Oil & Gas E-Report

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Kansas Appellate Court Rejects Argument by Royalty Owner Class that There Cannot be a Good Faith Sale of Gas Until After Gas is Prepared for Interstate Market

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A Kansas appellate court recently issued a decision regarding the marketable condition rule. This decision, *L. Ruth Fawcett Trust v. Oil Producers, Inc. of Kansas,*[1] is part of the same case that produced an important decision from the Kansas Supreme Court in 2015 regarding the marketable condition rule—namely, *L. Ruth Fawcett Trust v. Oil Producers, Inc. of Kansas*.[2]

This rule is particularly relevant if an oil and gas lessee drills a well that produces or is capable of producing natural gas and the lease provides that royalties on natural gas will be based on the market value of gas "at the well" or "at the wellhead," or based on the price of sale "calculated at the wellhead." In these circumstances, Kansas's marketable condition rule requires the lessee to bear the entire cost of putting natural gas into a "marketable" condition, unless the lease clearly provides otherwise.

In the *Fawcett* case, a lessee sold gas to a purchaser at the well. That first purchaser treated and processed the gas, transported it via pipeline, and re-sold it to various customers. The price that the first purchaser paid for the gas was primarily based on the sales price that this first purchaser would obtain when it re-sold the gas to its customers, minus certain costs that the first purchaser incurred after taking delivery of the gas at the well. The lessee paid royalties to lessors based on the price it received under this formula. A group of royalty owners sued, arguing that the lessor had a duty to put the gas in a marketable condition and that, as a matter of law, gas is not in a marketable condition until it meets the specifications required to transport the gas in an interstate pipeline. Further, the plaintiffs argued that, because the formula price effectively required the lessors to bear a portion of the costs to upgrade the gas to pipeline specifications, this method of calculating the royalty violated the marketable condition rule.

In *Fawcett* I, the Kansas Supreme Court rejected that argument, holding that "the duty to make gas marketable is satisfied when the operator delivers the gas to the purchaser in a condition acceptable to the purchaser in a good faith transaction." Once the operator does that, the operator has actually marketed the gas. And, given that the gas was marketed, it must have been marketable.

On remand after *Fawcett* I, the district court dismissed most of the plaintiffs' claims based on the holding in *Fawcett* I. The plaintiffs sought to amend their suit to assert that, as a matter of law, a sale of natural gas cannot be made in good faith until after the gas is put into a condition that satisfies the quality specifications of interstate pipelines. The district court denied the plaintiffs request to amend their suit in this way. The district court determined that this amendment would be inconsistent with the Kansas Supreme Court's decision in *Fawcett* I. The plaintiffs appealed, but the appellate court affirmed, expressing agreement with the district court's conclusion. The appellate court stated that *Fawcett* I implicitly held that a sale of gas at the wellhead could be in good faith even if the gas did not satisfy interstate pipeline specifications.

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[1] 475 P.3d 1268 (Kan. Ct. App. 2020) [*Fawcett* II].
[2] 352 P.3d 1032 (Kan. 2015) [*Fawcett* I].

Purchaser of Oil from Operator that had, Unknown to Purchaser, Produced Oil While Trespassing Could Rely on Louisiana's Good Faith Purchaser Defense

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The Hills brought a subsurface trespass action against TMR Exploration, Inc., Park Exploration, Inc., and Vitol Resources, Inc., seeking to recover the value of minerals that were produced from the Hills' land without authority.[1] The Hills alleged that TMR drilled a well from the surface of a neighboring tract that TMR had under lease, but the well was bottomed beneath the Hills' land. The Hills had not granted a lease or given their consent to the well, and the Hills' land was not part of a drilling unit. TMR produced oil from the well for a time, then assigned its interest to Park, which subsequently assigned its interest to Vitol.

The Hills also sued certain Sunoco entities (collectively, "Sunoco") that had purchased oil produced from the well. Sunoco filed a motion for summary judgment to dismiss the claims against it based on the good faith purchaser defense set forth in Louisiana Civil Code articles 521 through 524. The district court granted the motion, and the Hills appealed.

The Hills noted that, under Louisiana Civil Code article 2452, "The sale of a thing belonging to another does not convey ownership." Further, although the Civil Code applies to mineral disputes if the "[Mineral] Code does not expressly or impliedly provide for a particular situation," the Mineral Code "prevails" to the extent that it provides for a particular situation.[2] The Hills argued that the Mineral Code provides a rule that applies to their dispute with Sunoco. Thus, the Mineral Code "prevails" over the Civil Code's good faith purchaser defense and that defense does not apply.

In particular, the Hills relied on Mineral Code article 210. This article provides protection to "[a] purchaser of minerals produced from a recorded lease granted by the last record owner holding under an instrument translative of title to the land or mineral rights leased … unless and until a suit is filed testing title to the land or mineral rights embraced in the lease and the purchaser receives notification of it by registered mail." However, the "purchaser is not entitled to this protection unless he has filed for registry in the conveyance records of the parish in which the land subject to the lease is located notice that the minerals produced have been and will be purchased by him." Because Sunoco did not file a notice in the conveyance records, the Hills argued Sunoco was not entitled to protection under Mineral Code article 210.

Sunoco argued, however, that Mineral Code article 210 did not apply and the Louisiana First Circuit Court of Appeal agreed. The First Circuit stated that, "The purpose and intent of La. R.S. 31:210 is to address rental and royalty payments due to parties holding an interest in the 'leased property' when a dispute or defect in the title exists." But here, the Hills' claims were based on a trespass beneath their unleased land, and these claims were "separate and distinct from the 'recorded lease' over the land of [the Hills' neighbor.]" For this reason, Mineral Code article 210 did not apply.

Because Mineral Code article 210 did not apply, it would not "prevail" over otherwise applicable Civil Code provisions. Moreover, the First Circuit concluded that Sunoco qualified for the Civil Code's good faith purchaser defense. Under Civil Code article 522, "A transferee of a corporeal movable in good faith and for fair value retains the ownership of the thing even though the title of the transferor is annulled on account of a vice of consent."[3] Further, under article 524, "[t]he owner

[1] *Hill v. TMR Expl., Inc.*, 2020-0667 (La. App. 1 Cir. 1/27/21); 2021 WL 267916.
[2] La. R.S. 31:2.
[3] Under Louisiana law, a "corporeal" thing is similar to a "tangible" thing under common law. *See* La. Civ. Code art. 461. A "movable" thing is similar to "personal" property. *Bridges v. National Financial Systems, Inc.*, 960 So. 2d 202, 205 (La. App. 1st Cir. 2007) (citing Louisiana Supreme Court decisions for the proposition that, "'Tangible personal property' is a

of a lost or stolen movable may recover it from a possessor who bought it in good faith … from a merchant customarily selling similar things," but only after the owner reimburses the possess or for "the purchase price." Article 523 specifies that, "An acquirer of a corporeal movable is in good faith for purposes of this Chapter unless he knows, or should have known, that the transferor was not the owner." Here, the Hills did not produce any evidence to challenge Sunoco's status as a good faith purchaser. Therefore, Sunoco was entitled to summary judgment.

