Case Law from Marcellus States
2010 - 2011

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SELECTED PENNSYLVANIA OIL AND GAS CASES

July 2010-October 2011

I. Minimum Royalty Act Litigation

Rodriguez v. Anadarko E & P Company v. Chesapeake Appalachia (No. 3:08-CV-2068; 2010 WL 4962825; M.D. Pa. Dec. 1, 2010) Plaintiffs entered into oil and gas leases with Anadarko E & P Company (Anadarko) and Chesapeake Appalachia (Chesapeake) in March 2007. Plaintiffs sued Anadarko and Chesapeake alleging that the lease "calculates the royalty owed using the net-back method of calculation, rather than calculating it exclusive of post-production costs" and violated Pennsylvania's Guaranteed Minimum Royalty Act (GMRA). The court relying on *Kilmer v. Elexco Land Services, Inc.*, 605 Pa. 413(deducting post-production costs from the gross sale proceeds before calculating the royalty does not violate the GMRA), granted the defendants' motion to dismiss stating the "use of the net-back method of calculation is valid under 58 Pa. State. Ann. 33."

Pollock v. Energy Corporation of America (No. 10-1553; 2011 WL 3667289; W.D. Pa. June 27, 2011; Report approved Aug. 18, 2011) Plaintiffs assert that a magistrate judge's report misinterpreted and misapplied the holding in *Kilmer v. Elexco Land Services,* 605 Pa. 413 (which determined that deducting post-production costs from the gross sale proceeds before calculating the royalty does not violate the GMRA). The court determined that the Report does not hold that Kilmer-approved deductions are deductible in every Pennsylvania oil and gas lease. Instead, the report concluded that the language of the leases intended that the royalties were to be calculated utilizing the net-back method, as authorized by the holding in *Kilmer*.

Lauchle v. The Keeton Group, LLC (No. 4:08-CV-1868; 2010 WL 78924; M.D. Pa. March 8, 2011) Early in 2008, a group of landowners (plaintiffs) entered into nearly identical oil and gas leases with The Keeton Group, LLC (Keeton Group). In the late fall, plaintiffs sought a declaration as to whether the leases were valid under Pennsylvania's Guaranteed Minimum Royalty Act (GMRA). As a result of the litigation, the Keeton Group ceased all development of drilling activities and sought an equitable extension of the leases while the litigation was pending. The Keeton Group invited the court to hold that a lawsuit to invalidate an oil and gas lease constituted a repudiation of the lease and that the proper remedy is an equitable extension of the lease term by the length of time the lawsuit was pending. Plaintiffs' cited *Derrickheim Company v. Brown,* 305 Pa. 173 (a lawsuit initiated by the lessee to resolve a cloud on the title does not warrant an equitable extension of the lease), to support the contention that a lawsuit does not act as a repudiation of the lease. The court, relying on *Derrickheim*, declined to equitably extend the Plaintiffs' leases with the Keeton Group.

Frederick v. Range Resources — Appalachia, LLC, (2011 WL 1045665 W.D. Pa. March 17, 2011) The plaintiffs held oil and gas leases with Range Resources and were owners of royalty interests for all the natural gas produced and sold. In the class action complaint, plaintiffs alleged that Pennsylvania's Guaranteed Minimum Royalty Act (GMRA) prevented Range Resources from "deducting costs of transporting, processing and marketing natural gas after it is captured from the gas well." While this case was pending, *Kilmer v. Elexco*, 605 Pa. 413 (deducting post-production costs from the gross sale proceeds before calculating the royalty does not violate the GMRA), was decided and the plaintiffs withdrew their initial complaint. The claim was then amended to challenge the propriety of the amounts deducted by the gas company. A settlement was later reached and the court approved the class action settlement.

Ulmer v. Chesapeake Appalachia (No. 4:08-CV-2062; 2011 WL 1344596; M.D. Pa. April 8, 2011) Ulmer claimed that his oil and gas lease with Chesapeake Appalachia (Chesapeake) violated Pennsylvania's Guaranteed Minimum Royalty Act (GMRA) and sought to have it declared void. In January of 2009 the court granted a motion to Compel Arbitration and months later granted a motion to Stay Arbitration until the Pennsylvania Supreme Court ruled in *Kilmer v. Elexco,* 605 Pa. 413 (deducting post-production costs from the gross sale proceeds before calculating the royalty does not violate the GMRA). A year later, Ulmer still contended that his lease was invalid under the GMRA because it was different from the lease in *Kilmer*. The court notes that Ulmer's lease utilizes the same net back method that was used in *Kilmer* and is therefore valid under the GMRA.

