “exists in and attaches immediately to all oil and gas on the effective date of the act.”³⁹

Bill Section 4 (somewhat redundantly) also says that the oil and gas lien is granted and exists as part of and incident to the ownership of the interest owners' oil and gas rights, and “exists and is perfected from the effective date of this act.”⁴⁰ Section 4 further stipulates that the interest owners' oil and gas lien continues uninterrupted and without lapse in all oil and gas produced, upon and after the extraction (except as qualified elsewhere in the bill); continues uninterrupted and without lapse in and to all proceeds (again, except as qualified in SB 1615); exists until the interest owner or other

person entitled to receive the proceeds has been paid (with some elaboration as to who is entitled to payment and protection for good faith payment); and is not dependent on possession nor is it affected by a change in possession or ownership, and that the lien follows any transfer of the oil and gas rights.⁴¹ Section 4 also provides that the interest owners' oil and gas lien is automatically perfected without the need to file a financing statement or any other type of documentation, and as to existing oil and gas rights is perfected as of the effective date of SB 1615.⁴²

Section 7 of the bill provides that, except for a "permitted lien" (see discussion below), an interest owners' oil and gas lien takes priority over any other lien or any security interest.⁴³ In conjunction with Sections 3.D. and 4. of the bill,⁴⁴ this creates an automatic super-priority without any public notice by a filing or by possession. This is less troublesome than it may seem, because in all probability those affected by it, *e.g.*, in the industry or lending to it, are sophisticated parties who will be aware of this provision of the bill and can act accordingly.⁴⁵ Whether an automatic super-priority always will apply in the face of other laws, which may provide their own priority rules, will be a task for courts to sort out on a case-by-case basis, although perhaps SB 1615, as the later and more specific law, will be effective as stated. Moreover, many of the potential problems of application are avoided by the priority exceptions for BIOCOBs and permitted liens, as noted below.⁴⁶

Under bill Section 2.11., a permitted lien is essentially a mortgage or security interest granted by a first purchaser which "secures payment under a written instrument of indebtedness signed by the first purchaser"⁴⁷ — and is accepted in writing (or in a record) by the secured party (even if the instrument is a promissory note which a payee normally does not accept in writing), *prior to the effective date of SB 1615*, with a fixed amount of principal and maturity date.⁴⁸ A "permitted lien" does not include security devices that do not meet these criteria, or that involve a later modification, amendment or restatement that increases the principal or extends the maturity after the effective date of SB 1615, or does not have first priority (except a statutory or regulatory lien that has first priority by statute or regulation is recognized).⁴⁹ Also, as just noted, included in the protection afforded a "permitted lien" is "a

validly perfected and enforceable lien created by statute or by rule or regulation of a governmental agency for storage or transportation charges" owed by the first purchaser, except one in favor of an affiliate of a first purchaser (unless authorized by the statute, rule or regulation creating the lien) or one for charges in excess of 90 days past due.⁵⁰

Section 5 of the bill deals with the tracing, continuation and priority of the interest owners' oil and gas lien, in relation to other such liens and competing security interests, other liens and permitted liens, in commingled oil and gas.⁵¹

Section 6 qualifies the provision of the bill that provides for the super-priority of an interest owners' oil and gas lien, given the above-referenced continuance of such a lien in extracted oil and gas and in any proceeds, and the priority of such.⁵² Section 6 provides that a "purchaser"⁵³ "takes free" of an interest owners' oil and gas lien on the oil and gas purchased by the purchaser, and the purchaser is relieved of the obligations under 52 Okla. Stat. section 570.10A, if the purchaser qualifies as a BIOCOB as defined in UCC Article 9,⁵⁴ or the purchaser has paid all consideration due to the first purchaser, "including by exchange of oil or gas, net-out or set-off, under all applicable enforceable contracts in existence at the time of payment."⁵⁵ Otherwise, the interest owners' oil and gas lien continues "uninterrupted in the proceeds paid to or otherwise due the first purchaser" (which should be construed to mean not only that the lien continues but also its perfection and priority continue as provided in the bill).⁵⁶ The last sentence of Section 6.2. of the bill, stating the priority of the lien, is again merely a redundancy.⁵⁷