Further, the court noted another aspect of Louisiana law that might defeat the Hills' claim. In particular, the Hills' claim against Sunoco was based on a premise that the Hills were owners of the oil. But under Louisiana law, no one owns oil or gas naturally in place in the subsurface.[4] A landowner generally has the exclusive right to drill and produce oil, gas, or other fugitive minerals from the land, "and to reduce them to possession and ownership," but his or her ownership of these fugitive minerals does not begin until the landowner reduces them to possession.[5] Here, the Hills never possessed the oil sold to Sunoco.

Accordingly, the court found the Hills lacked any claim against Sunoco based on ownership of the oil, although the Hills might have trespass claims against TMR, Park, and Vitol based on subsurface trespass for the value of the oil produced by those defendant operators.

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common law term, but Louisiana courts have found it synonymous with the Civil Code concept of 'corporeal movable property.'").

Vices of consent include error, fraud, and duress. La. Civ. Code art. 1948.

[4] Louisiana Mineral Code article 6 (La. Rev. Stat. 31:6) provides:

> Ownership of land does not include ownership of oil, gas, and other minerals occurring naturally in liquid or gaseous form, or of any elements or compounds in solution, emulsion, or association with such minerals. The landowner has the exclusive right to explore and develop his property for the production of such minerals and to reduce them to possession and ownership.

Thus, Louisiana is one of the minority of states that follows a "non-ownership" theory. Other states that appear to follow a non-ownership theory include Alabama, California, Illinois, Indiana, Kentucky, New York, Ohio, Virginia, and Wyoming. Patrick H. Martin & Bruce M. Kramer, WILLIAMS & MEYERS OIL AND GAS LAW § 203.

A slightly larger number of states, including Texas, follow an ownership in place theory. *Id.* at § 203.3.

[5] La. Min. Code art. 6 (La. Rev. Stat. 31:6). Mineral Code article 7 (La. Rev. Stat. 31:7) states that, "Minerals are reduced to possession when they are under physical control that permits delivery to another."

A Company's Unasserted, Potential Claim for Reformation of a Mineral Deed, so as to Make the Deed Apply to Additional Tracts of Land, Could Not Defeat the Protection that Louisiana's Public Records Doctrine Provided to Third Person who Purchased Interests in Those Tracts

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Naomi Brewer of Arkansas purchased a 2/7th "mineral interest"[1] in three tracts of land located in DeSoto Parish in 1946.[2] The tracts were located in: (1) the South Half of the Southwest Quarter of Section 32, Township 14 North, Range 15 West, DeSoto Parish; (2) the South Half of the Northeast Quarter of the Southwest Quarter of the same Section 32; and (3) the South Half of the Southeast Quarter of the same Section 32.

Mrs. Brewer died in 2005. Her will left her Louisiana properties to Bank of America as trustee, with various relatives being beneficiaries of the trust. In Mrs. Brewer's succession proceeding, the Bank filed a detailed descriptive list that referred to an interest in the "West one-half" of Section 32.[3] The court entered a judgment closing the succession based on the descriptive list. The judgment appeared in the record of the succession proceeding, but it was not recorded in the conveyance records of DeSoto Parish.

Bank of America listed the late Mrs. Brewer's properties on an internet-based marketplace for oil and gas properties. Beaver Run Resources bought the listed property at auction, utilizing an "Oil and Gas Deed" effective September 1, 2008. The Oil and Gas Deed described the property as a 2/7ths mineral interest in land in the Southeast Quarter of Section 32. The Oil and Gas Deed did not mention any property interests in the Southwest Quarter, where two of the three tracts in which Mrs. Brewer had owned a 2/7ths mineral interest were located.

In September 2018, Bank of America moved to reopen the succession proceeding. The Bank noted that the Oil and Gas Deed had mentioned the tract in the Southeast Quarter only, whereas Mrs. Brewer also had owned a mineral interest in two tracts in the Southwest Quarter. The Bank sought a judgment to distribute the mineral interest in those two tracts to the beneficiaries of the trust. The court reopened the succession and entered a judgment as requested by the Bank on September 20, 2018. The judgment was filed in the conveyance records.

Not long after the new judgment was entered, a company called Bull Run Acquisitions II, LLC began negotiating with the trust beneficiaries, and in late 2018 Bull Run purchased the beneficiaries' mineral interests for the two tracts in the Southwest Quarter of Section 32. Bull Run then sent a demand letter to Covey Park Gas, LLC, which operated a unit that encompassed all three of the Section 32 tracts in which Mrs. Brewer had owned a mineral interest. The demand letter, sent pursuant to Mineral Code article 137 in February 2019, requested payments for a share of unit production allocable to the two tracts in which it had purchased an interest in the Southwest Quarter. Covey Park replied that it had been paying Beaver Run for the portion now claimed by Bull Run. Covey Park filed a concursus, naming Bull Run and Beaver Run as defendants.

Bull Run filed an answer, noting that Beaver Run's Oil and Gas Deed did not include a description of the two tracts at issue, but that Bull Run's mineral deeds did describe the two tracts. Bull Run later filed a motion for summary judgment. Beaver Run opposed the motion, arguing that

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[1] This "mineral interest" probably was a mineral servitude. Louisiana recognizes mineral servitudes, but does not recognized severed mineral estates. La. Rev. Stats. 31:16, 31:21; *Frost-Johnson Lumber Co. v. Salling's Heirs*, 150 La. 756, 91 So. 207 (1922); *Wemple v. Nabors Oil & Gas Co.*, 154 La. 483, 97 So. 666 (1923).
[2] *Covey Park Gas, LLC v. Bull Run Acquisitions, II, LLC*, 53,670 (La. App. 2 Cir. 1/13/2021), 2021 WL 116330.
[3] The descriptive list apparently did not refer to a mineral interest in the South Half of the Southeast Quarter of Section 32 (or, more generally, in the East Half of Section 32), even though that is where one of the three tracts was located.

both Beaver Run and Bank of America had intended for the Oil and Gas Deed to cover all three tracts. Beaver Run also asserted that the Oil and Gas Deed was subject to reformation. The district court granted summary judgment in favor of Bull Run. Beaver Run appealed.

