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I. Introduction

This Article summarizes and discusses important developments in West Virginia oil and gas law between August 1, 2021 and July 31, 2022. Part II of this Article will discuss developments in state statutes and regulations. Part III will discuss common law developments in West Virginia's state and federal courts.

II. Legislative and Regulatory Developments

A. Legislative Enactments

The West Virginia Legislature enacted two bills during the 2022 regular session that will have significant effect on the oil and gas industry: (1) Senate Bill 694, which established a new statutory pooling process for horizontal oil and gas wells; and (2) Senate Bill 650, which amended the Cotenancy Modernization and Majority Protection Act.

The West Virginia Legislature enacted Senate Bill 694, codified as West Virginia Code § 22C-9-7a, which allows oil and gas operators to unitize property for the drilling of horizontal oil and gas wells without unanimous consent from all oil and gas owners in the unit. The operator must have the consent to pool the leases by 75 percent or more of executive interest royalty holders, a term that includes all oil and gas interests for which the owner has the right to grant an oil and gas lease, but which excludes wellbore-only working interests, overriding royalty interests, non-participating royalty interests, non-executive mineral interests, and net profits interests, in the proposed unit, and the applicant operator must have at least 55 percent of the working interest in the unit. For royalty owners who do not consent to unitization of their interests, the statute provides compensation in an amount equal to the 25 percent weighted average monetary bonus amount on a net mineral acre basis and a production royalty percentage equal to 80 percent of the weighted average production royalty percentage rounded to the nearest one tenth of one percent paid to other executive interest owners of leased tracts in the unit in the same target formation.

Senate Bill 650 amended the Cotenancy Modernization and Majority Protection Act[1] so that a super-majority of co-tenants, namely 75 percent of the ownership, would be permitted to develop their oil and gas interests over the refusal of minority co-tenants to consent to such development. Previously, the Act only applied to tracts with seven or more co-owners. The amendment removed the seven-or-more-owners limitation and applied the act to tracts owned by any number of co-tenants so long as all of the other provisions of the act were satisfied.

B. Regulatory Changes

There were no relevant oil and gas regulatory changes between August 1, 2021 and July 21, 2022.

III. Judicial Developments

A. West Virginia Supreme Court of Appeals

1. Orville Young, LLC v. Bonacci

In *Orville Young, LLC v. Bonacci*,[2] the West Virginia Supreme Court of Appeals affirmed a lower court decision that a tax deed was void because it was based upon an invalid assessment of an oil and gas leasehold interest; there, the oil and gas estate itself had never been severed in title from the surface of the land, it had been properly assessed as part of a larger tract of land, and all taxes on the land had been paid. The Court's decision comes against a backdrop of long-standing rules regarding the payment of real property taxes assessed against mineral interests. Under West Virginia law, where one person owns the surface estate in a tract of land and another person owns a mineral estate, the assessor "shall assess such respective estates, or any undivided interest therein, to the respective owners thereof . . . ."[3] But, in *State v. Allen*, the West Virginia Supreme Court of Appeals held that "the State is not entitled to double taxes on the same land under the same title" and "in case of two assessments of the same land, under the same claim of title, for any year, one payment of taxes, under either assessment, is all the State can require."[4]

In 1906, Albert Schenk purchased 500 acres of farmland in Marshall County, which included both the surface and oil and gas estates in the land.

1. W. VA. CODE §§ 37b-1-1 *et seq*.
2. 246 W. Va. 26, 866 S.E.2d 91 (2021).
3. W. VA. CODE § 11-4-9.
4. State v. Allen, Syl. Pts. 1 and 2, 65 W. Va. 335, 64 S.E. 140 (1909).

