

# Ohio Oil and Gas Litigation in the New Fracking Era

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## I. INTRODUCTION

There is a new era of oil and gas exploration in Ohio: the horizontal “fracking” era. Although the hydraulic fracturing process has been utilized for decades,<sup>1</sup> the recent development of horizontal drilling

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<sup>1</sup>Fracking is a popular term to describe hydraulic fracturing or hydrofracturing. See *Wiser v. Enervest Operating, L.L.C.*, 803 F. Supp. 2d 109, 111 n.1 (N.D.N.Y. 2011) (“Hydraulic fracturing, also referred to as ‘fracking,’ is a well stimulation process used to maximize the extraction of underground resources like oil, natural gas, and geothermal energy.”). Although horizontal hydraulic fracturing is a new development, vertical “fracking” has taken place in Ohio for over sixty years. See *Hydraulic Process Used in Developing New Oil Well on Rohrer Farm*, THE HARTVILLE NEWS, Sept. 3, 1954, at 1 (“A

methods has enabled companies to extract oil and gas from the Marcellus and Utica deep shale formations. Horizontal hydraulic fracturing has substantially changed oil and gas drilling in eastern Ohio, as evident by the following statements taken from a complaint filed by landowners in Columbiana County:

From 2008 through 2010, few Columbiana County landowners understood the significance of the Utica shale play. . . . [M]any landowners enter[ed] into oil and gas leases in which they received less than 1% of the fair market value for the up-front Signing Bonus payments that are currently being paid in Columbiana County and without requiring appropriate lease provisions that would protect the landowners and their lands against the much greater risks and disruptions which accompany horizontal drilling.<sup>2</sup>

The advent of horizontal fracking also prompted Ohio to update its oil and gas statutes. On June 11, 2012, Governor John Kasich signed Senate Bill 315, which amended Revised Code (R.C.) Chapter 1509 and expanded state authority over horizontal drilling and hydraulic fracturing.<sup>3</sup>

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comparatively new process in this area to develop oil wells was used by the Belden Oil & Gas Co. in developing the well on the Ethan Rohrer farm, [three] miles southeast of Hartville. This process, ‘hydraulic fracturing,’ was first used in the West Texas oil fields in September of 1949 and the first well in the Appalachian area to use the method was a Belden well near East Sparta in July of 1952.”)

<sup>2</sup> See *Koonce v. Chesapeake Exploration, L.L.C.*, No. 12-CV-00736, 2012 WL 1642717, at ¶¶ 8–9 (N.D. Ohio Mar. 27, 2012) (citing the original complaint in *Koonce v. Chesapeake Exploration, L.L.C.*, No. 2012-CV-136 (C.P., Columbiana Cnty., Ohio, Mar. 27, 2012). In this Essay, references to “landowners” describe property owners with both surface and mineral rights, unless otherwise noted.

<sup>3</sup> A copy of Amended Substitute S.B. 315, 129th Gen. Assemb. (Ohio 2012), which became effective on September 10, 2012, can be found at [http://www.legislature.state.oh.us/bills.cfm?ID=129\\_SB\\_315](http://www.legislature.state.oh.us/bills.cfm?ID=129_SB_315). See also *Governor Kasich Signs Far-Reaching Energy Bill Into Law*, BRICKER & ECKLER BULLETIN (June 14, 2012), <http://www.bricker.com/documents/publications/2451.pdf> (summarizing the bill’s key provisions). In order to obtain a permit to drill a new horizontal well, water sampling must be completed for all water wells within 1,500 feet of the proposed well, and the applicant must undertake good faith efforts to negotiate a road use maintenance agreement with local communities. See OHIO REV. CODE ANN. §§ 1509.06(A)(8)(c), (A)(11)(b) (West 2012). If the horizontal well is to be located in an urbanized area, site-specific terms and conditions may be attached to the permit, including the establishment of fencing, screening, and landscaping requirements. OHIO REV. CODE ANN. § 1509.06(H)(1) (West 2012). In delegating rulemaking authority to the Division of Mineral Resources Management, the General Assembly directed the Division to protect “the public and private water supply, including the amount of water used and the source or sources of the water.” OHIO REV. CODE ANN. § 1509.03(A)(2) (West 2012). The Division of Mineral Resources Management is part of the Ohio Department of Natural Resources.

Part II of this Essay summarizes recent decisions concerning the state's regulation of oil and gas drilling and production. Part III looks at cases raising tort issues such as trespass, negligence, nuisance, and strict liability. Part IV describes a variety of actions seeking to invalidate, terminate, and interpret leases. Part V examines cases seeking to declare minerals abandoned and reunited with the surface estate.

## II. DECISIONS CONCERNING STATE REGULATION OF OIL AND GAS DRILLING AND PRODUCTION

Ohio courts decided two cases in the first two months of 2013 that interpreted R.C. Chapter 1509. On January 30, 2013, the Ohio Supreme Court, in *Chesapeake Exploration, L.L.C. v. Oil and Gas Commission*, held that the issuance of a permit to drill an oil and gas well is not appealable.<sup>4</sup> As noted by the Court, “[a]lthough R.C. 1509.36 generally confers appellate jurisdiction on the Oil and Gas Commission over appeals from orders of the chief of the Division of Oil and Gas Resources Management by persons adversely affected, R.C. 1509.06(F) manifestly divests the commission of appellate jurisdiction over the chief’s decisions to issue permits for oil and gas wells.”<sup>5</sup> The decision did not address the wisdom of denying affected parties—such as surface owners without mineral rights—the right to seek review of orders granting permits to drill oil and gas wells.

On February 6, 2013, the Court of Appeals for the Ninth Appellate District held, in *State of Ohio ex rel. Morrison v. Beck Energy Corporation*,<sup>6</sup> that certain municipal ordinances regulating drilling operations were preempted by the state statute. The question of whether local governments can regulate or prohibit fracking has emerged as a highly divisive topic in several states.<sup>7</sup> Numerous villages, townships,

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<sup>4</sup>No. 2012-1207, 2013 WL 363411, at \*1 (Ohio 2013).

<sup>5</sup>*Id.* at \*3. R.C. 1509.06 governs permits to drill, reopen, convert, or plug back a well, and R.C. 1509.06(F) in its current form states that “[t]he issuance of a permit shall not be considered an order of the chief.” The dissenting justices argued that the order at issue was appealed to the Oil and Gas Commission before the amendment became effective. *Chesapeake Exploration*, 2013 WL 363411, at \*4–5 (Pfeifer, J. & Lanzinger, J., dissenting).

<sup>6</sup>No. 25953, 2013 WL 461023 (Ohio Ct. App. Feb. 6, 2013).

<sup>7</sup>*See* *Robinson Twp. v. Commonwealth*, 52 A.3d 463 (Pa. Commw. Ct. 2012) (interpreting Pennsylvania’s Act 13, which revised the state’s Oil and Gas Act in response to increased extraction of natural gas from the Marcellus Shale). The court held that the Act violated substantive due process by requiring local municipalities to adhere to uniform zoning laws that would provide for the development of oil and gas resources. *Id.* at 480–85. In another part of the decision, the court held that Act 13 preempts local regulation, including environmental laws and zoning code provisions, except in limited instances

and cities in Ohio have taken action to either ban or restrict hydraulic fracturing within their jurisdictional limits.<sup>8</sup>

The issue presented in *Beck Energy* was “whether the City of Munroe Falls can enforce its ordinances governing oil and gas drilling and related zoning and rights-of-way issues despite the state’s comprehensive statutory scheme for drilling set forth in R.C. Chapter 1509.”<sup>9</sup> The

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regarding setbacks in certain areas involving oil and gas operations. *Id.* 488–89. The case is currently before the Pennsylvania Supreme Court. The Supreme Court of Tompkins County, in *Anschutz Exploration Corp. v. Town of Dryden*, 35 Misc.3d 450, 451 (N.Y. Sup. Ct. 2012), held that New York’s Oil, Gas and Solution Mining Law did not preempt local zoning power to regulate land use in connection with oil and gas production, and thus did not preempt the town’s zoning amendment which banned oil and gas production within town limits. *See also* *Cooperstown Holstein Corp. v. Town of Middlefield*, 35 Misc.3d 767, 767 (N.Y. Sup. Ct. 2012) (determination by the Supreme Court of Otsego County that New York’s Environmental Conservation Law did not preempt a local zoning ordinance banning oil and gas drilling within the geographical borders of the township). Both decisions have been appealed.

<sup>8</sup> *See, e.g., Brunswick: Council Passes Fracking Ordinance, Business Objects*, WKYC.COM (Mar. 1, 2013, 1:00 PM), <http://www.wkyc.com/news/article/285829/3/Brunswick-Council-passes-fracking-ordinance-business-objects>; Linda Martz, *Environmental Issue Heats Up: Bill of Rights Would Set Requirements for Wells in City*, MANSFIELD NEWS JOURNAL (Nov. 2, 2012), [http://www.mansfieldnewsjournal.com/article/20121102/NEWS03/311020006?nclck\\_check=1](http://www.mansfieldnewsjournal.com/article/20121102/NEWS03/311020006?nclck_check=1); David Skolnick, *Council Approved an Ordinance on a Fracking-ban Charter Amendment*, YOUNGSTOWN VINDICATOR (Feb. 21, 2013, 12:00 AM), <http://www.vindy.com/news/2013/feb/21/fracking-ban-gets-ok-by-council/?newswatch>. One website provides links to anti-fracking measures enacted by the following Ohio communities: Amesville, Athens, Athens County, Broadview Heights, Brunswick, Burton, Canal Fulton, Canton, Chester Twp. (Geauga County), Cincinnati, Columbiana, Garrettsville, Girard, Hartville, Heath, Hinckley Twp., Lake Erie, Mansfield, Medina Twp., Meyers Lake, Montville Twp. (Medina County), Munroe Falls, Niles, North Canton, Oberlin, Plain Twp., Randolph Twp., Sharon Twp. (Medina County), South Russell, Stow, Summit County, Weathersfield Twp., Yellow Springs, Youngstown, and York Twp. (Medina County). *See Local Actions Against Fracking, Passed Measures*, FOOD & WATER WATCH, <http://www.foodandwaterwatch.org/water/fracking/fracking-action-center/local-action-documents/> (last visited Apr. 8, 2013).

