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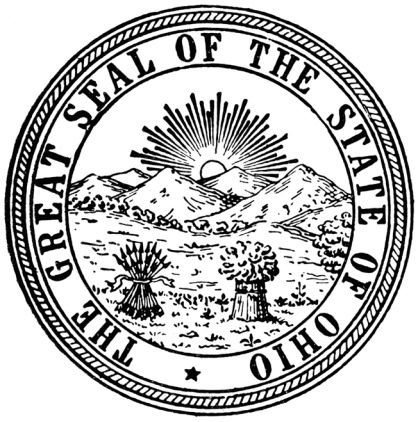

OHIO

Gregory W. Watts & Matthew W. Onest[†]

I. MINERAL OWNERSHIP

A. *The Ohio Marketable Title Act*

Ohio courts continue applying the Ohio Marketable Title Act to severed oil and gas rights.[1] As with many statutes, there are generally two questions that must be answered: (1) does the particular statute apply to the particular facts of the case and (2) if the statute applies in the first instance, how does a court apply the statute to the particular facts of the case? Both questions about Ohio's Marketable Title Act and severed mineral interests were further examined and explored in 2020.

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1. Senterra Ltd. v. Winland, 148 N.E.3d 34, 39–41 (Ohio Ct. App. 2019), *modified on reconsideration*, No. 18 BE 0051, 2019 WL 7670234 (Ohio Ct. App. 2019), *appeal granted*, 145 N.E.3d 311 (Ohio 2020).

1. Does the Ohio Marketable Title Act apply to severed minerals, generally?

In *West v. Bode*, the Ohio Supreme Court accepted a discretionary appeal on the specific issue of whether the Ohio Marketable Title Act applies to severed mineral rights or whether the enactment of the Ohio Dormant Mineral Act (R.C. 5301.56) precluded its application.[2] On December 3, 2020, the Ohio Supreme Court finally answered this question in the affirmative.[3]

The Ohio Supreme Court held that the Ohio Marketable Title still applies to severed mineral interests.[4] The Court determined that (1) there was not an "irreconcilable conflict between the Dormant Mineral Act and the Marketable Title Act"[5], (2) that the Ohio General Assembly intended for both statutes to apply to severed mineral interests[6], and (3) the statutes provide "independent, alternative statutory mechanisms that may be used to reunite severed mineral interests with the surface property subject to those interests."[7]

As to the claim there was a conflict between the statutes because the statutes have different mechanisms, the Court saw no problem with applying both statutes independent of one another: "[b]ut the fact that the two acts operate differently, toward different ends, does not mean that they are irreconcilably in conflict. Indeed, it suggests the contrary."[8]

Based on the West decision, surface owners may use both statutes, "either of which may be used to effect the termination of a severed mineral interest, depending on the circumstances of the case and the time that has elapsed."[9]

On December 29, 2020, the Ohio Supreme Court denied the mineral owners' motion for reconsideration in *West*, thereby solidifying its present precedential value.[10]

The Fifth and Seventh District Court of Appeals had, on several occasions, confronted the question posed in *West*. From 2019 to 2020, like in previous years, these courts continued to hold that the Marketable Title Act does indeed apply to severed minerals, in

2. West v. Bode, 137 N.E.3d 1190, 1196 (Ohio 2019).
3. West v. Bode, No. 2019-1494, 2020 WL 7049820, ¶ 11(Ohio 2020).
4. *Id.* ¶¶ 1-2.
5. *Id.* ¶¶ 2, 27-42.
6. *Id.*
7. *Id.* ¶ 59.
8. *Id.* ¶ 29.
9. *Id.* ¶ 44.
10. *West v. Bode*, 159 N.E.3d 1168 (Ohio 2019).

conjunction with and parallel to the Ohio Dormant Mineral Act.[11] Ohioans and legal practitioners now have the Ohio Supreme Court's say on this matter.

2. How does the Ohio Marketable Title Act apply to the particular severed mineral at issue in each case?

Moving past the threshold question of whether to apply the Marketable Title Act to severed mineral interests, Ohio courts continue to examine and refine how the particular provisions of the statute apply to certain mineral interests or certain fact patterns.

