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## West Virginia Oil and Gas Update

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# WEST VIRGINIA OIL AND GAS UPDATE



By: *Andrew S. Graham & Cole T. Delancey*

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## I. INTRODUCTION

This Article summarizes and discusses important cases and legislation, issued or enacted between September 1, 2011, and August 31, 2012, pertaining to the law of oil and gas in West Virginia. The Article is divided into two parts. Part One discusses the Natural Gas Horizontal Well Control Act, which was enacted by the West Virginia Legislature on December 14, 2011. Part Two 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, as well as decisions by the United States District Courts for the Northern and Southern Districts of West Virginia.

## II. PART ONE: HORIZONTAL WELL ACT

In 2010, in response to fears concerning irresponsible drilling of the Marcellus Shale, Governor Earl Ray Tomblin issued an executive order directing the West Virginia Department of Environmental Protection ("WVDEP") to issue emergency regulations regarding the disposal of water used to drill horizontal gas wells.<sup>1</sup> These regulations were temporary measures designed to give the legislature time to enact new legislation. In order to adequately address the new technologies and practices associated with horizontal drilling and hydraulic fracturing, the legislature enacted the Natural Gas Horizontal Well Control Act (the "Act") on December 14, 2011.<sup>2</sup>

The Act applies to any natural gas—excluding coalbed methane—well drilled using a horizontal drilling method.<sup>3</sup> Horizontal drilling is defined as "a method of drilling a well . . . [where] the wellbore is initially vertical but is eventually curved to become horizontal, or nearly horizontal, to parallel a particular geologic formation."<sup>4</sup> To fall under the Act's purview, the horizontal well must disturb three acres or more of surface, utilize more than 210,000 gallons of water in any thirty-day period, or both.<sup>5</sup>

Under the Act, the Secretary of the WVDEP has the "sole and exclusive authority" to regulate the permitting, operation, location, and spacing of wells; any and all drilling and production processes; fracturing; stimulation and well completion activities; and the plugging and reclamation of oil and gas wells, including operation.<sup>6</sup>

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1. W. Va. Exec. Order No. 4-11 (July 13, 2010), [www.governor.wv.gov/Documents/20110713150559476.pdf](http://www.governor.wv.gov/Documents/20110713150559476.pdf).

2. W. VA. CODE ANN. § 22-6A-2(a)(4) (LexisNexis Supp. 2012).

3. W. VA. CODE ANN. § 22-6A-4(b)(6) (LexisNexis Supp. 2012).

4. *Id.* § 22-6A-4(b)(5).

5. W. VA. CODE ANN. § 22-6A-3 (LexisNexis Supp. 2012).

6. W. VA. CODE ANN. § 22-6A-6(b) (LexisNexis Supp. 2012).

### A. Permit

The Act imposes additional requirements on oil and gas operators when submitting horizontal well permitting applications. The permit application requires information regarding the total depth of the well; the proposed angle and direction of the well; the actual or approximate depth at which the well deviates from vertical; the angle and direction of the non-vertical wellbore until the well reaches its total target depth; the formation in which the well will be completed; the stimulation of the well; and the entire casing program, if casing will be required.<sup>7</sup>

The permit application requires a fee of \$10,000 for drilling the initial horizontal well and \$5,000 for each additional horizontal well drilled on a single well pad at the same location.<sup>8</sup> Along with the permit application, operators must file and submit the following plans: an erosion and sediment control plan; a well site safety plan; and if over 210,000 gallons of water are used in a thirty-day period, a water management plan.

#### 1. Water Management Plan

A water management plan must be submitted if the operator will use 210,000 gallons of water or more in any thirty-day period. This plan can be submitted on an individual well or on a watershed basis. The plan must include (1) the type of water (surface or ground); (2) the county of each source to be used; (3) the anticipated volume of each withdrawal; (4) the anticipated months when withdrawals will be made; (5) the management and disposition of waste water; and (6) the listing of additives that may be used in water utilized for fracturing or stimulating the well.<sup>9</sup> Upon well completion, a listing of the additives that were *actually* used in the fracturing or stimulating of the well shall be submitted as part of the completion log or report.<sup>10</sup>

If the water is withdrawn from a surface-water source, the operator will also need to identify the current uses for the source, demonstrate the sufficiency of flow downstream from the point of withdrawal, and indicate the methods used in order to minimize adverse impact to aquatic life.<sup>11</sup>

#### 2. Safety Plan

The well site safety plan is a detail of the well operation that includes the well work, the completion and production activities, and an emergency point of contact for the well operator. The well site safety

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7. W. VA. CODE ANN. § 22-6A-7(b)(5)–(7) (LexisNexis Supp. 2012).

