



EMENS & WOLPER LAW FIRM

"The Landowners Law Firm" SM
"The Family Business Law Firm" SM

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Oil & Gas, Solar, Pipeline, and Energy Newsletter November 1, 2017

Dear Clients, Friends, and Colleagues:

We want to share with you two exciting facts:

I. On November 1, 2017, the St. Clairsville office of Emens & Wolper Law Firm opens its doors to better serve our many clients and other friends in Belmont, Jefferson, Monroe, Noble, Guernsey, Harrison, Carroll and Columbiana Counties, Ohio

Attorney Heidi Kemp and Administrative Assistant, Dawn Homan, will be working full time in our new office and will provide all the same legal services as our Columbus office. The office is located at 250 West Main Street - a half mile west of the St. Clairsville Courthouse. Attorneys Dick Emens, Bea Wolper, Sean Jacobs, Kelly Jasin and Cody Smith will also be in the St. Clairsville Office on a regular basis. The new office has joint telecommunication facilities with our Columbus Office and plenty of parking.

II. Because so many of our clients and recipients of this newsletter are involved in family businesses, we have included in the Newsletter masthead our second service mark, "The Family Business Law Firm".

Did you know you might have a "family business?" So many times, when we are talking with farmers and other landowners, they don't realize that the sharing of farm responsibilities and crop revenue with family members, or the sharing of oil and gas royalty distributions - is really a family business!!!

When two or more family members are "in business" together, - - that is a family business. What is often ignored is how to transition the farm/income/distributions to the next generation. Do the parents feel the need to divide assets equally among children (even though fair is not often equal, and equal is not fair)?

How to do it? How to transfer ownership, authority, relationships, knowledge, management, leadership and values?

Over 80% of farmland and other family business owners want to transition the farm/business to the next generation, but less than 30% take the necessary steps.

Fortunately, Emens & Wolper Law Firm can help with these issues as well as with all oil and gas legal issues.

We look forward to seeing you in St. Clairsville and Columbus!

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**EMENS & WOLPER
UPCOMING MEETINGS AND
PRESENTATIONS**

EXPLORATION AND DEVELOPMENT UPDATE

J. Richard Emens

OIL AND GAS MINERAL
ISSUES – 39TH ANNUAL REAL
ESTATE LAW INSTITUTE
Cleveland Metropolitan Bar
Association

Thursday, Nov. 9, 2017

Starting at 1:00 p.m.

Located at:
CMBA Conference Center
1375 East 9th St.
Floor 2 – One Cleveland
Center
Cleveland, OH 44114

Beatrice E. Wolper

FAMILY BUSINESS
SUCCESSION: WHY IS IT
DIFFERENT?
Ohio State Bar Association

Monday, Nov. 20, 2017

Starting at 8:30 a.m.

Located at:
Ohio State Bar Association
1700 Lakeshore Dr.
Columbus, OH 43204

Also Webcast Live in Akron,
Cleveland, Fairfield, and
Perrysburg

Ohio May Soon Allow Oil and Gas Production Under State-Owned Lands. In 2011, the Ohio General Assembly passed HB 133 which overhauled the process of leasing and developing lands owned by or controlled by the State of Ohio for oil and gas exploration. As part of the process, HB 133 included a provision to create an Oil and Gas Leasing Commission ("Commission"), which would be comprised of appointments from the Governor of Ohio, to govern the process of leasing the estimated 41,697 acres owned by or controlled by the State of Ohio. Governor John Kasich, however, failed to appoint any members to the Commission, which prevented the development of these acres. Without including State-owned mineral interests in drilling units, landowners who are adjacent to the State-owned lands are often unable to have some, or all, of their oil and gas minerals developed due to size and spacing restrictions on development units. The National Association of Royalty Owners and the Ohio Oil and Gas Association have commented on behalf of these affected landowners to the Ohio General Assembly urging reformation or for Governor Kasich to appoint members to the Committee. The Ohio General Assembly recently passed HB 49 as part of the state budget, which would strip the appointment power from the Governor of Ohio and give it to the Ohio General Assembly. Governor Kasich has since vetoed this bill, but in a historic move, the Ohio House overrode the veto. Now the members of the House are "in talks to do the same" with the Ohio Senate. In response, Governor Kasich appears to have made a deal with the Ohio General Assembly and is in the process of finding suitable appointees after a six-year hiatus.