In *Senterra Ltd. v. Winland*, the Seventh District Court of Appeals held that: (1) a surface owner was not precluded from using the Marketable Title Act to extinguish a mineral interest after the surface owner attempted an abandonment under the Dormant Mineral Act and (2) actions by the surface owner or mineral interest holder under the Dormant Mineral Act would not revive an interest already extinguished by the Marketable Title Act.

The case raised three important issues. First, the court held the Marketable Title Act applies to severed mineral rights.[12] Second, the court held that a landowner is permitted to use the Marketable Title Act to extinguish mineral interests when the landowner had already attempted to use the Dormant Mineral Act to abandon the same interest allowed, noting that a landowner can raise alternative theories of recovery in a case.[13] Further, under Ohio Revised Code section 5301.51, if a mineral interest has already been extinguished under the Marketable Title Act, it cannot be revived. Therefore, it is unclear how an action by the surface owner (whether under the Dormant Mineral Act or not) could somehow revive an already extinguished interest.

Third, how do you determine the forty-year look back period under the MTA? Ohio Revised Code section 5301.48 indicates that a person has record marketable title if he or she has an unbroken chain of title

11. *See* Peppertree Farms, L.L.C., v. Thonen, No. 2019CA00159, 2020 WL 2563411, at *9 (Ohio Ct. App. May 19, 2020); Peppertree Farms, L.L.C. v. Thonen, No. 2019CA00161, 2020 WL 2563417, at *8 (Ohio Ct. App. May 19, 2020); Erickson, 151 N.E.3d at 116; Cain v. Horn, No. 19CA000031, 2020 WL 2989117, at *3 (Ohio Ct. App. May 11, 2020), *appeal granted*, 151 N.E.3d 634 (Ohio 2020); Miller v. Mellott, 130 N.E.3d 1021, 1026 (Ohio Ct. App. 2019), *appeal granted*, 138 N.E.3d 1163 (Ohio 2020).

12. Senterra Ltd. v. Winland, 148 N.E.3d 34, 39–41 (Ohio Ct. App. 2019), *modified on reconsideration*, No. 18 BE 0051, 2019 WL 7670234 (Ohio Ct. App. 2019), *appeal granted*, 145 N.E.3d 311 (Ohio 2020).

13. *Id.* at 40.

for forty years or more with nothing in the record purporting to divest the person of the interest. Record marketable title extinguished interests and claims existing prior to the effective date of the root of title.[14] "Root of title" is defined as:

> [t]hat conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by the person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined.[15]

The court found that a root of title has two elements; one is temporal, and one is substantive.[16] The root of title cannot be the initial severance deed of the interest the person is seeking to extinguish, but it can contain a repetition of a reservation. To determine the root of title, one must find a deed at least forty years prior to the time marketability is being determined and then examine the recordings in the forty years succeeding that title transaction to see if there is anything in the record purporting to divest the person of the claimed interest.[17] If there is, then that deed does not qualify as the root of title, and the next preceding deed must be examined. A title examiner continues moving back in time until he or she finds a conveyance followed by forty years of clean title. That document is the root, and the examiner can safely conclude that the act extinguished all competing interests recorded prior to that date.

Once the examiner finds a forty-year period where there is no preserving act, it is important to understand that no act occurring after the forty-year period can revive the extinguished interest. Therefore, while there were leases executed by the mineral holders in 2016 and 2017, those leases would not revive the interest if it was already extinguished. The court found that there were no preservation acts within the applicable forty-year periods (1954–1994 for one reservation and 1971–2011 as to other reservations), and therefore they were extinguished.[18]

14. OHIO REV. CODE ANN. § 5301.47(A) (West 2018).
15. *Id.* § 53047(E).
16. *Senterra*, 148 N.E.3d at 42.7
17. *Id.* at 42–43.
18. *See id.* at 48–49.

