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# Pennsylvania

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# PENNSYLVANIA

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## I. RECENT OIL AND GAS ACTIVITY IN PENNSYLVANIA[1]

According to the U.S. Energy Information Administration, Pennsylvania ranked second among states in production of natural gas in 2018, contributing nearly seven trillion cubic feet.[2] Although the

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1. Unless otherwise noted, this article is limited to September 1, 2019 through September 1, 2020.

2. *Pennsylvania Profile Overview*, U.S. ENERGY INFO. ADMIN.,

number of unconventional permit applications received by the Pennsylvania Department of Environmental Protection ("PADEP") remains relatively robust, the number of unconventional well applications continues to decline from the peak of 3,182 received in 2014.[3] In 2019, PADEP received 1,475 unconventional permit applications, as compared to 1,868 in 2018 and 2,028 in 2017.

## II. LEGISLATIVE UPDATE

On November 7, 2019, Governor Tom Wolf signed Act 85 of 2019 (previously S.B. 694), *Oil and Gas Lease Act–Cross Unit Drilling for Unconventional Wells*. Act 85 provides that if an operator has the right to drill an oil or gas well on separate units, the operator may (under certain circumstances) drill and produce a well that traverses, by horizontal drilling, more than one unit.[4]

If the operator elects to drill across units pursuant to Act 85, the operator must reasonably allocate production from the cross-unit well to or among each unit containing the well.[5] Act 85 permits the operator to allocate production on an acreage basis for multiple units provided the allocation has a reasonable correlation to the portion of the horizontal well in each unit.[6] The operator may not elect cross-unit development if the terms of an applicable lease expressly prohibit such development.[7]

Act 85 excepts the portion of the lateral crossing the unit boundary from the Oil and Gas Conservation Law 330-foot setback requirement.[8] Finally, Act 85 provides that nothing in the Act authorizes an operator to drill an oil or gas well that is not subject to a valid lease or royalty agreement and that nothing in the Act automatically expands or diminishes the current surface rights of an operator to include operations related to any existing unit or any well drilled between existing units.[9]

https://www.eia.gov/state/index.php?sid=PA#tabs-3 [https://perma.cc/R8AP-ESW3].

3. *2019 Oil and Gas Annual Report*, PA. DEP'T OF ENVTL. PROTECTION, https://storymaps.arcgis.com/stories/3f99825a393d4fe080d6d1c8e74b6f34 [https://perma.cc/B9YC-W7KL] (last visited Oct. 8, 2020).

4. 58 PA. STAT. AND CONS. STAT. ANN. § 34.2(a) (West, Westlaw through 2020 Reg. Sess. Act 79).

5. *Id.* § 34.2(a).

6. *Id.*

7. *Id.*

8. *Id.* § 34.2(b).

9. *Id.* § 34.2(c).

## III. OIL AND GAS LITIGATION

In the past year, the federal district courts and Commonwealth appellate courts issued significant decisions concerning oil and gas title and lease issues.

### A. *Pennsylvania Supreme Court Issues Decision on Trespass by Hydraulic Fracturing*

In January 2020, the Supreme Court of Pennsylvania released a highly anticipated opinion concerning the possibility of trespass by hydraulic fracturing. In *Briggs v. Southwestern Energy Production Co.*, the Pennsylvania Supreme Court held that "the rule of capture remains extant in Pennsylvania, and developers who use hydraulic fracturing may rely on pressure differentials to drain oil and gas from under another's property, at least in the absence of a physical invasion."[10]

The pleadings and facts alleged in *Briggs* are somewhat peculiar. Notably, the plaintiff in *Briggs* did not allege in the pleadings, summary judgment briefing, or in the appellate proceedings at the Pennsylvania Superior Court that the defendant (Southwestern) used hydraulic fracturing to physically intrude on the property at issue.[11] Instead, the plaintiff contended that shale gas is non-migratory in nature, and therefore the traditional rule of capture did not apply to hydraulic fracturing intended to produce shale gas.[12]

The Court first held that it "reject[ed] as a matter of law the concept that the rule of capture is inapplicable to drilling and hydraulic fracturing that occurs entirely within the developer's property solely because drainage of natural resources takes place as the direct or indirect result of hydraulic fracturing or that such drainage stems from less natural means than conventional drainage."[13] The Court then held that there was no evidence in the record "that drainage from under a plaintiff's parcel can only occur if the driller first physically invades the property."[14]