West Virginia District Court Upholds Flat-Rate Post-Production Deductions. Landowners filed a class action lawsuit in the United States District Court for the Northern District of West Virginia against CNX Gas Company LLC ("CNX") and Noble Energy, Inc. ("Noble") alleging the companies fraudulently entered into lease agreements with the owners of oil and gas mineral rights because the leases expressly provided for flat-fee post production expense deductions from royalty payments owed. The leases, entered in 2009, expressly excluded all implied warranties and covenants and contained a royalty provision permitting the company to deduct post-production deductions in "an amount equal to \$1.20 per MMBtu" – an amount the affected landowners claimed was well beyond the true expenses contemplated under the lease. The language of the leases also stated that the parties agreed that the flat-fee deduction for expenses "will be presumed to be actually incurred and reasonable." Ultimately, the Court found that the post-deduction flat-fees were unambiguously contracted for and that the parties were able to "freely contract that the flat-rate reductions are 'actually incurred and reasonable.'" For more information, see <http://www.stepto-johnson.com/content/federal-court-upholds-fixed-rate-post-production-deduction-provision-west-virginia> and <http://www.classactionsreporter.com/investments/cnx-noble-energy-oil-and-gas-royalty-class-action>.

Ascent Resources LLC ("Ascent") Planning for Initial Public Offering ("IPO") or Sale. Ascent, based in Oklahoma City, Oklahoma, and founded by the late Aubrey McClendon, appears to be preparing for an IPO or a sale. Ascent has been interviewing bankers to shepherd an offering and is aiming for a stock-market valuation of more than \$3.5 billion. After the death of McClendon, some investors believed that Ascent would become insolvent. However, private-equity firms Energy & Minerals Group and First Reserve Corp. doubled down on their investments in the company, giving it approximately \$1.5 billion to pay down its debt.



EMENS & WOLPER LAW FIRM

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EMENS & WOLPER LAW FIRM LEGAL SERVICES

Our law firm provides numerous legal services related to natural resources including the following:

- We review, analyze and negotiate new and old oil and gas leases and mineral deeds;
- We review, analyze and negotiate solar options, letters of intent, and leases;
- We review royalty payments, deductions, and division orders;
- We represent landowners in ODNR mandatory unitization proceedings who are being forced unitized;
- We review, analyze and negotiate all wind farm documents;
- We review, analyze and negotiate pipeline easements;
- We analyze mineral abandonment claims and claims regarding expired leases;
- We review, analyze and negotiate water, sand, timber, gravel, and coal rights agreements;
- We review, prepare and negotiate real estate deeds, mortgages, notes and liens;
- We review, analyze, negotiate sale of minerals and royalties; and
- We assist with litigation on all of these matters.

Our law firm also provides services regarding estate planning, succession planning for family farms and other businesses and purchases and sales of farms and other businesses.

EXPLORATION AND DEVELOPMENT UPDATE (CONT.)

Ascent Resources LLC ("Ascent") Planning for Initial Public Offering ("IPO") or Sale (Cont.).

In the past year, Ascent has become a strong participant in the Ohio shale play. As we discussed in the August 2017 Edition of this Newsletter, Ascent Resources – Utica, LLC was issued the most permits of any oil and gas developer in Ohio in 2016. The 37 permits issued to it that year were primarily issued in Belmont, Jefferson, Guernsey, and Harrison Counties. During the first half of 2017, Ascent drilled 20 of the top 25 producing oil wells in Ohio. This has nearly doubled the production of Ascent from the first half of 2016 to the first half of 2017. Production may continue to rise as it is currently believed Ascent holds 300,000 acres in eastern Ohio and West Virginia. For more information, see THE WALL STREET JOURNAL, "Ascent Resources Plans IPO or Sale," Thursday, October 19, 2017.

Pipeline Projects Raise the Price of Gas for Marcellus/Utica Drillers: As natural gas pipeline projects are completed across northern Appalachia, gas producers in the Marcellus and Utica Shale plays are able to send more and more gas to market to areas that are not overly saturated with production. The United States Energy Information Administration has completed analysis on the price obtained for both Marcellus and Utica gas in the first seven months of both 2016 and 2017. In 2016, gas averaged a sale price of \$0.76 below the benchmark Henry Hub price. In 2017, gas averaged a sale price of \$0.53 below the benchmark Henry Hub price. The gap appears to be narrowing every year. The difference between 2016 and 2017 amounts to a 30% improvement in one year! As more natural gas pipeline projects become completed, we expect to see this trend continue and hope gas prices continue to rise. For more information, see <http://marcellusdrilling.com/2017/08/new-pipelines-raise-gas-prices-for-m-u-drillers-by-30-in-2017/>.