Section 8 of SB 1615 deals with circumstances where the ownership of oil and gas is transferred and is consistent with UCC Article 2 Section 2-401, which is also applicable since extracted oil and gas is a form of "goods."⁵⁸ Section 8 also preserves the right of the first purchaser to take or receive oil and gas under the terms of a division order or agreement to sell, and thus the bill cannot retroactively intrude on prior transactions or relationships.⁵⁹ To the extent they are subject to the bill, other purchasers should be accorded the same treatment.⁶⁰ Interest owners are protected as against such rights under Section 12 of the bill,⁶¹ and the rights of operators are protected as against interest owners under bill Section 11.⁶² It might

have been better to have broadened Section 12 of the bill to include others in addition to interest owners, to provide a comprehensive resolution of competing interests in a single section, instead of using different language (except as required by different rights and status) in different sections of the bill to establish essentially the same policy. In such respects, the bill is not as polished as, *e.g.*, a uniform act. Nonetheless, except as differences need to be recognized due to the context, the different provisions of the bill should be interpreted to reach the common goal of non-impairment of established rights under a prior law or contract.

Section 9 of the bill is titled “Waiver” and states a general rule, that any relinquishment or waiver of rights under the bill by interest owners, under terms other than full payment of the sales price, is void as against public policy.⁶³ However, a waiver or other provision, which would include a subordination of the priority of an interest owners’ oil and gas lien, which is accompanied by the posting of a satisfactory letter of credit or a binding contractual arrangement, satisfactory in form and substance, to prepay or escrow the sales price and to perform all of the first purchaser’s obligations under a satisfactory agreement to sell, is valid.⁶⁴ Two further points may be made as to such a contractual arrangement, agreement to sell or letter of credit. First, there are no concrete statutory criteria in the bill for determining what is “satisfactory.” The purpose was to provide discretion to interest owners, who are in the best position to decide whether a waiver is in their best interests under given circumstances, but at the same time to both place limits on that discretion (by requiring, in essence, a letter of credit or escrow arrangement) and to give interest owners in such matters statutory guidelines to follow. Second, the applicable standards will include the requirements of UCC Article 5 for letters of credit,⁶⁵ a sales agreement will be measured by the provisions of UCC Article 2 and an alternative binding contractual arrangement should be subject to the standards of ordinary contract law.

Finally, Section 10 of the bill provides for the expiration of an interest owners’ oil and gas lien by the passage of time (one year after the last day of the month following the date proceeds from the sale of oil or gas subject to the lien are due as to oil or gas sold during the month) — unless an action to enforce the lien has been commenced.⁶⁶ Section 10 also deals

with what is a proper court, and with bankruptcy and joinder of multiple parties and preserves any right of an interest owner to maintain a personal action on the debt for the sales price.

CONCLUSION

Overall, the bill is not perfect, but if properly construed by the courts it represents a reasonable compromise among interest owners, operators, secured parties and purchasers, and does not put secured lenders to the first or a subsequent purchaser in any worse position than they would occupy under UCC Article 9 if they were subject to a purchase money security interest in favor of interest owners’ claims.⁶⁷ In that sense, it is much like the case with fixtures under UCC section 9-334, where secured parties under UCC Article 9 have to deal with competing real property claims — the difference being that in the case of fixtures, Article 9 sets the accommodation rules (but only after an earlier, false start that ignored real estate interests to too great a degree), and here the Oil and Gas Lien Owners’ Act of 2010 sets the accommodation rules, perhaps again because UCC Article 9 alone does not fully address oil and gas interests.⁶⁸

1. These facts and the background of the Oklahoma-related issues in the litigation involving SemGroup (the *SemGroup* litigation) are described in the June 2009 opinion of the Bankruptcy Court in the *SemGroup* litigation. See *Samson Resources Company, et al. v. SemCrude, LP et al.* (*In re SemCrude LP*), Case No. 08-11525 (BLS), Adversary No. 08-51445, 2009 WL 1740750 (Bankr. D. Del. June 19, 2009) (regarding Oklahoma Law issues). Companion orders were issued relating to Kansas and Texas law. See *In re SemCrude*, 2009 WL 1740747 (Bankr. D. Del. June 19, 2009) (Kansas law); *In re SemCrude*, 2009 WL 1740748 (Bankr. D. Del. June 19, 2009) (Texas law). This article is limited to the issues involving Oklahoma law. The facts and issues in the *SemGroup* litigation have also been described in the media. See, *e.g.*, Rod Walton, “SemGroup to Present Plan,” *Tulsa World*, Oct. 24, 2009, at E1; Rod Walton, “SemGroup Plan OK’d to Repay Producers,” *The Oklahoman*, Sept. 23, 2009, at 1B; Rod Walton, *SemGroup Lenders See Full Payment*, *Oklahoman*, May 7, 2009, at 1B. On related issues, see Rod Walton, “Producers sue SemGroup LP Connections,” *The Oklahoman*, May 18, 2010, at 3B.