The Louisiana Second Circuit stated that reformation of instruments is an equitable remedy that can be used to correct mistakes or errors in written instruments when such instruments do not reflect the contractual intent of the parties. However, an instrument "may not be reformed or corrected to the prejudice of third parties who are authorized to rely on the integrity of the instrument or who have relied on the public records." The Louisiana public records doctrine is found at Louisiana Civil Code article 3338, which provides that certain types of instruments, including instruments that "transfer[] an immovable or establish[] a real right therein,"[4] have no effect as to third persons unless the instruments are filed in the conveyance records of the parish where the immovable is located. Civil Code article 3343 defines "third person" as meaning "a person who is not a party to or personally bound by an instrument.

The recordation of an instrument does not ensure that the document will be given legal effect. For example, if an instrument is fraudulent, it will not be given legal effect merely because someone records it in the conveyance records. Instead, the doctrine's purpose and effect are to protect third persons against any effect from unrecorded instruments. For this reason, the public records doctrine is sometimes called a "negative doctrine."

The court reviewed the required standard for property descriptions in deeds that transfer or establish real rights in immovable property.[5] The Second Circuit noted that the property description in such a deed must be sufficient that the property at issue "can be located and identified, and the general rule is that the description must fully appear within the four corners of the instrument itself, or that the deed should refer to some map, plat, or other deed as part of the description, so that the description may be clear." No precise criteria exist for the sufficiency of a property description. Rather, each case is evaluated "on its own facts," with courts applying "a liberal construction so as to sustain, rather than defeat, the conveyance."

Here, the deed to Beaver Run did not describe the two tracts in question. Beaver Run argued that summary judgment nevertheless was improper because Beaver Run allegedly had a viable claim for reformation of its deed. The Second Circuit rejected this argument, noting that instruments may not be reformed to prejudice third parties who relied on the instrument or who would be entitled to rely on the public records doctrine.

The court also noted that an action for reformation is subject to a ten-year liberative prescription,[6] pursuant to Civil Code article 3499, and that Beaver Run had not filed a reformation action within ten years. The court acknowledged that liberative prescription "does not begin to run until the party seeking reformation discovers or should have discovered the error" that the party seeks to correct. But here, Beaver Run's theory as to why a third person could be prejudiced by a reformation action was that the alleged error in Beaver Run's deed was so obvious that even third parties should have discovered it. But assuming that third parties could be bound in the event an error was obvious, and that the alleged error in this case was that obvious, then Beaver Run itself should have discovered the error from the start. Thus, the running of prescription would not have been delayed and a reformation action would no longer be timely.[7]

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[4] Under Louisiana law, the class of property classified as "immovable" roughly corresponds to the common law's "real" property.
[5] It is not clear that the precision of the property description in the deed to Beaver Run was really at issue. Rather than giving a vague, incomplete, or erroneous description of the two tracts at issue, the deed seems not to refer to those tracts.
[6] Liberative prescription is a limitations period for bringing a civil action. It is similar to a statute of limitations.
[7] Further, under Beaver Run's argument, part of the reason that the alleged error was so obvious was an inconsistency between Beaver Run's deed and certain documents filed in the court records of Mrs. Brewer's succession proceeding, but

Moreover, the court noted that if Beaver Run had filed a timely reformation action prior to Bull Run's purchase of an interest in the disputed properties, Bull Run would not have been bound by the mere pendency of the action unless Beaver Run (or someone else) had filed a notice of lis pendens in the conveyance records, pursuant to Louisiana Code of Civil Procedure article 3752.

Under the circumstances, Beaver Run's potential action for reformation did not create an issue of disputed fact that would preclude summary judgment. The Second Circuit therefore affirmed the grant of summary judgment in favor of Bull Run in the concursus proceeding.

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not filed in the conveyance records. Instruments must be filed in the conveyance records to have effect against third persons.

Ohio Developments

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In recent years, oil and gas companies operating in Ohio have struggled at times with determining the present ownership of decades-old severed mineral interests. This is due to lingering questions surrounding the state's statutory scheme aimed at terminating these interests. As background, in 1961, the legislature enacted the Ohio Marketable Title Act (the "OMTA"),[1] which provided a framework for the extinguishment of certain "ancient" interests in real property. The OMTA was amended to specifically apply to severed mineral interests in 1973. Subsequently, in 1989, the Ohio Dormant Mineral Act (the "ODMA"),[2] was enacted as an amendment to the OMTA and provided a separate mechanism for the abandonment of severed mineral interests. The ODMA was later amended in 2006 to add certain notice procedures to this mechanism.

One of the questions that had vexed operators was whether the 1989 version of the ODMA was self-executing. In 2016, the Supreme Court of Ohio answered that question in *Corban v. Chesapeake Exploration, L.L.C.*,[3] holding that the 1989 version of the ODMA was not self-executing and that all claims to abandon severed mineral interests asserted after 2006 must comply with the new notice procedures in the statute. While the biggest question then surrounding the ODMA was put to rest by *Corban*, a different concern had come to the forefront – whether, after the enactment of the ODMA, the OMTA could still operate to extinguish severed mineral interests.

On December 2, 2020, the Supreme Court of Ohio issued its decision in *West v. Bode*,[4] closing the door on the question of the OMTA's applicability to severed mineral interests (for now[5]). In *West*, finding no irreconcilable conflict between the OMTA and the OMDA, the Court held that the OMTA continues to apply to severed mineral interests despite the later enactment of the ODMA. Thus, courts must apply each statute as the General Assembly wrote it – "as independent, alternative statutory mechanisms that may be used to reunite severed mineral interests with the surface property subject to those interests."[6] The Court explained that differences between the statutes cause them to operate differently (*e.g.*, with respect to the threshold period of time required for termination of a severed mineral interest) and achieve different results (extinguishment by operation of law, requiring no further action (OMTA) vs. deemed abandonment, requiring further action (ODMA)). The Court concluded that the OMTA and the ODMA "afford independent procedures, either of which may be used to effect the termination of a severed mineral interest, depending on the circumstances of the case and the time that has elapsed."[7]

