Chapter 13

Developing Jurisprudence in the Marcellus and Utica Shale

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§ 13.01.  Introduction.

Legal issues continue to arise with development of the Marcellus and Utica Shales. One need only look to the region’s first impression cases this past year to see that opportunities for litigation are growing. Those cases ran the gamut from contract interpretation in Ohio to ownership of shale gas in Pennsylvania. The variety highlights the relative infancy of the region’s jurisprudence in the development of “unconventional gas” and the overall lack
of established precedent upon which producers can rely. Operating in the region not only presents uncertainty for producers, but also provides further incentive for mineral owners, surface owners, environmental interests and their respective attorneys to be creative in their search for the next novel legal theory and big verdict. Consequently, until many more years of precedent like those from 2011 and 2012 are available, producers in the region are left to speculate about the likely outcomes of court decisions.


In what some might eventually call the landmark case of 2012, the Pennsylvania Superior Court issued a decision in Butler v. Charles Powers Estate\(^3\) that throws into question what was previously thought to be settled law regarding ownership of shale gas. Butler revolves around the definition of minerals and whether natural gas trapped in the Marcellus Shale is owned by the owner of the minerals.\(^4\) Although Butler was remanded by the Superior Court for further development and then subsequently appealed to the Pennsylvania Supreme Court of Appeals where it is pending, the implications, if a final ruling affirms the Superior Court’s opinion in Butler, should not be understated.\(^5\) The analogous coalbed methane case of U.S. Steel Corp. v. Hoge,\(^6\) which forever changed the ownership and development of that form of “unconventional gas,” serves as an example.

The federal district court in Hoffman v. Arcelormittal Pristine Resources, Inc. was also confronted with similar issues regarding ownership of unconventional gas, albeit in a less complex set of circumstances relative to Butler and resulting in a decision inapposite to Butler. In addition, Hoffman


\(^4\) Id.

\(^5\) Id.

serves to provide a concise restatement of long-standing precedent in the area of adverse possession for mineral rights.7

[1] — Butler v. Charles Powers Estate.8

Plaintiff-landowners brought a quiet title action asserting ownership by adverse possession to the minerals and petroleum oils underlying their 244-acre property.9 Defendants responded by filing a declaratory judgment action seeking that the court confirm their ownership of the natural gas pursuant to an 1881 exception and reservation of the “minerals and Petroleum oils” to their predecessor-in-interest, Charles Powers.10 The defendants’ 1881 reservation, however, failed to specifically include natural gas.11 The trial court applied Pennsylvania’s longstanding “Dunham Rule” for deed construction, which provides that the term “minerals” does not include oil and gas.12 Based on that application, the trial court held there is a rebuttable presumption that the 1881 reservation of “minerals” did not include the natural gas.13 The trial court dismissed defendants’ declaratory judgment action and defendants appealed.14 The case was remanded by the appellate level Superior Court until a standing issue was resolved.15 Once standing was resolved in favor of defendants, their appeal of the declaratory judgment action was allowed to proceed.16

On appeal, defendants sought to escape the rebuttable presumption of the “Dunham Rule” by arguing the 1881 deed reservation in their chain of title had been drafted prior to, and therefore without the benefit of, the 1882 case

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8 Butler, 29 A.3d 35.
9 Id.
10 Id. at 43.
11 Id.
12 Id.
13 Butler, 29 A.3d at 36 (citing Dunham v. Kirkpatrick, 101 Pa. 36 (1882)).
14 Id.
15 Id.
16 Id.
that gave rise to that rule of construction. Thus, as the defendants proposed, the drafter of the 1881 reservation intended “minerals” to include natural gas, which defendants claimed had been the common practice prior to the 1882 Dunham case. The court did not find this argument convincing and instead chose to rely on the plain language in the deed reservation. The court was particularly influenced by the reservation’s specific mention of petroleum oil and the lack of specificity regarding reservation of the natural gas. The court also found noteworthy the fact that the defendants had failed to assert ownership of the natural gas since the 1881 reservation.

In addition, and most significantly, the defendants also claimed ownership of the Marcellus shale gas by arguing they were the owners of the shale that contained this unconventional gas. Here, the defendants drew comparisons with coalbed methane jurisprudence in Pennsylvania which holds the owner of the coal is the owner of the coalbed methane gas contained within the coal seam. Ultimately, the Superior Court found this argument persuasive and remanded the case for development of the record on the issues of whether: “(1) Marcellus shale constitutes a mineral; (2) Marcellus shale gas constitutes the type of conventional natural gas contemplated in Dunham . . . and (3) Marcellus shale is similar to coal to the extent that whoever owns the shale, owns the shale gas.”

Currently, the Supreme Court of Pennsylvania has granted the plaintiff’s Petition for Allowance of Appeal and the following issues are now pending before that court:

17 Id. at 40-41.
18 Id. at 40.
19 Id.
20 Id.
21 Id. at 41.
22 Id. at 39-40.
23 Id. at 40 (discussing U.S. Steel Corp. v. Hoge, 468 A.2d 1380 (Pa. 1983)).
24 Id. at 43.
25 At least one other jurisdiction has found similarities between shale and coal (see Cimarron Oil Corp. v. Howard Energy Corp., 909 N.E.2d 1115 (Ind. App. 2009) (comparing gas in coal and shale formations as similar gases; gas in shale is generally produced in same manner as gas in coal)).
In interpreting a deed reservation for “minerals,” whether the Superior Court erred in remanding the case for the introduction of scientific and historic evidence about the Marcellus shale and the natural gas contained therein, despite the fact that the Supreme Court of Pennsylvania has held (1) a rebuttable presumption exists that parties intend the term “minerals” to include only metallic substances, and (2) only the parties’ intent can rebut the presumption to include non-metallic substances.26


In *Hoffman*, the plaintiff-surface owner brought a declaratory judgment action against the purported owner of the minerals underlying her 97-acre property.28 Plaintiff had acquired the property in 1971 by deed but subject to a 1928 deed exception and reservation in her chain of title for “all gas and oil within and underlying” the property, which gas and oil rights were subsequently conveyed to defendant.29 Plaintiff’s 1971 deed also contained an exception and reservation of “coal, oil and gas, and other minerals and mining and drilling rights, etc. as conveyed in prior instruments of record in the chain of title.”30 Despite the above-described exceptions and reservations in plaintiff’s recorded chain of title, plaintiff and various lessees entered separate oil and gas leases in 1971, 1981 and 2006.31 However, only the 2006 lease led to any efforts to explore for gas and oil underlying the property.32

Plaintiff put forth two alternative theories to support her claim as owner of the oil and gas interests in the property. First, plaintiff relied on the seminal coalbed methane case of *United States v. Hoge* to argue that because “Marcellus shale mining was not commercially exploitable” at the time of

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28 *Id.*
29 *Id.* at 1.
30 *Id.*
31 *Id.* at 2-3.
32 *Id.* at 3.
the 1928 deed, that exception and reservation was ambiguous. 33 According to this argument, the “intent of the parties was to except and reserve only the geological formations capable of the production of natural gas with then existing technology.” 34 Secondly, and in the alternative, plaintiff also argued that because she had leased the property on three separate occasions, she had adversely possessed the oil and gas underlying the property. 35

The court summarily addressed the first of plaintiff’s arguments as “creative” but lacking in substance. 36 The deed was “clear and unambiguous” in its exception and reservation of “all oil and gas to defendants [sic] predecessor-in-interest.” 37 The court stated that according to “long standing precedent . . . ‘when the language of the deed is clear and unambiguous the intent of the deed must be gleaned solely from its language’. ” 38 Thus, defendant’s motion for summary judgment was granted on the issue of ownership through the exception and reservation in the 1928 deed. 39

Next, regarding plaintiff’s claim to ownership through adverse possession, the court confirmed the “well-established” rule that adverse possession of mineral rights requires “actual entry upon and use of the underlying minerals for the requisite time period.” 40 This standard requires actual “drilling and production” of the oil and gas, not just leasing as the plaintiff in this case had done. 41 Accordingly, because neither plaintiff nor

