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West Virginia

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WEST VIRGINIA

Michael K. Reer[†] and Valerie Antonette^{††}

I. RECENT OIL AND GAS ACTIVITY IN WEST VIRGINIA¹

West Virginia is one of the most prolific energy-producing states in the country. According to the U.S. Energy Information Administration, West Virginia ranked seventh among states in

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

production of natural gas in 2018, contributing 1.8 trillion cubic feet.² Further, the consistency in permit application appears to support the proposition that West Virginia operators will continue producing significant volumes well in the future. The West Virginia Department of Environmental Protection (“WVDEP”) issued 582 horizontal well permits in 2015, 223 in 2016, 509 in 2017, 433 in 2018, and 467 in 2019.³

II. LEGISLATIVE UPDATES

The West Virginia Legislature is a bicameral body that holds regular sixty-day sessions each year, generally beginning on the second Wednesday in January.⁴ The 2020 Regular Session was particularly active with respect to bills relating to oil and gas development.

A. *HB 4217 Changes Spacing Requirements for Deep Wells*

On March 25, 2020, Governor Jim Justice signed HB 4217 into law, which authorizes a legislative rule of the Oil and Gas Conservation Commission (the “Commission”) amending the minimum spacing requirements for deep wells in West Virginia.⁵ The Commission regulates the development of deep wells in West Virginia.⁶ Deep wells are those drilled to a depth below the top of the uppermost member of the Onondaga Group, which includes Utica wells.⁷

Previously, the Commission’s rules required minimum spacing of 3,000 feet between deep wells.⁸ On June 14, 2019, the Commission filed an emergency rule to change the minimum spacing requirements,

2. *West Virginia State Profile and Energy Estimates*, U.S. ENERGY INFO. ADMIN., (Sept. 19, 2019), <https://www.eia.gov/state/?sid=WV#tabs-3> [https://perma.cc/9JKT-STBM].

3. *Horizontal Drilling*, W. VA. DEP’T OF ENVTL. PROT., <https://dep.wv.gov/oil-and-gas/Horizontal-Permits/Pages/default.aspx> [https://perma.cc/5VRZ-SBDA] (last visited Oct. 2, 2020).

4. *Citizen’s Guide to the Legislature*, W. VA. LEGISLATURE, <https://www.wvlegislature.gov/Educational/citizens/process.cfm#:~:text=On%20the%20first%20day%20of,with%20the%20state’s%20budget%20bill> [https://perma.cc/LUG6-3JNN] (last visited June 5, 2020).

5. W. VA. CODE § 64-3-2 (2020).

6. *Mission*, OIL AND GAS CONSERVATION COMMISSION, <https://ogcc.wv.gov/Pages/default.aspx> [https://perma.cc/M649-5J9S] (last visited Sept. 13, 2020).

7. W. VA. CODE R. § 39-1-2 (2020).

8. Notice of an Emergency Rule June 14, 2019 (codified with some differences in language at W. VA. CODE R. § 39-1-4.2.1.a (2020)).

noting that 3,000-foot spacing is “impractical and uneconomical” and that, on a practical basis, “every company desiring to hydraulically fracture a formation below the top of the Onondaga must formally request a public hearing before the Commission to obtain an exception to the existing 3,000-foot rule [and] bring witnesses to Charleston to build a record that supports and justifies each requested exception.”⁹

The final rules, confirmed by HB 4217, require that in the absence of an exception (also known as an operational order) or field rules, deep wells must adhere to the following spacing restrictions: (1) no less than 1,000 feet from the productive interval measured perpendicularly from a previously permitted deep well operated by a different operator; (2) no less than 800 feet from the productive interval measured perpendicularly from a previously permitted deep well operated by the same operator; (3) no less than 500 feet from a lease or unit boundary measured perpendicularly for wells where the adjoining lease or unit is operated by a different operator; and (4) no less than 400 feet from a lease or unit boundary measured perpendicularly for wells where the adjoining lease or unit is operated by the same operator.¹⁰ In addition, the distance between the productive interval nearest the heel or toe to a new deep well may not be less than 150 feet from the productive interval nearest the heel or toe of a previously permitted deep well and no less than seventy-five feet from a lease or unit boundary.¹¹