II. Other Leasing Issues

Euphemia Standefer v. T.S. Dudley Land Company (No. 3:09-CV-1115; 2010 U.S. Dist. LEXIS 132267; M.D. Pa. July 14, 2010) In 2008, Euphemia Standefer entered into an oil and gas lease with NewPenn. A year later Standefer brought suit against NewPenn alleging five counts of breach of contract. After dismissing three of the counts, only claims for fraudulent inducement and breach of contract due to untimely bonus payment remained. The court granted NewPenn's motion for summary judgment on both claims stating that the fraudulent inducement claim was an unsupported accusation and that a "delay in making payment is not such a breach as to entitle Plaintiffs to cancel transaction."

Shafer v. Range Resources-Appalachia (No. 2:10-CV-1142; 2011 WL 677479; W.D. Pa. Feb. 16, 2011) Plaintiffs executed a five-year lease with Range Resources on August 30, 2008. In addition to the lease, plaintiffs signed a side agreement in which Range Resources was to pay a total bonus of $130,747.50. This letter was signed by plaintiffs on August 30, 2008 and returned to Range Resources along with the lease. A provision of the letter stated that payment of the bonus was to be made after "management approves the lease" and within 90 days from lease execution date. Range Resources failed to make the bonus payment within 90 days, and plaintiffs filed suit in breach of contract for failure to pay the bonus. Range Resources filed a motion to dismiss plaintiffs suit, arguing that the lease and bonus payment were subject to management approval, and because this condition precedent was not satisfied, a binding contract was never formed. The court noted that "management approval" was explicitly stated in the lease, but Range Resources had not notified plaintiffs that the leases were

rejected. The court denied Range Resources motion to dismiss in order to allow the record to be more fully developed, as more facts are necessary to decide the issue.

Pinebrook Minerals v. Anadarko E & P Co. (No. 4-11-CV-00177; 2011 WL 3584783; M.D. Pa. July 25, 2011) Anadarko was assigned the exploration and production rights under a lease between a land company and a hunting club. Pinebrook was assigned the hunting club's royalty interests. Later, the club executed a Mineral Deed conveying Pinebrook all of the mineral rights on the property "subject to any rights now existing to any lessee or assigns under any valid and subsisting oil and gas lease of record heretofore executed." This deed was not signed by Anadarko. Pinebrook filed suit against Anadarko claiming that the hunting club's original oil and gas lease was void *ab initio* because the club's secretary and treasurer had signed it. The court states that "the lease was a contract and that both contract and property law apply." Under 15 PA Cons. Stat. Ann 5506 a contract entered into "between any non-profit corporation and any other person when signed by one or more officers or agents shall be held to have been properly executed for and in behalf of the corp." The court concluded that the club was a non-profit corporation and that the secretary and treasurer had apparent authority to execute the original lease.

Hite v. Falcon Partners, 13 A.3d 942 (Pa. Super. Ct. Jan. 4, 2011)
Falcon held multiple natural gas leases with several landowners but had not commenced drilling operations within the primary term. Delayed rental payments were required under the lease until production began so Falcon sent checks to all landowners for $2.00 per acre for each day that drilling did not take place. After the landowners were presented with offers from competing gas companies, they sent Falcon a termination letter and expressed their intent to enter another lease. The landowners brought suit and argued that the delayed rental payments only protected the lessee's drilling rights during the primary term of the lease and that if this term expires before production begins the lessee loses all drilling rights. Falcon argued to the court the delayed rental payments protected their mineral interest, and bound the landowners to the terms of the lease. The court ruled that a lessee could not postpone development indefinitely by the mere payment of delay rentals.