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34 Id.
35 Id. at *6.
36 Id. at 5.
37 Id.
38 Id. (quoting In re Conveyance of Land Belonging to City of DuBois, 335 A.2d 352, 358 (Pa. 1975); citing Teacher, Exrx. v. Kijurina, 76 A.2d 197 (Pa. 1950)).
39 Id. at 6.
40 Id.
41 Id. at *7 (citing Natural Gas Pipeline Co. of Am. v. Pool, 124 S.W.3d 188 (Tex. 2003); Schaneman v. Wright, 470 N.W. 2d 566, 577 (Neb. 1991) (explaining mere execution, delivery or recording of oil and gas lease or mineral deeds will not constitute adverse possession); Piney Oil & Gas Co. v. Scott, 79 S.W.2d 394, 401 (Ky. 1934) (stating adverse occupation and use of property “cannot be wrought in the office of the county clerk no matter how many deeds or leases the would-be disseisor may record there.”); Lyles v. Dodge, 228 S.W.
her lessees had drilled on the property, defendant’s motion for summary judgment on adverse possession was also granted.42

§ 13.03. Judicial Ascertainment Clauses in Leases (Ohio).43

In Conny Farms v. Ball Resources, the validity of a lease’s judicial ascertainment clause presented a case of first impression for an Ohio court.44 Judicial ascertainment clauses, which typically require a judicial determination of default and include a right to cure, have been widely used in the oil and gas industry to prevent unintentional forfeitures. In the Marcellus and Utica shale region, West Virginia’s courts have explicitly declared judicial ascertainment clauses invalid.45 In addition, as is stated in Williams and Meyers’ Oil and Gas Law, “[i]t has long been understood that a leasehold created by an [‘and as long thereafter as’] lease terminates automatically without any requirement of notice or judicial ascertainment in the event of failure of production at or after the end of the primary term or in the event of failure to make timely payment of delay rentals during the primary term.”46 That was the ruling by a Pennsylvania court in Babb v. Clemensen47 when it stated, “and as long thereafter clause, combined with due determination that the wells are no longer being produced necessitate the conclusion that

316, 317 (Tex. Civ. App. 1921) (registration of oil lease, even if they had been recorded for a sufficient length of time to meet the requirements of the statute, would not constitute notice of adverse possession of the minerals)).
42 Id. at 7.
43 The following example of a judicial ascertainment clause is taken from Wellman v. Energy Res., Inc., 557 S.E.2d 254, 259 (W. Va. 2001): “This lease shall never be forfeited or terminated for failure of Lessee to perform in whole or in part any of its express or implied covenants, conditions or obligations until it shall have been first finally judicially determined that such failure exists, and Lessee shall have been given a reasonable time after such final determination within which to comply with any such covenants, conditions or obligations.”
45 Id. at 258.
46 4 Williams and Meyers, Oil and Gas Law § 354.6 – 356, 682.2 (see also Babb v. Clemensen, 687 A.2d 1120 (Pa. Super. 1996)).
the leases have expired by their own terms and a judicial [determination of] forfeiture is not required."^{48}

[1] — Conny Farms v. Ball Resources.^{49}

Landowners sought declaratory judgment voiding their leases with lessee by arguing that lessee had failed to make any royalty or rental payments, which rendered the leases invalid.^{50}

The trial court granted summary judgment in favor of the lessee, and the court of appeals reversed and remanded while holding judicial ascertainment clauses in oil and gas leases to be unenforceable in Ohio as against public policy.^{51}

In so holding, the court of appeals found the West Virginia case of Wellman v. Energy Resources, Inc.^{52} was persuasive.^{53} In Wellman, the court voided judicial ascertainment clauses for three reasons.^{54} First, judicial ascertainment clauses “require courts to try cases piecemeal, which is generally disfavored.”^{55} Second, these clauses prevent judicial economy and would essentially convert the courts into “mere boards of arbitration.”^{56} For example, the court’s determination on the validity of a lease would first require a determination on the facts alleged. The court would then allow the lessee a reasonable time to comply with its obligations or surrender the lease.^{57} If the lessee failed to cure in the time allowed, the court would then be forced to render a second judgment.^{58} The third and final reason put forth by the Wellman Court for voiding judicial ascertainment clauses was

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^{48} Id. (citing Tisdale v. Walla, 1994 WL 738744, at *7 (Ohio Ct. App. Dec. 23, 1994)).
^{50} Id.
^{51} Id. at 1.
^{53} Id. at 3.
^{54} Id.
^{55} Id.
^{56} Id.
^{57} Id.
^{58} Id.
the unequal bargaining power of parties in oil and gas leases.\textsuperscript{59} Here, the court believed that judicial arbitration clauses would allow the lessee, with substantial resources, to subject the lessor, with minimal resources, to unfair pressure and concessions.\textsuperscript{60}

Although the court acknowledged that freedom to contract is a fundamental right, the court rejected lessee’s argument that the lease is like any other contract and that the language contained therein is always controlling between the parties.\textsuperscript{61}

§ 13.04. Local Zoning Restricting Oil and Gas Activities.

Courts in Ohio, West Virginia and New York recently decided cases concerning attempts by local governments to regulate oil and gas production activities through zoning. Although the facts in the Ohio and West Virginia cases differ greatly, their holdings are nearly identical in that they rely on state preemption doctrine for invalidation of the applicable local regulations. In stark contrast to those holdings, two New York cases held their respective local zoning laws were not preempted by state legislation. Meanwhile, in Pennsylvania, which recently enacted legislation to preempt local regulation, a court will face constitutional questions over the level of influence the state may exert to ensure uniformity in local regulation.


[a] — \textit{Robinson Township v. Commonwealth of Pennsylvania}.\textsuperscript{62}

In February 2012, the Pennsylvania Legislature adopted Act 13 making numerous amendments to Title 58 (Oil and Gas) of the Pennsylvania Consolidated Statutes.\textsuperscript{63} The Act uses the state’s “purse string power” to accomplish statewide implementation of oil and gas regulation by requiring each county to adopt an Act 13 compliant ordinance or be

\begin{itemize}
\item \textsuperscript{59} \textit{Id.} at 3-4.
\item \textsuperscript{60} \textit{Id.} at 260–61.
\item \textsuperscript{61} \textit{Id.} at 4.
\item \textsuperscript{63} \textit{Id.} at 1.
\end{itemize}
prohibited from receiving funds under the Act’s “unconventional gas well impact fee revenues.”64 Included within the amendments to Act 13 are provisions that provide for uniform local zoning regulations throughout the Commonwealth.65 For instance, the Act sets maximum site location standards for local ordinances to follow to ensure conformity to other sections of the Act.66

On March 29, 2012, various local government groups and interested parties challenged the constitutionality of Act 13 in *Robinson Township v. Commonwealth of Pennsylvania*.67 The plaintiffs also sought a preliminary injunction to prevent Act 13 from officially becoming law on April 14, 2012.68 The court granted that injunction for 120 days to give municipalities an “adequate opportunity to pass zoning laws that comply with Act 13 without the fear or risk that development of oil and gas operations under Act 13 will be inconsistent with later validly passed local zoning ordinances.”69 Regarding the suit itself, the plaintiffs claim, among other things, that Act 13 represents an unconstitutional plan for statewide zoning.70

[b] — *In Re: Notice of Appeal from Township of Bradford Township Zoning Hearing Board.***71

New Century Pipeline (New Century) operates an oil and gas well within the municipal borders of the Township of Bradford, Pennsylvania (Town). Adjacent to the well site, New Century also operates a “small compressor and stripper station, which purifies the natural gas before placing it in a pipeline for movement from the site.”72 The Township’s zoning officials issued New Century an enforcement notice asserting that its compressor station “was