Supreme Court Hears Oral Arguments on Driller's Obligations to Explore Shale for Gas. In 1980, Linda Alford signed a lease with Collins-McGregor Operating Corp. ("CM"), allowing it to drill for oil on 74 acres of her property near Ohio's West Virginia Border. A conventional vertical well was drilled and CM has continued to produce oil from the property as required under the lease. Ms. Alford, through her attorneys, filed a lawsuit against CM, claiming that CM should be required to either produce from the deeper shale through horizontal drilling or release those formations so she could lease them to another producer. This suit was appealed to the Supreme Court of Ohio who heard oral arguments on September 26, 2017. Ms. Alford has been arguing that the deep rights should not be considered part of the original lease because the lease was signed in 1980 – well before hydraulic fracturing was commonplace in Ohio. Both lower courts found in favor of CM and it appears the Supreme Court of Ohio may do the same based on the Justices' lines of questioning. The entire oral argument can be viewed online on the Ohio Channel at <http://www.ohiochannel.org/video/case-no-2016-1281-alford-v-collins-mcgregor-operating-co>.

Rice Energy Inc. ("Rice") and EQT Corporation ("EQT") Issue Proxy Statement Regarding Shareholder Vote for Proposed Merger. On October 19, 2017, Rice and EQT issued a shared proxy statement providing information to shareholders of both companies related to the proposed merger announced on June 1, 2017. If approved by both the shareholders of both companies, EQT will issue common stock to shareholders of Rice in connection with the proposed merger agreements. The proxy statement states "[i]f the merger is completed, each outstanding share of Rice common stock (with certain exceptions described in the accompanying joint proxy statement/prospectus) will convert into the right to receive 0.37 of a share of EQT common stock and \$5.30 in cash, without interest and subject to applicable withholding taxes." A special shareholders meeting will be held on November 9, 2017, at 8:00 a.m., at Rice's executive offices at 2200 Rice Drive, Canonsburg, PA 15317 for purposes of voting on the proposed merger.



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***Landowner Groups and
Other Ohio Counties
Where Emens & Wolper
has Assisted
Landowners***

Black River Landowners
Association—Lorain County

Central Ohio Landowners
Association—Richland and
Ashland Counties

Coshocton County
Landowners Group—
Coshocton and Northeastern
Muskingum Counties

Jefferson County Landowners
Group—Jefferson County

Mohican Basin Landowners
Group—Ashland, Wayne, and
Holmes Counties

Muskingum Hills
Landowners—Southeastern
Muskingum County

Perry County Landowners—
Perry County

Resources Land Group—
Licking and Southeastern
Knox County

Smith Goshen Group—
Belmont County

Ashland, Ashtabula, Athens,
Brown, Carroll, Columbiana,
Crawford, Defiance,
Delaware, Erie, Fayette,
Franklin, Fulton, Geauga,
Guernsey, Hardin, Harrison,
Henry, Highland, Hocking,
Holmes, Huron, Mahoning,
Marion, Meigs, Monroe,
Montgomery, Noble, Preble,
Pickaway, Portage, Ross,
Sandusky, Seneca, Stark,
Summit, Trumbull,
Tuscarawas, Union,
Washington, Wayne, Wood,
and others.

PIPELINE UPDATE

Federal Energy Regulatory Commission ("FERC") Officially has Three-Member Quorum. The five-Commissioner FERC may only approve pipeline projects when it has a quorum of three Commissioners seated. FERC had not had a quorum since February and only had one Commissioner seated through most of July. However, as mentioned in the August 2017 Edition of this Newsletter, President Donald Trump nominated two individuals to the Commission who were each approved by the Senate Energy and Natural Resources Committee ("Committee"): Neil Chatterjee – R and Robert Powelson – R. Now, both men have been confirmed by the United States Senate and are properly seated on FERC's Commission, giving FERC the needed quorum.

As expected, President Trump also nominated two individuals to fill the remaining FERC Commission seats: Jones Day partner, Kevin McIntyre – R and Robert Glick – D. On September 19, 2017, these men were unanimously approved by the Committee and are awaiting approval by the United States Senate. Once confirmed, Mr. McIntyre will become the new Chairman of FERC. For more information, see <https://www.troutmansandersenergyreport.com/2017/09/senate-energy-natural-resources-committee-advances-ferc-nominees-confirmation/>.

