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West Virginia

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WEST VIRGINIA

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I. INTRODUCTION

This Article summarizes and discusses important cases, legislation, and regulations issued or enacted pertaining to the oil and gas jurisprudence of West Virginia between September 1, 2010, and August 31, 2011. The Authors acknowledge that the term "important" is subjec-

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tive; nevertheless, they endeavor to discuss the most germane cases and regulations affecting the oil and gas industry.

This Article is divided into two parts. Part One discusses a very important regulation promulgated by the Office of Oil and Gas, a division of the West Virginia Department of Environmental Protection, regarding water use by the oil and gas industry when drilling horizontal wells. Noticeably absent from this Part is any discussion of major legislation affecting the oil and gas industry. During the requisite period, no significant legislation was enacted, which the Authors subjectively deemed worthy of discussion. Nevertheless, the legislature introduced numerous bills, which if enacted, would have substantially impacted the oil and gas industry.

Part Two of this Article discusses developments in West Virginia's case law regarding oil and gas. In this Part, the Authors will discuss and analyze major decisions issued by the West Virginia Supreme Court of Appeals ("Supreme Court of Appeals"), one important case litigated in the Circuit Court of Monongalia County, West Virginia, and the United States District Courts for the Northern and Southern Districts of West Virginia.

II. PART ONE – REGULATIONS

On July 13, 2010, Governor Earl Ray Tomblin issued Executive Order No. 4-11 ordering and directing the West Virginia Department of Environmental Protection ("WVDEP") to issue emergency regulations regarding the use and disposal of water used to drill horizontal oil and gas wells "to ensure the immediate preservation of public health, safety and welfare and to prevent substantial harm to the public interest . . . ."[2] Governor Tomblin issued this order in response to fears concerning irresponsible drilling of the Marcellus Shale.[3]

Pursuant to this order, the WVDEP issued regulations meant to ensure the quality and quantity of water supplies throughout the state.[4] This regulation specifically covers horizontal wells, which are wells "drilled initially on a vertical plane but eventually curved to become horizontal, or nearly horizontal."[5] These regulations impose additional requirements on oil and gas operators when submitting their well permit applications and when completing their horizontal wells.

When filing the permit application, operators must file and submit the following plans: erosion and sediment control plan, site construction plan, water management plan, and a well site plan.[6] The erosion

2. W. Va. Exec. Order No. 4-11 (July 13, 2010), www.governor.wv.gov/Documents/20110713150559476.pdf.

3. *Id.*

4. W. VA. CODE R. §§ 35-8-1 to -5 (2011), *available at* http://www.sos.wv.gov/administrative-law/emergencyrules/Documents/35-08.pdf.

5. *Id.* § 35-8-2.2.

6. *Id.* §§ 35-8-3.1 to 3.4.

and sediment control plan and site construction plan must be filed if the well site will disturb three acres or more, excluding acreage disturbed by pipelines, gathering lines or roads.[7] The sediment and control plan must contain information pertaining to stabilization, seeding and mulching, and detail erosion and sediment controls to be employed.[8] The site construction plan, which must be certified by a West Virginia registered professional engineer, includes information pertaining to the actual construction and preparation of the well site.[9]

The water management plan must be filed if the operator will use 210,000 gallons of water or more in any one-month period.[10] This plan must include the following: (1) the type of water (surface or ground); (2) the county of origination; (3) the anticipated amount of water; (4) a planned management and disposition of wastewater from fracturing; (5) a list of additives used to fracture the well; and (6) a demonstration that sufficient in-stream flow will continue immediately downstream despite the intended usage.[11]

The final plan to be submitted, for wells encompassing three acres or more, is the well site safety plan.[12] The important requirements of this plan, include: (1) an evacuation plan for residents and personnel in surrounding areas; (2) a list of telephone numbers, including twenty-four hour contact information for the operator, any contractors, the WVDEP, and local emergency response units; (3) a list of schools and public facilities within a one mile radius; (4) material safety data sheets for all materials and chemicals maintained on the well site; and (5) the requirement that safety meetings be held weekly on-site.[13] This particular plan must be filed with the local emergency planning committee or the county office of emergency services at least seven days prior to the commencement of operations at the well site.[14]

In addition to these plans, this emergency rule imposes record keeping requirements regarding the amount of flow back from hydraulic fracturing, the quantity of water transported and delivered, delivery or disposal locations of all water, and the names of all water hauling companies employed.[15] This regulation further requires all drill cuttings and mud produced from wells disturbing more than three acres, or using more than 210,000 gallons of water during any one-month period, be disposed of by an approved solid waste facility.[16]

7. *Id.* § 35-8-3.2.
8. *Id.* §§ 35-8-3.1.a.1 to 3.3.
9. *Id.* § 35-8-3.2.
10. *Id.* § 35-8-3.3.
11. *Id.* §§ 35-8-3.3.a to 3.3.f.
12. *Id.* § 35-8-3.4.
13. *Id.* §§ 35-8-3.4.a.3 to 3.4.a.6, 3.4.b.
14. *Id.* § 35-8-3.4.
15. *Id.* § 35-8-4.2.c.
16. *Id.* § 35-8-4.3.