Smith v. Steckman Ridge (No. 3:09-268; 2010 WL 3905071; W.D. Pa. Sept. 29, 2010.) William and Angela Smith (plaintiffs) entered into an oil and gas lease with a gas company later purchased by Steckman Ridge LP (Steckman). The lease contained a clause allowing the leaseholder to convert the lease into one for the storage of natural gas as long as the Lssee paid lessor the estimated value of the remaining recoverable gas and a delay rental payment. In July 2007, Steckman's parent company sent plaintiffs a check for $345,202.65 and a month later filed a "Gas Payment and Conversion Notice" with the Bedford County Recorder of Deeds. The Notice stated that Steckman had elected to convert the plaintiffs' leased property to gas storage and that plaintiffs had received a payment "for the value of the economically recoverable gas remaining …that could have been produced if the conversion to gas storage was not made." Several months later the plaintiffs filed a petition for Appointment of Viewers in the Court of Common Pleas in Bradford County requesting a determination that a de facto taking of their property had occurred. Plaintiffs argued that the lease had expired because no delay rental or storage payments were made, that the original gas company had ceased production on the well, and that the shut-in provision did not extend the lease. Steckman argued that it had complied with the terms of the lease and that it is still valid. The Court denied both parties' motions for Partial Summary Judgment

because the terms "cessation of production," "shut-in," and "delay" were not unambiguously defined in the lease. The court determined that without clear definitions for these terms a reasonable trier of fact would be unable to conclude whether the lease was valid or not.

Defour v. Carrizo Oil and Gas, Inc., (No. 3:10-CV-00013; 2011 WL 1136801; W.D. Pa. March 25, 2011) Kathy and Darrell Defour (Plaintiffs) signed a natural gas lease with Carrizo Oil and Gas, Inc. (Carrizo) for over 300 acres of land owned by plaintiffs. The signing bonus was $1,250.00 per acre, totaling $377,775.00. In addition to the lease, a bank draft document was tendered to plaintiffs. The bank draft conditioned the bonus payment on approval of the title, a provision that was not mentioned anywhere in the lease. After several months without receiving the bonus payment, Carrizo informed the plaintiffs that there was a defect in the title and no bonus payment would be tendered subject to the bank draft document. Plaintiffs filed claims of Fraud and Breach of Contract. Carrizo moved to dismiss, alleging the bonus payment was subject to approval of title, and plaintiff's title was defective. Citing the inconsistencies between the lease and the bank draft document, the court denied the motion to dismiss and ruled that plaintiffs' complaint sufficiently alleged facts supporting a claim for breach of contract.

III. Municipal Regulation

Penneco Oil Co. v. County of Fayette (4 A.3d 722; Pa. Commw. Ct. July 22, 2010)
Fayette's ordinance allowed wells in residential, industrial, and airport zones, but only by special exception upon the satisfaction of specified conditions. The Pennsylvania Oil and Gas Act (OGA) expressly preempts local regulation of oil and gas operations except for ordinances passed under the Municipalities Planning Code (MPC) or the Flood Plain Management Act. Further, MPC-based enactments like Fayette's ordinance are preempted if they share OGA's purposes or if they regulate features of oil and gas operations addressed by OGA. 58 PA. STAT. § 601.602. In 2009, the Pennsylvania Supreme Court addressed OGA preemption of municipal ordinances in *Huntley & Huntley v. Borough Council*, 964 A.2d 855, and *Range Res. v. Salem Twp.*, 964 A.2d 869. These cases established the framework under which all OGA preemption issues are analyzed. In Penneco, the Commonwealth Court found Fayette's ordinance to be generally applicable, affecting oil and gas wells only with regard to their location. Furthermore, the court found that although Fayette's zoning ordinance overlapped with OGA's purposes to a certain degree, its primary effect on oil and gas operations was to ensure the continued vitality of neighborhoods and to encourage compatible land use. The court determined that these traditional zoning purposes were distinct from OGA's purposes and thus not preempted.

IV. Surface Restrictions

Minard Run Oil Co. v. US Forest Services (No. 10-1265; U.S. Court of Appeals for 3rd Circuit; Sept. 20, 2011) The U.S Court of Appeals for the Third Circuit affirmed the preliminary injunction granted by the U.S. District Court for the Western District of Pennsylvania. The dispute involved private mineral rights owners' entitlement to "reasonable use of the surface" within the Allegheny National Forest (ANF). A recent settlement agreement between the U.S. Forest Service (Service) and environmental groups changed management of drilling within the ANF from an ongoing cooperative process, to a postponement of all NTPs (Notice to Proceed) until completion of a forest-wide

Environmental Impact Study (EIS), under the National Environmental Policy Act (NEPA). The District Court preliminarily enjoined the Service from implementing the settlement policy, "prohibiting [the Service] from making the completion of the forest-wide EIS a condition for issuing NTPs and requiring it to return to its prior, cooperative process for issuing NTPs." The Court of Appeals affirmed the injunction, holding, inter alia, that issuance of an NTP need not be preceded by a NEPA analysis; and that the Service's implementation of the new policy did not conform with the notice and comment requirement of the Administrative Procedures Act.