B. *SB 554 Requires Lessees to Release Terminated Leases*

SB 554, effective May 31, 2020, requires lessees to deliver a properly executed and notarized release (in recordable form and without cost to the lessor) of leases that have terminated, expired, or been canceled.¹² Lessees must deliver the notarized release to lessors within sixty days of lease termination, expiration, or cancellation.¹³

If the lessee fails to provide a timely release, the lessor may provide notice to the lessee of the lessee’s failure to provide the required release.¹⁴ The notice must include a statement that the lease is

9. *Id.*

10. W. VA. CODE R. § 39-1-4.2.2.a.1 to 4, 6 (2020) (Operators may agree, in writing, to waive the greater spacing limitations applicable to wells operated by different operators and instead adhere to the spacing limitations applicable to wells operated by the same operator).

11. § 4.2.2.a.5.

12. W. VA. CODE § 36-4-9b(a) (2020).

13. *Id.*

14. *Id.* § 36-4-9b(b).

terminated, expired, or canceled according to its terms (including the date of termination, expiration, or cancellation), that the lessee has a duty to provide a release, and that if the release, or a written dispute to such termination, expiration, or cancellation, is not received by the lessor within sixty days from receipt of the notice, the lessor has the right to file an affidavit of termination, expiration, or cancellation.¹⁵ The notice must also include: (1) the name and address of the lessor; (2) a brief description of the land covered by the lease; (3) the name or API number of any well on the land covered by the lease (if known to the lessor); (4) the name of any unit that includes land covered by the lease (if known to the lessor); (5) the recording information regarding the lease (or memorandum of lease), execution date of the lease, and the identity of the original lessor and lessee under the lease; and (6) a service sheet showing the names and addresses of all persons upon whom the notice has been served.¹⁶ The notice must be sent to the lessee, all other lessors, and all other persons who have an interest in the leasehold estate or the oil and natural gas leased thereunder.¹⁷

After receiving notice, if the lessee disputes in good faith that the oil or natural gas lease is terminated, expired, or canceled as stated in the notice, within sixty days of receiving the notice, the lessee must deliver a written dispute of the contents of the notice to the lessor, detailing the good-faith basis for such dispute.¹⁸

A lessor who serves notice, but fails to receive a timely dispute from the lessee, may record an affidavit of termination, expiration, or cancellation in the office of the county clerk.¹⁹ An affidavit of termination, expiration, or cancellation must contain: (1) the name and address of the affiant; (2) the names and addresses of the lessor and lessee; (3) if located in a unit, the name of the unit, if known to the affiant; (4) if there is a well on the land, the name or API number of the well, if known to the affiant; (5) the recording information for the lease (or memorandum of lease), the execution date of the lease, and

15. *Id.* § 36-4-9(b)(1)(A)–(C).

16. *Id.* § 36-4-9b(b)(2)–(7).

17. *Id.* § 36-4-9b(c) (stating that “A lessor’s inability to afford notice to everyone to whom notice is to be given thereunder does not relieve a lessee of its obligation to respond”); *see also id.* § 36-4-9b(d) (stating that “Service of notice under subsections (b) and (c) of this section shall be effected either personally or by certified mail to the recipient’s last known business address, or, if service cannot reasonably be made by those means, by publication once a week for two weeks in a newspaper of general circulation in the county or counties in which the lands covered by the lease are located”).

18. *Id.* § 36-4-9b(e).

