

Oil and Gas, Natural Resources, and Energy Journal

Volume 2 | Number 3
2016 SURVEY ON OIL & GAS


September 2016

Ohio

Timothy M. McKeen

M. Vafa Barissi

Follow this and additional works at: <http://digitalcommons.law.ou.edu/onej>

 Part of the [Energy and Utilities Law Commons](#), [Natural Resources Law Commons](#), and the [Oil, Gas, and Mineral Law Commons](#)

Recommended Citation

Timothy M. McKeen & M. V. Barissi, *Ohio*, 2 OIL & GAS, NAT. RESOURCES & ENERGY J. 269 (2016), <http://digitalcommons.law.ou.edu/onej/vol2/iss3/18>

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in Oil and Gas, Natural Resources, and Energy Journal by an authorized administrator of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.

ONE J

Oil and Gas, Natural Resources, and Energy Journal

VOLUME 2

NUMBER 3

OHIO



*Timothy M. McKeen and M. Vafa Barissi**

Table of Contents

I. Introduction	270
II. Statutory Law	270
III. Common Law	270
A. Leases	270

* Timothy McKeen is a member the Wheeling office of Steptoe & Johnson PLLC and M. Vafa Barissi is a member of the Columbus office of Steptoe & Johnson PLLC. Both authors would like to thank and credit Ryan S. Bundy, Melissa S. Grimes, and Casey Wynn of Steptoe & Johnson PLLC for their contributions to this survey.

B. Dormant Mineral Act..... 272
 IV. Conclusion 273

I. Introduction

This year Ohio continued to advance its pursuit of developing its oil and gas reserves in a prudent and effective manner through statutory enactments and common law decisions.

II. Statutory Law

The Ohio House of Representatives enacted Ohio House Bill 390 (“Bill 390”). The purpose of Bill 390 is to mitigate delays in unit designation orders that include mineral rights owned by the Ohio Department of Transportation (“ODOT”). If an applicant includes such mineral rights in their application, then the Chief of the Division of Oil and Gas Resources Management (the “Chief”) shall have a forty-five day period in which to either deny or grant said applicant’s request for a declaration of pooling.¹ This time constraint shall retroactively apply to all applications where, prior to the law’s effective date, the Chief held a hearing that impacted ODOT’s mineral rights.² The applicant shall have a twenty-four month grace period to commence operations for all orders issued pursuant to Bill 390.³

III. Common Law

Several Ohio courts provided guidance in the various complexities that naturally arise in the development of valuable oil and gas rights.

A. Leases

1. Implied Covenant to Develop and No-Term Lease

The Ohio Supreme Court (the “Court”) considered whether an oil and gas lease contains an implied covenant to develop, even if the parties thereto specifically disclaimed all implied covenants. In its recent decision set forth in *Claugus Family Farm, L.P. v. Seventh District Court of Appeals*, a consolidated action consisting of *Hustack v. Beck Energy Corp.* (previously *Hupp v. Beck Energy Corp.*) and *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of*

1. H.R. 390, 131st Gen. Assemb., Reg. Sess. (Ohio 2016).
 2. *Id.*
 3. *Id.*

Appeals,⁴ the Court applied the general rule that a lease does not include an implied covenant to develop when that lease either requires development within a specified time frame or otherwise disclaims implied covenants.⁵ In *Claugus Family Farm*, the Court found that the lease was not subject to an implied covenant to develop during the ten-year primary term because it expressly disclaimed such covenants.⁶

The Court then reviewed the Seventh District Court of Appeals analysis of whether the language in the leases at issue in *Claugus Family Farm* created no-term leases, which are strongly disfavored in Ohio.⁷ The Seventh District Court of Appeals held that the leases actually contained two terms: a ten-year primary term, and a secondary term contingent upon oil and gas production.⁸ The Seventh District Court of Appeals also found that delay rentals apply only during the primary ten-year term and, thus, had no impact on the lease's perpetuity.⁹ The Court agreed with the Seventh District Court of Appeals and ruled that the leases at issue were not perpetual in nature because a delay rental that allows for continued rights regardless of development only applies during the primary term.¹⁰

