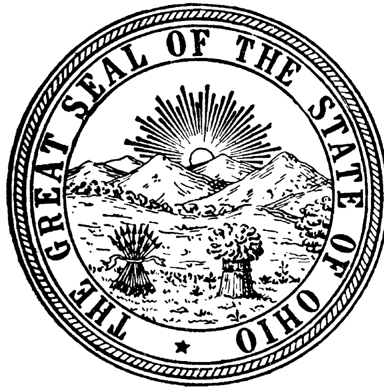

Ohio

Gregory W. Watts & Matthew W. Onest†

I. Mineral Ownership

This Section will discuss recent legislation and judicial decisions that seek to aid the determination of mineral rights ownership.

A. *What to Do if a Deed or Other Conveyance Instrument is Defective*

In 2017, the Ohio Legislature made significant changes to a statute that helps protect against defective conveyance instruments, including instruments containing defective notary acknowledgments. Section 5301.07 of the Ohio Revised Code governs several situations wherein a real property instrument[1] suffers from some sort of defect, including defective notary acknowledgments.

One such scenario arises when a person who acknowledges an instrument possesses an interest in the property.[2] Instead of voiding said instrument, the statute creates a rebuttable presumption that the instrument is enforceable against the person who signed it.[3] That presumption may thereafter be overcome "by clear and convincing evidence of fraud, undue influence, duress, forgery, incompetency, or incapacity."[4]

† Attorneys at the law firm of Krugliak, Wilkins, Griffiths & Dougherty Co., L.P.A.

1. Ohio Rev. Code Ann. § 5301.07 (LexisNexis 2017). The statute defines "real property instrument" as "a deed, mortgage, and installment contract, lease, memorandum of trust, power of attorney, or any instrument accepted by the county recorder under section 317.08 of the Revised Code." *Id.* § 5301.07(a).
2. § 5301.47(B)(1).
3. § 5301.47(B)(1)(a).
4. § 5301.47(B)(2).

The curative statute provides curative relief to other defective instruments so long as the defective instruments have been of record for more than four years.[5] Any instrument that is of record for more than four years is cured of any "defect in the making, execution, or acknowledgment of the instrument . . . ."[6] The statute provides a non-exhaustive list of "defects" to be cured: (1) an instrument that was not properly witnessed; (2) an instrument without a certificate of acknowledgment; (3) an instrument with a defective certificate of acknowledgment; and (4) an instrument in which the name of the person with an interest in the real property is not listed within the granting clause of the instrument, but is signed by that person without any limitation.[7]

B. *The Meaning of "Minerals"*

An issue that appears to perplex judges and attorneys is whether a severance or reservation of "minerals" includes oil or gas. There is often no question whether a party intended to reserve coal, as the pertinent language usually includes reference to coal and coal-related rights. But, the answer may not be as easy if the reservation states "coal and other minerals."

Recently, the Seventh District Court of Appeals of Ohio, which oversees most counties where the Utica Shale production has occurred historically and is still occurring,[8] decided that the term "minerals" within a reserving clause did not include oil or gas. In *George Sheba, et al. v. Patricia L. Kautz, et al.*,[9] the appellate court had to determine whether the trial court properly decided, on summary judgment, that the following reserving language did not include oil or gas:

> Said Day however expressly reserves to himself his heirs and assigns the sole and exclusive right to all the mineral & coal lying under the tract of land above described with the right & privilege to mine the same from his land on the East side thereof, excepting a parcel [11.5 poles wide on the South side] the said Anshutz and his heirs & assigns are to have in fee simple the entire mineral and coal privilege under the said last mentioned tract [re-describing the 11.5 pole strip] also the land above said coal & mineral—The meaning & interest of the above exception is to reserve the coal and mineral privileges under the whole of the above described tract of land, to the said Day his heirs & assigns excepting only [the 11.5 pole strip]; but the said Day his heirs & assigns are not to enter upon any part of the same to mine for said coal & mineral, but may enter [? 1] under only from his own land on the East and Northeast side thereof. To

5. § 5301.47(C).
6. *Id.*
7. *Id.*
8. The Seventh District Court of Appeals of Ohio oversees appeals from the trial and lower courts of the following counties: Belmont, Carroll, Columbiana, Harrison, Jefferson, Mahoning, Monroe and Noble.
9. Sheba v. Kautz, 7th Dist. Belmont No. 15 BE 0008, 2017-Ohio-7699.

