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I. Introduction

This Article summarizes and discusses important developments in West Virginia oil and gas law between July 1, 2015, and June 30, 2016. This Article is divided into two Parts. The first part will discuss common law developments in both State and Federal courts. The second part will discuss statutory developments in both enacted and proposed legislation.

II. Judicial Developments

Courts in West Virginia have been relatively busy over the last year deciding issues related to oil and gas development in the state. This section will first discuss the single oil and gas case decided by West Virginia's highest court. Next, decisions issued by West Virginia's federal district courts, which have been particularly busy, and a decision by the Fourth Circuit Court of Appeals will be discussed and presented in chronological order as the decisions were handed down by the courts.

A. The West Virginia Supreme Court of Appeals

In *Chesapeake Appalachia, LLC v. Hickman*,[1] the West Virginia Supreme Court of Appeals affirmed in part and reversed in part, a ruling from the Circuit Court of Ohio County that denied a motion to compel arbitration and granted lessors' motion for summary judgment.

Four siblings (the "Hickmans") owned a 143 acre tract of land (1/4 each) in Ohio County, West Virginia.[2] Four different leases signed in 2005, 2006, January 2011, and in February 2011 were at issue.[3] Also relevant to the case was a lease signed by the Hickmans in 2001.[4] The 2001 lease was negotiated by William Capouillez,[5] a geologist who operated a company that negotiated leases on the behalf of mineral owners.[6] Three siblings signed the 2001 Lease at the same time, then, the signed leased was mailed

1. 781 S.E.2d 198 (W. Va. 2015).
2. *Id.* at 204.
3. *Id.* at 204-08.
4. *Id.* at 204.
5. Mr. Capouillez was a defendant in this case. For more about Mr. Capouillez, *see* Geological Assessment & Leasing v. O' Hara, 780 S.E.2d 647 (W. Va. 2015), in which the West Virginia Supreme Court of Appeals considered certain issues relating to allegations that Mr. Capouillez engaged in the unauthorized practice of law.
6. *Chesapeake Appalachia*, 781 S.E.2d at 204.

to the forth sibling, Cecil, which he signed.[7] Cecil contended this established a pattern of dealing with Mr. Capouillez.[8]

The first lease (the "2005 Lease"), a lease to Great Lakes Energy Partners, LLC (now Range Resources—Appalachia, LLC) ("Range") was only signed by three siblings, not Cecil, even though he was listed as a lessor.[9] Mr. Capouillez was listed as a "consultant" on the lease and was to receive a share of the bonuses and royalties.[10] The lease also contained an arbitration clause that stated "any controversy or claim arising out of or relating to this Lease . . . shall be ascertained and settled by arbitration."[11] Again, Cecil Hickman never signed this lease.

The second lease (the "2006 Lease") was sent to Cecil Hickman by Range in 2006 which contained the same extension language and arbitration clause as the 2005 Lease.[12] Cecil signed both the lease and a memorandum of lease, had them acknowledged, and sent them back to Range.[13] Cecil contended that he never dated the documents and that Range had fraudulently filled in the effective date of July 19, 2006.[14] Cecil thought he was just agreeing to the lease his siblings had signed in 2005.[15] To add another layer of intrigue, the memorandum of lease incorrectly identified the parcel as being in Brooke County, West Virginia,[16] where it was filed in the county clerk's office.[17] Mr. Capouillez was again listed on the lease as a "consultant."[18] This lease, along with the 2005 Lease, was assigned to Chesapeake Appalchaia, LLC ("Chesapeake").[19]

The third lease (the "January 2011 Lease") was between Chesapeake and all four siblings![20] However, the lease was not signed by Chesapeake or any of its agents.[21] Cecil Hickman alleges that an agent of Chesapeake

