By Stephen Gibson
(c) 2021

> **Implied Ratification:** *An action or series of actions inconsistent with the rights asserted by the actor is not an implied ratification of the denial of those rights unless a totality of the circumstances manifest an objective intent to ratify.*
>
> **Oil and Gas Leases**: *A lessor's acceptance of royalty payments calculated on a pooling arrangement prohibited under the lease without the lessor's written consent standing alone does not conclusively establish an implied ratification of the pooling arrangement.*

Under an opinion by Justice Blacklock, a 5:4 majority of the Supreme Court of Texas held in *BPX Operating Co. et al. v. Strickhausen* that the lessor's negotiation of royalty checks purportedly calculated on a pooled basis did not conclusively establish the lessor's objective intent to ratify a pooling arrangement proscribed under the lease without the lessor's "express written consent."

As is often the case, objective events were undisputed and the fight was over the inferences fairly drawn from those events. Although the lessor never provided the "express written consent" necessary under the lease, the lessee pooled the lessor's tract with several others. The lessee drilled a well on the lessor's tract and asked the lessor to sign a pooling consent agreement. Lessor's attorney sought an explanation of the pooling arrangement while communicating the lessor was not agreeing to the pooling arrangement. The lessor later received a royalty check bearing the notation payment was for royalties from a "unit" in the pool. Lessor's attorney advised the lessee the lessor would only ratify the pooling arrangement for a bonus payment and the negotiation of the royalty check in payment for royalties for a designated period. Lessor deposited the royalty check before that offer expired. The lessee never accepted lessor's offer, but continued to send lessor monthly checks bearing the same notation which lessor deposited. This pattern repeated several months until the lessor sued for breach of contract.

Implied ratification requires circumstances showing unequivocally a knowing acceptance or confirmation of an action the actor had the right to repudiate.

In the process of reviewing the disposition of a summary judgment motion, the majority imported for implied *ratification* a standard akin to that applied to implied *waivers*. The majority held implied ratification required circumstances showing *unequivocally* the adoption or confirmation of an otherwise non-binding act by person who knew all material facts. This is a rigorous standard. Even when the objective facts are undisputed, an inference has probative value only if it is the only reasonable inference available. Understandably, the lessee sought to avoid this burden by arguing that a lessor's accepting royalties calculated on a pooled basis impliedly ratified the pooling arrangement as a matter of law.

The majority rejected the suggestion that any single, inconsistent act supports a *finding* of implied ratification. Of course, speaking in terms of a "finding" suggests the resolution of a fact issue on which there is disputed evidence

– something not permitted in the summary judgment context. The majority correctly mentioned implied ratification could not rest solely on "any [inconsistent] act" because the issue is one of the actor's intent, not perfect consistency.

Look to the totality of the circumstances.

The majority then turned to whether the totality-of-the-circumstances established the lessor impliedly ratified the lessee's unilateral pooling arrangement. It first observed the lessor had less reason to be concerned about an implied ratification because the lease forbade pooling without the lessor's explicit written consent. The majority distinguished the written consent requirement from a categorical prohibition. Any act that acknowledged a categorically prohibited arrangement was "inconsistent" and, thus, fodder for the implied ratification argument. This reasoning did not apply, however, because the lease explicitly required acceptance of a pooling arrangement by an affirmative act – written consent – which never occurred.

Merely depositing pool-calculated royalty checks was not necessarily inconsistent with the written consent requirement. The lessor was entitled to royalties even without pooling because the well was located on her tract. The majority characterized the inference of implied ratification under these circumstances as "unusually weak" because acceptance of the royalty payments could be "reasonably explained." In other words, the lessor's conduct was not *necessarily* inconsistent with the lease. Thus, treating the deposit of the checks as inconsistent with the lack of assent to pooling was not the *only* reasonable inference from accepting the royalty checks. Unless an inference from circumstantial evidence is the only inference that could be reasonably drawn, the inference lacks any probative value.

Finally, the majority noted the lessee could not have been misled because the lessor had "consistently asserted her right to reject pooling, and [the lessee] consistently acknowledged that right." The majority was especially persuaded because the lease provided only one means for pooling – the lessor's express written agreement. Thus, even if the lessor had been less than perfectly consistent, it was impossible for such conduct to establish implied ratification as a matter of law.

The dissent would find implied ratification by the inconsistent conduct of accepting, without explanation, royalty payments known to have been calculated based on a pooling of the lessor's tract.

