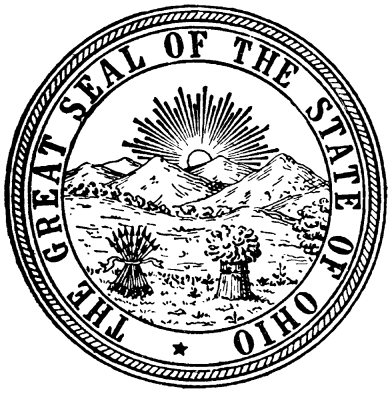

Ohio

By: Gregory W. Watts and Matthew W. Onest†

I. Mineral Ownership

This Section will discuss judicial decisions which seek to aid the determination of mineral rights ownership.

A. *Deed Interpretation*

As production of mineral reserves, particularly oil and gas, continues, Ohio courts continue to redefine what it means to own "minerals." In *Mid-Ohio Coal Co. v. Brown*, the Fifth District Court of Appeals, which oversees numerous counties, including Guernsey County, determined whether a coal company owned all minerals associated with a particular piece of real property or whether it only owned the coal.[1] The coal company claimed that it owned all of the subsurface rights, including oil and gas rights, pursuant to the following reservation in an 1882 deed:

> But reserving to said grantors their heirs and assigns all the surface of said land including stone and water privileges on or under the same exception [sic] stone coal. Provided that if said grantee should need any hard surface of said land for coal or other minerals there under it shall take and use what is necessary therefore . . .[2]

The appellate court held that the above-quoted language did not accept or reserve oil and gas, and the deed merely covered stone coal.[3] The appellate court noted that when the reserving deed is unambigu-

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1. Mid-Ohio Coal Co. v. Brown, 2018-Ohio-1934, 2018 WL 2254673.
2. *Id.* ¶ 15.
3. *Id.* ¶ 26.

ous, one cannot review subsequent deeds from the reserving deed for purposes of interpreting the original reserving deed.[4]

In *Freeport Lodge #415 Free & Accepted Masons of Ohio v. MC Mineral Co.*, the Fifth District Court of Appeals determined whether the appellant's claim for deed reformation was time-barred. In 1966, owners of 160.25 acres in Guernsey County conveyed the property to another party pursuant to an option agreement.[5] Under the option agreement, the grantors were supposed to reserve the oil and gas rights.[6] However, their deed failed to reserve the oil and gas rights.[7] Thereafter, the surface owners leased the property's oil and gas rights on three different occasions and subsequently, in 1994, conveyed the oil and gas rights to the appellant.[8] In 2015, the appellant brought suit against various parties, all of whom claimed to own the oil and gas rights or claimed to have working interests in the same land via an oil and gas lease, seeking to quiet title to the oil and gas rights.[9] The appellant's quiet title claim was based upon a theory of deed reformation.[10]

The court of appeals initially held and confirmed that a ten-year statute of limitations period applied to the appellant's claim for deed reformation.[11] The appellant argued that it had the benefit of the statute of limitations exception that is applicable to vendees of land contracts.[12] Appellant claimed that it was a vendee under the statute because it had purchased the property from the parties who should have reserved the oil and gas rights under the original option agreement.[13] First, the appellate court held that the appellant was not the vendee of the deed for the simple reason that it was not a party to that deed.[14] The appellate court further held that the appellant could not be the vendee, even if it could bootstrap its claim to the original surface owners, because those owners were not vendees in relation to the deed to be reformed, but were instead the vendors.[15] Thus, the appellant's claim for deed reformation was time-barred.

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4. *Id.* ¶ 30 ("The granting language of the deed is a clear and unambiguous conveyance of fee simple. The reservation language does not include gas and oil, so we are restricted to reviewing the language of the deed and may not resort to the extrinsic evidence promoted by appellants.")

5. Freeport Lodge #415 Free & Accepted Masons of Ohio v. MC Mineral Co., 2018-Ohio-3783, 2018 WL 4520018, at ¶ 2.

6. *Id.*

7. *Id.*

8. *Id.* ¶ 3.