Nexus Pipeline Project ("Nexus") Receives Certificate of Public Convenience and Necessity ("CPCN") – Expected to Begin Construction Soon. On August 25, 2017, FERC issued its first large-scale natural gas pipeline decision by issuing Nexus its CPCN to proceed with its proposed 255-mile natural gas pipeline designed to connect Marcellus and Utica Shale areas to markets in the Midwest and Canada. The \$2.1 billion project proposes constructing a 36-inch pipeline across approximately 209.8 miles in Ohio, covering 13 counties, and 46.8 miles in Michigan, covering 4 counties. The project would also involve four new compressor stations in Ohio's Columbiana, Medina, Sandusky and Lucas Counties.

While obtaining a CPCN from FERC is needed to commence construction of Nexus' natural gas pipeline, Nexus requires additional permits from the Ohio Environmental Protection Agency ("OEPA") before it begins. Recently, the OEPA granted Nexus a water-quality certificate. Now the OEPA is requiring Nexus to have and implement detailed contingency plans for managing unanticipated release to the environment, which may be a response to drilling mud being released in the Tuscarawas River by ET Rover during its construction. For more information, see <http://www.naturalgasintel.com/articles/111530-making-up-for-lost-time-revamped-ferc-grants-nexus-certificate> and <http://www.medina-gazette.com/Medina-County/2017/09/22/Ohio-EPA-grants-certificate-NEXUS-pipeline-plan-advances.html>.

Pipeline End Cap Rupture in Stark County, Ohio Kills Wooster, Ohio Resident. A Columbia Gas Transmission pipeline endcap came off a pipe near a metering station in Stark County, Ohio on Monday, October 23, 2017. The pressure of the gas coming out of the pipe forced a 60-year-old worker backward into a fence, killing him instantly. The pipe valve has been sent to a crime lab for testing to determine what caused the end cap to rupture. Residents in the area were told to evacuate their homes for 45 minutes before an "all-clear" was given. Residents described the accident by stating the gas escaping the pipe sounded like a jet engine. Currently it is unknown how long the investigation will take. For more information, see <http://marcellusdrilling.com/2017/10/explosion-at-columbia-pipeline-meter-station-in-ne-oh-kills-worker/>.



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*Please visit our website
for Educational Articles
www.emenswolperlaw.com*

- Solar is Here in Ohio:
Landowners Beware
- Selling Your Mineral Rights –
Questions You Should Consider
First!
- Separating your Mineral Rights:
Remember Real Estate Taxes
- Post-Production Costs: Protecting
Landowner Rights
- Oil and Gas Leases and Pipeline
Easements - -This Time It's
Different
- Oil and Gas Considerations
When Buying and Selling
Farmland
- "Force Pooling" in Ohio:
Requiring Non-Consenting
Landowner's to Develop Their
Oil and Gas Minerals
- "Mineral Rights ARE Different
Pipeline Easements and Right of
Ways: Protecting Your Rights
- Pipeline Easements: Steps to
Protecting Landowner Rights
- Unusual Ohio Oil and Gas Lease
Provisions
- Ohio Oil and Gas Conservation
Law – The First Ten Years
(1965-1975)

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PIPELINE UPDATE (CONT.)

Rover Pipeline ("Rover") Obtains Approval to Transport Natural Gas Through First Phase of Pipeline Project. On Friday, August 18, 2017 Rover made an official request to FERC to begin transporting natural gas through Phase 1A of the pipeline on August 31, 2017. The Phase 1A of the pipeline project is in three primary areas in Ohio: (1) the Cadiz lateral, which is 3.5 miles of 30-inch diameter natural gas pipelines in Harrison County, Ohio; (2) the Supply Connector Line A, which is 18.6 miles of single, 42-inch diameter natural gas pipelines extending between Harrison County, Ohio and Carroll County, Ohio; and (3) the Mainline A, which is 190.9 miles of single, 42-inch diameter natural gas pipeline extending from Carroll County, Ohio to the newly-constructed compressor station in Defiance County, Ohio.

On Thursday, August 31, 2017, FERC granted Rover's request to transport natural gas through Phase 1A of the pipeline project. Natural gas was originally expected by Rover to be transported through this section of the pipeline project as early as July of this year. However, FERC had stopped horizontal directional drilling for the entire project due to 2 million gallons of diesel-contaminated drilling mud being leaked into the Tuscarawas River and surrounding areas. In FERC's approval letter, FERC said Rover had removed the contaminated slurry from a quarry in northern Tuscarawas County, Ohio near Beach City and was "proceeding satisfactorily" with a similar cleanup at the Oster Sand and Gravel quarry north of Massillon. FERC, however, continues to investigate how diesel got into the drilling mud. For more information, see <http://marcellusdrilling.com/2017/08/rover-pipe-ready-to-flow-seeks-ferc-permission-for-aug-31-start/> and <http://www.cantonrep.com/news/20170831/ferc-approves-partial-use-of-rover-pipeline>.

