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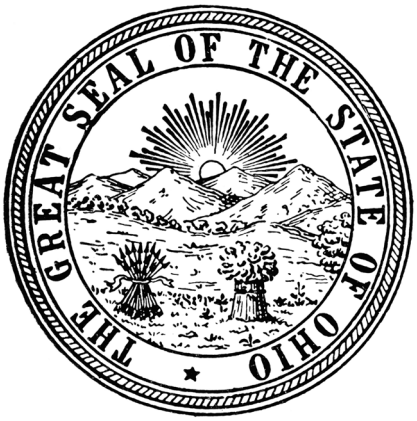

OHIO

By: Gregory W. Watts & Matthew W. Onest[1]

I. MINERAL OWNERSHIP

This section will discuss judicial decisions which seek to aid the determination of mineral rights ownership.

A. *The Ohio Marketable Title Act*

In recent years, as a result of Ohio's Utica shale boom, Ohio courts have confronted the issue of how to apply the Ohio Marketable Title Act.[2] As with many statutes, there are generally two questions to answer: (1) does the particular statute apply to the particular facts of the case? and (2) if the statute applies in the first instance, how does a court apply the statute to the particular facts of the case? Both

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1. Attorneys at the law firm of Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.
2. *See* OHIO REV. CODE ANN. §§ 5301.47–5301.56 (West 2019).

questions about Ohio's Marketable Title Act and severed mineral interests were examined and explored in 2019.

The Seventh District Court of Appeals, which appears to have examined the most cases involving questions of severed mineral ownership, recently answered the first question in the affirmative, holding the Ohio Marketable Title Act applies to severed mineral interests. In *Stalder v. Bucher*, the severed mineral owners claimed the Ohio Marketable Title Act does not apply to severed mineral interests, meaning it would not extinguish severed mineral interests because the Ohio Dormant Mineral Act exists to abandon severed minerals, i.e. they argued the specific statute ("Dormant Mineral Act") controls over the general statute (the "Marketable Title Act").[3] The Seventh District rejected this argument and held both statutes are equally and separately applicable to severed mineral interests.[4]

As to the applicability of the Ohio Marketable Title Act to specific facts, the Seventh District Court of Appeals issued several decisions in close proximity to one another and which appear to be internally inconsistent on how to apply the statute to severed property interests.

In order to prevail on a claim that the Marketable Title Act extinguished certain property interests, one must show the interest to be extinguished predates the "root of title" for the particular property interest.[5] The "root of title" is defined as the "conveyance or other title transaction in the chain of title of a person, purporting to create the interest claimed by such person, upon which he relies as a basis for the marketability of his title, and which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined."[6]

Another section of the Ohio Marketable Title heavily litigated in 2019 and involving the "root of title" is Revised Code § 5301.49(A), which provides property interests are preserved, i.e. protected from extinguishment, if they are specifically referenced within the muniments of title. In late 2018, the Ohio Supreme Court adopted a

3. Stalder v. Bucher, No. 17 MO 0017, slip op. ¶¶ 11–19 (Ohio Ct. App. Mar. 3, 2019), *appeal denied*, 125 N.E.3d 937 (Ohio 2019).

4. *Id*. at ¶ 19 ("Because an oil and gas interest is subject to both the MTA and the DMA, the trial court did not err in finding the MTA applicable in this case.").

5. § 5301.50.

6. § 5301.47.

three-part test for determining whether an interest was specifically referenced under Revised Code § 5301.49(A).[7]

In early 2019, in three separate decisions, the Seventh District held that any reference to a severed mineral interest with a purported root of title, including general reservation language such as "reserving all oil and gas," prevented a party from claiming marketable title as against any severed mineral interests predating that root of title.[8] However, the Seventh District appears to have implicitly overruled itself in *Stalder*.[9]