This regulation imposes additional casing and cementing requirements to minimize disturbance of fresh groundwater zones.[17] To effectuate this purpose, all casing must be new and meet the requirements of the American Petroleum Institute ("API").[18] Further, it requires all cementing to comply with the standards of the API, and operators must give twenty-four hours notice to the Office of Oil and Gas prior to cementing operations.[19]

Finally, but certainly not least in importance, is the public notice requirements of this regulation pertaining to drilling horizontal wells within the boundaries of any municipality.[20] Prior to drilling a horizontal well within the boundaries of a municipality, an operator, contemporaneously with the filing of the well permit application, must place a Class 1 legal advertisement in a newspaper of general circulation in the area of proposed operations.[21] No well work permit will be issued until thirty days has elapsed from the time of publication.[22] Particularly, this advertisement must contain the following information: (1) name of applicant; (2) proposed date for commencement of site preparation; and (3) a contact number for more information.[23]

This emergency rule is only temporary. It is designed to give the legislature time to enact legislation to better effectuate its purpose. Accordingly, oil and gas operators will need to stay abreast of future developments as any legislation enacted to surpass this emergency rule will undoubtedly impose greater restrictions on oil and gas operators.

III. Part Two – Case Law Developments

Part Two of this Article discusses and analyzes important case law developments in West Virginia. This Part is divided into three Sections. The first Section discusses important decisions rendered by the Supreme Court of Appeals. The second Section will discuss an important case adjudicated by the Circuit Court of Monongalia County, West Virginia. The final Section will discuss cases and trends in the United States District Courts for the Northern and Southern Districts of West Virginia.

A. *West Virginia Supreme Court of Appeals*

Before discussing important court decisions from the Supreme Court of Appeals, it is important to note that any update of West Virginia case law, as it pertains to the state courts, is seriously impeded by

17. *Id.* § 35-8-4.4.
18. *Id.* § 35-8-4.4.a.
19. *Id.* § 35-8-4.4.b.
20. *Id.* § 35-8-5.1.
21. *Id.*
22. *Id.*
23. *Id.*

one very important factor: West Virginia lacks an intermediate appellate court. There are currently thirty-one judicial circuits covering West Virginia's fifty-five counties. Orders entered in these thirty-one courts are only appealable to one court: the Supreme Court of Appeals. This absence of an intermediate appellate court has, in these Authors' opinion, resulted in an incongruent and redundant development of the case law. Further exacerbating the problem, there is no mechanism for publishing or indexing the opinions of the circuit courts, resulting in case law that is specific to each of these thirty-one circuits.

Despite this impediment to development of West Virginia's jurisprudence, the Supreme Court of Appeals issued three opinions of varying importance and applicability to the oil and gas industry.

1. *Cabot Oil & Gas Corp. v. Huffman*

In the past year, the most important case for the oil and gas industry decided by the Supreme Court of Appeals was *Cabot Oil & Gas Corp. v. Huffman*.[24] The significance of this case is that it may open portions of West Virginia's state parks to oil and gas development, despite a statutory limitation preventing the director of the West Virginia Division of Natural Resources from leasing state parks for oil and gas purposes.

On November 18, 1960, the Lawson Heirs, Inc. ("Lawson Heirs") conveyed 3,271 acres of surface and coal to the Logan Civic Association, which was acting on behalf of the West Virginia Conservation Commission, predecessor to the present day West Virginia Division of Natural Resources.[25] The Lawson Heirs excepted and reserved from this conveyance "all oil and gas, or either, within and underlying the lands [t]hereby conveyed, with the right to search for, explore, operate for, drill, produce and market oil, gas and gasoline . . . ."[26]

This reservation of the oil and gas was not unqualified. Specifically, this deed contained the following limitations on developing the oil and gas estates in consideration of this property's intended use as a state park:

> No well shall be drilled, without the consent in writing of the party of the second part [Logan Civic Association], its successors or assigns, first had and obtained, within one thousand (1,000) feet of any building or structure, tipple, shaft, air shaft, or lake; within two hundred (200) feet of any existing or projected entry, road, riding trail, haul way, or air course of any mine in operation, any of which is now or may hereafter be constructed upon the premises hereby conveyed; or within the view or site of any overlook that has been developed for public use; provided, however, that neither the party

24. *See* Cabot & Oil Corp. v. Huffman, 705 S.E.2d 806 (W. Va. 2010) (per curiam).
25. *Id.* at 809.
26. *Id.*

> of the first part, its successors, assigns, or lessees, shall in any event be required to remove any equipment, facility, or installation by reason of these restrictions, if at any time the same are constructed or installed, the location thereof complied with the requirements herein set forth.
>
> No road, power line, pipe line, or telephone line shall be constructed without the prior written approval, as to location, of the Director of the Conservation Commission of West Virginia, or his authorized representative, but such written approval shall not be unreasonably or arbitrarily withheld. Any timber that is cut in the construction of any of the above shall be sawed into standard log lengths and left along the right of way. This timber shall be the property of the party of the second part, its successors or assigns.
>
> What timber is cut, in addition to being sawed into logs, the trees shall be trimmed and the branches stacked and piled in accordance with the rules and regulations of the Director of the Conservation Commission of West Virginia, its successors or assigns. Where timber is cut for rights of way for pipe line, or power or telephone lines, the rights of way shall be cleared for reseeding.
>
> When in the exercise of any of the rights excepted or reserved it becomes necessary to expose the mineral soil, such shall be reseeded in manner that is approved in writing by the Director of the Conservation Commission of West Virginia, or his authorized representative, after the purpose of such exposure has been accomplished.
>
> All abandoned roads shall be treated in the manner approved by the Conservation Commission of West Virginia.[27]