19. *Id.* § 36-4-9b(f).

the names of the original lessors and lessees; (6) a brief recitation of the facts known to the affiant relating to the termination, expiration, or cancellation of the lease, including relevant dates; (7) a statement that the lessor complied with the duty to serve proper notice to the lessee and that the lessee failed to provide a timely challenge to the notice (the affidavit must attach a copy of the notice made and served); and (8) the notarized signature of the affiant.²⁰

A person filing an affidavit must provide service of the affidavit upon all persons who received the notice. The filing of an affidavit does not constitute a modification of a lease, or limit, waive, or prejudice any claim or defense of any party to the lease.²¹

C. Legislature Addresses Expedited Permits, the Abandoned Well Plugging Fund, and Unknown Royalty Owners

On February 18, 2020, Governor Justice signed HB 4091 into law, which provides a process for operators to receive expedited permits and expedited permit modifications for certain horizontal production wells.²² Expedited permits and expedited permit modifications are not available for deep wells.²³

To file an expedited permit application, the operator must pay an additional fee of \$20,000 for an initial horizontal well and \$10,000 for each additional horizontal well proposed for the same pad.²⁴ Upon receipt of the permit application, WVDEP must issue or deny an expedited permit within forty-five days unless WVDEP seeks additional information or modification from the applicant, which tolls the forty-five-day period until WVDEP receives the requested information.²⁵ For each day WVDEP exceeds the allotted time approving or denying the expedited permit application, the agency must refund \$1,333.33 for an initial well and \$666.66 for additional wells proposed on the same pad until the expedited fee is reduced to the normal permit fee amount.²⁶

20. *Id.* § 36-4-9b(g).

21. *Id.* § 36-4-9b(h).

22. *See id.* §§ 22-6A-7(h)(1)–(3), (i)(1)–(3).

23. *Id.* §§ 22-6A-7(h)(1), (i)(1); *see also* § 22C-9-2(a)(12) (defining “deep wells” as those drilled to a depth below the top of the uppermost member of the Onondaga Group, and including Utica wells).

24. W. VA. CODE § 22-6A-7(h)(1).

25. *Id.* § 22-6A-7(h)(2).

26. *Id.* § 22-6A-7(h)(3).

To file an expedited permit modification application, the operator must pay an additional fee of \$5,000 for each horizontal well.²⁷ Upon receipt of the permit application, WVDEP must issue or deny an expedited permit within twenty days unless WVDEP seeks additional information or modification from the applicant, which tolls the twenty-day period until WVDEP receives the requested information.²⁸ For each day WVDEP exceeds the allotted time for approving or denying the expedited permit application, the agency must refund \$500 per day.²⁹

On March 23, 2020, Governor Justice signed HB 4090 into law, which lowered the severance tax on certain marginally producing oil and gas wells³⁰ and created the Oil and Gas Abandoned Well Plugging Fund.³¹ Specifically, HB 4090 lowered the severance tax rate on wells (excluding wells utilizing horizontal drilling techniques targeting shale formations) that produced an average between 5,000 and 60,000 cubic feet of natural gas per day during the calendar year immediately preceding the beginning date of a given taxable year.³² On applicable wells, HB 4090 lowered the severance tax from 5% to 2.5% of the gross value of production as shown by the gross proceeds derived from the sale.³³ HB 4090 requires placement of the 2.5% severance tax into the newly created Oil and Gas Abandoned Well Plugging Fund, which is designed to fund WVDEP efforts to plug and reclaim abandoned oil and gas wells without a responsible operator.³⁴

On March 25, 2020, Governor Justice signed HB 4088 into law, which allows certain unclaimed funds related to oil and gas interests to be deposited into the newly-created Oil and Gas Reclamation Fund.³⁵ Under preexisting provisions codified in Chapter 55, Article 12A (“Lease and Conveyance of Mineral Interests Owned by Missing or Unknown Owners or Abandoning Owners”), if an owner of a

27. *Id.* § 22-6A-7(i)(1).

28. *Id.* § 22-6A-7(i)(2).

29. *Id.* § 22-6A-7(i)(3).

30. *Id.* § 11-13A-3a.

31. *Id.* § 22-6-29a.