While the Supreme Court of Ohio affirmed the continued applicability of the OMTA to severed mineral interests, that has done nothing to diminish interest in the ODMA. In fact, recently there has been a good amount of litigation relating to the ODMA's notice requirements when the surface owner is unable to complete service by certified mail. Under the statute, the surface owner is required to serve a notice of abandonment by certified mail on each holder of the severed mineral interest, or each holder's successors or assignees, at the last known address of each.[8] If service of the notice of abandonment "cannot be completed to any holder," then the surface owner may publish

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[1] Ohio Rev. Code 5301.47, *et seq*.
[2] Ohio Rev. Code 5301.56.
[3] 149 Ohio St.3d 512, 2016-Ohio-5796, 76 N.E.3d 1089.
[4] 2020-Ohio-5473.
[5] While the Court did not address the argument due to a procedural defect, the appellants raised a potential due process challenge in their merit brief relating to the OMTA's termination of a property right without notice, given the assumed self-executing nature of the OMTA. It seems likely that due process challenges to the OMTA will pop up in Ohio courts in the future, though given the OMTA's usage in the broader Ohio real estate industry, such a challenge would almost certainly face stiff opposition.
[6] 2020-Ohio-5473, ¶ 2.
[7] *Id.* ¶ 44.
[8] Ohio Rev. Code 5301.56(E).

the notice of abandonment in a local newspaper.[9] The underlying uncertainty is what constitutes "reasonable diligence" on behalf of the surface owner in attempting to identify and locate the current holders of the severed mineral interest, particularly in the modern internet era.

In *Gerrity v. Chervenak*,[10] the surface owners searched the public records in the county where the subject property was located, as well as the public records of the county where the last record holder of the severed mineral interest resided (the last-known address was identified in the deed conveying the severed mineral interest to this holder). After this search, the surface owners sent a notice of abandonment to the record owner's last known address, which was returned undeliverable. Only then did the surface owners publish their notice of abandonment in the newspaper. Unbeknownst to the surface owners, the last record holder had died in Florida over a decade earlier.

The heir of the last record holder alleged that the surface owners failed to exercise reasonable diligence in attempting to identify and locate him. Specifically, he claimed that the surface owners were required to search internet resources in addition to their public records searches. The Court disagreed, finding that the surface owners' efforts were sufficient in this case. However, the Court declined to adopt a bright-line rule for what constitutes reasonable diligence on the part of a surface owner. Instead, the Court held that whether a surface owner exercised reasonable diligence will depend on the facts and circumstances of each case. Notwithstanding, the Court did offer some guidance to courts and surface owners, stating that a review of public-property and court records in the county where the subject property is located will "generally establish a baseline of reasonable diligence."[11] But, as a caveat, the Court clarified that there may be circumstances when "the surface owner's independent knowledge or information revealed by the surface owner's review of the public-property and court records would require the surface owner…to continue looking elsewhere to identify or locate a holder."[12]

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[9] *Id*.
[10] 2020-Ohio-6705.
[11] *Id.* ¶ 36.
[12] *Id*.

Oklahoma Supreme Court Affirms Trial Court Denial of Temporary Injunction in Surface Damages Act Proceedings; Temporary Injunction is Dissolved; and Case Remanded for Further Proceedings

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In *Revolution Resources, LLC v. Annecy, LLC*,[1] an oil and gas operator (Revolution) filed a petition for the appointment of appraisers under the Oklahoma Surface Damages Act (SDA), 52 O.S. §§ 318.2 – 318.9 to determine the damages that should be paid in connection with the drilling of a proposed well. Revolution contacted Annecy in October 2019 to discuss its intent to drill an oil and gas well on the subject property, but the parties were unable to reach an agreement. Revolution initiated appraisal proceedings on the well under the SDA. Annecy filed a motion for temporary injunction and restraining order. Annecy argued that it would suffer irreparable harm if Revolution was allowed to drill on the subject tract, and that Revolution was required under the City's Code and state law to procure a variance from the City's Board of Adjustment prior to the City issuing the permits. Had a hearing on the intended operations been held, Annecy asserted that it would have prevailed in preventing Revolution from receiving a variance and drilling on the subject premises. In response, Revolution made a series of arguments, including that the SDA was specifically structured by the Legislature to provide money damages to surface owners for any potential harm they might suffer from the drilling operations. The SDA did not provide for injunctive relief since Annecy suffered no irreparable harm. Among the other arguments, Revolution also contended that recent enactments diminished municipal powers over oil and gas operations. The provisions of 52 O.S. Supp. 2015, § 137.1 provided the Oklahoma Corporation Commission (OCC), with few exceptions, exclusive jurisdiction over oil and gas regulation as between municipalities and the OCC.

The district court denied Annecy's motion for a temporary injunction and restraining order. Annecy appealed the ruling of the district court. Annecy also filed a separate action in the district court for declaratory judgment, determining Annecy's rights under the zoning and variance laws and requiring the City to comply with its obligations under those laws. Annecy further filed a motion for emergency relief, requesting a temporary injunction against Revolution while the issues presented on appeal were addressed.

On appeal to the Oklahoma Supreme Court, Annecy argued that the district court abused its discretion in denying its motion for temporary injunction within an action filed under the SDA. The district court had found that Annecy did not prove it would be irreparably harmed, so the injunction was not granted. In this appeal, the Court concluded that the district court did not abuse its discretion in denying Annecy's motion.

Since the Oklahoma Supreme Court found that the district court ruled as to only one of the four required factors necessary to obtain a temporary injunction (*i.e.,* a showing of irreparable harm), the Court focused on whether Annecy had proved by clear and convincing evidence that it would be irreparably harmed if a temporary injunction was not granted:

> A temporary injunction is not appropriate under these circumstances. Annecy did not meet its burden of proving by clear and convincing evidence that it would be irreparably harmed by Revolution's oil and gas operations. . . Annecy did not meet its burden to prove all necessary factors to obtain extraordinary relief, therefore its motion for temporary injunction was correctly denied. . . [I]t clearly was not an abuse of discretion. Accordingly, we affirm the district court's denial of Annecy's motion for temporary injunction.[2]

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[1] 2020 OK 97, 477 P.3d 1133.
[2] 2020 OK 97, at ¶ 17.