64 Id.
65 Id.
66 Id.
67 Id.
68 Id. at 2-3.
69 Id.
70 Id. at 3.
72 Id. at *1.
not equipment ‘necessary to drilling or pumping operations’ and was not incidental to a gas pumping operation” to qualify as a permitted use under the Bradford Township Zoning Ordinance (Ordinance).\textsuperscript{73} Instead, the Township believed the compressor station was actually used to process gas from the wellhead, which was an activity that could only occur in the Township’s General Manufacturing District.\textsuperscript{74} After a hearing on the enforcement notice, the Town’s Zoning Hearing Board (Board) held the compressor station violated the Ordinance as an unpermitted use in a district other than the General Manufacturing District.\textsuperscript{75}

In affirming the Board’s holding on appeal, the trial court concluded the compressor station “was processing gas because it was a step taken after the gas had moved a few feet from the wellhead, and it effected a chemical change on the thing acted upon, i.e., the natural gas.”\textsuperscript{76} New Century appealed this trial court order affirming the Board’s enforcement action to remove the compressor station.\textsuperscript{77}

The Commonwealth Court reversed the orders of the trial court and the Board. That court held that the compressor station could be classified as either “production” or “processing” according to various dictionary definitions and court decisions.\textsuperscript{78} The confusion created by these various definitions makes those sources unreliable. In the end, the court relied on a statutory rule of construction for zoning ordinances in Pennsylvania which provides:

[T]he language shall be interpreted, where doubt exists as to the intended meaning of the language written and enacted by the governing body, in favor of the property owner and against any implied extension of the restriction.\textsuperscript{79}

\textsuperscript{73} Id.
\textsuperscript{74} Id. at 546.
\textsuperscript{75} Id.
\textsuperscript{76} Id. at *2-*5.
\textsuperscript{77} Id. at 545.
\textsuperscript{78} Id. at *5-*8.
Accordingly, because the compressor station was equipment necessary for "gas production" and was not otherwise specifically prohibited, the court held the Ordinance must be construed in favor of New Century and therefore the compressor station was a permitted accessory use under the Ordinance.80


[a] — Northeast Natural Energy LLC v. City of Morgantown.81

Northeast Natural Energy LLC (Northeast) was in the process of drilling two Marcellus shale natural gas wells in the Morgantown Industrial Park, an industrial site outside the municipal boundaries of the City of Morgantown, West Virginia (City).82 The two wells had been permitted by the West Virginia Department of Environmental Protection (WVDEP) when the City enacted an ordinance banning horizontal drilling and fracking of oil and gas wells in and within one mile of the City.83

Northeast brought suit in the Circuit Court of Monongalia County, West Virginia and filed its motion to enjoin enforcement of the ordinance on the grounds that the ordinance was preempted by state law.84 The circuit court, prior to addressing the motion to enjoin, held that the ordinance was preempted by the State’s oil and gas regulatory scheme and was therefore invalid.85

In its holding, the circuit court succinctly stated its standard for applying the preemption doctrine:

The doctrine of preemption is applicable law when the State has assumed control of a particular subject of regulation, and a local government has enacted an ordinance in the same field.86 When a

80 Id. at 552.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id. (quoting 62 C.J.S. Municipal Corporations § 141 (2011)).
state law fully occupies a particular area of legislation, indicated by the State’s comprehensive regulatory scheme, no local ordinances will be permitted to contravene it.87

The court then analyzed whether the State’s authority to regulate the field would be encroached upon by the City’s ordinance.88 Ultimately, the court held that control of oil and gas development and production throughout the State was exclusively provided to the WVDEP.89

Although the Northeast Natural Energy LLC decision was not appealed, the case nonetheless serves as an important example of how West Virginia courts may approach local oil and gas regulation preemption questions.


[a] — Natale v. Everflow Eastern, Inc.90

Plaintiff brought suit against a producer alleging nuisance, violation of local zoning ordinance and intentional misconduct when the producer erected an oil and gas well with associated storage tanks on the property of his next-door neighbor.91 Producer’s oil and gas activities were properly permitted by the State and had received a variance from the local zoning authority.92 Plaintiff’s nuisance claim was based on the alleged loud noises and foul smells emitted from the structure, which interfered with his use and enjoyment of his land.93 The intentional misconduct claim was alleged to have stemmed from plaintiff’s refusal to grant an easement to producer for its operations in the area.94 Specifically, plaintiff argued that in retaliation for his unwillingness to grant the easement, the producer had placed the well

87 Id. (quoting Am. Tower Corp. v. Common Council of City of Beckley, 557 S.E.2d 752 (W. Va. 2001); City of Clinton v. Sheridan, 530 N.W.2d 690 (Iowa 1995); City of Indianapolis v. Fields, 506 N.E.2d 1128 (Ind. Ct. App. 1987)).
88 Id.
89 Id. (citing W. Va. Code §§ 22-6-1 to -41 (1994)).
91 Id. at 605.
92 Id. at 605-606.
93 Id. at 605.
94 Id.
and storage tanks very close to his property. Most significantly, plaintiff argued that the producer had violated certain oil and gas well location and operation ordinances of Warren, Ohio. Violations of those zoning ordinances, according to plaintiff, resulted in negligence per se.

The trial court granted summary judgment to the producer on all claims brought by the plaintiff. In affirming the trial court’s holding, the court of appeals considered whether the City ordinances were preempted by state legislation. Citing Struthers v. Sokol, the court offered a standard for preemption questions:

The powers of local self-government conferred to a municipality by Section 3, Article XVIII of the Ohio Constitution are limited to the extent that they conflict with the general laws of the state. The test is whether the ordinance permits or licenses that which the statute forbids and prohibits, and vice versa.

Operating with this construct, the court held the City’s ordinances were preempted by state statute after finding the language of Ohio’s R.C. 1509.02 to be controlling. R.C. 1509.02 explicitly states that Ohio has a strong interest in maintaining uniform regulation of the oil and gas industry. This regulation must be applicable to “all aspects of the locating, drilling, and operating of oil and gas wells within this state.” Because the plaintiff’s claims were based on location and operation, the ordinances cited by the plaintiff were preempted by state law. Thus, not only had the City authorized the use that plaintiff now claimed to be a nuisance, regulation of the location and operation of that same use was preempted by State law. Lastly, regarding a private right of action for nuisance, the court went on to

95 Id. at 606.
96 Id. at 607-608.
97 Id. at 608.
99 Natale, 959 N.E.2d at 610 (citing Struthers v. Sokol, 108 Ohio St. 263, 268 (1923)).
100 Id. at 611.
101 Id.
102 Id. at 611 (citing Ohio Admin. Code 1509.02 (2011)).
103 Id.
state, “In light of R.C. 1509.02, it is clear that no private right of action exists pursuant to the referenced ordinances of the City of Warren.”


[a] — Anschutz Exploration Corp. v. Town of Dryden. 105

In response to public outcry over the impending use of hydraulic fracturing in the area, the Town of Dryden (Town) amended the Dryden Zoning Ordinance “to ban all activities related to the exploration for, and production or storage of, natural gas and petroleum.” 106 Prior to the amendment, Anschutz had obtained gas leases in the Town and invested approximately $5.1 million in related exploration activities. Anschutz brought suit seeking to invalidate the amendment based on preemption by the state’s Oil, Gas and Solution Mining Law (OGSML). 107

In its upholding of the Town’s amendment, the court placed great emphasis on the legislative intent behind the OGSML and, in particular, the lack of any direct or indirect conflict between the OGSML and the amendment. 108 For instance, the OGSML contains a “supersedure clause” that provides “the provisions of this article shall supersede all local laws or ordinances relating to the regulation of the oil, gas and solution mining industries.” 109 The court found this clause preempted local law that regulates oil and gas operations, but not local law that regulates land use. 110 The court also emphasized that unlike other statutes that require an agency to consider the traditional concerns of zoning before issuing a permit, the OGSML lacked a mechanism to allow for notice to, and participation by, a municipality in the permitting process. 111 Thus, the court held that not only does the OGSML

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104 Id.
106 Id. at *1.
107 Id. at *5.
108 Id. at *1.
109 Id. at *5 (citing N.Y. Envtl. Conserv. Law § 23-0303(2) (2011)).
110 Id.
111 Id. at #9
lack an explicit preemption of local zoning in comparison with other New York statutes, but it also fails to provide for local concerns in the agency review process.