Justice Boyd, joined by Justice Bland, Justice Huddle and Chief Justice Hecht, dissented. The dissenters urged the lessor's acceptance of royalty payments known to have been calculated on the basis of pooling standing alone was enough to conclusively establish implied ratification of pooling. The dissenters emphasized the lessor never overtly refused to consent, only that she never accepted pooling after the lessee explained the impact of acceptance on the royalty payments. This, coupled with the deposit of the royalty checks, the dissent deemed sufficient for implied ratification. As is so often the case, the majority and the dissent's squabble focused on the language and rationale of previous cases. They disagreed about the ramifications of a case that held that both the acceptance of benefits from and failure to challenge the wrongful act were enough to establish implied ratification. The majority suggests *both* were required; the dissent deemed *either* sufficient.

The dissenters point out that implied ratification can occur by accepting the benefits even under protest or disapproval of the very act by which that party benefits. In this writer's opinion, the dissent overlooks that acceptance under protest implies a ratification if, but only if, the act ratified was the *only* means of receiving the benefit. Otherwise, approval is not the only reasonable inference from the actor's conduct. When circumstantial evidence supports more than one reasonable inference, the inference itself is utterly without probative value.

The dissent also deemed conclusory the lessor's attorney's affidavit that he made it clear to the lessee the lessor "would not ratify the pooling . . . until a favorable settlement could be reached." The affidavit recited no facts demonstrating how the attorney made the point clear and did not explain the lessor's prolonged silence between that communication and the filing of suit, during which time the lessor was depositing the lessee's royalty checks. The dissent would disregard these protestations because the lessor's *conduct* was inconsistent with her stated intentions. According to the dissent, the lessor could only avoid the *objective* appearance of inconsistency by communicating to the lessee the lessor believed that she was entitled to a greater *before* she filed suit. For the dissent, it was enough the lessee "knew the nature of what she was paid, and … accepted those payments." The lease's written consent

requirement was beside the point because "engag[ing] in months of negotiations to ratify the pooling agreement, propos[ing] a settlement offer, and accept[ing] seventeen months of royalty payments" was enough to establish implied ratification.

The takeaway from these divergent views is not entirely clear. The topic is one that arises frequently *qua* implied ratification or under the labels of waiver or estoppel. From a practical standpoint, the court was as closely divided as possible with neither side clearly addressing the procedural context in which it was deciding whether there was a categorical rule that *any* inconsistent action concerning a material term of an agreement impliedly accepted the contractual deviation. Accordingly, practitioners would be well advised not to forego the argument that a party's conduct inconsistent with the terms of an agreement is an implied acceptance of the inconsistent term or a waiver or estoppel to insist on the contractual provision that is inconsistent with that party's conduct.

Practitioners would also be wise to consider addressing the non-categorical approach reflected in the majority's reasoning. In the summary judgment context this means the party resisting the suggestion of an implied ratification, waiver or estoppel should focus on the elements that such must occur knowingly and intelligently and adduce evidence raising a fact issue on those requirements to prevent doctrines from being, as the Court put it, reduced to a game of "gotcha" as the result of an unguarded moment. The party urging an implied ratification, on the other hand, should backup the dissent's categorical approach with circumstantial evidence showing the opposing party's knowing appreciation of and anticipated benefit from its conduct at variance with the terms of the agreement. Clearly, this task is aided by carefully framing the communications of the parties at the transactional phase so that implied ratification remains the only reasonable inference that can be drawn from the circumstances. As always in any case, the advocates must be extremely careful to support their contentions with *facts* not conclusions. As the opinion illustrates, that means saying more than the parties "understood" a given circumstance but showing that understanding from their statements and conduct.

> **Statutory Interpretation:** *The proper interpretation of a statute or constitutional provision is informed by more than its particular language and must take the larger statutory or constitutional framework into account.*

> ***Ad Valorem* Public Use Property Tax Exemption:** ***P****ublic use of privately owned property does not make that property owned by the public as required to satisfy the* ad valorem *tax exemption for state-owned property.*

In *Odyssey 2020 Academy, Inc. v. Galveston Central Appraisal District,* the Texas Supreme Court ruled in a 6:3 decision by Justice Busby that a charter school is not exempt from paying *ad valorem* taxes on privately-owned subleased property, even if the school pays for the lease with state funds. State-owned property is exempt from *ad valorem* taxes under Tax Code §11.11(a). Education Code § 12.128(a) says that property a charter school purchases or leases with state funds is considered public property. The charter school argued the subleased property was exempt as "state-owned" property under these statutes.