> have and to hold the above tract of land with all the appurtenances thereof excepting as above exception * * *.

The appellate court, after examining the totality of the circumstances surrounding the creation of the reservation, found that the above-quoted language did not include oil or gas.[10]

In doing so, the court relied on the fact that the deed at issue pre-dated the deed analyzed by the Ohio Supreme Court in *Detlor v. Holland*,[11] the fact that the record contained no evidence that oil or gas production was occurring in the vicinity of the property at issue, and the lack of any easement or access language within the reservation that pertained specifically to oil or gas production.[12] What *Sheba* reinforces is the need, in some cases, to go beyond the plain language of a mineral reservation when deciding whether the reservation covers oil or gas. One must look at the time period during which the interest was created, focusing on whether oil or gas production was common in the area.

In *Sarchet v. Sarchet*, the Fifth District Court of Appeals was tasked with deciding whether timber is reserved through use of the term "minerals."[13] Harold E. Sarchet conveyed ninety-six acres of land to his son, James E. Sarchet.[14] In that deed, Harold reserved "all of the minerals and mineral rights in and underlying the above described premises."[15] The court of appeals, agreeing with the trial court, determined that timber rights are not included within the mineral estate. In denying the mineral owners attempt to expand the definition to include timber, the court of appeals held "that mineral rights include only those types of resources, such as oil and gas, rocks, ores and metals, or other raw materials found beneath the surface of the land."[16] The Court of Appeals relied upon the legal definition for "minerals" and "inorganic" when it concluded that trees were not "minerals."[17] The court reasoned that because "minerals" are inorganic and trees are organic, trees cannot fall within the term "minerals."[18]

An issue related to the definition of "minerals" is whether "rents and royalties" cover upfront signing bonuses for new oil and gas leases or amended oil and gas leases. The *Rocchus v. Thompson* decision is

10. *Id*. at ¶ 2.
11. 57 Ohio St. 492, 49 N.E. 690 (1898).
12. *Id.* at ¶¶ 31–32.
13. Sarchet v. Sarchet, 5th Dist. Guernsey No. 16 CA 29, 2017-Ohio-4262, at ¶ 27.
14. *Id.* at ¶ 5.
15. *Id.* at ¶ 6.
16. *Id.* at ¶ 27. While one could read this decision and analysis quite literally to exclude surface coal mining, the Court of Appeals likely would have found that the term "minerals" included coal of all kinds, including coal found on the "surface" of the land, as opposed to only the coal found beneath the surface of the land.
17. *Id.* at ¶¶ 28–29.
18. *Id.* at ¶ 30 ("As trees are plants, and plants are by definition inorganic [sic], trees cannot be included in the definition of minerals because minerals are composed of inorganic matter.").

relevant not only to energy law attorneys, but also domestic law attorneys.[19] This case arose from a divorce and split of marital real property and minerals. Within the final divorce decree, the domestic court determined that the husband was to receive the property and its mineral rights.[20] The court further found that the property was subject to current production of oil and gas and as a result, the husband and wife would each receive 50% of the "rentals and royalties received from said production . . . . "[21]

After a dispute relating to the husband's signing of an amended oil and gas lease and receipt of an additional bonus payment erupted in litigation, the Seventh District Court of Appeals affirmed the domestic court's ruling on a motion to enforce on two separate grounds. First, the appellate court upheld the domestic court's broad power to modify and interpret its own orders.[22] Furthermore, the appellate court held that the domestic court's decision that "rents and royalties" would include bonus payments conformed to oil and gas law.[23] The appellate court determined that "bonus payments have been considered advance royalties."[24] Because the ex-wife was entitled to rents and royalties, the domestic court's previous entry giving the ex-wife one-half (1/2) of all future rents and royalties would cover future bonus payments, even those on lease amendments.[25]

C. *The Ohio Dormant Mineral Act and the Ohio Marketable Title Act*

As Ohio was thrust into the unconventional oil and gas exploration boom, which came about after the discovery of the productive viability of the Utica Shale formation, Ohio practitioners were confronted with questions of who actually owned the oil and gas rights when those rights had been severed from the surface estate, but then left unused for decades. During the 2009 to 2016 time period, practitioners were tasked with using and litigating three different statutes.