Landowner Options with Rover Construction Issues or Complaints. On August 2, 2017, attorneys from Emens & Wolper Law Firm attended a Rover issue briefing with the Ohio Farm Bureau in Wooster, Ohio. The main piece of advice given to affected landowners was clear: Document any and all damage to the property caused by pipeline construction with good records, photographs, and videos. "You own the property, and you have the right to walk the construction site," said Dale Arnold of the Ohio Farm Bureau. "Take photographs . . . Having photographs is key to linking an activity with damages," he continued.

In addition to documenting any property damages, landowners should also first attempt to reach out to the pipeline company with any issues or complaints. Pipeline companies appear to be more responsive to landowner complaints than those from an attorney. For Rover, the complaint hotline is (888) 844-3718. If, after 36 hours, the pipeline company has not responded to a landowner's issues or complaints, the landowner may call the FERC hotline at (877) 337-2237.

WIND AND SOLAR ENERGY UPDATE

Solar Projects Continue to be Proposed Across Ohio. While not currently much in the news, we continue to receive calls from landowners asking us to review options and leases for solar projects. As we have previously stated, these agreements generally contain language that is landowner unfriendly.



LEGAL UPDATE

Federal District Court Holds Ohio Follows the “At the Well Rule” for Royalty Deductions. In *Lutz et al, v. Chesapeake Appalachia, L.L.C.*, N.D.Ohio No. 4:09-cv-2256 (Decided Oct. 25, 2017), a group of landowner-lessors, claimed that Chesapeake Appalachia, L.L.C. (“Chesapeake”) underpaid gas royalties due to them under the terms of their respective leases. The leases at issue, which provided

“[t]he royalties to be paid by Lessee are: . . . (b) on gas, . . . produced from said land and sold or used off the premises . . . 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”

were claimed by Chesapeake to allow post-production costs to be allocated to landowners before royalty checks were paid. *Id.* at p. 7. Chesapeake argued that the “at the well” language meant that a lessee could deduct post-production costs from the downstream sales price of natural gas to work back to the price of the gas “at the well” when calculating royalties (i.e. the “at the well rule”). The landowners, conversely, urged the court to adopt the “marketable product rule,” which provides that post-production costs must be borne solely by the lessee.

In April 2015, the United States District Court for the Northern District Court of Ohio (the “District Court”) certified the question of whether Ohio follows the “at the well” or the “marketable product” rule to the Supreme Court of Ohio. Although the Supreme Court of Ohio accepted the certified question, it ultimately declined to answer it, concluding that oil and gas leases are contracts and the rights and remedies of the parties are controlled by the specific language of their individual lease agreements.

After the Supreme Court of Ohio decertified the question back to the District Court, Chesapeake renewed its partial motion for summary judgment on the interpretation of the leases’ royalty clauses. Concluding that the “at the well” language in the lease was clear and unambiguous, the District Court found that it referred to the “location at which the gas is valued for purposes of calculating a lessor’s royalties.” Thus, partial summary judgment was granted in the case in favor of Chesapeake allowing it to take post-production deductions from landowners’ royalty checks under these leases.

Ohio Court Reverses Itself to Hold Lease Termination Cases to 21-Year Statute of Limitations. In *Rudolph v. Viking Internatl. Resources Co., Inc.*, 2017-Ohio-7369 (4th Dist.), the Court of Appeals for the Fourth District of Ohio reversed a decision from the Common Pleas Court of Washington County, Ohio, by holding that a landowner’s cause of action for declaratory judgment to quiet title on an oil and gas lease is governed by the 21-year statute of limitations, Ohio Rev. Code Ann. § 2304.04. This decision appears to be a stark departure from the Court’s previous decision in *Schultheiss v. Heinrich Ents. Inc.*, 2016-Ohio-121 (4th Dist.), where it held “any delay by the lessor in asserting termination of the lease cannot give life to . . . the statute of limitations.”