In 1919, Schenk granted an oil and gas lease for a 202-acre part of the 500-acre farm (the "Leased Tract"). In 1930, Schenk died, and, in his will, he devised the farm into a testamentary trust for the benefit of his grandson Albert Schenk III until his grandson reached the age of 40 (the trustee later conveyed the farm to Albert Schenk III in 1957). At some time after Mr. Schenk's death, the trustee along with Mr. Schenk's estate entered into agreements with the Natural Gas Company of West Virginia, reducing the royalties payable on two wells on the Leased Tract, Well Nos. 629 and 630. In 1935, the Marshall County assessor entered two assessments against Mr. Schenk's estate and the testamentary trust: one for the 500-acre farm (the "Farm Assessment"), which would have included the Leased Tract, and the other for "202 Royalty Wells #629-630 Nat Gas Co. W. Va." (the "Well Assessment"). In spite of the two assessments, there had been no severance of the ownership of the oil and gas estate underlying the 500-acre farm. The taxes assessed against both entries were paid for 1935, but the estate and the trustee only paid the taxes against the Farm Assessment in 1936 and did not pay the taxes against the Well Assessment that year. As a result, the taxes against the Well Assessment were declared delinquent and were ultimately sold to Everett Moore, who received a tax deed for the property covered by the Well Assessment in 1949. The Well Assessment was again sold for delinquent taxes to Orville Young, who received a tax deed for it in 1995; this interest was later conveyed to Orville Young, LLC and Rolaco, LLC. In the meantime, Albert Schenk III died in 1995 and devised the farm to his wife, who, in turn, conveyed part of the farm, including part of the Leased Tract, to her daughter Katherine Schenk Bonacci, who, by subsequent deeds, conveyed this part of the Leased Tract to her sons Frank A. Bonacci and Brian F. Bonacci. The Bonacci brothers filed a declaratory judgment action to determine the ownership of the oil and gas underlying their part of the Leased Tract. Ultimately, the circuit court granted the Bonacci brothers' motion for summary judgment and Orville Young, LLC and Rolaco, LLC appealed.

The West Virginia Supreme Court of Appeals affirmed and held that the tax deeds to Moore and Young were void because both were based upon invalid, duplicate tax assessments erroneously created by the Marshall County assessor. The court noted that "when a single landowner owns both the surface and the subjacent mineral estate in a parcel of property and such mineral estate has not been severed from the surface, the property should be assessed as a single, whole unit and not as separate assessments for the surface estate and the mineral estate."[5]

This decision marks the fourth time in the past five years[6] that the court has considered a case involving tax deeds arising from assessments for either severed oil and gas estates or erroneously created assessments for leasehold royalties entered under the oil and gas owner's name. The confusion created by these duplicative assessments and the resulting tax deeds continue to be a challenge to mineral title examiners in West Virginia.

2. SWN Prod. Co., LLC v. Kellam[7]

In *SWN Prod. Co., LLC v. Kellam*,[8] the West Virginia Supreme Court of Appeals, in a 4-1 decision,[9] answered a certified question from the United States District Court for the Northern District of West Virginia and reaffirmed that *Tawney v. Columbia Natural Resources, LLC*[10] remains good law in West Virginia; however, the court reformulated a set of three other certified questions into one question, namely: "What level of specificity does *Tawney* require of an oil and gas lease to permit the deduction of post-production costs from a lessor's royalty payment, and if such deductions are permitted, what types of costs may be included?" and then declined to answer that question because doing so "necessarily involves the exploration of contractual language, the possible need for interpretation of said language, and the development of facts to assist either the court or the factfinder, as appropriate."[11]

5. Orville Young, LLC, 866 S.E.2d at 98.

6. *See also* L&D Investments, Inc. v. Mike Ross, Inc., 241 W. Va. 46, 818 S.E.2d 872 (2018), Hill v. Lone Pine Operating Co., No. 16-0219, 2016 WL 6819787 (W. Va. Nov. 18, 2016), *and* Haynes v. Antero Res. Corp., No. 15-1203, 2016 WL 6542734 (W. Va. Oct. 28, 2016).

7. Disclosure: please note that the author's law firm represented *amici curiae* American Petroleum Institute, Gas and Oil Association of WV, Inc., and the West Virginia Chamber of Commerce in this proceeding.

8. 875 S.E.2d 216 (W. Va. 2022).