<sup>9</sup> *Beck Energy Corp.*, No. 25953, 2013 WL 461023 at \*1. OHIO REV. CODE ANN. § 1509.02 (West 2012) in its current form reads, in pertinent part:

There is hereby created in the department of natural resources the division of oil and gas resources management, which shall be administered by the chief of the division of oil and gas resources management. *The division has sole and exclusive authority to regulate the permitting, location, and spacing of oil and gas wells and production operations within the state*, excepting only those activities regulated under federal laws for which oversight has been delegated to the environmental protection agency and activities regulated under sections 6111.02 to 6111.029 of the Revised Code. *The regulation of oil and gas activities is a matter of general statewide interest that requires uniform statewide regulation*, and this chapter and rules adopted under it constitute a comprehensive plan with respect to all aspects of the locating, drilling, well stimulation, completing, and operating of oil and gas wells within this state, including site

Eleventh Appellate District had previously held, in *Natale v. Everflow Eastern, Inc.*, that state law preempted a city ordinance concerning the location and operation of oil and gas wells in Warren, Ohio.<sup>10</sup> Although the Munroe Falls drilling ordinances did not purport to directly regulate well location and operation, the Ninth Appellate District noted that the preemptive reach of R.C. 1509.02 encompasses not only location, spacing, and operation, but also permitting, drilling, well stimulation, and completion of oil and gas wells.<sup>11</sup> Consequently, the court held that R.C. 1509.02 preempted the city ordinances requiring a permit, application fees, performance bond, public hearing, and a conditional zoning certificate prior to the commencement of drilling.<sup>12</sup> In light of *Natale* and *Beck Energy*, it appears that local efforts to ban hydraulic fracturing will fail, although the Ohio Supreme Court has not yet addressed the issue.<sup>13</sup>

### III. TORT ISSUES RELATING TO HYDRAULIC FRACTURING

There have been over fifty lawsuits filed in eight states since 2009 raising tort claims in connection with alleged contamination of groundwater by hydraulic fracturing activities.<sup>14</sup> The typical causes of action are trespass, negligence, negligence per se, nuisance, and strict liability for abnormally dangerous activities. Although no court has

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*construction and restoration, permitting related to those activities, and the disposal of wastes from those wells. . . .* Nothing in this section affects the authority granted to the director of transportation and local authorities in section 723.01 or 4513.34 of the Revised Code, provided that the authority granted under those sections shall not be exercised in a manner that discriminates against, unfairly impedes, or obstructs oil and gas activities and operations regulated under this chapter.

OHIO REV. CODE ANN. § 1509.02 (West 2012) (emphasis added).

<sup>10</sup> 959 N.E.2d 602, 611–12 (Ohio Ct. App. 2011).

<sup>11</sup> *Beck Energy Corp.*, 2013 WL 461023, at \*10–11.

<sup>12</sup> *Id.* at \*10–12. Each drilling ordinance was held to conflict with state law, although the court did hold that the city “is within its authority to require a public hearing . . . where it is not a condition precedent to the issuance of a drilling permit.” *Id.* at \*11. On the other hand, the court found that the right-of-way ordinances do not conflict with R.C. 1509.02. *Id.* at \*10 (“R.C. 1509.02 specifically leaves the regulation of rights-of-way to the municipalities.”).

<sup>13</sup> See generally Gregory D. Russell & Robert J. Krummen, *Ohio’s Experience with Preempting Local Regulation of Oil and Gas Development*, 19 TEX. WESLEYAN L. REV. 37 (2012).

<sup>14</sup> See BLAKE A. WATSON, HYDRAULIC FRACTURING PRIMER (2013), available at [http://www.udayton.edu/directory/law/documents/watson/hydraulic\\_fracturing\\_primer\\_jan\\_2013.pdf](http://www.udayton.edu/directory/law/documents/watson/hydraulic_fracturing_primer_jan_2013.pdf) (summarizing groundwater contamination disputes and related cases involving hydraulic fracturing); see also *Berish v. Sw. Energy Prod. Co.*, 763 F. Supp. 2d 702, 703–04 (M.D. Pa. 2011); *Fiorentino v. Cabot Oil & Gas Corp.*, 750 F. Supp. 2d 506, 508–10 (M.D. Pa. 2010).

found in favor of a plaintiff, numerous cases have been settled,<sup>15</sup> including a lawsuit filed in the Geauga County Court of Common Pleas.

The aforementioned lawsuit, *Payne v. Ohio Valley Energy Systems Corporation*, was based on allegations that vertically fractured gas seeped into water wells and caused an explosion at a home in Bainbridge, Ohio.<sup>16</sup> Pursuant to a 2011 settlement, forty-three households received an undisclosed amount, and Bainbridge Township received \$50,000 to replace a water well and for other expenses.<sup>17</sup>

There are two cases currently pending in the United States District Court for the Northern District of Ohio that allege that fracking fluids and other chemicals were discharged into the ground near homes and water wells in Chatham, Ohio, causing health injuries and other damages. The plaintiffs in *Boggs v. Landmark 4, LLC and Mangan v. Landmark 4, LLC* asserted claims for negligence, strict liability, private nuisance, unjust enrichment, negligence per se, battery, intentional fraudulent concealment, and negligent misrepresentation.<sup>18</sup> The battery and fraudulent concealment claims were dismissed on August 13, 2012, but the court refused to dismiss the negligence and strict liability claims on statute of limitations grounds.<sup>19</sup> On March 11, 2013, the court dismissed

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<sup>15</sup>Settlements have been reached in at least eighteen cases. The terms are usually secret, although a \$1.6 million settlement was announced in a Pennsylvania case in which landowners alleged that drilling activities caused spills and discharges that contaminated their land and water supply. *Chesapeake Pays Another \$1.6 Million for Bad Marcellus Wells*, PLATTS (June 22, 2012, 4:37 PM), <http://www.platts.com/RSSFeedDetailedNews/RSSFeed/NaturalGas/6413043>.

<sup>16</sup>Complaint, *Payne v. Ohio Energy Systems, Corp.*, No. 09-P-000115 (C.P., Geauga Cnty., Ohio Jan. 30, 2009).

<sup>17</sup>The plaintiffs brought an action “in trespass, negligence, private nuisance, nuisance per se, engaging in an ultra-hazardous activity, fraudulent concealment, failure to warn, and negligent infliction of emotional distress, for actions and inactions stemming from the drilling of a gas well that has caused the explosion of Richard and Thelma Payne’s home . . . and the contamination of Plaintiffs’ properties, including but not limited to the groundwater aquifer which serves as the drinking water supply for Plaintiffs’ properties.” Complaint at 7, *Payne v. Ohio Energy Systems, Corp.*, No. 09-P-000115 (C.P., Geauga Cnty., Ohio Jan. 30, 2009), available at <http://www.tddl.com/documents/Complaint.pdf>. See also Joan Demirjian, *Gas-Well Ordeal Finally Ends Well*, CHAGRIN VALLEY TIMES (Feb. 16, 2011), <http://www.chagrinvallleytimes.com/NC/0/2811.html>. In 2008, the Ohio Department of Natural Resources issued a detailed report on the incident. OHIO DEP’T OF NATURAL RES., DIV. OF MINERAL RES. MGMT., REPORT ON THE INVESTIGATION OF THE NATURAL GAS INVASION OF AQUIFERS IN BAINBRIDGE TWP. OF GEAUGA CNTY., OHIO (2008), <http://www.dnr.state.oh.us/Portals/11/bainbridge/report.pdf>.

<sup>18</sup>See Complaint at 7–15, *Boggs v. Landmark 4, LLC*, No. 12-CV-614 (N.D. Ohio Mar. 12, 2012), 2012 WL 960913; Complaint at 7–15, *Mangan v. Landmark 4, LLC*, No. 12-CV-613 (N.D. Ohio Mar. 12, 2012), 2012 WL 924852.

<sup>19</sup>*Boggs v. Landmark 4, LLC*, No. 1:12-CV-614, 2012 WL 3485288, at \*6 (N.D. Ohio Aug. 13, 2013). See also Glenn Morrical & Carter Strang, *Legal Opinion: Federal Suit*

the negligence per se claims, but refused to dismiss the strict liability claims, and allowed plaintiffs to assert their negligence and strict liability claims in the alternative.<sup>20</sup>

#### IV. ACTIONS SEEKING TO INVALIDATE, TERMINATE, AND INTERPRET LEASES

Most of the Ohio oil and gas litigation in the horizontal fracking era has involved efforts to invalidate, terminate, and interpret leases. In a few instances, companies have sued to rescind leases and recover bonus payments. More often, however, landowners allege that their leases are invalid for a variety of reasons, including fraudulent inducement, unconscionability, mistake, or failure to comply with Ohio's notary requirements. Other landowners contend that their leases expired when the lessee failed to comply with "drill or pay" or pooling requirements, assignment restrictions, "fair market value" agreements, and renewal provisions. In a few instances, owners of mineral rights and surface owners without mineral rights have requested courts to interpret leases to limit or prohibit certain surface uses.

##### A. *Lawsuits to Recover Bonus Payments*

According to Gulfport Energy Corporation, landowners Edwin and Martha Weaver received a signing bonus of \$341,167.28 in June 2011 for leasing their property in Guernsey County.<sup>21</sup> Gulfport alleges that the land is subject to an existing lease, and asserts claims of mistake, unjust enrichment, breach of contract, and fraud.<sup>22</sup> The Weavers contend that the prior lease is no longer in effect due to breach of implied covenants,

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*Could Impact Utica Drilling*, CRAIN'S CLEVELAND BUSINESS, (Dec. 11, 2012, 4:30 AM), <http://www.crainscleveland.com/article/20121211/SHALEMAGAZINE/121129868/1225/newsletter04>.

<sup>20</sup> *Boggs*, 2013 WL 944776, at \*2; *Mangan*, 2013 WL 950560, at \*2. In both cases, the court held that the complaints alleged "sufficient facts and information to raise a question as to whether fracking, even in the absence of negligence, should be considered an abnormally dangerous activity." *Boggs*, 2013 WL 944776, at \*2; *Mangan*, 2013 WL 950560, at \*2.

