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The Next Dormant Mineral Act Case At Ohio High Court

On November 17, 2015, the Supreme Court of Ohio heard oral arguments in *Eisenbarth v. Reusser,*[1] a case in which two chains of title each end in a separate set of cousins who dispute ownership to a previously severed mineral interest based on differing interpretations of the state's Dormant Mineral Act.[2] The case was originally accepted on two propositions of law. Proposition of law No. 1 raises whether the 1989 version of the act is prospective in nature and operated to automatically reunite severed mineral interests in factual scenarios where none of the statutes enumerated saving events took place within the 20-year period immediately preceding any date during the time that version of the statute was in effect. Proposition of law No. 2 raises whether a lease is a "title transaction" as defined by O.R.C. § 5301.47(F); however, that question was recently decided in the high court's Nov. 5, 2015, decision in *Chesapeake Exploration, LLC v. Buell*.[3] Still, a decision in the *Eisenbarth* case has the potential to provide much needed guidance to attorneys in the energy and real estate sectors.

Factual and Procedural Background

In 1954, William Eisenbarth conveyed two tracts comprising a total of 153 acres in Monroe County, Ohio, to his son and daughter-in-law, Paul and Ida Eisenbarth, as tenants in common, but reserved one-half of all the minerals (including oil and gas). William specifically conveyed the executive right to lease, however, to Paul and Ida. William then conveyed the reserved one-half minerals, less the executive right, to his daughter Mildred Reusser. In 1973, Paul and Ida Eisenbarth executed a lease covering the property which was recorded in 1974.

Later, in 1989, Paul and Ida Eisenbarth conveyed one of the above described tracts to their son, Keith Eisenbarth. Paul subsequently died and his interest in the second tract was transferred to Ida by a 1990 certificate of transfer. When Ida died, her interest in the second tract was transferred by a 1998 certificate of transfer to her three sons, Keith, Leland and Michael (the "Eisenbarths"). Mildred Reusser died in 2002. Her estate was left to Dean, Vernon, Paul, Davis, and Dennis Reusser, and Marilyn Ice, Wilda Fetty, and Martha Maag (the "Reussers").

In 2009, the Eisenbarths executed and published a notice of abandonment as described in the 2006 version of the Dormant Mineral Act in an attempt to declare the severed minerals abandoned. However, the Reussers responded with a claim to preserve, conduct which would be sufficient to preserve the interest under the Supreme Court's ruling in *Dodd v. Croskey* earlier this summer.[4] The Eisenbarths filed a lawsuit in 2012 seeking, inter alia, that under the 1989 version of the act the severed mineral interest held by the Reussers was abandoned and reunited with the Eisenbarths as the surface tract owners. The Reussers filed a counterclaim to quiet their title. On summary judgment, the trial court found for the Reussers, holding that the 1974 lease was a title transaction and saving event under the 1989 version of the act.

The Eisenbarths appealed the decision to the Seventh District Court of Appeals, whose jurisdiction contains several large shale gas producing counties, including Belmont, Monroe and Jefferson. Yet, in applying the 1989 version of the act, the appellate court also found that the existence and recording of the 1974 lease was dispositive of the case and affirmed the lower court's judgment. The Eisenbarths then appealed to the Supreme Court of Ohio, which agreed to hear the case.

The Act

The original version of the Dormant Mineral Act, which went into effect on March 22, 1989, set forth a procedural framework for declaring abandonment of severed mineral interests and reuniting ownership of those interests with ownership of the surface lands. However, such a reunification could not occur in certain circumstances, such as when the severed mineral interest was the subject of a “title transaction,” during the applicable statutory period. This applicable statutory period, often referred to as the “look-back” period, was described in the 1989 version of the act as the “preceding 20 years.” The statute was updated and amended in 2006. Changes included the addition of notice procedures informing the severed mineral interest holder or their heirs or assigns of the intent to declare their interest abandoned. The 2006 version of the act also stated that the 20-year look-back period was to be measured 20 years back from the attempt to abandon.

Little action occurred in the courts when the 1989 version of the act was first enacted, meaning that only scarce interpretive case law exists. However, the start of the shale boom in the mid-2000s meant that severed interests became highly valuable to landowners and lessees alike, and this rarely used statute became one of the hot-button topics discussed by practitioners and oil and gas industry professionals in the region. Many cases currently being considered by both trial courts and appellate courts involved the same issues present in the *Eisenbarth* case. Which version of the act applies? What constitutes a title transaction? Does the 1989 version of the act automatically divest the severed mineral interest holders or does a quiet title action need to be filed? Is the 1989 version’s 20-year look-back period measured from the date of enactment, the date a quiet title action is filed, or some other event?

