Winter 2015

DEWHIRST & DOLVEN LLC
Attorneys at Law

LEGAL UPDATE

Utah • Wyoming • New Mexico • Colorado • Texas • Arizona

IN BRIEF

COLORDAO

- Dewhirst & Dolven attorneys Kathleen Kulasza and Sue Pray successfully obtained a defense decision in a trial involving real estate lien claims. The Plaintiff was the successful bidder at a foreclosure auction who challenged the redemption of the property by the holder of three junior liens.

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UTAH

Despite recognizing that it did not have privity of contract with the Defendant general contractor, the Plaintiff HOA argued it could still assert contract claims due to its theory that the general contractor was an alter-ego of the developer. The Utah Court of Appeals disagreed, holding that Plaintiff failed to establish the requirements of the "alter-ego" test. The Court also refused to allow the HOA's requests for equitable relief as to third-party claims against subcontractors.

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WYOMING

In a construction defect case, the Wyoming Supreme Court interpreted when substantial completion of an improvement occurs under the statute of repose, W.S.A. § 1-3-111. The Court held that substantial completion began when the improvement could be utilized for purpose for which they were intended. In this case, that was determined to be when the property's certificate of occupancy was issued.

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NEW MEXICO

In addressing whether a Plaintiff's expert testimony should be excluded in a product liability case involving claims of defective design of a stool that collapsed, the federal court excluded the expert testimony and affirmed summary judgment in Defendants' favor, holding that the testimony was unreliable. The court found that the report was only conclusory rather than providing any analysis of authority.

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TEXAS

In an oil and gas dispute concerning a shut-in royalty clause, the federal court held that if the well has been developed enough to allow raw gas or crude oil to escape into the environment, then the well is "capable of production," and the lessee can keep the lease in effect past the primary term under its shut-in royalty clause.

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COLORADO

DEWHIRST & DOLVEN WINS DEFENSE DECISION IN REAL ESTATE LIEN CASE

El Paso County: In a case of first impression, the successful bidder at a foreclosure auction challenged the redemption of the property by the holder of three junior liens. The bidder alleged that the "friendly foreclosure" and redemption amounted to a fraudulent conspiracy and unlawful bid rigging. The auction winner sued the borrower, the real estate agent who assisted him, the attorneys who set up and pursued the foreclosure action, and the family friend who had loaned a nominal sum for the purpose of creating a fourth deed of trust on the property. After a four-day trial to the court, the El Paso County District Court Judge entered judgment in favor of the Defendants, who were represented by Dewhirst & Dolven attorneys Kathleen Kulasza and Sue Pray.

Specifically, the court found that the Defendants had done nothing illegal or otherwise improper. There is a brisk market in Colorado for the purchase and sale of liens, including liens that are in default. The auction winner had the same opportunity to purchase the first, second, and third deeds of trust as did the purchasing party who ultimately redeemed them. Moreover, the creation of a friendly fourth deed of trust was simply a matter of good bankruptcy estate planning.

Defendants presented expert opinion testimony from a respected Colorado real estate attorney, a real estate broker, and two appraisers.

Goldilocks Acres v. Woodall et al., Case No. 13CV30046.

WAIVER OF UM/UIM COVERAGE HELD TO APPLY ONLY TO NAMED INSUREDS WHO EXPRESSLY WAIVE COVERAGE OR EXPRESSLY AUTHORIZE WAIVER

Colorado Court of Appeals: As provided in C.R.S. § 10-4-609(1)(a), Colorado automobile liability insurance policies must contain coverage for bodily injury damages caused by uninsured and underinsured motorists (UM/UIM). An exception to this rule, under §609, is when "the named insured" waives such coverage

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in writing.

This lawsuit presented the issue of "what happens when more than one person is listed on the policy as a 'named insured,' but only one of them waives UM/UIM coverage. Is the named insured who did not waive such coverage bound by the other's waiver in all circumstances?" The Court of Appeals answered that question: "No. Under the facts of this case, we conclude that the decision of one named insured to waive UM/UIM coverage binds others who are also named insureds on the same policy only if the other expressly authorized such a decision."

In arriving at this holding, the Court found the phrase "the named insured" to be clear and unambiguous to mean all persons who the policy lists as "the named insured." The Court also noted that the legislative intent and policy behind Colorado's UM/UIM statute was consistent with this holding, namely that the statute is to "maximize, not minimize insurance coverage."