Additionally, in *Hickman*, the Seventh District granted appellants' application for reconsideration and enacted a new rule for this reference-within-root issue—the void within chain-of-title rule. On September 25, 2019, the *Hickman* court reconsidered its previous opinion and offered a new justification for that decision.[10] It held that a court need not apply the *Blackstone* test to a purported repetition or reference within a root of title unless the record, meaning the evidentiary record before the court, contains all title documents within the chain-of-title from the date of severance forward.[11] The opinion goes further by essentially holding that the Marketable Title Act would not extinguish an interest absent those title documents being presented at evidence in a lawsuit seeking confirmation of extinguishment under the statute.[12] This appears to be an implicit, and possibly mistaken, holding that the statute operates once a lawsuit is filed.[13]

In a non-mineral rights case, the Sixth District Court of Appeals in *David v. Paulsen* further discussed how one determined the

7. Blackstone v. Moore, 122 N.E.3d 132, 136 (Ohio 2018) ("The statute presents a three-step inquiry: (1) Is there an interest described within the chain of title? (2) If so, is the reference to that interest a 'general reference'? (3) If the answers to the first two questions are yes, does the general reference contain a specific identification of a recorded title transaction? Here, the answer to the first question is yes: the 1969 deed that constitutes the root of title recites that it is subject to the royalty interest. Thus, we turn to the second question: is the reference a 'general reference'?")

8. Hickman v. Consolidation Coal Co., 129 N.E.3d 1052 (Ohio Ct. App. 2019); Miller v. Mellott, 130 N.E.3d 1021 (Ohio Ct. App. 2019); Soucik v. Gulfport Energy Corp., No. 17 BE 0022, 2019 WL 549770, slip op. (Ohio Ct. App. Feb. 7, 2019).

9. *But see* Hickman v. Consolidation Coal Co., No. 17 CO 0012, 2019 WL 4894087 (Ohio Ct. App. Sept. 26, 2019).

10. *Hickman*, 2019 WL 4894087.

11. *Id.* ¶ 24.

12. *Id.*

13. *See* Warner v. Palmer, No. 14 BE 0038, 2017 WL 1102786, slip op. ¶ 34, (Ohio Ct. App. Mar. 27, 2017).

specific "root of title."[14] As previously discussed, the "root of title" is determined based, in part, on the following criteria: "which was the most recent to be recorded as of a date forty years prior to the time when marketability is being determined . . . ." The *David* court analyzed what is meant by "the time when marketability is being determined. In doing so, the court held that the date marketability is determined is the date on which the superiority of the property rights at issue is being asserted.[15]

However, the Seventh District determined that the forty-year period for severed mineral interests is essentially a rolling period, governed by the potential root of title documents.[16]

On June 19, 2019, the Seventh District Court of Appeals decided *Kilburn v. Graham*.[17] *Kilburn* involved the interpretation of the following mineral conveyance language—"the one-half part or share of their royalty of all [the oil] and gas in and under [the property]."[18] In 1919, Frieda and Chancy Ankrom owned the surface estate and one-half of the oil and gas royalty for 120 acres in Monroe County, Ohio. In May of 1919, the Ankroms conveyed "unto F .F Burkhart, A.C. and E.L. Peters and H.J. Cooper the one-half part or share of their royalty of all [the oil] and gas in and under [the property]."[19] The dispute involved the present surface owner of the property (the plaintiff) and the heirs of F.F. Burkhart.[20]

The trial court found the use of the term "the one-half" in the Ankrom conveyance meant they conveyed the entirety of their interest and that the conveyance consisted of three equal, undivided parts, meaning a total of one-sixth interest in the royalties was conveyed to F.F. Burkhart, A.C. and E.L. Peters, and H.J. Cooper.[21]

14. David v. Paulsen,—N.E.3d—, 2019 WL 2323846, ¶¶ 15–24 (Ohio Ct. App. 2019).

15. *Id.* at ¶ 20 ("We think it more appropriate to determine marketability as of the date that David and Sanders sought to enforce a purportedly-superior right to the property-which, in this case, was the date that they filed an action to enforce the Declaration of Restrictions against the Moores.").

16. Senterra Ltd. v. Winland, No. 18 BE 0051, 2019 WL 5544130, slip op. ¶¶ 53–58 (Ohio Ct. App. October 11, 2019).

17. No. 18 MO 0022, 2019 WL 2755129, slip op. (Ohio Ct. App. June 19,2019).

18. *Id.* at ¶ 10.

19. *Id.* ¶ 3.