<sup>21</sup> Complaint at ¶ 18, *Gulfport Energy Corp. v. Weaver*, No. 2:12-cv-00918 (S.D. Ohio Oct. 5, 2012), 2012 WL 5188778.

<sup>22</sup> *Id.* at ¶¶ 19, 28–67. Some leases specifically state that bonus payments are non-refundable except in instances of fraud. The *Weaver* lease includes an express warranty "that Lessor is not currently receiving any bonus, rental, production royalty as the result of any prior oil and gas lease covering any or all of the subject premises, and that there are no commercially producing wells currently existing on the subject premises, or upon other lands within the boundaries of a drilling or production unit utilizing all or a part of the subject premises." *Id.* at ¶ 17.

and—if the lease is valid—that Gulfport is estopped from recovering the bonus because it was advised that two wells had previously been drilled.<sup>23</sup>

Gulfport filed a second lawsuit in February of 2013, seeking the return of \$316,884.80 in bonus payments paid to a different landowner in Guernsey County under similar circumstances.<sup>24</sup> Other oil and gas companies have also sued Ohio landowners seeking to recover bonus payments.<sup>25</sup>

### *B. Lawsuits to Invalidate Leases Due to Fraud, Unconscionability, or Mistake*

In the time period just prior to the dawn of the horizontal fracking era in Ohio, were landowners entitled to receive “truthful and accurate information” regarding the value of the Utica and Marcellus shale formations? Landowners are requesting that leases executed during this period be declared invalid due to fraud, misrepresentation, unconscionability, unjust enrichment, and mistake. In response, oil and gas companies contend that such lawsuits are “efforts by plaintiffs to escape from their binding, written contracts . . . .”<sup>26</sup>

In *Koonce v. Chesapeake Exploration, L.L.C.*, the plaintiffs raise claims of fraud and civil conspiracy.<sup>27</sup> The plaintiffs allegedly relied on representations that they would never receive a higher bonus, and that

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<sup>23</sup> Answer at ¶¶ 41–43, *Gulfport Energy Corp. v. Weaver*, No. 2:12-cv-00918 (S.D. Ohio Oct. 24, 2012), 2012 WL 5188778. The Weavers assert that the prior lease terminated due to breach of “the implied covenant of reasonable development, the implied covenant to explore further, the implied covenant to market the oil and gas, the implied covenant to protect the lease from drainage, and the implied covenant to conduct to conduct all operations that affect the Lessor’s royalty interest with reasonable care and diligence . . . .” *Id.* at ¶ 42.

<sup>24</sup> Complaint at 11, *Gulfport Energy Corp. v. Gray Family Revocable Living Trust*, No. 13-cv-00153 (S.D. Ohio Feb. 19, 2013), 2013 WL 618347.

<sup>25</sup> Complaint at ¶ 18, *Amarado Oil Co., Ltd. v. Davis*, No. 5:12-CV-00627 (N.D. Ohio Mar. 13, 2012); Complaint at ¶ 14, *Chesapeake Exploration, L.L.C. v. Weekley*, No. 4:12-CV-02956, slip op. at ¶ 14 (N.D. Ohio Nov. 30, 2012), *dismissed* (Jan. 7, 2013). In *Haas v. Chesapeake Exploration*, the landowner claims entitlement to a bonus payment, despite apparent title problems, because he gave no warranties of title. Complaint at ¶¶ 3–4, *Haas v. Chesapeake Exploration, LLC*, No. 12-CVH-27056 (C.P., Carroll Cnty., Ohio Feb. 14, 2012).

<sup>26</sup> Memorandum in Support of Motion to Dismiss Filed by Defendants Chesapeake Exploration, L.L.C. and CHK Utica L.L.C. at 2, *Koonce v. Chesapeake Exploration, L.L.C.*, No. 12-cv-00736 (C.P., Columbiana Cnty., Ohio Apr. 3, 2012), 2012 WL 6147052.

<sup>27</sup> No. 2012-cv-136 (C.P., Columbiana Cnty., Ohio Mar. 7, 2012), *removed*, No. 2012 CV 736 (N.D. Ohio Feb. 27, 2012), *remanded*, No. 2012-cv-136 (C.P., Columbiana Cnty., Ohio Jan. 14, 2013).



only vertical wells would be drilled.<sup>28</sup> The plaintiffs in *Skinner v. Oxford Oil Company* and *Cameron v. Hess Corporation* allege that they were not informed of the value of the oil and gas reserves contained within the Marcellus and Utica shale formations.<sup>29</sup> The plaintiff in *Kemerer v. Chesapeake Exploration, L.L.C.*, alleges that the leasing agent said nothing about hydraulic fracturing, and stated instead that traditional wells would be drilled.<sup>30</sup>

On the other hand, in *Yoskey v. Eric Petroleum Corporation*, the plaintiff alleges he was promised a Marcellus deep well within six months, and was induced to sign the lease based on this misrepresentation.<sup>31</sup> In *Beaverkettle Farms, Ltd. v. Chesapeake*

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<sup>28</sup> Complaint at ¶¶ 8–11, *Koonce*, No. 2012-cv-136 (C.P., Columbiana Cnty., Ohio Mar. 7, 2012), 2012 WL 1642717.

<sup>29</sup> *Skinner v. Oxford Oil Co.*, No. 12 CV 0540 (C.P., Belmont Cnty., Ohio Dec. 10, 2012); Complaint at ¶ 24, *Cameron v. Hess Corp.*, No. 2:12-cv-00168 (S.D. Ohio Feb. 23, 2012), 2012 WL 6086478. According to one news account, Shane and Peggy Skinner of Barnesville, Ohio, signed a lease in 2008 without knowing about the value of Marcellus and Utica shale. Kristy Foster Seachrist, *Marcellus and Utica Shale: Barnesville Couple Files Lawsuit Against Oxford Oil Company*, FARM AND DAIRY (Jan. 24, 2103), <http://www.farmanddairy.com/news/marcellus-and-utica-shale-barnesville-couple-files-lawsuit-against-oxford-oil-company/46832.html>. In another lawsuit, David Cameron and Stephen and Melissa Griffith seek to represent the class of individuals who entered into oil and gas leases with Mason Dixon Energy, Inc., in Jefferson County, Ohio, between 2005 and 2009. Complaint at ¶¶ 8–13, *Cameron v. Hess Corp.*, No. 2:12-cv-00168 (S.D. Ohio Feb. 23, 2012), 2012 WL 6086478. They allege that, “as a direct and proximate result of the superior knowledge Mason Dixon withheld from all class members, it was able to unconscionably lease class members’ oil and gas rights for between \$5.00 and \$500.00 per acres when the true value of said rights to class members was between \$5,000.00 and \$6,000.00 per acre, and where the value of such leases among oil and gas companies is between \$10,000.00 and \$20,000.00 per acre.” *Id.* at ¶ 28. In response, Mason Dixon argues that, because it has assigned the leases to Marquette Exploration, LLC, it has no rights or responsibilities under the leases. Motion of Defendant Mason Dixon Energy, Inc. for Summary Judgment at 1, *Cameron v. Hess Corp.*, No. 2:12-cv-00168 (S.D. Ohio Aug. 27, 2012), 2012 WL 6086484. The lead defendant, Hess Corporation, is the successor in interest to Marquette Exploration, LLC.

<sup>30</sup> Amended Complaint at ¶ 63, *Kemerer v. Chesapeake Exploration, LLC*, No. 12-cv-02977 (N.D. Ohio, Jan. 21, 3013). The plaintiff also contends that his consent was needed regarding the location of wells; that he would receive 600,000 cubic feet of free gas each year; and that no trees would be removed. These promises were allegedly written in the margins of the lease that plaintiff executed, but the recorded lease does not contain marginal notations. *Id.* at ¶¶ 64–69. In *Fritz Dairy Farm LLC v. Chesapeake Exploration, L.L.C.*, No. 12-CVH-27084, slip op. at ¶ 9 (C.P., Carroll Cnty., Ohio Mar. 12, 2012), the plaintiffs alleged that the lessee’s employer/agent fraudulently substituted pages in the leases, forged signatures, and attached false notarizations. The case was dismissed without prejudice upon the plaintiffs’ motion.

<sup>31</sup> Complaint at 1–2, *Yoskey v. Eric Petroleum Corp.*, No. 2012-CV-00808 (C.P., Columbiana Cnty., Ohio Dec. 21, 2012), 2012 WL 6899955. Yoskey also asserts that the lease is unconscionable for several reasons, including “Eric Petroleum’s knowledge that, in

*Appalachia, LLC*, the plaintiff claims mutual or unilateral mistake.<sup>32</sup> According to Beaverkettle Farms, the type of operations contemplated by the original parties to the 2004 lease “were in the nature of the relatively invisible, traditional drilling that had only a minor potential for pollution as opposed to the kind of massive operation that is being done in connection with the horizontal drilling being engaged in by [assignee] Chesapeake . . . .”<sup>33</sup>

In one instance, a court refused to dismiss a claim that a lease was unconscionable, noting that the elderly lessors had a low level of education, were unwell, and were not represented by counsel.<sup>34</sup> In two other case courts rejected fraud claims, and in one instance a jury found in favor of the oil and gas company. On August 9, 2012, United States District Court Judge John Adams dismissed the fraud and economic coercion claims in *Cain v. Chesapeake Exploration, LLC*.<sup>35</sup> The plaintiffs alleged that they were told that, if they did not agree to amend their leases, Chesapeake would drill a well elsewhere and cause their property to become “a hole on the map.”<sup>36</sup> In light of the fact that the plaintiffs refused to amend their leases, Judge Adams held that the plaintiffs were neither induced nor coerced to act.<sup>37</sup>

In *Wiley v. Triad Hunter Gathering, LLC*,<sup>38</sup> the plaintiffs argued their action was improperly removed to federal district court because of their claim that an Ohio land agent misrepresented the nature of the drilling that would take place.<sup>39</sup> On November 30, 2012, United States Magistrate Norah McCann King recommended that the motion to remand the action to state court be denied. In support of her determination that the Ohio land agent had been fraudulently joined as a party, Magistrate King

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the contract formation process, Plaintiff was unable to reasonably protect his interests by reason of his own relative ignorance on the subject.” *Id.* at 3.