Lastly, the court went on to hold that not only can the municipality regulate land uses through its zoning power, but that it may even “completely ban operations related to oil and gas production within its borders.”

[b] — Cooperstown Holstein Corp. v. Town of Middlefield.

Three days after the Anschutz decision, another New York court upheld a similar zoning law that “effectively banned oil and gas drilling within the borders of the township [of Middlefield].” In this case, the plaintiff landowner had executed two oil and gas leases with Elexco Land Services, Inc. prior to enactment of Middlefield’s zoning law. The new zoning law stated, “Heavy industry and all oil, gas or solution mining and drilling are prohibited uses . . . .” Due to the obvious frustration that the new law would cause to the purposes of the leases, plaintiffs brought this declaratory action and motion for summary judgment declaring the ban void by preemption under the OGSML. Relying on analysis that mirrors the Anschutz holding, the Cooperstown court also found that:

[T]he state’s interests may be harmonized with the home rule of local municipalities in their determination of where oil, gas and solution drilling or mining may occur. The state maintains control over the “how” of such procedures while the municipalities maintain control over the “where” of such exploration.

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112 Id. at *8 (citing N.Y. Envtl. Conserv. Law § 27-1107 (local municipalities may not require “conformity with local zoning or land use laws and ordinances” in the siting of hazardous waste management facilities)).
113 Id. at *9.
115 Id. at *2.
116 Id. at 760-770.
117 Id.
118 Id. at 723-724.
119 Id. at 729.
Although the *Cooperstown* decision comes by way of the trial court level, this second successive holding that the OGSML does not preempt local land use regulation exemplifies a strong current in New York jurisprudence regarding upholding local zoning regulation of oil and gas activities.

Through the zoning framework, municipalities in New York have found an effective tool to limit and, as in *Anschutz* and *Cooperstown*, even ban oil and gas activities within their borders.

§ 13.05. Pennsylvania Guaranteed Minimum Royalty Act (GMRA).\(^{120}\)

In what remains an active litigation area even after last year’s landmark case of *Kilmer v. Elexco Land Services, Inc.*,\(^{121}\) Pennsylvania’s courts continue to confront issues associated with applying the “net-back method” to calculate the statutory minimum one-eighth royalty under the GMRA.\(^{122}\) Under the “net-back method,” royalties are calculated as “one-eighth of the sales price of the gas minus one-eighth of the post-production costs of bringing the gas to the market.”\(^{123}\) The GMRA cases of 2012 involved lessors seeking to distinguish their claims from Kilmer by arguing that their leases did not provide for the post-production costs actually deducted.\(^{124}\)

[1] — *Pollock v. Energy Corp. of America*.\(^{125}\)

In *Pollock*, the plaintiffs were landowners who had entered into oil and gas leases with Energy Corporation of America (ECA).\(^{126}\) The plaintiffs alleged that ECA breached those leases by taking impermissible volumetric deductions in calculating their royalties. Specifically, plaintiffs claimed ECA had “failed to pay royalties on gas: 1) used or lost between the wellhead and

\(^{121}\) *Kilmer v. Elexco Land Serv., Inc.*, 990 A.2d 1147 (Pa. 2010).
\(^{122}\) *Id.* at 1149.
\(^{123}\) *Id.* at 1149.
\(^{124}\) *Id.* at 1157.
\(^{126}\) *Id.*
point of sale; 2) lost or which became unaccounted for during the production and transportation of the substance; and 3) used by ECA both on and off the leasehold premises.” In addition, plaintiffs alleged that even if the court held the leases permitted the volumetric deductions, ECA breached the leases by deducting allocated line loss rather than actual line loss.

ECA’s motion to dismiss argued that Kilmer foreclosed plaintiffs’ claims because that case approved the “calculation of royalties based upon the net price of gas actually sold.” According to ECA, gas that is lost or unaccounted for is not sold and therefore plaintiffs were not entitled to the statutory minimum one-eighth royalty on that gas. The most vulnerable aspect of ECA’s reliance on Kilmer, as was argued by plaintiffs, was the difference in language between the Kilmer leases to those that were the subject of Pollock. In Kilmer, the leases expressly included “all losses of produced volumes” as a post-production cost. The Pollock leases were silent as to lost gas. Plaintiffs also highlighted a recent change in ECA’s standard lease form to now explicitly exclude royalties on gas lost or unaccounted for during production or transportation.

Ultimately, however, the court accepted ECA’s argument that the subject leases allowed for application of the net-back method and were therefore “in conformity with industry custom, [that] lessees and lessors should share post-production costs.” In so holding, the court restated a portion of Ulmer v. Chesapeake Appalachia, LLC, which is another 2011 decision where the court was forced to interpret the reach of Kilmer:

127 Id. at 1.
128 Id. at *2.
129 Id.
130 Id.
131 Id. at 3-4.
132 Id. at *4.
133 Id. at *3.
134 Id.
*Kilmer* is properly read broadly in light of the fact that the Pennsylvania Supreme Court granted extraordinary jurisdiction to resolve the purely legal question of whether post-production costs are proper under Pennsylvania oil and gas law . . . [a]pplying common sense to the matter, it is evident that the Pennsylvania Supreme Court surely considered that all of the leases that would be affected by their decision were not identical, thus their holding cannot be strictly applied only to leases that are on all fours to the lease in *Kilmer*.137

As in *Ulmer*, the *Pollock* court emphasized that if a lease provides for the net-back method, the starting point for the royalty calculation is at the point of sale.138 Thus, if gas does not make it to the point of sale, it cannot be considered in the lessor’s royalty calculation.

Lastly, plaintiffs’ claim that ECA breached the leases by deducting allocated line loss rather than actual line loss survived ECA’s motion to dismiss.139 On that issue, the court stated the plaintiffs should have the opportunity to determine whether the allocated share was a proper deduction.140

The *Kilmer*, *Ulmer* and *Pollock* line of cases show the importance of specifying in each lease when the net-back method is to be used for calculating royalties at the wellhead. However, as was explicitly stated by the court in *Pollock*, these cases do “not hold that Kilmer-approved deductions are deductible in every Pennsylvania oil/gas lease . . . [t]he question of what costs are deductible under the leases is yet to be litigated.”141

138 *Id.* at *5.
139 *Id.* at *2.
140 *Id.* at *1 (See also Frederick v. Range Res.-Appalachia, LLC, No. 08-288 ERIE, 2011 WL 1045665 (W.D. Pa. March 17, 2011) (Landowners claimed lessee improperly reduced the amounts of their royalty payments by: a) improperly using the point of sale volume of gas, rather than the volume of gas collected at the well head, to calculate the gross royalty; b) improperly adjusting the volumes by applying temperature and pressure; c) improperly assessing and deducting the costs of marketing the gas; d) assessing and withholding a management fee; and e) failing to pay royalties on the value of the sale of liquid hydrocarbons)).
141 *Id.* at *1.

In another attempt to distinguish *Kilmer*, the landowner in *Katzin* argued the very question that the *Pollock* court above had managed to avoid: “[W]hat costs are deductible under the leases[?]”

Landowner brought a declaratory judgment action against Central Appalachia Petroleum and its successor in leasehold interest, Chesapeake Appalachia, LLC, to declare the lease invalid for violation of the Pennsylvania Guaranteed Minimum Royalty Act (GMRA). The trial court granted defendants’ motion for judgment on the pleadings and landowner appealed. The landowner’s only claim on appeal was that the royalty clause in the lease was so vague regarding what costs may be deducted from the royalty paid that it was not compliant with the GMRA. The royalty clause reads as follows:

(A) ROYALTY: To pay Lessor as Royalty, less all taxes, assessments and adjustments on production from the Leasehold as follows:

1. OIL: To deliver to the credit of Lessor, free of cost, a Royalty of the equal one-eighth part of all oil and any constituents thereof produced and markets from the Leasehold.