Significantly, the Court did not address a separate argument advanced by Southwestern: that "trespass should not be viewed as occurring miles beneath the surface of the earth" because "in some

10. Briggs v. Sw. Energy Prod. Co., 224 A.3d 334, 352 (Pa. 2020).
11. *See id.* at 344, 345.
12. *Id.* at 344.
13. *Id.* at 348–49.
14. *Id.* at 349.

jurisdictions traditional concepts of physical trespass have been relaxed where activities take place miles below the surface, and the plaintiff is not deprived of the use and enjoyment of the land."[15] In choosing not to address the issue, the Court noted that Southwestern failed to correctly preserve the argument for review.[16] This unaddressed argument may reappear either in subsequent briefing in *Briggs* (which the Court remanded) or in another action, given its favorable treatment in *Coastal Oil & Gas Corp. v. Garza Energy Trust*.[17]

### B. *Superior Court Clarifies Ostensible Agency Principles*

In *Wiedenhoft v. Chief Exploration & Development, LLC*, the Pennsylvania Superior Court considered the application of ostensible agency principles where a lessee used a land brokerage firm to lease acreage in Somerset County, Pennsylvania.

Specifically, the lessor-plaintiffs alleged that a landman from a brokerage company showed the plaintiffs a brochure from the lessee-operator, the landman represented that he had authority to negotiate a lease on behalf of the lessee-operator, and the landman induced the lessor-plaintiffs to sign a form lease with the promise that the lessor-plaintiffs' lawyer could later draft and attach an addendum to the form lease (subject to final approval by the lessee-operator).[18] Subsequently, the lease was recorded (without any addendum), and the lessee-operator took the position that the lease was valid and could not be amended.[19] The lessor-plaintiffs brought suit against both the land brokerage firm and the lessee-operator alleging, among other

15. *Id.* at 350.

16. *Id.*

17. Coastal Oil & Gas Corp. v. Garza Energy Trust, 268 S.W.3d 1, 11 (Tex. 2008) ("Had Coastal caused something like proppants to be deposited on the surface of Share 13, it would be liable for trespass, and from the ancient common law maxim that land ownership extends to the sky above and the earth's center below, one might extrapolate that the same rule should apply two miles below the surface. But that maxim—*cujus est solum ejus est usque ad coelum et ad inferos*—has no place in the modern world. Wheeling an airplane across the surface of one's property without permission is a trespass; flying the plane through the airspace two miles above the property is not. Lord Coke, who pronounced the maxim, did not consider the possibility of airplanes. But neither did he imagine oil wells. The law of trespass need no more be the same two miles below the surface than two miles above.").

18. Wiedenhoft v. Chief Expl. & Dev., LLC, No. 910 WDA 2019, 2020 WL 3057989, at *1 (Pa. Super. Ct. June 8, 2020) (non-precedential).

19. *Id.*

things, that the landman was an ostensible agent of the lessee-operator.[20]

The trial court granted summary judgment against the plaintiffs, finding that the plaintiffs supplied no direct or circumstantial evidence of an agency relationship between the landman and lessee.[21] On appeal, the plaintiffs argued that they had presented evidence of an agency relationship through their testimony of the actions and representations made by the landman.[22]

The Pennsylvania Superior Court rejected the attempt to apply principles of ostensible agency to a suit for economic damages caused by intentional torts of an independent contractor:[23]

> However, such principles of ostensible agency have only been applied in Pennsylvania to impose liability upon one who utilizes the services of an independent contractor for personal injuries caused by the negligence of the independent contractor . . . The Wiedenhofts offer no argument or authority to suggest that ostensible agency principles may be utilized to impose liability on Chief for their economic damages caused by the intentional torts of an independent contractor.[24]

Accordingly, the superior court held that evidence of ostensible agency could not be used to establish vicarious liability and upheld the trial court grant of summary judgment.[25]

### C. *Superior Court Considers Malpractice Claim Related to Title-Bust*

In *Bastin v. Bassi*, the superior court considered a legal malpractice claim in the context of an allegedly inaccurate title run sheet. Specifically, the plaintiffs executed a provisional oil and gas lease with a lessee, which was subsequently defected because of a preexisting and continuing lease executed by the plaintiffs'

20. *Id.*
21. *Id.* at *2.
22. *Id.*
23. *Id.* at *3.
24. *Id.* (emphasis in original).
25. *Id.* at *3–4.