8. *Id.* § 22-6A-7(g).

9. *Id.* § 22-6A-7(e).

10. *Id.*

11. *Id.*

plan must also be provided to the local emergency planning committee at least seven days before commencement of well work or site preparation work that involves any disturbance of land.<sup>12</sup>

### 3. Comments

Any party entitled to notice has the right to file comments with the secretary within thirty-days of filing the application.<sup>13</sup> The Secretary has the discretion to consider other parties' comments. The Secretary must notify the applicant of the *character* of the comments within fifteen days after the close of the comment period.<sup>14</sup>

### 4. Well Location Restrictions

Wells may not be drilled within 250 feet, measured horizontally, from any existing water well or developed spring used for human or domestic animal consumption.<sup>15</sup> The center well pads may not be located within 625 feet of an occupied dwelling structure or a building 2,500 square feet or larger that is used to house or shelter dairy cattle or poultry husbandry.<sup>16</sup> These spacing requirements apply only to structures, springs, wells, or other similar objects that existed or were under construction on the date notice was given.<sup>17</sup> This limitation may be waived by written consent.<sup>18</sup>

The operator may also be granted a variance by submitting a plan that identifies sufficient measures, facilities, or practices to be employed.<sup>19</sup> No well pad may be prepared, or well drilled, within 100 feet, measured horizontally, from "any perennial stream, natural or artificial lake, pond or reservoir, or a wetland," or within 300 feet of a "naturally reproducing trout stream."<sup>20</sup> No well pad may be located within 1,000 feet of a surface or ground water intake of a public water supply.<sup>21</sup>

### 5. Permit Issuance

Once the permit is issued, the operator has the obligation (1) to plug all wells when the wells become abandoned; (2) to properly dispose of all drill cuttings and associated drilling mud generated from the well site in either an approved solid waste facility or, if the surface owner consents, on-site; (3) to grade, terrace and plant, and seed or

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12. *Id.* § 22-6A-7(b)(13).

13. W. VA. CODE ANN. § 22-6A-11(a) (LexisNexis Supp. 2012).

14. *Id.* § 22-6A-11(c).

15. W. VA. CODE ANN. § 22-6A-12(a) (LexisNexis Supp. 2012).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* § 22-6A-12(b).

21. *Id.*

sod the area disturbed to prevent substantial erosion and sedimentation; (4) to take action to minimize fire hazards and other conditions that constitute a hazard to health and safety of the public; and (5) to protect the quantity and the quality of water in surface and ground-water systems both during and after drilling operations and during reclamation.<sup>22</sup>

Operators withdrawing more than 210,000 gallons of water in a thirty-day period have the additional obligation of identifying water withdraw locations forty-eight hours prior to the withdrawal of water, providing signage for water withdrawal locations, reporting water usage, and keeping records for three years.<sup>23</sup>

## B. *Property Owners*

### 1. Notice

The operator must provide at least seven days' notice, but no more than forty-five days' notice, prior to entry on the surface tract to conduct any plat surveys. Notice must be provided to the surface owners of the tract, any owner or lessee of coal seams beneath the tract, and any owner of minerals underlying such tract. No later than the filing date of a permit application for well work or construction of an impoundment or pit, an applicant must provide copies of the application, the erosion and sediment control plan, and the well plat to (1) the surface owners of record; (2) the surface owners of record of tracts overlying the oil and gas leasehold being developed by proposed well work if the surface is to be used for roads or other land disturbance; (3) the coal owner, operator, or lessee; (4) the surface owners of record of tracts overlying the oil and gas leasehold being developed by proposed well work if the surface is to be used for the placement, construction, enlargement, alteration, repair, removal, or abandonment of any impoundment or pit; (5) any surface owner or water purveyor known to have a water well spring or water supply source within 1,500 feet of the center of well pad; and (6) the operator of any natural gas storage field where the proposed well work activity is to take place.<sup>24</sup>

The operator must give at least ten days' notice prior to filing a permit application to the surface owner of intent to enter upon his land for the purpose of drilling a horizontal well. Such notice may be waived in writing by the surface owner. The operator must also give the surface owner notification of planned operations no later than the date for filing the permit application.<sup>25</sup>

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22. W. VA. CODE ANN. § 22-6A-8(g) (LexisNexis Supp. 2012).

