

Texas Justices Say Noble Can't Ditch \$63M Cleanup Indemnity

By Jess Krochtengel

Law360, Dallas (June 23, 2017, 2:00 PM EDT) –

The Texas Supreme Court on Friday held Noble Energy Inc. must indemnify ConocoPhillips Co. for \$63 million in environmental cleanup costs under an indemnity agreement that wasn't disclosed when Noble's predecessor bought oil and gas assets during a Chapter 11 bankruptcy.

In a 5-3 split, with Justice Debra Lehrmann not participating, the court held Noble inherited the indemnity obligation to ConocoPhillips from its predecessor, which bought oil and gas assets from Alma Energy Corp. as part of a Chapter 11 reorganization. Under the terms of the bankruptcy court's order, Noble's predecessor was assigned an undisclosed contractual indemnity obligation of Alma, it said.

The indemnity agreement concerns a Louisiana property, referred to as the Johnson Bayou property, that was later determined to be contaminated by oil and gas drilling, prompting ConocoPhillips to settle Louisiana's environmental contamination claims for \$63 million. A ConocoPhillips predecessor had swapped assets with Alma through an agreement with a mutual indemnity clause, and ConocoPhillips argued Noble clearly took on that contract and had to defend and indemnify it against the environmental contamination claim.

The bankruptcy order provided any executory contracts not specifically referenced in the reorganization plan were to be assumed and assigned to Noble's predecessor unless rejected at closing, and because the Johnson Bayou exchange agreement was not rejected, Noble took it on, the court said in an opinion written by Chief Justice Nathan Hecht. The bankruptcy court order can't be written off as "boilerplate" language but must be read as intentional, the court said.

"As critical as disclosure in bankruptcy proceedings may be, we think it more critical that parties to bankruptcy proceedings and others have confidence that reorganization plans and court orders will be interpreted and enforced according to their plain terms," Justice Hecht wrote.

The majority said Noble knew from the plain terms of its asset purchase agreement, the Chapter 11 plan and the court's order that it could be assigned executory contracts not specifically listed. It had at least constructive knowledge of the exchange agreement as part of its own chain of title, and years after the bankruptcy proceeding was over, it repeatedly honored the indemnity obligation

imposed by the agreement, the court said.

"We are pleased with the outcome," Kris Sava, a spokesman for ConocoPhillips, said Friday.

Counsel for Noble did not immediately respond to a request for comment.

Dissenting judges, led by Justice Phil Johnson, said Alma's exchange agreement did not conform with Section 365 of the Bankruptcy Code and shouldn't have been enforced. Justice Johnson said the majority was also "mistaken" in finding Noble had constructive knowledge of the property exchange agreement because of the general language in the bankruptcy court's order, even though Alma did not disclose the agreement.

He said the court's decision conflicts with federal bankruptcy authority and is "manifestly inequitable" because Noble was not notified of the indemnity obligation at issue. He said though parties to a bankruptcy should have confidence in the proceedings and court orders, that confidence can come only if the proceedings are transparent and bankruptcy law and requirements are strictly complied with.

"Otherwise, the proceedings become a matter of gamesmanship — how opaque can a debtor's filings and disclosures be and how many omissions can be made without consequences to the debtor seeking relief and other parties such as Conoco with knowledge of the opaqueness and who ostensibly are benefitted?" Justice Johnson wrote.

Chief Justice Nathan Hecht and Justices Don Willett, Jeff Boyd, John Devine and Jeff Brown joined the majority. Justices Phil Johnson, Paul Green and Eva Guzman dissented. Justice Debra Lehrmann did not participate in the decision.

Noble Energy is represented by John Zavitsanos, Jane Robinson and Foster Johnson of Ahmad Zavitsanos Anaipakos Alavi & Mensing PC, Deborah Hankinson of Hankinson LLP, and Tom Wright, Wanda McKee Fowler, Raffi Melkonian and Elizabeth Rivers of Wright & Close LLP.

ConocoPhillips is represented by Richard Mithoff and Sherie Beckman of Mithoff Law and Tom Phillips, Omar Alaniz, Macey Stokes and Ben Geslison of Baker Botts LLP.

The case is Noble Energy Inc. v. ConocoPhillips Co., case number 15-0502, in the Supreme Court of Texas.

—Editing by Orlando Lorenzo.