predecessor-in-interest.[26] The plaintiffs alleged that they hired an attorney to issue a title report prior to the purchase of the property at issue and that the title report contained no reference to the preexisting lease.[27] Even taking the plaintiffs' claims as true,[28] the superior court found that the plaintiffs' alleged harm, the loss of a lease bonus, was not the proximate cause of the alleged breach, an omission on the title report.[29] In other words, the superior court found that the loss of the lease bonus was the result of the preexisting oil and gas lease and not the result of any act or omission of the attorney.[30]

### D. *Superior Court Holds Overriding Royalty Interests Subject to Recording Statute*

In *Hayward v. LPR Energy*, the superior court considered the application of the Commonwealth's recording statute to a reservation of certain overriding royalty interests in Clearfield County. In *Hayward*, a geologist and landman assembled oil and gas leases within a prospective 13,000 acre mineral development area and then granted the leases to an operator, reserving a 3.125% overriding royalty interest ("ORRI").[31] Assignments concerning approximately 2,000 acres of the prospective development referenced the ORRI reservation, and assignments concerning the other 11,000 acres merely referenced "an executed and unrecorded agreement" between the geologist and the assignee.[32] The geologist and landman brought suit against a successor-in-interest to the assignee to enforce the ORRIs, and the trial court granted judgment against the geologist and landman as to the 11,000 acres.[33]

The superior court agreed with the trial court, holding that the Commonwealth recording statute (which effectuates a "race-notice" scheme) required the geologist and landman to record their ORRI

26. Bastin v. Bassi, No. 682 WDA 2019, 2019 WL 6840606, at *1 (Pa. Super. Ct. Dec. 16, 2019).

27. *Id.* at *2.

28. *Id.* The Superior Court's opinion demonstrates significant skepticism that the attorney was engaged to conduct a title examination of the property at issue.

29. *Id.* at *3.

30. *Id.*

31. Hayward v. LPR Energy, LLC, No. 794 WDA 2018, 2019 WL 7388588, at *1 (Pa. Super. Ct. Dec. 31, 2019).

32. *Id.* at *3. At trial, the geologist testified that the decision to not record the details of the ORRI on the 11,000 acre assignments was purposeful, and part of an effort to avoid educating other geologists and landmen about the prospect.

33. *Id.* at *5.

interest.[34] Because the geologist and landman failed to record their interest before the successors-in-interest to the assignee took title and recorded notice thereof, the geologist and landman were not first-in-time to record.[35] The court rejected the argument that the reference to "an executed and unrecorded agreement" should have placed the assignee's successor-in-interest on constructive notice of the ORRIs.[36] Among other reasons, the court determined that the argument would, if accepted, effectuate the complete opposite of the intent of the recording statute by allowing parties to give "constructive notice" of interests not actually in the public record.[37]

### E. *Commonwealth Court Considers Zoning Issues*

In the past year, the commonwealth court issued three opinions in cases that concern oil and gas zoning issues.[38] In the first case, Protect PT challenged the substantive validity of a 2016 zoning ordinance in Penn Township, which established a Rural Resource District with a Mineral Extraction Overlay that permitted unconventional natural gas development in low-density residential areas.[39] Protect PT challenged the validity of the zoning ordinance through the Environmental Rights Amendment in Article I, Section 27 of the Pennsylvania Constitution, arguing that the zoning ordinance would allow "heavy industrial activity" in a "growing suburban community."[40]

Among other protections, the zoning ordinance at issue prohibited wastewater impoundments, set minimum setbacks for property lines and protected structures, reserved the right to add further conditions on development through the special exception process, and required the operator to demonstrate that development would not violate the Environmental Rights Amendment. The operator must demonstrate this through reports from "qualified environmental individuals," to submit air modeling, and to submit hydrological studies concerning

34. *Id.* at *9, 11. The Court also determined that ORRIs are real property interests in Pennsylvania, and not only contractual.

35. *Id.* at *9.

36. *Id.*

37. *Id.*

38. Protect PT v. Penn Twp. Zoning Hearing Bd., 220 A.3d 1174 (Pa. Cmmw. Ct. 2019); Protect PT v. Penn Twp. Zoning Hearing Bd., No. 575 C.D. 2019, 2020 WL 3640001 (Pa. Cmmw. Ct. July 6, 2020); Protect PT v. Penn Twp. Zoning Hearing Bd., No. 576 C.D. 2019, 2020 WL 3639998 (Pa. Cmmw. Ct. July 6, 2020).