The first, contained at R.C. 5301.56, and in effect between March 1989 and July 2006, is commonly referred to as the 1989 Ohio Dormant Mineral Act ("1989 ODMA").[26] The Ohio Supreme Court decided in September of 2016 that the 1989 ODMA did not automatically abandon dormant severed mineral interests and reunite

19. Rochus v. Thompson, 7th Dist. Noble No. 16 NO 0430, 2017-Ohio-4138.
20. *Id.* at ¶ 4.
21. *Id.*
22. *Id.* at ¶¶ 10–13.
23. *Id.* at ¶ 14.
24. *Id.* at ¶ 16 (citing Prichard v. Helvering, 310 U.S. 404, 409 (1940); Tex. Co. v. Parks, 247 S.W.2d 179, 184 (Tex. Civ. App. 1952).
25. *Id.* at ¶¶ 17–18.
26. 1989 Ohio Dormant Mineral Act, sec. 1, § 5301.56, 1989 Ohio Laws 981 (codified at OHIO REV. CODE ANN. §5301.56) (amended 2006).

them with the surface estate.[27] Prior to that decision, Ohio appellate courts fairly consistently held that the 1989 ODMA automatically abandoned and re-vested severed mineral interests that met the statute's abandonment requirements.

In the beginning of July 2006, a new version of R.C. 5301.56 was put into effect and is commonly referred to as the 2006 Ohio Dormant Mineral Act ("2006 ODMA").[28] The new statute contains an abandonment mechanism, whereby the surface owner is to serve the severed mineral holder or its successors or assigns with notice of the surface owner's intent to have a mineral interest abandoned and re-vested with the surface estate.[29] The mineral holder must file one of two documents within sixty days of being served with notice: (1) an affidavit identifying a "savings" event, identified within the statute at R.C. 5301.56(B), that occurred within the twenty years before the surface owner's notice or (2) a claim to preserve that states that the mineral holder does not intend to abandon his or her mineral interest.[30]

The third statute that practitioners have utilized to determine who owns severed mineral rights is the Ohio Marketable Title Act, contained at R.C. 5301.47, *et seq.*

i. The 1989 ODMA

As previously discussed, prior to September of 2016, Ohio appellate courts were in agreement that the 1989 ODMA automatically abandoned severed mineral interests and re-vested the same in the respective surface estates if the severed mineral interests were not subject to one of the statute's enumerated savings events during an applicable twenty-year period.[31] However, in September of 2016, the Ohio Supreme Court reversed the consensus position and instead, held that the 1989 ODMA was not an automatic statute of abandonment and re-vesting.[32] In *Corban*, the Ohio Supreme Court, after comparing the 1989 ODMA's use of the phrase "deemed abandoned and vested" with the Ohio Marketable Act's use of the word "extinguished," stated:

> In accord with this analysis, we conclude that the 1989 law was not self-executing and did not automatically transfer ownership of dormant mineral rights by operation of law. Rather, a surface holder seeking to merge those rights with the surface estate under the 1989 law was required to commence a quiet title action seeking a decree that the dormant mineral interest was deemed abandoned.[33]

27. Corban v. Chesapeake Expl., LLC, 149 Ohio St. 3d 512, 2016-Ohio-5796, 76 N.E.3d 1089, ¶ 26.
28. Ohio Rev. Code Ann. § 5301.56 (LexisNexis 2016).
29. § 5301.56(E).
30. § 5301.56(H).
31. § 5301.56(B), 1989 Ohio Laws at 986.
32. *Corban*, 149 Ohio St. 3d at 519, 2016-Ohio-5796, 76 N.E.3d 1089, at ¶ 28.
33. *Id.*

The Supreme Court's decision shaped the litigation landscape relating to the 1989 ODMA. It affected all cases then pending before any Ohio court and thereby resulted in the termination of most of that litigation. However, one court has made clear that mineral holders who previously lost ownership of severed mineral interests as a result of trial courts' pre-*Corban* application of the 1989 ODMA, but had failed to appeal those decisions, would be bound by the decisions.[34]