20. *Id.* at ¶¶ 3, 7.

21. *Id.* at ¶ 13.

The Seventh District upheld the trial court on both points. As to the interpretation of "the one-half part or share of their royalty," the Seventh District provided little to no analysis to support its conclusion:

> At the time of the conveyance, the Ankroms owned an undivided 1/2 interest in the oil and gas royalty. The fact that the conveyance granted "the one-half part or share of their royalty" indicates that the Ankroms intended to convey their entire interest in the royalty. "[T]heir share," indicates that the Ankroms only owned a portion of the royalty, not the whole royalty. As they conveyed "the one-half part or share," the deed shows that the Ankroms intended to convey their entire interest in the royalty.[22]

Based on the scant amount of legal analysis, it is difficult to believe the holding of this case will offer much precedential value to other deed interpretation cases. However, if one is confronted with interpreting a conveyance involving fractional interests, this case may help provide a little guidance as to how to interpret said conveyance.

As to the number of shares conveyed by the Ankroms, the Seventh District held that the Ankroms conveyed three equal shares. The Seventh District relied, principally, upon the lack of a serial or Oxford comma between A.C. and E.L. Peters name.[23] The appellate court refrained from rewriting the deed to state either "F .F Burkhart, A.C., and E.L. Peters, and H.J. Cooper" or "F .F Burkhart, A.C. Peters, and E.L. Peters and H.J. Cooper."[24] The court further relied upon the fact that the grantees were grouped by last names, indicating three distinct groups of grantees.[25]

In *Windland v. Christman*, the Seventh District Court of Appeals analyzed how res judicata, which is comprised of claim and issue preclusion, may work when a surface owner sues a severed mineral interest owner's predecessors and a judgment has been rendered against those prior mineral owners.[26] In *Winland*, the

22. *Id*. at ¶ 24.
23. *Id.* at ¶ 30.
24. *Id.*
25. *Id*. at ¶ 31.
26. Winland v. Christman, No. 18 MO 0005, 2019 WL 2513801, slip op. (Ohio

putative mineral owners alleged to have acquired the severed mineral interest via inheritance from their father.[27] Their father had acquired the interest in 1944 via an auditor's deed.[28] That deed made specific reference to two of the original owners (Bentley and Watson).[29] In a previous lawsuit, the surface owner sued Bentley and Watson and "their unknown heirs, devisees and legatees."[30] The surface owner ultimately prevailed in that lawsuit, and the court of common pleas determined he owned the severed mineral rights.[31] Even though the putative mineral owners in *Winland* were not named in the previous lawsuit, the Seventh District still held they were bound by that decision. Thus, their claim of mineral ownership was barred based upon res judicata because they were in privity with the original mineral owners (Bentley and Watson).[32]

B. *The Ohio Dormant Mineral Act*

In *Gerrity v. Chervenak*, T. D. Farwell originally reserved oil and gas rights underlying a Guernsey County property in a 1961 deed.[33] Mr. Farwell's estate conveyed the reserved mineral rights to his daughter, Jane F. Richards, via a recorded certificate of transfer in 1965.[34] The certificate of transfer listed Ms. Richards as living at a Cleveland, Ohio address.[35] The reserved interest was not thereafter conveyed of record in Guernsey County.[36]

In 1999, the Chervenaks acquired the surface of the lands.[37] In 2012, the Chervenaks initiated abandonment procedures under the Dormant Mineral Act, sending notice of abandonment to Ms. Richards at the Cleveland address listed on the 1965 certificate of transfer via certified mail.[38] When certified mail failed, the Chervenaks served

Ct. App. June 14, 2019) *appeal denied*.