39. Protect PT v. Penn Twp. Zoning Hearing Bd., 220 A.3d 1174, 1177 (Pa. Cmmw. Ct. 2019).

40. *Id.*

potential pathways that a spill or release would flow.[41] The zoning ordinance was the result of some nineteen planning commission meetings, fifty-three commissioners' meetings, two public meetings, and a town hall event.[42]

In upholding the trial court's determination that the zoning ordinance passed constitutional muster, the commonwealth court specifically addressed several arguments advanced by Protect PT. First, the commonwealth court rejected the argument that the trial court committed reversible error by failing to consider pre-production phases of unconventional development, such as excavation, construction, drilling, and completion as part of the "zoning analysis."[43] While cautioning that the "better jurisprudential articulation is that impacts from any stage can be taken into consideration by the fact-finder in a substantive validity analysis," the commonwealth court found "no reversible error" because "zoning regulates the *use* of the land, not the particulars of development and construction."[44]

Second, the commonwealth court rejected the Protect PT argument that the zoning ordinance was deficient because it was inconsistent with the township comprehensive plan.[45] Per the Commonwealth Municipal Planning Code, "no action by the governing body of a municipality shall be invalid or be subject to challenge on appeal on the basis that such action is inconsistent with or fails to comply with the provisions of a comprehensive plan."[46]

Third, the commonwealth court rejected the Protect PT argument that the zoning ordinance violated the Commonwealth's Environmental Rights Amendment.[47] In discussing the Environmental Rights Amendment, the commonwealth court favorably cited a decision by the Pennsylvania Environmental Hearing Board in *The Delaware Riverkeeper Network v. Department of Environmental Protection & R.E. Gas Development, LLC*,:

> In that case, the EHB articulated a two-step process for determining compliance with the ERA. The first step involves an evaluation of whether the environmental

41. *Id.* at 1179.
42. *Id.*
43. *Id.* at 1189.
44. *Id.* at 1189, 1191–92.
45. *See id.* at 1192–95.
46. *Id.* at 1194–95.
47. *Id.* at 1197.

> impacts of the action were considered and whether there was a correct determination that the action would not result in unreasonable degradation, diminution, depletion, or deterioration of the environment. The second step involves an evaluation of whether the government entity fulfilled its responsibilities as a trustee under the ERA by acting with prudence, loyalty, and impartiality with respect to the beneficiaries of the natural resources impacted by the action.

The commonwealth court noted that the zoning ordinance expressly required the operator to demonstrate compliance with the Environmental Rights Amendment before approval of a special exception[48] and held that Protect PT failed to show with credible evidence that unconventional development would unreasonably impair the rights of the township residents.[49] The court also commented that the Environmental Rights Amendment "does not impose express duties on municipalities to enact specific affirmative measures to promote clean air, pure water, and the preservation of different value of our environment."[50]

In *Protect PT II* and *Protect PT III*, the commonwealth court rejected Environmental Rights Amendment challenges to special exceptions related to unconventional development that Penn Township granted.[51] Among other reasons, the court held that constitutional challenges to the special exception were not proper because the "proposed unconventional gas well operations [were] permitted by special exception . . . , which evidences a legislative decision that the uses [were] consistent with the zoning plan and

48. *See* Protect PT v. Penn Twp. Zoning Hearing Bd., No. 575 C.D. 2019, 2020 WL 3640001, at *5 (Pa. Cmmw. Ct. July 6, 2020) ("A special exception is neither special nor an exception, but rather a use expressly contemplated that evidences a legislative decision that the particular type of use is consistent with the zoning plan and presumptively consistent with the health, safety and welfare of the community.").

49. Protect PT v. Penn Twp. Zoning Hearing Bd., 220 A.3d 1174, 1197–98 (Pa. Cmmw. Ct. 2019)

50. *Id.* at 1198.