V. Strict Liability

Fiorentino v. Cabot Oil and Gas Corp. (No. 09-CV-2284; 750 F. Supp. 2d. 506; M.D. Pa. Nov. 15, 2010) Sixty-three landowners in Dimock and Montrose, Pennsylvania filed a complaint against Cabot Oil and Gas Corp., alleging that improper hydraulic fracturing and other activities caused methane, gas and other toxins to be released onto the plaintiffs' land and into their groundwater. Plaintiffs raised the following causes of action, a claim under the Hazardous Sites Cleanup Act (HSCA), negligence, private nuisance, strict liability breach of contract, fraudulent misrepresentation, medical monitoring trust funds, and gross negligence. Cabot moved to dismiss the HSCA, strict liability, medical monitoring and gross negligence claims. With regards to the strict liability claim, the court stated, "Pennsylvania courts have not yet addressed whether… gas-well drilling is an abnormally dangerous activity that is subject to strict liability under Pennsylvania law." The court denied the defendant's motion to dismiss the strict liability claim but stated that their argument could later be asserted in a motion for summary judgment when a more fully developed record exists.

Fiorentino v. Cabot Oil and Gas Corp. (No. 3:09-CV-2284; 2011 WL 4944274; M.D. Pa. October 17, 2011.) Non-party witnesses, Suzanne and Michael Johnson, were issued a subpoena by the plaintiffs requiring them to appear at a deposition and to produce a "fairly extensive list of fifteen different types of documents and materials." The Johnsons field a Motion to Quash and asserted that the subpoena was "overly burdensome" and that some of the documents requested were "protected and privileged" information. The court decided to modify the subpoena because much of the information requested was either duplicative or available from another source.

Berish v. Southwestern Energy (No. 3:10-CV-1981; 763 F. Supp. 2d 702; M.D. Pa. Feb. 3, 2011) In early 2008, Southwestern Energy Production Company (SEPCO) was utilizing hydraulic fracturing and horizontal drilling techniques to extract natural gas from the Marcellus Shale rock formation in Susquehanna County. Due to insufficient casing, the toxic and carcinogenic fracturing fluid discharged into the ground and contaminated the water supply surrounding the well. A group of landowners with properties near the well initiated a lawsuit against SEPCO alleging violations of the Hazardous Sites Cleanup Act (HSCA), negligence, private nuisance, strict liability, trespass and seeking to set up a medical monitoring trust. SEPCO moved to dismiss plaintiffs' strict liability claim as well as the claim for emotional damages. The court noted that no Pennsylvania court has determined hydraulic fracturing or horizontal drilling activities to be abnormally dangerous. Due to the fact-intensive nature of determining whether an activity is abnormally dangerous, the court denied SEPCO's motion in order to allow the record to develop more fully.

VI. Mineral Rights Reservations

Butler v. Powers Estate, (2011 Pa. Super. 198; Pa. Super. Sept. 7, 2011)
John E. and Josephine Butler (the Butlers) were owners in fee simple of 244 acres in Susquehanna County, Pennsylvania. The deed to their land contained a reservation for "one half of the minerals and Petroleum Oils to said Charles Powers, his heirs and assigns…" The Butlers filed a complaint to quiet title naming "Charles Powers' estate and the estate's heirs and assigns" as defendants. Heirs to the Powers estate, William H. Pritchard and Craig L. Pritchard (the Pritchards), responded to a motion for publication and filed for declaratory judgment. The Pritchards claimed the reservation of rights in the deed includes Marcellus shale gas. On appeal, the Pritchards raised the issue of whether the trial court "erred in determining that the… reservation in the chain of title to the surface land…did not include a reservation of one half of such unconventional Marcellus shale gas..." The court concluded that it was unable to say with certainty whether the Pritchards have a cognizable claim based on the facts. The case was then remanded to determine (1) whether Marcellus shale constitutes a "mineral"; (2) whether Marcellus shale gas constitutes the type of conventional natural gas contemplated in Dunham and Highland; and (3) whether Marcellus shale is similar to coal to the extent that whoever owns the shale owns the shale gas.