<sup>32</sup> Complaint for Declaratory Judgment at ¶¶ 125–41, *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*, No. 2011-CV-00750 (C.P., Columbiana Cnty., Ohio Oct. 31, 2011), 2011 WL 7945174.

<sup>33</sup> *Id.* at ¶ 134.

<sup>34</sup> *Morsheiser Family Revocable Living Trust v. Anschutz Exploration Corp.*, No. 5:12-CV-01734, slip op. at 3–4 (N.D. Ohio Oct. 31, 2102). The case was settled.

<sup>35</sup> No. 12-CV-1699, slip op. at \*4 (N.D. Ohio Aug. 9, 2012), 2012 WL 3263792.

<sup>36</sup> *Id.* at \*2.

<sup>37</sup> *Id.*

<sup>38</sup> No. 12-CV-0116 (C.P., Noble Cnty., Ohio, June 8, 2012), *removed*, No. 12-CV-00605 (S.D. Ohio July 9, 2012).

<sup>39</sup> *Wiley v. Triad Hunter Gathering, LLC*, No. 12-cv-605, 2012 WL 6611480, at \*6 (S.D. Ohio Nov. 30, 2012) (Magis. Report and Recommendation).

concluded that the complaint failed to assert a colorable claim against the agent.<sup>40</sup>

In *Starkey v. Patriot Energy Partners LLC*,<sup>41</sup> the landowners claimed that Patriot Energy concealed facts about the hydraulic fracturing process. After a trial which lasted five days, a Columbiana County jury found in favor of the defendants.<sup>42</sup> In a statement released after the verdict, Patriot Energy president Andrew Blocksom declared that “we did everything properly, and the jury took less than 30 minutes to arrive at the same conclusion.”<sup>43</sup>

### *C. Lawsuits to Invalidate Leases for Failure to Comply With Notary Requirements*

Several lawsuits have been filed seeking to invalidate oil and gas leases due to execution and acknowledgment irregularities.<sup>44</sup> In *Starkey*,

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<sup>40</sup> *Id.* at \*7.

<sup>41</sup> No. 2012-CV-00405 (C.P., Columbiana Cnty., Ohio June 11, 2012).

<sup>42</sup> *Columbiana Jury Finds for Patriot Energy in Lawsuit*, THE BUSINESS JOURNAL DAILY (Dec. 7, 2012), <http://businessjournaldaily.com/drilling-down/columbiana-jury-finds-patriot-energy-lawsuit-2012-12-7>.

<sup>43</sup> *Id.*

<sup>44</sup> In *Green v. Chesapeake Exploration, LLC*, some defendants allegedly violated Ohio notary laws by engaging in “robo-notarization.” First Amended Complaint at ¶ 10, *Green v. Chesapeake Exploration LLC*, No. 2012-cv-1223 (C.P., Stark Cnty., Ohio June 6, 2012). In *Koonce v. Chesapeake Exploration, L.L.C.*, the defendants argued that negligence per se and civil conspiracy claims asserted against Ohio notaries were baseless and thus did not deprive the federal court of diversity jurisdiction. Memorandum in Support of Motion to Dismiss Filed by Defendant Chesapeake Exploration, L.L.C and CHK Utica, L.L.C. at 2, *Koonce v. Chesapeake Exploration, L.L.C.*, No. 2012-CV-136 (N.D. Ohio Apr. 13, 2012). However, shortly after briefing the issue, the action was remanded by stipulation to the Columbiana County Court of Common Pleas. See No. 2012-CV-736 (N.D. Ohio Apr. 13, 2012) (remand order). In *Cole v. North Coast Energy Inc.*, the plaintiffs assert that their lease is invalid because the notary was not present when the lease was executed. Complaint with Class Action Allegations at ¶ 38, *Cole*, No. 2012-CV-01415 (C.P., Trumbull Cnty., Ohio June 18, 2012), *removed*, No. 12-cv-01923 (N.D. Ohio July 25, 2012); see also Dan Pompili, *Couple Sue to Void Gas Lease*, TRIBUNE CHRONICLE (June 27, 2012), <http://www.tribune-chronicle.com/page/content.detail/id/573462/Couple-sue-to-void-gas-lease.html?nav=5021> (Warren, Ohio). In *Skinner v. Oxford Oil Company*, the plaintiffs claim that the notary held a financial interest in the lease and was not present when the lease was signed. No.12-CV-0540 (C.P., Belmont Cnty., Ohio Dec. 10, 2012); see also Seachrist, *supra* note 29. In another pending action, David Cameron and Stephen and Melissa Griffith allege that certain leases signed in Jefferson County between 2005 and 2009 are invalid because the notary was not present when the leases were executed, and that other Jefferson County leases are invalid because they were not signed by all owners of the oil and gas rights. Complaint at 9–10, *Cameron v. Hess Corp.*, No. 2:12-CV-00168 (S.D. Ohio Feb. 23, 2012), 2012 WL 6086478. In *Eberling v. Chesapeake Appalachia, L.L.C.*, No. 5:12-cv-03028 (N.D. Ohio Dec. 12, 2012), the landowners alleged that the notary falsely certified that they acknowledged the

the landowners contended their 2008 lease was invalid because it was notarized by individuals who held an economic interest in the lease. Most of the claims of notary fraud and irregularities were dismissed prior to trial, however, and a Columbiana County jury found for the defendants in December 2012 on all remaining claims.<sup>45</sup> In *Wiley*, the plaintiffs asserted that (1) the defendant notarized leases without witnessing the plaintiffs' signatures; (2) such conduct violated R.C. § 5301.01; and (3) the statutory violation constituted negligence per se.<sup>46</sup> The United States Magistrate, Norah McCann King, rejected the third proposition, holding that "Section 5301.01 is not one of 'those relatively few statutes' the violation of which may underlie a claim of negligence *per se*."<sup>47</sup>

Two state courts rejected notary claims in February of 2013. The Trumbull County Court of Common Pleas, in *Tomko v. Cobra Leasing, LLC*, dismissed a claim seeking to invalidate a lease for noncompliance with R.C. §5301.01.<sup>48</sup> The Portage County Common Pleas Court, in

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lease in his presence. The action was dismissed without prejudice upon the plaintiffs' motion.

<sup>45</sup> Kristy Foster, *Energy Company Wins Lawsuit*, SHALE GAS REPORTER.COM (Dec. 12, 2012), <http://shalegasreporter.com/news/energy-company-wins-lawsuit/1326.html>. See also Kristy Foster Seachrist, *\$1 Million Lawsuit Filed By Carroll County Farming Family Over Gas Lease*, FARM AND DAIRY (June 19, 2012), <http://www.farmanddairy.com/news/1-million-lawsuit-filed-by-carroll-county-farming-family-over-gas-lease/38480.html>; Deanne Johnson, *Starkey Lawsuit Against Chesapeake Dismissed*, THE REVIEW (Sept. 29, 2012), <http://www.reviewonline.com/page/content.detail/id/560219/Starkey-lawsuit-against-Chesapeake-dismissed.html?nav=5188> (East Liverpool, Ohio).

<sup>46</sup> Complaint for Declaratory Judgment, Anticipatory Breach of Contract, Fraud/Fraudulent Inducement, and Writ of Mandamus at ¶¶ 64–74, *Wiley v. Triad Hunter Gathering, LLC*, No.12-CV-0116 (C.P., Noble Cnty., Ohio, June 8, 2012). OHIO REV. CODE ANN. § 5301.01 (West 2012) provides in pertinent part that a lease "shall be signed by the . . . lessor . . . [and the] signing shall be acknowledged by the . . . lessor . . . before a judge or clerk of a court of record in this state, or a county auditor, county engineer, notary public, or mayor, who shall certify the acknowledgment and subscribe the official's name to the certificate of the acknowledgment." Two Ohio notaries were originally named as defendants, but plaintiffs only included one in their proposed amended complaint. *Wiley v. Triad Hunter Gathering, LLC*, No. 12-cv-605, 2012 WL 6611480 at \*4 n.2 (S.D. Ohio Nov. 30, 2012) (Magis. Report and Recommendation). The plaintiffs also argued, without success, that the federal court lacked diversity jurisdiction because of their claim for mandamus against the Noble County Recorder to remove the improperly notarized leases from the county records. *Id.* at \*11–12 ("In sum, because the Recorder's decision to refuse to record a written instrument is a discretionary act and because the leases in question were facially valid, the Recorder has no clear duty to act under the facts of this case. Therefore, even assuming that this Court has jurisdiction to entertain plaintiffs' claim for a writ of mandamus, that claim against the Recorder must fail.").

<sup>47</sup> *Id.* at \*6 (quoting *Chambers v. St. Mary's School*, 697 N.E.2d 198, 203 (Ohio 1998)).

<sup>48</sup> No. 2012-CV-01066 (C.P., Trumbull Cnty., Ohio Feb. 22, 2013) (Judgment entry dismissing plaintiff's third amended complaint). In support of its determination that the

*Bernard Philip Dedor Revocable Declaration of Trust v. Reserve Energy Exploration Co.*, granted the defendant's motion for summary judgment on the defective acknowledgment claim, holding that "[a] defect in the notary clause does not affect the obligations agreed to between the parties. . . . [but instead] affects notice to the rest of the world."<sup>49</sup>

#### *D. Lawsuits to Terminate Leases for Failure to Comply with "Drill or Pay" or Pooling Requirements*

Landowners in several cases contend that leases executed prior to the horizontal fracking era have expired due to the failure to drill, produce, or pay delay rentals.<sup>50</sup> In *Hupp v. Beck Energy Corp.*, the state court

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complaint failed to state a claim, the court noted that the Ohio Supreme Court, in *Citizens Nat. Bank in Zanesville v. Denison*, 133 N.E.2d 329, 332 (Ohio 1956), had declared that a defectively executed conveyance of an interest in land is valid as between parties thereto, in the absence of fraud. The court also relied on the statement in *H & S Co., Ltd. v. Aurora*, No. 2003-P-0104, 2004 WL 148694, at ¶ 13 (Ohio Ct. App. 2004), that "[a]cknowledgment has reference . . . to the proof of execution, and not to the force, effect, or validity of the instrument."