51. *See* Protect PT v. Penn Twp. Zoning Hearing Bd., No. 575 C.D. 2019, 2020 WL 3640001, at *14 (Pa. Cmmw. Ct. July 6, 2020); *see also* Protect PT v. Penn Twp. Zoning Hearing Bd., No. 576 C.D. 2019, 2020 WL 3639998, at *5 (Pa. Cmmw. Ct. July 6, 2020)

presumptively consistent with the health, safety, and welfare of the community."[52]

F. *Pennsylvania and Federal Courts Address Delay Rental Issues*

In 2020, the Pennsylvania Superior Court issued two decisions concerning the effect of delay rental payments on oil and gas lease termination.[53] In *Barton*, the lessee attempted to use a delay rental provision to save a lease with one well that "ha[d] not produced any gas since June 1993," was "disconnected from any tanks or commercial distribution systems for the sale of gas, and [was] overgrown and surrounded by trees, brush, and saplings."[54] The court rejected the lessor's argument that indefinite delay rental payments, after the expiration of the primary term, could prevent termination of the lease and instead found that the lease expired by its own terms once production ceased and the habendum clause was no longer satisfied.[55]

Conversely, in *Wilson*, the Pennsylvania Superior Court enforced a delay rental savings provision in an oil and gas lease.[56] The delay rental savings provision provided compensation to the lessors of $3.00 per acre per year that drilling was delayed.[57] The lessors accepted delay rental payments for seven years, after which the lessee began operations on the leasehold.[58] In holding that the delay rental payments saved the lease from terminating, the superior court noted that the lessors "accepted annual delay rental payments, which purported to extend the leases under their agreements' terms."[59]

In *Northeast Natural Energy LLC v. Larson*, the U.S. District Court for the Western District of Pennsylvania denied a motion to vacate an arbitration award in a delay rental case. The lease at issue provided that the "[l]essee shall pay to [the l]essor a minimum amount equal to [$250] per acre of leased premise, during the primary term of this [l]ease, for the privilege of delaying commencement of drilling operations" and that the "[l]essee, at any time . . . may surrender this

52. Protect PT v. Penn Twp. Zoning Hearing Bd., No. 575 C.D. 2019, 2020 WL 3640001, at *14 (Pa. Cmmw. Ct. July 6, 2020).

53. Wilson v. Snyder Brothers, Inc., 232 A.3d 872 (Pa. Super. Ct. 2020); Barton v. Graham, No. 1704 WDA 2018, 2020 WL 1488440 (Pa. Super. Ct. 2020) (non-precedential).

54. *Barton*, 2020 WL 1488440, at *1.

55. *Id.* at *7.

56. Wilson, 232 A.3d at 878.

57. *Id.* at 874.

58. *Id.* at 877.

59. *Id.*

lease as to all or part thereof . . . and thereupon this lease and the rights, rentals and obligations of the parties hereunder shall terminate as to the part so surrendered."[60] The arbitration panel determined that surrender did not terminate the obligation to pay delay rentals because the lessor had a "vested right to payment," and the district court agreed that the "record supports this interpretation of the [l]eases and adheres to principles of contract interpretation."[61]

### G. *Commonwealth Court Denies Summary Judgment in Proctor Heirs/Game Commission Dispute*

In *Commonwealth v. Thomas E. Proctor Heirs Trust*, the commonwealth court denied competing motions for summary judgment filed by the Proctor Heirs Trust and the Pennsylvania Game Commission. The lawsuit resulted from a Game Commission quiet title action and concerned approximately 59,000 acres previously owned by Thomas E. Proctor, which he conveyed to the Elk Tanning Company in 1894—expressly reserving a right to the natural gas.[62] The Elk Tanning Company conveyed the surface to the Central Pennsylvania Lumber Company ("CPLC") subject to the Proctor reservation.[63] The surface warrant at issue was purchased twice at Lycoming County tax sales (once in 1908 and once in 1924) and each time quitclaimed back to CPLC.[64]

The Game Commission contended that each tax sale effectively washed the title of the Proctor severance by operation of the Act of 1806.[65] The Act of 1806 effects a limited subset of cases involving quiet title actions for formerly unseated lands sold at tax sales prior to 1947.[66] Generally, the Act of 1806 requires any person who became a holder of unseated land to provide notice to the county commissioners of the transfer of ownership.[67] In *Herder Spring Hunting Club v. Keller*, the Pennsylvania Supreme Court explained that "if a purchaser of unseated land failed to report a severance to the county

60. N.E. Nat. Energy LLC v. Larson, 3:18-CV-240, 2019 WL 4575845, at *2 (W.D. Pa. Sept. 20, 2019).
61. *Id.* at *5.
62. Pennsylvania v. Thomas E. Proctor Heirs Tr., 493 M.D. 2017, 2020 WL 256984, at *1 (Pa. Commw. Ct. Jan. 16, 2020).
63. *Id.* at *2.
64. *Id*. at *2–3.
65. *Id.* at *4.
66. *Id.* at *5.
67. *Id.* at *4.