23. *Id.*

24. W. VA. CODE ANN. § 22-6A-10(b) (LexisNexis Supp. 2012).

25. *Id.*

## 2. Compensation

The oil and gas developer is obligated to pay the surface owner compensation for (1) the lost income or expenses incurred as a result of being unable to dedicate land actually occupied by the driller's operation, or to which access is prevented by the drilling operation, to the uses for which it was dedicated prior to commencement of the activity for which a permit was obtained; (2) the market value of crops, including timber, destroyed, damaged, or prevented from reaching market; (3) any damage to a water supply in use prior to the commencement of the permitted activity; (4) the cost of repair to personal property of like age, wear, and quality; and (5) the diminution of value, if any, of the surface lands and other property after completion of the surface disturbance done pursuant to the activity for which the permit was issued, determined according to the market value of the actual use made thereof by the surface owner immediately prior to the commencement of the permitted activity.<sup>26</sup>

The operator must also pay the surface owner a one-time payment of \$2,500 to compensate him for the payment of real property taxes for surface lands and surrounding lands that are encumbered or disturbed by the construction or operation of a horizontal well pad.<sup>27</sup>

### C. Further Environmental Review

Currently, the Act only regulates impoundments and pits not associated with a specific well work permit.<sup>28</sup> Although pits and impoundments are both man-made excavations for the retention of fluids, pits contain an accumulation of process waste fluids, drill cuttings, or any other liquid substance generated in the development of a horizontal well.<sup>29</sup> Because either excavation could potentially impact surface or groundwater, the Secretary must report on their safety and evaluate whether testing and special regulatory provisions are needed for radioactivity or other toxins by January 1, 2013.<sup>30</sup> Additionally, the Secretary is to report on the possible need for the regulation of air pollution from the wells by July 1, 2013.<sup>31</sup>

## III. PART TWO: CASE LAW DEVELOPMENTS

The highest appellate court, and currently the only one, in the State of West Virginia is the West Virginia Supreme Court of Appeals ("Supreme Court of Appeals"). As discussed in last year's article, published by the Authors in the Texas Wesleyan Law Review Annual Oil

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26. W. VA. CODE ANN. § 22-6B-3(a) (LexisNexis Supp. 2012).

27. W. VA. CODE ANN. § 22-6A-17 (LexisNexis Supp. 2012).

28. W. VA. CODE ANN. § 22-6A-9(a) (LexisNexis Supp. 2012).

29. W. VA. CODE ANN. § 22-6A-4 (LexisNexis Supp. 2012).

30. W. VA. CODE ANN. § 22-6A-22 (LexisNexis Supp. 2012).

31. *Id.*

and Gas Update, the development of West Virginia's case law has suffered from the absence of an intermediate appellate court to hear cases from the thirty-one judicial districts throughout the state. Of course, this deficiency is not absolute, but it exists nevertheless.<sup>32</sup>

### A. *West Virginia Supreme Court of Appeals*

Case law issued by the Supreme Court of Appeals was sparse. Nevertheless, the Supreme Court of Appeals did address, at least indirectly, several areas of oil and gas jurisprudence. The reader needs to be forewarned: these memorandum decisions do not set binding precedence. Instead, they simply affirm decisions or orders entered by the lower courts, and they only include the most sparse discussion or analysis of the underlying causes of action. This Article will address three such cases.

#### 1. Adverse Possession

The first such case is *Gassaway v. Dominion Exploration & Development, Inc.*<sup>33</sup> In *Gassaway*, the plaintiff, Maria Gassaway ("Gassaway"), claimed ownership of a one-fourth interest in the oil and gas within and underlying a tract of land containing 192 acres situated in Doddridge County, West Virginia.<sup>34</sup> Gassaway's parents acquired ownership of said tract, together with the undivided oil and gas interest in 1957.<sup>35</sup> Nevertheless, in 1965, this interest of Gassaway's parents in the tract, being all the surface and one-fourth of the minerals, was conveyed to D.A. Davis and Delphia Davis as a result of a foreclosure sale.<sup>36</sup>