9. *Id.*

10. *Id.* ¶¶ 3, 11.

11. *Id.* ¶ 8.

12. *Id.*, quoting OHIO REV. CODE ANN. § 2305.22 (LexisNexis 2017).

13. *Id.* ¶¶ 9–10.

14. *Id.* ¶ 11.

15. *Id.*

B. *The Ohio Marketable Title Act*

While no opinion and decision has yet been issued, it is important to briefly mention *Blackstone v. Moore*, a case before the Ohio Supreme Court involving the Ohio Marketable Title Act.[16] In *Blackstone*, the following propositions of law are before the Ohio Supreme Court: (1) "The specific identification contemplated in R.C. 5301.49(A) requires sufficient reference that a title examiner may locate the prior conveyance by going directly to the identified conveyance record in the recorder's office without checking conveyance indexes;" and (2) "The exception to a person's marketable record title under R.C. 5301.49(A) does not include interests and defects, created by a recorded title transaction prior to the root of title, of which the person has actual knowledge, if the reference to such recorded title transaction is general rather than specific."[17] Thus, the Ohio Supreme Court will likely issue an opinion in the near term that provides specific guidance on how to apply the Ohio Marketable Title Act to severed mineral interests.

II. Mineral Development

This Section will discuss judicial decisions, legislation, and administrative law changes relating to mineral development.

A. *Oil and Gas Lease Issues*

1. Implied Covenants

Ohio law reads several implied covenants into oil and gas leases unless they are expressly waived by the parties.[18] In *Alford v. Collins-McGregor Operating Co.*, the Ohio Supreme Court had to decide whether Ohio law recognizes an implied covenant to explore further separate and apart from the implied covenant of reasonable development.[19] The landowners-lessors in *Alford* owned seventy-four acres subject to an oil and gas lease.[20] The lease had a primary term of one year and a secondary term measured by the production of oil or gas.[21] The lease did not disclaim the implied covenants.[22]

In 1981, the lessees drilled one well that consistently produced oil and gas from the Gordon Sand formation, which was a shallow geo-

16. Blackstone v. Moore, 152 Ohio St. 3d 1406, 2018-Ohio-723, 92 N.E.3d 878.

17. *See* Brief of Appellants at 3, 22, Blackstone v. Moore, 152 Ohio St. 3d 1406, 2018-Ohio-723, 92 N.E.3d 878 (No. 2017-1639).

18. *See* State *ex rel.* Claugus Family Farm, L.P. v. Seventh Dist. Court of Appeals, 145 Ohio St. 3d 180, 2016-Ohio-178, 47 N.E.3d 836, at 843.

19. *See* Alford v. Collins-McGregor Operating Co., 152 Ohio St. 3d 303, 2018-Ohio-8, 95 N.E.3d 382.

20. *Id*. ¶ 3.

21. *Id*. ¶ 4.

22. *Id*.

logical formation.[23] The landowners-lessors brought suit arguing, in part, that the lease had expired or terminated as to formations below the Gordon Sand formation due to the lessee's breach of the implied covenant to further explore.[24] Thus, the landowners-lessors were arguing for a partial forfeiture of the leasehold.

The Ohio Supreme Court acknowledged that oil and gas leases are ordinarily subject to an implied covenant to reasonably develop the land (unless the parties contract otherwise or waive the implied covenant).[25] In following prior precedent from Texas and Oklahoma, the Court agreed with the lessee that although the lessors have an interest in development of the land, that interest is sufficiently protected by the implied covenant of reasonable development and, therefore, rejected any implied covenant to explore further.[26]

Although the Court rejected the implied covenant to explore further (and therefore lessors' effort at a horizontal forfeiture of the lease in this case), the Court specifically left open the possibility of horizontal forfeiture under the implied covenant of reasonable development.[27] In fact, the Court noted that the implied covenant was well suited to address the primary driver of the lessors' interests, namely the emergence of new drilling technologies permitting production from deep strata that could not be obtained before.[28] However, because the lessor raised only the implied covenant of further development on appeal, the Ohio Supreme Court did not express any opinion as to how a prudent operator would or would not employ new deep-drilling technologies.[29] The Court did note that the implied covenant of reasonable development would focus on all facts and circumstances relevant to development, including what is known about the market; the geology and adjoining activity; and the interests of both the lessor and lessee.[30] Thus, while *Alford* did not recognize an implied covenant to explore further, the Court does not appear to foreclose a lessor from seeking partial forfeiture of a lease as to deeper formations under the implied covenant of reasonable development.