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7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 205.
11. *Id.* (internal quotation marks omitted).
12. *Id.* at 206.
13. *Id.*
14. *Id.*
15. *Id.*
16. Brooke County borders Ohio County to the north in West Virginia's Northern Panhandle.
17. *Chesapeake Appalachia*, 781 S.E.2d at 206.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*

contacted him the lease was signed to inform him that he was still under lease by the 2006 Lease and that none of the siblings would receive the promised bonuses of the January 2011 Lease unless they agreed to remove Cecil from it.[22] This lease contained a clause stating that "Chesapeake retains the right to surrender the Lease . . . at any time and for any reason."[23]

Lastly, the fourth lease (the "February 2011 Lease") was a top lease signed by Cecil Hickman, which he claims he acquiesced to out of duress that his siblings would not receive their bonuses under the January 2011 Lease.[24] Again, the lease was not signed by Chesapeake or any of its agents.[25] Cecil's three siblings were paid their bonuses and work began on the leased premises that Chesapeake contends was sufficient to constitute "a bona fide attempt to secure . . . the production" of oil and gas, thus locking in Cecil under the 2006 Lease.[26]

Cecil Hickman filed suit, pursuing a number of claims. First, that he was bound by the 2005 Lease as there had been a "meeting of the minds" and that this lease had expired when they signed the January 2011 Lease.[27] Second, that Mr. Capouillez was negligent, incompetent, and had breached fiduciary duties.[28] Third, that Range had fraudulently altered the 2006 Lease and had published statements derogatory to his title.[29] Fourth, Chesapeake's agents fraudulently induced him to sign the February 2011 Lease. Lastly, that Chesapeake had breached the implied covenant of good faith and fair dealing, mishandled leases, published false statements about his title, and engaged in the tort of outrage.[30]

The trial court ruled that the 2006 Lease (no meeting of the minds) and February 2011 (mistakes of fact and misrepresentation) were void, the 2005 Lease had expired, and that the parties were compelled to arbitrate their claims under the January 2011 Lease.[31] However, Chesapeake was ordered to pay Cecil his bonus under the January 2011 Lease to avoid its failure for lack of consideration.[32]

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22. *Id.* at 207-08.
23. *Id.* at 207.
24. *Id.* at 208.
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.* at 209.
29. *Id.*
30. *Id.*
31. *Id.* at 209-10.
32. *Id.* at 210.

On appeal, the West Virginia Supreme Court of Appeals affirmed the trial court's decision that the February 2011 Lease was void and unenforceable as it was acquired through mistake of fact and misrepresentation.[33] The Court also affirmed the decision that Chesapeake must pay Cecil his bonus if it wanted to compel arbitration under the January 2011 Lease, but disagreed that Chesapeake needed pay Cecil royalties because that would be a question for arbitration.[34] However, the Court reversed and held that Range and Mr. Capouillez do not have to arbitrate under the January 2011 Lease.[35] In its holding, the Court found five theories under which a signatory to an arbitration agreement can bind a non-signatory: "(1) incorporation by reference; (2) assumption; (3) agency; (4) veil-piercing/alter ego; and (5) estoppel."[36] The Court held that Mr. Capouillez and Range were not bound by the arbitration agreement in the January 2011 Lease because none of these five theories were satisfied. Furthermore, the Court also found that the trial court had failed to analyze the 2005 Lease and the 2006 Lease under the Federal Arbitration Act and must do so on remand.[37]

B. Federal Courts

In *Statoil USA Onshore Properties Inc. v. Pine Resources, LLC*, the United States District Court for the Southern District of West Virginia granted Statoil's motion for summary judgment finding it had no obligation to perform drilling requirements contained in a prior agreement.[38]

Pine owned a 565-acre parcel in Barbour County, West Virginia.[39] In 2008, Pine sold its mineral rights in the property to PetroEdge, retaining for itself an 18% overriding royalty interest.[40] Pine and PetroEdge entered into a Purchase and Sale Agreement ("PSA") requiring that PetroEdge would "apply for a meter tap on a gas transmission line within sixty days of execution . . ., spud one well within one year after installation of the meter tap, and spud three wells (including the first well) within five years after