For more than forty years thereafter, Gassaway, or her parents, were paid one-fourth of the oil and gas royalty from the wells drilled on this tract.<sup>37</sup> The 1965 foreclosure sale went unnoticed until 2007 when Dominion Exploration and Production, Inc. ("Dominion") ceased making payments to Gassaway following a title update.<sup>38</sup> The results of which vested record title to the oil and gas interest in Gertrude Dotson ("Dotson"), daughter of D.A. Davis and Delphia Davis.<sup>39</sup>

Gassaway then brought suit claiming, *inter alia*, that she had adversely possessed this contested oil and gas interest.<sup>40</sup> On her claim

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32. Andrew Graham & Cole DeLancey, *West Virginia*, 18 TEX. WESLEYAN L. REV. 675, 679 (2012).

33. *Gassaway v. Dominion Exploration & Prod., Inc.*, No. 11-0535, 2011 WL 8193596, at \*1 (W. Va. Oct. 11, 2011).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*



and others, the circuit court of Doddridge County, West Virginia granted summary judgment in favor of Dominion, thereby validating the title of Dotson.<sup>41</sup> In upholding this ruling, the Supreme Court of Appeals agreed that adverse possession cannot be exercised by a third party.<sup>42</sup> Restated, Gassaway could only obtain actual, hostile possession by drilling and producing the wells herself; she could not rely on the conduct of a third party to do so.<sup>43</sup>

*Gassaway* expounds upon, and hopefully finalizes, this most basic rule of adverse possession of oil and gas. Still, operators are warned that this area of jurisprudence is wholly underdeveloped in West Virginia. For instance, What is the scope of adverse possession? Is it limited to development of a particular wellbore? Does it include just the formation being produced, or does it include all the oil and gas within and underlying the relevant tract?

## 2. Diligent Title Examinations

Discussing constructive notice for oil and gas operators, *Evans v. LaRosa* is quite possibly the most relevant case addressed by the Supreme Court of Appeals.<sup>44</sup> The facts are straightforward. Dominick LaRosa (“LaRosa”) purchased an interest in a tract of land containing 638.57 acres from Mary Roda, James D. LaRosa, and Virgil B. LaRosa.<sup>45</sup> Due to an oversight by the County Clerk of Upshur County, LaRosa’s deed was not recorded.<sup>46</sup> Though not recorded, the County Clerk did prepare a transfer list that was given to the County Assessor for purposes of taxing the interest in the name of LaRosa.<sup>47</sup> Accordingly, LaRosa was assessed for real estate tax purposes.<sup>48</sup>

In 1990, the plaintiffs were conveyed an easement by LaRosa over and across the contested tract of land.<sup>49</sup> Thereafter, the plaintiffs became interested in purchasing the property, so they hired an attorney to conduct a title examination.<sup>50</sup> As a result of this title examination, the plaintiffs purchased the interest of Mary Roda despite finding the

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41. *Id.* at \*2. Gassaway failed to name Dotson as a defendant in the underlying action. *Id.* On appeal, Gassaway raised this issue, but the Supreme Court of Appeals considered the issue moot following its affirmation of the circuit court’s summary judgment ruling. *Id.*

42. *Id.* at \*3.

43. *Id.* (citing *Welch v. Cayton*, 395 S.E.2d 496 (W. Va. 1990)).

44. *Evans v. LaRosa*, No. 11-1107, 2012 WL 3104308 (W. Va. May 29, 2012).

45. *Id.* at \*1 (explaining that the interest purchased is never described though it appears to have an undivided one-half interest according to the tax assessments covering the subject property).

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

tax assessment in the name of LaRosa, but finding no assessment in the name of Mary Roda.<sup>51</sup>

At the close of evidence, the circuit court of Upshur County granted LaRosa's motion for judgment as a matter of law.<sup>52</sup> The circuit court found that the plaintiffs had sufficient knowledge of LaRosa's ownership as a result of the tax assessment and from recitals reflecting the same that were contained in their very own easement and deed to their neighboring tract.<sup>53</sup> The circuit court held that "[w]hen a prospective buyer of an interest in real estate has reasonable grounds to believe that property may have been conveyed in an instrument not of record, he is obliged to use reasonable diligence to determine whether such previous conveyance exists."<sup>54</sup> Accordingly, the plaintiffs were not bona fide purchasers of this interest because they had legally sufficient notice of LaRosa's interest.<sup>55</sup>

The ramifications of this case cannot be overstated: operators may be imputed with constructive notice with even the most tangential record notice. Compounding this problem is the fact that many areas of the state have severed ownership of the oil and gas. Often, these severances date back to the 1870s or 1880s, especially in counties that now contain the highly desirable "wet" gas. Nevertheless, all cases are decided upon the facts at hand. Particularly, the Authors believe the interaction between the plaintiffs and LaRosa was especially damaging to their case and claim of lack of knowledge.