27. *Id.* at ¶ 52.
28. *Id.*
29. *Id.*
30. *Id.* ¶ 46.
31. *Id.* ¶ 43.
32. *Id.* ¶¶ 52–55.
33. Gerrity v. Chervenak**,** No. 18 CA 26, 2019 WL 2745501, slip op. ¶ 2 (Ohio Ct. App. June 28, 2019) *appeal docketed.*
34. *Id.*
35. *Id.* ¶ 15.
36. See *Id.*
37. *Id.* ¶ 3.
38. *Id.*

notice of abandonment via publication in a Guernsey County newspaper and then completed the abandonment process by filing a notice of failure to file.[39]

Timothy Gerrity, a resident of Franklin County, Ohio, and the sole heir of Jane F. Richards, claimed to be the rightful owner of the mineral interest.[40] Mr. Gerrity sued the Chervenak Family Trust, the then-owner of the surface estate, claiming that the abandonment procedures were invalid due to the Chervenaks' failure to exercise reasonable diligence to locate him and serve him notice.[41] The trial court found in favor of the Chervenak Family Trust.[42]

The Fifth District Court of Appeals upheld the trial court's decision in its entirety, determining that the Chervenaks' attempts to locate the heirs of Ms. Richards were reasonable.[43] The Fifth District noted Ms. Richards' address as being in Cleveland, Ohio as of 1965, and while she died in Broward County, Florida in 1997, there was nothing of record in Guernsey County or Cuyahoga County to point the Chervenaks to Florida.[44] After certified mail to the Cleveland address failed, the Chervenaks searched the recorder's and probate records in Guernsey County, Ohio (location of property) and Cuyahoga County, Ohio (last known address for Ms. Richards) and found nothing to indicate any other location for Ms. Richards or her heirs.[45]

The Fifth District held an exhaustive internet search for Ms. Richard's heirs was not warranted for several reasons: (1) Gerrity was an attorney in Franklin County, Ohio, with a different last name than Ms. Richards, the registered holder of the interest; (2) the Chervenaks searched recorder and probate records in both the county in which the property was located and the county of Ms. Richards' last known location; and (3) that search did not reveal any further addresses for Ms. Richards or her heirs.[46] The Fifth District determined that the Dormant Mineral Act did not contemplate a "worldwide exhaustive

39. *Id.* ¶ 19.
40. *Id.* ¶ 3.
41. *Id.* ¶ 4.
42. *Id.* ¶ 5.
43. *Id.* ¶¶ 24–27.
44. *Id.*
45. *Id.* ¶ 25.
46. *Id.*

search" for a holder, and on these facts, upheld the validity of the abandonment procedure.[47]

II. MINERAL EXPLORATION AND PRODUCTION

This section will discuss judicial decisions, legislation, and administrative law changes relating to mineral development.

A. *Recording Statutes Apply to Assignments of ORRI*

In *Talmage v. Bradley*, the United States District Court for the Southern District of Ohio had to decide, on summary judgment, whether Ohio's recording statutes apply to assignments or other conveyances of overriding royalty interests in oil and gas leases. More specifically, whether an unrecorded assignment or conveyance of an overriding royalty interest may be enforced against a subsequent lessee (meaning one who acquired the subject lease after the creation of the override).[48]

In April 1994, TransAtlantic Energy Corp., TransAtlantic Management Company, and TransAtlantic Gas Marketing, Inc. assigned various oil and gas leases.[49] The TransAtlantic-Eastern assignment was recorded in Belmont, Monroe, and Noble Counties in Ohio.[50] All of the leases assigned were described in one exhibit, meaning they were conveyed by one instrument.[51]

After the Transatlantic assignment, the assignment of the overriding royalty at issue, made to Ralph Bradley, was recorded in Monroe County and Belmont County.[52] Due to a clerical error, the assignment was not recorded in Noble County, despite it covering leases for Noble County properties.[53]

Eastern States, which acquired the leases from TransAtlantic and conveyed the override to Mr. Bradley, underwent a series of mergers, name changes, and intercompany transfers.[54] NCL

47. *Id.*
48. 377 F. Supp. 3d 799, 808 (S.D. Ohio 2019).
49. *Id.* at 803.
50. *Id.*
51. *Id.*
52. *Id.* at 804–05.
53. *Id.*
54. *Id.* at 805.