33. *Id.* at 213.
34. *Id.* at 220.
35. *Id.* at 221.
36. *Id.* at 217 (citing Am. Bureau of Shipping v. Tencara Shipyard S.P.A., 170 F.3d 349, 352 (2d Cir. 1999)).
37. *Id.* at 222.
38. No. 2:14-cv-021169, 2015 WL 5304295, *4 (S.D.W. Va. Sept. 9, 2015).
39. *Id.* at *2.
40. *Id.*

installation of the meter tap."[41] PetroEdge did not complete any wells on the property. [42] In 2012, PetroEdge sold its mineral ownership to Statoil.[43]

Statoil filed a complaint seeking a declaratory judgment that it owed no obligations to Pine under the PSA.[44] Pine counterclaimed, alleging breach of contract and sought specific performance.[45] Both parties filed motions for summary judgment.[46]

At issue was the PSA, specifically, the identification of the parties to the PSA and the obligations of the "Purchaser."[47] PetroEdge was designated as the Purchaser in the PSA.[48] Statoil argued that the drilling obligations in the PSA only applied to PetroEdge, relying on Section 7.2[49] of the PSA.[50] Pine argued that Statoil became the "Purchaser" and that Section 8.8[51] applied the terms of the PSA to the successors and assigns.[52]

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41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at *3.
45. *Id.*
46. *Id.*
47. *Id.* at *2.
48. *Id.* at *6.
49. Section 7.2 of the PSA states that

> (a) The representations and warranties of the Parties in Articles 3 (except Section 3.7) and 4 and the covenants and agreements of the Parties in Article 6 (*sic*) (except Section 5.4 through 5.9) shall survive the Execution Date for a period of two (2) years. The representations, warranties, covenants and agreements of Seller in Sections 3.7 and 5.4 shall survive until the close of business 30 days after the expiration of the applicable statutes of limitation (including any extensions thereof) provided that any proceeding or indemnification claim pending on the date of any such termination shall survive until the final resolution thereof. The remainder of this Agreement shall survive the Execution Date so long as Purchaser holds any interest in the Mineral Rights. Representations, warranties, covenants and agreements shall be of no further force and effect after the date of their expiration, provided that there shall be no termination of any bona fide claim asserted pursuant to this Agreement with respect to such a representation, warranty, covenant or agreement prior to its expiration date.

Id. at *2.

50. *Id.* at *6.
51. Section 8.8 of the PSA states that

> [a]ny assignment by Seller of all or any part of its rights with respect to the Excluded Mineral Rights or any related interests shall be made expressly subject to the terms and conditions of this Agreement, and such assignment not in compliance with this Section 8.8 shall be void *ab initio*. Subject to the foregoing, this Agreement shall be binding upon and inure to the benefit of the

The court granted Statoil's motion for summary judgment.[53] First, the court found the PSA language to be clear and unambiguous.[54] The specific terms of Section 7.2 of the PSA states that the PSA will remain in effect "so long as Purchaser holds any interest in the Mineral Rights."[55] PetroEdge was specifically identified as the Purchaser.[56] Accordingly, only PetroEdge was obligated under the PSA.[57] Furthermore, Section 8.8 did not modify the remainder of the contract.[58] Lastly, Statoil was not estopped by ratification because "a contract, if ratified at all, must be ratified as a whole."[59] Pine has filed an appeal to United States Court of Appeals for the Fourth Circuit.

In *SWN Production Co., LLC v. Edge*,[60] the United States District Court for the Northern District of West Virginia granted the oil and gas company's motion for a preliminary injunction so it could enter onto defendant's land to "explore, drill, and develop the area for oil and gas operations."[61]

The defendants own the surface of 87.85 acres in Marshall County, West Virginia.[62] The oil and gas interests were excepted and reserved in the conveyance granting the defendants their tract of land.[63] At the time of that conveyance in 1980, the property was subject to a 1977 lease to Columbia Gas Transmission Corporation.[64] In 2010, the owners of the oil and gas interests leased the property to NPAR, LLC with the "exclusive right to explore, drill, develop, and conduct oil and gas operation, plus all other rights and privileges that are necessary or land covered hereby."[65] The plaintiff acquired the rights to that lease and it was renewed in 2015.[66] The

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Parties hereto and their respective successors and assigns.