PAPCO Inc. v. U.S. Forest Services (No. 08-253; 2011 WL 3844129; W.D. Pa. Aug. 30, 2011) In 1930 the surface estate of land owned by the Jamieson family was deeded to the United States (the Jamieson Deed). The land would later become the site of the Allegheny National Forest. Decades later, the mineral rights that were reserved in the Jamieson Deed were conveyed to PAPCO. In 2007 PAPCO discovered that Forest Services was operating an unauthorized stone pit on property covered in the Jamieson deed. The court found that the parties to the deed intended to permit surface mining by the owners of the reserve oil, gas and mineral rights. Glass sand was specifically mentioned in the reservation and there is historical evidence that surface mining was common in area therefore sandstone is a "mineral" within the mineral reservation of the deed and belongs to PAPCO.

VII. Public Utilities

Transcontintental Gas Pipe Line Company, LLC v. Brandywine Creek Landowners (No. 09-1385; 2010 WL 3282954; E.D. Pa. Aug 19, 2010) Five land owners from Brandywine Creek filed suit against Transcontinental Gas Pipeline Company (Transco) claiming they were entitled to attorney's fees and costs after Transco chose not to proceed with an action to expand its existing rights of way through eminent domain. The court determined that Transco, as a public utility, is considered a "federal agency" and "the United States" under 42 U.S.C. 4654. As such, Transco must reimburse the Brandywine landowners for the attorneys' fees spent opposing an ultimately abandoned condemnation proceeding.

Tennessee Gas Pipeline Company v. Garrison (No. 3:10-CV-1845; 2010 WL 3632152; M.D. Pa. Sept. 10, 2010) Tennessee Gas Pipeline Company (Tennessee) was granted a Certificate of Public Convenience and Necessity by the Federal Energy Regulation Commission (FERC) thus giving it the power of eminent domain. Before beginning construction of its the pipeline system, Tennessee was required to file survey reports with FERC. Defendants refused to allow Tennessee to access their land,

preventing the completion of the surveys. Tennessee brought suit against the defendants and motioned for a preliminary injunction. The court stated that Tennessee improperly relied on the Pennsylvania Natural Gas Act. According to the court, the Act does not "incorporate the Pennsylvania right to precondemnation access" for survey purposes.

VIII. Miscellaneous

Beinlich v. Chief (No. 4:11-CV-00697; 2011 U.S. Dist. LEXIS 64960; M.D. Pa. June 2011) Beinlich sued Chief claiming that his lease was not properly extended and sought to recover attorney's fees. The court applied the American Rule (attorney's fees are not recoverable from an adverse party absent an express statutory authorization, a clear agreement by the parties or some other established exception) and determined that "attorney's fees are not recoverable where the lease is silent as to the awarding of attorney's fees."

Kendzior v. Pennsylvania Housing Finance Agency (No. 2782 C.D. 2010; 2011 Pa. Commw. Unpub. LEXIS 579; Pa. Commw. July 20, 2011) The Housing Finance Agency determined that Kendzior had "no reasonable prospect of resuming full mortgage payments" and denied his loan application. Kendzior filed an administrative appeal and argued the Agency failed to consider his expected royalties from his oil and gas lease with Chesapeake Appalachia. The hearing examiner stated that there is no guarantee that Chesapeake will drill on Kendzior's property and affirmed the denial. Kendzior appealed claiming the Agency "lacked a clear understanding of what Chesapeake is doing in Bradford, County." The court agreed with the hearing examiner and held that "any possible income from future gas/oil royalties must remain speculative until received."

In re Graff (No. 10-21820-BM; 2011 WL 3702382; Bkrtcy. W.D. Pa. Aug. 23, 2011)
Cloyd and Wanda Graff, (debtors) filed for Chapter 7 bankruptcy protection and exempted certain property under U.S.C. s 522(d)(1), which provides an exemption of "the debtor's aggregate interest... in real property or personal property that the debtor... uses as a residence." The debtors claimed a personal residence exemption that was made up of two parts; $35, 395.44 was assigned to their residence and $1,500.00 was assigned to oil and gas rights separate from the realty. A trustee, Charles Zebley, filed a motion to clarify the exemption and claimed the debtor's mobile home was the only property that could be exempted as a personal residence under 522(d)(1). Relying on two other areas of the Code to define "residence", the court concluded that a debtor's residence can include the land that surrounds a mobile home and the oil and gas rights that accompany such realty.