Appalachian Partners, LP eventually acquired Eastern's interest in the leases and wells.[55] NCL thereafter assigned the leases and wells to Northwood Energy.[56] The NCL-Northwood Assignment provided that Northwood acquired NCL's interest in the leases, subject to all overriding royalty interests of record.[57]

At the time Northwood Energy was acquiring NCL's interest, Northwood was also acquiring a 50% interest in the undeveloped portions of the leases, which TransAtlantic had originally retained when the leases and wells were originally conveyed to Eastern.[58] In 2012, Northwood Energy sold the deep rights to the leases, and other unrelated leases, to Gulfport Energy Corporation.[59] Gulfport subsequently sold some of the leases to Antero Resources Corporation.[60]

In early 2010, Northwood Energy received a series of emails from Joseph W. Haas of Reserve Energy Exploration, which detailed the terms of the Bradley override and provided a copy of the override assignment.[61] Northwood Energy had separately obtained due diligence information from another producer, which contained, in part, specific information relating to the Bradley override.[62] Additionally, in August of 2012, Ralph Bradley detailed his override in a communication with Northwood Energy.[63]

The primary questions before the court was whether Ohio's recording statutes applied to assignments of overriding royalties and if so, which of the statutes applied to such assignments?

By way of background, two Ohio recording statues were at issue in *Talmage*. The first, contained at Revised Code § 5301.09, specifically applies to oil and gas leases and interests related thereto.[64]

55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 807.
61. *Id.* at 805–06.
62. *Id.* at 806.
63. *Id.*
64. OHIO REV. CODE ANN. § 5301.09 (West 2019) ("In recognition that such leases and licenses create an interest in real estate, all leases, licenses, and assignments thereof, or of any interest therein, given or made concerning lands or tenements in this state, by which any right is granted to operate or to sink or drill wells thereon for natural gas and petroleum or either, or pertaining thereto, shall be filed for record and recorded in such lease record without delay…").

The second, contained at Revised Code § 5301.25, is Ohio's general recording statute, governing all conveyances of land, encumbrances on land, tenements, or hereditaments.[65]

Initially, it must be noted that the *Talmage* court did not choose one of the recording statutes. Instead, it analyzed the facts of the case under both statutes, ultimately determining it could not decide the applicability of the statutes on summary judgment.

As to the applicability of Revised Code § 5301.09, the court decided it could not determine the applicability of one of the statute's exceptions to recording—the exception that "the recording requirement is not applicable between the contracting parties."[66] Section 5301.09 of the Revised Code states, in pertinent part: "No such lease or license is valid until it is filed for record, ***except as between the parties thereto***, unless the person claiming thereunder is in actual and open possession."[67] The court's analysis focused on the emphasized language. First, the court held the statute applies to assignments or conveyances of overriding royalty interests, meaning such documents must be recorded in order to avoid a subsequent lessee from seeking to avoid the unrecorded override.[68] The court held it needed to determine whether Northwood could be "deemed as standing in the shoes of Eastern" because the Bradley override assignment was not recorded in Noble County (which was the county at issue in plaintiffs' claims seeking to avoid the override). This would therefore mean the "as between the parties" exception within Revised Code § 5301.09 was met.[69] After reviewing the various contracts and agreements, the court could not say the facts were undisputed on this issue and therefore refused to grant summary judgment to any party.

As to the applicability of Revised Code § 5301.25, the court likewise passed on giving summary judgment to any party because there was a factual dispute as to whether Northwood Energy Corporation (the first lessee to acquire the leases from the original lessee group) had actual knowledge of the unrecording overriding royalty when it acquired the leases.[70] The court examined numerous

65. OHIO REV. CODE. ANN. § 5301.25 (West 2019).
66. Talmage v. Bradley, 377 F. Supp. 3d 799, 810 (S.D. Ohio 2019).
67. *Id.* at 816 (emphasis added).
68. *Id.* at 817.
69. *Id.* at 810.
70. *Id.* at 815 ("In conclusion, the Court cannot make a final decision as to whether Northwood was a bona fide purchaser as there is a question of fact as to

pieces of evidence going to the issue of Northwood's knowledge of the Bradley override prior to its acquisition of the leases and wells. One should review that case in detail to examine the various pieces of evidence which relate to a purchaser's knowledge of an unrecorded overriding royalty.[71]