### 3. Scope of Grant

In *Belmont Resources, LLC v. Tunnelton Cooperative Coal Co.*, the circuit court of Preston County, West Virginia was asked to determine the scope of a grant contained in a 1901 deed.<sup>56</sup> The contested language read as follows:

The said Grantors do grant with covenants of General Warranty, all the coal and other minerals being and underlying the three certain parcels or tracts of land as hereinafter described situate in Reno District, County of Preston and State of West Virginia.

It is herein especially understood by and between the said Grantee and Grantors that said Grantors only intend to convey and do convey, one third of all the coal and other minerals being and underlying the said second tracts [sic] of land herein described or sixteen

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51. *Id.*

52. *Id.* at \*2.

53. *Id.*

54. *Id.* at \*3 (quoting Syl. Pt. 1, *Eagle Gas Co. v. Doran & Assocs., Inc.*, 387 S.E.2d 99, 99–100 (W. Va. 1989)).

55. *Id.* at \*4.

56. *Belmont Res. L.L.C. v. Tunnelton Coop. Coal Co.*, No. 11-0159, 2011 WL 8201837, at \*1 (W. Va. Nov. 28, 2011).

acres and seven perch of said coal and other minerals, underlying the said herein named and described second tract.<sup>57</sup>

According to the plaintiffs, these clauses when read together resulted in the grantee, predecessor in interest to the defendants, receiving an undivided one-third interest in the oil and gas within and underlying the subject tracts as opposed to the 100% interest claimed by the defendants. Their argument centered on the language contained in the “recital” that, they claimed, limited the grant to a one-third interest.<sup>58</sup>

In finding that this language resulted in the predecessor to the defendants receiving an undivided 100% interest in the oil and gas, the circuit court discussed two points. First, it focused on the lack of any reservation or exception in the language of the grant, the first paragraph.<sup>59</sup> A reservation in a deed must be clear, correct, conventional and “expressed in definite language.”<sup>60</sup> Its basis for requiring such clear and unequivocal reservation language is found in section 36-1-11 of the West Virginia Code:

When any real property is conveyed or devised to any person, and no words of limitation are used in the conveyance or devise, such conveyance or devise shall be construed to pass the fee simple, or the whole estate or interest, legal or equitable, which the testator or grantor had the power to dispose of, in such real property, unless a contrary intention shall appear in the conveyance or the will.<sup>61</sup>

Next, the circuit court examined the actual interests of the grantors, A.F. Gibson and his wife, in and to the coal and other minerals. From its investigation, the circuit court determined that the grantors only owned a one-third interest in the coal underlying two of the three tracts conveyed.<sup>62</sup> To the circuit court, this was evidence of the intent of the grantors to convey all of their undivided interest in the minerals.<sup>63</sup> Restated, one-third interest in the coal was all of the grantor’s interest.

What are the practical implications to be taken from this case? Most importantly, courts will read reservations narrowly. There are potential exceptions to this generality, but one must remember that section 36-1-11 of the West Virginia Code speaks to this point. Finally, the interest of the grantors at the time of conveyance may be indicative of the parties’ intent, particularly if the grantors own less

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57. *Id.*

58. *Id.* at \*2–3. Actually, the plaintiff claimed that the “recital” was actually a limitation on the grant. *Id.* at \*2. Whereas, the defendants claimed that the “recital” was in fact a recital without any legal bearing on the language of grant. *Id.*

59. *Id.* at \*5.

60. *Id.*

61. W. Va. Code Ann. § 36-1-11 (LexisNexis Supp. 2012).

62. *Id.*

63. *Id.*

than an undivided 100% interest. As development of the Marcellus Shale increases and higher bonus payments are made, it is not surprising to see even more cases like *Belmont Resources, LLC*. This further illustrates the importance of diligent title examinations.