Annecy additionally argued that it was denied due process because it was never given notice and an opportunity to be heard at a variance proceeding before the City's Board of Adjustment. However, the Court found that the issue of whether due process was denied did not relate to this proceeding under the SDA. The evidence supported the finding of due process in the present action. Annecy's argument concerning due process related to the Board of Adjustment variance hearing, not the present Surface Damages Act proceedings. The issue of what right, if any, Annecy has to variance proceedings concerning oil and gas operations, and thus whether due process was denied, is not ripe for appellate review until there is an appeal of a final judgment of the district court deciding that issue in the separate declaratory judgment action.

Finally, the Oklahoma Supreme Court affirmed the district court's order denying Annecy's request for a temporary injunction. The temporary injunction granted by this Court pending appeal should not have been granted. The Court dissolved that temporary injunction and remanded the case to the district court for further proceedings.

New Guidance for Pennsylvania Unconventional Natural Gas Operators Following Settlement Relating to 25 Pa. Code Chapter 78a[1]

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Summary and Background

By Order entered on January 6, 2021, the Commonwealth Court of Pennsylvania approved a partial settlement by and between the Marcellus Shale Coalition ("MSC"), as the underlying petitioner, and the Commonwealth's Department of Environmental Protection ("DEP") and Environmental Quality Board ("EQB"), the underlying respondents, which will result in clarification surrounding the regulation of unconventional wells under 25 Pa. Code Chapter 78a.[2] Specifically there was agreement to make program improvements regarding onsite processing of waste, well development impoundments, centralized impoundments, well site restoration, spill remediation, and waste reporting. The timeline for implementation of these program improvements is generally between "as soon as possible" and twelve months from the date the Court dismissed certain counts in the lawsuit (i.e., January 6, 2021). Specifically, the parties submitted the proposed partial settlement on December 8, 2020, which relates to Counts III – VIII of MSC's petition.[3] The entirety of Count I, pertaining to public resources, and portions of Count II, pertaining to the area of review, survive the Partial Settlement and will continue to work through the litigation process.[4]

The DEP started the process of updating its oil and gas regulations in 2011. In 2014, the regulations known as 25 Pa. Code Chapter 78 were split into two sections with Chapter 78 addressing conventional oil and gas drilling operations and Chapter 78a pertaining to unconventional oil and gas drilling, particularly drilling in the Marcellus Shale formation. The legislature and Governor Wolf eliminated the proposed rule changes to Chapter 78 for conventional well drilling in June of 2016. On October 8, 2016, the EQB promulgated the regulations relating to unconventional drilling operations under 25 Pa. Code Chapter 78a by publication in the *Pennsylvania Bulletin*.[5]

The MSC immediately commenced the current litigation against the DEP and EQB filing its Petition on October 13, 2016 under the Commonwealth Court's original jurisdiction in the nature of a complaint seeking declaratory and injunctive relief challenging the validity and enforcement of the new regulations for unconventional drilling operations under Chapter 78a.[6] The Commonwealth Court, with subsequent affirmation from the Pennsylvania Supreme Court, granted the request for injunctive relief regarding centralized impoundments, public resources, and well operators' area of review obligations.[7]

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[2] Order Granting Application for Relief, *The Marcellus Shale Coal. v. Dep't of Envtl. Prot.*, 573 MD 2016 (Pa. Commw. Ct., Jan. 6, 2021) ("Settlement Order").
[3] Stipulation for Settlement, *MSC. v. DEP.*, 573 MD 2016 (Pa. Commw. Ct., Dec. 8, 2020) ("Partial Settlement").
[4] *See* Petition for Review, *MSC. v. DEP.*, 573 MD 2016 (Pa. Commw. Ct., Oct. 13, 2016) ("Petition").
[5] 46 Pa.B. 6431.
[6] *See* Petition.
[7] *MSC. v. DEP.*, 646 Pa. 482, 185 A.3d 985 (2018).

Settlement

The Partial Settlement focuses on program enhancements in the areas of onsite processing, well development impoundments, centralized impoundments, well site restoration, spill remediation, and waste reporting.[8] Over the course of the next twelve months, the DEP is required to update its forms and FAQs with regard to these areas.[9] The Partial Settlement details the specific forms and FAQs that are required to be updated.[10] For example, the DEP will be required to include the following FAQ which would be applicable in the event of a spill, subsequent remediation by the operator within 90 days, and submission of an appropriate final report demonstrating attainment of the applicable standard:

> Question: Will public notice be required?
>
> Answer: Public notification to the municipality and the public via the newspaper notice, and publication in the Pennsylvania Bulletin are not required for background or Statewide health standard remediations if the final report demonstrating attainment of the standard is submitted within 90 days of the release.[11]

Further, the interpretations expressed within the updated forms and FAQs will "provide a framework within which the [DEP] will exercise administrative discretion in the future" although the DEP "reserves the discretion to deviate from the interpretations if circumstances warrant."[12] The DEP must also provide industry training relating to the updated forms and FAQs. In order to promote an orderly transition, certain compliance deadlines relating to centralized impoundments were also extended by 6 months and 3 years. Specifically, the regulation with the extended deadlines would read:

> (a) An operator using a centralized impoundment as of October 8, 2016, shall close the centralized impoundment in accordance with this section or obtain a permit in accordance with Subpart D, Article IX (relating to residual waste management). The closure plan shall be submitted electronically to the Department through its web site for review and approval no later than [*April 8, 2017* now extended six months to *June 7, 2021*]. The operator shall properly close the centralized impoundment in accordance with the approved plan or obtain a permit in accordance with Subpart D, Article IX no later than [*October 8, 2019* now extended 3 years to *January 8, 2024*].[13]

Finally, as to spill remediation, the DEP will update its compliance database to show when multiple citations are the result of one incident.

Conclusion

By entering into the Partial Settlement, the DEP and EQB sought to "clarify existing statutory regulatory requirements in its forms and other documents as well as to review its efficiency and consistency in implementing these existing statutory and regulatory requirements."[14] The MSC entered into the Partial Settlement in order to provide "clarity and consistency" and ensure "the development of natural gas resources in the Commonwealth provides effective protection of the environment, health, safety and well-being of the communities in which its members operate."[15]

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[8] Partial Settlement at 5 – 15.
[9] *Id.*
[10] *Id.*
[11] *Id.* at 13 – 14.
[12] *Id.* at 5.
[13] 25 Pa. Code § 78a.59c.
[14] *Id.* at 2.
[15] *Id.* at 2-3.

Operators of unconventional wells may wish to closely monitor these regulatory changes to determine the impact on their operations.