32. *Id.* § 11-13A-3a(b)(2). For oil wells, the severance decrease applies to wells (excluding wells utilizing horizontal drilling techniques targeting shale formations) that produced an average between one-half barrel per day and 10 barrels per day, during the calendar year immediately preceding the beginning date of a given taxable year.

33. *Id.*

34. *Id.*

35. *Id.* § 37-4-9.

mineral interest leased through a special commissioner's lease³⁶ remains unknown or missing, or does not disavow abandonment, for a period of seven years from the date of the special commissioner's lease, the party that received the unclaimed funds must report the funds as unclaimed to the court.³⁷ If the owners of the surface estate present proof of ownership in fee of the surface estate, the court must order the special commissioner to convey the mineral interest to the surface owners.³⁸ Until HB 4088, the court also awarded the unclaimed funds attributable to the mineral interest to the surface owners.³⁹ However, HB 4088 now directs that these funds be paid to the Oil and Gas Reclamation Fund, which is used to reclaim and plug abandoned wells that have either been inadequately plugged or never plugged at all.⁴⁰

III. OIL AND GAS LITIGATION

In the past year, significant decisions concerning oil and gas title and lease issues have been issued by the Supreme Court of Appeals of West Virginia, the U.S. Court of Appeals for the Fourth Circuit, and the U.S. District Court for the Northern District of West Virginia.

A. *West Virginia Supreme Court Holds Joint Operating Agreements May Create Partnerships*

In *Northeast Natural Energy LLC v. Pachira Energy LLC*, the Supreme Court of Appeals of West Virginia determined that a joint operating agreement ("JOA") creating an area of mutual interest ("AMI") may result in a partnership under the Uniform Partnership Act. By way of background, Northeast and Pachira created the Blacksville AMI, which the two parties jointly owned 75%–25% through a JOA and for which Northeast acted as the operator.⁴¹ The Blacksville AMI included a water system used to transport water from the Monongahela River to wells inside the AMI.⁴² Pachira learned that Northeast intended to use the water system to transport water from the Monongahela River to wells outside the AMI and to sell water to third

36. *See id.* § 55-12A-7.

37. *Id.*

38. *Id.*

39. *See id.*

40. *Id.* § 22-6-29(b)(1).

41. *Ne. Nat. Energy LLC v. Pachira Energy LLC*, 844 S.E.2d 133, 136 (W. VA. 2020).

42. *Id.*

parties outside the AMI.⁴³ Pachira received a preliminary injunction from the circuit court enjoining Northeast from using the AMI water system to transport and sell water to third parties for use outside of the AMI.⁴⁴

In upholding the injunction, the Supreme Court of Appeals found that Pachira made a substantial case before the circuit court indicating that the parties formed a water system partnership and rejected Northeast's argument that the parties owned the water system as tenants in common.⁴⁵ Specifically, the Supreme Court of Appeals relied on the broad definition of "partnership" found in the Partnership Act: "an association of two or more persons to carry on as co-owners a business for profit . . . whether or not the persons intend to form a partnership."⁴⁶ Further, the Court noted that property purchased with partnership funds, such as the AMI water system, "is presumed to be partnership property, notwithstanding the name in which title is held."⁴⁷

The Court also rejected Northeast's argument that Pachira did not demonstrate irreparable harm because Pachira could be compensated with money damages if Pachira succeeded on the merits of its claims. The Court instead held that "the term irreparable does not always mean what it seems to signify, that is, a physical impossibility of reparation."⁴⁸ The Court held that an "irreparable injury is one that is actual and imminent, and it is likely that the past offensive conduct will recur."⁴⁹ Significantly, the Court also noted that the Partnership Act "charges a partner with a fiduciary duty of loyalty to the partnership and to other partners" and that breach of a partner's fiduciary duty of loyalty also supports injunctive relief.⁵⁰

B. *Supreme Court of Appeals Applies Equitable Defenses to Settle Title Issues*

In *EQT Prod. Co. v. Taschler*, the Supreme Court of Appeals upheld a circuit court's grant of summary judgment in favor of a landowner who sought to quiet title to certain mineral interests in Ritchie County.