In *Richmond Mills, Inc. v. Ferraro*, the Seventh District Court of Appeals, in addition to deciding that the Marketable Title Act applies to severed mineral interests, interpreted Ohio Revised Code section 5301.51(B). That portion of the Ohio Revised Code provides a method for preserving any possessory interest under the MTA:

> If the same record owner of any possessory interest in land has been in possession of the land continuously for a period of forty years or more, during which period no title transaction with respect to such interest appears of record in his chain of title, and no notice has been filed by him on his behalf as provided in division (A) of this section, and such possession continues to the time when marketability is being determined, the period of possession is equivalent to the filing of the notice immediately preceding the termination of the forty-year period described in division (A) of this section.[19]

The physical possession, preserving event under the Marketable Title Act applies to all possessory interests affecting real property, not just severed oil and gas rights. The Seventh District interpreted this statute in a more expansive manner by holding there is no need for the possessory interest owner to physically possess the land. Instead, the court opted for a definition of possession that only requires the owner to still be alive when marketability is determined.[20] Under such an interpretation, all record owners of a pre-root interest would be presumed to be in constructive possession merely by being a record owner.

B. *The Ohio Dormant Mineral Act*

1. How extensive of a search for mineral holders must a surface owner undertake before publishing notice of intent to abandon severed minerals?

In *Gerrity v. Chervenak,*[21] the Ohio Supreme Court addressed the reach of the notice requirements the Dormant Mineral Act imposes as

19. OHIO REV. CODE ANN. § 5301.51(B) (West 2018).
20. Richmond Mills, Inc. v. Ferraro, No. 18 JE 0015, 2019 WL 6974458, *8 (Ohio Ct. App. 2019), *appeal granted*, 148 N.E.3d 595 (Ohio 2020).
21. No. 2019-1123 (Ohio 2020).

prerequisites to deeming a severed mineral interest abandoned and vested in the owner of the surface of the land subject to the severed mineral interest.

In *Gerrity*, the minerals to Guernsey County property were severed in a 1961 deed.[22] A title search revealed the mineral rights were conveyed to Jane F. Richards by a certificate of transfer filed with the Guernsey County Recorder in 1965.[23] The certificate of transfer lists a Cleveland, Ohio address for Richards.[24] "The Chervenak chain of title contained no other records regarding ownership of the severed mineral interest."[25]

Before a severed mineral interest becomes vested in the owner of the surface, the Dormant Mineral Act provides the surface owner shall "[s]erve notice by certified mail, return receipt requested, to each holder or each holder's successors or assignees, at the last known address of each, of the owner's intent to declare the mineral interest abandoned.[26] If service of notice cannot be completed to any holder, the owner shall publish notice of the owner's intent to declare the mineral interest abandoned[.]"[27]

The Dormant Mineral Act broadly defines holder to include the record holder, and any person who derives the person's rights from the record holder.[28] The Supreme Court found that a surface owner does not need to specifically identify by name every holder, because when the identity of a holder cannot be identified, publication is expressly permitted when service cannot be completed by certified mail – which is plainly the case when a holder cannot be identified.[29]

The Supreme Court noted the Dormant Mineral Act was enacted to "address the difficulty (and sometimes impossibility) of identifying the owners of severed mineral interests and to encourage reliance on record chains of title."[30] Requiring endless searching is not the intended consequence of the statute because "[n]o matter the effort expended, a surface owner can never be certain that he has identified every successor and assignee of every holder who appears in the public

22. *Id.* ¶ 2.
23. *Id.* ¶ 3.
24. *Id.*
25. *Id.*
26. OHIO REV. CODE ANN. § 5301.56(E) (West 2021)
27. *Id.*
28. OHIO REV. CODE ANN. § 5301.56(A)(1) (West 2021).
29. *Gerrity*, No. 2019-1123, ¶ 17.
30. *Id.* ¶ 20.

record."[31] Indeed, the Supreme Court held that the legislature did not intend service by certified mail to be mandatory, nor does it mandate an attempt at service by certified mail "when it is apparent that such service cannot be completed."[32]

The Supreme Court rejected Gerrity's attempt to incorporate the service requirements under Civil Rule 4.4, which requires an affidavit of all efforts to locate a party to be served with notice of a lawsuit before service by publication can be granted by a court order.[33]