Mineral Owner Complained about Surface Owner Having Granted Lease to a Company that Constructed a Solar Facility which Occupied Most of the Surface; Because the Mineral Owner was not Actively Trying to Develop the Minerals, and had Never Attempted to do so, a Texas Appellate Court Holds that Mineral Owner's Complaint was Premature

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Construction of Solar Facility

In 2015, two surface owners granted leases to Midway Solar, LLC, along with options to renew the leases.[1] This granted Midway the right to use the surface for up to 55 years to install solar panels and transmission lines. The leases expressly recognized that the surface owner did not own mineral interests in the land and that the land was encumbered by the mineral owners' interests.

The surface owners and Midway amended the leases to identify "Designated Drill Site Tracts"—an 80-acre area along the north end of the land and a 17-acre area along the south end. Midway constructed solar panels and transmission lines that covered 215 acres, which represents about 70% of the land.

Surface Waiver Agreements

Midway obtained agreements from twenty individuals who owned mineral interests on tracts adjoining the tract that Midway had leased for solar development. The waivers purported to relinquish those individuals' right to use the surface of the leased premises. Some of these agreements expressly stated that the individuals owned mineral interests in the leased premises, while some of the other agreements suggested that through reference to attachments. However, none of those individuals actually owned mineral interests in the leased tract. Midway recorded the agreements in the public records of Pecos County, Texas.

After the Lyles complained, Midway recorded a disclaimer of any interest in the mineral estate for the leased premises. Midway also corrected some of the surface waiver agreements' statements that the persons signing those agreements had mineral interests in the leased premises. Midway recorded the corrections, but the corrected agreements did not contain the signatures of the individuals who signed the original surface waivers. Further, Midway did not correct all the surface waiver agreements.

The Lawsuit

The persons who owned mineral interests in the land leased by Midway were the Lyles. They filed suit alleging: (1) the surface owner and Midway had breached the 1948 Deed that created a split estate because Midway's construction of a solar facility covering 70% of the surface denied the Lyles reasonable access for use of their mineral estate; (2) the Lyles were entitled to a declaration quieting title in their mineral estate because the surface agreements created a cloud on their title; (3) the surface owner and Midway were trespassing on the Lyles' mineral estate. Lyles named as defendants the surface owner, Midway, and the persons who had signed the surface waivers. The Lyles settled with some of the surface waiver defendants.

Later, the district court resolved all claims in summary judgment. With respect to the quiet title claims, the trial court concluded that Midway's disclaimer of interest fixed any problem. With respect to the dispute over construction of the solar facility, the trial court concluded that Midway

[1] *Lyle v. Midway Solar LLC*, 2020 WL 7769632 (Tex. App.—El Paso 2020).

and the surface owners owed no duty to the Lyles until the Lyles attempted to use the mineral estate. The trial therefore rejected the Lyles' breach of contract and trespass claims.

Appellate Court's Resolution of Dispute Over Construction of Solar Facility

The appellate court noted that the mineral estate owner has the right to use the surface of the land as reasonably necessary for the exploration and development of minerals, unless the parties agreed otherwise. Because the mineral estate owner generally has a right to use the surface, the mineral estate is called the "dominant estate" and the surface estate is called the "servient estate."

However, the dominance of the mineral estate is tempered by the accommodation doctrine, which was articulated by the Texas Supreme Court in *Getty Oil Co. v. Jones*.[2] Under this doctrine, the surface and mineral estate owners must exercise their respective rights with "due regard" for each other's rights. Under this doctrine, a surface owner who seeks to limit a mineral estate owner's activities must show that: (1) the mineral owner's use of the surface precludes or substantially impairs an existing use of the surface owner; (2) there is no reasonable alternative method for the surface owner to continue its existing use, other than to restrict the mineral estate owner's activities; and (3) the mineral estate owner has an available alternative that would allow it reasonably to utilize its mineral rights.

The accommodation doctrine is the default rule. It applies unless the parties have agreed otherwise in the deed that created the split estate or in a later agreement. If the parties have agreed otherwise, their agreement governs. Thus, the parties can expand or diminish the rights that the mineral estate owner otherwise would have to use the surface.

The Lyles argued that the accommodation did not apply because the 1948 deed that established a split estate stated that the mineral estate owner could use the surface "as may be usual, necessary or convenient in the use and enjoyment of the oil, gas, and general mineral estate." Further, the Lyles argued that this clause gave them greater surface use rights than they otherwise would have had, and that the accommodation doctrine did not apply. The appellate court disagreed with the Lyles' contention that the accommodation doctrine did not apply. The court noted that past courts have concluded that when deeds give the mineral estate owner the right to use the land as "necessary and convenient," that grant of rights is too vague to define the mineral estate owner's surface use rights and displace the accommodation doctrine. The court concluded that inclusion of the word "usual" in the description of the mineral estate owner's surface rights was similarly too vague to displace the accommodation doctrine.

After concluding that the accommodation doctrine applied, the appellate court went on to address the dispute. The Lyles complained that Midway's construction of the solar facility already had harmed the Lyles by diminishing the value of their mineral estate. The appellate court disagreed. It noted that the Lyles were not attempting to use their mineral estate and had never attempted to do so. The appellate court held that, until the Lyles attempted to develop or use their mineral estate, their breach-of-the-deed and trespass claims were premature. Therefore, the appellate court affirmed the dismissal on summary judgment of these claims.

Appellate Court's Resolution of Quiet Title Claims

The appellate court concluded that some of the surface use agreements did not create a cloud on the Lyles' title to the mineral interests in the premises leased by Midway. Therefore, the court affirmed the dismissal of the quite title action as to those agreements.

The appellate court reversed, however, the dismissal of certain of the Lyles' quiet title claims. The court reasoned that several of the surface wavier agreements cast a cloud on the Lyles' title by

[2] 470 S.W.2d 618 (Tex. 1971).

stating or suggesting that the individuals who signed those agreements owned mineral interests in the leased premises, even though the individuals did not own such interests. Midway's attempt to correct some of the deeds was ineffective because Midway had not secured the individuals' signatures on the corrections. Midway had not attempted to correct some of the other agreements.

Further, Midway's attempt to disclaim any mineral interest in the leased premises did not correct the problem. The problem was not that the surface agreements had purported to transfer mineral interests to Midway. Indeed, the agreements had not done so. Rather, some of the agreements had stated that the individuals who were waiving certain surface rights had mineral interests in the leased premises in which they held no such interest and in which the Lyles owned the mineral estate.