43. *Id.*

44. *Id.* at 137.

45. *Id.* at 138.

46. *Id.*

47. *Id.* at 139.

48. *Id.* at 140.

49. *Id.*

50. *Id.* at 140.

The facts of *Taschler* are somewhat unique: the tract at issue was subject to a 1905 lease.⁵¹ In 1985, the landowner's predecessor in interest filed an action to challenge the validity of the 1905 lease and received a default judgment.⁵² In 2015, the defendant executed a "ratified lease agreement" (as lessee) with "an heir of the predecessor in title of the original lessor" (as lessor) under the 1905 lease.⁵³ The landowner filed suit in 2016 to quiet title.⁵⁴

The defendant argued that the 1985 default judgment "ha[d] no legal force or effect and [was] not binding upon [the defendant] because the mineral owner/lessor and lessee were not joined as parties in that action."⁵⁵ Nonetheless, the Court upheld the grant of summary judgment, among other reasons, because "given the passing of thirty-six years since entry of the default judgment, [the defendant] was estopped, pursuant to the doctrine of laches, from asserting any arguments regarding the impropriety of the default judgment awarded"⁵⁶

The Court also upheld the application of laches to a title dispute in *Van Camp v. McIntyre*. In *Van Camp*, the will at issue, given effect in 1910, allowed a trustee to sell a specific tract provided that the trustee retain the mineral rights and convey them to the beneficiary of the residue clause.⁵⁷ The trustee sold the tract in 1910 but failed to reserve the mineral rights.⁵⁸ The successors in interest to the beneficiary under the residue clause brought suit in 2016, claiming (in part) that the trustee violated the limitation in the will by not reserving the mineral rights.⁵⁹ The circuit court granted summary judgment against the successors in interest on the basis of laches, and the Supreme Court of Appeals upheld the grant of summary judgment, finding that "the expiration of over 100 years from [the] conveyance mandated the application of the doctrine of laches to preclude the claim by the petitioners."⁶⁰

51. *EQT Prod. Co. v. Taschler*, No. 19-0370, 2020 WL 3407766, at *1 (W. Va. June 18, 2020).

52. *Id.*

53. *Id.*

54. *Id.* at *2.

55. *Id.* at *1.

56. *Id.* at *3.

57. *Van Camp v. McIntyre*, No. 18-0760, 2020 WL 877817, at *1–2 (Va. Feb. 24, 2020).

58. *Id.* at *2.

59. *Id.* at *3.

60. *Id.* at *4.

In June 2020, the Court upheld the grant of a summary judgment in *U.S. Exploration, LLC v. Griffin Producing Co.*, among other reasons, on the basis of unclean hands. In *Griffin*, the lessee (a family-owned company named Magnum) was the subject of a hotly contested divorce proceeding between the president and vice-president.⁶¹ The Magnum vice-president purported to convey the 4,000 acre oil and gas lease at issue to a company he solely owned (U.S. Exploration), but the conveyance was not immediately recorded.⁶² Subsequently, the Magnum president executed a partial release of the lease at issue, and the partial release was recorded first-in-time.⁶³

The Court expressed some concern regarding the “troubling question” of whether the Magnum president and vice-president executed conveyances in conflict with the equitable distribution order in the divorce proceeding.⁶⁴ The Court noted the general rule in West Virginia:

When a party to a divorce case undertakes—before the final order of equitable distribution in the case is effective—to transfer real property to a third party having actual knowledge of the divorce proceedings, the transfer is effective only to the extent it does not conflict with the equitable distribution order unless the other party to the divorce joins in the transfer. To the extent the attempted transfer conflicts with the order of equitable distribution and there is evidence that the transfer was made to avoid application of the equitable distribution statutes or was otherwise a fraudulent conveyance, it is void.⁶⁵

Despite the general rule and the Court’s identification of the “troubling question,” no facts in evidence demonstrated whether the partial release violated an order in the divorce proceeding or even whether the divorce proceeding was ongoing at the time of the partial release.⁶⁶

61. *U.S. Expl. v. Griffin*, No. 18-0847, 2020 WL 3163644, at *1, *2 (W. Va. 2020).