## B. Federal Courts

### 1. Summary Judgment

In *Hagy v. Equitable Production Co.*,<sup>64</sup> the plaintiffs, Dennis and Tamera Hagy, brought suit against a litany of defendants, claiming that drilling operations had contaminated their water supply.<sup>65</sup> Specifically, the plaintiffs claimed negligence, private nuisance, strict liability, trespass, and medical monitoring.<sup>66</sup>

In addressing a motion for summary judgment filed by one of the defendants, BJ Services Company, USA (“BJ Services”), the district court dismissed the plaintiffs’ claims as to negligence, trespass, and private nuisance. With respect to negligence, the plaintiffs alleged four negligent acts. First, the plaintiffs alleged that that BJ Services was negligent without “identifying the specific equipment which allegedly failed.”<sup>67</sup>

Secondly, the plaintiffs claimed that BJ Services’s equipment “failed to properly seal the well-bore with cement before pressurized tracking fluids were pumped in the ground.”<sup>68</sup> With respect to this second claim, the plaintiffs relied on a statement by an Equitable Production Company employee who stated that it was unusual to have cement density like that achieved in that instance.<sup>69</sup>

Thirdly, the plaintiffs alleged that BJ Services failed to properly place packers to stabilize the casing pipe, thereby resulting in tracking fluids rising up from the well-bore.<sup>70</sup> Hurting their argument, the plaintiffs failed to identify on which of the four wells the specific negligence took place, nor did they show the significance of failing to properly place packers and how it related to their alleged harm.

Fourthly and lastly, the plaintiffs alleged that the use of old pumps by BJ Services resulted in a failure to maintain pressure during the tracking of the well.<sup>71</sup> The impetus for this claim was taken from a review of BJ Services’s work completed by Equitable Production Company, stating that the pumps failed to maintain pressure.<sup>72</sup> How-

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64. *Hagy v. Equitable Prod. Co.*, No. 2:10-cv-01372, 2012 WL 2562856 (S.D. W. Va. June 29, 2012).

65. *Id.* at \*1.

66. *Id.*

67. *Id.* at \*3.

68. *Id.*

69. *Id.*

70. *Id.* at \*4.

71. *Id.*

72. *Id.*

ever, like their previous allegations, the plaintiffs failed to show how this resulted in their alleged harm.<sup>73</sup>

In granting BJ Services's motion for summary judgment, the district court stated the following:

In sum, the plaintiffs have failed to provide evidence from which I can identify any wrongful act on the part of BJ Services that caused the plaintiffs harm. Instead, the plaintiffs have made a variety of vague statements and speculative allegations. Having fully and carefully considered the evidence in the record, the court **FINDS** that there is insufficient evidence to create a genuine issue of material fact with respect to whether BJ Services committed negligent conduct.<sup>74</sup>

The Authors discuss this case simply to show the detail required by the district courts. This case illustrates that plaintiffs cannot simply claim negligence without more facts that actually address the specific acts of negligence.

## 2. Arbitration Clauses in Leases

Arbitration clauses are becoming more and more commonplace in oil and gas leases. In *Heller v. TriEnergy, Inc.*, the district court granted the defendant's motion to compel arbitration.<sup>75</sup> In *Heller*, the plaintiff challenged the enforceability of his lease, claiming that it had expired by its own terms.<sup>76</sup> In response to the plaintiff's claims, the defendant requested arbitration pursuant to the terms of the lease.<sup>77</sup> The lease contained the following language: "Any question concerning this lease or performance thereunder shall be ascertained and determined by three disinterested arbitrators . . . . The cost of such arbitration will be borne equally."<sup>78</sup>

The plaintiff raised two defenses to this arbitration: (1) the clause was unconscionable and (2) the lease was fraudulently induced.<sup>79</sup> Specifically, the plaintiff alleged that the cost-sharing scheme, the framework of the arbitration process, prevention of relief available at law, and the waiver of a jury trial made the arbitration clause unconscionable.<sup>80</sup>

Regarding the cost-sharing scheme, the court stated that for it to be unconscionable, the movant must show that it "would impose an un-

73. *Id.*

74. *Id.* (emphasis added).

75. *Heller v. TriEnergy, Inc.*, No. 5:12-cv-45, 2012 WL 2740870 (N.D. W. Va. July 9, 2012).

76. *Id.* at \*3.

77. *Id.* at \*4.

78. *Id.* at \*2.