2. See the Oil and Gas Owners’ Lien Act of 2010, Oklahoma Enrolled Senate Bill 1615, §2.6. (signed into law by Gov. Henry April 19, 2010) (codified at 52 Okla. Stat. §549.2.6.) (definition of Interest Owner).

3. A “check” is an “instrument” under Uniform Commercial Code (UCC) Articles 3 and 9. See UCC §§3-104(f), 9-102(a)(47). “Account” is defined at UCC §9-102(a)(2). In Oklahoma the UCC is codified at Title 12A of the Oklahoma statutes. UCC citations in this article reference the uniform text, unless otherwise noted.

4. See sources cited *supra* at note 1.

5. *Id.* See also Wade D. Gungoll, “The SemGroup Bankruptcy and the Ramifications for Oklahoma Producers,” 80 *OBJ* 1041 (2009).

6. See *supra* notes 1 and 5.

7. In Oklahoma, Article 9 is codified at 12A Okla. Stat. §§1-9-101 *et seq.*, and Article 2 at §§2-101 *et seq.* Oklahoma law has not adopted the 2003/2005 Official Amendments to Article 2, except to exclude transactions in information. However, as these amendments resolve many ambiguities and splits in the case law, they furnish guidance for interpretation of present law.

8. 52 Okla. Stat. §548 *et seq.* See also Gungoll, *supra* note 5.

9. UCC §1-201(b)(9) (2001 uniform text); 12A Okla. Stat. §1-201(b)(9)(2010 cumm. suppl.).

10. 52 Okla. Stat. §§570.1 *et seq.* See also Gungoll, *supra* note 5.

11. See *SemGroup*, 2009 WL 1740750, and *supra* notes 1 and 5.

12. See *supra* note 11. The Oklahoma attorney general's opinion is 2008 OK AG 31 (Nov. 5, 2008).

13. *E.g.*, pursuant to UCC §9-301. Under §9-301(1), the law of the jurisdiction where the debtor is located governs perfection, the effect of perfection or nonperfection, and priority of a security interest; this is subject to §9-301(3), providing that the effect of perfection or nonperfection and priority as to a security interest in certain types of collateral (including goods, instruments and money) are governed by the law of the state where the collateral is located. UCC, §9-307(e) provides that a "registered organization" is located in the state where it is organized. In the *SemGroup* litigation the debtor was deemed to be located in Delaware. In contrast, the Bankruptcy Court's discussion of Oklahoma issues in its June 19, 2009, opinion does not significantly address these issues, being primarily limited to the Oklahoma Oil and Gas Owners' Lien Act and §570.10A of the Production Revenue Standards Act. See *SemCrude*, 2009 WL 1740750 (citing *Arkla Exploration Co. v. Norwest Bank of Minneapolis*, 948 F.2d 656 (10th Cir. 1991)); other authorities cited *supra* at note 1; Gungoll, *supra* note 5. See also *infra* note 14.

14. See *supra* note 13; and UCC §§9-102(a)(6), 9-301(4). See *SemGroup*, 2009 WL 1740750, and other authorities cited *supra* note 1.

15. See UCC §§9-317, 9-322(a); *SemGroup*, 2009 WL 1740750; and other authorities cited *supra* note 1.

16. Which, in the *SemGroup* litigation according to the Bankruptcy Court's opinion, did not apply because the debtor (*SemGroup*) was located in Delaware, pursuant to UCC §§9-301 and 9-307, and because the assets were not found to be "as extracted collateral." See *SemGroup*, 2009 WL 1740750; other authorities cited *supra* note 1; *supra* note 13.

17. See, *e.g.*, Terry I. Cross, "Oil and Gas Product Liens - Statutory Security Interests for Producers and Royalty Owners under the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming," 50 48 (1996). *Consumer Fin. L. Q. Rep.*

18. See *supra* note 2.

19. *Id.* Note, however, that Judge Russell of the Western District of Oklahoma subsequently considered the issue and rejected the attorney general's opinion, instead adopting the reasoning of the Delaware Bankruptcy Court in the *SemGroup* litigation. See *McKnight v. Linn Operating Inc.*, Case No. CIV-10-30-R (W.D. Okla. April 1, 2010). It remains possible, however, that a state court would hold otherwise.