One Ohio trial court has taken *Corban*'s discussion of a conclusive presumption of abandonment and applied that same to the 2006 ODMA, meaning the court has decided that the 2006 ODMA contains the same judicial abandonment mechanism as contained within the 1989 ODMA. In *Ritchie v. Heinlen*, the Monroe County Court of Common Pleas held that a severed mineral interest is subject to a conclusive presumption of abandonment. Thus, the severed mineral interest is subject to judicial abandonment under the 2006 DMA upon the filing of the affidavit of abandonment provided under R.C. 5301.56(E)(2) and if there is no preserving event in the 20 years before notice was served on the mineral holders under the statute.[35] This means that the filing of a claim to preserve or affidavit identifying a preserving event by a mineral holder would preserve the interest only from statutory abandonment, leaving open the possibility of judicial abandonment. However, it appears that the *Ritchie* holding and analysis may have been implicitly overruled by the Seventh District Court of Appeals.[36]

ii. The 2006 ODMA

An important concept, much like the one previously discussed relating to whether "minerals" includes oil or gas, that has come up during application of the 2006 ODMA, is whether a "mineral interest," as defined within the statute, covers severed royalty interests, meaning severance of perpetual royalties for future oil and gas production. In 2017, the Seventh District Court of Appeals of Ohio answered that question in the affirmative. In *DeVitis v. Draper*, the appellate court had to decide whether a reservation of "one-half (1/2) (being the one-sixteenth) of the royalty oil and gas in and under the above premises" was a "mineral interest" subject to abandonment under the 2006 ODMA.[37]

The appellate court acknowledged that no other Ohio court had ever decided this issue.[38] A "mineral interest" subject to abandonment under the 2006 ODMA was, and is, defined as "a fee interest in

34. Jeffrey D. Pike & Mindi A. Pike Tr. v. Piatt, 7th Dist. Monroe No. 16 MO 0014, 2017-Ohio-642.
35. Ritchie v. Heinlein, No. CVH2016-105 (Monroe C.P. Mar. 13, 2017).
36. Bayes v. Sylvester, 7th Dist. Monroe No. 13 MO 0020, 2017-Ohio-4033.
37. Devitis v. Draper, 2017-Ohio-1136, 87 N.E.3d 656, at ¶ 2.
38. *Id.* at ¶ 12.

at least one mineral regardless of how the interest is created and of the form of the interest, which may be absolute or fractional or divided or undivided."[39] In deciding that a royalty interest was a "mineral interest," the appellate court relied upon its previous holdings that a severed royalty interest was subject to extinguishment under the Ohio Marketable Title Act.[40] Utilizing that precedent, the court held that a severed royalty interest must be included within the "mineral interest" because the 2006 ODMA is part of the Marketable Title Act and, therefore, the court could and would draw definitional parallels between the two statutes.[41] Going beyond the marketable title precedent, the appellate court held that the royalty interest is one of the "bundle of sticks" that make up a mineral interest, and therefore, it can be specifically abandoned under the 2006 ODMA in the same manner as the full mineral interest.[42] Based on the foregoing, the Seventh District unequivocally held that severed royalty interests can be separately abandoned under the 2006 ODMA.[43]

Moving past what interests may be abandoned under the 2006 ODMA, one must next determine how that process actually works. The process raises a number of questions, such as how notice by the surface owner should proceed and what constitutes a valid claim to preserve under the statute.

With regard to service of the surface owner's notice, the Seventh District Court of Appeals has recently added some guidance. If a surface owner is aware of the identity of the current holder, it must attempt certified mail service on the current holder and not the previous holder.[44] That includes successor corporate entities or persons substituted for dissolved corporations.[45]

The Seventh District Court of Appeals has also held that a mineral holder does not need to strictly comply with the 2006 ODMA's requirements governing claims to preserve.[46] In *Paul v. Hannon*, there was no dispute that the mineral holders had filed claims to preserve that did not comply with all of the statute's requirements.[47] Instead of requiring strict compliance with the statute, the appellate court held that one is to generally review the purported claim to preserve to determine whether one can generally understand what the holder is attempting to do.[48] For instance, the holder does not need to reference

39. OHIO REV. CODE ANN. § 5301.56(A)(3) (LexisNexis 2016).
40. *Devitis*, 2017-Ohio-1136, 87 N.E.3d at 659, at ¶¶ 14–16.
41. *Id*. at ¶ 17.
42. *Id*. at ¶ 18.
43. *Id*. at ¶ 19.
44. Harmon v. Capstone Holding Co., 7th Dist. Noble No. 14 NO 0413, 2017-Ohio-4155, at ¶ 16.
45. *Id*. at ¶ 14.
46. Paul v. Hannon, 7th Dist. Carroll No. 15 CA 0908, 2017-Ohio-1261.
47. *Id*. at ¶ 53.
48. *See id*. at ¶¶ 49–62.

