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I. Introduction

For the period of August 1, 2022, through July 31, 2023, there were critical changes in the landscape of oil and gas law in the state of Ohio. The Ohio legislature passed new legislation clearing the path for greater oil and gas drilling on public lands. Further, the Ohio courts were busy and decided several important cases.

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II. Legislative and Regulatory Developments

A. State Legislative Developments

There were significant state legislative developments in Ohio during the period of August 1, 2022, to July 31, 2023.

1. Passed Legislation

a) Ohio House Bill 507

On January 6, 2023, Governor DeWine signed House Bill 507 (the “Bill”) into law with an effective date of April 7, 2023.¹ This Bill was passed to increase utilization of natural gas.² Pertinent to the oil and gas industry, the Bill establishes the definition of “green energy” to R.C. 4928.01, as any energy generated by using an energy resource that meets certain emissions and sustainability requirements, which, by its new definition, will include most energy generated utilizing natural gas.³

Alongside this new definition, the Bill further addresses new leasing procedures for land owned by state agencies.⁴ Prior to the Bill’s enactment, a state agency was authorized to lease oil and gas resources under the agency’s control, but it was not required to do so. If the state agency chose to lease oil and gas resources, then the state agency had to include statutorily required terms in the lease. However, under this new Bill, the law requires each state agency to, in good faith, lease agency-owned or controlled oil and gas resources for development prior to the date that rules governing leasing procedures are adopted by the Ohio Oil and Gas Commission (the “Commission”).⁵

According to the rules governing nomination and leasing procedures on May 15, 2023, and effective May 30, 2023, the Commission adopted that any person or entity interested in leasing a formation within one or more parcels of land that are owned or controlled by a state agency for the exploration, development, or production of oil or natural gas may submit a nomination form to the Commission.⁶ Upon receipt of a completed form and fee, the

1. H.B. 507 at 39, 135th Gen. Assemb., Reg. Sess. (Ohio 2023).

2. *Id.*

3. *Id.*

4. *Id.* at 2.

5. *Id.* at 1.

6. See, *Past Meetings, Oil & Gas Land Management Commission*, THE OHIO DEP’T OF NAT. RES., <https://ohiodnr.gov/business-and-industry/municipalities-and-public-entities/commissions-and-councils/oil-gas-land-management-commission> (last visited May 30, 2023)

Commission shall post a Notice of Nomination on the website pursuant to R.C. 155.32 for a forty-five day notice-comment period.⁷ After the forty-five-day comment period has expired, the Commission shall schedule a meeting within one-hundred and twenty days, for the purpose of approving or disapproving the pending nominations.⁸ The Commission will consider multiple factors when determining to approve the nomination, such as economic benefits from oil or natural gas operation, the environmental impact if operations occur, and potential impacts to the operations or equipment of the property owned or controlled by a state agency.⁹ After a decision is rendered, the Commission shall post notice of its decision on its website and send notice via email and certified mail to the person who submitted the nomination and to the state agency that owns the formation.¹⁰

However, this Bill has not been passed without some opposition, as environmental groups have recently filed suit against the state of Ohio and the Ohio Department of Natural Resources to block the Bill, alleging that the Bill was passed in violation of the state constitution's one subject rule and three-consideration rule.¹¹

III. Judicial Developments

A. Ohio Supreme Court Cases

1. A Party May Pursue Equitable Relief to Enforce Alienation Deed Restrictions

Although Ohio district courts remained busy during the period of August 1, 2022, to July 31, 2023, there were only a few notable case opinions issued by the Supreme Court of Ohio. The case *Ohio Publ. Works Comm'n v. Barnesville*, was one of the few cases decided by the Supreme Court of Ohio

(referencing Commission Procedures, Land Nomination Form, and Notice of Nomination Form that were approved by the Oil & Gas Land Management Commission on May 15, 2023).

7. See, *Nomination Requirements*, OIL AND GAS LAND MGMT. COMM'N, https://ohio.dnr.gov/static/documents/oil-gas/lm_commission/23-0515/OGLMC-CommissionProcedures-Approved-051523.pdf.

8. *Id.*

9. *Id.*

10. *Id.*

11. See, *Ohio Env't Council v. Ohio*, Franklin County Court of Common Pleas Case No. 23CV002403.

during that time.¹² The case concerned whether a party could pursue equitable relief to enforce alienation deed restrictions imposed by grant agreements.