2. Notice of Breach Provisions

In *Cunningham Prop. Mgmt. Tr. v. Ascent Resources-Utica, LLC*, the plaintiffs brought suit alleging claims that relate to the underpayment of royalties under two leases, which predate the Utica shale boom.[31] Both leases contained identical notice of breach provisions:

23. *Id.* ¶ 5.
24. *Id.* ¶¶ 6–7.
25. *Id.* ¶¶ 12–13.
26. *Id.* ¶ 17.
27. *Id.* ¶¶ 22, 25.
28. *Id.* ¶ 24.
29. *Id.*
30. *Id.* ¶ 23.
31. 4277195 (S.D. Ohio Sept. 25, 2017).

> In the event Lessor considers that Lessee has not complied with all its obligations hereunder, both express and implied, Lessor shall notify Lessee in writing setting out specifically in what respects Lessee has breached this contract, Lessee shall then have thirty (30) days after receipt of said notice within which to meet or commence to meet all or any part of the breaches alleged by Lessor. The service of said notice shall be precedent to the bringing of any action by Lessor on said lease for any cause, and no such action shall be brought until the lapse of thirty (30) days after service of such notice on Lessee.[32]

The plaintiff claimed that its royalties were subjected to excessive and improper deductions for post-production costs.[33] The plaintiff alleged that its attorney sent a letter to Ascent-Resources Utica, which satisfied the notice provision.[34] The parties had exchanged several communications, through counsel after that initial letter.[35]

Ultimately, the court held that the letters from plaintiff's counsel did not satisfy the notice provision. First, the court held that the letter "did not offer any specific explanation of ARU's purported breaches."[36] The initial letter failed to even allege that a breach had occurred.[37] The second letter from plaintiff's counsel likewise failed to allege any specific breaches by the lessee.[38] And despite the second letter indicating that the plaintiff was preparing a lawsuit, the court could not turn the letter into a notice under the specific provision of the lease—"[b]ut given Cunningham's obligation to set out specifically how ARU breached the leases, the Court cannot reasonably infer that Cunningham complied with the leases' notice requirement."[39] Interestingly, the court did not dismiss the lawsuit, but merely stayed the lawsuit to permit the plaintiff to serve a proper notice and to permit the parties to engage in meaningless pre-suit discussions in hope of resolving the dispute. Thus, the lessor lived to fight another day.[40]

3. Lessor Royalties

A common area of dispute between lessors and lessees involves the payment of royalties, specifically whether the lessees are miscalculating the lessors' royalties. One issue which underpins these disputes is whether post-production costs, such as costs for gathering, transportation, and processing, may be deducted from the lessors' royalties.

32. *Id.* *1.
33. *Id.* *2.
34. *Id.* *3.
35. *Id.*
36. *Id.* *7–10.
37. *Id.* *7.
38. *Id.*
39. *Id.* *8.
40. *Id.* *11.

In *Lutz v. Chesapeake Appalachia, LLC*, the United States District Court for the Northern District of Ohio decided numerous issues relating to the calculation of lessors' royalties.[41] *Lutz* is a putative class action case brought on behalf of numerous landowners-lessors with leases with Chesapeake Appalachia, LLC.[42] The district court, during a previous summary judgment proceeding, certified a question of undecided state law to the Ohio Supreme Court.[43] Ohio Supreme Court Practice Rule 9.01 provides:

> The Supreme Court may answer a question of law certified to it by a court of the United States. This rule is invoked if the certifying court, in a proceeding before it, issues a certification order finding there is a question of Ohio law that may be determinative of the proceeding and for which there is no controlling precedent in the decisions of this Supreme Court.