Id. at *2.

52. *Id.* at *3.
53. *Id.* at *6.
54. *Id.* at *5.
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. No. 5:15CV108, 2015 WL 5786739 (N.D.W. Va. Sept. 30, 2015).
61. *Id.* at *1.
62. *Id.*
63. *Id.*
64. *Id.*
65. *Id.* at *2.
66. *Id.*

plaintiff had permitted and planned to operate a well on the property by October 2015. [67] However, in July 2015, the defendants denied the plaintiff's personnel entry onto the property and continued to deny entry.[68]

The plaintiff filed suit seeking a preliminary injunction and a declaratory judgment of its rights under the lease.[69] The defendants alleged that the plaintiff did not have the right to enter their property and that it cannot use the surface of their property to drill a horizontal well to extract oil and gas from neighboring lands.[70]

The issue before the court was whether the 1977 and 2010 leases and the 1980 deed give the plaintiff the express right to use the land as proposed.[71] Specifically, the defendants argued that the reservation in the 1980 deed incorporated by reference the 1977 lease and that any reservation in the deed expired with that lease.[72] However, under West Virginia law, "parties may incorporate into their contract the terms of some other writing."[73] The reservation in the deed is as follows:

> There is excepted and reserved from this conveyance, however, all of the oil and gas, in and underlying said land, together with all of the rights to enter upon said land to explore, drill for, produce and market all such oil and gas as said rights are set forth in the lease from Harold H. Fisher and Dorothy L. Fisher, his wife, to Columbia Gas Transmission Corporation, by lease dated May 3, 1977, and recorded in the office of the Clerk of the County Court of Marshall County, West Virginia, in Deed Book 460, page 351.[74]

The court granted the preliminary injunction finding that the plain language of the deed is clear and unambiguous and that the reference to the 1977 lease in the 1980 deed merely illustrates the scope of the rights reserved.[75]

In *Equitrans, L.P. v. 0.56 Acres More or Less of Permanent Easement Located in Marion, County, West Virginia,*[76] the United States District

67. *Id.*
68. *Id.*
69. *Id.* at *1.
70. *Id.* at *2.
71. *Id.* at *4.
72. *Id.*
73. *Id.* at *5.
74. *Id.* at *1.
75. *Id.*
76. No. 1:15CV106, 2015 WL 7300548 (N.D.W. Va. Nov. 18, 2015).

Court for the Northern District of West Virginia granted Equitrans's 12(b)(6) motion to dismiss the counterclaims of vexatious litigation and trespass by landowners and denied the landowners'12(b)(6) motion to dismiss.[77] The current suit arose out of a previous suit wherein the landowners, the Moores, won a jury trial that found that Equitrans had violated a pipeline right-of-way or had trespassed by maintaining a pipeline outside of the right-of-way.[78] The court stayed an execution of the judgment so Equitrans could seek a condemnation of the right-of-way, the subject of the current litigation.[79] The court found the Moores failed to state a claim upon which relief can be granted and that Equitrans's claims were sufficiently plead.[80] In *K & D Holdings, LLC v. Equitrans, L.P.*,[81] the United States Court of Appeals for the Fourth Circuit reversed a decision by the United States District Court for the Northern District of West Virginia that a lessee had abandoned its oil and gas lease.