9. Two of the Court's five justices, Tim Armstead and Haley Bunn, recused themselves from hearing this case. Justice Bill Wooton delivered the opinion for the Court, joined by Chief Justice John Hutchison and two temporary justices, Family Court Judge Jara Howard and Circuit Judge Jack Alsop. Chief Justice Hutchison filed a concurring opinion and Justice Beth Walker filed a dissenting opinion.

10. 219 W. Va. 266, 633 S.E.2d 22 (2006)

11. *Kellam*, 875 S.E.2d at 219.

SWN Production Company, LLC and Equinor USA Onshore Properties, Inc. own the working interest in an oil and gas lease that was first granted by Charles and Phyllis Kellam in 2007 and have engaged in oil and gas development pursuant to it. The Kellams' lease contains the following royalty provision:

> 4. In consideration of the premises the Lessee covenants and agrees:
>
> (A) To deliver to the credit of the Lessor in tanks or pipelines, as royalty, free of cost, one-eighth (1/8) of all oil produced and saved from the premises, or at Lessee's option to pay Lessor the market price for such one-eighth (1/8) royalty oil at the published rate for oil of like grade and gravity prevailing on the dates such oil is sold into tanks or pipelines. Payment of royalty for oil marketed during any calendar month to be on or about the 60th day after receipt of such funds by the Lessee.
>
> (B) To pay to the Lessor, as royalty for the oil, gas, and/or coalbed methane gas marketed and used off the premises and produced from each well drilled thereon, the sum of one-eighth (1/8) of the price paid to Lessee per thousand cubic feet of such oil, gas, and/or coalbed methane gas so marketed and used, measured in accordance with Boyle's Law for the measurement of gas at varying pressures, on the basis of 10 ounces above 14.73 pounds atmospheric pressure, at a standard base temperature of 60 degrees Fahrenheit, without allowance for temperature and barometric variations *less any charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane gas for sale*. Payment for royalty for oil, gas, and/or coalbed methane gas marketed during any calendar month to be on or about the 60th day after receipt of such funds by the Lessee.[12]

On April 28, 2020, the Kellams filed a putative class action lawsuit in the United States District Court for the Northern District of West Virginia against SWN and Equinor, alleging that both companies had improperly deducted post-production costs from royalty checks because the terms of the royalty clause in the Kellams' lease (and other similar leases) did not permit such deductions since the royalty clause lacked the specific language

12. *Id.* at 220 (emphasis in original).

necessary to permit such deductions, as required under *Tawney*. SWN and Equinor filed answers to the Kellams' complaint in July 2021 and then moved for judgment on the pleadings, seeking a dismissal of the Kellams' complaint with prejudice. On September 13, 2021, the district court, *sua sponte*, certified four questions to the West Virginia Supreme Court of Appeals.[13]

Explaining its decision to re-affirm *Tawney*, the court noted that it had first addressed the question of the use of post-production cost deduction in royalty calculations in *Wellman v. Energy Resources, Inc.*,[14] where it held that such deductions can only be taken when the lease explicitly permits them and that only reasonable expenses, actually incurred, may be deducted, a position that is usually called the "marketable product rule," because "a lessee impliedly covenants that he will market oil or gas produced," so that "the lessee should bear the costs associated with marketing products produced under a lease."[15] In *Tawney*, the court reaffirmed *Wellman*'s default rule that the lessee bears the brunt of post-production costs absent lease language shifting some of that cost to the lessor and held that such cost-shifting language "must expressly provide that the lessor shall bear some part of the costs incurred between the wellhead and the point of sale, identify with particularity the specific deductions the lessee intends to take from the lessor's royalty (usually 1/8), and indicate the method of calculating the amount to be deducted from the royalty for such post-production costs."[16] As a justification for leaving *Tawney* undisturbed now, the court noted that since that decision in 2006, "thousands of oil and gas leases in this State—including the Kellams' own lease—were crafted with this standard in mind."[17]

But also in those intervening years, *Tawney* came under criticism from the court itself in *Leggett v. EQT Prod. Co.*,[18] a case in which the court determined that West Virginia Code § 22-6-8(e), which provides that fractional royalty payments arising from new development on older oil and gas leases that provided for flat-rate gas well rentals, could be calculated

13. Kellam v. SWN Prod. Co., LLC, Civil Action No. 5:20-cv-85, 2021 WL 4621067 (N.D.W. Va. Sept. 13, 2021).

14. 210 W. Va. 200, 557 S.E.2d 254 (2001).