This tract of land was subsequently conveyed to the State of West Virginia for the use and benefit of the Conservation Commission.[28] In 1961, after the state acquired ownership of this tract of land, the West Virginia legislature enacted W. Va. Code § 20-4-3. The relevant part of this statute reads:

> The purpose[ ] of [a state park and public recreation system] shall be to promote conservation by preserving and protecting natural areas of unique or exceptional scenic, scientific, cultural, archaeological or historic significance, and to provide outdoor recreational opportunities for the citizens of this state and its visitors. *In accomplishing such purposes the director [of the DNR]* shall, insofar as is practical, maintain in their natural condition lands that are acquired for and designated as state parks, and *shall not permit* public hunting, *the exploitation of the minerals* or harvesting of timber thereon for commercial purposes.[29]

27. *Id.* at 809–10.
28. *Id.* at 810.
29. *Id.* (quoting W. VA. CODE § 20-4-3 (1961)) (emphasis in original).

In 2006, this section was subsequently amended and re-codified as W. Va. Code § 20–5–2(b)(8).[30] The relevant portion of this code section, in effect during the controversy at hand, reads:

> (b) The Director of the Division of Natural Resources shall:
>
> . . .
>
> (8) Propose rules for legislative approval in accordance with the provisions of article three [§ 29A–3–1 et seq.], chapter twenty-nine-a of this code to control the uses of parks: Provided, That *the director may not permit* public hunting, except as otherwise provided in this section, *the exploitation of minerals* or the harvesting of timber for commercial purposes *in any state park* [.][31]

Ultimately, the Lawson Heirs leased its interest in the oil and gas underlying this tract of land to Cabot Oil & Gas Corporation ("Cabot").[32] Pursuant to this lease, Cabot sought to drill five wells on this tract of land, and, thereafter, filed the requisite well permit applications with the WVDEP Office of Oil and Gas ("Office of Oil and Gas") on November 21, 2007.[33] The Office of Oil and Gas denied these permit applications on December 12, 2007, citing W. Va. Code § 20–5–2(b)(8).[34] In justifying the denial, the Office of Oil and Gas acknowledged that this section of the code was not directed at it specifically; however, it justified its denial pursuant to W. Va. Code § 22-1-6(c)(1), which charges the Office of Oil and Gas with the duty to assure, among other things, that the Department "carries out its functions in a manner which supplements and complements the environmental policies, programs and procedures of . . . other instrumentalities of this state[.]"[35] Accordingly, it claimed to be preventing the development of the oil and gas underlying state parks pursuant to W. Va. Code § 20–5–2(b)(8).[36]

On appeal to the Circuit Court of Logan County, the court overturned the Office of Oil and Gas's order because the court exceeded its statutory authority when it considered legislation affecting a separate government agency and when it erroneously applied the statute to the development of minerals not owned by the state.[37] The circuit court further found this order unconstitutional because it violated the equal protection and due process provisions under Article III, Section 10 of the West Virginia Constitution and the Contracts Clause of Article III, Section 4 of the West Virginia Constitution.[38]

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30. *Id.* at 810.
31. *Id.* (quoting W. VA. CODE § 20-5-2(b)(8) (2006)) (emphasis added by the court).
32. *Id.* at 810.
33. *Id.*
34. *Id.* at 811.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 812.

On appeal, the Supreme Court of Appeals succinctly stated the question to be answered: "does the statutory provision prohibiting the DNR from authorizing mineral exploitation within West Virginia state parks, i.e. W. Va. Code § 20-5-2(b)(8), preclude the issuance of well permits for which Cabot has applied?"[39] The Supreme Court of Appeals answered this question in the negative.[40]

First, the Supreme Court of Appeals found the reservation unambiguous.[41] Being unambiguous, the Court next determined whether the 1961 statute banning exploitation of oil and gas underlying state parks should be retroactively applied to the deed, executed in 1960, from the Lawson Heirs. In reviewing the legislative history, the Supreme Court of Appeals found no indication the legislature intended to retroactively apply this statute.[42] In determining whether to retroactively apply the statute, the Court made it clear that it would not retroactively apply a statute that "diminished substantive rights or diminishes substantive liability. . .unless the statute provides explicitly for retroactive application," which includes the taking or diminishing of a property right in the oil and gas.[43]

The significance of this case is readily apparent: owners of the oil and gas underlying state parks are free to lease and develop these estates provided that the reservation predates the enactment of W. Va. Code § 20-4-3 on July 1, 1961, which was subsequently re-codified to W. Va. Code § 20-5-2(b)(8). Unfortunately, one very important question remains: would the outcome have changed had the reservation of the oil and gas been consummated after July 1, 1961? The Supreme Court of Appeals only discussed the issue of retroactively applying a statute. It did not consider or discuss whether enforcement of this statute constituted an unconstitutional taking. Therefore, the issue remains whether the oil and gas excepted and reserved after July 1, 1961, underlying property conveyed to the state for use as a state park, may be leased and developed.