79. *Id.* at \*12.

80. *Id.* at \*13–15.

conscionably impermissible burden or deterrent.”<sup>81</sup> In dismissing this argument, the court found the plaintiff’s claim lacking of any evidence that the cost sharing scheme would pose an impermissible burden or deterrent.<sup>82</sup>

Plaintiff, then, claimed the clause was unconscionable because it did not contain a definite framework for appointing arbitrators and conducting arbitration.<sup>83</sup> In dismissing this argument, the court reiterated that the Federal Arbitration Act provided relief in the event the parties could not agree to the specifics.<sup>84</sup>

Finally, the plaintiff argued the clause was unconscionable because (1) it did not specifically authorize the arbitrators to award all relief available by law and (2) it resulted in a waiver of jury trial.<sup>85</sup> The court summarily dismissed these claims as standing in conflict to the Federal Arbitration Act and common sense.<sup>86</sup>

With respect to federal jurisdiction, arbitration clauses can be of significant import. Nevertheless, it is uncertain how state courts would address such a clause.

### 3. Gaps in Production & Failure to Pay Flat Rate Rentals

*Wellman v. Bobcat Oil & Gas, Inc.* is of significance to operators, especially those operating old shallow wells.<sup>87</sup> In *Wellman*, the subject lease provided for quarterly royalty payments of \$75.00 (flat-rate rental) for a secondary term “as long thereafter as oil or gas, or either of them, is produced from the said land.”<sup>88</sup> The plaintiff claimed the subject lease, dating back to 1933, was invalid due to gaps in production throughout the 2000s.<sup>89</sup>

In response, the defendant, relying on *Bruen v. Columbia Gas Transmission Corp.*, recriminated that the amount of actual production was irrelevant since the lease provided for a flat-rate rental.<sup>90</sup> To this court, “[t]he case law is clear: a lessee who makes the required payments on a flat-rate mineral lease may avoid this contractual termination clause of the lease agreement even without producing any minerals from the leased minerals estate.”<sup>91</sup>

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81. *Id.* at \*13 (quoting Syl. Pt. 13, *Brown v. Genesis Healthcare Corp.*, 729 S.E.2d 217, 221 (W. Va. 2012)).

82. *Id.*

83. *Id.* at \*14.

84. *Id.* (citing and discussing 9 U.S.C. § 5 (2006)).

85. *Id.* at \*15.

86. *Id.* at \*14.

87. See *Wellman v. Bobcat Oil & Gas, Inc.*, No. 3:10-0147, 2011 WL 6415487 (S.D. W. Va. Dec. 21, 2011).

88. *Id.* at \*2–3.

89. *Id.* at \*3.

90. *Id.* (discussing *Bruen v. Columbia Gas Transmission Corp.*, 426 S.E.2d 522 (W. Va. 1992)).

91. *Id.* at \*4.

Alternatively, the plaintiff claimed the lease was invalid because the defendant failed to make certain flat-rate rental payments in 1995, 2003, and 2004.<sup>92</sup> Relying on ratification, the court dismissed this claim because the plaintiff had accepted subsequent rental payments, thereby electing to treat the contract as continuing in enforceability.<sup>93</sup> Moreover, the court stated that “West Virginia law specifically prohibits a lessor from accepting imperfect performance under a lease on an ongoing basis, then complaining of the accepted breach.”<sup>94</sup>

#### 4. Disposal of Drilling Cuttings

Drilling has been and continues to be subject to various environmental claims. *Whiteman v. Chesapeake Appalachia, LLC* addresses the right of an operator to dispose of drill cuttings and waste in pits on the leasehold property.<sup>95</sup> Because of this disposal, the plaintiffs brought suit alleging nuisance, trespass, negligence, strict liability, intentional infliction of emotional distress, and negligent infliction of emotional distress.<sup>96</sup>

During its drilling operations, the defendant placed large amounts of drill cuttings, mud, and chemical additives in two lined pits on the plaintiffs’ property.<sup>97</sup> Subsequently, the liners in these pits were removed, and clean soil was used to cover these pits.<sup>98</sup>

Plaintiffs alleged that the defendant had trespassed on its property because its use of the surface exceeded the rights conveyed in the title. In addressing this claim, the court reiterated West Virginia’s trespass law:

It is well settled in West Virginia that one who owns subsurface rights to a parcel of property has the right to use the surface of the land in such a manner and with such means as would be fairly necessary for the enjoyment of the subsurface estate.<sup>99</sup>

To determine whether the defendant’s use was “fairly necessary,” the court looked at the reservation rights created in the severance instrument.<sup>100</sup> The 1952 severance deed contained the following provision:

THERE IS RESERVED AND EXCEPTED unto the said Ellis O. Miller, grantor, all of his interest in and to the oil and gas within and underlying the above-described parcels as well also as all of the coal

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92. *Id.* at \*5.