The *Lutz* court previously certified the following question to the Ohio Supreme Court: "Does Ohio follow the 'at the well' rule (which permits the deduction of post-production costs) or does it follow some version of the 'marketable product' rule (which limits the deduction of post-production costs under certain circumstances)?"[44] Ultimately, the Ohio Supreme Court refused to answer the question as a general, statewide rule and instead held that each oil and gas lease must be interpreted on its own.[45]

Without any direct guidance as the interpretation of the leases' royalty provisions, the district court decided, on October 25, 2017, that Ohio courts would subject the following royalty provision to the "at the well" rule:

> The royalties to be paid by Lessee are * * * (b) on gas, including casing head gas or other gaseous substance, produced and sold or used off the premises or for the extraction of gasoline or other product therefrom, the market value at the well of one-eighth of the gas so sold or used, provided that on gas sold at the wells the royalty shall be one-eighth of the amount realized from such sale.[46]

The court supported that decision by focusing on the location where purchasers determine the gas's value.[47] The court stated: "Here, a close reading of the royalty provision, in light of Ohio's contract law, leads to the conclusion that the parties' intent was that the location for valuing the gas for purposes of computing the royalty was 'at the

41. *See* No. 4:09-CV-2256, 2017 WL 4810703 (N.D. Ohio Oct. 25, 2017).
42. *Id*. *1.
43. *Id*. *2.
44. *Id*. *3.
45. Lutz v. Chesapeake Appalachia, L.L.C., 148 Ohio St. 3d 524, 2016-Ohio-7549, 71 N.E.3d 1010, at ¶¶ 10–11.
46. Lutz v. Chesapeake Appalachia, L.L.C., 2017 WL 4810703, at *4 (N.D. Ohio Oct. 25, 2017).
47. *Id*. *7.

well.'"[48] Basing its decision on that contract interpretation, the court granted the lessee's motion for summary judgment.

The *Lutz* court also held that a lessee is not required to pay royalties on the actual production volumes but must pay royalties on the volumes actually sold.[49] This holding relates to issues surrounding line loss, which occurs when gas from the production stream is lost between the wellhead and the point of sale. In declining to adopt the lessors' position, the district court focused on the fact that the lessors failed to rebut the lessees' position with evidence or any legal authority.[50]

The *Lutz* court also examined the application of the fraudulent concealment rule to extend the lessors' claims for royalties. Under Ohio law, a lessor must bring its claim for wrongful payment of royalties within four years from when the cause accrues.[51] However, the lessor may have the ability to seek royalties for periods prior to four years before a lawsuit is filed if the lessor can show fraudulent concealment by the lessee.[52] The *Lutz* court rejected the lessors' fraudulent concealment because the lessors failed to exercise due diligence:

> But, at a minimum, if plaintiffs expect to toll the statute of limitations, due diligence requires that they had checked. All they needed to do was access the TCO Index and compare the price displayed on their check stubs to the index price. They admittedly never did so. Although plaintiffs were entitled to rely on defendant's accuracy in paying their royalties, they cannot say (for purposes of belatedly tolling the statute of limitations) that the information supplied was inadequate to allow them to protect their rights. All that can be concluded from this record is that the information was unverified by plaintiffs, not that it was unverifiable.[53]

Thus, in order to toll the four-year statute of limitations period, a plaintiff-lessor must show that it performed an investigation into its royalties; the lessee had fraudulently concealed crucial information; and but for the concealment, the fraud would have been discovered during the plaintiff's investigation.[54]

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48. *Id.* *8.

49. *Id.* *9.

50. *Id.*

51. OHIO REV. CODE ANN. §§ 1302.98, 2305.041 (LexisNexis 2017).

52. *Lutz*, 2017 WL 4810703, at *9.

53. *Id.* *11 (emphasis omitted).

54. *Id.* ("Although the allegations of the complaint were ruled sufficient by the Sixth Circuit at the motion to dismiss stage of the proceedings, the court only directed that plaintiffs should be allowed to proceed because 'there is "some question as to the depth and scope of [the plaintiffs'] investigation[.]"' . . . This Court now has the indisputable answer to that question: the plaintiffs did nothing to investigate. They did not consider any information on the check stubs except the amount of royalties they were receiving.").