Johnson v. State Farm Mutual Automobile Ins. Co., Inc., 2014 COA 135 (Colorado Court of Appeals, decided October 9, 2014, not yet released for publication in the permanent law reports).

DEFENSE VERDICT IN SNOW SLIP AND FALL CASE

Arapahoe County: Plaintiff Ramona Hernandez sustained a badly fractured ankle when she slipped and fell on a landing at the bottom of the stairs of an apartment complex. It had snowed the day before. Plaintiff claimed that the stairs and landing had not been cleared in any way, nor was there any ice melt applied. Plaintiff also claimed that weeks before the accident, a tenant witness complained to the apartment complex about the area of the accident.

Plaintiff sued the apartment complex for her injuries. She alleged that Defendant did not use a professional property management company for snow removal and had no written policies or logs concerning snow removal. The district court granted Plaintiff's motion to request punitive damages.

Defendant admitted that Plaintiff fell and broke her ankle. Defendant denied that a dangerous condition existed, and affirmatively alleged that snow and ice had been removed the night before and morning of the accident. At trial, Defendant called as a witness a one-legged man who had descended the stairs with his wife thirty minutes before the accident. The man testified that the stairs and landing were safe.

Plaintiff's final demand before trial was $90,000, and Defendant's final offer was $65,000. Defendant did not call any expert witnesses. The jury returned a verdict in favor of Defendant.

Hernandez v. Woodmere Apartments, Case No. 13-CV-688.

Utah

PLAINTIFF HOA'S CONTRACT CLAIMS AGAINST GENERAL CONTRACTOR STRICKEN DESPITE HOA'S ALTER-EGO ARGUMENT

Utah Court of Appeals: In this construction defect case, the homeowners association brought claims against the developer (Bear Hollow) and general contractor (Hamlet Homes). The Court of Appeals primarily addressed two issues on appeal: (1) whether the district court erred in ruling that Hamlet Homes was not Bear Hollow's alter ego; and (2) whether the district court erred in denying the HOA's request for equitable relief as to the Defendants' claims against subcontractors.

As to the first issue, the HOA recognized that it lacks privity of contract with Hamlet Homes which would enable it to pursue contract claims against Hamlet Homes. However, the HOA argued that it could pursue contract claims because Hamlet Homes was an alter ego of Bear Hollow.

The Court of Appeals re-iterated that a corporation is ordinarily regarded as a legal entity, separate and apart from its shareholders, which insulates shareholders from the corporation's liabilities. Though the alter ego doctrine is an exception to this general rule, the Court of Appeals ruled that the HOA had failed to satisfy the two-part alter ego test.

The first part of the alter ego test requires the movant to show "such unity of interest and ownership that the separate personalities of the corporation and individual no longer exist." The second part of the test requires the movant to "show that observance of the corporate form would sanction a fraud, promote injustice, or condone an inequitable result." Central to the Court's determination that the HOA failed to satisfy this two-part test were the facts that Hamlet Homes and Bear Hollow were distinct entities with separate organizational documents, and had separate ownership, bank accounts, tax returns, and records. The Court also determined that the HOA had failed to establish its claim that the project was undercapitalized.

As to the second issue addressed on appeal, the district court had denied the HOA's request to assert a constructive trust, a writ of replevlin, and a writ of attachment with regard to the Defendants' claims against subcontractors. The Court of Appeals affirmed the district court's denial of this equitable relief, ruling that the district court did not abuse its discretion. As to the request for a constructive trust, the Court held that the HOA failed to satisfy the requirements for a constructive trust, specifically that the Defendants engaged in "active or egregious misconduct." The Court further held that the HOA failed to adequately brief its request for a writ of replevlin and writ of attachment. Thus, the district court's rulings were affirmed.

The Lodges at Bear Hollow Condominium Homeowners Association, Inc. v. Bear Hollow Restoration, LLC et al., 2015 UT App 6 (Utah Court of Appeals, decided January 2, 2015, not yet released for publication in the permanent law reports).

EXPERT TESTIMONY HELD TO BE REQUIRED IN SKI RESORT PERSONAL INJURY CASE

Utah Court of Appeals: Plaintiff Callister sustained injuries while skiing at Snowbird ski resort when a tram impacted him from behind. Plaintiff sued Snowbird for negligence and other tort claims, asserting that Snowbird failed to rope off the area and warn skiers of the tram.