The Supreme Court also rejected Gerrity's argument that a reasonable search should include the internet:

> The ever-changing quantum and quality of information available on the Internet, the inconsistent reliability of that information, and the variability of Internet-search results all weigh against a bright-line requirement for online searches, let alone a bright-line requirement that a surface owner consult any particular paid subscription services, to identify heirs to a severed mineral interest.[34]

Whether a party has exercised reasonable diligence will depend on the facts and circumstances of each case.[35] Thus, no bright line test exists. However, the Supreme Court provided guidance on the test. A surface owner must start by searching the chain of title to the property at interest as a starting point.[36] "In addition to property records in the county in which the land that is subject to the mineral interest is located, a reasonable search for holders of a severed mineral interest will generally also include a search of court records, including probate records, in that county."[37] Whether any further searching will be necessary will depend on the results of the county search or the surface owner's independent knowledge.[38] Assuming those searches do not reveal any additional information (including that the holder has died,

31. *Id.* ¶ 21.
32. *Id.* ¶ 24.
33. *Id.* ¶ 27 ("The General Assembly has not incorporated the requirements of Civ.R. 4.4 or R.C. 2703.24—or any similar requirements—into the Dormant Mineral Act as prerequisites for using notice by publication, and this court may not do so by judicial fiat.").
34. *Id.* ¶ 34.
35. *Id.* ¶ 31.
36. *Id.* ¶ 35.
37. *Id.*
38. *Id.* ¶ 36.

transferred the interest, or has a more recent address), it appears no further search is necessary, and the surface owner can proceed to send notice, including by publication (which the Court held raises no due-process concerns).

In *Fonzi v. Brown*, the Seventh District Court of Appeals examined what level of research is needed, specifically looking at whether a surface owner must look at counties outside where the real property at issue is located. The court stated, "[w]e again decline to establish a bright-line rule requiring a specific search process and reaffirm that what constitutes reasonable due diligence will depend on the facts and circumstances of each case."[39] Thus, *Fonzi* does not require any specific type of search. Instead, the decision reinforces the need to look at each case on its unique facts.

Additionally, in *Fonzi*, the title researcher had specific knowledge the reserving party lived in Washington County, Pennsylvania, as the "reservation deed expressly stated that this is where the Fonzis lived."[40] The title researcher "conceded that he learned this fact early in his search process."[41] It was "[t]his fact alone that would have led any reasonable researcher to extend the search into Washington County, Pennsylvania."[42] Therefore, the Seventh District held that the surface owner "had specific knowledge" that the mineral owners or their families lived in a different county and state than the subject property.[43] The surface owner's "failure to conduct any search into the Washington County public records after learning that this is where the Fonzis resided" was "per se unreasonable based on the facts of this case."[44] The outcome in *Fonzi*, that the search was unreasonable, turned on one fact—the surface owner had actual knowledge of where the reserving parties lived and did not check there.

In *Hutchins v. Baker*, the Seventh District Court of Appeals decided whether an affidavit of fact relating to how a holder allegedly acquired her interest in the minerals was a title transaction, meaning a preserving event under the Ohio Dormant Mineral Act.[45] The affidavit at issue discussed three alleged title transactions from which the holder

39. Fonzi v. Brown, No.19 MO 0012, 2020 WL 3639886, at *6 (Ohio Ct. App. June 1, 2020).
40. *Id.*
41. *Id.*
42. *Id.*
43. *Id.* at *6.
44. *Id.*
45. Hutchins v. Baker, No. 19 MO 0005, 2020 WL 1488726, at *3–*4 (Ohio Ct. App. Feb. 26, 2020).)

claimed her title to the minerals.[46] It also described "each death and passing of the interest was a title transaction regarding the mineral interest."[47] The affidavit described "family history and heirship" but did not actually claim to convey the interest from one party to another party (the appellant).[48]

The term "title transaction" is not defined within Ohio Revised Code section 5301.56; however, it has been interpreted to have the same meaning as defined in the Ohio Marketable Title Act.[49] A title transaction is "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quit claim deed, or mortgage."[50]