2. GAS: To pay Lessor an amount equal to one-eighth of the revenue realized by Lessee for all gas and the constituents thereof produced and marketed from the Leasehold during the preceding month.

Although the court found the landowner’s argument to be creative, it did not conclude that the defendants’ potential violation of the GMRA was enough to invalidate the lease. Specifically, the court found that the landowner was essentially arguing the lessee *might* pay less than the royalty guaranteed under the GMRA due to the vagueness of the allowable deductions in the royalty clause. However, the royalty clause clearly provided for the

143  *Pollock*, 2011 WL 3667289 at *1.
144  Id. at 308.
146  Id. at 309.
147  Id.
statutory minimum of one-eighth royalty under the GMRA. Thus, the court held it must “imply a promise” by defendants to comply with the GMRA.\footnote{Id.} The court went on to suggest that if the landowner has received payment under the lease that violates the GMRA, then the landowner could bring a “breach of contract action based upon a breach of this implied promise.”\footnote{Id.}

As in Pollock, the Katzin court managed to avoid making a direct determination regarding what costs are deductible under the lease. This issue will continue to be litigated as plaintiff-landowners seek to invalidate leases by distinguishing non-deductible costs from those that were upheld in Kilmer.\footnote{Id.}

\section*{§ 13.06. Development of Minerals in a National Forest (Pennsylvania).}

The U.S. Forest Service (Service) is charged with managing the surface of the United States’ national forests, including the surface of the Allegheny National Forest (ANF).\footnote{Minard Run Oil Co. v. U.S. Forest Serv., 670 F.3d 236, at 239 (3d Cir. 2011).} In most cases, the mineral tracts underlying the ANF are privately owned. Beginning in 1980, those mineral owners seeking to utilize the surface of the ANF to drill for natural gas engaged in a cooperative process with the Service. Mineral owners would provide 60 days’ notice to the Service of their drilling plans and the Service would provide a Notice to Proceed (NTP), which acknowledged receipt of the advance notice and memorialized any drilling agreements between the Service and mineral owner.\footnote{Id. at 243 (citing United States v. Minard Run Oil Co., Lexis 9570 (W.D. Pa. 1980)).} However, when that process was challenged for non-compliance with the National Environmental Policy Act (NEPA) in Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., the Service immediately halted its long-standing procedure for dealing with mineral owner drilling requests. As a result of the Service’s reversal, the pending suit over the Service’s non-compliance with NEPA was dismissed pursuant to a\footnote{Forest Serv. Employees for Envtl. Ethics v. U.S. Forest Serv., No. 08-323, 2009 WL 1324154 (W.D. Pa. May 12, 2009).}
settlement agreement (the Settlement Agreement) and ANF mineral owners were left to wait indefinitely until the Service attained a NEPA required environmental impact study (EIS) pursuant to the Settlement Agreement.154

Prior to the Service’s reversal, the Service “viewed itself as a resource agency negotiating use of jointly owned land” when dealing with mineral rights owners.155 However, after the reversal, the Service looked like it might become “a regulatory agency issuing permits” to mineral owners for use of surface tracts in the ANF in the development of their mineral interests.156 As the ANF Forest Supervisor ominously stated at the time, “[a]ll . . . pending oil and gas proposals, and all future proposals, will be processed after the appropriate level of environmental analysis has been conducted under the NEPA.”157 Until completion of the EIS, which some projected could take several years, if a mineral owner took any action that changed the land of the ANF without first obtaining a NTP under NEPA, then that owner could be subject to criminal penalties.158

[1] — _Minard Run Oil Co. v. U.S. Forest Serv._159

In _Minard Run Oil Co._, the plaintiffs brought suit against the Service and others seeking to invalidate the moratorium on drilling and restore the previous framework by which mineral owners could attain NTP’s without prolonged environmental review. The District Court granted the plaintiffs an injunction from the new regulatory framework imposed by the Settlement Agreement and re-instituted the previous NTP process for mineral owners.160 The Service subsequently appealed to the Third Circuit, which resulted in the instant action.161

In upholding the District Court’s decision, the Third Circuit addressed the Service’s claimed regulatory authority over co-tenant access under the

154 _Id._ at 2.
155 _Minard Run Oil Co._, 670 F.3d 236 at 246.
156 _Id._
157 _Id._ at 245.
158 _Id._ at 245–46.
159 _Id._
160 _Id._ at 242.
161 _Id._
Weeks Act. Specifically, the Service had argued that not only did the Weeks Act explicitly provide that mineral rights are subject to the rules and regulations contained in the instrument conveying title to the United States, but that nothing prevented those same mineral rights from being subject to other regulations not contained in the instrument. In rejecting the Service’s interpretation of the Weeks Act, the court held all rules and regulations applicable to mineral owner access rights must be expressed in the instrument of conveyance. Furthermore, under Pennsylvania law, mineral right owners have a right to reasonable use of the surface estate and thus the Service does not have the “broad authority it claims over private mineral rights owners’ access to surface lands.” The Service is entitled to notice from mineral owners prior to surface access, and “may request and negotiate accommodation of its state-law right to due regard, [but] its approval is not required for surface access.”

Accordingly, issuance of a Notice to Proceed to a mineral owner prior to development in the ANF is not a permit under NEPA and an “EIS need not be completed prior to issuing an NTP.”

§ 13.07. Attorney’s Fees for Frivolous Lawsuits (Ohio).

It should come as no surprise that during times of economic booms, such as the current shale gas play, frivolous lawsuits increase dramatically. While oil and gas owners are experiencing massive windfalls from leasehold royalties, other stakeholders and their attorneys will seek to argue creative ways to share in these fortunes. Perhaps no greater example exists than the Butler v. Charles Powers Estate case discussed above, where a correlative

162 Id. at 248.
163 The Weeks Act authorized the Secretary to acquire surface estates with a reservation of rights to the grantor and provided that the exercise of reserved rights would be subject to the “rules and regulations” promulgated by the Secretary and included in the instrument of conveyance. 16 U.S.C. § 518.
164 Id.
165 Id. at 251.
166 Id. at 254.
167 Id.
168 Id.
169 Butler, 29 A.3d at 35.
estate seeks not just a piece of the royalties but the whole thing. Although the creative arguments in the Butler case could hardly be characterized as frivolous, there are many examples over the past few years where plaintiffs’ attorneys have skirted the frivolous lawsuit line. A frequent question that arises in these cases is whether the court will award attorney’s fees to the prevailing party.

[1] — Durr v. Artex Oil Company.\textsuperscript{170}

In Durr, a landowner conveyed all of her “right, title and interest” to 74 acres but reserved “all of the oil and gas underlying the premises herein conveyed, together with the right to receive royalties from any wells now existing or to be drilled, but assigning herein the right to use natural gas for farm purposes.”\textsuperscript{171} Through several subsequent conveyances, the plaintiffs acquired all “right, title and interest” to four acres of the same 74-acre surface that had been conveyed by landowner and was therefore subject to landowner’s reservation.\textsuperscript{172} Landowner then entered into an oil and gas lease with Artex Oil Company (Artex) with respect to her 74-acre oil and gas estate.\textsuperscript{173} Plaintiffs brought this action against Landowner and Artex claiming: 1) that as surface owners, they were entitled to share in the royalties pursuant to the terms of the oil and gas lease with Artex; 2) Artex was committing trespass on the four acres; and 3) plaintiffs were entitled to free gas.\textsuperscript{174} Regarding the first and most egregious claim, plaintiffs based their argument on language in the lease, which provides:

If lessor owns a less interest in the above-described land than the entire undivided fee simple estate therein, then the royalties and rentals therein provided for shall be paid to the lessor only in the proportion which lessor’s interest bears to the whole and undivided fee.\textsuperscript{175}

\textsuperscript{171} Id. at *1.
\textsuperscript{172} Id. at 1.
\textsuperscript{173} Id.
\textsuperscript{174} Id. at 2.
\textsuperscript{175} Id. at 3.
Accordingly, by arguing that the Landowner did not own the surface, plaintiffs sought to convince the court that Landowner did not own the entire fee simple and therefore was not entitled to 100 percent of the royalties.176