2. Royalties

The Fifth District Court of Appeals examined whether the improper payment of royalties to one lessor has any effect on the royalty rights of another lessor in its recent decision set forth in *K & D Farms, Ltd. V. Enervest Operating, LLC*.¹¹ The property in question was subject to several oil and gas leases executed in 1954.¹² Each lease allowed the lessee to consolidate various tracts of land, with royalties to be paid proportional to acreage.¹³ The lessee made an inadvertent mistake and paid the appellants full royalties, when

4. 145 Ohio St. 3d 180, 2016-Ohio-178, 47 N.E.3d 836.

5. *Id.* at 186-87, 2016-Ohio-178, ¶ 31, 47 N.E.3d at 843.

6. *Id.* at 187, 2016-Ohio-178, ¶ 31, 47 N.E.3d at 843.

7. *Id.* at 184, 2016-Ohio-178, ¶ 20-21, 47 N.E.3d at 841.

8. *Id.* at 185-86, 2016-Ohio-178, ¶¶ 22-30, 47 N.E.3d at 841-42.

9. *Id.*

10. *Id.*

11. *K & D Farms, Ltd. v. Enervest Operating, LLC*, No. 2015CA000038, 2015 WL 6507786.

12. *Id.* at *1.

13. *Id.*

they were only entitled to their proportionate share.¹⁴ Upon awareness of its mistake, the lessee notified the appellants and indicated that the four years of overpaid royalties would be subtracted from their future royalty payments.¹⁵ Dissatisfied with the lessee's notification, the appellants brought suit. The Fifth District Court of Appeals affirmed the trial court's dismissal of the appellant's breach of contract claim because the language clearly indicated that the owners proportionally share in the royalties from any well drilled on the consolidated unit.¹⁶ The Court rejected the appellants' arguments and noted that failing to include all royalty owners on an ODNR well permit does not alter the parties' lease or consolidation agreement;¹⁷ that using the word "agent" in itself does not create a fiduciary relationship between lessor and lessee;¹⁸ that even with a fiduciary duty, the appellants had failed to assert damages;¹⁹ and, that the economic loss doctrine generally prevents recovery in damages of purely economic loss.²⁰

B. Dormant Mineral Act

The Court issued a significant Ohio Dormant Mineral Act ("ODMA") opinion by providing further clarity to what constitutes a saving event under the ODMA in its decision set forth in *Chesapeake Exploration, LLC v. Buell*.²¹ ODMA saving events, whether under the 1989 version or the 2006 version, crucially determine whether a severed mineral interest holder maintains their mineral rights or if the interest re-vests with the surface owner.²² Ohio Rev. Code Ann. § 5301.56(B) dictates that severed mineral interest holders wishing to avoid abandonment must make their interests the subject of a title transaction or else be protected by one of the five other specified options.²³ With respect to leases, the Court conclusively held that a recorded lease is a title transaction. It also held that the unrecorded expiration of said lease is

14. *Id.* at *2.

15. *Id.*

16. *Id.* at *4-6.

17. *Id.* at *7.

18. *Id.* at *8-9.

19. *Id.*

20. *Id.* at *9.

21. *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St. 3d 490, 2015-Ohio-4551, 45 N.E.3d 185.

22. *Id.* at 496 n.2, 2015-Ohio-4551, ¶ 27, 45 N.E.3d at 191.

23. *Id.*

not a title transaction and therefore does not constitute an ODMA savings event.²⁴

IV. Conclusion

Ohio oil and gas law continues to evolve as the legislature enacts statutes that govern the oil and gas development. The Court currently has a number of pending cases, which will likely have a huge impact on the interpretation of the ODMA and other issues. Courts on all levels, from trial courts to the Supreme Court of Ohio, are taking steps to further clarify Ohio oil and gas law.

24. *Id.* at 509, 2015-Ohio-4551, ¶ 84, 45 N.E.3d at 202.