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The Latest On Ohio Dormant Mineral Act

In an opinion filed November 5, 2015, in *Chesapeake Exploration LLC v. Buell,*[1] the Ohio Supreme Court held that the recording of an oil and gas lease is a title transaction that affects title to an interest in land, qualifying it as a saving event under the state's Dormant Mineral Act.[2] This opinion, the most recently issued in a line of cases accepted by the court that address the act, also held that the unrecorded expiration of a recorded oil and gas lease is not a title transaction that qualifies as a saving event.

The act sets forth a procedural framework for reuniting ownership of dormant severed mineral interests with ownership of the surface. However, in certain circumstances it prevents reunification, such as when the severed mineral interest is the subject of a "title transaction," during the applicable statutory period. The act has been the subject of multiple civil suits filed over the past few years, many of which are currently before the Supreme Court. As a result, practitioners are essentially stuck in a legal limbo where they are frequently unable to advise their clients as to who owns the oil and gas underlying certain parcels.

While this most recent ruling does not answer all of the important questions still outstanding, it does help clarify the effect that oil and gas leases have under the act. In their review of *Buell,* the United States District Court for the Southern District of Ohio determined that the outcome of the case depended on the answers to two questions for which there was no binding Ohio case law:

1. Is the recorded lease of a severed subsurface mineral estate a title transaction under the [act]?
2. Is the expiration of a recorded lease and the reversion of the rights granted under that lease a title transaction that restarts the twenty year forfeiture clock under the [act] at the time of reversion?

The district court certified these questions to the Supreme Court of Ohio in 2014.

In addressing the first question, the court began with the act's definition of a "title transaction" being "any transaction affecting title to any interest in land, including title by will or descent, title by tax deed, or by trustee's, assignee's, guardian's, executor's, administrator's, or sheriff's deed, or decree of any court, as well as warranty deed, quitclaim deed, or mortgage."[3] The court determined that the definition's list of qualifying items and instruments was meant to be inclusive — not exclusive — and that the use of the word "any" indicated that the definition should not be read in a limited way. Thus, the failure to list "leases" as an example of a title transaction does not prohibit its inclusion in that category.

The court went on to analyze the functions of a lease and its effects on both mineral and surface interests in land, even citing to *Eisenbarth v. Reusser,*[4] a lower court case from last year that analogizes a lease to an encumbrance similar to a mortgage. Accordingly, the court answered the first question in the affirmative, determining that an oil and gas lease meets the definition of a title transaction, and that the recording of a lease is a saving event under the act that might prevent the reunification of the surface and severed mineral estates.

In its analysis of the second question, the court referenced *Energetics Ltd. v. Whitmill,*[5] a Michigan case that supported that the expiration of an oil and gas lease constituted a transfer of mineral interests. The court also pointed out that "[i]t is self-evident that the termination or expiration of a lease returns the lessor and the mineral estate to the status quo prior to the lease." However, the court stopped short of finding that an unrecorded expiration of an oil and

gas lease is a title transaction. Instead, the court stated that “even if the automatic expiration of an oil and gas lease were a ‘title transaction,’ it would not rise to the level of a saving event under [the act] when it is not filed or recorded as required by the statute.” Therefore, the court answered the second certified question in the negative.

The court specifically declined to address the effect of a recorded termination of an oil and gas lease under the act but indicated that such an event would likely satisfy the definition of title transaction and act as a saving event. Additionally, though it approvingly cited to the legal analysis in *Eisenbarth,* the court did not fully tip its hand in that case, which is set for oral argument in front of the court on Nov. 17, 2015.

Eisenbarth is similar to *Buell* in that it involves a recorded oil and gas lease, but factually unique in that the lessors owned only half of the oil and gas but owned the executive rights to the entire mineral estate. Therefore, it is possible that a decision in *Eisenbarth* addressing the effect of a lease in such a fact pattern may also be applicable to situations involving severed royalty interests. Furthermore, though a footnote in the *Buell* opinion alluded to related issues currently before the court in other cases, such as which version — 1989 or 2006 — of the statute applies, and the fixed or rolling nature of the 1989 version of the act’s required period of dormancy, no definitive direction was given on those issues.

The *Buell* opinion provides much-needed guidance as to the definition of a title transaction under the act. Practitioners can now more confidently advise their clients as to the effect of a recorded oil and gas lease and the unrecorded expiration of the same. However, there are many questions that remain unanswered with respect to oil and gas severances potentially affected by the act. Given that the outcomes in these cases may effectively determine ownership to vast reserves of valuable shale gas, operators, landowners and counsel alike will undoubtedly keep a watchful eye on the Ohio Supreme Court as it continues to issue these opinions.

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[1]*Chesapeake Exploration LLC v. Buell,* Slip Opinion No. 2015-Ohio-4551 (Ohio Nov. 5, 2015).
[2]Ohio Rev. Code 5301.56(B)(3)(a).
[3]Ohio Rev. Code 5301.47(F).
[4]*Eisenbarth v. Reusser,* 2014-Ohio-3792, 18 N.E.2d 477 (7th Dist.).
[5]*Energetics, Ltd. v. Whitmill,* 442 Mich. 38, 497 N.W.2d 497 (1993).

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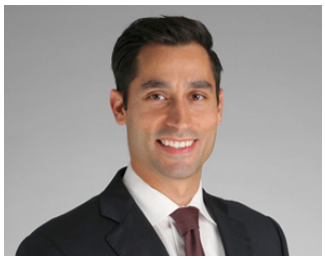

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