About a year after litigation commenced, the district court issued a notice of order to show cause why the case should not be dismissed. There had been no filings in the case within that year. The parties then entered a stipulated case management order setting forth case deadlines. The parties, however, failed to comply with those case deadlines. Over a year later, the district court issued a second notice of order to show cause, which resulted in an amended case management order being agreed upon by the parties.

After the deadline passed for disclosing expert witnesses, Snowbird moved for summary judgment on the basis that Plaintiff's failure to disclose a liability expert was fatal to his claims. Plaintiff responded by arguing that expert testimony was not necessary because specialized knowledge was not required to establish negligence in this case. In the event that the district court determined an expert was required, Plaintiff requested that the expert witness designation deadline be extended to allow him to disclose such an expert.

The district court granted Snowbird's motion, holding that expert testimony was required for Plaintiff's claims. In light of the pattern of delay in the case, the court also denied Plaintiff's request to extend the expert disclosure deadline.

On appeal, Plaintiff asserted that expert testimony was not necessary because the jury could have relied upon common sense to determine that "in a situation where a tram is traveling low enough to strike a skier, the ski resort has a duty to warn skiers about that danger…." Plaintiff argued that the jury could infer that Snowbird breached its duty by doing nothing, from the fact that Plaintiff was struck by the tram.

The Utah Court of Appeals re-asserted Utah law that "where the standard of care is usually not within the common knowledge of the lay juror, testimony from relevant experts is generally required in order to ensure that factfinders have adequate knowledge upon which to base their decisions." It also ruled that negligence cases involving ski resorts require expert testimony because "an average person would not have the knowledge of standards of care in those industries and thus would be forced to speculate about how a reasonable ski resort operator would act." Plaintiff must have therefore established the applicable standard of care, via expert testimony, to show whether Snowbird's action or inaction breached that standard.

The Court also denied Plaintiff's request to extend the expert witness disclosure deadline, noting Plaintiff's pattern of delay in the case. As such, the grant of summary judgment in Snowbird's favor was affirmed.

Callister v. Snowbird Corp., 2014 UT App. 243, 337 P.3d 1044 (Utah Court of Appeals, decided October 17, 2014).

DEFENSE VERDICT AS TO HOME OWNER'S CLAIMS AGAINST HOA

Salt Lake County: Plaintiff Walker I Investments owned a house that was part of the Sun Peak Home Owners Association ("SPHOA"). Walker leased the house to its manager, Joshua Mendelsohn. Included in SPHOA's declarations, covenants and conditions was the requirement that any property alterations had to be approved by the Sun Peak Design Review Committee ("SPDRC").

Walker requested permission to build an interior fence in the backyard of its property. SPDRC approved Walker's request, despite one committee member stating that Mendelsohn should "kill his dog, negating the need for a fence." SPDRC's use of the term "dog run" for "fence" during the approval process subsequently caused controversy. When Walker later sought approval to construct a garage addition that would look like other subdivision garage additions, SPDRC requested additional documents and restricted design criteria. The SPDRC reportedly did not impose these requirements on other property owners with similar additions.

As the approval process was delayed, Walker went ahead and constructed the addition without formal approval. SPHOA filed a $3,500 lien against the property as a fine for building it without approval. Walker asserted that this fine exceeded other fines imposed by the SPHOA and that the SPHOA had failed to enforce its rules against other homeowners. Walked thus sued the SPHOA and SPDRC alleging breach of contract and violation of Utah's Community Association Act by its arbitrary and capricious treatment against Walker. Walker also sought a declaratory judgment stating that its fence was not a dog run, and also requested punitive damages.

Defendants denied liability and asserted that the Utah Community Association Act was not in effect at the time Walker complained of SPHOA's actions. Upon jury trial, the jury returned a verdict for Defendants, finding Walker had not proven that SPHOA had breached the CC&R's and that Defendants' actions were not arbitrary or capricious. The jury also determined that the enclosure on Walker's property was a fence rather than a dog run.

Walker I Invs. v. Sun Peak Homeowners Association, Case No. 2012-05-00272, 2014 WL 5088243.