The charter school subleased the property in 2009. The sublease obligated the school to pay rent and *ad valorem* taxes and provided explicitly the school had no purchase rights to any of the property. Seven years later, the school unsuccessfully sought an exemption from *ad valorem* taxes from 2016 onward. A majority of the Texas Supreme Court ruled the subleased property did not satisfy the "public" property exemption because the private individuals held fee title.

According to the majority, the Texas constitution forbids the Legislature from enacting a legal fiction that the public use of privately owned property makes that property owned by the public for purposes of satisfying the *ad valorem* tax exemption. The majority reasoned the charter school's contention that the property should be exempt as state-owned strained the exemption's ownership requirement language and violated the Texas constitution's limits on legislative authority to create tax exemptions by requiring that taxation be "equal and uniform." Tex. Const. art. VIII, § 1(a). "If [Texans] want to exempt any property owner who leases to a charter school and take that additional tax burden on themselves, they can … by amending the constitution," and that it is not the "place [of the judiciary] to override their policy judgment." The majority acknowledged the Education Code provides no exceptions to deeming

property used by a school as "public" property, but could not reconcile this unequivocal statutory language with the fact the Education Code did not purport to deprive the private lessors of their fee interest ownership.

The majority was also unpersuaded public use alone satisfies the exemption's requirements when other types of constitutionally-exempted property is considered. These include "the property of counties, cities and towns, owned and held *only* for public purposes, such as public buildings and the sites therefore ... and all other property devoted *exclusively* to the use and benefit of the public." (Emphasis added). The majority reasoned all of these were subsets of property owned by governmental entities and did impliedly authorize the exemption's application to an entirely different category of property ultimately held by private owners.

In a dissenting opinion Justice Eva Guzman, joined by Chief Justice Hecht and Justice Huddle, urged the school was qualified for the exemption. The dissenters would have interpreted article XI, §9 of the constitution to create a separate tax break when a public entity uses property exclusively for public purposes. That provision says "[t]he property of counties, cities and towns, owned and held only for public purposes … and all other property devoted exclusively to the use and benefit of the public shall be exempt . . . from taxation." In the view of the dissenters, the Article 11 exemption extends to property that, exclusively for public purposes, is *either owned* by public entities or *used* by public entities. The dissent goes into considerable grammatical detail about why Article 11 "recognizes that property used exclusively for the public may be owned but not possessed by a public entity and, conversely, that such property may be possessed but not so owned." The majority, however, dismissed the dissenting opinion as an interpretation that contradicted both precedent and the plain language of the provision itself and made other constitutional provisions redundancies.

Although the particulars of the tax exemption may not be something many practitioners will ever encounter, the larger dispute over how to interpret statutes is a subject practitioners will frequently encounter. The contrasting approaches of the majority and the dissent are, interestingly enough, rooted in opposing approaches to a common theory of document interpretation which highlights the soft underbelly of textualism. Like beauty, the standards by which textualist interpretations are judged are ultimately subjective because they exist only in the eyes of the beholder.

> ***Ecclesiastical Abstention*:** *The ecclesiastical abstention doctrine based on First Amendment protections prevents the exercise of jurisdiction over a suit if its resolution invades the church's determination of religious doctrine or governance.*

The First Amendment guarantees a religious institution the right to determine questions concerning faith and doctrine as well as church governance. As a result, ecclesiastical abstention prohibits civil courts from delving into these internal issues. *In re Diocese of Lubbock* asked the Court about the limits of this doctrine. The case arose when a deacon sued the diocese for defamation after the diocese named him in a list of clergy facing credible allegations of sexually abusing minors. The accusations against the deacon, however, did not involve a minor. Instead, he was accused of a relationship with a woman "with a history of mental and emotional disorders." The diocese rejected the deacon's demand to retract his name from the list because it considered the woman within the Canon Law definition of "minor" which included adults vulnerable due to a habitual inability to exercise reason.

The diocese unsuccessfully moved to dismiss the suit under the ecclesiastical-abstention doctrine. Reasoning the dispute ceased to be purely ecclesiastical after the list of the accused was released publicly, the court of appeals denied the request of the diocese to issue a writ of mandamus directing dismissal of the deacon's suit. A majority of seven Justices, under an opinion by Justice Devine (and you thought the SCOTX had no sense of humor), the majority ruled the trial court had no jurisdiction because the resolution of the suit would require invasion of religious matters protected by the First Amendment.