In 2000, Ohio voters passed a constitutional amendment which authorized the state to issue bonds to pay for environmental conservation and revitalization projects.¹³ In 2002, the Village of Barnesville applied for two grants to partially fund the purchase of land in Belmont County. The two grants were for the Village's purchase of two properties designated for an "open space" reservoir and a wetlands project.¹⁴ Pursuant to the grant agreements for both projects, the Village was required to receive prior written consent of the Ohio Public Works Commission ("OPWC") regarding any sale, assignment, transfers, leases, exchanges, or encumbrances of the two properties.¹⁵

In 2012, without obtaining OPWC's consent, the village entered an oil and gas lease with Antero Resources Appalachian Corporation ("Antero").¹⁶ In 2014, the village entered a "water lease" with Antero that included two parcels of land that were part of the reservoir-project properties.¹⁷ Thereafter in 2014, Antero assigned its interest and rights under the oil and gas lease for the reservoir-project property to Gulfport, and in 2015, Antero assigned its interest and rights under the oil and gas lease for the wetlands project property to Eclipse Resources I, L.P. ("Eclipse").¹⁸

In 2018, OPWC brought this action against the Village of Barnesville.¹⁹ OPWC sought an injunction, declaratory judgment, and damages, alleging that the village violated use, development, and alienation deed restrictions imposed in connection with grants from an environmental conservation fund for Village's purchase of two properties for the "open space" reservoir and wetlands projects. The complaint alleged that OPWC was entitled to such equitable relief, because the Village of Barnesville leased oil and gas rights without obtaining OPWC's consent.²⁰

On appeal, the Seventh District Court of Appeals held that "use and development and alienation restrictions in a deed apply to both the surface

12. 2022-Ohio-4603, *reconsideration denied sub nom.*, Ohio Pub. Works Comm'n v. Barnesville, 168 Ohio St. 3d 1514, 2022-Ohio-4808, 200 N.E.3d 293.

13. *Id.* ¶ 2.

14. *Id.* ¶ 3.

15. *Id.* ¶ 4.

16. *Id.* ¶ 5.

17. *Id.* ¶ 6.

18. *Id.* ¶ 7.

19. *Id.* ¶ 9.

20. *Id.*

and subsurface of the properties at issue.”²¹ The Court also held that the Village of Barnesville violated those restrictions when it transferred oil and gas rights to another entity, which later leased those rights to the appellant, Gulfport Energy Corporation (“Gulfport”) without obtaining written consent from OPWC.²² Gulfport and the village appealed to the Supreme Court of Ohio.²³

The Supreme Court of Ohio decided the case on December 22, 2022. The court held that public policy did not preclude alienation deed restrictions.²⁴ The court further held that the Village of Barnesville violated use and development restrictions when the village transferred oil and gas rights without OPWC’s written consent.²⁵ The court reasoned that because the use and development restrictions applied to both the surface and the subsurface of the properties, OPWC was entitled to pursue equitable relief to enforce restrictions.²⁶ On December 30, 2022, the Supreme Court of Ohio denied the appellant’s motion for reconsideration.

2. Ohio Courts Do Not Have to Defer to an Administrative Agency’s Interpretation of Ambiguous Statutes

Although not an exclusive oil and gas case, the decision in *TWISM Enters., LLC v. State Bd. Of Registration for Pro. Eng’rs & Surveyors* may significantly impact the oil and gas industry in the future.²⁷ In *TWISM Enters.*, an engineering firm brought action in the Court of Common Pleas of Hamilton County, Ohio, challenging a decision of the Ohio Board of Registration for Professional Engineers and Surveyors.²⁸ The Ohio Board of Registration for Professional Engineers and Surveyors denied the engineering firm’s application for a certificate of authorization to provide engineering services in the state of Ohio.²⁹

The Board based its denial on the engineer firm’s failure to “designate one or more full-time partners, managers, members, officers, or directors as being responsible for and in charge of professional engineering activities for the

21. *Id.* ¶ 1.

22. *Id.*

23. *Id.*

24. *Id.* ¶ 27.

25. *Id.*

26. *Id.* ¶ 1.

27. 2022-Ohio-4677, 2022 WL 17981386.