Although the affidavit at issue in *Hutchins* described "how title was received," it was "not a transaction."[51] And descriptions "of prior title transactions" are not, in and of themselves, title transactions.[52] The *Hutchins* court held the affidavit was not a title transaction and then separately analyzed whether it qualified as a "claim to preserve," as the term is used in the Dormant Mineral Act.[53] The court ultimately decided it was not a valid claim to preserve because it did not contain: (1) the mineral holder's address; (2) the names of the record owner of the lands covered by the affidavit (meaning the surface owners); (3) the recording information for the surface owners' acquisition instruments; and (4) the recording information for the instrument from where the property description came.[54] The court held this affidavit neither strictly nor substantially complied with the statute's requirements, which somewhat contradicts a previous decision from the same court.[55] Thus, it appears the court failed to set any bright-line test on what is sufficient to be a claim to preserve.

46. *Id.* at *3.
47. *Id.*
48. *Id.*
49. Dodd v. Croskey, 37 N.E.3d 147, 154 (Ohio 2015).3
50. OHIO REV. CODE ANN. § 5301.47(F) (West 2018).
51. *Hutchins*, 2020 WL 1488726 at *4.
52. *Id.*
53. *Id.*
54. *Id.* at *4.
55. *Compare id. with* Paul v. Hannon, No. 15 CA 0908, 2017 WL 1231743 at *1 (Ohio Ct. App. Mar. 31, 2017)..

C. *Words of Inheritance and Life Estates*

Real property estates conveyed or reserved prior to March 25, 1925, needed to have words of inheritance, such as "to [grantor], heirs, and assigns forever," otherwise it conveyed or reserved merely a life estate.[56] On March 25, 1925, Ohio General Code section 8510-1 went into effect, which removed the requirement of words of inheritance.

In *Headley v. Ackerman*, the Seventh District Court of Appeals Court held no words of inheritance were required to extend a royalty reservation past a life estate if the interest in the conveyance or reservation was already in existence.[57] Essentially, if the reserving party intended to reserve and at the same time create a new property interest, meaning one unique to that which was previous owned, then words of inheritance were needed. Otherwise, no such words were needed.

In *Peppertree Farms, LLC v. Thonen*, the Fifth District Court of Appeals held that the following pre-1925 mineral reservations had to have words of inheritance or they were merely life estates: "is hereby reserved and is not made part of this transfer" and "excepts and reserves one-half of the royalty of the oil and gas under the described real estate."[58] The court relied on the fact that each of these reservations indicated "the grantors were reserving interests unto themselves, not merely excepting them from the grant."[59] Thus, whether to apply the rule to a particular mineral reservation will be fact-sensitive, focusing upon the original parties' intent.

II. MINERAL EXPLORATION AND PRODUCTION

A. Oil and Gas Lease Issues

1. Lease Royalty Issues

As the development of Ohio's shale moved away from leasing and mineral acquisition and into production of the minerals, there have been significantly more lawsuits about the calculation of landowners'

56. Roberts v. Jones, 91 N.E.2d 817, 818 (Ohio Ct. App. 1949); *see also* Gill v. Fletcher, 78 N.E. 433 (Ohio 1906); Embleton v. McMechen, 143 N.E. 177 (Ohio 1924).

57. Headley v. Ackerman, No. 16 MO 0010, 2017 WL 4351411 at *6 (Sept. 22, 2017).

58. Peppertree Farms, L.L.C., v. Thonen, No. 2019CA00159, 2020 WL 2563411, at *7 (Ohio Ct. App. May 19, 2020).

59. *Id.*

lease royalties. Landowners throughout Ohio have brought claims alleging the producers wrongfully calculated their royalties under the operative oil and gas leases.