B. *Royalty Disputes*

The *Zehentbauer Family Land, LP v. Chesapeake Expl., L.L.C.* case is a class action royalty dispute alleging claims that Chesapeake Exploration, LLC wrongfully made royalty deductions against the landowners' lease royalties.[72] On appeal was the issue of whether the district court had properly granted class certification.[73] The specific issue on appeal relating to the class certification was whether the predominance requirement under Fed. R. Civ. P. 23(a)(2) was met when "plaintiffs argue that the netback method breached the leases because the defendants improperly deducted post-production costs in violation of the lease language prohibiting the defendants from deducting any expenses other than the plaintiffs' share of taxes."[74] Since the leases presented uniform royalty provisions, the Sixth Circuit held that plaintiffs met their burden of showing predominance of issues amongst the class members:

> If the plaintiffs prevail in showing that the defendants' uniform practice of deducting post-production costs to calculate royalties breached the leases, then the plaintiffs will have succeeded in proving liability. And conversely, if the defendants' method of calculating royalty payments by deducting post-production costs did not breach the leases, then all of the plaintiffs' claims will fail on the merits. This theory of liability, moreover, does not require an estimation of the

what Northwood knew at the time the NCL-Northwood Assignment was made.").

71. *Id.* at 812–14.

72. 935 F.3d 496, 499 (6th Cir. 2019) ("According to the plaintiffs, the defendants underpaid the royalties due to the plaintiffs during the years in question because the netback method (1) does not accurately approximate an arm's-length-transaction price, and (2) improperly deducts post-production costs from the price.").

73. *Id.*

74. *Id*. at 506.

> individual market prices of oil and gas at each well. Liability will turn solely on whether the leases permit the defendants to deduct post-production costs in calculating the royalties due to the plaintiffs (like the at-the-well rule), or whether the leases prohibit the defendants from deducting post-production costs (like the marketable-product rule).[75]

In upholding the class certification, the Sixth Circuit rejected defendants' contention that the court should fully examine and determine the merits of the parties' positions, i.e. whether the lessee was permitted to deduct post-production costs.[76] The Sixth Circuit determined that a merits analysis was not necessary to determine whether there was a predominance of issues amongst the class members because the leases were identical.[77]

The Sixth Circuit went further with the potential damage calculation plaintiffs could receive should they prevail on their theory of improper deductions, noting it relied on a rather straightforward calculation:

> Should the plaintiffs prevail in establishing that the defendants breached the leases by deducting post-production costs, then the plaintiffs' damages model must calculate what the royalty payments would have been had the defendants not deducted these costs in the royalty-payment calculations. This method will, in effect, base royalty payments solely on the prices at which the defendants' midstream affiliates sold oil and gas to downstream companies. Damages will then equal the difference between the royalty payments based on the downstream prices and the actual royalty payments calculated using the netback method, the latter having deducted post-production costs. This

75. *Id.*
76. *Id*. at 508.
77. *Id*. ("The defendants' argument challenging the plaintiffs' post-production-costs theory is a merits argument that is not germane to the predominance requirement of Rule 23(b)(3), so we decline to engage with it at the present time.").

> damages model is consistent with the plaintiffs' theory of liability.[78]

C. *Right to Inject Materials to Produce Oil and Gas*

In *Merino v. Levine Oil Enterprises, LLC*, the lessors brought a breach of contract claim against the lessee claiming a provision barring a lessee from injecting into the land prevented the lessee from injecting materials into the shale strata for purposes of facilitating hydraulic fracturing.[79] The paragraph at issue stated the following:

> It is agreed upon that we will not travel through the land to transport gas unless a well is drilled first on the leased land. It is also agreed upon that we will not inject the land. A separate deal in the future is possible if injection for disposal of wells is needed. The lessee has the right to purchase the well at salvage value if lessor chooses to abandon it in the future.[80]

On the other hand, the lessee claimed the paragraph relied upon by the lessors governed the use of disposal or injection wells and not production wells.[81] Instead, lessee claimed paragraph 1 of the lease governed producing wells and that hydraulic fracturing, including through the use of injecting water and chemicals, was permitted under that paragraph.[82]

Ultimately, the court of appeals sided with the lessee and held paragraph 1 governed the drilling of production wells and did not limit the lessee's ability to stimulate a well through hydraulic fracturing.[83] Instead, the paragraph specifically permitted use of injection of water and chemicals to aid in a well's production:

> That the Lessor * * * for the purpose of drilling, operation for, producing and the covenants and

78. *Id.* at 510.
79. Merino v. Levine Oil Enter., LLC, 131 N.E.3d 368, 371 (Ohio Ct. App. 2019).
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 375.