Texas Supreme Court Interprets "Continuous-development" Clause that Allowed Lessee which Completed Well Before End of Term to Carry Forward "unused days ... in order to extend the next ... term"

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A lessor granted an oil and gas lease to an original lessee that transferred its interest to Endeavor Energy Resources, L.P.[1] The lease contained a "continuous-development" clause providing that, after the primary term of the lease, the lease would terminate as to all acreage not within a proration unit containing a producing well unless the lessee complied with a drilling schedule. Under that schedule, the lessee was required to commence a new well within 150 days of completing each preceding well. The clause also provided, however:

> Lessee shall have the right to accumulate unused days in any 150-day term during the continuous development program in order to extend the next allowed 150-day term between the completion of one well and the drilling of a subsequent well.

Endeavor completed its twelfth well within about five and a half years after the end of the primary term. On November 2, 2015, the lessor granted a lease to Energen Resources Corp., covering the area not within a proration unit with a producing well. By that time, 310 days had passed without Endeavor commencing a thirteenth well. On November 4, 2015, Energen sued Endeavor to obtain a ruling that Endeavor's lease had terminated as to the acreage covered by Energen's lease. On November 12, 2015, Endeavor began drilling its thirteen well.

Whether Endeavor's lease had terminated as to the disputed acreage depended on the proper interpretation of the provision in the continuous-development clause that allowed a carryover of "unused days" in a term to the subsequent term. The Court noted that the clause provides for the allowed term between completion of one well and commencement of the next well to be 150 days, unless the term has been extended by a carryover of "unused" days from a prior term. Further, the provision gives the lessee right to extend a term by the carryover of "unused days *in any 150-day term*" (emphasis added). But any term that has been extended would not be a 150-day term. Thus, if this clause were interpreted in a manner that the Court characterized as a "hyper-literal," the lessee would only be able to carryover days every other term. That would be a bizarre result. Neither Endeavor nor Energen argued for such an interpretation and the Court rejected it as well.

Endeavor argued for an interpretation that would work as follows. Suppose that Endeavor completed its first well, then commenced a second well within 140 days of completing the first. There would be ten "unused days" that would carry forward to the next term. Thus, after completing the second well, Endeavor would have 160 days (150 plus the ten carryover days). Now suppose that Endeavor commenced its third well within 140 days of completing the second well. Given that the term for commencing the third well had been extended from 150 to 160 days, Endeavor's commencement of the third well within 140 days would mean that there were 20 unused days in the term for commencing the third well. These twenty days would carry forward to that the term for commencing the fourth well would be 170 days (150 plus the 20 carryover days) after completion of the third.

Endeavor asserted that this interpretation made business sense because it would ensure the lessor of a well being commenced, on average, within 150 days of the completion of each prior well. Further, this interpretation would be consistent with the provisions reference to Endeavor being able to "accumulate used days."

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[1] *Endeavor Energy Resources, L.P. v. Energen Resources Corp., et al.*, 615 S.W.3d 144 (Tex. 2020).

Energen disputed this interpretation. Energen noted that the provision referred to "unused days in any 150-day term." Thus, the only time a carryover of days was allowed was when a well was commenced less than 150 days after completion of the prior well, and that the number of days that could be carried over was the difference between the 150 days allowed and the number of days that elapsed between completion of one well and commencement of the next. Thus, if Endeavor commenced a second well within 140 days of completing the first, then Endeavor could wait as long as 160 days (150 plus ten carryover days) after completion of the second well before commencing a third. But if Endeavor commenced the third well only 140 days later, then the carryover to the subsequent term would be just ten days, not twenty.

Energen asserted that this interpretation is consistent with the provision's reference to extending a term by "unused days in any 150-day term." Further, argued Energen, Endeavor's interpretation essentially allowed the compiling of unused days from multiple preceding terms, but that the provision refers to terms in the singular, stating that unused days in any term can be carried forward to extend the "next term." Further, the use of the phrase "next term" indicates that unused days can be carried forward to only the immediately subsequent or "next" term. Energen asserted that its interpretation made business sense because it ensured that there would be no undue delay between the drilling of any two wells, and that this was the intent of the clause, rather than to ensure that the "average" time between wells was not too great.

The Court, having already noted that both Endeavor and Energen, as well as the Court itself, had rejected a "hyper-literal" interpretation, concluded that both of the proffered interpretations were plausible. Further, the language of the provision did not clearly favor one interpretation versus the other.

Energen's argument that unused days could only be carried forward to the "next term" had some appeal, but that interpretation of "next term" would not necessarily defeat Endeavor's overall argument. If, for example, 10 days were carried forward to the next term, the next term would be 160 days. Thus, if the next well was commenced within 140 days, it was just as plausible to argue (as Endeavor would) that there were 20 unused days from the 160-day term, and that those 20 days could be carried forward to the "next term," as it would be to argue (as Energen would) that this amounted to carrying forward ten days each from two separate terms, with ten of those days effectively being carried forward to the term after "next term."

The Court found that the provision's use of "accumulation" weighed in favor of Endeavor's position because the word could suggest accumulation of unused days from multiple terms, but that "accumulation" need not necessarily refer to the compilation of unused days from multiple terms.

Ultimately, the Court noted that the clause at issue was being used as a special limitation that would terminate the lease in part. Under Texas law, special limitations should not be interpreted so as to terminate a lease unless the limitation is "clear, precise, and unequivocal." Here, given that Energen's interpretation was not "clear, precise, and unequivocal," the Court rejected that interpretation. The Court therefore rendered judgment for Endeavor.

West Virginia Supreme Court Applies Recording Statute to Resolve Dispute as to Whether Top Lease or Amended Base Lease Would Prevail when Base Lease was Amended to Extend its Primary Term

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The defendants (the "Lemasters") owned 100% of the oil and gas rights in a 15.25-acre tract in Tyler County, West Virginia.[1] In 2011, they granted an oil and gas lease to a company that later assigned the lease (the "EQT Base Lease" or "Base Lease") to EQT Production Company. The EQT Base Lease would terminate at the end of a five-year primary term unless the lessee had a well that was producing oil or gas (or that was capable of producing oil or gas) or the lessee was engaged in other operations on the property. The Base Lease did not grant the lessee an option or a right to extend the lease.