2. *Hairston v. General Pipeline Construction, Inc.*

In *Hairston v. General Pipeline Construction, Inc.*, the Supreme Court of Appeals answered five certified questions regarding the common law cause of action for grave desecration.[44] Particularly, it answered whether the common law cause of action for grave desecration

39. *Id.* at 814.

40. *Id.*

41. *Id.* at 815.

42. *Id.*

43. *Id.* (citing Smith v. W. Va. Div. of Rehab. Servs. & Div. of Pers., 540 S.E.2d 152, 153 (W. Va. 2000)).

44. *See* Hairston v. Gen. Pipeline Const., Inc., 704 S.E.2d 663 (W. Va. 2010).

still existed, or whether it was preempted by enactment of W. Va. Code § 29-1-8(a) (1993).[45]

In *Hairston*, Equitable Production Company hired a subcontractor, General Pipeline Company, to relocate a gas pipeline.[46] Using a bulldozer, with its blade raised, to move the pipeline, the operator noticed that he had crossed into an overgrown area containing grave sites.[47] This graveyard was not indicated on a map, reserved by any deed, or listed as a graveyard with the state.[48]

The first certified question, and one of particular importance to oil and gas operators, concerned the scope of W. Va. Code § 29-1-8(a). The purpose of this statute is to protect historic or prehistoric grave sites, which includes a statutory mechanism for punishing desecration of these graves sites.[49] The Court held, however, it does not apply to publicly or privately maintained grave sites, or to grave sites less than fifty years old.[50] In other words, this statute only applies to grave sites older than fifty years that are not maintained by any entity.

Concerning common law claims, which apply to desecration of publicly and privately maintained graveyards and graveyards that are less than fifty years old, the Court certified the elements for the cause of action of desecration:

> (1) the grave site in question must be within a publicly or privately maintained cemetery, clearly marked in a manner which will indicate its use as a cemetery, with identifiable boundaries and limits; (2) dedication of the area to the purpose of providing a place of burial by the owner of the property or that the owner acquiesced in its use for burial; (3) the area was identifiable as a cemetery by its appearance prior to the defendant's entry or that the defendant had prior knowledge of the existence of the cemetery; (4) the decedent in question is interred in the cemetery by license or right; (5) the plaintiff is the next of kin of the decedent with the right to assert a claim for desecration; and (6) the defendant proximately caused, either directly or indirectly, defacement, damage, or other mistreatment of the physical area of the decedent's grave site or common areas of the cemetery in a manner that a reasonable person knows will outrage the sensibilities of others.[51]

The Court further acknowledged that the common law elements for desecration include a claim for indirect grave desecration, *e.g.*, mine

45. *Id.* at 667.
46. *Id.* at 666.
47. *Id.* at 666-67.
48. *Id.* at 667.
49. *Id.* at 670.
50. *Id.*
51. *Id.* at 676.

subsidence.[52] This cause of action rests with the spouse or closest living relative to the person interred in the desecrated gravesite.[53]

Limited to answering these certified questions and others, the Court then remanded this case to the Circuit Court of Logan County.[54] Accordingly, we have no record of its ultimate outcome, if any. Nevertheless, oil and gas operators and pipeline companies should exercise caution for two reasons. First, the Court explicitly recognized a common law claim for indirect grave desecration. As its name implies, this ill-defined claim could include a wide variety of claims for grave desecration. Second, oil and gas operators need to exercise adequate due diligence to ensure that no cemeteries are located within their area of operations. This begins with a title examination to find any reservations or conveyances of property for use as a grave site. This title examination must be coupled with inspection of the physical premises and an investigation of all known cemeteries listed with the state. Failure to exercise due diligence may result in an award of damages for mental distress and punitive damages.[55]

3. *Renner v. Bonner*

In *Renner v. Bonner*, the Supreme Court of Appeals expounded upon the law of partition; particularly, it reiterated the requirement that a trial court adequately justify any order to sell, rather than to partition in kind, real property, and it confirmed the power of trial courts to punish parties who acted in bad faith to prevent a partition in kind.[56] In *Renner*, the plaintiffs owned an undivided eight-ninths interest in the subject property.[57] The other outstanding one-ninth interest was acquired by the defendants, owners of a contiguous tract of land, to effectuate their claim to a prescriptive easement across the subject property.[58]

The plaintiffs made six conveyances of minuscule interests in the subject property ranging in size from a one forty-fifth interest to a one nine-hundredths interest.[59] In 2007, the plaintiffs filed a partition action—they had voluntarily dismissed a similar action on April 11, 2005—seeking partition by allotment or sale.[60] At a hearing on June 17, 2007, the defendants objected to these "sham transactions" claiming they were consummated merely for the purpose of making it im-

52. *Id.* at 673–74.
53. *Id.* at 675.
54. *Id.* at 667.
55. *See id.* (explaining mental distress; and punitive damages [may result] if the defendant's conduct is determined to be willful, wanton, reckless, or malicious).
56. *See* Renner v. Bonner, 709 S.E.2d 733 (W. Va. 2011) (per curiam).
57. *Id.* at 737.
58. *Id.*
59. *See id.* at 737–38.
60. *Id.*

possible to partition the property in kind.[61] The circuit court refused to address this claim because "it was not aware of any law prohibiting [the plaintiffs] from conveying small interests in the subject property to family members."[62]