Fay v. Dominion Transmission Inc. (No. 3:30-CV-1384; 2011 WL 2632910; M.D. Pa. July 5, 2011)
Dominion Transmissions operates gas storage fields under land owned by plaintiffs Fay and Robbins. Plaintiffs argue that the requisite "buffer zones" surrounding the natural gas storage facilities make extracting from these restricted areas "commercially impractical" for gas companies. Both plaintiffs allege that because of these buffer zones they are unable to lease their land to a gas company and that this amounts to a taking in violation of the Fifth Amendment. The court granted the defendant's motion to have the case proceed under the Pennsylvania Eminent Domain Code since it provides adequate remedy and the plaintiffs agreed.

SELECTED OHIO OIL AND GAS CASES

January 2010-November 2011

I. Pipeline Issues

Strahm v. Buckeye Pipe Line Company (No. 1-10-60; 2011 Ohio 1171; 2011 Ohio App. LEXIS 1016; March 14, 2011) In 1984 Robert Strahm purchased two pieces of property that were subject to separate pipeline easements now owned by Buckeye Pipe Line Company (Buckeye). Four years later, Strahm entered an agreement with the National Conservation Reserve Program to create a wildlife habit on the property by planting various trees and shrubs. In 2001 Strahm began receiving letters from Buckeye stating that the trees were a "non-permitted use of the right-of-way" and that they were impediments to the access and maintenance of the pipeline. Six years later, Buckeye informed Strahm that it "cannot access or maintain its pipe line under the present right-of-way conditions" and that Buckeye would begin clearing trees and other vegetation from the easements. By the end of October, Buckeye had removed all of the trees and brush from the easements and mowed the fields to prevent regrowth. Strahmn filed a complaint for declaratory judgment and damages claiming Buckeye's clearing went beyond the rights granted in the explicit language of the lease. Buckeye denied these claims and both parties filed for partial summary judgment. The trial court granted the partial summary judgment motion in favor of Buckeye and found that both easements gave Buckeye the right to remove vegetation from the easements but that only one easement required Buckeye to compensate Strahm for clearing the property. There remained a genuine issue of material fact as to (1) whether the planting of the trees constituted an "interference or obstruction" with Buckeye's rights and (2) whether Buckeye exceeded its rights under the easement and unlawfully damaged Strahm's property. On appeal, the trial court's judgment was reversed. The Court of Appeals of Ohio found that summary judgment is not proper without uncontroverted evidence that it was necessary for Buckeye to clear all vegetation from all areas of the easement.

Pomante v. Marathon Ashland Pipe Line LLC (No. 08AP-653; 187 Ohio App. 3d 731; April 27, 2010) Karen Pomante, and several other plaintiffs, owned property on land containing a pipeline easement granted to the Sinclair Refining Company in 1944. This easement was later assigned to the Marathon Ashland Pipeline Company (Marathon). In 2006, Marathon wanted to remove trees from Pomante's front yard to improve access to the pipeline. Pomante filed a complaint and motioned for a temporary restraining order to enjoin Marathon from removing the trees. The trial court granted summary judgment in favor of Marathon. On appeal, the lower court's judgment was reversed. Under Ohio law, when the dimensions of the easement are not contained in the grant itself, the dimensions are established by use and acquiescence. The dimensions of Marathon's easement were not stated in the grant. The Court of Appeals of Ohio determined that a genuine issue of material fact existed as to the dimensions of the Pomante easement.

II. Leasing Issues

Swallie v. Rousenberg (No. 09-MO-2; 190 Ohio App. 3d 473; Sept. 23, 2010)

Linda Swallie acquired a piece of property from the Burkhart family by way of quitclaim deed executed and recorded in early October of 1998. Swallie later became the sole owner of the property when other members of the Burkharts conveyed their remaining interests to her. Carl Rousenberg claimed to own the oil and gas rights on Swallie's property via lease executed by the Burkharts in 1998. This lease was later assigned to Profit Energy. In 2006, Swallie filed a complaint for declaratory judgment against Rousenberg and Profit Energy seeking to invalidate the assignment of the oil and gas interests from the Burkharts to Rousenberg and to have the Burkhart's oil and gas lease declared null and void.
The lease was stated to run for a 20-year primary term and "so much longer thereafter as oil, gas or their constituents are produced in paying quantities." Citing *American Energy Service v. Lekan*, 75 Ohio App. 3d. 205 ("if after the expiration of the primary term the conditions of the secondary term are not continuing to be met, the lease terminates by the express terms of the contract herein and by operation of law revesst the leased estate in the lessor,") the court determined the primary term of the lease expired in 1939 and the secondary term continued until the well stopped producing in paying quantities in 1994. Therefore, the lease had terminated and the interest revested in the Burkharts.