<sup>49</sup> *Bernard Philip Dedor Revocable Declaration of Trust v. Reserve Energy Exploration Co.*, No. 12-CV-843, slip. op. at 4 (C.P., Portage Cnty., Ohio Feb. 28, 2013) (order and journal entry).

<sup>50</sup> See Complaint at 7–8, 10–11, *Ritteger v. Chesapeake Exploration, L.L.C.*, No. 13-cv-000391 (C.P., Columbiana Cnty., Ohio Jan. 18, 2103) (alleging that the lease expired because lessee did not engage in "operations" and did not pay delay rentals); *Summitcrest, Inc. v. Eric Petroleum Co.*, No. 2011-CV-00745 (C.P., Columbiana Cnty., Ohio Oct. 20, 2011) (alleging that the 2004 lease expired for all areas other than a single operating unit drilled in 2004; case was settled with respect to "deep" rights but appeal by assignee is pending regarding "shallow" rights); Complaint For Declaratory Judgment at ¶ 3, *Absalom v. Hess Corp.*, No. 12-CV-0161 (C.P., Belmont Cnty., Ohio Apr. 4, 2012), *removed*, No. 12-CV-394, 2012 WL 6087097, (S.D. Ohio May 7, 2012) (alleging that the lease terminated due to failure to commence drilling operations); Complaint For Quieting of Real Estate Title at 2, *Holmes v. Chesapeake Exploration, L.L.C.*, No. CVH-2012-0033 (C.P., Harrison Cnty., Ohio Apr. 16, 2012), *removed*, No. 12-CV-00414, 2012 WL 5209542 (S.D. Ohio May 14, 2012) (alleging that the lease expired due to untimely delay payments, was dismissed on Nov. 12, 2012, in accord with a settlement agreement); *Eastham v. Chesapeake Appalachia, L.L.C.*, No. 12-CV-281 (C.P., Jefferson Cnty., Ohio June 12, 2012), *removed*, No. 12-CV-615, 2012 WL 5222047, at ¶ 12 (S.D. Ohio July 11, 2012) (alleging that the 2007 lease expired and renewal clause is unenforceable); Complaint at ¶¶ 15–46, *Kemerer v. Chesapeake Exploration, L.L.C.*, No. 2012-CV-719 (C.P., Columbiana Cnty., Ohio Nov. 5, 2012), *removed*, No. 12-CV-02977, 2012 WL 6211159 (N.D. Ohio Dec. 4, 2012), *remanded* No. 2012-CV-719 (C.P., Columbiana Cnty., Ohio Mar. 29, 2013) (alleging that the lease expired for failure to drill or pay delay rentals in timely fashion). Some landowners have discovered, to their delight, that their existing leases only granted oil and gas rights from shallow formations (such as the Clinton formation), and thus reserved rights to the Marcellus and Utica shale formations. See *W. Reserve Port Auth. v. B&K Energy*, No. 2013-CV-00157 (C.P., Trumbull Cnty., Ohio, Jan. 13, 2013); Ed Runyan, *WR Port Authority Sues To Get Clear Title to Mineral Rights—15 Gas And Oil Companies Named As Defendants*,

found that the lease purported to give the lessee a unilateral right to indefinitely postpone development, and held instead that the lessee breached an implied duty to develop by failing to drill a well within the one-year primary term.<sup>51</sup> In *Henry v. Chesapeake Appalachia, LLC*, the United States District Court for the Southern District of Ohio held that leases at issue expired because the assignees failed to properly unitize the land.<sup>52</sup>

Landowners in Columbiana County and Stark County, who previously leased their lands to store natural gas, have filed lawsuits to establish that any rights under existing leases to drill for oil and gas have expired.<sup>53</sup> According to attorney Robert Tscholl, the gas storage companies “can’t sit on these leases for 40, 50, 60 years and do nothing with production and then claim that they hold the mineral rights for other shale formations.”<sup>54</sup> In three cases from Belmont County, the lessee defendants have invoked force majeure clauses and argued that their failure to produce oil and gas during the primary terms was due to

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YOUNGSTOWN VINDICATOR (Jan. 26, 2013), <http://www.vindy.com/news/2013/jan/26/complaint-seeks-to-clarify-mineral-right/>.

<sup>51</sup> No. 2011-345, slip op. at 15–26 (C.P., Monroe Cnty., Ohio, July 12, 2012). The court cited with approval *Hite v. Falcon Partners*, 13 A.3d 942, 949 (Pa. Super. 2011) (refusing to enforce a no-term lease and requiring instead development within the primary term).

<sup>52</sup> No. 2:12-cv-00122, slip op. at 7–8 (S.D. Ohio Aug. 8, 2012), *appealed*, No. 12-4090 (6th Cir.).

<sup>53</sup> *Baer v. Columbia Gas Transmission LLC*, No. 2012-CV-00270 (C.P., Columbiana Cnty., Ohio Apr. 23, 2012); *May v. Columbia Gas Transmission LLC*, No. 2012-CV-00295 (C.P., Columbiana Cnty., Ohio May 1, 2012); *Cibula v. Columbia Gas Transmission LLC*, No. 2012-CV-00311 (C.P., Columbiana Cnty., Ohio May 8, 2012); *Ambrose v. Columbia Gas Transmission LLC*, No. 2012-CV-00356 (C.P., Columbiana Cnty., Ohio May 25, 2012); *McNicol v. Columbia Gas Transmission LLC*, No. 2012-CV-00366 (C.P., Columbiana Cnty., Ohio, May 30, 2012); *Garwood v. Columbia Gas Transmission LLC*, 2012 CV 00373 (C.P., Columbiana County, Ohio, Jun. 1, 2012); *Gruszecki v. Columbia Gas Transmission LLC*, No. 2012-CV-00415 (C.P., Columbiana Cnty., Ohio June 14, 2012); *BK Builders Ltd. v. East Ohio Gas Co.*, No. 2012-CV-01971 (C.P., Stark Cnty., Ohio June 20, 2012). See Deanne Johnson, *Second Lawsuit Filed Over Brinker Field Leases*, THE MORNING JOURNAL NEWS (May 4, 2012), <http://www.morningjournalnews.com/page/content.detail/id/539813/Second-lawsuit-filed-over-Brinker-Field-leases.html?nav=5006> (Lisbon, Ohio); Edd Pritchard, *Landowners Sue For Mineral Rights In Jackson*, CANTONREP.COM (June 30, 2012, 11:20 PM), [http://www.cantonrep.com/news/x1873086293/Landowners-sue-for-mineral-rights-in-Jackson?zc\\_p=0](http://www.cantonrep.com/news/x1873086293/Landowners-sue-for-mineral-rights-in-Jackson?zc_p=0); Burton Speakman, *Columbiana County Residents Seek Law Imposing Minimum Royalties*, YOUNGSTOWN VINDICATOR (June 8, 2012), <http://www.vindy.com/news/2012/jun/08/residents-seek-law-imposing-minimum-roya/>.

<sup>54</sup> Alison Grant, *Gas Storage Fields Complicating Ohio Shale Energy Boom*, THE PLAIN DEALER (Nov. 13, 2012, 6:52 PM), [http://www.cleveland.com/business/index.ssf/2012/11/gas\\_storage\\_fields\\_complicatin.html#](http://www.cleveland.com/business/index.ssf/2012/11/gas_storage_fields_complicatin.html#).

government officials who either failed to grant drilling permits or refused to allow the construction of access roads.<sup>55</sup>

Perhaps the case that best illustrates the unforeseen impacts of horizontal hydraulic drilling is *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia, LLC*.<sup>56</sup> Beaverkettle owns 4,108 acres in Columbiana County, Ohio, and Beaver County, Pennsylvania. Over half of this land is subject to conservation easements that protect Little Beaver Creek and four tributaries. Beaverkettle, however, retained the right to lease its oil and gas rights, and did so on May 5, 2004, several years before the Marcellus and Utica shale oil and gas leasing boom.<sup>57</sup>

According to Beaverkettle, the original parties to the lease contemplated “traditional drilling” with “minor potential for pollution.”<sup>58</sup> However, the lease was assigned in 2010 to Chesapeake Appalachia, which proposed to join a portion of Beaverkettle’s land with other lands in Pennsylvania to create a horizontal Utica shale drilling unit. Instead of granting its approval, Beaverkettle expressed concern about “fracking” accidents and impacts, and requested documentation showing what protective steps would be taken to safeguard against such problems.<sup>59</sup> Chesapeake, without notice to Beaverkettle, filed a “Declaration and Notice of Pooled Unit” in April of 2011 in Columbiana and Beaver Counties.<sup>60</sup> Only 184 acres of Beaverkettle property are part of the

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<sup>55</sup> *Beamer v. Oxford Oil Co.*, No. 12-CV-0200 (C.P., Belmont Cnty., Ohio Apr. 27, 2012); *Hallstrom v. Oxford Oil Co.*, No. 12-CV-0512 (C.P., Belmont Cnty., Ohio Nov. 16, 2012); *Russell v. Oxford Oil Co.*, No. 12-CV-0432 (C.P., Belmont Cnty., Ohio Sept. 24, 2012). The inability to obtain drilling permits from the Ohio Department of Natural Resources was allegedly due to objections raised by Murray Energy Corporation, which holds coal rights in the same properties. See Kristy Foster, *Couple Seeks \$2 Million in Oil and Gas Lawsuit*, SHALE GAS REPORTER.COM (Nov. 1, 2012), <http://shalegasreporter.com/news/couple-seeks-2-million-in-oil-and-gas-lawsuit/1238.html>; Casey Junkins, *Murray Concerned Over Natural Gas Drilling Safety*, THE HERALD-STAR (Apr. 3, 2012), <http://hsconnect.com/page/content.detail/id/572056/Murray-concerned-over-natural-gas-drilling-safety.html?nav=5010> (Steubenville, Ohio); Kristy Foster Seachrist, *Belmont County Landowners Trying to Cancel Five-year-old Oil And Shale Gas Leases*, FARM AND DAIRY (June 14, 2012), <http://www.farmanddairy.com/news/belmont-county-landowners-trying-to-cancel-five-year-old-oil-and-shale-gas-leases/38387.html>; Kristy Foster Seachrist, *More Lawsuits Against Oxford Oil Company*, SHALE GAS REPORTER.COM (Dec. 18, 2012), <http://shalegasreporter.com/news/more-lawsuits-against-oxford-oil-company/1337.html>.