The circuit court appointed commissioners to determine the feasibility of partitioning the subject property in kind.[63] On November 29, 2007, the commissioners reported that the property could not be partitioned in kind without discussing any particular facts justifying their decision.[64] The defendants filed objections to this report, *inter alia*, claiming that the commissioners failed to provide sufficient justification for refusing to partition the tract of land in kind.[65] Without addressing this objection and refusing to take evidence or testimony, the circuit court ordered the property to be sold.[66] On January 15, 2010, the plaintiffs purchased the subject property for $235,000.[67]

On appeal to the Supreme Court of Appeals, the defendants claimed the circuit court committed two errors. First, the circuit court erred by failing to justify, on factual grounds, why the property could not be partitioned in kind.[68] Second, the circuit court erred when it refused to consider whether the plaintiffs engaged in sham real estate transactions to prevent a partition in kind.[69] Regarding the first claim, the Supreme Court of Appeals agreed and overturned the sale.[70] In doing so, it reiterated the legal truism "that a partition sale, rather than a division in kind, is something that must be supported by sound facts and evidence because the court is being asked to adjudicate an individual's sacred right of property."[71] The Supreme Court of Appeals stressed that a trial court may not sell property without providing some justification or reasoning in its order as to why the property cannot be partitioned in kind.

Regarding the second error, the defendants contended that the plaintiffs had conveyed these miniscule interests for the sole purpose of inhibiting a partition in kind.[72] The Supreme Court of Appeals concurred with this reasoning because partition actions are actions in equity.[73] In actions in equity, the judge alone decides the outcome, making it the judge's responsibility to know all relevant facts, includ-

61. *Id.* at 738.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at 738–39.
66. *Id.* at 739.
67. *Id.*
68. *Id.* at 740–41.
69. *Id.* at 741.
70. *Id.*
71. *Id.*
72. *Id.*
73. *Id.*

ing whether any party is acting in bad faith.[74] Accordingly, the Supreme Court of Appeals remanded the case to the circuit court to determine whether the plaintiffs had acted in bad faith.

Though this case does not involve a partition of the oil and gas estate, the Authors believe this case, and other developments in the law of partition, will take on even greater importance in the immediate future as development of the Marcellus Shale continues to accelerate. For years, it was common practice in the oil and gas industry in West Virginia to bypass tracts of land subject to convoluted estates or heirship. The advent of horizontal drilling, and with it, the necessity of pooling and unitizing large tracts of land, has made it difficult, if not impossible, to avoid these tracts. Accordingly, it is likely that partition actions will become more prevalent as owners and oil and gas operators seek to lease and develop these tracts of land.

B. *Circuit Court Case*

This Article only discusses one case decided by one of West Virginia's circuit courts. As previously discussed, it is often difficult, if not impossible, to know the outcome of cases at the circuit court level. Nevertheless, *Northeast Natural Energy, LLC v. City of Morgantown*[75] overcame that hurdle to become, quite possibly, the most anticipated case of the year in West Virginia.

In *Northeast Natural Energy, LLC,* the City of Morgantown ("Morgantown") enacted a ban on all hydraulic fracturing of the Marcellus Shale within the city limits and areas extending one mile therefrom.[76] This ordinance was enacted following the completion of two wellbores to develop the Marcellus Shale.[77] At the time of enactment of this ordinance, the owner of these wellbores, Northeast Natural Energy, LLC ("Northeast"), had not fractured these wells.[78]

In March 2011, the WVDEP issued two permits to Northeast to drill Marcellus Shale wells.[79] Subsequently, the Morgantown Utility Board ("MUB") questioned the issuance of these permits amid concerns of contamination of the Monongahela River.[80] MUB then requested Northeast accept additional safety measures, which it did.[81] Despite these additional safety measures, Morgantown enacted its ban on June 7, 2011, by prohibiting the "[d]rilling [of] a well for the pur-

74. *See id.*

75. *See* Ne. Natural Energy, LLC v. City of Morgantown, No. 11-C-411 (W. Va. Cir. Ct. Aug. 12, 2011), *available at* http://www.frackinginsider.com/Tucker_Marcellus_Order.pdf.

76. *Id.* at 1.

77. Pam Kasey, *Gas Producer Fights Morgantown Anti-Fracking Law*, STATE JOURNAL (Jul. 13, 2010), http://www.statejournal.com/Global/story.asp?S=15782326.

78. *Id.*

79. *Ne. Natural Energy, LLC*, No. 11-C-411, slip op. at 2.