commissioners, a subsequent tax sale would effectively 'wash' the title of the severance and vest the tax sale purchaser with all right, title, and interest in both the surface and the subsurface rights, as if the severance had never occurred."[68] The Court also stated that "absent proof to the contrary" Pennsylvania courts may presume that the entire property continued to be assessed, taxed, and sold as a whole.[69]

The commonwealth court found that two fact issues precluded the grant of summary judgment.[70] First, the Proctor Heirs Trust submitted evidence that their predecessors-in-interest "declared or reported their interests" in the subsurface to the County Commissioners of Lycoming County.[71] Second, the commonwealth court determined that a fact issue existed as to whether the tax sale "purchasers" were agents of CPLC, which (depending on the specifics of the agency and the tax sale purchase) could have made the tax sale purchases the functional equivalent of redemptions—thereby restoring the separate ownership interests in each of the surface and subsurface.[72]

### H. *Federal Courts Find Leasehold Value Satisfies Amount-in-Controversy Requirement*

Both the Western and Middle Districts of Pennsylvania issued opinions concerning the proper method for valuing oil and gas leases with respect to the amount-in-controversy requirement for diversity jurisdiction.[73] In *Kopko*, the U.S. District Court for the Western District of Pennsylvania denied a motion to remand a complaint seeking recession of an oil and gas lease. In short, the complaint averred that the lessee-landman (who was an attorney) took advantage of a prior attorney-client relationship with the lessor to convince the lessor to accept lease terms that were below market rates. The complaint stated that the lessee-landman then misrepresented that the

68. *Id.*
69. *Id.* at *5.
70. *Id.* at *7–8.
71. *Id.* at *7. The Commonwealth Court also noted the Game Commission argument that the record contained no evidence that the Proctor Heirs predecessors-in-interest ever reported the severance, such that the severed minerals could be assessed and taxed separately.
72. *Id.* at *8. The Proctor Heirs presented evidence that, instead of paying taxes, the CPLC allowed its properties to be "sold" at tax sale, only to have its agents purchase and redeem the properties, and quitclaim them back to CPLC.
73. Kopko v. Range Res.-Appalachia, LLC, 2:20-CV-00423-MJH, 2020 WL 3496277, at *1 (W.D. Pa. June 29, 2020) (mem. op.); Earnshaw v. Chesapeake Appalachia, L.L.C., No. 3:19-CV-1479, 2019 WL 6839305, at *1 (M.D. Pa. Dec. 16, 2019) (mem. op.).

lease could not be canceled or changed within ninety days of execution (even though the lease provided otherwise).[74]

The lessee moved to remand the complaint to the Court of Common Pleas on the basis that the equitable remedy of rescission did not exceed the amount-in-controversy requirement of $75,000.[75] In denying the motion to remand, the court noted that "[i]n the context of oil and gas leases, courts have held that the value of the lease *in toto* determines the jurisdictional amount even when [the] plaintiff seeks only equitable relief" and that it was uncontested that the lessor received a bonus of $176,550 and royalties of approximately $155,386 under the lease.[76] The court also granted the lessee's motion to dismiss the claims, applying the Commonwealth's two-year statute of limitation for fraud-based claims, which would bar claims brought in 2019 for fraud that allegedly occurred in 2008.[77]

Similarly, in *Earnshaw*, the U.S. District Court for the Middle District of Pennsylvania determined the amount in controversy requirement was satisfied where the landowner alleged that a horizontal wellbore entered the property at issue without a valid lease.[78] The operator submitted declarations from employees demonstrating that the $75,000 amount in controversy threshold was met several different ways, including through the aggregate amount of royalties the landowner received, the amount of damages the landowner sought, the cost to complete specific performance, and the value that the operator would lose in completing the specific performance.[79]

### I. *Middle District Construes Implied Covenant Obligations*

The Middle District of Pennsylvania recently issued three opinions that concerned the implied covenant obligations of lessees.[80] In *Sargent*, the Middle District considered a motion to dismiss a claim