III. Private Nuisance

Natale v. Everflow Eastern Inc. (No. 2010-T-0088; 2011 Ohio 4304; August 26, 2011)
Paul Natale filed a claim against Everflow Eastern Inc. (Everflow) alleging that the gas well and storage tanks constructed by Everflow on a neighboring property created such an offensive smell, sight and noise that he has been deprived the enjoyment of his property. Specifically the complaint contained a count for alleged nuisance, for an injunction against the nuisance, for a violation of the local zoning ordinance and for intentional misconduct. The trial court entered summary judgment in favor of Everflow on all four counts. Natale appealed but the lower court's ruling was upheld. The Court of Appeals of Ohio determined that in order to support a claim of private nuisance Natale would need to prove that the well was operating in an unreasonable manner or outside the normal limits allowed by laws and regulations. The court stated that Everlow proved that the well was operating properly and thus the lower court's decision was upheld.

SELECTED NEW YORK OIL AND GAS CASES

January 2010-November 2011

I. Leasing Issues

Wiser v. Enervest (No. 3:10-CV-794; 2011 WL 3586014; N.D.N.Y. March 22, 2011)
From 1999-2000 David Wiser and several other plaintiffs entered into nearly identical gas leases with Belden and Blake Corporation (B & B), a subsidiary of Enervest. All of the leases were for a primary term of ten years and were able to be extended indefinitely so long as gas was produced in paying quantities. Under the lease, B & B was also required to pay annual delay rental payments until drilling began. In 2008 the governor of New York issued a memorandum that required the state perform an environmental study of the effects of horizontal drilling and high-volume hydraulic fracturing. This memorandum did not entirely prohibit Marcellus drilling; it required producers to apply the NY Department of Environmental Conservation for a horizontal drilling permit and conduct an independent Environmental Impact Study (EIS). During the ten-year primary term of the leases, no wells were drilled on plaintiffs' lands. B & B made the annual delay rental payments to the plaintiffs until December of 2008. No delay rental payments were made in 2009 and the payments offered in 2010

were rejected by the plaintiffs. In July of 2010 plaintiffs filed suit seeking to have their leases declared expired due to the end of ten year primary term. Plaintiffs later amended this complaint and asserted that the leases became null and avoid after B & B failed to make the required delay rental payments. B & B filed a counterclaim and argued that the NY governor's memorandum created a de facto moratorium and qualifies as a force majeure thus extending the primary term of the lease until completion of the Supplemental Generic Environmental Impact Statement. Both parties moved for summary judgment. The court granted the plaintiffs' motion for summary judgment and determined that although the moratorium was a force majeure and did extend the primary term of the lease, the plaintiffs still had a right to receive delay rental payments for as long as drilling was postponed. The court determined that the leases became null and void when no payment was received in 2009.

Jayne v. Talisman Energy USA Inc. (84 A.D.3d 1581; 923 N.Y.S.2d 271; 2011 N.Y. Slip Op. 03957; May 12, 2011) Cecil Jayne along with his two brothers and sister-in-law owned a parcel of land as tenants in common. In 2000 Cecil's brother, Stanley Jayne, entered into an oil and gas lease with Potter-McKean Resources without notifying Cecil. This lease was later assigned to Talisman Energy (Talisman) who obtained well permits and began extracting natural gas from the land. In 2007, Cecil, his brother and sister-in-law executed a ratification agreement with Talisman that compensated each of them for the gas. Cecil later filed suit seeking to have the ratification declared null and void because Talisman failed to include a provision informing Cecil of his right to cancel the ratification within three days. Cecil claims this violated the New York's General Obligations Law sec. 5-333 (5). The Supreme Court found that the statute only applied to oil and gas leases, not the ratification agreement and granted Talisman's motion to dismiss. Cecil appealed but the Appellate Division of the New York Supreme Court affirmed the ruling. The court held that only oil and gas leases are addressed in the plain language of the General Obligations Law, not ratification agreements.