Eisenbarth Oral Arguments

The second proposition of law which the Ohio Supreme Court accepted in *Eisenbarth* was whether a lease was a title transaction. However, as we recently described in Law360, the court decided this question in *Chesapeake v. Buell* for which a decision was handed down Nov. 5, 2015. In *Chesapeake,* the court held that the pertinent definition of title transaction was not limited to a list of examples given. Furthermore, the court held that a lease is an encumbrance on title similar to a mortgage or easement which “affects an interest in land” and is therefore a title transaction.

During *Eisenbarth* oral arguments, counsel for the Eisenbarths started by briefly referencing the court’s decision in *Chesapeake,* immediately moving on to the second proposition of law. Later in rebuttal, that side conceded that the severed mineral interest was properly leased within the 1974 lease, as the lessors therein owned all executive rights to the minerals. Interestingly, though, little attention was paid to the unique factual circumstances here. The 1974 lease was executed by Paul and Ida Eisenbarth, who then owned the surface, one-half of the minerals, and all of the executive right to lease those minerals. The severed mineral interest holder did not participate in the transaction which both lower courts pointed to as the saving event preventing abandonment of the severed interest. As both lower courts found this factual distinction inconsequential, it is possible that the Supreme Court will follow suit.

The first proposition of law in *Eisenbarth* is more complex and potentially requires the court to answer many of the questions practitioners have about the application of the act. The proposition essentially asks if the 20-year look-back period in the 1989 version of the act is “fixed” or “rolling.” If fixed, meaning the period covers the 20 years immediately preceding the enactment of the statute, a title transaction recorded in 1974 would prevent abandonment of the severed mineral interests. A rolling period would mean that any 20-year period of dormancy ending between 1989 and 2006 (when the amended statute went into effect) would be sufficient.

When one of the justices asked counsel for the Reussers whether he thought the period was fixed or rolling, his response was that his clients should win the case regardless. Even under a rolling analysis, he argued, the 1989 version of the act is not self-executing and later instruments in the Eisenbarths’ chains, which referenced the severance, were title transactions under the act. His answer illuminated that the court may be unable to answer one

question about the act without raising others.

Ultimately, if the court holds that the 1974 lease is a saving event regardless of the unique factual circumstances surrounding its execution, and it holds that the look-back period is fixed, it will find that the severed mineral interest was not abandoned. However, if it holds either that the 1974 lease is not a saving event or that the look-back period is rolling, a court would need to determine whether the 1989 act automatically effectuates abandonment and reunification or if some other action, like filing a suit for quiet title, is necessary. Furthermore, a court may also need to address the effect of the transfers which took place in 1989, 1990 and 1998 in the Eisenbarths' chains of title. Though it is unlikely that either side would dispute that these instruments are title transactions, the statute requires that the severed mineral interest must be the "subject of" the title transaction in order for it to qualify as a saving event. The mineral severance was recited in some of these later instruments but was not conveyed therein.

The lower court decisions in *Eisenbarth* discussed neither the potentially automatic nature of the act nor the effect of the later transfers because the courts determined that the look-back period was fixed and the 1974 lease was a saving event. Accordingly, if the Supreme Court determines that the period is rolling, it will most likely remand the case for further proceedings answering the other questions which then become relevant. Furthermore, the court's recent decision in *Chesapeake* was issued more than 13 months after oral argument was held. Unfortunately for the parties, and for practitioners, it may be quite a while before any of the questions raised by this case are sufficiently answered.

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[1]*Eisenbarth v. Reusser,* 2014-Ohio-3792, 18 N.E.3d 477 (Ohio Ct. App. 7th Dist. 2014) *accepted for review* at 2015 Ohio St.3d 1488, 26 N.E.3d 823 (March 11, 2015).
[2] Ohio Rev. Code § 5301.56.
[3]*Chesapeake Exploration, LLC v. Buell,* 2015-Ohio-4551, 2015 Ohio LEXIS 2971 (Nov. 5, 2015).
[4]*Dodd v. Croskey,* 143 Ohio St. 3d 293, 37 N.E.3d 147 (June 18, 2015).

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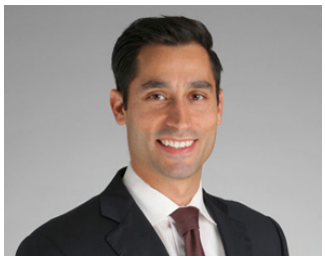

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