The trial court summarily dismissed plaintiffs’ claim for royalties and free gas.177 The plaintiffs then voluntarily withdrew their claim for trespass against Artex.178 On appeal, the Fifth District Court of Appeals was asked to address the only issue that was not held in defendants’ favor: Defendants’ Motion for Attorney’s Fees and Costs.179 In so doing, the court stated to find “frivolous conduct,” which is required to award court costs, attorney fees, and other reasonable expenses, it must conduct a legal analysis to determine whether “the conduct is not warranted under existing law and cannot be supported by a good-faith argument for an extension, modification, or reversal of existing law.”180

The court of appeals had little trouble finding the claim for royalties constituted frivolous conduct under its standard.181 Regarding the free gas claim, the court upheld the trial court’s denial of attorney fees since the plaintiffs had made a “plausible, good faith argument the right to free gas ran with the land.”182 Lastly, as to whether the trespass claim was frivolous, the court held that the “existence of the mineral estate itself creates the right to enter and extract minerals, however, such does not blanket the Appellant Artex with complete immunity from a claim of trespass . . . if it exceeded its rights under the Lease.”183 The court does not elaborate on the issue of how a lease between an operator and mineral owner would provide a standard of trespass to a surface owner with no privity through said lease.

176 Id.
177 Id.
178 Id. at *1.
179 Id. at 2.
180 Id. at *2.
181 Id.
182 Id. at *4.
183 Id.
§ 13.08. Pipeline Relocation (West Virginia).

[1] — *EQT Gathering Equity, LLC v. Fountain Place, LLC*.184

EQT Production Company (EQT Production) owned, and Gathering Equity, LLC (EQT Gathering) operated, a transmission facility located in Logan County, West Virginia that crossed certain property owned by Fountain Place, LLC (Fountain). EQT Production operated the pipeline pursuant to certain easement rights it had acquired as successor in interest to a 1944 lease.185 At trial, the jury found that Fountain and its predecessor had, on at least two occasions, deposited fill dirt on EQT Production’s pipeline.186 The jury further found that this fill dirt reasonably necessitated EQT Gathering to relocate the pipeline at a cost of $158,131.80 to prevent safety issues associated with a buried non-coated pipeline.187 By way of motion for judgment as a matter of law, Fountain raised various defenses to these jury findings as it sought to avoid reimbursing EQT Gathering for the relocation expense.188 The court gave the bulk of its attention to the two main thrusts of Fountain’s filing:

[First,] Plaintiffs failed to demonstrate that they relocated the pipeline due to either an express or implicit request from Fountain; and secondly, the plaintiffs’ claims were barred by the two-year statute of limitations period “where the jury had already found that the plaintiffs knew, or by reasonable diligence should have known, of Fountain’s fill by November 21, 2001.”189

In denying these two defenses, the court relied heavily on the analysis in the seminal case of *Quintain Development, LLC v. Columbia Natural Resources, Inc.*190 For instance, regarding the statute of limitations argument,

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185  *Id.*
186  *Id.* at 2.
187  *Id.*
188  *Id.*
189  *Id.* at *6.
Fountain asserted that plaintiffs’ claims were subject to the two-year limitation imposed on trespass and negligence actions.\textsuperscript{191} However, as shown in \textit{Quintain}, the obligations and duties associated with EQT Production’s pipeline arose not from tort but rather from the granting instrument, which here was a lease.\textsuperscript{192} Thus, the court held the applicable statute of limitations to be ten years since the cause of action was based on breach of the lease contract.\textsuperscript{193}

The court also relied on \textit{Quintain} to dispose of Fountain’s claim that it had not requested the pipeline relocation and therefore could not be liable for the associated relocation expense.\textsuperscript{194} As the jury had already determined, Fountain’s actions reasonably caused EQT Gathering to relocate the pipeline due to safety concerns.\textsuperscript{195} Under \textit{Quintain} and its progeny, the cost falls on the party that altered the status quo. Accordingly, because Fountain, by its actions, had disturbed the status quo, it was responsible for the relocation cost.\textsuperscript{196}

\textbf{§ 13.09. Judicial Construction of “Paying Quantities” (Pennsylvania).}

Landowners and producers across the Marcellus Shale region have engaged in disputes regarding the survival of antiquated leases. Through \textit{T.W. Phillips Gas and Oil Co. v. Jedlicka},\textsuperscript{197} the Supreme Court of Pennsylvania sought to clarify the proper test for evaluating whether an oil and gas lease has produced “in paying quantities.” Clearly, that court recognized the importance of establishing a benchmark by which interested parties in the industry could judge their leases.

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{191} \textit{Id.}
\item \textsuperscript{192} \textit{Id. at *7.}
\item \textsuperscript{193} \textit{Id.}
\item \textsuperscript{194} \textit{Id. at *8.}
\item \textsuperscript{195} \textit{Id.}
\item \textsuperscript{196} \textit{Id.}
\item \textsuperscript{197} \textit{T.W. Phillips Gas & Oil Co. v. Jedlicka}, 42 A.3d 261 (Pa. March 26, 2012).
\end{itemize}
\end{footnotesize}

Ann Jedlicka (Jedlicka) brought this declaratory action against T.W. Phillips Gas and Oil Co. (T.W. Phillips) seeking forfeiture of their lease.\(^\text{198}\) The subject lease had been entered into by Jedlicka’s predecessor in interest in 1928 and Jedlicka now claimed T.W. Phillips had failed to produce oil and gas in “paying quantities.”\(^\text{199}\) As with many older leases, the subject lease failed to define the term “paying quantities” as it appeared in the habendum clause.\(^\text{200}\)

In claiming forfeiture, Jedlicka basically argued that a $40 loss incurred by T.W. Phillips in 1959 terminated the lease for lack of production in “paying quantities.”\(^\text{201}\) The Pennsylvania Supreme Court, in affirming the trial court’s holding that “paying quantities” had in fact been produced over the term of the lease, relied heavily on its decisions in Young v. Forest Oil Co.\(^\text{202}\) and Colgan v. Forest Oil Co.\(^\text{203}\) The court cited these cases to establish that Pennsylvania employs a subjective test, including consideration of the producer’s good faith judgment, when determining whether an oil and gas lease had produced in “paying quantities.”\(^\text{204}\) The burden was on Jedlicka to show that T.W. Phillips was “not acting in good faith on [its] business judgment” to develop her property and operate the wells for revenue.\(^\text{205}\) Furthermore, Jedlicka was incorrect in arguing that a loss that occurred in a one-year time period, such as the loss incurred in 1959, was sufficient evidence to prove that T.W. Phillips had failed to produce in “paying quantities.”\(^\text{206}\) Instead, the court further elaborated on the details of this subjective standard when it stated, “determination of what constitutes a reasonable time period by which to evaluate whether a well has produced in paying quantities must be based on

\(^{198}\) Id.

\(^{199}\) Id. at 264.

\(^{200}\) Id at 261.

\(^{201}\) Id.

\(^{202}\) Young v. Forest Oil Co., 194 Pa. 243 (1899).

\(^{203}\) Colgan v. Forest Oil Co., 194 Pa. 234 (1899).

\(^{204}\) T.W. Phillips Gas and Oil Co., 42 A.3d 261 at 265.

\(^{205}\) Id.

\(^{206}\) Id.

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the circumstances of each individual case, and be driven by consideration of the good faith judgment of the operator.”

§ 13.10. Operations Necessary to Extend the Primary Term (Pennsylvania).

[1] — Burke v. Gapco Energy LLC.

Plaintiff-landowners brought suit against EQT Production Company (EQT) and its predecessor for breach of contract, trespass, and to quiet title to a 136-acre parcel of land located in Greene County, Pennsylvania. Plaintiffs’ lease with EQT had a primary term of three years, and would not expire provided that “Lessee is then engaged in operations thereon.” The lease defined “operations” to include a broad array of activities and provided the additional catch-all provision that “all work preparatory, incident or related to any such operation” would be considered an operation under the lease. Plaintiffs and defendants filed competing motions for summary judgment regarding whether defendants’ activities constituted “operations” under the lease.