15. *Kellam,* 875 S.E.2d at 222 (quoting *Wellman*, 210 W. Va. at 211, 557 S.E.2d at 265).

16. *Id.* at 223 (quoting *Tawney*, 219 W. Va. at 268, 633 S.E.2d at 24).

17. *Id*.

18. 239 W. Va. 264, 800 S.E.2d 850 (2017).

using a method that allocated some post-production costs to the lessor.[19] While the *Leggett* Court determined that *Tawney* did not apply to the question at hand, its opinion contained a lengthy discussion critical of *Tawney* and *Wellman*, which the *Kellam* Court treated as *obiter dictum* and ignored.

Nevertheless, SWN and Equinor argued that *Leggett*'s criticism of *Tawney* and *Wellman* presented an opportunity to revisit whether West Virginia law continued to recognize the implied covenant to market and the marketable product rule. In declining to do so, the court relied in part on the doctrine of stare decisis, but more interestingly, the court held that it did not need to address the implied covenant to market because "in the case at bar…that covenant is not implicated," further noting that in the Kellams' lease "there is a contractual provision addressing the allocation of post-production costs such that an implied covenant is not necessary to ascertain the parties' intent in contracting," and pointing to the provisions in Paragraph 4(B) of the Kellams' language, highlighted in the extract above, regarding "charges for transportation, dehydration and compression paid by Lessee to deliver the oil, gas, and/or coalbed methane for sale."[20] Since the Kellams' lease is not silent on the allocation of post-production costs, the court held that the implied covenant to market is inapplicable because "there is no gap for the implied covenant to fill."[21] Instead, the court left it to the district court, as factfinder, to determine whether this lease provision satisfies *Tawney*'s specificity requirements, declining to "create a hard and fast rule" regarding that question.[22] The court also reiterated that requirements under *Tawney* and *Wellman* in order to allocate post-production costs to the lessor: "the lease must: (1) include language indicating the lessor will bear some of those costs; (2) identify with particularity the deductions to be made (with an understanding that such deductions must be both reasonable and actually-incurred under *Wellman*); and (3) indicate the method of calculating the amount to be deducted."[23]

Curiously, the court said nothing about the way in which *Tawney* had been applied by the United States Court of Appeals for the Fourth Circuit in

19. The West Virginia Legislature amended the statute during its 2018 regular session and effectively overruled *Leggett* by specifically providing that royalties calculated under the statute would be "free from any deductions for post-production expenses." *Kellam,* 875 S.E.2d at 223-24 (citing W. VA. CODE § 22-6-8(e)).

20. *Id.* at 226.

21. *Id.*

22. *Id*. at 227.

23. *Id*.

Young v. Equinor USA Onshore Props., Inc.,[24] where the federal appeals court determined that the royalty clause of an oil and gas lease satisfied *Tawney*'s requirements and permitted post-production cost deductions, but in his concurring opinion, Chief Justice Hutchison criticized *Young* and its statement that "*Tawney* doesn't demand that an oil and gas lease set out an Einsteinian proof for calculating post-production costs," insisting that "lessees insist on taking estimated costs or vague, malleable, impossible-to-measure deductions from royalties – in essence, using Einsteinian methods that are incomprehensible to all but the most clever industry accountants."[25] In her dissent, Justice Walker, the one member of the *Leggett* court still sitting on the state's highest bench, reiterated many of the points from *Leggett*'s criticism of *Tawney* and *Wellman* and stated that she would have taken this opportunity to overrule both of them.[26]

B. United States District Courts for the Northern and Southern Districts of West Virginia

1. Benson v. High Road Operating, LLC[27]

In *Benson v. High Road Operating, LLC*,[28] the United States District Court for the Northern District of West Virginia granted summary judgment in favor of High Road Operating, LLC (formerly known as American Petroleum Partners Operating, LLC) ("HRO") in a dispute with a group of landowners in Ohio County, West Virginia, over HRO's decision to surrender the oil and gas leases granted to it by the landowners and HRO's refusal to tender bonus payments to the landowners because the court determined that the bonus payments were subject to a condition precedent, specifically the execution and acknowledgement of the leases by HRO, which was never satisfied.