62. *Id.* at *2–3.

63. *Id.* at *3.

64. *Id.* at *8.

65. *Id.* at *8 (quoting Syl. Pt. 7, *Whiteside v. Whiteside*, 663 S.E.2d 631 (W.Va. 2008)).

66. *Id.*

Irrespective of whether an order in the divorce proceeding would have prohibited the conveyance of marital or corporate assets (including the partial release executed by the president), the Court found that the vice president and U.S. Exploration violated the general rule first “and cannot now complain that [the president] subsequently violated it by executing” the partial release.⁶⁷ Stated another way: “we believe that the doctrine of unclean hands prohibits [the vice-president], and by extension U.S. Exploration, a company he owns, from raising this issue.”⁶⁸ Therefore, the Court upheld the circuit court’s ruling effectuating the partial release under the West Virginia race-notice provisions.⁶⁹

C. *Supreme Court of Appeals Construes Royalty Reservation*

In *Haught Family Trust v. Williamson*, the Supreme Court of Appeals upheld a circuit court interpretation of a deed that reserved “one half of the proceeds of all gas [that] may be produced from said tract of land” as a reservation of a royalty interest and not as a reservation of any oil and gas in place. In upholding the circuit court interpretation, the Supreme Court of Appeals relied on the long-standing general rule in *Paxton v. Benedum-Trees Oil Co.*, which provides that “the words ‘when produced’ [do not speak] in terms of an interest in the oil and gas then in place, but rather of the royalty interest which would follow production of oil or gas, or both.”⁷⁰

D. *Fourth Circuit Reverses Southern District on Lease Interpretation*

In *Lucey v. Chesapeake Appalachia, LLC*, the U.S. Court of Appeals for the Fourth Circuit reversed and remanded an order granting a motion to dismiss issued by the U.S. District Court for the Southern District of West Virginia.

The facts and legal controversy in *Lucey* are not complex: the primary term of the lease ended on August 21, 2011.⁷¹ The lessors filed suit after the end of the primary term, alleging that the lease had

67. *Id.* at *9.

68. *Id.* at *8.

69. *Id.*

70. *Haught Family Trust v. Williamson*, No. 19-0368, 2020 WL 1911459 (W. Va. Apr. 20, 2020); *see also* *Davis v. Hardman*, 133 S.E.2d 77, 81 (W. Va. 1963).

71. *Lucey v. Chesapeake Appalachia, LLC*, 786 Fed. Appx. 394, 395 (4th Cir. Oct. 1, 2019).

terminated.⁷² The parties entered into a settlement agreement with an effective date of October 29, 2012.⁷³ As part of the settlement agreement, the lessee received a new leasehold interest, and the lessee agreed to pay the lessors “an additional \$500.00/acre . . . if there [was] not a commencement of two [] wells within one [] year of the effective date of this agreement.”⁷⁴ Prior to October 29, 2013, the lessee pooled the leased acreage with four off-tract wells commenced prior to the effective date of the settlement agreement.⁷⁵

As discussed by the Fourth Circuit, “the only issue . . . is whether the condition precedent for [the lessee] to avoid paying [a]dditional [c]onsideration required that [the lessee] commence two wells *at any time before* October 29, 2013, or whether it required that [the lessee] commence two wells *between* October 29, 2012 (the effective date of the [s]ettlement [a]greement) and October 29, 2013.”⁷⁶

The district court determined that the settlement agreement only required the commencement of two wells at any time before October 29, 2013.⁷⁷ In reversing, the Fourth Circuit held that the district court’s decision rendered the additional compensation provision superfluous:

The district court ruled that the former was the unambiguous intent of the parties. We reject this finding. Applying the district court’s reasoning, the wells had already been commenced at the time the Settlement Agreement was executed. Thus, the condition precedent to Chesapeake owing no further compensation had already been met. As such, there were no circumstances under which Chesapeake would ever owe Additional Consideration. Accordingly, the district court’s interpretation of the agreement rendered the one-year deadline and the negotiated amount of additional compensation superfluous.⁷⁸

The Fourth Circuit also found the use of the word “within” significant:

72. *Id.*

73. *Id.*

74. *Id.* at 395–96.