20. SB 1615, §14.

21. SB 1615, §4 (codified at 52 Okla. Stat. §549.4.). See also discussion *infra* this text at notes 39-41.

22. Old 52 Okla. Stat. §§548.1 - 548.6. See SB 1615, §13.

23. 52 Okla. Stat. §570.10A. See Gungoll, *supra* note 5.

24. See *supra* note 12.

25. *Id.*

26. The first purchaser under bill §2.4. (52 Okla. Stat. §549.2.4.) is the person that purchases oil or gas from an interest owner under an agreement to sell.

27. Note that BIOCOB is actually defined in UCC Article 1. See *supra* note 9.

28. SB 1615, §6 (codified at 52 Okla. Stat. §549.6.).

29. See *supra* note 9.

30. See, *e.g.*, PEB Commentary No. 6, March 10, 1990, discussing the "shelter principle."

31. SB 1615, §3.A. (codified at 52 Okla. Stat. §549.3.A.).

32. SB 1615, §2.14. (codified at 52 Okla. Stat. §549.2.14.). SB 1615 uses the term "severance" rather than the more common term "extraction," but defines "severance" essentially as extraction.

33. SB 1615, §2.9.a. (codified at 52 Okla. Stat. §549.2.9.a.) (definition of oil and gas rights).

34. *Id.* §2.9.b. (codified at 52 Okla. Stat. §549.2.9.b.) (illustrative examples of oil and gas rights).

35. *Id.* §3.A. (codified at 52 Okla. Stat. §549.3.A.).

36. See, *e.g.*, Robert A. Leflar, Luther L. McDougal III & Robert L. Felix, *American Conflicts Law* §§165, 170 and 171 (4th ed. 1986) (law of the situs applies). UCC Article 9 recognizes this basic principle with respect to other real estate-related collateral, including as-extracted collateral. See UCC §§9-102(a)(6) (definition of as extracted collateral), 9-301(3), (4) (choice of law). See also *infra* note 69.

37. Pursuant to UCC Article 9 §9-301(1) (location of the debtor controls). See also *id.* §9-307; *supra* notes 1 and 13.

38. See SB 1615, §9 (codified at 52 Okla. Stat. §549.9.). On waiver, see *infra* this text at notes 63-65.

39. SB 1615, §3.B.1. (codified at 52 Okla. Stat. §549.3.B.1.). See also *supra* note 21 (noting SB 1615 §4.).

40. SB 1615, §4 (codified at 52 Okla. Stat. §549.4.). See also *id.* §3 (codified at 52 Okla. Stat. §549.3.); *supra* notes 37-39 and this note 40 and accompanying text. There are a number of redundancies in the bill as well as provisions that are qualified by other provisions, but there are no cross-references. As a result, the bill's provisions must be read *in pari materia* and with the understanding that the redundancy is a result of the political process rather than intending a different meaning.

41. SB 1615, §4 (codified at 52 Okla. Stat. §549.4.).

42. *Id.* See also *supra* notes 39-40 and accompanying text.

43. SB 1615, §7 (codified at 52 Okla. Stat. §549.7.).

44. *Id.* §§3.D. and 4. (codified at 52 Okla. Stat. §§549.3.D. and 549.4.).

45. See also bill §9 on waiver, discussed, *infra* this text at notes 63-65.

46. See also *supra* notes 29-30 and accompanying text.

47. Which (under other law which overrides many writing requirements) may include an electronically-signed record that is stored in an electronic or other medium and is retrievable in perceivable form, under both the federal ESIGN Act and the Uniform Electronic Transactions Act. The latter is enacted in Oklahoma at 12A Okla. Stat. §§15-101 *et seq.*

48. SB 1615, §2.11.a. (codified at 52 Okla. Stat. §549.2.11.a.). The italicized language in the text above is intended to emphasize that this protects only those security interests created prior to the effective date of SB 1615. See also *id.* §2.11.a. and a.(1) (52 Okla. Stat. §2.11.a. and a.(1) (... a permitted lien does not include a mortgage lien or security interest which 1) secures payment of any indebtedness incurred from and after the effective date of this act. . . .).

49. *Id.* §2.11.a.(1)-(5) (codified at 52 Okla. Stat. §549.2.a.(1)-(5)).

50. *Id.* §2.11.b. (codified at 52 Okla. Stat. §549.2.11.b.).

51. *Id.* §5 (codified at 52 Okla. Stat. §549.5.). The ability to trace a lien into commingled proceeds of all types is governed by *id.* §3.B.3. (codified at 52 Okla. Stat. §549.3.B.3.) (The lien "[c]ontinues uninterrupted and without lapse in and to all proceeds.") See also *id.* §2.14. (codified at 52 Okla. Stat. §549.2.14.) (definition of proceeds).