In April and May 2018, the landowners executed the following instruments: (1) a Paid-Up Oil and Gas Lease; (2) an Addendum to the Lease; (3) Order of Payment – Oil & Gas Lease Bonus; and (4) a Memorandum of Lease. While the landowners signed and acknowledged the leases, HRO did not execute any of them; however, the landowners and

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24. 982 F.3d 201 (4th Cir. 2020).

25. *Kellam*, 875 S.E.2d at 234 (C.J. Hutchison, concurring) (quoting *Young*, 982 F.3d at 208).

26. *Id*. at 235.

27. Disclosure: please note that the author's law firm represented High Road Operating, LLC in this case.

28. Civil Action No.: 5:20-cv-00229, 2022 WL 264548 (N.D.W. Va. Jan. 27, 2022).

HRO did execute and acknowledge the Memoranda of Lease, each of which recited that the landowners and HRO had entered into a Lease. In May and June 2018, HRO recorded the Memoranda in the Ohio County Clerk's office.

The Order of Payment required HRO to tender a bonus payment to the landowners equal to $6,500 per net mineral acre; however, this payment was "[o]n and subject to approval of the fully executed and notarized Oil and Gas Lease . . . by the management of [HRO] . . . and upon and subject to further approval of [the landowners'] title and rights thereunder by [HRO]."[29] The Order of Payment called for the bonus payment to be made within 90 business days from the date of the Order of Payment and provided that, if the title examination revealed that the landowners owned less than 100 percent of the oil and gas, then the bonus payment could either be proportionately reduced or HRO could, at its sole option, void the Lease. The landowners executed the Order of Payment, but HRO did not because there was no line on the Order of Payment for HRO's execution. HRO never tendered any bonus payments to the landowners.

Between October 5, 2018 and April 18, 2019, HRO sent each landowner a Surrender of Oil and Gas Lease, executed by HRO, which under HRO "release[d], relinquish[ed], surrender[ed] . . . any and all right, title, and interest whatsoever presently owned."[30] The landowners leased their mineral interest to another company for a $4,500/acre bonus payment and then they filed suit against HRO in 2020, stating causes of action for breach of contract, breach of the implied covenant of good faith and fair dealing, and slander of title. The landowners and HRO both filed motions for summary judgment and the district court granted summary judgment in favor of HRO.

The district court, applying West Virginia law, held that a breach of contract claim has four elements: (1) the existence of a valid, enforceable contract; (2) the plaintiff has performed under the contract; (3) the defendant has breached or violated its duties or obligations under the contract; and (4) the plaintiff has been injured as a result. According to the district court, the second and fourth elements were undisputed, and the court's decision would hinge on the first and third elements. The landowners argued that they had formed valid, enforceable contracts with HRO and that HRO had breached those contracts by failing to pay the bonus, while HRO argued that there was no such contract, that even if there

29. *Id.* at *1.
30. *Id.* at *2.

was, conditions precedent to its performance had not been satisfied, and that any obligation owed by HRO to the landowners had been discharged by these conditions precedent.

The district court held that there was a valid and enforceable contract between the landowners and HRO. Under West Virginia law, a valid and enforceable contract requires (1) competent parties, (2) legal subject matter, (3) valuable consideration, and (4) mutual assent. HRO disputed that the parties had mutually assented to form a contract, but the court found, by construing the Lease, the Memorandum of Lease, and the Order of Payment together, that HRO had manifested an intent to be bound and that the terms of the Lease and the Order of Payment were certain enough to create a power of acceptance on the part of the landowners. The court also rejected HRO's argument that the Lease and the Order of Payment represented only preliminary negotiations between the parties, relying on a six-factor test adopted by the West Virginia Supreme Court of Appeals in *Blair v. Dickinson*[31]—the factors being, whether: (1) the contract is the type usually made in writing; (2) the contract requires a formal writing for its full expression; (3) the contract has many details or only a few; (4) the value of the contract is large; (5) it is a common or unusual contract; and (6) the negotiations themselves indicate a written draft is contemplated as a final conclusion of negotiations.