<sup>56</sup> No. 2011-CV-00750 (C.P., Columbiana Cnty., Ohio Oct. 31, 2011), *removed*, No. 11-CV-02631 (N.D. Ohio Dec. 5, 2011).

<sup>57</sup> Complaint for Declaratory Judgment at ¶¶ 4–16, *Beaverkettle*, No. 2011-CV-00750 (C.P., Columbiana Cnty., Ohio, Oct. 31, 2011), 2011 WL 7945174.

<sup>58</sup> *Id.* at ¶ 130.

<sup>59</sup> *Id.* at ¶ 78–79.

<sup>60</sup> *Id.* at ¶ 112.

drilling unit. The Beaverkettle acreage in the unit is just over 4% of its leased land.

Chesapeake contends that: (1) it properly created a drilling unit that contains 184 acres of Beaverkettle property; (2) by drilling a well within the unit, it extended the entire 4,108 acre Beaverkettle lease into its secondary term; and (3) it is no longer required to pay delay rentals, either for the 184 acres within the unit or the 3,924 acres outside of the unit.<sup>61</sup>

According to Beaverkettle, because it did not give consent, the fact that Chesapeake drilled a well on land within the purported unit—but on land not belonging to Beaverkettle—did not suffice to extend the Beaverkettle lease beyond its primary term.<sup>62</sup> Alternatively, if Chesapeake did extend the lease by drilling within the unit, Beaverkettle argues that Chesapeake did not maintain its rights to the remaining 3,924 acres because it failed to make delay rental payments required to retain rights to the undrilled acreage.<sup>63</sup>

Beaverkettle did not anticipate, and does not desire, the extraction of oil and gas from the Utica Shale, and argues that the lease has expired. Chesapeake, on the other hand, contends that the lease remains in effect and authorizes horizontal hydraulic fracturing.

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<sup>61</sup>Memorandum in Support of Defendant Chesapeake Appalachia L.L.C.'s Motion for Summary Judgment at 12–14, 20, *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia L.L.C.*, No. 11-CV-02631 (N.D. Ohio Sept. 20, 2012), 2012 WL 6194366. Chesapeake argues that it is generally accepted that engaging in operations in the search for oil or gas anywhere on the leasehold premises, or on pooled acreage, is sufficient to extend the entire lease into the secondary term, unless there is clear and explicit language in the habendum clause to the contrary. *Id.* at 13. Chesapeake further argues that it was not required to obtain Beaverkettle's approval of the drilling unit and, if it was, that Beaverkettle unreasonably withheld or delayed approval in an attempt to terminate the lease. *Id.* at 16.

<sup>62</sup>Memorandum in Support of Plaintiff Beaverkettle, LTD.'s Motion for Summary Judgment at 10–20, *Beaverkettle Farms, Ltd. v. Chesapeake Appalachia L.L.C.*, No. 11-CV-02631 (N.D. Ohio Sept. 20, 2012), 2012 WL 6194366. According to Beaverkettle, the lease's duration was seven years starting on May 5, 2004, but the lease further provided that it would terminate earlier than May 5, 2011, unless the lessee drilled a producing well by May 5, 2005, or paid a delay rental, quarterly and in advance, of \$10 per acre per year. *Id.* at 12.

<sup>63</sup>*Id.* at 12–17.



*E. Lawsuits to Terminate Leases for Failure to Comply with Assignment Restrictions*

Landowners have challenged lease assignments as contrary to statutory requirements and contractual rights.<sup>64</sup> In *Wiley*, two of the issues are whether R.C. 1509.31(A) requires notification to royalty interest holders of lease assignments, and whether a statutory violation nullifies a purported assignment.<sup>65</sup> In *Yoskey*, the landowner argues that a clause granting the lessee the right to assign the lease was contradicted by another clause under which the lessor agreed to “hereby lease and let *exclusively unto Lessee . . .*”<sup>66</sup> However, in a separate case involving the same lease terms, the Portage County Common Pleas Court held that the clause was not ambiguous and did not restrict the lessee’s right to assign the lease.<sup>67</sup>

*F. Lawsuits to Terminate Leases for Failure to Comply with “Fair Market Value” Agreements*

From 2008 to 2010, numerous landowners in eastern Ohio entered into oil and gas leases with Anschutz Exploration Company. Paragraph 14 of the Anschutz leases (which were later assigned to Chesapeake Exploration, LLC and CHK Utica, LLC) is entitled “Preferential Right to Renew,” and has been characterized by the landowners as a “fair market

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<sup>64</sup> See, e.g., Complaint at 8–9, *Fonner v. Chesapeake Appalachia, L.L.C.*, No. 13-C-00323 (C.P., Columbiana Cnty., Ohio Jan. 11, 2013) (alleges that lessee’s attempted assignment of leases without the landowners’ consent was a material breach); *Cesario v. Chesapeake Appalachia, L.L.C.*, No. 12-cv-01144 (S.D. Ohio Dec. 11, 2012) (alleges that the lessee failed to provide timely notice of the lease assignment).

<sup>65</sup> No. 12-cv-0116 (C.P., Noble Cnty., Ohio June 8, 2012), *removed*, No. 12-cv-605 (S.D. Ohio July 9, 2012). R.C. 1509.31(A), which was amended in 2010 and 2011, currently provides in pertinent part:

Whenever the entire interest of an oil and gas lease is assigned or otherwise transferred, the assignor or transferor shall notify the holders of the royalty interests . . . of the name and address of the assignee or transferee by certified mail, return receipt requested, not later than thirty days after the date of the assignment or transfer.

<sup>66</sup> Complaint at 4, *Yoskey v. Eric Petroleum Corp.* No. 2012-CV-00808, (C.P., Columbiana Cnty., Ohio Dec. 21, 2012), 2012 WL 6899955. The plaintiff, who requests that the lease be declared invalid, argues that “[t]he concepts of Lessee exclusivity and Lessee rights of assignment are mutually exclusive, rendering the meaning of the lease ambiguous as to its assignability.” *Id.* at 4.

<sup>67</sup> *Bernard Philip Dedor Revocable Declaration of Trust v. Reserve Energy Exploration Co.*, No. 12-CV-843, slip op. at 4 (C.P., Portage County, Ohio Feb. 28, 2013) (order and journal entry).

value” provision.<sup>68</sup> In *Chesapeake Exploration, LLC v. Catlett Quality Plumbing & Heating, Inc.*, the plaintiffs argued that Paragraph 14 provides the lessee or assignee “a preferential right to match the terms of a third-party offer and *renew* a Lease *beyond the lease term*.”<sup>69</sup> This interpretation differs significantly from the position taken by the defendant landowners: that Paragraph 14 “permits the landowners to market their property to other oil and gas companies during the primary term of the leases,” and requires Anschutz or its assignees “to match any bona fide offer from other oil and gas companies within thirty days.”<sup>70</sup>

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<sup>68</sup> *Chesapeake Exploration, LLC v. Catlett Quality Plumbing & Heating, Inc.*, No. 12-CV-188 (N.D. Ohio Oct. 30, 2012), 2012 WL 5364259, at \*1, *appeal filed*, Nos. 12-04517, 12-04466, (6th Cir.). Specifically, the provision reads as follows:

14. *PREFERENTIAL RIGHT TO RENEW*. If, at any time during the primary term hereof, or within one (1) year from the expiration, cancellation or termination of this Lease, Lessor receives an acceptable, bona fide third-party offer to lease the Leasehold, in whole or part, Lessor shall promptly provide the Lessee, in writing, of all of the verifiable particulars of such offer. Lessee shall have thirty (30) days from the receipt thereof to advise Lessor, in writing, of its agreement to match said third-party offer as to all terms and consideration; immediately thereafter, Lessor and Lessee shall take all cooperative steps necessary to effectuate the consummation of said transaction and the survival of said transaction through any statutorily mandated right of cancellation thereof. Any lease or option to lease the Leasehold, in whole or part, granted by Lessor in contravention of the purposes of this paragraph shall be deemed null and void.

*Id.* at \*1.

<sup>69</sup> Memorandum in Support of Plaintiffs’ Motion for Summary Judgment at 1, *Chesapeake Exploration, LLC v. Catlett Quality Plumbing & Heating, Inc.*, No. 12-CV-188 (N.D. Ohio Mar. 8, 2012), 2012 WL 6188237 (emphasis added). *See also* Complaint at ¶ 124, *Chesapeake Exploration, LLC v. Catlett Quality Plumbing & Heating, Inc.*, No. 12-CV-188 (N.D. Ohio, Mar. 8, 2012), 2012 WL 6188240 (“The Preferential Right to Renew provision in Paragraph 14 of the Leases does not permit a Defendant to terminate its Lease if Chesapeake does not elect to meet the terms of an allegedly ‘better’ offer presented by a third party. In fact, nothing in Paragraph 14 permits a Defendant to interfere with Chesapeake’s exclusive rights in the oil and gas during the Primary Term.”).

<sup>70</sup> *See* Memorandum in Support of Motion of Plaintiffs for Summary Judgment on Count I of Plaintiffs’ Complaint at 1, *Cain v. Chesapeake Exploration, LLC*, No. 12-CV-1699 (N.D. Ohio Sept. 5, 2012), 2011 WL 9556602. The *Cain* landowners present the following reasons for the inclusion of Paragraph 14 in the Anschutz leases:

At the time that these leases were entered into, Anschutz knew something that the landowners did not: that their property was sitting above one of the largest oil and gas reserves in the world. As part of their agreements, Anschutz promised to give the landowners, including all of the Plaintiffs in this action, the best deal available for their mineral rights, at a later time. . . . Anschutz was probably being a good corporate citizen: it knew of the reserves, it knew technology (a.k.a. fracking) allowed access to the reserves and, with the likely market pressure on the horizon, it gave the landowners one opportunity to increase their lease value to fair market value.