The United States District Court for the Northern District of Ohio, operating with diversity jurisdiction, decided two cases involving the same oil and gas lease (meaning the royalty provisions were identical in the cases). In *Bounty Minerals, LLC v. Chesapeake Exploration, LLC* and *Zehentbauer Family Land LP v. Chesapeake Exploration, LLC*, the court decided whether the producer was permitted to assess post-production costs against the landowner's gas royalty under the following royalty provision:

> To pay to the Lessor seventeen and one-half percent [] royalty based upon the gross proceeds paid to Lessee for the gas marketed and used off the leased premises, including casinghead gas or other gaseous substance, and produced from each well drilled thereon, computed at the wellhead from the sale of such gas substances so sold by Lessee in an arm's-length transaction to an unaffiliated bona fide purchaser, or if the sale is to an affiliate of Lessee, the price upon which royalties are based shall be comparable to that which could be obtained in an arm's-length transaction (given the quantity and quality of the gas available for sale from the leased premises and for a similar contract term) and without any deductions or expenses except for Lessee to deduct from Lessor's royalty payments Lessor's prorated share of any tax, severance or otherwise, imposed by any government body. For purposes of this Lease, "gross proceeds" means the total consideration paid for oil, gas, associated hydrocarbons, and marketable by-products produced from the leased premises.[60]

60. Bounty Minerals, LLC v. Chesapeake Expl., LLC, No. 5:17cv1695, 2019 WL 7171353, at *9–10 (N.D. Ohio Dec. 23, 2019); *see also* Zehentbauer Family Land, LP v. Chesapeake Expl., L.L.C., 934 F.3d 496 (6th Cir. 2019) (noting that the oil and gas leases in these cases contained different gas royalty percentages, but contained identical language as to how to calculate the royalties, meaning with or without post-production cost deductions).

In *Bounty*, the district court determined that post-production costs could be assessed against the landowner's royalties, relying on the single phrase "computed at the wellhead."[61] Initially, the district court held that the phrase "computed at the wellhead" applied to both sales to unaffiliated third parties and sales to affiliates.[62] Then, the district court went on to say that the point of valuation for gas royalties under this lease form was "at the wellhead," meaning the lease prohibits only deductions for production costs.[63] And Bounty ultimately lost its claims against Chesapeake in this case because: (1) Bounty did not dispute that the affiliate transaction between Chesapeake Exploration and Chesapeake Marketing was an actual sale and (2) the district court found Bounty's royalties were calculated based on that transaction, meaning calculated at the wellhead.[64]

In *Zehentbauer Family Land*, the district court followed the *Bounty* court's ruling. *Zehentbauer* was a class action, wherein the class included all those lessors with the lease in *Bounty* and who had been receiving royalties or were entitled to receive royalties.[65] The district court agreed with the *Bounty* court's determination that the lessors' royalties should be computed at the wellhead, meaning post-production costs were permitted between the wellhead and the point of actual sale upon which the initial sales price was taken.[66] In doing so, the district court essentially held that the gross proceeds language prevented only those post-production costs incurred prior to the

61. *Bounty Minerals, LLC*, 2019 WL 7171353 at *10–12.

62. *Id.* at *28 (quoting that "Indeed, as counsel for Bounty Minerals repeatedly explained during oral argument, it is Bounty Minerals' position that this Court should entirely ignore the second clause of the gas royalty provision when applying the third clause, rendering the "at the wellhead" language irrelevant. It is well-established, however, that a contract should be construed to give effect to all of its provisions").

63. *Id.* at *29.

64. *Id.* at 33 (quoting that "Notably, Bounty Minerals does not dispute that (1) Chesapeake Exploration's transfer of the hydrocarbons to CEM constitutes a 'sale to an affiliate' under the Lease; or (2) Defendants calculated the value of the hydrocarbons 'at the wellhead.' Therefore, the Court finds that Bounty Minerals has failed to demonstrate that Defendants breached the gas royalty provisions of the relevant leases)".

65. Zehentbauer Family Land LP v. Chesapeake Expl., LLC, 450 F. Supp. 3d 790, 811 (N.D. Ohio), *appeal filed*, No. 20-3469 (6th Cir. May 1, 2020).