But, having determined that valid and enforceable contracts existed between the landowners and HRO, the court nonetheless held that HRO did not breach its contractual duty because the conditions precedent to HRO's obligation to tender the bonus payments had not been satisfied. Specifically, the court pointed to the language in the Order of Payment that conditioned the bonus payment "[o]n and subject to approval of the fully executed and notarized Oil and Gas Lease herewith ("Oil and Gas Lease") by the management of [HRO]."[32] While the court did not try to define "management approval," it nevertheless held that HRO was not obligated to tender the bonus payments because the Lease was never "fully executed and notarized," as HRO never executed or acknowledged the Leases.

In a later decision in the same case,[33] the court dismissed with prejudice claims for breach of the implied covenant of good faith and fair dealing and slander of title made by a group of landowners in Ohio County, West

31. 133 W. Va. 38, 54 S.E.2d 828 (1949)

32. *Benson,* 2022 WL 264548, at *7.

33. Benson v. High Road Operating, LLC, 2022 WL 2161507 (N.D.W. Va. June 15, 2022) (*Benson II*).

Virginia against HRO. After the court dismissed the landowners' claim for breach of contract, HRO filed a motion for judgment on the pleadings regarding the remaining claims for breach of the implied covenant of good faith and fair dealing and for slander of title. The district court granted judgment on the pleadings in favor of HRO on both counts, recognizing that the landowners could not proceed with a claim for the implied covenant breach after the dismissal of their breach of contract claim because West Virginia law does not recognize an independent cause of action for breach of the implied covenant apart from the breach of contract claim, and that the landowners had not plead specific factual allegations about special damages sufficient to sustain a claim for slander of title. Under West Virginia law, slander of title requires proof of "(1) publication of (2) a false statement (3) derogatory to plaintiff's title (4) with malice (5) causing special damages (6) as a result of diminished value in the eyes of third parties."[34] The landowners argued that they had suffered special damages because they were paid a lower per-acre bonus for the leases granted to SWN than they would have been paid for the HRO leases, but the district court pointed out "it is unclear how the lower bonus payment reflects a diminished value in [the landowners'] mineral interests and/or real estate" since a bonus "is not consideration for the actual value of the property" and "is not necessarily based on the value of the property."[35]

2. Glover v. EQT Prod. Co.

In *Glover v. EQT Prod. Co*.,[36] the United States District Court for the Northern District of West Virginia denied a motion for partial summary judgment against an oil and gas royalty owner's claim for fraudulent misrepresentation on the grounds that the royalty owner had testified that she had not read the remittance statements submitted with the royalty payments. The fraudulent misrepresentation claim is part of a purported class action by a group of oil and gas royalty owners who allege that their lessees have improperly calculated royalty payments for natural gas liquids, having "intentionally and deliberately misrepresented certain information relating to the calculation and payment of NGL royalties on the remittance statements in order to be able to conceal their failure to pay the royalties required under the leases and that the plaintiffs relied upon the truth of

34. *Id.* at *4 (quoting TXO Prod. Co. v. Alliance Res. Corp., Syl. Pt. 3, 187 W. Va. 457, 419 S.E.2d 870 (1992)).

35. *Id.* at *8.

36. Civil Action No.: 5:19-cv-223, 2022 WL 740762 (N.D.W. Va. Feb. 23, 2022).

these statements and the amount of the checks to their detriment."[37] Based upon testimony by one of the purported class representatives that she did not read the remittance statements, the defendants moved for partial summary judgment on her fraud claim because she could not have relied upon statements that she did not read.