WYOMING

WYOMING SUPREME COURT ADDRESSES WHEN SUBSTANTIAL COMPLETION BEGINS UNDER STATUTE OF REPOSE FOR REAL PROPERTY

Wyoming Supreme Court: Plaintiffs Richard and Mary Horning sustained damages from carbon monoxide poisoning after an exhaust pipe in the furnace in their home ruptured. They filed suit against Penrose Plumbing & Heating, Inc. and others to recover damages. The district court granted

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summary judgment for Penrose after concluding that the Hornings did not file their complaint within the applicable ten year statute of repose under W.S.A. § 1-3-111. The issue on appeal is when the statute of limitations under § 111 begins to run.

The subject property was part of a condominium unit developed by Mill Iron Partners, LLC. Mill Iron hired Woodcraft, Inc. as the project manager, who subcontracted with Penrose for the HVAC work. Penrose completed installation of the HVAC system in August of 2001. According to Mill Iron and Woodcraft, the condominium was substantially completed in early 2002. However, Mill Iron did not pay the water tap fee required for the city to do the final inspections and issue a certificate of occupancy until August 2003. The Hornings purchased their condo in 2004.

In January 2012, eight years after purchasing the condo, the Hornings discovered the carbon monoxide leak which resulted from a ruptured exhaust pipe. In 2012, they filed their complaint, alleging that that the pipe ruptured because the installation manual had been wedged inside the pipe.

Penrose argued that the Hornings's lawsuit was barred under § 111, which requires claims for alleged defective conditions for improvements to real property to be brought within ten years of substantial completion of the improvement. Penrose relied upon evidence that it completed construction of the HVAC system in August 2001, eleven years before the complaint was filed. The Hornings argued that the ten year statute of repose did not begin to run until construction of condo was sufficiently completed such that they could utilize the home and furnace for the purpose for which they were intended. They argued that this could not occur until a certificate of occupancy was issued in August 2003, which was within the ten year repose period.

On appeal, the Wyoming Supreme Court noted that § 110 defines substantial completion as "the degree of completion at which the owner can utilize the improvement for the purpose for which it was intended." The Court determined that neither the condo nor the HVAC system could be utilized for the purpose for which they were intended until the home could be occupied. This could not occur until the city issued a certificate of occupancy.

The Court noted that there was appeal in Penrose's argument that its exposure to liability for defective work should not be dependent on when the developer eventually paid the water tap fee to obtain the certificate of occupancy. However, the Court noted that its role was to interpret the legislature's language of § 111, rather than to amend it. Thus, the Court reversed the grant of summary judgment.

Horning v. Penrose Plumbing & Heating, Inc., 2014 WY 133, 336 P.3d 151 (Wyoming Supreme Court, decided October 28, 2014).

TWO DECISIONS ISSUED CONCERNING AWARD OF COSTS FOR STATUTORY OFFERS OF SETTLEMENT

Wyoming Supreme Court: The Supreme Court recently issued two concurrent decisions addressing an award of costs following a party's non-acceptance of a Rule 68 statutory offer of settlement.

In the first opinion, *Graus v. OK Investments, Inc*., Plaintiffs brought suit against OK Investments and others alleging injuries resulting from Plaintiffs' rental of a house containing black mold. Plaintiffs did not accept Defendants' Rule 68 offer. During the jury trial, Plaintiffs moved to voluntarily dismiss some of their claims. The district court granted this motion on the condition that Defendants were the prevailing party on those claims. Defendants also moved for judgment as a matter of law as to Plaintiffs' remaining claims, which the court granted. Defendants then sought an award of deposition and expert costs pursuant to Rules 68 and 54, which the court granted.

Rule 68 provides: "If the judgment finally obtained by the offeree is not more favorable than the offer, the offeree must pay the costs incurred after the making of the offer." Rule 54 provides that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs."

On appeal, Plaintiffs argued that Rule 68 does not apply when the party making the settlement offer is declared the prevailing party. They also argued that the court erred in awarding the requested costs because they were not costs authorized under Wyoming law.