On October 11, 1978, a Washington County, Ohio landowner entered an oil and gas lease (the “Lease”) “for a term of two years from the date hereof, and as much longer as oil, gas or gasoline can be produced in paying quantity.” In 1994, Plaintiff-Appellant, Victor H. Rudolph acquired the subject property. Only one well, the Quick #1 Well, was drilled thereon in accordance with the primary term of the Lease. This well produced oil or gas until 1998, with an undisputed cessation in production between 1998 and 2001. As a result, the Lease expired on December 31, 1999, after two years of non-production.

Defendant-Appellee, Stonebridge Operating Co. LLC (“Stonebridge”) acquired the working interest in the Lease after a series of conveyances and continued to operate and produce from the Quick #1 Well since 2002. Viking International Resources Co., Inc. (“Viking”) was assigned an overriding leasehold interest in the Lease in 2003. In June 2012, Rudolph received an oil and gas division order from Stonebridge dated June 1, 2012, which he did not sign, because he believed the Lease had terminated by its own terms due to non-production. On March 11, 2014, Rudolph filed a complaint in the Common Pleas Court of Washington County, Ohio against Stonebridge, Viking, and all other potential lessees seeking a declaration that the Lease was terminated due to non-production between 1998 and 2001.

The Court stated that “[a]n oil and gas lease containing a habendum clause stating the lease shall remain in effect as long as oil or gas is produced in paying quantities automatically expires when no oil or gas is produced for two or more years.” If, after the primary term, there exists any cessation for two years, the lease automatically expires and “no affirmative action on the part of a lessor is required to formally terminate the lease.” Nevertheless, although termination of an oil and gas lease may occur automatically, the landowner may need court intervention to obtain *complete* relief such as cancellation of the lease of record and removal of the cloud from title.



LEGAL UPDATE (CONT.)

Ohio Court Overrules Itself to Hold Lease Termination Cases to 21-Year Statute of Limitations (Cont.). A landowner's ability to obtain complete relief must not be improperly delayed if the lessee of a lease has resumed production under the automatically-terminated lease; the landowner's action will be subject to an applicable statute of limitation. Thus, the Court reduced many of Rudolph's assignments of error to one particular issue: is the 8 or 15-year statute of limitation in Ohio Rev. Code Ann. § 2304.05 for breach of contract or the 21-year statute of limitation in Ohio Rev. Code Ann. § 2304.04 for actions to recover title to or possession of real property applicable in cases related to oil and gas leases?

Ultimately, the Court stated that

"When a lease expires because the leasehold does not produce in paying quantity, or as here, has no production at all, the failure *does not necessarily* give rise to a cause of action for breach of the lease. There is no violation of the lease or corresponding remedy for breach where production has ceased because the lessee has made a good faith determination that it is not economically reasonable to commercially operate the well due to the limited amount of oil or gas found, or the well simply has become depleted."

Rudolph at ¶ 43. Thus, the Court held the 21-year statute of limitation for recovery under Ohio Rev. Code Ann. § 2304.04 is applicable to a declaratory judgment actions for oil and gas leases. Here, Rudolph's complaint was filed in 2014, well before application of the applicable statute of limitations. Therefore, the lawsuit was timely filed.

Although *Rudolph* appears to be straightforward, its implications under Ohio law are immense. The decision comes just one year after the Court issued *Schultheiss v. Heinrich Ents. Inc.*, 2016-Ohio-121 (4th Dist.), which seemingly foreclosed the possibility of *any* statute of limitations reviving an automatically-terminated oil and gas lease. Even after the Court overruled itself, however, *Rudolph* has had the effect of leaving practitioners with a jurisdictional split on which statute of limitations applies to these types of cases. In December of 2016, the Court of Appeals for the Seventh District of Ohio held in *Potts v. Unglaciated Indus.*, 2016-Ohio-8559 (7th Dist.), which was discussed in the February 2017 edition of this Newsletter, that the 8 or 15-year statute of limitation in Ohio Rev. Code Ann. § 2304.05 for breach of contract applies to oil and gas lease termination cases.