4. Paying Quantities

Moving beyond issues surrounding the length of an oil and gas lease's primary term, the law governing *paying quantities* under a lease's secondary term was further refined in 2018. The Seventh District Court of Appeals, which oversees the majority of Ohio's counties within the Utica Shale play, is the most active on this issue and has made these cases very difficult for the lessor.

In *Burkhart v. Miley*, the Seventh District Court of Appeals reaffirmed that the party challenging a lease's efficacy has the burden of proof to show insufficient paying quantities to support a mineral lease.[55] The appellate court also examined specific issues relating to the paying quantities analysis. For instance, the court reaffirmed its prior holding that a lessee's failure to file production reports with the Ohio Department of Natural Resources, which Ohio's statutes mandate, does "not add to the determination of whether a well is producing."[56] The court also held that tax returns showing a financial loss are not evidence of a lack of paying quantities if they do not relate to the specific well or wells at issue.[57] Furthermore, the fact that the lessee has a financial incentive for holding a lease, and therefore may claim profits where none exist, is not relevant to paying quantities.[58] Finally, the court said that royalty payments can be evidence of paying quantities but are not necessarily conclusive.[59]

In *Hogue v. Whitacre*, Donald Hogue was the owner of a 78.5-acre tract of land that was subject to a 2006 oil and gas lease.[60] Said lease provided for a primary term of one year and a secondary term for "as much longer as oil or gas is found in paying quantities thereon."[61] In 2006, Whiteacre Enterprises drilled a single well on a property and remained in production from 2006 to 2013.[62] A third-party's faulty compression station caused production to halt from January 2014 through November 2015, at which point production resumed at its normal levels.[63] Production records show that Hogue profited from 2006-2013, lost in 2014 and 2015, and profited in its first two quarters after the construction was completed.[64] Hogue filed a complaint alleg-

55. Burkhart v. Miley, 2017-Ohio-9006, 101 N.E.3d 563, at ¶ 56, *appeal not allowed*, 152 Ohio St. 3d 1446, 2018-Ohio-1600, 96 N.E.3d 300.

56. *Id*. ¶ 48 (citing Burkhart Family Tr. v. Antero Res. Corp., 2016-Ohio-4817, 68 N.E.3d 142, *appeal not allowed*, 147 Ohio St. 3d 1437, 2016-Ohio-7677, 63 N.E.3d 156).

57. *See Burkhart*, 2017-Ohio-9006, at ¶ 46.

58. *Id*. ¶ 52.

59. *Id*. ¶ 55 (citing RHDK Oil & Gas, LLC v. Dye, 2016-Ohio-4654, at ¶ 30).

60. Hogue v. Whitacre, 2017-Ohio-9377, 103 N.E.3d 314, at ¶ 2, *appeal not allowed*, 152 Ohio St.3d 1480, 2018-Ohio-1990, 98 N.E.3d 294.

61. *Id*. ¶ 19.

62. *Id*. ¶¶ 2, 5.

63. *Id*. ¶ 43.

64. *Id*. ¶ 5.

ing that the lease terminated under its terms because of insufficient production in 2014 and 2015.[65]

In denying Hogue's claims and affirming the trial court, the Seventh District, apparently for the first time, distinguished between direct and indirect operating expenses, stating that direct operating expenses related to the well at issue can be the subject of a payable-quantities analysis, but its indirect expenses cannot.[66] The court provided specific examples of direct expenses that can be considered, including landowner royalties, gas severance taxes, and well maintenance expenses.[67] Similarly, the court provided specific examples of indirect expenses that cannot be considered, including office payroll and lease expenses, software, postage, professional services, building utilities, clothing, vehicles, and machinery.[68]

The appellants also argued that the appellees' investors were not paid in the years 2013, 2014, and 2015.[69] According to the appellants, the failure to pay investors was evidence that the well was not profitable.[70] However, the investor agreement was not part of the record on appeal, so the court held that it could not determine how and when the investors were to be paid pursuant to that agreement and, therefore, found the argument to be unsupported.[71]