The Wyoming Supreme Court held that Rule 54, and not Rule 68, governs an award of costs to a prevailing party. As to recoverable costs under Rule 54, the Court held that deposition costs were awardable if the depositions were reasonably necessary for the preparation for trial. With regard to expert fees, the Court limited the award to the statutorily-provided amount for expert fees, rather than the amount charged by the expert. *Graus v. OK Investments, Inc. et al., 2014 WY 166 (Wyoming Supreme Court, decided December 22, 2014, not yet released for publication in the permanent law reports).*

In the second opinion, Weinstein v. Beach, Plaintiffs sued Defendants alleging injuries from carbon monoxide poisoning caused by Defendants' failure to maintain a property they rented to Plaintiffs. Plaintiffs rejected Defendants' Rule 68 offer. Following a jury verdict in Defendants' favor, Defendants filed a motion for costs in the amount of $45,410.62, pursuant to Rule 68 and 54. Applying Uniform Rules of District Court Rule 501, the district court entered an order awarding Defendants costs in the amount of $1,326.05.

Defendants appealed, making two arguments: (1) that the court erred in applying U.R.D.C. 501 to an award of costs under Rule 68; and (2) that if U.R.D.C. 501 does apply, the court abused its discretion in the manner in which the cost award was limited.

As to the first argument, the Supreme Court referred to its holding in the above *Graus* decision that Rule 68

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does not allow for an award of costs to a prevailing party. Rather, a prevailing party is entitled to costs under Rule 54. Nevertheless, the Court held that even if Rule 68 were to apply, recoverable costs are only as provided under U.R.D.C. 501. The Court thus rejected Defendants' argument that Rule 68 allows recovery of all costs incurred after a Rule 68 offer has been made. The Court then held that the additional costs requested by Defendant, specifically those related to depositions, were not established as being reasonably necessary for trial preparation. The Supreme Court thus affirmed the district court's order.

Weinstein et al. v. Beach, 2014 WY 167 (Wyoming Supreme Court, decided December 22, 2014, not yet released for publication in the permanent law reports).

New Mexico

Plaintiff's Expert Testimony Excluded as Unreliable in Products Liability Case

U.S. Dist. Court App., 10th Cir.: This appeal arises from a products liability suit brought by Plaintiff Heer against Defendants Costco Wholesale Corp., Rubbermaid, Inc., and Tricam Industries, Inc. Plaintiff sought damages for injuries she sustained when she fell after a Rubbermaid step stool collapsed from under her. She had purchased the stool at Costco, and Tricam designed and manufactured it.

Plaintiff's expert, Bradley Stolz, opined that Plaintiff's fall was not the result of misuse or failure to follow warnings, but instead due to a defect in the design of the stool's leg. Mr. Stolz's opinion was based solely upon his observations and measurements of the stool. Absent from his report were any discussions of tests, calculations, industry standards, or the application of engineering standards to support his theory.

Defendants moved to exclude Mr. Stolz's testimony on the basis that it did not meet the requirements of Federal Rule of Civil Procedure 702 because his methodologies were not reliable. Defendants also moved for summary judgment on the basis that Plaintiff could not establish a design defect without Mr. Stolz's testimony. The district court found Mr. Stolz's opinions unreliable as being "completely conclusory" and granted Defendants' motions.

Plaintiff appealed, arguing that the court erred in excluding Mr. Stolz's testimony. In addition, Plaintiff argued, even if inadmissible, circumstantial evidence of the stool collapsing was sufficient to support an inference of a design defect.

The 10th Circuit affirmed the exclusion of Mr. Stolz's expert testimony under Rule 702. In doing so, it found that "there is simply too great an analytical gap between the data and the opinion offered" because his report provided no scientific basis

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About Our Firm

Dewhirst & Dolven congratulates attorneys Rick Haderlie and Kyle Shoop on their recent summary judgment victories in a large construction defect lawsuit with $40 million in alleged damages. After extensive litigation, the district court granted three motions for partial summary judgment in favor of their client, a masonry subcontractor. The combined grant of those motions result in the favorable disposition of all claims against the client.

Dewhirst & Dolven, LLC is pleased to serve our clients throughout the intermountain west and Texas from the following offices: Salt Lake City, Utah • Denver, Colorado • Colorado Springs, Colorado • Grand Junction, Colorado • Fort Collins, Colorado • Dallas, Texas • and Port Isabel, Texas. Please see our website at DewhirstDolven.com for specific contact information.

Dewhirst & Dolven, LLC has been published in the A.M. Best's Directory of Recommended Insurance Attorneys and is rated an "AV" law firm by Martindale Hubbell. Our attorneys have extensive experience and are committed to providing clients throughout Utah, Wyoming, New Mexico, Colorado, Texas and Arizona with superior legal representation while remaining sensitive to the economic interests of each case.