Ambiguity Surrounds Interpretation of Pooling and Unitization Lease Clause. In *Bond v. Halcon Energy Properties, Inc.*, 2017-Ohio-7754 (7th Dist.), the Court of Appeals for the Seventh District of Ohio reversed a decision from the Common Pleas Court of Mahoning County, Ohio, which granted summary judgment to a producer by stating that a pooling and unitization clause was unambiguous as to an oil and gas lease. On June 23, 1970, Anna J. Tims entered into an oil and gas lease with Murphy Oil Company (the "Lease"), which was partially assigned to Halcon Energy Properties, Inc. ("Halcon"). The Lease covered approximately 70 acres in Mahoning County, Ohio and allowed unitization to "pool or combine the land covered by [the] lease, or any portion thereof, into a well unit or units not exceeding approximately 40 acres for oil and not exceeding approximately 640 acres for gas." In August 2000, the Bonds purchased 40.9 acres covered by the Lease from the Tims. In April 2013, Halcon drilled a horizontal well, known as the Davidson 1H, comprising 151.52 acres including some of the Bond's property. Ultimately the Davidson 1H well produced large quantities of both oil and gas. In May 2013, Halcon sought amendments of all of its leases, seeking unitization clauses with larger limits – the Bonds refused claiming that the Davison 1H well was an oil well, producing in violation of the pooling and unitization clause of the Lease because it was larger than the allowed 40-acre limit. This caused the Bonds to file a lawsuit against Halcon claiming breach of contract and trespass.

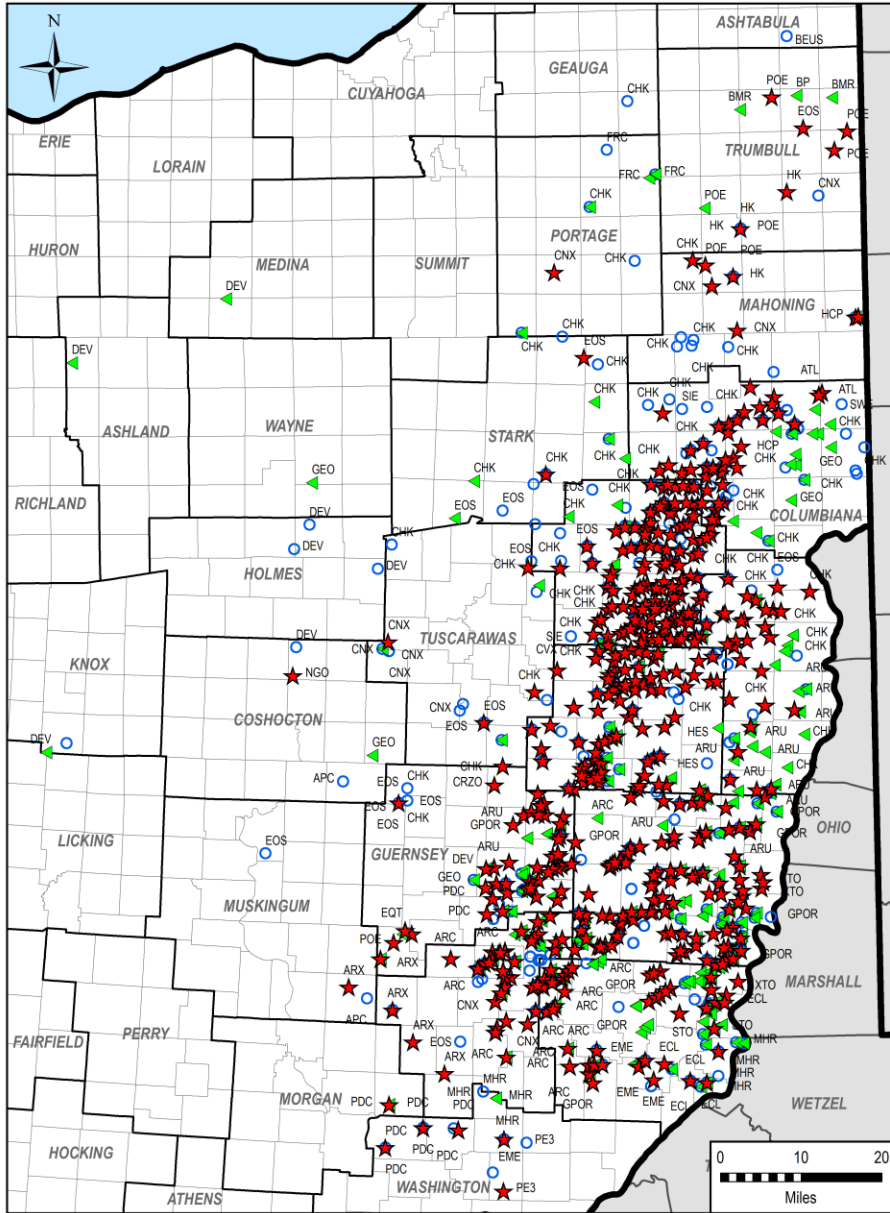
Before trial and upon Halcon's motion, the trial court granted summary judgment in favor of Halcon by stating that the Davidson 1H well was a "gas well" under the pooling and unitization clause because a "gas well" is any well "capable of producing gas." Although the trial court never explained its reasoning, it appears the trial court relied on the shut-in clause of the Lease, which states "[i]f a well capable of producing gas . . . is shut in . . . such shut-in well shall . . . be considered a well on such land producing gas in paying quantities." The Court ultimately reversed the trial court holding that the pooling and unitization clause was sufficiently ambiguous enough to create genuine issues of material fact. Thus, the case was remanded back to the lower court for reconsideration by the trial court.