Defendants argued that they had extended the primary term of the Lease when they performed certain preparatory work, including “clearing access roads, beginning tree removal between the Burke–2 and Burke–3 Wells, stacking trees along the roadway for the damages claim evaluation, and clearing, leveling and developing the well pad of the Burke–3 Well.” The defendants also cited their work on surveying, erosion and sediment control plans, and permit applications with the Pennsylvania Department of Environmental Protection. Plaintiffs, however, contended that none

207 Id.
209 Id.
210 Id.
211 Id. at *1.
212 Id.
213 Id. at *2.
214 Id. at 2.
of those acts were explicitly listed in the lease as “operations” that would extend the primary lease term.\textsuperscript{215}

The court, in its denial of both motions to dismiss, held that “there is a genuine issue of material fact with respect to the extent of the activities engaged in by [d]efendants . . . and whether plaintiffs’ version of facts, if proven, would constitute ‘operations,’ even under the broad terms of the lease.”\textsuperscript{216}

The parties are preparing for jury trial, which is scheduled to commence on October 22, 2012.\textsuperscript{217}

\section*{§ 13.11. Development of Oil and Gas Underlying a Conservation Easement (Pennsylvania).}

\textsuperscript{[1]} Stockport Mountain Corporation LLC \textit{v.} Norcross Wildlife Foundation, Inc.\textsuperscript{218}

The plaintiff-landowner’s predecessor in interest and defendant were parties to a conservation easement which empowered the defendant to enforce restrictions on a two thousand acre property.\textsuperscript{219} Five years after purchasing the property, plaintiff sought the concurrence of defendant in its plan to enter into a ten-year oil and gas lease for the property.\textsuperscript{220} The defendant, in claiming that natural gas drilling violated the conservation easement, refused to concur with plaintiff’s oil and gas lease plan. Plaintiff brought this declaratory judgment action seeking the court’s determination that the conservation easement permits surface extraction of natural gas.\textsuperscript{221}

The conservation easement provides for a series of land use patterns and contains certain prohibited uses, but fails to specifically prohibit oil and gas activities.\textsuperscript{222} Despite the lack of a specific prohibition, defendant filed a motion to dismiss alleging that the conservation easement “clearly

\begin{itemize}
\item \textsuperscript{215} Id.
\item \textsuperscript{216} Id. at *3.
\item \textsuperscript{217} Id.
\item \textsuperscript{219} Id.
\item \textsuperscript{220} Id. at 2.
\item \textsuperscript{221} Id.
\item \textsuperscript{222} Id.
\end{itemize}
and unambiguously” prohibits oil and gas development since drilling: i) constitutes prohibited industrial or commercial activity; ii) requires depositing chemicals on the property, which is expressly prohibited; iii) requires the prohibited construction of new roads and supporting structures; and iv) violates the purpose of the conservation easement. 223

Plaintiff survived defendant’s motion to dismiss by arguing the crucial provisions of the conservation easement were ambiguous.224 For example, plaintiff highlighted the conservation easement’s “express approval of many activities that are contrary to its purpose, such as allowing limited timbering, quarrying, ATV / snowmobile use and the construction of four residences.”225 In addition, regarding the prohibited release of chemicals during drilling and defendant’s other claims of disturbance, the court looked favorably upon plaintiff’s assertion that those activities would only occur below surface. The parties are now engaged in pretrial discovery.226

§ 13.12. Lease Contract Formation: Offer and Acceptance Subject to “Management Approval” (West Virginia).

A series of cases have arisen in northern West Virginia centered around the oil and gas leasing activities of Range Resources-Appalachia, LLC, Range Resources Corporation, and Duncan Land and Energy, Inc.227 These cases are concerned with what constitutes actual offer and acceptance in the context of oil and gas leases where producers have provided “Dear Property Owner” letters, entered bonus contracts with landowners, and allegedly made certain oral representations regarding leases. The following case of Backwater

223 Id. at 7.
224 Id. at 8.
225 Id. at *6.
226 Id.
Properties, LLC v. Range Resources–Appalachia, LLC is representative of this surge of cases in the area and exemplifies the potential pitfalls inherent in delayed leasing programs dependent upon “management approval.”

[1] — Backwater Properties, LLC v. Range Resources Appalachia

Plaintiffs-landowners alleged that the defendants operated a “bid rigging plan” to tie-up lucrative oil and gas leases in the Marcellus Shale and exclude competition. Beginning in 2008, defendants offered above-market leases and bonus contracts to landowners in the form of “Dear Property Owner” letters. These offer letters stipulated bonus payments would be “subject to a 180-day ‘approval period’ by management,” during which time Range would purportedly seek to confirm the landowner’s title. Plaintiffs alleged that Range landmen assured them that “management approval and confirmation of good title were ‘perfunctory,’ [and] ‘mere formalities’ . . . [and] landowners could ‘accept’ these ‘offers’ by signing the oil and gas leases and bonus contracts.” According to plaintiffs, Range surreptitiously used the approval period to monitor the “spot markets” for oil and gas and eventually returned the leases as void when oil and gas prices began to decline.

The defendants moved to dismiss plaintiffs’ complaint for failure to state a claim. The district court denied defendants’ motion to dismiss as to plaintiffs’ claims for breach of lease and bonus contracts, specific performance, fraud, interference with prospective contract, and unjust enrichment. The district court accepted defendants’ argument that the plaintiffs’ Sherman Antitrust claim must be dismissed because the complaint failed to allege the defendants were legally distinct entities seeking to impose an unreasonable restraint on trade. The parties are now engaged in pretrial discovery.

229 Id.
230 Id. at 1.
231 Id. at *1.
232 Id. at *1–*2.
233 Id.
234 Id. at *10.
235 Id. at *9–*10.
§ 13.13. County Clerk Recording of Oil and Gas Instruments.

An incidental but important issue arising in the hotbed counties of the Marcellus and Utica shale plays is the increasingly overwhelmed resources of county officials. These county officials are caught between the proverbial “rock and a hard place” with constitutional and statutory mandates to meet demand but a lack of corresponding funds to do so. Real estate clerks around the region may be struggling to keep up with the onslaught of the shale gas boom, but as the following case illustrates, the judicial system will have little sympathy for officials that overstep their authority in an effort to alleviate workload burdens.


This case arose in the context of a 30 percent increase in documentation submitted to the Wayne County, Pennsylvania Recorder of Deeds (Recorder) over a three-year period attributable to Marcellus Shale activities. On March 29, 2010, Chesapeake Appalachia, LLC-plaintiff submitted for the Recorder’s recording four multiple lease assignments containing a total of 211 leases. The Recorder, citing an inadequate computer system for cross-referencing and indexing each lessor, refused to record plaintiff’s “blanket” assignments because doing so would not provide constructive notice. The trial court granted plaintiff’s motion for summary judgment and directed the Recorder to “record all documents that are within the scope of Pennsylvania’s recording statutes, so long as they are properly acknowledged and the appropriate statutory fee has been paid.” On appeal, the Commonwealth Court upheld the trial court’s decision and further clarified that, under 21 P.S. Section 358(2), the Recorder failed to prove that the “parties” for purposes of indexing an assignment of lease would be anyone other than the assignor.