the instrument through which it acquired the severed mineral interest or name the surface owner or owners to be affected by the claim.[49] The appellate court also held that a holder sufficiently identifies his or her address by referencing only the state and county of residence.[50] Finally, the court held that the holder does not need to separately notify the surface owner that a claim to preserve has been filed, even though the statute explicitly requires such notification.[51] Unfortunately, after *Paul v. Hannon*, there is still little to no guidance as to what elements imposed upon a claim to preserve must be followed in order to satisfy substantial compliance.[52]

Another issue is determining who is entitled to file a claim to preserve or preservation affidavit (i.e. who is a holder or a holder's successor or assign). Only the "holder" of a mineral interest may file a claim to preserve.[53] The "holder" is defined as "the record holder of a mineral interest, and any person who derives the person's rights from, or has a common source with, the record holder and whose claim does not indicate, expressly or by clear implication, that it is adverse to the interest of the record holder."[54] In *M & H Partnership v. Hines*, the Seventh District Court of Appeals held that any person who succeeded to the original holder either through testate or intestate succession is a holder.[55] The Seventh District Court of Appeals held separately in *Warner v. Palmer* that a person does not lose his or her status as a holder merely because a severed mineral interest was not included in the probate estates for previous holders.[56] Thus, a person "to whom the mineral interest should have been transferred during an estate administration" is entitled to file a claim to preserve.[57]

iii. The Ohio Marketable Title Act

Even without the 1989 ODMA, Ohio courts have been tasked with determining whether severed mineral rights have been extinguished through non-use under the Ohio Marketable Title Act. As a threshold

49. *Id.* at ¶¶ 55–59.
50. *Id.* at ¶ 61.
51. *Id.* at ¶ 56.
52. Paul v. Hannon, 7th Dist. Carroll No. 15 CA 0908, 2017-Ohio-1261. A notice of appeal for *Paul v. Hannon* was filed with the Ohio Supreme Court on June 2, 2017. As of the date of this survey note, the Ohio Supreme Court had not decided whether to accept that discretionary appeal. Memorandum in Support of Jurisdiction of Appellant, Terri L. Paul, Paul v. Hannon, No. 2017-0747 (June 2, 2017).
53. OHIO REV. CODE ANN. § 5301.56(C)(1) (LexisNexis 2016) ("A claim to preserve a mineral interest from being deemed abandoned under division (B) of this section may be filed for record by its holder.").
54. § 5301.56(A)(1).
55. M&H P'ship v. Hines, 7th Dist. Harrison No. 14 HA 0004, 2017-Ohio-923, 86 N.E.3d 780, at ¶ 19.
56. Warner v. Palmer, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080, at ¶ 26.
57. *Id.*

matter, courts have been asked to opine on whether the Marketable Title Act even applies to severed mineral interests.

The Marketable Title Act, codified in R.C. 5301.47, *et seq*., provides a statutory mechanism through which interests in real estate may be extinguished. The Marketable Title Act extinguishes real property interests that predate a landowner's "root of title" and are not subject to an exception or enumerated preserving event.[58] In essence, the Marketable Title Act operates "as a 40-year statute of limitations for bringing claims against a title record."[59]

As previously discussed, the 1989 ODMA and 2006 ODMA are additions to the Marketable Title Act.[60] An argument has been advanced by severed mineral holders that the 1989 ODMA and 2006 ODMA specifically govern the termination of severed mineral interests through abandonment and, therefore, they supplant the general provisions of the Marketable Title Act. At least one appellate court has rejected that position on several occasions.

In *Warner v. Palmer*, a surface owner claimed that a severed mineral interest, specifically a severed one-half mineral interest, had been extinguished by the Marketable Title Act.[61] That surface owner also brought claims under the 1989 ODMA and 2006 ODMA.[62] After determining that judgment for the surface owner under the 1989 ODMA and 2006 ODMA was improper, the Seventh District Court of Appeals determined that the Marketable Title Act did apply to the severed mineral interest at issue.[63] The appellate court relied upon how the Ohio Supreme Court had compared the language of the 1989 ODMA and Marketable Title Act.[64] This decision falls in line with other post-*Corban* decisions.[65] Thus, it appears that a separate claim for extinguishment under the Marketable Title Act is valid even after *Corban*.