80. *Id.*

81. *Id.*

pose of extracting or storing oil or gas using horizontal drilling with fracturing methods within the limits of the City of Morgantown or within one mile of the corporate limits of Morgantown."[82]

On motion for summary judgment, the plaintiffs, Northeast and its lessor, Enrout Properties, LLC, claimed that Morgantown's hydraulic fracturing ban was preempted by the rules and regulations enacted by the WVDEP.[83] In determining whether the ordinance had been preempted by state law, the circuit court discussed the scope and power of the WVDEP.[84] W. Va. Code § 22-1-1(a)(2) charges the WVDEP with "primary responsibility for protecting the environment."[85] Additionally, the WVDEP is charged with enforcing and administering the West Virginia Oil and Gas Act, recorded in W. Va. Code § 22-6 to 10, *et seq.*[86] Most importantly, the circuit court found no statutory exception or authorization allowing municipalities to regulate hydraulic fracturing.[87]

According to Morgantown, hydraulic fracturing constituted a nuisance, which it was constitutionally empowered to regulate pursuant to Article VI, Section 39(a) of the West Virginia Constitution.[88] The relevant portion of this section reads:

> Under such general laws, the electors of each municipal corporation, wherein the population exceeds two thousand, shall have power and authority to frame, adopt and amend the charter of such corporation, or to amend an existing charter thereof, and through its legally constituted authority, may pass all laws and ordinances relating to its municipal affairs: **Provided,** That any such charter or amendment thereto, and any such law or ordinance so adopted, shall be invalid and void if inconsistent or in conflict with this constitution or the general laws of the state then in effect, or thereafter from time to time enacted.[89]

The circuit court was not persuaded by this reasoning. First, it recognized that cities are creatures of the state.[90] Being creatures of the state, cities only possess those powers granted to them by the state legislature, which are "expressly granted or necessarily or fairly implied or essential and indispensible."[91] These express limitations on the power of municipalities coupled with comprehensive regulatory powers entrusted solely to the WVDEP convinced the circuit court

82. *Id.* at 3–4.
83. *Id.* at 5.
84. *Id.* at 6.
85. *Id.*
86. *Id.*
87. *Id.*
88. *Id.* at 8.
89. W. VA. CONST. art. VI, § 39(a).
90. *Ne. Natural Energy, LLC*, No. 11-C-411, slip op. at 7 (citing Alderson v. Huntington, 52 S.E.2d 243 (W. Va. 1949)).
91. *Id.* at 8 (citing Syllabus Part 2, State *ex rel.* Charleston v. Hutchinson, 176 S.E.2d 691, 692 (W. Va. 1970)).

that Morgantown was preempted from regulating hydraulic fracturing; therefore, it granted summary judgment in favor of Northeast.[92]

Because the Supreme Court of Appeals had not decided this issue and will not due to Morgantown's failure to appeal within thirty days of the verdict, reliance on this case must be done cautiously

C. *Federal District Courts of West Virginia*

This Section discusses and summarizes important case development of the United States District Courts for the Northern and Southern Districts of West Virginia. Unfortunately, the majority of the cases discussed in this Section are not dispositive of the underlying issues. Instead, the courts in these cases were presented with various motions; particularly, whether to grant a motion to dismiss or a motion for summary judgment. Nevertheless, their utility is not diminished as they are indicative of the types of claims likely to plague the oil and gas industry in the immediate future.

1. *Wendy Rupe Trust v. Cabot Oil & Gas Corp.*

In *Wendy Rupe Trust v. Cabot Oil & Gas Corp.*, the plaintiffs, John Fox and Joyce Fox, trustees of the Wendy Rupe Trust, executed a lease on March 11, 2004, with Cabot Oil & Gas Corporation ("Cabot") to develop the oil and gas underlying a tract of land containing 171.63 acres.[93] This lease allowed Cabot to build roads on the leased premises.[94] This provision, however, was limited by a lease addendum providing that the "Lessor and Les[s]ee [are] to agree on access road, drill site and pipeline locations, not to be unreasonably withheld by Lessor."[95]

Following completion of a well on the subject property, Cabot offered the plaintiffs $10,000 to construct a road across their property to access a well on an adjoining tract of land; the plaintiffs declined this offer.[96] In April 2007, Cabot constructed this road, which was discovered by the plaintiffs in September 2008.[97] On November 9, 2009, the plaintiffs filed suit claiming, *inter alia*, that Cabot had committed trespass and intentional infliction of emotional distress ("IIED") by building this road without permission.[98] On November 22, 2010, Cabot moved for summary judgment on both counts.[99]

92. *Id.* at 9.
93. Wendy Rupe Trust v. Cabot Oil & Gas Corp., No. 2:09-cv-01435, 2011 WL 1527594, at *1 (S.D. W. Va. Apr. 20, 2011).
94. *Id.* at *3.
95. *Id.*
96. *Id.* at *1.
97. *Id.*
98. *Id.*
99. *Id.*

The court first addressed the claim of trespass. Trespass in West Virginia requires "actual, nonconsensual invasion of the plaintiff's property, which interferes with the plaintiff's possession and use of that property."[100] Cabot claimed that the plaintiffs unreasonably withheld consent to the location of the road, and therefore, it was excused from abiding by the terms of the addendum.[101] The court refused to grant summary judgment finding a genuine issue of material fact existed regarding whether the plaintiffs unreasonably withheld consent to build this road.[102]

The court then considered the plaintiffs' claim for IIED. A claim for IIED requires the plaintiff must first prove that the alleged conduct is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society."[103] The plaintiffs did not allege the actual construction of the road was outrageous; instead, they argued the outrageousness of Cabot's addendum violation.[104]