The ecclesiastical abstention doctrine prevents the exercise of jurisdiction when resolution of the issue turns on questions of religious doctrine or church governance.

The majority explained ecclesiastical abstention protects the rights of "hierarchical religious bodies to establish their own internal rules and regulations and to create tribunals for adjudicating disputes over religious matters" and deciding "its own ecclesiastical rules, customs, and laws." But the doctrine is not boundless. "A court

may exercise jurisdiction … if it can apply neutral principles of law that will not require inquiry into religious doctrine, interference with [believers'] free-exercise rights … , or meddling in church government." That boundary is determined by whether the dispute is one about religion or merely the application of civil law. If questions of church doctrine cannot be separated from the legal dispute, courts must invoke ecclesiastical abstention and dismiss.

In this case, the deacon claimed the diocese defamed him by listing him among those credibly accused of sexual misconduct with a minor. As part of his contention that his inclusion on the list was defamatory, the deacon challenged whether the woman in question fit the Canon Law definition of "minor" employed by the diocese in formulating the list. The list was formulated after an investigation directed by the United States Conference of Bishops to comply with the directive for more transparent communicat[ions] with the public [about] sexual abuse of minors by the clergy."

The majority believed the deacon's defamation claim directly questioned ecclesiastical doctrine and governance.

Because the majority believed the deacon's claims directly … question the [d]iocese's investigation and conclusions ... , they necessarily reach behind the ecclesiastical curtain." Stated differently, the deacon's defamation claim could not be decided without invading the church's internal investigatory process and without deciding whether the diocese properly applied Canon Law – something the First Amendment does not permit.

The majority rejected the reasoning of the court of appeals that when the diocese decided to make the list available to the public, it ceased to be a matter of internal religious doctrine. As suggested by the necessity of complete separation between the legal dispute and religious doctrine, the majority ruled "[w]hether a party's claims … are barred by ecclesiastical abstention, though, is based not on whether a publication goes beyond church walls but rather whether the substance and nature of the plaintiff's claims implicate ecclesiastical matters, including a church's internal affairs, governance, or administration." The majority perceived the deacon's defamation claim to challenge not only religious doctrine concerning the who was a "minor" under Canon Law, but also church governance by questioning the implementation of the directive to investigate alleged sexual abuse of minors by the clergy. As such, the majority reasoned, the deacon's suit could not be resolved solely by the application of neutral legal principles.

The concurring Justice applies ecclesiastical abstention because the judiciary should defer to the church's pursuit of the perfect judgment of God.

Justice Blacklock concurred to point out ecclesiastical abstention was appropriate deference to the mission of the church. He described that mission as one "seek[ing] conformity with God's perfect judgment, not … man's imperfect variety." He also maintained abstention was essential to the right of individuals to freely exercise their religious beliefs. "[I]t is not for courts to apply the earthly standards of defamation law to the church's words." It is unknown whether a similar deference would be shown if the church in question professed a less accepted faith tradition.

The dissent posits the First Amendment does not protect publication of defamatory statements outside the church and to the public at large.

Justice Jeffrey S. Boyd dissented because the publication of the list to the public did not include the Canon Law explanation of what was meant by reference to a "minor." Justice Boyd surveyed the application of ecclesiastical abstention in other jurisdictions and concluded that it the majority of jurisdictions hold it only applied to the publication of defamatory statements only to church leaders or members. Some of these cases involved publication that was part of an internal investigatory or disciplinary process. Justice Boyd also pointed out that numerous courts hold ecclesiastical abstention does not apply to alleged defamatory statements "communicated beyond the religious organization." When the diocese communicated the alleged defamatory statement about the deacon to the public at large, he maintained the church's conduct was no longer "strictly and purely ecclesiastical in its character." To Justice Boyd, the defamation claims could be separated from the church's doctrine and investigatory directive.

According to Justice Boyd, the deacon's complaint was not about the decision to investigate or publish the list, but rather about his name being included on the list and thereby communicating he had credibly accused of

sexually abusing a "minor." Justice Boyd advances a distinction which, in this writer's opinion, is less artificial. He posits that adjudication of the defamation claim would only threaten "a religious organization's ability to make false and defamatory statements about its clergy or members to the general public." That ability, Justice Boyd concluded, is not protected by the First Amendment.

> **Summary Judgment – Tolling Limitations:** Like the discovery rule or any other issue that delays the accrual of a cause of action, the movant for traditional summary judgment based on limitations must conclusively negate the non-movant's claim mental incapacity deferred the accrual of a cause of action.