K & D Holdings is the lessor and Equitrans is the lessee of oil and gas rights to 180 acres in Tyler County.[82] Equitrans sublet its rights to EQT to produce gas from subsurface formations that are not used for the storage of gas or protection of stored gas.[83] EQT has not engaged in the exploration or storage of oil and gas on the property, but it has engaged in the protection of stored gas.[84] Part of the property is within a 2,000 foot buffer zone established by the Federal Energy Regulatory Commission to protect Equitrans's nearby Shirley Storage Field.[85] The Durational Provision of the lease read:

> To have and to hold the said land and privileges for the said purposes for and during a period of 5 years from December 2, 1989, and as long after commencement of operations as said land, or any portion thereof or any other land pooled or unitized therewith as hereinafter provided, is operated for the exploration or production of gas or oil, or as gas or oil is found in paying quantities thereon or stored thereunder, or as long as said land is used for the storage of gas or the protection of gas storage on

77. *Id.* at *1.
78. *Id.*
79. *Id.*
80. *Id.* at *8.
81. 812 F.3d 333 (4th Cir. 2015).
82. *Id.* at 335.
83. *Id.* at 336.
84. *Id.*
85. *Id.*

> lands in the general vicinity of said land. It is understood that a well need not be drilled on the leased premises to permit the storage of gas thereunder and the Lessee shall be the sole judge of when and if said land is being used for the storage of gas or the protection of gas storage on lands in the general vicinity of said land.[86]

K & D filed a complaint claiming that because EQT has not produced or sold gas for a period greater than 24 months the lease had been abandoned.[87] Acting sua sponte, the district court found that the lease was divisible as a matter of law.[88] According to the district court, the portion of the property being used for protection of stored gas remained under lease while the portion that was not used for exploration or production had expired.[89] The Court of Appeals had no reservation reversing the District Court, finding that the plain terms of the Durational Provision prevented this lease from being divisible.[90] The case was reversed and remanded with instructions to enter judgment in favor of the lessees.

In *Leggett v. EQT Production Co.*,[91] the United States District Court for the Northern District of West Virginia certified two questions to the West Virginia Supreme Court of Appeals. The questions are:

> 1. Does *Tawney v. Columbia Natural Resources, L.L.C.*, 633 S.E.2d 22 (2006), which was decided after the enactment of West Virginia Code § 22-6-8, have any effect upon the Court's decision as to whether a lessee of a flat-rate lease, converted pursuant to West Virginia Code § 22-6-8, may deduct post-production expenses from his lessor's royalty, particularly with respect to the language of "1/8 at the wellhead" found in West Virginia Code § 22-6-8(e)?
>
> 2. Does West Virginia Code § 22-6-8 prohibit flat-rate royalties only for wells drilled or reworked after the statute's enactment and modify only royalties paid on a per-well basis where permits for new wells or to modify existing wells are sought, or do the

86. *Id.*
87. *Id.*
88. *Id.* at 337.
89. *Id.*
90. *Id.* at 340.
91. No. 1:13CV4, 2016 WL 297714 (N.D.W. Va. Jan. 22, 2016).

> provisions of West Virginia Code § 22-6-8 abrogate flat-rate leases in their entirety?[92]

In *Leggett*, the lease in question was a 1906 lease providing for a royalty of $300.00 per year per well (a flat-rate royalty).[93] West Virginia has a flat-rate well statute that provides that owners of the oil and gas are to receive

> not less than one eighth of the total amount paid to or received by or allowed to the owner of the working interest *at the wellhead* for the oil or gas so extracted, produced or marketed before deducting the amount to be paid to or set aside for the owner of the oil or gas in place, on all such oil or gas to be extracted, produced or marketed from the well.[94]

In *Estate of Tawney v. Columbia Natural Resources., LLC*,[95] the West Virginia Supreme Court of Appeals held that "at the wellhead" language contained in a lease does not allow the producer to deduct post-production expenses from the royalty payment.[96] Thus, the lessors claim that their royalties were improperly calculated, calling into question what "at the wellhead" means within the flat-rate well statute.[97]

Of relevance, here, is the breach of contract claim against EQT which the court deferred pending answers from the West Virginia Supreme Court of Appeals.[98]

In *EQT Production Co. v. Wender*,[99] the United States District Court for the Southern District of West Virginia granted summary judgment in favor of EQT, finding that a Fayette County ordinance banning the storage, disposal, or use of oil and natural gas waste in the county was preempted by state law and thus void.[100]

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92. *See* Fout v. EQT Prod. Co., No. 1:15CV68, 2016 WL 868279 (N.D.W. Va. Mar. 7, 2016). *Fout* is very similar, factually, to *Leggett.* In *Fout*, plaintiffs' motions were denied without prejudice as the court awaits answers from the West Virginia Supreme Court of Appeals. *Id.*

93. *Leggett*, 2016 WL 868279 at *2.