28. *Id.*

29. *Id.* ¶ 9.

firm.”³⁰ The Board also held that the firm could not designate an independent contractor as its full-time registered professional engineer manager to obtain a certificate of authorization.³¹ The lower courts applied the principle commonly known as “Chevron deference” which was a framework decided by the U.S. Supreme Court in *Chevron U.S.A., Inc. v. Natural Defense Council, Inc.* under which a court is supposed to “defer to an administrative agency’s reasonable interpretation of an ambiguous statute.”³² The Supreme Court of Ohio categorically rejected to apply Chevron deference to this case and to future cases.³³

The Supreme Court of Ohio held that it is never mandatory for a court to defer to the judgment of an administrative agency with respect to the interpretation of a statute.³⁴ The court reasoned that under Ohio’s system of separation of powers, it is not “appropriate for a court to turn over its interpretive authority to an administrative agency.”³⁵ While the case does not directly concern oil and gas, the case may have broad implications on developments within the industry in the future.

B. Appellate Activity

1. Unambiguous Language in a Lease may Impute Liability on Oil and Gas Companies for Bad Faith Trespass and Conversion

In the case of *Tera, LLC v. Rice Drilling D, LLC*, Ohio’s Seventh District Court of Appeals considered whether the reservation of “all formations below the base of the Utica Shale” to the lessor in a drilling lease unambiguously reserved the lessee’s rights to drill into the Point Pleasant Formation on lessor’s property, and whether the lease provided lessees the right to extract oil and gas from the Point Pleasant below the lessor’s property.³⁶ The court concluded that Utica Shale and Point Pleasant Formation were separate geological structures and therefore the reservation clause language did unambiguously reserve the right to drill into the Point Pleasant Formation to the lessors.³⁷

In 2013, Rice Drilling D, LLC (“Rice Drilling”) and Gulfport were working interest partners in six horizontal oil and gas wells. During that same

30. *Id.*

31. *Id.*

32. *Id.* ¶ 21.

33. *Id.* ¶ 63.

34. *Id.* ¶ 42.

35. *Id.*

36. 2023-Ohio-273, 205 N.E.3d 1168, ¶ 5.

37. *Id.* ¶¶ 50–51.

time, Thomas Shaw, lessor, entered into an oil and gas lease with Rice Drilling, lessee. In 2014, the parties entered a second lease. Both leases granted unto the lessee the exclusive right to the “oil, gas, minerals, and their constituents (not including coal) in the formations commonly known as the Marcellus Shale and Utica Shale,” but reserving to the lessor “all formations below the base of the Utica Shale.”³⁸ Then in 2015, five of the six horizontal wells began production.³⁹

Subsequently, Tera alleged that the wells were located in the Point Pleasant, arguing that it is a “distinct geographical formation” below the Utica Shale and therefore reserved to the lessor and brought suit for willful trespass and conversion.⁴⁰ The trial court entered partial summary judgment in favor of Tera on the issue of trespass, reasoning that the unambiguous language in the leases reserves the subsurface rights in the Point Pleasant to the surface owner.⁴¹ Rice Drilling and Gulfport appealed, arguing that extrinsic evidence should be included when examining the leases’ terms because, they subsequently argued, in 2013 and 2014, the phrase “the formation commonly known as the Utica Shale” had special meaning that could not be understood by a plain reading of the lease.⁴²

In upholding the trial court’s summary judgment, the Ohio Seventh District Court of Appeals examined the lease under established principles of contract interpretation, reasoning that words and phrases are given their common and ordinary meanings unless, the terms in the contract are ambiguous and cannot be determined from the reading of the entire contract.⁴³ If there is ambiguity, extrinsic evidence may then be used to understand its terms.⁴⁴ Here, the court found that the language in the lease was not ambiguous, as the phrase “commonly known as” compels the court to rely on a common reading of the contract rather than a technical one. Further, even if the language was ambiguous, both leases specifically reserve “all formations below the base of the Utica Shale” and forego the phrase that would create ambiguity.⁴⁵ Thus, the court separates the Point Pleasant formation from the Utica Shale formation because the lease was unambiguous to its terms and because the Point Pleasant formation is located

38. *Id.* ¶ 7.

39. *Id.* ¶¶ 8–10.

40. *Id.* ¶ 12.

41. *Id.* ¶ 2.

42. *Id.* ¶¶ 5, 48.

43. *Id.* ¶ 38.

44. *Id.* ¶ 39.

