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TABLE OF CONTENTS

I. HEALY V. CHESAPEAKE APPALACHIA, LLC 669
II. LEGARD V. EQT PRODUCTION CO..... 670
III. HALE V. CNX GAS CO. 670
IV. ADAIR V. EQT PRODUCTION CO. 672
V. ADDISON V. CNX GAS CO..... 672

This update covers the period from September 1, 2010, through August 31, 2011. During this time, Pamela Meade Sargent, United States Magistrate Judge for the United States District Court for the Western District of Virginia, Abingdon Division, addressed five cases concerning disputes over oil and gas leases and estate interest in coal bed methane ("CBM").

I. HEALY V. CHESAPEAKE APPALACHIA, LLC

In this case, Judge Sargent submitted a report and recommended disposition on Defendant's Motion to Dismiss.[2] The Plaintiff's complaint alleges that Chesapeake Appalachia, LLC ("Chesapeake") underpaid royalties by selling gas at below-market prices to affiliated companies and by improperly deducting certain post-production costs from royalties on gas leases on Healy's properties in Buchanan

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2. Healy v. Chesapeake Appalachia L.L.C., No. 1:10cv00023, 2011 WL 24261, at *1 (W.D. Va. Jan. 5, 2011).

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County, Virginia. Healy further alleges that Chesapeake purposefully concealed these improper deductions by intentionally omitting these deductions from the accounting statements that accompanied the royalty payments. The Plaintiff seeks an accounting from Chesapeake as well as compensatory and punitive damages for breach of contract, breach of implied duties to market, failure to act as a reasonably prudent operator, breach of good faith and fair dealing, breach of fiduciary duties, fraud and fraudulent concealment, unjust enrichment, civil conspiracy, conversion, and negligence.[3]

Defendant filed a Motion to Dismiss, arguing that Healy's contract claims are barred by Virginia's five-year statute of limitations on actions based on a written contract and by other statutes of limitation. Healy's other claims, other than the breach of contract claim, are not recognized by Virginia law.[4] Judge Sargent recommends that claims for breach of an implied duty, collateral estoppel, unjust enrichment, indemnification and assumption of liability, breach of fiduciary duty, and negligence should be dismissed for failure to state a claim.[5] Judge Sargent also found that the breach of contract claim for underpayment of royalties paid during the five years prior to the filing of this action are not barred by the statute of limitations and that Virginia courts would recognize an implied duty on the part of oil and gas lessees to operate diligently and prudently, including a duty to market the gas produced and to provide an accounting.[6]

II. LEGARD V. EQT PRODUCTION CO.

This case also addressed the issue of statute of limitations. Plaintiffs alleged that the Defendant failed to pay royalties as required under the leases because it had sold the gas produced for less than fair market prices or in less than marketable condition or because it had underreported the volume of gas produced.[7] Judge Sargent found that the plaintiff's contract claims should not be dismissed as barred by the statute of limitations because the claims accrued when the actions occurred (at specific intervals).[8]

III. HALE V. CNX GAS CO.

Shortly after addressing *Healy*, Judge Sargent decided *Hale*, which is a case concerning a question of first impression in that there is no Virginia case law addressing the Gas Act or any similar provision. In

3. *Id.*
4. *Id.*
5. *Id.* at *24–25.
6. *Id.* at *24.
7. Legard v. EQT Prod. Co., No. 1:10cv00041, 2011 WL 86598 (W.D. Va. Jan. 11, 2011), *adopted by*, 2011 WL 4527784 (W.D. Va. Sept. 28, 2011).
8. *Id.* at *1.

this case, the plaintiff, Jeffry Carlos Hale ("Hale") sued CNX Gas Company, LLC ("CNX") seeking a judgment declaring that:

> 1. Hale and the class members are owners of the CBM that is attributable to those tracts on which CNX asserts that there are conflicting claims of CBM ownership between gas estate owners and coal estate owners;
> 2. CNX, as the CBM unit operator, must account to Hale and the class members as unleased mineral owners for all proceeds, net of operational expenses, for past and future production from these CBM wells;
> 3. All proceeds attributable to Hale's and the class members' CBM interests must be released from escrow;
> 4. CNX must provide an accounting of the revenues from these CBM units and of the escrowed funds; and
> 5. If the "deemed leases" provision of the Gas Act are interpreted to limit Hale and the class members to recovery of only a 1/8th royalty, then the Gas Act is unconstitutional because it allows a taking of private property for private use and without adequate and just compensation.[9]

The Complaint also asserts claims against CNX for trespass, conversion, negligence, breach of fiduciary duties, unjust enrichment, punitive damages, and attorneys' fees.