66. *Id.* at 809 ("The Court finds the Lease language in the case at bar, 'without any deductions or expenses' means CELLC and TEPUSA may not deduct the post-production costs they pay prior to the sale to CEMLLC or TGPNA. Thus, CELLC and TEPUSA follow the 'without any deductions or expenses' Lease language by taking no deductions for their post-production costs from the price they receive from the affiliate sales to CEMLLC or TGPNA.").

wellhead, thus adopting the netback method for calculating royalties.[67] That Chesapeake Exploration was transacting with its marketing affiliate did not change the district court's analysis on this subject.[68]

In *Gateway Royalty, L.L.C. v. Chesapeake Exploration*, Ohio state courts Carroll County and the Seventh District Court of Appeals decided whether Chesapeake could deduct post-production costs under the following royalty provision:

> as royalty for the gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth [] of such gas so marketed and used at the price paid to [the] [l]essee . . . less any charges for transportation, compression and/or dehydration to deliver the gas for sale.[69]

The appellate court concluded that post-production deductions were permitted because: (1) Chesapeake produced and marketed the gas through production efforts; (2) Chesapeake sold the production to its marketing affiliate "at or near the wellhead"; (3) the Chesapeake marketing affiliate then calculated the netback "price by taking the proceeds it receive[d] from third-party buyers downstream and deducting the transportation, compression, gathering, and other post-production costs it incurs"; and (4) the marketing company then "pa[id] the Chesapeake defendants the 'netback' price for the gas and NGLs produced and sold at the wellhead."[70]

An interesting event occurred in proximity to the above-discussed royalty cases—Chesapeake Energy Corporation and numerous affiliated companies filed for Chapter 11 bankruptcy protections on June 29, 2020.[71]

67. *Id.*

68. *Id.* at 810 ("The objective standard set forth in the plain language of the Gross Royalty Leases is that the price on which royalties are based shall be comparable to that which could be obtained in an arms length sale. Therefore, if CEMLLC pays CELLC or TGPNA pays TEPUSA a price that is greater than what could be obtained in an arms length sale, CELLC/TEPUSA may pay a royalty based on the lower price a non-affiliated buyer would pay for the same gas.").

69. Gateway Royalty, L.L.C. v. Chesapeake Expl., No. 19 CA 0933, 2020 WL 1671626, at ¶ 3 (Ohio Ct. App. Apr. 3, 2020), *reh'g denied sub nom.* Gateway Royalty, L.L.C. v. Chesapeake Exploration, L.L.C., 2020 WL 3604278 (Ohio Ct. App. June 24, 2020).

70. *Id.* at *4.

71. Matthew DiLallo, *Chesapeake Energy Files for Bankruptcy*, THE MOTLEY FOOL (June 29, 2020, 8:58 AM), https://www.fool.com/investing/2020/06/29/chesapeake-energy-files-for-

In *Board of Education Toronto City Schools v. American Energy Utica, LLC*, an Ohio appellate court decided whether the lessor could include American Energy Utica (the ultimately lessee and producer) as a known principal when the oil and gas leasing documents listed only American Energy Utica's agent.[72] The court held that the lessor could do just that because American Energy had authorized the agent to enter into the contract.[73]

2. Statute of Limitations on Lease Expiration Claims

In *Browne v. Artex Oil Co.*, the Ohio Supreme Court held that a cause of action alleging an oil and gas lease expired or terminated by its own terms must be brought within twenty-one years of when the cause of action accrues, which is the statute of limitations for quiet title actions in Ohio.[74] In doing so, the Court rejected the argument that lease termination or expiration claims are based on breaches of contract.[75] The court declined to answer when the cause of action actually accrues, leaving that to future cases.[76]

3. Paying Quantities Under Oil and Gas Leases

Several Ohio cases have examined whether oil and gas leases continue to be held by production in paying quantities. In *Talbott v. Condevco, Inc.*, the Ohio appellate court made several holdings relating to lease expiration: (1) unless an oil and gas lease requires the lessee to comply with state reporting requirements, such as change of ownership forms for oil and gas wells, in order to perpetuate the lease, then the lessee's failure to comply does not terminate the lease;[77] (2) a lessee need not account for the fair market rental value of a swab rig if the lessee owns their own swab rig and no charges are assessed to

bankruptcy.aspx [https://perma.cc/CZ4Z-XYJX].