On October 30, 2012, Judge John Adams of the United States District Court for the Northern District of Ohio held that Paragraph 14 “grants Chesapeake a right to match a bona fide offer and renew the lease,” and that Chesapeake’s choice to not match bona fide offers “does nothing other than allow the current lease to run its course.”<sup>71</sup> The landowners in *Catlett Quality Plumbing & Heating* have appealed the decision to the United States Court of Appeals for the Sixth Circuit, as have the landowners in two other cases which were also before Judge Adams.<sup>72</sup>

The “fair market value” provision has also been addressed by two state judges. On November 15, 2012, Judge Richard Markus held that Paragraph 14 did in fact grant certain rights to the landowners.<sup>73</sup> On December 11, 2012, Judge Frank Forchione refused to grant summary judgment in *Green v. Chesapeake Exploration, LLC*, holding that genuine issues of material fact exist with regard to the meaning of Paragraph 14.<sup>74</sup>

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*Id.* at 1–2. *See also id.* at 4 (“The opportunity given to the landowner to renegotiate explains, in part, the below market rate that the landowners received from Anschutz when they entered into their lease agreements. . . . The Anschutz leases and the Fair Market Value Provisions afford the landowners in this case a unique contractual right—a right to renegotiate that was bargained for and reflected in the consideration they received.”). This interpretation of Paragraph 14 has not been accepted by any court to date.

<sup>71</sup>*Chesapeake*, 2012 WL 5364259, at \*6, *appeal filed*, Nos. 12-4517, 12-4466 (6th Cir.).

<sup>72</sup>The other two cases are *Cain v. Chesapeake Exploration, LLC*, No. 12-CV-01699, 2012 WL 5996910, at \*1 (N.D. Ohio Nov. 30, 2012) (“paragraph 14 . . . does not provide Plaintiffs with a right of termination.”), *appeal pending*, No. 13-03021 (6th Cir.); *Stewart v. Chesapeake Exploration LLC*, No. 2:12-cv-0026 (C.P., Noble Cnty., Ohio, Feb. 27, 2012), *removed*, No. 12-cv-02070 (N.D. Ohio Aug. 2, 2012), *judgment entry*, No. 12-cv-02070 (Nov. 27, 2012), *appeal pending*, No. 12-04457 (6th Cir. Dec. 6, 2012). The Paragraph 14 issue is pending in *Wiley v. Triad Hunter Gathering, LLC*, No. 2:12-cv-0116 (C.P., Noble Cnty., Ohio June 8, 2012), *removed*, No. 12-cv-605, 2012 WL 6611480 (S.D. Ohio Nov. 30, 2012).

<sup>73</sup>*Koonce v. Chesapeake Exploration, L.L.C.*, No. 2012-CV-136 (C.P., Columbiana Cnty., Ohio Nov. 15, 2012). Judge Markus held that paragraph 14 “gives the plaintiff-landowner-lessors a right to accept a competitor’s offer during the primary term and during the first year after all other lease rights end, if Chesapeake fails to match that competitor’s offer pursuant to paragraph 14 . . . .” *Id.* at 12. The replacement lease, however, “cannot interfere with Chesapeake’s rights to maintain inactive speculation during the primary term, or its rights to maintain ‘continuing operations’ or ‘production’ under paragraphs 12 and 13.” *Id.* It thus appears that the lessors’ rights are minimal: if the lessee fails to match a lease offer made and accepted during the primary term, the lessee loses the right to extend or renew the original lease when it expires. Both sides have appealed to the Seventh District of the Ohio Court of Appeals.

<sup>74</sup>No. 2012-CV-01223 (C.P., Stark Cnty., Ohio Dec. 11, 2012). The case was subsequently removed to federal court. No. 5:13-cv-00368 (N.D. Ohio Feb. 20, 2013).

### G. *Lawsuits to Terminate Leases for Failure to Comply with Renewal Provisions*

In three cases where no oil and gas was produced during the primary term, the issue presented is whether the assignee may invoke a provision which states that, “[u]pon the expiration of this lease and within sixty (60) days thereafter, Lessor grants to Lessee an option to extend or renew under similar terms a like lease.”<sup>75</sup> In each instances, the landowners contend that the renewal provision is vague, indefinite and unenforceable.<sup>76</sup>

### H. *Lawsuits to Interpret Leases to Limit or Prohibit Certain Surface Uses*

At this point, one might suppose that all Ohio litigation in the horizontal fracking era ends favorably for the lessee or its assignee. That is not true, however, as evidenced by *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, L.L.C.*<sup>77</sup> The issue presented was whether Chesapeake Exploration and Ohio Buckeye Energy had the right to drill and operate horizontal wells to recover oil and gas from lands other than the plaintiff’s property. When the surface rights were purchased in 1959 by Jewett Sportsmen & Farmers Club, the owner of the mineral estate reserved the right “of mining and removing *through and under* said described premises other coal, oil, gas or other minerals belonging to said Grantor or which may hereafter be acquired by said Grantor.”<sup>78</sup>

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<sup>75</sup> Complaint at ¶ 26, *Fonner v. Chesapeake Appalachia, L.L.C.*, No. 13-CV-00023 (C.P., Columbiana Cnty., Ohio Jan. 11, 2013) (emphasis omitted); Amended Complaint at ¶ 54, *Kemerer v. Chesapeake Exploration, LLC*, No. 2012-CV-00719 (C.P., Columbiana Cnty., Ohio Nov. 5, 2012), *removed*, No. 12-CV-02977, 2012 WL 6211159 (N.D. Ohio Dec. 4, 2012), *remanded*, No. 2012-CV-719 (C.P., Columbiana Cnty., Ohio Mar. 29, 2013); Class Action Complaint for Declaratory Judgment and to Quiet Title at 3, *Eastham v. Chesapeake Appalachia, L.L.C.*, No. 12-CV-281 (C.P., Jefferson Cnty., Ohio July 12, 2012), *removed*, No. 12-CV-615, 2012 WL 5222047, (S.D. Ohio July 11, 2012).

<sup>76</sup> Complaint at ¶ 36, *Fonner*, No. 2013-CV-00023 (C.P., Columbiana Cnty., Ohio Jan. 11, 2013); Amended Complaint at ¶ 57, *Kemerer v. Chesapeake Exploration, LLC*, No. 12-CV-02977 (N.D. Ohio Jan. 21, 2013); Class Action Complaint for Declaratory Judgment and to Quiet Title at ¶ 16, *Eastham v. Chesapeake Appalachia, L.L.C.*, No. 12-CV-281 (C.P., Jefferson Cnty., Ohio June 12, 2012). In three other cases, the landowners assert that the provision does not authorize renewals effectuated *prior* to the expiration of the lease. *Batalo v. Chesapeake Exploration, L.L.C.*, No. 2:13-cv-00296 (S.D. Ohio Mar. 28, 2013); *Benzel v. Chesapeake Exploration, L.L.C.*, No. 13-cv-00280 (S.D. Ohio Mar. 25, 2013); *Cesario v. Chesapeake Appalachia, L.L.C.*, No. 12-cv-01144 (S.D. Ohio Dec. 11, 2012).

<sup>77</sup> No. CVH-2011-0113 (C.P., Harrison Cnty., Jan. 17, 2012), *available at* [http://media.cleveland.com/business\\_impact/other/Judgement%20Entry%201-17-12.pdf](http://media.cleveland.com/business_impact/other/Judgement%20Entry%201-17-12.pdf).

<sup>78</sup> *Id.* at 4 (emphasis omitted).

On January 17, 2012, the Harrison County Common Pleas Court concluded that the 1959 deed “does not authorize Defendants to use any portion of the premises . . . to access or to recover oil, gas or other substances from areas outside the subject premises.”<sup>79</sup> Consequently, the defendants were enjoined from using the plaintiff’s property to extract, by horizontal drilling, oil and gas from other leased lands.<sup>80</sup>

Landowners who did not anticipate the horizontal fracking era when they leased their oil and gas rights may find some solace in *Jewett Sportsmen*, which involves a deed from another era that by serendipity

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<sup>79</sup> *Id.* at 13. According to the court, the deed reserved the right to remove oil, gas, coal, and other minerals under land located outside of the Jewett tract by taking it “through and under” the Jewett tract and then up to the surface of land other than the Jewett tract. But the deed did not reserve to the owner of the mineral estate the right to use the surface of the Jewett tract to remove minerals located under lands other than the Jewett tract. The “through and under” language meant that the Jewett tract could serve as a conduit, but not as an exit point, for minerals located under other lands. *Id.* at 6.

<sup>80</sup> *Id.* at 14. North American Coal Royalty Company filed a Motion for Reconsideration on March 1, 2012. Not all surface use disputes in the horizontal fracking era have been resolved in favor of Ohio landowners. After Chesapeake Exploration drilled a gas well on the property of Joseph and Frank Coniglio, the landowners argued that Chesapeake had no right to connect the well to a pipeline. See Dan O’Brien, *Utica Pipeline Hookup Halted by Legal Dispute*, THE BUSINESS JOURNAL, July 20, 2012, available at <http://businessjournaldaily.com/drilling-down/utica-pipeline-hookup-halted-legal-dispute-2012-7-20>. United States District Court Judge John R. Adams held otherwise, despite an addendum to the lease that stated that “[n]otwithstanding anything to the contrary contained in the Lease, no rights to use the surface of the Leasehold to . . . install pipelines and related facilities are granted to Lessee.” *Coniglio v. CBC Services, Inc.*, No.12-cv-01773, slip op. at 4 (N.D. Ohio Aug. 6, 2012) (order explaining Court’s reasons for dissolving TRO). Judge Adams noted that the lease elsewhere provided that “[a]ny and all pipeline laid by Lessee shall be buried to a minimum depth of 36 inches below ground level.” *Id.* at 5. In his view, “it defies belief that Chesapeake would invest nearly \$20 million into drilling a well without having secured the full rights to transport all of the oil and gas from the well.” *Id.* at 6.