In reaching its decision to deny the defendants' motion, the district court noted that discovery in the case has not yet concluded and that the court would assume the truth of the plaintiffs' claims and focus only on the question of whether failure to read the remittance statements is fatal to the fraud claim. The district court decided to excuse the plaintiff's failure to read the remittance statements because "[a] review of the statement or check stub would not provide her with any information that would inform her that the statements concealed improper activity on the part of [the lessee]."[38] Relying upon two decisions made under consumer protection laws, one by the United States Court of Appeals for the Fourth Circuit in *Alig v. Quicken Loans Inc.*,[39] and one by the West Virginia Supreme Court of Appeals in *White v. Wyeth*,[40] the district court held that the logic and rationale of these cases, namely that "where concealment, suppression or omission is alleged, and proving reliance is an impossibility, the causal connection between the deceptive act and the ascertainable loss is established by presentation of facts showing that the deceptive conduct was the proximate cause of the loss," absolved the plaintiff from proving reliance on the remittance statements that she had not read.[41]

C. United States Court of Appeals for the Fourth Circuit

In *Kay Company, LLC v. EQT Production Co.*,[42] the United States Court of Appeals for the Fourth Circuit affirmed a decision by the United States District Court for the Southern District of West Virginia,[43] in which the district court refused to enforce the final judgment and final order in a class action settlement between oil and gas companies and a class of royalty owners so as to enjoin a mineral trespass filed in the Circuit Court of

37. *Id*. at *1.
38. *Id*. at *2.
39. 990 F.3d 782 (4th Cir. 2021), *judgment vacated on other grounds,* Rocket Mortg., LLC v. Alig, 142 S. Ct. 748, 211 L.Ed.2d 468 (2022).
40. 227 W. Va. 131, 705 S.E.2d 828 (2010).
41. *Id*. at *2 (internal punctuation omitted).
42. 27 F.4th 252 (4th Cir. 2022).
43. Kay Co. v. Equitable Prod. Co., 535 F. Supp. 3d 537 (S.D.W. Va. 2021).

Wetzel County by some of the members of the royalty owner class (the "Huey Plaintiffs").

In 2006, a class action lawsuit was filed against EQT Production Company and Equitable Resources, Inc. ("EQT") in the district court, seeking damages for (1) improper deduction of post-production expenses from royalty payments, (2) breach of lease agreements, (3) breach of fiduciary duty, (4) fraud, (5) violation of the West Virginia Consumer Credit and Protection Act,[44] (6) violation of the West Virginia flat-rate royalty statute,[45] and (7) punitive damages. In 2010, the district court approved a settlement of this class action, which included a provision releasing EQT "from future claims by Class Members from any and all royalty claims through the settlement date of December 8, 2008."[46] The settlement agreement defined "royalty claims" as

> [t]hose claims asserted by the Plaintiff Class Representatives in this Action, individually and as representatives of the Class, including claims for improper royalty payments, improper deductions, improper measurement, improper accounting for natural gas liquids, improper sales prices, breach of lease agreements, breach of fiduciary duty, fraud, violation of the West Virginia Consumer Credit and Protection Act (W. Va. Code § 46A-6-101, et seq.), violation of the flat rate royalty statute (W. Va. Code § 22-6-8), and punitive damages, all based upon the failure to pay proper royalty.[47]

The release was also limited to a compensation period running from February 1, 2000 to December 8, 2008.

Class members had to submit a claim form to obtain settlement funds. One such form, which applied to those class members subject to flat-rate leases, provided that claimants "cannot seek forfeiture of their Flat Rate Leases after entry of Final Order and Judgment in this civil action."[48] The Huey Plaintiffs submitted a Flat Rate Lease claim form and received funds from the settlement of the class action. As part of the settlement of the class action, the district court also ordered that the class members were barred from asserting royalty claims against EQT, that all such claims were released through December 8, 2008, and that the settlement agreement

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44. W. VA. CODE §§ 46A-6-101 *et seq*.
45. W. VA. CODE § 22-6-8.
46. *Kay*, 27 F.4th at 256.
47. *Id*.
48. *Id*. at 257.

provided the sole and exclusive remedy to the class members for royalty claims.