Many Texas limitations statutes require suit within a prescribed time after the cause of action accrues. To obtain a *traditional* summary judgment based on limitations, the defendant must conclusively establish when the cause of action accrued and that the suit was not filed before the limitations period expired. Texas traditional summary judgment procedure distinguishes between a *tolling* provision that delays accrual and a non-movant's assertion of a confession and avoidance concerning the burden of summary judgment proof.

If the plaintiff raises a *tolling* provision to delay the accrual date to avoid limitations, the movant for a traditional summary judgment must conclusively negate its application to obtain summary judgment based on limitations, even though plaintiff would have the burden of proof on this issue at trial. If, however, the movant conclusively negates the tolling provision's applicability, the non-movant must then assert a matter in confession-and-avoidance, such as fraud or estoppel to avoid summary judgment. As the name implies, confession-and-avoidance concedes limitations has run, but asserts a matter that avoids its effect.

If the non-movant seeks to avoid limitations by asserting a confession and avoidance, the non-movant bears the burden of adducing some summary judgment evidence sufficient to raise a fact issue on each element of the confession and avoidance.

In *Draughon v. Johnson*, the plaintiff sued to quiet title eleven years after executing a deed conveying the disputed property. The grantee filed a traditional summary judgment motion asserting a four-year limitations statute. Plaintiff claimed limitations was tolled because he had been mentally incompetent. At issue was whether mental incapacity should be treated like a tolling provision which the movant must conclusively negate, or like a confession and avoidance, on which the non-movant has the burden of adducing some evidence. The court of appeals treated mental incapacity as a confession and avoidance on which the non-movant had the burden of coming forward with some evidence sufficient to raise a fact issue.

Under an opinion by Justice Busby, a five-justice majority reversed, treating mental capacity like a tolling provision. Accordingly, the *movant* seeking a traditional summary judgment is obliged to conclusively negate mental incapacity to establish an essential element of the limitations defense: the accrual of a cause of action. The majority explained that this was true even though there is a presumption of sufficient capacity and the party claiming incapacity would have the burden in a trial. Such presumptions do not shift the movant's burden of establishing each and every element of an affirmative defense made the basis of the traditional summary judgment motion. The majority further analogized to the discovery rule, which a movant asserting limitations is obliged to negate if the non-movant pleads it. On the other hand, when the non-movant asserts an equitable defense that would defeat an otherwise valid limitations defense, the *non-movant* bears the burden of adducing some probative evidence raising a fact issue on each and every element of that defense.

The majority points out a summary judgment movant can shift to the nonmovant the burden of coming forward with evidence to support a claim that limitations was tolled by asserting a *no evidence* motion for summary judgment. The "no evidence" variant of state summary judgment practice was adopted to more closely conform to federal summary judgment practice in which the burden of adducing summary judgment evidence on a given issue remained with the party that would have the burden at trial on that issue.

In a dissenting opinion by Justice Bland, the author along with Chief Justice Hecht and Justices Blacklock and Huddle, rejected the notion that merely pleading or asserting unsound mind as a basis for tolling limitations was

sufficient to burden the traditional summary judgment movant to negate it. The dissenters maintained the non-movant should bear the burden of adducing at least some evidence sufficient to raise a fact issue that the cause of action had not accrued due to the plaintiff's mental incapacity. The dissent reasoned this special rule concerning the burden of coming forward with evidence was warranted by the presumption of capacity. At trial, an unrebutted presumption substitutes for evidence.

The majority responded, however, that the rationale applied generally to all tolling provisions have consistently rejected placing the burden of raising a fact issue in traditional summary judgment practice on the party who would have the burden of proof at trial. To the majority, bright-line rules and consistency concerning limitations was essential because "[c]hipping away at doctrinal consistency in this manner will only sow confusion."

In this writer's opinion, the dissent's real justification for a special rule concerning mental incapacity is the party claiming it has the best access to the information necessary to prove it. This view, however, overlooks the discovery available before a traditional summary judgment motion should be entertained. Moreover, the majority overlooks the traditional summary judgment's objective of only eliminating patently unmeritorious issues or cases. If the case is patently unmeritorious, the movant is still able to meet the burden of conclusively disproving it. However, if not patently unmeritorious, the difficulty of proof means the issue is one that is rightly decided by the trier of fact in a plenary trial. Holding otherwise would be inconsistent with the limited objective of the traditional summary judgment as a means of more efficiently using judicial resources.