74. Kopko v. Range Res.-Appalachia, LLC, 2:20-CV-00423-MJH, 2020 WL 3514075, at *1 (W.D. Pa. June 29, 2020).
75. *Kopko*, 2020 WL 3496277, at *1.
76. *Id.* at *2.
77. *Kopko*, 2020 WL 3514075, at *2.
78. *Earnshaw* , 2019 WL 6839305, at *1.
79. *Id.* at *3.
80. *See* Sargent v. SWEPI LP, No. 4:19-CV-1896, 2020 WL 1503222 (M.D. Pa. Mar. 23, 2020); Hordis v. Cabot Oil & Gas Corp., No. 3:19-CV-296, 2020 WL 2128968 (M.D. Pa. May 5, 2020); Diehl v. SWN Prod. Co., No. 3:19-CV-1303, 2020 WL 1663342 (M.D. Pa. Apr. 3, 2020).

for breach of the implied covenant of good faith and fair dealing.[81] In granting the motion to dismiss, the court held that the plaintiff's failure to allege an independent breach of the terms of the relevant leases "proves fatal" because, among other reasons, the implied covenant cannot overcome the express terms of an agreement.[82]

Likewise, in *Hordis*, the Middle District reached a similar result, holding that breach of the implied covenant of good faith and fair dealing supplies an independent claim for breach of contract "only in very narrow circumstances."[83] Instead, the Middle District posited that the implied covenant "informs the meaning of existing terms but cannot supply new ones." In other words, the implied covenant "helps the court to harmonize the reasonable expectation of the parties" as they pertain to the express terms of the agreement.[84] However, the *Hordis* court cautioned that the Pennsylvania Supreme Court had not directly answered the question of whether a breach of the implied covenant can independently support a cause of action sounding in contract.[85]

Finally, in *Diehl*, the Middle District considered the implied covenants to market and develop in the context of a motion to dismiss.[86] The court denied the lessee's motion to dismiss the lessor's claims for breach of implied covenant to market because the lessor alleged that the lessee sold production to an affiliate for below-market rates.[87] Conversely, the court undertook a narrow interpretation of the implied covenant to develop, holding that Pennsylvania courts have "consistently concluded that an implied duty to develop was not applicable or was not breached when the lessor was not holding the property without developing it—where development had commenced it was the express terms of the lease that controlled."[88]

81. *Sargent*, 2020 WL 1503222, at *2.
82. *Id*.
83. *Hordis*, 2020 WL 2128968, at *5.
84. *Id.* at *4.
85. 2020 WL 2128968, at *4.
86. Diehl v. SWN Prod. Co., No. 3:19-CV-1303, 2020 WL 1663342 (M.D. Pa. Apr. 3, 2020).
87. *Id.* at *5.
88. *Id.* at *12; *see also id.* at *14 (quoting that "Here, the lease does not contain express terms related to the number of wells to be drilled or other specific aspects of development, but the parties agreed upon what shall be done in terms of the development needed to hold the lease in the habendum clause.").

### J. *Middle District Defines the "Due Diligence" Requirement*

In *Butters v. SWN Production Co., LLC*, the Middle District denied a motion for summary judgment concerning a lease with a habendum clause that provided, among other things, that the lease remained in full force and effect so long as "drilling operations continue with due diligence . . . ." The lessee contended that the due diligence provision in the habendum clause should be interpreted within the business judgment rule and that the clause was satisfied so long as the lessee did not act "in bad faith or fraudulently."[89] In denying the motion for summary judgment, and in determining that whether the lessee acted with due diligence was a fact issue, the court held that "due diligence" should be interpreted consistent with the Black's Law Dictionary definition of the term—"the diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation."[90]

### K. *Western District Denies Request for Accounting*

In *Pflasterer v. Range Resources-Appalachia, LLC*, the Western District denied a request for an equitable accounting where a lessor alleged that a lessee miscalculated royalty payments. The district court noted that under Pennsylvania law, an equitable accounting is generally only available in the instance of a fiduciary relationship where there are allegations of fraud or misrepresentation, no adequate remedy at law exists, or the lessee refuses the lessor the opportunity to inspect the lessee's books or records.[91]

### L. *Middle District Considers Necessary Parties Defense*

In *Kave Consulting, LLC v. Chesapeake Appalachia, LLC*, the Middle District considered a lessee's motion to dismiss for failure to join necessary parties. The plaintiffs owned a 50% interest in the property at issue, and their cotenants executed a lease with the lessee that yielded a royalty for a ten-year period.[92] In filing an action for an

89. Butters v. SWN Prod. Co., No. 4:17-CV-797, 2020 WL 1503657, at *7 (M.D. Pa. Mar. 30, 2020) (mem. op.).

90. Id. at *8 (quoting Diligence, BLACK'S LAW DICTIONARY (8th ed. 2004)).

91. Pflasterer v. Range Resources-Appalachia, LLC, No. 2:18-cv-1437-SPB, 2019 WL 4242057, at *6 (W.D. Pa.
Sept. 6, 2019).