In 2017, the Huey Plaintiffs field a civil action against EQT in the Circuit Court of Wetzel County, alleging, among other things, mineral trespass on the grounds that an oil and gas lease granted in 1900, the Hoge Lease, which granted EQT the right to produce the oil and gas owned by the Huey Plaintiffs had expired, but that EQT continued to produce oil and gas after the expiration of the Hoge Lease. The Hoge Lease provided for a primary term of five years and a secondary term that would continue "as long after the commencement of operations as said premises are operated for the production of oil or gas."[49] The Huey Plaintiffs alleged in the Wetzel County case that, from 1935 to 2014, the Hoge Lease was being held by production from a single oil well, but that that well did not produce in 1987, 2004, or 2005, so that the Hoge Lease had terminated by its own terms for lack of production and that EQT had drilled additional wells on the Hoge Lease in 2013 and 2014.

In 2020, EQT filed a motion in the United States District Court for the Southern District of West Virginia to enforce the settlement agreement against the Huey Plaintiffs because the Huey Plaintiffs' Wetzel County trespass claim was actually a royalty claim that had been satisfied by the settlement agreement and that the Huey Plaintiffs, when they had submitted their class action claim form had represented that the Hoge Lease was a valid lease, which would mean that the Wetzel County trespass claim was in violation of the settlement agreement. The district court denied the motion. It found that the Wetzel County trespass claim did not fall within the definition of a "royalty claim" for purposes of the settlement agreement because the trespass claim "had nothing to do with whether EQT paid proper royalties."[50] The district court also declined to enjoin the Wetzel County case because it did not find an exception to the Anti-Injunction Act that applied and, even if one did, the district court would not use its discretion to enjoin the case because EQT had other remedies and an injunction would be an extraordinary remedy.

EQT appealed and asked the Fourth Circuit to reverse the district court's decision for three reasons: (1) the district court failed to find that the Huey Plaintiffs were bound by the settlement agreement; (2) the district court erred when it found that the Wetzel County case was not a royalty claim barred by the settlement agreement; and (3) the district court abused its

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49. *Id.*
50. *Id.* at 258.

discretion in not issuing an injunction against the Wetzel County case and that it erred in finding that two exceptions to the Anti-Injunction Act did not apply.

The Fourth Circuit rejected the first argument because the district court had addressed whether the Huey Plaintiffs had violated the settlement agreement, so the district court must have assumed that they were bound by the agreement. The Fourth Circuit rejected the second argument, focusing, as the district court had, on the definition of "royalty claims" set forth in the settlement agreement, especially the provision that such claims were "based upon the failure to pay proper royalty."[51] The Fourth Circuit distinguished the Wetzel County case from the class action because the trespass claim is not based on royalty payments, but rather on alleged damage to the Huey Plaintiffs' property. The Fourth Circuit also noted that, even if the Wetzel County case were a royalty claim, the settlement agreement would not bar it because the release in the settlement agreement only applied to royalty claims prior to December 8, 2008, and the Huey Plaintiffs' trespass claim in the Wetzel County case was related to an alleged trespass in 2013 and 2014, which occurred after the period covered by the settlement agreement. Finally, the Fourth Circuit disagreed with EQT's contention that its motion fell within either the "in aid of jurisdiction" or "re-litigation" exceptions to the Anti-Injunction Act. While federal law authorizes federal courts to enjoin state court proceedings that interfere with federal judgments, such injunction cannot be granted unless (1) expressly authorized by an Act of Congress, (2) necessary in aid of the federal court's jurisdiction, or (3) necessary to protect or effectuate the federal court's judgments, and even then, the federal court's decision to grant such an injunction is discretionary on the part of the federal court. Here, the Fourth Circuit agreed with the district court that the Wetzel County case did not "seriously impair the district court's flexibility and authority to decide the class action" nor that it represented a re-litigation of the class action because the trespass claim had not been squarely presented for the district court's determination.[52] The Fourth Circuit also held that, had one of the two exceptions to the Anti-Injunction Act applied, the district court did not abuse its discretion by refusing to issue the injunction sought by EQT.

51. *Id.* at 259.
52. *Id*. at 261 (internal citations omitted).