In 2016, prior to the expiration of the primary term of the EQT Base Lease, the Lemasters granted a top lease to Antero Resources Corp. Antero recorded a memorandum of the top lease (the "Antero Top Lease" or "Top Lease") in August 2016. The Lemasters also promised not to amend or extend the EQT Base Lease. Despite that promise, the Lemasters granted an extension of the Base Lease in September 2016, about a month after Antero recorded the memorandum of the Antero Top Lease. EQT recorded the amendment and extension of its Base Lease in December 2016, a day before the expiration of that lease's original primary term. EQT did not establish production or initiate operations prior to the end of the original primary term.

Antero filed suit seeking a declaration that its Top Lease was enforceable over the amended and extended EQT Base Lease. The Circuit Court for Tyler County granted summary judgment in favor of Antero. EQT appealed.

The West Virginia Supreme Court noted that an oil and gas lease is both a contract and a conveyance of real property. Further, under West Virginia's Recording Act, a written contract conveying real property has no effect against "as to … subsequent purchasers for valuable consideration without notice, until and except from the time that it is duly admitted to record in the county wherein the property embraced in such contract … may be."[2] In lieu of recording a lease, however, a party may record a memorandum of lease, and such a recordation will have the same effect as recording the lease itself, provided that the memorandum contains certain information required under West Virginia Code § 40-1-8.

In this case, Antero filed the memorandum of its Top Lease in August 2016, and the memorandum satisfied the statutory requirements necessary for such a recordation to have the same effect as recording the lease itself. As of the time that Antero recorded that memorandum, EQT had not yet obtained the amendment and extension of its Base Lease, much less recorded the amendment. Thus, the subsequent amendment and extension of the EQT Base Lease were not binding on Antero. Moreover, because the memorandum of the Antero Top Lease was recorded, EQT's amended Base Lease was subject to the Top Lease, which was the enforceable oil and gas lease under the circumstances.

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[1] *EQT Production Co. v. Antero Resources Corp.*, 851 S.E.2d 94 (W. Va. 2020).
[2] W. Va. Code § 40-1-9.

West Virginia Oil and Gas Lease that was Silent on the Lessee's Right to Pool or Unitize did not Grant Lessee an Implied Right to Pool or Unitize

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Ascent Resources – Marcellus LLC ("Ascent") owned 50% of the mineral estate in a 94-acre tract in Tyler County, West Virginia.[1] In addition, Ascent held the lessee's interest under a 1980 oil and gas lease granted by former owners of the other 50% interest in the mineral estate. That lease was still in effect because it was being held by production. Thus, Ascent held exclusive drilling and development rights.

The 1980 lease was silent regarding any right of the lessee to pool or unitize. Ascent desired to drill a horizontal well to produce natural gas from the Marcellus formation, but Ascent concluded that it would not be practical to do this without creating a drilling unit. West Virginia law does not authorize the use of statutory pooling for primary recovery unless a well is drilled below the top of the Onondaga Formation, which is deeper than the Marcellus Formation. Thus, statutory pooling was not an option. Further, Ascent's 1980 oil and gas lease was silent regarding any right of the lessee to use pooling or unitization. Thus, Ascent could not argue that it had no express right to pool.

Instead, Ascent filed an action seeking a declaratory judgment that it had an implied right to pool. Ascent supported its request by asserting that, to develop the Marcellus Formation, it was reasonably necessary to use horizontal drilling, but that the leased tract was too small to support a horizontal well of economical length. Moreover, courts have recognized that the intent of parties entering a lease is to secure production of oil and gas. Further, parties to contracts have duties of cooperation, as well as good faith and fair dealing. Moreover, public policy favors development of West Virginia's oil and gas resources, including the gas in the Marcellus Formation. Ascent also noted that the doctrine of implied covenants in oil and gas leases is well established.

For all these reasons, Ascent asserted that it was entitled to a judgment "declaring that Ascent has the implied right to pool and unitize the Subject Lease with other mineral leases or mineral interests as a necessary adjunct to its right to drill and operate the premises for oil and gas." The defendants, who occupied the position of lessors, filed a motion for summary judgment. The Circuit Court for Tyler County granted the motion and dismissed Ascent's claims.

Ascent appealed to the West Virginia Supreme Court, which affirmed. The Supreme Court distinguished the implied covenant cases on the basis that those cases impose obligations on the lessee for the benefit of the lessor. Here, in contrast, Ascent sought an implied benefit for the lessee. The Court concluded that the lease was clear and unambiguous, rejecting Ascent's argument that the 1980's silence regarding pooling and unitization created an ambiguity. Given that the lease was clear and unambiguous, the court was not free to add terms to the lease.

[1] *Ascent Resources—Marcellus, LLC v. Huffman*, 851 S.E.2d 782 (W. Va. 2020).

FERC Proposes Changes to Price Index Reporting Policy[1]

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On December 17, 2020, the Federal Energy Regulatory Committee ("FERC") acted to revise its long-standing policy and guidelines pertaining to the reporting of natural gas transaction prices to price index publishers by issuing two items to encourage an increased level of voluntary reporting of natural gas transaction pricing. First, it issued a Notice of Proposed Rulemaking (Docket No. RM20-7) in which FERC proposes to amend its regulations to codify the Safe Harbor Policy so that it will be binding on FERC in favor of market participants. Second, it issued a Proposed Revised Policy Statement on Natural Gas and Electric Price Indices (Docket No. PL20-3). Therein FERC proposes several revisions to its policy to encourage more reporting of natural gas transaction prices to index publishers – for example, by allowing data providers (market participants that report transaction data) to report either their non-index based next-day natural gas transactions, their non-index based next-month natural gas transactions, or both. In addition, FERC proposes to modify its standards applicable for one to remain an approved natural gas price index publisher.

Whether or not to report natural gas transaction prices remains a voluntary – not mandatory – activity. However, if a company reports natural gas transaction prices to price index publishers, it must comply with certain FERC-prescribed requirements before doing so.

As background, FERC has broad authority to obtain price information from market participants, including required reporting of transaction pricing. However, under FERC's existing Policy Statement, market participant reporting is on a *voluntary* basis. Although reporting is voluntary, under the existing Policy Statement, if a market participant chooses to report, it must comply with certain FERC criteria (e.g., a code of conduct and other criteria) to ensure the accuracy and veracity of reported data. If the market participant adheres to such requirements, it would historically receive the benefit of a rebuttable presumption that it has submitted data accurately, timely, and in good faith, thereby insulating it from certain liability (the "Safe Harbor Policy"). However, the Safe Harbor Policy is presently only memorialized in FERC's existing Policy Statement. As such, the Safe Harbor Policy is not binding on FERC – an issue that has caused concern among market participants providing pricing data to price index developers.

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