92. Kave Consulting, LLC v. Chesapeake Appalachia, LLC, No. 4:19-CV-00196, 2019 WL 4687765, at *1 (M.D. Pa.

accounting, the plaintiffs alleged that they did not consent to the production of oil and gas from the property at issue and that they had not been paid royalties for production.[93] The lessee filed a motion to dismiss on the basis that the lessor-cotenants were necessary parties.[94] In denying the motion to dismiss, the court rejected the lessee's arguments that the request for an accounting would put the lessee at risk of an inconsistent outcome in different forums and that the litigation would impede the ability of the unjoined cotenants to protect their interest in royalties already received from the lessee.[95]

### M. *Federal Courts Consider Arbitration Issues*

Several federal decisions concerning arbitration issues may impact future claims brought by Pennsylvania lessors.[96] In *Marbarker*, the U.S. Court of Appeals for the Third Circuit considered whether an arbitration provision allowed class-wide arbitration of royalty claims.[97] In finding that the leases at issue did not allow for class-wide arbitration, the third circuit cautioned that courts "may not force parties to arbitrate unless they have consented to it."

> Thus, courts will not force parties to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so. Contractual silence is not enough. Nor is contractual ambiguity. We will not infer consent. Rather, there must be an affirmative contractual basis for finding that the parties consented specifically to *class* arbitration.[98]

The court also upheld the trial court determination that a declaratory judgment action seeking a declaration that the lessee waived their right to enforce certain arbitration clauses was not ripe until the lessee actually moved to compel arbitration.[99]

Sept. 26, 2019).

93. *Id.*

94. *Id.*

95. *Id.* at *2.

96. *See* Marbarker v. Statoil USA Onshore Props., Inc., 801 F. App'x. 56 (3d Cir. 2020); Ostroski v. Chesapeake Appalachia, L.L.C., 2:18cv947, 2019 WL 6118353 (W.D. Pa. Nov. 18, 2019) (mem. op.).

97. *Marbarker*, 801 F. App'x. at 60.

98. *Id.* (internal citations omitted).

99. *Id.* at 59.

Likewise, in *Ostroski*, the Western District upheld an arbitration award, finding that royalties were properly calculated and paid at the wellhead where the lease required payment in the amount of "[one-eighth] of the revenue realized by the [l]essee" and where the lessee sold the gas to their affiliate at the wellhead.[100]

### N. *Middle District Certifies Royalty Class*

In *Slamon v. Carrizo (Marcellus) LLC*, the Middle District certified two classes of royalty owners. The first class consisted of royalty owners with leases that "expressly prohibit[ed] the deduction of post-production expenses when calculating royalty amount due," and the second class consisted of royalty owners with leases that provided for payment based on "the greater of the NYMEX spot price and/or the prevailing local market price, or the price at which gas is sold . . . ."[101]

In certifying the classes, the court expressly rejected the argument that the Rule 23 commonality requirement could not be demonstrated because of "the number of variations in lease language."[102] Instead, the court cautioned that courts "have denied certification in cases only where the plaintiffs failed to examine all or a majority of the class leases and were unable to demonstrate common language."[103]

## IV. CONCLUSION

In the next year, several additional appellate opinions regarding oil and gas lease issues are expected. Already, the Pennsylvania Supreme Court granted petitions for allowance of appeal in two cases expected to impact the oil and gas industry: *SLT Holdings, LLC v. Mitch-Well Energy, Inc.*, which concerns issues related to lease abandonment under a "drill or pay oil and gas lease;" and *Commonwealth v. Chesapeake Energy Corp.*, which concerns conduct alleged to violate the Pennsylvania Unfair Trade Practices and Consumer Protection Law perpetrated by certain lessees in the context of leasing mineral rights.

100. *Ostroski*, 2019 WL 6118353, at *1, *3.
101. Slamon v. Carrizo (Marcellus) LLC, No. 3:16-CV-2187, 2020 WL 2525961, at *4 (M.D. Pa. May 18, 2020).
102. *Id.* at *11.
103. *Id.*