II. Restrictive Covenants & Leases

Weiden Lake Property Owners Assoc. v. Cabot Oil & Gas Corp. (No. 3885/09; 2011 WL 3631955; N.Y.Sup. August 18, 2011) In 2008, Jeff Klansky, a homeowner in the Weiden Lake Community and member for the Property Owners Association (POA), entered into a gas lease with Cabot Oil and Gas (Cabot). Klansky's property was subject to a restrictive covenant that barred "commercial uses" and permitted only residential, agricultural or recreational use. Plaintiffs, POA, asserted that the covenant prohibits the exploration, drilling and production of oil and natural gas on Klansky's property. Cabot argues that the restrictive covenant does not apply to oil and gas leases. Cabot sought to have the lease rescinded, claiming it was entered into under mistake of law and that Cabot was not aware of the restrictive covenants. The court determined that Cabot, a sophisticated business entity, is not entitled to rescission of the lease because it knew of the existence of the restrictive covenants and made a calculated decision to enter into a lease agreement. The court ordered that the protective covenant prohibited drilling and that Cabot was permanently enjoined from drilling Klansky's property.

SELECTED WEST VIRGINIA OIL AND GAS CASES

January 2010-November 2011

I. Leasing Issues

Wendy Rupe Trust v. Cabot Oil and Gas (No. 2:09-CV-01435; 2011 WL 1527594 S.D.W.Va.; April 20, 2011) Trustees of the Wendy Rupe Trust entered into an oil and gas lease with Cabot Oil and Gas (Cabot) in 2004. Cabot built a well known as "Fox #1" on the trustees property and paid them 1/8 royalty interests from the well. In 2005, Cabot offered the trustees $10,000 to construct a road across their property to access a well on an adjacent tract of land known as "Ramco 60-02." The trustees

rejected this offer. A month later, Cabot pooled and unitized the trustees well with other wells in the area and a year later built an access road over their property. The trustees discovered the access road in September of 2008 and filed suit against Cabot in November 2009. The trustees alleged causes of action for trespass, compensation of surface owners for drilling operations, and intentional infliction of emotional distress. The court denied Cabot's motion for summary judgment on the trespass claim. Cabot argued that the terms of the lease prevented the trustees from "unreasonably withholding" consent to the location of the access road while the trustees claim the lease's addendum states that lessor and lessee must agree on the location of access roads. The court determined that there was a genuine issue of material fact as to whether the construction of the access road "exceeded the scope of its permissible activities on the land pursuant to the terms of the lease."

Cather v. Seneca-Upshur Petroleum Inc. v. Forest Oil Corporation (No. 1:09-CV-139; 2010 WL 3271965; N.D.W.Va.; August 18, 2010) H. Dotson Cather and the other plaintiffs alleged that at one time they had executed oil and gas leases with companies that were later acquired by either Seneca-Upshur Petroleum Inc (Seneca) or Forest Oil Corporation (Forest). Cather claimed that while these leases were in effect Seneca and Enervest Management (a subsidiary of Forest) took wrongful deductions for production and transportation costs from their royalties. Cather filed causes of action for breach of contract, breach of fiduciary duty, fraud and violations of the West Virginia Consumer Credit and Protection Act. The defendants filed motions to dismiss each claim. The court denied the motion to dismiss for the breach of contract claim and determined that the defendants were put on notice of the breach claim when they purchased or assumed the leases from the previous companies. The court dismissed the breach of fiduciary duty claim and determined that in West Virginia "the duty owed by an oil and gas operator to a royalty owner to be one of 'ordinary prudence.'" The court felt enough evidence existed to support a fraud claim and therefore denied the defendants' motion to dismiss. The motion to dismiss the violation of the WVCCPA was granted because the plaintiffs were lessors and not consumers.

Wellman v. Bobcat Oil and Gas (No. 3:10-0147; 2010 WL 2720748; S.D.W.Va.; July 2010) Martha and Charles Wellman had an oil and gas lease with Bobcat Oil and Gas (Bobcat). Wellman filed suit alleging that Bobcat failed to pay necessary royalties from the sale of gas produced from the wells on the Wellman property. The complaint stated causes of action for breach of contract, breach of fiduciary duties, fraud, a declaration that the lease is null and void, and trespass. Bobcat filed a motion to dismiss the breach of fiduciary duty and fraud claims. The court acknowledged that "special or extra-contractual duties exist between an operator of a gas well and the lessor of mineral rights," but states that this does not create or imply a fiduciary relationship. The court granted Bobcat's motion to dismiss the breach of fiduciary duty claim, and citing *Grass v. Big Creek Development Co.,* 75 W.Va. 719 (W.Va. 1915), stated that the standard of ordinary prudence exists between the lessor and lessee in West Virginia. The fraud claims was also dismissed after the court determined that the case was not pled with sufficient specificity.