45. *Id.* ¶¶ 50–51

below the base of the Utica Shale, and it is therefore reserved to the lessor. In its conclusion, the court ruled that in this situation, the horizontal wells drilled into the Point Pleasant formation would constitute “bad faith trespass and conversion by the oil and gas companies.”⁴⁶

2. Description of Oil and Gas Interests Need to be Specific to Preserve Interest for Heirs Under MTA

In the case of *Chartier v. Rice Drilling D, LLC*, Ohio’s Seventh District Court of Appeals considered claims surface owners brought against heirs and potential heirs of a gas and oil interests in property.⁴⁷ The primary issue the court examined in this case is whether, under the Ohio Marketable Title Act (“OMTA,”) a recital of reservation is considered a specific enough reference to preserve a mineral interest even though it does not contain the identical interest being excepted from a conveyance of land.⁴⁸ The Ohio Seventh District Court held that because the language was ambiguous and unclear as to what prior reservation was being excepted from the subsequent conveyances, and even though the recital of reservations did recite the parties to the reserved interest, the recitals were general references that would not preserve an interest under the OMTA.⁴⁹

In this case, Annie Carpenter conveyed to Bessie Cook 135 acres of land, reserving to herself, “one-half-interest in the oil, gas, and royalties” in 1944, (the “Reservation Deed”).⁵⁰ Subsequently, throughout the subsequent chain of title, the reservation language is omitted from a majority of the deeds conveying interest to the surface of the property, except for two subsequent deeds of the property in 1951 and 1976, which excepted and reserved “½ of all oil and gas royalties under said lands together with mining rights and reservations made in the deed conveying said lands from Annie E. Carpenter to Bessie Cook.”⁵¹

In 2019, the lawsuit at issue arose when surface owners asserted claims under the Ohio Dormant Minerals Act (ODMA), Declaratory Judgment Act (DJA), and OMTA to quiet title of interest in surface owners’ names. The heirs counterclaimed seeking to quiet title of interest in their names and other relief.⁵² The trial court granted the surface owners motion for summary

46. *Id.* ¶ 46.

47. 2023-Ohio-272, 206 N.E.3d 755, ¶ 3.

48. *Id.* ¶ 46.

49. *Id.* ¶ 52.

50. *Id.* ¶ 3.

51. *Id.* ¶¶ 7–8.

52. *Id.* ¶¶ 17–25.

judgment and denied the heirs' motion for summary judgment.⁵³ The heirs appealed, arguing that, under the OMTA, the recital of reservations in 1951 and 1976 were specific references to the Reservation Deed recorded in 1944.⁵⁴

In regard to the courts analysis of OMTA, the OMTA will extinguish an oil and gas interest by operation of law if it is not specifically stated or identified in either the root of title or in any of the muniments in the chain of title within the 40 year period immediately after the root of title, or if the interest is not arising out of a title transaction within said 40 year period.⁵⁵ The heirs argued that the language contained an order for the mineral owners to preserve their interests to the oil and gas underlying a piece of property, because it contained near identical recital of reservation and the names of the reserving parties such that a reasonable title search would have revealed the specific interest reserved in the Reservation Deed.⁵⁶ However, the Seventh District Court disagreed, stating the reservation deed reserved "one-half-interest in the oil, gas, and royalties." The 1951 and 1976 deeds, however, excepted and reserved a "½ of all oil and gas royalties," effectively limiting interest to only the royalties, and not ownership, of the oil and gas. Furthermore, the language in the 1951 and 1976 deeds reserved the royalty interest "with mining rights and reservations," implying that it could be referencing other mining rights and reservations that were included in the Reservation Deed.⁵⁷ Because of these reasons, the court concluded that the language was ambiguous, and would be insufficient to preserve an interest under the OMTA.⁵⁸ Thus, by operation of the OMTA, the heirs' interest to the oil and gas had been extinguished by operation of law.⁵⁹

3. A Lessor Cannot Maintain a Claim for Breach of Implied Duty of Good Faith and Fair Dealing Absent a Claim for Breach of an Oil and Gas Lease

In *Ischy v. Equinor U.S.A. Onshore Props., Inc.*, Ohio's Seventh District Court of Appeals addressed a lessor's claim for declaratory judgment action against a lessee seeking declaration that an oil and gas lease was expired by its terms, the lessee's production of oil and gas was mineral trespass, and the

53. *Id.* ¶ 28.

54. *Id.* ¶ 39.

55. *Id.* ¶ 36.

56. *Id.* ¶¶ 38–39.