The *Hogue* court also analyzed whether the halt in production from January 2014 through November 2015 was sufficiently long enough to terminate the lease under the habendum clause.[72] The court determined that said period was a mere temporary cessation in production that was insufficient to cause a termination of the lease.[73] In reaching this conclusion, the court cited that the halt in production was relatively short by pointing out that no appellate court in Ohio has deemed a lease forfeited based on fewer than two years of nonproduction; that the cessation of production was not Whitacre's fault, but rather due to an issue with a third-party's machinery; and that once the machinery was fixed, production immediately returned to pre-cessation levels.[74]

In *Kraynak v. Whitacre*, an operator transferred $300 per month to related company as "operating expenses" for the well.[75] In the years 2012-2015, the operator concluded that the well was profitable but did

65. *Id.* ¶ 6.
66. *Id.* ¶ 31.
67. *Id.*
68. *Id.* ¶ 24.
69. *Id.* ¶ 39.
70. *Id.*
71. *Id.*
72. *Id.* ¶¶ 41–51.
73. *Id.* ¶ 51.
74. *Id.* ¶ 49–50.
75. Kraynak v. Whiteacre, 2018-Ohio-2784, 2018 WL 3414258, at ¶ 10.

not include the $300 per month transfers.[76] The operator claimed that the $300 per month transfers were "blanket expenses that had no impact on [the] well's ability to produce."[77] Including the $300 per month transfers as expenses would have resulted in loss in 2012–2014.[78]

The Seventh District Court of Appeals held that it was the Lessee's discretion to determine paying quantities, but that determination must be done in good faith.[79] The operator's testimony was found by the trial court to be "self-serving, irrelevant, and not persuasive."[80] While the operator claimed that the lessor did not meet its burden to prove that the payments were "direct costs," the court found that the evidence was ambiguous and that the trial court's decision that the payments were direct costs, which was rendered after a trial, supported the evidence of record.[81]

5. Unitization, Pooling, and Consolidation

In *State ex rel. Kerns v. Simmers*, several landowners filed a petition for a writ of mandamus with the Ohio Supreme Court, seeking an order to require the Ohio Department of Natural Resources to institute condemnation proceedings in response to a forced unitization order.[82] The lessee sought a unitization order under the statute, which permits the Chief of the Ohio Department of Natural Resources to issue "an order providing for the unit operation of a pool or part thereof if the chief finds that such operation is reasonably necessary to increase substantially the ultimate recovery of oil and gas, and the value of the estimated additional recovery of oil or gas exceeds the estimated additional cost incident to conducting the operation."[83] The landowners, who were unleased mineral owners subject to the unitization order, appealed the order to the Ohio Oil and Gas Commission, but the Commission dismissed the appeal on grounds "that it did not have jurisdiction to determine the constitutionality of the order or of R.C. 1509.28."[84] The landowners did not appeal that dismissal to the Franklin County Court of Common Pleas, which is specifically provided for and required under Ohio law.[85]

The Ohio Supreme Court refused to examine whether a R.C. 1509.28 unitization order constitutes an unlawful taking as to unleased

76. *Id.* ¶ 7.
77. *Id.* ¶ 9.
78. *Id.* ¶ 10.
79. *Id.* ¶ 16.
80. *Id.* ¶ 19.
81. *Id.* ¶ 24.
82. State ex rel. Kerns v. Simmers, 153 Ohio St. 3d 103, 2018-Ohio-256, 101 N.E.3d 430.
83. *Id.* ¶¶ 2–3; OHIO REV. CODE ANN. § 1509.28 (West 2015).
84. *Id.* ¶ 3.
85. *Id.* ¶ 4–5.

mineral rights. The Ohio Supreme Court dismissed the mandamus action because the landowners failed to exhaust their appeals.[86] A writ of mandamus requires a petitioner to demonstrate that he or she has "no plain and adequate legal remedy."[87] Typically, the appellate process requires an appeal to the Ohio Oil and Gas Commission and then to the Franklin County Common Pleas Court. The Ohio Supreme Court held that the appellate process provides a complete remedy because the landowner could raise and develop an argument relating to the constitutionality of the unitization order, including a claim for compensation for a taking, with the common pleas court.[88] This appeals process was also a speedy remedy because there were no unique delays and because R.C. 1509.37 appeals must be given preference over all other pending civil cases.[89] Based on these findings, the Ohio Supreme Court denied the petitioners' writ.