52. *Id.* §6 (codified at 52 Okla. Stat. §549.6.). See also *supra* notes 43-46 and accompanying text.

53. For the definition of "purchaser," see SB 1615, §2.15. (codified at 52 Okla. Stat. §549.2.15.); compare the UCC definition at UCC §1-201(b)(30), (31). The term as used in the bill is not to be confused with a UCC Article 9 "purchaser," which includes a secured party, even though the definition in bill §2.15. could be read to include a secured party if not read in the overall context of the bill.

54. Note again the BIOCOB is actually defined in UCC Article 1. See *supra* notes 9 and 27.

55. SB 1615, §6.2. (codified at 52 Okla. Stat. §549.6.2.). See also *supra* notes 26-30 and accompanying text.

56. See SB 1615, §6.2., and *id.* §7. (codified at 52 Okla. Stat. §§549.6.2. and 549.7.).

57. *Id.*

58. *Id.* §8 (codified at 52 Okla. Stat. §549.8.). UCC Article 2 applies to sales of goods. See UCC §2-102 (scope); *id.* §2-105 (definition of goods). See generally *Continental Supply Co. v. Marshall*, 152 F.2d 300 (10th Cir. 1945) (extracted oil and gas becomes personal property); *Octagon Gas Systems Inc. v. Rimmer*, 995 F.2d 948 (10th Cir. 1993) (sale of natural gas in a pipeline is a sale of goods under UCC Article 2); definition of BIOCOB at UCC §1-201(b)(9).

59. See also *id.*

60. *Id.* See also *supra* note 30 (shelter doctrine).

61. SB 1615, §12.A. (codified at 52 Okla. Stat. §549.12.A.) (the rights of interest owners under SB 1615 are cumulative with other rights at law and in equity and are to be "liberally construed" to provide "the most comprehensive protection.") Compare UCC §1-103(a) (UCC is to be liberally construed to promote its underlying purposes).

62. *Id.* §11 (codified at 52 Okla. Stat. §549.11.) (SB 1615 does not impair the rights of an operator to withhold, set-off, or otherwise be paid funds from an interest owner). "Operator" is defined at *id.* §2.10. (codified at 52 Okla. Stat. §549.2.10.), as "a person engaged in the severance [*i.e.*, extraction] of oil or gas...."

63. *Id.* §9. (codified at 52 Okla. Stat. §549.9.).

64. *Id.* §9.1. and 2. (codified at 52 Okla. Stat. §549.9.1. and 2.).

65. 12A Okla. Stat. §5-101 *et seq.*

66. SB 1615, §10 (codified at 52 Okla. Stat. §549.10.).

67. It has been asserted by some observers that interest owners wishing such protection should be required to acquire and assert a purchase money security interest under Article 9, and that remains an alternative to SB 1615 under the law of every state. However, an approach based on the filing of financing statements by interest owners could be complicated because of the extensive fractionalization of oil and gas royalty interests; because of the large number of interest owners, such an approach could be burdensome for all parties

involved. Thus, the transaction costs of that approach exceed those of SB 1615, without any significant compensating benefits.

68. It should also be noted that the 1998 revisions to the uniform text of UCC Article 9, reflecting the report of the American Bar Association, UCC Committee Task Force on Oil and Gas Law (of which one of your authors was chair) contemplated the assertion of interest owner claims under real property law, outside of UCC Article 9, consistent with SB 1615. See Alvin C. Harrell, "Oil and Gas Finance Under Revised UCC Article 9," 33 *Tex. Tech. L. Rev.* 31, 52 (2001) (citing UCC §9-320 cmt. 7 (2001), which also addresses this issue and in turn cites Terry I. Cross, "Oil and Gas Product Liens-Statutory Security Interests for Producers and Royalty Owners Under the Statutes of Kansas, New Mexico, Oklahoma, Texas and Wyoming," 50 *Consumer Fin. L.Q. Rep.* 48 (1996)). As noted in Harrell, *id.*, the uniform text of UCC Article 9 endorses this view. See Harrell, *id.*, and UCC §9-320, cmt. 7 (stating that Article 9 "leaves [this] resolution to other law"). See also Alvin C. Harrell and Owen L. Anderson, "Report of the ABA UCC Committee Task Force on Oil and Gas Finance," 25 *Tex. Tech. L. Rev.* 805, at 830-31 (1994) (same).

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