The court granted Cabot's motion for summary judgment as to the IIED claim, stating "[i]t is well established that 'conduct that is merely annoying, harmful of one's rights or expectations, uncivil, mean-spirited, or negligent does not constitute outrageous conduct.'"[105] To this court, mere trespass "devoid of any allegations of outrageousness beyond the tortious conduct that is inherent in the activity, cannot serve as an adequate basis for a claim of IIED."[106]

It is becoming more and more common to have leases for oil and gas purposes with restrictions on the placement of surface operations. Many of these restrictive leases require the lessor to act reasonably in vetoing or withholding consent as to the placement of roads pursuant to the terms of the lease. Though undecided, this case, if fully adjudicated, could be of substantial importance when determining whether a party acted reasonably in denying the placement of roads or pipelines. Moreover, it appears that the question of "reasonableness" will be decided by a jury, and not by the judge on motion, as it constitutes a genuine issue of material fact.

2. *Kerns v. Range Resources-Appalachia, LLC*

In *Kerns v. Range Resources-Appalachia, LLC*, the plaintiffs, Ralph Kerns and Mary O. Kerns, alleged that Range Resources-Appalachia,

100. *Id.* at *2 (citing Rhodes v. E. I. du Pont de Nemours & Co., 636 F.3d 88, 96 (4th Cir. 2011)).
101. *Id.* at *3.
102. *Id.* at *3–4.
103. *Id.* at *4 (citing Keyes v. Keyes, 392 S.E.2d 639, 696 (W. Va. 1990)).
104. *Id.*
105. *Id.* at *5 (citing Courtney v. Courtney, 413 S.E.2d 418, 423 (W. Va. 1991)).
106. *Id.*

LLC ("Range") entered into a binding contract with them to lease the oil and gas underlying 207 acres of land.[107] In 2008, Range provided the plaintiffs unsigned copies of an "Oil and Gas Lease," an "Addendum to the Lease," a "Memorandum of Oil and Gas Lease," and a "Dear Property Owner" letter, which the plaintiffs executed and returned to Range on September 5, 2008.[108]

On November 11, 2008, Range wrote to the plaintiffs stating that their lease proposal had been declined due to a downturn in the economy and a corresponding decline in oil and gas prices.[109] This letter further stated:

> As an alternative, if you remain interested in leasing your property:
> • Range would consider entering into a five (5) year term delay rental lease with a lease date commencing in early 2009.
> • Upon your execution of such a lease, Range would tender 20% of the consideration provided for in the Proposed Lease.
> • The lease would provide for four (4) annual delay rental payments with each payment equaling 20% of the consideration provided for in the Proposed Lease.
> • Range would still need to verify your title to the oil and gas rights under the lands described in the lease, which Range would expect to complete by the lease date.[110]

The plaintiffs signed this letter and returned it to Range.[111] Several months later, Range sent a letter to plaintiffs' attorney stating that it was suspending all operations in West Virginia, and it would not be pursuing a lease with the plaintiffs.[112] The plaintiffs claimed that the letter, dated November 11, 2008, created a valid contract between the parties and subsequently filed suit for breach of contract and numerous other claims.[113] In turn, Range filed a motion to dismiss the plaintiffs' complaint because a contract was never formed.[114]

Applying West Virginia law, the court discussed the factors necessary to create a contract.[115] To form a contract, there must be an offer, acceptance of the offer, and consideration.[116] This requires mutuality of assent resulting in "a complete meeting of the minds on all material matters, leaving nothing for future negotiations."[117] The court then contrasted mutual assent with a manifestation of willingness to enter into a contract. This latter conduct does not constitute

107. Kerns v. Range Res.-Appalachia, LLC, No. 1:10CV23, 2011 WL 197908, at *1 (N.D. W. Va. Jan. 18, 2011) (mem. op.).
108. *Id.*
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.* at *2.
113. *Id.*
114. *Id.*
115. *Id.* at *3.
116. *Id.* (citing First Nat'l Bank v. Marietta Mfg. Co., 153 S.E.2d 172 (1967)).
117. *Id.* (quoting Allen v. Simmons, 125 S.E. 86, 88 (W. Va. 1924)).

mutual assent and, accordingly, does not create a binding contract, but is merely considered preliminary negotiations.[118]

Applying this law, the court held the November 11th letter did not create a binding contract, but instead, it was a continuance of preliminary negotiation.[119] The court paid particular attention to the language contained in the letter stating Range "would consider" entering into a lease.[120] This language lacked any "actual or definitive promise or obligation"; therefore, it did not qualify as an offer.[121] Accordingly, the court granted Range's motion to dismiss.[122]

Kerns states that oil and gas operators need to be careful in their rush to secure leases from prospective lessors. Particularly, operators must clarify that they are *negotiating* for a lease rather than making an offer, which the lessor may accept.