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237 *Id.* at 1279.
238 *Id.* at 1279.
239 *Id.*
240 *Id.* at 1280.
and assignee.\textsuperscript{241} Accordingly, the court held the Recorder had improperly exercised her discretion in refusing to record plaintiff’s assignments.\textsuperscript{242}


The Environmental Protection Agency (EPA) administers compliance under the Clean Water Act (CWA) to regulate, “among other things, ‘the discharge of any pollutant by any person,’ without a permit, into the ‘navigable waters,’ which the CWA defines as ‘the waters of the United States.’”\textsuperscript{243} Prior to the case of \textit{Sackett v. E.P.A.}, it was unclear whether EPA compliance orders under Section 309 of the CWA could be challenged under the Administrative Procedure Act (APA). The APA provides for judicial review of “final agency action for which there is no other adequate remedy in a court.”\textsuperscript{244} \textit{Sackett} will likely have far-reaching implications for EPA enforcement efforts under the CWA. As Justice Alito stated in his scathing concurrence, although Congress and the EPA have failed to adequately define the reach of the CWA as it applies to the “navigable waters,” this decision will at least allow property owners to challenge EPA jurisdictional determinations via the APA.\textsuperscript{245}

\textbf{[1] — \textit{Sackett v. E.P.A.}\textsuperscript{246}}

The Sacketts received an EPA compliance order related to their discharge of fill materials in the construction of a home on a residential lot.\textsuperscript{247} The EPA claimed the Sacketts’ home site contained “jurisdictional wetlands” due to its proximity to a lake and was therefore subject to permit approval prior to the “discharge of pollutants” on the property under the Clean Water Act.\textsuperscript{248} Among other things, the EPA compliance order required the Sacketts to “restore the [s]ite in accordance with [an EPA-created] Restoration Work

\begin{itemize}
\item \textsuperscript{241} \textit{Id.} at 1282.
\item \textsuperscript{242} \textit{Id.} at 1281-1282.
\item \textsuperscript{243} \textit{Sackett v. E.P.A.}, 132 S. Ct. 1367 (2012) (quoting 33 U.S.C. § 1311, 1344, 1362(7)).
\item \textsuperscript{244} 5 U.S.C. § 500 \textit{et seq.}
\item \textsuperscript{245} \textit{Sackett}, 132 S. Ct. at 1375 (Alito, J., concurring).
\item \textsuperscript{246} \textit{Id.} at 1367.
\item \textsuperscript{247} \textit{Id.}
\item \textsuperscript{248} \textit{Id.} at 1372.
\end{itemize}
Plan.” The EPA, through its CWA compliance order enforcement authority, may impose penalties of up to $75,000 per day per violation, including up to $37,500 per underlying violation, and an additional $37,500 for failure to follow a compliance order. After the EPA denied the Sacketts’ request for a hearing, the Sacketts brought this action under the APA seeking judicial review of the compliance order as a “final agency action for which there is no other adequate remedy in court.”

The district court in Idaho and the 9th Circuit both concluded the APA “precluded pre-enforcement judicial review of compliance orders.” The Supreme Court, however, noted the lack of an explicit prohibition in the CWA against pre-enforcement judicial review. Furthermore, the court determined the EPA’s compliance order represented a “final agency action” because it determined the rights and obligations of the Sacketts, imposed penalties, precluded alternative permitting provided by the Army Corps of Engineers, and was not subject to further agency review. With no other “adequate remedy” available to the Sacketts under the CWA, the court remanded the case for further proceedings on whether the Sacketts’ property was within the EPA’s jurisdiction.

§ 13.15. Lease Assignment and Forfeiture (West Virginia).


Plaintiffs entered into certain gas leases with Fortuna Energy Inc. (now known as Talisman Energy USA Inc.) and those leases were subsequently assigned between the other defendants. The leases contained the following paragraph 22 regarding assignment:

249 Id. at 1371.
250 Id. at 1369.
251 Id.
252 Id. at 1372.
253 Id. at 1372.
254 Id. at 1373.
255 Id.
If the interest of either Lessor or Lessee is assigned, and the right to assign in whole or in part is expressly permitted, all rights, duties and liabilities under this Lease shall enure to the benefit of and be binding on the assignee and the assignee’s respective heirs, executors, administrators, successors and assigns.\textsuperscript{257}

The plaintiffs claimed this clause authorized assignments only with the express permission of the lessor. In addition, because the leases had been assigned without authorization, plaintiffs also sought a declaration that the assignments were void and the leases are terminated.\textsuperscript{258} Defendants filed a motion to dismiss on these issues and the court dismissed in part and granted in part the defendants’ claims by this Order.\textsuperscript{259}

The court first gave attention to defendants’ claim that the assignment clause did not restrict assignment. The parties agreed that under West Virginia law, “unless there is some statutory prohibition or an express provision in the lease to the contrary, a lease on real property . . . is assignable.”\textsuperscript{260} However, Paragraph 22 was found to have multiple interpretations, which created an ambiguity as to its meaning. Applying a “fundamental rule of contract interpretation,” the court stated it must construe the ambiguity against Talisman Energy USA Inc. as the drafter of this language.\textsuperscript{261} Thus, regarding defendants’ motion to dismiss the claim that paragraph 22 expressly authorized assignment, the court could not at this time hold in favor of the defendants.\textsuperscript{262}

A second issue before the court was whether to dismiss plaintiffs’ claim for forfeiture.\textsuperscript{263} Here, the court reiterated that under West Virginia law:

[T]he right to forfeit must be clearly stated for in terms, else it does not exist . . . [and] breaches are usually compensable in damages, and, if a forfeiture has not been stipulated for, it is presumed that the

\textsuperscript{257} \textit{Id.} at *2.
\textsuperscript{258} \textit{Id.}
\textsuperscript{259} \textit{Id.} at *1–2.
\textsuperscript{260} \textit{Id.} at *2.
\textsuperscript{261} \textit{Id.} at *3.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
§ 13.16. Real Estate Commissions in Oil and Gas Leasing (Ohio).


Defendant and plaintiff entered into an oral agreement to have plaintiff identify landowners to defendant so that it could then negotiate to obtain their mineral rights.268 Plaintiff alleged that pursuant to that oral contract, defendant agreed to pay plaintiff from $50.00 to $200.00 per acre for the land identified if defendant obtained the mineral rights.269 Plaintiff alleged that he had identified at least 10,000 acres of land for which defendant had obtained the mineral rights and, based on the oral contract, was due at least $500,000 from defendant.270

Defendants filed a Motion for Judgment on the Pleadings with the thrust of their argument being that Ohio does “not permit a real estate broker to seek compensation for referring interests in real estate unless the broker is licensed at the time the referrals took place [under Ohio Rev. Code Section 4735.21].”271 Thus, according to the defendants’ argument, because the plaintiff did not have a real estate license at the time of the

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264 Id. at *4 (citations omitted).
265 Id. at 5.
266 Id.
268 Id.
269 Id. at *1.
270 Id.
271 Id.
referrals, plaintiff’s claims are barred. Plaintiff responded that his role in this referral arrangement with defendant was more similar to a “finder” in corporate acquisitions rather than as a real estate broker. Citing an Ohio “corporate finder” case in Legros v. Tarr, plaintiff sought to escape the application of Ohio Rev. Code Section 4735.21, which has been “strictly enforced against persons who, although not licensed by Ohio, have sought to recover brokerage commissions through litigation in Ohio.” The court rejected this defense, however, and clarified that Legros “involved the acquisition of business entities, not real estate transactions [as the leases constitute here].” In addition, the court found that under Ohio Rev. Code Section 4735.01(A) (7), plaintiff had “assisted in the procurement of prospects or negotiation of transactions designed to result in the sale or lease of real estate.” Accordingly, the court granted defendant’s motion for judgment on the pleadings because plaintiff was barred from obtaining compensation without a valid real estate license at the time of the referrals.

§ 13.17. Conclusion.

In summary, the Marcellus and Utica shale plays have given rise to a healthy variety of case law over this past year. Many of these decisions will provide further direction for regional stakeholders in their pursuit to capitalize on these shale plays. While the cases discussed above may provide a detailed look at the legal issues addressed by the courts in the Marcellus and Utica Shale states over the past year, these cases offer only a glimpse into how the body of jurisprudence is growing due to increased oil and gas activities in the area. No matter where you might fit within the shale play movement, you will likely be impacted by the associated increase in oil and gas litigation.

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272 Id.
273 Id.
275 Id. at *2–3 (citation omitted).
276 Id. at *3.
277 Id.
278 Id.