Columbiana County landowners have been unsuccessful in arguing that their leases do not permit entry for seismic testing. See *TGS-NOPEC Geophysical Co. v. Zimmerman*, No. 2012-CV-00217 (C.P., Columbiana Cnty., Ohio Oct. 29, 2012); *TGS-NOPEC Geophysical Co. v. Bernet*, No. 2012-CV-00437 (C.P., Columbiana Cnty., Ohio Oct. 29, 2012); *TGS-NOPEC Geophysical Co. v. Golden H Acres, LLC*, No. 2012-CV-00214 (C.P., Columbiana Cnty., Ohio Oct. 24, 2012); *TGS-NOPEC Geophysical Co. v. Carter*, No. 2012-CV-00215 (C.P., Columbiana Cnty., Ohio July 20, 2012); *TGS-NOPEC Geophysical Co. v. Fryfogle*, No. 2012-CV-00186 (C.P., Columbiana Cnty., Ohio Apr. 20, 2012); *TGS-NOPEC Geophysical Co. v. Glasser*, No. 2012-CV-00216 (C.P., Columbiana Cnty., Ohio Apr. 18, 2012); see also Burton Speakman, *Seismic Testing Company Sues Property Owners Over Access*, YOUNGSTOWN VINDICATOR (Apr. 18, 2012, 12:06 AM), <http://www.vindy.com/news/2012/apr/18/seismic-testing-company-sues-property-ow/>. The *Zimmerman* and *Golden H Acres* cases have been consolidated and are on appeal to the Seventh Appellate District. One of the defendants in the *Bernet* case allegedly escorted a man off his property at gunpoint. See Deanne Johnson, *Civil Suit Filed*, MORNING JOURNAL NEWS (June 28, 2012), <http://www.morningjournalnews.com/page/content.detail/id/540990.html>.

contained language which now enables the surface owner to veto—or be compensated for—horizontal drilling. For example, on May 4, 2012, surface owner Kenneth Buell of Harrison County moved to intervene in the *Jewett Sportsmen* litigation in order to obtain an injunction prevent the use of his property for extracting oil, gas, and other minerals from adjacent parcels.<sup>81</sup>

#### V. ACTIONS TO REUNITE SEVERED MINERALS WITH THE SURFACE ESTATE

Kenneth Buell has also raised an even more significant claim: that the severed mineral estate was abandoned at some point and reunited with his surface estate pursuant to the Ohio Dormant Mineral Act.<sup>82</sup> The Act, both as originally passed in 1989 and as amended in 2006, provides that severed mineral interests may in some situations be reunited with the surface estate.<sup>83</sup> The basic rule is that the severed mineral interest is deemed abandoned unless certain "savings" events took place within the preceding 20 years.<sup>84</sup> The 2006 amendments further require that the surface owner take affirmative steps to notify the mineral interest owner prior to abandonment.<sup>85</sup>

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<sup>81</sup> See Plaintiff's Motion for a Permanent Injunction at 1, *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, L.L.C.*, No. CVH-2011-0113 (C.P., Harrison Cnty., Ohio May 4, 2012). The Buell deed contains the identical "through and under" language at issue in *Jewett Sportsmen*. The well on Buell's property, named Buell 8H, was Ohio's largest-producing Utica Shale well in 2012. See *Chesapeake's Best Utica Well (Buell 8H) in Legal Trouble*, MARCELLUS DRILLING NEWS (July 2012), <http://marcellusdrilling.com/2012/07/chesapeakes-best-utica-well-buell-8h-in-legal-trouble/> (last visited Mar. 19, 2013) (noting that the Buell 8H well is "300 times more productive than the average vertical well in Ohio, and it has also has produced in excess of 13,000 barrels of oil. . . . If the local judge's ruling stands (and it will certainly be challenged by Chesapeake), it will throw much of the Utica Shale drilling industry into chaos across the state.").

<sup>82</sup> See Plaintiff's Motion for a Permanent Injunction at 5, *Jewett Sportsmen & Farmers Club, Inc. v. Chesapeake Exploration, LLC*, No. CVH-20111-0113 (C.P., Harrison Cnty., Ohio May 4, 2012), available at <http://thebiggestfairytale.files.wordpress.com/2012/06/buell-motion-to-intervene-may-4-101.pdf>; OHIO REV. CODE ANN. § 5301.56 (West 2012).

<sup>83</sup> See John K. Keller & Gregory D. Russell, *Ohio's Dormant Mineral Act*, OHIO LAWYER, Nov./Dec. 2011, at 12–13, available at [http://www.vorysenergy.com/uploads/file/0h\\_Lawyr\\_NovDec\\_oil.pdf](http://www.vorysenergy.com/uploads/file/0h_Lawyr_NovDec_oil.pdf).

<sup>84</sup> OHIO REV. CODE ANN. § 5301.56(B)(3) (West 2012). Generally speaking, the severed mineral interest is "saved" if, during the relevant time period: (a) the interest was "the subject of a title transaction that has been filed or recorded in the office of the county recorder of the county in which the lands are located"; (b) there was actual production by the holder of the mineral interest; (c) the mineral interest was used in underground gas storage operations; (d) a drilling or mining permit was issued; (e) a claim to preserve the mineral interest was properly filed; or (f) a separately listed tax parcel number was created for the mineral interest. *Id.* § 5301.56(B)(3)(a)–(f).

<sup>85</sup> See OHIO REV. CODE ANN. § 5301.56(E)–(I) (West 2012).

It is not surprising that, given the rising value of mineral rights in Ohio, surface owners have asserted claims under the Ohio Dormant Mineral Act. Several statutory interpretation issues have emerged, including the continuing applicability of the 1989 Act; what must be done to satisfy the 2006 notice requirements; whether an oil and gas lease is a “title transaction” (and thus a savings event); and whether the “title transaction” provision is satisfied when a deed conveying the surface estate refers to the previously severed mineral estate. In a few instances, common pleas courts have applied the 1989 Act and held that the minerals were abandoned and reunited with the surface owner.<sup>86</sup> On the other hand, two other common pleas courts have held that surface owners did not establish the abandonment of severed minerals.<sup>87</sup> Claims under the Ohio Dormant Mineral Act are also pending before the United States District Court for the Southern District of Ohio.<sup>88</sup>

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<sup>86</sup>In *Wiseman v. Potts*, the court granted summary judgment to the plaintiffs, apparently agreeing with their contention that, when a previously severed mineral interest is mentioned in a “surface” deed, the mineral interest is not “the subject of the title transaction” and the deed does not qualify as a savings event. See Plaintiff’s Motion for Summary Judgment at 4–5, *Wiseman v. Potts*, No. 08-CV-0145 (C.P., Morgan Cnty., Ohio Dec. 10, 2009). The parties settled, however, and the case was dismissed with prejudice. No. 08-CV-0145 (C.P., Morgan Cnty., Ohio Nov. 17, 2010) (judgment entry). In *Wendt v. Dickerson*, No. 2012-CV-02-0135, slip op. at 16 (C.P., Tuscarawas Cnty., Ohio Feb. 21, 2013), the court found that, pursuant to the 1989 Act, the mineral interest had vested in the surface owner on March 22, 1992. In *Walker v. Noon*, No. 212-0098, slip op. at 2 (C.P., Noble Cnty., Ohio Mar. 20, 2013), the court agreed with *Wiseman* that deeds conveying the surface estate are not “title transactions” under the 1989 Act merely because they mention mineral rights that were previously severed.

<sup>87</sup>In *Dodd v. Croskey*, the court held that the surface owners did not satisfy the 2006 Act’s requirements for establishing abandonment. *Dodd v. Croskey*, No. CVH-2011-0019, slip op. at 11–12 (C.P., Harrison Cnty., Ohio Oct. 29, 2012). In contrast to *Wiseman* and *Walker*, the court held that a previously severed mineral interest is “the subject of a title transaction” when it is mentioned in a deed conveying the surface estate. *Id.* at 11. In *Bender v. Morgan*, the court held that oil and gas leases, and lease assignments, are “title transactions” and thus savings events which prevented the abandonment of the mineral interest. *Bender v. Morgan*, No. 2012-CV-00378 (C.P., Columbiana Cnty., Ohio Mar. 22, 2013).

<sup>88</sup>See *Corban v. Chesapeake Exploration, L.L.C.*, No. 2:13-cv-00246 (S.D. Ohio Mar. 15, 2013); *Chesapeake Exploration, L.L.C. v. Buell*, No. 2:12-cv-00916 (S.D. Ohio Oct. 4, 2012). Although Kenneth Buell’s claim was dismissed, Chesapeake Exploration’s lawsuit continues against other surface owners who claim mineral interests under the Dormant Mineral Act. Chesapeake Exploration contends that the court should not apply the 1989 Act; that the surface owners failed to give notice required by 2006 amendments; and that “title transactions” include oil and gas leases, lease assignments, and deeds that mention previously severed minerals. See Plaintiffs’ Motion for Summary Judgment at 8–9, *Chesapeake Exploration, L.L.C. v. Buell*, No. 2:12-cv-00916 (S.D. Ohio Mar. 11, 2013). The surface owners argue that the 1989 Act should apply, and that “title transactions” do not include oil and gas leases, assignments, and “surface” deeds that refer to previously severed

## VI. CONCLUSION

Horizontal hydraulic fracturing of the Marcellus and Utica deep shale formations has spurred oil and gas development in eastern Ohio, and has also caused an upsurge in oil and gas litigation. State and local governments are sorting out their regulatory roles; landowners are raising tort claims based on alleged contamination of water supplies; lessors are seeking to invalidate unfavorable leases; lessees are suing to recover bonus payments that were paid to the wrong persons; and surface owners are asserting ownership claims to previously severed minerals. Most of these claims are not new, just as hydraulic fracturing itself is not new. However, what is unprecedented is the amount of money at stake, the additional surface disturbances, and the risks associated with deep drilling and the disposal of flowback and “fracking” fluids. Although uncertainties exist, there is no doubt that Ohio oil and gas litigation will flourish in the horizontal fracking era.

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minerals. *See* Defendants’ Arieh Ordronneau, Sunni Ordronneau, Jeffrey Elias, Janice Elias, Dennis Elias and Margaret Elias’ Memorandum in Support of Motion for Summary Judgment at 9–19, *Chesapeake Exploration, L.L.C. v. Buell*, No. 2:12-cv-00916 (S.D. Ohio Mar. 11, 2013).