This decision is important for Ohio practitioners because, as the Court notes, "Ohio does not have a statutory, administrative or common law definition to distinguish between oil and gas wells or well units." Many other states, including Kentucky, Montana, and Virginia contain such statutes. Practitioners will be on watch to see how the courts view this ambiguity as many historic Ohio oil and gas leases contain pooling and unitization provisions that are different for oil wells and gas wells.



EMENS & WOLPER LAW FIRM

"The Landowners Law Firm" SM
 "The Family Business Law Firm" SM



UTICA HORIZONTAL WELL STATUS THROUGH 9/30/2017

- ★ PRODUCING (1,693)
- ▲ DRILLING; DRILLED (441)
- PERMITTED OR NOT DRILLED (498)

OPERATOR	LBL	PROD	PMT	DRLG	DRLD	TOT
AMERICAN ENERGY UTICA LLC	AEU	0	2	0	3	5
ANADARKO E & P ONSHORE LLC	APC	0	4	0	0	4
AMERICAN PETROLEUM PRTR OH LLC	APP	0	2	0	0	2
ANTERO RESOURCES CORPORATION	ARC	178	32	21	27	258
ASCENT RESOURCES UTICA LLC	ARU	161	26	50	29	266
ARTEL OIL COMPANY	ARX	0	4	2	1	7
ATLAS NOBLE LLC	ATL	12	0	0	0	12
BEUSA ENERGY LLC	BEUS	0	1	0	0	1
BRAMMER ENGINEERING INC	BMR	0	0	0	2	2
BP AMERICA PRODUCTION COMPANY	BP	0	0	0	1	1
CHESAPEAKE EXPLORATION LLC	CHK	675	110	14	53	852
CNX GAS COMPANY LLC	CNX	37	12	7	26	82
CARRIZO (UTICA) LLC	CRZO	12	3	0	1	16
CHEVRON APPALACHIA LLC	CVX	2	7	0	1	10
DEVON ENERGY PRODUCTION CO	DEV	0	6	0	3	9
ECLIPSE RESOURCES I LP	ECL	85	48	12	9	154
EM ENERGY OHIO LLC	EME	6	7	8	0	21
ENERVEST OPERATING LLC	EOS	5	20	0	1	26
EQT PRODUCTION COMPANY	EQT	0	0	0	2	2
MOUNTAINEER KEYSTONE LLC	FRC	0	1	2	5	8
GEOPETRO LLC	GEO	0	4	1	0	5
GULFPORT ENERGY CORPORATION	GPOR	265	60	45	20	390
HILCORP ENERGY COMPANY	HCP	45	7	0	1	53
HESS OHIO DEVELOPMENTS LLC	HES	20	57	0	13	90
HG ENERGY LLC	HGE	4	1	0	2	7
HALCON OPERATING COMPANY INC	HK	0	1	1	3	5
TRIAD HUNTER LLC	MHR	22	3	1	1	27
NGO DEVELOPMENT CORP	NGO	0	0	1	0	1
PDC ENERGY INC	PDC	32	8	2	0	42
PROTÉGÉ ENERGY III LLC	PE3	0	2	0	0	2
PIN OAK ENERGY PARTNERS LLC	POE	10	3	0	1	14
RICE DRILLING D LLC	RDD	73	13	9	19	114
R E GAS DEVELOPMENT LLC	REG	5	23	6	16	50
SIERRA RESOURCES LLC	SIE	0	0	3	0	3
STATOIL USA ONSHORE PROP INC	STO	4	14	3	7	28
SWEPI LP	SWE	0	0	0	1	1
XTO ENERGY INC.	XTO	40	18	1	4	63
TOTALS		1693	499	189	252	2633



KEY	DESCRIPTION
PROD	PRODUCING
PMT	PERMITTED
DRLG	DRILLING
DRLD	DRILLED

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Emens & Wolper would like to thank Marty Shumway for providing the Utica Status Map, above.