In what amounts to a companion case to *Kerns*, *American Energy-Utica, LLC v. Fuller* held that a lessee breached a unitization prohibition lease clause when the lessee used the forced unitization or pooling statutory procedures.[90] In *Fuller*, the lease at issue contained a handwritten amendment providing "UNITIZATION BY WRITTEN AGREEMENT ONLY!"[91] Only one shallow-producing oil and gas well was drilled and was producing on the particular leasehold.[92]

In 2013, American Energy-Utica, LLC, now known as Ascent Resources, acquired the deep rights for the lease.[93] In 2015, Ascent Resources filed a lawsuit against the lessor in anticipation of deep rights exploration, seeking access to the leasehold for purposes of geophysical testing.[94] The lessor countersued and claimed that the lease did not give the lessee the right to produce natural gas liquids.[95] Ultimately, Ascent Resources and the lessor settled Ascent's claim for access to perform geophysical seismic testing.[96] However, the month after that settlement, the lessor received notice that Ascent Resources had filed an application for forced pooling under R.C. 1509.28.[97] The lessor never gave his consent for unitizing the leasehold, and thereafter, he amended his counterclaim seeking to block the unitization and seeking damages for breach of contract.[98]

86. *Id.* ¶¶ 6–14.
87. *Id.* ¶ 5 (citing State ex rel. Berger v. McMonagle, 6 Ohio St. 3d 28, 29, 451 N.E.2d 225 (1983)).
88. *Id.* ¶ 13.
89. *Id.* ¶ 14.
90. Am. Energy-Utica, LLC v. Fuller, 2018-Ohio-3250, 2018 WL 3868119, at ¶ 40.
91. *Id.* ¶ 7.
92. *Id.* ¶ 9.
93. *Id.* ¶ 10.
94. *Id.* ¶ 12.
95. *Id.* ¶ 13.
96. *Id.* ¶ 14.
97. *Id.* ¶ 15.
98. *Id.* ¶¶ 16–18.

The Fifth District Court of Appeals agreed with the trial court when it stated that R.C. 1509.28 permits the unitization of a lease with a unitization prohibition clause.[99] However, the appellate court held that a lessee could breach a unitization prohibition provision when it uses the provision of R.C. 1509.28.[100] In deciding that Ascent Resources had breached the lease by using R.C. 1509.28, the court said:

> In applying the above holding to the case before us, we find that Appellees' use of the application procedure under R.C. 1509.28, without Fuller's written agreement, was "used to retroactively impair the obligation of the contract" set forth in the Lease. We therefore find that such constituted a breach of the lease and hereby remand this matter back to the trial court to make a determination of the appropriate remedy.[101]

Based on their research, the Authors note that R.C. 1509.28 was enacted in the 1960s in a form that is substantially similar to its current form. Thus, it does not appear that the statute's *enactment* retroactively impaired the lease; but instead, is the lessee's *application of the statute to an existing lease* retroactively impaired the existing lease.

6. Statute of Limitations Period for Lease Expiration Claims

Once an oil and gas lease expires by its own terms, one must determine if and when a lessor must bring a quiet title claim seeking relief based upon the expiration. In *Browne v. Artex Oil Co.*, there was little doubt that the lease expired sometime prior to 1999.[102] The issue was whether the lessor's quiet title claim, which sought to clear title to the leasehold if the lease had expired, was time-barred.[103]

The court of appeals determined that such a claim related to the terms and conditions of an oil and gas lease and, thus, was subject to the general statute of limitations relating to breach of contract.[104] The lessor could not prove that the lease had expired based on the then-existing fifteen-year statute of limitations applicable to breach of written contract claims.[105] In adopting the statute of limitations for breach of contract, the court of appeals ignored the separate statute of limitations period specifically covering quiet title claims. The statute of limitations for quiet title claims is usually twenty-one years, unless the person entitled to bring the action has a disability like unsound mind or minority, that extends the time period to within ten years after the