In addition to holding that the Marketable Title Act applies to severed mineral interests, the *Blackstone* decision provides guidance on one particular interest-preserving event under the Marketable Title Act. A property owner's title is subject to the following interests:

> All interests and defects which are inherent in the muniments of which such chain of record title is formed; provided that a general reference in such muniments, or any of them, to easements, use restrictions, or other interests created prior to the root of title shall

58. § 5301.47.
59. Collins v. Moran, 7th Dist. No. 02 CA 218, 2004-Ohio-1381.
60. Corban v. Chesapeake Expl., LLC, 149 Ohio St. 3d 512, 2016-Ohio-5796, 76 N.E.3d 1089.
61. Warner v. Palmer, 7th Dist. Belmont No. 14 BE 0038, 2017-Ohio-1080, at ¶¶ 2–3.
62. *Id*. at ¶ 1.
63. *Id.* at ¶¶ 29–34.
64. *Id.* at ¶ 34.
65. Blackstone v. Moore, 7th Dist. Monroe No. 14 MO 0001, 2017-Ohio-5704.

> not be sufficient to preserve them, unless specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest . . . .[66]

Blackstone presented the question of what exactly the meaning of "specific identification be made therein of a recorded title transaction which creates such easement, use restriction, or other interest . . . " was.[67] The Seventh District Court of Appeals answered this question by adopting a four factor test, thereby holding that "when determining whether a reference is specific or general, we look to whether it included: (1) the type of mineral right created, (2) the nature of the encumbrance (an estate, profit, lease, or easement), (3) the original owner of the interest, and (4) whether it referenced the instrument creating the interest."[68] Speaking specifically about the fourth element, the appellate court held that the volume and page need not be referenced if the reference includes the name of the party who created the severed mineral interest.[69] This holding was in conflict with the law of another Ohio appellate district. As a result, on September 18, 2017, the Seventh District Court of Appeals certified a conflict of law to the Ohio Supreme Court, thereby seeking the Ohio Supreme Court's guidance on what is required for a "specific identification."[70]

II. Mineral Development

A. *Oil and Gas Lease Issues*

i. Delay Rental Payments

Within the past few years, lessors have brought challenges to oil and gas leases on grounds that the leases appear to provide for indefinite delay rental or minimum rental payments. The lessors have claimed that any oil and gas lease in which it appears the lessee can continue the lease without exploring and producing oil or gas is void as against public policy. These challenges have typically focused on an argument that the lease can be held beyond the primary term through delay rental or minimum royalty payments.

In *Bohlen v. Anadarko E & P Onshore, LLC*, the Ohio Supreme Court held that an oil and gas lease with a primary term of one year

66. Ohio Rev. Code Ann. § 5301.49(A) (LexisNexis 2016).
67. *Blackstone*, 7th Dist. Monroe No. 14 MO 0001, 2017-Ohio-5704, at ¶ 32.
68. *Id*. at ¶ 38.
69. *Id.* at ¶ 39 ("Further, the reservation specified that the encumbrance was originally reserved by Nick Kuhn. While the reference did not provide the volume and page number of the reserving deed, it is readily apparent that the reserving deed was the Kuhn deed, which was in the Blackstones' chain of title. As such, the Kuhn reservation was specific pursuant to the requirements of Ohio Rev. Code Ann. § 5301.49(A).").
70. Blackstone v. Moore, 7th Dist. Monroe No. 14 MO 0001, 2017-Ohio-7751, at ¶ 7.

and an annual delay rental payment was not a no-term lease.[71] In holding as such, the Ohio Supreme Court reaffirmed its recent holding in *State ex rel. Claugus Family Farm, L.P. v. Seventh District Court of Appeals*, where the Court had held that an oil and gas lease with a primary term of ten years and an annual delay rental payment was not a no-term lease based in part on the finding that delay rental payments typically may only be paid during the primary term and thus, typically may not be used to keep a lease alive during the secondary term.[72]