75. *Id.* at 396.

76. *Id.* at 397.

77. *Id.* at 396.

78. *Id.* at 397.

The primary definition of the word ‘within’ is ‘inside, enclosed by.’ The use of the word ‘within’ in the context of time computation requires two boundary points, together framing a time period ‘inside’ of which or ‘enclosed by’ which the relevant events must occur. Had the parties intended that the wells could be commenced at any time prior to October 29, 2013, the [s]ettlement [a]greement likely would have said so.⁷⁹

E. *Northern District Construes Wellbore Conveyance*

In *Mountaineer Minerals, LLC v. Antero Resources Corp.*, the U.S. District Court for the Northern District of West Virginia held that a conveyance of two specific wells, “and any and all leasehold rights associated therewith,” conveyed “leasehold rights only insofar as those rights pertained to those specific [a]ssigned [w]ells.” The parties to the case disputed whether the conveyance of “any and all leasehold rights associated” with the specifically enumerated shallow wells included the leasehold rights associated with the Marcellus shale.⁸⁰ In holding that the conveyance was limited to those rights pertaining to the specifically enumerated wells, the court noted that its reasoning was bolstered by the assignment’s mention of specific obligations related to the wells, including the obligation to pay royalty, and the assignee’s right to produce and operate the assigned wells.⁸¹

F. *Northern District Emphasizes Pleading Requirements for Breach of Lease Actions*

In *Langford v. Antero Resources Corp.*, Judge Keeley granted, in part, a motion to dismiss where the lessor-plaintiffs failed “to adequately plead the elements of [a] breach of contract claim” related to a lease with Antero Resources. The plaintiffs alleged that Antero failed to properly pay the royalty by deducting certain costs and expenses from the royalty in contravention of the lease terms.⁸² After noting that the plaintiffs failed to attach the leases at issue to the complaint, Judge Keeley held:

79. *Id.* at 397–98.

80. *Mountaineer Minerals, LLC v. Antero Res. Corp.*, No. 1:16CV28, 2019 WL 5727589, at *1, *5 (N.D.W. Va. Nov. 5, 2019).

81. *Id.*

82. *Langford v. Antero Res. Corp.*, No. 1:19CV178, 2020 WL 608285, at *1 (N.D. W.Va. Feb. 7, 2020).

The [p]laintiffs' [c]omplaint fails to adequately identify their oil and gas interests in the subject property. It does not identify or explain the parties' obligations under the various contracts and modifications at issue, and it fails to allege how Antero even acquired its alleged interests, if any, in the subject leases. In addition, the [c]omplaint fails to allege whether the [p]laintiffs have performed their obligations under the contracts, and fails to identify the specific contract provisions Antero breached.⁸³

Langford highlights the importance of pleading with specificity in federal court.

G. Northern District Certifies Lessor Class Action Against Antero

In *Romeo v. Antero Resources Corp.*, Judge Keely certified a class of royalty owners who alleged that Antero improperly deducted post-production costs and failed to pay royalties on the basis of the price received at the point of sale.⁸⁴ Specifically, the plaintiffs sought certification of a class that included those with leases that required Antero to do the following:

- (a) to pay monthly Lessors' proportionate share of the one-eighth [] of the value at the well of the gas from each and every gas well drilled on said premises, the product from which is marketed and used off the premises . . . or
- (b) to pay Lessor as royalty for the native gas from each and every well drilled on said premise[s] producing native gas, as amount equal to one-eighth [] of the gross proceeds received from the sale of the same at the prevailing price for gas sold at the well, for all native gas saved and marketed from the said premises, payable quarterly.⁸⁵

Without determining the merits of the claim, Judge Keeley determined that the proposed class satisfied the four requirements of Federal Rule of Civil Procedure 23(a) (numerosity, commonality, typicality, and

83. *Id.* at *2–3.