> agreements hereinafter contained, does hereby lease exclusively unto the Lessee, for the purpose of drilling, operation for, producing and removing oil and gas and all the constituents thereof, ***and of injecting air, gas, brine and other substances from any sources and into any subsurface strata***.[84]

D. *Statutory Unitization and Breach of Lease*

On June 19, 2019, the Seventh District Court of Appeals issued a decision in *Paczewski v. Antero Resources Corp.*, which involved an oil and gas lessee's use of Ohio's forced unitization procedure.[85] The oil and gas lease in *Paczewski*, entered into in 1975, covered over 700 acres of property in Monroe County, Ohio and originally stated that the lessee could consolidate the leased lands with other lands to form development units not to exceed a total of 640 acres.[86] However, the original parties struck that clause by crossing out the text of the provision.[87] Ultimately, it appeared that sixteen shallow wells were drilled on the 700-plus acres, including a shallow well on the plaintiffs' property.[88]

Antero Resources Corp. eventually acquired the deep rights for the lease.[89] Antero attempted to negotiate an amendment to the lease, permitting Antero to pool or unitize the leased acreage with other acreage to form one or more units.[90] Those efforts failed and as a result, Antero filed an application with the Ohio Department of Natural Resources ("ODNR") for a statutory unitization order under Revised Code § 1509.28.[91] ODNR eventually approved the application and issued the unitization order including the leased

84. *Id.* at 371 (emphasis added).
85. Paczewski v. Antero Res. Corp., No. 18 MO 0016, 2019 WL 2722600, slip op. ¶ 2 (Ohio Ct. App. 2019). ("Appellants concede that the unitization order issued by the Division pursuant to R.C. 1509.28 ("Order") is valid, but argue nonetheless that the Order constitutes a breach of the oil and gas lease at issue in this case, as well as an unconstitutional taking of the property and minerals subject to the lease without just compensation.").
86. *Id.* ¶ 8.
87. *Id.*
88. *Id.* ¶ 9
89. *Id.* ¶¶ 9–10.
90. *Id.*
91. *Id.* ¶ 10.

acreage.[92] Plaintiffs appealed that decision to the Ohio Oil & Gas Commission and while that appeal was pending, they filed a lawsuit against Antero and the lessee owning the shallow rights.[93] Two of plaintiffs' claims were addressed by the Seventh District Court of Appeals' opinion—breach of lease based on the statutory unitization, meaning a breach of contract claim, and a claim that the unitization order violated the Ohio Constitution's takings clause.

The trial court dismissed all claims within the plaintiffs' complaint.[94] After that decision, the Fifth District Court of Appeals issued a decision in *Am. Energy-Utica, LLC v. Fuller*, holding that a lessee's use of statutory unitization to unitize an oil and gas lease, which stated "UNITIZATION BY WRITTEN AGREEMENT ONLY!" constituted a breach of contract.[95] Relying upon the *Fuller* decision, plaintiffs asked the trial court to vacate its dismissal of the plaintiffs' complaint.[96] The trial court denied the request and the plaintiffs thereafter appealed to the Seventh District Court of Appeals.[97]

Ultimately, the Seventh District Court of Appeals upheld the trial court's decision, thereby upholding the dismissal of the plaintiffs' complaint, in its entirety. As to the breach of contract issue, the Seventh District held that the lease at issue was silent as to whether Antero could unitize or pool the plaintiffs' lands because the original unitization/pooling provision was stricken.[98] The Seventh District adopted a rule, which was also adopted by the Tenth and Eleventh Appellate Courts, that provides a deleted or stricken lease clause renders the lease silent as to the subject matter of the stricken clause.[99] Thus, a stricken prohibition would mean the lease does not permit nor prohibit pooling.[100] The Seventh District relied on this rule to uphold the trial court's dismissal of the plaintiffs' breach of contract claim:

92. *Id.* ¶ 13.
93. *Id.* ¶¶ 14–15.
94. *Id.* ¶ 17.
95. American Energy-Utica, LLC. v. Fuller, No. 17 CA 000028, 2018 WL 3868119, ¶ 1 (Ohio Ct. App. Aug. 13, 2018).
96. Paczewski, 2019 WL 2722600, ¶ 21.
97. *Id.* ¶ 23.
98. *Id.* ¶ 34.
99. *Id.*
100. *Id.*

> Having considered the arguments of all parties, we find that the deletion of the voluntary unitization clause in the Lease renders it silent on the issue of unitization in any form. Because the Lease is silent with respect to either type of unitization, we conclude that the Order does not constitute a breach of the Lease, and that Appellants' first and second assignment of error have no merit.[101]

Further, the Seventh District relied on the plaintiffs' lease provision being stricken to distinguish the case from *Fuller*.[102]

The Seventh District also upheld the trial court's dismissal of the plaintiffs' takings claim. The court relied on the fact that Ohio provides less protections to subsurface mineral rights, and the Ohio Supreme Court previously held the pooling procedures constitute a proper exercise of the state's police power.[103] Furthermore, the appellate court held, per the unitization statute, no unitization order may be construed to have caused the title of the minerals to be transferred.[104] As a result, the court reasoned that Antero's unitization order left the plaintiffs' mineral interest intact, and the order was a mere regulation of mineral interests, not a taking without just compensation.[105]

E. *Paying Quantities and Conversion Post-Expiration*

In *Woods v. Big Sky Energy*, the Fifth District Court of Appeals rejected a producer's argument that its challenging the ODNRs refusal to accept a bond (required under Ohio law to operate an oil and gas well) from the producer's chosen insurance company.[106] After it rejected the producer's bond, the ODNR ordered the producer to cease producing all of its wells until a substitute bond was in place.[107] Instead of securing an alternate bond, which it admits it could have

101. *Id.* ¶ 35.
102. *Id.* ¶ 33.
103. *Id.* ¶¶ 39–40.
104. *Id.* ¶ 44.
105. *Id.* ¶ 45.
106. Woods v. Big Sky Energy, No. CT2017-0031, 2019 WL 645151 slip op. ¶ 6 (Ohio Ct. App. Feb. 6, 2019).
107. *Id.*

done, the producer "refused to do so as a matter of principle because Barr [the producer] disagreed with ODNR's decision."[108] Litigation between the producer and ODNR ensued and was still pending when *Woods v. Big Sky Energy*, which involved a paying quantities challenge by the lessor, went to trial.[109]

The trial court held the lease had expired and that the producer had converted the lessor's royalties and awarded the lessor $28,066.39 in compensatory damages.[110] The trial court issued a separate punitive damages award in the amount of $28,066.39, relying on the producer's concealment of "records which would demonstrate their failure to pay the full amount of royalties due" to lessor.[111]

The court of appeals upheld the trial court's decision that the lease had terminated and was not held under the lease's force majeure clause. The court relied on the fact the producer admitted it could have obtained alternate insurance, which would have permitted it to produce its wells, but chose to fight the State of Ohio "as a matter of principle, to demonstrate he was right and ODNR was wrong."[112] Ultimately, this decision means a producer that elects to not remedy the situation which led to a cease-production order from the ODNR while it is challenging the order does so at its own peril.

The producer did prevail on its appeal of the conversion claim and was given another opportunity to challenge the amount of the conversion damages. Here, the appellate court held the lessor was entitled to the converted unpaid royalties and not the revenue from the well.[113] Since the trial court gave a damages award based on the total revenue of the well and not the amount of royalties that would have been paid on that revenue under the terms of the lease, the appellate court found fault with the trial court's calculation and remanded the matter for further proceedings.[114] That trial would involve calculating the amount of "the converted royalties only."[115]

108. *Id.*
109. *Id.*
110. *Id.* ¶ 8.
111. *Id.*
112. *Id.* ¶ 17.
113. *Id.* ¶ 23.
114. *Id.*
115. *Id.*