CNX moved for the court to dismiss the claims for lack of subject matter jurisdiction, and for failing to state a claim and join necessary parties. The Commonwealth of Virginia also intervened in this matter and moved that the court dismiss Hale's constitutional claim and his claim to his proportional share of 1/8ths of the net revenues from the CBM wells.[10] Judge Sargent recommended that the Motion to Dismiss be granted, in part, and denied, in part. Most importantly, she concluded that the location of the phrase "subject to a final legal determination of ownership" immediately following the word "deemed" in Virginia Code section 45.1-361.22 of the Gas Act was not intended by the General Assembly to conditionally impose CBM force pooled deemed leases only until such time as a final legal determination of ownership of the CBM; and that the language simply recognizes that any party's interest under a deemed lease is subject to a final legal determination of ownership of the CBM.[11] Judge Sargent also found that the Gas Act does not require CNX to deposit all proceeds from its forced-pooled CBM wells, net ongoing operational expenses, into escrow as a "participating operator;" and that the Gas Act does not take property from landowners, but rather gives the landowners a right to receive a proportional share of the value of oil and gas taken

9. Hale v. CNX Gas Co., No. 1:10cv00059, 2011 WL 4527447, at *1, *5 (W.D. Va. Jan. 21, 2011), *adopted by*, 2011 WL 4502262, at *1 (W.D. Va. Sept. 28, 2011).

10. *Id.* at *5.

11. *Id.* at *11.

from under their property by adjacent landowners.[12] Finally, Judge Sargent found that Virginia courts would hold that forced-pooled CBM well unit operators have a fiduciary duty to properly account for and pay into escrow the royalties owed to CBM owners under deemed leases.

IV. Adair v. EQT Production Co.

Here, the case concerned a Plaintiff's Motion to Regulate Defendant EQT Production Company's Contact with Putative Class Members (CBM owners) who EQT had been contacting, in person, and urging to enter into split agreements with coal owners claiming that split agreements were the only way to receive any CBM royalties out of escrow.[13] The Defendants filed a Motion to Dismiss. Judge Sargent found that EQT had made abusive communications in the past and, by its own admission, continued in those efforts making action necessary to protect putative class members from unwittingly giving up any right to relief they may obtain through this case based on false information provided by EQT.[14]

V. Addison v. CNX Gas Co.

This case is another dispute over CBM gas interests subject to forced-pooling orders entered by the Virginia Gas and Oil Board.[15] CNX claimed that the royalties from these four drilling units have been paid into a Board-ordered escrow fund based on conflicting claims of ownership.[16] The Plaintiff sought a ruling that she, and not the coal owner, Commonwealth, owns the rights to these gas interests, an accounting from CNX as to the royalties owed her and payment of these royalties either out of escrow or from CNX. Judge Sargent distinguished this case from *Healy* and *Adair*. Unlike the *Healy* case, the parties' relationship in this case is not entirely defined by contract and "like in the *Adair* case, the Board's pooling orders require any amounts owed to be deposited into escrow pending determination of ownership of the CBM."[17] Judge Sargent made similar findings as in *Healy* and *Adair*, finding that declaratory judgment as to the ownership of the CBM at issue should not be denied simply because the Supreme Court of Virginia's opinion in *Ratliff* is not determinative as a matter of law at this stage; declaratory judgment as to the ownership of the CBM at issue should not be denied at this stage for failure to

12. *Id.* at *13, *21–22.

13. Adair v. EQT Prod. Co., No. 1:10cv00037, 2011 WL 3273480, at *1–2 (W.D. Va. July 29, 2011), *vacated by*, 2011 WL 4501048 (W.D. Va. Sept. 28, 2011).

14. *Id.* at *3.

15. Addison v. CNX Gas Co., No. 1:10cv00065, 2011 WL 4553090, at *1 (W.D. Va. May 13, 2011), *adopted by*, 2011 WL 4527812 (W.D. Va. Sept. 28, 2011).

16. *Id.*

17. *Id.* at *18.

name all the coal owners as defendants; and that the Complaint sufficiently pleads a claim for punitive damages.[18]

Judge Sargent recognized that *Adair*, *Hale*, and *Addison* all confront the issue of failure to join necessary and indispensable parties under Federal Rule of Civil Procedure 12(b)(7). Judge Sargent stated, "there is no dispute that each of the coal owners in forced-pooled units operated by CNX where conflicting claims of ownership exist are necessary and indispensable parties before class action judgment may be entered."[19] Judge Sargent recognized that federal courts are hesitant to dismiss for failure to join a party, and in general, a dismissal should be granted only when the defect cannot be cured.[20] Judge Sargent recommended that because the identities of those named as John Doe were available and the pleadings could be amended to add those named parties, the motions should be denied at this stage.

18. *Id.* at *19–20.
19. *Id.* at *7.
20. *Id.*