72. Bd. of Educ. Toronto City Sch. v. Am. Energy Utica, LLC, 152 N.E.3d 378 (Ohio Ct. App.), *appeal denied sub nom.* Toronto City Sch. Bd. of Educ. v. Am. Energy Utica, L.L.C., 146 N.E.3d 586 (Ohio 2020).

73. *Id.* at 390.

74. Browne v. Artex Oil Co., 144 N.E.3d 378, 389 (Ohio 2019) ("We agree with the Fourth District's holding in *Rudolph* that an action to recognize the reversion of mineral interests following the alleged termination of an oil and gas lease pursuant to its express terms is not an action upon a written contract; it is more akin to a quiet-title action.").

75. *Id.*

76. *Id.* at 390.

77. Talbott v. Condevco, Inc., No. 19 MO 0007, 2020 WL 2781729, at *7 (Ohio Ct. App. May 4, 2020).5

the lessee for the swab rig's use;[78] (3) the hours and wages for the lessee's employees who are paid to conduct the swabbing should be counted as an operating expense, meaning the payment counts as an expense in determining paying quantities profit;[79] and (4) the employees' labor rate need not be set at the fair market labor rate for workers outside the lessee for purposes of paying quantities analysis.[80]

In *Tewanger v. Stonebridge Operating Co.*, the appellate court: (1) assumed a paying-quantities claim accrual date of when production under the lease began (which is somewhat confusing considering lease termination cannot, by their nature, accrue until the production ceases);[81] and (2) held that the lease terminated because the lessee conceded a lack of production for six consecutive years.[82]

In *Fiocca v. AIM Energy, LLC*, the appellate court held that a lessee may pool common meter or common tank production from multiple wells located on the same leasehold or leaseholds.[83] In *Fiocca*, the lessee drilled four wells on the same leasehold and pooled their production volumes.[84] The production from those wells was not commingled with production from other wells located on other leaseholds, thus there were no concerns about lack of production on the leasehold at issue.[85] The lease at issue did not require that each well drilled under the lease separately produce in paying quantities, thus there was no issue with commingling the wells' production.

In *Head v. Victor McKenzie Drilling, Inc.*, the appellate court affirmed its prior precedent, holding that Ohio courts have no authority to order an oil and gas well be plugged.[86] Only the Chief of the Ohio Department of Natural Resources has the authority to order wells be plugged.[87]

78. *Id.* at *13.
79. *Id.* at *14.
80. *Id.*
81. Tewanger v. Stonebridge Operating Co., LLC, No. 17 NO 0456, 2020 WL 416290, at *8 (Ohio Ct. App. Jan. 24, 2020).
82. *Id.* at *10.
83. Fiocca v. AIM Energy, LLC, No. 19 CA 0930, 2019 WL 6713251, at *4 (Ohio Ct. App. Dec. 6, 2019).
84. *Id.*
85. *Id.*
86. Head v. Victor McKenzie Drilling, Inc., No. 19-CA-00002, 2019 WL 6118294, at *3 (Ohio Ct. App. Nov. 18, 2019).
87. *Id.*

4. Implied Covenants

Pavsek v. Wade dealt with the implied covenant of reasonable development and issues of notice to the lessee.[88] When "a well is producing in paying quantities under the lease, in order for a lessor to assert that the failure to drill additional wells resulted in forfeiture for breach of the implied covenant of reasonable development, the lessor must have provided notice demanding further development to avoid forfeiture."[89] The notice is designed to provide, and must contain, "a reasonable time" for the lessee to conduct further development of the leasehold.[90] And the lessor is not excused from providing the notice merely because a great deal of time has passed since the producing well was originally drilled.[91]

88. Pavsek v. Wade, 136 N.E.3d 1283, 1286–87, 1290, 1293 (Ohio App. 7th Dist. 2019).
89. *Id*. at 1293.
90. *Id.*
91. *Id.*