The *Bohlen* Court also had to deal with a minimum annual-rental payment provision.[73] The lessor argued that the minimum annual rental provision modified the delay rental provision and, therefore, permitted the lease to be held in perpetuity through minimum payments.[74] The Ohio Supreme Court rejected that theory and held that the annual rental provision did not permit forfeiture or termination of the lease upon non-payment.[75] Because the non-payment of the annual rental was not classified as a forfeiture condition, any failure to timely or correctly pay the annual rental could not result in a forfeiture of the lease.[76]

ii. 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 2017. In *Paulus v. Beck Energy Corporation*, the Seventh District Court of Appeals analyzed several issues surrounding the paying quantities calculation.[77] Initially, the appellate court held that a lessor's lease royalties must be deducted from income prior to determining whether the lessee made a profit on the lease's production.[78] The court also had to determine whether several types of expenses should be considered "operating expenses," which would in turn reduce the lessee's income within the paying quantities analysis. The court held that "non-recurring capital" investments, such as the replacement of a pump, are not considered "operating expenses" and as a result, are not considered during the paying quantities analysis.[79] The critical issue then appears to be whether a given expense is a recurring expense typical of any day-to-day operation of a well. With that concept in mind, the appellate court held that a corporate lessee must attribute "internal operating ex-

71. 150 Ohio St. 3d 197, 2017-Ohio-4025, 80 N.E.3d 468, ¶¶ 1, 38–39.
72. 145 Ohio St. 3d 180, 2016-Ohio-178, 47 N.E.3d 836.
73. *Bohlen*, 150 Ohio St. 3d 197, 2017-Ohio-4025, 80 N.E.3d 468, at ¶ 18.
74. *Id*.
75. *Id.* at ¶¶ 30, 32.
76. *Id*. at ¶ 33.
77. 7th Dist. Monroe No. 16 MO 0008, 2017-Ohio-5716.
78. *Id.* at ¶¶ 48–54.
79. *Id.* at ¶¶ 55–61.

penses to a well which was visited by a salaried employee," especially when the lessee traditionally accounted for the same as operating expenses.[80] Finally, the court held that a lessee's subjective belief that a lease would become profitable in the future when the commodity market normalizes does not undo prior operating losses, even though the same can be considered when deciding the time frame during which paying quantities should be examined.[81]

In *Barclay Petroleum, Inc. v. Bailey*, the Fourth District Court of Appeals held that an oil and gas lease expires when there is a cessation of production for two or more years.[82] Furthermore, the provision of free gas for domestic purposes cannot be considered "paying quantities."[83] Finally, a lessee's maintenance of oil and gas wells for the purposes of ensuring the provision of domestic gas cannot be considered operations, as that term is used in an oil and gas lease's secondary term.[84]

iii. Unitization, Pooling, and Consolidation

In *Burke v. Excalibur Exploration, Inc.*, an oil and gas lease contained a unitization provision which provided, in part that "[o]perations upon and production from any unit, including all or any portion of the leased lands, shall be treated as if such operations were upon or such production were from the leased lands whether or not the well or wells are located thereon . . . ."[85] The lessee, with the lessor's consent, included 20.52 acres out of the 227.70 total lease acres in a unit.[86] The Eleventh District Court of Appeals held that the lease's unitization provision addressed only that portion of the leasehold that was contained in a unit.[87] As a result, the appellate court held that only 20.52 acres of the leasehold were held by production and the lease had expired as to all portions of the leasehold not included within the unit, which would amount to approximately 207 acres.[88] This decision was subsequently vacated by the Ohio Supreme Court on grounds unrelated to the court of appeals' analysis on the consolidation issue.[89]

80. *Id*. at ¶ 64.
81. *Id.* at ¶ 68 ("Profitability, under the income minus operating expenses equation, is the standard in Ohio. Although the Ohio Supreme Court did not expressly add a second step dealing with good faith (after a loss is calculated), the application of *Blausey* still involves various equivalent considerations in determining a reasonable base period for the equation in a particular case.").
82. 4th Dist. Hocking No. 16CA14, 2017-Ohio-7547.
83. *Id*. at ¶ 20.
84. *Id*. at ¶ 22.
85. 11th Dist. Ashtabula No. 2016-A-0041, 2017-Ohio-999, at ¶¶ 2–3.
86. *Id*. at ¶ 5.
87. *Id*. at ¶ 14.
88. *Id*. at ¶¶ 8, 15.
89. *See* Burke v. Excalibur Expl., Inc., 2017-Ohio-600, 81 N.E.3d 1269 (Judgment entered on Sept. 13, 2017) (The Ohio Supreme Court granted intervening appellants'