3. *Windstar Holdings, LLC v. Range Resources Corp.*

In *Windstar Holdings, LLC v. Range Resources Corp.*, the court addressed a factual situation that was, in some aspects, very similar to the facts discussed in *Kerns* with one very important difference: it alleged oral statements on the part of an agent for Range.[123] The plaintiff, Windstar Holdings, LLC, entered into lease negotiations with Range through its agents, Gary & Associates, LLC ("Gary"), and Adam G. Young ("Young").[124] On September 11, 2008, Windstar executed a lease that was unsigned by Range.[125] The proposed lease contained the following terms: 18.5% royalty, signing bonus of $2,850 per acre, and lease approval subject to title certification.[126] Young further stated that "time was of the essence" and that Range would accept these terms if the plaintiff acted within a month.[127] This lease was returned to the plaintiff stamped "void" on November 11, 2008.[128]

The November 11th letter proposed slightly less favorable terms, by spacing the bonus payments out over five years.[129] The plaintiff executed this new lease after Young stated it was contingent only upon a title examination and that plaintiff could expect the bonus payments to begin in January 2009.[130] The plaintiff executed the lease and was

118. *Id.* (quoting RESTATEMENT (SECOND) OF CONTRACTS, § 26 (1981)).
119. *Id.* at *5.
120. *Id.*
121. *Id.*
122. *Id.* at *5, *7.
123. Windstar Holdings LLC v. Range Res. Corp., No. 1:10CV204, 2011 WL 2709849, at *1–2 (N.D. W. Va. July 12, 2011) (mem. op.).
124. *Id.*
125. *Id.* at *2.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*

told "the money [was] coming" by Young.[131] As of May 2009, the plaintiff had yet to receive any payments, so it contacted Range, which said the lease was "under management review."[132] In June 2009, Range sent a letter to the plaintiff stating that it had ceased leasing in West Virginia, and it would not be pursuing a lease with plaintiff.[133]

Following this letter, the plaintiff filed its complaint against Range, Gary, and Young alleging seven causes of action: (1) breach of contract; (2) specific performance; (3) violation of the West Virginia Antitrust Act; (4) violation of the Sherman Antitrust Act; (5) fraud and civil conspiracy; (6) negligent misrepresentation; and (7) tortious interference with prospective contracts.[134] In response to these seven allegations, Range and Gary (Young had not been served) filed a motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.[135]

Assuming the factual allegations of the complaint as true, the court addressed each of these allegations in turn.[136] Regarding the first claim, the court found that the plaintiff had pled sufficient facts to establish a claim for breach of contract, especially because the claim of fraud placed the contract outside of the statue of frauds.[137] Finding count two, specific performance, to be a potential remedy in the event the plaintiff establishes a claim for breach of contract, the court denied the defendants' motion to dismiss this claim.[138]

Counts three and four, alleging breach of the West Virginia Antitrust Act and the Sherman Antitrust Act, respectively, were both dismissed.[139] The court reasoned Range, Gary, and Young, members of the same enterprise, were not, as a matter of law, capable of conspiring or combining in a manner giving rise to antitrust liability.[140]

Count five included two separate causes of action, fraud and civil conspiracy.[141] The court found plaintiff had alleged sufficient facts to constitute a claim of fraud.[142] Specifically, the court inferred a plausible claim, based upon the plaintiff's allegations of large offers and statements from the defendants, that the defendants intended to keep the plaintiff from leasing the property until or unless it became profit-

131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.* at *2–6.
135. *Id.* at *2.
136. *Id.* (citing Francis v. Giacomelli, 588 F.3d 186, 193 (4th Cir. 2009)).
137. *Id.* at *3.
138. *Id.*
139. *Id.* at *3–4.
140. *Id.*
141. *Id.* at *4.
142. *Id.*

able.[143] Nevertheless, the court dismissed the claim for civil conspiracy because it is impossible for a corporation to conspire with itself.[144]

The sixth count, negligent misrepresentation, was not dismissed.[145] The plaintiff claimed Young knew, or should have known, that his comments regarding lease approval being subject only to a title search were false.[146] If Young knew that Range would only approve the lease subject to economic factors, then his failure to disclose this information constituted negligence.[147]

The seventh, and final, count claimed tortious interference with prospective client.[148] According to the plaintiff, Range, through its agents, Gary and Young, interfered with other prospective contracts by making offers it did not intend to consummate in an effort to keep competitors from securing this lease acreage.[149]

The importance of this case must be qualified. The court was tasked with deciding whether to grant a motion to dismiss, which is a very hard burden for a defendant to satisfy. The claims not dismissed herein may not survive a motion for summary judgment or trial. Nevertheless, these claims provide a cautionary tale to oil and gas developers warning them to be cautious when securing leases. All the claims alleged by the plaintiff are dependent upon the alleged actions or conduct of the leasing agents. Therefore, operators need to be cautious when using leasing agents. Commonly paid on commission, leasing agents may be willing to mislead potential lessors. Therefore, it is essential that the principal, the oil and gas operator, maintain adequate control over any leasing agents to ensure they are not misleading potential lessors.

IV. CONCLUSION

The accelerating development of the Marcellus Shale will undoubtedly lead to greater litigation and, with it, further development of West Virginia's oil and gas jurisprudence. Many of the cases discussed in this Article are directly related to development of this shale. Accordingly, oil and gas operators will need to act cautiously to ensure continuous compliance with West Virginia's developing oil and gas law.

143. *Id.*
144. *Id.*
145. *Id.* at *5.
146. *Id.*
147. *Id.*
148. *Id.*
149. *Id.*