57. *Id.* ¶ 52.

58. *Id.* ¶ 53.

59. *Id.* ¶ 53.

lessee breached its implied duty of good faith and fair dealing.⁶⁰ The case concerns 297 acres of land in Monroe County which are owned by the Ischys.⁶¹ In 2012, the Ischys originally leased the oil and gas rights for the Property to the defendant, Northwood Energy Corporation (“Northwood”).⁶² However, the current lessee is Equinor.⁶³ Under the terms of the lease, there exists a primary term of five years which ended on April 5, 2017.⁶⁴ The lease also provided that a secondary term could be extended in four different ways:

- (1) actual production in paying quantities; (2) ‘operations,’ as defined in the Lease, in the pursuit of oil and gas on the Property or land pooled with the Property; (3) advanced minimum royalty (AMR) payments for wells drilled but not yet producing; and (4) the lessee paying an extension payment of \$5,000 per net mineral acre.⁶⁵

In 2014, Equinor began to drill on the R & D Hilltop Unit, which did not include the property.⁶⁶ On July 18, 2016, Equinor pooled 0.19 acres of property into the R & D Hilltop Unit, and production began on August 6, 2017.⁶⁷ The plaintiff’s March 2019 complaint alleged that including the 0.19 acres in a pooled unit breached the lessee’s covenant of good faith and fair dealing.⁶⁸ On June 11, 2019, Equinor tendered payment to Timothy Ischy which was accepted.⁶⁹ On June 10, 2021, Equinor filed for motion for summary judgment arguing that the lease had extended into a secondary term with full force and effect.⁷⁰

On November 17, 2021, the trial court granted Equinor’s summary judgment motion.⁷¹ The issue on appeal was whether summary judgment in favor of the defendants was proper.⁷² Ohio’s Seventh District Court of Appeals affirmed the lower court’s decision and rejected the plaintiff’s

60. 2022-Ohio-4755, 203 N.E.3d 1249, ¶ 1.

61. *Id.* ¶ 2.

62. *Id.*

63. *Id.*

64. *Id.* ¶ 3.

65. *Id.*

66. *Id.* ¶ 4.

67. *Id.*

68. *Id.* ¶ 19.

69. *Id.* ¶ 8.

70. *Id.* ¶ 9.

71. *Id.* ¶ 10.

72. *Id.* ¶ 12.

claim.⁷³ The court held that a lessor cannot maintain a claim for breach of an implied duty of good faith and fair dealing absent a claim for breach of an oil and gas lease.⁷⁴

The court reasoned that even if the lease had not been held by the pooling of those units, the lease still would have extended to a secondary term because the lessee's preparatory actions involving an oil well located outside the premises of the leased property constituted "operations" within the meaning of an oil and gas lease.⁷⁵

4. U.S. Sixth Circuit Court of Appeals Rejects Claim that Oil and Gas Lease Had Terminated as to Lease Acreage Located Outside of Producing Unit at the End of the Lease's Primary Term

The U.S. Sixth Circuit Court of Appeals decided one case during the period of August 1, 2022, to July 31, 2023, which will significantly impact case precedent within the state of Ohio.⁷⁶ The case *Scenicview Estates, LLC v. SWM Production (Ohio) LLC*, stems from an oil and gas lease executed within the Southern District of Ohio. The facts of the case are straightforward. Scenicview Estates LLC alleges that the lease expired on September 19, 2017, and that the defendants have committed several state law violations by continuing operations on the leasehold beyond that date.⁷⁷ The defendants, SWM Production LLC, claimed that they validly pooled portions of the leasehold into a drilling unit and conducted operations on the drilling unit such that the lease extended beyond September 19, 2017.⁷⁸

The district court granted the defendants' motion for summary judgment as to all claims.⁷⁹ The issue on appeal was whether the district court properly awarded summary judgment in favor of the defendants. The U.S. Sixth Circuit Court of Appeals affirmed the lower court's decision and rejected the claim that an oil and gas lease had terminated as to lease acreage located outside a producing unit at the end of the lease's primary term.⁸⁰ The court reasoned that the lease's habendum clause extended the lease while

73. *Id.* ¶ 30.

74. *Id.* ¶ 26.

75. *Id.* ¶ 38.