iv. 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 is obligated to bring a quiet title claim seeking relief based upon the expiration. In *Rudolph v. Viking International Resources Co.*, the Fourth District Court of Appeals held that a lessor's claim that an oil and gas lease previously expired by its own terms is governed by Ohio's twenty-one year statute of limitations provided in R.C. 2305.04.[90] The appellate court reasoned that "[a]fter the expiration of the primary term of the oil and gas lease, if the conditions of the secondary term are not met, the lease automatically expires."[91] The court further stated that the mere expiration of the lease does not immediately give rise to a cause of action relating thereto, meaning the lessor's cause of action[92] does not necessarily accrue immediately upon the cessation of paying quantities production.[93] Instead, the cause of action appears to accrue when the lessor has reason to believe the lessee does not consider the lease expired after the previous period of paying quantities cessation.[94]

v. Issues Relating to Lease Acquisition

An issue relating to the leasing of oil and gas rights is whether a person must be a licensed real estate agent in order to receive a commission for securing oil and gas leases on behalf of a third-party, most frequently the oil and gas production company. In *Dundics v. Eric Petroleum Corporation*, the court of appeals found that any person who seeks to acquire oil and gas leases on behalf of another person must be a licensed real estate agent or broker and if unlicensed, that person is not entitled to a real estate commission under R.C. 4735.21.[95]

B. *The Right to Transport Minerals—Federal Eminent Domain under the Natural Gas Act*

i. The Right to Quick-Take

In recent years, the use of eminent domain under the Natural Gas Act has accelerated in Ohio due to the pressing need for gas transportation infrastructure. One question that arose during those proceedings is whether the condemner is entitled to take possession of the affected lands after receiving its Certificate of Public Convenience and

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(lease-working interest owners) motion to vacate the decision and remanded the case to the trial court to determine all necessary parties to the litigation.).

90. 4th Dist. Washington No. 15CA 26, 2017-Ohio-7369, ¶ 36.

91. *Id*. at ¶ 40.

92. *Id.* at ¶ 43. In *Rudolph*, the lessor brought a claim under Ohio's declaratory judgment statute. *Id*. at ¶ 47.

93. *Id.* at ¶¶ 43–49.

94. *See id.* at ¶¶ 48–49.

95. Dundics v. Eric Petroleum Corp., 2017-Ohio-640, 79 N.E.3d 569, at ¶ 23.

Necessity, but before obtaining a condemnation award, including the provision of just compensation to the landowners, in the related eminent domain litigation. In *Columbiana Gas Transmission, LLC v. 171.54 Acres*, the United States District Court for the Southern District of Ohio held that the condemner could take possession prior to a final adjudication, which is often referred to as a "quick-take."[96] The court found that a "quick-take" was permitted under a court's "inherent equitable power," even though pre-condemnation possession is not provided for under the Natural Gas Act or Federal Rule of Civil Procedure 71.1, which governs eminent domain proceedings in federal courts.[97] Thus, a court may grant immediate possession through use of a preliminary injunction once the condemner "demonstrates a substantive right to condemn property under the NGA [Natural Gas Act]."[98]

ii. Determining Just Compensation—Use of Commissions

In *Rover Pipeline, LLC v. 5.9754 Acres*, the United States District Court for the Northern District of Ohio held that an Ohioan whose land is subject to a condemnation proceeding in federal court under the Natural Gas Act is not entitled to a jury trial for purposes of determining just compensation.[99] The court found that Federal Rule of Civil Procedure 71.1 generally provides that all issues in federal eminent domain actions are tried by the court, subject to three exceptions.[100] One such exception permits the court to appoint a three-person commission for purposes of determining compensation, even when a party has requested a jury trial.[101] In denying a jury trial in Natural Gas Act eminent domain cases brought in federal court, the court held that Ohio's Constitution, which provides Ohioans with the right to a jury trial for purposes of determining just compensation, cannot be used as a basis for holding that a jury trial is required in federal eminent domain litigation. As a result, a landowner is not guaranteed a jury trial in eminent domain proceedings in federal court.

96. S.D. Ohio No. 2:17-cv-70, 2017 WL 838214, *1.
97. *Id*. at *6.
98. *Id*.
99. N.D. Ohio No. 3:17CV225, 2017 WL 3130244, * 2.
100. *Id*. at *1.
101. *Id.* (*citing* Fed. R. Civ. P. 71(h)(2)(A)).