94. W. VA. CODE ANN. § 22-6-8(e) (West 2016) (emphasis added).

95. 633 S.E.2d 22 (W. Va. 2006).

96. *Id.* at 30.

97. *Leggett*, 2016 WL 868279 at *1.

98. *Id.* at *14.

99. No. 16-000290, 2016 WL 3248503 (S.D.W. Va. June 10, 2016).

100. *Id.* at *16.

III. Statutory Developments

The Second Session of the Eighty-second Legislature of West Virginia was a busy time for our State Senators and Delegates, more so over a budget battle, but bills were introduced and passed affecting oil and gas development in the state.[101]

There was focus on taxes, fees and safety in the oil and gas industry in the legislation introduced during the last legislative session.

Senate Bill 491 terminated an additional severance tax on natural gas.[102] Senate Bill 505 exempted certain uses of field gas from the motor fuel excise tax. Field gas is defined as natural gas "extracted from a production well, storage well, gathering system, pipeline, main or transmission line that is used as fuel to power field equipment."[103] As long as this gas is not used on the public roads and the royalty payments have been made to the mineral owners, this gas is exempt from the motor fuel excise tax.[104] Senate Bill 592 amended W. Va. Code §24B-5-3, allowing the Public Service Commission to levy a rate of $18.60 per mile of three-inch equivalent pipeline as a special license fee.[105]

House Bill 4218 revised the definition of "underground facility" relating to the One-call system in W. Va. Code § 24C-1-2. Of relevance, "underground facility" means

> any underground pipeline facility, owned by a utility and regulated by the Public Service Commission, which is used in the transportation or distribution of gas, oil or a hazardous liquid; any underground pipeline facility, owned by a company subject to the jurisdiction of the federal energy regulatory commission, which is used in the gathering, transportation or distribution of gas, oil or a hazardous liquid; any underground production or gathering pipeline for gas, oil, or any hazardous substance with a nominal inside diameter in excess of four inches and that is not otherwise subject to one-call reporting requirements under federal or state law . . . .[106]

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101. For a complete list of completed legislation in West Virginia, go to http://www.legis.state.wv.us.

102. S. 491, 82d Leg., Reg. Sess. (W. Va. 2016)

103. S. 505, 82d Leg., Reg. Sess. (W. Va. 2016).

104. *Id.*

105. S. 592, 82d Leg., Reg. Sess. (W. Va. 2016).

106. H.R. 4218, 82d Leg., Reg. Sess. (W. Va. 2016).

House Bill 4323 requires pipeline operators and well operators to report incidents to the Division of Homeland Security and Emergency Management at the Mine and Industrial Accident Call Center within fifteen minutes of ascertaining the occurrence of an incident at a well, well pad, or pipeline facility. An "incident" is defined as:

> (A) An injury to an individual at a well, well pad or pipeline facility that results in death or 5 serious bodily injury or that has a reasonable potential to cause death;
>
> (B) An unintended confinement of an individual in an enclosed space at a well, well pad or pipeline facility from which a person will not be released for a period exceeding fifteen minutes;
>
> (C) The unintended ignition or explosion of oil, natural gas or other substance at a well, well pad or pipeline facility;
>
> (D) An unintended fire in or about a well, well pad or pipeline facility not extinguished within fifteen minutes of discovery of the unintended fire; and
>
> (E) Any unintended release of poisonous or combustible substances that have a reasonable potential to cause death.[107]

107. H.R. 4323, 82d Leg., Reg. Sess. (W. Va. 2016).