93. *Id.* at \*6.

94. *Id.* (discussing *Ohio Fuel Oil Co. v. Greenleaf*, 99 S.E. 274, 279–80 (W. Va. 1919)).

95. See *Whiteman v. Chesapeake Appalachia, L.L.C.*, 873 F. Supp. 2d 767 (N.D. W. Va. 2012). This case does not identify the wells as being vertical or horizontal.

96. *Id.* at 769.

97. *Id.* at 771.

98. *Id.*

99. *Id.* at 772.

100. *Id.* at 773.

not heretofore conveyed, and all other minerals within and underlying the above-described property, **with the necessary rights and privileges appertaining thereto.**<sup>101</sup>

Next, the court looked at the rights contained in the 1963 oil and gas lease to see what rights were contained therein.<sup>102</sup> The relevant language stated that the defendant has those “exclusive rights as may be necessary or convenient” to extract the oil and gas.<sup>103</sup>

Finding no express right to construct pits for collection of drill cuttings, the court then addressed the implied rights that are “reasonably necessary” for the extraction of the minerals by looking at the West Virginia Code and the regulations of the WVDEP.<sup>104</sup> Finding a permit process administered by the WVDEP for disposing of drill cuttings, the court found that this was a common practice in the oil and gas industry and that it was thereby reasonable and necessary.<sup>105</sup> Of importance was the fact that the plaintiffs waived their right to comment and protest this permit.<sup>106</sup>

One must remember that the entry of this summary judgment only applied to the trespass claim. This memorandum order does not address the remaining claims of the plaintiffs.

### 5. Pipeline Relocations (Change in Status Quo)

A reoccurring issue in West Virginia concerns the allocation of expenses for relocated oil and gas pipelines. Expounding upon earlier cases, *EQT Gathering Equity, LLC v. Fountain Place LLC* addressed the statute of limitations for status quo claims.<sup>107</sup>

*EQT Gathering Equity, LLC* filed claim, seeking restoration for moneys expended in relocating a pipeline, which it claims was relocated for safety concerns because the defendant’s predecessor had started to pile dirt over the pipeline constructed pursuant to an oil and gas lease.<sup>108</sup> According to the plaintiff, this change in the status quo benefitted the defendant, which entitled the plaintiff to reimbursement.<sup>109</sup>

The defendant sought to dismiss the claim on the basis that the two-year statute of limitations for torts had elapsed (the claim was filed in 2009).<sup>110</sup> In rejecting this argument and citing section 55-2-6 of the

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101. *Id.* (emphasis in original).

102. *Id.*

103. *Id.*

104. *Id.* at 774.

105. *Id.* at 774–75.

106. *Id.* at 775.

107. *EQT Gathering Equity L.L.C. v. Fountain Place L.L.C.*, No. 2:09-0069, 2012 WL 895769, at \*6 (S.D. W. Va. Mar. 15, 2012).

108. *Id.* at \*3.

109. *Id.* at \*3 (discussing *Quintain Dev., L.L.C. v. Columbia Natural Gas Res., Inc.*, 556 S.E.2d 95 (W. Va. 2001)).

110. *Id.* at \*6.



West Virginia Code, the court noted that this litigation was based on contract (the lease), and therefore was subject to a ten-year statute of limitations.<sup>111</sup>

#### I. CONCLUDING REMARKS

The past year has seen several developments and additions to West Virginia's oil and gas jurisprudence. The accelerated development of the Marcellus Shale formation will undoubtedly lead to more developments in the upcoming years. To ensure continual compliance, operators must stay abreast of these developments. As discussed herein, several of these developments, particularly the Natural Gas Horizontal Well Control Act discussed in Part One, are very technical and require considerable effort to remain compliant. Nevertheless, the Authors are cautiously optimistic that West Virginia will continue to develop a fair and uniform body of case law.

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111. *Id.* at \*8.