84. *Romeo v. Antero Res. Corp.*, No. 1:17CV88, 2020 WL 1430468, at *1 (N.D. W.Va. Mar. 23, 2020).

85. *Id.* at *7.

adequacy of representation) and the three requirements of Rule 23(b) (predominance, superiority, and ascertainability).⁸⁶

Judge Keeley “readily conclude[d]” that the numerosity requirement was satisfied because counsel for the plaintiffs identified over 700 individuals or entities with lease language identical to that of the proposed class representatives.⁸⁷ Judge Keeley also determined that Antero did not significantly contest the adequacy of representation and that the commonality requirement of Rule 23(a) is “subsumed under, or superseded by, the more stringent Rule 23(b)(3) requirement that questions common to the class predominate over other questions.”⁸⁸ Judge Keeley also found that the proposed class demonstrated typicality despite significant possible differences in individual claims:

Although their claims may differ factually because gas was extracted from different wells, gas was sold at different points of sale, gas was transported to different locations, gas was processed or unprocessed, or Antero took different types of deductions for post-production expenses, the representative Plaintiffs’ claims all arise from the same practice or course of conduct and are based on the same legal theory. Indeed, all of the breach of contract claims are based on the theory that Antero has been unlawfully deducting post-production expenses from the Plaintiffs’ royalty payments. And although the Plaintiffs’ damages may vary based on the amount and frequency of Antero’s allegedly unlawful deductions, the class representatives and class members need not have suffered *identical* injuries or damages.⁸⁹

Judge Keeley also concluded that the proposed class satisfied the predominance, superiority, and ascertainability requirements of Rule 23(b). As to predominance, Judge Keeley identified four common questions of law and fact that “far outweigh the dissimilarities in damages among class members that likely will require individualized inquires.” The four common questions included:

86. *Id.* at *8–13.

87. *Id.* at *8.

88. *Id.* at *8.

89. *Id.* at *9 (internal quotations omitted).

- (1) Do *Wellman*⁹⁰ and *Tawney*⁹¹ apply to both market value and proceeds leases?
- (2) If so, do the leases at issue, as modified by any subsequent modifications (if any), have the specific language required by *Wellman* and *Tawney* that would allow Antero to deduct post-production expenses from the Plaintiffs' royalty payments?
- (3) If not, did Antero unlawfully deduct post-production expenses from the Plaintiffs' royalty payments?
- (4) If so, how did Antero calculate these deductions?⁹²

Finally, and given the pervasiveness of common questions of law and fact, Judge Keeley found that a class action was superior to individual litigation and that the class was ascertainable through Antero's accounting system and summary royalty reports.⁹³

IV. CONCLUSION

In the next year, the Northern District may opine on whether *Wellman* and *Tawney* apply to both market value and proceeds lease—an issue that will significantly affect both lessor and lessee interests in West Virginia. Further, the Supreme Court of Appeals decision in *Pachira* may spur similar litigation related to whether areas of mutual interest create partnership assets—and also fiduciary duties—in other jurisdictions. Finally, the legislature is expected to again be active with respect to oil and gas issues in 2020. Bills that ultimately did not pass in 2020, including those related to the tax treatment of natural resources, partitions, and bonding, may be introduced and debated again.

90. *Wellman v. Energy Res., Inc.*, 557 S.E.2d 254 (W. Va. 2001).

91. *Estate of Tawney v. Columbia Nat. Res., LLC*, 633 S.E.2d 22 (W. Va. 2006).

92. *Romeo*, 2020 WL 1430468, at *10.

93. *Id.* at *12–13.