76. No. 22-3318, 2023 WL 1991986, at *1 (6th Cir. Feb. 14, 2023).

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

operations were being conducted either on the leased premises or on pooled acreage.⁸¹

The court reasoned that the clause included “performing any preliminary or preparatory work necessary for drilling, conducting internal technical analysis to initiate and/or further develop a well, [and] obtaining permits and approvals associated therewith.”⁸² The court reasoned that budgeting activities, title research, surveying, mapping, and cellar installation for the new unit wells were sufficient to be considered performing preliminary work within the language of the clause.⁸³ Although some of the activities were not physically conducted on the leased premises, the court held that the activities which did occur were sufficient to extend the lease into its second term.⁸⁴ As a result, the Sixth Circuit Court of Appeals affirmed the district court’s decision.

C. Trial Activity

1. A Lessee Does Not Breach its Lease’s Reasonable Development Clause by Failing to Protect Against Drainage by Drilling an Offset Well

In the case *Lehman v. Gulfport Energy Corp.*, the U.S. District Court for the Southern District of Ohio addressed issues arising out of a contractual dispute between parties to an oil and gas lease.⁸⁵ On May 23, 2013, Gulfport entered an oil and gas lease with the Lehman’s for a piece of property located in York Township, Belmont County, Ohio.⁸⁶ In 2017, XTO Energy, Inc. drilled two wells on the property which did not begin production until the fourth quarter of 2018 and the first quarter of 2019, respectively. In 2018, within five-hundred feet of the Property’s southern boundary line, CNX drilled another well which began producing during the first quarter of 2018. The property at issue in this case concerned 86.13 undeveloped acres that Gulfport released on April 18, 2018.⁸⁷

On May 14, 2020, the plaintiffs filed this action against Gulfport in the Belmont County Common Pleas Court, asserting two counts.⁸⁸ First, the plaintiffs asserted a claim seeking a declaration from the court that the lease

81. *Id.*

82. *Id.* at *5.

83. *Id.* at *6.

84. *Id.*

85. No. 2:20-CV-3053, 2023 WL 3168316, at *1 (S.D. Ohio May 1, 2023).

86. *Id.*

87. *Id.*

88. *Id.* at *2.

requires Gulfport to drill an offset well under the property.⁸⁹ Second, the plaintiffs asserted a claim of breach of contract from Gulfport's failure to drill an offset well and protect the land from drainage.⁹⁰ The case was removed to the U.S. District Court for the Southern District of Ohio.⁹¹ The proceedings were stayed because of Gulfport filing for bankruptcy in November of 2020.⁹² In February of 2022, Gulfport alerted the court that litigation could resume in the case, and the court lifted the stay.⁹³

On May 1, 2023, the U.S. District Court rendered its decision. The court granted Gulfport's motion for judgment on the pleadings and dismissed the plaintiff's complaint with prejudice.⁹⁴ The court rejected the claim that the lessee had breached its lease's reasonable development clause by failing to protect against drainage by drilling an offset well.⁹⁵ The court reasoned that under the language of the lease, the lessee was not required to protect property that was previously released from the lease against drainage from an adjacent well.⁹⁶

2. Class Certification May Be Denied When Plaintiffs Allege Subsurface Mineral Trespass Claims Based on Unambiguous Lease Language

In the case, *J&R Passmore, LLC v. Rice Drilling D, LLC*, the U.S. District Court for the Southern District of Ohio denied class certification to plaintiffs that alleged subsurface mineral trespass claims based on a lease's language.⁹⁷ The dispute concerns a group of four plaintiffs who own various pieces of property in Belmont County, Ohio, as well as the oil and gas rights to these properties.⁹⁸ Defendants Rice Drilling ("Rice") and Gulfport Energy Corporation ("Gulfport") entered into a lease agreement whereby they agreed to drill wells in Belmont County.⁹⁹ Pursuant to this agreement, each defendant was allowed to drill wells on the plaintiff's property in Belmont County.¹⁰⁰ The plaintiffs allege that the defendants have infringed on the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.*

94. *Id.* at *7.