99. *Id.* ¶ 37.
100. *Id.*
101. *Id.* ¶ 40.
102. Browne v. Artex Oil Co., 2018-Ohio-3746, 2018 WL 4471737.
103. *Id.* ¶ 19.
104. *Id.* ¶¶ 22–24.
105. *Id.* ¶ 20. It should be noted here that Ohio recently changed the statute of limitations for breach of written contracts to eight years. That amendment was made effective September 28, 2012, and neither party in *Browne* argued for the use of the shorter period.

removal of the disability.[106] The Authors believe that this issue needs clarification from the Ohio Supreme Court given the plain language of R.C. 2305.04 and given the conflicting authority on this issue.[107]

7. Issues Relating to Lease Acquisition

In *Dundics v. Eric Petroleum Corporation*, the Ohio Supreme Court found that any person who seeks to acquire oil and gas leases on behalf of another person must be a licensed real estate broker and, if unlicensed, that person is not entitled to a real estate commission under R.C. 4735.21.[108]

B. *Plugging of Orphan Wells*

The Ohio State Legislature recently amended Ohio's statutory scheme relating to orphan oil and gas wells, which are wells that have become idle and forgotten by their operators.[109] A landowner who discovers an idle and orphaned well may report the well to the Ohio Department of Natural Resources.[110] The Chief of the Ohio Department of Natural Resources must have the well inspected within thirty days from the landowner's report.[111] The Chief must also create a matrix of all idle and orphaned wells.[112] The recent changes to the law increased the percentage of revenue credited to the Oil and Gas Well Fund that the Chief must spend to plug these types of wells between 14% to 30%.[113] The changes also increased the FY 2019 appropriation for plugging of oil and gas wells between $9 million–$15 million. The changes also amended the notice procedure that the Chief must follow prior to plugging an idle and orphan well, including shortening the length of time to remove the equipment from the leasehold before it is forfeited to the state from sixty down to thirty days.[114] Finally, the changes implemented new and more extensive reporting requirements for the Chief relating to idle and orphan wells.[115]

III. The Ohio Oil and Gas Commission

Finally, the Ohio Oil and Gas Commission, which is the first body to hear appeals of the orders from the Chief of the Ohio Department of Natural Resources, proposed to make changes to its administrative

106. Ohio Rev. Code Ann. § 2305.04 (2017 & Supp. 2018).
107. *See* Rudolph v. Viking Int'l Res. Co., 2017-Ohio-7369, 84 N.E.3d 1066, at ¶¶ 36–46.
108. Dundics v. Eric Petroleum Corp., 2018-Ohio-3826, 2018 WL 4627711, at ¶ 15.
109. *See* Ohio Rev. Code Ann. § 1509.071 (West 2018).
110. § 1509.071(C)(1).
111. § 1509.071(C)(2).
112. § 1509.071(C)(3).
113. § 1509.071(B).
114. § 1509.071(D)(3).
115. § 1509.071(J).

rules. One such proposed change would permit the commission to permit a party or its counsel to appear by telephone when the commission determines it is necessary and appropriate.[116] The proposed changes would also permit the commission to personally serve subpoenas to appear at hearings on employees of Ohio Department of Natural Resources who work in the Department's Columbus office.[117] The changes also provide that motions for recusal of a commission member shall be decided by the member against whom the motion to recuse is filed.[118]

116. OHIO DEPT. OF NAT. RESOURCES, O.A.C. 1509-1-04, PROPOSED AMENDMENTS TO OIL & GAS COMMISSION'S PROCEDURAL RULES, oilandgas.ohiodnr.gov/portals/oilgas/pdf/Proposed.Amendments.to.Rules.pdf [https://perma.cc/4J6C-PDBS] (last visited Oct. 28, 2018).

117. *Id.* 1509-1-18.

118. *Id.* 1509-1-19.