We strive to understand our clients' business interests to assist them in obtaining solutions through the legal process. Our priority is to establish a reputation in the legal and business community of being exceptional attorneys while maintaining a high level of ethics and integrity. We are committed to building professional relationships with open communication, which creates an environment of teamwork directed at achieving successful results for our clients.

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Rick N. Haderlie, Esq and
Kyle L. Shoop, Esq
of
Dewhirst & Dolven, LLC

For more information regarding legal developments, assistance with any Utah, Wyoming, Colorado, Texas or New Mexico matter, or to receive this publication via email, contact Rick Haderlie at
rhaderlie@dewhirstdolven.com
2225 East Murray-Holladay Rd., Suite 103
Salt Lake City, UT 84117
(801) 274-2717
www.DewhirstDolven.com

DEWHIRST & DOLVEN
Attorneys at Law
www.DewhirstDolven.com

SALT LAKE CITY
2225 East Murray-Holladay Rd,
Ste 103
Salt Lake City, UT 84117
(801) 274-2717

GRAND JUNCTION
607 28 1/4 Road, Ste 211
Grand Junction, CO 81506
(970) 241-1855

DENVER
650 So. Cherry St., Ste 600
Denver, CO 80246
(303) 757-0003

FORT COLLINS
1631 Greenstone Trail
Fort Collins, CO 80525
(970) 214-9698

COLORADO SPRINGS
102 So. Tejon, Ste 500
Colorado Springs, CO 80903
(719) 520-1421

PORT ISABEL
400 North Yturria Street
Port Isabel, TX 78578
(956) 433-7166

DALLAS
5430 LBJ Freeway
Suite 1200
Dallas, TX 75240
(972) 789-9344

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or authority for its conclusion. The Court also noted that Mr. Stolz did not test his theory.

As to Plaintiff's argument that circumstantial evidence may prove the presence of a design defect, the Court noted New Mexico authority supporting the proposition. However, the facts of this case showed that Plaintiff had previously used the stool without incident and that the stool had passed all standard industry performance tests. Thus, the circumstantial evidence did not support such an inference. The 10th Circuit therefore affirmed the district court's grant of summary judgment in Defendants' favor.

Heer v. Costco Wholesale Corp. et al., 2014 WL 5462336 (U.S. District Court of Appeals, 10th Circuit, decided October 29, 2014, not yet released for publication in the permanent law reports).

TEXAS

SURFACE EQUIPMENT IS NOT NECESSARY FOR AN OIL AND GAS WELL TO BE "CAPABLE OF PRODUCTION"

U.S. Dist. Court, W. Dist. of Texas: Property owners leased their mineral rights to EnerQuest Oil & Gas under a lease that contained a "shut-in royalty clause." Usually, an oil and gas lease has two terms: the 'primary term' and the 'secondary term.' Most primary terms are only three to five years, but can be extended into a secondary term. A "shut-in royalty clause" allows the lessee to keep the lease in effect past the primary term if it pays a price for the time the well is shut-in. The clause also thus allows a lessee to avoid lease termination if a well on the property is at least "capable of producing in paying quantities" when the shut-in royalty is tendered. A shut-in royalty clause is thus one type of savings clause that oil and gas lessees include in contracts to keep the lease in effect.

EnerQuest did no new drilling on the property during the primary term of the lease, nor did it obtain any production from the existing, old, non-producing wells on the property. However, EnerQuest tendered the contractual "shut-in" royalty payment before the end of the primary term. The property owners argued that, because EnerQuest did not have any surface equipment on the property, the wells could not, by definition, be "capable of producing" gas and reducing it to a marketable state.

The U.S. District Court held that it was equipped at least enough to allow raw gas to flow from the wellhead if EnerQuest were to open up the old well, even if there was nothing to capture the gas and reduce it to a marketable state. Thus, the court's holding was that if the well has been developed enough to allow raw gas or crude oil to escape into the environment, then the well is "capable of production," and the lessee can keep the lease in effect past the primary term under its "shut-in royalty clause."

EnerQuest Oil & Gas, LLC v. Plains Exploration & Production Co., 981 F. Supp. 2d 575 (U.S. District Court, Western Dist. of Texas, decided November 7, 2013).