95. *Id.*

96. *Id.*

97. No. 2:18-CV-01587, 2023 WL 2667749, at *1 (S.D. Ohio Mar. 28, 2023).

98. *Id.*

99. *Id.*

100. *Id.*

plaintiffs' mineral rights by drilling outside of the property specified in the leases.¹⁰¹

In their complaint, the plaintiffs allege that the leases limit the defendants drilling to the Marcellus Shale and Utica Shale Rock Formations.¹⁰² The plaintiffs further allege that despite this "clear reservation," the defendants have "unlawfully drilled every well below the base of the Utica Shale into and are producing oil and gas from the Point Pleasant Formation."¹⁰³ Pursuant to Rule 23(a) of the Federal Rules of Civil Procedure, to certify a class action there must be: numerosity, commonality, typicality, and adequacy.¹⁰⁴ The court held that the plaintiffs satisfied the factors required of Rule 23(a).¹⁰⁵

However, the under Rule 23(b)(3) of the Federal Rules of Civil Procedure to certify an opt-out class action there must be: predominance, superiority, and ascertainability.¹⁰⁶ The court held that the plaintiffs failed to satisfy the Rule 23(b)(3) factors required to certify the class. Therefore, class certification was denied because individualized inquiries predominate over common issues alleged by the plaintiffs.¹⁰⁷ Notably, the court held that for the plaintiffs to succeed on their subsurface mineral trespass claims, each plaintiff would need to individually establish an invasion of their separate property rights.

3. A Lessee Did Not Commit Subsurface Trespass Merely by Including the Plaintiff's Property in a Pooled Unit

In the case, *Golden Eagle Res. II LLC v. Rice Drilling D, LLC*, the U.S. District Court for the Southern District of Ohio held that a lessee does not necessarily physically enter a property that pools into a unit.¹⁰⁸ The dispute arises out of competing leases for natural resource rights for 18.934 acres of land in Belmont County, Ohio.¹⁰⁹ In 2011, Jerimiah J. Gillespie acquired the property and subsequently sold an 11.456-acre parcel of property the same year, and he sold the remaining 7.478 to a different buyer in 2014.¹¹⁰ However, Gillespie retained the subsurface oil, gas, and mineral rights to

101. *Id.* at *2.

102. *Id.*

103. *Id.*

104. *Id.* at *9.

105. *Id.* at *17.

106. *Id.*

107. *Id.* at *19.

108. No. 2:22-CV-02374, 2023 WL 1927799, at *1 (S.D. Ohio Feb. 10, 2023).

109. *Id.*

110. *Id.*

both parcels of land.¹¹¹ In 2013, the drilling rights were leased to Paloma Partners III (“Paloma”).¹¹²

The leases provide that Gillespie and his wife “reserved the rights to natural resources produced from the geologic formations between the surface and the top of the Marcellus Shale, between the bottom of the Marcellus Shale to the top of the Utica formation, and below the base of the Utica Shale.”¹¹³ In 2015, Paloma assigned the drilling rights in the lease to the defendant, Rice Drilling.¹¹⁴ The Gillespie’s then conveyed the mineral rights to Westhawk Minerals, LLC, who then conveyed the rights to Golden Eagle in 2015.¹¹⁵ On May 21, 2019, Rice Drilling received a well permit from the Ohio Department of Natural Resource to drill an oil and gas well, pursuant to the rights Paloma assigned.¹¹⁶ In 2020, Rice Drilling began producing from the Utica and Point Pleasant formations from the well.¹¹⁷

In 2022, Golden Eagle filed a complaint against Rice Drilling in the Belmont County Court of Common Pleas seeking damages and injunctive relief for trespass and conversion.¹¹⁸ The case was removed to federal court by the defendant, who thereafter filed a motion to dismiss for failure to state a claim.¹¹⁹ On February 10, 2023, the court held that a lessee does not commit subsurface trespass merely by including the plaintiff’s property in a pool unit, because a lessee does not necessarily have to physically enter a property that it pools into a unit.¹²⁰

However, the court also held that a producer may commit subsurface trespass by injecting fluids into subsurface below a property as part of the hydraulic fracking process.¹²¹ The court reasoned that Ohio courts will recognize conversion claims predicated on natural resources that have been acquired via hydraulic fracturing when the process invades a plaintiff’s property.¹²² As such, the court allowed the plaintiff time to amend its

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at *2.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.* at *5.

121. *Id.* at *7.

122. *Id.* at *10.

complaint. However, since the decision was rendered, a new amended complaint has not been filed.

IV. Conclusion

During the period of August 1, 2022, to July 31, 2023, there were few statutory law updates in Ohio. Further, there were not many decisions made by the Supreme Court of Ohio during this period. However, there were several substantial decisions made in the lower courts, with some already leading to or presumably heading towards important decisions to be made in the Supreme Court of Ohio during the next year.